No. 09-1242

In the Supreme Court of the United States

DONALD W. BAIN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
DANIEL S. GOODMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether, on remand from this Court for further consideration in light of *Nelson* v. *United States*, 129 S. Ct. 890 (2009) (per curiam), the court of appeals correctly determined that the district court had not applied a presumption of reasonableness to the advisory Sentencing Guidelines range.

2. Whether the court of appeals correctly applied plain-error review to petitioner's claim that the district court committed procedural error when petitioner had not informed the district court of his objection.

3. Whether the district court's consideration of the advisory Sentencing Guideline for child pornography offenses was unreasonable and violated the separation of powers because the Guideline was the product of congressional action.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 586 F.3d 634. A prior opinion of the court of appeals (Pet. App. 24-45), vacated by this Court, 129 S. Ct. 2157, is reported at 537 F.3d 876.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 2009. A petition for rehearing en banc was denied on January 13, 2010 (Pet. App. 66). The petition for a writ of certiorari was filed on April 13, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Iowa, petitioner was

convicted of receiving and distributing child pornography, in violation of 18 U.S.C. 2252(a)(2), and possessing child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). He was sentenced to 210 months of imprisonment, to be followed by ten years of supervised release. The court of appeals affirmed. Pet. App. 24-45.

This Court granted petitioner's petition for a writ of certiorari, vacated the court of appeals' judgment, and remanded for further consideration in light of *Nelson* v. *United States*, 129 S. Ct. 890 (2009) (per curiam). 129 S. Ct. 2157. On remand, the court of appeals again affirmed the judgment of the district court. Pet. App. 1-23, 66.

1. On February 9, 2005, agents of the Federal Bureau of Investigation executed a search warrant at petitioner's house. The agents seized three computers and numerous computer disks containing hundreds of images and digital movies depicting minors engaged in sexual acts. The images in petitioner's collection were extremely graphic and depicted sadistic violence, torture, and rape. Petitioner admitted to the agents that he had engaged in online trading of child pornography files from his home. Pet. App. 2; Gov't C.A. Br. 2-5.

2. A federal grand jury in the Southern District of Iowa returned an indictment charging petitioner with one count of receiving and distributing child pornography, in violation of 18 U.S.C. 2252(a)(2), and one count of possessing child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). Petitioner pleaded guilty to both counts without a plea agreement. Gov't C.A. Br. 1.

3. Using the 2006 version of the federal Sentencing Guidelines, the Presentence Investigation Report (PSR) calculated petitioner's base offense level as 22. PSR ¶ 29. The PSR determined that petitioner was sub-

ject to several enhancements to his base offense level: (1) two levels under Guidelines § 2G2.2(b)(2), because some of petitioner's pornographic materials involved minors under the age of 12; (2) five levels under Guidelines § 2G2.2(b)(3)(B), because petitioner had traded his child pornography for additional child pornography; (3) four levels under Guidelines § 2G2.2(b)(4), because some of the material in petitioner's collection of child pornography portrayed sadism, masochism, and other violence; (4) two levels under Guidelines § 2G2.2(b)(6), because petitioner had used a computer to receive and distribute child pornography; and (5) five levels under Guidelines § 2G2.2(b)(7)(D), because petitioner's offense involved more than 600 images of child pornography. PSR ¶ 30. The PSR recommended a reduction of three offense levels for petitioner's acceptance of responsibility, resulting in a total offense level of 37. PSR ¶¶ 36, 37. That offense level, together with petitioner's criminal history category of I, yielded an advisory Guidelines range of 210 to 262 months of imprisonment. PSR ¶¶ 41, 85.

At petitioner's sentencing hearing on August 9, 2007 —after this Court had decided *Rita* v. *United States*, 551 U.S. 338 (2007), but before the Court had decided *Gall* v. *United States*, 552 U.S. 38 (2007)—the district court accepted the PSR's Guidelines calculations. Pet. App. 48. Petitioner requested the statutory minimum sentence of 60 months, and the district court responded:

> I can't do that. Hang on. In order to go below the Guidelines pursuant to 3553 which are viewed in the Eighth Circuit now as affirmed by the United States Supreme Court as presumptively reasonable, there's got to be a ground for a variance. I mean, what are the grounds for a variance of as much as two-thirds

to three-fourths of the sentence under the Guidelines?

Id. at 52-53. Petitioner acknowledged that "[a] grounds for variance that make it acceptable in the Guidelines does not exist," but he argued that his character, history, and low likelihood of recidivism justified a lenient sentence. *Id.* at 53. The government disagreed with petitioner's claim that his offense was an aberration, but suggested that a sentence at the bottom of petitioner's advisory Guidelines range would be sufficient in this particular case. *Id.* at 57-58.

The district court then considered each of the sentencing factors in 18 U.S.C. 3553(a) as they pertained to petitioner's case. Pet. App. 58-60. In doing so, the court stressed the "seriousness" of petitioner's offense, explaining that "the number of images involved here and the amount of trading of files puts this case above the garden variety" child pornography offense. *Id.* at 58. Regarding the Sentencing Guidelines, the court observed that they "are not mandatory" but noted that they "are presumed reasonable here in the Eighth Circuit Court of Appeals." *Id.* at 59. Because the Guidelines both "exhibit the will of Congress" and "promote consistency in sentencings," the district court considered them "an important though not singularly controlling factor to be considered." *Ibid.* "Based on all the circumstances of this case," the district court concluded "that a sentence at the bottom of the [Guidelines] range is sufficient to address the essential sentencing considerations." *Id.* at 60. The court therefore sentenced petitioner to 210 months of imprisonment. *Ibid.* The court concluded by asking counsel, "[D]o you have anything

else?" *Id.* at 64. Petitioner's counsel responded, "No, Your Honor." *Ibid.*

4. The court of appeals affirmed petitioner's sentence. Pet. App. 24-45. The court first considered petitioner's argument that the district court had committed procedural error by treating the Guidelines as presumptively reasonable, allegedly in violation of *Rita*, and by requiring extraordinary circumstances to justify a non-Guidelines sentence, in violation of *Gall*. *Id.* at 28. The court of appeals held that the district court's references to a presumption of reasonableness for a Guidelines sentence were to an appellate presumption, not a sentencing presumption, and that the district court's approach was therefore consistent with *Rita*. *Id.* at 29.

The court of appeals held, however, that the district court had "committed *Gall* error by requiring extraordinary circumstances to justify the * * * non-guidelines sentence" requested by petitioner. Pet. App. 29-30. The court held that petitioner's request for a non-Guidelines sentence itself was insufficient to preserve a claim that the district court erred in requiring extraordinary circumstances to justify the sentence. *Id.* at 31-33. The court explained that, in order to preserve such a claim for plenary appellate review, a defendant "must object to the district court's erroneous application of the law." *Id.* at 32. Because petitioner had failed to argue at sentencing that the district court had erred in requiring extraordinary circumstances, the court of appeals reviewed that claim only for plain error. *Id.* at 32-33. The court held that petitioner was not entitled to relief under the plain-error standard because petitioner had not established a reasonable probability that he would have received a lower sentence if the district

court had not erred and therefore he had not shown that the error violated his substantial rights. *Id.* at 34-35.

The court of appeals next reviewed, for abuse of discretion, the substantive reasonableness of petitioner's sentence. Because the district court had erroneously required extraordinary circumstances to justify the non-Guidelines sentence requested by petitioner and therefore had not "*independently* reach[ed] the same conclusion" as the Sentencing Commission with respect to the proper sentence, the court of appeals did not apply the normal appellate presumption of reasonableness to the within-Guidelines sentence. Pet. App. 36. The court of appeals nevertheless found petitioner's sentence to be substantively reasonable. Noting the district court's "detailed consideration of the § 3553(a) factors" (*id.* at 39), the court of appeals found itself unable to say that a 210-month sentence was "outside the range of choice dictated by the facts of the case." *Id.* at 40 (quoting *United States* v. *Jones*, 507 F.3d 657, 659 (8th Cir. 2007)).

Judge Benton filed a concurring opinion. Pet. App. 40-45. In his view, because the district court had committed procedural error in sentencing petitioner, the court of appeals had "no reliable basis for substantive review, [and] the sentence should be reversed and remanded for resentencing." *Id.* at 44. Judge Benton nevertheless concurred in the decision affirming petitioner's sentence because circuit precedent concerning plain-error review did not allow for a remand. *Id.* at 45.

5. Petitioner filed a petition for a writ of certiorari in this Court, No. 08-820, raising two claims. First, petitioner argued that the court of appeals' decision circumvented this Court's decision in *Rita* when the court of appeals held that the district court had not applied a

presumption of reasonableness to the Sentencing Guidelines range. Second, petitioner claimed that the court of appeals' decision contravened *Gall* when the court held that petitioner had not preserved his claim of procedural error at sentencing and therefore reviewed that claim only for plain error.

On May 4, 2009, this Court granted the petition, vacated the judgment of the court of appeals, and remanded to the court of appeals for further consideration in light of *Nelson*. 129 S. Ct. 2157. In *Nelson*, the Court had addressed the first issue raised by petitioner and had reiterated its earlier holding in *Rita*, 551 U.S. at 351, that a sentencing court may not presume that a sentence within the applicable Guidelines range is reasonable. *Nelson*, 129 S. Ct. at 892. The Court in *Nelson* remanded for further proceedings, on confession of error by the Solicitor General, because it was "plain from the comments of the sentencing judge that [the judge] did apply a presumption of reasonableness to [the] Guidelines range." *Ibid.* No issue of plain-error review was raised in *Nelson*.

6. On remand in the present case, the court of appeals again affirmed the judgment of the district court. Pet. App. 1-23. The court of appeals distinguished *Nelson*, explaining that, "[u]nlike *Nelson*, the sentencing judge's statements here do not indicate that he presumed the Guidelines range [to be] reasonable." *Id.* at 7. The court of appeals elaborated that, when the district court referred to a presumption of reasonableness, the court was referring to an appellate presumption, "recogniz[ing] that a sentence within the Guidelines range is presumed reasonable at the appellate level." *Ibid.* Further, the court of appeals noted, while the sentencing in *Nelson* took place 14 months before this

Court decided *Rita*, petitioner's sentencing occurred one month after the *Rita* decision, and thus the district court in the instant case knew better than to apply a presumption of reasonableness to petitioner's advisory Guidelines range. *Id.* at 8.

The court of appeals reiterated its prior holding that the district court had committed procedural error by requiring extraordinary circumstances to justify a non-guidelines sentence, but again reviewed petitioner's unpreserved claim in that regard only for plain error. Pet. App. 8-13. Once again the court of appeals concluded that petitioner had "not met his burden of showing a reasonable probability of a lower sentence" stemming from the district court's error. *Id.* at 13. To the contrary, the court of appeals concluded, "[o]n this record, it is not clear what action the district court would have taken absent [that] error." *Ibid.*

Finally, the court of appeals again reviewed the substantive reasonableness of petitioner's sentence. Pet. App. 14-18. As before, the court of appeals cited the district court's "detailed consideration of the § 3553(a) factors" and the deferential standard of review in concluding that petitioner's 210-month sentence was substantively reasonable. *Id.* at 18.

Judge Benton filed the same concurring opinion that he had previously filed. Pet. App. 18-23.

ARGUMENT

Petitioner renews his contention (Pet. 17) that the court of appeals "circumvent[ed]" this Court's decision in *Rita* v. *United States*, 551 U.S. 338 (2007), by holding that the district court did not apply a presumption of reasonableness to the advisory Sentencing Guidelines range. Petitioner also renews his claim (Pet. 23) that

the court of appeals "circumvent[ed]" this Court's decision in *Gall* v. *United States*, 552 U.S. 38 (2007), when it held that petitioner had not preserved his claim of procedural error at sentencing and therefore reviewed that claim only for plain error. Finally, petitioner raises a new claim, not raised in either court below, that the district court acted unreasonably in considering the advisory Sentencing Guideline for child pornography offenses because that Guideline was the product of congressional action and therefore violated the separation of powers. Those claims lack merit and do not warrant this Court's review.

1. This Court held in *Rita* that, although a court of appeals may apply a "presumption of reasonableness" to a within-Guidelines sentence, "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." 551 U.S. at 351. The sentencing court's task is to consider the PSR, to listen to the arguments of the government and the defendant, and then to impose a sentence after evaluating the factors set out in 18 U.S.C. 3553(a). *Rita*, 551 U.S. at 351. The Court reiterated that procedure in *Gall*, stating that, in considering the Section 3553(a) factors, the district court "may not presume that the Guidelines range is reasonable." 552 U.S. at 49-50. The Court reaffirmed that proposition yet again in *Nelson* v. *United States*, 129 S. Ct. 890, 892 (2009) (per curiam).

The Eighth Circuit has recognized and applied that principle. See, *e.g.*, *United States* v. *Henson*, 550 F.3d 739, 740 (2008), cert. denied, 129 S. Ct. 2736 (2009); *United States* v. *Toothman*, 543 F.3d 967, 970 (2008) ("A sentence within the Sentencing Guidelines range is accorded a presumption of substantive reasonableness on appeal, although the sentencing court does not enjoy the

presumption's benefit when it determines the merits of the arguments by the prosecution or the defense that a Guidelines sentence should not apply."). The court of appeals in this case did not hold otherwise. To the contrary, the court acknowledged this Court's holding in *Nelson* that sentencing courts may *not* apply a presumption of reasonableness to a within-Guidelines sentence but held that, unlike the district court in *Nelson*, the district court in this case did not apply such a presumption. Pet. App. 7 (quoting *Nelson*, 129 S. Ct. at 892).

Petitioner asserts (Pet. 20-22) that the court of appeals misread the record when it concluded that the district court had not applied a presumption of reasonableness to the advisory Guidelines range when it sentenced him. That fact-bound contention does not warrant this Court's review. See Sup. Ct. R. 10 (This Court generally does not grant review "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

In any event, the court of appeals correctly concluded, based on a careful examination of the record, that the district court did not presume that a sentence within the advisory Guidelines range would be reasonable. Pet. App. 7-8. Significantly, the district court never stated that it was applying a presumption of reasonableness and stressed that the Guidelines "are not mandatory." *Id.* at 59. Petitioner relies (Pet. 21-22) on the district court's statements, in response to petitioner's request for a non-Guidelines sentence, that "there's got to be a ground for a variance," Pet. App. 52; that "the Guidelines * * * are viewed in the Eighth Circuit now as affirmed by the United States Supreme Court as presumptively reasonable," *ibid.*; and that "[t]he Sentencing Guidelines are presumed reasonable here in the

Eighth Circuit Court of Appeals." *Id.* at 59. Those statements do not indicate, however, that the district court itself applied a presumption of reasonableness. As the court of appeals explained, the district court's statements "merely recognize that a sentence within the Guidelines range is presumed reasonable *at the appellate level*." *Id.* at 7 (emphasis added). The Eighth Circuit has not held that district courts must apply a presumption of reasonableness to the Guidelines when sentencing a defendant. Thus, the court of appeals was correct in reading the district court's statements, which refer explicitly to the Eighth Circuit, as simply acknowledging the *appellate* presumption of reasonableness.

The district court's actions in sentencing petitioner also confirm that the court did not apply a presumption of reasonableness to the Guidelines range. As a matter of procedure, the court consulted the properly calculated Guidelines range, considered the other Section 3553(a) factors, and fully explained the reasons for its sentence. Pet. App. 58-60. In particular, the court repeatedly made clear its independent view that a substantial sentence was necessary to reflect the seriousness of petitioner's offense and to provide the necessary general deterrence, given the nature of the crimes that petitioner had committed and the fact that "the number of images involved here and the amount of trading of files puts this case above the garden variety." *Id.* at 58. Both the district court's process and its ultimate conclusion reflect independent judicial analysis, a balancing of factors, and the "adversarial testing contemplated by federal sentencing procedure" and Section 3553(a). *Rita*, 551 U.S. at 351.

There is no indication that the district court wished to impose a lower sentence but felt legally constrained

by petitioner's advisory Guidelines range from doing so. Instead, the court carefully balanced the competing factors of petitioner's personal history against the court's views that child pornography offenses are among the most serious and harmful crimes and that petitioner's conduct was "above the garden variety" for such offenses. Pet. App. 58. Given the seriousness of petitioner's offenses and the need for deterrence, the district court concluded that a sentence of 210 months of imprisonment was appropriate. *Id.* at 58-60; see *id.* at 60 ("I conclude that the Guideline system adequately addresses the circumstances of *this defendant*.") (emphasis added).

Petitioner notes (Pet. 20) that the district court said, "I can't do that" in response to petitioner's request for a non-Guidelines sentence. The court's statement does not demonstrate that the court believed it was not permitted to impose a non-Guidelines sentence, but instead suggests that the court did not see any basis for a downward variance in this case. See Pet. App. 53-54. Indeed, the court asked petitioner to provide reasons for a variance of the magnitude that petitioner had requested, *ibid.*, a request that was entirely appropriate. See *Gall*, 552 U.S. at 46 ("[A] district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications."). Petitioner's fact-bound disagreement with the court of appeals' reading of the record in his case does not warrant any further review.[1]

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[1] Even if petitioner were correct that the district court applied a presumption of reasonableness, he would not be entitled to any relief. Be-

2. Petitioner also renews his contention (Pet. 23-30) that the court of appeals erroneously applied plain-error review to his claim that the district court committed procedural error by requiring extraordinary circumstances to justify the non-Guidelines sentence that petitioner requested. That contention lacks merit.

The courts of appeals broadly agree that a defendant must preserve in district court a claim that his sentence is procedurally unreasonable and that, if he does not do so, the court of appeals reviews only for plain error. The court below correctly applied that principle.

Petitioner acknowledges that his claim that the district court erroneously required extraordinary circumstances is a procedural reasonableness claim of the sort discussed in *Gall*. See Pet. 23, 25. A substantial majority of the courts of appeals agree that, when a defendant raises that kind of claim, the defendant must object at sentencing to the alleged error—and thus give the district court a fair opportunity to correct it—or else be limited to plain-error review on appeal. See *In re Sealed Case*, 527 F.3d 188, 191-192 (D.C. Cir. 2008); *United States* v. *Mangual-Garcia*, 505 F.3d 1, 15 (1st Cir. 2007), cert. denied, 128 S. Ct. 2081 (2008); *United States* v. *Villafuerte*, 502 F.3d 204, 211 (2d Cir. 2007); *United States* v. *Mondragon-Santiago*, 564 F.3d 357, 361 (5th Cir.), cert. denied, 130 S. Ct. 192 (2009); *United States*

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cause petitioner failed to object in the district court, his claim is subject to review only for plain error. See pp. 13-14, *infra*. Petitioner is not entitled to relief under the plain-error standard for the same reason that the court of appeals concluded that petitioner is not entitled to relief under that standard for the district court's error in requiring extraordinary circumstances to justify an extraordinary variance: petitioner has not shown that the district court would have given him a lower sentence if it had not erred. See Pet. App. 12-13.

v. *Vonner*, 516 F.3d 382, 391 (6th Cir.) (en banc), cert. denied, 129 S. Ct. 68 (2008); *United States* v. *Perkins*, 526 F.3d 1107, 1111 (8th Cir. 2008); *United States* v. *Knows His Gun*, *III*, 438 F.3d 913, 918 (9th Cir.), cert. denied, 547 U.S. 1214 (2006); *United States* v. *Romero*, 491 F.3d 1173, 1177-1178 (10th Cir.), cert. denied, 552 U.S. 930 (2007).

That rule applies with equal force to claims that the district court erroneously required extraordinary circumstances to justify a non-Guidelines sentence or erroneously treated the Sentencing Guidelines as presumptively reasonable. See, *e.g.*, *United States* v. *Howe*, 538 F.3d 842, 857 (8th Cir. 2008); *United States* v. *Rodriguez-Rodriguez*, 530 F.3d 381, 387-388 (5th Cir. 2008) (per curiam); *United States* v. *Burnette*, 518 F.3d 942, 945-947 (8th Cir.), cert. denied, 129 S. Ct. 138 (2008); see also, *e.g.*, *United States* v. *Leyva-Ortiz*, 325 Fed. Appx. 710, 713-714 (10th Cir. 2009); *United States* v. *Taft*, 300 Fed. Appx. 238, 239 (4th Cir. 2008), cert. denied, 129 S. Ct. 2825 (2009); *United States* v. *Amaya-Capetillo*, 292 Fed. Appx. 419, 420-421 (5th Cir. 2008) (per curiam), cert. denied, 129 S. Ct. 1021 (2009); *United States* v. *Valle-Martinez*, 290 Fed. Appx. 169, 174-175 (10th Cir. 2008), cert. denied, 129 S. Ct. 1581 (2009).

Petitioner contends (Pet. 29-30) that the Sixth Circuit would not have applied plain-error review to his claim because that court applies that standard only when the district court, after pronouncing sentence, asks the parties if they have any "objections." Here, the district court asked the functionally equivalent question whether the parties had "anything else" to say, and petitioner's counsel answered that he did not. Pet. App. 64. To the extent that the district court's inquiry in this case would not satisfy the Sixth Circuit's requirement for

triggering plain-error review, see *United States* v. *Gapinski*, 561 F.3d 467, 473-474 (6th Cir. 2009) (rejecting similar formulation and requiring invitation to make objections), the Sixth Circuit's requirement erroneously elevates form over substance. In any event, the court below did not address the question whether a request for objections is necessary to trigger plain-error review and, if so, what formulation is required, and this Court's review of an issue that was neither pressed nor passed on below, see *United States* v. *Williams*, 504 U.S. 36, 41 (1992), would not be appropriate in this case.[2]

Two courts of appeals, while agreeing that procedural sentencing errors must be preserved in the district court, have held that a particular kind of claim of procedural error—a court's alleged failure to explain the sentence—may be preserved by a request for a lower sentence. See *United States* v. *Lynn*, 592 F.3d 572, 576-577, 578-579 (4th Cir. 2010); *United States* v. *Sevilla*, 541 F.3d 226, 231 (3d Cir. 2008). Those courts, however, have not extended that rule to claims that the district court applied a presumption of reasonableness or required extraordinary circumstances for a non-Guidelines sentence. Thus, this case does not present an occasion to resolve any disagreement among the courts of appeals concerning the preservation requirement.

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[2] The Ninth and Tenth Circuits have rejected the Sixth Circuit's rule. *United States* v. *Steele*, 603 F.3d 803, 806-807 (10th Cir. 2010); *United States* v. *Vanderwerfhorst*, 576 F.3d 929, 934 (9th Cir. 2009). The Eleventh Circuit applies a rule under which the district court's failure to elicit objections is a freestanding procedural error that can result in vacatur and a remand for resentencing. See *United States* v. *Campbell*, 473 F.3d 1345, 1347-1348 (2007). The Third Circuit has questioned the correctness of that rule but has not definitively resolved the question. *United States* v. *Starnes*, 583 F.3d 196, 219 n.12 (2009).

Petitioner incorrectly asserts that the application of plain-error review to his belated claim of procedural error "circumvent[s]" this Court's decision in *Gall*. Pet. 23. Nothing in *Gall* calls into question this Court's prior statement that courts of appeals, in reviewing criminal sentences, should apply "ordinary prudential doctrines, * * * [such as] whether the issue was raised below and whether it fails the 'plain-error' test." *United States* v. *Booker*, 543 U.S. 220, 268 (2005). A procedural error at sentencing is therefore subject to the general principle that any error "not brought to the [district] court's attention" is forfeited on appeal, unless it meets the four-part standard for reversible plain error. Fed. R. Crim. P. 52(b); see *United States* v. *Olano*, 507 U.S. 725, 732 (1993). This Court has already made clear that it will not "creat[e] out of whole cloth * * * an exception to [Rule 52(b)]." *Johnson* v. *United States*, 520 U.S. 461, 466 (1997). Nothing about the present case compels a contrary result.

Petitioner also errs in suggesting (Pet. 26-27) that the court of appeals' application of plain-error review conflicts with Federal Rule of Criminal Procedure 51(b). That rule provides that "[a] party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b). Petitioner's reliance on Rule 51(b) is misplaced. Under Rule 51(b), petitioner's request for a variance from the Guidelines range preserved his challenge to the substantive reasonableness of the sentence that was ultimately imposed, and the court of appeals therefore reviewed the substantive reasonableness of that sentence for abuse of discretion. Pet. App. 14-18.

With respect to the district court's asserted error in requiring extraordinary circumstances to justify a non-Guidelines sentence, however, petitioner did not satisfy the requirement of Rule 51(b), because he never "inform[ed] the court" of "the action [he wished] the court to take," *i.e.*, not requiring extraordinary circumstances for a variance from the advisory Guidelines range.

This Court has already denied several petitions involving the standard of review for procedural-error sentencing cases in which the defendant made no objection in the district court. See, *e.g.*, *Mondragon-Santiago* v. *United States*, 130 S. Ct. 192 (2009) (No. 08-11099); *Vasquez-Rodriguez* v. *United States*, 129 S. Ct. 1612 (2009) (No. 08-7046); *Vaughn* v. *United States*, 129 S. Ct. 998 (2009) (No. 08-6064); *Commodore* v. *United States*, 129 S. Ct. 487 (2008) (No. 07-11206); *Vonner* v. *United States*, 129 S. Ct. 68 (2008) (No. 07-1391). There is no reason for a different result here.

3. Finally, petitioner argues (Pet. 30-39), for the first time, that the district court's consideration of Guidelines § 2G2.2, the child pornography Guideline, was unreasonable and violated the separation of powers because the Guideline is the product of congressional action. Petitioner did not raise that claim in either the district court or the court of appeals, and neither of those courts addressed it. The claim is therefore not properly before this Court. See *Williams*, 504 U.S. at 41 (Court does not ordinarily entertain claims that were neither pressed in nor passed on by the lower courts).

In any event, petitioner's claim lacks merit. Petitioner is correct that Congress itself directly amended Guidelines § 2G2.2 in the PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650. But that does not mean that sentencing courts act unreasonably or unconstitutionally if

they give that Guideline respectful consideration, provided the courts recognize, as the district court recognized here (Pet. App. 59), that the Guideline, like other Guidelines, is advisory only. See *Spears* v. *United States*, 129 S. Ct. 840 (2009) (per curiam); *Kimbrough* v. *United States*, 552 U.S. 85 (2007).

All of the Guidelines promulgated by the Sentencing Commission reflect, to a greater or lesser degree, congressional policy. In the Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.*, Congress provided guidance to the Commission about the contents of the Guidelines, some of it quite specific. See *Mistretta* v. *United States*, 488 U.S. 361, 375-377 (1989). Congress has continued to provide detailed direction to the Commission about a variety of Guidelines. For example, Congress has required the Commission to increase the offense level for certain offenses involving international terrorism, kidnapping, or fraud involving higher-education assistance. See Guidelines App. B 618-619, 629 (Nov. 1, 2007) (collecting statutes affecting the Guidelines). Congress has been especially active in directing increases and adjustments in the terrorism Guidelines. See, *e.g.*, Guidelines App. C. amends. 526, 539, 565.

But those Guidelines remain advisory. If district courts were required to follow all policy judgments reflected in the Guidelines, on the theory that they reflected congressional will, then the Guidelines system would not be advisory, as *Booker* provided. Accordingly, when Congress directs the Commission to promulgate or amend Guidelines, the district court must consider those Guidelines at sentencing, but they are neither more nor less binding than Guidelines reflecting a lesser degree of congressional involvement. See *Booker*, 543 U.S. at 264 ("The district courts, while not bound to apply the

Guidelines, must consult those Guidelines and take them into account when sentencing.").

Contrary to petitioner's contentions, Congress's actions in shaping the Guidelines present no separation of powers issue. Rather, those congressional actions are simply a routine application of Congress's longstanding role in setting sentencing policy, the legitimacy of which this Court recognized in *Mistretta*. See *Mistretta*, 488 U.S. at 364. Although petitioner suggests that the Court should "revisit" (Pet. 33) *Mistretta*, its holding that the Sentencing Guidelines do not violate the separation of powers is even less subject to question now that the Guidelines are only advisory and thus cannot be construed as having the effect of law. See *Mistretta*, 488 U.S. at 413 ("I dissent from today's decision because I can find no place within our constitutional system for an agency created by Congress to exercise no governmental power other than the making of laws.") (Scalia, J., dissenting). Petitioner's unsubstantiated claim that the advisory Guidelines have somehow "undermined the integrity of the Judiciary" (Pet. 35) does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
LANNY A. BREUER
Assistant Attorney General
DANIEL S. GOODMAN
Attorney

JULY 2010