No. 21-______

IN THE

# Supreme Court of the United States

TIMOTHY HARDIN,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Under federal law, the Model Penal Code, and the laws of 39 states and the District of Columbia, consensual sex between a 21-year-old and a 17-year-old is legal. In 11 states, such conduct is criminalized.

The question presented is whether, under the categorical approach, a conviction under one of those 11 states' statutes "relat[es] to . . . abusive sexual conduct involving a minor" and thus serves as a predicate for the sentencing enhancements in Sections 2252 and 2252A of title 18 of the U.S. Code.

## RELATED PROCEEDINGS

*United States v. Hardin*, No. 5:18-cr-00025 (W.D.N.C.).

*United States v. Hardin*, No. 19-4556 (4th Cir.).

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Timothy Hardin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is published at 998 F.3d 582 (4th Cir. 2021). The relevant order of the district court is unpublished but is printed at Pet. App. 46a-65a.

## JURISDICTION

The court of appeals entered judgment on May 25, 2021. Pet. App. 1a. It denied a timely petition for rehearing on July 20, 2021. Pet. App. 45a. On October 12, 2021, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 2, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY PROVISIONS

Section 2252A(b)(1) of title 18 of the U.S. Code provides in relevant part: "[I]f such person 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 . . . such person shall be . . . imprisoned for not less than 15 years nor more than 40 years." 18 U.S.C. § 2252A(b)(1); *see also id.* § 2252(b)(1) (same).

The 1993 version of the Tennessee Code provides in relevant part:

> Statutory rape is sexual penetration of a victim by the defendant or of the defendant by

> the victim when the victim is at least thirteen (13) but less than eighteen (18) years of age and the defendant is at least four (4) years older than the victim.

Tenn. Code Ann. § 39-13-506(a) (1993).

Other relevant provisions of the U.S. Code—specifically Sections 2243, 2252, 2252A, and 2256 of title 18—are reproduced at Pet. App. 66a-83a.

## INTRODUCTION

Federal law requires district courts to enhance certain defendants' sentences if they have prior convictions "under the laws of any State relating to . . . abusive sexual conduct involving a minor[.]" 18 U.S.C. §§ 2252(b)(1), 2252A(b)(1). Courts have divided over how far this provision extends with respect to statutory rape convictions. In the decision below, the Fourth Circuit—applying what it called the "categorical approach 'and then some,'" Pet. App. 10a—held that a conviction under a state law that criminalizes consensual sex between 17- and 21-year-olds "relat[es] to . . . abusive sexual conduct involving a minor" and thus triggers the enhancement. Had petitioner been sentenced in the Ninth Circuit, however, he would not have been subject to the sentencing enhancement.

This conflict has drastic consequences for individual liberty. The Fourth Circuit's interpretation increases the statutory minimum from 5 to 15 years and the statutory maximum from 20 to 40 years. The Fourth Circuit's holding also contravenes the statutory text, flouts this Court's precedent, and undermines the uniformity of federal criminal law. Petitioner challenged the application of the sentencing

enhancement at every stage of his case, and the answer to the question presented will determine the length of time he spends in prison. This case thus presents an ideal opportunity to resolve the conflict.

## STATEMENT OF THE CASE

### A. Legal background

1. *Statutory framework*. In 1978, Congress passed the Protection of Children Against Sexual Exploitation Act. As originally enacted, this statute—codified at 18 U.S.C. § 2251 *et seq.*—prohibited the sale or distribution of child pornography and the transportation, shipment, or receipt of child pornography. *See* Pub. L. No. 95-225, § 2(a), 92 Stat. 7 (1978). Congress has amended this statutory framework many times. In 1996, for example, Congress added sentencing enhancements for recidivist offenders who had prior convictions for specified sexual offenses, including convictions "under the laws of any State relating to . . . abusive sexual conduct involving a minor." Child Pornography Prevention Act, Pub. L. No. 104-208, § 121(5), 110 Stat. 3009-26, 3009-30 (1996) (amending 18 U.S.C. § 2252(b)(1)). Under current law, an individual who violates Section 2252(a)(1), (2) or (3) and has a qualifying prior conviction "shall be . . . imprisoned for not less than 15 years nor more than 40 years." PROTECT Act, Pub. L. No. 108-21, § 103, 117 Stat. 650, 652 (2003) (amending 18 U.S.C. § 2252(b)(1)). Without this enhancement, the individual would be subject to a 5-to-20-year sentencing range. *See id.*

In 1996, Congress enacted a similar law aimed at new, digitally altered forms of child pornography. *See*

Child Pornography Prevention Act, Pub. L. No. 104-208, § 121(3), 110 Stat. 3009-26, 3009-28 to -29 (1996). This provision, codified at 18 U.S.C. § 2252A, contains a sentencing enhancement materially identical to the one in Section 2252(b)(1).

2. *Categorical approach*. Numerous federal sentencing enhancements (as well as some federal immigration provisions) turn on whether prior state-law convictions fall within designated federal statutory categories. Yet states' criminal codes sometimes use the same or similar labels to criminalize disparate conduct. *Taylor v. United States*, 495 U.S. 575, 589 (1990). And determining the actual facts underlying a state conviction can be an onerous—or simply impossible—task, especially decades after a conviction, when relevant records may be lost or incomplete. "Sixth Amendment concerns" can also arise when a sentencing court makes factual findings that increase a defendant's sentencing range—whether those findings relate to the present or past convictions. *Descamps v. United States*, 570 U.S. 254, 267 (2013).

To avoid "the practical difficulties and potential unfairness" that arise under a "factual approach" to sentencing enhancements like those in Sections 2252 and 2252A, the Court applies the "categorical approach." *Descamps*, 570 U.S. at 267 (quoting *Taylor*, 495 U.S. at 601). Under the categorical approach, the actual facts of a defendant's offense are irrelevant. Courts "must presume that the conviction rested upon nothing more than the least of the acts criminalized" by the state law, and then "determine whether even those acts are encompassed" by the federal definition of the offense. *Moncrieffe v. Holder*, 569 U.S. 184, 190-

91 (2013) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)) (internal quotation marks and alterations omitted).

Courts applying the categorical approach first identify the elements of the federal predicate offense by looking to either the federal statutory definition or the "generic" definition of the offense. *Descamps*, 570 U.S. at 257; *see also Lockhart v. United States*, 136 S. Ct. 958, 968 (2016). If the court is relying on federal statutory analogues, it looks to definitions of the offense elsewhere in the criminal provisions of the U.S. Code. In contrast, if the court is relying on an offense's generic definition, it consults state criminal codes, the Model Penal Code, federal analogues, and dictionaries to determine how the offense is "commonly understood." *Descamps*, 570 U.S. at 257; *see also, e.g.*, *Taylor*, 495 U.S. at 598.

Once the court determines the elements of the federal predicate offense, it then compares them to the elements of the defendant's prior state offense. "[I]f the [state] statute sweeps more broadly than the generic crime"—that is, if it criminalizes conduct not criminalized under the federal definition—"a conviction under that law cannot count as a[] . . . predicate, even if the defendant actually committed the offense in its generic form." *Descamps*, 570 U.S. at 261. Again, "[t]he key . . . is elements, not facts." *Id.*; *see also Taylor*, 495 U.S. at 600.

c. In *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017), this Court employed the categorical approach when construing statutory language similar to that at issue in this case. There, the Court considered whether statutory rape under California law categorically constituted "sexual abuse of a minor"

for purposes of rendering a noncitizen deportable under the Immigration and Nationality Act ("INA"). *Id.* at 1567. After surveying dictionaries, federal law, the Model Penal Code, and state criminal codes, the Court determined that sexual conduct is not considered "abusive" for federal predicate purposes solely because of the participants' ages unless the state law requires that the younger party be under 16. *Id.* at 1569-72. California's law in that case set the age of consent at 18. *Id.* at 1567. Because the state law swept more broadly than the federal generic definition of "sexual abuse of a minor," this Court held that the petitioner's California conviction was not a qualifying offense for purposes of the INA. *Id.*

### B. The present controversy

1. Tennessee criminalizes consensual sex with a person under 18 if the participants are at least four years apart in age. *See* Tenn. Code Ann. § 39-13-506(a) (1993); *see also* Tenn. Code Ann. § 39-13-306 (2012). In 1993, Mr. Hardin violated this provision by engaging in sexual conduct with a 14-year-old when he was 18. *See* Sentencing Tr. 31 (Dkt. No. 39).[1]

Twenty-five years later, in 2018, the government indicted Mr. Hardin on one count of receiving child pornography, in violation of 18 U.S.C. § 2252A(a)(2). He pleaded guilty to the charge.

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[1] Although Mr. Hardin's counsel stated that he was 19 at the time of his prior offense, he was 19 only at the time of conviction; he was 18 at the time of the relevant conduct. *See* Presentence Investigation Rep. ¶ 45 (Dkt. No. 26). Unless otherwise indicated, docket entries cited in this petition appear in the docket in *United States v. Hardin*, No. 5:18-cr-00025 (W.D.N.C.).

Because of Mr. Hardin's prior conviction, the probation office recommended enhancing his sentence under Section 2252A(b)(1). Pet. App. 3a-4a. Mr. Hardin objected to the enhancement, citing this Court's decision in *Esquivel-Quintana*. *See id.* 13a-14a; Sentencing Mem. 3-10 (Dkt. No. 28). The district court rejected Mr. Hardin's argument. The district court first pointed to the definition of "minor" in 18 U.S.C. § 2256(1) as a person under 18. Sentencing Tr. 15. Second, it concluded that the phrase "relating to" in 18 U.S.C. § 2252A(b)(1) is a "broad" term. *Id.* at 16. The court sentenced Mr. Hardin to the statutory minimum term of 15 years in prison. *Id.* at 40. That sentence was ten years more than the statutory minimum he faced without the enhancement. *See* 18 U.S.C. § 2252A(b)(1).

2. A divided Fourth Circuit panel affirmed. The panel majority first identified the least serious conduct criminalized by Tennessee's statute as consensual sex between a 17-year-old and a 21-year-old. Pet. App. 6a. The court then asked whether such conduct "relat[es] to abusive sexual conduct involving a minor." *Id.* 7a. To answer that question, the court construed each term.

First, the Fourth Circuit parsed "abusive sexual conduct" to mean "physical or nonphysical misuse or maltreatment . . . for a purpose associated with sexual gratification." Pet. App. 8a-9a (citation omitted). It then defined "misuse" to mean "incorrect or careless use" or "wrong or improper use." *Id.* 13a (citation omitted). And it *then* held that, because Tennessee criminalizes consensual sex between a 17-year-old and a 21-year-old, a conviction under that Tennessee

statute necessarily entails "misuse," and is therefore inherently "abusive" under Section 2252A. *Id.*

The Fourth Circuit acknowledged that both the federal generic definition of "sexual abuse of a minor," as established in *Esquivel-Quintana*, and the federal offense of sexual abuse of a minor codified at 18 U.S.C. § 2243(a) do not consider sexual conduct "abusive" solely because of the participants' ages unless the younger party is under 16. Pet. App. 14a-15a. But the court reasoned that, by defining "minor" as a person under 18, *see* 18 U.S.C. § 2256, Congress "cast a wider net" when it wrote the recidivist enhancement in Section 2252A. Pet. App. 14a.

Second, the court read "relating to" broadly to mean "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." Pet. App. 11a (citation omitted). The court concluded that Congress's decision to use the "relating to" language meant that the court did not have to apply the usual categorical approach when construing Section 2252A(b)(1). Instead, it believed itself free to "apply the categorical approach 'and then some.'" *Id.* (citation omitted). Under this "and then some" rule, a defendant qualifies for Section 2252A's enhancement even if the state law under which he was convicted does *not* match the predicate offense specified in the federal enhancement provision. *Id.* 10a. The state law need only "stand in some relation" to that predicate offense. *Id.* 10a-11a.

In the panel majority's view, the least serious conduct criminalized by Tennessee's statute—consensual sex between a 17-year-old and a 21-year-old—does "stand in some relation to a perpetrator's physical or nonphysical misuse or maltreatment of a

person under the age of eighteen for a purpose associated with sexual gratification." Pet. App. 11a-12a. The majority accordingly held that petitioner's prior conviction qualifies as a predicate offense under Section 2252A.[2]

3. Judge Wynn dissented. To determine whether a state conviction for statutory rape qualifies as "abusive sexual conduct involving a minor," Judge Wynn explained, the court should apply the categorical approach as usual. Under that approach—which involves considering *Esquivel-Quintana*, state criminal codes, the Model Penal Code, and dictionary definitions—sexual conduct is "abusive" solely because of the participants' ages only if the younger party is under 16. Pet. App. 29a. Consequently, in Judge Wynn's view, because Tennessee's law allows conviction as long as the younger party is under 18, it is not a categorical match for "abusive sexual conduct involving a minor." *Id.* 25a.

Judge Wynn also rejected the majority's interpretation of the law as inconsistent with the statutory text. Reading "abusive sexual conduct involving a minor" to encompass all prohibited sexual conduct involving minors renders the phrase "abusive" wholly superfluous. Pet. App. 26a. And the majority's interpretation of "relating to," Judge Wynn reasoned,

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[2] On appeal, Mr. Hardin also argued that the district court failed to adequately explain its reasoning for imposing a lifetime term of supervised release and associated conditions. Pet. App. 17a. The Fourth Circuit agreed and accordingly vacated Mr. Hardin's lifetime term of supervised release and remanded for reconsideration of that issue. *Id.* 21a.

has "no apparent limiting principle" and thus vitiates the categorical approach. *Id.* 39a.

4. Mr. Hardin sought rehearing en banc, which the Fourth Circuit denied on July 20, 2021. Pet. App. 45a.

## REASONS FOR GRANTING THE WRIT

### I. The courts of appeals are divided over the question presented.

The Fourth Circuit's decision in this case directly conflicts with the Ninth Circuit's decision in *United States v. Jaycox*, 962 F.3d 1066 (9th Cir. 2020). Had Mr. Hardin been prosecuted in the Ninth Circuit, he would not have had his sentence enhanced under Section 2252A and thus would have been subject to a significantly lower statutory minimum.

In *Jaycox*, the Ninth Circuit held that a California statute criminalizing consensual sex between a 21-year-old and someone nearly 18 does *not* qualify as a predicate offense under Section 2252. *See* Cal. Penal Code § 261.5(c). Citing *Esquivel-Quintana*, it held that there is "no question that § 261.5(c) is not a categorical match to the generic federal definition of sexual abuse of a minor" in Section 2252. *Jaycox*, 962 F.3d at 1070. As the court explained, the minimum conduct required for conviction under Section 261.5(c) "includes consensual sexual intercourse between an individual a day shy of eighteen and an individual who is twenty-one years of age." *Id.* That conduct could not be categorized as "abusive" for federal purposes because the federal generic definition requires that the younger party be under 16 where conduct is abusive solely by reason of the age of consent.

Nor, in the Ninth Circuit's view, did the "relating to" language in Section 2252(b)(1) bridge the gap between the state law and the federal generic definition. Although that language has a "broadening effect" and allows for "certain flexibility at the margins," it does not sweep in the conduct criminalized by Section 261.5(c). *Id.* A "core substantive element of the state crime—the age of the participants—is too far removed from the relevant federal generic definitions to be 'related to' them." *Id.* at 1070-71.

In contrast, the decision below held that a Tennessee statute criminalizing consensual sex between a 21-year-old and a 17-year-old *does* qualify as a predicate offense under Section 2252A. *See* Pet. App. 12a-14a. That holding followed from the Fourth Circuit's different definitions of the statutory terms "abusive" and "relating to." *Id.* 12a-15a. The Fourth Circuit concluded that because Tennessee's statute criminalized consensual sex between a 17-year-old and a 21-year-old, such conduct must be "abusive," and that—even if Tennessee's law is broader than the federal generic definition of "abusive" sexual conduct—the state law still "relat[es] to" such conduct.

## II. The Fourth Circuit's decision is incorrect.

The Fourth Circuit is wrong that the Tennessee law under which Mr. Hardin was convicted criminalizes "abusive sexual conduct involving a minor" or "relat[es] to" such conduct. 18 U.S.C. §§ 2252(b)(1), 2252A(b)(1). The federal definition of statutory rape—whether defined by reference to the federal statutory analogue or to the generic offense—excludes the least culpable conduct criminalized by

Tennessee's statute: consensual sex between a 21-year-old and a 17-year-old. Because Mr. Hardin's statute of conviction is categorically broader than the federal offense, it may not serve as a predicate to enhance his sentence under Section 2252A(b)(1). The phrase "relating to" does not alter this analysis.

### A. Consensual sex between a 21-year-old and a 17-year-old does not constitute "abusive" sexual conduct involving a minor.

The federal definition of statutory rape excludes the least culpable conduct criminalized by Tennessee law: consensual sex between a 21-year-old and a 17-year-old.

1. The categorical approach requires comparing the elements of the state statute of conviction against either (1) the federal definition of the predicate offense in other provisions of title 18 or (2) the offense's "generic" definition. *See Lockhart v. United States*, 136 S. Ct. 958, 968 (2016). Here, both methods yield the same result.

a. *Other provisions in title 18*. Section 2243(a) of title 18 defines the federal substantive offense of "[s]exual abuse of a minor" and expressly incorporates an age of consent of 16. 18 U.S.C. § 2243. That offense entails "knowingly engag[ing] in a sexual act with another person who—(1) has attained the age of 12 years but has not attained the age of 16 years; and (2) is at least four years younger than the person so engaging." 18 U.S.C. § 2243(a).

Because Sections 2243, 2252, and 2252A "deal[] with the same subject," they should be interpreted "harmoniously." *See* Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 252

(2012). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) (quoting *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007)); *see Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972) (this Court presumes that Congress "uses a particular word with a consistent meaning in a given context"). As a "closely related federal statute," Section 2243 indicates that Sections 2252 and 2252A "incorporate[] an age of consent of 16." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1570 (2017).

This "standard principle of statutory construction . . . is doubly appropriate here" because Congress modified Sections 2252, 2252A, and 2243 "at the same time." *Cf. Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007). In 1996, Congress first allowed prior state convictions to qualify a defendant for sentence enhancements under Sections 2252(b)(1) and 2252A(b)(1). Congress also revised the definition of "sexual abuse of a minor" in Section 2243—but continued to define the offense as requiring the younger party to be under 16. *See* Child Pornography Prevention Act of 1996, Pub. L. 104-208, § 7(c), 110 Stat. 3009-31. In the years since, Congress has repeatedly revised Section 2243, but has never raised the age of consent.[3] Sections 2252 and 2252A

[3] *See* Protection of Children From Sexual Predators Act of 1998, Pub. L. 105-314, § 301(b), 112 Stat. 2974, 2979; Violence Against Women and Department of Justice Reauthorization Act

should not be read so expansively as to lead courts down a path Congress chose not to take.

The Fourth Circuit did not dispute that the Tennessee law is broader than Section 2243(a). But the panel majority believed that, because Section 2256 defines "minor" to mean a person under 18, the offense described in Section 2252A encompasses any criminalized, sexual conduct with someone under 18. Pet. App. 8a. Section 2256's definition of "minor," however, does not determine when "sexual conduct involving a minor" becomes *abusive* for purposes of the sentence enhancement provisions of Sections 2252(b)(1) and 2252A(b)(1). Section 2256's definitions simply do not ask or answer that question.

b. *Generic offense*. Under the generic approach, this Court's precedent requires distilling "[t]he prevailing view" of the offense, *Taylor v. United States*, 495 U.S. 575, 598 (1990) (citation omitted), from federal criminal law, the Model Penal Code, states' criminal codes, dictionary definitions, and common understandings of the relevant terms, *see, e.g.*, *Esquivel-Quintana*, 137 S. Ct. at 1569-72. Here, as just discussed, federal criminal law dictates that sexual conduct is not "abusive" solely due to the age of the participants unless the younger party is under 16. The other sources support the same result. Indeed, this Court specifically held in *Esquivel-Quintana* that, "in the context of statutory rape offenses that criminalize sexual intercourse based solely on the age

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of 2005, Pub. L. 109-162, § 1177(b)(1), 119 Stat. 3125; Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, § 207, 120 Stat. 615; Consolidated Appropriations Act, 2007, Pub. L. 110-161, § 555(c), 121 Stat. 2082.

of the participants, the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16." 137 S. Ct. at 1568.

i. *Dictionaries*. In *Esquivel-Quintana*, this Court cited "reliable dictionaries" from 1996—the same year Congress enacted Section 2252A—to determine the generic meaning of "sexual abuse" and "age of consent." 137 S. Ct. at 1569. Those dictionaries defined "sexual abuse" as "engaging in sexual contact with a person who is below a specified age." *Id.* (quoting Merriam-Webster's Dictionary of Law 454 (1996)). And they defined the generic "age of consent" to be 16. *Id.* (citing Bryan Garner, A Dictionary of Modern Legal Usage 38 (2d ed. 1995) ("Age of consent, usu[ally] 16, denotes the age when one is legally capable of agreeing . . . to sexual intercourse"); *see also* Black's Law Dictionary 76 (11th ed. 2019) (noting that the age of consent is "usu[ally] defined by statute as 16 years"). These dictionary definitions show a consensus that sexual conduct is abusive solely by virtue of the younger party's age only if that party is under 16.

ii. *Criminal codes.* State criminal codes and the Model Penal Code provide further evidence that the generic age of consent—for purposes of establishing inherently "abusive" conduct based on age alone—is 16. The vast majority of U.S. jurisdictions—39 states and the District of Columbia—do not criminalize consensual sex with someone who is 17. *See* Paul H. Robinson & Tyler Scot Williams, Mapping Criminal Law: Variations Across the 50 States 208 (2018). And 32 jurisdictions do not criminalize consensual sex with someone who is 16. *Id.* The Model Penal Code likewise sets the age of consent at 16. *See* Model Penal Code

§§ 213.3, 213.4 (1985); *see also* Model Penal Code, Draft No. 5, § 213.8(1) (May 4, 2021).

iii. *Common usage.* Setting the age of consent at 16 accords with the "ordinary, commonsense meaning," *United States v. Johnson*, 529 U.S. 53, 57 (2000), of "abusive sexual conduct involving a minor." In common parlance, consensual sex between a 21-year-old and a 17-year-old is not inherently "abusive." *See United States v. Osborne*, 551 F.3d 718, 720 (7th Cir. 2009). Such individuals are often in the same peer groups—as college students, for example.

2. The Fourth Circuit's contrary views are wrong. Its interpretation of Sections 2252 and 2252A effectively reads "abusive" out of the statute and undermines the uniform application of the statute's enhanced penalty provisions.

a. It is a central principle of statutory interpretation that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant[.]" *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). The Fourth Circuit's reading of the statute defies that bedrock principle by rendering the word "abusive" superfluous. In its view, any prohibited sexual conduct with someone under 18 qualifies as "abusive." But if all sexual conduct involving a minor were *per se* abusive, the word "abusive" in the statute would do no work; "convicted under the laws of any state relating to . . . sexual conduct involving a minor or ward," would have exactly the same effect. *See* 18 U.S.C. §§ 2252(b)(1), 2252A(b)(1).

b. The Fourth Circuit's holding also "turns the categorical approach on its head by defining the generic federal offense of sexual abuse of a minor as whatever is illegal under the particular law of the State where the defendant was convicted." *Esquivel-Quintana*, 137 S. Ct. at 1570. Under the Fourth Circuit's rule, because Tennessee criminalized Mr. Hardin's prior conduct, that conduct qualifies as "abusive" under federal law. Pet. App. 8a-13a. That reasoning runs flatly contrary to one of the key motivations for the Court's adoption of the categorical approach in the first place: "protect[ing] offenders from the unfairness of having enhancement depend upon the label employed by the State of conviction." *Taylor*, 495 U.S. at 589.

**B. The phrase "relating to" does not allow these sentence enhancement provisions to encompass state offenses that are broader than their federal counterparts.**

Although "relating to" can have many meanings, in the context of Sections 2252 and 2252A, the phrase indicates that what follows—"aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward"—are *categories* of offenses, rather than certain, particular offenses. *See, e.g.*, *Bailey v. United States*, 516 U.S. 137, 145 (1995) ("[T]he meaning of statutory language, plain or not, depends on context.").

1. *Text*. "Relating to" means "hav[ing] reference to," *see* 13 Oxford English Dictionary 549 (2d ed. 1989), as in the phrase "the new legislation related to corporate activities," New Oxford Dictionary of English 1566 (1998). In this phrase, "related to"

identifies a *category* of new legislation—namely, new legislation on corporate activities. Multiple *types* of legislation could fall within that category, even though they are not individually specified. *See also* Webster's Third New Int'l Dictionary of the English Language 1916 (1993).

This interpretation accords with common understandings of the phrase "relating to." When a library patron asks for books "relating to Asian cuisine," she invites the librarian to select books from a broad category. The patron would be satisfied with a Thai or Chinese cookbook—even a history of sushi would do. But what the librarian *cannot* do is bring the patron a German cookbook, because in doing so, the librarian disregards the word "Asian" entirely. True, the librarian might contend that a German cookbook "stand[s] in *some* relation to" Asian cuisine. Pet. App. 11a (emphasis added). But construing "relating to" that broadly would defy the expectations of the typical English speaker. Indeed, when the phrase is interpreted expansively—as the Fourth Circuit did here—it becomes so "indetermina[te]" as to have no meaning at all. *Mellouli v. Lynch*, 575 U.S. 798, 812 (2015) (citation omitted). Similarly, sexual conduct that is *not* treated as "abusive" in the vast majority of U.S. jurisdictions cannot "relate to" "abusive sexual conduct" for purposes of a federal sentence enhancement without effectively reading the word "abusive" out of the statute. In contrast, reading the phrase "relating to" to mean "in the category of" gives effect to each term used by Congress.

2. *Context*. The context of Sections 2252 and 2252A confirms that this reading of "relating to" is appropriate here. The recidivist enhancement in these

statutes is triggered when a defendant's prior state conviction falls within certain *categories* of offenses: "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." 18 U.S.C. §§ 2252(b), 2252A(b). These are "categor[ies] of crimes." *See Esquivel-Quintana*, 137 S. Ct. at 1569 (interpreting "sexual abuse of a minor" in similar statutory setting).

"Relating to" thus enables the sentencing enhancements to reach all relevant state offenses, without regard to the specific label the state puts on any given offense. No state has an offense called "abusive sexual conduct involving a minor."[4] But they do have multiple laws criminalizing conduct that might fall within the *category* of "abusive sexual conduct involving a minor." For example, Louisiana has nine separate crimes under the subheading of "sexual offenses affecting minors." La. Stat. Ann. §§ 14:80-14:81.5. These include "felony carnal knowledge of a juvenile"—the statute that most closely parallels the Tennessee statutory rape law at issue here—as well as "indecent behavior with juveniles," *id.* § 14:81; and "computer-aided solicitation of a minor," *id.* § 14:81.3. The phrase "relating to" makes clear that the enhancement provisions of Sections 2252 and 2252A may reach convictions under state statutes like these.

[4] The only state criminal code provision using the phrase "abusive sexual conduct" simply cross-references the INA. *See* Cal. Pen. Code § 679.10. Even states that do use the term "sexual abuse" in relation to minors generally criminalize conduct only if the offender holds some position of authority over the victim or if the victim is very young. *See, e.g.*, Va. Code § 16.1-228.4; Ariz. Rev. Stat. § 13-1417; N.D. Cent. Code § 12.1-20-03.1.

In this sense, the phrase "relating to" does have some "broadening effect." Pet. App. 10a n.7 (internal quotation marks and citation omitted). The phrase does not, however, soften the categorical approach or mean that a court should apply a sentencing enhancement to conduct simply because it is illegal in a handful of states.

3. *Precedent*. This Court has held that courts should interpret the phrase "relating to" narrowly when construing statutes like Sections 2252 and 2252A. *See Mellouli*, 575 U.S. at 812-13. In *Mellouli*, an individual was convicted under Kansas law for possessing drug paraphernalia. That state law allowed conviction based on possession of paraphernalia used to store or consume a wide variety of drugs, including many not listed in Section 802 of title 21 of the U.S. Code. Federal law, however, rendered the defendant deportable only if he had a prior conviction "*relating to* a controlled substance (as defined in section 802 of Title 21)." *Id.* at 801 (citing 8 U.S.C. § 1227(a)(2)(B)(i)) (emphasis added). The government argued that "relating to" should be interpreted broadly to allow the defendant's prior state conviction to qualify him for removal, even though the state and federal statutes did not match. *Id.* at 811. This Court rejected that argument, explaining that the statute's text and history counseled in favor of a narrower reading. And "extend[ing]" the words "relating to" to "the furthest stretch of [their] indeterminacy" would expand the federal statute "to the breaking point" and "stop nowhere." *Id.* at 811-12 (internal quotation marks and citation omitted).

4. *Lenity*. To the extent any doubt remains about the proper interpretation of the language in Sections 2252(b)(1) and 2252A(b)(1), that doubt should "be resolved in the defendant's favor." *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). The rule of lenity mandates that "when [a] choice has to be made between two readings" of a criminal statute, "it is appropriate, before [choosing] the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347 (1971) (internal quotation marks and citation omitted). The rule protects citizens from being subjected to punishments that are "not clearly prescribed," incentivizes Congress to "speak more clearly," and keeps courts from "making criminal law in Congress's stead." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion of Scalia, J.). It also ensures that citizens are given "fair warning concerning conduct rendered illegal." *Liparota v. United States*, 471 U.S. 419, 427 (1985).

5. *Constitutional avoidance*. An expansive reading of "relating to" would not only ignore the statutory text and context, but would also raise serious vagueness concerns. This Court has cautioned against—and invalidated—sentence-enhancement provisions that are "so vague that [they] fail[] to give ordinary people fair notice of the conduct [they] punish[], or so standardless that [they] invite[] arbitrary enforcement." *Johnson v. United States*, 576 U.S. 592, 595 (2015). That is exactly what the Fourth Circuit's interpretation does: It instructs courts to "apply the categorical approach 'and then some.'" Pet. App. 10a. But there is no way for courts or prosecutors—much less criminal defendants—to know what "and then

some" encompasses. As a result, there is no way for the legal system to enforce the enhancement provisions in Sections 2252 and 2252A evenhandedly. That undermines not only the purpose of the categorical approach, *see supra* at 4-5, but also "the twin constitutional pillars of due process and separation of powers," *Davis*, 139 S. Ct. at 2325.

**III. The question presented is extremely important.**

Federal courts' disagreement over the proper scope of the sentence enhancements in Sections 2252 and 2252A has drastic consequences for individual liberty, frustrates proper application of the categorical approach, and undermines the uniformity of federal law.

A. Sentencing enhancements carry "significant implications . . . for a defendant's very liberty[.]" *See Apprendi v. New Jersey*, 530 U.S. 466, 495 (2000). Here, the interpretation of the sentencing enhancement in Sections 2252 and 2252A has dramatic consequences. Roughly 1,500 people are prosecuted federally each year for child pornography offenses. U.S. Sentencing Comm'n, *Mandatory Minimum Penalties for Sex Offenses in the Federal Criminal Justice System* 4 (2019). A substantial number of these offenders may be subject to the enhancements in Sections 2252 and 2252A each year. And the enhancement here transforms the sentencing range to which a defendant is subject, doubling the statutory maximum from 20 to 40 years, and tripling the statutory minimum from 5 to 15 years. 18 U.S.C. §§ 2252(b)(1), 2252A(b)(1).

When "applying a mandatory minimum . . . it's very important to have consistent results." Tr. 64,

*Wooden v. United States*, No. 20-5279 (Oct. 4, 2021) (Gorsuch, J.); *see also Kimbrough v. United States*, 552 U.S. 85, 107 (2007) ("[I]t is unquestioned that uniformity remains an important goal of sentencing."). Yet disagreement about the proper application of the enhancements in Sections 2252 and 2252A creates severe disparities in sentences for child pornography offenses. Disagreement among the courts of appeals on the proper application of the enhancements in Sections 2252 and 2252A will make it more difficult for federal courts to obey their statutory mandate to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6).

B. The question presented also has broader ramifications for various statutory sentencing enhancements.

For example, in interpreting the enhancement provisions of Sections 2252 and 2252A outside the context of prior statutory rape convictions, courts have disagreed about how to construe the phrase "relating to." Some interpret it narrowly to require an element-by-element match. *See United States v. Hudson*, 986 F.3d 1206, 1213 (9th Cir. 2021). Others interpret it expansively by using a "looser categorical approach." *United States v. Portanova*, 961 F.3d 252, 256 (3d Cir. 2020), *cert. denied* 141 S. Ct. 683 (2020); *see also* Pet. App. 10a ("the categorical approach 'and then some'"). And some courts opt for some sort of vague middle path. *See United States v. Kraemer*, 933 F.3d 675, 684 (7th Cir. 2019) (applying the enhancement where the state offense "falls well within the heartland" of the federal offense). These varying interpretations of "relating to" have led to diametrically opposite

outcomes for similarly situated defendants—such as those previously convicted of state child pornography offenses that do not match the elements of the federal child pornography offense. *Compare, e.g.*, *United States v. Reinhart*, 893 F.3d 606, 616-18 (9th Cir. 2018), *with, e.g.*, *Portanova*, 961 F.3d at 254, 258-59.

This disagreement in the courts of appeals on the proper interpretation of the "relating to" language in Sections 2252 and 2252A also has implications for many other statutory contexts. Numerous federal laws use the same "relating to" phrasing. *See, e.g.*, 8 U.S.C. §§ 1101(a)(43)(Q-T); 18 U.S.C. § 2251(e); 21 U.S.C. §§ 841(e), 842(c)(2)(B), 843(d) (all federal statutes prescribing adverse consequences for convictions "relating to" particular offenses). And courts interpreting each of these statutes apply the categorical approach. *See, e.g.*, *Escobar Santos v. Garland*, 4 F.4th 762 (9th Cir. 2021) (8 U.S.C. § 1101(a)(43)(R)); *United States v. Zigler*, 708 F.3d 994 (8th Cir. 2013) (18 U.S.C. § 2251(e)); *see also Taylor v. United States*, 495 U.S. 575, 600-02 (1990). Without this Court's intervention and guidance, confusion over the phrase "relating to" threatens to muddle many other applications of the categorical approach.

C. The division among courts undermines the objective of nationwide uniformity that motivated this Court's adoption of the categorical approach in the first place. Although a heavy majority of U.S. jurisdictions set the age of consent at 16, millions of Americans live in states that criminalize consensual sex with 16- and 17-year-olds—including New York,

California, Texas, and Florida.[5] As a result, many Americans are subject to statutory rape laws that sweep more broadly than the statutory and generic federal offenses. *See Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017); 18 U.S.C. § 2243(a). For example, a 21-year-old who engaged in consensual sex with a 17-year-old in Washington, D.C. would not be breaking the law. But one Metro stop away in Arlington, Virginia, the same individual would be violating the state's statute and thus—under the Fourth Circuit's interpretation—could be subject to a future federal sentencing enhancement.

This Court adopted the categorical approach precisely to avoid this sort of "odd result[]," which inevitably follows when state "labels" for criminal offenses dictate the reach of federal sentencing enhancements. *See Taylor*, 495 U.S. at 591, 592. This approach conforms with the general presumption that "in the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law." *Jerome v. United States*, 318 U.S. 101, 104 (1943). This presumption is rooted in the fact that federal statutes are generally intended to have uniform nationwide application, and federal programs would be "impaired if state law were to control." *Id.*

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[5] In 1996, the year that Section 2252 was passed, 31 states and the District of Columbia set the age of consent at 16 for "statutory rape offenses that hinged solely on the age of the participants"; 10 set the age at 18, and the rest varied from 14 to 17. *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1571 (2017).

## IV. This case is an ideal vehicle for resolving the question presented.

This case is an excellent vehicle for resolving the question presented, which has been explicitly pressed and passed upon and determined the length of Mr. Hardin's sentence.

The district court and the Fourth Circuit extensively explored and passed on the applicability of Section 2252A(b)(1). Mr. Hardin submitted written objections to the presentencing investigation report's sentence-enhancement recommendation, Sentencing Mem. 3, and the district court deemed his objections "very well done," Sentencing Tr. 40. That court then held a lengthy sentencing hearing, *see* Sentencing Tr., during which Mr. Hardin specifically objected to the application of the Section 2252A(b)(1) enhancement, *id.* at 3-16.

At the appellate level, both parties thoroughly briefed the Section 2252A(b)(1) issue. In its Fourth Circuit brief, the government conceded that Mr. Hardin objected to the application of the enhancement at the trial stage and that the court's standard of review was de novo. U.S. CA4 Br. 7, 21. The Fourth Circuit devoted the vast majority of its opinion to the applicability of the Section 2252A(b)(1) enhancement. Pet. App. 2a-17a. And Judge Wynn's dissent dealt solely with that issue. *Id.* 23a.

Finally, the interpretation of the sentencing enhancement determines Mr. Hardin's statutory sentencing range. If Mr. Hardin's prior Tennessee conviction qualifies as a predicate offense under Section 2252A(b)(1), then his statutory sentencing range is 15 to 40 years. If it does not, the range is 5 to

20 years. Even factoring in other aspects of the federal Sentencing Guidelines, application of the higher mandatory minimum significantly increases the final sentence here. *See* Sentencing Tr. 28. The facts of this case thus vividly illustrate the real-world effects of the Fourth Circuit's error and the injustice produced by the conflict below. The matter warrants this Court's review.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 2, 2021

# APPENDIX

## APPENDIX A

PUBLISHED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 19-4556

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UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

TIMOTHY SCOTT HARDIN,

Defendant – Appellant.

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Appeal from the United States District Court for the Western District of North Carolina, at Statesville. Kenneth D. Bell, District Judge. (5:18-cr-00025-KDB-DCK-1)

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Argued: March 10, 2021 Decided: May 25, 2021

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Before WYNN, THACKER, and QUATTLEBAUM, Circuit Judges.

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Affirmed in part, vacated in part and remanded by published opinion. Judge Quattlebaum wrote the opinion, in which Judge Thacker joined. Judge Wynn wrote a dissenting opinion.

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**ARGUED:** Joshua B. Carpenter, FEDERAL DEFENDERS OF WESTERN NORTH CAROLINA, INC., Asheville, North Carolina, for Appellant. Anthony Joseph Enright, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellee. **ON BRIEF:** Anthony Martinez, Federal Public Defender, FEDERAL DEFENDERS OF WESTERN NORTH CAROLINA, INC., Charlotte, North Carolina, for Appellant. R. Andrew Murray, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellee.

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QUATTLEBAUM, Circuit Judge:

Appellant Timothy Hardin pled guilty to a single count of receiving child pornography in violation of 18 U.S.C. § 2252A(a)(2). On appeal, he asks us to vacate his sentence on two grounds. First, Hardin contends his prior conviction for Tennessee statutory rape does not categorically qualify under the federal child pornography statute for the recidivist enhancement as "relating to . . . abusive sexual conduct involving a minor or ward . . . ." 18 U.S.C. § 2252A(b)(1).[1] As such, he argues the district court incorrectly applied the recidivist enhancement to his sentence. We disagree. Tennessee statutory rape categorically qualifies, and the district court's sentence properly applied the statutory recidivist enhancement.

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[1] For clarity, we will hereinafter refer to this phrase of the enhancement statute as "relating to abusive sexual conduct involving a minor." We acknowledge, however, that this simplification omits some text.

Second, Hardin asserts that we should vacate the district court's imposition of a life term of supervised release and associated conditions because the court failed to explain its reasoning. On this argument, we agree. As such, we affirm in part, vacate in part and remand for further proceedings.

I.

The statutory penalty range for a § 2252A(a)(2) violation is ordinarily a minimum term of five years and a maximum term of twenty years. 18 U.S.C. § 2252A(b)(1). If, however, a defendant 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 . . . ," the penalty increases to a minimum of fifteen years and a maximum of forty years. *Id.* Central to this appeal is the fact that Hardin had a prior conviction for statutory rape in Tennessee from decades earlier.

The probation office's Presentence Investigation Report ("PSR") applied the enhanced penalty based on Hardin's prior statutory rape conviction and recommended a supervised release term of five years to life. Moreover, in addition to the mandatory and standard conditions of supervision, the PSR identified that the Standard Sex Offender Conditions adopted by the Western District of North Carolina may apply.

At his sentencing hearing, Hardin first objected to application of the statutory enhancement, arguing the Tennessee statute swept more broadly than the generic federal definition, and as such, captured conduct not "relat[ed] to abusive sexual conduct involving a minor." *See* 18 U.S.C. § 2252A(b)(1). The

district court disagreed, relying on *United States v. Colson*, 683 F.3d 507 (4th Cir. 2012), to find that Tennessee statutory rape qualified as a predicate offense because it related to "the perpetrator's physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification." J.A. 73–74 (internal quotation marks omitted). According to the district court, while the guidelines' range without the enhancement would be 135 to 168 months, the statutory enhancement resulted in an increase to the statutory mandatory minimum to 180 months. Accordingly, the district court imposed a sentence of 180 months of incarceration.

Additionally, the district court imposed the maximum supervised release term authorized under the statute—a lifetime term—and a variety of conditions, including "standard sex offender conditions of supervised release that have been adopted by the Court in this district." J.A. 99–100. Hardin objected to both the length of the term and several conditions. The district court overruled Hardin's objection to the length of the supervised release term, indicating it could later terminate supervised release if appropriate. In response to Hardin's objections to various standard sex offender conditions, first, regarding conditions limiting contact with children and prohibiting loitering or being in places where children may be present, the district court acknowledged Hardin's arguments. But it elected to leave those conditions in place, indicating it could address any modifications at Hardin's release. As to the conditions prohibiting Hardin's use of internet-enabled devices without permission or

knowledge of the probation department, the district court acknowledged Hardin's objection. But it overruled it given this was not a per se ban. Finally, as to the employment condition prohibiting Hardin from working in a position or volunteering in any activity that involves direct or indirect contact with children, the district court acknowledged Hardin's argument. But again, the district court elected to leave the condition in place without explanation.

After the district court entered judgment, Hardin timely appealed. We have jurisdiction to hear his appeal under 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

II.

We first evaluate whether Hardin's conviction for Tennessee statutory rape properly qualifies under the federal child pornography statute's recidivist enhancement as "relating to abusive sexual conduct involving a minor." 18 U.S.C. § 2252A(b)(1). This requires us to look at Tennessee statutory rape through the lens of the categorical approach. *See Colson*, 683 F.3d at 509–10. Under that approach, we look "'only to the statutory definition of the state crime and the fact of conviction to determine whether the conduct criminalized by the statute, including the most innocent conduct, qualifies' as an offense 'relating to' the predicate offenses listed in 18 U.S.C. § 2252A(b)(1)." *Id.* at 510 (quoting *United States v. Diaz-Ibarra*, 522 F.3d 343, 348 (4th Cir. 2008)).

To determine the most innocent conduct under the Tennessee statutory rape statute, we review its text:

> (a) Statutory rape is sexual penetration of a victim by the defendant or of the defendant by the victim when the victim is at least thirteen (13) but less than eighteen (18) years of age and the defendant is at least four (4) years older than the victim.

Tenn. Code Ann. § 39-13-506 (1993).[2] The Supreme Court has told us that the most innocent conduct under a statutory rape statute looks not to conduct, but to age of the individuals. *See Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017) (defining the most innocent conduct under the categorical approach of a California law which criminalized "unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator and define[d] a minor as someone under age 18," as "consensual sexual intercourse between a victim who is almost 18 and a perpetrator who just turned 21" (internal quotation marks omitted)). Here, under the Tennessee statute, the most innocent conduct covered would be consensual sex between a seventeen-year-old victim and a twenty-one-year-old defendant.

With that information in hand, we examine whether this conduct qualifies for the recidivist enhancement under 18 U.S.C. § 2252A(b)(1). The recidivist enhancement provides that:

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[2] Tenn. Code Ann. § 39-13-501(7) defines "sexual penetration" to include "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body, but emission of semen is not required."

> if such person [who is in violation of Section 2252A(a)(2)] 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 . . . such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

18 U.S.C. § 2252A(b)(1) (emphasis added). Thus, if consensual sex between a seventeen-year-old victim and a twenty-one-year-old defendant "relat[es] to abusive sexual conduct involving a minor," such conduct qualifies under the enhancement, and Hardin's sentence should be affirmed. On the other hand, if such conduct does not qualify under the enhancement, the sentence must be vacated.[3]

To answer this question, we must interpret § 2252A(b)(1)'s phrase "relating to abusive sexual conduct involving a minor." Fortunately, to do so, we need not create or interpret anything new. Rather, we need only substitute words and phrases contained in § 2252A(b)(1) with the proper meanings provided by both Congress and our binding precedent. We analyze this phrase in two composite parts—"abusive sexual conduct involving a minor" and "relating to."

We begin with the phrase "abusive sexual conduct involving a minor." Congress expressly defined "minor" for this enhancement statute. The

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[3] We review legal questions, including whether a state conviction qualifies as a predicate offense under a statutory enhancement, de novo. *United States v. Spence*, 661 F.3d 194, 197 (4th Cir. 2011).

defining statute states, "[f]or the purposes of [Chapter 110. Sexual Exploitation and Other Abuse of Children], . . . 'minor' means any person under the age of eighteen years." 18 U.S.C. § 2256(1). Thus, after substituting the term "minor" with the statutory definition, the enhancement statute reads that a previous state conviction, like Tennessee statutory rape, qualifies under § 2252A(b)(1) if it relates to abusive sexual conduct involving a person under the age of eighteen.

Unpacking our phrase further, we turn to "abusive sexual conduct." Our decision in *Colson* squarely interprets that language. There, Colson had a prior conviction under Virginia law for "Production, Publication, Sale, or Possession, etc. of Obscene Items Involving Children."[4] *Colson*, 683 F.3d at 509 (internal quotation marks omitted). We were asked whether his prior state conviction qualified for the § 2252A(b)(1) enhancement as "relating to abusive sexual conduct involving a minor." *See id.* at 510 (quoting 18 U.S.C. § 2252A(b)(1)). In response, we defined the phrase "abusive sexual conduct involving a minor" in § 2252A(b)(1) to mean a "perpetrator's physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual

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[4] At the time of Colson's state-law conviction, Virginia law provided, "[a] person shall be guilty of a Class 5 felony who . . . [p]roduces or makes or attempts to prepare or prepares to produce or make sexually explicit visual material which utilizes or has as a subject a person less than 18 years of age." *Colson*, 683 F.3d at 510 (quoting Va. Code Ann. § 18.2–374.1(B)(2) (1984)).

gratification."[5] *Id.* at 510 (quoting *Diaz-Ibarra*, 522 F.3d at 352). Additionally, we gave no consideration to the impact of consent on our understanding of either the term "minor" or what conduct amounted to "misuse or maltreatment." With that additional clarification, § 2252A(b)(1) reads that a previous state conviction, like Tennessee statutory rape, qualifies if it relates to physical or nonphysical misuse or maltreatment of a person under the age of eighteen for a purpose associated with sexual gratification.[6]

We now turn to our second phrase, "relating to." For that, *Colson* is again instructive. There, we explained that § 2252A(b)(1), viewed through the lens of the categorical approach, "does not require that the predicate conviction *amount to* 'sexual abuse' or 'abusive sexual conduct involving a minor.' Rather, a

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[5] While we did not address more specifically the meaning of "involving a minor," our decision appears to support our importation of "minor" from 18 U.S.C. § 2256(1). *See Colson*, 683 F.3d at 511 ("[W]e have little difficulty concluding that Colson's 1984 conviction for '[p]roduc[ing] or mak[ing] or attempt[ing] to prepare . . . to produce or make sexually explicit visual material which utilizes or has as a subject a person less than 18 years of age' under Virginia law 'stands in some relation to,' 'pertains to,' 'concerns,' or has a 'connection' with the sexual abuse of children, as well as the production of child pornography.").

[6] Up to this point, our good colleague in dissent agrees. Dissenting Op. at 23. On application, however, our paths diverge. While we seek to measure the Tennessee statute against our agreed-upon definition, the dissent seeks to revisit the term "abusive" and redefine it to mean something different than that upon which we already agreed. But our role here is limited. It does not include giving our opinions on the merits and policy of the recidivist enhancement.

conviction qualifies as a predicate conviction merely if it *relates to* sexual abuse or abusive sexual conduct involving a minor, or indeed, even to child pornography." *Id.* at 511; *see also United States v. Spence*, 661 F.3d 194, 200 (4th Cir. 2011) (explaining that, in light of the "relating to" language, "the nature of the crime . . . does not need to satisfy a narrow definition of sexual abuse in order to qualify as a predicate offense" under § 2252A(b)(2)).

"Relating to" calls for a different application of the categorical approach. In the typical application, we look to see if the state conviction matches the federal counterpart. But because of the use of "relating to," the match need not be perfect. This is because "Congress chose the expansive term 'relating to' in § 2252A(b)(1) to ensure that individuals with a prior conviction bearing some relation to sexual abuse, abusive conduct involving a minor, or child pornography receive enhanced minimum or maximum sentences." *Id.* at 511–12. A different way of saying this is that the inclusion of "relating to" means we apply the categorical approach "and then some."[7] But even so, we still need to understand the

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[7] Although we use "and then some" colloquially, the phrase is consistent with how our sister circuits have interpreted the same language. *See United States v. Jaycox*, 962 F.3d 1066, 1069 (9th Cir. 2020) ("[W]hen a federal statute includes the phrase 'relating to,' our inquiry does not end even if a state offense is not a categorical match. The Supreme Court has held that this 'key phrase' has a broadening effect."); *United States v. Mateen*, 806 F.3d 857, 860 (6th Cir. 2015) ("[A] prior state conviction requires only that the defendant have been convicted of a state offense 'relating to . . . sexual abuse.' Other circuits have broadly interpreted the phrase 'relating to' as triggering sentence enhancement for any state offense that stands in some

parameters of "and then some." *Colson* provides those parameters. In defining "relating to," *Colson* held that the conduct only needs "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with" abusive sexual conduct involving a minor. *Id.* at 511 (internal quotation marks omitted).[8]

Putting these pieces together, we now have our inquiry: Does consensual sex between a seventeen-year-old victim and a twenty-one-year-old defendant stand in some relation to a perpetrator's physical or nonphysical misuse or maltreatment of a person

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relation, bears upon, or is associated with that generic offense." (internal citation and quotation marks omitted)); *United States v. Barker*, 723 F.3d 315, 322–23 (2d Cir. 2013) ("In the context of sentencing enhancements, 'relating to' has been broadly interpreted . . . to apply not simply to state offenses that are equivalent to sexual abuse, but rather to any state offense that stands in some relation [to], bears upon, or is associated with [the] generic offense." (alteration in original and internal quotation marks omitted)); *United States v. Sonnenberg*, 556 F.3d 667, 671 (8th Cir. 2009) ("We must assume that Congress chose the words 'relating to' for a purpose. The phrase 'relating to' carries a broad ordinary meaning, i.e., to stand in some relation to; to have bearing or concern to pertain; refer; to bring into association or connection with." (internal citations and quotation marks omitted)).

[8] Against this understanding of "relating to abusive sexual conduct involving a minor," we concluded in *Colson* that a prior conviction of production of child pornography categorically related to a perpetrator's physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification. *See Colson*, 683 F.3d at 510, 512 (internal quotation marks omitted). The production of child pornography was categorically connected with using a person under the age of eighteen for sexual gratification. *See id.* at 512.

under the age of eighteen for a purpose associated with sexual gratification?

Plainly, it does. First, statutory rape, even by its most innocent conduct, involves a person under the age of eighteen. Second, the most innocent conduct here stands in some relation to physical misuse or maltreatment for a purpose associated with sexual gratification.[9] The fact that a seventeen-year-old victim and a twenty-one-year-old defendant may be engaging in a *consensual* activity is of no moment for purposes of the Tennessee statute. Consent, by definition, is no defense to statutory rape. It is illogical, therefore, for consent to now, in the context of the enhancement, render statutory rape not related to misuse or maltreatment of someone under the age of eighteen. In fact, such a result seems inconsistent with the entire premise behind statutory rape—that regardless of circumstances, it is wrong to have sex with someone, a child, under a proscribed age because they are legally incapable of consent.

To this point, *Colson* gave no indication consent would mean that the production of child pornography did not relate to misuse or maltreatment for purposes of the enhancement. In other words, a seventeen-year-old victim consenting to have a nude photograph taken would still relate to misuse or maltreatment of

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[9] It cannot be contested that Tennessee statutory rape is "for a purpose associated with sexual gratification." In fact, this is even more so than the production of child pornography at issue in *Colson* because here, sexual gratification is necessarily bound up in the defendant and involves sexual penetration of a minor. Hardin does not argue, nor could he, that Tennessee statutory rape is committed for some purpose other than one associated with sexual gratification.

a person under eighteen. Our use of the word "misuse," in fact, suggests such conduct need not be based on a colloquial understanding of "abusive." Rather, "misuse" merely means "incorrect or careless use" or "wrong or improper use." *Misuse*, WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d ed. 2002). And pursuant to the Tennessee statute, sex with a seventeen-year-old victim, even if consensual, falls within either definition of "misuse." For all these reasons, Hardin's prior conviction qualifies under the enhancement.

Hardin, however, claims this interpretation ignores the word "abusive," such that it renders the term meaningless. For support, Hardin directs us to *Esquivel-Quintana v. Sessions*. There, the Supreme Court considered whether statutory rape amounted to "sexual abuse of a minor," thus making Esquivel-Quintana deportable for a prior conviction of an aggravated felony under the Immigration and Nationality Act ("INA"). *Esquivel-Quintana*, 137 S. Ct. at 1567. Critically, however, unlike § 2252A(b)(1), the INA contained no statutory definition of the term "minor" to guide the Supreme Court's analysis. *Id.* at 1569. In the absence of a statutory definition of "minor," the Supreme Court had to ascertain the meaning of "sexual abuse of a minor" utilizing principles of statutory interpretation. *See id.* Based on the language of the statute and the term "minor" as ordinarily understood and defined,[10] the Court

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[10] "[T]o qualify as sexual abuse of a minor, the statute of conviction must prohibit certain sexual acts based at least in part on the age of the victim." *Esquivel-Quintana*, 137 S. Ct. at 1569. Statutory rape laws are an example because they prohibit "sexual intercourse with a younger person under a specified age,

held "the general consensus from state criminal codes points to the same generic definition as dictionaries and federal law: Where sexual intercourse is abusive solely because of the ages of participants, the victim must be younger than 16." *Id.* at 1572.

*Esquivel-Quintana*, however, does not control our analysis of the § 2252A(b)(1) enhancement. *Esquivel-Quintana* was interpreting an entirely different statute—the INA, which does not define "minor." We see no reason to substitute the definition Congress provided for the term "minor" in § 2252A(b)(1) with a definition reached in interpreting an entirely different statute which did not define that term.

Further, in addition to not defining "minor" as a person under eighteen, the INA differs from § 2252A(b)(1) in another important way. The INA makes an alien deportable for conduct that, in fact, amounts to "sexual abuse of a minor." *See* 8 U.S.C. § 1101(a)(43)(A). Section 2252A(b)(1), in contrast, applies to conduct that *relates to* abusive sexual conduct involving a minor. As described above, by using "relating to," Congress cast a wider net in § 2252A(b)(1) than it did in the INA.

The other authority on which Hardin relies to argue that "abusive" means a victim younger than sixteen is not applicable for the same reasons as *Esquivel-Quintana*. First, he directs us to the federal

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known as 'the age of consent.'" *Id.* The generic age of consent is usually sixteen. *See id.* And "[a] closely related federal statute, 18 U.S.C. § 2243, provides further evidence that the generic federal definition of sexual abuse of a minor incorporates an age of consent of 16, at least in the context of statutory rape offenses predicated solely on the age of the participants." *Id.* at 1570.

criminal statute defining conduct amounting to "sexual abuse of a minor" at 18 U.S.C. § 2243. There, Congress did provide a definition: "sexual abuse of a minor" amounts to "knowingly engag[ing] in a sexual act with another person who—(1) has attained the age of 12 years but has not attained the age of 16 years; and (2) is at least four years younger than the person so engaging." 18 U.S.C. § 2243(a). But that statute hardly supports his position. To the contrary, § 2243(a) indicates Congress knows how to limit sexual abuse of a minor to victims under sixteen. Despite that, it defined "minor" in § 2256(1) as persons under eighteen. The fact that Congress elected to define "minor" differently in statutes, if anything, suggests that Congress knowingly cast a wider net for the recidivist enhancement than it did for the statute codifying a direct offense. It is not our job to narrow Congress's net or compel definitional consistency across unrelated legislation. Additionally, like the INA, 18 U.S.C. § 2243 describes conduct that amounts to sexual abuse of a minor, not conduct that *relates to* sexual abuse of a minor. Thus, its reach is narrower than § 2252A(b)(1).

Finally, Hardin claims our decision in *United States v. Rangel-Castaneda*, 709 F.3d 373 (4th Cir. 2013), supports his argument that "'sexual abuse of a minor' does not cover consensual sexual 'actions that involve only individuals who are above age sixteen.'" Appellant's Br. at 14 (quoting *Rangel-Castaneda*, 709 F.3d at 381). There, we were first asked whether a defendant's conviction for Tennessee statutory rape categorically amounted to a "crime of violence" under U.S.S.G. § 2L1.2(b)(1)(A)(ii) and, more specifically, as "sexual abuse of a minor" under Application Note

1(B)(iii) of that guideline provision. *Rangel-Castaneda*, 709 F.3d at 380. But again, that crime of violence enhancement neither defined "minor" nor contained "relating to" language. Thus, we had to use principles of statutory interpretation to define "sexual abuse of a minor." *See id.* at 380–81. Based on principles similar to those in *Esquivel-Quintana*, we found "sexual abuse of a minor" required statutory rape of a victim under the age of sixteen. *See id.* at 380–81. In *Rangel-Castaneda*, we also considered whether the defendant's same conviction alternatively qualified under the aggravated felony enhancement at U.S.S.G. § 2L1.2(b)(1)(C) and cmt.n.3(A). *Id.* at 381. "Sexual abuse of a minor" from 8 U.S.C. § 1101(a)(43) triggers the enhancement. *Id.* Like the crime-of-violence enhancement, however, neither §1101(a)(43) nor the aggravated felony enhancement define "minor." Further, neither contain "relating to" language. Thus, although we determined Tennessee statutory rape was categorically overbroad and did not qualify for the aggravated felony enhancement, *Rangel-Castaneda* does not help Hardin because the federal statutes at issue neither defined minor as under eighteen nor covered conduct relating to abusive sexual conduct involving a minor.

In short, none of the authority to which Hardin, and now the dissent, direct our attention defines "minor" as our statute does, a person under the age of eighteen, or captures conduct "relating to" abusive sexual conduct involving a minor. Rather, the authority either does not define "minor" or defines "minor" as someone under sixteen and captures only conduct that "amounts to" abusive sexual conduct

involving a minor. Given § 2252A(b)(1), § 2256(1) and our binding precedent directly answer our inquiry, we decline Hardin's invitation to look elsewhere to interpret relating to abusive sexual conduct involving a minor. Based on § 2256(1)'s definition of a minor as a person under eighteen, consensual sex involving a seventeen-year-old victim and a twenty-one-year-old defendant "relat[es] to abusive sexual conduct involving a minor." Therefore, the most innocent conduct criminalized under the Tennessee statutory rape statute qualifies under § 2252A(b)(1)'s enhancement, and we affirm the district court's application of the enhancement to Hardin's sentence.

## III.

We next turn to Hardin's argument that the district court failed to adequately explain its imposition of a life term of supervised release and associated conditions. For the reasons set forth below, we hold the district court's explanations are insufficient.[11]

First, as to length of the supervised release term, "[w]hen a defendant offers nonfrivolous reasons for imposing a sentence outside of the Guidelines range, 'a district judge should address the party's arguments and explain why he has rejected those arguments.'" *United States v. Arbaugh*, 951 F.3d 167, 174 (4th Cir. 2020) (quoting *United States v. Carter*, 564 F.3d 325, 328 (4th Cir. 2009)). But a court need not "address every argument a defendant makes," focusing instead

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[11] We review a district court's explanation of the sentence it imposed for abuse of discretion. *United States v. Lynn*, 592 F.3d 572, 581 (4th Cir. 2010).

on the whole of defendant's argument. *Id.* "Instead, '[t]he adequacy of the sentencing court's explanation depends on the complexity of each case . . . [and] [t]he appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon the circumstances.'" *Id.* (alterations in original) (quoting *United States v. Blue*, 877 F.3d 513, 518 (4th Cir. 2017)). This requires, at bottom, that "the sentencing court has said 'enough to satisfy' us that the court 'has considered the parties' arguments and has a reasoned basis for exercising [its] own legal decision-making authority.'" *Id.* (alteration in original) (quoting *Blue*, 877 F.3d at 518). "[I]n a routine case, where the district court imposes a within-Guidelines sentence, the explanation need not be elaborate or lengthy." *Id.* at 174–75 (internal quotation marks omitted).

Here, the district court imposed a life term of supervised release. Under the statute, the authorized term of supervised relief for an offense involving a minor is not less than five years to life, 18 U.S.C. § 3583(k), and a life term of supervised release was expressly recommended. Hardin objected, his essential argument being that "he is among the least culpable of child pornography offenders and presents the lowest risk of committing a future offense." Appellant's Reply Br. at 13 (internal quotation marks omitted); J.A. 113–15. And while we do not doubt that the district court heard and understood Hardin on his objection,[12] its explanation was insufficient.

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[12] The district court stated at the outset of the hearing, "I know that there are some objections to the presentence report. I have studied your very lengthy explanations of those objections so you can assume that I am familiar with your arguments, but

The district court responded specifically to Hardin's objection to the life term of supervised release as follows: "I think the best way to handle that, the way we will handle it in this case is, if appropriate at any time while he is under supervised release, that they can come back to the Court, either party, and ask that the supervised release be terminated or the conditions be altered. So we will leave it like that." J.A. 115. While the district court's explanation for a within-Guidelines sentence need not be lengthy, *see Arbaugh*, 951. F.3d at 174–75, simply stating that Hardin's term may be modified at a later date is insufficient.

As to the district court's explanations for the conditions imposed, *United States v. McMiller*, 954 F.3d 670 (4th Cir. 2020), controls. In *McMiller*, we considered the same standard sex offender conditions at issue here, with the district court imposing "[w]ithout additional explanation, . . . the standard sex offender conditions of supervised release that have been adopted by the Court in the Western District of North Carolina." 954 F.3d at 673 (internal quotation marks omitted). On appeal, this Court found the imposition of two of the same conditions, without individualized explanation, plain error. *Id.* at 675–76. The Court emphasized that the district court had a duty "to explain to [defendant] 'why he faces special conditions that will forever modify the course of his life.'" *Id.* at 676 (quoting *United States v. Ross*,

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I would like to hear from you on them." J.A. 61. The record reveals that the district court specifically heard and considered Hardin's overarching argument—that he was lower risk and thus, merited a shorter term than the sentencing recommendation. J.A. 113–15.

912 F.3d 740, 746 (4th Cir. 2019)). This duty cannot be satisfied by reference to a standing order. *Id.*[13]

Here, the district court first appeared to do precisely what the district court did in *McMiller*—order compliance with standard sex offender conditions by reference to a standing order. *Compare McMiller*, 954 F.3d at 676 (The court "summarily order[ed] McMiller to comply with the 'standard sex offender conditions of supervised release that have been adopted by the Court in the Western District of North Carolina.'"), *with* J.A. 100 ("While on supervised release the defendant . . . shall comply with the standard conditions of supervised release, and the standard sex offender conditions of supervised release that have been adopted by the Court in this district . . . .").

Turning next to what the district court said above and beyond its mere reference to the standing order, we hold these individualized explanations also fail under *McMiller*. Even under our deferential standard of review, the district court's explanations fail to provide adequate explanation sufficient for meaningful appellate review. Most contain, at most one or two sentences that, rather than explain the condition, indicate a determination to keep the condition in place. While the district court may have wide discretion to impose conditions such as these, the district court has a duty to explain its imposition of life-altering conditions of supervised release. *McMiller*, 954 F.3d at 676.

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[13] In fairness to the district court, our *McMiller* decision had not been issued at the time of Hardin's sentencing. Therefore, it did not have the benefit of its guidance.

*McMiller* also instructs us as to our disposition of Hardin's case in light of the district court's insufficient explanations. There, facing facts very similar to those presented here, we vacated the specific conditions imposed and remanded for further proceedings on those issues. *Id.* at 677 ("[W]e vacate special conditions 9 and 13 as procedurally unreasonable and remand to the district court for further explanation. We affirm the balance of McMiller's sentence."); *see also Arbaugh*, 951 F.3d at 179 ("We therefore vacate Arbaugh's sentence only as to the challenged special conditions of release. We remand for resentencing so that the district court can decide whether to impose those conditions and, if so, to provide an individualized assessment of its reasons . . . ."). Following that approach, we vacate the district court's imposition of a life term of supervised release and special conditions 7, 8, 9, 13 and 15 and remand to the district court for further proceedings.[14]

IV.

In conclusion, we affirm the district court's application of the recidivist enhancement, holding that Tennessee statutory rape categorically qualifies as "relating to abusive sexual conduct involving a minor." We do, however, vacate the portion of the

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[14] In *United States v. Singletary*, 984 F.3d 341 (4th Cir. 2021), and *United States v. Rogers*, 961 F.3d 291 (4th Cir. 2020), we vacated sentences in their entirety when the district court failed to pronounce discretionary conditions orally at sentencing hearings but later imposed them in written judgments. In *McMiller* and *Arbaugh*, as here, the district court pronounced these conditions, but failed to explain them. In response to that error, we did not vacate the sentence in its entirety but only the portions that were inadequately explained.

district court's sentence imposing a life term of supervised release and related sex-offender conditions and remand for further proceedings.

*AFFIRMED IN PART, VACATED IN PART AND REMANDED*

WYNN, Circuit Judge, dissenting:[15]

In 1993, Tennessee law criminalized consensual sexual activities between individuals who were seventeen years old and those who were twenty-one years old. The issue on appeal is whether Timothy Hardin's prior conviction under that law qualifies as one "relating to . . . abusive sexual conduct involving a minor" under the federal child-pornography statute's recidivist enhancement. 18 U.S.C. § 2252A(b)(1). While I agree with my colleagues that the Tennessee law is a categorical match for "sexual conduct involving a minor," I disagree that it categorically "relat[es] to" "abusive" sexual conduct involving a minor.

In my view, the majority's expansive interpretation of § 2252A misreads binding case law, creates a circuit split, misapplies the categorical approach, and adopts a definition of the phrase "relating to abusive sexual conduct involving a minor" that triples mandatory-minimum sentences based on prior convictions for conduct that is not criminal in forty-two states. I respectfully dissent.

I.

For over thirty years, federal courts have evaluated the applicability of sentencing enhancements based on predicate convictions using the categorical approach—that is, by determining

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[15] Because I would vacate Hardin's sentence on the basis that the district court should not have applied the § 2252A enhancement, I would not reach his objections to the length and terms of his supervised release. Accordingly, my dissent is limited to the § 2252A enhancement issue.

whether the most innocent conduct criminalized under the predicate state offense would also be unlawful under the corresponding generic federal offense. If not, the state offense is broader than the generic federal definition of the offense, and the state conviction cannot serve as a predicate for federal sentencing purposes. *See Taylor v. United States*, 495 U.S. 575, 599–602 (1990); *United States v. Johnson*, 945 F.3d 174, 179 (4th Cir. 2019) ("We look to the elements of the offense to resolve 'whether the conduct criminalized by the statute, including the most innocent conduct, qualifies' as a predicate." (quoting *United States v. Diaz-Ibarra*, 522 F.3d 343, 348 (4th Cir. 2008))).

One of the Supreme Court's reasons for adopting the categorical approach was that, absent clear congressional direction, "the meaning of the federal statute should not be dependent on state law." *Taylor*, 495 U.S. at 592 (quoting *United States v. Turley*, 352 U.S. 407, 411 (1957)). In other words, a situation in which "conduct that is perfectly legal for some people . . . subject[s] many others in neighboring states to years upon years in federal prison" would be precisely "the sort of unjust and 'odd result[ ]' that *Taylor* intended to preclude" when it adopted the categorical approach. *United States v. Rangel-Castaneda*, 709 F.3d 373, 377 (4th Cir. 2013) (quoting *Taylor*, 495 U.S. at 591).

As the majority notes, the most innocent conduct criminalized by the Tennessee law under which Hardin was convicted is consensual sexual activity between a seventeen-year-old and a twenty-one-year-

old.[16] Majority Op. at 6; *see* Tenn. Code Ann. § 39-13-506(a) (1993). This conduct does not categorically "relat[e] to . . . abusive sexual conduct involving a minor," and thus cannot support Hardin's enhanced sentence. 18 U.S.C. § 2252A(b)(1).

## II.

Like the majority, I begin with the phrase "abusive sexual conduct involving a minor." Congress defined "minor" as used in § 2252A to include all persons under the age of eighteen. 18 U.S.C. § 2256(1). And we have previously defined "abusive sexual conduct involving a minor" as the "physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification." *United States v. Colson*, 683 F.3d 507, 510 (4th Cir. 2012) (quoting *Diaz-Ibarra*, 522 F.3d at 352).[17] Combining these definitions, the majority correctly reads "abusive sexual conduct involving a minor" in § 2252A(b)(1) to mean the "physical or nonphysical misuse or maltreatment of a person under the age of eighteen for a purpose associated with sexual gratification." Majority Op. at 8. So far, so good.

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[16] As the majority notes, the Tennessee statute covers a wider range of sexual activities than just intercourse. *See* Tenn. Code Ann. §§ 39-13-501(7), -506(a) (1993).

[17] While *Colson* involved the interpretation of the phrase "abusive sexual conduct involving a minor" in 18 U.S.C. § 2252A(b)(1), *Diaz-Ibarra* interpreted the phrase "sexual abuse of a minor" in the sentencing guidelines. *See Colson*, 683 F.3d at 509; *Diaz-Ibarra*, 522 F.3d at 345. Thus, *Colson* made clear that we may rely on precedent interpreting "sexual abuse of a minor" when seeking to understand "abusive sexual conduct involving a minor." *Colson*, 683 F.3d at 510–11.

Further, there is no dispute that the Tennessee statute reaches only conduct that is "sexual" and involves victims who are "minors," as Congress defined that term for the purposes of § 2252A (that is, those under age eighteen). In other words, it is obviously true that if the Tennessee statute criminalized nonsexual conduct or covered victims up to the age of, say, twenty, it would be categorically broader than § 2252A's phrase, "abusive sexual conduct involving a minor." My friends in the majority and I are in full agreement that the Tennessee statute is a categorical match for "sexual conduct involving a minor." 18 U.S.C. § 2252A(b)(1).

But § 2252A speaks not of *all* sexual conduct involving a minor, but of *abusive* sexual conduct involving a minor. *Id.* And "[t]he phrase 'abusive sexual conduct involving a minor or ward' must be a subset of all 'sexual conduct involving a minor or ward'"; otherwise, the word "abusive" is superfluous. *United States v. Osborne*, 551 F.3d 718, 719 (7th Cir. 2009). In other words, the key question is not just whether the sexual conduct involves a minor, but whether it involves a minor *and is abusive* (that is, involves "physical or nonphysical misuse or maltreatment"). To be a categorical match, we need both.

Accordingly, I find the majority's footnoted assertion that my view does anything other than "measure the Tennessee statute against our agreed-upon definition" rather perplexing. Majority Op. at 8 n.6. The recidivist enhancement requires "abuse," which, we agree, requires "physical or nonphysical misuse or maltreatment" of the minor in question. Nothing in my analysis seeks to redefine that term.

My point is that the *majority*'s view fails to apply this definition because it inappropriately *assumes* there is categorically misuse or maltreatment involved in a violation of the Tennessee statute. But as I discuss below, the majority's analysis cannot withstand scrutiny in light of Supreme Court and Fourth Circuit precedent.

Turning to the question of abuse, there is no doubt that much sexual conduct involving minors is inherently abusive. For example, we held in *United States v. Colson* that a Virginia child-pornography-production offense categorically related to the misuse or maltreatment of individuals under the age of eighteen. *Colson*, 683 F.3d at 512. This is unsurprising, given the Supreme Court's longstanding recognition that the production and distribution of child pornography is inherently abusive. *See New York v. Ferber*, 458 U.S. 747, 758–59 & nn.9–10 (1982). Similarly, we have held that a conviction for the molestation of a child under the age of fourteen categorically qualifies as "misuse or maltreatment" of that child. *See Diaz-Ibarra*, 522 F.3d at 352.

Nevertheless, Congress did not define "abusive" for purposes of § 2252A. Further, our definition—that "abuse" means "physical or nonphysical misuse or maltreatment"—is of little assistance because Tennessee's statute undisputedly covers even consensual sexual conduct. *State v. Collier*, 411 S.W.3d 886, 894 (Tenn. 2013) ("Consent is not a defense to any form of statutory rape."). And normally, consensual sexual conduct is not abusive. *Cf. United States v. Jaycox*, 962 F.3d 1066, 1070 (9th Cir. 2020) ("We have consistently recognized that

consensual sexual intercourse with individuals over the age of sixteen is not necessarily physically or psychologically abusive." (internal quotation marks omitted)). Rather, there must be some aggravating factor that renders otherwise consensual sexual conduct *abusive*, such as the permanence of the child pornography at issue in *Colson*. *See Ferber*, 458 U.S. at 759 ("[T]he materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation."). I fully concur with the majority that the legal impossibility of a victim's consent due to their age renders sexual conduct abusive—sex without consent is abuse. Majority Op. at 11. Where we differ is on how to determine the relevant age of consent.

The majority appears to offer two related explanations for why the most innocent conduct criminalized by Tennessee's statute is "abusive," that is, involves "physical or nonphysical misuse or maltreatment": first, that it involves a minor, as defined by § 2252A; and second, that it is criminalized by Tennessee law. But neither explanation is sufficient under applicable precedent. The first conflates the age used to define "minor" (indisputably eighteen under § 2252A) with the age at which otherwise consensual sexual conduct becomes criminal or "abusive" solely because the younger participant is too young to legally consent (eighteen under the Tennessee statute, but undefined in § 2252A), ultimately leading the majority to erroneously disregard the Supreme Court's decision in *Esquivel-Quintana v. Sessions*. The second misapplies the categorical approach. I will elaborate on each error in turn.

A.

Because § 2252A does not define "abusive," the categorical approach instructs us to look to its generic federal definition. Specifically, we must determine what constitutes "generic" "abusive sexual conduct involving a minor" in the context of statutes criminalizing sexual conduct *solely based on the ages of the participants*.

Luckily, a unanimous Supreme Court spoke clearly to this point in 2017. After evaluating dictionaries, related federal law, and state criminal provisions, the Court concluded that, "in the context of statutory rape offenses that criminalize sexual intercourse based solely on the age of the participants, the generic federal definition of sexual abuse of a minor requires that the victim be *younger than 16*." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017) (emphasis added). The Tennessee statute is categorically broader than this definition because it sets the age of consent at eighteen.

Certainly, *Esquivel-Quintana* involved a different statute, the Immigration and Nationality Act.[18] But the same evidence mandates the same conclusion here: dictionaries, related federal law, and state criminal provisions continue to point toward sixteen as the generic age of consent.

Today, "a robust majority of American jurisdictions"—some thirty-two states and the District of Columbia—set their age of consent at sixteen, and ten others define statutory rape so as to exclude consensual intercourse between a seventeen-

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[18] *See* 8 U.S.C. §§ 1101(a)(43)(A), 1227(a)(2)(A)(iii).

year-old and a twenty-one-year-old.[19] *Rangel-Castaneda*, 709 F.3d at 377. "Bolstering this consensus, both the Model Penal Code and *Black's Law Dictionary* recognize sixteen as the default age of consent." *Id.* at 378 (citing Model Penal Code § 213.3(1)(a); *Statutory Rape*, Black's Law Dictionary (9th ed. 2009); *Age of Consent*, Black's Law Dictionary (9th ed. 2009)). Further, a federal statute, 18 U.S.C. § 2243(a), prohibits "[s]exual abuse of a minor" in the form of "knowingly engag[ing] in a sexual act" with a minor who is at least twelve but

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[19] *See Rangel-Castaneda*, 709 F.3d at 377–78 & nn.1–2. In addition to the thirty-two states that set the age of consent to sexual activity at sixteen, seven states set the age of consent at seventeen. *Id.* at 378 n.2. The remaining eleven states set the age of consent at eighteen, *id.* at 378, but three of those would not criminalize consensual sexual activity between a seventeen-year-old and a twenty-one-year-old, *see* Del. Code Ann. tit. 11, § 770(a)(2) (2021) (setting a minimum age of prosecution of thirty for sexual acts with an individual who is at least sixteen); Fla. Stat. Ann. § 794.05(1) (2021) (setting the minimum age of prosecution for "engag[ing] in sexual activity with a person 16 or 17 years of age" at 24); Utah Code Ann. § 76-5-401.2(2) (2021) (setting the minimum age differential for "[u]nlawful sexual conduct with a 16- or 17-year-old" at seven years if the defendant "knew or reasonably should have known the age of the minor," and otherwise at ten years). Thus, the most innocent conduct criminalized under Tennessee's 1993 statute would not be criminal today in forty-two states or the District of Columbia. *See also Esquivel-Quintana*, 137 S. Ct. at 1571, 1573–76 (collecting statutes showing that, in 1996—the year § 2252A was enacted—forty states and the District of Columbia set the age of consent at seventeen or younger).

not yet sixteen and is at least four years younger than the perpetrator.[20]

Reviewing the same evidence as the Supreme Court did in *Esquivel-Quintana* must lead us to the same conclusion: that "consensual sexual conduct involving a younger partner who is at least 16 years of age does not qualify as" abusive sexual conduct involving a minor pursuant to § 2252A(b)(1). *Esquivel-Quintana*, 137 S. Ct. at 1572. No surprise, then, that the Ninth Circuit recently held that a similar California statute, which (like Tennessee's) criminalizes "consensual intercourse between a twenty-one-year-old and someone nearly eighteen," is "not a categorical match to the generic federal definition of sexual abuse of a minor." *Jaycox*, 962 F.3d at 1068, 1070 (interpreting Cal. Penal Code § 261.5(c) (2000) for purposes of the enhancement under 18 U.S.C. § 2252(b)(1), which includes the same relevant language as § 2252A(b)(1)).

Seeking to avoid this conclusion, the majority dismisses *Esquivel-Quintana*'s clear language as turning on the meaning of the word "minor," which was undefined in the statute at issue in *Esquivel-Quintana* and which, we all agree, is set at under eighteen by § 2256(1). Majority Op. at 12–13. But that simply misreads the Court's opinion. In noting that, "[w]here sexual intercourse is abusive solely because of the ages of the participants, the victim must be younger than 16," the Court also explained that "the generic crime of sexual abuse of a minor

[20] Another statute, 18 U.S.C. § 2241, prohibits sexual acts against a person of any age by force or threat, and also prohibits sexual acts involving children under the age of twelve.

*may include a different age of consent* where the perpetrator and victim are in a significant relationship of trust." *Esquivel-Quintana*, 137 S. Ct. at 1572 (emphasis added). Plainly, the Court did not mean that the word "minor" would have a different meaning if the perpetrator had a significant relationship of trust with the victim. Instead, the question was whether the relevant conduct constituted "sexual abuse of a minor" because one participant was legally unable to consent—which could occur because the younger party was under the age of sixteen, or under a different age, depending on other circumstances such as the relationship between the parties.

So *Esquivel-Quintana* cannot be distinguished on the basis that it sought to define "minor" in the absence of a statutory definition of *that* term. Rather, the Court in *Esquivel-Quintana* was tasked with defining the full phrase "sexual abuse of a minor"—a phrase that, like "abusive sexual conduct involving a minor" in § 2252A(b)(1), was undefined by the statute in question. *See id.* at 1567 (noting that the Immigration and Nationality Act "does not expressly define *sexual abuse of a minor*" and that the key question the Supreme Court was analyzing was "whether a conviction under a state statute criminalizing consensual sexual intercourse between a 21-year-old and a 17-year-old qualifies as *sexual abuse of a minor* under" that Act (emphases added)). And the most innocent conduct criminalized by the Tennessee statute simply does not constitute "sexual abuse of a minor" under *Esquivel-Quintana*'s articulation of the generic federal meaning of that phrase for offenses rendering "sexual intercourse . . .

abusive solely because of the ages of the participants." *Id.* at 1572.

The majority also implicitly distinguishes *Esquivel-Quintana* because the Supreme Court relied on 18 U.S.C. § 2243 in defining "sexual abuse of a minor," a statute the majority finds unhelpful to Hardin's case here. "To the contrary," the majority writes, § 2243 "indicates Congress knows how to limit sexual abuse of a minor to victims under sixteen" when it wants to—whereas § 2252A(b)(1) uses a definition of "minor" that includes all those under the age of eighteen. Majority Op. at 13.

I disagree. The statutes can more plausibly be read *together* to support the view that *this form* of abusive sexual conduct requires a victim under the age of sixteen. Section 2252A(b)(1) refers to "abusive sexual conduct involving a minor," that is, someone under age eighteen. Section 2243 provides one form of such abusive sexual conduct: "knowingly engag[ing] in a sexual act" with someone who is at least twelve but not yet sixteen, and who is at least four years younger than the perpetrator. Another statute, § 2241, provides another form: "knowingly engag[ing] in a sexual act" with a child who is not yet twelve. In other words, § 2243 merely suggests one type of "abusive sexual conduct" covered by the § 2252A(b)(1) enhancement. There is no contradiction because § 2243 does not seek to define *all* forms of "abusive sexual conduct" covered by § 2252A(b)(1), some of which will cover victims older than sixteen but not yet eighteen.

This view of the two statutes is supported by their shared history. Notably, in *Esquivel-Quintana*,

the Supreme Court emphasized that Congress expanded § 2243 to cover all those under the age of sixteen[21] "in the same [1996] omnibus law that added sexual abuse of a minor to the [Immigration and Nationality Act]." *Esquivel-Quintana*, 137 S. Ct. at 1570. Congress enacted our provision, § 2252A, in that very same omnibus law. *See* Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, §§ 121(3), 121(7), 321, 110 Stat. 3009–28, 3009–31, 3009–627 (1996). Plainly, Congress was worried about all sexually abusive conduct involving children under the age of eighteen. But just as plainly, in Congress' view, one *form* of such abuse was otherwise consensual sexual conduct with children under the age of consent—which it set at sixteen.

Of course, the Supreme Court concluded that it was not necessary or advisable to "import[] [§ 2243(a)] wholesale" into the Immigration and Nationality Act, and I would hold the same to be true here. *Esquivel-Quintana*, 137 S. Ct. at 1571. Still, I would follow the Supreme Court in "rely[ing] on § 2243(a) for *evidence* of the meaning of sexual abuse of a minor, but not as providing the complete or exclusive definition." *Id.* (emphasis added). In other words, § 2243 provides one piece of evidence about the generic federal meaning of "abusive sexual conduct involving a minor" in § 2252A(b)(1); as in *Esquivel-Quintana*, dictionaries and state criminal codes constitute other relevant evidence. And all of

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[21] As the Court also noted, "[t]o eliminate a redundancy, Congress later amended § 2243(a) to revert to the pre-1996 language," but "[t]hat amendment does not change Congress' understanding in 1996." *Esquivel-Quintana*, 137 S. Ct. at 1571 n.2.

that evidence points to the same conclusion: "Where sexual intercourse is abusive solely because of the ages of the participants, the victim must be younger than 16." *Id.* at 1572.

In sum, the fact that there is a statutory definition provided for the word "minor" in § 2252A does not render *Esquivel-Quintana* irrelevant. We all agree that the Tennessee statute's inclusion of victims up to the age of eighteen does not render it overbroad as to the definition of "minor." But, of course, consensual sexual conduct is only "misuse or maltreatment" so as to be "abusive" if there is something abusive about the conduct. In the context of statutory rape statutes premised solely on the ages of the parties, that "something" is the legal inability of the minor to consent. And the generic federal definition of the age of consent is sixteen. Thus, the Tennessee statute covers more conduct than does § 2252A(b)(1), and it cannot serve as a predicate.

B.

The majority's logic also suffers from a second fatal flaw: it centers the analysis on what Tennessee defines as criminal, rather than on the generic federal definition of "abusive sexual conduct." *See* Majority Op. at 11–12. But our obligation under the categorical approach is to ensure that Tennessee's law does not sweep more broadly than the generic federal definition. *See Esquivel-Quintana*, 137 S. Ct. at 1568 ("Under [the categorical] approach, we ask whether 'the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding [enumerated offense].'"

(quoting *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013) (internal quotation marks omitted))).

As it happens, Tennessee's law *does* sweep unusually broadly. The majority asserts that "statutory rape, even by its most innocent conduct, involves a person under the age of eighteen." Majority Op. at 10. While technically true, this statement is misleading: as discussed above, in most states, statutory rape requires a victim under the age of *sixteen*.

And more to the point, § 2252A(b)(1) does not name "statutory rape" as a qualifying predicate; it speaks of "abusive sexual conduct involving a minor."[22] So even if *all* states' statutory-rape statutes swept as broadly as Tennessee's does, we would still have to determine whether the minimum conduct criminalized by those statutes constituted abusive sexual conduct. And the Supreme Court has answered that question in the negative.

In this light, it becomes clear that the majority's argument about the effect of consent is beside the point. The majority contends that since consent is no

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[22] What's more, this Court has already interpreted the phrase "statutory rape" in the federal sentencing guidelines—and concluded that statutory rape under Tennessee law is not a categorical match, because the "'generic, contemporary meaning' of statutory rape sets the general age of consent at sixteen years old." *Rangel-Castaneda*, 709 F.3d at 375 (quoting *Taylor*, 495 U.S. at 598). The majority's interpretation thus leads to an oddity: if Congress had specifically listed "statutory rape" as a predicate offense in § 2252A, our precedent would compel the conclusion that Hardin's prior conviction would not qualify. And yet the majority reaches the opposite conclusion where Congress has *declined* to enumerate "statutory rape." That can't be right.

defense to statutory rape, it would be "illogical" for consent to exclude a statutory-rape offense from the realm of "abusive" conduct. Majority Op. at 11. But this argument responds to the wrong question, which is not whether *Tennessee* considers consent relevant to criminality or abusiveness, but whether Tennessee's statutory-rape law criminalizes more conduct than qualifies as abusive under *the generic federal definition* of "abusive sexual conduct involving a minor." It may be true that this Court's definition of "misuse or maltreatment" sweeps more broadly than "a colloquial understanding of 'abusive[,]'" but the majority provides no support for its bare conclusion that "sex with a seventeen-year-old victim, even if consensual," automatically constitutes "incorrect or careless use" or "wrong or improper use," or for its similar assertion that "the most innocent conduct here stands in some relation to physical misuse or maltreatment for a purpose associated with sexual gratification." *Id.* at 10–11.

No support, that is, except for its state-law illegality. *See id.* (noting that consent "is of no moment *for purposes of the Tennessee statute*" and concluding that "*pursuant to the Tennessee statute*, sex with a seventeen-year-old victim, even if consensual," constitutes misuse (emphases added)). But such reliance is improper under the categorical approach. In suggesting the incorrectness or illegality of a course of conduct for federal sentencing-enhancement purposes arises from its proscription under Tennessee law, the majority "turns the categorical approach on its head by defining the generic federal offense of [abusive sexual conduct involving a minor] as whatever is illegal under the

particular law of the State where the defendant was convicted." *Esquivel-Quintana*, 137 S. Ct. at 1570. The "unjust and odd result" of the majority's view is that "conduct that is perfectly legal for some people"—that is, twenty-one-year-olds in forty-two states and the District of Columbia—"could subject many others in neighboring states to years upon years in federal prison." *Rangel-Castaneda*, 709 F.3d at 377 (internal quotation marks and alterations omitted). As noted, this is precisely the kind of nonuniformity in federal sentencing that the categorical approach is meant to avoid. *Id.* (citing *Taylor*, 495 U.S. at 591–92).

C.

To be clear, I voice no opinion as to the appropriate age of consent that ought to apply under criminal law. Nor do I express any "opinion[] on the merits and policy of the recidivist enhancement." Majority Op. at 8 n.6. Those are questions for legislatures to answer. My point is only that legislatures, both state and federal, have spoken—and so did the Supreme Court, when, taking account of that near-unanimous legislative action, it interpreted the generic federal definition of "sexual abuse of a minor." Tennessee is, of course, within its rights to consider sexual acts between seventeen-year-olds and twenty-one-year-olds criminal.[23] And

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[23] *See Rangel-Castaneda*, 709 F.3d at 379 ("Tennessee retains the ability to define the state crime of statutory rape in the manner it desires. And yet, when it comes to the common meaning of that offense for federal sentencing enhancement purposes, the gap between an age of consent of sixteen versus eighteen is simply too consequential to disregard, and the

Congress would be within its rights to permit a conviction under that Tennessee law to serve as a predicate for federal sentencing purposes. It simply has not done so under the current iteration of § 2252A(b)(1), as properly understood in light of the categorical approach. Accordingly, "[w]e simply [should] not accept the government's attempt to justify imposition of a steep . . . sentencing enhancement [tripling the mandatory minimum sentence] for actions that are entirely lawful in [forty]-two states and the District of Columbia, as well as under federal law." *Id.* at 381.

III.

That brings us to the second disputed aspect of § 2252A: its use of the words "relating to." *See* 18 U.S.C. § 2252A(b)(1) (sentencing enhancement applies to those with a prior conviction "under the laws of any State *relating to* . . . abusive sexual conduct involving a minor" (emphasis added)). Those words admittedly have a "broadening effect" that alters the categorical-approach analysis, *Jaycox*, 962 F.3d at 1070, such that a state crime "does not need to satisfy a *narrow definition* of sexual abuse in order to qualify as a predicate offense," *United States v. Spence*, 661 F.3d 194, 200 (4th Cir. 2011) (emphasis added). Nevertheless, as the Supreme Court has emphasized, the words "relating to" are not limitless. *Mellouli v. Lynch*, 575 U.S. 798, 811–12 (2015). And here, the majority's interpretation of "relating to" contains no apparent limiting principle, as it sweeps

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majority of states adopting the former age is too extensive to reject.").

so broadly that it deprives the statutory term "abusive" of any meaning.

The majority looks to this Court's decision in *United States v. Colson* for the "parameters" of what it terms "the categorical approach 'and then some.'" Majority Op. at 9. The problem is that *Colson* involved a very different predicate conviction. And in the years since *Colson*, the Supreme Court has noted that context "may tug in favor of a narrower reading" of the words "relating to." *Mellouli*, 575 U.S. at 812 (internal quotation marks and alterations omitted). Such context exists here.

*Colson* involved a conviction under a Virginia child-pornography-production statute that forbade, among other things, depictions of "lewd exhibitions of nudity" of minors. *Colson*, 683 F.3d at 510. As the Supreme Court recognized long ago, the production of child pornography "is harmful to the physiological, emotional, and mental health of the child." *Ferber*, 458 U.S. at 758; *see also Paroline v. United States*, 572 U.S. 434, 439–40 (2014) (noting that child-pornography production "involves child abuse"); *United States v. McCauley*, 983 F.3d 690, 696 (4th Cir. 2020) (noting "the deeply harmful effects that [child-pornography] production can wreak on individual lives and on our social fabric"); *cf. Ferber*, 458 U.S. at 759 ("The distribution of photographs and films depicting sexual activity by juveniles is *intrinsically related to* the sexual abuse of children[.]" (emphasis added)). Thus, *Colson* was not a close case. Indeed, this Court "ha[d] little difficulty concluding" that the defendant's conviction, while not "*equivalent to* the production of child pornography *under federal*

*law*," was *related* to the sexual abuse of minors. *Colson*, 683 F.3d at 511 & n.2.

By contrast, statutory rape, by its nature, avoids the blurry twilight zone of conduct that plausibly "relates to" sexual abuse. By grounding illegality solely in the ages of the participants, statutory rape creates a sharp binary between conduct that is punishable (and, therefore, presumably abusive in the eyes of the legislature) and conduct that is perfectly legal and non-abusive (consensual sexual conduct between parties legally capable of consenting). Moreover, many statutory-rape laws, including Tennessee's, are strict-liability crimes. The sole determinates of criminal liability under such laws are the birthdates of the victim and the perpetrator.

This distinguishes statutory rape from other sexual crimes, which may involve gradations of culpability along either the actus reus or mens rea dimensions. They might ask about the intent of the perpetrator. Or they might involve complex evaluations of whether what happened constitutes a crime—such as, under the statute at issue in *Colson*, whether photographs involved "lewd" depictions of nudity. For that reason, this Court has noted that "[t]here are good reasons to treat statutory rape differently from other crimes." *Thompson v. Barr*, 922 F.3d 528, 534 (4th Cir. 2019) (distinguishing *Esquivel-Quintana* because *Esquivel-Quintana*, like the case before us now, involved a statutory-rape offense).

Outside the statutory-rape context, then, it makes perfect sense for the words "relating to" to,

effectively, blur the edges of the categorical approach—or, as the Ninth Circuit put it, to "allow certain flexibility at the margins." *Jaycox*, 962 F.3d at 1070. In other words, for most sexual crimes, conduct that might not squarely *constitute* sexual abuse for federal purposes may still *relate* to sexual abuse. Congress presumably included the words "relating to" in order to capture such conduct—like the psychologically damaging, if not federally criminal, production of "lewd exhibitions of nudity" at issue in *Colson*. *Colson*, 683 F.3d at 510; *cf. Ferber*, 458 U.S. at 758 & n.9.

But statutory rape presents clear lines: the most innocent conduct it criminalizes is conduct that would *definitively* be neither criminal nor abusive if both participants were legally able to consent. Put differently, the age of consent creates a clear division between criminal and noncriminal conduct. To hold that "relating to" encompasses conduct across even *that* line divests the phrase of any real meaning. The statute might as well say that *any* conviction for *any* "sexual conduct involving minors" can serve as a predicate.

But it doesn't. And because it doesn't, "the Government's construction of [§ 2252A] stretches to the breaking point, reaching state-court convictions, like [Hardin]'s, in which [Supreme Court precedent establishes that no 'abusive' conduct categorically] figures as an element of the offense." *Mellouli*, 575 U.S. at 811 (declining to adopt a meaning of "relating to" that would read words out of the statute); *see also United States v. Schopp*, 938 F.3d 1053, 1066 (9th Cir. 2019) (interpreting *Mellouli* as holding that "relating to" "does not permit an expansion beyond

the substantive linchpin element of the federal generic crime . . . [,] although it does permit inclusion of various kinds of conduct involving that generic crime"); *Jaycox*, 962 F.3d at 1070–71 (applying *Schopp* to § 2252(b)(1)); *cf. Rangel-Castaneda*, 709 F.3d at 377 ("[T]he disparity between the predicate state crime[, Tennessee's statutory-rape provision, which sets the age of consent at eighteen,] and the defendant's contended generic offense here[, which sets the age of consent at sixteen,] simply cannot be considered insignificant. . . . [T]he contrast between age sixteen and age eighteen is highly consequential[.]"). In other words, the fact that the majority's interpretation of the words "relating to" would functionally erase "abusive" from the statute provides context "tug[ging] . . . in favor of a narrower reading" of the words "relating to," at least when it comes to statutory-rape laws like Tennessee's.[24] *Mellouli*, 575 U.S. at 812 (quoting *Yates v. United States*, 574 U.S. 528, 539 (2015)).

For that reason, I would join our sister circuit in concluding that the most innocent conduct criminalized by a statute like Tennessee's 1993 statutory-rape provision does not categorically relate to abusive sexual conduct involving a minor. *Jaycox*, 962 F.3d at 1070–71 (explaining that California's statutory-rape law did not "relate to" abusive sexual conduct involving a minor because the state crime and generic federal definition differed as to a "core substantive element" of the offense—the age at which otherwise consensual sex became unlawful).

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[24] Further, to the extent § 2252A(b)(1) is ambiguous, the rule of lenity counsels in favor of Hardin's interpretation.

IV.

Because the Tennessee law under which Hardin was convicted does not categorically relate to abusive sexual conduct involving a minor, I would vacate Hardin's sentence and remand for resentencing without application of the § 2252A(b)(1) enhancement. Because the majority holds otherwise, I respectfully dissent.

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 19-4556

(5:18-cr-00025-KDB-DCK-1)

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UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

TIMOTHY SCOTT HARDIN

Defendant – Appellant

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ORDER

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The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

## APPENDIX C

**UNITED STATES DISTRICT COURT**
Western District of North Carolina

| UNITED STATES OF AMERICA<br><br>V.<br><br>TIMOTHY SCOTT HARDIN | **JUDGMENT IN A CRIMINAL CASE**<br><br>(For Offenses Committed On or After November 1, 1987)<br>Case Number: DNCW518CR000025-001<br>USM Number: 34249-058<br>Peter Adolf<br>Defendant's Attorney |
|---|---|

**THE DEFENDANT:**

☒ Pleaded guilty to count 1.

☐ Pleaded nolo contendere to count(s) __ which was accepted by the court

☐ Was found guilty on count(s) after a plea of not guilty.

**ACCORDINGLY,** the court has adjudicated that the defendant is guilty of the following offense(s):

| Title and Section | Nature of Offense | Date Offense Concluded | Counts |
|---|---|---|---|
| 18 U.S.C. § 2252A(a)(2), 18 U.S.C. § 2252A(b)(1) | Receipt of Child Pornography that has been Shipped and Transported in and Affecting Interstate and Foreign Commerce by any Means Including by Computer | 3/31/2016 | 1 |

The Defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, *United States v. Booker*, 125 S.Ct. 738 (2005), and 18 U.S.C. § 3553(a).

☐ The defendant has been found not guilty on count(s).

☐ Count(s) (is)(are) dismissed on the motion of the United States.

**IT IS ORDERED** that the Defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay monetary penalties, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence: 7/18/2019

Signed: July 19, 2019

*Kenneth D. Bell*
Kenneth D. Bell
United States Judge [SEAL]

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED EIGHTY (180) MONTHS.

☒ The Court makes the following recommendations to the Bureau of Prisons:

1. Participation in any available educational and vocational opportunities.
2. Participation in any available mental health treatment programs.
3. Participation in sex offender treatment programs, if eligible.
4. Participation in any available substance abuse treatment program and if eligible, receive benefits of 18:3621(e)(2).
5. Defendant shall support all dependents from prison earnings.
6. Placed in a facility as close to Boone, NC as possible, consistent with the needs of BOP.
7. Participation in the Federal Inmate Financial Responsibility Program.

☒ The Defendant is remanded to the custody of the United States Marshal.

☐ The Defendant shall surrender to the United States Marshal for this District:

☐ As notified by the United States Marshal.

☐ At__ on __.

☐ The Defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ As notified by the United States Marshal.

☐ Before 2 p.m. on __.

☐ As notified by the Probation Office.

**RETURN**

I have executed this Judgment as follows:

________________________________________________
________________________________________________
________________________________________________

Defendant delivered on _____ to ____________ at _____________, with a certified copy of this Judgment.

____________________________
United States Marshal

By: ____________________
Deputy Marshal

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of LIFE.

☐ The condition for mandatory drug testing is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

## CONDITIONS OF SUPERVISION

The defendant shall comply with the mandatory conditions that have been adopted by this court.

1. The defendant shall not commit another federal, state, or local crime.
2. The defendant shall not unlawfully possess a controlled substance.
3. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court (unless omitted by the Court).
4. ☐ The defendant shall make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (check if applicable)
5. The defendant shall cooperate in the collection of DNA as directed by the probation officer (unless omitted by the Court).

The defendant shall comply with the standard conditions that have been adopted by this court and any additional conditions ordered.

1. The defendant shall report to the probation office in the federal judicial district where he/she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
2. The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.
3. The defendant shall not leave the federal judicial district where he/she is authorized to reside without first getting permission from the Court or probation officer.
4. The defendant shall answer truthfully the questions asked by the probation officer.
5. The defendant shall live at a place approved by the probation officer. The probation officer shall be notified in advance of any change in living arrangements (such as location and the people with whom the defendant lives).
6. The defendant shall allow the probation officer to visit him/her at any time at his/her home or elsewhere, and shall permit the probation officer to take any items prohibited by the conditions of his/her supervision that the probation officer observes.
7. The defendant shall work full time (at least 30 hours per week) at lawful employment, unless

excused by the probation officer. The defendant shall notify the probation officer within 72 hours of any change regarding employment.

8. The defendant shall not communicate or interact with any persons engaged in criminal activity, and shall not communicate or interact with any person convicted of a felony unless granted permission to do so by the probation officer.

9. The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer.

10. The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential informant without the permission of the Court.

12. If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk. The probation officer may contact the person and make such notifications or confirm that the defendant has notified the person about the risk.

13. The defendant shall refrain from excessive use of alcohol and shall not unlawfully purchase, possess, use, distribute or administer any narcotic or controlled substance or any psychoactive substances (including, but not limited to, synthetic marijuana, bath salts) that impair a person's physical or mental functioning, whether or not intended for human consumption, or any paraphernalia related to such substances, except as duly prescribed by a licensed medical practitioner.

14. The defendant shall participate in a program of testing for substance abuse if directed to do so by the probation officer. The defendant shall refrain from obstructing or attempting to obstruct or tamper, in any fashion, with the efficiency and accuracy of the testing. If warranted, the defendant shall participate in a substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise the defendant's participation in the program (including, but not limited to, provider, location, modality, duration, intensity) (unless omitted by the Court).

15. The defendant shall not go to, or remain at any place where he/she knows controlled substances are illegally sold, used, distributed, or administered without first obtaining the permission of the probation officer.

16. The defendant shall submit his/her person, property, house, residence, vehicle, papers,

computers (as defined in 18 U.S.C. § 1030(e)(1)), or other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer and such other law enforcement personnel as the probation officer may deem advisable, without a warrant. The defendant shall warn any other occupants that such premises may be subject to searches pursuant to this condition.

17. The defendant shall pay any financial obligation imposed by this judgment remaining unpaid as of the commencement of the sentence of probation or the term of supervised release in accordance with the schedule of payments of this judgment. The defendant shall notify the court of any changes in economic circumstances that might affect the ability to pay this financial obligation.

18. The defendant shall provide access to any financial information as requested by the probation officer and shall authorize the release of any financial information. The probation office may share financial information with the U.S. Attorney's Office.

19. The defendant shall not seek any extension of credit (including, but not limited to, credit card account, bank loan, personal loan) unless authorized to do so in advance by the probation officer.

20. The defendant shall support all dependents including any dependent child, or any person

the defendant has been court ordered to support.

21. The defendant shall participate in transitional support services (including cognitive behavioral treatment programs) and follow the rules and regulations of such program. The probation officer will supervise the defendant's participation in the program (including, but not limited to, provider, location, modality, duration, intensity). Such programs may include group sessions led by a counselor or participation in a program administered by the probation officer.

22. The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

ADDITIONAL CONDITIONS:

23. The defendant shall participate in a mental health evaluation and treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise the defendant's participation in the program (including, but not limited to provider, location, modality, duration, and intensity). The defendant shall take all mental health medications as prescribed by a licensed health care practitioner.

24. The defendant shall submit to location monitoring technology for a period of TWELVE (12) months and comply with its requirements as directed.

25. The defendant is to pay the cost of the location monitoring portion of this sentence not to exceed the daily contractual rate. Payment for the location monitoring shall be made in accordance with the probation officer's direction.

## SEX OFFENDER CONDITIONS OF SUPERVISION

1. The defendant shall have no direct or indirect contact, at any time, for any reason with any victim(s), any member of any victim's family, or affected parties in this matter unless provide with specific written authorization to do so in advance by the U.S. Probation Officer.
2. The defendant shall submit to a psycho-sexual evaluation by a qualified mental health professional experienced in evaluating and managing sexual offenders as approved by the U.S. Probation Officer. The defendant shall complete the treatment recommendations and abide by all of the rules, requirements, and conditions of the program until discharged. The defendant shall take all medications as prescribed.
3. The defendant shall submit to risk assessments, psychological and physiological testing, which may include, but is not limited to a polygraph examination and/or Computer Voice Stress Analyzer (CVSA), or other specific tests to monitor the defendant's compliance with supervised release and treatment conditions, at the direction of the U.S. Probation Officer.
4. The defendant's residence, co-residents and employment shall be approved by the U.S. Probation Officer. Any proposed change in residence, co-residents or employment must be provided to the U.S. Probation Officer at

least 10 days prior to the change and pre-approved before the change may take place.

5. The defendant shall not possess any materials depicting and/or describing "child pornography" and/or "simulated child pornography" as defined in 18 U.S.C. § 2256, or that would compromise the defendant's sex offender treatment, nor shall the defendant enter any location where such materials can be accessed, obtained or viewed, including pictures, photographs, books, writings, drawings, videos or video games.

6. The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which the defendant resides, works, is a student, or was convicted of a qualifying offense.

7. The defendant shall not have any contact, including any association such as verbal, written, telephonic, or electronic communications with any person under the age of eighteen (18) except: 1) in the presence of the parent or legal guardian of said minor; 2) on the condition that the defendant notifies the parent or legal guardian of their conviction or prior history; and, 3) has written approval from the U.S. Probation Officer. This provision does not encompass persons under the age of eighteen (18), such as waiters, cashiers, ticket vendors, etc. with whom the

defendant must deal, in order to obtain ordinary and usual commercial services. If unanticipated contact with a minor occurs, the defendant shall immediately remove himself/herself from the situation and shall immediately notify the probation officer.

8. The defendant shall not loiter within 100 feet of any parks, school property, playgrounds, arcades, amusement parks, day-care centers, swimming pools, community recreation fields, zoos, youth centers, video arcades, carnivals, circuses or other places primarily used or can reasonably be expected to be used by children under the age of eighteen (18), without prior written permission of the U.S. Probation Officer.

9. The defendant shall not use, purchase, possess, procure, or otherwise obtain any computer (as defined in 18 U.S.C. § 1030(e)(1)) or electronic device that can be linked to any computer networks, bulletin boards, internet, internet service providers, or exchange formats involving computers unless approved by the U.S. Probation Officer. Such computers, computer hardware or software is subject to warrantless searches and/or seizures by the U.S. Probation Office.

10. The defendant shall allow the U.S. Probation Officer, or other designee, to install software designed to monitor computer activities on any computer the defendant is authorized to use. This may include, but is not limited to, software that may record any and all activity

on computers (as defined in 18 U.S.C. § 1030(e)(1)) the defendant may use, including the capture of keystrokes, application information, internet use history, email correspondence, and chat conversations. The defendant shall pay any costs related to the monitoring of computer usage.

11. The defendant shall not use or have installed any programs specifically and solely designed to encrypt data, files, folders, or volumes of any media. The defendant shall, upon request, immediately provide the probation officer with any and all passwords required to access data compressed or encrypted for storage by any software.

12. The defendant shall provide a complete record of all computer use information including, but not limited to, all passwords, internet service providers, email addresses, email accounts, screen names (past and present) to the probation officer and shall not make any changes without the prior approval of the U.S. Probation Officer.

13. The defendant shall not have any social networking accounts without the approval of the U.S. Probation Officer.

14. The defendant shall not possess any children's items, including, but not limited to, clothing, toys, and games without the prior approval of the U.S. Probation Officer.

15. The defendant shall not be employed in any position or participate as a volunteer in any

activity that involves direct or indirect contact with children under the age of eighteen (18), and under no circumstances may the defendant be engaged in a position that involves being in a position of trust or authority over any person under the age of eighteen (18), without written permission from the U.S. Probation Officer.

## CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments.

| ASSESSMENT | FINE | RESTITUTION |
|---|---|---|
| $5,100.00 | $0.00 | $0.00 |

☐ The determination of restitution is deferred until. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

## FINE

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☒ The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ The interest requirement is waived.

☐ The interest requirement is modified as follows:

## COURT APPOINTED COUNSEL FEES

☐ The defendant shall pay court appointed counsel fees.

☐ The defendant shall pay $0.00 towards court appointed fees.

**SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☐ Lump sum payment of $0.00 due immediately, balance due

☐ Not later than

☐ In accordance ☐ (C), ☐ (D) below; or

B ☒ Payment to begin immediately (may be combined with ☐ (C), ☒ (D) below); or

C ☐ Payment in equal Monthly (E.g. weekly, monthly, quarterly) installments of $50.00 to commence 60 (E.g. 30 or 60) days after the date of this judgment; or D ☒ Payment in equal Monthly (E.g. weekly, monthly, quarterly) installments of $ 50.00 to commence 60 (E.g. 30 or 60) days after release from imprisonment to a term of supervision. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. Probation Officer shall pursue collection of the amount due, and may request the court to establish or modify a payment schedule if appropriate 18 U.S.C. § 3572.

Special instructions regarding the payment of criminal monetary penalties:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court costs:

☒ The defendant shall forfeit the defendant's interest in the following property to the United States as set forth in the Consent Order document 17 entered 1/7/2019:

Document No. 17 is incorporated into this Judgment

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States District Court Clerk, 401 West Trade Street, Room 210, Charlotte, NC 28202, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. All criminal monetary penalty payments are to be made as directed by the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

## STATEMENT OF ACKNOWLEDGMENT

I understand that my term of supervision is for a period of _____months, commencing on ___________.

Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

I understand that revocation of probation and supervised release is mandatory for possession of a controlled substance, possession of a firearm and/or refusal to comply with drug testing.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed)_____________________ Date: ___________
Defendant

(Signed)_____________________ Date: ___________
U.S. Probation Office/
Designated Witness

## APPENDIX D

RELEVANT STATUTORY PROVISIONS

**18 U.S.C. § 2252 - Certain activities relating to material involving the sexual exploitation of minors:**

(a) Any person who—

(1) knowingly transports or ships 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 mails, any visual depiction, if—

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

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails, if—

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

(B) such visual depiction is of such conduct;

(3) 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 Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly sells or possesses with intent to sell any visual depiction; or

(B) knowingly sells or possesses with intent to sell any visual depiction that has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce, or has been shipped or transported in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported using any means or facility of interstate or foreign commerce, including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct; or

(4) 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 Government of the United States, or in the Indian country as defined in section 1151 of

this title, knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction; or

(B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b)

(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but if such person has a prior conviction under this chapter, section 1591, 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, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 10 years, or both, but if any visual depiction 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.

(c) Affirmative Defense.—It shall be an affirmative defense to a charge of violating paragraph (4) of subsection (a) that the defendant—

(1) possessed less than three matters containing any visual depiction proscribed by that paragraph; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any visual depiction or copy thereof—

(A) took reasonable steps to destroy each such visual depiction; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

* * *

**18 U.S.C. § 2252A - Certain activities relating to material constituting or containing child pornography.**

(a) Any person who—

(1) knowingly mails, or transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any child pornography;

(2) knowingly receives or distributes—

(A) any child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

(3) knowingly—

(A) reproduces any child pornography for distribution through the mails, or 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

(B) advertises, promotes, presents, distributes, or solicits through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct;

(4) 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 sells or possesses with the intent to sell any child pornography; or

(B) knowingly sells or possesses with the intent to sell any 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;

(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;

(6) knowingly distributes, offers, sends, or provides to a minor any visual depiction, including any photograph, film, video, picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct—

(A) that has been mailed, 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;

(B) that was produced using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer; or

(C) which distribution, offer, sending, or provision is accomplished using the mails or any means or facility of interstate or foreign commerce, for purposes of inducing or persuading a minor to participate in any activity that is illegal; or

(7) knowingly produces with intent to distribute, or distributes, by any means, including a computer, in or affecting interstate or foreign commerce, child pornography that is an adapted or modified depiction of an identifiable minor.[1]

shall be punished as provided in subsection (b).

(b)

(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but, if such person has a prior conviction under this chapter, section 1591, 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, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) 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.

(3) Whoever violates, or attempts or conspires to violate, subsection (a)(7) shall be fined under this title or imprisoned not more than 15 years, or both.

(c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that—

(1)

(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and

(B) each such person was an adult at the time the material was produced; or

(2) the alleged child pornography was not produced using any actual minor or minors.

No affirmative defense under subsection (c)(2) shall be available in any prosecution that involves child pornography as described in section 2256(8)(C). A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection

(a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 14 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other specialized testimony or evidence upon which the defendant intends to rely. If the defendant fails to comply with this subsection, the court shall, absent a finding of extraordinary circumstances that prevented timely compliance, prohibit the defendant from asserting such defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) or presenting any evidence for which the defendant has failed to provide proper and timely notice.

(d) Affirmative Defense.—It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant—

(1) possessed less than three images of child pornography; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof—

(A) took reasonable steps to destroy each such image; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

(e) Admissibility of Evidence.—

On motion of the government, in any prosecution under this chapter or section 1466A, except for good cause shown, the name, address, social security number, or other nonphysical identifying information, other than the age or approximate age, of any minor who is depicted in any child pornography shall not be admissible and may be redacted from any otherwise admissible evidence, and the jury shall be instructed, upon request of the United States, that it can draw no inference from the absence of such evidence in deciding whether the child pornography depicts an actual minor.

(f) Civil Remedies.—

(1) In general.—

Any person aggrieved by reason of the conduct prohibited under subsection (a) or (b) or section 1466A may commence a civil action for the relief set forth in paragraph (2).

(2) Relief.—In any action commenced in accordance with paragraph (1), the court may award appropriate relief, including—

(A) temporary, preliminary, or permanent injunctive relief;

(B) compensatory and punitive damages; and

(C) the costs of the civil action and reasonable fees for attorneys and expert witnesses.

(g) Child Exploitation Enterprises.—

(1) Whoever engages in a child exploitation enterprise shall be fined under this title and imprisoned for any term of years not less than 20 or for life.

(2) A person engages in a child exploitation enterprise for the purposes of this section if the person violates section 1591, section 1201 if the victim is a minor, or chapter 109A (involving a minor victim), 110 (except for sections 2257 and 2257A), or 117 (involving a minor victim), as a part of a series of felony violations constituting three or more separate incidents and involving more than one victim, and commits those offenses in concert with three or more other persons.

* * *

**18 U.S.C. § 2256 - Definitions for chapter**

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;

(ii) graphic or lascivious simulated;

(I) bestiality;

(II) masturbation; or

(III) sadistic or masochistic abuse; or

(iii) graphic or simulated lascivious exhibition of the anus, genitals, or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(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—

(i)

(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.

(10) "graphic", when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted; and

(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.

* * *

**18 U.S.C. § 2243 - Sexual abuse of a minor or ward**

(a) Of a Minor.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who—

(1) has attained the age of 12 years but has not attained the age of 16 years; and

(2) is at least four years younger than the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(b) Of a Ward.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who is—

(1) in official detention; and

(2) under the custodial, supervisory, or disciplinary authority of the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(c) Defenses.—

(1) In a prosecution under subsection (a) of this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years.

(2) In a prosecution under this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the persons engaging in the sexual act were at that time married to each other.

(d) State of Mind Proof Requirement.—In a prosecution under subsection (a) of this section, the Government need not prove that the defendant knew—

(1) the age of the other person engaging in the sexual act; or

(2) that the requisite age difference existed between the persons so engaging.