No. _____

In the Supreme Court of the United States

ALEJANDRO CARRASCO, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

Rachel Brill
Franco L. Pérez-Redondo
José David Rodríguez
Counsel of Record
FEDERAL PUBLIC DEFENDER,
DISTRICT OF PUERTO RICO
241 F.D. Roosevelt Ave.
San Juan, PR 00918

Counsel for Petitioner

QUESTIONS PRESENTED

I. Does an external consultant retained by a state or local government qualify as a government "agent" subject to prosecution under 18 U.S.C. § 666 where the consultant lacks authority to act with respect to the entity's funds?

II. Is the government free to convict a public official of quid pro quo bribery without having to show that the defendant engaged in an official act? Put differently, is any "act" by a public official sufficient *quo* to convict under 18 U.S.C. § 666 or, as with other federal bribery laws, must the government establish that the official accepted payment in exchange for an "official act"?

PARTIES

Alejandro Carrasco, Petitioner, was the defendant-appellant below.

The United States of America, Respondent, was the plaintiff-appellee below.

RELATED PROCEEDINGS

United States v. Alejandro Carrasco, No. 21-1396 (1st Cir. opinion and judgment issued August 28, 2023; order denying rehearing issued Jan. 16, 2024; mandate issued Jan. 24, 2024).

United States v. Alejandro Carrasco, No. 3:14-cr-423-FAB-1 (D.P.R. judgment entered April 27, 2021).

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OPINION BELOW

Alejandro Carrasco respectfully petitions for a writ of certiorari to review the judgment of the First Circuit. Pet.App.2a-20a. It is reported at 79 F.4th 153.

JURISDICTION

The First Circuit entered judgment on August 28, 2023, and denied a timely petition for rehearing *en banc* on January 16, 2024. Pet.App.1. Justice Jackson extended the time to file a petition for writ of certiorari until May 15, 2024, and then further extended the time for filing a petition to June 14,

2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 666(a)(1)(B) provides:

> Whoever…being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof…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.

18 U.S.C. § 666 is reproduced in full, *infra*, Pet.App.30a-31a.

STATEMENT

This case raises two important questions about the scope of 18 U.S.C. § 666, the most widely charged federal anti-corruption statute. The first question asks the Court to address, for the first time, who can be prosecuted under the statute. Question two asks the Court to settle whether § 666, like other federal bribery offenses, requires an official act as part of the quo.

On the first issue, the circuits are split. The First, Second, Third, and Eleventh Circuits define "agent" broadly. Within those circuits, *any* employee or private contractor acting on behalf of a government entity or organization is subject to

prosecution—without requiring a connection to the entity's funds. Conversely, the Fifth Circuit has adopted a narrower rule, requiring that an agent have authority to act on behalf of the government or organization *with respect to its funds*.

Clarifying the class of people subject to criminal liability under § 666 is critical given the large number of people affected. In the First, Second, Third, and Eleventh Circuits, 19.2 million state and local government employees are "agents" and thus subject to up to 10 years in prison. Additionally, many private institutions—from hospitals to universities to think tanks— meet the $10,000 federal grant threshold, placing millions of their employees at risk of liability.

This Court should resolve the split and clarify that an "agent" under § 666 must exercise some degree of control over the entity's funds.

The second question is no less consequential. This Court in *McDonnell v. United States*, 579 U.S. 550 (2016), clarified that not every act by a public official qualifies as an official act for purposes of bribery laws. Informal actions—such as introducing people or setting up an event—are insufficient for conviction. *Id.* at 567, 573. Instead, an "official act" is required, and such an "official act" must be narrowly defined. To hold otherwise would intrude upon public officials' interactions with their constituents and raise a host of "significant" constitutional problems. *Id.* at 574-577.

Contrary to *McDonnell*, the Second, Fourth, Sixth, and Eleventh Circuits have held that § 666 does not require an

official act for conviction. According to these Circuits, because § 666 does not explicitly mention "official act," any promise by a public official in exchange for money is sufficient for quid pro quo bribery. Never mind that the charged offenses in *McDonnell* did not include the words "official act" either.

The situation is different in the Third Circuit. There, the relevant parties—government, defendants, and district court— are operating under the assumption that *McDonnell* applies to § 666, and an official act is being required.

The Fifth Circuit, for its part, has suggested that § 666 demands an official act. And, in the First Circuit, official acts have been required in some cases while not in others (like this one) without any consistency or clarity.

Settling whether § 666 requires an official act is essential because the "significant" constitutional concerns that this Court identified in *McDonnell* are even more pressing in the § 666 context. Unlike the bribery statute in *McDonnell*, which targets federal officials, *see* 18 U.S.C. 201(a)(1), section 666 focuses on state and local officials. *See* 18 U.S.C. §§ 666(a)(1) & (d)(4). Because § 666 intrudes upon the interactions of state and local officials with their constituents, and because Congress' interest in preventing corruption at the state and local level is lower than in preventing corruption at the federal level, the quo in § 666's quid pro quo cannot be broader than the quo in § 201.

Allowing the federal government to convict state and local officials without proving official action undermines constitutional rights and democratic principles. The Court

should clarify that *McDonnell*'s requirements apply fully to § 666.

This case is an ideal vehicle to address both questions presented. On the first question, Mr. Carrasco, a sole practitioner, was charged as a public official under § 666 because his legal consulting contracts allowed him to represent three municipalities in court, without evidence linking his work to the corrupt activities alleged in the indictment. His mere position as outside counsel was deemed sufficient for liability as a government "agent."

On the second question, trial testimony showed that Mr. Carrasco accepted payments from a private client (an environmental engineer) for introducing the client to mayors and informing the client about new proposal requests for environment engineering work in the three municipalities. Despite these actions being similar to the informal acts rejected in *McDonnell* as insufficient quo, the district court declined to instruct the jury on the necessity of an official act. Mr. Carrasco was convicted of § 666 bribery as a public official and sentenced to 10 years in prison.

A. Statutory and Factual Background

1. Section 666—officially titled "Theft or bribery concerning programs receiving Federal funds"— is the most frequently used public corruption statute in the federal government's arsenal. *See* U.S. Dept. of Just., Bureau of Just. Stat., *FY 2022 Number of Persons in Cases Filed: 18 U.S.C. § 666*, https://fccps.bjs.ojp.gov/. This statute prohibits a public official, referred to as an "agent," from stealing property of a

state, local, tribal, or territorial government, or from accepting or requesting a bribe. *See* 18 U.S.C. § 666(a)(1)(A) & (B). It also sanctions private citizens who bribe or attempt to bribe the public official. 18 U.S.C. § 666(a)(2).[1]

Section 666 provides that any agent of a local government who corruptly solicits, demands, accepts, or agrees to accept anything of value, intending to be influenced or rewarded in connection with any government business or transactions "involving any thing of value of $5,000 or more," faces up to 10 years in prison. 18 U.S.C. § 666(a)(1)(B).

An "agent" is defined as "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." 18 U.S.C. § 666(a)(d)(1).

A state or local government is an entity covered by the statute if said state or local government received at least $10,000 in federal benefits the previous year. 18 U.S.C. § 666(b). The term "State" includes "any commonwealth, territory, or possession of the United States." 18 U.S.C. § 666(d)(4). The term "local" means "of or pertaining to a political subdivision within a State." 18 U.S.C. § 666(d)(3).

2. Two key figures are central to this case. The first is Alejandro Carrasco, the petitioner, a 67-year-old former

[1] Likewise, the statute applies to an "agent" of a private organization that receives at least $10,000 in federal grants.

attorney who had a distinguished solo practice in Puerto Rico, serving both private and government clients.

The second is Juan Carlos Mercado, an environmental engineer and owner of I Technical Group (ITG), a mid-size firm specializing in landfill and environment issues, primarily serving local governments in Puerto Rico.

Carrasco and Mercado met in the early 2000s, while working as outside consultants for a local municipality. They developed a professional relationship and friendship, with Carrasco occasionally handling legal matters for Mercado and Mercado assisting Carrasco with construction projects.

Between 2009 and 2012, Carrasco was retained as an outside consultant for three Puerto Rico municipalities: Rio Grande, Juncos, and Barceloneta.[2] According to the prosecution, Mercado and Carrasco developed a "scheme" to help Mercado secure contracts for ITG from these municipalities. Pet.App.7a. Carrasco allegedly arranged meetings with the mayors of these municipalities, who were also his friends, and kept Mercado informed about new proposal opportunities in exchange for "bribes" disguised as legal fees. Pet.App.28a-29a.

Carrasco was not the only person receiving payment from Mercado. The testimony at trial revealed that Mercado was paying bribes to the mayors of Rio Grande and Barceloneta, as well as to Barceloneta's Planning Director, to secure

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[2] Rio Grande's population is 47,060; Juncos' 37,012; and Barceloneta's 22,657. *See* Puerto Rico - Census Bureau Profiles Results.

lucrative municipal contracts worth millions of dollars. 12/4/19 Tr. 19:23-25, 20:1-4, 25:20-23, D. Ct. Dkt. 375.

In 2012, Mercado was arrested and charged federally with bribery. Pet.App.6a. Mercado cooperated with federal authorities and was offered pretrial diversion. The charges against Mercado were eventually dropped, without Mercado spending a single night behind bars.

B. Procedural History

In 2014, Mr. Carrasco was charged federally with four counts of federal funds bribery under 18 U.S.C. § 666(a)(1)(b). The government alleged that, between 2009 and 2012, Carrasco helped Mercado secure three contracts with Rio Grande, one with Barceloneta, and one with Juncos, all in exchange for payment. Pet.App.6a.

The government did not charge Mr. Carrasco with aiding and abetting Mercado's bribery of the mayors. Instead, the prosecution adopted the ambitious legal position that Mr. Carrasco was himself a public official or "agent," and it charged him as such.

During a six-day jury trial in December 2019, the only evidence presented to establish Carrasco's status as a § 666 "agent" were his legal-services contract with each municipality. Pet.App.7a. These contracts indicated that Mr. Carrasco's duties as an external consultant included representing the municipalities in court. Pet.App.7a. The prosecution presented no evidence of the specific tasks Carrasco performed or how his role in representing the

municipalities related to the alleged corrupt acts charged in the indictment. Pet.App.7a.

The government relied solely on Mercado's testimony to establish the alleged corrupt acts. Mercado explained that the mayors had the authority to award contracts, and Mercado had to submit proposals and negotiate the terms of each contract with municipal staff. 12/4/19 Tr. 28:17-25, 29:1-3, D. Ct. Dkt. 375.

When the prosecution asked about the acts Carrasco performed in exchange for the alleged bribes, Mercado indicated they were informal tasks like setting up meetings and keeping Mercado informed about work opportunities:

> The Prosecution: Did the Defendant offer to help you get those additional contracts or at least some of those additional contracts in Barceloneta, Rio Grande, Juncos, between 2009 and 2012?
>
> The Defense: Objection, Your Honor. Leading.
>
> The Court: Overruled.
>
> Mercado: Yes.
>
> The Prosecution: How?
>
> Mercado: Well, [Carrasco] kept me up to date as to the opportunities that would come up in Rio Grande. In Barceloneta, he would take me to the mayor to help him solve multiple problems that were coming up with multiple agencies. And in Juncos, the same thing. There was a big problem

> at the Federal level with the landfill. And so he took me to Papo [the mayor], and we worked from then [sic].

Pet.App.28a-29a.

That was as specific as the prosecution's evidence got regarding the alleged quo to Mercado's quid. Despite multiple attempts by the prosecution to inquire about the quid pro quo, Mercado's responses remained vague and amorphous—even though Mercado was an adverse witness to the defense and had full immunity. For instance, when asked what he expected Carrasco to do for him, Mercado responded with "[a]cess, protection, watch my back." Pet.App.11a. Pressed to clarify, Mercado said he hoped that by paying kickbacks Carrasco would not speak poorly of him to the mayors or with the municipal staff, although no evidence was presented that Carrasco would do so. 12/5/19 Tr. 36:5-8, D. Ct. Dkt. 376; 12/5/19 Tr. 9:23-25, 10:1-5 D. Ct. Dkt. 362.

Mercado also testified that Carrasco was friends with the mayors and that it "appeared" to him that Carrasco had "total access" and "total influence" with the mayors. Pet.App.11a. Mercado, however, was unable to give any concrete examples of how this alleged "influence" was exercised other than setting up meetings.

Checks purporting to be the alleged bribes were presented in evidence. The checks, encompassing a period of four years, totaled over $100,000. Mercado labeled them as payments for legal services and deducted the amounts as legal fees on his tax returns. 12/5/19 Tr. 82:17-21, D. Ct. Dkt. 376. Mercado

also stated that Carrasco was not acting as his attorney when arranging the meetings with the mayors and keeping him informed about work opportunities. Mercado, however, acknowledged that several checks were indeed for actual legal services Carrasco provided to him, his company, or his family. 12/5/19 Tr. 56:3-4, D. Ct. Dkt. 376.

After the close of evidence, the defense requested that the jurors be instructed that, to convict a public official of bribery under § 666, the prosecution must establish that the "agent" agreed to be paid in exchange for engaging in an "official act," as defined in *McDonnell*. *See* Motion Submitting Proposed Jury Instructions, *United States v. Carrasco*, 14-cr-423-FAB-1, ECF No. 370 at 1-3 (Dec. 9, 2019). The prosecution opposed this, arguing that § 666 does not require an official act. The district court agreed with the prosecution, and the jury was not instructed to identify any official act. *See* Final Jury Instructions, *United States v. Carrasco*, 14-cr-423-FAB-1, ECF No. 380 at 16-18 (Dec. 11, 2019).

The jury returned a guilty verdict on all counts. Carrasco moved for a judgment of acquittal, arguing that the government had failed to establish (1) that he was an "agent" under § 666 and (2) that he agreed to engage in any "official actions" in exchange for payment. *See* Motion for Acquittal, *United States v. Carrasco*, 14-cr-423-FAB-1, ECF No. 394 at 3-4, 14 (Dec. 30, 2019). The district court denied the motion, holding that Carrasco was an agent for § 666 purposes because, as an attorney, Carrasco could "represent" the municipalities in court. *See* Opinion and Order, *United States v. Carrasco*, 14-cr-423-FAB-1, ECF No. 406 at 17 (Feb. 26,

2020). As to an official act, the district court held that it did not apply to public corruption cases prosecuted under § 666. *Id.* at 21. Carrasco was sentenced to 10 years in prison, the statutory maximum. Pet.App.22a.

Carrasco appealed, contending that the evidence failed to establish that he—as an independent contractor with no managerial responsibilities or decision-making ability to act with respect to the municipalities' funds—was an "agent" of a local government under § 666. *See* Appellant's Br., *United States v. Carrasco*, No. 21-1396, 2022 WL 443607, at *13, 15 (1st Cir. Feb. 8, 2022). Carrasco also argued that "[t]he government failed to prove that [he] engaged in any behavior qualifying as an official act under the statute and *McDonnell*, and moreover, the jury was not adequately instructed on that requirement." *Id.* at *21.

Carrasco explained that, "[g]iven the constitutional concerns that arise whenever the government seeks to criminalize an interaction between the public and a public official, the official act requirement must be met in all public official bribery cases, regardless of the specific statutes under which the government chooses to charge. Any other view would turn *McDonnell* on its head." *Id.* at *26. Here, "[t]he instructions that were provided to the jury were flawed, leaving the jury free to convict without finding the kind of official act *McDonnell* requires." *Id.* at 25.

The First Circuit affirmed the conviction. On the "agent" issue, the panel held that, because the legal-services contracts authorized Carrasco to represent the municipalities

in court, "it would appear that the evidence does suffice to support the 'agent' element of the offense." Pet.App.7a.

On the "official act" issue, the First Circuit, despite recognizing that the jury was not instructed that an "official act" was required, indicated that § 666 does not require official action to convict because "unlike the text of [18 U.S.C.] § 201 that the Supreme Court construed in *McDonnell*, [§ 666] does not include the phrase 'official act.'" Pet.App.10a.

The First Circuit acknowledged that "although our Circuit has proceeded in some cases on the understanding that § 666 does contain an 'official act' element, we have done so only in cases in which the government did not dispute the point and in which the jury had been instructed that the offense does contain an 'official act' element." Pet.App.10a.

The court also mentioned that four Circuit Courts had held that the federal government "need not show that a defendant engaged in an 'official act' to secure a conviction under § 666." Pet.App.10a. The three-judge panel added, however, that even if an official act were required, Mercado's testimony "suffice[d] to permit a finding that Carrasco advised the mayors knowing or intending that his advice would form the basis for an official act taken by the mayors – namely, the award of the contracts to Mercado." Pet.App.11a. (cleaned up).

Carrasco petitioned to rehear the case, but a majority of the active judges in the First Circuit denied rehearing *en banc*. Pet.App.1a.

REASONS FOR GRANTING THE PETITION

This petition raises two important questions about the scope of 18 U.S.C. § 666, the most prosecuted federal public corruption statute: Who is subject to liability as an "agent" of a government or organization under this statute? And does § 666 require an "official act" to convict a public official of bribery?

The Circuit Courts are divided on both questions, and confusion abounds. Moreover, the issues are of utmost importance: They affect millions of citizens who could face to up to 10 years in prison for engaging in conduct that may well be protected by the Constitution. The issues also raise serious federalism and democratic concerns, such as the federalization of ethics standards for state and local officials.

I. This Court Should Clarify When, If at All, An External Consultant Can Be Prosecuted as a Governmental "Agent" Under 18 U.S.C. § 666.

A. The Circuits are split on who qualifies as an "agent" subject to criminal liability under § 666.

Currently, there is a 4-1 split on how broadly to define the term "agent" in § 666. The First, Second, Third, and Eleventh Circuits have adopted the broad interpretation where an agent is anyone who can act *in any way* on behalf of the covered government or organization. *See United States v. Carrasco*, 79 F.4th 153, 158-59 (1st Cir. 2023) (Pet.App.7a-8a); *United States v. Dawkins*, 999 F.3d 767, 784 (2d Cir. 2021); *United States v. Keen*, 676 F.3d 981, 989-90 (11th Cir.

2012); *United States v. Vitillo*, 490 F.3d 314, 323 (3d 2007). For example, the Eleventh Circuit considers a low-level county employee a § 666 "agent" simply for being authorized to drive a county vehicle. No more is required. *See Keen*, 676 F.3d at 991.

Meanwhile, the Fifth Circuit has adopted a narrower definition: An "agent" for § 666 purposes is anyone who can act on behalf of the government or organization *with respect to its funds*. *See United States v. Whitfield*, 590 F.3d 325, 344 (5th Cir. 2009). For example, a parish tax assessor who lacks authority to act or make decisions about the parish's funds is not an "agent" of the parish subject to liability. *See United States v. Phillips*, 219 F.3d 404, 411, 413 (5th Cir. 2000).

Without expressly announcing their position on the split, other Circuits have taken sides. The Seventh Circuit appears to agree with those Circuits that interpret the term broadly, as seen in a case where a real estate broker hired by a local government was deemed an agent of the local government despite having no authority over government funds. *See United States v. Lupton*, 620 F.3d 790, 800-801 (7th Cir. 2010). The Sixth Circuit agrees with the narrower interpretation, recognizing a private contractor as a § 666 "agent" only if they have managerial responsibilities and make purchases on behalf of the district. *See United States v. Hudson*, 491 F.3d 590, 594-95 (6th Cir. 2007).

The term "agent" is particularly confusing for outside consultants and independent contractors hired by § 666-covered entities. For, even within the Circuits that have

adopted the broadest interpretation, there are major inconsistencies. The Third Circuit, despite holding that a § 666 "agent" need not have the authority or ability to act with respect to the entity's funds, specifies in its jury instructions that "[a]n outside consultant *who exercises significant managerial responsibility* within the organization is an agent of that organization if the consultant is authorized to act on behalf of the organization." U.S. Court of Appeals for the Third Circuit, Model Jury Instruction, Ch.6 Final Instructions: Elements of Offenses: 18 U.S.C. § 666A et seq., https://www.ca3.uscourts.gov/model-criminal-jury-table-contents-and-instructions. (emphasis added). Meanwhile, in the First Circuit, an outside consultant—like the petitioner here—is still an "agent" subject to liability even if he lacks any managerial duties with respect to the entity. *See* Pet.App.7a-8a.

The Fourth Circuit has adopted a different analysis altogether: The critical question is not whether the contractor exercises managerial responsibilities or if they can act with respect to the entity's funds, but whether there is evidence of a "close link" between the contractor and the § 666 entity. *United States v. Pinson*, 860 F.3d 152, 166 (4th Cir. 2017). Despite the defendant in *Pinson* being a manager in the construction for which the county had hired an outside firm, the Fourth Circuit ruled that he was not an "agent" for purposes of § 666 where the evidence showed only minimal interactions between Pinson and the county government. *Id.* at 165.

This Court should resolve the Circuit split and clarify who can be an "agent" under § 666. Currently, an external consultant (or the employees of a consulting firm) hired by a state or local government to conduct an audit, for example, can be charged as an "agent" of the state or local government in the First, Second, Third, and Eleventh Circuits if authorized to act on behalf of the entity. In contrast, in the Fifth Circuit, the same consultant would only be charged if they had authority over the entity's funds.

The same consultant would not face liability in the Third Circuit unless they exercised "significant managerial responsibility." *See supra* p.16. But that consultant is criminally liable in the First Circuit regardless of any managerial responsibilities, significant or not. While in the Fourth Circuit, their liability will depend on whether a court finds sufficiently close interactions with the government entity, regardless of managerial responsibilities or ability to act with respect to the entity's funds. *See Pinson*, 860 F.3d at 166.

Such inconsistent, variable interpretations breed confusion and unpredictability. This Court should address the split among the Circuits and provide clear guidance on this fundamental issue.

B. Who can be prosecuted as an "agent" under § 666 is a fundamental issue of widespread applicability.

The question of who qualifies as an "agent" under § 666 is crucial due to its broad impact. The statute's jurisdictional threshold is minimal: Any public or private entity receiving

$10,000 annually in federal funds is covered. *See* 18 U.S.C. § 666(b). This means over 19 million government employees, from town hall janitors to mayors, could be subject to prosecution unless a narrow definition is adopted.

Additionally, millions of employees at private institutions receiving federal grants are also at risk, regardless of how removed their duties and responsibilities are from anything resembling the management of institutional funds. *See Dawkins*, 999 F.3d at 782. In this day and age, some of the most vital organizations in the country—from universities, to hospitals, to think tanks—receive well over $10,000 annually through federal programs and grants. Clarifying to the officers and employees of § 666-covered institutions whether they come within the sweep of the statute is therefore vital.

The issue is particularly important for external consultants and private contractors. These individuals, hired to provide specific services that the covered entity is unable or unwilling to do, often have no direct ties to the covered entity's management of funds. Yet, under the broad interpretation adopted by some Circuits, these private citizens and companies can be considered § 666 agents and face prosecution. Regardless of whether they have any control or discretion over how the government or organization spends its funds.

The consulting industry, a multibillion-dollar industry, is especially vulnerable, with consultants navigating a legal minefield where they may be prosecuted as § 666 "agents" in some jurisdictions but not others. *See supra* pp.15-17. This is

an untenable situation that requires this Court's involvement to finally settle if, or under what circumstances, these independent contractors —like Mr. Carrasco— can face criminal liability as "agents" under § 666.

Addressing this issue is vital because once someone is deemed an "agent" they can be charged under § 666 for any number of actions. The Eleventh Circuit, for example, affirmed the conviction of a low-level county employee who, in his private capacity, included false information in a request for government assistance. *See Keen*, 676 F.3d at 986. The federal government proceeded under the theory that, once a person is deemed an "agent," almost anything that can potentially affect the entity's funds in general (it need not be related to a federal program) is prosecutable under § 666. And the Eleventh Circuit bought that theory. *Id.* at 990-91. Because Mr. Keen was authorized to drive a municipal vehicle, he was deemed an "agent" of the local government, even though, as a zoning inspector, he lacked the ability to affect the county's funds and even though the unlawful conduct charged was unrelated to his official duties. *Id.* at 991.

The terms of § 666 (prohibiting accepting "anything of value" in connection with "any business" or "transaction") and their broad interpretation by lower courts mean that anyone deemed an agent runs the risk of being charged for all sorts of conduct. Clarifying who qualifies as an "agent" under § 666 presents an urgent and critical matter.

C. The decision below adopted an incorrect rule of law.

The First Circuit concluded that Carrasco was a § 666 agent because his legal consulting contracts authorized him to represent the municipalities in court. In so holding, the First Circuit adopted a rule by which it deemed the terms of a contract dispositive. Pet.App.7a. It did not matter that the government presented no evidence of the actual work Carrasco did for the municipalities, or of any connection between his contractual duties and the alleged corrupt acts. It also did not matter to the Circuit that no evidence was presented showing that Carrasco had any managerial duties or the ability to affect the local governments' funds. Instead, the Circuit fixated on the word "represent" in the legal services contracts and engaged in the following problematic syllogism: (1) § 666 states that a "representative" of a covered entity can be an "agent;" (2) an attorney is by definition a representative; (3) therefore Carrasco is an agent for purposes of § 666. Pet.App.7a.

The rule adopted by the First Circuit here clashes with that of other Circuits, which reject such mechanical "agent" analysis. *See Pinson*, 860 F.3d at 165-66; *Hudson*, 491 F.3d at 595. Furthermore, under the First Circuit's erroneous rule, all attorneys hired by a state or local government instantly become government "agents" liable under § 666. The First Circuit's approach risks labeling any professional with a "representative" role as an agent, including attorneys, financial advisors, accountants—even if they have no managerial responsibilities or control over funds. That is so

despite other Circuits having held that traditional agency principles do not automatically apply in the § 666 context. *See Vitillo*, 490 F.3d at 323.

The rule adopted in this case is even inconsistent with prior holdings by the same Court. For example, in *Sotomayor-Vazquez*, 249 F.3d 1, 8-9 (1st Cir. 2001), it rejected that contractual terms could be dispositive. To find that the outside consultant in that case qualified as a § 666 agent, the First Circuit deemed it critical to consider the evidence presented at trial regarding the actual tasks performed by the defendant, including evidence of tasks showing that he exercised "significant managerial responsibility" on behalf of the entity. *Id.* at 8-9. No such evidence of the actual tasks performed by Carrasco was presented in this case, nor did the First Circuit deemed it relevant this time that said evidence be presented in order to determine whether Carrasco, despite his outside consultant status, could qualify as an "agent" of the local government. Pet.App.7a, 9a.

Given the broad impact on millions of citizens currently subject to prosecution under a lax interpretation of the term "agent" in § 666, clarifying the scope of that term is crucial. The vague terms of the statute and expansive interpretations by lower courts mean that anyone deemed an agent risks prosecution for any number of actions. This Court's intervention is necessary to establish a limiting principle, ensuring that only those with control over funds are considered agents.

By making clear that a § 666 "agent" must exercise some control over the entity's funds, this Court would align the offense's reach with Congress' original intent: protecting the integrity of federal funds entrusted to state and local governments and private organizations. *See* Justin Weitz, Note, *The Devil Is in the Details: 18 U.S.C. S 666 After Skilling v. United States*, 14 N.Y.U. J. Legis. & Pub. Pol'y 805, 817–18 (2011). A narrow construction of the term "agent," as adopted by the Fifth Circuit, is essential to prevent § 666 from being misused beyond Congress' intended scope.

II. This Court Should Clarify that *McDonnell's* Official Act Requirement Applies to Public Corruption Cases Prosecuted Under 18 U.S.C. § 666.

Six Circuit Courts have held that § 666 does not require an official act to convict in public-official bribery cases, conflicting with this Court's rationale in *McDonnell*. Meanwhile, one Circuit Court has suggested that *McDonnell's* "official act" requirement applies to § 666 prosecutions, while another Circuit routinely requires official acts in § 666 public-corruption cases. And, in the First Circuit, the official act requirement is applied inconsistently; it has been required in some cases but not in others (like this one) without any clear rationale. Guidance from this Court is urgently needed.

The issue is also of the utmost importance. It affects the right of state and local government officials to interact with their constituents. Without an "official act" quo component, campaign donations and promises could be prosecuted as bribery under § 666. Meanwhile, prosecutors are free to

disregard *McDonnell* by simply charging public officials and citizens with § 666 instead of with other federal bribery laws where this Court has already made clear that an official act is necessary.

A. The decisions of six Circuit Courts conflict with *McDonnell*.

A quick refresher on *McDonnell*. In *McDonnell*, the federal government accused the Virginia governor of accepting money and gifts from the CEO of a company in exchange for promoting the company's business by arranging meetings between the CEO and government officials, hosting events for the CEO at the Governor's Mansion, and discussing the company's product with other officials. *See McDonnell*, 579 U.S. at 556-561. The government charged McDonnell with Hobbs Act extortion (18 U.S.C. § 1951(a)) and honest services fraud (18 U.S.C. §§ 1343, 1346) under the theory that the payments were part of a quid pro quo scheme. *Id.* at 562. As to honest services fraud, the parties agreed to define the term "honest services" with reference to 18 U.S.C. § 201, the principal federal bribery statute, which makes it a crime for a public official to accept something of value in exchange for "any official act." *Id.* McDonnell was convicted; he appealed, and the Fourth Circuit affirmed. *Id.* at 556.

Before this Court, the government argued that virtually any action undertaken by a public official—like the acts McDonnell undertook to promote the CEO's business—qualified as an official act. *Id.* at 566-67. This Court rejected such an expansive interpretation of the quo in federal bribery

cases partly because it would "raise significant constitutional concerns" such as a host of First Amendment, due process, and federalism issues. *Id.* at 575-577. This Court unanimously vacated McDonnell's conviction and held that an official act must involve a definite "decision or action" by a public official "*on*" a specific government question or matter. *Id.* at 572, 573.

The Court thus set forth a two-part test for what constitutes an "official act." First, the government must identify a "formal exercise of governmental power" that is "specific and focused." *Id.* at 574. Second, the government must show the official agreed to take a definite "decision or action" on that matter. *Id.* Activities such as "setting up a meeting, calling another public official, or hosting an event," or "expressing support for [whatever a supporter wants], at a meeting, event, or call" do not qualify as official acts. *Id.* at 567, 573.

Despite this clear ruling, describing the "substantial" and "significant" constitutional problems in allowing the prosecution to treat nearly any act by a public official as an official act, the Second, Fourth, Sixth, and Eleventh Circuits have explicitly rejected applying *McDonnell* to § 666 cases. *See United States v. Lindberg*, 39 F.4th 151, 169 (4th Cir. 2022); *United States v. Roberson*, 998 F.3d 1237, 1246 (11th Cir. 2021); *United States v. Ng Lap Seng*, 934 F.3d 110, 134 (2d Cir. 2019); *United States v. Porter*, 886 F.3d 562, 565-66 (6th Cir. 2018). According to these Circuits, the prosecution need not establish that the official agreed to take official action in exchange for money. Any act by a public official

suffices for conviction. *See Lindberg*, 39 F.4th at 169; *Ng Lap Seng*, 934 F.3d at 133, 138.

The Eight and Ninth Circuits, for their part, have implied that *McDonnell* is irrelevant for purposes of § 666. *See United States v. Suhl*, 885 F.3d 1106, 1112-14 (8th Cir. 2018); *United States v. Robles*, 698 F. App'x 905, 906 (9th Cir. 2017).

B. The Circuits are split on whether § 666 requires an official act.

The Third Circuit operates as if *McDonnell* directly applies to § 666 cases. *See United States v. Allison*, 27 F.4th 913, 920 (3d Cir. 2022) ("[We] assume, but do not decide, that the Government had to show Allison bought official acts."). In § 666 prosecutions within the Third Circuit, prosecutors and the defense are stipulating from the get-go that an official act is required to convict a public official of bribery. *Id.*

Similarly, the Fifth Circuit has also held that § 666 contains an official act requirement. In a recent decision, it vacated the defendant's conviction in part because the jury was not instructed that "any 'official act' by the councilmembers was required." *Hamilton*, 46 F.4th at 393 (citation omitted). The Fifth Circuit further recognized that "[t]reating § 666 as though it covers all sorts of interactions with local public officials raises First Amendment, federalism, and due-process concerns." *Id.* at 398 (citing *McDonnell*, 579 U.S. at 550; *McCormick v. United States*, 500 U.S. 257 (1991)).

And the First Circuit held, in one case at least, that *McDonnell's* "official act" requirement applies to § 666,

stating that to convict the defendant "the government was required to prove that defendant accepted a thing of value while intending to be influenced by it to perform an official act." *United States v. Martinez*, 994 F.3d 1, 6-7 (1st Cir. 2021) (cleaned up).

In this case, however, the First Circuit backtracked and strongly implied that an official act is not required. Pet.App.10a. The court minimized its prior ruling by characterizing *Martinez* as a case where the parties had stipulated that the jury should be instructed in accordance with *McDonnell*, something that did not happen in Mr. Carrasco's case. Pet.App.10a.

As shown, then, the situation in the Circuits is chaotic. Several refuse to require an official act, in contravention of *McDonnell*. Others require it. And the First Circuit remains inconsistent. This Court should step in to settle the law, which affects litigants and the general public due to the important constitutional rights involved and the potential 10-year prison term citizens face.

C. The "official act" issue presents an important question of federal law.

This Court is currently evaluating whether evidence of a quid pro quo is required to convict under § 666. *See Snyder v. United States*, No. 23-108. If the Court answers that question in the affirmative, the next big question is how that quo should be defined, *i.e.*, whether it includes an "official act." If the Court answers the *Snyder* question in the negative and holds that § 666 also covers gratuities in addition to quid pro

quo arrangements, then clarifying whether an official act must be tied to said gratuity is essential to avoid rendering the statute standardless. *See United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 408 (1999). Either way, addressing whether § 666 requires an official act is an inescapable issue of momentous consequence.

Whether or not the government must establish an official act in public corruption cases brought under § 666—federal prosecutors' preferred public-corruption statute—raises constitutional concerns of primary order. The same First Amendment, overbreadth, and democratic concerns identified in *McDonnell* are at stake in public-bribery prosecutions under § 666. *See McDonnell*, 579 U.S. at 575. In fact, the concerns are even greater here because, unlike § 201 (which generally applies to federal officials), § 666 governs state and local officials' interaction with constituents.

Whether an official act is required under § 666 thus implicates the extent to which the federal government can intrude into the democratic affairs of other governments. Federalism concerns are therefore at its peak in the § 666 context. And, without an "official act" limitation, the federal government is free to impose its own standards about how local officials should interact with constituents. This is so despite this Court traditionally declining to construe a statue "'in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards' of 'good government for local and state officials.'" *McDonnell*, 579 U.S. at 577 (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987)).

Likewise, the vagueness and due process concerns identified in *McDonnell* are heightened in the case of § 666. *See McDonnell*, 579 U.S. at 576. Part of the reason why this Court rejected the theory that any act by a public official could constitute an "official act" was because such an expansive quo would not provide clear guidance to public officials and citizens (as well as to the jurors tasked with assessing their guilt) on what conduct is prohibited by the bribery laws and what is protected under the Constitution. *Id.*

The same problem exists in the § 666 context—if no official act is required to convict. Moreover, the problem is aggravated because, unlike § 201, section 666 does not explicitly include the phrase "official act" (although, as will be discussed in the next section, such a requirement is implicitly incorporated in public-official bribery cases). Without a clear official act requirement, the term "in connection with any business or transaction" in § 666 becomes dangerously vague, leading to potential prosecutorial overreach and arbitrary enforcement. *See United States v. Fernandez*, 722 F.3d 1, 14 (1st Cir. 2013); *United States v. Robinson*, 663 F.3d 265, 274 (7th Cir. 2011).

Without an official act component clearly delimiting § 666's quo, "well-connected and effective lobbyists," for example, are vulnerable to prosecution and face up to 10 years in prison. *See Percoco v. United States*, 598 U.S. 319, 331 (2023). Similarly, campaign donations and political promises could easily be recast by creative prosecutors as quid pro quo schemes chargeable under § 666. An official act requirement helps draw a line between these legitimate interactions and unlawful policies-for-money transactions.

Settling once and for all that § 666, like other federal bribery statutes, requires an official act in public bribery cases is also important to promote consistency in the federal criminal law. In light of the decisions of six Circuit Courts—plus the First Circuit—holding or strongly suggesting that official action is not required to convict, prosecutors can easily turn *McDonnell* into dead letter simply by charging defendants under § 666 rather than under other applicable statutes. Section 666, after all, *already is* the most prosecuted federal bribery statute. Making clear that the prosecution's burden to prove an official act is the same under § 666 as in § 201, honest services fraud, or Hobbs Act extortion, is thus crucial to foster uniformity in the federal criminal system and avoid incongruous results between similarly situated defendants.

D. The decision below adopted an incorrect rule of law.

The First Circuit, relying on the decisions of four Circuit Courts, ruled that no official action is required under § 666 because "the text of § 666, unlike the text of § 201 that the Supreme Court construed in *McDonnell*, does not include the phrase 'official act'." Pet.App.10a. This interpretation is mistaken.

While § 666 does not expressly include the words "official act," neither did the statutes used to prosecute McDonnell: Hobbs Act extortion and honest services fraud. *See McDonnell*, 579 U.S. at 562; *see also Skilling v. United States*, 561 U.S. 358, 404 (2010) (construing honest services fraud to

forbid "fraudulent schemes to deprive another of honest services through bribes and kickbacks"); *Evans v. United States*, 504 U.S. 255, 260, 269 (1992) (construing Hobbs Act extortion to include "'taking a bribe'").

In any event, statutory construction tools make pellucid that an "official act" is required in § 666 public-official bribery cases. Section 666 "was born as the stepchild of another statute, 18 U.S.C. § 201." *United States v. Fernandez*, 722 F.3d 1, 20 (2013) (quoting 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). It was enacted at a time when it was not clear whether § 201 could also be used to prosecute not just federal officials but also state and local government ones as well as private parties exercising governmental functions. (This Court later held that it extended to those officials in *Dixson v. United States*, 465 U.S. 482 (1984)). *See* Weitz, *The Devil is in the Details*…, 14 N.Y.U. J. Legis. & Pub. Pol'y 816. In light of the legal uncertainty that existed, Congress enacted § 666 to ensure that the federal government could prosecute acts of corruption involving federal funds received by state and local governments, as well as private organizations. *Id.*

Section 666 "tracks closely with § 201(b)'s bribery provision." *Hamilton*, 46 F.4th at 397. It does not have the phrase "official act" in it like § 201 does, presumably because § 666 was written to cover not only public-official corruption cases but also private corruption by organizations receiving federal funds. As far as public-corruption cases are concerned, however, § 666 brought with it the "old soil" from § 201 and

therefore should be construed to import the official act element from the statute after which it was modeled and that it closely resembles. *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947) ("[I]f a word is obviously transplanted from another legal source, whether the common law or legislation, it brings the old soil with it.").

Further, there is a long tradition that the quo in bribery cases are the official acts of the public servant. *See United States v. Birdsall*, 233 U.S. 223, 230-31 (1914) (holding that to be deemed bribery "the action sought to be influenced [must be] official action"). This common law meaning of bribery as dealing with official acts informed the enactment of § 201 and, consequently, it is also in the DNA of § 201's stepchild. *See* Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 318 (2012) ("A statute will be construed to alter the common law only when that disposition is clear."). Although § 666 uses the phrase "business or transaction" instead of "official act" (since § 666 also covers conduct by non-governmental parties) there is no doubt that, when public corruption is concerned, the government's business and transactions are its official acts: "[F]or bribery, there must be a *quid pro quo*—a specific intent to give or receive something of value in exchange for an official act." *Sun-Diamond Growers of Cal.*, 526 U.S. at 404-05.

Moreover, the First Circuit and other Circuits that have held that *McDonnell* does not apply to § 666 because the phrase "official act" does not explicitly appear in the statute, overlook that an important part of this Court's analysis in

McDonnell was anchored in constitutional concerns. *See McDonnell*, 579 U.S. at 574-577. And, as we have seen, these same constitutional concerns, which the Court characterized as "substantial" and "significant," are even more serious in the § 666 context. *See supra* pp.27-28.

Without an official act requirement, § 666 gives the government a new vehicle to resurrect theories of criminal liability long rejected by this Court. The Court has held, for instance, that campaign contributions cannot form the basis of a bribery charge unless there is a clear exchange for an official act. *See McCormick v. United States*, 500 U.S. 257, 273 (1991). The prosecution, however, can turn *McCormick* on its head by proceeding under § 666 rather than under the Hobbs Act, the relevant statute in *McCormick*.

Likewise, to save the statute from unconstitutional infirmity, this Court construed honest services fraud to include only "paradigmatic cases of bribes and kickbacks." *Skilling v. United States*, 561 U.S. 358, 411 (2010). The paradigmatic federal bribery statute is 18 U.S.C. § 201. *See Id.* at 412-13 n.45. If § 666 is read to not require an official act, the government can sidestep the limitations *Skilling* imposed by defining honest services fraud with reference to § 666 rather than § 201.

And, although this Court adopted the official acts doctrine in *McDonnell* as an important limitation on expansive theories of public bribery liability, since state and local government officials can be prosecuted under both § 201 and

§ 666, the prosecution can render *McDonnell* an empty gesture by simply proceeding under the latter statute.

When the federal government adventures to criminalize and prosecute allegedly unlawful interactions between citizens and public officials, this Court has long held that "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." *Sun-Diamond Growers of Cal.*, 526 U.S. at 408. It is inconsistent with this Court's jurisprudence and with the Constitution to treat almost any act by a state or local official as sufficient quo to convict of quid pro quo public bribery under § 666. Such a "meat axe" approach, analogous to the government's theory in *McDonnell*, should be rejected and the decisions of the lower courts that have so held, corrected.

The jury in Carrasco's case was not given an official-act instruction; they were not told that bribery requires an official act to convict. The evidence they heard at trial about the acts Carrasco agreed to do in exchange for the alleged bribes were of the informal and routine kind, like those in *McDonnell*: procuring meetings and keeping Mercado informed about work opportunities. But in *McDonnell* this Court made clear that bribery laws are not concerned with simple influence but rather with the sale of one's official position.

Because the jurors below were not asked to identify an official action taken by Carrasco nor instructed about what an official act is, there is a serious risk that they may have convicted Carrasco without finding that he committed or agreed to commit an official act. In other words, they may

have found that "influence" or "access" were sufficient quo under the law. This Court should review and clarify this important issue about which there is considerable confusion in the lower courts.

CONCLUSION

Based on the reasons above, the petition for a writ of certiorari should be granted.

Respectfully submitted.

Rachel Brill
Franco L. Pérez-Redondo
Jose David Rodríguez
Federal Public Defender,
District of Puerto Rico
241 F.D. Roosevelt Ave.
San Juan, PR 00918

Counsel for Petitioner

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