No. ___-_____

IN THE

SUPREME COURT OF THE UNITED STATES

SEAN J. TRAHAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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January 6, 2025

QUESTION PRESENTED

Whether a district court may impose an enhanced mandatory minimum sentence under 18 U.S.C. 2252A(b)(2) based on a prior state conviction "relating to" possession of "child pornography" where the triggering state predicate offense criminalizes possession of material what would not qualify as "child pornography" under federal law.

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OPINIONS BELOW

The First Circuit's opinion is reported at 111 F. 4th (1st Cir. 2024) and is included in the Appendix at A1. The district court did not issue a written opinion. Transcripts of the sentencing hearing, A12, and the judgment, A37 also are included in the Appendix.

JURISDICTION

The First Circuit affirmed the judgment of the district court on August 8, 2024. On October 31, 2024, Justice Jackson granted Application No. 24A423 and thereby extended the time within which to file a petition for a writ of certiorari to and including January 6, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 2252A(b)(2), which contains the sentencing enhancement at issue, provides:

> 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.

18 U.S.C. § 2256, which defines the term "child pornography," provides:

For the purposes of this chapter, the term—

(1) "minor" means any person under the age of eighteen years;
(2)
(A) Except as provided in subparagraph (B), "sexually explicit conduct" means actual or simulated—
(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
(ii) bestiality;
(iii) masturbation;
(iv) sadistic or masochistic abuse; or
(v) lascivious exhibition of the anus, genitals, or pubic area of any person;
(B) For purposes of subsection 8(B) [1] of this section, "sexually explicit conduct" means—
(i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;
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(4) "organization" means a person other than an individual;
(5) "visual depiction" includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format;

(6) “computer” has the meaning given that term in section 1030 of this title;
(7) “custody or control” includes temporary supervision over or responsibility for a minor whether legally or illegally obtained;
(8) “child pornography” means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

(9) “identifiable minor”—

(A) means a person—

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(I) who was a minor at the time the visual depiction was created, adapted, or modified; or

(II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

(ii) who is recognizable as an actual person by the person’s face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and

(B) shall not be construed to require proof of the actual identity of the identifiable minor.

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(11) the term “indistinguishable” used with respect to a depiction, means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.

INTRODUCTION

The recidivist sentencing enhancement at issue in this case has generated a circuit split that is the subject of a least one other pending petition for certiorari, *Liestman v. United States*, No. 24-264.[1]

Under 18 U.S.C. § 2252A(b)(2), a sentencing court must impose a 10-year mandatory minimum 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."[2]

Applying the well-established categorical approach, the Sixth and Ninth Circuits have held that a predicate state conviction cannot trigger the enhancement if the state statute criminalizes material that would not qualify as "child pornography" as that term is defined under federal law in 18 U.S.C. § 2256.

By contrast, the Third, Seventh, Eighth, and Tenth Circuits have applied a "looser" categorical approach, reasoning that the statutory phrase "relating to" broadens the enhancement to cover predicate state crimes that would not qualify as "child

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[1] Another pending petition for certiorari, *Flint v. United States*, No. 24-5883, presents a similar question about whether a prior state conviction "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward" triggers the enhancement.

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pornography" offenses under federal law. In the decision below, the First Circuit joined the majority position.

This intractable circuit split warrants certiorari because it generates dramatically inconsistent outcomes across statutes that are used to sentence thousands of defendants every year. On the merits, the majority position, including the decision below, conflicts with this Court's decision in *Mellouli v. Lynch*, 575 U.S. 798 (2015). This case presents an ideal vehicle for this Court to resolve the conflict and clarify an important aspect of federal sentencing law.

STATEMENT OF THE CASE

This case was one of many that originally arose from the "Operation Pacifier" investigation, during which the government seized control and continued the operation of a server that hosted a child pornography distribution website on the Dark Web called "Playpen." *See generally United States v. Levin*, 874 F.3d 316 (1st Cir. 2017). The FBI obtained a warrant in the Eastern District of Virginia to deploy a Network Investigative Technique ("NIT") that permitted the FBI to identify the internet protocol ("IP") addresses of Playpen users. *See id.* at 320.

Mr. Trahan was identified as an individual who accessed the site and possessed child pornography. A3. He subsequently pleaded guilty to an information charging him with two counts of possessing child pornography, in violation of 18 U.S.C. § 2251A(a)(5)(B) and (b)(2), and one count of knowing access with intent to view child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(2). A3-4.

The Presentence Report called for the imposition of a 10-year mandatory minimum sentence under 18 U.S.C. § 2252A(b)(2) based on a prior Massachusetts conviction under Mass. Gen. Laws. ch. 272, § 29C, a statute which prohibits possession of "visual material of a child depicted in sexual conduct." A4. Mr. Trahan objected, arguing that the prior conviction was not necessarily one "relating to … the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography" because, applying the categorical approach, the state statute is overbroad. A4.

As the government conceded below and the district court recognized, A6, the Massachusetts statute criminalizes a broader swath of conduct than federal law. For example, without limitation, the Massachusetts statute criminalizes possession of images depicting lewd "fondling, touching or caressing another person or animal,' acts of "excretion or urination within a sexual context," and lewd depictions of the "buttocks" or "fully or partial developed breast" of a female child, none of which are covered under the federal definition in 18 U.S.C. § 2256.

The district court nevertheless applied the enhancement and sentenced Mr. Trahan to the mandatory minimum of 120 months imprisonment on each count, to be served concurrently.[3] A4-5.

[3] The district court also imposed a consecutive sentence of six months pursuant to 18 U.S.C. § 3147 for commission of a crime on pretrial release, for a total sentence of 126 months. A5.

The First Circuit affirmed. It held that this Court's decision in *Mellouli* "does not require a narrow reading of § 2252A(B)(2)'s 'relating to' and [ ] conclude[d] that it carries its usual broad meaning." A9. The First Circuit went on to reason that it "need not spend much time on whether the Massachusetts definition of 'visual material of child depicted in sexual conduct' relates to the federal definition of 'child pornography' as the core purposes of the statutes are the same." A9.

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE INTRACTIBLY DIVIDED.

A majority of the courts of appeals—the Third, Eighth, Seventh, and Tenth Circuits, in addition to the First Circuit in this case—have now held that the phrase "relating to" in section 2252A(b)(2) and other identically-worded federal sentencing enhancements permits state convictions under statutes that criminalize material that would not qualify as "child pornography" under federal law to trigger an enhanced federal mandatory minimum sentence. In other words, these cases hold that sentencing courts may apply a recidivist enhancement even where the predicate statute would be overbroad under an ordinary application of the categorical approach.

The Third Circuit has fashioned what it calls a "looser categorical approach." *United States v. Portanova,* 961 F.3d 252, 258 (3d Cir. 2020). The court concluded that section 2252(b)(1) "does not require complete congruence between federal and state predicates." *Id*. at 269. It suffices that the state and federal statutes "target the same *core*

criminal *conduct* such that they are 'directly analogous.'" *Id*. at 262 (internal citation omitted) (emphasis in original).

In *United States v. Liestman*, 97 F. 4th 1054 (7th Cir. 2024), a divided (6-5) en banc Seventh Circuit permitted the enhancement to apply "despite some amount of overbreadth" in the state statute at issue. *Id*. at 1062.

While professing to apply a categorical approach, the Eighth Circuit has opined that "[t]he question … is not whether the statutes criminalize exactly the same conduct, but whether the full range of conduct prescribed under [the state statute] relates to the 'possession of child pornography' as that term is defined under federal law." United *States v. Mayokok*, 854 F.3d 987, 992-93 (8th Cir. 2017). Even though "one can conjure scenarios that violate one statute but not the other," the Court nevertheless concluded that the "broad ordinarly meaning" of the phrase "relating to" permitted the enhancement. *Id*. at 993.

Finally, a divided Tenth Circuit has held that a predicate offense "need only 'stand in some relation to,' 'pertain to,' or 'have a connection' with the possession of child pornography." *United States v. Bennett*, 823 F. 3d 1316, 1322 (10th Cir. 2016) (internal citation and quotation marks omitted).

On the other side of the coin, the Ninth Circuit has rejected the argument that words "relating to" before the term "child pornography" somehow permitted broadening the categorical analysis of predicate convictions. *See United States v. Reinhart*, 893 F.3d 606 (9th Cir. 2018). The court "conclude[d] that, applying well-established statutory

principles, where there is a federal definition of 'child pornography' in the same statutory chapter as the sentencing provision at § 2252(b)(2)," that definition controlled. *Id*. at 613. The Ninth Circuit explained that in *Mellouli*, while analyzing similar statutory language, this Court gave the phrase "relating to" a "narrower reading" and "applied the usual categorical approach." *Id*. at 614. Accordingly, because the "California statute of conviction is overbroad compared to the federal definition" it "does not trigger the federal § 2252(b)(2)'s mandatory minimum because there is not a categorical match…." *Id*. at 617-18.

The Sixth Circuit employed similar analysis in *United States v. McGrattan*, 504 F. 3d 608 (6th Cir. 2007). The court held that an overbroad Ohio statute could not serve as a triggering predicate. *See id*.

II. THE QUESTION PRESENTED IS IMPORTANT.

According to Sentencing Commission data, of the 64,124 cases reported in FY 2023, 1,408 (just over four percent) involved child pornography, a 2.9 percent increase since FY 2019.[4] Thus, the unresolved circuit split thus threatens dramatically disparate outcomes in a large and growing number of criminal cases every year. It also exposes defendants in the majority circuits to harsh mandatory minimum sentences that would not otherwise apply.

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[4] *See* https://www.ussc.gov/research/quick-facts/child-pornography#_ftn2 (last visited January 6, 2025).

III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE QUESTION PRESENTED.

This case squarely supplies a clear instance of the issue presented where there is no dispute that the triggering state predicate statute sweeps more broadly than the federal definition of child pornography.

IV. THE DECISION BELOW IS INCORRECT.

The First Circuit's decision below—and the majority position it joins—plainly conflict with this Court's decision in *Mellouli*. There, the statute at issue provided, in relevant part:

> Any alien who…has been convicted 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)… is deportable.

8 U.S.C. § 1227(a)(2)(B)(i) (emphasis added). Analyzing the statute, this Court stated: "The state conviction triggers removal only if, by definition, the underlying crime falls within a category of removable offenses defined by federal law." *Mellouli*, 575 U.S. at 805. This Court held that the prior conviction did not render *Mellouli* deportable because "the state law under which he was charged categorically 'relat[ed] to a controlled substance' but was not limited to substances defined in *[§802]*." 575 U.S. at 808 (brackets and emphasis in original).

Ultimately, the majority circuits leave unanswered the critical question: if the definition of "child pornography" in section 2256 does not control the analysis,

then how can defendants, lawyers, and judges use the categorical approach to determine whether the mandatory minimums in sections 2252(b)(1) and (2) or 2252A(b)(1) and (2) are applicable? Even if "relating too" could justify some expansion of the statutory definition of "child pornography" (it does not), the categorical approach still demands an articulable standard. Its "interpretation must somehow be anchored to prevent it from drifting aimlessly." *Bennett*, 823 F.3d at 1316 (Hartz, J. dissenting); *see also Mellouli*, 575 U.S. at 812 (emphasizing that terms such as "relating to," if "extended to the furthest stretch of their indeterminacy …. stop nowhere.") (brackets and ellipses in original) (internal citations omitted). Otherwise, lower courts are left with nothing but *ad hoc* decisions lacking discernable standards and defendants are left without notice, which would offend due process. *See generally, e.g., Johnson v. United States*, 576 U.S. 591 (2015).

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of certiorari. This Court should vacate the judgment of the First Circuit Court of Appeals and remand the case for resentencing.

Respectfully Submitted,

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by his attorney,

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REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE INTRACTIBLY DIVIDED.

A majority of the courts of appeals—the Third, Eighth, Seventh, and Tenth Circuits, in addition to the First Circuit in this case—have now held that the phrase "relating to" in section 2252A(b)(2) and other identically-worded federal sentencing enhancements permits state convictions under statutes that criminalize material that would not qualify as "child pornography" under federal law to trigger an enhanced federal mandatory minimum sentence. In other words, these cases hold that sentencing courts may apply a recidivist enhancement even where the predicate statute would be overbroad under an ordinary application of the categorical approach.

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The Sixth Circuit employed similar analysis in *United States v. McGrattan*, 504 F. 3d 608 (6th Cir. 2007). The court held that an overbroad Ohio statute could not serve as a triggering predicate. *See id*.

II. THE QUESTION PRESENTED IS IMPORTANT.

According to Sentencing Commission data, of the 64,124 cases reported in FY 2023, 1,408 (just over four percent) involved child pornography, a 2.9 percent increase since FY 2019.[4] Thus, the unresolved circuit split thus threatens dramatically disparate outcomes in a large and growing number of criminal cases every year. It also exposes defendants in the majority circuits to harsh mandatory minimum sentences that would not otherwise apply.

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[4] *See* https://www.ussc.gov/research/quick-facts/child-pornography#_ftn2 (last visited January 6, 2025).

III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE QUESTION PRESENTED.

This case squarely supplies a clear instance of the issue presented where there is no dispute that the triggering state predicate statute sweeps more broadly than the federal definition of child pornography.

IV. THE DECISION BELOW IS INCORRECT.

The First Circuit's decision below—and the majority position it joins—plainly conflict with this Court's decision in *Mellouli*. There, the statute at issue provided, in relevant part:

> Any alien who…has been convicted 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)… is deportable.

8 U.S.C. § 1227(a)(2)(B)(i) (emphasis added). Analyzing the statute, this Court stated: "The state conviction triggers removal only if, by definition, the underlying crime falls within a category of removable offenses defined by federal law." *Mellouli*, 575 U.S. at 805. This Court held that the prior conviction did not render *Mellouli* deportable because "the state law under which he was charged categorically 'relat[ed] to a controlled substance' but was not limited to substances defined in *[§802]*." 575 U.S. at 808 (brackets and emphasis in original).

Ultimately, the majority circuits leave unanswered the critical question: if the definition of "child pornography" in section 2256 does not control the analysis,

then how can defendants, lawyers, and judges use the categorical approach to determine whether the mandatory minimums in sections 2252(b)(1) and (2) or 2252A(b)(1) and (2) are applicable? Even if "relating too" could justify some expansion of the statutory definition of "child pornography" (it does not), the categorical approach still demands an articulable standard. Its "interpretation must somehow be anchored to prevent it from drifting aimlessly." *Bennett*, 823 F.3d at 1316 (Hartz, J. dissenting); *see also Mellouli*, 575 U.S. at 812 (emphasizing that terms such as "relating to," if "extended to the furthest stretch of their indeterminacy …. stop nowhere.") (brackets and ellipses in original) (internal citations omitted). Otherwise, lower courts are left with nothing but *ad hoc* decisions lacking discernable standards and defendants are left without notice, which would offend due process. *See generally, e.g., Johnson v. United States*, 576 U.S. 591 (2015).

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of certiorari. This Court should vacate the judgment of the First Circuit Court of Appeals and remand the case for resentencing.

Respectfully Submitted,

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