SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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KENDRICK JARRELL BEAIRD,)

Petitioner,)

v.) No. 25-5343

UNITED STATES,)

Respondent.)

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Washington, D.C.

Tuesday, October 13, 2026

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

KEVIN JOEL PAGE, Assistant Federal Public Defender, Dallas, Texas; on behalf of the Petitioner.

ERIC J. FEIGIN, Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent, in support of vacatur.

ANTHONY J. DICK, ESQUIRE, Washington, D.C.; Court-appointed amicus curiae.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case Number 25-5343, Beaird versus United States.

Mr. Page.

ORAL ARGUMENT OF KEVIN JOEL PAGE

ON BEHALF OF THE PETITIONER

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

For two reasons, the courts below erred in deferring to the commentary when interpreting Guideline 2K2.1.

First, the proper rule for deference to guideline commentary is no deference. Nothing in the text of the Sentencing Reform Act suggests that courts must ever defer to commentary when interpreting a guideline, let alone defer on the -- according to the extreme rule of Stinson.

That alone should resolve the question presented given the baseline expectation that courts independently determine the meaning of legal provisions. That expectation dates back to Marbury, and it should be especially hard to

displace in the criminal setting, where respect for liberty demands that we turn square corners.

In fact, the Sentencing Reform Act is affirmatively incompatible with any deference regime. Section -- Section 3553(a)(4) requires that the Commission set forth the range of imprisonment in the guidelines, not elsewhere. And Sections 994 and 995 of Title 28 attach detailed procedural requirements to the amendment of guidelines, which requirements do not apply to guideline commentary.

Why would Congress bother to require detailed notice, public comment, 180 days of congressional review, and the approval of four voting commissioners every time the -- the Commission amends a guideline if the Commission could simply bind the courts to a new interpretation of the guideline without going through all of this simply by amending the commentary?

The second reason the courts below erred in affording Stinson deference is that if the Sentencing Reform Act leaves room for deference, the proper predicate is genuine

ambiguity of the kind that survives every tool of construction, not the mere absence of plain or flat inconsistency, as Stinson suggests.

The rule applied below, which requires courts to construe guidelines in ways that they think are wrong, certainly can't be found in the SRA's text, and it is not consistent with the judicial role.

I am pleased to take the Court's questions.

JUSTICE THOMAS: What do you do with Kisor?

MR. PAGE: The significant fact of Kisor is that it weakens the force of stare decisis in -- in -- because it -- it weakens Seminole Rock, and so, for that reason, the Court should return to first principles and reconsider the terms of the statute.

My first-line position, my primary rule that I suggest the Court ought to follow, is that it should simply review the text of the Sentencing Reform Act and ought to, therefore, conclude that no deference is appropriate.

However, if it believes that -- that Kisor sets forth the appropriate rule for

agencies, at least the rule here ought to be as favorable to judicial resolution of legal provisions as was Kisor.

CHIEF JUSTICE ROBERTS: Of course, after Booker, the guidelines are advisory. And I'm not sure why we should invite the lower courts to engage in somewhat it strikes me as an academic exercise of interpreting.

Why don't they just look at what the Commission meant in the guidelines and move on to the 3553(a) factors?

I just think -- I'm not quite sure that, you know, Stinson is not a more workable regime.

MR. PAGE: The -- the simple answer is it is not the question -- it is not the process that the Sentencing Reform Act calls for. It is not what the statute calls for. The statute indicates that the courts are to find the sentencing range in the guidelines themselves.

It distinguishes between guidelines and commentary in terms of how they are created, and those are different categories of enactments, and, therefore, the guidelines must be determined independently.

JUSTICE JACKSON: While they're different categories of enactments, I think what concerns me about your argument is that you're suggesting that they are separable in some way, which is really not the way in which the guidelines were devised.

And I think we sort of have a -- a fundamental misunderstanding of how the manual works because the guidelines and commentary are actually inextricably linked. And what I mean by that is that sentencing judges use the Guidelines Manual to do what is essentially a calculation. It's kind of like math, that the guidelines themselves have certain components to them, and the commentary tells you how those pieces fit together, how you are supposed to take them into account. When you are a judge, you're using both to reach the right answer under the guidelines, and there is a right answer as to what the guideline range is.

And so what concerns me about your way of framing this is you suggest that the court can somehow look at the guidelines, not take into account the commentary, not defer to it, not use it, and yet still have an accurate

guideline calculation, which is really not how the system is designed.

So can you -- can you respond to that?

MR. PAGE: Of course. Stinson presumes that the guidelines have a freestanding meaning. Stinson says that the guidelines mean one thing, and if the Commission -- and if the commentary is plainly inconsistent with them, we are to disregard them.

So the assumption that the Commission has always been using or should have always been using -- and it has -- is that you can determine a meaning from the guidelines alone and resort to the commentary --

JUSTICE JACKSON: But it's a very, very narrow category. I mean, as Stinson understood it, the guidelines have a meaning, obviously, but if the commentary says something that is totally inconsistent, then you have a problem.

But, if it's not inconsistent, then I don't take Stinson to say you shouldn't be reading them in coordination, in conjunction. The problem arises just when the judge doesn't

know what to do because the guidelines say one thing and the commentary says something totally different.

What you're suggesting is that even when the two can be reconciled, the commentary can be disregarded and we don't have to pay attention to it in understanding the guidelines, and -- and -- and that, I don't think, is how the guidelines are designed.

MR. PAGE: So it -- whether or not it is how the guidelines are designed, it is how the statute is designed. The statute says that the sentencing range is set forth in the guidelines. The only mention of commentary in the Sentencing Reform Act is in 3553(b)(1), which says that the commentary may be of use in determining when it is appropriate or not appropriate to depart.

So, if we look at the -- the text of the statute alone and we look at the cues from the structure of 994, specifically the heightened procedural requirements of guidelines in preference to commentary, we can tell a -- we can see a congressional intent that the sentencing range should be determined

by --

JUSTICE KAVANAUGH: I'm sorry. Keep going.

JUSTICE SOTOMAYOR: Well --

MR. PAGE: No, of course.

JUSTICE KAVANAUGH: Stinson looked at all that 30 years ago and came to the conclusion that the commentary was binding, controlling, force of law, and went through this whole exercise. And since then, as the Chief Justice said, the one major change in the sentencing realm is that those guidelines are no longer, as a whole, binding. They're advisory.

So, I guess, Stinson plus Booker together suggests that we've already been down this road, it's been that way for 30 years. 1B1.7 of the -- of the guidelines itself says the commentary has the force of law. The commentary to that says that.

So, given all that, why are we reinventing the wheel when Stinson did this 30 -- 30-some years ago?

MR. PAGE: Well, first of all, I don't think that we can say that -- that Congress or

any other objective observer can -- could confidently say that Stinson sets forth the rule that governs the relationship between -- between commentary and guidelines at least since Kisor, right? We -- we -- we -- the -- the apple cart has already been upset, and now we are just trying to -- please.

JUSTICE SOTOMAYOR: Why?

MR. PAGE: I'm sorry?

JUSTICE SOTOMAYOR: Counsel --

MR. PAGE: Yeah.

JUSTICE SOTOMAYOR: -- why? Why has Kisor upset the apple cart?

MR. PAGE: Well --

JUSTICE SOTOMAYOR: We reference -- we reference Seminole Rock as an imprecise analogy, but we relied on the guideline, 1B1.7, which tells us that the commentary should -- should be followed. And we relied on Williams. And we relied on the structure of the guidelines system and said that -- and we announced the level of deference.

Why did Kisor upset that?

MR. PAGE: Well, first, we can answer the question empirically and see that in half

of the circuits that under the --

JUSTICE SOTOMAYOR: Yeah, half the circuits may have gotten it wrong, but what does that have to do with anything? The other half have said it has no application. Other than that uncertainty, the courts have been pretty clear of what to do, right? Kisor's the only thing that introduced uncertainty.

MR. PAGE: Well, I mean, I think that's a bit post ergo, post hoc. Since Kisor, there has been more uncertainty. But, as Judge Bibas explained in Nasir, Kisor sort of awakened us from a doctrinal slumber in which we -- we moved from a position where, essentially, the -- the -- the commentary was --

JUSTICE SOTOMAYOR: Let me ask you how this operates, and -- and let's take this note -- this -- this -- this guideline, okay?

The -- the guideline says the application -- let's look at the guideline. It defines it as a semi-automatic firearm that is capable of accepting a large capacity magazine, okay? That's the guideline. That gives you the enhancement under the guideline.

The application note says -- makes it clear that this refers only to a firearm that "at the time of the offense either had attached to it or had in close proximity a large capacity magazine."

If I read the guideline just as a guideline and it says you apply the enhancement to a semi-automatic firearm that is capable of accepting a large capacity magazine, I look at the structure of the gun, and if it's capable of it, I don't care where the magazine is or what size the magazine is because the words of the guideline say capable.

So, if I decide that, wouldn't I be more punitive if I decided that "large capacity firearm" meant any firearm that was built to hold a large magazine?

MR. PAGE: In this particular case, no. And the reason we take that position or the reason we believe that is that to say that -- that a gun is capable of accepting a large capacity magazine might mean that it is physically capable if a large capacity magazine were present, or it might mean that --

JUSTICE SOTOMAYOR: But that's not

what the guideline says. All I'm suggesting to you is it's only by reading the application note do I know that the magazine has to be attached to it or have -- or be in close proximity. It's only the application note that tells us.

MR. PAGE: My -- respectfully, I disagree that that comes only from the application note, and the reason is that capable -- there is an ambiguity in what "capable of accepting a large capacity magazine" means.

It might mean capable --

JUSTICE SOTOMAYOR: But I'm -- I'm a literalist. Capable to me means you can do it.

MR. PAGE: What --

JUSTICE SOTOMAYOR: You can -- you can give me any alternative you want, but if -- without the application note, you're creating a sea of confusion for district court judges to fill in the blanks --

MR. PAGE: I --

JUSTICE SOTOMAYOR: -- when the application note makes it very clear what it means.

MR. PAGE: So the application note does have some clarifying function, but anything that the Commission could do to clarify in the text of a commentary it could do to --

JUSTICE SOTOMAYOR: So you're suggesting your rule is more workable than Stinson?

MR. PAGE: Yes, I do believe it is more --

JUSTICE SOTOMAYOR: All right. So now we have ambiguity as to what "capable" means. We have ambiguity as to how large the magazine has to be. And that's less workable following the application note than your system of letting every district court judge have to define these terms anew --

MR. PAGE: So --

JUSTICE SOTOMAYOR: -- and decide what they mean anew. That's more workable for you?

MR. PAGE: Well, so in -- a couple of things will assist in containing any disuniformity in the precedent.

The first is that the courts can still use the -- the commentary as an interpretive

aid, as they would under Skidmore, which will -- means that it will still have a sort of anchoring effect and contain any disruption to the system.

The second thing is that the -- the -- the -- the Sentencing Commission is uniquely created to respond to disruptions to its precedent and to disuniformity in its precedent, and Congress's intended way of dealing with disuniformity in the precedent is for them to meet every year and amend the text of the guidelines.

JUSTICE KAGAN: Do you think, Mr. --

JUSTICE GORSUCH: It's called -- sorry, please.

JUSTICE KAGAN: Do you think, Mr. Page, that the Commission needs to defer to the Commission's policy statements, as Williams indicated?

MR. PAGE: The courts or the Commission?

JUSTICE KAGAN: I'm sorry, that the -- that the -- that the courts need to defer.

MR. PAGE: Interpretive policy statements I do not believe carry binding

deference any more than commentary. And that comes from, first of all, 3553(a)(4), which says that the sentencing range is defined --

JUSTICE KAGAN: So that's -- that's the opposite of what we said in Williams. So you're asking us not only to overthrow Stinson but to overthrow Williams as well?

MR. PAGE: Well, no. I think that in Williams, the Court was dealing with a -- was not dealing with an interpretive policy statement that amended another guideline. It was dealing with a policy statement that limited when we could depart -- when the court could depart from the guidelines, and that's all that was at issue in -- in Williams.

JUSTICE KAGAN: Not -- you don't take Williams to be talking about policy statements generally?

MR. PAGE: I don't take it to be talking about interpretive policy statements. I take it to be saying that policy statements can limit -- and -- and this was the clear impact of 3553(b)(1) in the pre-Booker era -- when a court could depart and that they were effectively mandatory in that realm before

Booker.

And there simply isn't -- there wasn't a guideline that the policy statement was interpreting. So it's very difficult to see it as an interpretive policy concerning that.

JUSTICE GORSUCH: Mr. Page, on stare decisis, it seems to me we -- we first have to acknowledge that the circuits are currently badly split and somebody is going to be -- existing law below is going to be rejected.

MR. PAGE: I -- I think that's clear.

JUSTICE GORSUCH: That's yes. And, second, we'd have to decide that interpretive principles are entitled to stare decisis effect, something about which judges on this Court have -- have opined different ways.

MR. PAGE: Correct. That's the second issue presented.

JUSTICE GORSUCH: And then the next thing we'd have to look at is the quality of reasoning. And Stinson relied on silence being enough to be an implicit delegation of -- of interpretive authority and that their ambiguity is the appropriate trigger, both of which we've since rejected in Loper Bright.

MR. PAGE: Indeed. And it would have to require on silence to -- to create deference in the criminal setting particularly.

JUSTICE GORSUCH: Yeah. And you'd have to say that 994, which says, right, not even commentary but interpretive guidance is -- plus 3553, which says to courts consider, is somehow an express delegation of interpretive authority, exclusive interpretive authority in the Commission.

MR. PAGE: It seems, if that's a -- an express delegation, you will find express delegations of interpretive authority all over the place.

JUSTICE GORSUCH: And then you'd say -- have to say, well, it's consistent somehow with Booker even though Booker -- the whole point of Booker is that everything's supposed to be advisory in this area, not mandatory.

MR. PAGE: I think Your Honor is right.

JUSTICE GORSUCH: And then -- and then, on terms of reliance, I mean, does any criminal in the country rely on the commentary

to the guidelines when deciding whether to commit a crime?

MR. PAGE: No. I think the only reliance interests are those of the Commission, and they can be easily dealt with by moving text from -- to the commentary.

JUSTICE GORSUCH: Thank you.

JUSTICE JACKSON: Can I just --

CHIEF JUSTICE ROBERTS: Thank you, counsel.

You -- you argue that Loper Bright undermined Stinson. And Loper Bright concerned executive agencies interpreting statutes instead of -- instead of courts interpreting them.

And I just don't see what Stinson, which involves an agency in the judicial branch and issues non-binding advice, really has much to do with Loper Bright at all.

MR. PAGE: Well, Loper Bright, first of all, it indicated that -- that statutes have a -- a single best meaning rather than a range of permissible meanings, and it rejected the idea of an implied delegation of interpretive authority.

Perhaps the Court could distinguish agencies and statutes on that ground and say that for some reason, those principles do not apply to regulations or agency -- agencies. But, if it were to distinguish an agency, it oughtn't distinguish the Sentencing Commission, which deals with particularly the sentencing realm, where there is a -- ought to be a strong expectation that judges will resolve those questions that determine the defendant's fate rather than defer to another actor.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

Justice Alito?

JUSTICE ALITO: You began by saying the -- the rule in a case like this should be no deference. Now the ultimate question here, as Justice Sotomayor was discussing, includes the term "large capacity magazine." So let's say you are a district judge and you are not to defer to the commentary of the Sentencing Commission as to what constitutes a large capacity magazine.

How do you go about deciding what that

means?

MR. PAGE: You use the -- the text and the structure of the guidelines, just as you use the text and structure of the other --

JUSTICE ALITO: Yeah, concretely. Concretely. You have the term "large." What is large?

MR. PAGE: "Large" means large for a semi-automatic firearm. So whatever that is, it isn't 17, which is the average. And we look at (a)(2), which provides -- excuse me, (a)(3), which provides the same adjustment for a large capacity magazine that is provided for a bomb, a -- or a machine gun or a sawed-off shotgun. And we ask, is the average gun really merit the same kind of adjustment? Did the Commission mean that?

JUSTICE ALITO: So the -- your -- your -- your methodology would be to examine all semi-automatic weapons and see what is the average, and so whatever is above the average, that would be the -- the large capacity magazine?

MR. PAGE: So I don't know that -- that something that's just above the median

would necessarily qualify, and so there would -- there could be potentially edge cases. And -- and -- and -- and --

JUSTICE ALITO: But I just don't see how this could possibly work without some degree of deference to what is essentially a policy call by the Sentencing Commission.

MR. PAGE: The -- the Sentencing Commission is free to make that policy call. It needs to do that in the text because that is where the stat -- the Sentencing Reform Act told them to resolve questions of that sort.

JUSTICE ALITO: It has to be in a guideline?

MR. PAGE: It has to be in a guideline.

JUSTICE ALITO: It can't be in a policy statement?

MR. PAGE: No. In my view, it -- it cannot. A policy statement is not -- does not have the binding authority to determine the guideline range. And the reason that we know that is because 3553(a)(4) says that the range is set forth in the guidelines and because -- because they are distinguished in 3553(b)(1)

and because of the different procedure.

JUSTICE ALITO: Do they go through notice and comment?

MR. PAGE: Typically, yes. They don't have to.

JUSTICE ALITO: Does commentary typically go through notice and comment?

MR. PAGE: Typically, yes.

JUSTICE ALITO: What was your answer to the question whether we have to overrule Williams? Yes or no?

MR. PAGE: I -- the -- the holding of Williams itself, no, I don't believe you do because the -- the -- Williams concerned a -- a -- did not concern an interpretive policy statement of any kind, so we don't have to -- we also don't have a policy statement here. We have commentary. And those are distinguished in 3553(b)(1) and throughout the Guideline Manual.

JUSTICE ALITO: One might wonder what practical difference the issue here makes. First of all, the guidelines are now simply advisory. Second, the district court here stated that "even if the guideline range was

not calculated or applied correctly," it would have imposed the same sentence regardless of the applicable guideline range.

MR. PAGE: So --

JUSTICE ALITO: So why does this matter for your client?

MR. PAGE: -- the Fifth Circuit has consistently -- well, not consistently, but it has often said that it does not take such statements at face value, that it undertakes a separate harmless error analysis in that circumstance. And that is a recognition of the fact that there are courts that say this in literally every sentencing case.

JUSTICE ALITO: So it doesn't believe these judges? You think -- he says -- they think these judges are lying when the judge says, look, I -- I've gone through this whole guidelines calculation, but it doesn't really matter, I'd impose the same sentence even if the guidelines didn't come into play at all? That's a lie?

MR. PAGE: I don't know that it thinks that they are lying, but I think that it may think that they have included a boilerplate

statement in -- and that it may -- they may have over- -- underestimated the impact of the guidelines on their own thinking.

JUSTICE ALITO: Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

JUSTICE SOTOMAYOR: I'm not sure I understood your answer to Justice Alito about Williams. Williams said that policy statements had to be followed, correct? That's the same thing Stinson says, that commentary has to be followed.

MR. PAGE: It -- it said that in a particular context.

JUSTICE SOTOMAYOR: The context there was a policy statement that said that district courts couldn't do certain things, correct?

MR. PAGE: That it -- that they could not depart. And that came from 3553(b)(1) because it had -- and it had an express statutory basis.

JUSTICE SOTOMAYOR: So a policy statement that operates the way this does, which talks about what something means, would have to -- we would have to overrule that part

of Williams's holding, correct?

MR. PAGE: I don't think that Williams expressly addressed that.

JUSTICE SOTOMAYOR: Williams said we had -- district courts had to follow policy statements in all circumstances to calculate the guidelines. That's how I read Williams's holding.

MR. PAGE: That question is not before you --

JUSTICE SOTOMAYOR: I know it's not, counsel. Assume it were. Would you overrule that part of Williams?

MR. PAGE: Insofar as it affects this case, then that part of Williams --

JUSTICE SOTOMAYOR: I didn't say I took it out of this case. If the holding in Williams, as I read it, was that district courts are required to apply the policy statements in calculating guidelines, would that holding be overruled or more limited by your view under --

MR. PAGE: If -- if the Court were of the opinion that that is the holding of Williams, it would be limited. However,

either --

JUSTICE SOTOMAYOR: What would be limited?

MR. PAGE: The holding of Williams would be limited to the --

JUSTICE SOTOMAYOR: That some part of -- of Williams would have to be overruled, correct?

MR. PAGE: I -- in my view, Williams does not speak to --

JUSTICE SOTOMAYOR: All right.

MR. PAGE: -- the calculation of guidelines.

JUSTICE SOTOMAYOR: We'll fight about that after. We can go -- both go look back at it.

CHIEF JUSTICE ROBERTS: Justice Kagan?

JUSTICE KAGAN: So, again, on policy statements, Mr. Page, Congress specifically authorizes the Commission to issue policy statements. Is that correct?

MR. PAGE: It does.

JUSTICE KAGAN: So we're not talking about implied or implicit delegations. We're talking about an express delegation to the

Commission?

MR. PAGE: In my view, we are talking about an implied delegation because we are talking about an implied delegation to create binding policy statements, whereas what -- what the -- what is expressly delegated is the -- the ability to create policy statements of some kind.

JUSTICE KAGAN: Okay. Well, we'll get to whether it's binding or not. But there's an express delegation authorizing the creation of policy statements, correct? I mean, you have to say yes to that.

MR. PAGE: Obviously, yes.

JUSTICE KAGAN: And -- and -- and what a policy statement is is defined very broadly. The Commission can issue general policy statements -- and I'm -- I'm quoting here -- "regarding application of the guidelines or any other aspect of sentencing or sentencing implementation."

That's what the Commission can do, correct?

MR. PAGE: That is the statutory text, yes.

JUSTICE KAGAN: So -- so suppose that all the commentary in the sentencing manual was just relabeled as policy statements, that there's an express authorization to issue those, correct?

MR. PAGE: If -- the Court -- the Sentencing Commission could redefine commentary through the appropriate procedures as policy statement or as guideline if it wished to change the legal effect of them.

JUSTICE KAGAN: Well, I mean, what I'm getting at is that the -- the policy statements have a very broad definition encompassing everything that's found in the commentary. So, if the Commission just took all the commentary and relabeled it as policy statements, Congress would have expressly authorized it.

I would think that the -- the result of that, the implication of that is that, of course, Congress meant for courts to follow it in the same way that courts have to follow -- you know, had to follow guidelines.

MR. PAGE: Well, so there are policy statements that Congress has specifically stated that courts must follow. Those are in

3582(c)(1), (c)(2), 3583(d)(3), right? There is no general statement that courts must follow policy statements.

JUSTICE KAGAN: No, there's not a general statement, but there's an express authorization to create these policy statements.

Do you think that -- that Congress meant that the Commission should create these policy statements and then people could take them for whatever they were worth, that that's all it was?

MR. PAGE: Yes. I mean, to the extent that a policy statement interprets a guideline, yes, that -- that is precisely what Congress intended if -- if it authorized interpretive policy statements at all.

Now one reason that we know this is not a policy statement is, number one, they are expressly distinguished from commentary in 3553(b)(1), and, second, because the Commission has consistently distinguished between policy statements and commentary.

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice

Gorsuch?

JUSTICE GORSUCH: 994 says they may issue policy statements silent as to commentary.

MR. PAGE: Correct.

JUSTICE GORSUCH: So, first, we'd have to somehow conflate those two.

MR. PAGE: Correct, and in spite of 3553(b)(1).

JUSTICE GORSUCH: And then 3553(a) generally says, you consider the commentary and the guidelines -- sorry, the -- the guidelines and the policy statements.

MR. PAGE: Correct.

JUSTICE GORSUCH: If we found that were enough to commit to the Commission the power to issue binding, on courts, binding interpretations, what would be left of Loper Bright?

MR. PAGE: Well, I mean --

JUSTICE GORSUCH: Because doesn't every agency have the power to issue -- most agencies have the power to issue interpretive rules --

MR. PAGE: I think you would have to

find that there is a --

JUSTICE GORSUCH: -- and guidance documents? That's all within their power. And -- and, here, all Congress has said is consider them.

MR. PAGE: Correct.

JUSTICE GORSUCH: It would be a pretty --

MR. PAGE: I will -- I will say that --

JUSTICE GORSUCH: -- pretty big hole in Loper Bright.

MR. PAGE: Well, I -- I will say that I don't -- I'm not sure that the -- the force of the precedent at issue here would necessarily -- necessarily has to extend beyond the sentencing context. There is -- well, it's even under --

JUSTICE GORSUCH: Oh, you don't -- you don't think -- you don't think the federal government's other agencies would come in here and say, we've got similar language?

MR. PAGE: I think they would say it.

JUSTICE GORSUCH: Okay.

MR. PAGE: Right.

JUSTICE GORSUCH: And then -- and then doesn't Congress know how to tell us when it wants us to follow policy statements?

MR. PAGE: It -- it does.

JUSTICE GORSUCH: I'm looking at 3553(e), for example, just one example, that in those circumstances, the sentence shall be imposed in accordance with the guidelines and policy statements. There it is.

MR. PAGE: Correct, correct, in several places throughout the code.

JUSTICE GORSUCH: Several places. So, if -- if -- if we're looking at contextual clues, we would say this is very different than those?

MR. PAGE: Indeed.

JUSTICE GORSUCH: Okay. And then Williams, I thought that to be about 3553(b), which is no longer enforceable.

MR. PAGE: Correct.

JUSTICE GORSUCH: Yeah. Thanks.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

JUSTICE KAVANAUGH: On Justice Kagan's question about policy statements versus the

commentary, I'd be interested in what you do with 994(a)(2), where it says policy statements are regarding application of the guidelines and the commentary is typically labeled application notes.

The same word, "application," would suggest that that commentary is a policy statement because policy statements are regarding application of the guidelines. Just curious on your thoughts on that.

MR. PAGE: Well, so two points about that. The first is that I think, when it refers to a general policy statement concerning application of the guideline, it's talking about things like 1B1.10, 1B1.13, or 6A3, the standard of proof, that address questions about how to apply the guidelines without determining -- that -- that -- but they're not talking about the category of offender or the category of offense. Those are to be determined by the guidelines, and we know that from 3553(a)(4).

Now, whether the -- the Commission intended to say that policy statements -- that commentary was a policy statement because it

used the term "application notes," to me, that doesn't quite follow because they also labeled it commentary, and the statute itself indicates in 3553(b)(1) that those are specific. They also attach commentary to policy statements, which would be strange -- a strange thing to do if they were the same.

JUSTICE KAVANAUGH: Then, on Congress's understanding, I guess, of -- of the process, 1B1.7, as I mentioned earlier, since 1987 has specifically said commentary is to be construed to have the same force as policy statements.

What do you do with that?

MR. PAGE: So --

JUSTICE KAVANAUGH: Congress has never -- even though Congress has actually, as you know, overturned certain commentary, Congress has never reacted to 1B1.7 or the commentary to 1B1.7, which has been in place since 1987 on this.

MR. PAGE: Congress does not legislate by acquiescence. It does not legislate merely because --

JUSTICE KAVANAUGH: But it gets the

guideline amendments each year, and the House and Senate Judiciary Committees get that, and I think its understanding would -- everyone's understanding since 1987 was -- confirmed by Williams and Stinson, was that those policies -- those commentary is -- has the force of policy statements.

MR. PAGE: Well, so I -- I -- I do not agree that the Commission giving Congress notice that it wants to -- to promulgate a species of enactment --

JUSTICE KAVANAUGH: That's a fair point. That's a -- that's a fair point.

On -- on -- just quickly on Williams and Stinson, I mean, Williams -- Stinson says the principle that the Guidelines Manual is binding on federal courts applies as well to policy statements, and Williams, we said, where a policy statement prohibits a district court from taking a specified action, the statement is an authoritative guide to the meaning of the applicable guideline.

And then the next page, 43, of Stinson says, our holding in Williams dealing with policy statements applies with equal force to

the commentary before us here.

I mean, I think you have a little bit of a problem with Williams if you're -- you're fighting pretty hard on that.

MR. PAGE: Well, the -- the -- the strange -- I mean, that language in Williams is a little bit strange for its context. It's talk -- it says the meaning of the guidelines, but it's not really talking about the meaning of any individual provision.

I think what it meant to say, what it was saying when it said "the meaning of the guidelines" is the outcome dictated by the Guidelines Manual. And it was speaking about that in the context -- in a very different sentencing system, where the Guidelines Manual dictated a particular result, and it wasn't talking about a provision that -- that changes the meaning of a guideline.

JUSTICE KAVANAUGH: Last one. Justice Gorsuch's good questions about Loper Bright and what's binding. I mean, isn't Booker a game-changer on that in the sense that whatever you come up with as a district judge in terms of following the guidelines, following the

policy statements, following the commentary, is then only advisory and the district judge then can determine whether to vary up or down.

And it seems to me that really distinguishes this from kind of the whole executive branch situation at least potentially. I want to get your reaction to that possibility that Booker mitigates the concern there.

MR. PAGE: So Booker doesn't change the fact that the -- that the Sentencing Reform Act commits a piece of legal text, requires a court to -- and -- and requires a court to interpret it. And the baseline expectation is that when that occurs, that legal issue will be decided by an Article III judge. It's no different, say, than a Federal Rule of Appellate Procedure which said --

JUSTICE KAVANAUGH: Then it's not going to be binding at all, the judge, I mean on anyone, right?

MR. PAGE: Well, I mean, it's binding on --

JUSTICE KAVANAUGH: Given Booker?

MR. PAGE: It's not binding as to the

ultimate sentence. It still has determinate legal consequences.

JUSTICE KAVANAUGH: Okay.

MR. PAGE: It states what -- what courts must do to explain the sentence. It affects the standard. It is reviewed de novo by a court, and a defendant can -- and a court can be reversed for failing --

JUSTICE KAVANAUGH: Thank you.

MR. PAGE: -- to get it right. Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

JUSTICE BARRETT: So the Sentencing Reform Act tells district courts that they have to follow the guidelines, putting aside Booker here, but, you know, they do have to, and we've said to district courts that you have to accurately calculate the guidelines range even though you can depart from it.

What if the Sentencing Commission adopted a guideline saying that the commentary authoritarily -- authoritatively interprets our guidelines?

MR. PAGE: So --

JUSTICE BARRETT: Stronger than 1 -- 1B17 because that's a little bit equivocal. It may give background. It could be reversible error. So, if -- if that guideline were amended to say something very definitive, what would your response be?

MR. PAGE: If the Commission did that through notice and comment, it called that new guideline a guideline, it would be within its power to do, it would be strange because there is a lot of things in the commentary that do not directly interpret a guideline, so it wouldn't be clear how to make binding force of it.

But -- but, if Your Honor's point is that the -- the -- that the Commission can interpret its own guidelines through a guideline, of course, it can.

JUSTICE BARRETT: It just seems then that this is all about nomenclature.

MR. PAGE: Right. So it is a label chosen by the Sentencing Commission, and that label has a consequence of -- according to the Sentencing Reform Act. So --

JUSTICE BARRETT: Well, why is it so

important to you if, as a practical matter, the commentary goes through the same process as the guidelines do, goes through notice and comment, Justice Alito asked you about this, and then goes to Congress, just like the guidelines.

Then what is the practical difference?

MR. PAGE: So the -- the practical -- I mean, the difference -- the important difference is that these are different categories of enactments that are set forth in the Sentencing Reform Act.

We could treat all commentary as binding if it goes through notice and comment, and perhaps that would be -- achieve Congress's goals maybe, but that's not the way that Congress chose to -- to -- to create its goals.

And the -- to achieve its goals. What it chose to do was to create three different categories of enactments and that the -- and that only guidelines would determine the sentencing range.

JUSTICE BARRETT: Why do you think the Commission -- is it your sense that the Commission, by calling this commentary, is somehow pulling a fast one, getting things into

the commentary that it might not be able to put into the guideline itself?

MR. PAGE: So the Commission has been staffed by conscientious public servants who are conscientious of their role, and they have not attempted in general to -- to -- to circumvent anything.

But the -- the -- the more important point is that this speaks to congressional intent. It speaks to congressional intent that it would not have undermined the procedural requirements that it stated in 994 by permitting the -- the Sentencing Commission to do that or even leaving that opportunity on the table.

JUSTICE BARRETT: Okay. One last question about Stinson and stare decisis. I'm thinking about probation offices. You know, they're the ones that calculate in the PSR, and, presumably, the commentary application notes are very helpful to probation officers.

So is the idea that if Stinson goes, probation officers are then interpreting the guidelines and can't treat the -- you know, de novo themselves and can't treat the application

notes as -- you know, or give deference to the application notes?

MR. PAGE: So, I mean, the application notes will still be available as -- as an interpretive aid. It's not that anybody has to cover their eyes when they are interpreting a guideline.

But I would say that anybody who is trying to reach a correct result about the meaning of the guideline must confine themselves to the guideline when determining what is dispositive in deciding the meaning of that.

JUSTICE BARRETT: Thank you.

CHIEF JUSTICE ROBERTS: Justice Jackson?

JUSTICE JACKSON: So I guess I was a bit confused in your response to Justice Kavanaugh that Congress doesn't operate by acquiescence in this area. That is not the case.

I mean, isn't the entire way the sentencing system is structured that the Commission forms its guidelines, commentary, policy statements, or whatever, and it submits

it, the whole package, omnibus, to Congress, who then, if they don't do anything, it becomes the binding "law," pre-Booker law, that we're talking about?

So it -- it seems odd that we would even be thinking that there might be a situation in which the Commission is smuggling in something in commentary because that's really not the way this works.

MR. PAGE: So I -- I certainly agree that the Commission has not attempted to smuggle anything in and that -- and that in practice it -- it hasn't behaved that way.

Now Congress does -- a congressional acquiescence, because it has delegated the power to write guidelines, does mean that guidelines become effective merely because Congress doesn't act. But Congress -- congressional acquiescence doesn't change the structure of the Sentencing Reform Act.

JUSTICE JACKSON: No, I understand, but you're -- you're -- you're sort of dancing on the head of a pin, I think, because Congress gave the Commission this authority from the beginning, and the Commission structured the

system in the way that it is.

Congress mentioned these things in the legislation but gave the Commission the ability to set up the scheme. And the Commission decided, we're going to call this part guidelines, we're going to save the commentaries to help you apply those guidelines, and then we'll have these policy statements. So I -- I just worry about your taking so much stock in these different categories.

Let me -- let me ask you a more general question, which is the entire system, when we're talking about congressional intent, I thought, was set up to cabin judicial discretion with respect to sentencing, and so it's actually, at its very baseline, different than the world of administrative discretion and the kinds of things that Justice Gorsuch talked to you about, right? In this world, we have a background principle of judges not having discretion because that's the whole point of the guidelines system.

So it's a little troubling that you're now suggesting that the deference

determinations and limitations that exist outside of this world should be imported in this way.

MR. PAGE: Well, they were imported by Seminole Rock, right, and so the --

JUSTICE JACKSON: Not into the guidelines. They were started by Seminole Rock. They were imported by Stinson, right?

MR. PAGE: Correct.

JUSTICE JACKSON: But Stinson was pre-Booker in a world in which the guidelines were sort of operating as a mandatory legal system. And this goes back to the Chief Justice's point. Now the guidelines are a recommendation to judges.

And so to suggest that there should be judicial deference in calculating the guidelines, it -- it sort of up-ends the whole system. I don't know how it works anymore if --

MR. PAGE: So --

JUSTICE JACKSON: -- if we have that.

MR. PAGE: -- in -- Booker changed the ultimate legal force of a guideline to the point -- to the extent that a -- a defendant no

longer -- I mean a court no longer has to sentence within a range barring certain circumstances.

JUSTICE JACKSON: I understand, but the point of the guideline was to establish a baseline. Similarly situated defendants were going to be treated similarly under the guidelines system because the Congress said we don't want, you know, judges exercising their discretion in this way.

And so, if that's the whole point, it seems odd to inject into the guidelines system the baseline judicial discretion. And that's what you're asking us to do by looking at the deference doctrines in the exterior, in the other part of agency world, and importing them into this world.

MR. PAGE: In my view, there's a difference between judicial discretion to sentence within a range under (a)(2), to interpret (a)(2) under the -- the particular -- apply (a)(2) to the particular facts of a defendant, and the -- the -- the task of interpreting a guideline in order to determine the --

JUSTICE JACKSON: And why do you think that judges have that discretion? That's my point. Why do you think that judges -- Congress intended for judges to have the discretion to interpret the guidelines inconsistently when they are calculating them?

MR. PAGE: My view is that they do not have the discretion to -- to interpret them inconsistently. They -- they are commanded --

JUSTICE JACKSON: To interpret them individually without --

MR. PAGE: -- to interpret them correctly.

JUSTICE JACKSON: -- without the Commission's input. And, as Justice Alito said, that means every judge just goes, what do I think large is, in looking at this guideline, leading to inconsistent calculations. And I guess I'm wondering why you think Congress would have wanted that in this context.

MR. PAGE: Congress had a particular mechanism in mind to contain differing opinions of the guidelines, and that is 994(o), and that is to have yearly amendment cycles in which they are expressly commanded to review the

input from different stakeholders and the decisions of the -- the courts in order to determine whether there is disuniformity and then to resolve that through 994(o). This Court recognized that in Braxton.

JUSTICE JACKSON: Thank you.

MR. PAGE: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Feigin.

ORAL ARGUMENT OF ERIC J. FEIGIN
ON BEHALF OF THE RESPONDENT,
IN SUPPORT OF VACATUR

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

Our position is really the only one that's faithful to this Court's precedents. Stinson interpreted the Sentencing Reform Act to incorporate the same measure of deference for guidelines commentary that Seminole Rock gives to an agency's interpretation of its own rules. Kisor then clarified what Seminole Rock deference means. Add those two decisions together and you get that Kisor applies to guidelines commentary.

That said, I don't want to overstate the difference between our position and the position of the amicus here. I -- we believe that even under Kisor, the guidelines are going to continue to be informed and interpreted in most instances by the commentary where there is commentary.

Our difference is simply the very small area where the commentary may take an interpretation that is an unreasonable interpretation of an ambiguous guideline or even tries to override unambiguous guidelines text. But we wouldn't think that happens very often.

On the other hand, Petitioner wants to swing the pendulum way in the other direction and have a regime of no deference under which individual district judges are just free to interpret for themselves the advice that the Commission is trying to give them, notwithstanding what the Commission is telling them.

That would be a massive upheaval that would probably cause some kind of revision to the guidelines that, of course, wouldn't solve

all the retroactive problems with the cases that are still in the system. And there's no point. It makes all the sense in the world, when the Commission is reasonably saying what the Commission is trying to say, to listen to the Commission. And that's exactly where our Goldilocks position here lands.

Now I've kind of taken Petitioner's counsel to have essentially conceded the point -- I'm sorry, Justice Thomas.

JUSTICE THOMAS: Mr. Feigin, there's been some discussion that Booker changed the landscape. Would you elaborate on that a bit from your perspective?

MR. FEIGIN: Okay. And I think I need to make two elaborations because I'm kind of in the middle here with two different directions.

JUSTICE THOMAS: Yeah.

MR. FEIGIN: As to whether it affects Stinson, I don't think it affects the idea that Seminole Rock deference is the appropriate measure of deference for guidelines commentary because, if anything, deferring makes even all the more sense when it's simply advisory and not binding the way we envision normal agency

rules under Kisor to be.

As between our position and the amicus's position, we also don't think that it makes a difference in the sense that I don't think that it would mean that the commentary, which we acknowledge is a different species of promulgation from an actual -- actual guideline text or -- or even a policy statement, we don't think that it would affect the amount of deference the commentary should receive.

And it shouldn't mean that commentary could override an unambiguous guideline or adopt an unreasonable interpretation of an ambiguous one.

JUSTICE GORSUCH: Mr. Feigin, you accuse amicus of trying to reconceptualize Stinson and the entire legal practical framework that underlies it through this express delegation theory that he's positing now and that no circuit has ever adopted, despite the fact we have a 6-6 split and pretty much every judge in America has written on this.

You stand by that, right?

MR. FEIGIN: We do not think that the

commentary as it's been promulgated by the Commission can either be viewed right now as a policy statement or as a guideline. That's correct.

JUSTICE GORSUCH: Nor do you argue that the statutes before us command express delegation to binding views from the -- from the Commission. I mean, you rejected that. You -- you say that Stinson is premised on Seminole Rock, which is a theory of implicit delegation through silence, not explicit delegation through 994, for example.

MR. FEIGIN: I wouldn't quite say that, Justice Gorsuch.

JUSTICE GORSUCH: I -- I don't see it anywhere in your brief, that argument.

MR. FEIGIN: So, Your Honor, first of all, Stinson itself looks to both 3553(b) and 1B1.7. Beyond that, though, Your Honor, we have, I think, express post-Stinson action from Congress that acknowledges commentary and the force it can have.

Number one, you have the PROTECT Act and --

JUSTICE GORSUCH: No, I --

I understand -- I understand you wind up in a similar place. But the way you get there is entirely different. Amicus says that 994 and 3553 evince an express delegation for the Commission to write binding -- binding authority. You say no. Stinson -- Stinson is an Auer case, a Seminole Rock case, and it's through silence and -- and ambiguity that deference is required. Totally -- totally different rules.

MR. FEIGIN: Your Honor, I don't think it's quite silence and ambiguity. Our main difference with the amicus is whether commentary actually is a policy statement.

I -- I will acknowledge it's --

JUSTICE GORSUCH: Yeah, I know -- I know you agree with that as well -- disagree with that as well, but it does seem to me -- like, let's take the government's arguments on its own terms.

What do we do with the fact that the idea that silence as delegation has been rejected by Loper Bright and we said that ambiguity is a trigger that we -- we just don't even know how to apply, it's not a meaning

we -- it's a fiction, the Court said.

MR. FEIGIN: Well, Your Honor, I think the particular situation that we have here is different. First of all, as I was just saying, I think at least as we look at it today, even if you think Stinson was incorrect in the first instance to interpret the Sentencing Reform Act to adopt the measure of deference from Seminole Rock and -- or -- or -- or simply even in thinking commentary is a thing the Commission can do, we have 40 years of practice and then Congress in 2002 in the PROTECT Act itself modifying commentary to make sure that it's consistent with the guidelines in the --

JUSTICE GORSUCH: I get that's a stare decisis argument. But I was asking you, you know, just as an original matter, how can you defend silence as -- as -- as a delegation and ambiguity as a trigger, and I haven't heard an answer to that yet.

MR. FEIGIN: Your Honor, so I think one thing that the Commission is certainly entitled to do under (a)(1) is to promulgate a guideline. They promulgated -- one of the guidelines they promulgated is 1B1.7, which

expressly references commentary and the role that it can play.

And I took Petitioner's counsel just now to effectively concede that the Commission can issue a guideline that, when it wants it congressionally reviewed, would give some weight to commentary.

JUSTICE GORSUCH: Sure. It absolutely could.

MR. FEIGIN: Now, Justice Barrett, I think 1B1.7 has more --

JUSTICE GORSUCH: It absolutely could.

MR. FEIGIN: Sorry.

JUSTICE GORSUCH: Mr. Feigin, it absolutely could. No one -- no one questions that, I don't think, before us. And Congress provided a way for it to do it.

But isn't it a topsy-turvy world where commentary is binding but the guidelines aren't post-Booker?

MR. FEIGIN: Well --

JUSTICE GORSUCH: And let me -- let me just spin it out a little bit further. And why bother? I mean, Petitioner acknowledged that as a practice, the Commission does put its --

much of its commentary through notice and comment. But it doesn't have to. It doesn't even have to give it to Congress.

What kind of incentives structure would we create by saying: Hey, you can put binding things over here, that you don't have to do any of the protective things the guidelines are associated with, and then just put the cherry on top?

No one thinks that the Federal Rules of Civil Procedure, the advisory notes are binding, even though they rest on statutory authority not dissimilar to 994.

MR. FEIGIN: So, Your Honor, I think the binding nature goes to different things. The commentary is binding with respect to the interpretation of the guidelines, where at least it's not unreasonable and the guideline text isn't -- isn't unambiguous.

And then the guidelines, the question of whether they're binding is whether they're binding on federal sentencing courts in the ranges of sentencings that they can set. You could see that the guidelines themselves might not be binding on sentencing courts in that

context, and that's what the Court held in Booker.

But that doesn't say that you couldn't have commentary that's binding on the interpretation of the guidelines themselves while they remain advisory. And I think that's exactly the regime that we've always had for 40 years. The guidelines --

JUSTICE JACKSON: And isn't it important? Isn't it important? Because, if you don't have that, it's hard to understand how the guidelines actually operate as a starting point or a baseline or anything in the world that we have.

In other words, I thought the whole point was to try to reduce unwarranted sentencing disparities by having the Commission issue some kind of document that tells judges what it believes the sentencing range should be as a result of these facts that exist in a particular case.

If each fact and each factor can be separately decided by a judge, it's very hard to see how you're going to get a consistent baseline in order to have a sentencing system.

One of the things I'm worried about is the statistics and the data collection function of the Commission because, right now, the Commission uses the offense level as a proxy for understanding the seriousness of an offense, and it runs all these calculations based on the offense level, assuming we have a consistent determination of offense level across similarly situated defendants.

If the system changes in the way that Petitioner suggests and each judge can determine the factor on their own, you won't have the same ability to determine what's happening in the system.

Do you understand what I mean by this?

MR. FEIGIN: Yes, Your Honor. I think that's absolutely right. And I think, as you were pointing out during Petitioner's portion of the argument, the guidelines and the commentary have, since their inception, been designed as kind of interlinked with one another.

And Congress has recognized that interlinked structure when it amends common -- guidelines directly, it sometimes -- it amends

the commentary. It did that in the PROTECT Act in 2002.

And then we have a couple examples in our brief, the Artists Rights Act and the Stop Infringement Act, in which Congress directly amends inter- -- sorry, doesn't directly amend, but it directly instructs the Commission to consider changes to commentary that we would consider directly interpretive commentary.

One of the pieces of commentary it directed the Commission to reconsider was the definition of the term "uploading." The other was the definition of the term "infringement amount."

I don't know how much more direct Congress can get in making clear that this is a kind of thing that the Commission is empowered to do, and it's a kind of thing that would have at least some effect, or there's very little point in Congress instructing the Commission to reconsider the --

JUSTICE KAVANAUGH: Your argument there is --

JUSTICE ALITO: Mr. -- Mr. Feigin, what -- what would be the practical

consequences of overruling Stinson? I'm told that there were 66,000 defendants sentenced in federal courts, federal district courts, in 2025. Do you have an estimate of how many of those sentences relied on commentary and would have to be done over?

MR. FEIGIN: I don't, Your Honor, but if you look at, for example, just 2K2.1, it's essentially impossible to apply it in the first instance without -- in many cases, without referencing the commentary, which will tell you, for example, that the definition of "crime of violence" is to be found in 4B1.2(a).

It -- it -- the guidelines often use commentary to explain cross-references. They give explanatory examples. One piece of commentary that I think would be really central and subject to upheaval and very difficult for the Commission to do as an actual guideline text would be in 1B1.3, which is the relevant conduct guideline, which is central to defining the conduct that the judge is supposed to consider when applying the guidelines.

If you look at, for example, Notes 3 and 4, they're about jointly undertaken

activity, and that's defined as the -- the conduct that a defendant's accountable for is defined in the text as conduct that's in the scope of the joint activity, that's in furtherance of it, and that it was reasonably foreseeable. But --

JUSTICE ALITO: Is it reasonably -- is it reasonably foreseeable that overruling Stinson would require the resentencing of, what, 10,000 defendants from 2025 alone?

MR. FEIGIN: I -- I -- I --

JUSTICE ALITO: Yeah? Especially since, apparently, district courts, according to some courts of appeals, can't be believed when they say I would have done the same thing even if the guidelines had not indicated this?

MR. FEIGIN: So, Your Honor, I think we'd argue that in a lot of those cases, the courts reached the correct result notwithstanding having referenced the commentary. But I think that I -- I have no reason to disagree with that estimate insofar as it would --

JUSTICE GORSUCH: Well, Mr. Feigin, you -- you didn't --

MR. FEIGIN: -- be the number of sentencing claims we might face.

JUSTICE GORSUCH: -- you didn't make a floodgates, the-end-of-the-world argument anywhere in your briefs. And we all agree that after Edwards versus Vannoy, there's no habeas review for constitutional rules of criminal procedure. I don't know why there would be here. And on --

MR. FEIGIN: Well --

JUSTICE GORSUCH: -- and on direct review, as Justice Alito pointed out, district courts often do the belts-and-suspenders approach, saying I do this one way or the other. We have harmless error review. We have the opportunity, as Justice Barrett said, to -- to have a guideline saying commentary. We have (o), which is the actually prescribed statutory means. Just amend it every year as you're supposed to. And -- and the government will benefit sometimes too. I mean, there are some commentary that the government opposes because it thinks it's too lenient. So it's going to work both ways.

MR. FEIGIN: Well --

JUSTICE GORSUCH: What do you say to that?

MR. FEIGIN: -- Your Honor, everything you pointed out is an ameliorative measure. But, if you have 66,000 sentencings a year, under Peugh, they all have to apply the old guidelines that were in effect at the time the defendant committed his offense. And because of Peugh, any changes that aren't in a defendant's favor can't be retroactive to those particular defendants.

So, for all of those cases, courts are still going to be at sea. And there are going to be years and years and years of those cases because, of course, the statute of limitations is five years, and it sometimes takes cases longer to get to trial.

JUSTICE KAGAN: Mr. Feigin?

MR. FEIGIN: As for the -- yes.

JUSTICE KAGAN: Sorry. I'm sorry.

MR. FEIGIN: No, Justice Kagan, please.

JUSTICE KAGAN: If -- if Kisor applies to commentary, does Kisor also apply to policy statements?

MR. FEIGIN: I think that would be a very interesting question, Your Honor, on which we haven't taken a position here, but I think there is an argument that Kisor would apply there at least insofar as we think it affects the commentary in that I -- I think a legitimate question would arise whether even policy statements can override unambiguous guideline text or do something that would be unreasonable --

JUSTICE KAGAN: I mean --

MR. FEIGIN: -- in light of ambiguous text.

JUSTICE KAGAN: -- I -- I read Stinson. The first block of Stinson really says we just want to follow the Williams rule. You know, this is the same as Williams. It's only later on in the opinion that the Court brings in the Seminole Rock analogy and says this is kind of like the -- the -- the interpretation of agency regulations. But it -- it does suggest that, like, there needs to be the same rule, right?

MR. FEIGIN: Yeah, insofar as Stinson continues going on after the Williams analogy,

we've kind of taken Stinson to be explaining the particular deference to the commenter.

I do think there's an argument, as you just pointed out, that because the Court starts by comparing this to Williams, that whatever result it reached for the commentary would also be the same level of deference for policy statements.

We'd want to think about that in light of whatever the Court says in this case, if it were to say something that upsets either -- that upsets the kind of simple syllogism that we think --

JUSTICE KAGAN: Yeah.

MR. FEIGIN: -- really ought to resolve the case.

JUSTICE KAGAN: Are you worried -- Justice Alito suggested that the Petitioner's view would lead to a lot of resentencing demands. But wouldn't your own position lead to a lot of resentencing demands? I mean, to the extent that you say, well, now we're in Kisor land, which is a little bit less deferential, isn't somebody -- you know, aren't there going to be defendants who are saying,

well, that change alone requires a resentencing?

MR. FEIGIN: Well, I think there's a particular -- I think -- I don't know that that's going -- I mean, it's certainly not going to be enough on collateral review. I do think we'll see more arguments about commentary to the guidelines. Certainly, we have in -- in some of the circuits that have adopted the Kisor approach.

But, by and large, as we explain in our brief and I was trying to explain here today, because most of the hallmarks or, essentially, all the hallmarks for Kisor deference are going to be satisfied in most commentary cases, I don't think it's going to be a large swath of cases where we're really having a significant battle. And it's largely been localized to a few discrete areas even in the circuits where we do have this litigation.

I mean, it still continues and there are some pockets of it, but the Commission's focused on some of the particularly difficult areas by moving them into guidelines.

JUSTICE KAVANAUGH: To pick up on --

JUSTICE BARRETT: Mr. --

JUSTICE KAVANAUGH: Go ahead. Go ahead.

JUSTICE BARRETT: I was just going to ask you how far you understand Stinson deference to go. If a court really thought the commentary to a guideline was flatly inconsistent with the guideline, do you understand Stinson to still require the court to follow the commentary?

MR. FEIGIN: No, because I think that would violate the specific terms of what's -- even Stinson's kind of adoption of the -- what the Court in Kisor called the caricature description of Seminole Rock deference.

JUSTICE BARRETT: So there are limit -- I mean, even if we take Kisor out of the equation, it's not like Stinson is this hard-and-fast rule that would permit commentary to supersede the guideline?

MR. FEIGIN: I -- I think that's right, Your Honor. I -- but I do think that Kisor explains what Stinson has always meant.

I also want to make one other note --

JUSTICE BARRETT: Let me just -- let

me ask you about that. So, if you think Kisor explains what Stinson has always meant because Kisor rejects this caricature even of Auer/Seminole Rock deference, why are you arguing that we need to say that Kisor deference applies here in a way that would modify Stinson? Are you saying that this is what Stinson has always required, or are you saying that Kisor somehow modified Stinson?

MR. FEIGIN: I think that this is what Seminole -- I -- I may have misspoken, Your Honor, two cases beginning with S.

If I might finish, Mr. Chief Justice?

CHIEF JUSTICE ROBERTS: Sure.

MR. FEIGIN: I meant to say that Kisor clarifies what Seminole Rock deference has always meant. Since Kisor was issued, we've been having an issue with this in the circuit courts where they've gone different directions as to whether to essentially follow the more "caricature" approach that the actual language of Stinson might in some places be taken to suggest versus the explication of Kisor -- the explication of Seminole Rock that appears in Kisor.

We're simply saying that the latter approach is correct. We've been saying that since Kisor was issued. And, again, I don't think that's going to change too much in actual practice, but it is just to the extent there is a little bit of daylight there with unambiguous guidelines -- you can see a little bit of that in the decision below -- or reasonable interpretations, even if ambiguity and what is controlling in those circumstances, that's where we think there might be a little bit of daylight there. And we're just urging the position that's most faithful to this Court's precedents, but, of course, we have a strong interest in consistency.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas, anything?

Justice Alito?

Justice Sotomayor?

JUSTICE SOTOMAYOR: I'm at a total loss. What do you say is the difference between Kisor and Stinson?

MR. FEIGN: So --

JUSTICE SOTOMAYOR: What -- what's

that area of daylight?

MR. FEIGIN: -- Your Honor, I don't -- I mean, let me -- I would say let me be clear, but let me be as clear as I guess I can under these circumstances.

JUSTICE SOTOMAYOR: Some of this is because of the semantics, don't you think?

MR. FEIGIN: So, yes, I think a lot of this is semantics. What Stinson does is it adopts what -- it restates several times, I think about three times, the -- what Kisor describes as a caricature of Seminole Rock deference in saying that it has to be plainly erroneous or inconsistent with the guideline. And that could suggest, as Kisor points out, an almost reflexive deference.

In -- under Kisor, Kisor explains that, no, it's not reflexive deference, there are some limits to it, and Kisor describes what those limits are.

As it happens under the Sentencing Reform Act and for all the reasons we explain in our brief, the limits on Kisor deference are generally going to be satisfied in most cases involving guidelines commentary because the

commentary and the guidelines are so interlinked that the concept of ambiguity is kind of in a little bit of --

JUSTICE SOTOMAYOR: So, for this --

MR. FEIGIN: -- a feedback loop there.

JUSTICE SOTOMAYOR: -- for this sliver of cases, you're asking us to create chaos in the courts below? You're asking us to potentially open up 66,000 cases last year, there's probably 66,000 cases pending where the district courts may have to redo a sentence or go through this exercise, and we're going to have to have district courts and circuit courts decide whether this new semantic deference called Kisor require the district court to follow or not follow the guideline?

MR. FEIGIN: Well, let me --

JUSTICE SOTOMAYOR: That -- that -- this is -- I thought that was the essence of stare decisis in saying don't make changes when the effect is not egregiously wrong.

MR. FEIGIN: Well, let me say three quick things to that, Your Honor.

First, I don't interpret Kisor, which itself was decided on stare decisis grounds, to

be changing anything.

Second, we -- this isn't -- I don't think this is going to make a huge difference because the guidelines, given that they're considered judgments that often go through notice and comment and are exercises the agency's expertise in -- in this interlinked area where they're meant to function to define some of the guidelines' text and to explain it, is going to produce --

JUSTICE SOTOMAYOR: This --

MR. FEIGIN: -- different results in most cases --

JUSTICE SOTOMAYOR: It's not the question of different results. It's the process you're changing.

MR. FEIGIN: And then --

JUSTICE SOTOMAYOR: And what you're opening up is a whole new avenue of legal debate about whether something's ambiguous, unambiguous, is it ambiguous -- is it unambiguous enough or ambiguous enough to require deference, not require deference? That's what Kisor would do.

Right now, courts just follow it and

then choose if there is an argument about a meaning in the guideline to depart.

MR. FEIGIN: So --

JUSTICE SOTOMAYOR: But they don't go through this exercise.

MR. FEIGIN: -- two -- two points to that. First of all, if Your Honor -- if the Court wants to say that the guidelines don't need to follow Kisor, I mean, as -- as a policy matter, I think we'd be very happy with that because it would ensure the kind of consistency that the kind of caricatured version of Stinson would provide. We're simply working with the Court's precedents as best we can.

JUSTICE SOTOMAYOR: All right. Thank you, counsel.

CHIEF JUSTICE ROBERTS: Justice Kagan?

Justice Gorsuch?

JUSTICE GORSUCH: Just curious where you think Kisor and Stinson deference would -- would come from. Is it a substantive canon of interpretation?

MR. FEIGIN: Where --

JUSTICE GORSUCH: Because there's no --

MR. FEIGIN: -- where Kisor and -- sorry --

JUSTICE GORSUCH: Yeah, because there's no explicit --

MR. FEIGIN: -- Stinson --

JUSTICE GORSUCH: There's no explicit direction that would carve this out of Loper Bright from Congress. Congress can sometimes say thou shalt defer to the interpretations. Didn't do that here. Said consider them. So we don't have a -- an express delegation.

I know amicus disagrees, but that's your position. So, if -- where does this presumption of deference come from?

MR. FEIGIN: The presumption of deference in particular in the sentencing guidelines, I think, came from the fact that the Sentencing Reform Act was adopted against the backdrop of Seminole Rock, and then Stinson --

JUSTICE GORSUCH: No, I understand -- I understand doctrinally, but I'm asking you where does that doctrine -- where is it grounded on? Normally, when we have a substantive canon of interpretation putting a

thumb on the scale, as opposed to a linguistic canon, we ground that in the Constitution most frequently or in longstanding understandings about congressional practice maybe, but I -- I don't know where that is here.

MR. FEIGIN: Well, I think it's kind of a unique animal and, Your Honor, I think that --

JUSTICE GORSUCH: I agree with that.

MR. FEIGIN: -- it -- it's because the Court has said so. If the Court looks to Justice Scalia's unanimous opinion for the Court in Braxton against United States, and this is at page 348, what Justice Scalia says is that even though, like, Congress or a regulatory agency can issue an amendment, generally, the Court thinks it's primarily and initially its own task to interpret the law but that it thinks the sentence -- but then he goes on to say: "The Sentencing Reform Act, however, we think, adopts a different approach."

And that is why the Court doesn't address --

JUSTICE GORSUCH: But you don't -- you

don't rest on that. You don't point us to anything in the statute, 994 or 3553, that does the kind of work that we would expect Congress to do.

Now we see it in 3553(e), for example, where we have an express direction, but we don't see that in the rest of 3553(a) or in 994, which are the provisions before us. So we have to have some background principle, some substantive canon that does the work.

MR. FEIGIN: So, again --

JUSTICE GORSUCH: And -- and I guess I'm wondering -- you -- you say it's Kisor or something like it. And I'm asking, where does that come from?

MR. FEIGIN: Well, again, Your Honor, I think, when Congress adopted the Sentencing Reform Act, it enacted it against the backdrop of Seminole Rock. It then recognized commentary when it enacted 3553(b). It's recognized it again in the other statutes that are cited in our brief and that I mentioned here today.

And it was operating against the backdrop of not only, as I just mentioned,

Braxton and I think the important statement that the Court makes at page 348 but also the Court's own decisions, obviously, in Stinson and then a case like Buford in 2001 that makes clear that commentary is a way that the agent -- that the Commission can change the interpretation of a guideline.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

JUSTICE KAVANAUGH: I'll tick through a couple things quickly if I can.

Justice Barrett raised the question about what if the commentary's inconsistent with the guideline, and I read Stinson on 43 -- I just want to make sure this is consistent with your answer -- to say, in those circumstances, you go with the guideline when there's a flat inconsistency.

Is that your understanding?

MR. FEIGIN: Yes, Your Honor.

JUSTICE KAVANAUGH: Justice Kagan asked about Stinson, the Williams piece of Stinson, and then they go through the different potential analogies. When they come to Seminole Rock -- and this goes to your

syllogism at the beginning -- the Court cautions at the beginning that the analogy is not precise, which suggests that you don't follow it for all it's worth.

I'm just curious what you think "not precise" means there.

MR. FEIGIN: So the Court, I think, explains that what it means by "not precise" is that the guidelines go through congressional review whereas, at that time --

JUSTICE KAVANAUGH: Exactly. They say the --

MR. FEIGIN: -- roles -- roles did not. I mean, that --

JUSTICE KAVANAUGH: Because Congress has a role in promulgating the guidelines is what the Court follows up with. So the analogy is -- is not perfect to begin with, the Seminole Rock analogy to Stinson, correct?

MR. FEIGIN: Yeah. I think the Court acknowledges that it's not a perfect analogy.

JUSTICE KAVANAUGH: Okay. Third -- third --

MR. FEIGIN: So what we're working with here isn't Seminole Rock.

JUSTICE KAVANAUGH: That's good enough for that one. The third -- third one --

MR. FEIGIN: Yeah.

JUSTICE KAVANAUGH: -- Congress, you -- you mentioned that Congress has amended the commentary directly a few times.

MR. FEIGIN: I -- I -- that -- that is true, but I -- I just want to make clear --

JUSTICE KAVANAUGH: That's true. That's all I need.

MR. FEIGIN: -- that I misspoke briefly as to the two acts I mentioned beyond the PROTECT Act.

JUSTICE KAVANAUGH: Right. Does that reflect -- what does that reflect about Congress's understanding of 1B1.7, if anything?

MR. FEIGIN: I think it reflects that 1B1.7 essentially means exactly what we viewed it to -- we view it to mean and what Stinson viewed it to mean, which is that commentary does play an important role in the interpretation of the guidelines.

Now I acknowledge, Justice Barrett, it says that it could result in an error, but I think that's just cabining that not every case

of failure to follow commentary is going to result in an error.

JUSTICE KAVANAUGH: Last -- last thing --

MR. FEIGIN: You otherwise reach the correct result.

JUSTICE KAVANAUGH: Last thing about stability of the system, which Justice Alito has raised. And, you know, I came on the federal judiciary in 2006, a year after Booker and years and years of -- of trying to figure out how to apply that. I worry that if we change here, we're going to have years and years of trying to figure out how much weight you give to particular commentary and different courts going different ways.

Your position, though, is not the same as -- as the amicus. If you're looking for stability and not changing, yours seems like it's also a solution in search of a problem as well.

So why isn't amicus's approach in terms of stability, which may not be the overriding issue, but if it is an issue, stability's better served by amicus's position,

not yours, correct?

MR. FEIGIN: I -- yes, there would certainly be less upheaval under that. And as I mentioned to Justice Sotomayor, if the Court wants to go that way, I mean, frankly, in -- in -- in many policy respects, we'd prefer that approach. We're just working with what Kisor said and combining it with what Stinson said.

JUSTICE KAVANAUGH: Thank you.

MR. FEIGIN: We think that's the result that is reached under those precedents.

CHIEF JUSTICE ROBERTS: Justice Barrett?

JUSTICE BARRETT: Mr. Feigin, I just want to clarify your view of 1B1.7.

Okay. So you said you think it's just sort of nomenclature that could be reversed on appeal if you -- if you don't follow the commentary to a guideline.

Do you understand 1B1.7 to be the kind of express instruction from the Commission that I posited with Mr. Page saying, like, yes, this is a guideline that says you have to follow the commentary, or do you read it to mean not that strong?

MR. FEIGIN: I think it comes pretty close, Your Honor, and I think Stinson largely reads it that way. It mentions 1B1.7 several times. Now it disregards the commentary to 1B1.7 at one point, but the text of 1B1.7 has been consistent, it's been congressionally reviewed multiple times.

And I do think that it is the kind of express acknowledgment, first of all, that this is the type of thing the Commission's going to do and, second of all, the effect it's going to have because, of course, the analogy that's -- the -- the direct link between Williams and Stinson that Stinson draws is the -- on the 3742(f)(1) reversal for failure to correctly apply the guidelines issue.

So I think that shows that what 1B1.7 is trying to do is give it the effect that Williams found it to have, which is essentially the effect of a policy statement.

JUSTICE BARRETT: Okay. So do you think it's fair to just consider -- there were questions earlier to Mr. Page about whether commentary should just be considered the same thing as a policy statement. What do you think

about that?

MR. FEIGIN: So I don't think it can quite be considered the same thing as a policy statement for a couple of reasons.

One is 1B1.7 clearly does draw a distinction between the two. It may not be a substantive distinction in terms of how everything shakes out in practice, but it is at least a terminological distinction.

And then, if we follow the Chenery Principle that an agency can't be kind of understood after the fact to do something that it didn't understand itself to be doing in the first instance, I don't think it's fair to say that when the Commission is issuing something that it labels as commentary and not a policy statement -- and I do agree with my friend that, you know, the fact that you can attach commentary to a policy statement makes it particularly strange to think that it is a policy statement -- that the Commission was actually issuing policy statements all the time.

JUSTICE BARRETT: Thank you.

CHIEF JUSTICE ROBERTS: Justice

Jackson?

JUSTICE JACKSON: So isn't your answer to Justice Gorsuch's questions about whether -- where the authority or delegation regarding the deference come from the Sentencing Reform Act?

I mean, I thought the Sentencing Reform Act expressly created a binding system that removed sentencing authority from judges, their discretion in that regard, and gave it to the Commission. And at the time it was created, it was binding. Judges didn't -- they had to defer to the Commission's determinations initially.

Is that the wrong way to look at it in terms of thinking about where this comes from?

MR. FEIGIN: No, Your Honor. I mean, that was the original conception of the sentencing guidelines. I mean, they would give to the Commission the ability to prescribe ranges that were almost always going to be binding on the sentencing court.

JUSTICE JACKSON: And also, general policy statements regarding application of the guidelines or any other aspect of the sentence or sentencing implementation. And I appreciate

that there, afterwards, were developed something that the Commission called a "policy statement" as opposed to commentary describing the guidelines, but isn't Congress giving the Commission the authority to do all of that in the context of setting up a guidelines system?

MR. FEIGIN: I think so, Your Honor. I think that -- I don't think that anything the Commission is doing is beyond its authority. And we think it's fine as it is. And we certainly think it would be fine if done as a -- if done as a policy statement.

JUSTICE JACKSON: So you're just here because Kisor made a change and because Stinson referenced Kisor -- I mean referenced Seminole Rock as an analogy?

MR. FEIGIN: Well, we're not here because Kisor made a change insofar as Kisor just kind of explicated --

JUSTICE JACKSON: Reinterpreted Seminole Rock?

MR. FEIGIN: -- what had always -- re- -- it, as it put it, you know, restated and expanded on what we understand to have always been the case.

JUSTICE JACKSON: But I heard you say that you would be fine if the Court were to say that whole Kisor thing is really not for this area. We don't have to adopt Kisor in the government's position?

MR. FEIGIN: That would be fine or a -- I mean, like, we don't think that's quite where the precedents lead, but if the Court wants to do that, I -- I -- I don't have any real push-back for you.

I would say that one easy way to say that without really kind of discarding Kisor altogether would just be the approach that's suggested in our brief, which essentially says that although Kisor applies, it's basically going to shake out the way that people have always understood it essentially to shake out.

JUSTICE JACKSON: No, I understand, but one -- one last question.

How is Kisor consistent with Congress's broader goal of eliminating disparity? I mean, if our question is, do we adopt a Kisor-based approach or do we not for this area, why is it -- why -- why is it superior to do so --

MR. FEIGN: Well --

JUSTICE JACKSON: -- other than the fact that we made this reference in -- to Seminole Rock in Stinson?

MR. FEIGIN: So, Your Honor, just being faithful to the statutes and to this Court's precedents, there is a difference between guideline text and commentary.

Commentary does -- although, by practice, it's subjected to notice and comment, goes through congressional review, gets the vote of four commissioners, it doesn't have to. And so the guideline text needs to be there as an anchor, and the commentary is -- has to be anchored to the guideline text.

And I think that to the extent courts would interpret commentary to be able to overrule guideline text or do things that the guideline text would think are unreasonable, if you agree -- to the extent the courts are reading Stinson deference to do that, I do think it's fair --

JUSTICE JACKSON: Which would be wrong -- in your -- in your dialogue with Justice Barrett, we determined that that would

be a wrong way to interpret Stinson. But fine.

MR. FEIGIN: I think there has -- to the extent -- I mean, I -- I understand there's a little bit of dancing on the head of a pin going on here, but I think clarifying that Stinson -- you can't take Stinson to actually mean what Kisor described as the caricature of just reflexive deference, that there are going -- there could, in theory, be these very isolated instances where the commentary goes too far.

JUSTICE JACKSON: I understand.

MR. FEIGIN: But -- yeah.

JUSTICE JACKSON: Thank you.

MR. FEIGIN: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. FEIGIN: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Dick.

ORAL ARGUMENT OF ANTHONY J. DICK,

COURT-APPOINTED AMICUS CURIAE

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

It is emphatically the province of the judiciary to say what the law is, but the

advisory sentencing guidelines are not the law. They are advisory. As a result, when interpreting the guidelines, the question is not what the law is but, rather, what is the non-binding advice that the Commission is offering about what type of sentence should be imposed?

On that question, the sensible approach is to defer to the Commission on the meaning of its own non-binding advice and then have courts decide for themselves, based on their own independent judgment, whether to follow that advice in deciding what type of sentence they want to impose.

Now this type of deference doesn't pose any of the problems that you get when you defer to executive agencies on the meaning of the binding rules that they promulgate and enforce. That creates all kinds of problems for the separation of powers and the rule of law that this Court has cut back on in its recent decisions.

But Congress gave us two very clear indications that the Commission is different from executive agencies when it comes to

deference.

First, Section 706 of the APA, which applies to executive agencies, makes very clear that courts should be the ones to resolve interpretive issues. So anytime you have an executive agency claiming authority for deference, that is a backdrop that's going to require a very clear statement to overcome.

Second, instead of Section 706 of the APA, which does not apply to the Sentencing Commission at all, what we have is the text of the Sentencing Reform Act, which does authorize the Commission not only to promulgate guidelines but also to promulgate policy statements that authoritatively interpret the guidelines.

And, Justice Gorsuch, that is the square holding of Williams, which we can talk about. In Williams, this Court held that when a policy statement interprets a guideline, that is an authoritative interpretation of the guideline. And then, in Stinson, this Court simply recognized that when the Commission uses the label of "commentary" to interpret a guideline, that falls within the same statutory

authority. And Stinson starts with Williams, and it doesn't get to Seminole Rock until after it says that there is authority to interpret the guidelines.

So, as a result of all of that, the Commission's deference that it gets is based on express statutory text. There's no need to rely here on any fictional presumption of implied delegation. This Court's cases cutting back on that fictional presumption in Loper Bright and Kisor simply don't apply. And the deference that the Commission enjoys rests on express authority that is just as sturdy today as it was when Stinson was decided.

Stinson should be upheld. There's no reason to create the chaos that would come from overruling it.

And I welcome the Court's questions.

JUSTICE THOMAS: Mr. Dick, this argument reminds me of my metaphysics class.

(Laughter.)

JUSTICE THOMAS: And that's not necessarily a compliment.

(Laughter.)

JUSTICE THOMAS: Let's go back to what

this case is about so I can have an under -- a complete understanding of how we're looking -- what we're looking at.

This is a provision that says -- that enhances the sentence for a large capacity magazine. That's the language, right? Where do we find that definition of what a large capacity magazine is?

MR. DICK: In the commentary that defines it as a magazine capable of holding more than 15 rounds.

JUSTICE THOMAS: And if a judge disagrees with that and says, I don't think that a large capacity magazine is -- that that is a large capacity magazine, what is the effect?

MR. DICK: Well, I think that the authority to interpret what that means has been given in the first instance to the Commission.

JUSTICE THOMAS: What is --

MR. DICK: So judges --

JUSTICE THOMAS: -- what is the guideline based on then?

MR. DICK: The guideline is based on the Commission's authority under 994(a)(1) to

promulgate a guideline for the enhancement. And then the Commission has been given the authority to interpret that in the first instance through policy statements.

And my submission is that it should not make any difference whether the Commission uses the label of "policy statement" or uses the label of "commentary" when it interprets that guideline.

So I think it -- you know, you should think about it in two steps. First, has there been authority given to the Commission to interpret what that means? The answer to that is yes. That's Williams and Stinson.

And then the second step is, okay, we have authority for the Commission to interpret the guideline. Now what we need to do at step 2 is to police whether the Commission has gone outside the boundaries of that delegated authority.

That's what the Stinson test is for. If it's inconsistent with or a plainly erroneous interpretation, the Commission can't go there, but as long as you can put these two provisions together and sensibly read them

together to determine what the Commission's non-binding advice is, if they can be reconciled, Your Honor, they should be read together to give the authoritative position on what sentence the Commission is recommending. Then, of course, it is up to the courts to exercise their independent discretion, do we want to follow that advice or not?

But I think it would be nonsensical to try to interpret the guideline as a standalone statute as if it were something written like a statute that is going to have its own independent legal meaning when, in fact, it was promulgated with the commentary simultaneously to Congress, hey, here is what the guideline says, large capacity magazine, here is what large capacity magazine means. It's all part of the same package through notice and comment.

And I think it's very, very different from a statute that's going to be freestanding and have some meaning --

JUSTICE KAVANAUGH: The --

MR. DICK: -- apart from that.

JUSTICE KAVANAUGH: -- the last step of that that you mentioned is important, I

think. After you go through and determine the advisory guidelines range, you look at the guideline, you look at the commentary, you come up with the advisory guideline range. The court can decide -- the district court can decide to vary up, down, or stay within the guidelines range.

So, ultimately, that's post-Booker, obviously. How does that fit into what you're talking about?

MR. DICK: Absolutely right, Your Honor. I think so. Usually, you discard your precedents when they've been undermined or weakened. But, in this case, Booker has made Stinson a hundred times stronger because now the consequences of deferring are nothing like we get in the executive context, where you're talking about binding law that can have implications for fair notice and all kinds of other problems we get when an agency gets to promulgate, interpret, and enforce its own rules.

JUSTICE KAVANAUGH: Now the counter to that would be that the advisory range still has some force and that some judges want to be

guideline sentencers and some judges don't. So you have a disparity out there.

But, for the judges who want to be guideline-centric sentencers --

MR. DICK: Right.

JUSTICE KAVANAUGH: -- it still has some magnetic effect. So how do you deal with that?

MR. DICK: Absolutely. I mean, I think the Court basically dealt with this in Beckles, where it said, yes, some judges may find the guidelines persuasive and may decide to follow them. But the point is it's ultimately the judge's decision.

And if you look at the backdrop against the -- you know, the traditional system was Congress prescribes a crime. Congress prescribes the statutory range. And the judge could pick a sentence based on whatever characteristic the judge wants within that range.

And that's not a fair notice problem. That's not any kind of separation-of-powers problem or rule-of-law problem. Much less going to be a problem when the Commission

recommends a sentence within that range.

And that's what makes this very different from all of the executive agency deference cases. You could think there's no legitimate agency difference ever and still think that deference is appropriate here because of the advisory nature of that.

JUSTICE GORSUCH: Mr. Dick, that's -- it's -- it's a nice reconceptualization of Stinson, but that's not what Stinson said, I mean, and -- and you resist the government vehemently in your brief on -- on trying to Kisor this and saying we can't rely on implicit delegations, right, and that the ambiguity trigger isn't meaningful, right? You're shaking your head. I'm taking that as --

MR. DICK: Correct, correct, Your Honor. Yeah, I think --

JUSTICE GORSUCH: And -- and -- and -- and -- and -- and -- and so you say we just can't go down that road and also that Stinson suggests that even -- even unambiguous guidelines could be revised or glossed by -- by the -- by commentary, you know, in kind of a Brand X sort of way and override judicial

opinions. And you reject all of those things that are associated with Stinson.

And you try and ground it admirably in -- in statutory text and express delegation. But I'm having a hard time seeing that in 994. Yes, they have the authority to write these things. But all courts have to do is consider them under 3553, absent special circumstances, where courts are bound by them. Congress knows how to write that. Normally, we say that's a contextual clue that should give us some -- some idea that the other -- other situation's different, that the normal run of the situation is different.

So I just don't see how that doesn't -- Mr. Feigin and his colleagues will be up here in the next case saying, hey, look at this statute, it's exact -- written exactly the same way and that agency too should be allowed to write binding regulations.

MR. DICK: Absolutely, Your Honor. I think you're right to worry that the government is going to try to circumvent Loper Bright by trying to find an express delegation in every vaguely worded statute they can find. I'm very

sensitive to that problem, and here is why I think it's not a problem.

So, first of all, you've got Section 706, which is a very clear statutory command.

JUSTICE GORSUCH: Forget about that. Forget -- forget about that here. Work -- work with the statute we have here.

MR. DICK: Absolutely, Your Honor, but I think it's important to realize that in any executive context, you're going to have that statutory background rule of 706.

JUSTICE GORSUCH: We also have Article III in every case --

MR. DICK: You do have Article III, but Loper Bright says --

JUSTICE GORSUCH: -- which says that judges normally interpret law de novo.

MR. DICK: Absolutely.

JUSTICE GORSUCH: Right? You --

MR. DICK: Absolutely. That's right. But Loper Bright says that when the Congress gives authority to an agency to promulgate something with binding effect, that -- then that is not an Article III problem. I think the problem, you know, in that type of

situation may be a non-delegation problem.

But -- but put that to the side.

JUSTICE GORSUCH: No, I'm not talking about that. Put that to the side is right. I -- I'm saying just look at the statute we have here.

Where does it say -- where are there any words saying that the Sentencing Commission shall have something binding in --

MR. DICK: Right.

JUSTICE GORSUCH: -- in -- in -- in -- in policy statements, let alone commentary?

MR. DICK: So -- so let me address the -- the -- the text of the Sentencing Reform Act. So the first point about it is that Williams squarely held this, so you don't need to reinvent any new wheels here with respect to policy statements.

But let me point you to the features of the text that I think are most important. So you've got Section 994(a) authorizing the promulgation of guidelines and policy statements as two prongs of the same authority that what it can promulgate, right, so I think both of those should be understood to be

different types of authoritative statements.

Then I would direct you to Section 995(b), which is the adjacent provision, which refers to "the power of the Commission" to "establish policy statements and guidelines."

JUSTICE GORSUCH: Yeah, it's --

MR. DICK: So --

JUSTICE GORSUCH: -- very similar to the Rules Enabling Act in the civil rules context, which says that the rules committee shall report to this Court and to Congress rules and -- and -- and -- and give explanatory notes. And nobody has ever thought that the advisory notes are -- are binding.

MR. DICK: Yeah. It's absolutely nothing like the Rules Enabling Act or any other statute that we've been able to find regarding an executive agency. The Rules Enabling Act does not say that there is a power to issue or establish a statement that regards application of -- of the rules.

I think that's just very, very different. So I think you have here text that is very unique in the Sentencing Reform Act that is not -- you don't have to read it

against the backdrop of 706.

JUSTICE GORSUCH: I think it says may -- may provide explanatory notes, is what the statute says.

MR. DICK: Well, it does not refer to a power -- the power, right, to promulgate something that -- and establish something on the same par as a guideline, and --

JUSTICE GORSUCH: Okay. But then every -- every administrative agency has the power to issue interpretive regulations, the power --

MR. DICK: Not -- not in a statute -- not in a statute that says you have the power to issue and establish a statement regarding application of this. Even if you did have that with an administrative agency, you'd have to deal with whether that is a clear enough statement to overcome Section 706.

JUSTICE GORSUCH: What -- and what --

MR. DICK: Here, you don't have to.

JUSTICE GORSUCH: -- what about the topsy-turvy problem that we have binding commentary --

MR. DICK: Oh.

JUSTICE GORSUCH: -- advisory guidelines?

MR. DICK: Not a problem at all.

JUSTICE GORSUCH: And -- and I know you say this is all good with Booker, but, boy, the more -- the more you make these things binding, you're creeping up to a Booker problem again.

MR. DICK: It's -- it's binding only in the sense of it's what the Commission's advice means.

JUSTICE GORSUCH: Yeah, but --

MR. DICK: It's binding on the meaning of the guideline, not binding in the sense you have to follow it.

JUSTICE GORSUCH: You agree all these guidelines have heavy gravitational force in sentencing in America?

MR. DICK: Exactly.

JUSTICE KAVANAUGH: That they're --

JUSTICE JACKSON: And isn't that the point of the Sentencing Reform Act? I mean, again, I guess I don't understand how the system works unless it is binding.

If -- if the whole point of this is to

have the gravitational pull that comes from judges all starting at the same advice from the Commission --

MR. DICK: Well --

JUSTICE JACKSON: -- I don't understand how we're going to have a guidelines system unless you have judges calculating this consistent with what the Commission says to do.

MR. DICK: Exactly right. So, you know, Congress initially wanted it to be binding in the sense that courts would have to follow it. Now it's not binding, but I agree with you it still does have a significant anchoring effect. Nobody disputes that. I think that is a very good thing because it helps enhance consistency.

And one of the main reasons that we get that consistency is because, up until recently, everyone has understood we'll follow the same commentary to get the same meaning of what the Commission is advising. So it's still --

JUSTICE JACKSON: And, right now, that's the starting point, so fine, everybody has the same starting point. But, in -- in

direct answer to Justice Thomas, I would think you would say a judge who disagrees that the enhancement should apply for a large capacity magazine in this situation would just vary at the end of the day.

MR. DICK: Correct.

JUSTICE JACKSON: Right.

CHIEF JUSTICE ROBERTS: Also --

MR. DICK: So I think that it confirms --

CHIEF JUSTICE ROBERTS: I'm sorry, go ahead.

MR. DICK: Mr. Chief Justice, please.

CHIEF JUSTICE ROBERTS: Loper Bright has been mentioned a few times, and it had a footnote that talked about express delegation, and you mentioned this, I think, in your response to Justice Gorsuch.

What is your understanding of the scope of that in Footnote 5?

MR. DICK: The scope of -- the scope of?

CHIEF JUSTICE ROBERTS: The reference in Footnote 5 to the express delegation.

MR. DICK: Right. So I think the

points, the Court's point, you'd know better than I, but -- but was just that when Congress actually indicates that it is giving authority to an agency to promulgate a statement with the force and effect of law, then, of course, the court's role is to simply interpret that statutory authority and -- and find out what the scope of authority that's been given to the agency is and follow that authority.

So that's very different from the type of presumption of implied delegation that would just exist as a kind of brooding omnipresence in the sky where we're going to assume that anytime there's an ambiguity there has been a delegation to an agency to have interpretive authority.

So I think how that's relevant here is, in 994(a)(2), you have Congress saying that a -- the Commission can issue a statement regarding application of the guidelines and you have to just look at that statutory authority and interpret, okay, when is the agency, when is the Commission, acting within the scope of that authorization?

And the answer is interpreting a

guideline is part and parcel of the power to apply the guideline because, if you don't interpret the guideline to know what it means, you can't know how it applies.

So the -- the question in the case is, what is the legitimate bounds of that power of interpretation? As long as the agency, the Commission, is doing what Stinson says, you're not plainly inconsistent or plainly erroneously interpreting the guideline, you're within the realm of -- of authority that Congress has conferred on what the Commission can do, and -- and that is subsidiary, of course, to the guidelines because the guidelines have to go through the full two-track process of notice and comment and congressional review.

So, if the Commission wants to change the fundamental architecture, say something inconsistent with the guidelines, it would have to go through that process. But, if it just wants to exercise the delegated power to interpret the guidelines within the range of meanings that the guidelines can bear, it can use the policy statement process to do that. And it can call a policy statement commentary.

I, for the life of me, cannot understand why the substantive authority of the Commission would suddenly vanish if it relabels a policy statement as commentary.

JUSTICE BARRETT: Well, Mr. Dick, Mr. Feigin said that would be a Chenery problem. Do you want to respond to that?

MR. DICK: Yeah, I think it's completely different from Chenery. This is not an administrative context. This not an adjudication on the record. There's no obligation for the Commission to identify this is the basis for our rationale as if that were going to be subject to some sort of APA arbitrary-and-capricious review.

What we have here instead is just a statutory authority given to the Commission to promulgate the guidelines based on the authority given in 994(a)(1) and (a)(2). And the question is, has what the Commission has promulgated fallen within the authority given to the agency?

So you -- the sensible thing to do is look at what is the substantive authority given to the Commission. It's to promulgate

guidelines, and then it's to promulgate statements --

JUSTICE BARRETT: But it seems to understand itself to be doing something different when it adopts commentary than when it adopts a policy statement because it calls them different things.

MR. DICK: I don't think it's -- it understands itself to be exercising a different authority. I think what happened is that the Commission adopted these labels for purposes of readability and for purposes of making the manual more understandable.

I mean, if you look back at the way that this worked, when the Sentencing Reform Act was first passed, it didn't refer to commentary at all. It referred to guidelines and policy statements. And the Commission promulgated a Guidelines Manual where it used different labels within that manual, and it said here's the whole thing promulgated under our 994(a) authority.

And it's -- from very early on, it has been express in saying that 994(a) is the authority under which we're promulgating all of

this, right? So I think the fact that it has chosen to use a different label for formatting purposes does not say anything about what authority the Commission understood itself to be acting under.

JUSTICE KAGAN: Well, only for formatting purposes, or is there, in fact, an understanding that the Commission has that these two things are slightly different? Like, when you're -- when you look at the -- at the manual as a whole and you try to figure out why they labeled one thing a policy statement and why they labeled another thing a commentary, what do you take?

MR. DICK: Yeah, I think, frankly, there are overlapping instances where they sometimes use them for -- for the same and for different purposes. But I think, you know, the -- it's a Commission-created label that comes from the Commission. So Congress had never used the term "commentary" at all.

And I think it's really, really important to understand the statutory history of how this worked because, in 3553(b), it used to be the case before Booker that courts were

not allowed to depart unless they could identify some circumstance that had not been adequately taken account of by the Commission.

So, after the Commission had created the Guidelines Manual and created a section of the Guidelines Manual called Commentary and created that term, the way that that term came about in the statute was the Commission goes to Congress and says, we are worried that we're going to start getting subpoenaed and we're going to start getting discovery about why and what -- you know, what we took into account in promulgating the Guidelines Manual.

And so Congress, to solve that problem, then amends the Sentencing Reform Act, and what it does is it says, when you're considering what the Commission took into account, by the way, you can only look at the Guidelines Manual. And it then uses the label of "commentary" to say you can look at the policy statements, you can look at the guidelines, and you can look at the commentary, which is a Commission-created label. And it's acting just for the very narrow purpose of saying what you can look at in determining

whether the Commission took something into account.

So -- so Congress was just acting in a world where the Commission had created this section of the manual, and it wanted to tell people what they could look at. Congress was not saying anything at all about what authority these provisions were promulgated under.

And I think the -- the really important thing about that is, when the -- when the Sentencing Reform Act was first passed with 994(a) as the only authority, the Commission used that authority to promulgate guidelines, policy statements, and commentary, which, to me, is very, very telling that it was relying on that authority as it had been created to issue commentary as a type of policy statement.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

JUSTICE THOMAS: Mr. Dick, if Congress passed a statute that enhanced a sentence for possession of a large capacity magazine and the Commission issued an opinion or commentary on that statute and the court -- would a court be

able to interpret the statute differently?

MR. DICK: Absolutely not. I don't think anybody suggests that the Commission has authority to issue a policy statement in --

JUSTICE THOMAS: No, no, I said "if" it issued its opinion as to what that statute meant, would a court have the authority to review that and interpret the statute differently?

MR. DICK: Absolutely. A court's authority to interpret the statute exists independently of anything the Commission would --

JUSTICE THOMAS: So the -- the court would have more liberty to do that with a statute than it does with the guidelines?

MR. DICK: Absolutely, because 994(a)(2) gives the Commission authority to interpret and apply guidelines but not statutes. So that express delegation does not extend to interpreting statutes.

CHIEF JUSTICE ROBERTS: Justice Alito?

Justice Sotomayor?

Justice Kagan?

Justice Gorsuch?

JUSTICE GORSUCH: Sorry to belabor the point, Mr. Dick.

(Laughter.)

JUSTICE GORSUCH: But, when I look at Footnote 5 in Loper Bright, it says that certain things are or are not to be done as defined by or as determined by or as delineated by an agency. And we say that's an express delegation.

And I do see that in 3553(e), for example, which says that such sentence shall be imposed in accordance with the guidelines and policy statements. Put aside your problem with commentary not being in 994, okay? There it is. That's exactly the kind of thing that Footnote 5 had in mind.

It doesn't have in mind a statutory direction to consider the guidelines and policy statements or commentary.

MR. DICK: Right. So, Your Honor, I think that the word "consider" is the same thing that's used for both guidelines and policy statements. So I don't think you can get anything out of "consider" because what you have -- the thing that gives force to the

guidelines is Section 3741 -- excuse me, 3742(f)(1), which says that you can vacate a sentence for incorrect application of the guidelines, which is exactly the language used in --

JUSTICE GORSUCH: Sure. That tells you what a court of appeals can do. But I'm talking about in the first instance when a district court's 3553(a) is considered.

MR. DICK: Right. Consider both the guidelines and the policy statements.

JUSTICE GORSUCH: Sure.

MR. DICK: So -- so the -- the consideration requirement is not where the force comes from. What the force comes from is 994(a)(1) and (a)(2), which authorizes the agency to establish both guidelines and policy statements.

JUSTICE GORSUCH: To promulgate.

MR. DICK: 995(b) calls that a power to establish those things.

JUSTICE GORSUCH: Sure.

MR. DICK: And this Court squarely held in Williams that when the Commission promulgates a policy statement that interprets

a guideline, that is an authoritative guide to the meaning of the guideline.

If I could just say a word about why that is the holding of Williams --

JUSTICE GORSUCH: No, no, I -- I'm -- forget about Williams. I'm asking just on the statutory language.

MR. DICK: Right. So I don't think I can do any better than what I've said, which is 990 --

JUSTICE GORSUCH: Okay. All right. That's fine. Thank you.

MR. DICK: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

JUSTICE KAVANAUGH: Quickly, your approach that you're recommending would not be pro-defendant or pro-government, correct, in -- in the sense that --

MR. DICK: Absolutely.

JUSTICE KAVANAUGH: -- some of these -- some of the commentary is pro-defendant in certain cases and some is pro-government in certain cases, correct?

MR. DICK: That -- that's right, Your

Honor. I think it's notable that in both Stinson and Williams themselves, those were commentary provisions that helped the defendants, you know, in terms of giving a more lenient sentence.

JUSTICE KAVANAUGH: Since Booker made the guidelines advisory, I gather you're saying just take full account of all the advice of the Commission, which includes the commentary?

MR. DICK: That's right. That's right.

JUSTICE KAVANAUGH: And then, third, I -- I would be concerned if I end up agreeing with your position, I would be concerned about making sure that we do anything to -- to undermine Loper Bright or Kisor, and I would want to make that crystal-clear.

Your advice on how to do that.

MR. DICK: Absolutely. I think the two critical points are, again, Section 706, which applies to executive agency, says courts have to do interpretation. That's a very clear statement that we don't want to defer to executive agency interpretations. And you would need very, very clear language, maybe

like something in Footnote 5 from Loper Bright, to overcome that.

That doesn't apply at all in the context of the Sentencing Reform Act, so you don't need as clear of a statement to get an express delegation. And then what you have is the very unique language of the Sentencing Reform Act, which, again, 994(a)(1) and (a)(2).

995(b), which refers to the power of the Commission to establish, I think, is very, very strong language about giving an actual legal power to the Commission to establish an interpretation with legal effect.

And I think, finally, that (a)(2) language about policy statements regarding application of the guidelines matches up very well with 3742(f)(1), which talks about vacating a sentence if it's based on an incorrect application of the guidelines, which everybody understands to refer to interpretation is part of that.

So I think, if you put all those things together, what you can do is say there's a very, very, very, you know, statute-specific reason to find an express delegation here

that's not going to be present in any executive agency case. So the government, despite all their very smart lawyers, are not going to be able to come up with a way to use this to locate express delegations for executive agencies, very narrow, the Sentencing Commission and the Sentencing Reform Act is a extraordinarily specific instance, and you should uphold Stinson on that basis without doing anything in the project of Loper Bright and Kisor to cut back on the fictional presumption of implied delegation.

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

Justice Jackson?

JUSTICE JACKSON: And so you're reading 3553 to say that Congress wanted courts to consider the Commission's recommendation, is that right, I mean, in other words, and the recommendation comes in the form of the guidelines, calculated as the Commission would have them?

MR. DICK: Correct.

JUSTICE JACKSON: So the deference

here, the -- the binding nature of it is just in determining what the Commission's recommendation is. It's almost as if the Commission -- you know, I thought of this hypothetical, right? The Commission writes a letter to each judge in every sentencing circumstance and says: Here's our recommendation as to what you should do.

Instead of doing that, we just have a guidelines system where the judge is supposed to determine what the Commission's recommendation is, but there really isn't room for the judge to exercise their discretion. They're just trying to figure out what the Commission recommended, right?

MR. DICK: Exactly right. I think it's binding on what the Commission's advice means. It's not binding in the sense that courts have to follow it. That's exactly right.

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Page, rebuttal?

REBUTTAL ARGUMENT OF KEVIN JOEL PAGE
ON BEHALF OF THE PETITIONER

MR. PAGE: May it please the Court:

The most workable regime is one of no deference because it eliminates all threshold tests before courts are required to calculate the guidelines. It is -- it remains a statutory command of what is left of Booker to calculate the guidelines. And so the Court should simply instruct the district courts to do that without asking them to decide whether the commentary is in tension with that or, if so, how much tension.

It is also the case that if the Court were to scour the text of the Sentencing Reform Act, it will find no provision that states that -- that commentary or policy statements ought to bind the courts in the interpretation of the guidelines. And I do believe that -- that if the Court finds an express delegation of interpretive authority here, it will find them all over the place.

553(b) expressly authorizes the creation of interpretative rules. If there is an express delegation to make that bind -- to

make the commentary binding, why not those as well?

But I do want to -- to point out that I think, if the Court applies the limitations in Kisor to the commentary in the policy statements, that will actually solve many of the concerns that have been raised here today. It will resolve the -- one concern about disuniformity in the precedent because the -- the policy statements and the commentary will be available to resolve cases of grave ambiguity.

It will resolve the -- any concerns the Court may have about stare decisis because the Court wouldn't be doing anything in the sentencing context to move from Stinson to Kisor that it didn't do in the agency context to go from Seminole Rock to Kisor.

And if Williams pertains, it -- and I don't think a move to Kisor would undermine Williams in any way because, if Williams pertains to the interpretation of guidelines through policy statements, then there isn't any reason that Kisor wouldn't apply to that as well.

As to the concern about whether or not moving to Kisor would open the floodgates to a number of resentencings, first of all, there are only a few cases of -- of tension between commentary and -- and the text of a guideline that have actually been litigated in this case, so I don't think that we can say that -- that every defendant will have an opportunity to challenge their guideline -- that it has arisen in 2B1.1, it has arisen in -- in this case, and it has arisen in 4B1.2, and there has been one issue about the -- the -- the issue of what a dangerous weapon is, but there has not been a floodgate of people asserting, even in a world where Kisor might be thought to apply to the guidelines, that their guideline calculations are infirm.

And we can take, I think, my friend at his word and at his analysis that -- that Kisor would limit the amount of resentencing litigation that would happen or at least the amount of resentencings as well.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Dick, this Court appointed you to brief and argue this case as an amicus curiae in support of the judgment below. You have ably discharged that responsibility, for which we are grateful.

The case is submitted.

(Whereupon, at 11:58 a.m., the case was submitted.)

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