No. 22-_____

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH RAUBER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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Question Presented

The federal sentencing statute contains a "safety valve" that protects defendants from mandatory minimum sentences if they meet certain criteria. 18 U.S.C. § 3553(f). A recent amendment to that statute has changed the first criterion – § 3553(f)(1) – to include a three-part conjunctive negative proof, disqualifying a defendant only if he has A, B, *and* C. While the Ninth Circuit has held that the "and" means "and," the Seventh and Eighth Circuits have held that "and" means "or."

Whether "and" means "and" for the purposes of 18 U.S.C. § 3553(f)(1).

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Petition for a Writ of Certiorari

Joseph Rauber petitions the Court for a writ of certiorari to review the United States Court of Appeals for the Eighth Circuit's August 15, 2022 opinion and judgment.

Introduction

Like the petitioner in *Pulsifer v. United States*, No. 22-340, whose case is currently seeking review by this Court, Petitioner Joseph Rauber sits squarely in the middle of a circuit split over the federal sentencing "safety valve."

The safety valve permits a defendant to be sentenced below the statutory mandatory minimum in a federal drug case if the defendant

meet certain criteria. 18 U.S.C. § 3553(f)(1)-(5). The first criterion – and the one at issue in this case – relates to the defendant's criminal history. 18 U.S.C. § 3553(f)(1).

Before December 2018, a defendant could "not have more than 1 criminal history point" in order to qualify for the safety valve. 18 U.S.C. § 3553(f)(1) (2017). But with the passage of the First Step Act,[1] Congress replaced the not-more-than-one criterion with a broader, multi-sectioned provision. The new § 3553(f)(1) now reaches defendants who "do[] 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...; *and* (C) a prior 2-point violent offense...[.]" 18 U.S.C. § 3553(f)(1)(A)-(C) (emphasis added).

At the time of his sentencing on a federal drug charge with a mandatory minimum, Joseph Rauber had more than four criminal history points and a prior 3-point offense. He did not, however, have a prior 2-point violent offense. The district court's and Eighth Circuit's

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1 Pub. L. 115-391 (Dec. 21, 2018).

disjunctive interpretation of 18 U.S.C. § 3553(f)(1) – which provides that meeting any one of those criteria disqualifies a defendant, prevented Mr. Rauber from receiving the benefit of the safety valve and he was sentenced with a mandatory minimum. Had the lower courts employed the correct conjunctive interpretation – *i.e.,* that only defendants meeting all three criteria are disqualified – Joseph Rauber would have been eligible for a sentence below the mandatory minimum.

There are three reasons to grant this petition.

First, there is a circuit split over whether § 3553(f)(1) ought to be read conjunctively or disjunctively. The Seventh and Eighth Circuits have ruled incorrectly that this subsection ought to be read disjunctively, *i.e.,* that having (A), (B), *or* (C) bars a defendant from safety-valve relief. The Ninth Circuit, however, has held correctly that the use of "and" between §§ 3553(f)(1)(B) and (C) means a defendant must have all three to be disqualified. The Eleventh Circuit is considering this issue *en banc* and will soon contribute to the split.

Second, this question is important. The First Step Act intended to broaden safety-valve eligibility to the thousands of federal drug

defendants facing mandatory minimums each year. It would be patently unjust for two comparably situated defendants to receive disparate sentences based upon nothing more than the circuit in which they are prosecuted.

Finally, Joseph Rauber's case is an ideal vehicle for resolving this issue. The government has conceded, and the district court found, that Mr. Rauber is not disqualified by any of the other provisions. The only thing making Mr. Rauber ineligible for safety-valve relief is the Eighth Circuit's disjunctive reading of § 3553(f)(1).

Opinions Below

The decision of the United States Court of Appeals affirming Rauber's conviction and sentence is unpublished. A copy of the decision is appended to this Petition. (Pet. App. 1A-3A) The district court's judgment (Pet. App. 4A-11A) and sentencing transcript (Pet. App. 12A-40A) are also unpublished and appended.

Jurisdiction

The judgment of the Eighth Circuit Court of Appeals was entered on August 15, 2022. Mr. Rauber invokes this Court's jurisdiction under 28 U.S.C. § 1254(1), having timely filed this petition for a writ of certiorari within ninety days of the Eighth Circuit's decision.

Statutory and Constitutional Provision Involved

Title 18, U.S. Code, section 3553(f):

> **(f) LIMITATION ON APPLICABILITY OF STATUTORY MINIMUMS IN CERTAIN CASES.**–Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846), section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), or section 70503 or 70506 of title 46, the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation 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;

(2) 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;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.

Statement of the Case

On January 12, 2021, Mr. Rauber pled guilty to conspiring to distribute more than 500 grams of methamphetamine, an offense carrying a mandatory minimum term of ten years imprisonment. 21

U.S.C. §§ 841(a)(1) & (b)(1).

On March 15, 2021, the U.S. Probation Office released its Revised Presentence Investigation Report (PSR), which concluded that Mr. Rauber had ten criminal-history points under the sentencing guidelines:

- a three-point conviction for DUI and driving on a suspended license;
- a two-point theft-by-receiving-stolen-property conviction;
- a two-point driving-on-a-suspended-license/no-proof-of-insurance conviction; and
- three one-point convictions.

This criminal history raised the question of Mr. Rauber's eligibility for the safety valve under 18 U.S.C. § 3553(f).

Before the passage of the First Step Act, a defendant with more than one criminal-history point was automatically disqualified from receiving safety-valve relief. But the First Step Act changed § 3553(f)(1) to replace the one-point disqualification with a more lenient scheme. Specifically, to avoid disqualification under § 3553(f)(1), the evidence must show:

> (1) [T]he 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).

Between Mr. Rauber's plea and sentencing hearings, two circuit courts of appeal issued diametrically opposed decisions interpreting § 3553(f). In *United States v. Lopez,* 998 F.3d 431 (9th Cir. 2021), the Ninth Circuit held that a defendant qualifies for safety-valve relief under § 3553(f)(1) unless he has *each of the following*: more than four criminal-history points (not counting the one-pointers); a three-point offense; *and* a violent two-point offense. The Eleventh Circuit, however, in *United States v. Garcon,* 997 F.3d 1301 (11th Cir. 2021), *vacated and reh'g en banc granted,* 23 F.4th 1334 (11th Cir. 2022), held that a defendant is disqualified from safety-valve relief if he meets *any one* of these criteria.

The district court sided with the Eleventh Circuit, concluding that, even though Mr. Rauber did not have a violent two-point offense

on his record, he was ineligible for safety valve and would be subject to the 120-month mandatory minimum. The district court then sentenced Joseph Rauber to 180 months in prison.

Between Mr. Rauber's sentencing and appeal, the United States petitioned the Ninth Circuit for *en banc* rehearing in *Lopez.. United States v. Lopez*, Case No. 19-50305 (9th Cir. Aug. 5, 2021), Dkt. Entry #49. That petition remains pending. Shortly thereafter, the Eleventh Circuit in *Garcon* granted the appellant's petition for rehearing *en banc*. *Garcon*, 23 F.4th 1334 (11th Cir. Jan. 21, 2022). That, too, remains pending.

Rauber appealed to the Eighth Circuit. While his appeal was pending, a panel of the Eighth Circuit issued its interpretation of § 3553(f)(1) in *United States v. Pulsifer*, 39 F.4th 1018 (8th Cir. 2022) . The *Pulsifer* Court adopted the Eleventh Circuit's rationale, concluding that "and" in § 3553(f)(1) is used as a conjunctive in the distributive sense, serving as a checklist. Applying this precedent, the Eighth Circuit affirmed Joseph Rauber's sentence.

Like Mark E. Pulsifer, Joseph Rauber now seeks a writ of certiorari from the Eighth Circuit Court of Appeals.

Reasons for Granting the Petition

I. An existing circuit split over the interpretation over 18 U.S.C. § 3553(f)(1) has created disparate treatment of drug offenders facing mandatory-minimum penalties.

The safety-valve provision of 18 U.S.C. § 3553(f) allows a sentencing court to disregard a mandatory minimum in certain conditions. To become entitled to the safety valve, the defendant must *fulfill* one requirement (18 U.S.C. § 3553(f)(5)) and *not have* any of four disqualifiers. *See* 18 U.S.C. §§ 3553(f)(1) – (4). By truthfully providing all information and evidence he had concerning his offense, Joseph Rauber fulfilled the lone requirement (§ 3553(f)(5)). And because he did *not* use violence, threats, firearms or dangerous weapons (§ 3553(f)(2)); because his offense did *not* result in death or serious bodily injury (§ 3553(f)(3)); and because he was *not* an organizer, leader, manager, or supervisor of others or engaged in a continuing criminal enterprise (§ 3553(f)(4)), he was not disqualified. *Id.*

The only potential disqualifier facing Joseph Rauber was § 3553(f)(1).

A. An entrenched split in the circuits has developed over the criteria a defendant must meet to qualify for the safety valve.

In *United States v. Lopez*, 998 F.3d.431 (9th Cir. 2021), the Ninth Circuit held that the "and" in 18 U.S.C. § 3553(f)(1) means that *all three* facts must exist to disqualify someone from safety-valve. In other words, the Court concluded that the plain meaning of "and" is conjunctive. 998 F.3d at 436.

According to the Ninth Circuit, § 3553(f)(1) is a "conjunctive negative proof." *Id.* at 436 "A conjunctive negative proof includes a list of prohibitions stating, for example, 'not A, B, and C.'" "'To be eligible, you must prove that you have not A, B, and C.' A conjunctive negative proof requires a person to prove that he or she does not meet A, B, and C, *cumulatively*." *Id.* (emphasis in original)(*quoting* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 119-20 (2012).

This interpretation is consistent with the Senate's drafting manual, which advises its users to use "or" "[i]n a list of criteria that specifies a class of things" "to indicate that a thing is included in the

class if it meets 1 or more of the criteria[.]" *Id.* at 436 (*quoting* Office of the Legislative Counsel, *Senate Legislative Drafting Manual* 64 (1997)). The manual tells drafters to use "and" if "a thing is included in the class only if it meets all of the criteria." *Id.*

Interpreting "and" as conjunctive is also consistent with the canon of consistent usage. The *Lopez* opinion noted that an "and" not only divides §§ 3553(f)(1)(A), 3553(f)(1)(B) *and* 3553(f)(1)(C), but also §§ 3553(f)(1), 3553(f)(2), 3553(f)(3), 3553(f)(4), *and* 3553(f)(5). Because the "and" separating §§ 3553(f)(4) and (f)(5) is treated as a conjunctive, the canon of consistent usage requires the presumption that § 3553(f)(1)'s "and" is also conjunctive. *Id.* at 437.

In *Lopez*, the government conceded both: (1) that the plain and ordinary meaning of § 3553(f)(1)'s "and" is conjunctive and (2) that the canon of consistent usage required a presumption that "and" is conjunctive. *Id. at* 436, 437. Despite these concessions, the government asserted that the conjunctive interpretation would lead to absurdity, surplusage, and ambiguity.

The *Lopez* Court concluded that this conjunctive interpretation

"does not produce 'absurd' results." *Id.* at 439. The court noted that § 3553(f)(1)'s structure could have reflected Congress' goal to exclude only "violent drug offenders," with subsection (A) addressing recidivism, (B) addressing serious convictions, and (C) addressing violence. *Id.* at 439. The government's absurdity arguments, the *Lopez* Court held, amounted to a mere "request for a swap of policy preferences." *Id.* at 440.

The *Lopez* Court also rejected the government's surplusage argument, *i.e.*, that a defendant who had a three-point conviction (*see* § 3553(f)(1)(B)) *and* a two-point violent conviction (*see* § 3553(f)(1)(C)) would have more than four criminal points, seemingly rendering § 3553(f)(1)(A) redundant. The *Lopez* Court pointed out that a single three-point violent conviction could satisfy subsections (B) and (C) without giving a defendant four points. *Id.* at 440-441. Notably, Judge Milan Smith believed that § 3553(f)(1) did create surplusage, *id.* at 444-45 (Smith, J. concurring in part, dissenting in part), but nonetheless agreed with the majority's conclusion that, even if there was surplusage, "[t]he canon against surplusage is just a rule of thumb" that

"does not supersede a statute's plain meaning and structure" or override the canon the consistent usage. *Id.* at 441; *see id.* at 446.

The *Lopez* Court lastly rejected the government's ambiguity arguments, finding § 3553(f)(1) "unambiguously conjunctive." *Id.* at 443. The court also invoked the rule of lenity to conclude that, even if there was ambiguity, it must be construed in the defendant's favor. *Id.*

In both *Pulsifer* and Joseph Rauber's case, the Eighth Circuit rejected the *Lopez* rationale. The *Pulsifer* Court concluded that the "and" in § 3553(f)(1) must mean "or" and that to read otherwise would create surplusage. 39 F.4th 1018, 1021. (8th Cir. 2022). The Eighth Circuit adopted a "distributive" reading of § 3553(f)(1), requiring defendants prove that they "do not have" (A), (B), *or* (C). *Id.*

In a 2-1 decision, the Seventh Circuit agreed with the Eighth that the conjunctive interpretation created surplusage and "absurd results." *United States v. Pace*, 48 F.4th 741, 755 (7th Cir. 2022). In *Pace,* the Court concluded that § 3553(f)(1)'s em dash after "does not have" supported the *Pulsifer* distributive argument, effectively adding a "does not have" before each subsection. *Id.* at 754-55.

Judge Wood, in dissent, noted that "Congress used the word 'and' and as judges it is our duty to apply the law as written." *Id.* at 761. She rejected the majority's surplusage and em dash arguments and noted that this Court has rejected the idea "of construing statutes to conform to what we judges think Congress 'really' meant, rather than follow the words that Congress actually used." *Id.* at 766 (*citing Oklahoma v. Castro-Huerta*, 142 S.Ct. 2486, 2496 (2022)).

B. The Ninth Circuit's interpretation is correct.

Between *Lopez*, *Pace,* and *Pulsifer*, it is the *Lopez* Court and Judge Wood – supported by unambiguous language, Congress's drafting manual, and two canons of statutory construction – who are correct.

"If the words of a statute are unambiguous, this first step of the interpretive inquiry is [the] last." *Rotkiske v. Klemm,* 140 S.Ct. 355, 360 (2019). Courts must assume "that the ordinary meaning of [the] language chosen by Congress 'accurately expresses the legislative purpose.'" *Microsoft Corp. v. i4i Ltd. Partnership,* 564 U.S. 91 (2011) "If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent. 'It is beyond

our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result.'" *Id.* at 542 (*quoting United States v. Granderson,* 511 U.S. 39, 68 (1994) (omission in the original)).

Section 3553(f)(1) of Title 18, U.S. Code, is an unambiguous conjunctive negative proof. The language of § 3553(f)(1), when laid over the Scalia/Garner conjunctive negative proof definition, almost tracks it precisely: "To be [safety-valve] eligible, [the evidence] must prove that [the defendant has] not A, B, and C," *see* Scalia & Garner, *supra*, at 119-20, where A is 'acquired more than four criminal history points,' B is 'acquired a three-point offense,' and C is 'acquired a violent two-point offense.' Even "[a]fter a negative, the conjunctive *and* is still conjunctive: *Don't drink and drive.* You can do either one, but you can't do both." Scalia & Garner, *supra*, at 119.

Any other interpretation would run afoul of the canon of consistent usage. Section 3553(f) uses two conjunctive "ands": one between §§ 3553(f)(1)(B) and (C) and one between §§ 3553(f)(4) and (5). When interpreting the larger § 3553(f) structure, the government has

not argued – and would never argue – that satisfying *one of* §§ 3553(f)(1), 3553(f)(2), 3553(f)(3), 3553(f)(4), *or* 3553(f)(5) should be enough to be safety-valve eligible. If the "and" connecting §§ 3553(f)(4) and (5) is conjunctive, the "and" between §§ 3553(f)(1)(B) and (C) should be treated the same way.

Moreover, Congress's concentration of these provisions into a single provision supports a conjunctive reading. Except for § 3553(f)(5), § 3553(f) is a list of independent disqualifiers. Had Congress wanted any one of §§ 3553(f)(1)(A), (f)(1)(B), and (f)(1)(C) to be individually disqualifying, it would have put them in their own separate subsections, as it did for, say, firearm-possessing defendants (§ 3553(f)(2)) and leader/organizer defendants (§ 3553(f)(4)). Indeed, in a statute where there are other independent disqualifiers listed separately and joined by a conjunctive "and," the only plausible explanation for clumping § 3553(f)(1)(A)-(C) together with an "and" is that Congress also wanted these provisions read conjunctively.

The *Pace* and *Pulsifer* Courts wrongly allow one canon of statutory construction – the canon against surplusage – to trump otherwise

unambiguous language and other canons of statutory construction.

A statute's awkwardness or even its ungrammatical nature does not necessarily make it ambiguous. *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) "Surplusage does not always produce ambiguity and our preference for avoiding surplusage constructions is not absolute." *Id.* In *Lamie*, this Court concluded that "[w]here there are two ways to read the text" – one where there is surplusage but the text is plain and one where there is nonsurplusage but the text is ambiguous – "applying the rule against surplusage is, absent other indications, inappropriate." *Id.* "We should," the *Lamie* Court concluded, "prefer the plain meaning since that approach respects the words of Congress." *Id.*

Even if the statute were ambiguous, the rule of lenity should resolve the question in a criminal defendant's favor. *See Wooden v. United States,* 142 S.Ct. 1063, 1081 (2022) (Gorsuch, J., joined by Sotomayor, J., concurring in the judgment.) Under this rule, a court "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).

C. This Court should resolve the split.

The official tally of circuits stands at 1-2, but the divide is even deeper than that. The Seventh Circuit's *Pace* opinion generated a majority opinion joined by Judges Ripple and Kirsch, a concurrence by Judge Kirsch ("writing separately to explain my understanding or 18 U.S.C. § 3553(f)'s safety valve"), and a dissent by Judge Wood. 48 F.4th at 744, 756, and 759. The Ninth Circuit, which is currently considering this issue *en banc*, issued its *Lopez* opinion with Judges Murguia and Boggs in the majority and Judge Milan Smith writing separately to disagree with the majority's conclusion about surplusage. 998 F.3d at 432, 444. And the Eleventh Circuit's now-vacated *Garcon* opinion featured Judge Branch writing both the majority opinion on behalf of Judges Jordan and Pryor and a separate concurrence to provide "further support to our holding that the 'and' in § 3553(f)(1) is disjunctive...." 997 F.3d at 1302, 1306. Put simply, there seem to be as many opinions on how to interpret § 3553(f)(1) as there are judges to consider the matter. And with the Eleventh Circuit (and possibly the Ninth Circuit) poised to issue *en banc* opinions, the number of

interpretations will only grow.

II. The question presented is important.

This issue is not rare. In Fiscal Year 2021, 17,692 offenders were sentenced for federal drug offenses. U.S. Sentencing Commission, 2021 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table D-13, n.1.[2] Of the 17,192 federal drug offenders for which the Sentencing Commission received adequate data, 11,534 (67%) faced a mandatory minimum sentence. *Id.* Of these 11,534 offenders, 5,215 received the benefit of the safety valve and 6,319 did not. *Id.* In Fiscal Year 2020, the numbers were comparable with 10,561 (almost 66%) facing a drug mandatory minimum, 4,427 receiving the benefit of the safety valve and 6,134 not. U.S. Sentencing Commission, 2020 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table D-13, n.1.[3] A consistent interpretation of

2 *Available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/TableD13.pdf (last accessed November 2, 2022).

3 *Available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/TableD13.pdf (last accessed November 2, 2022).

the critical first safety-valve prong will impact thousands of drug defendants each year.

The government has already conceded that this question is one of "exceptional importance." *Lopez*, Case No. 19-50305 (9th Cir. Aug. 5, 2021), Dkt. Entry #49 at 17. The government believes that the Ninth Circuit's view of safety-valve is too expansive, undercuts the government's leverage to secure cooperation, and fosters unpredictable outcomes. *Id.* at 17-20. While Joseph Rauber disagrees with the government's position, both parties agree that the question is important.

III. Petitioner Joseph Rauber's case is the ideal vehicle to resolve this issue.

The government has conceded, and the district court found, that Mr. Rauber is not disqualified by §§ 3553(f)(2) through (5). The only thing making Mr. Rauber ineligible for safety-valve relief is the Eighth Circuit's disjunctive reading of § 3553(f)(1).

The district court sentenced Mr. Rauber to 180 months – 60 months more than the 120-month mandatory minimum. Under the

terms of the plea agreement, which provided for a further two-level reduction and a low-end recommendation from the prosecutor if Rauber was safety-valve eligible, Mr. Rauber's guideline range would have been 140-175 months. The government would have been required to ask the district court for a sentence at the low end of that range, Rauber would have been free to ask for any sentence, and the district court would have been required to consider a sentence below the mandatory minimum.

Joseph Rauber should not face a mandatory minimum that an otherwise-identical defendant would avoid in the Ninth Circuit. With the government's concession that Mr. Rauber is otherwise eligible and the government's agreement to recommend a further reduction in the guidelines and a low-end-of-the-range sentence, Rauber's case is an ideal vehicle for this issue. A decision in his favor likely would lead to a shorter sentence.

Conclusion

As Mark E. Pulsifer has argued thoroughly and persuasively in Case No. 22-340, the existing circuit split over this issue affecting

thousands of federal drug defendants is only expected to widen. The Court should grant Joseph Rauber's petition for a writ of certiorari to address this issue and resolve the split.

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