NO. 21-829

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

BRIEF OF AMICI CURIAE DUE PROCESS INSTITUTE AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

SHANA-TARA O'TOOLE
DUE PROCESS INSTITUTE
700 PENNSYLVANIA AVE. SE,
STE. 560
WASHINGTON, DC 20003

JEFFREY T. GREEN
CO-CHAIR, NACDL
AMICUS COMMITTEE
1660 L STREET
WASHINGTON, DC 20005
(202) 872-8600

JAMIE CROOKS
COUNSEL OF RECORD
ALEXANDER ROSE
ERIC CHIANESE
FAIRMARK PARTNERS, LLP
1499 MASSACHUSETTS AVE., NW
WASHINGTON, DC 20005
(619) 507-4182
JAMIE@FAIRMARKLAW.COM

JANUARY 3, 2022 *COUNSEL FOR AMICI CURIAE*

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES – Continued

Page

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE[1]

Amicus DUE PROCESS INSTITUTE is a nonprofit, bipartisan, public-interest organization that works to honor, preserve, and restore procedural fairness in the criminal legal system because due process is the guiding principle that underlies the Constitution's solemn promises to "establish justice" and to "secure the blessings of liberty." U.S. Const., pmbl. The organization takes a strong interest in this case because the rights of the accused across our nation should not vary based on the happenstance of geography.

Amicus the NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ("NACDL") was founded in 1958 and is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. In line with its mission to advocate against systemic injustice and improve policy and practice in the criminal legal system, NACDL

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[1] Counsel for *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this brief, and their letters of consent have been filed with the Clerk.

files amicus briefs every year, including in this Court, that are often cited and emphasize the immense impact of judicial decisions on the fields of criminal justice and immigration.

NACDL has an important professional interest in the petition for a writ of certiorari in this case because of the immense consequences the judicial ruling will have on defendants and their loved ones, many of whom NACDL members represent. NACDL also has a particular interest in the categorical approach being applied correctly, as evidenced by its many amicus briefs, because of the impact it will have on its members as criminal defense attorneys in effectively representing their clients.

INTRODUCTION

This case presents the question of whether a defendant's prior conviction for statutory rape under a state law that criminalizes consensual sexual conduct between a 21-year-old and a 17-year-old can subject that defendant to a mandatory 15-year minimum sentence. Last year, the Ninth Circuit considered this question and answered "no." *See United States v. Jaycox*, 962 F.3d 1066. But in the decision below, the Fourth Circuit answered "yes." *See* Pet.App.12a-14a. In doing so, the Fourth Circuit increased Petitioner Hardin's mandatory minimum sentence from 5 years to 15 years and doubled the statutory maximum he faces from 20 years to 40.

The Court should resolve this clear circuit split, which could subject hundreds of persons per year to

thousands more collective years in prison based solely on geographical happenstance. As the petition explains, the Fourth Circuit's decision misinterprets the relevant statutory term—18 U.S.C. § 2252A (b)(1)'s mandatory sentencing enhancement for prior convictions "relating to . . . abusive sexual conduct involving a minor"—and distorts this Court's settled method for applying the categorical approach to sentencing enhancements. The result is a decision holding conduct that is legal in 39 States and the District of Columbia to be categorically "abusive sexual conduct" under a federal law that subjects a defendant to a 15-year mandatory minimum.

Amici submit this brief to press two further arguments that warrant granting the petition. *First*, if uncorrected, the Fourth Circuit's misapplication of the categorical approach threatens to subject hundreds of people each year to inconsistent and unjust punishments. The court below held that consensual sex between a 21-year-old and a 17-year-old satisfied § 2252A's "abusive" requirement precisely because the Tennessee legislature had criminalized such conduct. This circular reasoning ignores that one key purpose underlying the categorical approach is the need to determine "some uniform definition *independent of the labels employed by the various States' criminal codes*." *Taylor v. United States*, 495 U.S. 575, 592 (1990) (emphasis added). This Court has concluded from examining both federal and state law—the two primary sources courts should consult when determining whether a state crime is a categorical match—that statutory rape does not inherently involve "abusive" conduct unless the statute requires the younger party to be under 16 years old.

See Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1569-72 (2017). By flouting the appropriate analysis and ruling instead that a State's criminalization of certain conduct means it is categorically "abusive," the Fourth Circuit's ruling threatens to broaden the categorical approach beyond recognition, particularly if applied to other terms (such as "burglary," *Descamps v. United States*, 570 U.S. 254 (2013), or a "crime of moral turpitude," *cf. Pereida v. Wilkinson*, 141 S. Ct. 754, 762 (2021)).

Just as troubling is the Fourth Circuit's interpretation of the clause "relating to" in § 2252A. In the Fourth Circuit's telling, because § 2252A says its sentencing enhancement should apply to convictions "*relating to* . . . abusive sexual conduct involving a minor," courts must apply the "categorical approach 'and then some.'" Pet.App.10a (emphasis added). That is, the "relating to" language expands the category of conduct subject to the sentencing enhancement beyond categorically abusive sexual conduct to any and all conduct that, in a court's view, "stand[s] in some relation to" such abusive conduct. Pet.App.11a. That nearly boundless inquiry flouts the uniformity and notice principles on which this Court built the categorical approach. And given the number of sentencing and immigration statutes that use similar "relating to" language, and the immense harm that mandatory minimums inflict on defendants and their families, the Court should step in to clarify that those two words do not give courts free rein to sweep broad swaths of new conduct under federal sentencing enhancements.

Second, the rule of lenity, under which ambiguities in criminal statutes must be resolved in the defend-

ant's favor, precludes the Fourth Circuit's broadening interpretation of § 2252A. The holding below that the statute's use of the common phrase "relating to" called for application of the "categorical approach 'and then some'" cannot be squared with this venerated interpretive canon. The rule of lenity precludes such a freewheeling expansion of a punitive statute, both because it resolves ambiguity in the statute *against* defendants and because it does so in a way that could not possibly put defendants or, indeed, their defense counsel on notice of what conduct the statute reaches. Any argument that the phrase "relating to" would so substantially and indeterminately broaden the conduct covered by § 2252A's text must be rejected, under both the policies underlying the categorical approach and the principles of the rule of lenity. This is particularly true given the severe harm mandatory minimum sentences inflict on defendants and their families, with little appreciable countervailing benefit to society.

The Court should grant the petition to resolve the clear split the Fourth Circuit's decision created, and to clarify the proper application of the categorical approach and the rule of lenity in this context.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI TO CORRECT THE FOURTH CIRCUIT'S FLAWED APPLICATION OF THE CATEGORIAL APPROACH.

A. The Fourth Circuit's Holding That Tennessee's Statutory Rape Statute Categorically Requires "Abusive" Sexual Conduct Warrants Reversal.

The Fourth Circuit's first error is that it held that consensual sex between a 17-year-old and a 21-year-old is, by definition, "abusive sexual conduct involving a minor." According to the Fourth Circuit, such conduct is categorically abusive simply because the Tennessee statute sets the age of majority at 18 and provides that consent is not a defense. As the majority put it, because the State legislature concluded that "it is wrong to have sex" with someone who cannot legally consent, including a 17-year old, consensual sex between a 17-year-old and a 21-year-old is, per force, abusive. Pet.App.12a-13a (defining "abuse" as "incorrect or careless use" or "wrong or improper use," and noting that "*pursuant to the Tennessee statute*, sex with a seventeen-year-old victim, even if consensual, falls within either definition") (emphasis added).

The Court should grant the petition and instruct lower courts that this methodology—accepting the State's criminalization of certain conduct as *per se* evidence that it satisfies a generic federal definition like "abusive"—cannot be squared with the categorical

approach's intents and purposes. In applying the categorical approach, a court seeks to understand the meaning of a federal statute (here, the term "abusive" in § 2252A), which, as this Court has made clear, "should not be dependent on state law." *Taylor*, 495 U.S. at 592 (quoting *United States v. Turley*, 352 U.S. 407, 411 (1957)).

This principle—that the meaning of a federal statute does not depend on state law—was recently applied by this Court in *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562. There, the Court assessed whether California's statutory rape law was a categorical match for "sexual abuse of a minor," which is defined in 8 U.S.C. § 1101(a)(43)(A) as an aggravated felony subjecting a defendant to removal. 137 S. Ct. at 1567. In so doing, the Court had no trouble rejecting the Government's argument that "sexual abuse of a minor" should be defined as conduct that "(1) is illegal, (2) involves sexual activity, and (3) is directed at a person younger than 18 years old." *Id.* at 1569 (citation omitted).

The Court reasoned that the Government's proposed definition "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." *Id.* 1570 (citing *Taylor*, 495 U.S. at 591). Instead, after analyzing the sources courts look to under the categorical approach—federal law, other jurisdictions' treatment of the conduct at issue, and dictionaries—the Court concluded that, as a matter of Congressional intent, "[w]here sexual intercourse is abusive solely because of the ages of the participants, the victim must be younger than 16." *Id.* at 1572.

California's statute criminalized consensual sex with a 17-year-old, so it was not a categorical match. *Id.*

Permitting the Fourth Circuit's method to stand risks frustrating one of the categorical approach's key goals: uniformity in sentencing, such that "the same type of conduct is punishable on the Federal level in all cases." *Taylor*, 495 U.S. at 582 (citation omitted); *see also Descamps v. United States*, 570 U.S. 254 at 293 (Alito, J., dissenting) (key purpose of categorical approach is to ensure "enhanced penalties would be applied uniformly, regardless of state-law variations"). As the dissent below noted, the "unjust and odd result of the majority's view is that conduct that is perfectly legal" for people in the vast majority of jurisdictions "could subject many others in neighboring states to years upon years in federal prison." Pet.App.38a (internal quotations and citation omitted).

Because the Fourth Circuit's approach flouts this Court's categorical approach precedents and threatens the uniform application of serious criminal statutes such as § 2252A, the Court should grant certiorari to correct the court below's misguided reasoning.

B. The Fourth Circuit's Interpretation of § 2252A's "Relating to" Clause Threatens to Improperly Extend the Categorical Approach and Frustrate its Objectives.

Under § 2252A(b)(1), the sentencing range for defendants convicted of various crimes related to possession of child pornography can be enhanced from 5-to-20 years to 15-to-40 years if: such person has a prior conviction . . . under the laws of any State *relating to* . . . abusive sexual conduct involving a minor or ward.

18 U.S.C. § 2252A(b)(1) (emphasis added). According to the Fourth Circuit, Petitioner's Tennessee conviction qualifies for the sentencing enhancement for the independent reason that § 2252A's "relating to" language calls for application of the "categorical approach 'and then some.'" Pet.App.10a. Per the majority, consensual sex between a 21-year-old and a 17-year-old "relat[es] to abusive sexual conduct involving a minor" because consensual sex with a minor "stand[s] in some relation to" sexual abuse. *Id.* at 11a-12a.

The Court should grant the petition and make clear that this boundless, unpredictable approach is improper. Numerous federal statutes to which the categorical approach applies use the phrase "relating to" to describe prior convictions that trigger a sentencing enhancement or removability. *See, e.g.*, Pet. 24 (listing such offenses); *see also Mellouli v. Lynch*, 575 U.S. 798, 810 (2015) (considering "relating to" language in 8 U.S.C. § 1227(a)(2)(B)(i)). Left intact, the Fourth Circuit's "and then some" standard will open the door for the Government to argue for the application of this expansive approach to the broad swath of federal statutes that use this language.

The uncertainty created by the decision below will have particularly harmful consequences in the immigration context, where the Government may argue for application of the Fourth Circuit's "and then some" approach to the numerous sections of the Immigration and Naturalization Act that use the phrase "relating to" to define state crimes as removable "aggravated felonies." *See, e.g.*, 8 U.S.C. § 1101(a)(43)(Q-T).

In the immigration context, the need for predictability and uniformity—and the potential harm caused by the decision below—is uniquely strong. As this Court has recognized, defense attorneys have a duty to advise noncitizen clients of a criminal conviction's potential adverse immigration consequences. *See generally Padilla v. Kentucky*, 559 U.S. 356 (2010). Accordingly, the categorical approach has clear rules concerning what defines a generic offense and what sources to look to as interpretive guides to ensure that noncitizens and their attorneys can "anticipate the immigration consequences of guilty pleas in criminal court." *Mellouli*, 575 U.S. at 806 (cleaned up). Uncorrected, the Fourth Circuit's "and then some" approach may seriously hinder defense attorneys' ability to predict the immigration consequences of their clients' criminal pleas.

This Court dealt with just such a statute in *Mellouli v. Lynch*, which held that a Kansas misdemeanor conviction for possessing drug paraphernalia was not a categorical match for the INA's removal provision for convictions "relating to a controlled substance." 575 U.S. at 800-01 (quoting 8 U.S.C. § 1227 (a)(2)(B)(i)). In so ruling, the Court rejected the Government's argument that the INA provision's use of the phrase "relating to" could make up for the lack of a categorical match. *Id.* at 811. As the Court explained, this interpretation would "stretc[h] to the breaking point" the federal removal statute at issue. *Id.* at 811. Because the words "'relating to' are 'broad' and 'indeterminate,'" the Court clarified, they must be constrained when applied as part of the categorical approach. *Id.* (cleaned up).

Rather than heed this guidance, the Fourth Circuit interpreted the phrase "relating to" exceptionally broadly—to sweep into § 2252A's reach conduct that is not itself categorically abusive, but that "stand[s] in some relation to" *other* conduct that is abusive. Pet.App.11a-12a. The Court should step in to correct this error.

As the dissent noted, the Fourth Circuit's decision "contains no apparent limiting principle." Pet. App.39a. Its application therefore deprives citizens and defense counsel of any semblance of notice as to what conduct generic federal offenses will cover. Even crimes that are misdemeanors in most or all states—or that, like here, reach conduct generally not criminalized at all—might trigger sentencing enhancements or removal from the country. Whether or not the phrase "relating to" may have, as other courts have held, some "broadening effect," *United States v. Jaycox*, 962 F.3d 1066, 1070 (9th Cir. 2020), it cannot possibly have the unbounded effect the Fourth Circuit gave it here. This case presents an ideal vehicle for the Court to address that important question. Pet. 26-27.

II. THE RULE OF LENITY REQUIRES RESOLVING ANY DOUBT ABOUT THE MEANING OF THE TERM "ABUSIVE SEXUAL CONDUCT" IN DEFENDANTS' FAVOR.

A. Any Ambiguity Introduced by the Phrase "Relating to" Must Be Resolved in Petitioner's Favor.

For the reasons given in the petition and above, a straightforward application of the categorical approach yields the conclusion that consensual sex between a 17-year-old and a 21-year-old is not categorically "relat[ed] to . . . abusive sexual conduct involving a minor." But if there were any doubt about that conclusion, the Court should apply the rule of lenity to resolve that doubt in Petitioner's favor. Under longstanding principles of lenity, an individual cannot be subjected to a ten-year increase in their sentence because a judge, after the fact, determines that their prior conviction "stand[s] in some relation to" *other* crimes that Congress deemed worthy of a sentencing enhancement. Pet.App.11a.

Pursuant to the rule of lenity, this Court has long held that "ambiguous criminal laws [should] be interpreted in favor of the defendants who are subjected to them." *United States v. Santos*, 533 U.S. 507, 514 (2008) (plurality opinion); *cf. United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.) (rule of lenity is "perhaps not much less old than" the task of statutory "construction itself"). Thus, before interpreting an ambiguous criminal statute to impose a "harsher alternative," courts must find that Congress has spoken in "clear and definite" language. *United States v. Bass*, 404 U.S.

336, 347-48 (1971) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952)); *see also Yates v. United States*, 574 U.S. 528, 548 (2015) ("[I]t is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.").

The rule of lenity applies with equal force to "sentencing provisions." *Taylor*, 495 U.S. at 596; *see also United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) (ambiguities in sentencing provisions are resolved "in the defendant's favor"); *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980) (same). "Statutes imposing harsh mandatory sentences present a particularly compelling need for invocation of the rule of lenity." *United States v. Scott*, 990 F.3d 94, 137 (2d Cir. 2021) (Leval, J., dissenting).

As relevant here, the rule of lenity furthers two fundamental principles that have "long been part of our tradition," *Bass*, 404 U.S. at 348, and that overlap directly with the goals the categorical approach was designed to foster.

First, the rule of lenity is designed to provide "'fair warning' to would-be violators" about what conduct a criminal statute punishes. *Whitman v. United States*, 135 S. Ct. 352, 354 (2014) (statement of Scalia, J., respecting denial of certiorari) (quoting *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704, n.18 (1995)); *Davis*, 139 S. Ct. at 2333 (rule of lenity is "founded on the tenderness of the law for the rights of individuals to fair notice of the law" (citation and internal quotations omitted)); *cf. Johnson v. United States*, 576 U.S. 591, 595-97 (2015) (discussing need for categorical

approach to provide "fair notice" to defendants of conduct it would subject to sentencing enhancement).

Second, just as the Court fashioned the categorical approach to ensure the uniform interpretation of federal sentencing laws, *Taylor*, 495 U.S. at 582, the rule of lenity was designed to "foster uniformity in the interpretation of criminal statutes," *Bryan v. United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting), by "minimiz[ing] the risk of selective or arbitrary enforcement" of criminal laws, *United States v. Kozminski*, 487 U.S. 931, 952 (1988). *See also Kansas v. Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring) ("Our principal responsibility . . . is to ensure the integrity and uniformity of federal law.").

Taken together, these two foundational principles—fair notice and uniformity[2]—warrant correcting the flawed methodology in the Fourth Circuit's decision below. The rule of lenity applies when there is ambiguity in the reach of a criminal sentencing statute, and the majority's "categorical approach 'and then some'" standard is nothing if not ambiguous. *Cf.* Pet.App.14a (asserting that "by using 'relating to,' Congress cast a wider net" but declining to define how far the net reaches). Because a more reasonable alternative interpretation of § 2252A exists—that a statutory rape conviction only "relates to . . . abusive

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[2] The rule of lenity has also been recognized as serving a third policy: that "legislatures and not courts should define criminal activity." *Bass*, 404 U.S. at 348. Because the decision below arrogated to judges the boundless task of applying the "categorical approach 'and then some,'" Pet.App.10a, it implicates this policy as well. This provides yet another reason why the Court should reverse the Fourth Circuit's decision.

sexual conduct involving a minor" if it necessarily involves a victim under the age of 16, *see Jaycox*, 962 F.3d at 1070—the rule of lenity requires adopting that interpretation. *Cf. Yates v. United States*, 574 U.S. at 548 (2015) ("[I]t is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.").

Instead, the decision below expanded § 2252A's reach to conduct that reasonable citizens—as well as 39 States, the District of Columbia, and the Ninth Circuit—do not consider definitionally "abusive." And, going forward, it invites wildly disparate applications of § 2252A's severe penalties to whichever state crimes a judge determines "stand in some relation to" those crimes to which § 2252A's text actually applies. Pet.App.11a. This Court has already recognized that, when applying the categorical approach, the words "relating to. . . . extended to the furthest stretch of their indeterminacy stop nowhere." *Mellouli*, 575 U.S. at 812 (citations and alterations omitted). The rule of lenity counsels that such "broad" and "indeterminate" language, *id.* at 811, must be construed in the defendant's favor. Here, that required the Fourth Circuit to reject an interpretation of "abusive sexual conduct involving a minor" that would subject Petitioner to a 15-year mandatory minimum sentence for sexual conduct that is legal in most states.

B. Granting Review to Clarify How the Rule of Lenity Applies in the Categorical Approach Is Important Given Mandatory Minimum Sentences' Drastic Impact.

Statutes "imposing harsh mandatory sentences present a particularly compelling need for invocation of the rule of lenity." *United States v. Scott*, 990 F.3d at 137 (en banc) (Leval, J., dissenting). This is because an overbroad use of mandatory minimums directly implicates all of the rationales underlying the rule of lenity. Because they severely constrain liberty with little to no countervailing benefit, mandatory minimums are prime candidates for application of the rule of lenity, and they thus further counsel in favor of granting certiorari to resolve the circuit split the Fourth Circuit's decision created.

Mandatory minimums were introduced as a result of a "perceived political need" to get "tough on crime," Chief Judge Walker, U.S. District Court for the Northern District of California, *Testimony to the U.S. Sentencing Comm'n*, at 43 (May 28, 2009)," and to prevent recidivism, *see Almendarez-Torres v. United States*, 523 U.S. 224, 243 (1998). But the empirical data make clear they have little if any deterrent effect on citizens. "'[T]he weight of the evidence clearly shows that enactment of mandatory penalties has either no demonstrable effects or short-term effects that rapidly waste away.'" *United States v. Gregg*, 435 F. App'x 209, 220 (4th Cir. 2011) (Davis, J., concurring) (quoting Barbara S. Vincent & Paul J. Hofer, Federal Judiciary Ctr., THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS 1 (1994) (alteration omitted)). Indeed, individuals "contemplating crime often don't know

how long sentences are, or even that sentences have gotten longer." *United States v. Moore*, 851 F. 3d 666, 676 (7th Cir. 2017); *see also* John Pfaff, *A Better Approach to Violent Crime*, W.S.J. (Jan. 27, 2017), ("[L]ong prison sentences provide neither the deterrence nor the incapacitation effects that their proponents suggest . . . a long line of studies makes it clear that longer sentences don't really deter would-be criminals") (collecting studies), *available at* https://on.wsj.com/3s5wkGD.

And while Congress intended mandatory minimums to more adequately punish a "very small" group of repeat, dangerous offenders, these laws have instead led to unjust, disproportionate, and often absurd sentences for a much broader population. H.R. Rep. No. 98-1073, at 1, 3; Orrin G. Hatch, *The Role of Congress in Sentencing*, 28 WAKE FOREST L. REV. 185, 194-95 (1993) (mandatory minimums provide for "sharp variations in sentences based on what are often only minimal differences in criminal conduct or prior record"). So, while Congress enacted mandatory minimums to punish the small category of people responsible for a "large percentage" of the most violent crimes, *Taylor*, 495 U.S. at 581 (citation omitted), these laws have instead severely penalized a much broader swath of individuals, including those, like Petitioner, who engaged in conduct whose predicate offenses did not even result in a term of imprisonment.

These inequities further warrant the rule of lenity's application. The disparate effects mandatory minimums have wrought, particularly on vulnerable populations, exemplify the types of "moral condemnation" that the rule of lenity is designed to cabin. *Bass*, 404 U.S. at 348. These empirical realities, alongside the policy goals

the rule of lenity has long fostered, especially warrant its application here. Limiting the application of § 2252A to only what its text clearly encompasses will allow offenders to better reintegrate into society.

CONCLUSION

For the foregoing reasons and those stated in the petition, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

JAMIE CROOKS
COUNSEL OF RECORD
ALEXANDER ROSE
ERIC CHIANESE
FAIRMARK PARTNERS, LLP
1499 MASSACHUSETTS AVE., NW
WASHINGTON, DC 20005
(619) 507-4182
JAMIE@FAIRMARKLAW.COM

SHANA-TARA O'TOOLE
DUE PROCESS INSTITUTE
700 PENNSYLVANIA AVE. SE, STE. 560
WASHINGTON, DC 20003

JEFFREY T. GREEN
CO-CHAIR, NACDL
AMICUS COMMITTEE
1660 L STREET
WASHINGTON, DC 20005
(202) 872-8600

COUNSEL FOR AMICI CURIAE

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