No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RAMON VALENCIA-CRUZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTION PRESENTED

When conducting "closer review" of a sentencing decision that was based on the district court's decision to vary from the United States Sentencing Guidelines due to a policy disagreement with the Guidelines under *Kimbrough v. United States*, 552 U.S. 85, 109 (2007), must an appellate court ensure that the district court (1) considered the Sentencing Commission's pertinent policy statements, as required by 18 U.S.C. § 3553(a)(5), before expressing disagreement with them, and (2) fully explained its disagreements with the Commission on the record, as the Third, Fourth, Seventh, and Eighth Circuit Courts of Appeals have done? Or does an appellate court fulfill its obligation to conduct "closer review" when it determines that a district court altogether has failed to consider a pertinent policy statement and rejects Guidelines policy *sub silentio*, but nonetheless affirms the sentence, as the Ninth Circuit has done?

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Petitioner, Ramon Valencia-Cruz, respectfully prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on November 25, 2019.

OPINION BELOW

The decision of the court of appeals is an unpublished memorandum decision and is attached as Appendix A.

JURISDICTION

The court of appeals affirmed Mr. Valencia's sentence on November 25, 2019. *See* App'x A. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The pertinent statutory provision, 18 U.S.C. § 3553, is attached as Appendix B.

Statement of the Case

Ramon Valenciz-Cruz was convicted by a jury in the Southern District of California of illegal reentry under 8 U.S.C. § 1326. At sentencing, Mr. Valencia requested a downward variance from his 27-to-33-month Guideline range, with no supervised release to follow. Mr. Valencia argued that because he was a deportable alien, U.S.S.G. § 5D1.1(c) recommended that no supervision be imposed.

The court imposed a 27-month sentence. Turning to the question of supervised release, the court rejected Mr. Valencia's argument that § 5D1.1(c) applied to his case. The court determined that "supervised release is necessary here, as a check and a deterrent on the defendant returning to the United States."

Mr. Valencia objected that "[t]he guidelines don't call for [the imposition of supervised release] and we don't think there's an adequate basis to" impose it. The court overruled the objection, explaining that "under *Kimbrough* [*v. United States*, 552 U.S. 85, 111 (2007), a] Supreme Court case, the Court is entitled to voice disagreement with provisions of the guidelines." The court then stated that it "underst[oo]d . . . that the basis for . . . the [S]entencing [C]ommission's recommendation that supervised release ordinarily should not be imposed in a case involving a non[-]U.S. citizen . . . is that the person if he or she is deported can't benefit from the rehabilitative aspects of supervised release." But, the court noted, "supervised release conditions also have a deterrent aspect to them." The court stated, "I don't think that [deterrence] was adequately taken into consideration by the [S]entencing [C]ommission." The court then found that "[t]here's a need for deterrence here[.]"

Having determined that the Sentencing Commission failed to "take[] into consideration" the deterrent value of supervised release and that "there's a need for deterrence here," the court imposed the statutory maximum term of supervision: three years.

On appeal, Mr. Valencia argued that the district court erroneously varied from the Guidelines by imposing a period of supervised release. Specifically, Mr. Valencia argued that because he fell within the category of defendants for whom no supervision should be imposed, pursuant to § 5D1.1(c), the court varied from the Guidelines by imposing supervision. Moreover, Mr. Valencia explained, this variance was unreasonable. The court's reason for varying was that the Sentencing Commission had not adequately considered deterrence in promulgating § 5D1.1(c). But in fact, that the Commission had *expressly* taken deterrence into account in advising against supervised release for deportable aliens. The district court simply overlooked the Commission's deterrence-based rationale. Because the court's reasoning was ill-founded, Mr. Valencia argued, its variance in imposing supervision was unreasonable.

In an unpublished, memorandum decision, the court of appeals summarily rejected Mr. Valencia's claim. *See* App'x A, at 4-5. Despite the district court's express statement that it was exercising its *Kimbrough* discretion, the court of appeals held that the district court did not exercise its *Kimbrough* discretion, because it never varied from the Guidelines in imposing supervised release. The court of appeals held that "the three-year term of supervised release represents a within-guideline sentence and is entirely reasonable given the recidivist history and personal characteristics of Valencia." *Id.* at 5. It therefore affirmed the sentence. *Id.*

SUMMARY OF THE ARGUMENT

The Court in *Kimbrough v. United States*, 552 U.S. 85, 109 (2007), held that district courts may base sentencing decisions on policy disagreements with the United States Sentencing Commission. However, to preserve the Sentencing Commission's "important institutional role," the Court requires "closer review" on appeal of a sentencing in which the district court varied from the Guidelines based on "the judge's view that the Guidelines range 'fails properly to reflect [18 U.S.C.] § 3553(a) considerations' even in a mine-run case." *Id.* at 109 (quoting *Rita v. United States*, 551 U.S. 338, 351 (2007)).

The federal courts of appeals are divided as to how to apply the "closer review" standard when reviewing sentences that are premised on a district court's policy disagreement with the Sentencing Commission. Some courts of appeals have strictly interpreted *Kimbrough's* "closer review" language and demanded that a district court that varies from the Guidelines range based on its view that the range fails to reflect the § 3553(a) sentencing factors must rigorously explain its disagreement with the Guidelines in terms of the § 3553(a) factors. *See, e.g.*, *United States v. Merced*, 603 F.3d 203, 221 (3d Cir. 2010); *United States v. Engle*, 592 F.3d 495, 402 (4th Cir. 2010); *United States v. Corner*, 598 F.3d 411, 415-16 (7th Cir. 2010) (en banc); *United States v. Hodge*, 469 F.3d 749, 757 (8th Cir. 2006).

Others, including the Ninth Circuit in Mr. Valencia's case, have adopted a looser interpretation of their "closer review" duties and have not required district courts to consider the § 3553(a) factors on the record or to provide any explanation for the basis of their categorical rejection of Guidelines policy in mine-run cases. For example, the Ninth Circuit in Mr. Valencia's case summarily affirmed the district court's sentence as procedurally reasonable when the district

court expressly exercised its discretion under *Kimbrough* to reject the Sentencing Commission's pertinent policy statement.

The uncertainty generated in the wake of *Kimbrough*'s call for "closer review" has caused disparate treatment of defendants in various federal courts of appeal. In circuits that apply more rigorous "closer review," defendants have had their sentences vacated as a result of a district court's insufficient explanation of its policy disagreement with the Guidelines. By contrast, defendants in the Ninth Circuit have had their sentences affirmed even when the Sentencing Commission has advised a different sentence and the district court has not fully explained the basis of its disagreement with that advice.

The "closer review" confusion also has caused disparities in the circuit courts' views of the "important institutional role" that the Sentencing Commission plays. *Kimbrough*, 552 U.S. at 109. The relationship between the federal courts and the Sentencing Commission "is meant to be an iterative, cooperative institutional effort to bring about a more uniform and a more equitable sentencing system." *Pepper v. United States*, 131 S. Ct. 1229, 1255 (2011) (Breyer, J., concurring in part and concurring in the judgment). District courts that provide a "reasoned sentencing judgment, resting upon an effort to filter the Guidelines' general advice through § 3553(a)'s list of factors, can provide relevant information to both the court of appeals and ultimately the Sentencing Commission." *Rita*, 551 U.S. at 358. By extension, courts of appeals whose application of "closer review" permits a district court to reject a Guidelines sentence based on a policy disagreement with the prosecution for non-§ 3553(a) reasons minimize the importance of the Sentencing Commission's institutional role and sever an important feedback link from the federal courts to the Commission. In contrast, courts of appeal that stringently apply "closer

review" accord more deference to the Commission's institutional expertise and "key role" in creating an equitable sentencing system. *Kimbrough*, 552 U.S. at 108. Without clarification from this Court, widening variation in the application of *Kimbrough* discretion threatens greater disparity in federal sentencing and greater disruption in the cooperative relationship among the trial courts, courts of appeal, and Sentencing Commission.

This case provides the Court with an opportunity to clarify the function of the courts of appeal post-*Kimbrough* by articulating the contours of "closer review." The district court rejected the application of the Commission's policy statement to Mr. Valencia's mine-run case based on an unreasonable policy disagreement. The Ninth Circuit, applying its interpretation of "closer review" of the district court's exercise of *Kimbrough* discretion, affirmed Mr. Valencia's sentence as procedurally reasonable. Had Mr. Valencia appeared in the Third, Fourth, Seventh, or Eighth Circuits, he likely would have faced the opposite outcome: his sentence would have been vacated because, applying a more stringent "closer review," those courts would have found the district court's exercise of *Kimbrough* discretion unreasonable.

This Court should grant the instant petition to provide clear guidance to the courts of appeals on what "closer review" entails and to district courts on what constitutes a procedurally sound exercise of *Kimbrough* discretion. *See* Sup. Ct. R. 10(a), (c).

REASON FOR GRANTING THE PETITION

A. The district court's improper exercise of *Kimbrough* discretion and the Ninth Circuit's application of "closer review."

The district court in Mr. Valencia's case varied from the Guidelines sentence based on an unreasonable, unfounded policy disagreement with the Sentencing Commission. This was improper under *Kimbrough*. The court determined that the Guideline should be rejected because

the Commission had not taken deterrence into consideration; in fact, the Commission had *expressly* taken deterrence into consideration in creating the Guideline. U.S.S.G. § 5D1.1 cmt. n.5. Based on its misunderstanding of the Commission's consideration of the relevant § 3553(a) factors, the court varied upward to sentence Mr. Valencia to the *maximum* term of supervision.

The district court's sentence is "at odds with the clearly expressed policy views of the Sentencing Commission." *See Engle*, 592 F.3d at 502 (remanding when district court imposed non-Guidelines sentence without ever acknowledging or considering relevant policy statements); *accord United States v. Reyes-Medina*, 683 F.3d 837, 842 (7th Cir. 2012) (holding that "because § 3553 still requires some consideration of pertinent policy statements, a sentencing judge must say something that enables the appellate court to infer that he considered pertinent policy statements.") (internal quotation marks and citation omitted) (emphasis original); *United States v. Garcia-Rivas*, 241 F. App'x 830, 832 (3d Cir. Jul. 3, 2007) (unpublished) (instructing that "[o]n remand, the District Court should consider the policy statements promulgated by the Sentencing Commission together with the other § 3553(a) factors."). As a general matter, Congress has empowered district courts to place a defendant "on a term of supervised release after imprisonment[.]" 18 U.S.C. § 3583(a). "Congress intended supervised release to assist individuals in their transition to community life," which is accomplished by "provid[ing] individuals with postconfinement assistance." *United States v. Johnson*, 529 U.S. 53, 59–60 (2000). Thus, "supervised release . . . should focus on the integration of the violator into the community, while providing the supervision designed to limit further criminal conduct." U.S.S.G. ch. 7 pt. A n.4; *accord Johnson*, 529 U.S. at 709.

In 2011, the Sentencing Commission recognized that the community-reintegration aim of supervised release misses the mark in the case of defendants who are deportable aliens. *See* U.S.S.G.

app. C amend. 756 (2011) (amending § 5D1.1). Because such defendants are removed from the United States to their home countries once they complete the custodial portion of the sentence, their supervised release is not *supervised* by the U.S. Probation Office and, as a result, "their transition into [their home country's] community life" will be on their own rather than "assist[ed]." *Johnson*, 529 U.S. at 59–60. Thus, the primary purpose of supervised release—to help reintegrate a defendant into the community—simply cannot be fulfilled in cases involving removable aliens.

Moreover, the Commission recognized that the § 3553(a) sentencing goals would not be served by imposing supervised release upon illegal reentry defendants. *See* U.S.S.G. app. C amend. 756. In its research on recidivism and the effects of subsequent sentences in illegal reentry cases, the Commission determined that the best available evidence showed that imposition of supervised release is "generally unnecessary" to promote the key goals of deterrence or protection of the public. *Id.* The Commission noted that (1) removal of criminal aliens is "'virtually inevitable for a vast number of noncitzens convicted of crimes'" and (2) repeat offenders are likely to be prosecuted separately for returning to the United States illegally. *Id.* (quoting *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010)). The Commission found that this certainty of removal and of future illegal-reentry prosecutions for those who return without permission serve to satisfy the need for deterrence and incapacitation, such that imposing supervised release would be superfluous in the ordinary case. *See* U.S.S.G. § 5D1.1 cmt. n.5 (2011) (stating that "[i]f [a removable alien] defendant illegally returns to the United States, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution.").

Accordingly, the Sentencing Commission amended the Guidelines to reflect the poor fit between the primary goals of supervised release and illegal reentry defendants. *See* U.S.S.G. app. C

amend. 756. The Guidelines now provide that in the typical case, removable aliens should not be put on supervised release:

> The court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment.

U.S.S.G. § 5D1.1(c) (amended Nov. 1, 2011). The Commission's commentary reiterates that "the court ordinarily should not impose a term of supervised release" in the case of a removable alien. U.S.S.G. § 5D1.1, cmt. n.5.

The commentary to the Guideline further states that an exceptional circumstance in which a removable alien should receive supervised release exists *only* if the court makes case-specific findings regarding deterrence that explain why the threat of a new prosecution alone would not provide a *sufficient* deterrent effect to prevent the alien from returning to the United States:

> Unless such a defendant legally returns to the United States, supervised release is unnecessary. If such a defendant illegally returns to the United States, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution. The court should, however, consider imposing a term of supervised release on such a defendant if the court determines it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case.

U.S.S.G. § 5D1.1, cmt. n.5.

Here, Mr. Valencia's was a mine-run illegal reentry case. Mr. Valencia was a deportable alien. He would likely be prosecuted anew for illegal reentry should he return without permission in the future, as the Guidelines contemplate. *See* U.S.S.G. § 5D1.1 cmt. n. 5. Therefore, the Guidelines recommended that no supervision be imposed. *See* § 5D1.1(c). Nevertheless, the district court purported to exercise its discretion under *Kimbrough* to impose the maximum term of supervision. The court explained that a variance was warranted because, in its view, the Commission had not

adequately taken the § 3553(a) sentencing goal of deterrence into account in promulgating § 5D1.1. In fact, the Commission had considered deterrence; it determined that because the deterrence goal was adequately served by the threat of a new illegal-reentry prosecution, the ordinary case presented no need for supervision as a deterrent. Ignoring this, the court rejected § 5D1.1 and varied upward to impose a three-year term of supervision.

The district court's variance based on its express exercise of *Kimbrough* discretion is precisely the type of sentence that calls for "closer review" on appeal. *Kimbrough*, 552 U.S. at 109 (stating 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.") (quoting *Rita*, 552 U.S. at 351). Had it applied "closer review," the Ninth Circuit would have vacated Mr. Valencia's sentence because the district court expressly stated that it was applying *Kimbrough* discretion based on a policy disagreement but wholly failed to provide a justifiable basis for its policy disagreement. But rather than carefully assessing the soundness of the district court's explicit disagreement with the Guideline, the Ninth Circuit cursorily affirmed the sentence, finding that the court never actually exercised its *Kimbrough* discretion because it determined that supervised release was necessary to provide an "added measure" of deterrence—in keeping with U.S.S.G. § 5D1.1(c). *See* App'x A at 4-5. This is not the "closer review" that *Kimbrough* requires. *See Kimbrough*, 552 U.S. at 109.

B. The clear circuit split on the important issue of what constitutes "closer review" warrants granting this petition.

This Court has intervened numerous times since the watershed opinion in *United States v. Booker*, 543 U.S. 220 (2005), which rendered the federal Sentencing Guidelines advisory rather than mandatory, to provide guidance to both district and appellate courts on the standards

governing the practice of federal sentencing in order to bring greater uniformity to the process. *See, e.g.*, *Gall v. United Sates*, 552 U.S. 38 (2007) (deciding whether a court of appeals can require a district court to point to extraordinary circumstances to justify a non-Guidelines sentence); *Rita*, 551 U.S. at 338 (deciding whether a court of appeals may apply a presumption of reasonableness to a within-Guidelines sentence); *Spears v. United States*, 555 U.S. 261, 263-64 (2009) (per curiam) (deciding whether a district court that rejects the Guidelines' 100:1 ratio for crack/powder-cocaine offenses possesses the power to apply a different ratio).

In *Kimbrough*, this Court addressed a question that arose in the wake of *Booker*: whether a sentence outside the Guidelines range was *per se* unreasonable because it was based on a disagreement with the sentencing disparity for crack/powder-cocaine offenses. *See* 552 U.S. at 91. In answering "no," this Court clarified that sentencing judges have wide latitude to disagree with the Sentencing Commission's policy choices embodied in the Guidelines. *See Kimbrough*, 552 U.S. at 109-11. *Kimbrough* did not, however, grant district courts unfettered authority. Rather, the Court clearly preserved the primacy of the Sentencing Commission's policy-making role and its policy choices, as embodied in the Guidelines, even as it delegated discretion to sentencing judges to depart from those choices. *See id.* at 108-09 (noting that the Commission "fills an important institutional role: It has the capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.") (internal quotation marks and citation omitted); *see also Pepper v. United States*, 131 S. Ct. 1229, 1255 (2011) (Bryer, J., concurring in part and concurring in the judgment) (stating that *Kimbrough* discretion "does not leave a sentencing court free to disregard the Guidelines at will. To the contrary, the law permits the court to disregard the Guidelines only where it is 'reasonable' for a court to do so.").

Accordingly, in light of the Commission's key role in formulating sentencing policy, *Kimbrough* held that in a mine-run case, when a sentencing judge disagrees with a Guideline that "exemplif[ies] the Commission's exercise of its characteristic institutional role," "closer review" of its sentence "may be in order." 552 U.S. at 109.

This Court in *Kimbrough* left undefined the parameters of "closer review." Following the decision, lower courts have struggled with the "closer review" criterion. District courts exhibit confusion about when and how they may disagree with the Guidelines on policy grounds, while appellate courts struggle with how to review a district court's exercise of *Kimbrough* discretion. Questions concerning "closer review" have led to an ever-widening methodological split among the circuits. This petition—concerning the degree of "closer review" required of a district court's decision to reject a Guideline based on a disagreement over the government's effective prosecution of cases—presents the Court with an opportunity to eliminate the division in the lower courts and restore the uniformity in sentencing that Congress intended.

The circuits have split into two camps as to how to conduct "closer review." The Third, Fourth, Seventh, and Eighth Circuits all strictly heed *Kimbrough*'s call for "closer review," demanding that district courts provide rigorous justification, encompassing all of the § 3553(a) factors, for their policy disagreement with the Guidelines in mine-run cases. In these circuits, a district court procedurally errs when it fails to provide a reasoned basis, rooted in all of the § 3553(a) factors, for its disagreement with the Sentencing Guidelines. These courts focus more on the institutional strengths of the Sentencing Commission and § 3553(a)'s mandatory language, which requires consideration of all of the sentencing factors set forth in that provision.

For example, the Third Circuit in *United States v. Merced* held that when a district court categorically rejects a Guideline as flawed, "[t]he freedom to vary . . . is not free. Its price is a reasoned, coherent, and 'sufficiently compelling' explanation of the basis for the court's disagreement." 603 F.3d 203, 219-20 (3d Cir. 2010) (quoting *United States v. Lychock*, 578 F.3d 214, 219 (3d Cir. 2009)). In *Merced*, the district court varied downward from the career-offender Guidelines range, which was 188 to 235 months, and sentenced the defendant to sixty months in prison, the minimum mandatory sentence, for distributing and possessing with intent to distribute crack-cocaine. *See id.* at 209. The district court remarked in passing that "'I kind of reserve career offender status for violent, significant drug deals, that type of thing, even though the guidelines may advise that it's appropriate.'" *Id.* at 211-12 (emphasis omitted). The government appealed, arguing inter alia that the district court procedurally erred by failing to explain sufficiently the significant downward variance that it imposed. *See id.* at 216. The Third Circuit agreed, concluding that "the district court failed to adequately explain its apparent policy disagreement with the career offender provision of § 4B1.1 and what role, if any, that disagreement played in determining Merced's sentence." *Id.* at 217. Assuming that the district court varied downward on the basis of a policy disagreement with § 4G1.1, it should have "better explain[ed] and justif[ied] that decision." *Id.* at 218-20.

Although the Third Circuit recognized the authority that district courts possess to vary from the Guidelines range due to a policy disagreement, it emphasized the importance of the explanation requirement:

> [W]e assume for present purposes that the freedom district courts enjoy under *Kimbrough* and *Spears* includes the freedom to vary from a career offender Guidelines range based on a policy disagreement. However, "such disagreement is permissible only if a District Court provides 'sufficiently compelling reasons to

> justify it.'" *Lychock*, 578 F.3d at 219 (quoting *Gall*, 552 U.S. at 50 . . .). A "sufficiently compelling" explanation is one that is grounded in the § 3553(a) factors. The authors of the Guidelines, no less than district courts, have been tasked with ensuring that criminal sentences meet the goals of sentencing set forth in § 3553(a). *Rita*, 551 U.S. at 348 . . . (explaining that "both the sentencing judge and Commission . . . [carry] out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale."). Thus, the Guidelines reflect the Sentencing Commission's "rough approximation of sentences that might achieve § 3553(a)'s objectives." *Id.* at 350 . . . If a district court concludes that those objectives are not achieved by a sentence within the career offender Guideline range, and that belief is driven by a policy disagreement with the career offender provision, then the court must explain why its policy judgment would serve the § 3553(a) sentencing goals better than the Sentencing Commission's judgments.

Merced, 603 F.3d at 221 (footnote omitted). Applying the "sufficiently compelling explanation" standard, the Third Circuit held that the district court's explanation was deficient because "it offered no real explanation at all – only a suggestion as to what its personal sentencing practices are in light of [its policy] disagreement." *Id.* at 222 (emphasis omitted). The court's justification for its policy disagreement was "little more than a 'conclusory statement of personal belief' that career offender status should be reserved for violent or large-scale drug dealers." *Id.* (quoting *Lychock*, 578 F.3d at 220). The Third Circuit determined that "[t]his is inadequate, and constitutes procedural error." *Id.*; *see also Lychock*, 578 F.3d at 219-20 (vacating sentence because the district court provided only a "conclusory statement of personal belief" regarding its policy disagreement with the Guidelines and such a statement "does not suffice"); *United States v. Levinson*, 543 F.3d 190, 201-02 (3d Cir. 2008) (holding that "if a district court wants to vary from the Guidelines for a reason that is contrary to the Commission's stated position, it must explain why the general policy should not apply in the particular case before it" and vacating sentence because district court's bare assertion to justify a policy disagreement was insufficient).

Similarly, the Fourth Circuit in *United States v. Engle* held that a district court procedurally erred by taking a position contrary to that adopted by the Sentencing Commission in the Guidelines, without considering the Commission's wisdom on that topic as set forth in a relevant policy statement. 592 F.3d 495, 497-98 (4th Cir. 2010). In *Engle*, the district court imposed a sentence of four years of probation, a significant variance from the Guidelines range of twenty-four to thirty months of imprisonment. *See id.* The district court indicated during the sentencing proceeding that it did not regard the defendant's $2 million of tax evasion as a particularly serious offense and did not view imprisonment as necessary to achieve general deterrence. *See id.* at 502. The district court failed to mention the Sentencing Commission's policy statement on these topics, in which the Commission explained its view that probationary sentences are too lenient for such tax evasion crimes, and that sentences of imprisonment were appropriate to "serve as a significant deterrent." *Id.* at 501-02. On appeal, the Fourth Circuit was troubled by the fact that the district court "seemed to suggest that [it] fundamentally disagreed with the Guidelines' approach," yet never actually addressed the Guidelines approach or "offer[ed] any insight into why [it] believe[d] [its variance was appropriate]." *Id.* at 502-04 (emphasis original).

The Seventh Circuit has taken a similar position, requiring a district court to consider pertinent Guidelines and sufficiently explain any policy disagreement it may have with the Commission:

> We understand *Kimbrough* and *Spears* to mean that district judges are at liberty to reject any Guideline on policy grounds – though they must act reasonably when using that power . . . . The allowable band of variance is greater after Booker than before, but intellectual discipline remains vital. A motion to a court's discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles. . . . So long as a district judge acts reasonably, however the Sentencing Commission's polices are not binding.

> . . . A sentencing judge needs to understand the Commission's recommendations, which reflect (among other things) the goal of avoiding unwarranted disparities in how different judges treat equivalent offenses and offenders. 18 U.S.C. § 3553(a)(6); *United States v. Bartlett*, 567 F.3d 901, 907-09 (7th Cir. 2009). But *Booker*, *Kimbrough*, and *Spears* conclude that a judge who understands what the Commission recommends, and takes account of the multiple criteria in § 3553(a), may disagree with the Commission's recommendation categorically, as well as in a particular case.

United States v. Corner, 598 F.3d 411, 415-16 (7th Cir. 2010) (en banc) (internal quotation marks, brackets, and citations omitted) (emphasis original); *see also United States v. Reyes-Medina*, 683 F.3d 837, 842 (7th Cir. 2012) (reasoning that "because § 3553 still requires some consideration of pertinent policy statements, a sentencing judge must say something that enables the appellate court to infer that he considered pertinent policy statements.") (internal quotation marks and citation omitted) (emphasis original).

Likewise, the Eighth Circuit has applied *Kimbrough*'s "closer review" criterion rigorously. *See United States v. Hodge*, 469 F.3d 749, 757 (8th Cir. 2006). In *Hodge*, the district court relied on the fact that the defendant was addicted to drugs to impose a more lenient sentence. *See Hodge*, 469 F.3d at 756. Its reliance was couched upon consideration of § 3553(a)(1), the history and characteristics of the defendant. *See id.* However, at no time did the district court consider U.S.S.G. § 5H1.4, the Sentencing Commission's policy statement on drug dependence. Section 5H1.4 set forth the Commission's position that "drug or alcohol dependence is not a reason for a downward departure'" – a position at odds with the one taken by the district court in varying downwards. *See Hodge*, 469 F.3d at 757 (quoting U.S.S.G. § 5H1.4). Citing § 3553(a)(5), the Eighth Circuit vacated the sentence. *See id.* at 758. It reasoned that the policy statement "remain[ed] relevant to the determination of a reasonable sentence." *Id.*

By contrast, the Ninth Circuit has taken the completely opposite approach, espousing a much laxer interpretation of *Kimbrough*'s "closer review" criterion than have its sister circuits, as exemplified by Mr. Valencia's case. Here, the district court expressly stated that it was exercising its "option to disagree" under *Kimbrough*. ER16. The district court acknowledged the Commission's policy against imposing supervised release in the mine-run case. ER16. The court then rejected the policy. ER28. In so doing, the court expressed disagreement not with the Commission out of § 3553(a) concerns, but rather with the U.S. Attorney's Office based on efficiency concerns. ER16-17.

The district court's reason for exercising its *Kimbrough* discretion was improper, and had Mr. Valencia's case arisen in the Third, Fourth, Seventh, or Eighth Circuits, the case likely would have been reversed and remanded for resentencing. These courts likely would have vacated Mr. Valencia's sentence because § 5D1.1(c) "remain[ed] relevant to the determination of a reasonable sentence," *Hodge*, 469 F.3d at 757, but the "district court did not acknowledge the policy statement[] [or] . . . offer any insight into why the court believed" that its rejection of the Guidelines was appropriate." *Engle*, 592 F.3d at 504 (emphasis original). However, because Mr. Valencia appealed to the Ninth Circuit, his sentence was affirmed. *See* App'x A at 4-5. One of these approaches is incorrect: either a district court must consider pertinent policy statements and fully explain its reasons for invoking *Kimbrough* discretion under § 3553(a) before rejecting the Guidelines in a mine-run case, or it need not do so.

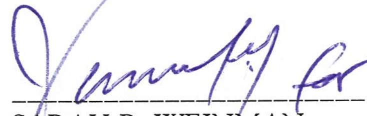
The courts of appeal need guidance from this Court on the scope of a district court's *Kimbrough* discretion and the scope of a court of appeals' "closer review" and remain split on the issue. The resulting division of authority is untenable. The division leads to disparities in federal

sentencing and disturbances in what is intended to be a symbiotic relationship among the district courts, courts of appeal, and the Sentencing Commission. The Court therefore should grant the instant petition to bring the lower courts into alignment and reaffirm the important institutional role of the Sentencing Commission.

CONCLUSION

On the basis of the foregoing, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,



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