NO._____

IN THE SUPREME COURT OF THE UNITED STATES

RICARDO GARCIA, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
Attorney of Record

KATHRYN SHEPHARD
Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1056
Telephone: (713) 718-4600

QUESTION PRESENTED

Pursuant to the "safety-valve" provision of the federal sentencing statute, a defendant convicted of certain nonviolent drug crimes can obtain relief from statutory mandatory minimum sentences if, among other things, his criminal history satisfies criteria in 18 U.S.C § 3553(f)(1): 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" (emphasis added).

The question presented is whether a defendant is ineligible for relief from the mandatory minimum if his criminal history runs afoul of any one of the disqualifying criteria in subsections (A), (B), or (C), or is ineligible only if his criminal history runs afoul of all three disqualifying criteria, *i.e.*, subsections (A), (B), and (C)?

LIST OF PARTIES

All parties are named in the caption of the case on the cover page.

RELATED CASES

- *United States v. Ricardo Garcia, Jr.*, No. 22-cr-1002, U.S. District Court for the Southern District of Texas. Judgment entered Jan. 5, 2023.
- *United States v. Ricardo Garcia, Jr.*, No. 23-40019, U.S. Court of Appeal for the Fifth Circuit. Judgment entered July 10, 2023.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS – (cont'd)

Page

TABLE OF CITATIONS

Page

CASES

TABLE OF CITATIONS – (cont'd)

Page

CASES – (cont'd)

STATUTES AND RULES

TABLE OF CITATIONS – (cont'd)

Page

STATUTES AND RULES – (cont'd)

SENTENCING GUIDELINES

MISCELLANEOUS

PRAYER

Petitioner Ricardo Garcia, Jr., respectfully prays that this Court grant his petition for certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is attached to this petition as an Appendix. The district court did not issue a written opinion.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion on July 10, 2023. *See* Appendix. This petition is filed within 90 days after entry of judgment. *See* Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION 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.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

This case was originally brought as a federal criminal prosecution under 21 U.S.C. §§ 952(a), 960(a)(1), 960(b)(1) and 18 U.S.C. § 2. The district court therefore had jurisdiction under 18 U.S.C. § 3231.

STATEMENT OF THE CASE

In the United States District Court for the Southern District of Texas, petitioner pleaded guilty to a nonviolent federal drug offense, namely, importing into the United States a controlled substance, that is, 500 grams or more of a mixture or substance containing a detectable of methamphetamine, a Schedule II controlled substance, in violation of 21 U.S.C. §§ 952(a), 960(a)(1), 960(b)(1) and 18 U.S.C. § 2. The district court ruled, over objection, that petitioner was ineligible for "safety valve" relief because he had a "prior 3-point offense," *see* 18 U.S.C. § 3553(f)(1)(B), even though his criminal history did not meet *all* the disqualifying criteria in § 3553(f)(1)(A)-(C). The court imposed a statutory minimum sentence of 120 months' imprisonment.

Petitioner timely appealed. The Fifth Circuit summarily affirmed the district court's judgment in light of *United States v. Palomares*, 52 F.4th 640, 642, 647 (5th Cir. 2022), *petition for cert. filed* (U.S. Dec. 21, 2022) (No. 22-340), which held that a defendant is ineligible for the safety valve if his criminal history satisfies just one of § 3553(f)(1)'s conditions. *See* Appendix.

REASONS FOR GRANTING THE PETITION

The Court should hold this petition pending its decision in *Pulsifer v. United States* (No. 22-340), and then dispose of the petition as appropriate in light of that decision. In the event that *Pulsifer* does not resolve the question presented here, the petition should be granted because there is a deep split in the circuits regarding whether a defendant is ineligible for relief from the mandatory minimum sentence under 18 U.S.C. § 3553(f)(1) if his criminal history runs afoul of any one of the disqualifying criteria in subsections (A), (B), or (C), or is ineligible only if his criminal history runs afoul of all three disqualifying criteria, *i.e.*, subsections (A), (B), and (C).

A. This Court should hold this petition pending its decision in *Pulsifer v. United States*.

The decision below in petitioner's case rested on the Fifth Circuit's holding in *Palomares*, *supra*, which held that a defendant is ineligible for the safety valve if his criminal history satisfies just one of § 3553(f)(1)'s conditions. *See* Appendix.

On February 27, 2023, this Court granted certiorari in *Pulsifer v. United States*, No. 22-340, on the following question (as framed in the petition): "[W]hether the 'and' in 18 U.S.C. § 3553(f)(1) means 'and,' so that a defendant satisfies the provision so long as he does not have (A) more than 4 criminal history points, (B) a 3-point offense, and (C) a 2-point offense (as the Ninth Circuit holds), or whether the 'and' means 'or,' so that a defendant satisfies the provision so long as he does not have (A) more than 4 criminal history points, (B) a 3-point offense, or (C) a 2-point violent offense (as the Seventh and Eighth Circuits hold)." Because *Pulsifer* will be argued this Term and will likely resolve the circuit split over the interpretation of § 3553(f)(1), this Court should hold this consolidated petition pending its decision in *Pulsifer*, and then dispose of the petition as appropriate in light of that decision.

B. There is a deep and entrenched circuit split on the question presented.

In the event that *Pulsifer* does not resolve the question presented here, the petition should be granted because there is a deep split in the circuits regarding whether a defendant is ineligible for relief from the mandatory minimum sentence under 18 U.S.C. § 3553(f)(1) if his criminal history runs afoul of any one of the disqualifying criteria in subsections (A), (B), or (C), or is ineligible only if his criminal history runs afoul of all three disqualifying criteria, *i.e.*, subsections (A), (B), and (C). *See* Sup. Ct. R. 10(a).

The Fourth, Ninth, and Eleventh Circuits have held that the use of the word "and" within the revised statutory language of § 3553(f)(1) is unambiguous and serves its ordinary meaning as a "conjunctive," which means that a defendant is not disqualified from potential safety-value relief unless a defendant fails all three of § 3553(f)(1)'s criteria. *See United States v. Jones*, 60 F.4th 230 (4th Cir. 2023); *United States v. Garcon*, 54 F.4th 1274 (11th Cir. 2022) (*en banc*), *petition for cert. filed* (U.S. Mar. 8, 2023) (No. 22-851); *United States v. Lopez*, 998 F.3d 431 (9th Cir. 2021).

In contrast, the Fifth, Sixth, Seventh, and Eighth Circuits have held that the use of the word "and" creates a "disjunctive" list of qualifications akin to the use of the word "or." *See United States v. Haynes*, 55 F.4th 1075 (6th Cir. 2022), *petition for cert. filed* (U.S. Mar. 21, 2023) (No. 22-7059); *United States v. Pace*, 48 F.4th 741 (7th Cir. 2022), *petition for cert. filed* (U.S. Mar. 1, 2023) (No. 22-828); *United States v. Palomar*es, 52 F.4th 640 (5th Cir. 2022), *petition for cert. filed* (U.S. Dec. 21, 2022) (No. 22-340); *United States v. Pulsifer*, 39 F.4th 1018 (8th Cir. 2022), *cert. granted* (U.S. Feb. 27, 2023) (No. 22-340).

This statutory interpretation prohibits a defendant who fails any of the three criteria in § 3553(f)(1)—(A) more than 4 criminal history points, (B) a prior 3-point offense, or (C) a prior 2-point violent offense—from being eligible for sentencing relief.

This deep and entrenched circuit split is the product of numerous court of appeals' opinions that have exhaustively analyzed the issue and reached conflicting conclusions. There is no prospect that the split will go away on its own. As it stands, the circuits' differing interpretations of the safety-valve provision cause defendants to receive disparate sentences based on the vagaries of geography. This situation is intolerable and will persist unless resolved by this Court, as it likely will do in *Pulsifer* (No. 22-340).

C. The question presented is important.

The correct interpretation of the First Step Act's "safety-valve" provision presents an "important question" of federal law that warrants this Court's review. *See* Sup. Ct. R. 10(c). The fact that the entrenched and broad circuit conflict has arisen so quickly after the passage of the First Step Act (in 2018) demonstrates the recurring nature of the issue and the need for this Court's review. And the issue is of fundamental importance because it concerns the proper interpretation of a federal criminal sentencing statute with broad application. The First Step Act was a major piece of legislation that passed with broad, bipartisan support. The sentencing provisions in the Act were specifically designed to "address[] overly harsh and expensive mandatory minimums for certain nonviolent offenders" by "expanding the existing Federal safety valve to include more low-level, nonviolent offenders." 164 Cong. Rec. S7648, S7649 (daily ed. Dec. 17, 2018) (statement

of Sen. Grassley); *see also* 164 Cong. Rec. S7745, S7748 (daily ed. Dec. 18, 2018) (statement of Sen. Klobuchar) (the Act "allows judges to sentence below the mandatory minimum for low-level, nonviolent drug offenders who work with the government").

D. The Fifth Circuit's decision in *Palomares* is wrong.

As noted above, the decision below in petitioner's case rested on the Fifth Circuit's *Palomares* decision, which held that a defendant is ineligible for the safety valve if his criminal history satisfies just one of § 3553(f)(1)'s conditions. *See* Appendix.

In *Palomares*, the Fifth Court agreed with the government's position that § 3553(f)(1) bars a defendant from safety-valve relief if his 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 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 (emphasis in original).

The panel majority acknowledged that "[t]he ordinary meaning of 'and,' which § 3553(f)(1) uses to join the three subsections, is conjunctive." *Id.* 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), 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." *Id.* 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," *id.* 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. *Id.* 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.

The panel majority's decision in *Palomares* is unsound and cannot stand, as it strains against the plain meaning of the word "and" and the conjunctive/disjunctive canon of construction in favor of an inconsistent application of the em-dashes in § 3553(f) that has no support in the case law or other authorities, all for the purpose of avoiding surplusage.

1. The ordinary meaning of "and" is conjunctive. Under the plain language, then, a defendant is disqualified under § 3553(f)(1) only if his 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.*, — U.S —, 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 his 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 his criminal history runs afoul of all three of its criteria. *See Garcon*, 54 F.4th at 1277-80; *Lopez*, 998 F.3d at 433, 437.

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*, — U.S. —, 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 (same). "[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 Pace*, 48 F.4th at 762 (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].").

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

The *Palomares* panel majority's "distributive" theory—that is, its 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 Government 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" (in which the only permanent rule is that you cannot play it the same way twice). *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 three elements)." *Palomares*, 52 F.4th at 655 n.15 (Willett, J., dissenting) (emphasis in original). That would effectively eliminate all mandatory minimums for drug crimes—and under that interpretation, petitioner would still win, because he satisfies (f)(2)-(5). *Id.* at 654.[1]

3. A conjunctive interpretation of "and" does not render § 3553(f)(1)(A) surplusage; and 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)." *Palomares*, 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 drug

[1] 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.

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 [USSG] § 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 Garcon*, 54 F.4th at 1281 (providing similar examples); *Pace*, 48 F.4th at 763-64 (Wood, J., dissenting in part) (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 1281-82 (same); *Pace*, 48 F.4th at 764 (Wood, J., dissenting in part) (same).

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* USSG § 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. Atl. 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." *Palomares*, 52 F.4th at 657 (Willett, J., dissenting). 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 (Willett, J., dissenting). And 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.").

4. 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 him from safety-valve relief, the rule of lenity requires that the question be resolved in favor of petitioner. 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*, — U.S. —, 142 S. Ct. 1063, 1081 (2022) (Gorsuch, J., joined by Sotomayor, J., concurring in the judgment). The *Palomares* panel majority viewed § 3553(f)(1)'s

structure as "perplexing." 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 [petitioner'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 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 petitioner'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 the foregoing reasons, the Court should hold this petition pending its decision in *Pulsifer v. United States* (No. 22-340), and then dispose of the petition as appropriate in light of that decision. In the event that *Pulsifer* does not resolve the question presented here, the petition should be granted.

Date: September 28, 2023

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
Attorney of Record

By 
KATHRYN SHEPHARD
Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1056
Telephone: (713) 718-4600