

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

2 (10:04 a.m.)

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

6 Mr. Page.

7 ORAL ARGUMENT OF KEVIN JOEL PAGE

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

9 I am pleased to take the Court's
10 questions.

11 JUSTICE THOMAS: What do you do with
12 Kisor?

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

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

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

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

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

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

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

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

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

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

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

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

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

3 So can you -- can you respond to that?

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

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

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

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

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

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

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

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

1 by --

2 JUSTICE KAVANAUGH: I'm sorry. Keep
3 going.

4 JUSTICE SOTOMAYOR: Well --

5 MR. PAGE: No, of course.

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

15 So, I guess, Stinson plus Booker
16 together suggests that we've already been down
17 this road, it's been that way for 30 years.
18 1B1.7 of the -- of the guidelines itself says
19 the commentary has the force of law. The
20 commentary to that says that.

21 So, given all that, why are we
22 reinventing the wheel when Stinson did this
23 30 -- 30-some years ago?

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

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

8 JUSTICE SOTOMAYOR: Why?

9 MR. PAGE: I'm sorry?

10 JUSTICE SOTOMAYOR: Counsel --

11 MR. PAGE: Yeah.

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

14 MR. PAGE: Well --

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

23 Why did Kisor upset that?

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

1 of the circuits that under the --

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

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

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

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

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

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

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

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

25 JUSTICE SOTOMAYOR: But that's not

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

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

13 It might mean capable --

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

16 MR. PAGE: What --

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

22 MR. PAGE: I --

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

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

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

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

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

18 MR. PAGE: So --

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

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

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

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

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

13 JUSTICE KAGAN: Do you think, Mr. --

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

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

20 MR. PAGE: The courts or the
21 Commission?

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

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

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

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

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

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

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

1 Booker.

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

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

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

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

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

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

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

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

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

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

21 MR. PAGE: I think Your Honor is
22 right.

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

1 to the guidelines when deciding whether to
2 commit a crime?

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

7 JUSTICE GORSUCH: Thank you.

8 JUSTICE JACKSON: Can I just --

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

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

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

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

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

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Justice Thomas?

15 Justice Alito?

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

25 How do you go about deciding what that

1 means?

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

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

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

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

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

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

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

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

13 JUSTICE ALITO: It has to be in a
14 guideline?

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

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

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

1 and because of the different procedure.

2 JUSTICE ALITO: Do they go through
3 notice and comment?

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

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

8 MR. PAGE: Typically, yes.

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

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

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

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

4 MR. PAGE: So --

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

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

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

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

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

4 JUSTICE ALITO: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Sotomayor?

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

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

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

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

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

1 of Williams's holding, correct?

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

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

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

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

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

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

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

1 either --

2 JUSTICE SOTOMAYOR: What would be
3 limited?

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

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

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

11 JUSTICE SOTOMAYOR: All right.

12 MR. PAGE: -- the calculation of
13 guidelines.

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

17 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

22 MR. PAGE: It does.

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

1 Commission?

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

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

14 MR. PAGE: Obviously, yes.

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

22 That's what the Commission can do,
23 correct?

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

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

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

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

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

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

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

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

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

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

18 Now one reason that we know this is
19 not a policy statement is, number one, they are
20 expressly distinguished from commentary in
21 3553(b)(1), and, second, because the Commission
22 has consistently distinguished between policy
23 statements and commentary.

24 JUSTICE KAGAN: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch?

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

5 MR. PAGE: Correct.

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

8 MR. PAGE: Correct, and in spite of
9 3553(b)(1).

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

14 MR. PAGE: Correct.

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

20 MR. PAGE: Well, I mean --

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

25 MR. PAGE: I think you would have to

1 find that there is a --

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

6 MR. PAGE: Correct.

7 JUSTICE GORSUCH: It would be a
8 pretty --

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

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

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

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

23 MR. PAGE: I think they would say it.

24 JUSTICE GORSUCH: Okay.

25 MR. PAGE: Right.

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

4 MR. PAGE: It -- it does.

5 JUSTICE GORSUCH: I'm looking at
6 3553(e), for example, just one example, that in
7 those circumstances, the sentence shall be
8 imposed in accordance with the guidelines and
9 policy statements. There it is.

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

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

16 MR. PAGE: Indeed.

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

20 MR. PAGE: Correct.

21 JUSTICE GORSUCH: Yeah. Thanks.

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh?

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

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

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

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

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

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

8 JUSTICE KAVANAUGH: Then, on
9 Congress's understanding, I guess, of -- of the
10 process, 1B1.7, as I mentioned earlier, since
11 1987 has specifically said commentary is to be
12 construed to have the same force as policy
13 statements.

14 What do you do with that?

15 MR. PAGE: So --

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

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

25 JUSTICE KAVANAUGH: But it gets the

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

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

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

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

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

1 the commentary before us here.

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

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

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

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

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

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

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

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

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

24 JUSTICE KAVANAUGH: Given Booker?

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

1 ultimate sentence. It still has determinate
2 legal consequences.

3 JUSTICE KAVANAUGH: Okay.

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

9 JUSTICE KAVANAUGH: Thank you.

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

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett?

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

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

25 MR. PAGE: So --

1 JUSTICE BARRETT: Stronger than 1 --
2 1B17 because that's a little bit equivocal. It
3 may give background. It could be reversible
4 error. So, if -- if that guideline were
5 amended to say something very definitive, what
6 would your response be?

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

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

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

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

25 JUSTICE BARRETT: Well, why is it so

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

6 Then what is the practical difference?

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

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

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

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

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

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

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

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

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

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

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

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

14 JUSTICE BARRETT: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Jackson?

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

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

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

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

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

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

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

1 system in the way that it is.

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

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

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

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

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

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

9 MR. PAGE: Correct.

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

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

21 MR. PAGE: So --

22 JUSTICE JACKSON: -- if we have that.

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

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

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

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

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

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

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

10 JUSTICE JACKSON: To interpret them
11 individually without --

12 MR. PAGE: -- to interpret them
13 correctly.

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

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

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

6 JUSTICE JACKSON: Thank you.

7 MR. PAGE: Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Mr. Feigin.

11 ORAL ARGUMENT OF ERIC J. FEIGIN

12 ON BEHALF OF THE RESPONDENT,

13 IN SUPPORT OF VACATUR

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

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

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

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

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

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

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

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

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

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

18 JUSTICE THOMAS: Yeah.

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

1 rules under Kisor to be.

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

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

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

24 You stand by that, right?

25 MR. FEIGIN: We do not think that the

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

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

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

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

17 MR. FEIGIN: So, Your Honor, first of
18 all, Stinson itself looks to both 3553(b) and
19 1B1.7. Beyond that, though, Your Honor, we
20 have, I think, express post-Stinson action from
21 Congress that acknowledges commentary and the
22 force it can have.

23 Number one, you have the PROTECT Act
24 and --

25 JUSTICE GORSUCH: No, I --

1 I understand -- I understand you wind up in a
2 similar place. But the way you get there is
3 entirely different. Amicus says that 994 and
4 3553 evince an express delegation for the
5 Commission to write binding -- binding
6 authority. You say no. Stinson -- Stinson is
7 an Auer case, a Seminole Rock case, and it's
8 through silence and -- and ambiguity that
9 deference is required. Totally -- totally
10 different rules.

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

15 I -- I will acknowledge it's --

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

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

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

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

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

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

1 expressly references commentary and the role
2 that it can play.

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

8 JUSTICE GORSUCH: Sure. It absolutely
9 could.

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

12 JUSTICE GORSUCH: It absolutely could.

13 MR. FEIGIN: Sorry.

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

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

21 MR. FEIGIN: Well --

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

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

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

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

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

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

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

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

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

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

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

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

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

15 Do you understand what I mean by this?

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

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

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

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

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

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

22 JUSTICE KAVANAUGH: Your argument
23 there is --

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

1 consequences of overruling Stinson? I'm told
2 that there were 66,000 defendants sentenced in
3 federal courts, federal district courts, in
4 2025. Do you have an estimate of how many of
5 those sentences relied on commentary and would
6 have to be done over?

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

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

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

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

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

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

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

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

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

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

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

10 MR. FEIGIN: Well --

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

25 MR. FEIGIN: Well --

1 JUSTICE GORSUCH: What do you say to
2 that?

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

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

18 JUSTICE KAGAN: Mr. Feigin?

19 MR. FEIGIN: As for the -- yes.

20 JUSTICE KAGAN: Sorry. I'm sorry.

21 MR. FEIGIN: No, Justice Kagan,
22 please.

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

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

11 JUSTICE KAGAN: I mean --

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

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

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

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

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

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

14 JUSTICE KAGAN: Yeah.

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

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

1 well, that change alone requires a
2 resentencing?

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

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

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

25 JUSTICE KAVANAUGH: To pick up on --

1 JUSTICE BARRETT: Mr. --

2 JUSTICE KAVANAUGH: Go ahead. Go
3 ahead.

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

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

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

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

24 I also want to make one other note --

25 JUSTICE BARRETT: Let me just -- let

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

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

13 If I might finish, Mr. Chief Justice?

14 CHIEF JUSTICE ROBERTS: Sure.

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

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

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Thomas, anything?

19 Justice Alito?

20 Justice Sotomayor?

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

24 MR. FEIGN: So --

25 JUSTICE SOTOMAYOR: What -- what's

1 that area of daylight?

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

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

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

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

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

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

4 JUSTICE SOTOMAYOR: So, for this --

5 MR. FEIGIN: -- a feedback loop there.

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

17 MR. FEIGIN: Well, let me --

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

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

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

1 be changing anything.

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

11 JUSTICE SOTOMAYOR: This --

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

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

17 MR. FEIGIN: And then --

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

25 Right now, courts just follow it and

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

3 MR. FEIGIN: So --

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

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

15 JUSTICE SOTOMAYOR: All right. Thank
16 you, counsel.

17 CHIEF JUSTICE ROBERTS: Justice Kagan?
18 Justice Gorsuch?

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

23 MR. FEIGIN: Where --

24 JUSTICE GORSUCH: Because there's
25 no --

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

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

5 MR. FEIGIN: -- Stinson --

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

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

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

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

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

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

9 JUSTICE GORSUCH: I agree with that.

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

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

25 JUSTICE GORSUCH: But you don't -- you

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

5 Now we see it in 3553(e), for example,
6 where we have an express direction, but we
7 don't see that in the rest of 3553(a) or in
8 994, which are the provisions before us. So we
9 have to have some background principle, some
10 substantive canon that does the work.

11 MR. FEIGIN: So, again --

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

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

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

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

8 CHIEF JUSTICE ROBERTS: Justice
9 Kavanaugh?

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

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

19 Is that your understanding?

20 MR. FEIGIN: Yes, Your Honor.

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

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

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

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

11 JUSTICE KAVANAUGH: Exactly. They say
12 the --

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

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

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

22 JUSTICE KAVANAUGH: Okay. Third --
23 third --

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

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

3 MR. FEIGIN: Yeah.

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

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

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

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

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

17 MR. FEIGIN: I think it reflects that
18 1B1.7 essentially means exactly what we viewed
19 it to -- we view it to mean and what Stinson
20 viewed it to mean, which is that commentary
21 does play an important role in the
22 interpretation of the guidelines.

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

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

3 JUSTICE KAVANAUGH: Last -- last
4 thing --

5 MR. FEIGIN: You otherwise reach the
6 correct result.

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

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

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

1 not yours, correct?

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

9 JUSTICE KAVANAUGH: Thank you.

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

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett?

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

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

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

1 MR. FEIGIN: I think it comes pretty
2 close, Your Honor, and I think Stinson largely
3 reads it that way. It mentions 1B1.7 several
4 times. Now it disregards the commentary to
5 1B1.7 at one point, but the text of 1B1.7 has
6 been consistent, it's been congressionally
7 reviewed multiple times.

8 And I do think that it is the kind of
9 express acknowledgment, first of all, that this
10 is the type of thing the Commission's going to
11 do and, second of all, the effect it's going to
12 have because, of course, the analogy that's --
13 the -- the direct link between Williams and
14 Stinson that Stinson draws is the -- on the
15 3742(f)(1) reversal for failure to correctly
16 apply the guidelines issue.

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

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

1 about that?

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

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

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

24 JUSTICE BARRETT: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

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

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

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

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

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

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

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

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

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

20 JUSTICE JACKSON: Reinterpreted
21 Seminole Rock?

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

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

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

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

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

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

1 MR. FEIGN: Well --

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

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

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

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

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

1 be a wrong way to interpret Stinson. But fine.

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

12 JUSTICE JACKSON: I understand.

13 MR. FEIGIN: But -- yeah.

14 JUSTICE JACKSON: Thank you.

15 MR. FEIGIN: Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 MR. FEIGIN: Thank you.

19 CHIEF JUSTICE ROBERTS: Mr. Dick.

20 ORAL ARGUMENT OF ANTHONY J. DICK,
21 COURT-APPOINTED AMICUS CURIAE

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

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

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

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

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

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

1 deference.

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

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

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

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

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

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

18 And I welcome the Court's questions.

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

21 (Laughter.)

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

24 (Laughter.)

25 JUSTICE THOMAS: Let's go back to what

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

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

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

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

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

20 JUSTICE THOMAS: What is --

21 MR. DICK: So judges --

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

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

1 promulgate a guideline for the enhancement.

2 And then the Commission has been given the
3 authority to interpret that in the first
4 instance through policy statements.

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

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

15 And then the second step is, okay, we
16 have authority for the Commission to interpret
17 the guideline. Now what we need to do at step
18 2 is to police whether the Commission has gone
19 outside the boundaries of that delegated
20 authority.

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

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

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

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

22 JUSTICE KAVANAUGH: The --

23 MR. DICK: -- apart from that.

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

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

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

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

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

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

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

5 MR. DICK: Right.

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

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

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

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

1 recommends a sentence within that range.

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

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

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

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

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

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

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

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

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

3 So, first of all, you've got Section
4 706, which is a very clear statutory command.

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

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

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

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

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

18 MR. DICK: Absolutely.

19 JUSTICE GORSUCH: Right? You --

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

1 situation may be a non-delegation problem.

2 But -- but put that to the side.

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

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

10 MR. DICK: Right.

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

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

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

1 different types of authoritative statements.

2 Then I would direct you to Section
3 995(b), which is the adjacent provision, which
4 refers to "the power of the Commission" to
5 "establish policy statements and guidelines."

6 JUSTICE GORSUCH: Yeah, it's --

7 MR. DICK: So --

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

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

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

1 against the backdrop of 706.

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

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

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

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

20 JUSTICE GORSUCH: What -- and what --

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

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

25 MR. DICK: Oh.

1 JUSTICE GORSUCH: -- advisory
2 guidelines?

3 MR. DICK: Not a problem at all.

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

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

12 JUSTICE GORSUCH: Yeah, but --

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

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

19 MR. DICK: Exactly.

20 JUSTICE KAVANAUGH: That they're --

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

25 If -- if the whole point of this is to

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

4 MR. DICK: Well --

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

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

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

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

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

6 MR. DICK: Correct.

7 JUSTICE JACKSON: Right.

8 CHIEF JUSTICE ROBERTS: Also --

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

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

13 MR. DICK: Mr. Chief Justice, please.

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

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

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

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

25 MR. DICK: Right. So I think the

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

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

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

25 And the answer is interpreting a

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 whether the Commission took something into
2 account.

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

9 And I think the -- the really
10 important thing about that is, when the -- when
11 the Sentencing Reform Act was first passed with
12 994(a) as the only authority, the Commission
13 used that authority to promulgate guidelines,
14 policy statements, and commentary, which, to
15 me, is very, very telling that it was relying
16 on that authority as it had been created to
17 issue commentary as a type of policy statement.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice Thomas?

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

1 able to interpret the statute differently?

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

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

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

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

17 MR. DICK: Absolutely, because
18 994(a)(2) gives the Commission authority to
19 interpret and apply guidelines but not
20 statutes. So that express delegation does not
21 extend to interpreting statutes.

22 CHIEF JUSTICE ROBERTS: Justice Alito?
23 Justice Sotomayor?
24 Justice Kagan?
25 Justice Gorsuch?

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

3 (Laughter.)

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

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

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

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

1 guidelines is Section 3741 -- excuse me,
2 3742(f)(1), which says that you can vacate a
3 sentence for incorrect application of the
4 guidelines, which is exactly the language used
5 in --

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

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

12 JUSTICE GORSUCH: Sure.

13 MR. DICK: So -- so the -- the
14 consideration requirement is not where the
15 force comes from. What the force comes from is
16 994(a)(1) and (a)(2), which authorizes the
17 agency to establish both guidelines and policy
18 statements.

19 JUSTICE GORSUCH: To promulgate.

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

22 JUSTICE GORSUCH: Sure.

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

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

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

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

8 MR. DICK: Right. So I don't think I
9 can do any better than what I've said, which is
10 990 --

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

13 MR. DICK: Thank you, Your Honor.

14 CHIEF JUSTICE ROBERTS: Justice
15 Kavanaugh?

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

20 MR. DICK: Absolutely.

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

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

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

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

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

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

18 Your advice on how to do that.

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

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

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

9 995(b), which refers to the power of
10 the Commission to establish, I think, is very,
11 very strong language about giving an actual
12 legal power to the Commission to establish an
13 interpretation with legal effect.

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

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

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

13 JUSTICE KAVANAUGH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Barrett?

16 Justice Jackson?

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

24 MR. DICK: Correct.

25 JUSTICE JACKSON: So the deference

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

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

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

21 JUSTICE JACKSON: Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Mr. Page, rebuttal?

25

1 REBUTTAL ARGUMENT OF KEVIN JOEL PAGE
2 ON BEHALF OF THE PETITIONER

3 MR. PAGE: May it please the Court:

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

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

23 553(b) expressly authorizes the
24 creation of interpretative rules. If there is
25 an express delegation to make that bind -- to

1 make the commentary binding, why not those as
2 well?

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

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

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

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

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

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

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

6 The case is submitted.

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

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