No. 24-5883

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES VICTOR FLINT, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

SARAH M. HARRIS
Acting Solicitor General
Counsel of Record

ANTOINETTE T. BACON
JENNY C. ELLICKSON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's prior Colorado conviction for attempted sexual assault of a child, in violation of Colorado Revised Statutes § 18-3-405(1) (2006), is a conviction "under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward" for purposes of the recidivist sentencing enhancement for the federal offense of possessing child pornography, 18 U.S.C. 2252A(b)(2).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-4a) is not published in the Federal Reporter but is available at 2024 WL 3576413.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 2024. The petition for a writ of certiorari was filed on October 28, 2024. 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 Wyoming, petitioner was convicted on one count

of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) and (b)(2). Judgment 1. The district court sentenced petitioner to 120 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 2a-4a.

1. In October 2022, petitioner downloaded six images of child pornography, including images featuring prepubescent minors. Second Revised Presentence Investigation Report (PSR) ¶ 4. A week later, petitioner downloaded two more images of child pornography. Ibid. A search of petitioner's computer later revealed 17,374 images of child erotica and at least 16 images of child pornography, including explicit images of infants and prepubescent girls. Ibid. In petitioner's bedroom, police officers found two pairs of "little girls' panties," condoms, and a box labeled "Vaginal Contraceptive applicators." Ibid.

Petitioner disclosed that he was "sexually interested" in prepubescent girls and preferred girls aged 10 to 12. PSR ¶ 6. Petitioner described that interest as a "fetish" but claimed that he had never attempted to groom or have sex with a minor. Ibid. Petitioner acknowledged, however, that he had "chats" with adult women about whether they would allow him to "'play with' their children." Ibid.

Petitioner also admitted that he had previously been convicted on one count of luring a child on the internet, in

violation of Colorado Revised Statutes § 18-3-306(a) (2006), for arranging to have sex with someone whom he believed to be an underaged girl. PSR ¶ 9; see 2 C.A. ROA 148. The police later discovered that petitioner also had a prior conviction for attempted sexual assault of a child, in violation of Colorado Revised Statutes § 18-3-405(1) (2006), based on a separate incident in which he attempted to have sex with someone whom he believed to be a minor, namely, an undercover officer whom petitioner believed to be a 14-year-old girl. PSR ¶ 32; see 2 C.A. ROA 133-134, 141.

2. A federal grand jury in the District of Wyoming returned an indictment charging petitioner with one count of possessing child pornography involving prepubescent minors, in violation of 18 U.S.C. 2252A(a)(5)(B) and (b)(2). Indictment 1. Petitioner pleaded guilty. Pet. App. 2a.

A conviction under Section 2252A(a)(5)(B) for possessing child pornography involving prepubescent minors carries a default statutory sentencing range of zero to 20 years of imprisonment. 18 U.S.C. 2252A(b)(2). That sentencing range increases to 10 to 20 years of imprisonment if the offender has "a prior conviction * * * 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." Ibid.

The Probation Office determined that petitioner qualified for the statutory-minimum 10-year sentence under Section 2252A(b)(2). PSR ¶ 66. The government agreed that petitioner was subject to an enhanced sentence under Section 2252A(b)(2) based on his prior Colorado conviction for attempted sexual assault of a child. 2 C.A. ROA 126-130. Colorado law provides that a person commits sexual assault of a child if he "knowingly subjects another not his or her spouse to any sexual contact * * * if the victim is less than fifteen years of age and the actor is at least four years older than the victim." Colo. Rev. Stat. § 18-3-405(1) (2006).

At the time of petitioner's child-sexual-assault offense, Colorado defined "'[s]exual contact'" to mean "the knowing touching of the victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim's or actor's intimate parts if that sexual contact is for purposes of sexual arousal, gratification, or abuse." Colo. Rev. Stat. § 18-3-401(4) (2003). Colorado defined "'[i]ntimate parts'" to mean "the external genitalia or the perineum or the anus or the buttocks or the pubes or the breast of any person." Id. § 18-3-401(2). And Colorado law provided that "[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." Id. § 18-2-101(1) (2002).

Petitioner objected to the enhancement, arguing that his Colorado attempted-child-sexual-assault conviction could not be used to increase his sentence under Section 2252A(b)(2), based on the assertion that his state-law offense was categorically broader than the predicate offenses listed in the federal statute. 2 C.A. ROA 171-177. But petitioner acknowledged (id. at 172, 177) that his position was foreclosed by circuit precedent holding that a "state statute need only categorically 'relate to,'" "not precisely match," a generic offense under Section 2252A(b)(2). United States v. Hebert, 888 F.3d 470, 473 (10th Cir. 2018); see United States v. Bennett, 823 F.3d 1316, 1322 (10th Cir.), cert. denied, 580 U.S. 926 (2016).

The district court overruled petitioner's objection and found that petitioner qualified for a 10-year statutory minimum sentence under Section 2252A(b)(2). Pet. App. 18c-19c. The court sentenced petitioner to 10 years of imprisonment, to be followed by five years of supervised release. Judgment 2-4.

3. The court of appeals affirmed in an unpublished order. Pet. App. 2a-4a. The court emphasized that, "[b]y its plain terms," Section 2252A(b)(2) "requires a mandatory minimum ten-year prison sentence if the defendant 'has a prior conviction . . .

under the laws of any [s]tate relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor.'" Id. at 3a (quoting 18 U.S.C. 2252A(b)(2)) (second set of brackets in original). The court explained that "the phrase 'relating to'" carries "its ordinary meaning" and that a prior state conviction will therefore support an enhanced sentence under Section 2252A(b)(2) when the state offense "'stand[s] in some relation to,' 'pertain[s] to,' or 'ha[s] a connection' with" aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor. Id. at 3a-4a (quoting 18 U.S.C. 2252A(b)(2); Bennett, 823 F.3d at 1322). And because petitioner did not dispute that his Colorado conviction for attempted sexual assault of a child qualifies as a Section 2252A(b)(2) offense on that understanding of the federal statute, the court found that its precedent foreclosed his challenge to the enhancement. Id. at 4a.

ARGUMENT

Petitioner contends (Pet. 6-11) that the lower courts erred in determining that his prior conviction for attempted sexual assault of a child, in violation of Colorado Revised Statutes § 18-3-405(1) (2006), was "under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward" for purposes of 18 U.S.C. 2252A(b)(2). The court of appeals' decision does not conflict with any decision of this Court or implicate any circuit conflict that warrants

further review in this case. This Court has repeatedly and recently denied petitions for writs of certiorari presenting similar claims. See, e.g., Liestman v. United States, 2025 WL 76431 (Jan. 13, 2025) (No. 24-264); Kaufmann v. United States, 141 S. Ct. 137 (2020) (No. 19-7260); Portanova v. United States, 141 S. Ct. 683 (2020) (No. 20-5772). It should follow the same course here. Indeed, this case would be a particularly unsuitable vehicle to address the question presented because it would be reviewable only for plain error.

For the reasons explained in the government's brief in opposition to the petition for a writ of certiorari in Liestman, the phrase "relating to" in Section 2252A(b)(2) bears the ordinary meaning attributed to it in the decision below. See Br. in Opp. at 8-16, Liestman, supra (No. 24-264) (filed Dec. 2, 2024) (Liestman Opp.).* As the court of appeals correctly recognized, the Section 2252A(b)(2) enhancement applies when a defendant has a prior conviction for a state offense that "'stand[s] in some relation to,' 'pertain[s] to,' or 'ha[s] a connection' with" aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor. Pet. App. 3a (quoting United States v. Bennett, 823 F.3d 1316, 1322 (10th Cir.), cert. denied, 580 U.S. 926 (2016)); see Liestman Opp. at 8-16. And petitioner "does not

* The government has served petitioner with a copy of the Liestman Opp., which is also available on this Court's electronic docket.

dispute that under this interpretation of the statute, his Colorado conviction for attempted sexual assault on a minor qualifies as a predicate offense" that triggers an enhanced sentencing range under Section 2252A(b)(2). Pet. App. 4a.

Petitioner contends (Pet. 7-11) that the decision below conflicts with Mellouli v. Lynch, 575 U.S. 798 (2015), and raises vagueness concerns, but those contentions lack merit for the reasons explained in the brief in opposition in Liestman. See Liestman Opp. at 13-16. Petitioner also asserts (Pet. 6-7) that a conflict exists regarding how to determine whether a defendant's prior child-pornography conviction was "under the laws of any State relating to * * * the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography." 18 U.S.C. 2252A(b)(2). But this case does not directly implicate that issue because petitioner's sentence rests on a prior sexual-abuse conviction -- not a child-pornography conviction.

Petitioner acknowledges (Pet. 6-7) that no circuit conflict exists regarding the proper interpretation of the statutory language at issue here, i.e., whether and when a prior conviction under state law "relat[es] to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." 18 U.S.C. 2252A(b)(2). This case would therefore be an unsuitable vehicle for reviewing any disagreement on the classification of

prior child-pornography convictions. Nor would any disagreement on that issue warrant this Court's review even if this case did squarely implicate it. See Liestman Opp. at 16-22.

Finally, even assuming that the question presented would otherwise warrant this Court's review, this case would be a poor vehicle for considering it because petitioner's challenge would be reviewable only for plain error. During the sentencing proceedings, petitioner's objection -- that his 2006 state-law conviction was categorically broader than any predicate offenses listed in Section 2252A(b)(2) -- rested on inapposite statutory language that Colorado did not enact until 2019. See 2 C.A. ROA 173-175, 177; compare Colo. Rev. Stat. § 18-3-401(4) (2003), with Colo. Rev. Stat. § 18-3-401(4) (2019). On appeal, petitioner abandoned that argument and asserted for the first time that his Colorado offense is categorically broader than the predicate offenses in Section 2252A(b)(2) based on the theory that the Colorado offense has a lower mens rea and encompasses sexual contact with a greater range of bodily parts. Pet. C.A. Br. 6-7 & n.6; see Gov't C.A. Br. 5-6.

Although the court of appeals had no need to reach the preservation issue, see Pet. App. 4a n.1, it is apparent that petitioner did not preserve his new claims in district court, which means that they are reviewable only for plain error. See Fed. R. Crim. P. 52(b); United States v. Olano, 507 U.S. 725, 731-732

(1993). To establish reversible plain error, petitioner must demonstrate (1) error; (2) that is clear or obvious; (3) that affected substantial rights; and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings. Olano, 507 U.S. at 732-736; see, e.g., Puckett v. United States, 556 U.S. 129, 135 (2009). Petitioner does not even attempt to show that he could satisfy the plain-error standard, and it is not apparent that he would be entitled to relief as a practical matter, even if he were to prevail on the statutory-interpretation question that he now asks this Court to review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SARAH M. HARRIS
Acting Solicitor General

ANTOINETTE T. BACON
JENNY C. ELLICKSON
Attorneys

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