No. 23-6643

IN THE

Supreme Court of the United States

MICHAEL JOSEPH PEPE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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The petition presents two questions concerning stare decisis and *Mortensen v. United States*, 322 U.S. 369 (1944). The first is whether the government can manufacture federal jurisdiction over local criminal activity by splitting a round trip taken for a wholly innocent purpose into two parts as to permit an inference that travel home was for an illegal purpose, despite *Mortensen* prohibiting an "arbitrary splitting" of such an innocent round trip "into two parts" to "inject a retroactive illegal purpose into the return trip" and thereby make the "homeward journey" criminal. *Id*. at 375-76. The second is whether a statute that criminalizes travel in commerce or across state lines with an improper purpose or intent only requires the government to prove that prohibited conduct was "a motivating purpose" of the travel, despite *Mortensen* holding that it "must be the dominant motive of such interstate movement." *Id*. at 374. Both questions merit the Court's review.

1. The Ninth Circuit refused to apply *Mortensen*'s innocent-round-trip doctrine, characterizing that opinion as a "narrow" and "fact-bound" decision where the Court "went out of its way to confine its reasoning to the facts of that case" such that its rationale could not be extended beyond the "unique circumstances" of the vacation from the brothel at issue there. Pet. App. 12a-16a; *see* Pet. 11-15 (discussing *Mortensen*) and 19-25 (discussing Ninth Circuit opinion). The government's arguments defending the Ninth Circuit's ruling do not withstand scrutiny.

a. The government wrongly claims that Michael Pepe "does not dispute that sufficient evidence supports his convictions on the ground that" he "traveled back" to Cambodia with the requisite intents for the charged crimes. BIO 11-12. His petition contends that, under *Mortensen*, the evidence is insufficient to prove the intent elements given the following facts, which the government does not dispute: Pepe had long lived in Cambodia when the alleged child-sex acts occurred there, and the charged American crimes were based on the return legs of two brief round trips to the United States, both taken for the wholly-innocent purpose of visiting his family. Pet. 8-9; *see also* Pet. 5-6, 9, 19-21.[1]

b. Like the Ninth Circuit's opinion, the government's brief in opposition never mentions stare decisis and insists that *Mortensen* is a narrow decision that "explicitly tethered its sufficiency-of-the-evidence holding to 'the evidence adduced' in that case." BIO 14-15. The government points to other circuits that have also

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[1] The government asserts that Pepe "set up residence in Cambodia (a country whose people he generally disliked) to enable him to sexually abuse minors[.]" BIO 11-12. But the trial evidence does not permit that inference. It establishes that Pepe built a full life in Cambodia (which included marrying a local woman, obtaining a job, and participating in community activities) starting in March 2003, and there were no alleged child-sex acts until 27 months later, nor was there any evidence of sexual interest in children before that. AOB 6-19; ARB 18-22. In any event, what matters here is how *Mortensen* applies to Pepe's undisputedly-innocent rounds trips to the United States in 2005.

pronounced that *Mortensen* must be limited to "its facts." *See United States v. Wheeler*, 444 F.2d 385, 387 (10th Cir. 1971) ("Courts have refused to extend *Mortensen* beyond its facts."); *United States v. Kotakes*, 440 F.2d 342, 345 (7th Cir. 1971) ("In our judgment, these two cases [including *Mortensen*] are limited to their facts and are inapposite here."); *Forrest v. United States*, 363 F.2d 348, 350 (5th Cir. 1966) ("This court has long declined to extend the doctrine of *Mortensen* beyond its facts."); BIO 15-16.[2] Such pronouncements aside, those courts had valid reasons to distinguish *Mortensen* because none of the cases involved innocent round trips. *See Wheeler*, 444 F.2d at 386-88 (women transported from one state to another for purpose of engaging in prostitution at destination); *Kotakes*, 440 F.2d at 343-46 (women engaged in prostitution during out-of-state round trip, as well as before and after); *Forrest*, 363 F.2d at 349-51 (same). In contrast, Pepe's innocent round trips are undisputed. *See* Pet. 8-9.

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[2] The government also cites two cases that considered *Mortensen* when interpreting a production-of-child-pornography statute and therefore had nothing to do with the innocent-round-trip doctrine applicable to travel-for-sex crimes. *See United States v. Torres*, 894 F.3d 305, 315-16 (D.C. Cir. 2018) ("We are dealing not with interstate travel—the jurisdictional hook is elsewhere in this statute[.]"); *United States v. Lebowitz*, 676 F.3d 1000, 1014 (11th Cir. 2012) (*Mortensen* and *Forrest* "are Mann Act cases involving crimes other than the production of child pornography."). BIO 16.

The problem with the government, the Ninth Circuit, or any other court demanding that *Mortensen* be limited to its facts is that it violates stare decisis. *See* Pet. 16-18. "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which [courts] are bound." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996). In other words, contrary to what the Ninth Circuit and the government believe, stare decisis is not limited "to the holdings of" the Court's cases; lower courts must also follow "their explications of the governing rules of law"—that is, the "rationale upon which the Court based the results of its" decisions. *Id.* at 66-67 (cleaned up); *see also Ramos v. Louisiana*, 590 U.S. __, 140 S. Ct. 1390, 1146 n.6 (2020) (Kavanaugh, J., concurring in part) ("In the American system of stare decisis, the result and the reasoning each independently have precedential force, and courts are therefore bound to follow both the result and the reasoning of a prior decision."); *cf. Smith v. Titus*, 141 S. Ct. 982, 987 (2021) (Sotomayor, J., dissenting from denial of certiorari) ("The Eighth Circuit's cramped view of our precedent is untenable. . . . When this Court announces a legal principle and applies it to a particular factual situation, it is the legal principle itself, not the factual outcome, that becomes clearly established federal law."). Given stare decisis, the Ninth Circuit's opinion refusing to follow

Mortensen cannot be dismissed as just a run-of-the-mill "fact-bound decision" reviewing the sufficiency of the evidence. BIO 15 (cleaned up).[3]

The government's cramped reading of *Mortensen* is also inconsistent with the long-standing practice of this Court, which does not grant review just to issue an opinion affecting only the outcome of that case. Pet. 23-24. That *Mortensen* established a legal principle to govern other cases is confirmed by the Court itself summarily reversing other cases based on it. *See Becker v. United States*, 348 U.S. 957 (1955); *Oriolo v. United States*, 324 U.S. 824 (1945); *see* Pet. 15-16. The government brushes off these cases in a footnote, claiming that "they did not expound on the limited *Mortensen* decision[.]" BIO 15 n.3. But they and the numerous circuit cases applying the innocent-round-trip doctrine (*see* Pet. 18-19) belie any claims that *Mortensen* is narrow and fact-bound, must be limited to its facts, or in any other way does not deserve the full respect that stare decisis requires.

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[3] The government mentions in passing that the Ninth Circuit's opinion "addresses a version of Section 2423(b) that has since been superseded[,]" but it does not claim that the recent amendments to that statute affect the *Mortensen* issue in any way. BIO 11. Nor could it. *Mortensen*'s innocent-round-trip doctrine is a legal principle that applies generally to travel-for-sex statutes, including not only 18 U.S.C. § 2423(b) but also 18 U.S.C. § 2241(c), the other statute under which Pepe was convicted. *See* Pet. 6-7, 21-22.

c. The scope of stare decisis precludes the government's argument, echoing the Ninth Circuit, that *Mortensen* can be disregarded merely because that case involved transporting others with illicit intent whereas this case involves Pepe's intent when transporting himself alone. BIO 12-14. As previously explained, that difference, if meaningful at all, makes *Mortensen*'s reasoning more compelling as applied here because Pepe (who did not travel with any girls) was further "disassociated" from the alleged sexual activity during his trips, thereby buttressing (not undermining) the return trip's "integral relation with the innocent round trip as a whole." 322 U.S. at 375; *see* Pet. 21-22.

Ignoring that point, the government claims that when a defendant transports someone else for a vacation, he "does not provide the return journey for the purpose of facilitating a nonvacation activity" but rather "the return journey is the conclusion of the overall service of providing the person with a vacation *from* that activity," whereas when a defendant transports himself for vacation, "the journey back may well be motivated by the desire or need to engage in a particular activity upon return." BIO 14 (cleaned up) (emphasis in original). That strained and illogical distinction between the two scenarios cannot be reconciled with *Mortensen*, where all those on the trip anticipated that the women would resume prostitution when they got back to the brothel and, thus, were motivated by the desire or need to engage in that particular activity upon return. 322 U.S. at 374; *id*. at 378 (Stone, C.J., dissenting); *see* Pet. 11, 20. In fact, the Court rejected an argument the

government made in that case that is similar to the one it makes here—"If a person takes a vacation from an ordinary employment, one of the purposes of his return trip would normally be to go back to work; indeed that is often the main reason." *Mortensen v. United States*, Brief for the United States, 1944 WL 42874, *25 (Mar. 1944); *see* Pet. 12-14, 20-21.

That the government, like the Ninth Circuit, must resort to pointing out an insignificant difference in an attempt to distinguish *Mortensen* demonstrates why the Court's review is necessary. By enforcing stare decisis here, the Court can make clear that judges "don't have license to adopt a cramped reading of a case or to create razor-thin distinctions to evade the reach of precedent." *Tandon v. Newsom*, 992 F.3d 916, 937 (9th Cir.) (Bumatay, CJ, concurring in part and dissenting in part) (cleaned up), *further proceedings*, 593 U.S. 61 (2021).

d. The government claims that there is no circuit conflict because cases cited by Pepe purportedly never "adopted the broad rule [he] proffers" or "addressed facts analogous to those here." BIO 16-17 (citing *Twitchell v. United States*, 330 F.2d 759 (9th Cir. 1964); *United States v. Hon*, 306 F.2d 52 (7th Cir. 1962); *United States v. Ross*, 257 F.2d 292 (2d Cir. 1958); *Smart v. United States*, 202 F.2d 874 (5th Cir. 1953)); *see* Pet. 18-19 (citing those cases and contrasting cases that did not involve innocent round trips). It ignores the Second Circuit's pronouncement in *Ross* more than six decades ago that it was "bound by precedent to hold the evidence insufficient" where the defendant took a woman who worked for him as a prostitute

out of state for a weekend of recreation because "the Supreme Court in an unbroken line of decisions on the precise point has held that the trip to and fro must be taken as a unit. It cannot be split up into two trips[,]" so "the return trip cannot be separated from but remains an integral part of a single unitary undertaking." 257 F.2d at 292-93 (citing *Mortensen* and *Oriolo*); *see* Pet. 19. More recently, the Third Circuit described *Mortensen* as giving "birth to what has become known as the 'innocent round trip' exception" to the Mann Act. *United States v. Schneider*, 801 F.3d 186, 193 (3d Cir. 2015). Thus, in contrast to the Ninth Circuit, other circuits have recognized that *Mortensen* did create a generally-applicable doctrine.

It bears repeating that the government does not dispute that Pepe's trips to the United States were wholly innocent. *See* Pet. 8-9. But it does not, and cannot, point to a single opinion—until the Ninth Circuit's opinion affirming Pepe's convictions—that refused to apply *Mortensen* to a travel-for-sex case involving a round trip that was innocent.

e. The government does not dispute that the Ninth Circuit's resurrection of the travel theory rejected in *Mortensen* will have sweeping and far-reaching consequences—allowing the government to manufacture federal jurisdiction for purely-local crimes under existing statutes and Congress to enact new statutes expanding federal police power even further. Pet. 25-26. Its failure to respond effectively concedes the point. *See Shinn v. Ramirez*, 596 U.S. 366, 375 (2022)

("Respondents do not dispute, and therefore concede, that their habeas petitions fail on the state-court record alone.").

2. The second question is how to define the mens rea element when a statute criminalizes travel in commerce or across state lines with an improper purpose or intent given the Court's holding in *Mortensen* that engaging in conduct prohibited by the Mann Act "must be the dominant motive of such interstate movement." 322 U.S. at 374; *see* Pet. 27-37. To distinguish *Mortensen* and the Court's subsequent precedent applying its dominant-motive language, the government again relies on the same meaningless transportation of others versus transportation of one's self distinction that has been refuted above. BIO 19-20 & n.4; *see* Pet. 29-30; *see also supra* Part 1.c.

The government also cites cases that have dismissed *Mortensen*'s "dominant motive" language as dicta or have otherwise disregarded it on the grounds that there supposedly was no immoral purpose for the return trip to the brothel in that case. BIO 20-21. It does not even try to refute Pepe's points that that language is precedent, not dicta, that must be followed and that the factual premise underlying the dicta claim is wrong because it was undisputed that the Mortensens intended that the women would resume prostitution upon their return to the brothel, so getting them back to that work was at least a purpose of transporting them home. Pet. 28-32, 36.

The government cites several cases that have purportedly endorsed standards somewhat similar to the "dominant, significant, or motivating purpose" instructions approved by the Ninth Circuit. BIO 19. But it fails to acknowledge that the current state of the law is the result of a decades-long drift from this Court's precedent, as described by Judge Bybee, who rightly concluded that the "dominant, significant, or motivating purpose" instruction "lowered the government's burden of proof, contrary to the Supreme Court's decision in *Mortensen*[.]" *United States v. Flucas*, 22 F.4th 1149, 1166 (9th Cir.) (Bybee, CJ, dissenting), *cert. denied*, 143 S. Ct. 320 (2022); *id.* at 1166-70 (discussing history); *see* Pet. 32-35. Nor does the government acknowledge the Seventh Circuit's suggestion that instead of "strained" verbal formulas using terms like "dominant," "significant, or "motivating," "it would be better to ask whether, had a sex motive not been present, the trip would not have taken place or would have differed substantially." *United States v. McGuire*, 627 F.3d 622, 625 (7th Cir. 2010) (cleaned up); *see* Pet. 35-36. That is a kind of but-for test the government wrongly claims is not appropriate. BIO 18;[4] *see* Pet. 37. These opinions demonstrate the need for the Court's guidance on the matter.

3. Finally, the government does not dispute that this case is an excellent vehicle for the Court to address the questions presented and impress upon the lower courts

[4] The government relies on *Burrage v. United States*, 571 U.S. 204 (2014), a case that has nothing to do with the intent elements for travel-for-sex crimes. BIO 18.

the importance of stare decisis. *See* Pet. 38-39. The Court should therefore grant the petition.

April 26, 2024

Respectfully submitted,

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