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IN THE SUPREME COURT OF THE UNITED STATES

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AVONDALE LOCKHART, :

Petitioner : No. 14-8358

v. :

UNITED STATES. :

- - - - - x

Washington, D.C.

Tuesday, November 3, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

EDWARD S. ZAS, ESQ., Assistant Federal Defender, New York, N.Y.; on behalf of Petitioner.

ANN O'CONNELL, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case 14-8358, Lockhart v.  
5 United States.

6 Mr. Zas.

7 ORAL ARGUMENT OF EDWARD S. ZAS

8 ON BEHALF OF THE PETITIONER

9 MR. ZAS: Mr. Chief Justice, and may it  
10 please the Court:

11 This case concerns the ten-year mandatory  
12 minimum prison sentence that Section 2252(b)(2)  
13 sometimes requires Federal judges to impose.

14 The statutory language in dispute reserves  
15 the severe punishment for a defendant with a prior State  
16 conviction for an offense relating to any kind of sexual  
17 abuse involving a minor or ward. Because Petitioner's  
18 prior offense did not involve a minor or ward, the  
19 statute's mandatory minimum penalty does not apply to  
20 him.

21 JUSTICE GINSBURG: Suppose the conviction  
22 had been, under Federal law, the -- the conviction for  
23 sexual abuse of an adult and we have the same question:  
24 Does the mandatory minimum apply?

25 I take it if it had been under Federal law,

1 then the mandatory minimum would apply.

2 MR. ZAS: That's correct. If the conviction  
3 had been under Chapter 109A of Title XVIII, which covers  
4 sexual abuse offenses, then it would trigger the  
5 mandatory penalty. But Congress, in this statute, since  
6 the time it was first enacted in 1978, has never sought  
7 to create symmetry or parity between the Federal  
8 predicates and the State predicates.

9 This may be most clear now in  
10 Subsection 2252(b)(1), where you can see that a prior  
11 Federal conviction for sex trafficking of anyone, which  
12 is a violation of Section 1591, the corresponding State  
13 analogue, is textually limited to sex trafficking of  
14 children.

15 So this decision to treat prior State and  
16 Federal predicates differently is inescapable, and it's  
17 been true ever since the first statute.

18 So from 1970 --

19 JUSTICE KENNEDY: I -- I don't -- why -- why  
20 is it in this case -- it -- it does seem to me that  
21 Congress, eight years later, when it wrote the -- the  
22 second statute, used the -- the -- the same style and  
23 that this very much favors the government. But then you  
24 say that that's inapplicable, because?

25 MR. ZAS: Because when this language was

1 first added -- first, it was added in 1994.

2 JUSTICE KENNEDY: Yes.

3 MR. ZAS: The Federal predicates. At that  
4 time there were still no State law predicates at all.

5 In 1996, when the language was first  
6 introduced, and it was then introduced in Section --  
7 Subsection (b)(1), which applies to the distribution and  
8 receipt offenses, even then the penalty for simple  
9 possession of child pornography was the only Federal  
10 predicate.

11 So someone in Mr. Lockhart's position at  
12 that time would not have faced the mandatory minimum  
13 penalty even if people who -- who committed the  
14 distribution offenses would or even if -- even if he had  
15 a conviction for -- under Chapter 109A.

16 So -- and then in 1998, when this language  
17 in dispute was then added at the government's urging to  
18 Subsection (b)(2), even at that time Congress clearly  
19 wasn't aiming for parity because then they added a new  
20 Federal predicate, Chapter 117 offenses, which are  
21 violations of the Man Act: Transportation for illegal  
22 sexual activity.

23 But at that time it didn't add any State  
24 law -- State offense analogue for that offense.

25 This has continued up to the present day.

1 So in 2003, there were amendments to add the obscenity  
2 offenses, the Federal obscenity offenses in Chapter 71  
3 to the list of Federal predicates, but no corresponding  
4 State crime for obscenity offenses.

5 The --

6 JUSTICE GINSBURG: How do you say it works  
7 now for the manufacturing and distribution offenses? We  
8 have your position on the possession -- well, you said  
9 there's a disparity between a Federal conviction and a  
10 State conviction. How about a conviction, either the  
11 manufacturing or distribution?

12 MR. ZAS: Yes. So -- so that offense is  
13 covered by the different provision of Section 2251(e).  
14 That's the penalty provision for the much more serious  
15 crime of actually using minors or children to produce  
16 this material.

17 The language in 2251(e) as amended in 2006  
18 is -- it does seem to track, to qualify the predicates  
19 to include State-law abuse offenses that involve adults  
20 as well as children. But that's because there's an  
21 important textual difference between Section 2251(e) and  
22 the statute we're talking about.

23 So if you go back to Section 2252(b)(2),  
24 you'll see an important textual point here, which is the  
25 word "or." This may be easier to follow if you actually

1 look at the statute if you don't have it open in the  
2 statutory appendix to the blue brief at pages -- at  
3 page 10A. You'll see that the list is written as  
4 aggravated sexual abuse, sexual abuse, abuse of  
5 sexual -- I'm sorry, or abusive sexual conduct involving  
6 a minor or ward or a bunch of other offenses.

7           The "or" before abusive sexual conduct would  
8 not be there on the government's reading. That is, if  
9 abusive sexual conduct involving a minor or ward were an  
10 independent stand-alone offense, the "or" does no work.  
11 It's unnatural to be. Then the list would just read,  
12 aggravated sexual abuse, sexual abuse, abusive sexual  
13 conduct involving a minor or ward, or -- and it would  
14 continue.

15           JUSTICE ALITO: Well, there's another  
16 possible explanation for that, because the last item in  
17 the list itself involves a great many -- itself involves  
18 a list. So the second "or" could be a substitute for a  
19 semicolon.

20           But let me ask you another question about  
21 the language that you just read. As I understand your  
22 argument, this provision would apply to sexual abuse  
23 involving a minor and also abusive sexual conduct  
24 involving a minor.

25           Is there any difference between those two

1 things?

2 MR. ZAS: No, Your Honor. We --

3 JUSTICE ALITO: So why did Congress put them  
4 both in?

5 MR. ZAS: Well, because I think the first  
6 point here is it must be for the same reason it used  
7 aggravated sexual abuse at the beginning of the list,  
8 which -- which I think both sides agree does no  
9 independent work. It's already covered.

10 JUSTICE ALITO: Well, there's something that  
11 jumps out. It's a strange list, aggravated sexual  
12 abuse, sexual abuse. Sexual abuse would include  
13 aggravated sexual abuse. So that seems to be -- the  
14 reference to aggravated sexual abuse seems to be  
15 redundant. And abusive sexual conduct, if understood in  
16 ordinary -- in the terms of ordinary language, does seem  
17 to duplicate sexual abuse.

18 But there's an explanation that jumps out,  
19 and that is that this -- almost this precise terminology  
20 appears in Sections 2241, 2242, and 2243. And in those  
21 provisions, all those terms are defined so that they  
22 mean something different.

23 So it seems to jump out at the reader that  
24 that's what Congress was doing in this list.

25 Why is -- what is wrong with that?



1           MR. ZAS: Well, first, if you go back to the  
2 time this -- this language we're talking about was first  
3 added in 1996, that Congress not only knew how to -- how  
4 to do what Your Honor is suggesting, that is, to be  
5 tracking the Federal predicates exactly. Because in a  
6 different provision, the provision that became 2241(c),  
7 it did exactly that. It -- it describes State offenses  
8 whose conduct would constitute a Federal crime if  
9 committed within Federal jurisdiction.

10           So they didn't do that here, and they didn't  
11 do it again when they added the particular language in  
12 1998 to (b) (2) again.

13           CHIEF JUSTICE ROBERTS: I'm sorry, I don't  
14 follow that. I --

15           MR. ZAS: Yes.

16           CHIEF JUSTICE ROBERTS: As I see it, they  
17 did, as Justice Alito said, track pretty much exactly  
18 2241, 42, and 43 in developing the list that they --  
19 they add -- that's before us today. I didn't understand  
20 your response.

21           MR. ZAS: Mr. Chief Justice, there are  
22 really two responses. One, the one I gave to Justice  
23 Alito is that this Congress, in 1996 and '98, knew how  
24 to track when they wanted to track. They did so  
25 explicitly in other provisions of the same legislation.

1 In 1996, the other provision was 2241(c). In 1998, the  
2 other provision was 2426(b). So it knew -- it knew how  
3 to do it, and didn't do it, and has never done it.

4 JUSTICE ALITO: Well, it could have done it  
5 more clearly. That's certainly the answer to this whole  
6 case. They could have handled this issue a lot more  
7 clearly.

8 But that is the -- the idea that they were  
9 picking up the definitions in the Federal provisions is  
10 one explanation for this rather strange -- this list.  
11 The other makes the list terribly redundant, and I  
12 haven't heard your explanation as to why they would do  
13 that.

14 Why include both sexual abuse and aggravated  
15 sexual abuse? Why include sexual abuse and abusive  
16 sexual conduct?

17 MR. ZAS: Two responses, Your Honor.

18 First -- and this goes to the Chief  
19 Justice's question as well -- this list does not track  
20 the Federal predicates as precisely, I think, as some  
21 have suggested. The Federal list of predicates has four  
22 crimes, sexual -- aggravated sexual abuse, sexual abuse,  
23 sexual abuse of a minor or ward, and abusive sexual  
24 contact. If Congress had meant to track those, they  
25 surely would have used the same four-prong list. They

1 didn't do that. Instead, they used a different term,  
2 "abusive sexual conduct."

3 JUSTICE KENNEDY: I don't understand how  
4 that answers the redundancy question. There's  
5 redundancy in both interpretations, but much more in  
6 yours than in the government's.

7 MR. ZAS: Well, I -- I disagree with that.  
8 I think the government reads the modifying clause out of  
9 this statute in terms of doing any operative work at  
10 all. But -- but let me respond --

11 JUSTICE KENNEDY: I'm not sure how your  
12 answer was responsive to Justice Alito's redundancy  
13 question.

14 MR. ZAS: It wasn't. But that's the second  
15 part of the answer.

16 The redundancy here was meant to go very  
17 broadly, to pick up, not the Federal predicates, but any  
18 terms or crimes that the States might create.

19 So we cited this in the yellow brief in  
20 reply. You'll see that the States call sexual abuse a  
21 variety of different things, including aggravated sexual  
22 abuse of a minor, sexual abuse of a minor, abusive  
23 sexual misconduct. So Congress is using these redundant  
24 terms as it sometimes does to emphasize inclusiveness.  
25 Whatever the label is, Congress wanted to protect

1 children by picking those up.

2 But it limited. It limited the reach of the  
3 terms by setting a bright line floor. And that floor  
4 was at children. The statute, after all, its principal  
5 purpose as its title, as the title of Chapter 110  
6 suggests, is about protecting against sexual  
7 exploitation and other abuse of children.

8 JUSTICE KAGAN: Mr. Zas, is it possible when  
9 you read these three terms, as you say, Congress might  
10 have meant to be just trying to pick up every  
11 conceivable State statute it could think of. But it's  
12 possible also to think of these as the aggravated sexual  
13 abuse is the worst offense; the sexual abuse is the  
14 medium offense; and the abusive sexual conduct is  
15 actually somewhat a more minor offense, in other words,  
16 might include things that are not sexual abuse  
17 themselves. Let's say indecent exposure or something  
18 like that.

19 And if you understand the provisions in that  
20 way as sort of going from the top to the bottom and  
21 meant to pick up everything, then it would seem that the  
22 involving a minor or ward really ought to refer to all  
23 of them. Right? That there's no reason why the  
24 involving a minor or ward would -- would refer only to  
25 the most minor offenses as the others.

1 MR. ZAS: Well, I think -- I think Your  
2 Honor makes a good point. We have not been able to --

3 JUSTICE KAGAN: Maybe I said that wrong. I  
4 think I said the exact opposite of what I meant.

5 (Laughter.)

6 JUSTICE SCALIA: It makes sense to me,  
7 though.

8 (Laughter.)

9 JUSTICE KAGAN: What?

10 If you read -- if you read them going --  
11 going down, right -- well, what do you think would  
12 follow?

13 (Laughter.)

14 What do you think would follow from that  
15 understanding of this list?

16 MR. ZAS: Well, Your Honor, we have tried to  
17 figure out what -- what in the world the difference is  
18 between sexual abuse and abusive sexual conduct when you  
19 give these terms their ordinary meaning. There is no  
20 meaningful difference. Sexual abuse, as ordinarily  
21 defined, is just the misuse, physical or nonphysical, of  
22 another --

23 JUSTICE KAGAN: But just presume with me  
24 that abusive sexual conduct is supposed to be -- is  
25 supposed to include some things that sexual abuse would

1 not.

2 What do you think follows from that?

3 MR. ZAS: Well, again, first, even with that  
4 assumption, you have this prefatory language to the list  
5 here, "relating to," which this Court has described --  
6 has defined, has interpreted, to be very broad. It only  
7 means "to stand in some relation to."

8 JUSTICE SCALIA: When I think -- what I  
9 think you would say is that if it's in descending order  
10 like that, you don't have to make the third one, which  
11 is already less than the second, which is less than the  
12 first. You don't have to make the third one a teeny,  
13 teeny, teeny third one by tagging on children only to  
14 the third and not to the other two.

15 It seems to me much more regular to assume,  
16 as you do, that the limitation to children applies to  
17 all three of these descending crimes. And -- and isn't  
18 that the answer?

19 MR. ZAS: Yes, Your Honor.

20 JUSTICE SCALIA: Your answer.

21 MR. ZAS: It -- it is the answer. And --  
22 and it is essentially an instance of the principle that  
23 has -- that has come to be known as the series  
24 qualifier.

25 JUSTICE SCALIA: But -- but the -- the

1 problem with that is -- maybe I'm wrong, but I think you  
2 have conceded that there is no difference between the  
3 last two, that it -- it's -- it's not descending. I  
4 mean, it's -- it's Justice Kagan who's suggested that  
5 abusive sexual conduct could mean exposure, for example,  
6 indecent exposure, which would probably not fit the  
7 second -- the second term. Haven't you conceded that  
8 the two are the same?

9 MR. ZAS: Yes, we have, but we don't view  
10 it --

11 JUSTICE SCALIA: What did you do that for?

12 MR. ZAS: We do not view it as -- we don't  
13 view it as a concession. We have allowed for the  
14 possibility, as -- as Justice Kagan, I think, is trying  
15 to do, of trying to come up with some fine distinction  
16 in meaning between the last two terms, but whether there  
17 is or isn't a little bit of daylight between those  
18 terms, it's all overcome by the terms "relating to."  
19 Anything relating to one is going to relate to the  
20 other.

21 And pity the poor district judge who would  
22 have to decide in cases around the country, does this  
23 offense relate to sexual abuse, in which case on the  
24 government's reading, it doesn't matter whether a minor  
25 or ward was involved; or does it relate to this other

1 category of abusive sexual conduct, which as far as we  
2 can --

3 CHIEF JUSTICE ROBERTS: But just to be  
4 clear, it's abusive sexual contact, right?

5 MR. ZAS: Not in our list. That's the  
6 language from --

7 CHIEF JUSTICE ROBERTS: (e)?

8 MR. ZAS: -- the Federal predicates. The  
9 separate crime in 2244 is abusive sexual contact.

10 CHIEF JUSTICE ROBERTS: I see.

11 MR. ZAS: Our list is abusive sexual  
12 conduct. As far as we can tell, no one has ever  
13 explained what in the world the difference is.

14 JUSTICE BREYER: Well, we might be -- when  
15 did they write? We're looking at, call it "your  
16 section," which is (a)(4); is that right? Or what is  
17 it? It's -- for the three things in it. The one you're  
18 interested in is -- let's -- I don't want a name for it.

19 MR. ZAS: Yes. It's --

20 JUSTICE BREYER: I call it "your section."

21 MR. ZAS: It's the penalty provision.

22 JUSTICE BREYER: All right. I'm going to  
23 call it "your section."

24 MR. ZAS: You can, Your Honor.

25 JUSTICE BREYER: Your section.



1           Then think of several other sections, which  
2           are the one I hadn't thought about which Justice Alito  
3           raised. That's really suspicious the way that looks  
4           there. 41, 42, 43. Now, when you pull up 41, 42, 43,  
5           law or written before the relevant parts of your section  
6           were written.

7           MR. ZAS: They were, Federal predicates  
8           prior to --

9           JUSTICE BREYER: Okay. If that's so -- and  
10          I don't know if this helps you or hurts you, but it  
11          seems to me that there is a ready-made right there for a  
12          drafter explanation of why he uses these words. Because  
13          we first look to 41, and that's aggravated. And then we  
14          look to 42, and that's sexual abuse without aggravated.  
15          And conduct is just the same as contact, but the drafter  
16          is thinking maybe we should go a little bit bigger.  
17          Now, the difficulty is in each of the sections I've  
18          mentioned, there is a special related section for  
19          children.

20          So the difference between the two for adults  
21          is the nature of the force requiring a person to perform  
22          a sexual act. A threat of violence, et cetera. That's  
23          one. Right?

24          And then the next section, abuse, it can be  
25          some other kind of threat. Then we get to the way it

1 deals with children, and it deals with children under  
2 the 12 -- under 12. That's one. And it deals 12 to 16.  
3 That's the next. And then we have a section called  
4 contact, and that has to do with sex acts basically that  
5 really weren't sex acts but for a certain kind of  
6 conduct which is defined. All right.

7           So I read this, I say, hey, that's what they  
8 picked up. They just -- a drafter just picked it up and  
9 changed a little bit, but that's what he had in mind.  
10 Then the question is: Your question. And in your  
11 favor, I think, is the fact that each of these earlier  
12 sections does have a special section dealing with  
13 children under the same number.

14           Now, don't tell me I'm right if I'm not  
15 right, but that's what I suddenly saw when Justice Alito  
16 asked his question. Just tell me your reaction.

17           MR. ZAS: Well --

18           JUSTICE SCALIA: You're not going to tell  
19 him he's right.

20           (Laughter.)

21           MR. ZAS: I wouldn't do that, Your Honor.

22           The courts of appeals that have addressed  
23 this precise question, just -- just so it's clear, none  
24 of them -- they've all rejected the idea that I -- that  
25 I think starts the premise here, which is that Congress

1 meant to -- meant for courts to interpret these terms by  
2 reference to the Federal predicates. In fact, that's  
3 the government's position here as well.

4           So the parties are on common ground in  
5 saying that these weren't meant to track the Federal  
6 predicates. And as I pointed out earlier, Congress not  
7 only knew how to do it when they wanted to, they did it  
8 in these two pieces of legislation in '96 and '98.

9           Now, it's true that these terms existed in  
10 the Federal predicates before they were added to this  
11 section. But they also exist all around the country in  
12 the 50 States. So Congress wasn't -- wasn't trying to  
13 track them. It could have just said, any State offense  
14 that would be a violation of Federal law if -- if in  
15 Federal jurisdiction. It -- it -- it didn't do that.

16           It was recognizing that States do all kinds  
17 of things. And it's using these terms to say, anything  
18 relating to it. It doesn't have to even be sexual  
19 abuse; it just has to relate to sexual abuse. But  
20 because that could pick up misdemeanor sex offenses  
21 around the country, committed only against an adult.

22           Public lewdness would be an example.  
23 That -- that crime, we sited one statute in the briefs.  
24 That's -- the statutory maximum is 30 days in jail. But  
25 if that were picked up, suddenly someone who is in

1 Federal court with their first offense, the first  
2 Federal offense of possessing child pornography, is  
3 suddenly going to have their sentence go --

4 JUSTICE ALITO: But your -- your argument is  
5 that it is just a coincidence that Congress came up with  
6 this list of three terms that are redundant and that  
7 just so happen to be almost exactly the same three terms  
8 in the same order that appear in the Federal provisions.

9 MR. ZAS: No, I -- I -- I don't mean to say  
10 that. It's -- it's not a coincidence. Congress would  
11 naturally use terms that it is familiar with, that are  
12 in the Federal -- the Federal -- Federal chapter, but  
13 that's very different.

14 JUSTICE SCALIA: They didn't use the same  
15 terms.

16 MR. ZAS: That's -- that's right.

17 JUSTICE SCALIA: The third term is  
18 different.

19 JUSTICE ALITO: But they used -- they  
20 used --

21 JUSTICE SCALIA: Do you think it was an  
22 accident that the third term was different?

23 MR. ZAS: No. I think the court presumes  
24 that when Congress uses a different term, it -- it acts  
25 deliberately -- and I -- I think --

1 JUSTICE ALITO: When they use "sexual abuse"  
2 and "sexually abusive conduct," they were not -- they --  
3 they had in mind the Federal provisions, but they didn't  
4 want those terms in this provision to mean the same  
5 thing as they mean in the Federal provision, even  
6 though, according to you, there is no generally accepted  
7 understanding of the difference between sexual abuse and  
8 abusive sexual conduct.

9 MR. ZAS: That's right. That's right.  
10 They -- they didn't.

11 Sex -- I'm sorry. Chapter 110, the chapter  
12 that contains the statute, has its own definitional  
13 section. There is no definition there of any of these  
14 terms. The only potentially pertinent term that's  
15 defined is the term "minor," which is defined  
16 differently in this chapter than it's defined or used --

17 JUSTICE ALITO: Sexual abuse is defined, and  
18 abusive sexual contact is defined, are they not?

19 MR. ZAS: They are -- they are defined in  
20 Chapter 109A. But as Justice -- as Justice Scalia  
21 pointed out, they didn't use abusive sexual contact.  
22 They used abusive sexual conduct. So it -- it could be  
23 viewed as, that's going broader, but with a floor. We  
24 want to brightline it. If you commit any kind of sexual  
25 abuse, not -- not only sexual abuse, but anything

1 relating to sexual abuse, you're going to face these  
2 severe penalties, so long as it involves a minor or  
3 ward. That's the focus. Congress was trying to protect  
4 children, and to punish and deter those who would harm  
5 them.

6           There is nothing in the history or the  
7 understanding of these provisions at the time of  
8 enactment to suggest that they were also focused on  
9 sexual abuse -- State sexual-abuse crimes against  
10 adults. Now, that's a serious crime. No one disputes  
11 that. But it wasn't the focus of this legislation.

12           JUSTICE KAGAN: But why would they be  
13 focused on Federal sexual abuse involving adults but not  
14 State sexual abuse involving adults?

15           MR. ZAS: Because the 1996 Congress was  
16 focused on a very specific problem that they identify.  
17 And that's the link, the connection between child  
18 pornography and other sex offenses against children.

19           So that was their focus. And given that  
20 focus and given that the other State law predicates in  
21 this statute are also limited to -- to crimes against  
22 children, they naturally limited these offenses as well  
23 to children.

24           JUSTICE KAGAN: No, but the -- the Federal  
25 predicate, the Section 109, I believe it is, does apply

1 to adults as well. So why would they be focused on  
2 adults with respect to Federal offenses but not with  
3 respect to State offenses?

4 MR. ZAS: Because, I think most importantly,  
5 Congress controls the Federal -- Federal crime. It  
6 creates them, it knows what they are, they're a finite  
7 set, and it knows that those predicates are not going to  
8 change without congressional action.

9 Once the national legislature has to  
10 consider 50 penal codes around the country which can  
11 change at any time and can cover things that may relate  
12 to sexual abuse or abusive sexual conduct, Congress  
13 reasonably may have decided that it didn't want to sweep  
14 that broadly, so it, again, created this floor.  
15 "Involving a minor or ward" was the key phrase. And our  
16 reading is the only one proposed that gives it some  
17 operative work to do.

18 I'd like to reserve the balance of my time  
19 for rebuttal.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Ms. O'Connell.

23 ORAL ARGUMENT OF ANN O'CONNELL

24 ON BEHALF OF THE RESPONDENT

25 MS. O'CONNELL: Mr. Chief Justice, and may

1 it please the Court:

2 This case involves two competing canons of  
3 statutory interpretation, and there are four basic  
4 reasons why we think the government's interpretation is  
5 correct.

6 First, Petitioner's interpretation creates  
7 an unexplained redundancy where the Court would have to  
8 conclude that Congress created a list of three things,  
9 two of which are the same.

10 Second, our interpretation is consistent  
11 with the only possible reading of Section --

12 JUSTICE SCALIA: Excuse me. Let's do them  
13 one by one.

14 On the first one, even under your  
15 interpretation, two of the three are the same, aren't  
16 they?

17 MS. O'CONNELL: Under our interpretation,  
18 what -- what we've said is that the first category and  
19 the third category are logically subsets of the more  
20 general category of sexual abuse.

21 JUSTICE SCALIA: Right.

22 MS. O'CONNELL: But there's a couple of  
23 explanations for why Congress may have done that.

24 The first is that, when they added these  
25 State law predicates to the Section 2252(b)(1) for the



1 first time in 1996, there already were Federal  
2 predicates on the list that included aggravated sexual  
3 abuse, sexual abuse, and sexual abuse of a minor or  
4 ward. So even though it may be true that Congress could  
5 have covered everything it wanted to cover in the State  
6 law crimes by just saying "sexual abuse," it would have  
7 opened itself up to arguments if it had just said all of  
8 those Federal crimes and then any State law relating to  
9 sexual abuse, that those other types of sexual abuse  
10 under State law were not covered.

11 Especially with respect to the third  
12 category, sexual abuse or abusive sexual conduct  
13 involving a minor or ward, Congress made clear when it  
14 included that third category that it was picking up  
15 State law offenses where a person is deemed incapable of  
16 consenting to sexual contact or sexual conduct, because  
17 of their status as either a minor or a ward.

18 So our interpretation can be explained.  
19 There is redundancy, and we're not asking for just an --  
20 a straight invocation of the canon against surplusage.  
21 Both interpretations contain surplusage. But it's a  
22 reason why it doesn't make sense to apply the  
23 series-qualifier canon here, because it --

24 JUSTICE ALITO: Why do you resist -- why --  
25 why do you resist the argument that what Congress was

1 doing was picking up basically the definitions of the  
2 Federal offenses that are worded almost identically? If  
3 that's what they are doing, then it's understandable  
4 what is meant by all three terms. If that's not what  
5 they were doing, it's a strange coincidence.

6 And not only is there redundancy, but  
7 there's ambiguity about what is meant by sexual abuse as  
8 opposed to abusive sexual conduct, and why they had to  
9 put in aggravated sexual abuse in addition to sexual  
10 abuse.

11 MS. O'CONNELL: Justice Alito, we -- we  
12 don't think that Congress was trying to pick up the  
13 exact definitions of the three Federal statutes. And we  
14 think that's most clear, as Petitioner pointed out, by  
15 the fact that there are other provision in this chapter  
16 where Congress used different language when it wanted to  
17 do so.

18 The most clear example is the recidivist  
19 provision for the sexual abuse offenses.

20 JUSTICE ALITO: Yes, they could have done it  
21 more clearly, of course. The -- the statute is -- is  
22 poorly drafted. You know, we give them a "D" for their  
23 drafting of this statute.

24 But what is the difference between sexual  
25 abuse and abusive sexual conduct? Putting aside the

1 definitions of those -- of those terms or similar terms  
2 in Chapter 109.

3 MS. O'CONNELL: I don't think there is any  
4 difference between those two terms.

5 And -- and Petitioner agrees, which is  
6 why --

7 JUSTICE ALITO: So why did they put -- why  
8 did they do that?

9 MS. O'CONNELL: I think because the --

10 JUSTICE ALITO: Just catchy phrases that  
11 came to their mind?

12 MS. O'CONNELL: No. I think the last  
13 category, "sexual abusive conduct involving a minor or  
14 ward," was meant to -- to indicate and make clear that  
15 Congress was picking up State offenses where a person is  
16 deemed incapable of giving consent because they are a  
17 minor or a ward. They are deemed incapable by the law  
18 even though, under a generic definition of "sexual  
19 abuse" that may apply to everyone --

20 JUSTICE SCALIA: Ward -- a ward can't --  
21 why -- why would you say a -- why would you add "ward"  
22 if -- if that was the reason for it? Why wouldn't you  
23 just say of "a minor"?

24 MS. O'CONNELL: Well, Congress added "ward."  
25 And --

1 JUSTICE SCALIA: I know. Why? That's what  
2 I'm asking.

3 MS. O'CONNELL: Right. Well, we think the  
4 most --

5 JUSTICE SCALIA: To achieve what -- what you  
6 say they were achieving, it would -- it would have  
7 sufficed to say "minor."

8 MS. O'CONNELL: No, I don't think so.

9 JUSTICE SCALIA: No?

10 MS. O'CONNELL: A minor -- a ward is not  
11 just a person who is a minor or a foster child, or a  
12 person who's been placed under a guardianship because of  
13 mental incompetence or something like that. Those  
14 people are all wards, but as we've explained in our  
15 brief, a ward also very clearly includes a prisoner, and  
16 Congress would have known that.

17 And the -- the  
18 Federal sexual abuse of a ward provision refers  
19 basically to --

20 JUSTICE SCALIA: But that -- that's not  
21 somebody who could not -- who could not give consent.

22 MS. O'CONNELL: Under --

23 JUSTICE SCALIA: You're -- you're saying the  
24 reason for it was they wanted to pick up people who  
25 could not consent to the thing. But to do that, all

1 they had to say was "minor."

2 MS. O'CONNELL: No -- no. I think that a --  
3 a ward is also basically deemed incapable of giving  
4 consent --

5 JUSTICE SCALIA: Prisoners -- prisoners are  
6 deemed incapable of giving consent?

7 MS. O'CONNELL: The law has the same sort of  
8 operation, yes. It -- it deems the conduct abusive even  
9 if it's consensual. The Section 2243 does that, the  
10 Federal sexual abuse of a ward statute. And we've cited  
11 in footnote 14 a lot of State laws that prohibit the  
12 same thing.

13 JUSTICE GINSBURG: And "concrete" would mean  
14 that, if it was a prison guard and a prisoner --

15 MS. O'CONNELL: Right.

16 JUSTICE GINSBURG: -- even if the prisoner  
17 said, "Yes."

18 MS. O'CONNELL: Exactly. That that would be  
19 deemed abusive sexual conduct. It would be --

20 JUSTICE KENNEDY: But a ward -- a ward could  
21 also be a 40-year-old person who is incompetent.

22 MS. O'CONNELL: Correct. A ward could  
23 certainly be an adult.

24 And I think this is a -- a key point that  
25 Petitioner has never really answered is that Petitioner

1 is trying to say that there is this clear pattern that  
2 Congress had when it was creating the -- these lists,  
3 and that the Federal crimes can involve both adults and  
4 minors, but it was always limiting the State law crimes  
5 to crimes against children. And it just isn't the case.  
6 And even under his interpretation, because "wards" are  
7 included, there is at least some adult sexual-abuse  
8 crimes against adults that are being swept up even if it  
9 applies to all three categories.

10 And also in Section 2251(e), the --  
11 the enhancement for child pornography production  
12 offenses, the only way that you could read that  
13 provision is to include sexual abuse offenses against  
14 adults.

15 And so it's not the case that there is this  
16 very clear pattern where Congress was only including  
17 child victim counterparts to all of the Federal offenses  
18 that it was putting on the list.

19 JUSTICE KAGAN: Ms. O'Connell --

20 JUSTICE GINSBURG: Is Petitioner right when  
21 Petitioner says that it was the Department of Justice's  
22 original view that involving a minor or ward, it  
23 modified all three categories? That that was -- the  
24 first position that the government took and then the  
25 government changed?

1 MS. O'CONNELL: No. I -- I -- I don't think  
2 that that is an official position that the government  
3 took. We never took that position in a brief. Any time  
4 we were confronted with actually interpreting the  
5 statute as a legal matter, we have contended that  
6 involving a minor or ward applies only to the last  
7 category.

8 JUSTICE SCALIA: Where did you get that idea  
9 from, then?

10 Where did he get that idea? What -- what  
11 had the Department said that -- that suggested the  
12 opposite?

13 MS. O'CONNELL: There was the -- this letter  
14 submitted in 1998 that the Petitioner cites where, when  
15 the -- the author of the letter -- the -- the point of  
16 the paragraph is to say, look, Congress, in the -- the  
17 sexual abuse provision or the recidivist provision  
18 for -- for receipt and distribution offenses in  
19 2252(b)(1), you have all these State law crimes that you  
20 didn't include on the -- on the list of predicate  
21 offenses for 2252(b)(2), the possession offenses, and we  
22 think you should line them up.

23 In summarizing that argument, the drafter of  
24 the letter referred to them as "child molestation  
25 crimes" or "child abuse crimes." It was an -- it was an

1 underinclusive, inaccurate, short -- it -- it wasn't  
2 inaccurate. They do involve child molestation crimes.  
3 But it was just a useful way of summarizing what was  
4 there and what would have been most --

5 JUSTICE SCALIA: Surely it shows --

6 MS. O'CONNELL: -- for Congress.

7 JUSTICE SCALIA: -- that -- that an  
8 intelligent person could think that that's what this  
9 involved.

10 MS. O'CONNELL: I --

11 JUSTICE SCALIA: I assume that the person  
12 read this and -- and thought that that's what it meant.

13 MS. O'CONNELL: And -- and, Justice Scalia,  
14 I think that's why the canons of interpretation don't  
15 get anybody a hundred percent of the way there.

16 JUSTICE SCALIA: I agree. And what I worry  
17 about is the rule of lenity. You have these dueling  
18 canons, and you have a rule that when the government  
19 sends somebody to jail for ten years, it has to turn  
20 sharp corners. It has to dot every I and cross every T.  
21 It has to be clear.

22 And, you know, I -- we've been discussing  
23 this dueling canons and so forth. My goodness, I have  
24 no -- I have no assurance what the right answer is. But  
25 I know that somebody could read this and think that it



1 means what the petitioner says it means. And if that's  
2 the case, it seems to me the rule of lenity comes into  
3 play. That's -- that's what concerns me most about this  
4 case, not the dueling canons.

5 MS. O'CONNELL: Justice Scalia, I think if  
6 you read the text of the statute once, you may think, I  
7 don't know what this means. It could go either way.  
8 But if you just read the rest of the list of things that  
9 Congress included and take a look at it, we think  
10 there's four things that jump out that make clear that  
11 involving a minor or ward only is modifying the last  
12 category. The first is the -- the redundancy problem  
13 that Petitioner's interpretation creates.

14 JUSTICE KAGAN: Well, could I ask about  
15 your -- your basic theory as to that, which, if I  
16 understand it, says the reason why we shouldn't worry  
17 about the redundancy you create is because Congress just  
18 wanted to make absolutely clear that the sexual abuse  
19 was also sexual abuse involving somebody who couldn't  
20 consent. That's basically your theory.

21 And there is a very easy way to do that, and  
22 it would have completely made this -- I mean, made this  
23 a hundred percent clear. Congress would just have said  
24 aggravated sexual abuse, sexual abuse, or sexual abuse  
25 involving a minor or ward. And just by using the exact

1 same language, it would have been clear, but the  
2 distinction was between sexual abuse and sexual abuse  
3 involving a minor or ward.

4           But Congress doesn't do that, right?  
5 Congress changes the language of the third noun. And  
6 that's what creates the puzzlement. And -- and so it  
7 seems to me that your theory doesn't really cohere with  
8 the fact that this third term -- although, nobody can  
9 say exactly what it means that is different -- the third  
10 term is linguistically dissimilar from the second one.

11           MS. O'CONNELL: It is, but -- but under a  
12 generic interpretation of sexual abuse, any generic  
13 definition that a court has come up with, I think one  
14 that is a typical one is sexual conduct that uses or  
15 misuses or injures a victim so as to cause harm or  
16 damage. They all include sexual conduct. And so  
17 regardless of whether sexual conduct is -- you know,  
18 under the Federal law, sexual conduct could be both a  
19 sexual act or a sexual contact, anything that's defined  
20 within the Federal provision. But the term "sexual  
21 abuse" was already broad enough to cover abusive sexual  
22 conduct.

23           I can't say that I know why Congress didn't  
24 say "sexual abuse of a minor or ward" as opposed to  
25 "abusive sexual conduct involving a minor or ward." But

1 I think the key part of it to focus on is the fact that  
2 they use the term "involving a minor or ward." It's the  
3 same category or category of people that they are trying  
4 to pick up that's reflected in the prohibitions on  
5 sexual --

6 JUSTICE SOTOMAYOR: Well, why not just say  
7 -- drop the "abusive"? Just say "sexual conduct with a  
8 minor or a ward"? Because now you have to deal with the  
9 adjective "abusive." So how does that get you to  
10 consent or no consent?

11 MS. O'CONNELL: I think Congress could have  
12 done this without saying abusive, but, you know, the  
13 Federal sexual-abuse statute of -- of a minor or ward is  
14 called sexual abuse of a minor or ward. They also  
15 include the word "abusive." I think it's just -- the  
16 ambiguity really is that abuse could mean different  
17 things depending on who the victim is. Something could  
18 be abusive because it's done to or in front of a child  
19 but not an adult. And so that may be -- it's not a  
20 reason why Congress wouldn't -- needed to use the word  
21 "abusive," but there -- there is a reason -- it is a  
22 reason why there could be some daylight between the two  
23 categories.

24 JUSTICE BREYER: What were the -- what were  
25 the other three? You said there were four reasons. I

1 started where I think Justice Scalia did. Of course, I  
2 might more often than he think that the canons don't  
3 help us all that much. And this -- this is a poster  
4 child, I think, for that proposition.

5 And so you said, no, there are four things  
6 here that show that this isn't ambiguous. You shouldn't  
7 end up that way. Now, one was a redundancy, which I'm  
8 not sure what it was, and then you didn't get to the  
9 other three, which I'd like to hear.

10 MS. O'CONNELL: Okay.

11 JUSTICE SCALIA: I apologize for that. I  
12 jumped in on it.

13 MS. O'CONNELL: No apology necessary.

14 JUSTICE BREYER: No, it wasn't.

15 MS. O'CONNELL: The second reason why we  
16 think the Petitioner's interpretation doesn't make sense  
17 is because in the penalty provision for production  
18 offenses Section 2251(e), Petitioner agrees that the  
19 only way you can read that penalty provision is to  
20 include State sexual abuse offenses against adults,  
21 because Congress worded it slightly differently. They  
22 included all the same crimes, but the way that provision  
23 is -- reads, it says, "State laws relating to aggravated  
24 sexual abuse, sexual abuse, abusive sexual contact  
25 involving a minor or a ward or sex trafficking of

1 children."

2           So it's no longer -- involving a minor or  
3 ward is no longer a modifier that appears at the end of  
4 a list. This is at page 13A of the appendix to the gray  
5 brief.

6           And so there's only one possible  
7 interpretation of the list of State sexual-abuse  
8 offenses in Section 2251(e), and there's two possible  
9 interpretations of the -- the same three crimes in the  
10 next provision. And so the Court would have a choice  
11 between saying that those -- the State sexual abuse  
12 offenses have different scopes in the two provisions.

13           Third is that it ignores -- Petitioner's  
14 interpretation ignores the clear parallel between the --  
15 the three main categories of sexual abuse offenses in  
16 Chapter 109A, the Federal offenses.

17           JUSTICE BREYER: Yeah. And the other?

18           MS. O'CONNELL: That's the -- and the three  
19 categories that it created for State sexual offenses.

20           JUSTICE BREYER: Right. And the fourth.

21           JUSTICE SCALIA: Which is not a parallel  
22 if -- if you read the word, right?

23           MS. O'CONNELL: It's not exactly parallel.

24           JUSTICE SCALIA: Contact is not conduct.

25           MS. O'CONNELL: I -- I think that's -- that

1 is debatable. I mean, there's -- there's sexual conduct  
2 --

3 JUSTICE SCALIA: It's debatable that contact  
4 and conduct are different words? That's not debatable.

5 MS. O'CONNELL: Not that they're different  
6 words. But I think even Petitioner points out that in  
7 the abusive sexual contact provision, sexual contact  
8 is -- they start out by calling it sexual conduct in  
9 circumstances where it didn't amount to a sexual act.  
10 It's all --

11 JUSTICE KAGAN: You're not suggesting this  
12 is just a scrivener's error, are you? That it was meant  
13 to be contact?

14 MS. O'CONNELL: I think the -- they both do  
15 the same job. So I don't -- I don't know why it was  
16 changed, but I don't think there is a reason why it's --

17 JUSTICE BREYER: Fourth, fourth.

18 MS. O'CONNELL: The fourth is that  
19 Petitioner's interpretation would frustrate the purpose  
20 of the statute because under the categorical approach,  
21 it would exclude as predicates any sexual abuse crimes  
22 that were committed against children if the defendant  
23 was convicted under a generally applicable sexual-abuse  
24 statute.

25 JUSTICE BREYER: Okay. So he'll say "or" is

1 in this one and it's not in the other one for a reason.  
2 He'll say they're superfluous reading both ways. He'll  
3 say that -- I can't remember the third -- but the fourth  
4 he's going to say, yeah, it's underinclusive versus  
5 overinclusive. Yours is it would be somewhat  
6 under-inclusive for the reason you say, and you take  
7 your reading, it will be overinclusive for the reason he  
8 says.

9 So if we're at -- this is the only place  
10 that -- if we are absolutely at equipoise, which I can't  
11 say we are now, but I think it through -- if we are  
12 absolutely at equipoise, before turning to the rule of  
13 lenity, I would like your comment on my temptation to  
14 say at least here, the legislative history helps. And  
15 indeed --

16 JUSTICE SCALIA: I knew you were going to  
17 say that.

18 (Laughter.)

19 JUSTICE BREYER: Indeed --

20 JUSTICE SCALIA: I knew it.

21 JUSTICE BREYER: -- it isn't just a letter  
22 from the Justice Department. It is that the report, the  
23 way these are actually written is that a general idea is  
24 given to a person whose job it is to draft. And that  
25 drafter tries to put in words the general intention

1 that's been described, and the report is used to  
2 describe what the general intention was. I'm not saying  
3 a hundred percent, but very often with technical  
4 statutes, that's how it works.

5           So I read that report, and what do I  
6 discover? A repeat offender with a prior conviction  
7 under da-ta-da, or under any State child abuse law, or  
8 law relating to the production receipt or distribution  
9 of child pornography. And it is only two years later  
10 after they pass that that the Justice Department writes  
11 its letter noting that the provision they just passed  
12 involved individuals with prior convictions for child  
13 abuse. And recommending an enhanced penalty as well if  
14 they had a prior conviction for sexual abuse of a minor.

15           Okay. So I read that and said, short, but  
16 clear. And that's what the drafter would have been  
17 looking at when -- the first one, anyway -- working with  
18 the staff of the committee when trying to translate  
19 general intentions of senators and representatives into  
20 actual language. And I think it's not contrary to  
21 popular belief to say that senators and representatives  
22 do hire staff to do such things and do not sit there  
23 with pen and pencil thinking, where does the "or" go?

24           Okay? So what is -- what is the Justice  
25 Department's response to that?



1 MS. O'CONNELL: I think there are two  
2 things. The first is the response I gave before, which  
3 is just that this may have been a useful shorthand way  
4 to describe the conduct that Congress would have been  
5 most concerned about, for the person writing the report  
6 and for the Department of Justice trying to convince  
7 Congress to add these State law crimes to the child  
8 pornography possession recidivist enhancement.

9 And I think the other response is just that,  
10 even if you think the letter is against us, you look at  
11 what Congress actually did. And they created a -- a  
12 provision that basically parallels the three Federal  
13 offenses. They included many Federal offenses that can  
14 involve adult victims. And then eight years later, when  
15 they added State law predicates to Section 2251(e), they  
16 made very clear they understood the modifier to apply  
17 only to the last category.

18 JUSTICE SCALIA: Ms. O'Connell, you -- you  
19 don't think Congress can leave it to its staff to decide  
20 what a statute means, do you?

21 MS. O'CONNELL: No.

22 JUSTICE SCALIA: Isn't legislative power  
23 nondelegable?

24 MS. O'CONNELL: Right. We think the -- the  
25 most important thing here is to look at the text of the

1 --

2 JUSTICE BREYER: You asked a really quite  
3 broad -- I don't know what the 4,000 people over there  
4 are doing, if -- if they're not entrusted by their  
5 principals to write words on paper that would reflect  
6 the general idea.

7 You think they can't do that?

8 MS. O'CONNELL: Justice Breyer, I think  
9 it -- as we explained in the brief, it -- it may have  
10 just been a useful shorthand way to describe the most  
11 serious conducts included in that provision.

12 JUSTICE GINSBURG: Who is -- who is the  
13 author of this?

14 CHIEF JUSTICE ROBERTS: I don't know what  
15 the hundred people --

16 JUSTICE GINSBURG: Who is the author?

17 CHIEF JUSTICE ROBERTS: -- are doing over  
18 there if they're delegating everything to the staff.

19 JUSTICE GINSBURG: This -- this -- this  
20 letter that so much discussion has revolved around, who  
21 was it in the Department of Justice that wrote?

22 MS. O'CONNELL: It was the Acting Assistant  
23 Attorney General Ann Harkins.

24 JUSTICE KENNEDY: Could you talk about the  
25 rule of lenity? Does the rule of lenity apply with the

1 same force when the question is the substantive  
2 definition of a crime as distinct from the penalty  
3 that's attached?

4 MS. O'CONNELL: The Court --

5 JUSTICE KENNEDY: It seems to me there's an  
6 argument that it should apply equally, but have we  
7 talked about that?

8 MS. O'CONNELL: I think the Court has  
9 typically applied the same-strength rule of lenity to  
10 both substantive provisions and penalty provisions.

11 JUSTICE KENNEDY: That -- that makes a great  
12 deal of sense. It -- other than that rule of lenity to  
13 the extent it's based on notice, it seems to have  
14 somewhat more force when it applies to the substantive  
15 definition of the offense as opposed to the punishment.  
16 But I -- you could argue it either -- either way.

17 But have we -- have we talked about any  
18 distinction?

19 MS. O'CONNELL: There has not been a  
20 distinction in the Court's cases. There have been a few  
21 times where criminal defendants have tried to say that  
22 there should be a supercharged rule of lenity in a case  
23 that's talking about mandatory minimums or maximums or  
24 consecutive sentence. And the Court has resisted that.

25 And I think this would be not a -- not a

1 good case for the Court to go down that path because  
2 the -- the guidelines range for this particular criminal  
3 defendant was 78 to 97 months. His minimum was 120.  
4 It's not actually a huge difference. And under -- under  
5 current law, the statutory maximum would have been the  
6 same, regardless of -- of whether this enhancement  
7 applied.

8 Justice Breyer has helpfully walked me  
9 through all of my points; so if the Court has no further  
10 questions.

11 JUSTICE KAGAN: Well, can I go back to  
12 the -- to the language? You know, it's confusing  
13 language. And I showed it to all my clerks and -- and  
14 basically said how would you read it. And two came out  
15 on one side, and two came out on the other side. But --  
16 but I'm sort of left with this feeling that it -- we're  
17 not in -- in a situation where there are dueling canons.  
18 We actually might be in a situation where one canon  
19 trumps the other.

20 I mean, you have this last-antecedent rule,  
21 and it's an important rule. But it gives way when a  
22 certain -- when there is a certain quality to all the  
23 antecedents when they're all parallel and when the last  
24 modifier equally sensibly refers to them all, right?  
25 And that that's a situation, so that series-qualifier

1 rule is in some sense a rule about when the  
2 last-antecedent rule doesn't apply.

3 So I guess I would ask you to comment on  
4 that.

5 MS. O'CONNELL: There -- I have a couple of  
6 different responses.

7 The first one is that the context is the  
8 most important thing. And it's not the case that the  
9 Court hasn't applied the last-antecedent rule in cases  
10 where the statute involves a list of parallel terms.

11 I think the FTC v. Mandel Brothers is the  
12 best example of that. There's a list of a purchaser,  
13 consignee, factor, bailee, correspondent or agent, or  
14 any other person who is engaged in dealing commercially  
15 in fur products or fur.

16 And the Court said it didn't make sense to  
17 only apply this to a purchaser who is also dealing in  
18 the -- in the fur products, and so we're going to apply  
19 it only to the last antecedent. The series-qualifier  
20 principle, you know, petitioner relies quite heavily on  
21 the explanation in -- in Justice Scalia's book that goes  
22 through all of the canons. And the book even says that  
23 the series qualifier principle more so than others is  
24 highly dependent on context and can be overcome if  
25 something doesn't feel right about the way that it --

1 the statute reads when you apply it.

2 And we think the clearest indication here  
3 that it doesn't make sense for the qualifier to apply to  
4 all three of the categories is that it -- it literally  
5 renders categories B and C the same.

6 I'll -- I'll point out just one other thing.

7 Justice Breyer, you mentioned during the  
8 Petitioner's argument that you noticed that each of the  
9 Federal predicates, 2241, 2242, 2243, have a provision  
10 that applies to minors and wards. Section 2242 does  
11 not.

12 JUSTICE BREYER: No. But it's followed by  
13 what could be taken as. They just gave it a different  
14 number; isn't that right? 2243 does, in fact, deal with  
15 minors?

16 MS. O'CONNELL: 2243 is the sexual abuse of  
17 a minor or ward provision.

18 JUSTICE BREYER: Right.

19 MS. O'CONNELL: 2241, aggravated sexual  
20 abuse, has a special subsection dealing with very young  
21 children. Section 2242, the general sexual abuse crime,  
22 does not include any specific for minors or wards.

23 JUSTICE BREYER: Yes, yes, yes, yes. I -- I  
24 saw that.

25 MS. O'CONNELL: All right. Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
2 Mr. Zas, you have four minutes.

3 REBUTTAL ARGUMENT OF EDWARD S. ZAS  
4 ON BEHALF OF THE PETITIONER

5 MR. ZAS: Justice Alito, Justice Scalia, and  
6 Justice Breyer I think all echoed the same theme, which  
7 is, at the very least, this statute is not unambiguously  
8 correct, which is the standard language this Court used  
9 in Granderson for when the rule of lenity must apply.

10 So under that rule --

11 JUSTICE ALITO: I don't think I actually  
12 said anything about the rule of lenity.

13 MR. ZAS: No, no. Your -- Your Honor did  
14 say --

15 JUSTICE SCALIA: I don't think he ever  
16 mentioned the rule of lenity.

17 MR. ZAS: But he did say -- he did use the  
18 word "ambiguity," and he did say that the statute was  
19 poorly drafted. And I think -- I think we certainly  
20 would agree that this is -- this is not a model of the  
21 drafter's art, by any means. But --

22 JUSTICE ALITO: Well, you -- you are making  
23 an argument that an awful lot of this big book is -- is  
24 subject to the rule of lenity because a lot of it is  
25 very poorly drafted.

1           MR. ZAS: Well, this is -- this is -- this  
2 is not just poorly drafted. We -- both sides have gone  
3 through all the canons, all the tools, legislative  
4 history. And at the end of the day, as Justice Kagan  
5 pointed out, you can read it reasonably both ways. But  
6 we think as a matter of text we actually have the better  
7 reading.

8           My colleague from the Solicitor General's  
9 office conceded when she was up here that there is no  
10 difference between sexual abuse and abusive sexual  
11 conduct. So the parties agree on that, and yet we draw  
12 radically different conclusions.

13           The government says the solution is to just  
14 limit the modifier to the second term, but that doesn't  
15 eliminate surplusage. It causes the entire modifying  
16 phrase, the entire category, abusive sexual conduct  
17 involving a minor or ward, to effectively drop out of  
18 the statute.

19           Our solution is to say, give the  
20 nonredundant portion of the statute involving a minor or  
21 ward some meaning. Congress used those words for a  
22 reason. And the reason was the problem they were  
23 focused on, which is the danger to children.

24           So the way to preserve effect for the --  
25 that modifying phrase is to apply it to all three terms,



1 which makes perfect sense. If two of them mean exactly  
2 the same thing, why in the world would Congress limit  
3 only one to minors and children? They're synonyms. It  
4 makes sense --

5 JUSTICE SOTOMAYOR: My problem is, why would  
6 they include adults as a predicate for the minimum in  
7 Federal crimes but not in straight State crimes.

8 MR. ZAS: Because --

9 JUSTICE SOTOMAYOR: I know they have done it  
10 in other situations.

11 MR. ZAS: Yes.

12 JUSTICE SOTOMAYOR: But why here? If  
13 they're worried about the abuse of children, why would  
14 they not capture every conceivable person or every  
15 conceivable abusive act towards kids?

16 MR. ZAS: Well, in -- in addition to the  
17 fairness and administrability problems we've identified,  
18 Congress reasonably could have determined that people  
19 who commit abuse offenses against adults, as bad as that  
20 is, don't pose the same level of danger to children.

21 JUSTICE BREYER: Well, she's saying why --  
22 but they -- they do include the sexual abuse adult when  
23 you're talking about prior conviction of a Federal  
24 crime.

25 MR. ZAS: Yes.

1 JUSTICE BREYER: And the answer, I guess,  
2 has to be that you -- the drafters know what they're  
3 getting into with the Federal crimes, and they have no  
4 idea what they're getting into when they're dealing with  
5 50 State crimes. Is that your response?

6 MR. ZAS: That's --

7 JUSTICE BREYER: I'm not trying to put words  
8 in your mouth. I want to know what -- that's what I  
9 read in the --

10 MR. ZAS: Your Honor, that's one answer.

11 JUSTICE ALITO: Let's take a -- an offense  
12 as to which there isn't much ambiguity: Rape. All  
13 right? Under the -- the ordinary meaning, why would  
14 rape in a Federal enclave qualify; rape a few yards  
15 away, perhaps, in State territory, not -- not qualify?

16 MR. ZAS: Because Congress was not focused  
17 on symmetry in that way. The -- the Federal predicates  
18 were added by the 1994 Congress. They were -- they  
19 were -- yes. They were made Federal predicates. The  
20 later Congress, 1996 Congress, was the one that added  
21 the State law predicates.

22 So it's not as if the same legislators are  
23 making this decision at the same time: Should we cover  
24 Federal and -- and --

25 Mr. Chief Justice, I'm sorry. I see my

1 light is on.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 The case is submitted.

4 MR. ZAS: Thank you.

5 (Whereupon, at 10:59 a.m., the case in the  
6 above-entitled matter was submitted.)

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<p style="text-align: center;"><b>A</b></p> <p><b>a.m</b> 1:13 3:2 51:5  <b>able</b> 13:2  <b>above-entitled</b> 1:11              51:6  <b>absolutely</b> 33:18              39:10,12  <b>abuse</b> 3:17,23 4:4              6:19 7:4,4,4,12,12              7:22 8:7,12,12,12              8:13,14,17 10:14              10:15,15,22,22,23              11:20,22,22 12:7              12:13,13,16 13:18              13:20,25 15:23              17:14,24 19:19,19              21:1,7,17,25,25              22:1,9,13,14              23:12 24:20 25:3              25:3,3,6,9,9,12              26:7,9,10,19,25              27:19 28:18 29:10              30:13 31:17,25              33:18,19,24,24,24              34:2,2,12,21,24              35:14,16 36:20,24              36:24 37:11,15              38:21 40:7,13,14              46:16,20,21 48:10              49:13,19,22  <b>abusive</b> 7:5,7,9,12              7:23 8:15 10:15              10:23 11:2,22              12:14 13:18,24              15:5 16:1,4,9,11 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