No. 17-___

IN THE

Supreme Court of the United States

ROD BLAGOJEVICH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When the Government prosecutes a public official for soliciting campaign contributions in alleged violation of the Hobbs Act or other federal anticorruption laws, must the Government prove the defendant made an "*explicit* promise or undertaking" in exchange for the contribution, *McCormick v. United States*, 500 U.S. 257, 273 (1991) (emphasis added), as five circuits require, or "only . . . that a public official has obtained a payment . . . knowing that [it] was made in return for official acts," *Evans v. United States*, 504 U.S. 255, 268 (1992), as three other circuits hold?

2. May a district court decline to address a defendant's nonfrivolous argument that a shorter sentence is necessary to avoid "unwarranted sentence disparities," 18 U.S.C. § 3553(a)(6), so long as it issues a sentence within the U.S. Sentencing Guidelines, as the Seventh and Tenth Circuits hold, in conflict with the law of the majority of circuits?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rod Blagojevich respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

INTRODUCTION

Petitioner was prosecuted for allegedly seeking campaign contributions in exchange for official acts. At his trial, petitioner insisted that although he solicited donations from constituents who had benefited, or stood to benefit, from his official acts, he never made an explicit promise to make any decision contingent on the donation, and never intended to do so. The district court rejected petitioner's request that the jury be instructed it must find that petitioner made an "explicit promise or undertaking" in exchange for the donations, as required by *McCormick v. United States*, 500 U.S. 257, 273 (1991). Instead, the court gave a charge based on the Seventh Circuit's pattern jury instructions, which, in turn, draw upon language from this Court's decision in *Evans v. United States*, 504 U.S. 255 (1992). Those instructions permit conviction based on an *implied* promise surmised from the official's acceptance of the contribution, "believing that it would be given in exchange for specific requested exercise of his official power." Pet. App. 49a. Such instructions are consistent with the law of several circuits, which view *Evans* as modifying *McCormick*'s "explicit promise" standard. But they are in conflict with the law of most other circuits, which hold that campaign contribution cases are controlled by *McCormick*, not *Evans*. *See, e.g.*, *United*

States v. Blandford, 33 F.3d 685, 695-96 (6th Cir. 1994) (describing split).

The difference between the *McCormick* and *Evans* standards, although seemingly subtle at first, is of extraordinary real-world significance. Consider a common interaction between a politician and a potential donor. The donor very much wishes to secure an agreement that the official will vote for, say, a zoning variance, but realizes that he cannot make that an explicit condition of his campaign donation. The official, meanwhile, is aware of the donor's wishes, but has no intention of making such a promise. Perhaps she even has already made up her mind to vote against the variance.

Under *McCormick*, the official may safely accept the donation because she has made no explicit promise or undertaking. Moreover, the legality of the donation is completely within her own control – whatever the donor's motives, the official can steer clear of federal anticorruption law by ensuring that she makes no explicit promises in return for the donation. Under *Evans*, though, she cannot be so sure. A jury could well conclude that candidate was aware of the donor's intentions and might conclude that she accepted the donation, "knowing that the payment was made in return for official acts," and thereby *implicitly* agreed to a *quid pro quo*. *Evans*, 504 U.S. at 268.

If the donor were offering hockey tickets, the candidate could just turn down the gift. But as this Court recognized in *McCormick*, soliciting campaign donations from those who may benefit from official action – and, indeed, may *expect* their donation to influence official action – in "a very real sense is unavoidable so long as election campaigns are

financed by private contributions or expenditures, as they have been from the beginning of the Nation." 500 U.S. at 272. The present circuit conflict over the line between legal and illegal campaign solicitations puts candidates throughout the country in an untenable position.

This petition also provides the Court a chance to resolve a circuit conflict over a recurring sentencing question. Petitioner argued below that his proposed 168-month sentence was more than twice as long as the sentences given to other officials found guilty of the same, or more culpable, conduct. *See* 18 U.S.C. § 3553(a)(6) (a sentencing court "shall consider . . . the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"). The district court failed to address this sentencing disparity argument, but the Seventh Circuit held that such consideration was categorically unnecessary, given that the court ultimately issued a sentence within the Sentencing Guidelines. Pet. App. 4a-5a; *see also United States v. Chapman*, 694 F.3d 908, 916 (7th Cir. 2012) (per curiam) ("Challenging a within-range sentence as disparate is a 'pointless' exercise . . . .") (citation omitted). That rule is the subject of a recognized, entrenched circuit split. *See generally* Alison Siegler, *Rebellion: The Courts of Appeals' Latest Anti-*Booker *Backlash*, 82 U. CHI. L. REV. 201, 213-14 (2015).

This Court can, and should, eliminate both circuit conflicts in this case.

OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on April 21, 2017. Pet. App. 1a. On June 5, 2017, the Seventh Circuit denied petitioner's timely petition for rehearing and rehearing en banc. Pet. App. 31a-32a. On August 1, 2017, Justice Kagan extended the time for filing this petition through and including November 2, 2017. *See* 17A129. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

In relevant part, the Hobbs Act, **18 U.S.C. § 1951** provides:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> . . .
>
> (2) The term "extortion" means the obtaining of property from another, with his

consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

In relevant part, **18 U.S.C. § 666** provides:

(a) Whoever, if the circumstance described in subsection (b) of this section exists—

(1) . . .

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; . . .

shall be fined under this title, imprisoned not more than 10 years, or both.

In relevant part, **18 U.S.C. § 1343** provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud . . . causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1346 provides:

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

In relevant part, **18 U.S.C. § 3553** provides:

> (a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
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> . . .
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

STATEMENT OF THE CASE

I. Legal Background

A. The *Quid Pro Quo* Requirement For Federal Criminal Extortion And Bribery Prosecutions

The Hobbs Act criminalizes "extortion," defined to include the "obtaining of property from another, with his consent, . . . under color of official right." 18 U.S.C. § 1951(b)(2). This Court construed the statute's application to bribery schemes by public officials in two cases of central relevance to this petition.

1. McCormick v. United States

In *McCormick v. United States*, 500 U.S. 257 (1991), the defendant was accused of extorting campaign contributions from doctors who had an interest in pending legislation. The court of appeals had held that "payments to elected officials could violate the Hobbs Act without proof of an explicit *quid*

pro quo." *Id*. at 271. It therefore approved a jury instruction that allowed conviction so long as a payment

> was made by or on behalf of the doctors with the *expectation* that such payment would influence Mr. McCormick's official conduct, and with *knowledge* on the part of Mr. McCormick that they were paid to him with that *expectation* by virtue of the office he held.

Id. at 265 (emphasis added) (internal quotation marks omitted).

This Court held that this instruction was inadequate in the campaign funding context. The Court explained that Congress must have understood that "[m]oney is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done." 500 U.S. at 272. To avoid criminalizing longstanding methods of campaign financing and to ensure that the Act's "forbidden zone of conduct" is defined "with sufficient clarity," the Court declared that the receipt of campaign donations can violate the Hobbs Act "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 (emphasis added).

The dissenting Justices agreed that the Hobbs Act required proof of a *quid pro quo*, but objected to requiring that the promise be "explicit" in the campaign contributions context. *See* 500 U.S. at 282-83 (Stevens, J., dissenting).

2. Evans v. United States

In *Evans v. United States*, 504 U.S. 255 (1992), this Court "granted certiorari to resolve a conflict in the Circuits over the question whether an affirmative act of inducement by a public official, such as a demand, is an element of the offense of extortion 'under color of official right' prohibited by the Hobbs Act." *Id*. at 256 (citations omitted). The Court held that no such inducement was required. *See id*. at 259-66.

The Court also briefly considered the defendant's argument that his jury instructions "did not properly describe the *quid pro quo* requirement for conviction if the jury found that the payment was a campaign contribution." 504 U.S. at 268. The defendant complained the instructions did not require the jury to find that the official had fulfilled, or at least taken steps toward fulfilling, his promise. *Ibid*. This Court held that the instruction was sufficient to "satisf[y] the *quid pro quo* requirement of *McCormick*" because "the offense is completed at the time" of payment of the bribe. *Ibid*. In other words, "fulfillment of the *quid pro quo* is not an element of the offense." *Ibid*. Nor was "an affirmative step" toward fulfilling the promise required, in light of the "common-law tradition from which the term of art was drawn and understood." *Ibid*.

The Court thus had no occasion to address whether the instructions were flawed for failing to require an "*explicit* promise or agreement" under *McCormick*. But in the course of summarizing its rejection of the defendants' "fulfillment" and "affirmative step" arguments, the Court used

language that has since taken on a life of its own in the lower courts:

> We hold today that 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*.

504 U.S. at 268 (emphasis added).[1]

B. Statutory Sentencing Factors

Section 3553(a) of Title 18 provides that a sentencing court, "in determining the particular sentence to be imposed, shall consider" an enumerated list of sentencing factors. One is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id*. § 3553(a)(6).

In *Rita v. United States*, 551 U.S. 338 (2007), this Court explained that in announcing a sentence, a "sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Id.* at 356. That explanation ordinarily need not be extensive. *See ibid*. But "[w]here the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence, however, the judge will normally go further and

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[1] Justice Kennedy concluded that inducement was required, but can be satisfied by proof of a *quid pro quo* agreement. 504 U.S. at 273 (Kennedy, J., concurring). He further stated that the parties "need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods." *Id.* at 274.

explain why he has rejected those arguments." *Id*. at 357.

II. Factual Background

Petitioner Blagojevich was elected governor of Illinois in 2002 and reelected in 2006 to a second four-year term. Based principally on recorded conversations and witnesses themselves charged with serious crimes, the Government indicted petitioner for extortion, bribery, and honest services fraud.

As relevant here, the charges related to three alleged schemes. In none of them did petitioner *explicitly* demand campaign contributions or other property in return for any official act. Instead, the Government required the jury to read between the lines and rely on the testimony of others involved in the communications about what they believed petitioner *really* had in mind and *implicitly* agreed to.

A. The Alleged Attempt To Extort Campaign Contributions From The President Of Children's Memorial Hospital

The Government charged that petitioner demanded a $25,000 campaign contribution from Patrick Magoon, the president of Children's Memorial Hospital, in exchange for a Medicaid rate increase for pediatric specialists.

In June 2008, Magoon began lobbying for increased reimbursements for pediatric specialists. Tr. 2145, 2506-10. In October 2008, petitioner told a lobbyist he intended to approve the rate increase and also stated that he wanted to ask Magoon for a $25,000 campaign contribution. Tr. 2364-71, 2415-18. On

October 17, 2008, petitioner called Magoon to tell him that he had approved the rate increase, which would take effect after January 1, 2009. Tr. 2511-13. Five days later, Robert Blagojevich (the Governor's brother and fundraising chairman) called Magoon, introduced himself, and then asked if he would raise $25,000 for the Governor's campaign fund.

At trial, Magoon testified that he believed the rate increase "was contingent upon a contribution of $25,000" because Robert had asked him to raise the money "in a very strong suggestion" and had mentioned a January 1 deadline for fundraising. Tr. 2521-22, 2548. Magoon decided not to raise the funds for petitioner and stopped returning Robert's calls.

During a November 12, 2008, recorded call, petitioner's deputy advised that the Governor still had "discretion over" the rate increase, and petitioner responded, "[t]hat's good to know." Tr. 2159-61. The deputy testified that he interpreted petitioner's response as a direction to put a hold on the rate increase, which he did, causing a delay in the start date of the increase. Tr. 2161-65, 2247. (The rate increase did go into effect in January 2009, though the district court precluded the jury from hearing this fact. Tr. 2558, 2596.)

B. The Alleged Attempt To Extort Campaign Contributions From Horse Racing Executive John Johnston

The indictment also alleged that petitioner attempted to extort a campaign contribution from an Illinois horse racing executive in exchange for the timely signing of a bill that benefited the horse racing

industry. Again, that claim depended not on any explicit *quid pro quo* but on third parties' interpretation of petitioner's ambiguous statements.

As governor, petitioner was a consistent supporter of the Illinois horse racing industry. Perhaps as a result, John Johnston, a race track owner, was a longtime supporter of the Governor. Tr. 2717, 2744. In early 2008, Johnston made a commitment to raise $100,000 for the Blagojevich campaign by the end of October. Tr. 3764-70. On several occasions during November 2008, Johnston told Lon Monk – a lobbyist who was previously petitioner's Chief of Staff – that delivery of the contribution was imminent, and Monk conveyed that information to petitioner. Tr. 3776-77, 3780-81.

Johnston had an interest in a pending bill that would require Illinois casinos to pay a percentage of their revenue to the horse racing industry. The racetrack bill passed both houses of the Illinois legislature and was sent to the Governor's desk on November 24, 2008. Tr. 1567-69, 2743-49, 2753. Monk and others then began lobbying the Governor to quickly sign the bill. Tr. 1569, 2756, 2769, 2986. In a recorded conversation on December 3, Monk told petitioner, "I want to go to [Johnston] without crossing the line . . . give us the money and one has nothing to do with the other, but give us the f'ing money." Tr. 2763, 2769. Petitioner responded, "I think you just say, look, it's been a year. Let's just get this done, just get it done. Christ." Tr. 2772.

At trial, however, Monk – who by then had agreed to testify for the Government in exchange for a lower sentence on his own unrelated criminal charges – testified that it was his "understand[ing]" that

petitioner wanted him to deliver the message to Johnston that "they were in exchange for one another." Tr. 2776. Johnston – who was given immunity – testified that Monk told him that the Governor was "concerned that if he signs the racing legislation you might not be forthcoming with a contribution." Tr. 2989. Monk told Johnston that the contribution was a "different subject matter" from the bill signing, but Johnston said he "did not believe" him. Tr. 2989-91, 3032.

On December 4, 2008, even though Johnston had not yet fulfilled his pledge, petitioner told Monk in a recorded call that he would sign the bill "next week." Tr. 2787-89. Less than a week later, on December 9, petitioner was arrested before signing the bill. Tr. 2993.

C. The Alleged Scheme Regarding President Obama's Vacant Senate Seat

After Senator Barack Obama was elected president, petitioner had the authority to appoint Obama's successor in the Senate. Tr. 1305. The Government alleged that petitioner proposed to appoint the President's preferred candidate in exchange for being made head of the Department of Health and Human Services. That conviction, however, was reversed on appeal and is no longer at issue. Pet. App. 12a-18a.

The Government also alleged that petitioner discussed with his advisors the possibility of asking the President-elect and a prominent member of Congress to use their influence to set up a not-for-profit organization focused on children's healthcare that petitioner would lead after he left office. Tr. 1514,

1739-49, 1836, 1909-11. No steps were ever taken to carry out any such plan.

Finally, the Government alleged that petitioner attempted to obtain $1.5 million in campaign contributions in exchange for appointing U.S. Congressman Jesse Jackson, Jr. Pet. App. 9a; Tr. 2064. In October 2008, a supporter of both the Governor and Jackson approached Robert Blagojevich with an offer that Jackson supporters would raise funds for petitioner's campaign in exchange for the appointment of Jackson to the Senate. Tr. 2037, 2039. On October 31, 2008, petitioner told his deputy about the overture from Jackson's camp. Tr. 2109-10.

Two months later, petitioner's pollster advised the Governor that Jackson was polling better than any of the other prospective candidates for the Senate seat. Tr. 2112-13. Later that day, petitioner told his Chief of Staff that he was "honestly going to objectively look at the value of putting Jesse, Jr. there." Tr. 1604. Also later that day, petitioner told his brother to meet with a Jackson supporter and tell him that Jackson was "very much . . . realistic . . . . And the other point, you know, all these promises of help, that's all well and good, but he's had an experience with Jesse and Jesse promised to endorse him for governor and lied to him, okay . . . . [T]hen some of this stuff's got to start happening now." Tr. 4533, 4537-38.

Whether petitioner was willing to agree to an actual *quid pro quo*, or only intended to lead the donors into believing he might appoint Jackson in the hopes of securing their donations, presumably would have become clear at a future meeting with Jackson's supporters. But the Government arrested petitioner before such a meeting could take place. In the end,

petitioner did not appoint Jackson, and Jackson's supporters contributed only $5,000 to petitioner's campaign. Tr. 2061-62.

III. Procedural Background

A. The Trials, Conviction, And Sentencing

Petitioner was charged with attempting and conspiring to commit extortion under the Hobbs Act,[2] soliciting and conspiring to accept a bribe,[3] engaging in honest services wire fraud,[4] and making a false statement to the FBI.[5] Pet. App. 9a-10a. At an initial jury trial, petitioner was convicted of making a false statement to investigators, but the jury failed to reach a verdict on the remaining charges.

At the retrial, petitioner asked the court to instruct the jury, consistent with *McCormick*, that

> [i]n order for [campaign] contributions to constitute extortion, bribery or wire fraud, the government must prove that the payments are made in return for an *explicit promise or undertaking* by the official to perform or not to perform an official act.

Dist. Ct. Doc. 715, at 38 (May 23, 2011) (emphasis added).[6] The court instead issued an instruction

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[2] 18 U.S.C. §§ 2, 1951.

[3] 18 U.S.C. §§ 371, 666(a)(1)(B).

[4] 18 U.S.C. §§ 1343, 1346.

[5] 18 U.S.C. § 1001.

[6] Because "extortion 'under color of official right' and bribery are really different sides of the same coin," *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993), and because honest services

drawn from the Seventh Circuit's pattern jury instructions and modeled on the statement in *Evans* discussed *supra*, at 9:

> if an official receives or attempts to obtain money or property *believing that it would be given in exchange for specific requested exercise of his official power*, he has committed extortion under color of official right even if the money or property is to be given to the official in the form of a campaign contribution.

Pet. App. 49a (emphasis added); *see also id*. at 45a ("It is sufficient that the public official knew that the thing of value was offered with the intent to exchange the thing of value for the performance of an official act."); *compare* Pattern Criminal Jury Instructions of the Seventh Circuit 494 (2012 ed.).[7] The jury convicted. Pet. App. 7a.

At sentencing, petitioner argued, among other things, that the lengthy sentence the Government proposed would result in an unwarranted sentencing disparity, given the much more lenient sentences given other public officials charged with similar, if not more serious, misconduct. *See* Dist. Ct. Doc. 865, at

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fraud requires proof of bribery (or kickbacks, which are not alleged here), *see Skilling v. United States*, 561 U.S. 358, 412-13 (2010), the *McCormick* standard applied equally to petitioner's bribery and fraud charges. *See, e.g.*, *United States v. Ring*, 706 F.3d 460, 466 (D.C. Cir. 2013) (assuming *McCormick* extends to honest services fraud); *United States v. Siegelman*, 640 F.3d 1159, 1171-74 (11th Cir. 2011) (per curiam) (assuming same for bribery and honest services charges).

[7] *Available at* http://www.ca7.uscourts.gov/pattern-jury-instructions/7th_criminal_jury_instr.pdf.

59-67 (Nov. 30, 2011) (showing, *e.g.*, that other Illinois politicians convicted of corruption involving cash payments and self-enrichment, including former Governor George Ryan, received sentences ranging from 10 to 78 months' imprisonment). The district court nonetheless handed down a 168-month sentence without addressing petitioner's sentencing disparity argument. *See* Pet. App. 58a-74a.

B. First Appeal

1. On appeal, petitioner argued that the jury instructions erroneously failed to require proof of an "explicit promise or undertaking" under *McCormick*, and that the evidence was insufficient to prove the required *quid pro quo* under the proper standard. Petr. C.A. Br. 37-39, 41, 45, 50-54. Relying on Judge Myron Thompson's decision in *United States v. McGregor*, 879 F. Supp. 2d 1308 (M.D. Ala. 2012), petitioner further argued that to "be explicit, the promise or solicitation need not be in writing" and may be "inferred from both direct and circumstantial evidence," but must be "clearly set forth" and establish a "meeting of the minds." Petr. C.A. Br. 53 (internal quotation marks omitted).

The Seventh Circuit never reached the question of what counts as an "explicit" *quid pro quo*, deciding instead that a *quid pro quo* need not be "demanded explicitly" at all. Pet. App. 18a; *see also ibid.* (characterizing the explicit promise or undertaking

standard as a "magic-words requirement" inconsistent with the statute).[8]

However, the court of appeals reversed the counts relating to petitioner's alleged scheme to obtain a cabinet appointment for unrelated reasons and remanded. Pet. App. 18a.

2. After an unsuccessful petition for rehearing en banc, petitioner sought review in this Court, challenging the Seventh Circuit's *quid pro quo* standard. *See Blagojevich v. United States*, No. 15-664. The Government's leading argument against review was that "the case is still in an interlocutory posture." BIO 9. The "interests of judicial economy would be served best," the Government advised, "by denying review now and allowing petitioner to reassert his claims – including any new claims that might arise following resentencing or retrial, if one occurs – at the conclusion of the proceedings." *Id*. at 9-10. This Court denied the petition. 136 S. Ct. 1491.

C. Remand And Resentencing

On remand, the Government elected not to retry petitioner, but nonetheless asked the district court to impose the same extraordinary sentence as before.

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[8] The court also stated in a passing parenthetical that the "jury was entitled to conclude that" any campaign donation would be "for [Blagojevich's] personal benefit rather than a campaign" because petitioner "had decided not to run for a third" term as governor. Pet. App. 9a. But the Government never asked the jury to make such a finding, perhaps recognizing that Illinois law strictly forbade expenditure of campaign funds for personal use, 10 ILL. COMP. STAT. 5/9-8.10, even after leaving office, 10 ILL. COMP. STAT. 5/9-5. Instead, state law permits politicians to spend unused campaign funds for other political purposes. *Ibid.*

Petitioner again argued, among other things, that the 168-month sentence was unprecedented in comparison to those handed down in other corruption cases. Dist. Ct. Doc. 1233, at 15 (July 11, 2016); Dist. Ct. Doc. 1255, at 9-10 (Aug. 9, 2016). The court reinstated the prior sentence, while again failing to address petitioner's sentencing disparity argument. Pet. App. 75a-83a.

D. Second Appeal

Petitioner appealed again, objecting among other things to the district court's failure to address his sentencing disparity argument. Pet. App. 2a-3a. The Seventh Circuit affirmed. *Id.* at 6a. Because the judge "gave a sentence within the revised Guidelines range," and because the "Sentencing Guidelines are themselves an anti-disparity formula," the court concluded that the district court "therefore did not need to discuss § 3553(a)(6) separately." *Id*. at 4a-6a; *see also, e.g.*, *United States v. Annoreno*, 713 F.3d 352, 359 (7th Cir. 2013) (district court did not err in failing to address disparity argument because "challenges that a within-range sentence is disparate [are] 'pointless.'") (citation omitted).

The Seventh Circuit subsequently denied petitioner's petition for rehearing and rehearing en banc. Pet. App. 31a-32a.

REASONS FOR GRANTING THE WRIT

I. Certiorari Is Warranted To Resolve The Longstanding Circuit Conflict Over The Appropriate *Quid Pro Quo* Standard In Campaign Contribution Cases.

Numerous courts have observed that "[e]xactly what effect *Evans* had on *McCormick* is not altogether clear." *United States v. Blandford*, 33 F.3d 685, 695 (6th Cir. 1994); *see also, e.g.*, *United States v. Giles*, 246 F.3d 966, 971-72 (7th Cir. 2001) (noting that "not all courts of appeals that have considered the issue have found the *Evans* holding entirely clear"); *McGregor*, 879 F. Supp. 2d at 1316-17 (Thompson, J.) (observing there is "considerable debate" over *McCormick* and *Evans*, and the "Circuit Courts of Appeals have struggled with these questions"). That ambiguity in this Court's decisions has led to the circuit conflict at the center of this case.

A. The Circuits Are Divided 5-3.

The majority of circuits to have considered the question treat *McCormick* as setting the standard for campaign contribution cases and *Evans* as establishing a lesser standard for other contexts. Other circuits agree that *Evans* establishes a lesser standard, permitting conviction upon proof of a merely *implicit* agreement. But they hold that *Evans* established a *replacement* for the *McCormick* test, applicable to all cases, including campaign donation prosecutions.

1. The Majority Position

Second Circuit. As then-Judge Sotomayor once explained, the Second Circuit "harmonized

McCormick and *Evans* in *United States v. Garcia*, 992 F.2d 409 (2d Cir. 1993)." *United States v. Ganim*, 510 F.3d 134, 143 (2d Cir. 2007) (Sotomayor, J.). In *Garcia*, the Second Circuit held:

> Although the *McCormick* Court had ruled that extortion under color of official right in circumstances involving campaign contributions occurs "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," *Evans* modified this standard *in non-campaign contribution cases* by requiring that the government show only "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."

992 F.3d at 414 (emphasis added) (internal citations omitted).

Accordingly, in the Second Circuit "proof of an *express* promise is necessary when the payments are made in the form of campaign contributions." *Ganim*, 510 F.3d at 142 (emphasis added). In the "non-campaign context," however, the necessary "agreement may be *implied* from the official's words and actions." *Id*. at 143 (citing *Garcia*, 992 F.3d at 414, in turn citing *Evans*, 504 U.S. at 274 (Kennedy, J., concurring)) (emphasis added).

Third Circuit. The Third Circuit draws the same distinction. In *United States v. Salahuddin*, 765 F.3d 329 (3d Cir. 2014), that court explained that an "explicit *quid pro quo* is required for extortion based upon campaign contributions," *id*. at 343 n.9, but that

the court had "previously rejected attempts to require an explicit *quid pro quo* arrangement outside of the campaign contribution context," *id*. at 343 (citing *United States v. Bradley*, 173 F.3d 225, 232 (3d Cir. 1999)).

The Third Circuit therefore approved the district court's distinction between the two contexts in its jury instructions. To convict the defendant for accepting campaign donations, the district court required the jury to find that the defendant had accepted "a political contribution knowing that it is given in exchange for *an explicit promise or understanding* by the official to perform or not to perform a specific official act or course of official action." *Salahuddin*, 765 F.3d at 343 n.9 (emphasis added) (internal quotation marks omitted). The instructions regarding other bribes properly omitted the requirement of an "explicit promise or undertaking," the Third Circuit explained, because in that context "'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.'" *Id*. at 344 (quoting *Evans*, 504 U.S. at 268).

Fourth Circuit. In *United States v. Taylor*, 993 F.2d 382 (4th Cir. 1993), the Fourth Circuit reversed the conviction of a public official charged with extortion for accepting what he claimed to be campaign contributions. *Id*. at 382-83. The Fourth Circuit explained that *McCormick* and *Evans* establish two different tests applicable to two different situations:

> It is necessary for the prosecution to prove under the *Evans* standard "that a public official has obtained a payment to which he is

> not entitled, knowing that the payment was made in return for official acts." *Or, if the jury finds the payment to be a campaign contribution*, then, under *McCormick*, it must find that "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 385 (emphasis added) (internal citations omitted).

Ninth Circuit. The Ninth Circuit has similarly embraced the distinction between the *explicit* agreement required under *McCormick* for campaign contribution bribery and the *implicit* agreement that is sufficient under *Evans* in other contexts.

In *United States v. Kincaid-Chauncey*, 556 F.3d 923 (9th Cir. 2009), Judge Bybee explained that "it is well established that to convict a public official of Hobbs Act extortion for receipt of property *other than campaign contributions*," the *Evans* standard applied and an "*explicit* quid pro quo is not required; an agreement *implied* from the official's words and actions is sufficient to satisfy this element." *Id*. at 937 (emphasis added). The court thus approved the district court's instruction in the case before it, which provided:

> In the case of a public official who obtains money, *other than a campaign contribution*, the Government does not have to prove an *explicit promise* to perform a particular act made at the time of the payment. Rather, it is sufficient if the public official understands that he or she is *expected* as a result of the

> payment to exercise particular kinds of influence as specific opportunities arise.

Ibid. (emphasis added).

In contrast, in *United States v. Inzunza*, 638 F.3d 1006 (9th Cir. 2011), a campaign contribution case, the Ninth Circuit reaffirmed that what "'*McCormick* requires is that the *quid pro quo* be *clear and unambiguous*, leaving no uncertainty about the terms of the bargain.'" *Id*. at 1013 (quoting *United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir. 1992)) (emphasis added). This "'explicitness requirement,'" the court explained, "'serves to distinguish between contributions that are given or received with the 'anticipation' of official action and contributions that are given or received in exchange for a 'promise' of official action.'" *Ibid*.

D.C. Circuit. Finally, in *United States v. Ring*, 706 F.3d 460 (D.C. Cir. 2013), the D.C. Circuit rejected the argument "that an *explicit* quid pro quo is required outside the [campaign] contribution context." *Id*. at 466. Writing for the court, Judge Tatel explained that in *McCormick* this Court "held that making campaign contributions can constitute criminal extortion under the Hobbs Act only when made pursuant to an explicit quid pro quo agreement." *Id*. at 465. But the court reasoned that "whereas soliciting campaign contributions may be practically 'unavoidable'" and may "implicate First Amendment speech and petition rights," other forms of bribery do not. *Id*. at 466 (citation omitted). In the latter context, the court held that the district court appropriately instructed the jury that it was enough that a non-campaign gift was "'conditioned . . . upon the recipient's express *or*

implied agreement to act favorably to the donor.'" *Id*. at 468 (emphasis added) (citation omitted).

2. The Minority Position Of The Sixth, Seventh, And Eleventh Circuits

In conflict with the majority view, the Sixth, Seventh, and Eleventh Circuits have held that there is a single *quid pro quo* standard and that under it, the Government *never* needs to prove an explicit promise or undertaking, even in campaign donation cases.

Sixth Circuit. In *United States v. Blandford*, the Sixth Circuit recognized that other circuits have concluded that *Evans* "establishes a modified or relaxed *quid pro quo* standard to be applied in non-campaign contributions cases," in contrast to the "comparatively strict standard of *McCormick* [that] still would govern when the alleged Hobbs Act violation arises out of the receipt of campaign contributions by a public official." 33 F.3d at 695. However, the court went on, "[w]e read *Evans* somewhat differently." *Id*. at 696. "*Evans*, we believe, merely clarified . . . that the *quid pro quo* of *McCormick* is satisfied by something short of a formalized and thoroughly articulated contractual arrangement." *Ibid*. In particular, the Sixth Circuit read *Evans* to direct that in *any* Hobbs Act case, "merely knowing [that] the payment was made in return for official acts is enough." *Ibid*.; *see also id*. at 697 (standard in campaign cases is "*McCormick* [as] informed by *Evans*").

Seventh Circuit. The Seventh Circuit embraced the same position in this case. The court rejected petitioner's argument "that extortion can violate the Hobbs Act only if a *quid pro quo* is demanded

explicitly." Pet. App. 18a. And it affirmed the district court's decision to use the Circuit's pattern jury instructions, which are based on *Evans*. *See id.* at 19a-21a; Pattern Criminal Jury Instructions, *supra*, at 494; *see also id*. at 495 (Committee Comment stating that the "*quid pro quo* can be implied").

That decision was consistent with *United States v. Giles*, in which the Seventh Circuit likewise upheld *Evans*-based instructions tracking the Circuit's model jury charge, where the defendant was accused of extorting money for his campaign and himself. *See* 246 F.3d at 969-70, 971-72.

Eleventh Circuit. In *United States v. Siegelman*, 640 F.3d 1159 (11th Cir. 2011) (per curiam), the Eleventh Circuit considered the conviction of an official who allegedly accepted campaign contributions in exchange for political favors. The court acknowledged *McCormick*'s requirement of an explicit *quid pro quo* in campaign donation cases. *Id*. at 1169-70. But relying on Justice Kennedy's concurrence in *Evans*, the court nonetheless held that the required agreement "may be '*implied* from [the official's] words and actions.'" *Id*. at 1172 (quoting *Evans*, 504 U.S. at 274 (Kennedy, J., concurring)) (alteration in original) (emphasis added).

B. The First Question Presented Is Recurring And Important.

The breadth and duration of the circuit conflict demonstrates that the first Question Presented is frequently recurring. Moreover, the location of the line between lawful campaign solicitation and felony extortion is a question of undeniable practical importance to candidates throughout the country.

See, e.g., *McDonnell v. United States*, 136 S. Ct. 2355, 2372-73 (2016); *McCormick*, 500 U.S. at 272.

The present uncertainty also implicates constitutional concerns of the highest order. Seeking and making campaign donations implicates fundamental First Amendment rights. *See, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444, 1448 (2014) (plurality opinion). At the same time, using a federal criminal statute to regulate state campaign finance – displacing state law and the supervision provided by the People themselves through the ballot box – raises "significant federalism concerns." *McDonnell*, 136 S. Ct. at 2373. Candidates and donors also have a Due Process right to know with some certainty what the criminal law requires of them. *See, e.g.*, *id*. at 2372-73. And the lack of clarity about the correct interpretation of an already vague law provides fertile ground for abuse of prosecutorial power.

All of these constitutional values are at risk when courts, politicians, and donors are uncertain about what is permitted and what is criminal. Indeed, this Court required proof of an "explicit promise or undertaking" in *McCormick* precisely to ensure the line is drawn with "sufficient clarity" in the campaign contribution context. 500 U.S. at 273. The present conflict over whether, and when, that requirement still applies intolerably undermines the clarity this Court sought to provide.

C. The Seventh Circuit's Decision Is Wrong.

Certiorari is further warranted because the Seventh Circuit's decision is wrong.

This Court was right in *McCormick* to require 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. That is the only way to ensure that the Hobbs Act reaches the public official who "asserts that his official conduct will be controlled by the terms of the promise or undertaking," without casting a chill on ordinary fundraising, in which candidates seek donations from those they expect to be supportive of their agenda without explicitly promising that the donation will control their official conduct. *McCormick*, 500 U.S. at 273.

To say that this promise must be "explicit" is not to say that it must be *express*. *Contra* Pet. App. 18a-19a. But an explicit promise must be *unambiguous* in its essential terms, particularly with respect to the defendant's agreement to engage in an official act in return for the donation. *See, e.g.*, BLACK'S LAW DICTIONARY 401 (6th ed. abr. 1991) (defining "explicit" as "[n]ot obscure or ambiguous, having no disguised meaning or reservation"). An "explicit" *quid pro quo* thus is not satisfied simply because the one party had some *specific* official action in mind. It requires that *both* parties have agreed to an exchange under which the official act is unambiguously *contingent* on the donation.

When there is no express agreement – when a jury is asked to read between the lines and decide what the candidate and donor *really* meant – it is *especially* important that the jury be instructed that it must find an unambiguous agreement. Here, for example, prosecutors' claim that petitioner intended to extort campaign contributions from racetrack executive Johnston depended on Johnston's testimony about

what he believed an intermediary *really* meant, in conveying what that intermediary took petitioner *really* to mean by statements that, on their face, did not make approval of the pending legislation contingent on payment of the campaign pledge. *See supra*, at 12-13.

It is all too easy to cast entirely lawful interactions as having an illegal subtext, particularly when jurors may find the reality of campaign fundraising distasteful or the defendant is politically unpopular. An official may say to a donor, "I've been very supportive of your industry and expect we will see eye-to-eye on many legislative issues in the future. I would appreciate your support as well." Did she really mean "I need a donation or I will hold back on further support for your agenda?" Or a donor may say, "I'd be happy to raise money for you, given that we seem to have the same philosophy when it comes to supporting our industry. I hope that continues in the next legislative session when our bill comes up." Is the donor proposing an illegal *quid pro quo*? If the official accepts the donation, is he agreeing to it?

The risk of misinterpretation 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. The jury is required to extrapolate from a defendant's preliminary, sometimes off-hand, statements about what he would eventually agree to if the discussions had proceeded further. When the line between legal fundraising and illegal extortion lies in the precise *details* of what would have been negotiated – *i.e.*, whether the defendant would have promised to

engage in an official act, or merely allowed the donor to believe that favorable action was likely – requiring proof of an explicit *quid pro quo* is necessary to avoid "cast[ing] a pall of potential prosecution" over common fundraising interactions. *McDonnell*, 136 S. Ct. at 2372.

The possibility that innocent statements and interactions can be misconstrued as implicit solicitations for an illegal *quid pro quo* also gives enormous power to federal prosecutors, a power that may – in actuality or public perception – be exercised on the basis of political hostility or for partisan advantage.

The standard drawn from *Evans* comes nowhere near requiring the degree of explicitness demanded by *McCormick* and needed to avoid impinging on important constitutional rights. It permits conviction based on the defendant's awareness that a donor believes he is making a contribution in return for an official act, without requiring the jury to ask whether the defendant, in fact, agreed to that deal. In this way, the *Evans*-based instruction given in this case and many others is hardly any different from the instruction this Court held inadequate in *McCormick* itself. *Compare supra*, at 7 (*McCormick* instruction), *with supra*, at 16 (instruction in this case); *contra* Pet. App. 18a (Seventh Circuit claiming that instructions "track" *McCormick*).

The sentence in *Evans* upon which the Seventh Circuit and other courts have based their jury instructions was never intended to modify or supplant the "explicit promise or undertaking" test from *McCormick*. Instead, it simply summarized the Court's rejection of Evans' argument that *McCormick*

required proof that the defendant had fulfilled, or taken affirmative steps toward fulfilling, his promise. The Court explained that no steps toward fulfillment were required because the offense was completed upon *acceptance* of the contribution, so long as the other *quid pro quo* requirements were met. *See Evans*, 504 U.S. at 268. The Court then paraphrased those other requirements in words that did not repeat the *McCormick* test verbatim. But the imprecision of that paraphrase has no significance – this Court does not modify prior precedent in such a casual, off-handed way, particularly when the issue is not before it.

II. Certiorari Is Warranted To Resolve A Circuit Conflict Over Whether District Courts May Disregard Sentencing Disparity Arguments When They Issue Within-Guidelines Sentences.

Independently, this Court should grant certiorari to decide whether a district court is categorically excused from addressing a sentencing disparity argument when it provides a within-Guidelines sentence.

A. The Circuits Are Divided.

This recurring sentencing question has divided the circuits.

1. The Majority View

The majority of circuits hold that a sentencing court generally must address all nonfrivolous sentencing factor arguments, without providing any exception for sentencing disparity arguments or within-Guidelines sentences. *See, e.g.*, *United States v. Corsey*, 723 F.3d 366, 377 (2d Cir. 2013) (per

curiam); *United States v. Friedman*, 658 F.3d 342, 362 (3d Cir. 2011); *United States v. Lynn*, 592 F.3d 572, 583-84 (4th Cir. 2010); *United States v. Mondragon-Santiago*, 564 F.3d 357, 362-64 (5th Cir. 2009); *United States v. Trujillo*, 713 F.3d 1003, 1010-11 (9th Cir. 2013); *see also United States v. Bigley*, 786 F.3d 11, 16 (D.C. Cir. 2015) (Brown, J., concurring) ("A majority of circuits require judges to address a defendant's nonfrivolous arguments for a sentence below the advisory Sentencing Guideline range.") (collecting cites).

At least two circuits have applied their general rule to reverse courts that failed to address Section 3553(a)(6) arguments even though the resulting sentence was within the Guidelines range.

Third Circuit. For example, in *United States v. Friedman*, the Third Circuit explained that a "'district court need not discuss and make findings as to each of the § 3553(a) factors if the record makes clear that the court took the factors into account,'" but that when "'one party raises a colorable argument about the applicability of one of the factors, the court should respond to that argument.'" 658 F.3d at 362 (citations and alteration omitted). In the case before it, a defendant who had received a Guidelines sentence objected that the district court failed to address his sentencing disparity argument in favor of a lower sentence. *Id*. at 361-62. Finding that there was "no explicit discussion or indication in the record that it was considered," the court held the sentence procedurally unreasonable and remanded for a new sentencing hearing. *Id*. at 363.

Fourth Circuit. The Fourth Circuit likewise vacated a within-Guidelines sentence for failure to

address a sentencing disparity argument in *United States v. Lynn*. The defendant complained that the court failed to address his arguments regarding several statutory sentencing factors, including Section 3553(a)(6). *See* 592 F.3d at 583. In vacating the sentence, the Fourth Circuit explained that "a district court *cannot* presume that a within-Guidelines sentence is reasonable." *Id*. at 584. Because there was "no indication that the district court considered the defendant's nonfrivolous arguments prior to sentencing him, we must find error." *Id.* at 585; *see also, e.g.*, *United States v. Slappy*, 872 F.3d 202, 208 (4th Cir. 2017) (explaining that if a court rejects a nonfrivolous sentencing factors argument, it "must explain why in a detailed-enough manner that this Court can meaningfully consider the procedural reasonableness of the . . . sentence imposed").

2. The Minority Position

Seventh Circuit. This case is emblematic of the Seventh Circuit's contrary rule. The court of appeals did not dispute petitioner's assertion that "the district judge did not address [his] contention, based on 18 U.S.C. § 3553(a)(6), that a 168-month sentence would produce an unwarranted disparity compared with the sentences meted out to other persons convicted of corruption in political office." Pet. App. 4a. Instead, it affirmed the sentence solely on the ground that the judge "gave a sentence within the revised Guidelines range . . . and therefore did not need to discuss § 3553(a)(6) separately." *Id*. at 5a. The court explained that, in its view, "the Sentencing Guidelines are themselves an anti-disparity formula," such that "to base a sentence on a properly determined Guideline range is to give adequate consideration to

the relationship between the defendant's sentence and those of other persons." *Id*. at 4a-5a.

The Seventh Circuit has applied this rule and repeated its rationale in multiple cases, even going so far as to say that "[c]hallenging a within-range sentence as disparate is a 'pointless' exercise." *United State v. Chapman*, 694 F.3d 908, 916 (7th Cir. 2012) (per curiam) (citation omitted); *see also United States v. Martin*, 718 F.3d 684, 688 (7th Cir. 2013) (per curiam) (holding that district court did not "err in declining to address Martin's argument that a below-guidelines sentence would be necessary to avoid unwarranted sentencing disparities" because a sentence within the Guidelines "'cannot be treated as unreasonable in reference to [Section] 3553(a)(6)'") (citation omitted); *ibid*. (disparity argument may "therefore be passed over in silence"); *Annoreno*, 713 F.3d at 359 (district court did not err in failing to address disparity argument because "challenges that a within-range sentence is disparate [are] 'pointless'") (citation omitted); *United States v. Bartlett*, 567 F.3d 901, 908 (7th Cir. 2009) ("A sentence within a Guideline range 'necessarily' complies with § 3553(a)(6).").

Tenth Circuit. The Tenth Circuit takes this rule one step further, excusing the district court from specifically addressing *any* sentencing factor argument if it issues a within-Guidelines sentence.

In the Circuit's seminal decision, then-judge Gorsuch rejected a defendant's argument that because "he 'raised a non-frivolous argument implicating the 18 U.S.C. § 3553(a) sentencing factors . . . the district court was required to address the argument.'" *United States v. Ruiz-Terrazas*, 477 F.3d 1196, 1199 (10th Cir.

2007) (Gorsuch, J.) (citation omitted). The court reasoned that when a judge issues a within-Guidelines sentence, the "plain language" of the sentencing statute requires "only a general statement of the 'reasons for [the court's] imposition of the particular sentence,'" not a response to a defendant's sentencing factor arguments. *Ibid*. (citation omitted); *see also id*. at 1202 (holding "that a specific discussion of Section 3553(a) factors is not required for sentences falling within the ranges suggested by the Guidelines"). Echoing the Seventh Circuit's reasoning, the court further pointed to "the fact that the Guidelines themselves seek, in some measure, to give meaning to the considerations embodied in Section 3553(a)." *Id*. at 1200.

Although *Ruiz-Terrazas* was decided before *Rita v. United States*, 551 U.S. 338 (2007), the Tenth Circuit has continued to apply its precedent in more recent cases. *See United States v. Wireman*, 849 F.3d 956, 963 (10th Cir. 2017) (reaffirming that "when the district court has imposed a sentence within the Guidelines, our cases have noted that the district court need *not* specifically address and reject each of the defendant's arguments for leniency so long as the court 'somehow indicates that it considered . . . the 18 U.S.C. § 3553(a) statutory factors") (citation and alterations omitted); *see also ibid*. (reiterating "principle" that "a district court need not specifically address and instead may functionally reject a defendant's arguments for leniency when it sentences him within the Guidelines range"); *United States v. Gantt*, 679 F.3d 1240, 1248-49 (10th Cir. 2012) ("Indeed, one can say as a general rule that when a court considers what the guideline sentence (or

sentencing range) is, it necessarily considers whether there is a disparity between the defendant's sentence and the sentences imposed on others for the same offense.") (citing *Gall v. United States*, 552 U.S. 38, 54 (2007)).

3. The Sixth Circuit's Conflicting Decisions

There are cases in the Sixth Circuit emphatically embracing both sides of the circuit conflict. *Compare United States v. Houston*, 529 F.3d 743, 752 (6th Cir. 2008), *with United States v. Wallace*, 597 F.3d 794, 803-05 (6th Cir. 2010).

B. The Second Question Presented Is Recurring And Important.

As then-Judge Gorsuch observed in *Ruiz-Terrazas*, how much a court must say in response to a defendant's argument for a lower sentence is a question "that has become of recurring significance for litigants and district courts alike in our jurisdiction." 477 F.3d at 1199. Trial courts sentence tens of thousands of defendants each year, and disparity arguments are common.

At the same time, the answer to the Question Presented has real-world significance. "Requiring a sentencing court to both consider *and address* a defendant's argument for mitigation also can affect outcomes." *Bigley*, 786 F.3d at 17 n.1 (Brown, J., concurring) (emphasis added) (citing Jennifer Niles Coffin, *Where Procedure Meets Substance: Making the Most of the Need for Adequate Explanation in Federal Sentencing*, CHAMPION, Mar. 2012, at 36). In the study Judge Brown cited, the author found that within-Guidelines sentences reversed for failure to address an argument were altered more than 60% of the time of

remand, usually to reduce the sentence, sometimes dramatically.[9]

C. The Seventh Circuit's Rule Is Wrong.

The Seventh Circuit's categorical rule is also irreconcilable with the text of the sentencing statute and this Court's decisions.

Section 3553(a) unambiguously requires that in *every* case, the sentencing court "*shall* consider" various factors, including "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6) (emphasis added). It provides no exception for within-Guidelines sentences. Nor does this Court's admonition that sentencing courts should address nonfrivolous arguments countenance any categorical exceptions. *See Rita*, 551 U.S. at 356, 357.

The Seventh Circuit's observation that the Guidelines were designed to minimize sentencing disparities provides no support for its rule either. As *Rita* explained, the Guidelines regime contemplates that every case will involve a "double determination" of how the statutory sentencing factors should apply to a particular defendant. 551 U.S. at 347. The Sentencing Commission is initially charged with writing Guidelines "that will carry out the[] . . . § 3553(a) objectives." *Id*. at 348. But the statute then

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[9] Jennifer Niles Coffin, *Where Procedure Meets Substance: Making the Most of the Need for Adequate Explanation* 18 (2016), https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/where-procedure-meets-substance-making-the-most-of-the-need-for-adequate-explanation.pdf (updated version of study).

requires the judge also to consider all the sentencing factors in Section 3553(a), including the need to avoid unwarranted sentencing disparities. *Id*. at 347-48. The second look by the sentencing court is intended to allow that court to decide whether "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations" or "the case warrants a different sentence regardless." *Id*. at 351.

Given this leeway, a court cannot just assume that a within-Guidelines sentence will avoid unwarranted sentencing disparities. For example, a disparity could arise because other courts regularly sentence similar defendants outside the Guidelines. Or a sentencing judge could permissibly conclude that the Guidelines themselves could fail to capture the relevant differences and similarities among defendants. *Rita*, 551 U.S. at 351.

This case is a perfect example. Petitioner presented evidence that his within-Guidelines sentence – which was driven largely by the size of the campaign contributions discussed and made no distinction between campaign contributions and payments for personal enrichment – was at least twice as long as sentences given to other public officials convicted on federal corruption charges. *See supra*, at 17, 19. A sentencing court plainly has discretion to alter its sentence in light of that disparity. *See, e.g.*, *Spears v. United States*, 555 U.S. 261, 265 (2009) (per curiam).

Finally, the Court's observation in *Gall v. United States*, 552 U.S. 38 (2007), that the trial judge "necessarily gave significant weight and consideration to avoid unwarranted disparities" by calculating the Guidelines range addressed a sentencing judge's

explanatory obligation when no specific disparity argument is raised. *Id.* at 54. The Court then went on to address whether the judge adequately responded to the Government's specific disparity arguments, documenting the various steps the court took beyond calculating the Guidelines range, *id.* at 54-55, none of which would have been necessary under the Seventh Circuit's rule. *See also ibid*. (noting that "[h]ad the prosecutor raised the issue [of the seriousness of the offense], specific discussion of the point might have been in order").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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