No. 20-60

In the Supreme Court of the United States

SHELDON SILVER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly affirmed petitioner's conviction for extortion under color of official right, in violation of 18 U.S.C. 1951, and honest-services bribery, in violation of 18 U.S.C. 1341, 1343, and 1346, where the jury found that he sought or received payments "in exchange for the promise or performance of official action."

2. Whether this Court should overrule its decision in *Evans* v. *United States*, 504 U.S. 255 (1992).

3. Whether the court of appeals abused its discretion in the circumstances of this case by considering *sua sponte* whether an error in the jury instructions was harmless.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

United States v. *Silver*, No. 15-cr-93 (Sept. 17, 2018)

United States Court of Appeals (2d Cir.):

United States v. *Silver*, No. 16-1615 (July 13, 2017)

United States v. *Silver*, No. 18-2380 (Apr. 1, 2020)

Supreme Court of the United States:

Silver v. *United States*, No. 17-562 (Jan. 16, 2018)

Silver v. *United States*, No. 19A1018 (Apr. 10, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-73a) is reported at 948 F.3d 538.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 2020. A petition for rehearing was denied on February 21, 2020 (Pet. App. 74a-75a). The petition for a writ of certiorari was filed on July 20, 2020. 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 Southern District of New York, petitioner was convicted on two counts of honest-services mail fraud, in violation of 18 U.S.C. 1341, 1346, and 2; two counts of honest-services wire fraud, in violation of

18 U.S.C. 1343, 1346, and 2; two counts of extortion under color of official right, in violation of 18 U.S.C. 1951 and 2; and one count of money laundering, in violation of 18 U.S.C. 1957 and 2. Pet. App. 76a-79a. The court sentenced him to seven years of imprisonment, to be followed by three years of supervised release. 7/30/18 Judgment 3-4. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1a-73a. On remand, the district court resentenced petitioner to 78 months of imprisonment, to be followed by two years of supervised release. 7/23/20 Judgment 3-4.

1. From 1994 to 2015, petitioner served as Speaker of the New York State Assembly. Pet. App. 5a. As Speaker, he was one of the most powerful officials in New York, with significant control over the Assembly's passage of legislation. Gov't C.A. Br. 5. Petitioner also served on the Public Authorities Control Board, which had the power to approve tax-exempt financing for public projects. *Id.* at 6.

Petitioner engaged in multiple schemes to use his political positions to enrich himself. Gov't C.A. Br. 3. In one such scheme, petitioner accepted thousands of dollars from two real estate developers in exchange for taking official action that benefited the developers. Pet. App. 40a-44a; Gov't C.A. Br. 15-18. Specifically, the developers hired a law firm headed by petitioner's friend to handle various tax matters, and the firm in turn passed on a portion of their legal fees to petitioner. Pet. App. 40a. In return, petitioner performed at least two sets of official acts for the developers' benefit. *Id.* at 41a-42a. First, as Speaker, petitioner helped to ensure the passage of legislation establishing a tax-abatement program and a rent-stabilization program—measures

that were "controversial," but "important" to the developers. *Ibid.* Second, as a member of the Public Authorities Control Board, he voted to support a developer's applications for over $1 billion in tax-exempt financing. *Ibid.*; Gov't C.A. Br. 17-18.

2. A grand jury in the U.S. District Court for the Southern District of New York indicted petitioner on two counts of honest-services mail fraud, in violation of 18 U.S.C. 1341 and 1346; two counts of honest-services wire fraud, in violation of 18 U.S.C. 1343 and 1346; two counts of extortion under color of official right, in violation of 18 U.S.C. 1951; and one count of money laundering, in violation of 18 U.S.C. 1957. Pet. App. 6a, 76a-79a. Those counts arose out of both the real-estate scheme just discussed and another scheme that is not at issue here. *Id.* at 5a-6a.

The jury found petitioner guilty on all counts. Pet. App. 6a. The district court sentenced him to 12 years of imprisonment, to be followed by two years of supervised release. *Ibid.* The court of appeals, however, concluded that the jury instructions were faulty in light of this Court's intervening decision in *McDonnell* v. *United States*, 136 S. Ct. 2355 (2016), vacated all of the convictions, and remanded. See 864 F.3d 102, 119-124. This Court then denied petitioner's petition for a writ of certiorari. See 138 S. Ct. 738.

3. At petitioner's retrial, the district court instructed the jury that, to obtain a conviction for honest-services fraud, the government had to prove that petitioner sought or received bribes "in exchange for the promise or performance of official action." Pet. C.A. Special App. 30. The court explained that, "because the intent of the [bribe giver] may be different from the intent of the [bribe recipient] * * * the government only

has to prove that [the bribe recipient]—not the bribe giver—understood that, as a result of the bribe, he was expected to exercise official influence or take official action * * * and, at the time the bribe was accepted, intended to do so as specific opportunities arose." *Ibid.* The court similarly instructed the jury that, to obtain a conviction for extortion under color of official right, the government had to prove that petitioner "sought or received property, directly or indirectly, in exchange for the promise or performance of official action." *Id.* at 32. The court also instructed the jury that the government had to prove that petitioner was aware that "the extorted party was motivated, at least in part, by the expectation that as a result of the payment, [petitioner] would exercise official influence or decision-making for the benefit of the extorted party." *Id.* at 33.

The jury again found petitioner guilty on all counts. Pet. App. 7a. The district court sentenced petitioner to seven years of imprisonment, to be followed by three years of supervised release. *Ibid.*

4. The court of appeals affirmed petitioner's convictions on four of the seven counts, vacated his convictions on the remaining three counts, and remanded the case for further proceedings. Pet. App. 1a-73a.

As relevant here, the court of appeals rejected petitioner's contention that the district court should have instructed the jury that conviction for extortion under color of official right requires proof "that the bribe payor and receiver share a common corrupt intent—*i.e.*, a 'meeting of the minds' as to the official acts to be procured by the payment." Pet. App. 9a. The court observed that, under this Court's decisions in *McCormick* v. *United States*, 500 U.S. 257 (1991), and *Evans* v.

United States, 504 U.S. 255 (1992), a public official commits extortion under color of official right if (1) he "obtain[s] a payment to which he [i]s not entitled" and (2) he either "promise[s] to perform or not to perform an official act" in return for the payment, or accepts the payment "knowing that the payment was made in return for official acts." Pet. App. 11a (quoting *Evans*, 504 U.S. at 268; *McCormick*, 500 U.S. at 273) (ellipsis omitted). The court explained that neither of those elements requires a showing of "a meeting of the minds." *Ibid.*; see *id.* at 11a-15a.

The court of appeals also rejected petitioner's parallel argument that the district court should have instructed the jury that conviction for honest-services bribery requires proof "that the bribe payor and receiver share a common corrupt intent." Pet. App. 9a. The court observed that, in the district court, the parties had agreed to define honest-services bribery by reference to 18 U.S.C. 201(b)(2)(A), a statute prohibiting bribery of federal officials. Pet. App. 16a. The court explained that, in order to obtain a conviction under Section 201, the government must prove a "*quid pro quo*," which the court had variously defined as the official's "'knowledge' of the payor's expectations," "'underst[anding] that the . . . payments were made in return for official action,'" or "'promise to perform' an official act in exchange for payment." *Id.* at 16a-17a (brackets and citations omitted). The court observed that none of those formulations "supports [petitioner's] argument that there must be a meeting of the minds between the payor and the official as to the corrupt purpose of the payments." *Id.* at 17a.

Finally, the court of appeals addressed petitioner's contention that the district court had erred by instructing the jury that an official may be guilty of extortion and honest-services fraud when he has promised "to take official action in exchange for . . . payments as the opportunity arose." Pet. App. 19a (citation and emphasis omitted). The court of appeals concluded that the jury instructions were faulty because they failed to convey that the government was required to prove that petitioner promised or understood that he was expected "to take official action on a *specific and focused question or matter* as the opportunities to take such action arose." *Id.* at 54a-55a; see *id.* at 20a. But the court went on to find the error harmless as to the counts at issue here, because it was "clear beyond a reasonable doubt that a rational jury would have found that [petitioner] accepted * * * fees with the belief that he was expected to influence a particular matter, namely the relevant tax abatement and rent stabilization programs, absent the error." *Id.* at 58a. At the same time, the court found that the error was not harmless as to three other counts (all involving a separate bribery scheme); it accordingly vacated petitioner's convictions on those counts, and remanded the case for further proceedings. *Id.* at 55a-58a.

5. The court of appeals denied petitioner's motion to stay the mandate pending disposition of the petition for a writ of certiorari. See 954 F.3d 455 (2020). As relevant here, the court determined that petitioner "presents no substantial questions raising a reasonable probability that certiorari will be granted." *Id.* at 458 (capitalization and emphasis omitted). Addressing petitioner's contention that the jury instructions inaccurately conveyed the elements of extortion under color of

official right and honest-services bribery, the court stated that petitioner "rel[ies] upon cribbed quotations from * * * cases that are taken out of context in order to contrive a nonexistent conflict." *Ibid.* Addressing the contention that this Court should overrule *Evans*, the court saw "no reason to think * * * that five justices will vote to overturn *Evans*, which has been the law for nearly 30 years." *Id.* at 459. And addressing the contention that the court erred by considering harmlessness on its own motion, the court explained that petitioner's "manufactured circuit split * * * lacks any precedential support." *Ibid.* The court also stated that "[petitioner's] arguments on all points are likely to fail because the Opinion is predicated upon the rare factual scenario presented by [petitioner's] case." *Ibid.*

Justice Ginsburg likewise denied petitioner's application for a stay of the mandate pending disposition of the petition for a writ of certiorari. See No. 19A1018. Meanwhile, on remand, the district court resentenced petitioner to 78 months of imprisonment, to be followed by two years of supervised release. 7/23/20 Judgment 3-4.

ARGUMENT

Petitioner contends (Pet. 11-32) that his convictions for extortion under color of official right and honest-services fraud are invalid for lack of proof of "an agreed-upon exchange between the bribe payor and the person being bribed," Pet. 13; that this Court should overrule the interpretation of the extortion statute, 18 U.S.C. 1951, adopted in *Evans* v. *United States*, 504 U.S. 255 (1992); and that the court of appeals erred by considering the harmlessness of the instructional error *sua sponte*. The court of appeals correctly affirmed the convictions at is-

sue and its affirmance does not conflict with any decision of this Court or any other court of appeals. The petition for a writ of certiorari should be denied.

1. Petitioner contends (Pet. 13-19) that his conviction for extortion and honest-services fraud required proof of an "agreed-upon exchange" between petitioner and the bribe-giver, Pet. 13. This Court has previously denied petitions presenting similar issues. See, *e.g.*, *Suhl* v. *United States*, 139 S. Ct. 172 (2018) (No. 17-1687); *Blagojevich* v. *United States*, 136 S. Ct. 1491 (2016) (No. 15-664); *Terry* v. *United States*, 571 U.S. 1237 (2014) (No. 13-392); *Ring* v. *United States*, 571 U.S. 827 (2013) (No. 12-1462). The Court should follow the same course here.

a. The Hobbs Act prohibits "obstruct[ing], delay[ing], or affect[ing] commerce * * * by * * * extortion." 18 U.S.C. 1951(a). The statute defines extortion as "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." 18 U.S.C. 1951(b)(2). Addressing "under color of official right" extortion in *Evans*, this Court observed that, at common law, "[e]xtortion by a public official was the rough equivalent of what we would now describe as 'taking a bribe.'" 504 U.S. at 260. And the Court explained that "the present statutory text is much broader than the common-law definition," and thus covers at least what the common law covered. *Id.* at 263 (footnote omitted).

The federal fraud statutes forbid the use of the mail and the wires in furtherance of "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346; see 18 U.S.C. 1341, 1343. This Court has interpreted that term to cover "bribery and

kickback schemes." *Skilling* v. *United States*, 561 U.S. 358, 408 n.42 (2010). The parties here agreed to define bribery by reference to the federal-official bribery statute, 18 U.S.C. 201. Pet. App. 16a. That statute, in relevant part, prohibits a public official from "directly or indirectly, corruptly demand[ing], seek[ing], receiv[ing], accept[ing], or agree[ing] to receive or accept anything of value * * * in return for * * * being influenced in the performance of any official act." 18 U.S.C. 201(b)(2)(A).

b. Petitioner errs in contending (Pet. 13) that the court of appeals "approved instructions that * * * eliminated any requirement that there be an agreed-upon exchange between the bribe payor and the person being bribed." To the extent that petitioner means (Pet. 1) that the jury instructions "simply dispensed with the element of an * * * exchange," his argument lacks record support. The district court instructed the jury that, to obtain a conviction for extortion, the government had to prove that petitioner "obtained property * * * knowing that it was given *in return for official acts* * * * rather than being given voluntarily and unrelated to [petitioner's] public office." Pet. C.A. Special App. 32-33 (emphasis added). The court similarly instructed the jury that, to obtain a conviction for honest-services bribery, the government had to prove that "a bribe was sought or received by [petitioner], directly or indirectly, *in exchange* for the * * * performance of official action." *Id.* at 30 (emphasis added). The court of appeals, in turn, made clear that a conviction for extortion under color of official right requires proof "that the official manifested a willingness to take payment *for* official action or inaction." Pet. App. 12a (emphasis added). And the court similarly stated that a conviction for honest-

services bribery requires proof that the official conveyed the intent to be influenced in an official act "*in exchange*" for the bribe. *Id.* at 12a, 16a-17a (emphasis added).

To the extent that petitioner instead means (Pet. 12) that proof of this element is not enough to sustain his convictions for extortion and bribery, his argument lacks legal support. With respect to Hobbs Act extortion, this Court held in *Evans* that, in order to obtain a conviction for extortion under color of official right, 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. That test focuses on what the "public official" "kn[ew]"—not on whether the extorted party agreed with the public official to undertake the proposed course of action. *Ibid.* The Court's decision in *Ocasio* v. *United States*, 136 S. Ct. 1423 (2016), likewise indicates that the focus is on a payee defendant's own mental state. There, the Court discussed a hypothetical scenario where "a health inspector demands a bribe from a restaurant owner, threatening to close down the restaurant if the owner does not pay." *Id.* at 1436. "If the owner reluctantly pays the bribe in order to keep the business open," the health-inspector has still committed Hobbs Act extortion, even though the owner does not necessarily share the health inspector's corrupt intent. *Ibid.*; see Pet. App. 13a-14a.

The federal-official bribery statute similarly focuses on the defendant's mens rea. The statute makes it a crime for "a public official" to "corruptly demand[], seek[], receive[], accept[], or agree[] to receive or accept anything of value * * * in return for * * * being influenced in the performance of any official act." 18 U.S.C.

201(b)(2)(A). Reaching an agreement is thus one way to commit bribery, but it is not the only way; an official can also commit bribery by, for example, unilaterally asking for a bribe. Indeed, a *separate* clause of the statute makes it a crime for the bribe giver to give or offer anything of value "with intent * * * to influence any official act." 18 U.S.C. 201(b)(1)(A). That clause makes the bribe giver's intent an element of his own crime of giving a bribe, see *ibid.* not the official's crime of accepting one, see 18 U.S.C. 201(b)(2)(A).

Petitioner errs in suggesting (Pet. 13-16) that the court of appeals' decision contradicts this Court's precedents on bribery. In *McDonnell* v. *United States*, 136 S. Ct. 2355 (2016), this Court explained that a public official commits bribery if he accepts a payment "knowing that it was given with the expectation that the official would perform an 'official act' in return." *Id.* at 2371 (citation omitted). Similarly, in *United States* v. *Brewster*, 408 U.S. 501 (1972), the Court stated that, "[t]o sustain a conviction [for bribery] it is necessary to show that [the public official] solicited, received, or agreed to receive, money with knowledge that the donor was paying him compensation for an official act." *Id.* at 527. Those decisions confirm that the government must prove that the public official understood that he was accepting the bribe in return for an official act, but neither decision requires the government to prove that the bribe giver reached an agreement with the official or shared the official's corrupt purpose.

c. The petition likewise fails to show that this case implicates a conflict in the courts of appeals. In denying the motion for a stay of the mandate, the court of appeals explained that petitioner "opts to rely upon cribbed quotations * * * that are taken out of context

in order to contrive a nonexistent conflict," and that the cases on which petitioner relies "are not only distinguishable from [petitioner's] case but are also consistent with the Opinion." 954 F.3d 455, 458.

In *United States* v. *Jennings*, 160 F.3d 1006 (1998), which was a prosecution of a bribe giver rather than a recipient, the Fourth Circuit concluded that the district court had erred by instructing the jury "that it was sufficient if [the defendant] paid [a public employee] * * * 'in connection with' or 'in reference to' [official] business." *Id.* at 1022. The Fourth Circuit believed that such an instruction "could have described a situation in which [the defendant] paid [the employee] with a 'vague expectation of some future benefit,'" rather than one in which the defendant intended to exchange the money for some "official act or course of action." *Ibid.* (brackets and citation omitted). But the Fourth Circuit did not suggest, much less hold, that the instructions like the ones given in this case—which required the government to prove that a defendant who received payment understood it as part of an exchange for an official act—suffered from any legal defect.

In *United States* v. *Terry*, 707 F.3d 607 (2013), cert. denied, 571 U.S. 1237 (2014), the Sixth Circuit *affirmed* a conviction for bribery, explaining that the jury instructions properly required the government to prove that the public official had the "intent to exchange official acts for [payments]" and "understood that, 'whenever the opportunity presented itself,' [he] would 'take specific official actions on the giver's behalf.'" *Id.* at 614 (brackets and citation omitted). The instructions here likewise required the government "to prove that [the bribe recipient]—not the bribe giver—understood that,

as a result of the bribe, he was expected to exercise official influence or take official action * * * and, at the time the bribe was accepted, intended to do so as specific opportunities arose." Pet. C.A. Special App. 30.

Finally, in *United States* v. *Whitman*, 887 F.3d 1240 (11th Cir. 2018), *United States* v. *Ring*, 706 F.3d 460 (D.C. Cir.), cert. denied, 571 U.S. 827 (2013), and *United States* v. *Wright*, 665 F.3d 560 (3d Cir. 2012), the courts simply stated that, in a prosecution against a public official for receiving a bribe, the government must establish that the official had "a specific intent to * * * receive something of value *in exchange* for an official act." *Whitman*, 887 F.3d at 1247 (citation omitted); see *Ring*, 706 F.3d at 468 ("the evidence must show that the official conveyed an intent to perform official acts in exchange for personal benefit"); *Wright*, 665 F.3d at 567-568 (requiring "a specific intent to * * * receive something of value *in exchange* for an official act") (citation omitted). As already discussed, the instructions in this case required the government to make such a showing. See pp. 9-10, *supra*.

d. In any event, as the court of appeals recognized when denying petitioner's motion for a stay of the mandate, this case would be a poor vehicle for considering the question presented. See 954 F.3d at 459-460. The "rare factual scenario presented by [petitioner's] case," the "complexity of the Government's theory at trial," and the "unusual factual context" all mean that this case is "not conducive to review by the Supreme Court for the purposes of resolving broad, open questions of law." *Ibid.* In addition, much of petitioner's argument rests on assertions about the jury instructions that are particular to his individual case. See Pet. 8-9 (arguing that

that the instructions were "convoluted," and that although they "did * * * refer to an exchange" at one point, they undercut that requirement in other places). Those factbound contentions do not warrant this Court's review. See Sup. Ct. R. 10; *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

2. A writ of certiorari also is not warranted to review petitioner's contention that *Evans* should be overruled.

a. In *Evans*, this Court interpreted the Hobbs Act's provisions prohibiting extortion under color of official right in light of the common-law meaning of extortion. 504 U.S. at 259-260. The Court explained that, "[a]t common law, extortion was an offense committed by a public official who took 'by colour of his office' money that was not due to him for performance of his official duties." *Id.* at 260 (footnote omitted). The Court stated that the common-law offense included "the rough equivalent of what we would now describe as 'taking a bribe.'" *Ibid.* More specifically, the Court held that the common-law offense—and thus the modern statute—encompasses "a public official [who] has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Id.* at 268.

The dissent in *Evans* agreed that the Court should read the extortion statute against the backdrop of the common law, but disagreed with the Court's view of the common law. 504 U.S. at 278 (Thomas, J., dissenting). In particular, the dissent maintained that, at common law, extortion "was understood to involve not merely a wrongful taking by a public official, but a wrongful taking *under a false pretense of official right*." *Id.* at 281.

The Court, however, explained that although "wrongful takings under a false pretense of official right" constituted "a well-recognized type of extortion," common-law extortion was not "limited" to that type of wrongdoing. *Id.* at 269 (emphasis omitted); see *id.* at 269-270 (discussing cases).

b. Petitioner does not dispute (Pet. 25) that overruling precedent generally requires a "special justification, not just an argument that the precedent was wrongly decided." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014) (citation and internal quotation marks omitted). The Court has applied that principle with "special force in the area of statutory interpretation," where, "unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what [the Court] ha[s] done." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989). *Evans* itself noted that its holding was "buttressed by" Congress's evident "aware[ness] of the prevailing view that common-law extortion is proscribed by the Hobbs Act" and its response of "silence" rather than "'contrary direction.'" 504 U.S. at 268-269. Neither the statute nor the common law has changed since *Evans*, and the Court itself has decided cases in which the correctness of *Evans* was undisputed by the parties and taken as a given by the Court. See *Ocasio*, 136 S. Ct. at 1429-1437.

Petitioner principally argues (Pet. 22-24) that *Evans* should be overruled because it was wrongly decided. The Court has already carefully considered and rejected each of the arguments against its reading of the statute. For example, petitioner invokes (Pet. 22) the statutory text, but the Court in *Evans* analyzed the text

of the Hobbs Act with care before holding that the statute covered bribery. See 504 U.S. at 263-266. Petitioner also cites (Pet. 23) the common law, but the Court in *Evans* surveyed numerous common-law cases before finding a "complete absence of support" for the theory petitioner now advances. 504 U.S. at 270. Last, petitioner raises (Pet. 23-24) concerns about federalism, but the Court considered and rejected such concerns in both *Evans* and *Ocasio*. See *Ocasio*, 136 S. Ct. at 1434 n.9 ("We are not unmindful of the federalism concerns implicated by this case, but those same concerns were raised—and rejected—in *Evans*.").

Petitioner also errs in arguing (Pet. 25) that *Evans* warrants overruling because it "was decided without full briefing." Petitioner's argument rests (*ibid.*) on *Hohn* v. *United States*, 524 U.S. 236 (1998), but that case addressed the precedential force of a per curiam opinion "rendered without full briefing or argument." *Id.* at 251. *Evans* was a full merits opinion that followed briefing and argument, not simply a per curiam disposition "rendered without full briefing or argument." *Ibid.* Petitioner also is wrong in suggesting (Pet. 25) that the parties in *Evans* had failed to brief the specific issue whether the common law supported the Court's definition of extortion. While that may be true as to the petitioner in *Evans*, see 504 U.S. at 272 (O'Connor, J., concurring), the government's brief did address common-law extortion, see Gov't Br. at 22-26, *Evans*, *supra* (No. 90-6105). It also is unlikely that additional briefing would have changed the result, given that the Court and the dissent both reviewed the common law in detail. *Evans*, 504 U.S. at 269-271; *id.* at 280-287 (Thomas, J., dissenting).

Petitioner's contention (Pet. 25) that *Evans* has proved "unworkable" likewise lacks merit. In the mine-run case, "the trier of fact is quite capable of deciding the intent with which words were spoken or actions taken as well as the reasonable construction given to them by the official and the payor." *Evans*, 504 U.S. at 274 (Kennedy, J., concurring). Petitioner cites no evidence that *Evans*'s application has led to arbitrary or unjust results, or that courts or juries have struggled with the decision. Petitioner relies (Pet. 26) on Justice Breyer's and Justice Sotomayor's opinion in *Ocasio*, but those opinions state only that *Evans* may raise workability problems in the unusual context of *conspiracy* to commit extortion—which is not at issue here. See 136 S. Ct. at 1437 (Breyer, J., concurring); *id.* at 1445 (Sotomayor, J., dissenting).

3. Finally, a writ of certiorari is not warranted to review petitioner's contention (Pet. 26-32) that the court of appeals abused its discretion by considering *sua sponte* whether an error in the jury instructions was harmless.

Although "our adversarial system of adjudication" generally follows "the principle of party presentation"—the rule that the parties, rather than judges, are responsible for framing the issues for decision—"[t]he party presentation principle is supple, not ironclad," and "[t]here are no doubt circumstances in which a modest initiating role for a court is appropriate." *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). For example, in some circumstances, a federal court may, "on its own initiative," dismiss a complaint as untimely. *Day* v. *McDonough*, 547 U.S. 198, 202 (2006).

In this case, the court of appeals had sound reasons for exercising its authority to consider harmlessness

sua sponte. The district court instructed the jury that it could find petitioner guilty so long as the government proved that he promised "to take official action in exchange for ... payments *as the opportunities arose*." Pet. App. 19a (citation omitted). In the court of appeals, petitioner argued broadly that this Court's decision in *McDonnell* "eliminated this so-called 'as the opportunities arise' theory of bribery." *Ibid.*; see Pet. C.A. Br. 53-59. The court rejected that broad argument, but it nonetheless held that the instructions were erroneous on the narrower ground that they "failed to convey that [petitioner] could not be convicted * * * unless the Government proved that, at the time the bribe was accepted, [petitioner] promised to take official action on a *specific and focused question or matter* as the opportunities to take such action arose." Pet. App. 54a; see 954 F.3d at 459 (explaining that "courts of appeal are free to identify errors in jury instructions that depart from those offered by criminal defendants"). Having identified an error on which the parties' briefs had not focused, the court acted well within its discretion in deciding whether that error was harmless. No sound basis exists for petitioner's one-sided view that a court of appeals may identify an error on its own, but, having done so, may not go on to consider the error's harmlessness.

The court of appeals stated when denying the motion for a stay of the mandate that "[petitioner's] manufactured circuit split regarding harmless error analysis lacks any precedential support" and that "[petitioner] fails to cite a case that, after even a cursory reading, validates his position." 954 F.3d at 459. Petitioner acknowledges (Pet. 28-29) that every court of appeals to consider the issue has determined that an appellate court may, in its discretion, consider whether an error

is harmless even if the government has not argued harmlessness. Petitioner instead faults (Pet. 27-30) the court of appeals for not reciting the factors that other courts of appeals consider when deciding whether to consider harmlessness *sua sponte*. But even assuming an extended discussion was necessary, the court undertook it in its opinion denying the stay of the mandate. See 954 F.3d at 459 (explaining that "it makes good sense to allow courts to review errors in jury instructions for harmlessness where, as in [petitioner's] case, they can identify the relevant portions of the record" themselves); *ibid.* (discussing the risk of "interminable cycles of remand or requests for additional briefing from the parties"). And in other cases where the Second Circuit has recognized its discretion to consider harmlessness *sua sponte*, it has relied on some of the same decisions that petitioner views as instructive. See *United States* v. *Dolah*, 245 F.3d 98, 107 (2d Cir. 2001) (citing *United States* v. *Rose*, 104 F.3d 1408 (1st Cir.), cert. denied, 520 U.S. 1258 (1997), and *United States* v. *Pryce*, 938 F.2d 1343 (D.C. Cir. 1991), cert. denied, 503 U.S. 941, and 503 U.S. 988 (1992)).

To the extent that different courts of appeals describe their discretion in this area in different terms, petitioner makes no showing that such variations have produced disparate results. In any event, "[t]he courts of appeals have wide discretion to adopt and apply 'procedural rules governing the management of litigation,'" and this Court does not often grant certiorari to review disparities in "the circuit courts' procedural rules." *Joseph* v. *United States*, 574 U.S. 1038, 1038, 1040 (2014) (statement of Kagan, J., respecting the denial of certiorari) (citation omitted).

At all events, any factbound challenge to the court of appeals' exercise of discretion in this case would not warrant this Court's review. See Sup. Ct. R. 10. Indeed, the circumstances suggest that the harmlessness review would not have been meaningfully different had the court of appeals requested further briefing. Petitioner outlines (Pet. 31-32) the testimony that he would have presented in support of his harmless-error argument, but the court of appeals was already aware of that evidence because petitioner cited the same evidence in support of his arguments in both his opening and reply briefs. See Pet. C.A. Br. 41, 52, 58; Pet. C.A. Reply Br. 22-23.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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