No. 22-6391

IN THE
Supreme Court of the United States

NONAMI PALOMARES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF FAMM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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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)?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Rules

Other Authorities

INTEREST OF *AMICUS CURIAE* [1]

Amicus FAMM, previously known as Families Against Mandatory Minimums, is a national, nonprofit, nonpartisan organization whose primary mission is to promote fair and rational sentencing policies and to challenge mandatory sentencing laws and the inflexible and excessive penalties they require. Founded in 1991, FAMM currently has more than 75,000 members around the country. By mobilizing prisoners and their families who have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM advances its charitable purposes in part through education of the public and through selected *amicus* filings in important cases.

FAMM submits this brief aware of the toll mandatory minimums exact on its members in prison, their loved ones, and society more broadly. The decision below erred by significantly narrowing the safety-valve provision of 18 U.S.C. § 3553(f) far beyond what Congress intended and the rule of lenity permits. In light of the grave harm wreaked by mandatory minimum sentences, FAMM is keenly interested in ensuring that they be imposed sparingly and only in accordance with congressional intent and due process.

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. *Amicus* notified all parties of its intention to file this brief more than 10 days prior to its due date. *See* Sup. Ct. R. 37.2.

SUMMARY OF ARGUMENT

The Fifth Circuit held below that a defendant is ineligible for the benefit of the federal sentencing statute's safety valve if any one of the three disqualifying criteria in 18 U.S.C. § 3553(f)(1) applies to her. That this decision deepens a 4-2 circuit split is reason alone to grant certiorari, as the Solicitor General recently acknowledged. *See* Br. for United States at 7, 10–11, *Pulsifer v. United States*, No. 22-340 (U.S., pet. filed Oct. 7, 2022). Three additional reasons warrant this Court's urgent review.

First, the Fifth Circuit's decision renders illusory the rule of lenity, a principle "not much less old than" the task of statutory "construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.). The decision below proclaims that lenity guides the interpretation of a statute only upon a finding of "grievous ambiguity." That heightened standard conflicts with more than two centuries of this Court's teachings and undermines the principles animating the rule of lenity. Additionally, the Fifth Circuit interpreted "grievous ambiguity" in a way that ensures the standard will never be satisfied: Even though judges across six circuits have adopted at least three conflicting interpretations of the safety-valve provision, that provision is not ambiguous enough to trigger the rule of lenity in the Fifth Circuit's view. Indeed, the Fifth Circuit held that the provision is not ambiguous at all. Pet. App. 10a.

Second, the decision below is flatly at odds with Congress's purpose in enacting the First Step Act of 2018, which expanded eligibility for "safety valve" relief. That historic statute ameliorated excessive sentences for many defendants in a variety of ways. One example is how Congress aimed to make eligibility for

safety-valve relief the norm rather than the exception for low-level, nonviolent drug offenders such as Ms. Palomares. But under the Fifth Circuit's erroneous decision, only a small number of defendants may be spared from inflexibly long mandatory-minimum sentences.

Third, review is warranted because the question presented is of national and practical importance. Mandatory minimum sentences impose significant costs on defendants, their families, and society as a whole. Undermining the congressional reform effort, the Fifth Circuit's interpretation exacerbates the already-deleterious effects of mandatory prison sentences, particularly for defendants of color. This Court should not let stand an unjustifiable judicial application of a sentencing statute that will force thousands of nonviolent drug offenders each year to stay in prison longer than Congress intended.

ARGUMENT

Under the rule of lenity, ambiguities in criminal statutes must be resolved against the government. The decision below nullified that rule and violated this Court's precedents by making the promise of lenity illusory. That result is especially appalling here, where Congress specifically enacted the First Step Act provision at issue (§ 402) to make safety-valve relief more available to nonviolent drug offenders such as Ms. Palomares. This Court's review is needed to ensure that lenity remains a valuable safeguard of due process for criminal defendants in this country.

I. THE DECISION BELOW EFFECTIVELY NULLIFIES THE RULE OF LENITY.

The question presented concerns the safety-valve provision in 18 U.S.C. § 3553(f), which allows a court

to disregard a statutory mandatory minimum sentence if five conditions are met. At issue is the first of those five conditions, which requires a finding 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[.]

18 U.S.C. § 3553(f)(1) (emphasis added).

Petitioner persuasively argues that because "and" means "and," a defendant is eligible for relief unless all three disqualifying criteria are present. Pet. 16–18. But even if a different interpretation could be grammatically tenable, certiorari still would be warranted because the Fifth Circuit's holding that "the rule of lenity does not apply," Pet. App. 13a, guts a venerable and constitutionally driven principle of statutory interpretation.

The Fifth Circuit joined the Seventh and Eighth Circuits in invoking the wrong standard for applying the rule of lenity when interpreting § 3553(f)(1). And it applied that standard in a way that would make it virtually impossible for the rule of lenity ever to apply. This Court should grant review to reaffirm the bedrock principle of lenity and to prevent it from becoming an illusory promise of our constitutional order.

A. The Decision Below Invokes the Wrong Standard for Applying the Rule of Lenity.

"[T]he rule of lenity[] teach[es] that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). Historically, this Court has applied lenity to a criminal statute whenever, after applying other rules of construction, reasonable doubt persists about a penal statute's meaning. The decision below, however, deviated from this Court's established practice by refusing to apply lenity absent "grievous ambiguity."

1. For centuries, this Court has applied the rule of lenity whenever "the traditional tools of statutory interpretation yield[ed] no clear answer." *Wooden v. United States*, 142 S. Ct. 1063, 1085–86 (2022) (Gorsuch, J., concurring in the judgment); *see also, e.g.*, *Abramski v. United States*, 573 U.S. 169, 204 (2014) (Scalia, J., dissenting) (observing the rule of lenity applies when "all legitimate tools of interpretation . . . do not decisively dispel the statute's ambiguity").

Lenity began in the English courts, "justified in part on the assumption that when Parliament intended to inflict severe punishments it would do so clearly." *Wooden*, 142 S. Ct. at 1082 (Gorsuch, J., concurring in the judgment). To avoid imposing harsh sentences without clear authority, English judges "strictly construed" criminal statutes against the government. 1 William Blackstone, *Commentaries on the Laws of England* *88 (1765); *see also* 2 Matthew Hale, *History of the Pleas of the Crown* 335 (1736) (felonies "are construed literally and strictly"); *see generally* David S. Romantz, *Reconstructing the Rule of Lenity*, 40 Cardozo L. Rev. 523, 526–27 (2018).

Following that practice, this Court has long applied lenity whenever it has "reasonable doubt[]" about the application of a penal statute. *See, e.g.*, *Harrison v. Vose*, 50 U.S. (9 How.) 372, 378 (1850). More than two hundred years ago, Chief Justice Marshall explained that to construe a criminal statute against a defendant requires more than just the probability of correctness. *See Wiltberger*, 18 U.S. (5 Wheat.) at 105. Because "probability is not a guide which a court . . . can safely take," the government bears the burden of establishing with *certainty* that a criminal statute encompasses a defendant's conduct. *Id.* Accordingly, as this Court has repeatedly observed, lenity applies to "situations in which a reasonable doubt persist[ed] about a statute's intended scope even after resort to" ordinary tools of construction. *Moskal v. United States*, 498 U.S. 103, 108 (1990) (emphasis omitted); *see also, e.g.*, *United States v. R.L.C.*, 503 U.S. 291, 305, 308 (1992) (plurality and concurring ops.); *McBoyle v. United States*, 283 U.S. 25, 27 (1931). So long as a statute "is not entirely free of doubt, the doubt must be resolved in favor of lenity." *Whalen v. United States*, 445 U.S. 684, 694 (1980).

Requiring clarity from criminal statutes "uphold[s] the Constitution's commitments to due process and the separation of powers." *Wooden*, 142 S. Ct. at 1082 (Gorsuch, J., concurring in the judgment). Before interpreting an ambiguous criminal statute to impose a "harsher alternative," courts must find that Congress has spoken in "clear and definite" language. *United States v. Bass*, 404 U.S. 336, 347–48 (1971) (citation omitted). This rule "vindicates the fundamental principle that no citizen should be . . . subjected to punishment that is not clearly prescribed." *United States v. Santos*, 553 U.S. 507, 514 (2008) (Scalia, J.) (plurality op.). It thereby ensures that, "whether or

not individuals happen to read the law, they can suffer penalties only for violating standing rules announced in advance." *Wooden*, 142 S. Ct. at 1083 (Gorsuch, J., concurring in the judgment). Entitlement to notice is no small thing—it comprises a core aspect of due process and the rule of law. *See* Lon Fuller, *The Morality of Law* 51–62 (1964).

Lenity also protects a second basic tenet of American government: Only Congress—not the courts—may create criminal offenses and prescribe punishments. *Wiltberger*, 18 U.S. (5 Wheat.) at 95; *see United States v. Hudson*, 11 U.S. (7 Cranch) 32, 32 (1812). The separation of powers ensures that "[a]ny new national laws restricting liberty require the assent of the people's representatives and thus input from the country's 'many parts, interests and classes.'" *Wooden*, 142 S. Ct. at 1083 (Gorsuch, J., concurring in the judgment) (quoting *The Federalist No. 51*, at 324 (James Madison) (Clinton Rossiter ed., 1961)); *see also* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 132–34 (2010). Lenity thereby "embodies 'the instinctive distastes against [people] languishing in prison unless the lawmaker has clearly said they should.'" *Bass*, 404 U.S. at 348 (citation omitted). In this way, the rule of lenity is essential to "maintain[ing] the proper balance between Congress, prosecutors, and courts." *United States v. Kozminski*, 487 U.S. 931, 952 (1988).

2. The Fifth Circuit held here that "the rule of lenity does not apply" without "grievous ambiguity." Pet. App. 12a–13a (citation omitted). The Seventh and Eighth Circuits took the same approach in their interpretations of the same provision. *United States v. Pace*, 48 F.4th 741, 755 (7th Cir. 2022); *United States v. Pulsifer*, 39 F.4th 1018, 1023 (8th Cir. 2022).

Those decisions flout more than two centuries of this Court's teachings.

It was not until 1991 that this Court first suggested that lenity may require "grievous" ambiguity. *Chapman v. United States*, 500 U.S. 453, 463 (1991) (citation omitted); *see* Romantz, *supra* at 552–54 (explaining that a passing reference to "grievous ambiguity" in a 1974 decision merely described the statute at issue and did not establish a new standard). Since then, the Court has nonetheless continued to apply the rule of lenity to statutes marked by ambiguity that does not rise to the level of being "grievous." *E.g.*, *R.L.C.*, 503 U.S. at 306; *accord id.* at 307–08 (Scalia, J., concurring in part and concurring in the judgment).

The Court should grant review to disavow expressly the grievous-ambiguity standard, which unmoors lenity from its constitutional underpinnings. If lenity requires grievous ambiguity, then it no longer protects a defendant's right to "fair notice of [the law's] demands." *Wooden*, 142 S. Ct. at 1082 (Gorsuch, J., concurring in the judgment). When a defendant is required to guess how a court will choose between competing canons of construction, "fair warning" simply has not "be[en] given . . . in language that the common world will understand." *McBoyle*, 283 U.S. at 27. The grievous-ambiguity standard likewise fails to safeguard the separation of powers. If judges can side with the government whenever they devise a colorable textual argument or ferret out a friendly bit of legislative history—thereby saving the ambiguity from rising to the "grievous" standard—lenity places no limit at all on judges' ability to impose "their own sensibilities" on Congress's enactments. *Wooden*, 142

S. Ct. at 1083 (Gorsuch, J., concurring in the judgment).

Two other recent interpretations of the safety-valve provision illustrate the hollowness of the rule of lenity as lower courts have applied it to the safety valve statute. In *Pace*, a Seventh Circuit panel majority found no "grievous ambiguity" based in part on its view that some of "the legislative history surrounding the statute" supported its preferred view. 48 F.4th at 755. And in *United States v. Haynes*, a panel majority of the Sixth Circuit conceded that both possible meanings of the safety valve "[we]re grammatically sound" and "no rule of construction strongly favor[ed] one meaning over the other," 55 F.4th 1075, 1079 (6th Cir. 2022), aside from the majority's "own sense of good policy," *id.* at 1085 (Griffin, J., dissenting) (citation omitted). The rule of lenity serves no purpose if courts can disregard an equally plausible construction of a criminal statute based purely on policy intuitions or fragments of legislative history. *See Hughey v. United States,* 495 U.S. 411, 422 (1990). Ambiguity is sufficiently "grievous" to demand application of the rule of lenity if it persists after ordinary efforts at statutory construction. A higher hurdle would be inconsistent with the history and purpose of the rule.

Because the decision below misapplied the rule of lenity, this Court should grant review even if it were disinclined to agree with petitioner that her construction of the safety-valve provision is unambiguously correct.

B. Under Any Standard, Lenity Applies Here.

The Fifth Circuit compounded its error by treating the grievous-ambiguity standard as virtually

unattainable—not even satisfied by a statute in which "and" purportedly means "or." And not even satisfied when judges in multiple circuits have construed the statutory text at least three different ways. If ever there was an occasion for finding at least "grievous ambiguity," this statute provides it.

1. As Ms. Palomares persuasively explains, the "and" in § 3553(f)(1) unambiguously means "and," not "or." *See* Pet. 16–21.

That is the text's plain meaning. Because the statute uses the word "and" to join the three criteria in § 3553(f)(1), a defendant remains eligible for safety-valve relief unless she has (A) four criminal history points, (B) a three-point offense, *and* (C) a two-point violent offense.

The canons of consistent usage and meaningful variation confirm that "and" means "and," not "or." Elsewhere in the safety-valve provision, Congress used "and" to mean "and." Along with the three subparts of paragraph (1), Congress also used "and" to join the larger list of five elements a defendant must meet to avoid a mandatory minimum. 18 U.S.C. § 3553(f)(1)–(5). Everyone agrees that a defendant must satisfy each of those five subsections. So too, a defendant remains eligible to avoid a mandatory minimum so long as she does not meet each element listed in § 3553(f)(1). In other parts of the statute where Congress meant "or," it said "or." *See, e.g.*, *id.* § 3553(f)(2) (eligibility for safety-valve relief requires that "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"). Just as "[t]his Court does not lightly assume that Congress silently attaches different meanings to the same term," *Azar v.*

Allina Health Servs., 139 S. Ct. 1804, 1812 (2019), it also presumes "differences in language . . . convey differences in meaning," *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017). Reading "and" to mean "or" in § 3553(f)(1) violates both those canons of statutory interpretation.

2. Even if grievous ambiguity were required to apply the rule of lenity, the discordant conclusions of the twenty-six circuit judges who have construed the statute satisfy that standard.

Thirteen circuit judges have correctly concluded that "and" means "and." *United States v. Lopez*, 998 F.3d 431, 437 (9th Cir. 2021); *id.* at 448 (M. Smith, J., concurring in part, dissenting in part, and concurring in the judgment); *United States v. Garcon*, 54 F.4th 1274, 1276 (11th Cir. 2022) (en banc); *Pace*, 48 F.4th at 761–62 (Wood, J., dissenting in part); Pet. App. 23a (Willett, J., dissenting); *Haynes*, 55 F.4th at 1080 (Griffin, J., dissenting). Seven circuit judges, in contrast, have asserted that "and" means "or." *Pace*, 48 F.4th at 754 (majority op.); *Garcon*, 54 F.4th at 1297–1301 (Branch, J., dissenting); *id.* at 1290–92 (Jordan, J., dissenting); *Haynes*, 55 F.4th at 1076 (majority op.). And six other circuit judges have construed "and" as distributing the phrase "does not have" to each separate subsection. *Pulsifer*, 39 F.4th at 1021–22; *Pace*, 48 F.4th at 756 (Kirsch, J., concurring); Pet. App. 12a; *id.* at 22a (Oldham, J., concurring in the judgment).

Circuit judges are hopelessly divided not just on the meaning of "and," but also on how to reconcile the three subparagraphs of § 3553(f)(1), which require that a defendant not have "(A) more than 4 criminal history points," "(B) a prior 3-point offense," "and (C) a prior 2-point violent offense." 18 U.S.C. § 3553(f)(1).

Some judges have held that "and" must mean "or" to avoid rendering subparagraph (A) superfluous. In their view, a defendant with a prior three-point offense and a prior two-point violent offense will always satisfy subsection (A) by having at least five criminal history points. *See* Pet. App. 8a; *Pace*, 48 F.4th at 754; *Pulsifer*, 39 F.4th at 1021–22. Other judges, however, have disagreed that any surplusage arises from construing "and" to mean "and." *See, e.g.*, Pet. App. 29a–31a (Willett, J., dissenting); *Pace*, 48 F.4th at 763–64 (Wood, J., dissenting in part); *Haynes*, 55 F.4th at 1082–84 (Griffin, J., dissenting). As two circuit courts have correctly explained, defendants can satisfy subsections (B) and (C) without also satisfying subsection (A)'s requirement of four criminal history points. *See Lopez*, 998 F.3d at 440 (three-point violent offense can simultaneously satisfy subparagraphs (B) and (C)); *Garcon*, 54 F.4th at 1280–82 (under U.S.S.G. § 4A1.2(a)(2), two-point violent offense and three-point offense charged in same instrument score only three criminal history points); *id.* (under U.S.S.G. § 4A1.1(a)–(b) & cmts. 1–2, "stale" offenses do not generate countable criminal history points).

These fractured decisions compellingly show that § 3553(f)(1) fails to provide adequate notice to would-be defendants. To be sure, "a division of judicial authority" alone is not "automatically sufficient to trigger lenity." *Moskal*, 498 U.S. at 108. But when federal judges cannot even agree on *why* "and" does not mean "and," criminal defendants should not receive more punishment for failing to divine that counterintuitive result. *See Wooden*, 142 S. Ct. at 1082–83 (Gorsuch, J., concurring in the judgment); *McBoyle*, 283 U.S. at 27 ("[I]t is reasonable that a fair warning should be given . . . of what the law intends to do if a certain line is passed."). Under any standard of lenity,

the statute should not have been construed against Ms. Palomares.

This Court therefore should grant review to ensure that the rule of lenity still safeguards the rule of law and the separation of powers.

II. THE DECISION BELOW DEFEATS CONGRESS'S PURPOSE IN PROVIDING SAFETY-VALVE REFORM IN THE FIRST STEP ACT.

Congress broadened eligibility for safety-valve relief under § 402 of the First Step Act to allow low-risk, nonviolent drug offenders like Ms. Palomares to be eligible for sentencing under the Sentencing Guidelines without the artificial restrictions of mandatory minimums. As Congress recognized, judicial discretion rather than overly harsh and rigid mandatory minimums should guide sentences for such defendants. The decision below is incompatible with this congressional purpose.

The First Step Act was enacted by a "historic bipartisan coalition—the likes of which, over the last several decades, Congress has rarely seen—[that] came together to bring greater fairness and justice to the Nation's criminal justice system." Br. of Sens. Durbin, Grassley, Booker, and Lee as *Amici Curiae* 2, *Terry v. United States*, No. 20-5904, 141 S. Ct. 1858 (2021). The statute passed both the Senate and the House "by a landslide." *Id.* at 8–9. One thing uniting these lawmakers was a desire to "give nonviolent, low-risk offenders and their families greater hope for a brighter future" and give "more Americans in the [f]ederal prison system . . . [a] second chance." 164 Cong. Rec. S7737, S7752 (daily ed. Dec. 18, 2018).

In enacting this "once-in-a-generation criminal justice reform" statute, Congress purposely aimed to

reduce the prison population by departing from earlier rigid sentencing schemes. 164 Cong. Rec. S7823, S7838 (daily ed. Dec. 19, 2018). It did so by eliminating or moderating long sentences for broad swaths of defendants. For example, the statute made retroactive §§ 2 and 3 of the Fair Sentencing Act of 2010—which reduced the racially disparate 100-to-1 crack-to-powder ratio and eliminated the mandatory minimum penalty for crack cocaine offenses. *See* Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (Dec. 21, 2018). The statute also significantly reduced penalties for recidivism and amended 18 U.S.C. § 924(c) so that defendants do not face decades-long enhancements for prior offenses charged in a single prosecution. *Id.* § 401, 132 Stat. at 5220; *id.* § 403, 132 Stat. at 5221–22.

Congress likewise amended the safety-valve provision to ameliorate minimum penalties for nonviolent drug offenders. *Id.* § 402, 132 Stat. at 5222. The First Step Act empowers judges to use discretion rather than mandatory minimums more often when sentencing defendants, thereby giving more nonviolent drug offenders a chance at redemption. As the bill's co-sponsor explained, this "critical sentencing reform" aimed to "reduce mandatory minimums and give . . . discretion back" to "judges who sit and see the totality of the facts." 164 Cong. Rec. S7737, S7764 (Booker) (daily ed. Dec. 18, 2018). Granting judges authority to impose a sentence tailored to each individual "allow[ed] [them] to do the job that they were appointed to do—to use their discretion to craft an appropriate sentence to fit the crime." 164 Cong. Rec. S7756 (Nelson) (daily ed. Dec. 18, 2018). Among the principal objectives of the First Step Act was thus to allow judges to sentence more defendants "below mandatory

minimums." 164 Cong. Rec. S7774 (Feinstein) (daily ed. Dec. 18, 2018).

In amending the safety-valve provision in particular, Congress sought to "shift[ ] the focus of sentencing judges away from the *length* of past sentences and toward the underlying *substance* of the past crimes." *Pace*, 48 F.4th at 765–66 (Wood, J., dissenting in part). Whereas safety-valve relief previously was not available to any defendant who had been sentenced to 60 days or more in prison, *see* 18 U.S.C. § 3553(f)(1) (2017), the revised provision makes safety-valve relief available based on the nature of the prior offenses—including the total number of current criminal history points and the size and violent nature of those offenses, *see id.* § 3553(f)(1)(A)–(C). Congress thus drafted the statute to "achieve[] a coherent policy objective": making discretionary sentencing available to more defendants (especially nonviolent offenders like Ms. Palomares), while continuing to mandate minimum penalties for violent recidivists with recent criminal histories. *Pace*, 48 F.4th at 764 (Wood, J., dissenting in part).

The Fifth Circuit turned the statute on its head by foreclosing safety-valve relief for the *vast majority* of defendants. As Judge Willett's dissent notes, it is entirely unsurprising for "a significant number of career criminals [to] have a 2-point violent offense on their records." Pet. App. 36a. Under the Sentencing Guidelines, a defendant accrues two points for any prior sentence of 60 days or more—including for misdemeanors. U.S.S.G. § 4A1.1(b). Three-point offenses, based on sentences of more than 13 months, also arise frequently: In the 2021 fiscal year alone, 20,553 defendants had been convicted of at least one such offense. U.S. Sent. Comm'n, *2021 Annual Report and*

Sourcebook of Federal Sentencing Statistics 76 (2021). Multiple-point offenses are particularly ubiquitous because, under indeterminate sentencing regimes used by 34 states—such as where the court imposes a sentence of "one to five years"—a defendant's criminal history points are calculated based on the maximum term of imprisonment (in this example, five years). U.S.S.G. § 4A1.2 cmt. 2; Edward E. Rhine et al., Robina Inst. of Crim. Law & Crim. Just., *Levers of Change in Parole Release and Revocation* 4 (2018), https://bit.ly/3XiMit7. The maximum term drives the number of points even under sentencing regimes where parole or other conditional relief is standard (and was in fact granted) and even where defendants served only the minimum term (or less, in some states, based on good conduct). As a result, a defendant convicted of merely possessing or selling marijuana, say, may end up accruing three points. *See, e.g.*, Ala. Code §§ 13A-12-211, 13A-5-6(a)(2) (mandatory two-year sentence for selling any marijuana); Miss. Code. Ann. § 41-29-139(b)(2)(A) (allowing sentence of up to three years for possessing "thirty . . . grams or less" of marijuana with intent to distribute); Mo. Ann. Stat. §§ 558.011, 579.020 (allowing sentence of up to four years for selling 35 grams or less of marijuana).

Consider the case of Eric Lopez. Mr. Lopez was "a low-level nonviolent drug offender who . . . cooperated with law enforcement." *United States v. Lopez*, No. 19-CR-0261-L, 2019 WL 3974124, at *7 (S.D. Cal. Aug. 21, 2019). His only criminal history points arose from a "prior conviction for spray painting a building" some ten years earlier. *Id.* at *3, *7. He clearly was not the sort of dangerous recidivist who Congress thought should be ineligible for safety-valve relief. But had the district court in Mr. Lopez's case followed the Fifth Circuit's approach, that single three-point

offense would have disqualified him from safety-valve relief, requiring a five-year mandatory minimum sentence. *Id.* That result is entirely at odds with Congress's goal that judges be allowed to use their discretion when sentencing nonviolent drug offenders.

III. THE INTERPRETATION OF THE SAFETY-VALVE PROVISION IS OF PRACTICAL AND NATIONAL SIGNIFICANCE.

The Fifth Circuit's flawed interpretation of the safety-valve provision will harm a great number of criminal defendants, their families, and society at large. This Court's review is warranted to determine whether those offenders must face a mandatory minimum sentence or instead have an opportunity to show a judge that they deserve a lesser punishment.

The question presented affects thousands of nonviolent drug offenders each year. According to Sentencing Commission data, applying the Fifth Circuit's erroneous interpretation to drug defendants sentenced in fiscal year 2021 alone would make 3,791 defendants who meet the other four requirements for safety valve relief ineligible for sentences below the applicable mandatory minimum. U.S. Sent. Comm'n, *Proposed Amendments to the Sentencing Guidelines: First Step Act—Drug Offenses* 2 (2023), https://bit.ly/3Xe5J6E. It is thus unsurprising that scholars have characterized the issue presented as having "significant" implications. Douglas A. Berman, *Another Accounting of Ninth Circuit's Significant FIRST STEP Safety-Valve Expansion* Lopez *Ruling*, Sentencing Law and Policy (May 23, 2021), https://bit.ly/3QDT3nk.

The conflict among the courts of appeals will only grow deeper without this Court's intervention.

Although the Sentencing Commission has sought public comment on whether to apply the Fifth Circuit's interpretation to a sentencing guidelines provision that adjusts the offense level for persons meeting criteria mirroring those in § 3553(f)(1), the issue presented on eligibility for relief from a mandatory minimum is not one that the Commission can—or even proposes to—resolve. U.S. Sent. Comm'n, *Proposed Amendments to the Sentencing Guidelines: First Step Act—Drug Offenses* 3; *contra Stinson v. United States*, 508 U.S. 36, 44 (1993); *see also United States v. LaBonte*, 520 U.S. 751, 753 (1997) (rejecting Sentencing Commission interpretation of federal statute that governed operation of sentencing guidelines). Regardless of whether or how the Commission adjusts the offense level for drug offenses in light of § 3553(f), only this Court can resolve the split in authority over whether a defendant who satisfies fewer than all three disqualifying criteria in § 3553(f)(1) is eligible for relief from mandatory minimum sentences prescribed by statute.

Such sentences devastate both criminal defendants and their families. Longer mandatory-minimum sentences make reentry into society harder: The longer a defendant spends in prison, the fewer the resources and the weaker the support infrastructure she can expect upon release, meaning it becomes more likely that she will return to the people and circumstances that led her to commit crime in the first place. *See* Andrew D. Leipold, *Is Mass Incarceration Inevitable?*, 56 Am. Crim. L. Rev. 1579, 1586 (2019). Children of incarcerated individuals likewise suffer: These innocent third parties face greater risks of health and psychological problems and generally have diminished educational and economic success. *See* Eric Martin, *Hidden Consequences: The Impact of*

Incarceration on Dependent Children, 278 Nat'l Inst. Just. 10, 10–16 (2017).

The costs of lengthy incarceration also extend to society more broadly. Mandatory minimums drain government resources, increasing the number of incarcerated individuals severalfold and imposing substantial costs to imprison them. *See* Barbara S. Vincent & Paul J. Hofer, *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings*, 7 Fed. Sent'g Rep. 33, 36–37 (1994). And despite their intended deterrent effect, mandatory terms likely exacerbate crime since longer terms of imprisonment increase recidivism, thus generating more costs than they do benefits. *See* Daniel S. Nagin et al., *Imprisonment and Reoffending*, 38 Crime & Just. 115, 121 (2009); *see also* Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 Crime & Just. 65, 68 (2009).

As happens too often, people of color are disproportionately affected by harsh mandatory-minimum sentences. U.S. Sent. Comm'n, *An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System* 36 (2017) ("In fiscal year 2016, Hispanic offenders continued to represent the largest group of offenders (40.4%) convicted of an offense carrying a mandatory minimum penalty."); Lucius T. Outlaw III, *An Honest Drug Offender Sentencing Letter*, 17 Ohio St. J. Crim. L. 481, 488 (2020) ("[T]he numbers show that blacks are sentenced to mandatory minimum penalties at a higher rate than whites even though both racial groups are convicted for drug offenses at a similar rate"). If left in place, the Fifth Circuit's interpretation of the safety-valve provision thus promises to heighten the disparate sentencing impacts on defendants of color.

This Court should look with skepticism at judicial applications of the sentencing laws that serve no apparent deterrent or other proper public purpose—particularly when a historic bipartisan coalition in Congress enacted the First Step Act to ameliorate harsh mandatory minimum sentences. No construction of § 3553(f) that compels judges to impose sentences in violation of § 3553(a)'s "parsimony principle" can be correct if not clearly compelled by the statutory language. *Holguin-Hernandez v. United States*, 140 S. Ct. 762, 766 (2020). Whether thousands of nonviolent drug offenders are eligible for sentences based on discretion rather than "mandatory statutory penalties" that "act as sledgehammers" is worthy of this Court's review. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2487 (2004).

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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