

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -x

3 EDWARD DORSEY, SR., :

4 Petitioner : No. 11-5683

5 v. :

6 UNITED STATES. :

7 - - - - -x

8 and

9 - - - - -x

10 COREY A. HILL, :

11 Petitioner : No. 11-5721

12 v. :

13 UNITED STATES. :

14 - - - - -x

15 Washington, D.C.

16 Tuesday, April 17, 2012

17

18 The above-entitled matter came on for oral
19 argument before the Supreme Court of the United States
20 at 10:19 a.m.

21 APPEARANCES:

22 STEPHEN E. EBERHARDT, ESQ., Tinley Park, Illinois; for
23 Petitioners.

24 MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,
25 Department of Justice, Washington, D.C.; for

1 Respondent in support of Petitioners.

2 MIGUEL A. ESTRADA, ESQ., Washington, D.C.;

3 court-appointed amicus curiae, in support of the

4 judgments below.

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	STEPHEN E. EBERHARDT, ESQ.	
4	On behalf of the Petitioners	4
5	ORAL ARGUMENT OF	
6	MICHAEL R. DREEBEN, ESQ.	
7	On behalf of the Respondent	
8	in support of the Petitioners	15
9	ORAL ARGUMENT OF	
10	MIGUEL A. ESTRADA, ESQ.	
11	As the court-appointed amicus curiae,	31
12	in support of the judgments below	
13	REBUTTAL ARGUMENT OF	
14	STEPHEN E. EBERHARDT, ESQ.	
15	On behalf of the Petitioners	56
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(10:19 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 11-5683, Dorsey v. United States, and 11-5721, Hill v. United States.

Mr. Eberhardt.

ORAL ARGUMENT OF STEPHEN E. EBERHARDT

ON BEHALF OF THE PETITIONERS

MR. EBERHARDT: Mr. Chief Justice, may it please the Court:

The judges of the Seventh Circuit are unanimous in their belief that this case raises a good question. And, of course, that good question is: Why would Congress want district courts to continue to impose sentences that were universally viewed as unfair and racially discriminatory?

My colleague sitting on the other side of the podium, I submit to the Court, does not answer that question. Petitioners feel that the answer to that question can be found in the text of the Fair Sentencing Act. And while we admit that there is no express answer, the text gives us the required fair implication.

The text in section 8, the text in section

10 --

JUSTICE SCALIA: Excuse me. Is a fair

1 implication enough? You're talking here about a repeal,
2 essentially, of an earlier provision, section 109. And
3 our cases uniformly say that it -- it has to be clear
4 implication, unquestionable implication.

5 Do you think this is really clear and
6 unquestionable?

7 MR. EBERHARDT: No, it is not, but the
8 standard from this Court, Justice Scalia, is fair
9 implication, and it has been ever since Great -- the
10 Great Northern case. It -- these standards began -- I'm
11 sorry -- as a necessary implication in Great Northern,
12 moved to plain and clear implication in Hertz and
13 Woodman, and then Marrero, which is relied on heavily by
14 amicus.

15 CHIEF JUSTICE ROBERTS: Of course, the
16 statute itself says "express," right? Talking about
17 section 109.

18 MR. EBERHARDT: That is correct.

19 CHIEF JUSTICE ROBERTS: So, we're pretty far
20 removed from the language of the statute, I guess.

21 MR. EBERHARDT: But, again, ever since 1908,
22 that's a standard that this Court has not accepted. And
23 this is based on the provision, the well-settled
24 provision, that an earlier Congress cannot bind a later
25 Congress.

1 CHIEF JUSTICE ROBERTS: Oh, and I understand
2 that. But presumably -- we also have the proposition
3 that Congress, when it enacts legislation, knows the
4 law. They would have known section 109 required an
5 express statement if they wanted to apply the change
6 retroactively. So, why shouldn't we hold them to that
7 standard?

8 MR. EBERHARDT: The answer is no, I don't
9 believe that Congress felt that that was the standard.
10 Again relying on this Court's jurisprudence that said
11 you give us text and if we are able to find that the
12 fair implication and the intent of Congress through that
13 fair implication is that this new statute applies,
14 because an earlier Congress cannot bind the newer
15 Congress --

16 JUSTICE KENNEDY: Well, on your statement
17 that the --

18 JUSTICE GINSBURG: It --

19 JUSTICE KENNEDY: -- one Congress cannot
20 bind a later Congress, do you mean we're not supposed to
21 look at 109? We're not supposed to look at the
22 Dictionary Act?

23 MR. EBERHARDT: Oh, absolutely, the Court
24 is, Your Honor. And we acknowledge --

25 JUSTICE KENNEDY: So, then -- so, then the

1 fact that 109 is on the books is relevant. And -- and
2 it's not a question of one Congress binding the other.
3 It's a question of what the second Congress did.

4 MR. EBERHARDT: Yes, 109 is relevant, but
5 it's the standard to be employed in determining whether
6 or not there's a fair implication of what the later
7 Congress meant.

8 JUSTICE SCALIA: I'm really troubled by
9 "fair implication" --

10 JUSTICE GINSBURG: You're right that if
11 you're right --

12 CHIEF JUSTICE ROBERTS: Justice Scalia.

13 JUSTICE SCALIA: How many -- how many cases
14 do you have that say "fair implication" as opposed to
15 quite a few that say "clear and unquestionable
16 implication"?

17 Marrero? Is that -- is that the one case
18 you rely on?

19 MR. EBERHARDT: Fair implication from
20 Marrero --

21 JUSTICE SCALIA: From a footnote in Marrero,
22 right?

23 MR. EBERHARDT: Correct.

24 JUSTICE SCALIA: Yes. Anything else?

25 MR. EBERHARDT: Marcello.

1 JUSTICE SCALIA: Marcello? Where -- what's
2 the cite for that?

3 I mean, there are a lot of earlier cases
4 that make it clear when you're repealing a prior statute
5 if it isn't express, it has to be at least a clear
6 implication. And I'm -- I'm astounded to think that in
7 a footnote, we're suddenly going to change that to
8 simply "fair implication."

9 MR. EBERHARDT: Yes, Your Honor. You're
10 correct, a clear or a necessary, but Petitioners contend
11 that not only do we meet the fair implication
12 standard --

13 JUSTICE SCALIA: Well, that's a different
14 question. And we can talk about that. But how did
15 Marrero come out? Did it -- did it find an overruling
16 or not?

17 MR. EBERHARDT: Marrero primarily was based
18 on the fact that there was a specific provision for
19 nonretroactivity. In an alternate holding, the Court
20 held that 109 would also be relevant to the decision.

21 Marrero, though, was a habeas --

22 JUSTICE SCALIA: So, it did not find 109
23 overcome by fair implication, right?

24 MR. EBERHARDT: Correct.

25 JUSTICE SCALIA: So, it's entirely dictum,

1 right? And dictum in a footnote.

2 MR. EBERHARDT: No, I believe it is an
3 alternative holding, because the primary holding in --

4 JUSTICE SCALIA: I thought it was the other
5 way. The holding was that 109 governed. No?

6 MR. EBERHARDT: I'm sorry.

7 JUSTICE SCALIA: I thought you said the
8 holding was that section 109 governed, that it had not
9 been repealed.

10 MR. EBERHARDT: 109 was the alternative
11 holding, saying that 109 would also preclude the
12 retroactivity provision.

13 JUSTICE SCALIA: Exactly. And, therefore,
14 whatever it said about what is necessary for repeal of
15 109 was purely dictum, because it held that 109 was not
16 repealed. So, even if fair implication was the test, it
17 was not the test applied and determinative in the case.
18 So, it's dictum. And dictum in a footnote.

19 MR. EBERHARDT: I don't agree, Your Honor.

20 JUSTICE SCALIA: All right.

21 JUSTICE GINSBURG: But that's true of all of
22 the cases that you -- the cases -- you pointed to two or
23 three that use "fair implication." The Court in all
24 those cases found that there was no fair implication, so
25 that 109 governed.

1 Isn't -- isn't that so?

2 That was true in Marrero. It was true in
3 Northern Securities.

4 MR. EBERHARDT: In Marrero, the primary
5 holding was based on the fact that there was a specific
6 provision for nonretroactivity.

7 JUSTICE GINSBURG: But in none of the cases
8 that used the fair implication language did the Court
9 say: And, therefore, the old statute no longer governs.

10 MR. EBERHARDT: Correct.

11 JUSTICE GINSBURG: So, you're relying on a
12 standard that this Court did -- must have considered
13 appropriate because it deviated from the words of the
14 statute. It said it a few times. But in application,
15 it always came out the same way.

16 MR. EBERHARDT: Well, in application, when
17 the Court applied this in Marcello, when they were
18 weighing the language of the Administrative Procedure
19 Act as opposed to the language of the Immigration and
20 Nationality Act, I think the Court made clear, as it
21 went through the statute there, that there was a fair
22 implication. And then once you get to the point of fair
23 implication, it necessarily means that there is some
24 kind of an ambiguity.

25 And then the Court followed up saying that

1 we then did look to the legislative history, and the
2 legislative history backs up the implication that we did
3 find.

4 JUSTICE GINSBURG: But that was not true of
5 the 109 cases. You don't have a 109 case that said the
6 standard is fair implication, and, therefore, the old
7 statute is not enforced.

8 MR. EBERHARDT: Directly? I don't believe
9 so.

10 JUSTICE KAGAN: Do you think that --

11 JUSTICE ALITO: What do --

12 JUSTICE KAGAN: Do you think that if we
13 stick to the language of the statute, if we are, indeed,
14 looking for an express provision, do you agree that
15 there isn't any here?

16 MR. EBERHARDT: We agree there is no express
17 provision, but obviously, we also contend that going
18 back to the proposition that an earlier Congress cannot
19 bind a later, that that standard has been rejected even
20 though argued by my colleague to my left. That is no
21 longer the standard ever since --

22 JUSTICE SCALIA: Oh, I'm not sure he's
23 arguing that. I think he acknowledges, as our opinions
24 say, that it can be done by implication, but it has to
25 be clear and unmistakable implication. I think that's

1 the position he's taking.

2 Anyway, you want to tell me why this is
3 clear and unmistakable?

4 MR. EBERHARDT: When you look at the
5 language of section 8, when Congress has mandated the
6 Sentencing Commission to use their emergency authority
7 to achieve consistency with other guideline provisions
8 and applicable law, it makes clear that Congress meant
9 this needs to take effect as soon as possible. Congress
10 even said "as soon as practicable and no later than
11 90 days."

12 This would be meaningless, actually, with
13 regard to the individuals who were in this pipeline to
14 be sentenced, because there would be so few individuals
15 who would be arrested, charged, convicted, and sentenced
16 within that 90-day period that Congress could only --

17 JUSTICE ALITO: Well, there might be a few,
18 but there -- but assume that you're drafting this
19 legislation and you want it to apply only to defendants
20 who commit an offense after the enactment of the Fair
21 Sentencing Act, but you also want to do everything that
22 you reasonably can to make sure that when the very first
23 one of those defendants comes up for sentencing, there
24 will be new sentencing guidelines in effect that are
25 geared to the new lower mandatory minimums rather than

1 the old sentencing guidelines in effect.

2 Would you not provide that the -- would you
3 not require the Sentencing Commission to act as quickly
4 as possible to get the new sentencing guidelines out?

5 MR. EBERHARDT: No.

6 JUSTICE ALITO: No?

7 MR. EBERHARDT: Because of the --

8 JUSTICE ALITO: You would say take your time
9 and it doesn't matter if a few -- a few defendants who
10 are -- who commit the offense after the enactment of the
11 Fair Sentencing Act come up and they are -- they're
12 subjected to the old soon-to-be-obsolete sentencing
13 guidelines?

14 MR. EBERHARDT: No. I think it's clear that
15 the average time from charging to sentencing is going to
16 be at least 11 months. In a case where a defendant goes
17 to trial, it's going to be much more than that. So,
18 there really need be no rush on the part of Congress to
19 condense this down into 90 days. They could go through
20 their usual 120-day -- or 180-day procedure, submit
21 these to Congress, wait for approval or disapproval, and
22 things like that.

23 CHIEF JUSTICE ROBERTS: Are we just supposed
24 to assume that Congress knows that? I mean, if you had
25 asked me how long is the usual time from conviction

1 or -- I mean, arrest to conviction, I wouldn't know if
2 it's closer to 90 days or 11 months.

3 MR. EBERHARDT: I think we do, Chief
4 Justice -- Mr. Chief Justice. We have to know that
5 Congress -- Congress knows that because these are the
6 individuals who drafted the Sentencing Reform Act.

7 CHIEF JUSTICE ROBERTS: Well, right. But I
8 mean -- and we assume Congress knows the law. I don't
9 know that we can readily assume they know details such
10 as that and evaluate their -- what would your position
11 be if the Congress said do this as soon as practical
12 but, in any event, no later than 8 months from now?
13 Would we then think there's a fair implication that
14 Congress meant it to apply retroactively or not?

15 MR. EBERHARDT: On just the point of the
16 immediacy placed on by Congress, I think that would take
17 away from the fair implication that Congress meant that
18 it -- the law should be go -- or the law should be
19 effective on the date of the President's signature.

20 JUSTICE GINSBURG: Why do you pick the date
21 that the Fair Sentencing Act went into effect, if it --
22 if what -- if the guidelines, the 90-day period that the
23 Commission came out with its new guidelines on
24 November 1st, that's some time after August 3rd, which
25 is when the Sentencing Act. So, on your theory, why

1 isn't the right date the date that the Sentencing
2 Guidelines went into effect?

3 MR. EBERHARDT: The correct date is the
4 August 3rd date, Your Honor, because of the intent of
5 Congress made known through the implication of the
6 language taken in the legal context of the Sentencing
7 Reform Act. When Congress meant to correct their error,
8 I believe they made it perfectly clear that they meant
9 to correct this error as soon as possible. This has
10 been an error that had been discussed for 25 years and
11 was finally trying to be corrected.

12 And, Mr. Chief Justice, if I might reserve
13 the rest of my time.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 MR. EBERHARDT: Thank you.

16 CHIEF JUSTICE ROBERTS: Mr. Dreeben.

17 ORAL ARGUMENT OF MICHAEL R. DREEBEN

18 ON BEHALF OF THE RESPONDENT

19 IN SUPPORT OF THE PETITIONERS

20 MR. DREEBEN: Mr. Chief Justice, and may it
21 please the Court:

22 The Fair Sentencing Act manifests the
23 requisite fair and necessary implication that Congress
24 intended that its new mandatory minimum thresholds apply
25 in all sentencings after the date of the Act.

1 JUSTICE SOTOMAYOR: Do you think it's a
2 clear and unmistakable implication --

3 MR. DREEBEN: First of all --

4 JUSTICE SOTOMAYOR: -- if we're going to
5 argue about the language?

6 MR. DREEBEN: I do, Justice Sotomayor.
7 Although this Court has not used the words "clear and
8 unmistakable" to describe what it takes to overcome of
9 the presumption by section 109, it has used the
10 words --

11 JUSTICE SOTOMAYOR: Well, generally the word
12 "express" incorporates "clear."

13 MR. DREEBEN: There's no dispute here, I
14 don't think, that there's a -- a lack of an express
15 statement in the Act. But --

16 JUSTICE SOTOMAYOR: So, that -- why doesn't
17 that defeat your case?

18 MR. DREEBEN: Well, as Justice Scalia
19 explained in his concurring opinion in
20 Lockhart v. United States, one Congress cannot impose
21 standards of how another Congress is to enact
22 legislation. The subsequent Congress is free to choose
23 how it will express its will in the language or
24 structure that it sees fit. And I'd like to give an
25 example --

1 JUSTICE KENNEDY: Well, so then we -- we
2 ignore the dictionary?

3 MR. DREEBEN: No, of course not,
4 Justice Kennedy. These --

5 JUSTICE KENNEDY: And do we ignore 109?

6 MR. DREEBEN: No. It provides a background
7 presumption that overcomes the common-law rule of
8 abatement, under which, if Congress had amended a
9 statute, all prosecutions under the prior statute would
10 be deemed to be a nullity and they would not --

11 JUSTICE KENNEDY: Well, why doesn't it --
12 why doesn't that bring us right back to what 109 says?

13 MR. DREEBEN: This Court has made clear in
14 not only the section 109 cases, but I think, as my
15 colleague mentioned in *Marcello v. Bonds*, that there are
16 no magical passwords that Congress has to use to explain
17 itself.

18 And let me give an example because I think
19 that it will help to put in focus why I think the Fair
20 Sentencing Act does contain the requisite implication.
21 If Congress had written in the Fair Sentencing Act,
22 henceforth, after the date of this Act, probation
23 officers shall prepare presentence reports and submit
24 them to courts in which they shall calculate the
25 mandatory minimum penalties under the standards

1 announced in this Act, I think this Court would draw the
2 structural inference that it did not intend that
3 probation officers prepare that information for nothing.
4 They intended that it be prepared so that sentencing
5 courts would use those new mandatory --

6 JUSTICE SCALIA: Exactly, and I think we
7 would come out that way. I think you're entirely right.
8 But the accelerated -- the direction to the Guidelines
9 Commission to promulgate the guidelines on a -- on an
10 emergency basis is not, as you just put it, for nothing.
11 It has --

12 MR. DREEBEN: I agree with that,
13 Justice Scalia.

14 JUSTICE SCALIA: As Justice Alito was
15 suggesting --

16 MR. DREEBEN: No, I don't --

17 JUSTICE SCALIA: -- it has some effect.

18 MR. DREEBEN: I don't disagree with that.

19 JUSTICE SCALIA: So, it -- it's not
20 comparable to what you've just said.

21 MR. DREEBEN: Well, I think it is because
22 there's a piece of the -- that -- that section that I'd
23 like to draw the Court's attention to, because I think
24 that it critically explains what the Sentencing
25 Commission was supposed to do. Section 8 is all over

1 the briefs, but I have it in the Government's gray brief
2 at page 10a.

3 This is the section that directs the
4 Sentencing Commission to promulgate new guidelines and
5 to exercise its emergency authority -- and I'm going to
6 quote here -- "to make such conforming amendments to the
7 Federal sentencing guidelines as the Commission deems
8 necessary to achieve consistency with other guidelines
9 provisions and" -- here's the critical phrase --
10 "applicable law."

11 That phrase, "applicable law," can only mean
12 sections 2 and 3 of the Fair Sentencing Act, which are
13 the provisions that increased the thresholds of
14 quantities necessary to trigger the mandatory minimum
15 sentences.

16 JUSTICE SCALIA: That's fine. But it --
17 they apply that applicable law to those, as you say,
18 admittedly few people who have been prosecuted,
19 convicted, and are now being sentenced under that
20 applicable law.

21 MR. DREEBEN: But --

22 JUSTICE SCALIA: There may not be many of
23 them, but it does not -- it does not deprive that
24 language of all meaning.

25 MR. DREEBEN: Well, Justice Scalia, I want

1 to put this in the structural context of the Sentencing
2 Reform Act. The Sentencing Reform Act directs courts to
3 apply the version of the Sentencing Guidelines that is
4 in effect on the day of sentencing. It's not a time of
5 offense rule; it's a time of sentencing rule.

6 And there -- that means that everybody who
7 comes before the sentencing court after the date of the
8 Fair Sentencing Act when the new guidelines are in place
9 will have those guidelines applied to those defendants.
10 Those guidelines are supposed to be conformed to
11 applicable law. The only applicable law that there
12 could be is the new mandatory minimum standard.

13 JUSTICE SCALIA: Well, no, you're begging
14 the question. The -- the law applicable to pre- --
15 pre-statute offenses continues to be the prior law, and
16 the applicable law to offenses that have occurred after
17 the enactment date is the --

18 MR. DREEBEN: But that would mean,
19 Justice Scalia, that the guidelines would not be
20 conformed to applicable law for the defendants who are
21 sentenced after the FSA. They would be conformed to
22 inapplicable law. And Congress knew when it set up
23 section 3553(a) that the guidelines that would be
24 applied are the ones that are in force at the time of
25 sentencing.

1 CHIEF JUSTICE ROBERTS: So, why -- why
2 90 days? I mean, the Commission basically just took the
3 ratio under the new Act and applied it, didn't they,
4 throughout? They took the mandatory minimum formula
5 that had been changed and changed it throughout the --
6 the sentencing provisions?

7 MR. DREEBEN: Well, it was a little bit more
8 complex than that, because what -- what the FSA did was
9 two things: It lowered the mandatory minimums by
10 increasing the crack thresholds, and it targeted role in
11 the offense of the defendant for increased sentencing
12 and mitigating factors for decreased sentencing. And
13 the Commission had to translate that into new
14 guidelines.

15 It acted quickly. It was told to act as
16 soon as practicable. It was entirely possible under the
17 statute, and probably would have been desired by
18 Congress, that new guidelines would have gone into
19 effect on August 4th. At that point, the only people in
20 front of the sentencing court would have been pre-FSA
21 offenders.

22 JUSTICE BREYER: Yes, but how -- how many
23 are we talking about, say, a 3-month period? How
24 many people commit -- most people -- everybody pleads
25 guilty. They're caught quickly and sentenced quickly --

1 MR. DREEBEN: Not necessarily.

2 JUSTICE BREYER: I know not necessarily.
3 That's why I want your estimate of how many we're
4 talking about.

5 MR. DREEBEN: Well, roughly speaking, there
6 has historically been about 5,000 crack offenders a
7 year. So, that means that come --

8 JUSTICE BREYER: And how -- how long
9 historically, roughly, if you know, does it take from
10 the time the person's caught till the time he's
11 sentenced, when he pleads guilty?

12 MR. DREEBEN: We put in the brief the
13 figures from the Administrative Office of the U.S.
14 Courts, which indicate that the median figure is around
15 11 months, but --

16 JUSTICE BREYER: Eleven months?

17 MR. DREEBEN: Yes.

18 JUSTICE BREYER: But how many of -- you see
19 what I'm trying to get at. I'm trying to get at a
20 guess, if you like, of how many people we're talking
21 about. The two numbers that I can't find in the briefs
22 are roughly -- if your opponent is correct, and it only
23 applies to new people, this thing. That's the
24 applicable law. In other words, you're assuming the
25 answer -- in your answer to Justice Scalia, you're

1 assuming the answer.

2 I haven't heard an argument for it, except
3 that there are very few people that his interpretation
4 or the opposite interpretation would catch. And how
5 many were there?

6 MR. DREEBEN: I'm reluctant to guess,
7 Justice Breyer.

8 JUSTICE BREYER: About? I mean, is it more
9 like 10, or is it more like 50, is it more like 100?
10 Can you make a guess at all?

11 MR. DREEBEN: Well, let me put it this way,
12 Justice Breyer --

13 JUSTICE BREYER: All right --

14 MR. DREEBEN: I think that there -- there
15 will probably be thousands of crack defendants who will
16 be sentenced under the old mandatory minimums that
17 Congress repealed because they were perceived as being
18 racially disparate and unfair and --

19 JUSTICE BREYER: It isn't obvious to you
20 what I'm trying to get at.

21 MR. DREEBEN: Well --

22 JUSTICE BREYER: You -- you see what I'm
23 trying to get at? I guess --

24 MR. DREEBEN: I don't think that Congress
25 balanced numerically --

1 JUSTICE BREYER: No, no.

2 MR. DREEBEN: -- the numbers --

3 JUSTICE BREYER: But you're saying it would
4 be absurd to think that this section 8 has to do only
5 with prior -- the pre-enactment offenses. Absurd, all
6 right? If there's just likely to be one person, I tend
7 to buy your absurdity argument. If there's likely to be
8 500 or 1,000, I'm much less certain.

9 MR. DREEBEN: I'm not making an absurdity
10 argument, Justice Breyer. The argument that I'm making
11 is that when Congress directed the Commission --

12 JUSTICE BREYER: Yes.

13 MR. DREEBEN: -- to conform the guidelines
14 to applicable law, the only applicable law that it could
15 have had in mind --

16 JUSTICE BREYER: No, that argument -- of
17 course, they could have had both in mind. They could
18 have had applicable law for the new people is our new
19 statute; applicable for the old people, you don't need
20 any amendment, we're not talking about that, just apply
21 the old law.

22 MR. DREEBEN: But they don't --

23 JUSTICE BREYER: That made perfect sense.

24 MR. DREEBEN: But the Sentencing Reform
25 Act -- it doesn't make perfect sense, because the

1 Sentencing Reform Act is set up to apply new guidelines
2 to people based on date of sentencing.

3 JUSTICE SCALIA: New guidelines to what
4 people? That's the issue.

5 MR. DREEBEN: Everybody.

6 JUSTICE SCALIA: If it's only new -- you're
7 begging the question again.

8 MR. DREEBEN: No, I don't believe so,
9 Justice Scalia.

10 JUSTICE SCALIA: If it's -- if it's only to
11 people who have committed their offenses after that Act,
12 then you have one set of applicable guidelines for those
13 people, and you leave in effect, for people who
14 committed their offense before the -- the enactment
15 date, the prior guidelines. I don't think there's
16 anything necessarily implied by -- by this provision to
17 the effect that --

18 MR. DREEBEN: Justice Scalia --

19 JUSTICE SCALIA: -- there is only in the
20 future one set of guidelines applied, you know, one
21 guideline fits all. I don't think that's --

22 MR. DREEBEN: Let me refer to the statute
23 because the statute answers this question differently
24 than the way Your Honor has assumed it works. Okay? On
25 page 30a of our appendix, we reproduce section 3553(a),

1 and 3353(a)(4) establishes that when a --

2 JUSTICE SCALIA: Excuse me. 30a?

3 MR. DREEBEN: 30a -- I'm sorry, 39a.

4 JUSTICE SCALIA: 39a.

5 MR. DREEBEN: Sorry about that.

6 The -- the Sentencing Reform Act provides
7 that the applicable set of guidelines that will be
8 applied are those that are in effect on the date that
9 the defendant is sentenced. This is 3553(a)(4)(A)(ii).
10 And that provision has been in the Sentencing Reform Act
11 since the -- since the time the Sentencing Reform Act
12 was enacted. And Congress explained, for those who read
13 legislative history, that it wanted -- and I am going to
14 quote here from the legislative history: "The
15 guidelines and policy statements to be applied are those
16 in effect at the time of sentencing."

17 Congress's reason for that was it wanted the
18 most sophisticated statements available that will most
19 appropriately carry out the purposes of sentencing, and
20 to impose a sentence under outmoded guidelines will
21 foster irrationality in sentencing and would be contrary
22 to the goal of consistency in sentencing. So --

23 JUSTICE SCALIA: What is section 3742(g),
24 which was --

25 MR. DREEBEN: That provides that if a case

1 is reversed on appeal and sent back for resentencing,
2 the original set of guidelines that were applied at the
3 date of the initial sentencing shall be used. It's an
4 exception to the general rule.

5 JUSTICE ALITO: Could I ask you this about
6 your argument? Because I do think the one you're
7 stressing now is a -- is a good argument and your best
8 one. But what troubles me is that an earlier bill, H.R.
9 265, which contained the provision that says "there
10 shall be no retroactive application of any portion of
11 this Act" contains the very language that you're
12 stressing now.

13 So, how do you reconcile that?

14 MR. DREEBEN: Well, first of all,
15 Justice Alito, what that bill would have done is
16 postpone the effective date for 180 days so that there
17 could be synchronicity between the guidelines and the
18 new mandatory minimums. The retroactivity that it was
19 concerned about would have reopened final sentences.
20 There's no question here about reopening final
21 sentences. So, that bill was explicit: We don't want
22 to reopen final sentences.

23 The Government is not asking for reopening
24 of final sentences.

25 JUSTICE ALITO: No, I understand that. But

1 wouldn't you want -- the problem that you're -- maybe --
2 I understand your argument to be that the language
3 you're stressing now will mean, if this applies only to
4 post-enactment offenders, that there will be defendants
5 who will be sentenced to -- under the -- under old --
6 under the old mandatory minimums but the new guidelines.

7 MR. DREEBEN: Correct.

8 JUSTICE ALITO: Would that not occur under
9 the -- clearly occur under H.R. 265?

10 MR. DREEBEN: No, I don't think so, because
11 that -- that bill was designed to postpone the effective
12 date for 180 days.

13 I think everyone in Congress understood that
14 these guidelines had undermined the credibility of the
15 criminal justice system for years. The Sentencing
16 Commission had four times submitted reports to Congress
17 that bemoaned the fact that they were not only
18 inconsistent with the purposes of --

19 JUSTICE SCALIA: Okay. But I mean -- yes,
20 that's very nice, but let's talk about text, not what
21 about the emotions of Congress.

22 This section that you quoted, (a) -- what,
23 (4)(A)(ii) --

24 MR. DREEBEN: Yes.

25 JUSTICE SCALIA: -- of section 3553(a) --

1 MR. DREEBEN: Yes.

2 JUSTICE SCALIA: Is that in the new statute?

3 MR. DREEBEN: No. That's part of the
4 Sentencing Reform Act from the beginning of the
5 guidelines. It was --

6 JUSTICE SCALIA: It was in effect --

7 MR. DREEBEN: Yes.

8 JUSTICE SCALIA: It was not the amendment.

9 MR. DREEBEN: No. No.

10 JUSTICE SCALIA: Congress didn't insert
11 that --

12 MR. DREEBEN: It was --

13 JUSTICE SCALIA: -- when it made this
14 amendment. You're just saying that that is the
15 incidental effect of the provision that Congress did
16 adopt?

17 MR. DREEBEN: No, I'm saying that the
18 background principle that our legislators are familiar
19 with the law surely applies to sentencing law; and
20 Congress understood that once the new guidelines were in
21 effect, which it wanted to happen as soon as
22 practicable, they would be applied to all defendants in
23 the system based on time of -- of sentencing, not time
24 of offense. And it wanted those guidelines to be
25 conformed to applicable law.

1 And it is very strange to say that it wanted
2 new guidelines in effect to be conformed to inapplicable
3 law such that there would be the incongruous result that
4 the new guidelines that finally fixed this egregious
5 problem in the criminal justice system would be
6 irrelevant for many defendants because they would still
7 be living under the 100-to-1 racially disparate impact
8 effect of the guidelines, of these --

9 JUSTICE SOTOMAYOR: Mr. Dreeben, almost any
10 law that repeals a prior penalty is doing so because the
11 legislature determines that that prior penalty is unjust
12 in some way, because why do you eliminate a penalty
13 unless you think it is necessary to do so and that it's
14 unjust or unjust in some way?

15 So, what makes this repeal particularly
16 different so that the exception doesn't swallow the
17 rule, because you can argue in almost any situation that
18 the repeal is of something that's unjust?

19 MR. DREEBEN: Mr. Chief Justice, may I
20 answer the question?

21 CHIEF JUSTICE ROBERTS: Certainly.

22 MR. DREEBEN: Justice Sotomayor, what's
23 unique about this context is that there's a confluence
24 between the way that the guidelines treated crack and
25 the way that the statutes treated crack. And for years,

1 the Sentencing Commission had said: We can't fix this
2 problem with the guidelines alone; we need the help of
3 Congress to alter the mandatory minimums.

4 And once you do that, give us emergency
5 authority so that we can put new guidelines into place
6 that will work hand-in-glove with the new mandatory
7 minimums, as the Chief Justice explained, so that all
8 defendants who come before the Court will not be subject
9 to the discredited crack policy that Congress had
10 repealed.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Mr. Estrada.

13 ORAL ARGUMENT OF MIGUEL A. ESTRADA,

14 AS THE COURT-APPOINTED AMICUS CURIAE,

15 IN SUPPORT OF THE JUDGMENTS BELOW

16 MR. ESTRADA: Thank you, Mr. Chief Justice,
17 and may it please the Court:

18 I think this is a difficult case for public
19 policy but is not a difficult case for legal doctrine.

20 Fairness is on both sides --

21 JUSTICE SOTOMAYOR: Mr. Estrada, what's so
22 difficult for a legal doctrine to say that when Congress
23 has made a finding that a law has a discriminatory
24 impact -- because I always thought that when
25 discrimination was at issue, that we should do as speedy

1 a remedy as we could, because it is one of the most
2 fundamental tenets of our Constitution, as has been
3 repeatedly emphasized in case after case, that our laws
4 should be -- should be enforced in a race-neutral way.

5 Once Congress has said this law's not being
6 enforced in a race-neutral way, we want to fix it, why
7 shouldn't our presumption be that the fix is immediate
8 rather than delayed?

9 MR. ESTRADA: Because I think it would be
10 wrong to assume that the passage of the Act reflects
11 Congress's concession of intentional discrimination. I
12 think it does recognize that there were members of
13 Congress that had concerns about the disparate impact of
14 the law.

15 JUSTICE SOTOMAYOR: Mr. Estrada, I've been a
16 judge for nearly 20 years, and I don't know that there's
17 one law that has created more controversy or more
18 discussion about its racial impact than this one.

19 MR. ESTRADA: Absolutely.

20 JUSTICE SOTOMAYOR: I don't think there is
21 any other law that had as much conversation about its
22 racial implications than this one.

23 MR. ESTRADA: Justice Sotomayor, that is
24 absolutely right. But it is very significant that for
25 20 years we had this argument. The Sentencing

1 Commission, as the Government points out, went to
2 Congress again and again and again to say we don't agree
3 with this, this makes no sense. And for 20 years,
4 Congress could not bring itself to change it because
5 there was no agreement on the part of the lawmakers that
6 the public policy was that easy.

7 And the fact is you have a whole assortment
8 of bills that were considered by Congress in the last
9 several sessions. For people who believe legislative
10 history is significant, they're all very instructive.
11 Most of them did a variant of the same thing. Most of
12 them have very identical language, even some of the
13 language that's at issue here.

14 They had different proposals. There was one
15 for 24:1, another one -- there were many one to one. It
16 was clear that Congress could not bring itself to an
17 agreement as to what the right answer was.

18 JUSTICE SOTOMAYOR: Well, but this --

19 JUSTICE KAGAN: Mr. Estrada, I mean, that's
20 true, that it took Congress a long time to decide to do
21 this. I think the question is, once having decided to
22 do this, what did it decide to do; and whether it would
23 make sense, once having decided to do this, to have the
24 guidelines be the new guidelines, but the mandatory
25 minimums be the old mandatory minimums.

1 And what everybody understood was that if
2 that were the case, if the new guidelines and the
3 old mandatory minimums sort of -- both applied together,
4 it would lead to ridiculous disparities in the way
5 people were sentenced.

6 And so, the question is, once having decided
7 to do this, can't we assume that Congress decided to do
8 it?

9 MR. ESTRADA: No. Let me give three answers
10 to that.

11 I think, you know, one of the fundamental
12 points here is that a premise of the law is to treat
13 like people alike. And people who committed the same
14 offense on the same date and may have done so with each
15 other we would expect to get comparable punishment if
16 they are comparably situated as to criminal history.
17 And the -- that the solution that's being urged
18 undermines that even though that is exactly what section
19 109 says.

20 JUSTICE GINSBURG: But you have to draw a
21 line someplace, and that's inevitable, that -- that some
22 people are going to fall on one side. But the point
23 about the guidelines and the statute working together,
24 wasn't there a time when the Sentencing Guidelines --
25 they wanted to do away with this distinction and

1 Congress said, no, Sentencing Commission, you can't do
2 it, you can't do it to the guidelines when we don't do
3 it to the statute?

4 MR. ESTRADA: There are two points about the
5 guidelines that I think we have to keep in mind, Justice
6 Ginsburg. The first one is that they are guidelines,
7 especially in the world after Booker, which is the world
8 that confronted Congress in 2010. They are guides that
9 must be considered by the judge to inform judicial
10 discretion. So, in the nature of the guidelines, there
11 is nothing inherent in saying that we must have new ones
12 that also implies a new obligation of statutory law to
13 people whose offense conduct occurred earlier.

14 The second aspect of it is that it has been
15 part of the nature of a guidelines system for two
16 decades that it has been consistent with the decision by
17 Congress in some areas to constrain the exercise of
18 discretion with mandatory minimums. And this Court has
19 recognized that in multiple occasions, in Kimbrough, in
20 Neal, in DePierre, any number of cases. And the
21 guidelines themselves in section 5G1 recognize that the
22 mandatory minimum may trump a lower guideline.

23 So, when you have a long history in 2010 of
24 rulings from this Court acknowledging, as you said in
25 your opinion in Kimbrough, that this may lead to cliffs,

1 et cetera, and you also have a recognition by the
2 Commission itself that they have to integrate this
3 reality of sentencing law into their own guidelines,
4 there is very little basis for an inference that
5 Congress in providing new guidelines would have
6 contemplated that the effective date of the law would
7 change --

8 JUSTICE GINSBURG: But Congress did say:
9 Sentencing Commission, you conform your new guidelines
10 to applicable law. The applicable law has got to be the
11 new law, because if it were the old law, there's nothing
12 to conform. There's nothing that they need to change.
13 It's only that this -- section 8(2) makes sense only if
14 the applicable law is the new law. Otherwise, the
15 Commission doesn't have to do anything to achieve
16 consistency.

17 MR. ESTRADA: Justice Ginsburg, I am
18 prepared to admit for purposes of this case, and I think
19 it's probably the right answer, that Congress intended
20 that the guidelines had to line up with the penalties of
21 the FSA. The question is cui bono? For whose benefit?
22 And Congress clearly contemplated for some of the
23 reasons that you outlined that the system in the change
24 in the statute would not do any good for people coming
25 to be sentenced 6 months later if they still had higher

1 guidelines.

2 But much has been said here today about the
3 90-day window. The 90-day window is irrelevant. The
4 really relevant window is the comparison of what the new
5 guidelines would have been and when they would have come
6 out absent the emergency authority. Absent any
7 emergency authority, new guidelines would have come out
8 November 1st, 2011, which would have been a good
9 15 months after the passage of the FSA. And even under
10 the Government's accounting --

11 JUSTICE SOTOMAYOR: Mr. Estrada, even
12 without the guideline amendment, for those defendants
13 who committed crimes after the effective date of this
14 Act, they would not have had -- new offense, not old
15 offense -- if the day after this Act they committed the
16 offense, they wouldn't have had a mandatory minimum that
17 required their imprisonment for a certain amount of
18 time, because the Act had already done away with the
19 mandatory minimum, correct? Or changed the --

20 MR. ESTRADA: For some of them. They have
21 changed some of them.

22 JUSTICE SOTOMAYOR: Yes, changed it, lowered
23 the amounts.

24 MR. ESTRADA: Some of them may drop from 10
25 to 5, for example, as one of the --

1 JUSTICE SOTOMAYOR: Exactly.

2 MR. ESTRADA: -- as one of the particulars.

3 JUSTICE SOTOMAYOR: So, those people would
4 not have been bound to a mandatory minimum. And since
5 district courts were not bound to the guidelines anyway,
6 even if there had been no amendment to the guideline,
7 the judges would have known they weren't bound to the
8 mandatory minimum and probably not bound to guidelines
9 that hadn't been amended yet either.

10 MR. ESTRADA: That's correct on both counts.

11 JUSTICE SOTOMAYOR: So, it would have
12 benefited these defendants no matter what.

13 MR. ESTRADA: That's correct on both counts,
14 but that -- but that I -- you know, it sort of assumes
15 that the guidelines are systemically irrelevant in all
16 cases, because after an -- after an appropriate
17 analysis --

18 JUSTICE SOTOMAYOR: No, only in cases like
19 this, where we know they have to change because Congress
20 has directed they be changed.

21 MR. ESTRADA: But, look -- I mean, one of
22 the interesting aspects about these cases is that one of
23 the Petitioners, for example, got the benefit of being
24 sentenced at the time that the post-FSA guidelines, the
25 new emergency guidelines, provided a sentencing range of

1 him of 110 to 137. That's -- that's Mr. Hill. These
2 are the new guidelines. He was sentenced to a mandatory
3 minimum of 10, which is on -- on the lower end of that
4 guideline.

5 The only reason that case is in the U.S.
6 Supreme Court is because, even after the new statute,
7 the judge was of a mind that he wanted to use a
8 one-to-one ratio. And that's why there's a controversy
9 here. But the -- that highlights, you know, the point
10 that I'm trying to make and that the Court made in
11 Kimbrough, which is that the mandatory minimums tend to
12 enforce a species of uniformity in a world in which the
13 guidelines are advisory, and they do help uphold, you
14 know, the principle that people that committed
15 comparable offenses will have some rough comparability.

16 JUSTICE SOTOMAYOR: But that begs the
17 question --

18 JUSTICE KAGAN: But the problem with this --

19 JUSTICE SOTOMAYOR: -- I started with, with
20 you, which is if we know that this new Congress has
21 already determined that those -- that mandatory minimum
22 is discriminatory in the way that it had been
23 constructed, what would be the purpose of delaying
24 implementation?

25 MR. ESTRADA: If Congress had made that

1 finding, Justice Sotomayor, I would fully expect them,
2 as a citizen, to cut the sentences of everybody who is
3 already serving the sentence irrespective of finality.
4 And the fact that Congress did not do that, which is a
5 proposition on which everybody agrees, I think is
6 powerful evidence that the assumption that this
7 necessarily reflects a conclusion that the previous
8 system was indisputably discriminatory as opposed to
9 arguably discriminatory --

10 JUSTICE SCALIA: I would find that
11 extraordinary, that they say it's racist, but we're
12 going to leave in effect all of the sentences that have
13 previously been -- been imposed. That seems to me very
14 unlikely.

15 Mr. Estrada, I would like you to explain the
16 effect of 3553(a)(4)(A)(ii), which -- which does seem
17 to -- to be sure, it's not in the new legislation, but
18 it's the background against which the new legislation
19 was adopted, and it seems to require that -- that the
20 court use the guidelines in effect at the time of
21 sentencing.

22 MR. ESTRADA: Right. This is a fight about
23 competing background rules. Section 109 is one of them
24 and it says the old law shall be applied to people who
25 committed their offenses while the old law was in force.

1 It is a directly applicable statute to the situation at
2 hand.

3 This purported competing background rule is
4 a rule that simply says a judge shall consider the
5 guidelines then extant. And this is part of the advice
6 that he gets. It implies nothing about the duty to
7 apply --

8 JUSTICE BREYER: Suppose you're wrong about
9 that.

10 JUSTICE KAGAN: But, Mr. Estrada, you
11 don't --

12 MR. ESTRADA: I'm sorry.

13 JUSTICE BREYER: Suppose you're wrong about
14 that. I mean, I think when they -- they meant do it,
15 not consider it. Does that change?

16 MR. ESTRADA: I think it would be a radical
17 understanding.

18 JUSTICE BREYER: No. I mean, I think that
19 when they wrote 3553, they were thinking those were the
20 guidelines that are going to apply. Do it. Now, I'll
21 look into that.

22 But if I -- if I reach the conclusion I
23 reach -- competing background briefs --

24 MR. ESTRADA: Justice Breyer --

25 JUSTICE BREYER: The applicable law doesn't

1 help us, because -- all the time, there are two
2 different sets of guidelines that apply depending upon
3 when you committed the crime. That's very common. All
4 right. So, I agree with you that far.

5 But now I'm worried about -- the last
6 question Justice Scalia asked does, I think, focus this
7 question, because we have not only 109; we have also
8 the -- the one we're talking about now, and that says,
9 normally, you will apply the guidelines in effect even
10 to people who committed the crime before the new
11 statute.

12 MR. ESTRADA: Okay.

13 JUSTICE BREYER: And now, do we have any
14 analogies? Has this ever happened before? Is there --
15 I can't find out how many people we're talking about.
16 I'd like to know at least are there many other occasions
17 when Congress amended mandatory minimums so there's some
18 precedents? Any?

19 MR. ESTRADA: Justice Breyer, this is a
20 staple of what has happened in the lower courts in a
21 routine application of section 109.

22 JUSTICE BREYER: Yes.

23 MR. ESTRADA: My best example -- and please
24 do not think I'm pandering -- is a case called
25 U.S. v. Smith from the Second Circuit, which -- which

1 was authored by then-Judge Sotomayor. And it was a
2 comparable case in which Congress had dropped the
3 severity of a penalty.

4 JUSTICE BREYER: Yes.

5 MR. ESTRADA: It had to be -- you know, the
6 penalty that deals with supervised release.

7 And Congress had gone from a world in which
8 a violation of supervised release had to be subject to a
9 mandatory sentence, to a world in which the statute had
10 been changed, to say that it was up in the discretion of
11 the judge. By the time the offender came to court, he
12 had violated his supervised release. And his argument,
13 which was actually a lot more plausible than this one,
14 was that before he violated, the law had changed, and he
15 was now in effect now coming to the court for a new
16 sentencing. Which is exactly analogous to this.

17 The Second Circuit had no trouble in saying
18 that a routine application of section 109 killed that
19 claim because the offense was considered completed at
20 the time it was committed; and, therefore, this was a --
21 a claim that simply was not tenable in light of the
22 language of section 109. And that, too, is a -- is a
23 case where somebody could have said the law that now
24 applies is the one that applies to my new sentencing
25 under the new applicable guidelines.

1 Now, I will say another two logical points
2 about, you know, the competing rule that the Government
3 is urging.

4 JUSTICE KAGAN: Mr. Estrada, before you do,
5 if I can understand your argument as it relates to
6 Justice Scalia's questions -- I just want to make sure I
7 understand it. There's a person who has 4.99 grams of
8 crack cocaine. And you do not dispute, do you, that
9 that person would be subject to the new guidelines,
10 which are based on the 18-to-1 ratio rather than the
11 100-to-1 ratio?

12 MR. ESTRADA: I do not. And --

13 JUSTICE KAGAN: Okay. So, you do not
14 dispute that. So -- so, then we're living in a world in
15 which the person who has 4.99 grams of cocaine is
16 getting the 18-to-1 ratio, and a person who has 5 grams
17 is getting the 100-to-1 ratio that's embedded in the
18 mandatory minimums.

19 MR. ESTRADA: That is absolutely right, and
20 that was the -- the paradox, if you want to call it
21 that -- that the government brought you in Kimbrough.
22 And the Court accepted that that was the case. It said,
23 yes, this leads to cliffs. It leads to a lack of a
24 straight line in between all of the possible penalties.
25 We accept all of that. It is an artifact of the fact

1 that Congress at certain points, but not on a continuous
2 line, has chosen to constrain sentencing discretion with
3 the rough tool of a quantity threshold.

4 It is all set out in the Kimbrough case.

5 JUSTICE KAGAN: Now, when Judge Easterbrook
6 talked about this anomaly -- and he, of course, adopted
7 the position that you adopted. But he just said, look,
8 there is no earthly reason for this. It's just that we
9 can't find a clear enough statement in the statute.

10 I guess the question I would ask you is:
11 Can you do better than Judge Easterbrook? Can you find
12 an earthly reason for why Congress would have wanted to
13 create this weird halfway system in which, if you have
14 4-1/2 grams of cocaine, one rule applies, but if you
15 have 5 grams, another rule applies?

16 MR. ESTRADA: I don't think that that's what
17 he found inexplicable. I think the -- you know, the
18 whole notion of changing it up to a point was more what
19 he's saying.

20 I can think that Congress has at least the
21 rational reason that the Court ascribed to the system in
22 its post-Booker way at the top of page 108, I think, in
23 the Kimbrough case, where it is that now that we have a
24 system in which so much depends on the discretion of the
25 individual sentencer, it is actually salutary to have a

1 few points of confluence that work as an enforced,
2 although rough, uniformity in the sentences of
3 comparably situated offenders.

4 If I go back --

5 JUSTICE KENNEDY: But the Government is
6 arguing and the Petitioner is arguing for a uniform
7 rule, the rule that the time of sentencing controls.

8 MR. ESTRADA: Right.

9 JUSTICE KENNEDY: So that uniformity doesn't
10 quite answer it, unless I misunderstood --

11 MR. ESTRADA: No, I think that they are
12 competing visions of fairness and of uniformity in this
13 case, Justice Kennedy. I am trying to hold, you know,
14 the Government to the one they had in the McNeill case
15 last year, because the identical argument was made to
16 them in the -- on the other side, that it was somewhat
17 irrational to apply the better sentence to the person 1
18 day later versus the person 1 day earlier.

19 JUSTICE KENNEDY: But Justice Kagan's
20 question concerning what interest is served by your
21 position has particular force when we're talking about
22 the sentencing judge. The hardest thing -- as we know
23 in the judicial system, one of the hardest things is
24 sentencing. And you're saying that a sentencing judge
25 who knows the law has been changed, who knows the law

1 has been criticized, is nevertheless bound and
2 determined that it's fair for this -- for this person to
3 be sentenced to the longer term.

4 That's a very difficult --

5 MR. ESTRADA: But if I could --

6 JUSTICE KENNEDY: -- position to put the
7 judge in. Now, I would --

8 MR. ESTRADA: If I could take the -- I'm
9 sorry, Justice Kennedy.

10 JUSTICE KENNEDY: Go ahead.

11 MR. ESTRADA: If I could take, you know, the
12 other side of that argument. One of the reasons why I
13 think, you know, the Court should accept that Congress
14 contemplated new guidelines but not necessarily take up,
15 you know, the Government's view that this is actually
16 called for by the very end of that section, applicable
17 law, is that the Government looks at this as a world in
18 which Congress has now intervened and in effect
19 compelled a -- a more linear function of sentencing so
20 that, henceforth, I guess the Commission has to conform
21 to the -- to the 18-to-1 ratio, and it would no longer
22 be open to the Commission, for example, to do what it
23 did in 2007, which is we changed our mind; there is a
24 mandatory minimum that constrains us, but in light of
25 the most recent scholarship, we think the ratio should

1 be 16 to 1.

2 And -- and one of the reasons why I am
3 reluctant to urge you to accept, you know, the
4 Government's construction, which I can see how they
5 would be helped by in future cases, is that I think it's
6 very implausible for Congress to have considered this,
7 as they say, the centerpiece of the statute and have --
8 have it be the last depending clause of section 8.

9 JUSTICE BREYER: Wait, wait. This is --
10 just tell me if maybe the light is dawning, and maybe
11 I'm just at the same question Justice Kagan asked.
12 Think of before the statute. There were two sets of
13 people: those people subject to the mandatory minimum
14 and those crack people who -- the mandatory minimum
15 didn't matter, but the Commission wrote amendments
16 consistent with.

17 So, they were tough amendments, though the
18 law didn't require it --

19 MR. ESTRADA: Right.

20 JUSTICE BREYER: -- to produce consistency.
21 Now the statute's passed. Now we have some of the
22 pre-Act offenders. Because of the two sets of things,
23 section 8 on the one hand and the 3553(g) on the other,
24 in respect to those people who were not governed by the
25 mandatory minimum previously but were subject to the

1 then-conforming amendments, now will have to be subject
2 to new conforming amendments that conform to the new
3 thing.

4 And that -- because that'll have to be
5 because of the combination of the two sections that Mr.
6 Dreeben read, the -- all right. Now, if that's so, we
7 get to the cliffs that Justice Kagan is talking about.
8 And if I'm right so far, we're now back at the probation
9 officer example, and it's so odd and so peculiar that it
10 is not just a fair -- do you see where I'm going?

11 MR. ESTRADA: Frankly, no. But --

12 JUSTICE BREYER: Is that too complicated?

13 (Laughter.)

14 JUSTICE BREYER: I don't blame you, frankly.

15 But I --

16 MR. ESTRADA: But let me -- let me say two
17 things --

18 JUSTICE BREYER: All right.

19 MR. ESTRADA: You know, the --

20 JUSTICE BREYER: I don't blame you. I don't
21 blame you.

22 MR. ESTRADA: The simple point I was trying
23 to make, Justice Breyer, is that the whole thing that
24 the guideline system now has to conform with applicable
25 law, which, you know, the Government reads as the new

1 ratio and could extend to other things, could
2 potentially disable the Commission from adopting its own
3 ameliorating amendments that depart from the regime
4 of -- of the mandatory minimums. And so, whereas there
5 are mandatory minima that are troublesome and give rise
6 to cliffs, there are also occasions in which the
7 Commission is able to do things that are not consistent
8 with the statute.

9 Let me give one example that was mentioned
10 by the Court in DePierre. As the statute was
11 interpreted in DePierre, cocaine base is cocaine base;
12 it gets you a mandatory minimum if it's chemically
13 based. The Commission thinks that you only get the
14 enhanced penalties if the cocaine base happens to be
15 crack.

16 Similarly, under the Neal case, you get to
17 weigh the carrier medium for the LSD, but, you know, the
18 Commission thinks that you give it a presumed weight
19 that is probably lower than the actual medium. In both
20 of those cases, the Commission comes up with guidelines
21 that are lower than the methodology that is contemplated
22 under the statutory analysis.

23 Were you to adopt the applicable law on the
24 assumption that the Congress has now dictated that these
25 things have to line up and never to have cliffs again

1 because they are bad, you could end up having untoward
2 consequences as to what it is that the Commission can do
3 in the future in order to deal with other
4 inequalities --

5 JUSTICE SOTOMAYOR: Mr. Estrada, I'm not
6 sure I follow --

7 JUSTICE ALITO: -- the question --

8 JUSTICE SOTOMAYOR: I'm sorry.

9 CHIEF JUSTICE ROBERTS: Go ahead, Justice
10 Sotomayor.

11 JUSTICE SOTOMAYOR: I'm not sure I follow
12 your example. I think that the guideline regulation is
13 that the guideline -- the Sentencing Commission always
14 has to be -- pass guidelines consistent with the
15 mandatory minimum. And if the statute says that the
16 mandatory minimum requires the -- the carrying medium to
17 be included, the guidelines can't change that. The
18 mandatory minimum would apply.

19 MR. ESTRADA: For -- for purposes of the
20 mandatory minimum, but not for the sentences in between.

21 JUSTICE SOTOMAYOR: But defendant -- I don't
22 know that I know of one guideline scheme that changes
23 whatever Congress has statutorily required.

24 MR. ESTRADA: I just gave you two examples:
25 The LSD guideline that was at issue in Neal and the

1 crack guideline that was not at issue but was discussed
2 in connection with the statutory interpretation in -- in
3 DePierre.

4 You know, my point -- I don't want to
5 overstate the point. My point is there is reason to
6 believe that Congress intended the new guidelines to be
7 available for new offenses. The fact that Congress gave
8 emergency authority so that that would be possible makes
9 perfect sense because in the absence of emergency
10 authority, the new guidelines would not --

11 JUSTICE SOTOMAYOR: No, no. You have to --
12 what you're arguing is not that the guidelines would be
13 available for new offenses. What you're arguing is that
14 they would be available for everybody except the
15 cliffhangers. That -- that's what you're arguing.

16 MR. ESTRADA: Except for? I'm sorry.

17 JUSTICE SOTOMAYOR: Everyone but the
18 cliffhangers, because, as Justice Breyer pointed out,
19 those people who were subject to the old guideline at a
20 higher rate above the minimum now have the benefit of a
21 lower rate. And so, they're going to get sentenced to a
22 lower amount because they're not bound by the mandatory
23 minimum.

24 MR. ESTRADA: But there are -- there are two
25 alternative worlds after the FSA, Justice Sotomayor. In

1 the first one, guidelines don't change for 15 months.
2 People who committed the crime after the FSA come to the
3 court for sentencing 10 months later and they get the
4 new mandatory minimum, but it doesn't matter because the
5 old guidelines are higher. It is possible that the
6 judge would intervene and use Booker discretion, but not
7 necessarily so.

8 And the alternative world which Congress did
9 give us is you change the guidelines as soon as you can;
10 if you come to the bar of the court with a pre-FSA
11 offense, it doesn't matter, because the new guidelines,
12 like every guidelines book since the beginning, say that
13 if a mandatory minimum applies, that controls over the
14 then-current guidelines, which is one of the fundamental
15 reasons why the alternative view of the world and the
16 alternative rule of construction the Government proffers
17 makes no sense.

18 As a pure statutory construction matter and
19 for those members of the Court who give weight to
20 legislative history, I will point out that the emergency
21 authority section that the Government thinks is
22 dispositive on this point was in every version of this
23 bill -- Senate 1711, Senate 1383, you know, the House
24 versions that they cite -- even when those statutes, as
25 Justice Scalia pointed -- I'm sorry -- as Justice Alito

1 pointed out earlier, provided an effective date for the
2 new statute of 6 months hence. It is --

3 JUSTICE ALITO: Well, along those lines,
4 could I -- could I ask you this question, which is
5 intended to explore the -- the issue whether the
6 argument about bringing the guidelines into consistency
7 with applicable law doesn't assume the answer that is --
8 that one attempts to get from it?

9 Suppose the -- the Fair Sentencing Act said
10 expressly this applies only -- the new mandatory
11 minimums apply only to post-Act offenders, but it also
12 contained a provision that says the Sentencing
13 Commission has to bring the guidelines into consistency
14 with applicable law. I assume there what they would
15 have to do would be to say that the new guidelines apply
16 only to post-enactment offenders, so that the Fair
17 Sentencing Act would trump this previous provision in
18 the Sentencing Reform Act. Wouldn't that be correct?

19 MR. ESTRADA: Correct. And I think that
20 that would be true here as well. And the reason why I
21 was highlighting the earlier bills is because each and
22 every one of them had the same, almost word for word,
23 "conform with applicable law" emergency authority. All
24 of them uniformly said the new mandatory minimums will
25 not apply for another 6 months after the enactment.

1 As a logical proposition, if Congress
2 thought that the identical language made sense to bring
3 the guidelines into conformity with a law that would not
4 take into -- that would not kick in for another 6
5 months, having it kick in sooner does not have any more
6 logical import in saying that, therefore, you know, the
7 guidelines now mean that previous offenses get a
8 different sentence.

9 JUSTICE KAGAN: But could I understand what
10 you're saying, Mr. Estrada? Because if Justice Alito is
11 right, then the new guidelines that the Sentencing
12 Commission has in fact promulgated should not be being
13 applied right now to those who committed crimes before
14 the enactment date. And that's not what's happening now
15 on the ground, is it?

16 MR. ESTRADA: Justice Kagan, it is not
17 happening in that manner because the guidelines, every
18 book of the guidelines, I believe since 1987, which is
19 the first one, has had, like, 5G1.1, which says these
20 are the guidelines, but 5G tells you if a mandatory
21 minimum applies, for whatever reason, you apply that and
22 that becomes the mandatory sentence.

23 And so, there has never been any reason to
24 have two sets of guidelines to account for cliffs or
25 mandatory minimums, because every guidelines book has

1 had a built-in solution to that problem, which is we
2 understand that there are cliffs, we understand that
3 there is a world of mandatory minimums; we can't fix
4 those, this is our guideline sentence. If somehow, for
5 some reason -- because it occurred, you know, before or
6 whatever -- there is a mandatory minimum that applies,
7 the guidelines say the mandatory minimum becomes the
8 guideline sentence.

9 So, in that sense, a Congress that knew the
10 law would understand that saying you have to have new
11 guidelines had no logical force in saying that,
12 therefore, the effective date of mandatory minimums or
13 any other factor that bore on the application of
14 mandatory minimums would be changed.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 Mr. Estrada.

17 MR. ESTRADA: Thank you, Mr. Chief Justice.

18 CHIEF JUSTICE ROBERTS: Mr. Eberhardt, you
19 have 3 minutes.

20 REBUTTAL ARGUMENT OF STEPHEN E. EBERHARDT

21 ON BEHALF OF THE PETITIONERS

22 MR. EBERHARDT: Thank you,

23 Mr. Chief Justice, and may it please the Court:

24 Obviously, this Court recognizes the
25 difficulty of those district court judges sitting and

1 asking themselves: What do I do with this defendant as
2 opposed to another defendant? And after listening to my
3 colleague, Mr. Estrada, I still have to ask the Court to
4 consider the question that the Court has been asking:
5 What possible reason could Congress have to want a
6 district court judge to have to sit back, 5 years after
7 the date of enactment of the Fair Sentencing Act, and
8 impose mandatory minimums that everyone agrees at this
9 point are racially discriminatory?

10 JUSTICE SCALIA: Of course, you could say
11 that about any statute that runs afoul of -- of section
12 109. I mean, that's what section 109 says: Even though
13 we have decided that this old law is bad and the penalty
14 should be lesser, even though we've decided, when we do
15 that, you continue to apply the bad old penalty to
16 people who committed a crime before the amendment.
17 Isn't that what 109 says?

18 MR. EBERHARDT: It can be, but, as Justice
19 Sotomayor recognizes, there has never been a situation
20 such as this basically in the history of criminal law
21 and criminal law sentencing in our country.

22 JUSTICE BREYER: I'd imagine you'd find
23 disagreement with that. You know -- you know -- you
24 know if -- as a matter of fact, in the year that these
25 took effect, think of the sentences that were not

1 governed by mandatory for crack, not governed by the
2 mandatory minimum. Did the guidelines provide, let's
3 call it a low sentence, disproportionately low?

4 MR. EBERHARDT: Congress ultimately felt
5 that they did, yes, because what they --

6 JUSTICE BREYER: And did they change those
7 non-mandatory part when they wrote new ones?

8 MR. EBERHARDT: The guidelines changed in
9 different respects with regard to different amounts.
10 The new --

11 JUSTICE BREYER: All right. I'll look it
12 up. I'll look it up.

13 MR. EBERHARDT: I suggest the Court -- we
14 admit that 109 has to be considered in the case, but I
15 think to find what was really meant by Congress, after
16 the Court looks to section 109, the Court does have to
17 look to the 3553 sentence -- or 3553 section, that makes
18 it very plainly clear, ever since the Sentencing Reform
19 Act, that the date of sentencing clearly is the
20 important date, as opposed to the date of the commission
21 of the crime.

22 CHIEF JUSTICE ROBERTS: All those arguments
23 have nothing to do with the provision about the
24 Sentencing Commission is supposed to act quickly or any
25 of that, right?

1 Your argument is what rational reason could
2 Congress have had to -- given the urgency of the
3 problem, the seriousness, why wouldn't they have wanted
4 the provisions to apply as you urged they should?

5 MR. EBERHARDT: But it goes hand-in-hand
6 with the mandate from the Sentencing Commission to put
7 the new guidelines in place as soon as practical, as
8 well as provisions of section 10.

9 Thank you very much.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 Mr. Eberhardt.

12 Mr. Estrada, at the invitation of the Court,
13 you have briefed and argued this case as an amicus
14 curiae in support of the judgment below. You've ably
15 discharged that responsibility, for which the Court is
16 grateful.

17 The case is submitted.

18 (Whereupon, at 11:21 a.m., the case in the
19 above-entitled matter was submitted.)

20

21

22

23

24

25

A				
abatement 17:8	admit 4:21 36:18 58:14	amount 37:17 52:22	29:19 43:24,24 45:14,15 53:13	57:1,4
able 6:11 50:7	admittedly 19:18	amounts 37:23 58:9	54:10 55:21 56:6	aspect 35:14
ably 59:14	adopt 29:16 50:23	analogies 42:14	apply 6:5 12:19 14:14 15:24	aspects 38:22
above-entitled 1:18 59:19	adopted 40:19 45:6,7	analogous 43:16	19:17 20:3 24:20 25:1	assortment 33:7
absence 52:9	adopting 50:2	analysis 38:17 50:22	41:7,20 42:2,9 46:17 51:18	assume 12:18 13:24 14:8,9
absent 37:6,6	advice 41:5	announced 18:1	54:11,15,25 55:21 57:15	32:10 34:7 54:7,14
absolutely 6:23 32:19,24 44:19	advisory 39:13	anomaly 45:6	59:4	assumed 25:24
absurd 24:4,5	afoul 57:11	answer 4:18,19 4:22 6:8 22:25	appropriate 10:13 38:16	assumes 38:14
absurdity 24:7,9	agree 9:19 11:14 11:16 18:12	22:25 23:1 30:20 33:17	appropriately 26:19	assuming 22:24 23:1
accelerated 18:8	33:2 42:4	36:19 46:10 54:7	approval 13:21	assumption 40:6 50:24
accept 44:25 47:13 48:3	agreement 33:5 33:17	answers 25:23 34:9	April 1:16	astounded 8:6
accepted 5:22 44:22	agrees 40:5 57:8	anyway 12:2 38:5	areas 35:17	attempts 54:8
account 55:24	ahead 47:10 51:9	appeal 27:1	arguably 40:9	attention 18:23
accounting 37:10	alike 34:13	APPEARAN... 1:21	argue 16:5 30:17	August 14:24 15:4 21:19
achieve 12:7 19:8 36:15	Alito 11:11 12:17 13:6,8	appendix 25:25	argued 11:20 59:13	authored 43:1
acknowledge 6:24	18:14 27:5,15 27:25 28:8	applicable 12:8 19:10,11,17,20	arguing 11:23 46:6,6 52:12	authority 12:6 19:5 31:5 37:6
acknowledges 11:23	51:7 53:25 54:3 55:10	20:11,11,14,16 20:20 22:24	52:13,15	37:7 52:8,10 53:21 54:23
acknowledging 35:24	alter 31:3	24:14,14,18,19 25:12 26:7	argument 1:19 3:2,5,9,13 4:3	available 26:18 52:7,13,14
act 4:21 6:22 10:19,20 12:21	alternate 8:19	29:25 36:10,10 36:14 41:1,25	4:7 15:17 23:2 24:7,10,10,16	average 13:15
13:3,11 14:6 14:21,25 15:7	alternative 9:3 9:10 52:25	43:25 47:16 49:24 50:23	27:6,7 28:2 31:13 32:25	a.m 1:20 4:2 59:18
15:22,25 16:15 17:20,21,22	53:8,15,16	54:7,14,23	43:12 44:5 46:15 47:12	
18:1 19:12	ambiguity 10:24	application 10:14,16 27:10	54:6 56:20 59:1	B
20:2,2,8 21:3	ameliorating 50:3	42:21 43:18 56:13	arguments 58:22	back 11:18 17:12 27:1
21:15 24:25	amended 17:8 38:9 42:17	applied 9:17 10:17 20:9,24	arrest 14:1	46:4 49:8 57:6
25:1,11 26:6	amendment 24:20 29:8,14	21:3 25:20 26:8,15 27:2	arrested 12:15	background 17:6 29:18
26:10,11 27:11	37:12 38:6 57:16	29:22 34:3 40:24 55:13	artifact 44:25	40:18,23 41:3 41:23
29:4 32:10	amendments 19:6 48:15,17	applies 6:13 22:23 28:3	ascribed 45:21	backs 11:2
37:14,15,18	49:1,2 50:3		asked 13:25 42:6 48:11	bad 51:1 57:13 57:15
54:9,17,18	amicus 2:3 3:11 5:14 31:14		asking 27:23	balanced 23:25
57:7 58:19,24	59:13			bar 53:10
acted 21:15				base 50:11,11,14
actual 50:19				based 5:23 8:17 10:5 25:2
Administrative 10:18 22:13				29:23 44:10

<p>50:13 basically 21:2 57:20 basis 18:10 36:4 began 5:10 begging 20:13 25:7 beginning 29:4 53:12 begs 39:16 behalf 3:4,7,15 4:8 15:18 56:21 belief 4:12 believe 6:9 9:2 11:8 15:8 25:8 33:9 52:6 55:18 bemoaned 28:17 benefit 36:21 38:23 52:20 benefited 38:12 best 27:7 42:23 better 45:11 46:17 bill 27:8,15,21 28:11 53:23 bills 33:8 54:21 bind 5:24 6:14 6:20 11:19 binding 7:2 bit 21:7 blame 49:14,20 49:21 Bonds 17:15 bono 36:21 book 53:12 55:18,25 Booker 35:7 53:6 books 7:1 bore 56:13 bound 38:4,5,7 38:8 47:1 52:22 Breyer 21:22 22:2,8,16,18</p>	<p>23:7,8,12,13 23:19,22 24:1 24:3,10,12,16 24:23 41:8,13 41:18,24,25 42:13,19,22 43:4 48:9,20 49:12,14,18,20 49:23 52:18 57:22 58:6,11 brief 19:1 22:12 briefed 59:13 briefs 19:1 22:21 41:23 bring 17:12 33:4 33:16 54:13 55:2 bringing 54:6 brought 44:21 built-in 56:1 buy 24:7</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 3:1 4:1 calculate 17:24 call 44:20 58:3 called 42:24 47:16 carrier 50:17 carry 26:19 carrying 51:16 case 4:4,12 5:10 7:17 9:17 11:5 13:16 16:17 26:25 31:18,19 32:3,3 34:2 36:18 39:5 42:24 43:2,23 44:22 45:4,23 46:13,14 50:16 58:14 59:13,17 59:18 cases 5:3 7:13 8:3 9:22,22,24 10:7 11:5 17:14 35:20 38:16,18,22</p>	<p>48:5 50:20 catch 23:4 caught 21:25 22:10 centerpiece 48:7 certain 24:8 37:17 45:1 Certainly 30:21 cetera 36:1 change 6:5 8:7 33:4 36:7,12 36:23 38:19 41:15 51:17 53:1,9 58:6 changed 21:5,5 37:19,21,22 38:20 43:10,14 46:25 47:23 56:14 58:8 changes 51:22 changing 45:18 charged 12:15 charging 13:15 chemically 50:12 Chief 4:3,9 5:15 5:19 6:1 7:12 13:23 14:3,4,7 15:12,14,16,20 21:1 30:19,21 31:7,11,16 51:9 56:15,17 56:18,23 58:22 59:10 choose 16:22 chosen 45:2 Circuit 4:11 42:25 43:17 cite 8:2 53:24 citizen 40:2 claim 43:19,21 clause 48:8 clear 5:3,5,12 7:15 8:4,5,10 10:20 11:25 12:3,8 13:14 15:8 16:2,7,12</p>	<p>17:13 33:16 45:9 58:18 clearly 28:9 36:22 58:19 cliffhangers 52:15,18 cliffs 35:25 44:23 49:7 50:6,25 55:24 56:2 closer 14:2 cocaine 44:8,15 45:14 50:11,11 50:14 colleague 4:17 11:20 17:15 57:3 combination 49:5 come 8:15 13:11 18:7 22:7 31:8 37:5,7 53:2,10 comes 12:23 20:7 50:20 coming 36:24 43:15 commission 12:6 13:3 14:23 18:9,25 19:4,7 21:2,13 24:11 28:16 31:1 33:1 35:1 36:2,9,15 47:20,22 48:15 50:2,7,13,18 50:20 51:2,13 54:13 55:12 58:20,24 59:6 commit 12:20 13:10 21:24 committed 25:11,14 34:13 37:13,15 39:14 40:25 42:3,10 43:20 53:2 55:13 57:16 common 42:3</p>	<p>common-law 17:7 comparability 39:15 comparable 18:20 34:15 39:15 43:2 comparably 34:16 46:3 comparison 37:4 compelled 47:19 competing 40:23 41:3,23 44:2 46:12 completed 43:19 complex 21:8 complicated 49:12 concerned 27:19 concerning 46:20 concerns 32:13 concession 32:11 conclusion 40:7 41:22 concurring 16:19 condense 13:19 conduct 35:13 confluence 30:23 46:1 conform 24:13 36:9,12 47:20 49:2,24 54:23 conformed 20:10,20,21 29:25 30:2 conforming 19:6 49:2 conformity 55:3 confronted 35:8 Congress 4:14 5:24,25 6:3,9 6:12,14,15,19 6:20 7:2,3,7</p>
--	--	---	--	---

<p>11:18 12:5,8,9 12:16 13:18,21 13:24 14:5,5,8 14:11,14,16,17 15:5,7,23 16:20,21,22 17:8,16,21 20:22 21:18 23:17,24 24:11 26:12 28:13,16 28:21 29:10,15 29:20 31:3,9 31:22 32:5,13 33:2,4,8,16,20 34:7 35:1,8,17 36:5,8,19,22 38:19 39:20,25 40:4 42:17 43:2,7 45:1,12 45:20 47:13,18 48:6 50:24 51:23 52:6,7 53:8 55:1 56:9 57:5 58:4,15 59:2 Congress's 26:17 32:11 connection 52:2 consequences 51:2 consider 41:4,15 57:4 considered 10:12 33:8 35:9 43:19 48:6 58:14 consistency 12:7 19:8 26:22 36:16 48:20 54:6,13 consistent 35:16 48:16 50:7 51:14 Constitution 32:2 constrain 35:17 45:2</p>	<p>constrains 47:24 constructed 39:23 construction 48:4 53:16,18 contain 17:20 contained 27:9 54:12 contains 27:11 contemplated 36:6,22 47:14 50:21 contend 8:10 11:17 context 15:6 20:1 30:23 continue 4:14 57:15 continues 20:15 continuous 45:1 contrary 26:21 controls 46:7 53:13 controversy 32:17 39:8 conversation 32:21 convicted 12:15 19:19 conviction 13:25 14:1 COREY 1:10 correct 5:18 7:23 8:10,24 10:10 15:3,7,9 22:22 28:7 37:19 38:10,13 54:18,19 corrected 15:11 counsel 15:14 31:11 country 57:21 counts 38:10,13 course 4:13 5:15 17:3 24:17 45:6 57:10 court 1:1,19</p>	<p>4:10,18 5:8,22 6:23 8:19 9:23 10:8,12,17,20 10:25 15:21 16:7 17:13 18:1 20:7 21:20 31:8,17 35:18,24 39:6 39:10 40:20 43:11,15 44:22 45:21 47:13 50:10 53:3,10 53:19 56:23,24 56:25 57:3,4,6 58:13,16,16 59:12,15 courts 4:14 17:24 18:5 20:2 22:14 38:5 42:20 Court's 6:10 18:23 court-appointed 2:3 3:11 31:14 crack 21:10 22:6 23:15 30:24,25 31:9 44:8 48:14 50:15 52:1 58:1 create 45:13 created 32:17 credibility 28:14 crime 42:3,10 53:2 57:16 58:21 crimes 37:13 55:13 criminal 28:15 30:5 34:16 57:20,21 critical 19:9 critically 18:24 criticized 47:1 cui 36:21 curiae 2:3 3:11 31:14 59:14 cut 40:2</p>	<p style="text-align: center;">D</p> <p>D 4:1 date 14:19,20 15:1,1,3,4,25 17:22 20:7,17 25:2,15 26:8 27:3,16 28:12 34:14 36:6 37:13 54:1 55:14 56:12 57:7 58:19,20 58:20 dawning 48:10 day 20:4 37:15 46:18,18 days 12:11 13:19 14:2 21:2 27:16 28:12 deal 51:3 deals 43:6 decades 35:16 decide 33:20,22 decided 33:21 33:23 34:6,7 57:13,14 decision 8:20 35:16 decreased 21:12 deemed 17:10 deems 19:7 defeat 16:17 defendant 13:16 21:11 26:9 51:21 57:1,2 defendants 12:19,23 13:9 20:9,20 23:15 28:4 29:22 30:6 31:8 37:12 38:12 delayed 32:8 delaying 39:23 depart 50:3 Department 1:25 depending 42:2</p>	<p>48:8 depends 45:24 DePierre 35:20 50:10,11 52:3 deprive 19:23 Deputy 1:24 describe 16:8 designed 28:11 desired 21:17 details 14:9 determinative 9:17 determined 39:21 47:2 determines 30:11 determining 7:5 deviated 10:13 dictated 50:24 dictionary 6:22 17:2 dictum 8:25 9:1 9:15,18,18 different 8:13 30:16 33:14 42:2 55:8 58:9 58:9 differently 25:23 difficult 31:18 31:19,22 47:4 difficulty 56:25 directed 24:11 38:20 direction 18:8 directly 11:8 41:1 directs 19:3 20:2 disable 50:2 disagree 18:18 disagreement 57:23 disapproval 13:21 discharged 59:15 discredited 31:9</p>
--	--	--	---	--

<p>discretion 35:10 35:18 43:10 45:2,24 53:6 discrimination 31:25 32:11 discriminatory 4:16 31:23 39:22 40:8,9 57:9 discussed 15:10 52:1 discussion 32:18 disparate 23:18 30:7 32:13 disparities 34:4 dispositive 53:22 disproportion... 58:3 dispute 16:13 44:8,14 distinction 34:25 district 4:14 38:5 56:25 57:6 doctrine 31:19 31:22 doing 30:10 Dorsey 1:3 4:4 drafted 14:6 drafting 12:18 draw 18:1,23 34:20 Dreeben 1:24 3:6 15:16,17 15:20 16:3,6 16:13,18 17:3 17:6,13 18:12 18:16,18,21 19:21,25 20:18 21:7 22:1,5,12 22:17 23:6,11 23:14,21,24 24:2,9,13,22 24:24 25:5,8 25:18,22 26:3</p>	<p>26:5,25 27:14 28:7,10,24 29:1,3,7,9,12 29:17 30:9,19 30:22 49:6 drop 37:24 dropped 43:2 duty 41:6 D.C 1:15,25 2:2</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 1:22 3:1,3,14 4:1,1,7 56:20 earlier 5:2,24 6:14 8:3 11:18 27:8 35:13 46:18 54:1,21 earthly 45:8,12 Easterbrook 45:5,11 easy 33:6 Eberhardt 1:22 3:3,14 4:6,7,9 5:7,18,21 6:8 6:23 7:4,19,23 7:25 8:9,17,24 9:2,6,10,19 10:4,10,16 11:8,16 12:4 13:5,7,14 14:3 14:15 15:3,15 56:18,20,22 57:18 58:4,8 58:13 59:5,11 EDWARD 1:3 effect 12:9,24 13:1 14:21 15:2 18:17 20:4 21:19 25:13,17 26:8 26:16 29:6,15 29:21 30:2,8 40:12,16,20 42:9 43:15 47:18 57:25 effective 14:19 27:16 28:11</p>	<p>36:6 37:13 54:1 56:12 egregious 30:4 either 38:9 Eleven 22:16 eliminate 30:12 embedded 44:17 emergency 12:6 18:10 19:5 31:4 37:6,7 38:25 52:8,9 53:20 54:23 emotions 28:21 emphasized 32:3 employed 7:5 enact 16:21 enacted 26:12 enactment 12:20 13:10 20:17 25:14 54:25 55:14 57:7 enacts 6:3 enforce 39:12 enforced 11:7 32:4,6 46:1 enhanced 50:14 entirely 8:25 18:7 21:16 error 15:7,9,10 especially 35:7 ESQ 1:22,24 2:2 3:3,6,10,14 essentially 5:2 establishes 26:1 estimate 22:3 Estrada 2:2 3:10 31:12,13,16,21 32:9,15,19,23 33:19 34:9 35:4 36:17 37:11,20,24 38:2,10,13,21 39:25 40:15,22 41:10,12,16,24 42:12,19,23</p>	<p>43:5 44:4,12 44:19 45:16 46:8,11 47:5,8 47:11 48:19 49:11,16,19,22 51:5,19,24 52:16,24 54:19 55:10,16 56:16 56:17 57:3 59:12 et 36:1 evaluate 14:10 event 14:12 everybody 20:6 21:24 25:5 34:1 40:2,5 52:14 evidence 40:6 exactly 9:13 18:6 34:18 38:1 43:16 example 16:25 17:18 37:25 38:23 42:23 47:22 49:9 50:9 51:12 examples 51:24 exception 27:4 30:16 Excuse 4:25 26:2 exercise 19:5 35:17 expect 34:15 40:1 explain 17:16 40:15 explained 16:19 26:12 31:7 explains 18:24 explicit 27:21 explore 54:5 express 4:21 5:16 6:5 8:5 11:14,16 16:12 16:14,23 expressly 54:10</p>	<p>extant 41:5 extend 50:1 extraordinary 40:11</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>fact 7:1 8:18 10:5 28:17 33:7 40:4 44:25 52:7 55:12 57:24 factor 56:13 factors 21:12 fair 4:20,22,25 5:8 6:12,13 7:6 7:9,14,19 8:8 8:11,23 9:16 9:23,24 10:8 10:21,22 11:6 12:20 13:11 14:13,17,21 15:22,23 17:19 17:21 19:12 20:8 47:2 49:10 54:9,16 57:7 fairness 31:20 46:12 fall 34:22 familiar 29:18 far 5:19 42:4 49:8 Federal 19:7 feel 4:19 felt 6:9 58:4 fight 40:22 figure 22:14 figures 22:13 final 27:19,20 27:22,24 finality 40:3 finally 15:11 30:4 find 6:11 8:15 8:22 11:3 22:21 40:10 42:15 45:9,11</p>
--	--	---	---	---

57:22 58:15 finding 31:23 40:1 fine 19:16 first 12:22 16:3 27:14 35:6 53:1 55:19 fit 16:24 fits 25:21 fix 31:1 32:6,7 56:3 fixed 30:4 focus 17:19 42:6 follow 51:6,11 followed 10:25 footnote 7:21 8:7 9:1,18 force 20:24 40:25 46:21 56:11 formula 21:4 foster 26:21 found 4:20 9:24 45:17 four 28:16 frankly 49:11,14 free 16:22 front 21:20 FSA 20:21 21:8 36:21 37:9 52:25 53:2 fully 40:1 function 47:19 fundamental 32:2 34:11 53:14 future 25:20 48:5 51:3	7:10 9:21 10:7 10:11 11:4 14:20 34:20 35:6 36:8,17 give 6:11 16:24 17:18 31:4 34:9 50:5,9,18 53:9,19 given 59:2 gives 4:22 go 13:19 14:18 46:4 47:10 51:9 goal 26:22 goes 13:16 59:5 going 8:7 11:17 13:15,17 16:4 19:5 26:13 34:22 40:12 41:20 49:10 52:21 good 4:12,13 27:7 36:24 37:8 governed 9:5,8 9:25 48:24 58:1,1 government 27:23 33:1 44:2,21 46:5 46:14 47:17 49:25 53:16,21 Government's 19:1 37:10 47:15 48:4 governs 10:9 grams 44:7,15 44:16 45:14,15 grateful 59:16 gray 19:1 Great 5:9,10,11 ground 55:15 guess 5:20 22:20 23:6,10,23 45:10 47:20 guideline 12:7 25:21 35:22	37:12 38:6 39:4 49:24 51:12,13,22,25 52:1,19 56:4,8 guidelines 12:24 13:1,4,13 14:22,23 15:2 18:8,9 19:4,7,8 20:3,8,9,10,19 20:23 21:14,18 24:13 25:1,3 25:12,15,20 26:7,15,20 27:2,17 28:6 28:14 29:5,20 29:24 30:2,4,8 30:24 31:2,5 33:24,24 34:2 34:23,24 35:2 35:5,6,10,15 35:21 36:3,5,9 36:20 37:1,5,7 38:5,8,15,24 38:25 39:2,13 40:20 41:5,20 42:2,9 43:25 44:9 47:14 50:20 51:14,17 52:6,10,12 53:1,5,9,11,12 53:14 54:6,13 54:15 55:3,7 55:11,17,18,20 55:24,25 56:7 56:11 58:2,8 59:7 guides 35:8 guilty 21:25 22:11	59:5 happen 29:21 happened 42:14 42:20 happening 55:14,17 happens 50:14 hardest 46:22 46:23 hear 4:3 heard 23:2 heavily 5:13 held 8:20 9:15 help 17:19 31:2 39:13 42:1 helped 48:5 henceforth 17:22 47:20 Hertz 5:12 higher 36:25 52:20 53:5 highlighting 54:21 highlights 39:9 Hill 1:10 4:5 39:1 historically 22:6 22:9 history 11:1,2 26:13,14 33:10 34:16 35:23 53:20 57:20 hold 6:6 46:13 holding 8:19 9:3 9:3,5,8,11 10:5 Honor 6:24 8:9 9:19 15:4 25:24 House 53:23 H.R 27:8 28:9	imagine 57:22 immediacy 14:16 immediate 32:7 Immigration 10:19 impact 30:7 31:24 32:13,18 implausible 48:6 implementation 39:24 implication 4:22 5:1,4,4,9,11,12 6:12,13 7:6,9 7:14,16,19 8:6 8:8,11,23 9:16 9:23,24 10:8 10:22,23 11:2 11:6,24,25 14:13,17 15:5 15:23 16:2 17:20 implications 32:22 implied 25:16 implies 35:12 41:6 import 55:6 important 58:20 impose 4:15 16:20 26:20 57:8 imposed 40:13 imprisonment 37:17 inapplicable 20:22 30:2 incidental 29:15 included 51:17 incongruous 30:3 inconsistent 28:18 incorporates 16:12 increased 19:13
<hr/> G <hr/> G 4:1 geared 12:25 general 1:24 27:4 generally 16:11 getting 44:16,17 Ginsburg 6:18				
		<hr/> H <hr/> habeas 8:21 halfway 45:13 hand 41:2 48:23 hand-in-glove 31:6 hand-in-hand	<hr/> I <hr/> identical 33:12 46:15 55:2 ignore 17:2,5 ii 28:23 Illinois 1:22	

<p>21:11 increasing 21:10 indicate 22:14 indisputably 40:8 individual 45:25 individuals 12:13,14 14:6 inequalities 51:4 inevitable 34:21 inexplicable 45:17 inference 18:2 36:4 inform 35:9 information 18:3 inherent 35:11 initial 27:3 injust 30:14 insert 29:10 instructive 33:10 integrate 36:2 intend 18:2 intended 15:24 18:4 36:19 52:6 54:5 intent 6:12 15:4 intentional 32:11 interest 46:20 interesting 38:22 interpretation 23:3,4 52:2 interpreted 50:11 intervene 53:6 intervened 47:18 invitation 59:12 irrational 46:17 irrationality 26:21 irrelevant 30:6 37:3 38:15</p>	<p>irrespective 40:3 issue 25:4 31:25 33:13 51:25 52:1 54:5</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>judge 32:16 35:9 39:7 41:4 43:11 45:5,11 46:22,24 47:7 53:6 57:6 judges 4:11 38:7 56:25 judgment 59:14 judgments 2:4 3:12 31:15 judicial 35:9 46:23 jurisprudence 6:10 justice 1:25 4:3 4:9,25 5:8,15 5:19 6:1,16,18 6:19,25 7:8,10 7:12,12,13,21 7:24 8:1,13,22 8:25 9:4,7,13 9:20,21 10:7 10:11 11:4,10 11:11,12,22 12:17 13:6,8 13:23 14:4,4,7 14:20 15:12,14 15:16,20 16:1 16:4,6,11,16 16:18 17:1,4,5 17:11 18:6,13 18:14,14,17,19 19:16,22,25 20:13,19 21:1 21:22 22:2,8 22:16,18,25 23:7,8,12,13 23:19,22 24:1 24:3,10,12,16 24:23 25:3,6,9</p>	<p>25:10,18,19 26:2,4,23 27:5 27:15,25 28:8 28:15,19,25 29:2,6,8,10,13 30:5,9,19,21 30:22 31:7,11 31:16,21 32:15 32:20,23 33:18 33:19 34:20 35:5 36:8,17 37:11,22 38:1 38:3,11,18 39:16,18,19 40:1,10 41:8 41:10,13,18,24 41:25 42:6,13 42:19,22 43:4 44:4,6,13 45:5 46:5,9,13,19 46:19 47:6,9 47:10 48:9,11 48:20 49:7,12 49:14,18,20,23 51:5,7,8,9,9,11 51:21 52:11,17 52:18,25 53:25 53:25 54:3 55:9,10,16 56:15,17,18,23 57:10,18,22 58:6,11,22 59:10</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>Kagan 11:10,12 33:19 39:18 41:10 44:4,13 45:5 48:11 49:7 55:9,16 Kagan's 46:19 keep 35:5 Kennedy 6:16 6:19,25 17:1,4 17:5,11 46:5,9 46:13,19 47:6 47:9,10</p>	<p>kick 55:4,5 killed 43:18 Kimbrough 35:19,25 39:11 44:21 45:4,23 kind 10:24 knew 20:22 56:9 know 14:1,4,9,9 22:2,9 25:20 32:16 34:11 38:14,19 39:9 39:14,20 42:16 43:5 44:2 45:17 46:13,22 47:11,13,15 48:3 49:19,25 50:17 51:22,22 52:4 53:23 55:6 56:5 57:23,23,24 known 6:4 15:5 38:7 knows 6:3 13:24 14:5,8 46:25 46:25</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>lack 16:14 44:23 language 5:20 10:8,18,19 11:13 12:5 15:6 16:5,23 19:24 27:11 28:2 33:12,13 43:22 55:2 Laughter 49:13 law 6:4 12:8 14:8,18,18 19:10,11,17,20 20:11,11,14,15 20:16,20,22 22:24 24:14,14 24:18,21 29:19 29:19,25 30:3 30:10 31:23 32:14,17,21 34:12 35:12</p>	<p>36:3,6,10,10 36:11,11,14,14 40:24,25 41:25 43:14,23 46:25 46:25 47:17 48:18 49:25 50:23 54:7,14 54:23 55:3 56:10 57:13,20 57:21 lawmakers 33:5 laws 32:3 law's 32:5 lead 34:4 35:25 leads 44:23,23 leave 25:13 40:12 left 11:20 legal 15:6 31:19 31:22 legislation 6:3 12:19 16:22 40:17,18 legislative 11:1 11:2 26:13,14 33:9 53:20 legislators 29:18 legislature 30:11 lesser 57:14 let's 28:20 58:2 light 43:21 47:24 48:10 line 34:21 36:20 44:24 45:2 50:25 linear 47:19 lines 54:3 listening 57:2 little 21:7 36:4 living 30:7 44:14 Lockhart 16:20 logical 44:1 55:1 55:6 56:11 long 13:25 22:8 33:20 35:23 longer 10:9</p>
--	---	---	---	---

<p>11:21 47:3,21 look 6:21,21 11:1 12:4 38:21 41:21 45:7 58:11,12 58:17 looking 11:14 looks 47:17 58:16 lot 8:3 43:13 low 58:3,3 lower 12:25 35:22 39:3 42:20 50:19,21 52:21,22 lowered 21:9 37:22 LSD 50:17 51:25</p> <hr/> <p style="text-align: center;">M</p> <p>magical 17:16 making 24:9,10 mandate 59:6 mandated 12:5 mandatory 12:25 15:24 17:25 18:5 19:14 20:12 21:4,9 23:16 27:18 28:6 31:3,6 33:24 33:25 34:3 35:18,22 37:16 37:19 38:4,8 39:2,11,21 42:17 43:9 44:18 47:24 48:13,14,25 50:4,5,12 51:15,16,18,20 52:22 53:4,13 54:10,24 55:20 55:22,25 56:3 56:6,7,12,14 57:8 58:1,2 manifests 15:22</p>	<p>manner 55:17 Marcello 7:25 8:1 10:17 17:15 Marrero 5:13 7:17,20,21 8:15,17,21 10:2,4 matter 1:18 13:9 38:12 48:15 53:4,11,18 57:24 59:19 McNeill 46:14 mean 6:20 8:3 13:24 14:1,8 19:11 20:18 21:2 23:8 28:3 28:19 33:19 38:21 41:14,18 55:7 57:12 meaning 19:24 meaningless 12:12 means 10:23 20:6 22:7 meant 7:7 12:8 14:14,17 15:7 15:8 41:14 58:15 median 22:14 medium 50:17 50:19 51:16 meet 8:11 members 32:12 53:19 mentioned 17:15 50:9 methodology 50:21 MICHAEL 1:24 3:6 15:17 MIGUEL 2:2 3:10 31:13 mind 24:15,17 35:5 39:7 47:23 minima 50:5</p>	<p>minimum 15:24 17:25 19:14 20:12 21:4 35:22 37:16,19 38:4,8 39:3,21 47:24 48:13,14 48:25 50:12 51:15,16,18,20 52:20,23 53:4 53:13 55:21 56:6,7 58:2 minimums 12:25 21:9 23:16 27:18 28:6 31:3,7 33:25,25 34:3 35:18 39:11 42:17 44:18 50:4 54:11,24 55:25 56:3,12 56:14 57:8 minutes 56:19 misunderstood 46:10 mitigating 21:12 months 13:16 14:2,12 22:15 22:16 36:25 37:9 53:1,3 54:2,25 55:5 morning 4:4 moved 5:12 multiple 35:19</p> <hr/> <p style="text-align: center;">N</p> <p>N 3:1,1 4:1 Nationality 10:20 nature 35:10,15 Neal 35:20 50:16 51:25 nearly 32:16 necessarily 10:23 22:1,2 25:16 40:7 47:14 53:7 necessary 5:11</p>	<p>8:10 9:14 15:23 19:8,14 30:13 need 13:18 24:19 31:2 36:12 needs 12:9 never 50:25 55:23 57:19 nevertheless 47:1 new 6:13 12:24 12:25 13:4 14:23 15:24 18:5 19:4 20:8 20:12 21:3,13 21:18 22:23 24:18,18 25:1 25:3,6 27:18 28:6 29:2,20 30:2,4 31:5,6 33:24 34:2 35:11,12 36:5 36:9,11,14 37:4,7,14 38:25 39:2,6 39:20 40:17,18 42:10 43:15,24 43:25 44:9 47:14 49:2,2 49:25 52:6,7 52:10,13 53:4 53:11 54:2,10 54:15,24 55:11 56:10 58:7,10 59:7 newer 6:14 nice 28:20 nonretroactivi... 8:19 10:6 non-mandatory 58:7 normally 42:9 Northern 5:10 5:11 10:3 notion 45:18 November</p>	<p>14:24 37:8 nullity 17:10 number 35:20 numbers 22:21 24:2 numerically 23:25</p> <hr/> <p style="text-align: center;">O</p> <p>O 3:1 4:1 obligation 35:12 obvious 23:19 obviously 11:17 56:24 occasions 35:19 42:16 50:6 occur 28:8,9 occurred 20:16 35:13 56:5 odd 49:9 offender 43:11 offenders 21:21 22:6 28:4 46:3 48:22 54:11,16 offense 12:20 13:10 20:5 21:11 25:14 29:24 34:14 35:13 37:14,15 37:16 43:19 53:11 offenses 20:15 20:16 24:5 25:11 39:15 40:25 52:7,13 55:7 Office 22:13 officer 49:9 officers 17:23 18:3 Oh 6:1,23 11:22 Okay 25:24 28:19 42:12 44:13 old 10:9 11:6 13:1,12 23:16 24:19,21 28:5</p>
--	---	---	--	--

<p>28:6 33:25 34:3 36:11 37:14 40:24,25 52:19 53:5 57:13,15 once 10:22 29:20 31:4 32:5 33:21,23 34:6 ones 20:24 35:11 58:7 one-to-one 39:8 open 47:22 opinion 16:19 35:25 opinions 11:23 opponent 22:22 opposed 7:14 10:19 40:8 57:2 58:20 opposite 23:4 oral 1:18 3:2,5,9 4:7 15:17 31:13 order 51:3 original 27:2 outlined 36:23 outmoded 26:20 overcome 8:23 16:8 overcomes 17:7 overruling 8:15 overstate 52:5</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 4:1 page 3:2 19:2 25:25 45:22 pandering 42:24 paradox 44:20 Park 1:22 part 13:18 29:3 33:5 35:15 41:5 58:7 particular 46:21 particularly 30:15</p>	<p>particulars 38:2 pass 51:14 passage 32:10 37:9 passed 48:21 passwords 17:16 peculiar 49:9 penalties 17:25 36:20 44:24 50:14 penalty 30:10,11 30:12 43:3,6 57:13,15 people 19:18 21:19,24,24 22:20,23 23:3 24:18,19 25:2 25:4,11,13,13 33:9 34:5,13 34:13,22 35:13 36:24 38:3 39:14 40:24 42:10,15 48:13 48:13,14,24 52:19 53:2 57:16 perceived 23:17 perfect 24:23,25 52:9 perfectly 15:8 period 12:16 14:22 21:23 person 24:6 44:7 44:9,15,16 46:17,18 47:2 person's 22:10 Petitioner 1:4 1:11 46:6 Petitioners 1:23 2:1 3:4,8,15 4:8,19 8:10 15:19 38:23 56:21 phrase 19:9,11 pick 14:20 piece 18:22</p>	<p>pipeline 12:13 place 20:8 31:5 59:7 placed 14:16 plain 5:12 plainly 58:18 plausible 43:13 pleads 21:24 22:11 please 4:10 15:21 31:17 42:23 56:23 podium 4:18 point 10:22 14:15 21:19 34:22 39:9 45:18 49:22 52:4,5,5 53:20 53:22 57:9 pointed 9:22 52:18 53:25 54:1 points 33:1 34:12 35:4 44:1 45:1 46:1 policy 26:15 31:9,19 33:6 portion 27:10 position 12:1 14:10 45:7 46:21 47:6 possible 12:9 13:4 15:9 21:16 44:24 52:8 53:5 57:5 postpone 27:16 28:11 post-Act 54:11 post-Booker 45:22 post-enactment 28:4 54:16 post-FSA 38:24 potentially 50:2 powerful 40:6 practicable 12:10 21:16</p>	<p>29:22 practical 14:11 59:7 pre 20:14 precedents 42:18 preclude 9:11 premise 34:12 prepare 17:23 18:3 prepared 18:4 36:18 presentence 17:23 President's 14:19 presumably 6:2 presumed 50:18 presumption 16:9 17:7 32:7 pretty 5:19 previous 40:7 54:17 55:7 previously 40:13 48:25 pre-Act 48:22 pre-enactment 24:5 pre-FSA 21:20 53:10 pre-statute 20:15 primarily 8:17 primary 9:3 10:4 principle 29:18 39:14 prior 8:4 17:9 20:15 24:5 25:15 30:10,11 probably 21:17 23:15 36:19 38:8 50:19 probation 17:22 18:3 49:8 problem 28:1 30:5 31:2</p>	<p>39:18 56:1 59:3 procedure 10:18 13:20 produce 48:20 proffers 53:16 promulgate 18:9 19:4 promulgated 55:12 proposals 33:14 proposition 6:2 11:18 40:5 55:1 prosecuted 19:18 prosecutions 17:9 provide 13:2 58:2 provided 38:25 54:1 provides 17:6 26:6,25 providing 36:5 provision 5:2,23 5:24 8:18 9:12 10:6 11:14,17 25:16 26:10 27:9 29:15 54:12,17 58:23 provisions 12:7 19:9,13 21:6 59:4,8 public 31:18 33:6 punishment 34:15 pure 53:18 purely 9:15 purported 41:3 purpose 39:23 purposes 26:19 28:18 36:18 51:19 put 17:19 18:10 20:1 22:12</p>
--	---	---	---	--

23:11 31:5 47:6 59:6	really 5:5 7:8 13:18 37:4 58:15 reason 26:17 39:5 45:8,12 45:21 52:5 54:20 55:21,23 56:5 57:5 59:1 reasonably 12:22 reasons 36:23 47:12 48:2 53:15 REBUTTAL 3:13 56:20 recognition 36:1 recognize 32:12 35:21 recognized 35:19 recognizes 56:24 57:19 reconcile 27:13 refer 25:22 reflects 32:10 40:7 Reform 14:6 15:7 20:2,2 24:24 25:1 26:6,10,11 29:4 54:18 58:18 regard 12:13 58:9 regime 50:3 regulation 51:12 rejected 11:19 relates 44:5 release 43:6,8 43:12 relevant 7:1,4 8:20 37:4 relied 5:13 reluctant 23:6 48:3 rely 7:18 relying 6:10	10:11 remedy 32:1 removed 5:20 reopen 27:22 reopened 27:19 reopening 27:20 27:23 repeal 5:1 9:14 30:15,18 repealed 9:9,16 23:17 31:10 repealing 8:4 repeals 30:10 repeatedly 32:3 reports 17:23 28:16 reproduce 25:25 require 13:3 40:19 48:18 required 4:22 6:4 37:17 51:23 requires 51:16 requisite 15:23 17:20 resentencing 27:1 reserve 15:12 respect 48:24 respects 58:9 Respondent 2:1 3:7 15:18 responsibility 59:15 rest 15:13 result 30:3 retroactive 27:10 retroactively 6:6 14:14 retroactivity 9:12 27:18 reversed 27:1 ridiculous 34:4 right 5:16 7:10 7:11,22 8:23 9:1,20 14:7	15:1 17:12 18:7 23:13 24:6 32:24 33:17 36:19 40:22 42:4 44:19 46:8 48:19 49:6,8 49:18 55:11,13 58:11,25 rise 50:5 ROBERTS 4:3 5:15,19 6:1 7:12 13:23 14:7 15:14,16 21:1 30:21 31:11 51:9 56:15,18 58:22 59:10 role 21:10 rough 39:15 45:3 46:2 roughly 22:5,9 22:22 routine 42:21 43:18 rule 17:7 20:5,5 27:4 30:17 41:3,4 44:2 45:14,15 46:7 46:7 53:16 rules 40:23 rulings 35:24 runs 57:11 rush 13:18	42:8 51:15 54:12 55:19 57:12,17 Scalia 4:25 5:8 7:8,12,13,21 7:24 8:1,13,22 8:25 9:4,7,13 9:20 11:22 16:18 18:6,13 18:14,17,19 19:16,22,25 20:13,19 22:25 25:3,6,9,10,18 25:19 26:2,4 26:23 28:19,25 29:2,6,8,10,13 40:10 42:6 53:25 57:10 Scalia's 44:6 scheme 51:22 scholarship 47:25 second 7:3 35:14 42:25 43:17 section 4:23,23 5:2,17 6:4 9:8 12:5 16:9 17:14 18:22,25 19:3 20:23 24:4 25:25 26:23 28:22,25 34:18 35:21 36:13 40:23 42:21 43:18,22 47:16 48:8,23 53:21 57:11,12 58:16,17 59:8 sections 19:12 49:5 Securities 10:3 see 22:18 23:22 48:4 49:10 sees 16:24 Senate 53:23,23 sense 24:23,25 33:3,23 36:13 52:9 53:17
<hr/> Q <hr/> quantities 19:14 quantity 45:3 question 4:13,13 4:19,20 7:2,3 8:14 20:14 25:7,23 27:20 30:20 33:21 34:6 36:21 39:17 42:6,7 45:10 46:20 48:11 51:7 54:4 57:4 questions 44:6 quickly 13:3 21:15,25,25 58:24 quite 7:15 46:10 quote 19:6 26:14 quoted 28:22	<hr/> R <hr/> R 1:24 3:6 4:1 15:17 race-neutral 32:4,6 racial 32:18,22 racially 4:16 23:18 30:7 57:9 racist 40:11 radical 41:16 raises 4:12 range 38:25 rate 52:20,21 ratio 21:3 39:8 44:10,11,16,17 47:21,25 50:1 rational 45:21 59:1 reach 41:22,23 read 26:12 49:6 readily 14:9 reads 49:25 reality 36:3	<hr/> S <hr/> S 3:1 4:1 salutary 45:25 saying 9:11 10:25 24:3 29:14,17 35:11 43:17 45:19 46:24 55:6,10 56:10,11 says 5:16 17:12 27:9 34:19 40:24 41:4		

<p>55:2 56:9 sent 27:1 sentence 26:20 40:3 43:9 46:17 55:8,22 56:4,8 58:3,17 sentenced 12:14 12:15 19:19 20:21 21:25 22:11 23:16 26:9 28:5 34:5 36:25 38:24 39:2 47:3 52:21 sentencer 45:25 sentences 4:15 19:15 27:19,21 27:22,24 40:2 40:12 46:2 51:20 57:25 sentencing 4:20 12:6,21,23,24 13:1,3,4,11,12 13:15 14:6,21 14:25 15:1,6 15:22 17:20,21 18:4,24 19:4,7 19:12 20:1,2,3 20:4,5,7,8,25 21:6,11,12,20 24:24 25:1,2 26:6,10,11,16 26:19,21,22 27:3 28:15 29:4,19,23 31:1 32:25 34:24 35:1 36:3,9 38:25 40:21 43:16,24 45:2 46:7,22 46:24,24 47:19 51:13 53:3 54:9,12,17,18 55:11 57:7,21 58:18,19,24 59:6 sentencings</p>	<p>15:25 seriousness 59:3 served 46:20 serving 40:3 sessions 33:9 set 20:22 25:1 25:12,20 26:7 27:2 45:4 sets 42:2 48:12 48:22 55:24 Seventh 4:11 severity 43:3 side 4:17 34:22 46:16 47:12 sides 31:20 signature 14:19 significant 32:24 33:10 Similarly 50:16 simple 49:22 simply 8:8 41:4 43:21 sit 57:6 sitting 4:17 56:25 situated 34:16 46:3 situation 30:17 41:1 57:19 Smith 42:25 Solicitor 1:24 solution 34:17 56:1 somebody 43:23 someplace 34:21 somewhat 46:16 soon 12:9,10 14:11 15:9 21:16 29:21 53:9 59:7 sooner 55:5 soon-to-be-ob... 13:12 sophisticated 26:18 sorry 5:11 9:6 26:3,5 41:12</p>	<p>47:9 51:8 52:16 53:25 sort 34:3 38:14 Sotomayor 16:1 16:4,6,11,16 30:9,22 31:21 32:15,20,23 33:18 37:11,22 38:1,3,11,18 39:16,19 40:1 43:1 51:5,8,10 51:11,21 52:11 52:17,25 57:19 speaking 22:5 species 39:12 specific 8:18 10:5 speedy 31:25 SR 1:3 standard 5:8,22 6:7,9 7:5 8:12 10:12 11:6,19 11:21 20:12 standards 5:10 16:21 17:25 staple 42:20 started 39:19 statement 6:5,16 16:15 45:9 statements 26:15,18 States 1:1,6,13 1:19 4:4,5 16:20 statute 5:16,20 6:13 8:4 10:9 10:14,21 11:7 11:13 17:9,9 21:17 24:19 25:22,23 29:2 34:23 35:3 36:24 39:6 41:1 42:11 43:9 45:9 48:7 48:12 50:8,10 51:15 54:2 57:11</p>	<p>statutes 30:25 53:24 statute's 48:21 statutorily 51:23 statutory 35:12 50:22 52:2 53:18 STEPHEN 1:22 3:3,14 4:7 56:20 stick 11:13 straight 44:24 strange 30:1 stressing 27:7 27:12 28:3 structural 18:2 20:1 structure 16:24 subject 31:8 43:8 44:9 48:13,25 49:1 52:19 subjected 13:12 submit 4:18 13:20 17:23 submitted 28:16 59:17,19 subsequent 16:22 suddenly 8:7 suggest 58:13 suggesting 18:15 supervised 43:6 43:8,12 support 2:1,3 3:8,12 15:19 31:15 59:14 Suppose 41:8,13 54:9 supposed 6:20 6:21 13:23 18:25 20:10 58:24 Supreme 1:1,19 39:6</p>	<p>sure 11:22 12:22 40:17 44:6 51:6,11 surely 29:19 swallow 30:16 synchronicity 27:17 system 28:15 29:23 30:5 35:15 36:23 40:8 45:13,21 45:24 46:23 49:24 systemically 38:15</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 3:1,1 take 12:9 13:8 14:16 22:9 47:8,11,14 55:4 taken 15:6 takes 16:8 talk 8:14 28:20 talked 45:6 talking 5:1,16 21:23 22:4,20 24:20 42:8,15 46:21 49:7 targeted 21:10 tell 12:2 48:10 tells 55:20 tenable 43:21 tend 24:6 39:11 tenets 32:2 term 47:3 test 9:16,17 text 4:20,22,23 4:23 6:11 28:20 Thank 15:14,15 31:11,16 56:15 56:17,22 59:9 59:10 then-conformi... 49:1</p>
---	---	---	---	--

<p>then-current 53:14 then-Judge 43:1 theory 14:25 thing 22:23 33:11 46:22 49:3,23 things 13:22 21:9 46:23 48:22 49:17 50:1,7,25 think 5:5 8:6 10:20 11:10,12 11:23,25 13:14 14:3,13,16 16:1,14 17:14 17:18,19 18:1 18:6,7,21,23 23:14,24 24:4 25:15,21 27:6 28:10,13 30:13 31:18 32:9,12 32:20 33:21 34:11 35:5 36:18 40:5 41:14,16,18 42:6,24 45:16 45:17,20,22 46:11 47:13,25 48:5,12 51:12 54:19 57:25 58:15 thinking 41:19 thinks 50:13,18 53:21 thought 9:4,7 31:24 55:2 thousands 23:15 three 9:23 34:9 threshold 45:3 thresholds 15:24 19:13 21:10 till 22:10 time 13:8,15,25 14:24 15:13 20:4,5,24</p>	<p>22:10,10 26:11 26:16 29:23,23 33:20 34:24 37:18 38:24 40:20 42:1 43:11,20 46:7 times 10:14 28:16 Tinley 1:22 today 37:2 told 21:15 tool 45:3 top 45:22 tough 48:17 translate 21:13 treat 34:12 treated 30:24,25 trial 13:17 trigger 19:14 trouble 43:17 troubled 7:8 troubles 27:8 troublesome 50:5 true 9:21 10:2,2 11:4 33:20 54:20 trump 35:22 54:17 trying 15:11 22:19,19 23:20 23:23 39:10 46:13 49:22 Tuesday 1:16 two 9:22 21:9 22:21 35:4,15 42:1 44:1 48:12,22 49:5 49:16 51:24 52:24 55:24</p> <hr/> <p style="text-align: center;">U</p> <p>ultimately 58:4 unanimous 4:12 undermined 28:14 undermines</p>	<p>34:18 understand 6:1 27:25 28:2 44:5,7 55:9 56:2,2,10 understanding 41:17 understood 28:13 29:20 34:1 unfair 4:15 23:18 uniform 46:6 uniformity 39:12 46:2,9 46:12 uniformly 5:3 54:24 unique 30:23 United 1:1,6,13 1:19 4:4,5 16:20 universally 4:15 unjust 30:11,14 30:18 unmistakable 11:25 12:3 16:2,8 unquestionable 5:4,6 7:15 untoward 51:1 uphold 39:13 urge 48:3 urged 34:17 59:4 urgency 59:2 urging 44:3 use 9:23 12:6 17:16 18:5 39:7 40:20 53:6 usual 13:20,25 U.S 22:13 39:5 42:25</p> <hr/> <p style="text-align: center;">V</p> <p>v 1:5,12 4:4,5</p>	<p>16:20 17:15 42:25 variant 33:11 version 20:3 53:22 versions 53:24 versus 46:18 view 47:15 53:15 viewed 4:15 violated 43:12 43:14 violation 43:8 visions 46:12</p> <hr/> <p style="text-align: center;">W</p> <p>wait 13:21 48:9 48:9 want 4:14 12:2 12:19,21 19:25 22:3 27:21 28:1 32:6 44:6 44:20 52:4 57:5 wanted 6:5 26:13,17 29:21 29:24 30:1 34:25 39:7 45:12 59:3 Washington 1:15,25 2:2 wasn't 34:24 way 9:5 10:15 18:7 23:11 25:24 30:12,14 30:24,25 32:4 32:6 34:4 39:22 45:22 weigh 50:17 weighing 10:18 weight 50:18 53:19 weird 45:13 well-settled 5:23 went 10:21 14:21 15:2 33:1</p>	<p>weren't 38:7 We'll 4:3 we're 5:19 6:20 6:21 8:7 16:4 22:3,20 24:20 40:11 42:8,15 44:14 46:21 49:8 we've 57:14 window 37:3,3,4 Woodman 5:13 word 16:11 54:22,22 words 10:13 16:7,10 22:24 work 31:6 46:1 working 34:23 works 25:24 world 35:7,7 39:12 43:7,9 44:14 47:17 53:8,15 56:3 worlds 52:25 worried 42:5 wouldn't 14:1 28:1 37:16 54:18 59:3 written 17:21 wrong 32:10 41:8,13 wrote 41:19 48:15 58:7</p> <hr/> <p style="text-align: center;">X</p> <p>x 1:2,7,9,14</p> <hr/> <p style="text-align: center;">Y</p> <p>year 22:7 46:15 57:24 years 15:10 28:15 30:25 32:16,25 33:3 57:6</p> <hr/> <p style="text-align: center;">1</p> <p>1 46:17,18 48:1 1st 14:24 37:8 1,000 24:8</p>
--	--	--	---	---

<p>10 4:24 23:9 37:24 39:3 53:3 59:8 10a 19:2 10:19 1:20 4:2 100 23:9 100-to-1 30:7 44:11,17 108 45:22 109 5:2,17 6:4 6:21 7:1,4 8:20 8:22 9:5,8,10 9:11,15,15,25 11:5,5 16:9 17:5,12,14 34:19 40:23 42:7,21 43:18 43:22 57:12,12 57:17 58:14,16 11 13:16 14:2 22:15 11-5683 1:4 4:4 11-5721 1:11 4:5 11:21 59:18 110 39:1 120-day 13:20 137 39:1 1383 53:23 15 3:8 37:9 53:1 16 48:1 17 1:16 1711 53:23 18-to-1 44:10,16 47:21 180 27:16 28:12 180-day 13:20 1908 5:21 1987 55:18</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2 19:12 20 32:16,25 33:3 2007 47:23 2010 35:8,23 2011 37:8 2012 1:16 24:1 33:15</p>	<p>25 15:10 265 27:9 28:9</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 19:12 56:19 3rd 14:24 15:4 3-month 21:23 30a 25:25 26:2,3 31 3:11 3353(a)(4) 26:1 3553 41:19 58:17,17 3553(a) 20:23 25:25 28:25 3553(a)(4)(A)(... 26:9 40:16 3553(g) 48:23 3742(g) 26:23 39a 26:3,4</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>4 3:4 28:23 4th 21:19 4-1/2 45:14 4.99 44:7,15</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>5 37:25 44:16 45:15 57:6 5G 55:20 5G1 35:21 5G1.1 55:19 5,000 22:6 50 23:9 500 24:8 56 3:15</p> <hr/> <p style="text-align: center;">6</p> <hr/> <p>6 36:25 54:2,25 55:4</p> <hr/> <p style="text-align: center;">8</p> <hr/> <p>8 4:23 12:5 14:12 18:25 24:4 48:8,23 8(2) 36:13</p> <hr/> <p style="text-align: center;">9</p> <hr/>	<p>90 12:11 13:19 14:2 21:2 90-day 12:16 14:22 37:3,3</p>		
--	---	---	--	--