No. 22-340

IN THE
Supreme Court of the United States

MARK E. PULSIFER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF FAMM, AMERICAN CIVIL LIBERTIES UNION, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

RYAN AZAD
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street
San Francisco, CA 94105

DAVID DEBOLD
Counsel of Record
MAXWELL A. BALDI
LAVI M. BEN DOR*
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
ddebold@gibsondunn.com

Counsel for Amici Curiae

(*Additional Counsel Listed on Inside Cover*)

MARY PRICE
SHANNA RIFKIN
FAMM FOUNDATION
1100 H Street, N.W.
Suite 1000
Washington, D.C. 20005

PETER GOLDBERGER
50 Rittenhouse Place
Ardmore, PA 19003

JEFFREY T. GREEN
Co-Chair, AMICUS COMMITTEE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1600 L. Street N.W.
Washington, D.C. 20036

DAVID D. COLE
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005

BRANDON BUSKEY
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St.
New York, NY 10004

Counsel for Amici Curiae

QUESTION PRESENTED

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

The question presented is whether the "and" in § 3553(f)(1) means "and," so that a defendant satisfies the provision so long as he does not have (A) more than 4 criminal history points, excluding any points resulting from a 1-point offense, (B) a 3-point offense, *and* (C) a 2-point violent offense (as the Fourth, Ninth, and Eleventh Circuits hold), or whether the "and" means "or," so that a defendant satisfies the provision only if he does not have (A) more than 4 criminal history points, excluding any points resulting from a 1-point offense, (B) a 3-point offense, *or* (C) a 2-point violent offense (as the Fifth, Sixth, Seventh, and Eighth Circuits hold).

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INTEREST OF *AMICI CURIAE* [1]

FAMM, previously known as Families Against Mandatory Minimums, is a national, nonprofit, nonpartisan organization whose primary mission is to promote fair and rational sentencing policies and to challenge mandatory sentencing laws and the inflexible and excessive penalties they require. Founded in 1991, FAMM currently has more than 75,000 members around the country. By mobilizing prisoners and their families who have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM advances its charitable purposes in part through education of the public and through selected *amicus* filings in important cases.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members and supporters dedicated to the principles of liberty and equality embedded in the United States Constitution. In the nearly 100 years since its founding, the ACLU has appeared in myriad cases before this Court, both as merits counsel and as an *amicus curiae*, to defend constitutional rights. This includes numerous cases in which the ACLU has urged this Court to ensure that the criminal justice system is administered in accordance with constitutional principles, such as *Mapp v. Ohio*, 367 U.S. 643 (1961); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Terry v. Ohio*, 392 U.S. 1 (1968); *Furman v. Georgia*, 408 U.S. 238

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[1] Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

(1972); and *City of Chicago v. Morales*, 527 U.S. 41 (1999).

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958 and has a nationwide membership of many thousands of direct members and up to 40,000 attorneys in affiliate organizations. NACDL is dedicated to advancing the proper, efficient, and fair administration of justice. NACDL files many *amicus* briefs each year in this Court and other federal and state courts, seeking to provide assistance in cases presenting issues important to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

Amici are strongly committed to fair and appropriate sentencing in which district courts exercise discretion based on the facts of each individual's situation—so that the punishment imposed fits the offender and the crime. Because this approach favors sentencing policies that enable judges to exercise principled discretion, *amici* have a deep interest in ensuring that district courts faithfully apply the safety-valve provision of 18 U.S.C. § 3553(f) in accordance with what Congress intended and what the rule of lenity requires. In light of the grave harm wreaked by mandatory minimum sentences, *amici* are keenly interested in ensuring that they be imposed sparingly and only in accordance with congressional intent and due process.

SUMMARY OF ARGUMENT

The Eighth Circuit held below that a defendant is ineligible for the benefit of the federal sentencing statute's "safety valve" if any one of the three criteria in 18 U.S.C. § 3553(f)(1) applies to him. As Mr. Pulsifer has explained, that decision was wrong, because the statute uses the word "and," not "or," to connect the three criteria for safety-valve relief. But two additional reasons support reversal here.

First, the Eighth Circuit's decision renders illusory the rule of lenity, a principle "not much less old than" the task of statutory "construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.). The decision below proclaims that lenity guides the interpretation of a statute only upon a finding of "grievous ambiguity." That ill-defined but evidently heightened standard conflicts with more than two centuries of this Court's teachings and undermines the principles animating the rule of lenity. The Eighth Circuit interpreted "grievous ambiguity" in a way that would render the rule an empty vessel: Under its approach, the safety-valve provision is not ambiguous enough to trigger lenity *even though* judges across six circuits have divided over its meaning, adopting at least three conflicting interpretations of the provision. If the rule of lenity is to have any application, surely it governs here. Section 3553(f)(1) satisfies any articulation of the rule of lenity.

The Eighth Circuit's refusal to invoke lenity is particularly problematic because its interpretation of the statute exacerbates the already deleterious effects of mandatory prison sentences on defendants, their families, and society as a whole. While Congress may choose to mandate those harsh punishments, it has not done so here. This Court should not let stand an

unjustifiable judicial application of a sentencing statute that will force thousands of low-level, nonviolent drug offenders each year to stay in prison longer than Congress required.

Second, the decision below is flatly at odds with Congress's purpose in enacting the First Step Act of 2018, which expanded eligibility for "safety valve" relief. That historic statute ameliorated excessive sentences for many defendants in a variety of ways. Congress sought to make eligibility for safety-valve relief the norm rather than the exception for low-level, nonviolent drug offenders, such as Mr. Pulsifer, who truthfully provide the government with all information about their offense conduct. But under the Eighth Circuit's decision, many such defendants will not be spared from inflexibly long mandatory-minimum sentences. This Court should reverse.

ARGUMENT

Under the rule of lenity, ambiguities in criminal statutes must be resolved against the government. The decision below nullified that rule and violated this Court's precedents by holding that lenity applies only where there is not just ambiguity, but "grievous ambiguity," an undefined term that is itself deeply ambiguous. But under any standard, § 3553(f)(1) triggers the rule of lenity. And the Eighth Circuit's result is especially baffling here, where Congress specifically enacted the First Step Act provision at issue (Act § 402) to make safety-valve relief more available to low-level, nonviolent drug offenders and where many federal judges have disagreed about what the statute means. This Court should reverse the decision below and ensure that lenity remains a valuable safeguard of due process for criminal defendants.

I. LENITY RESOLVES THIS CASE IN FAVOR OF MR. PULSIFER.

The question presented concerns the safety-valve provision in 18 U.S.C. § 3553(f), which allows a court to disregard a statutory mandatory minimum sentence in drug cases if five sets of conditions are met, including that the defendant was a low-level, nonviolent participant in the offense conduct who truthfully provided the government with all information the defendant had about the offenses that were part of a common scheme or plan. At issue is the first of the five conditions, which requires a finding 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)(1) (emphasis added).

Mr. Pulsifer persuasively argues that because Congress used "and," not "or," the plain language of the provision dictates that a defendant is ineligible for relief only if all three criteria are present. Pet. Br. 16–25. But even if a different interpretation were grammatically tenable, the Eighth Circuit's refusal to resolve this case in Mr. Pulsifer's favor contravenes the rule of lenity, a "venerable" and constitutionally

driven principle of statutory interpretation. *Bittner v. United States*, 143 S. Ct. 713, 724 (2023) (opinion of Gorsuch, J., joined by Jackson, J.).

By refusing to apply lenity absent what it referred to as "grievous ambiguity," the Eighth Circuit relied on the wrong standard for applying this important canon. If lenity does not apply here—when the statutory language has left more than two dozen jurists on the courts of appeals deeply divided about its meaning—lenity will never apply. These divided interpretations unequivocally show that "doubt persists" about whether Mr. Pulsifer's reading of the statute is correct, *Bittner*, 143 S. Ct. at 724 (opinion of Gorsuch, J.), and accordingly, this Court should apply the bedrock principle of lenity to rule in his favor.

A. The Eighth Circuit Invoked the Wrong Standard for Applying the Rule of Lenity.

"[T]he rule of lenity[] teach[es] that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). Historically, this Court has applied lenity to a criminal statute when, after applying other rules of construction, reasonable doubt persists about a penal statute's meaning. The decision below, however, deviated from this Court's established practice by refusing to apply lenity absent an unwarranted, ill-defined, but apparently especially demanding standard: "grievous ambiguity." Pet. App. 9a (citation omitted). Reasonable doubt, not "grievous ambiguity," is the correct standard.

1. For centuries, this Court has applied the rule of lenity whenever "the traditional tools of statutory interpretation yield[ed] no clear answer." *Wooden v.*

United States, 142 S. Ct. 1063, 1085–86 (2022) (Gorsuch, J., concurring in the judgment); *see also, e.g.*, *Abramski v. United States*, 573 U.S. 169, 204 (2014) (Scalia, J., dissenting) (observing the rule of lenity applies when "all legitimate tools of interpretation . . . do not decisively dispel the statute's ambiguity").

Lenity was first recognized in the English courts prior to the Founding, "justified in part on the assumption that when Parliament intended to inflict severe punishments it would do so clearly." *Wooden*, 142 S. Ct. at 1082 (Gorsuch, J., concurring in the judgment). To avoid imposing harsh sentences without clear authority, English judges "strictly construed" criminal statutes against the government. 1 William Blackstone, *Commentaries on the Laws of England* *88 (1765); *see also* 2 Matthew Hale, *History of the Pleas of the Crown* 335 (1736) (felonies "are construed literally and strictly"); *see generally* David S. Romantz, *Reconstructing the Rule of Lenity*, 40 Cardozo L. Rev. 523, 526–27 (2018).

Following that practice, this Court has long applied lenity whenever it has "reasonable doubt[]" about the application of a penal statute. *E.g.*, *Harrison v. Vose*, 50 U.S. (9 How.) 372, 378 (1850); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 299 (2012) ("favor[ing]" this "criterion" for the rule of lenity). More than two hundred years ago, Chief Justice Marshall explained that to construe a criminal statute against a defendant requires more than just the probability of correctness. The government bears the burden of establishing with *certainty* that a criminal statute encompasses a defendant's conduct. *See Wiltberger*, 18 U.S. (5 Wheat.) at 105 ("We admit that it is extremely improbable" Congress meant to limit the reach of the

criminal statute in the manner urged, "[b]ut probability is not a guide which a court, in construing a penal statute, can safely take."). Accordingly, as this Court has repeatedly observed, lenity applies to "situations in which a reasonable doubt persist[ed] about a statute's intended scope even after resort to" ordinary tools of construction. *Moskal v. United States*, 498 U.S. 103, 108 (1990) (emphasis omitted); *see also, e.g.*, *United States v. R.L.C.*, 503 U.S. 291, 305, 308 (1992) (plurality and concurring ops.); *McBoyle v. United States*, 283 U.S. 25, 27 (1931). So long as a statute "is not entirely free of doubt, the doubt must be resolved in favor of lenity." *Whalen v. United States*, 445 U.S. 684, 694 (1980); *see also Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284–85 (1978) (requiring only "some doubt").

Requiring this level of clarity from criminal statutes "uphold[s] the Constitution's commitments to due process and the separation of powers." *Wooden*, 142 S. Ct. at 1082 (Gorsuch, J., concurring in the judgment). Before interpreting an ambiguous criminal statute to impose a "harsher alternative," courts must find that Congress has spoken in "clear and definite" language. *United States v. Bass*, 404 U.S. 336, 347–48 (1971) (citation omitted). This rule "vindicates the fundamental principle that no citizen should be . . . subjected to punishment that is not clearly prescribed." *United States v. Santos*, 553 U.S. 507, 514 (2008) (Scalia, J.) (plurality op.). It thereby ensures that, "whether or not individuals happen to read the law, they can suffer penalties only for violating standing rules announced in advance." *Wooden*, 142 S. Ct. at 1083 (Gorsuch, J., concurring in the judgment). And entitlement to notice is no small thing—it comprises a core aspect of due process and the rule of law. *See* Lon Fuller, *The Morality of Law* 63–65 (1964).

Lenity also serves a second basic tenet of American government: Only Congress—not the courts—may create criminal offenses and prescribe their punishments. *Wiltberger*, 18 U.S. (5 Wheat.) at 95; *see United States v. Hudson*, 11 U.S. (7 Cranch) 32, 32 (1812). The separation of powers ensures that "[a]ny new national laws restricting liberty require the assent of the people's representatives and thus input from the country's 'many parts, interests and classes.'" *Wooden*, 142 S. Ct. at 1083 (Gorsuch, J., concurring in the judgment) (quoting *The Federalist* No. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961)); *see also* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 132–34 (2010) (noting that early courts applied lenity "as a tool for curbing themselves" "from expanding penal statutes beyond their terms"). Lenity thereby "embodies 'the instinctive distastes against [people] languishing in prison unless the lawmaker has clearly said they should.'" *Bass*, 404 U.S. at 348 (citation omitted). In this way, the rule of lenity is essential to "maintain[ing] the proper balance between Congress, prosecutors, and courts." *United States v. Kozminski*, 487 U.S. 931, 952 (1988).

For these same reasons, this Court has long held that the rule of lenity applies equally to sentencing statutes and laws defining criminal offenses. *E.g.*, *Hughey v. United States*, 495 U.S. 411, 422 (1990); *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *Busic v. United States*, 446 U.S. 398, 406–07 (1980); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.").

2. The Eighth Circuit brushed off Mr. Pulsifer's lenity arguments here by holding that the rule of lenity "applies. . . only when there remains a 'grievous ambiguity'" about a statute's meaning. Pet. App. 9a (citation omitted). That standard finds scant support in precedent and flouts more than two centuries of this Court's teachings.

The error stems from a passing reference to "grievous ambiguity" in a 1974 decision that merely described the statute at issue and did not purport to establish a new legal standard. *Huddleston v. United States*, 415 U.S. 814, 831 (1974); *see also* Romantz, *supra*, at 549–54. The Court in *Chapman v. United States*, 500 U.S. 453, 463 (1991), picked up that reference. But since then, the Court has continued to apply the rule of lenity to statutes marked by ambiguity that does not rise to the undefined level of "grievous." *E.g.*, *R.L.C.*, 503 U.S. at 306; *accord id.* at 307–08 (Scalia, J., concurring in part and concurring in the judgment). Yet some lower courts—including the Eighth Circuit here—now require "grievous" ambiguity in all cases before applying lenity.

This Court should disavow the grievous-ambiguity standard. That approach unmoors the doctrine from its constitutional underpinnings. "[W]hen the government means to punish, its commands must be reasonably clear" to satisfy due process. Scalia & Garner, *supra*, at 299. If lenity plays no part absent "grievous ambiguity," it will lead, as here, to interpretations of statutes that raise reasonable doubt about the scope of those statutes and their proper application. In that circumstance, the rule no longer protects defendants' rights to "fair notice of [the law's] demands." *Wooden*, 142 S. Ct. at 1082 (Gorsuch, J., concurring in the judgment). Put otherwise, when a

defendant is required to guess how a court will choose between competing canons of construction, "fair warning" simply has not "be[en] given . . . in language that the common world will understand." *McBoyle*, 283 U.S. at 27.

"Grievous ambiguity," moreover, gives judges far too much open-ended discretion. No one has defined what makes an ambiguity "grievous," so this amorphous standard fails to constrain judges, and instead allows them to reach whichever result they favor by attaching, or not attaching, the term "grievous" to ambiguous statutes. By contrast, reasonable doubt is as familiar as any standard known to the law.

The grievous-ambiguity standard also fails to safeguard the separation of powers. If judges can side with the government whenever they devise a colorable textual argument or ferret out a friendly bit of legislative history—thereby saving the ambiguity from rising to the ill-defined "grievous" standard—lenity will place no true limit on judges' ability to impose "their own sensibilities" on Congress's enactments. *Wooden*, 142 S. Ct. at 1083 (Gorsuch, J., concurring in the judgment).

Two other recent interpretations of the safety-valve provision illustrate the hollowness of the rule of lenity as lower courts, including the one here, have applied it to § 3553(f)(1). In *United States v. Pace*, a Seventh Circuit panel majority found no "grievous ambiguity" based in part on its view that some of "the legislative history surrounding the statute" supported its preferred view. 48 F.4th 741, 755 (7th Cir. 2022) (citation omitted). And in *United States v. Haynes*, a panel majority of the Sixth Circuit conceded that both possible meanings of the safety valve "[we]re grammatically sound" and "no rule of construction strongly

favor[ed] one meaning over the other." 55 F.4th 1075, 1079 (6th Cir. 2022). But rather than apply lenity in such a paradigmatic circumstance, the majority broke the tie by relying on its "own sense of good policy." *Id.* at 1085 (Griffin, J., dissenting) (citation omitted). The rule of lenity does not permit courts to disregard a plausible construction of a criminal statute—not to mention an *equally* plausible construction—based on policy preferences or fragments of legislative history. *See Hughey,* 495 U.S. at 422. Rather, a statute is sufficiently ambiguous to demand lenity if reasonable doubt about its meaning persists after ordinary efforts at statutory construction. A higher hurdle would be inconsistent with the history and purpose of the canon.

At a minimum, the safety-valve provision raises reasonable doubt as to the meaning of "and." That is enough to trigger lenity. Accordingly, this Court should reverse even if it were disinclined to agree with Mr. Pulsifer that his construction of the safety-valve provision is unambiguously correct.

B. Under Any Standard for Lenity, that Canon Applies Here.

The Eighth Circuit compounded its error by treating the grievous-ambiguity standard as virtually unattainable—not even satisfied by a statute in which "and" must be treated as meaning "or." *See* Pet. App. 9a. Nor was the court satisfied when judges in multiple circuits have found it plausible to construe the text at least three different ways. If ever there was an occasion for finding even "grievous ambiguity," this is it.

1. As Mr. Pulsifer persuasively explains, the "and" in § 3553(f)(1) means "and," not "or." *See* Pet. Br. 16–25.

That is the text's plain meaning. Because the statute uses the word "and" to join the three criteria in § 3553(f)(1), defendants remains eligible for safety-valve relief unless they have (A) four criminal history points, (B) a prior three-point offense, *and* (C) a two-point violent offense. If Congress had wished to provide otherwise it could easily have either used "or," or preceded the list with the expression "any of."

The canons of consistent usage and meaningful variation confirm that "and" means "and," not "or." Elsewhere in the safety-valve provision, Congress used "and" to mean "and": Specifically, the word "and" joins together the constituent items on the larger list of five sets of criteria a defendant must satisfy to avoid a mandatory minimum. 18 U.S.C. § 3553(f)(1)–(5). Everyone agrees that this means a defendant must qualify under *each* of those five subsections. So too, defendants remain eligible to avoid a mandatory minimum so long as they do not meet *each* of the criteria listed in § 3553(f)(1).

Similarly, in other parts of the statute where Congress meant "or," it said "or." *See, e.g.*, *id.* § 3553(f)(2) (eligibility for safety-valve relief requires that "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" (emphases added)). The use of "or" means that any one of the listed actions is disqualifying. Just as "[t]his Court does not lightly assume that Congress silently attaches different meanings to the same term," *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019), it also presumes "differences in language . . . convey differences in meaning," *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 86 (2017). Reading "and" to mean "or" in § 3553(f)(1)

violates both those canons. That is reason enough to reject the Eighth Circuit's reading. In this statute, "and" means "and," while "or" means "or."

2. Even if "grievous ambiguity" were required to apply the rule of lenity, the discordant conclusions of the twenty-nine circuit judges who have construed the statute satisfy that standard. *See United States v. Garcon*, 54 F.4th 1274, 1285–86 (11th Cir. 2022) (Rosenbaum, J., concurring) (the lack of an "indisputable winner" among the differing readings of § 3553(f)(1) reflects a "grievous ambiguity").

Sixteen circuit judges have correctly concluded that "and" means "and." *United States v. Lopez*, 998 F.3d 431, 437 (9th Cir. 2021); *id.* at 448 (M. Smith, J., concurring in part, dissenting in part, and concurring in the judgment); *Garcon*, 54 F.4th at 1276 (en banc); *United States v. Jones*, 60 F.4th 230, 239 (4th Cir. 2023); *Pace*, 48 F.4th at 761–62 (Wood, J., dissenting in part); *United States v. Palomares*, 52 F.4th 640, 652 (5th Cir. 2022) (Willett, J., dissenting); *Haynes*, 55 F.4th at 1080 (Griffin, J., dissenting). Seven circuit judges have determined that "and" means "or." *Pace*, 48 F.4th at 754 (majority op.); *Garcon*, 54 F.4th at 1297–1301 (Branch, J., dissenting); *id.* at 1290–92 (Jordan, J., dissenting); *Haynes*, 55 F.4th at 1076 (majority op.). And six other circuit judges have construed "and" as distributing the phrase "does not have" to each separate subsection. Pet. App. 8a–9a; *Pace*, 48 F.4th at 756 (Kirsch, J., concurring); *Palomares*, 52 F.4th at 647 (majority op.); *id.* at 651 (Oldham, J., concurring in the judgment).

Judges are thus deeply divided not just on the meaning of "and," but also on how to reconcile the three subparagraphs of § 3553(f)(1), which require that a defendant not have "(A) more than 4 criminal

history points," "(B) a prior 3-point offense," "and (C) a prior 2-point violent offense." 18 U.S.C. § 3553(f)(1).

Some judges have held that "and" must mean "or" to avoid rendering subparagraph (A) superfluous. In their view, a defendant with a prior three-point offense and a prior two-point violent offense will always satisfy subsection (A) by having at least five criminal history points. *See Palomares*, 52 F.4th at 645; *Pace*, 48 F.4th at 754; Pet. App. 7a–9a. Other judges, however, have concluded that no surplusage arises from construing "and" to mean "and." *See, e.g.*, *Jones*, 60 F.4th at 237; *Palomares*, 52 F.4th at 655 (Willett, J., dissenting); *Pace*, 48 F.4th at 763–64 (Wood, J., dissenting in part); *Haynes*, 55 F.4th at 1082–84 (Griffin, J., dissenting). Some defendants whom Congress could well have meant to protect can fall within the criteria in subsections (B) and (C) without also falling within subsection (A)'s criterion of four criminal history points. *See Garcon*, 54 F.4th at 1280–82 (under U.S.S.G. § 4A1.2(a)(2), two-point violent offense and three-point offense charged in same instrument score only three criminal history points); *id.* (under U.S.S.G. § 4A1.1(a)–(b) & cmts. 1–2, "stale" offenses do not generate countable criminal history points); *Jones*, 60 F.4th at 237 (agreeing with the reasoning in *Garcon*).

These disagreements among dozens of appellate judges about the meaning of "and" in the statute compellingly show that § 3553(f)(1) fails to provide adequate notice to would-be defendants. To be sure, "a division of judicial authority" alone is not "automatically sufficient to trigger lenity." *Moskal*, 498 U.S. at 108. But when federal judges cannot even agree on *why* "and" does not mean "and," criminal defendants should not receive more punishment for failing to

divine that counterintuitive result. *See Wooden*, 142 S. Ct. at 1082–83 (Gorsuch, J., concurring in the judgment); *McBoyle*, 283 U.S. at 27 ("[I]t is reasonable that a fair warning should be given . . . of what the law intends to do if a certain line is passed."). Under any standard of lenity, the statute should not have been construed against Mr. Pulsifer.

C. Applying the Rule of Lenity Here Avoids the High Costs of Reading Mandatory Minimums Too Broadly.

The mandatory-minimum context heightens the importance of "requir[ing] that Congress . . . sp[eak] in language that is clear and definite" before courts "choose the harsher alternative" interpretation. *Bass*, 404 U.S. at 347 (citation omitted). The costs of erroneously construing mandatory minimum sentencing provisions too broadly, and the safety-valve provision of the First Step Act too narrowly, are especially high: The mandatory minimum sentences that erroneously result inflict harm on many criminal defendants, their families, and society at large. Under the rule of lenity, this Court should adopt the interpretation of § 3553(f)(1) that makes discretionary sentencing available to more defendants, so that courts can exercise their sound judgment in the largest number of individual cases.

Mandatory minimum provisions often tie a prison sentence of years or decades (here, a decade and a half) to a single factual determination about the offense conduct. Mandatory minimum provisions therefore implicate a core concern that has motivated courts to apply the rule of lenity for centuries: a reluctance to impose a punishment of "extraordinarily disproportionate severity" unless Congress has clearly proscribed such a penalty. *United States v.*

Granderson, 511 U.S. 39, 53 (1994). For that reason, this Court does "not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner v. United States*, 358 U.S. 169, 178 (1958).

Mandatory minimum provisions are sometimes said to reflect the moral judgment of the community that particular conduct deserves harsher punishment in all cases, regardless of other circumstances. But in our system of government, we reserve judgments of that sort to the legislature. *See Granderson*, 511 U.S. at 69 (Kennedy, J., concurring in the judgment) ("'[L]egislatures and not courts should define criminal activity,' . . . and set the punishments therefor." (quoting *Bass*, 404 U.S. at 348)); *R.L.C.*, 503 U.S. at 309 (Scalia, J., concurring in part and concurring in the judgment) (describing one of "the rule of lenity's . . . purpose[s]" as "assuring that the society, through its representatives, has genuinely called for the punishment to be meted out").

Any criminal statute presents these concerns. But mandatory minimum provisions make them particularly weighty. Unlike other criminal laws, mandatory minimums are exceptions to the core moral principle of federal sentencing law that courts should "impose a sentence sufficient, but not greater than necessary," to accomplish the goals of criminal punishment after considering "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). A mandatory minimum is a congressional directive to subordinate justice in individual cases to a perceived need for greater deterrence or incapacitation generally.

Congress may choose to make that tradeoff (within constitutional bounds), but courts should ensure that Congress has actually done so before imposing needlessly harsh punishments in particular cases. *Cf. Busic*, 446 U.S. at 409 (in interpreting a sentencing enhancement, rejecting the "assumption that . . . Congress' sole objective was to increase the penalties . . . to the maximum extent possible").

The "harsh[]" consequences of erroneously expanding mandatory sentencing beyond the limits of congressional intent affect both criminal defendants and their families. *Bass*, 404 U.S. at 347 (citation omitted). Longer mandatory-minimum sentences make reentry into society harder: The longer defendants spend in prison, the fewer the resources and the weaker the support infrastructure they can expect upon release. And that makes it more likely that they will return to the people and circumstances that led them to commit crimes in the first place. *See* Andrew D. Leipold, *Is Mass Incarceration Inevitable?*, 56 Am. Crim. L. Rev. 1579, 1586 (2019). Children of the incarcerated likewise suffer: These innocent third parties face greater risks of health and psychological problems and generally have diminished educational and economic success. *See* Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, 278 Nat'l Inst. Just. 10, 10–16 (2017).

The costs of lengthy incarceration also extend to society more broadly. Mandatory minimums drain government resources, increasing the number of incarcerated individuals and imposing substantial costs to imprison them. *See* Barbara S. Vincent & Paul J. Hofer, *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings*, 7 Fed. Sent'g Rep. 33, 36–37 (1994). And despite their

intended deterrent effect, mandatory terms likely exacerbate crime since longer terms increase recidivism, thus generating more costs than they do benefits. *See* Daniel S. Nagin et al., *Imprisonment and Reoffending*, 38 Crime & Just. 115, 121 (2009); *see also* Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 Crime & Just. 65, 68 (2009).

And although mandatory-minimum sentences are motivated in part by the desire to generate uniformity in sentencing, they often have the opposite effect. *See* Kate Stith & Jose Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 123 (1998). As the Sentencing Commission has repeatedly reported, mandatory minimum sentences are "inconsistently applied" with "wide geographic variations." *E.g.*, U.S. Sent'g Comm'n, *Application and Impact of 21 U.S.C. § 851: Enhanced Penalties for Federal Drug Trafficking Offenders* 6 (2018). People of color are disproportionately affected by prosecutors' pursuit, and courts' imposition, of harsh mandatory-minimum sentences. U.S. Sent'g Comm'n, *An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System* 36 (2017) ("In fiscal year 2016, Hispanic offenders continued to represent the largest group of offenders (40.4%) convicted of an offense carrying a mandatory minimum penalty."); Lucius T. Outlaw III, *An Honest Drug Offender Sentencing Letter*, 17 Ohio St. J. Crim. L. 481, 488 (2020) ("[T]he numbers show that blacks are sentenced to mandatory minimum penalties at a higher rate than whites even though both racial groups are convicted for drug offenses at a similar rate"). If affirmed, the Eighth Circuit's interpretation of the safety-valve provision promises to heighten the disparate sentencing impacts on defendants of color.

It is precisely these concerns that led a historic bipartisan coalition in Congress to enact the First Step Act to ameliorate harsh mandatory minimum sentences for an expanded group of individuals. *See infra* at 20–22. Section 3553(f) should not be read to compel judges to impose sentences in violation of § 3553(a)'s "parsimony principle" when its text raises, at a minimum, a reasonable doubt that Congress intended such a reading. *Holguin-Hernandez v. United States*, 140 S. Ct. 762, 766 (2020) (citation omitted). Congress intended to allow low-level, nonviolent drug offenders to be sentenced under the Sentencing Guidelines rather than based on "mandatory statutory penalties" that "act as sledgehammers." Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2487 (2004). Because, at a minimum, the language Congress used raises a reasonable doubt, this Court should apply the rule of lenity to hold that defendants are eligible for safety-valve relief so long as they do not have all three of § 3553(f)(1)'s characteristics.

II. THE DECISION BELOW DEFEATS CONGRESS'S PURPOSE IN PROVIDING SAFETY-VALVE REFORM IN THE FIRST STEP ACT.

The Eighth Circuit's decision is also incompatible with congressional purpose. Congress broadened eligibility for safety-valve relief under § 402 of the First Step Act to allow low-risk drug offenders like Mr. Pulsifer to be eligible for sentencing under the Sentencing Guidelines, not mandatory minimums.

The First Step Act was enacted by a "historic bipartisan coalition—the likes of which, over the last several decades, Congress has rarely seen—[that] came together to bring greater fairness and justice to the Nation's criminal justice system." Br. of Sens.

Durbin, Grassley, Booker, and Lee as *Amici Curiae* 2, *Terry v. United States*, 141 S. Ct. 1858 (2021) (No. 20-5904). The statute passed both the Senate and the House "by a landslide." *Id.* at 8–9. One thing uniting these lawmakers was a desire to "give nonviolent, low-risk offenders and their families greater hope for a brighter future" and give "more Americans in the [f]ederal prison system . . . [a] second chance." 164 Cong. Rec. S7737, S7752 (daily ed. Dec. 18, 2018).

In enacting this "once-in-a-generation criminal justice reform" statute, Congress purposely aimed to reduce the prison population by departing from earlier rigid sentencing schemes. 164 Cong. Rec. S7823, S7838 (daily ed. Dec. 19, 2018). It did so by eliminating or moderating long sentences for broad swaths of defendants. For example, the statute made retroactive sections 2 and 3 of the Fair Sentencing Act of 2010—which reduced the racially disparate 100-to-1 crack-to-powder ratio and eliminated the mandatory minimum penalty for simple possession of crack cocaine. *See* Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (Dec. 21, 2018). The statute also significantly reduced penalties for recidivism and amended 18 U.S.C. § 924(c) so that defendants do not face decades-long "second or subsequent conviction" enhancements for multiple counts charged in a single prosecution. *Id.* § 401, 132 Stat. at 5220; *id.* § 403, 132 Stat. at 5221–22.

Congress likewise amended the safety-valve provision to ameliorate minimum penalties for low-level, nonviolent drug offenders. *Id.* § 402, 132 Stat. at 5221. The First Step Act empowers judges to use discretion more often, rather than being constrained by mandatory minimums, when sentencing such defendants, thereby giving more low-level, nonviolent drug

offenders a chance at redemption. As a co-sponsor of the bill explained, this "critical sentencing reform" aimed to "reduce mandatory minimums and give . . . discretion back" to "judges who sit and see the totality of the facts." 164 Cong. Rec. S7737, S7764 (Sen. Booker) (daily ed. Dec. 18, 2018). Granting judges authority to impose a sentence tailored to each individual "allow[ed] [them] to do the job that they were appointed to do—to use their discretion to craft an appropriate sentence to fit the crime." 164 Cong. Rec. S7756 (Sen. Nelson) (daily ed. Dec. 18, 2018). Among the principal objectives of the First Step Act was thus to allow judges to sentence more defendants "below mandatory minimums." 164 Cong. Rec. S7774 (Sen. Feinstein) (daily ed. Dec. 18, 2018).

In amending the safety-valve provision in particular, Congress sought to "shift[] the focus of sentencing judges away from the *length* of past sentences and toward the underlying *substance* of the past crimes." *Pace*, 48 F.4th at 765–66 (Wood, J., dissenting in part). Whereas safety-valve relief previously was not available to any defendant who had been sentenced just once to 60 days or more in prison, *see* 18 U.S.C. § 3553(f)(1) (2017), the revised provision makes safety-valve relief available based on the nature of the prior offenses—including the total number of current criminal history points as well as the size and violent nature of those offenses, *see id.* § 3553(f)(1)(A)–(C) (2018). Congress thus drafted the statute to "achieve[] a coherent policy objective": making discretionary sentencing available to more defendants (especially low-level, nonviolent offenders like Mr. Pulsifer), while continuing to mandate minimum penalties for a narrowly defined subcategory of violent recidivists with recent criminal histories. *Pace*, 48 F.4th at 764 (Wood, J., dissenting in part).

That view of § 3553(f) is harmonious with the rest of § 3553. In particular, the availability of safety-valve relief will not deter defendants from cooperating with law enforcement in order to receive a sentence below the Guidelines range. *See* 18 U.S.C. § 3553(e). Even where the safety-valve provision is triggered, defendants can gain a further departure by cooperating, and so § 3553(e) remains a meaningful incentive to encourage defendants to assist in law-enforcement investigations. That view is consistent with the experience of *Amici*.

The Eighth Circuit's holding, by contrast, turns the statute on its head by foreclosing safety-valve relief for the *vast majority* of defendants to whom the statutory amendment might apply. It is entirely unsurprising that "a significant number" of offenders "have a 2-point violent offense on their records." *Palomares*, 52 F.4th at 659 (Willett, J., dissenting). Under the Sentencing Guidelines, a defendant accrues two points for any prior sentence of 60 days or more—including for misdemeanors. U.S.S.G. § 4A1.1(b). Three-point offenses, where the sentence imposed was more than 13 months, also arise frequently: In the 2022 fiscal year alone, 23,745 defendants in the federal system—nearly 40%—had been convicted of at least one such offense. U.S. Sent'g Comm'n, *2021 Annual Report and Sourcebook of Federal Sentencing Statistics* 76 (2022).

Multiple-point offenses are particularly ubiquitous because, under the indeterminate sentencing regimes used by 34 states—such as where the court imposes a sentence of "one to five years"—a defendant's criminal history points are calculated based on the maximum term of imprisonment imposed (in this example, five years), even where time-to-be-served is

typically closer to the minimum term. U.S.S.G. § 4A1.2 cmt. 2; Edward E. Rhine et al., Robina Inst. of Crim. Law & Crim. Just., *Levers of Change in Parole Release and Revocation* 4 (2018), https://bit.ly/3Xi-Mit7. The maximum term drives the number of points even under sentencing regimes where parole or other conditional relief is standard (and was in fact granted) and even where defendants served only the minimum term (or less, in some states, based on good conduct). As a result, a defendant convicted of merely possessing or selling a small quantity of marijuana may end up accruing three points. *See, e.g.*, Ala. Code §§ 13A-12-211, 13A-5-6(a)(2) (mandatory two-year sentence for selling any amount of marijuana); Miss. Code Ann. § 41-29-139(b)(2)(A) (allowing sentence of up to three years for possessing "thirty . . . grams or less" of marijuana with intent to distribute); Mo. Ann. Stat. §§ 558.011, 579.020 (allowing sentence of up to four years for selling 35 grams or less of marijuana).

Consider the case of Nonami Palomares. She pleaded guilty to a single count for serving as the "'transporter of . . . heroin' from Mexico into the United States on a bus." Pet. 6, *Palomares v. United States*, No. 22-6391. Ms. Palomares's only other criminal offense, also a nonviolent drug crime, occurred nearly 20 years earlier, when she was 20 years old. *Id.* at 7. The district court nevertheless sentenced Ms. Palomares to the mandatory minimum sentence of 120 months in prison because, under its construction of the safety-valve provision, she was ineligible for discretionary sentencing as a result of her single three-point prior offense. *Ibid.*

The case of Eric Lopez also illustrates the harsh results that arise from the Eighth Circuit's interpretation of the safety-valve provision. Mr. Lopez was "a

low-level nonviolent drug offender who . . . cooperated with law enforcement." *United States v. Lopez*, No. 19-CR-0261-L, 2019 WL 3974124, at *7 (S.D. Cal. Aug. 21, 2019). His only criminal history points arose from a "prior conviction for spray painting a building" some ten years earlier. *Id.* at *3, *7. He clearly was not the sort of dangerous recidivist Congress thought should be ineligible for safety-valve relief. But had the district court in Mr. Lopez's case followed the Eighth Circuit's approach, that single three-point offense would have disqualified him from safety-valve relief, requiring a five-year mandatory minimum sentence. *Ibid.*

Such results are entirely at odds with what Congress sought to achieve in amending the safety-valve provision: that judges be allowed to use their discretion when sentencing low-level, nonviolent drug offenders. This Court should reject an interpretation of § 3553(f)(1) that nullifies Congress's purpose and results in harsh consequences for large numbers of criminal defendants.

CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted.

RYAN AZAD
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street
San Francisco, CA 94105

MARY PRICE
SHANNA RIFKIN
FAMM FOUNDATION
1100 H Street, N.W.
Suite 1000
Washington, D.C. 20005

PETER GOLDBERGER
50 Rittenhouse Place
Ardmore, PA 19003

DAVID DEBOLD
Counsel of Record
MAXWELL A. BALDI
LAVI M. BEN DOR*
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
ddebold@gibsondunn.com

JEFFREY T. GREEN
Co-Chair, AMICUS COMMITTEE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1600 L. Street N.W.
Washington, D.C. 20036

DAVID D. COLE
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005

BRANDON BUSKEY
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St.
New York, NY 10004

Counsel for Amici Curiae

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* Admitted only in New York and Pennsylvania; practicing under the supervision of principals of the firm.