

COMMENTS

Fast-Track Sentencing Disparity: Rereading Congressional Intent to Resolve the Circuit Split

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INTRODUCTION

Early disposition programs—commonly referred to as “fast-track” sentencing programs—allow a federal prosecutor to offer a below-Guidelines sentence in exchange for a defendant’s prompt guilty plea and waiver of certain pretrial and postconviction rights. Typically, fast-track sentencing is used to quickly process an overwhelming caseload of immigration offenses. Fast-track programs received official sanction when Congress, in the 2003 PROTECT Act,¹ directed the Sentencing Commission to authorize them. This authorization requires both the local US Attorney and the Attorney General to approve the implementation of each program.

Presently, fast-track sentencing is approved in just a fraction of judicial districts. Therefore, not all defendants are eligible for a reduced fast-track sentence, and eligibility is dependent on where the defendants are found and prosecuted. Defendants in non-fast-track districts argue that this geographic disparity implicates 18 USC § 3553(a)(6), which requires sentencing courts to consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”² These defendants argue that sentencing courts in non-fast-track districts have the discretion to grant below-Guidelines sentences to mitigate the disparity.³

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An excerpt from this Comment was published previously. See Thomas E. Gorman, *A History of Fast-Track Sentencing*, 21 Fed Sent Rptr (Vera) 311 (2009).

¹ Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub L No 108-21, 117 Stat 650.

² 18 USC § 3553(a)(6).

³ See, for example, *United States v Gomez-Herrera*, 523 F3d 554, 557 (5th Cir 2008), cert denied 129 S Ct 624 (2008). Some argue that sentencing courts *must* mitigate the disparity, see *United States v Castro*, 455 F3d 1249, 1251–52 (11th Cir 2006), but this stronger claim is beyond the scope of this Comment.

Prior to the Supreme Court's decision in *Kimbrough v United States*,⁴ the circuit courts uniformly agreed that sentencing courts could *not* mitigate the fast-track disparity. In *Kimbrough*, the Court stressed that the Sentencing Guidelines are advisory, and that sentencing courts have broad discretion to impose a below-Guidelines sentence if it is necessary to ensure that the sentence is "sufficient, but not greater than necessary."⁵ The Supreme Court further clarified that if Congress wants to limit this discretion, it must do so *explicitly*.⁶ In light of this decision, the circuits have begun to reconsider their precedent on fast-track sentencing, and a split has developed over whether courts in non-fast-track districts may impose below-Guidelines sentences to mitigate the sentence disparity. The First Circuit now holds that "sentencing courts can consider items such as fast-track disparity" when deciding whether to grant a below-Guidelines sentence.⁷ The Third Circuit concurs.⁸ By contrast, the Fifth, Ninth, and Eleventh Circuits continue to hold that sentencing courts may not take fast-track disparities into account when considering whether to impose a below-Guidelines sentence.⁹

This Comment argues that the circuit courts have each erred by unduly focusing on a single sentence in Congress's ambiguous authorization of fast-track in the PROTECT Act.¹⁰ The courts mistakenly ignore the larger purpose and context of that legislation through their narrow focus. A thorough examination of congressional efforts to reform sentencing is more fruitful than a limited focus on the vague authorization of fast-track. For the last thirty years, Congress has consistently prioritized two goals: promoting harsh sentences and reducing unwarranted sentencing disparities. These goals are also what drove Congress to authorize a limited form of fast-track sentencing in the PROTECT Act. This Comment argues that granting sentencing courts the discretion to mitigate the fast-track disparity is more supportive of Congress's goals than any alternative. This approach mitigates an enormous disparity between defendants, and has only a tiny effect on the *aggregate* harshness of the sentencing system. And, the

⁴ 552 US 85 (2007).

⁵ *Id.* at 101, quoting 18 USC § 3553(a).

⁶ *Id.* at 102–03.

⁷ *United States v Rodríguez*, 527 F3d 221, 231 (1st Cir 2008).

⁸ *United States v Arrelucea-Zamudio*, 581 F3d 142, 149 (3d Cir 2009).

⁹ See *Gomez-Herrera*, 523 F3d at 564; *United States v Gonzalez-Zotelo*, 556 F3d 736, 741 (9th Cir 2009), cert denied 130 S Ct 83 (2009); *United States v Vega-Castillo*, 540 F3d 1235, 1238–39 (11th Cir 2008), rehearing en banc denied, 548 F3d 980 (11th Cir 2008), cert denied 129 S Ct 2825 (2009).

¹⁰ See PROTECT Act § 401(m)(2)(B), 117 Stat at 675.

pro-discretion approach is more consistent with the Supreme Court's recent rulings defending judicial discretion. Therefore, this Comment argues that the First and Third Circuits, despite their unduly narrow analytical focus, have reached the right outcome in allowing below-Guidelines sentences to mitigate the fast-track disparity.

This Comment proceeds in four parts. Part I first explains the history of sentencing reform broadly. It then specifically explains the history of fast-track programs, from their development as a prosecutorial tool, through the PROTECT Act's authorization of fast-track, to recent trends in the use of fast-track programs. Part II summarizes several recent Supreme Court cases on sentencing, including the pivotal *Kimbrough* decision, to provide context for the fast-track sentencing debate. Part III then details the circuit split that has developed in the wake of *Kimbrough*. Finally, Part IV argues that courts in non-fast-track districts should be able to impose below-Guidelines sentences to mitigate the fast-track disparity. That approach is more supportive of Congress's goals, and it is more supportive of the trend in recent Supreme Court cases to grant broad discretion to sentencing courts.

I. A HISTORY OF SENTENCING REFORM AND FAST-TRACK SENTENCING

A. Congressional Sentencing Reform

Through most of the twentieth century, a highly discretionary, rehabilitative, "medical" model dominated criminal sentencing.¹¹ Federal judges had broad discretion to choose whatever penalty they felt appropriate for each defendant, within a broad range of statutorily permissible sentences.¹² And the parole system, by haphazardly releasing offenders before their full sentences had been served, exacerbated the indeterminacy of sentencing.¹³ This uncertainty in criminal penalties sparked significant criticism throughout the mid-twentieth century. Though there were a number of attempts by Congress to reform the

¹¹ See Marvin E. Frankel, *Criminal Sentences: Law without Order* 87–93 (Hill and Wang 1973) (describing the rehabilitative model and arguing that it results in indeterminate sentences and vagueness in the law).

¹² United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* xviii (Nov 2004), online at http://www.ussc.gov/15_year/15_year_study_full.pdf (visited Nov 15, 2009).

¹³ Kate Stith and Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L Rev 223, 226–27 (1993).

discretionary, rehabilitative model of sentencing,¹⁴ the push that eventually led to the Sentencing Guidelines, launched by Senator Ted Kennedy, only gained momentum after 1975. The legislation that eventually became the Sentencing Reform Act of 1984¹⁵ (SRA) was “sponsored and shepherded through Congress by an unusual coalition of liberals and conservatives.”¹⁶ Conservatives wanted to eliminate the indeterminacy created by the parole system and institute harsher sentences for drugs and violent crime.¹⁷ Liberals wanted uniform guidelines to prevent the arbitrary disparities endemic to discretionary¹⁸ (and sometimes biased¹⁹) sentencing. The stark contrast between these two constituencies is notable because it reveals Congress’s dual objectives for sentencing reform: the liberals wanted to eliminate arbitrary disparities; the conservatives wanted harsher sentences.

In 1984, Congress finally passed the SRA, which created the United States Sentencing Commission (USSC) and the Sentencing Guidelines, and made the Guidelines binding on sentencing courts.²⁰

¹⁴ See United States Sentencing Commission, *The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining* 9–12 (Dec 1991) (outlining the history of federal sentencing reform culminating in the Sentencing Reform Act of 1984).

¹⁵ Sentencing Reform Act of 1984 (SRA), Pub L No 98-473, ch 2, 98 Stat 1987, codified as amended at 18 USC § 3551 et seq and 28 USC § 991 et seq.

¹⁶ James M. Anderson, Jeffrey R. Kling, and Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and after the Federal Sentencing Guidelines*, 42 J L & Econ 271, 272 (1999). See also Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 Wake Forest L Rev 291, 292–93 (1993) (noting that the bipartisanship of the coalition backing the SRA—led by Senators Ted Kennedy, Joe Biden, Strom Thurmond, and Orrin Hatch—explains the important compromise provisions of the USSC’s enabling legislation, as well as some of the criticism directed at the Commission’s work).

¹⁷ See Kate Stith and José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 42–43 (Chicago 1998) (noting that a changed political configuration—namely President Ronald Reagan’s election and Senator Thurmond’s chairmanship of the Judiciary Committee—led to the Act’s elimination of parole and the addition of tough-on-crime provisions).

¹⁸ See Anderson, Kling, and Stith, 42 J L & Econ at 272 (cited in note 16) (noting liberals’ concern that discretionary sentencing posed a threat to equal treatment under the law). See also Edward M. Kennedy, *Criminal Sentencing: A Game of Chance*, 60 *Judicature* 208, 209–11 (1976); William B. Eldridge and Anthony Partridge, *The Second Circuit Sentencing Study: A Report to the Judges of the Second Circuit* 10 (FJC 1974) (studying sentences imposed in the Second Circuit and noting that the “consistent tenor of the data presented” was one of “substantial disparity”).

¹⁹ See Sentencing Guidelines, Hearings before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 100th Cong, 1st Sess 676–77 (July 23, 1987) (statement of Ilene H. Nagel, United States Sentencing Commission) (presenting statistical data showing significant disparities in sentences given in different districts and to different sexes and races).

²⁰ For a history of the SRA and the Guidelines, see Stith and Cabranes, *Fear of Judging* at 38–77 (cited in note 17). For a description of the Guidelines’ genesis, see generally Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 *Hofstra L Rev* 1 (1988).

The SRA enforced harsh sentences and reduced unwarranted disparities by eliminating parole and structurally preventing departures from the mandatory Guidelines.²¹ Departures were technically allowed under 18 USC § 3553(b), but they were strongly discouraged.²² The SRA created one-sided appealability rules: a non-Guidelines sentence could be appealed on the grounds that it was “unlawful or unreasonable under the circumstances,” but a court’s decision *not* to depart was within its discretion and unappealable.²³ Therefore, judges had an incentive to sentence within the Guidelines, since doing so eliminated the risk of reversal.²⁴ In addition, the Guidelines specifically listed the factors—such as diminished capacity or duress²⁵—that were approved as justifications for a downward departure.²⁶ Other arguably relevant factors—like vocational skills, employment record, or military service²⁷—were either implicitly or explicitly excluded.²⁸

This system sharply constricted the use of below-Guidelines sentences and eliminated most opportunities for judges to insert their own discretion into sentences.²⁹ Yet Congress repeatedly expressed concern that the rate of downward departures was still too high. For example, in 1995, members of the House Judiciary Committee held USSC oversight hearings³⁰ over the “role of judicial discretion as evidenced by the rate of guideline departures.”³¹ A USSC representative

²¹ Stith and Cabranes, *Fear of Judging* at 40, 43 (cited in note 17).

²² Id at 72. A “downward departure” occurs when the sentencing judge imposes a sentence below the floor of the applicable Guideline range.

²³ Id at 73.

²⁴ Id.

²⁵ USSG § 5K2.13 (diminished capacity); USSG § 5K2.12 (duress). The USSC essentially allowed judges to downwardly depart only on characteristics that would have provided an affirmative defense under the common law. Compare USSG §§ 5K2.10–13 with Joshua Dressler, *Understanding Criminal Law* 237–68, 323–42, 393–402 (LexisNexis 2006).

²⁶ Stith and Cabranes, *Fear of Judging* at 74–75 (cited in note 17); USSG § 5K2 (listing factors that are, and are not, acceptable bases for departures from the Guidelines range).

²⁷ USSG § 5H1.2 (vocational skills); USSG § 5H1.5 (employment record); USSG § 5H1.11 (military service).

²⁸ See, for example, USSG ch 5, pt H (describing the many factors that are “not ordinarily relevant” in determining “whether a sentence should be outside the applicable guideline range”). The USSC was not required by law to exclude so many individual characteristics from consideration, but instead did so on its own accord. See Stith and Koh, 28 Wake Forest L Rev at 283 (cited in note 13).

²⁹ See Stith and Cabranes, *Fear of Judging* at 82–83 (cited in note 17).

³⁰ See generally United States Sentencing Commission, Hearing before the Subcommittee on Crime of the House Committee on the Judiciary, 104th Cong, 1st Sess (June 29, 1995) (“Subcommittee on Crime Hearing”).

³¹ United States Sentencing Commission, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines (In Response to Section 401(m) of Public Law 108-21)* B-21 (Oct 2003) (“Downward Departures Report”), online at <http://www.usc.gov/departtrpt03/departtrpt03.pdf> (visited Nov 11, 2009).

generally defended the use of downward departures,³² but said that he wanted to conduct further investigation into prosecutorial practices that could “lead to increased disparity in sentencing.”³³ In 2000, the Senate also held an oversight hearing on the USSC.³⁴ Republican senators on the Judiciary Committee worried that the “increasing trend of sentencing criminals below the range established in the Guidelines”³⁵ served to undermine mandatory sentencing. The USSC’s representative commented that geographic disparities could be at odds with the SRA.³⁶

Thus, Congress has consistently focused on two goals in its sentencing legislation and oversight. First, Congress has been particularly interested in reducing unwarranted disparities. Second, Congress has demonstrated an interest in increasing the harshness of sentences.³⁷ These competing goals resulted in a compromise in the SRA between liberal reformers and law-and-order conservatives.³⁸ These two objectives should be the overarching focus of courts evaluating sentencing

³² Subcommittee on Crime Hearing, 104th Cong, 1st Sess at 16 (cited in note 30) (prepared statement of Judge Richard P. Conaboy, Chairman, United States Sentencing Commission).

³³ United States Sentencing Commission, *Downward Departures Report* at B-22 (cited in note 31). Later, the USSC became much more critical of departures in the context of the fast-track sentencing disparity. See *id.* at 66–67 (“Defendants sentenced in districts without authorized early disposition programs, however, can be expected to receive longer sentences than similarly-situated defendants in districts with such programs. This type of geographical disparity appears to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted disparity among similarly-situated offenders.”).

³⁴ *Oversight of the United States Sentencing Commission: Are the Guidelines Being Followed?*, Hearing before the Subcommittee on Criminal Justice Oversight of the Senate Judiciary Committee, 106th Cong, 2d Sess (2000) (“Subcommittee on Criminal Justice Oversight Hearing”).

³⁵ *Id.* at 1 (statement of Sen Strom Thurmond). See also *id.* at 3 (statement of Sen Jeff Sessions). Democratic senators expressed less concern. See, for example, *id.* at 74 (statement of Sen Patrick J. Leahy) (stating his disagreement with the Republicans’ belief that it was necessary to change the sentencing laws because judges were granting too many downward departures and undermining the Guidelines).

³⁶ Subcommittee on Criminal Justice Oversight Hearing at 18 n 1 (cited in note 34) (statement of John R. Steer, Vice Chair, United States Sentencing Commission).

³⁷ Stith and Koh, 28 Wake Forest L Rev at 284–85 (cited in note 13) (“[I]t is clear that Congress desired a significant degree of rigidity and harshness in the sentencing guidelines.”). As one professor described it, “Once a determinate sentencing bill is before a legislative body, it takes only an eraser and pencil to make a one-year ‘presumptive sentence’ into a six-year sentence for the same offense.” Franklin E. Zimring, *A Consumer’s Guide to Sentencing Reform: Making the Punishment Fit the Crime*, 6 Hastings Center Rep 13, 17 (1976). Since enacting the SRA, it seems that Congress only gets involved in sentencing to increase the harshness of criminal sentences. See Rachel E. Barkow, *Administering Crime*, 52 UCLA L Rev 715, 769–70 (2005) (noting that Congress has repeatedly passed legislation mandating higher penalties or directing the USSC to increase Guidelines ranges, and has rejected USSC proposals to lower the Guidelines).

³⁸ See Stith and Koh, 28 Wake Forest L Rev at 285–86 (cited in note 13) (arguing that compromises made by liberals in passing the SRA were an inevitable result of the legislative process).

legislation, and they are the basis of this Comment's solution to the fast-track circuit split.

B. An Explosion in Cases and the Creation of Fast-Track Sentencing

The first fast-track programs were implemented by various US Attorneys in the mid-1990s without any congressional warrant. These programs helped manage an exploding volume of immigration-related cases. This radical increase in immigration cases was driven by two factors. First, in the 1990s, federal law enforcement agencies dramatically increased their enforcement of immigration offenses. The Border Patrol grew rapidly in size and in budget.³⁹ The federal government also launched a series of high-profile operations to interdict illegal immigration.⁴⁰ Overall, apprehensions jumped from less than 1.2 million per year in 1992 to more than 1.6 million in 2000.⁴¹ Second, a small provision in the 1994 omnibus crime bill both enhanced the penalties for illegal reentry after deportation and expanded the offense's applicability to more defendants.⁴² This gave prosecutors more sentencing room to craft plea bargains with more defendants.⁴³ Quick plea bargains saved prosecutorial resources, which in turn allowed the US Attorney's Offices (USAOs) to charge more immigration cases.

To give a sense of scope, 2,300 cases were sentenced under the United States Sentencing Guidelines covering immigration offenses in 1991.⁴⁴ Ten years later, the number of sentenced immigration cases had

³⁹ United States General Accounting Office, *Report to Congressional Committees: INS' Southwest Border Strategy: Resource and Impact Issues Remain after Seven Years* 8 (Aug 2001), online at <http://www.gao.gov/new.items/d01842.pdf> (visited Nov 15, 2009) (noting that the number of active Border Patrol agents grew by more than 200 percent between 1993 and 2000); Ken Ellingwood, *Data on Border Arrests Raise Gatekeeper Debate*, LA Times A3 (Oct 1, 1999) (stating that the Border Patrol's budget grew from \$374 million in 1993 to \$952 million in 1999).

⁴⁰ See Joseph Nevins, *Operation Gatekeeper: The Rise of the "Illegal Alien" and the Making of U.S.-Mexico Boundary* 90 (Routledge 2002); Alan D. Bersin and Judith S. Feigin, *The Rule of Law at the Margin: Reinventing Prosecution Policy in the Southern District of California*, 12 Georgetown Immig L J 285, 299-300 (1998).

⁴¹ United States General Accounting Office, *INS' Southwest Border Strategy* at 13 (cited in note 39).

⁴² See Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA), Pub L No 103-322 § 130001, 108 Stat 1796, 2023, codified at 8 USC § 1326(b). The Act broadened the application of 8 USC § 1326 to include not just aliens with prior felony convictions, but also aliens convicted of three or more misdemeanors "involving drugs, crimes against the person, or both." Id.

⁴³ See Bersin and Feigin, 12 Georgetown Immig L J at 300-01 (cited in note 40) (concluding that the long prison terms prescribed in § 1326(b) encourage defendants arrested for illegal reentry to agree to fast-track plea agreements).

⁴⁴ United States Sentencing Commission, *Downward Departures Report* at 37 (cited in note 31).

jumped almost fivefold to 10,457.⁴⁵ Immigration cases represented 6.9 percent of all federal criminal sentences in fiscal year 1991, but in ten years they had grown to account for 17.5 percent of sentences.⁴⁶ Of course, some of this increase was surely due to the efficiency of fast-track sentencing. In 2001, approximately five thousand cases, comprising 10 percent of the entire federal criminal caseload, were fast-tracked in Southwest border districts.⁴⁷

Anecdotal evidence suggests that as many as half of the ninety-four USAOs developed some form of fast-track program.⁴⁸ There is only one detailed account of a fast-track program from this pre-PROTECT Act era,⁴⁹ but presumably most of the programs operated along roughly the same lines: a defendant promptly pleads guilty and waives a number of rights in exchange for a reduced charge or sentence.⁵⁰ The size of the reduction depended on the individual fast-track program and the discretion of local prosecutors, but it appears that some of these early fast-track programs offered quite generous bargains to defendants. The Southern District of California's program, for example, used a dramatic charge-bargaining mechanism—prosecutors withdrew an illegal reentry charge punishable by up to twenty years in prison, and replaced it with a charge that had a maximum statutory penalty of only two years.⁵¹

The courts were undisturbed by this bold use of prosecutorial discretion. For example, the Ninth Circuit noted in 1995 that fast-track sentencing “benefits the government and the court system by relieving court congestion,” and it “benefits [illegal reentry] defendants by offering them a substantial sentence reduction.”⁵²

Meanwhile, as stated above, Congress repeatedly suggested that downward departures from the mandatory Guidelines were a cause

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Vanessa Blum, *Ashcroft Memo Endorses Plan for Swift Pleas: New Policy Codifies “Fast-Track” Case Processing in Border States*, Legal Times 1 (Sept 29, 2003), online at <http://www.law.com/jsp/article.jsp?id=900005536751> (visited Oct 9, 2009).

⁴⁸ United States Sentencing Commission, *Downward Departures Report* at 64 (cited in note 31).

⁴⁹ See Bersin and Feigin, 12 Georgetown Immig L J at 300–02 (cited in note 40) (describing the fast-track program initiated in the Southern District of California around 1994).

⁵⁰ United States Sentencing Commission, *Downward Departures Report* at 65 (cited in note 31).

⁵¹ See Bersin and Feigin, 12 Georgetown Immig L J at 301 (cited in note 40). Most districts employed charge bargaining in their fast-track programs, though some districts used plea agreements that bound the USAO to recommend an offense-level reduction, or downward departure, at sentencing. See United States Sentencing Commission, *Downward Departures Report* at 61, 65 (cited in note 31).

⁵² *United States v Estrada-Plata*, 57 F3d 757, 761 (9th Cir 1995).

for concern in the late 1990s and early 2000s.⁵³ Under the then-mandatory Guidelines, a sentencing court had limited discretion to make an upward or downward departure if it found “that there exists an aggravating or mitigating circumstance of the kind, or to a degree, not adequately taken into consideration by the Sentencing Commission.”⁵⁴ Though many academics and judges thought this rule was too strict,⁵⁵ many in Congress believed that sentencing judges were abusing their discretion by granting too many below-Guidelines sentences and undermining the mandatory Guidelines.⁵⁶

The commissioners on the USSC, for their part, explained that departures, generally speaking, were “an integral part of sentencing under the guideline system,”⁵⁷ but they also expressed concern that prosecutorial practices varied significantly from district to district and that this created geographic disparities.⁵⁸ These geographic disparities in downward departures were “likely to be at odds with the [SRA’s] overarching goal of alleviating unwarranted sentencing disparity.”⁵⁹ A USSC report documented the disparity clearly: in 2001, the six judicial districts with the highest downward departure rates accounted for 47.3 percent of all downward departures.⁶⁰ Three of these high-departure districts were along the Southwest border, and a fourth covered New York City’s international airports, suggesting that many

⁵³ See, for example, Subcommittee on Criminal Justice Oversight Hearing, 106th Cong, 2d Sess at 1–2 (cited in note 34) (statement of Sen Thurmond); Subcommittee on Crime Hearing, 104th Cong, 1st Sess at 9 (cited in note 30) (testimony of Judge Conaboy, Chairman, United States Sentencing Commission) (noting a concern with “a potentially troubling aspect of guideline sentencing, and that’s the inconsistent exercise of prosecutorial discretion . . . including the use of substantial assistance departure motions and some charging and plea bargaining practices that appear to undermine the Sentencing Reform Act goals”).

⁵⁴ 18 USC § 3553(b)(1).

⁵⁵ See, for example, Stith and Cabranes, *Fear of Judging* at 83 (cited in note 17).

⁵⁶ Subcommittee on Criminal Justice Oversight Hearing, 106th Cong, 2d Sess at 1 (cited in note 34) (statement of Sen Thurmond). See also *id* at 3 (statement of Sen Sessions).

⁵⁷ *Id* at 19 (written statement of John R. Steer, Vice Chair, United States Sentencing Commission).

⁵⁸ United States Sentencing Commission, *Downward Departures Report* at B-21–22 (cited in note 31).

⁵⁹ Subcommittee on Criminal Justice Oversight Hearing, 106th Cong, 2d Sess at 18 n 1 (cited in note 34) (written statement of John R. Steer, Vice Chair, United States Sentencing Commission).

⁶⁰ See United States Sentencing Commission, *Downward Departures Report* at 34–35 (cited in note 31) (noting that two of these districts had consistently high downward departure rates while the other four varied significantly from year to year). The six districts were Arizona, New Mexico, the Eastern District of Washington, Connecticut, the Southern District of California, and the Eastern District of New York. The USSC data only accounts for downward departures at sentencing, and not the charge-bargaining agreements used in some districts.

departures were the product of fast-track programs for immigration and drug smuggling offenses.

C. The PROTECT Act and § 401(m)(2)(B)

In 2003, Congress authorized a narrow form of fast-track sentencing in the PROTECT Act,⁶¹ which “was part of a more general effort by Congress to deal with a perceived increase in the rate of departures from the Sentencing Guidelines.”⁶² The Act, which revised various criminal statutes, was written in response to a Supreme Court decision regarding child pornography. In *Ashcroft v Free Speech Coalition*,⁶³ the Supreme Court struck down statutory provisions that criminalized the possession or distribution of *virtual* child pornography.⁶⁴ In response, both the House and Senate proposed bills “focusing on the issues of child pornography, child abduction and child sexual offenses.”⁶⁵

During this lawmaking, Representative Tom Feeney proposed an amendment that sharply limited both downward departures and judicial discretion at sentencing.⁶⁶ The Feeney Amendment required specific, written reasons for any departure from the Guidelines, and only permitted downward departures for mitigating factors “identified as a permissible ground of downward departure in the sentencing guidelines.”⁶⁷ Offense level reductions for “acceptance of responsibility” could only be granted upon the government’s motion.⁶⁸ For the first time ever, Congress directly amended the Guidelines penalties for various offenses.⁶⁹ And, finally, the Feeney Amendment changed the standard of review for departures to *de novo* “to allow appellate courts to more effectively review illegal and inappropriate downward departures from federal sentencing guidelines.”⁷⁰

⁶¹ PROTECT Act § 401(m)(2)(B), 117 Stat at 675.

⁶² *United States v Arrelucea-Zamudio*, 581 F3d 142, 145 (3d Cir 2009).

⁶³ 535 US 234 (2002).

⁶⁴ *Id.* at 256. Virtual child pornography consists of “sexually explicit images that appear to depict minors but were produced without using any real children.” *Id.* at 239.

⁶⁵ See United States Sentencing Commission, *Downward Departures Report* at B-25 (cited in note 31).

⁶⁶ 149 Cong Rec H 2420 (daily ed Mar 27, 2003) (statement of Rep Feeney).

⁶⁷ *Id.*

⁶⁸ Providing for Consideration of HR 1104, The Child Abduction Prevention Act of 2003, HR Rep No 108-48, 108th Cong, 1st Sess 3 (2003).

⁶⁹ United States Sentencing Commission, *Downward Departures Report* at B-31 (cited in note 31).

⁷⁰ HR Rep No 108-48 at 3 (cited in note 68); PROTECT Act § 401(d)(2), 117 Stat at 670, codified at 18 USC § 3742(e).

Legislators made floor statements indicating that they supported the Feeney Amendment due to a continuing concern that sentencing courts were granting too many downward departures.⁷¹ The Feeney Amendment passed the House by an overwhelming margin, as did the full PROTECT Act.⁷² In conference, some of the amendment's provisions were moderated.⁷³ The conference compromise also ordered the Sentencing Commission to "conduct a thorough study of [downward departures], develop concrete measures to prevent this abuse, and report these matters back to Congress."⁷⁴

This section of the final bill, ordering the USSC to study downward departures, also contains the most important part of the Feeney Amendment for the fast-track disparity debate. Section 401(m)(2)(B) is a one-sentence provision that gave the USSC 180 days to promulgate "a policy statement authorizing a downward departure of not more than 4 levels if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney."⁷⁵ This section essentially authorized a limited form of fast-track sentencing. It is initially puzzling that Congress *authorized* fast-track departures in a bill otherwise devoted to sharply reducing downward departures. But without fast-track, prosecutors simply could not charge the vast majority of immigration offenders. A few offenders were sentenced harshly, while the vast majority were not prosecuted at all.⁷⁶ Congress's intent with this fast-track authorization is not exactly clear, but Congressman Feeney declared that the authorization of fast-track sentencing in

⁷¹ See, for example, 149 Cong Rec at S 5115 (daily ed Apr 10, 2003) (statement of Sen Hatch); 149 Cong Rec at S 5130 (daily ed Apr 10, 2003) (statement of Sen Sessions); 149 Cong Rec at H 2421 (daily ed Mar 27, 2003) (cited in note 66) (statement of Rep Feeney).

⁷² 149 Cong Rec at H 2436 (daily ed Mar 27, 2003) (cited in note 66) (displaying the roll call vote on the Feeney Amendment, which passed 357 to 58); 149 Cong Rec at H 2438 (daily ed Mar 27, 2003) (displaying the roll call vote on the PROTECT Act, which passed 410 to 14).

⁷³ Departures in child abduction and child sex offenses were permitted to reward substantial assistance in another prosecution. PROTECT Act § 401(a)(2)(iii), 117 Stat at 667–68. And while the appellate standard for sentencing decisions was changed to *de novo*, "factual determinations would continue to be subject to a 'clearly erroneous standard.'" United States Sentencing Commission, *Downward Departures Report* at B-32 (cited in note 31).

⁷⁴ 149 Cong Rec at S 5115 (daily ed Apr 10, 2003) (cited in note 66) (statement of Sen Hatch).

⁷⁵ PROTECT Act § 401(m)(2)(B), 117 Stat at 675.

⁷⁶ See *United States v Perez-Chavez*, 422 F Supp 2d 1255, 1263 (D Utah 2005) ("[W]hile fast-track programs do create disparity between *prosecuted* offenders from district to district; because they permit more prosecutions, they may prevent the even greater disparity that occurs when an offender goes *unprosecuted* because of the lack of prosecutorial resources in a district with a large volume of immigration offenses.").

§ 401(m)(2)(B) was designed to reduce this unwarranted *intradistrict* disparity created by resource constraints—a disparity between those who were charged and those who were not.⁷⁷ Congress’s goal, again, was to enforce harsh sentences and reduce disparities.

Through the enactment of this provision, § 401(m)(2)(B), Congress permitted the use of fast-track sentencing if three requirements were met: (1) the downward departure had to comply with a forthcoming USSC policy statement, (2) the departure could not be greater than four levels, and (3) both the Attorney General and local US Attorney had to authorize the particular fast-track program. Congress had repeatedly criticized the use of downward deviations, and clearly demanded more within-Guidelines sentences, but it authorized a restricted form of fast-track sentencing rather than completely ban the practice.

Consistent with its two overarching goals, Congress restricted judicial discretion by statute in order to prevent unwarranted disparities and to ensure enforcement of the harsh Guidelines.

D. The Implementation of Fast-Track Programs after the PROTECT Act

After the PROTECT Act, individual USAOs needed authorization from the Attorney General and a policy statement from the USSC to implement fast-track sentencing programs. On September 22, 2003, Attorney General John Ashcroft released a memorandum “set[ting] forth the general criteria that must be satisfied in order to obtain Attorney General authorization for ‘fast-track’ programs and the procedures by which US Attorneys may seek such authorization.”⁷⁸ Ashcroft asserted that fast-track programs are “properly reserved for exceptional circumstances, such as where the resources of a district would otherwise be significantly strained by the large volume of a particular category of cases.”⁷⁹ However, the memorandum also stated

⁷⁷ 149 Cong Rec at H 2421 (daily ed Mar 27, 2003) (cited in note 66) (statement of Rep Feeney) (emphasis added):

In order to avoid unwarranted sentencing disparities *within* a given district . . . [a]uthorization for the district to establish an early disposition program . . . may be granted only with respect to those particular classes of offenses (such as illegal reentry) whose high incidence within the district has imposed an extraordinary strain on the resources of that district as compared to other districts.

⁷⁸ John Ashcroft, Memorandum, *Department Principles for Implementing an Expedited Disposition or “Fast-Track” Prosecution Program in a District* (Sept 22, 2003), reprinted in 21 Fed Sent Rptr (Vera) 318, 318 (2009) (“DOJ Fast-Track Principles Memorandum”). The Deputy Attorney General also has the authority to approve fast-track programs. See *id* at 318 n 1.

⁷⁹ *Id* at 318.

that fast-track sentencing is not to be used to “avoid the ordinary application of the Guidelines to a particular class of cases.”⁸⁰ The policy requires a district to demonstrate certain caseload characteristics—to justify the necessity of fast-track—before an individual program will be authorized.⁸¹ And authorization also requires all fast-track programs to contain several consistent procedural elements.⁸²

As stated above, § 401(m) of the PROTECT Act also directed the USSC to promulgate a policy statement authorizing fast-track departures within 180 days,⁸³ so the Commission held hearings in September 2003 to decide upon the form of the statement.⁸⁴ Some speakers criticized fast-track programs and suggested that the policy statement add restrictions beyond those outlined in the Attorney General’s memorandum.⁸⁵ But the Commission ultimately honored the DOJ’s request

⁸⁰ Id. One of the benefits of downward departures is that they allow judges and prosecutors to show the USSC which Guidelines are unfairly harsh. Ashcroft, though, did not want fast-track programs to be used in this manner, which is consistent with other directives from his office constraining the prosecutorial discretion of the USAOs. See Alex Whiting, *How Prosecutors Should Exercise Their Discretion Now that the Sentencing Guidelines Are Advisory*, 8 Issues in Legal Scholarship Iss 2, Art 2, 1, 6–7 (2009), online at <http://www.bepress.com/ils/vol8/iss2/art2> (visited Nov 12, 2009) (“To ensure that the Guidelines achieved their goal of sentencing uniformity, the Department required prosecutors to charge defendants according to a consistent formula (the most serious provable offense), to pursue plea-bargains reflecting those charges, and to apply the Guidelines faithfully.”).

⁸¹ First, the district must either be facing “an exceptionally large number of a specific class of offense” that would “significantly strain prosecutorial and judicial resources,” or be facing “some other exceptional local circumstance with respect to a specific class of cases that justifies expedited disposition.” *DOJ Fast-Track Principles Memorandum*, 21 Fed Sent Rptr (Vera) at 319 (cited in note 78). Second, the cases in question must be “highly repetitive and present substantially similar fact scenarios.” Id. Third, it must be impossible or inappropriate to turn the cases over to state prosecution. Id. Fourth, the fast-tracked offense must not have been designated as a “crime of violence.” Id.

⁸² First, the defendant must promptly plead guilty. *DOJ Fast-Track Principles Memorandum*, 21 Fed Sent Rptr (Vera) at 319. Second, the plea agreement must be written, and it must include an accurate factual description of the offense conduct, an agreement not to file pretrial motions under FRCrP 12(b)(3), and waiver of the right to appeal or challenge the conviction under the habeas corpus statute. Id. at 320. The defendant does *not* waive the right to make a habeas claim regarding “ineffective assistance of counsel.” Id. Third, in exchange for the defendant’s plea and waiver of rights, the prosecutor may move at sentencing for a downward departure “of a specific number of levels, not to exceed 4 levels.” Id.

⁸³ PROTECT Act § 401(m)(2), 117 Stat at 675.

⁸⁴ See generally Implementing Requirements of the PROTECT Act, Public Hearing before the United States Sentencing Commission (Sept 23, 2003) (“USSC Hearing”), online at http://www.ussc.gov/hearings/9_23_03/092303PH.pdf (visited Nov 12, 2009).

⁸⁵ See, for example, Frank O. Bowman, III, *Only Suckers Pay the Sticker Price: The Effect of “Fast Track” Programs on the Future of the Sentencing Guidelines as a Principled Sentencing System* 9, online at http://www.ussc.gov/hearings/9_23_03/fbowman.pdf (visited Nov 12, 2009) (written statement for the USSC Hearing, cited in note 84). Professor Bowman alternately suggested that if the Sentencing Commission wanted to encourage prosecutors to flag bad guide-

for an “unfettered”⁸⁶ policy statement and promulgated USSG § 5K3.1,⁸⁷ which is nearly identical to § 401(m)(2)(b).

DOJ authorized the first fast-track programs a month after the release of Ashcroft’s “Department Principles” memo.⁸⁸ It has since issued new authorizations on roughly an annual schedule. In DOJ’s most recent authorization memo, Deputy Attorney General David W. Ogden approved twenty-nine fast-track programs in seventeen judicial districts.⁸⁹ All of the programs are for immigration-related crimes or cross-border drug smuggling offenses.⁹⁰

Because of fast-track’s efficiency, prosecutors are now able to charge and sentence many more offenders. Those sentences are shorter, but aggregate punishment is significantly harsher because of the many additional defendants prosecuted. For example, prior to fast-track, in 1992, there were over 500,000 apprehensions for illegal immigration in Southern California, but the local USAO only brought 245 felony cases.⁹¹ Logistical restraints, not prosecutorial discretion, dictated the decision to charge only this tiny fraction of offenders.⁹² In 2007, using fast-track sentencing, the USAO in the Southern District of California brought 2,062 felony immigration cases.⁹³ The average sentence was shorter, but fast-track can hardly be considered lenient. With fast-track, prosecutors increased the number of sentenced of-

lines by downwardly departing from them, it should grant “the widest possible leeway” to the Justice Department. *Id.*

⁸⁶ United States Sentencing Commission, *Downward Departures Report* at 66 (cited in note 31).

⁸⁷ USSG Appendix C, Amend 651 (creating USSG § 5K3.1).

⁸⁸ The first authorization came on October 24, 2003. See James M. Comey, Memorandum, *Authorization of Early Disposition Programs* (Oct 29, 2004), reprinted in 21 Fed Sent Rptr (Vera) 322, 323 (2009).

⁸⁹ David W. Ogden, Memorandum, *Authorization for Early Disposition Programs* (Mar 31, 2009), reprinted in 21 Fed Sent Rptr (Vera) 335, 335–36 (2009).

⁹⁰ *Id.* Two of the twenty-nine approved programs were for aggravated identity theft—a charge often used by USAOs against illegal immigrants with forged documents. Government filings from 2005 show that fast-track programs vary significantly from one another, but the implications of those differences are beyond the scope of this Comment. For example, some districts give different bargains to defendants depending on their individual criminal histories. See Government’s Supplemental Response in Opposition to Defendant’s Motion for a Non-Guideline Sentence based on Fast-Track Programs: Fast-Track Dispositions District-by-District Relating to Illegal Reentry Cases, *United States v Medrano-Duran*, No 04-cr-884, *22–31 (Appendix A) (ND Ill filed Aug 3, 2005), reprinted in 21 Fed Sent Rptr (Vera) 339, 339–48 (2009).

⁹¹ William Braniff, *Local Discretion, Prosecutorial Choices and the Sentencing Guidelines*, 5 Fed Sent Rptr (Vera) 309, 309 (1993).

⁹² *Id.* (noting that prosecuting all illegal immigrants would have overwhelmed the local court system as well as the entire federal prison system).

⁹³ Author’s analysis of Bureau of Justice Statistics, Federal Justice Statistics Resource Center, online at <http://fjsrc.urban.org> (visited Nov 15, 2009).

fenders by a factor of seven. Even with shorter average sentences, the cumulative punishment increased substantially. And since fewer offenders were escaping prosecution, the gross intradistrict disparity cited by Congress⁹⁴ was significantly reduced. This likely has a significant deterrent effect because offenders are more deterred by certainty of punishment than by severity of punishment.⁹⁵ Thus, Congress's fast-track authorization also served its two consistent sentencing objectives. Fast-track sentencing increased the aggregate harshness of sentences and severely reduced intradistrict disparities between charged and uncharged offenders.

II. RECENT SUPREME COURT RULINGS ON SENTENCING DISCRETION

As stated in Part I, under the sentencing regime created by the SRA, judges only had limited power to depart from the Guidelines under § 3553(b).⁹⁶ Congress further limited that judicial discretion with the PROTECT Act.⁹⁷ However, several Supreme Court decisions in the last decade have expanded sentencing court discretion and made the Guidelines advisory. It is important to understand what the Court has held, since these decisions have undone much of the sentencing system that was in place when Congress initially authorized fast-track sentencing.

A. Advisory Sentencing Guidelines

In 2005, the Supreme Court declared that the mandatory Sentencing Guidelines were unconstitutional in *United States v Booker*.⁹⁸ Specifically, the Court held that the Guidelines violated the Sixth Amendment's jury trial right because they allowed a sentencing judge to find facts, without a jury, that could raise a defendant's maximum statutory sentence.⁹⁹ *Booker* cleaved the Court into two factions, resulting in two separate 5-4 opinions: a merits opinion holding the

⁹⁴ See notes 76–77 and accompanying text.

⁹⁵ See Michael K. Block, *Commentary: Emerging Problems in the Sentencing Commission's Approach to Guideline Amendments*, 1 Fed Sent Rptr (Vera) 451, 451 (1989) (noting that "deterrence research indicates that an increase in the certainty of punishment is a more powerful method of dissuading potential offenders than an equivalent increase in the magnitude of punishment").

⁹⁶ See Part I.A.

⁹⁷ See Part I.C.

⁹⁸ 543 US 220 (2005).

⁹⁹ *Id.* at 226–27, 243–44.

Guidelines unconstitutional,¹⁰⁰ and a remedial opinion resolving the constitutional problem.¹⁰¹ In the remedial opinion, the Court's constitutional solution was to hold that the Guidelines were no longer mandatory.¹⁰² The Court excised the mandatory portions of the SRA, leaving the Guidelines "effectively advisory."¹⁰³ A sentencing court has to "take account of" the appropriate Guidelines range,¹⁰⁴ but it can "tailor the sentence in light of other statutory concerns as well, see § 3553(a)."¹⁰⁵

Title 18 USC § 3553(a) is the federal statute that "guide[s] sentencing,"¹⁰⁶ and it is critical to the fast-track debate. At sentencing, a district court judge is required by § 3553(a) to consult a set list of "Factors To Be Considered in Imposing a Sentence."¹⁰⁷ When the Guidelines were mandatory, sentencing judges rarely needed to rigorously work through these factors because the SRA usually bound courts to a narrow and mandatory Guidelines range. After *Booker*, § 3553(a) became the lodestar for all sentencing decisions. District courts are now required to carefully weigh the § 3553(a) factors in crafting an appropriate sentence.

The first clause of the statute, sometimes called the "parsimony clause,"¹⁰⁸ states "[t]he court shall impose a sentence sufficient, but not greater than necessary"¹⁰⁹ to accomplish the traditional sentencing goals of retribution, deterrence, incapacitation, and rehabilitation.¹¹⁰ Section 3553(a) also requires the court to consider "the kinds of sentences available," the sentencing range, and any pertinent policy statements from the USSC.¹¹¹ Most importantly for the fast-track debate, § 3553(a)(6) states that the court must consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."¹¹² This is the

¹⁰⁰ *Id.* at 225–44.

¹⁰¹ *Id.* at 244–71.

¹⁰² *Booker*, 543 US at 245.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 259.

¹⁰⁵ *Id.* at 245.

¹⁰⁶ *Booker*, 543 US at 261.

¹⁰⁷ 18 USC § 3553(a).

¹⁰⁸ The utilitarian "parsimony principle," proposed by Jeremy Bentham, holds that any punishment that does not serve its end is unjust. Jeremy Bentham, *The Rationale of Punishment* 23 (R. Heward 1830) ("All punishment being in itself evil, upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.").

¹⁰⁹ 18 USC § 3553(a).

¹¹⁰ 18 USC § 3553(a)(2)(A)–(D).

¹¹¹ 18 USC § 3553(a)(3)–(5).

¹¹² 18 USC § 3553(a)(6).

clause that defendants in non-fast-track jurisdictions cite when requesting a below-Guidelines sentence to mitigate the fast-track disparity.

B. Deferential Standard of Review

The remedial opinion in *Booker* also excised 18 USC § 3742(e),¹¹³ the Feeney Amendment's requirement that sentencing decisions must be reviewed de novo. In place of de novo review, the *Booker* Court held that appellate courts should review sentencing decisions under a deferential reasonableness standard.¹¹⁴ The Court noted that the PROTECT Act's justification for adding de novo review was "to make Guidelines sentencing even more mandatory than it had been," but that this "ceased to be relevant" with advisory Guidelines.¹¹⁵

Appellate courts apparently misunderstood the Court's directive to review sentencing decisions for unreasonableness, because the Court chose to decide three cases on the issue in the next two years. In these cases, the Court repeatedly and consistently held that the circuits are to *deferentially* review the discretion of sentencing courts.

For example, in *Gall v United States*,¹¹⁶ the Supreme Court held that appellate courts must review sentencing decisions under an "abuse-of-discretion" standard, regardless of whether a sentence is outside the defendant's Guidelines range.¹¹⁷ Appellate courts may not demand "extraordinary circumstances" for sentences substantially outside of the Guidelines range, because that is too close to a presumption that non-Guidelines sentences are unreasonable.¹¹⁸ *Gall* also contained detailed instructions for how a district court is to make sentencing decisions. First, the court must "correctly calculat[e] the applicable Guidelines range" as a "starting point and the initial benchmark."¹¹⁹ Second, the court must consider arguments from the parties as to the appropriate sentence.¹²⁰ Third, the district court must "consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party."¹²¹ If the court determines that an "out-

¹¹³ *Booker*, 543 US at 260.

¹¹⁴ *Id.* at 261.

¹¹⁵ *Id.*

¹¹⁶ 552 US 38 (2007).

¹¹⁷ *Id.* at 41.

¹¹⁸ *Id.* at 47.

¹¹⁹ *Id.* at 49 (arguing that this requirement was necessary "[a]s a matter of administration and to secure nationwide consistency").

¹²⁰ *Gall*, 552 US at 49–50.

¹²¹ *Id.*

side-Guidelines” sentence is warranted, the court must justify the variance.¹²² Again, § 3553(a) is the lodestar for sentencing decisions.

In *Rita v United States*,¹²³ the Court held that it was permissible for an *appellate court* to presume that a within-Guidelines sentence was reasonable,¹²⁴ so long as the presumption is not binding.¹²⁵ The Court noted that a “Guidelines sentence will usually be reasonable, because it reflects both the Commission’s and the sentencing court’s judgment as to what is an appropriate sentence for a given offender.”¹²⁶ However, the *sentencing court* may *not* presume a Guidelines sentence is reasonable.¹²⁷ The lower court must fairly consider “arguments by prosecution or defense that the Guidelines sentence should *not* apply.”¹²⁸ While *Gall* and *Rita* are important, this Comment focuses in particular on *Kimbrough v United States*, since that decision triggered the current fast-track debate.

C. *Kimbrough*: Courts May Issue Below-Guidelines Sentences for Policy Reasons

The question in *Kimbrough* was whether a sentence “outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses.”¹²⁹ The Court held that such a below-Guidelines sentence is not unreasonable, because lower courts have broad discretion to ensure that sentences abide by § 3553(a)’s parsimony principle.¹³⁰

At Derrick Kimbrough’s sentencing hearing, the district court judge gave him a below-Guidelines sentence. The judge believed that applying the Guidelines for crack cocaine offenses would be a violation of the parsimony clause’s requirement that sentences be “sufficient but not greater than necessary” to achieve the purposes of sentencing.¹³¹ At the time, the Guidelines for crack cocaine offenses were significantly higher than for similar offenses involving powder cocaine.

¹²² Id at 50 (noting that major departures should be supported by more significant justifications than minor ones).

¹²³ 551 US 338 (2007).

¹²⁴ Id at 347.

¹²⁵ Id.

¹²⁶ Id at 351.

¹²⁷ *Rita*, 551 US at 351.

¹²⁸ Id (emphasis added) (suggesting that such arguments may establish that the case at hand falls outside of the “heartland” of cases to which the Guidelines are meant to apply or that “the Guidelines sentence itself fails properly to reflect § 3553(a) considerations”).

¹²⁹ *Kimbrough*, 552 US at 91.

¹³⁰ Id at 110.

¹³¹ Id at 92–93.

The sentencing judge disagreed with this disparity on policy grounds, so he imposed the statutory minimum sentence, which was below the defendant's Guidelines range.¹³²

While the USSC usually develops Guidelines ranges through "an empirical approach based on data about past sentencing practices, including 10,000 presentence investigation reports,"¹³³ the *Kimbrough* Court found that "[t]he Commission did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses."¹³⁴ Instead, it modeled its Guidelines for crack and powder cocaine on Congress's Anti-Drug Abuse Act of 1986, which contained significantly higher statutory minima and maxima for crack cocaine offenses than powder cocaine offenses.¹³⁵ Years later the Commission "determined that the crack/powder sentencing disparity is generally unwarranted."¹³⁶ It then attempted to reduce the disparity, but Congress rejected the Commission's attempts to amend the Guidelines.¹³⁷

Booker made the Guidelines advisory, so the question in *Kimbrough* was whether the crack-powder disparity was "an exception to the 'general freedom that sentencing courts have to apply the [§ 3553(a)] factors.'"¹³⁸ The government argued that while Congress did not "expressly direct"¹³⁹ the Sentencing Commission to adopt the disparity, it did so *implicitly* both when it created a crack-powder disparity in the statutory minima and maxima of the Anti-Drug Abuse Act, and when it rejected the Commission's amendments to the Guidelines.¹⁴⁰ In other words, the government conceded that sentencing courts have broad discretion to disagree with *Guidelines* policy,¹⁴¹ but argued that courts lack the discretion to grant a below-Guidelines sentence if it would undermine an implicit *congressional* policy. The Court rejected this argument and held that Congress must be *explicit*

¹³² Id at 93.

¹³³ *Kimbrough*, 552 US at 96.

¹³⁴ Id.

¹³⁵ Id at 97 ("[T]he Commission, in line with the 1986 Act, adopted the 100-to-1 ratio."). See Anti-Drug Abuse Act of 1986, Pub L No 99-570 §1002, 100 Stat 3207, 3207-1-3207-3, codified at 21 USC § 841(b)(1) (mandating the same minimum sentence for distributing five hundred grams of powder cocaine as for distributing five grams of crack, thus establishing the infamous 100-to-1 ratio).

¹³⁶ *Kimbrough*, 552 US at 97.

¹³⁷ Id at 99.

¹³⁸ Id at 102 (citation omitted).

¹³⁹ Brief for the United States, *Kimbrough v United States*, No 06-6330, *33 (US filed Aug 30, 2007) (available on Westlaw at 2007 WL 2461473) (quotation marks omitted).

¹⁴⁰ Id at *31-42.

¹⁴¹ See id at *16.

if it intends to cabin judicial discretion in this fashion. The Court noted that the Anti-Drug Abuse Act of 1986 created statutory minimum and maximum sentences, but was absolutely silent as to “appropriate sentences within these brackets.”¹⁴² The Court “decline[d] to read any implicit directive into that congressional silence.”¹⁴³ Arguably this created something akin to a clear statement rule: Congress must speak unambiguously and explicitly if it means to limit judicial sentencing discretion.

Also, the Court declined to grant the usual deference to the USSC’s crack Guidelines because the USSC did not fulfill its usual institutional role. The Court noted that the Sentencing Commission “fills an important institutional role”¹⁴⁴ and that, “in the ordinary case, the Commission’s recommendation of a sentencing range will ‘reflect a rough approximation of sentences that might achieve § 3553(a)’s objectives.”¹⁴⁵ The sentencing judge, on the other hand, has a better understanding of the particular case before him.¹⁴⁶ So when a judge determines that a case is “outside the heartland,” the sentencing court’s decision to vary from the Guidelines is to be given “greatest respect.”¹⁴⁷ But “in a mine-run case,” “closer review” by the appellate court may be necessary when the sentencing court varies based on a disagreement with the Guidelines.¹⁴⁸ Yet the Court argued that this principle did not apply in *Kimbrough* because the crack-powder “Guidelines do not exemplify the Commission’s exercise of its characteristic institutional role.”¹⁴⁹ Because the Commission merely followed Congress’s cues from the 1986 Anti-Drug Abuse Act, and because the Commission later decided that the crack-powder disparity was unwarranted, the crack cocaine Guidelines apparently did not deserve the “greatest respect,” even in a mine-run case.¹⁵⁰

In *Kimbrough*, the Supreme Court powerfully reasserted that sentencing courts have broad discretion to determine an appropriate sentence under § 3553(a). The Court found that this sentencing discretion remains even when a contrary sentence is implicitly endorsed by Congress, and explicitly endorsed by the Guidelines. In addition, *Kimbrough* gave lower courts a post-*Booker* look at what the Supreme

¹⁴² *Kimbrough*, 552 US at 103.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 108–09.

¹⁴⁵ *Id.* at 109, quoting *Rita*, 551 US at 350.

¹⁴⁶ *Kimbrough*, 552 US at 109.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Kimbrough*, 552 US at 110.

Court would consider an “unwarranted disparity” under § 3553(a)(6). Although *Kimbrough* did not discuss fast-track programs, its emphasis on sentencing court discretion and hints as to the meaning of unwarranted disparity opened the door for circuit courts to reassess their fast-track precedent.

III. THE FAST-TRACK CIRCUIT SPLIT

Defendants in non-fast-track jurisdictions claim that the sentence disparity between fast-track and non-fast-track districts is “unwarranted” under § 3553(a)(6), which requires sentencing courts to consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”¹⁵¹ These defendants argue that sentencing courts have the discretion to mitigate the disparity by imposing below-Guidelines sentences. Every circuit court to hear this argument prior to 2007 determined that the disparity was not “unwarranted” because “Congress implicitly determined that the disparity was warranted” when it authorized fast-track programs in the PROTECT Act.¹⁵² However, the Supreme Court’s decision in *Kimbrough* has caused five circuits to reassess their precedent on this issue.

A. The Fifth, Ninth, and Eleventh Circuits: Courts May Not Mitigate the Fast-Track Disparity

In *United States v Gomez-Herrera*,¹⁵³ the Fifth Circuit reassessed the fast-track disparity question and held that *Kimbrough* did not undermine its precedent holding that sentencing courts may not mitigate the disparity at sentencing.¹⁵⁴ The defendant in the underlying case, Pedro Gomez-Herrera, pled guilty to illegal reentry following removal,

¹⁵¹ 18 USC § 3553(a)(6).

¹⁵² *United States v Castro*, 455 F3d 1249, 1252 (11th Cir 2006) (arguing that Congress’s PROTECT Act authorization of fast-track departures only in fast-track districts was an implicit determination that the disparity was warranted). For similar holdings from other circuits, see *United States v Andújar-Arias*, 507 F3d 734, 742 (1st Cir 2007); *United States v Mejia*, 461 F3d 158, 163 (2d Cir 2006); *United States v Vargas*, 477 F3d 94, 98–100 (3d Cir 2007); *United States v Perez-Pena*, 453 F3d 236, 243 (4th Cir 2006); *United States v Aguirre-Villa*, 460 F3d 681, 683 (5th Cir 2006); *United States v Hernandez-Fierros*, 453 F3d 309, 314 (6th Cir 2006); *United States v Martinez-Martinez*, 442 F3d 539, 542 (7th Cir 2006); *United States v Sebastian*, 436 F3d 913, 916 (8th Cir 2006); *United States v Marcial-Santiago*, 447 F3d 715, 718 (9th Cir 2006); *United States v Martinez-Trujillo*, 468 F3d 1266, 1268 (10th Cir 2006).

¹⁵³ 523 F3d 554 (5th Cir 2008).

¹⁵⁴ *Id.* at 559.

and argued at sentencing for a below-Guidelines sentence.¹⁵⁵ One of his justifications was the fast-track disparity.¹⁵⁶ Gomez-Herrera argued that *Kimbrough* had overruled the Fifth Circuit's precedent on the fast-track disparity issue.¹⁵⁷ The Fifth Circuit, however, held that "*Kimbrough*, which concerned a district court's ability to sentence in disagreement with *Guideline* policy, does not control this case, which concerns a district court's ability to sentence in disagreement with *Congressional* policy."¹⁵⁸

First, the court reasoned that the text of the PROTECT Act's fast-track authorization "plainly limits fast-track departures to early disposition programs authorized by the Attorney General."¹⁵⁹ Letting defendants in other jurisdictions obtain the "same benefits" as fast-track defendants would undermine the prosecutor's discretionary decision to offer fast-track benefits only when justified by the "economies" of early disposition.¹⁶⁰ Second, the court reasoned that the fast-track disparity is "not 'unwarranted' within the meaning of § 3553(a)(6)" because the disparity was "intended by Congress."¹⁶¹ According to the Fifth Circuit, "the disparity was specifically authorized by Congress in the PROTECT Act."¹⁶² Oddly, though, the court cited pre-*Kimbrough* precedent describing the authorization as "implicit" or "necessary," not "explicit."¹⁶³ The court asserted that *Kimbrough* was limited to sentencing decisions that contradicted USSC policy, and argued that the fast-track disparity instead turned on *congressional* policy because Congress had mandated the disparity in the PROTECT Act. For the Fifth Circuit then, *Kimbrough* did not undermine the circuit's precedent holding that a fast-track sentencing disparity is not *unwarranted* under § 3553(a)(6).¹⁶⁴ The court's conclusion rested

¹⁵⁵ Id at 556.

¹⁵⁶ Id at 556–57.

¹⁵⁷ *Gomez-Herrera*, 523 F3d at 559.

¹⁵⁸ Id (emphasis added).

¹⁵⁹ Id at 561.

¹⁶⁰ Id.

¹⁶¹ *Gomez-Herrera*, 523 F3d at 562.

¹⁶² Id at 562, quoting *Martinez-Trujillo*, 468 F3d at 1268.

¹⁶³ *Gomez-Herrera*, 523 F3d at 562–63, citing *Castro*, 455 F3d at 1252 ("Congress implicitly determined that the disparity was warranted.") (emphasis added); *Mejia*, 461 F3d at 163 ("Congress expressly approved of fast-track programs without mandating them; Congress thus necessarily decided that they do not create the unwarranted sentencing disparities that it prohibited in Section 3553(a)(6).") (emphasis added); *Aguirre-Villa*, 460 F3d at 683 ("Congress must have thought the disparity warranted when it authorized early disposition programs without altering § 3553(a)(6).") (emphasis added).

¹⁶⁴ The court also noted that Gomez-Herrera may not be "similarly situated" to fast-track defendants because he did not offer to sign the waiver of rights typically demanded by fast-track programs. *Gomez-Herrera*, 523 F3d at 563.

heavily on its interpretation of the PROTECT Act's fast-track authorization as an explicit warrant of the fast-track disparity.

The Eleventh Circuit reassessed the fast-track disparity question in *United States v Vega-Castillo*,¹⁶⁵ but ultimately held that it was unable to overturn its prior precedent on the issue.¹⁶⁶ The defendant in the underlying case, Victor Gonzalo Vega-Castillo, pled guilty to illegal reentry after removal. Vega-Castillo then asked the district court to grant a below-Guidelines sentence to mitigate the fast-track disparity.¹⁶⁷ The district court refused his request and imposed a sentence at the low end of his Guidelines range.¹⁶⁸ On appeal, the Eleventh Circuit panel's majority held that the circuit's prior precedent rule prevented it from overturning previous decisions on the fast-track disparity issue.¹⁶⁹ The majority interpreted the rule as requiring the panel to "follow a prior binding precedent unless and until it is overruled by this court en banc or by the Supreme Court."¹⁷⁰ It was not enough for the Supreme Court to overrule the "reasoning that supports that holding."¹⁷¹

The court went on, though, to distinguish *Kimbrough* from its precedent on the fast-track sentencing disparity. The first distinction was formalistic: *Kimbrough* dealt with a court's ability to consider a disparity created by the crack-powder cocaine Guidelines, whereas the fast-track disparity comes under a different Guideline.¹⁷² The second distinction was between a court's discretion to disagree with *Guideline* policy, and its discretion to disagree with *congressional* policy.¹⁷³ The

¹⁶⁵ 540 F3d 1235 (11th Cir 2008).

¹⁶⁶ *Id.* at 1238–39.

¹⁶⁷ *Id.* at 1236. The opinion indicates that Vega-Castillo proposed that sentencing courts *must* consider fast-track disparity at sentencing, rather than that they *may* consider the disparity. See *id.* at 1236. The Eleventh Circuit had prior precedent holding that a sentencing court is not required to consider fast-track disparity, *Castro*, 455 F3d at 1253, and that it may not consider such disparity. See *United States v Llanos-Agostadero*, 486 F3d 1194, 1199 (11th Cir 2007); *United States v Arevalo-Juarez*, 464 F3d 1246, 1251 (11th Cir 2006). The defendant's conflation of the *must* question is not problematic because the court decided the broader *may* question.

¹⁶⁸ *Vega-Castillo*, 540 F3d at 1236.

¹⁶⁹ *Id.* at 1236–39. The court later denied Vega-Castillo's petition for an en banc rehearing. *Vega-Castillo*, 548 F3d 980 (2008). Judge Edward Carnes filed a concurrence to the denial, stating that he agreed with the panel's majority opinion but that a "fresh look en banc" was appropriate if a future case raised the question more cleanly. *Id.* at 981–82 (Carnes concurring). Judge Carnes argued that Vega-Castillo's extended criminal history made him ineligible for fast-track even in a fast-track district, see note 90, and that Vega-Castillo's case was a bad vehicle for rehearing because he had not signed the waiver of rights demanded of fast-track recipients. 548 F3d at 982.

¹⁷⁰ *Vega-Castillo*, 540 F3d at 1236 (quotation marks omitted).

¹⁷¹ *Id.* at 1237.

¹⁷² *Id.* at 1239.

¹⁷³ *Id.*

majority cited *Gomez-Herrera* approvingly on this point,¹⁷⁴ and suggested that the fast-track disparity was not unwarranted under § 3553(a)(6) because “Congress implicitly determined that the disparity was warranted.”¹⁷⁵ The Eleventh Circuit then, like the Fifth Circuit, interpreted the fast-track authorization in the PROTECT Act as warranting the fast-track disparity. The third distinction was that *Kimbrough* “dealt only with [] Guidelines [] that, like the crack cocaine Guidelines, ‘do not exemplify the Commission’s exercise of its characteristic institutional role.’”¹⁷⁶ The implication was that the USSC’s promulgation of the fast-track policy statement was a proper example of its “institutional role.”

Judge Rosemary Barkett dissented passionately from the majority’s opinion.¹⁷⁷ She explained that “*Kimbrough* has completely undermined the rationale of [] prior cases” and that the majority had exaggerated the stickiness of the circuit’s prior precedent rule.¹⁷⁸ She further argued that a circuit panel must reverse precedent “when an intervening Supreme Court decision has ‘undermined [a prior panel decision] to the point of abrogation.’”¹⁷⁹ Judge Barkett also reasoned that the “implicit” congressional authorization of the crack-powder disparity in *Kimbrough* was comparable to the PROTECT Act’s implicit authorization of a fast-track disparity.¹⁸⁰ Since the Supreme Court had held in *Kimbrough* that an implicit authorization was insufficient to cabin judicial discretion,¹⁸¹ she argued that the Court had abrogated the circuit’s precedent. Her fundamental disagreement with the majority opinion, then, was in how she interpreted the fast-track authorization in the PROTECT Act.

Judge Barkett also remarked that the Supreme Court had “made consideration of the § 3553(a) factors paramount, including a determination that in a particular case, a within-Guidelines sentence may be ‘greater than necessary’ to serve the objectives of sentencing.”¹⁸² Finally, Judge Barkett described how the Supreme Court’s opinions in *Kimbrough*, *Rita*, and *Gall* showed that sentencing courts must “take

¹⁷⁴ *Vega-Castillo*, 540 F3d at 1239, citing *Gomez-Herrera*, 523 F3d at 563.

¹⁷⁵ The Eleventh Circuit found Congress’s warrant to be *implicit*, but the Fifth Circuit had earlier described Congress’s warrant of the fast-track disparity as *explicit*. Contrast *Vega-Castillo*, 540 F3d at 1238, quoting *Castro*, 455 F3d at 1252, with notes 162–63 and accompanying text.

¹⁷⁶ *Vega-Castillo*, 540 F3d at 1239, quoting *Kimbrough*, 552 US at 109.

¹⁷⁷ *Vega-Castillo*, 540 F3d at 1239 (Barkett dissenting).

¹⁷⁸ *Id.* at 1239. Judge Barkett also argued that the majority had misinterpreted the First Circuit’s prior precedent rule. See *id.* at 1241 n 5.

¹⁷⁹ *Id.* at 1239 (“I believe it to be beyond peradventure that *Kimbrough* has completely undermined that rationale of our prior cases . . .”).

¹⁸⁰ *Id.* at 1240.

¹⁸¹ *Id.*, citing *Kimbrough*, 552 US at 103.

¹⁸² *Vega-Castillo*, 540 F3d at 1240 (Barkett dissenting).

account of *sentencing practices in other courts*,”¹⁸³ and that they “may consider arguments that ‘the Guidelines sentence itself fails properly to reflect § 3553(a) considerations.’”¹⁸⁴

The Ninth Circuit reassessed its precedent on the fast-track disparity issue in *United States v Gonzalez-Zotelo*,¹⁸⁵ holding that *Kimbrough* did not undermine the circuit’s prior precedent forbidding the consideration of the fast-track disparity at sentencing.¹⁸⁶ The defendant, Juan Gonzalez-Zotelo, was convicted of illegal reentry and faced a Guidelines sentence of sixty-three to seventy-eight months.¹⁸⁷ Gonzalez-Zotelo was prosecuted in a fast-track district, but the USAO did not offer him a fast-track plea because of his prior “conviction for lewd or lascivious acts with a child under the age of 14.”¹⁸⁸ At sentencing, the district court judge imposed a below-Guidelines sentence due to a “lack of ‘consistency’” between Gonzalez-Zotelo and a defendant who had received a thirty month fast-track sentence earlier that same day.¹⁸⁹

The Ninth Circuit summed up the case’s key issue as “whether we are still bound to follow the reasoning of [our precedent] in light of *Kimbrough*.”¹⁹⁰ The court described its prior precedent rule as requiring a subsequent panel to follow prior precedent “unless a subsequent decision by a relevant court of last resort either effectively overrules the decision in a case closely on point or undercuts the reasoning underlying the circuit precedent rendering the cases clearly irreconcilable.”¹⁹¹ The court held that “*Kimbrough* did not effectively overrule[] or undercut[] the reasoning of [its precedent] so that the two cases are clearly irreconcilable.”¹⁹² Like the Fifth and Eleventh Circuits, the Ninth Circuit noted that *Kimbrough* was distinguishable because it concerned a policy disagreement with *Guidelines* policy, not *congressional* policy.¹⁹³ The court reasoned that since Congress had authorized fast-track sentencing “without revising the terms of § 3553(a)(6), Congress was necessarily providing that the sentencing disparities that result from these pro-

¹⁸³ Id at 1241, citing *Kimbrough*, 552 US at 108.

¹⁸⁴ *Vega-Castillo*, 540 F3d at 1241 (Barkett dissenting), citing *Kimbrough*, 552 US at 101–02 and quoting *Rita*, 551 US at 351.

¹⁸⁵ 556 F3d 736 (9th Cir 2009).

¹⁸⁶ Id at 740.

¹⁸⁷ *Gonzalez-Zotelo*, 556 F3d at 738.

¹⁸⁸ Id. Individual USAOs have different fast-track protocols, some of which exclude certain types of offenders from their programs. See note 90.

¹⁸⁹ Id.

¹⁹⁰ Id at 740.

¹⁹¹ *Gonzalez-Zotelo*, 556 F3d at 740 (quotation marks omitted).

¹⁹² Id (quotation marks omitted).

¹⁹³ Id.

grams are warranted.”¹⁹⁴ Like the other circuits, the Ninth Circuit’s decision depended heavily on reading the PROTECT Act as an explicit (or implicit) warrant of the fast-track disparity.

B. The First and Third Circuits: Courts May Mitigate the Fast-Track Disparity

The First Circuit also had precedent holding that the fast-track disparity was “not ‘unwarranted’ within the meaning of section 3553(a)(6) and that, therefore, any such disparity ‘may not be considered by a district judge in sentencing as a basis for a variance.’”¹⁹⁵ However, in contrast to the Fifth, Ninth, and Eleventh Circuits, the First Circuit held in *United States v Rodríguez*¹⁹⁶ that *Kimbrough* and *Gall* had “undermine[d] the interpretive approach” of its precedent.¹⁹⁷ The court rejected its prior precedent and held that “sentencing courts can consider items such as fast-track disparity” when sentencing.¹⁹⁸ The defendant, Yonathan Rodríguez, pleaded guilty to one count of illegal reentry following removal.¹⁹⁹ Rodríguez then argued for a below-Guidelines sentence based, in part, on the “unacceptable disparity” created by the district’s lack of a fast-track program.²⁰⁰ The court noted that he based this argument “not only on 18 U.S.C. § 3553(a)(6), but also on section 3553(a)’s overarching [parsimony] provision and sentencing goals.”²⁰¹

The court began its analysis by reviewing *Gall* and *Kimbrough*, noting that “under an advisory guidelines regime,” those decisions “emphasiz[ed] the breadth of a district court’s discretion to deviate from a defendant’s [Guidelines range] based on the compendium of sentencing factors mentioned in 18 U.S.C. § 3553(a).”²⁰² Sentencing courts are in a “superior coign of vantage” to find facts and determine their application under § 3553(a)’s sentencing factors.²⁰³ The court found *Kimbrough* particularly relevant due to its holding that sentencing courts may justify below-Guidelines sentences on policy consider-

¹⁹⁴ *Id.*, quoting *Marcial-Santiago*, 447 F3d at 718.

¹⁹⁵ *United States v Rodríguez*, 527 F3d 221, 224 (1st Cir 2008), quoting *Andújar-Arias*, 507 F3d at 739.

¹⁹⁶ 527 F3d 221 (1st Cir 2008).

¹⁹⁷ *Id.* at 222.

¹⁹⁸ *Id.* at 231.

¹⁹⁹ *Id.* at 222–23.

²⁰⁰ *Rodríguez*, 527 F3d at 223.

²⁰¹ *Id.*

²⁰² *Id.* at 225, citing *Gall*, 552 US at 49–50, and *Kimbrough*, 552 US at 101, 110–11.

²⁰³ *Rodríguez*, 527 F3d at 227.

ations.²⁰⁴ Additionally, the court drew attention to the Supreme Court's refusal in *Kimbrough* to "read any implicit directive into . . . congressional silence."²⁰⁵

The court then recognized several arguments for overturning its precedent on fast-track disparity. First, the court emphasized that "[l]ike the crack/powder ratio, fast-track departure authority has been both blessed by Congress and openly criticized by the [USSC]."²⁰⁶ Therefore, the fast-track programs do not "exemplify the [Sentencing] Commission's exercise of its characteristic institutional role."²⁰⁷ The court read *Kimbrough* to hold that the Guidelines deserve less deference when they are not the product of the Commission's rigorous, scientific procedure.²⁰⁸

Next the court noted that in its "pre-*Kimbrough*" decisions it had asked the "isthmian question" of whether fast-track disparity could be considered under § 3553(a)(6).²⁰⁹ But *Kimbrough*'s "organic reading of section 3553(a) suggests that a sentencing judge should engage in a more holistic inquiry."²¹⁰ The sentencing statute is "more than a laundry list of discrete sentencing factors; it is, rather, a tapestry of factors, through which runs the thread of an overarching principle."²¹¹ The court identified this "parsimony principle"²¹² in § 3553(a)'s broad directive that district courts should "impose a sentence sufficient, but not greater than necessary," to achieve the goals of sentencing.²¹³ "This inquiry should be guided by, but not made unflinchingly subservient to, the concerns expressed in the statute's various sub-parts."²¹⁴ Therefore, a sentencing court should not reject an argument for a below-Guidelines sentence until it has considered how the alleged disparity is implicated by the "constellation" of sentencing factors.²¹⁵ The court held that "even if a specific sentencing rationale cannot be considered

²⁰⁴ Id at 225–26.

²⁰⁵ Id at 226, quoting *Kimbrough*, 552 US at 103.

²⁰⁶ *Rodríguez*, 527 F3d at 227.

²⁰⁷ Id, quoting *Kimbrough*, 552 US at 109.

²⁰⁸ *Rodríguez*, 527 F3d at 227. Consider Comment, *Deviations Based on Policy Disagreements*, 122 Harv L Rev 326, 331–36 (2008) (arguing that *Kimbrough* showcased an "indeterminate" view of when sentencing courts can diverge from the Guidelines, meaning some Guidelines deserve less deference than others).

²⁰⁹ *Rodríguez*, 527 F3d at 227–28.

²¹⁰ Id at 228.

²¹¹ Id, citing *Kimbrough*, 552 US at 101.

²¹² *Rodríguez*, 527 F3d at 228.

²¹³ Id, quoting *Kimbrough*, 552 US at 101 and 18 USC § 3553(a).

²¹⁴ *Rodríguez*, 527 F3d at 228.

²¹⁵ Id.

under the aegis of a particular sub-part” of § 3553(a), such a bar does not prevent its consideration under “the full panoply” of § 3553(a).²¹⁶

Ultimately, the court held that *Kimbrough* opened the door for judges to consider fast-track sentencing disparities “within the overall ambit of 18 U.S.C. § 3553(a).”²¹⁷ The First Circuit reasoned that the fast-track authorization in § 401(m)(2)(B) of the PROTECT Act was not a bar. “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, the PROTECT Act . . . contains no such express directive.”²¹⁸ Section 401(m)(2)(B) “authorizes the Sentencing Commission to issue a policy statement,” but it says nothing about how courts must sentence or whether they may “deviate from the guidelines based on fast-track disparity.”²¹⁹ “*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.”²²⁰ Essentially, the First Circuit held in *Rodríguez* that lower courts may consider fast-track disparities when imposing sentences unless Congress unambiguously bars them from doing so, and it did not read such a statutory bar in § 401(m)(2)(B) of the PROTECT Act.²²¹

The Third Circuit jumped into the circuit split in *United States v Arrelucea-Zamudio*,²²² where the court “clarif[ied]” its precedent and held that “under the logic of *Kimbrough*, it is within a sentencing judge’s discretion to consider a variance from the Guidelines on the basis of a fast-track disparity.”²²³ The defendant, Pedro Manuel Arrelucea-Zamudio, like the defendants in the other circuits’ decisions, pled guilty to illegal reentry and requested a below-Guidelines sentence based on the fast-track disparity.²²⁴ The district court rejected his request due to the Circuit’s pre-*Kimbrough* precedent,²²⁵ and Mr. Arrelucea-Zamudio appealed.

²¹⁶ Id at 229.

²¹⁷ Id.

²¹⁸ *Rodríguez*, 527 F3d at 229 (citation omitted).

²¹⁹ Id.

²²⁰ Id at 230.

²²¹ Id at 229.

²²² 581 F3d 142 (3d Cir 2009).

²²³ Id at 143.

²²⁴ Id at 143–44.

²²⁵ Id at 144. See *Vargas*, 477 F3d at 98 (holding that the disparity between sentences in fast-track and non-fast-track districts is authorized by Congress and therefore not unwarranted under § 3553).

The Third Circuit's pre-*Kimrough* precedent on the fast-track disparity, like the precedent in other circuits, depended on the premise that the fast-track disparity was authorized by the PROTECT Act and that "any sentencing disparity authorized through an act of Congress cannot be considered 'unwarranted.'"²²⁶ In *Arrelucea-Zamudio*, the court determined that this "interpretation is no longer the view of our Court in light of *Kimrough*'s analytic reasoning."²²⁷ The Third Circuit's opinion explicitly rejected the interpretation of the PROTECT Act used by the Fifth, Ninth, and Eleventh Circuits.²²⁸ The Court described those decisions as striking a false equivalence: "The crux of the argument is that the PROTECT Act's congressional directive sanctioning fast-track programs in certain judicial districts necessarily authorizes disparate sentencing of immigration defendants between fast-track and non-fast-track districts, so that the disparity is not 'unwarranted' under § 3553(a)(6)."²²⁹ Like the First Circuit,²³⁰ the Third Circuit reasoned that "[t]he PROTECT Act contains no express congressional fast-track directive that would constrain a sentencing judge's discretion to vary from the Guidelines."²³¹ Seeing no statutory bar, the Third Circuit determined that a sentencing court could consider the fast-track disparity under the "totality of § 3553(a) factors,"²³² guided, "in particular," by the "parsimony provision."²³³

* * *

In summary, five circuits have now reconsidered the fast-track disparity question in light of *Kimrough*, and a split has developed. Each court has primarily based its decision on the one-sentence authorization in § 401(m)(2)(B) of the PROTECT Act, as interpreted in the wake of *Kimrough*. One side holds that the disparity is not "un-

²²⁶ *Vargas*, 477 F3d at 100.

²²⁷ *Arrelucea-Zamudio*, 581 F3d at 149. The Third Circuit's explanation of its prior precedent rule implies a less sticky rule than was announced by either the Eleventh or Ninth Circuits. Compare *id.* at 149 n 6 ("[A] panel may reevaluate a precedent in light of intervening authority.") with *Vega-Castillo*, 540 F3d at 1236–37 (noting that the court is bound by prior precedent unless it is directly overruled en banc or by the Supreme Court); *Gonzalez-Zotelo*, 556 F3d at 740 (noting that a panel must follow prior precedent unless a relevant court of last resort effectively overrules the decision or undercuts its reasoning). See also notes 169–71, 178–79 and accompanying text.

²²⁸ *Arrelucea-Zamudio*, 581 F3d at 150.

²²⁹ *Id.*

²³⁰ See *Rodríguez*, 527 F3d at 229. See also note 218 and accompanying text.

²³¹ *Arrelucea-Zamudio*, 581 F3d at 150–51.

²³² *Id.* at 149.

²³³ *Id.* at 155.

warranted” because Congress must have intended to create the fast-track disparity.²³⁴ The other side of the split holds that Congress’s authorization did not *explicitly* limit discretion, and therefore does not overcome *Kimbrough*’s presumption in favor of broad judicial discretion.

It is impossible to resolve the split by focusing on the “plain meaning” of § 401(m)(2)(B) in isolation, because the statute can be reasonably read to support either side. The Fifth Circuit²³⁵ is correct that Congress necessarily meant to create a fast-track disparity when it only authorized fast-track programs in some judicial districts. It must have been obvious to Congress that by authorizing the programs in some districts, but not others, a disparity would emerge. Since Congress did not amend § 3553(a) at that time, the appropriate inference is that Congress did not consider the fast-track disparity to be an “unwarranted disparity” under § 3553(a)(6).²³⁶

But the First Circuit also has a plausible reading of § 401(m)(2)(B). The authorization does not *explicitly* restrict judicial discretion. Congress restricted judicial discretion elsewhere in the Feeney Amendment, but the Supreme Court excised those provisions in *Booker*. The remaining statute does not explicitly restrict courts from granting below-Guidelines sentences to mitigate the fast-track disparity, and *Kimbrough* requires explicit language from Congress to limit judicial discretion.

IV. SOLUTION: REINTERPRETING CONGRESSIONAL INTENT

In attempting to resolve this split, the first step courts have taken is to look at the plain language of the statute. However, as explained above, § 401(m)(2)(B) does not offer a clear solution. The typical next step—assessing Congress’s specific intent²³⁷ in enacting § 401(m)(2)(B)—is also of limited usefulness for two reasons. First, “[t]he legislative history of the sentencing provisions . . . in the 2003

²³⁴ The Fifth Circuit actually argued that Congress *explicitly* mandated the disparity. See notes 162–63 and accompanying text.

²³⁵ For convenience, this Comment refers to the antidiscretion side of the circuit split as the “Fifth Circuit” position, while referring to the prodiscretion side as the “First Circuit” position.

²³⁶ See *Marcial-Santiago*, 447 F3d at 718 (“By authorizing fast-track programs without revising the terms of § 3553(a)(6), Congress was necessarily providing that the sentencing disparities that result from these programs are warranted and, as such, do not violate § 3553(a)(6).”).

²³⁷ Consider Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 Stan L Rev 1833, 1883–85 (1998) (describing two different types of legislative intent—specific intent versus general legislative purpose); William N. Eskridge, Philip P. Frickey, and Elizabeth Garrett, *Legislation and Statutory Interpretation* 213–18 (Foundation 2000) (critiquing the specific intent inquiry and explaining its shortcomings—problems of aggregation of intent, attribution of intent, interpretation, and changed circumstances).

PROTECT Act is somewhat sparse.”²³⁸ Second, since the Supreme Court has eliminated most congressional restrictions on sentencing discretion, it is impossible to implement Congress’s intended limits on downward departures. Therefore, this Comment focuses on a broader purposivist inquiry.²³⁹ What overarching objectives are detectable in Congress’s thirty-year campaign of sentencing reform? How do these congressional objectives inform our reading of § 401(m)(2)(B)?

Part IV.A argues that, based on the history of congressional sentencing reform, granting sentencing courts the discretion to mitigate the fast-track disparity is most supportive of Congress’s two broad goals: imposing harsh sentences and reducing disparities. By contrast, the approach of the Fifth Circuit imposes harsh sentences for only a tiny fraction of offenders. Since the vast majority of offenders are already prosecuted in fast-track districts, the aggregate gain from this approach is slight. Further, this approach creates an enormous disparity between defendants. This Comment argues that the First Circuit’s approach is superior—even though it may allow a small increase in lenient sentences—because it is so supportive of sentencing uniformity.

Part IV.B then argues that granting sentencing courts the discretion to mitigate the fast-track disparity is also more consistent with the Supreme Court’s recent case law. In *Kimbrough*, the Court noted that even in the face of congressional disfavor, judges have discretion to impose below-Guidelines sentences if such sentences are required by the parsimony clause of § 3553(a).²⁴⁰ Again and again, the Supreme Court has decreed that sentencing courts have broad authority to craft individually appropriate sentences. This Comment argues that the First Circuit’s approach is superior because it is more faithful to the Supreme Court’s recent jurisprudence.

A. Congressional Intent Justifies Granting Sentencing Courts the Discretion to Mitigate the Fast-Track Disparity

As explained in Part I, over the past thirty years, Congress has consistently worked toward building a sentencing system that dis-

²³⁸ United States Sentencing Commission, *Downward Departures Report* at B-28 (cited in note 31).

²³⁹ See Eskridge, Frickey, and Garrett, *Legislation and Statutory Interpretation* at 220–22 (cited in note 237) (defining purposivism as inquiring into a statute’s goals and lauding this approach for allowing statutory interpretation to adapt to new circumstances). Consider, as an analogy, the approach taken by the Court in *Booker*, 543 US at 246 (seeking to determine what “Congress would have intended” “had it known” about the unconstitutionality of certain portions of the sentencing statutes).

²⁴⁰ See text accompanying notes 130, 144–48.

penses harsh sentences and limits unwarranted disparities. Congress's various attempts to restrict judicial discretion were designed to accomplish these two goals. A solution to the fast-track circuit split which does not serve these congressional goals is unlikely to be convincing, since they have been central to the last thirty years of sentencing reform. Therefore, this Comment argues that the two sides of this circuit split should be assessed according to how successfully they achieve the congressional goals of promoting harsh sentencing and reducing unwarranted disparities. While limiting judicial discretion may have supported these congressional goals in other circumstances, in the context of fast-track programs, such discretion is in fact supportive of Congress's broader goals.

Giving trial courts the discretion to consider the fast-track disparity at sentencing supports the congressional objectives behind the PROTECT Act by significantly eliminating an odd geographic disparity and only minimally reducing the harshness of sentences. Consider the weakness of the approach advocated by the Fifth Circuit, wherein § 401(m)(2)(B) is interpreted to prohibit courts from considering a fast-track disparity at sentencing. The few offenders prosecuted in non-fast-track districts will receive *extremely* harsh sentences, while the majority of defendants nationwide receive lenient fast-track sentences.²⁴¹ This does not undermine the harshness of sentences. But because it only adds a small number of severe sentences, it does little to increase the nationwide aggregate harshness of sentences for all of these offenders. And this interpretation maintains the significant disparity between defendants in fast-track districts and those sentenced in other jurisdictions. Again, this only implicates the handful of offenders prosecuted in non-fast-track districts, but the disparity is enormous: in the cases underlying the circuit split, the disparity amounted to an increase in sentence length of roughly 50 to 100 percent.

At first blush, the increase in disparity seems balanced by the increase in harshness: defendants charged in non-fast-track districts suffer a significant disparity, but receive significantly harsher sentences. But harshness without uniformity was never Congress's intention. The conservative side of the SRA coalition wanted to eliminate the lenien-

²⁴¹ See United States Sentencing Commission, *Final Report on the Impact of United States v Booker on Federal Sentencing* 141–42 (2006) (citing statistics demonstrating that very few immigration cases are sentenced in the seventy-eight non-fast-track districts, and that the sentences imposed in non-fast-track districts rarely include downward departures). In 2007, for example, more than 79 percent of immigration cases were sentenced in the sixteen districts with fast-track programs for illegal reentry. Author's analysis of Bureau of Justice Statistics, Federal Justice Statistics Resource Center, online at <http://fjsrc.urban.org> (visited Nov 14, 2009).

cy of discretionary sentencing, but it was always thought that leniency would be eliminated through forced uniformity. “[T]he [Sentencing Reform] [A]ct and its legislative history demonstrate that Congress’s overriding concern was to reduce disparity thought to result from the exercise of judicial discretion in sentencing.”²⁴² Randomized harshness was certainly never the goal. “Conservatives and law enforcement interests” pushed for determinate sentencing for two main reasons.²⁴³ First, they wanted to end the practice of parole boards “releas[ing] prisoners who continued to pose a danger to society.”²⁴⁴ Second, they believed that requiring clear, determinate sentences would induce judges to incarcerate more defendants, which, “in turn, might increase the deterrent and incapacitative effects of the criminal law.”²⁴⁵ Even when pressing for a harsher sentencing regime, conservatives clearly advocated a sentencing regime that was uniform.²⁴⁶

Furthermore, the Fifth Circuit’s approach would hardly seem desirable to the liberals who “expressed particular concern that permitting the exercise of discretion compromised the ideal of equal treatment under the law.”²⁴⁷ Liberal reformers would not have interpreted this significant disparity as counterbalanced by the increase in harshness. To see those two in balance requires conceptualizing unwarranted disparities as a problem solely for the archetypal frustrated prisoner, suffering a disparately harsh sentence in a non-fast-track district. But liberal reformers believed that unwarranted disparities were broadly and “fundamentally at odds with ideals of equality and the rule of law.”²⁴⁸ Unwarranted disparities are not just a problem for

²⁴² Anderson, Kling, and Stith, 42 J L & Econ at 272 (cited in note 16).

²⁴³ Jonathan D. Casper, *Determinate Sentencing and Prison Crowding in Illinois*, 1984 U Ill L Rev 231, 236.

²⁴⁴ *Id.* (noting that evidence on recidivism suggested that parole boards were not very good at determining when prisoners had been rehabilitated).

²⁴⁵ *Id.* See also note 95 and accompanying text.

²⁴⁶ *Reform of the Federal Criminal Laws*, Hearings on SB 1437 before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary, 95th Cong, 1st Sess 8575, 8580–81 (June 7, 1977) (statement of Sen Lloyd Bentsen) (“We see a situation where a judge in one part of the country gives them a tap on the wrist. In another part of the country, they may be sentenced for an exceedingly long period of time for, in effect, the same crime.”); *id.* at 8996–97 (June 20, 1977) (statement of Ronald L. Gainer, Acting Deputy Assistant Attorney General, Office for Improvements in the Administration of Criminal Justice) (arguing that sentencing disparities are unfair and undermine the deterrent effect of the criminal justice process).

²⁴⁷ Anderson, Kling, and Stith, 42 J L & Econ at 272 (cited in note 16).

²⁴⁸ Stith and Koh, 28 Wake Forest L Rev at 227 (cited in note 13). See also Frankel, *Criminal Sentences* at 7 (cited in note 11) (“The result . . . [of indeterminate sentencing] is a wild array of sentencing judgments without any semblance of the consistency demanded by the ideal of equal justice.”).

the defendant who suffers an unfairly harsh sentence; disparities pose a justice problem for the system as a whole. On this broader view, the equities are no longer in balance. Since only a small minority of defendants are prosecuted in non-fast-track districts, the Fifth Circuit's approach causes a small increase in aggregate harshness. But the Fifth Circuit's approach creates a *fundamental* nationwide inequality that is contrary to equal treatment under the law.

Permitting sentencing courts to mitigate the fast-track disparity better supports the goals of harshness and uniformity. Admittedly, the harshness of *some* sentences would be diminished. If courts in non-fast-track districts are permitted to give below-Guidelines sentences, then the small fraction of offenders prosecuted for these offenses in non-fast-track districts could receive more lenient sentences.²⁴⁹ But because only a small fraction of these offenses are prosecuted in non-fast-track districts, this interpretation of the PROTECT Act does little to undermine the aggregate harshness of sentences. More importantly, this approach allows sentencing courts to mitigate an astonishingly large disparity.

This argument focuses on promoting the congressional goals of harsh sentencing and reducing unwarranted disparities for two reasons—because Congress has consistently advocated those goals, and because legislators actually justified fast-track sentencing as a way to promote a broad form of harshness and uniformity.²⁵⁰ Admittedly, “the [Sentencing Reform] [A]ct and its legislative history demonstrate that Congress’s overriding concern was to reduce disparity thought to result from the exercise of judicial discretion in sentencing.”²⁵¹ But, in the fast-track case, ironically, the only way to reduce disparity is actually to *increase* judicial discretion.

There are counterarguments to this Comment's proposed solution. One argument is that Congress's authorization of lenient fast-track programs in only some districts seems, on its face, to directly conflict with the broader congressional goals of harsh and uniform sentences. The argument is that a solution to the fast-track split should not prioritize those overarching goals when Congress seems to have rejected them

²⁴⁹ This may not add more below-Guidelines sentences if, without the “unwarranted disparity” argument, sentencing courts are already imposing lenient sentences under less contested § 3553(a) factors. Or perhaps there will not be more below-Guidelines sentences because courts will decline to impose below-Guidelines sentences in these cases because they do not find the disparity unwarranted, or because the defendants are otherwise undeserving of such a downward departure.

²⁵⁰ See notes 76–77 and accompanying text.

²⁵¹ Anderson, Kling, and Stith, 42 J L & Econ at 272 (cited in note 16).

in § 401(m)(2)(B). However, this concern is addressed by either of two responses. First, there is a narrow response, which focuses on the PROTECT Act's restrictions on fast-track programs. Second, there is a broad response, which looks at how fast-track programs promote harshness and prevent unwarranted disparities in the aggregate.

The narrow response is that the PROTECT Act imposed significant restrictions on downward departures compared to then-existing fast-track programs. Prior to § 401(m)(2)(B), prosecutors used fast-track sentencing in roughly half of all judicial districts,²⁵² the programs were inconsistent, and some of them granted enormous sentence reductions.²⁵³ Section 401(m)(2)(B) is only one sentence long, but it restricted the offense-level reduction to four levels, and required each program to be authorized by both the Attorney General and the local US Attorney. If one interprets fast-track programs as promoting leniency and disparity, then the PROTECT Act is a tough restriction on those programs. Congress's goal was to reduce disparities and increase harshness.

The broad response is that fast-track sentencing is supportive of harsh sentences and reduces unwarranted disparities if one considers the aggregate universe of offenders, not just those who are apprehended and sentenced.²⁵⁴ Pre-fast-track, prosecutors imposed harsh sentences on a tiny fraction of offenders but did not charge the vast majority. Fast-track programs allow prosecutors to charge more offenders, thereby increasing aggregate harshness. Also, without fast track, a few offenders are sentenced harshly, while the vast majority of offenders are not prosecuted at all.²⁵⁵ Congressman Feeney specifically declared that the fast-track authorization in § 401(m)(2)(B) was designed to reduce this *intradistrict* disparity.²⁵⁶ Thus, by taking a broader look at the entire class of offenders, and not just those offenders

²⁵² United States Sentencing Commission, *Downward Departures Report* at 64 (cited in note 31).

²⁵³ See, for example, Bersin and Feigin, 12 *Georgetown Immig L J* at 300-02 (cited in note 40) (describing how defendants subject to a maximum penalty of twenty years were permitted to plead to a lesser charge carrying a maximum sentence of only two years).

²⁵⁴ For an example of this broad conception of the criminal justice system, see Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 *J Polit Econ* 169, 176-79 (1968) (asserting that the expected utility, or disutility, of a criminal offense is a function of both the severity of the proscribed penalty and the probability of that sentence being imposed). The "deterrent" purpose of sentencing in § 3553(a)(2)(B) justifies this aggregate definition for harshness. The other purposes of sentencing are not implicated because this Comment assumes that fast-track sentences, already available to roughly 80 percent of offenders, adequately serves these purposes. See note 241.

²⁵⁵ See notes 76-77 and accompanying text.

²⁵⁶ See note 77.

charged by prosecutors, one sees that Congress actually *did* increase the harshness and uniformity of sentencing when it authorized fast-track sentencing.

Another potential counterargument is that Congress passed a statute that necessarily created a disparity. While Congress generally advocates for harshness and reducing disparities, the simple text of this statute creates a disparity, and therefore, courts should not have the discretion to mitigate it. This reasoning only makes sense because Congress was legislating against a background rule of mandatory Guidelines and limited judicial discretion. Without mandatory Guidelines, § 401(m)(2)(B) does not necessarily create a disparity. So, this counterargument, dependent as it is on an implied background of limited judicial discretion, is no longer convincing. Recent Supreme Court decisions now hold that judicial discretion is robust and cannot be undermined even by implicit congressional intentions.

B. Recent Supreme Court Jurisprudence Strongly Supports Discretion

The Supreme Court's recent sentencing decisions also militate in favor of the First Circuit's approach to the fast-track circuit split. As Part II explained, the Supreme Court has repeatedly held that sentencing courts have broad discretion to decide the appropriate sentence for each defendant. The Court has held that sentencing decisions are entitled to *deferential* appellate review.²⁵⁷ It has unshackled sentencing courts from the mandatory Guidelines.²⁵⁸ The Court has reaffirmed a deferential "abuse-of-discretion" standard for appellate review.²⁵⁹ It has also held that appellate courts may *not* presume that non-Guidelines sentences are unreasonable, nor may they demand extraordinary circumstances for sentences far outside the Guidelines.²⁶⁰ The Guidelines are so advisory that a sentencing court may not even presume a Guidelines sentence to be reasonable.²⁶¹ When the Fourth Circuit affirmed a sentencing court decision that had mistakenly stated that the Guidelines were presumptively reasonable, the Supreme Court summarily reversed.²⁶²

Instead of binding sentencing courts to mandatory Guidelines or strict appellate review, the Supreme Court has consistently held that

²⁵⁷ *Gall*, 552 US at 41.

²⁵⁸ See *Booker*, 543 US at 245, 259.

²⁵⁹ *Gall*, 552 US at 41.

²⁶⁰ See id at 47; *Rita*, 551 US at 345–56.

²⁶¹ *Rita*, 551 US at 351.

²⁶² See *Nelson v United States*, 129 S Ct 890, 892 (2009) (per curiam).

courts have broad freedom under the discretionary factors of § 3553(a). In *Booker*, the Court held that sentencing courts should “tailor the sentence in light of . . . § 3553(a)” rather than deferring completely to the Guidelines.²⁶³ In *Gall*, the Court held that the core of the sentencing decision was an analysis of whether the § 3553(a) factors supported the sentence suggested by either party.²⁶⁴ Even the *government* admitted in *Kimbrough* that sentencing courts have a “general freedom . . . to apply the [§ 3553(a)] factors.”²⁶⁵ Overall, the Supreme Court’s decisions “emphasiz[e] the breadth of a district court’s discretion to deviate from a defendant’s [Guidelines range] based on the compendium of sentencing factors mentioned in 18 U.S.C. § 3553(a).”²⁶⁶

In addition to holding that sentencing courts have broad discretion under § 3553(a), the *Kimbrough* Court made two key arguments that support this Comment’s solution. First, Congress can only cabin judicial discretion with explicit legislative action, such as when it passes statutory minimum sentences. The weakness of the Fifth Circuit’s approach is that it completely fails to identify any *explicit* congressional limit on judicial discretion.²⁶⁷ Pre-*Kimbrough* precedent from all circuits states that the fast-track disparity was only created “implicitly” or “necessarily”;²⁶⁸ even the Ninth and Eleventh Circuits continue to note that Congress never explicitly mandated the fast-track disparity.²⁶⁹

Kimbrough’s second key point was that a sentencing court has the discretion, under the parsimony clause of § 3553(a), to find that a governmentally created disparity results in sentences that are “greater than necessary” to serve the purposes of sentencing. Instead of relying on § 3553(a)(6), this argument runs from the parsimony principle. If a government-endorsed disparity is wrongheaded, then defendants on the harsh end of the disparity wrongly receive sentences that are “greater than necessary.” As the Third Circuit held, a sentencing court may “consider the disparate treatment of immigration defendants that is created by fast-track programs in determining whether a Guidelines sentence is *greater than necessary* under the § 3553(a) factors.”²⁷⁰ As the First Circuit suggested, “even if a specific sentencing rationale

²⁶³ 543 US at 245. See also *id.* at 261.

²⁶⁴ 552 US at 49–50.

²⁶⁵ 552 US at 102.

²⁶⁶ *Rodríguez*, 527 F3d at 225.

²⁶⁷ See note 163 and accompanying text.

²⁶⁸ *Id.* See also note 152.

²⁶⁹ See notes 175, 194, and accompanying text.

²⁷⁰ *Arrelucea-Zamudio*, 581 F3d at 149 (emphasis added) (“The fast-track issue should not be confined to subsection (a)(6).”).

cannot be considered under the aegis of a particular sub-part of section 3553(a), such a proscription does not bar consideration of that factor in the course of a more holistic review of the full panoply of section 3553(a) factors.”²⁷¹

Further support for the application of the parsimony principle stems from *Kimbrough*'s holding that courts do not have to pay respect to Guidelines that “do not exemplify the Commission’s exercise of its characteristic institutional role.”²⁷² The USSC did not use its empirical process to develop the fast-track policy statement—instead it cued the text directly off of Congress’s suggestion²⁷³—just as it did when writing the crack cocaine guidelines.²⁷⁴ And, of course, the USSC was always critical of the fast-track disparity.²⁷⁵

In the face of this recent Supreme Court jurisprudence, the remaining counterarguments seem quite weak. First, the Fifth Circuit distinguished *Kimbrough* as a disagreement with Guidelines policy, implying that fast-track mitigation requires disagreement with congressional policy, something that is beyond the authority of a sentencing court.²⁷⁶ But the government conceded this argument in recent filings by the Solicitor General, noting that the Supreme Court held in *Kimbrough* that a sentencing judge *may* “disagree[] with implicit congressional policy determinations that are expressed solely through directives to the Sentencing Commission.”²⁷⁷ This is in keeping with the *Booker* Court’s conclusion that it is not “possible to leave the Guidelines [] binding” in some cases and advisory in others.²⁷⁸ As this Comment was going to press, further developments have made it clear that the distinction between congressional and Guidelines policy does not distinguish the fast-track issue from *Kimbrough*. The fast-track policy statement at USSG § 5K3.1 is one of many sentencing provisions

²⁷¹ *Rodríguez*, 527 F3d at 229.

²⁷² 552 US 109.

²⁷³ United States Sentencing Commission, *Downward Departures Report* at 66–67 (cited in note 31) (“The Department of Justice requested that the Commission implement the directive regarding the early disposition programs in section 401(m) of the PROTECT Act in a similar unfettered manner by merely restating the legislative language.”).

²⁷⁴ *Id.* at 109–10.

²⁷⁵ *Id.* at 66–67.

²⁷⁶ See notes 161–64 and accompanying text.

²⁷⁷ Brief for the United States in Opposition to Petition for Certiorari, *Gomez-Herrera v United States*, No 08-5226, *9 (US filed Oct 10, 2008) (“*Gomez-Herrera* Cert Opposition Brief”), citing *Kimbrough*, 552 US at 102–03. See also Brief for the United States in Opposition to Petition for Certiorari, *Vega-Castillo v United States*, No 08-8655, *12 (US filed May 20, 2009), citing *Kimbrough*, 552 US at 102–03.

²⁷⁸ *Booker*, 543 US at 266.

crafted in response to a congressional mandate. In a sentencing dispute at the Supreme Court regarding how to interpret another one of these Guidelines, USSG § 4B1.1,²⁷⁹ the Solicitor General has again reiterated that she interprets all Guidelines to be advisory—even those mandated by a statutory act of Congress.²⁸⁰ In response to the Solicitor General's briefing the Supreme Court granted certiorari, vacated the Eleventh Circuit's decision below, and remanded the case "for further consideration in light of the position asserted by the Solicitor General in her brief filed for the United States."²⁸¹ The connection between the fast-track debate should not be minimized; the Eleventh Circuit's discredited opinion extensively cited the fast-track opinions from the Fifth and Eleventh Circuits as persuasive authority.²⁸² The Supreme Court is unlikely to be convinced that *Kimbrough* does not apply to the fast-track debate because of an implicit congressional warrant in the PROTECT Act.

Second, some courts invoke their prior precedent rules to avoid overturning pre-*Kimbrough* case law. At best, this is a legitimate avoidance of the debate's merits, but it simply requires the Supreme Court to accept certiorari in order to resolve the debate.²⁸³ At worst, hiding behind a prior precedent rule is a disingenuous attempt to avoid the lawful ruling.²⁸⁴

²⁷⁹ USSG § 4B1.1 ensures that adult defendants convicted of their third "crime of violence or [] controlled substance offense" receive extremely punitive sentences. The Guideline was created in response to the statutory order in 28 USC § 994(h) requiring that "[t]he Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for" this category of career offenders.

²⁸⁰ Brief for the United States in Support of the Petition for Certiorari, *Vazquez v United States*, No 09-5370, *9–11 (US filed Nov 16, 2009) (available on Westlaw at 2009 WL 5423020).

²⁸¹ *Vazquez v United States*, 2010 WL 154871 (US).

²⁸² See *United States v Vazquez*, 558 F.3d 1224, 1229 (11th Cir 2009) (citing *Gomez-Herrera* and *Vega-Castillo* for the proposition that where a "policy was expressly driven by Congress, a district court may not consider its disagreement with this policy in making its sentencing decisions").

²⁸³ The Court has requested a government response to the certiorari petitions filed in *Gomez-Herrera*, *Vega-Castillo*, and *Gonzalez-Zotelo*. See note 277; Brief for the United States in Opposition to Petition for Certiorari, *United States v Gonzalez-Zotelo*, No 08-10326, *11 (US filed Aug 5, 2009). The Court declined to grant certiorari in all three cases. See *Gomez-Herrera v United States*, 129 S Ct 624 (2008); *Vega-Castillo v United States*, 129 S Ct 2825 (2009); *Gonzalez-Zotelo v United States*, 2009 WL 1344552 (US). Requesting the views of the Solicitor General three times in one term suggests that the Court is quite interested in granting certiorari. See David C. Thompson and Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 Geo Mason L Rev 237, 273–77 (2009) (using empirical data to demonstrate that the court is thirty-seven times more likely to grant petitions for certiorari when it calls for the view of the Solicitor General than when it does not).

²⁸⁴ See notes 178–79 and accompanying text (discussing Judge Barkett's vigorous dissent in *Vega-Castillo*).

Third, courts note that non-fast-track defendants are not similarly situated to fast-track defendants because they have not waived their rights in the same way fast-track defendants do.²⁸⁵ Normatively, it seems unfair to ask defendants to waive substantive rights without a contemporaneous offer of a reduced sentence,²⁸⁶ and, of course, defendants can avoid this niggling complaint by offering a conditional waiver of all fast-track rights except for the right to appeal on this issue.²⁸⁷

Finally, the government claims that the First Circuit's approach infringes on prosecutorial discretion.²⁸⁸ But by congressional statute, the "court" imposes sentences under § 3553(a), not the US Attorney.²⁸⁹ Even in fast-track bargains, the sentence must meet judicial approval before it can be imposed.²⁹⁰ In a variety of other situations—for example, co-conspirator disparity²⁹¹ and reduction for substantial assistance²⁹²—a sentencing court has the discretion to impose a sentence reduction even in the face of the prosecutor's discretionary decision not to ask for such a reduction. Sentencing, in the end, is an "unquestionably judicial function."²⁹³

In summation, it is contradictory to the discretionary trend in the Supreme Court's recent case law to read § 401(m)(2)(B) as a flat ban on mitigating the fast-track disparity. The Supreme Court has clearly dictated that sentencing courts are to have broad discretion in impos-

²⁸⁵ See note 169.

²⁸⁶ See *Rodríguez*, 527 F3d at 230–31 ("Lacking the benefit of the bargain inherent in fast-track programs, a defendant cannot be expected to renounce his right to mount a defense.").

²⁸⁷ Alternatively, the Third Circuit suggests that the defendant "must demonstrate that he would have taken the fast-track guilty plea if offered (and, in so doing, waived his appellate rights, including his habeas rights but for ineffective assistance of counsel)." *Arrelucea-Zamudio*, 581 F3d at 156.

²⁸⁸ *Gomez-Herrera* Cert Opposition Brief at *10 (cited in note 277) (characterizing the decisions to create fast-track programs and offer participation to certain defendants as "classic exercises of prosecutorial discretion").

²⁸⁹ See Michael M. O'Hear, *The Duty to Avoid Disparity: Implementing 18 U.S.C. § 3553(a)(6) after Booker*, 37 McGeorge L Rev 627, 635, 643 (2006) (concluding, in light of "the language and structure of" § 3553(a)(6), "that the judiciary is authorized to make an independent evaluation . . . of what sorts of disparities are unwarranted") (emphasis added).

²⁹⁰ The sentencing court can reject a plea agreement under FRCrP 11(c)(1)(C). See *Arrelucea-Zamudio*, 581 F3d at 151.

²⁹¹ See, for example, *United States v Statham*, 581 F3d 548, 556 (7th Cir 2009) (stating that a sentencing court may be permitted to grant a below-Guidelines sentence under § 3553(a)(6) "because of a disparity with the sentence of a co-defendant").

²⁹² See, for example, *United States v Parker*, 462 F3d 273, 277 n 5 (3d Cir 2006) (noting that a district judge may find an unwarranted disparity where a prosecutor has made a motion for a "substantial assistance" downward departure for one, but not all, similarly situated codefendants).

²⁹³ *Rodríguez*, 527 F3d at 230 (reasoning that there are "no separation of powers concerns here").

ing sentences under § 3553(a). Perhaps below-Guidelines sentences in fast-track disparity cases deserve “closer [appellate] review,”²⁹⁴ but a blanket prohibition is inconsistent with a district court’s broad authority in sentencing. The First Circuit’s approach is much more faithful to the Supreme Court’s jurisprudence.

CONCLUSION

The correct solution to this split is to grant sentencing courts in non-fast-track districts the discretion to mitigate the fast-track disparity. Though it comes at a small cost to the overall length of time served for these offenses, this approach has the potential to eliminate a massive sentencing disparity. Additionally, this approach is more faithful to the Supreme Court’s recent decisions expanding judicial discretion. The legislative history, Congress’s overarching sentencing purposes, and Supreme Court case law all justify granting more discretion, rather than less, to resolve this circuit split.

²⁹⁴ *Kimbrough*, 552 US at 109 (noting that more stringent appellate review might be necessary when the sentencing judge departs from the Guidelines based solely on the judge’s belief that the Guidelines range does not properly reflect the § 3553(a) factors).

