No. 19-1260

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

REPLY BRIEF FOR PETITIONER

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August 7, 2020

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REPLY BRIEF FOR PETITIONER

Through argument, admission, and omission, the Government strengthens the need for this Court to grant review. The Government acknowledges "tension" between the Sixth Circuit and the Third Circuit as to whether *Kimbrough v. United States*, 552 U.S. 85 (2007), applies to the child pornography guidelines, United States Sentencing Guideline ("U.S.S.G.") § 2G2.2. The Government does not dispute that the Sixth Circuit subjected the district court's disagreement with these guidelines to "closer review," *or* that the Third Circuit does not invoke such heightened review of a district court's disagreement with the same guidelines. The Government does not dispute that the Sixth Circuit accords special respect to these guidelines because they are the product of Congress's policy determinations, *or* that the Third Circuit justifies its review of all policy-based variances on 18 U.S.C. § 3553 instead. In both principle and effect, the existence of conflict—not just "tension"—between the Sixth and Third Circuits is clear. The split is also deeper. The Government admits that it cannot identify a reason why the Second and Ninth Circuits concluded that *Kimbrough* applies to these guidelines. In fact, the reasons are multiple: the circuits addressed categorical concerns with U.S.S.G. § 2G2.2 raised by counsel, and the circuits also sought to clarify the district courts' discretion to vary on remand.

The Government's claim that substantive reasonableness review under *Gall v. United States*, 552 U.S. 38 (2007), is applied uniformly across the circuits is

similarly undermined by its admission that, in the final analysis, what mattered to the Sixth Circuit was its disagreement with a noncustodial sentence, an approach that is inconsistent with *Gall* and with other circuits that examine whether the record supports the district court's weighing of the sentencing factors.

The Government also offers a boilerplate argument that the Court should deny review because of the interlocutory status of the decision below. But this Court has regularly granted review in cases with the identical procedural posture of this case. Indeed, the Court did so in *Kimbrough* and *Gall*, and it did so again this year in *Van Buren v. United States*, No. 19-783. The Government itself has urged the Court to grant certiorari in interlocutory criminal cases. Petitioner need not endure a flawed resentencing and futile appeal, and disparities in federal sentencing need not fester any longer. The Government's argument thus runs counter to this Court's immediate and past practice, the Government's own representations before this Court, and significant practical considerations.

In opinions, testimony, and commentary, not to mention unprecedented variance rates, the federal judiciary has sent the unmistakable message that these congressionally mandated guidelines are disproportionate, distort the structure of federal sentencing, and erode the fairness and integrity of the criminal justice system. Indeed, as head of the Judicial Conference, then-Chief Justice Rehnquist informed the Senate Judiciary Committee that congressional amendments to

these guidelines "would do serious harm to the basic structure of the sentencing guideline system and would seriously impair the ability of courts to impose just and responsible sentences." 49 CONG. REC. S5120. The Government offers not a single word in response to the judiciary's fundamental concerns. This Court should not do the same. The Court should resolve the conflicts and infuse this broken area of federal sentencing with much-needed uniformity and proportionality.

ARGUMENT

I. The Government Reinforces the Existence of the Conflicts

a. Scope of *Kimbrough*

The conflict as to whether *Kimbrough* applies to the child pornography guidelines is widely recognized across the legal landscape, including by federal appellate and district courts,[1] federal appellate and district judges,[2] the U.S. Sentencing Commission,[3] the U.S.

[1] *See*, *e.g.*, *United States v. Miller*, 665 F.3d 114, 120-21 (5th Cir. 2011); *United States v. Pelloski*, 31 F.Supp.3d 952 (S.D. Ohio 2014).

[2] *See*, *e.g.*, Hon. James L. Graham, *The Sixth Circuit Broke New Ground in Post–*Booker *Guideline Sentencing with a Pair of Important Decisions*, 26 FED. SENT. R. 102, 103 (Dec. 2013); Hon. Thomas M. Hardiman et al., *Policy Disagreements with the United States Sentencing Guidelines: A Welcome Expansion of Judicial Discretion or the Beginning of the End of the Sentencing Guidelines?*, 50 DUQ. L. REV. 5, 30-32 (2012).

[3] *See e.g.*, UNITED STATES SENTENCING COMM'N, 2012 REPORT TO THE CONGRESS: FEDERAL CHILD PORNOGRAPHY

Department of Justice (in its own manual),[4] and legal scholars.[5] In refusing to fully acknowledge this split, the Government places itself on an island. The Government's explanations for its solitary position are without merit.

The Government is only able to bring itself to admit that there is "tension" between the Sixth Circuit's decision below and the Third Circuit's decision in *United States v. Grober*, 624 F.3d 592 (3d Cir. 2010). BIO 20. The Government does not dispute that the Sixth Circuit applied "closer review" under *Kimbrough* to the district court's policy disagreement with U.S.S.G. § 2G2.2, *see id*. at 6, 15, or that the Third Circuit in *Grober* did not subject the district court's variance to such "closer review," *see id*. at 19. This is a textbook definition of a direct conflict: similar policy-based disagreements with the child pornography guidelines are not reviewed similarly on appeal.

The Government unwittingly helps explain the substantive basis for this conflict. The Government

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OFFENSES 14 n.73, 239-40 (2012) ("COMMISSION REPORT TO CONGRESS"), http://perma.cc/JSZ6-L2XN; UNITED STATES SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 37-38 (2012), http://perma.cc/24TW-VWUM.

[4] *See* United States Dep't of Justice Manual, Comment. 9-27.710G, United States Sentencing Comm'n Primer: Departures and Variances (4th ed. 2020 Supp.).

[5] *See*, *e.g.*, Carol S. Steiker, *Lessons from Two Failures: Sentencing for Cocaine and Child Pornography under the Federal Sentencing Guidelines in the United States*, 76 LAW & CONTEM. PROBS. 27, 42-44 (2013).

argues, and the Sixth Circuit agrees, that U.S.S.G. § 2G2.2 is owed deference and consequently *Kimbrough* does not apply because Congress provided the empirical judgments underlying these guidelines. *See* BIO 15, 17-18. But the Second, Third, and Ninth Circuits interpret *Kimbrough* as according deference to guidelines only when the Commission, not Congress, is the body making the requisite empirical judgments. *See* Pet. 8-9. These opposing principles in turn produce the opposing approaches to the applicability of *Kimbrough* to U.S.S.G. § 2G2.2. The inevitable result of these divergent approaches is sentencing disparities. *See* Steiker, *supra*, at 44 ("This profound disagreement among the federal appellate courts guarantees that there will be an increase—probably a substantial one—in sentencing disparities among child pornography offenders"). Importantly, such disparities exist specifically as to noncustodial sentences in Section 2G2.2 possession cases. *See* COMMISSION REPORT TO CONGRESS 241-42 (observing that circuit courts "have taken seemingly inconsistent positions reviewing" sentences of probation or one-day).

The Government's argument—that U.S.S.G. § 2G2.2 should be entitled to "at least" the same respect accorded to other guidelines because these guidelines are a creature of Congress, BIO 18—also conflicts with the Government's past representations to this Court. Previously, the Government flatly rejected the "premise that congressional directives to the Sentencing Commission are equally binding on sentencing courts." Br. of the United States, *Vasquez v. United*

States, No. 09-5370, 2009 WL 5423020, at *9-11 (S. Ct. Nov. 16, 2009). Between the two, this Court's precedent and structural considerations support the Government's prior view. The theory that a sentencing court's discretion may be limited due to the congressional status of directives aimed at the Commission cannot be squared with the plain language of *Kimbrough*, 552 U.S. at 109 (tying deference to the Commission's exercise of its "characteristic institutional role"); the corresponding authority for district courts to vary on a categorical basis, *Spears v. United States*, 555 U.S. 261, 264 (2009); the advisory nature of the guidelines, *United States v. Booker*, 543 U.S. 220, 259-60 (2004); and the fact that congressional amendments directed towards the Commission bind only the Commission, and not the courts, *see United States v. Sanchez*, 517 F.3d 651, 663 (2d Cir. 2008).

The Sixth Circuit goes a step further by giving even greater respect to U.S.S.G. § 2G2.2 because the guidelines stem from Congress's policy determinations, and thereby raising the bar for district courts to disagree with them for policy reasons. *See United States v. Bistline*, 665 F.3d 758, 763 (6th Cir. 2012) (placing Section 2G2.2 on "stronger ground" than *Kimbrough*). This highlights yet another break with the circuits. The Third Circuit bases its examination of the reasons for a policy disagreement with the guidelines on 18 U.S.C. § 3553 and conducts this examination equally for all guidelines. *See Grober*, 624 F.3d at 599-600.

The Government also seeks to purge the Second and Ninth Circuits from the conflict by claiming that the courts in *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010), and *United States v. Henderson*, 649 F.3d 955 (9th Cir. 2011), had no "occasion" to consider the district court's discretion to vary. BIO 19.

But, in both cases, counsel raised categorical concerns with U.S.S.G. § 2G2.2, placing the respect owed to these guidelines directly at issue. *See* Def. Sentencing Mem., *United States v. Dorvee*, No. 1:08-cr-00514-TJM, at *7-8 (N.D.N.Y. Jan. 27, 2009); Br. for Appellant, *United States v. Dorvee*, No. 09-0648-cr, at *53-54 (2d Cir. Aug. 6, 2009); Br. for Appellant, *United States v. Henderson*, No. 09-50544, at *24 (9th Cir. Apr. 27, 2010); Def. Sentencing Mem., *United States v. Henderson*, No. 8:08-cr-00174-AG, at *6 (C.D. Cal. Oct. 14, 2009). And, in both cases, the Second and Ninth Circuits addressed the "serious flaws in U.S.S.G. § 2G2.2 [because they] must be dealt with by the district court at resentencing." *Dorvee*, 616 F.3d at 182; *see also Henderson*, 649 F.3d at 963-64 (explaining that the district court can exercise its "*Kimbrough* discretion" on remand). The Second and Ninth Circuits thus meaningfully contribute to the conflict among the circuits.

b. Implementation of *Gall*

The Government claims that there is a single way in which substantive reasonableness review is performed across the circuits. This is plainly incorrect.

Some circuit courts, including the Sixth Circuit, label their brand of review as an abuse of discretion,

but apply *de novo* review in effect. In another unforced error, the Government admits as much, conceding that the "big picture" was the Sixth Circuit's "conclu[sion] that a one-day sentence was too lenient[.]" BIO 24; *see also* Pet. App. 22a (disagreeing with Petitioner's non-custodial sentence because it does not comport with a "statistic" on child pornography cases); *United States v. Irey*, 612 F.3d 1160, 1191 n.17 (11th Cir. 2010) (en banc) (claiming that a finding of unreasonableness is not the same as disagreement, without providing any analytical distinction between the two).

This approach, however, is inconsistent with *Gall*, itself a case in which the defendant received a noncustodial sentence due to a significant downward variance. 552 U.S. at 51 ("The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court."). It conflicts with the nature of discretionary review. *See* Tr. of Public Hearing, U.S. Sentencing Comm'n, at 35 (July 9, 2009), http://perma.cc/Q8CE-J5NE ("the appellate role with respect to substantive review of sentences is going to be very, very limited") (remarks of Hon. Brett M. Kavanaugh). It also conflicts with other circuits that ask only whether the sentencing factors "can bear the weight assigned it." *United States v. Cavera*, 550 F.3d 180, 191 (2d Cir. 2008) (en banc); *accord Gall*, 552 U.S. at 54, 56, 59 (assessing only whether the record "supports" the factors). It also conflicts with the procedural component of reasonableness review, under which a district

court need not even expressly mention, let alone address, each sentencing factor. *See*, *e.g.*, *Irey*, 612 F.3d at 1160. Worse, it eviscerates the authority to vary that is necessary for the guidelines to be advisory and thus constitutional. *See Booker*, 543 U.S. at 259-60.

II. This Case is an Ideal Vehicle for the Court to Resolve these Conflicts

The Government opposes review because the "decision below is interlocutory." BIO 11. For at least four reasons, this argument falls short.

First, the very two cases that lie at the heart of the Petition—*Kimbrough* and *Gall*—both had the precise procedural posture of the present case: the district court imposed a sentence, the circuit court reversed and remanded, and the appellant sought and obtained certiorari. *Kimbrough*, 552 U.S. at 92-93; *Gall*, 552 U.S. at 43-45. The Court did not wait for resentencing in either case. Nor should the Court delay review here.

In other criminal cases, too, this Court has granted certiorari directly after a circuit court's remand order. *See*, *e.g.*, *Skilling v. United States*, 561 U.S. 358, 375-77 (2010); *Begay v. United States*, 553 U.S. 137, 140 (2008); *Koon v. United States*, 518 U.S. 81, 88-91 (1996); *see also* STEPHEN SHAPIRO ET AL., SUPREME COURT PRACTICE, § 4.18 (10th ed. 2013) (observing that the Court has "unquestioned jurisdiction to review interlocutory judgments," collecting additional cases). Just months ago, the Government repeated its standard objection to

interlocutory review. *See* Br. of the United States, *Van Buren v. United States*, No. 19-783, 2020 WL 1433239, at *8 (S. Ct. Mar. 10, 2020). Once again, this Court did not hesitate to grant review. *See* Order List: 550 U.S. (Apr. 20, 2020).

Second, the Government itself requested and obtained review of criminal cases sharing the same procedural characteristics of this case. *See*, *e.g.*, *United States v. Ruiz*, 536 U.S. 622, 626 (2002). The Government fails to identify any reason why it may proceed directly to this Court after a remand, but an American citizen cannot.

Third, the interlocutory status of a decision does not operate as a formal or categorical barrier to review. Three terms ago, the Government asked this Court to review an interlocutory decision, acknowledging that "this Court reviews interlocutory decisions that turn on the resolution of important legal issues." Reply Br. of the United States, *Hargan v. Garza*, No. 17-654, 2017 WL 6508405, at *5 (S. Ct. Dec. 19, 2017). The treatise and primary case cited by the Government likewise reflect this individualized approach. *See* Shapiro, at § 4.18 (observing that the Court grants review of interlocutory decisions raising an "important and clear-cut issue"); *Am. Const. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 385 (1893) ("[when to accept review] is left to the discretion of this court, as the exigencies of each case may require.").[6]

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[6] The only other source cited by the Government is a lone footnote, the text of which memorializes the unremarkable point

Fourth, all applicable pragmatic factors favor immediate review. Petitioner argues that the circuit court's interpretation of *Kimbrough* is inconsistent with other circuit court decisions and with this Court's precedents, and thereby improperly limits the sentencing discretion of the district court. If Petitioner were to wait for remand, Petitioner would subject himself to a flawed, unduly restrictive resentencing proceeding, and then to a repeat application of entrenched Sixth Circuit precedent. Moreover, Petitioner would be forced to expend additional funds to participate in that faulty resentencing and futile appeal.

In addition, without a ruling by this Court, judges and litigants would be deprived of clarity and uniformity as to the meaning of *Kimbrough* and *Gall*, where a central goal of federal sentencing is the reduction of unwarranted disparities. In short, the Government's proposed "wait and see" preference is anything but costless to Petitioner and the fair administration of justice in general.

Other equitable considerations counsel against starting over. Petitioner asks the Court to resolve two questions of law that require no further factual development. The resolution of the conflicts will determine the scope of the district court's discretion at sentencing and the depth of the circuit court's review for substantive reasonableness. Accordingly, the concern that

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that this Court has the "authority to consider . . . the most recent judgments of the Court of Appeals." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001).

review is not appropriate where the impact is unclear, *see Mt. Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (June 25, 2012) (Alito, J., concurring in the denial of certiorari), does not apply here.

III. Resolving these Conflicts is Important to Repairing the Structure of Federal Sentencing and Restoring Uniformity and Fairness to the Criminal Justice System

The federal judiciary has made clear that the child pornography guidelines lack the hallmarks of a measured or reasoned sentencing system. District courts have varied from these guidelines in 63% of all cases, well above any other offense type. Pet. 27. The Commission has disavowed these guidelines and invited courts to vary from them. *Id*. at 24. Courts have described the severity of the guidelines as "barbaric without being all that unusual." *United States v. Sawyer*, 907 F.3d 121, 126 (2d Cir. 2018). For these reasons, judges have recognized that, in the context of these guidelines, there's "something seriously wrong." Testimony of Judge Edith Jones, in COMMISSION REPORT TO CONGRESS 11-12 n.65 (2012).

The Judicial Conference observed that the guidelines "often" call for disproportionate sentences, which in turn (1) gives rise to the "concern that the goals of fair administration of justice and respect for the law are not being met" in these cases, (2) "undermines judicial confidence in the child pornography guidelines," and (3) "leaves judges . . . frustrated by the

inconsistency inherent in giving respectful consideration and weight to these guidelines calculations while also considering other pertinent factors [in] section 3553(a)." Statement of the Judicial Conference of the United States Comm. on Criminal Law, Before the United States Sentencing Comm'n, at *4, *33 (Feb. 15, 2012), http://perma.cc/K6T9-REXT. As noted above, the Judicial Conference also observed that the congressional directives governing these guidelines distort the structure of federal sentencing. *See* 49 CONG. REC. S5120.

Petitioner asks this Court to resolve conflicts that are important to individual sentencing determinations, the structure of federal sentencing, and the values of uniformity and proportionality that are the sources of a just and principled criminal justice system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 7, 2020