No. 23-108

In the
Supreme Court of the United States

JAMES E. SNYDER,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS*

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law and often appears before this Court. It also argues for a proper balance between federal law and state sovereignty in the pursuit of a constitutional scheme of governance that enhances, rather than threatens, the full participation of citizens in the political process. More relevant to this case, ACLJ addressed those issues previously in a bribery law context in its amicus briefs in *McDonnell v. United States*, 579 U.S. 550 (2016), and as amicus in this matter supporting Petitioner Snyder in urging certiorari.

SUMMARY OF ARGUMENT

The ruling here of the Seventh Circuit, in lock-step with the flawed reasoning of four other circuits, improperly held that the bribery offense in 18 U.S.C. § 666(a)(1)(B) does not require evidence of quid pro quo. Two other circuits disagree, based on a well-reasoned analysis of the text of § 666(a)(1)(B). *See United States v. Fernandez*, 722 F.3d 1 (1st Cir. 2013); *United States v. Hamilton*, 46 F.4th 389 (5th Cir. 2022).

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*No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from Amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

The threat from the shockingly broad reading of this bribery law in this case is particularly troublesome for smaller communities, as here, where personal, business, and political connections can naturally intersect between officials and citizens. Under the reasoning of the Seventh Circuit, ordinary transactions and points of personal contact that follow nearly any favorable official action can become the basis of illegal, after-the-fact criminal "gratuities." That result collides with the text and legislative history of § 666(a)(1)(B) as well as the fact that this statutory bribery language closely tracks the text of a similar federal bribery law, one that this Court has construed to require proof of quid pro quo.

This case also illustrates how § 666(a)(1)(B) prosecutions, under the Seventh Circuit's expansive interpretation of that statute, may easily interject evidence of legal campaign contributions and political platforms into those bribery trials, something that occurred here. Yet, absent any proof that a quid pro quo understanding was afoot, a bribery prosecution under those circumstances is blatantly at odds with the rulings of this Court.

When quid pro quo guard rails are removed, everything from otherwise lawful business consulting fees among town citizens, to innocent political donations supporting local public officials becomes fair game as the stuff of illegal "gratuities" (i.e. supposed "rewards" for public performance by implication) and therefore prison sentences.

Subjecting public officials to the harsh penalties and prison sentences fitted for bribery, while at the

same time gutting the quid pro quo bulwark historically established over centuries for bribery offenses, creates a chilling effect on political activity, and paves the way for politically motivated prosecutions.

The Seventh Circuit ignores not only the rule of lenity but also the "deeply rooted presumption of *mens rea*" applicable to criminal cases, regardless of pedigree. Both doctrines should arrive at the same point here, namely, to prevent criminalizing the vast variety of inevitable political and personal transactions occurring between local political officials and local citizens lacking any criminal quid pro quo intentionality or understanding.

Those threats are heightened by the manner in which the Seventh Circuit's interpretation of the statute creates a bewildering federal intrusion into the political workings of local cities and towns. The statute at issue has only a gossamer-thin requirement that federal money exist somewhere within the municipality in order for its harsh provisions to apply. There need be, as was the case here, no connection whatsoever between those federal funds and either the subject of the case or the transactions that are at its core. That is but one indicium that § 666(a)(1)(B) under the expansive interpretation by the Seventh Circuit collides with basic federalism principles.

Beyond that, this federal prosecution has usurped the police powers of Indiana, a state whose court rulings have required proof of quid pro quo for bribery convictions of public officials. Case law from the other Seventh Circuit states of Illinois and Wisconsin also

strongly suggests that those states treat quid pro quo as an important element in public corruption offenses.

In an odd reversal of personal liberties, aided by the Circuit Court's misconstruction of statutory text, federal prosecutions can sidestep a state's more liberty-protective approach to criminal bribery law and the state's police power prerogatives on matters that are essentially local in nature. The Seventh Circuit approach neuters the authority of states to protect more fully their local officials from inappropriate charges or even discriminatory prosecution.

ARGUMENT

I. THE STATUTORY TEXT WAS MISCONSTRUED BY THE SEVENTH CIRCUIT

A. The Text of § 666(a)(1)(B) Strongly Suggests Quid Pro Quo

The Seventh Circuit relied heavily on the prior rulings in its own Circuit to conclude that § 666(a)(1)(B) does not require quid pro quo.

The opinion referred several times to its reliance on the precedents of its own Circuit: "This circuit has repeatedly held that § 666(a)(1)(B) 'forbids taking gratuities as well as taking bribes' That is, we have refused to 'import an additional, specific *quid pro quo* requirement into the elements' of § 666." *United States v. Snyder*, 71 F.4th 555, 579 (7th Cir. 2023)

(citations omitted). The Seventh Circuit was disinclined "to overrule [its] precedents on this statute." *Id.* at 580 (citations omitted) ("We do not lightly overturn circuit precedent . . . we give 'considerable weight to prior decisions of this court unless and until they have been overruled or undermined by the decisions of a *higher court*.'") (emphasis added).

From a plain, contextual reading of the text of § 666(a)(1)(B) alone, the judgment of the Seventh Circuit should be reversed by this *higher Court*.

The Circuit Court determined that, rather than a bribery crime, a *bare* "gratuity" crime instead lurks within § 666(a)(1)(B), which is to say, a crime that is not officially bribery (despite all indications to the contrary) and that is unadorned by the protective cloak of a quid pro quo element. The court did so by analogizing § 666(a)(1)(B) to a specific bribery statute in 18 U.S.C. § 201.

At first glance, it is true that § 201 does not—as § 666(a)(1)(B) also does not—ever use the word "gratuity." Hence the flawed reasoning of the Seventh Circuit here. Because this Court in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404-05 (1999), found that the precise subsection of that statute at issue in that case, § 201(c)(1)(A), contains a gratuity offense even in the absence of that word, the Circuit Court therefore determined that the same should also be true of § 666(a)(1)(B) in this case. *Snyder*, 71 F.4th at 579 n.6.

But the comparison between those statutes is fatally flawed.

First, in *Sun-Diamond*, the illegal gratuity statute in question was § 201(c)(1)(A), dealing there with the offeror, rather than the recipient as here. More significantly, that statute criminalizes this:

> (c) Whoever—(1) otherwise than as provided by law for the proper discharge of official duty—(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official . . . .

18 U.S.C. § 201(c). This full text above, and most particularly *what is not* in the text as explained below, shows that the Circuit Court's analogizing § 666(a)(1)(B) as similar to § 201(c)(1)(A) is a flawed, one-way street. There are critical textual differences between § 201(c)(1)(A)'s "gratuity" section as construed in *Sun-Diamond*, and § 666(a)(1)(B), which the Circuit Court treated as if it were a § 201 gratuity crime.

On examination, the text of § 666(a)(1)(B) in this case is actually much closer to a *different section* of § 201 dealing with the recipient as here rather than the payor, and more significantly, a statutory section that Justice Scalia's opinion in *Sun-Diamond* expressly recognized as requiring quid pro quo.

The bribery language of § 201(b)(1), regarding a recipient and found to require quid pro quo, was further described in *Sun-Diamond* as containing at least three separate elements of that statute, all three of which are also present in § 666(a)(1)(B). The bribery language of § 201(b)(1) as to the recipient, closely tracking the language of § 201(b)(2) which relates to the bribery payor, is explained this way:

> The first crime, described in . . . § 201(b)(2) as to the recipient, is bribery, which requires a showing that something of value was . . . *corruptly* demanded, sought, received, accepted, or agreed to be received or accepted by a public official (as to the recipient) *with intent*, *inter alia*, "to influence any official act" (giver) or *in return for "being influenced in the performance of any official act*" (recipient).

Sun-Diamond, 526 U.S. at 404 (emphasis added) (quoting 18 U.S.C. § 201).

The three textual similarities between the bribery crime in § 201(b)(1) and § 666(a)(1)(B)— similarities brushed aside in the Seventh Circuit analysis—are significant.[1] Those similarities alone should be dispositive here, because *Sun-Diamond* construed § 201(b)(1), as well as (b)(2), to contain a quid pro quo

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[1] The Seventh Circuit briefly noted the contrary rulings in *United States v. Fernandez*, 722 F.3d 1 (1st Cir. 2013), and *United States v. Hamilton*, 46 F.4th 389 (5th Cir. 2022), both recognizing this similarity of text between § 666(a)(1)(B) and § 201(b). *Snyder*, 71 F.4th at 579. But the court instead chose to follow "our precedents." *Id.* at 580.

requirement, reasoning that the bribery statute, § 201(b)(1) (payor) and (b)(2) (recipient public official), requires proof of a quid pro quo agreement, as distinguished from a pure gratuity:

> The distinguishing feature of each crime is its *intent element*. Bribery requires *intent* "to influence" an official act or "*to be influenced*" in an official act, while illegal gratuity requires only that the gratuity be given or accepted "for or because of" an official act. In other words, for 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, 526 U.S. at 404-05 (emphasis added).

We next examine those three textual similarities that § 666(a)(1)(B) has in common with both the bribery crime in § 201(b)(1) (payor) and the bribery crime in (b)(2) (recipient), which require quid pro quo, because as *Sun-Diamond* explained: "for bribery there must be a *quid pro quo* -- a specific intent to give or receive something of value *in exchange* for an official act." 526 U.S. at 404-05.

As to those three elements in common, the text of § 666(a)(1)(B) (a subsection under 666's "bribery" heading) speaks clearly for itself. It makes it a crime for any public official who:

> *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 anything of value of $5,000 or more . . . .

§ 666(a)(1)(B) (emphasis added).

Accordingly, the bribery statute § 201(b)(2) (as to recipient) is posited in *Sun-Diamond* as requiring quid pro quo. This statute section, *not* applied in the Seventh Circuit opinion, requires three key elements under *Sun-Diamond*; all three textual elements also being present in § 666(a)(1)(B):

> (1) It requires the recipient has "*corruptly*" demanded, sought, received, accepted or agreed to receive or agreed to something of value;
>
> (2) It requires that the public official recipient must have acted "with *intent*";
>
> (3) and it requires that the intent was for payment "*in return for 'being influenced* in the performance of any official act.'"

Sun-Diamond, 526 U.S. at 404 (emphasis added)

This means that the relevant § 201(b) quid pro quo bribery statutes above, as well as § 666(a)(1)(B), all require: that a transaction be done "corruptly"; that it be done *with intent*; and that such an intent envisions

that the recipient public official will be "*influenced*" in the performance of official duties "in return" for the payment. *Sun-Diamond*, 526 U.S. at 404.

In addition, there are also the textual *differences* between § 201(c)(1)(A), the statute relied on incorrectly by the Seventh Circuit, and its supposed counterpart, § 666(a)(1)(B).

First, § 201(c)(1)(A) makes no reference to conduct that must be done "corruptly," yet § 666(a)(1)(B), the criminal statute in this case, does.

Second, the gratuity crime in § 201(c)(1)(A) does *not* require any *intent* to "influence" official action or to be influenced in one's official duties, and yet § 666(a)(1)(B) does.

These same distinctions are also present in the parallel language in § 201(c)(1)(B) relating to public official *recipients* of gratuities.

Nor does the presence of the word "rewarded" in § 666(a)(1)(B) in the phrase "intending to be influenced or rewarded," change any of this.

First, use of "reward" in the text does not "explicit[ly]" exclude quid pro quo.[2]

Second, the circuit court wrongly treated "influenced" and "rewarded" as two differing criminal prongs, rather than related prongs as the text suggests.

Ultimately, if public officials are to be hung from one of two adjacent hooks of a criminal statute, a court must first explain clearly why only one of them

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[2] *See infra* Section II.A., as to the necessity of quid pro quo in cases where, as here, campaign donations are implicated, absent statute text that is "explicit" that quid pro quo is not an element.

(presumably the "to be influenced" hook) is presumably bribery requiring quid pro quo, while its neighboring hook ("rewarded") does not, merely because the latter is presumed to be a bare "gratuity" crime despite the fact it quizzically carries a bribery-like prison sentence.[3]

The court of appeals failed to appreciate the relationship between "influenced" and "rewarded" in the phrase "intending to be influenced or rewarded." That textual language simply shows a difference in *timing* of the payment, not a difference in the *intent* requirement. "To be influenced" means an understanding *in advance* for a payment for the purpose of influencing official action in the future. "Rewarded" should refer to a payment, specifically agreed-to for official action, but *not payable until that action is accomplished*.

Third, the English common law, and early American bribery law substantiates that the word "reward" was used in, and was considered consistent with, the crime of bribery. *See infra* Section I.C. *Post*-official action rewards being subsumed within the genre of bribery then, means that a *pre*-official action quid pro quo understanding would have to be proven, as *Sun-Diamond* makes clear regarding all forms of bribery.

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[3] The Seventh Circuit recognized not only the harsher sentence for a supposed § 666(a)(1)(B) "gratuity" crime compared to a lesser sentence for a § 201 gratuity crime, but also noted yet another sentencing anomaly for bare gratuity sentences for local officials versus federal officials but dismissed that as well. *Snyder*, 71 F.4th at 580-81.

Lastly, the circuit court's error, separating rather than harmonizing "influenced" and "rewarded" violates a statutory construction principle: "the commonsense canon of *noscitur a sociis* . . . counsels that a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008). As we have just pointed out, those two next-door neighboring phrases "to be influenced" and "to be . . . rewarded," § 666(a)(1)(B), are most logically viewed as mere differences in transactional *timing* understood between the parties, i.e. whether payment for official conduct is to either precede, or else to follow-after, the agreed official action.

The result of the misconstruction of the text of § 666(a)(1)(B), and misapplication of a dissimilar section of § 201 as a supposed metric for comparison, has serious consequences. It is a rejection of the ancient axiom that the higher priority should be to protect from the jaws of prosecution law abiders (even if reckless or naive in their dealings) rather than to zealously pursue those conceivably capable of being found guilty. Requiring quid pro quo proof in public corruption bribery cases such as this one is an important component of that higher priority. Unfortunately, here that component was excised from the criminal statute to which it belongs.

B. The Legislative History of § 666(a)(1)(B) Strongly Suggests Quid Pro Quo

The legislative restructuring of § 666 is best examined by relating it to the text of § 201(b). Both statutes, dealing with bribery conduct by public officials or those who seek to influence them, contain similar textual language.

The Fifth Circuit in *United States v. Hamilton*, accurately set out the history of the changes to § 666, clearly showing how the more ambiguous "for or because of" was exchanged for a more precise metric of scienter, "intent to influence," and the modifier "corruptly," strongly signaling the requirement of a quid pro quo element. 46 F.4th at 395. The Fifth Circuit described it this way:

> When Congress passed and President Reagan signed what would become 18 U.S.C. § 666, it had only one subsection. It criminalized something like what is in subsection (c) [of § 201], the illegal-gratuity provision, with its "for or because of" language. *See* Comprehensive Crime Control Act, Pub. L. No. 98-473, § 1104(a), 98 Stat. 1837, 2143-44 (1984). Two years later, Congress changed that provision by swapping out the "for or because of" language for language like § 201(b), with its "intent to influence" verbiage, and it added a requirement that the giving be done "corruptly." *See* Criminal Law and Procedure Technical Amendments Act of

> 1986, Pub. L. No. 99-646, § 59, 100 Stat. 3592, 3612-13.

Id. The significance of Congress adding "intent to influence" and the modifier "corruptly" to the text of § 666(a)(1)(B) cannot be overstated; first, because those changes that were made to § 666(a)(1)(B) mirrored the text of § 201(b), and second, because *Sun-Diamond* calls § 201(b) a bribery—and not a gratuity—hence compelling the conclusion that § 666(a)(1)(B) likewise is a bribery, not a gratuity offense, therefore requiring quid pro quo.

The historical significance of the use of "corruptly" as a signal for bribery is also addressed, next.

C. Common Law Notions of Bribery Reinforce Quid Pro Quo Here

As we have argued, use of the word "rewarded" in § 666(a)(1)(B) has a semantic relationship with its neighboring term "influenced," and in that context, both indicate that bribery rather than gratuity is being referenced, and therefore, quid pro quo. This is consistent with the history of quid pro quo bribery. Bribery via "rewards" was a concept linked to "corruption," both terms serving as bribery terms of art.

In the outlawing of bribery-for-votes by members of Parliament under English law, the word "reward" did not negate a specific bribery intent, but actually embraced it. Blackstone described "the infamous practice of *bribery* and *corruption*" that would be

committed "if any money, gift, office, employment, or *reward* be given or promised to be given to any voter, at any time, in order to influence him to give or withhold his vote."[4] Under English rule from the outset, "rewards" were a form of bribery and were defined as politically *corrupt* payments specifically made or promised with the intent and purpose of influencing official action.

After the U.S. Constitution was ratified, the English understanding of bribery, as including rewards for previously agreed official influence, was imported into American statutory language. The very first congressional statute outlawing bribery associated a "reward" with a criminal "bribe." As one authority explains:

> The first federal *bribery* statute forbade giving any money "or any other *bribe*, present or *reward* . . . to obtain or procure the opinion, judgment or decree of any judge or judges of the United States." An Act for the Punishment of Certain Crimes against the United States (Act of Apr. 30, 1790), ch. 9, § 21, 1 Stat. 112, 117 (1790).

Albert W. Alschuler, *Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse*, 84

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[4] 1 William Blackstone, Commentaries (Edward Christian ed., 1793) *179 (emphasis added), https://books.google.com/books?id=MPra9LeKFy8C&lpg=PA181&dq=blackstone's%20commentary&pg=PA179#v=onepage&q&f=false.

Fordham L. Rev. 463, 467 n.14 (2015) (emphasis added).

II. SUPREME COURT PRECEDENT COMMANDS QUID PRO QUO HERE

A. Campaign Donations in a Bribery Case, and Quid Pro Quo

Evidence of campaign contributions and political activity was repeatedly mentioned by the Government in the Mayor's prosecution for bribery during his retrial for alleged violation of the federal bribery statute, § 666(a)(1)(B). *See* J.A. 44, 95-96. The Government frequently referenced lawful political donations to the Mayor's campaign from an owner of the truck company GLP, the company that had received a contract for the sale of garbage trucks to the municipality with the Mayor's approval. Pet. Writ Cert. 11 [hereinafter Pet.].

While the centerpiece of the prosecution's case targeted GLP's after-the fact hiring of the Mayor for permissible moonlighting work as a consultant, the Government also raised, in the same vein, campaign donations from GLP's owner to Mayor's election: "The government also repeatedly mentioned the $13,000 [consulting] payment alongside the [payor and GLP owner] Buhas' earlier campaign contributions to Mayor Snyder, although the government recognized that those contributions were perfectly legal." Pet. 11.

In addition, the Mayor's "campaign platform" to secure garbage trucks for the municipality was also

highlighted. As the U.S. District Court for the retrial noted: "The evidence at trial, considered in the light most favorable to the government, showed . . . . Snyder was elected Mayor of Portage and took office in January 2012. His *campaign platform* included automating garbage collection." Pet App. 56a (emphasis added).

Under the Seventh Circuit approach, it is but a short half-step from such campaign contributions and campaign promises as lawful, to contributions and fulfilment of political platforms creating bribery-lite by mere implication even though void of any quid pro quo understanding between the parties in the first place.

Without quid pro quo, campaign donations can easily be transformed into "rewards" or illegal "gratuities" under the overbroad construction by the circuit court. This conflicts with this Court's precedents.

An "explicit" statutory text excluding the necessity of quid pro quo proof in public corruption cases is necessary where political campaign support is implicated; otherwise, an "explicit" quid pro quo must be proven. *McCormick v. United States*, 500 U.S. 257, 272-73 (1991). The Court has limited the government interest in regulating campaign contributions to the narrow area of quid pro quo arrangements. *Citizens United v. FEC*, 558 U.S. 310, 356-57 (2010);[5] *see also United States v. Ganim*, 510 F.3d 134, 142 (2d Cir.

[5] In *McCormick*, the Government admitted as such, as the Court pointed out in referencing the Department of Justice Manual setting out the quid pro quo requirement. 500 U.S. at 273.

2007) (Sotomayor, J.) ("[P]roof of an express promise is necessary when the payments are made in the form of campaign contributions.").

As we have seen, § 666(a)(1)(B) has no such explicit text excluding quid pro quo. To the contrary, there are substantial reasons why quid pro quo must attach to the text.

B. The Rule of Lenity and the Presumption of *Mens Rea* Were Ignored

In construing criminal statutes and applying scienter requirements like the "corruptly" element in § 666(a)(1)(B), the goal, rather than creating tripwires for the unwitting, should make it harder for citizens to unwittingly commit a federal crime. *Wooden v. United States*, 142 S. Ct. 1063, 1076 (2022) (Kavanaugh, J., concurring) (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952)) (opining that mental-state requirements "are 'as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil'").

Both the rule of lenity and the presumption of *mens rea* counsel against the Seventh Circuit decision and, in fact, are much-related here, regardless whether in other contexts they may look like different progenies.

Referring to the lenity rule, Justice Gorsuch summarized in *Wooden* that, "[u]nder that rule, any reasonable doubt about the application of a penal law

must be resolved in favor of liberty." *Wooden*, 142 S. Ct. at 1081 (Gorsuch, J., concurring).

Lenity has ancient roots:

> The "rule of lenity" is a new name for an old idea—the notion that "penal laws should be construed strictly." *The Adventure*, 1 F. Cas. 202, 204, F. Cas. No. 93 (No. 93) (CC Va. 1812) (Marshall, C. J.). The rule first appeared in English courts, justified in part on the assumption that when Parliament intended to inflict severe punishments it would do so clearly. 1 W. Blackstone, Commentaries on the Laws of England 88 (1765) (Blackstone); 2 M. Hale, The History of the Pleas of the Crown 335 (1736); *see also* L. Hall, Strict or Liberal Construction of Penal Statutes, 48 Harv. L. Rev. 748, 749–751 (1935). In the hands of judges in this country, however, lenity came to serve distinctively American functions—a means for upholding the Constitution's commitments to due process and the separation of powers. Accordingly, lenity became a widely recognized rule of statutory construction in the Republic's early years.

Id. at 1082.

Justice Sotomayor concurred generally with Justice Gorsuch's approach to lenity in *Wooden*, a case that had everything to do with construing a criminal statute but nothing to do with bribery or quid pro quo. *See id.* at 1075 (Sotomayor, J., concurring) ("I agree with Justice Gorsuch, however, that the rule of lenity

provides an independent basis for ruling in favor of a defendant in a closer case . . . .").

On the other hand, Justice Kavanaugh in his concurrence in *Wooden* preferred to resolve that case through the "presumption of *mens rea*," in construing criminal statutes. *Id.* at 1075-76 (Kavanaugh, J., concurring), under the concept of providing *fair notice* to the public of what a criminal law forbids.

Here however, both doctrines converge in the subject case. A fair construction of § 666(a)(1)(B) counsels the application of both lenity as well as the "presumption of *mens rea*," thus providing a double assurance that a reversal of the Seventh Circuit is needed. The reason for that convergence is uniquely applicable to official corruption/bribery crimes.

The presumption of *mens rea* requires criminal intent because of the strict construction of criminal laws. Lenity gives the benefit of the doubt to defendants faced with a less-than-clear text in a criminal law. Both involve construing statutory text, and both are anchored in overarching constitutional values dictating that the harshness of criminal law should, in close cases, be deferential to the defendant rather than to the government, regardless of whether it is because criminal statutes must give *fair notice* to criminal defendants (per Justice Kavanaugh), or because "reasonable doubt about the application of a penal law must be resolved in favor of liberty" (per Justice Gorsuch).

In the § 666 offense here, the text refers to conduct that must be done both "corruptly" and "intending" to influence official action, which means a criminal *mens rea* is required.

At the same time, the manifestation of that criminal intent in every bribery case must reside

within the specific understanding between the criminal parties that official conduct-for-payment will be exchanged, i.e. quid pro quo. Although the charging statute here clearly resembles a bribery crime and not a gratuity offense and thus strongly implicates quid pro quo, like all bribery laws, it never uses the phrase "quid pro quo." Hence, not only because of the lack of absolute, explicit, textual clarity on that point, but also to avoid a head-on collision with *Sun-Diamond* as well as with federalism,[6] the rule of lenity is also a sufficient basis for reversal.

Some hills can be successfully scaled from two different directions. The quid pro quo hill here can be mounted from either the presumption of *mens rea*, or from the rule of lenity, or from both. In any case, reversal should result.

III. FEDERALISM REQUIRES QUID PRO QUO

A. Federalism Properly Recognizes State Criminal Authority as Primary Regarding Local Corruption

Certain structural presuppositions—one Justice, later Chief Justice, called them "tacit postulates"—inform our understanding of the constitutional plan regarding the relationship between federal and state government. *Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, J, dissenting). Those implicit "notions of a constitutional plan" satisfy "the full effect intended by the Framers" and are so "engrained in the fabric"

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[6] *See infra* Section III.

of the Constitution, that "without them, the Constitution is denied force, and often meaning." *Id*.

One of those essential postulates is the notion of *federalism*; i.e., the "division of power between the federal government and states," something James Madison believed was no mere organizational plan, but in fact "a double security" necessary to protect individual liberty.[7] Some Justices have expressly articulated that concept, notably Justice Scalia who opined that such legal presuppositions could actually be "more important to the safeguarding [of] individual liberties than the Bill of Rights itself."[8]

The Seventh Circuit's opinion improperly expanded the text, meaning, and parameters of § 666(a)(1)(B). It has effectively usurped the sovereign interest that states like Indiana have in their own criminal statutes that outlaw official corruption and bribery involving state and local officials, performing an end-run around state case law that recognizes the requirement of quid pro quo in such local offenses. A greater insult to the federalism notion that states should control essentially state matters involving local crime is hard to imagine.

Undoubtedly, limitless expansion of corruption and bribery law can "conflict[] with principles of federalism." *See Ocasio v. United States*, 578 U.S. 282,

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[7] Antonin Scalia & Kevin A. Ring, *Scalia's Court: A Legacy of Landmark Opinions and Dissents* 41 (2016) (citing Bradford R. Clark, *The Constitutional Structure and the Jurisprudence of Justice Scalia*, 47 St. Louis L.J. 753, 754 (2003)).

[8] Scalia & Ring, *supra* note 7, at 3 (citing David A. Schultz & Christopher E. Smith, *The Jurisprudential Vision of Justice Antonin Scalia* 88 (1996)).

304 (2016) (Thomas, J., dissenting). The Court has wisely refused to enlarge the reach of federal criminal laws that "would federalize much ordinary criminal behavior . . . that typically is the subject of state, not federal, prosecution." *Scheidler v. Nat'l Org. for Women*, *Inc.*, 547 U.S. 9, 20 (2006).

The Court has wisely chosen in the past to limit federal corruption crimes from reaching into state and local political affairs where the statutory text and its own precedents support such restraint:

> [W]here a more limited interpretation of [the phrase at issue] is supported by both text and precedent, we decline to "construe the statute 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." *McNally v. United States*, 483 U.S. 350, 360, 107 S. Ct. 2875, 97 L.Ed.2d 292 (1987); *see also United States v. Enmons*, 410 U.S. 396, 410-411, 93 S. Ct. 1007, 35 L.Ed.2d 379 (1973) (rejecting a "broad concept of extortion" that would lead to "an unprecedented incursion into the criminal jurisdiction of the States").

McDonnell v. United States, 579 U.S. 550, 576-77 (2016).

Such a policy is well advised, particularly considering how the former standard of federal prosecutorial restraint and respect for state criminal enforcement in mid-twentieth century America has

morphed into an alarming federalization of crime leading up to and into the twenty-first century.

Justice Robert Jackson, then-U.S. Attorney General, in his 1940 address to federal prosecutors stressed the importance of state prosecutorial discretion as the primary tool against local crime, as opposed to federal intrusion: "It is," he said, "an unusual and rare instance in which the local District Attorney should be superseded in the handling of litigation, except where he requests help of Washington."[9]

Admittedly, our nation had a smaller number of federal crimes on the books then, and with a shorter reach. Yet, the federalism balance should not depend on the mere proportionate number of federal-versus-state criminal statutes that outlaw bribery and public corruption; if that were the case, federalism would easily evaporate through the sheer increase in the number of federal criminal laws that usurp state versions.

It is the judiciary and ultimately this Court that is chartered with the task of preventing federal bribery laws from being expanded far beyond their actual text. It is "emphatically" for this Court to determine, as here, "what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). If not, federal prosecutions could quickly swallow up all state laws that, like Indiana's law, should be the primary tools

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[9] Robert H. Jackson, Attorney General of the United States, The Federal Prosecutor 2 (Apr. 1, 1940), https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf.

to prosecute public official bribery crimes that are inherently local in nature.

More than two decades ago, on the cusp of a new century, former Attorney General Edwin Meese III noted the escalation of new federal crimes:

> Following a two-year study by experts in all segments of the criminal justice process, the [ABA] task force documented the explosive growth of federal criminal law, including the startling fact that more than 40 percent of the federal criminal provisions enacted since the Civil War became law in just the past three decades. Most troubling is the high percentage of these federal crimes that *duplicate state laws that have been on the books for years*. This endangers the *constitutional principle of decentralized law enforcement authority* that has worked well in America and that has been a bulwark against the centralization of police power at the national level.[10]

Such a trend led then-Senator Joe Biden to complain, "we federalize everything that walks, talks, and moves."[11]

Section 666 gives federal prosecutors a strikingly large field for potential investigations and prosecutions of state and local officials regarding local

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[10] Edwin Meese III, *The Dangerous Federalization of Crime*, Hoover Institution (July 30, 1999) https://www.hoover.org/research/dangerous-federalization-crime (emphasis added).

[11] *Id.*

matters whenever federal money finds its way into local municipalities, with exponentially more funds being funneled now than in the mid-twentieth century when Justice Jackson cautioned about federal intrusion and outlined the values that should guide prosecutorial discretion.

The federal bribery law here shows on its face only a gossamer-thin federal interest in prosecuting local officials for intrinsically local conduct. It is highly significant that the "expansive" breadth of § 666(a)(1)(B) does *not* require any connection between the federal funds in a municipality and the local official prosecuted under that statute, only that such federal funds exist. *Salinas v. United States*, 522 U.S. 52, 56-57 (1997).

The mere tracing of federal money into municipal budgets is a dubious basis to federalize what in this case is basically a potential state offense involving a local public official; but it becomes intolerable where, under the Seventh Circuit's reasoning, it conflicts with Indiana state criminal law that would provide the greater protections of quid pro quo to a defendant in such a case, as detailed below.

Adding to the long list of other disparagements of federalism here, including the major usurpation generally of state criminal law described next, is the shocking disparity in sentencing against state officials compared to federal officials; that is, if and only if the Government is correct that § 666(a)(1)(B) contains a separate supposed non-bribery, non-quid pro quo, bare "gratuity" offense:

> If § 666 reaches gratuities, the statute departs from the common pattern of treating bribery as a more serious crime than taking gratuities. Moreover, the federal government punishes state and local officials for accepting gratuities *five times more severely than it punishes federal officials* for doing the same thing.

Alschuler, *supra*, at 471 n.45 (emphasis added) (citing George D. Brown, *Stealth Statute—Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666*, 73 Notre Dame L. Rev. 247, 308–11 (1998)).

B. The Usurping of Indiana State Criminal Law

This Court has recognized "the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (citing *Cooper v. California,* 386 U.S. 58, 62 (1967)).

The State of Indiana, the locus of this federal prosecution of the small-town mayor, has taken a position in its sovereignty regarding bribery charges against its local public officials. In so doing, it has provided more expansive protection to a defendant than that proffered in this case by the federal government. Indiana's bribery statute requires specific criminal intent and has been interpreted by

Indiana courts to require proof of quid pro quo. That state makes it a felony for any person who:

> being a public servant, solicits, accepts, or agrees to accept, either before or after the person becomes appointed, elected, or qualified, any property, except property the person is authorized by law to accept, *with intent* to control the performance of an act related to the person's employment or function as a public servant.

Ind. Code § 35-44.1-1-2(a)(2) (emphasis added).

In *Winn v. Indiana*, the court was clear that "[a]n essential element to the offense of bribery is a quid pro quo." 722 N.E.2d 345, 347 (Ind. Ct. App. 1999) (citing *Wurster v. Indiana*, 708 N.E.2d 587, 594 (Ind. Ct. App. 1999), *aff'd*, 715 N.E.2d 341 (Ind. 1999), reh'g denied). To the same effect, see *Tanoos v. Indiana*, 137 N.E.3d 1008, 1017-18 (Ind. Ct. App. 2019).

Further, in facts markedly similar to this one, *Wurster* had affirmed the dismissal of a bribery indictment against a member of the Indiana House of Representatives who had also worked as an independent marketing consultant to an engineering company, a company participating in an engineering association that had supported the politician's campaign. 708 N.E.2d at 590. The Indiana Court of Appeals, noting the need for quid pro quo evidence, rejected the state prosecution's argument that the politician's employment was a sham and was in reality a bribe. *Id.* at 594.

The Government here, like the prosecution argument in the *Wurster* case, impugns the evidence in the defense case showing the payments to Mayor Snyder were not a bribe but were for his services as a "consultant," Br. Opp'n 4, and argues that the payment instead was an illegal gratuity "reward" for granting a contract, Br. Opp'n 13.

However, as the judge in the Mayor's first trial noted, the Grand Jury testimony of the GLP owner who employed the Mayor as a consultant was clear that the Mayor did not receive any kind of reward because of the bid contract ultimately granted to his company. Pet. App. 148a. In the retrial, the owner of the GLP company denied any connection between the consulting payment and truck bids. Pet. 12. In addition, as the circuit court recognized, "Buha [the GLP owner] testified that the brothers agreed to pay Snyder $13,000 up front supposedly for consulting services he intended to provide." Pet. App. 29a.

Under Indiana law, the Mayor would likely never have been charged with bribery, or if charged, would almost certainly have had the charge dismissed. The disparity between that predicable state treatment of the Mayor under these facts pursuant to Indiana law on the one hand, and the actual federal prosecution conviction obtained here under the much expanded interpretation of the federal bribery statute § 666(a)(1)(B) on the other, is startling.

C. The Usurping of Wisconsin and Illinois Law

Illinois prohibits as a felony any public official receiving any personal advantage or property either "knowing" that it was offered "with intent . . . to influence the performance" of a public act or public function, or pursuant to an "understanding" that it was to influence a public act.[12]

The Illinois Court of Appeals recognizes the necessity of quid pro quo in proceedings under ethics prohibitions regarding certain campaign contributions intended to influence public acts. *See Berrios v. Cook Cnty. Bd. of Comm'rs*, 138 N.E.3d 695, 710 (Ill. App. Ct. 2018) (citing *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014)) (noting that "the only interest [the Supreme Court] had found to be legitimate for campaign finance restrictions was the prevention of *quid pro quo corruption* or its appearance") (emphasis added) (holding that the

[12] Bribery, as class-2 felony, occurs when a person "receives, retains, or agrees to accept any property or personal advantage which he or she is not authorized by law to accept *knowing* that the property or personal advantage was *promised or tendered with intent* to cause him or her to influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness." 720 Ill. Comp. Stat. 5/33-1(d) (emphasis added). Subsection (e) similarly prohibits such an exchange or tender, pursuant to an "*understanding*" that it is for the purpose of influencing a public act. *Id.* 5/33-1(e) (emphasis added). In both cases as the statute continues, "[a]s used in this Section, 'tenders' means any delivery or proffer made with the requisite intent." *Id.*

ethic ordinance's prevention of quid pro quo corruption was a sufficiently compelling interest).

Likewise, in the Seventh Circuit sister-state of Wisconsin, the state's bribery statute makes it a felony for a public official to accept or offer to accept any unauthorized property or personal advantage "pursuant to an understanding that the officer or employee will act in a certain manner in relation to any matter" either pending or that might come before that officer or employee in their "capacity as such officer or employee." Wis. Stat. § 946.10(2).

The Wisconsin Supreme Court has construed bribery to require specific criminal intent: "the crime of bribery is not one that was meant to be *malum prohibitum* but, on the contrary, is one that requires an evil or corrupt motive to be proved." *Wisconsin v. Alfonsi*, 147 N.W.2d 550, 555 (Wis. 1967). Wisconsin's Supreme Court noted that state courts are "reluctant to assume that the requirement of a corrupt intent has been eradicated." *Id.* at 555-56 (listing court decisions to the same effect from Missouri, Connecticut, Maryland and North Carolina).

It is clear that the courts of Wisconsin recognize the importance of specific intent, quid pro quo in public corruption cases. More recently, the Wisconsin Supreme Court has had the occasion to "re-endorse its commitment to upholding the fundamental right of each and every citizen to engage in lawful political activity and to do so *free from the fear of the tyrannical retribution of arbitrary or capricious governmental prosecution*." *Wisconsin ex rel. Two Unnamed Petitioners v. Peterson*, 866 N.W.2d 165, 212 (Wis.

2015) (emphasis added). The Wisconsin Supreme Court later disbanded a John Doe criminal investigation into campaign donation activities while noting the Supreme Court's quid pro quo jurisprudence. *Wisconsin ex rel. Three Unnamed Petitioners v. Peterson*, 875 N.W.2d 49 (Wis. 2015) (per curiam).

In sum, the decision of the Seventh Circuit in this case clashes with the quid pro quo judgments of the states within that Circuit as regards bribery prosecutions and related matters involving public officials. That disturbing result is magnified by the fact that the Government introduced evidence at trial that the Indiana defendant Mayor had received campaign contributions from the same party who had paid the Mayor for an otherwise lawful consulting job, a payment that the prosecution, unburdened from the need to prove any quid pro quo, argued was a bribery/gratuity under § 666.

This interjection of federal prosecutors into local political and municipal affairs of a small Indiana Mayoral office that involves matters intrinsically local in nature usurps the contrary prerogative of Indiana criminal law that would grant quid pro quo protections for its citizens. It does so under an interpretation of § 666(a)(1)(B) that clashes with its text, with comparable federal statutes, with historical precedents and most importantly, with the holdings of this Court, and deserves only one result.

CONCLUSION

The decision of the Seventh Circuit Court of Appeals should be reversed.

Respectfully submitted,

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