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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—continued:

Constitution, Statutes, and Regulations:

Page

Constitution, Statutes, and Regulations—continued:

Other Authorities:

Page

Other Authorities—continued:

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The government's case hinges on its contention that the word "rewarded" unambiguously encompasses gratuities. But depending on context, "rewarded" can refer to gratuities *or* bribes. All tools of statutory construction confirm that section 666 uses "rewarded" to refer to bribes only.

The government's reading makes section 666 apparently the only provision in the U.S. Code to couple lesser- and greater-included offenses together in the same sentence with the same penalty. The government identifies no gratuity statute that looks like section 666. The government relies on 18 U.S.C. § 215, which carries a 30-year maximum sentence for bank officials. But the government identifies no case holding that section 215

criminalizes gratuities, and the Ninth Circuit has held otherwise.

Section 666's "corruptly" mens rea naturally refers to bribery only. The federal-official bribery statute, section 201(b), criminalizes "corrupt[]" bribes. But section 201(c) criminalizes gratuities without requiring corrupt intent. Until this Court, the government maintained that "corruptly" in section 666 required only knowingly accepting a gratuity. Although that reading aligned section 666 with section 201(c), that reading drained "corruptly" of independent meaning. Br. 24-25. Apparently recognizing as much, the government (at 38-39) now says that "corruptly" under section 666 requires "wrongful, immoral, depraved, or evil" intent.

Even putting aside that the jury was never charged on that theory, the government's new definition walks the government into a different set of problems. The government offers no way to tell what makes a gratuity wrongful. The government (at 15, 17, 36, 39) promises that individuals "need not have any fear" if they "follow commonplace ethics rules" or receive "benign" or "innocuous" gifts. But what those rules are and what gifts are acceptable is anyone's guess.

The government's brief also does nothing to solve the startling and implausible breadth of its reading, which presumes that Congress intended that federal prosecutors should second-guess municipal ethics. And the government's position still leaves glaring First Amendment problems, criminalizing virtually all campaign contributions to state or local incumbents that prosecutors deem "immoral."

The government also does not explain why Congress would have subjected federal officials to a *two*-year maximum sentence for gratuities under section 201(c), but subjected every state, local, and tribal official, plus countless private individuals, to a *ten*-year maximum under section 666. Moreover, federal and banking officials are apparently protected by extensive regulations delineating prohibited gifts. Yet in the government's world, Congress hung everyone else out to dry, without prior notice of how to avoid criminal liability.

I. Section 666(a)(1)(B) Criminalizes Bribery Only

The government (at 21, 25) concedes that if section 666 just said "corruptly … intending to be influenced," the statute would cover bribery only. Where the government errs is arguing that "or rewarded" transforms section 666 into an additional gratuities offense.

A. Section 666's Text Excludes Gratuities

1. "Rewarded" Refers to Bribery

a. The government (at 19-20) argues that the ordinary meaning of "reward" encompasses gratuities—as when someone returns a lost wallet hoping to be "rewarded." *Accord United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 405 (1999) (referring to "gratuit[ies]" as "reward[s]"). But the government (at 22) rightly acknowledges that "reward" also can refer "solely" to bribes—as when someone is "rewarded" for returning a wallet spurred by the owner's prior offer of payment. Br. 17-18.

Here, Congress manifestly used "rewarded" to refer to bribes. Section 666's text would be an extremely awkward way to prohibit gratuities. On the government's reading, Congress made it a crime to corruptly accept a

gift ("anything of value"), intending to be gifted ("rewarded"). Yet everyone who accepts gifts intends to be gifted. Congress could have omitted "intending to be … rewarded" and simply criminalized corruptly accepting anything of value in connection with official business.

Historical usage confirms that section 666 uses "rewarded" to refer to bribes. Common-law authorities frequently used "reward" to describe bribery. Br. 18. Congress has long done the same. Br. 18-20 (collecting statutes); U.S. Br. 22-23 (same). The government (at 23) responds that bribery statutes using "reward" contain "express textual limits" that section 666 lacks. For instance, 18 U.S.C. § 600 prohibits "promis[ing] any employment … as consideration, favor, or reward for any political activity." And the 1790 Crimes Act criminalized giving a "bribe, present or reward … to obtain or procure" a federal-court judgment. Ch. 9, § 21, 1 Stat. 112, 117. Section 666's undisputed bribery language ("corruptly … intending to be influenced") serves the same function, showing that, in section 666, "rewarded" likewise means payments in exchange for official conduct.

The government (at 17-18, 21, 35) suggests that individual Justices have endorsed its reading. Justice Scalia's dissent from the denial of certiorari in *Sorich v. United States*, an honest-services-fraud case, stated that laws can provide "clear rules against certain types of corrupt behavior" and then cited section 666 with the parenthetical "bribes and gratuities to public officials." 555 U.S. 1204, 1207 (2009). If such fleeting descriptions are probative, the better source would be three of this Court's opinions, which 24 times refer to section 666 as a "bribery" statute without ever mentioning "gratuities." *Sabri v. United States*, 541 U.S. 600, 602, 604-07 (2004) (7 times); *Fischer v. United States*, 529 U.S. 667, 669, 671, 678, 681 (2000) (5

times); *Salinas v. United States*, 522 U.S. 52, 54-61 (1997) (12 times). The government (at 21) also invokes then-Judge Sotomayor's opinion in *United States v. Ganim*, which merely paraphrases circuit precedent holding that "rewarded" in section 666 "connotes an illegal gratuity." 510 F.3d 134, 150 (2d Cir. 2007) (citing *United States v. Bonito*, 57 F.3d 167, 171 (2d Cir. 1995)).

b. The government (at 23-25) says "[p]etitioner's reading assigns 'rewarded' no role." Not so. "[I]ntending to be influenced" covers bribes that alter officials' actions—*e.g.*, changing votes in exchange for payment. "[I]ntending to be … rewarded" further covers officials who supposedly would have taken the same action absent a bribe (or, conversely, who say they never intended to take the action and just wanted the money). And "intending to be … rewarded" covers officials who solicit or receive future payments contingent on official acts now. Together, "intending to be influenced or rewarded" prohibits different ways of taking bribes, not "two differing crim[es]." ACLJ Br. 10-11; *accord* Br. 20-22; LIUNA Br. 16-17.

The government (at 21, 23-24) responds that "intending to be influenced" already covers officials who purportedly would have acted the same way regardless. But to "influence" means to "affect" or "to cause a change in." Br. 17 (citing dictionaries). Section 666's "rewarded" language ensures that bribed officials cannot argue that they did not "intend[]" to be "affect[ed]" or "change[d]" when they would have taken the same action regardless.

On this score, section 666 critically differs from section 201(b). As the government (at 24) notes, section 201(b)(2)'s ban on accepting payments "in return for … being influenced in the performance of any official act" covers officials who do not "in fact intend to perform the

'official act,' so long as [they] agree[] to do so." *McDonnell v. United States*, 579 U.S. 550, 572 (2016). Section 201(b) thus uses "influenced" to describe the terms of the prohibited bargain ("anything of value … in return for … being influenced"). But section 666 defendants must "*intend*[] to be influenced." In other words, "Section 201 lacks an explicit intent requirement as to recipients of alleged bribes while Section 666 contains one." *United States v. Ford*, 435 F.3d 204, 210 n.2 (2d Cir. 2006). Section 666 therefore needs "rewarded" to clarify that the statute covers bribes that do not actually alter outcomes.

As for officials who solicit future payments contingent on official acts now, the government (at 24-25) contends that "intending to be influenced" already bars "that payment structure." But the more natural phrasing is that an official requesting later payment "intend[s] to be … rewarded," rather than "influenced." *See United States v. Fernandez*, 722 F.3d 1, 23 (1st Cir. 2013).

Even if "intending to be influenced" in section 666 arguably covers these two scenarios, that interpretation is far from obvious. Congress might have included "rewarded" as belt-and-suspenders to ensure that section 666 covered all bribe-takers—creating overlap as it did throughout section 666. Br. 21-22.

2. The Government's Reading Creates Superfluity and Untenable Anomalies

Regardless, the government has a worse superfluity problem. Without noting the irony, the government (at 25) argues that "influenced" is belt-and-suspenders that merely "eliminate[s] any ambiguity as to whether the statute also prohibits … up-front *quid pro quo* payments." But the government's reading does not just read out "influenced." It makes the entire bribery offense

superfluous. Br. 22-23; WLF/DPI Br. 14-15. Because gratuities are a lesser-included offense of bribery, prosecutors could always obtain section 666 convictions on a gratuity theory without ever proving a quid pro quo. The government identifies no statute anywhere in the U.S. Code that couples greater- and lesser-included offenses in the same sentence with the same penalty.

The government denies that gratuities are a lesser-included offense of bribery, notwithstanding its previous guidance to the contrary. Br. 22. The government (at 41) notes that bribery "includes conduct that would not be a gratuity." Obviously—which is why bribery is a *greater* offense requiring the quid pro quo element absent from a gratuity offense. Under *Blockburger v. United States*, offenses are separate only when "each provision requires proof of a fact which the other does not." 284 U.S. 299, 304 (1932). *Gratuities* require proof of no fact beyond bribery, just like larceny requires proof of no fact beyond robbery. The government's contrary theory would mean that the government could try defendants on a bribery-only theory and, following acquittal, retry the defendants on a gratuity theory. *See id.*

The government's theory would permit prosecutors to try every case, like this one, without specifying whether they are proving "a bribe or gratuity." J.A.79. If the jury convicts on a general verdict form, the government can, as here, argue at sentencing that it has proven bribery—triggering a higher Sentencing Guidelines range. 10/13/2021 Tr. 52:2-56:16, D. Ct. Dkt. 586; *see* U.S.S.G. §§ 2C1.1 (bribes), 2C1.2 (gratuities). The judge, not the jury, would decide the issue by a preponderance of the evidence, not beyond a reasonable doubt. *See United States v. O'Brien*, 560 U.S. 218, 224 (2010). While the district court rejected the government's argument for a bribery

Guidelines range here, 10/13/2021 Tr. 110:20-112:7, the government has every incentive to try the same troubling maneuver in every case.

3. "Corruptly" Refers to Bribery

Bribery statutes use "corruptly" to require the specific intent to exchange official conduct for money. Section 666 uses "corruptly" the same way. Br. 23-24.

The government (at 25-26) argues that "corruptly" "narrows the statute's scope … through a stringent mens rea requirement, not an artificially limited actus reus." But section 666(a)(1)(B)'s actus reus is to "solicit[] or demand[] … or accept[] or agree[] to accept[] anything of value." That same conduct could be a bribe or gratuity depending on the mental state. The phrase "corruptly … intending to be influenced or rewarded"—including the "rewarded" language on which the government relies—is the mens rea element.

Despite prosecuting countless defendants, including petitioner, on the theory that "corruptly" means "knowingly," the government now defines "corruptly" as "wrongful, immoral, depraved, or evil." U.S. Br. 38-39 (quoting *Arthur Andersen LLP v. United States*, 544 U.S. 696, 705 (2005)). The government cites no section 666 case using that definition, and petitioner is aware of none. *Arthur Andersen* interprets 18 U.S.C. § 1512(b), which pairs "knowingly … corruptly" with "intent to … cause or induce any person to" "withhold" or "alter" documents "for use in an official proceeding." 544 U.S. at 703. The meaning of "corruptly" necessarily depends on context. And in the bribery context, "corruptly" has long required a quid pro quo. Br. 23-24.

Notably, setting aside section 215, *infra* pp. 12-14, the government identifies no gratuity statute requiring "corrupt" intent. And the government offers no guidance on what gratuities would be "corrupt." At times (at 7, 41), the government suggests that gratuities are inherently corrupt, calling them "pernicious graft" that "inflict" "very real harm" and "undermine the public service as effectively as if the payments were the fruit of express corrupt agreement" (citation omitted).

The government (at 41) elsewhere suggests that "corrupt gratuities" are those that "give rise to deceitful behavior by their recipients, who may carry out their duties in a way designed to maximize the rewards to themselves instead of [their employer]." But which gifts skew official decision-making? Would it depend on the official's financial circumstances? Would it depend on the "part of the country," as the government has suggested in the bank-official context? *See* Br. 41. The government will not even commit to a minimum dollar threshold. Br. 37.

Moreover, section 201(c), which has no "corruptly" requirement, rests on the same concerns that the government uses to justify its interpretation of section 666. U.S. Br. 7. But the government never says how the two provisions relate. For instance, federal employees violate section 201(c) if they accept novels worth over $20, tote bags plus a Koozie if the combined value exceeds $20, or dinner-party invitations from regulated parties if not widely attended. *See* 5 C.F.R. § 2635.204. Are all of those gifts "corrupt[]" as to state, local, and tribal officials? If not, would it matter if the tote bag was designer or if the dinner party served caviar and champagne?

4. Title and Structure Confirm a Bribery Offense

Section 666's title—"Theft or bribery concerning programs receiving Federal funds"—confirms that section 666(a)(1)(B) criminalizes bribery only. Br. 26-27; *see* WLF/DPI Br. 13. The government (at 26) responds that section 201, the federal-official statute, criminalizes gratuities yet is entitled "Bribery of public officials and witnesses." But section 201 covers at least seven separate offenses, 18 U.S.C. § 201(b)(1)-(4), (c)(1)-(3), forcing the title to serve "the unenviable role of pithily summarizing a list of 'complicated and prolific' provisions." *Dubin v. United States*, 599 U.S. 110, 121 (2023) (citation omitted). Thus, Congress' "bribery" shorthand sheds little light on section 201's meaning. By contrast, section 666's title tracks its structure: subsection (a)(1)(A) prohibits theft and subsections (a)(1)(B) and (a)(2) prohibit bribery. The "title and text are mutually reinforcing," and "[b]oth point" to the absence of any gratuity offense. *See id.* at 127.

The government (at 26) invokes section 666(c)'s safe harbor for "bona fide … compensation" "in the usual course of business." According to the government, that provision suggests that section 666 criminalizes gratuities because "wages[] and the like are far more likely to be mistaken for a gratuity than for a *quid pro quo* bribe." But the government offers nothing to back up that assertion. As petitioner (at 27) explained, bribes and gratuities are equally likely to be mistaken for compensation. The government has no rejoinder.

B. Section 666 Contrasts with Gratuity Statutes

The "sharp[] contrast[]" between section 666 and gratuity statutes confirms that section 666 does not cover gratuities. *See Marx v. Gen. Rev. Corp.*, 568 U.S. 371, 384

(2013). Congress knows how to criminalize bribes and gratuities and does so using separate provisions, with separate penalties. Br. 28-29.

Congress criminalizes bribes and gratuities in different terms. Br. 29-31; ACLJ Br. 6-10; LIUNA Br. 18-24. Bribery statutes require "a specific intent to give or receive something of value *in exchange* for an official act." *Sun-Diamond*, 526 U.S. at 404-05. Gratuity statutes prohibit accepting gifts outside normal compensation, regardless of intent.

Thus, the government's exemplar gratuity provisions (at 4-6, 20-21)—which uniformly cover the government's *own* officials—look nothing like section 666. For instance, 18 U.S.C. § 1912 bars federal shipping inspectors from accepting any unauthorized "fee or reward for [their] services"—prohibiting all outside compensation without requiring specific intent. *Accord* 22 U.S.C. § 4202 (consular officers). Likewise, 26 U.S.C. § 7214(a)(2) prohibits IRS agents from "knowingly … receiv[ing] any fee, compensation or reward … for the performance of any duty." Again, the law bars outside compensation generally, without any specific-intent requirement. The Emoluments Clauses similarly categorically bar federal officials from accepting "present[s]" or "Emolument[s]" from prohibited sources. U.S. Const. art. I, § 9, cl. 8; *id.* art. II, § 1, cl. 7. And early statutes prohibited outside compensation like "gratuit[ies]," "gift[s]," or "fee[s]." *E.g.*, Act of Dec. 31, 1792, ch. 1, § 26, 1 Stat. 287, 298; Act of Feb. 26, 1853, ch. 81, §§ 2-3, 10 Stat. 170, 170; Ch. 15, § 1, 9 Va. Stat. 389, 389 (Oct. 1777). If Congress wanted to prohibit gratuities, it had ample models to choose from.

Congress also typically attaches significantly lower penalties to gratuities than to bribes, reflecting the offenses' "relative seriousness." *Sun-Diamond*, 526 U.S. at

405; Br. 32-33; NACDL Br. 14; WLF/DPI Br. 15. The government's interpretation bizarrely punishes both offenses with the same ten-year statutory maximum—five times the penalty for gratuities to most federal officials. The government does not explain why Congress would have intended that result.

The government (at 42 n.2) claims that lengthy gratuity maximums are common. But again setting aside section 215, *infra* pp. 12-14, the government's only two current examples, 18 U.S.C. § 1422 and 26 U.S.C. § 7214(a), are five-year maximum sentences for outside compensation to immigration and tax officials—well below section 666's ten-year maximum. That leaves 18 U.S.C. §§ 206-207 (1958), which carried fifteen-year maximum sentences for federal judges who accepted "bribe[s], present[s] or reward[s]" and those offering such payments. Congress repealed that penalty in 1962, lumping judges with other federal officials subject to a two-year maximum for gratuities and a fifteen-year maximum for bribes. *See* Pub. L. No. 87-849, 76 Stat. 1119 (1962). That long-repealed, judge-specific provision hardly supports a comparable regime for state, local, and tribal officials.

C. Statutory History Supports Petitioner's Reading

As originally enacted in 1984, section 666 criminalized payments "for or because of" official business—language that covered gratuities. U.S. Br. 27-29. In November 1986, Congress deleted that language. This Court does not ordinarily "reinstate statutory language removed by Congress." *Wilkinson v. Garland*, No. 22-666, slip op. at 14 (2024); *see* Br. 34-35; ACLJ Br. 13-14. Moreover, were the government correct that Congress carried forward a

gratuity offense, Congress had no reason to add superfluous new language covering bribery separately from gratuities, yet subjecting both to the same penalty.

The government (at 29-31) claims that the "retooled" section 666 still reaches gratuities based on the legislative history of the bank-bribery statute, 18 U.S.C. § 215. The government (at 29) reasons that because section 215's materially identical language "is well understood to cover gratuities," section 666 also covers gratuities.

But the government's premise is incorrect. The Ninth Circuit has held that section 215 does not reach gratuities: "'[t]o corrupt' is a standard synonym for 'to bribe,'" so "'[r]eward'" in section 215 is no "different from a bribe." *United States v. Rodrigues*, 159 F.3d 439, 450 (9th Cir. 1998); *accord United States v. Lonich*, 23 F.4th 881, 902-03 (9th Cir. 2022). To petitioner's knowledge, only dicta from an unpublished decision has suggested otherwise. *United States v. Kaufman*, 2023 WL 1871669, at *2 (2d Cir. Feb. 10, 2023).

The government's understanding of section 215 exclusively rests on section 215's legislative history and regulations post-dating section 666's enactment. Until 1986, section 215 prohibited bank officers from accepting "anything of value … for or in connection with" bank business. 18 U.S.C. § 215(a) (Supp. II 1984). Like "for or because of," "for or in connection with" covered gratuities. But that language, "read literally," would "reach[] all kinds of otherwise legitimate and acceptable conduct" like letting a customer pay for a business lunch. H.R. Rep. No. 99-335, at 3 (1985) (citation omitted). In August 1986, Congress thus deleted "for or in connection with" and inserted "corruptly … intending to be influenced or rewarded," Pub. L. No. 99-370, § 2, 100 Stat. 779, 779—

the same bribery-focused language Congress later added to section 666.

The government (at 30) cites a footnote in the House Report and testimony from a trade-association lawyer assuming that the revised version still covered some gratuities. The Justice Department notably opposed any amendments to the original section 215 because the government wanted to prosecute not just bribery but also "the receipt of gratuities"—addressing concerns about section 215's breadth by promising not to prosecute "reasonable" conduct. *Bank Bribery: Hearings on H.R. 2617, H.R. 2839 & H.R. 3511*, 99th Cong. 3-4 (1985) (statement of Victoria Toensing, Deputy Ass't Att'y Gen.). Yet Congress declined to "trust [the government's] prosecutorial judgment" and revised section 215 to its current form. H.R. Rep. No. 99-335, at 5. Thus, even if parsing a different statute's legislative history were a valid mode of statutory interpretation, section 215's history is at best mixed. And section 666's own House Report describes both sections 215 and 666 exclusively as "bribery" statutes. H.R. Rep. No. 99-797, at 30 n.9 (1986).

The government (at 31) invokes circa-1987 regulations purporting to exclude certain gratuities from section 215's coverage. By excluding some gratuities, the government argues, those regulations presume that section 215 criminalizes other gratuities. The government reasons that Congress implicitly blessed that assumption in 1989 by raising section 215's maximum penalty without otherwise amending the statute. Whatever the merits of that multistep inferential chain, this history *postdates* the 1986 enactment of section 666's operative text. If anything, the extensive guidance in the banking context confirms the massive vagueness problems with extending section 666 to gratuities. Br. 41-42.

II. A Gratuity Offense Is Implausibly Broad and Constitutionally Troubling

Common sense and constitutional avoidance further counsel against criminalizing gift-giving to every state, local, and tribal official in America.

A. The Government's Reading Is Untenably Vast and Creates Vagueness Problems

1. The government's interpretation is staggeringly broad, subjecting 19.2 million state and local officials, thousands of tribal officials, and untold millions of private employees to expansive, ill-defined liability. Br. 36-39; NACDL Br. 4-11; SOP Clinic Br. 11-13; WLF/DPI Br. 8-24. The government (at 35) dismisses these concerns as "policy arguments," citing a civil case. But in the "criminal" context, this Court "avoid[s] reading incongruous breadth into opaque language." *Dubin*, 599 U.S. at 130.

Section 666 covers every entity accepting over $10,000 annually in federal benefits. 18 U.S.C. § 666(b). The government's interpretation thus undisputedly reaches virtually every state, local, and tribal official and every person who gives them gifts. Br. 36-37. The government (at 40) minimizes section 666's application to private businesses as an anomaly of pandemic-era relief programs. But Congress continually creates new spending programs. And section 666 already reaches countless private businesses, including virtually every healthcare provider and university. Br. 36-37. Last year alone, the federal government made 197,000 grants, NACDL Br. 7 n.5, to entities such as Lockheed Martin (for Department of Defense research), a Toyota dealership and a direct-to-consumer lobster company (under USDA's Rural Energy for America Program), and the Metropolitan Museum of

Art and the Dr. Pepper Museum (from the National Endowments for the Humanities). *USASpending.gov*, https://tinyurl.com/9v6c2djx. The government routinely prosecutes private employees or those paying them under section 666. NACDL Br. 8 n.7 (collecting cases).

The government (at 17, 37) says that gifts "for small kindnesses or overall service" are safe because the payment must be "in connection with any business, transaction, or series of transactions" worth over $5,000. 18 U.S.C. § 666(a)(1)(B). The government (at 37-38) says that this language "parallels" section 201's "official act" requirement and "requires a nexus with a specific and significant activity."

The government previously pushed the opposite view, persuading several circuits that "section [666] is more expansive than § 201," *United States v. Boyland*, 862 F.3d 279, 291 (2d Cir. 2017), because section 666 does "not import[] an 'official act' requirement," *United States v. Roberson*, 998 F.3d 1237, 1247 (11th Cir. 2021) (collecting cases). The government's need to concede away countless previous convictions is troubling enough. But even the "specific and significant activity" requirement leaves section 666 expansive. Helping students with papers, plowing roads, processing marriage licenses, and restoring power apparently all count as "specific and significant activit[ies]" in the government's view, as the government (at 38) distinguishes these hypotheticals solely under the $5,000 threshold.

But the $5,000 threshold is easily met. Br. 37-38. The government (at 38) conspicuously ignores petitioner's hypotheticals, but posits its own examples that involve official conduct worth less than $5,000, like a teacher helping a student with a single paper. But tutoring the student all year would easily meet the threshold. Courts

have found the $5,000 requirement satisfied for minor business and "intangible benefits" like jailhouse conjugal visits, expediting eviction proceedings, and renewing liquor licenses. *United States v. Robinson*, 663 F.3d 265, 273-74 (7th Cir. 2011) (collecting cases).

Section 666(c)'s exception for "bona fide … compensation" also does nothing to exclude gifts, business opportunities, and campaign contributions. Br. 38. The government never argues otherwise, asserting (at 36) only that "legitimate outside work" is safe. But in every case (like this one), the government will presumably argue that the at-issue payment was not "legitimate."

The government (at 35) argues that section 666's pre-1986 application to gratuities assuages concerns about the statute's breadth. But given Congress' swift repeal of the gratuities language, the better inference is that Congress recognized the problems with the original statute.

2. The government (at 39) falls back on section 666's "corruptly" requirement to avoid criminalizing "innocuous tokens of gratitude" or "obviously benign gifts." This Court has already held that a "corruptly" mens rea element does not adequately cabin prosecutorial discretion. *Marinello v. United States*, 584 U.S. 1, 10-11 (2018).

Regardless, the government's new, ill-defined limitation creates hopeless line-drawing problems inconsistent with fair notice. Br. 39-40. While the government (at 36) says that "benign" gifts are safe, the only hypothetical it (at 39) concedes is coffee and doughnuts to police officers from a crime victim's family. But what about tickets to a high-school football game? A college basketball game? The Eras Tour? Where a gratuity crosses the line from "benign" to "immoral" (U.S. Br. 39) or "give[s] rise to deceitful behavior" (U.S. Br. 41) is anyone's guess.

If the test is "immoral[ity]," does it matter what the official uses the gratuity for? Can an official accept cash for baby formula but not pornography? What about office supplies or clothing? Does a daily carpool ride from a government contractor risk skewing official behavior? What if the contractor instead pays for a daily UberX? Uber Black? Does each jury decide what is "evil"?

The government (at 39) says that officials who "s[eek] in good faith to follow commonplace ethics rules need not have any fear." But the government does not explain where one finds such rules. And if wrongfulness turns on the employer's ethics rules (U.S. Br. 17), the government does not explain how petitioner's conviction could stand, since the government never claims petitioner violated Indiana's and Portage's extensive ethics rules. Br. 44-45. Does the government reserve the right to second-guess employers' gift limits? *See* Br. 42. What if employers set no limits? And the government is tellingly silent on the Office of Government Ethics' extensive section 201(c) regulations purporting to protect federal officials from criminal prosecution. Br. 39, 43. No similar guidance exists for everyone covered by section 666.

The government (at 40-41) argues that previous prosecutions have not involved "innocuous conduct." But this Court will not "construe a criminal statute on the assumption that the Government will use it responsibly." *McDonnell*, 579 U.S. at 576 (citation omitted). Regardless, the government's track record is not reassuring. On a gratuity theory, the government prosecuted a county contractor for donating $2,000 for plaques and food at a luncheon honoring female judges. Local 150 Br. 3. The government prosecuted a city building inspector for soliciting donations for his favorite youth sports league. U.S. Att'y's Office, N.D. Cal., *San Francisco Senior Building*

Inspector Pleads Guilty to Accepting Illegal Gratuities (Dec. 9, 2022), https://tinyurl.com/6375c5zj. And the government has prosecuted campaign contributions. *United States v. Hamilton*, 46 F.4th 389, 391 (5th Cir. 2022).

B. The Government's Reading Undermines Federalism

The government's interpretation offends federalism, replacing calibrated state gratuity laws with a one-size-fits-all regime directed by federal prosecutors. Br. 42-46; ACLJ Br. 22-32; Madison Ctr. Br. 14-18; SOP Clinic Br. 5-10; WLF/DPI Br. 25-30. Gratuities also stretch section 666's Spending Clause rationale past the breaking point, given the "non-existent" federal interest in gratuities to state and local officials. SOP Clinic Br. 13; *see* Br. 46-48. Section 666's text offers nothing like the clear statement needed for such blatant encroachment on state authority.

The government (at 32) responds that *Sabri*, 541 U.S. 600, rejected a Spending Clause challenge to section 666. But *Sabri* reached that conclusion on the understanding that section 666 "proscrib[es] bribery." *Id.* at 602. Nothing suggests that States and localities clearly consented to liability for *gratuities*.

States' diverse approaches to gratuities belie the government's insistence (at 41) that gratuities are inherently a "type of pernicious graft." Many States choose not to criminalize gratuities for most officials, sensitive to the need for outside employment in many communities. Br. 43-46. Congress left state and local ethics to state and local governments, not federal prosecutorial discretion.

This case illustrates why the federal government should not be in charge of municipal ethics. The government (at 14, 18, 41) accuses Mayor Snyder of "steering" or "rigging" the bidding process for Peterbilt. There is nothing inherently wrongful with "steering," *i.e.*, tailoring

bid requirements to community needs. Madison Ctr. Br. 9. The government might equally allege that a coach "rigged" high-school sports tryouts for students who later give the coach chocolates or that a surgeon's receptionist "steered" earlier appointments to patients who later send flowers. The government never alleges that Mayor Snyder or the City violated any of the 277 Indiana Code provisions that govern government purchasing. Ind. Code §§ 5-22-1-0.1, to 5-22-22-12. Instead, the government's lead agent "didn't find that the City did anything wrong in awarding the first round of bids" to Peterbilt. 3/17/2021 Tr. 1681:5-10, D. Ct. Dkt. 595.

The government (at 9, 41) asserts that Portage could have saved $60,000 by not requesting the trucks within 150 days. But the government omits that the cheaper trucks lacked the engine type the city mechanic (a government witness) had requested. 3/11/2021 Tr. 684:19-686:20, D. Ct. Dkt. 591; 3/16/2021 Tr. 1534:1-20, D. Ct. Dkt. 594. Portage thus could not have lawfully selected the cheaper, non-responsive bid. Ind. Code § 5-22-7-8. And while the government (at 9) implies that Mayor Snyder knew about the 150-day timeline in advance, the testimony the government cites says the opposite: Mayor Snyder was told only "after we opened up the bid specs," *i.e.*, after they were made public. 3/16/2021 Tr. 1457:13-17. As the government's lead agent testified at the first trial: There was no "evidence that James Snyder directed the 150-day time frame." 1/24/2019 Tr. 162:12-15, D. Ct. Dkt. 337. State and local authorities—who actually understand the relevant rules—are best positioned to oversee municipal ethics.

C. The Government's Reading Risks Chilling First Amendment Activity

The government's interpretation risks criminalizing campaign contributions, "threaten[ing] to chill the very interactions that representational democracy depends upon." WLF/DPI Br. 3-4; *see* Br. 48-49; ACLJ Br. 16-18; Madison Ctr. Br. 4-8. The government (at 33) admits that its theory permits the prosecution of "gratuities disguised as campaign contributions." But the government never explains what counts as a "disguise[]" making otherwise legitimate contributions criminal.

This Court has permitted prosecutions for campaign contributions only where "proof of a *quid pro quo*" is "essential" for conviction. *McCormick v. United States*, 500 U.S. 257, 273 (1991) (cited at U.S. Br. 33). That limitation tracks the "important governmental interest in preventing … *quid pro quo* corruption" that can justify restrictions on speech. *Citizens United v. FEC*, 558 U.S. 310, 359 (2010). Prosecuting campaign contributions as gratuities—without any quid pro quo requirement—crosses the First Amendment line.

The government (at 33) puzzlingly argues that campaign contributions are more likely to be "gift[s]" than gratuities. But as the government's repeated use of the word "gift" (at 3-5, 7, 15, 19, 25) makes clear, "gift" is synonymous with "gratuity." All campaign contributions to incumbents could be gratuities, so long as donors intended to approve in-office conduct and the government's amorphous "corruptly" requirement is met. Br. 49.

The government (at 16, 33) urges courts to address that glaring First Amendment problem "in case-specific ways" without "facially narrow[ing] the statute." But petitioner did not bring a facial challenge. Petitioner argues

that section 666 does not criminalize gratuities because a contrary reading would raise serious constitutional concerns. In *McDonnell*, this Court similarly rejected an interpretation that "could cast a pall of potential prosecution over … campaign contribution[s]"—even though *McDonnell*'s facts did not involve campaign contributions. 579 U.S. at 575.

D. The Rule of Lenity Resolves Any Ambiguity

The government (at 35) does not dispute lenity's relevance, but argues that section 666 is unambiguous. That conclusion is incorrect. By inserting "rewarded" into an otherwise clear bribery statute, Congress did not unambiguously make federal prosecutors the national regulators of state and local politics.[1]

III. Vacatur Is Required Even if Section 666 Reaches Gratuities

The government tried this case, like countless others, on the theory that section 666 criminalizes knowing receipts of gratuities. The district court instructed the jury that "corruptly" means "act[ing] with the understanding that something of value is to be offered or given to reward." J.A.28. The government's refusal to defend that instruction—contrary to its longstanding position[2]—requires reversal, even if the Court concludes that section

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[1] The government (at 43 n.3) argues that if section 666 reaches only bribes, any error may be harmless. That argument is meritless given the district court's comments at sentencing. Cert. Reply 2, 4. Moreover, although the government (at 43 n.3) correctly notes that the district court rejected petitioner's argument that the evidence did not support a bribery conviction, petitioner challenged that holding before the Seventh Circuit. C.A. Br. 56.

[2] U.S. Br. 18-20, *United States v. Ford*, 435 F.3d 204 (2d Cir. 2006), 2004 WL 3769949; U.S. Br. 47, *United States v. Grace*, 568 F. App'x

666 reaches gratuities. *See Percoco v. United States*, 598 U.S. 319, 332 (2023); Br. 25.

The government (at 39) asserts that petitioner forfeited any objection to the "corruptly" instruction below, *i.e.*, that he should have anticipated that the government would offer a new theory in the brief in opposition. But petitioner undisputedly preserved the argument that "corruptly" requires a quid pro quo. Pet. 23; *see* Br. in Opp. 14-15 (addressing this argument without claiming forfeiture). And nothing is wrong with the district court's knowingly instruction, *so long as section 666 is limited to bribery*. Petitioner therefore proposed instructions under which the jury could convict only if petitioner *knowingly took a bribe*. J.A.18-19. The district court (at the government's urging) instead asked the jury to decide whether petitioner *knowingly took a gratuity*. J.A.27-28; Br. 24. Petitioner had no reason to request an instruction that would criminalize some subset of "immoral" gratuities. That request also would have been futile under Seventh Circuit precedent, which approved the district court's instruction verbatim. *United States v. Hawkins*, 777 F.3d 880, 882 (7th Cir. 2015).

In previous criminal cases where the Solicitor General floated a new theory, this Court vacated the conviction without asking whether the defendant preserved an objection to the government's new theory. *E.g.*, *Percoco*, 598 U.S. at 332; *Ciminelli v. United States*, 598 U.S. 306, 317 (2023); *Rewis v. United States*, 401 U.S. 808,

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344 (5th Cir. 2014), 2013 WL 8902129; U.S. Br. 38, *United States v. Velazquez-Corchado*, No. 13-2052 (1st Cir. Jan. 26, 2015), 2014 WL 2994358; U.S. Br. 56, *United States v. McGee*, 612 F.3d 627 (7th Cir. 2010), 2009 WL 6414308; U.S. Br. 28-37, *United States v. Hawkins*, 777 F.3d 880 (7th Cir. 2015), 2014 WL 7235681; U.S. Br. 40, *United States v. Johnson*, 874 F.3d 990 (7th Cir. 2017), 2016 WL 7186813.

814 (1971). At a minimum, the same course is appropriate here.

CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted,

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