No. 23-7754

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

REPLY BRIEF FOR PETITIONER

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Mr. Carrasco's certiorari petition raises two key and unresolved questions about the scope of 18 U.S.C. § 666, the federal government's most frequently prosecuted public-corruption statute. The first question asks the Court to clarify the category of individuals to whom § 666 applies. The question deeply divides the circuits, leaving millions of people in legal limbo, as their criminal liability hinges on happenstance—the jurisdiction in which they happen to reside. The second question is equally significant: Does the "official acts" doctrine, as set forth in *McDonnell v. United States*, 579 U.S. 550 (2016), extend to bribery prosecutions under § 666? This question, too, has generated increasing conflict among the

lower courts, with most circuits concluding that any act—not just an "official act"—is sufficient to support a conviction.

The government opposes review, focusing primarily on the merits. This approach tacitly acknowledges the importance of the questions presented and the paramount need for this Court's intervention. Given the conflicts among the lower courts, the vast number of individuals affected, and the vital rights at stake, the Court should address the merits by granting certiorari.

I. The Decision Below Erroneously Extends § 666 Criminal Liability to Millions of Ordinary Citizens.

The First Circuit concluded that Mr. Carrasco, a private attorney, qualified as a government "agent" under § 666 merely because, in that capacity, he could represent the three municipalities in court. According to the court, the government wasn't required to prove that Carrasco had the power to control or make decisions about the use of the municipalities' funds.

In doing so, the First Circuit created a sweeping rule: every attorney with government clients is subject to § 666 criminal liability. By virtue of their role as a representative, any attorney who can act on a government client's behalf becomes an "agent" under the statute. And there's no need to show any link between the attorney's actions and the government's funds.

The implications don't stop at attorneys. This rule extends to other private actors, including contractors and consultants.

Because a contractor always acts on behalf of the government in performing their contracted duties, the First Circuit's interpretation makes every contractor a § 666 "agent." The result? An overly expansive definition that captures a vast swath of individuals who were never intended to fall under the statute's umbrella.

The First Circuit's rule has deepened a split over the meaning of "agent." The First, Second, Third, Seventh, and Eleventh Circuits interpret the term broadly, roping in anyone—employee or otherwise—who can act in any capacity on behalf of an entity receiving federal funds. In contrast, the Fourth, Fifth, and Sixth Circuits interpret "agent" narrowly, demanding a more specific showing: that the person can act with respect to the entity's funds before being classified as a § 666 "agent." *See* Pet.14-17.

Whether millions across the country face up to ten years in prison as government "agents" shouldn't hinge on geography. Mr. Carrasco's petition directly presents this pressing legal question, one that has never been squarely addressed by this Court.

1. The government claims there is no split over the issue. Yet, in the same breath, it acknowledges that the Fifth Circuit "requires" a "showing" that a person has authority to act with respect to the entity's funds before designating them a § 666 agent. This stands in contrast to the First, Second, Third, and Eleventh Circuits, all of which have expressly rejected the Fifth Circuit's narrower interpretation and adopted a broad

definition of "agent" to encompass anyone who can represent the government in any way or capacity.

To paper over this inconsistency, the government leans on the facts of the Fifth Circuit's key case, *Phillips*, to suggest that no true split exists. The government points out that the *Phillips* defendant wasn't an employee of the funds-receiving parish, which forced the Fifth Circuit to "ask whether some other basis existed for considering the defendant to be the parish's agent." G14. But this factual distinction only underscores the inconsistency. Mr. Carrasco, like the *Phillips* defendant, was not a municipal employee.

In fact, when it comes to applying the term "agent" to independent contractors, the cases the government cites show an even sharper split. The Seventh Circuit has sided with those broadly interpreting "agent." For instance, in *United States v. Lupton,* 620 F.3d 790, 800-801 (7th Cir. 2010), a real estate broker with no authority over a state government's funds was still deemed a § 666 agent. Meanwhile, the Sixth and Fourth Circuits have adopted a searching analysis, looking for evidence that a contractor has actual or implicit authority to affect the covered entity's funds. *See United States v. Hudson,* 491 F.3d 590, 594-595 (6th Cir. 2007) (private contractor authorized to make purchases was an agent); *see also United States v. Pinson*, 860 F.3d 152, 166 (4th Cir. 2017) (project manager not an agent).

The government wrongly argues that these two cases align with the First Circuit's interpretation. But, while the First

Circuit here considered a legal services contract dispositive, the Fourth and Sixth Circuit demand more.

Take *Hudson* as an example: The contract authorized a private contractor to "perform all duties, responsibilities and necessary actions" for a school district to develop a television station. Under the First Circuit's rule, this contract—without more—would suffice to make the contractor a § 666 "agent." Yet the Sixth Circuit didn't stop there. Instead, it scrutinized the evidence until finding proof that the contractor "operated as the district's contact person for the purchase of videotapes, studio sets, and stadium signs" and that he "initiated purchase orders on behalf of the district." *Hudson*, 491 F.3d at 594-95. Only after establishing that the contractor could act with respect to the school district's funds did the Sixth Circuit deem him an "agent."

Similarly, the Fourth Circuit in *Pinson* tackled whether a construction project manager hired by a private firm on behalf of a county was an "agent" for purposes of § 666. Despite the defendant's title as "manager," the Fourth Circuit concluded this label alone wasn't sufficient to establish agency under the statute. 860 F.3d at 165-166. By contrast, the First Circuit in this case held that, given the mere description of Mr. Carrasco as a legal "representative" in his contracts with municipalities, "it would appear that the evidence does suffice to support the 'agent' element of the offense." Pet.App.7a.

The Fourth Circuit has since issued another decision that further anchors its place among the jurisdictions that require evidence of an agent's ability to act with respect to funds. In

United States v. Underwood, the Fourth Circuit designated the defendants as § 666 "agents"—but only after determining that they were "authorized to obligate County funds to purchase items" and "incur travel expenses from the County." 95 F.4th 877, 886 (4th Cir. 2024). Revealing how integral the ability to act with respect to the funds is, the Fourth Circuit emphasized: "These are examples of the evidence that the jury had before it relating to the authority that Sheriff Underwood and his deputies had, providing evidence that they were 'agents' of the County for purposes of § 666." *Id.*

The government's reliance on two older certiorari denials is misplaced. Both cases predate the current circuit conflict by several years, before the lower courts' disagreement became so deeply entrenched. Additionally, in *Aronshtein*, the evidence clearly demonstrated that the defendant could act with respect to the entity's funds, while *Keen* involved an employee, not a private contractor or consultant, leaving unresolved the ongoing uncertainty over when nonemployees qualify as government "agents" under § 666.

2. On the merits, the government advocates for a standardless interpretation of § 666 that disregards statutory structure and history. Like the First Circuit, the government suggests that all independent contractors and consultants qualify as "agents," even if they have "no control or discretion over how a government spends its money or manages its affairs." G12. But this reading finds no backing in § 666's legislative history. As the Fifth Circuit observed, "[t]hat history reveals Congress' concern [was] with a defendant's ability to

administer or control the federal funds provided to a particular agency." *Phillips*, 219 F.3d at 411, n.7.[1]

Attempting to support its expansive definition of "agent," the government points to *Sabri v. United States*, 541 U.S. 600, 605 (2004). G12. But *Sabri* addressed an entirely different issue (*not* the scope of "agent") and, if anything, supports a narrower interpretation. It illustrates that Congress envisioned "agents" as state or local officials who control funds and either embezzle them or accept bribes to misappropriate them. *Id.* at 605-606. In finding § 666 a valid exercise of Congressional authority, this Court anchored its decision in Congress' power to safeguard federal money, ensuring it is used "for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars." *Id.*

Here, the trial produced no evidence that Mr. Carrasco had the ability or authority to act with respect to the municipalities' funds. The First Circuit itself acknowledged that the only proof offered to establish Mr. Carrasco as an agent was a set of legal services contracts "authoriz[ing] him to provide legal representation to the named municipality in the Courts of Puerto Rico and the administrative and inves-

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[1] *See also United States v. Jennings*, 160 F.3d 1006, 1012 (4th Cir. 1998) (§ 666's bribery offense "prohibits payoffs to state and local officials *who influence the distribution of federal funds*") (emphasis added).

tigative agencies." Pet.App.7a. That was all the information the First Circuit required to recast Mr. Carrasco, a private contractor, a government official and charge him as a § 666 agent.[2]

The First Circuit's expansive interpretation is deeply problematic. It lacks any limiting principle and contradicts both the letter and spirit of the statute. The entire architecture of § 666 is predicated on the notion that an "agent" must have access to the entity's funds such that they are positioned to either embezzle those funds or accept bribes to misuse them. If a defendant lacks such access, they cannot, by definition, engage in the very conduct § 666 seeks to criminalize. Accordingly, when § 666(d)(1) defines an agent as someone "authorized to act on behalf of … a government," that must—as the Fourth, Fifth, and Sixth Circuits have recognized—be tied to authority over the governmental funds.

This Court's intervention is critical, not just to settle the split, but because the liberty of millions is at stake.

II. Whether the Most Frequently Prosecuted Anti-Corruption Statute Requires Proof of An Official Act is An Important Question Squarely Presented.

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[2] The First Circuit did not rely on Mercado's testimony that it "appeared" to him that Carrasco had "total influence" with the mayors. Pet.App.7a. Neither did the prosecution present that testimony to prove that Carrasco was an "agent." In any event, Mercado was unable to give any concrete examples of how this alleged "influence" was exercised, other than setting up meetings.

This Court's recent decision in *United States v. Snyder*, 603 U.S. 1 (2024), confirmed that proof of a quid pro quo is necessary to convict of federal program bribery under § 666(a)(1)(B). The pressing follow-up question presented in this case is: What precisely defines the quo?

Nine circuit courts have either held or strongly implied that § 666 does not contain an official-act element as part of the quo. In contrast, the Third and Fifth Circuits operate under the assumption that evidence of an official act is required. With mounting confusion in the lower courts, certiorari is essential to bring much-needed clarity.

Further, the decisions of those nine circuits rejecting the official-act requirement stand in defiance of this Court's decisions in *McDonnell* and *Snyder*. The widening gulf between this Court's jurisprudence and the conflicting interpretations below is yet another compelling reason for review.

The stakes are high: Fundamental rights and principles of federalism hang in the balance. Even the government admits (by not contesting the point) that, under the current ambiguity, federal prosecutors can charge individuals with bribery for routine actions that wouldn't be criminal under other federal bribery statutes. This loophole not only raises vagueness concerns, but also chills the very interactions that are vital to representative democracy while fostering arbitrariness in federal criminal law. Without an official-act element clearly defining the prohibited conduct, § 666 grants federal prosecutors unchecked power to "set[] standards of good go-

vernment for local and state officials." *McDonnell*, 579 U.S. at 577 (citing cases).

1. To dissuade this Court from granting certiorari, the government points to past denials of similar petitions. But it's crucial to note two things: First, those denials predate *Snyder*, the case where this Court disavowed the very reasoning those circuits used to conclude that § 666 does not require proof of official acts. Second, Mr. Carrasco's case presents important factual and legal distinctions, making it an ideal vehicle—at the perfect moment—to definitively resolve the official-acts question that has puzzled litigants and divided lower courts since *McDonnell*.[3]

The government does not seriously contest that the circuits holding any act—not just an official act—suffices for § 666 bribery convictions are in direct conflict with *McDonnell*, which emphasized the necessity of a narrow quo to allow federal bribery statutes to coexist in harmony with First Amendment, fair notice, and federalism norms.

The rulings that the government defends—rulings the First Circuit cited approvingly below— dismiss the official-act requirement for three main reasons: (1) § 666 is a "completely

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[3] For example, in *Ng Lap Seng v. United States*, 141 S. Ct. 161 (2020) (No. 19-1145), the issue concerned the application of § 666 in the context of the United Nations, a context where the federalism and First Amendment concerns identified in *McDonnell* do not apply. And, in *Roberson v. United States*, 142 S. Ct. 1109 (2022) (No. 21-605), the question presented was not whether § 666 contains an official-act requirement but whether, in cases involving campaign donations, the government must present proof of an explicit quid pro quo.

different statute" from the statute in *McDonnell* (18 U.S.C. § 201); (2) it "does not include the term official act;" and (3) it supposedly does not present the constitutional concerns that the Court discussed in *McDonnell*. *See United States v. Lindberg*, 39 F.4th 151, 166 (4th Cir. 2022); *United States v. Ng Lap Seng*, 934 F.3d 110, 137 (2d Cir. 2019); *United States v. Porter*, 886 F.3d 562, 565 (6th Cir. 2018).

Those arguments no longer hold water post-*Snyder*. That decision clarified that § 666 (1) addresses bribery not mere gratuities; (2) "shares the defining characteristics of" and "tracks" the bribery provision in § 201; and (3) raises a host of constitutional concerns—like those flagged in *McDonnell*—if interpreted too broadly. *Id.* at 12, 14 19.

When the government-cited petitions reached this Court, the conflict with this Court's precedent wasn't as pronounced or intractable as it is now, post-*Snyder*. This case, a relatively low-profile but precisely framed challenge, offers the Court a prime opportunity to confirm that, like other federal bribery statutes, § 666 requires proof of an official-act quo.

As for the circuit split, the government claims that the Fifth Circuit didn't address the official-acts issue in *Hamilton*. But that's not quite right. While the Fifth Circuit reversed on another error, it pointedly noted that "[t]reating § 666 as though it covers all sorts of interactions with local public officials raises First Amendment, federalism, and due-process concerns." *United States v. Hamilton*, 46 F.4th 389, 398 n.3 (5th Cir. 2022) (citing *McDonnell*, 579 U.S. at 550; *McCormick v. United States*, 500 U.S. 257 (1991)). The Fifth Circuit even

updated its pattern jury instructions post-*Hamilton* to specify that § 666(a)(1)(B) "requires a quid pro quo—a specific intent to give or receive something of value in exchange for an *official act*." (emphasis added).[4]

And, while the Third Circuit has not "officially" ruled on the official-acts issue, the government concedes that the Third Circuit operates as if an official act is a necessary element in public-official bribery cases under § 666.

Nor does the government dispute that the First Circuit is mired in chaos, with conflicting decisions: some demanding proof of official acts, others (like the case below) suggesting otherwise. This leaves citizens and public officials alike facing the prospect of ten-year prison terms—for conduct that may well be protected—with no clear guidance.

2. On the merits, the government sees no fair notice problem because the phrase "in connection with any business [or] transaction" "involving any thing of value of $5,000 or more" supposedly provides enough clarity on the type of transactions that the statute prohibits. G20. But these ambiguous words are no substitute for the specific meaning of the term "official act," especially in light of *McDonnell's* carefully delineated definition.

Additionally, lower courts have broadly interpreted "business" or "transaction" under § 666 to encompass nearly anything an organizational agent does, including "transac-

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[4] *See* Fifth Circuit Pattern Jury Instructions (Criminal Cases), Instruction 2.33B, p.180 (2024 Edition).

tions in intangibles" with no monetary value. *See United States v. Robinson*, 663 F.3d 265, 274 (7th Cir. 2011) (citing cases). And the $5,000 threshold has also been watered down, with courts upholding numerous § 666 convictions where the bribes had no measurable financial impact on the federally funded entity. *See United States v. Fernandez*, 722 F.3d 1, 14 (1st Cir. 2013). The official act requirement is thus crucial to constrain § 666's otherwise "standardless sweep." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

The government thinks it's fatal that the First Circuit (wrongly) stated that the government had presented sufficient evident to prove an official-act element, even if it were required. Setting aside that the statement finds no support in the trial record, *see* Pet.App.9-10, this claim ignores a fundamental flaw: the district court never instructed the jury on an official-act requirement, Pet.App.10a. As a result, the First Circuit could not affirm the conviction "on legal and factual grounds that were never submitted to the jury." *McCormick v. United States*, 500 U.S. 257, 270 (1991).

The government's assertion that the First Circuit never explicitly ruled on the official-acts issue is a red herring. While the court didn't make a definitive holding, it strongly implied that no official-act quo is necessary. The First Circuit emphasized that § 666 "does not include the phrase 'official act'," approvingly citing decisions from circuits that rejected the *McDonnell* official-acts doctrine, and discounted prior First Circuit precedent that had required proof of official action. Pet.App.10a. This unmistakable rebuke sends a clear message: official acts are not required. *See United States v.*

Burke, No. 19 CR 322, 2023 WL 7110745, at *8 (N.D. Ill. Oct. 28, 2023) (citing the decision below to support that "[t]he weight of post-*McDonnell* circuit precedent suggests that the *quo* in § 666 is broader than § 201's"); *see also United States v. Perez-Otero*, No. CR 21-474 (ADC), 2024 WL 561858, at *3-4 (D.P.R. Feb. 8, 2024) (expressing doubts over whether official action is necessary).

Last, the government insists that the jury instructions were "the functional equivalent of" an official-act instruction. G20. This is simply incorrect. The First Circuit itself conceded that "the District Court did not instruct the jury in Carrasco's case that § 666 has an official act element." Pet.App.10a. While some of the jury instructions quoted out-of-context and butchered language from *McDonnell*, they fell far short. The jury never received a definition of an official act or guidance on how to identify one. They were not informed that a conviction required proof of properly defined official action. *See* C.A.App.696-701. Instead, the instructions told the jury to convict if they found that Mr. Carrasco accepted payment in exchange for any "action," contradicting *McDonnell*'s unanimous directive. *Id.* at 698; *see also* 579 U.S. at 577-579 (explaining the inadequacy of the jury instruction).[5]

[5] Mr. Carrasco objected to the jury instruction, both at trial ("we believe … the term should be "official action." Not just "action." C.A.App.712) and on appeal ("The instructions…were flawed, leaving the jury free to convict without finding the kind of official act *McDonnell* requires."). *See* Pet.12. Any suggestion to the contrary appears to stem from confusion.

This case illustrates the perils of omitting an official-act quo requirement, enabling the government to win verdicts—and send people to prison for up to a decade—based on vague claims of "influence" or "access." This low bar exerts tremendous pressure on defendants to plead guilty rather than risk harsh penalties by challenging the government's sweeping theories of liability at trial.

It has been said that "the 'line between quid pro quo corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights." *FEC v. Ted Cruz for Senate*, 596 U.S. 289, 303 (2022) (citation omitted). The official-act requirement is how our legal system draws that crucial line.

By exempting § 666 from the official-act requirement, the decisions of nine circuit courts have eroded the carefully considered limitations this Court has recognized for other bribery statutes. Pet.32-33. The pressing need for uniformity in federal law, along with the significant impact on the rights and liberties of countless citizens, urgently calls for this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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