GRANTED

No. 99-116

In The
Supreme Court of the United States

JEFFREY ALLAN FISCHER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

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

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QUESTION PRESENTED

Whether Medicare payments to a hospital for services provided to Medicare patients qualify as "benefits" to meet the jurisdictional requirements of Title 18 U.S.C. § 666 so as to federalize crimes of theft, embezzlement, and bribery involving the hospital?

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INTEREST OF *AMICUS CURIAE* [1]

The National Association of Criminal Defense Lawyers ("NACDL") submits this *amicus curiae* brief in support of the Petitioner, Jeffrey Allan Fischer. The NACDL is a nonprofit corporation with more than 10,000 lawyer-members and 28,000 affiliate-members in all 50 States. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

The NACDL was founded in 1958 to promote criminal-law research, to disseminate and advance knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal-defense counsel. The NACDL is particularly dedicated to advancing the proper administration of justice and to ensuring that criminal statutes are construed and applied in accord with the United States Constitution.

This case involves the interpretation and application of a relatively novel federal criminal statute, 18 U.S.C. § 666.[2] We believe the Court of Appeals' expansive reading of this statute disregards its plain language, its legislative history,

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[1]The parties have consented to the submission of this *amicus curiae* brief. Their letters of consent have been filed with the Clerk of this Court. None of the parties authored this brief in whole or in part and no one other than *amicus curiae*, its members, or its counsel contributed money or services to the preparation or submission of this brief. *See* S. Ct. Rule 37.6.

[2]*See generally* Daniel N. Rosenstein, Note, "Section 666: The Beast in the Federal Criminal Arsenal," 39 Cath. U. L. Rev. 673 (1990); George D. Brown, "Stealth Statute: Corruption, The Spending Power, and the Rise of Section 666," 73 Notre Dame L. Rev. 247 (1998).

and the traditional canons for interpreting federal criminal statutes. This reading is misguided as a matter of construction, creates serious federalism-based concerns, and could undermine the States' primary role in criminal-law enforcement.[3] The NACDL urges this Court to re-affirm the principle that courts should exercise restraint in construing federal criminal statutes, thereby preserving our system of enumerated powers and dual sovereignty and the individual liberties that system was designed to protect.

INTRODUCTION

This case presents a question of statutory interpretation that is clear and straightforward but at the same time of great constitutional importance. The decision below flies in the face of the relevant statute's plain meaning, *see* 18 U.S.C. § 666(b), and disregards established canons of construction and "first principles" of our Nation's constitutional federalism. *United States v. Lopez*, 514 U.S. 549, 552 (1995); *see also South Dakota v. Dole*, 483 U.S. 203, 207 (1987) ("The spending power is of course not unlimited . . . , but is instead subject to several general restrictions[.]").

Generally speaking, commercial bribery is not a federal crime. Before purely local criminal activity may be subject

[3]*See generally* ABA Task Force on the Federalization of Criminal Law, The Federalization of Criminal Law 56 (1998) (arguing that the health of our constitutional system of dual federalism depends on halting "inappropriate federalization"); Committee on Long Range Planning of the Judicial Conference of the United States, Proposed Long Range Plan for the Federal Courts 19 (Nov. 1994) ("If federal courts were to begin exercising . . . the broad range of subject-matter jurisdiction traditionally allocated to the states, they would lose both their distinctive nature and . . . their ability to resolve fairly and efficiently those cases of clear national import and interest[.]").

to federal penalties, the Constitution requires *some* federal "jurisdictional hook,"[4] such as, for example, an effect on or connection with interstate commerce. *See, e.g.*, 18 U.S.C. §§ 201 ("Bribery of public officials and witnesses"), 214 ("Offer for procurement of Federal Reserve bank loan"), 224 ("Bribery in sporting contests"). Here, Section 666 makes it a federal crime to offer or receive a bribe in connection with the business of any "organization" that "receives, in any one year period, benefits in excess of $10,000 under a Federal program involving . . . Federal assistance." 18 U.S.C. §§ 666(a)(1)-(2), (b). It is the "recei[pt]" of more than $10,000 in federal-assistance-program "benefits" that ensures a sufficient federal interest in what would otherwise only be a state-law offense. Thus, that "receipt" of program "benefits" is Section 666's statutorily *and constitutionally* required "jurisdictional hook."

This case is about that jurisdictional hook. It is about the meaning of the words "receives," "benefits," and "assistance." This Court must decide whether bribes relating to the business of an organization – in this case, a health-care facility – that does *not* itself "receive[]" "benefits" under a federal "assistance" program, but that *does* get paid for services from people who *themselves* "receive[]" financial "benefits" under such a program, are federal crimes. Put simply, would Section 666 apply to a bribe offered to the proprietor of a corner grocery store that "receive[d]" more than $10,000 in food stamps from its low-income patrons who are beneficiaries of the food-stamp program? *See United States v. LaHue*, 998 F. Supp. 1182, 1187 (D.Kan.

[4]*See generally*, Richard W. Garnett, "Once More Into the Maze: *United States v. Lopez*, Tribal Self-Determination, and Federal Conspiracy Jurisdiction in Indian Country," 72 N. D. L. Rev. 433, 449-450 (1996) (discussing "jurisdictional hooks" in federal criminal law).

1998) ("[N]early every large grocery store chain directly receives more than $10,000 in food stamps as payment from customers. . . . [S]urely a checkout clerk's theft of $5,000 in cash from a cash register does not constitute federal program fraud."), *aff'd*, 170 F.3d 1026 (10th Cir. 1999). The Court of Appeals for the Eleventh Circuit, in effect, answered "yes" to this question. *United States v. Fischer*, 168 F.3d 1273 (11th Cir. 1999). But this simply cannot be the law.

The relevant facts can be summarized quickly:[5] The Petitioner, Jeffrey Allan Fischer, was convicted under Section 666. Pet. App. 1-2. The government charged that Mr. Fischer arranged for a $10,000 "kickback" (Pet. App. 5) to be paid to the Chief Financial Officer of the West Volusia Hospital Authority ("WVHA") in return for a $1.2 million loan from WVHA to Quality Medical Consultants, Inc., of which Mr. Fischer was President and part owner. Pet. App. 3-5. But again, because bribery, standing alone, is not a federal crime, "[t]o establish that Fischer had violated 18 U.S.C. §§ 666(a)(1) and (a)(2), the Government was required to prove that WVHA was an agency receiving, in any one year period, benefits in excess of $10,000 under a federal assistance program. 18 U.S.C. § 666(b)." Pet. App. 6.

To meet this burden, the Government introduced testimony that "WVHA had collected between ten and fifteen million Medicare dollars in 1993." *Ibid.* The government did not present any evidence showing whether these Medicare payments were disbursed under Medicare "Part A" or "Part B" (Pet. App. 14); that is, the government's evidence "did not clearly establish whether WVHA received funds directly from the Medicare program or received funds as an

[5]*See generally* Pet. App. 1-8.

assignee under Part B or even Part A of the federal program."[6] *Ibid.* Thus, the Court of Appeals observed, "there is a possibility in this case that WVHA received funds directly from the Medicare program without having been assigned the right to receive those funds by a patient." Pet. App. 14. However, the Court of Appeals stated clearly that "*even if* the WVHA received funds as an assignee, the plain language of Section 666(b) does not distinguish between an organization, government, or agency that receives 'benefits' directly under a federal program and an organization, government, or agency that receives 'benefits' as an assignee under a federal program." Pet. App. 14 (emphasis added).[7]

[6]As the Court of Appeals observed, "[t]he Medicare program is divided into two parts, Part A and Part B. *See* 42 U.S.C. § 1395, *et seq.*" Pet. App. 13 n.9. The Court of Appeals for the Tenth Circuit described recently the differences between these two "parts" of the program: "Payment by Medicare under Part A for services rendered by a hospital or other institution may only be made to the institution, and the institution may not bill the patient directly, except for deductibles and coinsurance . . . . Under Part B, a physician may either request direct payment by patients on the basis of an itemized bill or accept assignment agreements. . . . This assignment scheme implies that the intended beneficiary of Medicare Part B is the patient." *United States v. LaHue*, 170 F.3d 1026, 1027-1028 n.3 (10th Cir. 1999).

[7]In our view, it makes no difference whether the Medicare funds were "assigned" by the program's beneficiaries to the health-care facility or were sent directly by the government to the facility in exchange for services provided to the beneficiaries. Under *both* Parts of Medicare, it is the *patient*, and not the health-care provider, that is the beneficiary and who "receives" "benefits" under that federal assistance program The relevant Medicare-related provisions make this clear. Under Part A, "[t]he benefits provided to an individual by the insurance program under this part shall consist of entitlement to have payment made on his behalf." 42 U.S.C. § 1395d(a). *See also* 42 U.S.C. §§ 1395k(a)(1), 1395u(a) ("individuals" receive "benefits" under Part B).

The Court of Appeals stated that Section 666's "use of the term 'benefits' serves to emphasize not that the recipient must be a 'target recipient,' but rather that the funds must have been received by the organization, government, or agency as part of an 'assistance' program, rather than a purely commercial transaction – the federal government's purchase of goods from a contractor, for example." Pet. App. 14-15 (citing *United States v. Copeland*, 143 F.3d 1439 (11th Cir. 1998)). The court held that the constitutionally and statutorily required jurisdictional hook – that the "organization" (here, the WVHA) "receive[d]" at least $10,000 in "benefits" under a federal "assistance" program – was established *solely*[8] on the basis of the funds the WVHA received as payment for services provided to that the Medicare program's beneficiaries. *See* Pet. App. 10-12, 14.

Less than three weeks after the Court of Appeals' ruling below, the Tenth Circuit reached the opposite conclusion, holding that payments to a health-care organization for services provided to Medicare Part B beneficiaries were *not* "benefits" "receive[d]" under Section 666(b):

> We conclude that Congress intended the reference in section 666(b) to an organization receiving federal program benefits to mean one that receives benefits before final distribution to the intended beneficiary, here the patient. *What happens to the funds once the patient receives them is beyond the scope of section 666.* Thus, any assignment of such funds to a third party does not constitute a receipt of federal program benefits within the reach of section 666.

United States v. LaHue, 170 F.3d 1026, 1031 (10th Cir. 1999) (emphasis added). This Court granted certiorari to resolve this conflict. *Fischer v. United States*, 120 S. Ct. 395 (Nov. 1, 1999) (No. 99-116).

[8]There was no evidence presented that the WVHA administered any programs or disbursed any funds for or on behalf of the United States.

SUMMARY OF THE ARGUMENT

We agree with the Petitioner that the Court of Appeals misread Section 666(b). Section 666 was designed to protect the integrity of federal funds by outlawing bribery in connection with the administration of those funds, and the plain meaning of the language the statute employs is adequate to achieve that purpose. The Court of Appeals, on the other hand, exploded the well defined limits that the statute's text imposes on federal jurisdiction over local bribery and embraced a reading that severely disrupts the Constitution's "delicate balance" between state and federal power. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1992). The rationale of the decision below has no logical stopping point. *See Lopez*, 514 U.S. at 563 ("[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.").

The Court of Appeals' interpretation of Section 666(b) is inconsistent with the plain meaning of the statute's terms. Moreover, even if the provision or its terms were ambiguous, the decision below could not be reconciled with longstanding canons of statutory construction and "first principles" of constitutional federalism. The spending power enjoyed by Congress under Article I does not permit the federal government to nationalize all local bribery prosecutions

absent *some* connection with the integrity of a federal program. The judgment of the Court of Appeals should be reversed.

ARGUMENT

I.

FEDERAL PAYMENTS TO A HOSPITAL FOR HEALTH-CARE SERVICES PROVIDED TO MEDICARE BENEFICIARIES ARE NOT "BENEFITS" UNDER 18 U.S.C. § 666(b).

The Court of Appeals validated a reading of Section 666 in which federal criminal jurisdiction lives like a virus in all program funds disbursed by the United States, wherever they go, however they are spent, and whoever eventually benefits from them.[9] We recognize, of course, that Congress used "expansive, unqualified" language when it outlawed bribery involving organizations that receive federal benefits or administer federal funds, *Salinas v. United States*, 118 S. Ct. 469, 473 (1997), but even "expansive" language has limits. *See Copeland*, 143 F.3d at 1441 ("The scope of § 666 . . . is not limitless."). The Court of Appeals' reading cannot be sustained.

[9] *See* David E. Engdahl, "The Spending Power," 44 Duke L. J. 1, 92 (1994) ("Money cannot infect the recipient with the germ of generalized federal government control, or an infectious virus capable of spreading that disease to anyone who touches the recipient or its property.").

A. The Decision Below Is Inconsistent with the Plain Meaning of Section 666(b).

Just two Terms ago, this Court emphasized – in its only other Section 666 case – that "[c]ourts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language. Only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language." *Salinas*, 118 S. Ct. at 474 (internal quotation marks and citations omitted); *Ardestani v. INS*, 502 U.S. 129, 135 (1991) (courts may deviate from a statute's plain language only in "rare and exceptional circumstances"); *United States v. Turkette*, 452 U.S. 576, 580 (1981) ("If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.") (citation and internal quotation marks omitted). The plain-language rule reflects, as Chief Justice Marshall emphasized, a respect not only for the means chosen by legislators but also for "the rights of individuals." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. . . . It is the legislature, not the Court, which is to define a crime, and ordain its punishment.").

The Court of Appeals concluded – based "*entirely* on the plain language of [the statute]" – that "WVHA received a type of 'benefits' expressly covered by Section 666(b)." Pet. App. 11 (emphasis added). In fact, though, the "plain language" of the statute requires reversal.

Section 666(b) defines the class of bribes that do not involve federal officials but are nonetheless federal crimes.[10] These bribes must involve an "organization, government, or agency" that "receives, in any one year period, benefits in excess of $10,000 under a Federal program involving . . . Federal assistance." 18 U.S.C. § 666(b). There is no question here whether WVHA is an "organization" nor, we think, is there any dispute whether the Medicare program – Part A or Part B – is a "Federal program involving Federal . . . assistance." What's more, it can be conceded that funds disbursed through the Medicare program are "benefits" – *"benefits" that are "receive[d]" as "assistance" by the program's beneficiaries, the patients.*

Thus, the question in this case is *not* whether the Medicare program disburses "benefits" – of course it does – but whether health-care providers like WVHA "receive[]" "benefits" when they are *paid* (whether by assignment or directly) for providing valuable services to Medicare beneficiaries. In other words, do "benefits" *stay* "benefits" forever -- do funds once disbursed through a federal program bear forever the federal brand[11] -- or do they ever, through exchange in commerce, become just regular, everday "money"?

"Benefit," Webster notes, comes from the Latin *bene factum*; its original English meaning is "an act of kindness."

[10]"Before § 666 was enacted, the federal criminal code contained a single, general bribery provision codified at 18 U.S.C. § 201. Section 201 by its terms applied only to public official[s][.]" *Salinas*, 118 S. Ct. at 474.

[11]*Compare* Genesis 4:15 (God "put a mark on Cain, lest any who came upon him should kill him").

Webster's Third New Int'l Dictionary 204 (1986) ("benefit"). Its modern noun usages include "something that guards, aids, or promotes well being"; "useful aid"; "help"; and "financial help in time of sickness, old age, or unemployment." Given these definitions, "benefits" describes quite accurately what it is that America's elderly and disabled "receive[]" from the federal government through Medicare. It does not at all describe, though, what it is that the health-care *providers* "receive[]." When WVHA "receives" funds *from* the Medicare program's beneficiaries (whether by assignment from the beneficiaries themselves or from the government directly on their behalf), it does *not* "receive[]" "useful aid" or "financial help in time of sickness." Rather, it "receives" *compensation in exchange for services rendered. See Copeland*, 143 F.3d at 1441 ("[O]rganizations engaged in purely commercial transactions with the federal government are not subject to § 666.").

Payments "receive[d]" by health-care providers like WVHA as a result of the Medicare program's disbursements – however such disbursements might be characterized when received by the program's beneficiaries, the patients – are simply not "benefits" "receive[d]" under a Federal "assistance" program, even if these providers do "benefit" from the government's involvement in the health-care market. The manufacturers and sellers of consumer goods that senior citizens can afford and live to enjoy, thanks to Medicare, also "benefit" in this sense, but no one thinks Cadillac is an "organization" under Section 666. Grocery stores obviously "benefit" from the funds disbursed through the federal food-stamp program, and food-stamps are clearly "benefits" to someone, but the stores do *not* "receive[]"

"benefits" within the meaning of Section 666(b).[12] Were it otherwise, where would it end?

The Court of Appeals failed to appreciate that Section 666(b) does not ask simply whether given monies are, at some point, to someone, "benefits," but instead focuses on whether federal-program "benefits" are "receive[d]" under a federal "assistance" program. The Court of Appeals concluded that "WVHA's receipt of between ten and fifteen million dollars in Medicare funds qualified as receipt of 'benefits' under a federal assistance program[.]" Pet. App. 9. Rather than asking whether, *as received by the health-care provider*, the funds paid for health-care services rendered could fairly be viewed as federal-program "benefits," the Court of Appeals asked whether the funds were disbursed "under a program involving federal assistance" rather than as a "result of 'purely commercial transactions with the government.'" Pet. App. 10 (quoting *Copeland*, 143 F.3d at 1442). This is where the court erred. It assumed that because the Medicare program *does* provide "benefits," under a federal "assistance" program, *to its beneficiaries*, the Medicare funds paid to WVHA for services rendered remained "benefits" for Section 666 purposes. *See* Pet. App. 11 ("Because WVHA received payments under a federal

[12]*See United States v. LaHue*, 998 F. Supp. 1182, 1187 (D. Kan. 1998) ("[N]early every large grocery store chain directly receives more than $10,000 in food stamps as payment from customers[, but] a checkout clerk's theft of $5,000 in cash from a cash register does not constitute federal program fraud."), *aff'd*, 170 F.3d 1026 (10th Cir. 1999). *United States v. Wyncoop*, 11 F.3d 119, 123 (9th Cir. 1993) ("Yet there is no more reason to conclude that Congress in enacting Section 666 intended to bring employees at every college and university in the country within the scope of potential federal criminal jurisdiction than it is to assume that Congress wished to reach employees of every grocery store.").

assistance program, WVHA received a type of 'benefits' expressly covered by § 666(b).").

En route to this mistaken interpretation, the Court of Appeals took pains to reject the "narrow" (Pet. App. 12) reading of Section 666(b) adopted by the District Court in *United States v. LaHue*, 998 F. Supp. 1182 (D. Kan. 1998), and affirmed by the Tenth Circuit, 170 F.3d 1026 (10th Cir. 1999). The court in *LaHue* had correctly concluded that although, under Medicare, health-care providers "ultimately receive funds traceable to a federal program, [they] do so only through patient payments or assignments." 998 F. Supp. at 1187. In the *LaHue* court's view, these funds ceased to be "benefits" after they reached the Medicare program's "target recipients." *Id.* at 1187-88; *see* Pet. App. 13.[13] The Court of Appeals in this case disagreed: "[T]he use of the term 'benefits' serves to emphasize not that the recipient must be a 'target recipient', but rather that the funds must have been received by the organization . . . as part of an 'assistance' program, rather than a purely commercial transaction – the federal government's purchase of goods from a contractor, for example." Pet. App. 14-15.

The Court of Appeals was wrong, and the *LaHue* court was right, for at least two reasons: *First*, the Court of Appeals' reading completely misses the point that, although it is true that Section 666(b) requires the receipt of "benefits" under a federal assistance program, it still requires, more fundamentally, that the "organization" in question

[13]The *LaHue* court reached this conclusion after turning to the statute's legislative history. We agree with the court's interpretation, but believe that this interpretation is compelled by the plain, unambiguous meaning of the statute's terms and confirmed by the legislative history.

"receive[]" the "benefits." The question, then, is not so much whether the statute says explicitly that the "organization must be the target recipient" – it doesn't – but whether the funds received by the hospital as compensation for services rendered can meaningfully be called "benefits."

Second, the Court of Appeals completely overlooked the fact that Section 666 is not satisfied simply when an organization receives federal funds. The organization must receive "benefits," and the term "benefits" must be read in light of the words that follow: "under a Federal program involving . . . *Federal assistance*." The maxim "*noscitur a sociis*" – "a word is known by the company it keeps" – is relevant here. *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (noting that this maxim "is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress").

Under the Medicare program, elderly citizens receive a "benefit" – they receive help and aid under an "assistance" program. But the health-care providers who serve these citizens do not, to put it crudely, get aid, they get *paid*. They "receive" funds in the market, not under an "assistance" program. So far as a health-care provider is concerned, the fact that a patient's bills are being paid by Uncle Sam no more converts those payments into federal *largesse* than if the bills were paid by the patient's Aunt Edna. The payments are, from the perspective of the provider, *precisely* the kind of "purely commercial transaction" that the Court of Appeals conceded Section 666 does not reach, and the funds received from patients in payment for medical services are no more federal-program "benefits," or "assistance," than a check drawn on a patient's checking account into which he deposits his federal military pension.

B. Even if Section 666(b) Were Ambiguous, the Decision Below Could Not Be Sustained.

The meaning of Section 666(b)'s language is clear, and that is reason enough to reverse the decision below. But even if this Court were to find some ambiguity in the meaning of the "benefits" that must be "receive[d]" under a Federal "assistance" program, the best course would still be to reject the untethered and boundless interpretation adopted by the court below, because it conflicts not only with the statute's legislative history but also with established background interpretive principles and canons of construction.[14]

First of all, as the *LaHue* court's food-stamps hypothetical shows, *supra*, the interpretation adopted below yields patently absurd results. This would be reason enough to reject the Court of Appeals' reading, even if that reading were consistent with the language of the statute. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) ("Some applications of respondents' position would produce results that were not merely odd, but positively absurd."); *Liteky v. United States*, 510 U.S. 540, 550 (1994) (noting that a proposed interpretation "produces results so intolerable as to be absurd"); *Chapman v. United States*, 500 U.S. 453, 476 (1991) ("There is nothing in our jurisprudence that compels us to interpret an ambiguous statute to reach such an absurd result."); *Turkette*, *supra*, at 580 ("[A]bsurd results are to be avoided[.]").

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[14]We emphasize that we are *not* suggesting that this Court should turn to legislative history or interpretive principles in order to *avoid* the plain meaning of the statute. *Cf. Salinas*, 118 S. Ct at 474.

The untenable implications of the Court of Appeals' interpretation were recognized by the court in the leading case on the question presented here. The Tenth Circuit in *LaHue*, *supra*, noted that "[u]nder the government's theory, any organization that is assigned $10,000 in a year in funds initially disbursed under a federal program source would fall within the statute." Pet. App. 26. It follows from this premise, though, that "if the recipient physician endorsed Medicare checks to pay a supplier of medical goods, the supplier would be receiving benefits from a federal program. As the district court aptly noted, this construction creates almost a limitless statutory reach beyond a plain commonsense interpretation of the statute." *Ibid* (citing *LaHue*, 998 F. Supp. at 1187).

It is also worth noting here that if the Court of Appeals is right, and funds once in the hands of the federal government retain forever their character as federal "benefits," even after they are disbursed to and perhaps spent by a federal program's beneficiaries, then it would seem that a number of this Court's leading Establishment Clause cases have been wrongly decided. In a long line of decisions, this Court has held that government funds distributed to individuals through religion-neutral public-benefit programs *lose* their government character when those individuals independently decide to direct those funds to religious uses or institutions.[15] But if the Court of Appeals' reading of Section 666(b) were correct, the fact that, for example, that Mr. Witters and not the State of Washington decided to spend government

[15] *Agostini v. Felton*; 521 U.S. 203 (1997); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Washington Dep't of Servs. for Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983); *Board of Educ. v. Allen*, 392 U.S. 236 (1968); *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

"benefits" on a religious education could not have prevented the government program through which those benefits were disbursed from violating the First Amendment. *See Witters v. Washington Dep't of Servs. for Blind*, 474 U.S. 481 (1986).

Second, it is well established that any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971); *see also United States v. Bass*, 404 U.S. 336, 348 (1971) ("[W]here there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant."); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952) ("[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."); *Dowling v. United States*, 473 U.S. 207, 229 (1985) (lenity is a "time-honored interpretive guideline"). The Court of Appeals' reading is inconsistent with this principle.

The rule of lenity serves, as this Court has observed, *see Bass*, 404 U.S. at 348, at least two important purposes: First of all, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). In addition, given our "instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should," Henry J. Friendly, Benchmarks 202 (1967), and given that "criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *Bass*, 404 U.S. at 348; *see also Bell v. United States*, 349 U.S. 81, 83 (1955) (rule of

lenity does not reflect "any sentimental consideration, or . . . want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.").

This is not a case in which a criminal defendant invokes lenity based on "[t]he mere possibility of articulating a narrower construction," *Smith v. United States*, 508 U.S. 223, 239 (1993), or in order to "engraft an illogical requirement to [a statute's] text." *Salinas*, 118 S. Ct. at 478. The "narrower construction" advocated here is not a desperate gambit by defense counsel but the more natural reading of the text. Thus, even if there were any ambiguity in the meaning of the terms "receives," "benefits," and "assistance," as they are used in Section 666(b), that ambiguity should be resolved in favor of restraining, rather than expanding, that criminal statute's reach.

Third, and related, it is particularly important that courts interpret *federal* criminal statutes with care, and avoid adding to the already rampant "federalization" of crime that has so gravely upset the federal-state balance in recent years.[16] In other words, although courts generally and appropriately exercise restraint when interpreting ambiguous

[16]The American Bar Association issued a report in late 1998 calling for "principled recognition by Congress of the long-range damage to real crime control and to the nation's structure caused by inappropriate federalization." ABA Task Force on the Federalization of Criminal Law, The Federalization of Criminal Law 56 (1998); *see also* James A. Strazzella and William W. Taylor, III, "Federalizing Crime: Examining the Congressional Trend to Duplicate State Laws," 14 Crim. Just. 4 (Spring 1999) (synopsis of the ABA's Task Force's Report).

terms in criminal statutes, that restraint becomes all the more important in cases involving the reach of a federal criminal statute. Courts should "not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Bass*, 404 U.S. at 349. Instead, courts should require a "clear statement" that Congress intended to expand its own power into areas of traditional state concern. *Id.* at 349-350; *see also Gregory v. Ashcroft*, 501 U.S. 452, 460-461 (1992); *McNally v. United States*, 483 U.S. 350, 360 (1987).

Fourth, as we discuss in more detail below, the Court of Appeals' reading of Section 666(b) is so broad and so untethered – at least in many of its likely applications – to a federal interest in particular federal projects or programs, *see Dole*, 483 U.S. at 207-209, as to trigger the established canon of construction that statutes be read so as to eliminate constitutional doubts. *See, e.g., X-Citement Video*, 513 U.S. at 78; *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

Finally, the legislative history and evident congressional purpose of Section 666 cut against the Court of Appeals' "viral" theory of the unbreakable link between once-federal money and federal criminal jurisdiction. As this Court observed in *Salinas*, Section 666 was enacted in response to a split in authority in the Courts of Appeals on whether state and local employees were "public officials"

within the meaning of the general federal bribery statute, 18 U.S.C. § 201. *Salinas*, 118 S. Ct. at 474.[17] Section 666 was "designed to extend federal bribery prohibitions to bribes offered to state and local officials employed by agencies receiving federal funds." *Ibid.*

There is *no* evidence, however, that Congress intended to federalize bribery generally, or to invite federal prosecution of bribes involving grocery stores that accept food stamps in exchange for their wares and hospitals that serve Medicare recipients. Instead, as the foremost scholar of Section 666 has observed, the relevant legislative history "support[s] the interpretation that Congress intended to deal with a relatively narrow problem, [namely,] specified forms of malfeasance in connection with the administration of federal assistance." *See* George D. Brown, "Stealth Statute: Corruption, The Spending Power, and the Rise of 18 U.S.C. § 666," 73 Notre Dame L. Rev. 247, 280 (1998). The Tenth Circuit similarly noted in *LaHue*, 170 F.3d at 1030 (Pet. App. 28), that:

> The legislative history reveals that although Congress intended "federal programs" to be broadly construed, Congress also intended to limit the statute to be consistent with its underlying purpose to "protect the vast sums of money distributed through federal programs from theft, fraud, and undue influence by

[17] *See United States v. Del Toro*, 513 F.2d 656, 661-662 (2d Cir.); *United States v. Mosley*, 659 F.2d 812, 814-816 (7th Cir. 1981); *United States v. Hinton*, 683 F.2d 195, 197-200 (7th Cir. 1982), *aff'd sub nom., Dixson v. United States*, 465 U.S. 482 (1984).

> bribery." S. Rep. No. 98-225, at 370 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3511.[18]

Thus, Congress' purpose for enacting Section 666 was "to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies[.]" S. Rep. No. 98-225, at 369 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510. In so doing, Congress was careful to disclaim any such extravagant ambitions. It took pains to define the phrase "federal program" in Sec. 666(b) narrowly and to require a "specific statutory scheme authorizing the Federal assistance in order to promote or achieve certain policy objectives. Thus, not every Federal contract or disbursement of funds [is] covered." S. Rep. No. 98-225, *supra*, at 370.

There is nothing about this clear purpose of protecting the integrity of federal-program funds that requires recourse to the Court of Appeals' broad interpretation. It would do no violence to Section 666 – indeed, it would fulfill Congress' stated objective – to limit the statute's reach to bribes involving organizations that actually "receive[]" "benefits" through federal "assistance" programs. Congress determined that such bribes – and only such bribes – actually threaten the

[18] *See also United States v. Wyncoop*, 11 F.3d 119, 123 (9th Cir. 1993) ("The statute . . . is not intended to do anything except protect the integrity of federal funds."); *United States v. Rooney*, 37 F.3d 847, 850-54 (2d Cir. 1994) ("666's manifest purpose is to safeguard finite federal resources from corruption and to police those with control of federal funds."); *Copeland*, 143 F.3d at 1441-1442 (relying on legislative history and insisting that "it is not the role of this Court to expand the scope of Section 666"); *United States v. Cicco*, 938 F.2d 441, 445 (3d Cir. 1991) (reviewing legislative history and concluding that Congress did not intend the statute to apply the defendants' solicitation of loyalty in exchange for municipal jobs).

integrity of the programs through which federal benefits are disbursed. But this case has nothing to do with the integrity of the Medicare program, or of those who administer it, or even of its beneficiaries. The Court of Appeals has read a statute designed to "vindicate significant acts of theft, fraud, and bribery involving Federal monies" as federalizing bribery involving any organization with which a federal-program beneficiary happens to do business.

II.

THE COURT OF APPEALS' INTERPRETATION OF SECTION 666(b) IS UNCONSTITUTIONAL.

Section 666(b)'s text provides a clear answer to the Question Presented in this case: Payments to a hospital for services provided to Medicare beneficiaries – whether those payments are made "directly" to the hospital by the government or "indirectly" (*i.e.*, are "assigned" by the beneficiary to the hospital) – are not "benefits" "receive[d]" by the hospital under a federal "assistance" program. Therefore, such payments *cannot* supply the basis for federal criminal jurisdiction over a run-of-the-mine commercial bribery case.

But this case also, in the words of one District Court, "raises the question of how far Congress has gone, and, under the Constitution, may go, to federalize crime." *United States v. McCormack*, 31 F. Supp. 2d 176, 177 (D. Mass. 1998). And so, even were the statute's language *not* clear, and even if there were evidence that Congress intended the broad reach conferred on Section 666 by the Court of Appeals, that court's expansion of federal criminal jurisdiction would so infringe "first principles" of dual sovereignty that this Court

would be required to reverse the Petitioner's conviction under Section 666 as unconstitutional.

A. Constitutional "First Principles" Circumscribe Federal Criminal Jurisdiction.

As the former Chief Judge of the Eighth Circuit, Judge Richard S. Arnold, has observed, "[o]ur Constitution is a charter for a federal government of limited powers, and under this charter the States possess primary authority for defining and enforcing the criminal law." *United States v. Delpit*, 94 F.3d 1134, 1149 (8th Cir. 1996) (internal quotation marks and citation omitted). In the same spirit, this Court has in recent years identified and enforced constitutional limits on Congress' power to expand federal regulatory power and jurisdiction.[19] It has been a persistent theme of this Court's

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[19] *See, e.g., Alden v. Maine*, 119 S. Ct. 2240 (1999); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2199 (1999); *Printz v. United States*, 521 U.S. 898 (1997); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *United States v. Lopez*, 514 U.S. 549, 552 (1995). This Court has also accepted several federalism cases for its October Term 1999. *See United States v. Morrison*, Nos. 99-5, 99-29 (Sept. 28, 1999) (whether provisions of the Violence Against Women Act exceed Congress' power under the Commerce Clause and Section 5 of the Fourteenth Amendment); *Reno v. Condon*, No. 98-1464 (May 17, 1999) (whether the Drivers' Privacy Protection Act is a valid exercise of Congress' power under the Commerce Clause or Section 5 of Fourteenth Amendment); *Kimel v. Florida Bd. of Regents*, Nos. 98-791, 98-796 (Sept. 28, 1999) (whether the Eleventh Amendment bars a private suit against a state under the Age Discrimination in Employment Act); *Vermont Agency of Natural Resources v. United States*, No. 98-1828 (June 24, 1999) (whether Eleventh Amendment immunity precludes a private relator from suing a state under the federal False Claims Act); *United States v. Jones*, No. 99-5739 (Nov. 15, 1999)(whether federal arson statute applies to arson

decisions that these are meaningful limits, and that Congress must "treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 119 S. Ct. 2240, 2263 (1999).

In particular, the Court's 1995 decision in *United States v. Lopez*, *supra*, illustrates this Court's respect for the "first principles" of Our Federalism. In *Lopez*, the Court emphasized that "[t]he Constitution creates a Federal Government of enumerated powers[,]," 514 U.S. at 552, and – quoting Madison – reminded Congress and courts that "[t]he powers delegated by the proposed Constitution to the United States are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Ibid* (quoting *The Federalist* No. 45, at 292-293 (C. Rossiter ed. 1961)).

Our dual-sovereignty structure, this Court made clear, is not a matter of mere administrative convenience; rather, the Framers limited the power of the federal government for a clear and crucial purpose – "to ensure protection of our fundamental liberties." *Ibid* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)). It is for this reason, among others, that the "States possess primary authority for defining and enforcing the criminal law." *Lopez*, 514 U.S. at 552, 561 n.3. The over-federalization of crime, however, "threatens to change entirely the nature of our federal system[.]" *See generally* Chief Justice William H. Rehnquist, Report to Congress (Jan. 1, 1999).

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of private residence and if such application is constitutional).

So, while it is unquestionably true that Congress has broad regulatory powers, there nevertheless remain real and justiciable lines – dictated by the Constitution – beyond which those powers cannot reach. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997) ("Under our Constitution, the Federal Government is one of enumerated powers."). The Court of Appeals' interpretation of Section 666(b), and the Petitioner's conviction under that statute, crossed these lines. If, as the Court of Appeals believed, Section 666(b) extends federal bribery jurisdiction to transactions involving any organization that takes in, in the course of a year's business, at least $10,000 in funds that once upon a time passed through the federal coffers, then, for all practical purposes, the statute covers everything. *Lopez*, 514 U.S. at 564 ("[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.").

B. Congress' Ability To Expand Criminal Jurisdiction Through the Spending Power Is Limited.

This Court's *Lopez* decision – like many of its recent federalism decisions – turned on the interpretation and application of the Commerce Clause.[20] Section 666, by contrast, was enacted pursuant to Congress' "Spending Power."[21] *See* Brown, *supra*, at 262; *see also, e.g.*, *United States v. Cantor*, 897 F. Supp. 110, 113 (S.D.N.Y. 1995).

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[20]This Court will return to the question of Congress' power to expand federal criminal jurisdiction using the Commerce Clause power in *United States v. Jones*, No. 99-5739, *supra*.

[21]Congress has the power to "provide for the common Defense and general Welfare of the United States," U.S. Const. art. I, § 8, cl. 1.

The federal government's ability to expand the reach of its regulatory authority by attaching conditions to the money it spends is no less subject to the "first principles" that guided this Court in *Lopez* than is its power to legislate pursuant to the Commerce Clause. Accordingly, in *South Dakota v. Dole*, 483 at 206-208, the Court identified specific restrictions on the extension of federal regulatory authority through conditions attached to federal spending, including a requirement that any such conditions must be related to the federal interest in the particular federal projects or programs through which the funds in question are disbursed. And although Congress' power to regulate what it funds is far-reaching, the restrictions outlined in *Dole* are real. Otherwise, "the spending power could render academic the Constitution's other grants and limits of federal authority." *New York v. United States*, 505 U.S. 144, 167 (1992) (under *Dole's* "relatedness" restriction, the conditions on federal spending must bear some relationship to the purpose of that spending.).

This Court has not yet had occasion to apply the *Dole* criteria in a criminal case. But courts are increasingly recognizing that, given the "first principles" of federalism emphasized in *Lopez* and the restrictions on conditional spending set out in *Dole*, the reach of Section 666 must be carefully controlled. For example, in *United States v. McCormack*, 31 F. Supp. 2d 176 (D. Mass. 1998), the District Court applied the *Dole* criteria – in particular, the "relatedness" requirement, *McCormack*, 31 F. Supp. 2d at 188 – to a Section 666 prosecution in a local-corruption case and held that in such a case the government must at least show that the bribe threatened the integrity of the program

through which the federal funds are disbursed. *Id.* at 189. The court stated:

> Directed by the concerns expressed in *Salinas* about applying § 666(a) to conduct that has no connection with the federal funds or programs, and the broader concerns of *Lopez* and *Bass*, I find that "integrity" must be more carefully construed to provide for at least some nexus with the federal funds or programs. Establishing such a requirement is consistent with the limits the Supreme Court has placed on the spending power. In particular, it gives meaningful content to the "relatedness" standards as applied to this statutory scheme.

Ibid (citations omitted).

This Court's one opinion dealing with the scope of Section 666 explicitly acknowledged the possibility that the Constitution limits the use of Section 666 in cases not implicating the integrity of federal programs and funds. In *Salinas*, *supra*, this Court rejected a criminal defendant's challenge to his Section 666 conviction. Salinas contended, among other things, that "the Government must prove the bribe in some way affected federal funds, for instance by diverting or misappropriating them, before the bribe violates § 666(a)(1)(B)." 118 S. Ct. at 473. This Court disagreed: "The prohibition [in Section 666] is not confined to a business or transaction which affects federal funds." *Ibid.* In so holding, however, this Court was careful to leave open the question whether – although the bribe itself need not directly "affect" federal funds to create Section 666 liability – the statute requires *some* "connection between a bribe and the expenditure of federal funds[.]" *Id.* at 474.

This Court also rejected Salinas' claim that applying Section 666 to his case was unconstitutional, but here too it was careful to limit its holding to the particular facts of Salinas' case: "Whatever might be said about [the statute's] application in other cases, the application of § 666(a)(1)(B) to Salinas did not extend federal power beyond its proper bounds." *Id.* at 475. As the Court emphasized several times, in Salinas' case, there *was* a "connection" between the bribes and the federal government's interest in the integrity of program funds, because "the bribe was related to the housing of a prisoner in facilities paid for in significant part by federal funds themselves" and "[t]he preferential treatment . . . was a threat to the integrity and proper operation of the federal program." *Ibid.* Thus, "*Salinas* may be read to indicate that the 'threat to the integrity and proper operation of [a] federal program' created by the corrupt activity is necessary to assure that the statute is not unconstitutionally applied." *United States v. Santopietro*, 166 F.3d 88, 93 (1999).[22]

C. The Court of Appeals' Decision Extends the Reach of Section 666 Beyond Constitutional Limits.

Article I of the Constitution gives Congress the power to promote the "general Welfare of the United States," U.S. Const. art. I, § 8, cl. 1, and to spend what it takes to do so.

[22]*See also, e.g.*, *United States v. LaHue*, 998 F. Supp. at 1190 ("The Supreme Court [in *Salinas*] most certainly was not implying that section 666(b)'s jurisdictional clause should be read any more broadly than its language and purpose permit."); *United States v. Roberts*, 28 F. Supp. 2d 741, 745 (E.D.N.Y. 1998) ("*Salinas* . . . did not foreclose the possibility that there is an outer boundary beyond which the relationship between the bribe and the expenditure of federal funds is too remote to support § 666 jurisdiction.").

This is an expansive, sweeping grant of authority. But the Constitution also imposes meaningful limits on the federal government's ability to use the spending power as a vehicle for expanding federal criminal jurisdiction over traditional state crimes. These limits – like the Constitution's other "structural" provisions that balance the powers of separate sovereigns – protect individual liberty in criminal cases by constraining government no less than do the Fourth, Fifth, and Sixth Amendments to the Constitution.

The Court of Appeals' interpretation of Section 666(b) undermines these liberty-protecting limits. Section 666 protects the integrity of federal programs by regulating the activities of those who administer federal funds, but the Court of Appeals read the statute as, in effect, federalizing all corruption. Congress did not, and constitutionally could not, enact such a law.

If the Court of Appeals were correct, Section 666 would authorize federal prosecutions for bribes involving *any* organization that in *any* way receives in a year more than $10,000 from *any source* so long as those funds had at *any* point passed through the bailiwick of a federal program. But the "Constitution does not contemplate that federal regulatory power should tag along after federal money like a hungry dog." David E. Engdahl, "The Spending Power," 44 Duke L. J. 1, 92 (1994). This Court's *Dole* decision, specifically, and this Court's federalism jurisprudence more generally, require that the regulatory "strings" Congress attaches to federal money be at least "related" to the federal interest in the program or purpose that money is being spent to support. The Eleventh Circuit's interpretation of Section 666(b), and the Petitioner's Section 666 conviction, are inconsistent with this requirement.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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