No. 22-340

In the Supreme Court of the United States

MARK E. PULSIFER, PETITIONER

v.

UNITED STATES

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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Yesterday the Fourth Circuit, in an opinion by Judge Agee, sided with the defendant on the question presented in this case, further deepening the circuit split. *United States v. Jones*, No. 21-4605, 2023 WL 2125134, at *1 (4th Cir. 2023). As the court noted, the Fourth, Ninth, and en banc Eleventh Circuits have held that "and" in 18 U.S.C. § 3553(f)(1) is conjunctive, while the Fifth, Sixth, Seventh, and Eighth Circuits have held that "and" means "or." *Id.* at *2 n.2 (citing *United States v. Garcon*, 54 F.4th 1274 (11th Cir. 2022) (en banc); and *United States v. Lopez*, 998 F.3d 431 (9th Cir. 2021), as adopting the conjunctive reading and *United States v. Palomares*, 52 F.4th 640 (5th Cir. 2022); *United States v. Haynes*, 55 F.4th 1075 (6th Cir. 2022); *United States v. Pace*, 48 F.4th 741 (7th Cir. 2022); and *United States v. Pulsifer*, 39 F.4th 1018 (8th Cir. 2022), as adopting the disjunctive reading). The deepening split confirms the urgent need for this Court's intervention, and Mr. Pulsifer and the United States agree that this case is the right vehicle.

The Fourth Circuit's reasoning tracks the reasoning in Mr. Pulsifer's cert petition and underscores the irreconcilable positions on each side. The court began by explaining that "§ 3553(f)(1)'s plain language is unambiguous": "and" means "and"—"*all* of the conditions." *Id.* at *2 (quoting *Lopez*, 998 F.3d at 436). That meaning "does not change simply because it is preceded by a negative marker." *Id.* (citing A. Scalia & B. Garner, *Reading Law* 119 (2012)). Thus, "a defendant is ineligible for safety value relief only if she has … the combination (A) more than four criminal history points, (B) a three-point offense, and (C) a two-point violent offense." *Id.* at *3. What's more, "the

presumption of consistent usage" suggests that "and" in § 3553(f)(1) means the same thing it means everywhere else in § 3553(f)—"and." *Id.* at *3-4.

The Fourth Circuit then dispatched the government's theories. In response to the government's argument that the statute's em dash requires a distributive reading, the court explained that Congress "would have used 'or' instead of relying on an ill-defined em-dash to alter the meaning of 'and.'" *Id.* at *5. And the government's supposed examples—like a prohibition on lying, cheating, and stealing—were merely examples of "common understanding" overriding an "and" "inserted inartfully in the place of the more natural 'or,'" not "syntax" guiding the reader. *Id.* at *4 (quoting *Garcon*, 54 F.4th at 1280).

The Fourth Circuit also explained that interpreting "and" to mean "and" does not make any part of § 3553(f)(1) superfluous, contrary to the government's argument and the reasoning of "most courts that have adopted its interpretation." *Id.* at *5. Agreeing with the Eleventh Circuit, the court reasoned that "a defendant could have two- and three-point offenses but fewer than five criminal history points … when the two- and three-point offenses are treated as a single sentence," such as when they "were imposed on the same day." *Id.* (quoting *Garcon*, 54 F.4th at 1282). Or the defendant might have two- or three-point offenses that are too old to add to criminal history points. *Id.* at *6 n.4 (citing *Garcon*, 54 F.4th at 1281-82).

Finally, the Fourth Circuit rejected the government's absurdity arguments. For one thing, "meeting the requirements of § 3553(f)(1) does not guarantee a defendant safety valve relief" given the statutes' "four other independent and separate requirements." *Id.* at

*7. For another, "even if the defendant meets all the statutory requirements," the judge can still impose a long sentence. *Id.* In short, the court observed, "[t]he remedy for any dissatisfaction with the results in particular cases lies with Congress and not with this Court." *Id.* (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982)).

The Fourth Circuit's decision is the latest to confirm that the split will not go away without this Court's intervention. Indeed, on February 14, on the government's motion, the Ninth Circuit stayed its mandate in *Lopez* (after denying rehearing en banc on January 27). Doc. No. 64, *Lopez*, No. 19-50305, 998 F.3d 431 (9th Cir.). In its motion, the government had explained that it "agreed that certiorari should be granted in … *United States v. Pulsifer*"—this case—"to resolve the [c]ircuit split." Doc. No. 63, *Lopez*.

The lower courts and many defendants await this Court's guidance. The Court should grant Mr. Pulsifer's petition.

Respectfully submitted.

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