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 OF SEPARATION OF POWERS CLINIC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Separation of Powers Clinic at the Gray Center for the Study of the Administrative State, located within the Antonin Scalia Law School at George Mason University, was established during the 2021–22 academic year for the purpose of studying, researching, and raising awareness of the proper application of the U.S. Constitution's separation of powers constraints on the exercise of federal government power. The Clinic provides students an opportunity to discuss, research, and write about separation of powers issues in ongoing litigation.

The Clinic has submitted numerous briefs at this Court and the lower courts in cases implicating separation of powers in the context of criminal law, including in *Donziger v. United States*, No. 22-274.

This case is important to *amicus* because it addresses the proper allocation of power between the Federal Government and the States and, in turn, the Constitution's vertical separation of powers.

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This Court has told the Government time and again (and again) that when a federal criminal statute can be taken as a "meat axe or a scalpel," it must be read as the latter. *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 412 (1999). But with a zeal fitting for *The Shining*, the Government once more yearns for a hatchet. Here as before, this Court should rebuke the effort: Section 666 does not harbor a far-reaching proscription on gratuities; it is a bribery statute, and is cabined to that discrete offense.

The Government's position to the contrary depends on reading § 666 differently from how this Court has read every federal corruption law it has seen for the last thirty-plus years. And it hazards perilous consequences for the separation of powers, to boot. The Constitution divides governmental power in this country horizontally and vertically. And the Government's interpretation strains both. It involves the Executive Branch mining a federal statute for a power Congress has not clearly given it; and along the way, the Federal Government captures for itself the ability to superintend state and local politics.

That is not the best reading of § 666—at minimum, Congress would have spoken plainly if it wished to make federal prosecutors the hall monitors of everyday politics in every jurisdiction in the country. Rather, here, the straightforward reading is the right one: Federal programs bribery needs a bribe—a *quid pro quo* exchange for official action.

ARGUMENT

I. The Separation of Powers Compels a Narrow Reading of Federal Criminal Laws Regulating Politics.

The federal corruption laws are notoriously vague. And enterprising federal prosecutors have long taken those vagaries as opportunities to pursue prosecutions with political undertones. *See, e.g.*, Sandra Caron George, *Prosecutorial Discretion: What's Politics Got to Do With It*, 18 Geo. J. Legal Ethics 739 (2005). But this Court has turned back those ambitious efforts for the better part of four decades. *See, e.g.*, *Percoco v. United States*, 598 U.S. 319 (2023); *Ciminelli v. United States*, 598 U.S. 306 (2023); *Kelly v. United States*, 140 S. Ct. 1565 (2020); *McDonnell v. United States*, 579 U.S. 550 (2016); *Skilling v. United States*, 561 U.S. 358 (2010); *Cleveland v. United States*, 531 U.S. 12 (2000); *McCormick v. United States*, 500 U.S. 257 (1991); *McNally v. United States*, 483 U.S. 350 (1987).

At one level, these cases exhibit a serious concern for fair notice. Americans, even politicians, should not learn they have committed a felony "when the prosecutor comes calling or the judge debuts a novel charging instruction." *Percoco*, 598 U.S. at 337–38 (Gorsuch, J., concurring). But this Court's corruption cases are further animated by even more fundamental considerations, framed around the Constitution's separation of powers and basic principles about our system of government. In particular, this Court has identified twin constitutional concerns—both of which demand a narrow reading of federal criminal laws

regulating politics, at least absent some clear statement from Congress otherwise.

First, this Court has held that the federal corruption laws should not be read to "cast a pall of potential prosecution" over ordinary politics. *McDonnell*, 579 U.S. at 575. And the reason why is intuitive. The Court has recognized that our system of government rests on a "basic compact" where ordinary citizens have the ability—indeed, right—to try and influence politicians to advance the citizens' priorities and address their concerns. *Id.*; *see also Sun-Diamond*, 526 U.S. at 405. It is the "natural right of every individual citizen," interested in influencing his government, to engage in a "free correspondence" with his representatives. Thomas Jefferson, Petition to the Virginia House of Delegates (Aug. 1797), *in* 8 THE WORKS OF THOMAS JEFFERSON 322, 327 (Paul Leicester Ford ed., 1904).

The problem, however, is that seemingly broad criminal laws allow enterprising prosecutors to turn the usual give-and-take and glad-handing of politics into something nefarious. It is all too easy for federal prosecutors and juries to collapse actual and colloquial corruption. And without more, the result is an epochal "chill" over otherwise routine politics. *McDonnell*, 579 U.S. at 575. As this Court has recognized, "[o]fficials might wonder whether they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse." *Id.* That is no way to run a country—at least one with the protections provided by the First Amendment.

This Court has responded to these concerns by insisting on narrow statutes with marked bounds. Justice Stewart's test for obscenity does not work in this area; rather, clear rules must define what is, and what is not, political corruption. And this Court has interpreted such laws by those lights at every turn. *See, e.g.*, *McDonnell*, 579 U.S. at 574 (narrowly defining "official act"); *Sun-Diamond*, 526 U.S. at 406 (holding gratuities require identified official act); *McCormick*, 500 U.S. at 272–73 (requiring "explicit" *quid pro quo* for campaign-contribution bribery). Anything less jeopardizes the basic compact at the heart of our system of government.

Second, the *federal* corruption laws should not be read to broadly extend over *state and local* politics, in particular. The above problems are bad enough; they are worse still where one sovereign uses its laws to interfere with the basic political functioning of another. *See, e.g.*, *Salinas v. United States*, 522 U.S. 52, 59 (1997) (the federal corruption laws should not be readily construed to disrupt the "existing balance of federal and state powers").

As touched on, the Constitution divides powers horizontally and vertically. For the Federal Government, power is distributed across three branches so as to preserve individual liberty—including the liberty to shape, influence, and pressure one's elected representatives. *See McConnell v. FEC*, 540 U.S. 93, 296–97 (2003) (opinion of Kennedy, J.). The Constitution further divides power vertically; a federal sovereign defined by limited, enumerated powers thus "requires a distinction between what is truly national and what is truly local." *United States*

v. Morrison, 529 U.S. 598, 617–18 (2000). And this Court has carefully guarded this divide. *See Gregory v. Ashcroft*, 510 U.S. 452, 460 (1991).

Nowhere are these principles of federalism more important than in the context of federal public corruption laws that involve *federal* prosecutors overseeing the regular interactions of *state and local* politics. Such laws, by intent and design, remove from local and state communities the ability to govern themselves, replacing community notions of proper conduct with uniform federal "standards of disclosure and good government." *Kelly*, 140 S. Ct. at 1574. In other words, one-size-fits-all federal corruption laws not only coopt a core state prerogative—developing the rules to govern local conduct—but do so in an area of core state concern—the relationship of its government to its governed. *See United States v. Lopez*, 514 U.S. 549, 561 n.3 (1994). And at minimum, the chill that follows these laws will freeze state and local officials from interacting with constituents as they once did.

That type of federal interference has serious consequences for federalism: The Constitution envisions that States will be separate sovereigns, capable of pushing back and checking the Federal Government. When federal prosecutors seize for themselves the authority to superintend state-level politics—and in so doing, seize for themselves the ability to define for that polity how the people may interact with their chosen leaders—it undermines the independence of the States, and reduces the ability of the people to exercise their voice through them.

None of this is to say, of course, that every gratuity should be legal; or that every gratuity is a force for good government. It is to say, though, that the Constitution expresses a clear preference for *who decides* where to draw those careful lines. And in the main, that should be state and local governments, able to shape laws around communal senses of right-and-wrong, and their own norms of proper politics.

The upshot, in turn, is that when the Federal Government seeks to regulate politics, the separation of powers thus compels that any such federal statute be construed narrowly. In this delicate domain, constitutional concerns require that laws be precise; when Congress wishes to regulate, it must perform that task clearly. For the same reasons, federal prosecutors need more than a "merely plausible textual basis" to brand something as criminal in this context. *West Virginia v. EPA*, 597 U.S. 697, 723 (2022). They need unambiguous text, lest the most meaningful check on their discretion becomes their ambition—which is of course no sort of check at all.

II. The Government's Broad Reading of § 666 Runs Headlong Into Core Constitutional Concerns.

There is no real argument that § 666, as written, *clearly* proscribes gratuities. Indeed, reading the statute that way assumes Congress was not just indifferent to federalism, but outright hostile to it. As the Government *must* have it, Congress decided to punish illicit gratuities to *state and local* officials five times harsher than those to *federal* officials (10 years under § 666, versus 2 years under § 201); and it

further desired to treat bribes and gratuities as distinct offenses for *federal* officials (punished very differently under § 201), but as the same offense for *state and local* officials (punished the same way under § 666). That sort of statutory construction is nonsensical, and by no means *compelled* by the plain text of the statute.

For its counterintuitive approach, the Government rests entirely on the word "reward." But this Court has consistently turned back similar statutory Trojan Horses, from "property" to "honest services" to "official acts." This case thus presents a familiar exercise, where this Court faces a broad and narrow reading of a federal corruption law. And this case should produce what is now a familiar result. Under the constitutional concerns that have driven this Court's precedents to date, this case does not present a close call.

Foremost, as this Court has recognized in similar contexts, reading § 666 to proscribe gratuities would create an immediate and sprawling "pall of potential prosecution" over much of everyday state and local politics. *McDonnell*, 579 U.S. at 575. And that is so because nobody really knows what a gratuity is—or at least, nobody can define it in a way that fails to see it everywhere. The formal definition of a gratuity is "a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken." *Sun-Diamond*, 526 U.S. at 405. But taken literally, that might make felons out of nearly everyone, especially given that § 666 prohibits not just the acceptance of a reward, but also the "offer[ing]" of one. 18 U.S.C.

§ 666(a)(2). After all, it is hard to see how any campaign contribution is not a "reward" for past activity, or one's pledge to do something in the future. Likewise, it would seem that every *award* a politician receives for his time in office fits the same bill. A moment's reflection reveals hundreds of similar examples. The point is that the two key pieces of a gratuity charge—the reward, and the act—are everywhere in ordinary state and local politics.

Such an interpretation thus risks serious consequences for federalism. Where the *actions* giving rise to a corruption charge are present everywhere, the only things limiting a corruption prosecution are (i) the prosecution's discretion, and (ii) the jury's perception of the gratuity-giver's intent. But neither of those limits do much—and at minimum, offer zero *ex ante* guidance to ordinary citizens.

As for the former, it is a common refrain that federal prosecutors will pledge to wield a broad law responsibly. It is also a common losing argument before this Court. *See, e.g.*, *McDonnell*, 579 U.S. at 576. But even more fundamentally, what a federal prosecutor deems an illegal gratuity—what parses a valid award from an illegal one—will be wholly commensurate with his sense of "good government." *Kelly*, 140 S. Ct. at 1574. In other words, empowering federal prosecutors to root out bad "gratuities" (whatever that really means) is to empower them to impose their views of proper politics on states and localities; it is inherent to the task of putting meat on the bones of this ambiguous concept. But that is *precisely* the sort of intrusion into the truly local that

this Court has held for many decades requires (at the least) a clear statement by Congress in the relevant statute. *McNally*, 483 U.S. at 360. Absent that, the Federal Government may not "use the criminal law to enforce (its view of) integrity in broad swaths of state and local policymaking." *Kelly*, 140 S. Ct. at 1574.

Of a piece, leaving all this to the jury does nothing to address the constitutional concerns present with the Government's reading. If anything, it compounds them. Subjective intent, after all, is "easy to allege and hard to disprove." *Crawford-El v. Britton*, 523 U.S. 574, 584–85 (1998). Few Americans—from donors, to gift-givers—would find much comfort in leaving their fate to whether a jury believes someone would give a reward to a politician for wholly altruistic reasons. Accordingly, having gratuities turn on such an "intent-based test" would produce the exact same "chill" described above; rather than risk the potential prosecution, people will just recede from the political space. *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468–69 (2007) (opinion of Roberts, C.J.).

And of course, none of this provides fair warning to would-be rewarders as to what is a permissible benefit, versus an illicit gratuity. That not only makes the above problems worse, but invites new ones too. "Vague laws" strain the separation of powers in their own right, because they impermissibly "hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). More, built into this open-ended grant is the capacity for "arbitrary and discriminatory enforcement."

McDonnell, 570 U.S. at 576. When gratuities are in the eye of the prosecutor, nobody is safe from charge.

If nothing else, the primary lesson of this Court's corruption cases has been that the federal corruption laws should not be read to cast a shadow of possible criminal liability over what is regular political activity in this country, for better or for worse. *McDonnell*, 579 U.S. at 566–67. But *that* is precisely what the Government is trying to do here (again). And here as elsewhere, that effort should fail (again). Section 666 is not an outlier: It is not the first federal corruption law in forty years that merits a broad reading. The same constitutional considerations that doomed the Government's other attempted prosecutorial power grabs must doom this one, as well.

III. The Government's Broad Reading Promises Broad Consequences.

Sometimes, this Court needs to use its imagination to see the repercussions of one of the Government's broad criminal constructions. Not so here. In the circuits that have blessed its reading of § 666, the Government *has* used the law to micromanage the ethics and conduct of state and local officials—and the separation of powers has suffered as a result. Thus, the "far-reaching consequences" of the Government's view here are not hypothetical; they are bearing out right now, and give all the more reason to doubt this is what Congress intended. *Dubin v. United States*, 143 S. Ct. 1557, 1572 (2023).

In response to this Court cabining the honest-services statute to genuine bribery, the Government has pivoted—not in *what* it seeks to prosecute, but in

how it seeks to do it. And for this, the Government has latched onto § 666 as its new, general anti-corruption statute. *See, e.g.*, Justin Weitz, *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, 817–18 (2011). As Snyder documents, it has become the Government's main tool for federal prosecutors seeking to target state-level corruption. *See also* George D. Brown, *Stealth Statute—Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666*, 73 Notre Dame L. Rev. 247, 252 (1998).

And this makes perfect sense: Why would a federal prosecutor go through the trouble of proving bribery, when he could get the same penalty for a much easier-to-prove offense? After all, in light of the above constitutional considerations, this Court has made proving federal bribery demanding. There needs to be an *exchange*—and where the *quid* is a campaign contribution, an *explicit* one. *See McCormick*, 500 U.S. at 273. And the exchange must be for *official action*—which is a narrow band of conduct, involving genuine exercises of sovereign power. *See McDonnell*, 579 U.S. at 574–75. But for *gratuities*, on the Government's view, federal prosecutors need not bother with these hurdles. For *gratuities*, § 666 offers federal prosecutors a return to the old days before this Court got involved with checking their many prosecutorial excesses under the guise of seemingly broad anti-corruption statutes.

The proliferation of § 666 prosecutions makes further sense given the statute's remarkable reach. Given the law's $10,000 federal funds hook, every state-level official and most local officials fall within

its ambit. Weitz, *supra*, at 816. And the prosecutorial pall is *especially* serious for those officials, in light of the financial reality of those offices. State officials are often part-time, by design, so they remain part of their communities; and local officials are almost always part-time, by necessity, because one often cannot make ends meet on those salaries. *See generally* Kellen Zale, *Part-Time Government*, 80 Ohio St. L.J. 987 (2019). It is thus common course for constituents to "patronize" a lawmaker's "law firm, insurance brokerage, or real estate agency." Albert W. Alschuler, *Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse*, 84 Fordham L. Rev. 463, 485–86 (2015). That dynamic—where local officials regularly receive outside compensation while performing the duties of their office—is perilous if combined with a roving reading of § 666. The daily life of almost every state and local officeholder would be fodder for a gratuity charge.

The specter of prosecution that the Government's position creates will not only chill routine political activity, but also will doubtless deter people from entering politics at all. And the proliferation of even strained § 666 charges will nonetheless dampen voters' confidence in their government. More, that downward cycle will only compound, as citizens lose the ability to effectively petition their elected leaders without raising the hackles of the local U.S. Attorney's office.

And adding insult to injury, all of this is in service of a fleeting—really, non-existent—federal interest. Section 666 was originally intended to combat misuse of federal funds. *See* Weitz, *supra*, at 817–18. But

nobody seriously argues that it has been kept to that narrow function, or is consistent with the contract that the States thought they entered as part of this Spending Clause legislation. It has instead been warped into a general anti-corruption law for the nation's local politics; and in turn, has become license for the Federal Government to supervise every political community in the country, just because it asserts the power to do so.

* * *

Relying on bedrock constitutional considerations, this Court has *for decades* made sure that the federal corruption laws will not come to consume or even chill the hurly-burly of ordinary politics. The same considerations apply here in full force—indeed, more so, given the particularly serious risks for federalism and the vertical separation of powers that the Government's position hazards. And those considerations yield a clear answer in this case: Section 666 is a bribery statute—subject to all of the restrictions on federal bribery that this Court has assiduously imposed, case after case. Section 666 is not an off-ramp to those strictures, and this Court should reject the Government's latest attempt to wrest itself from them.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to reverse.

Respectfully submitted,

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