No. 14-8358

IN THE

Supreme Court of the United States

AVONDALE LOCKHART,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

EDWARD S. ZAS
Counsel of Record
BARRY D. LEIWANT
DANIEL HABIB
DARRELL B. FIELDS
FEDERAL DEFENDERS OF NEW YORK, INC.
APPEALS BUREAU
52 Duane Street, 10th Floor
New York, New York 10007
(212) 417-8742
edward_zas@fd.org

Counsel for Petitioner

DAVID A. LEWIS
Of Counsel

261963

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Cited Authorities

Page

Page

CONSTITUTION, STATUTES, AND OTHER AUTHORITIES

Page

Page

Page

Page

PRELIMINARY STATEMENT

Section 2252(b)(2)'s text, context, structure, and history confirm that "involving a minor or ward" modifies "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct." Respondent's contrary reading falters at every stage.

Respondent mechanically invokes the last-antecedent rule without providing good reasons to apply that canon here. Its textual argument depends almost entirely on the absence of a comma before the modifying phrase, a discretionary punctuation choice to which this Court "will not attach significance." *United States v. Bass*, 404 U.S. 336, 340 n.6 (1971).

Nor does respondent refute petitioner's showing that the series-qualifier principle, which this Court has long applied in circumstances like this, best illuminates the meaning of this statute. Although respondent accuses petitioner of rendering "sexual abuse" and "abusive sexual conduct" redundant, it offers no alternative reading that avoids surplusage. Far from it. By treating "abusive sexual conduct involving a minor or ward" as a mere "subset" of "sexual abuse," respondent renders much of the statutory provision at issue—including the modifying phrase itself—wholly inoperative. That consequence confirms that respondent's reading is wrong.

Respondent's appeal to statutory structure and context fares no better. Congress indisputably treated prior federal and state convictions for the same conduct differently—for example, a prior federal conviction for sex trafficking of an adult triggers the recidivism

enhancement, but a prior state conviction must involve "sex trafficking *of children*." Thus, it is neither "strange" nor unreasonable that Congress likewise limited qualifying prior state sex-abuse convictions to those involving minors or wards. In fact, respondent originally read the statute petitioner's way—although it refuses to acknowledge that now.

Respondent's remaining arguments—that Congress, in § 2252(b)(2), meant to track the federal sex-abuse crimes in chapter 109A (without ever saying so); and that petitioner's reading could allow a "huge number" of child sex offenders to avoid mandatory minimum sentences—are unsupported and unpersuasive.

Finally, even if respondent's reading were plausible, it is not "unambiguously correct," so the rule of lenity requires reversal.

ARGUMENT

I. "Involving a minor or ward" modifies "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct."

A. The series-qualifier rule, not the last-antecedent rule, applies.

Invoking the last-antecedent rule, respondent argues that "involving a minor or ward" modifies only "abusive sexual conduct." Respondent's Brief ("RB") 18–20. But respondent offers no persuasive reason to follow that rule instead of the series-qualifier canon, which this Court has long applied to statutes like § 2252(b)(2). Petitioner's Opening Brief ("OB") 11–18.

Respondent observes that under the last-antecedent rule "a limiting clause or phrase … should ordinarily be read as modifying only the noun or phrase that it immediately follows," and posits that the rule applies unless "overcome by other indicia of meaning." RB 18 (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). But statutory interpretation is not a game of "rock-paper-scissors" in which the last-antecedent rule, by default, trumps all others. On the contrary, for statutes written like § 2252(b)(2), the series-qualifier rule, not the last-antecedent rule, reflects "ordinary construction," *United States v. Standard Brewery, Inc.*, 251 U.S. 210, 218 (1920) (quoting *Great Western Ry. Co. v. Swindon & Cheltenham Ry. Co.*, (1884), 9 App. Cas. 787, 808 (Lord Bramwell)), "the more plausible construction," *Bass*, 404 U.S. at 340, and "the natural construction of the language," *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920).

The choice of the appropriate canon turns not on respondent's imagined interpretive hierarchy, but on the statutory text. And where, as here, a statute contains an integrated list of noun phrases in parallel construction, separated by commas, followed by a modifying phrase that makes grammatical and substantive sense with respect to all, "[i]n the absence of some other indication, the modifier reaches the entire enumeration." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (Thomson/West 2012).

Employing the series-qualifier rule accords with this Court's precedents. The phrase "involving a minor or ward" "is applicable as much to the first and other words" in § 2252(b)(2)'s list of state-law predicates "as to the last." *Porto Rico Ry.*, 253 U.S. at 348. Respondent so

acknowledges by agreeing that "aggravated sexual abuse involving a minor or ward" and "sexual abuse involving a minor or ward" are "potential state-law crimes." RB 32. *See also infra* n.4. But respondent's contention that § 2252(b)(2) does not contain an "integrated" list because "'sexual abuse' and 'abusive sexual conduct' ... are identical rather than 'overlapping,'" RB 34, gets things backwards. The closer the items are in meaning, the *more* integrated the list is, not less. *See* OB 15–16.

Respondent dismisses this Court's century-old line of series-qualifier cases as a "handful of decisions" driven by extrinsic policy considerations. RB 38–40. For example, respondent says, *Bass* declined to adopt a last-antecedent construction only because to do so would have altered the "sensitive relation between federal and state criminal jurisdiction." RB 39 (quoting 404 U.S. at 349). In fact, this Court has grounded its series-qualifier decisions, including *Bass*, first and firmly in the statutory text. *See Paroline v. United States*, 134 S. Ct. 1710, 1721 (2014); *Bass*, 404 U.S. at 339–40; *Porto Rico Ry.*, 253 U.S. at 348; *Standard Brewery*, 251 U.S. at 218. And while *Bass* adduced additional extra-textual support for that approach, the principal such consideration was not comity, as respondent suggests, but "lenity," 404 U.S. at 347 (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)).

Respondent's reliance on *Barnhart* is misplaced. The statutory phrase at issue there—which authorized Social Security benefits if a claimant's disabilities were "of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy," 540

U.S. at 21–22 — was unlike § 2252(b)(2). It did not contain a list of parallel terms separated by commas and followed immediately by a modifying phrase. To apply the modifier "which exists in the national economy" to the antecedent "previous work," this Court would have had to leapfrog eighteen words and conclude that Congress intended the awkward locution "previous work which exists in the national economy." Even so, this Court did not hold that the last-antecedent rule applied unambiguously, only that the Social Security Administration's regulation survived deferential *Chevron* review. 540 U.S. at 29.[1]

Congress's decision not to insert a comma before "involving a minor or ward," *see* RB 19, is uninformative. This Court rejected respondent's reliance on an "omitted" comma in *Bass*, *see* 404 U.S. at 340 n.6, and the argument has not improved with age. It remains true that, although "commas at the end of series can avoid ambiguity," the "use of such commas is discretionary," so this Court should "not attach significance" to Congress's punctuation. *Id.* In *Simpson v. United States*, this Court, at respondent's

1. Neither *Jama v. Immigration & Customs Enf't*, 543 U.S. 335 (2005), nor *Fed. Trade Comm'n v. Mandel Bros.*, 359 U.S. 385 (1959), cited at RB 18, supports application of the last-antecedent rule here. *Jama* declined to apply a modifier to each clause in a preceding series of statutory subparagraphs because "[e]ach clause is distinct and ends with a period, strongly suggesting that each may be understood completely without reading any further." 543 U.S. at 344. Indeed, this Court distinguished *Bass* on just this ground. 543 U.S. at 344 n.4. And in *Mandel Bros.*, this Court agreed that the series-qualifier rule yielded a "possible construction" of the statutory language, one that the Court might have adopted had it been confronted, as here, with "a penal statute that deserves strict construction." 359 U.S. at 389.

urging, disregarded the absence of a comma and applied the series-qualifier rule to the statutory phrase "[w]hoever ... assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device." 435 U.S. 6, 11 n.6 (1978). Specifically, this Court agreed that "by the use of a dangerous weapon or device" modified "assaults" as well as "puts in jeopardy." *Id.* Nothing turns on the absence of a comma here, as § 2252 itself reflects. *See* § 2252(a)(1) (covering "[a]ny person who ... knowingly transports or ships *using any means or facility of interstate or foreign commerce*" child pornography, where italicized phrase modifies "transports" as well as "ships").[2]

B. Petitioner's reading makes sense because, unlike respondent's, it gives effect to "involving a minor or ward."

Respondent's principal claim is that petitioner's reading, which treats "sexual abuse involving a minor or ward" and "abusive sexual conduct involving a minor or ward" as synonyms, "runs up against the presumption against surplusage." RB 33. To be crystal clear: This case does not present a choice between one reading that creates surplusage and another that avoids it. Rather, the choice is between petitioner's reading, which entails some redundancy but gives meaning to the modifying phrase "involving a minor or ward," and respondent's, which also includes redundancy but reads "involving a minor or ward"

2. The Constitution contains some series qualifiers that use commas, *see* RB 19 n.7 (citing U.S. Const. amend. V), and some that do not, *see* U.S. Const. art. I, § 3, cl. 7 (providing that judgment in impeachment cases shall not extend beyond removal from Office "and disqualification to hold and enjoy any Office of honor, Trust or Profit *under the United States*" (modifying phrase emphasized)).

out of the statute altogether. As between these "available alternatives," this Court should select petitioner's, which "does least violence to the text." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 529 (1989) (Scalia, J., concurring).

Respondent argues that because "sexual abuse" and "abusive sexual conduct" mean the same thing, applying the series-qualifier principle to conclude that "involving a minor or ward" modifies both does not "make sense." RB 16, 32–34, 40. That is mistaken. Respondent acknowledges that the "terms used to describe the generic state-law offenses carry their ordinary, contemporary, and common meaning." RB 22–23 n.8. Petitioner has shown that the ordinary meanings of "sexual abuse" and "abusive sexual conduct" are the same (or nearly so, with any nuances swallowed by "relating to"). OB 17–18. Respondent does not disagree, propose alternative definitions, or identify any behavior that would relate to "abusive sexual conduct" but not "sexual abuse."[3]

Petitioner's interpretation produces no anomaly. This Court has recognized that Congress sometimes speaks redundantly. In *Freeman v. Quicken Loans, Inc.*, for example, this Court interpreted the statutory phrase "portion, split, or percentage" so that the three words "all mean the same thing." 132 S. Ct. 2034, 2043 (2012). This was "a perhaps regrettable but not uncommon sort of lawyerly iteration ('give, grant, bargain, sell, and

3. Although it now chides petitioner for acknowledging this congruence, respondent has done likewise: "The federal statutes seem to use the terms 'sexual conduct,' 'abusive sexual contact,' and 'sexual abuse' interchangeably." Brief for United States at 7 n.1, *United States v. Trogdon*, 339 F.3d 620 (8th Cir. 2003) (No. 02-3233).

convey')." *Id. See, e.g.*, *United States v. Olano*, 507 U.S. 725, 732 (1993) ("errors and defects" in former Fed. R. Crim. P. 52(b) mean same thing); *see also, e.g.*, *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992) ("Redundancies across statutes are not unusual events in drafting[.]"). As in *Freeman*, "[i]t is impossible to imagine" "abusive sexual conduct" that does not also relate to "sexual abuse." 132 S. Ct. at 2043.

Contrary to respondent's contention (at 34), the redundancy among "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct" is not "inexplicable" but easily explained. Congress understood that states use a variety of terms similar to these to refer to sex crimes committed against children and other vulnerable victims such as wards.[4] Congress used overlapping and redundant terms in § 2252(b)(2) to emphasize that prior convictions qualify as state predicates if they "relat[e] to" a broad range of sexually abusive behavior involving a child or ward, regardless whether a state labels the offense "aggravated sexual abuse of a minor," "sexual abuse of a minor," or "abusive sexual conduct involving a minor." As a matter of ordinary usage, "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct" do not represent distinct concepts, crisply defined, but rather evoke a common "core of meaning," *Graham County*

4. *See*, *e.g.*, Alaska Stat. § 11.41.434 ("sexual abuse of a minor"); Ariz. Rev. Stat. Ann. § 13-1405(A) ("sexual conduct with a minor"); D.C. Code Ann. § 22-3013 ("sexual abuse of a ward"); Ind. Code Ann. 35-42-4-9 ("sexual misconduct with a minor"); Mich. Comp. Laws Ann. 750.145c ("child sexually abusive activity or material"); N.D. Cent. Code Ann. § 12.1-20-06 ("sexual abuse of wards"); N.Y. Penal Law § 130.75 ("course of sexual conduct against a child"); Utah Code Ann. § 76-5-404.1 ("sexual abuse of a child" and "aggravated sexual abuse of a child").

Soil & Water Conservation Dist. v. United States ex rel. Wilson, 559 U.S. 280, 289 n.7 (2010), namely, wrongful sexual behavior. Thus, contrary to respondent's position, it makes perfect sense to interpret "involving a minor or ward" as applicable to all three categories.[5]

Respondent agrees that some redundancy is unavoidable in this statute. Consequently, the rule against surplusage is not dispositive. *See, e.g.*, *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013); *Microsoft v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2248 (2011). Respondent's interpretation, however, creates *unnecessary* surplusage and strips "involving a minor or ward" of any effect at all. That implausible result follows from respondent's position that "'aggravated sexual abuse' (and 'abusive sexual conduct involving a minor or ward') are properly viewed as subsets of the generic offense of 'sexual abuse.'" RB 33. Thus, under respondent's reading, both "aggravated sexual abuse" and "abusive sexual conduct involving a minor or ward" *have no effect*. Put another way, § 2252(b)(2) would mean exactly the same thing if it said: "a prior conviction ... under the laws of any State relating to sexual abuse," *period*—that is, if Congress *had never written* these two statutory phrases, including the modifying phrase that this Court granted certiorari to construe.

That approach would, no doubt, make it far easier for federal prosecutors to secure these severe mandatory minimum sentences, but it is at odds with basic principles

5. Respondent does not dispute that Congress could easily have drafted § 2252(b)(2) so that "involving a minor or ward" would modify only "abusive sexual conduct." *See* OB 20–21.

of statutory construction. The words "involving a minor or ward" "cannot be meaningless, else they would not have been used." *United States v. Butler*, 297 U.S. 1, 65 (1936). And this Court is "especially unwilling" to treat a statutory term as surplusage "when the term occupies so pivotal a place in the statutory scheme." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). In just these circumstances, this Court has applied the series-qualifier canon, not the last-antecedent rule, to avoid exactly the result respondent proposes. *See Standard Brewery*, 251 U.S. at 218. The statute at issue there prohibited the use of food products to make "beer, wine, or other intoxicating malt or vinous liquors for beverage purposes." *Id.* at 217–18. Respondent argued that the prohibition extended to "beer and wine whether intoxicating or not." *Id.* at 218. But this Court disagreed, recognizing that respondent's reading rendered "the qualifying words 'other intoxicating' ... quite superfluous" because, if respondent were right, "it would have been enough to have written the act without the qualifying words." *Id.*

Respondent advances the precise approach rejected in *Standard Brewery*, namely, that when Congress wrote the words "involving a minor or ward" it meant those words to have no independent effect.[6] Respondent hypothesizes that "abusive sexual conduct involving a minor or ward," although subsumed by "sexual abuse,"

6. Instead, respondent suggests, Congress included those words merely for emphasis—to "clarify[]" that the recidivist enhancement applies to "specialized and particularly serious" forms of "sexual abuse." RB 33. That is improbable. No reader would expect that a defendant with a prior conviction under a state law relating to "sexual abuse" might escape § 2252(b)(2)'s recidivist enhancement because he used violence or molested a child.

was nonetheless included in § 2252(b)(2) to "remove[] any doubt" that "consensual" offenses such as statutory rape count as state-law predicates. RB 33–34. That supposition is unlikely. Courts routinely conclude that statutory rape constitutes sexual abuse. *E.g.*, *United States v. Thomas*, 159 F.3d 296, 298 (7th Cir. 1998) (citing Illinois statute treating statutory rape as "aggravated criminal sexual abuse"). It is a longstanding principle of criminal law that minority renders consent ineffective, 2 Wayne R. LaFave, *Substantive Criminal Law* § 17.4(c) (2d ed. 2014), and "[s]exual conduct without voluntary consent is abusive," *United States v. Osborne*, 551 F.3d 718, 720 (7th Cir. 2009).

Similarly, respondent suggests (but does not affirmatively state, doubtless to preserve its options in future cases) that offenses such as "public lewdness or indecent exposure directed at an adult" might not relate to "sexual abuse." RB 44 & n.13. But why not? As a matter of language, exposing one's genitals to a stranger "misuses" and "maltreats" that stranger for purposes of sexual gratification. *See* OB 16–18. And it is difficult to see how, for example, an elderly person waiting alone at a bus stop at night would not suffer "psychological trauma" having "been used as the object of adult sexual gratification" by someone who exposes himself. RB 45 n.13. *United States v. Padilla-Reyes*, which relies on examples of conduct involving adults to conclude that "sexual abuse" does not require physical contact, says as much. 247 F.3d 1158, 1163 (11th Cir. 2001) (citing a newspaper article discussing verbal sexual abuse of an adult woman). Respondent has not identified an actual (or even a realistic hypothetical) case that would require a federal prosecutor to prove that a defendant's prior state conviction related to "abusive sexual conduct involving a minor or ward." This Court

will not adopt an interpretation of statutory language that "would in practical effect render" that language "entirely superfluous in all but the most unusual circumstances." *TRW Inc. v. Andrews*, 534 U.S. 19, 29 (2001). Although both parties' constructions entail some surplusage, petitioner's gives effect to "involving a minor or ward." Respondent's, by contrast, makes that provision a legal nullity. To affirm, this Court would have to conclude that Congress drafted the words "involving a minor or ward" but meant them to have no practical effect.

C. The statute's context and structure do not support respondent's reading.

1. Congress intended to treat prior federal and state convictions differently.

Respondent contends that context further supports its reading because § 2252(b)(2)'s recidivist enhancement applies to a defendant with a prior conviction under enumerated provisions of federal law (chapters 71, 109A, 110, and 117 of title 18, and 10 U.S.C. § 920) encompassing adult and minor victims, so state convictions should not be limited to those involving minors. RB 20–23.

Contrary to respondent's inference, § 2252(b)(2)'s disparate treatment of federal and state convictions is intended and inescapable. As petitioner has shown, § 2252(b)(2) has included a recidivist enhancement for certain federal convictions—but not state convictions for the same conduct—since the statute's enactment in 1978. OB 22–27. Respondent correctly acknowledges that federal offenses under chapter 71 (entitled "Obscenity"), which "can involve obscene depictions of both adults

and children," count as predicates, while state-law predicates must involve child pornography. Thus, a defendant previously convicted of a federal obscenity offense involving adult pornography (say, selling obscene adult pornography within federal jurisdiction, § 1460(a)) would receive § 2252(b)(2)'s recidivist enhancement, while a defendant previously convicted of selling the same pornography under state law would not. The resulting asymmetry—federal convictions involving obscene depictions of adults and children count; state convictions must involve children—is manifest.

Likewise misguided is respondent's attempt to dismiss the fact that § 2252(b)(1) limits state sex-trafficking predicates to offenses against children while punishing federal offenses involving both adults and minors. RB 43–44. That difference is of no moment, respondent contends, because it arose in 2006 and so "sheds no light on what Congress intended when it added state sexual-abuse offenses ... to the list of predicates in 1996." RB 44. Of course, respondent elsewhere hastens to divine the 1996 Congress's intent from the same 2006 legislation. *See* RB 36–37 (citing Adam Walsh Child Protection and Safety Act of 2006, § 206(b)(1)(B), Pub. L. No. 109-248, 120 Stat. 587, 614 (codified at § 2251(e)). More to the point, however, is respondent's key concession that "when Congress adds state-law offenses to the lists of predicate offenses triggering child-pornography recidivist enhancements, it sometimes adds state offenses corresponding to only a subset of the federal offenses that it had previously included." RB 43. That is precisely petitioner's point. Congress, whatever its reasons, has many times elected to define federal predicate offenses more broadly than their state counterparts, almost always by limiting the latter to offenses against children.

Respondent finds nothing untoward about this decision in general—nor would it matter if respondent did. Even this Court's "individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute." *TVA v. Hill*, 437 U.S. 153, 194 (1978). "Nor should this Court's approach to statutory construction be influenced by the supposition that 'it is highly unlikely that Congress intended' a given result." *Harbison v. Bell*, 556 U.S. 180, 198 (2009) (Thomas, J., concurring). A court's inability to identify a "logical reason" for Congress's differential treatment of federal and state convictions for the same conduct, *United States v. Mateen*, 764 F.3d 627, 631–32 (6th Cir. 2014) (en banc), or its view that such a choice would be "strange," *United States v. Rezin*, 322 F.3d 443, 448 (7th Cir. 2003), offers no reason to override § 2252(b)(2)'s plain text. This Court's task "is to apply the text, not to improve on it." *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 126 (1989). In any case, there are cogent reasons for Congress's choice. *See* OB 27–29. The universe of state sex offenses is so broad and wide-ranging in seriousness (including misdemeanors) that Congress, concerned with the link between child pornography and other child sex offenses, could reasonably decide to limit the qualifying crimes to those against children.

2. The titles of the chapter 109A offenses do not support respondent's reading.

Respondent perceives a "strong similarity" between the chapter 109A offenses of "aggravated sexual abuse," "sexual abuse," and "sexual abuse of a minor or ward," §§ 2241–43, and § 2252(b)(2)'s list of state predicates. RB 22–23. Because "Sections 2241 and 2242 encompass crimes against adult and minor victims," while "Section 2243 covers only crimes against minors and wards," respondent infers that the same is true of § 2252(b)(2). RB 22. Respondent is mistaken.

First, the parallel is attenuated. "Abusive sexual conduct" is not defined by statute and appears nowhere else in the U.S. Code, which weakens respondent's contention that Congress meant the term to correspond to a chapter 109A offense. Moreover, chapter 109A does not criminalize "abusive sexual conduct involving a minor or ward." It defines two offenses, "sexual abuse of a minor or ward" and "abusive sexual contact," §§ 2243–44, neither of which matches "abusive sexual conduct involving a minor or ward." As petitioner has already shown (OB 37–38), the premise that § 2252(b)(2)'s reference to "abusive sexual conduct involving a minor or ward" necessarily corresponds to § 2243's offense of "sexual abuse of a minor or ward" assumes the answer to the question presented. More plausibly, the relevant parallel (if any) is between "abusive sexual conduct" and the § 2244 offense of "abusive sexual contact." After all, § 2244(a)'s heading refers to "[s]exual conduct." If Congress meant "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct" to parallel the federal offenses of "aggravated sexual abuse," "sexual abuse," and "abusive sexual contact," §§ 2241,

2242, and 2244, then it makes perfect sense for the phrase "involving a minor or ward" to modify all three classes of state-law predicates. The §§ 2241, 2242, and 2244 offenses may be committed against adults and minors, so the limiting phrase "involving a minor or ward" would properly apply to all three.[7]

3. Section 2251(e) supports petitioner, not respondent.

Respondent further contends that § 2251(e), as amended in 2006, reflects the intent of the 1996 and 1998 Congresses to limit "involving a minor or ward" to state offenses "relating to ... abusive sexual conduct." RB 36–37. Petitioner has already noted that Congress used different language in § 2251(e) than in § 2252(b)(2), demonstrating its intent to express different meanings. OB 38 n.10 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004)). Respondent, however, misunderstands the relevant linguistic shift. It was not, as respondent suggests, merely the substitution of "contact" for "conduct." RB 37. Rather, Congress also deleted the conjunction "or" that appears before "abusive sexual conduct involving a

7. For the same reasons, respondent is wrong to argue that § 2252(b)(2)'s drafting history reflects the 1996 Congress's intent that the state-law predicates mirror the chapter 109A and 110 offenses. RB 24–25. When the 1996 Congress intended that result, it used precisely targeted language. *See* Child Pornography Prevention Act of 1996, Subsection 7, Pub. L. No. 104-208, 110 Stat. 3009, 3009-31 (recidivist enhancement applies if defendant has prior conviction under certain provisions of federal law "or of a State offense that would have been an offense" under those federal provisions "had the offense occurred in a Federal prison") (codified at § 2241(c)).

minor or ward" in § 2252(b)(2). Had the 2006 Congress understood § 2252(b)(2) as respondent now suggests, it would have imported the relevant state-law language wholesale into § 2251(e): "*aggravated sexual abuse, sexual abuse, or abusive sexual contact involving a minor or ward*, or sex trafficking of children, or the production ... of child pornography." Instead, Congress deleted the first "or," because only by doing so could it limit the reach of the modifying phrase "involving a minor or ward." Concluding, as respondent does, that this drafting choice has no significance "denies effect to Congress' textual shift, and therefore 'runs afoul of the usual rule that when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.'" *Roberts v. Sea-Land Servs.*, 132 S. Ct. 1350, 1357 n.5 (2012) (quoting *Sosa*, 542 U.S. at 711 n.9).

D. The original understanding confirms petitioner's reading.

Petitioner has shown that the Department of Justice originally understood "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" as synonymous with "prior state convictions for child molestation." OB 31–32 (quoting Letter from Ann M. Harkins, Acting Ass't Att'y Gen., U.S. Dep't of Justice). Remarkably, respondent's answer is to pretend that DOJ said no such thing. Respondent quotes an excerpt of that letter that omits "child molestation" and includes, instead, only the Department's reference to "prior convictions for child abuse." RB 47–48. Respondent then tells this Court, with a straight face, that DOJ's statement was

"imprecise" and "overinclusive" because the Department did not specify that prior state offenses must have been "sexual" in nature. RB 48. Of course, DOJ did just that, and respondent's unwillingness to acknowledge this fact is telling. As a backup position, respondent ventures that DOJ's statements "are best understood as attempts to condense and simplify the categories of state crimes being added to the recidivist enhancement." RB 48. Just so. DOJ (like Congress, which adopted the Department's proposed amendment) understood the state-law predicates, in simplest terms, to encompass sex crimes against minors—that is, "child molestation" offenses.

E. The statute's purpose does not support respondent's reading.

In a last-ditch effort to save its position, respondent leans heavily on what it perceives to be § 2252(b)(2)'s purpose. Respondent warns that, under the categorical approach of *Taylor v. United States*, 495 U.S. 575 (1990), petitioner's reading could allow a "huge number" of child sex offenders to avoid the mandatory penalties of § 2252(b)(2), undermining the statute's supposed objective: "to protect children by ensuring that child-pornography offenders who are convicted sexual predators serve longer prison terms." RB 15, 26. Respondent's argument is unfounded.

1. Respondent's purpose-based argument is circular.

"When interpreting a criminal statute," this Court does "not play the part of a mindreader," *United States v. Santos*, 553 U.S. 507, 515 (2008), but discerns a

statute's purpose from its text, *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 98 (1991). Section 2252(b)(2)'s text does not support respondent's self-serving description of the statutory purpose. Rather, that description "is a textbook example of begging the question." *Santos*, 553 U.S. at 515. Respondent *assumes* that Congress meant the recidivism enhancement to apply to offenders with prior convictions under state laws relating to sexual abuse involving adults as well as children, as opposed to just children. But that is "the very issue in the case." *Id.* Respondent's circular appeal to the statute's supposed purpose, unmoored from the text, is thus not a reliable guide to meaning. "[N]o legislation pursues its purposes at all costs," *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987), and respondent's "purposive argument simply cannot overcome the force of the plain text," *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1710 (2012). *See also Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993) ("[V]ague notions of a statute's 'basic purpose' are … inadequate to overcome the words of its text regarding the *specific* issue under consideration.").

2. Petitioner's reading is consistent with the statute's purpose.

Even if respondent's description of the statute's purpose were correct, it would not defeat petitioner's reading. Respondent argues that, under *Taylor*, petitioner's construction would "eliminate as predicate offenses any conviction under a state law that did not require a minor or ward victim as an element of the offense." RB 15–16. But this Court has not held that the categorical approach applies to the analysis of prior convictions under § 2252(b)(2), and the Courts of Appeals are divided on

that question, *see* Pet. 24–25. Petitioner agrees that the statutory terms "relating to" and "involving a minor or ward" can be read to invite a circumstance-specific inquiry that would make § 2252(b)(2)'s enhancement applicable to any state sex offense against a child, whether the victim's age was an element or not. *See, e.g.*, *United States v. McCutchen*, 419 F.3d 1122, 1126–27 (10th Cir. 2005); *Rezin*, 322 F.3d at 448; *see also, e.g.*, *Nijhawan v. Holder*, 557 U.S. 29 (2009); *United States v. Hayes*, 555 U.S. 415 (2009). This Court need not resolve this dispute in this case because petitioner's prior conviction did not involve a minor or ward under any analysis.

If the categorical approach applies, some offenders who may have committed sexual misconduct against children in the past—but whose crimes of conviction did not categorically involve children—would avoid the mandatory sentencing enhancements of § 2252(b)(2). But the "Government's objection to that underinclusive result is little more than an attack on the categorical approach itself," *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1692–93 (2013), and "there are several decades of water over that dam," *Descamps v. United States*, 133 S. Ct. 2276, 2286 n.3 (2013). "*Taylor* had good reasons to adopt the categorical approach," including "the utter impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction." *Johnson v. United States*, 135 S. Ct. 2551, 2562 (2015). *See also Descamps*, 133 S. Ct. at 2288–89 (reaffirming "the categorical approach's Sixth Amendment underpinnings").

Respondent notes that numerous states have laws that criminalize sexual abuse in general but do not

include as an element the victim's status as a minor or ward, RB 29–31 n.11, but ignores that numerous states also have criminal sexual-abuse statutes that *do* contain these elements.[8] Defendants convicted of these crimes would therefore categorically qualify for the recidivist enhancement under petitioner's reading.

The contrived hypothetical on pp. 28–29 of respondent's brief is thus unpersuasive. If this Court endorses a circumstance-specific inquiry, then neither this example nor any other in respondent's parade of horribles is cause for concern. And if the categorical approach does apply, a defendant who forcibly rapes his 14-year-old daughter is still guilty under New York law of rape in the second degree, N.Y. Penal Law § 130.30(1), which includes, as an element, that the victim is "less than fifteen years old." Either way, respondent's hypothetical defendant would be subject to § 2252(b)(2)'s enhanced penalties, just as Congress intended.

---

8. Alaska Stat. § 11.41.434; Ariz. Rev. Stat. Ann. § 13-1405; Cal. Penal Code §§ 269, 261.5(d); Colo. Rev. Stat. § 18-3-405; Conn. Gen. Stat. § 53a-70c; D.C. Code § 22-3008; Fla. Stat. §§ 794.011(2)(a), 794.011(4)(a), 794.011(5)(a); Ga. Code Ann. § 16-6-4(d)(1); Idaho Code §§ 18-1508A, 18-1506; 720 Ill. Comp. Stat. Ann. § 5/11-140; Ind. Code Ann. § 35-42-4-3; Mass. Ann. Laws ch. 265, § 22A; Md. Code Ann., Crim. Law § 3-602; Mo. Ann. Stat. § 566.067(1); Miss. Code Ann. § 97-5-23; Neb. Rev. Stat. Ann. §§ 28-319.01, 28-320.01; Nev. Rev. Stat. Ann. § 200.508; N.M. Stat. Ann. § 30-6-1(E); N.Y. Penal Law § 130.75; 21 Okla. Stat. Ann. tit. 21, § 1123; N.C. Gen. Stat. §§ 14-27.2A(a), 14-27.4A, 14-27.7A; 18 Pa. Cons. Stat. Ann. § 3122.1(b); R.I. Gen. Laws § 11-37-8.1; S.C. Code Ann. § 16-3-655; Tenn. Code Ann. §§ 39-13-522, 39-13-531; Tex. Penal Code Ann. § 21.11; Utah Code Ann. §§ 76-5-402.1, 76-5-402.3, 76-5-403.1; Vt. Stat. Ann. tit. 13, § 3253a; Wash. Rev. Code Ann. § 9A.44.073; Wis. Stat. § 948.02; Wyo. Stat. § 6-2-314.

II. The rule of lenity requires reversal because respondent's reading is not unambiguously correct.

Petitioner has shown (OB 39–43) that § 2252(b)(2) is, at the very least, ambiguous. Even after exhausting all legitimate tools of statutory construction, petitioner's reading is at least as reasonable as respondent's. Thus, petitioner's interpretation must prevail under the rule of lenity.

Respondent answers as it always does, claiming in conclusory fashion that the statute is "not ambiguous—and certainly not grievously so." RB 50. But the circumstances here refute that stock response:

- Petitioner's reading makes both grammatical and logical sense.

- At best for respondent, dueling canons of statutory construction (last-antecedent rule vs. series-qualifier rule) yield contradictory conclusions and fight to a draw.

- Neither side's reading avoids surplusage completely, but only petitioner's gives effect to the key phrase "involving a minor or ward."

- As respondent concedes, Congress has often treated federal and state convictions for the same conduct differently in § 2252, most often by requiring the latter to involve children.

- Respondent, at the time of enactment, gave the statute the same natural reading petitioner does, and conveyed that interpretation to Congress.

- The legislative history points solidly in petitioner's favor.

- Petitioner's reading is at least as consistent with the statute's purpose as respondent's.

Given these circumstances, respondent's interpretation is far from "unambiguously correct." *United States v. Granderson*, 511 U.S 39, 54 (1994). Rather, this is a "textbook case" for applying the rule of lenity. *Hayes*, 559 U.S. at 436 (Roberts, C.J., dissenting).

CONCLUSION

This Court should reverse the judgment below and remand.

Respectfully submitted,

EDWARD S. ZAS
Counsel of Record
BARRY D. LEIWANT
DANIEL HABIB
DARRELL B. FIELDS
FEDERAL DEFENDERS OF NEW YORK, INC.
APPEALS BUREAU
52 Duane Street, 10th Floor
New York, New York 10007
(212) 417-8742
edward_zas@fd.org

Counsel for Petitioner

DAVID A. LEWIS
Of Counsel