

No. 23-108

In the
Supreme Court of the United States

JAMES E. SNYDER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

**BRIEF FOR THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS AS
AMICUS CURIAE IN SUPPORT OF THE
PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defendants to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of thousands of direct members and up to 40,000 affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and criminal defense lawyers.

NACDL is dedicated to advancing the proper, efficient, and fair administration of justice. NACDL files numerous *amicus* briefs each year in this Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. The proper scope of prosecutions under 18 U.S.C. § 666—the most-prosecuted federal corruption statute—is a question of great importance to NACDL and the clients its attorneys represent, and NACDL is well positioned to provide additional insight into the implications of this issue for criminal defendants across the country.

¹ Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a criminal statute that has been stretched beyond its limits. Despite its moniker as the “federal program bribery provision,” 18 U.S.C. § 666 paradoxically does not require proof of a connection to any federal funds. And in the government’s view, it does not even require proof of bribery. Instead, as the Petitioner explains, the government reads section 666 to criminalize not only quid pro quo bribes, but also the payment of any after-the-fact gratuity, if that payment was made in recognition of actions already taken—even if the official did not agree to act in exchange for the payment. That reading is wrong as a textual and structural matter. And it has serious and far-reaching consequences for state and local government employees and their constituents.

By its terms, section 666 applies to any agent of a state or local government, or any private organization, so long as any component of the government or organization accepted at least \$10,000 in federal funding in the previous year. Federal funding to such entities—via grants, loans, contracts, subsidies, and more—regularly runs into the trillions of dollars annually. The scale of that federal spending means that virtually all of the more than 19 million employees of state and local governments are potentially at risk of liability under section 666—to say nothing of untold numbers of private businesses or organizations and their employees.

As that breathtaking scope makes clear, the quid pro quo bribery requirement stands as one of the few practical limitations on the statute’s reach. And it

also demonstrates why the government's position is so dangerous. Given the capacious definition of gratuities criminalized under the reading advanced by the government, millions of state and local government employees could face prosecution for a wide variety of conduct, with nothing short of a prosecutor's own imagination as a check on how section 666 could be used. For example, most local governments in the United States are run by part-time officials, many of whom maintain other careers outside their government service. But suddenly every car sold, every insurance policy written, every will drafted, and every tooth pulled could be the hook for section 666 liability if a prosecutor could characterize it as a gratuity for an official's past conduct. The corrosive effect of that result on the relationships between local officials and their constituents cannot be overstated.

What's more, that result runs directly contrary to this Court's repeated admonitions that federal corruption statutes are not a blank check for federal prosecutors to "involve[] the Federal Government in setting standards of 'good government for local and state officials.'" *McDonnell v. United States*, 579 U.S. 550, 576-77 (2016) (citation omitted). But the government's interpretation of section 666 provides precisely that: an amorphous and unchecked power for federal prosecutors to police the everyday interactions between state and local officials and their constituents. That result is inconsistent not only with settled due process principles, but also with bedrock principles of federalism.

And to top it all off, the government's position entrenches an illogical and unfair disparity in the criminal code that Congress never would have

expected or intended. Under the government’s reading, a defendant convicted for soliciting or offering a gratuity under the federal-official statute’s *explicit* gratuity provision may only be sentenced to a maximum of two years’ imprisonment. 18 U.S.C. § 201(c). But, bizarrely, a defendant convicted under section 666 for soliciting or offering a gratuity—despite that provision’s *lack* of any explicit language covering gratuities—may be sentenced to up to *ten years*’ imprisonment for the same crime. *Id.* § 666(a). That result makes no sense, and nothing in section 666’s text requires it.

For all these reasons, the Court should reject the government’s reading and reverse the judgment of the Seventh Circuit.

ARGUMENT

A. The Government’s Position Exposes Tens Of Millions Of State And Local Employees And Private Citizens To Potential Criminal Liability

1. Section 666(a)(1) punishes, with up to ten years’ imprisonment, any “agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof,” who “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 the agent’s principal, where the business or transaction “involv[es] any thing of value of \$5,000 or more,” 18 U.S.C. § 666(a)(1), and the principal “receives, in any one year period, benefits in excess of \$10,000 under a Federal program,” *id.* § 666(b). Section 666(a)(2) is similar, applying to

whoever “corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward” any such agents “in connection with” any such business or transactions. *Id.* § 666(a)(2).

The scope of those provisions is breathtakingly broad. Together, they create criminal liability for any actor—whether public employee or private citizen—if that person offers or receives any thing of value (no matter how small, and even if the value is intangible) “intending to be influenced or rewarded in connection with” any transaction worth \$5,000 or more, so long as the transaction involves an organization that has received at least \$10,000 in federal benefits in the previous year. The potential defendants who meet those criteria number at least in the tens of millions.

Start with state and local officials and government employees. The \$10,000 federal benefits threshold is satisfied not only by direct grants, but also by any “subsidy, loan, guarantee, insurance, or other form of Federal assistance.” 18 U.S.C. § 666(b). In 2022 the federal government provided roughly \$1.2 trillion in such aid to state, local, tribal and territorial governments. Office of Management and Budget, *Analytical Perspectives: Budget of the U.S. Government* 77 (2023), https://www.whitehouse.gov/wp-content/uploads/2023/03/spec_fy2024.pdf. At last count, there were 90,888 state and local governments. U.S. Census Bureau, *2022 Census of Governments – Organization, Data & Maps* (revised July 27, 2023), <https://www.census.gov/data//tables/2022/econ/gus/2022-governments.html> (select Table 1, then select Data spreadsheet). With an average of \$13.3 million in federal aid per government, it is reasonable to assume that virtually every state, local, tribal and

territorial government has received federal benefits sufficient to invoke section 666 liability. And because section 666 applies to any “agent” of an entity so long as that entity received the bare minimum in federal benefits, all of the 19.2 million people employed by these governments could fall within the scope of section 666. See U.S. Census Bureau, *2022 Census of Governments, Survey of Public Employment & Payroll Datasets & Tables, Surveys & Programs* (revised June 13, 2023), <https://www.census.gov/programs-surveys/apes/data/datasetstables/2022.html> (select State & Local Government Employment Data).

But section 666 liability is not limited to government employees. To the contrary, it also extends to employees of any “organization”—including private businesses, charities, and civic organizations—who meet the federal funding threshold. Every year, hundreds of billions of dollars in federal funding is dispensed to private parties in the form of government contracts, grants, or loans. In recent years, for example, the federal government has spent more than \$665 billion on government contracts,² nearly \$814 billion in Small Business Administration loans to small businesses,³ and more than \$117 million in National Endowment for the

² U.S. Gov’t Accountability Off., *A Snapshot of Government-Wide Contracting for FY 2020* (June 22, 2021), <https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2020-infographic>.

³ Gov’t Accountability Off., *Paycheck Protection Program: Program Changes Increased Lending to the Smallest Businesses and in Underserved Locations* 4 (Sept. 2021), <https://www.gao.gov/assets/gao-21-601.pdf>.

Arts grants.⁴ As these limited examples demonstrate, federal funding touches virtually every category of private organization—from Fortune 500 companies, to local small businesses, to schools, museums, and charities—and in amounts frequently in excess of the \$10,000 threshold.⁵ As a result, section 666’s reach encompasses untold numbers of employees of private organizations too.

It is clear that federal prosecutors have exploited section 666’s breadth. Indeed, from 2002 to 2022, nearly three thousand people were charged under section 666. See U.S. Dep’t of Justice, Bureau of Justice Statistics, *Federal Criminal Case Processing Statistics*, <https://fccps.bjs.ojp.gov/home.html?dashboard=FJSP-CriminalCodeStats&tab=CriminalCodeStatistics> (last visited Feb. 6, 2024). Those prosecutions were not limited to government employees alone. Instead, the government has frequently used section 666 to charge government

⁴ Nat’l Endowment for the Arts, *Fiscal Year 2022 Annual Performance Report 4* (Feb. 2023), <https://www.arts.gov/sites/default/files/NEA-FY22-Annual-Performance-Report.pdf>.

⁵ According to a search of one government database, in fiscal year 2023, \$10,000 or more in federal funds went to private businesses, nonprofits, institutions of higher education, and individuals in the form of more than 1 million government contracts, over 197,000 grants, and more than 750,000 direct payments. See *Spending by Prime Award*, Advanced Search, USASpending.gov, <https://www.usaspending.gov/search/?hash=227a1219ee9f94fb75eb954b5e86499e> (last visited Feb. 6, 2024) (select filters for FY 2023, contracts, grants, and direct payments award types, all business, all nonprofit, all higher education, all individuals, and minimum award of \$10,000).

contractors, subcontractors, and their employees,⁶ and even totally private businesses, organizations, and individuals.⁷

2. Given the statute's already enormous breadth, whether section 666 applies only to quid pro quo bribery becomes critically important as one of the few limits on prosecutors' discretion—if not the only one. Under the government's reading, however, prosecutors are handed a blank check to prosecute all manner of state, local, and even private activity. Such unlimited discretion would convert an alarming number of ordinary transactions between state and local officials and their constituents into criminal activity.

Most alarmingly, the government's interpretation threatens to criminalize constituent donations to state and local officials, because section 666 has no exception for political contributions. *See, e.g., United States v. Grubb*, 11 F.3d 426, 434 (4th Cir. 1993). As the Petitioner correctly points out, such an interpretation would raise significant constitutional

⁶ *See, e.g., United States v. Dominique-McClain*, 623 F. Supp. 3d 33, 35-36 (E.D.N.Y. 2022) (physical therapy subcontractor to New York City Department of Health and Mental Hygiene charged under 18 U.S.C. § 666(a)(1)(A) for submitting fraudulent invoices).

⁷ *See, e.g., United States v. Abdelaziz*, 68 F.4th 1, 16-17, 22-23 (1st Cir. 2023) (parent charged with bribing the University of Southern California to secure son's admission as a water polo recruit); *United States v. Askia*, 893 F.3d 1110, 1114-15 (8th Cir. 2018) (employee of local for-profit educational service provider), *cert. denied*, 139 S. Ct. 2705 (2019); *United States v. Edgar*, 304 F.3d 1320, 1323 (11th Cir. 2002) (employee of a private hospital), *cert. denied*, 537 U.S. 1132 (2003); *United States v. Campbell*, 798 F. Supp. 2d 293, 296 (D.D.C. 2011) (employee of the International Organization for Migration).

concerns if the government could charge constituents for donating to their mayor's campaign if the donation could be characterized as a gratuity for past services. *See* Pet. Br. 38, 48-49.

But the corrosive effect of interpreting section 666 to include gratuities could be much broader. Consider the case of a part-time city councilwoman. *See* 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."). To supplement the modest income from her government role, the councilwoman continues to run her own business—one of the town's only insurance brokerages. Could every new policy she writes for constituents trigger section 666 liability as a gratuity? Though section 666 excludes "bona fide salary, wages, fees, or other compensation paid . . . in the usual course of business," 18 U.S.C. § 666(c), the government will inevitably argue that such payments are not "bona fide" if they are meant to reward a politician for her previous actions, *see, e.g., United States v. Bryant*, 556 F. Supp. 2d 378, 427 (D.N.J. 2008) (concluding that "it cannot be argued with a straight face that the payments [to the legislator defendant] were 'bona fide' salary paid in the 'usual course of business'").

What if instead of making a purchase from the councilwoman's own business, a constituent donates to a charity run by the councilwoman's spouse? *See* Eric Lipton, *Wife's Charity Offers Corporate Tie to a Governor*, N.Y. Times (Mar. 2, 2011), <http://www.nytimes.com/2011/03/03/us/politics/03jindal.html>. Or, even more tangentially, if the constituent donates to a charity that the constituent knows the councilwoman's spouse likes? *See*

Raymond Hernandez & David W. Chen, *Gifts to Pet Charities Keep Lawmakers Happy*, N.Y. Times (Oct. 18, 2008), <http://www.nytimes.com/2008/10/19/us/politics/19charity.html>. Every potential interaction between state and local officials and their constituents—no matter how mundane—becomes grist for potential corruption prosecutions.⁸

More hypotheticals abound. Consider a state-funded parks department that opens a new baseball field at a cost of more than \$5,000. Because the state college has received federal funds, every branch of the state government falls within the scope of section 666. And when a little league coach shows his appreciation for the new baseball field by giving each local parks employee a hat with the team logo on it, his act of kindness exposes him to federal imprisonment under section 666. Even more remarkable, it also exposes each of those parks employees to ten years in prison.

Of course, to say that such prosecutions are possible is not to say that they are inevitable. But taken to its extremes, the government’s reading of section 666 invites boundless prosecutorial discretion—and therefore boundless potential for abuse. Without the critical limit of a quid pro quo requirement, criminal defendants are left protected only by “the assumption that the Government will ‘use [its power] responsibly.’” *McDonnell v. United*

⁸ The same is true with organizations: Suppose a used car business receives \$10,001 in Paycheck Protection Program loans. See, e.g., USASpending.gov, *Loan Summary: FAIN 5134009006*, https://www.usaspending.gov/award/ASST_NON_5134009006_7300 (last visited Feb. 6, 2024) (PPP loan of \$12,760 to used car business in Orlando, Florida). Customers can now be charged under section 666(a)(2) based on their dealings with the salesperson.

States, 579 U.S. 550, 576 (2016) (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010)). But this Court has never “rel[ied] on ‘the Government’s discretion’ to protect against overzealous prosecutions.” *Id.* It should not start now.

B. The Government’s Reading Conflicts With This Court’s Case Law

In recent years, this Court has repeatedly warned against interpreting federal corruption statutes to broadly sweep in the ordinary political activity of state officials. The government’s expansive interpretation of section 666 is dangerously out of step with that recent precedent.

In *McDonnell*, for example, this Court rejected the government’s sweeping interpretation of the federal-official bribery statute, 18 U.S.C. § 201. The government indicted Virginia Governor Bob McDonnell, who (along with his wife) received over \$175,000 in gifts from entrepreneur Jonnie Williams. The government argued that by arranging meetings with Virginia state officials for Williams to discuss research studies on his newly developed medication in return for these gifts, McDonnell committed honest services fraud because he was “influenced in the performance of an[] official act.” *McDonnell*, 579 U.S. at 562 (citation omitted). This Court rejected the government’s broad interpretation of section 201, and concluded that McDonnell’s arranging meetings was not an “official act.” Three aspects of that decision bear emphasis here.

First, this Court made clear that the broadest definition of “official act” would be so capacious that it would impose virtually no limit on the scope of section 201. “[I]f every action somehow related to the

research study were an ‘official act,’” the Court explained, “the requirement that the public official make a decision or take an action on that study, or agree to do so, would be meaningless.” *Id.* at 573. The Court highlighted the “significant constitutional [due process] concerns” raised by such a broad interpretation. *Id.* at 574. If “nearly anything a public official accepts” and “nearly anything a public official does” would be defined as an “official act,” then nearly everything would therefore be subject to prosecution. *Id.* at 574-75. The Court condemned that “standardless” reading, and rejected a world in which a public official “could be subject to prosecution, without fair notice, for the most prosaic interactions.” *Id.* at 576 (citation omitted).

Second, the Court emphasized the particular danger of such an unbounded interpretation in the context of the services that government officials provide to their constituents. As the Court explained, “the Government’s ‘breathtaking expansion of public-corruption law would likely chill [government] officials’ interactions with the people they serve and thus damage their ability effectively to perform their duties.” *Id.* at 575 (citation omitted).

Third, the Court noted that the government’s reading of section 201 raised “significant federalism concerns.” *Id.* at 576. In our federal system, the Court explained, each state has primary responsibility “to regulate the permissible scope of interactions between state officials and their constituents.” *Id.* For that reason, the Court “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 576-77 (citation omitted).

All of these concerns apply with equal force to section 666. *First*, the most critical and significant check on prosecutors’ discretion in the context of section 666 is the requirement that prosecutors prove the existence of a quid pro quo bribe. Without that limit, the government’s interpretation of section 666 results in a statute of such sweeping, standardless breadth that practically any activity engaged in by state and local officials and their constituents—to say nothing of private organizations—could result in criminal liability.

Second, the same chilling effect the Court noted in *McDonnell* is present here. If every potential interaction between officials and their constituents—including political donations—could implicate criminal activity, the natural result is a degraded relationship between government officials and the constituents in their communities.

Third, it makes little sense to think that the authorities who should be responsible for policing the outer bounds of these relationships are *federal* officials, rather than state and local authorities who rightly have the primary responsibility for matters close to home.

Since *McDonnell*, this Court has consistently rejected amorphous, all-purpose readings of federal criminal statutes, and has emphasized that not every local transgression is a federal case. *See, e.g., Dubin v. United States*, 599 U.S. 110, 120-31 (2023) (rejecting an expansive interpretation of the word “use” in federal criminal fraud statute). The government’s interpretation of section 666 runs

roughshod over these principles. Consistent with *McDonnell*, the Court should restore the statute to its necessary limits.

C. The Government’s Interpretation Entrenches An Illogical, Unfair Disparity In The Criminal Code

This Court should also reject the government’s interpretation, because that reading creates an unfair and unnecessary disparity between the federal-official bribery statute and section 666. As the Petitioner explains, the federal-official bribery statute separately criminalizes bribes and gratuities. Pet. Br. 28-29. By contrast, section 666 makes no mention of gratuities, and its “corruptly” language closely tracks the language of the federal bribery provision in section 201(b). *Id.* (citation omitted). The natural inference, then, is that section 666 criminalizes only bribes—not gratuities.

By rejecting that view, the government’s reading reinforces a reading of the criminal code that punishes state and local officials with up to ten years’ imprisonment for conduct that could only be punished with up to two years’ imprisonment under the federal-official statute. Compare 18 U.S.C. § 201(c), with *id.* § 666(a). That disparity is not just unfair, it also is a “result[] that Congress is most unlikely to have wanted.” *Murphy v. NCAA*, 584 U.S. 453, 469 (2018). This Court should not permit that inequality.

CONCLUSION

The Court should reverse the judgment of the Seventh Circuit.

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