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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 MR. 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 -- this list. The other
11 makes the list terribly redundant, and I haven't heard
12 your explanation as to why they would do that.

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

16 MR. ZAS: Two responses, Your Honor.

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

1 "abusive sexual conduct."

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

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

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

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

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

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

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

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

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

25 MR. ZAS: Well, I think -- I think Your

1 Honor makes a good point. We have not been able to --

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

4 (Laughter.)

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

7 (Laughter.)

8 JUSTICE KAGAN: What?

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

12 (Laughter.)

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

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

22 JUSTICE KAGAN: But just presume with me
23 that abusive sexual conduct is supposed to be -- is
24 supposed to include some things that sexual abuse would
25 not.

1 What do you think follows from that?

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

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

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

18 MR. ZAS: Yes, Your Honor.

19 JUSTICE SCALIA: Your answer.

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

24 JUSTICE SCALIA: But -- but the -- the
25 problem with that is -- maybe I'm wrong, but I think you

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

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

10 JUSTICE SCALIA: What did you do that for?

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

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

1 can --

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

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

6 CHIEF JUSTICE ROBERTS: (e)?

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

9 CHIEF JUSTICE ROBERTS: I see.

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

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

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

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

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

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

23 MR. ZAS: You can, Your Honor.

24 JUSTICE BREYER: Your section.

25 Then think of several other sections, which

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

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

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

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

23 And then the next section, abuse, it can be
24 some other kind of threat. Then we get to the way it
25 deals with children, and it deals with children under

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

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

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

16 MR. ZAS: Well --

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

19 (Laughter.)

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

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

1 reference to the Federal predicates. In fact, that's
2 the government's position here as well.

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

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

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

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

1 Federal offense of possessing child pornography, is
2 suddenly going to have their sentence go --

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

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

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

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

16 JUSTICE SCALIA: The third term is
17 different.

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

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

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

25 JUSTICE ALITO: When they use "sexual abuse"

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

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

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

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

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

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

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

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

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

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

23 JUSTICE KAGAN: No, but the -- the Federal
24 predicate, the Section 109, I believe it is, does apply
25 to adults as well. So why would they be focused on

1 adults with respect to Federal offenses but not with
2 respect to State offenses?

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

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

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

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Ms. O'Connell.

22 ORAL ARGUMENT OF MS. ANN O'CONNELL

23 ON BEHALF OF THE RESPONDENT

24 MS. O'CONNELL: Mr. Chief Justice, and may
25 it please the Court:

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

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

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

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

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

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

20 JUSTICE SCALIA: Right.

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

23 The first is that, when they added these
24 State law predicates to the Section 2252(b)(1) for the
25 first time in 1996, there already were Federal

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

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

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

23 JUSTICE ALITO: Why do you resist -- why --
24 why do you resist the argument that what Congress was
25 doing was picking up basically the definitions of the

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

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

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

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

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

23 But what is the difference between sexual
24 abuse and abusive sexual conduct? Putting aside the
25 definitions of those -- of those terms or similar terms

1 in Chapter 109.

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

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

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

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

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

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

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

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

25 JUSTICE SCALIA: I know. Why? That's what

1 I'm asking.

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

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

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

8 JUSTICE SCALIA: No?

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

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

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

21 MS. O'CONNELL: Under --

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

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

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

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

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

14 MS. O'CONNELL: Right.

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

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

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

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

23 And I think this is a -- a key point that
24 Petitioner has never really answered is that Petitioner
25 is trying to say that there is this clear pattern that

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

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

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

18 JUSTICE KAGAN: Ms. O'Connell --

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

25 MS. O'CONNELL: No. I -- I -- I don't think

1 that that is an official position that the government
2 took. We never took that position in a brief. Any time
3 we were confronted with actually interpreting the
4 statute as a legal matter, we have contended that
5 involving a minor or ward applies only to the last
6 category.

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

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

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

22 In summarizing that argument, the drafter of
23 the letter referred to them as "child molestation
24 crimes" or "child abuse crimes." It was an -- it was an
25 underinclusive, inaccurate, short -- it -- it wasn't

1 inaccurate. They do involve child molestation crimes.
2 But it was just a useful way of summarizing what was
3 there and what would have been most --

4 JUSTICE SCALIA: Surely it shows --

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

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

9 MS. O'CONNELL: I --

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

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

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

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

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

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

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

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

1 distinction was between sexual abuse and sexual abuse
2 involving a minor or ward.

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

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

22 I can't say that I know why Congress didn't
23 say "sexual abuse of a minor or ward" as opposed to
24 "abusive sexual conduct involving a minor or ward." But
25 I think the key part of it to focus on is the fact that

1 they use the term "involving a minor or ward." It's the
2 same category or category of people that they are trying
3 to pick up that's reflected in the prohibitions on
4 sexual --

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

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

23 JUSTICE BREYER: What were the -- what were
24 the other three? You said there were four reasons. I
25 started where I think Justice Scalia did. Of course, I

1 might more often than he think that the canons don't
2 help us all that much. And this -- this is a poster
3 child, I think, for that proposition.

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

9 MS. O'CONNELL: Okay.

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

12 MS. O'CONNELL: No apology necessary.

13 JUSTICE BREYER: No, it wasn't.

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

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

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

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

16 JUSTICE BREYER: Yeah. And the other?

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

19 JUSTICE BREYER: Right. And the fourth.

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

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

23 JUSTICE SCALIA: Contact is not conduct.

24 MS. O'CONNELL: I -- I think that's -- that
25 is debatable. I mean, there's -- there's sexual conduct

1 --

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

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

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

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

16 JUSTICE BREYER: Fourth, fourth.

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

24 JUSTICE BREYER: Okay. So he'll say "or" is
25 in this one and it's not in the other one for a reason.

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

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

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

17 (Laughter.)

18 JUSTICE BREYER: Indeed --

19 JUSTICE SCALIA: I knew it.

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

1 describe what the general intention was. I'm not saying
2 a hundred percent, but very often with technical
3 statutes, that's how it works.

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

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

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

25 MS. O'CONNELL: I think there are two

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

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

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

20 MS. O'CONNELL: No.

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

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

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

6 You think they can't do that?

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

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

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

15 JUSTICE GINSBURG: Who is the author?

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

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

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

23 JUSTICE KENNEDY: Could you talk about the
24 rule of lenity? Does the rule of lenity apply with the
25 same force when the question is the substantive

1 definition of a crime as distinct from the penalty
2 that's attached?

3 MS. O'CONNELL: The Court --

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

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

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

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

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

24 And I think this would be not a -- not a
25 good case for the Court to go down that path because

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

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

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

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

1 last-antecedent rule doesn't apply.

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

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

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

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

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

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

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

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

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

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

17 JUSTICE BREYER: Right.

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

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

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

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Zas, you have four minutes.

2 REBUTTAL ARGUMENT OF EDWARD S. ZAS

3 ON BEHALF OF THE PETITIONER

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

9 So under that rule --

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

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

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

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

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

25 MR. ZAS: Well, this is -- this is -- this

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

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

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

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

23 So the way to preserve effect for the --
24 that modifying phrase is to apply it to all three terms,
25 which makes perfect sense. If two of them mean exactly

1 the same thing, why in the world would Congress limit
2 only one to minors and children? They're synonyms. It
3 makes sense --

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

7 MR. ZAS: Because --

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

10 MR. ZAS: Yes.

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

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

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

24 MR. ZAS: Yes.

25 JUSTICE BREYER: And the answer, I guess,

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

5 MR. ZAS: That's --

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

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

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

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

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

24 Mr. Chief Justice, I'm sorry. I see my
25 light is on.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 The case is submitted.

3 MR. ZAS: Thank you.

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

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