

NO. \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

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KONRAD WOLFF,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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On Petition for Writ of Certiorari to the  
United States Court of Appeals  
For the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

(1)

In *Rita v. United States*, 551 U.S. 338 (2007), this Court detailed what explanation is required of district judges at sentencing hearings under 18 U.S.C. § 3553. A district judge's clear decision to adopt the United States Sentencing Commission's proposed Guideline range does "not necessarily require lengthy explanation." *Rita*, 551 U.S. at 356. But when a party "contests the Guidelines sentence generally under § 3553(a)—that is, argues that the Guidelines reflect an unsound judgment, or, for example, that they do not generally treat certain defendant characteristics in the proper way—or argues for departure," this Court explained more is required. *Id.* at 357. A judge presented with "nonfrivolous reasons" for rejecting a Guideline range must "normally go further and explain why he has rejected those arguments." *Id.* The district court must set "forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Id.* at 356. Shortly after *Rita* was decided, this Court held in *Kimbrough v. United States*, 552 U.S. 85 (2007), that a district court could vary from a Guideline range based on categorical policy disagreements with them, and not just on individualized determinations they yield an excessive sentence in a particular case.

The first question presented is whether under *Rita*, a district court must explain its reasons on the record for rejecting a policy-based challenge to the child pornography Guideline, U.S.S.G. § 2G2.2—a controversial Guideline with the highest rate of variance—brought under *Kimbrough*?

This issue is closely related to the issue presented in *Chavez-Meza v. United States*, No. 17-5639, in which this Court granted review to decide whether a district court is obligated to explain its decision to deny a discretionary sentence reduction in a 18 U.S.C. § 3582(c)(2) proceeding.

(2)

Federal Rule of Criminal Procedure 11(c)(1) prohibits a district judge from participating in plea discussions "out of concern that a defendant might be induced to plead guilty rather than risk displeasing the judge" and to "facilitate objective assessments of the voluntariness of a defendant's plea." *United States v. Davila*, 569 U.S. 597, 606 (2013). The second question presented is: in order to find a violation of this prohibition on judicial participation in plea discussions, must a district court *initiate* the discussion, as the United States Court of Appeals for the Ninth Circuit held below? Or, as held by the Second, Fifth and Seventh Circuits, is *any* judicial involvement in plea negotiations—even when initiated by the parties as opposed to a district court—a violation of Rule 11?

### INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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## INTRODUCTION

Konrad Wolff respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The Ninth Circuit's unpublished, split opinion affirming Mr. Wolff's conviction and sentence is reported at \_\_\_ Fed. Appx. \_\_\_, 2017 WL 4965695 (9th Cir. Oct. 31, 2017), and included in the Appendix ("App.") at 2a. Its December 20, 2017 order denying Mr. Wolff's petition for rehearing en banc is unreported and included in the Appendix at 6a.

## STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Ninth Circuit entered its judgment in favor of respondent on October 31, 2017, denied Mr. Wolff's petition for rehearing en banc on December 20, 2017, and issued its mandate on December 28, 2017. This petition is filed within 90 days of the Ninth Circuit's denial of Mr. Wolff's petition for rehearing en banc, and therefore timely under Sup. Ct. R. 13.3.

## STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reproduced in the Appendix at 30a.

## STATEMENT OF FACTS

On February 19, 2015, a superseding indictment was filed against Mr. Wolff, charging him with receipt of child pornography, a violation of 18 U.S.C. § 2252(a)(2). On July 6, 2015, Mr. Wolff moved to suppress the fruits of the seizures and searches

of his electronic devices that formed the basis of the federal case. The district court denied the motion in a written order issued on October 14, 2015. On December 18, 2015, Mr. Wolff was found guilty by the district court following a bench trial on stipulated facts. App. 2a, 7a, 11a.

At sentencing, the parties agreed the applicable Guideline was United States Sentencing Guideline (“U.S.S.G.”) § 2G2.2, and agreed on the specific Guideline calculations. App. 11a-12a.

As part of the agreed upon Guideline calculation, the parties agreed that Mr. Wolff should receive a downward adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1. App. 7a-8a, 12a. They agreed Mr. Wolff was entitled to a two-level downward adjustment under § 3E1.1(a) because he had “clearly demonstrate[d] acceptance of responsibility for his offense.” The parties also agreed he should receive—on the government’s motion—an additional one-level downward adjustment under § 3E1.1(b) because he had “timely notif[ied] authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently.”

The parties agreed the adjusted offense level was 30, that Mr. Wolff was in criminal history category I, and the resulting advisory Guidelines range was 97-121 months. App. 12a.

Though Mr. Wolff agreed with this Guidelines calculation, he argued in his sentencing memorandum that the child pornography Guideline, U.S.S.G. § 2G2.2, was excessive and unsupported by empirical evidence. App. 21a-29a. He requested

the district court exercise its discretion under *Kimbrough v. United States*, 552 U.S. 85 (2007) to vary downward and impose a sentence below that range. App. 24a-25a.

Mr. Wolff argued that since the 1990's, the sentencing ranges generated by § 2G2.2 had dramatically increased but—like the crack cocaine Guidelines at issue in *Kimbrough*—that was solely due to congressional mandate, rather than empirical study. App. 25a-26a. He also argued that many of the enhancements listed in § 2G2.2 and applied to his conduct, also applied to virtually all defendants sentenced under § 2G2.2, thus leaving little room for culpability distinctions. App. 27a-28a. Finally, Mr. Wolff noted that a substantial number of courts had concluded that § 2G2.2 was not entitled to significant deference because it was not developed through the Sentencing Commission's statutorily mandated evidence- and expert-based process. App. 24a-25a. Mr. Wolff pointed out that an increasing number of federal judges had grown uncomfortable with the sentencing ranges produced by § 2G2.2. He cited United States Sentencing Commission ("U.S.S.C.") data showing that in fiscal year 2015, almost 70% of sentences actually imposed on defendants sentenced under § 2G2.2 were below the advisory guideline range. App. 27a.

Prior to sentencing, Mr. Wolff also objected to restitution requests made by three victims depicted in the child pornography he possessed. It was undisputed Mr. Wolff had nothing to do with the production of these images, and did not distribute them to other individuals. Mr. Wolff objected that neither the probation office nor the government calculated a restitution amount comporting with his "relative role in

the causal process that underlies the victim's general losses" as required by *Paroline v. United States*, 134 S. Ct. 1710, 1727 (2014). App. 8a-9a.

At sentencing on May 26, 2016, the government moved for the additional one level downward adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1(b). The prosecutor explained Mr. Wolff had "save[d] the government considerable time and resources" by agreeing to a stipulated-facts bench trial. App. 7a. The district court disagreed, stating he was "skeptical" of the government's motion because Mr. Wolff had contested restitution and, by proceeding to bench trial, reserved his right to appeal. App. 7a-8a. After an extended discussion about whether Mr. Wolff was entitled to the acceptance of responsibility reduction, defense counsel told the district court that if it was "concerned about not awarding the third point based on restitution," Mr. Wolff would concede that issue. App. 9a.

The district court ultimately agreed to grant the third point for acceptance of responsibility in exchange for Mr. Wolff's appellate waiver as to the restitution order:

COURT: All right. So – So we're clear, [defense counsel], Mr. Wolff will pay the restitution to the three victims in the amounts specified in the presentence report and not challenge that order on appeal; is that right?

DEFENSE COUNSEL: So waived.

COURT: Okay. All right. I will grant, then, the additional level of reduction on the government's motion. And we will require Mr. Wolff to pay the restitution. That's stated in the presentence report.

App. 9a-10a.

Following the extraction of an agreement to pay restitution and the appellate waiver, the district court adopted the Guideline range agreed to by the parties. It

then stated it had “read and considered” Mr. Wolff’s sentencing memorandum. App. 10a. But the district court did not address any of Mr. Wolff’s arguments for rejecting § 2G2.2, not even to dismiss them shorthand. Nor did he explain why he believed the range generated by § 2G2.2 was appropriate. The district court sentenced Mr. Wolff to 108 months in the custody of the Bureau of Prisons (“BOP”), and ordered him to pay \$6,000 in restitution. App 20a.

On direct appeal, Mr. Wolff argued the district court procedurally erred under *Rita v. United States*, 551 U.S. 338 (2007), by failing to explain its rejection of his *Kimbrough* challenge to § 2G2.2. He also challenged the restitution order, arguing it failed to comply with the causation requirements of *Paroline*. Mr. Wolff argued that his oral waiver of the right to appeal the restitution order was invalid because it had been improperly negotiated by the district court, in violation of Federal Rule of Criminal Procedure 11(c)(1).<sup>1</sup>

In a split decision, the United States Court of Appeals for the Ninth Circuit affirmed Mr. Wolff’s sentence. App. 2a. The majority concluded the district court did not procedurally err because it professed to have “read and considered” Mr. Wolff’s sentencing memorandum, which “reminded the court of its discretion under *Kimbrough*.” App. 4a. The majority also declined to review Mr. Wolff’s challenge to the restitution order. It determined the appellate waiver was valid and enforceable,

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<sup>1</sup> Mr. Wolff also argued the district court improperly denied his pre-trial motion to suppress. That claim is not at issue in this petition.

finding no Rule 11 error because the district court neither “initiated” nor “directly negotiated” the waiver. *Id.*

The third judge on the panel—the Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation—dissented on both issues. App. 5a. First, Judge Gwin concluded that, while the district court “provide[d] a number of reasons for” the 108-month sentence, it nonetheless failed to “go further and explain” why it rejected Mr. Wolff’s challenge to the child pornography Guideline as required by *Rita*. *Id.* Second, Judge Gwin believed “the district court unnecessarily involved itself in plea negotiations” in violation of Rule 11. *Id.* He believed “[t]he district judge essentially engaged the defendant in a trade. If the defendant waived the defendant’s objection to restitution, the district court would award a third level for acceptance of responsibility under § 3E1.1(b).” *Id.* As a result, “Wolff’s Guidelines recommended incarceration shifted downward in exchange for Wolff’s agreement not to challenge \$6,000 in restitution.” *Id.*

Mr. Wolff filed a timely petition for panel rehearing and rehearing en banc, which was denied by the Ninth Circuit on December 20, 2017.

#### REASON FOR GRANTING THE WRIT

Mr. Wolff requests this Court issue a writ of certiorari to clarify the contours of two important procedural safeguards for criminal defendants.

First, this Court should grant review to make clear what a district court’s obligations under *Rita* are when presented with a policy-based, *Kimbrough* challenge to the child pornography Guideline, U.S.S.G. § 2G2.2. In light of the growing judicial

rejection of the Guideline—quantified by the fact 70% of sentences in 2017 fell below the sentencing range recommended by § 2G2.2—it is clear a *Kimbrough* attack in a child pornography case is “nonfrivolous,” thus requiring a judge to “go further and explain why he has rejected those arguments.” *Rita*, 551 U.S. at 357. This Court should grant certiorari to explain what going further means in this context, and whether it is enough for a district court to merely state it has “read and considered” the defendant’s sentencing memorandum, and then impose a sentence within the Guideline range.

This issue is closely related to the issue presented in *Chavez-Meza v. United States*, No. 17-5639, in which this Court granted certiorari to decide whether a district court is obligated to explain its decision to deny a discretionary sentence reduction in a 18 U.S.C. § 3582(c)(2) proceeding.

Second, though the plain language of Rule 11(c)(1) flatly prohibits judicial participation in plea discussions, the Ninth Circuit below split with the Second, Fifth, and Seventh Circuits to graft a requirement that a district judge must *initiate* the discussion with the parties in order to violate Rule 11. Given the fact that the vast majority of federal criminal cases are resolved with a guilty plea, this Court should grant review to clarify the circumstances in which a district judge violates the prohibition in Rule 11(c)(1) against judicial participation in plea negotiations.

Mr. Wolff respectfully requests this Court issue a writ of certiorari.

- A. This is an ideal case to clarify a sentencing court's obligation under *Rita* to explain its decision to reject a *Kimbrough* policy-based challenge to a Sentencing Guideline.

When "Congress has declared that a decision will be governed by consideration of particular factors, a district court must carefully consider those factors as applied to the particular case and, whatever its decision, clearly articulate their effect in order to permit meaningful appellate review." *United States v. Taylor*, 487 U.S. 326, 336 (1988). That is the only way an appellate court can "ascertain whether a district court has ignored or slighted a factor that Congress has deemed pertinent to the choice of remedy, thereby failing to act within the limits prescribed by Congress." *Id.* at 337.

Congress provided for the "consideration of particular factors" at sentencing in 18 U.S.C. § 3553(a). As a result, a sentencing court "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Gall v. United States*, 552 U.S. 38, 50 (2007).

In *Rita*, this Court elaborated a "lengthy explanation" is not necessarily required where circumstances "make clear that the judge rests his decision upon the [Sentencing] Commission's own reasoning that the Guidelines sentence is a proper sentence." 551 U.S. at 356-57. A sentencing court's obligations change, however, when a party argues that the Guidelines themselves "reflect an unsound judgment." *Id.* at 357. In such cases, a judge presented with "nonfrivolous reasons" for rejecting a sentence within the Guidelines must "normally go further and explain why he has rejected those arguments." *Id.* at 356. That means setting "forth enough to satisfy

the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Id.*

After *Rita*, this Court held in *Kimbrough* that district courts are entitled to reject and vary categorically from a correctly calculated Guidelines range "based solely on policy considerations, including disagreement with the Guidelines," particularly when a particular Guideline does not "exemplify the [Sentencing Commission's exercise of its characteristic institutional role." 552 U.S. at 101, 109; see also *Spears v. United States*, 555 U.S. 261, 266 (2009). Such policy-based disagreements relate to several of the specific sentencing factors in § 3553(a), including the nature and circumstances of the offense, the history and characteristics of the defendant, the Guidelines range and policy statements of the Sentencing Commission, and avoiding unwarranted sentencing disparity. See *Kimbrough*, 552 U.S. at 109. A disagreement also speaks to the overall mandate in § 3553(a) to impose a sentence "sufficient, but not greater than necessary" to achieve the purposes of sentencing. See *Spears*, 555 U.S. at 264.

Although Mr. Wolff presented a detailed *Kimbrough* challenge to the child pornography Guideline, the district court offered no explanation of its decision to reject that challenge, or explain why it believed the sentencing range generated by § 2G2.2 reflected sound policy. The majority below determined the district court had nonetheless satisfied its procedural requirements under *Rita* by "consider[ing]" Mr. Wolff's sentencing memorandum and "appreciat[ing]" its general discretion to sentence outside the Guidelines. App. 4a. The dissenting judge below reached the

opposite result, concluding the district court failed to fulfill its obligation under *Rita* to “go further and explain” why it rejected Mr. Wolff’s *Kimbrough* challenge to § 2G2.2. App. 5a. This split opinion demonstrates the need for this Court to provide guidance to sentencing courts on how to fulfill its *Rita* obligations when presented with a *Kimbrough* challenge to a particular sentencing Guideline.

That this issue arises in the context of the child pornography Guideline, § 2G2.2, is no surprise. Though Congress intended the Sentencing Guidelines “to inform judicial discretion in order to reduce unwarranted disparities in federal sentencing,” there are times when “the Guidelines become a cause of inequality, not a bulwark against it.” *Freeman v. United States*, 564 U.S. 522, 525 (2011) (plurality opinion). Over the past decade, courts have increasingly recognized that § 2G2.2 is a cause of inequality.

Like the disparity between crack and powder cocaine at issue in *Kimbrough*, the most common judicial observations about the sentences generated under § 2G2.2 are that they are disproportionately severe and not developed pursuant to the Sentencing Commission’s characteristic institutional role.

The sentencing ranges generated by § 2G2.2 have been deemed “draconian,” *United States v. Grober*, 624 F.3d 592, 596 (3d Cir. 2010), and “harsher than necessary.” *United States v. Stone*, 575 F.3d 83, 97 (1st Cir. 2009). The Guideline is “fundamentally different from most” and “cobbled together” rather than produced through an empirical analysis, resulting oftentimes in “manifestly unjust” sentences. *United States v. Dorvee*, 616 F.3d 174, 182-89 (2d Cir. 2010); *see also United States*

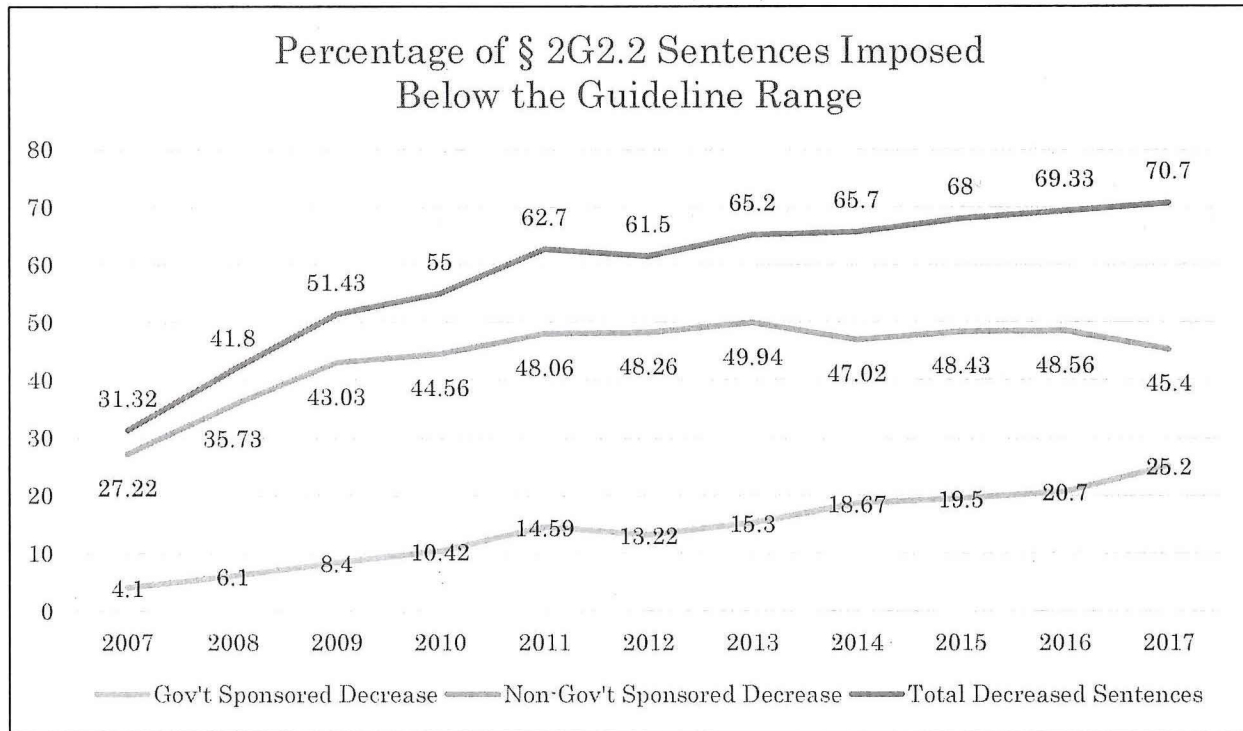
*v. Henderson*, 649 F.3d 955, 960 (9th Cir. 2011) (concluding § 2G2.2 was “not developed in a manner exemplify[ing] the Commission’s exercise of its characteristic institutional role”) (internal quotations marks omitted).<sup>2</sup>

The “widespread dissatisfaction” with the sentences produced by § 2G2.2, *United States v. Apodaca*, 641 F.3d 1077, 1083 (9th Cir. 2011), is reflected in the Sentencing Commission’s own data. In a 2010 survey, 69% of federal judges believed that the Guideline ranges under § 2G2.2 for receipt of child pornography—the

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<sup>2</sup> Numerous district courts have determined that, for virtually the same reasons presented by Mr. Wolff below, § 2G2.2 is not entitled to the deference typically afforded to the Guidelines. *See, e.g., United States v. R.V.*, 157 F. Supp. 3d 207, 209-11 (E.D.N.Y. 2016); *United States v. Diaz*, 720 F. Supp. 2d 1039, 1041-43 (E.D. Wis. 2010); *United States v. Riley*, 655 F. Supp. 2d 1298, 1302 (S.D. Fla. 2009); *United States v. McElheney*, 630 F. Supp. 2d 886, 895 (E.D. Tenn. 2009); *United States v. Beiermann*, 599 F. Supp. 2d 1087, 1103 (N.D. Iowa 2009); *United States v. Phinney*, 599 F. Supp. 2d 1037, 1043 (E.D. Wis. 2009); *United States v. Stern*, 590 F. Supp. 2d 945, 960-61 (N.D. Ohio 2008); *United States v. Johnson*, 588 F. Supp. 2d 997, 1003-04 (S.D. Iowa 2008); *United States v. Baird*, 580 F. Supp. 2d 889, 892 (D. Neb. 2008); *United States v. Hanson*, 561 F. Supp. 2d 1004, 1008-11 (E.D. Wis. 2008); *United States v. Shipley*, 560 F. Supp. 2d 739, 744 (S.D. Iowa 2008); *see also United States v. Munoz*, 2012 WL 5351750, \*4 (D. Minn. 2012); *United States v. Cameron*, 2011 WL 890502, \*5-6 (D. Me. 2011) (unpublished); *United States v. Burns*, 2009 WL 3617448, at \*7 (N.D. Ill. 2009) (unpublished); *United States v. Doktor*, 2008 WL 5334121, \*1 (M.D. Fla. 2008) (unpublished); *United States v. Noxon*, 2008 WL 4758583, \*2-3 (D. Kan. 2008) (unpublished); *United States v. Ontiveros*, 2008 WL 2937539, at \*8 (E.D. Wis. 2008) (unpublished); *United States v. Goldberg*, 2008 WL 4542957, at \*6 (N.D. Ill. 2008).

conviction at issue here—were too high.<sup>3</sup> The rate of downward variance—sentences imposed below the recommended Guideline range—in cases sentenced under § 2G2.2 has steadily increased over the last ten years.



In 2007, 30% of sentences under § 2G2.2 were imposed below the Guideline range.<sup>4</sup> By 2017, that number was 70%. The government itself has recognized the inequality generated by § 2G2.2. In 2007, the government only sponsored a sentence under the

<sup>3</sup> See U.S. Sentencing Commission, *Results of Survey of United States District Judges January 2010 through March 2010*, p. 13, available at [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608\\_Judge\\_Survey.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf).

<sup>4</sup> This chart was compiled by looking at the number of § 2G2.2 sentences imposed relative to the Guideline range, as reported by the U.S. Sentencing Commission in Table 28 in its annual Sourcebook of Federal Sentencing Statistics. The sourcebooks are available at <http://www.ussc.gov/research/sourcebook/archive>.

Guideline range in 4% of cases. By 2017, that number was 25%. Child pornography offenses as a whole have the second greatest number of sentences imposed below the Guideline range, after the far less frequently prosecuted category of tax offenses.<sup>5</sup>

A sentence imposed within the range recommended by § 2G2.2 is the *exception*, not the norm. It follows that a district court presented with a policy-based *Kimbrough* challenge to § 2G2.2 has a procedural *obligation* to “go further and explain why he has rejected those arguments.” *Rita*, 551 U.S. at 356. “It is not enough for a sentencing court to recite the § 3553(a) factors, say that counsel’s arguments have been considered, and then declare a sentence.” *United States v. Olhovsky*, 562 F.3d 530, 547 (3d Cir. 2009) (internal quotations and brackets omitted). “[T]he *Rita* instruction is concerned with *explanation*, not merely *consideration*.” *United States v. Trujillo*, 713 F.3d 1003, 1010 (9th Cir. 2013) (emphasis in original). A district court may very well deem the sentencing range generated by the Guideline appropriate. But without a specific explanation, the appellate court cannot know why the district court reached that conclusion, let alone determine whether the district court abused its discretion.

A statement of reasons by the district judge also provides “relevant information to both the court of appeals and ultimately the Sentencing Commission,” allowing the

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<sup>5</sup> In 2017, 68.5% of the 1,809 child pornography offenders—a broader category than offenders specifically sentenced under U.S.S.G. § 2G2.2—received a sentence below the Guideline range. The only group receiving a higher rate of variance was the 430 tax offenders, of whom 73.5% received a sentence below the advisory Guideline range. See U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics (2017)*, Table 27A, available at <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/Table27A.pdf>.

Guidelines to “constructively evolve over time, as both Congress and the Commission foresaw.” *Rita*, 551 U.S. at 358. The Sentencing Commission modifies the Guidelines “in light of what it learns, thereby encouraging what it finds to be better sentencing practices” and “promot[ing] uniformity in the sentencing process.” *United States v. Booker*, 543 U.S. 220, 263 (2005). Requiring a district court explain its reasons for rejecting a *Kimbrough* challenge to a controversial Guideline with a high rate of variance provides feedback that informs the sentencing discussions and policy of the future.

This case thus presents an ideal opportunity for this Court to clarify the duty of a sentencing judge to *explain* its rejection of a nonfrivolous *Kimrough* challenge to a specific Sentencing Guideline. The Ninth Circuit’s decision allowed the district court to place Mr. Wolff amongst the minority of federal child pornography defendants without any meaningful explanation for why it believed the range generated by § 2G2.2 was sound policy.

This Court has already granted certiorari this term in a case raising similar issues. In *Chavez-Meza v. United States*, No. 17-5639, this Court will decide whether a district court is obligated to explain its decision to deny a discretionary sentence reduction in an 18 U.S.C. § 3582(c)(2) proceeding. Section 3582(c)(2) allows a district court to resentence a defendant after the Sentencing Commission lowers the Guideline range for a particular crime. A motion brought under § 3582(c) is about finding “a systemic solution . . . to remedy systemic injustice.” *Freeman*, 564 U.S. at 534. A *Kimrough* challenge to a controversial and criticized Guideline like § 2G2.2

is also an attempt to remedy a “systemic injustice.” Like all sentencing hearings, § 3582(c) proceedings require the district court consider the § 3553(a) factors explicitly. *See* 18 U.S.C. § 3582(c)(2) (permitting district court to reduce sentence “after considering the factors set forth in section 3553(a) to the extent that they are applicable”).

*Chavez-Meza* requires this Court to clarify the interplay between § 3582(c)(2) and the sentencing court’s obligation under § 3553(a) to explain its sentencing decisions. This Court should likewise grant certiorari here to clarify the interplay between *Rita* and *Kimbrough* and decide what amount of explanation is required when a defendant raises a valid policy challenge to a Sentencing Guideline.

B. This Court should grant certiorari to resolve the Circuit split on whether a violation of the prohibition of judicial involvement in plea negotiations in Federal Rule of Criminal Procedure 11(c)(1) requires the district court initiate the discussion.

Under Federal Rule of Criminal Procedure 11(c)(1), the government and the defendant “may discuss and reach a plea agreement,” but “[t]he court must not participate in these discussions.” As this Court has explained, the prohibition is intended both to “facilitate objective assessments of the voluntariness of a defendant’s plea” and out of concerns that “a defendant might be induced to plead guilty rather than risk displeasing the judge who would preside at trial.” *United States v. Davila*, 569 U.S. 597, 606 (2013). This Court in *Davila* made clear that Rule 11(c)(1) serves as a “prohibition on judicial participation in plea discussions,” *Davila*, 569 U.S. at 605. It said nothing about who initiates this “judicial participation.” *Id.* Yet in this case, the Ninth Circuit grafted a requirement that Rule 11 is only violated when a

judge “initiate[s]” the discussion. App. 4a. Its decision is in conflict with decisions from the Second, Fifth and Seventh Circuits.<sup>6</sup>

In *United States v. Werker*, 535 F.2d 198 (2d Cir. 1976), the Second Circuit found Rule 11(c)(1) error where defense counsel initiated discussions with the judge regarding the plea arrangements. After the government declined to offer a favorable plea deal, defense counsel attempted to negotiate directly with the judge and get an indication of the sentence that would follow from an unqualified guilty plea made without any plea agreement. 535 F.2d at 201. The district court agreed to provide an indicated sentence after reviewing the presentence report. *Id.* The Second Circuit concluded that Rule 11(c)(1) “categorically” prohibited such an exchange. *Id.* at 201. The initiating party was irrelevant.

In *United States v. Crowell*, 60 F.3d 199 (5th Cir. 1995), the Fifth Circuit found a Rule 11(c)(1) violation when the parties affirmatively reached out to the judge to discuss the terms of a proposed plea agreement. After the judge rejected an initial plea agreement, the parties formulated a second plea agreement and “decided to contact the district court to inquire in advance whether the court anticipated any problems” with it. 60 F.3d at 202. The judge responded that an acceptable agreement would need to provide for a sentence “significantly” longer than the sentence proposed by the first, rejected agreement. *Id.* Despite the Fifth Circuit’s recognition that the

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<sup>6</sup> Although Rule 11(c)(1) is concerned with plea negotiations, the Sixth and Ninth Circuits have deemed its prohibitions against judicial involvement apply equally when a district court negotiates an appellate waiver at sentencing. *See United States v. Markin*, 263 F.3d 491, 496-97 (6th Cir. 2001); *United States v. Gonzalez-Melchor*, 648 F.3d 959, 963-64 (9th Cir. 2011).

judge's participation was "invited by counsel's improper inquiry," it concluded the discussion was prejudicial Rule 11(c)(1) error. *Id.* at 205, n.1.

The Seventh Circuit drew the same conclusion under similar facts in *United States v. Kraus*, 137 F.3d 447 (7th Cir. 1998). After the judge rejected the parties' first plea agreement as too lenient, the government, through a series of inquiries, attempted to "nail down exactly what the court found objectionable in the agreement" and whether there was "any possibility" of an agreement that the judge would accept. 137 F.3d at 449-50. The judge responded the parties could either reach another agreement or "open it up," but that a sentence less than 121 months would be unacceptable. *Id.* Later, the government contacted the judge's clerk to inform her the parties had reached an agreement for a higher sentence, and the clerk remarked the new agreement would have more "credence." *Id.* at 450-51. On appeal, the Seventh Circuit found prejudicial Rule 11(c)(1) error. *Id.* at 454-57. Again, it was irrelevant that the government, rather than the judge, initiated the exchange.

In contrast, here the Ninth Circuit concluded the district court did not violate Rule 11(c)(1) because it "neither 'initiated' nor 'directly negotiated' the waiver." App. 4a. That decision is in direct conflict other Circuit court opinions. It is even at odds with other Ninth Circuit decisions. In *United States v. Myers*, 804 F.3d 1246 (9th Cir. 2015), the defendant asked a judge to lead a criminal settlement conference, over the government's initial objection, to reach a resolution to his criminal case. 804 F.3d at 1251-52. The defendant acknowledged he "voluntarily participated in the settlement conference" by specifically requesting the conference himself. *Id.* at 1250.

Nonetheless, this Court found a Rule 11 violation, noting the rule “*categorically* bars judges from participating in plea negotiations.” *Id.* at 1253 (emphasis added). It was irrelevant the defendant initiated the judicial discussion.

While some circuit courts give additional weight when a judge initiates the improper discussion,<sup>7</sup> no circuit has followed the approach of the Ninth Circuit panel below and *required* a judge initiate the discussion in order to find a Rule 11(c)(1) error. Instead, most courts have deemed “Rule 11’s proscription [] categorical and emphatic.” *United States v. Baker*, 489 F.3d 366, 373 (D.C. Cir. 2007).<sup>8</sup> Indeed, one of the first cases looking at Rule 11(c)(1) just one year after it was enacted in 1975 noted “commentaries regarding this injunction, and consideration of its intendment, leave no room for doubt that its purpose and meaning are that the sentencing judge *should take no part whatever in any discussion or communication* regarding the sentence to be imposed prior to the entry of a plea of guilty or conviction, or submission to him of a plea agreement.” *Werker*, 535 F.2d at 201 (emphasis added).

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<sup>7</sup> See, e.g., *United States v. Bradley*, 455 F.3d 453, 462 (4th Cir. 2006) (looking to fact that judge “initiated plea discussions” to find error under Rule 11(c)(1)); *United States v. Harrell*, 751 F.3d 1235, 1239 (11th Cir. 2014) (finding Rule 11(c)(1) error in part because the district court “instigated” and “took the lead” in orchestrating plea agreement); *United States v. Baker*, 489 F.3d 366 (D.C. Cir. 2007) (finding Rule 11(c)(1) error in part because judge “unilaterally initiated and engaged in a lengthy plea discussion” with defendant).

<sup>8</sup> Not all courts have found Rule 11’s prohibition categorical. See *United States v. Paul*, 634 F.3d 668, 672 (2d Cir. 2011) (concluding “[i]ssues arising under Rule 11(c)(1) are highly fact-specific” and a “bright-line rule is inappropriate”) (internal quotations omitted); *United States v. Sandoval-Enrique*, 870 F.3d 1207, 1218, n.14 (10th Cir. 2017), *cert. denied*, 2018 WL 311829 (Jan. 8, 2018) (noting inquiry into Rule 11(c)(1) error “does not lend itself to bright-line rules”).

Other Circuits have reached similar conclusions. The Fifth Circuit has deemed Rule 11(c)(1) a “bright line rule” and “an absolute prohibition on all forms of judicial participation in or interference with the plea negotiation process.” *United States v. Pena*, 720 F.3d 561, 570 (5th Cir. 2013) (internal quotations omitted). The Eleventh Circuit has explained Rule 11(c)(1) is “a bright line rule that prohibits the participation of the judge in plea negotiations under any circumstances” and “admits of no exceptions.” *United States v. Harrell*, 751 F.3d 1235, 1239 (11th Cir. 2014) (internal quotations and brackets omitted). This Court should therefore grant certiorari to clarify that Rule 11(c)(1)’s prohibition on judicial participation in plea discussions is absolute and does not require a district judge initiate the discussion.<sup>9</sup>

This case presents an ideal vehicle to address this important, recurring issue. Almost all federal criminal defendants—97.2% in 2017—plead guilty.<sup>10</sup> This case presents the Court with an opportunity to make clear that *any* judicial involvement

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<sup>9</sup> Nor was the Ninth Circuit correct that the district court did not initiate the error. The district court initiated the waiver by improperly threatening to withhold an acceptance of responsibility adjustment. As Judge Gwin explained in his dissenting opinion, “the district judge refused the government’s motion unless Wolff withdrew his objection to restitution.” App. 5a. The district court placed Mr. Wolff in the unenviable position of having to decide whether to waive his valid legal challenges to restitution in exchange for receiving a lowered Guideline range, and likely a shorter sentence. *See Peugh v. United States*, 133 S. Ct. 2072, 2084 (2013) (“the Sentencing Commission’s data indicate that when a Guidelines range moves up or down, offenders’ sentences move with it.”).

<sup>10</sup> *See* U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics (2017)*, Figure C, available at: <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/FigureC.pdf>.

in such plea negotiations—regardless of who initiates the discussion—is not permitted.

With respect to Mr. Wolff specifically, the Ninth Circuit’s decision to require the district court initiate the forbidden negotiation in order to find a Rule 11 error undermines the rationale for the rule. The prohibition

flows from the fact that a judge’s participation in plea negotiation is inherently coercive. The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentencing in excess of that proposed is present whether referred to or not. It is the discretion to impose either a lenient or lengthy sentence that lies at the heart of the coercive potential inherent when a judge participates in plea negotiations.

*Markin*, 263 F.3d at 497–98 (quotations and citations omitted). The concerns over the “unequal positions of the judge and the accused” exist whether it is the judge, the government or the defendant that initiates the forbidden discussion.

This case involved the precise sort of coercive *quid pro quo* negotiation Rule 11(c)(1) aimed to prevent. As the dissenting judge below noted, “[t]he district judge essentially engaged the defendant in a trade. If the defendant waived the defendant’s objection to restitution, the district court would award a third level for acceptance of responsibility under § 3E1.1(b).” App. 5a. “Functionally, Wolff’s Guidelines recommended incarceration shifted downward in exchange for Wolff’s agreement not to challenge \$6,000 in restitution.” *Id.*

The result here was Mr. Wolff abandoned his valid legal arguments against restitution “rather than risk displeasing the judge.” *Davila*, 569 U.S. at 606. In turn, the discussion—which resulted in an appellate waiver enforced by the Ninth Circuit—thwarted an “objective assessment[]” of the restitution award. *Id.* The precise concerns underlying enactment of the bar against judicial involvement in plea negotiations thus came to the surface here, regardless of who initiated the discussion.

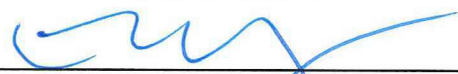
This Court should grant review.

### CONCLUSION

For the reasons stated above, Mr. Wolff respectfully requests this Court issue a writ of certiorari.

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