

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

PAUL ENGSTROM,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Appointed Under the Criminal Justice Act of 1964

QUESTIONS PRESENTED FOR REVIEW

- 1) In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), this Court recognized a right of fair warning against an unforeseeable and retroactive judicial expansion of a criminal statute. Is that right limited exclusively to cases concerning the scope of criminal liability, or does it include cases involving the calculation of a defendant's sentence?
- 2) In *Olano v. United States*, 507 U.S. 725 (1993), this Court set out the four prongs of analysis for plain-error review. Where a district court's error results in a sentence that the court would not have otherwise imposed, may the appellate court find plain-error review satisfied without considering *Olano's* fourth prong?

PARTIES TO THE PROCEEDING

Petitioner is Paul Engstrom, the defendant/appellee in the proceedings below.

Respondent is the United States of America.

STATEMENT OF RELATED PROCEEDINGS

The proceedings identified below are directly related to the above-captioned case in this Court.

- *United States v. Paul Engstrom*, No. 21-cr-190-ART-EJY-1, U.S. District Court for the District of Nevada. Judgment entered February 27, 2024.
- *United States v. Paul Engstrom*, No. 24-1878, U.S. Court of Appeals for the Ninth Circuit. Opinion entered February 5, 2026. Petition for Rehearing denied April 22, 2026.

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The Ninth Circuit's opinion is reprinted in the Appendix to the Petition. App-1-26.

JURISDICTION

On February 5, 2026, the United States Court of Appeals for the Ninth Circuit entered its decision reversing the district court's grant of safety-valve relief under 18 U.S.C. § 3553(f), vacating Paul Engstrom's sentence, and remanding the case for resentencing. App-1-26. On April 22, 2026, the United States Court of Appeals for the Ninth Circuit entered its order denying the petitioner's petition for rehearing. App-46. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall . . . be deprived of life, liberty, or property, without due process of law[.]

United States Constitution, Article I, Section 9, Clause 3:

No Bill of Attainder or ex post facto Law shall be passed.

INTRODUCTION

In *Bouie v. City of Columbia*, this Court held that the Due Process Clause protected “the right of fair warning” against “an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.” 378 U.S. 347, 352 (1964).¹ While *Bouie* addressed the judicial interpretation of a law concerning the scope of criminal liability, several Courts of Appeals have subsequently addressed cases involving the unforeseeable and retroactive judicial expansion of laws concerning the calculation of a sentence. And every one of the Courts but the Ninth Circuit has correctly held that the right of fair warning identified in *Bouie* applies equally in those cases. The Ninth Circuit is the sole outlier to have read *Bouie* narrowly to exclude sentencing cases, and it is wrong to have done so. This case presents this Court with an opportunity to resolve this circuit split.

Separately, in *Olano v. United States*, this Court set out the four-prong approach to plain-error review. 507 U.S. 725, 732–737 (1993). And this Court has subsequently stressed that the fourth prong (which requires a finding that the error “seriously affect the fairness, integrity, or public reputation of judicial proceedings,” *id.* at 736–37) “is meant to be applied on a case-specific and fact-intensive basis”—and that a “*per se* approach to plain-error review is flawed” because, even where “the integrity of the system may be called into question, . . . there may well be countervailing factors in particular cases.” *Puckett v. United States*, 556 U.S. 129, 142–43 (2009) (quoting *United States v. Young*, 470 U.S. 1, 17 n.14 (1985)). The

¹ While *Bouie* addressed the Due Process Clause of the Fourteenth Amendment, this case involves the cognate provision of the Fifth Amendment.

Eighth Circuit has appropriately held that, even in cases where the first three prongs of plain-error review are satisfied and where the error resulted in a sentence below the applicable statutory minimum, there may be case-specific facts that preclude a finding that the fourth prong was satisfied. But here, the Ninth Circuit has created a circuit split by holding that, in cases where the district court would have imposed a different sentence but for its error (e.g., in cases where the error resulted in a sentence below the applicable statutory minimum), “the third and fourth prongs collapse into one,” meaning the fourth prong is “automatically” satisfied. App-26. This case presents this Court with the opportunity to resolve this separate circuit split.

STATEMENT OF THE CASE

I. Course of Conduct

This case stems from Engstrom’s sale of cocaine over the dark web for cryptocurrency proceeds and his concealment of the proceeds by means of conversion to cash and personal property. 3-ER-452–454.

II. District Court Proceedings

In July 2021, Engstrom was charged via indictment with several federal crimes concerning controlled substances and money laundering. 3-ER-471–483.

In June 2023, the government filed a superseding information charging Engstrom with conspiracy to distribute a controlled substance, in violation of 21 U.S.C. §§ 841 & 846, and money laundering conspiracy, in violation of 18 U.S.C. § 1956. 3-ER-438–444. Engstrom entered into a plea agreement with the government and agreed to plead guilty to both counts in the superseding information. 3-ER-445-470.

In July 2023, Engstrom pled guilty to both counts in the superseding indictment. 3-ER-396–435.

In February 2024, the district court held Engstrom’s sentencing hearing. 2-ER-122. When he appeared for sentencing, Engstrom had a prior conviction for conspiracy to distribute controlled substances that scored for three criminal history points. *See* App-16. At that time, *United States v. Lopez*, 998 F.3d 431 (9th Cir. 2021), *abrogated by Pulsifer v. United States*, 601 U.S. 124 (2024), was controlling law in the Ninth Circuit. And under *Lopez*, Engstrom’s criminal history satisfied 18 U.S.C. § 3553(f)(1), which is one of the five requirements that defendants must satisfy to qualify for safety-valve relief. Per § 3553(f), safety-valve relief permits defendants who would otherwise be subject to a mandatory minimum sentence to be sentenced without regard to that statutory minimum. Separately, per USSG §2D1.1(b)(18), defendants who qualify for safety-valve relief also receive a two-level reduction to their total offense level.

At the sentencing hearing, the district court determined Engstrom’s offense level and subsequent advisory guidelines range without regard to §2D1.1(b)(18). 2-ER-134–135. The court then asked U.S. Probation why Engstrom was not safety-valve eligible. 2-ER-157–158. Probation responded that Engstrom satisfied all the requirements for safety valve (including § 3553(f)(1)) except for § 3553(f)(5), which requires the defendant to have provided the government all information or evidence concerning the offense. 2-ER-158. The court then stated that it was giving Engstrom

“the benefit of safety valve” and sentenced him to 70 months’ incarceration. 2-ER-159; 2-ER-162.

A few days later, the court held a hearing under Rule 35 of the Federal Rules of Criminal Procedure to “correct . . . a possible clear error in [its] sentencing.” 1-ER-16. The court noted that, at the prior sentencing hearing, it had “considered whether [Engstrom] was safety valve eligible” only “after [it] had calculated the guidelines,” resulting in “an incorrect guidelines calculation” and a sentence “above the mandatory minimum.” 1-ER-17. And the court stated that it would correct this “reversible error.” 1-ER-17.

Having explained its prior error, the court turned to § 3553(f)(5), the one safety-valve requirement that Probation had considered unfulfilled—and the court found that Engstrom’s provision of information to the government satisfied this requirement. 1-ER-25–34. The court then recalculated Engstrom’s advisory guidelines range to correct the error from the sentencing hearing. 1-ER-34–36. Finally, the court explained that consideration of this new Guidelines range “cause[d it] to have a different outcome on the sentence” and imposed a 46-month sentence. 1-ER-44–45.

On February 27, 2024, the district court entered an amended judgment. 1-ER-2–8; App-34–40. On March 15, 2024, this Court issued its decision in *Pulsifer*, which abrogated the Ninth Circuit’s decision in *Lopez*. As discussed below, Engstrom would not have satisfied § 3553(f)(1) had *Pulsifer* been issued prior to his sentencing—meaning he would not have qualified for safety-valve relief.

On March 27, 2024, the government filed a notice of appeal. 3-ER-519–520.

III. Circuit Court Proceedings

In August 2024, the government filed its opening brief with the Ninth Circuit Court of Appeals. C.A. D.E. 17 (government’s opening brief, “OB”). The government raised two issues: (1) whether the district court erred in holding a Rule 35 hearing to amend Engstrom’s sentence and (2) whether the district court erred in granting Engstrom safety-valve relief. OB at 6–7. On the second question, the government presented two arguments. First, the government argued the district court had erred in finding that Engstrom satisfied § 3553(f)(5)’s disclosure requirement. OB at 24–28. Second, the government argued that Engstrom had not satisfied § 3553(f)(1)’s criminal-history requirement in light of *Pulsifer*. OB at 28–29. The government conceded that plain-error review applied. OB at 28.

In March 2025, Engstrom filed his answering brief. C.A. D.E. 33 (Engstrom’s answering brief, “AB”). With respect to the § 3553(f)(1) claim, Engstrom argued that Ninth Circuit law at the time of his offense should apply—because applying *Pulsifer* retroactively would violate his due process right to fair notice. AB at 48–56.

On February 5, 2026, the Ninth Circuit issued its decision. The Ninth Circuit held that the district court had not plainly erred in holding a Rule 35 hearing, but that the district court had erred in finding Engstrom eligible for safety-valve relief—because Engstrom had failed to satisfy both § 3553(f)(1)’s criminal-history requirement and § 3553(f)(5)’s disclosure requirement. App-10; App-12. The Ninth Circuit found that *Pulsifer* applied retroactively because this Court’s limitations on retroactivity apply only to judicial decisions that “enlarge the scope of criminal

liability,” as opposed to decisions that merely concern “the calculation of the length of a term of imprisonment[.]” App-24–25 (quoting *United States v. Newman*, 203 F.3d 700, 702–03 (9th Cir. 2000)). And, in applying plain-error analysis to the *Pulsifer* claim, the Ninth Circuit found that, in cases such as Engstrom’s where the error necessarily affected the sentence imposed, “the third and fourth prongs of plain error review collapse into one” so that the fourth prong is “automatically” satisfied. App-26.

On March 23, 2026, Engstrom petitioned for either panel or en banc rehearing of the Ninth Circuit’s decision. C.A. D.E. 69 (Engstrom’s petition for rehearing, “PFR”). Engstrom argued that (1) the Ninth Circuit’s holding that *Pulsifer* is retroactively applicable because it concerns sentencing (rather than the scope of criminal liability) is contrary to decisions of this Court and other Courts of Appeals; (2) the Ninth Circuit’s holding that, in certain cases, the fourth prong of plain-error review is “automatically” satisfied is contrary to decisions of this Court and other Courts of Appeal; and (3) the Ninth Circuit had erred in determining that he had not satisfied § 3553(f)(5)’s disclosure requirement. PFR at 5–18.

On April 22, 2026, the Ninth Circuit denied Engstrom’s petition without explanation. C.A. D.E. 70 (order denying Engstrom’s petition for rehearing).

REASONS FOR GRANTING THE PETITION

This case presents an opportunity to resolve divides between the Courts of Appeals on two important issues.

In reversing the district court’s safety-valve determination, the Ninth Circuit entered a decision that conflicts with the decisions of other Courts of Appeals on the

important questions of (1) whether the due process right to notice applies to cases concerning the calculation of a sentence; and (2) whether courts are required to conduct a case-specific determination of the fourth prong of plain-error review when the error affected the term of imprisonment imposed.

I. Resolving the circuit split on whether the due process right to notice applies to unforeseeable judicial interpretation of sentencing laws.

This case presents an opportunity to resolve a divide between the courts on an important issue concerning the due process right to notice identified in *Bouie*.

When the Ninth Circuit held that this due process right does not extend to cases where the unforeseeable judicial interpretation concerned the calculation of a sentence (as opposed to the scope of criminal liability), it further entrenched itself as the sole Court of Appeals on that side of a circuit split.

But before turning to the circuit split on the issue of whether unforeseeable judicial interpretations of sentencing statutes are retroactively applicable, it is important to understand the context of the particular sentencing statute at issue here: 18 U.S.C. § 3553(f).

Section 3553(f) sets out five requirements that defendants must satisfy to establish safety-valve eligibility. The first requirement, § 3553(f)(1), is that the defendant “does not have—(A) more than 4 criminal history points [excluding points from one-point offenses]; (B) a prior 3-point offense []; and (C) a prior 2-point violent offense[.]” The Ninth Circuit’s decision in *Lopez* was the first Court of Appeals decision to address § 3553(f)(1)—and it read this section to mean that a defendant is eligible for relief so long as he does not have any one of the items listed. *Lopez*, 998

F.3d at 433. So, under the only reading of the statute endorsed by a Court of Appeals at the time of his offense, Engstrom was eligible for safety-valve relief. (Between the time of his offense and time of his sentencing, a circuit split on the reading of § 3553(f)(1) developed.)

After Engstrom had been sentenced, this Court issued its decision in *Pulsifer*, which reversed *Lopez*. In *Pulsifer*, this Court interpreted § 3553(f)(1) to disqualify from safety-valve eligibility any defendant who has any of the three items listed (more than four criminal history points, a prior three-point offense, or a prior two-point violent offense). 601 U.S. at 127–28.

There is no question that Engstrom satisfied § 3553(f)(1) under *Lopez* and that Engstrom would not satisfy § 3553(f)(1) under *Pulsifer*. The question, then, is whether the Ninth Circuit was correct to find *Pulsifer* retroactively applicable to Engstrom.

A. Every other Court of Appeals to have considered this matter has held that the due process right to notice extends to cases concerning the calculation of a sentence.

Prior to the Ninth Circuit issuing its decision in this case, at least four Courts of Appeals had held that unforeseeable judicial interpretations of sentencing laws are retroactively applicable. *See Helton v. Fauver*, 930 F.2d 1040, 1045 (3d Cir. 1991) (“the *Bowie* principle applies equally to after-the-fact increases in the degree of punishment”); *Johnson v. Kindt*, 158 F.3d 1060, 1063 (10th Cir. 1998) (same); *United States v. Beals*, 698 F.3d 248, 272 (6th Cir. 2012) (“concepts of ‘fair warning’ protect individuals also from *ex post* applications of unforeseeable judicial expansions of the *punishments* that result from a conviction”) (emphasis in original); *Davis v. Nebraska*,

958 F.2d 831, 833–34 (8th Cir. 1992) (“a retroactive application of a judicial interpretation of a law violates due process if” it “makes more burdensome the punishment for a crime, after its commission” (quoting *Collins v. Youngblood*, 497 U.S. 37, 42 (1990)); see also *United States v. Duncan*, 400 F.3d 1297, 1307 n.12 (11th Cir. 2005) (“We can assume *arguendo*, without deciding, that [the] fair warning principle does apply to retroactive increases of punishment as well as to the core . . . category of retroactive criminalization of conduct.”).

B. The Ninth Circuit’s decision further entrenches that court as the sole court on the erroneous side of a circuit split.

In rejecting Engstrom’s argument that *Pulsifer* was not foreseeable and that enforcing it retroactively would violate his right to notice, the Ninth Circuit relied on its prior decision in *United States v. Newman*, 203 F.3d 700 (9th Cir. 2000). App-24–25. In *Newman*, the Ninth Circuit held that unforeseeable judicial interpretations of criminal statutes are not retroactively applicable if they “concern[] the calculation of the length of a term of imprisonment” rather than “the scope of criminal liability.” 203 F.3d at 702–03.

C. The Ninth Circuit’s decision is wrong.

The Ninth Circuit’s law on this question (announced in *Newman* and followed in this case) conflicts with this Court’s holding in *Bowie*. *Bowie*’s holding that the “deprivation of the right of fair warning can result . . . from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language,” 378 U.S. at 352, speaks to all judicial interpretations of statutes without any suggestion of an exclusion for sentencing statutes.

Importantly, *Bowie* explained that defendants must be afforded notice of unforeseeable judicial interpretations because “an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids.” *Id.* at 353. And this Court has held that a law violates the Ex Post Facto Clause if it “makes more burdensome the punishment for a crime, after its commission.” *Collins v. Youngblood*, 497 U.S. 37, 42 (1990) (quoting *Beazell v. Ohio*, 269 U.S. 167, 169 (1925)).² Because *Pulsifer* made the punishment for Engstrom’s crime more burdensome, its retroactive application operated precisely like an *ex post facto* law and thus violated his right to notice.

In short, the Ninth Circuit was wrong to read *Bowie* as limited to cases involving the scope of criminal liability when in fact it encompasses sentencing cases.

II. Resolving the circuit split on whether the fourth prong of plain-error review requires case-specific analysis.

This case also presents an opportunity to resolve a divide between the courts on an important issue concerning the application of plain-error review.

In reversing the district court’s determination that Engstrom satisfied § 3553(f)(1), the Ninth Circuit entered a decision that conflicts with the decisions of other Courts of Appeals on the important question of whether the fourth prong of plain-error review requires case-specific analysis where the defendant would have received a different sentence but for the error.

² While *Bowie* and *Collins* addressed the Ex Post Facto Clause of Article I, Section 10, this case involves the cognate provision of Article I, Section 9.

A. No Court of Appeals had previously held that there are circumstances under which the fourth prong of plain-error review would not require case-specific analysis.

Prior to the Ninth Circuit issuing its decision in this case, no Court of Appeals had held that the fourth prong of plain-error review could be collapsed into any other prong or otherwise “automatically” satisfied without its own independent analysis.

The First Circuit made clear its view on the matter in *United States v. Gorsuch*, 404 F.3d 543 (1st Cir. 2005). There, the district court granted a downward departure for the defendant’s diminished capacity—and then erroneously imposed a sentence below the statutory minimum. *Id.* at 545. The First Circuit observed that the error satisfied the first three prongs of plain-error review. *Id.* at 547. But the First Circuit did not stop there. It carried on to the fourth-prong analysis—and considered the defendant’s argument that “because of the sad facts of this case and the lengthy prison term she would have faced had the district court not departed downward, the government has not satisfied the fourth prong” (i.e., that the error did not “seriously impair the fairness, integrity, or public reputation of judicial proceedings”). *Id.* And the First Circuit agreed, holding “that recognizing this forfeited error is not necessary to ensure the integrity and fairness of Gorsuch’s sentencing proceedings” and therefore “declin[ing] to afford such recognition to it.” *Id.*

This is a straightforward recognition that Courts of Appeals must analyze all four prongs of plain-error review, even where the error necessarily resulted in the defendant facing a lower sentence than she otherwise would have. Or, put differently, that an error resulting in the district court imposing a different sentence than it

otherwise would have does not automatically satisfy the fourth prong of plain-error review.

B. The Ninth Circuit’s decision creates a circuit split by holding that the fourth prong of plain-error review is “automatically” satisfied where the court would have imposed a different sentence but for the error.

Prior to the Ninth Circuit’s decision in this case, no court had held that the fourth prong of plain-error review is automatically satisfied where the court would have imposed a different sentence but for the error (or in any other situation). But that is what the Ninth Circuit held in this case.

After finding that the district court’s error in “not applying *Pulsifer* to this case” satisfied the first three prongs of plain-error review, the Ninth Circuit noted that the district judge would have been compelled to impose a different sentence but for the error. App-25. (That’s because without safety-valve relief, Engstrom was subject to a 60-month mandatory minimum sentence—so, the district court could not have imposed the 46-month sentence it selected.) In such cases, the Ninth Circuit held that “the third and fourth prongs of plain error review collapse into one,” so that satisfaction of the third prong “automatically satisfies” the fourth prong. App-26.

This approach is in direct conflict with *Gorsuch*, creating a split between the Courts on this important question of plain-error review.

C. The Ninth Circuit’s decision is wrong.

The Ninth Circuit was wrong to create a circuit split by holding that the fourth prong of plain-error review is “automatically” satisfied where the court would have imposed a different sentence but for the error.

As noted above, this Court has stressed that the fourth prong “is meant to be applied on a case-specific and fact-intensive basis,” and that a “*per se* approach to plain-error review is flawed.” *Puckett*, 556 U.S. at 142 (quoting *Young*, 470 U.S. at 17 n.14). And this Court has stressed that, even where an error satisfies the first three prongs of plain-error review, “[t]here may be instances where countervailing factors satisfy the court of appeals that the fairness, integrity, and public reputation of the proceedings will be preserved absent correction.” *Rosales-Mireles v. United States*, 585 U.S. 129, 142 (2018).

Nowhere has this Court, or any other court, suggested that there are cases in which the fourth prong collapses into another prong and is automatically satisfied.

It is certainly true that, for most cases, where an error results in a district court imposing a sentence below the statutory minimum, correcting that error will not seriously affect the fairness, integrity, or public reputation of judicial proceedings. But Engstrom’s case is precisely the type of case where a case-specific and fact-intensive assessment was called for. That’s because, by the time the Ninth Circuit was considering his case, Engstrom had already completed his carceral sentence and returned to the community. *See* App-8. Upsetting this successful reintegration by returning Engstrom to prison would not enhance the public reputation of judicial proceedings. This is particularly true given that Engstrom did not ask the district court to find him safety-valve eligible, and the district court’s error in doing so was erroneous only in light of *Pulsifer*—which was issued after sentencing. In addition, Engstrom represented himself, negotiated an unfavorable plea agreement that

precluded him from seeking safety-valve relief, and was initially sentenced to significantly more time than his co-defendants who distributed more drugs than he did. *See* AB at 69–70. And, on top of that, Engstrom spent a year-and-a-half in illegal pretrial detention based on the prosecutor’s misrepresentations to the court. *See* AB at 69.

In short, the unique nature of Engstrom’s case illustrates why this Court has instructed that courts of review must perform a case-specific and fact-intensive assessment for each prong of the plain-error test. The Ninth Circuit was wrong to hold that, in certain cases, courts may simply skip the fourth prong.

III. This case is a good vehicle to resolve the identified circuit splits.

This case presents an excellent vehicle for this Court to address the important issues raised above, and to resolve the circuit splits identified. While the Ninth Circuit’s decision rested not only on its findings that (1) *Bowie* applies to judicial interpretations of sentencing laws and (2) the fourth prong of plain-error review is automatically satisfied where the error in question necessarily affected the sentence imposed, but also on its findings that (1) *Pulsifer*’s interpretation of § 3553(f)(1) was foreseeable and (2) Engstrom failed to satisfy § 3553(f)(5)’s disclosure requirement, those latter two findings were straightforwardly incorrect and should not bar consideration of the important questions presented.

First, the Ninth Circuit’s decision that *Pulsifer* is retroactively applicable was based not only on its application of *Newman* (as discussed above) but separately on its finding that “*Pulsifer*’s interpretation of § 3553(f)(1) was foreseeable.” App-22. Because *Bowie* concerns the retroactive application of *unforeseeable* judicial

interpretations of statutes, 378 U.S. at 352–55, the foreseeability of *Pulsifer* is critical. The problem here is that the Ninth Circuit judged foreseeability from the time “[w]hen Engstrom was sentenced.” App-24. It is true that, at that time, other Courts of Appeals had taken the view of § 3553(f)(1) that was ultimately endorsed by this Court in *Pulsifer*—so, it was foreseeable that that view would prevail (even if it was not, at the time, the law in the Ninth Circuit). But foreseeability is not judged from the time of sentencing. Rather, it is judged from the time of the offense. *Bowie*, 378 U.S. at 354 (holding that the foreseeability of a judicial interpretation is judged against “the law which had been expressed prior to the conduct in issue”). And, at the time of Engstrom’s offense, *Lopez* was the only interpretation of § 3553(f)(1) to have been endorsed by a Court of Appeals. (*Lopez* was decided on May 21, 2021, and Engstrom’s criminal conduct ran through June 21, 2021. *See* 3-ER-439.) So, the Ninth Circuit’s foreseeability analysis was grounded in a clear misunderstanding of the law. Because *Lopez* was the only interpretation of § 3553(f)(1) to have been endorsed by a Court of Appeals at the time of Engstrom’s crime, *Pulsifer* was not foreseeable. The Ninth Circuit’s holding to the contrary was incorrect and is not an independent ground supporting the Ninth Circuit’s determination that *Pulsifer* is retroactively applicable to Engstrom.

Second, the Ninth Circuit’s decision reversing the district court rested not only on its erroneous § 3553(f)(1) determination but also on a determination that Engstrom had failed to satisfy § 3553(f)(5)’s disclosure requirement. (Section 3553(f)(5) provides that a defendant is eligible for safety-valve relief only if he “has

truthfully provided to the Government all information and evidence [he] has concerning the offense[.]” But the Ninth Circuit’s § 3553(f)(5) determination was grounded in mistaken application of basic principles of appellate review and thus should not bar a grant of certiorari.

The Ninth Circuit found that the district court had committed legal error in applying the wrong standard to the § 3553(f)(5) analysis. App-14 (finding the district court “read [§ 3553(f)(5) ’s] requirement out of the statute” and “proceed[ed] as if virtually any truthful statement . . . may be enough”). This was incorrect. The district court summarized the practice in the District of Nevada as requiring quite minimal information be provided to satisfy § 3553(f)(5)—but the district court did not endorse this approach. Rather, the district court accurately stated that § 3553(f)(5) requires a defendant “to provide truthful and complete information in good faith.” 1-ER-31. (The district court then found that Engstrom’s multiple provisions of information—upon his arrest, in the plea agreement, and in court—satisfied that standard. 1-ER-33–34.) In short, the Ninth Circuit’s finding that the district court applied the wrong legal standard was the result of misreading of the record.

And even if the Ninth Circuit was correct that the district court had committed legal error in applying the wrong standard, the proper course would have been to remand to the district court to apply the correct legal standard and to make factual findings in the first instance. *See Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982) (“When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should

be a remand for further proceedings to permit the trial court to make the missing findings[.]”); *see also* *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) (“If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings.”); *INS v. Ventura*, 537 U.S. 12, 17 (2002) (per curiam) (holding that, where a Court of Appeals identifies legal error, “the law’s ordinary remand requirement” compels remand to the decisionmaker to apply the correct legal standard in the first instance).

But rather than remand to the district court to apply the correct legal standard and to make factual findings, the Ninth Circuit proceeded to make its own factual findings in the first instance. The Ninth Circuit reviewed the record itself, weighed the evidence itself, and found that Engstrom “did not provide a complete disclosure.” App-15. This was a violation of this Court’s clear teaching that legal error requires remand for the district court to make a factual finding in the first instance. As this Court has explained, “The trial judge’s major role is the determination of fact, and with experience in fulfilling that role comes expertise.” *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). This is particularly true where, as here, “findings are based on determinations regarding the credibility of witnesses,” as “only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener’s understanding of and belief in what is said.” *Id.* at 575 (citing *Wainwright v. Witt*, 469 U.S. 412 (1985)).

By assessing the record itself rather than remanding for the district court to apply the correct legal standard and to make factual findings in the first instance, the Ninth Circuit violated a basic principle of appellate review. In short, the Ninth Circuit’s § 3553(f)(5) determination does not present an independent ground supporting reversal of the district court’s finding that Engstrom was eligible for safety-valve relief. Because the Ninth Circuit failed to follow “the law’s ordinary remand requirement,” *Ventura*, 537 U.S. at 17, its § 3553(f)(5) determination was grounded in a misunderstanding of the proper role of an appellate court. Thus, the questions presented under § 3553(f)(1)—on which the Courts of Appeals are divided—are outcome-determinative and merit a grant of certiorari.

CONCLUSION

For the foregoing reasons, Paul Engstrom respectfully asks the Court to issue a writ of certiorari.

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Respectfully Submitted,

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