No. 13-557

In the Supreme Court of the United States

RICHARD BISTLINE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court provided an adequate explanation for its wholesale rejection of Sentencing Guidelines § 2G2.2, when it failed directly to address the underlying policy rationales of that Guideline.

2. Whether the court of appeals erred in considering certain Sentencing Guidelines policy statements in concluding that the district court's sentence, which imposed one day of imprisonment for possession of hundreds of child-pornography images (including images of child rape), was substantively unreasonable.

3. Whether the court of appeals, which stated that it was applying abuse-of-discretion review to the substantive reasonableness of petitioner's sentence, in fact applied de novo review.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 720 F.3d 631. The previous opinion of the court of appeals (Pet. App. 34-54) is reported at 665 F.3d 758.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 2013. A petition for rehearing was denied on August 2, 2013 (Pet. App. 32-33). The petition for a writ of certiorari was filed on October 30, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Ohio, petitioner was convicted of possessing child pornography, in

violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). Judgment 1. He was sentenced to one day of imprisonment, to be followed by ten years of supervised release, including 30 days of home confinement. Pet. App. 77-79. The court of appeals vacated that sentence and remanded for resentencing, *id.* at 34-54, and this Court denied certiorari, 133 S. Ct. 423 (2012) (No. 11-1431). On remand, the district court sentenced petitioner to one day of imprisonment to be followed by ten years of supervised release, including three years of home confinement. Pet. App. 4. The court of appeals again vacated petitioner's sentence, and it remanded the case for reassignment and resentencing. *Id.* at 1-8.

1. In September 2007, law-enforcement agents downloaded 12 images of child pornography from an Internet Protocol address later determined to belong to petitioner. Pet. App. 36. Petitioner had placed the images in his "shared files" folder on a peer-to-peer Internet program (LimeWire), making them available to program users worldwide. *Id.* at 6, 36. Petitioner ultimately pleaded guilty to knowingly possessing 305 images and 56 videos of child pornography on his computer, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). Pet. App. 2, 36; see Judgment 1.

2. a. The Presentence Investigation Report (PSR) recommended a base offense level of 18, Sentencing Guidelines § 2G2.2(a)(1) (2008); three two-level enhancements, because his offense involved material depicting prepubescent minors, *id.* § 2G2.2(b)(2), distribution of child pornography to others, *id.* § 2G2.2(b)(3)(F), and use of a computer, *id.* § 2G2.2(b)(6); a five-level enhancement, because of the large number of images petitioner possessed,

id. § 2G2.2(b)(7)(D); and a three-level reduction for acceptance of responsibility, *id.* § 3E1.1. With a total offense level of 26 and a criminal history category of I, petitioner's recommended term of imprisonment under the advisory Sentencing Guidelines was 63 to 78 months. PSR ¶¶ 20-33, 36, 58. The maximum authorized sentence for petitioner's offense was ten years of imprisonment. 18 U.S.C. 2252(b)(2).

The PSR recommended a below-Guidelines sentence of 24 months of imprisonment, citing the facts that petitioner was 66 years old, had no prior criminal convictions, had health problems (having suffered two strokes in the preceding 13 years), and cared for his wife. PSR ¶¶ 45, 72. The government opposed that recommendation in a sentencing memorandum and asked the court to impose a sentence within the Guidelines range. Pet. App. 36.

b. At an initial sentencing hearing, the district court adopted the PSR's Guidelines calculations. 11/12/09 Sentencing Tr. 4. The court stated, however, that it had concluded that "the [G]uidelines for possession of child pornography are seriously flawed." Pet. App. 71; see *id.* at 68-74. In particular, the court noted its concern that because some aspects of the child-pornography Guideline, Section 2G2.2, "are a reflection of congressional mandates," the Guideline "may well have [been] influenced" by "political considerations." *Id.* at 69. The court stated that it would give the child-pornography Guideline "consideration, although less [deference] than [it] would other guidelines." *Id.* at 71.

The district court announced that it would sentence petitioner to one day of imprisonment (which he could serve in the courthouse lockup), to be followed by ten

years of supervised release, including 30 days of home confinement. Pet. App. 77-80. The district court viewed petitioner's possession offense (and child-pornography possession offenses in general) as less culpable than a production or distribution offense, *id.* at 72-73; discounted petitioner's distribution of images through file-sharing because petitioner did not produce, pay for, or receive payment for the images; *id.* at 73; noted petitioner's lack of a criminal record or record of child sexual abuse, *ibid.*; reasoned that the combination of humiliation from his arrest, public prosecution, required sex-offender registration, and supervised release would deter petitioner from future child-pornography crimes, *id.* at 74; and considered petitioner's age, health, and purported need to care for his wife. *Id.* at 75-76.

c. At a second sentencing hearing following further briefing from the government, see 11/12/09 Sentencing Tr. 34-38, the district court stated that it would adhere to its previously announced sentence. Pet. App. 58-60, 64-65. The court reiterated its belief that, because the child-pornography Guideline had partly been, "in effect, legislated," Section 2G2.2 provided "somewhat less guidance in arriving at a proper sentence under [18 U.S.C.] 3553(a)" than other Guidelines. *Id.* at 58-59. The court repeated some of the previously announced reasons for its sentence, and it also noted a psychologist's report discussing, *inter alia*, petitioner's emotional problems and incapability of committing sexual acts, *id.* at 61; the absence of information indicating that petitioner was a threat to the public, *id.* at 61-62; and the relatively unsophisticated nature of his crime, *id.* at 59-62.

3. After the government appealed, the court of appeals vacated the sentence and remanded for resentencing. Pet. App. 34-54.

The court of appeals concluded that "[p]erhaps the keystone of the district court's reasoning was its rejection of the relevant sentencing guideline, § 2G2.2, as 'seriously flawed.'" Pet. App. 38. The court stated that, "if a district court chooses to disagree with a guideline, [the court of appeals] will 'scrutinize closely' its reasons for doing so." *Ibid.* (quoting *United States* v. *Herrera-Zuniga*, 571 F.3d 568, 585 (6th Cir. 2009)). In this case, the court of appeals found that the district court's concerns about "congressional mandates" were misguided, because "'defining crimes and fixing penalties are legislative . . . functions.'" *Id.* at 39 (quoting *United States* v. *Evans*, 333 U.S. 483, 486 (1948)) (alteration in original). The court of appeals reasoned that "a district court cannot reasonably reject § 2G2.2—or any other guidelines provision—merely on the ground that Congress exercised, rather than delegated [to the Sentencing Commission], its power to set the policies reflected therein." *Id.* at 41. "That is not to say," the court of appeals emphasized, "that a district court must *agree* with a guideline in which Congress has played a direct role. It is only to say that the fact of Congress's role in amending a guideline is not itself a valid reason to disagree with the guideline." *Ibid.*

The court of appeals explained that, "before declining to apply § 2G2.2 out of hand," a district court "must refute" directly "Congress's reasons" for modifying it. Pet. App. 45. Here, however, the "district court did not seriously attempt to refute" those reasons, but instead had based its disagreement only on

the fact that the reasons were Congress's, rather than the Commission's. *Ibid.*; see *id.* at 41. The court of appeals distinguished the case from *Kimbrough* v. *United States*, 552 U.S. 85 (2007), in which this Court upheld a district court's authority to vary from the Guidelines based on a policy disagreement. *Id.* at 109-110. In adopting the crack-cocaine Guideline at issue in *Kimbrough*, the court of appeals explained, "the Commission 'did not take account of empirical data and national experience,'" but rather "simply lifted the [crack-powder] ratio off the rack of another, inapposite statutory provision." Pet. App. 43 (quoting *Kimbrough*, 552 U.S. at 109) (internal quotation marks omitted). Here, by contrast, "Congress was the relevant actor"; the Guideline accordingly was not "vulnerable" on the ground that the Commission had made "a policy decision for reasons that lie outside its expertise," which "is primarily empirical"; and a district court that seeks to disagree with a Guideline that embodies "Congress's own empirical and value judgments—or even just value judgments— * * * faces a considerably more formidable task than the district court did in *Kimbrough*." *Id.* at 42-44 (emphasis omitted).

The court of appeals concluded that petitioner's sentence was substantively unreasonable in light of the sentencing factors in 18 U.S.C. 3553(a). Pet. App. 53. The court reasoned that the district court had diminished the seriousness of child-pornography possession and disregarded the "great harm" petitioner's conduct had inflicted "upon its victims." *Id.* at 50; see *id.* at 49-50 (quoting sentencing statement submitted by victim who appeared in images found on petitioner's computer); *id.* at 46 (citing 18 U.S.C.

3553(a)(2)(A)). Nor did the one-day jail sentence afford adequate deterrence. *Id.* at 50 (citing 18 U.S.C. 3553(a)(2)(B)). The court found that the district court's emphasis on petitioner's public humiliation and on his registration as a sex offender was misplaced because those were consequences of his "prosecution and conviction," not his sentence. *Ibid.*; see also *id.* at 50-51. The court also noted that petitioner's Guidelines range already accounted for his lack of criminal history and the scope of his offense conduct. *Id.* at 51 (discussing 18 U.S.C. 3553(a)(6)).

Finally, with respect to "the history and characteristics of the defendant," 18 U.S.C. 3553(a)(1), the court of appeals concluded that petitioner's age, record as a "productive" citizen, health, and family circumstances did not justify the lenient sentence imposed. Pet. App. 51. The court found that the district court had failed to consider applicable policy statements by the Commission that discourage reliance on a defendant's age, physical condition, and family circumstances. *Id.* at 51-52 (citing *United States* v. *Christman*, 607 F.3d 1110, 1119 (6th Cir.), cert. denied, 131 S. Ct. 488 (2010)); see Sentencing Guidelines §§ 5H1.1, 5H1.4, 5H1.6. And it found that the district court had simply accepted certain assertions by petitioner "at face value." Pet. App. 52.

4. Petitioner sought review in this Court, arguing that the court of appeals had reviewed the district court's disagreement with the child-pornography Guideline too closely and had improperly instructed the district court to consider pertinent policy statements of the Sentencing Commission in fashioning its sentence. Pet. 7-15, 133 S. Ct. 423 (2012) (No. 11-

1431) (11-1431 Pet.). This Court denied certiorari. 133 S. Ct. at 423.

5. On remand, the district court re-imposed the same sentence, with the sole exception that it increased petitioner's home confinement from 30 days to three years. Pet. App. 4. The district court focused on petitioner's continued failing health, *id.* at 12; his successful completion of a sex-offender treatment program, *id.* at 13; and the absence of any further offenses, *id.* at 13-14. The court believed that petitioner "understand[s] * * * the harm to victims and the seriousness of the offense that he committed," and it surmised that petitioner "successfully addressed the issues that led to this offense behavior and that his risk of recidivism is very, very low." *Id.* at 14-15.

The district court then stated that it "continue[d] to have significant concerns about the helpfulness" of the child-pornography Guidelines and a "continued disagreement with the range of sentences that result under these guidelines in the average case." Pet. App. 15. The court cited as its "best evidence" that "these child pornography guidelines are not working as intended" statistics from the Sentencing Commission indicating "that sentencing judges are departing or sentencing at variance from these guidelines in over half of all the cases in which they sentence" without receiving a government request for a departure. *Ibid.*

The district court then proffered reasons "as to why, perhaps, these guidelines are not as helpful as they might be." Pet. App. 16. The court addressed the sentencing enhancement for use of a computer, see Sentencing Guidelines § 2G2.2(b)(6), and explained that it had not "seen an occasion yet that

didn't involve the use of a computer." Pet. App. 16. The court believed that the enhancement failed to distinguish between unsophisticated computer users (which the court viewed petitioner to be) and more sophisticated computer users. *Id.* at 16-17. The court also addressed the "substantial enhancements based upon the number of images," observing that "because of the use of computer technology, almost every case involves hundreds of images and videos." *Id.* at 16; see Sentencing Guidelines § 2G2.2(b)(7). The court noted that some of the images found on petitioner's computer were duplicates of one another. Pet. App. 17. The court also stated that the images found on petitioner's computer included not only "'hardcore' child pornography" but also "the nudist type of images involving children dressed but in suggestive poses and with their genitals exposed." *Id.* at 17-18. The court downplayed the description of some of the images as involving "the rape of children," reasoning that although "technically [the images] would probably satisfy the definition of rape in that some of these images involved physical sexual contact between adult males and female children," no images involved penetration. *Id.* at 18.

The district court next concluded that petitioner's age and health supported a lower sentence. Pet. App. 19-27. The court found its variance to be supported by Sentencing Guidelines § 5H1.1, which states that "[a]ge * * * may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines." See Pet. App. 19-20. The

court reasoned that those same considerations would be relevant in granting a variance from the Guidelines and that this was the sort of case contemplated in the policy statement. *Id.* at 20. In light of petitioner's health issues, the court believed that "home confinement is a form of punishment which would be equally efficient and less costly than incarceration." *Id.* at 20-21. The court found "many aspects to [petitioner's] health condition that will make incarceration a much harsher penalty than it would for the average person," making incarceration, in effect, "a death sentence for him." *Id.* at 26. The court stated that "[i]f I have got to send somebody like [petitioner] to prison, I'm sorry, someone else will have to do it. I'm not going to do it." 1/4/13 Sentencing Tr. at 58.

6. Following a second government appeal, the court of appeals vacated the sentence and remanded the case for resentencing before a different district judge. Pet. App. 1-8. Reviewing the district court's sentence "for substantive reasonableness under the abuse-of-discretion standard," the court explained that "[o]n remand the district court repeated many of the same errors that it made during [petitioner's] first sentencing." *Id.* at 4 (internal quotation marks and citation omitted). The district court "again failed to make the Sentencing Guidelines its 'starting point' and 'initial benchmark' for choosing [petitioner's] sentence." *Ibid.* (citation omitted). And the district court's expression of "'concerns about'" and "'disagreement with'" the range of sentences that result under the Guidelines "were merely conclusions, rather than reasons to disagree with the guidelines on policy grounds." *Id.* at 4-5.

The court of appeals recognized that the district court had "offer[ed] reasons for its disagreement with two guideline enhancements in particular"—the enhancement for use of a computer (Sentencing Guidelines § 2G2.2(b)(6)) and for the number of images possessed (*id.* § 2G2.2(b)(7))—but observed that the district court had "entirely overlooked that [petitioner's] base-offense level, standing alone, would place his guidelines range in the neighborhood of three years." Pet. App. 5. Additionally, the district court "continued to treat the issue of the guidelines' validity strictly as a question of social science," despite the court of appeals' prior conclusion that it is "Congress's prerogative to dictate sentencing enhancements based on a retributive judgment that certain crimes are reprehensible and warrant serious punishment" and that Congress's reasons for increasing child-pornography sentences "were not only empirical, but retributive—that they included not only deterrence, but punishment." *Ibid.* (internal quotation marks and citation omitted). "The district court did not acknowledge, much less refute, those bases for [petitioner's] guidelines range," and "[t]aken as a whole, * * * the district court's comments did not begin to approach the showing necessary for a court to 'declin[e] to apply § 2G2.2 out of hand[,]' * * * which is exactly what the district court did here." *Id.* at 6 (second and third pairs of brackets in original).

The court of appeals also reasoned that the district court had "continued to diminish the 'seriousness of [petitioner's] offense,'" Pet. App. 6 (quoting 18 U.S.C. 3553(a)(2)(A)), notwithstanding that petitioner "chose to download child pornography onto his computer 'affirmatively, deliberately, and repeatedly, hundreds

of times over, in a period exceeding a year,'" *ibid.* (citation omitted). The court of appeals observed that the district court "likewise put little weight on the need for [petitioner's] sentence to deter other potential violators of the child pornography laws," finding no basis for why "a period of home confinement would afford adequate deterrence for the crime at issue here—particularly given that [petitioner], by his own admission, was already largely self-confined to his home." *Id.* at 7.

The court of appeals additionally concluded that the district court "put an unreasonable amount of weight on [petitioner's] age and poor health." Pet. App. 7. It explained that "[a]lthough in exceptional cases a court may rely on these factors to support a below-guidelines sentence, *see* U.S.S.G. §§ 5H1.1, 5H1.4, 5K2.22, they simply cannot justify the sentence imposed here" and that petitioner's "age and health issues are not as extraordinary as he and the district court seem to think they are." *Ibid.* (internal quotation marks and citation omitted). The court of appeals reasoned that petitioner "may be elderly and in poor health, but 'the elderly do not have a license to commit crime, and adequate medical care is available in federal prisons.'" *Ibid.* (quoting *United States* v. *Moreland*, 703 F.3d 976, 991 (7th Cir. 2012), cert. denied, 133 S. Ct. 1610, and 133 S. Ct. 2377 (2013)).

"Throughout the process of imposing [petitioner's] first sentence and then his second," the court of appeals explained, "the district court placed excessive weight on the few factors that favor a lesser sentence, while minimizing or disregarding altogether the serious factors that favor a more severe one." Pet. App. 8. "The result," the court continued, "once again was an

abuse of the district court's discretion." *Ibid.* "The sentence imposed on remand does not 'reflect the seriousness of the offense'; it does not meet the retributive goal of 'provid[ing] just punishment for the offense'; and it does not 'afford adequate deterrence to criminal conduct' among other deficiencies." *Ibid.* (quoting 18 U.S.C. 3553(a)(2)(A) and (B)) (brackets in original).

ARGUMENT

Petitioner contends that the court of appeals reviewed the district court's disagreement with Sentencing Guidelines § 2G2.2 under an unduly exacting standard (Pet. 15-22); that it treated the Sentencing Commission's policy statements as "controlling" (Pet. 23-27); and that it impermissibly applied de novo review to the substantive reasonableness of petitioner's sentence (Pet. 28-33). Those arguments lack merit, and they largely repeat arguments raised in his first petition for a writ of certiorari, which this Court denied. 133 S. Ct. 423 (No. 11-1431). Petitioner errs in asserting (Pet. 9, 30) that the government's brief in opposition to that petition "conceded" that the court of appeals applied a "less deferential standard" of review in this case. To the contrary, the government stated that "the court of appeals' review of the district court's application of the Section 3553(a) factors * * * did *not* depend on applying a less deferential standard." U.S. Br. in Opp. 13, 133 S. Ct. 423 (No. 11-1431) (emphasis added). This petition, like the first one, at bottom seeks fact-bound review of the court of appeals' determination that the district court's sentence was substantively unreasonable in the particular circumstances of this case. No further review is warranted.

1. As a threshold matter, the decision below is interlocutory, and the petition should be denied on that basis. Although the court of appeals has made clear that a sentence that includes only a single day of imprisonment is substantively unreasonable, it has not directed the imposition of a particular sentence on remand. It is far from clear what term of imprisonment the new district judge will impose, and the district judge's reasoning may not contain the deficiencies that the court of appeals identified with the district court's reasoning here (see, *e.g.*, Pet. App. 4-7). If petitioner ultimately is dissatisfied with the sentence imposed on remand, petitioner will be able to raise his current claims—together with any other claims that may arise with respect to his resentencing—in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam). This case presents no occasion for this Court to depart from its usual practice of awaiting final judgment before determining whether to review a challenge to a criminal conviction or sentence.

2. Petitioner primarily contends (Pet. 15-22) that the court of appeals' decision impermissibly applied a "close scrutiny" standard of review to a district court's "policy disagreements with guidelines enacted or mandated by Congress." That contention, which petitioner also raised in his first petition for certiorari (11-1431 Pet. 9-15), is incorrect.

a. The court of appeals did not announce any broadly applicable new standard of review in this case, but instead expressly stated that it was applying "the abuse-of-discretion standard." Pet. App. 4. The court of appeals' only reference to any sort of "close

scrutiny" standard was a brief quotation in its first opinion from an earlier circuit precedent, to the effect that "if a district court chooses to disagree with a guideline, we will 'scrutinize closely' its reasons for doing so." *Id.* at 38-39 (quoting *United States* v. *Herrera-Zuniga*, 571 F.3d 568, 585 (6th Cir. 2009)). But in the earlier case, the court of appeals made clear that it was applying the same standard of review that this Court applied in *Kimbrough* v. *United States*, 552 U.S. 85 (2007).

In *Kimbrough*, this Court confirmed that a district court has discretion, after considering the factors in 18 U.S.C. 3553(a), to impose a sentence based on a specific policy disagreement with the Guidelines. 552 U.S. at 100-108; accord *Spears* v. *United States*, 555 U.S. 261, 264-266 (2009) (per curiam). Any such variance must be based on appropriate considerations and is subject to appellate review for reasonableness. *Kimbrough*, 552 U.S. at 111. The Court suggested in *Kimbrough* that "a district court's decision to vary from the advisory Guidelines may attract greatest respect when the sentencing judge finds a particular case 'outside the 'heartland' to which the Commission intends individual Guidelines to apply.'" *Id.* at 109 (quoting *Rita* v. *United States*, 551 U.S. 338, 351 (2007)). Conversely, the Court suggested, "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." *Ibid.* (quoting *Rita*, 551 U.S. at 351). But the Court in *Kimbrough* had no occasion to apply any such "closer review" because the crack-cocaine Guidelines "d[id] not exemplify the [Sentencing] Commis-

sion's exercise of its characteristic institutional role" —that is, unlike most Guidelines, the crack-cocaine Guidelines were based on an analogy to a statute rather than on "empirical data and national experience." *Ibid.* (internal quotation marks and citation omitted); see *id.* at 96-97, 109-110 (explaining that the Commission had looked to the ratio of drug quantities on which Congress had based statutory mandatory minimum sentences for crack and powder cocaine possession—the "100-to-1 ratio"—and decided to apply that same ratio in setting offense levels under the Guidelines). The Court thus held that the district court in *Kimbrough* did not abuse its discretion by varying from the crack-cocaine Guideline based on policy disagreement. *Id.* at 109-110.

In *Herrera-Zuniga* (the case briefly cited in the court of appeals' first decision), the Sixth Circuit likewise reviewed for abuse of discretion a district court's decision to vary from the Guidelines on policy grounds. 571 F.3d at 585-586; see also *id.* at 590-591 (reiterating abuse-of-discretion standard). That case involved the illegal-reentry Guideline, but the Sixth Circuit concluded that the illegal-reentry Guideline was sufficiently like the crack-cocaine Guideline that, under *Kimbrough*, the district court's decision must be sustained. *Id.* at 586. Nothing in *Herrera-Zuniga* resolved the question of how to review a district court's policy disagreement with other Guidelines.

Nor did the court of appeals resolve that question in this case. The outcome here did not turn on the standard of appellate review, but instead on the district court's imposition, and re-imposition, of a sentence that "does not *remotely* meet the criteria that Congress laid out in § 3553(a)." Pet. App. 3-4 (empha-

sis added). Echoing guidance from this Court, the court of appeals emphasized that the Guidelines must be the "'starting point' and 'initial benchmark' for choosing [petitioner's] sentence," *id.* at 4 (citing its previous opinion, *id.* at 38, quoting *Gall* v. *United States*, 552 U.S. 38, 49 (2007)), and found the district court's proffered reasons for categorically rejecting Sentencing Guidelines § 2G2.2 to be clearly inadequate, Pet. App. 4-5. See *Peugh* v. *United States*, 133 S. Ct. 2072, 2080 (2013) (stating that "the Guidelines should be the starting point and the initial benchmark" in sentencing and that a "major departure from the Guidelines should be supported by a more significant justification than a minor one") (internal quotation marks, citations, and brackets omitted). In its first decision, the court of appeals found that the district court "did not seriously attempt" to provide valid reasons for its disagreement with Section 2G2.2, Pet. App. 45, but instead rejected the Guideline simply because of "Congress's role in amending" it, *id.* at 41. And in the decision below, the court of appeals found that the district court's bald assertions of a "'disagreement with'" and "'concerns about the helpfulness' of" Section 2G2.2 were simply "conclusions, rather than reasons to disagree with the guidelines on policy grounds," *id.* at 4-5; that the district court's "reasons for its disagreement with two guideline enhancements in particular" provided no basis for disregarding the fact that the *base* offense level advised imprisonment, *id.* at 5; and that the "district court did not acknowledge, much less refute" the core rationales for that base offense level, *id.* at 6.[1]

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[1] The district court had observed that district courts vary more frequently from Section 2G2.2 than from other Guidelines. Pet.

Contrary to petitioner's contention (Pet. 18), the court of appeals' context-specific conclusion that the district court in this particular case failed to justify its policy disagreement with Section 2G2.2 does not render "congressionally-directed guidelines effectively mandatory." The court of appeals expressly recognized that "a district court may disagree with § 2G2.2 on policy grounds, just as it may any other" Guideline. Pet. App. 38; *id.* at 41 (rejecting the proposition that "a district court must agree with a guideline in which Congress has played a direct role") (emphasis omitted). Although the court of appeals believed that a district court seeking to disagree with Section 2G2.2 "faces a considerably more formidable task than the district court did in *Kimbrough*," *id.* at 44, that was not because any closer standard of review applies. Instead, it was because the crack-cocaine Guideline at issue in *Kimbrough*, unlike the child-pornography Guideline, was based on the Commission's misplaced reliance on a statute that did not reflect specific congressional value judgments concerning the appropriate Guidelines range. *Id.* at 5 (explaining that "Congress's long and repeated involvement in raising the offense levels for § 2G2.2 makes clear that the grounds of its action were not only empirical, but retributive—that they included not only deterrence, but punishment") (citation omitted); see *Kimbrough*, 552 U.S. at 102-105 (explaining that Congress had not directed any crack-cocaine sentencing practices other than with respect to mandatory-minimum sentences).

App. 15-16. But that observation is not a reason for "declin[ing] to apply § 2G2.2 out of hand," *id.* at 6 (citation omitted).

b. Petitioner contends (Pet. 19) that decisions in other circuits illustrate a "direct and well developed conflict * * * regarding the correct standard of review for policy disagreements with § 2G2.2." That contention is incorrect. Several of the Section 2G2.2 decisions cited by petitioner (Pet. 19-21) did not involve a district court's disagreement with Section 2G2.2 on policy grounds, and the courts of appeals neither found error in the district court's consideration of that Guideline nor addressed the possibility of "closer review" of disagreement with that Guideline. See *United States* v. *Halliday*, 672 F.3d 462, 474 (7th Cir. 2012) (finding no procedural error when the defendant did "not argue that the district court was unaware of its discretion to disagree with the Guidelines," but vacating the sentence on other grounds); *United States* v. *Regan*, 627 F.3d 1348, 1354 (10th Cir. 2010) (affirming a within-Guidelines sentence), cert. denied, 131 S. Ct. 2915 (2011); *United States* v. *Stone*, 575 F.3d 83, 89-94 (1st Cir. 2009) (same), cert. denied, 558 U.S. 1135 (2010).

The other decisions cited by petitioner likewise fail to support his assertion of conflicting standards of review. In *United States* v. *Dorvee*, 616 F.3d 174 (2010), the Second Circuit stated that the Commission did not use "an empirical approach based on data about past sentencing practices" when it adjusted Section 2G2.2 "at the direction of Congress," *id.* at 184; reasoned that the child-pornography Guideline can produce "irrational[]" offense-level calculations, *id.* at 187; and concluded that, as was the case in *Kimbrough*, a district court may vary from Section 2G2.2 based solely on its policy disagreement with it, *id.* at 187-188. The Ninth Circuit adopted a similar position

in *United States* v. *Henderson*, 649 F.3d 955 (2011). See *id.* at 962-963. The view in *Dorvee* and *Henderson* that Section 2G2.2 is on weak footing is in some tension with the court of appeals' view here that Section 2G2.2 is "on stronger ground than the crack-cocaine guidelines were on in *Kimbrough*." Pet. App. 43-44. But neither *Dorvee* nor *Henderson* involved a district court's decision to disregard Section 2G2.2, and thus neither had occasion to consider the standard of review that would apply where, as here, a district court varied downward based on a policy disagreement with Section 2G2.2, or whether the particular reasons given by the district court here would be sufficient. See *Dorvee*, 616 F.3d at 176-179 *Henderson*, 649 F.3d at 958.[2]

In *United States* v. *Grober*, 624 F.3d 592 (2010), the Third Circuit concluded that a district court had provided an adequate explanation for imposing a mandatory-minimum five-year sentence on a child-pornography defendant, where the district court had varied from the substantially higher Guidelines range based on its policy disagreement with Section 2G2.2 and its application of the Section 3553(a) factors. *Id.* at 595-599. The Third Circuit declined to apply "closer review" to the policy disagreement, on the ground that "the Commission did not do what 'an exercise of its characteristic institutional role' required—develop

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[2] In any event, since *Dorvee*, this Court has denied several petitions asserting that this Court should resolve a disagreement between the Second Circuit and other courts. See, *e.g.*, *VandeBrake* v. *United States*, 133 S. Ct. 1457 (2013) (No. 12-488); *Miller* v. *United States*, 132 S. Ct. 2773 (2012) (No. 11-9330); *Garthus* v. *United States*, 132 S. Ct. 2373 (2012) (No. 11-7811); *Woida* v. *United States*, 132 S. Ct. 122 (2011) (No. 10-9027).

§ 2G2.2 based on research and study rather than reacting to changes adopted or directed by Congress." *Id.* at 600-601 (quoting *Kimbrough*, 552 U.S. at 109). Again, although that reasoning is in some tension with the court of appeals' view of Section 2G2.2 in this case, no actual conflict exists. As discussed, the court of appeals did not apply "closer review" in reversing the district court for failing to provide reasons for its policy disagreement with Section 2G2.2. See pp. 14-18, *supra*. And the Third Circuit's decision in *Grober* emphasized that when a district court varies from a Guidelines range based on a policy disagreement, "it must provide a reasoned, coherent, and sufficiently compelling explanation of the basis for its disagreement," defining a "sufficiently compelling" justification as "one that is grounded in the § 3553(a) factors." *Id.* at 599-600 (internal quotation marks and citation omitted; brackets removed). *Grober*'s case-specific conclusion that the extensive policy reasons given by the district court in that case (which drew on considerable research and 13 days of hearings, see *id.* at 596-598) were sufficient to justify a five-year sentence does not dictate that the reasons given by the district court here (which focused on two particular enhancements and did not address the base offense level, see Pet. App. 4-5) would be sufficient to justify a one-day term of imprisonment.

c. The general question whether "closer review" applies to the district court's disagreement with the Guidelines does not warrant further review for an additional reason. The courts of appeals have not explored in any significant depth the question whether "closer review" is warranted in some cases of policy disagreement, and if so, in which cases. As one circuit

judge has noted, "the circuits have avoided staking out clear positions on this matter." *United States* v. *Mitchell*, 624 F.3d 1023, 1030 (9th Cir. 2010) (O'Scannlain, J., concurring), cert. denied, 131 S. Ct. 1542 (2011). Indeed, thus far only a single precedential appellate decision has expressly invoked and applied the concept of "closer review." *United States* v. *Irey*, 612 F.3d 1160, 1202-1203 (11th Cir. 2010) (en banc), cert. denied, 131 S. Ct. 1813 (2011).

Although some cases have discussed "closer review" in the course of declining to apply it, the discussion in those cases falls well short of defining or setting an approach. See, *e.g.*, *United States* v. *VandeBrake*, 679 F.3d 1030, 1038 (8th Cir. 2012) (declining to apply "closer review" where "the Commission's revisions to the antitrust guidelines have largely been in response to Congressional acts"), cert. denied, 133 S. Ct. 1457 (2013); *United States* v. *Arrelucea-Zamudio*, 581 F.3d 142, 153 (3d Cir. 2009) (declining to apply "closer review" to the fast-track Guideline because "the Commission did not act in its institutional capacity" in enacting it). The absence of a developed body of law on this question counsels against this Court's reviewing it now, in a case that does not fairly implicate it.

3. Petitioner's contention (Pet. 13, 23-27)—which he also raised in his previous petition, see 11-1431 Pet. 10, 14-15—that the court of appeals' decision gives undue weight to the Commission's policy statements likewise does not warrant further review. This Court has "instructed that district courts must still give 'respectful consideration' to the now-advisory Guidelines (and their accompanying policy statements)." *Pepper* v. *United States*, 131 S. Ct. 1229, 1247 (2011)

(quoting *Kimbrough*, 552 U.S. at 101)). The court of appeals' decisions here are consistent with that instruction.

In its first decision, the court of appeals found error in the district court's consideration of petitioner's "history and characteristics," 18 U.S.C. 3553(a)(1), in part because the district court failed to consider any of the Commission's policy statements discouraging imposition of a below-Guidelines sentence based on age, physical condition, and family responsibilities (Sentencing Guidelines §§ 5H1.1, 5H1.4, 5H1.6). Pet. App. 51-52. Although petitioner suggests (Pet. 24) that those policy statement are relevant only to departures, the Guidelines make clear that they address generally "whether a sentence should be outside the applicable guideline range," Sentencing Guidelines Ch. 5, Pt. H, intro. comment. At the very least, the Commission's views provide relevant factors for a court considering a variance. The court of appeals recognized that the district court could disagree with the policy statements, but it held that the district court must recognize the direction in which the policy statements point. Pet. App. 52.

On remand, the district court relied on Sentencing Guidelines § 5H1.1—which states that "considerations based on age" may be relevant to a departure if they "are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines"—as affirmatively supporting the minimal sentence it imposed. Pet. App. 19-20. The district court did not state that it understood, but disagreed with, the policy statements addressing age and health, nor did it offer any reasons to support any such disagree-

ment. Instead, it purported to find that Section 5H1.1's criteria supported a variance.

The court of appeals concluded that the district court had abused its discretion. Pet. App. 8; see *id.* at 4, 7. The court of appeals explained, citing the policy statements, that "[a]lthough in exceptional cases a court may rely on [age and health] to support a below-guidelines sentence," *id.* at 7 (citing Sentencing Guidelines §§ 5H1.1, 5H1.4, 5K2.22), "they simply cannot justify the sentence imposed here," *ibid.* (internal quotation marks and citation omitted). The court of appeals determined that the district court had "put an unreasonable amount of weight on [petitioner's] age and poor health" and that petitioner's "age and health issues are not as extraordinary as he and the district court seem to think they are." *Ibid.* Contrary to petitioner's contention (Pet. 26-27), the court of appeals did not hold that the Guidelines' policy statements "control" variances, such that variances based on age or health are *only* permitted in "extraordinary" cases. The court of appeals was addressing a district court that had *relied on* the policy statements, and it therefore adopted that same premise in reviewing the decision. The court of appeals had no occasion to consider the reasonableness of a district court's *rejection* of a policy statement.

Petitioner errs in asserting (Pet. 27) that "the Sixth Circuit splits dramatically from the other courts of appeals, which recognize that policy statements setting forth the Commission's departure standard and restrictions on departures on specified grounds do not control variances."[3] Neither the decisions in this case,

[3] In any event, every cited decision but one pre-dates this Court's decision in *Pepper* v. *United States*, *supra*, which made clear that

nor any of the other decisions cited by petitioner in which the Sixth Circuit has vacated low child-pornography sentences, hold that district courts must invariably follow Guidelines policy statements. See *United States* v. *Robinson*, 669 F.3d 767, 775 (2012), (stating that district court should "take into account" policy statements), cert. denied, 133 S. Ct. 929 (2013); *United States* v. *Christman*, 607 F.3d 1110, 1118-1120 (discussing policy statements in discussing reasonableness of sentence), cert. denied, 131 S. Ct. 488 (2010); *United States* v. *Camiscione*, 591 F.3d 823, 834-835 (2010) (citing policy statements in discussing reasonableness of sentence); see also *United States* v. *Peppel*, 707 F.3d 627, 640-642 (2013) (not mentioning policy statements).

4. Finally, petitioner errs in contending (Pet. 28-33) that the court of appeals applied de novo review to the district court's sentence. This Court has recently denied petitions raising similar claims, see *Robinson* v. *United States*, 133 S. Ct. 929 (2013) (No. 12-5508); *Jayyousi* v. *United States*, 133 S. Ct. 29 (2012) (No. 11-1194), and the same result is warranted here. Like every other Sixth Circuit decision cited by petitioner (Pet. 10) as an example of "what amounts to *de novo* review," the decision below expressly applied an

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courts "must still give 'respectful consideration'" to policy statements, 131 S. Ct. at 1247 (citation omitted). The one post-*Pepper* decision does not hold that the policy statements at issue here are categorically irrelevant to sentencing. See *United States* v. *Vasquez-Cruz*, 692 F.3d 1001 (9th Cir. 2012), cert. denied, 134 S. Ct. 76 (2013). And two of the cited decisions expressly recognize that district courts must consider policy statements, see *United States* v. *Simmons*, 568 F.3d 564, 569 (5th Cir. 2009); *United States* v. *Martin*, 520 F.3d 87, 93 (1st Cir. 2008).

abuse-of-discretion standard and vacated the sentence only after a careful review of the case-specific circumstances. See Pet. App. 4-8; *United States* v. *Robinson*, 669 F.3d at 773, 774-779; *Christman*, 607 F.3d at 1117-1123; *Camiscione*, 591 F.3d at 832-837; *United States* v. *Harris*, 339 Fed. Appx. 533, 536-539 (2009); *United States* v. *Hughes*, 283 Fed. Appx. 345, 349-356 (2008).

This Court's decisions make clear that a sentence imposed by a district court is subject to review by a court of appeals not only for procedural error, but also for substantive reasonableness. In *Gall* v. *United States*, *supra*, this Court instructed that, after determining that a sentence is "procedurally sound," a court of appeals "should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." 552 U.S. at 51. The reviewing court cannot presume that a sentence outside the advisory Guidelines range is unreasonable; must give "due deference to the district court's decision that the [sentencing factors listed in 18 U.S.C. 3553(a)], on a whole, justify the extent of [any] variance" from the Guidelines range; and may not reverse a sentence simply because it "might reasonably have concluded that a different sentence was appropriate" had it been in the district court's position. *Ibid.* But if the court of appeals, applying that deferential standard, concludes that the district court imposed a substantively unreasonable sentence, it may set that sentence aside. "In sentencing, as in other areas, district judges at times make mistakes that are substantive"; "[a]t times, they will impose sentences that are unreasonable"; and "[c]ircuit courts exist to correct such mistakes when they occur." *Rita*, 551 U.S. at 354.

The court of appeals properly performed that function here. After recognizing the "abuse-of-discretion standard" of review, Pet. App. 4, it concluded that "the district court placed excessive weight on the few factors that favor a lesser sentence, while minimizing or disregarding altogether the serious factors that favor a more severe one." *Id.* at 8. The record supports that conclusion. Petitioner's offense—the acquisition of hundreds of images of child pornography, including images and videos depicting eight- to ten-year-old girls being raped by adult men—was extremely serious. The court of appeals correctly concluded that a sentence that does not impose any substantial punishment for such a crime fails to reflect the seriousness of the offense or to promote deterrence among similar offenders. *Ibid.*

Petitioner's citation (Pet. 32) of decisions in other circuits that recognize a principle of deferential review does not show any conflict with the court of appeals' decision here, which similarly recognized the district court's primary role in sentencing. Pet. App. 4 (applying "the abuse-of-discretion standard") (citation omitted); see *id.* at 8 (concluding that the sentence "was an abuse of the district court's discretion"). Petitioner likewise errs in suggesting (Pet. 30) that the decision below conflicts with decisions of other circuits holding that "abuse-of-discretion review does not permit a court of appeals to disagree with the weight given a factor and to independently recalibrate the 'proper' weight to accord it." As an initial matter, the court of appeals did not "recalibrate" what weight to give to each factor. Rather, after concluding that the district court had abused its discretion in light of the Section 3553(a) factors in imposing a one-day

sentence, it remanded for a new district judge to conduct an appropriate analysis, while declining to identify specifically what a permissible sentence would be. See Pet. App. 8.

Petitioner, moreover, has identified no decision of this Court or another court of appeals holding that an appellate court may not reverse a sentence based on a conclusion that the district court applied the Section 3553(a) factors unreasonably. To the contrary, this Court's cases contemplate that reviewing courts will assess the reasonableness of the factors on which the district court relied. See *Gall*, 552 U.S. at 57-59 (finding that district court "quite reasonably attached great weight" to the defendant's voluntary withdrawal from drug conspiracy and "self-motivated rehabilitation"). The Court in *Gall* reversed the Eighth Circuit's decision not because the court of appeals made such an assessment, but because the court of appeals had failed to give "due deference to the District Court's reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence." *Id.* at 59-60. The court of appeals here, which expressly recognized the deferential standard of review, see Pet. App. 4, 8, made no similar error.

Following the decision in *Gall*, courts of appeals have regularly "consider[ed] whether [a] factor, as explained by the district court, can bear the weight assigned it under the totality of circumstances in the case." *United States* v. *Cavera*, 550 F.3d 180, 191 (2d Cir. 2008) (en banc), cert. denied, 556 U.S. 1268 (2009); see *United States* v. *Kane*, 639 F.3d 1121, 1136 (8th Cir. 2011) ("[S]ubstantive review exists, in substantial part, to correct sentences that are based on unreasonable weighing decisions.") (citation omitted), cert.

denied, 132 S. Ct. 1590 (2012); *Irey*, 612 F.3d at 1193-1194 & n.20 (citing decisions from ten other circuits authorizing consideration of sentencing courts' weighing of Section 3553(a) factors and agreeing with those courts about "the deferential nature of the review"). As the Second Circuit has explained, that approach "ensures that appellate review, while deferential, is still sufficient to identify those sentences that cannot be located within the range of permissible decisions." *Cavera*, 550 F.3d at 191.

Petitioner's suggestion that courts of appeals cannot review a district court's decisions about how much "weight" to attach to given sentencing factors would effectively eliminate the substantive-reasonableness review that *Gall* requires. Petitioner identifies no court of appeals that has adopted that view. His reliance (Pet. 30) on decisions from the Second and Eighth Circuits is belied by decisions from those same circuits, cited in the preceding paragraph, that fully accord with the court of appeals' approach here. See *Cavera*, 550 F.3d at 191; *Kane*, 639 F.3d at 1136. And the First and Tenth Circuit decisions he cites (Pet. 30-31) simply hold that a court of appeals may not engage in a de novo reweighing of the factors. See *United States* v. *Colón-Rodríguez*, 696 F.3d 102, 108 (1st Cir. 2012) (recognizing that weighing is "largely" within the district court's discretion) (citation omitted); *United States* v. *Smart*, 518 F.3d 800, 806-807 (10th Cir. 2008). The court of appeals here, however, did not do so. Pet. App. 4.

Petitioner advances various case-specific arguments (Pet. 28-29) about why, in his view, his one-day jail sentence was substantively reasonable. But apart from being wrong, those arguments do not suggest

any legal error that would justify this Court's intervention. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law."). No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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