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 STAES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[*]

The International Union of Operating Engineers, Local 150, AFL-CIO ("Local 150") is a labor organization and the exclusive collective bargaining representative of over 23,000 members working in various industries throughout northwest Indiana, northern Illinois, and eastern Iowa. By filing this *amicus* brief, Local 150 seeks to assist the Court in a case that presents an issue of exceptional importance to public advocacy and lobbying activities in labor industries. The appropriate scope of prosecutions under 18 U.S.C. § 666—the most-prosecuted federal corruption statute[1]—directly impacts Local 150's efforts to educate government officials, and to advocate, support, and draft legislation that promotes bidding opportunities for responsible contractors. Local 150 is well-positioned to offer insight into the consequences of the decision before the Court for public advocacy groups, lobbyists, and active citizens in labor industries.

SUMMARY OF ARGUMENT

The Seventh Circuit held below, and the government argues in this Court, that 18 U.S.C. § 666 does not require proof of a prior *quid pro quo* agreement. So construed, Section 666 violates the fundamental

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[*] No counsel for any party in this case authored this brief in whole or in part. No person or entity, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* Sup. Ct. R. 33.1(b).

[1] U.S. Dep't of Just., Bureau of Just. Stat., *FY 2022 Number of Defendants in Cases Filed: 18 U.S.C. § 666*, https://bjs.gov/fjsrc/tsec/cfm (last visited February 8, 2024).

principle that a criminal law must "give ordinary people fair notice of the conduct it punishes." *Johnson v. United States*, 576 U.S. 591, 605 (2015). The government's interpretation also renders the statute so standardless as to invite arbitrary enforcement. See *id.* Law-abiding participants in the political process, including lobbyists, public advocacy groups, and politically involved citizens, could be subject to prosecution for commonplace (and perfectly legitimate) interactions with state and local officials. To avoid these substantial due process concerns, the Court should require proof beyond a reasonable doubt of a prior *quid pro quo* agreement to sustain a criminal prosecution under Section 666.

In addition, the government's reading of Section 666 raises serious First Amendment concerns, as it would chill political expression in the form of public policy advocacy or education and other legislative initiatives routinely pursued by lobbyists, interest groups, and other participants in the political process. Requiring a prior *quid pro quo* agreement properly delineates between unlawful conduct, on the one hand, and lawful, protected speech on the other. Recognizing that such speech is essential to democracy, the Court should reverse.

ARGUMENT

Every day, in virtually every state and city across this Nation, interest groups, lobbyists, and businesspeople interact with state and local officials. In these dealings, law-abiding citizens legitimately and appropriately seek to influence the officials or persuade them to act on various matters of public importance. Such activity—educating public officials and

attempting to influence them as to both general policy and specific legislation—serves core First Amendment interests.

Much of this activity also customarily involves providing officials with what federal courts have construed to constitute "anything of value" within the meaning of Section 666, including, for example, meeting with an official over lunch or dinner, hosting a legislative reception, putting on an educational conference for legislators, or even donating to a worthy charity favored by the public official. Indeed, in *United States v. Donagher*, the government and district court agreed that the defendant's relatively modest charitable donations ($869 for plaques and $1,000 for food) to a cause also supported by a local county official (a luncheon honoring Women Judges of Illinois) were sufficient—without proof of a *quid pro quo*—to support a felony conviction and a prison sentence under Section 666. See *United States v. Donagher*, Case No. 19 CR 240 (N.D. Ill.), Doc. 97–98, 121.

Absent a prior *quid pro quo* requirement in Section 666, the highly consequential line between lawful political activity and unlawful conduct is indecipherable. The statute prescribes criminal punishment for anyone who "corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward" a state or local official "in connection with any" government business "involving anything of value of $5,000 or more." 18 U.S.C. § 666(a)(2). The trouble for those interacting with state and local officials is that lobbying and other protected political activity necessarily involves attempting "to influence" such officials. Without a prior *quid pro quo* requirement, the nebulous statutory requirement that a

person act "corruptly" does little to mark the boundary line between legal and illegal, and as discussed further herein, is essentially meaningless in practice.

For example, the current Seventh Circuit Pattern Jury Instruction for Section 666 defines "corruptly" as follows:

> A person acts corruptly when that person acts with the intent that something of value is given or offered to reward or influence an agent of an [organization; government; government agency] in connection with the agent's [organizational; official] duties.

Seventh Cir. Pattern Crim. Jury Instr. at 302 (2023 ed.). This definition is circular—it defines "corruptly" to mean nothing more than "acting with intent to influence," which essentially writes the term out of the statute.

This Court has made clear that, given First Amendment concerns, political contributions cannot give rise to criminal liability absent an explicit *quid pro quo* agreement. See *McCormick v. United States*, 500 U.S. 257, 273 (1991); *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 192 (2014). Yet lawful participation in the political process routinely involves providing things "of value" that benefit public officials in some way. An unduly broad reading of Section 666 casts a cloud of potential criminal prosecution over this legitimate conduct. A bright-line rule requiring proof of a prior *quid pro quo* agreement as an element of any prosecution under the statute is thus necessary to avoid arbitrary enforcement and provide fair notice of what the statute proscribes.

Applying Section 666 as the government urges means that "ordinary people can[not] understand what conduct is prohibited,'" and "'encourage[s] arbitrary and discriminatory enforcement.'" *McDonnell v. United States*, 579 U.S. 550, 576 (2016) (quoting *Skilling v. United States*, 561 U.S. 358, 412 (2010)). Without a *quid pro quo* element, lobbyists, interest groups, and politically active citizens "could be subject to prosecution, without fair notice, for the most prosaic interactions." *McDonnell*, 579 U.S. at 576. Under this Court's precedents, "'[i]nvoking so shapeless a provision to condemn someone to prison' … raises the serious concern that the provision 'does not comport with the Constitution's guarantee of due process.'" *Id.* (quoting *Johnson,* 576 U.S. at 602). Interpreting Section 666 to require a *quid pro quo* "avoids this 'vagueness shoal.'" *McDonnell*, 579 U.S. at 576 (quoting *Skilling*, 561 U.S. at 368).

In Illinois, for instance, legal guidance from the Secretary of State's Office indicates that lobbyists may provide a public official with "food or refreshments not exceeding $75 per person in value on a single day." Illinois Secretary of State, *Illinois Lobbyist Ethics Training* 7 (Jan. 2023), http://tinyurl.com/uswbcwpw. But under the current state of the law in the Seventh Circuit (and others), even if a lobbyist's meal expenditures comply with this guidance, a federal prosecutor could still accuse—and likely convict—the lobbyist of violating Section 666 for providing a "thing of value" (the meal) while conversing with the official during the meal with the intent to influence her.

As the law currently stands in the Seventh Circuit, "nothing but the Government's discretion prevents" it from prosecuting the lobbyist in this circumstance.

United States v. Sun-Diamond Growers of California, 526 U.S. 398, 408 (1999). The lobbyist or other policy advocate—who, again, is in compliance with state law—deserves a better safeguard against over-zealous prosecutions under Section 666 than merely the government's illusory and unenforceable "promise[] to use [the statute] responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010) ("[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*."). Indeed, the individual not only needs, but is constitutionally entitled to, "fair warning" of what conduct risks criminal prosecution. *Marinello v. United States*, 138 S. Ct. 1101, 1106, 1108 (2018) (quoting *United States v. Aguilar*, 515 U.S. 593, 600 (1995)); *see also Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005) (exercising restraint out of concern for fair warning).

For illustration, suppose a local union leader successfully advocates to state Representative B for legislation funding the construction of a renewable energy plant that would create hundreds of good jobs for the union's members. After the legislation passes, Representative B forwards resumés to the union leader, suggesting that the job applicants, who live in his district where unemployment is high, are well qualified to be employed by contractors. The union official passes those resumés on to the Union's hiring hall, and some of the applicants—who are, in fact, well-qualified—are hired and subsequently do good work for their employer. Assume further that there is no evidence of any illicit or untoward agreement or arrangement between the Representative and the union leader. Under the Seventh Circuit's current interpretation of Section 666, this mere sequence of events would be sufficient to allow a prosecutor to indict both

Representative B and the union leader on a gratuity theory under Section 666. And given the Seventh Circuit's Pattern Jury Instruction (see *supra* at 4), a jury might well convict. Without the requirement of a *quid pro quo* agreement, ambiguous circumstances can turn perfectly innocent conduct into a criminal conviction. That is not right and does not comport with due process.

Consistent with the central tenet of criminal law, union leaders and public officials must know in advance what conduct crosses the line. Drawing the line at requiring proof of a *quid pro quo* is the proper way, consistent with due process, to distinguish the lawful from the illegal under Section 666.

By way of another example, City Council Member A—like many part-time state and local legislators—must also hold private employment to make a living and provide for his family. *See* Nat'l Conf. of State Legislatures, *Full- and Part-Time Legislatures* (July 28, 2021), http://tinyurl.com/eramrn5y (finding that 40 states have part-time legislatures). The part-time city council member owns and operates an insurance agency in the small city in which he lives, and he also sits on the City Council's Zoning Committee. Council Member A votes to approve a zoning request argued for by the principal of one of the town's construction companies that wants to build a shopping center. Sometime later, the construction company buys insurance from Council Member A's insurance agency at fair market rate. Under the government's view, and that of the Seventh Circuit, both the Council Member and the principal of the construction company could be charged and convicted of a felony under Section 666 without even an allegation, much less proof, of a *quid*

pro quo agreement connecting the two transactions, which are, on their face, both perfectly legal and supportable on the merits.

Consider likewise the following hypothetical examples involving "things of value" that have been predicates for prosecution under Section 666:

- A construction company donates to a local charity supported by an official overseeing a municipal agency that has awarded, or later awards, a public contract to the company.

- A business funds an academic center at a public university in the state where it is headquartered. A state official with significant regulatory authority over the business is a prominent alumnus of the university and sits on its board of trustees.

In each case, something of "value" was given in a manner that was both unremarkable and arguably beneficial to a state or local official. Depending on the particular facts and circumstances, a reasonable jury could infer that the thing of value was given with the intent to "influence or reward" the official. The likelihood of a criminal prosecution and ultimate conviction would hinge on the extent to which the defendant (whether the giver of the benefit or the official accepting the benefit) could be deemed to have acted "corruptly."

Yet, as noted above, in the context of Section 666,

federal courts have struggled to define "corruptly" in a way that provides meaningful guidance. Thus, the Seventh Circuit's Pattern Jury Instruction on the meaning of "corruptly" in Section 666 (quoted above) is entirely circular, as it defines "corruptly" merely as having the intent to "reward or influence," thereby reading the term out of the statute. But, as a matter of sound statutory construction, "corruptly" must have independent meaning; it is a distinct element that must be proven beyond a reasonable doubt. See Seventh Cir. Pattern Crim. Jury Instr. at 305 (2023 ed.) (noting "that the definition does not appear to add any requirement beyond the intent requirement in the second element of the Pattern Instruction").

The court of appeals opined below that an official "acts 'corruptly' when 'he understands that the payment given is a bribe, reward, or gratuity." *United States v. Snyder*, 71 F.4th 555, 581 (7th Cir. 2023). But, again, this judicial gloss risks conflating legitimate political activity with illegitimate conduct. Because Section 666 does not include an "official act" requirement, it reaches a more amorphous range of conduct. *Cf. McDonnell*, 579 U.S. at 567 (construing 18 U.S.C. § 201). Participants in the political process routinely seek access to and influence over state and local officials as a matter of First Amendment right, and in the best sense of a participatory democracy. Legislators cannot and should not be expected to summarily shun all political and civic engagement that might benefit them in some way, even indirectly, on the ground that the sponsor of the activity may be seeking such access or influence. Nor should a private citizen's exposure to criminal liability turn on whether legitimate political activity can be construed as an attempt to "reward" an official in some generic and ill-defined

sense, without any proof of an illicit *quid pro quo*.

In sum, requiring proof of a prior *quid pro quo* agreement is the only way to lift the threat of criminal prosecution that shadows otherwise lawful, indeed encouraged, participation in the political process. Conversely, construing Section 666 not to require a prior *quid pro quo* agreement would have—indeed, is having—a chilling effect on protected First Amendment activity. Those who interact with state and local officials on matters of public policy should be able to do so without fear of federal prosecution. The Court should therefore reverse.

CONCLUSION

For the reasons stated above, the Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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