No. _____

In The Supreme Court of the United States

NATHAN RICHARD VINEYARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Sex Offender Registration and Notification Act ("SORNA"), 34 U.S.C. § 20901 *et seq.*, requires anyone convicted of a sex offense under state law to follow certain federal registration requirements or be convicted of a federal crime. Sex offenses include offenses that have an "element involving sexual contact with another."

This petition presents the important question of whether SORNA extends to anything meeting the dictionary definitions of "sexual" and "contact" or is instead limited to the intentional touching of certain body parts, as the term "sexual contact" is limited in the similar contexts of the U.S. criminal code and numerous state criminal codes.

LIST OF RELATED CASES

1. *United States v. Vineyard*, Case No. 5:17-cr-00383-RDP-JHE, U.S. District Court for the Northern District of Alabama. Judgment entered on April 11, 2018.
2. *United States v. Nathan Richard Vineyard*, No. 18-11690, U.S. Court of Appeals for the Eleventh Circuit. Opinion entered on December 20, 2019.

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Petitioner Nathan Richard Vineyard respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The decision of the district court is unpublished, but is reported at 2017 WL 6367891, and appears at Appendix "A" to the Petition. The Eleventh Circuit's decision affirming Mr. Vineyard's conviction appears as Appendix "B" to the Petition and is published at 945 F.3d 1164 (11th Cir. 2019).

JURISDICTION

The Eleventh Circuit affirmed the district court on December 20, 2019. This Court's jurisdiction in invoked under 28 U.S.C. § 1254(1). This petition is timely filed in accordance with Sup. Ct. R. 13.

The district court had original subject matter jurisdiction under 18 U.S.C. § 3231. It entered its judgment sentencing Mr. Vineyard to 24 months' imprisonment on April 17, 2018. The Eleventh Circuit had appellate jurisdiction under 28 U.S.C. § 1291.

PROVISIONS INVOLVED

34 U.S.C. § 20911(5)(A)(i) provides:

Except as limited by subparagraph (B) or (C), the term "sex offense" means--

> (i) a criminal offense that has an element involving a sexual act or sexual contact with another; […]

STATEMENT OF THE CASE

The government charged Petitioner Nathan Vineyard with failing to register as a sex offender, a violation of SORNA under 18 U.S.C. § 2250(a). Mr. Vineyard moved to dismiss the indictment on the basis that his prior conviction for sexual battery under Tenn. Code § 39-13-505(a)(2) did not qualify as a "sex offense" for purposes of SORNA. The district court denied the motion and the Eleventh Circuit affirmed.

1. Tennessee Conviction

The "sex offense" that qualified Mr. Vineyard for registration under SORNA was a conviction for sexual battery, in violation of Tenn. Code § 39-13-505(a)(2). Under Tennessee law, "sexual battery" requires nonconsensual "sexual contact with a victim by the defendant or the defendant by a victim." Tennessee further defines "sexual contact" as:

> the intentional touching of the victim's the defendant's or any other person's intimate parts, or the intentional touching of the clothing covering the immediate area of the defendant's, or any other person's intimate parts, if that intentional touching can reasonably construed as being for the purpose of sexual arousal or gratification.

Tenn. Code Ann. § 39-13-501(6). At the time of Mr. Vineyard's conviction, intimate parts" included "the primary genital area, groin, inner thigh, buttock, or breast of a human being." Tenn. Code Ann. § 39-13-501(2) (2012).

2. Federal Case in the District Court

Under SORNA, a "sex offense" is defined, in relevant part, as "a criminal offense that has an element involving a sexual act or sexual contact with another." 34 U.S.C. § 20911(5)(A)(i). SORNA does not define "sexual contact." Mr. Vineyard moved to dismiss the indictment, arguing that his Tennessee conviction did not qualify as a "sex offense" under SORNA, and thus, he was not required to register. Citing to the federal definition of "sexual contact" found in 18 U.S.C. § 2246(3)—the provision in the federal code that defines the terms used in Chapter 109A, which addresses sexual abuse under federal law—Mr. Vineyard asserted that the Tennessee definition of "sexual contact" was broader than the generic federal definition of sexual contact.

Following a hearing, the district court denied Mr. Vineyard's motion to dismiss the indictment. In its opinion, the court determined that the plain meaning of "sexual contact" governed, not the definitions found in § 2246. The court reasoned that "Sexual contact" was "touching or meeting of a sexual nature," and that the Tennessee definition of "sexual contact" fell within that definition.

3. The Eleventh Circuit's Affirmance

The Eleventh Circuit affirmed the district court's denial. *United States v. Vineyard*, 945 F.3d 1164 (11th Cir. 2019). The court of appeals refused to interpret "sexual contact" consistently with the definition of "sexual contact" that appears in Title 18. It also refused to apply a definition consistent with the definitions of "sexual contact" that appear in numerous state criminal codes. Instead of looking to these authorities, the court of appeals reasoned that the phrase's ordinary meaning governed, and thus, looked to the dictionary definition of each word to determine the meaning of the phrase as a whole. *Id.* at 1171-72. It held that "sexual contact" means "a touching or meeting of body surfaces where the touching or meeting is related to or for the purpose of sexual gratification." *Id.* at 1172. Next, the court reasoned that Mr. Vineyard's prior sexual battery conviction qualified as a "sex offense," because the Tennessee statute categorically required sexual contact as it had defined that term. *Id.* at 1173. Finally, the Court reasoned that, even under the definition of "sexual contact" set out in Title 18 of the federal code, Tennessee sexual battery would nonetheless categorically include an element of "Sexual contact." *Id.* at 1174-75.

REASONS FOR GRANTING THE PETITION

This petition presents an important federal question concerning the interpretation of a federal criminal statute. An overly broad definition of "sexual contact" risks classifying too many people as "sex offenders" under SORNA. In addition to imposing onerous registration requirements for those convicted of "sex offenses," hundreds of citizens are convicted and imprisoned each year for failing to comply with these requirements. *See* Federal Offenders Sentenced Under Each

Chapter Two Guideline, U.S. Sentencing Commission, *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/Table20.pdf (noting that 380 people were sentenced in fiscal year 2018 with USSG § 2A3.5 as a guideline). This Court has repeatedly granted certiorari to review cases in which the government and lower courts may have interpreted a criminal statute too broadly. *See*, *e.g.*, *United States v. Sineneng-Smith*, 140 S. Ct. 36 (2019) (granting certiorari to review whether federal criminal prohibition against encouraging or inducing illegal immigration for commercial advantage or private financial gain is facially unconstitutional because it is overbroad); *McDonnell v. United States*, 136 S. Ct. 2355, 2373 (2016) (declining to adopt an overly expansive definition of "official act" in a criminal anti-corruption statute, because it risked inclusion of commonplace actions taken by public officials); *Yates v. United States*, 574 U.S. 528, 135 S. Ct. 1074, 1081 (2015) (rejecting governments "unrestrained reading" of criminal provisions of Sarbanes-Oxley Act).

The opinion below is published, thus district courts throughout Alabama, Florida, and Georgia will look to this definition in determining whether a prior conviction triggers SORNA's registration requirement. In fact, courts have already begun relying on that definition. *See United States v. Bemis*, 2020 WL 1046827 (M.D. Fla. Mar. 4, 2020) (dismissing an indictment because the defendant's prior conviction did not have an element of "sexual contact" under the Eleventh Circuit's definition). Accordingly, it is key that this Court intervene and ensure that the definition is not overly broad.

I. The ordinary meaning of sexual contact is narrower than the Eleventh Circuit's definition, because it is limited to contact with specific areas of the body.

The Sex Offender Registration and Notification Act ("SORNA"), 34 U.S.C. § 20901 *et seq.*, requires anyone convicted of a "sex offense" "to provide state governments with (and to update) information, such as names and current addresses, for inclusion on state and federal sex offender registries." *Reynolds v. United States*, 565 U.S. 432, 434 (2012). Failure to register under SORNA is a criminal offense that can result in a sentence up to ten years. 18 U.S.C. § 2250(a).

This Court has not yet addressed the meaning of "sexual contact" under SORNA, but the parties below agreed that the categorical approach applies to determine whether a prior conviction qualifies as a "sex offense" under SORNA. *Vineyard*, 945 F.3d at 1170. Under the categorical approach, a prior conviction will qualify as a "sex offense" under SORNA if the statute of conviction covers the same conduct, or a narrower range of conduct, than SORNA. *Id.; see also Descamps v. United States*, 570 U.S. 254, 260-65 (2013) (explaining the categorical approach analysis under the Armed Career Criminal Act). Thus, to determine whether a state offense falls within SORNA's definition of "sex offense," a court must define "sexual contact."

In assessing whether Mr. Vineyard's prior Tennessee conviction qualified as a sex offense, the Eleventh Circuit first defined the term "sexual contact" as "a touching or meeting of body surfaces where the touching or meeting is related to or for the purpose of sexual gratification." 945 F.3d 1164, 1172 (11th Cir. 2019). But this definition is overly broad.

First, the Eleventh Circuit's interpretation focuses only on the motivation for the contact, instead of analyzing how "sexual" modifies the contact itself. *See United States v. Helton*, 944 F.3d 198, 209 (4th Cir. 2019) (Floyd, J., dissenting) (explaining that the majority's definition of "sexual act" under SORNA—something done voluntarily that relates to sexual gratification—reads "sexual" only as supplying motivation for an act as opposed to modifying the nature of the act itself). Thus, under the Eleventh Circuit's interpretation, bodily contact that is not inherently sexual, such as a handshake, can be transformed into sexual contact based solely on the intent behind it. The better definition interprets "sexual" as modifying the nature of contact, because it limits the contact to areas on the body typically associated with sex—the genitalia, anus, buttocks, groin, inner thigh, and breasts of a person. Thus, the federal generic definition of "sexual contact" should be the intentional touching of these specified parts, for the purpose of sexual gratification.

Second, the lower court failed to consider that "sexual contact" is a term defined elsewhere in the federal code and in the criminal codes of a majority of states. Because the term carries specialized meaning, this Court should look to the term's definitions in other statutes to define it under SORNA. *See* Scalia & Garner, Reading the Law: The Interpretation of Legal Texts 73 (2012) ("As Justice Frankfurter eloquently expressed it: '[i]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." (quoting Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947))).

This Court's decision in *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017), illustrates that principle well. In *Esquivel-Quintana*, the Supreme Court, relying on the categorical approach, determined that an offense involving consensual sex between an adult and a 17 year old did not qualify as "sexual abuse of a minor" under the Immigration and Nationality Act ("INA"). *Id.* at 1572. In determining the federal generic definition of "minor," this Court recognized that analysis first begins with analysis of the statutory language. *Id.* at 1569. Thus, it looked to the definition of "minor" found in several legal dictionaries. *Id.* But the analysis did not stop there. Instead, this Court, recognizing that "minor" is defined elsewhere in the federal criminal code and in various state statutes, looked to those statutes to determine the generic federal definition of the term. *Id.* at 1570-72.

In assessing the definition of "sexual contact," however, the Eleventh Circuit started and ended its analysis with the dictionary definition. *See Vineyard*, 945 F.3d at 1172. The court rejected Mr. Vineyard's argument below that the court should incorporate the definition of "sexual contact" in 18 U.S.C. § 2246, and in doing so, reasoned that "sexual contact" is not a legal term and did not require looking to additional legal sources. *Id.* at 1172-74. But that is precisely what this Court did in *Esquivel-Quintana.*

Because "sexual contact" is a legal term, rather than merely looking to a dictionary definition of the terms, this Court should look to the federal code and state statutes, to determine the federal generic definition. Review of these sources shows that "sexual contact" should defined more narrowly than the Eleventh Circuit's

definition. Specifically, the appropriate definition should be: an intentional touching of the breasts, genitalia, buttocks, "a touching or meeting of body surfaces where the touching or meeting is related to or for the purpose of sexual gratification."

Sexual contact is a term specifically defined in the legal codes of a large majority of states and in the federal criminal code. And those statutes largely define the phrase more strictly than the Eleventh Circuit's definition. Specifically, as opposed to the Eleventh Circuit's broad definition, encompassing any bodily contact done for sexual gratification, it includes only contact with specified intimate body parts. This definition fits better because, unlike the Eleventh Circuit's definition, it focuses more on the nature of the contact as opposed to merely the intent behind it.

The Eleventh Circuit defines "sexual contact" essentially as any bodily contact motivated by sexual gratification. But that interpretation focuses only on the motivation for the contact, instead of analyzing how "sexual" modifies the contact itself. *See United States v. Helton*, 944 F.3d 198, 209 (4th Cir. 2019) (Floyd, J., dissenting) (explaining that the majority's definition of "sexual act" under SORNA—something done voluntarily that relates to sexual gratification—reads "sexual" only as supplying motivation for an act as opposed to modifying the nature of the act itself). Thus, under the Eleventh Circuit's interpretation, bodily contact that is not inherently sexual, such as a handshake, can be transformed into sexual contact based solely on the intent behind it. The better definition, and the definition adopted by a majority of states and the federal code, interprets "sexual" as modifying the nature of

contact, because it limits the contact to areas on the body typically associated with sex.

For example, "sexual contact" is defined in the federal criminal code sections addressing sexual abuse. 18 U.S.C. § 2246(3). The federal code defines the term as "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." Thus, rather than just focusing on the intent behind the bodily contact, the federal statute focuses on the nature of the contact by limiting "sexual contact" to areas of the body that are generally considered intimate or sexual. Similarly, many state statutes likewise limit sexual contact to "intimate" or "sexual" body parts. *See, e.g.,* Ark. Code Ann. § 5-14-101(11) ("'Sexual contact' means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female"); Del. Code Ann. tit. 11, § 761 (defining sexual contact as the intentional touching of the defendant's or another person's "anus, breast, buttocks, or genitalia"); Ga. Code. Ann. § 16-6-5.1(a) (defining "sexual contact" as "any contact involving the intimate parts of either person for the purpose of sexual gratification of either person," and "intimate parts" as the genital area, groin, inner thighs, buttocks, or breast of a person"). A definition of sexual contact limited to specified areas of the body better reflects the definition of "sexual contact."

II. This case provides an ideal vehicle to resolve the question presented.

This case provides an ideal vehicle to resolve the question presented. Mr. Vineyard preserved and fully briefed the issue before both the district court and the court of appeals. Furthermore, this issue is determinative in Mr. Vineyard's case. Mr. Vineyard is charged with a single count of failing to register, in violation of SORNA. If this Court determines that the Eleventh Circuit has defined "sexual contact" too broadly, because it is not limited to specified areas of the body, Mr. Vineyard's prior conviction does not include an element of "sexual contact." Although the Tennessee statute does limit its definition of "sexual contact" to specified areas of the body, it includes areas broader than the proposed generic definition. For example, in *State v. Graham*, the Tennessee Court of Criminal Appeals held that the state had established "sexual contact" where the victim testified that the defendant put his hand "right at the top of [her] panties," even though she also testified that he never touched her between her legs and she could not say whether he touched her "private parts." No. 01-C019110CC00316, 1992 WL 300889, *2, *5 (Tenn. Crim. App. 1992). Tennessee courts have interpreted the statute to apply instances where the only clear contact was with the lower abdomen—where the waistband of panties would sit. Thus, Mr. Vineyard's prior conviction would not categorically qualify as a "sex offense" under SORNA.

CONCLUSION

The petition should be granted.

Respectfully Submitted,

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