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P R O C E E D I N G S

(10:05 a.m.)

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

Mr. Dvoretzky.

ORAL ARGUMENT OF SHAY DVORETZKY

ON BEHALF OF THE PETITIONER

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

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

The historic First Step Act made the safety valve available for many more nonviolent drug offenders. Taken together, (A) through (C) exclude violent recidivists with a history of committing serious crimes, while (f)(2)

1 through (f) disqualify current violent  
2 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 effect --  
13 reading and a 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 -- 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 -- 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, a  
18 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,  
20 is 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, it -- I hear you saying to Justice  
20 Kagan, and you said this to Justice Thomas,  
21 that your brain corrects "and"/"or." And when  
22 Justice Thomas asked you about whether the  
23 distributive understanding of "and" is  
24 grammatically correct, you kind of seemed to  
25 say no because you keep going to this example

1 where your brain changes "and" to "or." So I  
2 just wanted a 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 -- I think it can be  
7 grammatically correct in certain contexts but  
8 not in this context. But --

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  
24 Law" does, Justice Scalia and Professor Garner,  
25 in order to qualify, you must not have (A),

1 (B), or (C), that would be unequivocally clear  
2 to express a distributive meaning, and it would  
3 be unnatural to use "and" even though some  
4 people might hear it that way and understand it  
5 to be distributive even in that kind of a  
6 negated 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  
19 so, 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  
4 continuing criminal enterprise." So Congress  
5 knows how to use "or" and "and" to mean  
6 different things, and that's what it did in  
7 3553.

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

12 JUSTICE GORSUCH: But it comes --

13 MR. DVORETZKY: It's that --

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

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

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

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

7 Second, it --

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

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

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

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

18 JUSTICE GORSUCH: Right.

19 MR. DVORETZKY: -- what comes before.

20 JUSTICE KAGAN: But, Mr. Dvoretzky --

21 MR. DVORETZKY: Yeah.

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

1 B, and does not have C, you agree that the  
2 government wins, is that right?

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

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

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

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

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

1 that you shouldn't have.

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

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

20 So, for example --

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

23 JUSTICE GORSUCH: You --

24 JUSTICE BARRETT: -- would have a  
25 distributive meaning there too, as Judge Oldham

1 said? In that -- in that dash after (f), you  
2 know, "if the court finds at sentencing after  
3 the Government has been afforded an  
4 opportunity," et cetera, that could have a  
5 distributive meaning, and -- and then it  
6 wouldn't be Calvinball, you know, as -- as  
7 you've been saying. You could say it's  
8 distributive in both situations.

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

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

23 JUSTICE BARRETT: It doesn't have to.  
24 It could just be the clause that's preceded by  
25 the comma, the "if the court finds that." I



1 mean, I get -- I -- I think this is a very hard  
2 case. I think it's a very hard case, so I  
3 don't mean to suggest that it's clear.

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

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

11 JUSTICE KAVANAUGH: You --

12 MR. DVORETZKY: -- and that --

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

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

20 JUSTICE KAVANAUGH: Okay. But you  
21 agree that context matters?

22 MR. DVORETZKY: Yes.

23 JUSTICE KAVANAUGH: Okay. And the  
24 government says that one of the problems  
25 contextually with your interpretation, it -- it

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

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

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

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

20 In addition to that, as I said in my  
21 introduction --

22 JUSTICE KAVANAUGH: Do you accept my  
23 premise, though, that -- that your  
24 interpretation would mean offenders with more  
25 serious violent offense records would be

1 eligible and with less serious violent offense  
2 records would not be eligible in certain  
3 circumstances?

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

7 JUSTICE KAVANAUGH: In certain  
8 circumstances?

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

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

23 JUSTICE KAVANAUGH: On --

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

1 --

2 JUSTICE KAVANAUGH: (f)(2) through (f)  
3 don't have anything to do with criminal  
4 history, though, per se, right?

5 MR. DVORETZKY: They -- they -- they  
6 don't. And Congress could quite rationally,  
7 given the history of the -- the -- given the  
8 history of mandatory minimums and what Congress  
9 was trying to achieve here, wanted to focus  
10 more on the nature of the instant offense than  
11 on criminal history. But even as to criminal  
12 history, district judges can and do take that  
13 into account.

14 JUSTICE JACKSON: Don't they --

15 JUSTICE KAGAN: Well, but, presumably,  
16 they --

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

1           MR. DVORETZKY: You -- you would  
2 expect that. You might also expect that a  
3 serious violent recidivist would qualify for a  
4 career guidelines enhancement.

5           JUSTICE KAGAN: I mean --

6           JUSTICE JACKSON: And would you have  
7 --

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

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

23           MR. DVORETZKY: Justice Kagan, we do  
24 have an explanation, which is that Congress,  
25 again, legislating at a macro level, could have

1 rationally thought that the combination of A,  
2 B, and C was serving a gatekeeping function --

3 JUSTICE GORSUCH: And, counsel --

4 MR. DVORETZKY: -- to keep --

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

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

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

22 MR. DVORETZKY: I -- I --

23 JUSTICE GORSUCH: -- here we are, day  
24 one.

25 MR. DVORETZKY: -- I -- I -- I think

1 the better reading of the statute -- the better  
2 reading of the statute is that two and three  
3 are --

4 JUSTICE GORSUCH: Okay. So you  
5 embrace --

6 MR. DVORETZKY: -- mutually exclusive,  
7 but --

8 JUSTICE GORSUCH: -- you embrace the  
9 anomaly?

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

18 JUSTICE JACKSON: And, indeed --

19 JUSTICE GORSUCH: Right. It doesn't  
20 --

21 CHIEF JUSTICE ROBERTS: You talked  
22 about --

23 JUSTICE JACKSON: -- isn't that what  
24 just -- isn't that --

25 JUSTICE GORSUCH: It -- it --

1 JUSTICE JACKSON: -- what Judge Pryor  
2 said in the Garcon case? I mean, I -- I took  
3 you to be sort of embracing his philosophy as  
4 to how the guidelines work relative to the  
5 mandatory minimums and that it is not  
6 irrational at all for Congress to be making the  
7 amendment that they were making in this case,  
8 which was intended to broaden the -- the  
9 availability of the safety valve.

10 MR. DVORETZKY: That's right, Justice  
11 Jackson. It was intended to broaden the  
12 availability of the safety valve, in  
13 recognition of the fact that mandatory  
14 minimums, applying automatically without regard  
15 for the offenders' particular circumstances,  
16 are unfair and unjust, and so Congress wanted  
17 to move away from that --

18 JUSTICE ALITO: Are you talking about  
19 --

20 MR. DVORETZKY: -- but that -- I'm  
21 sorry.

22 JUSTICE ALITO: Just -- I'm sorry.  
23 Finish what you were --

24 MR. DVORETZKY: No, no. Please.

25 JUSTICE ALITO: -- finish what you



1 were saying.

2 MR. DVORETZKY: No, please.

3 JUSTICE ALITO: I didn't mean to  
4 interrupt. You mentioned surplusage. Could we  
5 talk about that? If (B) and (C) made (A)  
6 100 percent surplusage, what would you say?

7 MR. DVORETZKY: I would -- even in  
8 that circumstance, as Judge Newsom, for  
9 example, said in Garcon, you would still have  
10 to adhere to the ordinary meaning of "and" in  
11 -- in this situation, and the surplusage would  
12 not matter.

13 But it -- it -- (B) and (C) don't make  
14 (A) surplusage, and I think that's for the  
15 reason that Chief Judge Pryor, who was a former  
16 acting chair of the Sentencing Commission,  
17 explained in Garcon. That is that not every  
18 sentence for a prior offense earns criminal  
19 history points.

20 JUSTICE ALITO: Well --

21 MR. DVORETZKY: You can have --

22 JUSTICE ALITO: -- okay. I understand  
23 that argument. Suppose I think that if it made  
24 it a hundred percent surplusage, that would be  
25 a pretty strong argument against you. Let's

1 just take that as an assumption.

2           Would you draw a distinction between  
3 that situation, where it's a hundred percent  
4 surplusage, and the situation where it's  
5 99 percent surplusage or 98 percent surplusage?

6           MR. DVORETZKY: I -- I don't know that  
7 I would because, either way, the surplusage  
8 canon isn't an absolute rule, and it doesn't  
9 justify in this case overriding the ordinary  
10 meaning of "and." The other -- the other  
11 textual cues that we've talked about and argued  
12 about in our brief, the Senate's drafting  
13 manual here is also a relevant consideration.  
14 The manual says that "and" indicates that  
15 something is included in a class only if it  
16 meets all of the criteria, whereas "or" says  
17 that something is included only if it meets one  
18 or more of the criteria.

19           So the point is that Congress, by  
20 default, following that drafting manual, uses  
21 "and" in its joint sense.

22           JUSTICE JACKSON: And, counsel --

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

24           JUSTICE JACKSON: -- didn't -- didn't  
25 -- didn't --

1 JUSTICE GORSUCH: I -- I -- I -- go.

2 JUSTICE JACKSON: -- didn't Congress  
3 actually contemplate the difference between  
4 "and" and "or" in this very context? And by  
5 that, I mean, are you familiar with the  
6 enactment history? My understanding is that  
7 Congress looked at a bill in the previous cycle  
8 that would have done exactly -- almost exactly  
9 what happened here with respect to increasing  
10 to four points, including (B) and (C), and in  
11 that draft document, they used the word "or."  
12 And yet, here now, on the enactment of this, we  
13 have "and."

14 So that suggests to me at least that  
15 Congress was consciously determining that there  
16 was a difference between "and" and "or."

17 MR. DVORETZKY: Sure. And I think  
18 that there are a number of different  
19 indicators -- we can go through the list --  
20 that Congress understood the difference between  
21 "and" and "or," and these are the words that it  
22 wrote, and the words that it wrote have to be  
23 given effect even in the face of surplusage.

24 I don't think there is --

25 JUSTICE KAVANAUGH: Well, if we're

1 going to go -- if we're going to go into the  
2 legislative history, though, when Senator  
3 Grassley introduced the bill that became law,  
4 the Judiciary Committee report on that said  
5 that it would exclude offenders with  
6 three-point felony convictions or prior  
7 two-point violent offenses. So, if we're going  
8 to go down that road, which I'm not saying we  
9 should, but if we're going to go down that  
10 road, I'm not sure that that fully helps you.

11 MR. DVORETZKY: So I think that  
12 particular legislative history that you're  
13 focused on, Judge -- Justice Kavanaugh, is a  
14 little bit mysterious because the rest of it  
15 also says that offenders will not be eligible  
16 for the safety valve "absent a judicial finding  
17 that those prior offenses substantially  
18 overstate the defendant's criminal history and  
19 danger of recidivism."

20 So, while the statement that you're  
21 referring to used "or" rather than "and," the  
22 statement also suggests -- and I'm not quite  
23 sure where Congress was getting this -- that  
24 courts could exercise discretion to trigger the  
25 safety valve notwithstanding a defendant's

1 criminal history.

2 JUSTICE SOTOMAYOR: Counsel, I think  
3 it may have come from the legislation they had  
4 been looking at. That exact language that you  
5 just read came from the Sentencing Reform Act  
6 of 2015 that used the "or" between (A), (B),  
7 "or" (C). But then it gave a discretion to the  
8 sentencing judge to ignore it.

9 It actually supports your position  
10 that Congress knew that the "or" should be  
11 there but only if the court could deviate.

12 MR. DVORETZKY: Right.

13 JUSTICE SOTOMAYOR: When it decided to  
14 take away the power to deviate, it raised up  
15 the qualifications by doing (A), (B), "and"  
16 (C).

17 MR. DVORETZKY: Right. And all of  
18 that accords with the purpose of the First Step  
19 Act to move away from mandatory minimums  
20 towards considering the offender's individual  
21 circumstances in a particular case, which, of  
22 course, would include criminal history.

23 District judges obviously apply the  
24 guidelines. As the Federal Defenders' brief  
25 shows, I think at pages 7 to 8, district judges

1 routinely depart upward where it's called for  
2 based on a defendant's criminal history. The  
3 career offender guidelines lead to sentences  
4 routinely of 25 years to life. And so the  
5 Sentencing Guidelines will account for the kind  
6 of individualized circumstances that Congress  
7 wanted.

8 JUSTICE GORSUCH: On that score, I --  
9 I just wanted to take this case as an example  
10 to test it in my own mind, and I went back and  
11 looked at the presentence report and things  
12 like that. And as I understand it, 15-year  
13 minimum, 180 months, for some reason, your  
14 client got 162, I'm not sure why. Maybe you  
15 can tell me. And that -- that -- so that would  
16 be the 15-year mandatory minimum.

17 The safety valve gets him with his  
18 criminal history approximately, my -- my law  
19 clerks tell me, between 120 and 150 months. He  
20 was over 60 years old when he's sentenced, so  
21 we're talking about whether he might be free  
22 when he's 70, 73, or 75. Is -- is that what  
23 we're -- what's really at stake here?

24 MR. DVORETZKY: That's right. This --  
25 this is a 60-year-old offender. He does have a

1 criminal history. That criminal history would  
2 be taken into account under the Sentencing  
3 Guidelines. And nobody is talking about him  
4 not serving a serious prison term. This is --

5 JUSTICE GORSUCH: He's going to be at  
6 least 70 years old when he's released. He'll  
7 be under parole, I assume, for a good bit  
8 thereafter, supervised release. And -- and the  
9 judge, of course, could depart or vary upward  
10 if the judge wished to.

11 MR. DVORETZKY: That -- that's right.  
12 If the court wanted to do that, it could.

13 JUSTICE KAVANAUGH: Would -- would you  
14 have a different rule for a 22-year-old  
15 offender?

16 MR. DVORETZKY: No, but the -- but the  
17 point, Justice Kavanaugh, is that Congress  
18 wanted individualized circumstances --

19 JUSTICE KAVANAUGH: Then why have --

20 MR. DVORETZKY: -- to be taken into  
21 account.

22 JUSTICE KAVANAUGH: -- why have the  
23 criminal history disqualification at all? At  
24 least my understanding of the statistics is  
25 of -- based on 2021, of 11,000 offenders who

1 met the non-criminal history requirements  
2 pre-First Step Act, 6,000 would be  
3 disqualified. Under the government's  
4 interpretation, only 4,000 would be  
5 disqualified. So a substantial number, 2,000.

6 But, under yours, only 300 or so would  
7 be disqualified, which basically eliminates the  
8 criminal history disqualification in 98 percent  
9 of the cases.

10 MR. DVORETZKY: So to -- to --

11 JUSTICE KAVANAUGH: So why keep it at  
12 all? Given the -- as you rightly say, the  
13 individualized discretion that sentencing  
14 judges use, why -- why have all this if it's  
15 really not going to make a difference, as  
16 Justice Gorsuch says, in a lot of cases?

17 MR. DVORETZKY: If I could, two -- two  
18 points, one conceptual, one on the facts.

19 Conceptually, look, Congress could  
20 have thought that the combination of (A), (B),  
21 and (C) was a particularly egregious  
22 combination, and that at a macro level was what  
23 it was targeting. It could still serve some  
24 purpose. Congress didn't know when it passed  
25 that what the numbers would look like.



1           Second, on a factual level, in  
2     response to those numbers, those numbers, the  
3     2.8 percent or whatever it is, that's  
4     calculating things under the Ninth Circuit's  
5     Lopez interpretation. It's not calculating the  
6     numbers using the approach that we're  
7     advocating and that Chief Judge Pryor adopted  
8     in Garcon, which allows old offenses to be  
9     counted under (B) or (C) even if they don't  
10    count towards the criminal history total in  
11    (A).

12           So we actually don't know what the  
13    numbers would look like when you apply the  
14    approach that we're advocating for those.

15           JUSTICE KAVANAUGH: Well, it would be  
16    even fewer --

17           CHIEF JUSTICE ROBERTS: Thank you.

18           JUSTICE KAVANAUGH: Never mind.

19           CHIEF JUSTICE ROBERTS: Thank you,  
20    counsel.

21           Justice Thomas, anything further?

22           Justice Alito?

23           JUSTICE ALITO: Well, just out of  
24    curiosity, I wonder if I can ask you a question  
25    about how you think language works in general.

1 Let's just forget about special rules that  
2 apply to statutory interpretation for a moment  
3 and just talk about how language works in  
4 general and your understanding of that.

5 If I say something and it's ambiguous  
6 and you're trying to figure out whether I mean  
7 A or B, to what degree do you take into account  
8 whether A or B makes more sense?

9 MR. DVORETZKY: I might take it into  
10 account, but the other thing I would take into  
11 account is my relationship with you as the  
12 speaker.

13 So, if -- to Justice Kagan's  
14 hypothetical, if my doctor tells me, don't do  
15 A, B, and C, my relationship with the doctor is  
16 I want to pass -- I want the medical test to go  
17 well, and I assume that my doctor is being very  
18 cautious and conservative, because my doctor  
19 is, so I'm going to -- that's the context.  
20 It's the relationship with the speaker that's  
21 letting me turn an "and" into an "or" there.

22 In this situation, if Congress --

23 JUSTICE ALITO: No, I think that's  
24 a -- that's a -- that's a fair answer. So we  
25 have -- you have to take into account the --

1 some image of the speaker and your relationship  
2 to the speaker.

3 So who is the speaker that we're  
4 talking about when we're trying to understand a  
5 statute that is enacted by Congress, and what  
6 attributes do we attribute to that speaker?

7 MR. DVORETZKY: So I think that  
8 actually raises two different questions, I  
9 think.

10 JUSTICE ALITO: All right. Who is the  
11 speaker?

12 MR. DVORETZKY: So I think the speaker  
13 is Congress.

14 JUSTICE ALITO: Okay.

15 MR. DVORETZKY: But --

16 JUSTICE ALITO: And -- and what is our  
17 image of -- of this speaker? What  
18 characteristics does this speaker have?

19 MR. DVORETZKY: It -- it -- that feels  
20 like a loaded question. I -- I -- I --

21 (Laughter.)

22 JUSTICE ALITO: Why is it a loaded --  
23 well, no, I -- I don't mean to be derogatory of  
24 Congress. I'm not -- I'm not looking for a  
25 derogatory answer or necessarily a

1 complimentary one. But, if that's how language  
2 works, don't we have to have some image of  
3 who -- who's the -- the speaker of this speech  
4 that we are interpreting?

5 MR. DVORETZKY: Well, the -- the  
6 speaker in this case is an institution.

7 JUSTICE ALITO: Right.

8 MR. DVORETZKY: But the institution is  
9 also speaking in the context of a criminal  
10 case. And where we have basic words like "and"  
11 and "or," I think you hold the -- the  
12 institution, the maker of laws, to a higher  
13 standard of precision than I would hold my  
14 doctor, who I know has my best interests at  
15 heart and is trying to make me well.

16 And so, in that situation, where  
17 Congress knows how to use "and" or "or," and,  
18 again, particularly in a criminal context,  
19 where fairness is at stake, you hold Congress  
20 to the ordinary meaning of the word "and,"  
21 which is not a distributive meaning in this  
22 kind of a context.

23 JUSTICE ALITO: I mean, I think that  
24 the move to textualism in our interpretation of  
25 statutes was enormously beneficial and it

1 eliminated a lot of abuses that previously  
2 occurred, but, in the end, we are just  
3 interpreting language.

4           Everybody I assume in this courtroom  
5 today speaks the English language, and all  
6 we're trying to do is understand some words in  
7 the English language, and it just seems to me  
8 that a lot of these arguments that we've heard  
9 -- I mean -- I mean, the people here who  
10 haven't studied the case must think this is --  
11 this is gibberish. It might as well be -- it  
12 might as well be Greek with all this stuff  
13 about distributive and em dash and all of that.

14           Is it necessarily that complicated?

15           MR. DVORETZKY: So I -- I don't think  
16 it's complicated because I think that the  
17 natural way to express what Congress wanted to  
18 express here would have been "or." Using "and"  
19 to express that any of the three would  
20 disqualify you is unnatural. And -- and -- and  
21 so I -- I think that really is the key point,  
22 is that we're holding Congress to what the  
23 ordinary understanding of these terms is.

24           CHIEF JUSTICE ROBERTS: Justice  
25 Sotomayor?

1 JUSTICE SOTOMAYOR: I want to go back  
2 to that point. And as I understood you  
3 earlier, when Congress wanted to use the  
4 distributive form, it generally did it. It did  
5 it in (f)(2) by using "the defendant did not  
6 use violence or credible threats of violence or  
7 possess a firearm or other dangerous weapon  
8 or..."

9 When it wanted to do a "not" in  
10 (f)(4), it wrote, contrary to Justice Kagan's  
11 expectation, in a very cumbersome way, it said,  
12 the statute requires a defendant was not an  
13 organizer or leader and was not engaged, and it  
14 went on and on.

15 So, here, the anomaly would be  
16 Congress changing course just for this one  
17 provision and changing "and" to mean "or." I  
18 think that's your basic point. But assume that  
19 we have two ways of reading this statute, that  
20 you could accept that there was a possibility  
21 of reading "or" to mean "and."

22 Where does the Rule of Lenity come  
23 into this?

24 MR. DVORETZKY: If at the end of the  
25 day you conclude, taking into account all of

1 the various textual cues that are available  
2 here, that this statute is just -- is  
3 grievously ambiguous -- that's the standard  
4 that the Court has used -- then, at that point,  
5 the Rule of Lenity calls for Mr. Pulsifer to  
6 win, favoring the defendant.

7 And if Congress wants to change "and"  
8 to "or" in a revision of this statute, that's a  
9 very easy change for them to make, but the  
10 burden of that ought to be on Congress, not on  
11 defendants whose liberty is at stake in the  
12 face of a -- a seriously ambiguous statute.

13 JUSTICE SOTOMAYOR: So where does  
14 surplusage and common sense come into that?  
15 Meaning, if all of the grammatical indicators  
16 suggest that "and" means "and", and "or" means  
17 "or," and the two are not the same, does that  
18 constitute a grievous enough ambiguity to say  
19 that lenity should play a part here?

20 MR. DVORETZKY: I -- I -- I think it  
21 does. I think that alone is enough to conclude  
22 that "and" means "and," even if there were  
23 surplusage, which I -- which I don't think  
24 there is.

25 JUSTICE SOTOMAYOR: So assume there's

1 not, because I think Justice Alito was saying,  
2 I don't know. Can you quantify that surplusage  
3 here? The number of cases that would fall into  
4 your exception, is it a lot? Is it a little?  
5 I'm not sure.

6 MR. DVORETZKY: Meaning the -- the  
7 number of cases where somebody would satisfy B  
8 and C but not A?

9 JUSTICE SOTOMAYOR: Exactly.

10 MR. DVORETZKY: So -- so I can't  
11 quantify it, but Chief Judge Pryor and Judge  
12 Wood and others in the lower courts have given  
13 a number of examples where that could happen.  
14 You could have somebody with old offenses that  
15 qualify under B or C or tribal convictions or  
16 something subject to the single sentence rule.

17 And the guidelines in those  
18 situations, like you could have points  
19 associated with those offenses that don't add  
20 to the criminal history total, which is what A  
21 is focused on.

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



1 JUSTICE SOTOMAYOR: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

3 JUSTICE KAGAN: I want to go back to  
4 Justice Alito's line of questioning, and you  
5 said that the -- the -- the difference between  
6 my hypothetical and this case has to do with  
7 the relationship between the speaker and the  
8 person listening to the injunction or the  
9 prohibition or whatever you want to call it.

10 MR. DVORETZKY: That's one difference,  
11 yeah.

12 JUSTICE KAGAN: Yeah. And -- and I  
13 think that that might be one difference. But  
14 another difference, which is the one I  
15 suggested before, has to do with the  
16 relationship of the items on the list.

17 And this is why "don't drink and  
18 drive" is so powerful, because, automatically,  
19 we understand that the harm that's being sought  
20 to be averted is the combination of the two,  
21 whereas other lists, you can see that the harms  
22 are much more independent, that things are  
23 independently disqualifying and would -- were  
24 meant to be independently disqualifying.

25 And that's why the three-point/

1 two-point anomaly seems so significant to me,  
2 because what that suggests is that these were  
3 meant -- you know, they -- when you -- when you  
4 take the intersection of those, it doesn't work  
5 under your reading and it does work under the  
6 government's reading.

7 So I want you to respond to that view.

8 MR. DVORETZKY: I -- I -- I think the  
9 answer -- when you say it doesn't work, Justice  
10 Kagan, I -- I think what you mean by that is  
11 it's leading to an anomalous result in this  
12 particular case, that it --

13 JUSTICE KAGAN: Well, not just --

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

15 JUSTICE KAGAN: -- in this particular  
16 case. It leads to an anomalous result in the  
17 case of anybody who has lots of three-point  
18 offenses, both violent and non-violent, let's  
19 say, but does not have, just happens not to  
20 have a two-point violent offense.

21 MR. DVORETZKY: But it doesn't lead to  
22 anomalous results in a whole other class of  
23 cases where Congress might rationally have --

24 JUSTICE KAGAN: Well, that's true.  
25 But this anomaly suggests that those two

1 features, the three-point criterion and the  
2 two-point violent criterion, were meant to  
3 operate independently, each one being  
4 disqualifying.

5 MR. DVORETZKY: I -- that's one  
6 inference, but I don't think that's the only  
7 inference that you could draw from A, B, and C.  
8 Congress could have thought that A, B, and C  
9 combined were worse than any of them alone.

10 Now, yes, that could lead to a  
11 situation where a -- a seemingly more serious  
12 offender qualifies under (f)(1) as opposed  
13 to -- as opposed to somebody who's a less  
14 serious offender.

15 Congress didn't have a particular  
16 reason to be concerned about that because that  
17 offender would still have to satisfy (f)(2)  
18 through (5), and even then, the Sentencing  
19 Guidelines would take into account that  
20 person's criminal history and the district  
21 judge would take into account that criminal  
22 history when determining the sentence.

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

1 JUSTICE KAGAN: Thank you.

2 MR. DVORETZKY: Congress was --

3 JUSTICE KAGAN: I'm sorry.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Gorsuch?

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

8 The -- the two arguments we've heard  
9 this morning on the other side so far are that  
10 there's a surplusage problem you have, but  
11 everybody seems to admit there isn't a  
12 hundred percent surplusage. It's some --  
13 something less than that, so it's not really a  
14 surplusage argument of the kind we normally  
15 adopt or -- or take seriously.

16 And the second is the  
17 two-point/three-point violent offender anomaly,  
18 which is in the nature of or in the direction  
19 of an absurdity argument, but it never really  
20 gets there. And so everybody's dropped the --  
21 the -- the label that it's an absurdity. They  
22 tried to pursue that below, but nobody really  
23 argues that, takes it seriously here. It's a  
24 policy argument. It's a policy argument, and  
25 it's an imperfect one because one could

1 abstract at a policy level. Okay. That's on  
2 one side.

3 On the other side, "and" means "and,"  
4 plain language. Everybody in the room does  
5 understand that concept.

6 Number two, there is a distributive --  
7 examples elsewhere in the statute. (f)(2) is  
8 distributive, as Justice Sotomayor pointed out,  
9 so Congress knows how to distribute when it  
10 wants to distribute.

11 And then, three, lenity, which is the  
12 word that we dare not utter but which Chief  
13 Justice Marshall back in Wiltberger said  
14 applies before you get to things like  
15 legislative history and what Congress might  
16 have wanted and policy arguments.

17 And the fact of the matter is, at the  
18 end of the day, what we're really talking about  
19 here is whether mandatory minimums send people  
20 away for lifes, life sentences, effectively,  
21 for many people, or whether the guidelines,  
22 which are not exactly the most  
23 defendant-friendly form of sentencing known to  
24 man, themselves apply.

25 That's what's at stake here. What am

1 I missing?

2 MR. DVORETZKY: That -- that summation  
3 was better than my introduction.

4 (Laughter.)

5 MR. DVORETZKY: I -- I don't think  
6 you're missing anything, Justice Gorsuch.

7 JUSTICE KAVANAUGH: You agree --

8 CHIEF JUSTICE ROBERTS: Justice  
9 Kavanaugh?

10 JUSTICE KAVANAUGH: -- you agree,  
11 however, that context is relevant, you said  
12 that earlier, in determining whether the "and"  
13 distributes. I just want to make sure you  
14 still agree with that.

15 MR. DVORETZKY: I --

16 JUSTICE KAVANAUGH: You said that  
17 earlier.

18 MR. DVORETZKY: I -- I agree with it,  
19 and I think that the key context is the  
20 surrounding statutory text. That's what --  
21 that's what you look for -- look to first.

22 I don't think that policy  
23 considerations, as Justice Gorsuch was  
24 explaining in his question, are the relevant  
25 context to consider here.

1 JUSTICE KAVANAUGH: And then the  
2 second --

3 MR. DVORETZKY: "Context," I think, is  
4 a very broad term.

5 JUSTICE KAVANAUGH: And then I have a  
6 fact question and then one broader question  
7 raised by Justice Gorsuch's comment.

8 On the fact question, how many  
9 individual uses or dosages is 141 grams of meth  
10 get you? I mean, I'm sure you acknowledge meth  
11 is a serious problem in many communities in the  
12 United States. And what's your sense of 141  
13 grams? And the government can talk about this  
14 as well.

15 MR. DVORETZKY: I -- I -- I honestly  
16 don't have a sense to give you the answer to  
17 that question. You could certainly imagine  
18 that being a relevant consideration taking into  
19 -- taken into account at sentencing, but I -- I  
20 can't quantify that for you.

21 JUSTICE KAVANAUGH: And then, on the  
22 sentencing guidelines, those are -- are not  
23 mandatory, correct?

24 MR. DVORETZKY: They -- they are --  
25 they're not mandatory.

1 JUSTICE KAVANAUGH: Right. So --

2 MR. DVORETZKY: But --

3 JUSTICE KAVANAUGH: -- so the  
4 reference to the Sentencing Guidelines, a lot  
5 of judges would sentence under the Sentencing  
6 Guidelines in certain cases. And that happens.  
7 I guess the broader point there is the reason  
8 they're mandatory minimums -- there are  
9 problems with them, as you identify, but I want  
10 to give you a chance to respond to the  
11 counterpoint, which is that Congress uses them  
12 on some circumstances because, with the  
13 hundreds and hundreds of federal district  
14 judges around the country, they think that some  
15 judges might sentence certain serious offenders  
16 to too light a sentence, and so they wanted to  
17 prevent that from happening in certain kinds of  
18 cases.

19 So the discretion doesn't seem like a  
20 total answer to the concern that Congress would  
21 have about cases like this.

22 MR. DVORETZKY: Well, of course, the  
23 government can and does appeal sentences when  
24 they think that the -- the sentence ought to  
25 have been higher in those circumstances, but --



1 JUSTICE KAVANAUGH: That -- that  
2 almost -- you -- you know and I know that  
3 almost never works, but what's your other  
4 argument then?

5 MR. DVORETZKY: I mean, I think that  
6 this goes back to the purpose of the First Step  
7 Act. This was a once-in-a-generation  
8 sentencing reform, passed in a bipartisan  
9 manner, signed by President Trump, where the  
10 motivating force here was to move away from  
11 mandatory minimums.

12 Yes, it did -- Congress did not  
13 completely eliminate mandatory minimums from  
14 the U.S. Code. If it had, we wouldn't have  
15 this case. Congress chose this rather  
16 complicated First Step Act solution to the  
17 problem. But the problem it was trying to  
18 solve was moving away from numerous instances  
19 of unfair and unjust mandatory minimums and  
20 giving district courts the discretion, which,  
21 by and large, overwhelmingly they exercise  
22 properly --

23 JUSTICE KAVANAUGH: Right.

24 MR. DVORETZKY: -- to take into  
25 account individual circumstances.

1 JUSTICE KAVANAUGH: Okay. Thank you  
2 very much.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Barrett?

5 JUSTICE BARRETT: Mr. Dvoretzky, I  
6 wanted to give you a chance to respond to the  
7 government's argument that lenity doesn't apply  
8 to a safety valve statute. So lenity clearly  
9 applies to penalty-imposing provisions, like  
10 sentencing -- like sentencing provisions, and  
11 so one could say, well that principle would say  
12 that, you know, this -- this statute is part of  
13 the sentence and so it applies, and I -- I  
14 assume that would be your answer, but I asked  
15 my law clerk if she could find any examples of  
16 situations like this. You just told Justice  
17 Kavanaugh the point of the First Step Act was  
18 to afford relief.

19 And so it actually feels more to me  
20 like the argument would be a remedial statute  
21 should be construed broadly, rather than  
22 lenity, which is like a harsh statute should be  
23 construed more narrowly. So can you give any  
24 examples of situations in which lenity has  
25 applied to a situation like this?

1           MR. DVORETZKY: So, as you said,  
2 Justice Barrett, lenity has applied to  
3 sentencing cases. I'm not thinking of an  
4 example of a sentencing case where we're  
5 dealing with a safety valve kind of structure  
6 because, as my -- as part of my colloquy with  
7 Justice Kavanaugh, I was saying this was a  
8 convoluted way for Congress to do this.

9           But either way you want to look at it,  
10 whether it is lenity in favor of the defendant,  
11 the defendant having to satisfy all three in  
12 order to be disqualified, or if you want to  
13 look at it as Congress wanted to grant broad  
14 relief here from mandatory minimums, so,  
15 therefore, we ought to construe "and" to mean  
16 "and" and not limit the class of defendants who  
17 are eligible for that broad relief, I think,  
18 either way, it leads you to the same  
19 conclusion.

20           And, either way, Congress knows how to  
21 use "and" and "or." It ought to be held to  
22 those ordinary meanings. And if it were to  
23 disagree with this Court's decision in our  
24 favor, Congress is free to amend the statute.

25           JUSTICE BARRETT: Okay. And then I

1 have one other question that's related to this  
2 surplusage argument.

3 Do the guidelines use that phrase? I  
4 mean, I don't -- I don't want to go toe to toe  
5 with Chief Judge Pryor on what the Sentencing  
6 Guidelines allow and not, but I'm having a hard  
7 time getting my mind around this because,  
8 intuitively, it does seem like the surplusage  
9 argument makes more sense, and it seems to me  
10 like the argument that you can have a  
11 three-point offense that doesn't earn criminal  
12 history points because it's too old seems like  
13 it's kind of bending over backwards to find a  
14 way to make it not superfluous.

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

17 MR. DVORETZKY: The -- the guidelines  
18 don't use the phrase "three-point offense," but  
19 I think you get there both from the statute and  
20 from the guidelines. The statute itself draws  
21 this distinction. In (f)(1)(A), it talks about  
22 a four-point criminal history total -- point  
23 total. But then it excludes a one-point  
24 offense.

25 So the statute in (A) is -- is coming

1 -- is -- has this concept that you can have a  
2 one-point offense that actually doesn't count  
3 towards the criminal history total. That  
4 understanding of a one-point offense then  
5 carries through to (B) and (C) for a  
6 three-point offense and two-point offense.

7           The guidelines are consistent with  
8 that in a couple of respects. One, as Chief  
9 Judge -- as Chief Judge Pryor said, the  
10 guidelines do use the term "offense" and they  
11 talk about sentences from offenses not  
12 counting. That is what 4A1.2 does.

13           And so the guidelines are really  
14 setting up an order of operations. Under  
15 4A1.1, you assign points to a sentence based on  
16 its length. Under 4A2, however, you then say  
17 that certain sentences and offenses don't  
18 count. And so the guidelines have that  
19 concept.

20           Lastly, there's Note 3 to 4A2 which we  
21 highlight in our brief. That confirms that the  
22 guidelines contemplate that points can be  
23 associated with an offense without being  
24 counted. So, for purposes of the single  
25 sentence rule, the -- that -- that comment

1 tells you that if -- if an offense would have  
2 gotten two points, it can still serve as a  
3 predicate for the career offender guidelines.  
4 That idea of an -- an offense that would have  
5 gotten two points if they had counted is this  
6 concept that Congress employed here in the  
7 statute.

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

16 MR. DVORETZKY: That -- I think that's  
17 right.

18 JUSTICE BARRETT: Okay. But then he  
19 argued below that he only had two three-point  
20 offenses. So he didn't make this argument that  
21 he had three three-point offenses, right?

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

1 JUSTICE BARRETT: But I think he said  
2 initially that he had two three-point offenses.  
3 So you would say now -- your position now is  
4 that he has three three-point offenses?

5 MR. DVORETZKY: For purposes of this  
6 statute, yes.

7 JUSTICE BARRETT: Okay. Thank you.

8 CHIEF JUSTICE ROBERTS: Justice --

9 MR. DVORETZKY: But not for purposes  
10 of (A).

11 CHIEF JUSTICE ROBERTS: -- Jackson.

12 JUSTICE JACKSON: Yeah. So I'd like  
13 to go back to Justice Kagan's conception of  
14 this in -- in terms of the focus on the  
15 anomaly, and I guess I don't see it as  
16 anomalous given the context of the point of the  
17 statute.

18 And I think you sort of responded to  
19 Justice Kagan and Justice Kavanaugh in this  
20 way, but I -- I guess maybe you can help me to  
21 understand. I -- I thought this statute was  
22 about relieving discretion or relieving the  
23 mandatory minimum and thereby giving judges  
24 discretion.

25 So, to the extent that the First Step

1 Act wanted to do that -- I don't think anybody  
2 disputes that -- isn't it conceivable that  
3 Congress still just wanted to identify  
4 particular circumstances in which the mandatory  
5 minimum should apply on the basis of criminal  
6 history and they could do the -- that as  
7 narrowly as they wanted to, correct?

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

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

17 But, in other circumstances, even if  
18 they involve serious offenses, even if they  
19 involve, Congress was willing to allow for  
20 judges to have discretion under those  
21 circumstances to take into account what the  
22 guidelines would have said or whatever.

23 I don't understand why that's, like, a  
24 harm or anomalous or anything.

25 MR. DVORETZKY: No, I -- I think



1 that's right. And I think that's especially  
2 right when we're only talking about (f)(1) as  
3 playing the initial gatekeeping role. You  
4 still would have to satisfy (f)(2) through (5).

5 JUSTICE JACKSON: Correct.

6 MR. DVORETZKY: And even then --

7 JUSTICE JACKSON: So we already --

8 MR. DVORETZKY: -- you get -- I'm --  
9 I'm sorry.

10 JUSTICE JACKSON: Yes. Correct. So  
11 we already take care of really --

12 MR. DVORETZKY: Right.

13 JUSTICE JACKSON: -- terrible people  
14 in this particular situation. And I would  
15 think -- I would think that a situation in  
16 which you had a two-point offense in your  
17 background would be the kind of thing that  
18 Congress might hone in on as making sure  
19 because, otherwise, it could be kind of a  
20 borderline situation.

21 So Congress would say: Okay, we want  
22 to make clear that the mandatory minimum should  
23 still apply if a person has more than four and  
24 they had at least a three -- three-point  
25 offense, however it's defined. I under -- I

1 take Justice Barrett's point about that, but I  
2 do think the guidelines lead you to identify  
3 three-point offenses.

4 But Congress could say: Look, we're  
5 lifting the emphasis on criminal history.  
6 We're -- we -- this has been a problem, you  
7 know, keeping people -- the court from  
8 considering raising -- alleviating the  
9 mandatory minimums, so we're not going to have  
10 a focus on criminal history anymore.

11 However, there could be a situation in  
12 which we want to make clear, because it's so  
13 borderline we can't trust district judges to  
14 necessarily apply the mandatory minimum in this  
15 particular circumstance, so let us make clear  
16 that if the person has four criminal history  
17 points or more, if they have a three-point  
18 offense in their background, and if they have a  
19 two-point offense that is violent, you still  
20 have to apply the mandatory minimum in that  
21 situation.

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

24 MR. DVORETZKY: I -- I think that's  
25 right. And while the -- while the government

1 in its argument may disagree and prefer a  
2 different policy outcome, that really is at  
3 that point a policy debate.

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

12 JUSTICE JACKSON: Which -- which would  
13 seem to undermine Congress's purpose of  
14 allowing for district courts to not have to  
15 apply the mandatory minimum --

16 MR. DVORETZKY: Right.

17 JUSTICE JACKSON: -- in some  
18 situations.

19 MR. DVORETZKY: The -- the -- the  
20 government's argument is that under our  
21 interpretation, the First Step Act is doing too  
22 much. Under their interpretation, the First  
23 Step Act, I would argue, is doing too little.  
24 Either way, that's a policy debate, and --

25 JUSTICE JACKSON: One that Congress

1 could fix very clearly if we say it's "and" by  
2 just changing it to "or," correct?

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

7 JUSTICE JACKSON: Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 Mr. Liu.

11 ORAL ARGUMENT OF FREDERICK LIU

12 ON BEHALF OF THE RESPONDENT

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

15 "And" is conjunctive in 3553(f)(1).

16 The question is, what does "and" conjoin?

17 It joins together three independently  
18 disqualifying conditions by distributing the  
19 phrase "does not have." That's the only  
20 interpretation that avoids rendering the first  
21 subparagraph entirely redundant and the only  
22 interpretation that assigns (f)(1) a coherent  
23 gatekeeping role.

24 What's inexplicable about Petitioner's  
25 reading is that it would disqualify only those

1 defendants with a rare combination of  
2 characteristics, including a prior violent  
3 offense of exactly two points. So a defendant  
4 convicted of a violent offense would actually  
5 prefer to receive a longer sentence worth three  
6 points to avoid being disqualified. That makes  
7 no sense.

8           Petitioner's counterarguments fall  
9 into three buckets. First, he argued in his  
10 brief that the distributive interpretation is  
11 textually impermissible. But grammar, usage,  
12 and legal drafting guides say otherwise, and  
13 the law is filled with distributive uses of  
14 "and." Petitioner this morning attempts to  
15 distinguish these as -- as cases involving  
16 negative conditions, but that's just a  
17 distinction without a difference.

18           Second, Petitioner argues that the  
19 distributive use of "and" is less common. But,  
20 according to leading grammar authorities, "and"  
21 is usually distributive, including when  
22 combined with the negative. And even if that  
23 weren't true, even if, for example, 40 percent  
24 of the "ands" in the world were distributive,  
25 the job of the interpreter would be to figure

1 out whether, in context, this case falls within  
2 that 40 percent rather than to simply accept  
3 Petitioner's reading.

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

15 In any event, this Court has held that  
16 the mere possibility of a clearer phrasing  
17 can't defeat a meaning that's clear in context.  
18 Because "and" in context joins together three  
19 independently disqualifying conditions, the  
20 Eighth Circuit should be affirmed.

21 I welcome the Court's questions.

22 JUSTICE THOMAS: Mr. Liu, would you  
23 tell us exactly when we are to use the -- the  
24 distributive approach reading as opposed to the  
25 joint reading?

1           MR. LIU: Well, the answer is it  
2 depends. It depends on the context.

3           JUSTICE THOMAS: Well, see, that's the  
4 problem. We're not getting direction or  
5 guidance as to when it depends. The -- it's  
6 almost as though this is a substantive due  
7 process of the word "and," that we just make it  
8 up as we go along.

9           I -- I -- I think you have to give us  
10 more than that. At least Petitioner says the  
11 natural -- the more natural reading or almost a  
12 default reading is "and" is conjunctive in a --  
13 in a joint sense.

14          MR. LIU: Yeah. Well, if you look at  
15 the grammar books, they say the opposite. They  
16 say, when "and" is used, even when combined  
17 with a negative -- this is "The Cambridge  
18 Grammar of the English Language" -- they say  
19 "and" is more often distributive. So I think  
20 that that's a fair starting point.

21          But then I think you do need to look  
22 at the context of the statute. "And" -- "and"  
23 is a relationship word. It's a word that  
24 connects other words. So you can't just look  
25 up "and" in the dictionary in isolation to know

1 what it connects. The only way to figure out  
2 what it connects is to actually read the other  
3 words around "and" in this statute.

4 And, here, we think we have two  
5 extremely strong contextual indicators that  
6 Congress here intended "and" to be  
7 distributive. One is our surplusage argument,  
8 and the other is the argument that if you adopt  
9 Petitioner's reading, the -- the provision  
10 doesn't make any sense.

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

16 MR. LIU: No. We think "and" is doing  
17 the same work in both places. In the main list  
18 of things, (f)(1) through (5), what "and" is  
19 doing is creating an eligibility checklist.  
20 The Court must find (1), must find (2), must  
21 find (3), must find (4), must -- and must find  
22 (5).

23 What it's doing is the exact same  
24 thing in the subsidiary checklist. The  
25 defendant must not have A, must not have B, and



1 must not have C.

2 In both places, it's requiring that  
3 all the criteria be satisfied.

4 JUSTICE JACKSON: But only if you put  
5 in "must not have" three times. In other  
6 words, if you don't repeat "must not have,"  
7 then it seems to me that one is saying that the  
8 defendant does not have all of those three.

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

13 JUSTICE JACKSON: Well, what do you --

14 MR. LIU: -- the same --

15 JUSTICE JACKSON: -- what do you say  
16 about the fact that we have within this 3553 --  
17 and I'm looking at (f)(4) now -- a circumstance  
18 in which Congress has repeated, you know, the  
19 defendant "was not an organizer" and "was not  
20 engaged in?" So wouldn't we have expected for  
21 Congress to do that same sort of thing if it  
22 meant for these things to be distributed in  
23 (1)?

24 MR. LIU: Well, Congress did do the  
25 exact same thing in (f)(1). The only

1 difference is formatting. The only difference  
2 is formatting and style.

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

9 But the principle --

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

16 MR. LIU: I think the only -- the only  
17 change is the criteria that -- that the author  
18 thought were being connected.

19 JUSTICE JACKSON: No, there's a change  
20 in the language of the prior bill and this  
21 bill --

22 MR. LIU: Right.

23 JUSTICE JACKSON: -- with respect to  
24 the use of "and" and "or."

25 MR. LIU: And my guess is, when they

1 put in "or," they thought that (A), (B), and  
2 (C) should be read in a package because, when  
3 they're read as a -- as a single unit with  
4 brackets, then "or" makes sense.

5 But, at some point, I think whoever  
6 wrote this thought: Actually, I think the  
7 criteria is does not have (A), does not have  
8 (B), and does not have (C).

9 JUSTICE KAVANAUGH: Well, I think they  
10 were different -- the House had the "or" and  
11 the Senate always had the "and," correct?

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

14 JUSTICE KAVANAUGH: I don't know if  
15 that is -- that's not a full answer, but it's  
16 -- it's relevant to trying to figure out what  
17 the difference was --

18 MR. LIU: I think it's relevant, and  
19 my -- my -- my deep -- I guess I have two  
20 deeper fundamental points. First, I don't  
21 think we should be relying on this sort of  
22 legislative history at all. But, second --

23 JUSTICE JACKSON: But why is that? I  
24 -- I -- can you just -- why? Why not? I mean,  
25 we're trying to understand what, I thought,

1 Congress intended this to mean, and so it seems  
2 to me at least -- at least relevant what they  
3 had previously drafted as they looked at these  
4 various issues.

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

12 Anytime someone is speaking and uses a  
13 connector, they have in mind what's being  
14 connected. When they used "or," I would say  
15 that Congress --

16 JUSTICE SOTOMAYOR: Mr. Liu --

17 CHIEF JUSTICE ROBERTS: Mr. Liu --

18 JUSTICE SOTOMAYOR: -- Mr. Liu, could  
19 you point me to one statute -- we spend a lot  
20 of time with common language, but I've been  
21 looking at your brief and all the statutes you  
22 cited where you say that "and" also meant "or,"  
23 but all of them were framed in the affirmative.  
24 As examples, "executive" means -- 5 U.S.C.  
25 Section 105, "executive agency" means an

1 executive department, a government corporation,  
2 and an independent establishment.

3 Or sometimes examples are framed in  
4 the negative, such as 26 U.S.C. Section 17 --  
5 170(f)(16)(D), which provides that the term  
6 "household items" does not include food,  
7 paintings, antiques, and other objects of art,  
8 jewelry and gems, and collection.

9 But I can't find another statute  
10 except this one where a list of criteria is  
11 framed in the negative and we distribute that  
12 negative the way you have. Point me to one  
13 other statute.

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

15 JUSTICE SOTOMAYOR: You can't do it in  
16 this one.

17 MR. LIU: I think the example Your  
18 Honor just gave qualifies. The -- the  
19 provision in the Internal Revenue Code says, to  
20 qualify as a household item eligible for a  
21 deduction --

22 JUSTICE SOTOMAYOR: That's a list of  
23 examples. I'm talking about criteria that  
24 disqualify you. I want an example like this  
25 one.

1           MR. LIU: I think -- I think the  
2 household items one is just like this one. I  
3 think 34 U.S.C. 20 --

4           JUSTICE SOTOMAYOR: All right. We're  
5 -- we're -- we're going to fight on the  
6 starting premise.

7           JUSTICE GORSUCH: Counsel --

8           CHIEF JUSTICE ROBERTS: I --

9           JUSTICE GORSUCH: Oh, I'm sorry,  
10 Chief, you -- go ahead.

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

18          Well, what do you -- what do you think  
19 about that? I mean, does Congress really, when  
20 they're drafting these things, focus as much as  
21 we have been focusing today on the grammatical  
22 structure and differences, or should we take it  
23 in a more colloquial sense, or how should we --

24          MR. LIU: So I -- Mr. Chief Justice, I  
25 think the government wins whether you take a

1       literal or hyper-literal or colloquial  
2       understanding of what Congress is saying,  
3       either way.

4                CHIEF JUSTICE ROBERTS:   Okay.  But --  
5       but, as a general starting point, what should  
6       we do?  I mean, obviously, we --

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

8                CHIEF JUSTICE ROBERTS:  -- we've said  
9       we treat the language --

10               MR. LIU:  -- I --

11               CHIEF JUSTICE ROBERTS:  -- as being  
12       used in a common manner, but --

13               MR. LIU:  I think the most important  
14       thing to know about our relationship with  
15       Congress is that we presume Congress to be  
16       rational.  We presume Congress to be an  
17       intelligent drafter of opinion -- of -- of --  
18       of -- of statutes.  That's why we apply canons  
19       like consistent usage and -- and meaningful  
20       variation, and that's why we -- this Court has  
21       said that it's this Court's role to make sense,  
22       rather than nonsense, out of the corpus juris.

23               CHIEF JUSTICE ROBERTS:  Well, but you  
24       can't really say -- go so far as to say that it  
25       would be irrational for Congress to write the

1 statute the way your friend wants to write it.

2 MR. LIU: I do think the -- the -- the  
3 way Petitioner frames it, it is -- it is  
4 incoherent. It is inexplicable. It is -- it  
5 is -- it -- it can't be explained.

6 I mean, just -- just think of this  
7 hypothetical that we provide in our brief: Two  
8 defendants commit the same three-point offense.  
9 Then one defendant goes on to commit a series  
10 of murders, all three-point violent offenses.  
11 The second defendant goes on to -- to -- to  
12 commit just one more offense, a mid-level  
13 robbery, a two-point violent offense.

14 If -- if there was any sense to this  
15 statute, if -- if, as my friend says, this  
16 statute cares about recidivism and violence,  
17 then the first -- the first defendant would be  
18 the one that's disqualified.

19 JUSTICE GORSUCH: Counsel, that's --

20 MR. LIU: But, under his reading, only  
21 the second is.

22 JUSTICE GORSUCH: -- that -- that --  
23 that's a good policy argument, but you don't  
24 argue that it rises to the level of absurdity  
25 that would trigger our absurd doctrines -- our



1 absurdity canons, right?

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

4 JUSTICE GORSUCH: You haven't made  
5 that argument.

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

10 JUSTICE GORSUCH: So -- so you don't  
11 invoke that canon, and -- and one could imagine  
12 a rational Congress coming to this conclusion.  
13 It's not the conclusion you think most  
14 rational, but a whole bunch of lower court  
15 judges have found it rational.

16 And then you have a -- a superfluidity  
17 argument that isn't entirely leakproof, right?  
18 It -- it's -- it's a partial superfluidity  
19 argument.

20 MR. LIU: No, it's a hundred percent.  
21 It's a hundred percent.

22 JUSTICE GORSUCH: A hundred percent?

23 MR. LIU: The entire subparagraph (A)  
24 is superfluous.

25 JUSTICE GORSUCH: So Chief Judge Pryor

1 is -- is -- is wrong as well that one could  
2 read the statute rationally to -- every --  
3 every offense has a point but that not all of  
4 them are counted under A1, 2?

5 MR. LIU: That's right. I mean, his  
6 view of the guidelines can't be squared with  
7 the text of the guidelines or the text of the  
8 statute.

9 JUSTICE JACKSON: Can you explain that  
10 a little bit more, please?

11 JUSTICE GORSUCH: Oh, I'm -- I'm  
12 sorry, before that, I had one last question if  
13 it's all right.

14 JUSTICE JACKSON: Mm-hmm.

15 JUSTICE GORSUCH: Which is, when we're  
16 trying to figure out the most natural reading  
17 of a statute and whatever standard we talked  
18 about, what should we account for the fact that  
19 the government didn't make this argument until  
20 this Court in this case, that below, in the  
21 Eighth Circuit, it argued that "and" means  
22 "or"? You -- you started this argument by  
23 saying we agree "and" is conjunctive, but in  
24 the Eighth Circuit, the argument was it's  
25 disjunctive.

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

2 JUSTICE GORSUCH: Should that weigh in  
3 our consideration of what --

4 MR. LIU: -- we made the two arguments  
5 in the alternative. We made the distributive  
6 argument in our response brief in the Eighth  
7 Circuit, and that's why the Eighth Circuit  
8 accepted it. We -- we used the word  
9 "distributive" in our brief.

10 JUSTICE JACKSON: Counsel, I'd like to  
11 get back to the -- whether or not this comports  
12 with the guidelines. Guidelines 101 is order  
13 of operation. And 4A1.1, one of the things I  
14 noticed in the government's brief was the  
15 insistence on inverting 4A1.1 and 1.2, which is  
16 actually not the way in which the guidelines  
17 operate. You start with 1.1, which allows us  
18 to determine which prior sentences are eligible  
19 for points. You get three points for a certain  
20 set of characteristics; that is, the sentence  
21 is over one year and a month, you get two  
22 points, et cetera.

23 Once you have identified those, then  
24 you go on to 4 -- 1.2 and determine which  
25 count, which of those count for the purpose of

1 the criminal history. So, given that -- and I  
2 think that's incontrovertible -- how is it that  
3 Judge Pryor's view of the way in which this  
4 works is inconsistent with the guidelines?

5 MR. LIU: So, with respect, Justice  
6 Jackson, I don't think it's uncontroversial.  
7 I don't think the probation office or any  
8 government attorney has ever applied these two  
9 guidelines in that fashion.

10 JUSTICE JACKSON: I'm sorry, what's un-  
11 -- not uncontroversial? You don't go in order  
12 of operation?

13 MR. LIU: Correct. That when -- when  
14 you apply -- when -- when -- when someone is  
15 applying 4A1.1, they're applying 4A1.2 to  
16 determine which offenses should be --

17 JUSTICE JACKSON: Ultimately. But,  
18 second, after they do 4A1.1.

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

20 JUSTICE JACKSON: There's an order of  
21 operation.

22 MR. LIU: I respectfully disagree,  
23 Justice Jackson. I think the -- the clearest  
24 evidence of this is on 4a of our statutory  
25 appendix, where you have the application notes

1 too 4A1.1, and all of the application notes for  
2 when you add three points or add two points or  
3 add one point incorporate 4A1.2.

4 Now, if it were true that you look at  
5 4A1.1, you push it away, and then you subtract  
6 those points, it wouldn't make sense to build  
7 into the commentary for when you add them all  
8 the rules in 4A1.2. In other words, what this  
9 commentary is saying is, before you add points,  
10 see if you -- you're supposed to be counting --

11 JUSTICE JACKSON: All right. Well, if  
12 -- if --

13 MR. LIU: -- that offense in the first  
14 place.

15 JUSTICE JACKSON: -- if I disagree  
16 with you, do you lose on that point? In other  
17 words, if the Court decides that there is an  
18 order of operation, that you can identify  
19 offenses based on the points that are  
20 attributed to them under 4A1.1 and then you  
21 determine whether or not they're counted under  
22 4A1.2, does the government's surplusage,  
23 whatever the argument is, do you lose on that  
24 point?

25 MR. LIU: If the Court concludes that

1       there is such a thing as a two-point offense  
2       that doesn't add points to the defendant's  
3       total, then, yes, we do not have a surplusage  
4       argument.

5                   JUSTICE KAVANAUGH:  Can I ask you --

6                   JUSTICE KAGAN:  Mr. Liu, can I -- can  
7       I --

8                   JUSTICE KAVANAUGH:  You.

9                   JUSTICE KAGAN:  You know, I understand  
10       your argument about the foreign sentences and  
11       the old sentences, makes sense to me that you  
12       don't add up the points if you're not going to  
13       count them anyway.

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

18                   I'm not sure I understand your  
19       argument on the single sentence rule.

20                   MR. LIU:  Sure.

21                   JUSTICE KAGAN:  I'm not sure I  
22       understand Judge Pryor's view of the single  
23       sentence rule either.

24                   MR. LIU:  Right.

25                   JUSTICE KAGAN:  So I start with not

1 understanding his view, and I end with not  
2 understanding your response. So I'm just  
3 wondering whether you can go over why you think  
4 the single sentence rule does not operate  
5 against you --

6 MR. LIU: Well --

7 JUSTICE KAGAN: -- putting aside this  
8 -- the old sentence and the foreign -- the old  
9 conviction and the foreign conviction rule?

10 MR. LIU: So -- so the single sentence  
11 rule in principle is the same as the foreign  
12 conviction and military conviction rule in that  
13 it tells you what is your baseline for adding  
14 points, for being the basis for adding points.

15 And what the single sentence rule says  
16 is that when you have two sentences that are,  
17 say, charged on the same indictment and the  
18 defendant is sentenced on the same day, treat  
19 that, count that -- those are literal --  
20 literal words -- count that as a single  
21 sentence.

22 So then that's the basis on which you  
23 move to the instruction in 4A1.1, which says  
24 how many points to add. So, when you combine  
25 those two, may -- maybe you get a sentence

1 that's three years instead of just one year.  
2 So then you know when you get to 4A1.1 we're  
3 going to add three points to that instead of  
4 just the regular old one or two.

5 So that's how the single sentence rule  
6 operates. But the principle is the same, which  
7 is that you don't get to the point of adding  
8 points --

9 JUSTICE KAGAN: Yeah.

10 MR. LIU: -- until you figure out what  
11 you're counting.

12 JUSTICE KAGAN: Now, when Judge Pryor  
13 says this is contradicted by the language of  
14 (1)(A), what -- why do you think that that's  
15 wrong?

16 MR. LIU: I think it's wrong because  
17 (1)(A) has all over it the word "add." And so  
18 there's no context in which, as I think Chief  
19 Judge Pryor was supposing, that points are  
20 assigned without adding them. There's only --

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

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

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

25 MR. LIU: Right.



1 JUSTICE JACKSON: Mm-hmm.

2 MR. LIU: There's an exclusion in the  
3 text of (f)(1)(A) that says we're going to  
4 exclude points resulting from one-point  
5 offenses.

6 I don't see how that helps my friend  
7 because the negative implication of that is  
8 that all the two-point and three-point offenses  
9 are being included in the total points.

10 And so that just reinforces that when  
11 you have a two-point violent offense and a  
12 three-point offense, that's not being excluded  
13 from the total, it's being included.

14 JUSTICE JACKSON: No, but the fact  
15 that you could include or exclude is the  
16 problem. In other words, just -- Judge Pryor's  
17 point is Congress understood that there would  
18 be offenses that are called one-point offenses,  
19 are called two- or three-point offenses that  
20 would not be included. And that undermines  
21 your point because your surplusage argument  
22 relies on the view that every three-point  
23 offense is only such because it is counted.

24 So, to the extent that you can have a  
25 world in which something is a one-point

1 offense, but it is not counted, Judge Pryor at  
2 least says that I think that -- sorry, he says  
3 that that means that you're wrong about  
4 surplusage.

5 MR. LIU: I -- I don't -- I don't  
6 think this helps my friend's argument at all.  
7 In fact, I think it cuts against it. If you  
8 read the exclusion, it says points resulting  
9 from one-point offenses.

10 So the only offenses it has in mind  
11 are -- are offenses that would actually --  
12 actually result in points. What -- the problem  
13 with Chief Justice Pryor -- Chief Judge Pryor's  
14 vision is, is that there are some offenses out  
15 there that would have resulted in points but  
16 for the fact that they're not counted.

17 The text of -- of -- of 3553(f)(1)(A)  
18 doesn't contemplate that. The only one-point  
19 offenses it contemplates are one-point offenses  
20 that actually --

21 JUSTICE JACKSON: But what is the  
22 government's position on that? Do you disagree  
23 that there's a world in which you -- you have  
24 an offense that would be assigned points, but  
25 those points aren't counted for the purpose of

1 the criminal history score?

2 MR. LIU: I mean, would be -- I mean,  
3 sure, you can say would be, but --

4 JUSTICE JACKSON: So then why aren't  
5 those the three-point offenses that --

6 MR. LIU: Oh.

7 JUSTICE JACKSON: -- this statute is  
8 talking about?

9 MR. LIU: Because, in -- in referring  
10 to three-point and two-point offenses, the  
11 statute's referring to offenses that actually  
12 give rise to two point and three points, just  
13 like in the exclusion in (1)(A), it's referring  
14 to one-point offenses that actually result --

15 JUSTICE KAVANAUGH: Can --

16 MR. LIU: -- in points that count  
17 toward the total.

18 JUSTICE KAVANAUGH: -- can I -- can I  
19 ask you a question to follow up on Justice  
20 Thomas's original question? Because I think  
21 that's really important.

22 MR. LIU: Yeah.

23 JUSTICE KAVANAUGH: So my  
24 understanding is there's an established rule of  
25 language and grammar that "and" distributes in

1 circumstances where the context establishes  
2 that that's the better reading.

3 MR. LIU: Correct.

4 JUSTICE KAVANAUGH: But is there a  
5 more precise phrasing you can put on that? The  
6 context shows what?

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

14 The problem here is that there is  
15 nothing special about the combination of A, B,  
16 and C except for its arbitrariness.

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

21 MR. LIU: Correct.

22 JUSTICE KAVANAUGH: That's an  
23 established rule, so we just have to figure out  
24 when it is.

25 MR. LIU: Yeah. And --

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

9 MR. LIU: Correct.

10 JUSTICE KAVANAUGH: -- issue and also  
11 the number of offenders who would be  
12 disqualified now.

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

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

22 Second, we are not deriving purpose  
23 from the subjective views of the legislature.  
24 We are deriving purpose from what a reasonably  
25 objective user of words would glean from the

1 text and structure of this statute.

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

8 JUSTICE GORSUCH: That -- that --  
9 that -- that -- that -- in a -- in a textualist  
10 world, that would be an absurdity argument,  
11 that this -- this --

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

13 JUSTICE GORSUCH: Let me just finish  
14 the question. You can have all the time to  
15 respond you want.

16 MR. LIU: Fair enough.

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

22 You're saying: Hey, Congress wouldn't  
23 have done this because it wouldn't capture some  
24 bad people. That seems to me at -- at heart  
25 one of two things: either an argument about

1 intent, Congress couldn't have intended this,  
2 wouldn't have intended this because it wouldn't  
3 want bad people to get away, or, two, it's a  
4 policy argument, you shouldn't want this to  
5 happen.

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

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

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

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

23 JUSTICE GORSUCH: Purpose. So it is  
24 purposivist?

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

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

2 JUSTICE KAVANAUGH: I thought the -- I  
3 thought the point --

4 JUSTICE GORSUCH: Okay. I appreciate  
5 that concession.

6 MR. LIU: Absolutely. Mm-hmm.

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

11 MR. LIU: That's correct. It's a --  
12 it's a --

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

22 MR. LIU: Exactly. And this has --  
23 this has --

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



1 MR. LIU: Right.

2 JUSTICE KAVANAUGH: -- I think, what  
3 Justice Gorsuch is zeroing in on.

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

5 JUSTICE KAVANAUGH: That sounds like  
6 absurdity when you're bringing context. But  
7 maybe it being absurd is helpful to or close to  
8 absurd is helpful in thinking about context.

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

21 In Abbott versus the United States,  
22 which -- which we discuss in our brief, this  
23 Court addressed the applicability of 924(c)'s  
24 mandatory consecutive sentence regime. Under  
25 defendant's reading in that case, the most

1 culpable drug offenders would be excused from  
2 the mandatory minimum of 924(c), while the  
3 least -- less culpable ones would -- would  
4 still be subject to it.

5 JUSTICE JACKSON: But how do you --

6 JUSTICE BARRETT: So --

7 JUSTICE JACKSON: -- how do you -- go  
8 ahead.

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

15 MR. LIU: Correct.

16 JUSTICE BARRETT: -- of asking what  
17 the text means --

18 MR. LIU: Correct.

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

22 MR. LIU: I think the corpus  
23 linguistics brief helps us. It helps us in  
24 three different ways. Number one, the survey  
25 data and its analysis of the statutes in that

1 case just shows that this distributive reading  
2 is textually permissible.

3 JUSTICE BARRETT: But less -- less  
4 likely?

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

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

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

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

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

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

9 MR. LIU: I think --

10 JUSTICE SOTOMAYOR: And then it's a  
11 policy argument.

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

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

22 MR. LIU: And in our view, the  
23 Petitioner doesn't -- Petitioner doesn't have  
24 all three because he doesn't have (C). He has  
25 two out of the three. So he does not have --

1 he -- he -- he -- he doesn't have all three.

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

11 MR. LIU: Right.

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

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

23 And we -- Justice Barrett, I thank you  
24 for the clarification. We are not saying that  
25 we need to resort to absurdity because our main

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

6 JUSTICE SOTOMAYOR: Or it would mean  
7 the same thing all the time.

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

11 CHIEF JUSTICE ROBERTS: You can answer  
12 her question.

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

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

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

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

8           Justice Alito?

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

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

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

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

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 -- the methodology that was  
18    used in every particular study of this kind  
19    that is 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  
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's -- it  
22      -- it is about intent, and it's -- it's -- it's  
23      intent against the backdrop of a body,  
24      Congress, that we presume objectively to be  
25      reasonable.

1 JUSTICE ALITO: And if that is the  
2 case, why would we draw a bright line between  
3 absolute absurdity and mere absurdity?

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

12 CHIEF JUSTICE ROBERTS: Justice  
13 Sotomayor?

14 Justice Kagan?

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

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

1 "or." I would say it's 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  
6 defendant's liberty is on the line, where --  
7 I'm just going to assume that the Rule of  
8 Lenity applies, notwithstanding your argument.  
9 Why isn't that enough to get to Mr. Dvoretzky's  
10 position?

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

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

1 history.

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

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

13           JUSTICE KAGAN: Thank you.

14           CHIEF JUSTICE ROBERTS: Justice  
15 Gorsuch?

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

23           That's certainly how the Eighth  
24 Circuit understood the government's argument  
25 below. They said -- they -- they said that

1 "The parties discuss whether 'and' should be  
2 read conjunctively or disjunctively, but we do  
3 not believe that is the important question."

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

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

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

22           JUSTICE GORSUCH: On the basis of a  
23 completely different theory, that "and" means  
24 "or," which you in your first sentence as you  
25 got up, you said it's conjunctive before us.

1 And most of the argument below, I'm not going  
2 to say all of it, most of it below was  
3 disjunctive. And that's a difference. It's a  
4 difference.

5 MR. LIU: I -- I --

6 JUSTICE GORSUCH: And the government  
7 of the United States has a lot of resources,  
8 and the average criminal defendant doesn't.  
9 They're one-off players, you're a repeat  
10 player, and you've got a very sophisticated  
11 reticulated third theory of the possible  
12 meaning of the word "and," right? We're now up  
13 to three.

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

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

24 And so, as we often do in -- in this  
25 Court and in lower courts, we provide

1 alternative arguments. One way is to read the  
2 "and" as distributive. The other way, if -- if  
3 you want to go that route, is to read the "and"  
4 to mean an "or." But the bottom line of both  
5 -- of both interpretations were, as -- as the  
6 bargain's theorem shows, logically equivalent.

7 JUSTICE GORSUCH: But you -- you  
8 reject the "or" theory as -- as incorrect at  
9 this stage? You've not pursued it at any rate?

10 MR. LIU: Correct. There's no need --  
11 there's no need to do -- to read this "and" to  
12 mean an "or" because the -- the distributive  
13 use of "and" is the more common use.

14 JUSTICE GORSUCH: Because you've got  
15 this new theory.

16 All right, thank you.

17 CHIEF JUSTICE ROBERTS: Justice  
18 Kavanaugh?

19 Justice Barrett?

20 JUSTICE BARRETT: I -- I'd just like  
21 to follow up on that so that I understand the  
22 lay of the land. I thought the government did  
23 in some of the courts below make the  
24 distributive theory because it's what Judge  
25 Kirsch relied on in the Seventh.

1 MR. LIU: Yes.

2 JUSTICE BARRETT: It's what Judge  
3 Kethledge relied on in the Sixth.

4 MR. LIU: We -- we -- in all those  
5 circuits, we did. Correct.

6 JUSTICE BARRETT: Okay.

7 MR. LIU: And we did -- we didn't --

8 JUSTICE BARRETT: So it's just that  
9 you didn't make it uniformly across the  
10 circuits?

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

13 JUSTICE BARRETT: Okay.

14 MR. LIU: But we have made it in -- in  
15 the panel briefs in the other cases maybe with  
16 the exception of Garcon at the panel stage.  
17 But, in this case, we made both arguments in  
18 our brief below. In the Ninth Circuit en banc,  
19 we made both arguments. And in the -- in the  
20 Seventh, Eighth, and --

21 JUSTICE BARRETT: Sixth.

22 MR. LIU: -- Sixth Circuit cases, we  
23 made -- we made the distributive argument as  
24 well.

25 CHIEF JUSTICE ROBERTS: Justice



1 Jackson?

2 JUSTICE JACKSON: So I appreciate that  
3 "and" can sometimes mean "or," but this is not  
4 a conversation. This is a statute, and it's a  
5 criminal statute with huge implications for the  
6 lives and well-being of the people who come  
7 through the system.

8 And so I guess what I'm trying to  
9 understand is why the imprecision in this  
10 statute, the fact that you say that there are  
11 two textually grammatically possible readings.

12 Why doesn't that count against the  
13 government? Justice Kagan said, I'm going to  
14 assume lenity applies. Can you help me  
15 understand why it wouldn't?

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

21 Now, if you think this is the type of  
22 --

23 JUSTICE JACKSON: But wait. Why?  
24 Why? That's the thing I don't understand.

25 MR. LIU: It's because the -- the --

1 the definition of penal law that this Court has  
2 embraced, and it goes all the way back to  
3 Blackstone, encompasses laws that define a  
4 crime or that increase or impose a punishment.

5 And this provision here does neither.  
6 It relieves defendants of punishment. It is a  
7 congressional act of lenity. And this Court  
8 has never applied the Rule of Lenity --

9 JUSTICE JACKSON: So you -- you -- you  
10 reject -- even though it has to do with  
11 punishment and the implications of it vary  
12 dramatically depending -- your -- the level of  
13 punishment that a defendant can get varies  
14 dramatically depending upon whether or not it  
15 applies, you say lenity is not a relevant or a  
16 thing that we should consider?

17 MR. LIU: Correct. This Court has  
18 never applied the Rule of Lenity to this type  
19 of statute. It would be an extension of the  
20 Rule of Lenity to a new context.

21 I would analogize this sort of  
22 provision to say a statute that sets forth an  
23 affirmative defense. An affirmative defense to  
24 the substantive prohibition of a crime --

25 JUSTICE JACKSON: But in a civil -- in

1 a civil situation or in a criminal situation?

2 MR. LIU: In a criminal situation.

3 JUSTICE JACKSON: In a criminal  
4 situation?

5 MR. LIU: Correct.

6 JUSTICE JACKSON: An affirmative  
7 defense, you say no lenity?

8 MR. LIU: No lenity, because that's a  
9 type of -- that's not a penal statute. That's  
10 a -- that's not the type --

11 JUSTICE JACKSON: Right. But that  
12 doesn't necessarily have to do with punishment.  
13 I'm talking about we've determined this person  
14 is guilty, he's getting a punishment, and this  
15 statute relates to the range of applicable  
16 penalties that apply to him.

17 Your -- the government's position is  
18 still not a penal statute for the purpose of  
19 lenity if there is ambiguity as to whether or  
20 not it applies?

21 MR. LIU: Correct. And that's because  
22 this -- the reading of this -- this statute can  
23 only benefit the defendant. It's not the type  
24 of statute that could make the defendant --

25 JUSTICE JACKSON: Yeah, but if you

1 don't get it, you don't get the benefit. I  
2 mean, there's a difference, right, in -- in  
3 terms of your penalty presumably if you -- if  
4 you get it versus you don't.

5 MR. LIU: Right. I mean --

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

8 MR. LIU: It's certainly true that the  
9 defendant prefers one reading over the other.  
10 But the type of -- what -- what the Rule of  
11 Lenity cares about is the type of provision  
12 we're talking about and whether it fits the  
13 category of being penal. And a penal  
14 sentencing provision is one that imposes a  
15 punishment or increases it. This one doesn't  
16 do either. It can only go down.

17 Now the reason why we apply lenity in  
18 the first context is because we want to be sure  
19 before a defendant is made worse off that  
20 that's what Congress intended and the defendant  
21 had fair notice.

22 But, when the only direction the  
23 sentence can go is down, those -- those  
24 provisions --

25 JUSTICE JACKSON: The defendant who

1 doesn't get it is not made worse off if  
2 everybody else -- their -- their sentences can  
3 go down, but his can't. You're saying he's not  
4 made worse off?

5 MR. LIU: Not from the perspective of  
6 this type of provision. The -- Congress's  
7 enactment of this type of provision did not  
8 make defendants worse off.

9 JUSTICE JACKSON: Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

12 Mr. Dvoretzky, rebuttal.

13 REBUTTAL ARGUMENT OF SHAY DVORETZKY  
14 ON BEHALF OF THE PETITIONER

15 MR. DVORETZKY: Mr. Chief Justice, I'd  
16 like to start out with your question about  
17 whether Congress focuses on grammar. I think  
18 we have to assume that Congress focuses on  
19 grammar. Congress as a speaker does not get  
20 the benefit of colloquialisms. It's not the --  
21 there's no conversation that people are having  
22 with Congress in the way that you do with a  
23 doctor or somebody else.

24 The only conversation, if you want to  
25 use that analogy, is the conversation that this

1 Court has with Congress by interpreting its  
2 words to mean what they say, and if Congress  
3 disagrees, it can carry on its part of the  
4 conversation by changing the statute.

5 Otherwise, what we end up in is a  
6 guessing game about whether Congress might have  
7 meant this policy or that policy.

8 Instead, the Court should give  
9 Congress clear rules of the road. And, in  
10 fact, the Court should -- should instruct  
11 Congress to follow its own rules of the road,  
12 namely, the Senate Drafting Manual, which in  
13 this case would have called for the use of the  
14 word "or" if Congress meant a distributive  
15 meaning.

16 With respect to Mr. Liu's point that  
17 "and" is distributive in grammar books, the  
18 government has not come up with any examples of  
19 "and" in a negated conjunction in the U.S.  
20 Code. "Reading Law" tells us that when you  
21 have the formulation that someone must not have  
22 A, B, and C, that means all three.

23 The corpus linguistics study supports  
24 that conclusion, that if you had "or" there, it  
25 would be perfectly clear, and using "and" there

1 to express a distributive meaning is unnatural.

2 The -- the -- the government's best  
3 example of a statute is the household items  
4 provision in the Tax Code. First of all, as  
5 Justice Sotomayor pointed out, that says "does  
6 not include," so it's giving -- it's setting  
7 forth a list of examples rather than criteria.

8 Second, just looking at what it's  
9 talking about, food, paintings, antiques, other  
10 objects of art, jewelry and gems, there is  
11 simply no way to combine those things, right?  
12 There is no -- there is no such thing as edible  
13 antique jewelry. It -- it -- it's beyond  
14 absurd to think that there would be.

15 Here, it is not absurd to say that  
16 Congress could have required (A), (B), and (C)  
17 in combination. The government has policy  
18 arguments for why Congress might not have  
19 wanted that, but it's not absurd to think that  
20 it did.

21 With respect to the policy, if you had  
22 an individual defendant who had, let's say, two  
23 violent -- previous violent offenses in -- in  
24 addition to the current drug offense, that  
25 would make that defendant a career offender.

1 And if you walk through the guidelines, you end  
2 up with a guidelines range for an offense level  
3 of 34 for someone like that and a criminal  
4 history category of 6, which is 262 to 327  
5 months. That is a serious long sentence.

6 In addition, if you look at the  
7 Sentencing Commission's 2022 data, there were  
8 approximately 20,000 drug offenders. About  
9 1,000 of them, so around 5 percent, were career  
10 offenders.

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

20 Lastly, with respect to common sense,  
21 the government focuses a lot on common sense,  
22 but it's common sense that if Congress wanted  
23 to say "or," it would have said "or." It knew  
24 how to do that in other parts of this very  
25 sentence, of 3553(f). The -- Congress's own



1 drafting manual says to do so, and that would  
2 be the ordinary meaning -- that would be the  
3 ordinary term to use in order to express the  
4 meaning that the government attributes to this  
5 statute.

6           The Court should again hold the court  
7 to the ordinary meaning of the terms that it  
8 chose, and it's important to do that because,  
9 again, this is a -- this is a criminal statute  
10 where fairness is at stake. Whether you view  
11 that as lenity or whether you view that as the  
12 -- the breadth of a remedial statute, there's  
13 fairness at stake and there's somebody's  
14 liberty at stake. And if Congress wants to use  
15 -- Congress needs to use terms clearly in order  
16 to get the benefit of the government's  
17 interpretation here.

18           CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel. The case is submitted.

20           (Whereupon, at 11:46 a.m., the case  
21 was submitted.)

22

23

24

25

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