No. 22-

IN THE
Supreme Court of the United States

NONAMI PALOMARES,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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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, her criminal history satisfies criteria in 18 U.S.C § 3553(f)(1): 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" (emphasis added).

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

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Nonami Palomares, petitioner on review, was the defendant-appellant below.

The United States of America, respondent on review, was the plaintiff-appellee below.

No party is a corporation.

LIST OF RELATED PROCEEDINGS

United States Court of Appeals (5th Cir.):

United States v. *Palomares*, No. 21-40247 (Nov. 2, 2022)

United States District Court (S.D. Tex.):

United States v. *Palomares*, 20-CR-1355 (Feb. 10, 2021)

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PETITION FOR A WRIT OF CERTIORARI

Nonami Palomares respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 52 F.4th 640. Pet. App. 1a–36a. The District Court's judgment, (*id.* at 37a–42a) and the sentencing transcript (*id.* at 43a–66a) are unreported.

JURISDICTION

The court of appeals issued its opinion on November 2, 2022. This Court's jurisdiction is invoked 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 sen-

tence of the defendant unless the information relates to a violent offense.

STATEMENT OF THE CASE

A. Introduction

This case squarely presents an acknowledged, entrenched, and growing circuit conflict concerning the proper interpretation of the "safety-valve" provision of the federal sentencing statute. The Fifth Circuit's decision below widened a 2–1 circuit split into a 3–1 split (Fifth, Seventh and Eighth Circuits on one side, Ninth Circuit on the other). Then, earlier this month, the *en banc* Eleventh Circuit issued a decision siding with the Ninth Circuit that further widens the split to 3–2. And then earlier this week, the Sixth Circuit issued a divided decision siding with the Fifth, Seventh, and Eighth Circuits, expanding the split to 4–2.

This circuit conflict arises from changes that Congress made to the safety-valve provision in 2018. The conflict has developed so quickly because it concerns a sentencing issue that arises in thousands of cases each year: the conditions under which defendants can obtain relief from mandatory minimum sentences. The proper interpretation of the safety-valve provision is of vital importance to our criminal justice system because defendants should not receive unequal sentences based upon the circuit in which they are prosecuted. Ms. Palomares's case provides a compelling vehicle for review.

B. Statutory Background

18 U.S.C. § 3553(f), titled "Limitation on Applicability of Statutory Minimums in Certain Cases," exempts qualifying defendants who are convicted of certain nonviolent drug crimes from statutory minimum sentences. These defendants are instead sentenced under

the United States Sentencing Guidelines ("the Guidelines"). Because this provision exempts defendants from mandatory minimum sentences, it is commonly referred to as the "safety-valve" provision.

A core purpose of the safety-valve provision is to allow "low-level drug defendants" to "avoid the often harsh statutory minimum sentences" because they "often have no new or useful information to trade and thus cannot qualify for substantial assistance departures." *United States* v. *Alvarado-Rivera*, 386 F.3d 861, 869 (8th Cir. 2004); see also U.S. Sent'g Comm'n, *Mandatory Minimum Penalties For Drug Offenses in the Federal Criminal Justice System*, at 7 (Oct. 2017), https://bit.ly/3WhUkCn ("Offenders who performed higher-level functions were generally more likely to receive relief for providing substantial assistance than offenders who performed low-level functions, reflecting the fact that low-level offenders often do not have valuable information to provide due to their more limited role in the offense."); Cong. Rsch. Serv., *Federal Mandatory Minimum Sentences: The Safety Valve and Substantial Assistance Exceptions*, at 2 (July 5, 2022), https://sgp.fas.org/crs/misc/R41326.pdf ("Congress created the safety valve after it became concerned that the mandatory minimum sentencing provisions could have resulted in equally severe penalties for both the more and the less culpable offenders.").

To qualify for relief, a defendant must meet the criteria set forth in § 3553(f)(1) through (5). For example, the defendant must not have used violence or a firearm in the offense, *id.* § 3553(f)(2); the offense must not have resulted in death or serious bodily injury, *id.* § 3553(f)(3); the defendant must not have been an organizer or leader of others in the offense, *id.* § 3553(f)(4); and the defendant must have provided the government with information and evidence about the

offense and related offenses (but the fact that the defendant has no useful information to provide does not preclude compliance with this requirement), *id.* § 3553(f)(5).

This case concerns the criteria in § 3553(f)(1), which addresses the defendant's criminal history. Before 2018, a defendant had to show that she did "not have more than 1 criminal history point." 18 U.S.C. § 3553(f)(1) (2017). Congress amended this provision in the First Step Act of 2018, § 402, 132 Stat. at 5221, which expanded eligibility for relief. The First Step Act was designed to "address[] overly harsh and expensive mandatory minimums for certain nonviolent offenders." 164 Cong. Rec. S7648, S7649 (daily ed. Dec. 17, 2018) (statement of Sen. Grassley); see also *id.* (the Act "provides for more judicial discretion by expanding the existing Federal safety valve to include more low-level, nonviolent offenders"); 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").

Section 3553(f)(1) now requires the following showing:

> (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[.]

The question presented turns on the meaning of the word "and" in § 3553(f)(1)(B): Is a defendant ineligible for relief from the mandatory minimum if her criminal history runs afoul of any one of the disqualifying criteria in subsections (A), (B), or (C), or is a defendant ineligible for relief only if her criminal history runs afoul of all three disqualifying criteria, *i.e.*, subsections (A), (B), *and* (C)?

C. Factual and Procedural History

1. In December 2020, Ms. Palomares pleaded guilty to one count of possession with intent to distribute one kilogram or more of a mixture or substance containing heroin in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A) and 18 U.S.C. § 2. Pet. App. 3a. She was caught with six bundles of heroin (net weight of 4.94 kg or 10.9 lbs) in her luggage at a Border Patrol checkpoint in Texas. The Presentence Investigation Report (PSR) notes that Ms. Palomares's "role was that of a transporter of the heroin" from Mexico into the United States on a bus. PSR ¶ 10; see also *id.* ¶ 7 (noting that Ms. Palomares "admitted that an unidentified individual in Mexico forced her to transport narcotics" in her luggage). This offense carries a mandatory minimum sentence of ten years (120 months), with a maximum sentence of life imprisonment. Pet. App. 3a (citing 21 U.S.C. § 841(a)(1) and (b)(1)(A) and 18 U.S.C. § 2).

In her objections to the PSR, Ms. Palomares argued that she was eligible for relief from the mandatory minimum sentence under the safety-valve provision. See *id.* The safety-valve inquiry in her case turned solely on the criminal history criteria in § 3553(f)(1), *i.e.*, it is uncontested that Ms. Palomares satisfies the other criteria in § 3553(f)(2)–(5). Ms. Palomares's only criminal history is a prior 3-point (non-violent) drug offense, which means that her criminal history runs afoul of § 3553(f)(1)(B). PSR ¶ 27. This prior offense,

possession with intent to distribute cocaine, took place in 2001 when Ms. Palomares was 20 years old. *Id.* Ms. Palomares argued that the safety valve applied because § 3553(f)(1) requires mandatory minimum sentences only for defendants whose criminal history meets all three criteria listed in subsections (A) through (C), whereas her criminal history meets only one of those criteria. See Pet. App. 3a.

2. The district court overruled Ms. Palomares's objection at the sentencing hearing, concluding that she "is not eligible because she does have the three-point prior offense." Pet. App. 50a. The court concluded that the criteria in (A) through (C) are not "cumulative." Instead, "[o]nly one of those need to be present to be an exclusion," because "that's just sort of a common sense approach to" the statute. *Id.* at 48a–49a. The court granted Ms. Palomares a three-point reduction for acceptance of responsibility. *Id.* at 3a. This would have resulted in an advisory imprisonment range of 97–121 months, but the 10-year mandatory minimum resulted in an applicable sentencing range of 120–21 months. *Id.* at 3a–4a. The court sentenced Ms. Palomares to 120 months in prison. *Id.* at 4a.

3. In a divided decision, the Fifth Circuit affirmed. Pet. App. 1a–36a. The 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." *Id.* at 2a & 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 2a–3a (emphasis in original).

The majority acknowledged that "[t]he ordinary meaning of 'and,' which § 3553(f)(1) uses to join the three subsections, is conjunctive." Pet. App. 4a. 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 6a. 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.* 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.* at 6a–7a.

The majority further believed that its interpretation "avoids violating the canon against surplusage." Pet. App. 7a. 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 8a. Again, the majority rejected the Ninth Circuit's reasoning to the contrary. *Id.* at 9a–11a. Finally, the majority declined to apply the rule of lenity on the ground that there is no "grievous" ambiguity in the statute. *Id.* at 12a–13a.

Judge Oldham concurred in the judgment. In his view, § 3553(f) "constitutes one (admittedly long) statutory sentence." Pet. App. 22a. He 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 20a n.2.

Judge Willett dissented. In his view, the court "must assume that Congress meant what it said. Congress said 'and.'" Pet. App. 24a. 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.* 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 36a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW WIDENS AN ACKNOWLEDGED CIRCUIT SPLIT ON THE QUESTION PRESENTED.

There is an acknowledged and well-developed circuit split on the question presented. The 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 *Lopez*, 998 F.3d 431 (petition for rehearing filed on August 5, 2021 (No. 19-50305)); *United States* v. *Garcon*, No. 19-14650, 2022 WL 17479829 (11th Cir. Dec. 6, 2022) (*en banc*).

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. *Palomares*, 52 F.4th 640 (5th Cir. 2022); *United States* v. *Pulsifer*, 39 F.4th 1018 (8th Cir. 2022) (petition for certiorari filed, No. 22-340 (Oct. 7, 2022)); *United States* v. *Pace*, 48 F.4th 741 (7th Cir. 2022); *United States* v. *Haynes*, No.

22-5132, 2022 WL 17750939 (6th Cir. Dec. 19, 2022). 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.

A. The Ninth and Eleventh Circuits construe "and" to mean "and," not "or."

The Ninth Circuit, in *Lopez*, concluded that if the court finds at sentencing that the defendant does not have (A) more than 4 criminal history points, (B) a prior 3-point offense, *and* (C) a prior 2-point violent offence, the defendant is eligible for safety-valve relief. The court began with the plain text of the statute and gave the term "and" its "'ordinary, contemporary, common meaning,'" holding that "and" means what it says and is conjunctive. *Lopez*, 998 F.3d at 435 (quoting *Perrin* v. *United States*, 444 U.S. 37, 42 (1979)). In the Ninth Circuit a defendant therefore has to fail all three criteria in (A) through (C), cumulatively, in order to be disqualified from safety-valve relief. *Id*. at 436–437.

In reaching this conclusion, the Ninth Circuit consulted the last fifty years' worth of dictionaries and statutory-construction treatises, finding, without fail, that in each "when the term 'and' joins a list of conditions it requires not one or the other, but *all* of the conditions." *Id*. at 436 (emphasis in original). The Ninth Circuit also relied upon the Senate's own legislative drafting manual. *Id.*. The manual "instructs that the term 'and' should be used to join a list of conditions . . . when a conjunctive interpretation is intended." *Id*. Finally, in the Ninth Circuit's view, reading "and" in any other way would require the court to change the statute's entire structure "into a *disjunctive* negative proof" in contradiction of its plain meaning, the legislative drafting guide, numerous dictionaries, and also

the canon of consistent usage. *Id.* at 437 (emphasis in original).

The Ninth Circuit also rejected the government's claim that "and" is ambiguous and that the court could resolve this ambiguity by making "and" read disjunctively as "or." *Id.* at 438. The government reasoned that this reading was required in order to avoid surplusage or absurd results. The Ninth Circuit examined and rejected all of these arguments, finding that the government failed to consider how its hypotheticals would work in concert with other portions of the sentencing statute. *Id.* at 438–39.

Finally, the Ninth Circuit held in the alternative that even if the term "and" was ambiguous, the rule of lenity would apply. The court explained that it would never expect any defendant to "ignore the plain meaning of 'and,' ignore the Senate's legislative drafting manual" as well as "our prior case law interpreting 'and' in § 3553(f)(4), and then, somehow, predict that a federal court would rewrite § 3553(f)(1)'s 'and' into an 'or.'" *Id.* at 443.

The Eleventh Circuit *en banc* recently reached the same conclusion as the Ninth Circuit, by a 7–4 vote. *Garcon*, 2022 WL 17479829 (W. Pryor, J.). The Eleventh Circuit's majority opinion largely took the same interpretive journey as the Ninth Circuit in *Lopez*, relying upon consistent usage canons and the Senate's legislative drafting manual. *Id.* at *4–10. Like the Ninth Circuit, the Eleventh Circuit rejected the government's arguments based on negative prefatory phrases, surplusage, and absurdity. *Id.* at *11–22. In the end, the Eleventh Circuit concluded that the ordinary, unambiguous meaning of "and" is conjunctive. *Id.* at *3. Declining to adopt a "novel reading when [that reading] appears to have been crafted by the gov-

ernment specifically for this statute to achieve its preferred outcome," the court held that a defendant has to fail all three criteria in order to be disqualified from safety-valve relief. *Id*. at *4–5. Critically, the Eleventh Circuit also held that even if there were any ambiguity in the text, as again pressed by the government, the court would be required to apply the rule of lenity. Therefore, the Eleventh Circuit held that under either a clear or ambiguous reading of the statute, Garcon was entitled to safety-valve relief because he did not fail all three criteria in § 3553(f)(1). *Id*. at *23–24.

One of the dissenting judges expressly noted that "the Court's decision deepens a circuit split that is sure to attract the attention of the Supreme Court." *Id.* at *27 (Brasher, J., dissenting). The debate in the Eleventh Circuit's 11-judge *en banc* proceeding resulted in six separate opinions.

The stark division among the circuits is further illustrated by the fact that the reasoning of the Ninth and Eleventh Circuits strongly resembles the reasoning of the dissents in the Fifth, Sixth and Seventh Circuits. Judge Willett, the dissenter in the Fifth Circuit, criticized the majority's "[m]anufactured ambiguity" as a threat to the elemental use of English itself. Pet. App. 23a. He found that the majority's use of "complicated semantic bracework to augment [the] ordinary meaning" of "and" could not overcome Congress's plain drafting. *Id*. Accordingly, he concluded that a defendant has to fail all of the disqualifying criteria—not just one—in order to be ineligible for safety-valve relief.

Likewise, in her dissent in *Pace*, Seventh Circuit Judge Wood found it "painfully obvious that Congress did not use the word 'or' to connect" the criteria and while the majority "strain[ed] against that normal English understanding" of the word "and" it was their duty as judges "to apply the law as it is written." 48

F.4th at 760, 761. Judge Wood agreed with the Ninth Circuit's view that "[i]n everyday English, the word 'and' is a conjunction that signifies that all items in a list are included." *Id*. at 760.

Sixth Circuit Judge Griffin, in his dissent in *Haynes*, expressly agreed with the *en banc* Eleventh Circuit in *Garcon*, the Ninth Circuit in *Lopez*, and his "dissenting colleagues in the Fifth and Seventh Circuits," finding that their conjunctive interpretation "harmonizes most canons of statutory interpretation and gives effect to the language Congress used." *Haynes,* 2022 WL 17750939, at *5. Judge Griffin recognized that the panel majority's "acceptance of the government's interpretation is no more than doing what it says it is not: 'conflat[ing] plausibility with our own sense of good policy.'" *Id.* at *8; cf. *Lopez*, 998 F.3d at 440 ("The government's request . . . is simply a request for a swap of policy preferences."). And, highlighting the real-world impact of this interpretive divide, the judge pointed out that "whether one is eligible for safety-[valve] relief is now largely a function of geography." *Haynes*, 2022 WL 17750939, at *5.

B. The Fifth, Sixth, Seventh, and Eighth Circuits construe "and" as "or."

The Eighth Circuit acknowledged but expressly disagreed with the holding of the Ninth Circuit, finding that in the context of § 3553(f)(1) "and" has to mean "or." See *Pulsifer*, 39 F.4th at 1022 n.2. The Eighth Circuit recognized, but ignored, the literal definition of the word "and," stating that "[s]ubsection (A) has an independent operation only if 'and' is read severally" so as to avoid surplusage and give effect "'to every clause and word of'" the statute. *Id.* at 1021–22 (quoting *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000)). The

Eighth Circuit therefore held that a distributive reading of "and" "is the better reading of the statute." *Id.* at 1022.

The Eighth Circuit rejected the Ninth Circuit's reasoning, including its reliance on the canon of consistent usage and the rule of lenity. In the Eighth Circuit's view, consistent usage was overcome by "contextual differences" in the statute and there was no textual ambiguity after application of "traditional tools of interpretation." *Id.* at 1022–23. As a result, in the Eighth Circuit, "[i]f a defendant does not meet all three conditions, then the defendant is not eligible" and will be sentenced to the mandatory minimum or longer. *Id.* at 1022.

The Seventh Circuit, in *Pace*, began its decision by acknowledging the well-developed circuit split. 48 F.4th at 752. The Seventh Circuit described the competing interpretations of § 3553(f)(1) as the "conjunctive" versus "disjunctive" arguments. *Id.* at 752 n.18. It found the latter more persuasive because the "conjunctive argument creates more problems than solutions," rendering a part of the "statute superfluous." *Id.* at 754. In the Seventh Circuit's reading of the statute, "the most important textual basis for this 'distributive' reading is Congress's use of the em-dash." *Id.* In its view, "the em-dash serves to modify each requirement: *does not have* more than 4 criminal history points, *does not have* a prior 3-point offense, and *does not have* a prior 2-point violent offense," and "[t]his reading of the statute gives proper meaning to the word 'and' while also treating the subsections as a checklist of requirements a defendant must not have in order to be eligible for the safety valve." *Id.* Based on this interpretation, the Seventh Circuit did not view the "conjunctive" and "disjunctive" arguments as

equally plausible and the rule of lenity never came "into play." *Id.* at 755.

The Sixth Circuit, in *Haynes*, found that the word "and" might have "more meanings than one might suppose." 2022 WL 17750939, at *2. When trying to determine which sense of "and' to use, the distributive or joint, the Sixth Circuit conceded that "no rule of construction strongly favor[ed] one meaning over the other" but felt that "the respective content of each proposed meaning of § 3553(f)(1) shows that one sense of the word 'and' is more plausible than the other." *Id.* at *3. It concluded the government's interpretation that "the defendant must not have any of three disqualifying conditions" was the "logically [more] coherent" one because each of the conditions listed in § 3553(f)(1) "on its face is quite plausibly an independent ground to deny a defendant the extraordinary relief afforded by the safety valve." *Id.* The Sixth Circuit agreed with the Eighth Circuit that, "of the interpretations on offer here, only the distributive interpretation avoids surplusage." *Id.* at *4 (cleaned up).

The Fifth Circuit, as explained, also expressly rejected the reasoning of the Ninth Circuit and held that "the statute's uncommon structure holds the key to unlocking its meaning." Pet. App. 2a. In the case of § 3553(f)(1), the Fifth Circuit concluded that the opening "prefatory phrase coupled with an em-dash" acts to distribute the opening phrase to the list that follows, making the word "and" in the list of criteria effectively an "or." *Id.* at 2a–3a. The Fifth Circuit opined that "[t]he distributive reading cannot affect the rest of the statute because the list in § 3553(f)(1) works differently due to its negative clause 'does not have' that precedes an em-dash. By contrast, § 3553(f) contains a list of affirmative requirements." *Id.* at 7a. Thus, in the Fifth Circuit's view, to be eligible for safety-valve relief

under the statute a defendant must not fail any of § 3553(f)(1)'s listed criteria. The Fifth Circuit also found that there was no "grievous" ambiguity and thus declined to apply the rule of lenity. *Id.* at 12a–13a.

* * * * *

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.

II. THE FIFTH CIRCUIT'S DECISION IS WRONG.

In the decision below, the Fifth Circuit 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. This interpretation is unsound and should not stand.

1. A conjunctive interpretation of "and" does not render § 3553(f)(1)(A) surplusage. As noted, the panel majority 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)." Pet. App. 8a. This is incorrect, for multiple reasons. *First*, 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 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).

Pet. App. 29a–31a; see also *Garcon*, 2022 WL 17479829, at *5 (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. Pet. App. 30a–31a; see also *Garcon*, 2022 WL 17479829, at *6 (same); *Pace*, 48 F.4th at 764 (Wood, J., dissenting in part) (same).

Second, since the Guidelines treat the sentences for separate offenses as a "single sentence" for criminal-history purposes when "the sentences resulted from offenses contained in the same charging instrument" or "were imposed on the same day," U.S.S.G. § 4A1.2(a)(2), a defendant could, for example, "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*, 2022 WL 17479829, at *6.

Third, as the Ninth Circuit pointed out, a defendant who has only one three-point violent offense under the Sentencing 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").

2. 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." Pet. App. 31a–32a.

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." Pet. App. 31a–32a. 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)." Pet. App. 32a.

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." Pet. App. 32a. "[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).

3. The 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."[1] Pet. App. at 27a; see also *Garcon*, 2022 WL 17479829, at *4 ("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.").

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[1] *See* Bill Watterson, *Scientific Progress Goes Boink* 153 (1991), https://preview.tinyurl.com/mrxdnm3w ("The only permanent rule in Calvinball is that you can't play it the same way twice!") (last visited Dec. 14, 2022); *see also* 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 Dec. 14, 2022).

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)." Pet. App. 28a n.15. That would effectively eliminate all mandatory minimums for drug crimes—and under that interpretation, Ms. Palomares would still win, because she satisfies (f)(2)–(5). *Id.* at 26a–27a.[2]

4. 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 Ms. Palomares. 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). A court should not "punish individuals under ambiguous laws in light of [its] own perceptions about some piece of legislative history or the statute's purpose." *Id.* at 1085. "Where the traditional tools of statutory interpretation yield no clear answer, the judge's next step . . . is to lenity." *Id.* at 1085–86.[3]

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[2] Judge Oldham's interpretation of § 3553(f), which involves distributing the entire umbrella clause, *see* Pet. App. 20a–21a n.2, fails for this same reason.

[3] In the court of appeals, counsel for Ms. Palomares raised the rule of lenity and argued specifically that the rule should apply if, after the legitimate tools of interpretation have been applied, "a

Here, "[b]ecause reasonable minds could differ (as they have differed) on the question [presented], the rule of lenity demands a judgment in [Ms. Palomares's] favor." *Id.* 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 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. Pet. App. 12a. 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 Ms. Palomares's interpretation of the statute, any ambiguity here is "grievous" and the rule of lenity resolves it. See *Garcon*, 2022 WL 17479829, at *9; see also *id.* (Rosenbaum, J., concurring) ("[E]ven after we exhaust all the ammunition in our statutory-interpretation belts, a 'grievous ambiguity' remains[.]").

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reasonable doubt persists." *See* C.A. Oral Arg. Rec. at 35:35–36:20 & 38:20–42 (available at https://bit.ly/3G43NYh); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* at 299 (2012) (citing *Moskal* v. *United States*, 498 U.S. 103, 108 (1990) (Marshall, J.)).

III. THE COURT OF APPEALS' RULING PRESENTS A RECURRING AND IMPORTANT QUESTION OF FEDERAL LAW, AND THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING IT.

1. The correct interpretation of the First Step Act's "safety-valve" provision presents a recurring and "important question" of federal law that warrants this Court's review. See Sup. Ct. R. 10(c). The recurring nature of the issue is plain because several federal courts of appeals encountered it rapidly after the law was passed in 2018. In addition, other federal courts of appeals are currently confronting the issue. See *United States* v. *Jones*, No. 21-4605 (4th Cir.) (argued December 9, 2022); *United States* v. *Holroyd*, No. 20-3083 (D.C. Cir.) (argued October 14, 2022). The fact that the entrenched and broad circuit conflict has arisen so quickly demonstrates the need for this Court's review.

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. As noted, 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").

In fiscal year 2021 alone, the United States Sentencing Commission reports that 11,534 of the 17,192 federal offenders who received penalties for drug offenses were convicted of offenses carrying mandatory minimum penalties. See U.S. Sent'g Comm'n, *2021 Sourcebook of Federal Sentencing Statistics*, Table D13, https://bit.ly/3HWRoqm (last visited Dec. 19, 2022). Of those 11,534 offenders who were subject to mandatory minimums, 5,215 or approximately 45% obtained relief through the safety valve. See *id.*; see also U.S. Sent'g Comm'n, *Fiscal Year 2021 Overview of Federal Criminal Cases* 16 (April 2022), https://bit.ly/3BJtiM0 ("Nearly half of offenders (45.1%) convicted of an offense carrying a mandatory minimum penalty obtained relief from that penalty through the safety valve").

The issue has severe practical consequences for defendants. The law as it currently stands in the Fifth, Sixth, Seventh and Eighth Circuits will disqualify many nonviolent drug offenders from safety-valve relief simply because they have one prior 3-point offense (as Ms. Palomares does) or one prior 2-point violent offense. For example, the defendant in *Lopez* "would lose the possibility of safety-valve relief only because he spray-painted a sign onto a building almost fourteen years ago." *Lopez*, 998 F.3d at 439. Similarly, "a criminal defendant convicted of selling a small amount of marijuana (such as a marijuana cigarette), who received a sentence that exceeded thirteen months of imprisonment, could not receive safety-valve relief" because he would have a 3-point offense under U.S.S.G § 4A1.1(a). *Lopez*, 998 F.3d at 439–40. Such harsh results are precisely what Congress intended to prevent in the First Step Act. Congress aimed "to give back dis-

cretion to district courts to avoid unduly harsh mandatory-minimum sentences when unnecessary." *Id.* at 442.

The government has acknowledged that the question presented is one of "exceptional importance." Pet. for Reh'g *En Banc* at 17–20, *United States* v. *Lopez*, No. 19-50305 (9th Cir. Aug. 5, 2021). In the government's view, the Ninth Circuit's current approach has "severe practical effects, underscoring the exceptional importance of the question presented." *Id.* at 17 (heading). In particular, the government contends that the Ninth Circuit's approach "makes safety-valve relief potentially available to a wide range of serious, recidivist defendants" and its "effective vitiation of the safety valve's criminal-history requirements undercuts the United States' ability to obtain assistance from recidivist defendants who otherwise had every incentive to cooperate" with the government. *Id.* at 17–19. Ms. Palomares disagrees with those practical effects, but both sides concur that § 3553(f) should have a uniform interpretation in the federal courts and that the proper interpretation is of great consequence.

2. This case is an ideal vehicle for addressing the question presented. Ms. Palomares raised, and the lower courts expressly decided, the issue. The court of appeals squarely addressed the issue in a published opinion, with thorough majority and dissenting opinions that examine all sides of the matter.

The question presented is outcome determinative in Ms. Palomares's case. As noted, the safety-valve inquiry in her case turns solely on the criminal history criteria in § 3553(f)(1) because it is uncontested that she satisfies the four other criteria in § 3553(f)(2)–(5). And the question whether Ms. Palomares satisfies the criminal history criteria turns on the proper interpretation of § 3553(f)(1). Her criminal history runs afoul

of the disqualifying criteria in sub-section (B) (since she has a 3-point offense), but does not run afoul of the disqualifying criteria in subsections (A) or (C) (since she does not have more than 4 criminal history points or a 2-point violent offense). Accordingly, her entitlement to relief from the mandatory minimum under the safety valve turns solely on the proper interpretation of that provision.

Moreover, resentencing under the safety valve would likely provide Ms. Palomares with sentencing relief. Had the district court not determined that a 120-month mandatory minimum sentence applied, the advisory Guidelines range would have been 97 to 121 months (rather than 120 to 121 months). Pet. App. 3a–4a. The district court expressly anchored the sentence to that erroneous range, stating: "The Court, having determined that you're ineligible for the First Step Act does believe a sentence at the low end of the guideline range, which is the mandatory minimum here, is warranted." *Id.* at 58a. The government cannot demonstrate that this error was harmless (and made no attempt to do so in the courts below). See also *Molina-Martinez* v. *United States,* 578 U.S. 189, 198 (2016) ("When a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different out-come absent the error."); *Peugh* v. *United States*, 569 U.S. 530, 544 (2013) ("the Sentencing Commission's data indicate that when a Guidelines range moves up or down, offenders' sentences move with it").[4]

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[4] At this time, Ms. Palomares's projected release date is March 28, 2029, according to the Bureau of Prisons website. Available at https://www.bop.gov/inmateloc/ (search for Reg. 25987-177).

Finally, this case is a compelling vehicle for addressing the question presented because Ms. Palomares is a nonviolent, low-level drug offender. As noted, she was merely a drug courier. Her criminal history is not extensive, or violent. She had only one prior 3-point offense—a 2001 conviction and sentence for possession with intent to distribute cocaine. She did not benefit from a reduction for substantial assistance under 18 U.S.C. § 3553(e), which authorizes courts to impose a sentence below the statutory minimum "to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." Ms. Palomares could not escape the mandatory minimum under this alternative basis because § 3553(e) requires a government motion and Ms. Palomares did not have valuable information to offer the government given her minor role in the drug offense. Accordingly, she is precisely the type of low-level offender that Congress intended to aid in the safety-valve provision by giving the sentencing court discretion to avoid the inflexible mandatory minimum penalty.

In contrast to Ms. Palomares's case, the issue is not as cleanly presented in *Pulsifer*. Mr. Pulsifer's drug offense carried a mandatory-minimum sentence of 15 years (180 months). *Pulsifer*, 39 F.4th at 1019. He benefited, however, from "an unrelated reduction under different authority," and received a sentence below the mandatory minimum (162 months). *Id.* at 1020. Presumably that "different authority" was a substantial-assistance reduction under 18 U.S.C. § 3553(e).[5] Because § 3553(e) is an independent basis for obtaining

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Thus, this case will not be rendered moot even if the case is heard next Term and not decided until the end of the Term in 2024.

[5] There are only two ways to get relief from applicable mandatory minimums: (1) substantial assistance, as provided by

relief from the statutory minimum, and Mr. Pulsifer successfully obtained such relief, it is conceivable that the sentencing court's failure to accord him safety-valve relief was harmless. At a minimum, because Ms. Palomares received the statutory minimum sentence while Mr. Pulsifer did not, her case is a better vehicle for interpreting a safety-valve provision that is designed to provide relief from mandatory minimums.[6]

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§ 3553(e); or (2) the safety valve. *See United States* v. *Abrams*, No. 21-60589, 2022 WL 1421831, at *1 (5th Cir. May 5, 2022) ("A district court may impose a sentence below the statutory minimum *only* if the Government makes a motion pursuant to 18 U.S.C. § 3553(e) asserting the defendant's substantial assistance to the Government, or if the defendant meets the 'safety valve' criteria set forth in 18 U.S.C. § 3553(f).") (emphasis added).

[6] Pulsifer's assertion that he "likely" would have received an even lower sentence under the Sentencing Guidelines is debatable in light of the fact that the district court imposed a sentence that was significantly above the Guidelines range—with or without the Guidelines benefit from the safety valve (two-level reduction of offense level). *See Pulsifer* Petition, No. 22-340, at 24. Mr. Pulsifer's 162-month sentence likely reflects the fact that (unlike Ms. Palomares) he has a lengthy criminal history that includes, *inter alia*, two 3-point drug offenses and convictions for violent offenses. *See* Br. of Appellee at 2–3, *Pulsifer*, 39 F.4th 1018 (No. 21-1609), 2021 WL 2653174, at *2 (internal citations to the PSR omitted) (noting that Pulsifer "had convictions for weapons offenses; assaultive conduct (including domestic assault); and drug felonies (including possession with intent to deliver)" and had "amassed 12 criminal history points, although this was reduced to 10 under USSG § 4A1.1(c), which provides for a maximum of 4 points for one-point offenses").

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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