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

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Brief of *Amicus Curiae* James Madison Center for Free Speech In Support of Petitioner

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James Bopp, Jr.
Counsel of Record
Eamon McCarthy Earls

THE BOPP LAW FIRM, PC The National Building 1 South Sixth Street Terre Haute, IN 47807 812-232-2434 telephone 812-235-3685 fax jboppjr@aol.com

Counsel for Amicus Curiae

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Interests of Amicus Curiae[1]

The purpose of the James Madison Center for Free Speech ("**Madison Center**") is to support litigation and public education activities defending the rights of political expression and association.[2] The Madison Center is an internal educational fund of James Madison Center, Inc., a District of Columbia nonprofit corporation. Madison Center is tax exempt under 26 U.S.C. 501(c)(3). Counsel for Amicus have authored articles, testimony, and comments and litigated numerous cases involving campaign finance and free speech issues.

James Bopp, Jr. is Madison Center's general counsel. Cases in which he was counsel in this Court include *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), *FEC v. Beaumont*, 539 U.S. 146 (2003), *McConnell v. FEC*, 540 U.S.93 (2003), *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006), *Randall v. Sorrell*, 548 U.S. 230 (2006), *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007), *Citizens United v. FEC*, 558 U.S. 310 (2010), *American Tradition Partnership v. Bullock*, 567 U.S. 516 (2012), and *McCutcheon v. FEC*, 134 S.Ct. 1434 (2014).

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[1] Rule 37.6 Statement: No party's counsel authored this brief in whole or in part; no party's counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person or entity other than amicus or its counsel funded its preparation or submission.

[2] *See Mission Statement*, James Madison Center for Free Speech (Jan. 16, 2024, 10:23 AM), https://www.jamesmadisoncenter.org.

Summary of the Argument

Section 666 is unconstitutional as applied to gratuities because such a broad ambit would criminalize First Amendment guaranteed free speech and association, and disrupt the federal system. Simultaneously, Section 666, as interpreted by the Government and the Seventh Circuit, violates Fifth Amendment Due Process guarantees of notice and strays from accepted canons of statutory interpretation.

Applying Section 666 to gratuities would criminalize a wide variety of free speech and association. Broad regulations of speech are inherently suspect and must be narrowly tailored. By failing to require proof of a *quid pro quo* agreement, association in a small community or virtually any expression of gratitude undertaken before or after an official act could be deemed unlawful under Section 666. This would criminalize many forms of association in small communities, forcing many governments to contract exclusively with distant, large corporations.

Government violates the Fifth Amendment's Due Process Clause when it takes away life, liberty, or property under a law so vague that it fails to give ordinary people fair notice of the conduct it punishes. The rule of lenity applies when an individual, such as Mayor Snyder, is convicted under such a statute. The doctrine of stare decisis allows this Court to apply experience to reexamine laws it previously upheld, striking down as unconstitutional provisions that do not provide adequate notice, such as Section 666.

Regularly invoked canons of statutory interpretation also militate against the Government

and the Seventh Circuit's interpretation of Section 666. Applying the canon of *expressio unius*, a holistic reading of the statute, and the presumption that Congress does not hide "elephants in mouseholes," a close reading of Section 666 strongly indicates that it does not apply to gratuities, absent proof of a *quid pro quo* agreement.

Applying Section 666 in the way the Government asks–and the Seventh Circuit has permitted–threatens to disturb the delicate balance of federal and state power. Doing so would federalize a vast swath of crimes, displacing state and local law enforcement. The United States decentralizes power on purpose, yet Section 666 applies an exceptionally broad jurisdictional "hook" to countless activities that might be deemed to receive federal funds. Past precedent dictates that this Court avoid Constitutionally dubious interpretations that would disrupt the system of joint sovereigns envisioned by the Founders.

For these reasons, the Seventh Circuit's decision should be reversed.

Argument

I.
First Amendment guarantees of the right to speak freely and associate freely direct this Court to block Section 666's application to gratuities.

A. Section 666 sweeps too broadly in its scope, criminalizing many forms of legitimate speech and association.

The First Amendment ensures freedom of speech, association, and petition. U.S. Const. amend. I; *Americans for Prosperity Foundation v. Bonta*, 141 S.Ct. 2373, 2382 (2021). Broad regulations surrounding expression are inherently suspect, and must be narrowly tailored. *Id.* at 2384. Although designed to combat the legitimate public threat of bribery, Section 666 is a broad regulation, which is not narrowly tailored to prevent corruption while preserving freedom of speech and association. Indeed, by adopting the Government's viewpoint that Section 666 criminalizes gratuities without proof of a *quid pro quo* agreement, the Seventh Circuit transformed Section 666 into a statute that criminalizes countless legitimate interpersonal interactions protected by the First Amendment. The Seventh Circuit failed to consider the deleterious effects for First Amendment rights when it upheld the Government's ultra-broad interpretation of Section 666. 18 U.S.C. § 666(a)-(d); *see also United States v. Snyder*, 71 F.4th 555, 579-80 (7th Cir. 2023).

Imagine a public-spirited citizen. After a state senator passes legislation to support deployed

members of a state's National Guard, perhaps this public-spirited citizen writes out a check to the state senator's campaign committee, with a brief message explaining the purpose of the check: "Thanks for supporting our troops!" Under Section 666, this public-spirited citizen is now a federal criminal, awaiting indictment for a gratuity to an official of a government that receives federal funds.

In its decision, the Seventh Circuit brushed past cautionary analysis of Section 666 by the First Circuit, included in briefing by counsel for Mayor Snyder.[3]

This Court has previously held that a "court by 'definition abuses its discretion when it makes an error law.'" *Philippines v. Pimentel*, 553 U.S. 851, 864 (2008) (internal citations omitted). Despite acknowledging "[w]e understand the reasoning of the First and Fifth Circuit," the Seventh Circuit upheld the Government's interpretation of Section 666 without giving adequate weight to the analysis of these two other circuit courts, and without considering the deleterious First Amendment implications of that interpretation of the statute.

This Court observed "[t]hat. . .speech and

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[3] *See United States v. Snyder*, Case No. 21-2986 (7th Cir. 2023) (Appellant Br., 56, ECF No. 25), ("The First Circuit Court of Appeals, contrary to most other Courts of Appeals, interprets Section 666 to apply to bribes and finds that 'reward' modifies bribe and is distinguished from gratuity, a word not included in Section 666, by the timing of the agreement - prior to the offer or receipt of money, and by the less serious penalty provided for gratuities in Title 18, United States Code, Section 201"); *compare Snyder*, 71 F.4th at 579-80 (noting the decisions of the First and Fifth Circuits without fully analyzing the reasoning of those circuits and upholding prior Seventh Circuit interpretations of Section 666).

association for political purposes is the kind of activity to which the First Amendment ordinarily offers its strongest protection is elementary." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 42 (2010). During the same term, this Court spoke emphatically on protections for speech in the political realm, precisely the kind of speech most likely to be dampened by Section 666:

> [P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.' . . .By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. . . The First Amendment protects speech and speaker, and the ideas that flow from each.

Citizens United v. FEC, 558 U.S. 310, 340 (2010).

Where a statute imposes direct restrictions on protected First Amendment activities and attempts to accomplish a government's objectives through imprecise means, the statute can be facially attacked. *See Secy' of State of Md. v. Munson Co.*, 467 U.S. 947, 967-68 (1984); *see also United States v. Stevens*, 559 U.S. 460, 473 (2010) ("[A] law may be invalidated as overbroad if 'a substantial number of its applications

are unconstitutional, judged in relation to the statute's plainly legitimate sweep'").

Corrupt agreements are not protected by the First Amendment. *United States v. Williams*, 866 F.3d 107, 299 (2017) ("Offers to engage in illegal transactions are categorically excluded from First Amendment protections") (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973)). This Court distinguishes between advocacy and solicitation. *See id.* ("there remains an important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality.")

In contrast to the reasoning in *Williams*, where this Court upheld a ban on *soliciting* child pornography, Section 666–under the federal government's interpretation–does not require any kind of *quid pro quo* agreement comparable to the solicitation requirement in *Williams*. As a result, the statute directly conflicts with the protections of the First Amendment.

This Court has previously restrained the federal government's broad interpretation of federal bribery statutes. For instance, this Court rejected the Government's broad interpretation of an "official act" when it construed 18 U.S.C. § 201(a)(3). *McDonnell v. United States*, 579 U.S. 550, 566 (2016) (holding that by arguing Congress used intentionally broad language in the statute "The Government concludes that the term 'official act' therefore encompasses nearly any activity by a public official"). As the majority observed, "[W]e cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *Id.* at 576 (quoting *Stevens*, 559 U.S. at 480).

By failing to require that prosecutors prove a *quid pro quo* agreement, Section 666's criminalization of gratuities strikes at the heart of the First Amendment, potentially criminalizing many forms of speech and association in the context of state and local governments, public and private universities, medical facilities, and other organizations.

Left in place, as it applies to gratuities, Section 666 would act as a corrosive force on these Constitutional rights, giving prosecutors the opportunity to forever alter the lives of unwary citizens whose gratuitous behavior provokes the ire of the federal government. Because of the sheer number of interactions that could fall within Section 666's ban on gratuities, as adopted by the Seventh Circuit, Section 666 would likely be used on a highly selective basis, potentially as a means of punishing individuals disfavored by the federal government.

By failing to give adequate weight to First and Fifth Circuit analysis–and failing to consider long-run deleterious First Amendment effects–the Seventh Circuit strayed from this Court's command that courts avoid errors of law. The Seventh Circuit thereby ratified a dangerously broad interpretation of Section 666.

For the foregoing reasons, this Court should conclude that Section 666 is unconstitutional as it applies to gratuities.

B. Section 666 effectively criminalizes association in a small community.

By omitting a requirement to show a *quid pro quo* agreement in its interpretation of Section 666, the Seventh Circuit effectively criminalizes many forms of association in small communities, neighborhoods, or among individuals in the same professional network. By failing to apply First and Fifth Circuit reasoning, the Seventh Circuit wrongly endorsed the Government's interpretation of the statute.

Mayor Snyder's conviction was based on a gratuity and prior campaign contributions that the Government recognized as legal. Cert. Pet. at 12 (citing 3/9/2021 Tr. 134:25- 135:4; 3/18/2021 Tr. 1977:24-1979:8, 2079:23-2081:18). Testimony at trial demonstrates that Mayor Snyder's payment from Peterbilt related to legitimate consulting work that he did for Peterbilt to afford the costs of multiple children and outstanding tax liabilities. *Id.* (citing 3/12/2021 Tr. 1139:6-1140:1, D. Ct. Dkt. 592. and 3/16/2021 Tr. 1609:8-16; 1613:12-1614:2).

Without a *quid pro quo* requirement, the Government is able to leverage mere association to transform governmental discretion into evidence of something sinister. Discretion is a key premise of state-established bidding specifications. Discretion means that local officials in Nome, Alaska can specify their community needs Chevrolet Tahoe police cruisers capable of driving on rugged permafrost, rather than thin-wheeled Toyota Prius sedans.

Relying on its preferred interpretation of Section 666, the Government transformed bid "tailoring" into bid "rigging." *United States v. Snyder*, Cause No. 2:16

CR 00160 (ND Ind 2021) (Gov't Resp. to Def.'s Mot. for Acquittal, 7-14 (ECF No.519). Because it relied on an unconstitutional interpretation of Section 666, the Government prosecuted Mayor Snyder without bearing its burden of proof. An FBI agent testified that Mayor Snyder complied with Indiana bidding specifications. *Snyder*, Case No. 21-2986 (7th Cir. 2023) (Appellant Br., 6, ECF No. 24-1) (citing Tr. 2, Vol. 8, p. 1675). Mayor Snyder was aware of an opportunity to save the City of Portage $30,000. *Id.*

The Government asserted that Mayor Snyder picked an inexperienced associate, Randy Reeder, to oversee the bidding process, but merely asserted Reeder's inexperience and its alleged implications, even though Reeder was later promoted to become the current Portage Superintendent of Streets and Sanitation, weighing against any claim of inexperience.[4] Yet, despite these glaring contradictions that indicate the Government did not bear its burden of proof, it obtained a conviction of Mayor Snyder under its catch-all gratuity interpretation, wrongly affirmed by the Seventh Circuit.

Under the Government's reasoning, adopted by the Seventh Circuit, municipal governments would need to do virtually all contracting with large corporations without personnel or local branches in the municipality for fear that prosecutors could cast a preexisting business or personal relationship between a municipal official and a would-be contractor as a violation of

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[4] Streets & Sanitation, City of Portage, (2024), https://www.portagein.gov/180/Streets-Sanitation (accessed Feb. 6, 2024).

Section 666. The Peterbilt dealership at the center of Mayor Snyder's conviction illustrates this problem. It is the only dealership that specializes in providing vehicles large enough to be garbage trucks within nearly a 10-mile drive of downtown Portage.[5]

If an individual can be prosecuted and convicted for business deals that the Government itself does not claim are illegal, this application of Section 666 demonstrates its unconstitutional character under the First Amendment's guarantee of freedom of association. This Court's majority observed in 1996:

> Cities and other governmental entities make a wide range of decisions in the course of contracting for goods and services. The Constitution accords government officials a large measure of freedom as they exercise the discretion inherent in making these decisions. . Interests of economy may lead a governmental entity to retain existing contractors or terminate them in favor of new ones without the costs and complexities of competitive bidding. . .These are choices and policy considerations that ought to remain open to government officials when deciding to contract with some firms and not others, provided of course the asserted justifications are not the pretext for some improper practice.

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[5] *See* Truck Dealer [near Portage, Ind.], Google Maps, (Jan. 30, 2024), https://www.google.com/maps/search/@41.5912105 87.2466311 .

O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712, 724-25 (1996).

The freedom of association recognized by the First Amendment would need to yield to much more distant, arms-length association in any tight-knit municipality, neighborhood, or closely associated professional network. As a mid-size community of 38,000 people, Portage, Indiana is a bellwether of other communities where civic life could be torn apart at any time by Section 666.

On appeal, the Seventh Circuit recited conclusions of fact from the district court about Mayor Snyder's association with the Buha brothers who own Great Lakes Peterbilt. *See Snyder*, 71 F.4th at 573-74. Yet, in its subsequent analysis of how to interpret Section 666's applicability to gratuities it did not consider that contracting parties in small communities also commonly share business and social ties. *See, id.* at 579-80; *see also* Kellen Zale, *Part-Time Government*, 80 OHIO ST. L.J. 987, 988 (2019) ("Part-time government is the rule, not the exception, for cities in the United States.")

Nor did the Seventh Circuit consider that its interpretation would criminalize many local political contributions because Section 666 does not include an exception for political contributions. *See Snyder*, 71 F.4th at 579-80; *see also United States v. Grubb*, 11 F.3d 426, 434 (4th Cir. 1993). Neglecting this element would mean that guarantees of free speech and association do not apply equally at all levels of government.

This Court has periodically applied the logic of freedom of association to the lowest echelon of the

federal system: municipal government. *See Elrod v. Burns*, 427 U.S. 347, 366 (1976) (reasoning that "less drastic means for insuring government effectiveness" are preferred). In *Elrod*, the majority explained:

> [T]he government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' Such interference with constitutional rights is impermissible.

Id. at 359 (internal citations omitted).

Although *Elrod* concerned municipal political patronage, its commandment that government cannot interfere with freedom of association strongly supports the right of individuals to associate at the local level outside of their official duties as officials in a small community. *See id.* The federal government might not be able to command that municipalities contract with, for instance, large federal contractors, but under Section 666 it could effectively do so by raising the specter of prosecution for any political contribution or gift exchanged between closely associated officials and contractors in a municipality.

Section 666 conflicts with the *Elrod* standard because it strays from *Elrod's* directive that local

freedom of association be protected. Even outside the scenario of government contracting, the broad language of Section 666 could criminalize other forms of localized political speech and association, such as the hypothetical public-minded citizen making a campaign contribution after a legislator made a policy change, even without a *quid pro quo* arrangement.

The First Amendment's guarantee of freedom of assembly, restated by this Court as freedom of association, means that the broad reach of Section 666 would criminalize many forms of association in tight-knit communities. Under the misplaced reasoning put forth by the Government and adopted by the Seventh Circuit state and municipal officials would have little choice but to contract with distant, large corporations, and distance themselves from the citizenry for fear of being prosecuted under Section 666, yielding Section 666 a significant and unconstitutional restraint on freedom of association.

By failing to adequately consider the First and Fifth Circuit interpretations of Section 666's applicability to gratuities, and instead applying ill considered circuit precedent, the Seventh Circuit propounds an unconstitutional circumstance for small communities.

II.
Section 666 disrupts the federal structure, usurping law enforcement responsibilities best handled by state and local governments.

Applying Section 666 as the Seventh Circuit has in *Snyder* threatens to disturb the delicate balance of federal and state authority that undergirds the

American system of joint sovereigns. Adopting the Government's reading of the statute threatens to federalize a vast swath of crimes traditionally enforced at the state level, displacing well-staffed state and local police and prosecutors in favor of federal authorities.

Federal courts adhere to a strong presumption against the preemption of state law, particularly where a state regulates in an area without a historically significant federal presence. *See United States v. Locke*, 529 U.S. 89, 108 (2000). Although the Supremacy Clause makes the laws adopted by Congress the laws of the entire United States, and gives Congress the power to preempt state laws, the mere existence of a federal law does not erase state laws in that field.

The "'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)). Indeed, this Court affirmed "the well-established principle that 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers.'" *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014).

Because of this long-standing caution, this Court has rejected broad interpretations of the Travel Act, the federal mail fraud statute, and the Hobbs Act, that resemble the broad scope of Section 666 wrongly endorsed by the Seventh Circuit. *See, e.g. Rewis v. United States*, 401 U.S. 808, 812 (1971); *Cleveland v.*

United States, 531 U.S. 12, 24-25 (2000); *United States v. Enmons*, 410 U.S. 396, 411-12 (1973). In the context of corruption statutes, this Court has called for a narrow reading: "[A] statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter." *United States v. Sun- Diamond Growers of Cal.*, 526 U.S. 398, 412 (1999).

By maintaining a federal system of government, the United States decentralizes power. "[T]he principal benefit of the federalist system is a check on abuses of government power." *Ashcroft*, 501 U.S. at 458. "To preserve the 'proper balance between the States and the Federal Government" and enforce limits on Congress's Commerce Clause power, courts must 'be certain of Congress's intent" before finding that it 'legislate[d] in areas traditionally regulated by the States.'" *West Virginia v. EPA*, 142 S. Ct. 2587, 2621 (2022) (citing *Ashcroft*, 501 U.S. at 459-460).

Section 666 depends on a stunningly broad jurisdictional "hook," applying to virtually all government, and many non-governmental activities. *See* 18 U.S.C. § 666(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."). Under this broad ambit coupled with the Seventh Circuit's decision to apply the statute to gratuities, a wide-variety of crimes at the state and local level would fall under the statute, limiting the utility of well-staffed law enforcement agencies at lower levels of the federal structure.

This Court applies federalism canons to limit the degree to which Congress can federalize law enforcement. *See Fowler v. United States*, 563 U.S. 668, 684 (2011). "We have adopted a federalism principle that applies when a statute would render 'traditionally local criminal conduct . . . a matter for federal enforcement': '[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes.'" *Id.* (Scalia, J. concurring, quoting *Jones v. United States*, 529 U.S. 848, 858 (2000)). In *Fowler*, the majority overturned the conviction of an individual under the federal witness tampering statute because it was not clear that the individual intended to make a communication to a federal officer. *Fowler*, 563 U.S. at 684.

Constitutionally doubtful interpretations should be avoided whenever possible. *Jones*, 529 U.S. at 850 (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). In *Jones*, this Court limited the scope of a federal arson statute. *Id.* at 857. Rejecting the "Government's expansive interpretation," this Court reasoned that "hardly a building in the land would fall outside the federal statute's domain." *Id.* "Judges should hesitate . . . to treat statutory terms in any setting [as surplusage], and resistance should be heightened when the words describe an element of a criminal offense." *Id.* (quoting *Ratzlaf v. United States*, 510 U.S. 135, 140-141 (1994)).

Taken together, the rule of lenity and concerns about federalism militate in favor of striking down Section 666's broad scope as unconstitutional. *See Jones*, 529 U.S. at 858 (citing *Rewis v. United States*,

401 U.S. 808, 812 (1971)). This Court's majority directs that "traditionally local criminal conduct" not become "a matter for federal enforcement." *Id.* (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)).

Section 666 disturbs the federal structure, deviating from James Madison's sage observation on the American system of joint sovereigns:

> The powers delegated by the proposed Constitution to the federal government are few and. . .Those which are to remain in the state governments are numerous and indefinite. . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

Ashcroft, 501 U.S. at 458 (quoting The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961)).

Therefore, this Court should hold that Section 666 is unconstitutional as applied to gratuities because it attempts to federalize crimes best prosecuted by state and local authorities, and reverse the decision of the Seventh Circuit.

III.
Section 666 violates the Constitutional guarantee of Due Process by providing inadequate notice to citizens who might unwittingly break the law while engaged in lawful activity.

The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend V. This Court's cases establish that "the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983)).

The prohibition against vagueness in criminal statutes is a longstanding principle of American law. A statute that strays from this principle "violates the first essential of due process." *Johnson*, 576 U.S. at 595-96 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). By neglecting to consider the Fifth Amendment's directive against vagueness and the rule of lenity, when it gave only a cursory analysis of First and Fifth Circuit interpretations of Section 666, the Seventh Circuit strayed from the essentials of due process.

A conviction "fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Williams*, 553 U.S. at 304 (citing *Hill v. Colorado*, 530

U.S. 703, 732 (2000) and *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972)). Even though "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity," nor will this Court uphold a vague statute that fails to give even a modicum of adequate notice. *See Williams*, 553 U.S. at 304 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)).

A statute is rendered vague "not [by] the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *Id.* at 306. In *Williams*, this Court weighed whether a statute required a "true-or-false determination" of intent, rather than a "subjective judgment." *Id.* Section 666 under the federal government's interpretation can be used by prosecutors to obtain convictions without prosecutors bearing the burden of making a "true-or-false determination" for the finder of fact.

Failure of "'persistent efforts . . . to establish a standard' can provide evidence of vagueness." *Id.* at 598 (quoting *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 91 (1921)). Under this standard, then, the dissonance between the Seventh Circuit's holding, and the interpretations of the First and Fifth Circuit's is evidence of Section 666's vagueness.

This Court's holdings "squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Id.* at 602. A statute banning "unjust or unreasonable rate[s]" for groceries was struck down even though charging a thousand dollars for a pound of sugar would be unreasonable, in the

same way that a statute which criminalized people on sidewalks "conduct[ing] themselves in a manner annoying to persons passing by," even though spitting in a passerby's face would "surely be annoying." *Id.* at 602-603 (internal citations omitted).

Constitutional standards "can provide helpful guidance in this statutory context." *Ricci v. DeStefano*, 557 U.S. 557, 582 (2009). The rule of lenity–a doctrine that closely aligns with this Court's caution against vague statutes, "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States v. Lanier*, 520 U.S. 259, 266 (1997).

The doctrine of stare decisis supports this Court's ability to apply experience obtained through the passage of time to revisit a statute's constitutionality. *Johnson*, 576 U.S. at 605. ("The doctrine of stare decisis allows us to revisit an earlier decision where experience with its application reveals that it is unworkable") (citing *Payne v. Tennessee*, 501 U.S. 808, 827(1991)). Even if this Court rejected prior vagueness challenges, experience allows it to revisit its past decisions:

> Unlike other judicial mistakes that need correction, the error of having rejected a vagueness challenge manifests itself precisely in subsequent judicial decisions: the inability of later opinions to impart the predictability that the earlier opinion forecast.

Id. at 605.

Rather than apply stare decisis to ameliorate prior

judicial mistakes, conforming its interpretation toward that of the First and Fifth Circuits, the Seventh Circuit applied the doctrine of stare decisis to apply precedent for precedent's sake. *See id.*; *compare Snyder*, 71 F.4th at 580 ("Accordingly, we follow here our precedents holding that 18 U.S.C. § 666 applies to gratuities and does not require evidence of a prior quid pro quo agreement.") The Seventh Circuit failed to appropriately consider the vagueness inherent in the statute and did not apply the long-standing rule of lenity. *See id.*

Procedural due process rooted in the Fifth Amendment strongly supports striking down Section 666's application to gratuities. Permitting the broad statutory ambit used to convict Mayor Snyder to remain in effect would reinforce a statutory scheme that gives virtually no notice to potential violators, and permits the federal criminalization of many forms of association, without adequate tailoring needed to prevent *quid pro quo* corruption.

Therefore, this Court should hold that Section 666 is unconstitutional as it applies to gratuities, and reverse the decision of the Seventh Circuit.

IV.
Following the Government's interpretation of Section 666, adopted by the Seventh Circuit, violates accepted canons of statutory interpretation.

Regularly invoked canons of statutory interpretation, adopted through this Court's holdings strongly disfavor the Government's interpretation of the statute, as adopted by the Seventh Circuit. Section

666 provides that a violation occurs when a person: "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." 18 U.S.C. § 666(B).

The canon of *expressio unius* applies where the statement of one thing suggests exclusion of others. *See Bittner v. United States*, 143 S. Ct. 713, 716 (2023); *see also Chevron USA v. Echazabal*, 536 U.S. 73, 81 (2002). The inclusion of the phrasing "corruptly solicits or demands" qualifying "accepts or agrees to accept" and "intending to be influenced or rewarded," drives at a different meaning than the one favored by the Government. The close association and qualifying relationship of these clauses indicates, through application of the *expressio unius* canon, the application of the statute to *quid pro quo* arrangements to the exclusion of innocent gratuities.

This Court has previously directed that each statutory provision be read in context of the whole act. *See Gonzales v. Oregon*, 546 U.S. 243, 273-74 (2006). Statutory, interpretation, therefore, is a "holistic" activity. *United Sav. Ass'n v. Timbers of Inwood Forest Assocs*, *Ltd.*, 484 U.S. 365, 371 (1988).

Section 666(c) stipulates: "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." 18 U.S.C. § 666(c). Read holistically, this subpart, taken together with subpart (b)'s description of *quid pro quo* activity, conflicts dramatically with the Government's interpretation of

Section 666. Prosecutors alleged and introduced testimony that Mayor Snyder's business dealings were lawful, directly contradicting a *quid pro quo* theory. *See* Cert. Pet. at 12 (citing 3/9/2021 Tr. 134:25-135:4; 3/18/2021 Tr. 1977:24-1979:8, 2079:23-2081:18). Thus, the Government's interpretation goes against even the most hasty holistic reading of the statute.

This Court presumes that Congress does not hide elephants in mouseholes. *See Sackett v. EPA*, 143 S. Ct. 1322, 1340 (2023) (citing *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001)). Even the Department of Justice admits that there is virtually no legislative history to speak of about Section 666. It was passed as a minor provision in a broad slate of tough-on-crime policies in the early 1980s, as a response to rampant organized crime problems across the nation.

Criminalizing countless innocent gratuities without clearly saying so in the statute is not what Congress intended. Giving prosecutors the ability to pull such a broad criminal provision out of thin air from a mere 483 inapposite words of statutory text is not what the people's representatives in the Capitol sought to do in 1984, when Section 666 was passed.[6]

The Seventh Circuit failed to adequately consider Congressional intent when it construed Section 666. *See Snyder*, 71 F.4th at 579-80. Mayor Snyder's counsel in his appeal to this Court offer an incisive

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[6] *See* 1003. Legislative History—18 U.S.C. § 666, Department of Justice, (Feb. 2024), https://www.justice.gov/archives/jm/criminal-resource-manual-1003-legislative-history-18-usc-666 (citing S. Rep. No. 225, 98th Cong. 1st Sess. 369, reprinted in 1984 USCCAN 351).

explanation that Section 666 is limited to *quid pro quo* agreements based on vital differences between this statute and other federal bribery statutes. *See* Pet. Br. 18-22. Congress has adopted close to a dozen gratuity statutes, almost all limited in scope to federal employees. Pet. Br. 29 (citing 18 U.S.C. §§ 213, 1912; 19 U.S.C. § 60; 22 U.S.C. § 4202). Simultaneously, most corruption statutes treat bribery as more severe than gratuities, disfavoring the view that Congress sought to publish both with equal severity in Section 666. *See* Pet. Br. 33. The foregoing canons of statutory interpretation and the pattern of federal bribery statutes strongly indicates that "Congress [did not create] 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." Pet. Br. 26.

This Court has examined other aspects of Section 666's constitutionality, yet has not contended with the Government's gratuity claim and the circuit split that emerged in response to this over-broad interpretation. *See, e.g. Sabri v. United States*, 541 U.S. 600 (2004); *Fischer v. United States*, 529 U.S. 667 (2000); *Salinas v. United States*, 522 U.S. 52 (1997).

The absence of prior precedent from this Court on the question of gratuities under Section 666 despite the statute's now 40-year existence supports the notion that the Government has invented an "elephant" in the "mousehole" of Section 666, incorrectly ratified by the Seventh Circuit. Because the Seventh Circuit's reading of Section 666 goes contrary to multiple well-grounded canons of statutory interpretation, this Court should reject the Seventh Circuit's interpretation of Section

666 outright and reverse Mayor Snyder's conviction.

Conclusion

For the foregoing reasons, this Court should reverse the decision of the Seventh Circuit.

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Respectfully submitted,

James Bopp, Jr.
Counsel of Record
Eamon McCarthy Earls
THE BOPP LAW FIRM, PC
The National Building 1
South Sixth Street
Terre Haute, IN 47807
812/2322434 telephone
812/2353685
jboppjr@aol.com
Counsel for Amicus Curiae