

**SUPREME COURT  
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X  
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. Why  
9 don't they just look at what the Commission  
10 meant in the guidelines and move on to the  
11 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 arguments 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 text of the  
20 statute alone and we look at the cues from the  
21 structure of 994, specifically the heightened  
22 procedural requirements of guidelines in  
23 preference to commentary, we can tell -- we can  
24 see a congressional intent that the sentencing  
25 range should be determined by --

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

3 JUSTICE SOTOMAYOR: Well --

4 MR. PAGE: No, of course.

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

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

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

23 MR. PAGE: Well, first of all, I don't  
24 think that we can say that -- that Congress or  
25 any other objective observer can -- could

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

7               JUSTICE SOTOMAYOR: Why?

8               MR. PAGE: I'm sorry?

9               JUSTICE SOTOMAYOR: Counsel --

10              MR. PAGE: Yeah.

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

13              MR. PAGE: Well --

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

22              Why did Kisor upset that?

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

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

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

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

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

25 The application note says -- makes it

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

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

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

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

24 JUSTICE SOTOMAYOR: But that's not  
25 what the guideline says. All I'm suggesting to

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

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

12            It might mean capable --

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

15            MR. PAGE: What --

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

21            MR. PAGE: I --

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

25            MR. PAGE: So the application note

1 does have some clarifying function, but  
2 anything that the Commission could do to  
3 clarify in the text of a commentary, it could  
4 do to --

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

8 MR. PAGE: Yes, I do believe it is.

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

16 MR. PAGE: So --

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

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

22 The first is that the courts can still  
23 use the -- the commentary as an interpretive  
24 aid as they would under Skidmore, which will --  
25 means that it will still have a sort of

1 anchoring effect and contain any disruption to  
2 the system.

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

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

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

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

18           MR. PAGE: The courts or the  
19 Commission?

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

22           MR. PAGE: Interpretive policy  
23 statements I do not believe carry binding  
24 deference any more than commentary. And that  
25 comes from, first of all, 3553(a)(4), which

1 says that the sentencing range is --

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

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

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

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

25 And there simply isn't -- there wasn't

1 a guideline that the policy statement was  
2 interpreting. So it's very difficult to see it  
3 as an interpretive policy concerning that.

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

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

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

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

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

24 MR. PAGE: Indeed. And it would have  
25 to require on silence to -- to create deference

1 in the criminal setting particularly.

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

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

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

18 MR. PAGE: I think Your Honor is  
19 right.

20 JUSTICE GORSUCH: And then -- and  
21 then, on terms of reliance, I mean, does any  
22 criminal in the country rely on the commentary  
23 of the guidelines when deciding whether to  
24 commit a crime?

25 MR. PAGE: No. I think the only

1     reliance interests are those of the Commission,  
2     and they can be easily dealt with by moving  
3     text from -- to the commentary.

4             JUSTICE GORSUCH: Thank you.

5             JUSTICE JACKSON: Can I just --

6             CHIEF JUSTICE ROBERTS: Thank you,  
7     counsel.

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

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

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

23            Perhaps the Court could distinguish  
24    agencies and statutes on that ground and say  
25    that for some reason, those principles do not

1     apply to regulations or agency -- agencies.  
2     But, if it were to distinguish an agency, it  
3     oughtn't distinguish the Sentencing Commission,  
4     which deals with particularly the sentencing  
5     realm, where there is a -- ought to be a strong  
6     expectation that judges will resolve those  
7     questions that determine the defendant's fate  
8     rather than defer to another actor.

9             CHIEF JUSTICE ROBERTS: Thank you,  
10    counsel.

11            Justice Thomas?

12            Justice Alito?

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

22            How do you go about deciding what that  
23    means?

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

1 use the text and structure of the other --

2 JUSTICE ALITO: Yeah, concretely.

3 Concretely. You have the term "large." What  
4 is large?

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

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

21 MR. PAGE: So I don't know that --  
22 that something that's just above the median  
23 would necessarily qualify, and so there  
24 would -- there could be potentially edge cases.  
25 And -- and -- and -- and --

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

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

10 JUSTICE ALITO: It has to be in a  
11 guideline?

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

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

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

24 JUSTICE ALITO: Do they go through  
25 notice and comment?

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

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

5           MR. PAGE: Typically, yes.

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

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

18          JUSTICE ALITO: One might wonder what  
19    practical difference the issue here makes.  
20    First of all, the guidelines are now simply  
21    advisory. Second, the district court here  
22    stated that "even if the guideline range was  
23    not calculated or applied correctly," it would  
24    have imposed the same sentence regardless of  
25    the applicable guideline range.

1 MR. PAGE: So --

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

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

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

20 MR. PAGE: I don't know that it thinks  
21 that they are lying, but I think that it may  
22 think that they have included a boilerplate  
23 statement in -- and that it may -- they may  
24 have over- -- underestimated the impact of the  
25 guidelines on their own thinking.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Sotomayor?

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

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

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

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

18 JUSTICE SOTOMAYOR: So a policy  
19 statement that operates the way this does,  
20 which talks about what something means, would  
21 have to -- we would have to overrule that part  
22 of Williams's holding, correct?

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

25 JUSTICE SOTOMAYOR: Williams said we

1     had -- district courts had to follow policy  
2     statements in all circumstances to calculate  
3     the guidelines. That's how I read Williams's  
4     holding.

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

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

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

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

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

23            JUSTICE SOTOMAYOR: What would be  
24     limited?

25            MR. PAGE: The holding of Williams

1 would be limited to the --

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

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

7 JUSTICE SOTOMAYOR: All right.

8 MR. PAGE: -- the calculation of  
9 guidelines.

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

13 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

18 MR. PAGE: It does.

19 JUSTICE KAGAN: So we're not talking  
20 about implied or implicit delegations. We're  
21 talking about an express delegation to the  
22 Commission?

23 MR. PAGE: In my view, we are talking  
24 about an implied delegation because we are  
25 talking about an implied delegation to create

1 binding policy statements, whereas what -- what  
2 the -- what is expressly delegated is the --  
3 the ability to create policy statements of some  
4 kind.

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

10 MR. PAGE: Obviously, yes.

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

18 That's what the Commission can do,  
19 correct?

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

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

1       those, correct?

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

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

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

19              MR. PAGE:  Well, so there are policy  
20      statements that Congress has specifically  
21      stated that courts must follow.  Those are in  
22      3582(c)(1), (c)(2), 3583(d)(3), right?  There  
23      is no general statement that courts must follow  
24      policy statements.

25              JUSTICE KAGAN:  No, there's not a

1 general statement, but there's an express  
2 authorization to create these policy  
3 statements.

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

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

14 Now one reason that we know this is  
15 not a policy statement is, number one, they are  
16 expressly distinguished from commentary in  
17 3553(b)(1), and, second, because the Commission  
18 has consistently distinguished between policy  
19 statements and commentary.

20 JUSTICE KAGAN: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Gorsuch?

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

1 MR. PAGE: Correct.

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

4 MR. PAGE: Correct, and in spite of  
5 3553(b)(1).

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

10 MR. PAGE: Correct.

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

16 MR. PAGE: Well, I mean --

17 JUSTICE GORSUCH: Because doesn't  
18 every agency have the power to issue -- most  
19 agencies have the power to issue interpretive  
20 rules?

21 MR. PAGE: I think you would have to  
22 find that there is a --

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

1 consider them.

2 MR. PAGE: Correct.

3 JUSTICE GORSUCH: It would be a  
4 pretty --

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

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

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

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

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

20 JUSTICE GORSUCH: Okay.

21 MR. PAGE: Right.

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

25 MR. PAGE: It -- it does.

1 JUSTICE GORSUCH: I'm looking at  
2 3553(e), for example, just one example, that in  
3 those circumstances, the sentence shall be  
4 imposed in accordance with the guidelines and  
5 policy statements. There it is.

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

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

12 MR. PAGE: Indeed.

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

16 MR. PAGE: Correct.

17 JUSTICE GORSUCH: Yeah. Thanks.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Kavanaugh?

20 JUSTICE KAVANAUGH: On Justice Kagan's  
21 question about policy statements versus the  
22 commentary, I'd be interested in what you do  
23 with 994(a)(2), where it says policy statements  
24 are regarding application of the guidelines and  
25 the commentary is typically labeled application

1 notes.

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

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

19 Now, whether the -- the Commission  
20 intended to say that policy statements -- that  
21 commentary was a policy statement because it  
22 used the term "application notes," to me, that  
23 doesn't quite follow because they also labeled  
24 it commentary, and the statute itself indicates  
25 in 3553(b)(1) that those are specific. They

1     also attach commentary to policy statements,  
2     which would be strange -- a strange thing to do  
3     if they were the same.

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

10            What do you do with that?

11            MR. PAGE: So --

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

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

21            JUSTICE KAVANAUGH: But it gets the  
22     guideline amendments each year, and the House  
23     and Senate Judiciary Committees get that, and I  
24     think its understanding would -- everyone's  
25     understanding since 1987 was confirmed by

1 Williams and Stinson, was that those  
2 policies -- those commentary is -- has the  
3 force of policy statements.

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

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

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

19 And then the next page, 43, Stinson  
20 says, our holding in Williams dealing with  
21 policy statements applies with equal force to  
22 the commentary before us here.

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

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

7           I think what it meant to say, what it  
8     was saying when it said the meaning of the  
9     guidelines is the outcome dictated by the  
10    Guidelines Manual.

11           And it was speaking about that in the  
12    context -- in a very different sentencing  
13    system, where the Guidelines Manual dictated a  
14    particular result and it wasn't talking about a  
15    provision that -- that changes the meaning of a  
16    guideline.

17           JUSTICE KAVANAUGH: Last one. Justice  
18    Gorsuch's good questions about Loper Bright and  
19    what's binding. I mean, isn't Booker a  
20    game-changer on that in the sense that whatever  
21    you come up with as a district judge in terms  
22    of following the guidelines, following the  
23    policy statements, following the commentary, is  
24    then only advisory and the district judge then  
25    can determine whether to vary up or down.

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

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

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

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

21           JUSTICE KAVANAUGH: Given Booker?

22           MR. PAGE: It's not binding as to the  
23    ultimate sentence. It still has determinate  
24    legal consequences. It states what -- what  
25    courts must do to explain the sentence. It

1 affects the standard. It is reviewed de novo  
2 by a court, and a defendant can -- and a court  
3 can be reversed for failing --

4 JUSTICE KAVANAUGH: Thank you.

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

7 CHIEF JUSTICE ROBERTS: Justice  
8 Barrett?

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

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

20 MR. PAGE: So --

21 JUSTICE BARRETT: Stronger than 1 --  
22 1B17 because that's a little bit equivocal. It  
23 may give background. It could be reversible  
24 error. So, if -- if that guideline were  
25 amended to say something very definitive, what

1 would your response be?

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

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

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

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

20 JUSTICE BARRETT: Well, why is it so  
21 important to you if, as a practical matter, the  
22 commentary goes through the same process as the  
23 guidelines do, goes through notice and comment,  
24 Justice Alito asked you about this, and then  
25 goes to Congress, just like the guidelines.

1           Then what is the practical difference?

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

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

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

17           JUSTICE BARRETT: Why do you think the  
18 Commission -- is it your sense that the  
19 Commission, by calling this commentary, is  
20 somehow pulling a fast one, getting things into  
21 the commentary that it might not be able to put  
22 into the guideline itself?

23           MR. PAGE: So the Commission has been  
24 staffed by conscientious public servants who  
25 are conscientious of their role, and they have

1 not attempted in general to -- to -- to  
2 circumvent anything.

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

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

17 So is the idea that if Stinson goes,  
18 probation officers are then interpreting the  
19 guidelines and can't treat the -- you know, de  
20 novo themselves and can't treat the application  
21 notes as -- you know, or give deference to the  
22 application notes?

23 MR. PAGE: So, I mean, the application  
24 notes will still be available as -- as an  
25 interpretive aid. It's not that anybody has to

1 cover their eyes when they are interpreting a  
2 guideline.

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

9 JUSTICE BARRETT: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Jackson?

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

17 I mean, isn't the entire way the  
18 sentencing system is structured that the  
19 Commission forms its guidelines, commentary,  
20 policy statements, or whatever, and it submits  
21 it, the whole package, omnibus, to Congress,  
22 who then, if they don't do anything, it becomes  
23 the binding "law," pre-Booker law, that we're  
24 talking about?

25 So it seems odd that we would even be

1     thinking that there might be a situation in  
2     which the Commission is smuggling in something  
3     in commentary because that's really not the way  
4     this works.

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

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

16            JUSTICE JACKSON:  No, I understand,  
17    but you're -- you're sort of dancing on the  
18    head of a pin, I think, because Congress gave  
19    the Commission this authority from the  
20    beginning, and the Commission structured the  
21    system in the way that it is.

22            Congress mentioned these things in the  
23    legislation but gave the Commission the ability  
24    to set up the scheme.  And the Commission  
25    decided, we're going to call this part

1 guidelines, we're going to save the  
2 commentaries to help you apply those  
3 guidelines, and then we'll have these policy  
4 statements. So I -- I just worry about your  
5 taking so much stock in these different  
6 categories.

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

19           So it's a little troubling that you're  
20 now suggesting that the deference  
21 determinations and limitations that exist  
22 outside of this world should be imported in  
23 this way.

24           MR. PAGE: Well, they were imported by  
25 Seminole Rock, right? And so the --

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

4 MR. PAGE: Correct.

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

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

16 MR. PAGE: So --

17 JUSTICE JACKSON: -- if we have that.

18 MR. PAGE: -- in -- Booker changed the  
19 ultimate legal force of a guideline to the  
20 point -- to the extent that a -- a defendant no  
21 longer -- I mean a court no longer has to  
22 sentence within a range, barring certain  
23 circumstances.

24 JUSTICE JACKSON: I understand, but  
25 the point of the guideline was to establish a

1 baseline. Similarly situated defendants were  
2 going to be treated similarly under the  
3 guidelines system because the Congress said we  
4 don't want, you know, judges exercising their  
5 discretion in this way.

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

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

21 JUSTICE JACKSON: And why do you think  
22 that judges have that discretion? That's my  
23 point. Why do you think that judges --  
24 Congress intended for judges to have the  
25 discretion to interpret the guidelines

1       inconsistently when they are calculating them?

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

5               JUSTICE JACKSON: To interpret them  
6       individually without --

7               MR. PAGE: -- to interpret them  
8       correctly.

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

16              MR. PAGE: Congress had a particular  
17       mechanism in mind to contain differing opinions  
18       of the guidelines, and that is 994(o), and that  
19       is to have yearly amendment cycles in which  
20       they are expressly commanded to review the  
21       input from different stakeholders and the  
22       decisions of the -- the courts in order to  
23       determine whether there is disuniformity and  
24       then to resolve that through 994(o). This  
25       Court recognized that in Braxton.

1 JUSTICE JACKSON: Thank you.

2 MR. PAGE: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Mr. Feigin.

6 ORAL ARGUMENT OF ERIC J. FEIGIN

7 ON BEHALF OF THE RESPONDENT,

8 IN SUPPORT OF VACATUR

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

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

21 That said, I don't want to overstate  
22 the difference between our position and the  
23 position of the amicus here. I -- we believe  
24 that even under Kisor, the guidelines are going  
25 to continue to be informed and interpreted in

1 most instances by the commentary where there is  
2 commentary.

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

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

18 That would be a massive upheaval that  
19 would probably cause some kind of revision to  
20 the guidelines that, of course, wouldn't solve  
21 all the retroactive problems with the cases  
22 that are still in the system. And there's no  
23 point. It makes all the sense in the world,  
24 when the Commission is reasonably saying what  
25 the Commission is trying to say, to listen to

1 the Commission. And that's exactly where our  
2 Goldilocks position here lands.

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

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

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

13 JUSTICE THOMAS: Yeah.

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

22 As between our position and the  
23 amicus's position, we also don't think that it  
24 makes a difference in the sense that I don't  
25 think that it would mean that the commentary,

1     which we acknowledge is a different species of  
2     promulgation from an actual -- actual guideline  
3     text or -- or even a policy statement, we don't  
4     think that it would affect the amount of  
5     deference that commentary should receive.

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

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

19            You stand by that, right?

20            MR. FEIGIN:  We do not think that the  
21     commentary as it's been promulgated by the  
22     Commission can either be viewed right now as a  
23     policy statement or as a guideline.  That's  
24     correct.

25            JUSTICE GORSUCH:  Nor do you argue

1     that the statutes before us command express  
2     delegation to binding views from the -- from  
3     the Commission. I mean, you rejected that.  
4     You -- you say that Stinson is premised on  
5     Seminole Rock, which is a theory of implicit  
6     delegation through silence, not explicit  
7     delegation through 994, for example.

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

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

12            MR. FEIGIN: So, Your Honor, first of  
13     all, Stinson itself looks to both 3553(b) and  
14     1B1.7. Beyond that, though, Your Honor, we  
15     have, I think, express post-Stinson action from  
16     Congress that acknowledges commentary and the  
17     force it can have.

18            Number one, you have the PROTECT Act  
19     and --

20            JUSTICE GORSUCH: No, I understand --  
21     I understand you wind up in a similar place.  
22     But the way you get there is entirely  
23     different. Amicus says that 994 and 3553  
24     evince an express delegation for the Commission  
25     to write binding -- binding authority. You say

1 no. Stinson -- Stinson is an Auer case, a  
2 Seminole Rock case, and it's through silence  
3 and -- and ambiguity that deference is  
4 required, totally -- totally different rules.

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

9 I -- I will acknowledge it's --

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

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

21 MR. FEIGIN: Well, Your Honor, I think  
22 the particular situation that we have here is  
23 different. First of all, as I was just saying,  
24 I think at least as we look at it today, even  
25 if you think Stinson was incorrect in the first

1 instance to interpret the Sentencing Reform Act  
2 to adopt the measure of deference from Seminole  
3 Rock and -- or -- or -- or simply even in  
4 thinking commentary is a thing the Commission  
5 can do, we have 40 years of practice and then  
6 Congress in 2002 in the PROTECT Act itself  
7 modifying commentary to make sure that it's  
8 consistent with the guidelines in the --

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

15 MR. FEIGIN: Your Honor, so I think  
16 one thing that the Commission is certainly  
17 entitled to do under (a)(1) is to promulgate a  
18 guideline. They promulgated -- one of the  
19 guidelines they promulgated is 1B1.7, which  
20 expressly references commentary and the role  
21 that it can play.

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

1 weight to commentary.

2 JUSTICE GORSUCH: Sure. It absolutely  
3 could.

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

6 JUSTICE GORSUCH: It absolutely could.

7 MR. FEIGIN: Sorry.

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

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

15 MR. FEIGIN: Well --

16 JUSTICE GORSUCH: And let me -- let me  
17 just spin it out a little bit further. And why  
18 bother? I mean, Petitioner acknowledged that  
19 as a practice, the Commission does put its --  
20 much of its commentary through notice and  
21 comment, but it doesn't have to. It doesn't  
22 even have to give it to Congress.

23 What kind of incentive structure would  
24 we create by saying: Hey, you can put binding  
25 things over here, that you don't have to do any

1 of the protective things the guidelines are  
2 associated with? And then just put the cherry  
3 on top.

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

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

14 And then the guidelines, the question  
15 of whether they're binding is whether they're  
16 binding on federal sentencing courts in the  
17 ranges of sentencings that they can set. You  
18 could see that the guidelines themselves might  
19 not be binding on sentencing courts in that  
20 context, and that's what the Court held in  
21 Booker.

22 But that doesn't say that you couldn't  
23 have commentary that's binding on the  
24 interpretation of the guidelines themselves  
25 while they remain advisory. And I think that's

1 exactly the regime that we've always had for 40  
2 years. The guidelines --

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

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

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

20 One of the things I'm worried about is  
21 the statistics and the data collection function  
22 of the Commission because, right now, the  
23 Commission uses the offense level as a proxy  
24 for understanding the seriousness of an  
25 offense, and it runs all these calculations

1 based on the offense level, assuming we have a  
2 consistent determination of offense level  
3 across similarly situated defendants.

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

9 Do you understand what I mean by this?

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

17 And Congress has recognized that  
18 interlinked structure when it amends common --  
19 guidelines directly, it sometimes -- it amends  
20 the commentary. It did that in the PROTECT Act  
21 in 2002.

22 And then we have a couple examples in  
23 our brief, the Artists Rights Act and the Stop  
24 Infringement Act, in which Congress directly  
25 amends -- sorry, doesn't directly amend, but it

1 directly instructs the Commission to consider  
2 changes to commentary that we have considered  
3 directly interpretive commentary.

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

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

16 JUSTICE KAVANAUGH: Your argument  
17 there --

18 JUSTICE ALITO: Mr. -- Mr. Feigin,  
19 what -- what would be the practical  
20 consequences of overruling Stinson? I'm told  
21 that there were 66,000 defendants sentenced in  
22 federal courts, federal district courts, in  
23 2025. Do you have an estimate of how many of  
24 those sentences relied on commentary and would  
25 have to be done over?

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

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

18          If you look at, for example, notes 3  
19   and 4, they're about jointly undertaken  
20   activity, and that's defined as the -- the  
21   conduct that a defendant is accountable for is  
22   defined in the text as conduct that's in the  
23   scope of the joint activity, that's in  
24   furtherance of it, and that it was reasonably  
25   foreseeable.

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

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

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

11 MR. FEIGIN: So, Your Honor, I think  
12 we'd argue that in a lot of those cases, the  
13 courts reached the correct result  
14 notwithstanding having referenced the  
15 commentary.

16 But I think -- I -- I have no reason  
17 to disagree with that estimate insofar as it  
18 would --

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

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

23 JUSTICE GORSUCH: -- you didn't make a  
24 floodgates, the-end-of-the-world argument  
25 anywhere in your briefs. And we all agree that

1 after Edwards versus Vannoy, there's no habeas  
2 review for constitutional rules of criminal  
3 procedure. I don't know why there would be  
4 here. And --

5 MR. FEIGIN: Well --

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

20 MR. FEIGIN: Well --

21 JUSTICE GORSUCH: What do you say to  
22 that?

23 MR. FEIGIN: -- Your Honor, everything  
24 you pointed out is an ameliorative measure.  
25 But if you have 66,000 sentencings a year,

1 under Peugh they all have to apply the old  
2 guidelines that were in effect at the time the  
3 defendant committed his offense. And because  
4 of Peugh, any changes that aren't in a  
5 defendant's favor can't be retroactive to those  
6 particular defendants.

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

13 JUSTICE KAGAN: Mr. Feigin?

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

15 JUSTICE KAGAN: Sorry. I'm sorry.

16 MR. FEIGIN: No, Justice Kagan,  
17 please.

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

21 MR. FEIGIN: I think that would be a  
22 very interesting question, Your Honor, on which  
23 we haven't taken a position here, but I think  
24 there is an argument that Kisor would apply  
25 there at least insofar as we think it affects

1 the commentary in that I -- I think a  
2 legitimate question would arise whether, even  
3 policy statements can override unambiguous  
4 guideline text or do something that would be  
5 unreasonable --

6 JUSTICE KAGAN: I mean --

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

9 JUSTICE KAGAN: -- I read Stinson.

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

18 MR. FEIGIN: Yeah, insofar as Stinson  
19 continues going on after the Williams analogy,  
20 we've kind of taken Stinson to be explaining  
21 the particular deference to the commenter.

22 I do think there's an argument, as you  
23 just pointed out, that because the Court starts  
24 by comparing this to Williams, that whatever  
25 result it reached for the commentary would also

1 be the same level of deference for policy  
2 statements.

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

8 JUSTICE KAGAN: Yeah.

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

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

22 MR. FEIGIN: Well, I think there's a  
23 particular -- I think -- I don't know that  
24 that's going -- I mean, it's certainly not  
25 going to be enough on collateral review. I do

1 think we'll see more arguments about commentary  
2 to the guidelines. Certainly we have in -- in  
3 some of the circuits that have adopted the  
4 Kisor approach.

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

15 I mean, it still continues and there  
16 are some pockets of it, but the Commission is  
17 focused on some of the particularly difficult  
18 areas by moving them into guidelines.

19 JUSTICE KAVANAUGH: Pick up on --

20 JUSTICE BARRETT: Mr. --

21 JUSTICE KAVANAUGH: Go ahead. Go  
22 ahead.

23 JUSTICE BARRETT: I was just going to  
24 ask you, how far you understand Stinson  
25 deference to go? If a court really thought

1     that commentary to a guideline was flatly  
2     inconsistent with the guideline, do you  
3     understand Stinson to still require the Court  
4     to follow the commentary?

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

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

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

18            I also want to make one other note --

19            JUSTICE BARRETT:  Let me just -- let  
20    me ask you about that.  So if you think Kisor  
21    explains what Stinson has always meant because  
22    Kisor rejects this caricature even of  
23    Auer/Seminole Rock deference, why are you  
24    arguing that we need to say that Kisor  
25    deference applies here in a way that would

1     modify Stinson? Are you saying that this is  
2     what Stinson has always required or are you  
3     saying that Kisor somehow modified Stinson?

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

7             If I might finish, Mr. Chief Justice?

8             CHIEF JUSTICE ROBERTS: Sure.

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

20            We're simply saying that the latter  
21    approach is correct. We've been saying that  
22    since Kisor was issued. And, again, I don't  
23    think that's going to change too much in actual  
24    practice, but it is just to the extent there is  
25    a little bit of daylight there with unambiguous

1 guidelines -- you can see a little bit of that  
2 in the decision below -- or reasonable  
3 interpretations, even if ambiguity and what is  
4 controlling in those circumstances, that's  
5 where we think there might be a little bit of  
6 daylight there. And we're just urging the  
7 position that's most faithful to this Court's  
8 precedents.

9 But, of course, we have a strong  
10 interest in consistency.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 Justice Thomas, anything?

14 Justice Alito?

15 Justice Sotomayor?

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

19 MR. FEIGN: So --

20 JUSTICE SOTOMAYOR: What's that area  
21 of daylight?

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

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

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

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

16 As it happens, under the Sentencing  
17 Reform Act and for all the reasons we explain  
18 in our brief, the limits on Kisor deference are  
19 generally going to be satisfied in most cases  
20 involving guidelines commentary, because the  
21 commentary and the guidelines are so  
22 interlinked that the concept of ambiguity is  
23 kind of --

24 JUSTICE SOTOMAYOR: So, for this --

25 MR. FEIGIN: -- in a little bit of a

1 feedback loop there.

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

13 MR. FEIGIN: Well, let me --

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

18 MR. FEIGIN: Well, let me say three  
19 quick things to that, Your Honor. First, I  
20 don't interpret Kisor, which itself was decided  
21 on stare decisis grounds, to be changing  
22 anything.

23 Second, we -- this isn't -- I don't  
24 think this is going to make a huge difference  
25 because the guidelines, given that they're

1 considered judgments that often go through  
2 notice and comment, and are exercises the  
3 agency's expertise in this interlinked area  
4 where they're meant to function, to define some  
5 of the guidelines' text and to explain it, is  
6 going to produce --

7 JUSTICE SOTOMAYOR: This is --

8 MR. FEIGIN: -- different results --

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

12 MR. FEIGIN: And then --

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

20 Right now courts just follow it, and  
21 then choose, if there is an argument about a  
22 meaning in the guideline to depart.

23 MR. FEIGIN: So --

24 JUSTICE SOTOMAYOR: They don't go  
25 through this exercise.

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

11           JUSTICE SOTOMAYOR: All right. Thank  
12    you, counsel.

13           CHIEF JUSTICE ROBERTS: Justice Kagan?  
14           Justice Gorsuch?

15           JUSTICE GORSUCH: Just curious where  
16    you think Kisor and Stinson deference would  
17    come from? Is it a substantive canon of  
18    interpretation?

19           MR. FEIGIN: Where --

20           JUSTICE GORSUCH: Because --

21           MR. FEIGIN: Where Kisor and -- sorry  
22    --

23           JUSTICE GORSUCH: -- where --

24           MR. FEIGIN: -- Stinson --

25           JUSTICE GORSUCH: Yeah. There is no

1 explicit direction that would carve this out of  
2 Loper Bright from Congress. Congress can  
3 sometimes say thou shalt defer to the  
4 interpretations. Didn't do that here. Said  
5 consider them. So we don't have a -- an  
6 express delegation.

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

10 MR. FEIGIN: The presumption of  
11 deference in particular in the sentencing  
12 guidelines, I think, came from the fact that  
13 the Sentencing Reform Act was adopted against  
14 the backdrop of Seminole Rock and then Stinson  
15 --

16 JUSTICE GORSUCH: No, I understand. I  
17 understand doctrinally, but I'm asking you  
18 where does that doctrine -- where is it  
19 grounded on? Normally when we have a  
20 substantive interpretation putting a thumb on  
21 the scale, as opposed to a linguistic canon, we  
22 ground that in the Constitution, most  
23 frequently, or in long-standing understandings  
24 about congressional practice, maybe, but I  
25 don't know where that is here.

1           MR. FEIGIN: Well, I think it's kind  
2   of a unique animal and Your Honor, I think that  
3   --

4           JUSTICE GORSUCH: I agree with that.

5           MR. FEIGIN: It's because the Court  
6   has said so. The Court looks to Justice  
7   Scalia's unanimous opinion for the Court in  
8   Braxton against United States, and this is at 3  
9   -- page 348.

10           What Justice Scalia says is that even  
11   though, like, Congress or regulatory agency can  
12   issue an amendment, generally the Court thinks  
13   it's primarily and initially its own task to  
14   interpret the law but that it thinks the --  
15   then he goes on to say Sentencing Reform Act,  
16   however, we think, adopts a different approach.

17           And that is why the court  
18   doesn't address --

19           JUSTICE GORSUCH: You don't -- rest on  
20   that. You don't point us to anything in the  
21   statute, 994 or 3553, that does the kind of  
22   work that we would expect Congress to do.

23           Now we see it in 3553(e), for example,  
24   where we have an express direction, but we  
25   don't see that in the rest of 3553(a) or in

1 994, which are the provisions before us. So we  
2 have to have some background principle, some  
3 substantive canon that does the work.

4 MR. FEIGIN: Again --

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

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

17 And it was operating against the  
18 backdrop of not only as I just mentioned,  
19 Braxton and I think the important statement  
20 that the Court makes at page 348 but also the  
21 Court's own decisions, obviously, in Stinson  
22 and then a case like Buford in 2001 that makes  
23 clear that commentary is a way that the agency  
24 -- that the Commission can change the  
25 interpretation of a guideline.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Kavanaugh?

3 JUSTICE KAVANAUGH: Tick through a  
4 couple things quickly, if I can.

5 Justice Barrett raised the question  
6 about what if the commentary's inconsistent  
7 with the guideline. And I read Stinson on 43,  
8 I just want to make sure this is consistent  
9 with your answer, to say in those circumstances  
10 you go with the guideline when there is a flat  
11 inconsistency. Is that your understanding?

12 MR. FEIGIN: Yes, Your Honor.

13 JUSTICE KAVANAUGH: Justice Kagan  
14 asked about Stinson, the Williams piece of  
15 Stinson and then they go through the different  
16 potential analogies. When they come to  
17 Seminole Rock, this goes to your syllogism at  
18 the beginning, the Court cautions at the  
19 beginning that the analogy is not precise,  
20 which suggests that you don't follow it for all  
21 it's worth.

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

24 MR. FEIGIN: So the Court, I think,  
25 explains that what it means by not precise is

1     that the guidelines go through congressional  
2     review whereas at that time --

3             JUSTICE KAVANAUGH: Exactly. And they  
4     say --

5             MR. FEIGIN: Roles did not.

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

11            MR. FEIGIN: Yeah. I think the Court  
12    acknowledges that it's not a perfect analogy.  
13    So what we're working with here isn't Seminole  
14    Rock.

15            JUSTICE KAVANAUGH: That is good  
16    enough for that one. The third one, Congress,  
17    you mentioned that Congress has amended the  
18    commentary directly a few times.

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

21            JUSTICE KAVANAUGH: That's true that's  
22    all I need.

23            MR. FEIGIN: -- that I misspoke  
24    briefly as to the two acts I mentioned beyond  
25    the protect act.

1 JUSTICE KAVANAUGH: Right. What does  
2 that reflect about Congress's understanding of  
3 1(b)(1.7), if anything?

4 MR. FEIGIN: I think it reflects  
5 1(b)(1.7) essentially means exactly what we  
6 viewed it to -- we view it to mean and what  
7 Stinson viewed it to mean, which is that  
8 commentary does play an important role in the  
9 interpretation of the guidelines.

10 Now, I acknowledge, Justice Barrett,  
11 it says that it could result in an error, but I  
12 think that's just cabining that not every case  
13 of failure to follow commentary is going to  
14 result in an error.

15 JUSTICE KAVANAUGH: Last -- last thing  
16 --

17 MR. FEIGIN: They otherwise reach the  
18 correct result.

19 JUSTICE KAVANAUGH: Last thing about  
20 stability of the system, which Justice Alito  
21 has raised. And, you know, I came on the  
22 federal judiciary in 2006, a year after Booker,  
23 and years and years of -- of trying to figure  
24 out how to apply that. I worry that if we  
25 change here, we're going to have years and

1 years of trying to figure out how much weight  
2 you give to particular commentary and different  
3 courts going different ways.

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

9 So why isn't amicus's approach in  
10 terms of stability, which may not be the  
11 overriding issue, but if it is an issue,  
12 stability is better served by amicus's  
13 position, not yours, correct?

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

21 JUSTICE KAVANAUGH: Thank you.

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

24 CHIEF JUSTICE ROBERTS: Justice  
25 Barrett?

1 JUSTICE BARRETT: Mr. Feigin, I just  
2 want to clarify your view of 1(b)(1.7). Okay.  
3 So you said you think it's just sort of  
4 nomenclature that could be reversed on appeal,  
5 if you -- if you don't follow the commentary to  
6 a guideline.

7 Do you understand 1(b)(1.7) to be the  
8 kind of express instruction from the Commission  
9 that I posited with Mr. Page saying, like, yes,  
10 this is a guideline that says you have to  
11 follow the commentary or do you read it to mean  
12 not that strong?

13 MR. FEIGIN: I think it comes pretty  
14 close, Your Honor, and I think Stinson largely  
15 reads it that way and mentions 1(b)(1.7)  
16 several times. And now it disregards the  
17 commentary to 1(b)(1.7) at one point, but the  
18 text of 1(b)(1.7) has been consistent, it's  
19 been Congressionally reviewed multiple times.

20 And I do think that it is the kind of  
21 express acknowledgment, first of all, that this  
22 is the type of thing the Commission's going to  
23 do and, second of all, the effect it's going to  
24 have, because, of course, the analogy that's --  
25 the -- the direct link between Williams and

1 Stinson that Stinson draws is the -- on the  
2 3742(f)(1) reversal for failure to correctly  
3 apply the guidelines issue.

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

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

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

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

22 And then, if we follow the Chenery  
23 Principle that an agency can't be kind of  
24 understood after the fact to do something that  
25 it didn't understand itself to be doing in the

1 first instance, I don't think it's fair to say  
2 that when the Commission is issuing something  
3 that it labels as commentary and not a policy  
4 statement -- and I do agree with my friend  
5 that, you know, the fact that you can attach  
6 commentary to a policy statement makes it  
7 particularly strange to think that it is a  
8 policy statement -- that the Commission was  
9 actually issuing policy statements all the  
10 time.

11 JUSTICE BARRETT: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Jackson?

14 JUSTICE JACKSON: So isn't your answer  
15 to Justice Gorsuch's questions about whether --  
16 where the authority or delegation regarding the  
17 deference come from the Sentencing Reform Act?  
18 I mean, I thought the Sentencing Reform Act  
19 expressly created a binding system that removed  
20 sentencing authority from judges, their  
21 discretion in that regard, and gave it to the  
22 Commission. And at the time it was created, it  
23 was binding. Judges didn't -- they had to  
24 defer to the Commission's determinations  
25 initially.

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

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

9           JUSTICE JACKSON: And also, general  
10   policy statements regarding application of the  
11   guidelines or any other aspect of the sentence  
12   or sentencing implementation. And I appreciate  
13   that there, afterwards, were developed  
14   something that the Commission called a "policy  
15   statement" as opposed to commentary describing  
16   the guidelines, but isn't Congress giving the  
17   Commission the authority to do all of that in  
18   the context of setting up a guidelines system?

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

25          JUSTICE JACKSON: So you're just here

1     because Kisor made a change and because Stinson  
2     referenced Kisor -- I mean referenced Seminole  
3     Rock as an analogy?

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

7             JUSTICE JACKSON: Reinterpreted  
8     Seminole Rock?

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

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

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

23            I would say that one easy way to say  
24    that without really kind of discarding Kisor  
25    altogether would just be the approach that's

1 suggested in our brief, which essentially says  
2 that although Kisor applies, it's basically  
3 going to shake out the way that people have  
4 always understood it essentially to shake out.

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

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

13 MR. FEIGN: Well --

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

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

21 Commentary does -- although, by  
22 practice, it's subjected to notice and comment,  
23 goes through congressional review, gets the  
24 vote of four commissioners, it doesn't have to.  
25 And so the guideline text needs to be there as

1 an anchor, and the commentary is -- has to be  
2 anchored to the guideline text.

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

10 JUSTICE JACKSON: Which would be  
11 wrong -- in your -- in your dialogue with  
12 Justice Barrett, we determined that that would  
13 be a wrong way to interpret Stinson. But fine.

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

24 JUSTICE JACKSON: I understand.

25 MR. FEIGIN: But -- yeah.

1 JUSTICE JACKSON: Thank you.

2 MR. FEIGIN: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 MR. FEIGIN: Thank you.

6 CHIEF JUSTICE ROBERTS: Mr. Dick.

7 ORAL ARGUMENT OF ANTHONY J. DICK,  
8 COURT-APPOINTED AMICUS CURIAE

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

11 It is emphatically the province of the  
12 judiciary to say what the law is, but the  
13 advisory sentencing guidelines are not the law.  
14 They are advisory. As a result, when  
15 interpreting the guidelines, the question is  
16 not what the law is but, rather, what is the  
17 non-binding advice that the Commission is  
18 offering about what type of sentence should be  
19 imposed?

20 On that question, the sensible  
21 approach is to defer to the Commission on the  
22 meaning of its own non-binding advice and then  
23 have courts decide for themselves, based on  
24 their own independent judgment, whether to  
25 follow that advice in deciding what type of

1 sentence they want to impose.

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

10 But Congress gave us two very clear  
11 indications that the Commission is different  
12 from executive agencies when it comes to  
13 deference.

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

21 Second, instead of Section 706 of the  
22 APA, which does not apply to the Sentencing  
23 Commission at all, what we have is the text of  
24 the Sentencing Reform Act, which does authorize  
25 the Commission not only to promulgate

1 guidelines but also to promulgate policy  
2 statements that authoritatively interpret the  
3 guidelines.

4           And, Justice Gorsuch, that is the  
5 square holding of Williams, which we can talk  
6 about. In Williams, this Court held that when  
7 a policy statement interprets a guideline, that  
8 is an authoritative interpretation of the  
9 guideline. And then, in Stinson, this Court  
10 simply recognized that when the Commission uses  
11 the label of "commentary" to interpret a  
12 guideline, that falls within the same statutory  
13 authority. And Stinson starts with Williams,  
14 and it doesn't get to Seminole Rock until after  
15 it says that there is authority to interpret  
16 the guidelines.

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

1 as it was when Stinson was decided.

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

5 And I welcome the Court's questions.

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

8 (Laughter.)

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

11 (Laughter.)

12 JUSTICE THOMAS: Let's go back to what  
13 this case is about so I can have an under -- a  
14 complete understanding of how we're looking --  
15 what we're looking at.

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

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

24 JUSTICE THOMAS: And if a judge  
25 disagrees with that and says, I don't think

1     that a large capacity magazine is -- that that  
2     is a large capacity magazine, what is the  
3     effect?

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

7             JUSTICE THOMAS: What is --

8             MR. DICK: So judges --

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

11            MR. DICK: The guideline is based on  
12    the Commission's authority under 994(a)(1) to  
13    promulgate a guideline for the enhancement.  
14    And then the Commission has been given the  
15    authority to interpret that in the first  
16    instance through policy statements.

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

22            So I think it -- you know, you should  
23    think about it in two steps. First, has there  
24    been authority given to the Commission to  
25    interpret what that means? The answer to that

1 is yes. That's Williams and Stinson.

2 And then the second step is, okay, we  
3 have authority for the Commission to interpret  
4 the guideline. Now what we need to do at step  
5 2 is to police whether the Commission has gone  
6 outside the boundaries of that delegated  
7 authority.

8 That's what the Stinson test is for.  
9 If it's inconsistent with or a plainly  
10 erroneous interpretation, the Commission can't  
11 go there, but as long as you can put these two  
12 provisions together and sensibly read them  
13 together to determine what the Commission's  
14 non-binding advice is, if they can be  
15 reconciled, Your Honor, they should be read  
16 together to give the authoritative position on  
17 what sentence the Commission is recommending.  
18 Then, of course, it is up to the courts to  
19 exercise their independent discretion, do we  
20 want to follow that advice or not?

21 But I think it would be nonsensical to  
22 try to interpret the guideline as a standalone  
23 statute as if it were something written like a  
24 statute that is going to have its own  
25 independent legal meaning when, in fact, it was

1 promulgated with the commentary simultaneously  
2 to Congress, hey, here is what the guideline  
3 says, large capacity magazine, here is what  
4 large capacity magazine means. It's all part  
5 of the same package through notice and comment.

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

9 JUSTICE KAVANAUGH: The --

10 MR. DICK: -- apart from that.

11 JUSTICE KAVANAUGH: -- the last step  
12 of that that you mentioned is important, I  
13 think. After you go through and determine the  
14 advisory guidelines range, you look at the  
15 guideline, you look at the commentary, you come  
16 up with the advisory guideline range. The  
17 court can decide -- the district court can  
18 decide to vary up, down, or stay within the  
19 guidelines range.

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

23 MR. DICK: Absolutely right, Your  
24 Honor. I think so usually you discard your  
25 precedents when they've been undermined or

1 weakened. But, in this case, Booker has made  
2 Stinson a hundred times stronger because now  
3 the consequences of deferring are nothing like  
4 we get in the executive context, where you're  
5 talking about binding law that can have  
6 implications for fair notice and all kinds of  
7 other problems we get when an agency gets to  
8 promulgate, interpret, and enforce its own  
9 rules.

10 JUSTICE KAVANAUGH: Now the counter to  
11 that would be that the advisory range still has  
12 some force and that some judges want to be  
13 guidelines sentencers and some judges don't.  
14 So you have a disparity out there.

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

17 MR. DICK: Right.

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

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

1 ultimately the judge's decision.

2           And if you look at the backdrop  
3 against, you know, the traditional system was  
4 Congress prescribes a crime. Congress  
5 prescribes a statutory range. And the judge  
6 could pick a sentence based on whatever  
7 characteristic the judge wants within that  
8 range.

9           And that's not a fair notice problem.  
10 That's not any kind of separation-of-powers  
11 problem or rule-of-law problem. Much less  
12 going to be a problem when the Commission  
13 recommends a sentence within that range.

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

20           JUSTICE GORSUCH: Mr. Dick, that's --  
21 it's -- it's a nice reconceptualization of  
22 Stinson, but that's not what Stinson said, I  
23 mean, and -- and you resist the government  
24 vehemently in your brief on -- on trying to  
25 Kisor this and saying we can't rely on implicit

1 delegations, right, and that the ambiguity  
2 trigger isn't meaningful, right? You're  
3 shaking your head. I'm taking that as --

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

6 JUSTICE GORSUCH: And -- and -- and --  
7 and -- and -- and -- and so you say we just  
8 can't go down that road and also that Stinson  
9 suggests that even -- even unambiguous  
10 guidelines could be revised or glossed by -- by  
11 the -- by commentary, you know, in kind of a  
12 Brand X sort of way and override judicial  
13 opinions. And you reject all of those things  
14 that are associated with Stinson.

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

1 the situation is different.

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

8 MR. DICK: Absolutely, Your Honor. I  
9 think you're right to worry that the government  
10 is going to try to circumvent Loper Bright by  
11 trying to find an express delegation in every  
12 vaguely worded statute they can find. I'm very  
13 sensitive to that problem. Here is why I think  
14 it's not a problem.

15 So, first of all, you've got Section  
16 706, which is a very clear statutory command.

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

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

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

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

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

5           MR. DICK: Absolutely.

6           JUSTICE GORSUCH: Right? You --

7           MR. DICK: Absolutely. That's right.  
8 But Loper Bright says that when the Congress  
9 gives authority to an agency to promulgate  
10 something with binding effect, that -- then  
11 that is not an Article III problem. I think  
12 the problem, you know, in that type of  
13 situation may be a non-delegation problem.

14           But -- but put that to the side.

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

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

22           MR. DICK: Right.

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

25           MR. DICK: So -- so let me address

1 the -- the -- the text of the Sentencing Reform  
2 Act. So the first point about it is that  
3 Williams squarely held this, so you don't need  
4 to reinvent any new wheels here with respect to  
5 policy statements.

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

14 Then I would direct you to Section  
15 995(b), which is the adjacent provision, which  
16 refers to "the power of the Commission" to  
17 "establish policy statements and guidelines."

18 JUSTICE GORSUCH: Yeah, it's --

19 MR. DICK: So --

20 JUSTICE GORSUCH: -- very similar to  
21 the Rules Enabling Act in the civil rules  
22 context, which says that the rules committee  
23 shall report to this Court and to Congress  
24 rules and -- and -- and -- and give explanatory  
25 notes. And nobody has ever thought that the

1 advisory notes are -- are binding.

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

9 I think that's just very, very  
10 different. So I think you have here text that  
11 is very unique in the Sentencing Reform Act  
12 that is not -- you don't have to read it  
13 against the backdrop of 706.

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

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

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

24 MR. DICK: Not -- not in a statute --  
25 not in a statute that says you have the power

1 to issue and establish a statement regarding  
2 application of this. Even if you did have that  
3 with an administrative agency, you'd have to  
4 deal with whether that is a clear enough  
5 statement to overcome Section 706.

6 JUSTICE GORSUCH: What -- and what --

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

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

11 MR. DICK: Oh.

12 JUSTICE GORSUCH: -- advisory  
13 guidelines?

14 MR. DICK: Not a problem at all.

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

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

23 JUSTICE GORSUCH: Yeah, but --

24 MR. DICK: It's binding on the meaning  
25 of the guideline, not binding in the sense you

1 have to follow it.

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

5 MR. DICK: Exactly.

6 JUSTICE KAVANAUGH: That they're --

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

11 If -- if the whole point of this is to  
12 have the gravitational pull that comes from  
13 judges all starting at the same advice from the  
14 Commission --

15 MR. DICK: Well --

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

20 MR. DICK: Exactly right. So, you  
21 know, Congress initially wanted it to be  
22 binding in the sense that courts would have to  
23 follow it. Now it's not binding, but I agree  
24 with you it still does have a significant  
25 anchoring effect. Nobody disputes that. I

1 think that is a very good thing because it  
2 helps enhance consistency.

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

9 JUSTICE JACKSON: And, right now,  
10 that's the starting point, so fine, everybody  
11 has the same starting point. But, in -- in  
12 direct answer to Justice Thomas, I would think  
13 you would say a judge who disagrees that the  
14 enhancement should apply for a large capacity  
15 magazine in this situation would just vary at  
16 the end of the day.

17 MR. DICK: Correct.

18 JUSTICE JACKSON: Right.

19 CHIEF JUSTICE ROBERTS: Also --

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

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

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

25 CHIEF JUSTICE ROBERTS: Loper Bright

1 has been mentioned a few times, and it had a  
2 footnote that talked about express delegation,  
3 and you mentioned this, I think, in your  
4 response to Justice Gorsuch.

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

7 MR. DICK: The scope of --

8 CHIEF JUSTICE ROBERTS: The reference  
9 in footnote 5 to the express delegation.

10 MR. DICK: Right. So I think the  
11 points, the Court's point, you'd know better  
12 than I, but -- but was just that when Congress  
13 actually indicates that it is giving authority  
14 to an agency to promulgate a statement with the  
15 force and effect of law, then of course the  
16 court's role is to simply interpret that  
17 statutory authority and find out what the scope  
18 of authority that has been given to the agency  
19 is and follow that authority.

20 So that's very different from the type  
21 of presumption of implied delegation that would  
22 just exist as a kind of brooding omnipresence  
23 in the sky where we're going to assume that any  
24 time there's an ambiguity, there has been a  
25 delegation to an agency to have interpretive

1 authority.

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

10           And the answer is interpreting a  
11 guideline is part and parcel of the power to  
12 apply the guideline, because if you don't have  
13 interpret the guideline to know what it means,  
14 you can't know how it applies.

15           So the -- the question in the case is  
16 what is the legitimate bounds of that power of  
17 interpretation? As long as the agency, the  
18 Commission is doing what Stinson says, you're  
19 not plainly inconsistent or plainly erroneously  
20 interpreting the guideline, you're within the  
21 realm of -- of authority that Congress has  
22 conferred on what the Commission can do. And  
23 -- and that is subsidiary, of course, to the  
24 guidelines because the guidelines have to go  
25 through the full two-track process of notice

1 and comment and congressional review.

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

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

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

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

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

8           So you -- the sensible thing to do is  
9     look at what is the substantive authority given  
10    to the Commission? It's to promulgate  
11    guidelines, and then it's to promulgate  
12    statements --

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

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

24           I mean, if you look back at the way  
25    that this worked, when the Sentencing Reform

1 Act was first passed, it didn't refer to  
2 commentary at all. It referred to guidelines  
3 and policy statements. And the Commission  
4 promulgated a guidelines manual where it used  
5 different labels within that manual, and it  
6 said here's the whole thing promulgated under  
7 our 994(a) authority.

8 And it's -- from very early on, it has  
9 been express in saying that 994(a) is the  
10 authority under which we're promulgating all of  
11 this. Right? So I think the fact that it has  
12 chosen to use a different label for formatting  
13 purposes does not say anything about what  
14 authority the Commission understood itself to  
15 be acting under.

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

25 MR. DICK: Yeah, I think, frankly,

1     there are overlapping instances where they  
2     sometimes use them for -- for the same and for  
3     different purposes. But I think, you know, the  
4     -- it's a Commission-created label that comes  
5     from the Commission. So Congress had never  
6     used the term "commentary" at all.

7             And I think it's really, really  
8     important to understand the statutory history  
9     of how this worked because, in 3553(b), it used  
10    to be the case before Booker that courts were  
11    not allowed to depart unless they could  
12    identify some circumstance that had not been  
13    adequately taken account of by the Commission.

14            So after the Commission had created  
15    the guidelines manual and created a section of  
16    the guidelines manual called commentary and  
17    created that term, the way that that term came  
18    about in the statute was the Commission goes to  
19    Congress and says we are worried that we're  
20    going to start getting subpoenaed and we're  
21    going to start getting discovery about why and  
22    what -- you know, what we took into account in  
23    promulgating the guidelines manual.

24            And so Congress, to solve that  
25    problem, then amends the Sentencing Reform Act.

1 And what it does is it says when you're  
2 considering what the Commission took into  
3 account, by the way, you can only look at the  
4 guidelines manual. And it then uses the label  
5 of "commentary" to say you can look at the  
6 policy statements, you can look at the  
7 guidelines, and you can look at the commentary,  
8 which is a Commission-created label. And it's  
9 acting just for the very narrow purpose of  
10 saying what you can look at in determining  
11 whether the Commission took something in effect  
12 account.

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

19 And I think the -- the really  
20 important thing about that is when the -- when  
21 the Sentencing Reform Act was first passed with  
22 994(a) as the only authority, the Commission  
23 used that authority to promulgate guidelines,  
24 policy statements, and commentary, which to me  
25 is very, very telling that it was relying on

1     that authority as it had been created to issue  
2     commentary as a type of policy statement.

3             CHIEF JUSTICE ROBERTS: Thank you,  
4     counsel.

5             Justice Thomas?

6             JUSTICE THOMAS: Mr. Dick, if Congress  
7     passed a statute that enhanced a sentence for  
8     possession of a large capacity magazine, and  
9     the Commission issued an opinion or commentary  
10    on that statute, and the court -- would a court  
11    be able to interpret the statute differently?

12            MR. DICK: Absolutely not. I don't  
13    think anybody suggests that the Commission has  
14    authority to issue policy statements --

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

20            MR. DICK: Absolutely. A court's  
21    authority to interpret the statute exists  
22    independently of anything the Commission would  
23    --

24            JUSTICE THOMAS: So the -- the court  
25    would have more liberty to do that with a

1 statute than it does with the guidelines?

2 MR. DICK: Absolutely, because  
3 994(a)(2) gives the Commission authority to  
4 interpret and apply guidelines but not  
5 statutes. So that express delegation does not  
6 extend to interpreting statutes.

7 CHIEF JUSTICE ROBERTS: Justice Alito?  
8 Justice Sotomayor?  
9 Justice Kagan?  
10 Justice Gorsuch?

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

13 (Laughter.)

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

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

1 footnote 5 had in mind.

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

5 MR. DICK: Right. So, Your Honor, I  
6 think that the word "consider" is the same  
7 thing that's used for both guidelines and  
8 policy statements. So I don't think you can  
9 get anything out of "consider" because what you  
10 have -- the thing that gives force to the  
11 guidelines is Section 3741 -- excuse me,  
12 3742(f)(1), which says that you can vacate a  
13 sentence for incorrect application of the  
14 guidelines, which is exactly the language used  
15 in --

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

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

22 JUSTICE GORSUCH: Sure.

23 MR. DICK: So -- so the -- the  
24 consideration requirement is not where the  
25 force comes from. What the force comes from is

1 994(a)(1) and (a)(2), which authorizes the  
2 agency to establish both guidelines and policy  
3 statements.

4 JUSTICE GORSUCH: To promulgate.

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

7 JUSTICE GORSUCH: Sure.

8 MR. DICK: And this Court squarely  
9 held in Williams that when the Commission  
10 promulgates a policy statement that interprets  
11 a guideline, that is an authoritative guide to  
12 the meaning of the guideline.

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

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

18 MR. DICK: Right. So I don't think I  
19 can do any better than what I've said, which is  
20 99 --

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

23 MR. DICK: Thank you, Your Honor.

24 CHIEF JUSTICE ROBERTS: Justice  
25 Kavanaugh?

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

5 MR. DICK: Absolutely.

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

10 MR. DICK: That -- that's right, Your  
11 Honor. I think it's notable that in both  
12 Stinson and Williams themselves, those were  
13 commentary provisions helped the defendants,  
14 you know, in terms of giving a more lenient  
15 sentence.

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

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

23 JUSTICE KAVANAUGH: And then, third, I  
24 am -- I would be concerned if I end up agreeing  
25 with your position, I would be concerned about

1 making sure that we do anything to -- to  
2 undermine Loper Bright or Kisor, and I would  
3 want to make that crystal clear.

4 Your advice on how to do that.

5 MR. DICK: Absolutely. I think the  
6 two critical points are, again, Section 706,  
7 which applies to executive agency, says courts  
8 have to do interpretation. That's a very clear  
9 statement that we don't want to defer to  
10 executive agency interpretations. And you  
11 would need very, very clear language, maybe  
12 like something in footnote 5 from Loper Bright,  
13 to overcome that.

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

20 995(b), which refers to the power of  
21 the Commission to establish, I think, is very,  
22 very strong language about giving an actual  
23 legal power to the Commission to establish an  
24 interpretation with legal effect.

25 And I think, finally, that (a)(2)

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

8           So I think if you put all those things  
9 together, what you can do is say there's a  
10 very, very, very, you know, statute-specific  
11 reason to find an express delegation here  
12 that's not going to be present in any executive  
13 agency case. So the government, despite all  
14 their very smart lawyers, are not going to be  
15 able to come up with a way to use this to  
16 locate express delegations for executive  
17 agencies, very narrow, the Sentencing  
18 Commission and the Sentencing Reform Act is an  
19 extraordinarily specific instance and you  
20 should uphold Stinson on that basis, without  
21 doing anything in the project of Loper Bright  
22 and Kisor to cut back on the fictional  
23 presumption of implied delegation.

24           JUSTICE KAVANAUGH: Thank you.

25           CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 Justice Jackson?

3 JUSTICE JACKSON: And so you're  
4 reading 3553 to say that Congress wanted courts  
5 to consider the Commission's recommendation; is  
6 that right?

7 I mean, in other words, and the  
8 recommendation comes in the form of the  
9 guidelines, calculated as the Commission would  
10 have them.

11 MR. DICK: Correct.

12 JUSTICE JACKSON: So the deference  
13 here, the -- the binding nature of it is just  
14 in determining what the Commission's  
15 recommendation is. It's almost as if the  
16 Commission -- you know, I thought of this  
17 hypothetical, right, the Commission writes a  
18 letter to each judge in every sentencing  
19 circumstance and says: Here's our  
20 recommendation as to what you should do.

21 Instead of doing that, we just have a  
22 guideline system where the judge is supposed to  
23 determine what the Commission's recommendation  
24 is, but there really isn't room for the judge  
25 to exercise their discretion. They're just

1     trying to figure out what the Commission  
2     recommended, right?

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

8             JUSTICE JACKSON: Thank you.

9             CHIEF JUSTICE ROBERTS: Thank you,  
10    counsel.

11            Mr. Page, rebuttal?

12            REBUTTAL ARGUMENT OF KEVIN JOEL PAGE

13            ON BEHALF OF THE PETITIONER

14            MR. PAGE: May it please the Court:

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

25            It's also the case that if the Court

1     were to scour the text of the Sentencing Reform  
2     Act, it will find no provision that states that  
3     -- that commentary or policy statements ought  
4     to bind the courts in the interpretation of the  
5     guidelines. And I do believe that -- that if  
6     the Court finds an express delegation of  
7     interpretive authority here, it will find them  
8     all over the place.

9             553(b) expressly authorizes the  
10    creation of interpretative rules. If there is  
11    an express delegation to make that -- to make  
12    the commentary binding, why not those as well?

13            But I do want to -- to point out that  
14    I think if the Court applies the limitations in  
15    Kisor to the commentary in the policy  
16    statements, that will actually solve many of  
17    the concerns that have been raised here today.  
18    It will resolve the -- one concern about  
19    dis-uniformity in the precedent because the --  
20    the policy statements and the commentary will  
21    be available to resolve cases of grave  
22    ambiguity.

23            It will resolve the -- any concerns  
24    the Court may have about stare decisis because  
25    the Court wouldn't be doing anything in the

1 sentencing context to move from Stinson to  
2 Kisor that it didn't do in the agency context  
3 to go from Seminole Rock to Kisor.

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

11 As to the concern about whether or not  
12 moving to Kisor would open the floodgates to a  
13 number of resentencings, first of all, there  
14 are only a few cases of -- of tension between  
15 commentary and -- and the text of a guideline  
16 that have actually been litigated in this case,  
17 so I don't think that we can say that -- that  
18 every defendant will have an opportunity to  
19 challenge their guideline -- that it has arisen  
20 in 2(b)(1.1) , it has arisen in -- in this case  
21 and it has arisen in 4(b)(1.2) and there has  
22 been one issue about the -- the issue of what a  
23 dangerous weapon is, but there has not been a  
24 floodgate of people asserting, even in a world  
25 where Kisor might be thought to apply to the

1 guidelines, that their guideline calculations  
2 are infirm.

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

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

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

15 The case is submitted.

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

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