No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DARIN KAUFMANN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PROOF OF SERVICE

State of Illinois)
) ss
County of Champaign)

COLLEEN McNICHOLS RAMAIS, being first duly sworn on oath, deposes and states as follows:

1. That on January 7, 2020, the original and ten copies of the petition for writ of certiorari and motion to proceed *in forma pauperis* in the above-entitled case were deposited with Federal Express in Urbana, Champaign County, Illinois,

properly addressed to the Clerk of the United States Supreme Court and within the time for filing said petition for writ of certiorari; and

2. That an additional copy of the petition for writ of certiorari and motion to proceed *in forma pauperis* was served upon the following counsel of record for Respondent:

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United States Department of Justice
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Washington, D.C. 20530

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DARIN KAUFMANN, Petitioner

THOMAS W. PATTON
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s/ Colleen McNichols Ramais

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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Now comes the Petitioner, Darin Kaufmann, by his undersigned federal public defender, and pursuant to 18 U.S.C. § 3006A, and Rule 39.1 of this Court, respectfully requests leave to proceed *in forma pauperis* before this Court, and to file the attached Petition For Writ Of Certiorari to the United States Court of Appeals for the Seventh Circuit without prepayment of filing fees and costs.

In support of this motion, Petitioner states that he is indigent, was sentenced to a term of imprisonment in the United States Bureau of Prisons, and was

represented by the undersigned counsel pursuant to 18 U.S.C. § 3006A in the United States Court of Appeals for the Seventh Circuit.

DARIN KAUFMANN, Petitioner

THOMAS W. PATTON
Federal Public Defender

s/ Colleen McNichols Ramais

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Date: January 7, 2020

No. _____

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Federal law prohibits the transport, receipt, distribution, sale, and possession of visual depictions of minors engaging in sexually explicit conduct whose production involves the use of a real minor actually engaged in that conduct, commonly referred to as child pornography. 18 U.S.C. § 2252(a). The penalties for this offense, outlined in subsection (b) of the statute, are enhanced for any person who has a prior conviction under the laws of any State relating to, *inter alia*, "the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography." 18 U.S.C. § 2252(b)(1), (b)(2).

The questions presented are:

1. Did the Seventh Circuit err in holding that the categorical approach does not apply when determining whether a state conviction triggers a sentencing enhancement under 18 U.S.C. § 2252(b)?

2. What effect, if any, does the "relating to" language in 18 U.S.C. § 2252(b) have on the categorical approach applied to determining whether a prior offense is properly considered a sentence-enhancing predicate?

3. Does Indiana Code § 35-42-4-4, which criminalizes the possession of material that is not child pornography and protected by the First Amendment, categorically "relate to" the possession of child pornography for the purposes of triggering the mandatory minimum under 18 U.S.C. Section 2252(b)?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Darin Kaufmann respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is published at 940 F.3d 377, and appears in Appendix A to this Petition. The orders of the United States District Court for the Northern District of Indiana overruling Mr. Kaufmann's objections to the application of the heightened mandatory minimum sentence are unpublished, and appear at Appendices B and C.

JURISDICTION

The court of appeals entered its judgment on October 9, 2019. Pet. App. 1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In the present case, Mr. Kaufmann pleaded guilty to knowingly receiving child pornography in interstate commerce in violation of 18 U.S.C. § 2252(a)(2), and to knowingly possessing child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). 18 U.S.C. § 2252(a) provides, in relevant part:

> Any person who--
> …
> (2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate

or foreign commerce or in or affecting interstate or foreign commerce through the mails, if--
(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
(B) such visual depiction is of such conduct;
…
(4) either--
…
(B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if--
(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

18 U.S.C. § 2252(b) provides:

(1) Whoever violates or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but if such person has a prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 10 years, or both, but if any visual depiction involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of Title 10 (

> the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

The district court imposed an enhanced sentence, finding that Mr. Kaufmann was subject to the enhanced penalties of both Sections 2252(b)(1) and (b)(2) based on a prior conviction under Indiana Code Section 25-42-4-4(c). At the time of his conviction, the Indiana statute provided:

> A person who knowingly or intentionally possesses:
> (1) a picture;
> (2) a drawing;
> (3) a photograph;
> (4) a negative image;
> (5) undeveloped film;
> (6) a motion picture;
> (7) a videotape;
> (8) a digitized image; or
> (9) any pictorial representation;
> that depicts or describes sexual conduct by a child who the person knows is less than sixteen (16) years of age or who appears to be less than sixteen (16) years of age, and that lacks serious literary, artistic, political, or scientific value commits possession of child pornography, a Class D felony.

Ind. Code § 35-42-4-4(c) (2007).

STATEMENT OF THE CASE

This case presents an opportunity for this Court to resolve multiple circuit splits that have emerged as courts attempt to reconcile the categorical approach used in other enhancement provisions and based in constitutional protections with the "relating to" language found in the sentencing enhancement of 18 U.S.C.

§ 2252(b). First, this Court should bring the Seventh Circuit in line with all other circuits, reversing the Seventh Circuit's erroneous holding that the categorical approach does not apply to determine whether a prior state law conviction can be used to enhance the mandatory minimum sentence applicable to a defendant's current conviction under 18 U.S.C. §§ 2252(b)(1) and (b)(2), and rejecting its adopted "heartland" approach. Second, the Court should clarify how a modifier such as "relating to" alters the traditional categorical inquiry, if at all, to resolve confusion among the circuit courts.

I. Legal background

The so-called "categorical approach" must be used whenever a prior conviction triggers a statutory mandatory-minimum enhancement, as, under the Sixth Amendment, "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found by a reasonable doubt," with the narrow exception of the fact of a prior conviction. *Alleyne v. United States*, 570 U.S. 99, 103, 111 n. 1 (2013). This Court has carved out this exception for the "simple fact of a prior conviction" to the general requirement that facts that increase a maximum or minimum penalty must be submitted to a jury because these simple "facts" each carry with them Sixth Amendment and due process procedural safeguards. *Apprendi v. New Jersey*, 530 U.S. 466, 488 (2000). Significantly, "a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense.… He can do no

more, consistent with the Sixth Amendment, than determine what crime *with what elements*, the defendant was convicted of." *Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016) (emphasis added). This

> elements-focus avoids unfairness to defendants. Statements of "non-elemental fact" in the records of prior convictions are prone to error precisely because their proof is unnecessary. At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he "may have good reason not to" - or even be precluded from doing so by the court. When that is true, a prosecutor's or judge's mistake as to means, reflected in the record, is likely to go uncorrected. Such inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence.

Id. at 2253 (citations omitted).

The language in the mandatory-minimum enhancement here refers to a prior conviction, rather than prior conduct, and the only constitutional way to apply the enhancement without proving the prior conduct beyond a reasonable doubt is to apply a strict categorical approach to the question of whether a prior conviction triggers the enhancement to the statutory sentencing range. 18 U.S.C. § 2252(b)(1), (b)(2) (applying the enhancement for a "prior conviction"); see also *Mathis*, 136 S. Ct. 2243, 2252-53 (2016) (explaining the "three basic reasons for adhering to an elements-only inquiry," which apply with equal force to the issue at hand).

Under the categorical approach, courts must examine the elements of the statute forming the basis of the defendant's conviction and compare them to either the listed federally defined crime, or the appropriate "generic" version of the listed offense. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986 (2015); *Descamps v. United States*,

570 U.S. 254, 257 (2013). The prior conviction will only be used in an enhancement scheme such as this one "if the statute's elements are the same as, or narrower than, those of the generic offense" or the federal statutory definition of the offense. *Descamps*, 570 U.S. at 257; *Mellouli*, 135 S. Ct. at 1986. The inquiry seeks to determine whether the state offense "necessarily involved" facts that would satisfy the federal offense, presuming that the conviction "'rested upon [nothing] more than the least of th[e] acts' criminalized." *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)) (alterations in original).

Aside from the Seventh Circuit, the Federal Courts of Appeals have agreed that the categorical approach guide must guide their inquiry under the enhancement provisions of Section 2252(b), though, as discussed *infra*, its application has been far from uniform. See, *e.g.*, *United States v. Reinhart*, 893 F.3d 606, 611 (9th Cir. 2018); *United States v. Bennett*, 823 F.3d 1316, 1321 (10th Cir. 2016); *United States v. Colson*, 683 F.3d 507, 509 (4th Cir. 2012). In the instant case, however, the Seventh Circuit unequivocally confirmed that, in its view, "a § 2252(b) enhancement does not require the state statute of conviction to be the same as or narrower than the analogous federal law," because "the categorical approach does *not* apply to § 2252(b)(2)." Pet. App. at 2a, 6a (citing *United States v. Kraemer*, 933 F.3d 675, 683 (7th Cir. 2019)) (emphasis added). This case presents an opportunity for this Court to confirm that the categorical approach applies to

Section 2252(b), consistent with the constitutional protections underpinning its use for sentencing enhancements to statutory minimum and maximum sentence predicated on the fact of a prior conviction. See *Alleyne*, 570 U.S. at 103, 111 n. 1; *Apprendi*, 530 U.S. at 488. This case also provides the Court with an opportunity to clarify the interplay between the potentially broadening "relating to" language and the application of the elements-to-elements comparison called for by the categorical approach. The petition should be granted.

II. Factual background

Petitioner Darin Kaufmann was arrested after stealing money from an elderly man who he had been employed to care for in return for room and board. Pet. App. 2a. After his arrest, the man's family found child pornography among Mr. Kaufmann's belongings. *Ibid.*

III. Proceedings below

Petitioner pleaded guilty in the Southern District of Indiana to receipt of material involving the sexual exploitation of a minor, in violation of 18 U.S.C. § 2252(a)(2), and to possession with intent to view such material, in violation of 18 U.S.C. § 2252(a)(4)(B). Pet. App. 8a. The United States Probation office prepared a Presentence Investigation Report, in which it concluded that the enhanced penalties outlined in Section 2252(b) were applicable to petitioner, due to "a conviction under Indiana state law for the possession of child pornography." Pet. App 8a–10a.

Petitioner first objected to this assessment, arguing, as pertinent here, that under the rule laid out in *Mathis*, his prior conviction could not qualify as a predicate offense. Pet. App. 10a; *Mathis*, 136 S. Ct. 2243. The district court explicitly declined to extend *Mathis*'s categorical approach applied to the Armed Career Criminal Act to Section 2252(b). Pet. App. 10a–11a. Subsequently, petitioner filed a motion to reconsider this ruling, arguing that his prior Indiana conviction could not support an enhancement under the categorical approach. Pet. App. 12a–13a. While noting that neither this Court nor the Seventh Circuit have previously explicitly extended the categorical approach to sentencing for sex crimes offenses, the district court maintained that, even if it were to apply the categorical approach, it would arrive at the same result. Pet. App. 16a. The district court held that the term "child" in the statute indicated that the statute only criminalized depictions of minors and, thus, "the Indiana statute is narrower, not broader, than the federal law." Pet. App. 18a–19a. The district court subsequently sentenced petitioner in accordance with the heightened penalty provisions to 15 years' imprisonment on each count, to run concurrently.

In the court of appeals, petitioner again challenged the use of his prior Indiana conviction as a predicate offense for the enhancement provision, arguing that it was categorically over-broad to constitute an offense "relating to … possession … of child pornography" under either enhancement provision of Section 2252(b). Pet. App. 3a–4a. The Seventh Circuit affirmed petitioner's sentence,

holding that the categorical approach does not apply to the enhancement provisions of Section 2252(b) and that petitioner's conviction constituted a predicate offense because the Indiana statute falls inside the "heartland" of federal possession of child pornography restrictions. Pet. App. 7a.

As this decision was consistent with recent Seventh Circuit case law, petitioner did not file a petition for rehearing or rehearing en banc.

REASONS FOR GRANTING THE PETITION

The federal courts of appeals are now divided over related questions regarding the implementation of the enhancement provisions of the federal sexual exploitation framework relating to prior convictions. First, the Seventh Circuit has departed from the consensus of its sister circuits in holding that the categorical approach does not apply to the inquiry, and instead using a "heartland" analysis. Second, federal courts of appeals have inconsistently modified the standard categorical approach based on varying interpretations of "relating to" in the enhancement provision, creating a splintered application of this enhancement across circuits. 18 U.S.C. § 2252(b).

I. Federal courts are divided over the questions presented.

The Seventh Circuit in this case unequivocally held that its prior decision in *United States v. Kraemer*, 933 F.3d 675 (7th Cir. 2019), stood for the proposition that "the categorical approach does not apply to § 2252(b)(2)." Pet. App. 6a (citing *Kraemer*, 933 F.3d at 683). With this sweeping pronouncement, the court eschewed

any elemental examination of the purported predicate offense completely, concluding that, because the statute criminalizes, *inter alia*, knowing possession of sexually explicit images produced by actual minors, it bears some connection to federal possession of child pornography and could be used to enhance petitioner's sentence. Pet. App. 7a. This position is at odds with every other Circuit that has considered the issue, which have all held that the starting point for determining whether an enhanced penalty is appropriate under Section 2252 is the categorical approach as outlined by this Court in *Taylor v. United States*, 495 U.S. 575 (1990) and *Descamps v. United States*, 570 U.S. 254 (2013).[1] This case presents an opportunity for this Court to resolve an initial circuit split over whether the categorical approach applies at all.

[1] See *United States v. Barker*, 723 F.3d 315, 321 (2d Cir. 2013) (applying the categorical approach to determine while a prior state conviction triggers Section 2252(b)(2)'s mandatory minimum); *United States v. Landry*, 733 Fed. Appx. 693, 695-96 (4th Cir. 2018) (applying categorical approach to Section 2252(b)(2)'s enhancement); *United States v. Mateen*, 806 F.3d 857, 859 (6th Cir. 2015) ("when deciding whether a prior state-law conviction triggers an enhanced sentence, we begin with a categorical approach."); *United States v. Cover*, 703 F.3d 477, 481 (8th Cir. 2013) (applying categorical approach in 2252(b)(2) case); *United States v. Reinhart*, 893 F.3d 606, 615 (9th Cir. 2018) (using the "usual, elements-based, categorical approach" to determine whether a prior state statute triggers a mandatory minimum under Section 2252(b)(2) for defendants with prior offenses "relating to" child pornography); *United States v. Bennett*, 823 F.3d 1316, 1320-21 (10th Cir. 2016) (categorical approach applies to Section 2252(b)(2)). See also *United States v. Goguen*, 2018 U.S. Dist. LEXIS 195829, *11 (D. Maine, Nov. 16, 2018) (noting that while the First Circuit has not squarely addressed the issue, the inquiry begins with the categorical approach); *United States v. Galo*, 239 F.3d 572, 582 (3d Cir. 2001) (categorical approach applies to 18 U.S.C. § 2251(d), which contains the same language as Section 2252(b)(2)); *United States v. Johnson*, 681 Fed. Appx. 735, 739 (11th Cir. 2016) (categorical approach applies to identical language in 18 U.S.C. § 2251(e) and 18 U.S.C. § 2252A(b)(1)).

Moreover, this case provides the Court an opportunity to bring clarity to a muddled area of the law regarding the phrase "relating to" in Section 2252(b) and the effect it has on the operation of the categorical approach. Courts have held that, with respect to prior child pornography offenses, the proper approach is to either 1) conduct a strict comparison between the state statute and federal child pornography offenses, see *United States v. Reinhart*, 893 F.3d 606, 614–16 (9th Cir. 2018), or 2) conduct an elements-based approach, but only ask whether the state statute "stands in some relation to, pertains to, or has a connection with" the federal offense to trigger the enhancement, see, *e.g.*, *United States v. Bennett*, 823 F.3d 1316 (10th Cir. 2016). Additionally, there is disagreement regarding how to determine whether a state statute "relates to" child pornography versus "relates to" sexual abuse. Compare *United States v. Sullivan*, 797 F.3d 623, 640–41 (9th Cir. 2015) ("relating to" takes on a broad meaning when the Section 2252 enhancement is based on a prior conviction "relating to" sexual abuse), with *United States v. Reinhart*, 893 F.3d 606, 614–16 (9th Cir. 2018) ("relating to" is read narrowly if the defendant's prior state conviction is "relating to" child pornography). The confusion surrounding this statutory language creates inconsistent results that this Court has the power to remedy.

II. The questions presented are important.

As explained *supra*, the categorical approach of comparing elements of a prior conviction to a federally-defined offense was designed to protect defendants'

important Sixth Amendment rights to be proven guilty beyond a reasonable doubt of any factor that increases their statutory sentencing exposure. See *Alleyne*, 570 U.S. at 103, 111 n. 1; *Apprendi*, 530 U.S. at 488. These principles apply with equal force to the sentencing provisions at issue here.

A. The Seventh Circuit's "heartland" approach is impermissibly vague.

Despite clear direction from this Court, as well its own precedent and the precedent of every other circuit, the Seventh Circuit unequivocally stated that "the categorical approach does not apply to § 2252(b)(2)" and refused to engage in any sort of elemental analysis of the state statute in question. Pet. App. 7a (citing *Kraemer*, 933 F.3d at 683). Rather, the court held that "regardless" of whether prior convictions under the Indiana statute qualified as predicates using the categorical approach, "the convictions support an enhancement under *Kraemer*" because they fall within the "heartland" of federal possession of child pornography. *Id.* The court asked simply if the state law "stand[s] in some relation [to]; [has] bearing or concern [upon]; … pertain[s] [to]; refer[s] [to]; [or brings] in association with or connection with" the topics listed in the enhancement provision. Pet. App. 6a. By focusing on the "heartland" of cases and refusing to engage with the minimum conduct actually prohibited by the state statute, however, this test amounts to nothing more than a repackaging of the "ordinary case" analysis that this Court expressly rejected in *Johnson v. United States*, 135 S. Ct. 2151 (2015). In rejecting the residual clause of 18 U.S.C. § 924(e)(2)(B), this Court in *Johnson* held that judicial assessment should

not be tied to the "ordinary case," but rather should be tied to real-world facts or statutory elements. *Id.* at 2257.

The Seventh Circuit's "heartland" approach appears to do exactly what this Court deemed unconstitutionally vague in *Johnson*, by asking whether the "ordinary" conviction under a state child pornography statute will fit the federal definition for the purposes of Section 2252(b). Simply because the state statute attempts to address the same harm, the sexual exploitation of minors, targeted by the enhancement provision, the court concluded that it relates to possession of child pornography, notwithstanding the fact that the minimum conduct criminalized by the statute involves neither a child nor pornography. Pet. App. 7a. This Court rejected the "ordinary case" standard in *Johnson* and it should take the opportunity to reject the Seventh Circuit's attempted application of an analogous standard to Section 2252(b).

B. A clear application of the categorical approach to either a defined "generic" offense or to a federal criminal statute is required to comply with *Apprendi* and *Alleyne*.

Overwhelmingly, courts have stated that the "relating to" language "broadens" the scope of offenses reached by the enhancement provision beyond requiring a categorical match to a federal criminal statute, when determining whether a state statute relates to sexual abuse. See *Sullivan*, 797 F.3d at 636-637; see also *United States v. Hubbard,* 480 F.3d 341, 348 (5th Cir. 2007); *Kraemer*, 933 F.3d at 677; *Mateen*, 806 F.3d at 860-861. These courts have begun their categorical

approach analysis by defining the generic offense of sexual abuse. *Mateen*, 806 F.3d at 860. Rejecting defendants' arguments that the courts pin the generic definition to a specific federal statutory definition, these courts have found that statutory definitions of "sexual abuse" do not control the inquiry "because the penalty provisions of Section 2252 appear in Chapter 110, which contains a definition section but does not define sexual abuse." *Id.* at 861 (citing 18 U.S.C. § 2256). Thus, these courts reason, because Chapter 110 does not define sexual abuse, the term receives "its ordinary and natural meaning." *Id.* Courts therefore have constructed various generic definitions of sexual abuse. See, e.g., *Mateen*, 806 F.3d at 861 ("sexual abuse . . . connotes the use or treatment of so as to injure, hurt, or damage for the purpose of sexual or libidinal gratification."); *Sullivan*, 797 F.3d at 636-637 (breaking down the definition and giving examples of types of qualifying offenses).

In finding various state convictions to be qualifying predicate offenses, these courts then appear to be crafting a generic federal definition of sexual abuse, through common sense and ordinary meaning, and determining whether it is a categorical match to the underlying statue of conviction. As noted, these circuit courts reject arguments that a 1:1 match to the federal crime of sexual abuse is required because Congress did not define sexual abuse in the same Chapter as the Section 2252 enhancement. Thus, effectively, they apply the normal categorical approach to a generic definition of sexual abuse, and determining whether there is a match between that definition and the state offense.

For example, the Sixth Circuit held that, under this approach, all the conduct in the Ohio statute at issue was a categorical match because "[e]ach section of the statute proscribes sexual contact that is non-consensual by virtue of force, threats of force, impairment, or age, and therefore abusive." *Mateen*, 806 F.3d at 862. The court emphasized that "*all possible violations* of Ohio's gross sexual imposition statute relate to sexual abuse." *Id.* at 863 (emphasis added). Other circuits have reached the same conclusion. See *United States v. Landry*, 733 Fed. Appx. 693, 695-696 (4th Cir. 2018) ("all" conduct proscribed by the Virginia statute categorically involves sexual abuse); *United States v. Johnson*, 681 Fed. Appx. 735, 739 (11th Cir. 2017) (citing *Moncrieffe*, 133 S. Ct. at 1685) ("[w]hen applying the categorical approach, 'we must presume the conviction rested upon nothing more than the least of the acts criminalized'" by the Florida statute); *United States v. Cover*, 703 F.3d 477, 481 (8th Cir. 2013) (*full range* of conduct encompassed by the state statute must "relate to" sexual abuse to qualify as a predicate offense under Section 2252(b)(2)).

This approach used by many circuit courts is consistent with the categorical approach used in other enhancement provisions. See *Mathis*, 136 S. Ct. at 2251 (comparing a state burglary conviction to the elements of generic burglary). The sexual abuse test is not a different kind of analysis that broadens the scope of convictions that trigger Section 2252(b)'s enhancement. Rather, is it is the normal application of the categorical approach, using a generic definition for federal sexual

abuse. The underlying state statute of conviction must still be a categorical match, based on the statute's least culpable conduct, to the generic federal definition of sexual abuse.

There is a circuit split, however, regarding what definition of "child pornography" rightly applies to the enhancement provision. The Tenth Circuit, has applied a parallel analysis to child pornography predicates as sexual abuse predicates to hold that it was not constrained by a federal definition of child pornography. In *United States v. Bennett*, the court recognized that the Colorado child pornography statute may punish possession of visual depictions that fall outside the federal definition of child pornography. 823 F.3d 1322. However, the court relied on the "relating to" language in Section 2252 in holding that even though the Colorado statute was broader than the federal definition of child pornography, it still "related to" child pornography for the purposes of Section 2252 because it had a "connection" with child pornography. *Id.* Just as with the Seventh Circuit's "heartland" approach, this test is amorphous and vague, and liable to lead to conflicting results.

The Ninth Circuit, however, expressly rejected *Bennett*'s rationale. It has held that, when the underlying state conviction "relates to" child pornography, "we do not depart from the usual, elements-based, categorical approach to determine whether [the defendant's] prior state statutes of conviction trigger the federal mandatory minimum provision in § 2252(b)(2) for individuals with prior offenses

'relating to' child pornography." *Reinhart*, 893 F.3d at 615. In doing so, the Ninth Circuit departed from its prior analysis in *Sullivan*, a case that is relied upon by every court (including *Bennett*) to determine that "relating to" has a broadening effect in the sexual assault context.

The *Reinhart* court recognized that previously in *Sullivan* it had accepted the *Mellouli*-based reasoning that guided the Tenth Circuit in *Bennett*. 893 F.3d at 612. *Reinhart* noted that *Sullivan* found that "neither the language nor history of § 2252(b)(2), *as to the sexual conduct and sexual abuse clause*, required that narrow reading." *Id.* at 612-13 (emphasis added). Thus, in *Reinhart*, the government had urged that *Sullivan* and its "broad" reading of "relating to" controlled the outcome, which involved a prior conviction for child pornography. *Id.* at 613. The Ninth Circuit, in disagreeing with the government, recognized that *Sullivan* dealt with the exact same enhancement under Section 2252(b)(2), but that "§ 2252(b)(2) describes a number of prior types of state offenses, some of which include federally defined terms, and some of which do not." *Id.* Accordingly, *Reinhart* found that it was appropriate to look to the separate clauses in Section 2252(b)(2) to determine whether a narrower reading of "relating to" and the categorical approach should apply. *Id.*

Specifically, the Ninth Circuit held that *Reinhart* was distinguishable from *Sullivan* because the applicable term in *Sullivan* (sexual abuse) was not defined within the same chapter that the terms appeared. *Id.* Conversely, there is a federal

definition of child pornography in the same statutory chapter as the sentencing enhancement in § 2252(b)(2); chapter 110. *Id.* Thus, the court determined that "where there are federal definitions in chapter 110 that apply to the relevant "child pornography" clause in § 2252(b)(2), we apply those definitions." *Id.* at 614. "These definitions provide a basis in the statutory text that requires a narrower reading of "relating to."" *Id.* In so holding, *Reinhart* recognized that its decision created a circuit split with the Tenth Circuit on this specific issue. *Id.* However, as *Reinhart* found, this Court cautioned in *Mellouli* that the "relating to" language's interpretation must "somehow be anchored to prevent it from drifting aimlessly." *Id.* at 616 (citing *Bennett*, 823 F.3d at 1327 (Hartz, J., dissenting)). "Here, that anchor is the federal definition of child pornography defined in the same chapter as § 2252(b)(2)." *Id.*

Ultimately, rather than applying a new form of the categorical approach, somehow broadened or narrowed by the "relating to" language, each of these circuit courts, with the exception of the Seventh and arguably the Tenth in *Bennett*, have in essence applied the normal categorical approach to compare the state statute to a federally-defined offense, but looked to context to determine whether the comparison should be to a "generic" offense or to a specific federal criminal statute. Guidance from this court regarding the proper benchmark for an analysis of whether a state statute categorically relates to possession of child pornography (whether it be to some generic definition of child pornography, or whether it is

properly tethered to the definition used in the federal criminal offense) is warranted, to avoid disparities in sentencing between the circuits.

C. A categorical comparison to either a generic definition or the federal offense of possession of child pornography indicates that petitioner's convictions under Indiana Code Section 35-42-4-4(c) are categorically over-broad to constitute predicate offenses.

This Court should grant the petition for certiorari and resolve what has now become a three-way circuit split between the Seventh, Ninth, and Tenth Circuits to clarify the proper test for determining whether a prior state conviction "relates to" the possession of child pornography.

With respect to the "benchmark" definition of "child pornography," petitioner urges this Court to adopt the Ninth Circuit's view. *Reinhart* is well-reasoned and properly applies the principles set forth by this Court in *Mellouli*. As *Reinhart* and *Mellouli* both found, this narrow approach keeps "relating to" anchored to the federal definition of child pornography and prevents it from "drifting aimlessly." The fact that the federal definition of child pornography is found within Chapter 110, just like the enhancement at issue here, distinguishes this case from all the sexual abuse cases cited by *Bennett* and puts this case in line *Mellouli*. There is no need to go searching other titles or chapters to find the federal definition of child pornography when it is defined within the same section as the enhancement. "[B]y focusing on the legal question of what a conviction necessarily established, the

categorical approach ordinarily works to promote efficiency, fairness, and predictability." *Id.* (citing *Mellouli*, 135 S. Ct. at 1987).

The Ninth Circuit's narrow reading of "relating to" and application of the strict categorical approach to the child pornography clause is in line with this Court's decision in *Mellouli*. Neither the Tenth Circuit's broad approach, nor the independently created test by the Seventh Circuit, make sense when the underlying state court conviction "relates to" child pornography when that federal definition is contained within the same Chapter as the enhancement.

Alternatively, this Court should hold that the categorical approach applies and the "benchmark" is a generic child pornography offense. At present, petitioner believes that there is no "generic" definition of child pornography. However, any generic definition of "child pornography," using the ordinary and common sense meaning of those words, would require, at minimum, a "child" and "pornography." As the Second Circuit has held, by including the terms "conviction" and "laws . . . relating to" in Section 2252(b)(2), "Congress recognized variation in the diverse state sexual misconduct laws that could lead to predicate offenses under section 2252(b)(2)." *Barker*, 723 F.3d 324. However, there is no diversity in state child pornography laws that should lead to a predicate offense for Section 2252(b) that does not encompass both of these requirements: they must require 1) a child (or minor), 2) engaged in pornography. See *United States v. X-Citement Video, Inc.*, 513

U.S. 64, 69–73 (1994) (noting that broadening the scope of child pornography restrictions too far would present First Amendment issues).[2]

United States v. Galo, 239 F.3d 572 (3d Cir. 2001), is instructive on this point. In determining whether to apply an enhancement under Section 2251(d), the Third Circuit stated that the starting point was the categorical approach to determine whether the defendant was previously convicted of "laws . . . relating to the sexual exploitation of children." 239 F.3d at 582. In analyzing the Pennsylvania statute at issue, the Third Circuit held that "although the statute *can* include conduct relating to the sexual exploitation of children, it pertains with equal force to conduct such as gambling, underage drinking, or drug use. This statute is aimed at conduct of any nature that tends to corrupt children. It is broad enough to include underage drinking or drug use." *Id.* (emphasis added) The Third Circuit also noted that the second statute at issue could be violated regardless of the victim's age. *Id.* at 583. In finding that the statutes were not a categorical match, the Third Circuit held that Congress did not intend to condition enhancement on "generic convictions of minors that relate to sexual exploitation of minors only because of the specific conduct of

[2] As one district court has already recognized, these concerns are not present when the underlying conviction is for "sexual abuse," because there is no First Amendment issue as there is no concern that innocent parties will be swept up under the scope of the enhancement when the underlying conviction is sexual abuse. See *Goguen*, 2018 U.S. Dist. LEXIS 195829, at *22-*25. While this argument applies when the predict offense relates to sexual abuse, the Indiana statute at issue in this case shows that this Court's concerns in *X-Citement Video* are present when the predicate offense relates to child pornography.

the accused. As the Supreme Court noted in *Taylor*, only in this way can the enhancement be applied in a manner that is both uniform and practical." *Id.*

Under either of these tests, the Indiana state convictions at issue fail to qualify as predicate offenses. As defined for purposes of Chapter 110 of the federal criminal code, "child pornography" both explicitly requires that the visual depiction be of an actual minor, and explicitly excludes approximations, such as drawings, cartoons, or other hand-made, non-photographic pictorial representations. 18 U.S.C. § 2256(8); 18 U.S.C. § 2256(9)(A); 18 U.S.C. § 2256(1); 18 U.S.C. § 2256(11). Even if the Court chooses to read "relating to" broadly, Section 35-42-4-4(c) is still not a categorical match to a "generic" definition of child pornography, as it does not require the offending material include a "child" or be actual "pornography."

A closer look at the Indiana statute reveals its categorical over-breadth. Petitioner's prior convictions under Section 35-42-4-4(c) arise from conduct in 2007. At that time, the Indiana statute provided:

> A person who knowingly or intentionally possesses:
> (1) a picture;
> (2) a drawing;
> (3) a photograph;
> (4) a negative image;
> (5) undeveloped film;
> (6) a motion picture;
> (7) a videotape;
> (8) a digitized image; or
> (9) any pictorial representation;
> that depicts or describes sexual conduct by a child who the person knows is less than sixteen (16) years of age or who appears to be less than sixteen (16) years of age, and that lacks serious literary, artistic, political, or scientific value commits possession of child

pornography, a Class D felony.

Ind. Code § 35-42-4-4(c) (2007). By the plain terms of the statute, it encompasses media, such as drawings and other "pictorial representation[s]," that do not require an actual minor victim to produce. The statute is also not limited to depicting actual minors – by only requiring that the individual pictured "appear[] to be less than sixteen (16) years of age," the statute has no requirement that the state prove that the subject of the depiction is actually underage.

That the statute is not a categorical match is demonstrated by the fact that, since Mr. Kaufmann's conviction, the statute has been amended to reflect a relevant age of eighteen, instead of sixteen, years old. In fact, the relevant statutory language was amended in 2013 to read "…that depicts or describes sexual conduct by a child who the person knows is less than *eighteen (18)* years of age or who appears to be less than *eighteen (18)* years of age…" Ind. Code § 35-42-4-4(c) (eff. July 1, 2013) (emphasis added). The operative language remains unchanged to this day. Ind. Code § 35-42-4-4(d) (eff. July 1, 2017). This suggests that "a child" does not do the work of requiring the person in the image to actually be under eighteen, otherwise the language requiring the individual to merely "appear" to be a minor would be superfluous.

Further, the Court of Appeals of Indiana expressly recognized that the language of the statute was broad enough to extend to images of adults, as long as they appear to be underage, as Mr. Kaufmann contends. *Logan v. State*, 836 N.E.2d

467, 472 (Ind. Ct. App. 2005) ("Subsection 4(c) applies to written descriptions of child pornography, virtual child pornography, and pornography showing youthful-looking adults."). On its face, the statute does not categorically relate to child pornography, as that term is defined for purposes of Section 2252, because it extends to images (or even descriptions of images) whose production did not require the involvement of a minor, by encompassing both drawings and other "pictorial representations" and photographs or other media depicting adults that merely appear to be underage.

Examples of application of the statute in Indiana case law also support this conclusion, as the court of appeals has upheld convictions where the record reflects no more than the individuals pictured "appearing" to be under the relevant age. *See, e.g.*, *Romero v. State*, 904 N.E.2d 395, No. 02A03-0808-CR-413, 2009 WL 865661, at *3 (Ind. Ct. App. 2009) (affirming a conviction where the defendant "admitted … that the boys featured in the eleven-minute video in question *appear to be* under the age of sixteen") (emphasis added). Even where the defendant raised a defense that the website where he procured the offending images contained a disclaimer that the images were all of individuals eighteen years or older, the Court of Appeals concluded that testimony that "the girls in the images appeared to be of 'pubescent' or under legal age," was enough to conclude that the images violated Section 35-42-4-4(c), because "the females in the photograph appeared to be under legal age." *Howell v. State*, 990 N.E.2d 523, No. 47A05-1211-CR-590, 2013 WL 3526403, at *2-3

(Ind. Ct. App. 2013) (emphasis added). These multiple decisions by the Indiana courts show that there is a "realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Moncrieffe*, 569 U.S. at 191. It is not just a realistic probability; it a repeated reality.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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