No. 12-488

In the Supreme Court of the United States

STEVEN KEITH VANDEBRAKE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under *Kimbrough* v. *United States*, 552 U.S. 85 (2007), the court of appeals should have engaged in closer review of petitioner's above-Guidelines range sentence before affirming it as substantively reasonable.

2. Whether, in affirming petitioner's above-Guidelines range sentence, the court of appeals adequately considered whether the district court gave proper weight to "the need to avoid unwarranted sentence disparities," as required by 18 U.S.C. 3553(a)(6).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-47) is reported at 679 F.3d 1030. The opinion of the district court (Pet. App. 52-180) is reported at 771 F. Supp. 2d 961.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 2012. A petition for rehearing was denied on July 20, 2012 (Pet. App. 50-51). The petition for a writ of certiorari was filed on October 18, 2012. 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 Northern District of Iowa, petitioner was convicted on three counts of combining and

conspiring in unreasonable restraint of interstate trade or commerce, in violation of the Sherman Act, 15 U.S.C. 1. Pet. App. 2. He was sentenced to 48 months of imprisonment, to be followed by three years of supervised release. *Ibid.*[1] The court of appeals affirmed, *id.* at 1-47, and denied rehearing, *id.* at 50-51.

1. Petitioner was the sales manager for a company that operates ready-mix concrete plants in northwest Iowa. In March 2009, a competitor of that company reported a bid-rigging conspiracy to the United States Department of Justice in order to take advantage of the Antitrust Division's Leniency Program for first-reporting antitrust conspirators. The competitor's report implicated petitioner. The resulting investigation confirmed that petitioner was engaged in three separate conspiracies: bid-rigging and price-fixing schemes with each of two competitors and a price-fixing scheme with a third competitor. The total volume of commerce affected by petitioner's conspiracies was $5.66 million. Pet. App. 2-3, 63-70.

2. Petitioner was charged by information with three counts of combining and conspiring in unreasonable restraint of interstate trade or commerce, in violation of the Sherman Act, 15 U.S.C. 1. Pet. App. 3. He pleaded guilty to all counts. *Id.* at 3-5.

3. The district court sentenced petitioner to concurrent terms of 48 months of imprisonment on each count. Pet. App. 183. The court determined that petitioner's advisory Guidelines range under the guideline for antitrust offenses, Sentencing Guidelines § 2R1.1, was 21 to 27 months, based on a total offense level of

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[1] Petitioner was also assessed a fine of $829,715.85, which he challenged unsuccessfully in the court of appeals. Pet. App. 2, 22. Petitioner does not renew his challenge to the fine in this Court.

16 and a criminal history category of I. Pet. App. 110-112. The court concluded, however, that the 18 U.S.C. 3553(a) factors supported an upward variance. Pet. App. 164-165.

The district court first considered the nature and circumstances of petitioner's offenses and the need for the sentence. Pet. App. 134-148. While the court explained that it believed that sentences under the antitrust guideline were generally "overly lenient," the court determined that "several unusual circumstances" made petitioner's offenses particularly serious. *Id.* at 142. The court reasoned that, by entering into three separate conspiracies, petitioner "effectively created his own concrete cartel" that left his community with "substantially fewer or, in some instances, no market options" for purchasing concrete. *Id.* at 144. The Guidelines range, the court thus concluded, did not "correlate to the nature and extent of the harm that [petitioner's] schemes inflicted." *Id.* at 144-145. The court also concluded that the Guidelines range did not sufficiently account for petitioner's "involvement in multiple conspiracies" or "the volume of commerce" affected by his offenses. *Id.* at 145, 146. In particular, the court believed that the antitrust guideline scaled its offense-level increases based on an assumption that anticompetitive mark-ups would likely decline as the volume of commerce increased, but that "assumption [was] incorrect in this case." *Id.* at 146 (citing Sentencing Guidelines App. C, amend. 377). Accordingly, the court found no reason why loss-based increases in the offense level should "increase less rapidly than the offense level for comparative fraud violations." *Id.* at 147.

The district court then considered petitioner's personal history and characteristics, Pet. App. 148-155, placing substantial weight on his "total lack of remorse" and the fact that he initiated at least two of the three conspiracies, *id.* at 154. Turning to the kinds of sentences available, *id.* at 155-157, the court reasoned that the Guidelines range for a fraud offense resulting in a comparable amount of loss would be 46 to 57 months, roughly double petitioner's Guidelines range, *id* at 156. Compare Sentencing Guidelines § 2R1.1(b)(2)(A), with *id.* § 2B1.1(b)(1)(H); see also *id.* § 2R1.1, comment. (n.3). The court found that the remaining Section 3553(a) factors either counseled in favor of an upward variance or were neutral. Pet. App. 157-161.

The district court imposed a sentence of 48 months of imprisonment, concluding that such a sentence was "sufficient, but not greater than necessary, to accomplish the goals of sentencing." Pet. App. 165. The court recognized that a 48-month sentence was "higher than some recent sentences imposed for violations of the same statute," but determined that the difference in length was not unwarranted both because petitioner was "*not* similarly situated" to other antitrust defendants and because the court had "policy disagreements with" the antitrust guideline's "relatively lenient treatment" of antitrust offenses. *Id.* at 160.

In the same opinion, the district court sentenced one of petitioner's co-conspirators to 12 months and one day of imprisonment, a sentence at the bottom of his Guidelines range under the antitrust guideline. Pet. App. 113, 179. "[S]ignificant differences" in the nature and circumstances of the co-conspirator's offense and his personal history and characteristics, the

court concluded, warranted the lesser sentence. *Id.* at 175-176.

4. The court of appeals affirmed. Pet. App. 1-47. The court reviewed petitioner's sentence for substantive reasonableness under a "standard akin to an abuse-of-discretion standard," declining to engage in "closer review." *Id.* at 14, 17 (quoting *Kimbrough* v. *United States*, 552 U.S. 85, 109 (2007)). The court began by indicating that "closer review" was not warranted because the Sentencing Commission's revisions to the antitrust guideline "have largely been in response to Congressional acts" rather than "the Commission's exercise of its characteristic institutional role." *Id.* at 16-17 (quoting *Kimbrough*, 552 U.S. at 109). But the court continued by reasoning that "the district court's sentencing decision was primarily based on how the antitrust guideline applied to [petitioner] in particular, as well as the district court's consideration of individual characteristics of [petitioner] untethered to the antitrust guideline." *Id.* at 20. Because "the district court's sentencing decision was based on the *particular* facts of *an individual* case," the court concluded that it "exemplifie[d] the district court's institutional strengths" and was "entitled to 'greatest respect.'" *Id.* at 19 (quoting *Kimbrough*, 552 U.S. at 109) (some internal quotation marks omitted).

Applying a deferential standard of review, the court of appeals rejected petitioner's argument that his above-Guidelines sentence was substantively unreasonable because it was longer than the sentences imposed in many other antitrust cases. Pet. App. 15-16. The court reasoned that, "[b]ecause the district court varied from the guidelines, [petitioner's] sentence will necessarily differ when compared to a with-

in-the-guidelines' sentence," but "[t]hat mere fact does not *ipso facto* make the sentence substantively unreasonable." *Id.* at 15. Concluding that the district court "considered appropriate factors in varying from the guidelines" and "adequately explained" its sentencing decision, the court of appeals affirmed petitioner's sentence. *Id.* at 22.

Chief Judge Riley concurred "in the general reasoning and the conclusion" of the court of appeals' opinion but wrote separately to disassociate himself from statements made by the district court in sentencing petitioner. Pet. App. 22.

Judge Beam dissented. Pet. App. 22-47. He viewed the district court's upward variance as a replacement of the antitrust guideline with the fraud guideline, a "guideline substitution" that "resulted in procedural error." *Id.* at 25. Judge Beam would have reviewed petitioner's sentence de novo and rejected it. *Id.* at 28. Alternatively, he would have engaged in a "closer review" of petitioner's sentence because, in his view, the district court "categorical[ly]" varied from a guideline that "is a product of the Commission's institutional strengths." *Id.* at 37. Judge Beam would have rejected petitioner's sentence under that standard of review as well. *Id.* at 45.

5. Petitioner sought panel rehearing and rehearing en banc, both of which the court of appeals denied. Pet. App. 50-51. Judge Beam would have granted panel rehearing. *Id.* at 51. Judges Loken, Murphy, and Melloy would have granted rehearing en banc. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 11-15) that the court of appeals erred in holding that the Sentencing Commis-

sion does not exercise its characteristic institutional role when it modifies a guideline in response to congressional action, and, therefore, his above-Guidelines range sentence should have been subjected to closer review under *Kimbrough* v. *United States*, 552 U.S. 85 (2007). Petitioner also contends (Pet. 15-18) that, in affirming his above-Guidelines range sentence, the court of appeals improperly created an exception to the statutory requirement that sentencing courts consider the need to avoid unwarranted sentencing disparities. Both contentions lack merit and neither warrants this Court's review.

1. a. The court of appeals applied the proper standard of review to petitioner's sentence. In *Gall* v. *United States*, 552 U.S. 38 (2007), this Court held that "courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard." *Id.* at 41. In *Kimbrough*, this Court concluded 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 Sentencing Guidelines. 552 U.S. at 100-108; accord *Spears* v. *United States*, 555 U.S. 261, 264-266 (2009) (per curiam). The Court suggested 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.'" *Kimbrough*, 552 U.S. at 109 (quoting *Rita* v. *United States*, 551 U.S. 338, 351 (2007)). Conversely, "closer review may be in order," the Court suggested, "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). The *Kimbrough* Court had no occasion to apply any such "closer review" because the crack-cocaine guidelines at issue in that case "d[id] not exemplify the Commission'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.* (citation omitted).

The district court in this case did not vary from petitioner's sentencing range under the antitrust guideline, Sentencing Guidelines § 2R1.1, "based solely on [its] view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case." *Kimbrough*, 552 U.S. at 109 (quoting *Rita*, 551 U.S. at 351). Although the district court criticized the antitrust guideline generally for being too lenient, see, *e.g.*, Pet. App. 138, 141-142, its sentencing determination ultimately turned on its conclusion that, given the specific facts of this case, a within-Guidelines sentence was ill-suited to the totality and severity of petitioner's wrongdoing. Those facts included the "several unusual circumstances" of petitioner's offenses, such as the extent to which those offenses eliminated market options for purchasing concrete in his community, and the court's perception that the mark-ups on the commerce affected by petitioner's antitrust violations did not decline with increases in that commerce, contrary to the general assumption underlying the Guidelines loss-based enhancements. *Id.* at 142, 144, 145-147. Those facts also included aspects of petitioner's personal history and characteristics, such as his "total

lack of remorse." *Id.* at 154. Moreover, in the same opinion, the court sentenced one of petitioner's co-conspirators to a sentence at the bottom of his Guidelines range under the antitrust guideline, explaining that "significant differences" in the circumstances of the co-conspirator's offense and his personal history and characteristics warranted the lesser sentence. *Id.* at 175. The district court's decision to vary from petitioner's Guidelines range was thus based on a determination that the Guidelines range did not sufficiently account for petitioner's specific culpability; it was not based solely on rejection of the sentencing ranges under the antitrust guideline.

Petitioner nevertheless claims (Pet. 11) that this Court should grant certiorari to decide "whether the Sentencing Commission dispenses with its 'characteristic institutional role' when it modifies a guideline in response to congressional action." But the court of appeals' determination of the proper standard of review did not turn primarily on whether the antitrust guideline "exemplif[ied] the Commission's exercise of its characteristic institutional role." *Kimbrough*, 552 U.S. at 109. While the court noted that, in its view, the Sentencing Commission's revisions to the antitrust guideline "have largely been in response to Congressional acts," and thus not in an exercise of its characteristic institutional role, it was "more significant[]" that "the district court's sentencing decision was primarily based on how the antitrust guideline applied to [petitioner] in particular, as well as the district court's consideration of individual characteristics of [petitioner] untethered to the antitrust guideline." Pet. App. 17, 20. Indeed, the court of appeals made clear that even if the "volume of commerce grada-

tions" of the antitrust guideline were "the product of the Commission's institutional strengths," it "would still employ deferential substantive reasonableness review in this case because the district court's sentencing decision was based on the *particular* facts of *an individual* case," which "exemplifie[d] the district court's institutional strengths" and was "entitled to 'greatest respect.'" *Id.* at 19 (quoting *Kimbrough*, 552 U.S. at 109) (internal quotation marks omitted).

b. Petitioner contends (Pet. 13) that certiorari is warranted because four circuits (the Second, Third, Ninth, and now the Eighth) take the position that "congressional influence is inconsistent with the Commission's traditional empirical tools" and two circuits (the Sixth and Eleventh) disagree. Petitioner further contends (Pet. 9) that those positions affect "how to review sentences that are premised on a sentencing judge's policy disagreements with the Sentencing Guidelines," namely whether to apply "closer review." Petitioner overstates the division of authority among the courts of appeals, and any division that exists does not warrant review at this time.

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 amended the child-pornography guideline, Sentencing Guidelines § 2G2.2, several times "at the direction of Congress." 616 F.3d at 184. The court found that the child-pornography guideline can produce "irrational[]" offense-level calculations and explained that, as was the case in *Kimbrough*, a district court may vary from that guideline 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. In *United States* v. *Grober*, 624 F.3d 592 (2010), the Third Circuit also stated that the child-pornography guideline "was not developed pursuant to the Commission's institutional role and based on empirical data and national experience, but instead was developed largely pursuant to congressional directives." *Id.* at 608. The court explained that, while a district court may vary from the child-pornography guideline based on its policy disagreement with that guideline, it "must provide a reasoned, coherent, and sufficiently compelling explanation of the basis for [its] disagreement." *Id.* at 600 (internal quotation marks omitted).

In *United States* v. *Bistline*, 665 F.3d 758, cert. denied, 133 S. Ct. 423 (2012), the Sixth Circuit likewise stated that the Commission "did not act in its usual institutional role with respect to the relevant amendments to [the child-pornography guideline]." *Id.* at 763. But the court explained that, because of Congress's involvement in its development, the child-pornography guideline is "on stronger ground than the crack-cocaine guidelines were on in *Kimbrough*." *Ibid.* The Eleventh Circuit has only noted in a footnote that, in its view, the child-pornography guideline "do[es] not exhibit the deficiencies the Supreme Court identified in *Kimbrough*." *United States* v. *Pugh*, 515 F.3d 1179, 1201 n.15 (2008).

While some tension in the analysis of those cases exists, none of those cases applied the "closer review" that petitioner seeks. See *Bistline*, 665 F.3d 758 (no reference to "closer review"); *Henderson*, 649 F.3d at 964 (vacating a sentence because it was unclear whether district court recognized its discretion to vary

from the child-pornography guideline on policy grounds); *Grober*, 624 F.3d at 600-601, 608-609 (declining to apply "closer review"); *Dorvee*, 616 F.3d at 183-188 (reviewing a within-Guidelines sentence); *Pugh*, 515 F.3d 1179 (no reference to "closer review"). Indeed, the courts of appeals have not explored in any significant depth the question of 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). In fact, only one precedential appeals court decision has expressly invoked and applied closer review. See *United States* v. *Irey*, 612 F.3d 1160, 1202-1203 (11th Cir. 2010) (en banc), cert. denied, 131 S. Ct. 1813 (2011). The absence of a developed body of law on the questions of whether and when "closer review" applies counsels against this Court's reviewing those issues now.

In any event, this case is a poor vehicle for resolving any questions related to the scope or nature of "closer review." As discussed above, see pp. 8-9, *supra*, the court of appeals did not apply "closer review" to petitioner's sentence first and foremost because "the district court's sentencing decision was based on the *particular* facts of *an individual* case." Pet. App. 19 (internal quotation marks omitted). The court of appeals made clear that it would "employ deferential substantive reasonableness review in this case" regardless of whether the antitrust guideline was "the product of the Commission's institutional strengths." *Ibid.* Moreover, each case petitioner relies on to sub-

stantiate a split in authority involves the child-pornography guideline. See pp. 10-11, *supra*. To the extent that the applicability of "closer review" depends on the specific guideline at issue, see *Kimbrough*, 552 U.S. at 109, granting certiorari in this case is unlikely to resolve any tension in the child-pornography guideline cases.

2. Petitioner also contends (Pet. 15) that, in affirming his above-Guidelines sentence, the court of appeals "read * * * out of existence" 18 U.S.C. 3553(a)(6), which directs sentencing courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." In particular, petitioner takes issue (Pet. 16) with the court of appeals' statement that the fact that his above-Guidelines sentence "will necessarily differ when compared to a within-the-guidelines' sentence * * * does not *ipso facto* make the sentence substantively unreasonable." Pet. App. 15. Petitioner's contention lacks merit.

In *United States* v. *Booker*, 543 U.S. 220 (2005), this Court recognized that the advisory Guidelines regime would result in some variation in sentences. *Id.* at 263; see also *Kimbrough*, 552 U.S. at 107-108 ("our opinion in *Booker* recognized that some departures from uniformity were a necessary cost of the remedy we adopted"). Subsequently, the Court in *Kimbrough* rejected the suggestion that permitting district courts to vary from the Guidelines based on a specific policy disagreement would necessarily result in unwarranted sentencing disparities. *Id.* at 106-108. The court of appeals thus echoed *Booker* and *Kimbrough* in stating that the fact that petitioner's above-Guidelines sentence will necessarily be longer than a within-

Guidelines sentence does not in itself make his sentence substantively unreasonable.

Petitioner incorrectly claims (Pet. 16) that the court of appeals' "sole logic for affirmance" was that the difference in length between petitioner's above-Guidelines sentence and a within-Guidelines sentence was "inevitable." The court of appeals thoroughly reviewed the district court's sentencing decision and concluded that the district court "considered appropriate factors in varying from the guidelines" and "adequately explained" petitioner's sentence. Pet. App. 22.

To the extent that petitioner argues (Pet. 15-16) that the district court did not adequately consider the need to avoid unwarranted sentencing disparities in imposing his sentence, that contention is without merit as well. In sentencing petitioner, the district court recognized that his sentence was "higher than some recent sentences imposed for violations of the same statute." Pet. App. 160.[2] After carefully considering the Section 3553(a) factors, see *id.* at 134-161, however, the court determined that the difference in length was not unwarranted because of the seriousness of petitioner's antitrust violations, his lack of remorse, and the other "unusual circumstances" of his offenses. *Id.* at 142, 160-161.

Finally, contrary to petitioner's contention (Pet. 17), the courts of appeals are not in conflict on whether *Kimbrough* in effect nullified Section 3553(a)(6).

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[2] The court also explained that a number of factors, including the recent change to statutory maximum sentences under the Sherman Act and the few reported Sherman Act sentencing decisions, make it difficult to compare sentences for Sherman Act offenses. Pet. App. 158-160.

As explained above, see p. 13, *supra*, the court of appeals did not find a "*Kimbrough* exception," Pet. 17, to Section 3553(a)(6). The two other court of appeals' decisions that petitioner relies on to substantiate a split in authority stand only for the uncontroversial principle that sentencing courts must consider unwarranted sentencing disparities even when they disagree with the Sentencing Commission's policy choices. See *Henderson*, 649 F.3d at 964 (in varying on policy grounds, sentencing courts must "continue to consider all of the § 3553(a) factors"); *United States* v. *Merced*, 603 F.3d 203, 225 (3d Cir. 2010) (in varying on policy grounds, sentencing court should have "explained why that variance would not contribute to unwarranted sentencing disparities pursuant to § 3553(a)(6)").[3]

[3] In passing, petitioner asserts (Pet. 11) that the district court "rejected the antitrust Guideline outright and inserted the fraud Guideline in its place." See also Pet. 5-6. That is incorrect. In taking into account the kinds of sentences available, see 18 U.S.C. 3553(a)(3), the district court briefly considered the sentencing range for a fraud offense resulting in a comparable amount of loss. Pet. App. 155-157. That range was one of many factors that the court considered in varying upward from petitioner's Guidelines range. See *id.* at 134-161.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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