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 U.S. Court of Appeals for the Seventh Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND DUE PROCESS INSTITUTE AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE [1]

Washington Legal Foundation is a non-profit public-interest law firm and policy center that promotes free enterprise, individual rights, limited government, and the rule of law, and Due Process Institute is a non-profit bipartisan public interest organization that seeks to ensure procedural fairness in the criminal justice system. Both often appear as amicus curiae in cases addressing the proper scope of vague, ambiguous, or unduly broad criminal statutes—the very circumstances that exist here.

INTRODUCTION AND SUMMARY OF ARGUMENT

Two critical principles emerge from this Court's recent decisions rejecting expansive federal prosecutorial theories: amorphous theories of criminal liability no longer hold sway, and respect for federalism bars prosecutors from converting every local transgression into a federal crime. Not every political kerfuffle over a bridge in New Jersey or gift to a Governor invites federal prosecutors to come in with ever-expanding views of federal criminal jurisdiction to make matters right. The threat to individual liberty and federalism from prosecutorial overreach is palpable when local crimes carry modest penalties while federal felonies may impose ten-year prison sentences, even for first-time offenders.

This prosecution is another example of the sort of federal overreach this Court has repeatedly rejected.

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[1] No counsel for a party authored this brief in whole or in part and no person other than Amici and their counsel made a monetary contribution to its preparation or submission.

If the theories advanced by the government and adopted by the Seventh Circuit were correct, federal prosecutors wasted years pursuing honest-services-fraud theories, and this Court accomplished nothing by rejecting those theories, because prosecutors were always free to use Section 666 to prosecute everything (and more) that this Court has now held that the honest-services fraud statute does not cover. None of this aligns with the statute that Congress enacted, let alone first principles of liberty and federalism. The Court should reverse the Seventh Circuit and hold that nothing short of quid pro quo bribery violates Section 666.

ARGUMENT

I. THIS COURT HAS LIMITED EXPANSIVE THEORIES OF FEDERAL CRIMINAL LIABILITY TO PROVIDE FAIR NOTICE AND PRESERVE FEDERALISM

The government's zeal in advancing expansive theories of federal criminal liability has led it to treat decisions from this Court like a game of Whac-A-Mole. As this Court strikes down expansive theories under one statute, the government seeks to resurrect them under another. Too often, lower courts have obliged. As this Court has clamped down on prior abuses involving the honest-services fraud statute, Section 666 has emerged as the government's new vehicle for resurrecting the same overly expansive theories of federal criminal liability.

A. Federal Criminal Law Should Not Be Used To Federalize Ethical Standards For State And Local Officials

This Court has long required a clear statement from Congress before it allows a federal criminal statute to "render[] traditionally local criminal conduct a matter for federal enforcement." *United States v. Bass*, 404 U.S. 336, 350 (1971). It insists that federal criminal statutes "must be read consistent with principles of federalism inherent in our constitutional structure." *Bond v. United States*, 572 U.S. 844, 856 (2014). "[T]raditional state authority" extends not only to "the punishment of local criminal activity," *id.* at 858, but also to the "regulat[ion]" of "the permissible scope of interactions between state officials and their constituents." *McDonnell v. United States*, 579 U.S. 550, 576 (2016).

In the public corruption context, the Court has repeatedly "decline[d] 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.'" *Id.* at 577 (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987)). And the Court has underscored "a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter." *Id.* at 576 (quoting *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 408 (1999)).

The federalism and vagueness concerns are heightened in this context because imposing federal criminal boundaries on the interactions of state and local officials with their constituents—particularly unclear boundaries—threatens to chill the very

interactions that representational democracy depends upon. "The basic compact underlying representative government assumes that public officials will hear from their constituents and act appropriately on their concerns," and the Court has worried that expansive theories of federal criminal liability "could cast a pall of potential prosecution over these relationships." *Id.* at 575. Not only could public officials be inhibited from assisting citizens, but "citizens with legitimate concerns might shrink from participating in democratic discourse." *Id.*

The First Amendment right to petition the government is an acknowledgment of the rights of citizens to try to influence public officials. True, some citizens have more influence than others, but the fact that some citizens "have influence over and access to elected officials does not mean that these officials are corrupt." *Citizens United v. FEC*, 558 U.S. 310, 359 (2010). In representative democracies, "[f]avoritism and influence are [unavoidable]." *Id.* (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Thomas, J., concurring and dissenting)). Elected representatives naturally "favor certain policies, and, by necessary corollary, [] favor the voters and contributors who support those policies." *Id.* (citation omitted). In our society, "[i]t is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness." *Id.* (citation omitted); *see also FEC v. Ted Cruz for Senate*, 596 U.S. 289, 303 (2022) ("To be sure, the 'line between *quid pro quo* corruption and general influence may seem vague at times, but the distinction must be respected

in order to safeguard basic First Amendment rights.") (citation omitted); *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 446–47 (2015) (explaining "politicians are expected to be appropriately responsive to the preferences of their supporters" and a politician is expected to provide "special consideration to his campaign donors"); *id.* at 459 (Ginsburg, J., concurring) ("'Favoritism,' *i.e.*, partiality," may be "inevitable in the political arena."); *id.* at 458 ("'Favoritism and influence' are inevitable 'in *representative* politics.'") (citations omitted).

B. To Avoid Sweeping Theories Of Liability, The Court Has Limited The Scope Of Federal Anti-Corruption Statutes

For decades the government relied upon the mail and wire fraud statutes' protection of "property," 18 U.S.C. §§ 1341, 1343, to charge an expansive theory of honest-services fraud, but this Court in *McNally* "halted that trend by confining the federal fraud statutes to their original station" of traditional property rights. *Ciminelli v. United States*, 598 U.S. 306, 313 (2023). The Court explained that "[r]ather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights." *McNally*, 483 U.S. at 360. So, the Court held, "[i]f Congress desires to go further, it must speak more clearly than it has." *Id.*

A limited definition of property "prevents these statutes from criminalizing all acts of dishonesty by state and local officials" and "the upshot is that federal fraud law leaves much public corruption to the

States." *Kelly v. United States*, 140 S. Ct. 1565, 1571 (2020). The Court has emphasized that "the fraud statutes do not vest a general power in "the Federal Government . . . to enforce (its view of) integrity in broad swaths of state and local policymaking." *Ciminelli*, 598 U.S. at 312 (quoting *Kelly*, 140 S. Ct. at 1574).

Even so, prosecutors tried to circumvent *McNally* by redefining "property" to include exercises of the government's regulatory authority. In a series of decisions, this Court had to intervene to squelch those theories too. *See id.* at 313–14 (rejecting a right-to-control theory); *Kelly*, 140 S. Ct. at 1573 (rejecting a claim that "regulatory rights" are property rights); *Cleveland v. United States*, 531 U.S. 12, 24 (2000) (rejecting "a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress" that would treat a permit or license as government property).

Congress responded to *McNally* by restoring the "intangible right of honest services" to the mail and wire fraud statutes, 18 U.S.C. § 1346, but this Court remained troubled by Congress's lack of a clear statement about the prohibition's scope. Every Justice recognized that this intangible right of honest services was vague, but a divided Court found that the statute could be salvaged through a limiting construction that confined its reach to bribes and kickbacks. *Skilling v. United States*, 561 U.S. 358, 402 (2010); *see also Percoco v. United States*, 598 U.S. 319, 333–38 (2023) (Gorsuch, J., concurring) (questioning whether honest-services fraud supplies constitutionally adequate fair notice even after *Skilling*).

Since *Skilling*, the Court has had to erect further restraints on the honest-services fraud statute. The Court has rejected ambiguous theories for extending the duty to private parties with substantial influence over public officials, such as "particularly well-connected and effective lobbyists." *Percoco*, 598 U.S. at 331. The Court also has rejected efforts to extend the quo in an alleged quid pro quo bribery scheme to reach "nearly anything a public official does." *McDonnell*, 579 U.S. at 575.

McDonnell is particularly instructive. Although *Skilling* authorized honest-services fraud charges based on bribery, it did not define what would constitute bribery, so the Court looked to how that term was defined under the federal bribery statute, 18 U.S.C. § 201. *Id.* at 562. Under that statute, the alleged quo, or object of the bribe, must be an "official act." The Court reversed Governor McDonnell's conviction because jury instructions improperly defined "official act" so broadly as to reach even "the most prosaic interactions." *Id.* at 576.

McDonnell established a two-part test for what constitutes an "official act." First, the government must identify a "formal exercise of governmental power" that is "specific and focused." *Id.* at 574. Second, the government must show the official agreed to take a definite "decision or action" on that matter. *Id.* This test excludes "setting up a meeting, calling another public official, or hosting an event," or "expressing support for [whatever a supporter wants], at a meeting, event, or call—or sending a subordinate to such a meeting, event, or call." *Id.* at 567, 573. The Court noted that "an expansive interpretation" of the quo "would raise significant constitutional concerns"

in terms of vagueness and federalism, and a "substantial" concern that it would chill interactions between constituents and officials that is critical to representative democracy. *Id.* at 574–75.

Allowing prosecutors to circumvent these types of limitations simply by adopting an equally over-expansive interpretation of *a different* statute, should be rejected.

II. LIMITING SECTION 666 TO BRIBERY IS ESSENTIAL TO CONTAIN THE REACH OF THE STATUTE

All this Court's efforts to confine the scope of federal criminal statutes to avoid due process notice concerns, protect federalism, and avoid interfering with the ability of constituents to interact with state and local officials will be for naught if Section 666 is allowed to reach gratuities. If accepted, the government's theory will be the most expansive federalization of state and local standard of government conduct yet.

A. A Quid Pro Quo Bribery Requirement Is The Last Meaningful Limit On The Scope Of Section 666

Section 666's title "Theft or bribery concerning programs receiving federal funds," suggests it is a narrowly targeted bribery statute and the language of the statute itself suggests that is so, but prosecutors and lower courts have construed the statute incredibly broadly. Consistent with the statute being a spending power statute, the statute appears limited to bribery concerning some federally funded program, but prosecutors and lower courts have destroyed any such nexus.

Section 666 applies only where an "organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program." 18 U.S.C. § 666(b). If that jurisdictional requirement is met, Section 666 then makes it a crime when an "agent" of the federally funded entity "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." 18 U.S.C. § 666(a)(1)(B). The offeror of such a bribe violates Section 666(a)(2).

Lower courts have greatly and inappropriately expanded the scope of Section 666 beyond bribery concerning a federally funded program. First, they have allowed the federal government to *buy* federal criminal jurisdiction under Section 666 over every statewide office holder for $10,000. *See United States v. Fernandez*, 722 F.3d 1, 9 (1st Cir. 2013). They view federal jurisdiction over agents of a state to exist exists whenever the federal government provides $10,000 or more in benefits[2] to any part of the state

[2] Although "benefits" is more limited than dollars, as treating them synonymously "would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance," the lower courts do not seem to care. *Fischer v. United States*, 529 U.S. 667, 681 (2000). In cases where the government has offered only proof that federal dollars were given, with no showing that those dollars were benefits, some Courts of Appeals just assume the benefits threshold was met. In effect, they do not require this element of the crime be proven. *United States v. Hamilton*, 46 F.4th 389, 394 n.1 (5th Cir. 2022) (finding a stipulation addressing dollars, but not benefits, sufficient); *United*

government. *Id.* All states receive at least $10,000 in federal funds, so this is no limit at all.

Even where federal funds are only given to one branch of a state government (typically federally funded programs are given to specific executive branch agencies, not legislatures), courts find Section 666 jurisdiction over state officials in other government branches. *Id.* Although no single legislative official has control over federally funded programs administered by executive branch agencies, courts have found Section 666 applicable to legislators anyway. *Id.*; *United States v. Lipscomb*, 299 F.3d 303, 333 (5th Cir. 2002).

Likewise, state-wide employees are subject to Section 666 based on federal funds given to state agencies over which the employee has no control. If the requisite federal funds are given to the Texas Department of Transportation to repair a road in El Paso, that provides Section 666 jurisdiction over a livestock inspector for the Texas Animal Health Commission in Texarkana, 800 miles away and in a different agency that has no control over the federally funded program.

The federal government has also *bought* federal criminal jurisdiction under Section 666 over a vast swath of the private sector. Section 666 applies to any "organization" that receives the requisite federal benefits. *United States v. Seng*, 934 F.3d 110, 123–24 (2d Cir. 2019). Federal funding of private enterprise is

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States v. Willis, 844 F.3d 155, 168 (3d Cir. 2016) (evidence of total federal dollars given with no analysis of benefits sufficient); *but see United States v. Bravo-Fernandez*, 913 F.3d 244, 250 (1st Cir. 2019) (reversing conviction because the federal funds stipulation said only dollars and not benefits).

expansive. Medicare alone provides Section 666 jurisdiction across nearly every hospital and medical provider in the country. *Fischer v. United States*, 529 U.S. 667, 669 (2000). Similarly, roughly 5.2 million businesses received federal funds under the Paycheck Protection Program. Press Release 20-81, U.S. Small Business Administration, SBA and Treasury Announce Simpler PPP Forgiveness for Loans of $50,000 or Less (Oct. 8, 2020).

The recent "Varsity Blues" cases highlight how expansively Section 666 can be applied in the private sector. Those cases charge that Section 666 bribes were paid to get students into elite *private* universities (e.g., Georgetown, Harvard, Stanford, and University of Southern California) based on federal funding at those universities. A water polo coach who takes a bribe to help a prospective water polo player gain admission to the private school violates Section 666 if the federal government funds the science department, even if the water polo coach does not know of the federal funding or have any control over those federal funds. *See United States v. Abdelaziz*, 68 F.4th 1, 19 (1st Cir. 2023).

A second way in which Section 666 has been construed expansively is by lower courts construing the quo under Section 666—"business" or "transaction"—to mean anything that the agent of an organization does. This Court rejected a nearly identical conclusion that Section 201's "official act" quo reached "nearly anything a public official does," noting that such a construction would raise several constitutional concerns. *McDonnell*, 579 U.S. at 575. Nevertheless, lower courts have construed the term "business" in Section 666 to mean just that. Ignoring that the term

"business" is used in a commercial sense, they have rejected that a financial nexus for the federally funded entity is required and found "business" is used in a colloquial sense as whatever people do is their business. *See, e.g.*, *United States v. Robinson*, 663 F.3d 265, 274 (7th Cir. 2011); *Fernandez*, 722 F.3d at 14; *United States v. Hamilton*, 2021 WL 5178463, at *5 (N.D. Tex. Nov. 8, 2021) ("[T]he scope of § 666(a)(2) is not limited to financial or commercial exchanges, but should be construed broadly to encompass 'the intangible business or transactions of a federally funded organization.'") (quoting *Robinson*, 663 F.3d at 275). This expansive reading of "business" swallows the word "transaction" that follows it, but that has not stopped the lower courts. Prosecutors have thus charged numerous cases under Section 666 that cost the federally funded entity no money whatsoever, from a jailer bribed to give an inmate an unauthorized conjugal visit with his wife, *United States v. Marmelejo*, 89 F.3d 1185, 1191 (5th Cir. 1996), to a Puerto Rico Senator supporting a bill that passed unanimously to allow shopping malls to expel dangerous people, *Fernandez*, 722 F.3d at 14.

Lower courts also have watered-down Section 666's requirement that the business or transaction be valued at $5,000 or more. Although Section 666 is a spending power statute directed to protecting federal funds, courts have found the $5,000 valuation threshold of "business" or a "transaction" does not require that the business or transaction be worth $5,000 to the organization the statute seeks to protect. That someone is willing to pay $5,000 or more for a personal benefit that costs the organization nothing, like a conjugal prison visit with their spouse or giving property

owners a right to expel dangerous people, is deemed sufficient. *See id.*; *Marmelejo*, 89 F.3d at 1191.

B. Limiting Section 666 To Bribery Is the Correct Reading Of The Statute

Fortunately, it is clear from Section 666's statutory language that it is a prohibition against bribery—not a statute that criminalizes gratuities. That reading is signaled at the outset by the statute's title: "Theft or bribery concerning programs receiving federal funds." The natural implication from the title is that it concerns "bribery," just as it says, and not gratuities that go unmentioned. *See Dubin v. United States*, 599 U.S. 110, 120–21 (2023) (using a title to determine meaning).

There is no question that Section 666 was enacted to extend the bribery prohibitions of Section 201 to non-federal officials who receive federal funds. *See Hamilton*, 46 F.4th at 394. Section 201 has two provisions—one against "corruptly" offering or accepting a bribe, 18 U.S.C. § 201(b), and another that prohibits gratuities whether or not the gratuity is offered or accepted "corruptly," *id.* § 201(c).

Section 201's distinction when "corruptly" is used makes sense. By their very nature, a bribe is given or accepted with a corrupt intent. The whole purpose of a bribe is to have the public official take official actions based on their personal reward rather than what is best for the organization or constituency they serve.

But gratuities are different—they are not offered with the intent to corrupt the public official. They reward public officials for the actions they would have taken anyway, using their own best judgment. When they are prohibited, it is for a prophylactic reason.

They seek to avoid a slippery slope into corruption, where public officials may begin to expect gratuities and then calculate which official acts to take based on what they anticipate may bring about the biggest gratuity.

The distinction is telling because when Congress crafted Section 666, it included only one section that clearly prohibits bribery, and it uses the word "corruptly." If Congress had intended to prohibit gratuities, it would have crafted a second provision that tracked the language of Section 201's gratuity provision and does not use the work "corruptly." It did not.

Additionally, Section 666 would be illogical if it included a prohibition against gratuities. Gratuities are a lesser-included offense to bribery. *Brewster*, 506 F.2d at 73. In Section 201, the lesser gratuity offense carries a penalty of up to two years in prison while the more serious bribery offense carries a maximum fifteen-year sentence. *Compare* 18 U.S.C. § 201(b) *with id.* § 201(c). But Section 666 contains a single offense carrying a maximum ten-year sentence, which does not make sense if Section 666 covers both bribery and gratuities.

In the first place, including a gratuity provision in Section 666 would make the bribery prohibition irrelevant surplusage. As a lesser-included offense of briery, a gratuity offense will necessarily be proven in proving any bribery case, but the gratuity charge is far easier to prove without a quid pro quo agreement. In Section 201, the difference between bribery and the lesser-included offense is meaningful, as the more serious offense carries a much harsher punishment. Under Section 666, however, the prosecution has no need to prove the more difficult charge because the

supposed lesser-included charge carries the same statutory penalty as actual bribery. Thus, the bribery statutory language becomes irrelevant surplusage if gratuities are prohibited.

Second, the disparate penalties would be illogical. The strongest federal interest is in preventing *federal* officials from being corrupted, which is why bribing a federal official carries a fifteen-year statutory maximum under Section 201 while Section 666 bribery carries a ten-year sentence. But an illogical disparity is created if Section 666 carries a ten-year statutory maximum for a gratuity, while Section 201's gratuity offense carries only a two-year statutory maximum.

It should not readily be assumed that Congress intended for a U.S. Senator who takes a gratuity to receive a maximum sentence of two years while a state or local bureaucrat would be subject to a sentence *five times higher* for the same offense. *See Hamilton*, 46 F.4th at 397 (rejecting the claim that Congress could have intended this result because it "does not make sense"); *Fernandez*, 722 F.3d at 24 (concluding Congress would not have intended such a "dramatic discrepancy"); *see also* Pet.App.40a (acknowledging this is an "odd difference").

The government's argument to the contrary depends entirely on *one word* in Section 666—"rewarded"—but that is too slender a reed to uphold the weight of the government's argument. As the Petitioner notes, the word "rewarded" is often used to connote bribery in other federal statutes. Pet.Br.12. An incentive to take an action is often phrased as a "reward," just as you might see someone post a "reward" for the return of a lost pet or in an old Western movie

with a wanted poster promising a "reward" for the return of a fugitive, dead or alive.

Ignoring the surplusage problem identified above if Section 666 is construed as including a lesser-included gratuity offense, the government argues that the word "influenced" in the phrase "influenced and rewarded" means bribery, so rewarded must mean something different from bribery. Not so. Congress did not use the word "bribery" itself in the body of the statute, but used other words to ensure that it covered the concept of bribery comprehensively. It sought to cover improper payments whether they were styled as bribes or rewards, and whether they are paid before the official act sought or as an after-the-fact "reward."

The scope of Section 666 would mushroom if its bribery offense were extended to include the lesser-included offense of gratuities, and Congress should not be expected to have intended that by tossing the single word "rewarded" into a statute that's title tells us it is about "bribery." Congress does not "hide elephants in mouseholes." *Sackett v. EPA*, 598 U.S. 651, 677 (2023) (quoting *Whitman v. Am. Trucking Ass'ns., Inc.*, 531 U.S. 457, 468 (2001)). Congress could not have intended to craft a bribery statute where proof of bribery is never necessary to obtain a conviction, and that would federalize state and local corruption and punish it *five times* more harshly than identical conduct committed by federal officials.

III. DRAWING GRATUITIES WITHIN THE SCOPE OF SECTION 666 WOULD CREATE A DANGEROUSLY EXPANSIVE STATUTE

A. Allowing Section 666 To Cover Gratuities Would Create A More Expansive Crime Than Honest Services Fraud

Allowing Section 666 to reach gratuities pushes the scope of the offense well past the scope of the federal fraud statutes. *Skilling* forecloses any argument that the honest-services fraud statute applies to gratuities. Even the Seventh Circuit, which believes Section 666 covers gratuities, recognizes "an agent's secret receipt of a gratuity . . . does not violate § 1341 . . . . In other words, accepting money to be rewarded for an official position is not enough to meet the definition of bribery under *Skilling* unless the money is taken 'in exchange for' an official act." *United States v. Shelton*, 997 F.3d 749, 777 (7th Cir. 2021) (citation omitted); *see United States v. Avenatti*, 81 F.4th 171, 194 (2d Cir. 2023); *United States v. Teel*, 691 F.3d 578, 584 (5th Cir. 2012). The government concedes as much. *United States v. Bahel*, 662 F.3d 610, 633 (2d Cir. 2011).

B. Allowing Section 666 To Cover Gratuities Would Create A More Expansive Crime Than Section 201

Section 666 already is broader than Section 201 in that it applies to agents of non-governmental organizations, not just government employees, but Section 666 would be broader still if it included a gratuity offense. To be sure, Section 201 contains a gratuity provision (with a lesser penalty than the bribery provision), but even that is limited to a gratuity tied to an

"official act," a phrase this Court carefully limited in *McDonnell*. 18 U.S.C. § 201(c). By contrast, courts have held that Section 666 does not include this "official act" requirement. *United States v. Roberson*, 998 F.3d 1237, 1247 (11th Cir. 2021) ("The only Circuit Courts of Appeals to directly consider the issue in published cases post-*McDonnell*, the Second and Sixth, have not imported an 'official act' requirement into section 666.") (citing cases).[3]

Despite this Court cautioning in *McDonnell* that it would raise a host of constitutional problems to construe the quo in a bribery statute to be "nearly anything a public official does," *McDonnell*, 579 U.S. at 575, that is the very meaning lower courts have given the term "business" in Section 666. That is a vast expansion.

In effect, if the government's construction of Section 666 is correct then this Court's decision in *McDonnell* was an empty gesture. All the government had to do was prosecute the case under Section 666 and Governor McDonnell would be in federal prison today.

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[3] The phrase "official act" is not explicitly stated in Section 666, but it is implicitly there because the "business" and "transactions" of a *government* entity are the official acts of those government entities. Properly construed, "business" and "transactions" of government agencies are narrower sub-sets of official acts. A city council resolution praising the local little league champions is an official act, but not the "business" or "transaction" of the city council. By contrast, the city council operating a cafeteria in city hall would be its "business" or hiring someone to tend the grounds is a "transaction."

C. Allowing Section 666 To Reach Gratuities Would Greatly Expand The Reach Of The Statute In Disturbing Ways

1. Section 666 Would Criminalize Otherwise Legal Conduct—Tipping And Campaign Contributions

Expanding federal criminal jurisdiction under Section 666 by drawing "gratuities" within its reach produces staggering results. One of the deepest flaws in the intangible rights doctrine was that it turned a violation of the most trivial state misdemeanors or ethics requirements into a federal felony that carried far more substantial penalties than state law would impose. The government's construction of Section 666 is even worse by turning perfectly *legal* conduct at the state level into federal felonies.

This sort of "maximalist approach" with "an everybody-is-guilty standard" should be rejected because "the Constitution prohibits the Judiciary from resolving reasonable doubts about a criminal statute's meaning by rounding up to the most punitive interpretation its text and context can tolerate." *Dubin*, 599 U.S. at 134 (Gorsuch, J., concurring). There is no justice in a system where the deciding factor in who is convicted of a felony is not who crossed a line, but who a federal prosecutor chooses to charge. The net of criminal liability the government seeks to cast here is far too wide.

Tipping often is perfectly legal, but the government's interpretation of Section 666 would criminalize it. Under the government's view, a generous tip to your server at a mom-and-pop restaurant that received the requisite federal benefits would be a federal

felony. *See also* Tom Sietsma, *What Makes A Diner Tip $10,000? Servers Spill Their Secrets*, Wash. Post (Dec. 23, 2021) (noting some servers receive exorbitant tips). Tipping the staff at a wedding or business event costing more than $5,000 would be a felony too if the venue received the requisite federal benefits. Not knowing which venues received federal funds is no defense either. *See United States v. Feola*, 420 U.S. 671, 684 (1975) (holding a defendant can be convicted without knowing a jurisdictional element was met).

Common gratuities given to state and local government employees could become felony snares for the unwary too. Many businesses provide discounts to first responders, but such offers become invitations to commit felonies under the government's construction of Section 666.

Similarly, parents often give presents to public school teachers around the holidays—not to every teacher, just their children's teachers, and without expecting a gift in return—thanking them for teaching their child. Starbucks gift cards and other tokens of appreciation could become tickets to prison for those felons.

When a fireman falls in the line of duty, the community may bring food and other gifts to the firehouse to show their gratitude to the firemen for the dangerous work they do to protect the community. So, what about the pigtail-clad Girl Scout troop that drops off a plate of cookies? They may face more jail time than a gang of thugs for their felonious Section 666 conspiracy.

The GoFundMe website is blanketed with solicitations to raise money for teachers and first-responders

who have fallen on hard times, often when they or their children have become ill and have incurred significant medical expenses. *See* www.GoFundMe.com. If a donation is made to thank those public servants for their work—or received by a public servant who knows that was the reason for the gift—a felony Section 666 violation has occurred in the government's view.

When a firefighter at a crowded intersection asks drivers to "fill the boot" as part of their noble fundraising effort for muscular dystrophy, both parties are in a legally perilous situation. If someone tosses in a few dollars and says, "thank you for your service," the donor would have just committed a felony and the firefighter will commit a felony if he takes it.[4]

Section 666's requirement that the gratuity be paid "corruptly" provides no safe haven. Lower courts treat that requirement as meaning no more than that the gratuity is paid to intentionally reward someone for doing their job. Jury instructions typically say: "A person acts corruptly, for example, when he gives or offers to give something of value intending to influence or reward a government agent in connection with his official duties." *United States v. Bonito*, 57 F.3d

[4] A bribe or gratuity does not need to be given to an official personally, it can be a crime if given to a favored third-party (friend or family member) or a favorite charity. *See also United States v. Vavic*, 628 F. Supp. 3d 330, 368 (D. Mass. 2022) (noting prosecution's argument that "a donation to a person's favorite third-party charity" can be a bribe); U.S. Dep't. of Justice and Sec. and Exch. Comm'n, A Resource Guide to the U.S Foreign Corrupt Practices Act at 16 (2d ed. 2020) (explaining that donations to legitimate charities constitutes bribery if meant to influence public officials).

167, 171 (2d Cir. 1995). The Seventh Circuit below explained that it follows *Bonito*. Pet.App.41a (citation omitted). The jury was told "corruptly" required only an understanding that the public official was being rewarded "in connection with his official duties." J.A.28. Often, no knowledge of wrongdoing is required to obtain a conviction.

Making matters worse, juries are told to convict in mixed-motive cases if the intent to thank the agent for their work provides any motivation—no matter how small—for the gift giving. Even if the jury found the gift giving predominantly rested upon the most innocent of motives, such as desire to help find a cure to muscular dystrophy, "if one of the motives is to influence or reward the agent of the local government" the jury will be told to convict. Final Jury Instructions at 24, *United States v. Hamilton*, No. 3:19-cr-00083-M (N.D. Tex. June 24, 2021) ("The fact that providing a thing of value is motivated, in part, by friendship or compassion is no defense. Things of value given with more than one motive constitute bribery if one of the motives is to influence or reward the agent of the local government by tendering the thing of value."). A jury may even be instructed on possible innocent motivations for the gift giving, but the jury will be told that it can acquit only if the defendant's motive rested "solely" upon innocent motives. *United States v. Mangano*, 2022 WL 65775, at *19 (E.D.N.Y. Jan. 6, 2022); *see United States v. Correia*, 55 F.4th 12, 30 (1st Cir. 2022); *United States v. Burnette*, 2021 WL 5987025, at *8 (N.D. Fla. Dec. 18, 2021) ("[A] mixed-

motive payment—one made partly as a bribe and partly for some other purpose—is still a bribe.").[5]

To be sure, hopefully federal prosecutors would not bring cases charging such innocuous conduct as federal felonies, but the government often "makes a familiar plea: There is no reason to mistrust its sweeping reading, because prosecutors will act responsibly." *Dubin*, 599 U.S. at 131. In response to such pleas, "the Court gives a just-as-familiar response: We 'cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *Id.* (quoting *McDonnell*, 579 U.S. at 576).

Besides tipping, extending Section 666 to reach campaign contributions also is problematic. Campaign contributions can be bribes but, to protect First Amendment values, the Court has held that is "*only* if the payments are made in return for an *explicit* promise or undertaking by the official to perform or not to perform an official act." *McCormick v. United States*, 500 U.S. 257, 273 (1991) (emphasis added). This heightened burden to prove a quid pro quo agreement does not exist in the gratuity context. Campaign contributions and even votes are given all the time (and perhaps by definition) to show gratitude by citizens who benefited from or supported official acts taken by a public official, or for acts a candidate has committed to take. If that gratitude is even part of a donor's

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[5] An early Section 201 bribery case described the word "corruptly" as "incorporating a concept of the bribe being the *prime mover or producer* of the official act." *United States v. Brewster*, 506 F.2d 62, 82 (D.C. Cir. 1974) (emphasis added). Unfortunately, this requirement of a corrupt intent being the "prime mover or producer" or even a substantial motivation has fallen to the wayside.

motivation, then citizens who give campaign contributions and potentially even their votes (i.e., "anything of value") have committed a felony in the government's eyes, as has any public official who knowingly accepts that support.

McCormick warrants restricting Section 666 to bribery to avoid the First Amendment issue that would arise in creating a gratuity offense. It is impossible to square *McCormick*'s requirement that an *explicit* quid pro quo is necessary to protect First Amendment values with a gratuity statute that requires no quid pro quo at all.

This is not merely a hypothetical concern. In rejecting the view that Section 666 prohibits gratuities, the Fifth Circuit's decision in *Hamilton* reversed a Section 666 conviction based on giving campaign contributions as gratuities. 46 F.3d at 398. The government tried the case claiming that campaign donations solicited by a City Councilwoman for *other* candidates were either bribes or gratuities, and it was unclear on which basis the jury convicted. In the Seventh Circuit and other circuits that have adopted the government's position, this conviction would have been upheld even if the jury found the campaign donations solicited for *other people's* campaigns were gratuities.

2. The Harm To State And Local Representative Government Would Be Disastrous

The Court in *McDonnell* was concerned that a prohibition on bribery concerning an expansive definition of "official acts" would violate federalism and chill interactions between state and local officials, but extending Section 666 to gratuities would create a problem far worse than the Court envisioned in

McDonnell. As noted above, the *McDonnell* problem with an overly expansive quo already exists where courts have read an "official act" requirement out of Section 666 and instead find that anything an agent does is his or her "business." But eliminating the quid pro quo bribery requirement would magnify the problem.

The quid pro quo agreement required to prove bribery under Sections 201 and 666, where something of value is exchanged for a properly defined "official act" provides a readily ascertainable prohibition. People enter such agreements knowingly and they know bribery is wrong.

Clarity also exists as to gratuities given to a federal "public official" under Section 201. That clarity does not come from Section 201, but from the fact that other sources provide clear rules for gift giving to federal employees.[6] Federal officials typically are employed on a full-time basis, and the appropriate opportunities for gift giving are limited (e.g., hospitality based on friendship).

It is very different at the state and local level. Being a Member of Congress is a full-time job, but that typically is not true of state and local legislators.

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[6] Restrictions on federal employees obtaining outside income (including outside employment) and gifts are numerous. *See, e.g.*, U.S. Const, art. I, § 9 (foreign emoluments clause applicable to all federal officials); *id.* art. II, § 1 (domestic emolument clause applicable to the President); Code of Conduct for Justices of the Supreme Court of the United States, Canon 4(D) (Nov. 2023) (gift and outcome income restrictions); Standing Rules of the Senate, Rule XXXV & XXXVI (2013) (same); Rules of the House of Representatives, Rule XXV (2023) (same); 5 U.S.C. § 501 (restricting outside income for federal employees).

There are only ten full-time state legislatures. *See* Nat'l Conf. of State Legislatures, *Full and Part Time Legislatures* (2021), http://tinyurl.com/y8y268ee. In fourteen states, it is roughly a half-time job and the average pay is below the poverty level at $18,449. *Id.* In the remaining part-time legislatures, the workload of state legislators is roughly two-thirds of a full-time job and "usually not enough to allow them to make a living without having other sources of income." *Id.* In the vast majority of city councils across the country, councilmembers serve part time. *See* Brenner Fissel, *Rightsizing Local Legislatures*, 2023 Utah L. Rev. 393, 404 (2023) (explaining that roughly 92% of city councils across the country are part-time); Kellen Zale, *Part-Time Government*, 80 Ohio St. L. J. 987, 988 (2019) ("Part-time government is the rule, not the exception, for cities in the United States. The vast majority of the 20,000 cities in the Unites States—eleven out of every twelve—are governed by part-time city councils."); *see also id.* at 1012 ("The permissibility of outside employment for part-time city council members reflects both expectations about the time and attention that they devote to their positions on city council, as well as the recognition that if outside employment were not permitted, only a limited pool of candidates could afford to serve in a part-time position with relatively low pay.").

Outside employment necessarily draws these officials into financial interactions with their constituents. They may be employed by a constituent, own a business that sells goods and services to constituents, or otherwise profit through sales commissions or customer tips. Federal prosecutors may find this unseemly, but states decide how to structure their own governments and part-time work is often a practical

necessity. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). States and localities can address corruption concerns through conflict-of-interest rules.

Federalizing a criminal prohibition of gratuities would chill interactions between part-time legislators and their constituents because any financial relationship between them can be made to look like a gratuity. Whenever a benefit is conferred, a federal prosecutor can always question the motive behind it. Whether it is a job that is offered, a sale that is made, or a tip that is left, a federal prosecutor can always ask whether it had anything to do with a reward for something the recipient did as a public official. To convict, the federal prosecutor does not even need to establish that is the predominant reason, just that it was one factor that motivated that decision—that it crossed the donor's mind.

Federalizing a criminal gratuity prohibition in this context will chill relationships between public officials and their constituents. Where a business relationship exists, a constituent would fear that any request for an official act (however broadly construed) could be perceived as the object of some illegal gratuity. The public official would share the same concern when responding to such a request.

The only effective solution would be for constituents to sever any financial relationship with public officials, which would leave only those who can afford not to have outside employment to take a part-time job as a public official. Public officials cannot help making decisions that will impact the constituents they serve and, if they do their jobs well, they should do plenty of things that please their constituents. A federal prosecutor could always argue that anything

given to a public official—a job, a contract, a sale, a tip, or a gift—must have been a gratuity to say "thank you" for one of those official acts. And to convict, the prosecution will argue they just need to prove that this motive factored into the equation in even the slightest way, even if it is far from the most predominant motive.

The case law also shows that federal prosecutors often forget the fact that public officials, like all people, often form friendships with those who share their interests. Political friendships often turn into personal ones, and friends do nice things for each other.

The *Fernandez* decision out of the First Circuit and *Hamilton* decision out of the Fifth Circuit—the circuits that reversed Section 666 convictions based on gratuities—are illustrative.[7] In *Fernandez*, Mr. Bravo-Fernandez, the head of an association of private security professionals, began working with a Senator on legislation to address an outbreak of violence in shopping malls, and they became (and remain) close friends. The Senator introduced legislation that would give shopping mall owners the right to expel dangerous persons. Mr. Bravo-Fernandez was planning to attend a boxing match in Las Vegas with a group of friends and, when one of those friends was injured in a motorcycle accident and could not go, he invited the Senator to take his friend's place. Mr. Bravo-Fernandez had bought tickets for the match and reserved hotel rooms, and he did not seek reimbursement from the Senator. When they returned home, the Senator voted for the legislation *he*

[7] Undersigned counsel represented defendants in both cases at trial and on appeal.

previously introduced, and it passed unanimously. The prosecution argued the trip was either a bribe or a gratuity, and the First Circuit reversed because it found the gratuity theory presented to the jury under Section 666 invalid. 722 F.3d at 6–8.

Hamilton reflects a similar political friendship. Mr. Hamilton, a real estate developer and prolific donor to Democratic candidates and supporter of public school programs in underserved communities in Dallas, became close with a Dallas City Councilwoman whom he had supported and who shared his concerns about schools. She asked the developer to make donations to a worthwhile charity that they both supported[8] and to make campaign contributions to other Democratic candidates who shared their values. The developer sought a recommendation from the Dallas City Council that a Texas state agency award limited federal tax credits to a proposed real estate project, and that recommendation passed unanimously. Again, the prosecution argued the charitable contributions and third-party campaign donations were either bribes or gratuities, and the Fifth Circuit reversed because the gratuity theory presented to the jury under Section 666 was invalid. 46 F.4th at 391–93.

The sort of interactions between public officials and their constituents described in *Fernandez* and *Hamilton* occur every day across the country. It is not

[8] Donations were made to a charity that taught high school students about the civil rights movement. The head of the charity, however, skimmed some of the money donated by Mr. Hamilton for himself and the Councilwoman. No evidence was introduced showing that Mr. Hamilton knew they would embezzle some of his donations.

uncommon for public officials to encourage their supporters to donate to other candidates or charities, as in *Hamilton*. And friendships often form among public officials and constituents who work together on a project. While the $2,000 trip in *Fernandez* may seem overly generous to some (it was the sort of thing Mr. Bravo-Fernandez commonly did for his friends), gift giving among friends is not. Friends may pick up the tab at dinner for one another, give a friend a spare ticket to an event, and invite them on trips where the host incurs some expense. *Fernandez* and *Hamilton* show not only that federal prosecutors can charge such routine gifts as gratuities, they can secure convictions on that basis too—even where the official act in question passed unanimously and there was no reason to doubt that the public official would have taken the same official act even absent a personal benefit.

Given the weighty concerns with federalism, providing fair notice, and avoiding interference with representative democracy, the Court has advised time after time that where "Congress desires to go further" and criminalize more than what a statute explicitly covers, "it must speak more clearly." *Skilling*, 561 U.S. at 402 (quoting *McNally*, 483 U.S. at 360). The Court should limit Section 666 to bribery and deliver that same admonition yet again.

CONCLUSION

The Court should reverse the Seventh Circuit and hold that Section 666's prohibition against bribery does not extend to mere gratuities.

Respectfully submitted,

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