No. 17-658

In the Supreme Court of the United States

ROD BLAGOJEVICH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly upheld petitioner's conviction for extortion under color of official right where the jury was instructed that the government must prove that petitioner "agree[d] to accept money or property believing that it would be given in exchange for a specific requested exercise of his official power."

2. Whether the district court plainly erred by not specifically stating on the record its consideration under 18 U.S.C. 3553(a)(6) of "the need to avoid unwarranted sentencing disparities" in imposing a sentence within the range that the court and the parties viewed as proper under the Sentencing Guidelines.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 854 F.3d 918. A prior opinion of the court of appeals (Pet. App. 7a-30a) is reported at 794 F.3d 729.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 2017. A petition for rehearing was denied on June 5, 2017 (Pet. App. 31a-32a). On August 1, 2017, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including November 2, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of making a false statement, in violation

of 18 U.S.C. 1001 (Count 24). At a second trial, he was convicted of ten counts of wire fraud, in violation of 18 U.S.C. 1343 and 1346 (Counts 3, 5-13); two counts of attempted extortion, in violation of 18 U.S.C. 1951 (Counts 15 and 22); two counts of conspiracy to commit extortion, in violation of 18 U.S.C. 1951 (Counts 17 and 21); two counts of conspiracy to solicit a bribe, in violation of 18 U.S.C. 371 (Counts 18 and 23); and one count of solicitation of a bribe, in violation of 18 U.S.C. 666(a)(1)(B) (Count 16). 12/7/11 Judgment 1-2. He was sentenced to 168 months of imprisonment, to be followed by two years of supervised release. *Id.* at 3-4. The court of appeals vacated his convictions on Counts 5, 6, 21, 22, and 23, affirmed the remaining counts of conviction, vacated his sentence, and remanded for retrial on the vacated counts. Pet. App. 7a-30a. This Court denied a petition for a writ of certiorari, 136 S. Ct. 1491 (No. 15-664), and a petition for reconsideration, 136 S. Ct. 2386 (No. 15-664).

On remand, the government declined to retry the five vacated counts. Pet. App. 2a. The district court resentenced petitioner on the remaining 13 counts to 168 months of imprisonment, to be followed by two years of supervised release. 8/12/16 Amended Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-6a.

1. In 2002, petitioner was elected, and in 2006 reelected, Governor of Illinois. For several months before his arrest in December 2008, he attempted in various ways to trade official actions for personal gain. Pet. App. 8a-10a; 11-3853 Gov't C.A. Br. 6-33.

a. In November 2008, Barack Obama, then a United States Senator from Illinois, was elected President. As Governor of Illinois, petitioner would have the authority

to fill President Obama's vacated Senate seat. Pet. App. 8a. Petitioner "viewed th[is] opportunity * * * as a bonanza," to be leveraged for his own benefit. *Ibid.* Believing that President-elect Obama wanted Valerie Jarrett appointed to the Senate seat, petitioner offered through intermediaries to select Jarrett in exchange for (1) petitioner's appointment as the Secretary of Health and Human Services, (2) the creation and funding of a nonprofit organization under petitioner's control, or (3) a job as the head of a private foundation. *Id.* at 8a-9a. When no deal was struck, petitioner responded: "They're not willing to give me anything except appreciation. [Expletive] them." *Id.* at 9a.

Petitioner then attempted to appoint Congressman Jesse Jackson, Jr. to the Senate seat in exchange for $1.5 million in campaign contributions. Pet. App. 9a; see 11-3853 Gov't C.A. Br. 8-9, 19-22. A Jackson supporter had earlier proposed such an exchange to petitioner. 11-3853 Gov't C.A. Br. 8; see *id.* at 19 (petitioner told his deputy, "We were approached, pay to play") (brackets omitted); *ibid.* ("[H]e'd raise me 500 grand * * * then the other guy would raise a million, if I made him a senator."). On December 4, 2008, petitioner attempted to pursue this offer, instructing Robert Blagojevich, his brother and campaign manager, to meet the next day with Jackson's supporter. *Id.* at 8, 21-22. Petitioner made clear in related conversations that he was expecting "concrete tangible stuff from [Jackson's] supporters," with "some of it upfront." *Id.* at 20-21 (citations omitted); see *id.* at 21 (petitioner instructed his brother to tell Jackson's supporter that "some of the stuff's gotta start happening now") (citation omitted). That evening, petitioner learned that the Chicago Tribune was about to print an article suggesting that he had

been recorded during an ongoing federal criminal investigation. *Id.* at 8, 22. Early the next morning, petitioner directed his brother to cancel the meeting with Jackson's supporter because the request for campaign contributions was now "too obvious." *Id.* at 22 (citation omitted); see Pet. App. 9a.

b. During the same time period, petitioner attempted to extort campaign contributions from John Johnston, a racetrack owner and longtime supporter. Pet. App. 10a; 11-3853 Gov't C.A. Br. 9-10, 27-33. In November 2008, the Illinois legislature passed a bill extending subsidies to the horseracing industry. 11-3853 Gov't C.A. Br. 28. The bill was not passed in time to become effective before prior subsidies expired, however, and petitioner knew that Johnston's company was losing $9,000 per day in the interim. *Id.* at 9, 28-29. While the bill was awaiting petitioner's signature, he instructed an associate to try to collect a $100,000 campaign contribution from Johnston before the bill was signed. *Id.* at 9-10, 28-29. With petitioner's approval, the associate told Johnston that petitioner was concerned that Johnston would get "skittish" about making the $100,000 contribution once the bill was signed. *Id.* at 10 (citation omitted); see *id.* at 30 (associate told petitioner "that he would say [to Johnston], 'Stop screwing around, get me the money'") (citation omitted); see also *id.* at 29-31. Both the associate and Johnston understood that petitioner was delaying signing the bill to pressure Johnston to make the contribution. *Id.* at 31-32. At the time of petitioner's arrest on December 9, 2008, petitioner had not yet signed the bill, and Johnston had not contributed the $100,000. *Id.* at 12, 33; see Pet. App. 10a.

c. Petitioner also attempted to extort a $50,000 campaign contribution from Patrick Magoon, the President and Chief Executive Officer of Children's Memorial Hospital. Pet. App. 9a-10a; 11-3853 Gov't C.A. Br. 10-12, 22-27. The hospital had been lobbying for an increase in Medicaid reimbursement rates for pediatric specialty physicians, a change that petitioner had authority to adopt without legislative approval. 11-3853 Gov't C.A. Br. 10, 22-23. In or around September 2008, petitioner authorized his Deputy Governor to move forward with the rate increase, which was expected to take effect on January 1, 2009. *Id.* at 11, 23. Shortly thereafter, petitioner told a lobbyist for the hospital that "he was going to give the hospital $8 million," and that he wanted the lobbyist to "get Pat Magoon for 50." *Id.* at 11, 24. The lobbyist understood petitioner "to be making a reference to the cost of the pediatric rate increase and to be saying that [petitioner] wanted to approach Magoon for a $50,000 contribution." *Id.* at 24. When the lobbyist failed to follow up on soliciting a contribution from Magoon, petitioner directed his brother to do so. On October 22, 2008, Robert Blagojevich spoke to Magoon and asked him to raise $25,000 for the governor by January 1, 2009. *Id.* at 11, 24-25. Robert reported to petitioner that Magoon was not returning his follow-up calls, and the rate increase was put on hold. As of the date of petitioner's arrest, no increase had occurred. *Id.* at 11-12, 26-27; see Pet. App. 10a.

2. a. On February 4, 2010, a grand jury returned a 24-count second superseding indictment against petitioner. 11-3853 Gov't C.A. Br. 1, 3-4. After a two-month trial, petitioner was convicted of making false statements, in violation of 18 U.S.C. 1001(a)(2) (Count 24),

but the jury failed to reach a verdict on the remaining counts. 11-3853 Gov't C.A. Br. 4.[1]

In 2011, after three counts (Counts 1, 2, and 4) were dismissed, the remaining charges were tried. 11-3853 Gov't C.A. Br. 4. At the close of the case, the district court instructed the jury on the honest-services fraud, extortion, and bribery charges. The court told the jury that each charge required the government to prove that petitioner had received or attempted to obtain money or property "believing that it would be given in exchange for a specific requested exercise of his official power." Pet. App. 45a (honest-services fraud); see *id.* at 48a (extortion); *id.* at 54a (bribery). The court instructed the jury that "[i]t is not necessary that the defendant's solicitation or demand for a thing of value in exchange for influence or reward with respect to state business be communicated in express terms." *Id.* at 54a.

The jury convicted petitioner on nearly all counts, including two counts of attempted extortion, two counts of conspiracy to commit extortion, two counts of conspiracy to solicit a bribe, and two counts of solicitation of a bribe. The jury acquitted petitioner of one count of soliciting a bribe and was unable to reach a verdict on two other counts. 12/7/11 Judgment 1-2.

b. Petitioner's advisory Sentencing Guidelines range was 360 months (30 years) to life. 11-3853 Gov't C.A. Br. 110-111; Pet. App. 59a. Petitioner made several objections to the advisory range. See D. Ct. Doc.

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[1] Count 24 related to petitioner's false claim during an FBI interview that he tried to maintain a "firewall" between politics and government and that he did not track or want to know who contributed to him or how much they were contributing. 11-3853 Gov't C.A. Br. 99. In fact, "[petitioner] regularly found out who contributed how much." Pet. App. 11a.

865, at 2-19 (Nov. 30, 2011). He also argued that he deserved a variance below his advisory Guidelines range, and perhaps even a sentence of only probation, based on arguments that relied on nearly all of the 18 U.S.C. 3553(a) factors. See D. Ct. Doc. 865, at 20-69. One of his arguments was that, under 18 U.S.C. 3553(a)(6), a lower sentence was necessary to avoid unwarranted disparities between his sentence and those "that either have been, or are likely to be imposed on other defendants and/or participants in the allegations involving [petitioner]." D. Ct. Doc 865, at 59. He also urged the district court to consider the sentences that had been imposed in cases involving public officials who committed "conduct broadly similar" to petitioner's, including former Illinois Governor George Ryan, former Congressman Dan Rostenkowski, and former Chicago Alderman Ed Vrdolyak. *Id.* at 65; see *id.* at 65-67. Petitioner noted that those individuals had received terms of imprisonment ranging from 17 to 120 months. *Id.* at 65-66.

In response, the government argued that none of those individuals, when compared to petitioner, had "committed a similar scope and degree of criminal conduct." D. Ct. Doc. 862, at 16 (Nov. 30, 2011). The government identified numerous cases in which public officials had received decades-long terms of imprisonment for offenses involving corruption. See *id.* at 16-19 & Ex. A. The government also informed the court of its view that petitioner's advisory Sentencing Guidelines range was higher than necessary to effectuate the purposes of Section 3553(a). *Id.* at 20. The government instead recommended that petitioner be sentenced to a term of 15 to 20 years of imprisonment. *Ibid.*

At sentencing, the district court agreed with the government that the advisory Guidelines range was "inappropriate" and accepted the Probation Office's recommendation that petitioner's "effective guideline" should be 188 to 235 months of imprisonment. Pet. App. 59a. The court found that petitioner deserved an additional two-point reduction in his offense level for acceptance of responsibility, despite the court's observation that petitioner had not accepted responsibility for his crimes until after he was tried and convicted. *Id.* at 62a. As a result, the district court viewed petitioner's appropriate Guidelines range to be 151 to 188 months of imprisonment. *Ibid.*

The district court sentenced petitioner to 168 months of imprisonment on Counts 3, 5-13, 15-17, 21, and 22; 60 months of imprisonment on Counts 16, 18, and 23; and 36 months of imprisonment on Count 24, all to be served concurrently. 12/7/11 Judgment 3. The court stated that the principal harm that petitioner had inflicted was "the erosion of public trust in government." Pet. App. 70a. The court observed that "[i]f a state Senator takes a bribe, that's one person out of 59." *Ibid.* Petitioner, however, was "not to be compared with those who hold lesser positions in government, even, for example, the head of a major co-department in the State of Illinois." *Ibid.* That is because "[t]he image of corruption in a Governor seeps into the fabric of nearly all of them. When it is the Governor who goes bad, the fabric of Illinois is torn and disfigured and not easily or quickly repaired." *Ibid.* (page number omitted).

The government asked the district court whether, "although [it] ha[d] not hit on every single mitigation argument, because obviously there were many, [it]

ha[d] taken them all into account in coming to [its] sentence." Pet. App. 73a (page number omitted). The court confirmed that it had "considered all of them." *Id.* at 74a. The court stated that it had "read every paper submitted to" it "twice," in part "due to the fact that they were so long." *Ibid.*

3. The court of appeals vacated five counts of conviction (Counts 5, 6, 21, 22, and 23) and affirmed the remaining 13 counts of conviction. It also vacated petitioner's sentence and remanded for retrial of the vacated counts. Pet. App. 30a.

First, the court of appeals rejected as "frivolous" petitioner's challenges to the sufficiency of the evidence, finding "[t]he [trial] evidence, much of it from [petitioner's] own mouth," to be "overwhelming." Pet. App. 11a. But the court vacated all counts concerning petitioner's attempt to obtain a Cabinet appointment in exchange for appointing Jarrett to the Senate. The court concluded that "a proposal to trade one public act for another, a form of logrolling, is fundamentally unlike the swap of an official act for a private payment," *ibid.*, and thus does not constitute extortion, bribery, or honest-services fraud. *Id.* at 11a-18a. And because "the judge may have considered the sought-after Cabinet appointment in determining the length of the sentence," the court found it necessary to "remand for resentencing across the board." *Id.* at 18a.

Next, the court of appeals upheld the jury instructions defining extortion under the Hobbs Act, 18 U.S.C. 1951, finding the instructions to be "unexceptionable." Pet. App. 18a. The court explained:

> Much of [petitioner's] appellate presentation assumes that extortion can violate the Hobbs Act only

> if a *quid pro quo* is demanded explicitly, but the statute does not have a magic-words requirement. Few politicians say, on or off the record, "I will exchange official act X for payment Y." Similarly persons who conspire to rob banks or distribute drugs do not propose or sign contracts in the statutory language. "Nudge, nudge, wink, wink, you know what I mean" can amount to extortion under the Hobbs Act, just as it can furnish the gist of a Monty Python sketch.

Id. at 18a-19a. The court also rejected petitioner's argument that the jury instructions were inconsistent with *McCormick* v. *United States*, 500 U.S. 257 (1991), stating that the instructions given at trial "track *McCormick*." Pet. App. 18a.

Petitioner did not argue, and the court of appeals did not consider, whether the district court had failed to consider the need to avoid "unwarranted sentence disparities" under Section 3553(a)(6).

4. After the court of appeals denied petitioner's request for rehearing en banc, petitioner filed a petition for a writ of certiorari. Petitioner argued that the jury instructions for his extortion charge were deficient because they failed to require an "explicit" promise or undertaking to exchange official actions for money. 15-664 Pet. 13-30. This Court denied the petition, 136 S. Ct. 1491, and a petition for rehearing, 136 S. Ct. 2386.

5. On remand to the district court, the government declined to retry the five counts vacated by the court of appeals, and the case proceeded to resentencing. Pet. App. 2a. Petitioner acknowledged that the applicable Sentencing Guidelines calculations were unchanged from the original sentencing and that relitigation of those calculations was beyond the scope of the remand.

D. Ct. Doc. 1233, at 8 (July 11, 2016). Petitioner requested a sentence of five years of imprisonment, arguing that the vacated counts were the "centerpiece of the government's case" and that, during his time in prison, petitioner had engaged in "extraordinary post-offense rehabilitation." *Id.* at 13, 16 (capitalization altered); see *id.* at 13-20.

The district court again sentenced petitioner to 168 months of imprisonment. Pet. App. 81a. The court noted the "significant damage" that petitioner "inflicted on the People of the State of Illinois, which included the erosion of public trust in government that th[e] state, in particular, has suffered time and again." *Id.* at 75a. The court also noted that, when it first sentenced petitioner, the court had considered "four factors," and that "the issues most significant were that the penalty should reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense, to afford adequate deterrence to criminal conduct, [and] to protect the public from further crimes of the defendant." *Id.* at 79a-80a. The court again found that the advisory Guidelines range of 292 to 365 months of imprisonment "[w]as much too high," and the court imposed 168 months of imprisonment, which, the court observed, was "still significantly below the minimum recommended sentence." *Id.* at 81a. The court stated that "in a case such as this one with high stakes, that [a]ffect the entire State, deterrence can justify a significant sentence." *Ibid.*

6. On appeal, petitioner argued that the district court's instructions to the jury on extortion, bribery, and fraud were legally deficient under *McCormick*. 16-3254 Pet. C.A. Br. 32-45. Petitioner also argued, for the first time in any proceeding in this case, that the

district court had committed procedural error by failing to consider the need to avoid unwarranted sentencing disparities under Section 3553(a)(6). *Id.* at 26-27.

The court of appeals rejected petitioners' arguments. Pet. App. 1a-6a. The "problem" with petitioner's Section 3553(a)(6) argument, the court explained, was "that the Sentencing Guidelines are themselves an anti-disparity formula." *Id.* at 4a. The court noted that in *Gall* v. *United States*, 552 U.S. 38 (2007), this Court stated "that to base a sentence on a properly determined Guidelines range is to give adequate consideration to the relation between the defendant's sentence and those of other persons." Pet. App. 4a-5a (citing *Gall*, 552 U.S. at 54); see *id.* at 5a ("Since the District Judge correctly calculated and carefully reviewed the Guidelines range, he *necessarily* gave significant weight and consideration to the need to avoid unwarranted disparities.") (quoting *Gall*, 552 U.S. at 54). The court of appeals concluded that "[t]he district judge gave a sentence within the revised Guidelines range he constructed—a range that [petitioner] does not now contend is too high—and therefore did not need to discuss § 3553(a)(6) separately." *Id.* at 5a. And the court separately declined to reconsider its prior ruling on petitioner's jury-instruction claim. *Id.* at 6a.

ARGUMENT

Petitioner contends (Pet. 20-31) that the jury instructions for his extortion charge were deficient because they failed to require an "explicit" promise or undertaking to exchange official actions for money. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or of any other court of appeals.

Petitioner further contends (Pet. 31-39) that the court of appeals erred in reasoning that the district court was not required to discuss on the record its consideration of the need under 18 U.S.C. 3553(a)(6) to avoid unwarranted sentencing disparities because petitioner's sentence fell within the range that the district court viewed as appropriate under the Sentencing Guidelines. This case is not a suitable vehicle to review that issue, however, because petitioner did not invoke Section 3553(a)(6) at his resentencing as the basis of his sentencing-disparity claim; the district court considered all of petitioner's objections during sentencing, including the need to avoid unwarranted disparities; and petitioner did not preserve his procedural-reasonableness argument and cannot establish reversible plain error. Further review is unwarranted.

1. Petitioner contends (Pet. 20) that this Court's review is needed to resolve a disagreement in the lower courts regarding whether a jury must be instructed that Hobbs Act extortion involves an "explicit" exchange of official actions for campaign contributions. No such conflict exists; petitioner's argument is without merit; and this would be a poor case to address the argument in any event. This Court has previously denied certiorari in a case presenting a similar claim. See *Terry* v. *United States*, 134 S. Ct. 1490 (2014) (No. 13-392).

a. In *McCormick* v. *United States*, 500 U.S. 257 (1991), this Court addressed the elements of a prosecution for extortion under color of official right in violation of the Hobbs Act. The defendant was a member of the West Virginia House of Delegates who received campaign contributions from a lobbyist; the defendant and the lobbyist also discussed legislation favored by the lobbyist, which the defendant thereafter sponsored.

Id. at 260-261. The defendant was charged with extortion, and the jury was instructed:

> In order to find [the defendant] guilty of extortion, you must be convinced beyond a reasonable doubt that the payment alleged in a given count of the indictment was made * * * with the expectation that such payment would influence [the defendant's] official conduct, and with knowledge on the part of [the defendant] that they were paid to him with that expectation by virtue of the office he held.

Id. at 265 (citation omitted). The jury found the defendant guilty, and his conviction was affirmed on appeal. *Id.* at 265-266.

This Court reversed. The Court noted that campaign contributions are routinely solicited by public officials, including from individuals and groups with business pending before those same officials. *McCormick*, 500 U.S. at 272. The Court therefore declined to interpret the Hobbs Act as applying whenever an officeholder solicits a campaign contribution from constituents at the same time that he "act[s] for the benefit of [those] constituents." *Ibid.* Instead, the Court held, "[t]he receipt of such contributions" constitutes extortion "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." *Id.* at 273. Because the instructions had improperly allowed the jury to find the defendant guilty without proof of a quid pro quo—that is, without proof that the contributions had "been given in return for [his] performance of or abstaining from an official act"—the Court reversed the defendant's conviction. *Ibid.* (citation omitted).

This Court again addressed extortion under color of official right in *Evans* v. *United States*, 504 U.S. 255

(1992). There, the defendant was a county commissioner who had accepted cash and a check payable to his reelection campaign from an FBI agent posing as a real estate agent in need of the defendant's help with a zoning issue. *Id.* at 257. The jury was instructed that "if a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution." *Id.* at 258 (citation omitted). This Court held that the given instruction "satisfie[d] the *quid pro quo* requirement of *McCormick*, because the offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts." *Id.* at 268 (citation omitted). To convict a public official of extortion, the Court explained, "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Ibid.*

b. Petitioner contends (Pet. 27-31) that the jury instructions given in his case were deficient because they failed to state that the exchange of campaign contributions for official actions must be "explicit." Petitioner argues (Pet. 27-28) that *McCormick* "require[s] an *explicit* promise or undertaking before making a federal criminal case out of a politician's solicitation of campaign funds from a constituent who may hope or expect the donation to influence official acts." Petitioner also contends (Pet. 28) that "an explicit promise must be *unambiguous* in its essential terms, particularly with respect to the defendant's agreement to engage in an of-

ficial act in return for the donation." Petitioner's challenge to the jury instructions lacks merit and does not warrant this Court's review.

i. At the outset, this case presents a poor vehicle to consider whether an extortion charge that is based on campaign contributions requires the jury to be told that any quid pro quo must be "explicit."[2] In arguing that the exchange of campaign money for official action must be "explicit," petitioner has presented no consistent position on what "explicit" means. In the district court, petitioner argued that "explicit" means "express." See 9/17/12 Tr. 3265 ("[T]here has to be an expressed understanding on both sides that this was being communicated."); D. Ct. Doc. 715, at 2 (May 23, 2011) (arguing that the instructions must "require the jury to find that [petitioner] engaged in an express *quid pro quo*"). For instance, the government proposed to instruct the jury that "[i]t is not necessary that the exchange, or proposed exchange, be communicated in express terms." D. Ct. Doc. 715, at 6 (citation omitted). Petitioner objected to that instruction on the ground that "[t]his is not an accurate statement of the law. To the contrary, the communication must be explicit." *Ibid.*

On appeal, petitioner's brief argued that the relationship between the donation and the official act must be "explicit," see 11-3853 Pet. C.A. Br. 50-54, but his brief did not further define that term. The government

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[2] In discussing the contemplated appointment of Representative Jackson "in exchange for a $1.5 million 'campaign contribution,'" the court of appeals explained that the term "campaign contribution" must be "put * * * in quotation marks because [petitioner] was serving his second term as Governor and had decided not to run for a third. A jury was entitled to conclude that the money was for his personal benefit rather than a campaign." Pet. App. 9a.

responded that it "was not required to allege (or prove) that the bribe payer and the official expressed their agreement to exchange official acts for personal benefits in any particular words," 11-3853 Gov't C.A. Br. 57, and petitioner's reply brief did not suggest that the government had misconstrued his argument, see 11-3853 Pet. C.A. Reply Br. 9-10. The court of appeals apparently shared the government's understanding of petitioner's argument: It rejected his claim that "a quid pro quo [must be] demanded explicitly" by stating that "the statute does not have a magic-words requirement." Pet. App. 18a; see *ibid.* ("Few politicians say, on or off the record, 'I will exchange official act X for payment Y.'").

After the court of appeals ruled against him, petitioner for the first time disavowed the argument that "explicit" was equivalent to "express." 11-3853 C.A. Pet. for Reh'g 7. In his first petition for a writ of certiorari before this Court, petitioner argued that "[o]f course, 'explicit' is not synonymous with 'express.'" 15-664 Pet. 25; see *id.* at 27 ("[N]o party here contends that a corrupt solicitation need be *express*."). Instead, he argued that "explicit" means "set forth or demonstrated *very clearly*, leaving no ambiguity or room for doubt." *Id.* at 25.

Now, before this Court for a second time, petitioner has again changed his definition of "explicit." Petitioner now contends that "explicit" means "'not obscure or ambiguous, having no disguised meaning or reservation.'" Pet. 28 (brackets and citation omitted).

Thus, although petitioner has consistently maintained that extortion requires an "explicit" quid pro quo, he has not been consistent about what that term means. Even if the current form of petitioner's argument has not been waived or forfeited, but see Fed. R.

Crim. P. 52(b), it has not been presented to or addressed by the lower courts in a manner that would facilitate this Court's consideration. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). The petition should be denied for that reason alone.

ii. In any event, petitioner's argument is without merit because the instructions given to the jury on petitioner's extortion charge satisfied the standards articulated in *McCormick* and *Evans*. The jury was instructed that petitioner could be found guilty only if he "receive[d] or attempt[ed] to obtain money or property to which he [was] not entitled believing that the money or property would be given in return for the taking, withholding, or other influencing of official action." Pet. App. 48a. The jury was also told that petitioner "must [have] receive[d] or attempt[ed] to obtain the money or property in return for the official action." *Ibid.* (page number omitted). Those instructions required the jury to find that the contributions at issue had "been given in return for [petitioner's] performance of or abstaining from an official act." *McCormick*, 500 U.S. at 273 (citation omitted). Thus, as the court of appeals determined, the jury instructions "track *McCormick*." Pet. App. 18a. Indeed, the instructions given here are nearly identical to the instructions that were given in *Evans* and approved by this Court. Compare *id.* at 48a ("receive or attempt to obtain the money or property in return for the official action") (page number omitted), with *Evans*, 504 U.S. at 258 ("demands or accepts money in exchange for [a] specific requested exercise of his or her official power") (citation omitted).

Petitioner nevertheless contends (Pet. 27) that the jury instructions in his case lacked the "clarity" required by *McCormick*. That argument is incorrect. In *McCormick*, the jury was instructed that a Hobbs Act violation existed if "a campaign contribution, was made * * * with the expectation that [the defendant's] official action would be influenced for [the payors'] benefit and if [the defendant] knew that the payment was made with that expectation." 500 U.S. at 274. That instruction, which focused on the *donor's* "expectation" of future influence, was deficient because it failed to require proof that the official act and the campaign contribution were intended to be part of a quid pro quo. Here, however, the instructions permitted conviction only if petitioner "receive[d] or attempt[ed] to obtain the money or property *in return for* the official action." Pet. App. 48a (emphasis added; page number omitted); see *id.* at 49a ("given *in exchange for* specific requested exercise of his official power") (emphasis added); see also *ibid.* (attempt or conspiracy to commit extortion requires proof "that [petitioner] attempted or conspired to obtain property or money knowing or believing that it would be given to him *in return for* the taking, withholding, or other influencing of specific official action") (emphasis added; page number omitted). Those instructions, unlike the instruction of which this Court disapproved in *McCormick*, required proof that petitioner himself contemplated a reciprocal exchange.

Petitioner also contends (Pet. 7-8, 20, 27-31) that the instructions conflict with *McCormick* because they failed to require an "explicit" quid pro quo. If petitioner's objection is merely that the instructions did not use the word "explicit," then that argument is foreclosed by *Evans*, in which this Court held that the jury

instructions—which did not use the word "explicit"—"satisfie[d] the *quid pro quo* requirement of *McCormick*." 504 U.S. at 268. Petitioner suggests (Pet. 6-8, 20-31) that *Evans* is inapplicable here because, unlike *McCormick*, it was not a campaign contribution case. That is incorrect. Like petitioner, the defendant in *Evans* contended that all of the payments were contributions, and the instruction given at his trial required the jury to apply the same standard "regardless of whether the payment [was] made in the form of a campaign contribution." 504 U.S. at 258 (citation omitted); see *id.* at 257-258. This Court assessed under *McCormick* the adequacy of the jury instruction, and it "reject[ed] [the defendant's] criticism of the instruction." *Id.* at 268; see *id.* at 267-269; see also *id.* at 278 (Kennedy, J., concurring in part and in the judgment) ("Readers of today's opinion should have little difficulty in understanding that the rationale underlying the Court's holding applies *not only in campaign contribution cases*, but in all § 1951 prosecutions.") (emphasis added). Therefore, because the instructions given at petitioner's trial were nearly identical to those given in *Evans*, they too "satisfie[d] the *quid pro quo* requirement of *McCormick*." *Id.* at 268.

Finally, if petitioner's argument is that *McCormick* subjected the quid pro quo element to a heightened standard of proof, see Pet. 28 (equating "explicit" with "not obscure or ambiguous, having no disguised meaning or reservation") (brackets omitted), that is also incorrect. The question in *McCormick* was whether a quid pro quo was required at all. See 500 U.S. at 274. The Court concluded that it was and stated: "We thus disagree with the Court of Appeals' holding in this case that a *quid pro quo* is not necessary." *Ibid.*; see *ibid.*

("By the same token, we hold * * * that the District Court's instruction to the same effect was error."). In *Evans*, the Court similarly considered whether "the instruction * * * satisfies the *quid pro quo* requirement of *McCormick*." 504 U.S. at 268. Both *McCormick* and *Evans* thus confirm that a quid pro quo is a required element of Hobbs Act extortion under color of official right. But neither decision suggested that the quid pro quo element is subject to a special standard of proof, in excess of the reasonable-doubt standard that applies to elements of criminal offenses generally. Nor is there any basis in the statute for inferring that a special standard should apply.

c. Petitioner contends that this Court's intervention is needed to resolve confusion regarding "exactly what effect *Evans* had on *McCormick*." Pet. 20 (brackets, citation, and internal quotation marks omitted). He argues (*ibid.*) that the decision below conflicts with decisions from five courts of appeals, which "treat *McCormick* as setting the standard for campaign contribution cases and *Evans* as establishing a lesser standard for other contexts." See Pet. 20-27 (citing cases). Petitioner greatly overstates the degree of conflict, and any disagreement is not relevant to the outcome of this case.

The decisions cited by petitioner as evidence of the "majority" position (Pet. 20-25) do not establish any conflict on the facts of this case, because nearly all of them address requirements of proof in circumstances *not* involving campaign contributions. In *United States* v. *Ganim*, 510 F.3d 134 (2d Cir. 2007) (Sotomayor, J.), cert. denied, 552 U.S. 1313 (2008), for instance, the defendant was a mayor who traded official acts for "entertainment, meals and clothing," *id.* at 138; "cash, meals, fitness equipment, designer clothing, wine, jewelry and

other items," *ibid.*; payments to his wife, *ibid.*; and other financial benefits, *id.* at 138-140. The Second Circuit applied the quid-pro-quo test articulated by this Court in *Evans*, which it described as an appropriate standard "in the non-campaign context." *Id.* at 143. Other cases cited by petitioner similarly involved prosecutions in which official acts were traded for something other than campaign contributions. See *United States* v. *Garcia*, 992 F.2d 409, 414 (2d Cir. 1993) (Sotomayor, J.) (discussing proof requirement in "non-campaign contribution cases"); *United States* v. *Salahuddin*, 765 F.3d 329, 343 (3d Cir. 2014) ("[N]either the Supreme Court nor this Court requires an explicit *quid pro quo* for non-campaign charitable contributions."), cert. denied, 135 S. Ct. 2309 (2015); *United States* v. *Kincaid-Chauncey*, 556 F.3d 923, 936-938 (9th Cir.) (discussing proof requirements "for counts involving noncampaign contributions"), cert. denied, 558 U.S. 1077 (2009); *United States* v. *Ring*, 706 F.3d 460, 465-466 (D.C. Cir.) (discussing proof requirement "outside the campaign contribution context"), cert. denied, 134 S. Ct. 175 (2013). Those decisions accordingly could not establish—and did not establish—that a different, heightened standard applies when campaign contributions are at issue.

The remaining cases cited by petitioner are likewise inapposite. In *United States* v. *Taylor*, 993 F.2d 382 (4th Cir.), cert. denied, 510 U.S. 891 (1993), the court of appeals reversed the defendant's conviction because the jury instructions in that case—unlike the instructions in this case—failed to require any quid pro quo at all. See *id.* at 385 ("It is clear from the jury instructions that [the defendant] could have been convicted because the jury found that the payments were made because of his

public office and not because [the defendant] received a payment to which he was not entitled, knowing that the payment was made in return for his official acts."). Finally, the Ninth Circuit's decision in *United States* v. *Inzunza*, 638 F.3d 1006 (2011), cert. denied, 565 U.S. 110 (2012), involved a challenge to the sufficiency of the evidence, not the jury instructions; it affirmed the conviction at issue; and it made clear that a quid pro quo agreement in the campaign-contribution context "need not be verbally explicit" and that the jury "may consider both direct and circumstantial evidence" in determining its existence. *Id.* at 1013 (citation omitted); see *id.* at 1013-1016.

Thus, petitioner has identified no appellate holding of the sort he requests here—namely, one that invalidates an extortion instruction for failing to require proof of an "explicit" quid pro quo. Nor has petitioner identified any decision that actually invalidated a conviction on that basis. The lack of any such decision, in more than 25 years since *McCormick* and *Evans*, contradicts petitioner's assertion that the issue "is recurring and important." Pet. 26 (capitalization altered).[3]

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[3] Petitioner argues (Pet. 29) that "the risk of misinterpretation" of "entirely lawful interactions" between politicians and donors "is increased exponentially in cases like this one, when the Government does not wait for the consummation of an exchange, but instead charges the defendant with *attempting* or *conspiring* to reach an illegal *quid pro quo* agreement." But the danger of a chilling effect on legitimate campaign financing activities is addressed by instructions requiring the jury to find beyond a reasonable doubt that a public official has offered to perform a "specific act" in exchange for money. See Pet. App. 48a; see also *United States* v. *Siegelman*, 640 F.3d 1159, 1172 (11th Cir. 2011) (per curiam) (approving similar instructions as adequate protection in a campaign contribution case involving bribery under 18 U.S.C. 666), cert. denied, 566 U.S. 1043

As petitioner notes, courts of appeals have suggested in dicta that *McCormick* articulated a standard of proof for cases that involve campaign contributions that differs from the standard articulated in *Evans*, which they have applied to cases that do not involve such contributions. But even treating those statements as establishing governing circuit law, but see pp. 21-23, *supra*, petitioner has failed to show how the standard articulated in *McCormick* differs meaningfully from the jury instructions in his own case, or that any court of appeals would have overturned his conviction on that basis. The instructions in this case stated that "the public official [must] intend[ ] to seek or accept the money or property *in return for* the taking, withholding, or other influencing *of a specific act*." Pet. App. 49a (emphasis added); see *ibid.* ("specific requested exercise of his official power"). In requiring the jury to find that petitioner sought or accepted the donations "in return for" a "specific" official act, those instructions "track *McCormick*," *id.* at 18a, by making clear that the official act must be (as petitioner phrases it) "*contingent* on the donation," Pet. 28. Petitioner offers no reason to think that an additional instruction, requiring the jury to find that the parties' agreement to the exchange was also "explicit"—which he now defines to mean "unambiguous," *ibid.*—would have made a difference to the outcome.

(2012). Nor, given the recorded conversations between petitioner and his associates, see Pet. App. 9a, 11a, was there any "risk of misunderstanding" about what petitioner proposed to do. See *id.* at 11a ("The evidence, much of it from [petitioner's] own mouth, is overwhelming.").

2. Petitioner separately contends (Pet. 31-39) that the courts of appeals are in conflict over whether a district court is required to specifically state on the record its consideration, under 18 U.S.C. 3553(a)(6), of the need to avoid unwarranted sentencing disparities when issuing a sentence that falls within the defendant's calculated Sentencing Guidelines range. Even looking past the fact that this case involves a sentence that was already below the *actual* Guidelines range, see p. 8, *supra*, that issue is not properly presented here for multiple reasons: Petitioner failed to identify Section 3553(a)(6) as the basis of his sentencing-disparity argument; the district court in fact did address the need to avoid unwarranted disparities; and petitioner failed to object at sentencing to the court's purported lack of explanation. This Court has repeatedly declined to review defendants' challenges to the adequacy of sentencing courts' explanations for within-Guidelines sentences. See, *e.g.*, *Lopez-Aquirre* v. *United States*, 137 S. Ct. 829 (2017) (No. 16-6113); *LaFarga* v. *United States*, 563 U.S. 905 (2011) (No. 10-7712); *Martinez-Mendoza* v. *United States*, 562 U.S. 1202 (2011) (No. 10-6695). The same result is warranted here.

a. At petitioner's first sentencing, petitioner made numerous objections to a sentence within the range that the district court treated as his advisory Sentencing Guidelines range, including by arguing that a lower sentence was necessary to avoid unwarranted disparities between his sentence and those that had been imposed in cases involving other public officials. The court stated, however, that it had compared petitioner's conduct to other corruption-related offenses and had concluded that petitioner's conduct was particularly egregious because of his status as Illinois's chief executive

officer. See Pet. App. 70a ("If a state Senator takes a bribe, that's one person out of 59, even if a lesser statewide officer can go bad, people accept and move on without much worry."). The court further reasoned that petitioner was "not to be compared with those who hold lesser positions in government, even, for example, the head of a major co-department in the State of Illinois." *Ibid.* That is because, the court explained, "[t]he image of corruption in a Governor seeps into the fabric of nearly all of them. When it is the Governor who goes bad, the fabric of Illinois is torn and disfigured and not easily or quickly repaired." *Ibid.* (page number omitted).

At resentencing, petitioner again raised a variety of arguments. In his revised sentencing memorandum, however, petitioner did not cite 18 U.S.C. 3553(a)(6) or argue that he deserved a lesser sentence under that provision. See D. Ct. Doc. 1233, at 9 (identifying eight relevant "factors set forth in 18 U.S.C. § 3553(a)," but not the need to avoid unwarranted disparities). Instead, petitioner argued that he deserved a "reduced sentence" under Sentencing Guidelines § 2B1.1 because his "conviction for crimes exclusively related to political activity and not financial gain takes this case outside the heartland of ordinary political corruption cases." D. Ct. Doc. 1233, at 15; see *ibid.* (citing Sentencing Guidelines § 2B1.1 comment. (n.20(C)). Petitioner acknowledged that, "[i]n deciding upon [his] original sentence, th[e] Court looked at the sentences given to other politicians who sold their offices for political gain." *Ibid.* But petitioner argued that "this time, those comparisons are not appropriate." *Ibid.* At the resentencing hearing, petitioner similarly did not mention 18 U.S.C. 3553(a)(6). He referred to the disparity issue only briefly, stating that his offense was "closest" in kind to

that of former Alabama Governor Don Siegelman, but that Siegelman's conduct was "more egregious." 10/17/16 Resent. Tr. 10.

In resentencing petitioner, the district court again emphasized the "significant damage" that petitioner had "inflicted on the People of the State of Illinois, which included the erosion of public trust in government that th[e] state, in particular, has suffered time and again." Pet. App. 75a. The court stated that petitioner's "serious crimes" would have a "grave impact on the people of Illinois," including by "tax[ing] faith in their government." *Id.* at 80a. The court also stated that, in choosing the appropriate sentence, it had considered the same "factors" as in petitioner's original sentencing, *id.* at 79a, and that "in a case such as this one with high stakes, that [a]ffect the entire State, deterrence can justify a significant sentence." *Id.* at 81a.

b. As the foregoing makes clear, this case is not a suitable vehicle to address whether "a district court [may] decline to address a defendant's nonfrivolous argument that a shorter sentence is necessary to avoid 'unwarranted sentence disparities'" under 18 U.S.C. 3553(a)(6). Pet. i. First, petitioner failed at resentencing to identify Section 3553(a)(6) as the basis of his sentencing-disparity argument, instead seeking a downward variance under Sentencing Guidelines § 2B1.1. See D. Ct. Doc. 1233, at 15.

Second, the district court *did* consider all of petitioner's objections, including the need to avoid unwarranted sentencing disparities, before determining his sentence. As petitioner himself acknowledged, at the original sentencing, the court "looked at the sentences given to other politicians who sold their offices for political gain," D. Ct. Doc. 1233, at 15, and it determined

that petitioner's conduct was sufficiently egregious, in light of his unique position as the State's chief executive, to merit a 168-month sentence. At resentencing, the court reimposed the same sentence, again emphasizing that petitioner had violated the "public trust" and had "tax[ed]" the faith of Illinois's citizens by abusing his authority. Pet. App. 75a, 80a. Under those circumstances, even if petitioner were correct (Pet. 31) that a sentencing court always must "address[] a sentencing disparity argument when it provides a within-Guidelines sentence," the district court satisfied that requirement here.

Third, and in any event, petitioner did not object to the district court's asserted failure to address his sentencing-disparity argument. Petitioner did not claim, at either of his sentencings, that the court erred by failing to consider his argument. Rather, petitioner raised that procedural claim for the first time in two paragraphs of his opening brief in his second appeal. See 16-3254 Pet. C.A. Br. 26-27. As a result, petitioner's unpreserved claim of procedural error may be reviewed only for plain error. See Fed. R. Crim. P. 52(b); see, *e.g.*, *United States* v. *Flores-Mejia*, 759 F.3d 253, 256 (3d Cir. 2014) (en banc) ("[An] error of failure to give meaningful consideration must be brought to the district court's attention through an objection."); *United States* v. *Mangual-Garcia*, 505 F.3d 1, 15 (1st Cir. 2007) (applying plain-error review to argument "that the district court failed adequately to explain its reasons for imposing the particular sentence within the range"), cert. denied, 553 U.S. 1019 (2008); see also *Flores-Mejia*, 759 F.3d at 257-258 (observing that most circuits, but not all, apply plain-error review in such a circumstance).

Under the plain-error standard of review, petitioner would be entitled to relief only if he could show (1) an error (2) that is "clear or obvious, rather than subject to reasonable dispute," (3) that "affected [his] substantial rights," and (4) that "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Marcus*, 560 U.S. 258, 262 (2010) (citation omitted). Petitioner cannot satisfy that standard. Even assuming, contrary to the foregoing, that the district court failed to explain its reasons for rejecting petitioner's sentencing-disparity argument, the court committed no plain error. Petitioner does not argue that the sentence here, which was within the lower "revised Guidelines range [the court] constructed," Pet. App. 5a, should be treated as a non-Guidelines sentence. And as the court of appeals noted, this Court stated in *Gall* v. *United States*, 552 U.S. 38 (2007), that when a "District Judge [has] correctly calculated and carefully reviewed the Guidelines range, he *necessarily* [has given] significant weight and consideration to the need to avoid unwarranted disparities." Pet. App. 5a (quoting *Gall*, 552 U.S. at 54). That conclusion is consistent with *Rita* v. *United States*, 551 U.S. 338 (2007), in which the Court explained that no additional explanation is required when "context and the record make clear" the "reasoning [that] underlies the judge's conclusion" that a within-Guidelines sentence was warranted. *Id.* at 359. That is particularly true, the Court explained, in a case like this one, in which the defendant's sentencing arguments are "conceptually simple" and "[t]he record makes clear that the sentencing judge listened to each

argument."[4] *Id.* at 358-359; see *id.* at 359 ("[W]e do not believe the law requires the judge to write more extensively."). The district court here, by declining "to write more extensively" in response to petitioner's sentencing-disparity argument, *id.* at 359, thus committed no error, plain or otherwise. See *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1347 (2016) ("This Court has told judges that they need not provide extensive explanations for within-Guidelines sentences.") (citing *Rita*, 551 U.S. at 356-357).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2018

[4] At the original sentencing proceeding, the government asked the district court whether, "although [it] ha[d] not hit on every single mitigation argument, because obviously there were many, [it] ha[d] taken them all into account in coming to [its] sentence." Pet. App. 73a (citation omitted). The court responded that it had indeed "considered all of them." *Id.* at 74a. The court further explained that it had "read every paper submitted to" it "twice," in part "due to the fact that they were so long." *Ibid.*