No. 23-108

In the

Supreme Court of the United States

JAMES E. SNYDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Laborers' International Union of North America ("LIUNA") and its local union affiliates frequently lobby state and local elected officials on behalf of the workers they represent and frequently make campaign contributions to such officials. As such, LIUNA has an interest in the interpretation of statutes that might be construed to regulate campaign contributions or other aspects of the relationship between elected officials and their constituents. More particularly, LIUNA has an interest in the interpretation of statutes that, depending on how they are construed, can chill legitimate political activity. Section 666, which imposes severe criminal sanctions on those deemed to have violated it, is such a statute. If construed to cover all actions by constituents that benefit elected officials without regard to whether the benefit was conferred as part of a *quid pro quo* proposal or agreement, the statute will sweep too broadly and chill common political activity that Congress should not lightly be presumed to have intended to deter at all—and certainly not through the use of criminal sanctions.

BACKGROUND

Section 666 of Title 18 of the United States Code, titled "Theft or bribery concerning programs receiving Federal funds," was enacted by Congress in its

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[1] No counsel for a party authored this brief in whole or in part. No counsel, party, or person other than *amicus curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

current form in 1986 and "prohibits bribery of certain public officials." H.R. Rep. No. 99-797, at 34 (1986).

Section 666 effectuates its prohibition against bribery through two separate, reciprocal prohibitions: § 666(a)(1)(B) and § 666(a)(2). Section 666(a)(1)(B) applies to "agent[s]" of "State, local, or Indian tribal government[s]" that receive "benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. § 666(b). While the prohibition extends also to agents of certain private organizations, for ease of exposition and given the issue before the Court, we will refer to covered agents as "public officials" and to those that interact with them as "constituents."

The statute provides with respect to public officials:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists—
>
> (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—
> …
> (B) 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.

Section 666(a)(2) applies to individuals broadly and provides:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists—
>
> …
>
> (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, 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
>
> …
>
> shall be fined under this title, imprisoned not more than 10 years, or both.

Subsection (b) of § 666 states that the statute applies in the circumstance where the relevant public official is associated with a "government … [that] receives, in any one year period, benefits in excess of

$10,000 under a Federal program…." 18 U.S.C. § 666(b).

SUMMARY OF ARGUMENT

The question presented is whether 18 U.S.C. § 666(a)(1)(B) not only criminalizes bribes, but also criminalizes mere gratuities—payments to public officials that lack the *quid pro quo* element of bribery because they are made solely in appreciation of an action that the public official already has taken or previously committed to take. For at least two reasons, this question should be answered in the negative.

I. This Court's precedents have repeatedly instructed that where language in a criminal statute is reasonably susceptible of two constructions, a broad one that presents vagueness concerns and risks chilling protected speech, and a narrower one that avoids those difficulties, the narrower construction should be adopted. Those precedents are implicated here because subsection (a)(1)(B) of § 666 employs severe criminal sanctions to regulate a public official's solicitation or acceptance of "anything of value" "for the benefit of any person"—including the solicitation or acceptance of an ordinary campaign contribution made to an official's campaign or political action committee. Reciprocally, subsection (a)(2) of § 666 subjects a constituent's payment of "anything of value to any person"—including, again, a contribution made to an elected official's campaign or political action committee—to regulation through severe criminal sanctions.

The principal restraint on the broad sweep of these provisions is that they apply only to those who act "corruptly." But because the word "corruptly" is not defined in § 666 and is far from self-defining, *see Marinello v. United States,* 138 S. Ct. 1101, 1108 (2018), a narrow and precise construction is necessary to avoid raising serious Fifth Amendment vagueness issues and chilling commonplace—and First Amendment protected—political activity.

A narrow and precise construction of § 666 is readily available—a construction that the Court has placed on other federal statutes that regulate the conduct of political officials. Under this construction, § 666 would criminalize only the solicitation or acceptance of contributions that are tainted by an actual or proposed *quid pro quo*. It would not implicate constitutional concerns to construe "corruptly" in § 666 as limited to such transactions, because the understanding that *quid pro quo* transactions constitute criminal behavior is part of our "well-recognized common-law heritage." *Evans v. United States*, 504 U.S. 255, 268 n.20 (1992).

There is, however, no traditional understanding that all gratuities provided after the fact to reward previously taken or announced official acts are corrupt. Likewise, there is no widely accepted rubric for separating non-corrupt gratuities from corrupt ones. And, while the government argues that campaign contributions are outside the reach of § 666, the government supports that argument only by citation to a 1974 D.C. Circuit decision construing a different federal statute that contains materially

different language from § 666—language that, unlike the language of § 666, can reasonably be interpreted to exclude campaign contributions from its reach because it applies only to contributions made to the official "himself," and not to third-party entities such as political action committees.

II. The legislative backdrop against which Congress enacted the current version of § 666 buttresses the conclusion that Congress banned only bribes in § 666 and not mere gratuities. The Congress that enacted § 666 was well aware of 18 U.S.C. § 201, a statute that addressed bribery involving federal government officials in one subsection and improper gratuities involving such officials in a separate subsection. Yet Congress, in enacting the current version of § 666, chose to depart dramatically from the language of the improper-gratuity subsection of § 201 while closely tracking the bribery subsection. In so doing, Congress demonstrated a clear intent to criminalize only bribes and not mere gratuities.

Furthermore, if the government's construction of § 666(a)(1)(B) were adopted, officials of state and local governments would be exposed to criminal liability for a substantively broader range of conduct than their federal counterparts under § 201 as well as to longer prison terms for the same range of conduct. That result should not be lightly ascribed to Congress, given that Congress has a weaker interest in regulating the conduct of state and local officials—who already are separately regulated by state law—than of federal officials.

ARGUMENT

This case raises an important question about the proper construction of 18 U.S.C. § 666, titled "Theft or bribery concerning programs receiving Federal funds." The specific question is whether subsections (a)(1)(B) and (a)(2) of § 666 go beyond criminalizing bribes to also criminalizing mere gratuities, *i.e.*, payments that do not involve any *quid pro quo* because they are made by a public official's constituents or others solely in appreciation for actions that the official already has taken or previously committed to take. For at least the following two reasons, this question should be answered in the negative.

I. This Court's Statutory Construction Precedents Require § 666 To Be Construed To Reach Only *Quid Pro Quo* Arrangements, Not Mere Gratuities

A. A striking feature of § 666's language is its breadth in regulating solicitations by public officials and payments by their constituents. As to solicitations, subsection (a)(1)(B) does not merely encompass attempts by public officials to solicit money for themselves or for their personal use. It encompasses attempts by public officials to solicit anything of value "for the benefit of any person." And, reciprocally, subsection (a)(2) does not merely encompass payments made to public officials themselves. It encompasses the provision "to any person" of "anything of value."

This language is sweeping enough to encompass both the solicitation of, and the making of, ordinary contributions to campaign committees and political action committees, because a contribution made even to a legally separate campaign or political action committee is a payment "for the benefit of any person." *See United States v. Beldini*, 443 F. App'x 709, 719-20 (3d Cir. 2011).

The solicitation and making of contributions to political campaign committees and political action committees are among "the most fundamental First Amendment activities." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). And where "legislation imposes criminal penalties in an area permeated by First Amendment interests," that legislation must meet a heightened constitutional notice requirement. *Id.* at 40-41. Indeed, "even when speech is not at issue … precision and guidance are necessary" under the Due Process Clause of the Fifth Amendment, both to ensure that "regulated parties … know what is required of them" and to ensure that "those enforcing the law do not act in an arbitrary and discriminatory way." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). And "[w]hen speech is involved," there is an especial need for "rigorous adherence" to the requirement of regulatory precision in order "to ensure that ambiguity does not chill protected speech." *Id.* at 253-54.

It follows from these foundational principles that a statute susceptible of a narrow construction that reduces the risk of chilling legitimate expressive activity should be given such a construction where "fairly possible." *United States v. Hansen*, 599 U.S.

762, 781 (2023). This canon of construction reflects the judgment that Congress is presumed to legislate safely within constitutional limits, *see Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), whether those limits come from the First Amendment, *see Hansen*, 599 U.S. at 781-82, or from the Due Process Clause, *see Skilling v. United States*, 561 U.S. 358, 405-06 (2010).

Consistent with that canon, when confronted with the task of construing a criminal statute that, like § 666, addressed the "interaction between public officials and their constituents," the Court in *McDonnell v. United States* construed the statute narrowly so as to prevent the prospect that "citizens with legitimate concerns might shrink from participating in democratic discourse." 579 U.S. 550, 575-76 (2016). To illustrate the point, the *McDonnell* Court gave the example of a "union official worried about a plant closing" who, on the government's broad construction of the statute, might feel deterred from seeking the assistance of a local government official because "the union had given a campaign contribution in the past." *Id.* at 575. To avoid "cast[ing] a pall of potential prosecution" over such ordinary constituent-official interactions, the Court rejected the government's construction. *Id.*

B. The principal textual restraint on the broad sweep of § 666's provisions is that they apply only to those who act "corruptly." But the term "corruptly" is not defined in the statute and is hardly self-defining. A narrow and precise construction is therefore necessary to prevent imputing to Congress an intent

to pass a statute so broad and vague as to raise serious fair-notice issues and to chill the making of ordinary campaign contributions and other common means of "participat[ion] in democratic discourse." *McDonnell*, 579 U.S. at 575. And there is a readily available narrow, precise, and principled construction of "corruptly" that avoids these pitfalls.

Under this construction, a public official acts "corruptly" in connection with the solicitation or acceptance of a thing of value only where the official's intent is to propose or effectuate a *quid pro quo* transaction—a transaction exchanging an official act for a payment. Reciprocally, a constituent acts "corruptly" in giving or promising a thing of value only if the intent is to propose or effectuate a *quid pro quo* transaction. Adopting this definition has at least three virtues.

First, this definition would clarify the reach of § 666's undefined language in the same way that this Court, in *McCormick v. United States*, 500 U.S. 257 (1991) and *Evans v. United States*, 504 U.S. 255 (1992), clarified the reach of the Hobbs Act's ban on public officials' obtaining of property "under color of official right." The Hobbs Act did not define the quoted phrase, and the Court, to avoid imputing to Congress an intent to criminalize common interactions between public officials and their constituents—in particular, the solicitation and acceptance of ordinary campaign contributions—required proof that the property was obtained through a *quid pro quo*. *McCormick,* 500 U.S. at 273-74; *Evans*, 504 U.S. at 268. *See also Skilling*, 561 U.S. at 405-06 (similarly limiting the reach of 18 U.S.C. § 1346's ban on schemes to deprive

another of "honest services" to bribery and kickback schemes, so as to avoid imputing to Congress an intent to criminalize an ill-defined area of conduct).

Second, this definition comports with the definition that the courts of appeals, prior to Congress's enactment of § 666 in its current form in 1986, had given to the term "corruptly" in the context of a criminal statute that included distinct subsections prohibiting federal officials from soliciting or accepting bribes, *see* Act of Oct. 23, 1962, Pub. L. No. 87-849, § 201(c), 76 Stat. 1119, 1120 (1962), and gratuities, *see id.* § 201(g), 76 Stat. at 1120. Only the subsection that addressed bribes required that the defendant act "corruptly," and the courts of appeals had held that "corruptly" in that context required proof of an intent to propose or effectuate a *quid pro quo* transaction. *See, e.g., United States v. Strand*, 574 F.2d 993, 995 (9th Cir. 1978) ("It is this element of *quid pro quo* that distinguishes the heightened criminal intent requisite under the bribery sections of the statute from the simple *mens rea* required for violation of the gratuity sections"); *United States v. Johnson*, 621 F.2d 1073, 1076 (10th Cir. 1980) (same); *United States v. Brewster*, 506 F.2d 62, 71, 82 (D.C. Cir. 1974) ("*Brewster*") (same). *See also* Part II *infra* (developing this point further).

Third, because it is part of our "well-recognized common-law heritage" that a *quid pro quo* transaction is corrupt and criminal, *Evans*, 504 U.S. at 268 n.20, it would not implicate due process or First Amendment concerns to construe "corruptly" in § 666 to reach such transactions. Put another way, the *quid pro quo* test of corruption "presents a justiciable

standard with a relatively clear limiting principle." *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in part and dissenting in part).

Conversely, while there is a traditional and generally accepted understanding that *quid pro quo* bribery is corrupt, there is no such understanding that all campaign contributions and other gratuities provided to public officials to reward them for previously taken or announced official acts are corrupt. Nor is there any widely accepted rubric—let alone one with a common-law heritage—for separating non-corrupt gratuities to public officials from corrupt ones.

In these circumstances, it plainly would implicate fair-notice and democratic-participation values to construe § 666 as a statute that makes the lawfulness of the gift or acceptance of "anything of value" "for the benefit of any person" turn on a jury's attempt to define what "corruptly" might mean. Indeed, in an analogous context, this Court rejected the government's argument that the word "corruptly" in the *mens rea* component of a criminal statute was sufficient to cure the vagueness problems created by the government's sweepingly broad interpretation of the language comprising the *actus reus* component. *See Marinello*, 138 S. Ct. at 1108-09. The problem was that the word "corruptly" was so subjective, absent some limiting gloss, that it "risk[ed] allowing … 'prosecutors[] and juries to pursue their personal predilections'" in separating the culpable from the innocent. *Id.* (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)). The same would be true here, absent a construction of the phrase "corruptly …

intending to be … rewarded," that grounds it in the traditional and objective *quid pro quo* standard of corruption.[2]

To be sure, the government does not suggest that jurors in § 666 cases should simply be given the text of the statute and asked to apply their own definition of the word "corruptly" to the facts before them. But the definition the government has proffered to the Court hardly gives jurors any more guidance than does the bare word itself in separating criminal from innocent gratuities. The government says that "corruptly" means acting in a manner that is "wrongful, immoral, depraved, *or* evil." BIO 14 (quoting *Arthur Andersen LLP v. United States*, 544 U.S. 696, 705 (2005)) (emphasis added). Thus, according to the government a jury can convict if it finds a gift to be "wrongful" or "immoral" even if not depraved and evil. But in the context of campaign contributions and other gratuities to public officials, the words "wrongful" and "immoral" are of little assistance, as there is no general understanding, national consensus, or objective standard for distinguishing gifts that are "wrongful" or "immoral"

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[2] The term "corruptly," when unaccompanied by a statutory definition or a narrowing judicial construction, is sufficiently nebulous that the American Law Institute, in discussing bribery and related offenses, has stated that "the requirement of 'corrupt' purpose provides virtually no guidance," that "use of the general term 'corruptly' should be abandoned," and "that the issues with which it deals should be addressed more particularly." Model Penal Code § 240.1 cmt. at 5, 8 (1962). *See generally* Eric J. Tamashasky, *The Lewis Carroll Offense: The Ever-Changing Meaning of "Corruptly" Within the Federal Criminal Law*, 31 J. Legis. 129 (2004).

from those that are neither—except, of course, the traditional *quid pro quo* standard.

C. The difficulties with the government's interpretation of § 666 are exacerbated, not mitigated, by the government's assurance that its interpretation excludes from § 666's ambit "legitimate campaign contributions" made by a constituent or interest group with the intent of "rewarding" an elected official after the fact for conduct in office that the constituent or group considers worthy of recognition. BIO 18. That is because there is no textual basis in § 666 for categorically exempting campaign contributions, but not other types of gifts, from its reach.

To suggest that there is such a textual basis, the government cites the D.C. Circuit's 1974 decision in *Brewster*. BIO 18. In *Brewster*, however, the criminal provision at issue—the gift-ban provision applicable to federal officials—was worded quite differently from § 666.

For starters, that provision, which was then codified at 18 U.S.C. § 201(g), omitted the word "corruptly," *see Brewster*, 506 F.2d at 67—the very word that the government suggests is the basis in § 666 for excluding campaign contributions from its reach. BIO 18. Equally to the point, not only did the provision omit that word, it *included* two important words nowhere to be found in § 666, which required the government to prove that the federal official asked for or accepted a thing of value that was "*for himself*." Act of Oct. 23, 1962, § 201(g), Pub. L. No. 87-849, 76 Stat. at 1120 (emphasis added). The *Brewster* court held that, by using the phrase "for himself," Congress

excluded "contributions directed to a lawfully conducted campaign committee or other person or entity." 506 F.2d at 77.[3] *See also* Part II *infra* (further developing this point). In other words, the textual basis for the campaign-contribution exclusion in *Brewster* was a phrase that is conspicuously absent from § 666. Under § 666, as properly construed, campaign contributions made to show appreciation for official acts already taken plainly do qualify as "anything of value" "for the benefit of any person," but the reason such contributions do not expose the donor or recipient to criminal liability is because the "corruptly" element of the offense requires intent to propose or effectuate a *quid pro quo*.

While it is sufficient to say that there is no basis in text for treating campaign contributions as categorically different from other gifts in § 666, it bears noting that there is likewise no basis in experience for doing so. Contributions to campaign committees are far from the only type of "thing of value" that public officials, without even a hint of impropriety, frequently solicit in order to benefit

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[3] In November 1986, contemporaneously with the adoption of the current version of § 666, Congress renumbered § 201's subsections and made other non-substantive changes to § 201, including substituting the gender-neutral term "personally" for the phrase "for himself" that had appeared in the version of the statute construed by the court in *Brewster*. *See* Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 46(c), 100 Stat. 3592, 3602 (codified as amended at 18 U.S.C. § 201(c)). We cite to the pre-1986 version of § 201(g) both because it was that version which was operative when Congress was drafting the version of § 666 at issue in this case and because the pertinent pre-§ 666 case law refers to the subsections of § 201 by their old numbers.

third-party persons or entities. For example, public officials often help their departing or former staff employees find work in the private sector, and, in so doing, may ask a particular employer to hire such an individual in the belief that the person is qualified for the job. Public officials may also ask private-sector employers to hire veterans in their district returning from war or qualified ex-offenders who are trying to rehabilitate themselves. In *United States v. Sun-Diamond Growers of California*, this Court identified other common examples of gifts, wholly apart from campaign contributions, that are not generally understood to be marked by the kind of impropriety that would fall within the ambit of a criminal statute. 526 U.S. 398, 406-07 (1999).

D. Against all this, the government has argued that if "corruptly" in § 666 were construed to reach only actual or proposed *quid pro quo* arrangements, the phrase "or rewarded" in § 666(a)(1)(B) would be rendered superfluous. BIO 14. The Government is seriously mistaken. The phrase "or rewarded" does independent work in any case where a public official, without publicly announcing the fact, decides to vote in favor of or against a particular piece of legislation while nevertheless creating the impression that his vote is for sale. Consider, for example, a public official who knows he will vote to support a proposed redevelopment project but approaches construction firms who will benefit from the vote and misleads them into paying him for that vote. If the phrase "or rewarded" were struck from § 666(a)(1)(B), the official would escape punishment because he was not "intending to be influenced" in carrying out this scheme. The inclusion of the phrase "or rewarded"

thus ensures that such an official is covered by the statute, as he surely is "intending to be … rewarded" even if not "intending to be influenced."

In sum, the inclusion of the phrase "or rewarded" is fully consistent with the proposition that § 666 is aimed only at *quid pro quo* transactions. *See Evans*, 504 U.S. at 274 (Kennedy, J., concurring) ("The requirement of a *quid pro quo* means that without pretense of any entitlement to the payment, a public official … intends the payor to believe that absent payment the official is likely to abuse his office and his trust to the detriment and injury of the prospective payor or to give the prospective payor less favorable treatment if the *quid pro quo* is not satisfied.")

* * *

None of this is to say that the Due Process Clause or First Amendment deprives Congress or the States of the constitutional *power* to criminalize or otherwise regulate the acceptance or provision of a precisely defined category of non-*quid-pro-quo* gifts to elected officials. It is only to say that, given the manner in which § 666 was drafted, it would be contrary to the canon of constitutional avoidance—and to this Court's method of interpreting similar statutes in *McCormick, Evans, McDonnell*, *Skilling*, and *Marinello*—to conclude that Congress enacted a broad gift ban in § 666. As the Court observed in *Sun-Diamond*, when "when Congress has wanted to adopt such a broadly prophylactic criminal prohibition upon gift giving, it has done so in a more precise and more administrable fashion." 526 U.S. at 408.

II. Congress's Departure from the Language It Had Used in Enacting a True Gift Ban Compels the Conclusion That § 666 Is a Ban Only on Bribery and Not on Gifts

There is another reason for rejecting the government's proffered construction of § 666. As we foreshadowed in Part I, when Congress enacted the current version of § 666, it knew how to draft a gift-ban statute identifying which gratuities were deserving of criminal punishment and which were not. It had already done so in a separate provision of the criminal code of which Congress was well aware. Yet Congress chose to use materially different language when it drafted § 666 than it had used in that gift-ban provision. The government's proffered construction of § 666 renders Congress's choice to use that different language inexplicable and would impute to Congress the anomalous intention to expose state officials to criminal liability for a broader range of conduct than federal officials. Conversely, construing § 666 to reach only the solicitation or acceptance of contributions that are tainted by an actual or proposed *quid pro quo* makes perfect sense of Congress's drafting choices and results in no anomalies.

A. In 1962, Congress enacted 18 U.S.C. § 201 to consolidate then-existing bribery laws "applicable to various categories of persons—Government employees, Members of Congress, judges, and others" into one provision which applied to "officers and employees of the three branches of [the federal] government, jurors, and other persons carrying on activities for or on behalf of the [federal]

Government." S. Rep. No. 87-2213, *as reprinted in* 1962 U.S.C.C.A.N. 3852, 3856. Section 201 delineated two distinct but related criminal offenses that regulated federal officials' conduct: a bribery offense in § 201(c)(1), the violation of which could lead to a fifteen-year term of imprisonment; and an illegal gratuity offense in § 201(g), which could lead to a two-year term of imprisonment. Act of Oct. 23, 1962, Pub. L. No. 87-849, §§ 201(c), (g), 76 Stat. at 1120 (1962). "The punishments prescribed for the two offenses," as the Court has explained, "reflect their relative seriousness." *Sun-Diamond*, 526 U.S. at 405.

Section 201(c)(1), the bribery provision, deemed criminally liable a public official who "corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive any thing of value for himself or for any other person or entity, in return for: (1) being influenced in his performance of any official act." Pub. L. No. 87-849, 76 Stat. at 1120.[4]

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[4] The full text of § 201(c) provided for a prison sentence of up to fifteen years to:

> Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:
>
> (1) being influenced in his performance of any official act

Section 201(g), the gratuity provision, used the same series of eight verbs ("asks, demands [etc.]") as its bribery counterpart, but it did not require proof that the "[]thing of value" be "in return for" influencing the official's performance of an official act. Pub. L. No. 87-849, 76 Stat. at 1120.[5] The gratuity provision also contained other differences in language distinguishing it from the bribery provision, including two of crucial importance here.

First, the gratuity provision omitted the word "corruptly" to modify the series of eight verbs. That omission was significant because it indicated that Congress was criminalizing acts it considered culpable but not necessarily corrupt—acts this Court described in *Sun-Diamond* as "merely a reward," as distinguished from "a *quid pro quo*" involving "a specific intent to give or receive something of value *in exchange* for an official act." 526 U.S. at 404-05 (emphasis in original). In keeping with that understanding, the lower federal courts had consistently construed "corruptly" in former

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[5] The full text of § 201(g) provided for a prison sentence of up to two years to:

> Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided for law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him

§ 201(c)(1) to require proof of a specific intent to solicit or accept a *quid pro quo* transaction. *See Strand*, 574 F.2d at 995; *Johnson*, 621 F.2d at 1076; *Brewster*, 506 F.2d at 71, 82.

Second, the gratuity provision omitted the phrase "or for any other person" that appeared after "for himself" in the bribery provision. Pub. L. No. 87-849, 76 Stat. 1119, 1120. That omission was significant because it indicated that Congress did not even consider it culpable for a public official to solicit a gratuity for the benefit of a third party, including—of particular significance to *amicus curiae* here—a gratuity in the form of a "bona fide contribution[] directed to a lawfully conducted campaign committee or other person or entity." *Brewster*, 506 F.2d at 77. In other words, by keeping the phrase "for himself" but omitting the phrase "or for any other person," Congress evinced a clear intent in the gratuity provision to punish with criminal sanctions only *personal gifts* made to reward official acts. *Id.*

B. Section 666(a)(1)(B) closely tracks the language of the original federal officer *bribery* provision in § 201(c)(1) but departs dramatically from the language of the *gratuity* provision in § 201(g) in two important respects.

First. Section 666—like the bribery provision but unlike the gratuity provision—places the adverb "corruptly" immediately before the series of verbs in § 666(a)(1)(B) that establish the activities from which a conviction under the statute may result. *See* 18 U.S.C. § 666(a)(1)(B) ("Whoever … corruptly solicits or demands for the benefit of any person, or accepts or

agrees to accept, anything of value from any person"). And the lower-court decisions in *Strand*, *Johnson*, and *Brewster* that had construed "corruptly" in § 201 to require proof of an intent to solicit or accept a *quid pro quo*, *see supra* p.11, were decided in the 1970s—well before § 666 was enacted.

Congress is of course presumed to be aware of lower-court constructions of pre-existing statutes related to the one it is enacting. *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). And here, that presumption is not even necessary, for this Court observed in *Salinas v. United States* that Congress, in enacting § 666, had § 201 and its prior judicial construction firmly in mind. 522 U.S. 52, 58-59 (1997). When a statutory term is "'obviously transplanted from another legal source,'" it "'brings the old soil with it.'" *Hall v. Hall*, 138 S. Ct. 1118, 1128 (2018) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)).

Thus, the most straightforward explanation of § 666's similarity to § 201's bribery component and dissimilarity from its gratuity component is this: The word "corruptly" in § 666 performs the same function as it did in Section 201(c)—to make clear that a conviction under the statute requires proof of an intended *quid pro quo*.

Second. Section 666—like the bribery provision of § 201 but unlike its gratuity provision—applies even where the thing of value was solicited, not for the public official "himself," but for a third party. That breadth makes perfect sense if, but only if, § 666 is aimed at conduct that is inherently corrupt, as are

quid pro quo exchanges in all their forms whenever the "*quo*" is an official act. *See Salinas*, 522 U.S. at 56-57 (noting Section 666's "expansive, unqualified language, both as to the bribes forbidden and the entities covered"). By the same token, that breadth would make little sense if it covered requests for contributions to bona fide campaign committees or the other kinds of common and innocuous requests described *supra* pp.15-16 that are made not for the public official's personal enrichment, but for the benefit of independent third parties.

What is more, if § 666 were interpreted, as the government would have it, to cover requests that public officials make for the benefit of third parties, a perverse anomaly would result as between the way federal criminal law treats federal officials and the way it would treat state officials. Even though the conduct of federal officials is obviously of greater concern to Congress than is the conduct of state officials who are separately regulated by state law, federal officials would, on the government's interpretation, be subject to substantively lighter federal regulation under § 201 than their state counterparts would be under § 666. A federal official could make a solicitation for the benefit of a third party as an after-the-fact "reward[]" without fear that the solicitation would be reached by the gift-ban provision of § 201, as that ban is limited to solicitations made by the official "for himself." *See supra* n.5. But a state official who made the same solicitation under parallel circumstances would be exposed to a criminal prosecution under § 666, as § 666 regulates solicitations "for the benefit of any person." 18 U.S.C. § 666(a)(1)(B).

To be more concrete, a member of Congress, a federal judge, or other federal official who requested of a private employer that it hire a qualified departing staffer, clerk, or other person the official considered worthy of employment would be categorically outside the reach of § 201's gift ban provision; but a city council member, state-court judge, or other local official who made an identical request would be subject to the purported gift ban that the government claims is embedded within § 666. Thus, more than just generating an "'odd' *sentencing* disparity between state, local, and federal officials convicted under gratuity theories," Pet. 13 (quoting Pet.App.41a) (emphasis added), the government's position here would generate an odd disparity in the *substantive rules of conduct* as between federal officials and their state and local counterparts—a disparity that would run counter to ordinary federalism principles by injecting the federal government more deeply into state officials' affairs than into those of federal officials.

This anomaly disappears when § 666 is construed to mirror the scope of § 201's bribery provision, but not its gratuity provision. On that construction, state officials stand on the same footing as federal officials with respect to the scope of their conduct that is subject to criminal regulation. This provides yet another reason to construe § 666 to extend only to the solicitation or acceptance of contributions that are tainted by an actual or proposed *quid pro quo*.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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