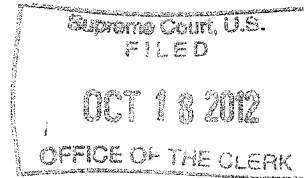


12-488

No. _____



In the Supreme Court of the United States

STEVEN KEITH VANDEBRAKE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Kimbrough v. United States*, 552 U.S. 85 (2007), this Court held that district courts may base sentencing decisions on their policy disagreements with the United States Sentencing Guidelines. To preserve the Sentencing Commission's "important institutional role," however, the Court ruled that when a sentencing judge in a mine-run case disagrees with a Guideline that "exemplif[ies] the Commission's exercise of its characteristic institutional role," "closer review" of the sentence "may be in order." *Id.* at 109 (quotation omitted). This case presents two questions about the meaning and continuing vitality of *Kimbrough*. The questions presented are:

1. Did the Eighth Circuit correctly hold that when the Sentencing Commission modifies a Guideline in response to congressional action, the Guideline no longer reflects the Commission's "characteristic institutional role," such that a district court's rejection of the Guideline on policy grounds is exempt from "closer review" under *Kimbrough*?
2. Did the Eighth Circuit correctly hold that when a sentencing court exercises its discretion under *Kimbrough* to reject a Sentencing Guideline on policy grounds, the sentencing court is no longer required to consider, under 18 U.S.C. § 3553(a)(6), whether its sentence avoids unwarranted disparities?

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PETITION FOR CERTIORARI

Petitioner Steven Keith VandeBrake respectfully petitions this Court for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the judgment in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-47) is reported at 679 F.3d 1030. The district court's sentencing memorandum (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. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTES AND REGULATIONS INVOLVED

18 U.S.C. § 3553(a) provides in relevant part:

The court, in determining the particular sentence to be imposed, shall consider . . . (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct

U.S.S.G. § 2R1.1 provides as in relevant part:

(a) Base Offense Level: 12

(b) Specific Offense Characteristics

(1) If the conduct involved participation in an agreement to submit non-competitive bids, increase by 1 level.

(2) If the volume of commerce attributable to the defendant was more than \$1,000,000, adjust the offense level as follows:

<u>Volume of</u> <u>Commerce</u> (Apply the Greatest)	<u>Adjustment to</u> <u>Offense Level</u>
(A) More than \$1,000,000	add 2
(B) More than \$10,000,000	add 4
(C) More than \$40,000,000	add 6
(D) More than \$100,000,000	add 8
(E) More than \$250,000,000	add 10
(F) More than \$500,000,000	add 12
(G) More than \$1,000,000,000	add 14
(H) More than \$1,500,000,000	add 16.

For purposes of this guideline, the volume of commerce attributable to an individual participant in a

conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation. When multiple counts or conspiracies are involved, the volume of commerce should be treated cumulatively to determine a single, combined offense level.

...

STATEMENT OF THE CASE

Mr. VandeBrake is a small-time antitrust offender. Based on personal philosophical views about the Sherman Act, the sentencing judge nonetheless imposed on him the longest pure antitrust sentence in American history. The court of appeals affirmed that sentence without engaging in the “closer review” mandated by this Court’s decision in *Kimbrough v. United States*, 552 U.S. 85 (2007), or even ensuring that the district court had discharged its statutory duty to avoid unwarranted sentencing disparities.

A. Pre-Sentencing Proceedings in the District Court

On April 26, 2010, the government charged Mr. VandeBrake with three counts of violating the Sherman Act, 15 U.S.C. § 1. Pursuant to a binding plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C), Mr. VandeBrake entered a guilty plea before a magistrate judge on May 4, 2010. The plea agreement stipulated that Mr. VandeBrake would receive a sentence of 19 months. On May 20, 2010, however, the district court entered a one-paragraph order announcing that it was “unwilling to be bound to the plea agreement’s limitations on the court’s

discretion regarding the length of the sentence and the amount of the fine.” Order Regarding Def.’s Rule 11(c)(1)(C) Plea Agreement (District Court Dkt No. 13). The court announced that it would conduct a hearing to reject the plea agreement in open court pursuant to Federal Rule of Criminal Procedure 11(c)(5).

The district court conducted the Rule 11(c)(5) hearing on May 26, 2010. It confirmed its intention to reject the Rule 11(c)(1)(C) plea agreement, and further made clear that it would reject *any* plea agreement offered pursuant to Rule 11(c)(1)(C). Mr. VandeBrake and the government then reached a non-binding plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(B), converting the sentencing stipulation to a recommendation to the court. The district court accepted Mr. VandeBrake’s guilty plea pursuant to this non-binding plea agreement. The factual stipulation accompanying the plea set forth that as the sales manager for a ready-mix concrete firm in northwest Iowa, Mr. VandeBrake had engaged in price-fixing and bid-rigging with three other regional firms.

B. The Sentencing Hearing and the District Court’s Ruling

The district court conducted a consolidated sentencing hearing for Mr. VandeBrake and Kent Robert Stewart, a co-conspirator of Mr. VandeBrake.¹ The extensive hearing was spread over three days between December 7 and December 15, 2010. Pursuant

¹ The government charged Mr. Stewart separately from Mr. VandeBrake. *See United States v. Stewart*, N.D. Iowa CR10-4028-MWB.

to the non-binding plea agreement, the government recommended a within-Guidelines sentence.

On February 8, 2011, the district court issued its Memorandum Opinion and Order Regarding Sentencing (the “Sentencing Memorandum”). App. 52-180. The court adopted the parties’ undisputed calculation that Mr. VandeBrake’s total offense level under U.S.S.G. § 2R1.1 was 16 and his criminal history category was I, yielding a sentencing range of 21 to 27 months.² Rebuffing the parties’ recommendations, however, the court varied upwards and imposed a sentence of 48 months.

After surveying the history of Sherman Act enforcement, the district court announced that it had “policy disagreements with the Sentencing Guidelines’ relatively lenient treatment of antitrust violations when compared to fraud sentences.” App. 160-161. The court arrived at Mr. VandeBrake’s 48-month sentence by calculating Mr. VandeBrake’s sentencing range using the Guideline governing fraud offenses, U.S.S.G. § 2B1.1. The court converted § 2R1.1’s “volume of commerce” to § 2B1.1’s “loss amount” by estimating that antitrust offenses inflate consumer prices by 10%. This yielded a “loss amount” for Mr. VandeBrake of \$566,349. Applying a § 2B1.1-specific enhancement for number of victims, the court announced that Mr. VandeBrake’s total offense level under § 2B1.1 was 23,

² The offense level of 16 is one level higher than that embodied in the plea agreement. At the sentencing hearing, Mr. VandeBrake elected not to object to the district court’s imposing a greater enhancement for his role in the offense than had been agreed to between the parties.

producing a range of 46 to 57 months. App. 155-157. The district court sentenced Mr. VandeBrake within the range called for by this alternate calculation.

The sentencing judge was not bashful about the fact that his policy disagreement with § 2R1.1 drove his decision, declaring that “the antitrust guideline § 2R1.1 is deserving of less deference” than the fraud Guideline, § 2B1.1. App. 142. Later, in even more direct terms, the judge declared that he “appear[ed] to be the first federal judge to consider varying upward from the Sentencing Guidelines based on my policy disagreements with the Sentencing Guideline’s relatively lenient treatment of antitrust violations when compared to fraud sentences.” App. 160-161 (emphasis added).³ The court ruled, moreover, that because he was the first – and *only* – judge to reject § 2R1.1 on policy grounds, Mr. VandeBrake’s sentence “will understandably result in a sentencing disparity between the defendants here and those sentenced previously.” App. 161. The sentencing disparity, the judge explained, was “entirely warranted in order to reflect” the judge’s perception of “the seriousness that Sherman Act violations pose to the well-being of the nation.” App. 161.

³ In a subsequent opinion in an unrelated case, the sentencing judge cited his Sentencing Memorandum in this case as “rejecting, on policy grounds, the relatively lenient treatment of antitrust violators in the Sentencing Guidelines, as compared to defendants sentenced for fraud.” *United States v. Williams*, 788 F. Supp.2d 847, 869 (N.D. Iowa 2011) (Bennett, J.).

C. The Eighth Circuit's Decision

Mr. VandeBrake appealed the sentence to the Eighth Circuit. As pertinent to this Petition, he argued that the district court's policy-based sentencing decision cannot survive the "closer review" called for in *Kimbrough*. He also argued that in imposing the longest pure antitrust sentencing in history on a small-time offender, the district court had failed to comply with 18 U.S.C. § 3553(a)(6), which obligates sentencing judges to give weight to the need to avoid unwarranted disparities.

A divided panel affirmed. The majority rejected Mr. VandeBrake's request that it engage in closer review of the sentence pursuant to *Kimbrough*. It held that closer review did not apply because the Sentencing Commission did not use its characteristic institutional tools to develop the antitrust Guideline, U.S.S.G. § 2R1.1. App. 12-13. This was so, according to the majority, because "the Commission's revisions to the antitrust guidelines have largely been in response to Congressional acts." App. 17. Reasoning that congressional involvement with a Guideline is inconsistent with the Commission's traditional empirical approach, the Eighth Circuit held that district judges are free to reject § 2R1.1 without inviting appellate scrutiny.

The majority also rejected Mr. VandeBrake's argument that the sentence imposed by the district court was procedurally and substantively improper because it wrought severe disparities between himself and previously sentenced antitrust offenders. The majority justified the sentence on the theory that

disparities are unavoidable – and thus warranted – when sentencing judges reject guidelines on policy grounds. The majority reasoned:

The length of VandeBrake’s sentence, however, results in large part from the district court’s policy disagreement with the antitrust guidelines. The district court believed the antitrust guidelines are too lenient, and consequently gave VandeBrake a more severe sentence than the within-the-guidelines’ sentence VandeBrake cites for comparison purposes. Because the district court varied from the guidelines, VandeBrake’s sentence will necessarily differ when compared to a within-the-guidelines’ sentence. That mere fact does not *ipso facto* make the sentence substantively unreasonable.

App. 15. This was the sum total of the court of appeals’ discussion of sentencing disparity.

Chief Judge Riley concurred in the “general reasoning and the conclusion” of the majority opinion. App. 22. He wrote separately, however, “to disassociate [himself] from the district court’s comments about economic success and status, race, heritage, and religion.” *Id.*

Judge Beam filed a lengthy dissent. App. 22-47. He found that the district court’s policy disagreement was an “assault on the Sentencing Commission” that should not survive appellate scrutiny. App. 41. Tracing § 2R1.1’s development from the first version of the Sentencing Guidelines to the present, he explained

that, unlike the crack-cocaine ratio in *Kimbrough*, § 2R1.1 “exemplifies the Commission’s institutional strengths.” App. 45. Accordingly, Judge Beam would have applied *Kimbrough*’s closer review standard. Judge Beam was especially concerned with the massive disparity between Mr. VandeBrake’s sentence and previous antitrust sentences. After extensively researching the history of antitrust sentences, Judge Beam concluded that “over a period of 15 years, VandeBrake was the *only* antitrust offender sentenced above the guidelines range.” App. 41 (emphasis in original). That disparity, Judge Beam concluded, cannot be justified on the strength of a sentencing judge’s philosophical disagreement with the Sentencing Commission.

The Eighth Circuit denied Mr. VandeBrake’s petition for rehearing en banc over the dissenting votes of Judges Loken, Murphy, and Melloy.

REASONS FOR GRANTING THE PETITION

The circuits are deeply and intractably confused about how to review sentences that are premised on a sentencing judge’s policy disagreements with the Sentencing Guidelines. Four years ago, Judge Calabresi, writing for an en banc majority of the Second Circuit, noted that he did not “take the Supreme Court’s comments [in *Kimbrough*] concerning the scope and nature of ‘closer review’ to be the last word on these questions.” *United States v. Cavera*, 550 F.3d 180, 192 (2d Cir. 2008) (en banc). In the years between Judge Calabresi’s call for clarification and the present, confusion has festered in the lower courts. See D. Michael Fisher, *Still in Balance? Federal District*

Court Discretion and Appellate Review Six Years after Booker, 49 DUQ. L. REV. 641, 655 (2011) (explaining that *Kimbrough*'s closer review language "has caused confusion over what degree of deference should be given to a sentencing judge's policy disagreement with certain Guidelines sentences"). The time is ripe for this Court to clarify this extraordinarily important area of the law.

This case offers an ideal vehicle to do that. It presents two interrelated issues arising from *Kimrough* on which the lower courts have divided: (i) whether the Sentencing Commission abandons its institutional role – and thereby loses its policy influence – when it modifies a Guideline in response to congressional action, and (ii) whether the freedom sentencing judges possess to reject Guidelines on policy grounds trumps the statutory directive that judges take sentencing disparities into account. The Court should take this case to resolve those questions. In so doing, it will bring long-needed clarity to post-*Kimrough* sentencing.

The bottom line of this case is shocking. Mr. VandeBrake's conspiracies affected \$5,666,348.61 of commerce. App. 70. In the context of federal criminal antitrust enforcement, where volumes of commerce are commonly eight, nine, and even ten-digit figures, that made Mr. VandeBrake a small-time offender. A federal judge imposed the longest pure antitrust sentence in *history* on this small-time offender because of the judge's idiosyncratic philosophical views about the Sherman Act. No sensible criminal justice system should permit that to occur. At its most fundamental level, this case raises whether sentencing in the federal

courts is a matter of law or of the proclivities of judges. The Court should hear this case to confirm, once again, that ours is a nation of laws.

I. The 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.

The district court’s policy-based disagreement with the pertinent Sentencing Guideline, U.S.S.G. § 2R1.1 dominated the sentencing decision in this case. Indeed, as Judge Beam explained in his dissenting opinion below, the district court’s disagreement was so severe that it rejected the antitrust Guideline outright and inserted the fraud Guideline in its place. App. 18-19 n.9.

After *United States v. Booker*, which made the Guidelines “effectively advisory,” 543 U.S. 220, 245 (2005), sentencing judges have latitude to disagree with the Commission’s policy choices embodied in the Guidelines. *Kimbrough*, 552 U.S. at 109-111. *Kimbrough*, however, did not write district courts a blank check. In both *Booker* and *Kimbrough*, this Court preserved a policymaking role for the Sentencing Commission even as it delegated discretion to sentencing judges. Accordingly, in light of the Commission’s “important institutional role” in sentencing policy, the Court held in *Kimbrough* that when a sentencing judge in a mine-run case disagrees with a Guideline that “exemplif[ies] the Commission’s exercise of its characteristic institutional role,” “closer

review” of its sentence “may be in order.” *Id.* (quotation omitted).

The Court exempted from “closer review” those Guidelines that are *not* the product of the Commissions’ traditional institutional tools. Applying this exemption, *Kimbrough* declined closer review of a district court’s policy disagreement with the crack-cocaine ratio in U.S.S.G. § 2D1.1 on the grounds that the ratio – which had been repeatedly criticized by the Commission itself – was not the product of the Commission’s institutional tools. *See United States v. Bistline*, 665 F.3d 758, 763 (6th Cir. 2011).

The Solicitor General has recognized that the Eighth Circuit’s decision in the instant case invoked *Kimbrough*’s “characteristic institutional role” exemption to justify not “closely reviewing” the district court’s disagreement with U.S.S.G. § 2R1.1. *See* Br. for the United States in Opp., *Bistline v. United States*, No. 11-1431, at 14 n.2. The Eighth Circuit explained that the Guideline does not embody the Commission’s institutional strengths because it was revised “in response to Congressional acts.” App. 17. The Commission has substantively modified § 2R1.1 in response to congressional action only once, however, increasing the offense levels in 2005 after Congress raised the Sherman Act’s statutory maximum from 3 years to 10. *See* App. 33-36 (Beam, J., dissenting). The Eighth Circuit’s opinion thus stands for the proposition that if the Commission has ever modified a Guideline in response to congressional action, even once, that Guideline no longer exemplifies the Commission’s characteristic institutional role, and sentences under

that Guideline are exempt from any review under *Kimbrough*.

A. The Federal Courts of Appeals Are Intractably Divided On This Issue.

In holding that the Commission abandons its characteristic institutional role when it reacts to a statutory amendment, the Eighth Circuit weighed in on a question that has divided the circuits since *Kimrough* whether congressional influence on a Guideline is toxic to the Commission's institutional role. The Eighth Circuit joins the Second, Third, and Ninth Circuits in finding that congressional influence is inconsistent with the Commission's traditional empirical tools. In *United States v. Henderson*, 649 F.3d 955 (9th Cir. 2011), the Ninth Circuit held that because the Sentencing Commission modified the child pornography Guideline, U.S.S.G. § 2G2.2, in response to "frequent mandatory minimum legislation and specific congressional directives," that Guideline was not "the result of the Commission's "exercise of its characteristic institutional role." *Id.* at 962-63 (quotation omitted). The Second, and Third Circuits have reached the same result, for essentially the same reason. *United States v. Grober*, 624 F.3d 592, 608-9 (3d Cir. 2010); *United States v. Dorvee*, 616 F.3d 174, 184-86 (2d Cir. 2010).

The Sixth and Eleventh Circuits disagree. In *Bistline*, the Sixth Circuit explained that Congress's influence on § 2G2.2 is an affirmative reason why district courts *should* give policy weight to that Guideline. The court explained: "[W]hen a guideline comes bristling with Congress's own empirical and

value judgments – or even just value judgments – the district court that seeks to disagree with the guideline on policy grounds faces a considerably more formidable task than the district court did in *Kimbrough*.” *Id.* at 764. The Eleventh Circuit took the same approach in *United States v. Pugh*, 515 F.3d 1179, 1201 n.15 (11th Cir. 2008).

**B. The Issue Is An Important One That
Warrants Review By This Court.**

The split between the Second, Third, Eighth, and Ninth Circuits, on the one hand, and the Sixth and Eleventh Circuits, on the other, is intractable. The viability of the Sentencing Commission itself, moreover, is at stake. Section 2R1.1 is a compelling example of dialogue between the Sentencing Commission and Congress. *See* App. 33-36 (Beam, J., dissenting) (describing § 2R1.1’s history). Similar success stories can be found across the Sentencing Guidelines. This dialogue is possible, however, only if the Commission can modify the Guidelines in response to congressional action. The decision below stands with those circuits that declare inter-branch dialogue between the Commission and Congress institutionally out-of-bounds.

If the decision below survives, only two outcomes are possible. The Commission may elect to ignore the views of the people’s representatives in Congress. That, as the Sixth Circuit explained in *Bistline* would be at odds with our constitutional structure. 665 F.3d at 764. Or the Commission may continue to interact with Congress and thereby become irrelevant to sentencing policy. That outcome is directly contrary to this Court’s

pronouncements in *Booker* and *Kimbrough*. The Court should grant certiorari to lift the existential threat the decision below poses to the Commission's viability.

II. The Court Should Grant Certiorari to Decide Whether *Kimbrough* Created an Exception to the Statutory Requirement That Sentencing Courts Consider the Need to Avoid Unwarranted Sentencing Disparities.

The decision below does violence to sentencing law and procedure in a second, more basic, way. 18 U.S.C. § 3553(a)(6) commands sentencing courts to consider and give weight to “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” The Eighth Circuit read this statutory requirement out of existence, however, in any case where a sentencing court, under *Kimbrough*, disagrees with a Guideline on policy grounds.

The district court recognized that Mr. VandeBrake's sentence would yield sentencing disparities. App. 157-161. It could hardly have done otherwise; the sentence is an eye-popping outlier, unique in the history of antitrust enforcement. Between 2006 and 2010, the median sentence for antitrust offenders without significant criminal histories ranged from five to fourteen-and-one-half months. Mr. VandeBrake's sentence – the only upward variance from § 2R1.1 in at least fifteen years and 278 sentences – thus exceeds the median by a factor between three and nine. Moreover, the only pure antitrust offender *ever* to receive a sentence as long as Mr. VandeBrake's affected more

than \$1 billion of commerce, about two-hundred times more than Mr. VandeBrake. *See* App. at 41-44 (Beam, J., dissenting) (describing these, and other, indicators of gross disparity).

Even if *Kimbrough* had empowered the district court to reject § 2R1.1 on policy grounds, that court was still obligated to follow the dictates of § 3553(a)(6) quoted above. It did not. To the contrary, the district court openly refused to give weight to the wide disparity it created, explaining that because it was the first court to vary upward from § 2R1.1 based on policy disagreement, the sentence “will understandably result in a sentencing disparity between the defendants here and those sentenced previously.” App. 161. The district court thus held that sentencing judges using the discretion afforded by *Kimbrough* may ignore disparities.

Instead of reviewing the district court’s failure to perform its duty under § 3553(a)(6), the Eighth Circuit joined the district court in uncritically embracing the disparity: “Because the district court varied from the guidelines, VandeBrake’s sentence will necessarily differ when compared to a within-the-guidelines’ sentence. That mere fact does not *ipso facto* make the sentence substantively unreasonable.” App. 15. The panel was otherwise silent on disparity. Its sole logic for affirmance was that disparity is inevitable – and hence unobjectionable – when district courts disagree with a Guideline on policy grounds under *Kimbrough*.

**A. The Court of Appeals' Decision
Conflicts With the Decisions Of This
Court And Of Other Courts of
Appeals.**

The Eighth Circuit thus created a “Kimbrough exception” to § 3553(a)(6). There is no basis for such a wholesale nullification of a congressional command. The “*Kimbrough* exception,” moreover, is contrary to *Kimbrough* itself, which made clear that § 3553(a)(6) applies in policy disagreement cases: “Section 3553(a)(6) directs *district courts* to consider the need to avoid unwarranted disparities – along with other § 3553(a) factors – when imposing sentences.” 552 U.S. at 108 (emphasis in original). And post-*Kimbrough* decisions from other circuits confirm that even where a sentencing court permissibly disagrees with the Commission’s policy choices, it still must consider and balance sentencing disparities. *See, e.g., Henderson* 649 F.3d at 964 (affirming district court’s policy disagreement and noting that “courts must also continue to consider all of the § 3553(a) factors in deciding upon the sentence”); *United States v. Merced*, 603 F.3d 203, 225 (3d Cir. 2010) (remanding in part because the district court “[f]ailed to analyze a highly relevant sentencing factor, § 3553(a)(6)”).

**B. The Issue Is An Important One That
Warrants Review By This Court.**

There is no support for the Eighth Circuit’s novel “*Kimbrough* exception” to § 3553(a)(6). The exception is also deeply troubling. Hewing to Congress’s express requirement that sentencing judges consider and give weight to “the need to avoid unwarranted sentencing

disparities” is a critical step in ensuring that *Kimbrough* delegated legitimate policy discretion and not arbitrary power. *See Cavera*, 550 F.3d at 220 (Sotomayor, J., concurring in part and dissenting in part) (“[A]rbitrary and subjective considerations, such as a judge’s feelings about a particular type of crime, should not form the basis of a sentence.”). Certiorari is warranted to correct the Eighth Circuit’s erroneous creation of a “*Kimbrough* exception” to § 3553(a)(6).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully Submitted,

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