No. 23-219

In the
Supreme Court of the United States

SHERMAN MOORE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

REPLY BRIEF

This case presents a recurring question of law over which the circuits are divided. Since 1978, Section 2251 has criminalized the "sexual exploitation of children." The original list of offenses, as well as today's expanded list, all have the same object: child pornography. See 18 U.S.C. § 2251(a)–(b) (1978); 18 U.S.C. § 2251(a)–(d) (2008). Years after first enacting Section 2251, Congress added an enhanced mandatory minimum sentence for offenders who have "2 or more prior convictions … under the laws of any State relating to the sexual exploitation of children." 18 U.S.C. § 2251(d) (1996) (now codified at Section 2251(e)). The fundamental question presented is whether, by repeating Section 2251's title in Section 2251's sentencing enhancement, the later Congress used the term "sexual exploitation of children" the same way the earlier Congress used it or whether the later Congress used the term to mean something much, much broader.

The Government concedes that seven circuits are split over the answer to this question. The Government does not dispute that, under the Ninth Circuit's interpretation of Section 2251(e), Mr. Moore's state indecency offenses do not trigger the 35-year mandatory minimum. Nor does the Government dispute that Mr. Moore would prevail under an interpretation of Section 2251(e) that tethers "sexual exploitation of children" only to child pornography and child sexual abuse, as the Sixth Circuit holds.

Without contesting the circuit split or the significance of the question presented, the Government skips ahead to the merits. Applying interpretive methods inconsistent with those it raised before the lower courts in this case, the Government attempts to steer this Court away from the original meaning of "sexual exploitation of children." The Government instead presents an inaccurate picture of the underlying facts and arguments, and it defies the Court's recent precedents on how to interpret federal criminal statutes.

The Government is wrong on the merits. But more importantly at this stage, the Government is wrong about whether the Court should answer the question presented. The split over the scope of Section 2251's 35-year mandatory minimum is clearly presented, clearly defined, and clearly pertinent to the resolution of this case. The Court should grant certiorari to resolve it.

I. The circuit split over the meaning of the term "sexual exploitation of children" in Section 2251(e) warrants further review.

The Government mostly opposes certiorari by defending the Fifth Circuit's decision on the merits. See Opp'n 6–14. In its short discussion of the circuit split, the Government accuses Mr. Moore of "overstat[ing] the extent of the disagreement," which it calls a "lopsided 6-1 split." Opp'n 14. This characterization ignores several important facts.

1. Seven circuits have issued precedential opinions on the meaning of "sexual exploitation of children" within Section 2251(e), including three that recently confronted the Ninth Circuit's strong textualist argument for a narrow reading. Earlier circuits simply ignored that the term at issue—"sexual exploitation of children"—is the same term Congress assigned to the child-pornography offenses Section 2251 has prohibited since 1978. Some courts instead focused on a smattering of modern dictionaries. See, *e.g.*, *United States* v. *Mills*, 850 F.3d 693, 697 (C.A.4 2017) (relying on dictionaries from 2005 and 2014). Others relied on their own understanding of the term. See, *e.g.*, *United States* v. *Smith*, 367 F.3d 748, 751 (C.A.8 2004) (stating, *ipse dixit*, that "[a]lthough the term 'sexual exploitation of children' is not defined in the statute, the term unambiguously refers to any criminal sexual conduct with a child"); *United States* v. *Galo*, 239 F.3d 572 (C.A.3 2001) (failing to provide any definition of the term).

The Ninth Circuit exposed glaring mistakes in the earlier courts' analyses. In its unanimous opinion in *United States* v. *Schopp*, 938 F.3d 1053 (C.A.9 2019), the Ninth Circuit addressed the sentencing provision within the context of Section 2251 as a whole. Recognizing that every statutory interpretation inquiry "begin[s] with the text of the statute" itself, the Ninth Circuit identified the two instances of the term "sexual exploitation of children" within Section 2251—in the statute's original and still-existing title and in its later-added sentencing provision. *Id.* at 1059–60. Based on the clear link between

the term and the statute's child-pornography offenses, the Ninth Circuit understood that Congress "signaled that the enumerated federal offenses in § 2251 constitute the federal understanding of the term 'sexual exploitation of children,' and that the term as subsequently used in § 2251(e) bears that same meaning." *Id.* at 1060; see also *id.* at 1060–61 (applying *Esquivel-Quintana* v. *Sessions*, 581 U.S. 385 (2017)).

The First, Fifth, and Sixth Circuits disagree with *Schopp*. Unlike earlier courts, these circuits acknowledged the statute's internally consistent use of the term "sexual exploitation of children," yet still rejected the Ninth Circuit's interpretation for varying reasons. See App. 6a–14a (recognizing the statute's title as a "strong point in Moore's favor," and rejecting dictionary definitions as "too vague to define the term clearly," but relying on other, later-enacted statutes and judicial interpretations to find a semantic drift in the term's meaning); *United States* v. *Winczuk*, 67 F.4th 11, 16–20 (C.A.1 2023) (relying primarily on dictionaries published in the early 1990s, and claiming to find support in the statutory context and amendment history); *United States* v. *Sykes*, 65 F.4th 867, 887–89 (C.A.6 2023) (relying on a 2019 dictionary, and attempting to draw conclusions based on Congress's amendment of the separate 25-year minimum).

2. The Ninth Circuit may be the only court of appeals to interpret "sexual exploitation of children" as referring to the child-pornography industry, but the

long side of the split is by no means unanimous on the term's meaning. Rather, as the Fifth Circuit recognized below, "[t]he circuits that have interpreted the phrase broadly have adopted a variety of definitions." App. 12a. Whereas the Fifth Circuit sided with the First and Eighth Circuits in interpreting the term to "unambiguously refer[] to any criminal sexual conduct involving children," App. 16a (quoting *Winczuk*, 67 F.4th at 17), the court acknowledged that the three other circuits (excluding the Ninth Circuit) had their own broad definitions, see App. 15a ("The Fourth Circuit defines it as 'to take advantage of children for selfish and sexual purposes.' The Sixth Circuit broadly states that it 'evinces a Congressional intent to define the phrase to extend to child-sexual-abuse offenses as well as child-pornography-related offenses,' and the Third Circuit does not appear to have a working definition." (citations omitted)). See also Br. of Appellee at 18, *United States* v. *Mills*, No. 15-4325 (C.A.4 July 22, 2016) (Government admitting that the Third Circuit has "not provid[ed] its own definition").

The variance in the circuits' definitions is understandable—the Government has repeatedly shifted its arguments. For example, the Government has been unable to decide which dictionary definitions apply. Compare Br. of Appellee at 39 n.7, *United States* v. *Smith*, No. 03-3626 (C.A.8 Jan. 13, 2004) (citing definitions of "exploitation" and "sexual relations" from 1999), with Br. of Appellee at 23, *United States* v. *Schopp*, No. 16-30185 (C.A.9 Nov. 1, 2018) (citing definitions of "sexual" and "exploitation" from

1983, "sexual" and "exploit" from 2005, and "sexual exploitation" from 2009), and Br. of Appellee at 51, *United States* v. *Sykes*, No. 21-6067 (C.A.6 May 2, 2022) (citing definitions of "sexual" and "exploitation" from 2005 and "sexual exploitation" from 2014). And the Government has taken inconsistent positions on the import of Congress's amendments to Section 2251. See Br. of Appellee at 38, *United States* v. *Smith*, No. 03-3626 (C.A.8 Jan. 13, 2004) (citing congressional findings for the PROTECT Act that supposedly "demonstrate that the drafters of the statutes use the terms 'sexual exploitation of children' and 'sexual abuse of children' interchangeably"); Br. of Appellee at 60, *United States* v. *Pavulak*, No. 11-3863 (C.A.3 June 4, 2012) (suggesting that Congress's amendment of Section 2251's 25-year minimum "was arguably intended to clarify, not severely restrict, the meaning of 'sexual exploitation of children' as to the 'one prior conviction' penalty"). With federal prosecutors making inconsistent arguments, it's no wonder the circuits have applied different tests.

3. While recognizing that most regional circuits have weighed in on the meaning of "sexual exploitation of children" in Section 2251(e), the Government urges the Court to allow for further percolation. Opp'n 14–16. But to what end?

The Government contends that, "to the extent that the contours of any circuit's position are unclear, that would at most counsel in favor of allowing

that court an opportunity to refine its interpretation" before this Court reviews. Opp'n 15. That contention is unpersuasive. Even if the Third and Sixth Circuits' interpretations are unclear at the margins, there is no question that both courts have ***rejected*** the narrowest interpretation. Additional Third or Sixth Circuit opinions won't change that.

The arguments for and against *Schopp*'s answer to the question presented have been fully briefed and extensively analyzed in several circuits. As it stands, the seven circuits' disparate approaches will lead to inconsistent criminal sentences under Section 2251. Further percolation is unwarranted.

II. The Government's arguments undermine its opposition to certiorari.

The Government also makes several errors regarding the arguments preserved, the proper method of statutory interpretation, and the importance of the question presented.

1. First, the Government falsely accuses Mr. Moore of abandoning an argument.

Unlike most defendants in his position, Mr. Moore prevails even if the term "sexual exploitation of children" "extends to child-sexual-abuse offenses as well as child-pornography-related offenses." *Sykes*, 65 F.4th at 889. For Mr. Moore's prior state-law convictions were for a crime—indecency with a child—that contains no harm-to-children element. See *Yanes* v. *State*, 149 S.W.3d 708, 709 (Tex. App.—Austin 2004, pet. ref'd) ("Indecency with a

child by exposure is not a victim-centered offense analogous to aggravated rape, or indecency with a child by contact, because indecency with a child by exposure centers on the mental state and actions of the perpetrator and not on the harm done to the victim."). Because sexual harm is not an element of indecency with a child under Texas Penal Code 21.11(a)(2), that offense is not, categorically, a form of child sexual abuse. Cf. *Esquivel-Quintana*, 581 U.S. at 391–97 (discussing the generic federal offense of "sexual abuse of a minor"). Accordingly, Mr. Moore's state-law offenses do not "relat[e] to the sexual exploitation of children" and therefore do not trigger the 35-year minimum under the Sixth Circuit's intermediate view.

The Government does not dispute the foregoing. The Government merely claims—in a footnote on the very last page of its brief—that Mr. Moore forfeited this argument by failing to raise it below. Opp'n 16 n.2. Not so. Mr. Moore raised this argument at sentencing, and he renewed it on appeal, where his fallback position was that the term "sexual exploitation of children" in Section 2251 "implicitly contains an element of harm to the child." Br. of Appellant at 32–34, *United States* v. *Moore*, No. 22-10412 (C.A.5 Aug. 11, 2022); Reply Br. at 26–30, *United States* v. *Moore*, No. 22-10412 (C.A.5 Nov. 23, 2022); App. 21a–22a (sentencing transcript). Mr. Moore may not have used the term "abuse" below, but his alternative argument about "harm" is substantively indistinguishable. And Mr. Moore may not have men-

tioned the Sixth Circuit's standard in his Fifth Circuit briefs, but that's because the Sixth Circuit opinion came down ***after*** briefing closed. Mr. Moore thus preserved the alternative interpretation he presses in the petition.

Moreover, because Texas prohibits indecency without regard to whether a child is sexually harmed, Mr. Moore is uniquely positioned to argue that Section 2251(e), if not limited to child-pornography offenses, is limited to those plus child-sexual-abuse offenses. The petitioners in *Winczuk* and *Sykes* both were convicted of archetypal sexual-abuse offenses. See Pet. 10–12 (discussing Winczuk's prior state sexual-assault-of-a-minor and child-pornography convictions and Sykes's prior state statutory rape convictions). Thus, while any of the three petitioners would prevail under the Ninth Circuit's interpretation of Section 2251(e), ***only*** Mr. Moore would prevail under the Sixth Circuit's interpretation of "sexual exploitation of children" as "extend[ing] to child-sexual-abuse offenses as well as child-pornography-related offenses." *Sykes*, 65 F.4th at 889.

2. The Government's arguments also reveal that prosecutors remain confused about how to interpret the federal Criminal Code.

The Government's misunderstandings are exemplified by its shifting arguments in this case. Whereas the Government didn't cite a single dictionary during sentencing, see App. 19a–21a, in the

Fifth Circuit, it relied on dictionaries published between 2007 and 2019, see Br. of Appellee at 9, *United States* v. *Moore*, No. 22-10412 (Oct. 19, 2022). Now, taking cues from the First Circuit's attempt to rebut the Ninth Circuit, the Government shifts again—citing dictionaries current in 1996, when Congress added the enhancement for prior offenses "relating to the sexual exploitation of children." See Opp'n 7 (relying on dictionaries published between 1989 and 1993). As a result, the Government's latest interpretation suffers from the same flaws as *Winczuk*—flaws the Fifth Circuit candidly pointed out. See App. 6a, 8a (recognizing the statute's title as a "strong point in Moore's favor," and rejecting all dictionary definitions as "too vague to define the term clearly").

Aside from the fact that the Government is still focused on the wrong time period (1996 instead of 1978), it places undue weight on dictionary definitions to define a term of art.† As the Ninth Circuit recognized in 2019, this Court in *Esquivel-Quintana* "indicated that a section heading may serve as the basis for establishing what offense is being defined

† The Government criticizes Mr. Moore for supposedly "rel[ying] heavily … on a footnote in a law review article published in 1977" to elucidate original meaning. Opp'n 10 (referring to C. David Baker, *Preying on Playgrounds: The Sexploitation of Children in Pornography & Prostitution*, 5 PEPP. L. REV. 809, 810 (1978)). Mr. Moore does not rely on just one article: The article extensively collects pre-1978 sources, which, like the Court's opinion in *New York* v. *Ferber*, 458 U.S. 747 (1982), all support Mr. Moore. See Pet. 2.

in the statutory text." *Schopp*, 938 F.3d at 1060. And if there were any ambiguity regarding how to interpret offenses in the Criminal Code, this Court's latest statutory interpretation opinions should have cleared it up. See *Dubin* v. *United States*, 599 U.S. 110, 120–24 (2023) (rejecting the Government's reliance on dictionaries, and interpreting a criminal offense in light if its title); *United States* v. *Hansen*, 599 U.S. 762, 773–78 (2023) (rejecting dictionary definitions, and interpreting a statutory term in its "specialized, criminal-law sense").

Instead of heeding the Court's correction, the Government just reiterates that a title "cannot undo or limit that which the text makes plain." Opp'n 11 (quoting *B'hood of R.R. Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 528–29 (1947)); see also Br. of Respondent at 24, *United States* v. *Dubin*, No. 19-50912 (S. Ct. Jan. 23, 2023) (Government invoking the same 70-year-old case for the same proposition). That maxim is irrelevant. The ***title*** and the ***text*** are verbatim identical. The question is whether they mean the same thing (as Mr. Moore contends) or different things (as the Government contends). As in *Dubin* and *Hansen*, the Government's "plain meaning" argument begs the question. See, *e.g.*, *Dubin*, 599 U.S. at 121 (where a statutory provision's "key terms" are "elastic," "they must be construed in light of the terms surrounding them, and the title Congress chose is among those terms" (quotation omitted)).

3. Finally, the Government suggests that Mr. Moore should have presented "arguments regarding the importance of the question presented or the frequency with which it arises." Opp'n 16. That's disingenuous. For, in response to statistics cited by the petitioner in *Winczuk*, the Government accused him of being insufficiently specific. Cert. Opp'n, *United States* v. *Winczuk*, No. 23-5619 (S. Ct. Nov. 20, 2023) (citing U.S. Sentencing Commission, Mandatory Minimum Penalties for Sex Offenses in the Federal Criminal Justice System 19 (Jan. 2019)). Truth is, Mr. Moore and other individual defendants have no way to determine how often this sentencing issue arises—much less how often defendants would challenge their 35-year sentences, rather than accept plea bargains, if there were any chance of a shorter sentence. If data were available, it is the Government, as the nation's lead prosecutor, that would have access to it. It is notable, then, that the Government does not say that the sentencing issue is ***unimportant***—just that petitioners have not proved otherwise.

***

For all its defense of the lower court's decision, the Government never tells this Court what it thinks the term "sexual exploitation of children" meant in 1978 when Congress enacted Section 2251. Fortunately, Congress did so itself when creating a new statute to address crimes connected to the growing "sexploitation" industry. See Baker, *supra* note † at 809, 842–44 (discussing the enactment of 18 U.S.C.

§ 2251); cf. *Ferber*, 458 U.S. at 757 (reviewing New York's analog to Section 2251 and finding that "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance"). By criminalizing only child-pornography offenses under the title "sexual exploitation of children," Congress elucidated its original understanding of that term. No amendment to the statute nor semantic drift in the term's colloquial meaning changes that a crime "relating to the sexual exploitation of children" under Section 2251 is a crime relating to the production and distribution of child pornography.

Because this issue is the subject of a clear, and deep, split dividing the circuit courts and resulting in significantly disparate mandatory minimum sentences across the country—and because this case is clearly the best pending vehicle for addressing this issue—the Court should grant Mr. Moore's petition for certiorari.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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