No.

In the Supreme Court of the United States

JAMES E. SNYDER,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

18 U.S.C. § 666(a)(1)(B) makes it a federal crime for a state or local official to "corruptly solicit[,] demand[,] … or accept[] … anything of value from any person, intending to be influenced or rewarded in connection with any" government business "involving any thing of value of $5,000 or more."

The question presented, on which the circuits are divided, is:

Whether section 666 criminalizes gratuities, *i.e.*, payments in recognition of actions the official has already taken or committed to take, without any quid pro quo agreement to take those actions.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. Snyder*, No. 21-2986 (7th Cir. June 15, 2023) (affirming conviction)
- *United States v. Snyder*, No. 2:16-cr-160 (N.D. Ind. Oct. 14, 2021) (entering judgment of conviction)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James E. Snyder respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (Pet.App.3a-45a) is reported at 71 F.4th 555. The court of appeals' order denying rehearing en banc (Pet.App.1a-2a) is unreported. The district court's order denying the motion for acquittal (Pet.App.53a-69a) is unreported.

JURISDICTION

The court of appeals entered judgment on June 15, 2023, and denied rehearing en banc on July 14, 2023.

Pet.App.1a-3a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 666(a)(1)(B) provides:

> Whoever … corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more … shall be fined under this title, imprisoned not more than 10 years, or both.

18 U.S.C. §§ 201 and 666 are reproduced in full, *infra*, Pet.App.184a-191a.

STATEMENT

This case presents an exceptionally important, outcome-determinative question concerning the scope of the most prosecuted federal public-corruption statute: 18 U.S.C. § 666. That statute makes it a crime for state and local officials to "corruptly solicit[,] demand[,] … or accept[] … anything of value" in order to be "influenced or rewarded in connection with" government business "involving any thing of value of $5,000 or more." 18 U.S.C. § 666(a)(1)(B).

The circuits are deeply divided over whether section 666 criminalizes gratuities, *i.e.*, payments in recognition of actions the official has already taken or committed to take where the official did not agree to take those actions in exchange for payment. In the First and Fifth Circuits, gratuities are not criminal. To secure a section 666 conviction, the government must instead prove that the official and

the payor agreed to exchange something of value for official action. In other words, the government must prove a quid pro quo bribe like paying a legislator to vote for a bill.

In direct conflict, the Seventh Circuit below, joined by the Second, Sixth, Eighth, and Eleventh Circuits, do not require a quid pro quo and permit convictions for gratuities. While section 666 requires that the official act "corruptly," those circuits and the government read that word to require only that officials knew they were getting something of value that was intended to reward them. That capacious interpretation risks chilling an enormous range of legitimate conduct. A constituent might donate to the campaign of a politician who took an action the constituent likes. Or a real-estate agent might offer a deal on a condo to a city housing official whose policies helped the agent weather a recession. In five circuits, those actions are illegal, and officials can be prosecuted for accepting donations or gifts.

Courts, commentators, and even the government recognize that 5-2 circuit split. And the split is entrenched and intractable. Circuits on both sides have acknowledged the conflict, and declined to reconsider their positions en banc. The battle lines are drawn, and only this Court can break the logjam and restore uniformity on the meaning of an important federal criminal statute.

This circuit split is also manifestly important. Millions of state and local officials nationwide fall within section 666's scope. And a parallel provision, 18 U.S.C. § 666(a)(2), criminalizes payments to a state or local official, reaching anyone who gives anything of value to public officials too. Whether people may spend years in federal prison should not turn on the happenstance of where they reside. Yet, as it stands, public servants, constituents, and others in New York, Chicago, and Miami can spend up to

ten years in prison for conduct that is not a federal crime in Boston or Houston. The current arbitrary disparity cries out for this Court's resolution.

Moreover, the government's reading of section 666 risks chilling a wide range of constitutionally protected conduct. Absent a quid pro quo requirement, section 666's reach is amorphous, sweeping up wide arrays of First Amendment-protected interactions with government officials. Officials and citizens across the country should not be left guessing when the everyday hustle and bustle of local politics becomes a federal crime. And federalism principles counsel strongly against reading section 666 to permit federal prosecutors to micromanage how state and local officials campaign, carry out their jobs, and interact with constituents.

This case is the ideal vehicle to resolve this critical and recurring question. Petitioner James Snyder, the former Mayor of Portage, Indiana, was convicted under section 666 for accepting $13,000 from a truck company *after* the company successfully won bids to sell garbage trucks to the City. Mayor Snyder maintains that this payment was a valid transaction with his consulting business, as the truck company's owner testified at trial. Regardless, the government does not allege that Mayor Snyder agreed to rig the bidding process in exchange for $13,000. The government instead alleged Mayor Snyder both approached the company and received the payment after the bidding was complete, *i.e.*, that Mayor Snyder received a gratuity.

Thus, at trial, the government repeatedly disavowed any obligation to prove a quid pro quo. The district court rebuffed Mayor Snyder's requests to dismiss the indictment, instruct the jury that section 666 does not cover gra-

tuities, or grant acquittal. And the Seventh Circuit affirmed Mayor Snyder's section 666 conviction solely on a gratuity theory, recognizing that the same conduct would not be a federal crime in the First and Fifth Circuits. This Court should grant certiorari now to resolve this entrenched, intolerable conflict.

A. Statutory and Factual Background

1. Every year, the federal government prosecutes nearly 100 individuals under 18 U.S.C. § 666, the government's most prosecuted public-corruption statute. *See* U.S. Dep't of Just., Bureau of Just. Stat., *FY 2021 Number of Defendants in Cases Filed: 18 U.S.C. § 666*, https://bjs.gov/fjsrc. Section 666 makes it a felony punishable by up to 10 years' imprisonment for state or local officials to steal state- or local-government property or accept or demand bribes. Section 666 equally applies to private individuals who bribe officials.

As relevant here, section 666 makes it a crime for state and local officials to "corruptly solicit[,] demand[,] … or accept[] … anything of value …, intending to be influenced or rewarded in connection with" government business "involving any thing of value of $5,000 or more." 18 U.S.C. § 666(a)(1)(B). So long as some component of the state or local government received over $10,000 in federal funding the previous year, officials of that State or locality face potential prosecution under section 666. *Id.* § 666(b).

2. This case arises from the federal government's section 666 prosecution of petitioner James Snyder, the former mayor of Portage, Indiana. Set on the shores of Lake Michigan, Portage—population 38,000—elected Mayor Snyder in November 2011. He ran on improving garbage collection and working with local businesses to spur Portage's economic recovery after the 2008 recession.

Once in office, Mayor Snyder got to work addressing Portage's waste-management problems. The Mayor tasked the Assistant Superintendent of Streets, a friend, with overseeing the public bidding process to secure more efficient automatic, side-loading garbage trucks. Pet.App.4a, 172a. In 2013, after the Portage Board of Works reviewed bids, Portage awarded two contracts worth $1.125 million to Great Lakes Peterbilt, a local truck company owned by brothers Robert and Stephen Buha. Pet.App.27a. For the first contract, awarded in January 2013, Peterbilt was the only fully responsive bidder. Pet.App.28a.

Later in 2013, Mayor Snyder learned that Peterbilt had an unused truck Peterbilt might sell the City at a discount. 3/16/2021 Tr. 1530:13-15, 1531:9-13, D. Ct. Dkt. 594. Mayor Snyder asked the City Attorney whether Portage could purchase the truck outright. 3/18/2021 Tr. 2066:16-34, D. Ct. Dkt. 596. The City Attorney responded that public bidding was required, and the Board of Works opened a second round of public bidding for more garbage trucks. Pet.App.28a. In December 2013, the Board awarded Peterbilt that contract too. Pet.App.28a.

Around the same time, Mayor Snyder sought to supplement his approximately $62,000 salary as mayor. As a father of four and owner of a mortgage company hit by the Great Recession, Mayor Snyder was financially strapped and owed tax penalties to the IRS. Pet.App.56a; 3/9/2021 Tr. 162:5-7, D. Ct. Dkt. 589. Consistent with Indiana law, which does not forbid small-town mayors from pursuing other employment, Mayor Snyder began offering consulting services.

After both bids had closed, Mayor Snyder approached the Buhas to discuss what services he could provide their company. Mayor Snyder maintains that Peterbilt hired

him to perform insurance and technology consulting. He initially sought $15,000 for his services, but Peterbilt agreed to a lesser amount of $250 per week for a year. Pet.App.29a; 3/18/2021 Tr. 1931:8-19. In January 2014, Peterbilt paid Mayor Snyder $13,000 upfront for a year's consulting. Pet.App.29a. The government disputes that the $13,000 was for consulting services and says the payment was instead a gratuity. But the government agrees that Mayor Snyder did not approach the Buhas about money until after Portage awarded the contracts. 3/18/2021 Tr. 2090:18-22.

In late 2013, the FBI began investigating Mayor Snyder after Portage's Superintendent of Streets and Sanitation approached the FBI with concerns that truck contracts were being steered to Peterbilt. 1/24/2019 Tr. 85:1-3, D. Ct. Dkt. 337; 3/11/2021 Tr. 762:4-20, D. Ct. Dkt. 591. A three-year investigation ensued, during which the government arranged with Mayor Snyder's brother to wear a wire and record conversations with the Mayor. 1/29/2019 Tr. 219:14-17, D. Ct. Dkt. 359.

By mid-2014, the investigation had become public, with the local press extensively reporting on the FBI's review of City contracts and requests for Mayor Snyder's campaign-finance records.[1] Nonetheless, in November 2015, the citizens of Portage reelected Mayor Snyder.

B. Procedural History

1. In November 2016, the federal government indicted Mayor Snyder in the Northern District of Indiana for two counts of violating 18 U.S.C. § 666(a)(1)(B) and one

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[1] *See* Bob Kasarda, *FBI Continues Probe into Portage Mayor*, Nw. Ind. Times (July 31, 2014), https://tinyurl.com/2bbtkdzb; Jeff Schultz, *FBI Returns to County, Eyes Portage Mayor*, Chesterton Trib. (July 22, 2014), https://tinyurl.com/2v562655.

tax-obstruction count under 26 U.S.C. § 7212(a). Pet.App.102a. The indictment alleged that Mayor Snyder received a $13,000 payment from Peterbilt after Portage had awarded Peterbilt the two contracts. Pet.App.101a-102a. Separately, the indictment alleged that Mayor Snyder solicited bribes in connection with a towing contract; a jury later acquitted Mayor Snyder of that count. Pet.App.5a. Finally, the government charged Mayor Snyder with obstructing IRS tax collection by omitting information on personal tax forms and routing payments through multiple bank accounts. Pet.App.18a-19a.

Initially, the U.S. Attorney's Office for the Northern District of Indiana handled the prosecution. But in 2017, Mayor Snyder's lawyer, Thomas L. Kirsch II, was confirmed as U.S. Attorney for that District (eventually becoming a judge on the U.S. Court of Appeals for the Seventh Circuit). Thus, the U.S. Attorney's Office for the Northern District of Illinois took over the prosecution. Pet.App.5a-6a n.1.

In January 2018, Mayor Snyder's defense team learned that the government had seized over 100,000 emails from Mayor Snyder, including some 300 privileged communications between then-attorney Kirsch and Mayor Snyder. Pet.App.177a. Mayor Snyder sought to dismiss the indictment or disqualify the prosecution team based on the government's intrusion into the attorney-client relationship. Pet.App.156a. While questioning "the prudence of [the government's] actions" and acknowledging that the government's filter team had a "semblance of the fox guarding the hen house," the district court denied the motion. Pet.App.165a, 178a.

2. Due to prosecutorial "irregularities" at his first trial, Pet.App.143a, Mayor Snyder was ultimately tried twice for the alleged gratuity from Peterbilt. At no point

during either trial did the government allege a quid pro quo whereby Mayor Snyder agreed to accept $13,000 in exchange for delivering bid awards to Peterbilt.

Quite the contrary, during the first trial, the government insisted that, "under 666, the government does not have to prove a quid pro quo." 1/22/2019 Tr. 168:6-8, D. Ct. Dkt. 343. At oral argument on motions to dismiss before the second trial, the government reiterated that it "didn't have to prove a quid pro quo under 666." 8/24/2020 Tr. 68:19, D. Ct. Dkt. 403. And at the start of the second trial, the government reaffirmed to the court: "We don't have to prove a quid pro quo under 666." 3/8/2021 Tr. 74:22-23, D. Ct. Dkt. 588.

Likewise, the district court repeatedly rebuffed Mayor Snyder's contention that section 666 requires a quid pro quo agreement. Instead, the court held that the statute covers gratuities—payments in recognition of actions the official has already taken or planned to take, without any quid pro quo. Pet.App.162a. Before the first trial, Mayor Snyder moved to dismiss the section 666 counts, arguing that the statute does not criminalize gratuities. Pet.App.161a. At the second trial, Mayor Snyder proposed a jury instruction that would have defined bribe, reward, and gratuity to clarify that bribes and rewards require "prior agreement" while gratuities do not. Pet.App.38a; Proposed Jury Instructions 8, D. Ct. Dkt. 458. The jury would have been instructed to acquit Mayor Snyder if it found only a gratuity. Pet.App.38a. And after the second trial, Mayor Snyder moved for acquittal because the government had not shown a quid pro quo bribe. Pet.App.38a. At each turn, the district court denied Mayor Snyder's motions, citing Seventh Circuit precedent holding that section 666 applies to gratuities without any

requirement that the government prove a quid pro quo exchange. Pet.App.38a.

3. Under those legal parameters, Mayor Snyder's first trial proceeded in January and February 2019. The jury acquitted Mayor Snyder of violating section 666 by allegedly soliciting bribes in connection with Portage's towing contracts. Pet.App.5a. But the jury convicted Mayor Snyder of violating section 666 based on the $13,000 payment from Peterbilt. Pet.App.4a-5a. The jury also convicted on the tax count. Pet.App.5a.

On Mayor Snyder's motion, the district court ordered a new trial on the section 666 count involving the $13,000 payment, citing "several irregularities on behalf of the government" that "pushed the envelope" too far. Pet.App.143a, 151a. The government "introduced several pieces of evidence that had not previously been provided to Mr. Snyder's attorneys." Pet.App.144a. The government also used "too much" second-hand testimony from an FBI agent, including testimony about the Buhas. Pet.App.144a. Because the Buhas did not testify but were "central players," the FBI agent's testimony acted as a "sword to pit the non testifying witnesses' words against Mr. Snyder," and a "shield" to protect the agent from cross-examination. Pet.App.144a-145a.

The court also reasoned that the government "surprised" Mayor Snyder and the court midtrial by refusing to call the Buhas or grant them immunity. Pet.App.145a-146a. While the Buhas "vehemently den[ied]" to the grand jury that their payment to Mayor Snyder had anything to do with the garbage-truck contracts, they now refused to testify, invoking the Fifth Amendment. Pet.App.146a. In granting a new trial, the district court criticized the government's apparent "gamesmanship" in "discourag[ing] the Buhas from testifying." Pet.App.145a n.8.

4. In March 2021, the government retried Mayor Snyder exclusively for the $13,000 payment from Peterbilt. The government proceeded on two theories; neither required establishing a quid pro quo promise to award contracts in exchange for payment. First, the government claimed that after Peterbilt won the garbage-truck contracts, Mayor Snyder approached the Buhas requesting money, which the government characterized in closing argument as "asking for a reward." 3/18/2021 Tr. 2091:9-11.

Alternatively, the government argued that Peterbilt paid Mayor Snyder $13,000 because he was "a man of influence." *Id.* at 2093:19-25. But the government never identified any later acts that Mayor Snyder purportedly took or contemplated for the Buhas' benefit. Indeed, the government opposed Mayor Snyder's request to admit evidence that Peterbilt *lost* multiple City bids after the $13,000 payment. U.S. Resp. to Mots. in Limine 27, D. Ct. Dkt. 454. In doing so, the government disclaimed that the payment "was solicited or received by [Snyder] in exchange for Peterbilt being awarded contracts in *later* bid processes." *Id.*

The government also repeatedly mentioned the $13,000 payment alongside the Buhas' earlier campaign contributions to Mayor Snyder, although the government recognized that those contributions were perfectly legal. 3/9/2021 Tr. 134:25-135:4; 3/18/2021 Tr. 1977:24-1979:8, 2079:23-2081:18.

At the second trial, the government afforded the Buhas immunity from prosecution but did not call them as witnesses. D. Ct. Dkt. 497, 498. When the defense called Robert Buha, he testified that Mayor Snyder approached the Buhas after the second contract to discuss the Mayor's financial troubles and request money to pay off a tax debt

and holiday expenses. 3/18/2021 Tr. 1999:9-22. Buha testified that Peterbilt agreed to pay Mayor Snyder $13,000 as upfront payment for the Mayor's insurance and technology consulting—not for any reason relating to Peterbilt's truck contracts. Pet.App.36a; 3/18/2021 Tr. 1931:13-19; 3/17/2021 Tr. 1894:1-7, D. Ct. Dkt. 595. Peterbilt's controller likewise testified that Buha consulted Mayor Snyder about the Affordable Care Act's impact on the business. 3/12/2021 Tr. 1139:6-1140:1, D. Ct. Dkt. 592. And an FBI agent testified that an email exchange between Mayor Snyder and Robert Buha showed that Mayor Snyder indeed put the Buhas in touch with business contacts. 3/16/2021 Tr. 1609:8-16; 1613:12-1614:2.

The jury convicted Mayor Snyder. Pet.App.46a. The district court sentenced him to 21 months' imprisonment on the section 666 and tax counts. Pet.App.47a-48a. Mayor Snyder appealed.

5. The Seventh Circuit affirmed. Pet.App.4a. As relevant here, the court "held that § 666(a)(1)(B) 'forbids taking gratuities as well as taking bribes.'" Pet.App.39a (quoting *United States v. Hawkins*, 777 F.3d 880, 881 (7th Cir. 2015)). The court acknowledged a 5-2 circuit split and hewed to its precedent interpreting section 666 to encompass more than quid pro quo bribery. Pet.App.39a. The court explained that quid pro quo bribery encompasses agreements to exchange something of value "for influence *in the future*." Pet.App.37a. By contrast, a gratuity is "a reward for actions the payee has already taken or is already committed to take." Pet.App.37a (quoting *United States v. Agostino*, 132 F.3d 1183, 1195 (7th Cir. 1997)).

The court reasoned that the term "rewarded" in section 666 offered "a strong indication that § 666 covers gratuities as well as bribes." Pet.App.40a. The court also ex-

pressed the view that section 666's requirement that a reward be paid or received "corruptly" mitigated the admittedly "odd" sentencing disparity between state, local, and federal officials convicted under gratuity theories. Pet.App.41a. Finally, the Seventh Circuit stated that limiting section 666 to quid pro quo bribes would create its own disparity because federal law would then criminalize gratuities paid to *federal* officials (in 18 U.S.C. § 201(c)), but not state or local officials. Pet.App.41a.

The Seventh Circuit denied rehearing en banc. Pet.App.1a-2a. The district court has ordered Mayor Snyder to surrender to federal custody on October 16, 2023. D. Ct. Dkt. 605.

REASONS FOR GRANTING THE PETITION

This petition is an ideal vehicle for resolving an entrenched and widely recognized 5-2 split over the scope of the most widely used federal public-corruption statute. As the Seventh Circuit and the government acknowledged below, the circuits are divided on whether 18 U.S.C. § 666 criminalizes gratuities or only quid pro quo bribes.

Gratuities are payments in appreciation for actions already taken or to be taken—say, campaign contributions for delivering on specific campaign promises, or prizes bestowed for exemplary performance of civic duties. Under the government's interpretation, these payments are "corrupt[]" and therefore illegal so long as the official knows the payment is "forbidden," Pet.App.41a, *i.e.*, that the contribution or bribe occurred because of the official action. Bribes instead require "a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act." *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404-05 (1999). Five circuits hold that section 666 criminalizes gratuities. But the First and Fifth

Circuits hold that section 666 covers only quid pro quo bribes.

This question is squarely presented, outcome determinative, recurring, and important. The Seventh Circuit affirmed Mayor Snyder's conviction based solely on its holding that section 666 covers gratuities, and the government repeatedly disclaimed having to prove a quid pro quo at trial. Section 666 is the most prosecuted federal public-corruption statute and covers millions of state and local officials nationwide. In five circuits, those officials can spend up to ten years in federal prison for conduct that is not a federal crime in two circuits. That arbitrary divide cries out for this Court's intervention. Whether public servants like Mayor Snyder spend years in federal prison should not turn on geographic happenstance.

I. The Circuits Are Split 5-2 on Whether Section 666 Criminalizes Gratuities

Below, the Seventh Circuit acknowledged that circuits have reached "contrary decisions" about whether "18 U.S.C. § 666 applies to gratuities." Pet.App.39a-40a. As the Seventh Circuit documented, the split is 5-2. Pet.App.39a. Only this Court can restore uniformity to this vitally important federal criminal law.

1. The First and Fifth Circuits hold that section 666 criminalizes only quid pro quo bribery, not gratuities.

In the First Circuit, "§ 666 does not criminalize gratuities." *United States v. Fernandez*, 722 F.3d 1, 6 (1st Cir. 2013). As that court has explained, "[t]he core difference between a bribe and a gratuity" is that a bribe requires a "*quid pro quo*, or the agreement to exchange [a thing of value] for official action." *Id.* at 19 (quoting *United States v. Griffin*, 154 F.3d 762, 764 (8th Cir. 1998)). If the official did not agree to receive a payment until "after th[e] act

has been performed," the payment is by definition a gratuity, not a bribe, because there can be no agreement to perform an act that already happened. *Id.*

The First Circuit recognizes that "most circuits to have addressed this issue" disagree. *Id.* at 6. But the "text of § 666, as well as its legislative history and purpose, do not support the argument that Congress intended the statute to reach gratuities." *Id.* at 25. Starting with the text, the First Circuit homed in on section 666's similarity to the federal-official bribery statute, 18 U.S.C. § 201(b). *Id.* at 23-24. Like section 201(b), section 666 requires that defendants act "corruptly." *Id.* at 21. "[A]ny payment made 'corruptly' is a bribe," so that word strongly signals that section 666 is limited to bribes. *Id.* at 24. For federal officials, Congress criminalized gratuities in an entirely separate subsection, 201(c), which does not use the word "corruptly." *Id.* at 23. The First Circuit deemed "it unlikely that Congress would condense two distinct offenses [in § 201] into the same subsection in § 666." *Id.* at 24-25.

The First Circuit also deemed "critical" the "distinct penalties" in sections 201 and 666. *Id.* at 24. Federal officials who accept gratuities face only 2 years in prison under section 201(c), but the government's reading of section 666 leaves state and local officials who accept gratuities exposed to 10 years in prison. The First Circuit found that "dramatic discrepancy" "difficult to accept." *Id.*

Similarly, the Fifth Circuit has held that section 666 is limited to quid pro quo bribery because the First Circuit has "the better approach under the plain language of § 666(a)." *United States v. Hamilton*, 46 F.4th 389, 397 (5th Cir. 2022). Section 666 "tracks closely" section 201(b), the federal-official bribery statute, "with the matching 'corruptly' and 'intent to influence' language." *Id.* Fur-

ther, the Fifth Circuit emphasized the "hoard of constitutional problems" with the government's "broad reading," including "First Amendment, federalism, and due-process concerns." *Id.* at 398 n.3. To the extent doubt remained, the court invoked the rule of lenity. *Id.* at 397-98 n.2.

Finally, the Fourth Circuit is "skeptical" that section 666 covers gratuities, but has not definitively taken sides. *United States v. Lindberg*, 39 F.4th 151, 171 n.17 (4th Cir. 2022). That court recognizes that "[i]ncluding gratuities within the ambit of § 666(a)(2)" is "at odds with the textual requirement that one most act 'corruptly.'" *Id.* And decisions extending section 666 to gratuities "blur the long standing distinction between bribes and illegal gratuities" by "abandon[ing] the traditional meaning of 'corrupt intent,'" which ordinarily "criminalizes only bribes." *United States v. Jennings*, 160 F.3d 1006, 1015 n.4 (4th Cir. 1998).

2. In stark contrast, five circuits—the Second, Sixth, Seventh, Eighth, and Eleventh—hold that section 666 extends to gratuities, no quid pro quo exchange required.

Start with the Second Circuit, which has long interpreted section 666 to "appl[y] to both illegal gratuities and bribes." *United States v. Bonito*, 57 F.3d 167, 171 (2d Cir. 1995). That court first reached that conclusion in a case involving a predecessor version of section 666. *Id.* But the Second Circuit has since extended that interpretation to the current section 666, holding that "the current statute continues to cover payments made with intent to reward past official conduct." *Id.* Thus, the Second Circuit reads section 666 to "impose criminal liability for both kinds of crime proscribed by § 201: bribery and illegal gratuities." *United States v. Ganim*, 510 F.3d 134, 150 (2d Cir. 2007).

The Sixth Circuit likewise emphasizes that section 666 "says nothing of a quid pro quo requirement to sustain a

conviction, express or otherwise." *United States v. Abbey*, 560 F.3d 513, 520 (6th Cir. 2009). While a quid pro quo is "sufficient to violate the statute, it is 'not necessary.'" *Id.* at 520 (quoting *United States v. Gee*, 432 F.3d 713, 714 (7th Cir. 2005)); *accord United States v. Porter*, 886 F.3d 562, 565 (6th Cir. 2018).

The Seventh Circuit too has "repeatedly held that § 666(a)(1)(B) 'forbids taking gratuities as well as taking bribes,'" including in the decision below. Pet.App.39a (citing *Hawkins*, 777 F.3d at 881; *United States v. Johnson*, 874 F.3d 990, 1001 (7th Cir. 2017)). In that court's view, "[t]he statutory language 'influenced or rewarded' easily reaches both bribes and gratuities." Pet.App.38a. While the Seventh Circuit recognizes "contrary decisions by the First and Fifth Circuits," the court has not been "persuaded to overrule [its] decisions holding that § 666 applies to gratuities." Pet.App.39a-40a.

The Eighth Circuit holds the same: "Section 666(a)(1)(B) prohibits both the acceptance of bribes and the acceptance of gratuities intended to be a bonus for taking official action." *United States v. Zimmermann*, 509 F.3d 920, 927 (8th Cir. 2007). That court has therefore affirmed convictions for "accepting gratuities rather than bribes" because the government is "not required to prove any quid pro quo." *Id.*

The Eleventh Circuit also has "expressly h[e]ld" that "§ 666 does not require a specific *quid pro quo*," aligning itself "with the Sixth and Seventh Circuits." *United States v. McNair*, 605 F.3d 1152, 1188-89 (11th Cir. 2010). In that court's view, "§ 666 sweeps more broadly than … § 201(b)," the federal-official bribery statute. *Id.* at 1191.

3. Courts, commentators, and even the government widely recognize the conflict. The Fourth Circuit has explained that "it is not settled law that § 666 covers gratuities" because "there is a circuit split on the issue." *Lindberg*, 39 F.4th at 171 n.17. Judge Ho, dissenting from the denial of rehearing en banc in the Fifth Circuit, highlighted "an admitted circuit split" on whether section 666 "criminalize[s] gratuities to local officials." *United States v. Hamilton*, 62 F.4th 167, 170 (5th Cir. 2023). And below, the Seventh Circuit noted that the Second, Sixth, Eighth, and Eleventh Circuits took "the same position" as the Seventh, while the First and Fifth Circuits had issued "contrary decisions." Pet.App.39a. Other circuits recognize the split as well. *Hamilton*, 46 F.4th at 396; *Fernandez*, 722 F.3d at 6; *United States v. Jackson*, 688 F. App'x 685, 694 (11th Cir. 2017).

Commentators also highlight this split. Law-review articles bemoan the "widening" "circuit split" over section 666's application to gratuities. Justin Weitz, Note, *The Devil Is in the Details: 18 U.S.C. § 666 After* Skilling v. United States, 14 N.Y.U. J. Legis. & Pub. Pol'y 805, 829, 831 (2011). Others note that "circuits courts have long grappled" with "whether § 666(a) criminalizes both bribery and illegal gratuities," and "split" on that question. *As Courts Split, Novel Question for 5th Circuit Centers on Quid Pro Quo*, Tex. Law. (Aug. 25, 2022).[2]

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[2] *Accord* Albert W. Alschuler, *Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse*, 84 Fordham L. Rev. 463, 471 n.42 (2015); Stephanie G. VanHorn, Comment, *Taming the Beast: Why Courts Should Not Interpret 18 U.S.C. § 666 to Criminalize Gratuities*, 119 Penn State L. Rev. 301, 304 (2014); Mark S. Gaioni, Note, *Federal Anticorruption Law in the State and Local Context: Defining the Scope of 18 U.S.C. Sec. 666*, 46 Colum. J.L. & Soc. Probs. 207, 220-21 (2012).

The government has acknowledged the split too. In the Fifth Circuit, the government noted that "most circuits agree that Section 666 is not limited to *quid-pro-quo* bribery," but the First Circuit holds "that Section 666 is limited to bribes." U.S. Br. 20-21, *Hamilton*, 46 F.4th 389 (No. 21-11157). Below, the government laid out the 5-2 split in full. C.A. U.S. Br. 53 & n.8. And just last month, the government observed that the First and Fifth Circuits "hold that § 666 criminalizes only bribes, not gratuities," but that interpretation is "inconsistent with the Seventh Circuit's holding in *Snyder*," *i.e.*, this case. U.S. Consolidated Resp. to Pretrial Mots. 63, *United States v. Madigan*, No. 22-cr-115 (N.D. Ill. July 11, 2023), ECF No. 74. The conflict is undeniable.

II. The Question Presented Is Exceptionally Important and Squarely Presented

Section 666's application to gratuities is a question of exceptional importance. Section 666 is the most prosecuted federal public-corruption statute. Yet the split means that state and local officials within some circuits can spend ten years in federal prison for conduct that is not a federal crime elsewhere. Only this Court can fix that perverse disuniformity in the application of a major federal criminal statute. And this case presents an optimal vehicle for resolving the split.

1. Public corruption is "an area of obvious public concern." *Hamilton*, 62 F.4th at 170 (Ho, J., dissenting from denial of rehearing en banc). And section 666—"the beast in the federal criminal arsenal"[3]—is the number one most prosecuted federal public-corruption statute. *See* Official

[3] Daniel N. Rosenstein, Note, *Section 666: The Beast in the Federal Criminal Arsenal*, 39 Cath. U. L. Rev. 673 (1990).

Corruption Prosecutions Drop Under Trump, *TRAC Reports* (Oct. 15, 2018), https://tinyurl.com/bde5jfuw. In 2018, the Justice Department brought nearly three times more cases under section 666 than under the federal-official statute, section 201. *Id.* And in recent years, the government has routinely brought gratuity cases under section 666.[4] Indeed, the government has used the decision below to double down on those efforts. In opposing the dismissal of a gratuity case against the former Speaker of the Illinois House last month, the government cited the decision below a dozen times. *Madigan* U.S. Resp. 45, 47-48, 57, 62-63.

Section 666's enormous sweep makes the statute "one of the federal government's principal weapons … against state and local corruption." George D. Brown, *Stealth Statute—Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666*, 73 Notre Dame L. Rev. 247, 252 (1998). So long as the state or local government receives more than $10,000 in federal funds, the State or locality's officials are subject to section 666. *See United States v. Grossi*, 143 F.3d 348, 350 (7th Cir. 1998) (citing 18 U.S.C. § 666(b)). Thus, the officials of all 50 States and "the vast majority" of America's 90,000 local governments are subject to federal prosecutors' oversight. Weitz, *supra*, at 816; 2022 Census of Governments, 85 Fed. Reg. 80764, 80764 (Dec. 14, 2020). All told, some 20 million Americans work for state and local governments and face potential prosecution under section 666. *See* Nat'l Ass'n of State

[4] *E.g.*, *Hamilton*, 46 F.4th at 394; *United States v. Reichberg*, 5 F.4th 233, 238 (2d Cir. 2021); *United States v. Skelos*, 988 F.3d 645, 660 (2d Cir. 2021); *United States v. Coles*, 2023 WL 1865349, at *1 (S.D.N.Y. Feb. 9, 2023); *United States v. McClain*, 2022 WL 488944, at *5-6 (N.D. Ill. Feb. 17, 2022).

Ret. Admin'rs, *Employment* (June 2023), https://tinyurl.com/5xbn7xx5.

Meanwhile, section 666 provides "federal prosecutors with nuclear-grade statutory weapons." Theodore Richardson, Note, *The Road to Hell Is Paved with Vague Intentions: Prosecutorial Development of 18 U.S.C. § 666 and Its Effect on Local Officials*, 10 Tex. A&M L. Rev. Arguendo 28, 41 (2023). The statute's aim, in the government's words, is to "protect the integrity of the vast sums of money distributed through Federal programs." U.S. Dep't of Just., Just. Manual § 9-46.100 (Jan. 2020). But this Court has held that the charged conduct need not "affect[] federal funds." *Salinas v. United States*, 522 U.S. 52, 57 (1997). Here, for example, the government did not have to prove that Portage's garbage trucks were funded by or even implicated the federal government. The fact that Portage as a whole took $10,000 sufficed.

Nor does the statute "limit the type of bribe offered"—any "valuable consideration" suffices. *Id.* Section 666 also reaches public officials and payors alike, covering both "accept[ing]" and "giv[ing]" unlawful payments. 18 U.S.C. § 666(a)(1)(B), (2). Both officials and payors face up to ten years in federal prison. *Id.* And it does not matter whether the payment actually goes to the official. Section 666 covers soliciting, demanding, giving, offering, or agreeing to give "anything of value" to "any person." *Id.*

Given section 666's breadth in other regards, it is especially important to keep the statute's substantive coverage clear and narrow. Otherwise, state and local officials nationwide will be left guessing whether federal prosecutors will view everyday interactions with constituents as federal crimes. And donors, constituents, and others face

uncertain risks whether campaign contributions and gifts can be recharacterized as illegal "gratuities." *Infra* pp. 26-27.

2. This case is the ideal vehicle for resolving the circuit split. The Seventh Circuit was squarely presented with whether section 666 applies to gratuities, acknowledged the circuit split, and affirmed Mayor Snyder's section 666 conviction solely on the gratuity theory. Pet.App.38a-41a. Indeed, the government repeatedly told the district court at both trials that it did not "have to prove a quid pro quo." 1/22/2019 Tr. 168:6-8; 8/24/2020 Tr. 68:19; 3/8/2021 Tr. 74:22-23. Had Mayor Snyder served the people of Portland, Maine (in the First Circuit) or Plano, Texas (in the Fifth), his conviction would have been vacated. But because he was elected by the citizens of Portage, Indiana (in the Seventh), he faces 21 months in federal prison. Geography should not determine whether a public servant goes to federal prison.

No further percolation is necessary. Circuits have acknowledged each other's conflicting interpretations and declined to reconsider their precedent. The First Circuit created the conflict by holding that section 666 does not reach gratuities, notwithstanding "most circuits[']" opposing view. *Fernandez*, 722 F.3d at 6. Last year, the Fifth Circuit widened the conflict, siding with the First Circuit and then denying rehearing en banc 9-7 over a forceful dissent. *Hamilton*, 62 F.4th at 167-68 (Ho, J., dissenting from denial of rehearing en banc). And below, the Seventh Circuit acknowledged the First and Fifth Circuit's "contrary decisions" but declined "to overrule [its] decisions holding that § 666 applies to gratuities" or revisit the question en banc. Pet.App.2a, 39a-40a. Only this Court can break the stalemate and restore uniformity to federal law.

III. The Decision Below Is Incorrect

Section 666 criminalizes only quid pro quo bribes—corrupt exchanges like paying a governor to veto a bill, or giving a housing inspector a luxury watch in exchange for a passing grade. The statute does not cover gratuities—payments for actions already taken or planned, like donating to the governor's campaign in approval of the veto or buying the inspector a nice case of wine after her report is submitted. The Seventh Circuit's contrary holding conflicts with the statutory text, history, and structure, and raises a panoply of constitutional concerns.

1. Section 666's text does not reach gratuities. State and local officials may not "*corruptly* solicit[,] demand[,] … accept[,] or agree[] to accept, anything of value from any person, intending to be influenced or rewarded in connection with" government business. 18 U.S.C. § 666(a)(1)(B) (emphasis added). "[A]ny payment made 'corruptly' is a bribe" requiring a quid pro quo. *Fernandez*, 722 F.3d at 23. Proscribing gratuities under section 666 would therefore be "at odds with the textual requirement that one must act 'corruptly' to run afoul of the statute." *Lindberg*, 39 F.4th at 171 n.17.

Section 666's history and structure reinforce that conclusion. Section 666 is "the stepchild" of the federal-official bribery statute, section 201. *Fernandez*, 722 F.3d at 20 (quoting Weitz, *supra*, at 816). Section 201 separately criminalizes bribes (in 201(b)) and gratuities (in 201(c)). *Sun-Diamond*, 526 U.S. at 404-05. Section 666 "tracks closely with § 201(b)'s bribery provision, with the matching 'corruptly' and 'intent to influence' language." *Hamilton*, 46 F.4th at 397. By contrast, section 201(c)'s gratuity provision asks whether the payment was "for or because of" the official act, with no "corruptly" requirement.

Because "§ 666 is more like § 201(b)," not 201(c), "the sensible conclusion" is "that Congress meant for § 666" to cover only bribes, not gratuities. *Id.* at 398.

Sections 201 and 666's maximum penalties confirm that section 666 does not criminalize gratuities. Section 201 dictates a fifteen-year maximum sentence for federal-official bribery, but only two years for federal-official gratuities. That disparity reflects the offenses' "relative seriousness." *Sun-Diamond*, 526 U.S. at 405. Congress considers quid pro quo bribery far worse than gratuities.

But section 666 contains a single ten-year maximum, which, on the government's reading, applies to both bribes and gratuities. State and local officials who accept gratuities (and people who give them) face up to ten years in prison while their federal counterparts face only *two* years. Given the federal government's far greater interest in corruption among federal officials, that "dramatic discrepancy"—a five-times greater penalty on state and local officials—is inexplicable. *Fernandez*, 722 F.3d at 24. Even the Seventh Circuit below found the difference "odd." Pet.App.40a.

The circuits that hold that section 666 covers gratuities have focused on the statute's use of the word "rewarded." *E.g.*, Pet.App.40a-41a; *Ganim*, 510 F.3d at 150; *Zimmermann*, 509 F.3d at 927. Because section 201(b)'s bribery provision does not contain that word, courts have reasoned that Congress' use of "rewarded" in section 666 "is a strong indication that § 666 covers gratuities as well as bribes." Pet.App.40a. But for federal officials, Congress did not reach gratuities by simply adding the word "rewarded" to section 201(b). Instead, Congress in section 201(c) omitted the word "corruptly" and criminalized the acceptance of "anything of value personally *for or because* of any official act" (emphasis added). It would be bizarre

for Congress to otherwise transplant section 201(b)'s language to section 666 and use "rewarded" to swallow gratuities. Rather, "rewarded" clarifies "that a bribe can be promised before, but paid after, the official's action on the payor's behalf." *Jennings*, 160 F.3d at 1015 n.3.

2. Reading section 666 to cover gratuities also creates "a hoard of constitutional problems." *Hamilton*, 46 F.4th at 398 n.3. To start, this Court presumes that Congress has not intruded on "areas of traditional state responsibility" like "local criminal activity" absent a "clear statement." *Bond v. United States*, 572 U.S. 844, 858 (2014) (citation omitted).

That federalism rule carries added force in public-corruption cases. Federal prosecutors do not "set[] standards of good government for local and state officials." *McDonnell v. United States*, 579 U.S. 550, 577 (2016) (citation omitted). While the Seventh Circuit questioned why Congress would criminalize gratuities to federal but not state and local officials, Pet.App.41a, "not every corrupt act by state or local officials is a federal crime." *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020). As the government has cautioned elsewhere, section 666 should not be read to "[f]ederalize many state offenses in which the Federal interest is slight or non-existent." U.S. Dep't of Just., Crim. Resource Manual § 1001 (Jan. 2020).

Yet the government's capacious prohibition on gratuities would run roughshod over States' "prerogative to regulate the permissible scope of interactions between state officials and their constituents." *McDonnell*, 579 U.S. at 576. Indiana, for example, has chosen to criminalize both quid pro quo bribery, Ind. Code § 35-44.1-1-2(a)(2), (4), and various "official misconduct" offenses, *id.* § 35-44.1-1-1(2)-(3). For Alcohol and Tobacco Commission employees, Indiana explicitly bans "receiv[ing] a gratuity"

from anyone licensed by the Commission. *Id.* § 7.1-5-5-2. And the Indiana State Board of Accounts, which ensures the integrity of the State and local governments, investigates conduct like the allegations against Mayor Snyder. States and localities do not need the U.S. Department of Justice to keep city garbage-truck contracts clean.

The government's interpretation also risks chilling substantial First Amendment-protected activity. Take campaign contributions, which allow individuals "to participate in the public debate through political expression and political association." *McCutcheon v. FEC*, 572 U.S. 185, 203 (2014). In that context, "Congress may target only a specific type of corruption—'*quid pro quo*' corruption." *Id.* at 207.

Yet the government's gratuity theory sweeps much farther, reaching any "reward for actions the payee has already taken or is already committed to take." Pet.App.37a (citation omitted). On that definition, it is hard to see what contribution is *not* a gratuity. Donors presumably support candidates who take actions they like. And because section 666 applies equally to politicians receiving funds and donors providing them, 18 U.S.C. § 666(a)(1)(B), (2), the swath of potentially covered conduct is massive.

Suppose a grandmother writes "Thank you for supporting our troops" on a donation check to a governor who fought to keep a military base open. Or say the head of a nurses' union hosts a gala honoring a state public-health official who "stood up for our healthcare heroes" by supporting vaccine mandates. Those acts "reward" public officials for past conduct and thus risk ten years in federal prison for both the official and the grateful constituent.

That ambiguous scope risks "chilling effect[s]" on protected speech. *See Counterman v. Colorado*, 143 S. Ct. 2106, 2114 (2023).

Further, the government's construction of section 666 poses major vagueness concerns. Criminal laws must give "fair notice" to avoid the risk of "arbitrary and discriminatory enforcement." *McDonnell*, 579 U.S. at 576 (citation omitted). Yet, as above, the breadth of conduct potentially meeting the government's definition of a gratuity is sweeping. As this case illustrates, any time a public servant accepts private employment (think: every ex-state legislator turned lobbyist), federal prosecutors might recast those payments as gratuities for actions taken in office.

The Seventh Circuit brushed aside these concerns, reasoning that section 666's prohibition on acting "corruptly" requires that the payment be taken "with the knowledge that giving or receiving the reward is forbidden." Pet.App.41a. That circularly assumes that what "is forbidden" is clear. But the government's interpretation leaves section 666's scope amorphous in the first place. Courts cannot "construe a criminal statute on the assumption that the government will use it responsibly." *McDonnell*, 579 U.S. at 576 (citation omitted).

To the extent doubt remains, the rule of lenity resolves "ambiguities about the breadth of a criminal statute … in the defendant's favor." *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). When a public-corruption statute can "linguistically be interpreted to be either a meat axe or a scalpel," it "should reasonably be taken to be the latter." *McDonnell*, 579 U.S. at 576 (quoting *Sun-Diamond*, 526 U.S. at 412). Section 666 is best read not to cover gratuities. At minimum, "reasonable doubts" about section

666's meaning compel reading the statute not to criminalize gratuities. *Hamilton*, 46 F.4th at 397-98 n.2; *accord Fernandez*, 722 F.3d at 40 (Howard, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AUGUST 1, 2023