No. 22-____

In the Supreme Court of the United States

MARK E. PULSIFER, PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The "safety valve" provision of the federal sentencing statute requires a district court to ignore any statutory mandatory minimum and instead follow the Sentencing Guidelines if a defendant was convicted of certain nonviolent drug crimes and can meet five sets of criteria. *See* 18 U.S.C. § 3553(f)(1)–(5). Congress amended the first set of criteria, in § 3553(f)(1), in the First Step Act of 2018, Pub. L. No. 115-391, § 402, 132 Stat. 5194, 5221, broad criminal justice and sentencing reform legislation designed to provide a second chance for nonviolent offenders. A defendant satisfies § 3553(f)(1), as amended, if he "does not have—(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines; (B) a prior 3-point offense, as determined under the sentencing guidelines; *and* (C) a prior 2-point violent offense, as determined under the sentencing guidelines." 18 U.S.C. § 3553(f)(1) (emphasis added).

The question presented is whether the "and" in 18 U.S.C. § 3553(f)(1) means "and," so that a defendant satisfies the provision so long as he does not have (A) more than 4 criminal history points, (B) a 3-point offense, *and* (C) a 2-point offense (as the Ninth Circuit holds), or whether the "and" means "or," so that a defendant satisfies the provision so long as he does not have (A) more than 4 criminal history points, (B) a 3-point offense, *or* (C) a 2-point violent offense (as the Seventh and Eighth Circuits hold).

RELATED PROCEEDINGS

United States Court of Appeals (8th Cir.):

United States v. Pulsifer, No. 21-1609 (July 11, 2022)

United States District Court (S.D. Iowa):

United States v. Pulsifer, No. 1:20-cr-00028-RGE-1 (Mar. 2, 2021)

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INTRODUCTION

This case presents an acknowledged circuit split over an important provision of the federal sentencing statute's "safety valve." 18 U.S.C. § 3553(f). The safety valve requires district courts to sentence a defendant convicted of certain nonviolent drug offenses "without regard to any statutory minimum sentence" if he meets the five sets of criteria in subsections (f)(1) through (f)(5). *Id.* Subsections (f)(2) through (f)(4) focus on the crime of conviction, while subsection (f)(5) requires the defendant to cooperate with the government.

The provision here, § 3553(f)(1), focuses on the defendant's criminal history. Before it was amended by the First Step Act of 2018, Pub. L. No. 115-391, § 402, 132 Stat. 5194, 5221, subsection (f)(1) required a defendant to show that he did "not have more than 1 criminal history point." 18 U.S.C. § 3553(f)(1) (2017). The First Step Act broadened that narrow criterion. As amended, § 3553(f)(1) reaches a defendant who "does not have—(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense … ; (B) a prior 3-point offense … ; *and* (C) a prior 2-point violent offense." 18 U.S.C. § 3553(f)(1)(A)–(C) (emphasis added).

The question presented is whether to read § 3553(f)(1) conjunctively or disjunctively. Put simply, does a defendant satisfy § 3553(f)(1) unless he has all three of (A), (B), *and* (C)—the conjunctive reading—or must he have none of (A), (B), *or* (C)—the disjunctive reading? The Ninth Circuit says conjunctive, relying on the ordinary conjunctive meaning of the word "and" to rule in the defendant's favor. But the Eighth Circuit here, since joined by the Seventh Circuit, said

disjunctive, expressly rejecting the Ninth Circuit's view and holding that "and" really means "or." That holding disqualified Petitioner Mark Pulslifer from safety-valve relief. Mr. Pulsifer otherwise met all the requirements in § 3553(f), and his Guidelines range would have been lower than the mandatory minimum sentence the district court thought it had to impose. The split won't go away on its own, and the en banc Eleventh Circuit will soon deepen it. The Court should intervene now to resolve this important issue.

1. The Seventh, Eighth, and Ninth Circuits have openly divided over how to interpret § 3553(f)(1). The Ninth Circuit says that "and" means "and." *United States v. Lopez*, 998 F.3d 431, 433 (9th Cir. 2021), *reh'g pet. pending* (Aug. 5, 2021). Thus, a defendant is eligible for safety-valve relief so long as he "does not have—(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense … ; (B) a prior 3-point offense … ; *and* (C) a prior 2-point violent offense"—*i.e.*, all three of (A), (B), and (C). 18 U.S.C. § 3553(f)(1)(A)–(C) (emphasis added). *Lopez* relied on the plain, ordinary meaning of "and"; the presumption of consistent usage ("and" also connects § 3553(f)(1) through (5)); and the recognized form of a "conjunctive negative proof." 998 F.3d at 436-37. As a familiar guide explains, the conjunctive negative proof forbids doing A, B, and C—that is, the combination of "all three"—when the prohibition is "[y]ou must not do A, B, *and* C." A. Scalia & B. Garner, *Reading Law* 119-20 (2012) (emphasis added). The disjunctive negative proof, in contrast, forbids doing *any* of A, B, or C when the prohibition is "not A, B, *or* C." *Id.* at 119.

The Eighth Circuit here expressly rejected the Ninth Circuit's reading, holding that "and" means

"or." App. 6a-7a & n.2. In the Eighth Circuit's view, a defendant is eligible for safety-valve relief only if he does not have (A) more than 4 points, (B) a 3-point offense, *or* (C) a 2-point violent offense. App. 7a. According to the Eighth Circuit, the Ninth Circuit's reading would make subsection (A) surplusage (because 3 points plus 2 points is more than 4 points), and that concern overcomes the canons of ordinary meaning and consistent usage. App. 6a-7a & n.2. And the Seventh Circuit recently sided with the Eighth Circuit in a 2–1 opinion over a dissent by Judge Wood, who would have read the statute disjunctively, like the Ninth Circuit. *United States v. Pace*, No. 21-2151, 2022 WL 4115728 (7th Cir. Sept. 9, 2022).

The disagreement won't end with these three circuits. In *United States v. Garcon*, 997 F.3d 1301, 1302 (11th Cir. 2021), a panel of the Eleventh Circuit took the same view as the Eighth Circuit before the en banc court granted rehearing and vacated the panel opinion, 23 F.4th 1334 (11th Cir. 2022). Relying on *Reading Law*, just like the Ninth Circuit in *Lopez*, Judge Branch's concurring panel opinion reasoned that § 3553(f)(1) is indeed a conjunctive negative proof. 997 F.3d at 1306-07. But she drew *the opposite* conclusion from *Lopez*, somehow finding that the *conjunctive* negative proof really is *disjunctive*.

That disagreement all the way down underscores the need for this Court's intervention. Whatever the en banc Eleventh Circuit decides, it will only deepen the existing circuit split. The rehearing petition in the Ninth Circuit doesn't change anything, either. That petition has been pending for well over a year, and the government has drawn both the Eighth Circuit's decision here and the Eleventh Circuit's now-vacated

panel decision to the court's attention, all without producing rehearing.

2. The question presented is important, and this case is an excellent vehicle for resolving it. The First Step Act of 2018, which amended § 3553(f)(1) to its current form, was a historic piece of bipartisan—if not nonpartisan—legislation. The legislation aims to give citizens convicted of nonviolent drug crimes a second chance. The circuit conflict—and the Seventh and Eighth Circuits' rule, in particular—frustrates that goal. The courts should not be more divided than the American people and their representatives on this important question.

This case is an ideal vehicle for resolving the issue. The only thing making Mr. Pulsifer ineligible for safety-valve relief is the Eighth Circuit's disjunctive reading of § 3553(f)(1). Indeed, the government has conceded that Mr. Pulsifer satisfies § 3553(f)(2) through (5). And the safety valve would make a difference. The district court sentenced Mr. Pulsfier to 162 months' imprisonment (the mandatory 15 years, or 180 months, minus an unrelated reduction). But Mr. Pulslifer's Guidelines range would have been 120–150 months in the Ninth Circuit, or even 100–125 months if the court were free to apply a variance reflecting the First Step Act's policy.

3. The Eighth Circuit's decision is wrong. Section 3553(f)(1) is unambiguously a conjunctive negative proof. A defendant satisfies the provision so long as he "does not have—(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense … ; (B) a prior 3-point offense … ; *and* (C) a prior 2-point violent offense"—*i.e.*, all three of (A), (B), and (C). 18 U.S.C.

§ 3553(f)(1)(A)–(C) (emphasis added). That's because, as *Lopez* put it, "'and' means 'and.'" 998 F.3d at 433. It doesn't mean "or," which Congress could have written if it intended the Eighth Circuit's reading. And reading "and" to mean "or" is all the more strange given that the "and" later in the same sentence—to connect § 3553(f)(1) through (5)—must mean "and." Neither the presumption against surplusage nor the government's preferred result under a disjunctive reading can modify the statute's ordinary, plain terms. And even assuming the presumption against surplusage could create some ambiguity, the rule of lenity would resolve it against the government. Courts don't construe the text of a criminal statute to mean something "different from its ordinary, accepted meaning," when doing so would "disfavor[] the defendant." *Burrage v. United States*, 571 U.S. 204, 216 (2014).

The Court should grant review.

OPINIONS BELOW

The court of appeals' opinion (App. 1a-9a) is reported at 39 F.4th 1018. The district court's judgment (App. 10a-23a) and the sentencing transcript (App. 24a-47a) are unpublished.

JURISDICTION

The court of appeals entered its judgment on July 11, 2022. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3553(f) of Title 18, U.S. Code, provides:

> LIMITATION ON APPLICABILITY OF STATUTORY MINIMUMS IN CERTAIN CASES.—Notwithstanding any other provision of law, in the case of an offense

under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846), section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), or section 70503 or 70506 of title 46, the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have—

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

> (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.
>
> Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.

STATEMENT

A. Statutory background

1. Under the "safety valve" provision of the federal sentencing statute, 18 U.S.C. § 3553(f), district courts "shall impose a sentence" under the United States Sentencing Guidelines and "without regard to any statutory minimum sentence" on qualifying defendants. A defendant qualifies if he was convicted of certain nonviolent drug crimes and can meet the criteria in § 3553(f)(1) through (5). For example, the defendant must not have "use[d] violence or credible threats of violence," or a firearm, "in connection with the offense," *id.* § 3553(f)(2), and the offense must not have resulted in death or serious bodily injury, *id.* § 3553(f)(3). The defendant also must have "truthfully provided to the Government all information and evidence" he has about the offense or related offenses. *Id.* § 3553(f)(5).

The question presented concerns the criteria in § 3553(f)(1), which focuses on the defendant's prior criminal history "as determined under the sentencing guidelines." Before § 3553(f)(1) was amended by the First Step Act of 2018, § 402, 132 Stat. at 5221, a defendant had to show that he did "not have more than 1 criminal history point." 18 U.S.C. § 3553(f)(1) (2017). The First Step Act broadened eligibility for relief. As amended, § 3553(f)(1) reaches a defendant who "does not have—(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense … ; (B) a prior 3-point offense … ; *and* (C) a prior 2-point violent offense." 18 U.S.C. § 3553(f)(1)(A)–(C) (emphasis added). The question presented is whether the term "and" carries a conjunctive or disjunctive meaning. In other words, does a defendant satisfy § 3553(f)(1) unless he has (A), (B), *and* (C), or must he have none of (A), (B), *or* (C)?

B. Factual and procedural background

1. Mr. Pulsifer pleaded guilty to one count of distributing at least fifty grams of methamphetamine, in violation of 21 U.S.C. § 841(a)(1). App. 2a. Because he had a prior "serious drug felony," he was subject to a mandatory minimum sentence of 15 years, 21 U.S.C. § 841(b)(1)(A), unless the safety valve applied.

The safety-valve inquiry turned on § 3553(f)(1) alone. Mr. Pulsifer had two 3-point drug offenses under § 3553(f)(1)(B), but no 2-point violent offense under § 3553(f)(1)(C). Presentence Investigation Report (PSR) ¶¶ 46, 53, pp. 10, 13-14; Pulsifer CA Br. 2-3; *see also* App. 5a. Mr. Pulsifer therefore contended that he satisfied § 3553(f)(1) because he did "not have—(A) more than 4 criminal history points … , (B)

a prior 3-point offense … ; *and (C) a prior 2-point violent offense*." 18 U.S.C. § 3553(f)(1) (emphasis added).

The district court rejected Mr. Pulsifer's argument, concluding that the 15-year (180-month) mandatory minimum applied. App. 2a, 35a-36a. In the court's view, a defendant with "one of those three things" is "ineligible for safety valve." App. 35a. Thus, after making an unrelated sentencing reduction, the court sentenced Mr. Pulsifer to 162 months' imprisonment. App. 2a, 12a.

2. a. The court of appeals affirmed. The court thought the word "and" in § 3553(f)(1) had to be interpreted "severally," not "jointly." App. 6a. In the court's view, § 3553(f)(1)(A) through (C) should be read distributively, such that a defendant must show that he does not have (A) more than 4 points, (B) a 3-point offense, *or* (C) a 2-point violent offense. *Id.*

According to the court of appeals, reading "and" jointly—such that a defendant must have (A), (B), *and* (C) before he is ineligible for relief—would make (A), the more-than-4-points requirement, superfluous. *Id.* The court reasoned that a defendant with a 3-point offense under (B) and a 2-point violent offense under (C) would always have more than 4 points under (A). *Id.* Reading the statute distributively, in contrast, would give (A) independent force by disqualifying a defendant who does not meet (B) or (C). App. 6a-7a.

The court of appeals rejected Mr. Pulsifer's argument that the presumption of consistent usage supported reading "and" conjunctively because the word "and" connects § 3553(f)(1) through (5). App. 8a. The court thought that presumption lacked force given the differences between the affirmative list in § 3553(f)(1) through (5) and the negative list in

§ 3553(f)(1)(A) through (C) and the need "to avoid surplusage." App. 8a. And because it thought that "the traditional tools of interpretation reveal the meaning of the provision," the court rejected Mr. Pulsifer's reliance on the rule of lenity. App. 9a.

b. The court of appeals recognized that its reading conflicted with the Ninth Circuit's holding in *Lopez*. The Eighth Circuit noted that in *Lopez*, the Ninth Circuit "believed that § 3553(f)(1) employs a 'conjunctive negative proof' in which the defendant is ineligible only if he meets all three conditions cumulatively.'" App. 7a n.2. According to the Eighth Circuit, the Ninth Circuit had "mistakenly assume[d] that the word 'and' is used in a joint sense, and the decision was reached only after revising the meaning of § 3553(f)(1)(C) to avoid surplusage." *Id.*

REASONS FOR GRANTING THE PETITION

The Seventh, Eighth, and Ninth Circuits have split 1–2 over the meaning of "and" in § 3553(f)(1). In the Ninth Circuit, "and" means "and." A defendant must have (A) more than 4 points, (B) a 3-point offense, *and* (C) a 2-point violent offense before § 3553(f)(1) disqualifies him from safety-valve relief. In the Seventh and Eighth Circuits, in contrast, "and" means "or." A defendant can satisfy § 3553(f)(1) and prove his eligibility for safety-valve relief only if he shows that he does not have (A) more than 4 points, (B) a 3-point offense, *or* (C) a 2-point violent offense—*i.e.*, that he has none of the above. And soon the Eleventh Circuit will deepen the split. In May 2021, a panel of the Eleventh Circuit took the view the Eighth Circuit would later adopt. Earlier this year, however, the Eleventh Circuit reheard the case en banc, setting up a choice that will soon deepen the 1–2 split.

Only this Court can resolve the disagreement. The Eighth Circuit here acknowledged the Ninth Circuit's contrary decision in *Lopez*; the Seventh Circuit acknowledged that it was choosing between the Eighth Circuit's disjunctive view and the Ninth Circuit's conjunctive reading; and the Ninth Circuit in *Lopez* was aware of the Eleventh Circuit's contrary panel decision. In the Seventh and Eighth Circuits' view, traditional canons of construction resolved the question in the government's favor; in the Ninth Circuit's view, those same canons resolved the question for the defendant. No matter what the en banc Eleventh Circuit decides, the split will remain—only deeper than before.

The issue is important. A historic bipartisan coalition enacted the First Step Act of 2018 to reform our criminal justice system and make it more just. Giving Americans who committed nonviolent drug crimes a chance at redemption was a key objective. But the Seventh and Eighth Circuits' disjunctive reading frustrates that goal. This Court should settle the dispute.

This case presents an ideal vehicle for doing so. The Eighth Circuit's disjunctive reading of § 3553(f)(1) is the only thing making Mr. Pulsifer ineligible for safety-valve relief. Indeed, the government concedes that Mr. Pulsifer meets the other § 3553(f) criteria. And resentencing under the safety valve would make a difference. Given the 15-year mandatory minimum, the district court sentenced Mr. Pulsifer to 162 months' imprisonment after applying an unrelated reduction. That sentence is longer than both Mr. Pulsifer's 120–150-month Guidelines range and the 100–125-month Guidelines range that would apply if the court were to make a corresponding variance reflecting the First Step Act.

The Eighth Circuit's decision is wrong. Section 3553(f)(1) means what it says: If a defendant doesn't have (A) more than 4 points, (B) a 3-point offense, *and* (C) a 2-point violent offense, he is eligible for safety-valve relief. "And" means "and"—conjunctively, jointly, and together. "And" doesn't mean "or," especially when Congress also used "and" conjunctively *in the very same sentence* to connect § 3553(f)(1) through (5). To put it technically, § 3553(f)(1) is a "conjunctive negative proof." And the canon against surplusage doesn't say otherwise—it's just a presumption that cannot overcome clear language like the statute's text here. Even if the presumption against surplusage created some ambiguity, the rule of lenity would resolve it against the government.

The Court should grant review.

I. The circuits have divided over the meaning of § 3553(f)(1), and that disagreement will only deepen.

The Seventh, Eighth, and Ninth Circuits have split 1–2 over what a defendant must establish to be eligible for safety-valve relief under § 3553(f)(1). In the Ninth Circuit, prior convictions disqualify a defendant only if he has (A) more than 4 points, (B) a 3-point offense, *and* (C) a 2-point violent offense. In the Seventh and Eighth Circuits, however, a defendant needs to prove that he doesn't have *any* of those things. That split won't go away on its own. The Seventh and Eighth Circuits have acknowledged their disagreement with the Ninth Circuit—in the Seventh Circuit, over a well-reasoned dissent from Judge Wood—and the Eleventh Circuit has heard en banc arguments after vacating a panel opinion taking the same view as the Seventh and Eighth Circuits. The

government has recognized that split before both the Ninth and Eleventh Circuits. And what is now a 1–2 circuit split will deepen once the en banc Eleventh Circuit weighs in. Only this Court can resolve the disagreement.

A. In the Ninth Circuit, "and" means "and," and the defendant is eligible for relief unless he has (A) more than 4 points, (B) a 3-point offense, *and* (C) a 2-point violent offense.

In *Lopez*, the Ninth Circuit held that "'and' means 'and'" and that a defendant must have (A) more than 4 points, (B) a 3-point offense, *and* (C) a 2-point violent offense "before he or she is barred from safety-valve relief under § 3553(f)(1)." 998 F.3d at 433.

1. a. The Ninth Circuit "beg[a]n with the statutory text and end[ed] there" because "the statute's language is plain." *Id.* at 435 (citing *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020)). The court noted the government's concession "that the plain and ordinary meaning of § 3553(f)(1)'s 'and' is conjunctive." *Id.* at 436. That made sense, the court continued, because the Senate's own legislative drafting manual tells drafters to "use 'and' to indicate that a thing is included in the class only if it meets all of the criteria." *Id.* (quoting Office of the Legislative Counsel, *Senate Legislative Drafting Manual* 64 (1997)). What's more, "the government concede[d] that the canon of consistent usage require[d] [it] to 'presume' that § 3553(f)(1)'s 'and' is a conjunctive." *Id.* at 437. Because the word "and" joining subsections (f)(1) through (5) is conjunctive, the "and" in subsection (f)(1) should be conjunctive as well.

The Ninth Circuit turned to *Reading Law* to explain the grammar in greater detail. *See Lopez*, 998 F.3d at 436-37. When a prohibition states that a person "'must prove that you have not A, B, and C,'" the person must "prove that he or she does not meet A, B, and C, *cumulatively*." *Id.* at 436 (quoting *Reading Law* 120). That's because "when the term 'and' joins a list of prohibitions, 'the listed things are individually permitted but cumulatively prohibited.'" *Id.* (quoting *Reading Law* 119). This grammatical structure is known as a "conjunctive negative proof." *Id.* And the government "*concede[d]* that § 3553(f)(1)'s structure as a conjunctive negative proof supports a conjunctive interpretation." *Id.* (emphasis added). The court contrasted the conjunctive negative proof with the "disjunctive negative proof," where the word "or" conveys that a person "must 'have done none' of the three conditions." *Id.* at 437 n.7 (quoting *Reading Law* 120).

b. The Ninth Circuit rejected the government's arguments. *First*, the court explained that reading "and" to mean "and" "does not produce 'absurd' results," *id.* at 439, much less any results "so gross as to shock the general moral or common sense," *id.* at 438 (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)). Congress' goal could have been targeting "violent drug offenders," with subsection (A) addressing recidivism, (B) addressing serious offenses, and (C) targeting violence. *Id.* at 439. Moreover, the government's argument ignored "the remainder of the safety-valve requirements" in subsections (f)(2) through (5), even though "Congress could have made a policy decision that the safety valve should focus more on the defendant's instant offense rather than the defendant's prior criminal history." *Id.* At the same time, the government's interpretation created results "that are

arguably more confounding," like rendering Mr. Lopez ineligible for relief just "because he spray-painted a sign onto a building almost fourteen years ago" (a 3-point offense under § 3553(f)(1)(B)). *Id.* at 439. The government's "request for a swap of policy preferences" was no reason to "rewrite § 3553(f)(1)'s 'and' into an 'or' based on the absurdity canon." *Id.* at 440.

Second, the Ninth Circuit rebuffed the government's reliance on the presumption against surplusage. *Id.* at 440-41. A defendant might have a 3-point violent offense, thus satisfying both § 3553(f)(1)(B) and (C) but not (A)'s condition of more than 4 points total. And even if reading "and" to mean "and" created surplusage, "[t]he canon against surplusage is just a rule of thumb" that "does not supersede a statute's plain meaning and structure" or license "inconsistently interpret[ing] the same word in the same sentence." *Id.* at 441.

Finally, the Ninth Circuit rejected the argument that the statute is ambiguous and should be construed in the government's favor. *See id.* at 437-38, 443-44. For starters, the court found that the "§ 3553(f)(1)'s 'and' is unambiguously conjunctive," so there was no ambiguity for the government's reading. *Id.* at 443. But even if there were, the court continued, the rule of lenity would lead to the same place, because the court could not give the statute "a meaning that is different from its ordinary, accepted meaning, and that disfavors the [criminal] defendant." *Id.* (quoting *Burrage*, 571 U.S. at 216).

2. Judge Milan Smith concurred in part, dissented in part, and concurred in the judgment. He agreed with the majority "except for its contention that 18 U.S.C. § 3553(f)(1) does not contain

superfluous language." *Id.* at 444. In his view, a 3-point violent offense cannot count as a 2-point violent offense, so a defendant with a 3-point offense and a (separate) 2-point violent offense "will always have 'more than 4 criminal history points,'" making "subsection (A) surplusage." *Id.* 444-45 (quoting 18 U.S.C. § 3553(f)(1)). But Judge Smith "agree[d] with the majority that this superfluity does not change the outcome," *id.* at 446, because courts do not "avoid surplusage at all costs," *id.* (quoting *United States v. Atlantic Rsch. Corp.*, 551 U.S. 128, 137 (2007)). In his view, the statute's "plain language" is clear and the statute's results are not absurd. *Id.* at 447-48.

3. The government sought rehearing en banc in *Lopez* in August 2021. Although that petition remains pending, there is no reason to think that the court, after all this time, will change its view. Indeed, the government has called both the Eighth Circuit decision here and the Eleventh Circuit's now-vacated panel decision in *Garcon* (discussed below, at 20-21) to the Ninth Circuit's attention. *See* Gov't Rule 28(j) Letters, *Lopez*, No. 19-50305 (9th Cir. Jan. 25, 2022, and July 11, 2022). And, of course, the Eleventh Circuit went en banc in *Garcon*, vacating its panel decision in the government's favor.

B. In the Seventh and Eighth Circuits, "and" means "or," and a defendant is ineligible for relief if he has (A) more than 4 points, (B) a 3-point offense, *or* (C) a 2-point violent offense.

1. The Eighth Circuit here disagreed with *Lopez*, holding instead that the word "and" in § 3553(f)(1) really means "or." According to the Eighth Circuit, reading § 3553(f)(1) as a conjunctive negative proof

could not be right because it would create surplusage. App. 7a n.2. In the Eighth Circuit's view, "[o]nly the distributive interpretation"—requiring the defendant to prove that he doesn't have (A) more than 4 points, (B) a 3-point offense, *or* (C) a 2-point violent offense—"avoids surplusage." App. 6a.

2. The Seventh Circuit, over a dissent by Judge Wood, recently sided with the Eighth Circuit after observing that "[t]hree other circuits have addressed this question but have reached differing conclusions." *Pace*, 2022 WL 4115728, at *8 (discussing this case, *Lopez*, and the panel decision and rehearing grant in *Garcon*).

a. In *Pace*, the 2–1 majority agreed with the Eighth Circuit's interpretation, reasoning that "[t]he conjunctive argument creates more problems than solutions and renders a portion of the statute superfluous." *Id.* at *9. (The majority did not respond to Judge Wood's detailed explanation in dissent as to why there is no superfluity. *See id.* at *17-18 (Wood, J., dissenting.)) Looking to the Eighth Circuit's decision here, the *Pace* majority reasoned that the em dash at the beginning of § 3553(f)(1) supported reading "does not have" distributively to apply to each of subsections (A), (B), and (C). *Id.* at *9 (majority) (citing App. 6a-8a). The majority also thought that the conjunctive reading "produces absurd results." *Id.* at *10. Finally, given its view of statutory text, context, and legislative history and purpose, the majority concluded that the rule of lenity didn't apply. *Id.*

b. Judge Kirsch concurred to opine that "a conjunctive 'and' can have a distributive or joint (cumulative) sense." *Id.* at 11 (Kirsch, J., concurring). He "recognize[d]" that "a distributive reading makes

'and' interchangeable with a disjunctive 'or.'" *Id.* But he saw § 3553(f)(1) as analogous to several unrelated statutes throughout the U.S. Code, such as a provision that a chapter "does not apply" to seven different kinds of contracts. *Id.* at *11-12 (quoting 41 U.S.C. § 6702(b)). In Judge Kirsch's view, "[t]he Eighth Circuit has gotten § 3553(f)(1) right" by reading the statute as an "eligibility checklist." *Id.* at *13 (quoting App. 8a).

c. Judge Wood dissented. "[B]egin[ning] with the language of the safety-valve statute," she reasoned that "everyday English" resolved the question in favor of reading § 3553(f)(1) conjunctively. *Id.* at *14-16 (Wood, J., dissenting). "Congress used the word 'and,'" she observed, "and as judges it is our duty to apply the law as it is written." *Id.* at *15.

Judge Wood rejected the majority's "contortions," to "strain against that normal English understanding of 'and.'" *Id.* Indeed, she added, the ordinary-English "view is entirely consistent with the discussion of the 'negative proof'" in *Reading Law*. *Id.* at *16 (discussing *Reading Law* 120). She gave three "intuitive example[s]": needing to prove "that you did not dine and dash," "that you did not text and drive," and "that you did not drink and drive." *Id.* at *22. The problem is "the *combination*," not each activity on its own. *Id.*

Turning to the government's purposive arguments, Judge Wood explained that "courts must follow statutory language, even if they think that the results would be absurd or wildly out of proportion to the goals that Congress has articulated." *Id.* at *15 (discussing *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 173, 194 (1978)). And far from approaching that point, the ordinary, conjunctive reading of § 3553(f)(1)

makes sense. Given the "significant support among federal judges and the general public for reforms to the safety-valve exception," Judge Wood explained, Congress amended the statute "in a way designed to make it available to more defendants." *Id.* at *16. The result is that the statute "achieves a coherent policy objective—that is, categorically to exclude violent recidivists with recent criminal history from safety-valve eligibility." *Id.* at *18. She saw no absurdity in "treating violent offenders who served shorter sentences differently from nonviolent offenders who served longer ones," noting that "[m]any laws do just that." *Id.* at *19.

Judge Wood rejected the majority's surplusage argument. She first noted that "the statute is doing real work any time the two-point offense is not for a crime of violence, and any time the defendant does not have a three-point offense." *Id.* *17. She also noted that there is no surplusage if old convictions count as prior offenses under subsections (B) and (C) but not for criminal history under subsection (A). *See id.* *17-18.

Judge Wood also rebutted the majority's reliance on the em dash. The Senate's drafting manual, in "rules that are scrupulously enforced by the Senate's Legislative Counsel," tells drafters to use an em dash for formatting lists, so "the em-dash has no meaning, distributive or otherwise." *Id.* at *20. What matters, as the Senate manual makes clear, "is the conjunction at the end of the list." *Id.*

Finally, Judge Wood addressed the textual arguments for a distributive reading. For starters, she explained, "the Supreme Court has repudiated" the notion "of construing statutes to conform to what we judges think Congress 'really' meant, rather than to

follow the words that Congress actually used." *Id.* (citing *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2496 (2022), and *Bostock*, 140 S. Ct. at 1754). And Judge Kirsch's concurrence fared no better, she continued, because it "disregarded the distinction between a simple list of examples and a list of criteria." *Id.* The examples in the concurrence set out simple lists of exceptions to statutory schemes, and "[t]here is nothing cumulative about the items" on those lists. *Id.* at *20-21 (discussing examples).

3. The government has informed the Ninth and Eleventh Circuits of the Eighth Circuit's decision here. As the government told the Ninth Circuit, the Eighth Circuit's "interpretation of the statute directly conflicts with the panel opinion" in *Lopez*. Gov't Rule 28(j) Letter 2, *Lopez*, No. 19-50305 (9th Cir. July 11, 2022).

C. The en banc Eleventh Circuit, which vacated a panel decision ruling for the government, will soon deepen the split.

The en banc Eleventh Circuit will soon deepen the disagreement between the Eighth and Ninth Circuits. Several days before the Ninth Circuit decided *Lopez*, a panel of the Eleventh Circuit sided with the government, reading § 3553(f)(1) distributively. But the en banc Eleventh Circuit vacated that opinion and has now heard argument.

Like the Eighth Circuit, the Eleventh Circuit panel relied on the canon against surplusage to hold that "the 'and' in § 3553(f)(1) is disjunctive." *Garcon*, 997 F.3d at 1305. Because a defendant with "(B)'s required three-point offense and (C)'s required two-point violent offense" would have more than 4 criminal history points, the panel reasoned, reading "and"

conjunctively "violates … the canon against surplusage." *Id.* The panel thus concluded that "the plain text of the statute does not support [the defendant's] interpretation." *Id.* at 1305 n.2. Finding the statute's text and structure "clear," the panel dismissed the defendant's lenity arguments. *Id.* at 1306.

Judge Branch, the author of the panel opinion, also filed a separate concurrence. *Id.* at 1306-07. She wrote that § 3553(f)(1) "employs a conjunctive negative proof" and, like the Ninth Circuit in *Lopez*, cited page 120 of *Reading Law*. But she drew *the opposite* conclusion, *compare supra* pp. 13-14, reasoning that "the disjunctive 'and' gives the list the same meaning as if it read 'the defendant does not have: more than 4 criminal history points, a prior 3-point offense, *or* a prior 2-point violent offense." *Garcon*, 997 F.3d at 1306-07 (Branch, J., concurring). In her view, the (disjunctive) conjunctive negative proof was "a useful tool which lends further support to the majority's reasoning." *Id.* at 1307.

D. Only this Court can resolve the circuit conflict.

Only this Court can resolve the disagreement among the Seventh, Eighth, and Ninth Circuits over the meaning of the word "and" in § 3553(f)(1). As noted, the Eighth Circuit here rejected the Ninth Circuit's view in *Lopez*, and the Seventh Circuit recently did the same. But the Ninth Circuit has not granted rehearing en banc, and there is no reason to think it will after all this time. What's more, although the en banc Eleventh Circuit has not yet taken sides after vacating a panel opinion in conflict with *Lopez*, its decision will only deepen the 1–2 circuit split.

The sparring opinions show just how deep the disagreement cuts. The Ninth Circuit, joined by Judge Wood in dissent in the Seventh Circuit, thinks § 3553(f)(1) is a conjunctive negative proof, relying on page 120 of *Reading Law* for the proposition that a prohibitive list joined by an "and" prohibits only all items in the list *together, not separately*. *See Lopez*, 998 F.3d at 436-37 & n.7; *Pace*, 2022 WL 4115728, at *21-22 (Wood, J., dissenting). As the Ninth Circuit explains, it's that "and" that makes § 3553(f)(1) a conjunctive negative proof rather than a disjunctive negative proof joined by "or." *Lopez*, 998 F.3d at 436-37 & n.7. In the Eighth Circuit's view here, in contrast, § 3553(f)(1) does not use a conjunctive negative proof. App. 7a n.2. The Seventh Circuit majority ignores the concept altogether. And in the Eleventh Circuit, Judge Branch has opined—like *Lopez*, relying on page 120 of *Reading Law*—that § 3553(f)(1) "employs a conjunctive negative proof," only with a "disjunctive 'and'" that means the same thing as "or"! *Garcon*, 997 F.3d at 1306-07 (Branch, J., concurring). It's time for this Court to intervene.

II. The question presented is important, and this case is an ideal vehicle for resolving it.

A. The question presented is important.

1. This Court's resolution of the question will determine the eligibility of many nonviolent drug offenders for safety-valve relief, as this case, *Lopez*, and *Garcon* all make clear. Whether those offenders have a chance to show that they should re-enter and contribute to society early is a critical question.

The First Step Act of 2018 was enacted by a "historic bipartisan coalition—the likes of which, over the last several decades, Congress has rarely seen—[that]

came together to bring greater fairness and justice to the Nation's criminal justice system." Br. of Sens. Durbin, Grassley, Booker, and Lee as Amici Curiae 2, *Terry v. United States*, No. 20-5904, 141 S. Ct. 1858 (2021). The act passed both the Senate and the House "by a landslide." *Id.* at 8-9. And "President Trump praised the Act's comprehensive sentencing reforms, lauding that 'Americans from across the political spectrum can unite around prison reform legislation that will reduce crime while giving our fellow citizens a chance at redemption, so if something happens and they make a mistake, they get a second chance at life.'" *Id.* at 9 (citation omitted).

In short, the legislation did not divide the American people or their representatives. It shouldn't divide the courts, either. Reading § 3553(f)(1) conjunctively helps provide the second chance that the Act promises.

2. The government too has argued that the question presented is one of "exceptional importance." Pet. for Reh'g En Banc 17, *Lopez*, No. 19-50305 (9th Cir.). In the government's view, the disjunctive view of § 3553(f) makes safety-valve relief too widely available, undercuts the government's ability to obtain substantial assistance from defendants under § 3553(e), and promotes unpredictable results. *Id.* at 17-20. Although Mr. Pulsifer disputes the government's view, the point is that both sides agree that the question presented is one this Court should resolve.

B. This case is an ideal vehicle for resolving the question. *First*, the question is outcome-determinative because, as the government conceded before the court of appeals, the four other sets of criteria, under § 3553(f)(2) through (5), are "not disputed." Gov't CA

Br. 5-6. The parties dispute only the question presented, and Mr. Pulsifer does not a have a prior 2-point violent offense. Thus, if this Court holds that § 3553(f)(1) should be read conjunctively, then Mr. Pulsifer would need to be resentenced "pursuant to" the Sentencing Guidelines, "without regard to" the 15-year "statutory minimum sentence" that otherwise would apply. 18 U.S.C. § 3553(f); *see* App. 2a.

Second, resentencing under the safety valve would make a difference. The district court based Mr. Pulsifer's sentence on the 15-year mandatory minimum—180 months—and reduced it for reasons not at issue to 162 months. App. 2a, 31a-32a, 39a. But Mr. Pulsifer's Guidelines range was 120–150 months, and would be 100–125 months with a 2-level variance reflecting the First Step Act. *See* Pulsifer CA Br. 3, 10-11; U.S.S.G. §§ 2D1.1(b)(18), 5C1.2; PSR ¶ 130, p. 28. The Guidelines are "the lodestar," and "in most cases the Guidelines range will affect the sentence." *Molina-Martinez v. United States*, 578 U.S. 189, 200-04 (2016). Resolving the question presented in Mr. Pulsifer's favor likely would lead to a shorter sentence.

III. The Eighth Circuit's decision is wrong.

The Eighth Circuit's decision is wrong. Section 3553(f)(1) is conjunctive, not disjunctive: "and" means "and." Thus, a defendant remains eligible for safety-valve relief unless he has (A) more than 4 points, (B) a 3-point offense, *and* (C) a 2-point violent offense. For one thing, the ordinary meaning of "and" is conjunctive (*i.e.*, "and," not "or"). For another, courts presume that Congress uses words consistently throughout a statute, and here Congress used "and" both to connect § 3553(f)(1)(A) through (C) and § 3553(f)(1) through (5)—which are all part of the same sentence. "And"

should not mean "or" at the beginning of the sentence (in § 3553(f)(1)) and "and" at the end (in connecting § 3553(f)(1) through (5)). Giving § 3553(f)(1) its ordinary, plain meaning means reading it as a "conjunctive negative proof," a recognized statutory and linguistic form.

The contrary reasoning advanced by the Eighth Circuit here, the panel opinion in the Eleventh Circuit, and the government lacks merit. The canon against surplusage is just a presumption that does not overcome plain, ordinary meaning. Nor does absurdity supply any reason to disregard § 3553(f)(1)'s terms. And the notion that a conjunctive negative proof is disjunctive makes sense only on Opposite Day.

Even assuming there's some lingering ambiguity given the canon against surplusage, the rule of lenity should resolve it in Mr. Pulsifer's favor. The rule of lenity does not permit courts to read a criminal statute to mean something other than what its words say.

A. The "and" in § 3553(f)(1) means "and."

Fundamental canons of statutory construction show that the "and" in § 3553(f)(1) means "and." Put another way, § 3553(f)(1) is a conjunctive negative proof, meaning that a defendant satisfies § 3553(f)(1) unless he has (A) more than 4 points, (B) a 3-point offense, *and* (C) a 2-point violent offense.

1. Statutory interpretation begins with text, and "[i]f the words of a statute are unambiguous, this first step of the interpretive inquiry is [the] last." *Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019). Just so here. "And" means "and." Unless a defendant has (A) 4 points, (B) a 3-point offense, "and" (C) an 2-point violent offense, he satisfies § 3553(f)(1).

2. Then there's the presumption of consistent usage—that "and" in one place in the statute means the same thing as "and" somewhere else. That "presumption surely at its most vigorous when a term is repeated within a given sentence." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). In § 3553(f), Congress used "and" to join both subsections (2) through (5) and conditions (A) through (C) in subsection (1)—all in the very same sentence. Why would "and" mean "or" in (f)(1) but "and" when connecting (f)(1) through (f)(5)?

3. Reading "and" to mean "and" in a negative list isn't novel or technical. Instead, as discussed, it's an example of a "conjunctive negative proof." *Reading Law* 120. "After a negative, the conjunctive *and* is still conjunctive: *Don't drink and drive.* You can do either one, but you can't do them both." *Id.* at 119. If you're drafting a statute (or speaking English) and you want to say, "not A, not B, *and* not C," you write (or say), "not A, B, *or* C." *Id.* That's because the "singular-negation effect, forbidding doing *anything* listed, occurs when the disjunctive *or* is used after a word such as *not* or *without*." *Id.*

To drive the point home, *Reading Law* observes that the phrase, "To be eligible, you must prove that you have not A, B, and C," is conjunctive, meaning that "you must prove that you did not do all three" together. *Id.* at 120. But with the "disjunctive negative proof," in contrast, you must prove that you did *none* of the three things. *Id.*

This isn't fine parsing. It's just English, as Judge Wood explained. *See supra* p. 18. It's why the Senate drafting manual sates that legislation should use "or" when "a thing is included in the class if it meets 1 or more of the criteria" and "and" when "a thing is

included in the class only if it meets all of the criteria." *Senate Legislative Drafting Manual* 64.

4. Giving § 3553(f)(1)'s terms their plain meaning matches Congress' purpose in the First Step Act to make safety-valve relief more widely available for nonviolent drug offenders. *See Pace*, 2022 WL 4115728, at *19 (Wood, J., dissenting). As the Ninth Circuit explained in *Lopez*, Congress rationally could have thought that subsection (A) targets recidivism while subsection (B) targets serious offenses and subsection (C) targets violent offenses. 998 F.3d at 439. Under a conjunctive reading of § 3553(f)(1), an offender like Lopez, who had an old, 3-point conviction for spray-painting a building, would be eligible for relief. *Id.* There is no reason to think Congress would prefer an atextual disjunctive reading just to exclude him. And subsections (f)(2) through (f)(5) ensure that the safety valve applies only to cooperative, nonviolent drug offenders.

B. The Eighth Circuit's interpretation and the government's arguments lack merit.

The Eighth Circuit, Seventh Circuit, now-vacated Eleventh Circuit panel opinion, and the government have advanced several arguments for reading "and" to mean "or": the canon against surplusage, absurdity, and the disjunctive conjunctive negative proof. None is persuasive.

1. The canon against surplusage cannot overcome the ordinary meaning of "and," its consistent usage in § 3553(f)(1) and in connecting § 3553(f)(1) through (5), and the established concept of the conjunctive negative proof. That's because, as *Lopez* put it, the canon against surplusage is just a "rule of thumb." 998 F.3d at 441. As this Court recently

explained, "[r]edundancy is not a silver bullet," but "only a clue." *Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019). "[C]anons are useful tools, but it is important to keep their limitations in mind." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1173 (2021) (Alito, J., concurring in the judgment). And given those limitations, "[s]ometimes the better overall reading of [a] statute contains some redundancy." *Rimini St.*, 139 S. Ct. at 881.

Just so with § 3553(f)(1), even assuming there's surplusage. *Contra Lopez*, 998 F.3d at 439-40; *Pace*, 2022 WL 4115728, at *18-19 (Wood, J., dissenting). The canon's fatal limitation here is that it cuts against ordinary, plain meaning. As this Court has instructed time and again, "a court should always turn first to one, cardinal canon before all others"—the presumption that "a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Concerns about surplusage cannot overcome plain meaning and consistent usage. It thus doesn't make sense to claim that the conjunctive reading "*violates* … the canon against surplusage." *Garcon*, 997 F.3d at 1305 (emphasis added). And in any event, it's far from clear that Congress recognized any superfluity anyway when it was focusing on the combination of (A) recidivism, (B) serious offenses, and (C) violent offenses.

2. Absurdity doesn't support the government's reading either. As *Lopez* explained, concerns that "a career offender with several drug convictions—but who never committed a violent act—could possibly become eligible for safety-valve relief under a conjunctive interpretation" don't move the needle. 998 F.3d at 438-39. As noted, when read conjunctively,

subsection (f)(1) addresses a combination of (A) recidivism, (B) seriousness of prior offenses, and (C) violent prior offenses. At the same time, the rest of § 3553(f) restricts the pool of eligible defendants to cooperative, nonviolent drug offenders. There's nothing irrational about those policy choices—and no "absurdity [that] is so clear as to be obvious to most anyone." *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 471 (1989) (Kennedy, J., concurring in the judgment). "Congress has spoken in the plainest of words" in § 3553(f)(1), and whatever the government or courts might think of them, "in our constitutional system the commitment to the separation of powers is too fundamental for [courts] to pre-empt congressional action by judicially decreeing what accords with 'common sense ….'" *Hill*, 437 U.S. at 194-95.

3. The Eighth Circuit, Judge Branch, and the government all offer an incorrect understanding of the conjunctive negative proof.

In the Eighth Circuit's view, reading § 3553(f)(1) as a conjunctive negative proof "mistakenly assumes that the word 'and' is used in a joint sense." App. 7a n.2. That conclusory response misses the point that the conjunctive negative proof confirms exactly what ordinary, plain meaning and the presumption of consistent usage show: "and" means "and."

In Judge Branch's view, § 3553(f)(1) "employs a conjunctive negative proof" and yet "is disjunctive." *Garcon*, 997 F.3d at 1306-07 (Branch, J., concurring). That's oxymoronic, and also contrary to what *Reading Law* says on the very pages she cites. *Reading Law* distinguishes between conjunctive negative proofs and disjunctive negative proofs. The difference? "Or" means "or," as in, "To be eligible for citizenship, you

must prove that you have not (1) been convicted of murder; (2) been convicted of manslaughter; *or* (3) been convicted of embezzlement." *Reading Law* 120 (emphasis added). The applicant facing that disjunctive negative proof needs to negate *each and every one* of those things. Judge Branch reads § 3553(f)(1) just like the citizenship example. But the problem is that the citizenship example is a disjunctive negative proof and § 3553(f)(1) is a conjunctive negative proof.

The government takes a different tack, trying to come up with examples of lists of things "you must not do" where "and" means "or." The government says, "To be healthy, you must not drink and smoke," and "you must not lie, cheat, and steal." Gov't En Banc Br. 19, 28, *Garcon*, No. 19-14650 (Mar. 14, 2022). But who says that? That's not natural English (unless you mean to set out a conjunctive negative proof). *See, e.g.*, *Van Orden v. Perry*, 545 U.S. 677, 715 (2005) (Stevens, J., dissenting) ("The State may admonish its citizens not to lie, cheat, *or* steal …." (emphasis added)).

As *Reading Law* explains, "Don't drink and drive" makes sense because it's a prohibition on doing both activities at the same time—one *and* the other—not on doing one *or* the other independently. And if you say, "Don't drink and smoke," someone might ask whether there's something particularly harmful about combining those habits, since "don't drink or smoke" would be the natural thing to say if your advice is just to do neither. (And the question would be understandable, because combining smoking *and* drinking is indeed worse than doing just one *or* the other. *See* K. Mure et al., *The Combination of Cigarette Smoking and Alcohol Consumption Synergistically Increases Reactive Carbonyl Species in Human Male Plasma*, 22 Int'l J. Molecular Scis., No. 9043, at 2 (Aug. 2021),

available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8396601/. Firefighters and Smokey the Bear probably don't like the combination, either.) The point is that the government relies not on ordinary usage or other interpretive principles, but on inferences from supposed purpose, when it argues that "and" and "or" are interchangeable and that the statute must really mean "or." But the relevant question is what the statute says, not what the government (or judges) thinks Congress must have meant.

4. Finally, Judge Kirsch's suggestion that other statutes scattered throughout the U.S. Code support reading § 3553(f)(1) disjunctively, *see Pace*, 2022 WL 4115728, at *11-12 (Kirsch, J., concurring), lacks merit. The statutes he cited are unlike § 3553(f)(1) for the reasons Judge Wood explained: while § 3553(f)(1) lists a set of three criteria a defendant must meet, the statutes Judge Kirsch cites all list separate, unrelated exceptions to a rule. *Id.* at *20 (Wood, J., dissenting). For example, 41 U.S.C. § 6702(b) lists various kinds of contracts that each are exempted, not one kind of contract meeting various criteria. Similarly, 18 U.S.C. § 845(a) sets out exceptions to federal crimes about explosive materials. In that kind of setting, as Judge Wood observed, "whether the list ends with 'and,' 'or,' or nothing makes no difference." *Pace*, 2022 WL 4115728, at *20 (Wood, J., dissenting).

C. Even if § 3553(f)(1) could otherwise be construed in the government's favor, the rule of lenity would forbid it.

Even assuming there's some ambiguity in § 3553(f)(1) that lets "and" mean "or," the rule of lenity would resolve the question in Mr. Pulsifer's favor. Under the rule of lenity, "any reasonable doubt about the

application of a penal law must be resolved in favor of liberty." *Wooden v. United States*, 142 S. Ct. 1063, 1081 (2022) (Gorsuch, J., joined by Sotomayor, J., concurring in the judgment). The rule of lenity supplies a clear-statement principle: Where a criminal statute remains ambiguous after a court considers its "text, structure, history, and purpose," the court should choose the interpretation favoring the defendant. *Maracich v. Spears*, 570 U.S. 48, 76 (2013) (citation omitted); *see Skilling v. United States*, 561 U.S. 358, 410 (2010). In other words, given two possible readings of a criminal statute, a court should not "choose the harsher alternative" unless Congress has "spoken in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347 (1971) (citation omitted); *see also Abramski v. United States*, 573 U.S. 169, 203 (2014) (Scalia, J., dissenting); *Evans v. United States*, 504 U.S. 255, 289 (1992) (Thomas, J., dissenting).

Here, assuming § 3553(f)(1) does not unambiguously require a conjunctive construction, then "reasonable minds could differ (as they have differed) on the question" presented and "the rule of lenity demands a judgment in [Mr. Pulsifer's] favor." *Wooden*, 142 S. Ct. at 1081 (Gorsuch, J., joined by Sotomayor, J., concurring in the judgment). Under the rule of lenity, a court "cannot give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant." *Burrage*, 571 U.S. at 216. So even assuming the canon against surplusage, for instance, weighs against ordinary meaning, the scales cannot come to rest in the government's favor.

* * *

The Seventh, Eighth, and Ninth Circuits have split over an important question about the scope of the

sentencing safety valve under the landmark First Step Act of 2018. And the en banc Eleventh Circuit will soon deepen the split. Only this Court can resolve the acknowledged and entrenched disagreement. The Court should grant review without delay.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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