No. 19-1260

In the Supreme Court of the United States

ANDREW DEMMA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in determining that the district court failed adequately to explain why its policy disagreement with Sentencing Guidelines § 2G2.2 (2016) justified a downward variance in the circumstances of this case, from a guidelines range of 78-97 months of imprisonment to a sentence of one day of imprisonment, for petitioner's possession of thousands of child-pornography images and videos, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2).

2. Whether the court of appeals erred in determining that, in the circumstances of this case, a sentence of one day of imprisonment for petitioner's possession of thousands of child-pornography images and videos, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2), was substantively unreasonable.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 948 F.3d 722.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2020. The petition for a writ of certiorari was filed on April 23, 2020. 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 Ohio, petitioner was convicted on one count of possessing child pornography, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). Pet. App. 2a. He was sentenced to one day of imprisonment already served, to be followed by ten years of supervised release. *Id.* at 5a. The court of appeals vacated and remanded for resentencing. *Id.* at 23a.

1. In February 2015, Federal Bureau of Investigation (FBI) agents seized a computer server that hosted a child-pornography website. Pet. App. 2a. The website operated through a network (called "Tor") that is "designed for anonymous internet use." *Ibid.* The agents began monitoring the activity of a particular user, whom they "observed * * * accessing 107 'threads' containing child pornography over a five-day period." *Ibid.* The agents traced that user's IP address to petitioner's residence in Dayton, Ohio. *Ibid.*

FBI agents executed a search warrant at petitioner's residence, where they found and seized multiple electronic devices. Pet. App. 2a. On those devices, the agents ultimately found more than 3600 images and 230 videos containing child pornography. *Ibid.*; see Presentence Investigation Report (PSR) ¶¶ 27-28. "Hundreds of the images depicted adult men raping and otherwise sexually abusing prepubescent girls." Pet. App. 2a.

Petitioner was charged by information with one count of knowingly possessing visual depictions of prepubescent minors engaging in sexually explicit conduct, which had been transported in, affecting, and using any means and facility of interstate and foreign commerce, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). Information 1. Petitioner waived indictment and pleaded guilty to the information pursuant to a plea agreement. D. Ct. Docs. 5, 6 (June 7, 2017).

2. The statutory maximum term of imprisonment for a violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2) is 20 years. 18 U.S.C. 2252(b)(2). In its presentence report, the Probation Office assigned petitioner a base offense

level of 18 under Sentencing Guidelines § 2G2.2(a)(1).* PSR ¶ 36. The Probation Office then applied the following enhancements to petitioner's offense level: two levels because petitioner possessed images showing prepubescent children, Sentencing Guidelines § 2G2.2(b)(2); four levels because the images involved sadomasochistic conduct, Sentencing Guidelines § 2G2.2(b)(4); two levels because the offense involved the use of a computer, Sentencing Guidelines § 2G2.2(b)(6); and five levels because the offense involved 600 or more images, Sentencing Guidelines § 2G2.2(b)(7)(D). PSR ¶¶ 37-40. The Probation Office also applied a three-level reduction for acceptance of responsibility, see Sentencing Guidelines § 3E1.1. PSR ¶¶ 46-47. Based on the resulting total offense level of 28, combined with petitioner's criminal history category of I, the Probation Office calculated an advisory Guidelines sentencing range of 78 to 97 months of imprisonment, PSR ¶¶ 48, 52, 75; Pet. App. 3a. The Probation Office recommended a sentence of 78 months. Pet. App. 3a; see PSR 22. Petitioner requested a noncustodial sentence, citing his upbringing and background, his lack of criminal history, and his service in the Army—during which, according to petitioner, he had become addicted to viewing child pornography, and as a result of which he suffered post-traumatic stress disorder (PTSD). Pet. App. 3a-4a; Pet. Sent. Mem. 1-17. In support of his contentions, petitioner submitted reports by two psychologists and a mitigation specialist as well as notes from a Veterans Administration hospital where he was treated. Pet. Sent. Mem. Exs. A-D.

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* Unless otherwise indicated, references in this brief to the Sentencing Guidelines refer to the 2016 version in effect at the time of petitioner's sentencing.

The government requested a custodial sentence. Pet. App. 5a. The government observed that, although petitioner "is a sympathetic defendant who encountered violence, death, and unspeakable emotional pain while serving as a U.S. Army medic," his crimes "harm[ed] real victims." Gov't Sent. Mem. 2. The government additionally maintained that "the sophistication of [petitioner's] access to the pornography, as well as the large number of images of 'prepubescent children being anally and vaginally penetrated by adult males,'" counseled in favor of a custodial sentence. Pet. App. 5a. The government noted that petitioner could receive sex-offender treatment while incarcerated. *Ibid.* The government acknowledged, however, that "[a] variance" from the guidelines range "in these circumstances would not be inappropriate." Sent. Tr. 16-17.

The district court adopted the presentence report's Guidelines calculations, including its determination of an advisory guidelines range of 78-97 months. Sent. Tr. 28, 42. But the court varied downward from that range to a sentence of one day of imprisonment. *Id.* at 45; Judgment 2. And the court recommended "[t]hat the one day of confinement be satisfied by" time already served, namely, "the day on which [petitioner] was processed by the United States Marshals." Sent. Tr. 49. The court recited factors adverse to petitioner—namely, the harm to petitioner's victims from the "never-ending offense" where they can "never know[] when [their] pictures will be circulated"; the role that child-pornography collectors play in "aiding and abetting the production and distribution of this material" by creating a market for it; and the number of images petitioner possessed, which was, "if not the highest the Court has ever seen in a pos-

session of child pornography, certainly not the lowest either." *Id.* at 30. In the court's view, however, other considerations outweighed those factors, to the point where petitioner should receive no custodial sentence at all. *Id.* at 42-44; see Pet. App. 5a-6a.

The district court "express[ed] [its] strong disagreement" with the Sentencing Guidelines "particularly with regard to possessors of child pornography." Sent. Tr. 42. The court stated that, "while certainly they're a starting point and they do achieve a certain amount of consistency," those Sentencing Guidelines "are artificially high because everyone secures most of the enhancements." *Ibid.* The court also stated that those Guidelines "make[] it difficult to distinguish between offender A and offender B." *Ibid.* The court additionally announced that petitioner, "because of his experiences, is to be treated differently"—and "w[ould] be treated differently"—"than someone who simply allowed his curiosity to get the better of him." *Id.* at 31. The court cited petitioner's diagnosis of PTSD stemming from his military service and stated that "very few people come home from a combat situation without suffering lasting damage," and it relied on the testimony of one of petitioner's psychologists that petitioner's experience in the military was "the direct cause of his involvement with child pornography." *Id.* at 34, 40. The court further noted that petitioner had "sought out treatment on his own" before he was charged and that petitioner posed "almost no danger" of "re-offend[ing] as a user of child pornography or as someone who acts out against children." *Id.* at 43. And although the court "recognize[d] the need to consider general deterrence," it opined that child-pornography possession is one "for which general deterrence is * * * more myth than reality." *Id.* at 33.

3. The court of appeals vacated petitioner's sentence and remanded for resentencing. Pet. App. 1a-23a.

a. The court of appeals observed that, under this Court's precedent, the Sentencing Guidelines "are no longer mandatory" but nevertheless "'should be the starting point and the initial benchmark.'" Pet. App. 7a (quoting *United States* v. *Bistline*, 665 F.3d 758, 761 (6th Cir.) (*Bistline I*), cert. denied, 568 U.S. 958 (2012), in turn quoting *Gall* v. *United States*, 552 U.S. 38, 49 (2007)). The court of appeals recognized that a "deferential abuse-of-discretion standard" applies in determining whether a sentence is substantively unreasonable. *Id.* at 8a (citation omitted). The court explained that the substantive-reasonableness inquiry "take[s] into account the totality of the circumstances," and a reviewing court may "consider the extent of the deviation" of a sentence from the Guidelines and the weight that the sentencing court placed on particular factors. *Ibid.* (quoting *Gall*, 552 U.S. at 51).

The court of appeals additionally recognized that, under this Court's precedent, sentencing courts "may vary from federal Guidelines ranges based solely on policy considerations, including disagreements with the Guidelines." Pet. App. 8a (quoting *Kimbrough* v. *United States*, 552 U.S. 85, 101 (2007)) (brackets omitted). The court observed, however, that

> [w]hen a guideline comes bristling with Congress's own empirical and value judgments—or even just value judgments—the district court that seeks to disagree with the guideline on policy grounds faces a considerably more formidable task than the district court did in *Kimbrough* which dealt with crack-cocaine guidelines that, unlike § 2G2.2, were not implicitly attributed to Congress.

Id. at 9a (quoting *Bistline I*, 665 F.3d at 764) (brackets omitted).

b. The court of appeals determined that the district court in this case had not "adequately explained its disagreement with the Guidelines on policy grounds" and that "its disagreement with the Guidelines" did not "justify its decision to ignore the delineated enhancements." Pet. App. 9a, 11a. The court of appeals observed that "the policy underpinnings of [Sentencing Guidelines] § 2G2.2 'were not only empirical, but retributive'" and "'included not only deterrence, but punishment.'" *Id.* at 11a (quoting *United States* v. *Bistline*, 720 F.3d 631, 633 (6th Cir. 2013) (*Bistline II*), cert. denied, 572 U.S. 1009 (2014)). "The district court here," the court of appeals explained, "did not discuss the retributive purposes of § 2G2.2 in rejecting the offense-level increases [it] recommended." *Ibid.*

The court of appeals further reasoned that, in any event, "the district court's disagreement with the Guideline enhancements on policy grounds cannot justify" its decision to "impose what is essentially no custodial sentence at all." Pet. App. 11a. The court of appeals observed that petitioner "would have scored an offense level of 15 even with none of the enhancements that the district court said made it 'impossible' to distinguish between defendants," and that even "[s]uch a stripped-down offense level (which is clearly inapplicable based on the facts of this case) would still have produced a Guidelines range of 18 to 24 months of imprisonment." *Id.* at 11a-12a. The court of appeals accordingly determined that "any policy disagreement with the Guidelines based on the alleged similarity of the enhancements does not justify the extent of the downward variance in the present case." *Id.* at 12a.

c. "[T]urn[ing] to the issue of substantive reasonableness," the court of appeals determined that the district court had not "justif[ied] [its] variance" from a range of 78-97 months to a one-day (already-served) term of imprisonment. Pet. App. 12a. The court of appeals explained that a "reduced sentence must reflect, expressly or impliedly, a proper consideration of the factors set forth in 18 U.S.C. § 3553(a)," and that the district court had not conducted a proper consideration of those factors here. *Ibid.*; see *id.* at 12a-22a.

The court of appeals determined that, "in deciding to vary downwards to an essentially noncustodial sentence," the district court had given "unreasonable weight" to petitioner's "military service and PTSD diagnosis." Pet. App. 14a. The court of appeals noted that those characteristics did not make petitioner unique, observing that it had repeatedly upheld significant custodial sentences for defendants convicted of offenses involving child pornography who had served in the military and had experienced PTSD. *Id.* at 14a-15a. The court additionally observed that, "in focusing on the role of [petitioner's] military service as purportedly causing his crimes, the district court cast [petitioner] more as the victim than the perpetrator." *Id.* at 15a. And the court of appeals found "no evidence in the record to support the proposition that military veterans suffering from PTSD typically become addicted to child pornography." *Id.* at 16a.

The court of appeals additionally determined that the district court had given "undue weight" to the need to provide "'correctional treatment in the most effective manner.'" Pet. App. 16a (quoting 18 U.S.C. 3553(a)(2)(D)). Although the district court had taken the view that incarceration would be detrimental to petitioner's treatment,

the court of appeals observed that the psychologist who runs the sex-offender treatment program in which petitioner had enrolled had explained "that [petitioner] could successfully continue treatment after a term of incarceration." *Ibid.* And the court of appeals noted that "the prison system itself provides sex-offender treatment." *Id.* at 17a.

Conversely, the court of appeals determined that the district court had given insufficient weight to other relevant factors. Pet. App. 17a-21a. The court of appeals observed that the district court had given only "sparse attention to the seriousness of [petitioner's] offense, as required of it under § 3553(a)(2)(A)," failing to account for case-specific "features that made [petitioner's] crimes particularly serious." *Id.* at 17a-18a. The district court, for example, had not considered that "the images in [petitioner's] possession depicted extreme, sadomasochistic content, including images of insertion or intercourse with prepubescent children." *Id.* at 18a. And it had not accounted for the volume of images and videos that petitioner possessed. *Id.* at 18a-19a. The court of appeals observed that the more than 3600 images and 230 videos petitioner possessed far exceeded the number possessed by the defendant in a prior case, arising in the same district, in which the court of appeals had twice vacated a one-day sentence as substantively unreasonable. *Id.* at 18a (citing *Bistline I*, 665 F.3d at 760); see *Bistline II*, 720 F.3d at 633-635. And it found "unreasonabl[e]" the district court's view that petitioner's "sophisticated and extensive access to child pornography somehow made him less culpable than 'someone who simply allowed his curiosity to get the better of him.'" *Id.* at 19a.

The court of appeals additionally determined that the district court had "failed to properly analyze * * * the need to provide general deterrence." Pet. App. 19a. It explained that the district court had "unreasonabl[y]" dismissed that consideration based on its view that "child-pornography possession is driven by addictive behavior" and that "general deterrence in the child-pornography context" is therefore "a 'myth.'" *Id.* at 19a-20a. And the court of appeals found that the district court "failed to properly weigh the specific-deterrence factor" by focusing on whether petitioner "was likely to physically molest a child in the future," and not on whether he was likely to possess child pornography. *Id.* at 20a-21a.

The court of appeals emphasized that its ruling did not foreclose the possibility "that some other defendant possessing far fewer and less offensive images over a much shorter period of time might justify such an extreme downward variance." Pet. App. 22a. But it "f[ound] no basis in the record" to support the district court's conclusion that petitioner should be among the less than 4% of child-pornography-possession offenders who receive noncustodial sentences. *Ibid.* The court of appeals accordingly vacated petitioner's sentence and remanded for resentencing consistent with its opinion. *Id.* at 23a.

ARGUMENT

Petitioner contends (Pet. 11-14) that the court of appeals erred in determining that the district court failed adequately to explain why its policy disagreement with Sentencing Guidelines § 2G2.2 justified a downward variance from a guidelines range of 78-97 months of imprisonment to a one-day sentence. Petitioner addition-

ally contends (Pet. 20-22) that the court erred in determining that his one-day term of imprisonment for his conviction of possessing thousands of child-pornography images and videos, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2), is substantively unreasonable. The court of appeals correctly declined to affirm petitioner's one-day sentence, and its decision in the circumstances of this particular case does not conflict with any decision of this Court or implicate any conflict in the courts of appeals that might warrant this Court's review. Further review is not warranted.

1. As a threshold matter, review is unwarranted in the case's current posture because the decision below is interlocutory. See, *e.g.*, *American Constr. Co.* v. *Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893); see also Stephen M. Shapiro et al., *Supreme Court Practice* 282-283 (10th ed. 2013). Although the court of appeals determined that the one-day sentence the district court imposed was substantively unreasonable and not justified by the court's policy disagreement with the applicable Sentencing Guidelines, the court of appeals did not direct the imposition of any particular sentence on remand. It is far from clear what term of imprisonment the district court will impose in resentencing petitioner. If petitioner ultimately is dissatisfied with the sentence imposed on remand, and if that sentence is upheld in any subsequent appeal, he will be able to raise his current claims, together with any other claims that may arise with respect to his resentencing, in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam); Shapiro 285-286. This case presents no occasion for this Court to depart from its

usual practice of awaiting final judgment before determining whether to review a challenge to a criminal conviction or sentence.

2. Petitioner contends (Pet. 11-14) that the court of appeals erred in determining that the district court failed adequately to explain how its policy disagreement with Sentencing Guidelines § 2G2.2 justified a downward variance from petitioner's guidelines range of 78-97 months of imprisonment to a one-day sentence. That contention lacks merit and does not warrant further review.

a. Before *United States* v. *Booker*, 543 U.S. 220 (2005), the Sentencing Guidelines were mandatory and generally binding on district courts at sentencing. See *Irizarry* v. *United States*, 553 U.S. 708, 713 (2008). The Guidelines authorized sentencing courts to "depart[]" from the applicable Guidelines range only in certain circumstances. See *id.* at 713-714. In *Booker*, this Court held that the mandatory Sentencing Guidelines system was invalid under the Sixth Amendment. See 543 U.S. at 226-227, 244. As a remedy, the Court invalidated those provisions of federal sentencing law that made the Guidelines mandatory, 18 U.S.C. 3553(b)(1) (Supp. IV 2004), and that required appellate review in conformance with the Guidelines, 18 U.S.C. 3742(e) (2000 & Supp. IV 2004). 543 U.S. at 245, 259.

As a result, the Guidelines are now "advisory." *Kimbrough* v. *United States*, 552 U.S. 85, 101 (2007) (citation omitted). A sentencing court "may vary from Guidelines ranges" based on its application of the statutory sentencing factors set forth in 18 U.S.C. 3553. *Kimbrough*, 552 U.S. at 101 (brackets and citation omitted). A court may do so, for example, based on "policy con-

siderations, including disagreements with the Guidelines." *Ibid.* (citation omitted). "That is particularly true," the Court has noted, "where * * * the Commission's views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted." *Pepper* v. *United States*, 562 U.S. 476, 501 (2011).

"As a matter of administration and to secure nationwide consistency," however, the Guidelines remain "the starting point and the initial benchmark" in sentencing proceedings. *Gall* v. *United States*, 552 U.S. 38, 49 (2007). "[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Ibid.* And although a sentencing court ultimately "may in appropriate cases impose a non-Guidelines sentence," including "based on a disagreement with the [Sentencing] Commission's views," this Court "ha[s] instructed that district courts must still give 'respectful consideration' to the now-advisory Guidelines." *Pepper*, 562 U.S. at 501 (quoting *Kimbrough*, 552 U.S. at 101). "[A] district judge must give serious consideration to the extent of any departure from the Guidelines." *Gall*, 552 U.S. at 46. And, "[if] he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance," and "must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications." *Id.* at 46, 50.

On appeal, a reviewing court "consider[s] the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Gall*, 552 U.S. at 51.

That review "will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range." *Ibid.*; see *ibid.* (explaining that, "if the sentence is outside the Guidelines range," the reviewing court "may consider the extent of the deviation" but "must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance"). The Court observed in *Kimbrough* v. *United States*, *supra*, that "closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case." 552 U.S. at 109 (citation omitted). *Kimbrough* concluded that such "closer review" was unnecessary in the context of that case itself, however, because it involved "[t]he crack cocaine Guidelines," which the Court found "d[id] not exemplify the Commission's exercise of its characteristic institutional role." *Ibid.*

b. The court of appeals acknowledged and properly applied those principles in reviewing petitioner's sentence. Pet. App. 7a-9a. The court explained that it was reviewing the substantive reasonableness of petitioner's sentence under a "deferential abuse-of-discretion standard" that "'take[s] into account the totality of the circumstances.'" *Id.* at 8a (quoting *Gall*, 552 U.S. at 51; additional citation and internal quotation marks omitted). The court recognized that "[t]he federal Sentencing Guidelines are no longer mandatory" and that sentencing "'courts may vary [from federal Guidelines ranges],'" including "'based solely on policy considerations'" such as "'disagreements with the [Guidelines].'" *Id.* at 7a-8a (quoting *Kimbrough*, 552 U.S. at 101) (brackets in original). But it also recognized that the

Guidelines "still * * * should be the starting point and the initial benchmark for choosing a defendant's sentence" and that a reviewing court may "'consider the extent of [a] deviation' in deciding whether the district court abused its discretion." *Id.* at 8a-9a (quoting *Gall*, 552 U.S. at 51; additional citation and internal quotation marks omitted).

The court of appeals additionally observed that a sentencing court "seeking to reject [Sentencing Guidelines] § 2G2.2 on policy grounds face[s] close scrutiny" because that particular provision in its current form is the product of congressional action. Pet. App. 9a (citing *United States* v. *Bistline*, 665 F.3d 758, 765 (6th Cir.), cert. denied, 568 U.S. 958 (2012)). As the court had noted in a prior decision, "'Congress has taken an active role' in crafting § 2G2.2," and "on numerous occasions Congress has amended this guideline directly or through mandates to the Sentencing Commission." *Bistline I*, 665 F.3d at 761 (citation omitted). The court observed in that case, and reiterated here, that "[w]hen a guideline comes bristling with Congress's own empirical and value judgments —or even just value judgments—the district court that seeks to disagree with the guideline on policy grounds faces a considerably more formidable task than the district court did in *Kimbrough*," which addressed the crack-cocaine Guidelines that did not reflect a similar congressional judgment concerning the appropriate guidelines range. Pet. App. 9a (quoting *Bistline I*, 665 F.3d at 764).

The court of appeals determined that the district court here had not "adequately explained its disagreement with the Guidelines on policy grounds." Pet. App. 9a; see *id.* at 10a-12a. The court of appeals observed that "the policy underpinnings of § 2G2.2 'were not only

empirical, but retributive,'" and that "'they included not only deterrence, but punishment.'" *Id.* at 11a (quoting *United States* v. *Bistline*, 720 F.3d 631, 633 (6th Cir. 2013), cert. denied, 572 U.S. 1009 (2014)). "The district court here," the court of appeals explained, "did not discuss the retributive purposes of § 2G2.2 in rejecting the offense-level increases recommended under the Guidelines, and its disagreement with the Guidelines cannot justify its decision to ignore the delineated enhancements." *Ibid.* That case-specific assessment of the inadequacy of the district court's stated justification for rejecting the applicable Sentencing Guidelines on policy grounds accords with this Court's precedent and does not warrant further review.

In any event, as the court of appeals further determined, the district court's policy-disagreement rationale was insufficient on its own terms to justify the sentence it imposed. Pet. App. 11a-12a. As the court of appeals observed, even without the enhancements with which the district court disagreed, petitioner's offense level "would still have produced a Guidelines range of 18 to 24 months." *Id.* at 12a. "[T]he district court's disagreement" with the Guidelines' enhancements "on policy grounds" thus "cannot justify * * * impos[ing] what is essentially no custodial sentence at all" and accordingly "d[id] not justify the extent of the downward variance" that the court adopted. *Id.* at 11a-12a.

c. Petitioner contends (Pet. 11-14) that the court of appeals erred by applying the "closer review" this Court described in *Kimbrough*, 552 U.S. at 109, to the district court's policy disagreement with Section 2G2.2. He argues (Pet. 11) that Section 2G2.2, like the crack-cocaine guidelines at issue in *Kimbrough*, is "not owed the respect accorded to other guidelines," and that a

district court's disagreement with that provision is exempt from the review applicable to other guidelines. That contention is mistaken.

Kimbrough held that "closer review" ordinarily may be appropriate when a sentencing court rejects a guideline based on a policy disagreement, but that such review was unnecessary in the context of the crack-cocaine guidelines. 552 U.S. at 109. The Court observed that those guidelines "do not exemplify the [Sentencing] Commission's exercise of its characteristic institutional role." *Ibid.* The Commission had formulated those provisions not based on "empirical data and national experience" but based on inferences from statutory-minimum sentences prescribed by an earlier statute. *Ibid.* (citation omitted). And it had expressed misgivings about the "disproportionately harsh sanctions" that the guidelines produced. *Id.* at 110.

In contrast, as the court of appeals here explained, Section 2G2.2 directly reflects "Congress's own empirical and value judgments." Pet. App. 9a (quoting *Bistline I*, 665 F.3d at 764). Whereas in *Kimbrough* "the Commission had simply lifted the ratio off the rack of another, inapposite statutory provision"—a decision that "the Commission had come to regret"—any departure from the Commission's "usual institutional role with respect to the relevant amendments to § 2G2.2" at issue here was instead "because Congress was the relevant actor with respect to those amendments." *Bistline I*, 665 F.3d at 763 (emphasis omitted). This Court's decision in *Kimbrough* considered and rejected an argument that the Guideline at issue there was explicitly or implicitly directed by Congress, see 552 U.S. at 102-106, and a congressionally shaped Guideline like Section 2G2.2 stands on different footing.

It is "Congress's prerogative to dictate sentencing enhancements based on a retributive judgment that certain crimes are reprehensible and warrant serious punishment as a result," and "[w]hen a congressional directive reflects such a judgment, a district court that disagrees with the guideline that follows must contend with those grounds too." *Bistline I*, 665 F.3d at 764. Contrary to petitioner's contention (Pet. 11), a provision such as Section 2G2.2 that reflects Congress's own policy determinations should be accorded at least the degree of "respect accorded to other guidelines."

d. Petitioner contends (Pet. 8-9) that review is warranted because the decision below conflicts with decisions of the Second, Third, and Ninth Circuits. That contention is unsound.

In *United States* v. *Dorvee*, 616 F.3d 174 (2010), the Second Circuit observed that the principle that a sentencing court "'may vary from the Guidelines range based solely on a policy disagreement with the Guidelines, even where that disagreement applies to a wide class of offenders or offenses' * * * applies with full force to § 2G2.2." *Id.* at 188 (citation omitted). The court stated that the Commission did not use "an empirical approach based on data about past sentencing practices" when it adjusted Section 2G2.2 "at the direction of Congress," and that the provision can produce "irrational[]" offense-level calculations. *Id.* at 184, 187. The Ninth Circuit in *United States* v. *Henderson*, 649 F.3d 955 (2011), articulated similar views. See *id.* at 962-963.

Those decisions do not conflict with the decision below. The court of appeals here likewise recognized that a district court may vary from Section 2G2.2 based on policy disagreement with the provision. Pet. App. 8a-9a.

It simply concluded that the district court's stated disagreement in this case did not justify the variance that it adopted, both because the court had not confronted or explained its disagreement with the specific congressional policy judgments embodied in that Guideline, and because the court's disagreement on its own terms did not support a downward variance to essentially a non-custodial sentence. *Id.* at 11a-12a. Moreover, neither *Dorvee* nor *Henderson* directly involved a district court's decision to disregard Section 2G2.2. Neither court had occasion in those cases to consider the standard of appellate review that should apply where, as here, a district court varies downward based on a policy disagreement with Section 2G2.2, or whether the particular reasons given by the district court here would be sufficient. See *Dorvee*, 616 F.3d at 176-179; *Henderson*, 649 F.3d at 958.

In *United States* v. *Grober*, 624 F.3d 592 (2010), the Third Circuit concluded that a district court had provided an adequate explanation for imposing a statutory-minimum five-year sentence on a defendant convicted of child-pornography offenses. *Id.* at 609. The district court in that case had varied from the substantially higher Guidelines range based on its policy disagreement with Section 2G2.2 and its application of the Section 3553(a) factors. *Id.* at 595-599. The Third Circuit declined to apply "'closer review'" to the policy disagreement, on the ground that "the 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." *Id.* at 600-601 (quoting *Kimbrough*, 552 U.S. at 109).

Although that reasoning is in tension with the court of appeals' approach in this case, no conflict exists that warrants this Court's review. The Third Circuit in *Grober* acknowledged that, when a district court varies from a Guidelines range based on a policy disagreement, "it must provide a reasoned, coherent, and sufficiently compelling explanation of the basis for its disagreement," and it defined a "sufficiently compelling" justification as "one that is grounded in the § 3553(a) factors." 624 F.3d at 599-600 (brackets, citations, and internal quotation marks omitted). The Third Circuit proceeded to apply that standard and found that the district court in that case had "set forth an explanation that [the Third Circuit] f[ound] to be sufficiently compelling, and well-grounded in the § 3553(a) factors, to justify its decision." *Id.* at 609. *Grober*'s case-specific conclusion that the policy reasons given by the district court in that case were sufficient to justify a five-year sentence does not conflict with the decision below. And that decision casts no doubt on the court of appeals' further determination here that, even on its own terms, the district court's policy disagreement with particular offense-level enhancements did not justify imposing a one-day, essentially non-custodial sentence.

3. Petitioner additionally contends (Pet. 14-20) that the court of appeals erred in assessing the substantive reasonableness of the sentence by analyzing the weight the district court placed on particular sentencing factors set forth in 18 U.S.C. 3553(a). That contention also lacks merit and does not warrant further review.

a. After ensuring that a district court has not committed any procedural error in imposing a sentence, an appellate court "should then consider the substantive reasonableness of the sentence imposed under an

abuse-of-discretion standard." *Gall*, 552 U.S. at 51. If the sentence is outside the advisory guidelines range, the reviewing court cannot presume that the sentence is unreasonable and must give "due deference to the district court's decision that the [sentencing factors listed in 18 U.S.C. 3553(a)], on a whole, justify the extent of the variance" from the Guidelines range. *Ibid.* And a court of appeals may not reverse a sentence simply because it "might reasonably have concluded that a different sentence was appropriate" had it been in the district court's position. *Ibid.*

But if the court of appeals, applying that deferential standard, concludes that the district court imposed a substantively unreasonable sentence, it may set that sentence aside. "In sentencing, as in other areas, district judges at times make mistakes that are substantive," and "[a]t times, they will impose sentences that are unreasonable." *Rita* v. *United States*, 551 U.S. 338, 354 (2007). "Circuit courts exist to correct such mistakes when they occur." *Ibid.*

b. The court of appeals did not err in its performance of that function here. Recognizing the "deferential abuse-of-discretion standard" of review, Pet. App. 8a (citation omitted), the court of appeals determined that "the district court weighed some factors under § 3553(a) too heavily and gave insufficient weight to others in determining [petitioner's] sentence," *id.* at 22a. The court of appeals appropriately determined that a one-day term of imprisonment did not reflect a reasonable evaluation of the seriousness of petitioner's offense or certain other relevant sentencing factors. *Id.* at 14a-22a.

The court of appeals observed that petitioner's offense conduct entailed possessing thousands of images and hundreds of videos of child pornography, some of

which showed "extreme, sadomasochistic content, including images of insertion or intercourse with prepubescent children." Pet. App. 18a. It also noted that the advisory guidelines range for his offense was 78-97 months of imprisonment. *Id.* at 3a. It found that the district court had given "unreasonable weight" to two particular characteristics of petitioner—his military service and PTSD diagnosis—and to the need for continuing correctional treatment despite the availability of treatment during and after his incarceration. *Id.* at 14a; see *id.* at 14a-17a. It found that the district court "gave sparse attention to the seriousness of [petitioner's] offense," including various circumstances that made his offense "particularly serious." *Id.* at 17a-18a. And it explained that the district court's analysis of the need to promote general and specific deterrence was unreasonable and inconsistent with binding precedent. *Id.* at 18a-22a. That case-specific determination does not warrant further review.

c. Petitioner contends (Pet. 20-22) that the court of appeals erred by considering the district court's analysis of particular sentencing factors and the relative weight the court ascribed to them. That contention lacks merit.

Petitioner identifies no decision of this Court holding that an appellate court may not reverse a sentence based on its determination that the district court applied the Section 3553(a) factors unreasonably. To the contrary, this Court's cases contemplate that reviewing courts will assess the reasonableness of the sentencing court's analysis of the factors on which it relied. In *Gall* itself, for example, the Court found that the district court had "quite reasonably attached great weight" to the defendant's voluntary withdrawal from drug conspiracy

and "self-motivated rehabilitation." 552 U.S. at 57-59. That observation is inconsistent with petitioner's view that a reviewing court, which must "take into account the totality of the circumstances," *id.* at 51, may not consider the manner in which a sentencing court analyzed and weighed a particular sentencing factor. Moreover, petitioner's suggestion (Pet. 21) that courts of appeals may not review at all a district court's conclusions about how much "weight[]" to attach to given sentencing factors would effectively eliminate the substantive-reasonableness review that *Gall* requires.

Petitioner observes (Pet. 20) that this Court in *Gall* reversed the Eighth Circuit's decision in that case that had overturned a sentence as unreasonable. See 552 U.S. at 56-60. But *Gall* did not reverse that decision because the court of appeals evaluated the district court's consideration of specific sentencing factors and the weight it had ascribed to them. This Court instead itself examined the district court's analysis of particular factors and observed that the district court's conclusions were reasonable in the context of that case. See *id.* at 56-59. And it reversed because the court of appeals had given "virtually no deference to the District Court's decision that the § 3553(a) factors justified a significant variance" and, despite articulating the abuse-of-discretion standard, "engaged in an analysis that more closely resembled *de novo* review." *Id.* at 56. The court of appeals made no similar error in this case. It did not engage in what was effectively de novo review or substitute its own judgment for that of the district court in the first instance. Instead, the court of appeals determined that the district court had given unreasonable weight to certain factors while largely disregarding or dismissing other relevant factors. Pet. App. 14a-20a.

Petitioner additionally faults (Pet. 21) the court of appeals for taking a "divide-and-conquer approach" rather than considering, "on the whole, [whether] the district court abused its discretion." See Pet. 21-22. That contention lacks merit. The court of appeals considered the "big picture," Pet. 19, when it concluded that a one-day sentence was too lenient for a defendant who possessed thousands of images and hundreds of videos of child pornography. Pet. App. 14a-20a. Its discussion of the seriousness of the offense and other particular sentencing factors merely established why, in the "totality of the circumstances," *id.* at 8a, 16a, 22a (citation omitted), the sentence the district court had imposed was substantively unreasonable.

d. Petitioner contends (Pet. 15-20) that review is warranted to resolve a conflict regarding the appropriate manner of appellate review of sentences for substantive reasonableness. That contention lacks merit.

Following this Court's decision in *Gall*, courts of appeals have regularly "consider[ed] whether [a] factor, as explained by the district court, can bear the weight assigned it under the totality of circumstances in the case." *United States* v. *Cavera*, 550 F.3d 180, 191 (2d Cir. 2008) (en banc), cert. denied, 556 U.S. 1268 (2009); see *United States* v. *Kane*, 639 F.3d 1121, 1136 (8th Cir. 2011) ("[S]ubstantive review exists, in substantial part, to correct sentences that are based on unreasonable weighing decisions." (citation omitted)), cert. denied, 565 U.S. 1229 (2012); *United States* v. *Irey*, 612 F.3d 1160, 1193-1194 & n.20 (11th Cir. 2010) (en banc), cert. denied, 563 U.S. 917 (2011). As the Second Circuit has explained, that approach "ensures that appellate review, while deferential, is still sufficient to identify those sentences that cannot be located within

the range of permissible decisions." *Cavera*, 550 F.3d at 191.

Petitioner asserts that the First, Second, and Tenth 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." Pet. 18 (emphasis omitted). That is incorrect. All three of those courts have correctly recognized that, although a district court's weighing of the Section 3553(a) factors is entitled to considerable deference, a court of appeals remains able to determine whether the sentencing court went too far and abused its discretion in the weighing process. See, *e.g.*, *United States* v. *Coombs*, 857 F.3d 439, 452 (1st Cir. 2017) (observing that "'[a] sentencing court is under a mandate to consider a myriad of relevant factors,'" and affirming sentence after determining that the district court had "weighed all of the relevant sentencing factors," had made clear that it gave mitigating factors cited by the defendant "due weight," and had "wove[n] th[e] factors into a plausible sentencing rationale" (citation omitted)); *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," but an appellate court must "ensure * * * that a factor can bear the weight assigned it under the totality of circumstances in the case" (citations and internal quotation marks omitted)), cert. denied, 569 U.S. 1025 (2013); *United States* v. *Sandoval*, 959 F.3d 1243, 1246 (10th Cir. 2020) (abuse-of-discretion standard permits appellate court to determine whether "the district court was arbitrary, capricious, whimsical, or manifestly unreasonable when it weighed the permissible § 3553(a) factors" (citation omitted)). Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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