No. 22-340

In the Supreme Court of the United States

MARK E. PULSIFER, PETITIONER

v.

UNITED STATES

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The "safety valve" provision of the federal sentencing statute requires a district court to ignore any mandatory minimum and instead impose a sentence pursuant to the Sentencing Guidelines if a defendant is convicted of certain nonviolent drug offenses and can meet five sets of criteria. *See* 18 U.S.C. § 3553(f)(1)–(5). Congress amended the first set of criteria—§ 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) 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 § 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, excluding any points resulting from a 1-point offense, (B) a 3-point offense, *and* (C) a 2-point violent offense (as the Fourth, Ninth, and Eleventh Circuits hold), or whether the "and" means "or," so that a defendant satisfies the provision only if he does not have (A) more than 4 criminal history points, excluding any points resulting from a 1-point offense, (B) a 3-point offense, *or* (C) a 2-point violent offense (as the Fifth, Sixth, Seventh, and Eighth Circuits hold).

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INTRODUCTION

In the First Step Act of 2018, Congress expanded the scope of 18 U.S.C. § 3553(f)—a "safety valve" that requires district courts to disregard disproportionate mandatory minimum sentences and instead exercise their wide discretion to impose sentences based on a variety of factors. Application of the safety valve turns on five sets of criteria: § 3553(f)(1), (f)(2), (f)(3), (f)(4), "and" (f)(5). 18 U.S.C. § 3553(f). The safety valve applies only when a defendant meets all five criteria, as the word "and" makes clear. Put simply, as all agree, the "and" in § 3553(f) means "and," not "or."

This case concerns the word "and" slightly earlier in the same sentence in § 3553(f)(1)—but this time the government says "and" means "or." Section 3553(f)(1) provides that 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, 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." *Id.* § 3553(f)(1) (emphasis added). The question is whether that "and" means "and." In other words, is a defendant is eligible for safety-valve relief so long as he does not have all three of (A), (B), *and* (C), or is he eligible only if he does not have (A), (B), *or* (C)?

Plain meaning, context, and purpose—not to mention Occam's razor—all point to the same conclusion: "and" means "and." Ordinary English speakers understand that "and" means "and," not "or." And given the statutory context—Congress' use of "and" twice in the

same sentence—there simply is no way that the "and" in § 3553(f) means "and" but the "and" in § 3553(f)(1) means "or."

The government disagrees. It reads the "and" in § 3553(f)(1) to functionally mean "or." In other words, the government contends that a defendant is eligible for safety-valve relief only if his criminal history does not trigger § 3553(f)(1)(A), (B), *or* (C)—any of them. And, the government contends, "and" *clearly* means "or" (because if the word "and" is ambiguous, then the rule of lenity means it can't mean "or").

The government's interpretation does severe damage to faithful textualism. Indeed, as Judge Willett observed, it would be "a body blow" to "our language, and our language-dependent legal system," for courts to "hold that it is reasonable to read 'or' for 'and.'" *United States v. Palomares*, 52 F.4th 640, 652 (5th Cir. 2022) (Willett, J., dissenting) (citation omitted). The government's "novel reading," as Chief Judge Pryor has explained, is textually impermissible, and "it appears to have been crafted by the government specifically for this statute to achieve its preferred outcome." *United States v. Garcon*, 54 F.4th 1274, 1280 (11th Cir. 2022) (en banc). But that's not how statutory interpretation works, at least if the separation of powers means anything. *See id.* at 1289-90 (Newsom, J., concurring).

When Congress said "and" in § 3553(f)(1), that's what it meant. The Court should reverse.

* * *

1. Fundamental canons of statutory construction show that Congress meant what it said in § 3553(f)(1): "and" means "and." Thus, a defendant satisfies § 3553(f)(1) so long as he does not have (A) more than

4 criminal history points, (B) a prior 3-point offense, *and* (C) a prior 2-point violent offense—all three.

The word "and" ordinarily joins things together. When "and" connects requirements, it joins them in a conjunctive list, meaning *every* requirement must be met. That logic applies no matter whether a command is affirmative—"you must wash your hands with soap *and* water"—or negative—"you must not drink *and* drive." "And" thus retains its ordinary, joint sense when it connects conditions framed in the negative, as in: To be eligible, you must not have done A, B, *and* C. A person is eligible so long as he has not done all three. This structure is called a conjunctive negative proof.

That's what § 3553(f)(1) is. Congress used "and" to connect three conditions framed in the negative: To be eligible for safety-valve relief, a defendant must not have (A), (B), *and* (C). Pulsifer does not have all three, so he is eligible for relief.

Context confirms this commonsense conclusion. Courts presume that a given term means the same thing throughout a statute, and that a material variation in terms—like "and" versus "or"—suggests a variation in meaning. Here, Congress used "and" twice in the same sentence: once to connect § 3553(f)(1) through (5), and again to connect (f)(1)(A) through (C). All agree that the "and" in § 3553(f) has a joint sense. The "and" in § 3553(f)(1) does, too. Had Congress meant something different, it would have said "or," as it did elsewhere in the statute.

Giving "and" its plain, ordinary meaning also aligns with the bipartisan First Step Act's purpose. Congress amended § 3553(f)(1) to expand the safety valve and require courts to exercise their discretion under the Sentencing Guidelines in a greater number

of cases to impose sentences tailored to the offense and the offender.

2. The government's "functionally disjunctive" (or "distributive") reading—a fancy way of saying "and" means "or"—is textually impermissible. To rule for the government, the Court would have to rewrite § 3553(f)(1): (1) replace "and" with "or," or (2) add the words "does not have" into the statute where they do not appear. The Court may not do either.

The functionally disjunctive reading isn't just bad English. It also violates the presumption of consistent usage and the meaningful-variation canon. Again, Congress used "and" twice in one sentence: to connect § 3553(f)(1) through (5), and to connect (f)(1)(A) through (C). Importantly, § 3553(f) and § 3553(f)(1) have the same structure. Thus, the word "and" cannot mean one thing for § 3553(f) and another thing for § 3553(f)(1). Moreover, Congress elsewhere confirmed it knew how to use "or" "to convey that the satisfaction of a single listed condition is disqualifying," *United States v. Jones*, 60 F.4th 230, 235 (4th Cir. 2023)—that is, to mean "or." And given the statute's plain, unambiguous language, the government cannot use the surplusage canon to transform "and" into "or." That is doubly true because there is no surplusage in the first place.

3. Even assuming the statute is ambiguous, the rule of lenity prohibits reading "and" in § 3553(f)(1) to mean "or." For one thing, courts cannot give a word in a criminal statute—like the "and" in § 3553(f)(1)—a meaning that is different from its plain meaning and that favors the government. For another, given everything pointing toward the plain, obvious, and rational reading—that "and" means "and"—the best the

government can do is show "grievous ambiguity," meaning the rule of lenity applies and Pulsifer wins.

OPINIONS BELOW

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

JURISDICTION

The court of appeals entered its judgment on July 11, 2022. Petitioner timely filed a petition for a writ of certiorari on October 7, 2022, and the Court granted review on February 27, 2023. 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. Legal background

The "safety valve" provision of the federal sentencing statute, 18 U.S.C. § 3553(f), requires district courts to sentence certain qualifying defendants pursuant to the Sentencing Guidelines "without regard to any statutory minimum sentence." A defendant qualifies for safety-valve relief if he was convicted of certain nonviolent drug offenses and can meet the criteria in § 3553(f)(1) through (5).

Subsections (f)(2) through (f)(4) focus on the crime of conviction. For example, a defendant meets subsection (f)(2) if he "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." *Id.* § 3553(f)(2). And he meets subsection (f)(4) if he "was not an organizer, leader, manager, or supervisor of others in the offense … and was not engaged in a continuing criminal enterprise." *Id.* § 3553(f)(4). Subsection (f)(5), in turn, focuses on the defendant's cooperation with the government: the defendant must have "truthfully provided to the Government all information and evidence" he has about the offense or related offenses. *Id.* § 3553(f)(5).

Section 3553(f)(1), the provision here, focuses on the defendant's criminal history. An earlier version of subsection (f)(1) limited relief to defendants who did "not have more than 1 criminal history point, as determined under the sentencing guidelines." 18 U.S.C. § 3553(f)(1) (2017). But Congress expanded that restrictive criterion in the First Step Act of 2018, Pub. L. No. 115-391, § 402, 132 Stat. 5194, 5221—a broad criminal justice and sentencing reform law designed to provide a second chance for nonviolent offenders. As amended, § 3553(f)(1) now 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, 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 word "and" in § 3553(f)(1) means "and," so that a defendant satisfies the provision so long as he does not have (A), (B), *and* (C)—the "conjunctive reading," or whether the "and" means "or," so that a defendant satisfies the provision only if he does not have (A), (B), *or* (C)—the "functionally disjunctive" (or "distributive") reading.

B. Factual and procedural background

1. Mark Pulsifer pleaded guilty to one count of distributing at least fifty grams of methamphetamine, in violation of 21 U.S.C. § 841(a)(1). Pet. App. 2a. Because he had a prior "conviction for a prior serious drug felony," Pulsifer faced a mandatory minimum sentence of 15 years unless he qualified for safety-valve relief. *Id.* All agreed that Pulsifer "satisfies the

requirements of Section 3553(f)(2) through (5)." U.S. Br. (Cert.) 12. The only question was whether Pulsifer, based on his criminal history, satisfies § 3553(f)(1).

It is undisputed that Pulsifer "does not have a prior 2-point violent offense," U.S. Br. (Cert.) 4, meaning his criminal history does not trigger § 3553(f)(1)(C), *see* Pet. App. 9a. It also is undisputed that Pulsifer's criminal history triggers § 3553(f)(1)(A) and (B), because he has more than 4 criminal history points, excluding any points resulting from a 1-point offense, and he has prior 3-point offenses. *See* Pet. App. 5a; U.S. Br. (Cert.) 4; Presentence Investigation Report (PSR) ¶¶ 46, 53.

Pulsifer argued that he satisfies § 3553(f)(1), and thus qualifies for safety-valve relief, because he does not have (A), (B), *and* (C). *See* Pet. App. 33a-34a; PSR Add. 1. The district court disagreed because, in its view, a defendant like Pulsifer whose criminal history triggers (A), (B), *or* (C) is ineligible for safety-valve relief. Pet. App. 35a-36a. The court therefore sentenced Pulsifer based on the 15-year (180-month) mandatory minimum. After making "an unrelated reduction under different authority," the court "sentenced Pulsifer to 162 months' imprisonment." Pet. App. 2a; *see also* Pet. App. 12a.

2. The Eighth Circuit affirmed. Pet. App. 1a-9a. Like the district court, the court of appeals read the "and" in § 3553(f)(1) as functionally disjunctive, such that a defendant must show that he does not have (A) more than 4 criminal history points, excluding any points resulting from a 1-point offense, (B) a prior 3-point offense, *or* (C) a prior 2-point violent offense. *See* Pet. App. 6a-9a. Put simply, the court held that

Pulsifer is ineligible for safety-valve relief because he "has a criminal history that meets the criteria in subsections (A) and (B)." Pet. App. 8a. In the court's view, that "Pulsifer does not also have a prior two-point violent offense that would meet the condition in subsection (C) is immaterial." Pet. App. 9a.

The court of appeals acknowledged that the word "and" in § 3553(f)(1) is conjunctive, not disjunctive. Pet. App. 5a. But it read "and" disjunctively anyway. According to the court, the conjunctive "and" has "a distributive (or several) sense as well as a joint sense." Pet. App. 6a (citation omitted). When read jointly, "and" means "and" because a defendant is ineligible for relief under § 3553(f)(1) only if he has (A), (B), *and* (C)—"all three." *Id.* But when read severally, "and" functionally means "or" because a defendant is ineligible for relief if he has (A), (B), *or* (C)—"any one of [them]." *Id.*

The court chose the functionally disjunctive reading because it thought the conjunctive reading would make § 3553(f)(1)(A) superfluous. *Id.* A defendant with a prior 3-point offense under § 3553(f)(1)(B) and a prior 2-point violent offense under § 3553(f)(1)(C), the court reasoned, would always have more than 4 points under § 3553(f)(1)(A), so subparagraph (A) would do no independent work. *Id.* The court thus read "and" to mean "or," thinking that was the only way to give subparagraph (A) independent meaning.

The court rejected the argument that Congress gave "and" in § 3553(f)(1) the same meaning that it gave "and" elsewhere in the statute. *See* Pet. App. 8a. For instance, Congress meant "and" when it used "and" in § 3553(f) to connect § 3553(f)(1) through (5), *see* 18 U.S.C. § 3553(f), and courts "presume that

identical words used in different parts of the same statute have the same meaning," Pet. App. 7a. But the court thought the presumption of consistent usage 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), plus the need "to avoid surplusage." Pet. App. 8a. Finally, the court rejected Pulsifer's reliance on the rule of lenity because it thought the meaning of "and" in § 3553(f)(1) is not ambiguous or uncertain. Pet. App. 9a.

3. The courts of appeals are split 3–4 over the question presented. In the Fourth, Ninth, and Eleventh Circuits, "and" means "and." *See United States v. Jones*, 60 F.4th 230 (4th Cir. 2023); *United States v. Lopez*, 998 F.3d 431 (9th Cir. 2021); *United States v. Garcon*, 54 F.4th 1274 (11th Cir. 2022) (en banc). In those circuits, a defendant is eligible for safety-valve relief under § 3553(f)(1) unless he has (A) more than 4 criminal history points, excluding any points resulting from a 1-point offense, (B) a prior 3-point offense, *and* (C) a prior 2-point violent offense—all three.

In the Fifth, Sixth, Seventh, and Eighth Circuits, however, "and" means "or." *See United States v. Palomares*, 52 F.4th 640 (5th Cir. 2022); *United States v. Haynes*, 55 F.4th 1075 (6th Cir. 2022); *United States v. Pace*, 48 F.4th 741 (7th Cir. 2022); Pet. App. 1a-9a. In those circuits, a defendant is eligible for safety-valve relief under § 3553(f)(1) only if he does not have (A), (B), *or* (C)—none of the above.

SUMMARY OF ARGUMENT

A. Fundamental canons of statutory construction show that Congress meant what it said in § 3553(f)(1): "and" means "and." A defendant thus satisfies

§ 3553(f)(1) so long as his criminal history does not trigger § 3553(f)(1)(A), (B), *and* (C)—that is, all three.

1. Statutory interpretation begins with the text and its plain meaning. The plain meaning of "and" is "and," a word ordinarily used to join things together. So when "and" connects requirements in a list, *every* requirement must be met, not one *or* another. That's true no matter whether the "and" follows an affirmative command, like "you must wash your hands with soap *and* water," or a negative command, like "don't clean the bathroom with bleach *and* ammonia." Thus, "and" means "and" when it connects conditions framed in the negative, as in: To be eligible, you must not have done A, B, *and* C. In such a conjunctive negative proof, a person is eligible unless she has done all three.

Section 3553(f)(1) is a conjunctive negative proof. Congress used "and" to connect three conditions framed in the negative: To be eligible for safety-valve relief, the defendant must not have (A), (B), *and* (C). Because Pulsifer doesn't have all three, he is eligible for relief.

2. Context confirms that Congress used "and" in its ordinary, joint sense in § 3553(f)(1). Courts presume that Congress uses the same term to mean the same thing throughout a statute, and that a material variation in terms suggests a variation in meaning. Here, Congress used "and" twice in the same sentence: once to join § 3553(f)(1) through (5), and again to join (f)(1)(A) through (C). There is no dispute that the "and" connecting (f)(1) through (5) means "and" in the ordinary, conjunctive sense. The "and" connecting (f)(1)(A) through (C) works the same way—Congress didn't forget what "and" meant in § 3553(f) when it amended § 3553(f)(1) to add "and" in the sentence. *See*

Brown v. Gardner, 513 U.S. 115, 118 (1994). Had Congress meant *not* to use "and" in § 3553(f)(1) in its ordinary, joint sense, the meaningful-variation canon says it would have used "or" instead, as it did elsewhere in § 3553.

3. Congress' use of "and" to mean "and" makes sense: a historically bipartisan Congress enacted the First Step Act to make safety-valve relief more widely available for nonviolent drug offenders. What's more, by using "and" in its ordinary, joint sense, Congress empowered courts to exercise their "wide discretion" in a greater number of cases. *Concepcion v. United States*, 142 S. Ct. 2389, 2395 (2022) (citation omitted). Greater safety-valve availability thus means fewer disproportionate mandatory-minimum sentences and more sentences, "pursuant to [the] guidelines," 18 U.S.C. § 3553(f), that fit the offender.

B. The government reads the "and" in § 3553(f)(1) to mean "or," such that a defendant whose criminal history triggers § 3553(f)(1)(A), (B), *or* (C)—any of them—is ineligible for safety-valve relief. That interpretation fails.

1. a. The government's reading is textually impermissible. It requires the Court to rewrite the statute by either (1) replacing "and" with "or"; or (2) "inject[ing] the words 'does not have' into the statute where they do not appear." *Garcon*, 54 F.4th at 1280. Only Congress may do that.

The government nonetheless claims the Court can rewrite the statute, based on an em-dash, to add the words "does not have" to § 3553(f)(1)(A), (B), and (C). In the government's view, the em-dash in § 3553(f)(1) distributes those words to subparagraphs (A), (B), and (C), so that a defendant must not have (A), must not

have (B), and must not have (C). That argument fails not just because it rewrites the statute, but also because it disregards the presumption of consistent usage and the meaningful-variation canon. Section 3553(f) and § 3553(f)(1) have the same structure, including the em-dash and the word "and" connecting their criteria. But of course the government isn't arguing that the em-dash in § 3553(f) makes § 3553(f)(1) through (5) independent criteria. If the em-dash really is the smoking gun the government says it is, then it also means Pulsifer is eligible for safety-valve relief four times over. Under the distributive reading, the district court would find that Pulsifer is eligible because he satisfies (f)(2), that Pulsifer is eligible because he satisfies (f)(3), that Pulsifer is eligible because he satisfies (f)(4), and that Pulsifer is eligible because he satisfies (f)(5). Unless statutory construction is a game of "heads I win, tails you lose," the em-dash can't mean one thing for § 3553(f) and another thing for § 3553(f)(1).

b. The government's reading also conflicts with the ordinary meaning of "and." For example, corpus linguistics scholars analyzing the question presented recently explained that the word "and" ordinarily joins things together, and that the ordinary and unambiguous way of expressing a disjunctive meaning is to use the word "or." Congress knows how to use both those words. And the government's failed examples confirm that its reading is anything but ordinary.

2. The surplusage canon lacks force. For one thing, even if § 3553(f)(1)(A) is redundant, the statute's plain, unambiguous language controls: "and" means "and," not "or." For another, there is no surplusage anyway, because § 3553(f)(1)(B)'s 3-point-offense requirement and § 3553(f)(1)(C)'s 2-point-

violent-offense requirement do not always produce "more than 4 criminal history points" under § 3553(f)(1)(A). That's because whether a defendant meets subparagraphs (A) through (C) is "determined under the sentencing guidelines," 18 U.S.C. § 3553(f)(1), and under the Guidelines not every sentence for a prior *offense* earns criminal history *points*, *see* U.S.S.G. § 4A1.2. Thus, for example, subparagraph (A) can do independent work where a prior sentence for a 3-point offense, which satisfies subparagraph (B), is too old to earn criminal history points "under the sentencing guidelines." 18 U.S.C. § 3553(f)(1)(B). Chief Judge Pryor (*Garcon*, 54 F.4th at 1281-83), and Judge Wood (*Pace*, 48 F.4th at 764 (Wood, J., dissenting in part)) have highlighted other examples that follow the same logic based on the plain language of the statute and the Guidelines.

3. Reading "and" in § 3553(f)(1) to mean "and" does not produce absurd results." Indeed, even those who read "and" to functionally mean "or" agree that the absurdity doctrine does not apply.

C. Even assuming there is ambiguity about the statute's meaning, the rule of lenity prohibits reading "and" in § 3553(f)(1) to mean "or." For one thing, courts cannot give a word in a criminal statute a meaning that both is different from its plain meaning and favors the government. For another, given everything pointing toward the plain, obvious, and rational reading that "and" means "and," the best the government can do is show grievous ambiguity—which means the rule of lenity applies and Pulsifer wins.

ARGUMENT

A. The "and" in 18 U.S.C. § 3553(f)(1) means "and."

Basic canons of statutory construction show that Congress meant what it said in § 3553(f)(1): "and" means "and." A defendant satisfies § 3553(f)(1) so long as he does not have (A) more than 4 criminal history points, excluding any points resulting from a 1-point offense, (B) a prior 3-point offense, *and* (C) a prior 2-point violent offense—that is, all three.

"And" ordinarily joins things together. So when "and" connects requirements in a list, *every* requirement must be met, not one *or* another. That linguistic logic applies no matter whether the "and" follows an affirmative command, like "you must," or a negative command, like "you must not." The negative command "don't drink and drive" is the most obvious example. It doesn't mean "don't drink *or* drive." "And" also retains its ordinary, conjunctive sense when it connects conditions framed in the negative, like, to be eligible, a person must not have done A, B, *and* C. In that scenario, a person is eligible so long as she has not done all three. Here, a defendant satisfies § 3553(f)(1) and is eligible for safety-valve relief so long as he does not trigger § 3553(f)(1)(A), (B), *and* (C).

Context confirms that "and" in § 3553(f)(1) means "and." Courts presume that Congress uses words consistently throughout a statute and that a material variation in terms suggests a variation in meaning. Here, Congress used "and" twice in the same sentence: once to connect § 3553(f)(1) through (5), and again to connect (f)(1)(A) through (C). All agree that the "and" connecting (f)(1) through (5) means "and" in the ordinary, conjunctive sense. The "and" connecting (f)(1)(A)

through (C) works the same. Had Congress instead meant "or," that's what it would have written, just as it did elsewhere throughout the statute. The Senate's legislative drafting manual further confirms that "and" means "and." What's more, giving "and" its plain meaning is consistent with the First Step Act, which Congress enacted to make safety-valve relief more widely available for nonviolent drug offenders.

1. The plain meaning of "and" is "and."

a. Statutory interpretation begins with the text and its "plain meaning." *Babb v. Wilkie*, 140 S. Ct. 1168, 1172 (2020). As the Court has "stated time and again," "courts must presume 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). And when the statute's plain language is "unambiguous," that "first step of the interpretive inquiry" is also the "last." *Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019). The reason is simple: "the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925).

b. Section 3553(f)(1)'s plain meaning is unambiguous: "and" means "and," so a defendant satisfies § 3553(f)(1), and thus 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," 18 U.S.C. § 3553(f)(1) (emphasis added)—all three.

i. "And" means "along with or together with." *Webster's Third New International Dictionary* 80 (1981); *see also Jones*, 60 F.4th at 233; *Garcon*, 54 F.4th at 1278; *Lopez*, 998 F.3d at 436. When "and" connects two or more requirements, it "combines" them into a "conjunctive list," meaning *every* requirement must be met. A. Scalia & B. Garner, *Reading Law* 116 (2012); *see also United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1620-21 (2021). For example, if a child must clean the dishes, take out the trash, *and* sweep the garage before she can play, she gets to play only if she completes "all three" chores. *Reading Law* 116.

"The meaning of 'and' does not change simply because it is preceded by a negative marker." *Jones*, 60 F.4th at 233. "For example, if someone says, 'Don't drink and drive,' she doesn't mean that you shouldn't drink *and* that you shouldn't drive, but only that you shouldn't do both at the same time." *Id.* With prohibitions like this, "the conjunctive *and* is still conjunctive"—*i.e.*, it couples the conduct—because the specified actions "are individually permitted but cumulatively prohibited." *Reading Law* 119. Another common-sense example proves the point. Suppose a university tells its students not to text and drive on campus. A student in the library can text his friend, while another student can drive from her dorm to the laboratory. The university didn't prohibit students from being students. It prohibited students from engaging in the unsafe behavior of texting *and* driving.

"And" also retains its ordinary, conjunctive sense when it connects conditions framed in the negative. For example, suppose a school policy provides:

> All student-athletes are eligible for an academic scholarship, provided that the student during the previous semester *did not*—
>
> (A) miss more than five classes;
>
> (B) fail to submit a paper in the semesterly, campus-wide writing competition; *and*
>
> (C) earn less than a 3.0 GPA.

In this so-called "conjunctive negative proof," *Reading Law* 120, a student-athlete is ineligible for the scholarship only if his past conduct triggers (A), (B), *and* (C)—"all three." *Id.* So a student on the bowling team who during the previous semester submitted a paper in the writing competition and earned a 3.4 GPA is scholarship-eligible even though he missed seven classes. The bowler would not be scholarship-eligible, however, if the school had used "or" instead of "and." "Or" would create a "disjunctive negative proof," meaning the person "must have done none" of the listed things. *Id.* Because the bowler did one of the listed things—miss more than five classes—he would be ineligible.

ii. When applied to § 3553(f)(1), these principles mandate one conclusion: a defendant is eligible for safety-valve relief so long as his criminal history does not trigger *all three* subparagraphs—(A), (B), *and* (C). Section 3553(f)(1) is a quintessential conjunctive negative proof. Because Congress used "and" to connect (or join) three conditions framed in the negative, a defendant is ineligible for safety-valve relief under § 3553(f)(1) only if he has the complete combo: (A) more than 4 criminal history points, excluding any points resulting from a 1-point offense, (B) a prior 3-point offense, *and* (C) a prior 2-point violent offense.

Pulsifer "does not have a prior 2-point violent offense." U.S. Br. (Cert.) 4. That makes him eligible for safety-valve relief under the statute's plain language.

2. Context confirms that "and" means "and."

The plain meaning of "and" in § 3553(f)(1) is unambiguous. It means what every ordinary English speaker thinks it means—"and." Thus, "the 'judicial inquiry is complete'" and "it is not necessary to go any further." *Babb*, 140 S. Ct. at 1172, 1177 (citation omitted). That said, context confirms that "the plain, obvious and rational meaning" of "and" is the correct one. *Lynch*, 267 U.S. at 370.

a. "Part of a fair reading of statutory text is recognizing that 'Congress legislates against the backdrop' of certain unexpressed presumptions." *Bond v. United States*, 572 U.S. 844, 857 (2014). One presumption is the presumption of consistent usage: courts presume "that a given term is used to mean the same thing throughout a statute, a presumption surely at its most vigorous when a term is repeated within a given sentence." *Brown*, 513 U.S. at 118 (internal citation omitted). And when Congress uses *different* terms, "the meaningful-variation canon," *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1789 (2022), presumes that "a material variation in terms suggests a variation in meaning," *Reading Law* 170.

These interpretive principles confirm that Congress used ordinary English in § 3553(f). When Congress used "and," it meant "and." When Congress used "or," it meant "or."

Start with "and." Recall that a defendant qualifies for safety-valve relief if, as relevant here, he can meet the criteria in § 3553(f)(1) through (5). *Supra* pp. 7-8.

Congress used "and" to connect (f)(1) through (5), just as it used "and" to connect (f)(1)(A) through (C). *See* 18 U.S.C. § 3553(f). "It is undisputed that the 'and' at the end of § 3553(f)(4) joining the five subparts together is conjunctive." *Jones*, 60 F.4th at 235. In other words, a defendant is eligible for safety-valve relief only if the sentencing court finds that he "satisfies each of subsections (f)(1) through (f)(5)"—all five. *Garcon*, 54 F.4th at 1279. The "and" joining (f)(1)(A) through (C) works the same: a defendant satisfies § 3553(f)(1) if the court finds that his criminal history does not trigger each of subparagraphs (A), (B), *and* (C)—all three. The force of the presumption that Congress used "and" consistently is at its zenith given that § 3553(f) is one long sentence. *Brown*, 513 U.S. at 118.

Now consider "or." "Congress used 'or' throughout the statute as a disjunctive term." *Jones*, 60 F.4th at 235. For example, a defendant satisfies § 3553(f)(2) only if, in connection with the crime of conviction, he "did not use violence *or* credible threats of violence *or* possess a firearm *or* other dangerous weapon (*or* induce another participant to do so)." 18 U.S.C. § 3553(f)(2) (emphases added). Section 3553(f)(2) is a disjunctive negative proof: the defendant "must have done none" of the things listed in § 3553(f)(2) to qualify for safety-valve relief. *Reading Law* 120. Section 3553(f)(4) is also a disjunctive negative proof: a defendant qualifies for safety-valve relief only if he "was not an organizer, leader, manager, *or* supervisor of others in the offense." 18 U.S.C. § 3553(f)(4) (emphasis added). "Again, it is disqualifying to have performed any one of the listed roles." *Garcon*, 54 F.4th at 1279. Put simply, Congress knows how to use "or" to mean "or"—to connect conditions framed in the negative so

"that the satisfaction of a single listed condition is disqualifying." *Jones*, 60 F.4th at 235.

But Congress didn't choose "or" in § 3553(f)(1). It chose "and." By connecting conditions framed in the negative with "and" rather than "or," Congress used "and" in its ordinary, joint sense to mean "that only satisfaction of all conditions is disqualifying." *Id.*; *see supra* pp. 17-19.

b. The Senate's legislative drafting manual—a "standard interpretive guide[]," *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004)—further confirms that Congress adhered to English in § 3553(f). The manual states that "and" indicates "that a thing is included in the class only if it meets all of the criteria," whereas "or" indicates "that a thing is included in the class if it meets 1 or more of the criteria." Office of the Legislative Counsel, *Senate Legislative Drafting Manual* 64 (1997). In other words, the Senate's own manual says that Congress knows that "and" means "and" while "or" means "or." And given the presumption of consistent usage and the meaningful-variation canon, Congress would have used "or" if that's what it meant.

3. Giving "and" its plain meaning is consistent with the First Step Act.

The conjunctive reading matches the whole point of the First Step Act: to make safety-valve relief more widely available for nonviolent drug offenders so that disproportionate mandatory minimums do not prevent sentencing courts from exercising their "wide discretion" to impose appropriate sentences. *Concepcion*, 142 S. Ct. at 2395 (citation omitted). Moreover, because the First Step Act preserves sentencing courts' discretion to consider "a wide variety of

aggravating and mitigating factors relating to the circumstances of both the offense and the offender," *id.* at 2399 (citation omitted), giving "and" its plain meaning will not prevent a court from imposing a sentence that fits the offender.

a. Safety-valve relief is important: it gives nonviolent drug offenders a chance at earlier reentry into society, and redemption, by enabling courts to disregard mandatory minimums. *See* 18 U.S.C. § 3553(f). Despite its importance, safety-valve relief before the First Step Act was limited to nonviolent drug offenders who did not have more than 1 criminal history point. For many, that stringent requirement made safety-valve relief an illusory promise. As a result, mandatory minimums continued to impose devastating consequences. Some individuals, for example, "have been sent to prison for more than 50 years for selling $350 worth of marijuana—a drug that is now legal in some States." 164 Cong. Rec. S7756 (daily ed. Dec. 18, 2018) (statement of Sen. Bill Nelson).

In the First Step Act, Congress expanded the availability of safety-valve relief, and it did so on a bipartisan—if not nonpartisan—basis. The law 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) (Senators Br.). 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).

Under the First Step Act, safety-valve relief from mandatory minimums is no longer an illusory promise. By amending § 3553(f)(1), *see supra* p. 8, Congress gave more nonviolent drug offenders a meaningful opportunity to benefit from the second chance that the First Step Act promises. Congress did that by instructing courts to evaluate the (f)(1) criteria "under the sentencing guidelines," 18 U.S.C. § 3553(f)(1)(A), (B), (C), and to "impose a sentence pursuant to [the sentencing] guidelines" for a defendant satisfying subsections (f)(1) through (5), *id.* § 3553(f). Congress thus signaled that it wanted sentencing courts to exercise their discretion and impose sentences proportionate to the offense and the offender. *See Concepcion*, 142 S. Ct. at 2395-96.

b. The plain meaning of § 3553(f)(1)—"and" means "and"—"has the virtue of consistency with Congress's purpose." *Pace*, 48 F.4th at 762 (Wood, J., dissenting in part). For one thing, giving "and" its plain meaning will give courts more discretion to give nonviolent drug offenders proportionate sentences and to disregard disproportionate mandatory minimums. That's because a defendant who has just one of the things listed in § 3553(f)(1)(A) through (C)—like a fourteen-year-old, 3-point conviction for spray-painting a building, *see Lopez*, 998 F.3d at 439—is still eligible for relief. But if "and" means "or," then that isolated and dated offense automatically disqualifies the defendant, making the mandatory minimum a mandatory part of the sentencing determination.

For another, Congress had good reason to use "and" in its ordinary, conjunctive sense. Each subparagraph of § 3553(f)(1) targets a different concern: subparagraph (A) targets recidivism, subparagraph (B) targets serious offenses, and subparagraph (C) targets violent offenses. *See id.* Given the devastating consequences of mandatory minimums, Congress could have decided that a defendant whose criminal history does not trigger *all three* subparagraphs deserves a second chance if he also satisfies § 3553(f)(2) through (5). Congress had no reason to be concerned about joining (A), (B), *and* (C), because it knew that a defendant would still need to satisfy the rest of § 3553(f) and that a sentencing court would still have discretion to impose a proportionate sentence. *Concepcion*, 142 S. Ct. at 2395-96.

* * *

Statutory text and context show that "and" in § 3553(f)(1) means "and"—a common-sense construction that is consistent with the First Step Act's purpose. Thus, a defendant satisfies § 3553(f)(1) so long as he does not have (A), (B), *and* (C). Pulsifer meets that standard: his criminal history does not trigger § 3553(f)(2)(C) because he "does not have a prior 2-point violent offense." U.S. Br. (Cert.) 4. And because Pulsifer also satisfies § 3553(f)(2) through (5), U.S. Br. (Cert.) 12, the district court should have sentenced him without regard to any mandatory minimum.

B. The arguments for reading "and" in § 3553(f)(1) to mean "or" fail.

The government and some courts of appeals think "and" functionally means "or," such that a defendant whose criminal history triggers § 3553(f)(1)(A), (B), *or*

(C)—any of them—is ineligible for safety-valve relief. That "novel reading" is textually impermissible. *Garcon*, 54 F.4th at 1280. It requires the Court to rewrite the statute, and it ignores the presumption of consistent usage and the meaningful-variation canon. Nor can the government use the surplusage canon to transform "and" into "or." That is doubly true: there is no ambiguity *or* surplusage. Lastly, the absurdity doctrine does not apply, because Congress rationally could have meant "and" when it said "and."

At bottom, this is just another case in which "the plain, obvious and rational meaning of a statute" defeats "any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *Lynch*, 267 U.S. at 370. As the Fourth, Ninth, and Eleventh Circuits have explained, there is no reason to depart from the statute's plain language. "And" means "and," not "or."

1. The functionally disjunctive reading lacks merit.

The government argues that Congress meant "or" when it said "and" in § 3553(f)(1). Like the decision below, *see* Pet. App. 6a, the government says that Congress used the conjunctive "and" in § 3553(f)(1) in the distributive sense, meaning Congress wanted § 3553(f)(1)'s prefatory phrase—"the defendant does not have"—to modify "each subparagraph, such that a defendant is eligible for safety-valve relief if he does not have (A), does not have (B), and does not have (C)," U.S. Br. (Cert.) 8. In other words, the government wants to add words to the statute to make it disqualify every nonviolent drug offender whose criminal history

triggers (A), (B), *or* (C). That's amendment, not interpretation.

a. The government's reading of § 3553(f)(1) is textually flawed. The functionally disjunctive reading disregards fundamental interpretive principles and instead "read[s] words into the statute." *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2179 n.1 (2021). It requires the Court to blue-pencil the statute's plain, unambiguous language in one of two ways, and it disregards the presumption of consistent usage and the meaningful-variation canon.

i. The government reads the conjunctive "and" in § 3553(f)(1) as if Congress had used a disjunctive "or." "Essentially, the government invites [the Court] to read 'and' to mean 'or,'" *Garcon*, 54 F.4th at 1280, because the distributive reading "is really no more than an elaborate way of saying that 'and' means 'or,'" *Jones*, 60 F.4th at 236. Although the government strains to avoid this concession, *see* U.S. Br. (Cert.) 10, there is no denying the consequences of its argument: the distributive reading transforms § 3553(f)(1) into a disjunctive negative proof, because a defendant "must have … none" of the listed conditions—(A), (B), *or* (C)—to qualify for relief. *Reading Law* 120. Even those who agree with the government admit that the distributive reading turns the conjunctive "and" into a disjunctive "or." *See, e.g.*, *Pace*, 48 F.4th at 756 (Kirsch, J., concurring). But the Court's "job [is] to apply faithfully the law Congress has written," not to rewrite it. *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 89 (2017).

ii. Although the government pretends it's not asking the Court to rewrite "and" to mean "or," it does

openly ask for a different rewrite. *See* U.S. Br. (Cert.) 8. "In the government's view," as Chief Judge Pryor has explained, "the statute should essentially be read as follows: A defendant is eligible for the safety valve if he (A) does not have more than 4 criminal history points (excluding 1-point offenses); (B) does not have a prior 3-point offense; and (C) does not have a prior 2-point violent offense." *Garcon*, 54 F.4th at 1280; *see Palomares*, 52 F.4th at 653-54 (Willett, J., dissenting).

But that's not what the statute says, and the Court may not "inject the words 'does not have' into the statute where they do not appear." *Garcon*, 54 F.4th at 1280. All the Court may do is "construe what Congress has written"—without adding to, subtracting from, deleting, or distorting the words Congress chose. *62 Cases of Jam v. United States*, 340 U.S. 593, 596 (1951). Giving "and" its plain meaning respects "the separation of powers, and democracy itself." *Garcon*, 54 F.4th at 1290 (Newsom, J., concurring). Reading "and" to mean "or" does not. *Id.*

iii. Stymied by these fundamental separation-of-powers principles, the government tries a different tack. The government contends that the em-dash right after § 3553(f)(1)'s prefatory clause, plus the line breaks and semicolons, distributes "does not have" across subparagraphs (A) through (C), just as if Congress had written that the defendant "(A) does not have more than 4 criminal history points (excluding 1-point offenses); (B) does not have a prior 3-point offense; and (C) does not have a prior 2-point violent offense." *Garcon*, 54 F.4th at 1280; *see Jones*, 60 F.4th at 236. In other words, the argument goes, these features basically make the "and" an "or." And that argument, said one court of appeals, is apparently

"the most important textual basis" supporting the government's reading. *Pace*, 48 F.4th at 754.

The problem is, there's no "textual basis" there. *First*, the argument runs headlong into the presumption of consistent usage, which is "at its most vigorous" here, *Brown*, 513 U.S. at 118, because Congress used the word "and" twice in the same sentence, both to connect § 3553(f)(1) through (5) and to connect (f)(1)(A) through (C). *Supra* pp. 20-21. Yet the distributive reading transforms the "and" in § 3553(f)(1) into an "or." *Supra* p. 27.

Second, neither the government nor any court of appeals has pointed to *any* authority supporting "this far-fetched and quixotic em-dash theory," *Lopez*, 998 F.3d at 441-42 n.11—that "and" becomes "or" when placed in a negative list of conditions preceded by an em-dash. That's because there isn't any. "Style guides, dictionaries, books on grammar, and the like are silent on whether putting an em-dash after the negative phrase changes its meaning." *Palomares*, 52 F.4th at 654 (Willett, J., dissenting). As Judge Willett put it, "Making up new grammatical rules on the fly isn't statutory interpretation." *Id.* at 654-55.

To see why, consider what happens not to § 3553(f)(1), but to § 3553(f), under the em-dash theory. After all, § 3553(f) and § 3553(f)(1) have the same structure: a prefatory clause ending with an em-dash, followed by a list of conditions separated by semicolons and line breaks. For § 3553(f), the prefatory clause essentially says, "the court shall impose a sentence without regard to any mandatory minimum if it finds that—", followed by a five-part list connected by the conjunctive "and." *See* 18 U.S.C. § 3553(f). For § 3553(f)(1), the prefatory clause says, "the defendant

does not have—", followed by a three-part list connected by the conjunctive "and." *See id.* § 3553(f)(1).

Under the em-dash theory, a defendant who satisfies (f)(1), (f)(2), (f)(3), (f)(4), *or* (f)(5)—"any one of [them]," Pet. App. 6a—would qualify for safety-valve relief. As Judge Willett explained, a court would distribute "everything that precedes the em dash," *Palomares*, 52 F.4th at 655 n.15 (Willett, J., dissenting), as those siding with the government recognize, *see id.* at 651 n.2 (Oldham, J., concurring in the judgment) ("I want to distribute all of the text ...."). And when everything preceding the em-dash in § 3553(f) is distributed across § 3553(f)(1) through (5), each subparagraph becomes a "separate" condition, rather than "one scenario consisting of five elements." *Id.* at 654 (Willett, J., dissenting); *see id.* at 651 n.2 (Oldham, J., concurring in the judgment) (reproducing § 3553(f) with "all of the text" distributed). If the em-dash does what the government says, then it means a defendant is eligible for safety-valve if it finds that he satisfies (f)(1); and that he is eligible if he satisfies (f)(2); and that he is eligible if he satisfies (f)(3); and that he is eligible if he satisfies (f)(4); and that he is eligible if he satisfies (f)(5). Put another way, "a defendant would qualify for safety valve relief by satisfying any one of the five elements," just as a defendant, under the government's reading, would fail § 3553(f)(1) if he has "any one" of the three elements in § 3553(f)(1)(A) through (C). *Id.* at 655 n.15 (Willett, J., dissenting).

The only way to avoid that result is to play "statutory Calvinball"—a game where the same rules never apply twice. *Id.* at 654-55 & n.15. But that's not—and cannot be—how statutory interpretation works. The em-dash, semicolons, and line breaks

cannot mean one thing for § 3553(f) and another thing for § 3553(f)(1). Statutory interpretation—especially in a criminal case, *see infra* pp. 47-49, isn't a game of "heads I win, tails you lose." That said, Mr. Pulsifer won't object if the government will stipulate to vacatur and a distributive understanding of § 3553(f)(1) through (5), so that he satisfies the statute several times over.

iv. Even if "and" in § 3553(f) could mean "or," the meaningful-variation canon forecloses that interpretation. *Supra* pp. 21-22. No court of appeals siding with the government has grappled with the meaningful-variation canon. As Judge Willett explained, to rule for the government, the Court "would have to believe that Congress meant to invoke the plain meaning of these words"—"and" and "or"—"every time *except* in subsection (f)(1)." *Palomares*, 52 F.4th at 657 (Willett, J., dissenting). That argument isn't just wrong. It's a sucker punch to administrable principles of statutory construction.

b. The government's reading is unordinary. The government's functionally disjunctive reading conflicts with the ordinary meaning of "and." A recent corpus linguistics study tailored to this very case proves the point: "the weight of [the] evidence" supports reading "and" in its ordinary "joint" sense. K. Tobia, J. Egbert, & T.R. Lee, *Triangulating Ordinary Meaning* 30 (May 8, 2023), https://tinyurl.com/SSRN-draft. Indeed, it is "much more difficult," the scholars explained, "to square the data with a conclusion that the statute clearly expresses a distributive sense." *Id.* The study confirms that Pulsifer should win, under either a plain reading of the text and context, *supra* pp. 17-20, or the rule of lenity, *infra* pp. 47-49.

The government's failed examples also show that its reading is unordinary. *See* Pet. 30-31. For instance, the government has said that "and" means "or" in the prohibition, "you must not lie, cheat, and steal." Gov't En Banc Br. 28, *Garcon,* No. 19-14650 (Mar. 14, 2022). But as the Eleventh Circuit correctly observed, "the more common wording of the prohibition uses an 'or' instead of an 'and': 'You must not lie, cheat, *or* steal.'" *Garcon*, 54 F.4th at 1280-81 (citations omitted).

The government has also argued that "and" means "or" when someone says, "you must not drink and smoke." Gov't En Banc Br. 19, *Garcon,* No. 19-14650. Sure, someone might hear that advice and think, "perhaps I shouldn't drink *or* smoke." "'But that understanding has little to do with syntax and everything to do with our common understanding that' drinking and smoking can be harmful individually." *Garcon*, 54 F.4th at 1280 (quoting *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1174 (Alito, J., concurring in the judgment)). Besides, the advice not to drink and smoke makes perfect sense. For one thing, 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. 22, 2021), https://tinyurl.com/333vpuxc. For another, "[s]moking combined with alcohol is often identified as factors in fire deaths in residences." U.S. Fire Admin., *Establishing a Relationship Between Alcohol and Casualties of Fire* 4 & n.35 (July 2003), https://nfa.usfa.fema.gov/downloads/pdf/statistics/v3i3.pdf.

The point is simple: the examples in which "and" could be understood as "or" turn on implied purpose or

intent, rather than ordinary usage, grammar, or other interpretive principles. And even then, all appear to recognize that the choice between "and" and "or" should match the purpose—indeed, the very terms of this debate are whether "and" can mean "or" when the speaker meant to say "or." And that's the ballgame. It's not courts' job "to elevate vague invocations of statutory purpose over the words Congress chose." *Saxon*, 142 S. Ct. at 1792-93. The government might think that reading "and" to mean "or" "accords with common sense" and what it thinks Congress might have wanted, U.S. Br. (Cert.) 9 (citation omitted)—*but see infra* pp. 45-46—but the U.S. Reports are filled with admonitions against rewriting statutory text to achieve some perceived policy goal. *E.g.*, *Henson*, 582 U.S. at 89; *Saxon*, 142 S. Ct. at 1792. The Court may "not know why Congress" chose the words it did, but it may not "revise that legislative choice, by reading" the statute's text "in a most improbable way." *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1073 (2018). The Court must give an undefined word its "ordinary meaning," *Johnson v. United States*, 559 U.S. 133, 138 (2010), and the plain, ordinary meaning of "and" is "and," not "or." *Supra* pp. 17-19.

2. The surplusage canon does not help the government.

The government argues that the "and" in § 3553(f)(1) must mean "or" to avoid surplusage. According to the government, a defendant with a prior 3-point offense triggering § 3553(f)(1)(B) and a prior 2-point violent offense triggering § 3553(f)(1)(C) will *always* have more than 4 criminal history points under § 3553(f)(1)(A), making subparagraph (A) superfluous. *See* U.S. Br. (Cert.) 8. The only way to remedy the

redundancy, the government concludes, is to read "and" as "or."

The surplusage canon does no work here, for two reasons. *First*, even assuming subparagraph (A) is redundant, the Court cannot disregard the statute's plain meaning: "and" means "and," not "or." *Second*, there is no surplusage anyway, because subparagraph (A) has independent force.

a. Statutory text and context control. The surplusage canon does not justify ignoring the plain meaning of "and," § 3553(f)(1)'s structure as a quintessential conjunctive negative proof, the presumption of consistent usage, and the meaningful-variation canon. *Supra* pp. 17-22. Time and again, the Court has explained that the surplusage canon is not license to ignore "the plain meaning" of a statute's unambiguous language. *Lamie v. United States Trustee*, 540 U.S. 526, 536 (2004); *see also Germain*, 503 U.S. at 253-54 ("When the words of a statute are unambiguous," the "judicial inquiry is complete," even if some language may be "superfluous." (citation omitted)). "The canon against surplusage is not an absolute rule," *Marx v. General Revenue Corp.*, 568 U.S. 371, 385 (2013), and courts do not "avoid surplusage at all costs," *United States v. Atlantic Research Corp.*, 551 U.S. 128, 137 (2007). Redundancy is permissible where, for example, it accompanies "the better overall reading of [a] statute," *Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019), or the proposed alternative interpretation does not give effect to "every word" of the statute, *Marx*, 568 U.S. at 385. The canon also lacks force where "redundancy is 'hardly unusual,'" *id.* (citation omitted)—like in criminal statutes, where some overlap "is not uncommon." *Loughrin v. United States*, 573 U.S. 351, 358 n.4 (2014).

Even if § 3553(f)(1) contains some redundancy, *but see infra* pp. 36-42, the surplusage canon lacks force for at least three reasons.

First, as Judge Newsom has explained, applying the surplusage canon means ignoring "§ 3553(f)(1)'s plain text." *Garcon*, 54 F.4th at 1290 (Newsom, J., concurring); *see also Jones*, 60 F.4th at 238; *Lopez*, 998 F.3d at 441. That's impermissible. *See Lamie*, 540 U.S. at 536. The Court should not "engage in interpretive gymnastics to make § 3553(f)(1) say what it objectively, demonstrably, verifiably does not say." *Garcon*, 54 F.4th at 1290 (Newsom, J., concurring). Congress said "and," not "or." And even assuming "Congress goofed," the Court has no license "to save Congress from itself." *Id.*

Second, as Judge Willett has explained, the government's proposed interpretation "*also* violates the canon against surplusage." *Palomares*, 52 F.4th at 657 (Willett, J., dissenting). If § 3553(f)(1)'s prefatory clause—"the defendant does not have"—modifies subparagraphs (A) through (C) severally, then those subparagraphs "operate independently regardless of what word appears between them"; the "word could be 'and,' 'or,' or no word at all." *Id.* The government's interpretation thus fails to give effect to "every word" of § 3553(f)(1), *Marx*, 568 U.S. at 385, meaning the surplusage canon cuts *against* the government.

Third, because some overlap or redundancy is hardly unusual in criminal statutes like § 3553, *see Loughrin*, 573 U.S. at 358 n.4, the surplusage canon "has considerably less force in this case," *Marx*, 568 U.S. at 385.

b. The surplusage canon doesn't apply anyway, because giving "and" in § 3553(f)(1) its plain, ordinary meaning does not produce surplusage. Section 3553(f)(1) instructs courts to consult "the sentencing guidelines," 18 U.S.C. § 3553(f)(1), and under the Guidelines, triggering subparagraphs (B) and (C) does not necessarily mean triggering subparagraph (A). As Chief Judge Pryor, a former member of the Sentencing Commission, has explained, "there are at least two circumstances in which a defendant could have 'a prior 2-point violent offense' and 'a prior 3-point offense … under the sentencing guidelines' but fewer than five 'criminal history points,'" *Garcon*, 54 F.4th at 1281 (citation omitted). One circumstance involves old offenses that do not cumulatively trigger § 3553(f)(1)(A) given that stale *offenses* do not score criminal history *points*. The other circumstance involves a separate 3-point and 2-point violent offense that are treated as a single sentence and thus produce only three criminal history points. There are more circumstances where § 3553(f)(1)(A) is not redundant, and each stems directly from the plain language of the statute and Guidelines.

Guidelines principles. Understanding how § 3553(f)(1) works requires understanding a few things about how the Guidelines work: § 3553(f)(1) instructs that whether a defendant has a certain number of criminal history "points" and a prior 3-point and 2-point "offense" must be "determined under the sentencing guidelines." 18 U.S.C. § 3553(f)(1).

The Guidelines assess a defendant's criminal history using a point system. Each prior sentence of imprisonment exceeding 13 months is a 3-point offense, U.S.S.G. § 4A1.1(a); each prior sentence of

imprisonment between 60 days and 13 months is a 2-point offense, U.S.S.G. § 4A1.1(b); and each prior sentence of imprisonment for less than 60 days is a 1-point offense, U.S.S.G. § 4A1.1(c).

But not every sentence for a prior *offense* earns criminal history *points*. *See* U.S.S.G. § 4A1.2. That is true no matter whether the prior offense is a 3-point offense under the Guidelines (meaning the court imposed a sentence exceeding 13 months) or a 2-point offense under the Guidelines (meaning the court imposed a sentence between 60 days and 13 months). This principle is the reason there is no redundancy, as the examples below show.

Old offenses. Section 3553(f)(1)(A) has independent force when a defendant has a prior 3-point offense or a prior 2-point violent offense that, under the Guidelines, is too old to earn criminal history points. Although the old offenses would trigger subparagraphs (B) and (C), the sentencing court would not give them points contributing to subparagraph (A)'s assessment of criminal history points. Thus, the defendant very well might not have "more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines." 18 U.S.C. § 3553(f)(1)(A); *see Garcon*, 54 F.4th at 1281-82; *Jones*, 60 F.4th at 237-38 n.4; *Pace*, 48 F.4th at 763-64 (Wood, J., dissenting in part); *Palomares*, 52 F.4th at 656 (Willett, J., dissenting); *Haynes*, 55 F.4th at 1082-84 (Griffin, J., dissenting).

As explained, not every sentence for a prior *offense* earns criminal history *points*. *See* U.S.S.G. § 4A1.2. For example, the Guidelines instruct courts *not* to add 3 points to a defendant's criminal history score if he

finished serving the sentence for a 3-point offense more than 15 years before commencing the present offense. *See* U.S.S.G. § 4A1.2(e)(1), (3); U.S.S.G. Manual § 4A1.1 cmt. n.1 (Nov. 2018). The Guidelines also instruct courts *not* to add 2 points if the sentence for a prior 2-point offense was imposed more than 10 years before the defendant began the present offense. *See* U.S.S.G. § 4A1.2(e)(2)-(3); U.S.S.G. Manual § 4A1.1 cmt. n.2.

With these instructions in mind, "it is not hard to imagine situations in which the conjunctive reading does not render [§ 3553(f)(1)(A)] superfluous." *Pace*, 48 F.4th at 763 (Wood, J., dissenting in part). Chief Judge Pryor came up with a straightforward example: "a defendant could have 20-year-old two-point and three-point offenses, satisfying subsections (B) and (C), but score zero criminal history points and fall below the threshold in subsection (A)." *Garcon*, 54 F.4th at 1281. Judge Wood provided two more:

- "A defendant who finished serving a sentence for a two-point violent offense 11 years ago, thus satisfying subpart (C), and who has a more recent three-point nonviolent offense (satisfying (B)), would not satisfy (A). His 'criminal history points … as determined under the sentencing guidelines' would be three, because the guidelines instruct that two-point or lower sentences older than 10 years should not be included in the criminal history points calculation." *Pace*, 48 F.4th at 763 (Wood, J., dissenting in part) (citation omitted).
- "Similarly, a defendant who finished serving a sentence for a three-point offense 21 years ago (satisfying (B)) and a two-point violent offense

> last year (satisfying (C)), would not satisfy (A). His 'criminal history points … as determined under the sentencing guidelines' would be two, because the guidelines instruct that no sentence older than 15 years should be included in the calculation." *Id.* at 763-64 (citation omitted).

The single-sentence rule. Section 3553(f)(1)(A) also has independent force when a defendant has a prior 3-point offense and a prior 2-point violent offense that, under the Guidelines, are treated as a single sentence for criminal-history purposes. Under the single-sentence rule, the Guidelines treat separate offenses as a single sentence when "the sentences resulted from offenses contained in the same charging instrument" or when "the sentences were imposed on the same day." U.S.S.G. § 4A1.2(a)(2). The Guidelines then instruct courts *not* to give each of those prior offenses their respective criminal history points under "§ 4A1.1(a), (b), and (c)." *Id.* Instead, the court must add points to the defendant's criminal history score based on either the longest or aggregate sentence of imprisonment, depending on whether the court imposed the sentence concurrently or consecutively. *Id.*

In that circumstance, the sentencing court would not give each of the prior offenses its points, meaning the defendant very well might not have "more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines." 18 U.S.C. § 3553(f)(1)(A). Instead, the defendant would "score only three criminal history points" under the Guidelines if, for example, his prior 3-point and 2-point offenses were charged in the same instrument. *Garcon*, 54 F.4th at 1282. Thus, if the defendant does

not have another prior 3-point or 2-point offense, he would not have "more than four criminal history points, excluding any criminal history points resulting from a 1-point offense." 18 U.S.C. § 3553(f)(1)(A). *See Garcon*, 54 F.4th at 1282; *Jones*, 60 F.4th at 237; *Haynes*, 55 F.4th at 1084 (Griffin, J., dissenting).

The application note corresponding to U.S.S.G. § 4A1.2(a)(2) both confirms this reading and supports the notion that giving "and" in § 3553(f)(1) its plain meaning will not prevent courts from imposing a proportionate sentence. *See supra* pp. 22-25. Note 3 first explains that a prior 2-point offense (like robbery) is still a predicate *offense* under the Guidelines even if, under the single-sentence rule, the court does not give that offense the two points mandated by § 4A1.1(b). *See* U.S.S.G. Manual § 4A1.2 cmt. n.3. In other words, a 2-point offense can still be a 2-point offense under the Guidelines even if it doesn't score criminal history points. Note 3 then explains that "an upward departure may be warranted" if, as a result of applying the single-sentence rule, the criminal history score "does not adequately reflect the seriousness of the defendant's criminal history or the frequency with which the defendant has committed crimes." *Id.* In other words, the court retains discretion to impose a sentence proportionate to the offense and the offender, just as Congress intended in § 3553(f).

Other examples. There are still more circumstances where § 3553(f)(1)(A) has independent force, each based on the Guidelines' instruction that not every prior *offense* scores criminal history *points*. For example, the Guidelines typically don't count criminal history points for prior offenses where the sentences resulted from "foreign convictions," U.S.S.G. § 4A1.2(h), or "tribal court convictions," U.S.S.G.

§ 4A1.2(i). Sentences "imposed by a summary court-martial," U.S.S.G. § 4A1.2(g), or sentences for "expunged convictions," U.S.S.G. § 4A1.2(j), likewise do not earn criminal history points. Thus, for example, "a defendant who committed a three-point offense (satisfying (B)), and a two-point violent offense adjudicated by a tribal court (satisfying (C)), would not satisfy (A)." *Pace*, 48 F.4th at 764 (Wood, J., dissenting in part). "His 'criminal history points ... as determined under the sentencing guidelines' would be three because the guidelines instruct that points resulting from tribal court convictions be excluded." *Id.* (citation omitted).

The government's counterargument lacks merit. The government has argued that 3-point offenses and 2-point violent offenses cannot trigger § 3553(f)(1)(B) and (C) unless they contribute to the defendant's criminal-history score. *See Garcon*, 54 F.4th at 1282. But the statute and the Guidelines refute that argument.

Start with the Guidelines, because § 3553(f) instructs sentencing courts to find whether the criteria are met "as determined under *the sentencing guidelines*." 18 U.S.C. § 3553(f)(1)(A), (B), (C) (emphasis added). As discussed, the Guidelines "use the word 'offense' to refer to convictions that may or may not contribute to a criminal history score." *Garcon*, 54 F.4th at 1282-83. And the distinction matters. For instance, the Guidelines make clear that a 2-point violent offense (like robbery) may serve "as a predicate *offense*" "under the career offender guideline" even if the "sentence of imprisonment for the robbery" does not contribute to the defendant's criminal-history score under the single-sentence rule. U.S.S.G. Manual § 4A1.2 cmt. n.3 (emphasis added).

Section 3553(f)(1) incorporates the same distinction and rules. Again, subparagraphs (A), (B), and (C) all state that they must be "determined under the sentencing guidelines." 18 U.S.C. § 3553(f)(1)(A), (B), (C). What's more, the statute "distinguishes between points associated with an 'offense'—points that may or may not count towards the criminal history score—and the final tally of 'criminal history points.'" *Garcon*, 54 F.4th at 1282. This distinction is all the more clear because the prior version of § 3553(f)(1) said nothing about a prior *offense* but instead limited safety-valve relief to defendants who did "not have more than 1 criminal history *point*." 18 U.S.C. § 3553(f)(1) (2017) (emphasis added). After all, "the presumption is that the different term denotes a different idea." *Saxon*, 142 S. Ct at 1789 (quoting *Reading Law* 170). Thus, under the statute's plain text, a prior 2-point violent offense, to take the robbery example above, can trigger § 3553(f)(1)(C) even if it does not score criminal history points.

The clear statutory distinction between offenses and points makes sense. Congress rationally could have decided that prior offenses that do not contribute to a defendant's criminal-history score nevertheless can trigger § 3553(f)(1)(B) and (C), because that is a reasonable way to ensure that § 3553(f)(1) continues to prevent the most dangerous offenders from qualifying for safety-valve relief. *See infra* pp. 44-45. The government's argument, in contrast, is "nonsensical," *Garcon*, 54 F.4th at 1282, because it contravenes the statute's plain text. Nothing in the statute remotely suggests "that offenses may have points associated with them only when those points contribute to the final criminal history score." *Id.*

3. The absurdity doctrine does not apply.

The government has also argued that the "and" in § 3553(f)(1) must mean "or" because it would have been absurd for Congress to give "and" its plain, ordinary meaning. *See, e.g.*, *Jones*, 60 F.4th at 238. That policy argument fails. Even those who read "and" to functionally mean "or" agree that the absurdity doctrine does not apply.

a. The absurdity doctrine permits courts "to override the literal terms of a statute only under rare and exceptional circumstances." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). "[T]he absurdity must be so gross as to shock the general moral or common sense." *Id.* Put another way, the alleged absurdity must be "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). It must be beyond dispute that Congress "could not conceivably have ... intended" what the statute plainly says. *Logan v. United States*, 552 U.S. 23, 36 (2007) (citation omitted).

Separation of powers is the reason courts rarely apply the absurdity doctrine. "Laws enacted with good intention, when put to the test, frequently, and to the surprise of the lawmaker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the lawmaking authority, and not with the courts." *Crooks*, 282 U.S. at 60. "The role of this Court is to apply the statute as it is written—even if [it] think[s] some other approach might 'accord with good policy.'" *Burrage v. United States*, 571 U.S. 204, 218 (2014) (citation omitted).

b. Giving "and" in § 3553(f)(1) its plain meaning—"and"—"does not produce absurd results." *Jones*, 60 F.4th at 238; *see supra* pp. 22-25; *see also Garcon*, 54 F.4th at 1283-84; *Lopez*, 998 F.3d at 438-40; *Palomares*, 52 F.4th at 658-59 (Willett, J., dissenting); *Haynes*, 55 F.4th at 1085 (Griffin, J., dissenting); *Pace*, 48 F.4th at 765-66 (Wood, J., dissenting in part). Indeed, even those who would replace "and" with "or" agree on that point, conceding that the conjunctive reading "does not produce truly absurd results." *Garcon*, 54 F.4th at 1304 (Branch, J., dissenting).

As Chief Judge Pryor explained, "Congress could rationally have 'questioned the wisdom of mandatory minimum sentencing,' which, 'it is often said, fails to account for the unique circumstances of offenders who warrant a lesser penalty.'" *Id.* at 1283 (majority op.) (alterations adopted; citation omitted). Further, "Congress could rationally have decided to allow many defendants to be sentenced based on their 'unique circumstances' while retaining mandatory minimums for those defendants it perceived to be particularly unworthy of relief." *Id.* (internal citation omitted). "To that end," § 3553(f)(1)(A) through (C) address "different type[s] of behavior suggestive of future dangerousness." *Id.* Subparagraph (A) targets recidivism, subparagraph (B) targets serious offenses, and subparagraph (C) targets violent offenses. *See Lopez*, 998 F.3d at 439. "Taken together, the conditions in section 3553(f)(1) are rationally aimed at ensuring that the most dangerous offenders—violent recidivists with a history of committing serious crimes—remain ineligible for safety-valve relief." *Garcon*, 54 F.4th at 1283.

Accounting for "the larger statutory scheme" makes "[t]he rationality of section 3553(f)(1) … even

clearer—and the absurdity argument even weaker." *Id.* Subsections (f)(2) through (5) further restrict eligibility for safety-valve relief to cooperative, nonviolent drug offenders who did not lead others in committing the instant offense. *See* 18 U.S.C. § 3553(f). These requirements "will often disqualify defendants the government considers unworthy of relief." *Garcon*, 54 F.4th at 1283. "Moreover, it does not follow from the availability of safety-valve relief that a defendant will always receive a sentence that is meaningfully different from the mandatory minimum." *Id.* at 1284. As explained, Congress had no reason to be concerned about joining § 3553(f)(1)(A), (B), *and* (C), because it knew that a sentencing court would have discretion impose a proportionate sentence. *Supra* pp. 22-25.

In sum, it's not hard to imagine why Congress meant "and" when it said "and." And because "a rational Congress could reach the policy judgment the statutory text suggests it did," "no amount of policy-talk can overcome [Congress'] plain statutory command." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021). Even assuming the government's policy arguments have some appeal, "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). The Court must give "and" in § 3553(f)(1) its "ordinary meaning." *Niz-Chavez*, 141 S. Ct. at 1486.

Although the government's policy arguments are irrelevant given § 3553(f)(1)'s plain command, it's worth seeing the government's "novel" theory for what

it is. *Garcon*, 54 F.4th at 1280. As the Eleventh Circuit explained, the "and"-means-"or" argument "appears to have been crafted by the government specifically for this statute to achieve its preferred outcome," *id.*—fewer second chances, and thus more prison time, for nonviolent drug offenders. That doesn't wash. One of the main goals of the historic, bipartisan First Step Act was to give nonviolent drug offenders "a chance at redemption, so if something happens and they make a mistake, they get a second chance at life." Senators Br. 9, *Terry*, No. 20-5904 (citation omitted); *see supra* pp. 22-25. There's no basis for holding that it would have been absurd for Congress to extend safety-valve relief to a nonviolent drug offender who does not have (A) more than 4 criminal history points, excluding any points resulting from a 1-point offense, (B) a prior 3-point offense, *and* (C) a prior 2-point violent offense. The absurdity lies in the government's argument and the damage it would do to statutory interpretation and the separation of powers by making so basic a word as "and" indeterminate. *See Palomares*, 52 F.4th at 652 (Willett, J., dissenting).

4. Other statutes do not help resolve the question presented.

The government may argue that other statutes scattered throughout the U.S. Code support reading the conjunctive "and" in § 3553(f)(1) as if Congress had used a disjunctive "or," and point to the statutes identified by Judge Kirsch. *See Pace*, 48 F.4th at 757-58 (Kirsch, J., concurring). But as Judge Wood explained, the statutes that Judge Kirsch cited are unlike § 3553(f)(1). *Id.* at 766-67 (Wood, J., dissenting in part). Section 3553(f)(1) lists a set of three criteria a defendant must meet, whereas the statutes Judge Kirsch cited all list separate, unrelated exceptions to

a rule. *Id.* at 767. 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*, 48 F.4th at 767 (Wood, J., dissenting in part). Given this clear "distinction between a simple list of examples and a list of criteria," *id.* at 766-67, Judge Kirsch's examples shed no light on the meaning of "and" in § 3553(f).

C. The rule of lenity prohibits reading the "and" in § 3553(f)(1) to mean "or."

Even assuming there is lingering ambiguity about the statute's meaning, the rule of lenity prevents the "and" in § 3553(f)(1) from meaning "or." Courts cannot give a word in a criminal statute a meaning that both is different from its plain meaning and favors the government. And given all the markers pointing toward the plain, obvious, and rational reading—that "and" means "and"—it would make no sense to hold that "and" means "or," unless, of course, the statute is somehow ambiguous. But if that's the case, the rule of lenity breaks the tie in Pulsifer's favor.

1. The rule of lenity requires courts to read ambiguous criminal statutes in favor of liberty. *Skilling v. United States*, 561 U.S. 358, 410 (2010); *see also Wooden v. United States*, 142 S. Ct. 1063, 1081 (2022) (Gorsuch, J., concurring in the judgment). The rule applies to all criminal statutes, including those pertaining to criminal penalties. *Bifulco v. United States*, 447 U.S. 381, 387 (1980). Indeed, "the Court will not interpret a federal criminal statute so as to increase

the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Id.* (citations omitted).

The rule of lenity kicks in when, after resort to the traditional tools of statutory construction, *see Callanan v. United States*, 364 U.S. 587, 596 (1961), "reasonable doubt persists about a statute's intended scope," *Moskal v. United States*, 498 U.S. 103, 108 (1990). The rule of lenity thus serves a specific and narrow role: it breaks the interpretive tie in favor of defendants when there is "grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." *Maracich v. Spears*, 570 U.S. 48, 76 (2013) (citation omitted). *But see Wooden*, 142 S. Ct. at 1084-85 (Gorsuch, J., concurring in the judgment) (explaining the dubious origins of the "grievous ambiguity" standard).

Although the rule of lenity is generally not a "front-end" interpretive principle, *Wooden*, 142 S. Ct. at 1075-76 (Kavanaugh, J., concurring); *see Callanan*, 364 U.S. at 596, the Court has made clear that the rule of lenity does impose an important front-end constraint: 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. *Burrage* delivered that unequivocal instruction when analyzing the ordinary meaning of a criminal statute, *id.* at 210-16, before rejecting the government's policy-based arguments, *id.* at 216-18. Indeed, as Chief Justice Marshall explained, when "the plain meaning of words" is clear, the "Court cannot enlarge the statute" even when the result those words command "is extremely improbable." *United States v. Wiltberger*, 5 Wheat. 76, 96, 105 (1820). That makes

sense: courts turn to the rule of lenity *before* policy. *Wooden*, 142 S. Ct. at 1086 (Gorsuch, J., concurring in the judgment).

2. The rule of lenity prevents "and" in § 3553(f)(1) from meaning "or." *See Garcon*, 54 F.4th at 1285; *Lopez*, 998 F.3d at 443-44; *Palomares*, 52 F.4th at 658-59 (Willett, J., dissenting). Again, the plain, ordinary meaning of "and" is "and," not "or." *Supra* pp. 17-19. Thus, as Judge Newsom observed, courts have "to engage in interpretive gymnastics" to construe "and" the government's way. *Garcon*, 54 F.4th at 1290 (Newsom, J., concurring). All of that is enough to resolve this case in Pulsifer's favor under "the tools of statutory interpretation before resorting to the rule of lenity." *Wooden*, 142 S. Ct. at 1075 (Kavanaugh, J., concurring).

But even assuming the government's gymnastics create an ambiguity, the rule of lenity resolves it in Pulsifer's favor. Precedent is clear that courts "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, and the ordinary meaning of "and" is "and." Still more, the problems with the government's argument—ordinary meaning; the presumption of consistent usage; the meaningful variation canon; the purpose of the First Step Act; and the weight of corpus linguistics evidence—show that any ambiguity would be "grievous" indeed. Thus, even if the government's functionally disjunctive reading is not unambiguously wrong, and even if the question is close, the rule of lenity prohibits reading "and" in § 3553(f)(1) to mean "or."

CONCLUSION

The Court should hold that "and" in § 3553(f)(1) means "and," so that a defendant satisfies § 3553(f)(1) and thus is eligible for safety-valve relief so long as he does not have § 3553(f)(1)(A), (B), *and* (C)—all three.

Respectfully submitted.

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