No. 20-

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL PORTANOVA,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "categorical approach," which this Court has repeatedly held must be applied in assessing whether a prior state conviction qualifies as a predicate offense for purposes of a federal sentencing enhancement, may be disregarded or "loosened" – as the court of appeals in this case concluded (deepening an existing circuit split) – in child pornography cases.

PARTIES TO THE PROCEEDINGS

The petitioner is Michael Portanova.

The respondent is the United States.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Michael Portanova, hereby petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit.

OPINION BELOW

The opinion of the Third Circuit is reported at 961 F.3d 252 and reproduced at Petition Appendix ("Pet. App.") 1a-26a.

JURISDICTION

The court of appeals entered judgment on May 27, 2020, Pet. App. 1a. This Court has jurisdiction over this timely filed petition under 28 U.S.C. § 1254(1).

STATUTORY PROVISION

The penalty provision in Section 2252(b)(1) provides:

> (b)(1) Whoever violates . . . paragraph . . .(2) . . . of subsection (a) . . . if such person has a prior conviction 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.

18 U.S.C. § 2252(b)(1) (emphasis added).

INTRODUCTION

This case presents whether a so-called "looser categorical approach" (as described by the court of appeals), *see* Pet. App. 8a, 12a, should be applied in cases involving child pornography. This Court has never used that phrase, has never suggested that the standard categorical approach may be "loosened" in any subset of cases, and has indeed said—repeatedly—that the categorical approach must be applied when a statute directs courts to consider whether a prior crime of conviction qualifies as a predicate for an enhancement. *E.g., Mathis v. United States*, 135 S. Ct. 2243, 2251-52 (2016). That includes cases, like this one, in which the statute provides for an enhancement when a prior conviction "relates to" a particular type of crime.

The court of appeals here nevertheless held that the standard approach should be (again, to use the circuit court's own verbiage) "loosened" in child pornography prosecutions, given the seriousness of the offense and the use of "relating to" language in the relevant statutes. *See* Pet. App. 8a. Several other circuits have agreed, while at least one other—the Court of Appeals for the Ninth Circuit—has held to the contrary. *See id*. at 12a-15a. That court, echoed by dissenting opinions in other courts, has said that a "looser categorical approach" is (with apologies for the pun) categorically forbidden by this Court's precedent. *See id*. at 13a-14a.

The issue demands review by this Court. The penalties for child pornography offenses are severe to begin with, and now a division within the circuits has created a geographical punishment disparity. This Court should grant a writ of certiorari to resolve the circuit split and bring uniformity to this area of the law.

STATEMENT OF THE CASE

A. Factual background

Having been sexually abused as a child and suffering from mental health issues, Mr. Portanova turned to the internet and ended up possessing and distributing child pornography. For this, in 2014 state authorities charged him and he pleaded guilty to distributing and possessing child pornography. *See* Pet. App. 3a; CA at 18.[1] The state court sentenced Mr. Portanova to an indeterminate term of imprisonment for 11 ½ to 23 months, followed by a four-year term of probation.

Part of the sentence for the state offense involved counseling and sex-offender treatment. While in treatment in 2017, Mr. Portanova admitted to relapsing and to downloading child pornography. As a result of that admission, state probation officers confronted him, and he confirmed that he had re-offended. *See* Pet. App. 3a; CA at 25. Around the same time, Homeland Security agents had been conducting an online investigation on the BitTorrent network, which allows the sharing of child pornography. *See id.* Those agents connected a cellular telephone with Mr. Portanova's internet protocol address that they believed had files containing child pornography. *See* CA at 25.

[1] CA refers to the appendix filed in the court of appeals.

Mr. Portanova provided a statement to county detectives, admitting to having used peer-to-peer software to download child pornography. *See* Pet. App. 3a; CA at 25. A later forensic examination of his phone revealed videos of child pornography. *See id.*

B. Procedural background

In January 2018, a grand jury returned a one-count indictment, charging Mr. Portanova with having received child pornography in violation of 18 U.S.C. § 2252(a)(2). *See* Pet. App. 2a-3a. The grand jury also alleged that the conduct occurred after state convictions for distributing and possessing child pornography, thus subjecting Mr. Portanova to the enhanced penalties in Section 2252(b)(1). *See id.*

Mr. Portanova pleaded guilty to the offense in October 2018, with counsel noting an objection to applying the mandatory minimum because it should not qualify as a prior conviction under the statute. *See* Pet. 3a-4a. The probation office prepared a presentence report and counsel objected to the enhanced sentence, arguing, among other things, that the district court should not count the state conviction as a qualifying prior conviction and that the language in Section 2252(b) was void for vagueness. *See* CA at 28-34. In particular, Mr. Portanova argued that the district court should apply a categorical approach in determining whether the prior conviction qualified as a predicate for the enhancement.

C. Rulings below

At sentencing, the district court acknowledged that the child pornography penalties were draconian, explaining that the court was sympathetic with Mr. Portanova's circumstances. *See* CA at 71, 76-77. Even so, the district found that the state-court conviction "related to" the federal pornography offense and that the statutory language was broadly interpreted. *See* CA at 71. Based on the statutory language, the district court did not apply a categorical approach.

On appeal, the Third Circuit affirmed, based on its "looser categorical approach." Pet. App. 3a. In doing so, the court acknowledged that the traditional (*viz*., not "looser") categorical approach must be applied in determining whether a prior conviction triggers an enhancement. *See* Pet. App. 5a. Under this approach, a court compares the elements of the state conviction with those of the federal definition or generic offense. *See id*. at 6a. And the court explained that a prior conviction counts as a predicate when its elements are the same as or narrower than the federal counterpart. *See id*. at 7a.

But the court did not employ the traditional categorical approach. Instead, the court found that its own "looser categorical approach" applied. Pet. App. 8a. In the court's view, Congress' use of the "relating to" language required an expansive analysis, "encompass[ing] crimes other than those specifically listed in the federal statutes." *Id*.

In reaching this conclusion, the court conceded several things. One, that it had employed a traditional categorical approach when interpreting other statutory enhancements conditioned on predicates "relating

to" certain offenses. *See* Pet. App. 11a nn.28-29. Two, that the circuits were divided on this issue. *See* Pet. App. 12a. Three, that this Court had addressed identical language, and that ruling supported employing a traditional categorical approach. *See* Pet. App. 15a-16a. And finally, that coupling the statute's scope to the phrase "relating to," leaves it with an indeterminate reach. *See* Pet. App. 18a.

The court recognized that the state predicate offense at issue was broader—encompassing additional types of nudity—than its federal counterpart. *See* Pet. App. 21a, 23a. But in the court's view, it stood in some "loose" relation to the possession of child pornography. *See* Pet. App. 22a. For this reason, it affirmed the enhancement of Mr. Portanova's sentence.

REASONS FOR GRANTING THE PETITION

Thirty years ago, this Court prescribed the categorical approach for determining when a prior conviction constitutes a predicate for a sentencing enhancement. *See Taylor v. United States*, 495 U.S. 575, 600 (1990).[2] This Court has consistently adhered to this approach, including this most recent Term. *E.g., Shular v. United States*, 140 S. Ct. 779, 783 (2020). And there has been only one recognized exception to the rule—when a statute has alternative elements. *See Descamps v. United States*, 570 U.S. 254, 261-62 (2013). In that circumstance, a court applies a

[2] The approach stems from Congress' directive to consider convictions and not conduct. But its roots extend to the latter 1800's when Congress directed non-citizens deportable based on convictions for crimes involving moral turpitude. *See, e.g.*, *United States ex rel. Guarino v. Uhl*, 107 F.2d 399, 400 (2d Cir. 1939) (explaining "deporting officials may not consider the particular conduct for which the [non-citizen] has been convicted"); *United States ex rel. Mylius v. Uhl*, 210 F. 860, 863 (2d Cir. 1914).

modified categorical approach. But this merely permits a court to look to a limited class of documents in identifying which of the alternative elements applied. *See Mathis*, 136 S. Ct. at 2256.

Courts have applied the categorical approach across various federal statutes. For instance, it has been employed for the Armed Career Criminal Act enhancement, 18 U.S.C. § 924(e), *e.g.*, *Taylor*, 495 U.S. at 600; for the penalty for possessing a firearm in relation to a felony, 18 U.S.C. § 924(c), *e.g.*, *United States v. Davis*, 139 S. Ct. 2319, 2334-35 (2019); for identifying an aggravated felony under the Immigration and Nationality Act, 8 U.S.C. § 1101, *e.g.*, *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013); and to the career-offender enhancement under the Sentencing Guidelines, *e.g., United States v. Ramos*, 892 F.3d 599, 606-07 (3d Cir. 2018).

But some circuits have carved out an exception to the categorical approach for the prior-conviction enhancement in the child pornography statute. That exception, which the Third Circuit describes as the "looser categorical approach," conflicts with this Court's precedent, the approach of the Ninth Circuit, and infringes on fundamental principles of federalism.

A. The "looser categorical" approach contravenes this Court's precedent interpreting identical statutory language.

In addressing Mr. Portanova's argument, the Third Circuit focused on the "relating to" language that precedes the list of predicate crimes. *See* Pet App. 7a-8a. That language, according to the appeals court, requires a broader reading under a different inquiry. *See* Pet. App. at 8a. Indeed, the court held that "relating to" must be read as expansive and including crimes

other than those specifically listed in the federal offenses. *Id*.

But this Court has construed identical statutory language, and chose not to "loosen" the categorical approach because of it. In *Mellouli v. Lynch*, 575 U.S. 798, 135 S. Ct. 1980 (2015), the Court addressed Section 1227(a)(2)(B)(i) of the Immigration and Nationality Act. That provision authorizes removal of an alien if they have been "convicted of a violation of . . . any law or regulation of a State . . . *relating to* a controlled substances (as defined in section 802 of Title 21)[.]" 8 U.S.C. § 1227(a)(2)(B)(i) (emphasis added). While acknowledging that the phrase "relating to" is both broad and indeterminate, the Court declined to use this as a basis for abandoning the categorical approach. *See Mellouli*, 135 S. Ct. at 1990. In reaching this conclusion, the Court stressed the statute's use of the term "convicted," and the efficiency, fairness, and predictability of the categorical approach. *See id*. at 1986-87. The Court explained that "relating to" extends to the furthest reach, stopping nowhere, and thus context tugged in favor of a narrower reading. *See id*. at 1990.

So too here. As this Court directed, the existence of the phrase "relating to" does not permit a "looser categorical approach." The text of Section 2252(b)(1) speaks of a "prior conviction." 18 U.S.C. § 2252(b)(1). By permitting the "relating to" language to expand the reach of the enhancement, the Third Circuit sidestepped the need for efficiency, fairness, and predictability–implicitly repudiating the holding of *Mellouli*.

1. The circuits are divided over the scope of the sentencing enhancement in Section 2252(b)(1), and in applying the categorical approach to identical language.

Following this Court's decision in *Mellouli*, the Ninth Circuit construed the "relating to" language in Section 2252(b)(1), in *United States v. Reinhart*, 893 F.3d 606 (9th Cir. 2018), just as this Court directed—*i.e.*, as not permitting a "loosened" approach. The court emphasized that one need not venture outside the statutory chapter for a definition of child pornography or sexually explicit conduct. *See id.* at 614-15. Rather, the court in *Reinhart* chose to anchor the "relating to" language to the federal definition of child pornography. *See id.* This, the court explained, prevented the language at issue from "drifting aimlessly." *Id.*[3] And, as the court noted, the lack of a statutory enhancement does not prevent an offender from receiving significant punishment—the Sentencing Guidelines adequately address that. *See id.*

At the same time, apart from the Third Circuit, several other circuits have reached the opposite conclusion. For instance, the Second, *see United States v. Barker*, 723 F.3d 315, 322 (2d Cir. 2013), Sixth, *see United States v. Mateen*, 806 F.3d 857, 860-61 (6th Cir. 2015), Eighth, *see United States v. Sumner*, 816 F.3d 1040, 1043-44 (8th Cir. 2016), Tenth, *see Bennett*, 823 F.3d at 1324-25, and the Eleventh Circuit, *see United States v. Miller*, 819 F.3d 1314, 1317 (11th Cir. 2016), have applied a broad approach to the enhancement.

Some of these decisions, notably, preceded *Mellouli*, did not discuss it, or relied on earlier holdings. *E.g.*,

[3] In this respect, the *Reinhart* court's rationale borrowed heavily from the dissenting opinion by Judge Hartz in the Tenth Circuit. *See United States v. Bennett*, 823 F.3d 1316, 1328-29 (10th Cir. 2016).

Barker, 723 F.3d at 322; *Miller*, 819 F.3d at 1317. Others, like the Third Circuit, tried to distinguish *Mellouli*, citing the historical background of the immigration statute and the lack of a defined offense reference. *See* Pet. App. 15a; *Bennett*, 823 F.3d 1322-23. But this Court's holding in *Mellouli* rested on the "relating to" language and concerns over its "indeterminacy." *Mellouli*, 135 S. Ct. at 1990. The same concern exists here.

And the Third Circuit's broad construction of "relating to" implicates other statutes, and other conflicts. For example, Section 3559(e) in Title 18 mandates a life sentence for having prior convictions "relating to" a list of sex offenses. 18 U.S.C. § 3559(e). Yet as the Third Circuit conceded, it applied the categorical approach to that language—not the "looser" version. *See* Pet. App. 11a n.29 (citing *United States v. Pavulak*, 700 F.3d 651, 671 (3d Cir. 2012)). Other courts have done the same. *E.g., United States v. Kroll*, 918 F.3d 47, 55 (2d Cir. 2019).

The result of these decisions is an ad hoc patchwork of rules governing substantial penalties that differ geographically. This division demands review.

2. This case presents an issue of exceptional importance.

Not only is the resolution of this issue of extraordinary importance to the many, like Mr. Portanova, who are subject to the enhancement. It also implicates fundamental concerns over federalism.

As to the former, Mr. Portanova's case highlights the significance of the enhancement. For example, his conduct could have been viewed as a relapse, requiring more counseling. Or, it may have been treated as a violation of his state supervision. Instead, the federal

prosecution, even without the enhancement, subjected him to a seven or eight-year term of incarceration under the Sentencing Guidelines. This was far more than what he was exposed to in the state system. Because of the enhancement, however, he is serving 15 years.

As to the latter, the holding of the appeals court here (and others that have agreed with it) implicates and undermines the balance of authority between the states and the federal government. States are entitled by the U.S. Constitution to define the crimes within their jurisdiction (within the limits imposed by the Bill of Rights) in their own way and according to their own judgments, and the federal government is likewise obligated by the U.S. Constitution to respect those judgments and to interpret state offenses in a manner consistent with that adopted by the state. The "loosened" categorical approach, however, allows and invites to define a state offense as one "relating to" child pornography—and thus qualifying as a predicate offense under Section 2252(b)(1)—when the state's own government defined it differently and, in fact, understood and intended that it would not so qualify. Put otherwise, it allows the federal government to dictate to states the nature and definition of the criminal offenses they have created.

States have a constitutional right to define crimes with the expectation that federal courts will interpret them the same way, including prior convictions. The "looser categorical" approach abandons federalism limitations, allowing overbroad state laws to trigger harsh federal penalties. And because of the severity of the penalties, courts should be particularly careful to apply them only within the bounds that Congress established. *See United States v. Stitt*, 139 S. Ct. 399

(2018) (No. 17-765, transcript of oral argument at 29:2-4, Ginsburg, J.). Here, respect for state authority requires acceptance of how they define a predicate offense. The "looser categorical" approach undermines federalism limitations, allowing overbroad state laws to trigger harsh federal penalties.

In sum, this case presents issues of exceptional importance, both to individual defendants (as Mr. Portanova) and also to the constitutional relationship between states and the federal government. Review is amply warranted.

CONCLUSION

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

Respectfully submitted,

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