**No. 22-7237**

In the

Supreme Court of the United States

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**Eric Grzywinski**,

*Petitioner,*

v.

**United States of America**,

*Respondent.*

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

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# REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## TABLE OF CONTENTS

## Table of Authorities

**Page(s)**

### Federal Cases



### Federal Statutes

## ARGUMENT

**The courts of appeals are closely divided as to whether this Court's decision in *Esquivel-Quintana v. Sessions* applies to prior conviction enhancements found in Chapter 110 of Title 18.**

The courts of appeals have taken directly opposite positions as to whether the formulation "relating to .. abusive sexual contact (or conduct) involving a minor" encompasses state statutory rape offenses involving a minor who has achieved the age of 16. ***Compare*** *United States v. Jaycox*, 962 F.3d 1066 (9th Cir. 2020), ***with*** [Appx. A]; *United States v Grzywinski*, 57 F.4th 237, 238-239 (5th Cir. 2023); *United States v. Hardin*, 998 F.3d 582 (4th Cir. 2021). The circuits have divided 2-1 as to that question, and the judges on the panel have divided 5-4. The question pertains to a question of statutory interpretation, not Guideline interpretation. Years, sometimes decades, of imprisonment turn on the answer. It meets the traditional criteria for certiorari, and the government identifies no good reason to deny the Petition.

The government first contends that the enhancement was properly applied because Chapter 110 contains a definition of the term "minor," reaching anyone under 18. *See* Brief in Opposition, at 6-7. Of course, this merits argument does not tend to defeat the case for certiorari, whose chief use is to standardize federal law. Further, it is not a persuasive merits argument. *Esquivel-Quintana v. Sessions*, 581 U.S. 385 (2017), established a 16-year-old generic age of consent in the term "sexual abuse of a minor," In doing so, however, it relied not on the word "minor," but on the term "sexual abuse." *See Esquivel-Quintana*, 581 U.S. at 397 (holding that "Where sexual intercourse is abusive solely because of the ages of the participants, the victim must

be younger than 16."). As such, the term "minor" in Chapter 110 does not exclude a 16-year-old age of consent for "abusive sexual conduct involving a minor or ward." After all, the definition of the word "minor" defines only a part of the critical phrase, and was likely included to clarify the scope of substantive offenses in which it appears alone. *See e.g.* 18 U.S.C. §2251(a)(creating a new federal crime for "Any person who employs, uses, persuades, induces, entices, or coerces any **minor** to engage in" certain conduct)(emphasis added).

Next, the government contends that the decision below occasions no conflict with the Ninth Circuit's decision in *Jaycox* because they pertained to different sentencing provisions, and did not consider all of the arguments it would have made. *See* (Brief in Opposition, at 8). The government candidly admits, however, that the decisions are "in considerable tension." (Brief in Opposition, at 8).

This is a bit of understatement. *Jaycox* interprets the phrase "abusive sexual conduct involving a minor or ward" as it appears in 18 U.S.C. §2252(b)(1). *See Jaycox*, 962 F.3d at 1068. The decision below interprets the phrase "abusive sexual contact involving a minor or ward" as it appears in 18 U.S.C. §2251(e). *See Grzywinski*, 57 F.4th at 238-239. The government offers no substantive difference between the meaning of the terms, and the only arguable difference is that §2252(b)(1) sweeps broader, reaching "sexual conduct" rather than "sexual contact." There is no good argument that §2251(e) could be satisfied by an offense carrying an 18-year-old age of consent in the Ninth Circuit.

Nor is the case distinguishable because the *Jaycox* panel relied on *Esquivel-Quintana* rather than 18 U.S.C. §2256 to resolve the case. *See Jaycox*, 962 F.3d at 1069-1070. The government cites *Webster v. Fall*, 266 U.S. 507 (1925), and its Ninth Circuit analog *United States v. Kirilyuk*, 29 F.4th 1128 (9th Cir. 2022), for the proposition that "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." (Brief in Opposition, at 8)(quoting *Webster*, 266 U.S. at 511, and citing *Kirilyuk*, 29 F.4th at 1134).

But the definition of §2256 is not a matter "lurking in the record," like, say the failure of the plaintiff to sue the correct executive official at issue in *Webster*. *Compare Webster*, 266 U.S. at 511. It is instead simply another authority that might have been brought to bear on the meaning of a statute.

Nor is the impact of §2256 on the phrase "abusive sexual conduct with a minor" like the unaddressed issue in *Kirilyuk*. In *Kirilyuk*, the defendant persuaded the panel that Note 3(F)(i) to §2B1.1, which provides a $500 minimum loss for each stolen credit card, conflicts with the Guideline's instruction to calculate "loss." *See Kirilyuk*, 29 F.4th at 1134. It used the *Webster* rule to disregard a Ninth Circuit case, *United States v. Yellowe*, 24 F.3d 1110 (9th Cir. 1994), that passed on the meaning of the Note, namely whether it applied to stolen credit card numbers in the absence of the card. *See Kirilyuk*, 29 F.4th at 1134. It also disregarded *United States v. Gainz*a, 982 F.3d 762 (9th Cir. 2020), a case addressing a factual dispute as to how many cards a defendant actually stole. *See Kirilyuk*, 29 F.4th at 1135. Neither *Yellowe* nor *Gainza*

involved the validity of the Note. *See Kirilyuk*, 29 F.4th at 1134-1135. By contrast, §2256 and *Esquivel-Quintana* simply represent different authorities that may bear on the meaning of the same provision. There is no good reason to think that the Ninth Circuit will permit the government, a sophisticated repeat player with the power to look after its future interests in litigation, to obtain exemptions from binding precedent by parceling out its best arguments one by one until a favorable panel agrees with it. To hold otherwise would significantly increase its power over other litigants (and the courts) and would leave lower courts and litigants entirely at a loss as to the binding force of precedent.

Finally, the government argues a series of vehicle issues that might compromise the "plain-ness" of error. (Brief in Opposition, at 8). But as the government has noted, the "possibility that [petitioner] might ultimately be denied [relief] on another ground would not prevent the Court from addressing [the question presented]. Indeed, the Court frequently considers cases that have been decided on one ground by a court of appeals, leaving other issues to be decided on remand, if necessary." Cert. Reply 11, *Astrue v. Capato*, 566 U.S. 541 (2012) (No. 11-159); *accord* Cert. Reply 10–11, *Salazar v. Patchak*, 567 U.S. 209 (2012) (No. 11-247). The government notes here that "[t]he court of appeals determined both that the district court did not err and that any such error was not plain." (Brief in Opposition, at 8). But of course, the "plain-ness" holding was simply a necessary corollary of the holding that found no error. If this Court resolved the meaning of "abusive sexual contact

involving a minor or ward," the court of appeals could then determine whether this amounted to plain error in light of that exegesis.

## CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 24th day of July, 2023.

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