No. 22-340

In the Supreme Court of the United States

MARK E. PULSIFER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, in order for a defendant to qualify for an exception from a statutory-minimum sentence under 18 U.S.C. 3553(f)(1), a court must find that the defendant does not have more than four criminal-history points (excluding any criminal-history points resulting from a one-point offense); does not have a prior three-point offense; and does not have a prior two-point violent offense.

TABLE OF CONTENTS

Page

Table of contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, and Guidelines:

Statutes and Guidelines—Continued: Page

Statutes and Guidelines—Continued: Page

Miscellaneous—Continued: Page

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 39 F.4th 1018.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2022. The petition for a writ of certiorari was filed on October 7, 2022, and granted on February 27, 2023. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND SENTENCING GUIDELINES PROVISIONS INVOLVED

Section 3553(f) of Title 18 of the 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 [21 U.S.C. 841 or other specified federal drug laws], 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 com-

> mon 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.

18 U.S.C. 3553(f).

Other statutory and Sentencing Guidelines provisions are reproduced in an appendix to this brief. App., *infra*, 1a-26a.

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Iowa, petitioner was convicted of distributing 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A). Pet. App. 10a-11a. The district court sentenced petitioner to 162 months of imprisonment, to be followed by ten years of supervised release. *Id.* at 12a-13a. The court of appeals affirmed. *Id.* at 1a-9a.

A. Legal Background

1. Congress has established minimum penalties for various drug offenses, including certain aggravated violations of the basic prohibition against drug distribution, 21 U.S.C. 841. See, *e.g.*, Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Tit. I, § 1002, 100 Stat. 3207-2 to 3207-4. The existence and length of the minimum penalties depend on the quantity and type of drug involved, the harm caused by the violation, and the defendant's criminal history.

For example, while distributing less than five grams of methamphetamine typically does not trigger a statutory-minimum sentence, see 21 U.S.C. 841(b)(1)(C), distributing five to 50 grams of methamphetamine typically carries a statutory minimum of five years of imprisonment, see 21 U.S.C. 841(b)(1)(B)(viii), and distributing 50 grams or more of methamphetamine typically triggers a statutory minimum of ten years of imprisonment, see 21 U.S.C. 841(b)(1)(A)(viii). Other drugs have different quantity thresholds; five- or ten-year statutory-minimum terms of imprisonment for distribution of lysergic acid diethylamide (LSD), for example, are triggered by distribution of one and ten grams, respectively. See 21 U.S.C. 841(b)(1)(A)(v) and (B)(v).

Section 841 also includes statutory-minimum penalties "if death or serious bodily injury results from the use" of the drug; distribution of even a small amount of methamphetamine with that effect, for example, carries a statutory minimum of 20 years of imprisonment. 21 U.S.C. 841(b)(1)(C); see 21 U.S.C. 841(b)(1)(A) and (B). The minimum penalties also increase if the defendant has a certain criminal history. For example, a defendant who distributes 50 grams or more of methamphetamine "after a prior conviction for a serious drug felony or serious violent felony" faces a statutory minimum of 15 years of imprisonment, while a defendant who engages in the same conduct after two or more such prior convictions faces a statutory minimum of 25 years of imprisonment. 21 U.S.C. 841(b)(1)(A).

2. Under 18 U.S.C. 3553(f)—a provision known as the "safety valve," *Dorsey* v. *United States*, 567 U.S. 260, 285 (2012) (Appendix B)—defendants convicted of specified drug offenses, including violations of Section 841, are exempted from the otherwise-applicable statutory

minimum if certain criteria are met. Those criteria, set forth in Sections 3553(f)(1) through (5), focus on the defendant's criminal history, the characteristics of the offense, and the defendant's cooperation with authorities.

The criminal-history criteria are codified in Section 3553(f)(1). As originally enacted in 1994, Section 3553(f)(1) contained only a single requirement, which was satisfied if the defendant "d[id] not have more than 1 criminal history point, as determined under the sentencing guidelines." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Tit. VIII, § 80001(a), 108 Stat. 1985. In the First Step Act of 2018, Congress amended Section 3553(f)(1) to replace that requirement with a new set of criminal-history criteria. Pub. L. No. 115-391, § 402(a)(1)(B), 132 Stat. 5221. Under Section 3553(f)(1) as amended, a defendant is eligible for safety-valve relief only if "the court finds at sentencing" 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.

18 U.S.C. 3553(f).

3. The subparagraphs of Section 3553(f)(1) cross-reference the calculation of criminal-history points under the Sentencing Guidelines. See 18 U.S.C. 3553(f)(1)(A)-(C). That calculation typically incorporates two sets of rules—one about which prior sentences are counted, and another about the number of points that are added

to a defendant's criminal-history score for each of those sentences.

Sentencing Guidelines § 4A1.2 defines the "prior sentence[s]" that may be counted. Sentencing Guidelines § 4A1.2(a)(1). That definition includes, by default, "any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense." *Ibid.* But it also carves out certain sentences; for example, particular sentences imposed more than a specified time period before the defendant's commission of the instant offense are not counted. *Id.* § 4A1.2(e). Similarly, sentences for certain types of convictions—military convictions, foreign convictions, tribal-court convictions, and expunged convictions—are not counted or are counted only under certain conditions. *Id.* § 4A1.2(g)-(j).

Sentencing Guidelines § 4A1.1 specifies how many criminal-history points are "[a]dd[ed]" to the defendant's "total points" for each prior sentence that is counted. Sentencing Guidelines § 4A1.1(a)-(c); see *id.* § 4A1.1, comment. Under Section 4A1.1(a), three points are "[a]dd[ed] * * * for each prior sentence of imprisonment exceeding one year and one month." *Id.* § 4A1.1(a). Under Section 4A1.1(b), two points are "[a]dd[ed] * * * for each prior sentence of imprisonment of at least sixty days not counted in" Section 4A1.1(a). *Id.* § 4A1.1(b). And under Section 4A1.1(c), one point is "[a]dd[ed] * * * for each prior sentence not counted in" Section 4A1.1(a) or (b), up to a total of four points. *Id.* § 4A1.1(c).

B. Factual And Procedural Background

1. In April 2020, petitioner made two drug sales to a purchaser who was a confidential informant. Presentence Investigation Report (PSR) ¶¶ 10-12. The first sale was at a gas station in Council Bluffs, Iowa, and

involved about 112 grams of methamphetamine. PSR ¶¶ 10-11. The second sale was on the side of a road outside Mondamin, Iowa, and involved about 29 grams of methamphetamine. PSR ¶ 12.

A federal grand jury in the Southern District of Iowa indicted petitioner on one count of distributing 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A), and one count of distributing 5 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B). Indictment 1-2. The government gave notice of its intent to seek enhanced penalties based on petitioner's prior conviction for a "serious drug felony"—namely, a 2013 Iowa conviction for possessing a controlled substance with intent to distribute. D. Ct. Doc. 29, at 1-2 (Oct. 15, 2020); see PSR ¶ 53; 21 U.S.C. 802(57), 841(b)(1)(A), 851.

Pursuant to a plea agreement, petitioner pleaded guilty to distributing 50 grams or more of methamphetamine, and the government agreed to dismiss the other count. Plea Agreement 1; D. Ct. Doc. 37, at 1 (Nov. 4, 2020); see Indictment 1. Due to the quantity and type of drug involved, and petitioner's prior conviction for a "serious drug felony," the statutory-minimum term of imprisonment was 15 years. 21 U.S.C. 841(b)(1)(A).

2. At sentencing, petitioner argued that he satisfied all of Section 3553(f)'s requirements for an exemption from that statutory minimum. See PSR Addendum 1; D. Ct. Doc. 50, at 2-5 (Feb. 10, 2021). The district court found otherwise. Pet. App. 33a-36a.

With respect to the criminal-history criteria in Section 3553(f)(1), petitioner acknowledged that he has "more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense." 18 U.S.C. 3553(f)(1)(A); see PSR Addendum 1;

PSR ¶¶ 30-55 (assigning six criminal-history points, excluding any points resulting from a one-point offense). Petitioner also acknowledged that he has two "prior 3-point offense[s]," 18 U.S.C. 3553(f)(1)(B); see PSR Addendum 1—namely, the 2013 Iowa drug conviction noted above and a 2006 Iowa conviction for possessing methamphetamine, see PSR ¶¶ 46, 53. But petitioner claimed that he nevertheless satisfied Section 3553(f)(1)'s criminal-history criteria because he does not have "a prior 2-point violent offense," 18 U.S.C. 3553(f)(1)(C); see PSR Addendum 1.

The district court, however, explained that because Section 3553(f)(1) is written "in the conjunctive," petitioner would need to show that he does not have "all three of th[e] things" specified in subparagraphs (A), (B), and (C) in order to be eligible for safety-valve relief. Pet. App. 33a. The court accordingly found that because petitioner "does have more than four criminal history points, he is not eligible for [the] safety valve." *Id.* at 36a. After granting "an unrelated reduction under different authority," *id.* at 2a; see Sent. Tr. 16-24; D. Ct. Doc. 54 (Mar. 2, 2021), the court sentenced petitioner to 162 months of imprisonment, Pet. App. 12a.

3. The court of appeals affirmed. Pet. App. 1a-9a. The court observed that a defendant may qualify for safety-valve relief under Section 3553(f)(1) "if he 'does not have—' the criminal history points specified in (A), the prior offense listed in (B), *and* the prior offense listed in (C)." *Id.* at 5a. The court accepted that the "most natural reading of 'and' is conjunctive," *ibid.*, and thus viewed "the important question" not as "whether 'and' should be read conjunctively or disjunctively," but instead "in what sense the statute uses the word 'and' in the conjunctive." *Id.* at 5a-6a.

The court of appeals observed that "[w]hen used as a conjunctive, the word 'and' has 'a distributive (or several) sense as well as a joint sense.'" Pet. App. 6a (quoting Bryan A. Garner, *Garner's Dictionary of Legal Usage* 639 (3d ed. 2011) (*Garner's*)). The court explained that a "joint" reading would mean that "a defendant is eligible for relief" under Section 3553(f)(1) if "he does not jointly have all three elements listed in (A), (B), and (C)." *Ibid.* The court then explained that a "distributive" interpretation, in contrast, "would mean that the requirement that a defendant 'does not have' certain elements of criminal history is distributed across the three subsections." *Ibid.* Under that interpretation, "[a] court will find that § 3553(f)(1) is satisfied only when the defendant (A) does not have more than four criminal history points, (B) does not have a prior three-point offense, and (C) does not have a prior two-point violent offense." *Id.* at 8a.

The court of appeals found "a strong textual basis to prefer [the] distributive reading." Pet. App. 6a. The court observed that "[i]f 'and' is read jointly, then subsection (A) is rendered superfluous," because a "defendant who has a prior three-point offense under subsection (B) and a prior two-point violent offense under subsection (C) would *always*" have "more than four criminal history points" and under "subsection (A)." *Ibid.* The court also observed that the "practical effect of reading 'and' in its distributive sense is that § 3553(f)(1) serves as an eligibility checklist for offenders who seek to avail themselves of the limitation on statutory minimums." *Id.* at 8a. And the court noted that because "the traditional tools of interpretation reveal the meaning of the provision," "there is no grievous ambiguity" that might warrant application of the rule of lenity. *Id.* at 9a.

The court of appeals found that petitioner failed to satisfy "all three" of the criminal-history criteria under the distributive interpretation of Section 3553(f)(1). Pet. App. 8a; see *id.* at 8a-9a. The court noted that petitioner "does not * * * have a prior two-point violent offense," thereby satisfying one of the three criteria. *Id.* at 9a. But the court found no dispute that petitioner "has more than four criminal history points and a prior three-point offense," thereby failing to satisfy the other two criteria. *Id.* at 8a-9a. The court therefore determined that "[t]hose circumstances make [petitioner] ineligible" for safety-valve relief. *Id.* at 9a.

SUMMARY OF ARGUMENT

The court of appeals correctly determined that a defendant satisfies 18 U.S.C. 3553(f)(1) only if he does not have more than four criminal-history points (excluding any points resulting from a one-point offense); does not have a prior three-point offense; *and* does not have a prior two-point violent offense. Because petitioner fails to satisfy all three of those criteria, he is ineligible for safety-valve relief.

I. All agree that the "and" in Section 3553(f)(1) has a conjunctive meaning. The critical question in this case is what the "and" connects. One grammatical possibility is that the "and" implicitly puts brackets around the criminal-history characteristics in subparagraphs (A), (B), and (C), such that a defendant satisfies Section 3553(f)(1) so long as he does not have the combination of the characteristics in [(A), (B), and (C)]. The other grammatical possibility is that the "and" distributes the prefatory phrase "does not have" to each subparagraph, such that a defendant satisfies Section 3553(f)(1) only if he does not have the characteristic in (A), does not have

the characteristic in (B), *and* does not have the characteristic in (C).

Determining which interpretation is correct requires examining the "and" in context. Here, context makes clear that the distributive interpretation is correct. That interpretation gives effect to every subparagraph, treating each criminal-history characteristic as an independently disqualifying condition. In contrast, construing the "and" as implicitly putting brackets around the three subparagraphs renders subparagraph (A) entirely superfluous, because a defendant who has both a prior three-point offense under (B) and a prior two-point violent offense under (C) will always also have more than four criminal-history points under (A). The implicit-bracket reading thus violates "one of the most basic interpretive canons"—that a statute should be construed "so that no part will be inoperative or superfluous, void or insignificant." *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018) (citation omitted).

Furthermore, only the distributive interpretation avoids turning Section 3553(f)(1) into an arbitrary measure of a defendant's criminal history. Section 3553(f)(1)'s role in the statute is to identify defendants whose criminal histories are sufficiently serious to render them ineligible for safety-valve relief. The distributive interpretation is consistent with that role because each characteristic in (A), (B), and (C) is sensibly viewed as serious enough on its own to be disqualifying. The implicit-bracket reading, in contrast, would disqualify only those defendants who have the *combination* of the characteristics in (A), (B), and (C). Thus, under petitioner's approach, a defendant who committed a series of three-point violent offenses would still be eligible under Section

3553(f)(1) simply so long as he does not commit a less serious *two-point* violent offense. That makes no sense.

II. Petitioner devotes much of his brief to arguing that only the implicit-bracket reading treats the "and" in Section 3553(f)(1) as conjunctive. But that argument attacks a strawman; the distributive interpretation also treats the "and" as conjunctive. The two interpretations differ only in what they understand that conjunction to conjoin.

On that critical issue, petitioner offers little to support his preferred reading. His attempt to avoid creating superfluity rests on the untenable hypothesis (Br. 40) that "a 2-point offense can still be a 2-point offense under the Guidelines even if it doesn't score criminal history points." His observation (Br. 25) that "[e]ach subparagraph of § 3553(f)(1) targets a different concern" actually undermines his own reading and supports the distributive interpretation. His assertion that the distributive interpretation is textually impermissible ignores the many examples of "and" used distributively throughout the law. And his last-resort appeal to the rule of lenity is misplaced, as Section 3553(f)(1) is neither a penal law nor a grievously ambiguous one.

ARGUMENT

In order for a defendant to be eligible for the safety valve, 18 U.S.C. 3553(f)(1) requires a court to find 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.

18 U.S.C. 3553(f) (emphasis added). As the lower courts correctly understood, Pet. App. 6a, 33a, the "and" in Section 3553(f)(1) conjoins three criminal-history criteria, such that a defendant satisfies Section 3553(f)(1) if he does not have more than four criminal-history points (excluding one-point offenses), does not have a prior three-point offense, *and* does not have a prior two-point violent offense. That is a standard, well-accepted, and contextually supported conjunctive use of "and"; petitioner's repeated claim that it transforms "and" into "or" is misguided; and because petitioner undisputedly fails to satisfy the first two criteria, he is ineligible for safety-valve relief.

I. A DEFENDANT SATISFIES 18 U.S.C. 3553(f)(1) ONLY IF HE DOES NOT HAVE MORE THAN FOUR CRIMINAL-HISTORY POINTS, DOES NOT HAVE A THREE-POINT OFFENSE, AND DOES NOT HAVE A TWO-POINT VIOLENT OFFENSE

The critical question in understanding Section 3553(f)(1) is what the word "and"—used in its standard conjunctive sense—actually conjoins. The only way to answer that question is through context. And context makes clear that it connects three criteria—that the defendant does not have more than four criminal-history points (excluding one-point offenses); does not have a prior three-point offense; *and* does not have a prior two-point violent offense. Accordingly, a court must find that a defendant satisfies all three of those criteria in order for the defendant to be eligible for safety-valve relief.

A. Context Determines What "And" Connects

The ordinary meaning of "and" is conjunctive. See *Webster's Third New International Dictionary* 80 (1993) (defining "and" to mean "along with or together with" and "as well as"). Used conjunctively, "and" connects things by joining them together. See Bryan A. Garner, *The Chicago Guide to Grammar, Usage, and Punctuation* 146 (2016) ("A conjunction is a function word that connects sentences, clauses, or words within a clause."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116 (2012) (*Reading Law*) (explaining that "*and*" is a conjunction that "combines items"); Siu-Fan Lee, *Logic: A Complete Introduction* 180 (2017) (Lee) ("Conjunction is a relation that joins constituent propositions together."). But the word "and" in isolation is not enough to indicate what things it connects.

Suppose someone says that she "sells red, white, and blue caps." Tobias A. Dorsey, *Legislative Drafter's Deskbook: A Practical Guide* § 6.11, at 174 (2006). Does that mean that "she sell[s] three different single-color caps, or one tricolor cap?" *Ibid.* The speaker could be using "and" in a "distributive (or several) sense," *Garner's* 639, distributing each of the three colors to the word "caps," to describe the sale of three different single-color caps: red caps, white caps, *and* blue caps. Or the speaker could be using "and" in a "joint sense," *ibid.*, treating the three colors as a unit that jointly modifies "caps," to describe the sale of tricolor caps. On either interpretation, the speaker is using "and" conjunctively; the distributive reading simply connects three different types of caps as opposed to three different colors.

The same interpretive issue frequently arises when a statement involves negation. Consider the following sentence: "Acme shall not notify Able and Baker." Kenneth A. Adams, *A Manual of Style for Contract Drafting* § 11.16, at 212 (3d ed. 2013) (Adams). The sentence could be using "and" to distribute the introductory phrase "shall not notify" to "Able and Baker" individually, thereby conveying that "Acme shall not notify Able *and* shall not notify Baker." *Ibid.* (emphasis altered). Or the sentence could be using "and" to treat "Able and Baker" as a unit, jointly modified by the introductory phrase, thereby conveying that "Acme shall not notify both Able and Baker but may notify just one or the other of them." *Ibid.* (emphasis omitted). On either reading, "and" is used conjunctively; it just connects different things.

In math and formal logic, parentheses and brackets are often used to indicate "what the connectives are connecting." Jc Beall & Shay Allen Logan, *Logic: The Basics* 89 (2d ed. 2017). In math, for example, the parentheses in the proposition $2 \times (3 + 5)$ indicate that the multiplication symbol connects 2 to the sum of 3 and 5, rather than just 3 alone. See Irving M. Copi et al., *Introduction to Logic* 271 (15th ed. 2019) (Copi) ("[T]o make meaning clear, punctuation marks in mathematics appear in the form of parentheses, ( ), which are used to group individual symbols."). Similarly, in formal logic, the brackets in the proposition $\neg [p \ \& \ q]$ indicate that p and q are to be joined together "before the whole result is negated." Lee 195; see Lee 194-195 ("Parentheses are used in propositional logic, like punctuation, to show the order of the operations, i.e. which operation is to be performed first and what propositions are within the scope of which operator.").

For better or for worse, however, "we do not use brackets in ordinary language." Lee 209; see Reed Dickerson, *The Fundamentals of Legal Drafting* § 6.1, at 103 (2d ed. 1986) (Dickerson) ("It is unfortunate that English has so few symbols for showing that specific phrases form a unit."). "Therefore, we can only judge their presence through interpreting texts in context." Lee 209. Indeed, "interpretation always depends on context." *Reading Law* 63; see *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U.S. 409, 415 (2005) ("Statutory language has meaning only in context.").

Interpreting what "and" is connecting is no exception. See *Shaw* v. *National Union Fire Ins. Co. of Pittsburgh*, 605 F.3d 1250, 1254 n.9 (11th Cir. 2010) ("The word *and* always serves some 'conjunctive' function; the question in a particular context is what other words the *and* is connecting, and how."). The use of "and" "cannot" "be interpreted in specific instances apart from the context in which it appears." Dickerson § 6.2, at 109; see *Scialabba* v. *Cuellar de Osorio*, 573 U.S. 41, 71 (2014) (plurality opinion) ("Whether 'and' works in [a particular] way * * * depends, like many questions of usage, on the context"); *Lockhart* v. *United States*, 577 U.S. 347, 355-356 (2016) (treating what a word "modifie[s]" as a "fundamentally contextual question[]").

A few examples illustrate the point. The Constitution grants Congress the power "[t]o declare war, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land *and* Water." U.S. Const. Art. I, § 8, Cl. 11 (emphasis added). In the abstract, the italicized "and" could be read in a joint sense, effectively putting brackets around "Land and Water," such that the only "Captures" that Congress may regulate are

captures occurring on land and water at the same time. But context makes clear that the provision uses "and" distributively, such that Congress may "make Rules concerning Captures on Land" and may "make Rules concerning Captures on * * * Water."

Just this past Term, this Court decided a case involving 5 U.S.C. 105, which provides: "For the purpose of this title, 'Executive agency' means an Executive department, a Government corporation, and an independent establishment." *Ibid.*; see *Ohio Adjutant General's Dep't* v. *Federal Labor Relations Auth.*, 143 S. Ct. 1193, 1198 (2023). Divorced from context, that provision could be read to use "and" in a joint sense to mean that, in order to be considered an "Executive agency," something must be everything on that list at once. But in context, "and" clearly distributes the lead-in language to each thing listed, such that "Executive agency" means an Executive department, means a Government corporation, *and* means an independent establishment.

Another example—quite similar to Section 3553(f)(1)—appears in a federal statute requiring "fines that are collected from persons convicted of offenses against the United States" to be deposited into the Crime Victims Fund. 34 U.S.C. 20101(b)(1). The statute provides:

> As used in this section, the term "offenses against the United States" does not include—
>
> (1) a criminal violation of the Uniform Code of Military Justice (10 U.S.C. 801 et seq.);
>
> (2) an offense against the laws of the District of Columbia; and
>
> (3) an offense triable by an Indian tribal court or Court of Indian Offenses.

34 U.S.C. 20101(f).

In the abstract, "and" could be read as implicitly putting brackets around the things specified in paragraphs (1), (2), and (3), such that only a crime that is the combination of those things is not included. But context makes clear that "and" distributes the introductory clause to each paragraph, such that the term "offenses against the United States" does not include the offenses described in paragraph (1), does not include the offenses described in paragraph (2), *and* does not include the offenses described in paragraph (3).

B. Context Makes Clear That Section 3553(f)(1) Uses "And" To Connect Three Criteria, Each Modified By The Phrase "Does Not Have"

In Section 3553(f)(1), as in the examples above, there are two grammatical possibilities. One grammatical possibility is to construe the "and" in Section 3553(f)(1) as implicitly putting brackets around the criminal-history characteristics in (A), (B), and (C), such that a defendant satisfies Section 3553(f)(1) so long as he does not have the combination of those characteristics. The other grammatical possibility is to understand the "and" in Section 3553(f)(1) as connecting three criminal-history criteria by distributing the phrase "does not have" to each subparagraph, such that a defendant satisfies Section 3553(f)(1) only if he does not have (A), does not have (B), *and* does not have (C).

As always, determining what "and" connects requires examining "and" in context. See pp. 14-18, *supra*. Here, context makes clear that the latter interpretation is correct: the "and" in Section 3553(f)(1) connects three criteria that the defendant must satisfy—that he does not have (A), does not have (B), *and* does not have (C). That is the only interpretation that avoids rendering subparagraph (A) entirely superfluous. And it is the only

interpretation that avoids turning Section 3553(f)(1) into an arbitrary measure of a defendant's criminal history.

1. Only the distributive interpretation avoids rendering subparagraph (A) entirely superfluous

It is a "'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute.'" *Parker Drilling Mgmt. Servs., Ltd.* v. *Newton*, 139 S. Ct. 1881, 1890 (2019) (citation omitted). Accordingly, the canon against surplusage instructs that a statute should be construed "so that no part will be inoperative or superfluous, void or insignificant." *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018) (citation omitted).

The distributive interpretation of Section 3553(f)(1) comports with that principle. Under that interpretation, each subparagraph does independent work. Subparagraph (A) disqualifies defendants who have more than four criminal-history points (excluding any points from a one-point offense), even if they do not have a prior three-point offense and do not have a prior two-point violent offense. Subparagraph (B), in turn, disqualifies defendants who have a prior three-point offense, even if they do not have more than four total criminal-history points and do not have a prior two-point violent offense. And subparagraph (C) disqualifies defendants who have a prior two-point violent offense, even if they do not have more than four total criminal-history points and do not have a prior three-point offense.

The implicit-bracket reading, in contrast, violates the antisurplusage canon. Under the implicit-bracket reading, Section 3553(f)(1) would disqualify only those defendants who have the *combination* of the characteristics in subparagraphs (A), (B), and (C)—*i.e.*, those defendants who have more than four criminal-history

points (excluding any points from a one-point offense), a prior three-point offense, and a prior two-point violent offense. But because three plus two will always equal more than four, any defendant who has both a prior three-point offense and a prior two-point violent offense will always also have more than four criminal-history points. As a result, any defendant who has the combination of the characteristics in (B) and (C) will always also have the combination of the characteristics in (A), (B), and (C). The implicit-bracket reading would thus render subparagraph (A) completely useless.

Context therefore strongly supports the distributive interpretation over the implicit-bracket reading. "The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme," *City of Chicago* v. *Fulton*, 141 S. Ct. 585, 591 (2021) (citation omitted)—just as the implicit-bracket reading would here. Indeed, the implicit-bracket reading would render superfluous not just another part of the same scheme, but the very first subparagraph of the same provision—a particularly problematic type of surplusage. See *National Ass'n of Mfrs.* v. *Department of Def.*, 138 S. Ct. 617, 632 (2018) (rejecting "an interpretation of [a] statute that would render an entire subparagraph meaningless").

2. Only the distributive interpretation avoids turning Section 3553(f)(1) into an arbitrary measure of a defendant's criminal history

Avoiding surplusage, while alone sufficient to identify the distributive interpretation as the correct one, is not the only basis for preferring that interpretation. Another "essential element of context that gives meaning to words" is the "evident purpose of what a text seeks to achieve." *Reading Law* 20. And "[c]ontext also

includes common sense." *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2379 (2023) (Barrett, J., concurring); see *The Federalist No. 83*, at 559 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("The rules of legal interpretation are rules of *common sense*."). Here, those considerations likewise point definitively to the distributive interpretation.

The evident purpose of Section 3553(f)(1) is to identify defendants whose criminal histories are sufficiently serious to disqualify them from safety-valve relief. See 18 U.S.C. 3553(f)(1) (requiring that a defendant "not have" certain criminal-history characteristics). The implicit-bracket reading, however, would arbitrarily disqualify defendants with less serious criminal histories while allowing defendants with more serious criminal histories to remain eligible. The distributive interpretation is thus the only interpretation that assigns Section 3553(f)(1) a rational, gatekeeping role.

Under the distributive interpretation, each subparagraph of Section 3553(f)(1) sets forth a criminal-history factor that the defendant must "not have." 18 U.S.C. 3553(f)(1). Treating each of those factors as independently disqualifying makes sense because each factor, on its own, reflects a criminal history that Congress "quite plausibly" could have viewed as sufficiently serious "to deny a defendant the extraordinary relief afforded by the safety valve." *United States* v. *Haynes*, 55 F.4th 1075, 1079 (6th Cir. 2022), petition for cert. pending, No. 22-7059 (filed Mar. 17, 2023). Congress could sensibly have reasoned that a defendant with more than four criminal-history points (excluding one-point offenses) has shown himself to be enough of a repeat offender to warrant application of the statutory minimum, but that even when a defendant has commit-

ted only one prior offense, that offense could be serious enough to be disqualifying where the offense resulted in a sufficiently long sentence (a three-point offense) or resulted in a shorter sentence but involved violence (a two-point violent offense).

Placing implicit brackets around the criminal-history factors specified in subparagraphs (A), (B), and (C), in contrast, would turn Section 3553(f)(1) into an arbitrary measure of the seriousness of a defendant's criminal history. See *Haynes*, 55 F.4th at 1079-1080. It would excuse, for example, a defendant with numerous two-point violent offenses on his record—say, a drug-cartel enforcer with numerous battery convictions—simply because he does not also have a three-point offense (violent or otherwise). And it would excuse a defendant with numerous three-point offenses—such as a career drug dealer—simply because none of his prior crimes was a two-point violent offense.

The facts of this very case illustrate that latter scenario. Petitioner has two prior three-point offenses, both involving methamphetamine, the same drug at issue here. PSR ¶¶ 46, 53. One of those prior offenses even qualifies as a "serious drug felony," increasing the statutory minimum for his Section 841 offense from ten years to 15 years of imprisonment. 21 U.S.C. 841(b)(1)(A); see 21 U.S.C. 802(57); PSR ¶ 53. The distributive interpretation gives effect to petitioner's history as a recidivist drug offender who continues to traffic methamphetamine notwithstanding prior convictions and sentences, and who does not deserve a special exception to the enhanced baseline sentence for his latest drug crime. Yet under the implicit-bracket reading, petitioner's substantial criminal history would not disqualify him from

safety-valve relief, simply because he happens not to have a prior two-point violent offense.

That makes little sense. And it makes even less sense when the implications of requiring a prior violent offense of exactly two points are taken into account. That would mean that even if petitioner had a prior three-point violent offense—even, for example, murder—he would still remain eligible for safety-valve relief. In order for his criminal history to be disqualifying under his proposed interpretation, petitioner would need to commit a violent offense serious enough to result in two points but not so serious as to result in three—say, a robbery for which he would be sentenced to "at least sixty days" but not more than "one year and one month" in prison. Sentencing Guidelines § 4A1.1(a) and (b); see 18 U.S.C. 3553(g) (defining "violent offense" as "a crime of violence, as defined in [18 U.S.C.] 16, that is punishable by imprisonment"); *Stokeling* v. *United States*, 139 S. Ct. 544, 548 (2019) (determining that "a robbery offense that has as an element the use of force sufficient to overcome a victim's resistance necessitates the use of 'physical force'").

So long as petitioner avoided committing such a two-point offense, however, it would not matter under the implicit-bracket reading how many more offenses—even three-point violent ones—he committed; he could accumulate many more criminal-history points and still remain eligible for safety-valve relief under Section 3553(f)(1). Indeed, a recidivist robber, even one who also has multiple felony drug-trafficking convictions, would perversely be better off for Section 3553(f)(1) purposes if judges gave him longer sentences for his robberies. An interpretation of Section 3553(f)(1) that gives such a

benefit to defendants with *more* serious criminal histories is insupportable.

Experience proves that the implicit-bracket reading benefits even those defendants with the most serious criminal histories. In the Ninth Circuit—which has adopted a version of the implicit-bracket reading, see p. 45 n.8, *infra*—defendants who have so many criminal-history points that they fall within the Sentencing Guidelines' highest criminal-history category (category VI, which requires at least 13 criminal-history points) have nonetheless been deemed eligible for safety-valve relief. See, *e.g.*, D. Ct. Doc. 77, *United States* v. *Castillo*, No. 21-cr-1113 (S.D. Cal.) (Jan. 23, 2023); D. Ct. Doc. 244, *United States* v. *Bounsavath*, No. 21-cr-1111 (S.D. Cal.) (Apr. 12, 2022); D. Ct. Doc. 63, *United States* v. *Inthavong*, No. 21-cr-1117 (S.D. Cal.) (Sept. 30, 2022); see also Judgment at 2, *Castillo*, *supra* (imposing sentence below the statutory minimum); Judgment at 2, *Bounsavath*, *supra* (same); Judgment at 2, *Inthavong*, *supra* (same).

Those defendants thereby received a benefit that less serious—possibly much less serious—offenders would have been denied. That result, under which a less culpable criminal remains subject to the statutory minimum but a more culpable criminal is excused from it, is inexplicable. The implicit-bracket reading's creation of that anomaly thus provides further evidence that, between the two grammatical possibilities, the distributive interpretation is the correct one.

II. PETITIONER'S ARGUMENTS LACK MERIT

Petitioner nonetheless urges this Court to adopt the implicit-bracket reading, principally on the theory that only his reading treats "and" as conjunctive. But while he devotes much of his brief to accusing the court of ap-

peals and the government of interpreting "and" as "or," that accusation is mistaken. All agree that "and," as used in Section 3553(f)(1), is conjunctive. The question here is which of two grammatically valid conjunctive readings is correct, a question that (as discussed above) only context can answer. And context forecloses petitioner's preferred implicit-bracket reading.

A. Petitioner Incorrectly Characterizes This Case As About Whether "And" Means "Or"

Beginning with the question presented (Pet. Br. i), and continuing throughout his brief (see, *e.g.*, *id.* at 1, 2, 4, 8, 11, 13, 25, 26, 32, 34, 35, 46, 47, 50), petitioner presupposes that any alternative to the implicit-bracket reading impermissibly turns "and" into "or." But as both the court of appeals and the district court recognized (Pet. App. 6a, 33a), and the foregoing discussion demonstrates (pp. 13-24, *supra*), that premise is wrong. The implicit-bracket reading is neither the only grammatical possibility nor, in context, the correct reading of the statutory text.

Petitioner asserts (Br. 27) that a distributive interpretation of "and" is "functionally disjunctive" because the statute could be rewritten using "or" to reach a similar result. But *any* conjunctive approach to Section 3553(f)(1)—including petitioner's—could be rephrased using "or" instead of "and." Under the principle of formal logic known as DeMorgan's theorem, just as the distributive interpretation ("not A, not B, *and* not C") is logically equivalent to a disjunctive alternative ("not [A, B, *or* C]"), petitioner's own implicit-bracket reading ("not [A, B, *and* C]") likewise has a disjunctive alternative ("not A, not B, *or* not C"). See Copi 324, 356.

DeMorgan's theorem thus confirms as a logical matter that "we can move back and forth between disjunc-

tive and conjunctive propositions as long as we are mindful about negations." R. E. Houser, *Logic as a Liberal Art: An Introduction to Rhetoric and Reasoning* 343 (2020). That does not, as petitioner would have it, imply that "and" means "or"; instead, what it highlights is the importance of reading language like Section 3553(f)(1)'s in context to determine what "and" connects. Any force that petitioner's accusation of transforming "and" into "or" has is thus purely rhetorical, not logical or grammatical.

Indeed, if Congress *had* written "or" instead of "and" in Section 3553(f)(1), that still would not have been conclusive. Replacing "and" with "or" would continue to create two grammatical possibilities: reading "does not have" as modifying Section 3553(f)(1)'s three subparagraphs jointly ("does not have [A, B, *or* C]"), or reading "does not have" as modifying each subparagraph individually ("does not have A, does not have B, *or* does not have C"). And some defendants would presumably have advocated the latter reading—the disjunctive equivalent, per DeMorgan's theorem, of petitioner's preferred reading here. See *United States* v. *Pace*, 48 F.4th 741, 759 (7th Cir. 2022) (Kirsch, J., concurring), petition for cert. pending, No. 22-828 (filed Feb. 27, 2023); *Reading Law* 120-121 (providing an example of a party arguing for a distributive reading of "or" in *United States* v. *One 1973 Rolls Royce*, 43 F.3d 794 (3d Cir. 1994)). Notwithstanding petitioner's repeated refrain, the proper interpretation of Section 3553(f)(1) cannot be reduced to a single word, considered in the abstract.

B. Context Does Not Support Petitioner's View Of What "And" Connects

Beyond his blinkered, and ultimately misguided, focus on the word "and," petitioner offers little to support

his preferred implicit-bracket reading. Most critically, he cannot reconcile the implicit-bracket reading with either the antisurplusage canon or common sense. And his arguments against the distributive interpretation lack merit.

1. Petitioner cannot square his implicit-bracket reading with the antisurplusage canon

As explained above, construing "and" as implicitly putting brackets around subparagraphs (A), (B), and (C) would render subparagraph (A) superfluous because any defendant who has both a prior three-point offense under (B) and a prior two-point violent offense under (C) will always also have more than four criminal-history points under (A). See pp. 19-20, *supra*. Petitioner's attempt to give independent meaning to subparagraph (A) under the implicit-bracket reading (Br. 33-42) rests on a misunderstanding of the Sentencing Guidelines. And he provides no sound reason to simply accept the surplusage and adopt his reading anyway.

a. Petitioner's efforts to avoid superfluity misunderstand the Sentencing Guidelines

The criminal-history characteristics in each subparagraph of Section 3553(f)(1) are expressly "determined under the sentencing guidelines." 18 U.S.C. 3553(f)(1)(A)-(C). Petitioner's efforts (Br. 36-42) to avoid superfluity in the implicit-bracket reading depend on the proposition that, under the Guidelines, a defendant could have a prior three- or two-point offense that is not added to his total criminal-history score. But as the court of appeals correctly recognized, there is no such thing under the Guidelines as a prior offense that is assigned points that are not added to the defendant's total. Pet. App. 3a-4a. A three- or two-

point offense only *because* it adds three or two points to the overall criminal-history score. Petitioner's contrary approach conflicts with both Sentencing Guidelines § 4A1.1 and Sentencing Guidelines § 4A1.2.

i. Sentencing Guidelines § 4A1.1 lays out the algorithm for calculating a defendant's criminal-history score by assigning points to a defendant's "prior sentence[s]." Petitioner incorrectly cites (Br. 36-37) Section 4A1.1 for the proposition that a prior offense can be a "3-point" or "2-point" offense even if the offense does not add any points to a defendant's total points. Under Section 4A1.1, a prior offense is assigned points, if at all, only in the context—and for the sole and express purpose—of "[a]dd[ing]" them to the defendant's "total." Sentencing Guidelines § 4A1.1(a), (b), (c), and (e).

An offense does not become a three- or two-point offense under Section 4A1.1 unless and until three or two points are "[a]dd[ed]" to the defendant's "total points." Sentencing Guidelines § 4A1.1(a) and (b). Petitioner's observation (Br. 37) that "not every sentence for a prior *offense* earns criminal history *points*" does not support his cause. Subparagraphs (B) and (C) of Section 3553(f)(1) care only about offenses that *do* earn criminal-history points—that is, "3-point" and "2-point" offenses. 18 U.S.C. 3553(f)(1)(B) and (C). And under Section 4A1.1, an offense is a three-point or two-point offense only if it "[a]dd[s]" those points to a defendant's "total points." Sentencing Guidelines § 4A1.1(a) and (b).

Petitioner observes that an offense may serve as a "predicate under the career offender guideline" or "other guidelines with predicate offenses" even if the offense does not score any criminal-history points. Sentencing Guidelines § 4A1.2, comment. (n.3(A)); see Pet. Br. 40-41. But subparagraphs (B) and (C) of Section

3553(f)(1) care only about offenses that *do* score three or two criminal-history points, 18 U.S.C. 3553(f)(1)(B) and (C), which happens only when they "[a]dd" those points to the defendant's "total," Sentencing Guidelines § 4A1.1(a) and (b).

Petitioner also notes that subparagraph (A) refers to total "points," whereas subparagraphs (B) and (C) refer to points associated with a prior "offense." Br. 42 (citation omitted). But that simply shows that while multiple offenses can count toward the points in subparagraph (A), subparagraphs (B) and (C) focus on individual "offense[s]." 18 U.S.C. 3553(f)(1)(B) and (C). It does not suggest that an offense can be a three- or two-point offense without actually "[a]dd[ing]" three or two points to a defendant's "total." Sentencing Guidelines § 4A1.1(a) and (b). Because points are assigned under Section 4A1.1 only in the context of "[a]dd[ing]" them to a defendant's "total points," *ibid.*, a defendant who has a prior three-point offense and a prior two-point violent offense will always have more than four points total.

ii. Petitioner's approach likewise conflicts with Sentencing Guidelines § 4A1.2, which specifies which "prior sentence[s]" are assigned points under Section 4A1.1. Sentencing Guidelines § 4A1.2(a)(1); see p. 6, *supra*. Petitioner accepts that an offense whose sentence is not counted under Section 4A1.2 cannot be counted when determining whether a defendant has "more than 4 criminal history points" for purposes of subparagraph (A). 18 U.S.C. 3553(f)(1)(A); see Pet. Br. 37-41. Yet, in petitioner's view (Br. 37-41), an offense whose sentence is not counted under Section 4A1.2 can still be counted when determining whether a defendant has a prior "3-point" or "2-point" offense for purposes of subparagraphs (B) and (C). 18 U.S.C. 3553(f)(1)(B) and (C).

That view is contrary to the text of both Section 3553(f)(1) and the Guidelines. Like subparagraph (A), subparagraphs (B) and (C) cross-reference "the sentencing guidelines" as a whole. 18 U.S.C. 3553(f)(1)(A)-(C). There is no sound basis for giving the phrase a different meaning in subparagraphs (B) and (C) than in subparagraph (A). See *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). Moreover, the commentary to Section 4A1.1 explicitly instructs that Sections "4A1.1 and 4A1.2 must be read together." Sentencing Guidelines § 4A1.1, comment. Because "[t]he definitions and instructions in § 4A1.2 govern the computation of the criminal history points," an offense whose sentence is not counted under Section 4A1.2 cannot be a three-point or two-point offense under Section 4A1.1. *Ibid.*; see *ibid.* ("highlight[ing] the interaction of §§ 4A1.1 and 4A1.2").

Petitioner therefore errs in jettisoning Section 4A1.2 from the determination of whether a defendant has a prior "3-point" or "2-point" offense "under the sentencing guidelines." 18 U.S.C. 3553(f)(1)(B) and (C). Every one of petitioner's scenarios in which his preferred reading purportedly would not result in surplusage suffers from that error. Petitioner asserts (Br. 37), for example, that if an offense is "too old to earn criminal history points" under Section 4A1.2(e), that offense can still be a three-point or two-point offense under the Guidelines. But an offense that is too old is simply "not counted," Sentencing Guidelines § 4A1.2(e)(3)—which means that it is not assigned any points at all, see *id.* § 4A1.1, comment. (nn.1-3). Likewise, if a sentence resulting from a military, foreign, tribal-court, or expunged conviction is not counted under Section 4A1.2(g)-(j), no points are assigned. See *ibid.* Petitioner thus errs in suggesting (Br. 40-41) that an offense whose sentence is not counted un-

der Section 4A1.2(g)-(j) can still be a three-point or two-point offense under the Guidelines.

Petitioner also errs in his example (Br. 39-40) involving the single-sentence rule. Under Section 4A1.2(a)(2), certain prior sentences that "resulted from offenses contained in the same charging instrument" or that "were imposed on the same day" are "treated as a single sentence" rather than "counted separately." Sentencing Guidelines § 4A1.2(a)(2). Petitioner posits a hypothetical involving two offenses whose sentences are treated as a single sentence—one offense that resulted in a sentence exceeding one year and one month, and another offense that was violent and resulted in a sentence of between 60 days and one year and one month. See Br. 39-40. Petitioner asserts that even though those two offenses would "score only three criminal history points" under the single-sentence rule, they would count as a three-point offense and a separate two-point violent offense under Section 4A1.1. Br. 39 (citation omitted).

But that assertion flouts the express function of Section 4A1.2(a)(2)—to determine "whether * * * sentences are counted separately or treated as a single sentence." Sentencing Guidelines § 4A1.2(a)(2). In petitioner's hypothetical, the two sentences would be "treated as a single sentence," whose length would be more than a year and a month, that would add three points to the defendant's criminal-history score. *Ibid.*; see *id.* § 4A1.1(a). They would thus merge to form a single "3-point offense, as determined under the sentencing guidelines." 18 U.S.C. 3553(f)(1)(B).[1]

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[1] Petitioner's assertion (Br. 39) that the "violent" offense in his hypothetical would count as a "2-point" offense also cannot be reconciled with Sentencing Guidelines § 4A1.1(e). To the extent that

That example, like petitioner's others, thus depends on a chimera: an offense that does not result in adding two or three points to a defendant's total points, but is still a two- or three-point offense. The Guidelines, however, do not contemplate such an offense. Petitioner accordingly cannot identify any scenario in which a defendant could have a prior two-point violent offense and a prior three-point offense but not have more than four criminal-history points. And petitioner identifies no basis—least of all, a textual one—to believe that Congress intended courts to employ a sui generis safety-valve-specific approach, different from the one used in calculating a defendant's advisory sentencing range, see 18 U.S.C. 3553(a)(4), when it directed courts to "determine[]" whether the defendant has a prior "3-point" or "2-point" offense "under the sentencing guidelines," 18 U.S.C. 3553(f)(1)(B) and (C).[2]

b. Petitioner provides no sound reason to disregard the antisurplusage canon here

Petitioner alternatively contends (Br. 35) that even if the implicit-bracket reading would render subparagraph (A) completely superfluous, the antisurplusage

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offense would be independently assigned any points at all, it would be assigned, at most, one point under Section 4A1.1(e) if it met the Guidelines' definition of a "crime of violence."

[2] Indeed, in this very case, the presentence report added zero points to petitioner's criminal-history score for a 1993 conviction for assault on an officer because the offense was too old to count. See PSR ¶ 37 (citing Sentencing Guidelines § 4A1.2(e)(3)). Under petitioner's approach, however, that offense, for which petitioner was sentenced to two years of imprisonment, would be considered a "3-point" offense for purposes of the safety valve, and a court would be able to figure that out only by conducting a separate, safety-valve-specific analysis of petitioner's prior offenses.

canon "lacks force" in this context. But none of the three reasons he proffers to support that contention withstands scrutiny.

First, petitioner asserts that applying the antisurplusage canon would mean "ignoring '§ 3553(f)(1)'s plain text.'" Br. 35 (citation omitted). That assertion, however, rests on the mistaken premise that applying the antisurplusage canon would require reading "and" to mean "or." *Ibid.* As explained above, it would not. The distributive interpretation gives "and" its ordinary, conjunctive meaning.

Second, petitioner asserts that the distributive interpretation itself "'violates the canon against surplusage'" because, in his view, it "fails to give effect to" the word "and." Br. 35 (citation omitted). Again, however, his assertion is premised on his mistaken view that the distributive interpretation reads "and" as "or." The distributive interpretation *does* give effect to the word "and"; indeed, it gives "and" a conjunctive meaning, just as petitioner's reading does. Under the distributive interpretation, "and" conjoins three criminal-history criteria, requiring a defendant to satisfy all three to be eligible under Section 3553(f)(1).

Third, petitioner asserts (Br. 35) that the type of surplusage that his implicit-bracket reading would produce is "hardly unusual." But his only support for that assertion is this Court's observation in *Loughrin* v. *United States*, 573 U.S. 351 (2014), that "criminal statutes" often "overlap" in the conduct that they prohibit, *id.* at 358 n.4—as when, for example, "perjury" statutes and "obstruction of justice" statutes both prohibit "false statements," *Hubbard* v. *United States*, 514 U.S. 695, 714 & n.14 (1995) (plurality opinion). That observation is inapposite here.

As a threshold matter, substantive overlap of criminal prohibitions is not superfluity; it is instead a consequence of a defendant's conduct implicating the interests safeguarded by different provisions of the U.S. Code. Furthermore, petitioner's reading would not simply produce overlapping criminal prohibitions; it would create redundant eligibility criteria set forth in a single provision, Section 3553(f)(1). And accepting petitioner's argument would result not in mere overlap, but in the superfluity of an entire subparagraph. Congress presumably intends its words—and even more so its subparagraphs—to serve some independent purpose. See pp. 19-20, *supra*. Yet petitioner's implicit-bracket reading would needlessly give none to subparagraph (A).

2. Petitioner cannot square his implicit-bracket reading with congressional design and common sense

As explained above, construing "and" as implicitly putting brackets around subparagraphs (A), (B), and (C) would also be contrary both to Section 3553(f)(1)'s evident purpose and to common sense. See pp. 20-24, *supra*. Petitioner fails to demonstrate otherwise, and he provides no sound reason to look past the arbitrariness of the implicit-bracket reading.

a. Petitioner attempts to defend the implicit-bracket reading on the rationale that "[e]ach subparagraph of § 3553(f)(1) targets a different concern: subparagraph (A) targets recidivism, subparagraph (B) targets serious offenses, and subparagraph (C) targets violent offenses." Br. 25; see Br. 44. But that rationale suffers from two critical flaws. First, under petitioner's reading, subparagraph (A) would not target any different concern at all because, as explained above, that subparagraph would be entirely redundant. See pp. 19-20, 27-32, *supra*. Sec-

ond, under his reading, subparagraph (C) would not target "violent" offenses generally, because that subparagraph expressly applies only to "*2-point* violent" offenses. 18 U.S.C. 3553(f)(1)(C) (emphasis added). Under petitioner's reading, a defendant who committed a series of *three-point* violent offenses would still be eligible under Section 3553(f)(1). See pp. 22-24, *supra*.[3]

A hypothetical underscores how, under petitioner's reading, subparagraphs (A) and (C) would not actually target recidivism and violence. Consider two defendants who together commit a three-point offense under subparagraph (B). After release from prison, their paths diverge. The first goes on to commit a series of violent offenses, each with a five-year sentence. The second, however, commits just one more offense, a robbery with a four-month sentence. If the implicit-bracket reading of Section 3553(f)(1) actually targeted recidivism and violence, it would surely disqualify the first defendant from the safety valve. But inexplicably, the implicit-bracket reading would disqualify only the second defendant.

Petitioner thus fails to make sense of the line that the implicit-bracket reading would draw. In fact, his recognition (Br. 25) that "[e]ach subparagraph of § 3553(f)(1) targets a different concern" actually supports, rather than undermines, the distributive interpretation. The distributive interpretation treats each characteristic in

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[3] Petitioner does not argue that subparagraph (C) covers three-point violent offenses, see Br. 2-3, 16, 19-20, 25, 36-37, and for good reason. The text of subparagraph (C) refers specifically to "a prior 2-point violent offense," 18 U.S.C. 3553(f)(1)(C), not "a prior 2-point *or 3-point* violent offense." "Congress meant what it said. Two points is two points. Two points is not three points." *United States* v. *Lopez*, 998 F.3d 431, 445 (9th Cir. 2021) (M. Smith, J., concurring in part, dissenting in part, and concurring in the judgment), reh'g en banc denied, 58 F.4th 1108 (9th Cir. 2023).

subparagraphs (A), (B), and (C) as independently disqualifying. See pp. 21-22, *supra*. If, as petitioner suggests, Congress viewed each characteristic as reflecting a "different type[] of behavior suggestive of future dangerousness," Br. 44 (citation omitted), then it makes perfect sense for Section 3553(f)(1) to disqualify a defendant who exhibited any one of those characteristics.

b. Petitioner alternatively asserts that any nonsensical implications of his reading are unproblematic because no matter how Section 3553(f)(1) is construed, "a defendant would still need to satisfy the rest of § 3553(f)," and "a sentencing court would still have discretion to impose a proportionate sentence." Br. 25; see Br. 44-45. But the existence of other eligibility requirements in Section 3553(f)(2) through (5) is no excuse to turn Section 3553(f)(1) into an arbitrary measure of a defendant's criminal history; "an ordinary reader would expect that § 3553(f)(1) itself would serve as a gatekeeper—and not an arbitrary one." *Haynes*, 55 F.4th at 1080. Nor does a court's continuing discretion to impose a sentence above the statutory minimum even when a defendant qualifies for the safety valve justify depriving Section 3553(f)(1) of a rational, gatekeeping role. The whole point of Section 3553(f)(1) is to identify cases in which leaving such decisions to judicial discretion would be inappropriate. See *ibid.*

Petitioner's contention (Br. 43-46) that the results produced by the implicit-bracket reading would not be so absurd as to justify invoking the "absurdity doctrine" is beside the point. A court would need to resort to the absurdity doctrine only to "override the literal terms of a statute." *Crooks* v. *Harrelson*, 282 U.S. 55, 60 (1930). Petitioner suggests (Br. 43) that a court would need to do so here, on the theory that the distributive interpre-

tation would override the plain meaning of Section 3553(f)(1). Once again, however, that suggestion rests (*ibid.*) on the false premise that the distributive interpretation would read "and" to mean "or."

The issue here is not whether the Court should adopt an interpretation that disregards the statute's text, but instead which of two grammatically possible interpretations is the correct one in context. And on that issue, it remains highly relevant, and a strong consideration in favor of the distributive interpretation, that the implicit-bracket reading would turn Section 3553(f)(1) into an arbitrary measure of a defendant's criminal history and thus an ineffective gatekeeper for the exceptional sentencing relief that the safety valve confers. See *Reading Law* 63 ("A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored.") (emphasis omitted); *id.* at 237 ("The oddity or anomaly of certain consequences may be a perfectly valid reason for choosing one textually permissible interpretation over another.").

3. Petitioner's arguments against the distributive interpretation are mistaken

While context undermines the implicit-bracket reading, it supports the distributive interpretation. Petitioner's contrary arguments lack merit.

a. The distributive interpretation is textually sound

i. Petitioner contends (Br. 4) that the distributive interpretation is "textually impermissible" because it would require either "(1) replac[ing] 'and' with 'or,' or (2) add[ing] the words 'does not have' into the statute where they do not appear." As described above, however, the distributive interpretation gives "and" its ordinary, conjunctive meaning and simply reads the

words "does not have" as modifying, rather than directly reappearing in, each subparagraph of Section 3553(f)(1).

No one would say that it is textually impermissible to read the Constitution as empowering Congress to "make Rules concerning Captures on Land" and to "make Rules concerning Captures on * * * Water." U.S. Const. Art. I, § 8, Cl. 11; see pp. 16-17, *supra*. Nor would anyone say that distributing the words "does not include" to each paragraph of 34 U.S.C. 20101(f) impermissibly injects those words where they do not appear. See pp. 17-18, *supra*. There is likewise nothing impermissible about a distributive interpretation of Section 3553(f)(1).

Indeed, the structure of Section 3553(f)(1)—an introductory clause punctuated by an em-dash, followed by separately indented items—is particularly suited to a distributive interpretation. The Government Printing Office's style manual advises using an em-dash "[a]fter an introductory phrase" to "indicat[e] repetition of such phrase" when reading each of the lines that "follow[]." U.S. Gov't Printing Office, *Style Manual: An Official Guide to the Form and Style of Federal Government Publishing* § 8.68, at 206 (2016). Other handbooks provide similar guidance. See Dickerson § 6.3, at 116 (explaining that in a tabulated list, "introductory language that applies to the first item necessarily applies to each of the other items"); Lawrence E. Filson & Sandra L. Strokoff, *The Legislative Drafter's Desk Reference* § 23.4, at 318 (2d ed. 2008) ("[W]hen using the dashed form each item must be a logical and grammatical continuation of the lead-in language so that the two can be read together, without regard to the rest of the provision, as a complete grammatical sentence or phrase."). Although

such a structure is neither necessary nor sufficient for a distributive interpretation, it is further evidence that such an interpretation is appropriate here.

ii. Petitioner nevertheless suggests that the distributive interpretation "appears to have been crafted by the government specifically for this statute," Br. 2 (citation omitted), or is at least "unordinary," Br. 32. In fact, however, the "meaning of *and* is *usually* several"—*i.e.*, distributive. *Garner's* 639 (quoting Scott J. Burnham, *The Contract Drafting Guidebook* 163 (1992)) (emphasis altered); see Dickerson § 6.2, at 106 ("Observation of legal usage suggests that in most cases * * * 'and' is used in the several rather than the joint sense."); Adams § 11.16, at 212 (observing that "[t]he more natural meaning" of "Acme shall not notify Able and Baker" is "Acme shall not notify Able and shall not notify Baker") (emphasis omitted); Rodney Huddleston & Geoffrey K. Pullum, *The Cambridge Grammar of the English Language* 1298-1299 (2002) (observing that when "and" is combined with negation, "and" "more often" distributes "the negative," such that the "[n]atural interpretations" of "I didn't like his mother and father" and "I'm not free on Saturday and Sunday" are "I didn't like his mother and I didn't like his father" and "I'm not free on Saturday and I'm not free on Sunday," respectively) (emphases omitted).

The law is full of examples of "and" being used in a distributive sense. The Constitution itself contains a number of them. For example, Congress's Article I power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," U.S. Const. Art. I, § 8, Cl. 3, plainly allows regulation of three different types of "Commerce"—"Commerce with foreign Nations," "Commerce * * * among the several

States," and "Commerce * * * with the Indian Tribes"—not one type of "Commerce" that is all three of those things at once. Similarly, Congress's Article I authority to "define and punish Piracies and Felonies committed on the high Seas," U.S. Const. Art. I, § 8, Cl. 10, allows regulation of both piracies and felonies, not just felony piracies. And Article III's extension of the "judicial Power" to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties," U.S. Const. Art. III, § 2, Cl. 1, extends that power to all three types of cases—not just cases that happen to arise under all three sources at the same time.

Similar examples fill the U.S. Code. Section 1963(h) of Title 18, for instance, authorizes the Attorney General to "promulgate regulations with respect to" a list of six subjects connected by "and," 18 U.S.C. 1963(h); that provision is sensibly understood as distributing the introductory clause to allow regulation of each subject, rather than placing implicit brackets around the list so as to allow regulation of only a singular subject comprising all six. Similarly, a provision of the Internal Revenue Code provides that the term "household items" "does not include—(I) food, (II) paintings, antiques, and other objects of art, (III), jewelry and gems, and (IV) collections." 26 U.S.C. 170(f)(16)(D). Each "and" in that provision distributes the phrase "does not include"; a painting need not be edible in order to be excluded from the definition of "household items."[4]

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[4] The U.S. Code contains many other distributive uses of "and." See, *e.g.*, 2 U.S.C. 1602(8)(B); 18 U.S.C. 202(d); 18 U.S.C. 212(c)(2); 18 U.S.C. 229A(c); 18 U.S.C. 232(5); 18 U.S.C. 341; 18 U.S.C. 601(b)(2); 18 U.S.C. 845(a); 18 U.S.C. 925(a)(2); 18 U.S.C. 926B(e)(3); 18 U.S.C. 1963(h); 18 U.S.C. 2510(9); 18 U.S.C. 3486(a)(1)(B); 18

Petitioner himself acknowledges (Br. 4) the existence of at least some distributive uses of "and" in the law—thereby recognizing that the issue is contextual. His effort (Br. 46) to portray such uses as limited to lists of "exceptions" disregards the examples of distributive uses in other contexts. See, *e.g.*, 5 U.S.C. 105; 18 U.S.C. 229A(c); 18 U.S.C. 4130(a); 18 U.S.C. 1963(h); 18 U.S.C. 3486(a)(1)(B); pp. 39-40, *supra*. And contrary to petitioner's assertion (Br. 22), nothing in the Senate's legislative drafting manual says that "and" cannot be used in a distributive sense. See Office of the Legislative Counsel, U.S. Senate, *Legislative Drafting Manual* § 302, at 64-67 (1997). The manual instead simply advises drafters to "use 'and' to indicate that a thing is included in the class only if it meets all of the criteria." *Id.* § 302(a)(2), at 64.

That is precisely how Section 3553(f)(1) uses "and." The conjunction indicates that a defendant is included in the eligible class only if he meets all three criminal-history criteria—does not have (A), does not have (B), *and* does not have (C).[5]

U.S.C. 4130(a); 26 U.S.C. 104(a); 26 U.S.C. 170(f)(16)(D); 26 U.S.C. 871(h)(4)(C); 31 U.S.C. 9701(c); 33 U.S.C. 2241(4) and (5); 38 U.S.C. 511(b); 41 U.S.C. 6702(b); 45 U.S.C. 231(a)(2); 46 U.S.C. 8103(b)(2); 49 U.S.C. 28301(b)(1); 52 U.S.C. 30118(b)(2).

[5] The recent corpus-linguistics study cited by petitioner (Br. 31), did not consider contextual "indicators" such as surplusage, evident purpose, and common sense. Professors Amicus Br. 6-7. And it actually confirms that the phrase "does not have A, B, and C" can permissibly be understood to mean "does not have A, does not have B, and does not have C." See *id.* at 15 (observing that the study found that "[m]any participants understood the language jointly and many understood the language distributively"). *Reading Law*'s discussion of a "conjunctive negative proof" likewise does not account for context. *Reading Law* 120.

b. The distributive interpretation is consistent with canons of construction

Petitioner invokes (Br. 20-22, 29-31) various canons of construction against the distributive interpretation. But his reliance on those canons, which rests largely on his mischaracterization of the distributive interpretation as a "disjunctive" reading of the word "and" itself, is misplaced.

Petitioner cites (Br. 20), for example, "the meaningful-variation canon," *Southwest Airlines Co.* v. *Saxon*, 142 S. Ct. 1783, 1789 (2022), which presumes that "a material variation in terms suggests a variation in meaning," *Reading Law* 170 (emphasis omitted). According to petitioner (Br. 21-22, 31), the distributive interpretation violates that canon by giving "and" the same disjunctive meaning as "or," a word used elsewhere in Section 3553(f). But as discussed above, the distributive interpretation gives "and" a conjunctive (rather than disjunctive) meaning, requiring a defendant to satisfy all three (rather than just one) of the criminal-history criteria that "and" connects.

A similar error undermines petitioner's invocation of the presumption of consistent usage, which presumes that "a given term is used to mean the same thing throughout a statute." *Brown*, 513 U.S. at 118; see Pet. Br. 20-21, 29-31. Again, the premise on which petitioner invokes that canon—that "the distributive reading transforms the 'and' in § 3553(f)(1) into an 'or,'" Br. 29—is wrong. Contrary to his suggestion, "and" has the same conjunctive meaning in Section 3553(f)(1) as it has at the end of Section 3553(f)(4). In Section 3553(f)(1), "and" has the effect of requiring that a defendant "not have" each of the characteristics in subparagraphs (A), (B), and (C). 18 U.S.C. 3553(f)(1). Similarly, at the end

of Section 3553(f)(4), "and" has the effect of requiring that a court "find[]" each of the things in paragraphs (1), (2), (3), (4), and (5). 18 U.S.C. 3553(f). Thus, in both places, "and" creates an "eligibility checklist" in which each paragraph or subparagraph is an independent condition that must be satisfied for a defendant to be eligible for safety-valve relief. Pet. App. 8a.[6]

c. The distributive interpretation is consistent with legislative intent

Petitioner does not advance his cause by arguing (Br. 22-24) that the legislative history of the First Step Act reflects an effort to broaden the safety valve. Both the distributive interpretation and the implicit-bracket reading would effectuate that legislative effort; under either, simply having more than one criminal-history point is no longer automatically disqualifying, as it was

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[6] Moreover, a comparison of the two "ands" can only go so far because their situations are not entirely similar. The "and" in 3553(f)(1) relates to a negative condition ("does not have"), while the one at the end of Section 3553(f)(4) relates to an affirmative condition ("finds at sentencing * * * that"). 18 U.S.C. 3553(f). In the context of that particular type of affirmative statement, the distributive interpretation ("finds (1), finds (2), finds (3), finds (4), and finds (5)") is the same as the implicit-bracket reading ("finds [(1), (2), (3), (4), and (5)]"). At all events, the presumption of consistent usage "readily yields to context," *Utility Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 320 (2014) (citation and internal quotation marks omitted); in particular, it "relents when a word used has several commonly understood meanings among which a speaker can alternate in the course of an ordinary conversation, without being confused or getting confusing," *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 595-596 (2004) (footnote omitted), as is the case here. See *Haynes*, 55 F.4th at 1078-1079 (providing an example in which one guest says that she likes to drink "bourbon and water," using "and" in a joint sense, while another guest says that he likes to drink "beer and wine," using "and" in a distributive sense).

under the previous version of Section 3553(f)(1). See p. 5, *supra*. The issue is simply the extent to which Congress pursued its eligibility-broadening goal, and petitioner provides no reason to presume that Congress desired his expansive interpretation—and all of the incongruous results it produces. See pp. 19-24, *supra*; *Luna Perez* v. *Sturgis Pub. Schs.*, 143 S. Ct. 859, 865 (2023) ("[N]o law pursues its . . . purposes at all costs.") (brackets, citation, and internal quotation marks omitted).

In fact, the First Step Act was a "compromise" intended to effect a "modest expansion of the safety valve." 164 Cong. Rec. S7749 (daily ed. Dec. 18, 2018) (statement of Sen. Leahy); see 164 Cong. Rec. S7649 (daily ed. Dec. 17, 2018) (statement of Sen. Grassley describing the Act as "expanding" the safety valve "to include more low-level, nonviolent offenders").[7] Only the distributive interpretation can be squared with that intent. See *United States* v. *Garcon*, 54 F.4th 1274, 1292-1293 (11th Cir. 2022) (en banc) (Jordan, J., dissenting), petition for cert. pending, No. 22-851 (filed Mar. 6, 2023). Using 2021 data, the Sentencing Commission estimated that, "of 17,520 drug trafficking offenders, 11,866 offenders me[t] the non-criminal history require-

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[7] Petitioner's citation of one Senator's disapproval of the result in a case in which a defendant was "sent to prison for more than 50 years for selling $350 worth of marijuana" is inapposite. Br. 23 (quoting 164 Cong. Rec. S7756 (daily ed. Dec. 18, 2018) (statement of Sen. Nelson)). That case involved mandatory consecutive sentences for violations of 18 U.S.C. 924(c). See *United States* v. *Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004) (noting that the defendant "carried a handgun to two $350 marijuana deals"). The First Step Act amended the penalties for Section 924(c) offenses in a provision not at issue here. § 403(a), 132 Stat. 5221-5222. Section 924(c) offenses are not among those covered by the safety valve. See 18 U.S.C. 3553(f).

ments of the safety valve (18 U.S.C. § 3553(f)(2)-(5))." 88 Fed. Reg. 7186 (Feb. 2, 2023). Of those 11,866 offenders, the pre-First Step Act version of Section 3553(f)(1) would have disqualified 6098; the distributive interpretation would have disqualified 4111; and "the Ninth Circuit's [implicit-bracket] interpretation" would have disqualified only 320 (or 2.7%). *Ibid.* While the distributive interpretation's expansion of the safety valve to include an additional 1987 offenders can plausibly be described as "modest," 164 Cong. Rec. S7749, the Ninth Circuit's interpretation—which would all but nullify Section 3553(f)(1)—cannot.[8]

C. Petitioner's Reliance On The Rule Of Lenity Is Misplaced

Finally, petitioner contends (Br. 47-49) that the rule of lenity supports construing Section 3553(f)(1) in his favor. But the rule of lenity has no role in interpreting an ameliorative provision like Section 3553(f)(1), and even if it did, the rule would be inapplicable here because Section 3553(f)(1) is not grievously ambiguous. Petitioner's reliance on the rule of lenity is therefore misplaced.

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[8] Petitioner's interpretation is even more nullifying than the Ninth Circuit's. Although it is unclear whether the Commission's statistics specifically account for it, the Ninth Circuit takes the view that a three-point violent offense can be a "2-point" violent offense under Section 3553(f)(1)(C). *Lopez*, 998 F.3d at 440 & n.10. That view is legally unsound, has not been adopted by any other circuit, and is not endorsed by petitioner. See p. 35 n.3, *supra*. But as a practical matter, it would at least preclude safety-valve relief for a class of defendants—those with more than four total criminal-history points as well as a three-point violent offense—who could obtain such relief under petitioner's approach. It is therefore possible that petitioner's approach would disqualify even *fewer* than 2.7% of offenders.

1. As a threshold matter, the rule of lenity applies only to "penal laws." *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.); see *Bray* v. *The Atalanta*, 4 F. Cas. 37, 38 (D.S.C. 1794) (No. 1819) ("[I]t is a penal law and must be construed strictly."). Penal laws, for purposes of the rule, fall into two categories: (1) laws that define a crime, and (2) laws that "inflict[] a penalty." 1 William Blackstone, *Commentaries on the Laws of England* 88 (1765) (Blackstone); see *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980) (explaining that the rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose"); *The Enterprise*, 8 F. Cas. 732, 735 (C.C.D.N.Y. 1810) (No. 4499) (Livingston, J.) ("Penal laws generally first prescribe what shall or shall not be done, and then declare the forfeiture."); J. G. Sutherland, *Statutes and Statutory Construction* § 208, at 275 (1891) ("Penal statutes are those by which punishments are imposed for transgressions of the law.").

Section 3553(f)(1), however, does not fall within either category. It does not define a crime because it does not "prescribe what shall or shall not be done." *The Enterprise*, 8 F. Cas. at 735. And it does not "inflict[] a penalty," 1 Blackstone 88, because it does not "creat[e] or increas[e] a penalty," *Commonwealth* v. *Martin*, 17 Mass. 359, 362 (1821); see *Bifulco*, 447 U.S. at 387 (explaining that the rule of lenity means that the Court will not interpret an ambiguity "so as to increase the penalty") (citation omitted). The statute that defines the offense and the penalty in this case is 21 U.S.C. 841. As its nickname reflects, Section 3553(f) functions merely as a safety valve, granting a court discretion to impose a sentence "without regard to any statutory minimum"

if the court finds that certain criteria are met. 18 U.S.C. 3553(f).

Accordingly, Section 3553(f)(1) is not a penal law for purposes of the rule of lenity. The rule of lenity exists "to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Crandon* v. *United States*, 494 U.S. 152, 158 (1990). But because no interpretation of Section 3553(f)(1) could render conduct illegal or increase the range of punishment established by the elements of the crime, neither of those purposes is implicated here. The rule of lenity does not apply.

2. In any event, the rule of lenity applies only if, "after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." *United States* v. *Castleman*, 572 U.S. 157, 172-173 (2014) (citation omitted); see *Shular* v. *United States*, 140 S. Ct. 779, 789 (2020) (Kavanaugh, J., concurring). And for the reasons above, no such grievous ambiguity exists here. See, *e.g.*, *Shular*, 140 S. Ct. at 787 (opinion for the Court) (finding "no ambiguity for the rule of lenity to resolve" after considering statutory "text and context"); *United States* v. *Hayes*, 555 U.S. 415, 425-426, 429 (2009) (finding no grievous ambiguity after observing that the defendant's interpretation would create superfluity); *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995) ("A statute is not '"ambiguous" for purposes of lenity merely because' there is 'a division of judicial authority' over its proper construction.") (citation omitted).

Petitioner's embrace (Br. 49) of the rule of lenity is based on his oft-repeated assertion that the distributive interpretation "read[s] 'and' in § 3553(f)(1) to mean

'or.'" But, once again, the distributive interpretation is both conjunctive and correct. The mere "grammatical possibility" of a different reading is not enough for application of the rule of lenity. *Caron* v. *United States*, 524 U.S. 308, 316 (1998). And the rule of lenity should certainly not be applied in service of the surplusage-creating, counterproductive, and nonsensical approach that petitioner urges. See, *e.g.*, *Abbott* v. *United States*, 562 U.S. 8, 28 n.9 (2010) (explaining that "the 'grammatical possibility' of a defendant's interpretation does not command a resort to the rule of lenity" if that interpretation "reflects 'an implausible reading of the congressional purpose'") (citation omitted); *Moskal* v. *United States*, 498 U.S. 103, 108 (1990) (explaining that "[b]ecause the meaning of language is inherently contextual," a statute is not "'ambiguous' for purposes of lenity merely because it [i]s *possible* to articulate a construction more narrow than that urged by the Government").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

TABLE OF CONTENTS

APPENDIX

18 U.S.C. 3553 provides in pertinent part:

Imposition of a sentence

* * * * *

(f) 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 dan-

gerous 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.

(g) DEFINITION OF VIOLENT OFFENSE.—As used in this section, the term "violent offense" means a crime of violence, as defined in section 16, that is punishable by imprisonment.

* * * * *

2. Sentencing Guidelines § 4A1.1 provides:

Criminal History Category

The total points from subsections (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add **3** points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add **2** points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add **1** point for each prior sentence not counted in (a) or (b), up to a total of **4** points for this subsection.

(d) Add **2** points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add **1** point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was treated as a single sentence, up to a total of **3** points for this subsection.

Commentary

The total criminal history points from § 4A1.1 determine the criminal history category (I-VI) in the Sentencing Table in Chapter Five, Part A. The definitions and instructions in § 4A1.2 govern the computation of the criminal history points. Therefore, §§ 4A1.1 and 4A1.2

must be read together. The following notes highlight the interaction of §§ 4A1.1 and 4A1.2.

Application Notes:

1. **§ 4A1.1(a)**. Three points are added for each prior sentence of imprisonment exceeding one year and one month. There is no limit to the number of points that may be counted under this subsection. The term "***prior sentence***" is defined at § 4A1.2(a). The term "***sentence of imprisonment***" is defined at § 4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, *see* § 4A1.2(k).

   Certain prior sentences are not counted or are counted only under certain conditions:

   A sentence imposed more than fifteen years prior to the defendant's commencement of the instant offense is not counted unless the defendant's incarceration extended into this fifteen-year period. *See* § 4A1.2(e).

   A sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted under this subsection only if it resulted from an adult conviction. *See* § 4A1.2(d).

   A sentence for a foreign conviction, a conviction that has been expunged, or an invalid conviction is not counted. *See* § 4A1.2(h) and (j) and the Commentary to § 4A1.2.

2. **§ 4A1.1(b)**. Two points are added for each prior sentence of imprisonment of at least sixty days not counted in § 4A1.1(a). There is no limit to the number of points that may be counted under this subsec-

tion. The term "***prior sentence***" is defined at § 4A1.2(a). The term "***sentence of imprisonment***" is defined at § 4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, *see* § 4A1.2(k).

Certain prior sentences are not counted or are counted only under certain conditions:

A sentence imposed more than ten years prior to the defendant's commencement of the instant offense is not counted. *See* § 4A1.2(e).

An adult or juvenile sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted only if confinement resulting from such sentence extended into the five-year period preceding the defendant's commencement of the instant offense. *See* § 4A1.2(d).

Sentences for certain specified non-felony offenses are never counted. *See* § 4A1.2(c)(2).

A sentence for a foreign conviction or a tribal court conviction, an expunged conviction, or an invalid conviction is not counted. *See* § 4A1.2(h), (i), (j), and the Commentary to § 4A1.2.

A military sentence is counted only if imposed by a general or special court-martial. *See* § 4A1.2(g).

3. **§ 4A1.1(c)**. One point is added for each prior sentence not counted under § 4A1.1(a) or (b). A maximum of four points may be counted under this subsection. The term "***prior sentence***" is defined at § 4A1.2(a).

Certain prior sentences are not counted or are counted only under certain conditions:

A sentence imposed more than ten years prior to the defendant's commencement of the instant offense is not counted. *See* § 4A1.2(e).

An adult or juvenile sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted only if imposed within five years of the defendant's commencement of the current offense. *See* § 4A1.2(d).

Sentences for certain specified non-felony offenses are counted only if they meet certain requirements. *See* § 4A1.2(c)(1).

Sentences for certain specified non-felony offenses are never counted. *See* § 4A1.2(c)(2).

A diversionary disposition is counted only where there is a finding or admission of guilt in a judicial proceeding. *See* § 4A1.2(f).

A sentence for a foreign conviction, a tribal court conviction, an expunged conviction, or an invalid conviction, is not counted. *See* § 4A1.2(h), (i), (j), and the Commentary to § 4A1.2.

A military sentence is counted only if imposed by a general or special court-martial. *See* § 4A1.2(g).

4. **§ 4A1.1(d).** Two points are added if the defendant committed any part of the instant offense (*i.e.*, any relevant conduct) while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. Failure to report for service of a sentence of imprisonment is to be treated as an escape from

such sentence. *See* § 4A1.2(n). For the purposes of this subsection, a "***criminal justice sentence***" means a sentence countable under § 4A1.2 (Definitions and Instructions for Computing Criminal History) having a custodial or supervisory component, although active supervision is not required for this subsection to apply. For example, a term of unsupervised probation would be included; but a sentence to pay a fine, by itself, would not be included. A defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (*e.g.*, a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence for the purposes of this provision if that sentence is otherwise countable, even if that sentence would have expired absent such warrant. *See* § 4A1.2(m).

5. **§ 4A1.1(e)**. In a case in which the defendant received two or more prior sentences as a result of convictions for crimes of violence that are treated as a single sentence (*see* § 4A1.2(a)(2)), one point is added under § 4A1.1(e) for each such sentence that did not result in any additional points under § 4A1.1(a), (b), or (c). A total of up to 3 points may be added under § 4A1.1(e). For purposes of this guideline, "***crime of violence***" has the meaning given that term in § 4B1.2(a). *See* § 4A1.2(p).

   For example, a defendant's criminal history includes two robbery convictions for offenses committed on different occasions. The sentences for these offenses were imposed on the same day and are treated as a single prior sentence. *See* § 4A1.2(a)(2). If the defendant received a five-year sentence of im-

prisonment for one robbery and a four-year sentence of imprisonment for the other robbery (consecutively or concurrently), a total of 3 points is added under § 4A1.1(a). An additional point is added under § 4A1.1(e) because the second sentence did not result in any additional point(s) (under § 4A1.1(a), (b), or (c)). In contrast, if the defendant received a one-year sentence of imprisonment for one robbery and a nine-month consecutive sentence of imprisonment for the other robbery, a total of 3 points also is added under § 4A1.1(a) (a one-year sentence of imprisonment and a consecutive nine-month sentence of imprisonment are treated as a combined one-year-nine-month sentence of imprisonment). But no additional point is added under § 4A1.1(e) because the sentence for the second robbery already resulted in an additional point under § 4A1.1(a). Without the second sentence, the defendant would only have received two points under § 4A1.1(b) for the one-year sentence of imprisonment.

Background: Prior convictions may represent convictions in the federal system, fifty state systems, the District of Columbia, territories, and foreign, tribal, and military courts. There are jurisdictional variations in offense definitions, sentencing structures, and manner of sentence pronouncement. To minimize problems with imperfect measures of past crime seriousness, criminal history categories are based on the maximum term imposed in previous sentences rather than on other measures, such as whether the conviction was designated a felony or misdemeanor. In recognition of the imperfection of this measure however, § 4A1.3 author-

izes the court to depart from the otherwise applicable criminal history category in certain circumstances.

Subsections (a), (b), and (c) of § 4A1.1 distinguish confinement sentences longer than one year and one month, shorter confinement sentences of at least sixty days, and all other sentences, such as confinement sentences of less than sixty days, probation, fines, and residency in a halfway house.

Section 4A1.1(d) adds two points if the defendant was under a criminal justice sentence during any part of the instant offense.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 259-261); November 1, 1991 (amendments 381 and 382); October 27, 2003 (amendment 651); November 1, 2007 (amendment 709); November 1, 2010 (amendment 742); November 1, 2013 (amendment 777); November 1, 2015 (amendment 795).

3. Sentencing Guidelines § 4A1.2 provides:

Definitions and Instructions for Computing Criminal History

(a) PRIOR SENTENCE

(1) The term "prior sentence" means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense.

(2) If the defendant has multiple prior sentences, determine whether those sentences are counted separately or treated as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Treat any prior sentence covered by (A) or (B) as a single sentence. *See also* § 4A1.1(e).

For purposes of applying § 4A1.1(a), (b), and (c), if prior sentences are treated as a single sentence, use the longest sentence of imprisonment if concurrent sentences were imposed. If consecutive sentences were imposed, use the aggregate sentence of imprisonment.

(3) A conviction for which the imposition or execution of sentence was totally suspended or stayed shall be counted as a prior sentence under § 4A1.1(c).

(4) Where a defendant has been convicted of an offense, but not yet sentenced, such conviction shall be counted as if it constituted a prior sentence under § 4A1.1(c) if a sentence resulting from that conviction otherwise would be countable. In the case of a conviction for an offense set forth in § 4A1.2(c)(1), apply this provision only where the sentence for such offense would be countable regardless of type or length.

"Convicted of an offense," for the purposes of this provision, means that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

(b) SENTENCE OF IMPRISONMENT DEFINED

(1) The term "sentence of imprisonment" means a sentence of incarceration and refers to the maximum sentence imposed.

(2) If part of a sentence of imprisonment was suspended, "sentence of imprisonment" refers only to the portion that was not suspended.

(c) SENTENCES COUNTED AND EXCLUDED

Sentences for all felony offenses are counted. Sentences for misdemeanor and petty offenses are counted, except as follows:

(1) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if (A) the sentence was a term of probation of more than one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense:

Careless or reckless driving
Contempt of court
Disorderly conduct or disturbing the peace
Driving without a license or with a revoked or suspended license
False information to a police officer
Gambling
Hindering or failure to obey a police officer
Insufficient funds check
Leaving the scene of an accident
Non-support
Prostitution
Resisting arrest
Trespassing.

(2) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are never counted:

Fish and game violations
Hitchhiking
Juvenile status offenses and truancy
Local ordinance violations (except those violations that are also violations under stat criminal law)
Loitering
Minor traffic infractions (*e.g.*, speeding)
Public intoxication
Vagrancy.

(d) OFFENSES COMMITTED PRIOR TO AGE EIGHTEEN

(1) If the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month, add **3** points under § 4A1.1(a) for each such sentence.

(2) In any other case,

(A) add **2** points under § 4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense;

(B) add **1** point under § 4A1.1(c) for each adult or juvenile sentence imposed within five years of the defendant's

commencement of the instant offense not covered in (A).

(e) APPLICABLE TIME PERIOD

(1) Any prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant's commencement of the instant offense is counted. Also count any prior sentence of imprisonment exceeding one year and one month, whenever imposed, that resulted in the defendant being incarcerated during any part of such fifteen-year period.

(2) Any other prior sentence that was imposed within ten years of the defendant's commencement of the instant offense is counted.

(3) Any prior sentence not within the time periods specified above is not counted.

(4) The applicable time period for certain sentences resulting from offenses committed prior to age eighteen is governed by § 4A1.2(d)(2).

(f) DIVERSIONARY DISPOSITIONS

Diversion from the judicial process without a finding of guilt (*e.g.*, deferred prosecution) is not counted. A diversionary disposition resulting from a finding or admission of guilt, or a plea of *nolo contendere*, in a judicial proceeding is counted as a sentence under § 4A1.1(c) even if a conviction is not formally entered, except that diversion from juvenile court is not counted.

(g) MILITARY SENTENCES

Sentences resulting from military offenses are counted if imposed by a general or special court-martial. Sentences imposed by a summary court-martial or Article 15 proceeding are not counted.

(h) FOREIGN SENTENCES

Sentences resulting from foreign convictions are not counted, but may be considered under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

(i) TRIBAL COURT SENTENCES

Sentences resulting from tribal court convictions are not counted, but may be considered under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

(j) EXPUNGED CONVICTIONS

Sentences for expunged convictions are not counted, but may be considered under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

(k) REVOCATIONS OF PROBATION, PAROLE, MANDATORY RELEASE, OR SUPERVISED RELEASE

(1) In the case of a prior revocation of probation, parole, supervised release, special parole, or mandatory release, add the original term of imprisonment to any term of imprisonment imposed upon revocation. The resulting total is used to compute the criminal

history points for § 4A1.1(a), (b), or (c), as applicable.

(2) Revocation of probation, parole, supervised release, special parole, or mandatory release may affect the time period under which certain sentences are counted as provided in § 4A1.2(d)(2) and (e). For the purposes of determining the applicable time period, use the following: (A) in the case of an adult term of imprisonment totaling more than one year and one month, the date of last release from incarceration on such sentence (*see* § 4A1.2(e)(1)); (B) in the case of any other confinement sentence for an offense committed prior to the defendant's eighteenth birthday, the date of the defendant's last release from confinement on such sentence (*see* § 4A1.2(d)(2)(A)); and (C) in any other case, the date of the original sentence (*see* § 4A1.2(d)(2)(B) and (e)(2)).

(*l*) SENTENCES ON APPEAL

Prior sentences under appeal are counted except as expressly provided below. In the case of a prior sentence, the execution of which has been stayed pending appeal, § 4A1.1(a), (b), (c), (d), and (e) shall apply as if the execution of such sentence had not been stayed.

(m) EFFECT OF A VIOLATION WARRANT

For the purposes of § 4A1.1(d), a defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (*e.g.*, a probation, parole, or supervised release

violation warrant) shall be deemed to be under a criminal justice sentence if that sentence is otherwise countable, even if that sentence would have expired absent such warrant.

(n) FAILURE TO REPORT FOR SERVICE OF SENTENCE OF IMPRISONMENT

For the purposes of § 4A1.1(d), failure to report for service of a sentence of imprisonment shall be treated as an escape from such sentence.

(o) FELONY OFFENSE

For the purposes of § 4A1.1(e), the definition of "crime of violence" is that set forth in § 4B1.2(a).

(p) CRIME OF VIOLENCE DEFINED

For the purposes of § 4A1.1(e), the definition of "crime of violence" is that set forth in § 4B1.2(a).

Commentary

Application Notes:

1. **Prior Sentence.**—"***Prior sentence***" means a sentence imposed prior to sentencing on the instant offense, other than a sentence for conduct that is part of the instant offense. *See* § 4A1.2(a). A sentence imposed after the defendant's commencement of the instant offense, but prior to sentencing on the instant offense, is a prior sentence if it was for conduct other than conduct that was part of the instant offense. Conduct that is part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions of § 1B1.3 (Relevant Conduct).

Under § 4A1.2(a)(4), a conviction for which the defendant has not yet been sentenced is treated as if it were a prior sentence under § 4A1.1(c) if a sentence resulting from such conviction otherwise would have been counted. In the case of an offense set forth in § 4A1.2(c)(1) (which lists certain misdemeanor and petty offenses), a conviction for which the defendant has not yet been sentenced is treated as if it were a prior sentence under § 4A1.2(a)(4) only where the offense is similar to the instant offense (because sentences for other offenses set forth in § 4A1.2(c)(1) are counted only if they are of a specified type and length).

2. **Sentence of Imprisonment**.—To qualify as a sentence of imprisonment, the defendant must have actually served a period of imprisonment on such sentence (or, if the defendant escaped, would have served time). *See* § 4A1.2(a)(3) and (b)(2). For the purposes of applying § 4A1.1(a), (b), or (c), the length of a sentence of imprisonment is the stated maximum (*e.g.*, in the case of a determinate sentence of five years, the stated maximum is five years; in the case of an indeterminate sentence of one to five years, the stated maximum is five years; in the case of an indeterminate sentence for a term not to exceed five years, the stated maximum is five years; in the case of an indeterminate sentence for a term not to exceed the defendant's twenty-first birthday, the stated maximum is the amount of time in pre-trial detention plus the amount of time between the date of sentence and the defendant's twenty-first birthday). That is, criminal history points are based on the sentence pronounced, not the length of time actually served. *See* § 4A1.2(b)(1)

and (2). A sentence of probation is to be treated as a sentence under § 4A1.1(c) unless a condition of probation requiring imprisonment of at least sixty days was imposed.

3. **Application of "Single Sentence" Rule (Subsection (a)(2)).—**

(A) **Predicate Offenses**.—In some cases, multiple prior sentences are treated as a single sentence for purposes of calculating the criminal history score under § 4A1.1(a), (b), and (c). However, for purposes of determining predicate offenses, a prior sentence included in the single sentence should be treated as if it received criminal history points, if it independently would have received criminal history points. Therefore, an individual prior sentence may serve as a predicate under the career offender guideline (*see* § 4B1.2(c)) or other guidelines with predicate offenses, if it independently would have received criminal history points. However, because predicate offenses may be used only if they are counted "separately" from each other (*see* § 4B1.2(c)), no more than one prior sentence in a given single sentence may be used as a predicate offense.

For example, a defendant's criminal history includes one robbery conviction and one theft conviction. The sentences for these offenses were imposed on the same day, eight years ago, and are treated as a single sentence under § 4A1.2(a)(2). If the defendant received a one-year sentence of imprisonment for the robbery and a two-year sentence of imprisonment for

the theft, to be served concurrently, a total of 3 points is added under § 4A1.1(a). Because this particular robbery met the definition of a felony crime of violence and independently would have received 2 criminal history points under § 4A1.1(b), it may serve as a predicate under the career offender guideline.

Note, however, that if the sentences in the example above were imposed thirteen years ago, the robbery independently would have received no criminal history points under § 4A1.1(b), because it was not imposed within ten years of the defendant's commencement of the instant offense. *See* § 4A1.2(e)(2). Accordingly, it may not serve as a predicate under the career offender guideline.

(B) **Upward Departure Provision.**—Treating multiple prior sentences as a single sentence may result in a criminal history score that underrepresents the seriousness of the defendant's criminal history and the danger that the defendant presents to the public. In such a case, an upward departure may be warranted. For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and the resulting sentences were treated as a single sentence because either the sentences resulted from offenses contained in the same charging instrument or the defendant was sentenced for these offenses on the same day, the assignment of a single set of points may not adequately reflect the seriousness of the defendant's criminal history or the

frequency with which the defendant has committed crimes.

4. **Sentences Imposed in the Alternative.**—A sentence which specifies a fine or other non-incarcerative disposition as an alternative to a term of imprisonment (*e.g.*, $1,000 fine or ninety days' imprisonment) is treated as a non-imprisonment sentence.

5. **Sentences for Driving While Intoxicated or Under the Influence.**—Convictions for driving while intoxicated or under the influence (and similar offenses by whatever name they are known) are always counted, without regard to how the offense is classified. Paragraphs (1) and (2) of § 4A1.2(c) do not apply.

6. **Reversed, Vacated, or Invalidated Convictions.**—Sentences resulting from convictions that (A) have been reversed or vacated because of errors of law or because of subsequently discovered evidence exonerating the defendant, or (B) have been ruled constitutionally invalid in a prior case are not to be counted. With respect to the current sentencing proceeding, this guideline and commentary do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law (*e.g.*, 21 U.S.C. § 851 expressly provides that a defendant may collaterally attack certain prior convictions).

   Nonetheless, the criminal conduct underlying any conviction that is not counted in the criminal history score may be considered pursuant to § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

7. **Offenses Committed Prior to Age Eighteen.**—Section 4A1.2(d) covers offenses committed prior to age eighteen. Attempting to count every juvenile adjudication would have the potential for creating large disparities due to the differential availability of records. Therefore, for offenses committed prior to age eighteen, only those that resulted in adult sentences of imprisonment exceeding one year and one month, or resulted in imposition of an adult or juvenile sentence or release from confinement on that sentence within five years of the defendant's commencement of the instant offense are counted. To avoid disparities from jurisdiction to jurisdiction in the age at which a defendant is considered a "juvenile," this provision applies to all offenses committed prior to age eighteen.

8. **Applicable Time Period.**—Section 4A1.2(d)(2) and (e) establishes the time period within which prior sentences are counted. As used in § 4A1.2(d)(2) and (e), the term "*commencement of the instant offense*" includes any relevant conduct. *See* § 1B1.3 (Relevant Conduct). If the court finds that a sentence imposed outside this time period is evidence of similar, or serious dissimilar, criminal conduct, the court may consider this information in determining whether an upward departure is warranted under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

9. **Diversionary Dispositions.**—Section 4A1.2(f) requires counting prior adult diversionary dispositions if they involved a judicial determination of guilt or an admission of guilt in open court. This reflects a policy that defendants who receive the

benefit of a rehabilitative sentence and continue to commit crimes should not be treated with further leniency.

10. **Convictions Set Aside or Defendant Pardoned.**—A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, *e.g.*, in order to restore civil rights or to remove the stigma associated with a criminal conviction. Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted. § 4A1.2(j).

11. **Revocations to be Considered.**—Section 4A1.2(k) covers revocations of probation and other conditional sentences where the original term of imprisonment imposed, if any, did not exceed one year and one month. Rather than count the original sentence and the resentence after revocation as separate sentences, the sentence given upon revocation should be added to the original sentence of imprisonment, if any, and the total should be counted as if it were one sentence. By this approach, no more than three points will be assessed for a single conviction, even if probation or conditional release was subsequently revoked. If the sentence originally imposed, the sentence imposed upon revocation, or the total of both sentences exceeded one year and one month, the maximum three points would be assigned. If, however, at the time of revocation another sentence was imposed for a new criminal conviction, that conviction would be computed separately from the sentence imposed for the revocation.

Where a revocation applies to multiple sentences, and such sentences are counted separately under § 4A1.2(a)(2), add the term of imprisonment imposed upon revocation to the sentence that will result in the greatest increase in criminal history points. **Example**: A defendant was serving two probationary sentences, each counted separately under § 4A1.2(a)(2); probation was revoked on both sentences as a result of the same violation conduct; and the defendant was sentenced to a total of 45 days of imprisonment. If one sentence had been a "straight" probationary sentence and the other had been a probationary sentence that had required service of 15 days of imprisonment, the revocation term of imprisonment (45 days) would be added to the probationary sentence that had the 15-day term of imprisonment. This would result in a total of 2 criminal history points under § 4A1.1(b) (for the combined 60-day term of imprisonment) and 1 criminal history point under § 4A1.1(c) (for the other probationary sentence).

12. **Application of Subsection (c).—**

(A) **In General.**—In determining whether an unlisted offense is similar to an offense listed in subsection (c)(1) or (c)(2), the court should use a common sense approach that includes consideration of relevant factors such as (i) a comparison of punishments imposed for the listed and unlisted offenses; (ii) the perceived seriousness of the offense as indicated by the level of punishment; (iii) the elements of the offense; (iv) the level of culpability involved; and (v) the degree to which the commission of the offense

indicates a likelihood of recurring criminal conduct.

(B) **Local Ordinance Violations**.—A number of local jurisdictions have enacted ordinances covering certain offenses (*e.g.*, larceny and assault misdemeanors) that are also violations of state criminal law. This enables a local court (*e.g.*, a municipal court) to exercise jurisdiction over such offenses. Such offenses are excluded from the definition of local ordinance violations in § 4A1.2(c)(2) and, therefore, sentences for such offenses are to be treated as if the defendant had been convicted under state law.

(C) **Insufficient Funds Check**.—"***Insufficient funds check***," as used in § 4A1.2(c)(1), does not include any conviction establishing that the defendant used a false name or non-existent account.

Background: Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 262-265); November 1, 1990 (amendments 352 and 353); November 1, 1991 (amendments 381 and 382); November 1, 1992 (amendment 472); November 1, 1993 (amendment 493); November 1, 2007 (amendment 709); November 1, 2010 (amendment 742); Novem-

	ber 1, 2011 (amendment 758); November 1, 2012 (amendment 766); November 1, 2013 (amendment 777); November 1, 2015 (amendment 795); November 1, 2018 (amendment 813).