No.

In the Supreme Court of the United States

GIOVANNI MONTIJO-DOMINGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

District courts exercise broad discretion at sentencing. They may take into consideration various factors relating to both the offense and the offender, and they may consult a wide range of information and evidence not available to the jury.

Section 3553(f) of Title 18 of the U.S. Code authorizes district courts to depart downward from mandatory minimum sentences for defendants found guilty of certain drug trafficking offenses. App., *infra*, 28a-29a. The statute establishes five preconditions for the grant of such relief. These preconditions must be found by "the court * * * at sentencing" (*ibid.*) by a preponderance of the evidence.

The question presented, over which there is an acknowledged conflict among the courts of appeals, is whether a district court's findings of fact under 18 U.S.C. 3553(f) are constrained by the findings of fact implied by the jury's verdict.

PARTIES TO THE PROCEEDINGS BELOW

The defendants-appellants in the court of appeals were petitioner Giovanni Montijo-Dominguez and his co-defendant Luis Mendoza-Alarcon. The plaintiff-appellee was the United States of America.

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Petitioner Giovanni Montijo-Dominguez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is unpublished. The district court's decision (*id*. at 15a-27a) was issued orally.

JURISDICTION

The court of appeals entered its judgment on April 25, 2019. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The relevant provision of the Violent Crime Control and Law Enforcement Act of 1994 is reproduced in the appendix at 28a-29a.

INTRODUCTION

This petition presents a discrete question of statutory interpretation that has divided the federal courts of appeals: whether a district court may grant safety-valve relief under 18 U.S.C. 3553(f) from a mandatory minimum sentence when the factual findings necessary to support such relief are inconsistent with the findings of fact implied by the jury's verdict.

Every relevant factor favors a grant of review.

First, the courts of appeals disagree over the question presented: While the Seventh and Ninth Circuits permit judges to make Section 3553(f) findings unconstrained by the jury's verdict, the Second and Tenth Circuits do not. The disagreement is openly acknowledged and deeply entrenched.

Second, the question presented is practically important: Thousands of defendants convicted of drug trafficking offenses every year appeal for leniency un-

der Section 3553(f), including hundreds who take their cases to trial. Under the Second and Tenth Circuits' rule, safety-valve relief is foreclosed to any such defendant who maintains his innocence at trial. The outcome is the opposite in the Seventh and Ninth Circuits. As a result, the length of a defendant's sentence will turn on the happenstance of geography.

This case proves the point. The judge stated clearly at sentencing that she would have granted petitioner safety-valve relief under Section 3553(f) and imposed a sentence "considerably less than 10 years" if she could have. App., *infra*, 18a. She denied relief only because her "hands [were] tied" by Tenth Circuit precedent resolving the question presented against petitioner. *Ibid*. See also *id*. at 13a-14a.

Finally, the Tenth Circuit's decision is wrong. It ignores the statutory text, is inconsistent with American and English legal tradition, and offends the statutory purpose and the broader federal sentencing scheme. Further review is therefore imperative.

STATEMENT

A. Statutory background

Prior to 1994, district courts could not sentence an offender below a statutorily-imposed mandatory minimum term of imprisonment for drug offenses unless the government made a motion for relief based upon the defendant's "substantial assistance in the investigation or prosecution of another person." 18 U.S.C. 3553(e). Substantial assistance was taken to mean assistance that provided significant value to an ongoing criminal investigation or prosecution. But this substantial assistance standard created a perverse result: "[M]ore culpable defendants who could provide the Government with new or useful information about drug sources fared better" at sentencing than did less

culpable "lower-level offenders, such as mules, who typically have less knowledge." *United States* v. *Ajugwo*, 82 F.3d 925, 926 (9th Cir. 1996).

Congress set out to correct this "[i]ron[y]" in federal sentencing law with the Violent Crime Control and Law Enforcement Act of 1994. H.R. Rep. No. 460, 103d Cong., 2d Sess. (1994). The Act is codified in relevant part at 18 U.S.C. 3553(f), which is commonly called the mandatory minimum "safety valve" provision.

Safety-valve relief is available to offenders convicted of possession, attempt, or conspiracy under certain federal drug laws "if the court finds at sentencing" that five conditions are met. App., *infra*, 28a-29a. The first four conditions, which are not contested in this case, require the court to find that the offender (1) has a limited criminal history; (2) did not use or threaten violence in the commission of the offense; (3) did not cause death or serious injury as a result of the offense; and (4) was not an organizer, leader, manager, or supervisor of others in the offense. *Ibid*.

The fifth and final criterion—the one at issue in this appeal—is known as the "tell all you can tell" provision. *United States* v. *Shrestha*, 86 F.3d 935, 939 (9th Cir. 1996). It requires the sentencing judge to find that the defendant "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." App., *infra*, 29a. In contrast to the substantial assistance statutory provision, the information provided does not have to be "relevant or useful," nor does it have to be new information that the government did not already have. *Ibid*.

Courts disagree over the proper application of this fifth factor when a defendant takes his case to trial and

maintains his innocence. If the defendant is found guilty, the jury necessarily will have rejected the defendant's version of events. Thus, if the defendant maintains his innocence in his post-conviction proffer to the government, granting safety-valve relief would require "the court [to] find[] at sentencing" that the defendant "truthfully" disclosed all information to the government (App., *infra*, 28a-29a), despite the jury's rejection of the defendant's story. Whereas the Second and Tenth Circuits have held that the judge's findings are constrained by the jury's verdict (effectively foreclosing safety-valve relief in such cases), the Seventh and Ninth Circuits have disagreed.

B. Factual background

Petitioner's co-defendant, Luis Mendoza-Alarcon, was contacted by a lieutenant of a Mexican drug cartel, who threatened to kidnap and torture Mendoza's daughter if Mendoza did not help the cartel purchase $250,000 worth of cocaine in the United States. App., *infra*, 2a-3a. Mendoza acquiesced. *Id*. at 3a.

Federal authorities became aware that Mendoza was on the market for large quantities of cocaine. App., *infra*, 3a. They lured him into a reverse sting operation, according to which Mendoza would purchase $150,000 worth of cocaine from undercover agents at a Walmart parking lot in Albuquerque. *Ibid*.

On the morning of the planned exchange, Mendoza called a friend but reached petitioner—his friend's brother—instead. App., *infra*, 3a. Mendoza told petitioner that he needed "to give drug cartel members his life savings" to protect his daughter, but he did not tell petitioner that the money was to purchase cocaine. *Ibid*. Mendoza asked petitioner to accompany him and drive him to Albuquerque. *Ibid*. Petitioner agreed. *Ibid*. Although Mendoza spoke on the phone during the car

ride, he did not mention drugs in his phone calls or in conversation with petitioner. *Id*. at 21a.

Mendoza and petitioner met the undercover agents in the Walmart parking lot. App., *infra*, 3a. Mendoza used "coded" language to discuss the drug transaction with the agents. *Ibid*. There was also significant street noise at the scene, and the evidence indicated that petitioner could not hear the conversation between Mendoza and the agents. *Id*. at 20a, 23a.

Petitioner handed the cash to the agents. App., *infra*, 4a. A different vehicle purportedly containing the cocaine arrived. *Ibid*. Mendoza entered the vehicle and received a package that he was told contained cocaine. *Ibid*. The agents then arrested Mendoza and petitioner. *Ibid*.

C. Procedural background

1. Mendoza and petitioner were jointly indicted for conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. 846 and 841(a)(1). See App., *infra*, 1a, 4a.[1]

The case proceeded to a joint trial. Petitioner testified that he believed the money was for an extortion payment and that he was unaware that the transaction involved drugs. He testified further that, if he had known that drugs were involved, he would not have agreed to help Mendoza. 3 ROA 1762-1778. Accord App., *infra*, 20a-21a.

For his part, Mendoza asserted that he was acting under duress. 1 ROA 1899-1900. Mendoza's testimony

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[1] Petitioner was also charged with an immigration violation, to which he pleaded guilty. See App., *infra*, 25a. Mendoza was charged additionally with a weapons violation, of which the jury acquitted him. *Id*. at 5a. Neither of the other charges is material to the question presented here.

also corroborated petitioner's account—that he had told petitioner only that the money was for the cartel to ensure his daughter's safety, and not that it was for a drug deal. 3 ROA 1761-1762.

2. The jury convicted Mendoza and petitioner on the drug conspiracy count. App., *infra*, 5a. The jury thus rejected petitioner's defense that he did not know the transaction was a drug deal. *Id.* at 18a.

Petitioner moved for an acquittal notwithstanding the verdict. App., *infra*, 5a-6a. The district court denied the motion, holding that there was sufficient evidence to support the verdict. *Id*. at 6a, 19a, 21a.

3. The district court sentenced petitioner to a mandatory minimum term of 10 years' imprisonment pursuant to 21 U.S.C. 841(b)(1)(A)(ii). App., *infra*, 26a.

Before the district court imposed the sentence, petitioner moved for safety-valve relief pursuant to Section 3553(f). Petitioner argued that the jury's finding of guilt—in particular, its rejection of petitioner's assertion that he did not know the transaction was a drug deal—did not preclude the district court from finding independently that petitioner had fully and truthfully debriefed the government concerning his role in and knowledge about the offense. See Dist. Ct. Dkt. 234. The government argued otherwise, contending that the jury's verdict precluded safety-valve relief because petitioner had maintained his innocence in his testimony and proffer to the government. Dist. Ct. Dkt. 239.

The district court reluctantly agreed with the government. Relying on binding Tenth Circuit precedent, the court explained (App., *infra*, 18a):

> I analyzed everything as best I could to see whether or not the defendant was eligible for the safety valve.

> I had no choice but to conclude that he is not eligible for the safety valve. Because if I concluded that the defendant had fully and completely and truthfully debriefed [the government about his offense], I would essentially find contrary to the jury verdict.
>
> I reviewed the jury instructions. I could not reconcile the jury verdict with the safety valve.

The district judge was clear that she otherwise would have granted safety-valve relief (*ibid.*):

> I will tell you that I think 10 years in this case for this defendant with these facts, 10 years is too long. If I had any say in the matter I would give the defendant a lengthy sentence, a justifiable sentence, but it would be considerably less than 10 years. But my hands are tied.
>
> I will tell you that it gives me no pleasure to deny the safety valve.
>
> * * *
>
> So it's hard to—it's hard to reconcile, it's hard to justify, and I can't say that I feel like justice will be served today, but my hands are tied.

The district court accordingly denied petitioner's request for safety-valve relief (*id.* at 22a) and sentenced petitioner to the statutory minimum of 10 years' imprisonment (*id.* at 26a).

4. The Tenth Circuit affirmed. App., *infra*, 1a-14a. As relevant here, the court rejected petitioner's argument that he was entitled to safety-valve relief despite that the findings necessary to support such relief were "contrary to the jury verdict." *Id.* at 13a.

To that end, the court of appeals relied on its prior decision in *United States* v. *De La Torre*, 599 F.3d 1198 (10th Cir. 2010), where it had held that "[n]o reasona-

ble defendant could claim safety-valve eligibility based on trial testimony that necessarily contradicts the conviction itself." App., *infra*, 14a. The court acknowledged that, in this regard, "[o]ur circuit's case law diverges from that of the Ninth Circuit," which held in *United States* v. *Sherpa*, 110 F.3d 656 (9th Cir. 1996), that "a district court [may] apply safety-valve relief notwithstanding a jury's finding that a defendant testified untruthfully." App., *infra*, 13a-14a.

Because "the jury found [petitioner] guilty of knowing participation in the conspiracy," the district judge "could not have granted safety-valve relief without directly undermining the jury's verdict that he knowingly conspired with Mr. Mendoza." App., *infra*, 14a. On that basis, the court of appeals affirmed petitioner's sentence.[2]

REASONS FOR GRANTING THE PETITION

The federal courts of appeals are divided over the question whether a district court may grant safety-valve relief under 18 U.S.C. 3553(f) from a mandatory minimum sentence when the factual findings necessary to support such relief are inconsistent with the jury's verdict. The Seventh and Ninth Circuits have held that district courts may grant safety-valve relief in such circumstances. The Second and Tenth Circuits disagree. The split is openly acknowledged and will not correct itself.

Proper resolution of the question presented is a matter of great practical importance. In this case and thousands like it every year, district courts decide

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[2] The court also affirmed the denials of petitioner's motion for an acquittal notwithstanding the verdict and of petitioner's preferred jury instructions. App., *infra*, 7a-11a. Petitioner does not challenge those aspects of the Tenth Circuit's decision.

whether to grant safety-valve relief from mandatory minimum sentences. The question presented is nearly certain to arise in every such case that goes to trial and in which the defendant maintains his innocence.

The question is also important to every criminal defendant whom it affects. In this case, the district judge stated clearly on the record that she would have imposed a significantly lower safety-valve sentence if she could have, but that she was precluded from doing so by circuit precedent. This case thus offers an especially attractive vehicle for resolving the conflict.

On top of that, the Tenth Circuit's decision is inconsistent with both the statutory text and traditional legal norms. Further review is warranted.

A. The lower courts are intractably divided over the question presented

The lower courts have expressly acknowledged the circuit split over the question presented. The Tenth Circuit recognized below that its "case law diverges from that of the Ninth Circuit." App., *infra*, 14a. The Second Circuit has described the Seventh and Ninth Circuits' opinions as "wrongly decided," and it has "decline[d] to follow them." *United States* v. *Reynoso*, 239 F.3d 143, 150 (2d Cir. 2000). The Fifth Circuit has recognized that the circuits have "reached differing conclusions on this issue," while "declin[ing] to extend [either side's] precedents." *United States* v. *Moreno-Gonzalez*, 662 F.3d 369, 375 (5th Cir. 2011). The Eighth Circuit has acknowledged the same, while likewise "declin[ing] to 'take sides.'" *United States* v. *Honea*, 660 F.3d 318, 328 (8th Cir. 2011).

This is a mature split that has persisted despite open recognition of the disagreement and repeated opportunities for the courts to consider the reasoning

adopted by their peers. Only this Court can resolve the disagreement among the lower courts.

1. The Seventh and Ninth Circuits hold that a judge's Section 3553(f) findings are not constrained by the jury's verdict

The Seventh and Ninth Circuits have interpreted Section 3553(f) as authorizing judicial findings of fact independent of the jury's verdict. Those courts have therefore held that the judge's findings need not be consistent with the jury's verdict.

a. Ninth Circuit. In *United States* v. *Sherpa*, 110 F.3d 656 (9th Cir. 1996), the jury convicted the defendant of possession and importation of heroin. *Id.* at 658. The defendant stated that he had not known that the suitcase he brought from Thailand to the United States contained heroin. *Id*. at 658-659. The guilty verdict reflected the jury's rejection of that defense. *Id*. at 659-660. Nonetheless, the district court granted the defendant Section 3553(f) relief from the mandatory minimum sentence. *Id*. at 659.

The government appealed, "arguing that the jury's guilty verdict precludes any notion that [the defendant] truthfully provided 'all information' he had concerning the offense." *Sherpa*, 110 F.3d at 660. As the government saw it, "the jury's guilty verdict legally forecloses any possibility that [the defendant's] consistent profession of ignorance (regarding the presence of drugs in the suitcase) was based in truth." *Ibid*.

The Ninth Circuit rejected that argument. After recounting the history and purpose of Section 3553(f), the court concluded that "[a] judge * * * could logically find that reasonable minds might differ on a given point so as to preclude a judgment of acquittal, but conclude that *he or she* would have voted differently had he or she been a juror." *Sherpa*, 110 F.3d at 661.

"While the judge's personal disagreement has no impact on the jury's finding of guilt, we hold that such disagreement is properly considered in the judge's sentencing decision." *Ibid*.

That conclusion "reflects the long-standing tradition that sentencing is the province of the judge, not the jury." *Sherpa*, 110 F.3d at 661. To hold otherwise would "confuse[] 'telling all'" under Section 3553(f)(5) with "acceptance of responsibility," which "are two very different concepts." *Id*. at 662.

"Consistent with the language of [Section] 3553(f) and the different roles involved when determining guilt and imposing sentence," the Ninth Circuit concluded, "the safety valve requires a separate judicial determination of compliance which need not be consistent with a jury's findings." *Sherpa*, 110 F.3d at 662. There is thus no question that this case would have come out differently if it had arisen in the Ninth Circuit.

b. Seventh Circuit. In *United States* v. *Thompson*, 76 F.3d 166 (7th Cir. 1996), the Seventh Circuit came to the same conclusion.

Similar to petitioner in this case, the defendant in *Thompson* was convicted of "conspiracy to possess cocaine with intent to distribute, and of knowingly distributing cocaine" after she provided a shopping bag containing cocaine to an undercover agent. 76 F.3d at 168. She testified that she was unaware that the bag contained cocaine. *Id.* at 169. The jury ultimately rejected that defense and found her guilty. *Ibid.* The district court nevertheless granted safety-valve relief from the mandatory minimum sentence. *Id.* at 168.

The Seventh Circuit upheld the jury's verdict and affirmed the district court's grant of safety-valve relief under Section 3553(f). *Thompson*, 76 F.3d at 170-171. Although the guilty verdict reflected the jury's rejec-

tion of the defendant's version of events, the Seventh Circuit concluded that "the district court, in its fact-finding role," relying on evidence introduced "at the sentencing hearing" and not presented to the jury, correctly "concluded that Thompson was forthright" as required by Section 3553(f)(5), notwithstanding the jury's verdict. *Id*. at 171. The Seventh Circuit declined to reverse that conclusion. *Ibid*.

2. The Second and Tenth Circuits hold the opposite

The Second and Tenth Circuits have come to the opposite conclusion, holding that a judge's safety-valve findings are constrained by the jury's verdict.

a. Tenth Circuit. The Tenth Circuit first resolved the question presented in *United States* v. *De La Torre*, 599 F.3d 1198 (10th Cir. 2010).

There, the court considered whether trial testimony was sufficient to satisfy Section 3553(f)(5) without a separate proffer interview. The court concluded that "there are circumstances in which trial testimony could be sufficiently thorough so as to constitute adequate compliance with [the Section 3553(f)(5)] requirement." *De La Torre*, 599 F.3d at 1206-1207. But, the court noted, "a defendant's trial testimony most often includes a denial of the essential factual elements of guilt and directly conflicts with the jury's finding of guilt." *Id*. at 1206. This will preclude relief as a practical matter, according to the Tenth Circuit, because "[n]o reasonable defendant could claim safety-valve eligibility based on trial testimony that necessarily contradicts the conviction itself." *Ibid*. The court remanded for resentencing in that case only because a "novel circumstance" concerning the nature of the defendant's offense made it "conceivable that a fact-

finder could believe [the defendant's] testimony without necessarily contradicting the conviction." *Ibid*.

In this case, by contrast, "the district court could not have granted safety-valve relief without directly undermining the jury's verdict." App., *infra*, 14a. The Tenth Circuit therefore concluded that *De La Torre* prevented the district court from granting safety-valve relief under Section 3553(f). *Id*. at 13a-14a. See also *id*. at 18a (district judge stating that she "had no choice but to conclude that [petitioner] is not eligible for the safety valve" and "my hands are tied"). On that basis, the Tenth Circuit stated below that its "case law diverges from that of the Ninth Circuit." *Id*. at 14a.

b. Second Circuit. The Second Circuit reached a similar conclusion in *United States* v. *Reynoso*, 239 F.3d 143 (2d Cir. 2000).

That case involved a mentally impaired defendant's plea bargain. *Reynoso*, 239 F.3d at 145. The evidence suggested that the defendant believed that her statements to prosecutors had been truthful, but they were in fact false. *Ibid.* The defendant argued that she was still entitled to safety-valve relief because subjective belief is sufficient to satisfy Section 3553(f)(5). *Id*. at 147. The Second Circuit rejected that argument, concluding instead that "a defendant must provide the Government with complete and objectively truthful information," regardless of subjective belief, "in order [to] qualify for safety valve relief." *Id*. at 149.

On its way to that conclusion, the Second Circuit addressed *Sherpa* and *Thompson*. *Reynoso*, 239 F.3d at 149. The defendant had argued that those cases supported her position because the defendants in each case had earnestly believed the truth of their proffers to the government. *Ibid.* For the most part, the Second Circuit distinguished the cases on their facts. *Ibid.* But "to

the extent that *Sherpa* and *Thompson* are arguably on point and support [the defendant's] construction of [Section] 3553(f)(5)," the court "conclude[d] that the cases are wrongly decided and decline[d] to follow them." *Id.* at 149-150.

Judge Calabresi dissented. *Reynoso*, 239 F.3d at 150-155. He disagreed with the majority's "half-hearted effort to distinguish [*Sherpa* and *Thompson*]" and explained that the cases cannot be reconciled with the majority's holding. *Id*. at 152.

* * * * *

The split among the circuits is undeniable. And it is leading to variable and unjust results. In any case where a defendant maintains his innocence at trial, the harshness of the sentence imposed will turn on location alone—defendants in Chicago and San Francisco will receive safety-valve relief, while those in New York and Denver will not. And as a result, judges in the Second and Tenth Circuits will often find themselves imposing sentences they believe to be unjustly long. This is no way to administer the Nation's criminal justice system. This Court's intervention is urgently needed.

B. The question presented is important, and this is an ideal vehicle for addressing it

Proper resolution of the question presented is a matter of great practical importance. For one, it arises frequently. In fact, it will arise in every case in which a federal criminal defendant takes his case to trial, is found guilty of a drug offense subject to a mandatory minimum sentence, but maintains his innocence.

Government data suggests that there are hundreds of such cases each year. More than ten thousand drug offenders were subject to mandatory minimum sentences and eligible to seek safety-valve relief in 2018 alone. See U.S. Sentencing Comm'n, *2018 Annual Re-*

port and Sourcebook of Federal Sentencing Statistics, 121 (2019), perma.cc/6VBS-KLA2. Of those, more than one in three—3,812 in total—were ultimately granted safety-valve relief. *Ibid*.

Contemporaneous data suggests that approximately 2% of federal criminal defendants take their cases to trial. John Gramlich, *Only 2% of federal criminal defendants go to trial, and most who do are found guilty*, Pew Research Ctr. (June 11, 2019), perma.cc/V69N-K3BX. Of those, 83% are convicted. *Ibid*. Assuming that every defendant subject to a mandatory minimum sentence seeks safety-valve relief, and assuming that every defendant who takes his case to trial maintains his innocence, the question presented arises in between 150 and 200 criminal cases every year.[3]

The question presented is also a matter of significant practical importance for each defendant whom it affects. Federal drug laws often carry lengthy minimum sentences, ranging from 10 to 25 years. See 21 U.S.C. 841(b)(1)(A). These sentences are usually significantly longer than the defendant's otherwise-applicable sentencing guidelines range.

This case proves the point. Petitioner's guidelines range was 78 to 97 months.[4] And the district court was clear that it would have imposed a sentence "considerably less than 10 years" if it had been permitted by

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[3] The question presented does not often arise in reported opinions, however, because courts typically impose sentences orally.

[4] The guidelines range calculated in the presentence report was 97 to 121 months based on an offense level of 30. Dist. Ct. Dkt. 220, at 15. But the district court sustained petitioner's objection to the obstruction enhancement (App., *infra*, 24a), resulting in an offense level of 28 (*id*. at 26a) and a corresponding guidelines range of 78 to 97 months. See U.S. Sentencing Comm'n, *Guidelines Manual 2018*, at 407 (Nov. 1, 2018), tinyurl.com/y45malrw.

Tenth Circuit law to grant safety-valve relief. App., *infra*, 18a. Thus by all indications, petitioner is serving several additional years in prison by reason of the Tenth Circuit's resolution of the question presented. At bottom, there is no question that petitioner would be serving significantly less time if he had been sentenced under the law of the Seventh and Ninth Circuits rather than the law of the Tenth Circuit. *See ibid*.

This case is thus a particularly attractive vehicle for addressing the question presented. The district court denied safety-valve relief only because its "hands [were] tied" by Tenth Circuit precedent. App., *infra*, 18a. If the judge had "had any say in the matter," she would have imposed a sentence "considerably less than 10 years." *Ibid*. Her inability to do so meant, in her view, that "justice will [not] be served" in this case. *Ibid*. These facts cry out for further review.

C. The decision below is wrong

The clean presentation of a question of significant practical importance implicating a circuit conflict is reason enough to grant certiorari. But the need for review is especially evident in this case because the decision below is manifestly wrong.

1. Statutory text. "The starting point in discerning congressional intent is the existing statutory text." *Lamie* v. *U.S. Trustee*, 540 U.S. 526, 534 (2004). The Court "must enforce plain and unambiguous statutory language according to its terms." *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010).

Section 3553(f)'s text provides that safety-valve relief may be granted "*if the court finds at sentencing*" that "the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses." 18 U.S.C. 3553-(f)(5) (emphasis added). These words are straightfor-

ward: They "require[] a determination by the judge, *not the jury*, as to the satisfaction of the" criteria for relief. *Sherpa*, 110 F.3d at 660.

Congress had good reason to authorize a district judge to make findings of fact at sentencing independent of the jury's verdict. "The judge is privy to far more information than the jury and is therefore in a much different posture to assess the case and determine whether the defendant complies with [Section] 3553(f)." *Sherpa*, 110 F.3d at 660. Such information may come from "witnesses, evidence, and testimony unpresented to the jury for whatever reasons" and from "the opportunity to observe a defendant many times, possibly over a period of months, in a host of circumstances apart from the stressful proceedings surrounding a criminal trial." *Ibid*.

As this Court has recognized, "[o]ut-of-court affidavits have been used frequently [at sentencing], and of course in the smaller communities sentencing judges naturally have in mind their knowledge of the personalities and backgrounds of convicted offenders." *Williams* v. *New York*, 337 U.S. 241, 246 (1949). That explains the outcome in *Thompson*: The sentencing judge heard evidence introduced "at the sentencing hearing" and not presented to the jury. 76 F.3d at 171.

It is therefore "irrefutable that a judge's access to information at sentencing is considerably less constrained than a jury's at trial." *Sherpa*, 110 F.3d at 660. Accord Fed. R. Evid. 1101(d)(3) (rules of evidence do not apply at sentencing); Note, *The Admissibility of Character Evidence in Determining Sentence*, 9 U. Chi. L. Rev. 715 (1942). And by expressly assigning the fact-finding role to the judge rather than to the jury, Congress assuredly intended for this additional information and evidence to be brought to bear on the question whether safety-valve relief is warranted, without

regard for the jury's findings based on a more limited record.

2. Historical practice. The Tenth Circuit's contrary holding is at odds with "the long-standing tradition that sentencing is the province of the judge, not the jury." *Sherpa*, 110 F.3d at 661. Sentencing is an inherently discretionary undertaking. See *Apprendi* v. *New Jersey*, 530 U.S. 466, 482 & n.9 (2000). Thus, "[b]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." *Id*. at 481 (quoting *Williams*, 337 U.S. at 246) (emphasis omitted).

This discretion has historically operated independent of the facts implied by the verdict, so long as the sentence is not "*more* severe * * * than the maximum authorized by the facts found by the jury." *Apprendi*, 530 U.S. at 482 n.9 (emphasis added). The Tenth Circuit's decision overrides a judge's long-settled discretion to sentence. See *id*. at 481-482 ("[A] sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review.") (quoting *United States* v. *Tucker*, 404 U.S. 443, 447 (1972)).

3. Context and purpose. The Court also must consider the statute's "context" and "purposes." *Watson* v. *Philip Morris Cos.*, 551 U.S. 142, 147 (2007). Here, those considerations confirm what the plain text provides: The availability of safety-valve relief is not constrained by the jury's verdict.

In enacting Section 3553(f), "Congress recognized that *more* culpable defendants" were entitled to sentencing relief for providing "substantial assistance"

under Section 3553(e), while *less* culpable offenders "such as mules, who typically have less knowledge" were subject to harsh mandatory minimums. *Sherpa*, 110 F.3d at 660 (emphasis added; quotation marks omitted). Thus, passage of Section 3553(f) reflected Congress's judgment that sentencing relief generally should be available to lower-level offenders as well. *Ibid*. Accord H.R. Rep. No. 460, 103d Cong., 2d Sess. (1994).

The Tenth Circuit's answer to the question presented cannot be squared with that purpose. According to its reasoning, a defendant who exercises his constitutional right to a jury trial will effectively never be eligible for safety-valve relief. After all, if the defendant is found guilty, the jury necessarily will have rejected his version of events. Yet there is no indication that Congress intended to close off safety-valve relief for offenders who exercise their Sixth Amendment right to a trial. See *United States* v. *Shrestha*, 86 F.3d 935, 940 (9th Cir. 1996) ("The safety valve statute is not concerned with sparing the government the trouble of preparing for and proceeding with trial.").

In fact, the broader federal sentencing scheme suggests the opposite. Under the Tenth Circuit's approach, the only non-pleading defendants who will be entitled to safety-valve relief are those who accept responsibility for their crime. But a proffer under Section 3553(f)(5) is a "very different concept[]" and serves a very different objective from "acceptance of responsibility." *Sherpa*, 110 F.3d at 662. That much is clear from the fact that Section 3E1.1(a) of the federal sentencing guidelines provides independently for a reduced sentence for "acceptance of responsibility." That provision would be redundant of safety-valve relief if the Tenth Circuit's interpretation of Section 3553(f) were correct. Yet there is "no evidence that through the safety valve

Congress or the Sentencing Commission intended to duplicate" relief available through independent provisions of the guidelines. *United States* v. *Mejia-Pimental*, 477 F.3d 1100, 1107 (9th Cir. 2007).

Relatedly, the Tenth Circuit's decision produces a bizarre result—one identified as "ironic" by the district court. See App., *infra*, 18a. Under the Tenth Circuit's rule, if petitioner had pleaded no contest to possession with intent to distribute and told the *exact same story* as he did in this case, he would have been entitled to safety-valve relief. If he had pleaded no contest, in other words, his proffer to the government—although the same in substance—would not have been "inconsistent" with the jury's findings, and safety-valve relief would have been available. *Id*. at 12a. But because his conviction followed a jury verdict rather than a plea deal, safety-valve relief was foreclosed. Nothing in the text or purposes of Section 3553(f) suggests that Congress intended such a nonsensical result.

In sum, the Tenth Circuit's decision cannot stand. It ignores the statutory text, is inconsistent with traditional American and English practice, and offends the statutory purpose. Because the Tenth Circuit's decision also squarely conflicts with decisions of its sister circuits, further review is in order.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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