No. 11-1431

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 improperly based its disagreement with Sentencing Guidelines § 2G2.2 on Congress's role in amending that Guideline rather than on policy reasons rooted in 18 U.S.C. 3553(a).

2. Whether the district court erred by failing to consider relevant policy statements of the Sentencing Commission when sentencing petitioner.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and guidelines: Page

Miscellaneous: Page

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 665 F.3d 758.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 2012. A petition for rehearing was denied on February 29, 2012 (Pet. App. 33a-34a). The petition for a writ of certiorari was filed on May 24, 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 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). He was sentenced to one day of imprisonment, to be followed by ten years

of supervised release. Pet. App. 26a. The court of appeals vacated the sentence and remanded for resentencing. *Id.* at 1a-21a.

1. In September 2007, law enforcement agents downloaded 12 images of child pornography from an Internet protocol address in Mount Vernon, Ohio, later determined to belong to petitioner. 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. Agents subsequently obtained a warrant to search petitioner's home. They found 305 still images and 56 videos of child pornography on his computer. Many of the images and videos showed adult males raping girls eight to ten years old. Pet. App. 2a-3a; Gov't C.A. Br. 5-6, 10.

2. An information charged petitioner with possessing child pornography, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). Petitioner pleaded guilty to that charge. Gov't C.A. Br. 3.

3. 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, 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 67 years old, had no prior criminal convictions, had health problems (having suffered two strokes in the preceding 11 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. 3a. Petitioner filed a sentencing memorandum asking for a sentence of probation. Gov't C.A. Br. 14.

b. At an initial sentencing hearing, the district court adopted the PSR's Guidelines calculations. 11/12/09 Sent. Tr. 4 (Sent. Tr. I). The court stated that it had concluded that "the [G]uidelines for possession of child pornography are seriously flawed." *Id.* at 24; see *id.* at 22-24. 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 22. The court stated that it would give the child-pornography Guideline "consideration, although less [deference] than [it] would other guidelines." *Id.* at 24.

The district court viewed petitioner's possession offense as less culpable than an offense involving production and distribution of child pornography. Sent. Tr. I at 25. The court noted the ease with which a possession offense can be committed, opining that computer viruses can cause the display of child pornography and that viewing activity is often compulsive. *Id.* at 25-26. And although petitioner had distributed child pornography through peer-to-peer software, the court discounted that

conduct because petitioner neither produced nor paid for the images, nor was he paid for redistributing them online. *Id.* at 26-27. The court also noted that petitioner had no criminal record or record of child sexual abuse. *Id.* at 27. The court believed that the "humiliation of [petitioner's] arrest," his prosecution before family and friends, the requirement of sex-offender registration, and supervised release would be sufficient to deter him from further involvement in child pornography. *Id.* at 27-28. The court noted petitioner's age and health, and it found that his purported need to care for his wife was an appropriate sentencing consideration. *Id.* at 29.

The district court announced that it would sentence petitioner to one day of imprisonment (and allow him to serve that sentence in the courthouse lockup), to be followed by ten years of supervised release. Sent. Tr. I at 31-34. The government objected to the sentence and requested an opportunity to brief the reasons for adhering to the child-pornography Guideline. *Id.* at 34-36. The court granted that request. *Id.* at 36-38. In its supplemental memorandum, the government noted (*inter alia*) that the Sixth Circuit had previously rejected the criticism that Section 2G2.2 reflects "congressional meddling." Gov't Supp. Sent. Mem. at 5-7; see *United States* v. *Kirchhof*, 505 F.3d 409, 414 (6th Cir. 2007) ("Kirchhof fails to recognize that it is the prerogative of Congress to fix the sentence for a federal crime and the scope of judicial discretion with respect to a sentence.").

c. At a second sentencing hearing, the district court reiterated its belief that, because the child-pornography Guideline had partly been, "in effect, legislated," it provided "somewhat less guidance in arriving at a proper sentence under [18 U.S.C.] 3553(a)" than other Guidelines. 1/7/10 Sent. Tr. 45 (Sent. Tr. II). The court added

that because the Guidelines are advisory, they are "only one factor" for the court to consider. *Ibid.*

The court announced that it would adhere to its previous view and impose a sentence of one day of incarceration, to be followed by ten years of supervised release. Sent. Tr. II at 45-46, 51. The court found that petitioner's crime did not require much planning and did not involve quid pro quo trading of child pornography. *Id.* at 46-48. Based on a psychologist's report, the court found that petitioner had significant emotional problems as a result of his health, was incapable of committing any sexual acts, and was not a risk to children. *Id.* at 48. The court cited petitioner's statement that he originally installed the LimeWire program on his computer to download music and opined that he was not a sophisticated computer user. *Id.* at 46-47. The court found that petitioner was the "sole caregiver" for his "invalid wife." *Id.* at 48. The court found no information indicating that petitioner was a threat to the public. *Id.* at 49. The court concluded that petitioner's age, "otherwise unblemished record as a productive citizen," health, and family circumstances called for mitigation of his sentence. *Ibid.*

4. The government appealed petitioner's sentence as substantively unreasonable. The court of appeals vacated the sentence and remanded the case for resentencing. Pet. App. 1a-21a.

a. 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. 5a. The court stated that, "if a district court chooses to disagree with a guideline, [the court] will 'scrutinize closely' its reasons for

doing so." *Ibid.* (quoting *United States* v. *Herrera-Zuniga*, 571 F.3d 568, 585 (6th Cir. 2009)).

The court of appeals found that the district court's concerns about "congressional mandates" (Sent. Tr. I at 22) were misguided, because "defining crimes and fixing penalties are legislative . . . functions." Pet. App. 6a (quoting *United States* v. *Evans*, 333 U.S. 483, 486 (1948)) (alteration in original). Congress delegated some of those functions to the Sentencing Commission, see generally 28 U.S.C. 994, and this Court upheld that delegation in *Mistretta* v. *United States*, 488 U.S. 361, 384 (1989), but "the Constitution merely tolerates, rather than compels, Congress's limited delegation of power to the Commission." Pet. App. 6a-7a. The court, therefore, "disagree[d] with the complaint * * * that Congress's amendments to § 2G2.2 'evince a blatant disregard for the Commission and are the most significant effort to marginalize the role of the Sentencing Commission in the federal sentencing process since the Commission was created by Congress[.]'" *Id.* at 7a (quoting *United States* v. *Dorvee*, 616 F.3d 174, 185 (2d Cir. 2010)) (internal quotation marks and citation in *Dorvee* omitted). The court stated:

> We think it follows that a district court cannot reasonably reject § 2G2.2—or any other guidelines provision—merely on the ground that Congress exercised, rather than delegated, its power to set the policies reflected therein. That is not to say 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. The district court cited that reason here; and

> that reason cannot support its decision to reject § 2G2.2.

Id. at 8a. For similar reasons, the court of appeals rejected the district court's reliance on the fact that "political considerations" may have affected Section 2G2.2; the court noted that in the context of legislation adopted by the political branches, "political considerations * * * are oftentimes democratic considerations." *Ibid.* "[T]he courts cannot bar Congress from acting on political considerations," the court of appeals stated, "any more than Congress can bar the courts from acting on legal ones." *Ibid.*

The court distinguished this case from *Kimbrough* v. *United States*, 552 U.S. 85 (2007), in which this Court held that a district court has discretion 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 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. 10a (quoting *Kimbrough*, 552 U.S. at 109). Here, by contrast, "*Congress* was the relevant actor with respect to" the relevant amendments to Section 2G2.2, which "puts [Section] 2G2.2 on stronger ground than the crack-cocaine guidelines were on in *Kimbrough*." *Ibid.* As the court explained, Congress's power to make sentencing policy does not depend on any particular expertise, but rather flows from the Constitution, "[a]nd nothing in that document confines the exercise of Congress's sentencing power to empirical grounds alone." *Id.* at 10a-11a. The court concluded that as a result, 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 11a. And here, the court of appeals concluded, the district court "did not seriously attempt to refute" Congress's reasons for amending Section 2G2.2; it based its disagreement only on the fact that those reasons were Congress's (not the Commission's). *Id.* at 12a; see *id.* at 9a.

b. The court of appeals concluded that petitioner's sentence was not reasonable in light of the sentencing factors in 18 U.S.C. 3553(a). As to 18 U.S.C. 3553(a)(2)(A), the court found that the district court diminished the seriousness of the offense of possessing child pornography and failed to recognize that petitioner's conduct had inflicted "great harm upon its victims." Pet. App. 13a-17a; see also *id.* at 15a-17a (quoting sentencing statement submitted by victim who appeared in images found on petitioner's computer). Nor did the one-day jail sentence afford adequate deterrence. *Id.* at 17a (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 the requirement that he register as a sex offender was misplaced because "none of those consequences ar[o]se from [petitioner's] sentence, as opposed to his prosecution and conviction." *Ibid.*; see also *id.* at 14a-15a. 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 18a (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 concluded that petitioner's age, record as a "productive" citizen, health, and family circumstances did not justify the lenient sentence imposed. Pet. App. 18a. 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. *Ibid.* (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 petitioner's assertions "at face value." Pet. App. 19a.

The court therefore concluded that petitioner's sentence was substantively unreasonable. *Id.* at 19a, 21a.

5. Petitioner sought and obtained a stay of the court of appeals' mandate, and he has not yet been resentenced.

ARGUMENT

Petitioner contends (Pet. 7, 9-13) that the court of appeals reviewed the district court's disagreement with Sentencing Guidelines § 2G2.2 under an unduly exacting standard that is inconsistent with decisions of this Court and other courts of appeals. He also contends (Pet. 8, 14-15) that the court of appeals gave too much weight to the Sentencing Commission's policy statements. The decision of the court of appeals is correct, and further review is not warranted.

1. As an initial matter, the court of appeals' decision is interlocutory, and the petition should be denied on that basis. The court of appeals held that petitioner's one-day sentence was substantively unreasonable and that the district court had wrongly based that sentence on certain considerations, but it did not require that the district court impose a particular sentence on remand. See, *e.g.*, Pet. App. 18a. As a result, although the court of appeals identified multiple reasons why a remand for

resentencing was required, the issues that the court of appeals addressed may not affect the sentence petitioner receives on remand to any significant degree. See, *e.g.*, *id.* at 19a (noting district court's failure to address various issues and objections). And 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 reviewing cases on appeal from final judgment.

2. Petitioner's primary contention is that the court of appeals applied the wrong standard of review and should have examined petitioner's one-day sentence more deferentially. But contrary to petitioner's portrayal, the court of appeals did not lay down any new rule of law concerning the standard of review for policy-based disagreements with the Guidelines, and no such new rule would have been necessary in this case, because under any standard, the one-day sentence imposed by the district court was unreasonably low. Petitioner thus is left with only the fact-bound argument that a one-day sentence was reasonable in his case. That claim does not warrant further review.

a. Petitioner devotes much of his petition to the proposition that the courts of appeals should not take up this Court's suggestion in *Kimbrough* v. *United States*, 552 U.S. 85 (2007), that "closer review may be in order when the sentencing judge varies from the Guidelines" solely because of a policy-based disagreement with those Guidelines. *Id.* at 109. But the court of appeals in this

case did not announce any broadly applicable principle of "closer review." Indeed, the court of appeals did not use that phrase, nor did it cite that part of *Kimbrough*.

Rather, the court of appeals' only reference to the standard of review was a brief quotation 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." Pet. App. 5a (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* itself, not answering the "closer review" question that this Court left open.

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 101-108; 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] 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.* (quotation marks and citation omitted).[1] This Court thus held that the district court in Kimbrough's case 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 decision below), 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 that Guideline was sufficiently like the crack-cocaine Guideline that, under *Kimbrough*, the district court's decision must be sustained. 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. Indeed, the court's opinion refutes any notion that the outcome turned on the standard of appellate review. Rather, the court of appeals concluded that the district court "did not seriously attempt" to provide valid reasons for its disagreement with the child-

[1] As the Court explained, 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. *Kimbrough*, 552 U.S. at 96-97, 109-110.

pornography Guideline. Pet. App. 12a. And the court of appeals' review of the district court's application of the Section 3553(a) factors likewise did not depend on applying a less deferential standard; the court of appeals concluded that "the sentence imposed in this case does not *remotely* meet the criteria that Congress laid out in [Section] 3553(a)." *Id.* at 21a (emphasis added). As the court of appeals correctly explained, *id.* at 8a-9a, a district court "must explain its disagreement [with the Guidelines] in terms that are persuasive on policy grounds, not political ones," *id.* at 9a, and the district court failed to do that here. Instead, all of the reasons the district court gave pertained to Congress's involvement in amending the guideline. See Sent. Tr. I at 22; Sent. Tr. II at 45. The court of appeals correctly held that "the fact of Congress's role in amending a guideline is not itself a valid reason to disagree with the guideline," Pet. App. 8a, and the district court's reliance on that invalid reason was an abuse of discretion—with or without "closer review."

b. Petitioner presses (Pet. 9-10) the broad argument that, despite this Court's suggestion in *Kimbrough*, "closer review" of a district court's policy disagreement with a Guideline is *never* permissible. Even if that issue were properly presented in this case and relevant to the outcome of the appeal, it would not warrant further review.

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. de-

nied, 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).[2]

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. As petitioner notes (Pet. 13 & n.4), the standard-of-review question he presents could affect criminal cases involving any one of dozens of different advisory Guidelines. The courts of appeals, therefore, will have further opportunities to interpret how *Kimbrough* applies in cases involving different Guidelines. This Court's usual practice, in the absence of any circuit conflict, is to let such developments percolate before granting plenary review. That course is appropriate here.

c. Petitioner next contends (Pet. 10-12) that "closer review" should not have applied here because the child-pornography Guideline, like the crack-cocaine Guideline at issue in *Kimbrough*, is not the product of the Sentencing Commission's "characteristic institutional role." As explained above, petitioner incorrectly portrays the standard of review the court of appeals applied. But even if petitioner's premise were correct, the child-pornography Guideline does not share the features of the crack-cocaine Guideline on which this Court relied in *Kimbrough*.

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[2] Although some cases have discussed "closer review" in the course of declining to apply it, 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"), the discussion in those cases falls well short of defining or setting an approach.

The 100-to-1 ratio in the crack-cocaine Guideline was not empirically based, but it also was not the product of a congressional directive—as this Court expressly held. *Kimbrough*, 552 U.S. at 102-105. Rather, the Sentencing Commission chose to borrow that ratio from another context—statutes prescribing mandatory minimums—even though it "later determined that the crack/powder sentencing disparity [wa]s generally unwarranted." *Id.* at 97. The child-pornography Guideline, by contrast, reflects direct congressional action on the very matters at issue, *e.g.*, the need for a sentencing enhancement when the offense involves an extremely large number of images, as petitioner's did. See Sentencing Guidelines § 2G2.2(b)(7); PROTECT Act, Pub. L. No. 108-21, § 401(i)(1)(C), 117 Stat. 673.

The reason that a within-Guidelines sentence may be presumed reasonable, and that a categorical policy disagreement with a particular Guideline might warrant more thorough consideration, is that "in the ordinary case, the Commission's recommendation of a sentencing range will 'reflect a rough approximation of sentences that might achieve'" Congress's "objectives" as reflected in Section 3553(a). *Kimbrough*, 552 U.S. at 109 (quoting *Rita*, 551 U.S. at 350). A Guideline that reflects direct congressional action is certainly no *less* likely to reflect Congress's objectives than is a Guideline promulgated on the Commission's own initiative.[3]

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[3] Contrary to petitioner's assertion (Pet. 12), the court of appeals did not hold that a sentence should be subject to more searching review if the district court disagrees with a congressionally enacted Guideline, as opposed to one promulgated by the Commission. The court merely held that a district court can more easily justify disagreement when (as in *Kimbrough*, but not here) "the Commission itself [has made] a policy decision for reasons that lie outside its expertise." Pet. App. 11a.

d. Petitioner contends (Pet. 12) that the court of appeals' decision conflicts with those of other courts of appeals in child-pornography cases, citing *United States* v. *Dorvee*, 616 F.3d 174 (2d Cir. 2010), and *United States* v. *Grober*, 624 F.3d 592 (3d Cir. 2010). Although some tension in analysis exists, those cases do not conflict with the decision below on the question petitioner presents, pertaining to the standard of review. Pet. i.

In *Dorvee*, the Second Circuit held that the defendant's sentence for distributing child pornography, which was effectively at the statutory maximum of 240 months and within the advisory Guidelines,[4] was substantively unreasonable, for several reasons. 616 F.3d at 176, 183-184. In doing so, the court stated that Section 2G2.2 "is fundamentally different from most" Guidelines, in that it had been frequently amended at Congress's direction and that, "unless applied with great care," the Guideline "can lead to unreasonable sentences that are inconsistent with what § 3553 requires." *Id.* at 184. The court found that Section 2G2.2 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 a policy disagreement. *Id.* at 187-188. But the court had no occasion to address the standard of appellate review that applies to such a disagreement because the district court

[4] Because a Sentencing Guidelines range cannot exceed the statutory maximum, in Dorvee's case the Guidelines recommended imposing the statutory maximum. 616 F.3d at 176-177. Dorvee's sentence was actually six months and 14 days below the statutory maximum and the Guidelines recommendation, reflecting time that he had already served on related state charges. *Id.* at 178. Nevertheless, the Second Circuit treated Dorvee's sentence as both "the maximum available sentence" and a "within-Guidelines sentence." *E.g.*, *id.* at 183, 184.

in *Dorvee* did not vary from the defendant's Guidelines range. See *id.* at 183 (treating Dorvee's sentence as "a within-Guidelines sentence"). See also *United States* v. *Henderson*, 649 F.3d 955, 960, 962, 964 (9th Cir. 2011) (vacating sentence because it was unclear whether district court recognized its authority to disagree with child pornography guidelines and stating that, because § 2G2.2 was not promulgated in a manner reflecting the Commission's exercise of "characteristic institutional role," district courts "must enjoy the same liberty to depart from them based on reasonable policy disagreement as they do from the crack-cocaine Guidelines discussed in *Kimbrough*").

It is true that in this case, the court of appeals stated that "because Congress was the relevant actor with respect to [the] amendments [to Section 2G2.2], * * * that puts [Section] 2G2.2 on stronger ground than the crack-cocaine guidelines were on in *Kimbrough*." Pet. App. 10a (emphasis omitted). That view contrasts with the view in *Dorvee*. See 616 F.3d at 187-188. But with respect to petitioner's specific focus on the standard of appellate review and *Kimbrough*'s "closer review" language, the cases do not conflict because neither case squarely addressed it.[5]

In *Grober*, the district court sentenced the defendant to the five-year mandatory minimum sentence, which was substantially below his advisory Guidelines range,

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[5] In any event, since *Dorvee*, this Court has denied several petitions for a writ of certiorari asserting that this Court should resolve a disagreement between the Second Circuit and other courts. See, *e.g.*, *Miller* v. *United States*, cert. denied, No. 11-9330 (June 18, 2012); *Garthus* v. *United States*, 132 S. Ct. 2373 (2012) (No. 11-7811); *Woida* v. *United States*, 132 S. Ct. 122 (2011) (No. 10-9027). The same disposition is appropriate here.

based on its policy disagreement with Section 2G2.2 and its application of the Section 3553(a) factors. 624 F.3d at 595-598. The Third Circuit upheld the sentence over the parties' cross-appeals. *Id.* at 595, 598. As relevant here, the court stated 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 (quotation marks and citation omitted; brackets removed). The court noted this Court's statement in *Kimbrough* that "closer review" of a policy disagreement may sometimes be warranted, but determined that it was not warranted in that case because "the Commission did not do what 'an exercise of its characteristic institutional role' required—develop § 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). The court went on to conclude that the district court had provided a sufficiently compelling justification for not applying Guidelines § 2G2.2 that was "well-grounded in the § 3553(a) factors." *Id.* at 609.

As already explained, the court in this case did not state that it would apply a "closer review" standard to a focused policy disagreement with the child-pornography Guidelines. And it had no occasion to consider that issue because the district court in this case did not offer the sort of substantive critiques of the child-pornography Guideline that the district court did in *Grober*, see 624 F.3d at 597-598; rather, the district court here justified its one-day sentence by focusing on the *procedural* history of the Guideline and treating Congress's involve-

ment as tainting it. See Sent. Tr. I at 22; Sent. Tr. II at 45; see *Grober*, 624 F.3d at 600 (equating a "sufficiently compelling explanation" with one "grounded in the § 3553(a) factors"). Nothing in the Third Circuit's decision to sustain Grober's five-year sentence establishes that it would also affirm a one-day sentence like petitioner's, on reasons like those the district court gave here.

e. To the extent that petitioner's arguments turn on particular aspects of the child-pornography Guideline, and on Congress's role in shaping that Guideline, further review would be premature for an additional reason. The Sentencing Commission "is undertaking a thorough examination" of the appropriate sentencing considerations for child pornography offenses, and it "anticipates issuing a comprehensive report later this year." *Public Hearing Before the United States Sentencing Commission* 7 (Feb. 15, 2012), http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Hearing_Transcript_20120215.pdf (remarks of Judge Patti Saris, Chair of the Sentencing Commission). Based on the findings in that report, the Commission may make "recommendations to Congress on any statutory and/or guideline changes that may be appropriate" for child-pornography offenses. 77 Fed. Reg. 31,070 (May 23, 2012).

To the extent petitioner's arguments depend on the premise that portions of Section 2G2.2 were not written by the Sentencing Commission after empirical study, those arguments likely would lack any prospective significance once the Commission amended the Guidelines. And at a minimum, the Commission's research and recommendations would be highly relevant to the question of the Guideline's empirical basis. It would therefore be

premature for this Court to take up a question focused on this Guideline and these issues while the Commission's empirical work is in process but not yet complete.

3. Petitioner's contention (Pet. 10, 14-15) that the court of appeals' decision gives undue weight to the Commission's policy statements also does not warrant further review. The court found error in the district court's consideration of petitioner's "history and circumstances," 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. 18a-19a. The court recognized that the district court could disagree with those policy statements and consider those background factors if it chose, but it held that the district court must recognize that on-point policy statements point the other way. As the court correctly explained, "[S]ection 3553(a)(5) requires that the district court consider applicable policy statements issued by the Sentencing Commission." *Id.* at 19a (quoting *United States* v. *Christman*, 607 F.3d 1110, 1119 (6th Cir.), cert. denied, 131 S. Ct. 488 (2010)).

Contrary to petitioner's contention (Pet. 14), the court's analysis was consistent with *Pepper* v. *United States*, 131 S. Ct. 1229 (2011). In *Pepper*, the Court held that a district court may consider evidence of a defendant's post-sentencing rehabilitation at resentencing. *Id.* at 1236. As relevant here, the Court rejected reliance on a Commission policy statement (Sentencing Guidelines § 5K2.19) providing that post-sentencing rehabilitation was not an appropriate basis for a downward departure at resentencing, explaining that a "district

court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views." 131 S. Ct. at 1247 (citing *Kimbrough*, 552 U.S. at 109-110). That was "particularly true" in the case of the policy statement precluding reliance on post-sentencing rehabilitation, which, the Court found, "rest[ed] on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted." *Ibid.* Petitioner mounts no similar attack on the "policy rationales" of the policy statements at issue here; rather, he contends that district courts are *never* required to consider policy statements. *Pepper* lends no support to that proposition.

The Court emphasized in *Pepper* "that district courts must still give 'respectful consideration' to the now-advisory Guidelines (and their accompanying policy statements)." 131 S. Ct. at 1247 (quoting *Kimbrough*, 552 U.S. at 101). Consistent with that statement, the court of appeals here did not preclude the district court from considering petitioner's age, health, and family circumstances, or from disagreeing with the Commission's policy statements concerning those factors, but held only that the district court was required to take those policy statements into account, as required by Section 3553(a)(5). Pet. App. 18a-19a.[6]

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[6] Petitioner erroneously contends (Pet. 15) that requiring a district court to consider the policy statements concerning a defendant's age, health, and family circumstances when considering a potential variance from his advisory range gives undue weight to the policy statements because the court will have already considered them when calculating the Guidelines range. The Guidelines Manual does not limit consideration of the policy statements addressing certain offender characteristics to decisions on downward departures, but rather states more broadly that they are relevant to "whether a sentence should be outside

Nor is petitioner correct that the decision below conflicts with those of other courts of appeals. Petitioner contends (Pet. 14) that "[c]ourts in other circuits have actually reversed sentencing decisions when Judges declined to consider relevant circumstances in deference to policy statements, and have rejected challenges to variances based on policy statements that restrict departures." But none of those cases involved the error here—a district court's failure to *consider* an applicable policy statement. See *United States* v. *Powell*, 576 F.3d 482, 498-499 (7th Cir. 2009); *United States* v. *Simmons*, 568 F.3d 564, 567-570 (5th Cir. 2009); *United States* v. *Harris*, 567 F.3d 846, 854-855 (7th Cir.), cert. denied, 130 S. Ct. 1032 (2009); *United States* v. *Chase*, 560 F.3d 828, 830-832 (8th Cir. 2009); *United States* v. *Hamilton*, 323 Fed. Appx. 27, 31 (2d Cir. 2009); *United States* v. *Howe*, 543 F.3d 128, 137-139 (3d Cir. 2008); *United States* v. *Martin*, 520 F.3d 87, 93 (1st Cir. 2008). Indeed, at least two of the cases cited by petitioner recognize that district courts must still consider policy statements. *Simmons*, 568 F.3d at 569; *Martin*, 520 F.3d at 93. Further review is not warranted.[7]

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the applicable guideline range." Sentencing Guidelines Ch. 5, Pt. H, intro. comment.

[7] Petitioner incorrectly contends that the decision below conflicts with other decisions of the Sixth Circuit. See Pet. 15 (citing *United States* v. *Tristan-Madrigal*, 601 F.3d 629 (2010); *United States* v. *Howe*, 373 Fed. Appx. 578 (2012); *United States* v. *Blue*, 557 F.3d 682, cert. denied, 130 S. Ct. 156 (2009)). But even if it did, a claim of an intra-circuit conflict would not warrant this Court's review, particularly where (as here) the claim was never presented to the court of appeals. See generally Pet. for Reh'g En Banc iv (citing none of these cases).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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