No. 21-2385

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

United States of America,

Plaintiff–Appellant,

v.

Thomas P. Thayer,

Defendant–Appellee.

On Appeal from the United States District Court
for the Western District of Wisconsin

No. 20-cr-0088
The Honorable James D. Peterson

Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Defendant–Appellee Thomas P. Thayer

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NACDL represents no parties here. It has no pecuniary interest in its outcome. No party's counsel authored this brief in whole or in part. NACDL is being represented here pro bono. No one contributed money to fund the preparation or submission of this brief.

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INTEREST OF THE AMICUS CURIAE

NACDL 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. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and of 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.

NACDL is dedicated to advancing the proper, efficient, and fair administration of justice. NACDL files many amicus briefs each year in the Supreme Court of the United States and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. The issues presented here involve matters important to NACDL, to criminal defendants and defense lawyers, to the criminal justice system, and to the nation.

NACDL submits this brief as amicus curiae in support of Defendant–Appellee Thomas P. Thayer, under Federal Rule of Appellate Procedure 29(a)(2). All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Sex Offender Registration and Notification Act (SORNA) creates a national scheme for tracking and monitoring convicted sex offenders. SORNA imposes significant consequences on those whose past convictions require them to register—including felony liability for those who fail to meet their SORNA registration obligation—so the approach for determining which past convictions count is critical.

Supreme Court precedent requires—and the district court correctly held—that courts must use the so-called categorical approach, under which a court "look[s] to the elements and the nature of the offense of conviction, rather than to the particular facts relating to [the defendant's] crime." *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004). Only that approach heeds SORNA's statutory text and structure. Only that approach guarantees fair notice about who must register—and, critically, who faces criminal liability for failing to register. And only that approach avoids the practical mess that a fact-specific approach would create.

1. SORNA has three main components, each of which imposes significant consequences on the registrant. First, it requires that States and other jurisdictions "maintain a jurisdiction-wide sex offender registry," thus

ensuring a comprehensive, coast-to-coast sex-offender registry network. 34 U.S.C. § 20912(a). The registry must maintain detailed, sensitive information about each registrant, including the registrant's physical description, photograph, fingerprints, palm prints, DNA sample, driver's license or other identification card, and criminal history. *Id.* § 20914(b)(1)–(7).

Second, SORNA imposes a registration duty on "sex offender[s]," 34 U.S.C. § 20913(a), a term defined to include any "individual who was convicted of a sex offense." *Id.* § 20911(1). Under SORNA, a sex offender must "register, and keep the registration current, in each jurisdiction where" that person "resides," "is an employee," or "is a student." *Id.* § 20913(a). To satisfy that requirement, registrants must provide their name; their Social Security number; their home address; their workplace's name and address; their school's name and address (if the registrant is or will be a student); their license plate number and vehicle's description; details about any intended travel abroad; and "[a]ny other information required by the Attorney General." *Id.* § 20914(a)(1)–(8). That obligation lasts for a long time: A registrant must "keep the registration current for the full registration period," which may last for 15 years, 25 years, or even life. *Id.* § 20915(a).

Third, SORNA punishes people who violate those requirements. A person who "is required" but "knowingly fails to register or update a registration" under SORNA "shall be fined," or "imprisoned not more than 10 years, or both." 18 U.S.C. § 2250(a)(3). A registrant who "knowingly fails to provide information required" under SORNA about intended travel abroad and "engages or attempts to engage in" that intended travel likewise "shall be fined," or "imprisoned not more than 10 years, or both." *Id.* § 2250(b)(2)–(3). And a registrant faces enhanced mandatory minimum sentences upon the commission of new crimes: A registrant "who commits a crime of violence under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States shall be imprisoned for not less than 5 years and not more than 30 years." *Id.* § 2250(d)(1).

2. In 2020, a federal grand jury indicted Thayer under 18 U.S.C. § 2250 for failing to register as a sex offender under SORNA. S.A. 13. The indictment was based on Thayer's guilty plea—made nearly 17 years earlier—to fourth-degree sexual conduct under Minnesota law. S.A. 6. The government maintained that, based on the conduct underlying that offense, Thayer had been convicted of a *sex offense* under SORNA's Section 20911(7)(I). That

provision defines *sex offense* to mean "an offense against a minor that involves . . . [a]ny conduct that by its nature is a sex offense against a minor." 34 U.S.C. § 20911(7)(I).

Thayer moved to dismiss the indictment asserting that his past conviction was not for a *sex offense* under SORNA. S.A. 27. He argued that SORNA requires a categorical approach: If the Minnesota statute's elements and SORNA's definition of *sex offense* do not categorically match, then Thayer's conviction was not for a qualifying sex offense. S.A. 14. Minnesota fourth-degree sexual contact defines *sexual contact* to include "the intentional touching by the actor of the complainant's intimate parts" with *either* "sexual *or* aggressive" intent. Minn. Stat. § 609.341 subdiv. 11(a) (2001) (emphasis added). For that reason, Thayer concluded that a violation of the Minnesota statute was not a qualifying sex offense under Section 20911(7)(I), and that he thus had no duty to register.

The district court agreed with Thayer and dismissed the indictment. It held that the categorical approach, not a fact-specific approach, governed whether Thayer's Minnesota conviction was a conviction for a sex offense. S.A. 31. The categorical approach, the district court explained, "does not call for or permit any evaluation of the actual offense conduct." *Id.* Rather, the

court may consider only whether the statutorily defined elements of the Minnesota match SORNA's definition of sex offense. S.A. 32. Under that approach, the district court found a "categorical mismatch" between Thayer's crime of conviction and SORNA's definition of sex offense. S.A. 36. Thus, "Thayer was under no obligation to register as a sex offender." *Id.* The government appealed.

3. This appeal presents a straightforward legal question: Does the SORNA registration duty imposed on an "individual who was convicted of a sex offense," 34 U.S.C. § 20911(1), defined as "*an offense* against a minor that involves . . . [a]ny conduct *that by its nature* is a sex offense against a minor," *id.* § 20911(7)(I) (emphasis added), require a court to analyze the defendant's predicate "offense" under the categorical approach to assess its "nature," or should the court look to the particular facts underlying the defendant's crime?

The Supreme Court has supplied a definite answer to that question. For three decades, and with only limited exception, the Supreme Court has consistently held that the categorical approach governs those statutes. And it has reaffirmed the longstanding rationales for doing so. First, statutory text and structure almost always command a categorical approach. Second,

constitutional concerns and practical considerations also reinforce the categorical approach.

Those rationales apply here. Section 20911(7)(I) bears all the textual and structural signals requiring a categorical approach. And the government's fact-specific approach raises significant constitutional and practical concerns. Because Thayer's Minnesota conviction was for an offense sweeping more broadly than Section 20911(7)(I)'s definition of "sex offense," Thayer had no duty to register, and the district court correctly dismissed the indictment.

ARGUMENT

I. The Categorical Approach Determines Whether Thayer's Minnesota Conviction Was For A "Sex Offense"

A. The Categorical Approach Presumptively Governs Statutes That Tie New Federal Penalties To Past Convictions

Day in and day out, federal courts confront federal statutes that impose new penalties based on past criminal convictions. Courts must determine *which* past convictions satisfy the federal statutes at issue, and thereby warrant imposing such penalties. With few exceptions, Supreme Court precedent has held that the categorical approach governs that determination.

The categorical approach compares the past offense to the predicate definition. If the offense—as defined only by its elements, not by the particular

conduct that led to a conviction—sweeps wider than the definition, then a past conviction for that offense cannot trigger the new penalty under federal law. Consistent with Supreme Court precedent, the district court correctly applied the categorical approach here and concluded that Thayer's past conviction did not trigger SORNA's registration requirement.

1. The categorical approach has deep roots. In 1891, Congress subjected noncitizens to possible removal based on past convictions for crimes involving moral turpitude. *See* Immigration Act of 1891, ch. 551, 26 Stat. 1084, 1084. To determine whether a past conviction qualified as a crime involving moral turpitude, courts used a categorical approach. *See, e.g.*, *United States ex rel. Mylius v. Uhl*, 210 F. 860, 863 (2d Cir. 1914) (holding that the question "must be determined from the judgment of conviction and not from the testimony adduced at the trial"); *United States ex rel. Guarino v. Uhl*, 107 F.2d 399, 400 (2d Cir. 1939) (emphasizing that "deporting officials may not consider the particular conduct for which the [noncitizen] has been convicted").

The categorical approach's modern incarnation dates to the Supreme Court's decision in *Taylor v. United States*, 495 U.S. 575 (1990). At issue in *Taylor* was a sentencing enhancement under the Armed Career Criminal Act (ACCA) for defendants convicted under 18 U.S.C. § 922(g) (unlawful

possession of a firearm) who had three prior convictions for "burglary." *Id.* at 577–78. The Court was "called upon to determine the meaning of the word 'burglary' as it is used in" ACCA. *Id.* at 577.

The Court's holding was two-fold. First, it held "that Congress meant by 'burglary' the generic sense," giving it a "generic, contemporary meaning" containing a few basic elements. *Id.* at 598. Thus, "a person has been convicted of burglary for purposes of [the sentencing] enhancement if he is convicted of any crime, regardless of its exact definition or label, having" those "basic elements" of burglary. *Id.* at 599. Second, and most relevant here, the Court held that lower courts must apply the sentencing enhancement using "a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Id.* at 600.

The Court endorsed the categorical approach on textual, historical, constitutional, and practical grounds. First, it held that ACCA's statutory text "generally supports the inference that Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Id.* In particular, it emphasized that the statute "refers to a person who

has three previous convictions for—not a person who has committed—three previous violent felonies or drug offenses." *Id.* (cleaned up).

Next, it held that "the legislative history of the enhancement statute shows that Congress generally took a categorical approach to predicate offenses." *Id.* at 601. Congress nowhere "suggested that a particular crime might sometimes count towards enhancement and sometimes not, depending on the facts of the case." *Id.* If "Congress had meant to adopt an approach that would require" conducting "an elaborate factfinding process regarding the defendant's prior offenses," the Court reasoned, "surely this would have been mentioned somewhere in the legislative history." *Id.*

Together with text and history, the Court noted two constitutional considerations—the right to a jury trial and fair notice. The Court suggested that a defendant's "right to a jury trial" might be threatened if a sentencing court were "to conclude, from its own review of the record, that the defendant actually committed a generic burglary." *Id.* And the Court explained that, "if a guilty plea to a lesser, nonburglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary." *Id.* at 601–02.

Lastly, the Court deemed the "practical difficulties" of a factual approach "daunting." *Id.* at 601. In many cases, "only the Government's actual proof at trial would indicate whether the defendant's conduct constituted generic burglary." *Id.* And, "in cases where the defendant pleaded guilty, there often is no record of the underlying facts." The Court rejected an approach that would require time-consuming minitrials reconstructing the underlying offense. *See id.*

Thus, under *Taylor*, courts may "look only to the fact of conviction and the statutory definition of the prior offense," *id.* at 602, to determine whether a defendant's prior conviction is one for "burglary" that triggers ACCA's sentencing enhancements.

2. In the three decades since *Taylor*, the Supreme Court has reaffirmed its "line of decisions" supporting the "elements-based," categorical approach, and it "remains the law." *Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016). The Court has reiterated each of the "longstanding principles" supporting the categorical approach, *id.* at 2251—textual analysis, history, constitutional concerns, and practical considerations.

First, the Supreme Court has repeatedly held that "statutory text commands the categorical approach." *United States v. Davis*, 139 S. Ct. 2319,

2328 (2019). A statute's text alone can compel or negate a categorical approach. *See, e.g.*, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1217 (2018) (plurality opinion); *Leocal*, 543 U.S. at 7. If Congress wants "to increase a sentence based on the *facts* of a prior offense," it must say so. *Descamps v. United States*, 570 U.S. 254, 267 (2013) (emphasis added).

The Supreme Court has identified several recurring textual signals for the categorical approach. Words like "conviction," "felony," or "offense," are "'read naturally' to denote the 'crime as *generally* committed.'" *Dimaya*, 138 S. Ct. at 1217 (quoting *Nijhawan v. Holder*, 557 U.S. 29, 34 (2009); citing *Leocal*, 543 U.S. at 7, and *Johnson v. United States*, 576 U.S. 591, 602–05 (2015)).

For example, in *Leocal*, the statute focused on "the 'offense' of conviction." 543 U.S. at 7. That "language," the Court held, "requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." *Id.* In *Johnson*, the Court likewise saw the statute's "emphasis on convictions" as compelling a categorical approach. 576 U.S. at 604.

The phrase "by its nature" is another phrase signaling the categorical approach. Take the statute at issue in *Davis*: It spoke "of an offense that, 'by

its nature,' involves a certain type of risk." 139 S. Ct. at 2329. That language "would be an exceedingly strange way of referring to the circumstances of a specific offender's conduct." *Id.* It thus supports focusing on "what an offense normally—or," as the Court has "repeatedly said, 'ordinarily'—entails, not what happened to occur on one occasion." *Id.* (quoting *Dimaya*, 138 S. Ct. at 1217–18; citing *Leocal*, 543 U.S. at 7). In much the same way, the Court in *Leocal* contrasted the "nature of the offense" with the "particular facts" underlying the crime. *Leocal*, 543 U.S. at 7.

The Court has also identified structural features supporting the categorical approach. When, for instance, a statute uses the word "offense" categorically in one place, the Court "would expect 'offense' to retain that same meaning" throughout the statute. *Davis*, 139 S. Ct. at 2328. "In all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning." *Id.* (quoting *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1512 (2019)).

Second, when text and structure are inconclusive, the Court has considered statutory history. In *Davis*, for example, when Congress copied the phrase "by its nature" from an existing statute into a new one, court decisions had "begun to settle on the view that" the existing statute "demanded a

categorical analysis." 139 S. Ct. at 2331 (alteration adopted). Yet, despite acting "specifically to abrogate the *results* of those decisions," Congress made no "attempt to overturn the categorical *reading* on which they were based. And *that* would have been an odd way of proceeding if Congress had thought the categorical reading erroneous." *Id.*

Third, the Court routinely cites the "serious risks of unconstitutionality" that a fact-specific approach raises and the categorical approach avoids. *Shepard v. United States*, 544 U.S. 13, 25–26 (2005). A fact-specific approach "would raise serious Sixth Amendment concerns" because "only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction." *Mathis*, 136 S. Ct. at 2252; *see also Descamps*, 570 U.S. at 269 (reaffirming "the categorical approach's Sixth Amendment underpinnings").

A fact-specific approach to determining whether a past conviction triggers penalties also would create serious fair-notice problems. As the Court explained in *Descamps*, a defendant who pleads guilty "may not wish to irk the prosecutor or court by squabbling about superfluous factual allegations." 570 U.S. at 270. That defendant "likely was not thinking about the possibility that his silence could come back to haunt him" decades later. *Id.* at 270–71. In that

way, as Judge Barron of the First Circuit articulated, a fact–specific approach "could therefore raise serious due process concerns" by depriving the defendant of "an opportunity to contest" conduct triggering a new federal penalty. *United States v. Faust*, 853 F.3d 39, 64 (1st Cir. 2017) (Barron, J., concurring) (citing *Mathis*, 136 S. Ct. at 2253).

Last, the Supreme Court continues to stress the categorical approach's practical underpinnings, in particular the interest in promoting "judicial and administrative efficiency by precluding the relitigation of past convictions in minitrials conducted long after the fact." *Moncrieffe v. Holder*, 569 U.S. 184, 200–01 (2013). The "daunting" practical difficulties of reevaluating the particular conduct underlying a prior conviction are what "first encouraged" the Court "to adopt the categorical approach." *Descamps*, 570 U.S. at 270.

3. In rare cases, "the text and structure" of a statutory provision "might call for a hybrid approach"—part categorical, and part fact specific. *United States v. Walker*, 931 F.3d 576, 580 , 581 (7th Cir. 2019) (citing *Nijhawan*, 557 U.S. at 32). Those cases arise when the statutory provision at issue defines a qualifying predicate crime "but adds an *exception* to that qualifying crime for offenses committed under particular circumstances,"

causing an otherwise-qualifying crime not to trigger the federal penalty. *Id.* at 580 (emphasis added).

This Court, in *Walker*, recently analyzed *Nijhawan*—one of the two (and only two) Supreme Court cases confronting that kind of hybrid provision. The provision at issue in *Nijhawan* "refers to 'an offense' that amounts to 'forging passports' but adds an exception to that qualifying crime for offenses committed under particular circumstances." *Id.* (quoting *Nijhawan*, 557 U.S. at 37) (alterations adopted). The Supreme Court "explained that while the forging-passports language 'may well refer to a generic crime the exception cannot possibly refer to a generic crime because there is no such generic crime.'" *Id.* (quoting *Nijhawan*, 557 U.S. at 37–38) (alterations adopted). "If no criminal statute contains both the offense and the exception," however, "then it would be impossible for a defendant's conviction to qualify as a predicate under that provision, and the provision would be void of any meaningful application." *Id.* (citing *Nijhawan*, 557 U.S. at 37). And so "the exception must refer to the particular circumstances in which an offender committed the crime on a particular occasion." *Id.* (quoting *Nijhawan*, 557 U.S. at 38).

One other Supreme Court case took a similar hybrid approach. In *United States v. Hayes*, the Court considered a federal statute defining "misdemeanor

crime of domestic violence." 555 U.S. 415, 420–21 (2009). As in *Nijhawan*, that provision refers to an offense—one having, "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon"—and an exception—the offense must have been "'committed by' a person who has a specified domestic relationship with the victim." *Id.* at 421 (internal quotation marks omitted). The Court held that the phrase "committed by" distinguished the offense from the exception. *See id.* at 422–24. And, as in *Nijhawan*, the Court held that the categorical approach applies to the description of the offense but not to the exception. *See id.* at 426.

This Court understood in *Walker* that those cases do not displace the categorical approach. When statutory text "calls for a categorical approach," the Supreme Court "has made clear" that "there are no exceptions to the elemental comparison." *Walker*, 931 F.3d at 581 (citing *Mathis*, 136 S. Ct. at 2257). So, even under this hybrid approach, step one remains considering whether the conviction "is a categorical match" to the statutorily defined offense. *Id.* Only when "it is," may the court "*then* consider" whether, based on the facts underlying the conviction, the exception applies. *Id.*

B. The Rationales For Adopting The Categorical Approach Require Applying It To Section 20911(7)(I)'s Definition Of "Sex Offense"

The district court got it right when it applied the categorial approach to determine whether Thayer's prior conviction required him to register under SORNA. SORNA's text and structure, along with the constitutional concerns and practical principles underlying *Taylor* and its progeny, all call for applying the categorical approach to SORNA's Section 20911(7)(I).

1. SORNA's text and structure require applying the categorical approach to Section 20911(7)(I)

The relevant provisions of SORNA signal nothing but the categorical approach. SORNA requires a *conviction*: A *sex offender* is "an individual who was *convicted* of a sex offense." 34 U.S.C. § 20911(1) (emphasis added). SORNA includes several definitions of "sex offense" but, critically, no matter which definition of *sex offense* applies, SORNA *always* requires a *conviction* for that offense. Section 20911(7)(I) is no exception. That "emphasis on convictions" signals a categorical approach. *Johnson*, 576 U.S. at 604; *see also Dimaya*, 138 S. Ct. at 1217; *Leocal*, 543 U.S. at 7.

What's more, SORNA repeatedly speaks of an "offense." A sex offender is a person "who was convicted of a sex *offense*." 34 U.S.C. § 20911(1) (emphasis added). A sex offense includes "a criminal *offense* that is a specified

offense against a minor." *Id.* § 20911(5)(A)(ii) (emphasis added). And Section 20911(7)(I) speaks of "an *offense* . . . that involves . . . conduct that by its nature is a sex *offense* against a minor." *Id.* § 20911(7)(I) (emphasis added). Text so focused on "the 'offense' of conviction," the Supreme Court instructs, "requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." *Leocal*, 543 U.S. at 7.

Section 20911(7)(I) itself contains another categorical signal: the phrase *by its nature*. For Thayer's Minnesota conviction to qualify under Section 20911(7)(I), it must have been a conviction for a "an offense against a minor that involves . . . [a]ny conduct that *by its nature* is a sex offense against a minor." 34 U.S.C. § 20911(7)(I) (emphasis added). The phrase *by its nature* connotes "what an offense normally—or," as the Court has "repeatedly said, 'ordinarily'—entails, not what happened to occur on one occasion." *Davis*, 139 S. Ct. at 2329 (quoting *Dimaya*, 138 S. Ct. at 1217) (citing *Leocal*, 543 U.S. at 7). So using that phrase here "would be an exceedingly strange way of referring to the circumstances of a specific offender's conduct." *Id.*

The statutory text is easily enough to resolve this case against the government. But SORNA's structure also calls for the categorical approach. The

categorical approach without question governs other definitions of *sex offense* in the statute. *See, e.g.*, *United States v. Rogers*, 804 F.3d 1233, 1237 (7th Cir. 2015) (applying categorical approach to definition of sex offense under Section 20911(5)(A)(ii)). As the Supreme Court emphasized in *Davis*: When the word "offense" calls for the categorical approach in one part of the statute, it ordinarily must "retain that same meaning" throughout. 139 S. Ct. at 2328.

Likewise, Section 20911(7)(I) appears on a list defining *offenses*, not mere facts underlying a conviction. The list defines "specified offense against a minor" to mean "an offense against a minor that involves any of the following": false imprisonment; solicitation to engage in sexual conduct; use in a sexual performance; solicitation to practice prostitution; video voyeurism; possession, production, or distribution of child pornography; criminal sexual conduct involving a minor, or the use of the internet to facilitate or attempt such conduct; and, of course, conduct that by its nature is a sex offense against a minor. 34 U.S.C. § 20911(7)(A)–(I).

The government does not (and cannot) dispute that the categorical approach governs *every other offense on that list*. If Congress had intended for Section 20911(7)(I)—alone on that list—to describe mere facts, that "would be an exceedingly strange way of" structuring the definition. *Davis*, 139

S. Ct. at 2329. A much simpler "way of achieving that goal would be to" add the phrase "based on the facts underlying the offense" to Section 20911(7)(I). *Id.* at 2336 (internal quotation marks omitted).

The government cannot overcome those textual and structural signals. For starters, it misses the threshold textual point that SORNA turns on convictions. The government suggests that anytime it proves that someone "*committed* a specified sex offense" (even if that person were not *convicted* under a statute defining a sex offense), it has established a duty to register under SORNA, and criminal liability for not registering. Gov't Br. 18 (emphasis added). Not so. That a person "*committed*" a predicate offense—"and so hypothetically *could have been* convicted under a law criminalizing that conduct"—is just what the Supreme Court "said, in *Taylor* and elsewhere, is not enough." *Descamps*, 570 U.S. at 268 (citing *Taylor*, 495 U.S. at 600, and *Carachuri–Rosendo v. Holder*, 130 S. Ct. 2577, 2586 (2010)).

The government also misplaces its reliance on the words *involves* and *conduct* when it argues that determining whether an offense "involve[s] conduct that by its nature is a sex offense against a minor" dictates a fact-specific inquiry. Gov't Br. 13 (internal quotation marks omitted). The Supreme Court has, at least twice, applied the categorical approach to statutes that, like

Section 20911(7)(I), define an offense as *involving* certain *conduct*. For instance, in *Kawashima v. Holder*, the Court considered a statute assigning immigration consequences to prior convictions for offenses that "*involve* fraud or deceit." 565 U.S. 478, 482 (2012) (quoting 8 U.S.C. § 1101(a)(43)(M)(i)) (alteration adopted) (emphasis added). That phrase, the Court held, "mean[s] offenses with elements that necessarily entail fraudulent or deceitful conduct," and thus calls for the categorical approach. *Id.* at 484.

The Court interpreted a similar statute much the same way in *Shular v. United States*. The statute at issue defined "serious drug offense" to include "an offense under State law, *involving* manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." 140 S. Ct. 779, 784 (2020) (emphasis added) (internal quotation marks omitted). The Court construed that phrase to require "only that the state offense"—and as defined only by "the state offense's elements"—"*involve* the *conduct* specified in the federal statute." *Id.* at 782 (emphasis added).

The dispute in *Shular* was about *how* to apply the categorical approach, not *whether* to apply it—but only because the government *agreed* that the provision called for a categorical approach. *See id.* at 784. That concession is in

considerable tension, if not outright conflict, with the government's position here: that determining whether an offense involves certain conduct necessarily *requires* a fact-specific inquiry. This Court should not "overlook the government's prior view," formed "when the government had no motive to concoct an alternative reading" of a provision much like Section 20911(7)(I). *Davis*, 139 S. Ct. at 2334

For all these reasons, SORNA's text and structure require applying the categorical approach to Section 20911(7)(I).[1]

2. Constitutional and practical considerations reinforce applying the categorical approach to Section 20911(7)(I)

Most categorical-approach cases consider whether a predicate offense triggers a recidivism sentencing enhancement. In the typical categorical-approach case, a qualifying predicate offense merely *increases punishment* for conduct that would otherwise be criminal even without the defendant's predicate conviction. By contrast, a determination that a predicate conviction qualifies as a sex offense under SORNA determines whether failure to register does or doesn't constitute a crime at all. That determination triggers an

[1] As Thayer explains, statutory history also supports the categorical approach. *See* Thayer Br., Dkt. 22, at 3–9.

affirmative obligation to register that would not exist but for the qualifying predicate conviction. Because the "sex offense" determination thus serves to demarcate innocent conduct from federal felonies, a fact-specific approach to SORNA would raise a host of constitutional and practical concerns that reinforce applying the categorical approach.

1. Most acute, applying a fact-specific approach to SORNA would raise significant fair-notice concerns. Fair-notice principles require giving people reasonable notice about whether they are subject to SORNA's demands. That, in turn, requires that a person be given fair notice about whether his or her past conviction was a conviction for a "sex offense" under SORNA. The categorical approach provides that notice. It is meant "to function as an on-off switch, directing that a prior crime would qualify as a predicate offense in all cases or in none." *Descamps*, 570 U.S. 268.

A fact-specific approach, by contrast, requires people to guess *which* underlying facts led to a conviction—and whether a future jury might find that the facts underlying the prior conviction triggered SORNA's registration requirements. That indeterminacy would conspire with SORNA's other complexities to deprive people of fair notice about whether SORNA's requirements—and criminal enforcement penalties—apply. *See Faust*, 853 F.3d at 64

(Barron, J., concurring) (discussing fair-notice concerns of fact-specific approach).

If a fact-specific approach is applied to govern SORNA's registration requirements, then the typical plea hearing—by far the most common resolution for criminal cases—will become a breeding ground for fair-notice problems to fester. Take a defendant who "surrenders his right to trial in exchange for the government's agreement that he plead guilty to a less serious crime, whose elements do not match" Section 20911(7)(I)'s definition. *Descamps*, 570 U.S. at 271. Perhaps the conduct of which he was accused—had it been proven beyond a reasonable doubt at trial—would have constituted a "sex offense," but the offense to which he pleaded guilty does not. Under the government's view, a later federal jury "could still treat the defendant as though he had pleaded to" a predicate sex offense, "based on legally extraneous statements found in the old record." *Id.*

When a defendant pleads to some lesser, non-predicate crime, "it would seem unfair to impose a" criminal penalty later "as if the defendant had pleaded guilty" to the more serious predicate offense. *Id.* (quoting *Taylor*, 495 U.S. at 601–02). A fact-specific approach "will deprive some defendants of the benefits of their negotiated plea deals." *Id.* And such defendants doubtless

would lack fair notice about whether they must register under SORNA and abide by its onerous requirements.

The government attempts to brush the fair-notice problem under the rug by arguing that convicting someone for failing to register under SORNA requires the government to prove the initial duty to register. *See* Gov't Br. 18. But the problem is notice, not proof. Notice of a duty to register that appears only *after* a trial and conviction for not satisfying that duty is not fair notice. The categorical approach avoids these significant fair-notice concerns.

Fair-notice concerns also might arise "where the requirements under [a] non-compliant state registry"—that is, a state registry whose requirements differ from SORNA's—"are less onerous than the requirements under SORNA, and the offender may thus lack fair notice of what *federal* law requires." *United States v. Felts*, 674 F.3d 599, 605 (6th Cir. 2012). An "inconsistency between federal and non-complying state regimes would render it impractical, or even impossible, for an offender to register under federal law." *Id.* The categorical approach eliminates that potential inconsistency. By definition, it ensures that a state-law conviction triggers SORNA requirements only when that conviction was categorically a sex offense.

A fact-specific approach also would threaten a person's due process right to predeprivation "notice and opportunity for hearing." *Goss v. Lopez*, 419 U.S. 565, 579 (1975). In *Connecticut Department of Public Safety v. Doe*, the defendant argued that Connecticut's sex offender registration laws violated that right by adding a person to its public sex-offender registry without an opportunity for a hearing. 538 U.S. 1, 7 (2003). The Supreme Court rejected that argument, but only because the state's registration "requirements turn on an offender's conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest." *Id.* Under a fact-specific approach, however, SORNA's registration requirements could turn on facts unnecessary to the crime of conviction and thus turn on facts that a convicted offender has *not* necessarily had a procedurally safeguarded opportunity to contest. Once again, the categorical approach poses no such due process concern.

2. At a minimum, these constitutional concerns with the fact-specific approach present "daunting" practical "difficulties" and "inequities" that the categorical approach avoids. *Descamps*, 570 U.S. at 270. The fact-specific approach would be practically daunting and unfair to a person trying to figure out whether to register under SORNA. How does that person, practically

speaking, determine which facts—though unnecessary to the conviction—the original jury necessarily found? The Supreme Court feared that sophisticated federal courts would struggle with that task during a full-blown sentencing hearing. But, under the government's view, individual defendants would be expected to navigate the analysis on their own and risk severe consequences for getting it wrong.

The fact-specific approach would also pose practical problems for courts applying SORNA's "sex offense" definition. It would ensure "the relitigation of past convictions in minitrials conducted long after the fact." *Moncrieffe*, 569 U.S. at 200–01. The categorical approach, by contrast, promotes "judicial and administrative efficiency by precluding" those inefficient, confusing, and distracting detours. *Id.* at 200.

* * *

By every measure, and under three decades of consistent Supreme Court precedent, the categorical approach governs Section 20911(7)(I). SORNA's text and structure dictate that result, and the important constitutional concerns and daunting practical difficulties of the government's fact-specific approach reinforce that result. This Court should affirm the district court's decision to apply the categorical approach.

II. Thayer's Minnesota Conviction Was Not For A "Sex Offense"

Thayer pleaded guilty in Minnesota state court to one count of Fourth Degree Sexual Conduct under Minnesota Statute § 609.345 Subdivision 1(b). The then-applicable statute to which Thayer pleaded guilty prohibited a person from engaging in "sexual contact with another person" when (1) "the complainant is at least 13 but less than 16 years of age," and (2) the actor is (a) "more than 48 months older than the complainant" or (b) "in a position of authority over the complainant." Minn. Stat. § 609.345 subdiv. 1(b) (2001). The term *sexual contact* included "the intentional touching by the actor of the complainant's intimate parts" with *either* "sexual *or* aggressive" intent. Minn. Stat. § 609.341 subdiv. 11(a)(i) (2001) (emphasis added).

Under the categorical approach, a conviction for that offense qualifies as a conviction for a sex offense under Section 20911(7)(I) only if that offense necessarily "involves any . . . conduct that by its nature is a sex offense against a minor." 34 U.S.C. § 20911(7), *id.* § 20911(7)(I).

It does not. A conviction under Minnesota Statute § 609.345 Subdivision 1(b) requires either sexual intent or aggressive intent—not both. *See, e.g.*, *State v. Austin*, 788 N.W.2d 788, 791–92 (Minn. Ct. App. 2010) ("Because 'sexual' and 'aggressive' are stated as alternatives, either is sufficient."). A

defendant who hits his child across his genitals and buttocks with aggressive intent may be convicted of that offense despite having no sexual intent. *Cf. State v. Chandler*, No. A12-2142, 2013 WL 5612549, at *3 (Minn. Ct. App. Oct. 15, 2013).

Because a conviction in Minnesota for fourth degree sexual contact need not involve sexual conduct, a conviction for that offense does not count as a predicate sex offense under Section 20911(7)(I).

CONCLUSION

For these reasons, the Court should affirm the opinion and order below.

Dated: February 2, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B), as modified by Circuit Rule 29. It contains 6,058 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by rule.

This brief also complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32. It is written in 14-point Century Supra font.

Dated: February 2, 2022

/s/ *Roy T. Englert, Jr.*
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CERTIFICATE OF SERVICE

In compliance with Fed. R. App. P. 25(d) and Circuit Rule 25, I hereby certify that, on this 2nd day of February, 2022, I electronically filed this Brief with the Clerk's Office of the United States Court of Appeals for the Seventh Circuit. The Court's electronic filing system will notify all counsel of record who have appeared in the case.

/s/ *Roy T. Englert, Jr.*
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