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IN THE SUPREME COURT OF THE UNITED STATES

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TIMOTHY D. KOONS, KENNETH JAY)
 PUTENSEN, RANDY FEAUTO, ESEQUIEL)
 GUTIERREZ, AND JOSE MANUEL GARDEA,)
 Petitioners,)

v.) No. 17-5716

UNITED STATES,)
 Respondent.)

- - - - -

Washington, D.C.

Tuesday, March 27, 2018

The above-entitled matter came on for oral
 argument before the Supreme Court of the United
 States at 11:03 a.m.

APPEARANCES:

JEFFREY L. FISHER, ESQ., Stanford, California;
 on behalf of the Petitioners.

ERIC J. FEIGIN, Assistant to the Solicitor
 General, Department of Justice, Washington,
 D.C.; on behalf of the Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	JEFFREY L. FISHER, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF:	
6	ERIC J. FEIGIN	
7	On behalf of the Respondent	21
8	REBUTTAL ARGUMENT OF:	
9	JEFFREY L. FISHER, ESQ.	
10	On behalf of the Petitioners	52
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (11:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 17-5716, Koons versus
5 United States.

6 Mr. Fisher.

7 ORAL ARGUMENT OF JEFFREY L. FISHER

8 ON BEHALF OF THE PETITIONERS

9 MR. FISHER: Mr. Chief Justice, and
10 may it please the Court:

11 In contrast to the case you just
12 heard, the "based upon" question in this case
13 turns on the -- how the substantial assistance
14 provision, codified at 18 U.S.C. Section
15 3553(e), works. And, specifically, the key is
16 whether the government is correct when it says
17 that a judge imposing a sentence in this
18 situation shall disregard or entirely set aside
19 the guideline range calculated according to the
20 defendant's criminal history and offense level.

21 And the answer to this question lies
22 directly in the plain text of the statute. And
23 that text says the opposite of what the
24 government claims. And I'm turning now to page
25 3a, which is in the government's brief, the

1 appendix, and that's where the statute appears.

2 And I just want to read to you the
3 operative language of Section 3553(e). It
4 says: "Such sentence shall be imposed in
5 accordance with the guidelines and policy
6 statements issued by the Sentencing Commission
7 pursuant to section 994."

8 So, in other words, that text directs
9 the court straight to the guidelines, not away
10 from the guidelines. And it says nothing about
11 tethering a sentence to the mandatory minimum
12 or somehow setting the guidelines aside.

13 And it makes perfect --

14 JUSTICE SOTOMAYOR: The problem really
15 is that the guidelines are a little confusing.
16 They talk about an initial guidelines range,
17 and then they tell the court that the real
18 guideline range is a statutory minimum. So
19 that it's talking about the guidelines doesn't
20 resolve that question because which guideline
21 are they talking about?

22 In my mind, they're told they have to
23 start from the statutory minimum in their
24 departure. So how do we get away from that
25 fact?

1 MR. FISHER: Well, Justice Sotomayor,
2 we don't think that's actually the way the
3 guidelines are properly read. I think you're
4 referring to Section 5G1.1.

5 JUSTICE SOTOMAYOR: Yes.

6 MR. FISHER: And in that section, what
7 it says is that if there's a statutorily
8 required minimum sentence, then the judge shall
9 adjust the guideline range to that minimum.

10 But remember the whole point of a
11 Section 3553(e) motion is to say that the
12 minimum does not apply. As the Court put it in
13 Dorsey, what the court does when it grants a
14 substantial assistance motion is it lets the
15 defendant escape the binding effect of the
16 mandatory minimum. So now the judge, as I just
17 read to you in the second sentence of Section
18 3553(e), directed right back to the guidelines
19 and the guideline range.

20 And it's -- and one other thing I want
21 to point out while I'm talking about --

22 JUSTICE SOTOMAYOR: So that means the
23 departure is not -- you're suggesting that the
24 departure -- this is the -- the effect of your
25 rule --

1 MR. FISHER: Right.

2 JUSTICE SOTOMAYOR: -- the departure
3 starts with the lower guideline range, and then
4 the only way they can go is down from that?

5 MR. FISHER: Yes, Justice Sotomayor.
6 But let me put this answer in context. So,
7 first of all, remember, sometimes the guideline
8 range is going to be above the minimum, and
9 sometimes it's going to be below, and sometimes
10 it's going to straddle the minimum. So what
11 Section 3553(e) does is says when the judge
12 grants a substantial assistance motion, the
13 judge should then sentence that defendant like
14 anyone else, which is go to the guideline
15 range.

16 Now, yes, that departure under 5K1 is
17 going to be from the guideline range,
18 regardless of whether it's above or below the
19 minimum. But, yes, the court is directed to
20 just sentence that defendant according to the
21 guideline range, just as he would any other
22 defendant.

23 And that makes perfect sense, because,
24 again, what Congress has done, remember, is set
25 up a default regime of guided discretion under

1 the guidelines as set by guideline ranges
2 according to offense level and criminal history
3 categories. And then it has stepped in and
4 created a disruption in a limited context of
5 mandatory minimums in particular drug cases,
6 but then Congress says, if there's substantial
7 assistance given, those two things cancel each
8 other out and we just want you to go back to
9 the default range.

10 And if I could add one other thing to
11 your question, Justice Sotomayor, that I think
12 puts this all together, it's to refer to the
13 Court's opinion in Melendez. Remember, in
14 Melendez, the Court talks about two different
15 types of substantial assistance departures.
16 One is from the guideline range under 5K. The
17 other, if the government wants to allow it, is
18 to allow that departure to go beneath the
19 mandatory minimum if the government puts that
20 as part of the motion.

21 So, when you go to 5K in the
22 guidelines, which is where these departures get
23 calculated, the beginning of 5K says that a
24 court may depart from the guideline range if
25 the substantial assistance warrants that

1 departure.

2 The guideline at 5K says nothing --
3 says nothing at all about departing from the
4 mandatory minimum. There's no such thing in
5 the guidelines. Only departures occur from the
6 guideline range.

7 And I think what cements this, if I
8 could return the -- the Court to the text that
9 I was referring to at page 3a of the
10 government's brief, it's the sentence -- it's
11 the reference to Section 994 as a whole.

12 The way the government reads this
13 sentence is that the government says, well, all
14 that sentence does is direct the court to the
15 5K guidelines, which are the ones for measuring
16 the substantial assistance departure.

17 But if that were so, what that text
18 would say is Section 994(n), because subsection
19 994(n) is the place in the Commission's
20 authority where Congress directs it to deal
21 with substantial assistance scenarios.

22 But, instead, what Congress did in
23 Section 3553(e) is refer to 994 as a whole,
24 which includes the entire guidelines system.
25 And if you compare that to the other statutory

1 provisions on these two pages, 2a and 3a,
2 you'll see that, on page 2a, Congress refers no
3 fewer than four times to particular subsections
4 of 994.

5 So, when Congress wanted to limit a
6 court's authority or to direct it to particular
7 guidelines, provisions, or particular elements
8 of the Commission's authority, Congress did so
9 specifically. By contrast --

10 JUSTICE GINSBURG: Mr. Fisher, there's
11 a -- there's an anomaly in the position you
12 take. That is, if the defendants involved
13 here, if they were to appear for initial
14 sentencing today, they would get the very same
15 sentence that they got -- that the -- the
16 sentence that they are now serving. So that
17 seems a little odd that -- that people who, if
18 they were being sentenced today, would get the
19 exact same sentence, should get the benefit of
20 this scale-down.

21 MR. FISHER: Justice Ginsburg, we
22 agree if that were true it would be odd. But I
23 have to disagree with your premise, and I think
24 this relates to the answer I gave to Justice
25 Sotomayor earlier about how 5G1.1 applies.

1 That argument which the government makes
2 depends on the assumption that the judge
3 sentencing somebody in a courtroom today in
4 this scenario needs to start with the mandatory
5 minimum and work from there.

6 And that's just a false premise. In
7 Section 3553(e), as I've quoted to you, the
8 direction is quite to the contrary. It's to
9 sentence the defendant according to the
10 guidelines and to start with the guideline
11 range. And 5G1.1 doesn't require starting at
12 the minimum today or for any future sentencing.

13 So, in effect, we're asking for our
14 defendants to be given sentence -- sentence
15 modifications that enable them to be given
16 sentences just as they would be in courtroom
17 today.

18 JUSTICE ALITO: What if the
19 district --

20 MR. FISHER: And the government's --

21 JUSTICE ALITO: What if the district
22 judge specifically disavows any reliance on the
23 guidelines? What if the district judge says I
24 don't care if the guidelines are subsequently
25 lowered; this is the sentence I'm imposing?

1 MR. FISHER: Well, two things, Justice
2 Alito. First of all, that judge would be -- if
3 you're -- if you're talking about a sentence in
4 the first instance, that judge would be
5 violating Section 3553(e), which tells that
6 judge to sentence the defendant according to
7 the guidelines. I think the only --

8 JUSTICE ALITO: Well, they're not --
9 they're not mandatory any longer.

10 MR. FISHER: Right. I think that's
11 the only way a judge might work around that, is
12 to say after Booker, the judge is allowed to
13 set the guidelines entirely aside.

14 JUSTICE ALITO: Yeah, so we are after
15 Booker. So that's what the judge says. Then
16 what?

17 MR. FISHER: I think if the judge set
18 the guidelines entirely aside and said I just
19 flat out disagree with anything the guidelines
20 say and I'm going to give you a certain
21 sentence, maybe I'd have a difficult case on
22 the "based upon" question. But anything short
23 of that, where the judge starts with the
24 guideline range or refers to it or uses it as
25 an anchor, I think you're easily within -- and

1 I think the way to solve this problem, we might
2 say --

3 JUSTICE ALITO: You'd have a difficult
4 case if the judge says, I disagree with the
5 guidelines, I'm basing my sentence on the
6 Sentencing Reform Act. It is not based -- my
7 sentence is not in any way based on the
8 guidelines. You'd have -- you would have just
9 a difficult case in saying that that's not --

10 MR. FISHER: Fair enough.

11 JUSTICE ALITO: -- that that's based
12 on the guidelines?

13 MR. FISHER: Fair enough. Maybe it
14 would be even more than difficult. But I think
15 that's a highly unusual scenario, Justice
16 Alito. And so, in all the other scenarios
17 where the judge does what is more commonly done
18 in -- in a Gall-type situation or all the other
19 situations this Court has seen where you start
20 with the guidelines, and -- and -- and our very
21 case illustrates you usually land within the
22 guidelines, or you vary from the guidelines for
23 one reason or another. All of those satisfied
24 "based on."

25 And I think, Justice Alito, the other

1 thing I would say in response to your concern
2 is remember -- and I think this was emphasized
3 in the first case -- remember all we're arguing
4 here is the defendants should be eligible to go
5 before a district judge and argue for a
6 sentence reduction.

7 If a district judge in that case says
8 to himself, well, look, the guidelines really
9 didn't have any meaningful effect the first
10 time around, that may well be a reason to deny
11 sentence mod -- sentence modification in that
12 context.

13 All we're asking is for judges to be
14 allowed to use their guided discretion given to
15 them by Congress and the Sentencing Commission.

16 JUSTICE GINSBURG: What is the
17 function of the -- the mandatory minimum?
18 Because it seems the guidelines have Sentencing
19 Commission, and that's fine, but mandatory
20 minimum, like it or not, is legislation, and it
21 seems to be vanishing in your approach.
22 Instead of being -- instead of trump --
23 trumping whatever would be the guidelines, it's
24 out of the picture.

25 MR. FISHER: Justice Ginsburg, of

1 course, the -- a mandatory minimum in a statute
2 trumps the guidelines in every -- and in the
3 ordinary situation. But we're in the special
4 situation of substantial assistance motions
5 being granted under 3553(e). And that special
6 situation, as the Court put it in Dorsey,
7 allows the defendant to escape the minimum.

8 Another way to think about it, Justice
9 Ginsburg, is we're not doing any -- we're not
10 avoiding any trumping problem, because we have
11 two statutes that have to work together. One
12 is the mandatory minimum statute and the other
13 is Section 3553(e).

14 And what the Court said is that -- and
15 I think what the plain text directs -- is that
16 the mandatory minimum is set aside when the
17 substantial assistance motion is granted.

18 And in -- if your own words in Dorsey
19 aren't enough, you can look any number of other
20 places, including the legislative history where
21 we quote statements from Senator Hatch and from
22 President Reagan where he -- who were -- they
23 introduced this. You can look at various
24 issuances from the Sentencing Commission that
25 we've quoted in our brief.

1 And again and again and again, courts,
2 legislators, administrators, all understand
3 that in the narrow situation of a substantial
4 assistance motion being granted, the mandatory
5 minimum is set aside. And all that happens in
6 that scenario, I want to stress one more time,
7 is the defendant is sentenced just like anybody
8 else.

9 JUSTICE SOTOMAYOR: Mr. Fisher, let's
10 start with that proposition.

11 In my experience, district court
12 judges use a lot of different approaches to
13 sentencing, and I think that many of the
14 surveys and amici brief that you have show
15 that.

16 There are judges who have fixed rules.
17 Perhaps they should or shouldn't. Let's not
18 get into that, okay? But there's a wide berth
19 of them who simply say my rule of thumb is you
20 cooperate 50 percent. And some of them never
21 deviate, 50 percent.

22 How can we say that for those judges,
23 that their sentence was based on the
24 guidelines, so that you're entitled to
25 eligibility? They based it on the statute --

1 they clearly tell you I'm basing it on the
2 statutory minimum.

3 MR. FISHER: Well, I think for two
4 reasons, Justice Sotomayor. First is we think
5 the "based upon" question should be answered
6 according to what the law requires, not
7 necessarily what a judge did, perhaps
8 mistakenly. So, as a legal matter, the -- the
9 sentence was required to be based on the
10 guidelines, even if the judge didn't do that.

11 JUSTICE SOTOMAYOR: But it was the --

12 MR. FISHER: But if your --

13 JUSTICE SOTOMAYOR: -- guideline at
14 the time.

15 MR. FISHER: Well, if your --

16 JUSTICE SOTOMAYOR: And -- and they
17 have discretion to say I want to use the
18 statutory minimum. I don't want to use the
19 lower guideline. I'm going to ask the other
20 side about the many judges who do use the
21 guidelines in substantial assistance. They say
22 it.

23 MR. FISHER: Right.

24 JUSTICE SOTOMAYOR: Prosecutors by
25 their own admission have gone in to judges and

1 said, base it on the guidelines.

2 So there are plenty of judges who --
3 who do depart based on the guidelines because
4 they believe that they're more reflective of
5 the seriousness of the crime and give them a
6 better sense of how much of a departure they
7 should or should not give. So, in those ways,
8 it informs their decision.

9 But we're not in that case. We're in
10 the first type of case.

11 MR. FISHER: Right. So let me say two
12 very important things to that question because
13 I think it's probably the hardest part about
14 this case.

15 The first is that for the very reason
16 you stated, Justice Sotomayor, that there's
17 such wide variance, sometimes not just between
18 districts but between courtrooms in the same
19 courthouse, it would be -- it would be in -- in
20 contravention of the very principles of the
21 Sentencing Reform Act, which say avoid
22 sentencing disparities, to deny relief to some
23 of those defendants and to give other
24 defendants relief, just based on the
25 happenstance of what judge that defendant

1 happened to adhere -- appear in front of.

2 We think it's a better rule to ask
3 what the law required the judge to do. And if
4 the law required the judge to consult the
5 guidelines, that should be enough to get into
6 the eligibility of relief.

7 But the second point I want to make,
8 Justice Sotomayor, is even if you want to look
9 at what the judge did on the record, warts and
10 all, mistakes and all, we still win this case.
11 And that's because the judge in our case
12 adjusted up to the mandatory minimum because of
13 5G1.1. And, as I've described, we think that
14 was incorrect.

15 But even if you accept that as
16 something that happened and something you need
17 to take into account, the Sentencing Commission
18 has addressed that exact scenario in the policy
19 statement that -- that accompanied Amendment
20 782, which brings us here today.

21 And this is in Section 1B1.10(c). The
22 Sentencing Commission says when you calculate
23 an amended range under the guidelines, pursuant
24 to this amendment, you should disregard 5G1.1
25 and use the range itself and not adjust.

1 So even if we were in a world where we
2 had to argue that in our case, even if the
3 judge made a mistake and relied on a guideline
4 incorrectly, that has been taken care of by the
5 Sentencing Commission amendments. And so we
6 still have a lower guideline range after
7 Amendment 782, which is all that's required to
8 get relief under Section 3582.

9 And I think that adds one other thing
10 I want to say, and it brings me back to Justice
11 Ginsburg's question about the concern about
12 disparities and who gets relief and who
13 doesn't.

14 We think that our solution actually,
15 for the reasons I just described, avoids
16 sentencing disparities and also avoids
17 sentencing disparities because we're asking for
18 our sentences to be adjusted just as somebody
19 would be sentenced today.

20 As we point out in our briefing,
21 though, the government is the one that creates
22 the disparity problem because, under the
23 government's view, people whose guideline
24 ranges were above the minimum, and even if the
25 judge sentenced below, those people are

1 eligible for Section 3582 relief.

2 And the only difference between those
3 people and -- and our clients in this case is
4 that the guidelines measured their crimes as
5 being more serious than the ones our clients
6 committed.

7 And we think it would be highly
8 irregular and, in fact, perverse for a court to
9 say for the people who committed more serious
10 offenses but are otherwise identically
11 situated, we are going to grant them relief in
12 sentences reductions, but not the people whose
13 crimes weren't judged to be quite as serious.
14 They are not even allowed to ask the judge to
15 exercise discretion in their favor.

16 So we think that would be a wild
17 anomaly that this Court ought to construe
18 Section 3582 to avoid.

19 If there are no more questions, I'll
20 reserve the rest of my time for rebuttal.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Mr. Feigin.

24

25

1 ORAL ARGUMENT OF ERIC J. FEIGIN

2 ON BEHALF OF THE RESPONDENT

3 MR. FEIGIN: Thank you, Mr. Chief
4 Justice, and may it please the Court:

5 There was very little discussion in
6 the last 20 minutes about anything that
7 happened at these particular Petitioners'
8 sentencings.

9 The sentencing transcripts are
10 entirely in the Joint Appendix. And what you
11 will not find in the sentencing transcripts is
12 any indication that the drug guidelines, that
13 the Sentencing Commission has amended, had any
14 effect on the sentences that these Petitioners
15 received.

16 In fact, if Petitioners were initially
17 sentenced for the first time today, they'd be
18 subject to the same statutory minimums, the
19 same sentencing ranges under 3553(a)(4), which
20 would be the statutory minimums. He's wrong
21 that that has changed. And they would be
22 subject to the exact same rules for taking into
23 account the -- their substantial assistance to
24 law enforcement in adjusting their sentences.

25 The Commission hasn't purported to

1 change any of that. What they're seeking is
2 windfall relief, and they assert that they're
3 entitled to that windfall relief because they
4 claim that the district judge made an error in
5 their cases.

6 They're wrong the district judge made
7 an error, and I'll get to that in one second,
8 but even if the district judge had made an
9 error, this Court's decision in Dillon makes
10 quite clear that Section 3582(c)(2) proceedings
11 are not for error correction. They are for
12 sentence reductions in cases in which the
13 sentence was actually based on a sentencing
14 range that the Commission has modified.

15 But I agree with Petitioners' counsel
16 that the crux of this case --

17 JUSTICE SOTOMAYOR: Well, it is a
18 sentencing range. That's the force of their
19 argument, which is the sentencing range was
20 raised to the statutory minimum.

21 So the original judge felt bound by
22 that sentencing range because of the statutory
23 minimum, but that became the new guideline.

24 MR. FEIGIN: And if they came before
25 the court again today for full resentencing,

1 even after Section 1B1.10(c), to which opposing
2 counsel referenced, even after Section
3 1B1.10(c) were enacted, Section 1G1.1 would
4 still require that the statutory minimum be
5 their guideline sentence for purposes of
6 Section 3553(a)(4).

7 JUSTICE SOTOMAYOR: It misses the next
8 step, which the guidelines say, if you
9 substantially cooperate, the minimum is
10 eliminated.

11 MR. FEIGIN: Well, first of all, Your
12 Honor, I don't think that's what the guidelines
13 say, but I don't think the guidelines even
14 could say that. First of all, the guidelines
15 under 994(b) have to comply with all relevant
16 provisions of law, which means 5G1.1, setting
17 the guideline sentence at the statutory
18 minimum, isn't optional. That's not a choice
19 the Commission made. The Commission is
20 required by statute to have a guideline like
21 that.

22 But I think the first place to look
23 here before we even get to what the Commission
24 did -- and I don't think the Commission has set
25 forth anything like the instruction he

1 suggests -- is the language of the statute.

2 And so, if we go to page 3a of the
3 government's brief, they want to read Section
4 3553(e) as though it were written exactly like
5 Section 3553(f), which allows sentencing
6 pursuant to the guidelines without regard to
7 the statutory minimum.

8 And they want to benefit even beyond
9 that. They not only want sentencing to start
10 at their below-minimum guideline range; they
11 want a further reduction from that point to
12 their substantial assistance.

13 I can get back to the text in one
14 second, but let's pause for a second. I think
15 that just doesn't make any sense. There is no
16 reason why the reward someone should get for
17 substantial assistance is that a cooperator who
18 has been convicted of an offense for which
19 Congress has prescribed a specific statutory
20 minimum should then by default automatically be
21 presumptively sentenced at the level of a
22 non-cooperator who has been convicted of a
23 different crime that does not carry a statutory
24 minimum, like a non-recidivist version of the
25 drug offense. That doesn't make any sense, and

1 that's not the text that Congress enacted.

2 When opposing counsel went through
3 3553(e), he didn't mention the first sentence
4 of 3553(e), under which "the court shall have
5 the authority to impose a sentence below" what
6 a statutory minimum requires "so as to reflect
7 a defendant's substantial assistance."

8 The "so as to reflect" language
9 modifies the sentence the court is imposing.
10 It does not modify the nature of the
11 government's motion. And it's a limitation on
12 what the court can take into account in
13 imposing a sentence below the minimum. The
14 court can only take into account substantial
15 assistance factors.

16 And that's exactly how the Commission
17 implemented this, as this Court recognized on
18 pages 128 to --

19 JUSTICE KENNEDY: Well, then -- then
20 what effect does the next sentence have?

21 MR. FEIGIN: So what that sentence
22 does, Your Honor, is it notes that the
23 guidelines are going to guide the court's
24 discretion, which is exactly what 5K1.1 does,
25 and it's exactly what this Court recognized

1 5K1.1 does in its decision in Melendez, if you
2 look at pages 128 to 129 and Note 10. And I
3 think that point is --

4 CHIEF JUSTICE ROBERTS: But -- but all
5 the guidelines?

6 MR. FEIGIN: Yes, in your --

7 CHIEF JUSTICE ROBERTS: Not -- not
8 just 5K1.1. And if you do look at it, in -- in
9 other places immediately surrounding this, it
10 does say 994 and then the subsections, and here
11 it just says 994.

12 MR. FEIGIN: So there's a reason --

13 CHIEF JUSTICE ROBERTS: Which suggests
14 that all of the guidelines should be taken into
15 account.

16 MR. FEIGIN: I -- I -- I do think this
17 was effectively settled in Melendez, Your
18 Honor, but addressed as a matter of first
19 principles. I think the reason for that is if
20 we now look at 994(n), which is on page 14a of
21 the government's brief, 994(n) says: the
22 Commission shall assure that the guidelines,"
23 writ large, "reflect the general
24 appropriateness of imposing a lower sentence
25 than would otherwise be imposed, including a

1 sentence that is lower than that established by
2 a statute as a minimum sentence, to take into
3 account a defendant's substantial assistance."

4 So just to address your question,
5 Mr. Chief Justice, first, before I get back to
6 the rest of this, you'll note that 994(n)
7 directs the Commission to do something with the
8 guidelines writ large. When Congress enacted
9 3553(e) -- that was in 1986 -- there were no
10 guidelines -- final guidelines that had been
11 promulgated at that point.

12 The Commission had a great deal of
13 discretion in how it might have decided to
14 implement 994(n), and it might have sprinkled
15 substantial assistance reductions and ways of
16 doing that for particular types of crimes all
17 over the guidelines. So I don't even know that
18 the Commission had to promulgate specific
19 guidelines to implement 994(n), although that
20 is, as this Court recognized in *Melendez*, what
21 they chose to do.

22 The other thing -- and this is back to
23 Justice Kennedy's question -- when we look at
24 994(n), is I think it recognizes that
25 substantial assistance sentencing works exactly

1 the way we describe. It recognizes that there
2 would be a sentence that would otherwise be
3 imposed, and it gives as an example a -- the
4 sentence that the statutory minimum would
5 require.

6 And then it tells the guidelines, and,
7 effectively, this goes back to the "reflects"
8 language that I was pointing out earlier in
9 3553(e), it instructs the Commission and the
10 courts that then what's going to happen is that
11 the court will give a sentence that is lower
12 than that, that reflects or takes into account
13 substantial assistance.

14 Again --

15 JUSTICE GINSBURG: But one other point
16 that I think Justice Sotomayor made earlier,
17 that, in fact -- and, in fact, it's in one of
18 the briefs -- that the district judges do take
19 into account the guidelines when they grant --
20 when they determine how much time to include
21 for substantial assistance.

22 MR. FEIGIN: So, Your Honor, 11 -- all
23 11 courts of appeals that have directly
24 addressed this question agree with our view of
25 how substantial assistance sentencing works.

1 They say the D.C. Circuit has said otherwise.
2 I don't think that's correct.

3 But I acknowledge, as Your Honor said
4 and as we acknowledge in our brief, there are
5 district courts that do this the way that
6 Mr. Fisher just described. And I also would
7 acknowledge that in those cases, the government
8 often is an accomplice to that by suggesting
9 that the court do it that way.

10 And I can't tell you -- but I think we
11 all agree -- and they acknowledge this in their
12 reply brief -- that they're doing that out of
13 compliance with circuit law. And I can't tell
14 you how they got out of circuit law compliance
15 in the first place.

16 What I can tell you is a reason why I
17 think this persists, is that it just doesn't
18 come up on appeal that often because, when you
19 do it the way that they think it should be done
20 and that some of these district courts do, the
21 defendant's not going to appeal because it's to
22 his benefit.

23 And from the government's perspective,
24 we don't frequently appeal sentences, and when
25 we do, it's not to vindicate abstract

1 principles of law. It's if we think the
2 sentence that was imposed is a sentence that
3 shouldn't have been imposed and was just flatly
4 outside the judge's discretion.

5 And so we've essentially gotten to a
6 place where, in at least some districts, the
7 government is attempting to just achieve the
8 sentencing results it believes are correct by
9 speaking to district courts --

10 JUSTICE SOTOMAYOR: Mr. Feigin, you're
11 just answering the very question, which is,
12 you're right, there's a lot of judges, and I
13 don't know that that's an abuse of discretion.
14 You're already saying it's not a gross abuse of
15 discretion or otherwise you would be appealing.
16 So you're not doing that.

17 It seems to me that the guidelines
18 don't help a judge in their words to determine
19 how much of a departure is just right, and
20 judges have to figure that out by having some
21 basis of comparison with something.

22 What if the -- because they give you
23 five factors to consider. You've got someone
24 who does a lot on Number 1, does a little on
25 Number 2, does a whole lot more on Number 3,

1 and then nothing on 4. The judge mixes that
2 all up and says: How much do I depart?

3 And the next defendant will have a
4 different mix, and the same question comes up.
5 And what I see judges doing is saying the
6 severity of this crime is measured most
7 accurately by the guidelines. It's based on a
8 sampling across the country of how serious this
9 crime is. Now I'm going to take that and
10 compare it to all of those other factors, and
11 I'm going to decide a percentage, both based on
12 the statutory minimum but also on the
13 guideline, of how much seems right to me.

14 So I -- it's not an abuse of
15 discretion in my view. And if it's not, what
16 do we do to ensure the equity that Mr. Fisher
17 is calling for?

18 MR. FEIGIN: Well, Your Honor, let me
19 say a few things about that.

20 The first thing I would say is when I
21 was referring to the kinds of abuses of
22 discretion we would appeal, there's usually a
23 substantive component to that. We look to the
24 actual sentence and see if it's a sentence we
25 can live with. And if it's a sentence we can

1 live with, we -- that is what I was
2 referencing.

3 JUSTICE SOTOMAYOR: Yeah, because --

4 MR. FEIGIN: And, Your Honor, I -- I
5 -- I think it's --

6 JUSTICE SOTOMAYOR: -- there's
7 different ways to get to the same reduction.

8 MR. FEIGIN: And I think -- exactly.
9 And even if the judge got there an
10 impermissible way, we're not necessarily going
11 to take an appeal just to vindicate an abstract
12 principle of law, even though in 11 circuits,
13 if we took that appeal, we'd win on procedural
14 grounds because they agree with us about how
15 these statutes should be read.

16 Now, Your Honor, in the situation you
17 described where a judge did perform the
18 substantial assistance reduction a way we think
19 is impermissible -- and in a second, I'd -- I'd
20 like to get back to the reasons why we think
21 it's impermissible, but I'd like to address
22 your question directly -- we don't think
23 Section 3852(c)(2) relief would be available
24 because we don't think 3582(c)(2) requires a
25 court to repeat the same mistake twice.

1 That defendant already got a
2 substantial benefit because the court was
3 looking to an even lower range than the court
4 should have looked to, and they don't need to
5 get, and shouldn't in Congress's view, get the
6 benefit again.

7 There are two legal reasons why I
8 think that is so under the statutes. The first
9 reason is I don't think in that case their
10 sentence can properly be said to be based on
11 that below-minimum guideline range because the
12 below-minimum guideline range didn't have any
13 legal force in their sentence. It shouldn't
14 have been applied in their sentence.

15 If you think about the function of
16 3582(c)(2), it's to give defendants the benefit
17 of the Commission's change in its views about
18 how a particular class of offenders and
19 offenses should be punished.

20 And although the guidelines' view of
21 how that particular class of offenders and
22 offenses should be punished has changed,
23 Congress's superseding view should not be
24 changed. Again, Congress has decided that
25 these defendants, based on their criminal

1 histories and based on the crimes they
2 committed, are subject to these statutory
3 minimums.

4 JUSTICE BREYER: I see that point. I
5 see -- I have a very basic question. And I
6 think your argument is perhaps the refutation
7 of it. But I think the guidelines are not the
8 tax code, despite the continuous effort
9 necessary to number after number after number.

10 So -- but I'm not saying you shouldn't
11 do it. You have to. But -- but the -- the --
12 the fact is here the guide -- the Commission
13 made a simple decision and so did Congress.

14 The drug guidelines were too high, so
15 we're going to lower them two points. And we
16 want people to be resentenced. If it has
17 really anything to do with that, I'm saying
18 based upon read it broadly, why?

19 MR. FEIGIN: Well --

20 JUSTICE BREYER: Because there's only
21 one person who knows really what that was based
22 upon, and that's the district judge who put the
23 sentence. And we can't psychoanalyze him.

24 And we try to proceed case-by-case in
25 three kinds of instances. One, he used the

1 guidelines. That's easy.

2 Two, he departed from the guidelines.
3 Was he looking at it when he departed? I don't
4 know. He knows.

5 Three, this kind of case, departure
6 from the statutory minimum.

7 Now, since we're never going to know,
8 really, and all we have to do if you read it
9 broadly "based upon," is send it back so that
10 judge himself or herself can resentence. And,
11 by the way, Judge, when you resentence, if the
12 guidelines had nothing to do with this, don't
13 change the sentence.

14 Now that seems to be practical,
15 prevents every case from trying to
16 psychoanalyze the judge, prevents us from
17 hearing appeal after appeal like the appellate
18 courts would certainly have to, and, anyway,
19 this is, you know, common sense as to how
20 they're supposed to work. Does the statute
21 permit it? Yes. Because the statute says:
22 Judge, in the departures, you start with the
23 guideline.

24 Because the statute says here: Judge,
25 in the language he read, you start with the

1 guideline. Now maybe some won't. Maybe some
2 will never use it and maybe somebody will say
3 60 months no matter what.

4 Good. You, Judge, want to do that.
5 Do it on remand, do it when you reconsider, if
6 it's legal.

7 MR. FEIGIN: Three points --

8 JUSTICE BREYER: Now that's a very
9 simple -- you see, it's -- it's a little
10 complicated to say, but you see what I'm doing?

11 MR. FEIGIN: Three points, Justice --

12 JUSTICE BREYER: What's your response?

13 MR. FEIGIN: -- Breyer. First,
14 there's no need to psychoanalyze the judge if
15 the result of the psychoanalysis would be that
16 the judge implemented the law incorrectly. You
17 don't get relief for that, so that -- in order
18 to have the court make the same mistake twice.

19 The second thing I'd say is it is a
20 very strange scheme in which the Commission's
21 judgment that the drug sentences are too high
22 is implemented only in the cases of
23 cooperators.

24 If you think of two defendants, each
25 subject to the statutory minimum --

1 JUSTICE BREYER: No, your -- your --
2 your -- your -- I sometimes speak more broadly
3 than I should. I don't mean really carry in a
4 psychoanalyst. What I really mean is you look
5 at all these things he wrote in different
6 things and try and put it together. Nor do I
7 mean in every case they wanted to lower it.
8 They wanted to lower it in these cases. That's
9 -- that's -- you're right about that.

10 MR. FEIGIN: Your Honor --

11 JUSTICE BREYER: I still have the same
12 question.

13 MR. FEIGIN: -- and my basic -- my
14 basic point is if the judge considered
15 something the judge should not have considered,
16 that is not a reason, and it -- particularly
17 where it benefitted the defendant, that's not a
18 reason for a 3582(c)(2) reduction.

19 The second thing is, just to your
20 instinct that these defendants should get their
21 sentences lowered, if you consider other
22 defendants --

23 JUSTICE BREYER: I'm not saying that.
24 I'm saying send it back to the judge because he
25 or she is the one who knows whether this was

1 really significantly influenced by the
2 guidelines or not, and, therefore, you can --
3 they -- the judge can impose the sentence he
4 really wants to impose.

5 MR. FEIGIN: Your Honor, even under
6 that approach, the only ones you're going to be
7 able to send back are the cases in which there
8 was a statutory minimum and there was a 3553(e)
9 motion, so you're going to wind up with a very
10 strange scheme where -- where the Commission's
11 judgment that the drug sentences are too
12 high -- and I think the district court judge
13 who is no friend to statutory minimums made
14 this point -- said that it's a very strange
15 scheme where the Commission's judgment that the
16 drug sentences are too high is implemented only
17 in the case of cooperators.

18 Amendment 782 says nothing about
19 cooperation or differentiating between two
20 defendants subject to statutory minimums
21 because one cooperated and one didn't.

22 But let me get back to 3553(e) and why
23 it doesn't instruct a court -- and I think it
24 couldn't instruct a court -- to start with the
25 below-minimum guideline range as the starting

1 point for the departure, to reward a cooperator
2 twice, once by treating him like he didn't
3 commit a different crime, and the second time
4 by giving him a substantial assistance
5 departure, and I guess a third time on
6 Petitioners' view by giving him a sentence
7 reduction that has nothing to do with his
8 cooperation.

9 The reason it couldn't work that way
10 is, although the guidelines are not mandatory
11 now, and we understand that is a constitutional
12 ruling, Congress implemented this against the
13 backdrop of guidelines it believed were
14 mandatory.

15 Now imagine a case in which a
16 defendant is subject to a 60-month statutory
17 minimum and the judge thinks: You know, this
18 defendant did provide substantial assistance,
19 not a great deal, I'd probably give him a year
20 off. I'd give him a 48-month sentence if it
21 were up to me.

22 Now imagine his guidelines range
23 calculation, if the statutory minimum did not
24 exist, were 24 to 30 months.

25 Under their scheme, you'd start with

1 -- the judge would then be faced with a
2 dilemma. If he decides he's going to grant the
3 substantial assistance motion, he has a range
4 where not only the -- where he's actually stuck
5 pretty much with that range. I don't think you
6 could have done an upward departure under the
7 mandatory guidelines system because he didn't
8 provide that much substantial assistance.

9 So the judge either has to give a
10 sentence of 30 months that he thinks is 18
11 months too low, or he can deny the substantial
12 assistance motion altogether and impose a
13 sentence that he thinks is 12 months too high.

14 I don't think there's any reason to
15 think that Congress was implementing a scheme
16 like that when it enacted Section 3553(e).

17 JUSTICE BREYER: Yes, if you're --
18 you're right about that, but then the
19 guidelines and policy statements, which is what
20 it says, have all kinds of things in them,
21 including negative things. You shouldn't do
22 this. You can't do that.

23 And my thought is, once we go down the
24 road that you're saying, which is examining, as
25 you've done, a sentencing transcript in case

1 after case, that way lies a kind of legal
2 perdition because did he -- did the judge, for
3 example, do the thing or did he think of doing
4 the thing which the guideline says you
5 shouldn't do?

6 And -- and you see the complexity of
7 second-guessing that seems worse, perhaps, from
8 the point of view of what Congress would have
9 wanted, if they'd thought of it --

10 MR. FEIGIN: Well --

11 JUSTICE BREYER: -- than giving "based
12 upon the guidelines and policy statements" a
13 pretty broad meaning.

14 MR. FEIGIN: Well, Your Honor, I don't
15 think I'm pointing the Court down the road to
16 perdition here. We have a very clear view --

17 (Laughter.)

18 JUSTICE BREYER: Quite right.

19 MR. FEIGIN: -- of how substantial
20 assistance sentencing should work, which,
21 again, is the view of the 11 -- all 11 courts
22 of appeals that have squarely addressed it.
23 And under that view, we think it doesn't matter
24 what the judge may have had in his mind.

25 You can't -- as we've acknowledged

1 when this was up for debate before the
2 Sentencing Commission, you know, judges may
3 have a lot of things in their minds, and some
4 of them are permissible considerations and some
5 of them are not, and I think we trust that
6 district judges at the end of the day should
7 have complied with the law. We presume they
8 did comply with the law.

9 And if -- even if it's apparent that
10 they made a mistake and that the mistake
11 benefitted the defendant, we don't go back and
12 give the defendant even further relief on the
13 basis of that mistake.

14 And that -- and, here, there was no
15 mistake at all. I think --

16 JUSTICE KAGAN: Well, why -- why is
17 that, Mr. Feigin? I -- I mean, this language
18 speaks in terms of questions of historical
19 fact. It's what you were sentenced based on,
20 not what you were sentenced -- you know, what
21 -- what your sentence should have been based
22 on.

23 And as to giving defendants some
24 further benefit, I mean, you had an opportunity
25 to appeal. And one might say that by thinking

1 about what should have happened, what you are
2 doing is seeking a form of collateral review
3 that you are not entitled to at this point.

4 MR. FEIGIN: So, Your Honor, first of
5 all, I -- I know you understand this, but we're
6 now talking about a case that is not like this
7 case. In this case, they have no argument, and
8 they haven't really made one, that their --
9 their sentences were based on the guidelines as
10 a matter of historical fact.

11 JUSTICE KAGAN: That's true, but
12 that's a different argument from the one you
13 are making in general. I mean --

14 MR. FEIGIN: Yes. I --

15 JUSTICE KAGAN: -- you started off by
16 saying look at the transcript. It wasn't based
17 on that. But you've moved to saying we
18 shouldn't be looking at what it was based on.
19 We should only be looking at what it should
20 have been based on.

21 And I guess my question is, textually,
22 why is that true? And sort of, you know,
23 structurally, why should it be true, given, you
24 know, sort of like a second shot at an appeal?

25 MR. FEIGIN: So there are -- there are

1 a couple of reasons, Your Honor. I just wanted
2 to be clear that we're talking about a case
3 that's not this one.

4 There are a couple of reasons. One is
5 just -- just as a practical matter, you would
6 be requiring the government to appeal even
7 sentences it thought it was substantively fine
8 with and could live with, just to preserve down
9 the road some procedural objection to
10 3582(c)(2) relief.

11 And I don't think that's a great use
12 of the courts of appeals' time or, frankly, the
13 -- the government's own resources. But there
14 are two statutory reasons why I don't think
15 that that approach is the right one.

16 One is the one I was discussing with
17 Justice Sotomayor earlier, which is that I
18 don't think a sentence can be said to be based
19 on; that is, the legal foundation of -- the
20 guidelines aren't the legal foundation of the
21 sentence if they're not even the guidelines
22 that the -- the court was required to apply.

23 So, again, 3582(c)(2) --

24 JUSTICE KAGAN: I guess I don't quite
25 understand that just as a matter of language,

1 something can be based on a legal error.

2 MR. FEIGIN: Well, Your Honor, here, I
3 think "based on a sentencing range" actually
4 has a very specific meaning. As we point out
5 in the first section of our brief and as
6 Petitioners never really respond to in their
7 reply brief, "sentencing range" is a term
8 that's only used in three different places in
9 the statute.

10 And the -- I think the relevant places
11 here are, one, we see it in 3582(c)(2). We
12 also see it in Section 3553(a)(4) as the thing
13 that the guideline -- the number that the
14 guidelines give back to you or the range of
15 numbers in most cases that the guidelines give
16 back to you under 3553(a)(4).

17 And I think "based on the sentencing
18 range" means that the number that 3553(a)(4)
19 gave back to the district judge, when he
20 computed the guidelines, was actually the
21 number -- it should actually be that number.
22 And where there was an error there, I don't
23 think 3582(c)(2) should be applied to give the
24 defendant further relief.

25 And the reason for that is the

1 guidelines, the third place "sentencing range"
2 is used, are required to return a sentencing
3 range to the district judge that complies with
4 all statutory law.

5 And when the Commission changes a
6 guidelines range, it only has permission to do
7 so outside the context of statutory minimums.
8 And so the whole function of 3582(c)(2) is to
9 give defendants the benefit of judgments that
10 the Commission has made that would change their
11 sentences if they were sentenced properly for
12 the first time today. And that puts them on
13 par with sentence -- defendants who are getting
14 sentenced properly for the first time today.

15 It doesn't really make sense to give
16 them relief where the Commission's changed a
17 judgment that shouldn't have had any effect on
18 their sentences to begin with.

19 The second legal operative rule I
20 would suggest here, and this is specific to the
21 context of statutory minimums, is that nothing
22 in Section 3582(c)(2) itself or any related
23 statute allows the Commission to grant
24 retroactive sentencing relief that would allow
25 a defendant to receive a sentence that is below

1 a statutory minimum.

2 They don't claim that the Commission
3 could write a rule that says everyone who is
4 sentenced to a 20-year statutory minimum under
5 21 U.S.C. 841 now gets a 10-year sentence.

6 Instead, to the extent they're relying
7 on the ability of the Commission or the judge
8 to recommend or impose a sentence that is below
9 the statutory minimum, they're relying on
10 Section 3553(e).

11 And for the reasons I've given and am
12 happy to get back to and -- and perhaps add a
13 few more, Section 3553(e) does not remove the
14 mandatory minimum for all purposes.

15 What it allows is a sentence that
16 reflects or takes account of substantial
17 assistance. And the entire delta between the
18 statutory minimum and the sentence the
19 defendant actually receives has to be based on
20 substantial assistance factors.

21 Neither the guidelines, I think, nor
22 dare I say common sense suggest that one of
23 those factors should be the sentence that a
24 non-cooperating defendant would have received
25 had he been convicted of a crime that Congress

1 did not deem serious enough to warrant a
2 statutory minimum.

3 We can disagree -- we don't -- but one
4 could disagree, as the district judge did, with
5 the policy wisdom of some of these statutory
6 minimum sentences, but the fact remains that in
7 the eyes of Congress, a defendant who has
8 committed an offense like these Petitioners did
9 with the criminal history that these
10 Petitioners have has committed an offense that
11 warrants a particular statutory minimum.
12 Section --

13 JUSTICE KENNEDY: There's one --
14 there's one small point I didn't quite
15 understand. In the course of your answer to
16 Justice Kagan, you indicated that if this had
17 to go back to the district judge, per Justice
18 Breyer's common sense approach, that that would
19 mean that the government in -- at the first
20 sentencing hearing would have to make all of
21 its arguments or it waived them?

22 I thought it was just a new sentencing
23 procedure. You could say: Well now, Your
24 Honor, the first time you had this sentence, we
25 thought that we made our case and we did, but

1 there are many other things you could consider.
2 You -- you could say that in the second
3 hearing, couldn't you?

4 MR. FEIGIN: I'm not sure that we
5 could, Your Honor, because the Court made clear
6 in Dillon it's not a complete resentencing.
7 You essentially do everything the same way you
8 did at the first sentencing and just substitute
9 in the --

10 JUSTICE KENNEDY: Is there any
11 authority I could look to to see if there's
12 this waiver?

13 MR. FEIGIN: To -- a waiver of the --

14 JUSTICE KENNEDY: Well, I mean, you
15 said you have to preserve all these points. So
16 you can't --

17 MR. FEIGIN: Well, I was responding --

18 JUSTICE KENNEDY: -- do them on round
19 2, that you're barred on round 2?

20 MR. FEIGIN: So Dillon addresses the
21 fact that this isn't a full resentencing
22 proceeding. And I was responding to Justice
23 Kagan's suggestion that the government had
24 effectively acquiesced to Section 3582(c)(2)
25 relief when it, in a case, again, not this

1 case, where substantial assistance sentencing
2 was done improperly and the government hadn't
3 appealed.

4 I -- I'd also like to quickly address
5 opposing counsel's suggestion that we're
6 creating sentencing disparities. I think
7 they're creating sentencing disparities in
8 three different ways.

9 The first is a timing disparity.
10 Again, under our view of how substantial
11 assistance works, which is the law of all the
12 circuits that have addressed it, and I think
13 the only fair reading of the statutes, they
14 would have a very strange timing disparity
15 where they're entitled to Section 3582(c)(2)
16 relief simply because they were sentenced
17 before Amendment 782, whereas identically
18 situated defendants sentenced today wouldn't
19 get relief. I think Justice Ginsburg pointed
20 this out earlier.

21 The second disparity that I think
22 exists here is the one I was pointing out to
23 Justice Breyer, which is that you have
24 Amendment 782, which has nothing to do with
25 cooperators and only has to do with the

1 appropriate sentences for defendants convicted
2 of drug crimes, and yet the -- as to two
3 different defendants, both of whom Congress
4 believed committed the same crime and deserved
5 the same statutory minimum, only the cooperator
6 gets the benefit of the Commission's judgment
7 on a matter that the Commission's judgment
8 isn't controlling because we know what Congress
9 specifically thought because there's a
10 statutory minimum.

11 And the third disparity is one I've
12 mentioned a few times here today, which is
13 that, again, I think there would be an anomaly
14 in their view of how substantial assistance
15 sentencing works.

16 Even if we get rid of that very odd
17 situation that I think would come up quite a
18 bit when the guidelines were mandatory and
19 shows Congress couldn't have intended it to
20 work the way they're suggesting, I still think
21 it is very odd for Congress to have enacted a
22 statute that would allow a defendant who is
23 sentenced to a statutory minimum and then
24 cooperates to presumptively receive a sentence
25 -- the same sentence if he had -- that he would

1 have gotten if he hadn't cooperated and if he
2 committed a different crime.

3 Section 3553(f) illustrates that
4 Congress knew exactly how to write language of
5 the sort the Petitioners want to read into
6 3553(e).

7 Although 3553(f) was enacted later,
8 they're not unrelated provisions. They're the
9 only two provisions of Section 3553(e) that
10 allow sentencing below a minimum -- that allow
11 sentencing below a minimum under any
12 circumstances. And Congress naturally would
13 have viewed them as related.

14 Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Thirteen minutes, Mr. Fisher.

18 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

19 ON BEHALF OF PETITIONERS

20 MR. FISHER: Thank --

21 JUSTICE SOTOMAYOR: Mr. Fisher, make
22 the following assumptions. Rejecting your
23 argument that the substantial assistance has to
24 start from the amended guideline down, let's
25 assume we accept the government, and the 11

1 circuits who have ruled this way, that it has
2 to start from the statutory minimum. But
3 assume further that some of those circuits have
4 said that the court can't even consider the
5 guideline range in determining how much of a
6 discount to give, and that was wrong. That, as
7 with all factors, a district court can consider
8 what it wants in determining, for all the
9 reasons I said earlier, how much of a discount
10 to give can be informed by the guideline range
11 in some way.

12 Where would that put your clients?
13 Because it's -- I'm not clear that -- and to be
14 frank with you, it wasn't something I was
15 paying attention to when I read the sentencing
16 transcripts. A, I'm not clear that the defense
17 attorneys in these cases below actually argued
18 anything different than you did today, which
19 would be rejected. That didn't raise an
20 argument that the guide -- that they properly
21 raised an argument that the guidelines should
22 inform the departure from -- from the maximum.

23 MR. FISHER: So the answer to your
24 question, where that would put my clients,
25 Justice Sotomayor, would be that this Court

1 should vacate the judgment and remand, as
2 Justice Breyer suggested, for the district
3 court to answer the question whether the
4 guidelines had some magnetic pull or -- or
5 influence on the ultimate sentence granted.

6 And remember for three --

7 JUSTICE GINSBURG: And why can't you
8 tell --

9 MR. FISHER: -- of them, it actually
10 ended in --

11 JUSTICE GINSBURG: -- why can't you
12 tell that from reading the transcript?

13 MR. FISHER: Well, Justice Ginsburg, I
14 think that the transcript, if anything,
15 suggests that it did because three of the
16 defendants, three of the five defendants here,
17 actually ended up with within guideline range
18 sentences.

19 And -- and for the only -- and for one
20 of them that the judge deviated from that,
21 Mr. Gutierrez, the judge actually said --
22 partly because he didn't think the guidelines
23 properly measured the offense. So, if
24 anything, we would win, but I think out of an
25 abundance of caution in the way that Section

1 3582 applies, you might just send it back to
2 the district judge, but --

3 JUSTICE SOTOMAYOR: I'm sorry, all of
4 them basically were the first type of judge I
5 mentioned earlier, I thought virtually all of
6 them, except that one, the judge said I give a
7 percentage on.

8 MR. FISHER: Right. Right, so I think
9 then you have the question that the government
10 itself raised when this was in front of the
11 Sentencing Commission, which is that even if
12 the judge characterizes the departure in terms
13 of a percentage, the judge may have in the back
14 of her mind where that percentage leads in
15 terms of the guideline range. And I think it's
16 not a coincidence that three of the five
17 sentences here ended up in the guideline range.

18 And I think, Justice Sotomayor, just
19 to reinforce the question that you asked, I
20 think it would be a highly undesirable and just
21 improper rule to say that the only two things
22 that can go into sentencing in a case like this
23 are the mandatory minimum and the 5K
24 substantial assistance factors, because there
25 the judge would be required to give the maximum

1 downward departure in every single case based
2 on those 5K factors, regardless of how serious
3 the crime was.

4 JUSTICE SOTOMAYOR: That clearly --

5 MR. FISHER: That would be very odd.

6 JUSTICE SOTOMAYOR: That -- that's
7 what I said earlier --

8 MR. FISHER: Yes.

9 JUSTICE SOTOMAYOR: -- which there has
10 to be a little bit more. The question is:
11 What are you comparing against?

12 MR. FISHER: Right.

13 JUSTICE SOTOMAYOR: And what are the
14 factors you're weighing?

15 MR. FISHER: Right. So I think if we
16 grant the government all of its legal
17 arguments, even there, as the Third Circuit
18 said in Winebarger, the guideline has some
19 effect on the ultimate sentence, at least to
20 the degree, as Justice Breyer was pointing out,
21 the district judge should have another look.

22 But if I could return to the main
23 argument I -- I made here because I -- I think
24 I understand the Court may be a little bit
25 perplexed at what it has in front of us. The

1 Court granted a -- a case dealing with Section
2 3582, but what really happens in this case
3 is -- is -- is everything turns, at least set
4 -- setting aside what we just discussed, but
5 everything in the first instance turns on
6 Section 3553(e). And so it all comes down to
7 how Section 3553(e) works.

8 Now the government keeps saying 11
9 circuits, 11 circuits. If you look at those
10 opinions, you'll find that only a few of them
11 have any reasoning in terms of Section 3553(e),
12 and I think it is quite clear the D.C. Circuit
13 has disagreed. So you have a circuit split you
14 need to resolve about Section 3553(e).

15 And if I could just read you one more
16 time -- I think the language, which hard --
17 Congress could hardly speak more clearly, at
18 page 3a when it says "Such sentence shall be
19 imposed in accordance with the guidelines and
20 policy statements issued by the Commission
21 pursuant to Section 994."

22 So the -- so the government -- so
23 Mr. Feigin made a few responses, and I want to
24 go through them one by one, to that statutory
25 language.

1 First, he said, well, I overlooked the
2 first sentence, which contains a phrase saying
3 that the sentence shall reflect the defendant's
4 substantial assistance.

5 Well, two points about that. First of
6 all, as we pointed out in our brief, the word
7 "reflect," simply as a textual matter, can mean
8 just to make apparent. And the fact the
9 sentence is lower than the mandatory minimum is
10 what makes apparent the fact that the defendant
11 granted substantial assistance. And even if
12 you thought the word "reflect" was ambiguous, I
13 would just return you again to the second
14 sentence, which is a directive straight to the
15 district court telling the district court how
16 to impose the sentence.

17 The next argument Mr. Feigin made was
18 that, well, Melendez forecloses the reading
19 that I've just given you. And that's just not
20 the case. That wasn't the issue in front of
21 Melendez. And, indeed, it wasn't even what the
22 government argued in Melendez. We cite in our
23 reply brief a few times that the government
24 argued that the second sentence of Section
25 3553(e) just requires the judge to give a

1 sentence according to the guidelines, as
2 opposed to the pre-guideline system of having
3 free rein to issue any sentence the judge
4 wants.

5 So, again, what the government argued
6 in Melendez and what Footnote 9 and other
7 places in the opinion, to the extent the Court
8 spoke to it at all, I think the better --

9 JUSTICE SOTOMAYOR: Mr. Fisher --

10 MR. FISHER: -- reading of Melendez is
11 --

12 JUSTICE SOTOMAYOR: -- go to (f),
13 because that's the strongest argument in my
14 mind that the government has. And I know you
15 counter by saying it's a later provision to
16 this one. But it's a later provision in light
17 of the circuit holding that's close to
18 unanimous, not quite, that (e) starts from the
19 statutory minimum. And if Congress knew enough
20 to change (f) to exclude statutory minimum, it
21 could have, at the very same time, done it to
22 (e) if it disagreed with the majority of
23 circuits.

24 MR. FISHER: Right. So -- so three
25 responses, Justice Sotomayor. First of all,

1 Section (f) was enacted in 1994 and I think
2 there were very few circuits that had spoken to
3 the (e) issue at that point. Almost all the
4 authority the government cites comes later.
5 And, indeed, what you find in those cases are
6 courts comparing (e) and (f) and thinking that
7 (e) means something different than (f). And so
8 that's what's driven them off the rails, is the
9 existence of (f).

10 Our position, to start with as a
11 statutory matter, is (e) has to mean what it
12 meant for the first eight years before (f) was
13 ever enacted; (f) can't have changed what (e)
14 means.

15 But if you do want to compare them --
16 so we think you shouldn't compare them, but if
17 you do want to compare them, the operative
18 language in (f) is almost identical to the
19 operative language in (e). It says that the --
20 "The court shall impose a sentence pursuant to
21 the guidelines promulgated" under -- by the
22 Sentencing Commission under -- "under section
23 994." It's almost precisely the same language
24 that -- that's in the second sentence of
25 subsection (e).

1 And so then all the government is left
2 with is, well, language before that in (f)
3 talks about without regard to the mandatory
4 minimum, whereas what we have in subsection (e)
5 is language that says the court has the
6 authority to sentence below the mandatory
7 minimum.

8 And the question I think that you
9 would be asking is: Do those two things mean
10 anything different? And we think the answer is
11 no, because -- and this goes to -- even more to
12 what Mr. Feigin was saying -- the whole point
13 of a mandatory minimum is to set a floor, and
14 so either you have a floor or you don't.

15 And once Congress tells you, you don't
16 have a floor anymore, there's no work left for
17 a mandatory minimum to do. So saying that a
18 court has the authority to sentence below a
19 mandatory minimum is -- is the functional
20 equivalent of saying: sentence without regard
21 to the mandatory minimum because that's the
22 only thing a mandatory minimum can do, is set a
23 floor.

24 So, once it's gone, it's simply gone.
25 It doesn't come back to life. And it doesn't

1 hang around like a zombie who's been killed and
2 somehow still has some pull on the sentencing
3 -- on the sentencing judge's discretion.

4 And the -- and I think that -- that
5 all of what I'm saying is reinforced, as the
6 Chief Justice pointed earlier, to the -- and I
7 pointed earlier to the points in the -- in the
8 Section 3553(e) provisions where Congress
9 points directly to subsets of 994.

10 It doesn't point directly to Section
11 994(n), which would support the regime
12 Mr. Feigin is describing. It says 994 as a
13 whole. And, again, Justice Sotomayor, what
14 does subsection (f) do? It's the only other
15 section that directs the court holistically to
16 Section 994.

17 So we think Congress was doing the
18 same thing. And what's what the Court itself
19 said in Dorsey. In Dorsey, the Court said
20 there are two ways for a judge and a defendant
21 to escape a mandatory minimum. One is sub (e)
22 and the other is sub (f). And the Court
23 treated them as equivalent.

24 So I want to make two final points.
25 The last point, aside from all these legal

1 points that Mr. Feigin made and the government
2 makes, was a policy argument that it would be a
3 double benefit of sorts for cooperators to have
4 their sentences pegged under (e) to a guideline
5 and then perhaps depart it down from that.

6 We just disagree with that premise.
7 Remember, it's not a -- the benefit of
8 cooperation is to be treated just like anybody
9 else. It's not a double benefit. It's just a
10 benefit -- it's just telling the court, look,
11 if you have a cooperator, take away the
12 mandatory minimum and sentence him just as you
13 would sentence anybody else.

14 Now the judge would have discretion to
15 give that defendant a within guideline range or
16 the judge would have discretion, if there were
17 exceptional cooperation, to go below the
18 guideline range. But that's in the court's
19 discretion, and Congress has just given the
20 court the ordinary discretion that somebody
21 else would have.

22 Another way to think about what (e)
23 does is it says we want all cooperators treated
24 the same. Regardless of whether the cooperator
25 is subject to a mandatory minimum or not, we

1 want to lift the mandatory minimum for those
2 who are and just have them sentenced according
3 to the guidelines. So cooperators are very
4 important to the justice system. The
5 government relies on them heavily. And so,
6 when a -- when a defendant makes the very
7 difficult choice to cooperate, we want that
8 defendant treated just like anybody else.

9 And one last thing on the policy is
10 that he said, well, our -- our result running
11 the section -- through Section 3582 would be to
12 give only cooperators the benefit of the
13 Sentencing Commission's drug guideline
14 reduction. That's just factually inaccurate.
15 For all defendants who are subject to a
16 mandatory minimum but whose guideline range
17 were above the mandatory minimum, they too get
18 the benefit of section -- of -- of Amendment
19 782 regardless of whether they cooperated. And
20 I think the government admitted that in its
21 brief, so that's just a small inaccuracy I
22 wanted to correct.

23 And the one last point I wanted to
24 make was to go back to Justice Kagan, your
25 question about "based upon" being a question of

1 historical fact. And this seems to be one
2 point where I think we and the government are,
3 in a sense, agreeing, which is we think that
4 that's one way to read the text, but it's not
5 the better way to read the text.

6 And the better way to read the text is
7 to ask what the law required in that situation,
8 for the reasons I've said and for some of the
9 reasons Mr. Feigin have said. But if you're
10 unpersuaded by that, I want to reiterate what
11 we say in our opening brief and then -- and
12 then say it again at page 15 and 16 of our
13 reply brief, which is: If you want to do this,
14 as a historical question, exactly what the
15 judge did, warts and all, we win.

16 And the reason why is because the
17 judge adjusted the guideline sentences in our
18 cases according to Subsection 5G1.1 and the
19 Commission, as part of its amendments to 782
20 and the policy statements accompanying it, said
21 when you calculate an amendment -- an amended
22 guideline range, you do not include Section
23 5G1.1 as part of that calculation.

24 So we have explained to the Court, and
25 I don't think it's rebuttable, that even if you

1 take the mistake the judge made in the first
2 instance as a historical fact that the Court
3 has to deal with, they still have lower
4 guideline ranges under Section 3582.

5 And that's all that's required for
6 eligibility. And so, for all the reasons that
7 several justices of the Court have said,
8 whether you -- no matter what you do, I think
9 the safest way to resolve these cases, this
10 narrow band of cases you're dealing with here
11 with cooperators whose -- whose guideline
12 ranges were below the mandatory minimum is to
13 send them back to the district judge and allow
14 the judge to exercise the informed expertise
15 that the Congress imagined and that Section
16 3582 in particular envisions to decide whether
17 these defendants should get a new sentence or
18 not, and how much that sentence -- new sentence
19 should be reduced.

20 If there are no further questions,
21 I'll submit the case.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel. The case is submitted.

24 (Whereupon, at 12:05 p.m., the hearing
25 concluded.)

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<p>1 ^[1] 30:24 10 ^[1] 26:2 10-year ^[1] 47:5 11 ^[8] 28:22,23 32:12 41:21,21 52:25 57:8,9 11:03 ^[2] 1:16 3:2 12 ^[1] 40:13 12:05 ^[1] 66:24 128 ^[2] 25:18 26:2 129 ^[1] 26:2 14a ^[1] 26:20 15 ^[1] 65:12 16 ^[1] 65:12 17-5716 ^[1] 3:4 18 ^[2] 3:14 40:10 1986 ^[1] 27:9 1994 ^[1] 60:1 1B1.10(c) ^[3] 18:21 23:1,3 1G1.1 ^[1] 23:3</p>	<p>782 ^[7] 18:20 19:7 38:18 50:17,24 64:19 65:19</p> <p>841 ^[1] 47:5</p> <p>9 ^[1] 59:6 994 ^[1] 4:7 8:11,23 9:4 26:10,11 57:21 60:23 62:9,12,16 994(b) ^[1] 23:15 994(n) ^[8] 8:18,19 26:20,21 27:6,14,19,24 62:11</p>	<p>10,10 66:13 allowed ^[3] 11:12 13:14 20:14 allows ^[4] 14:7 24:5 46:23 47:15 Almost ^[3] 60:3,18,23 already ^[2] 30:14 33:1 although ^[4] 27:19 33:20 39:10 52:7 altogether ^[1] 40:12 ambiguous ^[1] 58:12 amended ^[4] 18:23 21:13 52:24 65:21 Amendment ^[8] 18:19,24 19:7 38:18 50:17,24 64:18 65:21 amendments ^[2] 19:5 65:19 amici ^[1] 15:14 anchor ^[1] 11:25 anomaly ^[9] 9:11 20:17 51:13 another ^[4] 12:23 14:8 56:21 63:22 answer ^[7] 3:21 6:6 9:24 48:15 53:23 54:3 61:10 answered ^[1] 16:5 answering ^[1] 30:11 anybody ^[4] 15:7 63:8,13 64:8 anyway ^[1] 35:18 apparent ^[3] 42:9 58:8,10 appeal ^[11] 29:18,21,24 31:22 32:11,13 35:17,17 42:25 43:24 44:6 appealed ^[1] 50:3 appealing ^[1] 30:15 appeals ^[2] 28:23 41:22 appeals' ^[1] 44:12 appear ^[2] 9:13 18:1 APPEARANCES ^[1] 1:18 appears ^[1] 4:1 appellate ^[1] 35:17 appendix ^[2] 4:1 21:10 applied ^[2] 33:14 45:23 applies ^[2] 9:25 55:1 apply ^[2] 5:12 44:22 approach ^[4] 13:21 38:6 44:15 48:18 approaches ^[1] 15:12 appropriate ^[1] 51:1 appropriateness ^[1] 26:24 aren't ^[2] 14:19 44:20 argue ^[2] 13:5 19:2 argued ^[4] 53:17 58:22,24 59:5 arguing ^[1] 13:3 argument ^[20] 1:15 2:2,5,8 3:4,7 10:1 21:1 22:19 34:6 43:7,12 52:18,23 53:20,21 56:23 58:17 59:13 63:2 arguments ^[2] 48:21 56:17 around ^[3] 11:11 13:10 62:1 aside ^[8] 3:18 4:12 11:13,18 14:16 15:5 57:4 62:25 assert ^[1] 22:2 assistance ^[38] 3:13 6:12 7:7,15,25 8:16,21 14:4,17 15:4 16:21 21:23 24:12,17 25:7,15 27:3,15,25 28:13,21,25 32:18 39:4,18 40:3,8,12 41:20 47:17,20 50:1,11 51:14 52:23 55:24 58:4,11</p>	<p>Assistant ^[2] 1:21 5:14 assume ^[2] 52:25 53:3 assumption ^[1] 10:2 assumptions ^[1] 52:22 assure ^[1] 26:22 attempting ^[1] 30:7 attention ^[1] 53:15 attorneys ^[1] 53:17 authority ^[8] 8:20 9:6,8 25:5 49:11 60:4 61:6,18 automatically ^[1] 24:20 available ^[1] 32:23 avoid ^[2] 17:21 20:18 avoiding ^[1] 14:10 avoids ^[2] 19:15,16 away ^[3] 4:9,24 63:11</p>	<p>back ^[23] 5:18 7:8 19:10 24:13 27:5,22 28:7 32:20 35:9 37:24 38:7,22 42:11 45:14,16,19 47:12 48:17,55:1,13 61:25 64:24 66:13 backdrop ^[1] 39:13 band ^[1] 66:10 barred ^[1] 49:19 base ^[1] 17:1 based ^[35] 3:12 11:22 12:6,7,11,24 15:23,25 16:5,9 17:3,24 22:13 31:7,11 33:10,25 34:1,18,21 35:9 41:11 42:19,21 43:9,16,18,20 44:18 45:1,3,17 47:19 56:1 64:25 basic ^[3] 34:5 37:13,14 basically ^[1] 55:4 basing ^[2] 12:5 16:1 basis ^[2] 30:21 42:13 became ^[1] 22:23 begin ^[1] 46:18 beginning ^[1] 7:23 behalf ^[8] 1:20,23 2:4,7,10 3:8 21:2 52:19 believe ^[1] 17:4 believed ^[2] 39:13 51:4 believes ^[1] 30:8 below ^[14] 6:9,18 19:25 25:5,13 46:25 47:8 52:10,11 53:17 61:6,18 63:17 66:12 below-minimum ^[4] 24:10 33:11,12 38:25 beneath ^[1] 7:18 benefit ^[15] 9:19 24:8 29:22 33:2,6,16 42:24 46:9 51:6 63:3,7,9,10 64:12,18 benefitted ^[2] 37:17 42:11 berth ^[1] 15:18 better ^[5] 17:6 18:2 59:8 65:5,6 between ^[5] 17:17,18 20:2 38:19 47:17 beyond ^[1] 24:8 binding ^[1] 5:15 bit ^[3] 51:18 56:10,24 Booker ^[2] 11:12,15 both ^[2] 31:11 51:3 bound ^[1] 22:21 BREYER ^[14] 34:4,20 36:8,12,13</p>	
2	8	9	A		
<p>2 ^[3] 30:25 49:19,19 20 ^[1] 21:6 20-year ^[1] 47:4 2018 ^[1] 1:12 21 ^[2] 2:7 47:5 24 ^[1] 39:24 27 ^[1] 1:12 2a ^[2] 9:1,2</p>	<p>a.m ^[2] 1:16 3:2 ability ^[1] 47:7 able ^[1] 38:7 above ^[4] 6:8,18 19:24 64:17 above-entitled ^[1] 1:14 abstract ^[2] 29:25 32:11 abundance ^[1] 54:25 abuse ^[3] 30:13,14 31:14 abuses ^[1] 31:21 accept ^[2] 18:15 52:25 accompanied ^[1] 18:19 accompanying ^[1] 65:20 accomplice ^[1] 29:8 accordance ^[2] 4:5 57:19 according ^[9] 3:19 6:20 7:2 10:9 11:6 16:6 59:1 64:2 65:18 account ^[9] 18:17 21:23 25:12,14 26:15 27:3 28:12,19 47:16 accurately ^[1] 31:7 achieve ^[1] 30:7 acknowledge ^[4] 29:3,4,7,11 acknowledged ^[1] 41:25 acquiesced ^[1] 49:24 across ^[1] 31:8 Act ^[2] 12:6 17:21 actual ^[1] 31:24 actually ^[12] 5:2 19:14 22:13 40:4 45:3,20,21 47:19 53:17 54:9,17,21 add ^[2] 7:10 47:12 address ^[3] 27:4 32:21 50:4 addressed ^[5] 18:18 26:18 28:24 41:22 50:12 addresses ^[1] 49:20 adds ^[1] 19:9 adhere ^[1] 18:1 adjust ^[2] 5:9 18:25 adjusted ^[3] 18:12 19:18 65:17 adjusting ^[1] 21:24 administrators ^[1] 15:2 admission ^[1] 16:25 admitted ^[1] 64:20 agree ^[5] 9:22 22:15 28:24 29:11 32:14 agreeing ^[1] 65:3 ALITO ^[9] 10:18,21 11:2,8,14 12:3,11,16,25 allow ^[7] 7:17,18 46:24 51:22 52:</p>				
3	9	A			
<p>3 ^[2] 2:4 30:25 30 ^[2] 39:24 40:10 3553(a)(4) ^[5] 21:19 23:6 45:12,16,18 3553(e) ^[28] 3:15 4:3 5:11,18 6:11 8:23 10:7 11:5 14:5,13 24:4 25:3,4 27:9 28:9 38:8,22 40:16 47:10,13 52:6,9 57:6,7,11,14 58:25 62:8 3553(f) ^[3] 24:5 52:3,7 3582 ^[8] 19:8 20:1,18 55:1 57:2 64:11 66:4,16 3582(c)(2) ^[12] 22:10 32:24 33:16 37:18 44:10,23 45:11,23 46:8,22 49:24 50:15 3852(c)(2) ^[1] 32:23 3a ^[5] 3:25 8:9 9:1 24:2 57:18</p>					
4	10	A			
<p>4 ^[1] 31:1 48-month ^[1] 39:20</p>					
5	11	A			
<p>50 ^[2] 15:20,21 52 ^[1] 2:10 5G1.1 ^[8] 5:4 9:25 10:11 18:13,24 23:16 65:18,23 5K ^[7] 7:16,21,23 8:2,15 55:23 56:2 5K1 ^[1] 6:16 5K1.1 ^[3] 25:24 26:1,8</p>					
6	12	A			
<p>60 ^[1] 36:3 60-month ^[1] 39:16</p>					

<p>37:1,11,23 40:17 41:11,18 50:23 54:2 56:20 Breyer's [1] 48:18 brief [15] 3:25 8:10 14:25 15:14 24: 3 26:21 29:4,12 45:5,7 58:6,23 64: 21 65:11,13 briefing [1] 19:20 briefs [1] 28:18 briefings [2] 18:20 19:10 broad [1] 41:13 broadly [3] 34:18 35:9 37:2</p> <hr/> <p style="text-align: center;">C</p> <p>calculate [2] 18:22 65:21 calculated [2] 3:19 7:23 calculation [2] 39:23 65:23 California [1] 1:19 calling [1] 31:17 came [2] 1:14 22:24 cancel [1] 7:7 care [2] 10:24 19:4 carry [2] 24:23 37:3 Case [39] 3:4,11,12 11:21 12:4,9, 21 13:3,7 17:9,10,14 18:10,11 19: 2 20:3 22:16 33:9 35:5,15 37:7 38: 17 39:15 40:25 41:1 43:6,7,7 44:2 48:25 49:25 50:1 55:22 56:1 57:1, 2 58:20 66:21,23 case-by-case [1] 34:24 cases [13] 7:5 22:5,12 29:7 36:22 37:8 38:7 45:15 53:17 60:5 65:18 66:9,10 categories [1] 7:3 caution [1] 54:25 cements [1] 8:7 certain [1] 11:20 certainly [1] 35:18 change [5] 22:1 33:17 35:13 46:10 59:20 changed [5] 21:21 33:22,24 46:16 60:13 changes [1] 46:5 characterizes [1] 55:12 CHIEF [11] 3:3,9 20:21 21:3 26:4,7, 13 27:5 52:15 62:6 66:22 choice [2] 23:18 64:7 chose [1] 27:21 Circuit [7] 29:1,13,14 56:17 57:12, 13 59:17 circuits [8] 32:12 50:12 53:1,3 57: 9,9 59:23 60:2 circumstances [1] 52:12 cite [1] 58:22 cites [1] 60:4 claim [2] 22:4 47:2 claims [1] 3:24 class [2] 33:18,21 clear [7] 22:10 41:16 44:2 49:5 53: 13,16 57:12 clearly [3] 16:1 56:4 57:17 clients [4] 20:3,5 53:12,24 close [1] 59:17 code [1] 34:8 codified [1] 3:14</p>	<p>coincidence [1] 55:16 collateral [1] 43:2 come [3] 29:18 51:17 61:25 comes [3] 31:4 57:6 60:4 Commission [31] 4:6 13:15,19 14: 24 18:17,22 19:5 21:13,25 22:14 23:19,19,23,24 25:16 26:22 27:7, 12,18 28:9 34:12 42:2 46:5,10,23 47:2,7 55:11 57:20 60:22 65:19 Commission's [10] 8:19 9:8 33: 17 36:20 38:10,15 46:16 51:6,7 64:13 commit [1] 39:3 committed [7] 20:6,9 34:2 48:8, 10 51:4 52:2 common [3] 35:19 47:22 48:18 commonly [1] 12:17 compare [5] 8:25 31:10 60:15,16, 17 comparing [2] 56:11 60:6 comparison [1] 30:21 complete [1] 49:6 complexity [1] 41:6 compliance [2] 29:13,14 complicated [1] 36:10 complied [1] 42:7 complies [1] 46:3 comply [2] 23:15 42:8 component [1] 31:23 computed [1] 45:20 concern [2] 13:1 19:11 concluded [1] 66:25 confusing [1] 4:15 Congress [31] 6:24 7:6 8:20,22 9: 2,5,8 13:15 24:19 25:1 27:8 33:24 34:13 39:12 40:15 41:8 47:25 48: 7 51:3,8,19,21 52:4,12 57:17 59: 19 61:15 62:8,17 63:19 66:15 Congress's [2] 33:5,23 consider [5] 30:23 37:21 49:1 53: 4,7 considerations [1] 42:4 considered [2] 37:14,15 constitutional [1] 39:11 construe [1] 20:17 consult [1] 18:4 contains [1] 58:2 context [5] 6:6 7:4 13:12 46:7,21 continuous [1] 34:8 contrary [1] 10:8 contrast [2] 3:11 9:9 contravention [1] 17:20 controlling [1] 51:8 convicted [4] 24:18,22 47:25 51:1 cooperate [3] 15:20 23:9 64:7 cooperated [3] 38:21 52:1 64:19 cooperates [1] 51:24 cooperation [4] 38:19 39:8 63:8, 17 cooperator [5] 24:17 39:1 51:5 63: 11,24 cooperators [8] 36:23 38:17 50: 25 63:3,23 64:3,12 66:11 correct [4] 3:16 29:2 30:8 64:22</p>	<p>correction [1] 22:11 couldn't [4] 38:24 39:9 49:3 51:19 counsel [6] 20:22 22:15 23:2 25:2 52:16 66:23 counsel's [1] 50:5 counter [1] 59:15 country [1] 31:8 couple [2] 44:1,4 course [2] 14:1 48:15 COURT [60] 1:1,15 3:10 4:9,17 5: 12,13 6:19 7:14,24 8:8,14 12:19 14:6,14 15:11 20:8,17 21:4 22:25 25:4,9,12,14,17,25 27:20 28:11 29:9 32:25 33:2,3 36:18 38:12,23, 24 41:15 44:22 49:5 53:4,7,25 54: 3 56:24 57:1 58:15,15 59:7 60:20 61:5,18 62:15,18,19,22 63:10,20 65:24 66:2,7 Court's [5] 7:13 9:6 22:9 25:23 63: 18 courthouse [1] 17:19 courtroom [2] 10:3,16 courtrooms [1] 17:18 courts [10] 15:1 28:10,23 29:5,20 30:9 35:18 41:21 44:12 60:6 created [1] 7:4 creates [1] 19:21 creating [2] 50:6,7 crime [9] 17:5 24:23 31:6,9 39:3 47:25 51:4 52:2 56:3 crimes [5] 20:4,13 27:16 34:1 51:2 criminal [4] 3:20 7:2 33:25 48:9 crux [1] 22:16</p> <hr/> <p style="text-align: center;">D</p> <p>D.C [4] 1:11,23 29:1 57:12 dare [1] 47:22 day [1] 42:6 deal [4] 8:20 27:12 39:19 66:3 dealing [2] 57:1 66:10 debate [1] 42:1 decide [2] 31:11 66:16 decided [2] 27:13 33:24 decides [1] 40:2 decision [4] 17:8 22:9 26:1 34:13 deem [1] 48:1 default [3] 6:25 7:9 24:20 defendant [27] 5:15 6:13,20,22 10: 9 11:6 14:7 15:7 17:25 31:3 33:1 37:17 39:16,18 42:11,12 45:24 46: 25 47:19,24 48:7 51:22 58:10 62: 20 63:15 64:6,8 defendant's [5] 3:20 25:7 27:3 29: 21 58:3 defendants [21] 9:12 10:14 13:4 17:23,24 33:16,25 36:24 37:20,22 38:20 42:23 46:9,13 50:18 51:1,3 54:16,16 64:15 66:17 defense [1] 53:16 degree [1] 56:20 delta [1] 47:17 deny [3] 13:10 17:22 40:11 depart [4] 7:24 17:3 31:2 63:5 departed [2] 35:2,3</p>	<p>departing [1] 8:3 Department [1] 1:22 departure [17] 4:24 5:23,24 6:2,16 7:18 8:1,16 17:6 30:19 35:5 39:1, 5 40:6 53:22 55:12 56:1 departures [4] 7:15,22 8:5 35:22 depends [1] 10:2 describe [1] 28:1 described [4] 18:13 19:15 29:6 32: 17 describing [1] 62:12 deserved [1] 51:4 despite [1] 34:8 determine [2] 28:20 30:18 determining [2] 53:5,8 deviate [1] 15:21 deviated [1] 54:20 difference [1] 20:2 different [15] 7:14 15:12 24:23 31: 4 32:7 37:5 39:3 43:12 45:8 50:8 51:3 52:2 53:18 60:7 61:10 differentiating [1] 38:19 difficult [5] 11:21 12:3,9,14 64:7 dilemma [1] 40:2 Dillon [3] 22:9 49:6,20 direct [2] 8:14 9:6 directed [2] 5:18 6:19 direction [1] 10:8 directive [1] 58:14 directly [5] 3:22 28:23 32:22 62:9, 10 directs [5] 4:8 8:20 14:15 27:7 62: 15 disagree [6] 9:23 11:19 12:4 48:3, 4 63:6 disagreed [2] 57:13 59:22 disavows [1] 10:22 discount [2] 53:6,9 discretion [16] 6:25 13:14 16:17 20:15 25:24 27:13 30:4,13,15 31: 15,22 62:3 63:14,16,19,20 discussed [1] 57:4 discussing [1] 44:16 discussion [1] 21:5 disparities [6] 17:22 19:12,16,17 50:6,7 disparity [5] 19:22 50:9,14,21 51: 11 disregard [2] 3:18 18:24 disruption [1] 7:4 district [27] 10:19,21,23 13:5,7 15: 11 22:4,6,8 28:18 29:5,20 30:9 34: 22 38:12 42:6 45:19 46:3 48:4,17 53:7 54:2 55:2 56:21 58:15,15 66: 13 districts [2] 17:18 30:6 doing [9] 14:9 27:16 29:12 30:16 31:5 36:10 41:3 43:2 62:17 done [7] 6:24 12:17 29:19 40:6,25 50:2 59:21 Dorsey [5] 5:13 14:6,18 62:19,19 double [2] 63:3,9 down [7] 6:4 40:23 41:15 44:8 52: 24 57:6 63:5</p>
---	--	--	---

Official

<p>downward ^[1] 56:1 driven ^[1] 60:8 drug ^[9] 7:5 21:12 24:25 34:14 36:21 38:11,16 51:2 64:13</p>	<p>expertise ^[1] 66:14 explained ^[1] 65:24 extent ^[2] 47:6 59:7 eyes ^[1] 48:7</p>	<p>function ^[3] 13:17 33:15 46:8 functional ^[1] 61:19 further ^[6] 24:11 42:12,24 45:24 53:3 66:20 future ^[1] 10:12</p>	<p>60:21 64:3 guidelines' ^[1] 33:20 GUTIERREZ ^[2] 1:5 54:21</p>
E	F	G	H
<p>each ^[2] 7:7 36:24 earlier ^[10] 9:25 28:8,16 44:17 50:20 53:9 55:5 56:7 62:6,7 easily ^[1] 11:25 easy ^[1] 35:1 effect ^[8] 5:15,24 10:13 13:9 21:14 25:20 46:17 56:19 effectively ^[3] 26:17 28:7 49:24 effort ^[1] 34:8 eight ^[1] 60:12 either ^[2] 40:9 61:14 elements ^[1] 9:7 eligibility ^[3] 15:25 18:6 66:6 eligible ^[2] 13:4 20:1 eliminated ^[1] 23:10 emphasized ^[1] 13:2 enable ^[1] 10:15 enacted ^[8] 23:3 25:1 27:8 40:16 51:21 52:7 60:1,13 end ^[1] 42:6 ended ^[3] 54:10,17 55:17 enforcement ^[1] 21:24 enough ^[6] 12:10,13 14:19 18:5 48:1 59:19 ensure ^[1] 31:16 entire ^[2] 8:24 47:17 entirely ^[4] 3:18 11:13,18 21:10 entitled ^[4] 15:24 22:3 43:3 50:15 envisions ^[1] 66:16 equity ^[1] 31:16 equivalent ^[2] 61:20 62:23 ERIC ^[3] 1:21 2:6 21:1 error ^[6] 22:4,7,9,11 45:1,22 escape ^[3] 5:15 14:7 62:21 ESEQUIEL ^[1] 1:4 ESQ ^[3] 1:19 2:3,9 essentially ^[2] 30:5 49:7 established ^[1] 27:1 even ^[31] 12:14 16:10 18:8,15 19:1,2,24 20:14 22:8 23:1,2,13,23 24:8 27:17 32:9,12 33:3 38:5 42:9,12 44:6,21 51:16 53:4 55:11 56:17 58:11,21 61:11 65:25 everyone ^[1] 47:3 everything ^[3] 49:7 57:3,5 exact ^[3] 9:19 18:18 21:22 exactly ^[8] 24:4 25:16,24,25 27:25 32:8 52:4 65:14 examining ^[1] 40:24 example ^[2] 28:3 41:3 except ^[1] 55:6 exceptional ^[1] 63:17 exclude ^[1] 59:20 exercise ^[2] 20:15 66:14 exist ^[1] 39:24 existence ^[1] 60:9 exists ^[1] 50:22 experience ^[1] 15:11</p>	<p>faced ^[1] 40:1 fact ^[14] 4:25 20:8 21:16 28:17,17 34:12 42:19 43:10 48:6 49:21 58:8,10 65:1 66:2 factors ^[9] 25:15 30:23 31:10 47:20,23 53:7 55:24 56:2,14 factually ^[1] 64:14 Fair ^[3] 12:10,13 50:13 false ^[1] 10:6 favor ^[1] 20:15 FEAUTO ^[1] 1:4 FEIGIN ^[41] 1:21 2:6 20:23 21:1,3 22:24 23:11 25:21 26:6,12,16 28:22 30:10 31:18 32:4,8 34:19 36:7,11,13 37:10,13 38:5 41:10,14,19 42:17 43:4,14,25 45:2 49:4,13,17,20 57:23 58:17 61:12 62:12 63:1 65:9 felt ^[1] 22:21 few ^[7] 31:19 47:13 51:12 57:10,23 58:23 60:2 fewer ^[1] 9:3 figure ^[1] 30:20 final ^[2] 27:10 62:24 find ^[3] 21:11 57:10 60:5 fine ^[2] 13:19 44:7 first ^[35] 6:7 11:2,4 13:3,9 16:4 17:10,15 21:17 23:11,14,22 25:3 26:18 27:5 29:15 31:20 33:8 36:13 43:4 45:5 46:12,14 48:19,24 49:8 50:9 55:4 57:5 58:1,2,5 59:25 60:12 66:1 FISHER ^[42] 1:19 2:3,9 3:6,7,9 5:1,6 6:1,5 9:10,21 10:20 11:1,10,17 12:10,13 13:25 15:9 16:3,12,15,23 17:11 29:6 31:16 52:17,18,20,21 53:23 54:9,13 55:8 56:5,8,12,15 59:9,10,24 five ^[3] 30:23 54:16 55:16 fixed ^[1] 15:16 flat ^[1] 11:19 flatly ^[1] 30:3 floor ^[4] 61:13,14,16,23 following ^[1] 52:22 Footnote ^[1] 59:6 force ^[2] 22:18 33:13 forecloses ^[1] 58:18 form ^[1] 43:2 forth ^[1] 23:25 foundation ^[2] 44:19,20 four ^[1] 9:3 frank ^[1] 53:14 frankly ^[1] 44:12 free ^[1] 59:3 frequently ^[1] 29:24 friend ^[1] 38:13 front ^[4] 18:1 55:10 56:25 58:20 full ^[2] 22:25 49:21</p>	<p>Gall-type ^[1] 12:18 GARDEA ^[1] 1:5 gave ^[2] 9:24 45:19 General ^[3] 1:22 26:23 43:13 gets ^[3] 19:12 47:5 51:6 getting ^[1] 46:13 GINSBURG ^[10] 9:10,21 13:16,25 14:9 28:15 50:19 54:7,11,13 Ginsburg's ^[1] 19:11 give ^[23] 11:20 17:5,7,23 28:11 30:22 33:16 39:19,20 40:9 42:12 45:14,15,23 46:9,15 53:6,10 55:6,25 58:25 63:15 64:12 given ^[8] 7:7 10:14,15 13:14 43:23 47:11 58:19 63:19 gives ^[1] 28:3 giving ^[4] 39:4,6 41:11 42:23 got ^[5] 9:15 29:14 30:23 32:9 33:1 gotten ^[2] 30:5 52:1 government ^[29] 3:16,24 7:17,19 8:12,13 10:1 19:21 29:7 30:7 44:6 48:19 49:23 50:2 52:25 55:9 56:16 57:8,22 58:22,23 59:5,14 60:4 61:1 63:1 64:5,20 65:2 government's ^[9] 3:25 8:10 10:20 19:23 24:3 25:11 26:21 29:23 44:13 grant ^[5] 20:11 28:19 40:2 46:23 56:16 granted ^[6] 14:5,17 15:4 54:5 57:1 58:11 grants ^[2] 5:13 6:12 great ^[3] 27:12 39:19 44:11 gross ^[1] 30:14 grounds ^[1] 32:14 guess ^[3] 39:5 43:21 44:24 guide ^[3] 25:23 34:12 53:20 guided ^[2] 6:25 13:14 guideline ^[51] 3:19 4:18,20 5:9,19 6:3,7,14,17,21 7:1,16,24 8:2,6 10:10 11:24 16:13,19 19:3,6,23 22:23 23:5,17,20 24:10 31:13 33:11,12 35:23 36:1 38:25 41:4 45:13 52:24 53:5,10 54:17 55:15,17 56:18 63:4,15,18 64:13,16 65:17,22 66:4,11 guidelines ^[88] 4:5,9,10,12,15,16,19 5:3,18 7:1,22 8:5,15,24 9:7 10:10,23,24 11:7,13,18,19 12:5,8,12,20,22,22 13:8,18,23 14:2 15:24 16:10,21 17:1,3 18:5,23 20:4 21:12 23:8,12,13,14 24:6 25:23 26:5,14,22 27:8,10,10,17,19 28:6,19 30:17 31:7 34:7,14 35:1,2,12 38:2 39:10,13,22 40:7,19 41:12 43:9 44:20,21 45:14,15,20 46:1,6 47:21 51:18 53:21 54:4,22 57:19 59:1</p>	<p>hang ^[1] 62:1 happen ^[1] 28:10 happened ^[4] 18:1,16 21:7 43:1 happens ^[2] 15:5 57:2 happenstance ^[1] 17:25 happy ^[1] 47:12 hard ^[1] 57:16 hardest ^[1] 17:13 hardly ^[1] 57:17 Hatch ^[1] 14:21 hear ^[1] 3:3 heard ^[1] 3:12 hearing ^[4] 35:17 48:20 49:3 66:24 heavily ^[1] 64:5 help ^[1] 30:18 herself ^[1] 35:10 high ^[5] 34:14 36:21 38:12,16 40:13 highly ^[3] 12:15 20:7 55:20 himself ^[2] 13:8 35:10 historical ^[5] 42:18 43:10 65:1,14 66:2 histories ^[1] 34:1 history ^[4] 3:20 7:2 14:20 48:9 holding ^[1] 59:17 holistically ^[1] 62:15 Honor ^[16] 23:12 25:22 26:18 28:22 29:3 31:18 32:4,16 37:10 38:5 41:14 43:4 44:1 45:2 48:24 49:5</p>
I			
			<p>identical ^[1] 60:18 identically ^[2] 20:10 50:17 illustrates ^[2] 12:21 52:3 imagine ^[2] 39:15,22 imagined ^[1] 66:15 immediately ^[1] 26:9 impermissible ^[3] 32:10,19,21 implement ^[2] 27:14,19 implemented ^[5] 25:17 36:16,22 38:16 39:12 implementing ^[1] 40:15 important ^[2] 17:12 64:4 impose ^[7] 25:5 38:3,4 40:12 47:8 58:16 60:20 imposed ^[6] 4:4 26:25 28:3 30:2,3 57:19 imposing ^[5] 3:17 10:25 25:9,13 26:24 improper ^[1] 55:21 improperly ^[1] 50:2 inaccuracy ^[1] 64:21 inaccurate ^[1] 64:14 include ^[2] 28:20 65:22 includes ^[1] 8:24 including ^[3] 14:20 26:25 40:21 incorrect ^[1] 18:14 incorrectly ^[2] 19:4 36:16</p>

<p>indeed [2] 58:21 60:5 indicated [1] 48:16 indication [1] 21:12 influence [1] 54:5 influenced [1] 38:1 inform [1] 53:22 informed [2] 53:10 66:14 informs [1] 17:8 initial [2] 4:16 9:13 initially [1] 21:16 instance [3] 11:4 57:5 66:2 instances [1] 34:25 instead [4] 8:22 13:22,22 47:6 instinct [1] 37:20 instruct [2] 38:23,24 instruction [1] 23:25 instructs [1] 28:9 intended [1] 51:19 introduced [1] 14:23 involved [1] 9:12 irregular [1] 20:8 isn't [3] 23:18 49:21 51:8 issuances [1] 14:24 issue [3] 58:20 59:3 60:3 issued [2] 4:6 57:20 itself [4] 18:25 46:22 55:10 62:18</p>	<p>justices [1] 66:7</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>KAGAN [6] 42:16 43:11,15 44:24 48:16 64:24 Kagan's [1] 49:23 keeps [1] 57:8 KENNEDY [5] 25:19 48:13 49:10, 14,18 Kennedy's [1] 27:23 KENNETH [1] 1:3 key [1] 3:15 killed [1] 62:1 kind [2] 35:5 41:1 kinds [3] 31:21 34:25 40:20 knows [3] 34:21 35:4 37:25 KOONS [2] 1:3 3:4</p>	<p>48:25 49:5 56:23 57:23 58:17 63:1 66:1 magnetic [1] 54:4 main [1] 56:22 majority [1] 59:22 mandatory [35] 4:11 5:16 7:5,19 8:4 10:4 11:9 13:17,19 14:1,12,16 15:4 18:12 39:10,14 40:7 47:14 51:18 55:23 58:9 61:3,6,13,17,19, 21,22 62:21 63:12,25 64:1,16,17 66:12 MANUEL [1] 1:5 many [3] 15:13 16:20 49:1 March [1] 1:12 matter [12] 1:14 16:8 26:18 36:3 41:23 43:10 44:5,25 51:7 58:7 60:11 66:8 maximum [2] 53:22 55:25 mean [11] 37:3,4,7 42:17,24 43:13 48:19 49:14 58:7 60:11 61:9 meaning [2] 41:13 45:4 meaningful [1] 13:9 means [5] 5:22 23:16 45:18 60:7, 14 meant [1] 60:12 measured [3] 20:4 31:6 54:23 measuring [1] 8:15 Melendez [10] 7:13,14 26:1,17 27:20 58:18,21,22 59:6,10 mention [1] 25:3 mentioned [2] 51:12 55:5 might [6] 11:11 12:1 27:13,14 42:25 55:1 mind [4] 4:22 41:24 55:14 59:14 minds [1] 42:3 minimum [75] 4:11,18,23 5:8,9,12, 16 6:8,10,19 7:19 8:4 10:5,12 13:17,20 14:1,7,12,16 15:5 16:2,18 18:12 19:24 22:20,23 23:4,9,18 24:7,20,24 25:6,13 27:2 28:4 31:12 35:6 36:25 38:8 39:17,23 47:1, 4,9,14,18 48:2,6,11 51:5,10,23 52:10,11 53:2 55:23 58:9 59:19,20 61:4,7,13,17,19,21,22 62:21 63:12, 25 64:1,16,17 66:12 minimums [8] 7:5 21:18,20 34:3 38:13,20 46:7,21 minutes [2] 21:6 52:17 misses [1] 23:7 mistake [8] 19:3 32:25 36:18 42:10,10,13,15 66:1 mistakenly [1] 16:8 mistakes [1] 18:10 mix [1] 31:4 mixes [1] 31:1 mod [1] 13:11 modification [1] 13:11 modifications [1] 10:15 modified [1] 22:14 modifies [1] 25:9 modify [1] 25:10 months [5] 36:3 39:24 40:10,11, 13 most [2] 31:6 45:15</p>	<p>motion [10] 5:11,14 6:12 7:20 14:17 15:4 25:11 38:9 40:3,12 motions [1] 14:4 moved [1] 43:17 much [10] 17:6 28:20 30:19 31:2, 13 40:5,8 53:5,9 66:18</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>narrow [2] 15:3 66:10 naturally [1] 52:12 nature [1] 25:10 necessarily [2] 16:7 32:10 necessary [1] 34:9 need [4] 18:16 33:4 36:14 57:14 needs [1] 10:4 negative [1] 40:21 Neither [1] 47:21 never [4] 15:20 35:7 36:2 45:6 new [4] 22:23 48:22 66:17,18 next [5] 3:4 23:7 25:20 31:3 58:17 non-cooperating [1] 47:24 non-cooperator [1] 24:22 non-recidivist [1] 24:24 Nor [2] 37:6 47:21 Note [2] 26:2 27:6 notes [1] 25:22 nothing [9] 4:10 8:2,3 31:1 35:12 38:18 39:7 46:21 50:24 number [11] 14:19 30:24,25,25 34:9,9,9 45:13,18,21,21 numbers [1] 45:15</p>
<p style="text-align: center;">J</p> <hr/> <p>JAY [1] 1:3 JEFFREY [5] 1:19 2:3,9 3:7 52:18 Joint [1] 21:10 JOSE [1] 1:5 judge [81] 3:17 5:8,16 6:11,13 10:2,22,23 11:2,4,6,11,12,15,17,23 12:4,17 13:5,7 16:7,10 17:25 18:3, 4,9,11 19:3,25 20:14 22:4,6,8,21 30:18 31:1 32:9,17 34:22 35:10, 11,16,22,24 36:4,14,16 37:14,15, 24 38:3,12 39:17 40:1,9 41:2,24 45:19 46:3 47:7 48:4,17 54:20,21 55:2,4,6,12,13,25 56:21 58:25 59:3 62:20 63:14,16 65:15,17 66:1, 13,14 judge's [2] 30:4 62:3 judged [1] 20:13 judges [13] 13:13 15:12,16,22 16:20,25 17:2 28:18 30:12,20 31:5 42:2,6 judgment [7] 36:21 38:11,15 46:17 51:6,7 54:1 judgments [1] 46:9 Justice [96] 1:22 3:3,9 4:14 5:1,5, 22 6:2,5 7:11 9:10,21,24 10:18,21 11:1,8,14 12:3,11,15,25 13:16,25 14:8 15:9 16:4,11,13,16,24 17:16 18:8 19:10 20:21 21:4 22:17 23:7 25:19 26:4,7,13 27:5,23 28:15,16 30:10 32:3,6 34:4,20 36:8,11,12 37:1,11,23 40:17 41:11,18 42:16 43:11,15 44:17,24 48:13,16,17 49:10,14,18,22 50:19,23 52:15,21 53:25 54:2,7,11,13 55:3,18 56:4,6,9, 13,20 59:9,12,25 62:6,13 64:4,24 66:22</p>	<p style="text-align: center;">L</p> <hr/> <p>land [1] 12:21 language [15] 4:3 24:1 25:8 28:8 35:25 42:17 44:25 52:4 57:16,25 60:18,19,23 61:2,5 large [2] 26:23 27:8 last [4] 21:6 62:25 64:9,23 later [4] 52:7 59:15,16 60:4 Laughter [1] 41:17 law [15] 16:6 18:3,4 21:24 23:16 29:13,14 30:1 32:12 36:16 42:7,8 46:4 50:11 65:7 leads [1] 55:14 least [3] 30:6 56:19 57:3 left [2] 61:1,16 legal [11] 16:8 33:7,13 36:6 41:1 44:19,20 45:1 46:19 56:16 62:25 legislation [1] 13:20 legislative [1] 14:20 legislators [1] 15:2 level [3] 3:20 7:2 24:21 lies [2] 3:21 41:1 life [1] 61:25 lift [1] 64:1 light [1] 59:16 limit [1] 9:5 limitation [1] 25:11 limited [1] 7:4 little [7] 4:15 9:17 21:5 30:24 36:9 56:10,24 live [3] 31:25 32:1 44:8 longer [1] 11:9 look [16] 13:8 14:19,23 18:8 23:22 26:2,8,20 27:23 31:23 37:4 43:16 49:11 56:21 57:9 63:10 looked [1] 33:4 looking [4] 33:3 35:3 43:18,19 lot [5] 15:12 30:12,24,25 42:3 low [1] 40:11 lower [12] 6:3 16:19 19:6 26:24 27:1 28:11 33:3 34:15 37:7,8 58:9 66:3 lowered [2] 10:25 37:21</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>made [18] 19:3 22:4,6,8 23:19 28:16 34:13 38:13 42:10 43:8 46:10</p>	<p>maximum [2] 53:22 55:25 mean [11] 37:3,4,7 42:17,24 43:13 48:19 49:14 58:7 60:11 61:9 meaning [2] 41:13 45:4 meaningful [1] 13:9 means [5] 5:22 23:16 45:18 60:7, 14 meant [1] 60:12 measured [3] 20:4 31:6 54:23 measuring [1] 8:15 Melendez [10] 7:13,14 26:1,17 27:20 58:18,21,22 59:6,10 mention [1] 25:3 mentioned [2] 51:12 55:5 might [6] 11:11 12:1 27:13,14 42:25 55:1 mind [4] 4:22 41:24 55:14 59:14 minds [1] 42:3 minimum [75] 4:11,18,23 5:8,9,12, 16 6:8,10,19 7:19 8:4 10:5,12 13:17,20 14:1,7,12,16 15:5 16:2,18 18:12 19:24 22:20,23 23:4,9,18 24:7,20,24 25:6,13 27:2 28:4 31:12 35:6 36:25 38:8 39:17,23 47:1, 4,9,14,18 48:2,6,11 51:5,10,23 52:10,11 53:2 55:23 58:9 59:19,20 61:4,7,13,17,19,21,22 62:21 63:12, 25 64:1,16,17 66:12 minimums [8] 7:5 21:18,20 34:3 38:13,20 46:7,21 minutes [2] 21:6 52:17 misses [1] 23:7 mistake [8] 19:3 32:25 36:18 42:10,10,13,15 66:1 mistakenly [1] 16:8 mistakes [1] 18:10 mix [1] 31:4 mixes [1] 31:1 mod [1] 13:11 modification [1] 13:11 modifications [1] 10:15 modified [1] 22:14 modifies [1] 25:9 modify [1] 25:10 months [5] 36:3 39:24 40:10,11, 13 most [2] 31:6 45:15</p>	<p style="text-align: center;">O</p> <hr/> <p>objection [1] 44:9 occur [1] 8:5 odd [5] 9:17,22 51:16,21 56:5 offenders [2] 33:18,21 offense [7] 3:20 7:2 24:18,25 48:8, 10 54:23 offenses [3] 20:10 33:19,22 often [2] 29:8,18 okay [1] 15:18 once [4] 39:2 40:23 61:15,24 one [43] 5:20 7:10,16 12:23 14:11 15:6 19:9,21 22:7 24:13 28:15,17 34:21,25 37:25 38:21,21 42:25 43:8, 8,12 44:3,4,15,16,16 45:11 47:22 48:3,13,14 50:22 51:11 54:19 55:6 57:15,24,24 59:16 62:21 64:9, 23 65:1,4 ones [3] 8:15 20:5 38:6 only [25] 6:4 8:5 11:7,11 20:2 24:9 25:14 34:20 36:22 38:6,16 40:4 43:19 45:8 46:6 50:13,25 51:5 52:9 54:19 55:21 57:10 61:22 62:14 64:12 opening [1] 65:11 operative [4] 4:3 46:19 60:17,19 opinion [2] 7:13 59:7 opinions [1] 57:10 opportunity [1] 42:24 opposed [1] 59:2 opposing [3] 23:1 25:2 50:5 opposite [1] 3:23</p>

<p>optional ^[1] 23:18 oral ^[5] 1:14 2:2,5 3:7 21:1 order ^[1] 36:17 ordinary ^[2] 14:3 63:20 original ^[1] 22:21 other ^[24] 4:8 5:20 6:21 7:8,10,17 8:25 12:16,18,25 14:12,19 16:19 17:23 19:9 26:9 27:22 28:15 31:10 37:21 49:1 59:6 62:14,22 otherwise ^[5] 20:10 26:25 28:2 29:1 30:15 ought ^[1] 20:17 out ^[15] 5:21 7:8 11:19 13:24 19:20 28:8 29:12,14 30:20 45:4 50:20,22 54:24 56:20 58:6 outside ^[2] 30:4 46:7 over ^[1] 27:17 overlooked ^[1] 58:1 own ^[3] 14:18 16:25 44:13</p>	<p>11 26:3 27:11 28:15 34:4 37:14 38:14 39:1 41:8 43:3 45:4 48:14 60:3 61:12 62:10,25 64:23 65:2 pointed ^[4] 50:19 58:6 62:6,7 pointing ^[4] 28:8 41:15 50:22 56:20 points ^[9] 34:15 36:7,11 49:15 58:5 62:7,9,24 63:1 policy ^[9] 4:5 18:18 40:19 41:12 48:5 57:20 63:2 64:9 65:20 position ^[2] 9:11 60:10 practical ^[2] 35:14 44:5 pre-guideline ^[1] 59:2 precisely ^[1] 60:23 premise ^[3] 9:23 10:6 63:6 prescribed ^[1] 24:19 preserve ^[2] 44:8 49:15 President ^[1] 14:22 presume ^[1] 42:7 presumptively ^[2] 24:21 51:24 pretty ^[2] 40:5 41:13 prevents ^[2] 35:15,16 principle ^[1] 32:12 principles ^[3] 17:20 26:19 30:1 probably ^[2] 17:13 39:19 problem ^[4] 4:14 12:1 14:10 19:22 procedural ^[2] 32:13 44:9 procedure ^[1] 48:23 proceed ^[1] 34:24 proceeding ^[1] 49:22 proceedings ^[1] 22:10 promulgate ^[1] 27:18 promulgated ^[2] 27:11 60:21 properly ^[6] 5:3 33:10 46:11,14 53:20 54:23 proposition ^[1] 15:10 Prosecutors ^[1] 16:24 provide ^[2] 39:18 40:8 provision ^[3] 3:14 59:15,16 provisions ^[6] 9:1,7 23:16 52:8,9 62:8 psychoanalysis ^[1] 36:15 psychoanalyst ^[1] 37:4 psychoanalyze ^[3] 34:23 35:16 36:14 pull ^[2] 54:4 62:2 punished ^[2] 33:19,22 purported ^[1] 21:25 purposes ^[2] 23:5 47:14 pursuant ^[5] 4:7 18:23 24:6 57:21 60:20 put ^[7] 5:12 6:6 14:6 34:22 37:6 53:12,24 PUTENSEN ^[1] 1:4 puts ^[3] 7:12,19 46:12</p>	<p>quite ^[9] 10:8 20:13 22:10 41:18 44:24 48:14 51:17 57:12 59:18 quote ^[1] 14:21 quoted ^[2] 10:7 14:25</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>rails ^[1] 60:8 raise ^[1] 53:19 raised ^[3] 22:20 53:21 55:10 RANDY ^[1] 1:4 range ^[47] 3:19 4:16,18 5:9,19 6:3,8,15,17,21 7:9,16,24 8:6 10:11 11:24 18:23,25 19:6 22:14,18,19,22 24:10 33:3,11,12 38:25 39:22 40:3,5 45:3,7,14,18 46:1,3,6 53:5,10 54:17 55:15,17 63:15,18 64:16 65:22 ranges ^[5] 7:1 19:24 21:19 66:4,12 read ^[14] 4:2 5:3,17 24:3 32:15 34:18 35:8,25 52:5 53:15 57:15 65:4,5,6 reading ^[4] 50:13 54:12 58:18 59:10 reads ^[1] 8:12 Reagan ^[1] 14:22 real ^[1] 4:17 really ^[13] 4:14 13:8 34:17,21 35:8 37:3,4 38:1,4 43:8 45:6 46:15 57:2 reason ^[14] 12:23 13:10 17:15 24:16 26:12,19 29:16 33:9 37:16,18 39:9 40:14 45:25 65:16 reasoning ^[1] 57:11 reasons ^[12] 16:4 19:15 32:20 33:7 44:1,4,14 47:11 53:9 65:8,9 66:6 rebuttable ^[1] 65:25 REBUTTAL ^[3] 2:8 20:20 52:18 receive ^[2] 46:25 51:24 received ^[2] 21:15 47:24 receives ^[1] 47:19 recognized ^[3] 25:17,25 27:20 recognizes ^[2] 27:24 28:1 recommend ^[1] 47:8 reconsider ^[1] 36:5 record ^[1] 18:9 reduced ^[1] 66:19 reduction ^[7] 13:6 24:11 32:7,18 37:18 39:7 64:14 reductions ^[3] 20:12 22:12 27:15 refer ^[2] 7:12 8:23 reference ^[1] 8:11 referenced ^[1] 23:2 referencing ^[1] 32:2 referring ^[3] 5:4 8:9 31:21 refers ^[2] 9:2 11:24 reflect ^[6] 25:6,8 26:23 58:3,7,12 reflective ^[1] 17:4 reflects ^[3] 28:7,12 47:16 Reform ^[2] 12:6 17:21 refutation ^[1] 34:6 regard ^[3] 24:6 61:3,20 regardless ^[4] 6:18 56:2 63:24 64:</p>	<p>19 regime ^[2] 6:25 62:11 rein ^[1] 59:3 reinforce ^[1] 55:19 reinforced ^[1] 62:5 reiterate ^[1] 65:10 rejected ^[1] 53:19 Rejecting ^[1] 52:22 related ^[2] 46:22 52:13 relates ^[1] 9:24 relevant ^[2] 23:15 45:10 reliance ^[1] 10:22 relied ^[1] 19:3 relief ^[19] 17:22,24 18:6 19:8,12 20:1,11 22:2,3 32:23 36:17 42:12 44:10 45:24 46:16,24 49:25 50:16,19 relies ^[1] 64:5 relying ^[2] 47:6,9 remains ^[1] 48:6 remand ^[2] 36:5 54:1 remember ^[8] 5:10 6:7,24 7:13 13:2,3 54:6 63:7 remove ^[1] 47:13 repeat ^[1] 32:25 reply ^[4] 29:12 45:7 58:23 65:13 require ^[3] 10:11 23:4 28:5 required ^[11] 5:8 16:9 18:3,4 19:7 23:20 44:22 46:2 55:25 65:7 66:5 requires ^[4] 16:6 25:6 32:24 58:25 requiring ^[1] 44:6 resentence ^[2] 35:10,11 resentenced ^[1] 34:16 resentencing ^[3] 22:25 49:6,21 reserve ^[1] 20:20 resolve ^[3] 4:20 57:14 66:9 resources ^[1] 44:13 respond ^[1] 45:6 Respondent ^[4] 1:9,23 2:7 21:2 responding ^[2] 49:17,22 response ^[2] 13:1 36:12 responses ^[2] 57:23 59:25 rest ^[2] 20:20 27:6 result ^[2] 36:15 64:10 results ^[1] 30:8 retroactive ^[1] 46:24 return ^[4] 8:8 46:2 56:22 58:13 review ^[1] 43:2 reward ^[2] 24:16 39:1 rid ^[1] 51:16 road ^[3] 40:24 41:15 44:9 ROBERTS ^[7] 3:3 20:21 26:4,7,13 52:15 66:22 round ^[2] 49:18,19 rule ^[6] 5:25 15:19 18:2 46:19 47:3 55:21 ruled ^[1] 53:1 rules ^[2] 15:16 21:22 ruling ^[1] 39:12 running ^[1] 64:10</p>
P		R	
<p>p.m ^[1] 66:24 PAGE ^[8] 2:2 3:24 8:9 9:2 24:2 26:20 57:18 65:12 pages ^[3] 9:1 25:18 26:2 par ^[1] 46:13 part ^[4] 7:20 17:13 65:19,23 particular ^[10] 7:5 9:3,6,7 21:7 27:16 33:18,21 48:11 66:16 particularly ^[1] 37:16 partly ^[1] 54:22 pause ^[1] 24:14 paying ^[1] 53:15 pegged ^[1] 63:4 people ^[7] 9:17 19:23,25 20:3,9,12 34:16 per ^[1] 48:17 percent ^[2] 15:20,21 percentage ^[4] 31:11 55:7,13,14 perdition ^[2] 41:2,16 perfect ^[2] 4:13 6:23 perform ^[1] 32:17 Perhaps ^[6] 15:17 16:7 34:6 41:7 47:12 63:5 permissible ^[1] 42:4 permission ^[1] 46:6 permit ^[1] 35:21 perplexed ^[1] 56:25 persists ^[1] 29:17 person ^[1] 34:21 perspective ^[1] 29:23 perverse ^[1] 20:8 Petitioners ^[12] 1:6,20 2:4,10 3:8 21:14,16 45:6 48:8,10 52:5,19 Petitioners' ^[3] 21:7 22:15 39:6 phrase ^[1] 58:2 picture ^[1] 13:24 place ^[5] 8:19 23:22 29:15 30:6 46:1 places ^[5] 14:20 26:9 45:8,10 59:7 plain ^[2] 3:22 14:15 please ^[2] 3:10 21:4 plenty ^[1] 17:2 point ^[22] 5:10,21 18:7 19:20 24:</p>	<p>question ^[26] 3:12,21 4:20 7:11 11:22 16:5 17:12 19:11 27:4,23 28:24 30:11 31:4 32:22 34:5 37:12 43:21 53:24 54:3 55:9,19 56:10 61:8 64:25,25 65:14 questions ^[3] 20:19 42:18 66:20 quickly ^[1] 50:4</p>	<p>quite ^[9] 10:8 20:13 22:10 41:18 44:24 48:14 51:17 57:12 59:18 quote ^[1] 14:21 quoted ^[2] 10:7 14:25</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>rails ^[1] 60:8 raise ^[1] 53:19 raised ^[3] 22:20 53:21 55:10 RANDY ^[1] 1:4 range ^[47] 3:19 4:16,18 5:9,19 6:3,8,15,17,21 7:9,16,24 8:6 10:11 11:24 18:23,25 19:6 22:14,18,19,22 24:10 33:3,11,12 38:25 39:22 40:3,5 45:3,7,14,18 46:1,3,6 53:5,10 54:17 55:15,17 63:15,18 64:16 65:22 ranges ^[5] 7:1 19:24 21:19 66:4,12 read ^[14] 4:2 5:3,17 24:3 32:15 34:18 35:8,25 52:5 53:15 57:15 65:4,5,6 reading ^[4] 50:13 54:12 58:18 59:10 reads ^[1] 8:12 Reagan ^[1] 14:22 real ^[1] 4:17 really ^[13] 4:14 13:8 34:17,21 35:8 37:3,4 38:1,4 43:8 45:6 46:15 57:2 reason ^[14] 12:23 13:10 17:15 24:16 26:12,19 29:16 33:9 37:16,18 39:9 40:14 45:25 65:16 reasoning ^[1] 57:11 reasons ^[12] 16:4 19:15 32:20 33:7 44:1,4,14 47:11 53:9 65:8,9 66:6 rebuttable ^[1] 65:25 REBUTTAL ^[3] 2:8 20:20 52:18 receive ^[2] 46:25 51:24 received ^[2] 21:15 47:24 receives ^[1] 47:19 recognized ^[3] 25:17,25 27:20 recognizes ^[2] 27:24 28:1 recommend ^[1] 47:8 reconsider ^[1] 36:5 record ^[1] 18:9 reduced ^[1] 66:19 reduction ^[7] 13:6 24:11 32:7,18 37:18 39:7 64:14 reductions ^[3] 20:12 22:12 27:15 refer ^[2] 7:12 8:23 reference ^[1] 8:11 referenced ^[1] 23:2 referencing ^[1] 32:2 referring ^[3] 5:4 8:9 31:21 refers ^[2] 9:2 11:24 reflect ^[6] 25:6,8 26:23 58:3,7,12 reflective ^[1] 17:4 reflects ^[3] 28:7,12 47:16 Reform ^[2] 12:6 17:21 refutation ^[1] 34:6 regard ^[3] 24:6 61:3,20 regardless ^[4] 6:18 56:2 63:24 64:</p>	<p>19 regime ^[2] 6:25 62:11 rein ^[1] 59:3 reinforce ^[1] 55:19 reinforced ^[1] 62:5 reiterate ^[1] 65:10 rejected ^[1] 53:19 Rejecting ^[1] 52:22 related ^[2] 46:22 52:13 relates ^[1] 9:24 relevant ^[2] 23:15 45:10 reliance ^[1] 10:22 relied ^[1] 19:3 relief ^[19] 17:22,24 18:6 19:8,12 20:1,11 22:2,3 32:23 36:17 42:12 44:10 45:24 46:16,24 49:25 50:16,19 relies ^[1] 64:5 relying ^[2] 47:6,9 remains ^[1] 48:6 remand ^[2] 36:5 54:1 remember ^[8] 5:10 6:7,24 7:13 13:2,3 54:6 63:7 remove ^[1] 47:13 repeat ^[1] 32:25 reply ^[4] 29:12 45:7 58:23 65:13 require ^[3] 10:11 23:4 28:5 required ^[11] 5:8 16:9 18:3,4 19:7 23:20 44:22 46:2 55:25 65:7 66:5 requires ^[4] 16:6 25:6 32:24 58:25 requiring ^[1] 44:6 resentence ^[2] 35:10,11 resentenced ^[1] 34:16 resentencing ^[3] 22:25 49:6,21 reserve ^[1] 20:20 resolve ^[3] 4:20 57:14 66:9 resources ^[1] 44:13 respond ^[1] 45:6 Respondent ^[4] 1:9,23 2:7 21:2 responding ^[2] 49:17,22 response ^[2] 13:1 36:12 responses ^[2] 57:23 59:25 rest ^[2] 20:20 27:6 result ^[2] 36:15 64:10 results ^[1] 30:8 retroactive ^[1] 46:24 return ^[4] 8:8 46:2 56:22 58:13 review ^[1] 43:2 reward ^[2] 24:16 39:1 rid ^[1] 51:16 road ^[3] 40:24 41:15 44:9 ROBERTS ^[7] 3:3 20:21 26:4,7,13 52:15 66:22 round ^[2] 49:18,19 rule ^[6] 5:25 15:19 18:2 46:19 47:3 55:21 ruled ^[1] 53:1 rules ^[2] 15:16 21:22 ruling ^[1] 39:12 running ^[1] 64:10</p>
Q		R	
S		S	
<p>safest ^[1] 66:9 same ^[19] 9:14,19 17:18 21:18,19,22 31:4 32:7,25 36:18 37:11 49:7</p>			

Official

<p>51:4,5,25 59:21 60:23 62:18 63:24</p> <p>sampling [1] 31:8</p> <p>satisfied [1] 12:23</p> <p>saying [17] 12:9 30:14 31:5 34:10, 17 37:23,24 40:24 43:16,17 57:8 58:2 59:15 61:12,17,20 62:5</p> <p>says [30] 3:16,23 4:4,10 5:7 6:11 7:6,23 8:2,3,13 10:23 11:15 12:4 13:7 18:22 26:11,21 31:2 35:21,24 38:18 40:20 41:4 47:3 57:18 60:19 61:5 62:12 63:23</p> <p>scale-down [1] 9:20</p> <p>scenario [4] 10:4 12:15 15:6 18:18</p> <p>scenarios [2] 8:21 12:16</p> <p>scheme [5] 36:20 38:10,15 39:25 40:15</p> <p>second [16] 5:17 18:7 22:7 24:14, 14 32:19 36:19 37:19 39:3 43:24 46:19 49:2 50:21 58:13,24 60:24</p> <p>second-guessing [1] 41:7</p> <p>Section [57] 3:14 4:3,7 5:4,6,11,17 6:11 8:11,18,23 10:7 11:5 14:13 18:21 19:8 20:1,18 22:10 23:1,2,3, 6 24:3,5 32:23 40:16 45:5,12 46:22 47:10,13 48:12 49:24 50:15 52:3,9 54:25 57:1,6,7,11,14,21 58:24 60:1,22 62:8,10,15,16 64:11,11,18 65:22 66:4,15</p> <p>see [11] 9:2 31:5,24 34:4,5 36:9,10 41:6 45:11,12 49:11</p> <p>seeking [2] 22:1 43:2</p> <p>seems [8] 9:17 13:18,21 30:17 31:13 35:14 41:7 65:1</p> <p>seen [1] 12:19</p> <p>Senator [1] 14:21</p> <p>send [5] 35:9 37:24 38:7 55:1 66:13</p> <p>sense [9] 6:23 17:6 24:15,25 35:19 46:15 47:22 48:18 65:3</p> <p>sentence [92] 3:17 4:4,11 5:8,17 6:13,20 8:10,13,14 9:15,16,19 10:9, 14,14,25 11:3,6,21 12:5,7 13:6,11, 11 15:23 16:9 22:12,13 23:5,17 25:3,5,9,13,20,21 26:24 27:1,2 28:2,4,11 30:2,2 31:24,24,25 33:10, 13,14 34:23 35:13 38:3 39:6,20 40:10,13 42:21 44:18,21 46:13,25 47:5,8,15,18,23 48:24 51:24,25 54:5 56:19 57:18 58:2,3,9,14,16, 24 59:1,3 60:20,24 61:6,18,20 63:12,13 66:17,18,18</p> <p>sentenced [15] 9:18 15:7 19:19, 25 21:17 24:21 42:19,20 46:11,14 47:4 50:16,18 51:23 64:2</p> <p>sentences [20] 10:16 19:18 20:12 21:14,24 29:24 36:21 37:21 38:11, 16 43:9 44:7 46:11,18 48:6 51:1 54:18 55:17 63:4 65:17</p> <p>Sentencing [54] 4:6 9:14 10:3,12 12:6 13:15,18 14:24 15:13 17:21, 22 18:17,22 19:5,16,17 21:9,11,13, 19 22:13,18,19,22 24:5,9 27:25</p>	<p>28:25 30:8 40:25 41:20 42:2 45:3, 7,17 46:1,2,24 48:20,22 49:8 50:1, 6,7 51:15 52:10,11 53:15 55:11, 22 60:22 62:2,3 64:13</p> <p>sentencings [1] 21:8</p> <p>serious [6] 20:5,9,13 31:8 48:1 56:2</p> <p>seriousness [1] 17:5</p> <p>servicing [1] 9:16</p> <p>set [11] 3:18 6:24 7:1 11:13,17 14:16 15:5 23:24 57:3 61:13,22</p> <p>setting [3] 4:12 23:16 57:4</p> <p>settled [1] 26:17</p> <p>several [1] 66:7</p> <p>severity [1] 31:6</p> <p>shall [8] 3:18 4:4 5:8 25:4 26:22 57:18 58:3 60:20</p> <p>short [1] 11:22</p> <p>shot [1] 43:24</p> <p>shouldn't [10] 15:17 30:3 33:5,13 34:10 40:21 41:5 43:18 46:17 60:16</p> <p>show [1] 15:14</p> <p>shows [1] 51:19</p> <p>side [1] 16:20</p> <p>significantly [1] 38:1</p> <p>simple [2] 34:13 36:9</p> <p>simply [4] 15:19 50:16 58:7 61:24</p> <p>since [1] 35:7</p> <p>single [1] 56:1</p> <p>situated [2] 20:11 50:18</p> <p>situation [9] 3:18 12:18 14:3,4,6 15:3 32:16 51:17 65:7</p> <p>situations [1] 12:19</p> <p>small [2] 48:14 64:21</p> <p>Solicitor [1] 1:21</p> <p>solution [1] 19:14</p> <p>solve [1] 12:1</p> <p>somebody [4] 10:3 19:18 36:2 63:20</p> <p>somehow [2] 4:12 62:2</p> <p>someone [2] 24:16 30:23</p> <p>sometimes [5] 6:7,9,9 17:17 37:2</p> <p>sorry [1] 55:3</p> <p>sort [3] 43:22,24 52:5</p> <p>sorts [1] 63:3</p> <p>SOTOMAYOR [35] 4:14 5:1,5,22 6:2,5 7:11 9:25 15:9 16:4,11,13, 16,24 17:16 18:8 22:17 23:7 28:16 30:10 32:3,6 44:17 52:21 53:25 55:3,18 56:4,6,9,13 59:9,12,25 62:13</p> <p>speaking [1] 30:9</p> <p>speaks [1] 42:18</p> <p>special [2] 14:3,5</p> <p>specific [4] 24:19 27:18 45:4 46:20</p> <p>specifically [4] 3:15 9:9 10:22 51:9</p> <p>split [1] 57:13</p> <p>spoke [1] 59:8</p> <p>spoken [1] 60:2</p> <p>sprinkled [1] 27:14</p> <p>squarely [1] 41:22</p>	<p>Stanford [1] 1:19</p> <p>start [13] 4:23 10:4,10 12:19 15:10 24:9 35:22,25 38:24 39:25 52:24 53:2 60:10</p> <p>started [1] 43:15</p> <p>starting [2] 10:11 38:25</p> <p>starts [3] 6:3 11:23 59:18</p> <p>stated [1] 17:16</p> <p>statement [1] 18:19</p> <p>statements [6] 4:6 14:21 40:19 41:12 57:20 65:20</p> <p>STATES [4] 1:1,8,16 3:5</p> <p>statute [14] 3:22 4:1 14:1,12 15:25 23:20 24:1 27:2 35:20,21,24 45:9 46:23 51:22</p> <p>statutes [4] 14:11 32:15 33:8 50:13</p> <p>statutorily [1] 5:7</p> <p>statutory [44] 4:18,23 8:25 16:2, 18 21:18,20 22:20,22 23:4,17 24:7,19,23 25:6 28:4 31:12 34:2 35:6 36:25 38:8,13,20 39:16,23 44:14 46:4,7,21 47:1,4,9,18 48:2,5,11 51:5,10,23 53:2 57:24 59:19,20 60:11</p> <p>step [1] 23:8</p> <p>stepped [1] 7:3</p> <p>still [7] 18:10 19:6 23:4 37:11 51:20 62:2 66:3</p> <p>straddle [1] 6:10</p> <p>straight [2] 4:9 58:14</p> <p>strange [4] 36:20 38:10,14 50:14</p> <p>stress [1] 15:6</p> <p>strongest [1] 59:13</p> <p>structurally [1] 43:23</p> <p>stuck [1] 40:4</p> <p>sub [2] 62:21,22</p> <p>subject [8] 21:18,22 34:2 36:25 38:20 39:16 63:25 64:15</p> <p>submit [1] 66:21</p> <p>submitted [1] 66:23</p> <p>subsection [5] 8:18 60:25 61:4 62:14 65:18</p> <p>subsections [2] 9:3 26:10</p> <p>subsequently [1] 10:24</p> <p>subsets [1] 62:9</p> <p>substantial [40] 3:13 5:14 6:12 7:6,15,25 8:16,21 14:4,17 15:3 16:21 21:23 24:12,17 25:7,14 27:3, 15,25 28:13,21,25 32:18 33:2 39:4,18 40:3,8,11 41:19 47:16,20 50:1,10 51:14 52:23 55:24 58:4,11</p> <p>substantially [1] 23:9</p> <p>substantive [1] 31:23</p> <p>substantively [1] 44:7</p> <p>substitute [1] 49:8</p> <p>suggest [2] 46:20 47:22</p> <p>suggested [1] 54:2</p> <p>suggesting [3] 5:23 29:8 51:20</p> <p>suggestion [2] 49:23 50:5</p> <p>suggests [3] 24:1 26:13 54:15</p> <p>superseding [1] 33:23</p> <p>support [1] 62:11</p> <p>supposed [1] 35:20</p>	<p>SUPREME [2] 1:1,15</p> <p>surrounding [1] 26:9</p> <p>surveys [1] 15:14</p> <p>system [4] 8:24 40:7 59:2 64:4</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>talks [2] 7:14 61:3</p> <p>tax [1] 34:8</p> <p>tells [3] 11:5 28:6 61:15</p> <p>term [1] 45:7</p> <p>terms [4] 42:18 55:12,15 57:11</p> <p>tethering [1] 4:11</p> <p>text [11] 3:22,23 4:8 8:8,17 14:15 24:13 25:1 65:4,5,6</p> <p>textual [1] 58:7</p> <p>textually [1] 43:21</p> <p>there's [19] 5:7 7:6 8:4 9:10,11 15:18 17:16 26:12 30:12 31:22 32:6 34:20 36:14 40:14 48:13,14 49:11 51:9 61:16</p> <p>therefore [1] 38:2</p> <p>thinking [2] 42:25 60:6</p> <p>thinks [3] 39:17 40:10,13</p> <p>third [4] 39:5 46:1 51:11 56:17</p> <p>Thirteen [1] 52:17</p> <p>though [3] 19:21 24:4 32:12</p> <p>three [11] 34:25 35:5 36:7,11 45:8 50:8 54:6,15,16 55:16 59:24</p> <p>thumb [1] 15:19</p> <p>timing [2] 50:9,14</p> <p>TIMOTHY [1] 1:3</p> <p>today [14] 9:14,18 10:3,12,17 18:20 19:19 21:17 22:25 46:12,14 50:18 51:12 53:18</p> <p>together [3] 7:12 14:11 37:6</p> <p>took [1] 32:13</p> <p>transcript [4] 40:25 43:16 54:12, 14</p> <p>transcripts [3] 21:9,11 53:16</p> <p>treated [4] 62:23 63:8,23 64:8</p> <p>treating [1] 39:2</p> <p>true [4] 9:22 43:11,22,23</p> <p>trump [1] 13:22</p> <p>trumping [2] 13:23 14:10</p> <p>trumps [1] 14:2</p> <p>trust [1] 42:5</p> <p>try [2] 34:24 37:6</p> <p>trying [1] 35:15</p> <p>Tuesday [1] 1:12</p> <p>turning [1] 3:24</p> <p>turns [3] 3:13 57:3,5</p> <p>twice [3] 32:25 36:18 39:2</p> <p>two [20] 7:7,14 9:1 11:1 14:11 16:3 17:11 33:7 34:15 35:2 36:24 38:19 44:14 51:2 52:9 55:21 58:5 61:9 62:20,24</p> <p>type [2] 17:10 55:4</p> <p>types [2] 7:15 27:16</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>U.S.C [2] 3:14 47:5</p> <p>ultimate [2] 54:5 56:19</p> <p>unanimous [1] 59:18</p> <p>under [24] 6:16,25 7:16 14:5 18:23</p>
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<p>19:8,22 21:19 23:15 25:4 33:8 38:5 39:25 40:6 41:23 45:16 47:4 50:10 52:11 60:21,22,22 63:4 66:4</p> <p>understand ^[6] 15:2 39:11 43:5 44:25 48:15 56:24</p> <p>undesirable ^[1] 55:20</p> <p>UNITED ^[4] 1:1,8,15 3:5</p> <p>unpersuaded ^[1] 65:10</p> <p>unrelated ^[1] 52:8</p> <p>unusual ^[1] 12:15</p> <p>up ^[11] 6:25 18:12 29:18 31:2,4 38:9 39:21 42:1 51:17 54:17 55:17</p> <p>upward ^[1] 40:6</p> <p>uses ^[1] 11:24</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>vacate ^[1] 54:1</p> <p>vanishing ^[1] 13:21</p> <p>variance ^[1] 17:17</p> <p>various ^[1] 14:23</p> <p>vary ^[1] 12:22</p> <p>version ^[1] 24:24</p> <p>versus ^[1] 3:4</p> <p>view ^[13] 19:23 28:24 31:15 33:5,20,23 39:6 41:8,16,21,23 50:10 51:14</p> <p>viewed ^[1] 52:13</p> <p>views ^[1] 33:17</p> <p>vindicate ^[2] 29:25 32:11</p> <p>violating ^[1] 11:5</p> <p>virtually ^[1] 55:5</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>waived ^[1] 48:21</p> <p>waiver ^[2] 49:12,13</p> <p>wanted ^[7] 9:5 37:7,8 41:9 44:1 64:22,23</p> <p>wants ^[4] 7:17 38:4 53:8 59:4</p> <p>warrant ^[1] 48:1</p> <p>warrants ^[2] 7:25 48:11</p> <p>warts ^[2] 18:9 65:15</p> <p>Washington ^[2] 1:11,22</p> <p>way ^[26] 5:2 6:4 8:12 11:11 12:1,7 14:8 28:1 29:5,9,19 32:10,18 35:11 39:9 41:1 49:7 51:20 53:1,11 54:25 63:22 65:4,5,6 66:9</p> <p>ways ^[5] 17:7 27:15 32:7 50:8 62:20</p> <p>weighing ^[1] 56:14</p> <p>whatever ^[1] 13:23</p> <p>whereas ^[2] 50:17 61:4</p> <p>Whereupon ^[1] 66:24</p> <p>whether ^[8] 3:16 6:18 37:25 54:3 63:24 64:19 66:8,16</p> <p>who's ^[1] 62:1</p> <p>whole ^[7] 5:10 8:11,23 30:25 46:8 61:12 62:13</p> <p>whom ^[1] 51:3</p> <p>wide ^[2] 15:18 17:17</p> <p>wild ^[1] 20:16</p> <p>will ^[5] 21:11 28:11 31:3 36:2,2</p> <p>win ^[4] 18:10 32:13 54:24 65:15</p> <p>wind ^[1] 38:9</p> <p>windfall ^[2] 22:2,3</p>	<p>Winebarger ^[1] 56:18</p> <p>wisdom ^[1] 48:5</p> <p>within ^[4] 11:25 12:21 54:17 63:15</p> <p>without ^[3] 24:6 61:3,20</p> <p>word ^[2] 58:6,12</p> <p>words ^[3] 4:8 14:18 30:18</p> <p>work ^[8] 10:5 11:11 14:11 35:20 39:9 41:20 51:20 61:16</p> <p>works ^[6] 3:15 27:25 28:25 50:11 51:15 57:7</p> <p>world ^[1] 19:1</p> <p>worse ^[1] 41:7</p> <p>writ ^[2] 26:23 27:8</p> <p>write ^[2] 47:3 52:4</p> <p>written ^[1] 24:4</p> <p>wrote ^[1] 37:5</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>year ^[1] 39:19</p> <p>years ^[1] 60:12</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>zombie ^[1] 62:1</p>
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