No. _____

IN THE
Supreme Court of the United States

THOMAS P. THAYER,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has held that, where Congress makes the application of federal law turn on a prior "conviction" that, "by its nature," "involves" certain "conduct," a categorical approach governs. Federal law conditions the requirement to register as a sex offender on "convict[ion]" of a "sex offense," and it defines "sex offense" (as relevant here) as an "offense against a minor that involves . . . [a]ny conduct that by its nature is a sex offense against a minor." 34 U.S.C. §§ 20911(1), (5)(A)(ii), (5)(C), (7)(I). The Seventh Circuit concluded that a circumstance-specific analysis governs whether a prior conviction is a federal "sex offense."

The questions presented are:

1. Did the Seventh Circuit err in holding that a circumstance-specific approach applies to 34 U.S.C. §§ 20911(5)(A)(ii), (5)(C), (7)(I)?

2. If a categorical approach applies, then is Thomas Thayer's prior conviction under Minn. Stat. § 609.345(1)(b) a "sex offense"?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Thomas P. Thayer. Respondent is the United States of America. No party is a corporation.

STATEMENT OF RELATED PROCEEDINGS

This case is directly related to the following proceedings:

- *Thayer v. United States*, No. 22A593 (U.S.) (order, granting extension of time to file a petition for a writ of certiorari, entered Jan. 4, 2023).

- *United States v. Thayer*, No. 21-2385 (7th Cir.) (judgment entered July 21, 2022; petition for rehearing en banc denied Oct. 31, 2022).

- *United States v. Thayer*, No. 20-cr-88 (W.D. Wis.) (report and recommendation entered Jan. 4, 2021; opinion and judgment entered June 29, 2021).

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PETITION FOR A WRIT OF CERTIORARI

State sex-offender registries are regulated by both state and federal governments, and each sovereign's law gives rise to a *different* registration obligation. In 2003, Thomas Thayer was convicted of violating Minnesota law and had a state-law obligation to register on Minnesota's sex-offender registry for ten years. Seventeen years later, the federal government indicted him on the theory that his Minnesota conviction met the definition of a *federal* "sex offense" and that Thayer hadn't registered for the longer period required under federal law. This case asks whether Thayer's Minnesota conviction qualifies as a federal "sex offense." And the answer turns on whether courts apply a categorical or circumstance-specific analysis when comparing a prior conviction to the federal definition of "sex offense."

In answering that question, the courts in Thayer's case splintered. This Court has parsed the same language that appears in the federal subsections at issue here and held that that language triggers a categorical approach. Consistent with those decisions, the district court applied a categorical analysis, concluded that the Minnesota conviction's elements were broader than the federal definition of "sex offense," and dismissed the indictment. The Seventh Circuit held, over a dissent, that a circumstance-specific approach governs and remanded the case for a jury to figure out the specific facts underlying Thayer's (now twenty-year-old) conviction and to compare those facts to the federal definition of "sex offense." On remand, the district court explicitly asked for guidance from this Court and stayed the proceedings so that Thayer could file this petition.

This case presents an ideal vehicle to resolve this exceptionally important question. The issue of which analysis applies to 34 U.S.C. §§ 20911(5)(A)(ii), (5)(C), (7)(I) was cleanly pressed and passed upon below; there are no procedural hurdles. Further, left undisturbed, the Seventh Circuit's decision causes far-reaching harm. Allowing a circumstance-specific approach to govern does more than simply contravene this Court's precedents. It leaves defendants unsure whether a conviction carries a federal registration requirement and uncertain whether (and for how long) to register. It ensures arbitrary enforcement of 18 U.S.C. § 2250 by leaving courts and juries to grapple with what facts are relevant to the definition of "sex offense." And it makes failure-to-register trials nightmarish ordeals that not only risk the revictimization of complainants but also turn on exhuming records from decades-old case files. Respectfully, this Court should accept review.

OPINIONS AND RULINGS BELOW

The opinion of the Seventh Circuit is reported at 40 F.4th 797 (7th Cir. 2022) and reproduced at App. 1a–17a.[1] The Seventh Circuit's order denying rehearing *en banc* is unreported and reproduced at App. 19a. The district court's opinion granting Thayer's motion to dismiss is reported at 546 F. Supp. 3d 808 (W.D. Wis. 2021) and reproduced at App. 20a–26a. The magistrate judge's report and recommendation to grant Thayer's motion to dismiss is unreported and reproduced at App. 27a–39a.

JURISDICTION

The Seventh Circuit entered judgment on July 21, 2022, and denied rehearing en banc on October 31, 2022. App. 18a, 19a. On January 4, 2023, Justice Barrett extended the time within which to file a petition for a writ of certiorari to and including March 30, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Sixth Amendments to the United States Constitution; select provisions of the Sex Offender Registration and Notification Act, 18 U.S.C. § 2250, 34 U.S.C. § 20911; and Fourth Degree Criminal Sexual Conduct, Minn. Stat. § 609.345, are relevant to this petition. Consistent with Rule 14.1(i)(v), these materials are reproduced at App. 40a–52a.

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[1] This petition relies on abbreviated citations. Materials in the appendix are cited as "App. " District court materials are referenced by their district court docket number ("R."). And appellate materials are referenced by their Seventh Circuit docket number ("CA7 Dkt.").

STATEMENT OF THE CASE

A. Federal law obligates individuals to register as "sex offenders" only if they have a prior conviction that is a "sex offense."

There is no freestanding federal sex-offender registry; instead, the federal government has used its authority to push for a baseline-level of uniformity across the states' various sex-offender registries. *See Gundy v. United States*, 139 S. Ct. 2116, 2121–22 (2019). In 1994, Congress mandated that each state create a registry, and it established baseline categories of "criminal offense[s] against a victim who is a minor" that would trigger registration for a certain period. 42 U.S.C. § 14071(a)(1), (b)(6). It defined "criminal offense against a victim who is a minor" to "mean[] any criminal offense *in a range of offenses specified by State law* which is comparable to or which exceeds the following range of offenses." *Id.* § 14071(a)(3)(A) (1997) (emphasis added). And one of the categories that followed was "any conduct that by its nature is a sexual offense against a minor." *Id.* § 14071(a)(3)(A)(vii).

Congress simply set the floor. Each state could go beyond the categories of offenses that Congress had specified and demand that *other* convictions also trigger registration. Indeed, some states require registration for not only sexual but also *non-sexual* crimes. *E.g.*, Conn. Gen. Stat. Ann. § 54-251 (any crime against a minor). And, similarly, although Congress had established its own registration periods, states were free to demand a different registration period.

In 2006, as part of the Sex Offender Registration and Notification Act ("SORNA"), Congress amended the law but maintained that general structure. *See*

Pub. L. 109-248, 120 Stat. 587 (July 27, 2006). It changed the term of art for a predicate offense from a "criminal offense[] against a victim who is a minor" to a "sex offense," and it defined "sex offense" through categories of offenses. *Id.* § 111(1), (5)(A). Importantly, for one of those categories ("a criminal offense that is a specified offense against a minor"), Congress replicated its original list of qualifying offenses, including a residual category for "[a]ny conduct that by its nature is a sex offense against a minor." *Id.* § 111(7)(I). Consistent with the prior application of a categorical approach to that language, the Department of Justice's SORNA Guidelines explained that subsection (7)(I) was "intended to ensure coverage of convictions under statutes defining sexual offenses in which the status of the victim as a minor is an element of an offense." U.S. Dep't of Justice, *National Guidelines for Sex Offender Registration and Notification*, 73 Fed. Reg. 38030, 38052 (July 2, 2008). Thus, SORNA made plain that those with convictions for offenses that fall within the categories that Congress identified had a federal obligation to register. And, for the first time, failure to do so carried *federal* penalties. Pub. L. 109-248 § 141 (codified at 18 U.S.C. § 2250).

That backdrop informs the language at issue in this case. Today, the law continues to speak in terms of categories of offenses that trigger a federal registration requirement. An individual who "was convicted of a sex offense" is a "sex offender" who must register (on a state registry) for at least fifteen years. 34 U.S.C. §§ 20911(1), 20915(a). A "sex offense," as relevant here, is "a criminal offense that is a specified offense against a minor." *Id.* § 20911(5)(A)(ii). And a "specified offense against a minor" is "an offense against a minor that involves any of" nine categories of offenses,

including "[a]ny conduct that by its nature is a sex offense against a minor." *Id.* § 20911(7)(I). The law also contains a so-called Romeo-and-Juliet carve-out: an "offense involving consensual sexual conduct" between someone "at least 13 years old" and a defendant "not more than 4 years older" is *not* a "sex offense." *Id.* § 20911(5)(C).

B. Thayer was charged with failing to register as a sex offender based on a prior Minnesota state conviction.

In 2003, Thayer was convicted of committing fourth-degree sexual conduct in Minnesota. App. 4a–5a. The indivisible statute to which he pleaded guilty criminalizes "sexual contact" with someone who is 13–15 years old when the defendant *either* is more than four years older than the minor *or* "in a position of authority over" the minor. Minn. Stat. § 609.345(1)(b).[2] It covers both sexual and non-sexual acts, because "sexual contact" is defined as touching with "sexual *or* aggressive intent." *Id.* § 609.341(11)(a) (emphasis added); *e.g.*, *State v. Stephenson*, No. A05-417, 2006 WL 1319989, at *2–3 (Minn. Ct. App. May 16, 2006) (spanking). As a result of his conviction, Minnesota law obligated Thayer to register for ten years. App. 5a. At some point, he moved to Wisconsin. *Id.* In 2020, the federal government indicted him for crossing state lines and failing to register for the length of time that SORNA required. R.2.

The defense moved to dismiss the indictment because Thayer hadn't been convicted of a SORNA "sex offense" and, therefore, had no federal duty to register. It contended that a categorical approach governed: the court must look to the elements of the Minnesota offense and determine whether they are broader than an "offense

[2] All citations to the Minnesota Statutes reference the version in effect in 2003.

against a minor that involves . . . any conduct that by its nature is a sex offense against a minor." 34 U.S.C. §§ 20911(5)(A)(ii), (5)(C), (7)(I). A circumstance-specific approach—in which courts assess whether the actual facts of the prior offense satisfy the federal statute's elements—wasn't called for by the statute's language and implicated serious constitutional problems. And, the defense argued, under a categorical analysis, it was clear that the Minnesota statute was broader than SORNA's demands and, thus, was not a "sex offense."

C. The district court dismissed the indictment.

The magistrate judge agreed with the defense. In a Report and Recommendation, the court applied a categorical analysis and identified two mismatches between the Minnesota statute and SORNA's definition of "sex offense." First, the court reasoned, the Minnesota statute's Romeo-and-Juliet provision did not exempt a close-in-age defendant "in a position of authority," but SORNA's provision did. App. 31a, 35a n.3. Second, the Minnesota statute criminalized touching with "aggressive intent," but SORNA did not. *Id.* at 35a. The court placed greater weight on the latter reason and recommended that the district court dismiss the indictment. *Id.* at 36a.

The district court, which had jurisdiction under 28 U.S.C. § 3231, adopted the recommendation to dismiss the indictment. The court agreed that a categorical approach governed, because "[r]eading § 20911(7)(I) to allow the court to look at the underlying offense conduct for anything that would be a sex offense would render most of SORNA's definitions of sex offense mere surplusage." App. 22a. The court also expressed concern that a circumstance-specific approach risked judicial factfinding that contravened the Fifth and Sixth Amendments. *Id.* And, applying a conduct-based

categorical analysis, the court held that Thayer's Minnesota conviction was not a SORNA "sex offense" because the Romeo-and-Juliet carve-outs did not align. *Id.* at 24a–26a. It dismissed the indictment. *Id.* at 26a.

D. In a split panel decision, the Seventh Circuit reversed.

The Government timely appealed to the Seventh Circuit, which had jurisdiction under 18 U.S.C. § 3731. In a split-panel decision, it reversed.

1. The majority opinion began by explaining that SORNA's purpose "is to protect the public from sex offenders and offenders against children." App. 3a–4a (internal quotation marks omitted). From that premise, it reasoned that select terms counseled in favor of a circumstance-specific approach—namely, "offense" has to "refer[] to the specific acts in which an offender engaged on a specific occasion," because "whether a given 'offense' constitutes a 'sex offense' under §§ 20911(5)(A)(ii) and (7)(I) turns upon the 'nature' of the '*conduct*' that 'offense' 'involve[d].'" *Id.* at 6a–7a (emphasis added). A "focus on the 'conduct' underlying the prior offense," it continued, "refers to the specific circumstances of how a crime was committed." *Id.* at 7a. And "by its nature" only "reinforces this conclusion." *Id.* Relatedly, the majority explained, the Romeo-and-Juliet carve-out (§ 20911(5)(C)) calls for a circumstance-specific approach because it, too, "focus[es] on conduct." *Id.* at 11a. Although the definition of "sex offense" includes the word "conviction"—which "typically signif[ies] a crime as generally committed and a categorical analysis"—the majority gave it no weight, because it is "furthest in terms of proximity from the language of the specific sections at issue." *Id.* at 7a (internal quotation marks omitted).

In the majority's view, no authority counseled otherwise. Rather, Congress intended "to fashion a wide net ensnaring as many child sex offenders as possible"; meaning, §§ 20911(5) and (7) must be read to "apply to a broad range of conduct by child predators." App. 8a. Despite apparent structural similarities between § 20911(7) and 18 U.S.C. § 924(e)(2)(B)(ii), to which a categorical analysis applies, the majority distinguished them based on punctuation; Congress "separated generic crimes and specific conduct into isolated subsections" in § 20911(7) but used only commas in § 924(e)(2)(B)(ii). App. 10a. Further, although the Department of Justice's own guidelines "favor a categorical approach to §§ 20911(5)(A)(ii) and (7)(I)," they received no weight. *Id.* at 8a–9a. And, according to the majority, applying a circumstance-specific approach cannot offend the Sixth Amendment, because the Government always bears the burden of proof, and any evidentiary issues will benefit the defense. *Id.* at 9a.

2. Judge Jackson-Akiwumi dissented. The dissenting opinion cited this Court's explanation that a statute premised on "convictions" "indicates that 'Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions.'" *Id.* 14a (Jackson-Akiwumi, J., dissenting) (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). It found "stronger parallels" between § 20911(7)(I) and § 924(e)(2)(B)(ii). App. 12a–14a. And it repeated this Court's guidance that courts must not adopt an approach that requires "a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction"

because it is "utter[ly] impracticab[le]." *Id.* at 14a. What's more, the dissent highlighted, every other definition of "sex offense" in § 20911 triggers a categorical approach, and "it would be odd for Congress to require the categorical approach for all definitions of 'sex offense' found in § 20911 except for 'specified offense against a minor' under § 20911(5)(A)(ii)." *Id.* at 13a–14a. And the legislative history indicated that "Congress lifted § 20911(7)(I) from a list of enumerated offenses" to which a categorical approach applied, bringing that "old soil" into the new statute. *Id.* at 15a, 16a n.1 (quoting *United States v. Davis*, 139 S. Ct. 2319, 2331 (2019)).

The dissent also pointed to constitutional concerns that the majority overlooked. It highlighted that a categorical approach is not contingent on "a Sixth Amendment component," and adopting a circumstance-specific approach risks conviction without fair notice. *Id.* at 16a. As the dissent explained, a circumstance-specific approach "will create confusion about who is required under federal law to register." *Id.* Indeed, adopting that approach means defendants may be "sandbag[ged] . . . with a duty to register after they thought they had pled down to a conviction that did not carry a registration requirement." *Id.* (citing *Taylor*, 495 at 602). And they would not realize they needed to contest seemingly "superfluous factual allegations" about "conduct outside the elements of conviction" in order to protect themselves against a potential future § 2250 prosecution. *Id.* (quoting *Descamps v. United States*, 570 U.S. 254, 270 (2013)).

Finally, the dissent outlined the impracticalities of implementing a circumstance-specific approach. To abide by Confrontation Clause and hearsay restrictions,

"victims [will be] forced to come back and testify—perhaps decades after the fact." *Id.* Alternatively, prosecutors may seek to rely on "facts put in the record at a plea hearing," even though those facts "may not accurately reflect the strength of the government's case as to conduct outside the elements of conviction." *Id.* And it will create new burdens on federal district courts, which may need to hold "pre-registration hearing[s] . . . to determine whether the state could have proven additional facts not included in the plea." *Id.*

3. After the Seventh Circuit denied Thayer's petition for rehearing en banc, the case returned to the district court. Confronted with the prospect of a complex trial certain to raise novel issues, Judge Crocker observed: "The parties, the court, and the public all would benefit from a Supreme Court opinion in this case." R.41.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit's split decision is indefensible.

The tools that a court uses to resolve whether a categorical or circumstance-specific approach governs a particular statute don't change with the charge. Instead, this Court has instructed courts to look at the statutory text, then consider any constitutional implications and practical difficulties that flow from adopting one approach over the other. *E.g.*, *Davis*, 139 S. Ct. at 2327; *Sessions v. Dimaya*, 138 S. Ct. 1204, 1216–18 (2018) (plurality); *Mathis v. United States*, 579 U.S. 500, 510–12 (2016); *Descamps*, 570 U.S. at 267; *Nijhawan v. Holder*, 557 U.S. 29, 36–43 (2009). Those tools apply equally to the question of whether a categorical or circumstance-specific approach applies to §§ 20911(5)(A)(ii), (5)(C), (7)(I).

Yet, the Seventh Circuit's decision frames its analysis in terms of Congress's purpose in order to justify a circumstance-specific approach. It makes minimal efforts to distinguish controlling precedents that point to a categorical approach. It shortchanges constitutional concerns. And it dismisses the practical difficulties of implementing its holding. In other words, rather than even-handedly employing the tools that this Court instructed it to use, it turns the toolbox upside down. As this Court has explained before when interpreting SORNA, "[v]ague notions of a statute's 'basic purpose' are inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Carr v. United States*, 560 U.S. 438, 456 (2010) (cleaned up). But the Seventh Circuit's analysis begins and ends in the same place: Congress meant to protect the public from sex offenders, and the circumstance-specific approach better accomplishes this goal. *See* App. 3a, 8a.

As discussed below, the statute's text, constitutional principles, and pragmatic concerns all point to a categorical approach. This Court has held that, where Congress has made the application of federal law turn on a prior "conviction" that, "by its nature," "involves" certain "conduct," a categorical approach governs. *E.g.*, *Shular v. United States*, 140 S. Ct. 779, 784–85 (2020); *Davis*, 139 S. Ct. at 2327–29; *Dimaya*, 138 S. Ct. at 1217–18 (plurality); *Johnson v. United States*, 576 U.S. 591, 604–05 (2015); *Kawashima v. Holder*, 565 U.S. 478, 483–84 (2012); *James v. United States*, 550 U.S. 192, 201–02 (2007); *Taylor*, 495 U.S. at 600. Those very words appear in the statutes at issue here and warrant the same categorical treatment. Numerous canons of statutory construction confirm that a categorical approach governs. And, what's

more, the circumstance-specific approach runs aground on the Fifth Amendment and myriad pragmatic harms that attend its adoption.

A. The Seventh Circuit's decision is at odds with this Court's precedents that interpret highly similar statutory language.

The Seventh Circuit settled on a circumstance-specific approach without meaningfully engaging the text. The court of appeals' decision conflicts with this Court's controlling precedents interpreting similarly structured statutes with nearly identical language. As discussed below, the few reasons it offered for adopting a circumstance-specific approach do not withstand scrutiny. And, beyond those problems, the court of appeals failed to account for numerous canons of statutory construction that all point to a categorical approach. Indeed, the whole-text canon, principles of consistent construction, and the canon against surplusage all confirm that the text demands a categorical approach.

1.a. To begin, the Seventh Circuit's decision purports to focus on the key statutory terms but then distorts their plain meaning. It assumes that, because Congress made the definition of "sex offense" in subsection (7)(I) "turn[] upon the 'nature' of the 'conduct' that 'offense' 'involve[d],'" Congress necessarily intended for courts to find facts of some kind underpinning the conviction. *Cf.* App. 7a. But this Court "has long understood similarly worded statutes to demand similarly categorical inquiries." *United States v. Taylor*, 142 S. Ct. 2015, 2020 (2022). And a trail of controlling precedents reflects that "conviction," "involves," and "by its nature" each point to a *categorical* approach:

Key Word	Controlling Precedent	Seventh Circuit's Reasoning
"Conviction"	"Simple references to a 'conviction' . . . or 'offense,' we have stated, are read naturally to denote the crime as *generally* committed." *Dimaya*, 138 S. Ct. at 1217 (plurality) (cleaned up); *accord Johnson*, 576 U.S. at 604–05; *Taylor*, 495 U.S. at 600.	"Conviction" is part of the "highest-level definition of 'sex offender'" and "typically signif[ies] a categorical analysis," but "it is furthest in terms of proximity from the language of the specific subsections at issue." App. 7a. "Offense" triggers a circumstance-specific approach because "whether a given 'offense' constitutes a 'sex offense' . . . turns upon the 'nature' of the 'conduct' that 'offense involved.'" App. 7a.
"Involves" conduct	Offenses that "involve" certain conduct refer to "offenses with elements that necessarily entail" that conduct. *Kawashima*, 565 U.S. at 484; *accord Shular*, 140 S. Ct. at 784–85; *James*, 550 U.S. at 201–02.	"Conduct . . . refers to the specific circumstances of how a crime was committed, not to a generic offense." App. 7a.
"By its nature"	The term "by its nature" "tells courts to figure out what . . . [the object of that phrase] normally—or, as we have repeatedly said, 'ordinarily'—entails, not what happened to occur on one occasion." *Dimaya*, 138 S. Ct. at 1217–18 (plurality); *accord Davis*, 139 S. Ct. at 2329.	"The term 'by its nature'—which typically denotes something's normal and characteristic quality or basic or inherent features—reinforces" that a circumstance-specific analysis applies. App. 7a (cleaned up).

As the chart makes plain, the Seventh Circuit looked at the very terms that this Court has said indicate a categorical approach and held the opposite.

b. Meanwhile, the Seventh Circuit's decision offers a limited rationale for reading these terms differently. First, it found meaningful that "other portions of § 20911(7) refer to generic crimes . . . [while] § 20911(7)(I) addresses specific conduct

alone" in a subsection "isolated" by semicolons, rather than commas (like § 924(e)(2)(B)(ii)). App. 10a. But the semicolon-versus-comma distinction doesn't carry *that* much weight. *See id.* at 14a (dissent). In fact, this Court has described a similarly punctuated provision defining "aggravated felony" to constitute a "list[of] categories of offenses" to which a categorical approach applies. *Kawashima*, 565 U.S. at 481, 483 (8 U.S.C. § 1101(a)(43)). Relatedly, although the Seventh Circuit's decision found telling that Congress included "element" in subsection (5)(A)(i) and omitted it from (5)(A)(ii), this Court has read similarly structured statutes (with an "element" and non-"element" clause) to trigger a categorical approach throughout. *See Davis*, 139 S. Ct. at 2329 (18 U.S.C. §§ 924(c)(3)(A), (B)); *Johnson*, 576 U.S. at 596 (18 U.S.C. §§ 924(e)(2)(B)(i), (ii)).

Second, the court of appeals cited to the typical meaning of "by its nature" and suggested that this, too, points to a circumstance-specific approach. App. 7a. But it gave short shrift to the three separate occasions on which this Court instructed that "by its nature" *disclaims* a fact-bound inquiry. In *Leocal v. Ashcroft,* this Court noted that "by its nature" "requires us to look to . . . the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." 543 U.S. 1, 7 (2004). Then, in *Dimaya,* this Court observed that "by its nature" tells "courts to figure out what an offense normally" entails. 138 S. Ct. at 1217–18 (plurality). And, in *Davis,* this Court explained that, just as it is in "plain English, when we speak of the nature of an offense, we're talking about what an offense normally—or, as we have repeatedly said, ordinarily—entails, *not what happened to occur on one occasion*." 139 S. Ct.

at 2329 (emphasis added) (internal quotation marks omitted). The Seventh Circuit suggested these cases aren't controlling because "by its nature" modified "offense" in those cases, while "by its nature" modifies "conduct" in § 20911(7)(I), and the words "conviction" and "offense" are less "proximate." *See* App. 7a. But geographic proximity within a definition isn't dispositive. After all, Congress could have cross-referenced a different chapter to form a definition and still triggered a categorical approach. *E.g.*, *Mellouli v. Lynch*, 575 U.S. 798, 801, 805 (2015). And, here, "conviction" and "offense" remain the lodestar. Just as in § 924(e), § 20911 uses "conviction" in its prefatory language and defines the predicate as a type of "crime" (or "offense"). *Compare* 18 U.S.C. § 924(e)(2)(B)(ii), *with* 34 U.S.C. §§ 20911(1), (7)(I); *see Johnson*, 576 U.S. at 604–05 (categorical approach applies to § 924(e)(2)(B)(ii)). This sets up a categorical inquiry. "By its nature" simply continues that inquiry by asking whether the purported predicate's elements entail conduct that normally or ordinarily is a "sex offense"—not whether what happened to occur on one occasion was a "sex offense." *See Davis*, 139 S. Ct. at 2329.

Relatedly, the Seventh Circuit's emphasis on the word "conduct" does not bear weight. The court of appeals believed that the statute's "[e]xplicit focus on the 'conduct' underlying the prior offense . . . refers to the specific circumstances of how a crime was committed." *Id.* But this Court has held that "conduct" commands a categorical approach. In *Kawashima*, this Court explained that, where federal law defines a predicate offense in terms of whether it was "an offense that *involves fraud or deceit*," a categorical analysis governs. 565 U.S. at 483 (8 U.S.C. § 1101(a)(43)(M)(i))

(emphasis added). In *Johnson*, this Court reaffirmed that, where federal law defines a predicate offense in terms of whether it "*involves conduct* that presents a serious potential risk of physical injury," courts must employ a categorical approach. 576 U.S. at 604–05 (18 U.S.C. § 924(e)(2)(B)(ii)) (emphasis added). And in *Shular*, the Government agreed (and this Court reaffirmed) that, where federal law defines a predicate offense in terms of whether it was "an offense under State law, *involving manufacturing, distributing, or possessing with intent to manufacture or distribute*, a controlled substance," a categorical approach controls. 140 S. Ct. at 784–85 (18 U.S.C. § 924(e)(2)(A)(ii)) (emphasis added). Those statutes' structures echo § 20911(7)(I). In each, the statute defines the predicate in terms of whether it is an offense that entails certain conduct. Indeed, "it is natural to say that an offense 'involves' or 'requires' certain conduct" and, still, to apply a categorical approach. *Shular*, 140 S. Ct. at 785. Just as the statute in *Kawashima* refers categorically to "offenses with elements that necessarily entail fraudulent or deceitful conduct," § 20911(7)(I) refers categorically to offenses with elements that necessarily entail conduct that is a sex offense. *See* 565 U.S. at 484. Thus, "conduct" does not support a circumstance-specific approach.

Third, the Seventh Circuit never explains what fact a circumstance-specific approach will identify. Generally, a circumstance-specific approach applies where a statute defines a predicate offense (or some part of that offense) in terms of a specific factual detail—for example, a particular loss amount ($10,000+) or a complainant's age. *Nijhawan*, 557 U.S. at 36–40; *United States v. Walker*, 931 F.3d 576, 579–80 (7th Cir. 2019) (Barrett, J.). Tellingly, although the Seventh Circuit's decision asserts that

a circumstance-specific approach must govern §§ 20911(5)(A)(ii), (5)(C), (7)(I), it points to *no specific fact* that needs to be present. "Conduct," writ large, is not a fact. Adopting a circumstance-specific approach, then, leaves a factfinder to arbitrarily decide which facts are relevant in determining whether an offense is a "sex offense" "by its nature."

2. In adopting the circumstance-specific approach, the Seventh Circuit's decision also ignores canons of statutory construction that counsel in favor of the categorical approach. As a preliminary matter, the whole-text canon instructs that courts consider all the interrelated provisions of a statute together. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 167 (2012). The Seventh Circuit's decision, meanwhile, isolates subsections (5)(A)(ii) and (7)(I). But those provisions can't be read apart from the rest of the text. They provide the definition for a term of art ("sex offense") that sits within a broader definition. Again, a person is a "*sex offender*" who has to register because he has been "convicted" of a "sex offense"; a "sex offense" is a particular type of *conviction*. 34 U.S.C. § 20911(1) (emphasis added). And "conviction" supports a categorical approach. *Descamps*, 570 U.S. at 267; *Taylor*, 495 U.S. at 600.

Principles of consistent construction reinforce this conclusion. Courts must consider the methodology called for by a provision's neighboring subsections. *See, e.g.*, *Davis*, 139 S. Ct. at 2329; *Nijhawan*, 557 U.S. at 39. Numerous courts have held that §§ 20911(3), (4), and (5)(A)(i) demand a categorical or hybrid-categorical approach.[3]

[3] *E.g.*, *United States v. Navarro*, 54 F.4th 268, 278–79 (5th Cir. 2022) (§ 20911(3)(A)(iv)); *Walker*, 931 F.3d at 579–80 (§§ 20911(3)(A)(iv), (4)(A)(ii)); *United States v. Barcus*, 892 F.3d 228, 231–32 (6th Cir. 2018) (§ 20911(4)); *United States v. Young*, 872 F.3d 742, 746 (5th Cir. 2017) (same; joining First, Fourth, Ninth, and Tenth Circuits); *United States v. Helton*, 944

Equally, §§ 20911(5)(A)(iii)–(v) call for a categorical approach because they reference enumerated federal offenses. *See Nijhawan*, 557 U.S. at 37 (reference "to an 'offense described in' a particular section of the Federal Criminal Code" triggers categorical approach). That means § 20911(5)(A)(ii) is *surrounded* by provisions that call for a categorical approach:

Provision	Relevant Language	Approach
§ 20911(3)	"Offense" "comparable to or more severe than" enumerated federal offenses or which "involves use of a minor in sexual performance; solicitation of a minor to practice prostitution; or production or distribution of child pornography"	Categorical
§ 20911(4)	"Offense" "comparable to or more severe than" enumerated federal offenses or enumerated offenses with minor under 13, or which "involves kidnapping"	Categorical, *except to age*
§ 20911(5)(A)(i)	"Sex offense" is an "offense that has an element involving a sexual act or sexual contact with another"	Categorical
§ 20911(5)(A)(ii)	"Sex offense" is an "offense that is a specified offense against a minor," incorporating § 20911(7)	
§ 20911(5)(A)(iii)	"Sex offense" is an enumerated federal offense	Categorical
§ 20911(5)(A)(iv)	"Sex offense" is an enumerated military offense	Categorical
§ 20911(5)(A)(v)	"Sex offense" is "an attempt or conspiracy to commit an offense described in clauses (i) through (iv)"	Categorical

F.3d 198, 203–04 (4th Cir. 2019) (§ 20911(5)(A)(i)); *United States v. Vineyard*, 945 F.3d 1164, 1170 (11th Cir. 2019) (same); *United States v. Rogers*, 804 F.3d 1233, 1237 (7th Cir. 2015) (same).

The fact that all § 20911(5)(A)(ii)'s neighboring provisions call for a categorical approach reinforces the conclusion that § 20911(5)(A)(ii) demands the same. Indeed, "it would be odd" for that provision alone to be treated differently. App. 13a (dissent).

Finally, the Seventh Circuit's decision cannot be squared with the surplusage canon. That canon directs jurists to give effect to every provision of a statute and cautions against adopting a reading that would render other provisions "pointless." SCALIA & GARNER at 176. Here, as the district court noted, if a circumstance-specific approach applies, then other definitions of "specified offense against a minor" become surplusage—they would be swallowed up by subsection (I) because the behavior *always* would be "conduct that by its nature is a sex offense against a minor." App. 22a. In other words, while a categorical approach ensures that all provisions retain torque, adopting a circumstance-specific approach to subsection (I) causes every other provision in § 20911(7) "to have no consequence." *See* SCALIA & GARNER at 174.

B. The Seventh Circuit's decision does not grapple with the Fifth Amendment implications of a circumstance-specific approach.

This Court has been clear that, after consulting the text, courts must consider any constitutional anxieties that attend using a particular approach. Here, the Seventh Circuit's decision brushes off "Sixth Amendment concerns" on the theory that a defendant can always elect to go to trial. App. 9a. But nothing assuages the Fifth Amendment problems that come with a circumstance-specific approach.

The circumstance-specific approach provides *no notice* to a defendant as to whether an offense is a SORNA predicate. Indeed, if it governs, then a defendant will first learn whether he had a federal duty to register when the jury reads its verdict

at his failure-to-register trial. And neither the statute nor the Seventh Circuit's decision gives any guidance on what standard the factfinder uses to assess whether certain conduct, by its nature, is a sex offense. After all, what "facts" is the factfinder assessing—the allegations in the original criminal complaint, statements found in an old police report, testimony at an evidentiary hearing, the facts put into evidence at trial? *See* CA7 Dkt.26:25–28. "[E]ven the most expansive interpretation of a statute must have clear delineations," and, if the circumstance-specific approach applies here, then there are none. *See* App. 15a (dissent).

The Government previously has pointed to § 20919 as a salve (CA7 Dkt.52:13), but that provision doesn't cure the problem. Section 20919 obligates "[a]n appropriate official" to "inform" a "sex offender," in writing, of SORNA's registration requirement and to "ensure that the sex offender is registered." 34 U.S.C. § 20919(a). But this provision assumes that the "appropriate official" will know whether a defendant qualifies as a "sex offender." And, in practice, the official is in the same position as Thayer—left to guess whether the instant offense makes him a federal "sex offender" and creates a federal registration obligation. The official can't rely on the offense's label alone. *E.g.*, *Taylor*, 495 U.S. at 588–91 (meaning of "burglary" in § 924(e) could not depend on "crimes that happened to be labeled . . . 'burglary' by the laws of the State of conviction"). Instead, he or she must make a subjective judgment call. In other words, § 20919 risks arbitrary enforcement; one official may deem the "conduct" of an underlying offense to constitute a "sex offense" and inform a defendant that he needs to register, while another may disagree and *not* provide the notice. Neither

scenario necessarily aligns with how a jury would answer the same question. And defendants may register even when they are not "sex offenders." Thus, § 20919 doesn't clear up the fair notice concerns.

Tellingly, in the court of appeals, the Government tried to shift the burden to the defense. It submitted that there is no fair notice problem because "[a] defendant knows . . . whether the nature of his own conduct is a sex offense." CA7 Dkt.52:14. But, of course, that premise is inconsistent with the presumption of innocence and assumes legal omniscience. It is no answer to the due process concerns that plague application of the circumstance-specific approach to §§ 20911(5)(A)(ii), (5)(C), (7)(I).

C. The Seventh Circuit's decision underestimates the pragmatic harm of adopting a circumstance-specific approach.

The court of appeals dispensed with the defense's complaints about the practical realities of its holding on the belief that "[a]ny practical difficulties . . . favor Thayer." App. 9a. But the Seventh Circuit is mistaken.

First and foremost, the notice problems just described have consequences. Defendants can't make informed decisions about whether to plead guilty without knowing if the conviction also qualifies as a SORNA "sex offense." And those convicted don't know whether they must register. The problem is particularly acute for those convicted of non-sexual offenses. Do they register as a precautionary measure? And if so, for how long—15 years, 25 years, life? Prophylactic registration, of any length, is anathema to due process. And it carries severe penalties and social stigmas. *See* Abigail E. Horn, *Wrongful Collateral Consequences*, 87 GEO. WASH. L. REV. 315, 333–

35, 346–48 (2019) (sex offender registration, *inter alia*, destroys reputations, eliminates employment, affects access to federal programs, and restricts housing).

Second, in § 2250 prosecutions that implicate § 20911(7)(I), courts are left without guidance as to what "conduct" is relevant. Jury instructions will graft requirements onto the text, and those requirements will be driven by the facts that the Government thinks are pertinent. Thus, there will be no uniform definition of "conduct"; instead, courts will define "conduct" in light of the Government's case. Alternatively, juries will be left alone to decide what "conduct" is relevant, turning a legal question about the scope of the statute into a question of fact. And, as this Court previously has recognized (and the dissent cited), the sources on which they might rely in doing so will "deprive some defendants of the benefits of their negotiated plea deals" as to the prior offense. *See Descamps*, 570 U.S. at 271. Thayer may have had good reason not to contest certain statements the prosecutor made or that were contained in plea-related paperwork. *See id.* at 270. And he could not have been "thinking about the possibility that his silence could come back to haunt him in a" SORNA prosecution seventeen years later—§ 2250 "was not even on the books" in 2003. *See id.* at 270–71.

Third, the circumstance-specific approach is administratively burdensome and risks revictimization. It is unclear what documents the Government could find or rely on from the original proceeding at a subsequent § 2250 trial—criminal complaint, police reports, discovery materials, transcripts? *See, e.g.*, *Taylor*, 495 U.S. at 601 (ambiguity surrounding potential evidence relevant to "a factual approach" supported

categorical approach). Given the limits of record-retention policies, not all those materials will exist; and, even if they exist, it is unclear whether they are admissible. Does the Government call former counsel to testify about the original proceeding? Does it force a complainant to testify about traumatic events long put to rest? *See United States v. Morales*, 801 F.3d 1, 6 (1st Cir. 2015) (risk of retraumatizing complainants supported categorical approach). At what point does the court, bogged down by a trial within a trial, say "enough"?

Courts, litigants, and the public need not suffer in this way. It is appropriate to adopt the categorical approach to avoid such practical problems and promote "judicial and administrative efficiency." App. 17a (dissent) (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 200 (2013)). Indeed, as this Court has explained, "daunting difficulties of accurately reconstructing, often many years later, the conduct underlying a conviction" warrants adopting a categorical approach. *Dimaya*, 138 S. Ct. at 1218 (cleaned up); *accord Taylor*, 495 U.S. at 601 ("practical difficulties and potential unfairness" supported adopting categorical approach). Thus, the pragmatic strain of applying a circumstance-specific approach in this context, in addition to the plain text's demands and Fifth Amendment concerns, further tips the scale in favor of adopting a categorical approach.

D. Thayer's prior conviction is not a "sex offense."

Whether the categorical or circumstance-specific analysis governs makes all the difference to Thayer. Under the categorical approach, there is at least one (if not two) mismatches between the Minnesota statute and § 20911(7)(I). *See* App. 24a–26a, 31a–36a & n.3. Thus, the indictment against him must be dismissed.

On the other hand, if a circumstance-specific approach governs, this case will head to trial. Thayer will be forced to re-litigate the facts underpinning a decades-old offense, and a jury will have to decide whether those facts make his conviction one that "involves . . . [a]ny conduct that by its nature is a sex offense against a minor." Critically, the jury's verdict will be the first time that Thayer learns whether he had a duty to register—directly contrary to the Constitution's promise of fair notice.

II. This case presents an excellent vehicle to resolve this exceptionally important question.

This case cleanly presents the question for this Court's resolution. Whether a categorical or circumstance-specific approach governs 34 U.S.C. §§ 20911(5)(A)(ii), (5)(C), (7)(I) was "pressed" *and* "passed upon" below. *See Verizon Communc'ns, Inc. v. FCC*, 535 U.S. 467, 530 (2002) ("Any issue 'pressed or passed upon below' by a federal court is subject to this Court's broad discretion over the questions it chooses to take on certiorari[.]" (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)). The district court considered the issue and entered a written opinion. It was the sole question the Government presented on appeal. And the Seventh Circuit reached the merits of that question when it reversed the district court. Thus, there are no procedural hurdles to review.

And this Court should not wait to intercede. Unfortunately, the Seventh Circuit's misguided opinion does not stand alone. In decisions that straddle this Court's relevant precedents, four circuits have embraced the same view as the Seventh Circuit. *See United States v. Dailey*, 941 F.3d 1183 (9th Cir. 2019); *United States v. Hill*, 820 F.3d 1003 (8th Cir. 2016); *United States v. Price*, 777 F.3d 700 (4th Cir. 2015);

United States v. Dodge, 597 F.3d 1347 (11th Cir. 2010) (en banc).[4] Still standing, these decisions upend the Constitution's promise of due process by relegating a legal question to the jury and leaving litigants to rely on its verdict to learn in the first instance whether the defendant had a SORNA-imposed duty to register. At the same time, these decisions promise to deluge court administrators with requests to unearth decades-old case files; to burden district courts with trials, giving rise to complex evidentiary questions; and to retraumatize witnesses by forcing them to recount offenses long-ago put to rest. This Court previously has granted certiorari to address exceptionally important questions such as this one, even in the absence of a circuit split. *E.g.*, *Gundy*, 139 S. Ct. at 2122. It should do so here, too.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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March 23, 2023

[4] The Fifth Circuit also appears to favor a circumstance-specific approach, although it has not affirmatively held that it applies. *See United States v. Schofield*, 802 F.3d 722, 729 (5th Cir. 2015).