No. 23-5619

IN THE SUPREME COURT OF THE UNITED STATES

JORDAN WINCZUK, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior New Jersey convictions for sexually assaulting a minor between the ages of 13 and 15 and for endangering a child's welfare by sharing child pornography qualify as offenses "relating to the sexual exploitation of children" for purposes of the second sentencing enhancement in 18 U.S.C. 2251(e).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Mass.):

United States v. Winczuk, No. 19-cr-40011 (Mar. 16, 2022)

United States Court of Appeals (1st Cir.):

United States v. Winczuk, No. 22-1190 (May 2, 2023)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 67 F.4th 11. The order of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 2023. A petition for rehearing was denied on June 21, 2023 (Pet. App. C1). The petition for a writ of certiorari was filed on September 14, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Massachusetts, petitioner was convicted on one count of attempting to entice a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, in violation of 18 U.S.C. 2251(a), and one count of committing a felony offense against a minor while subject to a requirement to register as a sex offender, in violation of 18 U.S.C. 2260A. Pet. App. B1. The district court sentenced petitioner to 45 years of imprisonment, to be followed by five years of supervised release. Id. at B2-B3. The court of appeals affirmed. Id. at A1-A22.

1. In 2018, petitioner began messaging an 11-year-old boy on Instagram using an alias. Pet. App. A3. At the time he sent the messages, petitioner was required to register as a sex offender and was prohibited from contacting minors, as a result of prior convictions. Id. at A4-A5.

Petitioner at first talked to the child about school and complimented his physical appearance. Pet. App. A3. Over a two-week period, petitioner's messages became progressively more sexually explicit. Ibid. He began asking the boy about erections and masturbation and repeatedly requested photos of the child's genitals. Ibid. Petitioner also proposed plans for the child to visit him in New Jersey and described in detail the sex acts he would perform on the boy. Id. at A3-A4.

The child's mother learned about the messages two weeks after petitioner began contacting the child. Pet. App. A3. She then posed as her son, continued the conversation with petitioner, and elicited petitioner's real name and other identifying information. Ibid. She took that information to New Jersey law enforcement. Id. at A3-A4. A subsequent search of petitioner's electronic devices and his social-media accounts revealed that petitioner had also engaged in sexually explicit conversations with several other social-media users who appeared to be children. Id. at A4.

2. In 2019, a federal grand jury in the District of Massachusetts charged petitioner with one count of attempting to entice a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, in violation of 18 U.S.C. 2251(a), and one count of committing a felony offense against a minor while subject to a requirement to register as a sex offender, in violation of 18 U.S.C. 2260A. Pet. App. A5. Petitioner pleaded guilty to both offenses without a plea agreement. Ibid.

Section 2251's sentencing provision has a default statutory sentencing range of 15-30 years of imprisonment. See 18 U.S.C. 2251(e). Section 2251(e) also contains two enhancements that apply based on a defendant's criminal history. The first enhancement provides that if the defendant:

> has one prior conviction under this chapter [chapter 110 of title 18], 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[.]

18 U.S.C. 2251(e). The second enhancement states that if the defendant:

> 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.

Ibid.

In this case, the presentence report found that petitioner had two relevant prior convictions. First, in 2008, petitioner pleaded guilty to sexually assaulting a person between the ages of 13 and 15 as a person at least four years older, in violation of N.J. Stat. Ann. § 2C:14-2c(4) (West 2008). C.A. Sealed App. 16. Second, in 2009, petitioner pleaded guilty to one count of endangering the welfare of a child by file sharing child pornography, in violation of N.J. Stat. Ann. § 2C:24-4b(5)(1) (West 2009). C.A. Sealed App. 18. Based on those prior convictions, the presentence report found that petitioner was subject to Section 2251(e)'s second enhancement. Id. at 23.

Petitioner objected to the presentence report, asserting that he should be sentenced for his Section 2251 offense under Section

2251(e)'s first enhancement, rather than its second. C.A. App. 49-50. He argued that neither of his New Jersey convictions "relat[e] to the sexual exploitation of children" within the meaning of the second enhancement -- a phrase he interpreted to include only "the production of child pornography." Id. at 50.

At sentencing, the district court disagreed and found that Section 2251(e)'s second enhancement applied. Sent. Tr. 11. The court sentenced petitioner to a 35-year term of imprisonment for the Section 2251 count and a mandatory consecutive ten-year term of imprisonment for the Section 2260A count, to be followed by five years of supervised release. Pet. App. B2-B3; see id. at A2.

3. The court of appeals affirmed. Pet. App. A1-A22. While acknowledging the Ninth Circuit's contrary analysis in United States v. Schopp, 938 F.3d 1053 (2019), see Pet. App. A5, A13, the court rejected the Ninth Circuit's view that the statutory phrase at issue refers only to the production of child pornography, instead aligning itself with "the Third, Fourth, Sixth, and Eighth Circuits." Id. at A2; see United States v. Moore, 71 F.4th 392, 399 (5th Cir. 2023) (rejecting same limiting argument), petition for cert. pending, No. 23-219 (filed Sept. 5, 2023).

Relying on legal and nonlegal dictionaries from the time of the phrase's enactment in Section 2251's sentencing provision, the court of appeals found that "the plain text of 'sexual exploitation of children' unambiguously refers to any criminal sexual conduct involving children.'" Pet. App. A14; see id. at A11-A14. The

court rejected petitioner's argument that the phrase necessarily requires the conduct to "enrich or benefit the perpetrator beyond sexual gratification," id. at A13 (citation and internal quotation marks omitted), finding that proposed requirement unsupported, id. at A13-A14. The court also observed that Section 2251(e)'s use of "'relating to'" "further expands the breadth of [the] phrase." Id. at A14 (citation omitted).

The court of appeals found additional support for its interpretation in Section 2251(e)'s statutory context. Pet. App. A14-A16. Among other contextual indicators, the court observed that the phrase at issue "appears at the end of a list of federal predicates" concerning "a broad range of sexual conduct related to minors," not just conduct related to child pornography. Id. at A14-A15. This neighboring federal-predicate list indicated that petitioner's narrow interpretation of the state-predicate language would be "directly contrary to congressional intent." Id. at A15. The court further observed that "Congress has on multiple occasions defined 'exploitation' (albeit not specifically for purposes of § 2251) as encompassing a broad range of criminal sexual conduct related to children." Id. at A16 (citing Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 704, 120 Stat. 649; PROTECT Our Children Act of 2008, Pub. L. No. 110-401, § 2, 122 Stat. 4229-4230); see id. at A10-A11.

The court of appeals also relied on Section 2251(e)'s amendment history. Pet. App. A15-A16; see id. at A8-A11. Among

other considerations, the court pointed out that Congress first added the phrase "laws of any State relating to the sexual exploitation of children" to Section 2251(e)'s first and second recidivist enhancements in 1996; two courts of appeals then construed the phrase "as not being limited to the production of child pornography"; and Section 2251(e) was thereafter amended, against that judicial backdrop, in ways that left the phrase undisturbed in the second enhancement. Pet. App. A15-A16 (citing cases). The court observed that, given the "normal[] assum[ption]" that "when Congress enacts statutes, it is aware of relevant judicial precedent," Congress's decision to leave the interpreted language unchanged in the second enhancement was significant. Ibid. (quoting Ryan v. Gonzales, 568 U.S. 57, 66 (2013)).

Finally, the court of appeals rejected petitioner's remaining counterarguments. Pet. App. A17-A21. It declined to limit the plain meaning of "sexual exploitation of children" based on Section 2251's use of that phrase in its title, id. at A17-A18, or based on the definition of "exploitation" in a "very different child victims' and witness' rights statute" enacted in 1990, id. at A18 (citing 18 U.S.C. 3509(a)). The court also rejected the inference that the enumerated predicates triggering the 25-year minimum in the first enhancement (as amended) implicitly cabin the phrase "relating to the sexual exploitation of children" in the second enhancement. Id. at A19-20A. Pointing out that the first enhancement's enumerated list includes state offenses relating to

"the production * * * of child pornography," 18 U.S.C. 2251(e), the court reasoned that "[i]f anything," "[t]he fact that Congress clearly named this offense in the 25-year minimum weighs against giving different language in the 35-year minimum the same precise meaning." Pet. App. A20. And the court found the rule of lenity inapplicable because Section 2251(e) suffers from "neither grievous ambiguity nor grievous uncertainty." Id. at A21.

ARGUMENT

Petitioner renews his contention (Pet. 11-18) that the second enhancement in 18 U.S.C. 2251(e) applies only to convictions for state offenses involving the production of child pornography. Petitioner further contends (Pet. 9-11) that the Court should grant review to resolve a conflict among the courts of appeals on that question. Petitioner's arguments are similar to those raised in the petition for a writ of certiorari in Moore v. United States, No. 23-219 (filed Sept. 5, 2023). For the reasons explained in the government's brief in opposition in Moore, those contentions lack merit and the question presented does not warrant further review. See Br. in Opp. at 6-16, Moore, supra (No. 23-219).*

To the extent that petitioner raises additional arguments not raised by the petitioner in Moore, those arguments provide no basis for further review in this case. First, petitioner's reliance on

* We have served petitioner with a copy of the government's brief in opposition in Moore. The same question is also presented in the pending petition in Sykes v. United States, No. 23-5429 (filed Aug. 22, 2023).

the rule of lenity (Pet. 17-18) is misplaced. The rule applies only if, "after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." United States v. Castleman, 572 U.S. 157, 172-173 (2014) (citation omitted); see Shular v. United States, 140 S. Ct. 779, 789 (2020) (Kavanaugh, J., concurring). The rule has no application here, because the traditional tools of statutory interpretation do not reveal "grievous ambiguity" in the statute. See Pet. App. A21; see also Br. in Opp. at 6-14, Moore, supra (No. 23-219).

Second, petitioner suggests that the question presented "impacts many individuals each year." Pet. i. But his source for that assertion is a Sentencing Commission statistic aggregating all defendants who were convicted in fiscal year 2016 of an offense under Section 2251 or 18 U.S.C. 2260(a) (which cross-references Section 2251(e)'s penalty provision, see 18 U.S.C. 2260(c)(1)). See U.S. Sentencing Commission, Mandatory Minimum Penalties for Sex Offenses in the Federal Criminal Justice System 19 (Jan. 2019). That statistic does not reveal how many of those 373 defendants were subject to Section 2251(e)'s second enhancement specifically, let alone how many were subject to that enhancement based on at least one prior state conviction (as opposed to federal convictions), nor yet how many of those had prior state convictions for non-child-pornography-production offenses. See ibid. It

therefore provides little insight into the importance of the narrow question presented here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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