No. 23-

IN THE
Supreme Court of the United States

JAY ELHAGE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, despite years of Commerce Clause jurisprudence, the Court should now hold that Congress has no authority to criminally punish under the Commerce Clause, in that the Constitution specifies only certain crimes the Legislature is authorized to punish, leaving this case to State prosecution if criminal punishment is to be imposed.

PARTIES TO THE PROCEEDING

Petitioner is Jay Elhage, the defendant-appellant below.

Respondent is the United States of America, the plaintiff-appellee below.

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The opinion of the United States Court of Appeals for the Second Circuit affirming the judgment of the district court is unpublished. It is reprinted in Addendum to this Petition ("App.") at 1-6

JURISDICTION

The Court of appeals issued its decision on June 2, 2023. This petition is filed within 90 days after that date pursuant to Sup. Ct. R. 13. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

Article I, § 8, cl. 3, 6, 10:

> The Congress shall have Power … To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;…
>
> The Congress shall have the Power … To provide for the Punishment of counterfeiting the Securities and current Coin of the United States; … To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations ….

Article III, §3, cl. 2:

> The Congress shall have Power to declare the Punishment of Treason ….

STATEMENT OF THE CASE

Petitioner Jay Elhage seeks a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit entered on June 2, 2023 affirming a judgment of conviction for child-pornography-viewing offenses and a sentence of primarily 156 months' imprisonment.

Petitioner was charged by the State of New York for viewing child pornography. The federal government indicted Petitioner on November 4, 2021, at which point New York dismissed its charges against petitioner.

The charges concerned Elhage's viewing child pornography on his home computer, in private, and his downloading and "sharing" of images over the internet. He raised several issues concerning what he viewed as right to view child pornography that he did not create, in private in his home, and challenged the element that he knew the computer sharing program was downloading content onto his computer.

A jury convicted Elhage of one count of distribution of child pornography (18 U.S.C. §2252A(a)(2)(A) &(b)(1); one count of receipt of child pornography (18 U.S.C. §2252A(2)(A) & (b)(1); one count of attempted receipt of child pornography (same statute); and three counts of possession of child pornography (18 U.S.C. §2252A(5)(B) & (b)(2)).

He was sentenced to a below-Guideline sentence of concurrent 156-moth terms, 15 years of supervised release, restitution, forfeiture, and sex offender restrictions in the future. He is now serving his sentence.

Before closing arguments, the defendant asked through his lawyer to speak to the judge. He had asked prior to trial as well. He wanted to explain his position. The court stated that it would listen.

The defendant asked whether the laws "come under the commerce clause". The judge said that some do. Defendant began to argue his claim that the Constitution's interstate commerce clause itself does not provide for punishment, and that the federal government does not have authority to punish child pornography viewers or sharers pursuant to the commerce clause. Defendant stated that he had directed his attorney to argue this point, but his attorney's motion to dismiss did not make the exact arguments or consider the cases defendant had researched.

Judge McAvoy asked the defendant and his counsel to hand up the arguments that the defendant had wanted to make, and stated he would file the document and review defendant's claims in chambers. (T.416). After reviewing the material, Judge McAvoy stated that while past holdings and statements cited (and highlighted) by defendant in his research might well be taken to support defendant's position -- that Congress does not have authority to punish under the Commerce Clause and that this case should be a State matter if punishment is to be imposed -- the law had developed to the contrary.

Judge McAvoy suggested that since there is support for Petitioner' claims and the issue is preserved, he should ask the higher court to overrule or federal criminal powers differently, according to the Constitution's plain text.

The Second Circuit declined, in favor of this Court. The Second Circuit concluded that petitioner's arguments that Congress lacks authority to punish crimes not specifically enumerated in the Constitution were foreclosed by *United States v. Comstock*, 560 U.S. 126 (2010):

> Neither Congress' power to criminalize conduct, nor its power to imprison individuals who engage in that conduct…is explicitly mentioned in the Constitution. But Congress nonetheless possesses broad authority to do each of those things in the course of 'carrying into Execution' the enumerated powers 'vested by' the 'Constitution in the Government of the United States, Art. I, § 8, cl. 18—authority granted by the Necessary and Proper Clause.

560 U.S. at 137.

Appellant is serving his sentence. He seeks a writ of *certiorari.*

REASON FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO ADDRESS AND ROLL BACK THE EXPANSIVE VIEW OF FEDERAL CRIMINAL POWER UNDER THE COMMERCE CLAUSE TO COMPORT WITH THE CONSTITUTION'S ENUMERATION OF ONLY SPECIFIC AREAS IN WHICH CONGRESS IS GIVEN POWER TO PUNISH

With recent precedent being challenged on Constitutional grounds, the Court should consider whether Congress's power to punish is limited by the Constitutional delegation to Congress of power to punish, specifically, "treason," "counterfeiting securities and coin of the United States," "piracies and felonies omitted on the High Seas, and offenses against the laws of nations. This textual reading of limited federal power is supported by the statement of Thomas Jefferson, in a document called "The Kentucky Resolutions of 1798." The federal government is a

government of limited powers. It may be necessary and proper to impose civil penalties, but the Constitution expressly grants the power to punish. Punishment for violations of offenses to the Commerce Clause is reserved to the States.

As the District Court indicated, cases and material cited by Petitioner in fact show a basis to conclude that because express authority is given in the Constitution to the Legislature to prosecute certain specifically stated crimes, the founders did not intend to give the government power to punish as a component of its authority under the Commerce Clause.

The Supreme Court's decisions do not squarely address this issue. They essentially assume the power to punish under the Necessary and Proper clause and decide whether certain types of punishment are within those "necessary and proper." But they also recognize that the Constitution refers explicitly about punishment of certain crimes.

In 2010, the Supreme Court reviewed a federal civil-commitment statute authorizing the Department of Justice to detain a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released. The question it asked was whether the Federal Government has the authority under Article I of the Constitution to enact this federal civil commitment program or whether its doing so falls beyond the reach of a government "of enumerated powers." *McCulloch v. Maryland*, 4 Wheat. 316, 405, 4 L.Ed. 579 (1819).

The Court concluded that the Constitution granted Congress the authority to enact the civil commitment statute, §4248, as "necessary and proper for carrying

into Execution" the powers "vested by" the "Constitution in the Government of the United States." Art. I, § 8, cl. 18.

In so ruling, the Court recognized that the Constitution specifies certain subjects that the federal Legislature can punish:

> The Constitution, which nowhere speaks explicitly about the creation of federal crimes beyond those related to "counterfeiting," "treason," or "Piracies and Felonies committed on the high Seas" or "against the Law of Nations," Art. I, § 8, cls. 6, 10; Art. III, § 3, nonetheless grants Congress broad authority to create such crimes. See McCulloch, 4 Wheat., at 416, 4 L.Ed. 579 ("All admit that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of Congress"); see also United States v. Fox, 95 U.S. 670, 672, 24 L.Ed. 538 (1878).

The Court noted Congress' past exercises of authority to enact criminal laws in furtherance of powers to regulate:

> Congress routinely exercises its authority to enact criminal laws in furtherance of, for example, its enumerated powers to regulate interstate and foreign commerce, to enforce civil rights, to spend funds for the general welfare, to establish federal courts, to establish post offices, to regulate bankruptcy, to regulate naturalization, and so forth. Art. I, § 8, cls. 1, 3, 4, 7, 9; Amdts. 13–15. See, e.g., Lottery Case, supra (upholding criminal statute enacted in furtherance of the Commerce Clause); *Ex parte Yarbrough*, 110 U.S. 651,… (1884) (upholding Congress' authority to enact Rev. Stat. § 5508, currently 18 U.S.C. § 241 (criminalizing civil-rights violations) and Rev. Stat. § 5520, currently 42 U.S.C. § 1973j (criminalizing voting-rights violations) in furtherance of the Fourteenth and Fifteenth Amendments);

> *Sabri,supra*, (upholding criminal statute enacted in furtherance of the Spending Clause); *Jinks, supra*, at 462, n.2, … (*citing McCulloch*, *supra*, at 417) (describing perjury and witness tampering as federal crimes enacted in furtherance of the power to constitute federal tribunals); see also 18 U.S.C. § 1691 et seq. (postal crimes); § 151 et seq. (bankruptcy crimes); 8 U.S.C. §§ 1324–1328 (immigration crimes).

United States v. Comstock, 560 U.S. 126, 135-36 (2010).

But *Comstock's* citation of *McCulloch* begs the question. This issue was not raised and not resolved.

McCulloch v. Maryland, 17 U.S. 316, 416-17 (1819) does not, as suggested, broadly condone criminal punishments in all matters. Rather, the Court there addressed the propriety of enacting penal legislation as to subject matters of cases in which the Legislature is already given specific powers in the Constitution. The Court wrote:

> So, with respect to the whole penal code of the United States: whence arises the power to punish, in cases not prescribed by the constitution? All admit, that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of congress. The right to enforce the observance of law, by punishing its infraction, might be denied, with the more plausibility, because it is expressly given in some cases. Congress is empowered "to provide for the punishment of counterfeiting the securities and current coin of the United States," and "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." The several powers of congress may exist, in a very imperfect state, to be sure, but they may exist and be carried into execution, although no punishment should be inflicted, in cases where the right to punish is not expressly given.
>
> Take, for example, the power "to establish post-offices and post-roads." This power is executed, by the single act of making the establishment.

> But, from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offences, is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

McCulloch v. Maryland, 17 U.S. 316, 416-17 (1819).

Notably the Court excepted cases in which the Constitution does not grant legislative authority to punish, stating "no punishment should be inflicted, in cases where the right to punish is not expressly given. While the commerce power is broad, it is too broad to justify criminal prosecutions of conduct that is intrastate and local.

Justice Thomas' dissent in *Comstock* focuses on the Courts' repeated holdings that "the Necessary and Proper Clause is not an independent fount of congressional authority, but rather `a caveat that Congress possesses all the means necessary to carry out the specifically granted … powers vested by the Constitution.'", citing and *quoting Kinsella v. United States ex re. Singleton*, 361 U.S. 234, 247 (1960); *Carter Coal Co.,* 298 U.S. 238, 291 (1936) …." The power to punish is specially granted in limited areas in the constitution. The power to punish for Commerce Clause based violations is not one of the enumerated powers.

An indication from the Framers' supporting this principle of limited criminal jurisdiction and power is the statement of Thomas Jefferson, in a Resolution adopted by the Kentucky General Assembly in 1798. In that Resolution, Kentucky resolved to keep the federal government limited to the federal "Government for special purposes" –by which the Constitution, by the will of the People, "delegated to that Government certain definite powers, reserving each state to itself.

The Kentucky Resolution was quoted by dissenting Judge Batchelder in *United States v. Faasse*, 265 F.3d 475, 478 (6th Cir. 2001), a case dealing with the Constitutionality of the Child Support Recovery Act of 1992, 18 U.S.C. § 228, to "punish certain persons who intentionally fail to pay their child support obligations." … The case presented the question whether the Act is a valid exercise of Congress's Commerce Clause power under Article I, § 8, cl. 3 of the Constitution.

In arguing that this went beyond Congress' powers, the dissent stressed that the federal government was created with limited powers, and that powers to punish are specifically set forth and are limited. Quoting Thomas Jefferson:

> [T]he Constitution of the United States, having delegated to Congress the power to punish treason, counterfeiting the securities and current coin of the United States, piracies, and felonies committed on the high seas, and offenses against the law of nations, and no other crimes whatsoever; and it being true as a general principle, and one of the amendments to the Constitution having also declared, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," therefore . . . all their other acts which assume to create, define, or punish crimes, other than those so enumerated in the Constitution, are altogether void, and of no force; and that the power to create, define, and punish such other crimes is reserved, and, of right appertains solely and exclusively to the respective States, each within its own territory.

Kentucky Resolutions, 2d Resolved cl. (1798), reprinted in *The Portable Thomas Jefferson* 281, 282 (Merrill Peterson ed., 1979), and cited at *United States v. Faasse*, 265 F.3d 475, 497 (6th Cir. 2001).

Petitioner's position is that the federal government can regulate; it can investigate; it can lend its investigative abilities to the States. But it is the State that has the authority to prosecute and punish for violations of rules adopted in service of Commerce Clause jurisdiction. Perhaps it can impose civil sanctions, such as the restitution he is obligated to pay.

But the federal government is given no Constitutional power to put him in jail. Here, the State of New York arrested and charged Petitioner at first, based on an intrastate investigation, which, because it uses ubiquitous computers can be deemed State or federal based on the desire for greater penalties in the federal enforcement scheme – which has wrongly assumed that child pornography viewers are or will become pedophiles.

Petitioner asks that grant *certiorari* and hold that the federal government has no authority to prosecute the viewing of child pornography, justified by the Commerce Clause. This is a matter the States must prosecute, not the federal authorities.

Granted, the relief would upend things. So did the recent decision in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S.___ (2022), in which the court upended federal law and held that the Constitution of the United States does not confer a right to abortion. So did *Morrison v. National Australia Bank Ltd.*,

561 U.S. 247 (2010), holding that the federal securities fraud laws did not apply extraterritorially, upending decades of jurisprudence, including invalidating criminal prosecutions as well as civil claims. *United States v. Vilar*, 729 F.3d 62 (2d Cir. 2013). So did the Supreme Court invalidate a large part of the Bankruptcy system in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (holding that the 1978 Reform Act "has impermissibly removed most, if not all, of the 'essential attributes of the judicial power' from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise on Congress' power to create adjuncts to Art. III courts.")

Petitioner asks for similar consideration here. Federal criminal powers are enumerated in the Constitution. The Court should hold that the federal government does not have the power to punish Commerce Clause violations.

CONCLUSION

The Court should grant the Writ and roll back Commerce Clause criminal prosecutions.

Dated: August 2023

/s/_____

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22-763
United States v. Elhage

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd day of June, two thousand twenty-three.

PRESENT:

MYRNA PÉREZ,
ALISON J. NATHAN,
SARAH A. L. MERRIAM,

Circuit Judges.

United States of America,

Appellee,

v. **No. 22-763**

Jay F. Elhage,

Defendant-Appellant.

FOR APPELLEE: PAUL D. SILVER (Geoffrey J.L. Brown, *on the brief*), Assistant United States Attorneys, *for* Carla B. Freedman, United States Attorney for the Northern District of New York, Albany, NY.

FOR DEFENDANT-APPELLANT: VIVIAN SHEVITZ, Esq., Royal Oak, MI.

Appeal from a judgment and two orders of the United States District Court for the Northern District of New York (Thomas J. McAvoy, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the April 4, 2022 judgment of conviction, the March 28, 2022 order denying a motion for acquittal, and the November 30, 2021 order denying a motion to dismiss of the district court are **AFFIRMED**.

Defendant-Appellant Jay F. Elhage appeals his conviction after trial in the United States District Court for the Northern District of New York (McAvoy, *J.*) for distribution, receipt, attempted receipt, and possession of child pornography. Elhage also appeals his sentence of imprisonment. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal, which we discuss only as necessary to explain our decision to affirm.

BACKGROUND

After an undercover investigation identified that Elhage was sharing child pornography, law enforcement searched Elhage's home and found devices containing more than 5,000 images and videos of child pornography. Elhage was indicted and unsuccessfully moved to dismiss the indictment on the basis that the United States Constitution grants states the exclusive power to criminalize his offense conduct. After trial, Elhage was convicted of distribution, receipt, attempted receipt, and possession of child pornography, including images involving minors who had not attained 12 years of age, pursuant to 18 U.S.C. §§ 2252A(a)(2)(A), (a)(5)(B), (b)(1),

and (b)(2). The district court imposed a below-Guidelines sentence of concurrent 156-month terms of imprisonment for each count of conviction.[1]

STANDARD OF REVIEW

We review the constitutionality of a statute de novo, *United States v. Hassan*, 578 F.3d 108, 119 (2d Cir. 2008), and the substantive reasonableness of a sentence for abuse of discretion, "set[ting] aside a district court's *substantive* determination only in exceptional cases where the trial court's decision cannot be located within the range of permissible decisions," *United States v. Ingram*, 721 F.3d 35, 37 (2d Cir. 2013) (quoting *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc)).

DISCUSSION

We reject Elhage's assertions that Congress exceeded its powers when enacting the federal statutes under which Elhage was convicted and that his sentence is substantively unreasonable because it was premised on the United States Sentencing Guidelines, which recommend sentences that are "too long" in child pornography cases. Appellant's Br. at 32.

I. Congress Has Authority to Criminalize Elhage's Offense Conduct

With limited exceptions,[2] the Constitution "nowhere speaks explicitly about the creation of federal crimes." *United States v. Comstock*, 560 U.S. 126, 135 (2010). It "nonetheless grants Congress broad authority to create [federal] crimes," which authority "Congress routinely exercises . . . to enact criminal laws in furtherance of, for example, its enumerated powers to regulate interstate and foreign commerce." *Id.* at 136. We have held that Congress's

[1] The Court also imposed a fifteen-year term of supervised release with special conditions; a special assessment of $600; restitution of $15,000; and forfeiture of certain property. Elhage does not challenge any aspect of the sentence other than the term of imprisonment.

[2] *See* U.S. Const. art. I, § 8, cls. 6, 10 ("The Congress shall have Power . . . To provide for the Punishment of counterfeiting the Securities and current Coin of the United States; . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . . ."); *id.* art. III, § 3, cl. 2 ("The Congress shall have Power to declare the Punishment of Treason . . . .").

criminalization of the possession of child pornography does not exceed Congress's authority under the Commerce Clause. *United States v. Harris*, 358 F.3d 221, 223 (2d Cir. 2004) (Sotomayor, *J.*); *see also United States v. Ramos*, 685 F.3d 120, 134 (2d Cir. 2012) ("§ 2252A clearly lies within Congress's powers under the Commerce Clause . . . ."); *United States v. Holston*, 343 F.3d 83, 90 (2d Cir. 2003) (finding Congress's "prohibit[ion on] the production of child pornography using materials that have moved in interstate commerce" to be "a permissible exercise of Congress's authority under the Commerce Clause"). Elhage has raised no compelling argument that would lead us to revisit these well-reasoned and established rulings,[3] even if we could. *See United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004) ("[W]e . . . are bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court.").

To the extent Elhage is arguing that our precedents do not engage with the threshold question of whether Congress lacks authority to punish crimes not specifically enumerated in the Constitution, that was also squarely addressed by *Comstock*. There, the Supreme Court held:

> Neither Congress's power to criminalize conduct, *nor its power to imprison individuals who engage in that conduct* . . . is explicitly mentioned in the Constitution. But Congress nonetheless possesses broad authority to do *each of those things* in the course of 'carrying into Execution' the enumerated powers 'vested by' the 'Constitution in the Government of the United States,' Art. I, § 8, cl. 18—authority granted by the Necessary and Proper Clause."

[3] Elhage "rests his argument largely on statements of Thomas Jefferson, in a Resolution adopted by the Kentucky General Assembly in 1798," Appellant's Br. at 21, which challenged the constitutionality of the Alien and Sedition Acts on the basis that "all . . . acts which assume to create, define, or punish crimes, other than those so enumerated in the Constitution, are altogether void, and of no force; and . . . the power to create, define, and punish such other crimes is reserved, and, of right appertains solely and exclusively to the respective States," *id.* at 22 (quoting Kentucky Resolutions, 2d Resolved cl. (1798), *reprinted in* The Portable Thomas Jefferson 281, 282 (Merrill Peterson ed., 1979)). A single statement is a thin reed on which to base a challenge with such vast implications, especially in light of resounding contrary authority establishing Congress's authority to criminalize offenses not specifically enumerated in the Constitution.

560 U.S. at 137 (emphases added). Therefore, any argument that the federal government lacks the authority to "punish for violations of rules adopted in service of Commerce Clause jurisdiction," Appellant's Br. at 23, is also foreclosed.

II. Elhage's Sentence Was Substantively Reasonable

The district court imposed a substantively reasonable sentence and did not abuse its discretion. Elhage contends only that the "Guidelines are flawed" when it comes to sentencing persons convicted of child pornography offenses, so we "should not require Courts to start [by considering] the Guidelines in such cases." Appellant's Br. at 26. Our precedent encourages district courts to "take seriously the broad discretion they possess in fashioning sentences . . . bearing in mind that they are dealing with an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results." *United States v. Dorvee*, 616 F.3d 174, 188 (2d Cir. 2010). Far from suggesting that the district court acted carelessly or used the Sentencing Guidelines to reach a "shockingly high" sentence, *id.* at 183 (quoting *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009)), the record indicates that the district court "careful[ly] consider[ed]" the record, submissions by counsel, and the factors outlined in 18 U.S.C. § 3553(a) before imposing a "non-guideline sentence" because "the guideline range is greater than necessary to meet the goals of sentencing," Gov't App'x at 95–96. Indeed, in advocating for a "lenient sentence," Elhage's sentencing memorandum proposed a sentencing range that *included* the district court's eventual sentence of 156 months' imprisonment. *Id.* at 85 (requesting "a lenient sentence—the mandatory minimum [of five years' imprisonment] or a sentence closer to that than the bottom-end 292 months under the [Sentencing Guidelines]," *i.e.*, a term of imprisonment between 60 and 176 months). Accordingly, we conclude that Elhage's sentence is substantively reasonable and the district court did not abuse its discretion. Moreover, we decline Elhage's request that we vacate his sentence and direct the district court to resentence

him "without the use of the Guidelines," Appellant's Br. at 33, for the additional reason that doing so would violate section 3553(a) and our precedent, *see* 18 U.S.C. § 3553(a)(4)(A)(i) (requiring that a sentencing court "shall consider . . . the sentencing range" set forth in the Sentencing Guidelines); *Cavera*, 550 F.3d at 188 ("The district courts have discretion to select an appropriate sentence, and in doing so are statutorily bound to consider the factors listed in § 3553(a), including the advisory Guidelines range.").

We have considered Elhage's remaining arguments and found them to be without merit. Accordingly, we **AFFIRM** the judgment of conviction, the order denying a motion for acquittal, and the order denying a motion to dismiss.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court