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IN THE SUPREME COURT OF THE UNITED STATES

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EDWARD DORSEY, SR., :

Petitioner : No. 11-5683

v. :

UNITED STATES :

- - - - -x

and

- - - - -x

COREY A. HILL, :

Petitioner : No. 11-5721

v. :

UNITED STATES :

- - - - -x

Washington, D.C.

Tuesday, April 17, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:19 a.m.

APPEARANCES:

STEPHEN E. EBERHARDT, ESQ., Tinley Park, Illinois; on behalf of Petitioners.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; for

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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P R O C E E D I N G S

(10:19 a.m.)

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

Mr. Eberhardt.

ORAL ARGUMENT OF STEPHEN E. EBERHARDT

ON BEHALF OF THE PETITIONERS

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

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

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

The text in section 8, the text in section

10 --

JUSTICE SCALIA: Excuse me. Is a fair

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

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 the later, that that standard has been rejected  
20 even though argued by my colleague to my left. That is  
21 no longer the standard ever since --

22 JUSTICE SCALIA: Oh, 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 be 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 are a 90-day period, that  
23 the Commission came out with its new guidelines on  
24 November 1st, and some time after August 3, which was  
25 when the Sentencing Act -- so on -- 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 Mr. Chief Justice, if I might reserve the  
13 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 are 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 is no dispute here, I  
14 don't think, that there is 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?

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

5 JUSTICE KENNEDY: And can 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 not --

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 pre-sentence 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  
2 the 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 are entirely  
8 right. But the accelerated -- the direction to the  
9 Guidelines Commission to promulgate the guidelines on  
10 a -- on an emergency basis is not, as you just put it,  
11 for nothing. It has --

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

14 JUSTICE SCALIA: As Justice Alito was  
15 suggesting, it has some effect.

16 MR. DREEBEN: No, I -- I don't disagree with  
17 that.

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

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

1 at page 10a.

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

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

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

20 MR. DREEBEN: But --

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

24 MR. DREEBEN: Well, Justice Scalia, I want  
25 to put this in the structural context of the Sentencing

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

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

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

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

25 CHIEF JUSTICE ROBERTS: So why -- why

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

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

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

21 JUSTICE BREYER: Yes, but how -- how many  
22 are we talking about? Say, a 3-month period? How  
23 many people commit -- most people -- everybody pleads  
24 guilty, they are caught quickly --

25 MR. DREEBEN: Not necessarily.

1 JUSTICE BREYER: I know not necessarily.  
2 That's why I want your estimate of how many we are  
3 talking about.

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

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

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

15 JUSTICE BREYER: 11 months?

16 MR. DREEBEN: Yes.

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

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

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

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

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

12 JUSTICE BREYER: All right --

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

18 JUSTICE BREYER: Now, isn't it obviously  
19 what I'm trying to get at?

20 MR. DREEBEN: Well --

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

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

25 JUSTICE BREYER: No, no, but you are saying

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

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

9 JUSTICE BREYER: Yes.

10 MR. DREEBEN: -- to conform the guidelines  
11 to applicable law, the only applicable law that it could  
12 have had in mind --

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

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

20 JUSTICE BREYER: That makes perfect sense.

21 MR. DREEBEN: But the Sentencing Reform  
22 Act -- it doesn't make perfect sense, because the  
23 Sentencing Reform Act is set up to apply new guidelines  
24 to people based on date of sentencing.

25 JUSTICE SCALIA: New guidelines to what



1 people? That's the issue.

2 MR. DREEBEN: Everybody.

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

5 MR. DREEBEN: No, I don't believe so,  
6 Justice Scalia.

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

15 MR. DREEBEN: Justice Scalia --

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

19 MR. DREEBEN: Let me refer to the statute  
20 because the statute answers this question differently  
21 than the way Your Honor has assumed it works, okay? On  
22 page 30a of our appendix we reproduce section 3553(a),  
23 and 3353(a)(4) establishes that when a --

24 JUSTICE SCALIA: Excuse me. 30a?

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

1 JUSTICE SCALIA: 39a.

2 MR. DREEBEN: Sorry about that.

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

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

20 JUSTICE SCALIA: What is section 3742(g),  
21 which is --

22 MR. DREEBEN: That provides that if a case  
23 is reversed on appeal and sent back for resentencing,  
24 the original set of guidelines that were applied at the  
25 date of the initial sentencing shall be used. It's an

1 exception to the general rule.

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

10 So how do you reconcile that?

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

21 JUSTICE ALITO: No, I understand that. But  
22 wouldn't you want -- the problem that you're -- maybe --  
23 I understand your argument to be that the language  
24 you're stressing now will mean, if this applies only to  
25 post-enactment offenders, that there will be defendants

1 who will be sentenced to -- under the -- under old --  
2 under the old mandatory minimums but the new guidelines.

3 MR. DREEBEN: Correct.

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

6 MR. DREEBEN: No, I don't think so, because  
7 that bill was designed to postpone the effective date  
8 for 180 days.

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

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

18 This section that you quoted, (a) -- what,  
19 (4)(A)(ii) --

20 MR. DREEBEN: Yes.

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

22 MR. DREEBEN: Yes.

23 JUSTICE SCALIA: Is that in the new statute?

24 MR. DREEBEN: No. That's part of the  
25 Sentencing Reform Act from the beginning of the

1 guidelines. It was --

2 JUSTICE SCALIA: It was in effect --

3 MR. DREEBEN: Yes.

4 JUSTICE SCALIA: It was not the amendment.

5 MR. DREEBEN: No, no.

6 JUSTICE SCALIA: Congress didn't insert  
7 that --

8 MR. DREEBEN: It was --

9 JUSTICE SCALIA: -- when it made this  
10 amendment. You're just saying that that is the  
11 incidental effect of the provision that Congress did  
12 adopt?

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

22 And it is very strange to say that it wanted  
23 new guidelines in effect to be conformed to inapplicable  
24 law such that there would be the incongruous result that  
25 the new guidelines that finally fixed this egregious

1 problem in the criminal justice system would be  
2 irrelevant for many defendants because they would still  
3 be living under the 100-to-1 racially disparate effect  
4 of the guidelines, of these --

5 JUSTICE SOTOMAYOR: Mr. Dreeben, almost any  
6 law that repeals a prior penalty is doing so because the  
7 legislature determines that that prior penalty is unjust  
8 in some way, because why do you eliminate a penalty  
9 unless you think it is necessary to do so and that it is  
10 unjust or unjust in some way?

11 So what makes this repeal particularly  
12 different so that the exception doesn't swallow the  
13 rule, because you can argue in almost any situation that  
14 the repeal is of something that's unjust?

15 MR. DREEBEN: Mr. Chief Justice, may I  
16 answer the question?

17 CHIEF JUSTICE ROBERTS: Certainly.

18 MR. DREEBEN: Justice Sotomayor, what's  
19 unique about this context is that there's a confluence  
20 between the way that the guidelines treated crack and  
21 the way that the statutes treated crack. And for years  
22 the Sentencing Commission had said: We can't fix this  
23 problem with the guidelines alone; we need the help of  
24 Congress to alter the mandatory minimums.

25 And once you do that, give us emergency

1 authority so that we can put new guidelines into place  
2 that will work hand-in-glove with the new mandatory  
3 minimums, as the Chief Justice explained, so that all  
4 defendants who come before the Court will not be subject  
5 to the discredited crack policy that Congress had  
6 repealed.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
8 Mr. Estrada.

9 ORAL ARGUMENT OF MIGUEL A. ESTRADA,  
10 COURT-APPOINTED AMICUS CURIAE,  
11 IN SUPPORT OF THE JUDGMENTS BELOW

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

14 I think this is a difficult case for public  
15 policy but is not a difficult case for legal doctrine.

16 Fairness is on both sides --

17 JUSTICE SOTOMAYOR: Mr. Estrada, what's so  
18 difficult for a legal doctrine to say that when Congress  
19 has made a finding that a law has a discriminatory  
20 impact -- because I always thought that when  
21 discrimination was at issue, that we should do as speedy  
22 a remedy as we could, because it is one of the most  
23 fundamental tenets of our Constitution, as has been  
24 repeatedly emphasized in case after case, that our laws  
25 should be -- should be enforced in a race-neutral way.

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

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

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

15                  MR. ESTRADA: Absolutely.

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

19                  MR. ESTRADA: Justice Sotomayor, that is  
20 absolutely right. But it is very significant that for  
21 20 years we had this argument. The Sentencing  
22 Commission, as the government points out, went to  
23 Congress again and again and again to say we don't agree  
24 with this, this makes no sense. And for 20 years,  
25 Congress could not bring itself to change it because



1 there was no agreement on the part of the lawmakers that  
2 the public policy was that easy.

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

10 They had different proposals. There was one  
11 for 24:1, another one -- there were many one to one. It  
12 was clear that Congress couldn't bring itself to an  
13 agreement as to what the right answer was.

14 JUSTICE SOTOMAYOR: Well, but this --

15 JUSTICE KAGAN: Mr. Estrada, I mean, that's  
16 true, that it took Congress a long time to decide to do  
17 this, and the question is, once having decided to do  
18 this, what did it decide to do; and whether it would  
19 make sense, once having decided to do this, to have the  
20 guidelines be the new guidelines, but the mandatory  
21 minimums be the old mandatory minimums.

22 And what everybody understood was that if  
23 that were the case, if the new guidelines and the  
24 old mandatory minimums sort of -- both applied together,  
25 it would lead to ridiculous disparities in the way

1 people were sentenced.

2 And so the question is, once having decided  
3 to do this, can't we assume that Congress decided to do  
4 it?

5 MR. ESTRADA: No. Let me give three answers  
6 to that.

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

16 JUSTICE GINSBURG: But you have to draw a  
17 line someplace and that's inevitable that some people  
18 are going to fall on one side. But the point about the  
19 guidelines and statute working together, wasn't there a  
20 time when the Sentencing Guidelines -- they wanted to do  
21 away with this distinction and Congress said, no,  
22 Sentencing Commission, you can't do it, you can't do it  
23 to the guidelines when we don't do it to the statute?

24 MR. ESTRADA: There are two points about the  
25 guidelines that I think we have to keep in mind, Justice

1 Ginsburg. The first one is that they are guidelines,  
2 especially in the world after Booker, which is the world  
3 that confronted Congress in 2010. They are guides that  
4 must be considered by the judge to inform judicial  
5 discretion. So in the nature of the guidelines there is  
6 nothing inherent in saying that we must have new ones  
7 that also implies a new obligation of statutory law to  
8 people whose offense conduct occurred earlier.

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

18           So when you have a long history in 2010 of  
19 rulings from this Court acknowledging, as you said in  
20 your opinion in Kimbrough, that this may lead to cliffs,  
21 et cetera, and you also have a recognition by the  
22 Commission itself that they have to integrate this  
23 reality of sentencing law into their own guidelines,  
24 there is very little basis for an inference that  
25 Congress in providing new guidelines would have

1 contemplated that the effective date of the law would  
2 change --

3 JUSTICE GINSBURG: But Congress did say:  
4 Sentencing Commission, you conform your new guidelines  
5 to applicable law. The applicable law has got to be the  
6 new law, because if it were the old law, there is  
7 nothing to conform. There is nothing that they need to  
8 change. It's only that this section (a)(2) makes sense  
9 only if the applicable law is the new law. Otherwise  
10 the Commission doesn't have to do anything to achieve  
11 consistency.

12 MR. ESTRADA: Justice Ginsburg, I am  
13 prepared to admit for purposes of this case, and I think  
14 it's probably the right answer, that Congress intended  
15 that the guidelines had to line up with the penalties of  
16 the FSA. The question is cui bono: For whose benefit.  
17 And Congress clearly contemplated for some of the  
18 reasons that you outlined that the system in the change  
19 in the statute would not do any good for people coming  
20 to be sentenced 6 months later if they still had higher  
21 guidelines.

22 But much has been said here today about the  
23 90-day window. The 90-day window is irrelevant. The  
24 really relevant window is the comparison of what the new  
25 guidelines would have been and when they would have come

1 out absent the emergency authority. Absent any  
2 emergency authority, new guidelines would have come out  
3 November 1, 2011, which would have been a good 15 months  
4 after the passage of the FSA. And even under the  
5 government --

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

15 MR. ESTRADA: A --

16 JUSTICE SOTOMAYOR: Or changed the guide --

17 MR. ESTRADA: Changed some of them.

18 JUSTICE SOTOMAYOR: Changed it, Lowered the  
19 amounts.

20 MR. ESTRADA: Some of them may drop from 10  
21 to 5, for example, as one of the -- as one of the  
22 particulars.

23 JUSTICE SOTOMAYOR: Exactly. So those  
24 people would not have been bound to a mandatory minimum.  
25 And since district courts were not bound to the

1 guidelines anyway, even if there had been no amendment  
2 to the guideline, the judges would have known they  
3 weren't bound to the mandatory minimum, and probably not  
4 bound to guidelines that hadn't been amended yet either.

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

6 JUSTICE SOTOMAYOR: So it would have  
7 benefited these defendants no matter what.

8 MR. ESTRADA: That's correct on both counts,  
9 but that -- but that I -- you know, it sort of assumes  
10 that the guidelines are systemically irrelevant in all  
11 cases, because after an appropriate analysis --

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

15 MR. ESTRADA: But look. I mean, one of the  
16 interesting aspects about these cases is that one of the  
17 Petitioners, for example, got the benefit of being  
18 sentenced at the time that the post-FSA guidelines, the  
19 new emergency guidelines, provided a sentencing range of  
20 him of 110 to 137. That's -- that's Mr. Hill. These  
21 are the new guidelines. He was sentenced to a mandatory  
22 minimum of 10, which is on the lower end of that  
23 guideline.

24 The only reason that case is in the U.S.  
25 Supreme Court is because, even after the new statute,

1 the judge was of a mind that he wanted to use a  
2 one-to-one ratio. And that's why there is a controversy  
3 here. But that highlights, you know, the point that I  
4 am trying to make and that the Court made in Kimbrough,  
5 which is that the mandatory minimums tend to enforce a  
6 species of uniformity in a world in which the guidelines  
7 are advisory, and they do help uphold, you know, the  
8 principle that people that committed comparable offenses  
9 will have some lost comparability.

10 JUSTICE KAGAN: But that begs the  
11 question --

12 JUSTICE SOTOMAYOR: But the problem I  
13 started with, with you, which is if we know that this  
14 new Congress has already determined that those -- that  
15 mandatory minimum is discriminatory in the way that it  
16 had been constructed, what would be the purpose of  
17 delaying implementation?

18 MR. ESTRADA: If Congress had made that  
19 finding, Justice Sotomayor, I would fully expect them as  
20 a citizen to cut the sentences of everybody who is  
21 already serving the sentence irrespective of finality.  
22 And the fact that Congress did not do that, which is a  
23 proposition on which everybody agrees, I think is  
24 powerful evidence that the assumption that this  
25 necessarily reflects a conclusion that the previous

1 system was indisputably discriminatory as opposed to  
2 arguably discriminatory --

3 JUSTICE SCALIA: I would find that  
4 extraordinary, that they say it's racist but we are  
5 going to leave in effect all of the sentences that have  
6 previously been imposed. That seems to me very  
7 unlikely.

8 Mr. Estrada, I would like you to explain the  
9 effect of 353(a)(4)(A)(ii) which -- which does seem  
10 to -- to be sure, it's not in the new legislation, but  
11 it's the background against which the new legislation  
12 was adopted, and it seems to require that the Court use  
13 the guidelines in effect at the time of sentencing.

14 MR. ESTRADA: Right. This is a fight about  
15 competing background rules. Section 109 is one of them  
16 and it says: The old law shall be applied to people who  
17 committed their offenses while the old law was in force.  
18 It is a directly applicable statute to the situation at  
19 hand.

20 This purported competing background rule is  
21 a rule that simply says a judge shall consider the  
22 guidelines then extant. And this is part of the advice  
23 that he gets. It implies nothing about the duty to  
24 apply --

25 JUSTICE SOTOMAYOR: Mr. Estrada --



1 MR. ESTRADA: I'm sorry?

2 JUSTICE BREYER: Suppose you are wrong about  
3 that. I mean, I think when they -- they meant do it,  
4 not consider. Does that change?

5 MR. ESTRADA: I think it would be a radical  
6 understanding.

7 JUSTICE BREYER: No. I mean, I think that  
8 when they wrote this 3553, they were thinking those were  
9 the guidelines that are going to apply. Do it. Now,  
10 I'll look into that.

11 But if I -- if I reach the conclusion I  
12 reach -- competing background briefs --

13 MR. ESTRADA: Justice Breyer --

14 JUSTICE BREYER: The applicable law doesn't  
15 help us, because -- all the time, there are two  
16 different sets of guidelines that apply depending upon  
17 when you committed the crime. That's very common. All  
18 right. So I agree with you that far.

19 But now I'm worried about -- the last  
20 question Justice Scalia asked does, I think, focus this  
21 question, because we have not only 109, we have also  
22 the -- the one we're talking about now, and that says,  
23 normally, you will apply the guidelines in effect even  
24 to people who committed the crime before the new  
25 statute.

1 MR. ESTRADA: Okay.

2 JUSTICE BREYER: Now, do we have any  
3 analogies? Has this ever happened before? Is there --  
4 I can't find out how many people we're talking about.  
5 I'd like to know at least are there many other occasions  
6 when Congress amended mandatory minimums so there's some  
7 precedence? Any?

8 MR. ESTRADA: Justice Breyer, this is a  
9 staple of what has happened in the lower courts in the  
10 routine application of section 109.

11 JUSTICE BREYER: Yes.

12 MR. ESTRADA: My best example -- and please  
13 do not think I'm pandering -- is a case called  
14 U.S. v. Smith from the Second Circuit, which was  
15 authored by then-Judge Sotomayor. And it was a  
16 comparable case in which Congress had dropped the  
17 severity of a penalty.

18 JUSTICE BREYER: Yes.

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

21 And Congress had gone from a world in which  
22 a violation of supervised release had to be subject to a  
23 mandatory sentence, to a world in which the statute had  
24 been changed, to say that it was up in the discretion of  
25 the judge. By the time the offender came to court, he

1 had violated his supervised release. And his argument,  
2 which was actually a lot more plausible than this one,  
3 was that before he violated, the law had changed, and he  
4 was now in effect now coming to the court for a new  
5 sentencing. Which is exactly analogous to this.

6 The Second Circuit had no trouble in saying  
7 that a routine application of section 109 killed that  
8 claim because the offense was considered completed at  
9 the time it was committed. And, therefore, this was  
10 a -- a claim that simply was not tenable in light of the  
11 language of section 109. And that, too, is a -- is a  
12 case where somebody could have said the law that now  
13 applies is the one that applies to my new sentencing  
14 under the new applicable guidelines.

15 Now, I will say another two logical points  
16 about, you know, the competing rule that the government  
17 is urging.

18 JUSTICE KAGAN: Mr. Estrada, before you do,  
19 if I can understand your argument as it relates to  
20 Justice Scalia's questions -- I just want to make sure I  
21 understand it. There's a person who has 4.99 grams of  
22 crack cocaine. And you do not dispute, do you, that  
23 that person would be subject to the new guidelines,  
24 which are based on the 18-to-1 ratio rather than the  
25 100-to-1 ratio?

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

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

8 MR. ESTRADA: That is absolutely right, and  
9 that was the -- the paradox, if you want to call it  
10 that -- that the government brought you in Kimbrough.  
11 And the Court accepted that that was the case. It said,  
12 yes, this leads to cliffs. It leads to a lack of a  
13 straight line in between all of the possible penalties.  
14 We accept all of that. It is an artifact of the fact  
15 that Congress at certain points, but not on a continuous  
16 line, has chosen to constrain sentencing discretion with  
17 the rough tool of a quantity threshold.

18 It is all set out in the Kimbrough case.

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

24 I guess the question I would ask you is:  
25 Can you do better than Judge Easterbrook? Can you find

1 an earthly reason for why Congress would have wanted to  
2 create this weird halfway system in which you if you  
3 have 4-1/2 grams of cocaine, one rule applies, but if  
4 you have 5 grams, another rule applies?

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

9 I can think that Congress has at least the  
10 rational reason that the Court ascribed to the system in  
11 its post-Booker way at the top of page 108, I think, in  
12 the Kimbrough case, where it is that now that we have a  
13 system in which so much depends on the discretion of the  
14 individual sentencer, it is actually salutary to have a  
15 few points of confluence that work as an enforced,  
16 although rough, uniformity in the sentences of  
17 comparably situated offenders.

18 If I go back --

19 JUSTICE KENNEDY: But the government is  
20 arguing, and the Petitioner is arguing, for a uniform  
21 rule, the rule that the time of sentencing controls.

22 MR. ESTRADA: Right.

23 JUSTICE KENNEDY: So that uniformity doesn't  
24 quite answer it, unless I misunderstood.

25 MR. ESTRADA: No, I think that there are

1 competing visions of fairness and of uniformity in this  
2 case, Justice Kennedy. I am trying to hold, you know,  
3 the government to the one they had in the McNeill case  
4 last year, because the identical argument was made to  
5 them in the -- on the other side, that it was somewhat  
6 irrational to apply the better sentence to the person 1  
7 day later versus the person 1 day earlier.

8 JUSTICE KENNEDY: But Justice Kagan's  
9 question concerning what interest is served by your  
10 position has -- has particular force when we're talking  
11 about the sentencing judge. The hardest thing -- as we  
12 know in the judicial system, one of the hardest things  
13 is sentencing. And you're saying that a sentencing  
14 judge who knows the law has been changed, who knows the  
15 law has been criticized, is nevertheless bound and  
16 determined that it's fair for this person to be  
17 sentenced to the longer term.

18 That's a very difficult --

19 MR. ESTRADA: But if I could --

20 JUSTICE KENNEDY: -- position to put the  
21 judge in. Now, I would --

22 MR. ESTRADA: If I could take the other --  
23 I'm sorry, Justice Kennedy.

24 JUSTICE KENNEDY: Go ahead.

25 MR. ESTRADA: If I could take, you know, the

1 other side of that argument. One of the reasons why I  
2 think, you know, the Court should accept that Congress  
3 contemplated new guidelines but not necessarily take up,  
4 you know, the government's view that this is actually  
5 called for by the very end of that section, applicable  
6 law, is that the government looks at this as a world in  
7 which Congress has now intervened and in effect  
8 compelled a -- a more linear function of sentencing.

9           So that, henceforth, I guess the Commission  
10 has to conform to the 18-to-1 ratio, and it would no  
11 longer be open to the Commission, for example, to do  
12 what it did in 2007, which is we changed our mind;  
13 there's a mandatory minimum that constrains us, but in  
14 light of the most recent scholarship, we think the ratio  
15 should be 16 to 1.

16           And -- and one of the reasons why I am  
17 reluctant to urge you to accept, you know, the  
18 government's construction, which I can see how they  
19 would be helped by in future cases, is that I think it's  
20 very implausible for Congress to have considered this,  
21 as they say, the centerpiece of the statute and have --  
22 have it be the last depending clause of section 8.

23           JUSTICE BREYER: Wait, wait. This is --  
24 just tell me if maybe the light is dawning, and maybe  
25 I'm just at the same question Justice Kagan asked.

1 Think of before the statute. There were two sets of  
2 people: those people subject to the mandatory minimum  
3 and those crack people who -- the mandatory minimum  
4 didn't matter, but the Commission wrote amendments  
5 consistent with.

6 So they were tough amendments, so the law  
7 didn't require it --

8 MR. ESTRADA: Right.

9 JUSTICE BREYER: -- to produce consistency.  
10 Now the statute's passed. Now we have some of the  
11 pre-Act offenders. Because of the two sets of things,  
12 section 8 on the one hand and the 3553(g) on the other,  
13 in respect to those people who were not governed by the  
14 mandatory minimum previously but were subject to the  
15 then-conforming amendments, now will have to be subject  
16 to new conforming amendments that conform to the new  
17 thing.

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

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



1 JUSTICE BREYER: Is that too complicated?

2 (Laughter.)

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

4 But I --

5 MR. ESTRADA: But let me -- let me say two

6 things --

7 JUSTICE BREYER: All right.

8 MR. ESTRADA: You know, the --

9 JUSTICE BREYER: I don't blame you. I don't  
10 blame you.

11 MR. ESTRADA: The simple point I was trying  
12 to make, Justice Breyer, is that the whole thing that  
13 the guideline system now has to conform with applicable  
14 law, which, you know, the government reads as the new  
15 ratio and could extend to other things, could  
16 potentially disable the Commission from adopting its own  
17 ameliorating amendments that depart from the regime  
18 of -- of the mandatory minimums. And so whereas there  
19 are mandatory minima that are troublesome and give rise  
20 to cliffs, there are also occasions in which the  
21 Commission is able to do things that are not consistent  
22 with the statute.

23 Let me give one example that was mentioned  
24 by the Court in DePierre. As the statute was  
25 interpreted in DePierre, cocaine base is cocaine base;

1 it gets you a mandatory minimum if it's chemically  
2 based. The Commission thinks that you only get the  
3 enhanced penalties if the cocaine base happens to be  
4 crack.

5 Similarly under the Neal case, you get to  
6 weigh the carrier medium for the LSD, but, you know, the  
7 Commission thinks that you give it a presumed weight  
8 that is probably lower than the actual medium. In both  
9 of those cases, the Commission comes up with guidelines  
10 that are lower than the methodology that is contemplated  
11 under the statutory analysis.

12 Were you to adopt the applicable law on the  
13 assumption that the Congress has now dictated that these  
14 things have to line up and never to have cliffs again  
15 because they are bad, you could end up having untoward  
16 consequences as to what it is that the Commission can do  
17 in the future in order to deal with other  
18 inequalities --

19 JUSTICE SOTOMAYOR: Mr. Estrada, I'm not  
20 sure I follow --

21 CHIEF JUSTICE ROBERTS: I --

22 JUSTICE SOTOMAYOR: I'm sorry.

23 CHIEF JUSTICE ROBERTS: Go ahead, Justice  
24 Sotomayor.

25 JUSTICE SOTOMAYOR: I'm not sure I follow

1 your example. I think that the guideline regulation is  
2 that the guideline -- the Sentencing Commission always  
3 has to be -- pass guidelines consistent with the  
4 mandatory minimum. And if the statute says that the  
5 mandatory minimum requires the -- the carrying medium to  
6 be included, the guidelines can't change that. The  
7 mandatory minimum would apply.

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

10 JUSTICE SOTOMAYOR: But defendant -- I don't  
11 know that I know of one guideline scheme that changes  
12 whatever Congress has statutorily required.

13 MR. ESTRADA: I just gave you two examples:  
14 The LSD guideline that was at issue in Neal and the  
15 crack guideline that was not at issue, but was discussed  
16 in connection with the statutory interpretation in -- in  
17 DePierre.

18 You know, my point -- I don't want to  
19 overstate the point. My point is there is reason to  
20 believe that Congress intended the new guidelines to be  
21 available for new offenses. The fact that Congress gave  
22 emergency authority so that that would be possible makes  
23 perfect sense because in the absence of emergency  
24 authority, the new guidelines would --

25 JUSTICE SOTOMAYOR: No, no. You have to --

1 what you are arguing is not that the guidelines would be  
2 available for new offenses. What you are arguing is  
3 that they would be available for everybody except the  
4 cliffhangers. That's -- that's what you're arguing.

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

6 JUSTICE SOTOMAYOR: Everyone but the  
7 cliffhangers, because, as Justice Breyer pointed out,  
8 those people who were subject to the old guideline at a  
9 higher rate above the minimum now have the benefit of a  
10 lower rate, and so they're going to get sentenced to a  
11 lower amount because they are not bound by the mandatory  
12 minimum.

13 MR. ESTRADA: But there are -- there are two  
14 alternative worlds under the FSA, Justice Sotomayor. In  
15 the first one guidelines don't change for 15 months.  
16 People who committed the crime after the FSA come to the  
17 court for sentencing 10 months later and they get the  
18 new mandatory minimum, but it doesn't matter because the  
19 old guidelines are higher. It is possible that the  
20 judge would intervene and use Booker discretion, but not  
21 necessarily so.

22 And the alternative world which Congress did  
23 give us is you change the guidelines as soon as you can;  
24 if you come to the bar of the court with a pre-FSA  
25 offense, it doesn't matter, because the new guidelines,

1 like every guidelines book since the beginning, say that  
2 if a mandatory minimum applies, that controls over the  
3 then-current guidelines, which is one of the fundamental  
4 reasons why the alternative view of the world and the  
5 alternative rule of construction the government proffers  
6 makes no sense.

7           As a prosecutory construction matter and for  
8 those members in the Court who give weight to  
9 legislative history, I will point out that the emergency  
10 authority section that the government thinks is  
11 dispositive on this point was in every version of this  
12 bill -- Senate 1711, Senate 1383, you know, the House  
13 versions that they cite -- even when those statutes, as  
14 Justice Scalia pointed -- I'm sorry -- as Justice Alito  
15 pointed out earlier, provided an effective date for the  
16 new statute of 6 months hence. It is --

17           JUSTICE ALITO: Well, along those lines,  
18 could I -- could I ask you this question, which is  
19 intended to explore the -- the issue whether the  
20 argument about bringing the guidelines into consistency  
21 with applicable law doesn't assume the -- the answer  
22 that is -- that one attempts to get from it.

23           Suppose the -- the -- the Fair Sentencing  
24 Act said expressly, this applies only -- the new  
25 mandatory minimums apply only to post-Act offenders, but

1 it also contained a provision that says the Sentencing  
2 Commission has to bring the guidelines into consistency  
3 with applicable law. I assume there what they would  
4 have to do would be to say that the new guidelines apply  
5 only to post-enactment offenders, so that the Fair  
6 Sentencing Act would trump this previous provision in  
7 the Sentencing Reform Act. Wouldn't that be correct?

8 MR. ESTRADA: Correct. And I think that  
9 that would be true here as well. And the reason why I  
10 was highlighting the earlier bills is because each and  
11 every one of them had the same, almost word for word,  
12 "conform with applicable law" emergency authority. All  
13 of them uniformly said the new mandatory minimums will  
14 not apply for another 6 months after the enactment.

15 As a logical proposition, if Congress  
16 thought that the identical language made sense to bring  
17 the guidelines into conformity with a law that would not  
18 take into -- that would not kick in for another 6  
19 months, having it kick in sooner does not have any more  
20 logical import in saying that therefore, you know, the  
21 guidelines now mean that previous offenses get a  
22 different sentence.

23 JUSTICE KAGAN: But could I understand what  
24 you are saying, Mr. Estrada? Because if Justice Alito  
25 is right, then the new guidelines that the Sentencing

1 Commission has in fact promulgated should not be being  
2 applied right now to those who committed crimes before  
3 the enactment date. And that's not what's happening now  
4 on the ground, is it?

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

12 And so there has never been any reason to  
13 have two sets of guidelines to account for cliffs or  
14 mandatory minimums, because every guidelines book has  
15 had a built-in solution to that problem, which is we  
16 understand that there are cliffs, we understand that  
17 there is a world of mandatory minimums; we can't fix  
18 those, this is our guideline sentence. If somehow, for  
19 some reason -- because it occurred, you know, before or  
20 whatever -- there is a mandatory minimum that applies,  
21 the guidelines say the mandatory minimum becomes the  
22 guideline sentence.

23 So in that sense, a Congress that knew the  
24 law would understand that saying you have to have new  
25 guidelines had no logical force in saying that therefore

1 the effective date of mandatory minimums or any other  
2 factor that bore on the application of mandatory  
3 minimums would be changed.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 Mr. Estrada.

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

7 CHIEF JUSTICE ROBERTS: Mr. Eberhardt, you  
8 have 3 minutes.

9 REBUTTAL ARGUMENT OF STEPHEN E. EBERHARDT  
10 ON BEHALF OF THE PETITIONERS

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

13 Obviously this Court recognizes the  
14 difficulty of those district court judges sitting and  
15 asking themselves: What do I do with this defendant as  
16 opposed to another defendant? And after listening to my  
17 colleague, Mr. Estrada, I still have to ask the Court to  
18 consider the question that the Court has been asking:  
19 What possible reason could Congress have to want a  
20 district court judge to have to sit back 5 years after  
21 the date of enactment of the Fair Sentencing Act and  
22 impose mandatory minimums that everyone agrees at this  
23 point are racially discriminatory?

24 JUSTICE SCALIA: Of course, you could say  
25 that about any statute that runs afoul of -- of section



1 109. I mean, that's what section 109 says: Even though  
2 we have decided that this old law is bad and the penalty  
3 should be lesser, even though we have decided, when we  
4 do that you continue to apply the bad old penalty to  
5 people who committed a crime before the amendment.  
6 Isn't that what -- what 109 says?

7 MR. EBERHARDT: It can be, but, as Justice  
8 Sotomayor recognizes, there has never been a situation  
9 such as this basically in the history of criminal law  
10 and criminal law sentencing in our --

11 JUSTICE BREYER: I'd imagine you would find  
12 disagreement with that. You know -- you know -- you  
13 know as a matter of fact in the year that these took  
14 effect, think of the sentences that were not governed by  
15 mandatory for crack, not governed by the mandatory  
16 minimum. Did the guidelines provide, let's call it a  
17 low sentence, disproportionately low?

18 MR. EBERHARDT: Congress ultimately felt  
19 that they did, yes.

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

22 MR. EBERHARDT: The guidelines changed in  
23 different respects with regard to different amounts.  
24 The new --

25 JUSTICE BREYER: I'll look it up. I will

1 look it up.

2 MR. EBERHARDT: I suggest the Court -- we  
3 admit that 109 has to be considered in the case, but I  
4 think to find what was really meant by Congress, after  
5 the Court looks to section 109, the Court does have to  
6 look to the 3553 sentence, or 3553 section, that makes  
7 it very plainly clear, ever since the Sentencing Reform  
8 Act, that the date of sentencing clearly is the  
9 important date, as opposed to the date of the commission  
10 of the crime.

11 CHIEF JUSTICE ROBERTS: All those arguments  
12 have nothing to do with the provision about the  
13 Sentencing Commission is supposed to act quickly or any  
14 of that, right?

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

19 MR. EBERHARDT: But it goes hand-in-hand  
20 with the mandate from the Sentencing Commission to put  
21 the new guidelines in place as soon as practical, as  
22 well as provisions of section 10.

23 Thank you very much.

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 Mr. Eberhardt.

1                   Mr. Estrada, at the invitation of the Court,  
2 you have briefed and argued this case as an amicus  
3 curiae in support of the judgment below. You've ably  
4 discharged that responsibility, for which the Court is  
5 grateful.

6                   The case is submitted.

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

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