NO.

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID LEROY EARLS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. **Whether the failure of the Tenth Circuit to apply the rule of lenity to 18 U.S.C. § 2242(2)(A) resulted in an interpretation of ambiguous language in the statute that denied Petitioner his right to due process under the 5th Amendment. The statute prohibits engaging in a sexual act with a person incapable of appraising the nature of the conduct, and the phrase "incapable of appraising the nature of the conduct" is ambiguous, as evidenced by different interpretations of similar language in sex abuse statutes from different states. The Tenth Circuit interpretated the ambiguous language broadly and expanded the scope of potential victims to include those who lack the ability to consider the implications of their conduct on others. In so doing, the Tenth Circuit added language not contained in 18 U.S.C. § 2242(2)(A).**

PARTIES TO THE PROCEEDING

Petitioner David Leroy Earls was the defendant-appellant below.

Respondent United States of America was the plaintiff-appellee below.

STATEMENT OF RELATED PROCEEDINGS

U.S. District Court:

On October 5th, 2022, judgment was entered against Petitioner David Leroy Earls in *United States v. Earls*, No. CR-21-00136-RAW (E.D. Okla. Oct. 5th, 2022). **App. A1-A7.**

U.S. Court of Appeals:

On February 21, 2025, the Tenth Circuit affirmed Mr. Earls' convictions in a published decision, *United States v. Earls*, No. 22-7051, 129 F.4th 850 (10th Cir. 2025). **App. A10-A36.** Mr. Earls' petition for rehearing and rehearing en banc was denied on April 7, 2025. **App. A37.**

United States Supreme Court

Petitioner's application for extension of time was granted until August 5, 2025. **App. A38.**

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, David Leroy Earls, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on June 10, 2024.

OPINION BELOW

The Tenth Circuit's reported decision in Mr. Earls' case is available at 129 F.4th 850 (10th Cir. 2025) and is in the Appendix at **A10-A36.**

JURISDICTION

The United States District Court for the Eastern District of Oklahoma had jurisdiction in this criminal action pursuant to 28 U.S.C. § 3231. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and entered judgment on February 21, 2025. **App. A10**. Petitioner filed a timely petition for rehearing, which was denied on April 7, 2025. **App. A37**. On June 30, 2025, this Court granted a thirty-day extension to file this Certiorari petition, until August 5, 2025. **App. A38.** This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides:

> No person …shall be …deprived of life, liberty, or property, without due process of law.

18 U.S.C. § 2242(2)(A) provides:

> Whoever, …in the territorial jurisdiction of the United States …engages in a sexual act with another person if that person is incapable of appraising the nature of the conduct …or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life.

STATEMENT OF THE CASE

Sometime during late 2019 or early 2020, thirty-five-year-old David Leroy Earls had sexual relations with eighteen-year-old C.P. C.P. has been diagnosed with a mild to moderate intellectual disability and suffers from schizophrenia affective disorder and bipolar disorder with psychotic features. *United States v. Earls,* 129 F.4th 850, 856 (10th Cir. 2025). She has memory issues. However, C.P. enjoys reading and understands math at a second-grade level. *Id.* at 857. She cannot live independently, but she helps with household chores and enjoys feeding and taking care of animals. *Id.* C.P. testified at Mr. Earls' trial and was able to describe sex and identify the body parts involved. *Id.* at 858. She understood that intercourse could result in pregnancy and was aware that she had a birth control implant in her arm to prevent pregnancy. *Id.* The evidence was that the sexual activity between the two was consensual; Mr. Earls told law enforcement that C.P. had "constantly badgered" him into having sex with him. *Id.* There was no evidence presented that Mr. Earls ever forced C.P. into sexual activity. Mr. Earls was aware of C.P.'s mental disabilities but also believed her

to be "smart" at times. *Id.* at 858. He also admitted that she had occasional bad days, when she would "withdraw[ ] into her own world." *Id.*

A jury in the Eastern District of Oklahoma convicted Mr. Earls of three violations of 18 U.S.C. § 2242(2)(A) for three different sexual acts. Count One charged Mr. Earls with penetration between his penis and C.P.'s vulva. Count Two charged him with penetration of C.P.'s genital opening with his finger. Count Three charged Mr. Earls with contact between his mouth and C.P.'s vulva. *Earls,* 129 F.4th at 856. As Mr. Earls admitted to these acts, the only issue for the jury was whether C.P. was "incapable of appraising the nature of the conduct" between Earls and C.P. and if so, whether Mr. Earls knew of the incapacity. *Id.* The jury received no definitions of any words used in 18 U.S.C. § 2242(2)(A) and was simply instructed as to the elements contained in the statute. Mr. Earls was convicted of all three counts and sentenced to serve 140 months in prison. *Id.* at 859.

On appeal, Mr. Earls alleged, among other things, that the evidence was insufficient to support his convictions. He did not claim that 18 U.S.C. § 2242(2)(A) was vague as written but instead argued that the language of the statute was ambiguous and to interpret the statute in a constitutional fashion, the court should apply the rule of lenity. As the evidence was uncontroverted that C.P. understood the essential nature of sexual conduct and its immediate consequences, Mr. Earls argued that the government had failed to establish his guilt beyond a reasonable doubt. The

Tenth Circuit did not explicitly determine 18 U.S.C. § 2242(2)(A) to be unambiguous but refused to address the rule of lenity and instead applied its own interpretation of § 2242(2)(A). Even after Mr. Earls pointed out in a petition for rehearing that the Tenth Circuit failed to address ambiguity or the rule of lenity in its decision, the court refused to explain its broad view of § 2242(2)(A). The Tenth Circuit denied Mr. Earls' petition for rehearing without an opinion.

The Tenth Circuit went beyond any plain meaning of the words in the statute and concluded that "appraising the nature of the [sexual] conduct" included far-reaching consequences such as the impact on "the human environment surrounding the victim" and the "likely objectionable, or disruptive, nature of the charged conduct to C.P.'s personal life and her surrounding family and community." *Earls,* 129 F.4th at 860.[1] In other words, the Tenth Circuit determined that the evidence of guilt was sufficient because C.P. did not appear to understand that others in her family and community would find sex with David Earls to be objectionable.[2]

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[1] The Tenth Circuit provided no authority for this interpretation of the "incapable of appraising the nature of the conduct" language from § 2242(2)(A). The court cited to an unpublished decision that shed little light on the relevant language. *See United States v. R.D.A., Jr.,* 156 F.3d 1245, 1998 WL 480158 (10th Cir. 1998) (finding that the victim did not know the difference between a "good touch" and a "bad touch," and did not understand that sodomy was inappropriate). *Earls,* 129 F.4th at 860.

[2] This certainly requires *someone* to make a moral or value judgment. *Cf.* Model Penal Code § 213.1 commentary at 321-23 (1980)(rejecting a requirement that the government prove that a victim of sexual abuse lacked "the ability to comprehend the moral nature of the act" in favor of a standard requiring proof that the person was "incapable of appraising the nature of her conduct"; "[b]y specifying that the woman

Unlike many state statutes, 18 U.S.C. § 2242(2)(A) does not limit its application to those with a mental illness or an intellectually deficiency. The incredibly broad parameters of the Tenth Circuit's definition could apply to many, if not most, people who engage in sexual activity for the first time. Only the wisest of teenagers or young adults consider all the environmental consequences or possible community objections to their actions or conduct that may affect them in the long term. There was no evidence as to who made the decision regarding birth control for C.P., but she was aware that she had an implant, and she understood *why* she had the implant. Had C.P. decided to begin using birth control on her own, or at least consented to using birth control, this would seem a relevant consideration under § 2242(2)(A). The Tenth Circuit's interpretation did not recognize the importance of this decision.

Finally, the Tenth Circuit found that the district court erred in assessing a two-level enhancement under U.S.S.G. § 4A1.1 because Mr. Earls was not on probation when he had sex with C.P. The case was remanded to the district court for resentencing on this issue alone. No date has been set, but the sentencing issue is not pertinent to the issues raised in this petition.

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must lack ability to assess the 'nature' of her conduct, the statute is intended to avoid questions of value judgment and of remote consequences of immediate acts").

REASONS FOR GRANTING THE WRIT

I. By failing to apply the Rule of Lenity, the Tenth Circuit adopted an interpretation of 18 U.S.C. § 2242(2)(A) that is unconstitutionally vague and violates Petitioner's right to due process under the Fifth Amendment.

a. The Rule of Lenity

History

The Rule of Lenity exists in part to protect the Due Process Clause's promise that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Bittner v. United States*, 598 U.S. 85, 102 (2023), citing to *McBoyle v. United States,* 283 U.S. 25, 27 (1931). Scholars trace the rule back to Henry VIII and the extensive use of capital punishment during his reign for comparatively minor offenses. To compensate, courts – unwilling to see pickpockets hanged – created the rule of strict construction. Livingston Hall, *Strict or Liberal Construction of Penal Statutes,* 48 Harvard L. Rev. 748, 750 (1935). Essentially, the rule provides that a criminal statute cannot be interpreted to extend "beyond the plain meaning of its words." *United States v. Morris,* 39 U.S. (14 Pet.) 464, 475 (1840). The rule of strict construction crossed the Atlantic into American statutory interpretation and was first acknowledged by the Supreme Court in *United States v. Lawrence,* 3 U.S. (3 Dall.) 42, 45 (1795). *See also United States v. Wiltberger,* 18 U.S. (5 Wheat.) 76 (1820). Over two hundred years ago, Chief Justice

Marshall justified the rule on grounds of constitutional rights (liberty) and structure (legislative supremacy):

> The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, *not in the judicial department*.

Wiltberger, 18 U.S. at 95 (emphasis added).

During the nineteenth century, the Supreme Court continued to apply the rule of strict construction. *Morris,* 39 U.S. at 475. The rule reflected a strong preference for individual liberty and against excessive punishments, and it protected these values by narrowly construing a statute anytime the "plain meaning" of the statutory language was "reasonably open to question," especially in the case of potentially harsh punishment. J.G. Sutherland, *Statutes and Statutory Construction*, § 349-50, 438-41 (1891). In cases where the punishment was great, courts demanded a greater "degree of strictness" from Congress.[3]

In the twentieth century, the rule of strict construction morphed into the Rule of Lenity. *Callihan v. United States,* 364 U.S. 587, 596 (1961). The Rule of Lenity seeks to avoid ambiguity where possible, looking first to any clearly expressed Congressional intent to resolve any ambiguity. *See Bell v. United States,* 349 U.S. 81, 83

[3] Joel Prentiss Bishop, *Commentaries on the Law of Statutory Crimes; Including the Written Laws and Their Interpretation in General. What is Special to the Criminal Law, and the Specific Statutory Offences as to Both Law and Procedure,* § 193, at 185-87 (2d. ed. 1883).

(1955). (However, "[w]hen Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity."). *Id.*

Present Application of the Rule

It is now a "familiar principle" that "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Skilling v. United States,* 561 U.S. 358, 410 (2010). The application of the rule has not been entirely consistent, however. Some justices have held that the rule "applies only if a statute remains grievously ambiguous after we have consulted everything from which aid can be derived." *Brown v. United States,* 602 U.S. 101, 122 (2024)(internal citations omitted). Other justices apply the rule when a "reasonable doubt persists" as to the meaning of a statute after "all legitimate tools of interpretation have been exhausted." *See, e.g., Abramski v. United States,* 573 U.S. 169, 204 (2014)(Scalia, dissenting, quoting *Moskal v. United States,* 498 U.S. 103, 108 (1990)(Marshall, J.). The Chief Justice has written, albeit in a dissent, that lenity should apply before resorting to statutory purpose or legislative history. *See United States v. Hayes,* 555 U.S. 415, 436-37 (2009)(Roberts, C.J., argued that lenity, rather than legislative history, should control.). "Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text." *Crandon v. United States,* 494 U.S. 152, 160 (1990). This makes sense, for if an extensive analysis of legislative history is

required to understand the meaning of a criminal statute, how can a law be said to provide fair notice of prohibited conduct?

This Court's decision in *United States v. Santos,* 553 U.S. 507 (2008) illustrates the inconsistent application of the Rule of Lenity since the turn of the century. In that case, the Court addressed whether "proceeds" in the federal money laundering statute included only transactions involving criminal profits or also those involving criminal receipts. Justice Scalia noted that lenity "vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed." He rejected what he referred to as "the impulse to speculate regarding a dubious congressional intent," and instead that the Court should "interpret ambiguous criminal statutes in favor of defendants, not prosecutors." *Id.* at 515, 519.[4] Justice Paul Stevens, concurring in the judgment only, joined by Chief Justice John Roberts and Justices Anthony Kennedy and Stephen Breyer, argued in dissent that statutory context and purpose removed all ambiguity in *Santos* and thus the rule of lenity did not apply (Alito, J. dissenting).

The Rule of Lenity prevents courts from giving the words of a criminal statute "a meaning that is different from [their] ordinary, accepted meaning, and that disfavors the defendant." *Burrage v. United States,* 571 U.S. 204, 216 (2014). When a

[4] Justice Scalia advocated for a return to an originalist conception of lenity that aligned with a textualist view that the present majority of the Supreme Court should find appealing.

criminal statute has two possible readings, a court should not "'choose the harsher alternative'" unless Congress has "'spoken in language that is clear and definite.'" *United States v. Bass,* 404 U.S. 336, 347–349 (1971). Generally, the Rule of Lenity applies when other methods do not decisively dispel the statute's ambiguity.[5] *Skilling,* at 410; *see*, *e.g., Scheidler v. National Organization for Women, Inc.,* 537 U.S. 393, 409 (2003); *Cleveland v. United States,* 531 U.S. 12, 25 (2000); *Crandon v. United States,* 494 U.S. 152, 158 (1990). "[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct ...we apply the rule of lenity and resolve the ambiguity in [the defendant]'s favor." *United States v. Granderson,* 511 U.S. 39, 54 (1994).

b. 18 U.S.C. § 2242(2)(A) contains ambiguous language.

Prosecuting crimes involving sexual abuse or rape has long been the purview of the states, but the *McGirt*[6] decision has led to a greater number of convictions for sexual abuse in Oklahoma than there were prior to the decision. The United States Sentencing Commission reports that there were 12 defendants convicted of sexual abuse crimes in the Northern and Eastern Districts of Oklahoma in 2020. There were

[5] Much of the "Rule of Lenity" analysis contained in this petition for rehearing was taken from the dissent to *Abramski v. United States,* 573 U.S. 169, 203 (2014), where this Court interpreted language from 18 U.S.C. § 922(a)(6). The 5-4 decision is further evidence of the disagreement between members of this Court as to how to apply rules of statutory interpretation.

[6] *McGirt v. Oklahoma,* 591 U.S. 894 (2020) confirmed that approximately half of Oklahoma remained Indian Territory.

91 convictions for sexual abuse in the Northern and Eastern Districts in 2024.[7] This number, while on the rise in Oklahoma, remains small in comparison to the number of state prosecutions for sexual abuse. There is no federal authority interpreting the ambiguous language in 18 U.S. C. § 2242(2)(A). It therefore makes sense, when attempting to define language used in § 2242(2)(A), to look to state sex abuse statutes that use similar language. The language used in state statutes addressing the sexual abuse of the intellectually or mentally disabled varies somewhat from state to state, but all states have criminal statutes designed to protect "mentally defective" persons from sexual abuse. Persons suffering from a "mental disease or defect" are frequently defined as incapable of understanding or appraising the "nature" of sexual conduct. It is easy to conclude that the language used is ambiguous, as state courts interpret similar language in their statutes differently. Protected classes of the intellectually or mentally disabled under sexual abuse statutes as fall into at least three distinct groups:

1. Those who cannot understand what sexual conduct is;[8]

2. those who cannot understand the immediate consequences of sexual conduct, such as pregnancy or venereal disease; and

[7] This data was compiled through the "Interactive Data Analyzer" on the U.S.S.C. website. https://www.ussc.gov (accessed on July 25, 2025).

[8] The dictionary definition of "nature" would certainly support this as an appropriate interpretation of §2242(2)(A). Merriam-Webster defines "nature" as "the inherent character or basic constitution" of something. This would indicate that the nature of sexual conduct should be considered on a more basic level than the definition adopted by the Tenth Circuit. *See* https://www.merriam-webster.com/dictionary/nature.

3. those who do not understand the personal, societal, or moral implications of sexual conduct.[9]

One of the principal sponsors of 18 U.S.C. § 2242(2) testified in early House committee hearings that the statute was intended to make it a crime to "engag[e] in a sexual act with persons known by the offender to be incapable of appraising the nature of such conduct: *those who are physically incapable of declining participation in or communicating the unwillingness to engage in the sexual act*." *See* Federal Rape Law Reform: Hearing Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary (Hearings) 98th Cong. 80 (1986)(statement of Rep. Steny Hoyer)(emphasis added). Unfortunately, that was not the language used in the enacted version of § 2242(2)(A).

In *State v. Mosbrucker,* 758 N.W.2d 663, 667 (N.D. 2008), the majority opinion contains a refreshing acknowledgement of the three different interpretations of similar statutory language addressing sexual abuse of the intellectually disabled. In North Dakota, it is a crime to engage in a sexual act with a person if "[t]hat person knows or has reasonable cause to believe that the other person suffers from a mental disease or defect which renders him or her incapable of understanding the nature of her

[9] Should this Court care to explore the different state statutes in detail, an extremely comprehensive analysis is contained in Denno, *Sexuality, Rape, and Mental Retardation,* 1997 U. Ill. L. Rev. 315. Table B contains a comprehensive list of the terminology used by the states to define intellectually disabled victims of sexual abuse. *See Denno* at 397. This law review article proved to be an invaluable resource for the undersigned in the review of various state statutes and the preparation of this petition.

conduct." N.D.C.C. § 12.1-20-03(1)(e). The *Mosbrucker* court affirmed the defendant's conviction. The majority continued:

> The majority position interprets the standard of incapable of understanding the nature of his or her conduct to mean that the person does not know either the physiological aspects of sex or the possible consequences of sexual activity, such as pregnancy and the contraction of sexually transmitted diseases. A few jurisdictions have interpreted the term to have a broader meaning and in addition to understanding of the sexual act involved and its consequences, also require that the person must appreciate the moral dimensions of the decision to engage in sexual conduct although the person is free to act contrary to those societal ideas. Finally, one jurisdiction, New Jersey, has established the most limited interpretation and, while requiring the person understand the nature and the voluntariness of the action does not require the person understand the risk and consequences of sexual conduct.

Mosbruker, 758 N.W.2d at 667.

A review of the alternatives described in *Mosbruker* reveals the Tenth Circuit in Mr. Earls' case adopted a comparatively broad interpretation of the language contained in § 2242(2)(A). No published federal case had previously interpreted the statute in such a fashion. Due process bars courts from applying a novel construction of a criminal statute that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope. *See, e.g. Marks v. United States,* 430 U.S. 188 (1977). The dissent in *Mosbrucker* began by accusing the majority of criminalizing actions not included in the plain language of the statute. *Id.* The dissent went on to admit what was apparent to the majority: the statute was ambiguous. The dissent noted that the rule of lenity provides that any ambiguity in a criminal statute must be resolved in

favor of the defendant. 758 N.W.2d at 672. Neither the *Mosbruker* majority nor the Tenth Circuit took this approach.

Applying the rule of lenity, the dissent argued that – as did Petitioner in his brief before the Tenth Circuit – the language of the statute was more in line with New Jersey's definition of "mentally defective" addressed in *State v. Olivio,* 589 A.2d 597 (N.J. 1991). *Id.* New Jersey law limits its sexual abuse protection under N.J. Stat. Ann. 2C:14-1h to persons who are incapable of understanding the nature of sexual conduct because of a mental disease or defect. The New Jersey Supreme Court has held that knowledge in this context extends "only to the physical or physiological aspects of sex, [and not] to an awareness that sexual acts have probable serious consequences, such as pregnancy and birth, disease, infirmities, adverse psychological or emotional disorders, or possible adverse moral or social effects." *Olivio,* 589 A.2d at 602, 605.[10]

Other states disagree with the New Jersey approach. States like Alaska, California, Nebraska, North Dakota, and Utah have adopted a "nature and

[10] Specifically, the New Jersey statute defines sexual abuse victims as "temporarily or permanently incapable of understanding the distinctively sexual nature of the conduct, including, but not limited to, being incapable of providing consent, or incapable of understanding or exercising the right to refuse to engage in the conduct." *See also State v. Inzunza,* 316 P.3d 1266, 1272 (Ariz. Ct. App. 2014) (interpreting ARIZ. REV. STAT. § 13-1401(A)(7)(b)) (defining "mental defect" as when "the victim is unable to comprehend the distinctively sexual nature of the conduct or is incapable of understanding or exercising the right to refuse to engage in the conduct with another.").

consequences" test.[11] This test requires the individual to understand the sexual nature of the act itself as well as potential adverse consequences, such as unplanned pregnancy or sexually transmitted infections.[12] In contrast, states like Illinois, Michigan and New York have adopted a much broader definition applicable to sexual assault victims that is sometimes referred to as the "morality standard." This requires an understanding of the nature and consequences of the sexual act itself and of its "moral quality."[13] Essentially, this is the approach taken by the Tenth Circuit in its interpretation of 18 U.S.C. § 2242(2)(A).

Had Congress intended to include persons who do not understand the *consequences* of sexual activity, it could have done so by simply including the word "consequences" in the statute. The Alaska legislature did when it enacted a statute that

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[11] ALASKA STAT. § 11.41.470(4); UTAH CODE ANN. 1953 § 76-5-111(m); *People v. Miranda,* 132 Cal.Rptr.3d 315, 328-29 (Ct. App. 2011) (citing CAL. PENAL CODE § 261.6; *Reavis v. Slominski,* 551 N.W.2d 528, 538 (Neb. 1996) (citing NEB. REV. STAT. ANN. §§ 28-319(1), 28-320(1); OR. REV. STAT. 163.305(3); *State v. Reed,* 118 P.3d 791 (Or. 2005); N.D.C.C. § 12.1-20-03(1)(e).

[12] ALASKA STAT. § 11.41.470(4) ("'[M]entally incapable' means suffering from a mental disease or defect that renders the person incapable of understanding the nature or consequences of the person's conduct, including the potential harm to that person[.]"); *Mosbrucker,* 758 N.W.2d at 667 (interpreting N.D. CENT. CODE § 12.1-20-03(1)(e)) ("[T]he statutory language is surely broad enough to encompass knowledge of the practical consequences of sexual intercourse such as unwanted pregnancy and sexually transmitted diseases, and we conclude the intermediate construction better reflects the legislative intent…")

[13] *People v. Easley,* 364 N.E.2d 1328, 1332-33 (N.Y. 1977) (interpreting N.Y. PENAL LAW § 130.00(5); *People v. Breck,* 584 N.W.2d 602, 605 (Mich. Ct. App. 1998) (interpreting M.C.L.A. § 750.520a(j); *People v. McMullen,* 414 N.E.2d 214, 217 (Ill. App. Ct. 1980).

explicitly requires that the victim of sexual abuse be "incapable of understanding the nature *or consequences* of the person's conduct." Alaska Stat. § 11.41.470(4) (emphasis added). Even the addition of this language creates a certain degree of ambiguity; does the law intend for juries to consider a victim's ability to consider long-term consequences of sexual conduct, or more immediate consequences?

c. The legislative history of § 2242(2)(A)

The legislative history of § 2242(2)(A) is not particularly helpful in resolving ambiguities in the statute. In *United States v. Bruguier,* 735 F.3d 754, 771-72 (8th Cir. 2013)(en banc), the Eighth Circuit noted that "[t]he genesis of the [Sexual Abuse] Act was Congress's recognition that federal law was becoming increasingly inconsistent with state law." *Id.* at 772. "Members of Congress worried that antiquated federal laws and modernized state laws criminalized different conduct, an imbalance of particular concern in Indian country." *Id.* H.R. 4745 modernized and reformed federal rape provisions by: (1) defining the offenses in gender neutral terms; (2) defining the offenses so that the focus of a trial is upon the conduct of the defendant, instead of upon the conduct or state of mind of the victim; (3) expanding the offenses to reach all forms of sexual abuse of another; (4) abandoning the doctrines of resistance and spousal immunity; and (5) expanding federal jurisdiction to include all federal prisons. H. R. Rep. 99-594, 99th Cong.2d Sess. 10-11 (1986).

Unfortunately, there appears to be nothing in the legislative history of 18 U.S.C. § 2242(2)(A) to clarify who is "incapable of appraising the nature of the conduct" when defining sexual abuse. By relying on state laws to update antiquated federal rape law, Congress took this language from state statutes and showed no real concern for whether different states interpreted similar language differently. Congress appeared far more interested in correcting more obvious deficiencies in federal law. For example, the idea that marriage could be a defense to rape was offensive and inconsistent with Congress's desire to address crimes related to domestic abuse. Also, federal rape law did not prohibit male homosexual rape. *See* H.R. Rep. 99-594 at *8.[14] As prior federal law made no mention of those suffering from an intellectual disability, Congress apparently found no reason to clarify how the new language would apply to those considered to be intellectually disabled (although Congress did express the intent to broaden the class of victims beyond what had been included under prior law). Congress also neglected to include a mens rea requirement under 18 U.S.C. § 2242(2)(A), although the question of strict liability was resolved by the Tenth Circuit in Mr. Earls' direct appeal. *United States v. Earls,* 129 F.4th 850 (10th Cir. 2025)(concluding that § 2242(2)(A) was not a strict liability crime).

[14] H.R. Rep. No. 594, 99TH Cong., 2nd Sess. 1986, 1986 U.S.C.C.A.N. 6186, 1986 WL 31966, H.R. REP. 99-594 (Leg. Hist.).

If the purpose of the Sexual Abuse Act of 1986 was to establish greater consistency with state law, it makes sense to look to state law for direction, and that is what Mr. Earls did on direct appeal. These state decisions clearly established the ambiguous nature of the language used in § 2242(2)(A). The Tenth Circuit made no mention of any of the state court decisions cited in Mr. Earls' brief, nor did the court acknowledge any interpretation other than its own of the "incapable of appraising the nature of the conduct" language contained in § 2242(2)(A). In so doing, the court created an interpretation of the statute that extended its coverage far beyond what the plain language of the statute prohibited. In the words of Chief Justice Roberts:

> If the rule of lenity means anything, it is that an individual should not go to jail for failing to conduct a 50-state survey or comb through obscure legislative history. Ten years in jail is too much to hinge on the will-o'-the-wisp of statutory meaning pursued by the majority.

United States v. Hayes, 555 U.S. at 437 (Roberts, C.J., dissenting).

d. The rights of the intellectually disabled

The Tenth Circuit held: "As a general principle, we agree with Earls that § 2242(2)(A) 'does not prohibit all disabled persons from having sex.'" *Earls,* 129 F.4th at 860)(quoting from Mr. Earls' reply brief). These words carry little force when considering the evidence found by the court to be sufficient to convict Earls. Objectively, knowledge that a person is on social security disability for a mental or psychological condition that renders one unable to live independently would cause a careful person to err on the side of caution and avoid sexual relations. This is

particularly true when a mistake in judgment could result in a defendant serving the rest of his life in prison. Although ancillary to the issues addressed in Mr. Earls' appeal, it is important for this Court to remember the rights of the intellectually disabled to engage in a sexual relationship. This Court has come a long way since *Buck v. Bell,* 274 U.S. 200 (1927), where the Supreme Court approved of the forced sterilization of "feeble minded" women who were deemed to be a "probable potential parent of socially inadequate offspring." *Id.* at 207.

While the Tenth Circuit tried to convince Mr. Earls that § 2242(2)(A) was not an *absolute* prohibition against the intellectually disabled from engaging in sexual relations, the court failed to answer the obvious question facing anyone who might consider a sexual relationship with a person who has intellectual or other mental disabilities. How is he or she to know whether the sex is legal or not? There are clear violations, such as when a disabled person obviously does not understand what is happening during a sexual act. But what of a person who expresses the desire to engage in sexual relations, finds a private place to have sexual intercourse, and removes her clothing? How is one to react to a person who clearly understands at least the "essential nature" of sexual conduct? What can a person glean from the message contained in the *Earls* opinion? The undersigned would suggest that the message is that without knowing how the local United States Attorney feels about the relationship (and how could he), the only sensible thing to do is to walk away. As

pointed out in his brief on direct appeal, whatever "child-like" behavior exhibited by C.P. did not mean she was a child. She was an adult who expressed an interest in sex, and by all accounts, enjoyed having sex.[15] Did David Earls take advantage of this interest? Possibly. The question was not (as articulated by the prosecutor during trial) whether Mr. Earls' actions were right or wrong. The question was whether he was guilty of a crime that carried the possibility of life in prison.

For the same reasons that the government believed C.P. to be amenable to David Earls' influence, she was also receptive to the influence of those around her who did not approve of the relationship. C.P. did not appear to object to Mr. Earls' prosecution, because she was most certainly told by law enforcement and her family that what Mr. Earls did was wrong. She may even now believe that having sex is wrong. Who has the right to prevent C.P. from having a sexual relationship? Who decides whether a partner is "appropriate" for her? It seems reasonable that she should have some say in the matter. The Due Process Clause protects certain fundamental rights and liberties against government infringement unless the infringement passes strict scrutiny. *Reno v. Flores*, 507 U.S. 292, 301–02 (1993). In deciding whether a right is fundamental for substantive due-process purposes, the court must ask "whether the right is deeply rooted in our history and tradition and

[15] https://www.disabilityscoop.com/2015/11/19/for-disabilities-intimate-rare/21401/

whether it is essential to our Nation's scheme of ordered liberty." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 237 (2022). Fundamental liberties include the right to marry, *Loving v. Virginia*, 388 U.S. 1, 12 (1967), to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942), to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925), and to respect marital privacy, *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965). As the list above suggests, fundamental rights "for the most part ... relat[e] to marriage, family, procreation, and the right to bodily integrity." *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (plurality op.). While the right of those with intellectual disabilities to engage in sexual relations has not directly been addressed in the Supreme Court, related rights that have been addressed certainly suggest that the right to engage in sexual relations is closely related to other rights deemed to be fundamental. *See City of Cleburne Living Center, Inc.,* 473 U.S. 432, 463 (1985) (Marshall, J., concurring in judgment in part and dissenting in part) (emphasizing that mentally retarded persons are entitled to the right to marry and to procreate, one of the "basic civil rights of man"). The right of intellectually disabled individuals to engage in sexual relations may be considered implicit in the constitutional right to privacy.

It also must be acknowledged that the victimization of the intellectually disabled is nonetheless a real problem that cannot be ignored by Congress. These statutes cannot, however, rely on vague moral evaluations of what is proper or

acceptable. In Mr. Earls' case, the government did not approve of *his* sexual relationship with C.P., but suggested during his trial that if C.P. married a person with similar intellectual limitations, after meeting in a group home and falling in love, it would be acceptable for her to engage in sexual relations. Whatever moral standard that this requires, it in no way has anything to do with the language of the statute. The prosecutor's statement reflects the kind of moral judgment that cannot be permitted under the Constitution and should not be countenanced by this Court.

e. The Tenth Circuit's interpretation of 18 U.S.C. § 2242(2)(A) renders the statute unconstitutionally vague.

The Rule of Lenity has sometimes been described as a "junior version of the vagueness doctrine." H. Packer, *The Limits of the Criminal Sanction*, 95 (1968). The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Papachristou v. City of Jacksonville,* 405 U.S. 126 (1972). Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, this Court has recognized that the more important aspect of vagueness doctrine "is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to government law enforcement." *Smith v. Goguen,* 415 U.S. 566, 574 (1974). Where the legislature fails to provide such minimal guidelines, a criminal statute may

permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.,* 415 U.S. at 575.

In *Kolender v. Lawson,* 461 U.S. 352 (1983), this Court addressed a facial vagueness challenge to a criminal statute that required persons who loiter to provide a "credible and reliable" identification and to account for their presence when requested during a *Terry*[16] stop. The *Kolender* decision determined that the statute as it has been construed was unconstitutionally vague within the meaning of the Due Process clause of the Fourteenth Amendment by failing to clarify what is contemplated by the "credible and reliable" requirement.

Arguably, a law regulating sexual activity between consenting adults requires more precision than a loitering statute because of the severe penalties and the inevitable moral judgments connected with sex. Section 2242(2)(A) is not a clear prohibition, like having sex with children, or forcibly having sex with someone without consent. 18 U.S.C. § 2242(2)(A) prohibits consensual sex with an adult. *See Osborne v. Ohio,* 495 U.S. 103, 133-37 (1990)(dealing with the vagueness of the word "lewd"). In *Osborne,* unlike in Mr. Earls' case, the appellate court applied a narrow construction of a child pornography statute and avoided any due process issues.

From the filing of the indictment in Mr. Earls' case, the United States Attorney's Office was confused between the different meaning of "appraise" and

[16] *Terry v. Ohio,* 392 U.S. 1 (1968)

"apprise."[17] **App. A37**. The district court judge expressed dissatisfaction with the language of the statute.[18] "Men of common intelligence cannot be required to guess at the meaning of the enactment." *Winters v. New York,* 333 U.S. 507, 515 (1948), citing to *Connally v. General Const. Co.,* 269 U.S. 385, 391, 392 (1926) ("But it will be enough for present purposes to say generally that the decisions of the court, upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them…").

[17] In the indictment, Mr. Earls was accused of having sex with a woman who was unable to "apprise" the nature of the act. The AUSA's confusion continued throughout the trial.

[18] After the government rested, the district court considered the verb "appraise" as used in the statute: "…I know there's lots of evidence that, well, she's childlike, or you know, she doesn't have intellectual capabilities to fulfill certain activities of daily living. But in the area of sex which she knows about, how do we know she can't place some value on that?") **App. A45.**

CONCLUSION

For the forgoing reasons, Mr. Earls requests that this Court grant his petition for a writ of certiorari and remand for reconsideration by the Tenth Circuit.

Respectfully submitted,

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