No. 15-664

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 court of appeals correctly held that petitioner may not defend against charges of extortion, honest-services fraud, and bribery by claiming that he genuinely believed that he could lawfully exchange his official actions for money.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 794 F.3d 729. The opinion of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 2015. A petition for rehearing was denied on August 19, 2015 (Pet. App. 24a). The petition for a writ of certiorari was filed on November 17, 2015. 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 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 and 666(a)(1)(B) (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). 12/07/11 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. 1a-23a.

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. 2a-4a; 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. 2a. Petitioner "viewed [this] 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 3a. When no

deal was struck, petitioner responded: "They're not willing to give me anything except appreciation. [Expletive] them." *Ibid.*

Petitioner then attempted to appoint Congressman Jesse Jackson, Jr. to the Senate seat in exchange for $1.5 million in campaign contributions. Pet. App. 3a; see Gov't C.A. Br. 8-9, 19-22. A Jackson supporter had earlier proposed such an exchange to petitioner. Gov't C.A. Br. 8; see *id.* at 19 (petitioner told his deputy "[w]e were approached, pay to play"); *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. 3a.

b. During the same time period, petitioner attempted to extort campaign contributions from John Johnston, a racetrack owner and longtime supporter. Pet. App. 4a; Gov't C.A. Br. 9-10, 27-33. In November

2008, the Illinois legislature passed a bill extending subsidies to the horseracing industry. 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. 4a.

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. 4a; 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. 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. *Id.* at 11, 24-25. Robert Blagojevich 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. 4a.

2. On February 4, 2010, a grand jury returned a twenty-four count second superseding indictment against petitioner. Gov't C.A. Br. 1, 3-4. Many of those charges related to the events discussed above. 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. Gov't C.A. Br. 4.[1]

In 2011, after three counts (Counts 1, 2, and 4) were dismissed, the remaining charges were tried.

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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. Gov't C.A. Br. 99. In fact, "[petitioner] regularly found out who contributed how much." Pet. App. 5a.

Gov't C.A. Br. 4. Petitioner testified at the second trial. While petitioner's testimony was ongoing, the government objected to petitioner's attempts to testify that he believed his actions were permissible "horse trading" and politics as usual. *Id.* at 62 (citation omitted). After obtaining an offer of proof about petitioner's remaining testimony, the district court precluded petitioner from testifying that he had genuinely believed that trading "one for the other" was legal. *Id.* at 64 (citation omitted); see *id.* at 62-65.[2]

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. 26a (honest-services fraud); see *id.* at 27a (extortion), *id.* at 29a (bribery). The court rejected petitioner's request that it instruct the jury that "[s]olicitation of a campaign contribution only constitutes bribery if the payment was made or sought in return for an *explicit* promise or undertaking by the public official to perform or not perform a specific act." *Id.* at 31a (emphasis added); see *id.* at 35a. As for petitioner's claim that he could not be convicted of honest-services fraud, extortion, or bribery because had acted in "good faith," the court instructed that jury:

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[2] Notwithstanding the district court's ruling, petitioner continued to allude to his purported belief that he had acted lawfully. See Gov't C.A. Br. 66-67 (listing examples).

> In the context of this case, good faith means that the defendant acted without intending to exchange official actions for personal benefits. The burden is not on the defendant to prove his good faith; rather, the government must prove beyond a reasonable doubt that the defendant acted with the intent to defraud. The government is not required to prove that the defendant knew his acts were unlawful.

Id. at 26a (honest-services fraud); see *id.* at 28a (extortion); *id.* at 29a (bribery).

The jury convicted petitioner on seventeen 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. 12/07/11 Judgment 1-2.

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

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. 5a. 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 6a-12a. 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 12a.

Next, the court of appeals upheld the jury instructions defining extortion under the Hobbs Act, finding the instructions to be "unexceptionable." Pet. App. 12a. 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.

Ibid. 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. 12a.

Finally, the court of appeals held that the district court did not err by precluding petitioner's "good faith" defense and rejecting his requested instruction. Pet. App. 12a-14a. The court of appeals noted that "mistake of law" is not a defense to extortion or bribery. *Id.* at 13a; see *ibid.* ("[Petitioner] does not argue that knowledge of law is essential to conviction under § 666 or § 1951, so there's no basis for a good-faith

instruction."). The court distinguished other criminal offenses that do allow a good faith defense, such as tax evasion under 26 U.S.C. 7203, because those other offenses require a defendant to act "willfully." Pet. App. 13a (discussing *Cheek* v. *United States*, 498 U.S. 192 (1991)).

ARGUMENT

Petitioner contends (Pet. 13-30) 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. Petitioner also contends (Pet. 30-33) that he should have been permitted to argue that he was not guilty because he genuinely believed he could legally trade his official actions for campaign contributions. The court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court or of any other court of appeals.

1. As an initial matter, the Court's review is unwarranted at this time because the case is still in an interlocutory posture. The court of appeals vacated five counts of conviction, vacated petitioner's sentence, and remanded to the district court for retrial and resentencing. Pet. App. 23a. This Court normally "await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *VMI* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari); see *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (describing interlocutory posture as "a fact that of itself alone furnishe[s] sufficient ground for the denial of" certiorari). That practice ensures that all of a defendant's claims will be consolidated and presented in a single petition. Here, the interests of judicial economy would be

served best 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. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) ("[W]e have authority to consider questions determined in earlier stages of the litigation.").

2. Petitioner contends (Pet. 17) that this Court's review is needed to resolve a disagreement in the lower courts on 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.

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, 18 U.S.C. 1951. 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. 500 U.S. 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 office-holder 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. *Id.* at 273-274 (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 concluded, "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. 20-25) 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 that the instructions "violated *McCormick's* explicit quid pro quo requirement," because they permitted conviction based on "a *donor's* expectation that some future official act will benefit him," rather than "an *explicit* promise or undertaking *by the defendant* to perform an official act in exchange for the contribution." Pet. 22-23 (internal quotation marks omitted). Petitioner also contends (Pet. 27) that an extortion conviction in the campaign finance context requires "the promise of *certain* action if the requested contribution is made * * * in the nature of a 'firm offer' in contract law."

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."[3] 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 09/17/12 Tr. 3265 ("[T]here has to be an expressed understanding on both sides that this was being communicated."); D. Ct. Doc. 715, at 2 (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.'" *Id.* at 6. 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 Pet. C.A. Br. 50-54, but his brief did not further define that term. The government 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," Gov't C.A. Br. 57, and petitioner's reply brief did not suggest that the government had misconstrued his argument, Pet. Reply

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[3] 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. 3a.

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. 12a; 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." C.A. Reh'g Pet. 7. And in this Court, petitioner now argues that "[o]f course, 'explicit' is not synonymous with 'express.'" Pet. 25; see Pet. 27 ("[N]o party here contends that a corrupt solicitation need be *express*."). Instead, he argues (Pet. 25) that "explicit" means "set forth or demonstrated *very clearly*, leaving no ambiguity or room for doubt." He also suggests (Pet. 27), for the first time in this litigation, that an "explicit" offer to exchange official actions for campaign contributions "must be in the nature of a 'firm offer' in contract law."

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, 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 attempte[d] 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. 27a. 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 273-274 (citation omitted). Thus, as the court of appeals determined, the jury instructions "track *McCormick*." Pet. App. 12a. Indeed, the instructions given here are nearly identical to the instructions that were given in *Evans* and approved by this Court. Compare *id.* at 27a ("receive or attempt to obtain the money or property in return for the official action"), 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. 23, 28) that the jury instructions in his case lacked the "clarity" required by *McCormick*. See Pet. 28 n.13 ("*McCormick* rejected a similarly unspecific instruction."). He argues that the instructions given here, like those rejected in *McCormick*, permitted the jury to convict him of extortion "because of a *donor's* expectation that some future official act will benefit him," rather than "an *explicit* promise or undertaking *by the defendant*

to perform an official act in exchange for the contribution." Pet. 23 (internal quotation marks omitted).

That argument lacks merit. 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. 27a (emphasis added) (page number omitted); see *ibid.* ("given in exchange for specific requested exercise of his official power"); see also *id.* at 28a (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 *McCormick* instruction, required proof that petitioner himself contemplated a reciprocal exchange.

Petitioner also contends (Pet. 19-30) 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 (citation omitted). Petitioner suggests (Pet. 18-19, 29-30) 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 whether the payments were contributions. 504 U.S. 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 (citation omitted).

Finally, if petitioner's argument is that *McCormick* subjected the quid pro quo element to a heightened standard of proof, see Pet. 25 (equating "explicit" with "demonstrated *very clearly*, leaving no ambiguity or room for doubt"), 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 (citation omitted). 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, beyond 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 (Pet. 17) that this Court's intervention is needed to resolve confusion "regarding whether *Evans* modified or relaxed *McCormick*'s 'explicit promise or undertaking' requirement to prove public corruption offenses involving campaign contributions." He contends (Pet. 19) that the decision below conflicts with decisions from a "plurality" of courts of appeals, which apply "*McCormick's* explicit quid pro quo requirement * * * in campaign contribution[] cases." See Pet. 19-20 (citing cases). Petitioner greatly overstates the degree of conflict, and any disagreement is not relevant to the outcome of this case.

None of the decisions cited by petitioner invalidated a conviction on the ground that the jury instructions failed to require an "*explicit* promise or undertaking" or an "*explicit* quid pro quo." Pet. 25 (emphasis added). Three of the decisions reversed the defendants' convictions because the jury instructions in those cases—unlike the instructions in this case—failed to require any quid pro quo at all. See *United*

States v. *Davis*, 30 F.3d 108, 109 (11th Cir. 1994) ("[The district court] informed the jury that 'a specific quid pro quo is not always necessary for a public official to be guilty of extortion.'"); *United States* v. *Taylor*, 993 F.2d 382, 385 (4th Cir.) ("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."), cert. denied, 510 U.S. 891 (1993); *United States* v. *Garcia*, 992 F.2d 409, 414 (2d Cir. 1993) ("The district court's failure to give an instruction on quid pro quo was error.").

Three of the other decisions cited by petitioner *rejected* the defendants' challenges to jury instructions. Notably, none of the challenged instructions had required proof of an "explicit" promise, undertaking, or quid pro quo. See *United States* v. *Abbey*, 560 F.3d 517, 519 (6th Cir.), cert. denied, 558 U.S. 1051 (2009); *United States* v. *Blandford*, 33 F.3d 685, 698 (6th Cir. 1994), cert. denied, 514 U.S. 1095 (1995); see also *United States* v. *Siegelman*, 640 F.3d 1159, 1172 (11th Cir. 2011) (per curiam) (bribery prosecution under 18 U.S.C. 666), cert. denied, 132 U.S. 2711 (2012). Indeed, the instructions approved in *Blandford* were nearly identical to the instructions given in this case. 33 F.3d at 698 ("A public official commits extortion when he obtains a payment to which he was not entitled, knowing that the payment was made in return for his official act.") (emphasis omitted). Finally, the Ninth Circuit's decision in *United States* v. *Inzunza*, 638 F.3d 1006 (2011), cert. denied, 132 S. Ct. 997 (2012), involved a challenge to the sufficiency of

the evidence, not the jury instructions. See *id.* at 1013-1016. Thus, petitioner has identified no appellate holding of sort he requests here—namely, that an extortion instruction is invalid if it fails to require proof of an "explicit" quid pro quo.

It is true that some courts of appeals have suggested that the required proof may be different in extortion cases that involve campaign contributions. None of those decisions, however, indicates that a different result would be warranted here. *Blandford*, *Abbey*, and *Garcia* did not involve campaign contributions at all, and so cannot establish a heightened standard for jury instructions in that context. Moreover, those cases turned on factors other than whether the required quid pro quo was sufficiently "explicit." In *Blandford*, 33 F.3d at 698, the court upheld the jury instruction (which was nearly identical to the one given in this case) because "the instruction made the government prove a campaign contribution case even though no campaign contributions had in fact been made." In *Garcia*, 992 F.2d at 415, the court held that the instructions given at trial did not comply with *Evans* because they failed to tell the jury "that [the defendant] understood that the payment was made in return for performance of [his official] duties." And the outcome in *Abbey*, 560 F.3d at 519, turned on whether the public act promised by the defendant was sufficiently "specific." See *Siegleman*, 640 F.3d at 1172 (upholding "instruction [that] required the jury to find an agreement to exchange a specific official action for a campaign contribution"). The jury instructions in this case would have satisfied those decisions, because the instructions 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. 28a (emphasis added); see *id.* at 27a ("specific requested exercise of his official power").[4]

In sum, petitioner has failed to show how any disagreement among the courts of appeals would have affected the resolution of his case.

3. Petitioner renews his claim (Pet. 30-31) that extortion, bribery, and honest-services fraud are "specific intent" crimes, and therefore that he should have been allowed to raise a "good faith" defense that he "was following the law as he understood it." Petitioner does not base his argument on the language of those statutes. Nor does he contend that the court of appeals' decision in this case, which rejected his "good faith" defense, see Pet. App. 12a-14a, conflicts with a decision from any other court of appeals. Instead, petitioner claims (Pet. 32-33) that *Elonis* v. *United States*, 135 S. Ct. 2001 (2015), supports his argument

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[4] Petitioner argues (Pet. 26) that "*McCormick*'s 'explicit promise or undertaking' requirement is especially important in a case like this that involves only the *solicitation* and *attempt* to obtain campaign contributions," because "[s]uch situations create a heightened risk of misunderstanding about what exactly the candidate or official has promised to do." 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. 28a; see also *Siegelman*, 640 F.3d at 1171 (approving similar instructions as adequate protection in a campaign contribution case). Nor, given the recorded conversations between petitioner and his associates, see Pet. App. 3a, 5a, was there any "risk of misunderstanding" about what petitioner proposed to do. See *id.* at 5a ("The evidence, much of it from [petitioner's] own mouth, is overwhelming.").

or, at a minimum, warrants a remand to the court of appeals. Petitioner is incorrect.

Elonis involved a prosecution under 18 U.S.C. 875(c) for communicating threats, and it addressed the "requirement that a defendant act with a certain mental state in communicating a threat." 135 S. Ct. at 2008. Applying background presumptions about the mens rea required for criminal liability, the Court concluded that the defendant must be more than negligent about the threatening nature of the communications. *Id.* at 2011. But *Elonis* did not hold that Section 875(c) requires proof that the defendant knew his actions were criminal. To the contrary, the Court *rejected* the notion "that a defendant must know that his conduct is illegal before he may be found guilty." *Id.* at 2009; see *ibid.* ("The familiar maxim 'ignorance of the law is no excuse' typically holds true."). The Court thus focused on the defendant's mental state with respect to his own actions, while making clear that knowledge of the legal consequences of his actions is not required. *Ibid.* ("[A] defendant generally must know the facts that make his conduct fit the definition of the offense, even if he does not know that those facts give rise to a crime.") (citation and internal quotation marks omitted). That same focus applies here as well: Petitioner could validly be convicted because he knew that he was offering to exchange official actions for money—whether or not he also knew that doing so was illegal.[5]

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[5] In his separate opinion in *Evans*, Justice Kennedy observed that "a public official who labors under the good-faith but erroneous belief that he is entitled to payment for an official act does not violate the statute." 504 U.S. at 277 (Kennedy, J., concurring in part and in the judgment). That observation has no bearing here,

CONCLUSION

The petition for a writ of certiorari should be denied.[6]

Respectfully submitted.

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because petitioner never claimed to believe he was "entitled" by virtue of his office to any of the payments at issue, such as the money he attempted to extort from Johnston, Magoon, and supporters of Representative Jackson.

[6] In *McDonnell* v. *United States*, cert. granted, No. 15-474 (Jan. 15, 2016), this Court will consider whether benefits conferred on a private party by the Governor of Virginia constituted "official acts" for purposes of Hobbs Act extortion and honest-services fraud. The Court need not hold this petition pending resolution of *McDonnell*. Petitioner has not denied that the actions he took or offered to take in exchange for money—making a Senate appointment, increasing Medicaid reimbursements, and signing a bill—were official actions. Nor would any such argument be plausible.