No. 22-340

In the Supreme Court of the United States

MARK E. PULSIFER, PETITIONER

v.

UNITED STATES

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The safety-valve in the federal sentencing statute, 18 U.S.C. § 3553(f), requires a district court to impose a sentence based on the Sentencing Guidelines, regardless of any statutory mandatory minimum, when the defendant is convicted of certain nonviolent drug offenses and satisfies the criteria in § 3553(f)(1), (f)(2), (f)(3), (f)(4), *and* (f)(5). Thus, the government observes, a defendant must meet all 5 sets of criteria to be eligible. Subsection (f)(1) has the same structure: The defendant satisfies subsection (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." *Id.* § 3553(f)(1) (emphasis added). Put simply, "and" does the same work for § 3553(f)(1)(A) through (C) as it does for § 3553(f)(1) through (5), and a defendant satisfies § 3553(f)(1) so long as he does not have (A), (B), *and* (C)—all three. But now the government wants to change the rules. It claims that, to satisfy § 3553(f)(1), the defendant must not have (A), (B), *or* (C)—any of them.

As Judge Willett has explained, that heads-I-win, tails-you-lose approach is just as wrong as it sounds. *United States v. Palomares*, 52 F.4th 640, 654-55 (5th Cir. 2022) (Willett, J., dissenting). And as Thomas Lee and his fellow corpus linguistics scholars have confirmed based on extensive empirical evidence drawn from a study tailored to this very case, it sounds pretty wrong. Professors' Corpus Linguistics Br. 20-28. "And" means "and," not "or," especially in a

conjunctive negative proof like § 3553(f)(1). *See* A. Scalia & B. Garner, *Reading Law* 120 (2012). The only ordinary, natural interpretation of § 3553(f)(1) is that "and" joins the conditions framed in the negative, making the defendant eligible for relief unless he triggers (A), (B), *and*—not *or*—(C). Had Congress meant otherwise, it would have written "or."

The government never grapples with ordinary meaning. It dodges the corpus linguistics brief. It doesn't explain why, if its reading is correct, Congress didn't use "or" (the ordinary choice) but instead chose "and" (an unordinary, unnatural choice). Instead, the government's argument goes like this: Here are examples of "and" taking a "distributive" sense. The Court must look at context to decide what sense "and" takes. Context shows that our policy reading is better. And the surplusage canon shows that Pulsifer must be wrong.

The government gets statutory interpretation backward at each step.

First, "and" ordinarily joins things together when it is used, as in § 3553(f)(1), to connect conditions framed in the negative. Indeed, the government fails to identify *any* example—from the U.S. Code, the various books it cites, or even thin air—in which "and" functionally means "or" when it connects conditions framed in the negative, the very structure of § 3553(f)(1). The government ignores the "overwhelming evidence" showing that, in a negated list like § 3553(f)(1), "'and' is the coordinator ordinarily used to express joint meaning." Professors' Corpus Linguistics Br. 23. Instead, the government asks for a judicial amendment: either replace "and" with "or," or write "does not have" into § 3553(f)(B) and (C). But courts

construe statutes to mean what they say. Even if "Congress goofed"—and it didn't—the Constitution gives the Court no license to "save Congress from itself" and "make § 3553(f)(1) say what it objectively, demonstrably, verifiably does not say." *United States v. Garcon*, 54 F.4th 1274, 1290 (11th Cir. 2022) (en banc) (Newsom, J., concurring).

Second, the government's invocation of context gets it nowhere. For one thing, context doesn't trump ordinary meaning. *Lamie v. United States Trustee*, 540 U.S. 526, 536 (2004). For another, most of the government's "context" arguments are really outcome-oriented policy arguments in disguise. But "no amount of policy-talk can overcome a plain statutory command." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021). And even if statutory purpose were relevant, it's Pulsifer's reading of the statute, not the government's, that accomplishes Congress' goals. Giving "and" its ordinary, joint meaning makes sense given the purpose of the First Step Act: to make safety-valve relief more widely available for nonviolent drug offenders so that disproportionate mandatory minimums do not prevent sentencing courts from exercising their "wide discretion" to impose appropriate sentences. *Concepcion v. United States*, 142 S. Ct. 2389, 2395 (2022) (citation omitted).

When it comes to actual context, the government has no answer to serious contextual problems with its reading: to the presumption of consistent usage ("and" must mean the same thing in § 3553(f) as it does in § 3553(f)(1)); or to the meaningful variation canon (Congress knows how to use "or"). The centerpiece of the government's argument—its only affirmative argument aside from policy—is that the Court must blue-pencil the statute to avoid surplusage. But even

putting aside the surplusage canon's inability to trump ordinary meaning, giving "and" its joint meaning does not create surplusage. Indeed, as Chief Judge Pryor explained, "the statute itself refutes [the government's surplusage] argument" by making clear that points and offenses are distinct concepts. *Garcon*, 54 F.4th at 1281-83.

Finally, the rule of lenity prohibits reading the "and" in § 3553(f)(1) to mean "or," because courts cannot give a word in a criminal statute a meaning that is different from its plain meaning and that favors the government. The government claims lenity doesn't apply because § 3553(f)(1) doesn't define a crime or penalty. But lenity also "applies to sentencing … provisions," *United States v. Batchelder*, 442 U.S. 114, 121 (1979), and § 3553(f)(1) is a sentencing provision. Moreover, because the government fails to show that "and" *clearly* means "or," the best it can do is show "grievous ambiguity." Pulsifer wins.

ARGUMENT

A. The plain, ordinary meaning of "and" in 18 U.S.C. § 3553(f)(1) is "and," not "or."

The beginning and end of this case is the ordinary meaning of "and" when it connects conditions framed in the negative: "and" means "and," in its ordinary, joint sense. The "and" in § 3553(f)(1) thus joins subparagraphs (A), (B), *and* (C) together, meaning a defendant is eligible for safety-valve relief when his criminal history does not trigger all three.

The government claims "and" functionally means "or": a defendant must not have any of § 3553(f)(1)(A), (B), *or* (C) to be eligible for safety-valve relief. That "functionally disjunctive" (or "distributive") reading

fails. It's unordinary, as corpus linguistics confirms—it's rewriting, not reading.

1. In a conjunctive negative proof, "and" ordinarily bears its joint meaning—"and."

a. "And" ordinarily joins things together. When "and" connects conditions, it joins them in a list, meaning *every* condition must be met. For instance, if a child must clean the dishes, take out the trash, *and* sweep the garage before she can play, she gets to play only if she completes all three chores. The logic applies no matter whether the conditions are framed in the affirmative (chefs *must* wash their hands with soap *and* water before cooking) or negative (you *must not* drink *and* drive). The "and" couples the conduct such that the specified actions are either individually insufficient but cumulatively satisfactory (affirmative conditions) or individually permitted but cumulatively prohibited (negative conditions). Pulsifer Br. 18.

In a "conjunctive negative proof," *Reading Law* 120—or "negated conjunction," Professors' Corpus Linguistics Br. 1—"and" ordinarily joins the negative conditions, as in, to be eligible, you *must not* do A, B, *and* C—all three. Take the scholarship-eligibility example, which the government ignores: "All student-athletes are eligible for an academic scholarship, provided that the student during the previous semester *did not*—(A) miss more than five classes; (B) fail to submit a paper in the semesterly, campus-wide writing competition; *and* (C) earn less than a 3.0 GPA." Pulsifer Br. 18-19. A student-athlete is scholarship-eligible unless his past conduct triggers (A), (B), *and* (C).

As Thomas Lee and his colleagues explain, the "data on ordinary meaning" provides "overwhelming evidence" that "and" is "ordinarily used to express [a] joint meaning" when used in "a negated conjunction." Professors' Corpus Linguistics Br. 6, 23-24. The evidence also "confirms that a negated disjunction"—*e.g.*, to be eligible, you must not do A, B, *or* C—"is the more ordinary way" to say that the person must do *none* of the specified things. *Id.* at 24. English speakers understand that "and" ordinarily carries a joint sense when it connects conditions framed in the negative. They also understand that it is "unnatural" to use a negated conjunction "to express a distributive meaning." *Id.*

b. Section 3553(f)(1) is a conjunctive negative proof. Congress used "and" to connect three conditions framed in the negative: To be eligible for safety-valve relief, the defendant must not have (A), (B), *and* (C). Given the ordinary, joint meaning of "and" in negated conjunctions, a defendant is eligible for safety-valve relief if his criminal history does not trigger § 3553(f)(1)(A), (B), *and* (C). Had Congress meant to deny safety-valve relief to a defendant whose criminal history triggers (A), (B), *or* (C), "it easily could have drafted language to that effect." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 169 (2014). Because "or" is the ordinary way to convey that conditions in a negated list are not joined together, common sense says that Congress would have used "or" if it meant "or." *See Niz-Chavez*, 141 S. Ct. at 1481.

All agree that Pulsifer does not have a prior 2-point violent offense, meaning his criminal history does not trigger § 3553(f)(1)(C). Because Pulsifer does not have the complete combo—(A), (B), *and* (C)—he is eligible for safety-valve relief.

2. The functionally disjunctive reading fails.

The government claims that the "and" in § 3553(f)(1) functionally means "or." That reading gives "and" an unordinary, "distributive" meaning. The government doesn't provide *a single example* of a distributive "and" when "and" connects conditions framed in the negative, as in § 3553(f)(1). It instead presses a reading that requires judicial amendment: replace "and" with "or," or insert "does not have" twice into the statute.

a. The government's reading is unordinary.

i. Rather than grapple with ordinary meaning when "and" connects negative conditions, the government claims that "[t]he *only* way to answer [the question presented] is through context." Br. 13 (emphasis added). Wrong. Courts "start" with and "proceed from" the "ordinary meaning" of an undefined term. *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) (citation omitted). Ordinary meaning is "[f]irst and foremost," *Mount Lemmon Fire Dist. v. Guido*, 139 S. Ct. 22, 25 (2018), but the government leaps past it.

The government also fails to confront the fact that § 3553(f)(1) is a quintessential conjunctive negative proof. Instead, it suggests (Br. 41 n.5) that *Reading Law* and corpus linguistics don't matter because neither accounts for context, like surplusage. True, context can shed light on congressional intent. (Here, context confirms that "and" carries its ordinary meaning in § 3553(f)(1). *Infra* pp. 13-16.) But context—especially supposed surplusage—cannot change a term's ordinary meaning. And the government's reading simply is unordinary. Empirical data shows that

it is "unnatural" to use "and" distributively in a negated conjunction. Professors' Corpus Linguistics Br. 6, 24. "For speakers who intend to express the distributive meaning, 'or' is a more ordinary, natural choice than 'and.'" *Id.* at 28. In short, "the text enacted in § 3553(f)(1) is not a natural, ordinary way to express [a distributive] meaning." *Id.* at 21.

ii. While the government offers some examples where "and" could be distributive (Br. 14-18, 39-40), none shows that "and" ordinarily is distributive when it connects conditions framed in the negative—the structure of § 3553(f)(1).

First, the government identifies *no* conjunctive negative proof where the "and" is distributive rather than joint. Instead, the government mostly offers affirmative statements, like Jane sells red, white, and blue caps. U.S. Br. 14. But make that statement negative—Jane does not sell red, white, and blue caps—and the government's argument falls apart. Either Jane doesn't sell red caps, white caps, *and* blue caps—all three—or she doesn't sell tricolored caps. But an ordinary speaker would not think that Jane sells red caps and white caps but not blue caps.

Second, none of the government's examples (Br. 16-17, 39-40) pertains to conditions, affirmative or negative. Most are authority-vesting provisions, like "Congress shall have the Power … To define and punish Piracies and Felonies committed on the high Seas." U.S. Const. art. I, § 8, cl. 10; *see also id.* art. I, § 8, cls. 3, 11; *id.* art. III, § 2, cl. 1; 18 U.S.C. § 1963(h). Other examples are definitional provisions, like 26 U.S.C. § 170(f)(16)(D), which specifies what the term "household items" "includes" and "does not include." *See also* 5 U.S.C. § 105; 34 U.S.C. § 20101(f). Because

none of these examples is a set of conditions, *i.e.*, nothing must (or must not) happen, the "and" need not carry a joint sense. Conditional requirements are different. The chores-before-play example proves the point. *Supra* p. 5. No English speaker would say that completing fewer than all three chores satisfies the conditions necessary for play. Perhaps that's why the government ignores this example, just like it ignores the scholarship-eligibility example.

The government's remaining examples likewise lack conditional requirements and likewise miss the mark. If Elizabeth says, "I'm not free on Saturday and Sunday," U.S. Br. 39, Brian would understand that she is unavailable all weekend. Elizabeth is referring to the full unit (the weekend) and each of its parts (Saturday and Sunday). It thus makes no difference whether the "and" is joint or distributive—it's all the same. Ditto for the parents example. *Id.* Turn to Acme, which "shall not notify Able and Baker." U.S. Br. 15. Perhaps the "and" could be distributive. But like the admonition "don't drink and smoke," empirical evidence shows "that this is an unnatural way to express distributive meaning." Professors' Corpus Linguistics Br. 24. Again, in negated lists, "overwhelming evidence" establishes "that 'and' is the coordinator ordinarily used to express joint meaning … while 'or' is the coordinator ordinarily used to convey distributive meaning." *Id.* at 23.

Lastly, in straining to show that "and" *could* be distributive, the government doesn't suggest, much less argue, that "and" *ordinarily* is distributive *in a conjunctive negative proof*. That silence undermines the government's passing reliance on "math and formal logic," which uses "parentheses and brackets" to indicate meaning. U.S. Br. 15. Indeed, as the

government acknowledges, people "do not use brackets in ordinary language." Br. 16.

b. The government functionally replaces the "and" in § 3553(f)(1) with "or."

As Chief Judge Pryor explained, the government's interpretation requires the Court "to read 'and' to mean 'or.'" *Garcon*, 54 F.4th at 1280; *see* Pulsifer Br. 27. But courts have no authority "to rewrite this statute (or any other)." *Bartenwerfer v. Buckley*, 143 S. Ct. 665, 675 (2023).

The government says it makes no difference whether its interpretation "functionally" transforms "and" into "or" because DeMorgan's theorem permits "mov[ing] back and forth between disjunctive and conjunctive propositions as long as we are mindful about negations." Br. 25-26 (citation omitted). But the question is what Congress meant when it used "and" rather than "or" in § 3553(f)(1), not whether "an inferential rule of Boolean algebra," *Palomares*, 52 F.4th at 649 (Oldham, J., concurring in the judgment), lets the government "mindfully" line-edit statutes. Moreover, even those who would read "and" as "or" recognize "that ordinary English does not beget the sort of epistemic certainty that De Morgan invoked." *Id.* at 652.

Corpus linguistics also "cuts the other way." Professors' Corpus Linguistics Br. 21. The U.S. Code and general usage show that, contrary to the government's evidence-free assertion, "and" and "or" "are not interchangeable, and that 'or' is the more common way to express a distributive meaning." *Id.* Rejecting that insight would let "everyday words slip into linguistic black holes so dense that settled language rules break down," leaving Congress unable to "express its will."

Palomares, 52 F.4th at 652 (Willett, J., dissenting). The result would be "a body blow" not just to "our language, and our language-dependent legal system," *id.*, but also to "the separation of powers," *Garcon*, 54 F.4th at 1290 (Newsom, J., concurring).

The government wants to replace § 3553(f)(1)'s "and" with "or." But courts must "apply faithfully the law Congress has written." *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 89 (2017).

c. The government twice inserts "does not have" into § 3553(f)(1).

Sharpening its blue pencil, the government next reads § 3553(f)(1) to say that a defendant is eligible for safety-valve relief if he (A) *does not have* more than 4 criminal-history points; (B) *does not have* a prior 3-point offense; and (C) *does not have* a prior 2-point violent offense. Br. 13; Pulsifer Br. 27-28; *see Garcon*, 54 F.4th at 1280 (Pryor, C.J.); *Palomares*, 52 F.4th at 653-54 (Willett, J., dissenting). Congress did not enact the italicized words, and courts cannot "add" them to the statute. *62 Cases of Jam v. United States*, 340 U.S. 593, 596 (1951).

Apart from invoking a "far-fetched and quixotic em-dash theory," *United States v. Lopez*, 998 F.3d 431, 441-42 n.11 (9th Cir. 2021)—more on that below—the government does not justify its amendment with principles. It instead cites two examples—an authority-vesting provision, U.S. Const. art. I, § 8, cl. 11, and a definitional provision, 34 U.S.C. § 20101(f)—and reasons that because nobody would suggest that it is "textually impermissible" to squint at the text in those examples, there must be "nothing impermissible" about injecting new words into § 3553(f)(1). Br. 38. But the examples are inapposite. *Supra* pp. 8-9. The

government identifies no conjunctive negative proof susceptible to judicial revision.

Now for the em-dash. The government claims (Br. 38) that § 3553(f)(1)'s em-dash ("the defendant does not have—") authorizes adding the words "does not have" to subparagraph (A), *and* subparagraph (B), *and* subparagraph (C). *See* Pulsifer Br. 28-31. Abandoning the view that the em-dash is "the most important textual basis for [the] 'distributive' reading," *United States v. Pace*, 48 F.4th 741, 754 (7th Cir. 2022), the government now waffles, saying "such a structure is neither necessary nor sufficient for a distributive interpretation." Br. 39.

Whatever that means, one thing is clear: The em-dash theory "would effectively eliminate all mandatory minimums for drug crimes." *Palomares*, 52 F.4th at 654 (Willett, J., dissenting). Recall that § 3553(f) and § 3553(f)(1) share the same structure: a prefatory clause ending with an em-dash, then a list of conditions separated by semicolons and line breaks. Pulsifer Br. 29-30. Section 3553(f)'s prefatory clause essentially says, "the court shall impose a sentence without regard to any mandatory minimum if it finds that—", followed by a five-part list connected by the conjunctive "and." The government says that "each item" following the em-dash "must be a logical and grammatical continuation of the [prefatory clause] so that the two can be read together, without regard to the rest of the provision, as a complete grammatical sentence or phrase. Br. 38 (citation omitted). But if that's right, then a defendant who satisfies *any one of* (f)(1), (f)(2), (f)(3), (f)(4), *or* (f)(5) would qualify for safety-valve relief.

Take subparagraph (f)(3). On the government's logic, the statute would say, "the court shall impose a sentence without regard to any mandatory minimum if it finds that the offense did not result in death or serious bodily injury to any person." Because subparagraph (f)(3) must be read "without regard to the rest of the provision," U.S. Br. 38 (citation omitted), it becomes a "separate" condition, *Palomares*, 52 F.4th at 654 (Willett, J., dissenting). Thus, "a defendant would qualify for safety valve relief by satisfying any one of the five elements" in § 3553(f)(1) through (5), just as a defendant, under the government's reading, would fail § 3553(f)(1) if he has "any one" of the three elements in § 3553(f)(1)(A) through (C). *Id.* at 655 n.15.

The government doesn't engage with the consequences of its em-dash theory. It doesn't dispute that the Court would have to "distribute all of the text" in § 3553(f), *id.* at 651 n.2 (Oldham, J., concurring in the judgment), if the em-dash theory is to be "applied consistently," *id.* at 654 (Willett, J., dissenting). It instead suggests (Br. 43 n.6) that consistency is not a concern because § 3553(f)'s conditions are affirmative but § 3553(f)(1)'s conditions are negative. But "[w]hy should an em-dash function one way when it is preceded [by] the word 'not,' and another way when it isn't?" *Id.* Statutory Calvinball, apparently.

B. Context confirms that Congress used ordinary English in § 3553(f)(1).

At least four contextual clues—the presumption of consistent usage, the meaningful-variation canon, common sense, and the Senate's legislative drafting manual—confirm that Congress used "and" in § 3553(f)(1) in its ordinary, joint sense.

Despite arguing that the question presented turns entirely on context, the government makes no contextual argument that explains why Congress used "and" rather than "or," something no ordinary English speaker would have done. It instead relies only on the surplusage canon, claiming the Court must rewrite the statute to save § 3553(f)(1)(A). The government is wrong. Ordinary language supersedes the surplusage canon, and there is no surplusage anyway.

1. Context shows that Congress would have used "or," not "and," had it meant to limit safety-valve relief to defendants whose criminal history does not trigger § 3553(f)(1)(A), (B), or (C)—*i.e.*, any of them.

a. The presumption of consistent usage and meaningful variation canon confirms that Congress used ordinary English in § 3553(f)(1). Pulsifer Br. 20-22. Congress used "and" twice in the same sentence: to join § 3553(f)(1) through (5), and to join (f)(1)(A) through (C). All agree that the "and" connecting (f)(1) through (5) carries its ordinary, joint meaning. The presumption of consistent usage—which is at its zenith given that § 3553(f) is one long sentence, *Brown v. Gardner*, 513 U.S. 115, 118 (1994)—thus says that the "and" connecting (f)(1)(A) through (C) is also joint. Had Congress intended otherwise, the meaningful-variation canon says it would have used "or," as it did elsewhere in the statute. Take § 3553(f)(2) and (4). Both are *disjunctive* negative proofs, *see* Pulsifer Br. 21, confirming that Congress knows how to connect conditions framed in the negative so "that the satisfaction of a single listed condition is disqualifying," *United States v. Jones*, 60 F.4th 230, 235 (4th Cir. 2023). Congress' choice of "and" instead

of "or" in § 3553(f)(1) thus suggests that Congress meant to convey "that only satisfaction of all conditions is disqualifying." *Id.*

The government responds with semantics, not substance, claiming that Pulsifer has mislabeled the "distributive reading" as "functionally disjunctive." Br. 42. That misses the point. The meaningful-variation canon shows that Congress uses a different term to "denote[] a different idea." *Reading Law* 170. But giving § 3553(f)(1)'s "and" a distributive meaning ("not A, not B, *and* not C"), denotes *the same idea* as if Congress had used "or" ("not A, B, *or* C"). Linguistic black holes, indeed.

The government also claims that its reading gives the "and" connecting § 3553(f)(1) through (5) "the same conjunctive meaning" as the "and" connecting (f)(1)(A) through (C). Br. 42. Nonsense. "All agree that the 'and' in § 3553(f) has a joint sense." Pulsifer Br. 3. But the government claims the "and" in § 3553(f)(1) has a "distributive sense." Br. 9 (quoting Pet. App. 8a). How can each "and" can have "*the same* conjunctive meaning" (U.S. Br. 42 (emphasis added)) if one is joint while the other is distributive? They can't. If they did, Pulsifer would be eligible simply by satisfying any one of subparagraphs (f)(1) through (f)(5). *Supra* pp. 12-13.

b. "Context also includes common sense." *Biden v. Nebraska*, 143 S. Ct. 2355, 2379 (2023) (Barrett, J., concurring). And common sense confirms that the government's "claim that Congress chose 'and' to express the distributive meaning calls for explanation," whereas Pulsifer's "claim that Congress chose 'and' to express the joint meaning does not." Professors' Corpus Linguistics Br. 28; *see supra* p. 6.

What the government calls common sense (Br. 20-21, 34-37) is just its policy view. It argues, for example, that because Congress "could have" thought that each criminal-history factor in § 3553(f)(1) is serious enough to be "independently disqualifying," common sense "point[s] definitively to the distributive interpretation." Br. 21. But courts cannot "elevate vague invocations of statutory purpose over the words Congress chose." *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1792-93 (2022); *see infra* pp. 20-21. Besides, common sense "goes without saying," *Biden*, 143 S. Ct. at 2379 (Barrett, J., concurring), and the government's reading requires much explanation. If the government is right, why didn't Congress just use "or"? *See Barton v. Barr*, 140 S. Ct. 1442, 1453 (2020). Why didn't it follow the Senate's legislative drafting manual? Pulsifer Br. 22. The government can't say.

2. The surplusage canon does not help the government.

The government's *only* affirmative argument, aside from policy, is that the Court must rewrite the statute to avoid surplusage. According to the government (Br. 19-20), a defendant with a prior 3-point offense triggering § 3553(f)(1)(B) and a prior 2-point violent offense triggering § 3553(f)(1)(C) will *always* have more than 4 criminal-history points under § 3553(f)(1)(A), making subparagraph (A) superfluous. The only remedy, the government concludes, is to rewrite the statute.

The surplusage canon does no work here. *First*, the canon doesn't trump ordinary language, and the government cannot refute that "and" ordinarily is joint when used in a conjunctive negative proof.

Second, there is no surplusage anyway, because subparagraph (A) has independent force.

a. Text and context control.

As Judge Newsom explained, even if § 3553(f)(1) has some redundancy, applying the surplusage canon means ignoring "§ 3553(f)(1)'s plain text." *Garcon*, 54 F.4th at 1290 (Newsom, J., concurring). Engaging "in interpretive gymnastics to make § 3553(f)(1) say what it objectively, demonstrably, verifiably does not say" is impermissible. *Id.*; *see Lamie*, 540 U.S. at 536; Pulsifer Br. 34. The government responds (Br. 33) with its tired semantic mantra that the distributive reading does not functionally transform "and" into "or." The defense is meritless. *Supra* pp. 10-11.

Judge Willett identified another reason the surplusage canon lacks force: the government's reading "*also* violates the canon against surplusage." *Palomares*, 52 F.4th at 657 (Willett, J., dissenting). If § 3553(f)(1)'s prefatory clause—"the defendant does not have"—distributes to subparagraphs (A) through (C), making those subparagraphs "operate independently regardless of what word appears between them," then the "word could be 'and,' 'or,' or no word at all." *Id.* The government responds that the distributive reading "gives 'and' a conjunctive meaning." Br. 33. But if the government is correct, then *no word* is needed to connect subparagraphs (A) through (C). The distributive reading thus fails to give effect to "every word" of § 3553(f)(1). *Marx v. General Revenue Corp.*, 568 U.S. 371, 385 (2013).

b. There is no surplusage anyway.

As Chief Judge Pryor explained, giving "and" its joint meaning does not produce surplusage, because defendants who have a prior 3-point offense under

§ 3553(f)(1)(B) and a prior 2-point violent offense under § 3553(f)(1)(C) do not always have more than 4 criminal-history points under § 3553(f)(1)(A). *Garcon*, 54 F.4th at 1281-83. The reason: not every sentence for a prior *offense* earns criminal-history *points*. Pulsifer Br. 36-42. The government's response, that an *offense* cannot be associated with *points* unless those points are counted (Br. 27-32), is wrong. Indeed, as Chief Judge Pryor explained, § 3553(f)(1)(A) itself "distinguishes between points associated with an 'offense'—points that may or may not count towards the criminal-history score—and the final tally of 'criminal history points'" by instructing that the 4-point criminal-history count should exclude 1-point offenses. *Garcon*, 54 F.4th at 1282.

Guidelines principles. Courts must consult "the sentencing guidelines" when determining whether a defendant has more than 4 criminal-history "points" and a prior 3-point and 2-point "offense." 18 U.S.C. § 3553(f)(1). All agree that courts assign (a) 3 points to each prior sentence of imprisonment exceeding 13 months; (b) 2 points to each prior sentence of imprisonment between 60 days and 13 months; and (c) 1 point to each prior sentence of imprisonment for less than 60 days. *See* U.S.S.G. § 4A1.1(a)-(c); U.S. Br. 6. And "there are at least two" circumstances where points can be associated with an offense but not counted. *Garcon*, 54 F.4th at 1281.

Application. Start with the single-sentence rule. Pulsifer Br. 39-40. Under the Guidelines, prior "offenses contained in the same charging instrument" and prior sentences "imposed on the same day," *do not* count toward the defendant's criminal-history score. U.S.S.G. § 4A1.2(a)(2). Even so, as application note 3 to § 4A1.2(a)(2) confirms, points can be associated

with an offense without being counted toward the criminal-history score. Note 3 explains that a prior offense that "would have received 2 criminal history points under § 4A1.1(b)" absent the single-sentence rule may still serve as a predicate *offense* under the Guidelines and thus "should be treated as if it received criminal history points." U.S.S.G. Manual § 4A1.2 cmt. n.3 (Nov. 2018). In English, a 2-point offense can still be a 2-point offense even if it doesn't score criminal-history points.

In response to note 3, the government asserts that "subparagraphs (B) and (C) of Section 3553(f)(1) care only about offenses that *do* score three or two criminal-history points." Br. 28-29. The statute doesn't say that. And contrary to the government's argument, the Guidelines do "contemplate" "an offense that does not result in adding two or three points to a defendant's total points, but is still a two- or three-point offense," Br. 32, as note 3 proves. As Pulsifer explained (Br. 37-39), old offenses drive the point home—they can be associated with points even though the points may not actually count, depending on how long ago the sentence was imposed. *See also Garcon*, 54 F.4th at 1281-82 (discussing U.S.S.G. § 4A1.1(a) & cmt. n.1). More importantly, as Chief Judge Pryor explained, "the statute itself refutes" the government's argument because subparagraph (A) "distinguishes between points associated with an 'offense'—points that may or may not count towards the criminal history score—and the final tally of 'criminal history points.'" *Id.* at 1282.

3. Other statutes do not help resolve the question presented.

As explained (at 8-9), the government has not identified *any* legal provision that is a conjunctive negative proof in which the "and" is distributive rather than joint. Most of the remaining statutes that the government cites (Br. 40-41 n.4), are either definitional provisions, *see, e.g.*, 2 U.S.C. § 1602(8)(B); 18 U.S.C. § 202(d), or authority-vesting provisions, *see, e.g.*, 18 U.S.C. § 1963(h). The rest of the statutes simply list exceptions to a rule, *see, e.g.*, *id.* §§ 845(a), 925(a)(2), and the government does not dispute that these statutes "are syntactically different." Professors' Corpus Linguistics Br. 14.

C. Giving "and" its plain, ordinary meaning comports with the First Step Act.

1. As Pulsifer explained (Br. 22-25, 43-46), the historically bipartisan coalition that enacted the First Step Act rationally could have thought that the best way to make safety-valve relief *more widely available* for nonviolent drug offenders is to disqualify only those whose criminal history triggers every condition in § 3553(f)(1)—(A), (B), *and* (C). Congress also rationally could have thought that, assuming a defendant satisfies § 3553(f)(1) *and* § 3553(f)(2) through (5), the sentencing court would exercise its "wide discretion," *Concepcion*, 142 S. Ct. at 2395 (citation omitted), to impose a sentence exceeding the mandatory minimum when warranted.

2. The government conflates policy with context. *See, e.g.*, U.S. Br. 20-24. But "policy and purpose" are one and the same—they are not "contextual clues" but rather outcome-oriented accounts of what Congress might (or might not) have intended. *Slack*

Technologies, LLC v. Pirani, 143 S. Ct. 1433, 1440-42 (2023). So when the government says "evident purpose," U.S. Br. 20-21, 34, it means policy. And that's the ballgame, because policy arguments, however appealing, cannot stop a court "from giving the text its ordinary meaning." *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1542 (2021). Courts "assume that the ordinary meaning of the language that Congress employed 'accurately expresses the legislative purpose.'" *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985) (citation omitted). If "a rational Congress could reach the policy judgment the statutory text suggests it did," then courts must "give the law's terms their ordinary meaning," even if they think another approach is good policy. *Niz-Chavez*, 141 S. Ct. at 1486.

Regardless, the government's policy arguments fail on their own terms. *First*, contrast the original and amended versions of § 3553(f)(1). The original version withheld safety-valve relief from defendants with 2 or more criminal-history points. Pulsifer Br. 8. Thus, a defendant who had received a 13-month sentence for a prior nonviolent offense (*i.e.*, a 2-point nonviolent offense) would not have been eligible for safety-valve relief. Today, under both the joint and distributive reading, he would be (assuming no other criminal history). Now consider a defendant who had received a 14-month sentence for a prior offense (*i.e.*, a 3-point offense)—a sentence just one month longer. Assuming no other criminal history, that defendant would be eligible for relief under Pulsifer's reading, but not under the government's because his failure to satisfy § 3553(f)(1)(B) is "independently disqualifying." U.S. Br. 21. Put differently, the government's reading makes eligibility for relief under "the most

significant criminal justice reform bill in a generation," Br. of Sens. Durbin, Grassley, Booker, and Lee as Amici Curiae 9, *Terry v. United States*, No. 20-5904, 141 S. Ct. 1858 (2021), turn on *one month*. The better reading is that Congress meant to extend eligibility unless a defendant triggered all three subparagraphs.

Second, the government asserts (Br. 21-24) that giving "and" its joint meaning will result in scenarios where defendants with more serious criminal histories receive sentences that are below the statutory minimum. But "safety valve eligibility does not guarantee [a defendant] a below-statutory minimum sentence." *United States v. Owens*, 38 F.4th 1, 3 (8th Cir. 2022). "[A] court compelled to disregard a mandatory minimum sentence … may vary upward to and even past the mandatory minimum," *United States v. Quirante*, 486 F.3d 1273, 1276 (11th Cir. 2007), as courts regularly do, *see* National Association of Federal Defenders Br. 7-8.

D. The rule of lenity prohibits reading § 3553(f)(1)'s "and" to mean "or."

1. Courts cannot give a word in "a criminal statute … 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); *see* Pulsifer Br. 47-49. And as Judge Newsom observed, reading § 3553(f)(1) the government's way requires "interpretive gymnastics." *Garcon*, 54 F.4th at 1290 (Newsom, J., concurring). Thus, as Chief Judge Pryor explained, the best the government can do is show "grievous ambiguity," and because § 3553(f)(1) is a sentencing provision in a criminal statute, lenity requires courts "to give the word 'and' 'its ordinary,

accepted meaning.'" *Id.* at 1285 (majority) (citation omitted).

2. The government claims (Br. 46-47) that the rule of lenity does not apply because § 3553(f)(1) does not define a crime or penalty. But the rule of lenity applies to "criminal statutes," including "sentencing … provisions." *Batchelder*, 442 U.S. at 121. And § 3553(f)(1) is a sentencing provision: It tells courts how they "shall impose a sentence." 18 U.S.C. § 3553(f).

The government then claims that the rule of lenity does not apply because there is no "uncertainty in the statute." Br. 47 (citation omitted). But one thing is certain: the functionally disjunctive reading is not *unambiguously* right. So either (a) Pulsifer's reading is right; (b) Pulsifer's reading is "the *best reading*," Professors' Corpus Linguistics Br. 29; or (c) it's a tossup, with lenity calling it for Pulsifer.

CONCLUSION

The Court should hold that a defendant satisfies § 3553(f)(1) so long as he does not have § 3553(f)(1)(A), (B), *and* (C)—all three.

Respectfully submitted.

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August 23, 2023