No. 22-340

IN THE

Supreme Court of the United States

MARK PULSIFER,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JESSICA STENGEL
MICHAEL HOLLEY
JUDITH MINZER
Amicus Committee Members
NATIONAL ASSOCIATION OF FEDERAL DEFENDERS

VINCENT J. BRUNKOW
Counsel of Record
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 BROADWAY, STE. 900
SAN DIEGO, CA 92101
(619) 234-8467
vince_brunkow@fd.org

MICHAEL MARKS
Assistant Federal Public Defender
DISTRICT OF ALASKA

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. NAFD is a nationwide, non-profit, volunteer organization. Its membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. One of the guiding principles of NAFD is to promote the fair administration of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. Federal Defender organizations represent thousands of clients each year who are potentially eligible for Safety Valve relief under 18 U.S.C. § 3553(f), so *amicus* has particular expertise and interest in the issues presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In his brief, Petitioner Mark Pulsifer urges the Court to interpret 18 U.S.C. § 3553(f)(1) consistently with its plain meaning: "and" means "and." Petitioner ably explains why the Court should adopt this construction

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* made such a monetary contribution.

of the statute and reject the government's tortured "distributive" reading. *Amicus* concurs fully in Petitioner's argument that the plain meaning of the text carries the day: a defendant's criminal history must meet all three conditions in § 3553(f)(1)(A)–(C) to exclude the defendant from Safety Valve.

Amicus writes here to respond to two of the government's principal complaints with Petitioner's common-sense reading: that the conjunctive reading is implausibly arbitrary and that it violates the canon against surplusage. Opp. 8–10. First, *amicus* explains that Petitioner's interpretation of § 3553(f)(1) does not lead to absurd or arbitrary results. The government posits that certain defendants with lengthy criminal history might be eligible for Safety Valve relief under Petitioner's conjunctive reading. Opp. 9. But those hypothetical possibilities do not constitute the sort of impossibly absurd consequences that might warrant discarding the plain meaning of the statute. Moreover, as illustrated by several cases from the Circuits that employ Petitioner's reading of § 3553(f)(1), district judges have exercised discretion to impose appropriate sentences above the mandatory minimum when appropriate, even in the face of Safety Valve eligibility. The sky, it turns out, has not fallen.

Second, *amicus* explains that giving the word "and" in § 3553(f)(1) its ordinary meaning does not lead to surplusage. The government reasons that all defendants who have both a prior three-point offense under part (f)(1)(B) and a prior two-point offense under part (f)(1)(C) necessarily have more than four criminal history points, rendering part (f)(1)(A) superfluous. Opp. 8–9. This argument proposes an interpretation of those subsections inconsistent with the plain text of the law. The Safety Valve statute employs the specific

term 'prior offense'—instead of the Guidelines' distinct term 'prior sentence'—to include prior offenses that do not score criminal history points under the Guidelines. As a result, a person may have both a two-point violent offense and a separate three-point offense while not having more than four criminal history points. Part (A) is thus not superfluous under the conjunctive reading.

Last, *Amicus* explains why the government's proposed mode of statutory interpretation conflicts with the rule of lenity in the context of criminal law. The government has not offered a good faith attempt to resolve perceived ambiguity in the statute. Instead, the government asks the Court to keep digging into its bag of interpretive tools to manufacture ambiguity. This is the wrong way to approach statutory interpretation in the criminal law context. When a statute aims to provide notice of prohibited conduct or punishment to citizens, the Executive's identification of problems at the periphery of otherwise plain statutory language must yield to the application of the rule of lenity.

ARGUMENT

I. The Conjunctive Reading of § 3553(f)(1) Does Not Yield Absurd Results.

The First Step Act amended § 3553(f)(1) to expand the number of people who would be eligible for Safety Valve relief. *See* First Step Act of 2018, Pub. L. No. 115-391, § 402, 132 Stat. 5194, 5221. Still, the government complains that reading the text to mean what it says would make certain people with serious criminal history eligible for Safety Valve relief. *See* Opp. 9. In an attempt to transform that policy concern into legal argument, the government has proposed

that the conjunctive reading is " 'arbitrary enough to be implausible.' " *Id.* (quoting *United States v. Haynes*, 55 F. 4th 1274, 1280 (6th Cir. 2022)). The Court should reject this argument as untethered to precedent and factually overblown.

The government conspicuously abandons reference to the doctrine of absurdity in its response to the petition for certiorari. That argument gained very little foothold in the lower courts, which largely rejected the idea that the plain text reading of § 3553(f)(1) was absurd as a legal matter. *United States v. Jones*, 60 F.4th 230, 238 (4th Cir. 2023); *United States v. Garcon*, 54 F.4th 1274,1283–84 (11th Cir. 2022) (en banc); *United States v. Lopez*, 998 F.3d 431, 438–40 (9th Cir. 2021); *United States v. Palomares*, 52 F.4th 640, 658–59 (5th Cir. 2022) (Willett, J., dissenting); *Haynes*, 55 F.4th at 1085 (Griffin, J., dissenting); *United States v. Pace*, 48 F.4th 741, 765–66 (7th Cir. 2022) (Wood, J., dissenting in part). *But see Pace*, 48 F.4th at 755. Even Judge Branch, dissenting in *Garcon*, rejected the government's absurdity argument while preferring the disjunctive reading. *Garcon*, 54 F.4th at 1304 (Branch, J., dissenting).

Indeed, the government has never identified "rare and exceptional circumstances," *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930), that justify discarding the plain meaning of the statutory text. Section 3553(f)(1) identifies three "different type[s] of behavior suggestive of future dangerousness": (1) recidivism; (2) commission of serious crimes warranting long sentences; and (3) a history of violence. *Garcon*, 54 F.4th at 1283. The statute bars from eligibility only those defendants whose criminal history exhibits all three behaviors. As Petitioner capably explains, that

result falls well short of any absurdity "so gross as to shock the general moral or common sense." *Crooks*, 282 U.S. at 60. In fact, the scheme perfectly animates the First Step Act's expansion of Safety Valve by reserving harsh mandatory-minimum sentences for defendants with the most serious, recent, and violent criminal histories.

The government persists in its concern that Safety Valve eligibility for certain defendants under a conjunctive reading defies common sense. Opp. 9–10. The government finds it troubling that "'an incorrigible recidivist with, say, 24 criminal-history points, comprising a half-dozen convictions for robbery and two convictions for possession of explosives with intent to terrorize,' which are often 3-point offenses, 'would be eligible for safety-valve relief, for want of a prior *two*-point violent offense.'" *Id.* (quoting *United States v. Haynes*, 55 F. 4th 1075, 1080 (6th Cir. 2022)).[2] This hypothetical result, the government posits, counsels in favor of adopting its distributive reading as the "better" one. Opp. 10.

This argument fails because hypothetical unexpected results cannot undermine the plain meaning of a statute. "'[I]n the context of an unambiguous statutory text,' whether a specific application was anticipated by Congress 'is irrelevant.'" *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1751 (2020) (quoting *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998)).

[2] *Lopez* and Judge Wood (dissenting in *Pace*) see this problem as nonexistent, as they conclude a "2-point violent offense" means "violent offenses scoring two *or more* points." *See Lopez*, 998 F.3d at 440; *Pace*, 48 F.4th at 765 (Wood, J., dissenting). *Garcon* recognized this position but did not decide the question, as that case did not present it. *See Garcon*, 54 F. 4th at 1284.

Instead, courts must consider "the rationality of the overall statutory scheme and not whether a particular application of the scheme may lead to an arguably anomalous result." *Garcon,* 54 F.4th at 1284 (quotation marks and brackets omitted). Such "imperfection" is a normal and often unavoidable result of legislating 'at the macro level, not on a micro scale.'" *Id*. (quoting *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1229 (11th Cir. 2001)).

Moreover, the government's examples are not actually troubling. It makes sense that the amended Safety Valve statute is overinclusive at the margin. The First Step Act expanded the Safety Valve provision to avoid arbitrary sentences based on drug weight that "'fail[] to account for the unique circumstances of offenders who warrant a lesser penalty.'" *Garcon*, 54 F.4th at 1283 (quoting *Harris v. United States*, 536 U.S. 545, 568 (2002)). Congress chose a scheme that would make more defendants eligible for relief, even if the cost of that expansion was eligibility for some undeserving defendants. Eligibility, after all, does not guarantee a sentence under the mandatory minimum. Congress had confidence that judges would impose sentences at or above the mandatory minimum for any defendant whose criminal history warrants harsher punishment.[3] In other words, the amended Safety

[3] In fact, the government's cries of absurdity here are overblown, even under its *own* policies. At the same time the Solicitor General worries about too much discretion for judges to sentence below the mandatory minimum, the Attorney General has ordered his prosecutors to exercise similar discretion in their charging decisions. *See Attorney General's Memorandum re: Additional Department Policies Regarding Charging, Please, and*

Valve tolerates certain disparities in eligibility that judges have the discretion to fix at sentencing. That preference is not "arbitrary" or "implausible."

Indeed, sentences in the Fourth, Ninth, and Eleventh Circuits employing the conjunctive reading of § 3553(f)(1) illustrate this scheme functioning just as intended. Judges in these Circuits impose sentences at or above the mandatory minimum when warranted, even for defendants who are eligible for a lower sentence under § 3553(f).

In the Southern District of California, for example, a defendant was eligible for Safety Valve relief from a five-year mandatory minimum sentence, because he did not have a two-point violent offense as required by § 3553(f)(1)(C). Citing the defendant's prior drug smuggling activity and history of probation violations, however, the court imposed an 84-month sentence—two years higher than the mandatory minimum. United States v. Solis, No. 20-CR-2510-LAB (S.D. Cal.).

Similarly, a defendant in the Southern District of Florida was eligible for Safety Valve relief from a ten-year mandatory minimum sentence, because he had no prior violent offenses. The judge nonetheless imposed a sentence of 130 months, 10 months higher than the mandatory minimum. United States v. Pierre, No. 22-cr-20145 (S.D. Fla.).

Sentencing in Drug Cases (December 16, 2022), available at www.justice.gov/d9/2022-12/attorney_general_memorandum_-_additional_department_policies_regarding_charges_pleas_and_sentencing_in_drug_cases.pdf (requiring federal prosecutors to decline to charge drug quantities necessary to trigger a mandatory minimum in many cases).

In an extreme example from the Central District of California, a defendant was eligible for Safety Valve relief from a ten-year mandatory minimum sentence, again, because he had no prior violent offense satisfying § 3553(f)(1)(C). The judge imposed a sentence of 260 months, more than *double* the mandatory minimum, after concluding the defendant was a career offender. United States v. Chavez, No. 5:19-cr-0396-DSF (C.D. Cal.).

While imposing appropriately lengthy sentences for defendants with serious criminal history, judges in these Circuits have also taken advantage of the amended Safety Valve statute to show leniency when warranted. For example, a defendant in the Western District of Washington was eligible for Safety Valve relief because he had no two-point violent offense. He would have faced a five-year mandatory minimum sentence under the government's reading, because he had more than four criminal history points and a scoring, three-point offense. But exercising discretion granted by the amended Safety Valve statute, the judge imposed a sentence of 12 months and one day, reasoning that the defendant's consistent work as a journeyman laborer for his union and renewed dedication to parenting his young daughter warranted a mitigated sentence. United States v. Linder, No. 20-CR-5009-BHS (W.D. Wa.).

In the Southern District of California, another defendant faced a five-year mandatory minimum sentence, but was eligible for Safety Valve relief because she had no prior violent offense. She would have been ineligible under the government's reading of § 3553(f)(1) because she had more than four criminal history points. The judge ultimately imposed a 42-month sentence, believing the defendant's criminal

history was overstated and noting her pretrial commitment to drug rehabilitation. United States v. Villalba, No. 22-CR-113-TWR (S.D. Cal.).

In sum, the amended Safety Valve statute has accomplished exactly what it set out to do: expand the Safety Valve provision to provide relief to more deserving defendants while avoiding any windfall for defendants with serious criminal history. Petitioner's reading of § 3553(f)(1) is not absurd or implausible either in concept or practice. The government may raise its concerns over leniency with Congress, but its policy preference has no place in statutory interpretation.

II. The Conjunctive Reading of § 3553(f)(1) Does Not Lead to Surplusage.

The government argues that a conjunctive reading of § 3553(f)(1) leads to surplusage. As the government defines subsections 3553(f)(1)(A), (B), and (C), it contends a defendant whose criminal history satisfies parts (B) and (C) will also necessarily satisfy part (A). The conjunctive reading, then, makes part (A) superfluous, a conclusion shared by the Eighth Circuit in *United States v. Pulsifer*, 39 F. 4th 1018, 1021 (8th Cir. 2022), and divided panels in *Palomares*, 52 F. 4th at 644–46; *Haynes*, 55 F. 4th at 1080; and *Pace*, 48 F. 4th at 754. The government and these courts are wrong.

As an initial matter, the canon against surplusage is inapplicable because the text of § 3553(f)(1) is unambiguously conjunctive. "Surplusage does not always produce ambiguity and [the Court's] preference for avoiding surplusage constructions is not absolute." *Lamie v. U.S. Tr.*, 540 U.S. 526, 536 (2004). "Where there are two ways to read the text—either [a term] is

surplusage, in which case the text is plain; or [the term] is nonsurplusage [], in which case the text is ambiguous—applying the rule against surplusage is, absent other indications, inappropriate." *Id*. As Judge Willett puts it, "ignoring the plain meaning of a clearly understood word like 'and' is a more obvious and palpable problem than reading part of the statute as redundant." *Palomares*, 52 F. 4th at 657 (Willett, J., dissenting). Accordingly, the Court should decline to employ the canon against surplusage to inject ambiguity into the statute and adopt a counter-textual interpretation.

Moreover, the canon against surplusage provides no reason to read the statute in the "distributive" manner the government suggests. It turns out this depends not so much on application of the doctrine of surplusage, but rather on competing definitions of the three subsections of § 3553(f)(1). As *Jones*, *Garcon*, and *Lopez* define these subsections, no surplusage exists. The government urges this Court, however, to choose the definition of the subsections adopted by majority decisions in *Palomares*, *Haynes*, *Pace*, and *Pulsifer*. The government suggests this narrower definition—limiting prior "offenses" to those prior sentences that score criminal history points under the Guidelines—leads to surplusage under the conjunctive reading of (f)(1). Opp. 8–9. The problem for the government is that "the statute itself refutes this argument." *Garcon*, 54 F.4th at 1282.

As Eleventh Circuit Chief Judge Pryor—a former member of the Sentencing Commission—explained in his en banc opinion, "prior 3-point offense, as determined under the guidelines," and "prior 2-point violent offense, as determined under the guidelines," include certain 'offenses' which do not score criminal

history points. *Garcon*, 54 F. 4th at 1281–83 (providing, as examples, stale convictions, juvenile convictions, and convictions under the single-sentence rule of § 4A1.2(a)(2)); *see also Pace*, 48 F. 4th at 764 (Wood, J., dissenting) (tribal convictions). The court acknowledged that its interpretation "requires reading 'prior 3-point' and '2-point violent offense[s]' . . . to include offenses that do not contribute to the total criminal-history score," but explained, "this is a function of the statutory text." *Garcon*, 54 F.4th at 1282.

Section 3553(f)(1)(A) states a defendant must not have "more than 4 criminal history points[.]" The Sentencing Guidelines, for their part, tie the scoring of criminal history points to prior *sentences*, not the commission of *offenses*. *See, e.g.,* U.S.S.G. § 4A1.1(a) (instructing courts to add three points for each "prior sentence" of imprisonment). Sections 3553(f)(1)(B) and (C), on the other hand, refer to prior *offenses* rather than criminal history points. The Sentencing Guidelines use the word 'offense' distinctly to refer to "convictions that may or may not contribute to a criminal history score." *Garcon*, 54 F.4th at 1282; *see, e.g.,* U.S.S.G. § 4A1.2, app. n.3(A) (explaining that a prior sentence for a violent offense may not score criminal history points under the single-sentence rule of § 4A1.2(a)(2), but may serve as a "predicate offense" under the career offender guideline). Thus, "[u]nder the statute [§ 3553(f)(1)], criminal-history points [part (A)] are those that are actually scored, and a three-point offense [part (B)] is one that *would* add three points to the score, all else being equal." *Garcon,* 54 F.4th at 1282.

The practical application of the Guidelines reflects this distinction between prior offenses and criminal

history points. To advise a client properly, defense counsel must perform an initial analysis of the likely guideline range based on the offense level and criminal history. In calculating a client's criminal history, defense attorneys first look at each prior offense and determine whether it would normally score zero, one, two, or three points under § 4A1.1 based on the length of the sentence. The attorney then determines whether that sentence counts against the client's criminal history by applying the various rules and application notes found in § 4A1.2. In certain cases, the offense might not count for criminal history points because it is stale, the result of a juvenile adjudication, from a tribal court, or subsumed into a single sentence with another offense. But "[i]t makes no sense to say that a three-point offense suddenly ceases to be a three-point offense just because a different provision of the Guidelines requires it to be excluded for some reason." *Pace*, 48 F.4th at 764 (Wood, J., dissenting).

As explained in *Jones* and *Garcon* and the dissents to *Palomares* and *Pace*, circumstances abound where a person will have a three-point offense and a separate two-point violent offense but still have fewer than five criminal history points. This results from the plain text of the statute, which refers to "offenses" rather than the Guidelines' term "sentences."[4] Petitioner provides an exhaustive list of those circumstances, and

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[4] *Lopez* adopted a different interpretation of (f)(1)(B) and (C) that also avoids surplusage. *Lopez* held that "prior 2 point violent offense" refers to violent offenses scoring two *or more* criminal history points. 998 F.3d at 440. Section 3553(f)(1)(A) is not superfluous, according to *Lopez*, because it assures that a person with a lone three-point violent offense, satisfying *both* parts (B) and (C), would not be excluded from the Safety Valve unless he *also* had more than four criminal history points. *Id.*

amicus will not repeat them here. What these examples show is that the unambiguous text of § 3553(f)(1), with its distinct references to "criminal history points" and "prior offenses," produces no surplusage. Part (A) serves to ensure that a defendant is not excluded from Safety Valve based *solely* on offenses that do not score criminal history points under the Guidelines. As Judge Wood writes, the statute pays "careful attention to the structure of Chapter 4 [of the Sentencing Guidelines]" and "achieves a coherent policy objective—that is, categorically to exclude violent recidivists with recent criminal history from safety-valve eligibility." *Pace*, 48 F.4th at 764.

Various opinions below reach a contrary conclusion, all based on the idea that the term 'prior offense' is just a convenient substitute for the Guidelines' term 'prior sentence.' *See, e.g., Pulsifer*, 39 F.4th at 1021. If a 'prior offense' doesn't score criminal history points under the Guidelines, goes the argument, it doesn't satisfy parts (B) or (C). This proposition is where hostility to the plain text of § 3553(f)(1) is at its apex. "One cannot rescue the claim of surplusage by treating offenses that the guidelines do not include in the criminal history score calculation as zero-point offenses that do not satisfy either (B) or (C)." *Pace*, 48 F.4th at 764 (Wood, J., dissenting).

The Guidelines use very clear and succinct language: add points "for each prior *sentence* of imprisonment" of a certain length. *See* U.S.S.G. §§ 4A1.1(a)-(c) (emphasis added). There is no need for shorthand nor room for variation in expressing that command. Congress could easily have stated "prior sentence of imprisonment" instead of "prior offense" if it meant to

say what the government suggests. The choice of a different term implies a different meaning.[5]

Ultimately, the government's surplusage argument is a red herring. Section 3553(f)(1) does not result in surplusage when read conjunctively, and the Court could not discard the plain meaning of the statute even if it did.

III. Manufactured Ambiguity Must Yield to the Rule of Lenity.

Finally, *Amicus* urges the Court to reject the reasoning of *Palomares*, *Haynes*, *Pace*, and *Pulsifer* as nothing more than "[m]anufactured ambiguity." *See Palomares*, 52 F. 4th at 652 (Willett, J., dissenting). The text of § 3553(f)(1) is plain on its face, and a quick read resolves any question about its meaning in favor of Petitioner. The debate about this statute stems from a dissonance between what the text plainly says and what the government (and some jurists) expect it to say. But that discomfort provides no license for courts to rewrite the statute. And even if the Court perceives some ambiguity arising from the government's esoteric "distributive" reading, that ambiguity must yield to the rule of lenity.

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[5] Ironically, some of the same judges that read "offense" to mean "sentence" also reject *Lopez* as "rewriting" the statute by reading "2 point violent offense" to mean "2-point or 3-point violent offenses." *See, e.g., Garcon*, 54 F.4th at 1301 (Branch, J. dissenting). In contrast, *Jones* also rejected *Lopez*'s discussion of surplusage, but interpreted § 3553(f)(1) "without altering its plain language." 60 F.4th at 237. *Jones*, like *Garcon*, thus concluded that no surplusage exists. *Id.* Neither the government nor any court adopting the "distributive" reading has remained consistently faithful to the text of the statute like *Jones*.

"This Court has explained many times over many years that, when the meaning of the statute's terms is plain, [the Court's] job is at an end." *Bostock*, 140 S. Ct. at 1749. Although judicial canons of construction are useful "rules of thumb" to reveal the meaning of *ambiguous* statutes, they are inapplicable if the text of the statute is clear. *See Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992). The first and most important canon of construction is the presumption that the law's words mean what they say. *Id.* "When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Id.*

Yet armed with a wide array of interpretive canons, courts are often tempted to treat all statutes as if they were ambiguous and in need of judicial help to be correctly understood. *Palomares*, *Haynes*, *Pace*, and *Pulsifer* all give in to that temptation. They forget that the first thing a judge must do is simply read the text—not apply complex and esoteric legal and grammatical rules to pick it apart—just read it.

For example, *Pulsifer* recognizes that "[t]he most natural reading of 'and' is conjunctive" but posits that "[t]he important question here is what sense the statute uses the word 'and' in the conjunctive." 39 F.4th at 1021. Rather than adopt the plain meaning of the text, *Pulsifer* skips to another principal of statutory construction—the canon against surplusage—to resolve that question erroneously.

Judge Willett, in his well-penned dissent in *Palomares*, identified the danger in this sort of reasoning. He warned that "[m]anufactured ambiguity" poses a "special threat" to the proper interpretation of statutory text. *Palomares*, 52 F. 4th

at 652 (Willett, J., dissenting). "How can Congress express its will if everyday words slip into linguistic black holes so dense that settled language rules break down?" *Id*. Perhaps more troubling, how can a citizen conform with the law as written if the law is inherently ambiguous?

The "quixotic and far-fetched" resort, *see Lopez*, 998 F.3d at 441, n.11, to mystical powers of the em-dash and secondary canons of construction is just this sort of "manufactured ambiguity." The 'distributive' interpretation does nothing to undermine the plain meaning of § 3553(f)(1), which is apparent on the printed page. Instead, this counter-textual reading attempts to create ambiguity where none exists. The Court should not countenance this backward approach by beginning at the position that "and" is ambiguous. The Court's analysis should begin and end with the text, which is clear on its face.

Yet, even if the suggestion of ambiguity persuades the Court to examine alternative meanings of the text of § 3553(f)(1), the Court should reject the 'distributive' reading for another reason: the rule of lenity. *Garcon* put it best: "Even if our dissenting colleagues and the government were correct that our interpretation rendered part of section 3553(f)(1) superfluous, we would be faced with an ambiguous statute[.]" 54 F. 4th at 1285. Instead of resolving ambiguity, then, the government's reading at most triggers the rule of lenity. As this Court has explained, "[W]e cannot give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant." *Burrage v. United States*, 571 U.S. 204, 216 (2014).

Lenity applies in this case first because lenity is about *notice*. Justice Scalia cautioned that, although

"adequate notice is something of a fiction," it should not descend into "needless farce." *United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring). Here, the government suggests Petitioner should ignore the common usage of 'and,' note the em-dash, distribute the prefatory phrase, and voilà! He has reached the inevitable, (yet somehow, counter-textual) meaning of § 3553(1). If anything is absurd in this case, it is the suggestion that this proposed reading *resolves* ambiguity rather than creates it.

This Court has required that "'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so fair as possible the line should be clear.'" *United States v. Bass*, 404 U.S. 336 348 (1971) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)). Here, the distributive reading of § 3553(f)(1) requires interpretive leaps that deprive the public of fair warning about what the statute means.

"Closely related to its fair notice function is lenity's role in vindicating the separation of powers." *Wooden v. United States*, 142 S. Ct. 1063, 1083 (2022) (Gorsuch, J., concurring). "It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). The government here does not ask the Court to interpret a statute that is difficult to understand; it asks the Court to rewrite a statute it does not like. The government invites the Court to "make that dangerous move" of enlarging criminal liability because it fears § 3553(f)(1) is too lenient in certain cases. *See Palomares*, 52 F.4th at 659 (Willet, J., dissenting). "The rule of lenity prevents courts from using the absurdity doctrine to that end." *Id.*

CONCLUSION

The plain language of § 3553(f)(1) is controlling. No absurdity or surplusage exists and, even it did, neither would overcome the force of the text's clear meaning. This Court should reverse the Eighth Circuit and hold that a defendant is only barred from Safety Valve relief if his criminal history contains more than four criminal history points, a prior three-point offense, *and* a prior violent two-point offense.

Respectfully submitted,

JESSICA STENGEL
MICHAEL HOLLEY
JUDITH MINZER
Amicus Committee Members
NATIONAL ASSOCIATION OF FEDERAL DEFENDERS

VINCENT J. BRUNKOW
Counsel of Record
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 BROADWAY, STE. 900
SAN DIEGO, CA 92101
(619) 234-8467
vince_brunkow@fd.org

MICHAEL MARKS
Assistant Federal Public Defender
DISTRICT OF ALASKA

May 26, 2023