No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARK ALAN DEAKINS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari *to the United States Court of Appeals for the Sixth Circuit*

Petition for a *Writ of Certiorari*

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QUESTIONS PRESENTED

1. For the purposes of the enhanced penalties of 18 U.S.C. § 2251(e), when does a prior conviction "relat[e] to the sexual exploitation of children"?

2. For the purposes of 18 U.S.C. § 2251(a), when is material merely "in" interstate or foreign commerce, as opposed to "in or affecting" interstate or foreign commerce?

LIST OF PARTIES

All parties to this Petition appear on the cover page.

PRIOR PROCEEDINGS

U.S. District Court for the Eastern District of Tennessee

United States v. Mark Alan Deakins, No. 1:21-cr-00058-CEA-SKL-1 (E.D. Tenn.). Judgment entered on March 12, 2024.

U.S. Court of Appeals for the Sixth Circuit:

United States v. Mark Alan Deakins, No. 24-5223. Judgment entered September 10, 2025. Rehearing *en banc* was denied on October 14, 2025.

U.S. Supreme Court:

Justice Kavanaugh extended the deadline for filing a petition for writ of certiorari to February 26, 2026, via an order entered in *Mark Deakins v. United States*, No. 25A702 (Dec. 18, 2025).

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Mark Alan Deakins respectfully petitions this Court to issue a *writ of certiorari* to the U.S. Court of Appeals for the Sixth Circuit.

OPINIONS AND ORDERS BELOW

The Sixth Circuit Court of Appeals selected its opinion for publication. It was reported as *United States v. Deakins*, 152 F.4th 693 (6th Cir. 2025) and is reproduced in Appendix A. An unpublished order, reproduced in Appendix C, denied a timely petition for rehearing *en banc*.

The district court issued unreported findings of fact and conclusions of law after the bench trial, which are included in Appendix B1. The district court did not issue a written opinion in connection with the sentence, but relevant portions of the sentencing transcript are included in Appendix B2.

JURISDICTION

The district court had jurisdiction over the underlying criminal action. 18 U.S.C. § 3231. It entered final judgment on March 12, 2024.

The U.S. Court of Appeals for the Sixth Circuit had jurisdiction to consider the district court's final judgment. 28 U.S.C. §§ 1291, 1294.

This Court has jurisdiction to review the Sixth Circuit's judgment. 28 U.S.C. § 1254(1). The Sixth Circuit entered judgment on September 10, 2025. Rehearing *en banc* was denied on October 14, 2025.

Pursuant to U.S. Sup. Ct. R. 13.5, Justice Kavanaugh extended the deadline for this Petition until February 26, 2026, via an order dated December 18, 2025, No. 25A702.

STATUTORY PROVISIONS INVOLVED

This Petition involves the following statutes, the full text of which are set forth in Appendix D:

18 U.S.C. § 2251

18 U.S.C. § 2256

Tenn. Code Ann. § 39-13-506

Tenn. Code Ann. § 39-17-1002

Tenn. Code Ann. § 39-17-1003

Tenn. Code Ann. § 39-17-1005

STATEMENT OF THE CASE

Following a bench trial, Appellant Mark Alan Deakins was convicted in the U.S. District Court for the Eastern District of Tennessee of several charges, including, as is relevant here, two counts of violating 18 U.S.C. § 2251(a), for producing child pornography. He was sentenced to life imprisonment plus ten years.

At trial, the Government offered testimony that the cameras that made the images at issue logically must have come from outside Tennessee because no cameras were ever manufactured within the state that could have made the images. The Government adduced no proof, however, as to whether Mr. Deakins obtained the cameras directly from an out-of-state manufacturer or whether he purchased them from an in-state wholesaler, like Walmart.

As is relevant to this Petition, he argued on appeal that he should have been acquitted of the § 2251(a) charges. Specifically, with respect to his particular alleged offense conduct, he argued that the material used to produce the images had to have been obtained "in" commerce, and not, as later statutory addition provided for post-amendment defendants, "in or affecting" commerce. The Sixth Circuit, however, held in a published opinion that the statute did not require Mr. Deakins to have been "either the direct recipient or the direct

purchaser," [App. 17], so long as the devices had, at some point, crossed state lines, including via transmission to a wholesaler like Walmart.

Mr. Deakins also argued on appeal that, even if properly convicted of violating § 2251(a), he could not have been lawfully sentenced to life imprisonment because he did not have two prior convictions "relating to the sexual exploitation of children." 18 U.S.C. § 2251(e). True, he had prior state convictions in Tennessee for statutory rape, possessing child pornography,[1] and production of child pornography.[2] But he argued that he had only one strike, not two under 18 U.S.C. § 2251(e) because of the different wording between the one-strike and the two-strike provisions. The former encompasses convictions for "abusive sexual contact involving a minor" and "production [or] possession…of child pornography," whereas the two-strike provision with its potential life sentence requires two convictions for offenses "relating to the sexual exploitation of children." 18 U.S.C. § 2251(e). The Sixth Circuit, however, affirmed the increase in the statutory sentencing range to life, rather than the 25-50 years that would have obtained absent the two-strike provision.

Mr. Deakins sought rehearing *en banc*, but rehearing was denied.

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[1] Tennessee calls that offense "sexual exploitation of a minor." [App. 50].

[2] Tennessee calls that offense "especially aggravated sexual exploitation of a minor." [App. 50].

REASONS FOR GRANTING THE PETITION

As explained below, this Court's guidance is required to maintain the uniformity of federal law. First, the Circuits are in conflict about the applicability of the two-strike enhancement in 18 U.S.C. § 2251(e), with the Sixth Circuit's view subjecting Mr. Deakins to a life sentence here. Second, this Court's supervisory authority is needed to correct the Sixth Circuit's overlooking of this Court's "come to rest" Commerce Clause jurisprudence, which should have controlled when materials are "in" commerce for the purpose of § 2251(a).

I. The Courts of Appeals Need Clarity About Which Prior Convictions Trigger 18 U.S.C. § 2251(e)'s Enhanced Penalties.

The sentencing range for a violation of 18 U.S.C. § 2251 (i.e., Counts Two and Three) depends on whether a defendant has no, one, or two statutory strikes:

> Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under the Uniform Code of Military Justice or the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, 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 25 years nor more than 50 years, but if such person has 2 or more prior convictions under this chapter, chapter 71, chapter 109A, or chapter 117, or under the Uniform Code of Military Justice or the laws of any State relating to the

> *sexual exploitation* of *children*, such person shall be fined under this title and imprisoned not less than 35 years nor more than life….

18 U.S.C. § 2251(e) (emphasis added). As the Sixth Circuit correctly determined, the categorical approach applies to the question of whether a prior conviction counts for a sentencing enhancement. [App. 22]. This Court should, however, grant certiorari to decide when a prior offense relates to "sexual exploitation of children." 18 U.S.C. § 2251(e).

A. The Courts of Appeals Are Divided on Whether Only Production of Child Pornography Counts as a Predicate Conviction.

The Ninth Circuit in *United States v. Schopp*, 938 F.3d 1053 (9th Cir. 2019) specifically rejected the Government's argument that the incongruity in wording between the one-strike and two-strike provisions was an inadvertent drafting error rather than a deliberate statutory choice:

> [T]he government contends that because the single-and-multiple-conviction enhancements in § 2251(e) once contained the same predicate offenses, Congress's 2006 amendment to the enhancement provision reflects a drafting error. The government is suggesting that Congress meant to replace 'relating to sexual exploitation of children' in both the single-and multiple-conviction enhancements with 'relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward,' *see* 18 U.S.C. § 2251(e), but then did so only for the single-conviction enhancement.
>
> We 'have no free-floating power to rescue Congress from its drafting errors.' *King v. Burwell*, 135 S. Ct. 2480, 2504, 192 L. Ed. 2d 483 (2015)….

> Here, it is far from apparent that there was a drafting error. Congress quite reasonably could have included a narrower set of offenses for the multiple-conviction enhancement, which carries the hefty maximum penalty of life imprisonment, than for the single-conviction enhancement. Furthermore, the prosecution can obtain a substantial term of imprisonment—between twenty-five and fifty years—using the single-conviction enhancement statute to capture the various 'sexual abuse' state offenses not captured under 'sexual exploitation of children.'

Schopp, 938 F.3d at 1063 (cleaned up).

Indeed, in a unanimous, textualist analysis of the statute—involving Congress' choice of title headings, the structure of the statute, the dictionary-meaning of sexual exploitation, myriad state statutes that deem sexual exploitation as production of child pornography—the Ninth Circuit held that "all roads" lead to the conclusion that Congress specifically intended to limit the two-strikes provision's use of "sexual exploitation of children" to "production of child pornography." *Id.* at 1062 n.5.

By contrast, at least six Circuits disagree with the Ninth Circuit. They hold that—despite the differences in wording between the one-strike and the two-strikes provision following the 2006 amendment—Congress did not actually intend to limit the second strike to offenses involving the production of child pornography. The incongruity was not an accidental choice of words as the Government had contended in *Schopp* at all, but one intended to have expansive effects. Yet, even those Circuits do, however, still disagree with each other as to what, exactly, Congress intended the second strike to reach:

> The circuits that have interpreted the phrase [sexual exploitation of children] broadly have adopted a variety of definitions. The Fourth Circuit defines it as "to take advantage of children for selfish and sexual purposes." *United States v. Mills*, 850 F.3d 693, 697 (4th Cir. 2017). The Sixth Circuit broadly states that it "evinces a Congressional intent to define [the phrase] to extend to child-sexual-abuse offenses as well as child-pornography-related offenses," *United States v. Sykes*, 65 F.4th 867, 889 (6th Cir. 2023), and the Third Circuit does not appear to have a working definition, *United States v. Pavulak*, 700 F.3d 651, 675 (3d Cir. 2012); *Randolph*, 364 F.3d at 122. The Eighth Circuit says that it refers to "any criminal sexual conduct with a child" because, "[b]y its very nature, any criminal sexual conduct with a child takes advantage of, or exploits, a child sexually." *Smith*, 367 F.3d at 751. The First Circuit agrees, stating that it "unambiguously refers to any criminal sexual conduct involving children." *United States v. Winczuk*, 67 F.4th 11, 17 (1st Cir. 2023).

United States v. Moore, 71 F.4th 392, 399 (5th Cir. 2023). The Fifth Circuit—using the same textualist principles that the Ninth Circuit had used to limit the second strike to production of child pornography—decided that any offense involving criminal sexual contact with a child could qualify as a second strike, thereby joining the plurality. *Id.*

The six Circuits rejecting *Schopp* rendered superfluous the 2006 statutory amendment to § 2251(e) "striking "the sexual exploitation of children" [from] the *first* place it appear[ed, i.e. the old one-strike provision] and inserting 'aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography.'" Adam Walsh Child Protection and Safety Act of 2006, 109 P.L. 248, 120 Stat.

587, 614, § 206 (July 27, 2006) (emphasis added). If the use of "sexual exploitation of children" already reached all those items, Congress would have had no reason to change the first-strike provision to include an enumerated list.

In any event, textualism has led the Courts of Appeals to divergent conclusions. If a textualist reading of § 2251(e) simultaneously does (as the Ninth Circuit says) and does not (as the Fifth Circuit said) lead to the conclusion that only two prior convictions for production of child pornography will suffice to trigger a life sentence, the rule of lenity should control. *See generally Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 434 (2024) (Gorsuch, J., concurring) ("Since the founding, American courts have construed ambiguities in penal laws against the government and with lenity toward affected persons." (citations omitted))

Had Mr. Deakins been convicted in the Ninth Circuit, he would not have faced life imprisonment; he had only one prior conviction for production of child pornography and thus would not have been eligible for the two-strike life sentence. But because he happened to have been convicted in the Sixth Circuit, which does not limit second strikes to convictions for production of child pornography, he received a life sentence. This Petition thus squarely presents a conflict among the Circuits on a pure question of law.

B. Even if the Court Were to Reject the Ninth Circuit's Position, Mr. Deakins Would Still Be Entitled to Relief If This Court Holds that "Children" and "Minors" Are Not Synonymous.

As indicated above, the penalties under § 2251(e) depend on the number of qualifying convictions that a defendant has. The list of qualifying convictions for the one-strike rule includes some predicate convictions involving a "minor" and others involving "children." *See* 18 U.S.C. § 2251(e) (listing as qualifying crimes for the one-strike provision crimes "relating to…abusive sexual contact involving a *minor* or ward" as well as relating to "sex trafficking of *children*" (emphasis added)). By contrast, the two-strikes provision references prior state convictions "relating to the sexual exploitation of *children*." *Id.* (emphasis added).

Black-letter law requires courts "construe[ing] statutes, where possible, … to avoid rendering superfluous any parts thereof." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991).

Applying that rule of construction should require a distinction to be drawn between a "minor" and a "child." Congress specifically defined what a "minor" means for this statute: "any person under the age of eighteen years." 18 U.S.C. § 2256(1). Conflating "child" with "minor" would render superfluous the statutory definition of "minor," which must be avoided, if possible.

It is fully possible to give effect to both words by construing a "child" to mean a person under 16 years of age and construing a "minor" to mean all who are

under 18 years of age. While absurd interpretations are obviously inappropriate, it is not absurd to believe that, as part of the push-and-pull of politics, Congress deliberately chose to differentiate between a "child" and a "minor." Only 11 states make 18 as the legal age of consent. *See* U.S. Department of Health and Human Services Office of the Assistant Secretary for Planning and Evaluation, "Statutory Rape: A Guide to State Laws and Reporting Requirements" (Dec. 14, 2004), available at https://aspe.hhs.gov/reports/statutory-rape-guide-state-laws-reporting-requirements-1 (last accessed February 19, 2026).[3] Given that lack of consensus as to whether 16 or 18 should be the age of consent, it is not absurd to believe that Congress may have decided, for example, that prior convictions for statutory rape involving 17-year olds would be subject to the one-strike enhancement (i.e., going from a range of 15-30 years to 25-50 years) but not for the two-strike enhancement (i.e., going from 25-50 years to 35 years to life).

Accepting this Petition will allow this Court to decide whether Congress was careless with its words or whether "minor" means something different than "child" for the purposes of § 2251(e). Mr. Deakins respectfully submits that the text used two different words for a reason and, to whatever extent it

[3] Not even the Uniform Code of Military Justice makes 18 the age of consent. *See* 10 U.S.C. § 920b(g)(4) ("[T]he term 'child' means any person who has not attained the age of 16 years.").

is debatable on that point, lenity should break the tie. *See generally Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 434 (2024) (Gorsuch, J., concurring) ("Since the founding, American courts have construed ambiguities in penal laws against the government and with lenity toward affected persons." (citations omitted))

In this case, "the provisions of Tennessee law under which [Mr. Deakins] was convicted reach conduct involving seventeen-year-olds. [App. 22].[4] Thus, had the Sixth Circuit held that a child must be under 16, Mr. Deakins would not have had a second statutory strike, regardless of the Court's resolution of the dispute between the Ninth Circuit and the other Circuits that was addressed in the previous subsection.

II. The Sixth Circuit Ignored this Court's Precedents as to the Meaning of When an Item Is "in" Commerce.

Although not the subject of a Circuit split, Question Two nonetheless calls for this Court's review. The Sixth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." U.S.

[4] *See also* Tenn. Code Ann. § 39-13-506 (1998) (defining statutory rape as sex with a victim "at least thirteen (13) but less than eighteen (18) years of age...."); Tenn. Code Ann. § 39-17-1002(3) (1998) ("'Minor' means any person who has not reached eighteen (18) years of age[....]"); Tenn. Code Ann. § 39-17-1003 (1998) (requiring for conviction possession of material of a "minor" engaged in sexual activity); Tenn. Code § 39-17-1003 (2001) (requiring "a minor" for sexual exploitation of a minor); Tenn. Code § 39-17-1005 (1998) (requiring "a minor" for especially aggravated sexual exploitation of a minor)

Sup. Ct. R. 10. Specifically, by conflating "in" commerce with "in and affecting" commerce, the Sixth Circuit has countenanced a radical expansion of the reach of federal statutes that only purport to reach items "in" commerce.

As this Court has recognized, "Congress is aware of the distinction between legislation limited to activities 'in commerce' and an assertion of its full Commerce Clause power so as to cover all activity substantially affecting interstate commerce." *Scarborough v. United States*, 431 U.S. 563, 571 (1977) (quotation omitted). "In commerce" and "in or affecting commerce" are thus legislative "term[s] of art." *United States v. Mosby*, 60 F.3d 454, 456 (8th Cir. 1995).

When Congress writes statutes to regulate items "in" commerce, Congress means that the items directly involve commerce across state lines, as opposed to items that may have previously crossed the state lines before coming to rest within a state. *E.g.*, *United States v. Am. Bldg. Maintenance Indus.*, 422 U.S. 271, 285 (1975) (involving the Clayton Act, which reaches activities "in commerce") ("[A]lthough the Benton companies used janitorial equipment and supplies manufactured in large part outside of California, they did not purchase them directly from suppliers located in other States. Rather, those products were purchased in intrastate transactions from local distributors.... By the time the Benton companies purchased their janitorial supplies, the flow of commerce had ceased."); *Higgins v. Carr Bros. Co.*, 317 U.S. 572, 574 (1943) (holding that where the statute only applied to goods "in commerce" rather than

"affecting commerce," it did not purport to reach "merchandise coming from without the state [that] was unloaded at respondent's place of business its interstate movement had ended." (quotation omitted)); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 543 (1935) (holding that poultry were no longer "in" interstate commerce but instead had "come to rest" once they had "become commingled with the mass of property within the State and [were] there held solely for local disposition and use"). Thus, under this Court's "come to rest" line, goods purchased intrastate from local distributors after interstate shipment are not "in commerce" for statutes limited to "in commerce."

By contrast, when Congress regulates items "in and affecting" commerce, as it did in the felon-in-possession-of-a-firearm statute, Congress regulates items that have ever crossed state lines, even if not directly obtained from across state lines by the defendant. *See, e.g.*, *United States v. Chesney*, 86 F.3d 564, 571 (6th Cir. 1996) (involving felon-in-possession-of-a-firearm statute, which uses "in or affecting" commerce).

As this Court has previously noted, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance…. [Accordingly, this Court] will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *United States v. Bass*, 404 U.S. 336, 349

(1971) (footnote omitted) (narrowly interpreting the jurisdictional reach of the predecessor to the present felon-in-possession-of-a-firearm statute).

In this case, the indictment only charged the use of material "in" commerce, rather than "in and affecting" commerce.[5] The Sixth Circuit below thus correctly observed that a conviction on Counts Two and Three below required proof that Mr. Deakins "'produced [the visual depictions] using materials that ha[d] been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer." [App. 16 (alterations in original) (quoting 18 U.S.C. § 2251(a) (2006))]. Despite being alerted to this Court's precedents that draw a firm distinction between "in" commerce on the one hand and "in and affecting" commerce on the other, the Sixth Circuit did not even acknowledge those precedents, much less distinguish them. *See* [App. 17]. By eliding the two different types of congressional assertion of its power, the Sixth Circuit upset the federal-state balance struck with respect to the statute at issue during the alleged conduct in this case. The Sixth Circuit's published conflation of the terms, however, also creates precedent that undermines the federal-state balance in every other statute that involves items or activities merely "in" commerce.

[5] A later amendment that expanded jurisdiction to reach materials not just "in" commerce but also "affecting" commerce does not apply here, as all agreed below. [App. 16 & n.11].

Lower courts must abide this Court's precedents; otherwise "anarchy [will] prevail within the federal judicial system…." *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam). Certiorari is thus warranted on Question Two as an exercise of this Court's supervisory authority.

CONCLUSION

For the foregoing reasons, Mr. Deakins requests that the Court grant the Petition and issue a writ of certiorari.

Dated: February 26, 2026

Respectfully submitted,

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