

DISTRIBUTIVE, DISJUNCTIVE, AND DISCOMBOBULATED: INTERPRETING THE WORD “AND” IN 18 U.S.C. § 3553(F)(1)

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INTRODUCTION

In 2018, Congress enacted the First Step Act, “the culmination of a bi-partisan effort to improve criminal justice outcomes, as well as to reduce the size of the federal prison population while also creating mechanisms to maintain public safety.”¹ The Act includes a “safety valve” in which mandatory minimums for certain criminal drug offenses would not apply.² The Act, however, provides that to qualify for the safety valve, the court must find that

(1) the defendant **does not have**—

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

¹ *An Overview of the First Step Act*, FED. BUREAU OF PRISONS, <https://www.bop.gov/inmates/fsa/overview.jsp> [<https://perma.cc/G2XA-7SBW>] (last visited June 2, 2023).

² 18 U.S.C. § 3553(f) (applying the safety valve to 21 U.S.C. §§ 841, 844, 846, 960, 963 and 46 U.S.C. §§ 70503, 70506).

(B) a prior 3-point offense, as determined under the sentencing guidelines;
and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines³

This statutory framework is unique. As the Fifth Circuit recently observed in *United States v. Palomares*, it could not find any other case interpreting a negative prefatory phrase followed by an em dash and a conjunctive list.⁴ Its operation has “perplex[ed]” numerous federal courts, and several circuits reached widely varying understandings.⁵ It quickly became a battleground in statutory interpretation, both within textualism and between textualists and nontextualists.⁶ At heart, this debate centers around the word “and” in the statute. Seemingly benign, this word will determine whether numerous individuals are subject to mandatory minimums for certain drug offenses.

There are numerous canons at play in this debate, but two are fundamental: the conjunctive/disjunctive and ordinary meaning canons. Justice Antonin Scalia and Bryan Garner, in *Reading Law*, explain that the ordinary meaning canon dictates that “words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense.”⁷ In comparison, the conjunctive/disjunctive canon dictates that “[a]nd joins a conjunctive list, or a disjunctive list”⁸ They warn, however, that “with negatives, plurals, and various specific wordings there are nuances.”⁹

The conjunctive interpretation, adopted by the Fourth, Ninth and Eleventh Circuits, means that the defendant must violate all three sub-

³ *Id.* (emphasis added).

⁴ 52 F.4th 640, 644 (5th Cir. 2022). Compare *United States v. Jones*, 60 F.4th 230 (4th Cir. 2023) (holding that a defendant must violate each subpart to be ineligible for the safety valve), *United States v. Lopez*, 998 F.3d 431 (9th Cir. 2021) (same), and *United States v. Garcon*, 54 F.4th 1274 (11th Cir. 2022) (same), with *Palomares*, 52 F.4th 640 (holding that a violation of any one of the subparts renders a defendant ineligible for the safety valve), *United States v. Haynes*, 55 F.4th 1075 (6th Cir. 2022) (same), *United States v. Pace*, 48 F.4th 741 (7th Cir. 2022) (same), and *United States v. Pulsifer*, 39 F.4th 1018 (8th Cir. 2022) (same).

⁵ *Palomares*, 52 F.4th at 642 n.1.

⁶ Readers may see the purportedly textualist opinions on both sides of the “and” debate as differences in the application of textualism, as different versions of textualism, or both. This Note presumes that what Professor Tara Grove calls “formalistic textualism” is the superior mode of textualism, employed in cases such as *Bostock v. Clayton County*, and “emphasizes semantic context and downplays normative and consequential concerns.” See Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 290 (2020).

⁷ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 69 (2012).

⁸ *Id.* at 116.

⁹ *Id.* Of course, all canons are subject to such limitations as none are absolute. *Id.* at 59.

provisions of section 3553(f)(1) to be ineligible for the safety valve.¹⁰ In contrast, the conjunctive-but-distributive approach—functionally indistinguishable from a disjunctive approach—distributes the phrase “does not have” to each of the provisions, effectively turning the “and” into an “or” so that a defendant is ineligible for the safety valve if he or she violates even one of the sub-provisions. The Fifth, Sixth, Seventh, and Eighth Circuits have adopted this approach.¹¹ The Supreme Court has taken note of this circuit split potentially affecting many thousands of individuals in the federal criminal justice system, granting cert in the Eighth Circuit Case *Pulsifer*.¹²

This case comment examines the merits of these competing approaches through a textualist lens, ultimately concluding that the conjunctive interpretation is the best interpretation of the statute, regardless of the intent of Congress or any potential policy implications. The conjunctive interpretation holds true to the legal and linguistic reality that “and” is a conjunctive word which, in this context, requires criminal defendants to meet all three listed requirements. The conjunctive-but-distributive camp relies on a purported grammatical rule with minimal support¹³ and seems to rely on an improper consideration of original anticipated application rather than the semantic meaning.

I. THE CONJUNCTIVE/DISJUNCTIVE CANON

The conjunctive/disjunctive canon posits that “and” signifies a conjunctive list and “or” signifies a disjunctive list.¹⁴ Within the conjunctive/disjunctive canon, the idea of the negative proof seems to solve the puzzle of “and” in the Act. Consider this conjunctive example: “[t]o be eligible, you must prove that you have not A, B, and C.”¹⁵ In that case, “you must prove that you did not do all three.”¹⁶ Apart from the lack of an em dash and separated list, this example bears striking resemblance to the statutory text at issue in these cases.

Courts disagree as to the simplicity of interpreting this particular provision of the Act. Those judges advocating a conjunctive approach assert

¹⁰ *United States v. Jones*, 60 F.4th 230, 232 (4th Cir. 2023); *United States v. Lopez*, 998 F.3d 431, 433 (9th Cir. 2021); *United States v. Garcon*, 54 F.4th 1274, 1276 (11th Cir. 2022).

¹¹ *United States v. Palomares*, 52 F.4th 640, 643 (5th Cir. 2022); *United States v. Haynes*, 55 F.4th 1075, 1078–79 (6th Cir. 2022); *United States v. Pace*, 48 F.4th 741, 754 (7th Cir. 2022); *United States v. Pulsifer*, 39 F.4th 1018, 1021–22 (8th Cir. 2022).

¹² *Pulsifer v. United States*, 143 S. Ct. 978 (2023) (mem.).

¹³ The Fifth Circuit, for example, cited only a district court case for this proposition. *Palomares*, 52 F.4th at 654 n.12 (citing *Carroll v. Trump*, 498 F. Supp. 3d 422, 433 n.42 (S.D.N.Y. 2020)).

¹⁴ SCALIA & GARNER, *supra* note 7, at 116.

¹⁵ *Id.* at 120.

¹⁶ *Id.*

that the issue is simple: and means and.¹⁷ This approach incorporates dominant and important lessons of statutory interpretation—that one ought to follow the plain meaning of the text. Without delving into dictionaries and technical logic, all seem to know the basic distinction between “and” and “or.” When a court says “and means and,” it purports to keep true to its mission to interpret the law as written in a plain and simple way. What appears to be a simple issue has generated hundreds of pages of opinions and a deep circuit split—all over the word “and.”

Others argue that such a conclusion is not so simple.¹⁸ Almost all seem to agree that the word “and” means “and” in that it is conjunctive.¹⁹ However, the Eighth Circuit found that the list was conjunctive, but that the phrase preceding the em dash “does not have” is *distributed* to the list in (f)(1).²⁰ As the majority explains, “[t]he important question here is [not conjunctive or disjunctive, but] in what sense the statute uses the word ‘and’ in the conjunctive.”²¹ The Eighth Circuit and others who have followed its reasoning argue that “and” may be conjunctive in a joint or distributive sense.²² The conjunctive-but-distributive camp uses context and separate canons to conclude that the distributive reading is more plausible.²³

It is difficult to determine the difference between a disjunctive approach and a conjunctive-but-distributive approach in this context. The end result is clearly the same in *Pulsifer* and the Eighth Circuit opinion does not appear to explain such a distinction. Judge Kirsch, concurring in the Seventh Circuit decision *United States v. Pace*, concedes “that in this statute and others like

¹⁷ See, e.g., *United States v. Palomares*, 52 F.4th 640, 659 (5th Cir. 2022) (Willett, J., dissenting) (“We must take Congress at its word: ‘and.’”); *United States v. Haynes*, 55 F.4th 1075, 1080 (6th Cir. 2022) (Griffin, J., dissenting) (“I conclude that ‘and’ should indeed mean ‘and[]’”); *United States v. Lopez*, 998 F.3d 431 (9th Cir. 2021) (“Put another way, we hold that ‘and’ means ‘and.’”).

¹⁸ *Haynes*, 55 F.4th at 1078 (“It turns out that ‘and’ has more meanings than one might suppose.”).

¹⁹ The Fifth Circuit in a footnote distinguishes between the Eighth Circuit’s conjunctive-but-distributive approach and its characterization of the Seventh Circuit’s approach as nearly disjunctive. *Palomares*, 52 F.4th at 642 n.1. However, the majority opinion in *Pace* seems to have conflated the two arguments. At one point, the majority writes that “the em-dash serves to modify each requirement” but at other points refers to their approach as a disjunctive one. Compare *United States v. Pace*, 48 F.4th 741, 754 (7th Cir. 2022) (explaining the distribution), with *id.* at 755 (“The words of the statute, the canons of statutory construction, the legislative history surrounding the statute, and the purpose of the statute all support the disjunctive interpretation.”). Judge Kirsch’s concurrence, however, discusses the conjunctive-but-distributive approach at length. *Id.* at 756–60 (Kirsch, J., concurring).

²⁰ *United States v. Pulsifer*, 39 F.4th 1018 (8th Cir. 2022) (emphasis added).

²¹ *Id.* at 1021 (citing 1A NORMAN J. SINGER & SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 21:14 (7th ed. 2021)).

²² *Id.* (citing BRYAN A. GARNER, GARNER’S DICTIONARY OF LEGAL USAGE 639 (3d ed. 2011)); *Pace*, 48 F.4th at 754 (explaining that the “em-dash serves to modify each requirement.”); *Palomares*, 52 F.4th at 644 (same).

²³ *Pulsifer*, 39 F.4th at 1021.

it, a distributive reading makes ‘and’ interchangeable with a disjunctive ‘or.’”²⁴

Perhaps there is some validity to the distinction in other contexts, but to subdivide “and” into joint and distributive uses seems to violate the key canons at issue: conjunctive/disjunctive and ordinary meaning. As the Fourth Circuit put it in *Jones*, this distributive reading “is really no more than an elaborate way of saying that ‘and’ means ‘or.’”²⁵ Like the Eighth Circuit, Judge Kirsch looks to plain meaning and context to determine which conjunctive form applies.²⁶

II. ORDINARY MEANING CANON

The opinions across the board emphasize the importance of the ordinary meaning canon and the importance of interpreting statutes based on their plain text. Besides the simple phrase “and means and,” the circuits rely on a host of plain language examples. In support of plain language, the Fifth Circuit gives the following example: “To enter the stadium, you must not have—(a) a weapon; (b) any food; and (c) any drink.”²⁷ Any ordinary user of the English language, the court argued, would understand that each prohibition is barred individually.²⁸ No reasonable person would believe that he or she was allowed to bring in a weapon just because he or she did not bring in food or drink. But in ordinary speech, “and” means different things in different contexts. For example, Judge Willett, in dissent, provides his own plain language example: “[D]on’t drink and drive.”²⁹ In this example, it is clear that someone can do one of those actions, but not both simultaneously.

Plain language examples are common in modern statutory interpretation debates. Justices Kagan and Sotomayor, for example, battled out the interpretation of a child pornography statute using two different plain language examples in relation to the last-antecedent canon.³⁰ Justice Sotomayor in the majority uses the example “a defensive catcher, a quick-footed shortstop, and a pitcher from last year’s World Champion Kansas City Royals” to suggest that the team mentioned at the end of the series applies

²⁴ *Pace*, 48 F.4th at 756 (Kirsch, J., concurring).

²⁵ *United States v. Jones*, 60 F.4th 230, 236 (4th Cir. 2023).

²⁶ *Pace*, 48 F.4th at 756 (Kirsch, J., concurring).

²⁷ *Palomares*, 52 F.4th at 644.

²⁸ *Id.*

²⁹ *Id.* at 653 (Willett, J., dissenting) (alteration in original) (quoting SCALIA & GARNER, *supra* note 7, at 116).

³⁰ *See Lockhart v. United States*, 577 U.S. 347, 347 (2016) (interpreting the phrase “involving a minor or ward” at the end of a phrase in 18 U.S.C. § 2252(b)(2)).

only to the pitcher.³¹ In dissent, Justice Kagan countered with the example where a friend hoped to meet “an actor, director, or producer involved with the new Star Wars movie.”³² In her example, the ordinary listener would understand that all members of the cast and crew were to be from Star Wars rather than another movie such as “Zoolander.”³³

Plain language examples facially seem helpful in statutory interpretation, especially for textualism which purports to use plain language. However, the examples in *Palomares* and *Lockhart* show how ineffective these examples really are. Ordinary speech is often quick, informal, and off the cuff. It is not the result of the careful drafting and debate that theoretically occurs in Congress. Instead of relying on just the words, we rely on context and cues to eliminate ambiguity in ordinary speech. While context of course plays a role in textualism,³⁴ the law is neither conversational nor colloquial. Rather, the law is written in the language of the law, which is embedded with such canons and formalities designed to increase clarity.

Despite the fact that legal interpretation relies on the context of canons and formal tools, the plain language examples often utilized in these cases attempt to shift the role of text toward social context under the guise of common sense. By way of example, the government often used the following plain language example: “You must not—(A) lie; (B) cheat; and (C) steal.”³⁵ As two of the conjunctive circuits noted, “‘that understanding has little to do with syntax and everything to do with our common understanding that’ it is immoral to lie, cheat, or steal.”³⁶ The conjunctive-but-distributive circuits employing that example thus are not employing a textualist reading but are instead relying on prior moral knowledge to gloss over the word “and.” This criticism of plain language examples is not to say that textualism is a rejection of plain language, only that it is modified as a more formal language than conversational examples. The plain language examples in *Palomares* are not really based on the nature of language and grammar but reflect communal knowledge about restrictions in sporting venues and driving vehicles.

³¹ *Id.* at 351–52.

³² *Id.* at 362 (Kagan, J., dissenting).

³³ *Id.*

³⁴ Tara Leigh Grove, *The Misunderstood History of Textualism*, 117 NW. U. L. REV. 1033, 1037 (2023) (“In their efforts to distinguish their brand from the bad ‘plain meaning’ days, modern textualists have emphasized that they take account of the ‘context’ of a congressional enactment.”).

³⁵ *United States v. Jones*, 60 F.4th 230, 236 (4th Cir. 2023).

³⁶ *Id.* (quoting *United States v. Garcon*, 54 F.4th 1274, 1280 (11th Cir. 2022)).

The average person who reads the list in the majority’s opinion in *Palomares* would reach the same conclusion of the rules regardless of whether there was an “and” or an “or” because experience and context do most of the work. “Don’t drink and drive” is a common phrase understood by context—almost all Americans over the age of sixteen know that driving is legal and drinking is legal for those over the age of twenty-one, but that doing both simultaneously is illegal. In fact, one reading the phrase knows that the law is not actually concerned with doing *both* but doing the former before the latter. In the *Lockhart* examples, the ordinary speaker likely did not consciously think of the last-antecedent canon or how to deliver the message with unmistakable clarity.

However, distinct from everyday parlance, canons and formalism serve as tools of legal interpretation to give clarity to otherwise ambiguous language, all within the structured and historic language of the law. These plain language examples thus serve to muddy the textualist waters by focusing on the anticipated application of the phrase and the moral and social purposes of the statement rather than discerning the semantic content of the writing itself. In this case, the plain language canon properly understood ends with the word “and,” which is a conjunctive word meaning “along with or together with.”³⁷ The negative phrasing before the em dash changes nothing, as “[a]fter a negative, the conjunctive *and* is still conjunctive”³⁸

III. ANTI-SURPLUSAGE CANON

Beyond ordinary meaning and the conjunctive/disjunctive canon, the anti-surplusage canon may also play a role here. The anti-surplusage canon dictates that “[i]f possible, every word and every provision is to be given effect None should be ignored.”³⁹ The conjunctive-but-distributive opinions argue that their approach is the only one which gives effect to each of the subprovisions.⁴⁰ They argue that a defendant with two-point and three-point offenses on his or her record to satisfy (B) and (C) will automatically satisfy (A), which requires more than four criminal history points excluding one-point offenses, thus rendering (A) superfluous.⁴¹

Those in favor of the conjunctive interpretation offer multiple responses. Judge Wood, in dissent, distinguishes between “points” and

³⁷ *Jones*, 60 F.4th at 233 (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 80 (3d ed. 1961)).

³⁸ SCALIA & GARNER, *supra* note 7, at 119.

³⁹ *Id.* at 174.

⁴⁰ *See, e.g., United States v. Pace*, 48 F.4th 741, 754 (7th Cir. 2022).

⁴¹ *Id.*; *see also* 18 U.S.C. § 3553(f)(1).

“offenses,” as does Judge Griffin in dissent.⁴² (A) speaks of points, whereas (B) and (C) refer to offenses that are assigned criminal history points.⁴³ The distinction has meaning, Judge Wood argues, in that “[c]riminal history points are based on past sentences, but not all past sentences generate points.”⁴⁴ With this distinction, the age of the prior offense is relevant for (A), but not (B) and (C).⁴⁵ The conjunctive-but-distributive opinions counter that any points too old to be considered in sentencing would thus be treated as zero points, thus still leaving this surplusage.⁴⁶ For example, “[u]nder the sentencing guidelines, a two-point offense adds no points to the defendant’s criminal-history score if the sentence was imposed more than 10 years before the defendant commenced the present offense.”⁴⁷

The Ninth Circuit offered a different reason that the conjunctive reading does not render a word or phrase superfluous. The *Lopez* court argued that a singular three-point offense would satisfy (B) and (C), but not (A).⁴⁸ Concurring, Judge Smith took issue with such an interpretation, as the majority effectively rewrote (C) to mean “a prior violent offense of at least 2 points” rather than “a prior 2-point violent offense.”⁴⁹ The Eleventh Circuit did not adopt the Ninth Circuit’s reasoning on this point. The conjunctive camp provides yet a third reason that the conjunctive interpretation is not surplusage. Each subprovision has a different purpose: recidivism, serious offenses, and violence, respectively.⁵⁰ Thus, it is not clear that the conjunctive reading renders any of the words in the statute superfluous.

Even if, as the conjunctive-but-distributive camp argues, there may be some surplusage, the anti-surplusage canon is a “rule of thumb” that does not allow the judiciary to rewrite the statute.⁵¹ The conjunctive camp does not appear too concerned with the canon as any attempt to resolve the potential surplusage requires violating the plain language of the statute and effectively amending the “and” to an “or.” Though the anti-surplusage canon can be an

⁴² *Pace*, 48 F.4th at 763 (Wood, J., dissenting in part); *United States v. Haynes*, 55 F.4th 1075, 1082–83 (6th Cir. 2022) (Griffin, J., concurring).

⁴³ *Pace*, 48 F.4th at 763.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 764; *Haynes*, 55 F.4th at 1080 (“[A] prior offense that counts for zero points under that guideline is not a ‘3-point’ or ‘2-point’ offense . . .”).

⁴⁷ *United States v. Garcon*, 54 F.4th 1274, 1281 (11th Cir. 2022) (citing U.S. SENT’G GUIDELINES MANUAL §§ 4A1.1(b), 4A1.1(b) cmt. n.2 (U.S. SENT’G COMM’N 2018)).

⁴⁸ *United States v. Lopez*, 998 F.3d 431, 440 (9th Cir. 2021).

⁴⁹ *Id.* at 444 (Smith, J., concurring).

⁵⁰ *Id.* at 439; *Pace*, 48 F.4th at 764–65 (Wood, J., dissenting).

⁵¹ *Lopez*, 998 F.3d at 441.

important tool in statutory interpretation, it is not so powerful as to allow the judiciary to rewrite the law.⁵²

IV. ABSURDITY, LENITY, AND OTHER CANONS

The above sections have dealt with semantic and otherwise more textual canons. The conjunctive-but-distributive camp also looks to substantive canons. For example, the circuits place varying weight on the anti-absurdity canon. In the conjunctive-but-distributive camp, they point to hypothetical situations and policy implications that seek to undermine the conjunctive interpretation. They argue, for example, that the conjunctive interpretation allows an individual with numerous assault with a deadly weapon and domestic violence convictions to benefit from the safety valve if the prior offenses are all 2-point offenses, despite having over twenty points in total.⁵³

Such arguments underly a historic—but arguably nontextualist—conviction to give effect to the intentions and expected meaning of Congress, much like the dissenters in *Bostock*.⁵⁴ The conjunctive camp emphasizes that the absurdity doctrine is not a tool to question the judgment of Congress or to elicit its efforts in crafting good policy but is a tool to be used only in the case of utterly irrational plain meaning.⁵⁵ The conjunctive camp handles this canon correctly. It is the duty of the courts not to enforce the intent of Congress, but to take Congress at its word and hold its feet to the fire when need be. Ultimately, Congress creates laws via words on the written page—not intentions or expectations.

Finally, a potentially powerful substantive canon—lenity—has played little role in this debate to date. The rule of lenity provides that “[a]mbiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant’s favor.”⁵⁶ Here, the rule of lenity weighs in favor of the conjunctive reading. Modern case law specifies, however, that the canon applies only in the case of “grievous ambiguity or uncertainty in the statute.”⁵⁷ Even the Ninth Circuit rejected the canon’s applicability because their conjunctive interpretation was already more plausible.⁵⁸ The Eleventh Circuit only mentioned it near the end of its opinion after discussing the more

⁵² *United States v. Jones*, 60 F.4th 230, 237 (4th Cir. 2023).

⁵³ *United States v. Haynes*, 55 F.4th 1075, 1079–80 (6th Cir. 2022).

⁵⁴ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754–84 (2020) (Alito, J., dissenting) (arguing that Congress at the time of the law’s passing did not intend for Title VII to cover sexual orientation or identity and that no reasonable person would have believed it did at the time).

⁵⁵ *See, e.g., Lopez*, 998 F.3d at 438 (explaining that the interpretation need not be wise, just rational).

⁵⁶ SCALIA & GARNER, *supra* note 7, at 296.

⁵⁷ *United States v. Pulsifer*, 39 F.4th 1018, 1023 (8th Cir. 2022) (quoting *Muscarello v. United States*, 524 U.S. 125, 139 (1998)).

⁵⁸ *Lopez*, 998 F.3d at 443.

prominent canons and noted that the rule of lenity is merely an alternative argument in their favor.⁵⁹ Thus the persuasive force of the canon may be limited.⁶⁰ Ultimately, concerns for these canons and the anti-surplusage canon at best support either interpretation. Yet it is only the conjunctive approach that stays true to the plain language⁶¹ of the statute and employs a properly textualist methodology.

CONCLUSION

Section 3553(f)(1) is a perplexing statute, and its unartful drafting will have major consequences for criminal sentencing based on its interpretation. All centering around the word “and,” circuit courts are deeply divided over the meaning of a word that ordinary users of the English language understand with no difficulty—or so we think. If the practical importance of this provision were not enough, this deep divide pitting committed textualists against one another is an example of a much more abstract debate over textualism and how far to divorce the plain language from the context or expected meaning of the drafters. While it appears more plausible that Congress *meant* for each subprovision to be sufficient to disqualify a defendant for the safety valve, the ordinary and legal meaning of the word “and” holds otherwise.

⁵⁹ United States v. Garcon, 54 F.4th 1274, 1285 (11th Cir. 2022). Judge Rosenbaum did, however, emphasize the rule of lenity in her concurrence. *Id.* at 1285–86 (Rosenbaum, J., concurring).

⁶⁰ Circuits have cited some other canons that received lesser attention. Examples include the consistent usage canon, which says that the same words in a statute relating to the same or similar ideas are deemed to have the same meaning. *Garcon*, 54 F.4th at 1278 (citing *Util. Air Regul. Grp. v. Env’t Prot. Agency*, 573 U.S. 302, 319 (2014)). The conjunctive-but-distributive camp attempts to use context in order to read the word “and” differently between subprovisions of section 3553(f). *United States v. Pace*, 48 F.4th 741, 754–55 (7th Cir. 2022). Also discussed is the canon that material variations in terms mean that those terms have different meanings, referring to the differences in the usage of the words “or” and “and” throughout section 3553(f). *Garcon*, 54 F.4th at 1279 (citing SCALIA & GARNER, *supra* note 7, at 170). The argument is fairly straightforward: throughout section 3553(f) and the surrounding sections, the statute uses the words “and” and “or” in different lists. *Garcon*, 54 F.4th at 1279; *see also* 18 U.S.C. § 3553(f)(2), (4).

⁶¹ Plain language meaning the semantic content, not via the use of often unhelpful plain language examples. *See supra* Part II.