No. _____

In the Supreme Court of the United States

CHAYNA HOLGUIN, *PETITIONER*,

V.

UNITED STATES OF AMERICA, *RESPONDENT*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

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

The question presented is whether the "and" in § 3553(f)(1) means "and," so that a defendant satisfies the provision so long as she does not have (A) more than 4 criminal history points, excluding any points resulting from a 1-point offense, (B) a 3-point offense, and (C) a 2-point violent offense, or whether the "and" means

"or," so that a defendant satisfies the provision only if she does not have (A) more than 4 criminal history points, excluding any points resulting from a 1-point offense, (B) a 3-point offense, or (C) a 2-point violent offense.[1]

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[1] This same question is before the Court in *Pulsifer v. United States*, No. 22-340. The Court's decision in *Pulsifer* likely will be dispositive of Holguin's petition for writ of certiorari. Accordingly, Holguin's petition should be held pending the Court's resolution of *Pulsifer*, and then disposed of as appropriate in light of the decision in that case.

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Petitioner Chayna Holguin asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on March 16, 2023.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

RELATED PROCEEDINGS

- *United States v. Chayna Holguin*, No. 3:21-CR-13-KC-1 (W.D. Tex.) (amended criminal judgment entered Jan. 21, 2022)
- *United States v. Chayna Holguin*, No. 22-50685 (5th Cir.) (judgment entered Mar. 16, 2023)

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A copy of the opinion of the court of appeals, *United States v. Holguin*, No. 22-50083 (5th Cir. 2023) (per curiam) (unpublished), is reproduced at Pet. App. 1a–3a.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on March 16, 2023. This petition is filed within 90 days after entry of the judgment. *See* Sup. Ct. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3553(f) of Title 18, U.S. Code, provides:

> 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

Petitioner Chayna Holguin was charged in a two-count indictment with importing at least 40 grams of fentanyl, *see* 21 U.S.C. §§ 952(a), 960(a)(1), and possessing with intent to distribute at least 40 grams of fentanyl, *see* 21 U.S.C. § 841(a)(1).[2] She initially pleaded guilty under a plea agreement to the importation count only. But she later withdrew that plea, which would have committed her to an appeal waiver in her plea agreement, and instead pleaded guilty to both counts of the indictment without a plea agreement.

Holguin's initial presentence report stated that she would be subject to the statutory-minimum sentence of five years' imprisonment on each count. *See* 21 U.S.C. §§ 841(b)(1)(B)(vi), 960(b)(2)(F). But Holguin argued that she should be eligible for the safety valve, 18 U.S.C. § 3553(f). As amended by the First Step Act of 2018, Pub. L. No. 115-391, § 402, 132 Stat. 5194, 5221, the safety valve allows a court to impose a sentence shorter than the statutory minima in 21 U.S.C. §§ 841 and 960 if the court finds (among other things) that

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[2] The indictment and the relevant statutory provisions refer to fentanyl as N-phenyl-N-[l-(2-phenylethyl)-4-piperidinyl] propenamide. 21 U.S.C. §§ 841(b)(1)(B)(vi), 960(b)(2)(F).

> the defendant does not have—
> (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
> (B) a prior 3-point offense, as determined under the sentencing guidelines; and
> (C) a prior 2-point violent offense, as determined under the sentencing guidelines[.]

18 U.S.C. § 3553(f)(1).

Holguin did not dispute that she has a prior three-point offense. In 2010, she was convicted in New Mexico of drug crimes: trafficking by distribution, conspiracy to commit trafficking by distribution, and distribution of a controlled substance. Because Holguin received a sentence of imprisonment longer than thirteen months that was imposed and served within fifteen years of her fentanyl smuggling, the sentencing guidelines added three points to her criminal history score. *See* U.S.S.G. §§4A1.1(a), 4A1.2(a)(1), (b)(2), (e)(1), (k). But Holguin argued that the safety valve should apply unless a defendant meets all three criteria listed in § 3553(f)(1)—that is, unless a defendant has more than four criminal history points, a prior three-point offense, *and* a prior two-point violent offense. She argued that she qualified because she did not have more than four criminal history points or a prior two-point violent offense.

The Government opposed a sentence below the statutory minimum. The Government explained that the safety valve applies only if a defendant does not have any of the criminal history features listed in § 3553(f)(1)—that is, only if a defendant does not have more than four criminal history points, does not have a prior three-point offense, and does not have a prior two-point violent offense. Under that interpretation, Holguin's prior three-point offense would have disqualified her.

The district court, relying on a decision from the Ninth Circuit, ruled in Holguin's favor. *See United States v. Lopez*, 998 F.3d 431 (9th Cir. 2021), *petition for reh'g en banc denied*, 58 F.4th 1108, 1108 (9th Cir. 2023). It sentenced Holguin below the statutory minimum to 37 months' imprisonment.[3]

The Government appealed. While Holguin's appeal was pending, a divided panel of the Fifth Circuit endorsed the Government's view of the safety valve. *See* Pet. App. 2a; *United States v. Palomares*, 52 F.4th 640–41 (5th Cir. 2022), *petition for cert. filed* (U.S. Dec. 21, 2022) (No. 22-6391); *id.* at 647–48 (Oldham, J., concurring

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[3] The district court also applied sections 2D1.1(b)(18) and 5C1.2(a) of the Sentencing Guidelines, which parallel a previous iteration of the safety valve, to reduce Holguin's offense level.

in judgment). *But see id.* at 652–53 (Willett, J., dissenting). Holguin argued that *Palomares* was incorrectly decided, but conceded that, because she had a prior three-point offense, *Palomares* disqualified her from the safety valve. *See* Pet. App. 2a. For that reason, the panel vacated Holguin's sentence and remanded for further proceedings.[4] *See* Pet. App. 3a.

[4] Holguin has not yet been resentenced.

REASONS FOR GRANTING THE WRIT

When sentencing Holguin for her drug offenses, the district court applied the "safety valve" found in 18 U.S.C. § 3553(f), as amended by the First Step Act of 2018. That allowed the court to impose a sentence below the otherwise-applicable statutory minimum. The Government appealed, arguing that Holguin's criminal history disqualified her from the safety valve. The Fifth Circuit agreed with the Government's reading of § 3553(f), vacated Holguin's sentence, and remanded for further proceedings. Holguin now petitions for certiorari. The question presented is whether the word "and" in § 3553(f) means "and" or "or." Because this question of statutory interpretation has divided the circuits, this Court granted certiorari in *Pulsifer v. United States*, No. 22-340, to resolve it. Holguin therefore asks the Court to hold this petition pending a decision in *Pulsifer* and to dispose of the petition in light of the decision in that case.

I. Under § 3553(f)(1), a defendant is barred from "safety valve" relief only if her criminal history runs afoul of all three disqualifying criteria.

The safety-valve provision, § 3553(f), allows a district court to sentence a defendant below the mandatory-minimum sentence for certain drug offenses if she meets the criteria in subsections (1)–

(5). Under subsection (f)(1), as amended by the First Step Act,[5] a defendant must prove that she "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)(A)–(C).

In *United States v. Palomares*, 52 F.4th 640 (5th Cir. 2022), *petition for cert. filed* (U.S. Dec. 21, 2022) (No. 22-6391), the Fifth Circuit agreed with the Government's position that § 3553(f)(1) bars a defendant from safety-valve relief if her criminal history runs afoul of any one of the disqualifying criteria in subsections (A), (B), or (C). The panel majority first observed that "[t]he First Step Act's structure is perplexing" and that interpretation of the safety-valve provision has produced a "circuit split." *Palomares*, 52 F.4th at 641–42 & n.1 (describing the conflicting circuit decisions). It concluded, however, that the provision is "best interpreted to 'distribute' [§ 3553(f)(1)'s opening phrase 'does not have'] to each

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[5] *See* First Step Act of 2018, Pub. L. No. 115-391, § 402, 132 Stat. 5194, 5221.

following subsection," such that "[t]o be eligible for safety valve relief, a defendant must show that she does not have more than 4 criminal history points, does not have a 3-point offense, *and* does not have a 2-point violent offense." *Id.* at 642.

The panel majority acknowledged that "[t]he ordinary meaning of 'and,' which § 3553(f)(1) uses to join the three subsections, is conjunctive." *Palomares*, 52 F.4th at 643. It rejected this ordinary meaning, however, based on the section's structure, which "utiliz[es] a negative preceding an em-dash followed by a conjunctive list." *Id.* at 643. This structure, the majority concluded, means "that the phrase '[does] not have—' independently modifies each item in the list and thus creates a checklist of prohibited items." *Id.* at 644. The majority acknowledged that the Ninth Circuit rejected this interpretation in *United States v. Lopez*, 998 F.3d 431 (9th Cir. 2021), *petition for reh'g en banc denied*, 58 F.4th 1108, 1108 (9th Cir. 2023), but noted its disagreement with the Ninth Circuit's reasoning. *Id.*

The panel majority further concluded that its interpretation "avoids violating the canon against surplusage." *Palomares*, 52 F.4th at 644–45. Specifically, the majority reasoned that the conjunctive reading would render § 3553(f)(1)(A) surplusage "because every criminal defendant who has a 2-point violent offense and a

3-point offense (satisfying (B) and (C)) will have at least 5 criminal history points, satisfying (A)." *Id.* at 645. Again, the majority rejected the Ninth Circuit's reasoning to the contrary. *Id.* at 645–46. Finally, the majority declined to apply the rule of lenity on the ground that there is no "grievous" ambiguity in the statute. *Id.* at 647.

Judge Oldham, concurring in the judgment, wrote that § 3553(f) "constitutes one (admittedly long) statutory sentence," *Palomares*, 52 F.4th at 652, and interpreted it "to distribute all of the text, as Congress wrote it, and to conjoin the doubly distributed text with an 'and,' as Congress wrote it." *Id.* at 651 n.2.

Judge Willett dissented. *Palomares*, 52 F.4th at 652–59. In his view, the court "must assume that Congress meant what it said. Congress said 'and.' " *Id.* at 652. Had Congress "wished to withhold safety valve relief from defendants who failed any one of the three sub-sections," he reasoned, it would have "joined them together with 'or.' " *Id.* at 652–53. Judge Willett examined the contrary arguments of the majority, the concurrence, and the Government, and concluded that none of them overcame the imperative that the court "must take Congress at its word: 'and.'" *Id.* at 659.

Holguin contends that the Fifth Circuit got it wrong. As explained below, a defendant is disqualified under § 3553(f)(1) only if

her criminal history runs afoul of all three disqualifying criteria in subsections (A), (B), and (C).

A. The ordinary meaning of "and" is conjunctive. Under the statute's plain language, then, a defendant is disqualified under § 3553(f)(1) only if her criminal history runs afoul of all three of its criteria.

When construing a statute, a court should begin with the statutory text and end there if the language is plain. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020). A statutory term receives its "ordinary, contemporary, common meaning" unless that term is otherwise defined in the statute. *Perrin v. United States*, 444 U.S. 37, 42 (1979).

Section 3553(f)(1) provides that a defendant is barred from safety-valve relief if her criminal history runs afoul of § 3553(f)(1)(A), (B), and (C). The ordinary meaning of "and" is conjunctive, as the panel majority in *Palomares* recognized. *See* 52 F.4th at 643; *see also*, *e.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116–25 (2012). Put simply, "and" means "and." Under the plain language, then, a defendant is disqualified under § 3553(f)(1) only if her criminal history runs afoul of all three of its criteria. *See Lopez*, 998 F.3d at 433, 437; *United States v. Garcon*, 57 F.4th 1274, 1276 (11th Cir. 2022) (en banc).

If Congress had wanted to make ineligible a defendant who failed of any one of § 3553(f)(1)'s three subsections, it would have joined them together with "or." It did not. Courts "must take Congress at its word: 'and.'" *Palomares*, 52 F.4th at 659 (Willett, J., dissenting).

The conjunctive/disjunctive canon of construction lends additional support. Under that rule of interpretation, "[w]hen the word 'and' joins a list, all the things listed are required." *Reading Law*, at 119–20; *see*, *e.g.*, *United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1620–21 (2021) ("The requirements [of 8 U.S.C. § 1326(d)] are connected by the conjunctive 'and,' meaning defendants must meet all three."). When a negative (like "not") precedes a conjunctive list, as it does in § 3553(f)(1), the "and" is still conjunctive. *Palomares*, 52 F.4th at 653 (Willett, J., dissenting); *see also Garcon*, 54 F.4th at 1278. "[T]he listed things are individually permitted but cumulatively prohibited." *Reading Law*, at 119. For example, "[d]on't drink and drive" means that you can "do either one, but you can't do them both." *Id*. Also, to use Judge Willett's example, "'[d]o not mix heat, fuel, and oxygen' instructs the reader to prevent the unity of all three ingredients unless she wants a fire." *Palomares*, 52 F.4th at 653. A drafter wanting to prohibit individually each item in a list must use "or." *Id*.

Section 3553(f)(1) is an example of a "conjunctive negative proof." A "conjunctive negative proof" is a list of prohibitions stating, for example, "[t]o be eligible, you must prove that you have not A, B, and C." *Reading Law*, at 120. A conjunctive negative proof "requires a person to prove that he or she does not meet A, B, and C, *cumulatively*." *Lopez*, 998 F.3d at 436 (citing *Reading Law*, at 119–20; emphasis in *Lopez*); *see also United States v. Pace*, 48 F.4th 741, 762 (7th Cir. 2022) (Wood, J., dissenting in part) ("The only way in which the conjunctive proof does any work is if all three things must exist together—that is, the example [in *Reading Law*] should be understood this way: '"To be eligible, you must prove that you have not [A, B, and C]."').

B. The *Palomares* panel majority's "distributive" theory is as obscure as it is inconsistent.

The *Palomares* panel majority's "distributive" theory—that the negative language preceding the em-dash in § 3553(f)(1) ("the defendant does not have—") should be distributed to independently modify each following subsection, while the affirmative language preceding the em-dash in § 3553(f)'s umbrella clause ("Notwithstanding any other provision of law, … the court shall impose a sentence pursuant to guidelines … without regard to any statutory minimum sentence, if the court finds at sentencing, after the Gov-

ernment has been afforded the opportunity to make a recommendation, that—") should not be distributed in this same manner—is as obscure as it is inconsistent. As Judge Willett observed, "[t]he majority does not cite a single grammarian, dictionary, or case endorsing its on-again off-again view of em-dashes. Making up new grammatical rules on the fly isn't statutory interpretation, it's statutory Calvinball."[6] *Palomares*, 52 F.4th at 654–55; *see also Garcon*, 54 F.4th at 1280 ("We decline to adopt that novel reading when it appears to have been crafted by the government specifically for this statute to achieve its preferred outcome.") (cleaned up).

A consistent application of the "distributive" interpretation would require that all of the language in § 3553(f)'s umbrella clause be distributed to each subsection that follows (subsections (f)(1)–(5)). But "[i]f each item in the five-part list included the *entire* umbrella clause—i.e., everything that precedes the em-dash—then a defendant would qualify for safety-valve relief by satisfying any one of the five elements (just as the majority concludes that a defendant flunks § 3553(f)(1) by failing to satisfy any one of those

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[6] *See* The Calvin and Hobbes Wiki, *Calvinball*, https://calvinandhobbes.fandom.com/wiki/Calvinball ("Calvinball has no rules; the players make up their own rules as they go along, so that no Calvinball game is like another.") (last visited Jan. 27, 2003).

three elements)." *Palomares*, 52 F.4th at 655 n.15 (Willett, J., dissenting). That would effectively eliminate all mandatory minimums for drug crimes—and under that interpretation, Holguin would still win, because she satisfies (f)(2)–(5). *Id.* at 654.[7]

C. A conjunctive interpretation of "and" does not render § 3553(f)(1)(A) surplusage. In any event, in this instance the conjunctive/disjunctive canon of construction is a better indication of plain meaning than the canon against surplusage.

A conjunctive interpretation of "and" does not render § 3553(f)(1)(A) surplusage. The panel majority in *Palomares* believed that the conjunctive reading would render § 3553(f)(1)(A) surplusage "because every criminal defendant who has a 2-point violent offense and a 3-point offense (satisfying (B) and (C)) will have at least 5 criminal history points, satisfying (A)." 52 F.4th at 645. This is incorrect, for multiple reasons.

First, because some defendants will have a prior 3-point offense or prior 2-point violent offense that is ineligible for inclusion in the criminal-history calculation. As explained in Judge Willett's dissent, "a defendant who completed her sentence for a 3-point

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[7] Judge Oldham's interpretation of § 3553(f), which involves distributing the entire umbrella clause, *see Palomares*, 52 F.4th at 651 n.2, fails for this same reason.

drug offense more than 15 years ago, and who committed a 2-point violent offense within the last 10 years, will satisfy § 3553(f)(1)(B) and (C)—she has a prior 3-point offense and a prior 2-point violent offense. But she will not run afoul of subsection (A), because [U.S.S.G.] §4A1.2 tells courts to not count 3-point offenses that have 'gone stale.' This hypothetical defendant would satisfy subsections (B) and (C), but not (A)." *Palomares*, 52 F.4th at 656; *see also Pace*, 48 F.4th at 763–64 (Wood, J., dissenting in part) (providing similar examples); *Garcon*, 54 F.4th at 1281–82 (same). A "stale 3-point offense is still a 3-point offense" (rather than a "0-point offense") even though it is not counted in the criminal-history calculation. *Palomares*, 52 F.4th at 656 (Willett, J., dissenting); *see also Garcon*, 54 F.4th at 1282; *Pace*, 48 F.4th at 764 (same) (Wood, J., dissenting in part).

Second, the Guidelines treat separate offenses as a single sentence for criminal-history purposes when the sentences result from offenses charged in the same instrument or when they were imposed on the same day, *see* U.S.S.G. §4A1.2(a)(2), and

> [w]hen separate offenses are counted as a single sentence, the district court calculates the term of imprisonment based on the longest sentence if the sentences were imposed concurrently or the total of both sentences if they were imposed consecutively. So, for example, a defendant could have a two-point and a three-point offense charged in the

> same instrument, satisfying subsections (B) and (C), but score only three criminal history points and fall below the threshold in subsection (A).

Garcon, 54 F.4th at 1282.

Third, as the Ninth Circuit pointed out, a defendant who has only one three-point violent offense under the Guidelines would "have (B) a 'prior 3-point offense' and (C) a 'prior 2-point violent offense' but would have only three criminal-history points, not (A) 'more than 4 criminal history points.'" *Lopez*, 998 F.3d at 440 (citing § 3553(f)(1)(A)–(C)). "Put another way, a three-point violent offense can simultaneously satisfy two subsections, (B) and (C), while not satisfying subsection (A)." *Id.* (cleaned up); *see also id.* at 440 n.10 (construing a "2-point violent offense" to cover "violent offenses with sentences of at least 60 days").

Even if a conjunctive interpretation of "and" does render subsection (A) surplusage, courts need not "avoid surplusage at all costs." *United States v. Atlantic Rsch. Corp.*, 551 U.S. 128, 137 (2007). As Judge Willett recognized, there are "at least three reasons" why the conjunctive/disjunctive canon "is a better indication of plain meaning here." *Palomares*, 52 F.4th at 657. First, "ignoring Congress's choice of the word 'and' also violates the canon against surplusage" because, "[i]f the em-dash 'distributes' the prefatory clause, then subsections (A)–(C) operate independently regardless

of what word appears between them" (*e.g.*, "and," "or," or no word at all), in which case "the canon against surplusage can do no work." *Id*. As this Court has said, "[t]he canon against superfluity assists only where a competing interpretation gives effect to every clause and word of a statute." *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011) (cleaned up). Second, reading "and" out of subsection (f)(1) violates the canon of consistent usage, as "we would have to believe that Congress meant to invoke the plain meaning of these words ['and' and 'or'] every time [they appear in the statute] except in subsection (f)(1)." *Palomares*, 52 F.4th at 657. Third, "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." *Id*. "[T]he plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925) (cleaned up).

In the end, the "remedy for any dissatisfaction with the results in particular [statutory-construction] cases lies with Congress." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575–76 (1982). As Judge Smith said in his *Lopez* concurrence, a court "can only

carry out [Congress's] will in applying the plain language of the statute as enacted." 998 F.3d at 446; *see also Pace*, 48 F.4th at 760 (Wood, J., dissenting in part) ("Whether wisely or foolishly, Congress used the word 'and,' and as judges it is our duty to apply the law as it is written.").

D. Even if there is ambiguity, the rule of lenity applies.

Even if it is ambiguous whether a defendant must fail all three of § 3553(f)(1)'s subsections before § 3553(f)(1) bars her from safety-valve relief, the rule of lenity requires that the question be resolved in favor of Holguin. Under the rule of lenity, "any reasonable doubt about the application of a penal law must be resolved in favor of liberty." *Wooden v. United States*, 142 S. Ct. 1063, 1081 (2022) (Gorsuch, J., joined by Sotomayor, J., concurring in the judgment). The Fifth Circuit has admitted that § 3553(f)(1)'s structure is "perplexing." *Palomares*, 52 F.4th at 642. "Because reasonable minds could differ (as they have differed) on the question [presented], the rule of lenity demands a judgment in [Holguin's] favor." *Wooden*, 142 S. Ct. at 1081; *see also Smith v. United States*, 508 U.S. 223, 246 (1993) (Scalia, J., dissenting) ("Even if the reader does not consider the issue to be as clear as I do, he must at least acknowledge, I think, that it is eminently debatable—and that is

enough, under the rule of lenity, to require finding for the petitioner here.").

The *Palomares* panel majority insisted that the ambiguity must be "grievous" for the rule of lenity to apply, and thus concluded that the rule did not apply here. *Palomares*, 52 F.4th at 647. That was wrong. As Justice Gorsuch also explained in *Wooden*, "[t]his 'grievous' business does not derive from any well-considered theory about lenity or the mainstream of this Court's opinions." 142 S. Ct. at 1084. In any event, in view of the canons that support Holguin's interpretation of the statute, any ambiguity here is "grievous" and the rule of lenity resolves it. *See Garcon*, 54 F.4th at 1285; *see also id.* at 1285–86 (Rosenbaum, J., concurring) ("[E]ven after we exhaust all the ammunition in our statutory-interpretation belts, a 'grievous ambiguity' remains[.]").

CONCLUSION

FOR THESE REASONS, Holguin asks this Honorable Court to hold her petition pending the Court's resolution of *Pulsifer*, and then dispose of the petition as appropriate in light of the decision in that case.

Respectfully submitted.

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