No. _____

IN THE

Supreme Court of the United States

CHAD ROBERT KOLKMAN,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When the terms of a statute are unambiguous, "it's no contest" what a court should do—apply the law as written. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020). In drafting 18 U.S.C. §3553(f)(1), which allows a court to sentence below a mandatory minimum, Congress used the word "and" to separate three different criteria needed to disqualify a person from eligibility. The criteria are if the person "does not have—(A) more than 4 criminal history points … ; (B) a prior 3-point offense, … ; *and* (C) a prior 2-point violent offense, …." 18 U.S.C. §3553(f)(1) (emphasis added).

The question presented is whether the "and" in 18 U.S.C. §3553(f)(1) means "and" consistent with the ordinary meaning of the word, so that the person remains eligible unless the person meets (A), (B), and (C), as the Fourth, Ninth, and Eleventh Circuits have concluded, or is it a rare occasion where "and" can transform into "or," as the Fifth, Sixth, Seventh, and Eighth Circuits surmised.

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to this petition: petitioner Chad Robert Kolkman and respondent United States.

RELATED PROCEEDINGS

United States Court of Appeals (10th Cir.): *United States v. Kolkman*, No. 22-8004, 2022 WL 17543530 (Dec. 9, 2022) (pet. rehearing denied Jan. 19, 2023).

United States District Court (Wyoming): *United States v. Kolkman*, No. 21-CR-00008 (Jan. 4, 2022).

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INTRODUCTION

In recognizing that mandatory minimums were often leading to sentences that far exceeded a person's responsibility and history, Congress drafted 18 U.S.C. §3553. It provides courts discretion to sentence a person consistent with the guidelines, regardless of any mandatory minimum, pursuant to certain criteria. When drafting the language, Congress used the unambiguous word "and" to separate the three criteria in 18 U.S.C. §3553(f)(1).

Nevertheless, whether to apply the ordinary meaning of the word "and" has caused a sharp circuit split. The Fourth, Ninth, and Eleventh Circuits determined there is no basis to deviate from the plain language while the Fifth, Sixth, Seventh, and Eighth chose a different path. This Court recognized the circuit split in agreeing to grant certiorari in one of these cases, *Pulsifer v. United States*, No. 22-340 (pet. granted Feb. 27, 2023).

Because Congress chose the word "and" to separate the three criteria in §3553(f)(1), its plain text

required people such as Mr. Kolkman to meet all three to not be eligible. "The ordinary-meaning rule is the most fundamental semantic rule of interpretation." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 69 (Thomson/Reuters 2012) (Scalia & Garner). No cannon of statutory construction justified any other interpretation. But here, the district court assumed "and" meant "or," resulting in the erroneous conclusion Mr. Kolkman was not safety-valve eligible.

Because there was no objection, the Tenth Circuit declined to address the issue. But by ignoring basic principles of statutory construction that led to a longer prison sentence, the district court's error was plain and impacted Mr. Kolkman's substantial rights. *See Molina-Martinez*, 578 U.S. 189, 198 (2016). *See also United States v. Brown,* 316 F.3d 1151, 1158 (10th Cir. 2003) ("[T]he absence of circuit precedent [does not] prevent the clearly erroneous application of statutory law from being plain error."); *United States v. Evans*, 155 F.3d 245, 252 (3d Cir. 1998) (error can be plain even absent binding precedent).

Review is warranted here as in *Pulsifer* even with the lack of an objection because the error "threaten[s] to require individuals" convicted of crimes to "linger longer in federal prison than the law demands[.]" *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333 (10th Cir. 2014). And as this Court has said, "'what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity'" when courts refuse to correct errors "'of their own devise.'" *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018) (quoting *Sabillon-Umana*, 772 F.3d at 1333-34).

OPINIONS BELOW

The issue before the Court of Appeals was if the sentencing court committed plain error in refusing to consider Mr. Kolkman eligible for safety-valve relief because he had a single three-point conviction from a 1999 arrest when he was 18 years old that still counted against his criminal history points. The parties disagreed whether the "and" in 18 U.S.C. §3553(f)(1) should be read in the conjunctive or

disjunctive. The court decided that it "need not determine who has the better of the argument because, even if the district court erred in interpreting §3553(f)(1), its error was not plain." The court of appeals opinion and its denial of a petition for rehearing are attached. (App. A, App. B).

JURISDICTION

The court of appeals issued its decision on Dec. 9, 2022, and its denial of a petition for rehearing on Jan. 19, 2023. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3553(f)(1) of Title 18, U.S. Code, provides: a court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission … without regard to any statutory minimum sentence, if the court finds at sentencing … 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[.][1]

STATEMENT OF THE CASE

A. Statutory background

The question presented concerns whether §3553(f)(1), which focuses on the defendant's prior criminal history, should be interpreted based on the ordinary meaning of the plaint text Congress chose to use. Before §3553(f) was amended by the First Step Act of 2018, §402, 132 Stat. at 5221, a defendant was ineligible for safety-valve consideration by having "more than 1 criminal history point." 18 U.S.C. §3553(f)(1)(2017). Because nearly any conviction that resulted in an imposed prison sentence counted as 1

[1] The safety-valve has four other criteria that are not at issue in this case nor in any of the other related cases that have been decided by other circuit courts.

criminal history point, few people were safety-valve eligible under the original version.

The First Step Act sought to rectify the problem by broadening eligibility for relief. As amended, §3553(f)(1) reaches a person being sentenced who "does not have—(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense … ; (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). Senator Patrick Leahy, one of the bill's sponsors, said he "believe[d]" the passage of the First Step Act indicated "the error of mandatory minimum sentencing is coming to an end." 164 Cong. Rec. S7745-01, S7749 (daily ed. Dec. 18, 2018). Indeed, an original draft of the bill sought to return discretion to judges to sentence below a mandatory minimum in any case, regardless of criminal history. *See* Senate Committee on the Judiciary, The First Step Act of 2018 (S.3649) – As Introduced (Nov. 15, 2018) (explaining parameters of bill as introduced that permitted judges to go below a mandatory minimum,

regardless of a person's criminal history, if the court made sufficient findings).[2]

In drafting §3553(f)(1), Congress followed the format of "a conjunctive negative proof," which specifies that all the prohibited items are required. Scalia & Garner at 120. Congress also followed how the Senate's Drafting Manual instructs to use "and" when separating items, which provides that "and" should be used when indicating all criteria in a list are required. Legislative Drafting Manual §321.[3]

B. Factual and procedural background

Mr. Kolkman does not have a 2-point violent offense but has a single 3-point offense from a 1999 conviction when he was 18-years old for delivery of marijuana. Pursuant to the sentencing guidelines, offenses only "count" towards a person's criminal

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[2] Available at https://www.judiciary.senate.gov/imo/media/doc/S.%203649%20First%20Step%20Act%20Summary%20-%20As%20Introduced.pdf (last visited April 12, 2023).

[3] Available at https://law.yale.edu/sites/default/files/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual(1997).pdf.

history points if they fell—including any incarceration—within 15 years of the person's participation in the instant offense. On the 1999 offense, following a probation revocation, Mr. Kolkman was released from incarceration on August 27, 2004.

In this case, Mr. Kolkman pled guilty to participating in a conspiracy to distribute methamphetamine "[f]rom about August 2019, through and including on or about November 29, 2020[.]" As a result, the district court concluded the 1999 offense still counted. *See* App. C. The court said "those three points for his early felony at age 18 are playing a terrible role." The court explained, "I think a sentence less than that minimum mandatory would be appropriate in your case[.]" The court recognized that despite Mr. Kolkman's minor role in the alleged conspiracy, he was going to receive one of the longest sentences, including a longer sentence than the person who was in charge of the conspiracy. As a result, the court said "I'm not entirely pleased with what I'm required to do here today." Though Mr.

Kolkman's guidelines were 92-115 months, the court imposed the mandatory minimum sentence of 120 months.

On appeal, Mr. Kolkman challenged both whether he should have been safety-valve eligible and if the court correctly determined that his 3-point conviction should still count against him. The court of appeals affirmed, declining to address the safety-valve issue because there had not been an objection and deciding that the court did not err in counting the 1999 conviction.

REASONS FOR GRANTING THE PETITION

The Fourth, Ninth, and Eleventh (en banc) circuits have all interpreted §3553(f)(1) based on the ordinary meaning of "and." The Fifth, Sixth, Seventh, and Eighth read the "and" as "or." To ensure federal sentencing guidelines are being applied consistently across the country, only this Court can resolve the disagreement.

I. The issue is important, as this Court recognized in having already granted certiorari in *Pulsifer v. United States*.

Congress intended the First Step Act to be a "'significant reform' favoring judicial discretion." Sarah E. Ryan, *Judicial Authority Under the First Step Act: What Congress Conferred*, 52 Loy. U. Chi. L. J. 67, 99 (2020). Two goals of the Act were to address the number of people stuck in federal prison for too long due to a mandatory sentence and to restore discretion to judges to be able to sentence people according to their own history and conduct. At the time of its passage, one senator said the "legislation will allow judges to do the job that they were

appointed to do—to use their discretion to craft an appropriate sentence to fit the crime." *Id.* Another senator said the legislation "gives judges discretion back … who sit and see the totality of the facts." *Id.* The "legislative record contains no direct disagreement with these statements." *Id.*

Changing the "and" to an "or" renders the First Step Act anything but a "significant reform." Doing so means that a person with a single three-point prior offense, regardless of any other fact, must serve the mandatory minimum. A 3-point offense is not a high-bar. It is a conviction resulting in an *imposed* sentence of 13 or more months in prison. *See* U.S.S.G. §4A1.2 n.2.

A 2018 Department of Justice report shows that is most convictions. The report found that the average imposed sentence in state cases for all offenses was 6.4 years; for drug possession 4.0 years; and for theft offenses 3.7 years. *See* U.S. Dep't of Justice, *Time Served in State Prison, in 2016* (Nov.

2018).[4] There then exists countless examples of where a person could have a single prior conviction for a nonviolent offense that led to an imposed sentence of at least 13 months. Permitting such a conviction to by itself remove a person from safety-valve eligibility is at odds with the language and intent of the First Step Act.

Limiting the amount of sentencing discretion—an outcome of reading "and" as "or"—is the situation numerous federal district court judges openly discussed as leading to unjust and unfair sentences. It is these examples that spurred expanding the safety valve. *See*, *e.g.*, Erica Zunkel and Alison Siegler, *The Federal Judiciary's Role in Drug Law Reform in an Era of Congressional Dysfunction*, 18 Ohio St. J. Crim. L. 283, 310 (2020) ("Federal judges have … pleaded" with Congress "to do something serious about the serious injustices these long mandatory minimum sentences impose.").

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[4] Available at https://bjs.ojp.gov/content/pub/pdf/ tssp16.pdf.

II. The circuits have divided over the meaning of §3553(f)(1).

Thus far, seven circuit courts have decided the meaning of §3553(f)(1) and are split 4-3, with three courts deciding "and" means "and." Among the circuit judges to weigh in, 16 have agreed that "and" means "and," while 13 have not.

The Ninth, Eleventh, and Fourth Circuits all decided that "and" means "and." *See United States v. Lopez*, 998 F.3d 431, 436-37 (9th Cir. 2021), *United States v. Garcon*, 54 F.4th 1274, 1278 (11th Cir. 2022) (en banc), *United States v. Jones*, 60 F.4th 230, 233 (4th Cir. 2023). As the *Jones* court said, "[w]hen the words of the statute are clear, as is the case with §3553(f)(1), our 'judicial inquiry is complete.'" *Jones*, F.4th at 233 (citing *Crespo v. Holder*, 631 F.3d 130, 136 (4th Cir. 2011)); *see also Lopez*, 998 F.3d at 433; *Garcon*, 54 F.4th at 1278. The argument pursued by the Government in each of these cases has been "nothing more than an exaggerated way of saying 'and' means 'or,'" which those courts rightly "reject[ed]." *Jones*, 60 F.4th at 233.

Despite Congress's use of unambiguous language, the Fifth, Sixth, Seventh, and Eight Circuits all chose to transform the "and" in §3553(f)(1) into "or." *See United States v. Pulsifer*, 39 F.4th 1018, 1022 (8th Cir. 2022); *United States v. Pace*, 48 F.4th 741, 751 (7th Cir. 2022); *United States v. Palomares*, 52 F.4th 640, 642 (5th Cir. 2022); *United States v. Haynes*, 55 F.4th 1075, 1078 (6th Cir. 2022). However, other than *Pulsifer*, each of those cases had a sharply-divided panel, generating dissents that all similarly reasoned, "We give our language, and our language-dependent legal system, a body blow when we hold that it is reasonable to read 'or' for 'and'—or 'and' for 'or.'" *Palomares*, 52 F.4th at 652 (Willet, J. dissenting). *See also Pace*, 48 F.4th at 760 (Wood, J. dissenting) ("[A]s judges it is our duty to apply the law as written); *Haynes*, 55 F.4th at 1084 (Griffin, J. dissenting) ("[T]he majority's interpretation relies on a host of interpretive problems to reach its conclusion.").

The reasoning of the dissents in *Pace*, *Palomares*, and *Haynes* that explained why it was

error to deviate from the words Congress chose is consistent with this Court's jurisprudence. For instance, recently this Court in *Terry v. United States*, 141 S. Ct. 1858 (2021), refused to deviate from a statute's plain text to permit the defendant to be resentenced even when the drafters of the bill admitted precluding such a result was not their intent. Though the United States and the bipartisan lead sponsors of the bill urged this Court to "broadly" apply the provision at issue, this Court unanimously held it could not do so. *Id.* at 1862-64, 1868. The Court explained that "in light of the clear text," the defendant was not entitled to resentencing. *Id.* at 1863-64. In a concurrence, Justice Sotomayor even wrote that there was "no apparent reason" why Congress would have precluded someone in the defendant's situation. *Id.* at 1868 (Sotomayor, J. concurring). But, "[u]nfortunately, the text will not bear that reading." *Id.* The text of §3553(f)(1) does not bear the outcome reached by several circuits. This Court can now correct their mistake.

III. The exceptional error deserves this Court's consideration, even under a plain error review.

This Court has granted review far more freely in plain-error sentencing cases than other types of plain error. In this case, this Court should address the issue presented by this case's error even when the Tenth Circuit refused to do so. Plain error review is not meant to be "a grading system for trial judges," *Henderson v. United States*, 568 U.S. 266, 278 (2013), but exists under Fed. R. Crim. P. 52(b) to allow for the chance to correct those errors that "particularly undermine[] the fairness" of judicial proceedings. *Rosales-Mireles*, 138 S. Ct. at 1908. The error here, that entails the "risk of unnecessary deprivation of liberty," is such an error. *Id.*

First, the error should have been plain despite neither this Court nor the Tenth Circuit having ruled on the specific question at the time of Mr. Kolkman's sentencing. It is not a novel concept of statutory interpretation that "and" should mean "and" absent extraordinary circumstances. In fact, every cardinal

principle of statutory construction should have informed both the district court and the circuit court that reading "and" as "or" was incorrect. For example, this Court has said:

- when the words of a "statute are unambiguous, then, … judicial inquiry is complete;" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992);

- the word "and" is to be accepted for its conjunctive meaning and not interchangeable with "or" unless doing so produces the only result consistent with Congress's obvious intent; *United States v. Fisk*, 70 U.S. 445, 447 (1865);

- when the requirements in a statute are "connected by the conjunctive 'and'" it means that "all three must be met." *United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1621 (2021); and

- courts may not "alter" unambiguous text "in order to satisfy" one party's "policy preference." *Barnhart v. Sigmon Coal Company, Inc.*, 534 U.S. 438, 462 (2002).

Second, the nature of the error—a court-made mistake that impacts sentencing—supports this

Court addressing the issue despite a lack of objection. *See Molina-Martinez,* 578 U.S. at 192 (recognizing that an incorrect application of the sentencing guidelines often serves as "evidence of an effect on substantial rights"). This error can be corrected without needing a full retrial, unlike an error in the trial itself. *See Rosales-Mireles*, 138 S. Ct. at 1908 ("[A] remand for resentencing, while not costless, does not invoke the same difficulties as a remand for retrial does."). And the error means Mr. Kolkman is serving a longer sentence then necessary and longer than what the district court said it felt was just.

IV. In any event, this petition should be held pending resolution of the recently granted case of *Pulsifer v. United States*.

The district court believed it was bound by the mandatory minimum because Mr. Kolkman met some, but not all, of the criteria in 18 U.S.C. §3553(f)(1). The safety-valve separated those criteria with the unambiguous word "and," meaning its plain text should have rendered Mr. Kolkman eligible for relief. On February 27, 2023, this Court granted

certiorari in *Pulsifer v. United States*, No. 22-340 to decide the proper interpretation of §3553(f)(1).

If certiorari is not granted in the ordinary course of the question presented, this case should be held pending the decision in *Pulsifer* and then disposed of appropriately in light of that opinion.

CONCLUSION

For the foregoing reasons, petitioner Chad Robert Kolkman asks that this Court grant his petition for writ of certiorari, and reverse the judgment of the United States Court of Appeals for the Tenth Circuit affirming his sentence.

Respectfully submitted

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