

1 Respondent in support of Petitioners.

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

3 court-appointed amicus curiae, in support of the

4 judgments below.

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

2 (10:19 a.m.)

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

6 Mr. Eberhardt.

7 ORAL ARGUMENT OF STEPHEN E. EBERHARDT

8 ON BEHALF OF THE PETITIONERS

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

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

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

23 The text in section 8, the text in section
24 10 --

25 JUSTICE SCALIA: Excuse me. Is a fair

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

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

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

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

18 MR. EBERHARDT: That is correct.

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

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

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

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

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

18 JUSTICE GINSBURG: Did it --

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

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

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

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

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

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

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

12 CHIEF JUSTICE ROBERTS: Justice Scalia.

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

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

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

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

23 MR. EBERHARDT: Correct.

24 JUSTICE SCALIA: Yes. Anything else?

25 MR. EBERHARDT: Marcello.

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

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

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

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

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

21 Marrero, though, was a habeas --

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

24 MR. EBERHARDT: Correct.

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

1 right? And dictum in a footnote.

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

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

6 MR. EBERHARDT: I'm sorry.

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

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

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

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

20 JUSTICE SCALIA: All right.

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

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

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

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

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

10 MR. EBERHARDT: Correct.

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

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

25 And then the Court followed up saying that

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

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

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

10 JUSTICE KAGAN: Do you think that if --

11 JUSTICE ALITO: What do --

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

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

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

1 the position he's taking.

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

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

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

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

1 the old sentencing guidelines in effect.

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

5 MR. EBERHARDT: No.

6 JUSTICE ALITO: No?

7 MR. EBERHARDT: Because of the --

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

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

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

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

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

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

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

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

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

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

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

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 MR. EBERHARDT: Thank you.

16 CHIEF JUSTICE ROBERTS: Mr. Dreeben.

17 ORAL ARGUMENT OF MICHAEL R. DREEBEN

18 ON BEHALF OF THE RESPONDENT

19 IN SUPPORT OF THE PETITIONERS

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

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

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

3 MR. DREEBEN: First of all --

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

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

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

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

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

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

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

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

5 JUSTICE KENNEDY: And we ignore 109?

6 MR. DREEBEN: No. It provides a background
7 presumption that overcomes the common-law rule of
8 abatement, under which, if Congress had amended a
9 statute, all prosecutions under the prior statute would
10 be deemed to be a nullity and they would --

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

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

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

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

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

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

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

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

17 JUSTICE SCALIA: -- it has some effect.

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

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

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

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

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

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

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

21 MR. DREEBEN: But --

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

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

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

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

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

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

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

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

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

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

1 MR. DREEBEN: Not necessarily.

2 JUSTICE BREYER: I know not necessarily.

3 That's why I want your estimate of how many we're
4 talking about.

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

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

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

16 JUSTICE BREYER: Eleven months?

17 MR. DREEBEN: Yes.

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

1 assuming the answer.

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

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

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

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

13 JUSTICE BREYER: All right --

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

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

21 MR. DREEBEN: Well --

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

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

1 JUSTICE BREYER: No, no.

2 MR. DREEBEN: -- the numbers --

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

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

12 JUSTICE BREYER: Yes.

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

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

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

23 JUSTICE BREYER: That made perfect sense.

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

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

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

5 MR. DREEBEN: Everyone.

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

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

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

18 MR. DREEBEN: Justice Scalia --

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

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

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

2 JUSTICE SCALIA: Excuse me. 30a?

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

4 JUSTICE SCALIA: 39a.

5 MR. DREEBEN: Sorry about that.

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

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

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

25 MR. DREEBEN: That provides that if a case

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

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

13 So, how do you reconcile that?

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

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

25 JUSTICE ALITO: No, I understand that. But

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

7 MR. DREEBEN: Correct.

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

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

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

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

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

24 MR. DREEBEN: Yes.

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

1 MR. DREEBEN: Yes.

2 JUSTICE SCALIA: Is that in the new statute?

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

6 JUSTICE SCALIA: It was in effect --

7 MR. DREEBEN: Yes.

8 JUSTICE SCALIA: It was not the amendment.

9 MR. DREEBEN: No. No.

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

12 MR. DREEBEN: It was --

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

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

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

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

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

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

21 CHIEF JUSTICE ROBERTS: Certainly.

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

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

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

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Mr. Estrada.

13 ORAL ARGUMENT OF MIGUEL A. ESTRADA,
14 AS THE COURT-APPOINTED AMICUS CURIAE,
15 IN SUPPORT OF THE JUDGMENTS BELOW

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

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

20 Fairness is on both sides --

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

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

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

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

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

19 MR. ESTRADA: Absolutely.

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

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

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

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

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

18 JUSTICE SOTOMAYOR: Well, but this
19 agreement --

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

1 minimums be the old mandatory minimums.

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

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

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

12 I think, you know, one of the fundamental
13 points here is that a premise of the law is to treat
14 like people alike. And people who committed the same
15 offense on the same date and may have done so with each
16 other we would expect to get comparable punishment if
17 they are comparably situated as to criminal history.
18 And the -- that the solution that's being urged
19 undermines that even though that is exactly what section
20 109 says.

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

1 they wanted to do away with this distinction and
2 Congress said, no, Sentencing Commission, you can't do
3 it, you can't do it to the guidelines when we don't do
4 it to the statute?

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

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

24 So, when you have a long history in 2010 of
25 rulings from this Court acknowledging, as you said in

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

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

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

1 to be sentenced 6 months later if they still had higher
2 guidelines.

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

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

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

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

25 MR. ESTRADA: Some of them may drop from 10

1 to 5, for example, as one of the --

2 JUSTICE SOTOMAYOR: Exactly.

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

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

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

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

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

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

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

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

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

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

19 JUSTICE KAGAN: But the problem with this --

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

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

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

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

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

1 committed their offenses while the old law was in force.
2 It is a directly applicable statute to the situation at
3 hand.

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

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

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

13 MR. ESTRADA: I'm sorry.

14 JUSTICE BREYER: Suppose you're wrong about
15 that. I mean, I think when they -- they meant do it,
16 that considered. Does that change?

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

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

23 But if I -- if I reach the conclusion I
24 agree competing background rules --

25 MR. ESTRADA: Justice Breyer --

1 JUSTICE BREYER: I agree applicable law
2 doesn't help us, because -- all the time, there are two
3 different sets of guidelines that apply depending upon
4 when you committed the crime. That's very common. All
5 right. So, I agree with you that far.

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

13 MR. ESTRADA: Okay.

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

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

23 JUSTICE BREYER: Yes.

24 MR. ESTRADA: My best example -- and please
25 do not think I'm pandering -- is a case called

1 U.S. v. Smith from the Second Circuit, which -- which
2 was authored by then-Judge Sotomayor. And it was a
3 comparable case in which Congress had dropped the
4 severity of a penalty.

5 JUSTICE BREYER: Yes.

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

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

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

1 under the new applicable guidelines.

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

5 JUSTICE KAGAN: Mr. Estrada, before you do,
6 if I can understand your argument as it relates to
7 Justice Scalia's questions -- I just want to make sure I
8 understand it. There's a person who has 4.99 grams of
9 crack cocaine. And you do not dispute, do you, that
10 that person would be subject to the new guidelines,
11 which are based on the 18-to-1 ratio rather than the
12 100-to-1 ratio?

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

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

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

1 We accept all of that. It is an artifact of the fact
2 that Congress at certain points, but not on a continuous
3 line, has chosen to constrain sentencing discretion with
4 the rough tool of a quantity threshold.

5 It is all set out in the Kimbrough case.

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

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

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

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

1 individual sentencer, it is actually salutary to have a
2 few points of confluence that work as an enforced,
3 although rough, uniformity in the sentences of
4 comparably situated offenders.

5 If I go back --

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

9 MR. ESTRADA: Right.

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

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

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

1 who knows the law has been changed, who knows the law
2 has been criticized, is nevertheless bound to determine
3 that it's fair for this -- for this person to be
4 sentenced to the longer term.

5 That's a very difficult --

6 MR. ESTRADA: But if I could --

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

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

11 JUSTICE KENNEDY: Go ahead.

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

1 the most recent scholarship, we think the ratio should
2 be 16 to 1.

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

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

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

20 MR. ESTRADA: Right.

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

1 mandatory minimum previously but were subject to the
2 then-conforming amendments, now will have to be subject
3 to new conforming amendments that conform to the new
4 thing.

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

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

13 JUSTICE BREYER: Is that too complicated?

14 (Laughter.)

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

16 But I --

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

19 JUSTICE BREYER: All right.

20 MR. ESTRADA: You know, the --

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

23 MR. ESTRADA: The simple point I was trying
24 to make, Justice Breyer, is that the whole thing that
25 the guideline system now has to conform with applicable

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

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

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

24 Were you to adopt the applicable law on the
25 assumption that the Congress has now dictated that these

1 things have to line up and never to have cliffs again
2 because they are bad, you could end up having untoward
3 consequences as to what it is that the Commission can do
4 in the future in order to deal with other
5 inequalities --

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

8 JUSTICE ALITO: -- the question --

9 JUSTICE SOTOMAYOR: I'm sorry.

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

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

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

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

25 MR. ESTRADA: I just gave you two examples:

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

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

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

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

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

25 MR. ESTRADA: But there are -- there are two

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

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

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

1 Justice Scalia pointed -- I'm sorry -- as Justice Alito
2 pointed out earlier, provided an effective date for the
3 new statute of 6 months hence. It is --

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

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

20 MR. ESTRADA: Correct. And I think that
21 that would be true here as well. And the reason why I
22 was highlighting the earlier bills is because each and
23 every one of them had the same, almost word for word,
24 "conform with applicable law" emergency authority. All
25 of them uniformly said the new mandatory minimums will

1 not apply for another 6 months after the enactment.

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

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

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

24 And so, there has never been any reason to
25 have two sets of guidelines to account for cliffs or

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

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

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

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

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

21 REBUTTAL ARGUMENT OF STEPHEN E. EBERHARDT

22 ON BEHALF OF THE PETITIONERS

23 MR. EBERHARDT: Thank you,
24 Mr. Chief Justice, and may it please the Court:

25 Obviously, this Court recognizes the

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

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

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

23 JUSTICE BREYER: I'd imagine you'd find
24 disagreement with that. You know -- you know -- you
25 know if -- as a matter of fact, in the year that these

1 took effect, think of the sentences that were not
2 governed by mandatory for crack, not governed by the
3 mandatory minimum. Did the guidelines provide, let's
4 call it a low sentence, disproportionately low?

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

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

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

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

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

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

1 of that, right?

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

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

10 Thank you very much.

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

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

18 The case is submitted.

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

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A				
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