NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

CHARLES VICTOR FLINT— PETITIONER

VS.

UNITED STATES OF AMERICA— RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 18 U.S.C. § 2252A(b)(2), a defendant convicted of possessing child pornography is subject to a 10-year mandatory minimum prison sentence if he has a prior state conviction "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography . . . ."

The question presented, on which the circuits are divided, is:

> Whether § 2252A(b)(2)'s recidivism enhancement applies to a state sexual offense that criminalizes conduct more broadly than the corresponding federal offenses of aggravated sexual abuse, sexual abuse, sexual abuse of a minor, or those covering child pornography.

RELATED CASES

Final judgment entered in the United States District Court for the District of Wyoming on October 2, 2023. *United States v. Flint*, no. 2:23-cr-00067-ABJ-1 (D. Wyo.) (Oct. 2, 2023).

The Tenth Circuit Court of Appeals affirmed judgment in an unpublished opinion on July 30, 2024. *United States v. Flint*, no. 23-8069 (10th Cir. July 30, 2024).

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The unpublished decision of the United States Court of Appeals for the Tenth Circuit is found in the Petition Appendix ("Pet. App.") 1a-4a. The Judgment of the United States District Court for the District of Wyoming is found in Pet. App. 1b-10b.

JURISDICTION

The court of appeals entered judgment on July 30, 2024. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Section 2252A(a)(5) of Title 18, U.S. Code, states:

> **(a)** Any person who—
>
> **(5)** either—
>
> **(A)** in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or
>
> **(B)** knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or 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 that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer . . . .

shall be punished as provided in subsection (b).

Section 2252A(b)(2) of Title 18, U.S. Code, states:

> Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both, but, if any image of child pornography involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction 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 aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, 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 10 years nor more than 20 years.

INTRODUCTION

Long has this Court applied the *categorical approach* to determine whether prior state convictions qualify for federal recidivism sentence enhancers. *See, e.g., Taylor v. United States*, 495 U.S. 575 (1990). The categorical approach compares the elements of the prior state offense to those of the corresponding federal offense(s) that apply to similar conduct. *See Mathis v. United States*, 579 U.S. 500, 508 (2016). When the prior offense of conviction targets conduct the federal offense does not—*i.e.*, the statute underlying the prior conviction "sweeps more broadly" than the federal

offense—the prior conviction does not qualify for recidivism enhancement. *Descamps v. United States*, 570 U.S. 254, 261 (2013).

This case addresses a split among the circuits on how the recidivism enhancement in 18 U.S.C. § 2252A(b)(2), applies. Some circuits apply the traditional categorical approach to some of the enumerated triggering offenses (possession of child pornography) and require a categorical match between the elements of the prior state offense and the generic federal counterpart's elements. Others, like the Tenth Circuit, apply an "indeterminate," *see Mellouli v. Lynch*, 575 U.S. 798, 811 (2015), and amorphous test, requiring that the prior conviction only "relate to"—as commonly understood—the federal offense. *See United States v. Bennett*, 823 F.3d 1316, 1322 (10th Cir. 2016). This interpretation means that § 2252A(b)(2)'s recidivism enhancement encompasses a broad range of conduct, as the Tenth Circuit explains: "Under this interpretation, 'the offense need only stand in some relation to, pertain to, or have a connection with' the federal offenses." *Bennett*, 823 F.3d at 1322 (quoting *United States v. Becker*, 625 F.3d 1309, 1312 (10th Cir. 2010)).

The split over the meaning of "relating to" has created divergent results in the circuits and warrants this Court's review. Further, the Tenth Circuit's approach cannot square with this Court's *Mellouli* decision, which applied the traditional categorical approach to a removal statute that contained the same "relating to" phrase.

There was no dispute in this case that Colorado's sexual assault on a child statute was a categorical *mis*match with its federal counterpart. That is, Colorado's

statute sweeps more broadly than the corresponding federal statutes. Thus, resolution of this issue would unquestionably be dispositive in this case, and this case is therefore an excellent vehicle for this Court's review.

STATEMENT OF THE CASE

Mr. Flint pleaded guilty to one count of possession of child pornography.[1] It was undisputed that his guidelines range was 46 to 57 months in prison. But the government argued that Mr. Flint's prior conviction in Colorado for attempted sexual assault on a child subjected him to a mandatory minimum sentence of 10 years under 18 U.S.C. § 2252A(b)(2). That statute requires a 10-year minimum prison sentence if the defendant has a prior conviction "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor . . . ."

Mr. Flint objected to the statutory enhancement, arguing that, under the "categorical approach," the Colorado sexual assault on a child statute prohibits a broader range of conduct than the comparable federal statute, 18 U.S.C. § 2244, which meant that § 2252A(b)(2) did not apply. The government argued that the statute's phrase, "relating to," modified and broadened how the "categorical approach" applies under § 2252A(b)(2). According to the government, the court must interpret the statute's phrase, "relating to," consistent with the dictionary definition of "relate." Thus, according to the government, a prior conviction may "relate" to

[1] 18 U.S.C. §§ 2252A(a)(5)(B) and (b)(2).

sexual abuse or abusive sexual conduct of a minor even if the statute defining the prior offense is broader than the comparable federal statute.

The district court agreed with the government's argument and sentenced Mr. Flint to the minimum sentence available under § 2252A(b)(2)—10 years—because it was bound by circuit precedent. Pet. App. 17c-18c, 2b. He appealed this sentence.

The court of appeals affirmed, reasoning it too was bound by circuit precedent. Pet. App. 3a-4a. Both in *United States v. Bennett*, 823 F.3d 1316 (10th Cir. 2016), and *United States v. Hebert*, 888 F.3d 470 (10th Cir. 2018), the Tenth Circuit held that the recidivism enhancement in § 2252A(b)(2) applies to any prior offense "relating to"—in the common understanding of the phrase—aggravated sexual abuse, sexual abuse, abusive sexual conduct involving a minor or ward, or possession of child pornography. *See Hebert*, 888 F.3d at 475; *Bennett*, 823 F.3d at 1322-23. Under this binding authority, the court of appeals had to affirm even though there was no dispute Colorado's attempted sexual assault on a child offense sweeps more broadly than its federal counterpart. Pet. App. 3a-4a. The Colorado offense "stand[s] in some relation to" the federal sexual assault on a child statute, which is all that the Tenth Circuit requires. *See Bennett*, 823 F.3d at 1322 (quoting *Becker*, 625 F.3d at 1312).

REASONS FOR GRANTING THE PETITION

1. The circuits are split on how to apply the "relating to" phrase in § 2252A(b)(2).

Not all circuits follow the Tenth Circuit's broadening interpretation of "relating to," which supplants the traditional categorical approach. The Sixth and Ninth Circuits apply the traditional categorical approach to prior convictions for child pornography offenses (but not for prior convictions "relating to" aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward), such that a prior state offense "relating to" child pornography does not trigger the ten-year mandatory minimum sentence if the state offense sweeps more broadly than the federal child pornography offenses. *See United States v. Davis*, 751 F.3d 769 (6th Cir. 2014); *United States v. Reinhart*, 893 F.3d 606 (9th Cir. 2018).[2] The Ninth Circuit, for example, rejected the Tenth Circuit's approach and reasoned that the traditional categorical approach applies because "child pornography" is defined within the same chapter (Chapter 110) as the substantive federal offense, which requires a narrower reading of the phrase, "related to." *See id.* at 614. However, the circuit still applies the broad interpretation of "relating to" to supplant the traditional categorical approach when the prior offense is a sexual abuse offense because those enumerated offenses are defined in Chapter 109A, not Chapter 110, in the criminal code. *See id.*

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[2] The *Reinhart* Court addressed identical language in the adjacent statute, § 2252(b)(2).

On the other hand, five other circuits apply the same approach as the Tenth Circuit to all prior offenses listed in § 2252A(b)(2), reasoning that "related to" substantially broadens the class of recidivism offenses beyond those that categorically "match" the corresponding federal offense, including prior offenses involving child pornography. *See United States v. Trahan*, no. 22-1390 (1st Cir. Aug. 8, 2024); *United States v. Portanova*, 961 F.3d 252 (3d Cir. 2020); *United States v. Liestman*, 97 F.4th 1054 (7th Cir. 2024); *United States v. Sumner*, 816 F.3d 1040 (8th Cir. 2016); *United States v. Miller*, 819 F.3d 1314 (11th Cir. 2016) As noted, that approach generally requires only that the prior offense be *related to* aggravated sexual abuse, sexual abuse, or child pornography.

2. The decision below contradicts this Court's decision in *Mellouli v. Lynch*, 575 U.S. 798 (2015) and is wrong.

As the partial dissent in *Bennett* correctly recognized, "the term *related to* is broad language[,] [b]ut its interpretation must somehow be anchored to prevent it from drifting aimlessly." *Bennett*, 823 F.3d at 1327 (Hartz J. concurring in part, dissenting in part). In the dissent's view, a view shared by the Ninth Circuit, this Court's decision in *Mellouli* resolves how that phrase should operate in this context. *See id.*; *Reinhart*, 893 F.3d at 612.

In *Mellouli*, this Court interpreted a similarly structured subsection in 8 U.S.C. § 1227(a)(2)(B)(i), which authorized the deportation of someone "convicted of a violation of any law or regulation of a State, the United States, or a foreign country *relating to* a controlled substance (as defined in section 802 of Title 21)." *Mellouli*, 575

U.S. at 801 (cleaned up) (emphasis added). This Court determined that the broad phrase "relating to" did not render Mellouli deportable for having a Kansas drug paraphernalia conviction even though, as a matter of plain language, this conviction *related to* a controlled substance crime. *See id.* at 811. The Court reasoned that the Kansas prior did not relate to a federal controlled substance offense because Kansas's list of controlled substances swept more broadly (i.e., included more substances) than the federal list in section 802 of Title 21.

True, the removal statute *Mellouli* addressed has one feature § 2252A lacks—an explicit cross-reference to a federal criminal statute that follows the *relating to* phrase—and this Court relied, in part, on that reference to hold that the removal statute does not trigger removal for a state offense that criminalizes a broader class of substances. *See id.* But this Court did not rest its analysis on the statute's cross reference. Rather, it reasoned that setting the statute's reach under the commonly understood meaning of "relating to" would leave its reach "indeterminate" and limitless. *See id.* at 811-12 (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)).

The "narrower reading" this Court urged is particularly appropriate here because § 2252A is a *criminal* statute that fixes punishment. *Mellouli*, 575 U.S. at 812 (quoting *Yates v. United States*, 574 U.S. 528, 539 (2015)). Criminal statutes must be interpreted to avoid "due process concerns underlying the vagueness doctrine" or in the defendant's favor under the rule of lenity when the statute is ambiguous. *Skilling v. United States*, 561 U.S. 358, 408-11 (2010). Section 2252A(b)(2) must have

a narrower scope than applying to any prior offense that "stands in relation to" or "pertains to" sexual abuse or abusive sexual conduct involving a minor. Under the Tenth Circuit's interpretation, the statute provides no objective standard for courts and law enforcement to determine whether an offense "stands in relation to" the enumerated offenses in § 2252A(b)(2) or to what degree. *See, e.g., Johnson v. United States*, 576 U.S. 591, 595-96 (2015) (noting that sentencing statutes must satisfy the traditional vagueness test such that they must provide "ordinary people fair notice" and they may not be "so standardless that [they] invite[] arbitrary enforcement.") (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983)).

Two other points favor application of the traditional categorical approach. First, the explicit cross reference was necessary in the removal statute addressed in *Mellouli* because Title 8 did not contain a definition of controlled substance. *See Bennett*, 823 F.3d at 1328. In contrast, "aggravated sexual abuse," "sexual abuse," "sexually abusive conduct involving a minor or ward," and "child pornography" are all defined in the same, or an adjacent, chapter in the criminal code, *see* U.S.C. §§ 2242-44, 2256(8), and § 2252A(b)(2) explicitly references those offenses. *See Lockhart v. United States*, 577 U.S. 347, 353-54 (2016) ("We cannot state with certainty that Congress used Chapter 109A as a template for the list of state predicates set out in § 2252(b)(2),[3] but we cannot ignore the parallel, particularly because the headings in

[3] *Infra* n. 2., at p. 6.

Chapter 109A were in place when Congress amended the statute to add § 2252(b)(2)'s state sexual-abuse predicates.").

Second, if all that is required is that the prior state conviction have some minimal "relation" to these offenses, the list of offenses in § 2252A(b)(2) would contain at least one redundancy. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995) ("[T]he Court will avoid a reading which renders some words altogether redundant."). Any offense that related to, as commonly understood, "aggravated sexual abuse" would necessarily relate to "sexual abuse," and vis versa. Thus, that Congress provided a list of specific federally defined offenses has no sensible import under the Tenth Circuit's interpretation of the law. *Cf. Lockhart*, 577 U.S. at 356.

Application of the traditional categorical approach is not only consistent with *Mellouli* and this Court's interpretation of recidivism enhancement statutes, it provides a sensible reading of the statute. Here, that correct application reveals that Mr. Flint's prior Colorado conviction does not trigger the 10-year mandatory minimum sentence because Colorado defines "intimate parts" more broadly than the category of body parts implicated in the federal definition of "sexual contact."[4] Further, contrary to federal law, proof of "sexual contact" under Colorado law does not require proof of specific intent: a person only must *knowingly* touch "intimate parts." *Compare* Colo. Rev. Stat. § 18-3-401(4) (2006), *with* 18 U.S.C. § 2246(3)

[4] "Intimate parts" addressed in the Colorado statute that are not addressed by federal law are the perineum and pubes. *See* Colo. Rev. Stat. § 18-3-401(2); *see also* 18 U.S.C. § 2246(3).

(defining "sexual contact" as the "*intentional* touching" of specified body parts). And, under federal law, the defendant must have the specific intent to commit the substantive crime to be liable for attempting to commit it, whereas Colorado law only requires the prosecution to prove that the defendant acted with the substantive crime's mens rea (here, *knowingly*). *Compare* Colo. Rev. Stat. § 18-2-101 ("A person commits criminal attempt if, *acting with the kind of culpability otherwise required for commission of an offense*, he engages in conduct constituting a substantial step toward the commission of the offense." (emphasis added), *with United States v. Brooks*, 67 F.4th 1244, 1248 (10th Cir. 2023) ("To prove an attempt crime, the government must prove an intent to commit the substantive offense.") (quoting *United States v. Vigil*, 67 F.4th 1244, 1248 (10th Cir. 2023)) (cleaned up).

3. This case is a good vehicle for resolving the issue.

This case squarely presents this Court with the opportunity to clarify the meaning of "relating to" in § 2252A(b)(2) (and so in § 2252(b)(2)). The issue was preserved, and there was no dispute that the Colorado statute sweeps more broadly than the corresponding federal statute. *Hemphill v. New York*, 595 U.S. 140, 148-49 (2022) ("Once a federal claim is properly presented, a party can make any argument in support of that claim."). Thus, the legal issue this case presents is dispositive.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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