

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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MARK E. PULSIFER)
 Petitioner,)
 v.) No. 22-340
UNITED STATES,)
 Respondent.)
- - - - -

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 22-340, Pulsifer
5 versus United States.

6 Mr. Dvoretzky.

7 ORAL ARGUMENT OF SHAY DVORETZKY

8 ON BEHALF OF THE PETITIONER

9 MR. DVORETZKY: Mr. Chief Justice, and
10 may it please the Court:

11 The natural reading of
12 Section 3553(f)(1) is that "and" means "and."
13 It joins together enumerated criteria. To be
14 safety valve eligible, a defendant must not
15 have (A), (B), and (C), all three. That's what
16 ordinary grammar says and the surrounding text
17 confirms. Congress used "and" to join
18 (f)(1)(A) through (C) just as it used "and" to
19 require a defendant to satisfy each of (f)(1)
20 through (5). This reading makes sense.

21 The historic First Step Act made the
22 safety valve available for many more
23 non-violent drug offenders. Taken together,
24 (A) through (C) exclude violent recidivists
25 with a history of committing serious crimes,

1 while (f)(2) through (f) disqualify current
2 violent offenders.

3 The government needs "and" to mean
4 "or" or it needs the Court to insert the words
5 "does not have" into the statute three times.
6 But asking for a rewrite isn't statutory
7 interpretation. The government's surplusage
8 and policy arguments don't change that.

9 There is no surplusage because the
10 statute and the guidelines contemplate that not
11 every sentence for a prior offense earns
12 criminal history points.

13 As for policy, the government focuses
14 on whether someone with serial -- serious
15 criminal history could still satisfy (f)(1).
16 But the safety valve isn't a
17 get-out-of-jail-free card. Serious recidivists
18 will likely have a career offender enhanced
19 guidelines range at or above the mandatory
20 minimum, and judges can and do exercise their
21 discretion to impose appropriate sentences.

22 If Congress wanted to disqualify
23 defendants for having any of (A), (B), or (C),
24 all it had to do was say "or." That would have
25 unequivocally expressed a distributive meaning,

1 just as Congress did elsewhere in 3553(f).

2 Letting the government get to "or"
3 when Congress said "and" would encourage
4 Congress to be sloppy with the most basic
5 English words, leaving square corners far
6 behind, and in the criminal context, where
7 fairness matters most. The Court should hold
8 Congress to what it wrote.

9 I welcome the Court's questions.

10 JUSTICE THOMAS: From your argument,
11 it appears you do not accept the argument that
12 "and" could have a distributive reading and a
13 joint reading?

14 MR. DVORETZKY: Not in this context,
15 Justice Thomas, not -- not in the context --
16 not in the structure of a conjunctive negative
17 proof like what we have here in this statute.

18 JUSTICE THOMAS: In what context can
19 it have a distributive meaning?

20 MR. DVORETZKY: So I think the
21 government gives a number of examples where,
22 again, not in a conjunctive negative proof
23 context, you might hear "and" to be "or." I
24 think what's going on in a lot of those
25 examples, it's almost like your brain is

1 auto-correcting from "and" to "or." The proper
2 word actually would be "or" because, again,
3 "and" ordinarily connects things together.

4 But sometimes people use English in a
5 less precise way, and, again, you might
6 understand that to mean "or." That doesn't
7 mean that it's syntactically correct, and that
8 doesn't -- that's not the standard that
9 Congress ought to be held to when it's writing
10 a statute, let alone a criminal statute.

11 JUSTICE KAGAN: So is that what -- I
12 mean, let me give you a hypothetical, and tell
13 me if you think it falls into that category.

14 So you're going in for a medical test
15 and you receive something from the hospital,
16 and it says, to receive this test, the patient
17 should not -- and then, you know, it has, like,
18 a list of things that the patient shouldn't do,
19 and it says the patient shouldn't eat any food,
20 drink any liquids, and smoke.

21 So I'm going to assume, Mr. Dvoretzky,
22 that you're not a smoker. Do you feel
23 perfectly able to eat and drink as much as you
24 want?

25 MR. DVORETZKY: No. And that is a

1 situation where I would hear that "and" to be
2 an "or," but there are a couple things about
3 that -- first of all, in your hypothetical,
4 that's all the text that we have to work with,
5 whereas, in 30 -- 3553(f), we have --

6 JUSTICE KAGAN: Well, let's keep it
7 with my text, because you have some arguments
8 about other texts and the government has some
9 arguments about superfluity and anomalies, so
10 let's just keep it to the text itself.

11 MR. DVORETZKY: So, if we're focused
12 just on your hypothetical, I -- I probably -- I
13 would hear that to be an "or" rather than an
14 "and."

15 JUSTICE KAGAN: Obviously, because the
16 context tells you that it's an "or" rather than
17 an "and," that -- and -- and -- and the reason
18 that it's different from an example like drink
19 and drive, which is, you know, your example, is
20 there's something that connects those two
21 things so that we know that the harm comes from
22 the relationship between the two, whereas, in
23 this case, we know that the harm follows from
24 any one of the things.

25 So, either way, you're using context

1 to establish meaning, aren't you?

2 MR. DVORETZKY: Well, the -- the other
3 thing that we know from your hypothetical, if
4 I'm going in for a medical test, my mindset
5 going into the medical test, I'm not taking any
6 chances with the instructions that the doctor
7 gives me. If there's any ambiguity about
8 whether "and" means "or," I'm going to take the
9 safer course because I want to make sure that
10 my medical test goes properly.

11 So there is the context of the person
12 who is giving you that instruction that I think
13 also would lead you to take the safer choice
14 there, which is to treat the "and" as an "or."

15 JUSTICE BARRETT: But, Mr.
16 Dvoretzky --

17 MR. DVORETZKY: Yeah.

18 JUSTICE BARRETT: -- can I ask you --
19 you know, I hear you saying to Justice Kagan,
20 and you said this to Justice Thomas, that your
21 brain corrects "and"/"or". And when Justice
22 Thomas asked you about whether the distributive
23 understanding of "and" is grammatically
24 correct, you kind of seemed to say no because
25 you keep going to this example where your brain

1 changes "and" to "or." So I just wanted a
2 clear answer from you on that.

3 So you -- do you think that the
4 distributive understanding of "and" is
5 grammatically correct?

6 MR. DVORETZKY: I think it can be
7 grammatically correct in certain contexts but
8 not in this context.

9 JUSTICE BARRETT: So what about the
10 corpus linguistics brief that says in
11 38 percent of the time -- I understand -- and
12 you rely heavily on the fact that over
13 50 percent of the time, people understood it in
14 its joint sense, but 38 percent of the time,
15 they understood it in its distributive sense.

16 MR. DVORETZKY: So -- so they did, and
17 the corpus linguistics scholars concluded that
18 it was unnatural for "and" to have a
19 distributive meaning in that sense. By
20 contrast, they also concluded that a hundred
21 percent of people would understand "or" to be
22 distributive when used in a negative proof.

23 So, if you said, as -- as Reading Law
24 does, Justice Scalia and Professor Garner, in
25 order to qualify, you must not have (A), (B),

1 or (C), that would be unequivocally clear to
2 express a distributive meaning, and it would be
3 unnatural to use "and" even though some people
4 might hear it that way and understand it to be
5 distributive even in that kind of a negated
6 conjunction.

7 JUSTICE GORSUCH: You -- you've been
8 wanting to have the chance to explain why the
9 context here is different and point to your
10 contextual clues in this statute that are
11 different from some of the hypotheticals you've
12 heard. I'd just like to hear those.

13 MR. DVORETZKY: Sure. So there --
14 there are a few points that I would make.

15 First of all, the presumption of
16 consistent usage. Congress used "and" to
17 connect (f)(1) through (f), just as it used
18 "and" to connect (f)(1)(A) through(C). And so,
19 in both instances, that needs to have a
20 consistent joint meaning, particularly since
21 3553(f) is all one long sentence.

22 By contrast -- and this goes to the
23 meaningful variation canon -- Congress used
24 "or" throughout the statute as a disjunctive
25 term. Look, for example, at 3553(f)(4), a

1 defendant satisfies that provision if he was
2 not an organizer, leader, manager, or
3 supervisor and was not engaged in a continuing
4 criminal enterprise. So Congress knows how to
5 use "or" and "and" to mean different things,
6 and that's what it did in 3553.

7 In addition to that, the government's
8 argument is that "does not have" from the
9 beginning of 3553(f)(1) gets distributed to A,
10 B, and C.

11 JUSTICE GORSUCH: But it comes --

12 MR. DVORETZKY: It's that --

13 JUSTICE GORSUCH: -- before the --
14 before the dash.

15 MR. DVORETZKY: It comes before the em
16 dash. So there are a couple of reasons why the
17 em dash doesn't support that distribution in
18 addition to the obvious preliminary point that
19 the statute doesn't say, does not have A, does
20 not have B, and does not have C.

21 One, Congress itself didn't think that
22 the em dash distributed the language before it.
23 If it did, then it would not have had to repeat
24 in A, B, and C the phrase "as determined under
25 the Sentencing Guidelines." Congress could

1 have instead said, the defendant does not have,
2 as determined under the Sentencing Guidelines,
3 em dash A, B, C. Instead, Congress repeated
4 that every time. So Congress didn't think the
5 em dash was distributive.

6 Second, it --

7 JUSTICE GORSUCH: So that's your own
8 superfluidity argument on your end.

9 MR. DVORETZKY: Well, I actually don't
10 think it's a super -- superfluidity argument.

11 JUSTICE GORSUCH: No, no, no. For the
12 government's, it would be pointless to have
13 that language repeated but for your
14 interpretation?

15 MR. DVORETZKY: But for the fact that
16 the em dash doesn't distribute --

17 JUSTICE GORSUCH: Right.

18 MR. DVORETZKY: -- what comes before.

19 JUSTICE KAGAN: But, Mr. Dvoretzky --

20 MR. DVORETZKY: Yeah.

21 JUSTICE KAGAN: -- I mean, let me make
22 sure I understand your argument first. If
23 it -- if it said the defendant isn't eligible
24 for relief if he doesn't have A, doesn't have
25 B, and does not have C, you agree that the

1 government wins, is that right?

2 MR. DVORETZKY: Yes, because that
3 would be setting out three independent
4 conditions.

5 JUSTICE KAGAN: Right. So -- so --
6 so, when we look at this statute, I mean, isn't
7 what is most likely to have gone on here is
8 that Congress made a completely ordinary
9 drafting decision which said does not have A,
10 does not have B, and does not have C? Who
11 writes like that?

12 What we usually do is we try to make
13 writing efficient and not repetitive, and so we
14 take out terms that apply to everything and put
15 it in a format where we don't have to keep
16 repeating it. Put it in exactly this format.

17 I -- I mean, you know, we do this in
18 our ordinary writing. Congress does it in
19 writing statutes. We don't keep on repeating a
20 verb when the verb applies to everything.

21 So that's what Congress did here. It
22 just took out the -- rather than say "does not
23 have" three times, it took it out and put it in
24 prefatory language, followed by three things
25 that you shouldn't have.

1 MR. DVORETZKY: Two points, Justice
2 Kagan. One, yet Congress did repeat under --
3 under -- "as determined under the Sentencing
4 Guidelines" three times, which it didn't have
5 to under that -- under that approach.

6 Second, though, if you look at
7 3553(f), the opening paragraph, that also ends
8 with an em dash. So, if the em dash
9 distributes what's come -- what comes before to
10 each of (f)(1) through (5) -- I mean, I'm
11 sorry, if the em dash in (f)(1)(a) distributes
12 "does not have" to each of A, B, and C, then
13 the em dash at the end of 3553(f) also ought to
14 be understood to distribute what precedes that
15 em dash to each of (f)(1) through (5). If
16 that's right, then a defendant who satisfies
17 any one of those (f)(1), (2), (3), (4), or (5),
18 would qualify for relief.

19 So, for example --

20 JUSTICE BARRETT: Well, "does not
21 have" --

22 JUSTICE GORSUCH: You --

23 JUSTICE BARRETT: -- would have the
24 distributive meaning there too, as Judge Oldham
25 said? In that -- in that dash after (f), you

1 know, if the Court finds at sentencing after
2 the government has been afforded an
3 opportunity, et cetera, that could have a
4 distributive meaning, and then it wouldn't be
5 Calvinball, you know, as -- as you've been
6 saying. You could say it's distributive in
7 both situations.

8 MR. DVORETZKY: So I think what gets
9 distributed before the em dash, the -- the
10 government on page 38 of their brief explains
11 the em dash rule that they're advocating for,
12 the distributive rule that they're advocating
13 for. They say that each item after the em dash
14 must be a logical and grammatical continuation
15 of the prefatory clause so that the two can be
16 read together without regard to the rest of the
17 provision, as if it were complete.

18 And so what would actually get
19 distributed goes all the way back to the court
20 shall impose a sentence without regard to --

21 JUSTICE BARRETT: It doesn't have to.
22 It could just be the clause that's preceded by
23 the comma, if the court finds that. I mean, I
24 get -- I -- I think this is a very hard case.
25 I think it's a very hard case, so I don't mean

1 to suggest that it's clear.

2 All I'm saying is that there is a way
3 to read it that would be perfectly consistent
4 by treating that last clause as distributive.

5 MR. DVORETZKY: I think that would not
6 allow the distribution to be a complete
7 sentence in the same way that starting it
8 earlier would --

9 JUSTICE KAVANAUGH: You --

10 MR. DVORETZKY: -- and that --

11 JUSTICE KAVANAUGH: -- you agree that
12 determining whether the "and" distributes
13 depends on context as a general matter,
14 correct?

15 MR. DVORETZKY: As a general matter, I
16 do, but I think that the key context to look to
17 is the surrounding text in the first instance.

18 JUSTICE KAVANAUGH: Okay. But you
19 agree that context matters?

20 MR. DVORETZKY: Yes.

21 JUSTICE KAVANAUGH: Okay. And the
22 government says that one of the problems
23 contextually with your interpretation, it -- it
24 would mean that offenders with more serious
25 violent records, violent offense records, would

1 be eligible for the safety valve while
2 offenders with less serious violent offense
3 records would not be eligible, and the
4 government says that would defy common sense.

5 In addition to the superfluidity
6 argument they make, that seems to me a serious
7 contextual issue that you have to deal with.
8 So how -- how do you deal with that?

9 MR. DVORETZKY: So, Justice Kavanaugh,
10 Congress didn't have a reason to be concerned
11 about joining A, B, and C for a few reasons.

12 One, it knew that defendants would
13 still have to satisfy the rest of (f)(2)
14 through (f), which focuses on the -- whether
15 the instant offense is a violent crime or not.
16 And Congress could quite rationally have
17 thought that was the focus.

18 In addition to that, as I said in my
19 introduction --

20 JUSTICE KAVANAUGH: Do you accept my
21 premise, though, that -- that your
22 interpretation would mean offenders with more
23 serious violent offense records would be
24 eligible and with less serious violent offense
25 records would not be eligible in certain

1 circumstances?

2 MR. DVORETZKY: I -- I was going to
3 say I -- I don't accept that as a categorical
4 proposition.

5 JUSTICE KAVANAUGH: In certain
6 circumstances?

7 MR. DVORETZKY: It -- there -- you can
8 find individual cases where that would be true,
9 but as Chief Judge Pryor explained in the
10 Garcon case, Congress legislates at a macro
11 level, not at a micro level. That can lead to
12 particular cases where results might be
13 anomalous.

14 The reason that it doesn't defy common
15 sense, though, to use the phrase that I think
16 you used in your question, Congress knew that,
17 first, a defendant would have to satisfy (f)(2)
18 through (f), and, second, the safety valve
19 itself, all that means is that courts exercise
20 discretion to impose proportionate sentences --

21 JUSTICE KAVANAUGH: On --

22 MR. DVORETZKY: -- based on a variety
23 of factors, including criminal history. And so
24 --

25 JUSTICE KAVANAUGH: (f)(2) through (f)

1 don't have anything to do with criminal history
2 though, per se, right?

3 MR. DVORETZKY: They -- they don't.

4 And Congress could quite rationally, given the
5 history of the -- the -- given the history of
6 mandatory minimums and what Congress was trying
7 to achieve here, wanted to focus more on the
8 nature of the instant offense than on criminal
9 history. But even as to criminal history,
10 district judges can and do take that into
11 account.

12 JUSTICE JACKSON: Don't they --

13 JUSTICE KAGAN: Well, but, presumably,
14 they --

15 JUSTICE JACKSON: -- have to under the
16 Sentencing Guidelines? I mean, the safety
17 valve just removes the mandatory minimum, but
18 don't the judges then have to look at the
19 guidelines and wouldn't you expect that a
20 defendant who had a number of serious criminal
21 violent priors, the guidelines would take
22 account of that in terms of what the ultimate
23 sentence was going to be?

24 MR. DVORETZKY: You -- you would
25 expect that. You might also expect that a

1 serious violent recidivist would qualify for a
2 career guidelines enhancement.

3 JUSTICE KAGAN: I mean --

4 JUSTICE JACKSON: And would you have
5 --

6 JUSTICE KAGAN: -- presumably, this
7 provision was meant to make some amount of
8 sense, right? Congress would not have just
9 said: Well, whatever, we -- we'll just, you
10 know, repeat some nonsense because we know that
11 district courts have discretion in the end.
12 They meant this gatekeeping provision to be a
13 serious gatekeeping provision with serious
14 criteria that meant something.

15 And the question is: Why would
16 Congress -- why -- I mean, I guess what you're
17 saying is you don't have an explanation for why
18 Congress would say it's okay if you have a
19 gazillion three-point offenses so long as you
20 don't have a two-point violent offense.

21 MR. DVORETZKY: Justice Kagan, we do
22 have an explanation, which is that Congress,
23 again, legislating at a macro level, could have
24 rationally thought that the combination of A,
25 B, and C was serving a gatekeeping function --

1 JUSTICE GORSUCH: And, counsel --

2 MR. DVORETZKY: -- to keep --

3 JUSTICE GORSUCH: -- I -- I -- I mean,
4 why are you resisting the obvious conclusion
5 that the Ninth Circuit came up with, which is,
6 if you have a three-point violent offense, you
7 have a two-point violent offense, and,
8 therefore, there is no -- this anomaly
9 dissipates completely?

10 MR. DVORETZKY: Well, on that point,
11 I -- I think the better reading of the statute
12 is that two points means two points and three
13 points means three points. The Sentencing
14 Guidelines distinguish in that way between
15 two-point offenses and three-point offenses.
16 So I don't know that you need --

17 JUSTICE GORSUCH: So you think the
18 Ninth Circuit was wrong in a case that favors
19 you? Alas --

20 MR. DVORETZKY: I -- I --

21 JUSTICE GORSUCH: -- here we are, day
22 one.

23 MR. DVORETZKY: -- I -- I -- I think
24 the better reading of the statute -- the better
25 reading of the statute is that two and three

1 are --

2 JUSTICE GORSUCH: Okay. So you
3 embrace --

4 MR. DVORETZKY: -- mutually exclusive
5 but --

6 JUSTICE GORSUCH: -- you embrace the
7 anomaly?

8 MR. DVORETZKY: Well, I -- I -- so I
9 think there are two points associated with
10 this. One is the -- the surplusage point,
11 which we haven't talked about. The other is
12 the anomaly. On the anomaly, I think there can
13 be situations where that would happen. I don't
14 think that makes Congress's statute here
15 irrational.

16 JUSTICE JACKSON: And, indeed --

17 JUSTICE GORSUCH: It doesn't --

18 JUSTICE JACKSON: -- isn't that what
19 Justice -- isn't that what Judge Pryor said in
20 the Garcon case? I mean, I -- I took you to be
21 sort of embracing his philosophy as to how the
22 guidelines work relative to the mandatory
23 minimums and that it is not irrational at all
24 for Congress to be making the amendment that
25 they were making in this case, which was

1 intended to broaden the -- the availability of
2 the safety valve.

3 MR. DVORETZKY: That's right, Justice
4 Jackson. It was intended to broaden the
5 availability of the safety valve, in
6 recognition of the fact that mandatory
7 minimums, applying automatically without regard
8 for the offenders' particular circumstances,
9 are unfair and unjust, and so Congress wanted
10 to move away from that --

11 JUSTICE ALITO: Are you talking about
12 --

13 MR. DVORETZKY: -- but that -- I'm
14 sorry.

15 JUSTICE ALITO: Just -- I'm sorry.

16 MR. DVORETZKY: No, no. Please.

17 JUSTICE ALITO: Finish what you were
18 saying.

19 MR. DVORETZKY: No, please.

20 JUSTICE ALITO: I didn't mean to
21 interrupt. You mentioned surplusage. Could we
22 talk about that? If (B) and (C) made (A)
23 100 percent surplusage, what would you say?

24 MR. DVORETZKY: I would -- even in
25 that circumstance, as Judge Newsom, for

1 example, said in Garcon, you would still have
2 to adhere to the ordinary meaning of "and" in
3 -- in this situation, and the surplusage would
4 not matter.

5 But (B) and (C) don't make (A)
6 surplusage, and I think that's for the reason
7 that Chief Judge Pryor, who was a former acting
8 chair of the Sentencing Commission, explained
9 in Garcon. That is that not every sentence for
10 a prior offense earns criminal history points.

11 JUSTICE ALITO: Well --

12 MR. DVORETZKY: You can have --

13 JUSTICE ALITO: -- okay. I understand
14 that argument. Suppose I think that if it made
15 it a hundred percent surplusage, that would be
16 a pretty strong argument against you. Let's
17 just take that as an assumption.

18 Would you draw a distinction between
19 that situation, where it's a hundred percent
20 surplusage, and the situation where it's
21 99 percent surplusage or 98 percent surplusage?

22 MR. DVORETZKY: I don't know that I
23 would because, either way, the surplusage canon
24 isn't an absolute rule, and it doesn't justify
25 in this case overriding the ordinary meaning of

1 "and." The other -- the other textual cues
2 that we've talked about and argued about in our
3 brief, the Senate's drafting manual here is
4 also a relevant consideration. The manual says
5 that "and" indicates that something is included
6 in a class only if it meets all of the
7 criteria, whereas "or" says that something is
8 included only if it meets one or more of the
9 criteria.

10 So the point is that Congress, by
11 default, following that drafting manual, uses
12 "and" in its joint sense.

13 JUSTICE JACKSON: And, counsel --

14 MR. DVORETZKY: So even if you had --

15 JUSTICE JACKSON: -- didn't -- didn't
16 -- didn't --

17 JUSTICE GORSUCH: I -- I -- I --

18 JUSTICE JACKSON: -- didn't Congress
19 actually contemplate the difference between
20 "and" and "or" in this very context? And by
21 that, I mean, are you familiar with the
22 enactment history? My understanding is that
23 Congress looked at a bill in the previous cycle
24 that would have done exactly -- almost exactly
25 what happened here with respect to increasing

1 to four points, including (B) and (C), and in
2 that draft document, they used the word "or."
3 And yet, here now, on the enactment of this, we
4 have "and."

5 So that suggests to me at least that
6 Congress was consciously determining that there
7 was a difference between "and" and "or."

8 MR. DVORETZKY: Sure. And I think
9 that there are a number of different
10 indicators -- we can go through the list --
11 that Congress understood the difference between
12 "and" and "or," and these are the words that it
13 wrote, and the words that it wrote have to be
14 given effect even in the face of surplusage.

15 I don't think there is --

16 JUSTICE KAVANAUGH: Well, if we're
17 going to go -- if we're going to go into the
18 legislative history, though, when Senator
19 Grassley introduced the bill that became law,
20 the Judiciary Committee report on that said
21 that it would exclude offenders with
22 three-point felony convictions or prior
23 two-point violent offenses. So, if we're going
24 to go down that road, which I'm not saying we
25 should, but if we're going to go down that

1 road, I'm not sure that that fully helps you.

2 MR. DVORETZKY: So I think that
3 particular legislative history that you're
4 focused on, Judge -- Justice Kavanaugh, is a
5 little bit mysterious because the rest of it
6 also says that offenders will not be eligible
7 for the safety valve "absent a judicial finding
8 that those prior offenses substantially
9 overstate the defendant's criminal history and
10 danger of recidivism."

11 So, while the statement that you're
12 referring to used "or" rather than "and," the
13 statement also suggests -- and I'm not quite
14 sure where Congress was getting this -- that
15 courts could exercise discretion to trigger the
16 safety valve notwithstanding a defendant's
17 criminal history.

18 JUSTICE SOTOMAYOR: Counsel, I think
19 it may have come from the legislation they had
20 been looking at. That exact language that you
21 just read came from the Sentencing Reform Act
22 of 2015 that used the "or" between (A), (B),
23 "or" (C). But then it gave a discretion to the
24 sentencing judge to ignore it.

25 It actually supports your position

1 that Congress knew that the "or" should be
2 there but only if the court could deviate.

3 MR. DVORETZKY: Right.

4 JUSTICE SOTOMAYOR: When it decided to
5 take away the power to deviate, it raised up
6 the qualifications by doing (A), (B), "and"
7 (C).

8 MR. DVORETZKY: Right. And all of
9 that accords with the purpose of the First Step
10 Act to move away from mandatory minimums
11 towards considering the offender's individual
12 circumstances in a particular case, which, of
13 course, would include criminal history.

14 District judges obviously apply the
15 guidelines. As the Federal Defenders' brief
16 shows, I think at pages 7 to 8, district judges
17 routinely depart upward where it's called for
18 based on a defendant's criminal history. The
19 career offender guidelines lead to sentences
20 routinely of 25 years to life. And so the
21 Sentencing Guidelines will account for the kind
22 of individualized circumstances that Congress
23 wanted.

24 JUSTICE GORSUCH: On that score, I
25 just wanted to take this case as an example to

1 test it in my own mind, and I went back and
2 looked at the presentence report and things
3 like that. And as I understand it, 15-year
4 minimum, 180 months, for some reason, your
5 client got 162, I'm not sure why. Maybe you
6 can tell me. And that -- so that would be the
7 15-year mandatory minimum.

8 The safety valve gets him, with his
9 criminal history, approximately, my -- my law
10 clerks tell me, between 120 and 150 months. He
11 was over 60 years old when he's sentenced, so
12 we're talking about whether he might be free
13 when he's 70, 73, or 75. Is that what we're --
14 what's really at stake here?

15 MR. DVORETZKY: That's right. This is
16 a 60-year-old offender. He does have a
17 criminal history. That criminal history would
18 be taken into account under the Sentencing
19 Guidelines. And nobody is talking about him
20 not serving a serious prison term. This is --

21 JUSTICE GORSUCH: He's going to be at
22 least 70 years old when he's released. He'll
23 be under parole, I assume, for a good bit
24 thereafter, supervised release. And -- and the
25 judge, of course, could depart or vary upward

1 if the judge wished to.

2 MR. DVORETZKY: That -- that's right.

3 If the court wanted to do that, it could.

4 JUSTICE KAVANAUGH: Would you have a
5 different rule for a 22-year-old offender?

6 MR. DVORETZKY: No, but the -- but the
7 point, Justice Kavanaugh, is that Congress
8 wanted individualized circumstances --

9 JUSTICE KAVANAUGH: Then why have --

10 MR. DVORETZKY: -- to be taken into
11 account.

12 JUSTICE KAVANAUGH: -- why have the
13 criminal history disqualification at all? At
14 least my understanding of the statistics is
15 of -- based on 2021, of 11,000 offenders who
16 met the non-criminal history requirements
17 pre-First Step Act, 6,000 would be
18 disqualified. Under the government's
19 interpretation, only 4,000 would be
20 disqualified. So a substantial number, 2,000.

21 But, under yours, only 300 or so would
22 be disqualified, which basically eliminates the
23 criminal history disqualification in 98 percent
24 of the cases.

25 MR. DVORETZKY: So to -- to --

1 JUSTICE KAVANAUGH: So why keep it at
2 all? Given the -- as you rightly say, the
3 individualized discretion that sentencing
4 judges use, why -- why have all this if it's
5 really not going to make a difference, as
6 Justice Gorsuch says, in a lot of cases?

7 MR. DVORETZKY: If I could, two -- two
8 points, one conceptual, one on the facts.
9 Conceptually, look, Congress could have thought
10 that the combination of (A), (B), and (C) was a
11 particularly egregious combination, and that at
12 a macro level was what it was targeting. It
13 could still serve some purpose. Congress
14 didn't know when it passed that what the
15 numbers would look like.

16 Second, on a factual level, in
17 response to those numbers, those numbers, the
18 2.8 percent or whatever it is, that's
19 calculating things under the Ninth Circuit's
20 Lopez interpretation. It's not calculating the
21 numbers using the approach that we're
22 advocating and that Chief Judge Pryor adopted
23 in Garcon, which allows old offenses to be
24 counted under (B) or (C) even if they don't
25 count towards the criminal history total in

1 (A).

2 So we actually don't know what the
3 numbers would look like when you apply the
4 approach that we're advocating for those.

5 JUSTICE KAVANAUGH: Well, it would be
6 even fewer --

7 CHIEF JUSTICE ROBERTS: Thank you.

8 JUSTICE KAVANAUGH: Never mind.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Thomas, anything further?

12 Justice Alito?

13 JUSTICE ALITO: Well, just out of
14 curiosity, I wonder if I can ask you a question
15 about how you think language works in general.
16 Let's just forget about special rules that
17 apply to statutory interpretation for a moment
18 and just talk about how language works in
19 general and your understanding of that.

20 If I say something and it's ambiguous
21 and you're trying to figure out whether I mean
22 A or B, to what degree do you take into account
23 whether A or B makes more sense?

24 MR. DVORETZKY: I might take it into
25 account, but the other thing I would take into

1 account is my relationship with you as the
2 speaker.

3 So, if -- Justice Kagan's
4 hypothetical, if my doctor tells me, don't do
5 A, B, and C, my relationship with the doctor is
6 I want to pass -- I want the medical test to go
7 well, and I assume that my doctor is being very
8 cautious and conservative, because my doctor
9 is, so I'm going to -- that's the context.
10 It's the relationship with the speaker that's
11 letting me turn an "and" into an "or" there.

12 In this situation, if Congress --
13 JUSTICE ALITO: No, I think that's
14 a -- that's a -- that's a fair answer. So we
15 have -- you have to take into account some
16 image of the speaker and your relationship to
17 the speaker.

18 So who is the speaker that we're
19 talking about when we're trying to understand a
20 statute that is enacted by Congress and what
21 attributes do we attribute to that speaker?

22 MR. DVORETZKY: So I think that
23 actually raises two different questions, I
24 think.

25 JUSTICE ALITO: All right. Who is the

1 speaker?

2 MR. DVORETZKY: So I think the speaker
3 is Congress.

4 JUSTICE ALITO: Okay.

5 MR. DVORETZKY: But --

6 JUSTICE ALITO: And -- and what is our
7 image of -- of this speaker? What
8 characteristics does this speaker have?

9 MR. DVORETZKY: It -- that feels like
10 a loaded question. I -- I -- I --

11 (Laughter.)

12 JUSTICE ALITO: Why is it a loaded --
13 well, no, I don't mean to be derogatory of
14 Congress. I'm not -- I'm not looking for a
15 derogatory answer or necessarily a
16 complimentary one. But, if that's how language
17 works, don't we have to have some image of
18 who -- who's the -- the speaker of this speech
19 that we are interpreting?

20 MR. DVORETZKY: Well, the -- the
21 speaker in this case is an institution.

22 JUSTICE ALITO: Right.

23 MR. DVORETZKY: But the institution is
24 also speaking in the context of a criminal
25 case. And where we have basic words like "and"

1 and "or," I think you hold the -- the
2 institution, the maker of laws, to a higher
3 standard of precision than I would hold my
4 doctor, who I know has my best interests at
5 heart and is trying to make me well.

6 And so, in that situation, where
7 Congress knows how to use "and" or "or," and,
8 again, particularly in a criminal context,
9 where fairness is at stake, you hold Congress
10 to the ordinary meaning of the word "and,"
11 which is not a distributive meaning in this
12 kind of a context.

13 JUSTICE ALITO: I mean, I think that
14 the move to textualism in our interpretation of
15 statutes was enormously beneficial and it
16 eliminated a lot of abuses that previously
17 occurred, but, in the end, we are just
18 interpreting language.

19 Everybody I assume in this courtroom
20 today speaks the English language, and all
21 we're trying to do is understand some words in
22 the English language, and it just seems to me
23 that a lot of these arguments that we've heard
24 -- I mean -- I mean, the people here who
25 haven't studied the case must think this is --

1 this is gibberish. It might as well be -- it
2 might as well be Greek with all this stuff
3 about distributive and em dash and all of that.

4 Is it necessarily that complicated?

5 MR. DVORETZKY: So I -- I don't think
6 it's complicated because I think that the
7 natural way to express what Congress wanted to
8 express here would have been "or." Using "and"
9 to express that any of the three would
10 disqualify you is unnatural. And -- and so I
11 think that really is the key point, is that
12 we're holding Congress to what the ordinary
13 understanding of these terms is.

14 CHIEF JUSTICE ROBERTS: Justice
15 Sotomayor?

16 JUSTICE SOTOMAYOR: I want to go back
17 to that point. And as I understood you
18 earlier, when Congress wanted to use the
19 distributive form, it generally did it. It did
20 it in (f)(2) by using the defendant did not use
21 violence or credible threats of violence or
22 possess a firearm or other dangerous weapon or.

23 When it wanted to do a "not" in
24 (f)(4), it wrote, contrary to Justice Kagan's
25 expectation, in a very cumbersome way, it said,

1 the statute requires that a defendant was not
2 an organizer or leader and was not engaged and
3 it went on and on.

4 So, here, the anomaly would be
5 Congress changing course just for this one
6 provision and changing "and" to mean "or." I
7 think that's your basic point. But assume that
8 we have two ways of reading this statute, that
9 you could accept that there was a possibility
10 of reading "or" to mean "and."

11 Where does the Rule of Lenity come
12 into this?

13 MR. DVORETZKY: If at the end of the
14 day you conclude, taking into account all of
15 the various textual cues that are available
16 here, that this statute is just -- is
17 grievously ambiguous -- that's the standard
18 that the Court has used -- then, at that point,
19 the Rule of Lenity calls for Mr. Pulsifer to
20 win, favoring the defendant.

21 And if Congress wants to change "and"
22 to "or" in a revision of this statute, that's a
23 very easy change for them to make, but the
24 burden of that ought to be on Congress, not on
25 defendants whose liberty is at stake in the

1 face of a -- a seriously ambiguous statute.

2 JUSTICE SOTOMAYOR: So where does
3 surplusage and common sense come into that?
4 Meaning, if all of the grammatical indicators
5 suggest that "and" means and and "or" means or
6 and the two are not the same, does that
7 constitute a grievous enough ambiguity to say
8 that lenity should play a part here?

9 MR. DVORETZKY: I -- I -- I think it
10 does. I think that alone is enough to conclude
11 that "and" means and, even if there were
12 surplusage, which I -- which I don't think
13 there is.

14 JUSTICE SOTOMAYOR: So assume there's
15 not, because I think Justice Alito was saying,
16 I don't know. Can you quantify that surplusage
17 here? The number of cases that would fall into
18 your exception, is it a lot? Is it a little?
19 I'm not sure.

20 MR. DVORETZKY: Meaning the -- the
21 number of cases where somebody would satisfy B
22 and C but not A?

23 JUSTICE SOTOMAYOR: Exactly.

24 MR. DVORETZKY: So -- so I can't
25 quantify it, but Chief Judge Pryor and Judge

1 Wood and others in the lower courts have given
2 a number of examples where that could happen.
3 You could have somebody with old offenses that
4 qualify under B or C or tribal convictions or
5 something subject to the single sentence rule.

6 And the guidelines in those
7 situations, you could have points associated
8 with those offenses that don't add to the
9 criminal history total, which is what A is
10 focused on.

11 How many of those cases there will be,
12 I don't know, but Congress could quite
13 rationally have thought that B and C were
14 serving a different purpose than A.

15 JUSTICE SOTOMAYOR: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice Kagan?

17 JUSTICE KAGAN: I want to go back to
18 Justice Alito's line of questioning, and you
19 said that the -- the -- the difference between
20 my hypothetical and this case has to do with
21 the relationship between the speaker and the
22 person listening to the injunction or the
23 prohibition or whatever you want to call it.

24 MR. DVORETZKY: That's one difference,
25 yeah.

1 JUSTICE KAGAN: Yeah. And -- and I
2 think that that might be one difference. But
3 another difference, which is the one I
4 suggested before, has to do with the
5 relationship of the items on the list.

6 And this is why "don't drink and
7 drive" is so powerful, because, automatically,
8 we understand that the harm that's being sought
9 to be averted is the combination of the two,
10 whereas other lists, you can see that the harms
11 are much more independent, that things are
12 independently disqualifying and would -- were
13 meant to be independently disqualifying.

14 And that's why the three-point,
15 two-point anomaly seems so significant to me,
16 because what that suggests is that these were
17 meant -- you know, when you -- when you take
18 the intersection of those, it doesn't work
19 under your reading and it does work under the
20 government's reading.

21 So I want you to respond to that view.

22 MR. DVORETZKY: I -- I think the
23 answer -- when you say it doesn't work, Justice
24 Kagan, I -- I think what you mean by that is
25 it's leading to an anomalous result in this

1 particular case, that it --

2 JUSTICE KAGAN: Well, not just --

3 MR. DVORETZKY: -- that doesn't --

4 JUSTICE KAGAN: -- in this particular
5 case. It leads to an anomalous result in the
6 case of anybody who has lots of three-point
7 offenses, both violent and non-violent, let's
8 say, but does not have, just happens not to
9 have a two-point violent offense.

10 MR. DVORETZKY: But it doesn't lead to
11 anomalous results in a whole other class of
12 cases, where Congress might rationally have --

13 JUSTICE KAGAN: Well, that's true.
14 But this anomaly suggests that those two
15 features, the three-point criterion and the
16 two-point violent criterion, were meant to
17 operate independently, each one being
18 disqualifying.

19 MR. DVORETZKY: I -- that's one
20 inference, but I don't think that's the only
21 inference that you could draw from A, B, and C.
22 Congress could have thought that A, B, and C
23 combined were worse than any of them alone.

24 Now, yes, that could lead to a
25 situation where a -- a seemingly more serious

1 offender qualifies under (f)(1) as opposed
2 to -- as opposed to somebody who's a less
3 serious offender.

4 Congress didn't have a particular
5 reason to be concerned about that because that
6 offender would still have to satisfy (f)(2)
7 through (5), and even then, the Sentencing
8 Guidelines would take into account that
9 person's criminal history and the district
10 judge would take into account that criminal
11 history when determining the sentence.

12 So Congress had no reason to think
13 that as a result of that supposed anomaly there
14 would be unjust results in the real world.

15 JUSTICE KAGAN: Thank you.

16 MR. DVORETZKY: Congress was --

17 JUSTICE KAGAN: I'm sorry.

18 CHIEF JUSTICE ROBERTS: Justice
19 Gorsuch?

20 JUSTICE GORSUCH: Let me see if I've
21 got it right. Tell me where I go wrong, okay?

22 The -- the two arguments we've heard
23 this morning on the other side so far are that
24 there's a surplusage problem you have, but
25 everybody seems to admit there isn't a

1 hundred percent surplusage. It's something
2 less than that, so it's not really a surplusage
3 argument of the kind we normally adopt or -- or
4 take seriously.

5 And the second is the
6 two-point/three-point violent offender anomaly,
7 which is in the nature of or in the direction
8 of an absurdity argument, but it never really
9 gets there. And so everybody has dropped the
10 -- the label that it's an absurdity. They
11 tried to pursue that below, but nobody really
12 argues that, takes it seriously here. It's a
13 policy argument. It's a policy argument, and
14 it's an imperfect one because one could
15 abstract at a policy level. Okay. That's on
16 one side.

17 On the other side, "and" means "and";
18 plain language. Everybody in the room does
19 understand that concept. Number two, there is
20 a distributive -- examples elsewhere in the
21 statute. (f)(2) is distributive, as Justice
22 Sotomayor pointed out, so Congress knows how to
23 distribute when it wants to distribute.

24 And then, three, lenity, which is the
25 word that we dare not utter but which Chief

1 Justice Marshall, back in Wiltberger, said
2 applies before you get to things like
3 legislative history and what Congress might
4 have wanted and policy arguments.

5 And the fact of the matter is, at the
6 end of the day, what we're really talking about
7 here is whether mandatory minimums send people
8 away for lifes, life sentences, effectively,
9 for many people, or whether the guidelines,
10 which are not exactly the most
11 defendant-friendly form of sentencing known to
12 man, themselves, apply.

13 That's what's at stake here. What am
14 I missing?

15 MR. DVORETZKY: That summation was
16 better than my introduction.

17 (Laughter.)

18 MR. DVORETZKY: I don't think you're
19 missing anything, Justice Gorsuch.

20 JUSTICE KAVANAUGH: You agree --

21 CHIEF JUSTICE ROBERTS: Justice
22 Kavanaugh.

23 JUSTICE KAVANAUGH: You agree,
24 however, that context is relevant, you said
25 that earlier, in determining whether the "and"

1 distributes. I just want to make sure you
2 still agree with that.

3 MR. DVORETZKY: I --

4 JUSTICE KAVANAUGH: You said that
5 earlier.

6 MR. DVORETZKY: I agree with it, and I
7 think that the key context is the surrounding
8 statutory text. That's what -- that's what you
9 look for, look to first.

10 I don't think that policy
11 considerations, as Justice Gorsuch was
12 explaining in his question, are the relevant
13 context to consider here.

14 JUSTICE KAVANAUGH: And then the
15 second --

16 MR. DVORETZKY: "Context," I think, is
17 a very broad term.

18 JUSTICE KAVANAUGH: Then I have a fact
19 question and then one broader question raised
20 by Justice Gorsuch's comment.

21 On the fact question, how many
22 individual uses or dosages does 141 grams of
23 meth get you? I mean, I'm sure you acknowledge
24 meth is a serious problem in many communities
25 in the United States. And what's your sense of

1 the 141 grams? And the government can talk
2 about this as well.

3 MR. DVORETZKY: I -- I honestly don't
4 have a sense to give you the answer to that
5 question. You could certainly imagine that
6 being a relevant consideration, taking into --
7 taken into account at sentencing, but I -- I
8 can't quantify that for you.

9 JUSTICE KAVANAUGH: Then on the
10 sentencing guidelines, those are -- are not
11 mandatory, correct?

12 MR. DVORETZKY: They are -- they're
13 not mandatory. But --

14 JUSTICE KAVANAUGH: Right. So the
15 reference to the sentencing guidelines, a lot
16 of judges would sentence under the sentencing
17 guidelines in certain cases. And that happens.
18 I guess the broader point there is the reason
19 they are mandatory minimums -- there are
20 problems with them as you identify, but I want
21 to give you a chance to respond to the
22 counterpoint, which is that Congress uses them
23 on some circumstances because, with the
24 hundreds and hundreds of federal district
25 judges around the country, they think that some

1 judges might sentence certain serious offenders
2 to too light a sentence, and so they wanted to
3 prevent that from happening in certain kinds of
4 cases.

5 So the discretion doesn't seem like a
6 total answer to the concern that Congress would
7 have about cases like this.

8 MR. DVORETZKY: Well, if -- the
9 government can and does appeal sentences when
10 they think that the sentence ought to have been
11 higher and more --

12 JUSTICE KAVANAUGH: That, almost --
13 I'll -- you know and I know that almost never
14 works, but what's your other argument, then?

15 MR. DVORETZKY: I mean, I think this
16 goes back to the purpose of the First Step Act.
17 This was a once-in-a-generation sentencing
18 reform, passed in a bipartisan manner, signed
19 by President Trump, where the motivating force
20 here was to move away from mandatory minimums.

21 Yes, it did -- Congress did not
22 completely eliminate mandatory minimums from
23 the U.S. Code. If it had, we wouldn't have
24 this case. Congress chose this rather
25 complicated First Step Act solution to the

1 problem. But the problem it was trying to
2 solve was moving away from numerous instances
3 of unfair and unjust mandatory minimums, and
4 giving district courts the discretion, which,
5 by and large, overwhelmingly they exercise
6 properly.

7 JUSTICE KAVANAUGH: Right.

8 MR. DVORETZKY: To take into account
9 individual circumstances.

10 JUSTICE KAVANAUGH: Okay. Thank you
11 very much.

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett?

14 JUSTICE BARRETT: Mr. Dvoretzky, I
15 wanted to give you a chance to respond to the
16 government's argument that lenity doesn't apply
17 to a safety valve statute. So lenity clearly
18 applies to penalty-imposing provisions, so
19 sentencing -- like sentencing provisions, and
20 so one could say, while that principle would
21 say that, you know, this -- this statute is
22 part of the sentence and so it applies, and I
23 assume that would be your answer, but I asked
24 my law clerk if she could find any examples of
25 situations like this. You just told Justice

1 Kavanaugh the point of the First Step Act was
2 to afford relief.

3 And so it actually feels more to me
4 like the argument would be a remedial statute
5 should be construed broadly, rather than
6 lenity, which is like a harsh statute should be
7 construed more narrowly. So can you give any
8 examples of situations in which lenity has
9 applied to a situation like this?

10 MR. DVORETZKY: So, as you said,
11 Justice Barrett, lenity has applied to
12 sentencing cases. I'm not thinking of an
13 example of a sentencing case where we're
14 dealing with a safety valve kind of structure,
15 because, as my -- as part of my colloquy with
16 Justice Kavanaugh, I was saying, this was a
17 convoluted way for Congress to do this.

18 But either way you want to look at it,
19 whether it is lenity in favor of the defendant,
20 the defendant having to satisfy all three in
21 order to be disqualified, or if you want to
22 look at it as Congress wanted to grant broad
23 relief here from mandatory minimums, so,
24 therefore, we ought to construe "and" to mean
25 "and" and not limit the class of defendants who

1 are eligible for that broad relief, I think
2 either way it leads you to the same conclusion.

3 And, either way, Congress knows how to
4 use "and" and "or." It ought to be held to
5 those ordinary meanings. And if it were to
6 disagree with this Court's decision in our
7 favor, Congress is free to amend the statute.

8 JUSTICE BARRETT: Okay. And then I
9 have one other question that's related to this
10 surplusage argument.

11 Do the guidelines use that phrase? I
12 mean, I don't -- I don't want to go toe to toe
13 with Chief Judge Pryor on what the sentencing
14 guidelines allow and not, but I'm having a hard
15 time getting my mind around this because,
16 intuitively, it does seem like the surplusage
17 argument makes more sense. And it seems to me
18 like the argument that you can have a
19 three-point offense that doesn't earn criminal
20 history points because it's too old seems like
21 it's kind of bending over backwards to find a
22 way to make it not superfluous.

23 So, I mean, do the guidelines use that
24 phrase, "three-point offense"?

25 MR. DVORETZKY: The -- the guidelines

1 don't use the phrase "three-point offense," but
2 I think you get there both from the statute and
3 from the guidelines. The statute itself draws
4 this distinction. In (f)(1)(A), it talks about
5 a four-point criminal history total -- point
6 total. But then it excludes a one-point
7 offense.

8 So the statute in (A) is -- is coming
9 -- has this concept that you can have a
10 one-point offense that actually doesn't count
11 towards the criminal history total. That
12 understanding of a one-point offense then
13 carries through to (B) and (C) for a
14 three-point offense and two-point offense.

15 The guidelines are consistent with
16 that in a couple of respects. One, as Chief
17 Judge -- Chief Judge Pryor said, the guidelines
18 do use the term "offense" and they talk about
19 sentences from offenses not counting. That is
20 what 4A1.2 does.

21 And so the guidelines are really
22 setting up an order of operations. Under
23 4A1.1, you assign points to a sentence based on
24 its length. Under 4A1.2, however, you then say
25 certain sentences and offenses don't count.

1 And so the guidelines have that concept.

2 Lastly, there's note 3 to 4A1.2, which
3 we highlight in our brief. That confirms that
4 the guidelines contemplate that points can be
5 associated with an offense without being
6 counted. So for purposes of the single
7 sentence rule, the -- that -- that comment
8 tells you that if -- if an offense would have
9 gotten two points, it can still serve as a
10 predicate for the career offender guidelines.
11 That idea of an offense that would have gotten
12 two points if they had counted is this concept
13 that Congress --

14 JUSTICE BARRETT: So how many did
15 Mr. Pulsifer have? How many three-point
16 offenses? Because he -- well, I'll -- I'll
17 just tell you. Looking at the PCR -- I mean
18 the PSR, I think he had two three-point
19 offenses that counted, counted because they
20 weren't stale, and then one that was too old.
21 Is that correct?

22 MR. DVORETZKY: I -- I think that's
23 right.

24 JUSTICE BARRETT: Okay. But then he
25 argued below that he only had two three-point

1 offenses. So he didn't make this argument that
2 he had three three-point offenses, right?

3 MR. DVORETZKY: He didn't need to
4 argue this one way or another. What he -- what
5 he needed to argue and did argue is that he
6 didn't have a prior two-point violent offense.

7 JUSTICE BARRETT: I but I think he
8 said initially that he had two three-point
9 offenses. So you would say now, your position
10 now, is that he has three three-point offenses?

11 MR. DVORETZKY: For purposes of this
12 statute, yes.

13 JUSTICE BARRETT: Okay. Thank you.

14 CHIEF JUSTICE ROBERTS: Justice --

15 MR. DVORETZKY: But not for purposes
16 of (A).

17 CHIEF JUSTICE ROBERTS: -- Jackson.

18 JUSTICE JACKSON: Yeah. So I'd like
19 to go back to Justice Kagan's conception of
20 this in -- in terms of the focus on the
21 anomaly, and I guess I don't see it as
22 anomalous given the context of the point of the
23 statute.

24 And I think you sort of responded to
25 Justice Kagan and Justice Kavanaugh in this

1 way, but I -- I guess maybe you can help me to
2 understand. I -- I thought this statute was
3 about relieving discretion or relieving the
4 mandatory minimum and thereby giving judges
5 discretion.

6 So, to the extent that the First Step
7 Act wanted to do that -- I don't think anybody
8 disputes that -- isn't it conceivable that
9 Congress still just wanted to identify
10 particular circumstances in which the mandatory
11 minimum should apply on the basis of criminal
12 history and they could do the -- that as
13 narrowly as they wanted to, correct?

14 MR. DVORETZKY: Yes. That's right.

15 JUSTICE JACKSON: I mean, right?
16 Like, it just -- it doesn't seem to me to be
17 anomalous that Congress picked out a particular
18 circumstance, as you described it in your
19 introduction, a situation in which a person had
20 all three of these circumstances would be one
21 in which Congress still intended for the
22 mandatory minimum to apply.

23 But, in other circumstances, even if
24 they involve serious offenses, even if they
25 involve, Congress was willing to allow for

1 judges to have discretion under those
2 circumstances to take into account what the
3 guidelines would have said or whatever.

4 I don't understand why that's, like,
5 harm or anomalous or anything.

6 MR. DVORETZKY: No, I -- I think
7 that's right. And I think that's especially
8 right when we're only talking about (f)(1) as
9 playing the initial gatekeeping role. You
10 still would have to satisfy (f)(2) through (5).

11 JUSTICE JACKSON: Correct.

12 MR. DVORETZKY: And even then --

13 JUSTICE JACKSON: So we already --

14 MR. DVORETZKY: -- you get -- I'm
15 sorry.

16 JUSTICE JACKSON: Yes. Correct. So
17 we already take care of really --

18 MR. DVORETZKY: Right.

19 JUSTICE JACKSON: -- terrible people
20 in this particular situation. And I would
21 think -- I would think that a situation in
22 which you had a two-point offense in your
23 background would be the kind of thing that
24 Congress might hone in on as making sure
25 because, otherwise, it could be kind of a

1 borderline situation.

2 So Congress would say: Okay, we want
3 to make clear that the mandatory minimum should
4 still apply if a person has more than four and
5 they had at least a three, three-point offense,
6 however it's defined. I under -- I take
7 Justice Barrett's point about that, but I do
8 think the guidelines lead you to identify
9 three-point offenses.

10 But Congress could say: Look, we're
11 lifting the emphasis on criminal history.
12 We're -- we -- this has been a problem, you
13 know, keeping people from -- the court from
14 considering raising -- alleviating the
15 mandatory minimum, so we're not going to have a
16 focus on criminal history anymore.

17 However, there could be a situation in
18 which we want to make clear, because it's so
19 borderline, we can't trust district judges to
20 necessarily apply the mandatory minimum in this
21 particular circumstance.

22 So let us make clear that if the
23 person has four criminal history points or
24 more, if they have a three-point offense in
25 their background, and if they have a two-point

1 offense that is violent, you still have to
2 apply the mandatory minimum in that situation.

3 I don't see that as, like, crazy or
4 making the statute not make sense.

5 MR. DVORETZKY: I -- I think that's
6 right. And while -- while the government in
7 its argument may disagree and prefer a
8 different policy outcome, that really is at
9 that point a policy debate.

10 And if the government -- the other
11 thing I would add is, if the government's view
12 were correct that any of A, B, or C were
13 independently disqualifying, you could have
14 people disqualified as in the Lopez case, for
15 example, for a 14-year-old offense for spray
16 painting a building. That would be a -- a
17 three-point offense.

18 JUSTICE JACKSON: Which would seem to
19 undermine Congress's purpose of allowing for
20 district courts to not have to apply the
21 mandatory minimum --

22 MR. DVORETZKY: Right.

23 JUSTICE JACKSON: -- in some
24 situations.

25 MR. DVORETZKY: The government's

1 argument is that under our interpretation, the
2 First Step Act is doing too much. Under their
3 interpretation, the First Step Act, I would
4 argue, is doing too little. Either way, that's
5 a policy debate, and --

6 JUSTICE JACKSON: One that Congress
7 could fix very clearly if we say it's "and" by
8 just changing it to "or," correct?

9 MR. DVORETZKY: That's right. Either
10 way, that's a policy debate and Congress could
11 amend the statute, and it would be very easy
12 for it to do so simply using "and" and "or."

13 JUSTICE JACKSON: Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Mr. Liu.

17 ORAL ARGUMENT OF FREDERICK LIU

18 ON BEHALF OF THE RESPONDENT

19 MR. LIU: Thank you, Mr. Chief
20 Justice, and may it please the Court:

21 "And" is conjunctive in 3553(f)(1).
22 The question is what does "and" conjoin.

23 It joins together three independently
24 disqualifying conditions by distributing the
25 phrase "does not have." That's the only

1 interpretation that avoids rendering the first
2 subparagraph entirely redundant and the only
3 interpretation that assigns (f)(1) a coherent
4 gatekeeping role.

5 What's inexplicable about Petitioner's
6 reading is that it would disqualify only those
7 defendants with a rare combination of
8 characteristics, including a prior violent
9 offense of exactly two points. So a defendant
10 convicted of a violent offense would actually
11 prefer to receive a longer sentence worth three
12 points to avoid being disqualified. That makes
13 no sense.

14 Petitioner's counterarguments fall
15 into three buckets. First, the argument in his
16 brief that the distributive interpretation is
17 textually impermissible. But grammar usage and
18 legal drafting guides say otherwise, and the
19 law is filled with distributive uses of "and."
20 Petitioner this morning attempts to distinguish
21 these as -- as cases involving negative
22 conditions, but that's just a distinction
23 without a difference.

24 Second, Petitioner argues that the
25 distributive use of "and" is less common. But,

1 according to leading grammar authorities, "and"
2 is usually distributive, including when
3 combined with the negative. And even if that
4 weren't true, even if, for example, 40 percent
5 of the "ands" in the world were distributive,
6 the job of the interpreter would be to figure
7 out whether, in context, this case falls within
8 that 40 percent rather than to simply accept
9 Petitioner's reading.

10 Third and finally, Petitioner argues
11 that Congress could have more clearly expressed
12 the government's interpretation by using "or."
13 But Congress could have more clearly expressed
14 Petitioner's interpretation by, for example,
15 using the phrase "does not have" at least one
16 of the following. And if Congress had used
17 "or," you can bet that defendants would be
18 accusing the government of reading "or" to mean
19 "and" by requiring that defendants not have A,
20 not have B, and not have C.

21 In any event, this Court has held that
22 the mere possibility of a clearer phrasing
23 can't defeat a meaning that's clear in context.
24 Because "and" in context joins together three
25 independently disqualifying conditions, the

1 Eighth Circuit should be affirmed.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: Mr. Liu, would you
4 tell us exactly when we are to use the -- the
5 distributive approach reading as opposed to the
6 joint reading?

7 MR. LIU: Well, the answer is it
8 depends. It depends on the context.

9 JUSTICE THOMAS: Well, see, that's the
10 problem. We're not getting direction or
11 guidance as to when it depends. The -- it's
12 almost as though this is a substantive due
13 process of the word "and" that we just make it
14 up as we go along.

15 I -- I -- I think you have to give us
16 more than that. At least Petitioner says the
17 natural, the more natural reading or almost a
18 default reading is "and" is conjunctive in a --
19 in a joint sense.

20 MR. LIU: Yeah. Well, if you look at
21 the grammar books, they say the opposite. They
22 say when "and" is used, even when combined with
23 a negative -- this is the Cambridge Grammar of
24 the English language -- they say "and" is more
25 often distributive. So I think that that's a

1 fair starting point.

2 But then I think you do need to look
3 at the context of the statute. "And" -- "and"
4 is a relationship word. It's a word that
5 connects other words. So you can't just look
6 up "and" in the dictionary in isolation to know
7 what it connects. The only way to figure out
8 what it connects is to actually read the other
9 words around "and" in this statute.

10 And, here, we think we have two
11 extremely strong contextual indicators that
12 Congress here intended "and" to be
13 distributive. One is our surplusage argument,
14 and the other is the argument that if you adopt
15 Petitioner's reading, the provision doesn't
16 make any sense.

17 JUSTICE JACKSON: What about the use
18 of "and" at the end of 3553(f)? I mean, if
19 you're right, then is it the government's
20 position that (1), (2), (3), (4), and (5) are
21 also distributive?

22 MR. LIU: No. We think "and" is doing
23 the same work in both places. In the main list
24 of things, (f)(1) through (5), what "and" is
25 doing is creating an eligibility checklist.

1 The Court must find (1), must find (2), must
2 find (3), must find (4), must -- and must find
3 (5).

4 What it's doing is the exact same
5 thing in the subsidiary checklist. The
6 defendant must not have A, must not have B, and
7 must not have C.

8 In both places, it's requiring that
9 all the criteria be satisfied.

10 JUSTICE JACKSON: But only if you put
11 in "must not have" three times. In other
12 words, if you don't repeat "must not have,"
13 then it seems to me that one is saying that the
14 defendant does not have all of those three.

15 MR. LIU: That's true. Our whole --
16 our whole case depends on whether you
17 distribute the "does not have" or you don't.
18 What I'm saying is, if you apply --

19 JUSTICE JACKSON: Well, what do you --

20 MR. LIU: -- the same --

21 JUSTICE JACKSON: -- what do you say
22 about the fact that we have within this 3553 --
23 and I'm looking at (f)(4) now -- a circumstance
24 in which Congress has repeated, you know, the
25 defendant was not an organizer and was not

1 engaged in? So wouldn't we have expected for
2 Congress to do that same sort of thing if it
3 meant for these things to be distributed in
4 (1)?

5 MR. LIU: Well, Congress did do the
6 exact same thing in (f)(1). The only
7 difference is formatting. The only difference
8 is formatting and style.

9 What Congress did in (f)(1) was say:
10 Look, (A), (B), and (C) are pretty long. I
11 mean, this would be a very long -- much longer
12 than (f)(4). And so, to help the reader figure
13 out what the independent conditions are, we're
14 going to split it up.

15 But the principle --

16 JUSTICE JACKSON: So how -- how do you
17 explain the prior bill that actually used the
18 word "or" and had these same criteria? I mean,
19 we do have a change. It's not as though
20 Congress always used "and," and so we're trying
21 to figure this out in that sense.

22 MR. LIU: I think the only -- the only
23 change is the criteria that -- that the author
24 thought were being connected.

25 JUSTICE JACKSON: No, there's a change

1 in the language of the prior bill and this
2 bill --

3 MR. LIU: Right.

4 JUSTICE JACKSON: -- with respect to
5 the use of "and" and "or."

6 MR. LIU: And my guess is, when they
7 put in "or," they thought that (A), (B), and
8 (C) should be read in a package because, when
9 they're read as a -- as a single unit with
10 brackets, then "or" makes sense.

11 But, at some point, I think whoever
12 wrote this thought: Actually, I think the
13 criteria is does not have (A), does not have
14 (B), and does not have (C).

15 JUSTICE KAVANAUGH: Well, I think
16 there are different -- the House had the "or"
17 and the Senate always had the "and," correct?

18 MR. LIU: Right. I mean, look, I
19 don't think we should be looking --

20 JUSTICE KAVANAUGH: I don't know if
21 that is -- that's not a full answer, but it's
22 -- it's relevant to trying to figure out what
23 the difference was at this point.

24 MR. LIU: I think it's relevant, and
25 my -- my -- my deep -- I guess I have two

1 deeper fundamental points. First, I don't
2 think we should be relying on this sort of
3 legislative history at all. But, second --
4 JUSTICE JACKSON: But why is that? I
5 -- I -- can you just -- why? Why not? I mean,
6 we're trying to understand what, I thought,
7 Congress intended this to mean, and so it seems
8 to me at least -- at least relevant what they
9 had previously drafted as they looked at these
10 various issues.

11 MR. LIU: Yeah, I don't think so
12 because, in the context of this case, everyone
13 agrees -- I mean, we've been accused of this
14 throughout the brief -- that the same thing can
15 be rephrased as an "or." So the fact that it
16 was rephrased as an "or" I don't think moves
17 the needle at all.

18 Anytime someone is speaking and uses a
19 connector, they have in mind what's being
20 connected. When they used "or," I would say
21 that Congress --

22 JUSTICE SOTOMAYOR: Mr. Liu --

23 CHIEF JUSTICE ROBERTS: Mr. Liu --

24 JUSTICE SOTOMAYOR: -- Mr. Liu, could
25 you point me to one statute -- we spend a lot

1 of time with common language, but I've been
2 looking at your brief and all the statutes you
3 cited where you say that "and" also meant "or,"
4 but all of them were framed in the affirmative.
5 As examples, "executive" means -- 5 U.S.C.
6 Section 105, "executive agency" means an
7 executive department, a government corporation,
8 and an independent establishment.

9 Or sometimes examples are framed in
10 the negative, such as 26 U.S.C. Section 17 --
11 170(f)(16)(D), which provides that the term
12 "household items" does not include food,
13 paintings, antiques, and other objects of art,
14 jewelry and gems, and collection.

15 But I can't find another statute
16 except this one where a list of criteria is
17 framed in the negative and we distribute that
18 negative the way you have. Point me to one
19 other statute.

20 MR. LIU: Well, I think that the --

21 JUSTICE SOTOMAYOR: You can't do it in
22 this one.

23 MR. LIU: I think the example Your
24 Honor just gave qualifies. The -- the
25 provision in the Internal Revenue Code says, to

1 qualify as a household item eligible for a
2 deduction --

3 JUSTICE SOTOMAYOR: That's a list of
4 examples. I'm talking about criteria that
5 disqualify you. I want an example like this
6 one.

7 MR. LIU: I think -- I think the
8 household items one is just like this one. I
9 think 34 U.S.C. 20 --

10 JUSTICE SOTOMAYOR: All right. We're
11 -- we're -- we're going to fight on the
12 starting premise.

13 JUSTICE GORSUCH: Counsel --

14 CHIEF JUSTICE ROBERTS: I --

15 JUSTICE GORSUCH: Oh, I'm sorry,
16 Chief, you -- go ahead.

17 CHIEF JUSTICE ROBERTS: I was just
18 going to say, if you could discuss for a little
19 while, Mr. Dvoretzky talked about his doctor
20 and Congress, and I think Justice Alito made
21 the very important point that we have to focus
22 on who -- who we're talking to or who we're
23 listening to.

24 What do you -- what do you think about
25 that? I mean, does Congress really, when

1 they're drafting these things, focus as much as
2 we have been focusing today on the grammatical
3 structure and differences, or should we take it
4 in a more colloquial sense, or how should we --

5 MR. LIU: So I -- Mr. Chief Justice, I
6 think the government wins whether you take a
7 literal or hyper-literal or colloquial
8 understanding of what Congress is saying,
9 either way.

10 CHIEF JUSTICE ROBERTS: Okay. But --
11 but, as a general starting point, what should
12 we do? I mean, obviously, we --

13 MR. LIU: Yeah. Well, look --

14 CHIEF JUSTICE ROBERTS: -- we've said
15 we treat the language --

16 MR. LIU: -- I --

17 CHIEF JUSTICE ROBERTS: -- as being
18 used in a common manner, but --

19 MR. LIU: I think the most important
20 thing to know about our relationship with
21 Congress is that we presume Congress to be
22 rational. We presume Congress to be an
23 intelligent drafter of opinion -- of -- of --
24 of -- of statutes. That's why we apply canons
25 like consistent usage and -- and meaningful

1 variation, and that's why we -- this Court has
2 said that it's this Court's role to make sense,
3 rather than nonsense, out of the corpus juris.

4 CHIEF JUSTICE ROBERTS: Well, but you
5 can't really say -- go so far as to say that it
6 would be irrational for Congress to write the
7 statute the way your friend wants to write it.

8 MR. LIU: I do think the -- the -- the
9 way Petitioner frames it, it is -- it is
10 incoherent. It is inexplicable. It is -- it
11 is -- it can't be explained.

12 I mean, just think of this
13 hypothetical that we provide in our brief: Two
14 defendants commit the same three-point offense.
15 Then one defendant goes on to commit a series
16 of murders, all three-point violent offenses.
17 The second defendant goes on to -- to commit
18 just one more offense, a mid-level robbery, a
19 two-point violent offense.

20 If -- if there was any sense to this
21 statute, if -- if, as my friend says, this
22 statute cares about recidivism and violence,
23 then the first -- the first defendant would be
24 the one that's disqualified.

25 JUSTICE GORSUCH: Counsel, that's --

1 MR. LIU: But, under his reading, only
2 the second is.

3 JUSTICE GORSUCH: -- that -- that's a
4 good policy argument, but you don't argue that
5 it rises to the level of absurdity that would
6 trigger our absurd doctrines -- our absurdity
7 canons, right?

8 MR. LIU: We do think it would be
9 absurd. We don't think we need to --

10 JUSTICE GORSUCH: You haven't made
11 that argument.

12 MR. LIU: Well, we don't think we need
13 to because absurdity kicks in only when a court
14 needs to disregard the literal text of a
15 statute. And there is a textual --

16 JUSTICE GORSUCH: So -- so you don't
17 invoke that canon, and -- and one could imagine
18 a rational Congress coming to this conclusion.
19 It's not the conclusion you think most
20 rational, but a whole bunch of lower court
21 judges have found it rational.

22 And then you have a -- a superfluidity
23 argument that isn't entirely leakproof, right?
24 It -- it's -- it's a partial superfluidity
25 argument.

1 MR. LIU: No, it's a hundred percent.
2 It's a hundred percent.

3 JUSTICE GORSUCH: A hundred percent?

4 MR. LIU: The entire subparagraph (A)
5 is superfluous.

6 JUSTICE GORSUCH: So Chief Judge Pryor
7 is -- is wrong as well that one could read the
8 statute rationally to -- every -- every offense
9 has a point, but that not all of them are
10 counted under A1, 2?

11 MR. LIU: That's right. I mean, his
12 view of the guidelines can't be squared with
13 the text of the guidelines or the text of the
14 statute.

15 JUSTICE JACKSON: Can you explain that
16 a little bit more, please?

17 JUSTICE GORSUCH: Oh, I'm sorry,
18 before that, I had one last question if it's
19 all right.

20 JUSTICE JACKSON: Mm-hmm.

21 JUSTICE GORSUCH: Which is, when we're
22 trying to figure out the most natural reading
23 of a statute and whatever standard we talked
24 about, what should we account for the fact that
25 the government didn't make this argument until

1 this Court in this case, that below, in the
2 Eighth Circuit, it argued that "and" means
3 "or"? You -- you started this argument by
4 saying we agree "and" is conjunctive, but in
5 the Eighth Circuit, the argument was it's
6 disjunctive.

7 MR. LIU: No, I think we made -- we --

8 JUSTICE GORSUCH: Should that weigh in
9 our consideration of what --

10 MR. LIU: -- we made the two arguments
11 in the alternative. We made the distributive
12 argument in our response brief in the Eighth
13 Circuit, and that's why the Eighth Circuit
14 accepted it. We used the word "distributive"
15 in our brief.

16 JUSTICE JACKSON: Counsel, I'd like to
17 get back to the -- whether or not this comports
18 with the guidelines. Guidelines 101 is order
19 of operation. And for a 1.1, one of the things
20 I noticed in the government's brief was the
21 insistence on inverting for a 1.1 and 1.2,
22 which is actually not the way in which the
23 guidelines operate. You start with 1.1, which
24 allows us to determine which prior sentences
25 are eligible for points. You get three points

1 for a certain set of characteristics; that is,
2 if the sentence is over one year and a month,
3 you get two points, et cetera.

4 Once you have identified those, then
5 you go on to 41.2 and determine which count,
6 which of those count for the purpose of the
7 criminal history. So, given that -- and I
8 think that's incontrovertible -- how is it that
9 Judge Pryor's view of the way in which this
10 works is inconsistent with the guidelines?

11 MR. LIU: So, with respect, Justice
12 Jackson, I don't think it's uncontrovertible.
13 I don't think the probation office or any
14 government attorney has ever applied these two
15 guidelines in that fashion.

16 JUSTICE JACKSON: I'm sorry, what's
17 not uncontrovertible? You don't go in order of
18 operation?

19 MR. LIU: Correct. That when -- when
20 you apply -- when -- when -- when someone is
21 applying 4A1.1, they're applying 4A1.2 to
22 determine which offenses should be --

23 JUSTICE JACKSON: Ultimately. But,
24 second, after they do 4A1.1.

25 MR. LIU: No, I don't think so.

1 JUSTICE JACKSON: There's an order of
2 operation.

3 MR. LIU: I respectfully disagree,
4 Justice Jackson. I think the clearest evidence
5 of this is on 4a of our statutory appendix,
6 where you have the application notes to 4A1.1,
7 and all of the application notes for when you
8 add three points or add two points or add one
9 point incorporate 4A1.2.

10 Now, if it were true that you look at
11 4A1.1, you push it away, and then you subtract
12 those points, it wouldn't make sense to build
13 into the commentary for when you add them all
14 the rules in 4A1.2. In other words, what this
15 commentary is saying is, before you add points,
16 see if you -- you're supposed to be counting --

17 JUSTICE JACKSON: All right. Well, if
18 -- if --

19 MR. LIU: -- that offense in the first
20 place.

21 JUSTICE JACKSON: -- if I disagree
22 with you, do you lose on that point? In other
23 words, if the Court decides that there is an
24 order of operation, that you can identify
25 offenses based on the points that are

1 attributed to them under 4A1.1 and then you
2 determine whether or not they're counted under
3 4A1.2, does the government's surplusage,
4 whatever the argument is, do you lose on that
5 point?

6 MR. LIU: If the Court concludes that
7 there is such a thing as a two-point offense
8 that doesn't add points to the defendant's
9 total, then, yes, we do not have a surplusage
10 argument.

11 JUSTICE KAVANAUGH: Can I ask you --

12 JUSTICE KAGAN: Mr. Liu, can I -- can
13 I --

14 JUSTICE KAVANAUGH: You.

15 JUSTICE KAGAN: You know, I understand
16 your argument about the foreign sentences and
17 the old sentences, makes sense to me that you
18 don't add up the points if you're not going to
19 count them anyway.

20 And, indeed, like, trying to figure
21 out what the points are for some foreign
22 conviction strikes me as something that courts
23 don't do and we shouldn't ask them to do.

24 I'm not sure I understand your
25 argument on the single sentence rule.

1 MR. LIU: Sure.

2 JUSTICE KAGAN: I'm not sure I
3 understand Judge Pryor's view of the single
4 sentence rule either.

5 MR. LIU: Right.

6 JUSTICE KAGAN: So I start without
7 understanding his view, and I end with not
8 understanding your response. So I'm just
9 wondering whether you can go over why you think
10 the single sentence rule does not operate
11 against you --

12 MR. LIU: Well --

13 JUSTICE KAGAN: -- putting aside this
14 -- the old sentence and the foreign -- the old
15 conviction and the foreign conviction rule?

16 MR. LIU: So -- so the single sentence
17 rule in principle is the same as the foreign
18 conviction and military conviction rule in that
19 it tells you what is your baseline for adding
20 points, for being the basis for adding points.

21 And what the single sentence rule says
22 is that when you have two sentences that are,
23 say, charged on the same indictment and the
24 defendant is sentenced on the same day, treat
25 that, count that -- those are literal --

1 literal words -- count that as a single
2 sentence.

3 So then that's the basis on which you
4 move to the instruction in 4A1.1, which says
5 how many points to add. So, when you combine
6 those two, may -- maybe you get a sentence
7 that's three years instead of just one year.
8 So then you know when you get to 4A1.1 we're
9 going to add three points to that instead of
10 just the regular old one or two.

11 So that's how the single sentence rule
12 operates. But the principle is the same, which
13 is that you don't get to the point of adding
14 points --

15 JUSTICE KAGAN: Yeah.

16 MR. LIU: -- until you figure out what
17 you're counting.

18 JUSTICE KAGAN: Now, when Judge Pryor
19 says this is contradicted by the language of
20 1(A), why -- why do you think that that's
21 wrong?

22 MR. LIU: I think it's wrong because
23 1(A) has all over it the word "add." And so
24 there's no context in which, as I think Chief
25 Judge Pryor was supposing, that points are

1 assigned without adding them.

2 There's only --

3 JUSTICE JACKSON: No, I think she's
4 talking about 3553(f)(1)(A) Judge Pryor --

5 MR. LIU: Oh, (f)(1)(A).

6 JUSTICE JACKSON: Yes, (f)(1)(A).

7 MR. LIU: Right. There's an exclusion
8 in the text of (f)(1)(A) that says we're going
9 to exclude points resulting from one-point
10 offenses.

11 I don't see how that helps my friend
12 because the negative implication of that is
13 that all the two-point and three-point offenses
14 are being included in the total points.

15 And so that just reinforces that when
16 you have a two-point violent offense and a
17 three-point offense, that's not being excluded
18 from the total, it's being included.

19 JUSTICE JACKSON: No, but the fact
20 that you could include or exclude is the
21 problem. In other words, just -- Judge Pryor's
22 point is Congress understood that there would
23 be offenses that are called one-point offenses,
24 are called two- or three-point offenses that
25 would not be included.

1 And that undermines your point because
2 your surplusage argument relies on the view
3 that every three-point offense is only such
4 because it is counted.

5 So, to the extent that you can have a
6 world in which something is a one-point
7 offense, but it is not counted, Judge Pryor at
8 least says that I think that -- sorry, he says
9 that that means that you're wrong about
10 surplusage.

11 MR. LIU: I -- I don't -- I don't
12 think this helps my friend's argument at all.
13 In fact, I think it cuts against it. If you
14 read the exclusion, it says points resulting
15 from one-point offenses.

16 So the only offenses it has in mind
17 are -- are offenses that would actually --
18 actually result in points. What -- the problem
19 with Chief Justice Pryor -- Chief Judge Pryor's
20 vision is, is that there are some offenses out
21 there that would have resulted in points but
22 for the fact that they're not counted.

23 The text of -- of 3553(f)(1)(A)
24 doesn't contemplate that. The only one-point
25 offenses it contemplates are one-point offenses

1 that actually --

2 JUSTICE JACKSON: But what is the
3 government's position on that? Do you disagree
4 that there's a world in which you -- you have
5 an offense that would be assigned points, but
6 those points aren't counted for the purpose of
7 the criminal history score?

8 MR. LIU: I mean, would be -- I mean,
9 sure, you can say would be, but --

10 JUSTICE JACKSON: So then why aren't
11 those the three-point offenses that this
12 statute is talking about?

13 MR. LIU: Oh, because, in -- in
14 referring to three-point and two-point
15 offenses, the statute's referring to offenses
16 that actually give rise to two point and three
17 points, just like in the exclusion in (1)(A),
18 it's referring to one-point offenses that
19 actually result in points that contemplate the
20 total.

21 JUSTICE KAVANAUGH: Can I -- can I ask
22 you a question to follow up on Justice Thomas's
23 original question? Because I think that's
24 really important.

25 MR. LIU: Yeah.

1 JUSTICE KAVANAUGH: So my
2 understanding is there's an established rule of
3 language and grammar that "and" distributes in
4 circumstances where the context establishes
5 that that's the better reading.

6 MR. LIU: Correct.

7 JUSTICE KAVANAUGH: Is there a more
8 precise phrasing you can put on that, the
9 context shows what?

10 MR. LIU: Sure. And I -- I think
11 Justice Kagan provided a helpful heuristic. We
12 read things like "don't drink and drive"
13 because there is something special about the
14 combination of drinking and driving. It is
15 particularly harmful. And so we're telling
16 people don't do the two in combination.

17 The problem here is that there is
18 nothing special about the combination of A, B,
19 and C except for its arbitrariness.

20 JUSTICE KAVANAUGH: But the premise to
21 your point, I think -- and this is important
22 and Justice Thomas raised it -- is the "and"
23 distributes sometimes.

24 MR. LIU: Correct.

25 JUSTICE KAVANAUGH: That's an

1 established rule, so we just have to figure out
2 when it is.

3 MR. LIU: Yeah. And --

4 JUSTICE KAVANAUGH: And then, on
5 context, I think Justice Gorsuch has raised
6 important questions about policy, so you want
7 to distinguish the context that we should look
8 at from policy arguments, or how do we -- how
9 do you respond to the concern that those are
10 just policy arguments and not relevant to the
11 context, particularly the anomaly --

12 MR. LIU: Correct.

13 JUSTICE KAVANAUGH: -- issue and also
14 the number of offenders who would be
15 disqualified now.

16 MR. LIU: I want to make clear that
17 our con- -- our second contextual argument is
18 completely consistent with textualism. It's
19 consistent in three ways.

20 First, we're not arguing that purpose
21 should trump text. We are trying to figure out
22 as between two textually grammatically possible
23 readings which one is the best one in light of
24 context.

25 Second, we are not deriving purpose

1 from the subjective views of the legislature.
2 We are deriving purpose from what a reasonably
3 objective user of words would glean from the
4 text and structure of this statute.

5 And, third, we are not defining this
6 purpose at a high level of -- of abstraction
7 like the broader the safety valve or the
8 narrower the better. This isn't about broader
9 or narrower. It's about a line, any line, that
10 makes sense.

11 JUSTICE GORSUCH: That -- that --
12 that -- that -- that in a -- in a textualist
13 world, that would be an absurdity argument,
14 that this -- this --

15 MR. LIU: I don't -- I don't --

16 JUSTICE GORSUCH: Let me just finish
17 the question. You can have all the time to
18 respond to it.

19 MR. LIU: Fair enough.

20 JUSTICE GORSUCH: But absurdity, we
21 recognize that's a very high bar, and you
22 haven't invoked that canon directly. Now maybe
23 you want to here at the podium. Good luck with
24 that. But that's a very high bar.

25 You're saying: Hey, Congress wouldn't

1 have done this because it wouldn't capture some
2 bad people. That seems to me at heart one of
3 two things: either an argument about intent,
4 Congress couldn't have intended this, wouldn't
5 have intended this because it wouldn't want bad
6 people to get away, or, two, it's a policy
7 argument. You shouldn't want this to happen.

8 And either of those seem to me
9 straining at least your -- your claim that this
10 is all consistent with textualism, especially
11 since you haven't identified a canon other than
12 absurdity that would be kind of a classic
13 textualist argument.

14 MR. LIU: Well, with respect, Justice
15 Gorsuch, I think we're relying on a traditional
16 tool of construction that this Court relies on
17 all the time.

18 JUSTICE GORSUCH: Which is what? It's
19 called common sense in your brief. I don't
20 know that canon, but I guess it's a -- a good
21 one.

22 MR. LIU: It's called construing the
23 structure and the text of the statute, gleaning
24 the evident purpose --

25 JUSTICE GORSUCH: Purpose. So it is

1 purposivist?

2 MR. LIU: At -- at some level, yeah.

3 It's the -- I mean, I do want to --

4 JUSTICE KAVANAUGH: I thought the -- I
5 thought the point --

6 JUSTICE GORSUCH: Okay. I appreciate
7 that concession.

8 MR. LIU: Absolutely. Mm-hmm.

9 JUSTICE KAVANAUGH: I thought the
10 point was there's an established -- I don't
11 know if you want to call it canon -- rule of
12 English grammar about how to read "and."

13 MR. LIU: That's correct. It's a --
14 it's a --

15 JUSTICE KAVANAUGH: Okay. So that
16 if -- if we accept that there's an established
17 rule of English grammar about how to read "and"
18 and you don't always read it literally because
19 that's not how people speak, then that's -- you
20 don't need to get to absurdity because you're
21 trying to figure out whether the "and"
22 distributes or not. And then, in figuring that
23 out, the established rule is you look at
24 context, right?

25 MR. LIU: Exactly. And this has --

1 this has --

2 JUSTICE KAVANAUGH: But then what's
3 the -- you know, what context? That's --

4 MR. LIU: Right.

5 JUSTICE KAVANAUGH: -- I think, what
6 Justice Gorsuch was zeroing in on.

7 MR. LIU: I -- I think it has to be --

8 JUSTICE KAVANAUGH: That sounds like
9 absurdity when you're bringing context to it.
10 Maybe it being absurd is helpful to or close to
11 absurd is helpful in thinking about context.

12 MR. LIU: Well, I think this is the
13 way the Court has approached other cases. Take
14 last term's decision in Jones versus Hendrix.
15 The Court there was construing 2255's saving
16 clause, and one of the indicators of context
17 that it relied on was the fact that the
18 defendant's reading would mean that
19 non-constitutional claims, i.e. statutory
20 claims, would be given a superior remedy than
21 constitutional claims. The Court rejected that
22 because it called that result "strange and
23 bizarre."

24 In Abbott versus the United States,
25 which -- which we discuss in our brief, this

1 Court addressed the applicability of 9249(c)'s
2 mandatory consecutive sentence regime. Under
3 defendant's reading in that case, the most
4 culpable drug offenders would be excused from
5 the mandatory minimum of 924(c), while the
6 least -- less culpable ones would still be
7 subject to it.

8 JUSTICE BARRETT: So --

9 JUSTICE JACKSON: But how do you -- go
10 ahead.

11 JUSTICE BARRETT: I -- I just want to
12 make sure, you're not conceding that absurdity
13 applies because absurdity applies when the
14 actual plain meaning of the text would lead to
15 an absurd result. And we're at the antecedent
16 point --

17 MR. LIU: Correct.

18 JUSTICE BARRETT: -- asking what the
19 text means --

20 MR. LIU: Correct.

21 JUSTICE BARRETT: -- relying on these
22 kinds of things. But what do you do about the
23 corpus linguistics brief?

24 MR. LIU: I think that corpus
25 linguistics brief helps us. It helps us in

1 three different ways. Number one, the survey
2 data and its analysis of the statutes in that
3 case just shows that this distributive reading
4 is textually permissible.

5 JUSTICE BARRETT: But less -- less
6 likely?

7 MR. LIU: Less likely, according to
8 them, but I think the -- the job of a faithful
9 interpreter is to figure out whether -- you
10 know, if it's an 80 to 20 percent split or a 70
11 to 30, 60/40, the faithful interpreter needs to
12 figure out are we in the 20 percent, are we in
13 the 30 percent, are we in the 40 percent, or
14 are we in the other -- in the other box? It
15 would -- it would be to tolerate a huge error
16 rate if the Court simply assumed that because
17 70 percent of "and"s out there are joint, we're
18 just going to read every -- every "and" in the
19 world as joint. That would be a 30 percent
20 error rate.

21 JUSTICE SOTOMAYOR: I looked at the
22 Senate's manual, the Senate's legislative
23 drafting manual, and it says, "in a statement
24 in the negative, 'or' is almost always the
25 correct word." And I think that's what the

1 linguistic brief is telling us.

2 You're putting it at 20, 30, or 20.

3 But if your alternative reading is almost
4 always incorrect, taking the negative of what
5 the Senate manual is saying, don't I need
6 something like absurdity?

7 MR. LIU: I don't think so.

8 JUSTICE SOTOMAYOR: Don't you need --
9 I mean, I just don't know how you get to your
10 point unless you get to absurdity.

11 MR. LIU: I think --

12 JUSTICE SOTOMAYOR: And it's a policy
13 argument.

14 MR. LIU: The Senate manual also says
15 "use 'and' when you want to make clear that
16 something needs to satisfy all the criteria."
17 And that's, in our view, how Congress used
18 "and" here. The three criteria are does not
19 have (A), does not have (B), and --

20 JUSTICE SOTOMAYOR: No, no, I think
21 you just hurt yourself. You use "and" when you
22 want it to meet all criteria. I think that's
23 joint, all three.

24 MR. LIU: And in our view, the
25 Petitioner -- Petitioner doesn't have all three

1 because he doesn't have (C). He has two out of
2 the three. So he does not have -- he -- he
3 doesn't have all three.

4 JUSTICE SOTOMAYOR: Before we go too
5 -- too far on this, the alternatives are not
6 that the worst criminals are going to get
7 safety valve because, as -- if someone has all
8 three of this, one could view the Senate as
9 saying this is what disqualifies you only.
10 That would be the worst in the eyes of the
11 Senate. You have to have (A), (B), and (C).

12 MR. LIU: Right.

13 JUSTICE SOTOMAYOR: And so what you're
14 saying is I happen to think that someone that
15 doesn't have (A), (B), and (C), but has more
16 (B), is worse, but that's your policy judgment,
17 isn't it?

18 MR. LIU: No. To -- to be clear, our
19 policy judgment -- our contextual argument
20 isn't just the mere policy concern. It is a
21 fundamental statutory construction problem to
22 presume that Congress wrote a statute that
23 doesn't make any sense.

24 And we -- Justice Barrett, I thank you
25 for the clarification. We are not saying that

1 we need to resort to absurdity, because our
2 main point is "and" is inherently contextual.
3 It has to be contextual because it is a word
4 that connects other words together. So the
5 only way to figure out what it's connecting is
6 to read those other words in context.

7 JUSTICE SOTOMAYOR: Or mean the same
8 thing all the time.

9 MR. LIU: But to get back to Justice
10 Barrett's question about the -- -- or I -- or I
11 won't.

12 CHIEF JUSTICE ROBERTS: You can answer
13 the question.

14 MR. LIU: I just was going to finish
15 my -- my answer to her question about the
16 corpus linguistics brief. And I think the
17 other two points, just to round out my answer,
18 are that I think that brief itself acknowledges
19 that context matters.

20 On page 7, it gives an example of the
21 phrase "don't take drugs and alcohol." And the
22 meaning of that changes depending on which
23 context you're saying it. And the fact that
24 they can't rule out a distributive reading for
25 124 of the 125 statutes they studied also

1 indicates that context matters.

2 And the last point I'll make on the
3 corpus linguistics brief is that the brief then
4 stops short of actually looking at context.
5 This is also on pages 6 and 7. They say that's
6 beyond the purview of this brief.

7 CHIEF JUSTICE ROBERTS: Justice
8 Thomas, anything further?

9 Justice Alito?

10 JUSTICE ALITO: This case, to me,
11 raises a lot of general questions. It may not
12 dictate a decision one way or the other, but on
13 this last point about the corpus linguistics
14 brief, we have -- I think this is a -- a very
15 promising tool, but I don't know that we have
16 decided how it can legitimately play a role in
17 our statutory interpretation cases. This is an
18 empirical fact that is being introduced into
19 the case in an amicus brief.

20 What guidance would you give us about
21 the propriety of our relying on that?

22 MR. LIU: Yeah, I think the Court
23 needs to proceed with caution when presented
24 with evidence like this, just like it's
25 presented with evidence of any other sort of

1 scientific study.

2 I think, in the context of statutory
3 interpretation, we are trying to figure out
4 what a reasonably objective user of words would
5 understand a text to mean. And often we think
6 of ourselves as occupying that role. And so
7 empirical studies aren't necessarily helpful
8 because we can just -- we can just
9 introspectively think about what that
10 reasonably objective user of words would --

11 JUSTICE ALITO: Well, I have no reason
12 to think this was not a study done under the
13 highest -- in accordance with the highest
14 criteria, but it is an interesting question,
15 what we're going to do with this down the road.
16 Are we going to have to make a determination
17 about the -- the methodology that was used in
18 every particular study of this kind that is
19 presented to us in an amicus brief?

20 MR. LIU: I -- I think that's --
21 that's a -- a valid question and -- and why I
22 would suggest the Court view it with caution.
23 I think, though, in this particular case, even
24 if the Court does look at it, it -- it -- I
25 think it helps the government's view because it

1 only confirms what the grammar, usage, and
2 legal drafting books already say. So it's
3 simply reinforcing what -- what other sources
4 are saying about the meaning of these words.

5 JUSTICE ALITO: On another point, do
6 you think the absurdity canon is about anything
7 other than intent?

8 MR. LIU: I -- I think it is partly
9 based on this assumption that Congress is a
10 rational and intelligent drafter of -- of -- of
11 statutes, and so when we see a result that is
12 absurd, we presume that that is not one
13 Congress meant to embrace.

14 JUSTICE ALITO: It's an intent that's
15 attributed to Congress. We -- we assume that
16 they do not intend to write something that's
17 absurd.

18 MR. LIU: Correct.

19 JUSTICE ALITO: Right? So it is about
20 -- it is about intent.

21 MR. LIU: Correct. It's -- it is --
22 it is about intent, and it's -- it's intent
23 against the backdrop of a body, Congress, that
24 we presume objectively to be reasonable.

25 JUSTICE ALITO: And if that is the

1 case, why would we draw a bright line between
2 absolute absurdity and mere absurdity?

3 MR. LIU: I don't think this Court's
4 -- draw such a line. I think when, as here,
5 there are two textually or grammatically
6 possible readings, the Court quite often tries
7 to make sense, rather than nonsense, of the
8 corpus juris. And that is a perfectly
9 legitimate way, as Scalia and Gardner say, of
10 resolving this sort of statutory problem.

11 CHIEF JUSTICE ROBERTS: Justice
12 Sotomayor?

13 Justice Kagan?

14 JUSTICE KAGAN: Mr. Liu, I -- I take
15 your point that there are two grammatically
16 permissible ways of understanding this. And I
17 certainly think that your superfluity and your
18 anomaly arguments are extremely serious.

19 At the same time, I think
20 Mr. Dvoretzky has a point of his own, which is
21 that notwithstanding that there are two
22 grammatically permissible ways of understanding
23 this, that our -- that the most natural way of
24 communicating this idea is to use the word
25 "or."

1 I would say it's the sort of the most
2 natural way and also the way that prevents any
3 confusion. You know, we wouldn't be sitting
4 here if Congress had used the word "or."

5 So in a context in which a defendant's
6 liberty is on the line, where -- I'm just going
7 to assume that the Rule of Lenity applies,
8 notwithstanding your argument. Why isn't that
9 enough to get to Mr. Dvoretzky's position?

10 MR. LIU: I think because it's at most
11 just one more -- the fact that "or" might have
12 been a clearer way to express this, I think at
13 most that's just one more context -- contextual
14 consideration that you put into the balance.

15 And if you care about the
16 quote/unquote "unusualness" of using "and"
17 instead of "or", well then I -- I think what's
18 even more unusual are the problems with
19 Petitioner's reading. What's even more unusual
20 than distributive use of "and" is the fact that
21 the -- the very first subparagraph is
22 surplusage and the fact that this provision
23 isn't going to be a coherent measure of a
24 defendant's criminal history.

25 So to the extent we are kind of

1 weighing unusualness against unusualness, I
2 think there's just a -- maybe just a little bit
3 of unusualness here. I'm not really even
4 willing to concede that, given what the books
5 say.

6 But let's say you think there's a
7 little bit of unusualness in using "and". It's
8 far outweighed by the unusualness of just
9 striking out an entire sub paragraph and
10 rendering the rest incoherent.

11 JUSTICE KAGAN: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Gorsuch.

14 JUSTICE GORSUCH: In the unusualness
15 question, the government may have alluded to
16 this conjunctive distribution theory in its
17 Eighth Circuit brief, but really it argued that
18 it was disjunctive and that "and" can mean
19 "or". That was the thrust of its brief. I've
20 got it in front of me.

21 That's certainly how the Eighth
22 Circuit understood the government's argument
23 below. They said -- they said that the -- "the
24 parties discuss whether 'and' should be read
25 conjunctively or disjunctively but we do not

1 believe that is the important question."

2 The government also argued the "and"
3 versus "or" theory in Lopez in -- in front of
4 the Ninth Circuit. That's in its brief there
5 too. And I -- I -- I understand that this is
6 a -- a refined position and -- with the benefit
7 of the Solicitor General's office. And that --
8 that's great. And the government is entitled
9 to make whatever arguments it wants.

10 But when we're looking for plain
11 meaning, what ordinary people would understand
12 words to mean, isn't that some evidence that
13 the government itself took this long to really
14 figure out this particular theory?

15 MR. LIU: I don't -- I don't -- I
16 think it actually kind of proves the opposite.
17 I mean, the government looked at this from the
18 beginning and the idea that A, B, and C are
19 independently disqualifying was clear as day.

20 JUSTICE GORSUCH: On the basis of a
21 completely different theory, that "and" means
22 "or", which you in your first sentence as you
23 got up, you said it's conjunctive before us.
24 And most of the argument below, I'm not going
25 to say all of it, most of it below was

1 disjunctive.

2 And that's a difference. It's a
3 difference. And the government of the United
4 States has a lot of resources. And the average
5 criminal defendant doesn't. They're one-off
6 players, you're a repeat player, and you've got
7 a very sophisticated reticulated third theory
8 of the possible meaning of the word "and",
9 right? We're now up to three.

10 And the fact that it took so long to
11 get to the third, what do we do with that?

12 MR. LIU: I -- I acknowledge that
13 there were different theories, one relying on
14 "and", one relying on "or" that were advanced
15 in the lower courts. I think that just
16 reflects what is a well-accepted principle that
17 any phrase, a negative statement involving
18 "and" can be rephrased as a negative statement
19 involving "or".

20 And so as we often do in -- in this
21 Court and in lower courts, we provide
22 alternative arguments. One way is to read the
23 "and" as distributive. The other way, if -- if
24 you want to go that route, is to read the "and"
25 to mean an "or", but the bottom line of both --

1 of both interpretations were, as the bargain's
2 theorem shows, logically equivalent.

3 JUSTICE GORSUCH: But you -- you
4 reject the "or" theory as incorrect at this
5 stage, you've not pursued it at any rate?

6 MR. LIU: Correct. There's no need --
7 there's no need to do -- to read this "and" to
8 mean an "or" because the -- the distributive
9 use of "and" is the more common use.

10 JUSTICE GORSUCH: Because you've got
11 this new theory.

12 All right, thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Kavanaugh. Justice Barrett.

15 JUSTICE BARRETT: I -- I would just
16 like to follow up on that so that I understand
17 the lay of the land. I thought the government
18 did in some of the courts below make the
19 distributive theory because it's what Judge
20 Kirsch relied on in the Seventh.

21 MR. LIU: Yes.

22 JUSTICE BARRETT: It's what Judge
23 Kethledge relied on in the Sixth.

24 MR. LIU: We -- we -- in all of those
25 circuits, we did. Correct.

1 JUSTICE BARRETT: So it's just that
2 you didn't make it uniformly across the
3 circuits?

4 MR. LIU: We did not make it at the
5 panel stage in the Ninth Circuit.

6 JUSTICE BARRETT: Okay.

7 MR. LIU: But we have made it in -- in
8 the panel briefs in the other cases maybe with
9 the exception of Garcon at the panel stage.
10 But in this case, we made both arguments in our
11 brief below. In the Ninth Circuit en banc we
12 made both arguments. In the Seventh, Eighth
13 and --

14 JUSTICE BARRETT: Sixth.

15 MR. LIU: -- Sixth Circuit cases, we
16 made -- we made the distributive argument as
17 well.

18 CHIEF JUSTICE ROBERTS: Justice
19 Jackson.

20 JUSTICE JACKSON: So I appreciate that
21 "and" can sometimes mean "or" but this is not a
22 conversation. This is a statute. And it's a
23 criminal statute with huge implications for the
24 lives and well-being of the people who come
25 through the system.

1 And so I guess what I'm trying to
2 understand is why the imprecision in this
3 statute, the fact that you say that there are
4 two textually grammatically possible readings.

5 Why doesn't that count against the
6 government? Justice Kagan said I'm going to
7 assume lenity applies. Can you help me
8 understand why it wouldn't?

9 MR. LIU: It wouldn't for two reasons.
10 I'll just say the first one briefly, but I --
11 I'll skip over it after saying it. We don't
12 think this is the type of penal law to which
13 lenity applies.

14 Now, if you think this is the type of
15 --

16 JUSTICE JACKSON: Wait. Why? Why?
17 That's the thing I don't understand.

18 MR. LIU: It's because the -- the --
19 the definition of penal law that this Court has
20 embraced, and it goes all the way back to
21 Blackstone, encompasses laws that define a
22 crime or that increase or impose a punishment.

23 And this provision here does neither.
24 It relieves defendants of punishment. It is a
25 congressional act of lenity. And this Court

1 has never applied the Rule of Lenity --

2 JUSTICE JACKSON: So you just --

3 you -- you reject, even though it has to do

4 with punishment and the implications of it very

5 dramatically depending -- the level of

6 punishment that a defendant can get varies

7 dramatically -- depending upon whether or not

8 it applies, you say lenity is not a relevant or

9 a thing that we should consider?

10 MR. LIU: Correct. This Court has

11 never applied the Rule of Lenity to this type

12 of statute. It would be an extension of the

13 Rule of Lenity to a new context.

14 I would analogize this sort of

15 provision to say a statute that sets forth an

16 affirmative defense. An affirmative defense to

17 the substantive prohibition of a crime --

18 JUSTICE JACKSON: But in a civil -- in

19 a civil situation or in a criminal situation?

20 MR. LIU: In a criminal situation.

21 JUSTICE JACKSON: In a criminal

22 situation.

23 MR. LIU: Correct.

24 JUSTICE JACKSON: An affirmative

25 defense you say, no lenity?

1 MR. LIU: No lenity, because that's a
2 type of -- that's not a penal statute. That's
3 a -- that's not the type --

4 JUSTICE JACKSON: Right. But that
5 doesn't necessarily have to do with punishment.
6 I'm talking about we've determined this person
7 is guilty, he's getting a punishment, and this
8 statute relates to the range of applicable
9 penalties that apply to him.

10 Your -- the government's position is
11 still not a penal statute for the purpose of
12 lenity if there is ambiguity as to whether or
13 not it applies?

14 MR. LIU: Correct. And that's because
15 this -- the reading of this -- this statute can
16 only benefit the defendant. It's not the type
17 of statute that could make the defendant --

18 JUSTICE JACKSON: Yeah, but if you
19 don't get it, you don't get the benefit. I
20 mean, there's a difference, right, in -- in
21 terms of your penalty presumably if you -- if
22 you get it versus you don't.

23 MR. LIU: Right. I mean --

24 JUSTICE JACKSON: So it can harm the
25 defendant if you don't get it.

1 MR. LIU: It's certainly true that the
2 defendant prefers one reading over the other.
3 But the type of -- what -- what -- what the
4 Rule of Lenity cares about is the type of
5 provision we're talking about and whether it
6 fits the category of being penal.

7 And a penal sentencing provision is
8 one that imposes the punishment or increases
9 it. This one doesn't do either. It can only
10 go down.

11 Now, the reason why we apply lenity in
12 the first context is because we want to be sure
13 before a defendant is made worse off that
14 that's what Congress intended and the defendant
15 had fair notice.

16 But when the only direction the
17 sentence can go is down, those -- those
18 provisions --

19 JUSTICE JACKSON: The defendant who
20 doesn't get it is not made worse off if
21 everybody else -- if their sentences can go
22 down but his can't. You're saying he's not
23 made worse off?

24 MR. LIU: Not from the perspective of
25 this type of provision. The -- Congress's

1 enactment of this type of provision did not
2 make defendants worse off.

3 JUSTICE JACKSON: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Mr. Dvoretzky, rebuttal.

7 REBUTTAL ARGUMENT OF SHAY DVORETZKY

8 ON BEHALF OF THE PETITIONER

9 MR. DVORETZKY: Mr. Chief Justice, I'd
10 like to start out with your question about
11 whether Congress focuses on grammar. I think
12 we have to assume that Congress focuses on
13 grammar.

14 Congress as a speaker does not get the
15 benefit of colloquialisms. It's not the --
16 there's no conversation that people are having
17 with Congress in the way that you do with a
18 doctor or somebody else.

19 The only conversation, if you want to
20 use that analogy, is the conversation that this
21 Court has with Congress by interpreting its
22 words to mean what they say and if Congress
23 disagrees, it can carry on its part of the
24 conversation by changing the statute.

25 Otherwise, what we end up in is a

1 guessing game about whether Congress might have
2 meant this policy or that policy.

3 Instead the Court should give Congress
4 clear rules of the roads. In fact, the Court
5 should -- should instruct Congress to follow
6 its own rules of the road, namely, the Senate
7 Drafting Manual, which in this case would have
8 called for the use of the word "or" if Congress
9 meant a distributive meaning.

10 With respect to Mr. Liu's point that
11 "and" is distributive in grammar books, the
12 government has not come up with any examples of
13 "and" in a negated conjunction in the U.S.
14 code. Reading law tells us that when you have
15 the formulation that someone must not have A,
16 B, and C, that means all three.

17 The corpus linguistics study supports
18 that conclusion that if you had "or" there, it
19 would be perfectly clear and using "and" there
20 to express a distributive meaning is unnatural.

21 The -- the -- the government's best
22 example of a statute is the household items
23 provision in the Tax Code. First of all, as
24 Justice Sotomayor pointed out, that says "does
25 not include," so it's giving -- it's setting

1 forth a list of examples, rather than criteria.
2 Second, just looking at what it's talking
3 about, food, paintings, antiques, other objects
4 of art, jewelry and gems, there is simply no
5 way to combine those things, right? There is
6 no -- there is no such thing as edible antique
7 jewelry. It -- it is -- it's beyond absurd to
8 think that there would be.

9 Here, it is not absurd to say that
10 Congress could have required (A), (B), and (C)
11 in combination. The government has policy
12 arguments for why Congress might not have
13 wanted that, but it's not absurd to think that
14 it did.

15 With respect to the policy, if you had
16 an individual defendant who had, let's say, two
17 violent -- previous violent offenses in -- in
18 addition to the current drug offense, that
19 would make that defendant a career offender.
20 And if you walk through the guidelines, you end
21 up with a guidelines range for an offense level
22 of 34 for someone like that and a criminal
23 history category of 6, which is 262 to 327
24 months. That is a serious long sentence.

25 In addition, if you look at the

1 Sentencing Commission's 2022 data, there were
2 approximately 20,000 drug offenders. About
3 1,000 of them, so around 5 percent, were career
4 offenders.

5 Taking those two points together, what
6 that tells us is that you can have -- you will
7 have long sentences for the rare recidivist
8 that we've spent a lot of time talking today as
9 somebody who might somehow satisfy (f)(1).
10 It's entirely sensible that that is not what
11 Congress was focused on when it was seeking to
12 broaden discretionary sentencing and move away
13 from mandatory minimums.

14 Lastly, with respect to common sense,
15 the government focuses a lot on common sense,
16 but it's common sense that if Congress wanted
17 to say "or," it would have said "or." It knew
18 how to do that in other parts of this very
19 sentence, of 3553(f). The -- Congress's own
20 drafting manual says to do so, and that would
21 be the ordinary meaning -- that would be the
22 ordinary term to use in order to express the
23 meaning that the government attributes to this
24 statute.

25 The Court should again hold the Court

1 to the ordinary meaning of the terms that it
2 chose, and it's important to do that because,
3 again, this is a -- this is a criminal statute
4 where fairness is at stake, whether you view
5 that as lenity or whether you view that as the
6 breadth of a remedial statute. There's
7 fairness at stake and there's somebody's
8 liberty at stake. And if Congress wants to use
9 -- Congress needs to use terms clearly in order
10 to get the benefit of the government's
11 interpretation here.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 The case is submitted.

15 (Whereupon, at 11:46 a.m., the case
16 was submitted.)

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