

No. 22-340

In the Supreme Court of the United States

MARK E. PULSIFER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

ELIZABETH B. PRELOGAR

Solicitor General

Counsel of Record

KENNETH A. POLITE, JR.

Assistant Attorney General

FRANCESCO VALENTINI

Attorney

Department of Justice

Washington, D.C. 20530-0001

SupremeCtBriefs@usdoj.gov

(202) 514-2217

QUESTION PRESENTED

Whether, in order for a defendant to satisfy the prerequisite for “safety-valve” sentencing relief in 18 U.S.C. 3553(f)(1), a court must find that the defendant does not have more than 4 criminal history points (excluding any criminal history points resulting from a 1-point offense); does not have a prior 3-point offense; and does not have a prior 2-point violent offense.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 39 F.4th 1018.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2022. The petition for a writ of certiorari was filed on October 7, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Iowa, petitioner was convicted of distributing 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A). Pet. App. 10a-11a. The district court sentenced petitioner to 162 months of imprisonment, to be fol-

lowed by 10 years of supervised release. *Id.* at 12a-13a. The court of appeals affirmed. *Id.* at 1a-9a.

1. Under 18 U.S.C. 3553(f), defendants convicted of specified drug offenses “may obtain ‘safety valve’ relief” if they satisfy certain requirements. *Dorsey v. United States*, 567 U.S. 260, 285 (2012) (appendix B to the opinion of the Court). Such relief allows a district court to impose a sentence below the otherwise-applicable statutory minimum. 18 U.S.C. 3553(f).

Before 2018, safety-valve relief was available only if the court first found that “the defendant d[id] not have more than 1 criminal history point, as determined under the sentencing guidelines.” 18 U.S.C. 3553(f)(1) (2012). The statute set forth other eligibility requirements, all relating to the offense of conviction, in four additional paragraphs. 18 U.S.C. 3553(f)(2)-(5) (2012).

Section 402 of the First Step Act of 2018, Pub. L. No. 115-391, Tit. IV, 132 Stat. 5221, replaced the existing criminal-history requirement with a new Section 3553(f)(1). As amended, Section 3553(f) now provides:

Notwithstanding any other provision of law, in the case of an offense under [21 U.S.C. 841 or other federal drug laws], the court shall impose a sentence * * * 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 * * * .

18 U.S.C. 3553(f).

2. In April 2020, petitioner made two drug sales to a purchaser who turned out to be a confidential informant. Presentence Investigation Report (PSR) ¶¶ 10-12. The first sale occurred at a gas station in Council Bluffs, Iowa, involving about 112 grams of methamphetamine. PSR ¶¶ 10-11. The second sale occurred on the side of a road outside Mondamin, Iowa, involving about 29 grams of methamphetamine. PSR ¶ 12.

A federal grand jury in the Southern District of Iowa indicted petitioner on one count of distributing 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A), and one count of distributing 5 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B). Indictment 1-2. The government filed a notice under 21 U.S.C. 851 of its intent to seek enhanced penalties based on petitioner's prior conviction for a "serious drug felony"—namely, a 2013 conviction for possessing a controlled substance with intent to distribute, in violation of Iowa law. D. Ct. Doc. 29, at 1-2 (Oct. 15, 2020); see PSR ¶ 53; 21 U.S.C. 802(57), 841(b)(1)(A).

Pursuant to a plea agreement, petitioner pleaded guilty to the count of distributing 50 grams or more of methamphetamine, and the government agreed to dismiss the other count. Plea Agreement 1; D. Ct. Doc. 37, at 1 (Nov. 4, 2020). Because of his prior conviction for a "serious drug felony," petitioner faced a statutory minimum term of imprisonment of 15 years. 21 U.S.C. 841(b)(1)(A).

At sentencing, petitioner argued that he satisfied all the requirements for safety-valve relief under Section 3553(f). PSR Addendum 1. With respect to Section 3553(f)(1), petitioner acknowledged that he has more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense. *Ibid.*; see PSR ¶¶ 30-55 (attributing to petitioner 6 criminal history points, excluding any criminal history points resulting from a 1-point offense). Petitioner also acknowledged that he has two prior 3-point offenses. PSR Addendum 1; see PSR ¶¶ 46, 53 (describing the two 3-point offenses, each a drug offense). But he contended that because he does not have a prior 2-point violent offense,

he satisfied Section 3553(f)(1)'s criminal-history requirement. PSR Addendum 1.

The district court rejected that contention. Pet. App. 33a-36a. The court explained that because Section 3553(f)(1) is written “in the conjunctive,” petitioner would need to show that he does not have “all three of th[e] things” specified in subparagraphs (A), (B), and (C) in order to be eligible for safety-valve relief. *Id.* at 33a. And the court explained that because petitioner “does have more than four criminal history points, he is not eligible for [the] safety valve.” *Id.* at 36a. After granting “an unrelated reduction under different authority,” *id.* at 2a; see Sent. Tr. 16-24; D. Ct. Doc. 54 (Mar. 2, 2021), the court sentenced petitioner to 162 months of imprisonment, Pet. App. 12a.

3. The court of appeals affirmed. Pet. App. 1a-9a. The court observed that a defendant may qualify for safety-valve relief under Section 3553(f)(1) “if he ‘does not have—’ the criminal history points specified in (A), the prior offense listed in (B), *and* the prior offense listed in (C).” *Id.* at 5a. The court did not view “the important question” as “whether ‘and’ should be read conjunctively or disjunctively.” *Ibid.* Rather, the court accepted that the “most natural reading of ‘and’ is conjunctive,” *ibid.*, and viewed the relevant question as “in what sense the statute uses the word ‘and’ in the conjunctive,” *id.* at 6a.

The court of appeals observed that “[w]hen used as a conjunctive, the word ‘and’ has ‘a distributive (or several) sense as well as a joint sense.’” Pet. App. 6a (citation omitted). The court explained that a “joint” reading would mean that “a defendant is eligible for relief” under Section 3553(f)(1) if “he does not jointly have all three elements listed in (A), (B), and (C).” *Ibid.* And

the court explained that, in contrast, a “distributive” reading “would mean that the requirement that a defendant ‘does not have’ certain elements of criminal history is distributed across the three subsections, and a defendant is ineligible if he fails any one of the three conditions.” *Ibid.*

The court of appeals found “a strong textual basis to prefer [the] distributive reading.” Pet. App. 6a. The court observed that “[i]f ‘and’ is read jointly, then subsection (A) is rendered superfluous,” because a “defendant who has a prior three-point offense under subsection (B) and a prior two-point violent offense under subsection (C) would *always*” have “more than four criminal history points” and thus “meet the criterion in subsection (A).” *Ibid.* The court also observed that the “practical effect of reading ‘and’ in its distributive sense is that § 3553(f)(1) serves as an eligibility checklist for offenders who seek to avail themselves of the limitation on statutory minimums.” *Id.* at 8a. And the court explained that because “the traditional tools of interpretation reveal the meaning of the provision,” “there is no grievous ambiguity” to warrant application of the rule of lenity. *Id.* at 9a.

Finding no dispute that petitioner “has more than four criminal history points and a prior three-point offense,” the court of appeals determined that “[t]hose circumstances make him ineligible” for safety-valve relief. Pet. App. 8a-9a. The court explained that, under a distributive reading of Section 3553(f)(1), the fact that petitioner “does not also have a prior two-point violent offense that would meet the condition in subsection (C) is immaterial.” *Id.* at 9a.

DISCUSSION

Petitioner contends (Pet. 24-32) that a defendant is eligible for safety-valve relief under 18 U.S.C. 3553(f)(1) so long as he does not have every single one of the criminal-history factors specified in the subparagraphs of that provision. The court of appeals correctly rejected that contention. But the Eleventh Circuit's recent en banc decision accepting the contention makes it impossible for the circuits to correctly resolve this issue on their own. And this case would be a suitable vehicle for resolving the circuit conflict. This Court's review is therefore warranted.

1. The lower courts correctly found that petitioner does not meet Section 3553(f)(1)'s criterion for safety-valve relief. Pet. App. 4a-9a. For a defendant to satisfy that criterion, a court must "find[] at sentencing" 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). Petitioner does not qualify because he undisputedly has "more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines." 18 U.S.C. 3553(f)(1)(A). He also undisputedly has "a prior 3-point offense, as determined under the sentencing guidelines." 18 U.S.C. 3553(f)(1)(B).

a. As the court of appeals correctly recognized, Section 3553(f)(1)'s prefatory phrase—"the defendant does not have"—is best read to modify subparagraphs (A), (B), and (C) "severally." Pet. App. 6a (citation omitted); see *id.* at 6a-8a. "When used as a conjunctive, the word 'and'" can carry "'a distributive (or several) sense.'" *Id.* at 6a (quoting *Garner's Dictionary of Legal Usage* 639 (3d ed. 2011) (*Garner*)). Here, the statute uses "and" to distribute the prefatory phrase to each subparagraph, such that a defendant is eligible for safety-valve relief if he does not have (A), does not have (B), and does not have (C). See *United States v. Haynes*, 55 F.4th 1075 1079 (6th Cir. 2022) (observing that the distributive reading of Section 3553(f)(1) is "grammatically sound").

That interpretation of Section 3553(f)(1) avoids the critical contextual flaw of the alternative "joint sense" reading of the conjunction, *Garner* 639. That reading would treat the criminal-history factors specified in those subparagraphs as a package, such that a defendant is eligible for safety-valve relief if he does not have the combination of (A), (B), and (C). As the court of appeals explained, reading subparagraphs (A), (B), and (C) as a package would render subparagraph (A) "superfluous." Pet. App. 6a. Any defendant who has both "a prior 3-point offense" under (B) and "a prior 2-point violent offense" under (C) will necessarily also have "more than 4 criminal history points" under (A) because those two prior offenses alone would give the defendant 5 criminal history points. 18 U.S.C. 3553(f)(1).

Reading subparagraphs (A), (B), and (C) as a package would thus leave subparagraph (A) "without any independent operation," Pet. App. 6a, in contravention of the "cardinal principle of statutory construction" that courts "must 'give effect, if possible, to every clause and

word of a statute,’” *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (citation omitted). “Only the distributive interpretation avoids surplusage,” Pet. App. 6a, by requiring that the defendant “not have” each of the criminal-history factors specified in subparagraphs (A), (B), and (C).

b. The distributive understanding of Section 3553(f)(1) also accords with common sense. “[A]n ordinary reader would favor a logically coherent interpretation over a seemingly arbitrary one.” *Haynes*, 55 F.4th at 1079. Under the distributive reading, “the defendant must not have any of three disqualifying conditions in his criminal record: first, ‘more than 4 criminal history points,’ itself a fourfold increase over the prior cap; second, a prior offense serious enough to add three points to his criminal record; and third, a prior 2-point ‘violent offense.’” *Ibid.* “Each of those conditions on its face is quite plausibly an independent ground to deny a defendant the extraordinary relief afforded by the safety valve—which means this reading is logically coherent.” *Ibid.*

In contrast, reading subparagraphs (A), (B), and (C) as a package “would require that all these conditions be present for a defendant to be ineligible for safety-valve relief.” *Haynes*, 55 F.4th at 1079. Accordingly, “an incorrigible recidivist with, say, 24 criminal-history points, comprising a half-dozen convictions for robbery and two convictions for possession of explosives with intent to terrorize,” which are often 3-point offenses, “would be eligible for safety-valve relief, for want of a prior *two*-point violent offense.” *Id.* at 1080. Such results are “arbitrary enough to be implausible,” reinforcing the contextual understanding that the distributive reading of

Section 3553(f)(1)'s prefatory phrase is the "better" one. *Ibid.*

c. Petitioner's counterarguments lack merit. Nearly all of them rest on the premise that the court of appeals "h[e]ld" that "the word 'and' in § 3553(f)(1) really means 'or.'" Pet. 16; see Pet. 24-36. But the court accepted that "[t]he most natural reading of 'and' is conjunctive." Pet. App. 5a. And the court's distributive reading treats the word as "conjunctive," not disjunctive. *Id.* at 6a. Petitioner thus errs in framing the issue in this case as "whether the term 'and' carries a conjunctive or disjunctive meaning." Pet. 8; see Pet. App. 5a (explaining that "whether 'and' should be read conjunctively or disjunctively" is "not" "the important question"). The question instead is what Section 3553(f)(1)'s prefatory phrase modifies—(A), (B), and (C) "jointly," or (A), (B), and (C) "severally." Pet. App. 6a (citation omitted).

Petitioner likewise errs in asserting (Pet. 26) that the distributive understanding gives "and" a different meaning in Section 3553(f)(1) than at the end of Section 3553(f)(4), where it is employed to connect paragraphs (1) through (5). The distributive reading gives "and" a conjunctive meaning in both places. Indeed, the latter "and" itself is used in a distributive sense, because the "court finds at sentencing" language from the umbrella clause of (f) distributes" to each paragraph of (f). *United States v. Palomares*, 52 F.4th 640, 651 (5th Cir. 2022) (Oldham, J., concurring in the judgment), petition for cert. pending, No. 22-6391 (filed Dec. 21, 2022). A distributive reading of Section 3553(f)(1)'s prefatory phrase is thus consistent with Section 3553(f)'s overall structure, creating a single "eligibility checklist" in which each paragraph or subparagraph represents an inde-

pendent condition that a defendant must satisfy in order to obtain safety-valve relief. Pet. App. 8a.

Petitioner's reliance (Pet. 31-32) on the rule of lenity is also misplaced. By treating "and" as conjunctive, the distributive reading gives that word its "most natural" meaning. Pet. App. 5a. And as explained above, "the traditional tools of interpretation" foreclose reading subparagraphs (A), (B), and (C) as a package. *Id.* at 9a. Accordingly, "there is no grievous ambiguity" to justify resort to the rule of lenity. *Ibid.*

2. Although the court of appeals' decision in this case is correct, the decision below implicates a circuit conflict that warrants this Court's review. Like the Eighth Circuit in this case, the Fifth, Sixth, and Seventh Circuits have recognized that Section 3553(f)(1)'s prefatory phrase distributes to each subparagraph, so that a defendant is eligible for safety-valve relief only if he does not have more than 4 criminal history points as described in subparagraph (A), does not have a prior 3-point offense as described in subparagraph (B), and does not have a prior 2-point violent offense as described in subparagraph (C). See *Palomares*, 52 F.4th at 643-644; *Haynes*, 55 F.4th at 1078-1080; *United States v. Pace*, 48 F.4th 741, 754 (7th Cir. 2022).

The Ninth and the Eleventh Circuits, however, have adopted petitioner's contrary interpretation, under which a defendant can be eligible for safety-valve relief even if he does in fact have one (or two) of the criminal-history factors specified in the subparagraphs of Section 3553(f)(1). See *United States v. Lopez*, 998 F.3d 431, 433 (9th Cir. 2021), petition for reh'g pending, No. 19-50305 (filed Aug. 5, 2021); *United States v. Garcon*, 54 F.4th 1274, 1276 (11th Cir. 2022) (en banc). The government has filed a petition for rehearing en banc in the

Ninth Circuit, but the Eleventh Circuit has already considered the issue en banc. The circuit conflict therefore cannot resolve correctly on its own. And because this issue potentially affects a large number of drug cases, the circuit conflict warrants this Court's intervention.

3. This case is a suitable vehicle for resolving the question presented. Although the district court granted petitioner an 18-month reduction below the statutory minimum pursuant to a different statutory provision, see Pet. App. 2a, 41a; Sent. Tr. 16-24; D. Ct. Doc. 54, the court would have had authority to impose an even lower sentence "without regard to any statutory minimum," 18 U.S.C. 3553(f), if petitioner had satisfied the requirements for safety-valve relief under Section 3553(f). Because there is no dispute that petitioner satisfies the requirements of Section 3553(f)(2) through (5), see Gov't C.A. Br. 5-6, this case cleanly presents the issue of whether the court of appeals' interpretation of Section 3553(f)(1) is correct, and the relevant arguments were raised and considered below.

Two other pending petitions for writs of certiorari present the same issue. See *Rauber v. United States*, No. 22-6076 (filed Nov. 9, 2022); *Palomares v. United States*, No. 22-6391 (filed Dec. 21, 2022). The petition in *Rauber*, however, was filed more than one month after the petition here and seeks review of an unpublished decision of the Eighth Circuit that simply applied that court's precedential decision in this case. See *United States v. Rauber*, No. 21-2550, 2022 WL 3348982 (Aug. 15, 2022) (per curiam). The district court in *Rauber* also stated that it would not have imposed a sentence below the statutory minimum even if the defendant in that case qualified for safety-valve relief. Pet. App. at 37A, *Rauber, supra* (No. 22-6076). And the petition in *Palo-*

mares was filed more than two months after the petition here. Accordingly, the best course is for the Court to grant certiorari in this case and hold the petitions in *Rauber* and *Palomares* pending the Court's decision on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

KENNETH A. POLITE, JR.
Assistant Attorney General

FRANCESCO VALENTINI
Attorney

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