No. 24-264

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

A 6-5 en banc decision deepened an entrenched circuit split that now involves seven courts of appeals. The question presented matters to criminal defendants across the country. And the statutory puzzle—whether a state offense is one "relating to . . . possession . . . of child pornography" if it sweeps in material that falls outside of the federal definition of child pornography—requires assessing this Court's precedents about the meaning of the words "relating to" in different contexts. On the traditional certiorari factors, this case is a slam dunk.

In a tacit concession that this case warrants plenary review, the government minimizes those traditional factors and opens its brief with a lengthy disquisition on the merits. That discussion is unsuccessful on its own terms: It fails to distinguish this Court's decision in *Mellouli v. Lynch*, 575 U.S. 798 (2015); it cannot grapple with the administrability problems its reading creates; and it introduces makeweight arguments that do not move the needle. But more importantly, the government's arguments are premature. The Court can decide the merits at the merits stage.

When it finally reaches its certiorari-stage arguments, the government's brief is thin. The government acknowledges that the circuits are split but seeks to distract from that split by focusing on cases that do not present the same question. The government says nothing to minimize the importance of this case, and its sole vehicle objection misstates the record in this action. The Court should grant certiorari.

I. There is a deep, intractable, and growing circuit split.

Seven circuits have considered the question presented: whether the phrase "relating to . . . the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography" covers state offenses that cover a broader array of material than what federal law defines as "child pornography." The circuits are currently divided five-to-two, and they acknowledge the conflict. Pet. 9-14. The government, too, acknowledges that the circuits are divided on this issue. *See* BIO 16. But it then distorts the split, first by introducing cases on different topics to pad the number on its side and then by downplaying the relevant decisions that go against it.

1. The government begins by claiming that cases that apply the phrase "relating to" to various undefined terms found in the statutes at issue are in line with the decision below. BIO 17 & n.4.[1] This case, however, concerns a distinct question: whether "relating to" expands the statute's coverage beyond "child pornography," which is a *defined* term in the statute. Two courts of appeals say no, reasoning that the

[1] *See, e.g.*, *United States v. Barker*, 723 F.3d 315, 318 (2d Cir. 2013) (per curiam) ("relating to . . . abusive sexual conduct"); *United States v. Colson*, 683 F.3d 507, 509 (4th Cir. 2012) ("relat[ing] to sexual abuse of a minor"); *United States v. Hubbard*, 480 F.3d 341, 350 (5th Cir. 2007) ("relating to sexual abuse"); *United States v. Mateen*, 806 F.3d 857, 858 (6th Cir. 2015) ("relating to . . . sexual abuse"); *United States v. Sullivan*, 797 F.3d 623, 640 (9th Cir. 2015) ("relating to . . . sexual abuse"); *United States v. Miller*, 819 F.3d 1314, 1317 (11th Cir. 2016) (per curiam) ("relat[ing] to 'sexual abuse'").

phrase "relating to" cannot expand a statutory term to which Congress gave specific meaning. *See* Pet. 12-13.

That reasoning does not apply equally to other terms, such as "production," "possession," and so on, which are not defined by statute. Nor does it apply to the portion of the statute that imposes a sentencing enhancement for prior state convictions "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," none of which are statutorily defined terms.

2. On petitioner's side of the split, the government makes the same mistake of equating holdings dealing with undefined terms with holdings dealing with the defined term "child pornography." The government suggests that the Ninth Circuit might "revisit" its decision in *United States v. Reinhart*, 893 F.3d 606 (9th Cir. 2018), because that decision is in tension with a case that interprets "relating to" in a different context that lacks a federal definition. BIO 21. The Ninth Circuit will not do so, because it has already explained at length the distinction between these cases and explicitly held that, even if the phrase "relating to" might affect the meaning of undefined terms, it cannot broaden "defined terms," 893 F.3d at 616 n.5. The government may disagree with that distinction, *see infra* at 10, but that is a merits argument—not a problem with the split.

The government's attempt to minimize the Sixth Circuit's holding is similarly unsuccessful. In *United States v. McGrattan*, 504 F.3d 608 (6th Cir. 2007), the Sixth Circuit required the Ohio definition of "child pornography" to be congruent with, or narrower than,

its federal counterpart. *Id.* at 615. The government points to other Sixth Circuit decisions that arise in different contexts, but—because those contexts do not involve terms subject to a federal definition—they do not "undercut" the decision in *McGrattan*. BIO 20.

3. Finally, the government gestures at the argument that the split is stale because the Court denied two related petitions in 2020. *See* BIO 8. But of course, those denials predated the closely divided en banc decision below, as well as the First Circuit's recent opinion recognizing and joining the split. *See United States v. Trahan,* 111 F.4th 185 (1st Cir. 2024).[2] The split is now clearly intractable and ripe for resolution.

II. The question presented is recurring and important, and this case is an excellent vehicle for resolving it.

1. The government says nothing to diminish petitioner's arguments about the importance of this case. *See* Pet. 14-16. It does not dispute that the question presented may affect decades of prison time for hundreds of defendants sentenced each year. And it embraces the notion that a ruling for petitioner here

[2] The government's claim that "[a] similar issue is presented in the pending petition for a writ of certiorari in *Flint v. United States*, No. 24-5883," is overstated. BIO 8 n.2. The *Flint* petition concerns a prior conviction for "attempted sexual assault," not for a child-pornography offense that captures material that does not meet the federal definition of "child pornography." Pet. for Cert., *Flint*, No. 24-5883, at 4.

would affect sentencing enhancements for prior convictions under the laws of potentially "40 states." BIO 12.

2. Nor does the government present any serious argument that this case has a vehicle problem. There is no dispute that the relevant Wisconsin statute is broader than its federal equivalent, and the question presented provoked thoughtful en banc opinions on both sides of the issue. Furthermore, as explained in the petition for certiorari, the district court committed that it would "resentence" petitioner if the mandatory minimum did not apply. *See* Pet. 17 (quoting Dkt. No. 117, at 19:18-20). Thus, petitioner will benefit from a ruling in his favor.

The government recognizes this fact but nevertheless asserts that "reversal of the decision below is unlikely to meaningfully affect the length of petitioner's sentence." BIO 22. That is not a vehicle issue. The fact that petitioner will be resentenced if he prevails in this Court is enough to make plenary review meaningful.

Regardless, the government's prediction about what might happen at resentencing lacks any real foundation. Although the district court called petitioner's sentence potentially "fair" based on the facts known at the time, the court also emphasized that it would "be approaching the case differently" if "that mandatory minimum weren't here." Dkt. No. 117, at 20:1-3. It specifically noted that it would be "interested in hearing more from" petitioner's counsel about any mitigation arguments, which were not relevant given the statutory sentencing enhancement. *Id.* at 20:4. And, of course, it would be open to petitioner on

remand to present new arguments based on his good conduct and rehabilitation in prison since he was in front of the district court for his initial sentencing. *See Pepper v. United States*, 562 U.S. 476, 490-92 (2011).

III. The Seventh Circuit's interpretation of Section 2252(b)(1) is wrong.

That the government spends the bulk of its brief defending the merits of the decision below confirms that the question presented warrants certiorari—a conclusion made all the more evident by the flaws in the government's arguments.

1. The phrase "relating to" has never been permitted to broaden the meaning of a defined term. *See Mellouli v. Lynch*, 575 U.S. 798, 811-12 (2015). That principle makes good sense: Congress's choice of a particular definition must be given effect. *See Tanzin v. Tanvir*, 592 U.S. 43, 47 (2020). For that reason, while the words "relating to" can play a role in broadening an ambiguous or undefined term, *see, e.g.*, *Pugin v. Garland*, 599 U.S. 600, 607 (2023), they cannot be used to displace Congress's chosen definition in the event that they apply to a federally defined term.

The government resists this basic rule of interpretation by seeking to limit *Mellouli* in two respects. First, the government suggests that *Mellouli* applies only where the words "relating to" are used in conjunction with an explicit cross-reference to a federal definition. *See* BIO 14-15. As the petition explained, however, that argument does not withstand scrutiny. In *Mellouli*, the cross-reference was necessary to adopt a definition appearing in an entirely different

title within the U.S. Code (Title 21, in an action involving Title 8). Here, by contrast, the definition automatically applies by virtue of being located in a definitions section which Congress placed within the same title and chapter and provided would apply "[f]or the purposes of this chapter." 18 U.S.C. § 2256. Little wonder, then, that even a decision on the government's side of the split has rejected the notion that the absence of a cross-reference does anything to distinguish *Mellouli* in this context. *See* Pet. 21 n.4 (citing *United States v. Trahan*, 111 F.4th 185, 196 n.9 (1st Cir. 2024)).

Second, the government contends that *Mellouli* should be cabined to the "the specific context and history" of the particular removal statute at issue in that case. *See* BIO 13-14. That cramped reading ignores that *Mellouli* ultimately turned on the Court's determination, as a matter of textual interpretation, that reading "relating to" so broadly as to erase a federal definition "stretche[d]" the statutory language "to the breaking point." 575 U.S. at 811; *see United States v. Reinhart*, 893 F.3d 606, 615 (9th Cir. 2018) (rejecting the notion that statutory history "was essential to *Mellouli*'s holding"); *United States v. Bennett*, 823 F.3d 1316, 1329 (10th Cir. 2016) (Hartz, J., concurring and dissenting) (recognizing that *Mellouli*'s "'stretches to the breaking point' language" was a "sufficient ground for decision" that was "independent of the statutory history"). That *Mellouli* bolstered its textual analysis by discussing statutory history does not afford a basis for dispensing with that controlling precedent here.

What is more, in the present case, unlike in *Mellouli*, Congress defined the relevant term in precisely the same Act that created the sentence enhancement using that term. *See* Pet. 4. Statutory history therefore supports petitioner's reading, just as it did in *Mellouli*.

Indeed, to the extent there is any daylight between the removal statute at issue in *Mellouli* and Section 2252(b)(1), the distinction actually cuts against the government. In *Mellouli*, the term "relating to" immediately preceded the federally defined term "a controlled substance." 575 U.S. at 801 (quoting 8 U.S.C. § 1227(a)(2)(B)(i)). In Section 2252(b)(1), by contrast, "relating to" applies to a list of verbal nouns ("production, possession, receipt, mailing, sale, distribution, shipment, or transportation"), rather than operating directly on the federally defined term "child pornography." *Cf.* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 152 (2012) (under the "nearest-reasonable-referent canon," a "modifier normally applies only to the nearest reasonable referent"). If anything, then, the principle underlying *Mellouli* applies with even greater force in this case.

2. The government has no response to the grave administrability problems that plague its preferred interpretation—namely, that there is no principled means for courts to determine how much deviation from a statutory definition is permissible. *See* Pet. 22-24. That omission, in turn, leaves the government without a meaningful answer to the fair notice, vagueness, and lenity concerns wrought by its overbroad reading. *See* Pet. 24-25. The government derives no support from *Pugin*, which—as noted above, *see supra*

at 6—nowhere endorsed a reading of "relating to" that sweeps as broadly as the one posited by the government here. *See Pugin*, 599 U.S. at 607. And that broad readings of "relating to" have been deployed in various *civil* contexts, *see* BIO 15-16, obviously does nothing to quell those concerns in the context of criminal laws that place defendants' liberty at stake. Here, the sentencing provision at issue increases the mandatory minimum sentence by 10 years.

3. The government advances several additional makeweight arguments. But none is persuasive on the merits, much less on certiorari.

First, the government points to the language of 18 U.S.C. § 2241(c), which imposes a sentencing enhancement for defendants previously convicted of a "State offense that would have been an offense … had the offense occurred in a Federal prison." *See* BIO 11 (internal quotation marks omitted). According to the government, this language illustrates that "[w]hen Congress wants to reference only state law congruent with federal law, it has said so clearly and specifically." BIO 10 (internal quotation marks and citation omitted).

The problem for the government is that Congress had a different goal in enacting Section 2252(b)(1). That section does not demand an identity between federal and state offenses; rather, it sweeps in all state offenses (even if their elements encompass some distinct conduct) with particular characteristics. One of those characteristics, Congress determined, is that the offense involve child pornography as defined by federal law. And the statute does so in the most direct manner imaginable: by using a term that is defined in

the definitions section of the same chapter. The government does not identify any means for Congress to have accomplished its goal in a "clearer" or more "specific" manner, and none exists.

Second, the government accuses petitioner of impermissibly transforming the phrase "relating to" into a "statutory chameleon" that takes on different meanings depending on the term it modifies. BIO 15. That is mistaken: the effect of the term "relating to" on the conduct terms to which it directly applies (like the term "sexual abuse" and the list of verbal nouns preceding "child pornography") remains consistent throughout the statute. *See supra* at 8. And even if "relating to" is construed as applying to all of the language that follows it, the government's criticism has little force. *See Reinhart*, 893 F.3d at 616 n.5 (explaining that "reading the 'relating to' phrase differently as to different provisions" of the statute "is the appropriate reading in light of *Mellouli* and the fact that [the statute] contains some clauses of defined terms that require a narrow reading … and some of undefined terms that require a broad reading"). The government's assertion that petitioner's reading gives "no effect to Congress's deliberate choice to use the phrase 'relating to,'" BIO 15, thus rings false: "relating to" retains meaning under petitioner's reading, *see* Pet. 19, whereas it is the *government's* reading that fails to give effect to a deliberate choice of Congress by overriding its decision, in the same Act, to adopt a particular definition for "child pornography."

Third, and finally, the government asserts that petitioner's reading is impermissible because it excludes too many state laws from the sweep of Section

2252(b)(1). As an initial matter, the government has not established that the state laws it has identified in fact apply more broadly than the federal definition when construed by state courts—indeed, below, the government contested that conclusion as to the state statute here, *see* Pet. 16. But even taking at face value the government's suggestion that as little as ten state offenses qualify under Section 2252(b)(1), *see* BIO 11-12, that would still constitute a meaningful expansion relative to the prior version of the provision, which captured federal offenses only. *See* 18 U.S.C. § 2252(b)(1) (1994). The government offers no reason to presume that Congress intended to sweep more broadly when, in a single Act, it contemporaneously adopted its chosen definition for "child pornography" and then used that newly defined term to effectuate its expansion of the recidivist provision. *See* Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009-27 to -28 & -30.

CONCLUSION

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

Respectfully submitted,

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