No. 23-108

In the Supreme Court of the United States

JAMES E. SNYDER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
NICOLE M. ARGENTIERI
Acting Assistant Attorney General
KEVIN J. BARBER
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in upholding petitioner's conviction under 18 U.S.C. 666(a)(1)(B), which makes it a crime for certain state, local, and tribal officials whose agencies receive significant federal benefits to "corruptly * * * accept[] or agree[] to accept" money "intending to be influenced or rewarded in connection with" government business, where petitioner received $13,000 from a government contractor to which petitioner had successfully steered two contracts worth a total of $1.125 million.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-45a) is reported at 71 F.4th 555. The order of the district court denying petitioner's motion for a judgment of acquittal and a new trial (Pet. App. 53a-69a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 2023. A petition for rehearing was denied on July 14, 2023 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on August 1, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted on one count of corruptly soliciting a bribe or gratuity, in violation of 18 U.S.C. 666(a)(1)(B),

and one count of corruptly interfering with the administration of the internal revenue laws, in violation of 26 U.S.C. 7212(a). Pet. App. 46a. The district court sentenced him to 21 months of imprisonment, to be followed by one year of supervised release. *Id.* at 47a-48a. The court of appeals affirmed. *Id.* at 3a-45a.

1. Petitioner is the former mayor of Portage, Indiana. Pet. App. 27a. When he assumed that office in January 2012, petitioner was experiencing financial difficulties: He owned and operated First Financial Trust Mortgage, which by 2009 owed nearly $100,000 in payroll taxes, and was behind in paying his personal taxes. *Id.* at 18a. In December 2010 and February 2011, the IRS levied petitioner's personal bank accounts. *Ibid.*

Around that time, Portage needed to buy new garbage trucks. Pet. App. 27a. Although it purported to conduct a fair public bidding process, "there were significant irregularities in the bidding process" suggesting that petitioner "had it set up to come out in * * * favor" of Great Lakes Peterbilt (GLPB), a trucking company owned by two brothers, Robert and Steve Buha, who were "in serious financial difficulty" of their own. *Id.* at 56a-57a. Petitioner "hand-picked" his "close friend" Randy Reeder to administer the bidding process, even though Reeder had "no experience" with administering public bids. *Id.* at 27a, 57a. At the same time, petitioner told a "longtime veteran" of the City's Streets and Sanitation Department, who had "extensive experience overseeing public bid processes[,] * * * not to get involved in the bid processes and that he and Reeder would handle it." *Id.* at 57a.

Reeder then "tailored the bid specifications to favor" GLPB. Pet. App. 27a. Among other things, Reeder "based the chassis specifications on a Peterbilt chassis,"

the precise type that GLPB sold, and "specified that the trucks must be delivered within 150 days, a deadline that was suggested to him by GLPB, but was an unusually fast turnaround for a new garbage truck." *Ibid.* Reeder further directed that bids be submitted to petitioner rather than (as was customary) the city clerk-treasurer, and he "turned down equipment demonstrations offered by a number of [other] prospective suppliers." *Id.* at 57a-58a. The rigged process culminated in January 2013, when a board composed of petitioner and two of his appointees voted to award the contract to GLPB. *Id.* at 27a-28a.

Petitioner next attempted to have the city buy "an unused, 2012 model truck that had been sitting on GLPB's lot for two years." Pet. App. 28a. The Buhas had been unable to sell the truck and soon "would have had to start making balloon payments on [a] loan in order to avoid losing [it]." *Id.* at 59a. After a city lawyer advised "that the truck was too expensive to be purchased without going through the public bidding process," Portage opened a new round of bidding for two additional trucks in November 2013. *Id.* at 28a. Reeder "adjusted th[e] specifications" for one of the trucks "to match the truck sitting on GLPB's lot," even though GLPB's truck was not the current model and, "from a maintenance standpoint, it made little sense to purchase trucks with different specifications." *Ibid.* During the contracting process, petitioner exchanged dozens of phone calls and text messages with the Buhas—but none with any other bidders. *Id.* at 29a, 60a. GLPB again won the contract. *Id.* at 28a. The total value of the two contracts awarded to GLPB was $1.125 million. *Id.* at 27a.

Less than three weeks after the second contract was awarded, GLPB issued a check for $13,000 to a defunct firm owned by petitioner. Pet. App. 28a-29a, 56a. Most

of the funds were "quickly transferred to [petitioner's] personal account." *Id.* at 57a. Petitioner offered various explanations for the payment, telling a city planning consultant that GLPB paid him "to lobby the state legislature on its behalf," and later telling the FBI that the money was for "health insurance and information technology consulting he had provided to GLPB." *Id.* at 29a; see *id.* at 61a-62a. But neither petitioner nor the Buhas produced any "documentation relating to any consulting agreement or services performed by [petitioner] for GLPB," and petitioner did not include the $13,000 payment on a form to disclose compensation he received from parties doing business with the city. *Id.* at 61a-62a; see *id.* at 30a, 44a; 3/18/21 Tr. 1962, 2001-2002, 2016-2023. And at the time GLPB's controller issued the check, Robert Buha told the controller that "they were paying [petitioner] for his influence." Pet. App. 29a; see *id.* at 60a-61a.

2. a. In 2016, a federal grand jury in the Northern District of Indiana indicted petitioner on two counts of corruptly taking money "intending to be influenced or rewarded in connection with" city business, in violation of 18 U.S.C. 666(a)(1)(B), and one count of corruptly interfering with the administration of the internal revenue laws, in violation of 26 U.S.C. 7212(a). Indictment 1-2, 4-15. One of the Section 666 counts concerned the truck purchases discussed above; the other concerned city towing contracts; and the tax count concerned, among other things, petitioner's misrepresentations to the IRS about his income between 2010 and 2013. See *ibid.*[1]

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[1] In October 2017, petitioner's prior counsel, Thomas L. Kirsch II, became the United States Attorney for the Northern District of

Before trial, petitioner moved to dismiss the indictment "[i]nsofar as the government is attempting to build a 'gratuity' case." D. Ct. Doc. 129, at 3 (Sept. 21, 2018). Petitioner asserted that Section 666 prohibits only *quid pro quo* bribery, which requires "intent to give or receive something of value *in exchange* for an official act," *United States* v. *Sun-Diamond Growers*, 526 U.S. 398, 404-405 (1999), and not illegal gratuities, which include "a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken," *id.* at 405. See D. Ct. Doc. 129, at 3. The district court denied the motion, explaining that the Seventh Circuit had already held that Section 666 prohibits both. Pet. App. 161a-163a (citing *United States* v. *Johnson*, 874 F.3d 990, 1001 (7th Cir. 2017), cert. denied, 138 S. Ct. 1275 (2018), and *United States* v. *Hawkins*, 777 F.3d 880, 881 (7th Cir. 2015)).

A jury found petitioner guilty on the tax count and the Section 666 count concerning the truck purchases, but acquitted him on the Section 666 count concerning the towing contracts. Pet. App. 5a. The district court, however, granted petitioner a new trial on the Section 666 count concerning the truck purchases, due to the "cumulative effect of several irregularities," *id.* at 143a—principally that the Buhas had surprised petitioner and the court by invoking their privilege against self-incrimination and refusing to testify. See *id.* at 144a-150a.

b. During the second trial—at which Robert Buha testified for the defense under a grant of immunity, Pet.

Indiana. At that time, responsibility for the prosecution shifted to the United States Attorney's Office for the Northern District of Illinois. In December 2020, Mr. Kirsch became a judge on the United States Court of Appeals for the Seventh Circuit. Pet. App. 5a-6a n.1.

11—petitioner proposed a jury instruction distinguishing bribes and gratuities and directing acquittal if the government proved the latter but not the former. D. Ct. Doc. 458, at 8 (Feb. 16, 2021). The district court, however, declined to instruct the jury in those terms. D. Ct. Doc. 505, at 17 (Mar. 18, 2021). It instead repeated the terms in the statute by instructing the jury, in pertinent part, that the government was required to prove that petitioner "solicited, demanded, accepted or agreed to accept a thing of value from another person," and that he "acted corruptly, with the intent to be influenced or rewarded in connection with contracts with the City of Portage." *Ibid.*; cf. 18 U.S.C. 666(a)(1)(B). The second jury, like the first, found petitioner guilty of violating Section 666 in his conduct concerning the truck purchases. Pet. App. 5a.

The district court subsequently denied petitioner's motion for a judgment of acquittal or a new trial. Pet. App. 53a-69a. The court observed that petitioner's argument that Section 666 does not apply to gratuities was inconsistent with "a plain-language reading" of the statute and with Seventh Circuit precedent. *Id.* at 63a. "But," the court added, "even if [petitioner] were right" that Section 666 prohibits only *quid pro quo* bribery, "there was ample evidence permitting a rational jury to find, from the circumstantial evidence, that there was an up-front agreement to reward [petitioner] for making sure GLPB won the contract award(s)." *Ibid.*

Specifically, the court identified evidence "includ[ing] the machinations to make sure GLPB would win, which a rational jury reasonably could find were done at [petitioner's] direction and would not have been done without an understanding that he would be rewarded"; petitioner's "contacts with GLPB before the second round

of bidding"; his "making it clear to Reeder that he wanted GLPB to win the bidding"; and "his shifting stories and lies about why he had been paid and the work he had supposedly done for GLPB." Pet. App. 63a-64a. The court additionally found that petitioner had forfeited a posttrial claim about the jury instructions by asserting it in only "a single sentence" in his motion, "without any supporting argument." *Id.* at 68a. The court also emphasized that petitioner's proposed "instruction was an unnecessary addition to the statutory elements instruction." *Ibid.*

The district court sentenced petitioner to 21 months of imprisonment, to be followed by one year of supervised release. Pet. App. 47a-48a.

3. The court of appeals affirmed. Pet. App. 3a-45a. The court rejected petitioner's argument that Section 666 applies only to *quid pro quo* bribery. The court explained that "the statutory text"—and in particular, the phrase "'influenced or rewarded'"—"easily reaches both bribes and gratuities." *Id.* at 38a. And the court observed that it had "repeatedly held that § 666(a)(1)(B) 'forbids taking gratuities as well as taking bribes,'" and that "[m]any other circuits have taken the same position." *Id.* at 39a (quoting *Hawkins*, 777 F.3d at 881, and collecting authority).

The court of appeals declined petitioner's suggestion that it "reconsider [its] precedent in light of contrary decisions by the First and Fifth Circuits." Pet. App. 39a (citing *United States* v. *Hamilton*, 46 F.4th 389 (5th Cir. 2022), and *United States* v. *Fernandez*, 722 F.3d 1 (1st Cir. 2013)). The court emphasized that while those other courts focused on "similarities between the language" of Section 666 and the federal-official bribery statute, Section 666 uses the word "rewarded," which

does not appear in the federal-official bribery statute and "is a strong indication that § 666 covers gratuities as well as bribes." *Id.* at 41a. And it similarly emphasized that while those other courts had noted the difference in penalties between Section 666 and the federal-official gratuity statute (18 U.S.C. 201(c)), that difference was, *inter alia*, "mitigated" by the requirement that a Section 666 defendant act "corruptly." Pet. App. 41a (citation omitted).

The court of appeals also rejected petitioner's challenge to the sufficiency of the evidence underlying his Section 666 conviction. Pet. App. 41a-45a. Summarizing the evidence against petitioner, the court found that "a reasonable jury could conclude that [petitioner] accepted the [$13,000] check as a bribe or gratuity for steering the contracts to GLPB." *Id.* at 43a.

ARGUMENT

Petitioner renews his contention (Pet. 23-28) that the federal-funds bribery law, 18 U.S.C. 666, prohibits only *quid pro quo* bribery and not gratuities. That contention lacks merit, and further review is unwarranted. Although a lopsided disagreement exists among the courts of appeals on the question presented, it is unclear that the issue is outcome-determinative in a significant number of cases. Indeed, here, there is no reason to think the jury convicted petitioner on a gratuity theory alone, since the jury instruction paralleled the statutory text and, as both the district court and the court of appeals expressly held, there was ample evidence that petitioner engaged in *quid pro quo* bribery. This Court has previously denied petitions for writs of certiorari

raising the question presented or related issues.[2] The same result is warranted here.

1. The court of appeals correctly determined that Section 666 prohibits both *quid pro quo* bribery and the corrupt acceptance of gratuities.

a. The relevant provision of Section 666 prohibits "corruptly solicit[ing] or demand[ing] for the benefit of any person, or accept[ing] or agree[ing] to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions" involving "any thing" worth $5000 or more of a state, local, tribal, or other entity that received more than $10,000 in federal benefits in a single year. 18 U.S.C. 666(a)(1)(B); see 18 U.S.C. 666(b) and (d). Accepting a gratuity fits comfortably within that statutory text. The corrupt acceptance of a gratuity plainly qualifies as the acceptance of something of value "intending to be * * * *rewarded* in connection with" official business. 18 U.S.C. 666(a)(1)(B) (emphasis added); see *Sorich* v. *United States*, 555 U.S. 1204, 1207 (2009) (Scalia, J., dissenting from denial of certiorari) (describing Section 666 as imposing a "clear rule[]" prohibiting both "bribes and gratuities to public officials").

This Court has itself described gratuities in terms quite similar to Section 666(a)(1)(B)'s text. In *United States* v. *Sun-Diamond Growers*, 526 U.S. 398 (1999), the Court described "[a]n illegal gratuity" under the statute prohibiting federal officials from receiving one

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[2] See *Robles* v. *United States*, 571 U.S. 1222 (2014) (No. 13-8099); *McNair* v. *United States*, 562 U.S. 1270 (2011) (No. 10-533); see also *Roberson* v. *United States*, 142 S. Ct. 1109 (2022) (Nos. 21-605, 21-706); *Robles* v. *United States*, 140 S. Ct. 2761 (2020) (No. 19-912); *Jackson* v. *United States*, 583 U.S. 1054 (2018) (No. 17-448).

as "a *reward* for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken." *Id.* at 405 (emphasis added). And it observed that *quid pro quo* bribery of federal officials was covered by criminalizing payments with "intent 'to influence' an official act or 'to be influenced' in an official act." *Id.* at 404. By prohibiting covered persons from corruptly taking things of value "intending to be influenced or rewarded," Section 666 straightforwardly encompasses both *quid pro quo* bribery and gratuities. 18 U.S.C. 666(a)(1)(B); see *United States* v. *Ganim*, 510 F.3d 134, 150 (2d Cir. 2007) (Sotomayor, J.) ("[A] payment made to 'influence' connotes bribery, whereas a payment made to 'reward' connotes an illegal gratuity.") (citation omitted), cert. denied, 552 U.S. 1313 (2008).

Section 666(c) further supports the court of appeals' determination that the statute applies to gratuities. That subsection, which was enacted at the same time as the statute's current operative language, clarifies that Section 666 "does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business." 18 U.S.C. 666(c); see Criminal Law and Procedure Technical Amendments Act of 1986 (1986 Amendments Act), Pub. L. No. 99-646, § 59(a), 100 Stat. 3612-3613. That would be an odd clarification for Congress to make if Section 666 did not apply to gratuities. Salary, wages, and the like are far more likely to be mistaken for a gratuity than for a *quid pro quo* bribe.

b. The history of Section 666 confirms that it covers the corrupt receipt of gratuities. Gratuities have long been viewed as a species of corrupt payment. See 5 *The Selected Works of William Penn* 154 (3d ed. 1782) ("The

taking of a bribe or gratuity, should be punished with as severe penalties as the defrauding of the state. * * * Let men have sufficient salaries, and exceed them at their peril."). And some of the Nation's earliest anticorruption laws appear to have extended beyond *quid pro quo* bribery to gratuities.[3] So did "the first federal bribery statute of general application," *Dixson* v. *United States*, 465 U.S. 482, 491 n.8 (1984), an 1853 law that prohibited federal officers and Members of Congress from, *inter alia*, "receiv[ing] any gratuity, or any share of or interest in any claim from any claimant against the United States, with intent to aid or assist, or in consideration of having aided or assisted, in the prosecution of such claim," Act of Feb. 26, 1853, ch. 81, §§ 2, 3, 10 Stat. 170; see also *Burton* v. *United States*, 202 U.S. 344, 365-370 (1906) (upholding a similar statute).

In 1962, Congress enacted 18 U.S.C. 201, the bribery law governing federal officials, "as part of an effort to reformulate and rationalize all federal criminal statutes dealing with the integrity of government." *Dixson*, 465 U.S. at 491. Section 201 has always prohibited gratuities: Subsection (c) bars federal officials from taking, "otherwise than as provided by law[,] * * * anything of value personally for or because of any official act performed or to be performed by such official." 18 U.S.C. 201(c)(1)(B); see Act of Oct. 23, 1962, Pub. L. No. 87-849, § 201(g), 76 Stat. 1120 (original version); see also *Sun-Diamond*, 526 U.S. at 404 (discussing the "illegal

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[3] See, *e.g.*, Act of July 31, 1789, ch. 5, § 35, 1 Stat. 46-47 (providing that "any officer of the customs [who] shall, directly or indirectly, take or receive any bribe, reward or recompense for conniving, or shall connive at a false entry" of any ship, goods, or merchandise, shall face various penalties); Act of Mar. 3, 1815, ch. 100, § 17, 3 Stat. 243 (similar provision governing tax collectors).

gratuity" offense "defined in § 201(c)(1)(A) as to the giver, and in § 201(c)(1)(B) as to the recipient"). Section 201(b) separately prohibits *quid pro quo* bribery. See 18 U.S.C. 201(b)(1)(A) and (2)(A); *Sun-Diamond*, 526 U.S. at 404.

After Section 201's enactment, the lower courts disagreed as to "whether or under what circumstances" state or local officials or private parties who administer federally funded programs "may be considered * * * 'public official[s]'" subject to Section 201. S. Rep. No. 225, 98th Cong., 1st Sess. 369 (1983) (Senate Report). In 1984, Congress enacted Section 666—pursuant to its constitutional authority under the Spending Clause and the Necessary and Proper Clause, see *Sabri* v. *United States*, 541 U.S. 600, 605 (2004)—in order to reach agents of entities receiving more than $10,000 per year in federal benefits, and thereby "protect the integrity of * * * Federal programs." Senate Report 370; see Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, § 1104(a), 98 Stat. 2143-2144.

In its original form, Section 666 made particularly clear that it applied to gratuities. It included the same "for or because of" language present in Section 201(c). See, *e.g.*, *United States* v. *Crozier*, 987 F.2d 893, 899 (2d Cir.) ("It logically follows * * * that where Congress used the same language in two statutes, the second of which was enacted to supplement the first, the same meaning should be applied to both."), cert. denied, 510 U.S. 880 (1993). And the Senate Report accompanying the original law noted lawmakers' "intent to reach thefts and bribery in situations of the types involved in," *inter alia*, a Seventh Circuit case in which the defendant was convicted of violating Section 201's gratuities provision (then codified at 18 U.S.C. 201(g)). Senate

Report 370; see *United States* v. *Mosley*, 659 F.2d 812 (7th Cir. 1981); see also *Crozier*, 987 F.2d at 900.

In 1986, Congress amended Section 666 to essentially its current form. 1986 Amendments Act § 59, 100 Stat. 3612-3613. Instead of prohibiting an official's acceptance of something of value "for or because of the recipient's conduct" in official business, as did the original Section 666(b), the revised Section 666(a)(1)(B) prohibits the official's acceptance of something of value "intending to be influenced or rewarded in connection with" such business. 18 U.S.C. 666(a)(1)(B). Thus, "the deleted [for or because of] language [was] replaced with language that is to the same effect"—namely, the requirement that the defendant intend to be influenced or rewarded. *United States* v. *Bonito*, 57 F.3d 167, 171 (2d Cir. 1995), cert. denied, 516 U.S. 1049 (1996). As a result, "the current statute continues to cover payments made with intent to reward past official conduct, so long as the intent to reward is corrupt." *Ibid.*

Congress in 1986 also added an express mens rea requirement ("corruptly") to the statute, as well as the caveat about "bona fide" compensation paid "in the usual course of business." 18 U.S.C. 666(a)(1)(B), (2), and (c). The committee report accompanying a materially identical prior version of the legislation stated that the revised Section 666 would "avoid its possible application to acceptable commercial and business practices"—but said nothing to suggest, as petitioner asserts, that Congress was eliminating the coverage of gratuities. H.R. Rep. No. 797, 99th Cong., 2d Sess. 30 (1986) (House Report). In fact, the House Report described the update as making "technical and minor changes" to various provisions of Title 18, confirming that Congress did not intend a major alteration to Section 666's scope. *Id.* at

16; see *ibid.* (noting that all of the legislation's changes were "uncontroversial"); see also, *e.g.*, *BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 99 (2006) (rejecting argument that Congress altered the scope of a statute "by such an oblique and cryptic route").

2. Petitioner's contrary arguments (Pet. 23-28) lack merit.

a. Petitioner's textual argument depends on a crabbed reading of the word "'reward'" to refer not to gratuities, but instead exclusively to a *quid pro quo* "bribe" that is "promised before, but paid after, the official's action on the payor's behalf." Pet. 25 (citation omitted). But there is no indication that Congress intended for Section 666's use of the word to bear that limited meaning. And reading "reward" in that manner would violate "one of the most basic interpretive canons": the canon against surplusage, *Corley* v. *United States*, 556 U.S. 303, 314 (2009); see, *e.g.*, *Nielsen* v. *Preap*, 139 S. Ct. 954, 969 (2019). A bribe promised before but provided after a covered act would already be covered by the statute's prohibition on "agree[ing] to accept" payment "intending to be influenced" in the act's performance, without any separate prohibition on a "reward." 18 U.S.C. 666(a)(1)(B); see 18 U.S.C. 666(a)(2) (corresponding language for bribe-offeror).

Petitioner also errs in suggesting (Pet. 23) that gratuities do not fall within Section 666 on the theory that they can never be given or taken "corruptly." This Court has explained that the words "'[c]orrupt' and 'corruptly' are normally associated with wrongful, immoral, depraved, or evil." *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 705 (2005). And as Justice Scalia observed, the word "corruptly" "'includes bribery but is more comprehensive.'" *United States* v.

Aguilar, 515 U.S. 593, 616 (1995) (Scalia, J., concurring in part and dissenting in part) (citation omitted). Gratuities thus may be given and accepted corruptly under the plain meaning of that term. If, for example, a company paid $13,000 to the Assistant Attorney General for the Antitrust Division as a reward for having supported the company's planned merger, see *Sun-Diamond*, 526 U.S. at 408 (offering a similar example), it is hard to see why such a gratuity would not have been paid, and accepted, "corruptly."

Petitioner additionally contends (Pet. 24) that Section 666 must not criminalize gratuities because it "contains a single ten-year maximum" penalty, while Section 201 provides different penalties for federal-official bribery (a 15-year maximum sentence, see 18 U.S.C. 201(b)(4)) and federal-official gratuities (a two-year maximum, see 18 U.S.C. 201(c)(3)). But that "disparity," Pet. 24, proves little, because it existed in identical form when Section 666 was originally enacted—at which time, as discussed above, the statute undoubtedly prohibited gratuities. Compare 18 U.S.C. 201(f) and (g) (1982), with 18 U.S.C. 666(b) and (c) (1982 & Supp. II 1985).

b. Petitioner separately invokes (Pet. 25-28) federalism concerns, constitutional avoidance, and the rule of lenity, in an attempt to narrow Section 666 to cover only *quid pro quo* bribery. As a threshold matter, none of those doctrines applies when a statute is unambiguous. See *Salinas* v. *United States*, 522 U.S. 52, 60 (1997) (purported federalism concerns do not "warrant a departure from the statute's terms"); *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 842 (2018) ("constitutional avoidance 'comes into play only when, after the application of ordinary textual analysis, the statute is found to be

susceptible of more than one construction'") (citation omitted); *Ocasio* v. *United States*, 578 U.S. 282, 295 n.8 (2016) (lenity requires "grievous ambiguity") (citation omitted). And as already explained, the text and history leave no doubt that Section 666's references to "rewards" encompass gratuities.

This Court has also previously rejected a defendant's appeal to federalism concerns (and lenity) in a Section 666 case. In *Salinas*, the Court rejected the defendant's argument that Section 666 requires the Government to prove that the payment at issue "in some way affected federal funds, for instance by diverting or misappropriating them." 522 U.S. at 55. The Court explained that "[t]he enactment's expansive, unqualified language * * * does not support the interpretation that federal funds must be affected to violate § 666(a)(1)(B)," *id.* at 56-57, because the statutory language plainly showed otherwise, *id.* at 59; see *id.* at 66 (rejecting defendant's reliance on lenity for similar reasons). The language here is similarly clear, and *Salinas*'s own broad view of the statute's scope reinforces the extent to which it ensures that federal funds are not handed over to entities beset by corruption. Indeed, the statute's historical coverage of gratuities demonstrates that federalism (as well as constitutional and lenity) concerns did not limit Congress's efforts solely to *quid pro quo* bribery, leaving corrupt gratuities unchecked.

Petitioner's invocation (Pet. 25) of *Kelly* v. *United States*, 140 S. Ct. 1565 (2020), and *McDonnell* v. *United States*, 579 U.S. 550 (2016), is accordingly misplaced. *Kelly* considered whether the allocation of toll lanes constituted "property" under two fraud statutes, and *McDonnell* concerned whether a governor's various informal actions constituted "official acts" for purposes of

honest-services fraud and Hobbs Act extortion. Neither involved the relevant provisions of Section 666 or any language similar to the text at issue here. See *Kelly*, 140 S. Ct. at 1572-1574; *McDonnell*, 579 U.S. at 571. Indeed, in dissenting from the denial of certiorari on a question regarding the scope of honest-services fraud, Justice Scalia specifically distinguished Section 666's "clear rule[]" prohibiting "bribes and gratuities to public officials." *Sorich*, 555 U.S. at 1207 (Scalia, J., dissenting from denial of certiorari).

Petitioner's concerns are, moreover, misplaced. See *Jennings*, 138 S. Ct. at 836 (constitutional avoidance requires "*serious* constitutional doubts") (emphasis added); *Salinas*, 522 U.S. at 60. With respect to federalism, petitioner overlooks this Court's prior recognition that "[i]n enacting § 666, Congress addressed a legitimate federal concern" using its authority under the Spending Clause and the Necessary and Proper Clause. *Sabri*, 541 U.S. at 608 n.*; see *id.* at 605-608. As the Court explained, the federal government has a strong interest in ensuring that federal funds "are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars." *Id.* at 605. Both *quid pro quo* bribery and corrupt gratuities threaten "the integrity of the state, local, and tribal recipients of federal dollars," *ibid.*—just as both threaten the integrity of the federal government's own programs, see 18 U.S.C. 201.

Petitioner's concerns also fail to account for important limitations on the scope of Section 666, including that the entity at issue must receive significant federal "benefits"; the defendant must act "corruptly"; the relevant "thing of value" accepted by an official must be

connected to official business or transactions involving more than $5000; and the statute does not apply to bona fide compensation. 18 U.S.C. 666(a)(1)(B), (2), (b), and (c); see, *e.g.*, *United States* v. *Copeland*, 143 F.3d 1439, 1441 (11th Cir. 1998) (contractor engaged in "purely commercial transactions with the federal government" does not receive "benefits" under Section 666); *United States* v. *Cicco*, 938 F.2d 441, 446 (3d Cir. 1991) (political support or loyalty is not a "thing of value" under Section 666).

For example, petitioner invokes (Pet. 26) First Amendment concerns related to the payment of legitimate campaign contributions. But Robert Buha specifically testified, without contradiction, that the $13,000 contribution in this case was *not* a campaign contribution. 3/18/21 Tr. 1981. And petitioner does not explain how the receipt of legitimate campaign contributions could satisfy Section 666's "corruptly" mens rea. See *United States* v. *Brewster*, 506 F.2d 62, 73 n.26 (D.C. Cir. 1974) (explaining that Section 201's gratuity provisions must require "criminal intent" to avoid collapsing the distinction "between an illegal gratuity and a perfectly legitimate, honest campaign contribution"). Nor does he explain why other, less drastic readings of Section 666 would not suffice to preempt any First Amendment concern, in a case that actually presents such a concern. Cf. *McCormick* v. *United States*, 500 U.S. 257 (1991) (interpreting Hobbs Act extortion narrowly in context of campaign contributions).

3. As petitioner acknowledges (Pet. 14), the majority of the courts of appeals that have considered the question have recognized that Section 666 prohibits corrupt gratuities. See Pet. App. 39a-41a; *United States* v. *Ganim*, 510 F.3d 134, 150 (2d Cir. 2007) (Sotomayor, J.), cert. denied, 552 U.S. 1313 (2008); *United States* v.

Porter, 886 F.3d 562, 565 (6th Cir. 2018) (per curiam); *United States* v. *Zimmermann*, 509 F.3d 920, 927 (8th Cir. 2007); *United States* v. *McNair*, 605 F.3d 1152, 1188 (11th Cir. 2010), cert. denied, 562 U.S. 1270 (2011). And although two courts of appeals have held to the contrary, see *United States* v. *Hamilton*, 46 F.4th 389 (5th Cir. 2022); *United States* v. *Fernandez*, 722 F.3d 1 (1st Cir. 2013), that minority disagreement does not warrant this Court's review.

It is far from clear that the availability of a gratuities-only theory is outcome-determinative in a significant number of cases. Petitioner notes (Pet. 5) the overall number of Section 666 prosecutions, but identifies (Pet. 20 & n.4) only five that, in his view, are "gratuity cases." And each of those cases was—or at a minimum, could have been—prosecuted on a *quid pro quo* theory.[4]

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[4] See *United States* v. *Skelos*, 988 F.3d 645, 660 (2d Cir. 2021) (recounting that a "special verdict form specified that the jury found each defendant guilty under § 666 on both the gratuity theory and the unchallenged bribery theory"); *United States* v. *Coles*, No. 19-cr-789, 2023 WL 1865349, at *1 (S.D.N.Y. Feb. 1, 2023) (describing defendant's "bribery and kickback scheme," in which he paid "'monthly bribes * * * to corrupt hospital employees'" who would provide him with the names of accident victims, whom the defendant would refer to medical clinics in exchange for kickbacks) (citation omitted); Gov't Br. at 16, *United States* v. *Reichberg*, 5 F.4th 233 (2d Cir. 2021) (No. 19-1645) (explaining that "[w]ith respect to the federal program bribery counts," the district court's instructions required the government to "prove a *quid pro quo* exchange of a thing of value for official action"); Gov't Consolidated Resp. to Defs.' Pretrial Motions at 58 n.15, *United States* v. *Madigan*, No. 22-cr-115 (N.D. Ill. July 11, 2023) (explaining that "[e]ven if the Court were to find that § 666 requires a *quid pro quo* * * * the indictment sets forth ample allegations from which a *quid pro quo* could be inferred"); cf. *United States* v. *Hamilton*, 62 F.4th 167, 170-172 (5th

It is unclear that petitioner's preferred rule would have made a difference in this very case. As noted above, p. 6, *supra*, the jury instructions at petitioner's trial simply summarized the text of Section 666. As both the court of appeals and the district court recognized, the government provided evidence that petitioner received not just a gratuity but a *quid pro quo* bribe in connection with the City of Portage's truck purchases. See Pet. App. 43a, 63a.

In particular, the evidence showed that petitioner and his associate, Randy Reeder, took numerous steps to rig the contract-bidding process in favor of the Buha brothers' company. See pp. 2-4, *supra*. A reasonable jury would readily have inferred that petitioner would not have done so absent a *quid pro quo* agreement or understanding with the Buhas. Any decision holding that Section 666 does not prohibit gratuities is thus unlikely to make a difference to petitioner's criminal liability, because any error would be harmless. See *Ciminelli* v. *United States*, 598 U.S. 306, 317-318 (2023) (Alito, J., concurring) (recognizing that the harmless-error rule of *Neder* v. *United States*, 527 U.S. 1, 15 (1999), applies to the inclusion in jury instructions of an improper theory of criminal liability); *Hedgpeth* v. *Pulido*, 555 U.S. 57, 61 (2008) (per curiam); see also Gov't C.A. Br. 65-66 (arguing that "even if" Section 666(b)(1)(B) required a *quid pro quo*, "there was ample evidence here from which a jury could infer that the $13,000 check [petitioner] received from GLPB was a bribe—not a gratuity—as the district court expressly found in denying [petitioner's] posttrial motions"); *id.* at 66 (similar).

Cir. 2023) (per curiam) (Ho, J., dissenting from denial of rehearing en banc) (explaining that the Government had presented a *quid pro quo* bribery theory).

This case would therefore be an unsuitable vehicle for further review of the question presented. It would also be unsuitable for the independent reason that a main feature of petitioner's argument—his invocation of federalism, constitutional, and lenity concerns—was not properly raised in the court of appeals. The court of appeals never addressed that argument because petitioner raised the federalism canon only in his reply brief (see Pet. C.A. Reply Br. 44-47), and failed to raise the other considerations at all. See Pet. App. 37a-41a; *Stechauner* v. *Smith*, 852 F.3d 708, 721 (7th Cir.) ("Arguments raised for the first time in a reply brief are waived."), cert. denied, 583 U.S. 876 (2017). The principles that this Court is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and traditionally does not address issues that were not pressed or passed upon below, see *United States* v. *Williams*, 504 U.S. 36, 41 (1992), thus counsel against granting the petition for a writ of certiorari in this case. See, *e.g.*, *United States* v. *Apel*, 571 U.S. 359, 372-373 (2014) (declining to consider a constitutional-avoidance argument not passed upon by the court of appeals).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
NICOLE M. ARGENTIERI
Acting Assistant Attorney General
KEVIN J. BARBER
Attorney

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