No. _____

IN THE

Supreme Court of the United States

LEVIAN PACHECO PACHECO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress has made it a crime to engage in certain sexual acts with detainees who are "pending deportation." 18 U.S.C. §§ 2243(b), 2244(a)(4), 2246(5)(A). The court of appeals interpreted "pending deportation" to encompass not only those ordered deported and awaiting deportation but also those awaiting proceedings to determine whether they should be deported at all. Did the court of appeals deviate from this Court's method of statutory interpretation?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed on the cover of this petition.

DIRECTLY RELATED PROCEEDINGS

- *United States v. Levian D. Pacheco*, No. 2:17-cr-1152-PHX-SPL (D. Ariz.)
- *United States v. Levian Dela Car Pacheco Pacheco*, No. 19-10014 (9th Cir.)

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Petitioner Levian Pacheco respectfully asks this Court to reverse a decision of court of appeals that so deviated from this Court's method of statutory interpretation that its corrective intervention is appropriate.

DECISIONS BELOW

The district court's decisions denying Mr. Pacheco's motions for a judgment of acquittal during trial are unreported. The court of appeals's published opinion, which discusses the question presented here, is reported at 977 F.3d 764 (9th Cir. 2020). Its unpublished memorandum decision is reported at 829 F. App'x 207 (9th Cir. 2020). Both decisions are reproduced in the appendix.

STATEMENT OF JURISDICTION

The court of appeals issued its decisions in this case on October 6, 2020. It denied timely filed petitions for rehearing and rehearing en banc on December 31, 2020. This petition is timely filed pursuant to this Court's order of March 19, 2020. *See also* Sup. Ct. R. 13.1, 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED

18 U.S.C. § 2243(b):

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

(1) in official detention; and

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

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

18 U.S.C. § 2244(a):

Sexual Conduct in Circumstances Where Sexual Acts Are Punished by This Chapter.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in or causes sexual contact with or by another person, if so to do would violate—

(1) subsection (a) or (b) of section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than ten years, or both;

(2) section 2242 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than three years, or both;

(3) subsection (a) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both;

(4) subsection (b) of section 2243 of this title had the sexual contact been a sexual act, shall be fined

under this title, imprisoned not more than two years, or both; or

(5) subsection (c) of section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title and imprisoned for any term of years or for life.

18 U.S.C. § 2246(5):

The term "official detention" means—

(A) detention by a Federal officer or employee, or under the direction of a Federal officer or employee, following arrest for an offense; following surrender in lieu of arrest for an offense; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following civil commitment in lieu of criminal proceedings or pending resumption of criminal proceedings that are being held in abeyance, or pending extradition, deportation, or exclusion; or

(B) custody by a Federal officer or employee, or under the direction of a Federal officer or employee, for purposes incident to any detention described in subparagraph (A) of this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation;

but does not include supervision or other control (other than custody during specified hours or days)

after release on bail, probation, or parole, or after release following a finding of juvenile delinquency.

STATEMENT OF THE CASE

This case involves acts of sexual misconduct committed while Mr. Pacheco was working at Casa Kokopelli, a shelter for unaccompanied alien minors who are apprehended by immigration authorities. (C.A. E.R. 204:2–9; 210:4–9) The Office of Refugee Resettlement, a division of the Department of Health and Human Services, contracts with Southwest Key Programs to provide housing for these unaccompanied minors. (C.A. E.R. 204:2–9; 357:13–15; 359:11–13) Southwest Key operates the Casa Kokopelli shelter in Mesa, Arizona. (C.A. E.R. 203:24 to 204:9) Casa Kokopelli provides "educational services, medical services, clinical services, case management, education services," and "direct care services" to the unaccompanied alien minors in its care. (C.A. E.R. 359:20–23)

From May 23, 2016, to July 24, 2017, Mr. Pacheco was a youth care worker at Casa Kokopelli. (C.A. E.R. 208:13–14; 365:21 to 366:6; 1049:11–17) He was terminated when seven boys who were staying at Casa Kokopelli reported 10 incidents of sexual misconduct involving him. (C.A. Op. Br. at 5–12) Based on these reports and others, a grand jury indicted Mr. Pacheco on nine counts of abusive sexual contact with a ward, in violation of 18 U.S.C. § 2244(a)(4), and three counts of sexual abuse of a ward, in violation of 18 U.S.C. § 2243(b). The government dismissed one of the sexual-abuse counts before trial, and the trial court granted Mr. Pacheco a directed verdict on one of the sexual-contact counts. He was convicted at trial on the remaining 10 counts and sentenced to a total of 19 years in prison.

In order to establish federal jurisdiction, the indictment alleged that each of the boys was in "official detention" at Casa Kokopelli. The jury was instructed that in order to find this element of the charge to be proved, the government had to show that each boy was detained at Casa Kokopelli at the direction of a federal employee or contractor "pending deportation." 18 U.S.C. § 2246(5)(A). To make this showing, the government presented testimony from two people. First was Jallyn Sualog, the deputy director for children's programs at the Office of Refugee Resettlement. She explained that each boy was at Casa Kokopelli awaiting reunification with a sponsor in the United States. (C.A. E.R. 569:2–3) Second was Albert Gallman, the district director for Arizona and Nevada with U.S. Citizenship and Immigration Services. Although he explained that each boy had been served with a notice to appear, the document that commences removal proceedings, he never said that any of the boys had been ordered deported from the United States. (C.A. Op. Br. at 16) Mr. Pacheco made a motion for a judgment of acquittal at the end of the government's case-in-chief and at the end of his defensive case. The trial judge denied them both.

The court of appeals affirmed the denial of these motions. The court first observed that the statute involved, 18 U.S.C. § 2246(5), "does not define 'pending deportation' and thus we interpret that phrase using the normal tools of statutory interpretation." *United States v. Pacheco*, 977 F.3d 764, 767 (9th Cir. 2020) (quoting *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1569 (2017)) (cleaned up). Then, after reviewing dictionaries and caselaw, the court held that the word "pending" is "commonly used to indicate an ongoing process with an awaited or expected decision in the future." *Id.* Next, the court noted that "whether a term is ambiguous does not turn solely on the dictionary definitions of its component words. Rather, the plainness or ambiguity of statutory

language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 767–68 (citations omitted and cleaned up). In light of this observation, the court concluded that "'official detention' is not limited merely to those who remain in custody after their immigration case is fully adjudicated and who are merely awaiting an inevitable removal." *Id.* at 768 (citing *Parker Drilling Mgmt. Services, Ltd. v. Newton*, 139 S. Ct. 1881, 1888 (2019)). The court concluded that the term encompassed "individuals who are being held in federal custody while their case is being adjudicated." *Id.* Having broadly and erroneously construed the term "pending deportation" in this way, the court affirmed the district court's denial of Mr. Pacheco's motions for a directed verdict. *Id.* at 769–70.

REASONS FOR GRANTING THE WRIT

The court of appeals's decision deviates so far from this Court's established statutory-interpretation method as to warrant this Court's corrective intervention. It did not attempt to ascertain the ordinary public meaning of "pending deportation" at the time § 2246 was adopted. It looked to the wrong context clues and to the legislative history to determine that the term "pending deportation" is ambiguous. And the caselaw it relied on does not confirm the meaning it imparted to the phrase. This Court should reverse the court of appeals, explaining that properly applying this Court's method of statutory interpretation should have led the court of appeals to reverse the denial of Mr. Pacheco's motions for a judgment of acquittal and remand with instructions to dismiss the indictment.

1. The ordinary public meaning of the phrase "pending deportation" in 1986 when § 2246 was enacted did not cover deportation *proceedings*.

"This Court has explained many times over many years that when the meaning of a statute's terms is plain, our job is at an end." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020). Where the "plain language" of a statute is "unambiguous," this Court's "inquiry begins with the statutory text, and ends there as well." *National Ass'n of Manufacturers v. Dep't of Defense*, 138 S. Ct. 617, 631 (2018) (quoting *BedRoc Limited, LLC v. United States*, 541 U.S. 176, 183 (2004)). In *Bostock*, this Court employed a two-step framework for determining the ordinary public meaning of statutory words. First, the Court "orient[s]" itself "to the time of the statute's adoption" and "examin[es] the key statutory terms." 140 S. Ct. at 1738. Where the "straightforward application of legal terms with plain and settled meanings" leads to a clear result, "that should be the end of the analysis." *Id.* at 1743 (quoting *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 135 (2d Cir. 2018) (en banc) (Cabranes, J., concurring)). Second, this Court looks to caselaw and legislative history to confirm its conclusion about the clarity of the ordinary public meaning of the statute at the time of its adoption. *Id.* at 1743–44, 1749. The court of appeals should have deployed the *Bostock* framework for statutory interpretation and reversed the trial judge's decisions to deny Mr. Pacheco's motions for a judgment of acquittal.

In order to resolve Mr. Pacheco's challenge to the denial of his motions, the court of appeals first had to parse the meaning of the phrase "pending deportation" in 18 U.S.C. § 2246(5), which defines "official detention" to include people who are in federal custody "pending

deportation."[1] *United States v. Pacheco*, 977 F.3d 764, 767 (9th Cir. 2020). Section 2246 was enacted as part of the Sexual Abuse Act of 1986. *See* Pub. L. No. 99-646, § 87, 100 Stat. 3592, 3622 (1986) (codified then at 18 U.S.C. § 2245).[2] Contemporary court decisions relied on dictionary definitions to confirm that "pending" means "begun, but not yet completed; during; before the conclusion of; unsettled; undetermined; in the process of settlement or adjustment." *State v. Hilborn*, 705 P.2d 192, 194 (Or. 1985) (quoting *Pending*, *Black's Law Dictionary* (4th ed. 1951)). These decisions thus confirm that, for instance, a *lawsuit* is "pending" "from its inception through the final judgment." *Nichols v. Pierce*, 740 F.2d 1249, 1256 (D.C. Cir. 1984).

Contemporary court decisions do not reveal a dictionary definition for "deportation." But usage of the term in contemporary court decisions confirms that "deportation," now as then, meant "the act or an instance of removing a person to another country; esp., the expulsion or transfer of an alien from a country." *Deportation*, *Black's Law Dictionary* (11th ed. 2019); *accord Marcello v. Bowen*, 803 F.2d 851, 852 (5th Cir. 1986) ("Marcello's attorney objected that there was no kind of notice provision regarding the effectuation of

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[1] To be sure, § 2246(5) defines "official detention" to include detainees who are in a variety of circumstances. But on this record there was no possibility that the boys could have been in any circumstance other than "pending deportation." That was the theory that was submitted to the jury, and thus the only statutory phrase that is relevant here. *See Chiarella v. United States*, 445 U.S. 222, 236 (1980) (explaining that this Court "cannot affirm a criminal conviction on the basis of a theory not presented to the jury").

[2] What was codified in 1986 at § 2245 was moved in 1994 to § 2246 as part of the Federal Death Penalty Act. *See* Pub. L. No. 103-322, § 60010, 108 Stat. 1796, 1972 (1994).

Marcello's *deportation*; he wanted several days' notice of a pending physical *removal* of Marcello from the United States."); *Hagen v. City of Winnemucca*, 108 F.R.D. 61, 65 (D. Nev. 1985) ("In addition, if the *deportation* occurs, the class representative would be forcibly *removed* from the United States, unable to participate effectively in any lawsuit.").

Contemporary understanding of how a *deportation proceeding* functions reflects this usage. "A deportation proceeding is a purely civil action to determine eligibility to remain in this country." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). "A deportation hearing is held before an immigration judge" whose "sole power is to order deportation." *Id.* Such a proceeding necessarily precedes actual deportation, and no deportation would happen if the proceeding did not result in a deportation order. Similarly, contemporary caselaw reveals a parallel distinction with respect to detention "pending exclusion proceedings," where those proceedings have not yet concluded, as opposed to detention pending actual exclusion. *Jean v. Nelson*, 472 U.S. 846, 850 (1985).

Thus the ordinary public meaning in 1986 for a person who was detained "pending deportation" was that the person was detained after their deportation proceedings had concluded but before their physical removal from the United States had been accomplished. This meaning is consistent with the detention practices of immigration authorities in the mid-1980s. With respect to aliens "pending deportation proceedings," the rule was that an "alien generally should not be detained or required to post bond except on a finding that he is a threat to the national security or that he is a poor bail risk." *Reno v. Flores*, 507 U.S. 292, 294–95 (1993) (quoting *Matter of Patel*, 15 I. & N. Dec. 666 (BIA 1976)) (cleaned up). Even for aliens with final orders of deportation, the Attorney General had

discretion to detain them until they were deported or to release them on bond or other conditions. 8 U.S.C. § 1252(c) (1952). These features of immigration law as they existed in 1986 thus reinforce the notion that the ordinary public meaning of detention "pending deportation" in § 2246(5) is that the person is detained after receiving a final order of deportation but before actually being removed from the United States.

Despite this ordinary, contemporary public meaning, the court of appeals examined the "specific context in which" statutory language "is used, and the broader context of the statute as a whole." *Pacheco*, 977 F.3d at 768 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). The court of appeals then looked for "context" in the remaining types of detention set forth in § 2246(5). *See id.* But the court of appeals did *not* look to the context in which detention "pending deportation" took place in 1986, as this Court's method of statutory interpretation requires. *See Bostock*, 140 S. Ct. at 1738. It was only with the Immigration Act of 1990 that Congress allowed immigration officials to routinely detain "aliens pending a decision as to whether or not they were to be deported." Mary Bosworth & Emma Kaufman, *Foreigners in a Carceral Age: Immigration and Imprisonment in the United States*, 22 Stan. L. & Pol'y Rev. 429, 442 (2011). Thus the context in 1986 was that detention "pending deportation" meant *only* detention after a deportation order had been entered.

In reaching a contrary conclusion, the court of appeals looked to the wrong context and thus arrived at the wrong meaning. The court of appeals looked to the other kinds of custody that comprise "official detention" and concluded that they all had in common a kind of custody "while their case is being adjudicated." *Pacheco*, 977 F.3d at 768. But looking to the context in which the words appear was not

appropriate, because there were no truly competing definitions of the phrase "pending deportation" from which to choose. *See McDonnell v. United States*, 136 S. Ct. 2355, 2368 (2016). And even if looking to context were appropriate, the court's characterization of the context was factually mistaken. An arrest need not lead to any criminal charge being brought at all, and yet "official detention" includes detention "following an arrest for an offense." 18 U.S.C. § 2246(5)(A). A material witness is not detained in connection with a criminal charge against that person, and yet "official detention" includes detained material witnesses. *Id.* A person civilly committed is in "official detention" whether or not criminal charges are pending against that person. *Id.* Thus even considering the kinds of detention that are linked to criminal proceedings, the detainee need not be the subject of such proceedings in order to be in "official detention."

Moreover, § 2246(5) lists types of detention for which the link to criminal proceedings is more tenuous. A person detained "pending extradition," *id.*, is necessarily first detained "following an arrest for an offense," and is only detained pending extradition once a court determines that "the crime of which the person is accused is extraditable" and that "there is probable cause to believe the person committed the crime charged." *Santos v. Thomas*, 830 F.3d 987, 991 (9th Cir. 2016) (en banc) (citations omitted). And a person detained "pending exclusion," 18 U.S.C. § 2246(5)(A) (cleaned up)—a term that is no longer used[3]— may not even be detained during formal court

[3] In 1996, "Congress abolished the distinction between exclusion and deportation procedures and created a uniform proceeding known as 'removal.' Congress made 'admission' the key word, and defined admission to mean 'the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." *Vartelas v. Holder*, 566 U.S. 257, 262 (2012) (citations omitted and cleaned up) (citing Illegal Immigration Reform and Immigrant

proceedings. The Attorney General had the discretion to "parole into the United States… any alien applying for admission to the United States," 8 U.S.C. § 1182(d)(5)(A) (1952), rather than have that person detained while a "special inquiry officer or immigration judge" determines whether the person should be excluded, *see* 8 U.S.C. §§ 1225(b), 1226(a) (1952).

Nor could it fairly be said that, in 1986, detention while deportation proceedings were ongoing was a necessary incident to detention after those proceedings were concluded and an order of deportation issued. *Cf. Bostock*, 140 S. Ct. at 1747 (reading a statutory term to include things that it "necessarily entails"). Thus the court of appeals was manifestly incorrect to conclude that the common feature of the kinds of "official detention" set forth in § 2246(5) was that they all required the detainee to be the subject of an ongoing proceeding. The only common feature that they actually share is that they were all kinds of detention that federal officers and agencies employed in 1986.

2. Legislative history and precedent confirm that the ordinary public meaning of detention "pending deportation" in 1986 was detention after a deportation order had issued.

At the second step of the statutory-interpretation framework, this Court looks to legislative history and caselaw to confirm the ordinary public meaning of statutory language. Here, each confirms that in 1986 detention "pending deportation" referred to detention

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Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009–546 (1996)).

that takes place after a detention order issues but before actual removal from the United States.

"Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it." *Bostock*, 140 S. Ct. at 1749 (quoting *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011)). But "historical sources" can clarify whether "a statutory term that means one thing today or in one context might have meant something else at the time of its adoption or might mean something different in another context." *Id.* at 1750. Here, the legislative history does not speak directly to the meaning of the phrase "pending deportation" in § 2246(5). The Department of Justice explained that it wanted the law to include all federal prisoners—people charged with or serving a sentence for a federal crime—because at the time not all federal prisons were within the special maritime and territorial jurisdiction of the United States (18 U.S.C. § 7):

> [T]he jurisdictional scope of H.R. 4876 should be expanded to cover offenses committed against any person in official detention in a federal facility. There are seven federal prisons which are not currently within the special maritime and territorial jurisdiction of the United States, although plans exist to bring them within such jurisdiction. Extension of jurisdiction to persons in official detention in a federal facility would assure coverage of sex offenses committed against inmates of a federal detention facility following, for example, arrest, surrender in lieu of arrest, charge or conviction of an offense, or an allegation or finding of juvenile delinquency. Such an extension of jurisdiction would also include coverage of persons in official detention in a federal facility pursuant to a State sentence.

Federal Rape Law Reform: Hearings Before the Subcommittee on Criminal Justice of the H. Comm. on

the Judiciary, 98th Cong., 2d Sess. 96 (1984) (prepared statement of Deputy Asst. Att'y Gen. Victoria Toensing).

Similarly, the committee report for the bill that enacted § 2246 noted that, under the law at the time, federal law punished "rape" that is "committed within the special maritime and territorial or special aircraft jurisdiction of the United States," or in Indian country. H.R. Rep. No. 99-594, at 7 (1986). The purpose of the law was to "expand[] Federal jurisdiction to include all Federal prisons," consistent with the Department of Justice's request. *Id.* at 11. "The Committee believes that the Federal Government's obligation to maintain order within prisons requires that there be Federal jurisdiction to include all Federal correctional, detention, and penal facilities." *Id.* at 12. The term "official detention" was not meant to include "supervision or other control (other than custody during specified hours or days) after release on bail, on probation, on parole, or following a finding of juvenile delinquency." *Id.* at 20. The legislative history thus indicates that a detainee whose deportation case is under review is not in "official detention" as that term is used in § 2246.

This Court's caselaw confirms that the ordinary meaning of detention "pending deportation" does not extend to detention while deportation *proceedings* are ongoing. As an adjective, the word "pending" means "in continuance" or "not yet decided." *Carey v. Saffold*, 536 U.S. 214, 219 (2002). And as a preposition, it means "through the period of continuance of" or "until the completion of." *Id.* So, this Court has reasoned, an application for collateral relief is "pending" under 28 U.S.C. § 2244(d)(1)(A) "so long as the ordinary state collateral review process is in continuance—*i.e.*, until the completion of that process." *Saffold*, 536 U.S. at 219–20. Consistent with this reasoning, this Court has also said

that a lawsuit "ceases to be pending once it is dismissed." *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1979 (2015). But this does not mean that a *deportation* is pending once the government merely accuses a person of being deportable.

Moreover, this Court's cases confirm that where detention pending deportation *proceedings* is concerned, the ordinary usage is to add the word "proceedings" to clarify the context. *See Flores*, 507 U.S. at 306 ("detaining unaccompanied alien juveniles pending deportation proceedings"); *INS v. Nat'l Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 185 (1991) ("released from custody pending deportation or exclusion proceedings"); *United States v. Salerno*, 481 U.S. 739, 748 (1987) ("detention of potentially dangerous resident aliens pending deportation proceedings"). The court of appeals thus erroneously rejected reliance on caselaw to confirm the ordinary usage. *See Pacheco*, 977 F.3d at 769 (rejecting Mr. Pacheco's reliance on the usage in *Zavala v. Ives*, 785 F.3d 367 (9th Cir. 2015)).

It is one thing for a deportation *proceeding* to be ongoing, and quite another for the act of physically removing a person from the United States to be ongoing. By including the former as part of the latter, the court of appeals elided this critical distinction.

Furthermore, the court of appeals's gloss on the statute suggests that deportation hearings are fundamentally unfair. The need to add the word "proceedings" to distinguish between the determination whether to deport someone and the deportation itself reflects a constitutional truism: "It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Flores*, 507 U.S. at 306 (citing *The Japanese Immigrant Case*, 189 U.S. 86, 100–

01 (1903)). A usage that collapses the deportation *proceedings* into the deportation itself implies that the outcome of the hearing is a foregone conclusion—an arbitrary result that is the very antithesis of due process. This absurdity cannot result from a proper method of statutory interpretation. *See United States v. Wilson*, 503 U.S. 329, 334 (1992) (explaining that an interpretation of a statute that would produce an "arbitrary" outcome is "a result not to be presumed lightly") (citing *United States v. Turkette*, 452 U.S. 576, 580 (1981)).

Thus the legislative history and this Court's caselaw confirm what the ordinary usage suggests. Detention "pending deportation" means detention during the period of time beginning when a person is ordered removed from the United States and ending when that person is removed. Applying this Court's method of statutory interpretation, the court of appeals should have reversed the denial of Mr. Pacheco's motions for judgment of acquittal.

3. The court of appeals's failure to apply this Court's method of statutory interpretation is unjustifiable in a legal system that relies on separation of powers and neutral principles.

In concluding that detention "pending deportation" begins the moment the government accuses a person of being deportable, the court of appeals turned this Court's method of statutory interpretation on its head. The court of appeals "reject[ed] the argument that if Congress meant to refer to 'official detention' as 'pending… deportation… proceedings,' it was required to use that exact language." *Pacheco*, 977 F.3d at 769. But this conclusion mischaracterizes Mr. Pacheco's argument and misunderstands the task of statutory interpretation.

Time and again this Court has said that it is not for courts to rewrite a statute passed by Congress and signed by the President. "Our constitutional structure does not permit this Court to rewrite the statute that Congress has enacted." *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1949 (2016). The "enlargement of [a statute] by the court… transcends the judicial function." *Nichols v. United States*, 136 S. Ct. 1113, 1118 (2016). This is especially true in the realm of criminal law, where "under our federal system it is only Congress, and not the courts, which can make conduct criminal." *Bousley v. United States*, 523 U.S. 614, 620–21 (1998). For this reason, "penal laws are to be construed strictly." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

There is a meaningful difference between deportation and deportation *proceedings*. Congress's requirement that the detainee be awaiting actual deportation (rather than simply be in deportation proceedings) in order for § 2246 to confer federal jurisdiction is a choice that courts must respect instead of disregard. The court of appeals reframed that contention as nit-picking, and then rejected it in favor of what it wished the statute actually said. "When courts apply doctrines that allow them to rewrite the laws (in effect), they are encroaching on the legislature's Article I power." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2120 (2016). The court of appeals's reasoning here does exactly that, and so cannot stand.

Nor are courts "free to rewrite the statute to the Government's liking." *Nat'l Ass'n of Manufacturers*, 138 S. Ct. at 629. Rather, "the judge's greatest duty is to interpret [a] statute in a neutral, nonpartisan manner that honors the text and renders it intelligible to the public." William N. Eskridge, *Interpreting Law: A Primer on How to Read Statutes and the Constitution* 35–36 (2016).

A court's task when interpreting a statute is to arrive at an "independent and neutral interpretation of the laws Congress has enacted." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 791 (2020) (statement of Gorsuch, J.). And that task begins with the statutory text itself. "This tenet—adhere to the text—is neutral as a matter of politics and policy. The statutory text may be pro-business or pro-labor, pro-development or pro-environment, pro-bank or pro-consumer. Regardless, judges should follow clear text where it leads." Kavanaugh, *supra*, at 2135.

By rewriting the definition of "official detention" to affirm federal jurisdiction in this case, the court of appeals discarded a neutral tenet of statutory interpretation in order to allow an exercise of federal power that Congress did not authorize. "Perhaps the clearest example of traditional state authority is the punishment of local criminal activity." *Bond v. United States*, 572 U.S. 844, 858 (2014) (citing *United States v. Morrison*, 529 U.S. 598, 618 (2000)). This Court has insisted on a "clear indication that Congress meant to reach purely local crimes, before interpreting the statute's… language in a way that intrudes on the police power of the States." *Id.* at 860 (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)). Here, the State of Arizona had jurisdiction to investigate and prosecute crimes occurring in federal contract facilities, so the clear statement this Court requires from Congress is lacking.

Facilities operated by Southwest Key, the federal contractor that operates Casa Kokopelli, are regularly inspected by officials of the State of Arizona. In 2018, Southwest Key settled an enforcement action brought by the Arizona Department of Health Services stemming in part from Mr. Pacheco's conduct in this case. It agreed to close 2 of its 13 shelters in Arizona, to stop accepting new

placements until the ADHS director approved, and to allow unannounced inspections by ADHS personnel for two years.[4]

If state officials may inspect a federal contractor's facilities for health and safety violations, surely they may also prosecute crimes that take place in those facilities. *Cf. id.* at 864 ("It is also clear that the laws of the Commonwealth of Pennsylvania (and every other State) are sufficient to prosecute Bond."). By rewriting the statute to assert federal jurisdiction here, the court of appeals ignored the "background assumption that Congress normally preserves the constitutional balance between the National Government and the States." *Id.* at 862 (citation omitted and cleaned up). This judicial revision of statutory text disrespected the balance of federal and state power in the realm of criminal law enforcement.

[4] *See* Laura Gomez, *Southwest Key to freeze placement of migrant children in AZ shelters, close 2 locations*, *AZ Mirror*, Oct. 24, 2018, *available at* <https://bit.ly/3u9R7q7>.

CONCLUSION

The petition for a writ of certiorari should be granted, the court of appeals's decision should be reversed, and this Court should remand with instructions to reverse Mr. Pacheco's convictions.

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States of America, *Plaintiff - Appellee*, vs. Levian dela Car Pacheco Pacheco, aka Levian D. Pacheco, *Defendant - Appellant.*	No. 19-10014 D.C. No. 2:17-cr-1152-PHX-SPL **OPINION**

On Appeal from the United States District Court
for the District of Arizona
Steven P. Logan, District Judge, Presiding

Argued and Submitted August 12, 2020
San Francisco, California

Filed October 6, 2020

Before: Susan P. Graber and Daniel A. Bress, Circuit Judges, and Robert T. Dawson,[*] District Judge

Opinion by Judge Dawson

[*] The Honorable Robert T. Dawson, United States District Judge for the Western District of Arkansas, sitting by designation.

OPINION

DAWSON, District Judge:

Levian Pacheco Pacheco appeals his convictions for sexually abusing minors at a facility that housed unaccompanied noncitizen children. After an eight-day jury trial, Pacheco was convicted of seven counts of abusive sexual contact with a ward, two counts of sexual abuse of a ward, and one count of attempted sexual abuse of a ward. *See* 18 U.S.C. §§ 2243(b), 2244(a)(4).

To establish federal jurisdiction under the statutes of conviction, the victims must be in "official detention"—a term that extends to detentions "pending… deportation." 18 U.S.C. § 2246(5)(A). Pacheco contends that his convictions should be vacated because the government presented insufficient evidence to demonstrate that the minors were in official detention. In Pacheco's view, a person is "pending deportation" only if he is awaiting actual removal from the United States following a final order of removal.

We hold that, under 18 U.S.C. § 2246(5)(A), the phrase "pending… deportation" does not require a finding of actual or inevitable removal from the United States. Instead, it is sufficient that, as here, the government had initiated removal proceedings against the minors, even though those proceedings were unresolved and the minors therefore did not face a certainty of deportation. Because the government presented testimony establishing that the minors in this case had been served with Notices to Appear in Immigration Court and were placed into removal proceedings that created the

possibility of deportation, the statute's jurisdictional element was met.[1]

I.

The minors were approximately fifteen to seventeen years old when they immigrated illegally to the United States. After the minors were taken into federal custody, the government placed them at Casa Kokopelli, a shelter that housed unaccompanied noncitizen children pursuant to a federal contract. From May 2016 to July 24, 2017, Levian Pacheco Pacheco was employed as a youth care worker at Casa Kokopelli. Pacheco's duties consisted of escorting the minors throughout the facility, monitoring the hallways, and conducting headcounts.

At Pacheco's trial, the minors testified that Pacheco had grabbed their genitalia through over-the-clothes touching. Two minors testified that Pacheco performed fellatio on them. One of the minors testified that Pacheco propositioned him for anal sex, immediately after Pacheco unclothed himself and the minor and grabbed the minor's genitalia.

The government presented testimony from Jallyn Sualog, the deputy director for children's programs at the Office of Refugee Resettlement (ORR).[2] When the minors were housed at Casa Kokopelli, each minor had been served with a Notice to Appear in Immigration Court and their removal cases were in the process of being adjudicated. That was so even though, later, the minors were placed with sponsors in the United States and were

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[1] Pacheco raises additional evidentiary and sentencing challenges. We address these issues in a separate unpublished memorandum disposition, in which we affirm Pacheco's convictions.

[2] ORR is a program within the United States Department of Health and Human Services.

not ultimately deported. At the close of the government's case-in-chief, Pacheco moved for a Rule 29 judgment of acquittal on all counts. The court granted the motion on one count and denied the motion for the other counts. Pacheco renewed the motion after the defense rested; the court denied the renewed motion as well. On appeal, Pacheco contends the district court erred in denying the motion because the minors were not "pending… deportation" within the meaning of the statute. See 18 U.S.C. §§ 2243(b)(1), 2244(a)(4) (incorporating § 2243(b) by reference); 2246(5)(A) (defining "official detention" to include detention "pending . . . deportation").

II.

A.

This cased presents a question of statutory interpretation, which we review *de novo*. *United States v. Ventre*, 338 F.3d 1047, 1052 (9th Cir. 2003). The statutory definition of "official detention" is:

> *detention* by a Federal officer or employee, or under the direction of a Federal officer or employee, following arrest for an offense; following surrender in lieu of arrest for an offense; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following civil commitment in lieu of criminal proceedings or pending resumption of criminal proceedings that are being held in abeyance, or *pending* extradition, *deportation*, or exclusion[.]

Id. § 2246(5)(A) (emphasis added).

Pacheco argues for a limited construction of the phrase "pending… deportation." He contends that the natural reading of the phrase applies exclusively to persons awaiting actual, physical removal from the United

States, as opposed to potential removal. The statute does not define "pending… deportation" and, thus, "we interpret that phrase using the normal tools of statutory interpretation." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1569 (2017).

We begin our analysis with the text of the statute and with the presumption that Congress intended that the words used be given their plain and ordinary meaning. *United States v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999). The plain meaning of the text controls unless it is ambiguous or leads to an absurd result. *See Coeur d'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 692–94 (9th Cir. 2004); *SEC v. McCarthy*, 322 F.3d 650, 655 (9th Cir. 2003). To determine the ordinary meaning of an undefined term, we may refer to dictionary definitions. *See United States v. Santos*, 553 U.S. 507, 511 (2008) (utilizing dictionary definitions).

The question here is what constitutes "pending" as that term is used in 18 U.S.C. § 2246(5)(A). We turn first to the dictionary definition. Some dictionaries define "pending" as not requiring an event to occur or be completed. "Pending" means "through the period of continuance… of" or "until the… completion of" when used as an adverb, and it means "in continuance" or "not yet decided" when used as an adjective. *Carey v. Saffold*, 536 U.S. 214, 219–20 (2002) (quoting Webster's Third New International Dictionary 1669 (1993)); *see also, e.g.*, *Black's Law Dictionary*, Bryan A. Garner, Editor-in-Chief (11th ed. 2019) (defining "pending" as "1. Throughout the continuance of; during… 2. While awaiting; until," (prep.), and as "1. Remaining undecided; awaiting decision" (adj.)). These definitions show that pending is commonly used to indicate an ongoing process with an awaited or expected decision in the future.

Of course, as the Supreme Court has repeatedly cautioned in the context of statutory interpretation, whether a term is ambiguous "does not turn solely on dictionary definitions of its component words." *Yates v. United States*, 574 U.S. 528, 537 (2015) (plurality opinion). Rather, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). When analyzing a statute, we must "look to the provisions of the whole law" to determine the provision's meaning. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) (quoting *United States v. Heirs of Boisdoré*, 49 U.S. (8 How.) 113, 122 (1849)).

In the present case, the statutory context reveals that "official detention" is not limited merely to those who remain in custody after their immigration case is fully adjudicated and who are merely awaiting an inevitable removal. *See Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1888 (2019) (holding that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"). The definition of "official detention" includes individuals who are being held in federal custody while their case is being adjudicated, including detention "following arrest for an offense," "following a charge… of an offense," "following… an allegation… of juvenile delinquency," and "following civil commitment… pending resumption of criminal proceedings that are being held in abeyance." 18 U.S.C. § 2246(5)(A). Thus, the statutory context does not provide support for adopting a more narrow definition of "pending deportation."

Although we cannot find a federal case authoritatively defining "pending" in the context of 18 U.S.C.

§ 2246(5)(A), we note that the meaning of "pending" has been considered in other statutory contexts when the term is not defined. This too supports our interpretation. In *Carey*, the Supreme Court defined "pending" as "in continuance" or "not yet decided" when determining whether an application for habeas relief was timely. 536 U.S. at 219. Applying those definitions, the Court concluded that a habeas application was pending until it had "achieved final resolution." *Id.* at 220. Outside the habeas context, we have ruled that an action is pending so long as the parties' case has not reached its final resolution. For example, in *Beverly Community Hospital Ass'n v. Belshe*, 132 F.3d 1259, 1264–65 (9th Cir. 1997), we held that a statutory reference to "pending" lawsuits encompassed not only undecided cases at the district court level, but also cases in the process of appeal. Both *Carey* and *Beverly* defined "pending" based on whether there was an active adjudication of the relevant dispute.

With this guidance, we conclude that deportation is "pending" for the purposes of 18 U.S.C. § 2246(5)(A) when the victims of the defendant's conduct are in unresolved deportation or removal proceedings. We interpret "pending" by giving the term its ordinary meaning. *See Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) ("We thus begin and end our inquiry with the text, giving each word its ordinary, contemporary, common meaning." (internal quotations omitted)). Thus, where, as here, the government had issued Notices to Appear in Immigration Court, Pacheco's victims were pending deportation until the completion of that process, whether it resulted in deportation or not. In other words, the case has not "achieved final resolution," *Carey*, 536 U.S. at 220, and the victims are "pending… deportation" insofar as the proceedings could result in their removal from the United States.

Our construction is consistent with common usage of the word "pending." For example, we often refer to nominations that are "pending Senate confirmation" even though there is no guarantee that a nominee will ultimately be confirmed. A nomination is "pending" before the Senate as soon as the process begins, even if the Senate adjourns without acting or rejects the nominee.

Pacheco's reliance on *Zavala v. Ives*, 785 F.3d 367 (9th Cir. 2015), does not change our analysis. There, we interpreted "official detention" within a credit sentencing statute to mean that a noncitizen was entitled to credit toward his sentence when the U.S. Immigration and Customs Enforcement Service ("ICE") detained him pending potential criminal prosecution, rather than pending deportation in the sense of being removed from the country. *Id.* at 370–73. Unlike in *Zavala*, the victims here were in custody pending their civil deportation hearings; they were not detained for purposes of criminal prosecution. Moreover, we reject the argument that if Congress meant to refer to "official detention" as "pending… deportation… proceedings," it was required to use that exact language. Pacheco opines that omission of the word "proceedings" implies that a final order of removal is necessary to be "pending . . . deportation." But the provisions that Pacheco cites as support for this argument, 18 U.S.C. § 3142(d)(2) and 8 U.S.C. § 1231(a)(3), are unrelated to the statutes at issue in this case. Accordingly, Pacheco's argument on this point is not persuasive.

B.

The evolution of the statute over time affirms Congress' intent to broadly protect federal detainees from sexual abuse. The statutes of conviction were originally

enacted as part of the Sexual Abuse Act of 1986, criminalizing aggravated sexual abuse, sexual abuse, and abusive sexual contact by any person "in the maritime and territorial jurisdiction of the United States or in a Federal prison." *United States v. Mujahid*, 799 F.3d 1228, 1232–33 (9th Cir. 2015) (quoting Sexual Abuse Act of 1986, Pub. L. No. 99-654, 100 Stat. 3660 (codified as amended at 18 U.S.C. §§ 2241–2244)). In 2006, Congress expanded the jurisdictional reach of the statutes to include offenses "in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the Attorney General." *Id.* at 1233 (quoting Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 1177(a), 119 Stat. 2960, 3125 (2006) (codified as amended at 18 U.S.C. §§ 2241–2244)). In 2007, Congress further extended the jurisdictional reach to encompass "any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency…." *See* 18 U.S.C. §§ 2241–2244; Pub. L. 110-161, 121 Stat. 1844 (Dec. 26, 2007). That Congress has continually expanded the coverage of the statute also militates against Pacheco's request that we construe the statute narrowly.

III.

Pacheco also contends that the district court erred in denying his Rule 29 motion because the evidence was insufficient to show that the minors were pending deportation. In determining whether evidence was insufficient to sustain a conviction, we consider whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Nevils*, 598 F.3d 1158, 1163–64

(9th Cir. 2010) (en banc) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

When viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the children in Pacheco's case were pending deportation. Pacheco argues that the children were ultimately united with sponsors in the United States, rather than deported. Nevertheless, the government presented testimony demonstrating that either ICE or Border Patrol had initiated removal proceedings against each of the minor victims. Those proceedings were ongoing when Pacheco's conduct occurred. Applying our construction of § 2246(5)(A), we hold that any rational juror could have reached the conclusion that the minors were "pending… deportation." Accordingly, the district court did not err in denying Pacheco's Rule 29 motion.

* * *

For the foregoing reasons and those set forth in our accompanying memorandum disposition, we affirm Pacheco's convictions on all counts.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States of America, *Plaintiff - Appellee*, vs. Levian dela Car Pacheco Pacheco, aka Levian D. Pacheco, *Defendant - Appellant.*	No. 19-10014 D.C. No. 2:17-cr-1152-PHX-SPL **MEMORANDUM**[*]

On Appeal from the United States District Court
for the District of Arizona
Steven P. Logan, District Judge, Presiding

Argued and Submitted August 12, 2020
San Francisco, California
Filed October 6, 2020

Before: GRABER and BRESS, Circuit Judges, and DAWSON,[**] District Judge.

Levian Pacheco Pacheco appeals his sentence and conviction for seven counts of abusive sexual contact with a ward, two counts of sexual abuse of a ward, and one count of attempted sexual abuse of a ward. According to trial testimony, Pacheco sexually abused numerous

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The Honorable Robert T. Dawson, United States District Judge for the Western District of Arkansas, sitting by designation.

minors at the Casa Kokopelli Southwest Key Facility in Mesa, Arizona. In a published opinion issued concurrently with this memorandum disposition, we hold that the evidence sufficed to prove that the minors in this case were in official detention for purposes of 18 U.S.C. § 2246(5)(A). We now reject the remainder of Pacheco's arguments.

1. Pacheco contends that his conviction for attempted sexual abuse should be reversed for lack of evidence showing a substantial step toward anal penetration. To constitute a substantial step, "[t]here must be some appreciable fragment of the crime in progress." *United States v. Runco*, 873 F.2d 1230, 1232 (9th Cir. 1989) (internal quotation marks omitted). The minor testified that Pacheco entered the minor's room during the morning hours. Pacheco followed the minor to the bathroom, where he took off the minor's shorts and his own shorts. Pacheco then grabbed the minor's genitalia and placed the minor's phallus on Pacheco's buttocks. Pacheco propositioned anal sex, but the minor refused. Relying on this testimony, any rational juror could have concluded that Pacheco took a substantial step toward anal penetration. *See United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc) ("after viewing the evidence in the light most favorable to the prosecution, the reviewing court must determine whether this evidence, so viewed, is adequate to allow 'any rational trier of fact [to find] the essential elements of the crime beyond a reasonable doubt.'" (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis omitted)).

2. Pacheco further contends that the district court abused its discretion in permitting expert testimony from Wendy Dutton, a forensic interviewer specializing in child abuse. Specifically, Pacheco argues that the district court failed to satisfy its gatekeeping responsibility under Rule

702. *See United States v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1188 (9th Cir. 2019) (holding that the district court must ensure that expert testimony is both relevant and reliable, before admitting it), *cert. denied*, 140 S. Ct. 1135 (2020). Pacheco also argues that Dutton's testimony improperly bolstered the minors' credibility under Rule 403.

a. Dutton's testimony was relevant because she discussed why children similar to the minors in this case might delay in disclosing sexual abuse. Although jurors might have a common understanding that victims of abuse are reluctant to report and disclose, they may not understand the reasons for delayed reporting or partial disclosure. Therefore, Dutton's testimony was relevant. Fed. R. Evid. 401.

b. Furthermore, the district court ensured the testimony's reliability. Before trial, the parties briefed the issue of reliability, after which the court held that Dutton's testimony was admissible under Rule 702. When Dutton testified, the court satisfied its gatekeeping role by asking the government to lay additional foundation as to Dutton's experience and knowledge in the relevant cultural and age groups. The government did so. Accordingly, the district court ensured that Dutton's testimony rested on a reliable foundation.

c. Moreover, Dutton's testimony was not unfairly prejudicial under Rule 403. The risk of prejudice was minimized because Dutton's testimony was limited to the general behavioral characteristics of sexually abused children. She did not suggest whether the jury should believe these minors specifically. *See Brodit v. Cambra*, 350 F.3d 985, 991 (9th Cir. 2003) (stating that expert testimony is admissible when it "concerns [the] general

characteristics of victims and is not used to opine that a specific child is telling the truth").

d. Even if the court improperly admitted Dutton's testimony, any error was harmless. During the trial, the government elicited testimony from the seven minor victims. They testified to the details of each crime. Taken together, there was more than enough evidence for a jury to reach a guilty verdict.

3. Pacheco also argues that his sentence was unreasonable. The district court imposed a six-level upward departure based on aggravating circumstances, which amounted to nineteen years' imprisonment. Pacheco's sentence is "subject to a unitary review for reasonableness." *United States v. Mohamed*, 459 F.3d 979, 987 (9th Cir. 2006); *see also United States v. Vasquez-Cruz*, 692 F.3d 1001, 1008 (9th Cir. 2012) (reaffirming that departures are reviewed as part of the substantive reasonableness analysis and not for procedural error).

a. Pacheco argues that the district court improperly considered the risk of HIV infection at sentencing. Pacheco had HIV when he committed the conduct at issue. The court repeatedly described Pacheco's conduct as exposing the minors to a "potential death sentence." Pacheco contends that the court's remark lacked any support in the record and was medically unsound. Notwithstanding the district court's "death sentence" remark, the court appropriately explained that it imposed the upward departure because of several factors: the potential risk of HIV infection, the fact that the minors came to the United States to seek safety, and the fact that Pacheco held a position of trust as a supervisor at Casa Kokopelli. These determinations are supported by the record, and they are precisely the sort of conduct contemplated by U.S. Sentencing Guidelines Manual

§ 5K2.0(a)(1) (permitting departure based on aggravating circumstances in cases involving child crimes and sexual offenses).

b. Pacheco also argues that his sentence was unreasonable because it amounted to a "300% trial penalty"—as measured from a six-year plea offer that he rejected before trial. Pacheco suggests that the disparity between the pretrial offer and the sentence demonstrates that the district court punished him for exercising his right to trial. A careful examination of the sentencing transcript reveals that the court made no comment about Pacheco's decision to go to trial. Accordingly, there is no basis to conclude that the district court penalized Pacheco for exercising his trial rights.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States of America, *Plaintiff - Appellee*, vs. Levian dela Car Pacheco Pacheco, aka Levian D. Pacheco, *Defendant - Appellant.*	No. 19-10014 D.C. No. 2:17-cr-1152-PHX-SPL ORDER

Filed December 31, 2020

Before: GRABER and BRESS, Circuit Judges, and DAWSON,[*] District Judge.

The panel judges have voted to deny Appellant's petition for rehearing. Judges Graber and Bress have voted to deny the petition for rehearing en banc, and Judge Dawson has so recommended.

The full court has been advised of Appellant's petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellant's petition for panel rehearing and rehearing en banc, Docket No. 63, is DENIED.

[*] The Honorable Robert T. Dawson, United States District Judge for the Western District of Arkansas, sitting by designation.