

The Commission's Proposals to Restore Mandatory Guidelines Through Appellate Review

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I. The Commission's Proposals to "Develop More Robust Substantive Appellate Review" Would Further Diminish Review of Guideline Sentences and Reinstat e Strict Review of Non-Guideline Sentences, Contrary to Supreme Court Law, and Without Evidence of a Problem.

The Commission proposes that Congress "[d]evelop more robust substantive appellate review by requiring a presumption of reasonableness on appellate review of within range sentences, greater justification for sentences further outside the guideline range, and heightened review of sentences based on policy disagreements with the guidelines." Report, Part A, at 9. This would make review of guideline sentences less "robust" and review of non-guideline sentences more "robust," contrary to the Supreme Court's holding that that all sentences must be reviewed only for abuse of discretion, "whether inside, just outside, or significantly outside the Guidelines range,"¹ and whether based on individualized circumstances or on a conclusion that the guideline itself fails to achieve § 3553(a) objectives.²

The Commission claims that its proposals would ensure transparency and robustness. Report, Part A, at 112. It cites *Rita v. United States*, 551 U.S. 338, 357-58 (2007), for this proposition, but its proposals are inconsistent with *Rita*'s instructions in pursuit of those goals. First, the Court directed the sentencing judge when imposing a guideline sentence to "go further and explain why he has rejected . . . non-frivolous reasons" for a non-guideline sentence. *Id.* at 357. But the Commission simultaneously seeks a mandatory presumption of reasonableness for guideline sentences, and proportionally greater justifications for non-guideline sentences. These proposals together would suggest that little explanation is required for imposing a guideline sentence in the face of meritorious arguments for a non-guideline sentence. Second, the Court encouraged district courts to explain their reasons for non-guideline sentences in order to "provide relevant information" to the Commission so that "the Guidelines [can] constructively evolve." *Id.* at 358. But the Commission seeks "heightened" review of policy disagreements with the guidelines, which would only drive judicial criticism of the guidelines underground.

A. Mandatory Presumption of Substantive Reasonableness

The Commission complains that "even after *Rita*, in some circuits a sentence within a properly determined guideline range is presumed reasonable, while in others it is not." Report, Part A, at 44. It asserts that the "dichotomy" between circuits that have voluntarily adopted a

¹ *Gall v. United States*, 552 U.S. 38, 41 (2007); see also *Kimbrough v. United States*, 552 U.S. 85, 110 (2007); *Rita*, 551 U.S. at 351; *United States v. Booker*, 543 U.S. 220, 261 (2005).

² *Kimbrough*, 552 U.S. at 110; *Gall*, 552 U.S. at 51-53, 59-60.

presumption and those that have not somehow treats similar defendants differently. *Id.* at 112. Yet it reports that whether or not a circuit has adopted a presumption of reasonableness has no effect on the affirmance rate in appeals of guideline sentences. Report, Part B, at 48. Our research confirms this report, revealing only five guideline sentences reversed as substantively unreasonable since *Gall*, two in a circuit that has adopted a presumption, three in circuits that have not.³ All other guideline sentences that have been challenged as substantively unreasonable have been affirmed. The Commission contends that a required presumption would “facilitat[e] review of sentences,” Report, Part A, at 112, but if anything, it would further diminish substantive review of guideline sentences.

One might say that a voluntary presumption of reasonableness has made no difference, so why not a mandatory presumption? The Supreme Court rejected the government’s invitation in *Rita* to hold that guideline sentences are “entitled” to a presumption of reasonableness,⁴ because that would have suggested that *non-guideline* sentences should be presumed *unreasonable*. See *Rita*, 551 U.S. at 354-55; *Gall*, 552 U.S. at 47, 51. To avoid that result, the Court limited the presumption such that it is arguably no presumption at all: The presumption “is not binding,” “does not . . . insist that [either side] shoulder a particular burden of persuasion or proof,” does not reflect “deference of the kind that leads appeals courts to grant greater factfinding leeway to an expert agency than to a district judge.” *Rita*, 551 U.S. at 347. The presumption has no “independent legal effect,” but “simply recognizes . . . that when the judge’s discretionary decision accords with the Commission’s view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable.” *Id.* at 350-51. The Commission does not advocate that these limitations be written into a statute, and it is difficult to see how they could be. But they are precisely why the presumption does not violate the Sixth Amendment.

In concurrence, Justices Stevens and Ginsburg noted that the presumption and its limitations mean that “the presumption, of course, must be genuinely rebuttable. . . . Our decision today makes clear . . . that the rebuttability of the presumption is real. It should also be clear that appellate courts must review sentences individually and deferentially whether they are inside the Guidelines range (and thus potentially subject to a formal ‘presumption’ of reasonableness) or outside that range.” *Rita*, 551 U.S. at 366-67 (Stevens & Ginsburg, JJ., concurring).

By emphasizing that “the presumption [does not] reflect strong judicial deference of the kind that leads appeals courts to grant greater factfinding leeway to an expert agency than to a district judge,” *Rita*, 551 U.S. at 347, the Court meant to distinguish appellate review in the sentencing context from the law applicable to ordinary agencies. Under ordinary agency law, a court of appeals grants greater deference to an agency’s factfinding than to a district court judge’s factfinding.⁵ The opposite is true in the sentencing context. A court of appeals may not

³ See Appellate Decisions After *Gall*, Sept. 27, 2012, http://www.fd.org/docs/select-topics---sentencing/app_ct_decisions_list.pdf.

⁴ Brief of the United States at 11, *Rita v. United States*, 551 U.S. 338 (2007) (No. 06-5754).

⁵ Justice Breyer appears to be referring to *Dickinson v. Zurko*, 527 U.S. 150 (1999), another decision he authored. There, the Court held that the Administrative Procedures Act requires a court of appeals to

grant greater deference to the Commission’s factfinding than to the factfinding of a district court judge when the two conflict. The Court hammered this home by holding that a court of appeals may *not* apply a presumption of unreasonableness to a sentence outside the guideline range. *Rita*, 551 U.S. at 354-55; *Gall*, 552 U.S. at 47, 51.

Moreover, the permissible non-binding presumption rests on deference to the sentencing judge, *not* to the guidelines. “[T]he presumption reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, both the sentencing judge and the Sentencing Commission will have reached the same conclusion as to the proper sentence in the case. That double determination significantly increases the likelihood that the sentence is a reasonable one.” *Rita*, 551 U.S. at 347. That is, courts of appeals may presume that a guideline sentence is reasonable “when a district judge’s *discretionary decision* in a particular case accords with the sentence the [Commission] deems appropriate.” *Gall*, 552 U.S. at 40 (emphasis added).

The Commission’s justification for a mandatory presumption of reasonableness should raise serious concerns. It previously said that a mandatory presumption would “assist in ensuring” that the guidelines are given “substantial weight,”⁶ which would be unconstitutional.⁷ It now gives the same justification for a required presumption as for its “substantial weight” proposal: the guidelines “seek to embody the § 3553(a) considerations” and the Commission has “considered the factors listed in section 3553(a) [in] developing the initial set of guidelines and refining them throughout the ensuing years.” Report, Part A, at 112, 114.

The Commission’s justification (1) is factually inaccurate, (2) is contrary to the Court’s instruction that the presumption does not reflect “deference of the kind that leads appeals courts

review findings of fact by the Patent and Trademark Office (PTO) in support of a denial of a patent under a court/agency “substantial evidence” standard (or the apparently equivalent “arbitrary and capricious” standard that applies to informal rulemaking). The Court rejected the view of the Court of Appeals for the Federal Circuit that PTO factfinding should be reviewed under the court/court “clearly erroneous” standard applied to district court factfinding. The “substantial evidence” standard is more deferential to the agency, if slightly, than the “clearly erroneous” standard. *Id.* at 152-54, 162-63. A party seeking review of the PTO’s denial of a patent may either (1) seek direct review on the agency record in the court of appeals, or (2) may first seek trial *de novo* in the district court, where additional evidence may be presented, and then, if disappointed, seek review in the court of appeals. In the former case, the standard of review applied by the court of appeals is the court/agency “substantial evidence” standard, but in the latter case, it is the court/court “clearly erroneous” standard. The Court was unmoved by the argument of the Federal Circuit and its *amici* that applicants would simply take the latter path in order to obtain stricter review of the agency’s factfinding, and that the “clearly erroneous” standard should apply in the court of appeals for the sake of consistency and simplicity. *Id.* at 164.

⁶ Prepared Testimony of U.S. Sentencing Commission Chair Judge Patti B. Saris Before the Subcommittee on Crime Terrorism, and Homeland Security Testimony at 55-56 (Oct. 12, 2011).

⁷ See *Nelson v. United States*, 555 U.S. 350, 352 (2009) (“The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable.”); *Gall*, 552 U.S. at 59 (the “Guidelines are only one of the factors to consider when imposing sentence”); *Rita*, 551 U.S. at 351 (there is no “legal presumption that the Guidelines sentence should apply”).

to grant greater factfinding leeway to an expert agency than to a district judge,” (3) is contrary to the fact that the presumption the Court allowed rests on deference to the district court judge’s discretionary decision, not to the guidelines, and (4) would “make the guidelines more mandatory than before *Booker* . . . and thus clearly unconstitutional.”⁸

The Court in *Rita* described the “empirical” approach based on past practice sentences that the Commission said it had followed, *Rita*, 551 U.S. at 349, but largely did not, even by its own admission.⁹ It then said that the Commission “can” and “will” revise the guidelines based on feedback from the courts as required by the SRA, *id.* at 350, not that it *had* done so. The Court said that the guidelines may reflect a “rough approximation of sentences that might achieve § 3553(a)’s objectives,” *id.* at 350, but simultaneously recognized that the guidelines may “reflect an unsound judgment,” and “do not generally treat certain defendant characteristics in the proper way,” *id.* at 357. At best, the statutes “envision” the Commission and judges carrying out the same § 3553(a) objectives, the Commission “at wholesale,” and judges “at retail.” *Id.* at 348. Judges implement the § 3553(a) objectives “at retail” because they sentence individuals who differ in myriad ways, and are subject to § 3553(a)’s parsimony clause. Neither is true of the Commission.

B. Greater Justification the Further the Sentence From the Guideline Range

The Commission also asks Congress to “revitalize appellate review” by “requir[ing] sentencing courts to provide greater justification for sentences imposed the further the sentence is from the otherwise applicable guideline range.” Report, Part A, at 111-12. It claims that this would ensure that a “transparent system remains intact” and that appellate review “remains robust.” *Id.* at 112. But sentencing is far more transparent than it was before *Booker* because judges must now explain why they imposed a guideline sentence and rejected meritorious arguments for a non-guideline sentence.¹⁰ Appellate review of non-guideline sentences is as “robust” as it can be without running afoul of the Constitution. The Commission provides no evidence to the contrary, and the data it provides refutes any notion that such a change is warranted. Most importantly, the proposal is contrary to Supreme Court law.

1. The proposal is unsupported by the Commission’s data.

⁸ Paul J. Hofer, *Beyond the “Heartland”*: Sentencing Under the Advisory Federal Guidelines, 49 Duq. L. Rev. 675, 703 (2011); see also *United States v. Jimenez-Beltre*, 440 F.3d 514, 526-28 & n.11 (1st Cir. 2006) (Lipez, J., dissenting).

⁹ U.S. Sent’g Comm’n, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 47 (2004).

¹⁰ Appellate Decisions After *Gall*, Sept. 27, 2012, http://www.fd.org/docs/select-topics---sentencing/app_ct_decisions_list.pdf (81 guideline sentences reversed for failure to adequately explain or address non-frivolous arguments).

To support this proposal, one would expect to see increasing variation in the extent of judge-initiated reductions from the guideline minimum across time, or at least an increase in the aggregate average extent of reduction. But the opposite is true.

The Commission reports: “The average extent of the reduction below the guideline minimum [among judges] varied broadly during each period [*Koon*, Protect Act, *Booker*, *Gall*], and did not appear to have been affected by legislation or Supreme Court decisions.” Report, Part D, at 1.

The average extent of judge-initiated reductions for all offenses together and for career offender cases alone *decreased* after *Gall* as compared to the *Koon* period, and was *the same* after *Gall* as in the PROTECT Act period. For drugs, firearms, fraud, and child pornography, the average extent of judge-initiated reductions *decreased* after *Gall* as compared to both the *Koon* and PROTECT Act periods. The only offense type for which the extent of judge-initiated reductions increased after *Gall* relative to the *Koon* and PROTECT Act periods was illegal entry. *See* Report, Part A, at 92. The reason for that is obvious. Almost every district has a significant immigration caseload today as compared to the *Koon* and PROTECT Act periods, but very few districts had a fast track program until after the period covered by the Commission’s report.¹¹

2. The proposal is contrary to Supreme Court law.

The Court noted in *Rita* that “an *ordinary* explanation of reasons” as to why the judge imposed a non-guideline sentence “triggers no Sixth Amendment ‘jury trial’ requirement.” *Rita*, 551 U.S. at 357 (emphasis added). In *Gall*, the Court squarely rejected an appellate rule, adopted in several circuits after *Booker*, “requiring ‘proportional’ justifications for departures from the Guidelines range [as] not consistent with our remedial opinion in *United States v. Booker*.” *Gall*, 552 U.S. at 46; *see also id.* at 47 (also rejecting “appellate rule that requires ‘extraordinary’ circumstances to justify a sentence outside the Guidelines range,” and “use of a rigid mathematical formula . . . for determining the strength of the justifications required”).

The approaches the Court rejected would “come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range,” *id.* at 47, and amounted to *de novo* review, *id.* at 56, 59-60. The Court concluded that the “practice—common among courts that have adopted ‘proportional review’—of applying a heightened standard of review to sentences outside the Guidelines range . . . is inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of all sentencing decisions—whether inside or outside the Guidelines range.” *Id.* at 49. To avoid that Sixth Amendment problem, “courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard,” *Gall*, 552 U.S. at 41, and whether based on individualized circumstances, *id.* at 51-53, 59-60, or a conclusion that the guideline itself fails to achieve § 3553(a) objectives, *Kimbrough*, 552 U.S. at 110.

¹¹ On January 31, 2012, the Department of Justice instructed United States Attorneys in all districts to implement a fast track program. Memorandum from James M. Cole, Deputy Att’y Gen., to All U.S. Att’ys 2 (Jan. 31, 2012), *available at* <http://www.justice.gov/dag/fast-track-program.pdf>, but .

The Commission asserts that its proposal “aligns with Supreme Court doctrine as stated in *Gall*,” Report, Part A, at 112, but it fails to acknowledge the distinction the Court drew between the role of the district judge at sentencing and the role of the appellate court on review, *id.* at 44-45. The Court stated that “the district court judge . . . must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance,” and that “a major departure should be supported by a more significant justification than a minor one.” *Id.* at 50. But this is not an appellate rule. *Appellate courts* necessarily stand in a different position. The court of appeals “*may* consider the extent” of a variance as part of the “totality of the circumstances” but “*must* give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance” and *may not* substitute its judgment for that of the district judge. *Id.* at 51 (emphasis added). “[I]t is not for the Court of Appeals to decide *de novo* whether the justification for a variance is sufficient or the sentence reasonable.” *Id.* at 59.

The Commission’s requested statutory directive requiring appellate courts to “require sentencing courts to provide greater justification for sentences imposed the further the sentence is from the otherwise applicable guideline range” would transform the Supreme Court’s instruction to the district courts into an appellate rule. Contrary to *Gall*’s explicit directions, it would have the courts of appeals substitute their judgments for those of sentencing judges, would make the extent of a variance from the guideline range not just one consideration in the totality of circumstances under a deferential abuse-of-discretion standard but the primary consideration, and would thus be functionally equivalent to the “proportional justifications” approach that *Gall* held to be inconsistent with the abuse-of-discretion standard. In sum, the Commission’s proposal would violate the Sixth Amendment.

Every court of appeals recognizes that an appellate rule like the Commission’s proposal would be contrary to Supreme Court law, and makes clear that while the district court must adequately explain a departure or variance including its extent, the appellate court’s duty is to review that decision deferentially and does not include requiring greater justifications the further the sentence is from the guideline range.¹²

¹² See *United States v. Gardellini*, 545 F.3d 1089, 1093-94 & n.4 (D.C. Cir. 2008) (affirming downward variance from guideline range of 10-16 months to 5 years’ probation and a fine and noting that *Gall*’s statement that “[w]e find it uncontroversial that a major departure should be supported by a more significant justification than a minor one” was in a paragraph that “provided guidance to the district court”: “The appeals court, by contrast is required to give ‘due deference’ to the district court’s ‘decision that the § 3553(a) factors, on a whole, justify the extent of the variance,’ and to apply the ‘deferential abuse-of discretion standard of review . . . to all sentencing decisions.’”); *United States v. Martin*, 520 F.3d 87, 91-93 (1st Cir. 2008) (affirming downward variance from guideline range of 262-327 months to 144 months after describing the differing principles set forth in *Gall* that govern sentencing courts in making sentencing determinations and appellate review of those determinations, and stating: “A corollary of the broad discretion that *Gall* reposes in the district courts is the respectful deference that appellate courts must accord district courts’ fact-intensive sentencing decisions. . . . When the sentence is outside the [applicable guideline range], the appellate court is obliged to consider the extent of the variance, but even in that posture it ‘must give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance.’”); *United States v. Cavera*, 550 F.3d 180, 189-90, 193 (2d Cir. 2008) (*en banc*) (affirming upward variance from guideline range of 12-18 months to 24 months after

distinguishing between the roles of the sentencing court and appellate court: The district court “must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance” but the appellate court, playing “an important but clearly secondary role,” will not “substitute [its] own judgment for the district court’s on the question of what is sufficient to meet the § 3553(a) considerations in any particular case” but will “take into account the totality of the circumstances, giving due deference to the sentencing judge’s exercise of discretion, and bearing in mind the institutional advantages of district courts”: “When all is said and done[], once we are sure that the sentence resulted from the reasoned exercise of discretion, we must defer heavily to the expertise of district judges.”); *United States v. Tomko*, 562 F.3d 558, 571 (3d Cir. 2009) (“As the Supreme Court has explained, ‘it [is] uncontroversial that a major departure should be supported by a more significant justification than a minor one,’” but “[t]his does not mean . . . that we elevate our review of any variance and its accompanying explanation or justification beyond the abuse-of-discretion standard. The Supreme Court has unequivocally stated 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.’”); *United States v. Friedman*, 658 F.3d 342, 360 (3d Cir. 2011) (recognizing that *Gall*’s direction regarding the extent of justification is to the district courts, and reciting correct “totality of the circumstances” and “due deference” test for review for substantive reasonableness; reversing for procedural error where district court did not calculate the guideline range or consider or discuss nonfrivolous argument for a lower sentence); *United States v. Pauley*, 511 F.3d 468, 473-74 (4th Cir. 2007) (distinguishing between *Gall*’s direction to the sentencing court regarding its procedural duties and to the appellate court regarding its deferential review of the substance of the sentence: “Substantive reasonableness review entails taking into account the ‘totality of the circumstances, including the extent of any variance from the Guidelines range.’ . . . In reviewing the substantive reasonableness of the sentence, we may consider ‘the extent of the deviation,’ but we ‘must give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance’”); *United States v. Key*, 599 F.3d 469, 475-76 (5th Cir. 2010) (affirming upward variance from guideline range of 46-57 months to 216 months under correct appellate standard: “In reviewing a non-guidelines sentence for substantive unreasonableness, the court will consider the ‘totality of the circumstances, including the extent of any variance from the Guidelines range.’ . . . We must also review whether the § 3553(a) factors support the sentence. This inquiry, however, must ‘give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance.’”); *United States v. Grossman*, 513 F.3d 592, 595-96 (6th Cir. 2008) (affirming downward variance from guideline sentence of 120 months to 66 months after distinguishing between the “duty of the sentencing court” to ensure “as a matter of process” that it provides a “more significant justification” for “a major departure” and the “duty of an appellate court” when reviewing the length of a sentence for substantive reasonableness, which allows it to “‘consider the extent of the deviation,’” but requires it to “‘give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance,’ . . . which is to say, not just abuse-of-discretion review to the reasonableness of a sentence but abuse-of-discretion review to the district court’s determination that there is a legitimate correlation between the size of the variance and the reasons given for it”); *United States v. Carter*, 538 F.3d 784, 789-90 (7th Cir. 2008) (affirming downward variance while recognizing that the task of the district court is to “provide a justification that explains and supports the magnitude of the variance” and the task of the appellate court is to “give due deference to the district court’s determination that the section 3553(a) factors, taken as a whole, justified the extent of the variance”); *United States v. Townsend*, 618 F.3d 915, 919, 921 (8th Cir. 2010) (affirming upward variance from guideline sentence of 60 months to 120 months by applying correct appellate standard: “After considering ‘the totality of the circumstances, including the extent of the variance from the Guidelines range and giving due deference to the district court’s decision that the § 3553(a) factors, on the whole, justify the extent of the variance,’ we conclude that the district court did not abuse its discretion in sentencing Townsend to 120 months’ imprisonment”); *United States v. Carty*, 520 F.3d 984, 993 (9th Cir.

In support of its proposed appellate rule, the Commission cites a single case, *United States v. Castillo*, 695 F.3d 672 (7th Cir. 2012), *see* Report, Part A, at 112 & n.450, but that decision did not establish an appellate rule requiring greater justification the farther the judge varied from the guideline range, and indeed establishes the opposite. Reviewing deferentially the district court’s determination that “the § 3553(a) factors, taken as a whole, justified the extent of the variance,” as it must, *see United States v. Carter*, 538 F.3d 784, 789-90 (7th Cir. 2008), the court granted a motion to withdraw under *Anders* because the district court’s “failure to give extended consideration” to an upward departure which the court of appeals found to be “large” and “substantial,” was “easily excused” because the guideline did not take certain aggravating factors into account, and defense counsel failed to make the proper objection at sentencing. *Castillo*, 695 F.3d at 674-75.

3. The proposal would require courts of appeals to enforce the guidelines more strictly than the excised PROTECT Act standard of review.

The PROTECT Act standard required “due deference” when deciding whether “the sentence departs to an unreasonable degree from the applicable guideline range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a),” and “the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c).” 18 U.S.C. § 3742(e)(3)(C). It did not authorize *de novo* review of that decision. *See* 18 U.S.C. § 3742(e) (requiring *de novo* review only for determinations under (e)(3)(A) and (B)). The Commission now seeks a standard that would go further in enforcing the guideline range on appeal.

C. “Heightened” Review of Policy Disagreements

The Commission also asks Congress to “create a heightened standard of review for sentences imposed based on a ‘policy disagreement’ with the guidelines.” Report, Part A, at 112. It is clear from its discussion of the *Pepper* decision, *id.* at 42-43, that this “heightened” review would also apply to disagreements with its policy statements. The Commission acknowledges that the Supreme Court “permitted policy-based variances,” but asserts that it “believes” that there is a “lack of rigorous review” of policy disagreements and that this “undermines the role of the guidelines system and risks increasing unwarranted sentencing

2008) (*en banc*) (distinguishing between the role of the sentencing court to ensure that it has adequately justified a variance and that of the appellate court, “[i]n determining substantive reasonableness,” which is “to consider the totality of the circumstances, including the degree of variance for a sentence imposed outside the Guidelines range,” but that “[f]or a non-Guidelines sentence, we are to ‘give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance’”); *United States v. Smart*, 518 F.3d 800, 806-07 (10th Cir. 2008) (affirming downward variance from guideline range of 168-210 months to 120 months after recognizing that *Gall* altered the prevailing practice by directing sentencing courts to ensure that a variance is sufficiently justified as a matter of procedure, but that on review for substantive reasonableness, “‘it is not for the Court of Appeals to decide *de novo* whether the justification for a variance is sufficient or the sentence reasonable,’ and we must therefore defer not only to a district court’s factual findings but also to its determinations of the weight to be afforded to such findings”).

disparity as judges substitute their own policy judgments for” those of “Congress and the Commission.” *Id.*

The Commission fails to recognize that in order for the guidelines system to be constitutional, judges must be authorized to vary based on policy disagreements subject to the same abuse-of-discretion standard as any other sentence within or outside the guideline range. Moreover, even if the Commission’s belief that policy disagreements should be discouraged through more rigorous review could overcome that constitutional imperative, the Commission has failed to make a case through caselaw or data that policy disagreements create unwarranted disparity.

Indeed, policy disagreements avoid unwarranted disparity created by the guidelines themselves in individual cases, *Kimbrough*, 552 U.S. at 108, and “provide relevant information” to the Commission so that the guidelines can “constructively evolve.” *Rita*, 551 U.S. at 351. This *should* result in “ongoing revision of the Guidelines in response to sentencing practices” and thus “help to ‘avoid excessive sentencing disparities.’” *Kimbrough*, 552 U.S. at 107. Rather than seek to suppress this important feedback mechanism, the Commission should draw on judicial experience and expertise to improve unsound guidelines.

- 1. Policy disagreements are necessary to a constitutional guidelines system and must be reviewed under a deferential abuse-of-discretion standard.**
 - a. Policy disagreements are indispensable to a constitutional guidelines system.**

In *Cunningham v. California*, 549 U.S. 270 (2007), the Supreme Court struck down a sentencing system that did not permit policy disagreements. The California system provided for an upper term, a middle term, and a lower term.¹³ The judge was directed to start with the middle term and to move from that term only if the judge found and placed on the record aggravating or mitigating facts related to the offense or the offender, beyond the facts of which the defendant was convicted.¹⁴ There was no provision for the judge to impose a sentence above the middle term based on anything other than facts.¹⁵ The system would have been constitutional if it had authorized the judge to sentence above the middle term based solely on a “policy judgment” in light of the “general objectives of sentencing,” or the judge’s subjective belief regarding the appropriate sentence.¹⁶ Because California’s sentencing rules referred only to

¹³ *Cunningham*, 549 U.S. at 275.

¹⁴ *Id.* at 279.

¹⁵ *Id.* at 279-80.

¹⁶ *Id.* at 279-81, 292-93; *see also id.* at 300, 304-05 & n.6, 307-08 (contending that the California system, like the federal system under § 3553(a), permitted courts to sentence outside the specified term based on “policy considerations” or a “subjective belief” and not facts alone) (Alito, J., dissenting).

“facts” in aggravation,¹⁷ the system violated the Sixth Amendment, and notwithstanding that judicial factfinding was subject to “reasonableness” review.¹⁸

In contrast, the federal advisory guidelines system is constitutional because, “[a]s far as the law is concerned, the judge could disregard the Guidelines and apply the same sentence (higher than . . . the bottom of the unenhanced Guidelines range) in the absence of the special facts . . . which, in the view of the Sentencing Commission, would warrant a higher sentence.”¹⁹ Moreover, “courts are entitled to vary from the . . . guidelines in a mine-run case where there are no ‘particular circumstances’ that would otherwise justify a variance from the Guidelines’ sentencing range.”²⁰ Because “the Guidelines are now advisory[,] . . . courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.”²¹ The judge may find that “the Guidelines sentence itself fails properly to reflect § 3553(a) considerations,” that “the Guidelines reflect an unsound judgment,” that they “do not generally treat certain defendant characteristics in the proper way,” or that “the case warrants a different sentence regardless.”²² “The only fact *necessary* to justify such a variance is the sentencing court’s disagreement with the guidelines,” and a “categorical disagreement with and variance from the Guideline is not suspect” on appeal.²³

It is this ability to sentence outside the guideline range based on a policy judgment in any case – whether the court does so or not – that makes the guidelines advisory and thus constitutional. *See Kimbrough*, 552 U.S. at 91 (by prohibiting a policy disagreement with the crack guidelines, court of appeals treated the guidelines as “effectively mandatory”). As stated by then-Solicitor General Kagan, “[T]he very essence of an advisory guideline is that a sentencing court may, *subject to appellate review for reasonableness*, disagree with the guideline in imposing sentencing under Section 3553(a).”²⁴

¹⁷ *Id.* at 279.

¹⁸ *Id.* at 292-93.

¹⁹ *Rita v. United States*, 551 U.S. 338, 353 (2007).

²⁰ *Spears v. United States*, 555 U.S. 261, 267 (2009).

²¹ *Kimbrough v. United States*, 552 U.S. 85, 101-02 (2007) (internal quotation marks omitted); *see also Rita*, 551 U.S. at 351 (“The sentencing judge . . . may hear arguments . . . that the Guidelines sentence should not apply . . . because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless . . .”).

²² *Rita*, 551 U.S. at 351.

²³ *Spears*, 555 U.S. at 264 (citation omitted) (emphasis added).

²⁴ Brief for the United States at 11, *Vazquez v. United States*, 130 S. Ct. 1135 (2010) (No. 09-5370), 2009 WL 5423020 (emphasis added).

b. Under Supreme Court law, policy disagreements must be reviewed under a deferential abuse-of-discretion standard.

Supreme Court law is clear: Courts of appeals must afford the same deference to sentencing courts' decisions to impose sentence outside the guideline range as to their decisions to impose sentences inside the guideline range. In *Booker*, the Court excised a standard of review designed to enforce the mandatory guidelines by treating guideline and non-guideline sentences differently.²⁵ The Court replaced the statute with one deferential standard of review for all sentences: reasonableness with regard to the purposes and factors set forth in § 3553(a).²⁶ Under this single standard, “courts of appeals must review *all* sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard.”²⁷ When reviewing sentences outside the guideline range, a court of appeals may not apply a presumption of unreasonableness,²⁸ may not apply *de novo* review, explicitly or implicitly,²⁹ and may not apply a “heightened” standard of review, as that would be “inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of all sentencing decisions—whether inside or outside the Guidelines range.”³⁰

In *Kimbrough*, the Court rejected the government's argument that a policy-based variance is entitled to less deference on appeal than a fact-based variance.³¹ It held that “the cocaine Guidelines, like all other Guidelines, are advisory only,” *Kimbrough*, 552 U.S. at 91, and applied the “abuse of discretion” standard, *id.* at 110.

The Commission, however, states that the Supreme Court “recognized that ‘closer review may be in order when the sentencing judge varies from the guidelines based solely on the judge's view that the guideline range ‘fails properly to reflect § 3553(a) considerations’ even in a mine-run case.’” Report, Part A, at 112 (quoting *Kimbrough*, 552 U.S. at 109). More accurately than “recognized,” the Court described a suggestion made by Justice Breyer at oral argument in *Gall*.

²⁵ *Booker* excised § 3742(e), which (1) required reversal of a sentence imposed as “an incorrect application of the guidelines”; (2) required reversal of a sentence outside the guideline range if “not authorized by § 3553(b)”; and (3) required *de novo* review of sentences outside the guideline range, except with respect to whether a departure was unreasonable in degree. 18 U.S.C. § 3742(e) (as amended by the PROTECT Act).

²⁶ *Booker*, 543 U.S. at 261; *Rita*, 551 U.S. at 351; *Gall*, 552 U.S. at 46.

²⁷ *Gall*, 552 U.S. at 41 (emphasis added).

²⁸ *Id.* at 51; *Rita*, 551 U.S. at 354-55.

²⁹ *Booker*, 543 U.S. 220, 262; *Gall*, 552 U.S. at 56, 60.

³⁰ *Gall*, 552 U.S. at 49.

³¹ Brief of the United States at 29 n.7, *Kimbrough v. United States*, 552 U.S. 85 (2007) (No. 06-6330).

See *Kimbrough*, 552 U.S. at 109 (citing Tr. of Oral Arg. in *Gall v. United States*, O.T.2007, No. 06-7949, pp. 38-39). The Court dismissed that suggestion because the only justification offered for it — that the Commission has the “capacity” to “base its determinations on empirical data and national experience”³² — did not apply to the crack guidelines. “The crack cocaine Guidelines . . . present no occasion for elaborative discussion of this matter because those Guidelines do not exemplify the Commission’s exercise of its characteristic institutional role. In formulating Guidelines ranges for crack cocaine offenses, . . . the Commission . . . did not take account of ‘empirical data and national experience.’”³³

What the Court *held* was that when a court of appeals reviews a policy disagreement, “‘reasonableness’ is the standard controlling appellate review,”³⁴ and that it is “not . . . an abuse of discretion . . . to conclude” that a guideline “yields a sentence ‘greater than necessary’ to achieve § 3553(a)’s purposes, even in a mine-run case.”³⁵ The Court did not reach the question whether “closer review” would be constitutional, much less hold that it would. Justice Scalia’s concurring opinion explained that “closer review” would indeed violate the Sixth Amendment.³⁶

The Court again rejected heightened review of policy disagreements in *Spears v. United States*, 555 U.S. 261 (2009). The “point” of *Kimbrough* was that district courts “are entitled to vary categorically” from the “Guidelines based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case.”³⁷ When a district court disagrees with a Commission policy that does “not exemplify the Commission’s exercise of its characteristic institutional role,” that disagreement is entitled to as much “respect” on appeal as any other sentence and “is not suspect.”³⁸ A standard

³² *Id.*

³³ *Id.*

³⁴ *Kimbrough*, 552 U.S. at 90; *see also Gall*, 552 U.S. at 59.

³⁵ *Id.* at 110.

³⁶ Justice Scalia wrote separately to say that he joined the opinion because he did not take the discussion of “closer review” to be “an unannounced abandonment” of the principle “that the district court is free to make its own reasonable application of the § 3553(a) factors, and to reject (after due consideration) the advice of the Guidelines.” *Id.* at 112-13 (Scalia, J., concurring). Justice Scalia continued:

[I]f the Guidelines *must* be followed even where the district court’s application of the § 3553(a) factors is entirely reasonable; then the “advisory” Guidelines would, over a large expanse of their application, *entitle* the defendant to a lesser sentence *but for* the presence of certain additional facts found by judge rather than jury. This, as we said in *Booker*, would violate the Sixth Amendment.

Id. at 113-14.

³⁷ *Spears*, 555 U.S. 264, 265-66 (emphasis in original).

³⁸ *Id.* at 264.

of review that would discourage “‘categorical’ policy disagreements with the Guidelines” would lead judges to either “treat the Guidelines’ policy . . . as mandatory” or to “mask[] their categorical policy disagreements as ‘individualized determinations,’ neither of which “is an acceptable sentencing practice.”³⁹

In *Pepper v. United States*, 131 S. Ct. 1229 (2011), the Court again held that judges may disagree with the Commission’s views,⁴⁰ and ignored a renewed suggestion to abandon abuse of discretion review in favor of “closer review.”⁴¹

It is questionable that Justice Breyer’s suggestion of “closer review” could ever apply because judges do not disagree with guidelines based “solely” on their “views.” Instead, following *Kimbrough*, when courts disagree with particular guidelines, they conclude that the guideline in question was not based on empirical data and national experience. The guidelines with which judges frequently disagree have been repeatedly shown not to have been developed in that manner and to fail to achieve § 3553(a)’s objectives even in ordinary cases. *See* Part C.4, *infra*.

If the Court were faced with a policy disagreement with a guideline that is based on empirical data and national experience, it may then decide whether “closer review” would be consistent with the Sixth Amendment. The answer would almost certainly be “No.” The Court has already held that to pass constitutional muster, a guideline system that rests on judge-found facts must permit judges to sentence outside the guideline range based on “policy judgments” in light of the “general objectives of sentencing,” or their subjective belief as to the appropriate sentence.⁴² And as demonstrated in the next subsection, a “heightened” standard of review would result in actual Sixth Amendment violations.

Notably, the Commission’s proposal does not even meet the minimum requirements for the “closer review” standard the Court has rejected, *i.e.*, that the guideline with which the court disagreed “exemplify the exercise of the Commission’s characteristic institutional role” of “bas[ing] its determinations on empirical data and national experience.” Instead, the Commission states that the Court in *Kimbrough* only “perceived” that relying on empirical data

³⁹ *Id.* at 266.

⁴⁰ *Pepper*, 131 S. Ct. at 1247.

⁴¹ *Id.* at 1254-55 (Breyer, J., concurring in part and concurring in the judgment) (agreeing that Commission’s justification was not convincing, but urging “closer review” of policy disagreements and reinstatement of Commission’s “heartland” standard).

⁴² *See Cunningham v. California*, 549 U.S. 270, 278-81, 286-87 & n.12 (2007) (invalidating California system because, unlike the federal system under § 3553(a), it required a sentence to a specified term unless the court found “facts” about the offense or the offender, and did not permit a sentence outside the specified term based on a “policy judgment” in light of the “general objectives of sentencing”); *id.* at 300, 304-05 & n.6, 307-08 (contending that the California system, like the federal system under § 3553(a), permitted courts to sentence outside the specified term based on “policy considerations” or a “subjective belief” and not facts alone) (Alito, J., dissenting).

and national experience was its “usual practice.” Report, Part A, at 36; *see also id.* at 37 (stating that “the Court found that the crack cocaine guidelines ‘do not exemplify’ *what the Court considered* to be the Commission’s ‘characteristic institutional role’) (emphasis added). If the Court was wrong, the Commission has been acting without regard to its enabling legislation and violating the separation of powers all along. *See Mistretta v. United States*, 488 U.S. 361, 374-76 & n.10 (1989); *Rita*, 551 U.S. at 349-50.

c. “Heightened” review would result in Sixth Amendment violations.

The relevant “statutory maximum” for Sixth Amendment purposes is the maximum sentence that a judge may impose solely on the basis of facts established by a jury verdict or a plea of guilty.⁴³ A sentencing system violates the Sixth Amendment if it mandates, or even authorizes, a sentence above that maximum based solely on additional case-specific facts found by a judge.⁴⁴ Judge-found facts rarely result in Sixth Amendment violations under the current deferential abuse-of-discretion standard because, even without those facts, the judge is free to impose the same sentence based merely on her disagreement with the guideline range, and when she does, “appellate ‘reasonableness’ review merely asks whether the trial court abused its discretion.”⁴⁵

Under the Commission’s proposal, a sentencing judge’s disagreement with the guidelines would no longer be afforded deference. Under its proposal for “heightened” review, which can only mean *de novo* review,⁴⁶ a court of appeals would substitute its judgment for that of the district court. By reducing or eliminating the judge’s discretion to impose a higher sentence based on anything other than case-specific fact findings, the Commission’s proposal would make such findings necessary to authorize the sentence imposed. If, as is typical, the necessary facts were not found by the jury, the sentence would violate the Sixth Amendment.

Suppose a judge varied upward in a first-offense involuntary manslaughter case involving reckless driving, from a guideline maximum of 51 months to the statutory maximum of 96 months, based on its policy disagreement with the guideline.⁴⁷ A court of appeals, exercising

⁴³ *See Booker*, 543 U.S. at 227, 232, 235, 244; *Blakely v. Washington*, 542 U.S. 296, 299-300, 303-04 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

⁴⁴ *See Blakely*, 542 U.S. at 305 n.8; *Cunningham v. California*, 549 U.S. 270, 274-75 (2007).

⁴⁵ *Id.*

⁴⁶ There are only two standards of review for discretionary determinations involving mixed questions of law and fact such as the determination of the appropriate sentence: abuse-of-discretion and *de novo* review. *See Harry T. Edwards & Linda A. Elliott, Federal Courts — Standards of Review: Appellate Court Review of District Court Decisions and Agency Actions*, ch.1, pts. B, E (2007).

⁴⁷ Courts vary upward from the involuntary manslaughter guideline more often than any other guideline. U.S. Sent’g Comm’n, *2012 Sourcebook of Federal Sentencing Statistics*, tbl. 27A.

“heightened” (or *de novo*) review, could make its own judgment that the involuntary manslaughter guideline was sufficient to serve the purposes of sentencing. If so, the only way the judge could impose the same sentence (or any sentence above the guideline range) on remand would be to find specific facts about the offense or the defendant. Moreover, since the court of appeals’ ruling would be circuit law, judges in that circuit would be authorized to impose sentences above the guideline range in future similar cases only on case-specific facts. Such sentences would violate the Sixth Amendment.⁴⁸ Sixth Amendment violations would also occur when judicial fact-finding supported an upward guideline adjustment (*e.g.*, for multiple manslaughter victims).⁴⁹ If the same sentence could not be imposed based on a policy disagreement with the guideline, then absent the fact finding that increased the guideline range, the higher guideline sentence would not be authorized.

The Supreme Court has already found such a system unconstitutional. *See Cunningham v. California*, 549 U.S. 270 (2007). And if the Court holds in *Alleyne v. United States*, No. 11-9335, that facts that increase the minimum permissible sentence are subject to the Sixth Amendment jury trial requirement, an appellate reversal of a policy disagreement in support of a sentence below the guideline range will result in the same kind of Sixth Amendment violations.

d. These principles apply no less to guidelines resulting from congressional directives to the Commission.

The Commission suggests that guidelines based on congressional directives should be given greater weight than other guidelines, and perhaps that judges should not be permitted to disagree with them at all. Report, Part A, at 43. At least seventy-nine guidelines and policy statements have been promulgated or amended in response to specific congressional directives,⁵⁰

⁴⁸ *See Kimbrough*, 552 U.S. at 113-14 (Scalia, J., concurring) (“[T]he ‘advisory’ Guidelines would, over a large expanse of their application, *entitle* the defendant to a lesser sentence *but for* the presence of certain additional facts found by judge rather than jury. This, as we said in *Booker*, would violate the Sixth Amendment.”); *Rita*, 552 U.S. at 352 (“The Sixth Amendment question . . . is whether the law *forbids* a judge to increase a defendant’s sentence *unless* the judge finds facts that the jury did not find.”); *id.* at 353 (The Sixth Amendment is not violated because “[a]s far as the law is concerned, the judge could disregard the Guidelines and apply the same sentence (higher than . . . the bottom of the unenhanced Guidelines range) in the absence of the special facts . . . which, in the view of the Sentencing Commission, would warrant a higher sentence.”); *cf. Blakely v. Washington*, 542 U.S. 296, at 304 (2004) (“Had the judge imposed the 90-month sentence [above the standard range] solely on the basis of the plea, he would have been reversed.”).

⁴⁹ *See* USSG § 2A1.4(b)(1) (requiring special multiple-count increase for involuntary manslaughter of more than one person, even if the defendant is convicted of only one offense).

⁵⁰ *See* USSG §§ 1B1.1, 2A3.1, 2A3.2, 2A3.3, 2A3.4, 2A4.1, 2B1.1, 2B1.3, 2B4.1, 2B5.1, 2C1.8, 2D1.1, 2D1.2, 2D1.10, 2D1.12, 2D2.3, 2G1.1, 2G2.1, 2G2.2, 2G3.1, 2H3.1, 2H4.1, 2J1.2, 2L1.1, 2L1.2, 2L2.1, 2L2.2, 2P1.2, 2T4.1, 2X7.1, 3A1.1, 3A1.4, 3B1.2, 3B1.3, 3B1.4, 3B1.5, 3C1.4, 3E1.1, 4A1.1, 4A1.3, 4B1.1, 4B1.5, 5C1.2, 5D1.2, 5H1.4, 5H1.6, 5H1.7, 5H1.8, 5K2.0, 5K2.10, 5K2.12, 5K2.13, 5K2.17, 5K2.20, 5K2.22, 5K3.1.

general congressional directives,⁵¹ or both.⁵² These include the guidelines for fraud, drug trafficking, firearms offenses, possession of child pornography, alien smuggling, and illegal reentry, which applied in 82.8% of all cases in fiscal year 2012. *See* U.S. Sent’g Comm’n, 2012 Sourcebook of Federal of Federal Sentencing Statistics, tbl.28.

In *Kimbrough*, the Court rejected the government’s argument that Congress required the Commission and the courts to apply the Anti-Drug Abuse Act’s 100-to-1 powder-to-crack cocaine quantity ratio to all sentences between the statutory minimum and maximum sentences.⁵³ The Court rejected this interpretation because the statute said “nothing about the appropriate sentences within these brackets.”⁵⁴ To illustrate its point that the Act did not direct the Commission to incorporate the ratio into the guidelines, the Court contrasted that statute with 28 U.S.C. § 994(h), a directive that “specifically required *the Sentencing Commission* to set Guidelines sentences for serious recidivist offenders ‘at or near’ the statutory maximum.”⁵⁵ When the Eleventh Circuit later interpreted this directive to the Commission as binding on the courts, the Solicitor General argued, in support of the defendant’s petition for certiorari, that the “premise that congressional directives to the Sentencing Commission are equally binding on the sentencing courts . . . is incorrect.”⁵⁶ The Court granted the petition, vacated the judgment, and remanded for further consideration in light of the Solicitor General’s position.⁵⁷

Congress, of course, may bind the courts by enacting a statute directed *to the courts*, so long as the statute complies with the Constitution. But as long as Congress acts through the Commission, the resulting guidelines, like all other guidelines, are advisory only, and “the very essence of an advisory guideline is that a sentencing court may, *subject to appellate review for reasonableness*, disagree with the guideline in imposing sentencing under Section 3553(a).”⁵⁸

⁵¹ *See* USSG §§ 2A1.6, 2A2.2, 2A2.3, 2A2.4, 2A3.1, 2A3.2, 2A3.3, 2A3.4, 2A3.5, 2A3.6, 2A6.2, 2B1.1, 2B1.4, 2B2.3, 2B3.2, 2B4.1, 2B5.3, 2D1.1, 2D1.11, 2D1.12, 2G1.1, 2G1.2, 2G1.3, 2G2.1, 2G2.2, 2G2.4, 2H3.1, 2H4.1, 2H4.2, 2K2.1, 2K2.24, 2L1.1, 2M5.1, 2M5.2, 2X7.2, 3A1.1, 3A1.2, 3B1.3, 5E1.1.

⁵² *See* USSG §§ 2A3.1, 2A3.2, 2A3.3, 2A3.4, 2B1.1, 2B4.1, 2D1.1, 2D1.12, 2G1.1, 2G2.1, 2G2.2, 2H3.1, 2H4.1, 2L1.1, 3A1.1, 3B1.3.

⁵³ *Kimbrough*, 552 U.S. at 102-03.

⁵⁴ *Id.* at 103.

⁵⁵ *Id.* (emphasis added).

⁵⁶ Brief for the United States at 9, *Vazquez v. United States*, 130 S. Ct. 1135 (2010) (No. 09-5370), 2009 WL 5423020.

⁵⁷ *Vazquez*, 130 S. Ct. at 1135.

⁵⁸ Brief for the United States at 11, *Vazquez v. United States*, 130 S. Ct. 1135 (2010) (No. 09-5370), 2009 WL 5423020 (emphasis added).

2. There is no meaningful division among the circuits regarding disagreements with congressionally-directed guidelines, or with the Commission’s policy statements, that would support “heightened” review.

The Commission claims that there are “disagreements” among circuits regarding “when courts may disregard Commission policy-and even congressional policy-and [that] the permissible grounds for doing so have not been resolved.” Report, Part A, at 43. The two areas it says are unresolved are “how much weight” judges should give guidelines “resulting from congressional directives to the Commission,” and “the appropriate interaction” between the purported “proscriptions and limitations” on offender characteristics in section 994 of title 28. *Id.* It states that these purportedly unresolved differences create “unwarranted disparity” and thus seeks “heightened review” of judicial disagreements with its guidelines and policy statements, whether based on empirical data and national experience or not, and whether directed by Congress or not. *Id.* at 112-13.

Notably, while some of the guidelines with which courts frequently disagree were largely driven by congressional directives (*e.g.*, the child pornography guideline), others were not (*e.g.*, the crack and illegal reentry guidelines), and others exceeded a congressional directive (*e.g.*, the career offender guideline). Thus, even if the Commission were correct that there are unresolved differences among circuits with respect to policy disagreements with congressionally-directed guidelines, and that this creates unwarranted disparity, its proposal for “heightened” review of *all* policy disagreements would not be warranted.

In any event, there is no meaningful difference among circuits with respect to disagreements with guidelines that result from congressional directives to the Commission. The Eleventh and Seventh Circuits, contrary to other circuits, had initially held that courts could not disagree with the career offender guideline because it was directed by Congress.⁵⁹ The Commission’s claim that this division “continues unresolved,” Report, Part A, at 40, is untrue, as it otherwise appears to admit, *id.* at 40-41. In *Vazquez v. United States*, 130 S. Ct. 1135 (2010), the Court vacated the Eleventh Circuit’s judgment, and remanded for reconsideration in light of then Solicitor General Kagan’s position that that the “premise that congressional directives to the Sentencing Commission are equally binding on the sentencing courts . . . is incorrect,” and that “all guidelines are advisory, and the very essence of an advisory guideline is that a sentencing court may, subject to appellate review for reasonableness, disagree with the guideline in imposing sentencing under Section 3553(a).”⁶⁰ Relying in part on *Vazquez*, the *en banc* Seventh Circuit reversed a prior holding to the contrary.⁶¹ All circuits to address the matter now agree

⁵⁹ See *United States v. Vazquez*, 558 F.3d 1224 (11th Cir. 2009), *cert. granted, judgment vacated*, 130 S. Ct. 1135 (Jan. 19, 2010).

⁶⁰ Brief of the United States at 9, 11 & n.1, *Vazquez v. United States*, 130 S. Ct. 1135 (2010) (No. 09-5370).

⁶¹ See *United States v. Corner*, 598 F.3d 411, 415-16 (7th Cir. 2010) (*en banc*).

that judges may disagree with the career offender guideline subject to deferential abuse-of-discretion review, and that a directive to the Commission is not a directive to the courts.⁶²

The circuits also agree that judges may disagree with the child pornography guideline subject to deferential abuse-of-discretion review, and several circuits explicitly state that this is so despite the fact that the guideline is largely based on congressional directives.⁶³ The Sixth

⁶² See *Corner*, 598 F.3d at 415-16 (“all §994(h) requires” is that the Commission set the guideline at or near the maximum, and because “§ 4B1.1 is just a guideline, judges are as free to disagree with it as they are with §2D1.1(c),” so long as they “act reasonably”); *United States v. Martin*, 520 F.3d 87, 96 (1st Cir. 2008) (district court “did not abuse its discretion” in varying to non-career offender range, and rejecting argument that the sentence “effectively nullifies Congress’s intent”); *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008) (“[W]e do not see why disagreement with the Commission’s policy judgment (as expressed in the [career offender] guideline as we interpreted it in *Fiore*) would be any less permissible a reason to deviate than disagreement with the guideline policy judgment at issue in *Kimbrough*.”); *United States v. Sanchez*, 517 F.3d 651, 662-63 (2d Cir. 2008) (rejecting judge’s understanding that § 994(h) deprived her of authority to vary further from the career offender guideline because § 994(h) “is a direction to the Sentencing Commission, not to the courts”); *United States v. McLean*, 331 F. App’x 151, 152-53 (3d Cir. 2009) (“Based on *Spears*, we believe a district court in determining the weight to be given the Guideline range . . . is entitled to reject the policy judgments reflected in the career offender Guideline.”); *United States v. Collins*, 474 F. App’x 142, 143-44 (4th Cir. 2012) (recognizing that district courts may disagree with the career offender guideline because it lacks empirical support); *United States v. Michael*, 576 F.3d 323, 328 (6th Cir. 2009) (the “text” of 28 U.S.C. § 994(h) “tells the Sentencing Commission, not the courts, what to do,” and the “mandatory-minimums make clear [that] had Congress wanted to mandate certain sentences (as opposed to Guidelines ranges) for career offenders, it knew very well how to do so”); *United States v. Gray*, 577 F.3d 947, 950 (8th Cir. 2009) (recognizing that district courts may vary from the career offender guideline based on policy considerations, but there was no indication the district court failed to understand its authority to do so); *United States v. Mitchell*, 624 F.3d 1023, 1028-30 (9th Cir. 2010) (§ 994(h) “is a directive to the Sentencing Commission and not to sentencing courts,” so “the career-offender Guideline, like all other Guidelines, are advisory” and judges are “entitled” to disagree with it); *United States v. Friedman*, 554 F.3d 1301, 1311-1312 & n.13 (10th Cir. 2009) (recognizing court’s authority to disagree with career offender guideline but concluding that district court’s sentence was not based on that disagreement); *United States v. Bailey*, 622 F.3d 1, 10-11 (D.C. Cir. 2010) (district court failed to recognize its authority to disagree as a matter of policy with the career offender guideline).

⁶³ See *United States v. Stone*, 575 F.3d 83, 89-90 (1st Cir. 2009) (“[O]ur precedent has interpreted *Kimbrough* as supplying this power even where a guideline provision is a direct reflection of a congressional directive”); *id.* at 93-94, 97 (district court may agree with Congress’s policy as long as it recognizes its authority not to, but the child pornography “guidelines at issue are in our judgment harsher than necessary” and “we would have used our *Kimbrough* power to impose a somewhat lower sentence”); *United States v. Dorvee*, 616 F.3d 174, 188 (2d Cir. 2010) (*Kimbrough*’s holding that “it was not an abuse of discretion” for a district court to disagree with the crack guidelines “because those particular Guidelines ‘do not exemplify the Commission’s exercise of its characteristic institutional role’ . . . applies with full force to §2G2.2”); *United States v. Grober*, 624 F.3d 592, 600-01 (3d Cir. 2010) (rejecting closer review and applying abuse of discretion review 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 608-09 (“*Kimbrough* permits

Circuit takes a somewhat different approach but permits disagreement with the child pornography guideline, as the Commission acknowledges. Report, Part A, at 39. In *United States v. Bistline*, 665 F.3d 758 (6th Cir. 2012), it distinguished between guideline enhancements dictated by Congress, and guideline enhancements chosen by the Commission like the quantity enhancements at issue in *Kimbrough*. *Id.* at 763-64. For the latter, where the Commission “makes a policy decision for reasons that lie outside its [empirical] expertise,” the resulting guideline is “vulnerable on precisely that ground.” *Id.* For the former, the district court “must refute . . . Congress’s reasons.” *Id.* at 764. That is exactly what the Supreme Court did with the respect to the crack guidelines in *Kimbrough*, see 552 U.S. at 95-100, for even though the crack guidelines were not directed by Congress, they were chosen by the Commission to mimic congressional policy reflected in mandatory minimums. It is important to recognize that the approach the Sixth Circuit adopted in *Bistline* is *not* based on the notion that a directive to the Commission is also a directive to the courts. The Sixth Circuit has repeatedly recognized that such a directive tells the Commission, not the courts, what to do, and that if Congress wants to tell the courts what to do, it must act through a statute directed to the courts.⁶⁴

There is a difference remaining with respect to whether judges may vary based on the disparity caused by the existence of fast track departures in some districts but not others, with the

district courts to vary even where a guideline provision is a direct reflection of a congressional directive.”); *United States v. Geister*, 455 F. App’x 352, 353 (4th Cir. 2011) (recognizing that the district court may disagree with the child pornography guideline because it lacks empirical support); *United States v. Halliday*, 672 F.3d 462, 474 (7th Cir. 2012) (district courts are “at liberty to reject *any* Guideline on policy grounds,” but defendant did “not argue that the district court was unaware of its discretion to disagree with the [child pornography] Guidelines”); *United States v. Pape*, 601 F.3d 743, 749 (7th Cir. 2010) (stating that “district judges are at liberty to reject *any* Guideline,” including § 2G2.2, “on policy grounds-though they must act reasonably when using that power.”); *United States v. Henderson*, 649 F.3d 955, 959-60 (9th Cir.2011) (§2G2.2 was “not developed in a manner ‘exemplify[ing] the Commission’s exercise of its characteristic institutional role,’ . . . so district judges 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*.”); *id.* 963 n.3 (“That Congress has the authority to issue sentencing directives to the Commission” and “that the Guidelines conform to Congressional directives does not insulate them from a *Kimbrough* challenge.”); *United States v. Regan*, 627 F.3d 1348, 1353-54 (10th Cir. 2010) (defendant’s argument for a policy-based variance from § 2G2.2 was “quite forceful” but he “did not raise the argument that the Guidelines are entitled to less deference because they are not the result of empirical study by the Commission”); *United States v. Irey*, 612 F.3d 1160, 1212 n.32 (11th Cir. 2010) (“We do not rule out the possibility that a sentencing court could ever make a reasoned case for disagreeing with the policy judgments behind the child pornography guidelines.”).

⁶⁴ See *Michael*, 576 F.3d at 328 (the “text” of 28 U.S.C. § 994(h) “tells the Sentencing Commission, not the courts, what to do,” and the “mandatory-minimums make clear [that] had Congress wanted to mandate certain *sentences* (as opposed to Guidelines ranges) for career offenders, it knew very well how to do so”); *United States v. Camacho-Arellano*, 614 F.3d 244, 249 (6th Cir. 2010) (Congress’s fast-track directive “says nothing about a *district court*’s discretion to deviate from the guidelines based on fast-track disparity”) (emphasis added)).

majority of circuits holding that such a variance is permissible,⁶⁵ and the Fifth, Ninth, and Eleventh Circuits holding that it is not.⁶⁶ This does not matter for two reasons. First, the reasoning of the latter courts (that Congress directed the Commission to promulgate a fast track departure authorized by the Attorney General and thus implicitly precluded variances based on the resulting disparity) has been essentially rejected by the Supreme Court in *Vazquez*, and was questionable in the first place.⁶⁷ Second, the Attorney General has now directed all U.S. Attorneys to adopt an early disposition program.

⁶⁵ See *United States v. Rodriguez*, 527 F.3d 221, 229-30 (1st Cir. 2008) (“*Kimbrough* made pellucid that when Congress exercises its power to bar district courts from using a particular sentencing rationale, it does so by the use of unequivocal terminology”); *United States v. Arrelucea-Zamudio*, 581 F.3d 142, 143 (3d Cir. 2009) (it would not be “an abuse of a sentencing judge’s discretion” to vary based on fast-track disparity); *id.* 150-52 (“[A] Guideline is not a statute” and “to argue otherwise is an attempt to manipulate the advisory character of the Guidelines.”); *United States v. Camacho-Arellano*, 614 F.3d 244, 249-50 (6th Cir. 2010) (Congress’s fast-track directive “says nothing about a district court’s discretion to deviate from the guidelines based on fast-track disparity,” and “*Kimbrough* requires that we repudiate any prior hint that district judges could not grant variances based on the fast-track disparity.”); *United States v. Reyes-Hernandez*, 624 F.3d 405, 417-21 (7th Cir. 2010) (“§5K3.1 should be treated as a guideline and not a statute,” the “Commission clearly acted outside its characteristic institutional role in creating” it, and “[i]t is, therefore, reasonable that a sentencing court could consider sentencing practices in other jurisdictions in determining whether a particular defendant’s guideline sentence was ‘greater than necessary’”); *United States v. Jimenez-Perez*, 659 F.3d 704, 709-10 (8th Cir. 2011) (congressional fast track directive did not “carve out an exception to” the “norm” that the guidelines “are advisory only,” for “when Congress exercises its power” to direct district court sentencing practices, it “use[s] unequivocal terminology,” such as “statutorily imposing a mandatory minimum or maximum sentence”).

⁶⁶ See *United States v. Gonzalez-Zotelo*, 556 F.3d 736, 740-41 (9th Cir. 2009); *United States v. Vega-Castillo*, 540 F.3d 1235, 1239 (11th Cir. 2009); *United States v. Gomez-Herrera*, 523 F.3d 554, 561 (5th Cir. 2008).

⁶⁷ As the First Circuit explained, “the PROTECT Act’s authorization for the selective deployment of fast-track programs bears scant resemblance to a congressional directive instituting statutory minimum and maximum sentences. Although the latter directive necessarily cabins a sentencing court’s discretion, the former authorization says nothing about the court’s capacity to craft a variant sentence within the maximum and minimum limits.” *United States v. Rodriguez*, 527 F.3d 221, 228 (1st Cir. 2008). It “respectfully disagree[d] with the conclusion reached by the [Fifth Circuit] *Gomez-Herrera* panel”:

While the *Kimbrough* Court acknowledged that a sentencing court can be constrained by express congressional directives, such as statutory mandatory maximum and minimum prison terms, 128 S. Ct. at 571-72, the PROTECT Act—as the Fifth Circuit would have to concede—contains no such express imperative. The Act, by its terms, neither forbids nor discourages the use of a particular sentencing rationale, and it says nothing about a district court’s discretion to deviate from the guidelines based on fast-track disparity. The statute simply authorizes the Sentencing Commission to issue a policy statement and, in the wake of *Kimbrough*, such a directive, whether or not suggestive, is “not decisive as to what may constitute a permissible ground for a variant sentence.”

Id. at 229 (quoting *Kimbrough*, 552 U.S. at 104). Reading into the PROTECT Act an implicit restriction on a district court’s sentencing discretion requires “heavy reliance on inference and implication about

In sum, courts are not meaningfully “divided on . . . how much weight should be given to guidelines resulting from congressional directives to the Commission.” Report, Part A, at 43. The Supreme Court has made clear, and the lower courts agree, that a directive to the Commission does not apply to the courts, that sentencing judges may give *less* deference to a guideline that was not developed based on “empirical data and national experience” (or in the Sixth Circuit, less deference to the child pornography guideline if the court refutes Congress’s reasons), and that when a court disagrees with such a guideline, that decision is entitled to as much “respect” on appeal as any other sentence.

The Commission’s final complaint is that the Supreme Court in *Pepper* held that courts are free to disregard Commission policy statements restricting consideration of offender characteristics. Report, Part A, at 41-42. It states that the *Pepper* decision “may affect future circuit court decisions about sentencing courts’ authority to reject other guideline policies.” *Id.* at 41. It identifies no division in authority among the circuits on whether judges may consider relevant offender characteristics, and there is no such division.⁶⁸ Yet it says that “the appropriate interaction” between the purported “proscriptions and limitations” on offender characteristics in section 994 of title 28 remains unresolved. *Id.* at 43.

This entire discussion is quite troubling, for it makes clear that the Commission is seeking “heightened” review of any sentence that diverges from Commission policy as reflected in the guidelines or policy statements, whether based on empirical data and national experience or not, and whether directed by Congress or not.

3. The report provides no data showing that policy disagreements create unwarranted disparity.

According to the Commission, the “influence of the guidelines,” measured by the distance between the average guideline minimum and the average sentence imposed, “has remained relatively stable” for all offense types except the fraud and child pornography guidelines, whose “influence” “has diminished.” Report, Part A, at 60, 62-65, 67-68. Indeed, the difference between the guideline minimum and the sentence imposed for all offenses is the same after *Gall* as during the *Koon* period. *Id.* at 61. And the extent of non-government sponsored reductions as a percentage of the guideline range has decreased for every offense type

congressional intent—a practice that runs directly contrary to the Court’s newly glossed approach . . . In refusing to read a bar on policy disagreements into either Congress’s original formulation of the 100-to-1 crack/powder ratio in the Anti-Drug Abuse Act or its later rejection of the Sentencing Commission’s attempted softening of the ratio, *Kimbrough* made pellucid that when Congress exercises its power to bar district courts from using a particular sentencing rationale, it does so by the use of unequivocal terminology.” *Id.* at 229-30 (citing *Kimbrough*, 552 U.S. at 101-07). It thus “opened the door for sentencing courts to deviate from the guidelines in individual cases notwithstanding Congress’s competing policy pronouncements.” *Id.* at 230 (citing *Martin*, 520 F.3d. at 96).

⁶⁸ See Amy Baron-Evans & Thomas W. Hillier, II, *The Commission’s Legislative Agenda to Restore Mandatory Guidelines*, at 14-15 & n.50, 21-26 (forthcoming in 25 Federal Sentencing Reporter (April, 2013), available at SSRN: <http://ssrn.com/abstract=2252105>).

except illegal entry in the *Gall* period as compared to the PROTECT Act period, while the extent of *government-sponsored* variances has *increased* in fraud, child pornography, and illegal entry cases. *Id.* at 96.

The Commission claims that there are differences in the influence of the guidelines among circuits over time, *id.* at 75, but its analysis is remarkably inconclusive. It reports that in the Fourth Circuit, average sentences have “generally paralleled” average guideline minimums, though there was a 75% increase in the percent difference (from 8% to 14%) from 2008 to 2011, while claiming a “greater divergence” in the Third Circuit, though there was only a 46% increase in the percent difference there (from 18.8% to 27.6%). *Id.* at 75-76. It states that differences among circuits were greater by offense type, describing a 390% increase in the percent difference (from 3.3% to 16.2%) in fraud cases in the Fourth Circuit from 2008 to 2011 as “small,” *id.* at 77, while stating that “changes in average sentences have not paralleled changes in average guideline minimums” in fraud cases in the Second Circuit, though there was a 46% *decrease* in the percent difference there (from 48.6% to 33.3%). *Id.* at 78. It states that in child pornography cases, the relationship between the guideline minimum and the average sentence “may be diminishing in the Tenth Circuit,” *id.* at 79, that “[i]n all of the other circuits, average sentences have not increased to the same extent as average guideline minimums . . . through the *Gall* period,” and that average sentences in the Second Circuit “have demonstrated little relationship with average guideline minimums since 2006.” *Id.* at 80. Its analysis of firearms and illegal entry cases is similarly inconclusive. *Id.* at 81-85. It states that the relationship between the guideline minimum and average sentence in career offender cases has been “relatively stable” in the Fourth Circuit, though the percent difference increased by 103% (from 10% to 20.3%) from 2008 to 2011. *Id.* 85. By contrast, it says, average sentences “have not tracked” the guideline minimum in the First Circuit since 2004, though the percent difference increased by 170%, from 12.8% during the PROTECT Act period to 34.6% in 2011, *id.* at 86, and for unique reasons of which the Commission is well aware but does not discuss.⁶⁹

Moreover, an analysis of the Commission’s data on sentence length by district, which reflects the “combined effects of all actors and influences on sentence lengths,” shows “remarkable stability” among districts over time, “and provides no evidence that sentence lengths depend increasingly on the district in which a defendant is sentenced.” *See* Fact Sheet: Regional Differences in Federal Sentencing.

If there are differences among circuits in the influence of different guidelines over time, the Commission has not tied those differences to any differences in circuit law regarding policy disagreements that it claims to have found. If the Commission finds cause for concern in this data, the solution is to fix the guidelines, not to seek legislation that would drive judicial feedback underground and almost surely be held unconstitutional.

⁶⁹ *See* Defender Letter to the Commission Regarding Suggestions for Booker Report at 5 (Dec. 3, 2012), <http://www.fd.org/docs/select-topics---sentencing/defender-letter-of-12-3-12-regarding-suggestions-for-commission's-booker-report.pdf?sfvrsn=4>.

4. Instead of seeking to suppress policy disagreements, the Commission should draw on judges' experience and expertise to fix unsound guidelines.

Under the SRA as enacted, the Commission was to develop, review and revise the guidelines based on data, research and consultation.⁷⁰ The most important information the Commission was to use in revising the guidelines were data and reasons generated by judges when departing from the guideline range.⁷¹ District courts would state their reasons,⁷² the Commission would collect and study those reasons,⁷³ and appellate courts would uphold “reasonable” departures having regard for the sentencing court’s reasons and the factors set forth in § 3553(a).⁷⁴ The Commission would not “second-guess[] individual judicial sentencing actions either at the trial or appellate level,” but instead would learn “whether the guidelines are being effectively implemented and revise them if for some reason they fail to achieve their purposes.”⁷⁵ In this way, the guideline system would “reflect current views as to just punishment, and take account of the most recent information on satisfying the purposes of deterrence, incapacitation, and rehabilitation.”⁷⁶

⁷⁰ See 28 U.S.C. § 994(o) (directing Commission to revise the guidelines based on sentencing data and consultation with frontline actors in the criminal justice system); 28 U.S.C. § 994(x) (provisions of 5 U.S.C. § 553 relating to notice and public hearing “shall apply to the promulgation of guidelines”).

⁷¹ “The statement of reasons . . . assists the Sentencing Commission in its continuous reexamination of its guidelines and policy statements.” S. Rep. No. 98-225, at 80 (1983). “Appellate review of sentences is essential . . . to provide case law development of the appropriate reasons for sentencing outside the guidelines,” which “will assist the Sentencing Commission in refining the sentencing guidelines.” *Id.* at 151. See also *United States v. Rivera*, 994 F.2d 942, 949-50 (1st Cir. 1993) (Breyer, C.J.) (“[T]he very theory of the guidelines system is that when courts, drawing upon experience and informed judgment in cases, decide to depart, they will explain their departures,” the “courts of appeals and the Sentencing Commission, will examine, and learn from, those reasons,” and “the resulting knowledge will help the Commission to change, to refine, and to improve, the Guidelines themselves.”); Edward M. Kennedy, *Sentencing Reform—An Evolutionary Process*, 3 Fed. Sent’g Rep. 271 (1991) (“the structure of the guidelines system draws upon the expertise of the judiciary in addressing [key] issues,” departures “will lead to a common law of sentencing,” and “the guideline system [will] be evolutionary in nature.”).

⁷² 18 U.S.C. § 3553(c) (statement of reasons).

⁷³ 28 U.S.C. § 994(w) (judges shall submit statement of reasons to the Commission), § 995(a)(15) (Commission shall collect “information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 3553(a)”).

⁷⁴ 18 U.S.C. § 3742(e) (1990).

⁷⁵ S. Rep. No. 98-225, at 178 (1983).

⁷⁶ *Id.*

Under the mandatory guidelines system, however, judges “never played an important role in improving the supposedly evolutionary guidelines.”⁷⁷ Instead, the Commission actively suppressed departures, and the guidelines were revised frequently in response to short-sighted demands by the Department of Justice and congressional directives, but were not informed by judicial experience in real cases. “The resulting institutional imbalance . . . made the guidelines a one-way upward ratchet increasingly divorced from consideration of sound public policy and even from the commonsense judgments of frontline sentencing professionals who apply the rules.”⁷⁸

Variations based on policy disagreements can now provide valuable information to the Commission so that the guidelines can constructively evolve. Assessments by judges of whether certain guidelines effectuate the purposes of sentencing in real cases are the most useful advice the Commission can obtain. The Supreme Court has repeatedly urged the courts to provide this advice to the Commission and the Commission to revise the guidelines accordingly.⁷⁹

The Commission’s report unfortunately denigrates this important feedback mechanism as judges “substitut[ing] their own policy judgments for the collective policy judgments of Congress and the Commission.” Report, Part A, at 112; *see also id.* at 36, 42. This ignores and rejects the fact that judges have far more experience in sentencing than the Commission, Congress, or the appellate courts.⁸⁰ Judges have always had “special knowledge and expertise” in making “substantive or political judgment[s]” regarding sentencing.⁸¹ That is why judicial feedback through actual sentencing decisions was to be the primary driver of guidelines’ revision.⁸²

⁷⁷ Ronald F. Wright & Marc L. Miller, *Empty Heart, Vibrant Corpus*, 12 Fed. Sent’g Rep. 86, 88 (1999).

⁷⁸ Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319-20 (2005).

⁷⁹ *See Booker*, 543 U.S. at 266 (Commission “remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly); *Rita*, 551 U.S. at 357-58 (judges’ “reasoned judgment . . . can provide relevant information to [the] Commission,” to “help the Guidelines constructively evolve over time”); *Kimbrough*, 552 U.S. at 107 (“ongoing revision of the Guidelines in response to sentencing practices will help to ‘avoid excessive sentencing disparities’”); *Spears*, 555 U.S. at 266 (“masking . . . categorical policy disagreements as ‘individualized determinations’ . . . is institutionalized subterfuge”).

⁸⁰ *Gall*, 552 U.S. at 52 & n.7 (noting that a district court may sentence many hundreds of defendants in a single year, while only a small fraction of sentences are appealed, and that this experience gives district courts “an institutional advantage over appellate courts” in determining the appropriate sentence (internal quotation and citation omitted)); *Rita*, 551 U.S. at 357-58 (“The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court.”).

⁸¹ *Mistretta v. United States*, 488 U.S. 361, 396 (1989).

⁸² 28 U.S.C. § 994(o) (“The Commission periodically shall review and revise [the guidelines] in consideration of comments and data coming to its attention”); *Rita* 551 U.S. at 350, 358 (“The

The Commission asserts that judges disagree with guidelines based on their “varied backgrounds and preferences,” Report, Part A, at 112, but this is not a fair or accurate characterization. Judges are highly competent in evaluating the guidelines in light of evidence the Commission has disregarded or that current research and data no longer support. *Kimbrough*, 552 U.S. at 97. “In a different but not completely dissimilar context, . . . the Supreme Court has instructed that district courts should be the primary gate-keepers of junk science subject always to review that is deferential.” *United States v. Cavera*, 550 F.3d 180, 196 n.15 (2d Cir. 2008) (en banc) (citing, e.g., *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993)). There are hundreds if not thousands of cases in which judges have carefully analyzed the empirical and policy underpinnings of the guidelines and concluded, openly and transparently and based on the evidence before them, including Commission reports, empirical research by others, and other data, that a guideline is unsound. See, e.g., *United States v. Newhouse*, ___ F. Supp. 2d ___, 2013 WL 346432, *28 (N.D. Iowa Jan. 30, 2013) (exhaustively analyzing the career offender guideline as it applies to low-level, non-violent drug addicts and concluding that, in such cases, the career offender guideline “has the potential to overstate the seriousness of a defendant’s record and her risk of re-offending, to result in a sentence significantly greater than necessary to protect the public by deterring further crimes of the defendant, to result in unwarranted sentencing uniformity and unwarranted sentencing disparities among defendants found guilty of similar conduct, to result in an unduly harsh sentence which does not promote respect for the law, and to be inconsistent with the obligation to apply all of the relevant § 3553(a) factors”); *United States v. Moreland*, 568 F. Supp. 2d 674, 685-88 (S.D. W.Va. 2008) (carefully analyzing the career offender guideline as it applied to a non-violent drug offender and finding that its definition of “felony . . . controlled substance” “casts a wide net” that creates unwarranted uniformity and “would not produce justice in this case”);⁸³ *United States v. Diaz*, slip op., 2013 WL 322243 (E.D.N.Y. Jan. 28, 2013) (analyzing the Commission’s reasons for linking the drug guidelines to the “harsh” mandatory minimums in the ADAA, suggesting that the Commission should welcome policy disagreements with guidelines, and that it should fix the problems in the drug guideline identified by more than twenty-five years of application experience by de-linking the drug guideline ranges from the mandatory minimums and crafting lower ranges based on empirical data and expertise);⁸⁴ *United States v. Williams*, 788 F. Supp. 2d 847 (N.D. Iowa 2011)

statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. . . . [The] reasoned sentencing judgment [of the sentencing court] . . . can provide relevant information to both the court of appeals and ultimately the Sentencing Commission. The reasoned responses of these latter institutions to the sentencing judge’s explanation should help the Guidelines constructively evolve over time, as both Congress and the Commission foresaw.”); *Booker*, 543 U.S. at 264 (“[T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly.”).

⁸³ See also, e.g., *United States v. Whigham*, 754 F. Supp. 2d 239, 247-48 (D. Mass. 2010); *United States v. Woody*, slip op., 2010 WL 2884918, *7 (D. Neb. 2010); *United States v. Hicks*, slip op., 2010 WL 605294 (E.D. Wis. 2010).

⁸⁴ See also, e.g., *United States v. Thomas*, 595 F. Supp. 2d 949 (E.D. Wis. 2009).

(extensively analyzing the 18:1 powder-to-crack ratio adopted by the Commission after the Fair Sentencing Act, finding that “it is just as irrational as the 100:1 ratio and suffers from almost all of the same infirmities as the prior irrational ratio, plus some additional concerns,” and adopting a 1:1 ratio);⁸⁵ *United States v. McCarthy*, slip op., 2011 WL 1991146 (S.D.N.Y. May 19, 2011) (concluding, based on testimony of four expert witnesses and research and data concerning addictiveness, prevalence of use among youth, effect of the drug, and health risks, that the guidelines for MDMA offenses recommend punishment that is greater than justified and that MDMA should not be punished more severely than powder cocaine);⁸⁶ *United States v. Santillanes*, No. 07-619, Transcript of Sentencing Hr’g (D.N.M. Sept. 19, 2009) (concluding based on un rebutted evidence that guideline ranges for certain methamphetamine offenses are unsupported by any empirical data or study and create unwarranted disparity);⁸⁷ *United States v. Cabrera*, 567 F. Supp. 2d 271 (D. Mass. 2008) (concluding that two fundamental problems with drug guidelines are “over-emphasis on quantity” and “under-emphasis on role,” creating “false uniformity”; “apart from the recent adjustment in the crack cocaine guidelines . . . the Commission has never reexamined the drug quantity tables along the lines that the scholarly literature, the empirical data, or the 1996 Task Force and others, recommended”); *United States v. Marshall*, 870 F. Supp. 2d 489 (N.D. Ohio 2012) (analyzing the child pornography guideline and finding that it “produce a calculation that is both unfair and unreasonable and in direct conflict with the ‘sufficient, but not greater than necessary’ mandate of Section 3553(a)); *United States v. Grober*, 595 F. Supp. 2d 382, 412 (D.N.J. 2008) (scrutinizing the child pornography guideline and “conclud[ing] that the guideline does not guide,” thereby “join[ing] thoughtful district court judges” who have engaged in similar analyses), *aff’d*, *United States v. Grober*, 624 F.3d 592 (3d Cir. 2010); *United States v. Shipley*, 560 F. Supp. 2d 739, 744 (S.D. Iowa 2008) (examining the child pornography guideline and concluding that “the advice in this case is less reliable than in other cases where the guidelines are based on study and empirical data”);⁸⁸

⁸⁵ See also, e.g., *United States v. Shull*, 793 F. Supp. 2d 1048 (S.D. Ohio 2011).

⁸⁶ See also, e.g., *United States v. Qayyem*, 2012 WL 92287 (S.D.N.Y. Jan 11, 2012).

⁸⁷ See also, e.g., *United States v. Goodman*, 556 F. Supp. 2d 1002, 1016 (D. Neb. 2008).

⁸⁸ See also, e.g., *United States v. Stark*, slip op., 2011 WL 555437 (D. Neb. 2011); *United States v. McElheney*, 630 F. Supp. 2d 886 (E.D. Tenn. 2009); *United States v. Beiermann*, 599 F. Supp. 2d 1087 (N.D. Iowa 2009); *United States v. Burns*, slip op., 2009 WL 3617448 (N.D. Ill. 2009); *United States v. Riley*, 655 F. Supp. 2d 1298 (S.D. Fla. 2009); *United States v. Phinney*, 599 F. Supp. 2d 1037 (E.D. Wis. 2009); *United States v. Grober*, 595 F. Supp. 2d 382 (D. N.J. 2008); *United States v. Stern*, 590 F. Supp. 2d 945 (N.D. Ohio 2008); *United States v. Johnson*, 588 F. Supp. 2d 997 (S.D. Iowa 2008); *United States v. Rausch*, 570 F. Supp. 2d 1295 (D. Colo. 2008); *United States v. Doktor*, slip op., 2008 WL 5334121 (M. D. Fla. Dec. 19, 2008); *United States v. Ontiveros*, slip op., 2008 WL 2937539 (E.D. Wis. July 24, 2008); *United States v. Hanson*, 561 F. Supp. 2d 1004 (E. D. Wis. June 20, 2008); *United States v. Taylor*, 2008 WL 2332314 (S.D.N.Y. June 2, 2008); *United States v. McClelland*, slip op., 2008 WL 1808364 (D. Kan. April 21, 2008); *United States v. Baird*, slip op., 2008 WL 151258 (D. Neb. Jan. 11, 2008); *United States v. Stabell*, 2009 WL 775100 (E.D. Wis. March 19, 2009); *United States v. Gellatly*, slip op., 2009 WL 35166, *3-5 (D. Neb. Jan. 5, 2009); *United States v. Noxon*, 2008 WL 4758583, *2 (D. Kan. Oct. 28, 2008); *United States v. Stults*, slip op., 2008 WL 4277676, *4-7 (D. Neb. Sept. 12, 2008); *United States v. Goldberg*, slip op., 2008 WL 4542957, *6 (N.D. Ill. April 30, 2008).

United States v. Adelson, 441 F. Supp. 2d 506, 511 (S.D.N.Y. July 20, 2006) (concluding that the fraud guidelines had “so run amok that they are patently absurd on their face”); *United States v. Parris*, 573 F. Supp. 2d 744 (E.D.N.Y. 2008) (finding that the guideline range of 360 months to life, the result of multiple guideline increases driven by highly publicized major frauds, defied common sense in the run of the mill securities fraud case before him, and though it “would have much preferred a sensible guideline range to give me some semblance of real guidance,” the court asked the parties to prepare a compendium of sentences imposed in similar cases and sentenced the defendants to 60 months primarily on that basis); *United States v. Watt*, 707 F. Supp. 2d 149 (D. Mass. 2010) (in a large identity fraud case involving a defendant with no criminal history, whose gain was zero, and who pled guilty to an offense with a statutory maximum of five years, concluding that the guideline range of life imprisonment was “of no help”); *United States v. Galvez-Barrios*, 355 F. Supp. 2d 958, 962-64 (E.D. Wis. 2005) (scrutinizing the illegal reentry guideline and concluding that the 16-level enhancement was “excessive because it was based on (and double counted) a prior conviction that did not reflect the degree of dangerousness that could justify such a dramatic increase” and that the guideline range reflected unwarranted disparity as compared with sentences imposed in fast-track districts); ⁸⁹ *United States v. Handy*, 570 F. Supp. 2d 437, 478-80 (E.D.N.Y. 2008) (finding invalid the strict-liability component of the stolen-gun enhancement in part due to conflict with related criminal statute); *United States v. Grant*, slip op., 2008 WL 2485610 (D. Neb. June 16, 2008) (imposing below guideline sentence for second degree murder conviction because “[t]he Guidelines that establish the base offense levels for murder are among those that were not based on empirical data and national experience, . . . [so] they are a less reliable appraisal of a fair sentence and the court affords them less deference than it would to empirically-grounded Guidelines”).

And while the Commission asserts that the current standard of review for policy disagreements “risks increasing unwarranted sentencing disparity,” Report, Part A, at 112, it provides no proof that this is so, and fails to mention that courts of appeals frequently reverse sentences when district courts fail to consider policy-based arguments, thus avoiding unwarranted disparity. See, e.g., *United States v. Henderson*, 649 F.3d 955 (9th Cir. 2011) (reversing because the district court failed to consider defendant’s policy-based challenges to the child pornography guideline); *United States v. Tutty*, 612 F.3d 128 (2d Cir. 2010) (reversing because district court failed to consider policy-based challenge to child pornography guideline); *United States v. Hamilton*, 2009 WL 995576, *3 (2d Cir. Apr. 14, 2009) (reversing because district court may not have understood “that it had discretion to consider the policy argument disagreeing with the Guidelines’ refusal to consider age and its correlation with recidivism”); *United States v. Ricketts*, 395 F. App’x 69 (4th Cir. 2010) (reversing because district court failed to address non-frivolous policy-based argument based on the crack-to-powder ratio); *United States v. Simmons*, 568 F.3d 564 (5th Cir. 2009) (reversing because district court failed to adequately consider its own disagreement with guideline policy regarding the relevance of age);

⁸⁹ See also *United States v. Santos*, 406 F. Supp. 2d 320, 327 (S.D.N.Y. 2005) (double counting); *United States v. Zapata-Treviño*, 378 F. Supp. 2d 1321, 1327-28 (D.N.M. 2005) (same); *United States v. Galvez-Barrios*, 355 F. Supp. 2d 958, 962-63 (E.D. Wis. 2005) (same).

United States v. Davy, 433 F. App'x 343 (6th Cir. 2011) (reversing because the district court failed to adequately consider defendant's request for a policy-based variance on the ground that the 2-level strict liability enhancement for a stolen firearm reflects unsound policy where the defendant did not know the firearm was stolen); *United States v. Robertson*, 309 F. App'x 918 (6th Cir. 2009) (reversing because the district court failed to address defendant's policy-based arguments regarding double-counting of prior convictions under the firearms guideline); *United States v. Steward*, 339 F. App'x 650, 653-54 (7th Cir. 2009) (reversing because the district court passed over in silence defendant's non-frivolous argument based on Commission research showing that recidivism rates for defendants who qualify as career offenders based on prior drug convictions are much lower than others in Criminal History Category VI, and that the guideline does not deter drug crime because retail drug traffickers are easily replaced); *United States v. Santillanes*, 274 F. App'x 718 (10th Cir. 2008) (reversing because the district court failed to address the defendant's policy-based argument regarding the disparity between the guidelines for mixture and actual methamphetamine).

II. The Commission's Contention That Appellate Review Has Failed To Produce the "Uniformity" the Supreme Court Purportedly Anticipated Misreads the Court's Decisions And Lacks Factual Support.

The Commission asserts that "[a]ppellate review has not promoted uniformity in sentencing to the extent the Supreme Court anticipated in *Booker*." Report, Part A, at 105.

First, the premise that the Court expected appellate review to create the kind of "uniformity" the Commission seeks (*i.e.*, greater compliance with the guidelines) is a false one. The Court stated: "We cannot and do not claim that use of a 'reasonableness' standard will provide the uniformity that Congress originally sought to secure," because, "as by now should be clear, that mandatory system is no longer an open choice." *Booker*, 543 U.S. at 263. "[S]ome departures from uniformity [are] a necessary cost of the remedy we adopted." *Kimbrough*, 552 U.S. at 108. Moreover, contrary to the Commission's position, the Court recognized that *rates* of below-guideline sentences do not necessarily reflect *unwarranted* disparity. By varying from the guidelines, judges avoid "unwarranted disparities" and "unwarranted similarities" created by the guidelines "themselves." *Id.* at 108; *Gall*, 552 U.S. at 55.

Second, while the Court noted that deferential appellate review, which it chose to adopt rather than "invalidation of the entire Act," *Booker*, 543 U.S. at 263, would "tend to iron out sentencing differences," *id.*, it expected *the Commission* to "avoid excessive sentencing disparities" by revising the guidelines based on "what it learns" from "actual district court sentencing decisions," "appellate court decisionmaking," and research. *Booker*, 543 U.S. at 263-64. "[A]dvisory Guidelines combined with appellate review for reasonableness *and* ongoing revision of the Guidelines in response to sentencing practices will help to avoid 'excessive sentencing disparities.'" *Kimbrough*, 552 U.S. at 107-08 (emphasis added). In other words, the Court expected that appellate review would "tend to iron out sentencing differences" *in combination with* ongoing revision of the guidelines. Thanks in large measure to the pressure brought to bear by *Booker* and its progeny, the unwarranted disparity caused by the crack

guidelines has been reduced though not eliminated.⁹⁰ The Commission only recently sent a report to Congress regarding the need to amend the child pornography guidelines, and has not begun to address the problems with the fraud guidelines, any of the other drug guidelines, or the career offender guideline, among others. But the Commission entirely ignores the Court's repeated expectation that the Commission would fix unsound guidelines, and instead recommends "heightened" review of disagreements with its guidelines, "greater justifications" for non-guideline sentences, and a mandatory presumption of reasonableness for guideline sentences.

Third, the Commission provides no evidence that appellate review has not *tended* to iron out sentencing differences consistent with the *advisory* guidelines system the Supreme Court created and given the known problems with several frequently applied guidelines. It simply asserts that appellate review has not produced the "uniformity" the Court purportedly "anticipated," and describes four "reasons for this result." Report, Part A, at 105, 107.

A. "different views held by judges with respect to various factors, including offender characteristics and the guidelines"

The Commission claims that "most significantly, offenders with similar offense conduct and similar criminal history increasingly have received different sentences" which "reasonableness review . . . has not ironed out." Report, Part A, at 105. In other words, defendants with the same guideline range should be sentenced the same, regardless of mitigating offense circumstances or offender characteristics which the guidelines and policy statements ignore, prohibit, or discourage, and regardless of whether the guideline is manifestly unsound. The Commission's real complaint is that the law allows judges to take these factors into account.

The Commission's overarching premise is that appellate review "has not promoted uniformity in sentencing to the extent the Supreme Court anticipated in *Booker*." Report, Part A, at 105. In support of this premise, the Commission says that "[a] review of case law reveals that, in the wake of *Booker*, sentencing judges apply the section 3553(a) factors differently":

Some judges give substantial weight to the characteristics of the offender, including those that, consistent with section 994 of Title 28, the Commission has deemed ordinarily not relevant. Some judges view certain characteristics as grounds for decreasing the sentence, while others do not. Other judges consider such factors, but accord greater weight to the Commission's guidelines and policy statements. Still others categorically reject certain guidelines and policy statements.

Id. (citations omitted).

Given the proposition the Commission means to prove, one would expect vivid illustrations of district courts reaching different substantive outcomes with respect to offender characteristics in similar cases, with courts of appeals being forced to affirm these differing

⁹⁰ Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. Penn. L. Rev. 1631, 1672-74 (2012).

outcomes under prevailing law. But it cites no district court decisions reaching different sentencing outcomes that have been affirmed under controlling law. And it entirely ignores that the Commission itself, not appellate review, is the solution to the purported “problem” of sentencing judges who reject unsound guidelines.

In support of the assertion that “some judges give substantial weight to the characteristics of the offender,” including those the Commission deems “not ordinarily relevant”, the Commission cites the Third Circuit’s *en banc* decision in *United States v. Tomko*, 562 F.3d 558 (3d Cir. 2009) (*en banc*), as an example of a district court’s decision to consider the defendant’s employment record as mitigating. Report, Part A at 105, n.433. Though the Commission does not say so, the *en banc* court in *Tomko* affirmed the district court’s decision regarding employment record. It rejected the government’s argument on appeal, which it said “boils down to a claim that Tomko’s criminal history, employment record, community ties, and charitable works do not differentiate him enough from the ‘mine-run’ tax evasion case to justify his below-Guideline sentence,” because that test is the same as the “already-rejected ‘proportionality test.’” *Tomko*, 562 F.3d at 571. Instead, the court held, the district court’s reasons are “logical and consistent with the factors set forth in section 3553(a).” *Id.* (internal quotation marks and citation omitted).

Aside from the veiled complaint that the decision of the *en banc* Third Circuit is contrary to the Commission’s interpretation of section 994 set forth in its policy statements, which do not control variances, *see, e.g., Irizarry v. United States*, 553 U.S. 708, 714-15 (2008), the Commission points to no *sentencing judge* who has *declined* to consider employment history, which a court of appeals was constrained to uphold under the deferential standard of review. In short, this citation does not prove the Commission’s premise that sentencing judges are reaching different outcomes in similar cases.

In support of the assertion that “some judges view certain characteristics as grounds for decreasing the sentence, while others do not,” the Commission cites two *appellate* judges who concurred in the Eighth Circuit’s *en banc* decision in *United States v. Feemster*, 572 F.3d 455, 465-66 (8th Cir. 2009) (*en banc*) (Riley, J., concurring); *id.* at 467-70 (Colloton, J., concurring), and who expressed differing views regarding the relevance of youth. Report, Part A, at 105 n.434. There, the *en banc* Eighth Circuit held that “the district court’s justifications for imposing a 120-month sentence,” which included consideration of the defendant’s youth, “rest on precisely the kind of defendant-specific determinations that are within the special competence of sentencing courts, as the Supreme Court has repeatedly emphasized.” *Feemster*, 572 F.3d at 464 (8th Cir. 2009) (*en banc*) (internal quotation marks and alteration omitted). In its supplemental brief before the *en banc* court, the government conceded that a district court may properly consider a defendant’s youth under § 3553(a)(1). *Id.* at 463.

Judge Riley concurred in the *en banc* decision because the government conceded that youth is relevant under § 3553(a), *id.* at 466-67 (Riley, J., concurring), but expressed the view that the defendant’s youth was not relevant because it “does not distinguish him in any meaningful way from other defendants.” *Id.* at 465 (Riley, J. concurring). Judge Colloton, on the other hand, agreed with the government that the defendant’s youth is properly considered under § 3553(a), *id.* at 467 n.11 (Colloton, J., concurring), and agreed with the *en banc* court that its

deferential review and affirmance of the district court’s consideration of the defendant’s youth “follows from the Supreme Court’s decisions” in *Booker* and *Gall*. *Id.* at 476 (Colloton, J., concurring).

Thus, this citation stands for the proposition that most judges (the sentencing judge in *Feemster*, along with Judge Colloton and the other appellate judges of the *en banc* Eighth Circuit) view youth as relevant and potentially mitigating, while one concurring appellate judge does not (Judge Riley). But the Commission points to no *sentencing judge* who, unlike the sentencing judge in *Feemster*, decided that youth was irrelevant, and whose decision on that ground was nevertheless affirmed under deferential review. Moreover, the Commission itself declared in 2010 that “age (including youth) may be relevant” to the determination whether a downward departure may be warranted. *See* USSG § 5H1.1 (2010). The view of one concurring appellate judge tells us nothing about whether “sentencing judges apply the section 3553(a) factors differently,” and is also now in conflict with the Commission’s policy statement that youth is potentially relevant.

In support of its contention that “[o]ther judges consider [certain characteristics such as youth], but accord greater weight to the Commission’s guidelines and policy statements,” the Commission contrasts *United States v. Jackson*, 300 F. App’x 428 (7th Cir. 2008), with *United States v. Maloney*, 466 F.3d 663 (8th Cir. 2006), in both of which the defendant qualified as a career offender. Report, Part A, at 105 n.435. Neither case remains good law, and thus tell us nothing about the current state of appellate review.

In *Jackson*, the district court stated that the defendant was “young and impulsive and very dangerous” and that he “very much deserve[d]” being characterized as a career offender, and therefore declined to vary downward from the career offender range of 188-235 months, imposing a sentence “at the low end” of the career offender range. 300 F. App’x at 429-30. Nothing in this decision, however, reveals whether the defendant asked the sentencing court to consider his youth as a reason to vary below the guideline, nor is there any suggestion that the district court’s statements regarding the defendant’s youth were the subject of any arguments on appeal. Instead, the Seventh Circuit considered and rejected the defendant’s purely legal argument that *Kimbrough* applies to the career offender guideline. *Id.* at 430. The Commission fails to mention that *Jackson*’s actual holding—that the reasoning in *Kimbrough* does not apply to the career offender guideline—was abrogated by *United States v. Corner*, 598 F.3d 411 (7th Cir. 2010).

In *Maloney*, the district court varied downward from 360 months to the mandatory minimum of 180 months, explaining that 180 months would be just as effective at providing just punishment, deterrence, and promoting respect for law, and observing that the defendant, who was 22 years old at the time of the offense, had a “troubled childhood” and would “benefit from educational or vocational training, psychiatric counseling, alcohol and drug abuse training while he’s in prison,” and that anything more than 180 months would eliminate any chance of rehabilitating the defendant. 466 F.3d at 666. While that decision would surely be affirmed today under the deferential standard in *Gall*, the Eighth Circuit reversed it as unreasonable under its pre-*Gall* standard. *Maloney*, 466 F.3d at 669. The Commission fails to mention that *Maloney* was abrogated by *Feemster*, in which the *en banc* Eighth Circuit held in light of *Gall* that a

district court may rely on a defendant's youth as a mitigating factor under § 3553(a). *United States v. Feemster*, 572 F.3d 455, 464 (8th Cir. 2009) (*en banc*).⁹¹

In support of the contention that “[s]till other judges categorically reject certain guidelines and policy statements,” the Commission cites two appellate decisions implementing the Supreme Court’s decisions in *Kimbrough*, *Spears*, and *Vazquez* to affirm the authority of district courts to disagree with the child pornography guideline and the career offender guideline because those guidelines are unsound and do not achieve § 3553(a)’s objectives even in a mine-run case. Report, Part A, at 105 n.436. These decisions implementing Supreme Court law obviously are not evidence that appellate review “has not promoted uniformity” to the “extent the Supreme Court anticipated.” And it is not true that circuit courts are divided regarding whether district courts may disagree with the career offender guideline, as the Commission states elsewhere. Report, Part A, at 40. No circuit holds that district courts are not authorized to disagree with the career offender guideline, and most have expressly held or assumed that they are.⁹² Moreover, the Commission fails to acknowledge that it could “iron out” different outcomes that may result when some sentencing judges reject unsound guidelines by *fixing the guidelines*.

Finally, the Commission claims that the purported “fact” that judges “hold different views with respect to various sentencing factors” raises a “host of reasonableness issues,” as shown by the fact that in 2011, 45% of sentencing issues raised by defendants and 32% of sentencing issues raised by the government were related to reasonableness or the section 3553(a) factors. Report, Part A, at 105 & n.437. But 44% of sentencing issues raised by defendants and 58% of sentencing issues raised by the government were about *the guidelines*.⁹³ One therefore wonders what the point could be. If the fact that an issue is frequently appealed means that the source from which it arises is a problem, then the guidelines are as much of a problem as the section 3553(a) factors. And while the Commission here complains that there are too many appeals relating to reasonableness and the sentencing statute, *id.*, it complains two pages later that too few sentences are appealed. *Id.* at 107.

B. “the deferential standard of review”

⁹¹ The panel in *Feemster* had relied on *Maloney* to reverse a downward variance that was based in part on the defendant’s youth. See *United States v. Feemster*, 483 F.3d 583, 590 (8th Cir. 2007) (relying on *Maloney*). The Supreme Court granted *Feemster*’s petition for certiorari, vacated the judgment, and remanded for further consideration in light of *Gall*. When the panel declined to reconsider its decision, *United States v. Feemster*, 531 F.3d 615, 619-20 (8th Cir. 2008), the *en banc* Eighth Circuit reversed.

⁹² See *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008); *United States v. Sanchez*, 517 F.3d 651, 662-65 (2d Cir. 2008); *United States v. Merced*, 603 F.3d 203, 218-19 (3d Cir. 2010); *United States v. Michael*, 576 F.3d 323, 327 (6th Cir. 2009); *United States v. Corner*, 598 F.3d 411, 416 (7th Cir. 2010) (*en banc*); *United States v. Gray*, 577 F.3d 947, 950 (8th Cir. 2009); *United States v. Mitchell*, 624 F.3d 1023, 1028-30 (9th Cir. 2010); *United States v. Bailey*, 622 F.3d 1, 10-11 (D.C. Cir. 2010).

⁹³ U.S. Sent’g Comm’n, 2011 Sourcebook of Federal Sentencing Statistics, tbls.57, 58.

The next reason the Commission identifies for why appellate review “has not promoted uniformity” to the “extent the Supreme Court anticipated” is: “Consistent with Supreme Court law, appellate courts have afforded district court decisions great deference and have rarely reversed sentences on substantive reasonableness grounds.” Report, Part A, at 105-06. The Commission is correct that relatively few sentences are reversed for *substantive* unreasonableness,⁹⁴ and that this is entirely consistent with Supreme Court law.⁹⁵ It obviously does not follow that the Court “anticipated” frequent reversals for substantive unreasonableness.

The Commission fails to mention that the courts of appeals frequently reverse for *procedural error* when the district court fails adequately to explain the sentence, address the parties’ meritorious arguments, or explain why it has rejected such arguments.⁹⁶ There are far more reversals for procedural error than for substantive unreasonableness, for legal and practical reasons the Commission fails to appreciate. First, review for substantive reasonableness is necessarily deferential, or the system would be unconstitutional. *See Gall*, 552 U.S. at 51, 59. Second, whether a sentence is substantively reasonable cannot be decided in a vacuum; instead, substantive reasonableness depends on the district court’s reasons, which are first reviewed for procedural error. *See, e.g., Tomko*, 562 F.3d at 568 (“[I]f the district court’s sentence is procedurally sound, we will affirm it unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided.”). The court of appeals “must first ensure that the district court committed no significant procedural error”; *if* the decision “is procedurally sound,” the court of appeals “should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.” *Gall*, 552 U.S. at 51. If the sentence is procedurally flawed, the court of appeals ordinarily remands to the district court to correct the error, rather than reviewing a procedurally flawed sentence for substantive reasonableness. This procedure promotes judicial economy and accords appropriate deference to the district court judge.

The Commission next states that its “case review” shows that “[i]n child pornography and fraud appeals, panels of judges in different circuits have reached different outcomes regarding the reasonableness of similar sentences.” Report, Part A, at 106 & n.438; *see also id.*

⁹⁴ Between *Gall* and the end of fiscal year 2012, the courts of appeals reversed 38 sentences as substantively unreasonable: 17 as too high (5 guideline sentences, 10 above-guideline sentences, and 2 below-guideline sentences), and 21 below-guideline sentences as too low. *See Appellate Decisions After Gall* (Sept. 27, 2012), http://www.fd.org/docs/select-topics---sentencing/app_ct_decisions_list.pdf.

⁹⁵ *See Gall*, 552 U.S. at 51 (“if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness,” “must give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance,” and the “fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal”); *id.* at 59 (“[I]t is not for the Court of Appeals to decide *de novo* whether the justification for a variance is sufficient or the sentence reasonable.”).

⁹⁶ Between *Gall* and the end of fiscal year 2012, the courts of appeals reversed 81 guideline sentences, and 57 above- or below-guideline sentences, for failure adequately to explain the sentence, address the parties’ meritorious arguments, or explain why it rejected such arguments. *Id.*

at 47 (“[A] review of cases suggests appellate courts have reached different outcomes for seemingly similarly situated defendants.”). But the cases reviewed do not support its claim. In the two child pornography cases it cites, the Ninth Circuit upheld a five-year probationary sentence, and the Eleventh Circuit reversed a five-year probationary sentence while at the same time suggesting that a very short prison term would be reasonable. The guideline range in the Eleventh Circuit case was more than double that in the Ninth Circuit case; the defendant’s conduct was more serious in the Eleventh Circuit case than that of the defendant in the Ninth Circuit case; and the Eleventh Circuit reversed in reliance on a standard of review from pre-*Gall* cases that is not the law, while the Ninth Circuit applied the standard of review required by the Supreme Court in *Gall*.⁹⁷ This is not an example of different circuits reaching different outcomes in similar cases under the correct standard of review.

The Commission elsewhere points to two other cases as examples of within-guideline sentences in child pornography cases that “may be subject to different outcomes on substantive reasonableness review.” Report, Part A, at 48 & nn. 339-40. Again, the cases reviewed do not support its claim. The Second Circuit held that a within-guideline sentence was unreasonable, but it was not because of its view that the child pornography guideline is flawed. It was because the district court made three distinct substantive errors, including relying on factual conclusions that were contrary to the record evidence.⁹⁸ The Second Circuit went on to say that these errors were “compounded by the fact that the child pornography guideline, “unless applied with great care, can lead to unreasonable sentences that are inconsistent with what § 3553 requires.”⁹⁹ The Seventh Circuit upheld a within-guideline sentence, but it was not because it disagreed with the Second Circuit’s view. It acknowledged the Second Circuit’s view, which now coincides with the Commission’s view, but declined to state whether it agreed or disagreed with it for purposes of appellate review, saying that “it is ultimately for Congress and the Commission to consider these concerns.”¹⁰⁰ In the meantime, it expressly invited district courts to take the Second

⁹⁷ In *United States v. Autery*, 555 F.3d 864 (9th Cir. 2009), the guideline range was 41-51 months, the defendant was “totally different” for a variety of reasons than the hundreds of other defendants the court had sentenced who had ordered this sort of child pornography; and the court of appeals applied the deferential standard of review required by *Gall*. *Id.* at 867-68, 874, 878. In *United States v. Pugh*, 515 F.3d 1179 (11th Cir. 2008), the guideline range was 97-121 months; the defendant’s conduct was more serious in a variety of ways; and the court of appeals applied a standard of review under which it reweighed the § 3553(a) factors, citing a string of pre-*Gall* cases in which the court of appeals substituted its own judgment for that of the district court judge. *Id.* at 1184-87, 1191-92, 1199, 1201-02.

⁹⁸ *United States v. Dorvee*, 616 F.3d 174, 183-84 (2d Cir. 2010). The Second Circuit has not since relied on *Dorvee* to reverse a sentence as substantively unreasonable, and has on several occasions distinguished *Dorvee* in light of the actual substantive reasons *Dorvee* actually relied on. See, e.g., *United States v. Gouse*, 468 F. App’x 75, 78 (2d Cir. 2012); *United States v. Magner*, 455 F. App’x 131, 134-35 (2d Cir. 2012); *United States v. Hagerman*, 2012 U.S. App. LEXIS 25984 (2d Cir. Dec. 20, 2012); *United States v. Aumais*, 656 F.3d 147, 149 & 157 (2d Cir. 2011); *United States v. Henchey*, 443 Fed. App’x 617, 619-620 (2d Cir. 2011); *United States v. Aumais*, 656 F.3d 147, 157 (2d Cir. 2011).

⁹⁹ *Dorvee*, 616 F.3d at 184.

¹⁰⁰ *United States v. Mantanes*, 632 F.3d 372, 376-77 (7th Cir. 2011).

Circuit's concerns into account when exercising their sentencing discretion under the now advisory guidelines.¹⁰¹ The Commission has now criticized the guideline on precisely the grounds cited by the Second Circuit, and has asked Congress to allow it to amend the guidelines.¹⁰² These are not examples of different circuits reaching different outcomes in similar cases.

In the two fraud cases the Commission cites, Report, Part A, at 106 n.438, the guideline ranges were comparable (27-33 months in the Ninth Circuit case, 24-30 months in the Eighth Circuit case), and while the mitigating facts were different, they were comparably significant. The Ninth Circuit upheld a sentence of 5 years' probation, 7 months home detention, and \$102,000 restitution, in this 2010 case under the correct standard of review under *Gall*.¹⁰³ The Eighth Circuit reversed a sentence of time served, 5 years' supervised release, 12 months home detention, and 80 hours of community service in this 2006 case under the standard of review the Supreme Court *rejected* in *Gall*.¹⁰⁴ This is not an example of different circuits reaching different outcomes in similar cases under the correct standard of review.

Elsewhere, the Commission cites a different Ninth Circuit case and a Fourth Circuit case as examples of different circuits using "different approaches to substantive review" in fraud cases. Report, Part A, at 48-49 & nn.342, 352. In the Ninth Circuit case, the defendant sold unauthorized "access cards" that allowed his customers to access DirecTV's digital satellite feed, and its flow of copyrighted material, without paying for it, resulting in a loss of over \$1 million to the company.¹⁰⁵ The district court considered the defendant's remorse, post-offense rehabilitation, family circumstances, and that he did not pose a danger to the community, and sentenced the defendant to five years' probation, including 1,000 hours of community service, and ordered him to pay \$50,000 restitution, which it described as a "hefty" amount for the defendant, who then worked as a house painter.¹⁰⁶ The Ninth Circuit said these factors were

¹⁰¹ *Mantanes*, 632 F.3d at 377.

¹⁰² U.S. Sent'g Comm'n, *Report to the Congress: Federal Child Pornography Offenses* 320-23 (2012).

¹⁰³ *See United States v. Edwards*, 595 F.3d 1004 (9th Cir. 2010).

¹⁰⁴ The Eighth Circuit focused primarily on its view that Givens' post-offense rehabilitation was not "extraordinary." *United States v. Givens*, 443 F.3d 642, 645 (8th Cir. 2006). It further stated that the socio-economic status of the local area and the competitive world market, which the district court referred to as a reason a farmer under economic duress like Givens might be prompted to resort to fraud, is "irrelevant," *id.* at 646; that "the further the judge's sentence departs from the guideline sentence, the more compelling the section 3553(a) justification must be," *id.*; that the district court "gave too much weight" to Givens' history and characteristics, and "not enough" to the guideline range, *id.* It concluded that "[t]here is nothing so extraordinary here that supports a substantial deviation from the results contemplated by Congress." *Id.*

¹⁰⁵ *United States v. Whitehead*, 532 F.3d 992, 992-93 (9th Cir. 2008).

¹⁰⁶ *Id.* at 993.

properly within the district court’s discretion to consider, and upheld the sentence as substantively reasonable. In the Fourth Circuit case, the defendant evaded taxes for 16 years and had a total tax liability of over \$2 million.¹⁰⁷ In the four years that passed after pleading guilty but before sentencing, the defendant continued to work and travel internationally yet paid nothing toward the tax debt.¹⁰⁸ Two weeks before sentencing, he paid \$480, and even then only after he was contacted by the IRS.¹⁰⁹ The district court sentenced the defendant to four years’ probation so that the defendant could continue to work to pay restitution.¹¹⁰ The Fourth Circuit reversed, holding that the district court procedurally erred because it failed to adequately explain its sentence in light of the § 3553(a) factors,¹¹¹ and that it was substantively unreasonable for the district court to focus almost exclusively on the wealthy defendant’s ability to pay restitution, which it said was “constitutionally suspect” because such an exclusively dispositive link between ability to pay and the decision whether to imprison would relegate poor tax evaders to prison.¹¹² In short, in the Ninth Circuit case, the district court considered a number of relevant and permissible factors in deciding to sentence the defendant to probation, while in the Fourth Circuit case, the district court focused almost exclusively on a single “constitutionally suspect” factor. These cases do not demonstrate different approaches to substantive review in similar cases.

If appellate courts or judges are treating the fraud and child pornography guidelines differently in different circuits, this indicates that those guidelines, not the standard of review, are the problem. Indeed, according to the Commission, it is only the fraud and child pornography guidelines whose “influence,” measured by the distance between the average guideline minimum and the average sentence imposed, “has diminished.” Report, Part A, at 67-68. If the Commission is concerned about different outcomes in similar cases, the solution is to fix these guidelines.

C. “the lack of uniform procedures among circuits”

The Commission asserts that “differences in appellate procedures” among circuits “limit” the appellate courts’ ability to iron out sentencing differences. Report, Part A, at 106. First, it says, some circuits have adopted a presumption of reasonableness for guideline sentences and others have not. But as the Commission finds, this has made no difference in the rate at which circuits affirm or reverse guideline sentences. *See* Report, Part B, at 48; *see also* Appellate Decisions After *Gall*, Sept. 27, 2012, http://www.fd.org/docs/select-topics---sentencing/app_ct_decisions_list.pdf (since *Gall*, two guideline sentences reversed as

¹⁰⁷ *United States v. Engle*, 592 F.3d 495 (4th Cir. 2010).

¹⁰⁸ *Id.* at 503.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 499.

¹¹¹ *Id.* at 503-04.

¹¹² *Id.* at 504.

substantively unreasonable in a circuit with a presumption, three in circuits without a presumption).

Second, the Commission states: “Some circuits have required district courts to address guideline departure arguments, while other circuits have not. One circuit has declared departures ‘obsolete,’ while the other circuits have continued to view proper federal sentencing practice as a three-step process.” Report, Part A, at 106. Even assuming this is accurate, the Commission reports that affirmance rates are similar in both defendant- and government-initiated appeals across circuits, and has remained essentially the same for all circuits combined since 1993, except during the *Blakely* period. See Report, Part B, at 40. The data does not support the Commission’s claim.

Nor does the case law. The circuits are unanimous that when a party raises a non-frivolous ground for a sentence outside the guideline range, whether under a departure provision or as a variance under § 3553(a), the judge must consider and address the argument, as the Supreme Court directed. See *Rita*, 551 U.S. at 357. If the Commission’s real complaint is that the circuits do not require judges to consider departure policy statements *when no departure is raised*, the circuits are in agreement on that too. All circuits agree that district courts need not consider departure policy statements unless a party moves for a departure, and even then may consider a variance under § 3553(a) instead of a departure.¹¹³ The circuits are also unanimous that

¹¹³ See *United States v. Politano*, 522 F.3d 69, 74-75 (1st Cir. 2008) (where no departure was sought for underrepresentation of criminal history under § 4A1.3, and where district court did not consider § 4A1.3, affirming upward variance based in part on “unresolved charges” and “outstanding warrants,” and noting that a district court may, even when a departure is raised, elect to vary instead); *United States v. McGowan*, 315 F. App’x 338, 341-42 (2d Cir. 2009) (where neither party requested a departure, rejecting defendant’s argument that court should have sua sponte considered potentially available departures: “That some of the facts considered by the court could also have been potential bases for Guidelines departures, and that the court chose to impose a non-Guidelines sentence without determining precisely which departures hypothetically could apply, does not create procedural error.”); *United States v. Colon*, 474 F.3d 95, 99 & n.8 (3d Cir. 2009) (where government requested upward departure based on criminal history, but court imposed upward variance instead, court “need not rely on upward departures to sentence a defendant above the applicable guidelines range” and was “not bound by the ratcheting procedure”); *United States v. Diosdado-Star*, 630 F.3d 359, 362-66 (4th Cir. 2011) (where pre-sentence report identified grounds for departure but district court did not consider a departure and instead proceeded directly to the § 3553(a) analysis, earlier decision suggesting that courts must “first look to whether a departure is appropriate based on the Guidelines Manual or relevant case law” before considering a variance was “overruled” by *Rita* and *Gall*); *United States v. Gutierrez*, 635 F.3d 148, 153 (5th Cir. 2011) (holding that district court was not required to consider or calculate an upward departure under § 4A1.3 before varying upward based on underrepresented criminal history, relying on *United States v. Mejia-Huerta*, 480 F.3d 713 (5th Cir. 2007) (where government did not request an upward departure, holding that the district court did not err by failing to consider an applicable departure provision before varying upward); *United States v. Tristan-Madrigal*, 601 F.3d 629, 635 (6th Cir. 2010) (where the government did not request an upward departure under § 4A1.3, and the district court did not consider the policy statement, affirming upward variance; “district court does not necessarily abuse its discretion in considering criminal history that would not otherwise support a § 4A1.3 departure when that criminal history is directly relevant to the § 3553(a) factors.”); *United States v. Jackson*, 547 F.3d 786,

policy statements setting forth the Commission's departure standard and restrictions on departures on specified grounds do not control variances.¹¹⁴ In other words, *no* circuit endorses a “three-

793 (7th Cir. 2008) (because “the concept of departures is ‘obsolete’ and ‘beside the point,’” a sentencing court is not required to follow section 4A1.3 when imposing an above-guideline sentence”) (internal quotation marks omitted); *United States v. Carter*, 425 F. App'x 527, 529-30 (8th Cir. 2011) (rejecting defendant's argument that the district court committed reversible error “by not considering a traditional departure under § 4A1.3 of the guidelines before deciding on a substantial variance”: “The record [] show[s] that the district court clearly and explicitly considered the specific characteristics of Carter and his offense in light of the § 3553(a) factors and imposed the sentence based on those characteristics. Given the facts of Carter's case, the district court's failure to consider a traditional departure before varying was not a reversible error.”); *United States v. Vasquez-Cruz*, 692 F.3d 1001 (9th Cir. 2012) (holding that while judges may consider departures if raised, whether they consider them first or in a separate step from a variance is not grounds for appeal, and rejecting defendant's argument that the Commission's three-step guideline overruled circuit law in this regard); *United States v. Martinez-Barragan*, 545 F.3d 894, 901 (10th Cir. 2008) (when a defendant seeks both departure and variance, “[a]s long as the court takes into account all of the relevant considerations, the order in which it does so is unimportant”); *United States v. Moton*, 226 Fed. App'x 936, 939-40 (11th Cir. 2007) (while courts are required to “calculate correctly the sentencing range prescribed by the Guidelines,” they are not required to “apply departures under § 4A1.3 even when neither party requests that it do so,” and suggesting that such a requirement would make the policy statement “mandatory”); *United States v. Perez-Zuniga*, slip op., 2012 WL 6198549 (11th Cir. Dec. 12, 2012) (where government did not seek an upward departure, affirming upward variance based on criminal history where district court “did not reference [] § 4A1.3”).

¹¹⁴ See *United States v. Martin*, 520 F.3d 87, 93 (1st Cir. 2008) (policy statements “are not decisive as to what may constitute a permissible ground for a variant sentence in a given case”); *United States v. Hamilton*, 323 F. App'x 27, 31 (2d Cir. 2009) (district court need not agree “with the Guidelines’ refusal to consider age and its correlation with recidivism” and “abused its discretion in not taking into account policy considerations with regard to age recidivism not included in the Guidelines”); *United States v. Howe*, 543 F.3d 128, 137-39 (3d Cir. 2008) (departure policy statements do not control variances, and there is no requirement that a factor be present to an “extraordinary” or “exceptional” degree to support a variance under § 3553(a); affirming district court's consideration of factors discouraged by policy statements); *United States v. Simmons*, 568 F.3d 564, 567-70 (5th Cir. 2009) (abandoning prior precedent requiring courts to follow policy statements in light of *Gall* and *Kimbrough*); *United States v. Simpson*, 346 F. App'x 10, 15 (6th Cir. 2009) (reversing because “the court proceeded as if the Guidelines restrictions on departures are mandatory, and as if the § 3553(a) factors are only relevant if they rise to the level of ‘exceptional’ circumstances as stated in § 5 of the Guidelines,” an “approach [that] was erroneous because mitigating factors--even those that are not ‘exceptional’ or ‘extraordinary’--are proper considerations in determining whether a sentence should fall outside of the Guidelines range.”); *United States v. Powell*, 576 F.3d 482, 499 (7th Cir. 2009) (district court erred in declining to take account of defendant's age and poor health based on policy statements); *United States v. Harris*, 567 F.3d 846, 854-55 (7th Cir. 2009) (district court erred in failing to consider defendant's significant health problems under § 3553(a) based on policy statement requiring “extraordinary” impairment); *United States v. Chase*, 560 F.3d 828, 830-32 (8th Cir. 2009) (district court erred in declining to consider defendant's advanced age, prior military service, health issues, employment history, and lack of criminal history in reliance on policy statements because “standards governing departures do not bind a district court when employing its discretion” under § 3553(a)); *United States v. Tankersley*, 537 F.3d 1100, 1114-15 (9th Cir. 2008) (departure standards do not control whether a sentence meets the 3553(a) purposes and factors); *United States v. Tom*, 327 F. App'x 93, 94, 97-99 (10th Cir. 2009) (where district court “focused on [the defendant's] history and personal characteristics, including borderline mental retardation, youth, and the

step” process, as the Commission defines it, to require courts to consider policy statements when no departure is raised. *See* USSG § 1B1.1(b) (after calculating the guideline range, the court “shall then consider Parts H and K of Chapter Five . . . and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence”).

When the Seventh Circuit said that departures are “obsolete,” it did not mean that the district court could not consider a relevant factor if raised as a departure. In fact, the Seventh Circuit has the third highest departure rate in the nation. *See* 2012 Sourcebook of Federal Sentencing Statistics, tbls. NDC-N11. Rather, it decided not to *review* departures under departure law, but only as part of reasonableness review under § 3553(a). *See United States v. Jackson*, 547 F.3d 786, 793 (7th Cir. 2008). The Ninth Circuit has taken the same approach. *See United States v. Vasquez-Cruz*, 692 F.3d 1001 (9th Cir. 2012). The other circuits review departure decisions under departure law, and then for reasonableness under § 3553(a).¹¹⁵ The Commission has identified no sentencing differences that have not been ironed out as a result of this insignificant difference.

The Commission’s real complaint appears to be that courts of appeals are not requiring district courts to consider its restrictive policy statements even when no party raises a departure and when ruling on variances. *See* Report, Part A, at 114 (“The importance of the second step, which requires consideration of departure policy statements, is often overlooked by parties and the courts.”) (emphasis supplied). But the very point of *Booker* and its progeny was to put an end to the system in which the policy statements rendered the guidelines mandatory by making sentences outside the guideline range “not available in every case, and in fact . . . unavailable in most.” *Booker*, 543 U.S. at 234. Moreover, because that *is* the law, an appellate rule requiring consideration of departure policy statements in every case would be a waste of time: 76% of judges report that the policy statements do not adequately reflect reasons for a sentence outside the guideline range, and 65% find them to be too restrictive.¹¹⁶

aberrational nature of the offense” rejecting the government’s claim that the district court abused its discretion because “reliance on these factors is in tension with certain policy statements discouraging departures, and that these policy statements should have been considered under § 3553(a)(5).”; *United States v. Matthews*, 477 F. App’x 585, 588 (11th Cir. 2012) (rejecting defendant’s argument that district court should have considered policy statement regarding upward departure before varying).

¹¹⁵ *See, e.g., United States v. McBride*, 434 F.3d 470, 477 (6th Cir. 2006); *United States v. White*, 552 F.3d 240, 252-53 (2d Cir. 2009) (reviewing district court’s decision to depart upward under departure law, then reviewing sentence for reasonableness under § 3553(a)); *United States v. Jackson*, 467 F.3d 834, 839 (3d Cir. 2006) (reviewing district court’s departure decision under departure law, then reviewing sentence for reasonableness under § 3553(a)); *United States v. Stewart*, 462 F. App’x 242 (3d Cir. 2012) (reviewing district court’s departure decision under departure law, then reviewing sentence for reasonableness under § 3553(a)).

¹¹⁶ U.S. Sent’g Comm’n, Results of Survey of United States District Judges January 2010 through March 2010, tbls.13, 14 (June 2010), http://www.uscc.gov/Research/Research_Projects/Surveys/20100608_Judge_Survey.pdf.

Again, the Commission ignores that the Supreme Court expected the Commission to respond to appellate decisions implementing *Booker* by revising the guidelines “in light of what it learns,” *Booker*, 543 U.S. at 263-64, not by seeking legislation that would overrule their uniform import and be inconsistent with Supreme Court law.

D. “the relatively low number of sentencing appeals”

Finally, the Commission cites the fact that a relatively small percentage of sentences are appealed as a reason limiting the role of appellate review in promoting “nationwide uniformity.” According to the Commission, the number of defendants sentenced every year has increased, but the number of appeals has remained relatively flat and has been less than 10% since *Booker*. Report, Part A, at 106-07.

This complaint appears to assume that there is both reason and opportunity to appeal many more sentences than are appealed now. But for a variety of reasons, this is not so. Defendants who receive a fair sentence have less reason to appeal, and this occurs more often after *Booker*. Moreover, it appears that nearly 75% of defendants enter into a plea agreement,¹¹⁷ and as the Commission notes, a 2005 study shows that in nearly two thirds of cases settled by a plea agreement, defendants waived their right of appeal. See Report, Part A, at 50 & n.365, 106 n.440. That percentage may be higher now, since the immigration caseload has grown and DOJ has now required every U.S. Attorney’s office to adopt a fast track program. As to the government, there are few sentences it could possibly have reason to appeal. In 2012, 52.4% of sentences were within the guideline range, 2% were above it, 27.8% were government-sponsored below range,¹¹⁸ and in at least another 9% of cases, the government agreed to or did not oppose sentences classified as “non-government sponsored below range.”¹¹⁹

¹¹⁷ The Commission reports that in 2011, it received written plea agreements in 73% of all cases and that in another 1.3% of cases, there was an oral plea agreement. U.S. Sentg. Comm’n, 2011 Monitoring Dataset.

¹¹⁸ U.S. Sent’g Comm’n, 2012 Sourcebook of Federal Sentencing Statistics, tbl.N.

¹¹⁹ The government agreed to or did not oppose more than half of the 17.8% of sentences that are “non-government sponsored below range.” U.S. Sent’g Comm’n, 2012 Sourcebook of Federal Sentencing Statistics, tbl.N. First, it did not object to 46.6% of defense motions (3605 of 7735) for a below-range sentence classified as non-government sponsored. *Id.* tbl.28A. Second, because the statement-of-reasons form does not provide a checkbox for the court to indicate the government’s position regarding reasons not addressed in a plea agreement or motion by a party, there is no information regarding the government’s position on another 4392 below-range sentences, all of which are classified as non-government sponsored. *Id.* Since defense attorneys generally raise all nonfrivolous grounds for below-range sentences and judges do not raise meritless grounds *sua sponte*, it is likely that the government did not object to a significant portion of these sentences. Third, in 2998 other cases classified as non-government sponsored below-range, the Commission did not receive sufficient information to determine the government’s position or whether the source was a plea agreement, a motion by a party, or something else. *Id.* Since a large majority of cases for which information was available were sponsored or agreed to by the government, it is reasonable to assume that the government sponsored or acquiesced in a

But the Commission's real complaint is not that there are too few appeals, but that there are too few *government* appeals. See Report, Part A, at 106-07. It clearly suggests that the government appeals few sentences because it is too difficult for it to win after *Booker*, Report, Part A, at 106 n.441 (recounting complaints of individual prosecutors), but this is not so. The Commission's report itself shows that the government files as many or more appeals after *Booker* as in 1997-2001. See Report, Part A, at 107. And it has the same or a better success rate than in many years before *Booker*.¹²⁰ As noted above, there are few cases the government could possibly want to appeal, and as Deputy Solicitor General Michael Dreeben stated at the Commission's 2012 conference, the government has always been selective, and still files about two appeals per week, about twice the number the Commission reports in its Sourcebook.¹²¹ Unlike defense counsel, who represent one defendant at a time, the government can be selective. That is why, as the Commission acknowledges, "the government prevails in a higher percentage of its appeals" than defendants, Report, Part A, at 50, now as always.¹²²

Nonetheless, in order to make it easier for the government, and more difficult for defendants, to win on appeal, the Commission seeks legislation that would make review of non-guideline sentences more stringent through a proportionality test for sentences outside the guideline range and "heightened" review of policy disagreements, while diminishing review of guideline sentences through a mandatory presumption of reasonableness. It fails to explain what

significant portion of cases where information was not available. Together, these cases easily exceed 50% of sentences classified as "non-government sponsored below range."

¹²⁰ In fiscal year 2011, the government raised 92 issues on appeal, and it prevailed in 65% of the 26 issues that involved § 3553(a) or a claim of unreasonableness. In 1998, it raised 122 issues on appeal; of the 41 that related to departures, it prevailed 63% of the time. And in 1999, it raised 54 issues on appeal; of the 25 related to departures, it prevailed 28% of the time. U.S. Sent'g Comm'n, 2011 Sourcebook of Federal Sentencing Statistics, tbl.58; U.S. Sent'g Comm'n, 1998 Sourcebook of Federal Sentencing Statistics, tbl.56 (1998); U.S. Sent'g Comm'n, 1999 Sourcebook of Federal Sentencing Statistics, tbl.58 (1999). In 2003, under the strict PROTECT Act standard of review, the government raised 176 issues on appeal; of the 63 related to departures, it prevailed 73% of the time. U.S. Sent'g Comm'n, 2003 Sourcebook of Federal Sentencing Statistics, tbl.58.

¹²¹ See U.S. Sent'g Comm'n, 2012 Sourcebook of Federal Sentencing Statistics, tbl. 56 (reporting 60 government appeals).

¹²² Between *Gall* and the end of fiscal year 2012, the government won reversal of 21 sentences as substantively too low, which was 5% of all sentencing appeals it filed, while defendants won reversal of only 17 sentences as substantively too high, a mere .06% of all sentencing appeals they filed. And while defendants won more reversals for procedural error than the government in absolute numbers (121 versus 17), those reversals were only .4% of all appeals filed by defendants, as compared to 4% reversals for procedural error of all appeals filed by the government. The total number of sentencing appeals filed comes from U.S. Sent'g Comm'n, 2008-2012 Sourcebook of Federal Sentencing Statistics, tbls. 56, 56a (29,703 by defendants, 413 by the government), and covers October 1, 2007 through September 30, 2012. The number of substantive and procedural reversals was compiled by Sentencing Resource Counsel in Appellate Decisions After *Gall* (Sept. 27, 2012), http://www.fd.org/docs/select-topics---sentencing/app_ct_decisions_list.pdf, and covers December 10, 2007 through September 27, 2012.

this would accomplish other than to make the guidelines more mandatory, but that is “no longer an open choice.” *Booker*, 543 U.S. at 263.