No. 24-____

IN THE

Supreme Court of the United States

JAY A. LIESTMAN,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

18 U.S.C. § 2252(b)(1) imposes an increased mandatory minimum and maximum sentence on a defendant who "has a prior conviction . . . under the laws of any State relating to . . . the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography."

The question presented is: Whether the sentencing enhancement in Section 2252(b)(1) covers only convictions under state statutes that define "child pornography" in the same manner or more narrowly than federal law (as two circuits have concluded), or if instead the mandatory minimum reaches to include defendants convicted of state offenses that stretch beyond the federal definition of child pornography (as five circuits hold).

RELATED PROCEEDINGS

United States v. Liestman, No. 3:20-cr-00006-JDP-1 (W.D. Wis.)

United States v. Liestman, No. 21-3225 (7th Cir.)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jay A. Liestman respectfully requests a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit's opinion (Pet. App. 1a-49a) is reported at 97 F.4th 1054. The district court's order (Pet. App. 50a-54a) is unpublished but is available at 2021 WL 4551956.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 8, 2024. Pet. App. 1a. On June 28, 2024, Justice Barrett extended the deadline for filing the petition for a writ of certiorari to August 7, 2024. No. 23A1167. On July 23, Justice Barrett further extended the deadline for filing the petition to September 5, 2024. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 2252, which contains the sentence enhancement provision at issue here, and 18 U.S.C. § 2256, which defines the term "child pornography," are reproduced in full at Pet. App. 55a-62a.

INTRODUCTION

18 U.S.C. § 2252(b)(1) requires a sentencing court to impose a 15-year mandatory minimum sentence, instead of the 5-year mandatory minimum that would otherwise apply, on a defendant convicted of certain child pornography offenses who "has a prior conviction . . . under the laws of any State relating to . . . the

production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography." The provision also increases the applicable statutory maximum sentence from 20 to 40 years.

That sentencing enhancement—along with identically worded, neighboring provisions in Title 18, *see* 18 U.S.C. §§ 2251(e), 2252(b)(2), 2252A(b)(1)-(2)—has generated a circuit split. Applying the familiar categorical approach, the Sixth and Ninth Circuits hold that a state offense does not qualify under this section if it criminalizes the production (or possession, receipt, mailing, etc.) of material that is not "child pornography" under the federal definition that applies "for purposes of" the sentencing enhancement. The First, Third, Eighth, and Tenth Circuits, however, employ what one court calls a "looser categorical approach." *United States v. Portanova*, 961 F.3d 252, 256 (3d Cir. 2020) (citation omitted). In those circuits, the statutory language "relating to" expands the reach of the sentence enhancement beyond what federal law defines as "child pornography" offenses, requiring a district court to apply the mandatory minimum even if the state crime of conviction covers conduct that federal law does not classify in that manner.

In the en banc decision below, a bare majority of the Seventh Circuit joined the majority position. The six-judge majority concluded that the statutory phrase "relating to" requires judges to impose this enhancement based on state crimes that have a connection with (but are broader than) the federal definition of child pornography. Writing for the five dissenters, Judge Wood argued that "relating to" cannot be read so capaciously. Under this Court's holding in *Mellouli*

v. Lynch, 575 U.S. 798 (2015), the dissenters maintained, the statutory phrase "relating to" does not permit courts applying the categorical approach to sweep in state crimes that are broader than an applicable statutory definition.

This divide of authority warrants certiorari. The circuit split creates disharmony in a set of federal sentencing statutes that collectively affect a substantial swath of criminal defendants. And the question presented determines whether significant mandatory minimums apply in those defendants' cases. Petitioner's case, which generated thoughtful en banc opinions, is a prime example.

On the merits, the Seventh Circuit majority erred. The statute's text, structure, and design—together with principles of administrability and fair notice—foreclose the unbounded interpretation of "relating to" embraced by the decision below. And the Seventh Circuit reached its determination only by improperly cabining this Court's precedent in *Mellouli* to its particular facts. This Court's review is necessary to restore *Mellouli*'s analysis and ensure that courts do not lightly brush aside the statutory definitions Congress has provided.

STATEMENT OF THE CASE

1. In October 2019, petitioner communicated with an undercover FBI agent using a messenger app and sent the agent a link to videos containing child sexual abuse material. Pet. App. 2a. He subsequently pleaded guilty to a single count of transporting child pornography in violation of 18 U.S.C. § 2252(a)(1). *Id.*

At sentencing, the government argued for a sentencing enhancement pursuant to 18 U.S.C. § 2252(b)(1). *See* Pet. App. 3a. That statute increases the mandatory minimum and statutory maximum terms of imprisonment if a defendant has a prior conviction "under the laws of any State relating to … the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography." In the same Act that created this enhancement, Congress defined "child pornography" for purposes of the entirety of Chapter 110—the chapter that houses Section 2252(b)(1)—as materials depicting minors engaging in "sexually explicit conduct." 18 U.S.C. § 2256(8). And "sexually explicit conduct" is defined, in turn, to mean in relevant part the "lascivious exhibition of the anus, genitals, or pubic area." *Id.* § 2256(2)(A)(v).

To support applying the Section 2252(b)(1) sentencing enhancement, the government pointed to petitioner's previous state conviction for possession of child pornography. Pet. App. 2a-3a. That conviction was for violating Wis. Stat. § 948.12(1m)—a statute which, like federal law, prohibits the possession of materials depicting minors engaged in "sexually explicit conduct." Wisconsin law, however, defines "sexually explicit conduct" more broadly than does the federal statute, to include the "[l]ewd exhibition of intimate parts" including "the breast" and "buttock." Wis. Stat. §§ 939.22(19); 948.01(7)(e).

In other words, the Wisconsin statute under which petitioner was previously convicted criminalizes the possession of materials that do not qualify as "child

pornography" under federal law—most directly relevant here, those depicting lewd exhibition of "the breast" and "buttock." For that reason, petitioner argued at sentencing that he was not subject to a sentencing enhancement under Section 2252(b)(1). Pet. App. 2a-3a, 51a-52a.[1]

The district court did not dispute that the Wisconsin statute covered images that federal law does not classify as "child pornography." Notwithstanding that overbreadth, the district court agreed with the government and deemed that Section 2252(b)(1)'s enhancement applied to this case. Pet. App. 51a-54a. The court accordingly imposed the enhanced 15-year mandatory minimum sentence required by that provision. *Id.* 54a.

2. a. The Seventh Circuit *sua sponte* convened en banc to decide petitioner's appeal of his sentence, and it acknowledged that other courts of appeals that have addressed child-pornography priors are divided over whether Section 2252(b)(1) permits state child-pornography prior offenses "to serve as predicates despite some amount of overbreadth." Pet. App. 17a (noting 3-2 conflict). In a 6-5 decision, the Seventh Circuit adopted the "majority" position on the issue. *Id.*

The Seventh Circuit, in an opinion by Judge Scudder, began its substantive analysis by explaining that,

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[1] Petitioner also argued that Wis. Stat. § 948.12(1m) is broader than Section 2252(b)(1) because it prohibits "accessing" child pornography in addition to "possessing" it. Pet. App. 24a. That additional form of alleged overbreadth is not at issue in this petition.

under the categorical approach, "a prior offense can trigger a statutory consequence only if its statutory elements are defined in such a way that *all* possible violations of the statute, however committed, would fall within Congress's chosen federal benchmark." Pet. App. 4a. The court of appeals then turned to the particular question in this case: "whether Wis. Stat. § 948.12(1m) is categorically an offense 'relating to … the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography.'" Pet. App. 8a (quoting 18 U.S.C. § 2252(b)(1)). The court agreed with petitioner that Wis. Stat. § 948.12(1m) is broader than Section 2252(b)(1) because it "considers a wider range of material to be child pornography." Pet. App. 9a.

According to the Seventh Circuit majority, however, that acknowledged mismatch did not resolve the case because Section 2252(b)(1) requires only that the prior conviction "relat[e] to" production or the like of child pornography. Pet. App. 12a. The majority reasoned that the "ordinary" meaning of the phrase "relating to" is "broad," and that it had to give effect to this meaning to distinguish between "relating to" and other words (like "involving") that Congress has used in other sentencing enhancements. The court also asserted that other usages of "relating to" in Section 2252 called for construing the term broadly. And the court noted that a contrary rule would mean that many state statutes would have fallen outside the scope of Section 2252(b)(1) at the time of its enactment. Pet. App. 13a-16a.

The majority considered but rejected petitioner's argument that this Court's precedent compelled a

narrower understanding of "relating to" in the context of Section 2252(b)(1). In particular, petitioner focused on this Court's holding in *Mellouli v. Lynch*, 575 U.S. 798 (2015), that when the statutory phrase "relating to" modifies a federally defined term, the phrase cannot be read so broadly as to effectively overwrite the federal definition. *See id.* at 813 (rejecting such a "sweeping" interpretation). Accordingly, under *Mellouli*, that phrase in Section 2252(b)(1) might sweep in inchoate offenses that are not otherwise enumerated as qualifying offenses in a federal statute. *See id.* at 811. But petitioner maintained that "relating to" could not be construed so broadly as to encompass state offenses criminalizing conduct with respect to materials that did not qualify as "child pornography" under the federal definition.

The majority disagreed. It construed *Mellouli* as limited to the particular context of the removal statute at issue in that case. Pet. App. 18a-23a. Then, free from the rule of that case, the majority looked instead to this Court's recent decision in *Pugin v. Garland*, 599 U.S. 600 (2023), which construed the phrase "relating to" broadly with respect to a term ("obstruction of justice") that *lacked* a federal definition. Pet. App. 19a-20a.

Applying a similarly broad construction of "relating to" to petitioner's case, the court concluded that the categorical approach was satisfied here, notwithstanding "some amount of overbreadth" in the state statute at issue. Pet. App. 17a, 23a-25a. The court therefore held that Section 2252(b)(1)'s sentencing enhancement covered petitioner.

b. Like the majority, the five dissenters recognized that the "Wisconsin statute sweeps more broadly than the federal law" by considering a broader range of material to qualify as child pornography. Pet. App. 33a. But the dissent rejected the majority's interpretation of the phrase "relating to" as effectively constituting a "get-out-of-jail free card from the categorical approach" that would eliminate the significance of that mismatch. *Id.*

Instead, the dissent would have concluded that, under *Mellouli*, when Congress has provided a statutory definition, that definition must control for purposes of the categorical approach. Pet. App. 34a-48a. Applied to petitioner's case, that meant that the court had no need to "guess what offenses are reached by the phrase 'child pornography,' because the definition in section 2256 tells us exactly what conduct Congress had in mind." *Id.* 47a-48a. The dissent therefore contended that the court should not "ignore that definition." *Id.* 48a. The dissent would accordingly have deemed Section 2252(b)(1)'s enhanced sentencing range inapplicable and remanded for resentencing under the base 5-to-20-year range. *Id.* 49a.

REASONS FOR GRANTING THE WRIT

As the Seventh Circuit's en banc opinion recognized, Pet App. 17a, the decision below deepens a divide among the circuits about whether a state conviction "relat[es] to" the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography under 18 U.S.C. § 2252(b)(1) if the offense of conviction is based on a definition of "child pornography" that is materially broader than the federal definition of that term. (And the conflict

has deepened further since.) That question is important in numerous federal prosecutions. And this case is an ideal vehicle to address the issue. Finally, the judgment below is wrong: As Judge Wood explained in dissent, this Court's precedent squarely dictates that where, as here, the statutory phrase "relating to" modifies a term for which Congress has provided a definition, courts may not read the phrase to broaden that particular definition.

I. The courts of appeals are intractably divided over whether a state offense can serve as a predicate under Section 2252(b)(1) where it covers conduct that does not fall within the federal definition of "child pornography."

As the Seventh Circuit explained, "a majority of circuits to have interpreted 'relating to' in § 2252(b)(1) and materially identical enhancements elsewhere" have "permitted state offenses to serve as predicates despite some amount of overbreadth." Pet. App. 17a. More specifically, the Seventh Circuit is one of five courts of appeals to so hold, while two circuits have rejected that approach. The split is now intractable.

1. Along with the Seventh Circuit in this case, the First, Third, Eighth, and Tenth Circuits hold that "relating to" permits a mismatch between the state crime of conviction and the federal definition of "child pornography."

The Third Circuit holds that a "looser categorical approach" applies to the Section 2252(b)(1) "child pornography" enhancement. *United States v. Portanova*, 961 F.3d 252, 256 (3d Cir. 2020) (quoting *Williams v.*

Att'y Gen., 880 F.3d 100, 105 (3d Cir. 2018)). That court has held that—even though "child pornography" is defined by statute—the phrase "the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography" is "not collectively a defined term and is best understood generically." *Id.* at 257. "Accordingly, § 2252(b)(1) does not require complete congruence between federal and state predicates." *Id.* at 260. The court therefore applied the sentencing enhancement because, even though there was no "direct match," the state and federal "crimes share a logical connection between them" and "define nearly identical subject matter." *Id.* at 262.

In *United States v. Mayokok*, 854 F.3d 987 (8th Cir. 2017), the Eighth Circuit likewise confronted a state conviction under a statute with a more expansive definition of "child pornography" than the federal one. *Id.* at 992. But, it held, the question "is not whether the statutes criminalize exactly the same conduct, but whether the full range of conduct proscribed under [the state statute] *relates to* the 'possession of child pornography' as that term is defined under federal law." *Id.* at 992-93 (alteration adopted). Applying a "broad" understanding of the phrase "relating to," the court concluded that it did. *Id.* at 993 (quoting *United States v. Sonnenberg*, 556 F.3d 667, 671 (8th Cir. 2009)).

Over a dissent by Judge Hartz, the Tenth Circuit has also adopted the majority approach. In *United States v. Bennett*, 823 F.3d 1316 (10th Cir. 2016), the government "concede[d]" that the relevant state and federal definitions "do not completely overlap." *Id.* at

1322. But the court ruled that "relating to" has a "broadening effect" on the statutory definition. *Id.*

"Following [his] understanding of the Supreme Court's decision in" *Mellouli v. Lynch*, 575 U.S. 798 (2015), Judge Hartz would have held for the defendant, 823 F.3d at 1327 (Hartz, J., concurring and dissenting). Although he "agree[d] with the majority that the term *related to* is broad language," he wrote that "its interpretation must somehow be anchored to prevent it from drifting aimlessly." *Id.* "What was important" in *Mellouli*, he wrote, "is that there was an explicit federal definition of the term." *Id.* at 1328.

Most recently—in a decision issued after the Seventh Circuit's en banc ruling—the First Circuit joined the government's side of the split. The court held that the term "relating to" takes on a "broad meaning" in the context of Section 2252A(b)(2), such that "a state definition need not be a perfect match with the federal definition of child pornography" in order to trigger the sentencing enhancement. *United States v. Trahan*, 111 F.4th 185, 192 (1st Cir. 2024).[2] It therefore concluded that even though the definition of "child pornography" in Massachusetts law under which the defendant was previously convicted was more expansive than the federal definition, the conviction nonetheless triggered Section 2252A(b)(2) because "the core purposes of the statutes are the same—both address the

[2] As the Seventh Circuit correctly recognized, the sentencing enhancement in Section 2252(b)(1) is "materially identical" in relevant part to other enhancements in neighboring sections of the U.S. Code. Pet. App. 17a; *see* 18 U.S.C. §§ 2251(e), 2252(b)(2), 2252A(b)(1)-(2).

market for images of sexual abuse of children." *Id.* at 197.

2. In contrast with the positions of the First, Third, Seventh, Eighth, and Tenth Circuits, the Sixth and Ninth Circuits hold that a prior conviction does not qualify as a predicate under Section 2252(b)(1) if the state offense covers conduct that does not meet the federal definition of "child pornography."

In *United States v. Reinhart*, 893 F.3d 606 (9th Cir. 2018), the defendant had previously been convicted under a California "possession of child pornography statute" that "sweeps in depictions of a broader range of 'sexual conduct' than the federal child pornography statute." *Id.* at 618 (quoting *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1009 (9th Cir. 2015)). So the court was called to decide whether the "prior California convictions constitute offenses 'relating to' child pornography under 18 U.S.C. § 2252(b)(2)." *Id.* at 608. The answer, the court held, was no: "applying well-established statutory principles," the court concluded that "where there is a federal definition of 'child pornography' in the same statutory chapter as the sentencing enhancement provision at § 2252(b)(2), we apply that definition." *Id.* at 613.

The words "relating to," the court then explained, made no difference. The court relied heavily on *Mellouli*, reasoning that "because the terms 'child pornography' and 'sexually explicit content,' are defined . . . the statutory text tugs in favor of a narrower reading' of 'relating to.'" 893 F.3d at 615 (quoting *Mellouli*, 575 U.S. at 812 (alterations adopted)). The court accordingly declined to apply the statutory mandatory minimum. *Id.* at 621.

The Sixth Circuit interprets the relevant statutory language identically to the Ninth Circuit. In *United States v. McGrattan*, 504 F.3d 608 (6th Cir. 2007), the defendant had a prior conviction under an Ohio statute that the court held was broader than the federal definition of "child pornography," because there was "a 'realistic possibility' that the statute would be applied to someone who possessed depictions of nudity which were lewd, but which did not involve the genitals." *Id.* at 614. The court held that the dissimilarity between the statutes precluded applying the sentencing enhancement in 18 U.S.C. § 2252A(b)(1). *Id.* at 615. And the words "relating to," the court explained, made no difference: because the "underlying concern" with the categorical approach "is the protection of the defendant's jury trial right under the Sixth and Fourteenth Amendments," the "difference in the statutory language . . . is immaterial." *Id.* at 612.

3. These various decisions recognize the entrenched divide in authority. The decision below explained that it was joining a split, Pet. App. 17a—one that has only deepened since the opinion issued. The First Circuit's recent decision similarly observed that it "join[ed] four of the six circuits to have already considered this question." *Trahan*, 111 F.4th at 192.

Even before those two recent decisions, the courts of appeals had recognized their disagreement with each other. The Third Circuit devoted six paragraphs to explaining its disagreement with the Ninth Circuit's approach. It charged that *Reinhart*'s "reliance on *Mellouli* is misplaced" and that its "narrow reading of 'child pornography' fails to give sufficient weight

not only to the words 'relating to'—an approach arguably countenanced by *Mellouli*—but also to 'the possession of' preceding 'child pornography,'—words absent from the statute at issue in *Mellouli*." *Portanova*, 961 F.3d at 259 (alterations adopted). The court ended its discussion by stating that its "approach also better matches Congress' purpose of ensuring that a wide range of state offenses would fall within § 2252's enhancement provisions." *Id.* at 260.

The Ninth Circuit, for its part, "note[d] that we are at odds with the Tenth Circuit." *Reinhart*, 893 F.3d at 615. And that court explained at length why Judge Hartz's "dissent in *Bennett* . . . persuasively counters several of the government's arguments," such that the Tenth Circuit erred in its efforts to distinguish *Mellouli*. *Id.*

In short, this split in authority is not going away. The jurists who have considered the question understand that they are in disagreement with one other about how to construe the relevant sentencing enhancements in light of *Mellouli*. Only this Court can resolve which of the divergent approaches is the correct one.

II. The question presented is important.

This divide in authority is of profound importance to numerous individuals.

1. Roughly 1,500 people are convicted federally each year for child pornography offenses. U.S. Sentencing Comm'n, *Mandatory Minimum Penalties for Sex Offenses in the Federal Criminal Justice System* 4 (2019); *see* U.S. Sentencing Comm'n, *Quick Facts: Child Pornography Offenders* 1 (2022) (similar). And

the sentencing enhancements in Section 2251(b)(1) and the related provisions are highly consequential. If a defendant commits an offense punishable under Section 2251(b)(1) but does not trigger the mandatory minimum, he faces a prison term of "not less than 5 years and not more than 20 years." But if the mandatory minimum applies, the sentence increases dramatically: the defendant is to be "imprisoned for not less than 15 years nor more than 40 years."

The neighboring statutes that use the same language work the same way. 18 U.S.C. § 2251(e) (a production offense) provides for a base sentencing range of "not less than 15 years nor more than 30 years" and an enhanced range, based on a qualifying prior offense, of "not less than 25 years nor more than 50 years." 18 U.S.C. § 2252(b)(2) (a simple possession offense) provides for a prison term of "not more than 10 years" that increases to "not less than 10 years nor more than 20 years" where there is a qualifying prior conviction. And 18 U.S.C. § 2252A, which effectively covers the same conduct as § 2252, contains sentencing provisions (at § 2252A(b)(1) and (b)(2)) that mirror (respectively) the penalties in 18 U.S.C. § 2252(b)(1) and (b)(2). Thus, whether a prior conviction qualifies for application of the sentencing enhancement determines years or even decades of a defendant's prison sentence.

2. The government's appellate briefing in this case confirms that the question is of systemic importance. Surveying state statutes, the government informed the Seventh Circuit that "[t]hirty-two states, including Wisconsin, define child pornography to include visual depictions that fall outside the Section 2256

definition" of child pornography. U.S. CA7 Br. 22 (citing Ariz. Rev. Stat. Ann. §§ 13-3553(A)(2), 13-3551; Cal. Penal Code §§ 311.11(a), 311.4(d)(1); Idaho Code Ann. § 18-1507; Mont. Code Ann. § 45-5-625; Nev. Rev. Stat. Ann. §§ 200.730, 200.700(3); Wash. Rev. Code Ann. §§ 9.68A.070(1), 9.68A.011(4)). It further informed the court that twelve additional states' statutes "probably" or "arguably" used broader definitions than the federal law. *Id.* at 22-23. To be sure, the language of a statute alone is not determinative: here, for instance, the government argued unsuccessfully that a state supreme court decision narrowed the Wisconsin statute's reach and left it congruent with federal law. Pet. App. 10a-11a. But the government's research reveals the nationwide impact that a ruling from this Court would have.

III. This case is an ideal vehicle to resolve the question presented.

This case is the best possible vehicle to resolve the circuit split.

1. The dueling en banc opinions below thoroughly air the competing interpretive considerations. *Compare* Pet. App. 11a-23a (majority opinion), *with id.* 34a-48a (Wood, J., dissenting). And petitioner preserved his objection to the sentencing enhancement in district court, *see id.* 51a, and on appeal, *see id.* 3a.

2. Additionally, the question presented is outcome-determinative of petitioner's sentence. Both the majority and dissenting opinions agreed that petitioner's Wisconsin crime of conviction relied on a broader definition of "child pornography" than the federal definition. Pet. App. 9a ("[W]e agree with Liestman that

Wis. Stat. § 948.12(m) is broader than § 2252(b)(1) in two respects."); *id.* 49a (Wood, J., dissenting) ("We all agree that the Wisconsin statute criminalizes more conduct than the federal statute."). And the district court imposed the lowest sentence permitted under the enhanced sentencing range (15 years). It also specifically stated at sentencing that it "would resentence Mr. Liestman" "should the prior not apply." Dkt. No. 117, at 19:18-20.

IV. This decision below is incorrect.

The deep and growing divide among the circuits warrants this Court's intervention regardless of which side of the conflict is correct. But review is all the more warranted because the Seventh Circuit's interpretation of Section 2252(b)(1) is erroneous and inconsistent with this Court's precedents. A state offense is not categorically one "relating to" the "possession of … child pornography," a term defined by the statute, when it encompasses the possession of materials that fall outside of that definition. The statute's text, structure, and design establish that "relating to" cannot be stretched so broadly as to overwrite the definition Congress provided for "child pornography." Principles of administrability and fair notice confirm that conclusion.

1. *Text.* Under the Seventh Circuit's interpretation of Section 2252(b)(1), the relevant enhancement covers any state offense that "bears a connection" with the "the production, possession, receipt, mailing, sale, distribution, shipment, or transportation" of "child pornography" as federally defined—including those offenses that criminalize material that unquestiona-

bly does not qualify as "child pornography" under federal law. Pet. App. 23a Under controlling precedent, that is an untenably broad interpretation that "stretches" the statute's words "relating to" beyond their "breaking point." *Mellouli v. Lynch*, 575 U.S. 798, 811 (2015).

In *Mellouli*, the Court considered the words "relating to" in 8 U.S.C. § 1227(a)(2)(B)(i), which reaches convictions for violations of a law or regulation "relating to a controlled substance (as defined in Section 802 of Title 21)." The Court declined to read that language to encompass state offenses that considered substances *not* enumerated in Section 802 to be controlled substances. 575 U.S. at 811. The Court reasoned that the words "relating to," "extended to the furthest stretch of their indeterminacy, stop nowhere." *Id.* at 812 (quoting *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (alterations adopted)). "Context, therefore, may tug in favor of a narrower meaning." *Id.* (quoting *Yates v. United States*, 574 U.S. 528, 539 (2015) (plurality opinion) (alterations adopted)).

Mellouli thus stands for the proposition that where Congress has provided a definition for a word or phrase that is modified by "relating to," that statutory definition must control for purposes of the categorical approach. That rule effectuates the well-settled principle that "[w]hen a statute includes an explicit definition, we must follow that definition." *Tanzin v. Tanvir*, 592 U.S. 43, 47 (2020) (internal quotation marks and citation omitted).

In other words, where the words "relating to" modify a federally defined term, they cannot be afforded

what might be considered in other settings their broad, flexible, and relatively amorphous meaning. Instead, in this particular circumstance, "[c]ontext tugs in favor of a narrower reading"—one that gives effect to the definition Congress provided. *Mellouli*, 575 U.S. at 812 (alterations adopted). A "nearly … complete overlap" between the federal definition and the definition embraced by a state statute of conviction does not suffice. *Id.* at 810. The statutory text instead compels that the state definition be the same as, or narrower than, the federal definition.

Applied here, that analysis establishes that Section 2252(b)(1) does not sweep in petitioner's state statute of conviction. As explained, the term "child pornography" in Section 2252(b)(1) is defined in Section 2256(8). Courts cannot refuse to "follow that definition," *Tanzin*, 592 U.S. at 47, even if the statute also contains the phrase "relating to." So petitioner's state statute of conviction, which defines "child pornography" more broadly than the federal definition, falls outside the scope of Section 2252(b)(1).

To be clear, *Mellouli* does not dictate that the words "relating to" have no force at all. They still have ample function—in the context of Section 2252(b)(1), for example, "relating to" may operate to capture *attempts* or *conspiracies* to possess child pornography as federally defined. But as this Court's precedent makes clear, whatever the meaning of "relating to" and the extent of its broadening function in a particular statute may be, the one thing it cannot do is override a federal definition. It is precisely that proscribed

interpretation of "relating to" that the Seventh Circuit endorsed in the decision below.[3]

2. *Structure.* The Seventh Circuit's interpretation of Section 2252(b)(1) also is at odds with the statutory structure of Chapter 110. Section 2256 expressly states that it provides the definitions "[f]or the purposes of th[e] chapter" as a whole. By allowing the words "relating to" to effectively erase one of those definitions from Section 2252(b)(1), the Seventh Circuit's interpretation undermines that statutory structure. So, too, does the Seventh Circuit's suggestion that it may have given more weight to the federal definition of "child pornography" in its interpretation of "relating to" if Section 2252(b)(1) had contained an explicit cross reference to Section 2256(8). *See* Pet. App. 21a. As just noted, the first line of Section 2256 could hardly be more clear: that section provides the definitions for the entire chapter. In doing so, Congress definitively answered the question of what scope can be attributed to the term "child pornography." The majority's apparent belief that Congress had to reiterate that stance by also incorporating a redundant cross reference into Section 2252(b)(1) fails to give effect to the statutory structure Congress adopted. And the

[3] A different part of Section 2252 imposes a mandatory minimum based on a prior conviction for an offense "*relating to* aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." 18 U.S.C. § 2252(b)(2) (emphasis added). But "aggravated sexual abuse," "sexual abuse," and "abusive sexual contact involving a minor or ward" are not federally defined terms. Hence, "[t]he case at bar is distinguishable from" cases arising in that context. *United States v. Reinhart*, 893 F.3d 606, 613 (9th Cir. 2018).

majority never explained why, having structured Chapter 110 as it did, Congress would have wanted sentencing courts to use a broader definition for "child pornography" than the one set forth in the chapter's definitional provision.[4]

3. *Design*. The deliberate nature of Congress's selection of a particular definition for child pornography in 18 U.S.C. § 2256(8) confirms that this Court should not lightly dispense with Congress's choice. As the dissenting judge in the Tenth Circuit's decision on the issue pointed out, "Congress would have had no doubt about alternative definitions of child pornography when it enacted its detailed definition"—something that was not true even in *Mellouli*, where the categorization of newly emerging drugs as controlled substances was a constantly-evolving, iterative process. *Bennett*, 823 F.3d at 1329 (Hartz, J., concurring and dissenting) (emphasis omitted). All the more so be-

[4] In fact, the courts of appeals that have adopted the majority position are themselves split on whether *Mellouli* should be distinguished because Section 2252(b)(1) lacks a cross-reference to the definition in Section 2256(8). While the en banc majority below relied on that fact, *see* Pet. App. 21a-22a—as did the Third and Tenth Circuits, *see United States v. Portanova*, 961 F.3d 252, 259 (3d Cir. 2020); *United States v. Bennett*, 823 F.3d 1316, 1323 (10th Cir. 2016)—the First Circuit recently (and correctly) "f[ou]nd little to no significance in the fact that § 2252A(b)(2) does not specifically cite to § 2256 as § 2256 makes clear that it applies to all statutes within Chapter 110 (where § 2252A also appears)." *United States v. Trahan*, 111 F.4th 185, 196 n.9 (1st Cir. 2024); *see also* Pet. App. 48a-49a (Wood, J., dissenting) (similar); *Bennett*, 823 F.3d at 1328 (Hartz, J., concurring and dissenting) (similar).

cause that definition is in the very same Act that created the sentence enhancement here. Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009-27 to -28 & -30; *see Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (noting "the 'normal rule of statutory construction' that 'identical words used in different parts of the same act are intended to have the same meaning'" (quoting *Dep't of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)). Congress's considered selection of which materials constitute child pornography—and, by the same token, which offenses relate to child pornography—should control here.

4. *Administrability.* The Seventh Circuit's test is not one that can be applied with integrity. The test requires courts to determine whether a statute concerning materials that are *not* federally-defined child pornography "relates to" offenses that concern only materials that *do* constitute federally-defined child pornography. The problem with that approach is it is nonsensical to say that one term "relates to" another term when those terms are, by definition, distinct. Unlike, say, the circumstance when a court is called upon to compare two undefined terms in different statutes to gauge whether they relate to one another—"accessing" in the Wisconsin statute and "possessing" in the federal statute, for example—there is no zone of ambiguity around the term "child pornography" in Section 2252(b)(1). Congress itself has defined the term, and so there is no interpretive exercise by which a court could ever reach the conclusion that a non-child-pornography crime "relates to" the child-pornography crimes described in Section 2252(b)(1).

This Court confronted that precise problem in *Mellouli*, where the government touted "nearly a complete overlap" between the definitions of controlled substances under federal law and under the defendant's state statute of conviction. 575 U.S. at 810. As the Court recognized, under the government's broad reading of "relating to," there was in fact no "cogent reason" for a limitation to a "substantial" overlap. *Id.* at 812. "A statute with *any* overlap"—or possibly even *no* overlap—would do. *Id.* This Court rejected that overly "sweeping" construction, recognizing that it could not "be considered a permissible reading." *Id.* at 813.

The decisions of the Seventh Circuit and the other courts that share its interpretive approach exemplify the pitfalls of that unprincipled inquiry. Take, for example, the decision below, which endorsed Section 2252(b)(1)'s application to a state statute with "*some amount* of overbreadth" relative to the federal definition. Pet. App. 17a (emphasis added). The First Circuit, for its part, found Section 2252A(b)(2) applicable to a state statute with a broader definition of child pornography based on the simplistic conclusion that "the core purposes of the statutes are the same—both address the market for images of sexual abuse of children." *Trahan*, 111 F.4th at 197. And the Third Circuit required only that the state conviction "stand[] in some relation and pertain" to the possession of child pornography—a requirement it deemed satisfied when the "crimes share[d] a logical connection between them." *Portanova*, 961 F.3d at 262.

Needless to say, not one of those varying formulations constitutes an administrable test for ascertaining the scope of the sentencing enhancement found at Section 2252(b)(1) and neighboring statutes. Rather than permitting the courts below to decide sentencing questions based on vague notions of "purpose" or "logical connection," the Court should hold that the only principled approach is to recognize that an offense that criminalizes something that is *not* child pornography (in Congress's determination) simply cannot "relate to" child pornography.

5. *Fair Notice.* To the extent ambiguity remains as to whether petitioner's conviction categorically relates to the possession of child pornography within the meaning of Section 2252(b)(1), basic principles of fair notice foreclose reading the statute broadly. "[F]air warning should be given to the world in language that the common world will understand[] of what the law intends to do if a certain line is passed." *Marinello v. United States*, 584 U.S. 1, 7 (2018) (quoting *United States v. Aguilar*, 515 U.S. 593, 600 (1995)). This is true both in terms of traditional statutory construction and avoiding any potential void-for-vagueness problems on a constitutional level. "Time and again," therefore, "this Court has prudently avoided reading incongruous breadth into opaque language in criminal statutes." *Dubin v. United States*, 599 U.S. 110, 130 (2023).

Such prudence is warranted here. The opaque words "relating to" should not create a license for federal judges to make impressionistic decisions about what kinds of state convictions are for offenses that are similar enough to child pornography to warrant

substantial sentence enhancements. Where a criminal statute uses a defined term, there is fair warning for the conduct as Congress defined it—not for conduct as determined by a judge to be *close enough* to Congress's definition.

Finally, if push comes to shove, the rule of lenity likewise bars the Seventh Circuit's approach. That rule requires "ambiguities about the breadth of a criminal statute," including a sentencing provision, to be "resolved in the defendant's favor." *United States v. Davis*, 588 U.S. 445, 464 (2019); *see Bifulco v. United States*, 447 U.S. 381, 387 (1980); *see also Wooden v. United States*, 595 U.S. 360, 388 (2022) (Gorsuch, J., concurring) (the rule of lenity requires "any reasonable doubt about the application of a penal law" to be "resolved in favor of liberty"). If, after applying all of the canons of interpretation discussed above, Section 2252(b)(1) remained ambiguous, interpreting it to encompass petitioner's Wisconsin conviction would violate this rule.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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