No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JORDAN WINCZUK,
Petitioner,

v.

UNITED STATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal criminal statute entitled Sexual Exploitation of Children provides a series of mandatory-minimum penalties. 18 U.S.C. §2251(e). The penalty for violating §2251(a) is generally 15-30 years of incarceration. *Id.* Someone with one prior conviction under enumerated federal laws or a state law "relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography," is subject to 25-50 years of incarceration (the 25-year minimum). *Id.* Someone with two or more convictions under certain federal laws or a state law "relating to the sexual exploitation of children," is subject to 35 years to life (the 35-year minimum). *Id.*

The question presented is the proper definition of "relating to the sexual exploitation of children" in 18 U.S.C. §2251(e). It is an important question that impacts many individuals each year. U.S. Sent'g Comm'n, *Mandatory Minimum Penalties for Sex Offenses in the Federal Criminal Justice System*, at 19 (2019), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190102_Sex-Offense-Mand-Min.pdf. There is a Circuit split on this issue, which implicates this Court's statutory interpretation and rule of lenity jurisprudence. This Court should resolve this important question.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

The petitioner, Jordan Winczuk, respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The reported opinion of the Court of Appeals is Appendix A (App.A). The district court's judgment is Appendix B (App.B). The Court of Appeals order denying Mr. Winczuk's petition for rehearing en banc is Appendix C (App.C).

JURISDICTION

The Court of Appeals entered judgment on May 2, 2023. App.A 1. Mr. Winczuk filed a timely petition for rehearing en banc on May 16, 2023, which the Court of Appeals denied on June 21, 2023. App.C 1. This petition is being filed within ninety days of that denial. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. §2251
SEXUAL EXPLOITATION OF CHILDREN

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct shall be punished as provided under subsection (e) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

(c) (1) Any person who, in a circumstance described in paragraph (2), employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct outside of the United States, its territories or possessions, for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e).

(2) The circumstance referred to in paragraph (1) is that--

(A) the person intends such visual depiction to be transported to the United States, its territories or possessions, by any means, including

by using any means or facility of interstate or foreign commerce or mail; or

(B) the person transports such visual depiction to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or mail.

(d) (1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering--

(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct; shall be punished as provided under subsection (e).

(2) The circumstance referred to in paragraph (1) is that--

(A) such person knows or has reason to know that such notice or advertisement will be transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed; or

(B) such notice or advertisement is transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed.

(e) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years, but if such person has 2 or more prior convictions under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned not less than 35 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for not less than 30 years or for life.

INTRODUCTION

Mr. Winczuk pled guilty to attempted sexual exploitation of children. 18 U.S.C. §2251(a). Section 2251, entitled Sexual Exploitation of Children, criminalizes conduct related to the production of child pornography. The baseline penalty for violating §2251(a) is 15-30 years of imprisonment. 18 U.S.C. §2251(e). Someone with one prior conviction under "this chapter [110], section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice)," or a state law "relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography," is subject to 25-50 years of incarceration. *Id.* Someone with two or more convictions under "this chapter [110], chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice)," or a state law "relating to the sexual exploitation of children," faces imprisonment of 35 years to life. *Id.*

This case raises the question of which of these substantial mandatory minimums applies. Resolving this question requires defining the phrase "relating to the sexual exploitation of children" as used in the 35-year minimum. Mr. Winczuk has two New Jersey convictions. He conceded that these convictions qualify as predicates under the 25-year minimum. The government argued that they were predicates under the 35-year minimum. Mr. Winczuk argued that because they do not relate to the crimes enumerated in §2251, specifically offenses related to the

production of child pornography, they do not relate to "the sexual exploitation of children" and do not trigger the 35-year minimum. The district court and the First Circuit sided with the government.

The First Circuit defined "relating to the sexual exploitation of children" broadly to include "any criminal sexual conduct involving children." App.A 16. There is a Circuit split as to the proper interpretation of this phrase. A thorough and well-reasoned Ninth Circuit case held that "'sexual exploitation of children' as contained in §2551(e) means the production of child pornography." *United States v. Schopp*, 938 F.3d 1053, 1062 (9th Cir. 2019). The First Circuit did not address this ruling or recognize the Circuit split. Instead, it followed pre-*Schopp* cases from other Circuits that are not persuasive. The First Circuit, and the Circuits it followed, erred in defining "relating to the sexual exploitation of children" broadly. A proper application of this Court's statutory interpretation and rule of lenity cases results in the conclusion that offenses "relating to sexual exploitation of children" in §2251(e) means offenses connected to the crimes described by §2251, specifically those related to the production of child pornography.

STATEMENT OF THE CASE

A. Statutory Background

Congress enacted §2251, entitled "Sexual Exploitation of Children," in 1978. At that time, the recidivist enhancement applied to someone with a previous conviction "under this section." App.A 7-8. In 1994, Congress expanded the qualifying predicates to include previous convictions under "this chapter or chapter

109A." *Id.* Chapter 109A criminalizes sexual abuse. *Id.* Congress added state-law predicates and introduced the current, tiered structure of recidivist enhancements in 1996. *Id.* at 8. At that time, the 25-year and 35-year mandatory minimums were both triggered by prior convictions "under this chapter or chapter 109A, or under the laws of any State relating to the sexual exploitation of children." *Id.* In 1998 and 2003, Congress added federal predicates to both mandatory minimums. *Id.* at 9.

In 2006, Congress amended §2251(e) so that different predicates trigger the 25-year and 35-year minimums. *Id.* at 10. Specifically, it added "'section 1591,' after 'this chapter,' *the first place it appears*," and replaced the phrase "sexual exploitation" with a more expansive list of predicates in "*the first place it appears*." Pub. L. No. 109-248 §206(b)(1) (2006) (emphasis added). This reference to "the first place it appears" amended the 25-year minimum but left the 35-year minimum untouched. As a result of this amendment, the 25-year minimum applies when someone has a state law conviction "relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography." The 35-year minimum, in contrast, applies when someone has two or more state law predicates "relating to the sexual exploitation of children." §2251(e).

B. Proceedings Below

Jordan Winczuk pled guilty to one count of attempted sexual exploitation of a minor in violation of 18 U.S.C. §2251(a) and one count of committing a felony

involving a minor while required to register as a sex offender in violation of 18 U.S.C. §2260A.[1] App.A 5. This plea carried two substantial mandatory minimums. *Id.* at 1. Mr. Winczuk did not challenge the consecutive 10-year sentence required by §2260A. *Id.* The parties disagreed about what §2251(e) required.

Mr. Winczuk has two New Jersey convictions: one for sexual assault on a person who was at least 13 but less than 16 by someone at least 4 years older (N.J.S.A. 2C:14-2c(4)), and one for endangering a child by sharing child pornography (N.J.S.A. 2C:24-4b(5)(a)).[2] App.A 4. The government contended that these convictions subjected him to the 35-year minimum. Mr. Winczuk conceded that the 25-year minimum applied but argued that the 35-year minimum did not. He argued that his convictions did not relate to "sexual exploitation of children"—the title of §2251—because, as used in §2251(e), "sexual exploitation of children" means offenses prohibited by §2251, specifically offenses related to the production of child pornography. The district court applied the 35-year minimum. App.A 1. It sentenced Mr. Winczuk to 45 years of incarceration: 35 years on the §2251 count and 10 years on the §2260A count. *Id.*

The First Circuit affirmed Mr. Winczuk's sentence. It concluded "that the plain text of 'relating to the sexual exploitation of children' unambiguously refers to

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[1] In 2018, over the course of two weeks, Mr. Winczuk had sexually explicit conversations with an 11-year-old on Instagram, which included asking the child for pictures of his genitalia. App.A 3-5.

[2] In 2008, Mr. Winczuk was charged with sexually assaulting four minors. App.A 4. In 2009, he was charged with file sharing child pornography. *Id.* He resolved both cases in 2010 by pleading guilty to these charges. *Id.*

any criminal sexual conduct involving children." App.A 16. It stated that in reaching this conclusion, it "join[ed] the views of the Third, Fourth, Sixth, and Eighth Circuits." *Id.* at 2, 16, 18, 21. The panel did not discuss the contrary Ninth Circuit opinion or acknowledge the Circuit split.

The First Circuit looked to legislative history, dictionary definitions, and the federal predicates that trigger the 35-year minimum. *Id.* at 7-16. It noted that before 2006, when state offenses "relating to sexual exploitation of children" triggered both minimums, two Circuits interpreted that phrase broadly. *Id.* at 9, 15-16, 20-21. It assumed that Congress knew about these cases in 2006 and would not have limited the state predicates that trigger the 35-year minimum. *Id.* It stated that given the wide range of federal predicates in the 35-year minimum, it was "implausible" to believe that the list of state offenses was narrower. *Id.* at 15, 21.

After reaching this conclusion, the First Circuit rejected Mr. Winczuk's contrary arguments. *Id.* at 16-17. It concluded that the title of §2251—Sexual Exploitation of Children—could not limit the meaning it had already ascribed to "sexual exploitation of children" in §2251(e). *Id.* at 18. It stated that §3509, which defines "exploitation" as "child pornography or child prostitution," was not relevant to the definition of the term in §2251(e). *Id.* at 18-19. It rejected Mr. Winczuk's argument that a broad definition of "sexual exploitation of children" would give the divergent language in the 25-year and 35-year minimums the same meaning. *Id.* at 19-22. The Court concluded that the rule of lenity did not apply because the statute was not grievously ambiguous. *Id.* 21.

REASONS FOR GRANTING THE PETITION

A. The Courts of Appeals are divided over the reach of the 35-year minimum in 18 U.S.C. §2251(e).

The most thorough and well-reasoned opinion defining "sexual exploitation of children" in §2251(e) is *United States v. Schopp*, 938 F.3d 1053 (9th Cir. 2019); *see also United States v. Roberts*, No. 21-cr-00016-PB D.E. 40 (D.N.H.) (adopting narrow definition of "sexual exploitation of children" based in part on *Schopp*). The Ninth Circuit concluded that offenses "relating to the sexual exploitation of children" must relate to the production of child pornography to trigger the 35-year minimum. *Schopp*, 938 F.3d at 1059-68. It noted the importance of the title and content of §2251, which "sets forth a series of federal offenses, all related to the production of visual depictions of minors engaging in sexually explicit conduct." *Id.* at 1059. It found that:

> The statute's section heading, when read in conjunction with the statutory text, largely resolves our question concerning the federal generic definition of "sexual exploitation of children." Congress titled §2251 '[s]exual exploitation of children.' By doing so, it 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. The Ninth Circuit looked to other sources, including related statutes, Guidelines provisions, state laws, and dictionary definitions. *Id.* at 1059-68. It held that "all roads lead to the same conclusion: 'sexual exploitation of children' as contained in §2551(e) means the production of child pornography." *Id.* at 1062. It noted the distinction between sexual exploitation and sexual abuse. *Id.* at 1068. It concluded that Congress used "exploitation," to indicate "some form of distinct

enrichment or benefit deriving from the sexual conduct, other than sexual gratification from the conduct alone." *Id.* at 1061-62.

Without addressing *Schopp* or acknowledging the Circuit split, the First Circuit joined the Circuits that had defined "sexual exploitation of children" broadly. App.A 2, 16, 18, 21. These contrary cases predate *Schopp* and are not as thorough or well-reasoned. *See United States v. Mills*, 850 F.3d 693, 697-99 (4th Cir. 2017); *United States v. Pavulak*, 700 F.3d 651, 673-75 (3d Cir. 2012); *United States v. Sanchez*, 440 F. App'x 436, 440 (6th Cir. 2011) (unpublished); *United States v. Smith*, 367 F.3d 748, 751 (8th Cir. 2004). None discuss the fact that the title and content of §2251 define "sexual exploitation of children." Nor do they explain why, despite different language, the 35-year minimum should be given an expansive meaning mirroring the 25-year minimum. These opinions went beyond the text, context, and history of this statute to speculate about what was "plausible" for Congress to do.

The Fifth Circuit recently reached the same result as the First. *United States v. Moore*, 71 F.4th 392 (5th Cir. 2023). The Fifth Circuit acknowledged the split in a footnote. *Id.* at 399, n.15. Like the First Circuit in *Winczuk*, it did not engage with *Schopp* or its reasoning. Although *Moore* reached the same result as *Winczuck*, its rationale was distinct. The First Circuit found the language of the statute plain on its face and relied on dictionary definitions. App.A 7-16. The Fifth Circuit found no clear meaning for "sexual exploitation of children" in dictionaries or statutory structure. 71 F.4th at 396-97. Unlike the First Circuit, the Fifth Circuit recognized

the importance of the title of §2251 and could find no reason for the difference between the language in the 25-year and 35-year minimums. *Id.* at 397. The Fifth Circuit relied in large part on the fact that two cases had interpreted "sexual exploitation of children" broadly before the 2006 amendments. *Id.* at 397-99. As discussed below, it is inappropriate to assume that Congress knew about these cases when it amended §2251(e). *See infra* pp15-16.

Schopp is the most thorough and persuasive Circuit case on this issue. 938 F.3d at 1053. Its analysis is supported by the text and structure of §2251, related federal statutes, the Sentencing Guidelines, state statutes, and dictionary definitions. *Id.* at 1059-68. In reaching a different conclusion, the First Circuit misapplied the principles of statutory interpretation established by this Court.

B. The First Circuit misapplied principles of statutory interpretation and the rule of lenity established by this Court.

The "normal tools of statutory interpretation" begin with the statutory language. *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 391 (2017). The language must be considered within the broader statutory context. *Dubin v. United States*, 599 U.S. ---, 143 S. Ct. 1557, 1565 (2023). Statutory interpretation can include consideration of statutory structure, related statutes, legislative history, and state criminal codes. *Esquivel-Quintana*, 581 U.S. at 391-94. Each of these tools supports the conclusion that offenses "relating to the sexual exploitation of children" should be defined narrowly to include offenses connected to the crimes described by §2251, specifically the production of child pornography.

The terms "relating to" and "sexual exploitation of children" are not defined by §2251. When this statute, titled Sexual Exploitation of Children, was enacted in 1978, *Black's Law Dictionary* did not define "sexual exploitation." *Black's* (4th ed. 1968). At that time, *Black's* defined "exploitation" with reference to industry and profit: "Act or process of exploiting, making use of, or working up; utilization by application of industry, argument, or other means of turning to account, as the exploitation of a mine or forest." *Black's* (4th ed. 1968). It defined "abuse" generally, including "[e]verything which is contrary to good order established by usage." *Id.* These definitions indicate that "sexual exploitation of children" was a new term whose limits were set by the content of §2251. Congress's use of "exploitation" rather than "abuse" indicates that it meant something more specialized than general sexual misconduct involving children.

The phrase "sexual exploitation of children" was added to the recidivist enhancements in 1996. *Black's* did not define "sexual exploitation" at that time. *Black's* (6th ed. 1990). The distinction between "exploitation" and "abuse" persisted. In 1996, sexual abuse included "illegal sex acts performed against a minor;" child abuse included "[a]ny form of cruelty to a child's physical, moral or mental well-being;" and abuse included "[p]hysical or mental maltreatment." *Black's* (6th ed. 1990). Exploitation was defined as:

> Act or process of exploiting, making use of, or working up. Utilization by application of industry, argument, or other means of turning to account, as the exploitation of a mine or a forest. Taking unjust advantage of another for one's own advantage or benefit (e.g. paying low wages to illegal aliens).

Id. (citation omitted).

In 2006, when "sexual exploitation of children" was replaced with a long list of state predicates in the 25-year minimum, sexual exploitation was defined as "[t]he use of a person, esp. a child, in prostitution, pornography, or other sexually manipulative activity that has caused or could cause serious emotional injury. – Sometimes shortened to exploitation." *Black's* (8th ed. 2004). Exploitation was defined as "[t]he act of taking advantage of something; esp., the act of taking unjust advantage of another for one's own benefit." *Id.* The definition of abuse remained broad, including: "Physical or mental maltreatment"; "to injure (a person) physically or mentally"; "Intentional or neglectful physical or emotional harm inflicted on a child, including sexual molestation." *Id.*

These definitions do not support the First Circuit's conclusion that "sexual exploitation of children" includes "all sexual uses of children" or "unambiguously refers to any criminal sexual conduct involving children." App.A 13-14. *Black's* indicates that "exploitation" originated in the commercial context and that "sexual exploitation" is a specialized term, supporting the conclusion that "'sexual exploitation' includes some form of enrichment of or benefit to the perpetrator beyond sexual gratification." *Schopp*, 938 F.3d at 1061-62. Sexual exploitation is more limited than than abuse. Unlike "abuse," "exploitation" does not include "all sexual uses of children."[3]

[3] The distinction between sexual abuse and sexual exploitation is evident in other statues and the statutory history. *See Schopp*, 938 F.3d at 1068; *see also* App.A 8-9 (noting chapter 109 "addresses sexual abuse," and quoting history that talks about sexual abuse and child pornography as separate, but linked, concepts).

Statutory language must be interpreted in context. *Dubin*, 143 S. Ct. at 1565. This Court has noted that "relate to" is "context sensitive" because it has the potential to stretch beyond all limits. *Id.* at 1566. This Court recently examined statutory context by "[s]tart[ing] at the top, with the words Congress chose for" the statute's title. *Id.* at 1567. It explained that the title cannot overcome the plain language of a statute, but it is a tool that courts can use to define unclear statutory terms. The First Circuit erroneously concluded that the meaning of "sexual exploitation of children" is clear from the text and disregarded the statutory context, including the title. App.A 16, 18. As discussed above, §2251 used the phrase "sexual exploitation of children" before it appeared in *Black's*, and *Black's* reveals that exploitation is distinct from abuse and requires a benefit beyond sexual gratification. *See supra* pp11-12. To the extent the dictionary definitions do not make this clear, it is appropriate to look at the title of §2251 to interpret this term. Section 2251 is entitled "sexual exploitation of children." When Congress used this exact term in §2251(e), it meant to refer to the type of conduct criminalized by §2251, specifically conduct connected to the production of child pornography.

Another important piece of the context of §2251(e) is the difference between the 25-year and 35-year mandatory-minimum provisions. "When Congress includes particular language in one section of a statute but omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning (*expressio unius est exclusio alterius*)." *United States v. Bittner*, 598 U.S. 85, 94 (2023). Before 2006, the 25-year and 35-year minimums defined state predicates as

offenses "relating to sexual exploitation of children." *See* §2251 (effective date 04/30/03). The minimums are now triggered by different predicates. The First Circuit's opinion erases these differences. The First Circuit suggested that the 25-year and 35-year minimums are different because some of the predicates—aggravated sexual abuse and sexual abuse—that trigger the 25-year minimum need not involve minors. App.A 19-21. Congress did not add aggravated sexual abuse and sexual abuse to the 25-year minimum and leave "sexual exploitation of children" untouched; it radically altered the language. The broad list of predicates in the 25-year minimum means it is triggered by "any criminal sexual conduct involving children." Add.A 16. Giving "sexual exploitation of children" the same meaning, as the First Circuit did, collapses the stark difference in language.[4]

The legislative history of §2251 also supports a narrow definition of "sexual exploitation of children." The legislative history consistently makes a distinction between sexual abuse and sexual exploitation. *Schopp*, 938 F.3d at 1068; App.A 8-9. The First Circuit cited three pre-2006 cases that defined "sexual exploitation of

[4] The First Circuit suggested that a narrow definition of "sexual exploitation of children" would give that phrase the same meaning as the "production of child pornography" in the 25-year minimum." App.A 20. However, the 25-year minimum is triggered by state offenses "relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography." It does not contain the stand-alone phrase "production of child pornography" such that it could be replaced with "sexual exploitation of children." *Id.* Additionally, in the 25-year minimum the phrase "relating to" appears before the abuse-related offenses, but not before the trafficking or child-pornography-related ones. The 25-year minimum likely lists child-pornography-related offenses to ensure that they are all included as predicates.

children" in §2251(e) broadly. App.A 9-10, 15-16. It assumed that Congress knew about these cases in 2006 and that because it acted to broaden the statute, "sexual exploitation of children" cannot be read narrowly. *Id.*; *see also Moore*, 71 F.4th at 397-99. The inference that Congress knew about these cases is not supported.

The 2006 legislative history does not suggest that Congress was aware of these cases. If Congress had been aware of these cases, it would not have needed to amend the 25-year enhancement, because the phrase "sexual exploitation of children" already included the newly listed offenses. If it wanted to expand the predicates to include offenses not involving minors, it could have added aggravated sexual abuse and sexual abuse alone. Congress was undoubtedly aware of the title and contents of §2251 when it amended §2251(e). It is more logical to believe that it considered the title and content of §2251 than to presume that it knew about three lightly-reasoned Circuit court cases.

If "sexual exploitation of children" is defined as offenses related to the production of child pornography, the 2006 amendment broadened the 25-year enhancement while leaving the 35-year to life enhancement unchanged. The First Circuit said it would have been "implausible" for Congress to limit the predicates for the 35-year enhancement. App.A 15, 21. Statutory interpretation does not involve deciding whether Congress's choices were "plausible." The 2006 amendment should be read as broadening the 25-year minimum, not amending the 35-year minimum.

The First Circuit cited two legislative history sources to support its broad definition: an appropriation provision in the 2006 Act that amended §2251(e); and

the strategy described by the 2008 PROTECT Act. App.A 10-11, 16. Mr. Winczuk noted that 18 U.S.C. §3509 defines "exploitation" as "child pornography or child prostitution." The First Circuit discounted this argument. App.A 18-19. All three of these sources limit their definition to the specific provision, and none are linked to §2251. Like §2251, §3509 is part of Title 18. It was amended by the same 2006 Act as §2251(e). Section 3509 is a more accurate representation of how Congress used the phrase "sexual exploitation of children" in the criminal context than an appropriations provision or the definitions section of an Act enacted after 2006.

Finally, the First Circuit erred in concluding that the rule of lenity does not apply. It reached this conclusion without recognizing or examining the Circuit split. To the extent "sexual exploitation of children" is grievously ambiguous, the rule of lenity dictates that the narrower definition of "sexual exploitation of children" applies. *Bittner*, 598 U.S. at 101-04 (Gorsuch and Jackson, J.J., concurring). The fact that even Circuits that agree that a broad definition is appropriate disagree about *why* a broad definition is appropriate suggests that the statute is ambiguous. *Compare* App.A at 7-16 *with Moore*, 71 F.4th at 396-99. A New Hampshire judge found the statute grievously ambiguous:

> [W]hen you have a statute that does something as serious as impose mandatory minimum sentences of 25 or 35 years, there's a good reason to apply this principle of lenity and to ask Congress to be more clear in, when it wants to subject someone to an enhanced mandatory minimum, that they do so.

Roberts, D.E. 40 at 40. Two Justice of this Court recently expressed a similar sentiment in a different context:

> In a case like Mr. Bittner's, ... that would mean a person who willfully violates the BSA could face a $68 million fine and 1,360 years in prison rather than a $1.25 million fine and 25 years in prison. In these circumstances, the rule of lenity, not to mention a dose of common sense, favors a strict construction.

Bittner, 598 U.S. at 103 (Gorsuch and Jackson, J.J., concurring); *see also United States v. Wooden*, --- U.S. ---, 142 S. Ct. 1063, 1082-86 (2022) (Gorsuch and Sotomayor, J.J., concurring in judgment). If §2251(e) is grievously ambiguous, the rule of lenity requires application of the narrower definition of "sexual exploitation of children."

CONCLUSION

For the foregoing reasons, Mr. Winczuk asks this Court to grant this petition, to resolve the Circuit split by determining that the phrase "relating to sexual exploitation of children," as used in 18 U.S.C. §2251(e), means offenses relating to those defined by §2251, specifically offenses related to the production of child pornography, or is grievously ambiguous, and to conclude that the First Circuit erred in defining this phrase broadly. He asks this Court to remand this case for further proceedings.

Respectfully submitted,

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Date: September 14, 2023