No. 21-_____

IN THE

Supreme Court of the United States

TIMOTHY HARDIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Jeffrey L. Fisher
Edward C. DuMont
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Kendall Turner
O'MELVENY & MYERS LLP
1625 I Street, NW
Washington, DC 20006

Joshua B. Carpenter
Counsel of Record
Anthony Martinez
FEDERAL PUBLIC
DEFENDER FOR THE
WESTERN DISTRICT OF
NORTH CAROLINA
1 Page Avenue, Suite 210
Asheville, NC 28801
(828) 232-9992
Joshua_Carpenter@fd.org

QUESTION PRESENTED

Under federal law, the Model Penal Code, and the laws of 39 states and the District of Columbia, consensual sex between a 21-year-old and a 17-year-old is legal. In 11 states, such conduct is criminalized.

The question presented is whether, under the categorical approach, a conviction under one of those 11 states' statutes "relat[es] to . . . abusive sexual conduct involving a minor" and thus serves as a predicate for the sentencing enhancements in Sections 2252 and 2252A of title 18 of the U.S. Code.

RELATED PROCEEDINGS

United States v. Hardin, No. 5:18-cr-00025 (W.D.N.C.).

United States v. Hardin, No. 19-4556 (4th Cir.).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Timothy Hardin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is published at 998 F.3d 582 (4th Cir. 2021). The relevant order of the district court is unpublished but is printed at Pet. App. 46a-65a.

JURISDICTION

The court of appeals entered judgment on May 25, 2021. Pet. App. 1a. It denied a timely petition for rehearing on July 20, 2021. Pet. App. 45a. On October 12, 2021, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 2, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2252A(b)(1) of title 18 of the U.S. Code provides in relevant part: "[I]f 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 . . . such person shall be . . . imprisoned for not less than 15 years nor more than 40 years." 18 U.S.C. § 2252A(b)(1); *see also id.* § 2252(b)(1) (same).

The 1993 version of the Tennessee Code provides in relevant part:

> Statutory rape is sexual penetration of a victim by the defendant or of the defendant by

> the victim when the victim is at least thirteen (13) but less than eighteen (18) years of age and the defendant is at least four (4) years older than the victim.

Tenn. Code Ann. § 39-13-506(a) (1993).

Other relevant provisions of the U.S. Code—specifically Sections 2243, 2252, 2252A, and 2256 of title 18—are reproduced at Pet. App. 66a-83a.

INTRODUCTION

Federal law requires district courts to enhance certain defendants' sentences if they have prior convictions "under the laws of any State relating to . . . abusive sexual conduct involving a minor[.]" 18 U.S.C. §§ 2252(b)(1), 2252A(b)(1). Courts have divided over how far this provision extends with respect to statutory rape convictions. In the decision below, the Fourth Circuit—applying what it called the "categorical approach 'and then some,'" Pet. App. 10a—held that a conviction under a state law that criminalizes consensual sex between 17- and 21-year-olds "relat[es] to . . . abusive sexual conduct involving a minor" and thus triggers the enhancement. Had petitioner been sentenced in the Ninth Circuit, however, he would not have been subject to the sentencing enhancement.

This conflict has drastic consequences for individual liberty. The Fourth Circuit's interpretation increases the statutory minimum from 5 to 15 years and the statutory maximum from 20 to 40 years. The Fourth Circuit's holding also contravenes the statutory text, flouts this Court's precedent, and undermines the uniformity of federal criminal law. Petitioner challenged the application of the sentencing

enhancement at every stage of his case, and the answer to the question presented will determine the length of time he spends in prison. This case thus presents an ideal opportunity to resolve the conflict.

STATEMENT OF THE CASE

A. Legal background

1. *Statutory framework*. In 1978, Congress passed the Protection of Children Against Sexual Exploitation Act. As originally enacted, this statute—codified at 18 U.S.C. § 2251 *et seq.*—prohibited the sale or distribution of child pornography and the transportation, shipment, or receipt of child pornography. *See* Pub. L. No. 95-225, § 2(a), 92 Stat. 7 (1978). Congress has amended this statutory framework many times. In 1996, for example, Congress added sentencing enhancements for recidivist offenders who had prior convictions for specified sexual offenses, including convictions "under the laws of any State relating to . . . abusive sexual conduct involving a minor." Child Pornography Prevention Act, Pub. L. No. 104-208, § 121(5), 110 Stat. 3009-26, 3009-30 (1996) (amending 18 U.S.C. § 2252(b)(1)). Under current law, an individual who violates Section 2252(a)(1), (2) or (3) and has a qualifying prior conviction "shall be . . . imprisoned for not less than 15 years nor more than 40 years." PROTECT Act, Pub. L. No. 108-21, § 103, 117 Stat. 650, 652 (2003) (amending 18 U.S.C. § 2252(b)(1)). Without this enhancement, the individual would be subject to a 5-to-20-year sentencing range. *See id.*

In 1996, Congress enacted a similar law aimed at new, digitally altered forms of child pornography. *See*

Child Pornography Prevention Act, Pub. L. No. 104-208, § 121(3), 110 Stat. 3009-26, 3009-28 to -29 (1996). This provision, codified at 18 U.S.C. § 2252A, contains a sentencing enhancement materially identical to the one in Section 2252(b)(1).

2. *Categorical approach*. Numerous federal sentencing enhancements (as well as some federal immigration provisions) turn on whether prior state-law convictions fall within designated federal statutory categories. Yet states' criminal codes sometimes use the same or similar labels to criminalize disparate conduct. *Taylor v. United States*, 495 U.S. 575, 589 (1990). And determining the actual facts underlying a state conviction can be an onerous—or simply impossible—task, especially decades after a conviction, when relevant records may be lost or incomplete. "Sixth Amendment concerns" can also arise when a sentencing court makes factual findings that increase a defendant's sentencing range—whether those findings relate to the present or past convictions. *Descamps v. United States*, 570 U.S. 254, 267 (2013).

To avoid "the practical difficulties and potential unfairness" that arise under a "factual approach" to sentencing enhancements like those in Sections 2252 and 2252A, the Court applies the "categorical approach." *Descamps*, 570 U.S. at 267 (quoting *Taylor*, 495 U.S. at 601). Under the categorical approach, the actual facts of a defendant's offense are irrelevant. Courts "must presume that the conviction rested upon nothing more than the least of the acts criminalized" by the state law, and then "determine whether even those acts are encompassed" by the federal definition of the offense. *Moncrieffe v. Holder*, 569 U.S. 184, 190-

91 (2013) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)) (internal quotation marks and alterations omitted).

Courts applying the categorical approach first identify the elements of the federal predicate offense by looking to either the federal statutory definition or the "generic" definition of the offense. *Descamps*, 570 U.S. at 257; *see also Lockhart v. United States*, 136 S. Ct. 958, 968 (2016). If the court is relying on federal statutory analogues, it looks to definitions of the offense elsewhere in the criminal provisions of the U.S. Code. In contrast, if the court is relying on an offense's generic definition, it consults state criminal codes, the Model Penal Code, federal analogues, and dictionaries to determine how the offense is "commonly understood." *Descamps*, 570 U.S. at 257; *see also, e.g.*, *Taylor*, 495 U.S. at 598.

Once the court determines the elements of the federal predicate offense, it then compares them to the elements of the defendant's prior state offense. "[I]f the [state] statute sweeps more broadly than the generic crime"—that is, if it criminalizes conduct not criminalized under the federal definition—"a conviction under that law cannot count as a[] . . . predicate, even if the defendant actually committed the offense in its generic form." *Descamps*, 570 U.S. at 261. Again, "[t]he key . . . is elements, not facts." *Id.*; *see also Taylor*, 495 U.S. at 600.

c. In *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017), this Court employed the categorical approach when construing statutory language similar to that at issue in this case. There, the Court considered whether statutory rape under California law categorically constituted "sexual abuse of a minor"

for purposes of rendering a noncitizen deportable under the Immigration and Nationality Act ("INA"). *Id.* at 1567. After surveying dictionaries, federal law, the Model Penal Code, and state criminal codes, the Court determined that sexual conduct is not considered "abusive" for federal predicate purposes solely because of the participants' ages unless the state law requires that the younger party be under 16. *Id.* at 1569-72. California's law in that case set the age of consent at 18. *Id.* at 1567. Because the state law swept more broadly than the federal generic definition of "sexual abuse of a minor," this Court held that the petitioner's California conviction was not a qualifying offense for purposes of the INA. *Id.*

B. The present controversy

1. Tennessee criminalizes consensual sex with a person under 18 if the participants are at least four years apart in age. *See* Tenn. Code Ann. § 39-13-506(a) (1993); *see also* Tenn. Code Ann. § 39-13-306 (2012). In 1993, Mr. Hardin violated this provision by engaging in sexual conduct with a 14-year-old when he was 18. *See* Sentencing Tr. 31 (Dkt. No. 39).[1]

Twenty-five years later, in 2018, the government indicted Mr. Hardin on one count of receiving child pornography, in violation of 18 U.S.C. § 2252A(a)(2). He pleaded guilty to the charge.

---

[1] Although Mr. Hardin's counsel stated that he was 19 at the time of his prior offense, he was 19 only at the time of conviction; he was 18 at the time of the relevant conduct. *See* Presentence Investigation Rep. ¶ 45 (Dkt. No. 26). Unless otherwise indicated, docket entries cited in this petition appear in the docket in *United States v. Hardin*, No. 5:18-cr-00025 (W.D.N.C.).

Because of Mr. Hardin's prior conviction, the probation office recommended enhancing his sentence under Section 2252A(b)(1). Pet. App. 3a-4a. Mr. Hardin objected to the enhancement, citing this Court's decision in *Esquivel-Quintana*. *See id.* 13a-14a; Sentencing Mem. 3-10 (Dkt. No. 28). The district court rejected Mr. Hardin's argument. The district court first pointed to the definition of "minor" in 18 U.S.C. § 2256(1) as a person under 18. Sentencing Tr. 15. Second, it concluded that the phrase "relating to" in 18 U.S.C. § 2252A(b)(1) is a "broad" term. *Id.* at 16. The court sentenced Mr. Hardin to the statutory minimum term of 15 years in prison. *Id.* at 40. That sentence was ten years more than the statutory minimum he faced without the enhancement. *See* 18 U.S.C. § 2252A(b)(1).

2. A divided Fourth Circuit panel affirmed. The panel majority first identified the least serious conduct criminalized by Tennessee's statute as consensual sex between a 17-year-old and a 21-year-old. Pet. App. 6a. The court then asked whether such conduct "relat[es] to abusive sexual conduct involving a minor." *Id.* 7a. To answer that question, the court construed each term.

First, the Fourth Circuit parsed "abusive sexual conduct" to mean "physical or nonphysical misuse or maltreatment . . . for a purpose associated with sexual gratification." Pet. App. 8a-9a (citation omitted). It then defined "misuse" to mean "incorrect or careless use" or "wrong or improper use." *Id.* 13a (citation omitted). And it *then* held that, because Tennessee criminalizes consensual sex between a 17-year-old and a 21-year-old, a conviction under that Tennessee

statute necessarily entails "misuse," and is therefore inherently "abusive" under Section 2252A. *Id.*

The Fourth Circuit acknowledged that both the federal generic definition of "sexual abuse of a minor," as established in *Esquivel-Quintana*, and the federal offense of sexual abuse of a minor codified at 18 U.S.C. § 2243(a) do not consider sexual conduct "abusive" solely because of the participants' ages unless the younger party is under 16. Pet. App. 14a-15a. But the court reasoned that, by defining "minor" as a person under 18, *see* 18 U.S.C. § 2256, Congress "cast a wider net" when it wrote the recidivist enhancement in Section 2252A. Pet. App. 14a.

Second, the court read "relating to" broadly to mean "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." Pet. App. 11a (citation omitted). The court concluded that Congress's decision to use the "relating to" language meant that the court did not have to apply the usual categorical approach when construing Section 2252A(b)(1). Instead, it believed itself free to "apply the categorical approach 'and then some.'" *Id.* (citation omitted). Under this "and then some" rule, a defendant qualifies for Section 2252A's enhancement even if the state law under which he was convicted does *not* match the predicate offense specified in the federal enhancement provision. *Id.* 10a. The state law need only "stand in some relation" to that predicate offense. *Id.* 10a-11a.

In the panel majority's view, the least serious conduct criminalized by Tennessee's statute—consensual sex between a 17-year-old and a 21-year-old—does "stand in some relation to a perpetrator's physical or nonphysical misuse or maltreatment of a

person under the age of eighteen for a purpose associated with sexual gratification." Pet. App. 11a-12a. The majority accordingly held that petitioner's prior conviction qualifies as a predicate offense under Section 2252A.[2]

3. Judge Wynn dissented. To determine whether a state conviction for statutory rape qualifies as "abusive sexual conduct involving a minor," Judge Wynn explained, the court should apply the categorical approach as usual. Under that approach—which involves considering *Esquivel-Quintana*, state criminal codes, the Model Penal Code, and dictionary definitions—sexual conduct is "abusive" solely because of the participants' ages only if the younger party is under 16. Pet. App. 29a. Consequently, in Judge Wynn's view, because Tennessee's law allows conviction as long as the younger party is under 18, it is not a categorical match for "abusive sexual conduct involving a minor." *Id.* 25a.

Judge Wynn also rejected the majority's interpretation of the law as inconsistent with the statutory text. Reading "abusive sexual conduct involving a minor" to encompass all prohibited sexual conduct involving minors renders the phrase "abusive" wholly superfluous. Pet. App. 26a. And the majority's interpretation of "relating to," Judge Wynn reasoned,

---

[2] On appeal, Mr. Hardin also argued that the district court failed to adequately explain its reasoning for imposing a lifetime term of supervised release and associated conditions. Pet. App. 17a. The Fourth Circuit agreed and accordingly vacated Mr. Hardin's lifetime term of supervised release and remanded for reconsideration of that issue. *Id.* 21a.

has "no apparent limiting principle" and thus vitiates the categorical approach. *Id.* 39a.

4. Mr. Hardin sought rehearing en banc, which the Fourth Circuit denied on July 20, 2021. Pet. App. 45a.

REASONS FOR GRANTING THE WRIT

I. The courts of appeals are divided over the question presented.

The Fourth Circuit's decision in this case directly conflicts with the Ninth Circuit's decision in *United States v. Jaycox*, 962 F.3d 1066 (9th Cir. 2020). Had Mr. Hardin been prosecuted in the Ninth Circuit, he would not have had his sentence enhanced under Section 2252A and thus would have been subject to a significantly lower statutory minimum.

In *Jaycox*, the Ninth Circuit held that a California statute criminalizing consensual sex between a 21-year-old and someone nearly 18 does *not* qualify as a predicate offense under Section 2252. *See* Cal. Penal Code § 261.5(c). Citing *Esquivel-Quintana*, it held that there is "no question that § 261.5(c) is not a categorical match to the generic federal definition of sexual abuse of a minor" in Section 2252. *Jaycox*, 962 F.3d at 1070. As the court explained, the minimum conduct required for conviction under Section 261.5(c) "includes consensual sexual intercourse between an individual a day shy of eighteen and an individual who is twenty-one years of age." *Id.* That conduct could not be categorized as "abusive" for federal purposes because the federal generic definition requires that the younger party be under 16 where conduct is abusive solely by reason of the age of consent.

Nor, in the Ninth Circuit's view, did the "relating to" language in Section 2252(b)(1) bridge the gap between the state law and the federal generic definition. Although that language has a "broadening effect" and allows for "certain flexibility at the margins," it does not sweep in the conduct criminalized by Section 261.5(c). *Id.* A "core substantive element of the state crime—the age of the participants—is too far removed from the relevant federal generic definitions to be 'related to' them." *Id.* at 1070-71.

In contrast, the decision below held that a Tennessee statute criminalizing consensual sex between a 21-year-old and a 17-year-old *does* qualify as a predicate offense under Section 2252A. *See* Pet. App. 12a-14a. That holding followed from the Fourth Circuit's different definitions of the statutory terms "abusive" and "relating to." *Id.* 12a-15a. The Fourth Circuit concluded that because Tennessee's statute criminalized consensual sex between a 17-year-old and a 21-year-old, such conduct must be "abusive," and that—even if Tennessee's law is broader than the federal generic definition of "abusive" sexual conduct—the state law still "relat[es] to" such conduct.

II. The Fourth Circuit's decision is incorrect.

The Fourth Circuit is wrong that the Tennessee law under which Mr. Hardin was convicted criminalizes "abusive sexual conduct involving a minor" or "relat[es] to" such conduct. 18 U.S.C. §§ 2252(b)(1), 2252A(b)(1). The federal definition of statutory rape—whether defined by reference to the federal statutory analogue or to the generic offense—excludes the least culpable conduct criminalized by

Tennessee's statute: consensual sex between a 21-year-old and a 17-year-old. Because Mr. Hardin's statute of conviction is categorically broader than the federal offense, it may not serve as a predicate to enhance his sentence under Section 2252A(b)(1). The phrase "relating to" does not alter this analysis.

A. Consensual sex between a 21-year-old and a 17-year-old does not constitute "abusive" sexual conduct involving a minor.

The federal definition of statutory rape excludes the least culpable conduct criminalized by Tennessee law: consensual sex between a 21-year-old and a 17-year-old.

1. The categorical approach requires comparing the elements of the state statute of conviction against either (1) the federal definition of the predicate offense in other provisions of title 18 or (2) the offense's "generic" definition. *See Lockhart v. United States*, 136 S. Ct. 958, 968 (2016). Here, both methods yield the same result.

a. *Other provisions in title 18*. Section 2243(a) of title 18 defines the federal substantive offense of "[s]exual abuse of a minor" and expressly incorporates an age of consent of 16. 18 U.S.C. § 2243. That offense entails "knowingly engag[ing] in a sexual act with another person who—(1) has attained the age of 12 years but has not attained the age of 16 years; and (2) is at least four years younger than the person so engaging." 18 U.S.C. § 2243(a).

Because Sections 2243, 2252, and 2252A "deal[] with the same subject," they should be interpreted "harmoniously." *See* Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 252

(2012). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) (quoting *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007)); *see Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972) (this Court presumes that Congress "uses a particular word with a consistent meaning in a given context"). As a "closely related federal statute," Section 2243 indicates that Sections 2252 and 2252A "incorporate[] an age of consent of 16." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1570 (2017).

This "standard principle of statutory construction . . . is doubly appropriate here" because Congress modified Sections 2252, 2252A, and 2243 "at the same time." *Cf. Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007). In 1996, Congress first allowed prior state convictions to qualify a defendant for sentence enhancements under Sections 2252(b)(1) and 2252A(b)(1). Congress also revised the definition of "sexual abuse of a minor" in Section 2243—but continued to define the offense as requiring the younger party to be under 16. *See* Child Pornography Prevention Act of 1996, Pub. L. 104-208, § 7(c), 110 Stat. 3009-31. In the years since, Congress has repeatedly revised Section 2243, but has never raised the age of consent.[3] Sections 2252 and 2252A

---

[3] *See* Protection of Children From Sexual Predators Act of 1998, Pub. L. 105-314, § 301(b), 112 Stat. 2974, 2979; Violence Against Women and Department of Justice Reauthorization Act

should not be read so expansively as to lead courts down a path Congress chose not to take.

The Fourth Circuit did not dispute that the Tennessee law is broader than Section 2243(a). But the panel majority believed that, because Section 2256 defines "minor" to mean a person under 18, the offense described in Section 2252A encompasses any criminalized, sexual conduct with someone under 18. Pet. App. 8a. Section 2256's definition of "minor," however, does not determine when "sexual conduct involving a minor" becomes *abusive* for purposes of the sentence enhancement provisions of Sections 2252(b)(1) and 2252A(b)(1). Section 2256's definitions simply do not ask or answer that question.

b. *Generic offense*. Under the generic approach, this Court's precedent requires distilling "[t]he prevailing view" of the offense, *Taylor v. United States*, 495 U.S. 575, 598 (1990) (citation omitted), from federal criminal law, the Model Penal Code, states' criminal codes, dictionary definitions, and common understandings of the relevant terms, *see, e.g.*, *Esquivel-Quintana*, 137 S. Ct. at 1569-72. Here, as just discussed, federal criminal law dictates that sexual conduct is not "abusive" solely due to the age of the participants unless the younger party is under 16. The other sources support the same result. Indeed, this Court specifically held in *Esquivel-Quintana* that, "in the context of statutory rape offenses that criminalize sexual intercourse based solely on the age

---

of 2005, Pub. L. 109-162, § 1177(b)(1), 119 Stat. 3125; Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, § 207, 120 Stat. 615; Consolidated Appropriations Act, 2007, Pub. L. 110-161, § 555(c), 121 Stat. 2082.

of the participants, the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16." 137 S. Ct. at 1568.

i. *Dictionaries*. In *Esquivel-Quintana*, this Court cited "reliable dictionaries" from 1996—the same year Congress enacted Section 2252A—to determine the generic meaning of "sexual abuse" and "age of consent." 137 S. Ct. at 1569. Those dictionaries defined "sexual abuse" as "engaging in sexual contact with a person who is below a specified age." *Id.* (quoting Merriam-Webster's Dictionary of Law 454 (1996)). And they defined the generic "age of consent" to be 16. *Id.* (citing Bryan Garner, A Dictionary of Modern Legal Usage 38 (2d ed. 1995) ("Age of consent, usu[ally] 16, denotes the age when one is legally capable of agreeing . . . to sexual intercourse"); *see also* Black's Law Dictionary 76 (11th ed. 2019) (noting that the age of consent is "usu[ally] defined by statute as 16 years"). These dictionary definitions show a consensus that sexual conduct is abusive solely by virtue of the younger party's age only if that party is under 16.

ii. *Criminal codes.* State criminal codes and the Model Penal Code provide further evidence that the generic age of consent—for purposes of establishing inherently "abusive" conduct based on age alone—is 16. The vast majority of U.S. jurisdictions—39 states and the District of Columbia—do not criminalize consensual sex with someone who is 17. *See* Paul H. Robinson & Tyler Scot Williams, Mapping Criminal Law: Variations Across the 50 States 208 (2018). And 32 jurisdictions do not criminalize consensual sex with someone who is 16. *Id.* The Model Penal Code likewise sets the age of consent at 16. *See* Model Penal Code

§§ 213.3, 213.4 (1985); *see also* Model Penal Code, Draft No. 5, § 213.8(1) (May 4, 2021).

iii. *Common usage.* Setting the age of consent at 16 accords with the "ordinary, commonsense meaning," *United States v. Johnson*, 529 U.S. 53, 57 (2000), of "abusive sexual conduct involving a minor." In common parlance, consensual sex between a 21-year-old and a 17-year-old is not inherently "abusive." *See United States v. Osborne*, 551 F.3d 718, 720 (7th Cir. 2009). Such individuals are often in the same peer groups—as college students, for example.

2. The Fourth Circuit's contrary views are wrong. Its interpretation of Sections 2252 and 2252A effectively reads "abusive" out of the statute and undermines the uniform application of the statute's enhanced penalty provisions.

a. It is a central principle of statutory interpretation that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant[.]" *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). The Fourth Circuit's reading of the statute defies that bedrock principle by rendering the word "abusive" superfluous. In its view, any prohibited sexual conduct with someone under 18 qualifies as "abusive." But if all sexual conduct involving a minor were *per se* abusive, the word "abusive" in the statute would do no work; "convicted under the laws of any state relating to . . . sexual conduct involving a minor or ward," would have exactly the same effect. *See* 18 U.S.C. §§ 2252(b)(1), 2252A(b)(1).

b. The Fourth Circuit's holding also "turns the categorical approach on its head by defining the generic federal offense of sexual abuse of a minor as whatever is illegal under the particular law of the State where the defendant was convicted." *Esquivel-Quintana*, 137 S. Ct. at 1570. Under the Fourth Circuit's rule, because Tennessee criminalized Mr. Hardin's prior conduct, that conduct qualifies as "abusive" under federal law. Pet. App. 8a-13a. That reasoning runs flatly contrary to one of the key motivations for the Court's adoption of the categorical approach in the first place: "protect[ing] offenders from the unfairness of having enhancement depend upon the label employed by the State of conviction." *Taylor*, 495 U.S. at 589.

B. The phrase "relating to" does not allow these sentence enhancement provisions to encompass state offenses that are broader than their federal counterparts.

Although "relating to" can have many meanings, in the context of Sections 2252 and 2252A, the phrase indicates that what follows—"aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward"—are *categories* of offenses, rather than certain, particular offenses. *See, e.g.*, *Bailey v. United States*, 516 U.S. 137, 145 (1995) ("[T]he meaning of statutory language, plain or not, depends on context.").

1. *Text*. "Relating to" means "hav[ing] reference to," *see* 13 Oxford English Dictionary 549 (2d ed. 1989), as in the phrase "the new legislation related to corporate activities," New Oxford Dictionary of English 1566 (1998). In this phrase, "related to"

identifies a *category* of new legislation—namely, new legislation on corporate activities. Multiple *types* of legislation could fall within that category, even though they are not individually specified. *See also* Webster's Third New Int'l Dictionary of the English Language 1916 (1993).

This interpretation accords with common understandings of the phrase "relating to." When a library patron asks for books "relating to Asian cuisine," she invites the librarian to select books from a broad category. The patron would be satisfied with a Thai or Chinese cookbook—even a history of sushi would do. But what the librarian *cannot* do is bring the patron a German cookbook, because in doing so, the librarian disregards the word "Asian" entirely. True, the librarian might contend that a German cookbook "stand[s] in *some* relation to" Asian cuisine. Pet. App. 11a (emphasis added). But construing "relating to" that broadly would defy the expectations of the typical English speaker. Indeed, when the phrase is interpreted expansively—as the Fourth Circuit did here—it becomes so "indetermina[te]" as to have no meaning at all. *Mellouli v. Lynch*, 575 U.S. 798, 812 (2015) (citation omitted). Similarly, sexual conduct that is *not* treated as "abusive" in the vast majority of U.S. jurisdictions cannot "relate to" "abusive sexual conduct" for purposes of a federal sentence enhancement without effectively reading the word "abusive" out of the statute. In contrast, reading the phrase "relating to" to mean "in the category of" gives effect to each term used by Congress.

2. *Context*. The context of Sections 2252 and 2252A confirms that this reading of "relating to" is appropriate here. The recidivist enhancement in these

statutes is triggered when a defendant's prior state conviction falls within certain *categories* of offenses: "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." 18 U.S.C. §§ 2252(b), 2252A(b). These are "categor[ies] of crimes." *See Esquivel-Quintana*, 137 S. Ct. at 1569 (interpreting "sexual abuse of a minor" in similar statutory setting).

"Relating to" thus enables the sentencing enhancements to reach all relevant state offenses, without regard to the specific label the state puts on any given offense. No state has an offense called "abusive sexual conduct involving a minor."[4] But they do have multiple laws criminalizing conduct that might fall within the *category* of "abusive sexual conduct involving a minor." For example, Louisiana has nine separate crimes under the subheading of "sexual offenses affecting minors." La. Stat. Ann. §§ 14:80-14:81.5. These include "felony carnal knowledge of a juvenile"—the statute that most closely parallels the Tennessee statutory rape law at issue here—as well as "indecent behavior with juveniles," *id.* § 14:81; and "computer-aided solicitation of a minor," *id.* § 14:81.3. The phrase "relating to" makes clear that the enhancement provisions of Sections 2252 and 2252A may reach convictions under state statutes like these.

---

[4] The only state criminal code provision using the phrase "abusive sexual conduct" simply cross-references the INA. *See* Cal. Pen. Code § 679.10. Even states that do use the term "sexual abuse" in relation to minors generally criminalize conduct only if the offender holds some position of authority over the victim or if the victim is very young. *See, e.g.*, Va. Code § 16.1-228.4; Ariz. Rev. Stat. § 13-1417; N.D. Cent. Code § 12.1-20-03.1.

In this sense, the phrase "relating to" does have some "broadening effect." Pet. App. 10a n.7 (internal quotation marks and citation omitted). The phrase does not, however, soften the categorical approach or mean that a court should apply a sentencing enhancement to conduct simply because it is illegal in a handful of states.

3. *Precedent*. This Court has held that courts should interpret the phrase "relating to" narrowly when construing statutes like Sections 2252 and 2252A. *See Mellouli*, 575 U.S. at 812-13. In *Mellouli*, an individual was convicted under Kansas law for possessing drug paraphernalia. That state law allowed conviction based on possession of paraphernalia used to store or consume a wide variety of drugs, including many not listed in Section 802 of title 21 of the U.S. Code. Federal law, however, rendered the defendant deportable only if he had a prior conviction "*relating to* a controlled substance (as defined in section 802 of Title 21)." *Id.* at 801 (citing 8 U.S.C. § 1227(a)(2)(B)(i)) (emphasis added). The government argued that "relating to" should be interpreted broadly to allow the defendant's prior state conviction to qualify him for removal, even though the state and federal statutes did not match. *Id.* at 811. This Court rejected that argument, explaining that the statute's text and history counseled in favor of a narrower reading. And "extend[ing]" the words "relating to" to "the furthest stretch of [their] indeterminacy" would expand the federal statute "to the breaking point" and "stop nowhere." *Id.* at 811-12 (internal quotation marks and citation omitted).

4. *Lenity*. To the extent any doubt remains about the proper interpretation of the language in Sections 2252(b)(1) and 2252A(b)(1), that doubt should "be resolved in the defendant's favor." *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). The rule of lenity mandates that "when [a] choice has to be made between two readings" of a criminal statute, "it is appropriate, before [choosing] the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347 (1971) (internal quotation marks and citation omitted). The rule protects citizens from being subjected to punishments that are "not clearly prescribed," incentivizes Congress to "speak more clearly," and keeps courts from "making criminal law in Congress's stead." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion of Scalia, J.). It also ensures that citizens are given "fair warning concerning conduct rendered illegal." *Liparota v. United States*, 471 U.S. 419, 427 (1985).

5. *Constitutional avoidance*. An expansive reading of "relating to" would not only ignore the statutory text and context, but would also raise serious vagueness concerns. This Court has cautioned against—and invalidated—sentence-enhancement provisions that are "so vague that [they] fail[] to give ordinary people fair notice of the conduct [they] punish[], or so standardless that [they] invite[] arbitrary enforcement." *Johnson v. United States*, 576 U.S. 592, 595 (2015). That is exactly what the Fourth Circuit's interpretation does: It instructs courts to "apply the categorical approach 'and then some.'" Pet. App. 10a. But there is no way for courts or prosecutors—much less criminal defendants—to know what "and then

some" encompasses. As a result, there is no way for the legal system to enforce the enhancement provisions in Sections 2252 and 2252A evenhandedly. That undermines not only the purpose of the categorical approach, *see supra* at 4-5, but also "the twin constitutional pillars of due process and separation of powers," *Davis*, 139 S. Ct. at 2325.

III. The question presented is extremely important.

Federal courts' disagreement over the proper scope of the sentence enhancements in Sections 2252 and 2252A has drastic consequences for individual liberty, frustrates proper application of the categorical approach, and undermines the uniformity of federal law.

A. Sentencing enhancements carry "significant implications . . . for a defendant's very liberty[.]" *See Apprendi v. New Jersey*, 530 U.S. 466, 495 (2000). Here, the interpretation of the sentencing enhancement in Sections 2252 and 2252A has dramatic consequences. Roughly 1,500 people are prosecuted federally each year for child pornography offenses. U.S. Sentencing Comm'n, *Mandatory Minimum Penalties for Sex Offenses in the Federal Criminal Justice System* 4 (2019). A substantial number of these offenders may be subject to the enhancements in Sections 2252 and 2252A each year. And the enhancement here transforms the sentencing range to which a defendant is subject, doubling the statutory maximum from 20 to 40 years, and tripling the statutory minimum from 5 to 15 years. 18 U.S.C. §§ 2252(b)(1), 2252A(b)(1).

When "applying a mandatory minimum . . . it's very important to have consistent results." Tr. 64,

Wooden v. United States, No. 20-5279 (Oct. 4, 2021) (Gorsuch, J.); *see also Kimbrough v. United States*, 552 U.S. 85, 107 (2007) ("[I]t is unquestioned that uniformity remains an important goal of sentencing."). Yet disagreement about the proper application of the enhancements in Sections 2252 and 2252A creates severe disparities in sentences for child pornography offenses. Disagreement among the courts of appeals on the proper application of the enhancements in Sections 2252 and 2252A will make it more difficult for federal courts to obey their statutory mandate to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6).

B. The question presented also has broader ramifications for various statutory sentencing enhancements.

For example, in interpreting the enhancement provisions of Sections 2252 and 2252A outside the context of prior statutory rape convictions, courts have disagreed about how to construe the phrase "relating to." Some interpret it narrowly to require an element-by-element match. *See United States v. Hudson*, 986 F.3d 1206, 1213 (9th Cir. 2021). Others interpret it expansively by using a "looser categorical approach." *United States v. Portanova*, 961 F.3d 252, 256 (3d Cir. 2020), *cert. denied* 141 S. Ct. 683 (2020); *see also* Pet. App. 10a ("the categorical approach 'and then some'"). And some courts opt for some sort of vague middle path. *See United States v. Kraemer*, 933 F.3d 675, 684 (7th Cir. 2019) (applying the enhancement where the state offense "falls well within the heartland" of the federal offense). These varying interpretations of "relating to" have led to diametrically opposite

outcomes for similarly situated defendants—such as those previously convicted of state child pornography offenses that do not match the elements of the federal child pornography offense. *Compare, e.g.*, *United States v. Reinhart*, 893 F.3d 606, 616-18 (9th Cir. 2018), *with, e.g.*, *Portanova*, 961 F.3d at 254, 258-59.

This disagreement in the courts of appeals on the proper interpretation of the "relating to" language in Sections 2252 and 2252A also has implications for many other statutory contexts. Numerous federal laws use the same "relating to" phrasing. *See, e.g.*, 8 U.S.C. §§ 1101(a)(43)(Q-T); 18 U.S.C. § 2251(e); 21 U.S.C. §§ 841(e), 842(c)(2)(B), 843(d) (all federal statutes prescribing adverse consequences for convictions "relating to" particular offenses). And courts interpreting each of these statutes apply the categorical approach. *See, e.g.*, *Escobar Santos v. Garland*, 4 F.4th 762 (9th Cir. 2021) (8 U.S.C. § 1101(a)(43)(R)); *United States v. Zigler*, 708 F.3d 994 (8th Cir. 2013) (18 U.S.C. § 2251(e)); *see also Taylor v. United States*, 495 U.S. 575, 600-02 (1990). Without this Court's intervention and guidance, confusion over the phrase "relating to" threatens to muddle many other applications of the categorical approach.

C. The division among courts undermines the objective of nationwide uniformity that motivated this Court's adoption of the categorical approach in the first place. Although a heavy majority of U.S. jurisdictions set the age of consent at 16, millions of Americans live in states that criminalize consensual sex with 16- and 17-year-olds—including New York,

California, Texas, and Florida.[5] As a result, many Americans are subject to statutory rape laws that sweep more broadly than the statutory and generic federal offenses. *See Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017); 18 U.S.C. § 2243(a). For example, a 21-year-old who engaged in consensual sex with a 17-year-old in Washington, D.C. would not be breaking the law. But one Metro stop away in Arlington, Virginia, the same individual would be violating the state's statute and thus—under the Fourth Circuit's interpretation—could be subject to a future federal sentencing enhancement.

This Court adopted the categorical approach precisely to avoid this sort of "odd result[]," which inevitably follows when state "labels" for criminal offenses dictate the reach of federal sentencing enhancements. *See Taylor*, 495 U.S. at 591, 592. This approach conforms with the general presumption that "in the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law." *Jerome v. United States*, 318 U.S. 101, 104 (1943). This presumption is rooted in the fact that federal statutes are generally intended to have uniform nationwide application, and federal programs would be "impaired if state law were to control." *Id.*

---

[5] In 1996, the year that Section 2252 was passed, 31 states and the District of Columbia set the age of consent at 16 for "statutory rape offenses that hinged solely on the age of the participants"; 10 set the age at 18, and the rest varied from 14 to 17. *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1571 (2017).

IV. This case is an ideal vehicle for resolving the question presented.

This case is an excellent vehicle for resolving the question presented, which has been explicitly pressed and passed upon and determined the length of Mr. Hardin's sentence.

The district court and the Fourth Circuit extensively explored and passed on the applicability of Section 2252A(b)(1). Mr. Hardin submitted written objections to the presentencing investigation report's sentence-enhancement recommendation, Sentencing Mem. 3, and the district court deemed his objections "very well done," Sentencing Tr. 40. That court then held a lengthy sentencing hearing, *see* Sentencing Tr., during which Mr. Hardin specifically objected to the application of the Section 2252A(b)(1) enhancement, *id.* at 3-16.

At the appellate level, both parties thoroughly briefed the Section 2252A(b)(1) issue. In its Fourth Circuit brief, the government conceded that Mr. Hardin objected to the application of the enhancement at the trial stage and that the court's standard of review was de novo. U.S. CA4 Br. 7, 21. The Fourth Circuit devoted the vast majority of its opinion to the applicability of the Section 2252A(b)(1) enhancement. Pet. App. 2a-17a. And Judge Wynn's dissent dealt solely with that issue. *Id.* 23a.

Finally, the interpretation of the sentencing enhancement determines Mr. Hardin's statutory sentencing range. If Mr. Hardin's prior Tennessee conviction qualifies as a predicate offense under Section 2252A(b)(1), then his statutory sentencing range is 15 to 40 years. If it does not, the range is 5 to

20 years. Even factoring in other aspects of the federal Sentencing Guidelines, application of the higher mandatory minimum significantly increases the final sentence here. *See* Sentencing Tr. 28. The facts of this case thus vividly illustrate the real-world effects of the Fourth Circuit's error and the injustice produced by the conflict below. The matter warrants this Court's review.

CONCLUSION

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

Respectfully submitted,

Jeffrey L. Fisher
Edward C. DuMont
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Kendall Turner
O'MELVENY & MYERS LLP
1625 I Street, NW
Washington, DC 20006

Joshua B. Carpenter
Counsel of Record
Anthony Martinez
FEDERAL PUBLIC
DEFENDER FOR THE
WESTERN DISTRICT OF
NORTH CAROLINA
1 Page Avenue, Suite 210
Asheville, NC 28801
(828) 232-9992
Joshua_Carpenter@fd.org

December 2, 2021