No. _____

In The
Supreme Court of the United States

ANDREW DEMMA,

Petitioner.

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Though Congress established the United States Sentencing Commission to develop sentencing guidelines, Congress has all but dictated the child pornography guidelines. Because the Commission has determined that the corresponding congressional directives are outmoded and disproportionate, the Commission has "effectively disavowed" these guidelines and invited district courts to vary from them. *United States v. Jenkins*, 854 F.3d 181, 189-90 (2d Cir. 2017). District courts across the country are doing just that, varying in 63% of child pornography cases. A division among the appeals courts has followed as to the scope of a district court's discretion to vary from these guidelines. Appeals courts reviewing these and other sentencing decisions also are diverging as to how to check a sentence for substantive reasonableness. This petition raises both conflicts. The questions presented are:

(1) Whether the discretion recognized under *Kimbrough v. United States* for a district court to vary based on a policy disagreement applies to the child pornography guidelines, as held by the Second, Third, and Ninth Circuits, or whether that discretion is limited or foreclosed altogether, as held by the Fifth, Sixth, and Eleventh Circuits.

(2) Whether substantive reasonableness review under *Gall v. United States* requires an appeals court to reassess the relative weight assigned by the district court to each of the 18 U.S.C. § 3553(a) factors, as held by the Sixth and Eleventh Circuits, or whether such reweighing is impermissible, as held by the First, Second, and Tenth Circuits.

PARTIES TO THE PROCEEDINGS

Petitioner Andrew Demma was the appellee in the court of appeals.

Respondent is the United States.

RELATED CASES

United States v. Demma, No. 3:17-cr-00062-1, United States District Court for the Southern District of Ohio. Judgment and sentence entered October 17, 2018.

United States v. Demma, 18-4143, United States Court of Appeals for the Sixth Circuit. Judgment entered January 24, 2020.

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Petitioner Andrew Demma respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 948 F.3d 722. The district court proceedings (App., *infra*, 30a-54a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2020. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of the relevant statute, 18 U.S.C. § 3553(a), is reproduced in the appendix to this petition. App., *infra*, 56a-58a.

STATEMENT

Wanting to serve his country after the terrorist attacks of September 11, 2001, Petitioner Andrew Demma joined the U.S. Army. 25a. Demma served as a combat medic for over five years, and during that time completed two tours of duty in Iraq. 33a-34a. During his first deployment, Demma and his unit experienced 368 Improvised Explosive Device ("IED") attacks, faced daily enemy attacks—during one firefight, Demma provided acute medical care to a severely injured friend while another friend lay dead nearby—sustained multiple other casualties, and witnessed opposition forces remotely detonate a bomb strapped to a local girl. 24-29a. Demma also suffered injuries from a mortar blast while in Baghdad. 34a. Demma earned numerous decorations and medals for his military service. 45a.

Back home in Ohio, Demma joined medical school. 34a. During his medical studies, Demma was found to be in possession of well over 600 images of child pornography. 3a. He subsequently sought psychological treatment at a Veterans Affairs Hospital, and enrolled in a sex offender treatment program. 4a. In 2017, Demma pled guilty to one count of possessing visual depictions involving prepubescent minors engaging in sexually explicit conduct, 18 U.S.C. §§ 2552(a)(4)(B), (b)(2). 2a. The offense carried no mandatory minimum, a statutory maximum of twenty-years imprisonment, a term of supervised release of at least five years, fines not to exceed $250,000, financial restitution to each victim, mandatory assessments, property forfeiture, and lifetime compliance with the Sex Offender Registration and Notification Act ("SORNA"). 18 U.S.C. §§ 2552(b)(2), 2253, 2259(b)(2). The sentencing guideline applicable to the offense is United States Sentencing Guideline ("U.S.S.G.") § 2G2.2(a)(1). Based on the offense conduct (yielding an offense level of 28) and Demma's lack of criminal history (falling within category I), the guidelines pointed to a sentencing range of 78 to 97 months in prison. 46a. The probation officer recommended a sentence of 78 months; the government sought an unspecified custodial sentence, conceded that "a variance in these circumstances would not be inappropriate," and proposed restitution in the amount of $45,000; and Demma argued for a noncustodial sentence. 3a; Oral Arg. for the United States, *United States v. Demma*, No. 18-4143 (6th Cir. Dec. 12, 2019); Tr. Hearing, *United States v. Demma*, 3:17-cr-00062, at *16-17 (S.D. Ohio Oct. 3, 2018).

The district court, expressing "strong disagreement" with the child pornography guidelines, varied by imposing a sentence of one-day, ten years of supervised release, restitution in the amount of $45,000, and property forfeiture, triggering lifetime SORNA obligations. 46a, 48a-52a. In reaching this sentence, the district court asserted that the child pornography guidelines are "artificially high" and fail to distinguish between child pornography offenders. 46a. Turning to the purposes of punishment, the district court recognized that Demma committed a "very serious" offense with "no finite ending." 35a, 46a. As to Demma's culpability, the district court credited expert testimony from three psychologists who opined that Demma suffered from Post-traumatic Stress Disorder ("PTSD"), that Demma had not been exposed to child pornography until his first deployment, and that Demma's wartime experiences directly caused, or at least exacerbated, his addiction to child pornography. 39a-40a. As to utilitarian considerations, the district court took note of Demma's voluntary decision to receive treatment, the adverse impact incarceration would have on his continuing rehabilitative efforts, and the absence of any danger to the community. 46a-48a. The government appealed, challenging only the substantive reasonableness of the sentence. *See* Br. of the United States, *United States v. Demma*, No. 18-4143, at *20 (6th Cir. May 24, 2019); 53a.

The Sixth Circuit reversed and vacated the sentence for two reasons. First, the circuit court held that the district court's variance could not survive the "closer review" standard contemplated by *Kimbrough*

v. United States, 552 U.S. 85 (2007). In particular, the court asserted that the district court's decision to vary from U.S.S.G. § 2G2.2 was subject to "closer review" under *Kimbrough* and, applying this heightened scrutiny, concluded that the district court ignored the retributive and deterrent purposes of U.S.S.G. § 2G2.2, and otherwise failed to justify a non-custodial sentence. 8a-12a. Second, the circuit court determined that the sentence was not substantively reasonable. Citing *Gall v. United States*, 552 U.S. 38 (2007), the court reevaluated the weight assigned by the district court to each statutory sentencing factor, and concluded that the district court gave too much weight to Demma's individual characteristics and to the impact of incarceration on his rehabilitative progress, and too little weight to the retributive and deterrent value of a custodial sentence. 12a-21a.

REASONS FOR GRANTING THE PETITION

I. There is a Conflict Among Federal Circuit Courts as to Whether the Discretion to Vary Based on a Policy Disagreement, Recognized in *Kimbrough*, Applies to the Child Pornography Guidelines

In 1984, Congress sought to introduce greater uniformity into federal sentencing by establishing the United States Sentencing Commission and charging this agency with developing national norms for federal sentencing decisions throughout the country. *See* 18 U.S.C. § 3551 *et seq.*; 28 U.S.C. § 991 *et seq*. The original

Commission encountered many difficult questions in formulating the initial guidelines manual, including how to set penalty levels. After draft manuals based on "just deserts" and "crime control" philosophies failed, the Commission adopted an empirical approach to the guidelines. *See* U.S. Sentencing Comm'n, Guidelines Manual, Pt. A, § 1.3 (Oct. 1987) ("1987 Guidelines Manual"). In particular, the Commission studied approximately 10,000 sentences and effectively used past practice as the touchstone for identifying and quantifying penalty levels, enhancements, and reductions. *See id*.

There were several exceptions to the Commission's empirical approach. The Commission based penalty levels for drug offenses, significant white collar offenses, and violent offenses on mandatory minimums and congressional directives. *See* Brent Newton & Dawinder Sidhu, *The History of the Original United States Sentencing Commission, 1985-1987*, 45 HOFSTRA L. REV. 1167, 1272-74 (2017). In short, the guideline ranges for these categories of offenses followed Congress—not the data.

Kimbrough is consistent with this historical understanding. In *Kimbrough*, this Court acknowledged that the Commission plays a unique role in the development of sentencing policy because the Commission, unlike Congress, "has the capacity . . . to 'base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.'" 552 U.S. at 109 (quoting *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007)

(McConnell, J., concurring)). Accordingly, the Court suggested that, in general, a district court's policy disagreement with particular guidelines may invite "closer review." *Id*. But in the same breath, the Court cautioned that such "closer review" would not be appropriate where the guidelines in question are not predicated on the Commission's independent expertise. *Id*.; *see also Pepper v. United States*, 562 U.S. 476, 501 (2011) (broadening the discretion to vary where the Commission offers a "wholly unconvincing" policy rationale for the relevant guideline). As the drug-trafficking guideline of U.S.S.G. § 2D1.1 was a response to Congress, specifically the Anti-Drug Abuse Act of 1986, the Court held that a variance due to a disagreement with U.S.S.G. § 2D1.1 did not warrant "closer review." *Kimbrough*, 552 U.S. at 109-10; *see also Spears v. United States*, 555 U.S. 261, 265-66 (2009) ("[D]istrict courts are entitled to reject and vary categorically from [U.S.S.G. § 2D1.1] based on a policy disagreement with those Guidelines."). An open question—one that has evenly divided six appeals courts—is whether *Kimbrough* applies to the child pornography guidelines. *See* UNITED STATES SENTENCING COMM'N, 2012 REPORT TO THE CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES 14 n.73, 239-40 (2012) ("2012 COMMISSION REPORT"), http://perma.cc/JSZ6-L2XN ("[A]ppellate courts have taken inconsistent approaches in child pornography cases," contrasting the Second, Third, and Ninth Circuits' position with that of the Fifth, Sixth, and Eleventh Circuits).

A. Three circuits hold that the discretion to vary due to a policy disagreement fully applies to the child pornography guidelines

The Second, Third, and Ninth Circuits hold the child pornography guidelines did not stem from the Commission's independent administrative expertise, and therefore, as in *Kimbrough*, a variance based on a policy disagreement with these guidelines does not merit "closer review." *See United States v. Dorvee*, 616 F.3d 174, 188 (2d Cir. 2010) (holding that this Court's conclusion in *Kimbrough* "applies with full force to § 2G2.2") (citing *Kimbrough*, 552 U.S. at 109-10); *United States v. Grober*, 624 F.3d 592, 601 (3d Cir. 2010) ("[T]he Commission did not do what 'an exercise of its characteristic institutional role' required—develop § 2G2.2 based on research and study rather than reacting to changes adopted or directed by Congress.") (quoting *Kimbrough*, 552 U.S. at 109); *United States v. Henderson*, 649 F.3d 955, 960, 962 (9th Cir. 2011) ("[T]he child pornography Guidelines were not developed in a manner 'exemplifying the Commission's exercise of its characteristic institutional role,' so district judges must enjoy the same liberty to depart from them based on reasonable policy disagreement as they do from the crack-cocaine Guidelines discussed in *Kimbrough*.") (original alterations omitted; quoting *Kimbrough*, 552 U.S. at 109); *see also United States v. Regan*, 627 F.3d 1348, 1354 (10th Cir. 2010) (acknowledging that the argument that *Kimbrough* applies to the child pornography guidelines is "quite forceful,"

declining however to reach the issue as it was not raised before the district court).

B. Three circuits hold that the discretion to vary from the child pornography guidelines due to a policy disagreement is limited or foreclosed altogether

Here, by contrast, the Sixth Circuit contended that U.S.S.G. § 2G2.2 is the product of the Commission's considered judgment and therefore that any variance based on a disagreement with these guidelines must be subjected to heightened scrutiny. In the instant case, the Sixth Circuit, citing circuit precedent, claimed that U.S.S.G. § 2G2.2 has empirical underpinnings and furthers the retributive and deterrent purposes of punishment. 10a-11a (citing *United States v. Bistline*, 720 F.3d 631, 633 (6th Cir. 2013) ("*Bistline II*"); *United States v. Bistline*, 665 F.3d 758, 764 (6th Cir. 2012)). Accordingly, the Sixth Circuit applied "close scrutiny" to the district court's variance. 8a-9a. Likewise, the *en banc* Eleventh Circuit has held that a variance to the guidelines for the production of child pornography necessitates the "closer review" contemplated by *Kimbrough*. *United States v. Irey*, 612 F.3d 1160, 1203 (11th Cir. 2010) (en banc).

For its part, the Fifth Circuit expressly rejected the Second Circuit's conclusion in *Dorvee*, completely foreclosing a district court from varying on the basis of a policy disagreement with U.S.S.G. § 2G2.2. The Fifth Circuit declared:

> With great respect, we do not agree with our sister court's reasoning. Our circuit has not followed the course that the Second Circuit has charted with respect to sentencing Guidelines that are not based on empirical data. . . . [W]e will not reject a Guidelines provision . . . simply because it is not based on empirical data and even if it leads to some disparities in sentencing.

United States v. Miller, 665 F.3d 114, 120-21 (5th Cir. 2011).

There is no reason to postpone Supreme Court resolution of a clear and conspicuous division among the federal appeals courts. *See id.* (disagreeing directly with the Second Circuit). In 2014, the Solicitor General conceded that there is "tension" between the Second, Third, and Ninth Circuit's application of *Kimbrough* to the child pornography guidelines, on one hand, and the Sixth Circuit's narrower view, on the other. Br. for the United States in Opp., *Bistline v. United States*, S. Ct. No. 13-557, at *20-21 (Jan. 31, 2014). The Solicitor General downplayed the split, claiming that the Sixth Circuit's opinion in *Bistline II* only nominally referenced the "closer review" standard and that the law on varying due to policy disagreements is not well developed. *Id*. at *14-15. The opinion below leaves no doubt that "closer review" is not a hollow, one-off standard; rather, the opinion contains a standard that is both entrenched and highly consequential. *See* 9a (specifying that, under "closer review," "the district court faces a considerably more formidable task than the district

court did in *Kimbrough*") (internal quotation marks and citation omitted).

C. The Sixth Circuit's interpretation of *Kimbrough* and limits on sentencing discretion are wrong

For at least four reasons, the child pornography guidelines are not owed the respect accorded to other guidelines because these specific guidelines are not a function of the Commission's independent expertise. First, as with the crack-cocaine guidelines, the severity and disproportionality of the child pornography guidelines were a direct response to congressional directives. The Commission admitted as much in an exhaustive analysis of these very guidelines. The agency noted, "Congress has specifically expressed an intent to raise penalties associated with certain child pornography offenses several times through directives to the Commission and statutory changes aimed at increasing the guideline penalties and reducing the incidence of downward departures for such offenses." UNITED STATES SENTENCING COMM'N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 6 (Oct. 2009), http://perma.cc/2C7K-QJNG ("COMMISSION REPORT"). The Commission disclosed that it acceded to these congressional orders: "The Commission has sought to implement congressional intent in the area of child pornography offenses in a manner consistent with the [Sentencing Reform Act] and subsequent legislation." *Id*. at 7. This is not to say that the Commission did not, in discharging its responsibility, study the matter in

crafting the responsive guidelines. It is to say that the penalty levels were effectively dictated by Congress irrespective of research by the Commission. *See United States v. Perez-Frias*, 636 F.3d 39, 43 (2d Cir. 2011) ("[T]he absence of empirical support is not the relevant flaw we identified in *Dorvee*. We criticized the child pornography Guideline in *Dorvee* because Congress ignored the Commission and directly amended the Guideline[.]"). To be sure, the Commission's empirical work in this context has been challenged as flawed. *See*, *e.g.*, TROY STABENOW, DECONSTRUCTING THE MYTH OF CAREFUL STUDY: A PRIMER ON THE FLAWED PROGRESSION OF THE CHILD PORNOGRAPHY GUIDELINES (2009), http://perma.cc/69MP-3DTM.

Second, as with the drug guidelines at issue in *Kimbrough*, the child pornography guidelines mandated by Congress fail to properly distinguish between offenses in this area, despite the Commission's attempts to develop proportionate sentencing child pornography guidelines. *See* 2012 COMMISSION REPORT, *supra*, at 316 ("[S]entencing enhancements that originally were intended to provide additional proportional punishment for aggravating conduct now [because of congressional intervention] routinely apply to the vast majority of offenders."); *id*. at xxi (noting the "growing belief" "that the existing sentencing scheme in non-production cases no longer distinguishes adequately among offenders based on their degrees of culpability and dangerousness."); *id*. ("The Commission believes that the current non-production guideline warrants revision in view of its outdated and disproportionate

enhancements related to offenders' collecting behavior[.]"). Third, as with the development of the drug guidelines at issue in *Kimbrough*, the Commission's responses to the congressional directives on the child pornography guidelines have been hurried. *See*, *e.g.*, COMMISSION REPORT, *supra*, at 23 (identifying a gap of "just months" between the directives and the Commission's response).

Fourth, Congress has vetoed the Commission's attempts to set more measured and refined penalty levels for child pornography offenses. *See*, *e.g.*, *id*. at 19-23 (explaining that members of Congress expressly rebuked the Commission for establishing penalty levels that they believed were insufficiently severe, and that Congress reacted by negating the Commission's amendments with superseding legislation). Accordingly, to the extent that the Sixth Circuit suggests that the child pornography guidelines are supported by retributive and deterrence considerations, *see* 17a-21a, the evidence from the back-and-forth with Congress demonstrates that it was the Commission's repeated position that lower penalty levels were needed to reflect the seriousness of the offense, deter prospective criminals, and still stay within the bounds of the parsimony principle. *See* COMMISSION REPORT, *supra*, at 2 ("[T]he Commission is required to consider the same factors that a sentencing court is required to consider under 18 U.S.C. § 3553(a)."); 18 U.S.C. § 3553(a) (requiring a district court to impose a sentence that is "sufficient, but no greater than necessary" to further the purposes of punishment); *see also United States v.*

Stone, 575 F.3d 83, 97 (1st Cir. 2009) ("[T]he sentencing guidelines at issue [U.S.S.G. § 2G2.2] are in our judgment harsher than necessary.").

Moreover, the Court's recognition that its *Kimbrough* analysis applies with full force to child pornography guidelines will not open the door to *Kimbrough* extending to every offense or spell the end of the Sentencing Guidelines overall. For example, there is a limited set of guidelines that were grounded in congressional directives and not empirical information. *See* Newton & Sidhu, *supra*, at 1272-74 (listing original guidelines that were adjusted from past practice due to statutes); *id*. at 1303 n.933 (listing the guidelines that subsequently were adjusted from past practice due to statutes).

II. There is a Conflict Among the Federal Circuit Courts as to Whether, Under *Gall v. United States*, Substantive Reasonableness Review Requires or Forbids a Factor-by-Factor Reassessment of a District Court's Consideration of the 18 U.S.C. § 3553(a) Factors

In *United States v. Booker*, the Court specified that the role of the federal appeals courts in sentencing is to check the "reasonableness" of sentences imposed. 543 U.S. 220, 261-63 (2004). In conducting this reasonableness review, the Court later explained, "the appellate court must first ensure that the district court committed no significant procedural error" in determining the sentence, and "should then consider the

substantive reasonableness of the sentence imposed[.]" *Gall*, 552 U.S. at 51. The Court recently clarified that substantive reasonable review boils down to ensuring that, under an abuse of discretion standard, district courts impose a sentence that complies with the parsimony principle of 18 U.S.C. § 3553(a). *Holguin-Hernandez v. United States*, 589 U.S. ___, 140 S. Ct. 762, 766 (Feb. 26, 2020).

The case below raises divergent approaches as to how appellate courts are deploying the abuse of discretion standard when conducting substantive reasonableness review. As explained below, the Sixth and Eleventh Circuits recalibrate the weight assigned by a district court to each Section 3553(a) factor, and effectively set aside a sentence as unreasonable on that basis, whereas the First, Second, and Tenth Circuits conclude that such factor-by-factor reweighing is forbidden, with these circuits asking instead whether, overall, the sentence is reasonable.

A. Two circuits require an appeals court's reevaluation of the weight given by the district court to each of the 18 U.S.C. § 3553(a) factors

In this case, the Sixth Circuit, relying on circuit precedent, defined a sentence as substantively unreasonable if the "'sentence is too long . . . or too short.'" Xxa (quoting *United States v. Parrish*, 915 F.3d 1043, 1047 (6th Cir. 2019); *United States v. Rayyan*, 885 F.3d 436, 442 (6th Cir. 2018)). "This inquiry," the Sixth

Circuit continued, "requires us to determine whether 'the court placed too much weight on some of the § 3553(a) factors and too little on others.'" 8a (quoting *Rayyan*, 885 F.3d at 442). The court relied on *Gall* for the proposition that it may "'consider the extent of the deviation' in deciding whether the district court abused its discretion." 8a (quoting *Gall*, 552 U.S. at 51).

Here, the Sixth Circuit faulted the district court for giving "an unreasonable amount of weight" to several factors: Demma's PTSD diagnosis, the causal link between his wartime experiences and the offense conduct, and the fact that incarceration would slow Demma's rehabilitation. 14a-17a. At the same time, the circuit court claimed that the district court gave too little weight to other factors: the seriousness of the offense, Demma's culpability, and the general deterrent effect of incarceration in child pornography cases. 17a-21a. This factor-by-factor analysis doubled as the abuse of discretion analysis, as the court effectively admitted: "Our overall conclusion is that, based on the totality of the circumstances, the district court weighed some factors under Section 3553(a) too heavily and gave insufficient weight to others in determining Demma's sentence." 22a.

The *en banc* Eleventh Circuit endorsed this factor-by-factor approach to substantive reasonableness review. In doing so, the full court responded to and rejected a dissenting colleague's argument that such a deconstructive process is inconsistent with *Gall*. *Irey*, 612 F.3d at 1192. In determining that an evaluation of

the weight assigned to each Section 3553(a) factor follows—rather than flouts—*Gall*, the Eleventh Circuit interpreted *Gall* as deciding the reasonableness question "only after reviewing the weight the district court had assigned to various factors as well as its decision that the Section 3553(a) factors, as a whole, justified the sentence." *Id*. (citing *Gall*, 552 U.S. at 56-60). The court referenced language from *Gall* in which this Court mentioned the "'great weight'" given to the defendant's voluntary withdrawal from the conspiracy and the "'great weight'" given to the defendant's desire for rehabilitation. *Id*. (quoting *Gall*, 552 U.S. at 57, 59). The Eleventh Circuit, not unlike the Sixth Circuit decision here, concluded that the sentence imposed "discounted the value of general deterrence" and did not adequately promote retributive purposes. *Id*. at 1222.[1]

[1] The Fourth Circuit also reversed a sentence for relying "extensively" on a Section 3553(a) factor, though the court based its authority to reweigh these factors on three circuit decisions that predated *Gall*. *United States v. Howard*, 773 F.3d 519, 531 (4th Cir. 2014). This decision also seems to conflict with a prior Fourth Circuit ruling, issued shortly after *Gall*, in which the Fourth Circuit conceded that, "to the extent that [a previous circuit decision] suggests that a court cannot reasonably accord significant weight to a single sentencing factor in fashioning its sentence, *Gall* and *Kimbrough* hold otherwise." *United States v. Pauley*, 511 F.3d 468, 476 (4th Cir. 2007).

B. Three circuits prohibit an appeals court's reevaluation of the weight given by the district court to each of the 18 U.S.C. § 3553(a) factors

The First, Second, and Tenth Circuits disagree with the Sixth and Eleventh Circuits' interpretation of *Gall* and their resulting atomistic approach to substantive reasonableness review. For starters, the First Circuit has made clear that the weighing of the 3553(a) factors rests with the sound discretion of the trial court, and that it is not within the purview of the appellate court to revisit or revise that weighing. *See United States v. Rivera-Clemente*, 813 F.3d 43, 53 (1st Cir. 2016) (affirming sentence, where the district court placed "less weight" on certain factors and "more weight" on others, emphasizing that "such a choice of emphasis . . . is not a basis for a founded claim of sentencing error.") (internal quotation marks and citation omitted); *United States v. Madera-Ortiz*, 637 F.3d 26, 32 (1st Cir. 2011) (affirming sentence, stating that the district court's weighing of Section 3553(a) factors "represented a judgment call" and that "[w]ithin wide margins . . . such judgment calls are for the sentencing court, not for this court."); *United States v. Anonymous Defendant*, 629 F.3d 68, 78 (1st Cir. 2010) (affirming sentence against an objection that the district court "misweighed" the Section 3553(a) factors, explaining that the district court "holds the scales in gauging the extent of discretionary departure decisions.").

The Second Circuit shares the same view. *See United States v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir.

2012) ("The particular weight to be afforded aggravating and mitigating factors is a matter firmly committed to the discretion of the sentencing judge[.]"); *United States v. Nektalov*, 461 F.3d 309, 319 (2d Cir. 2006) (affirming the sentence, explaining that "we do not review the relative weight given to the competing [Section 3553(a)] factors"). In addition, the Tenth Circuit has disclaimed any authority under *Gall* to "examine the weight a district court assigns to various Section 3553(a) factors, and its ultimate assessment of the balance between them, as a legal conclusion to be reviewed *de novo*." *United States v. Smart*, 518 F.3d 800, 808 (10th Cir. 2008). An appellate court's disagreement with that weighing, the court added, "is simply not enough to support a holding that the district court abused its discretion." *Id*. Instead, the appellate court must "defer not only to a district court's factual findings but also to its determinations of the weight to be afforded to such findings." *Id*.

Unlike the Sixth Circuit, these circuits focus ultimately and properly on the big picture. *See United States v. Colón-Rodríguez*, 696 F.3d 102, 108 (1st Cir. 2012) (asking whether the district court has stated a "plausible" rationale for the sentence and imposed a "sensible" sentence); *United States v. Martin*, 520 F.3d 87, 96 (1st Cir. 2008) (asking whether the sentence is "defensible"); *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009) (Cabranes, J.) (likening substantive reasonableness to a "manifest injustice" or "shocks the conscience" standard); *United States v. Sells*, 541 F.3d 1227, 1239 (10th Cir. 2008) ("[A]s long as the balance

struck by the district court among the factors set out in Section 3553(a) is not arbitrary, capricious, or manifestly unreasonable, we must defer to that decision even if we would not have struck the same balance in the first instance.").

C. The Sixth Circuit's interpretation of *Gall* and reweighing of the Section 3553(a) factors are wrong

The Sixth Circuit's deconstructed brand of abuse of discretion review is incorrect for at least two independent reasons. First, it is predicated on a misreading of *Gall*. Consider that, in *Gall*, the appellate court reversed the district court's sentence, in relevant part, because the district court assigned "too much weight to Gall's withdrawal from the conspiracy[.]" *United States v. Gall*, 446 F.3d 884, 889 (8th Cir. 2006). Here, the Sixth Circuit reversed for a virtually identical reason, specifically that the district court gave too much weight to certain factors and too little to others. 22a.

But in *Gall*, this Court surmised that the appellate court had "clearly disagree[d] with the District Judge's conclusion that consideration of the Section 3553(a) factors justified a sentence of probation," and the Court nonetheless precluded the appellate court from conducting *de novo* review of the district court's balancing of the Section 3553(a) factors. *Gall*, 552 U.S. at 59. The Sixth Circuit's reassessment of the weighing of the Section 3553(a) factors is tantamount to the sort of *de novo* review that *Gall* forbids. *See Irey*, 612 F.3d

at 1260-62 (Tjoflat, J., concurring in part and dissenting in part) (likening an appellate court's objective reweighing of the Section 3553(a) factors to *de novo* review). Indeed, whereas *Gall* instructs appellate courts to keep the district court's weights fixed and assess whether the factor "can bear the weight assigned it," *United States v. Cavera*, 550 F.3d 180, 191 (2d Cir. 2008) (en banc), the Sixth Circuit compares the district court's weights against the weights it would have given.[2]

Second, and relatedly, the Sixth Circuit has adopted a divide-and-conquer approach that is meaningfully different than one that considers whether, on the whole, the district court abused its discretion. As the First Circuit explains:

> [S]entencing decisions represent instances in which the whole sometimes can be greater than the sum of the constituent parts. So here: it is the complex of factors—their presence in combination—that verges on the unique. The

[2] There are material similarities between *Gall* and the present case. There, as here, the Guidelines pointed to a custodial sentence. There, as here, the district court imposed a non-custodial sentence. There, as here, the district court emphasized the individual circumstances of the case, including defendant's rehabilitation, in explaining the sentencing decision. There, as here, the appellate court reversed and vacated the sentence as substantively unreasonable on the ground that certain Section 3553(a) factors were not given the right values. There, the Supreme Court restored the district court's discretion to make a reasonable individualized sentencing determination, as it should here, too.

> factors themselves, if viewed in isolation, present a distorted picture.

Martin, 520 F.3d at 95. With this perspective in mind, the Sixth Circuit's approach necessarily will lead to different qualitative outcomes compared to one that truly considers whether, in view of the totality of the circumstances, the trial court abused its discretion.

In sum, neither a proper interpretation of *Gall* nor practical considerations support the Sixth Circuit's position.

III. Only this Court Can Resolve these Conflicts

For five reasons, only the Court—not the Commission—can resolve these conflicts. First, the conflicts concern the proper interpretation of statutory provisions, here 18 U.S.C. § 3553(a), where the construction of federal statutes is a function reserved to this Court. *See James v. City of Boise*, 577 U.S. ___, 136 S. Ct. 685, 686 (Jan. 25, 2016) ("It is this Court's responsibility to say what a federal statute means[.]") (internal quotation marks, citation, and alteration omitted); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) ("It is the obligation of the last court in the [Article III] hierarchy that rules on the case to give effect to Congress's latest enactment[.]").

Second, the power to clarify its own precedents also lies with this Court and not with the Commission. *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)

(stressing that the reconsideration of precedent "is this Court's prerogative alone"); *Agostini v. Felton*, 521 U.S. 203, 238 (1997) (asserting that precedent remains binding "unless and until this Court reinterpret[s] the binding precedent."). Here, the conflicts concern two precedents from this Court: the authority of district courts to vary under *Kimbrough*, and the implementation of reasonableness review under *Gall*. This case therefore presents questions about interpreting statutes and this Court's precedents that this Court is uniquely suited to resolve; it does not implicate routine conflicts about guideline provisions that the Commission could resolve. *See Braxton v. United States*, 500 U.S. 344, 348 (1991) (suggesting that the Commission, not the Court, should be the primary actor in resolving conflicting interpretations of the guidelines).

Third, the Commission does not have the authority to change the congressional directives that supply the contents of the child pornography guidelines. *See*, *e.g.*, COMMISSION REPORT, *supra*, at 19-23. Its authority is limited to developing guidelines within the legislative lines drawn by Congress. *See Mistretta v. United States*, 488 U.S. 361, 412 (1989) (recognizing that Congress provided "significant statutory direction" to the Commission). Even then, the Commission can only propose guideline amendments that Congress approves or rejects. *See id*. at 393-94 ("[T]he Commission is fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit either

within the 180-day waiting period or at any time.") (citation omitted).[3]

Fourth, because the Commission's hands are largely tied by congressional directives and further because the Commission has found that those directives are "outdated and disproportionate," the Commission has "effectively disavowed" the child pornography guidelines and essentially invited courts to vary from them. *United States v. Jenkins*, 854 F.3d 181, 189-90 (2d Cir. 2017) (quoting 2012 COMMISSION REPORT, *supra*, at xxi).

Fifth, even if the Commission reclaimed ownership of these guidelines to the limited extent that it could amend them, the Commission is not in a position to propose amendments to these guidelines because it lacks a quorum to pass and submit any proposed amendments to Congress. *See* Press Release, U.S. Sentencing Comm'n (Dec. 13, 2018), http://perma.cc/3ED5-3WMU (reporting that the Commission will have only two voting members and that four are required for a quorum). Accordingly, answers to the questions presented must come from this Court.

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[3] Since 2012, Congress has not revisited its statutory directives or the child pornography guidelines. *See* Brent Newton, *A Partial Fix of a Broken Guideline: A Proposed Amendment to § 2G2.2 of the United States Sentencing Guidelines*, 70 CASE W. RES. L. REV. 53, 62-63 (2019) ("[S]ince the Commission issued its [2012] report, Congress has not given any indication that it intends either to amend the penal statutes governing child-pornography offenses or to give the Commission authority to amend the provisions of section 2G2.2 required by Congress.").

This case squarely addresses these two issues. *See* 7a-21a. Moreover, these issues are dispositive: should the Court rule that the Sixth Circuit unduly limited the discretion of the district court to vary or that the Sixth Circuit did not properly perform substantive reasonableness review, reversal will result, as it did in *Kimbrough* and *Gall*.

IV. This Court's Review Will Promote Consistency in Sentencing

In 1984, Congress responded to concerns about sentencing disparities by creating a national Commission that would develop sentencing policies applicable to all federal judges. In 1987, the Commission launched the first guidelines manual, cautioning that the experiment with coordinated federal sentencing is an "evolutionary" one. *See* 1987 Guidelines Manual, *supra*, at Pt. A, § 1.2. Federal sentencing was transformed by *Booker*, which made the Guidelines advisory and required appeals courts to review the "reasonableness" of sentences imposed. 543 U.S. at 260-62. As the Commission itself has recognized, however, "[s]ince *Booker*, where the Court anticipated that appellate review would tend to 'iron out' sentencing differences, the role of appellate review remains unclear, the standards inconsistent, and its effectiveness in achieving uniformity in sentencing is increasingly questionable." UNITED STATES SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 111 (2012), http://perma.cc/24TW-VWUM (quoting *Booker*, 543 U.S. at 263).

The Court has the opportunity to clarify the meaning and applicability of *Kimbrough*. *See United States v. Cavera*, 550 F.3d 180, 217 (2d Cir. 2008) (en banc) (observing that the "contours" of closer review under *Kimbrough* "remain imprecise") (Sotomayor, J., concurring in part and dissenting in part); *see also* Carissa Byrne Hessick, *Child Pornography Sentencing in the Sixth Circuit*, 41 U. DAYTON L. REV. 381, 389 (2016) ("[T]he Supreme Court has not said what that closer review will look like. Nor has it said that closer review should, in fact, occur."). At the same time, the Court has the opportunity to explain how appellate courts are to conduct substantive reasonableness review. *See* Tr. of Public Hearing, U.S. Sentencing Comm'n, at 207, Sept. 9, 2009, http://perma.cc/642N-M9V2 ("I must say I'm being close to a loss . . . in what I as a court of appeals judge should be doing when it comes to reviewing sentences for substantive reasonableness[.]") (remarks of Hon. Jeffrey S. Sutton); *see also* William H. Pryor, Jr., *Returning to Marvin Frankel's First Principles of Federal Sentencing*, 29 Fed. Sent'g Rep. 95, 99 (Dec. 2016-Feb. 2017) ("Reasonableness review, which occurs in thousands of appeals annually, does almost nothing to promote the first principles of sentencing."); *United States v. Johnson*, 916 F.3d 701, 705 (8th Cir. 2019) (lamenting that substantive reasonableness review after *Gall* and *Kimbrough* is "usually an exercise in futility") (Grasz, J., concurring). By resolving these two conflicts, the Court can ensure that the process used by appellate courts across the country is consistent and in that respect promote the goal of greater uniformity that lies at the heart of the grand experiment in federal sentencing.

There is no reason to delay these structural and substantive benefits, which will spread to litigants, the judiciary, and the fair administration of justice more generally. Nationally, district judges varied in 63% of child pornography cases, far more than any other offense type. *See* Statistical Information Packet for the Sixth Circuit, U.S. Sentencing Comm'n, Fiscal Year 2018 16 (table 10), http://perma.cc/U8XR-DLDC. Over 3,000 appeals of sentences likely will reach the appeals courts this year. *See* 2019 Annual Report and Sourcebook of Federal Sentencing Statistics, U.S. Sentencing Comm'n Table A-2, http://perma.cc/2UQL-JFVR (reporting 3,347 federal appeals of the original sentence in Fiscal Year 2019). Given the widespread frustration with the child pornography guidelines at the district court level and the number of cases heading up to the appellate level, nothing can be gained from forestalling review of the questions presented; to the contrary, the need for Supreme Court involvement is both pressing and substantial.

CONCLUSION

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

Respectfully submitted,

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