No. 14-8358

IN THE SUPREME COURT OF THE UNITED STATES

AVONDALE LOCKHART, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior New York conviction for first-degree sexual abuse involving an adult victim constitutes a "conviction under * * * the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," thereby triggering the ten-year mandatory minimum sentence provided in 18 U.S.C. 2252(b)(2).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 749 F.3d 148.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2014. A petition for rehearing was denied on October 16, 2014 (Pet. App. 20). The petition for a writ of certiorari was filed on January 14, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). He was sentenced to ten years of imprisonment, to be followed by ten years of supervised release. Pet. App. 28, 34-35. The court of appeals affirmed. Id. at 1-19.

1. In November 2008, agents from United States Immigration and Customs Enforcement (ICE) learned that petitioner had recently wired $1000 to a Russian money courier for a company that distributed child pornography. Presentence Investigation Report (PSR) para. 4. On June 2, 2010, ICE agents and United States postal inspectors sent petitioner a letter inviting him to visit a website where he could purchase child pornography. Petitioner responded, asking to buy six videos depicting children as young as nine years old engaging in sexually explicit conduct. PSR paras. 5-17.

After obtaining a warrant to search petitioner's residence, agents conducted a controlled delivery of a package purporting to contain the videos. When petitioner accepted the package, the agents executed the search warrant. On petitioner's laptop and external hard drive, the agents found more than 15,000

images and at least nine videos containing child pornography. Pet. App. 3.

2. A federal grand jury in the United States District Court for the Eastern District of New York returned an indictment charging petitioner with attempted receipt of child pornography, in violation of 18 U.S.C. 2252(a)(2) and (b)(1) (Count 1), and possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B) and 2252(b)(2) (Count 2). C.A. App. 14. Petitioner pleaded guilty to Count 2, pursuant to a plea agreement that preserved his right to appeal if the district court imposed a ten-year mandatory minimum sentence under 18 U.S.C. 2252(b)(2). C.A. App. 21.

The PSR prepared by the Probation Office noted that petitioner had previously been convicted of first-degree sexual abuse under New York law after he pinned down and attempted to rape his adult girlfriend. PSR paras. 47-48. In light of that conviction, the PSR concluded that petitioner faced a ten-year mandatory minimum term of imprisonment pursuant to Section 2252(b)(2). PSR para. 87. Section 2252(b)(2) requires a district court to sentence any person who is convicted of possessing child pornography in violation of Section 2252(a)(4) to a minimum term of ten years of imprisonment, if that person

> has a prior conviction under this chapter [i.e., chapter 110], chapter 71, chapter 109A, or chapter

> 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography.

18 U.S.C. 2252(b)(2).

Petitioner argued that Section 2252(b)(2) did not apply in his case because his prior state-law conviction for first-degree sexual abuse did not involve a minor. Pet. App. 22-23. The district court overruled that objection. Id. at 23. The court explained that petitioner's prior conviction "fits within th[e] part of [Section 2252(b)(2)] that speaks of a state conviction for aggravated sexual abuse." Ibid. The court sentenced petitioner to ten years of imprisonment, to be followed by ten years of supervised release. Id. at 28, 34-35.

3. The court of appeals affirmed. Pet. App. 1-19. The court held that the phrase "involving a minor or ward" in Section 2252(b)(2) modifies only "abusive sexual conduct," and not "aggravated sexual abuse" or "sexual abuse." Id. at 2. Accordingly, the court held, "a 'sexual abuse' conviction involving an adult victim constitutes a predicate offense" that triggers the ten-year mandatory minimum sentence provided in Section 2252(b)(2). Ibid.

The court of appeals stated that "the plain meaning [of Section 2252(b)(2)] is not pellucid," and it therefore considered two competing canons of statutory interpretation: (i) the "last antecedent rule," under which "a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows," Pet. App. 7-8 (quoting United States v. Kerley, 416 F.3d 176, 180 (2d Cir. 2005), cert. denied, 555 U.S. 1159 (2009)); and (ii) the "series qualifier" canon, which "provides that a modifier at the beginning or end of a series of terms modifies all the terms," id. at 8 (quoting United States v. Laraneta, 700 F.3d 983, 989 (7th Cir. 2012), cert. denied, 134 S. Ct. 235 (2013)). The court noted that applying the series-qualifier canon "would eliminate any distinction between 'sexual abuse involving a minor' and 'abusive sexual conduct involving a minor,' since 'abusive sexual conduct involving a minor' seemingly would encompass anything that constitutes 'sexual abuse involving a minor.'" Id. at 10. Petitioner's reading, the court explained, thus "run[s] up against the principle of statutory interpretation that '[w]e assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.'" Id. at 10-11 (quoting Bailey v. United States, 516 U.S. 137, 146 (1995)). The court stated, however, that it could

not "definitively determine by applying the canons whether the phrase 'involving a minor or ward' modifies the entire category of state-law sexual abuse crimes or only 'abusive sexual conduct.'" Id. at 12.

The court of appeals therefore looked to the remainder of Section 2252(b)(2) to determine "whether its overall scheme may shed light on what state-law sexual abuse offenses Congress intended to include as predicate offenses." Pet. App. 13. The court noted that, immediately before the reference to state-law crimes, Section 2252(b)(2) imposes an identical ten-year mandatory minimum sentence on defendants who are convicted of possessing child pornography and have a prior federal-law conviction under "[chapter 110], chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice)." Ibid. The court explained that those provisions "prohibit sexual conduct, including conduct that may have both minor and adult victims." Ibid. The court further explained that Section 2252(b)(2) "does not specify that a conviction under a federal statute must involve a minor; a violation of any of these statutory provisions constitutes a predicate offense for the application of [Section] 2252(b)(2)'s mandatory minimum sentence, regardless of the age of the victim." Id. at 13-14. The court concluded

that, "[l]ooking at [Section] 2252(b)(2) as a whole, we find, as a number of other circuits have explained, that it would be unreasonable to conclude that Congress intended to impose the enhancement on defendants convicted under federal law, but not on defendants convicted for the same conduct under state law." Ibid. (quotation marks and citation omitted; citing cases).

The court of appeals stated that "the Sixth, Eighth, and Tenth Circuits have reached the opposite conclusion, namely, that the phrase 'involving a minor or ward' modifies all three categories of state sexual abuse crimes." Pet. App. 15. The court explained, however, that "the Eighth and Tenth Circuits have drawn this conclusion without elaborating on their reasoning," and have expressed that understanding of Section 2252(b)(2)'s scope in cases where it "made little difference * * * since the predicate violations at issue involved minor victims." Id. at 15-16 (citing United States v. Hunter, 505 F.3d 829, 831 (8th Cir. 2007), and United States v. McCutchen, 419 F.3d 1122, 1125 (10th Cir. 2005)). The court further explained that the Sixth Circuit had "reached this conclusion * * * because it found that another panel of that court had 'already considered the proper construction of the statutory language at issue,' and that the prior decision bound the current panel, even though the earlier opinion did not engage in

any express analysis of the statutory language." Id. at 16 (quoting United States v. Mateen, 739 F.3d 300, 304-305 (6th Cir. 2014)).[1] The court stated that it was "not compelled to follow such unexplored assumptions in coming to [its] conclusion here." Ibid. The court of appeals further explained that Section 2252(b)(2)'s "brief legislative history" did not alter the court's conclusion, and that the rule of lenity did not apply because the statutory text allowed the court "to make far more than a guess as to what Congress intended." Id. at 18-19 (internal quotation marks and citations omitted).

ARGUMENT

Petitioner contends (Pet. 26-31) that his New York conviction for first-degree sexual abuse, which involved an adult victim, is not a state-law conviction "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward" within the meaning of 18 U.S.C. 2252(b)(2). The court of appeals correctly rejected that argument, and its decision does not conflict with any decision

[1] After the court of appeals issued its decision in petitioner's case, the panel opinion in Mateen was vacated and the Sixth Circuit sitting en banc ultimately agreed with the government that Section 2252(b)(2) applies in circumstances like those presented here. United States v. Mateen, 764 F.3d 627, 628 (2014) (en banc) (holding that a state-law conviction for sexual abuse need not involve a minor or ward in order to trigger the sentencing enhancement under Section 2252(b)(2)).

of this Court or any holding of another court of appeals on the specific issue presented in this case. Further review is not warranted.

1. Section 2252(b)(2) sets forth the penalties for possession of child pornography in violation of Section 2252(a)(4). The statute provides that if a person who violates Section 2252(a)(4)

> has a prior conviction under this chapter [i.e., chapter 110], chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

18 U.S.C. 2252(b)(2). In addition to the Second Circuit in this case, five other courts of appeals have concluded that the term "involving a minor or ward" in Section 2252(b)(2) -- or in similar sentencing provisions contained in 18 U.S.C. 2252(b)(1), 2252A(b)(1), and 2252A(b)(2) -- modifies only "abusive sexual conduct." See United States v. Mateen, 764 F.3d 627, 633 (6th Cir. 2014) (en banc); United States v. Spence, 661 F.3d 194, 197-198 (4th Cir. 2011); United States v. Sinerius, 504 F.3d 737, 740 (9th Cir. 2007), cert. denied, 552 U.S. 1211 (2008); United States v. Hubbard, 480 F.3d 341, 350 (5th Cir.), cert.

denied, 552 U.S. 990 (2007); United States v. Rezin, 322 F.3d 443, 448 (7th Cir. 2003).

Under the "rule of the last antecedent," under which a limiting or modifying phrase "should ordinarily be read as modifying only the noun or phrase that it immediately follows," see Barnhart v. Thomas, 540 U.S. 20, 26 (2003), the portion of Section 2252(b)(2) that describes state-law crimes "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward" describes three categories of state-law crimes, only the last of which must involve a minor. See Mateen, 764 F.3d at 631 (stating that the last-antecedent rule applies to Section 2252(b)(2), unless there are "other indicia of meaning to overcome the grammatical presumption") (internal citation and quotation marks omitted).

Petitioner contends that the last-antecedent rule is overcome here by the "series qualifier canon," which applies when "several words are followed by a clause which is applicable as much to the first and other words as to the last." Pet. 26 (quoting Paroline v. United States, 134 S. Ct. 1710, 1721 (2014)). Reading the term "involving a minor or ward" to modify each category of state-law crimes in the relevant clause, however, would render some of the statutory language superfluous. In particular, the term "abusive sexual conduct

involving a minor" would seemingly encompass all conduct that constitutes "sexual abuse involving a minor" and "aggravated sexual abuse involving a minor." Pet. App. 10; see Mateen, 764 F.3d at 631. Because an interpretation of a statute that makes any word, sentence, or clause superfluous should be avoided if possible, see, e.g., TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001), the series-qualifier canon does not "make[] sense" or supply "the more plausible construction" of Section 2252(b)(2). United States v. Bass, 404 U.S. 336, 339-340 (1971).

Other aspects of Section 2252(b)(2) confirm that the phrase "involving a minor" modifies only "abusive sexual conduct" in the relevant clause. In addition to identifying various state-law crimes for which prior convictions will trigger the ten-year statutory minimum sentence, Section 2252(b)(2) lists several categories of federal convictions that will have the same effect. Those include convictions "under this chapter [i.e., chapter 110], chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice)." 18 U.S.C. 2252(b)(2). Section 110 covers "sexual exploitation and other abuse of children," 18 U.S.C. 2251-2260A (2012; Supp. 2013); chapter 71 covers "obscenity," 18 U.S.C. 1460-1470; chapter 109A covers "sexual abuse," 18 U.S.C. 2241-2248; chapter 117 covers "transportation for illegal sexual

activity and related crimes," 18 U.S.C. 2421-2428 (2012; Supp. 2013); and article 120 of the Uniform Code of Military Justice covers "rape and sexual assault generally," 10 U.S.C 920. Many of the crimes identified in those various statutory provisions can have adult victims, and there is "no logical reason that Congress would have identified federal offenses not involving minor victims as qualifying predicates while excluding state offenses that criminalize identical conduct." Mateen, 764 F.3d at 631-632; see Spence, 661 F.3d at 197 ("[I]t would be unreasonable to conclude that Congress intended to impose the enhancement on defendants convicted under federal law, but not on defendants convicted for the same conduct under state law."); Hubbard, 480 F.3d at 350 (same).

Petitioner contends (Pet. 29-31) that no comparison can be drawn between the federal predicate crimes and the state predicate crimes because Congress specified a much broader range of federal offenses. But while Section 2252(b)(2) does not identify a state-law offense corresponding to every federal crime that triggers the ten-year statutory minimum sentence, the federal offenses that Congress identified within chapter 109A include the federal offenses of "aggravated sexual abuse," 18 U.S.C. 2241; "sexual abuse," 18 U.S.C. 2242; and "sexual abuse of a minor or ward," 18 U.S.C. 2243. Given the striking

similarity between those three federal statutes (the first two of which encompass crimes against adult victims) and the state-law crimes referenced in the portion of the statute at issue here, Congress's intent to capture state-law convictions for "aggravated sexual abuse" and "sexual abuse" of adult victims seems clear. See Mateen, 764 F.3d at 632 ("The parallel between these three federal offenses and the three listed categories of state offenses -- aggravated sexual abuse, sexual abuse, and abusive sexual conduct involving a minor or ward -- is inescapable.").

Petitioner's reliance (Pet. 31) on Section 2252(b)'s legislative history is unavailing. Petitioner points to a single sentence in a Senate Report stating that sentencing enhancements would apply to "a repeat offender with a prior conviction under Chapter 109A or 110 of title 18, or under any State child abuse law or law relating to the production, receipt or distribution of child pornography." Ibid. (quoting S. Rep. No. 358, 104th Cong., 2d Sess. 9 (1996)). That sentence provides no persuasive evidence of Congress's intent in enacting Section 2252(b)(2). Its reference to "State child abuse law[s]" does not accurately describe the text of the statute because prior convictions for "child abuse" do not trigger an enhancement (although convictions for child sexual abuse do).

Even if the Senate Report had referred instead to "any State child sexual abuse law," it would not demonstrate that the only state-law convictions that can trigger Section 2252(b)(2) are convictions for offenses against children. Instead, it would simply reflect the undisputed fact that such offenses are included among those that will trigger an enhanced statutory sentencing range.

2. Petitioner contends (Pet. 13-24) that the court of appeals' decision in this case conflicts with prior decisions of the Eighth Circuit. The court below stated (Pet. App. 15) that the Sixth, Eighth, and Tenth Circuits had "reached the opposite conclusion" from its holding in petitioner's case, i.e., that those courts had understood the phrase "involving a minor or ward" in Section 2252(b)(2) to modify "sexual abuse" and "aggravated sexual abuse" as well as "abusive sexual conduct." The decisions cited by petitioner and the court below do not create a conflict warranting this Court's review on the specific issue presented in this case.

As petitioner recognizes (Pet. 17-18), the Sixth Circuit decision that the court of appeals identified as being in conflict with its holding, United States v. Mateen, 739 F.3d 300 (2014), was subsequently vacated by the en banc court, which held that state-law sexual-abuse convictions involving adult

victims trigger the sentencing enhancement in Section 2252(b)(2). See Mateen, 764 F.3d at 628; note 1, supra.

Petitioner acknowledges (Pet. 11 n.2, 22-24) that the Tenth Circuit has not definitively resolved the question whether state-law "sexual abuse" or "aggravated sexual abuse" convictions must involve a minor in order to trigger the sentencing enhancement in Section 2252(b)(2). In United States v. McCutchen, 419 F.3d 1122 (2005), the court appeared to assume, without deciding, that the defendant's Kansas conviction for sexual battery could not be used to enhance his child-pornography sentence unless it involved a minor victim. See id. at 1125-1127. The defendant argued that, in order to trigger the enhancement, "the statute under which [his] prior state conviction arose must have included as an element the victim's status as a minor." Id. at 1125 (emphasis added). The court of appeals rejected that contention, concluding instead that the sentencing court had appropriately considered matters beyond the statutory elements of the prior offense (in particular, the complaint and the defendant's own statement in the prior criminal case) to determine whether the defendant's conduct had involved a minor victim. Id. at 1124-1127. The Tenth Circuit subsequently acknowledged that it had never squarely decided whether the phrase "involving a minor" in Section 2252(b)(2)

modifies only "abusive sexual conduct." United States v. Becker, 625 F.3d 1309, 1313 n.3 (2010), cert. denied, 131 S. Ct. 2961 (2011). That question remains open in the Tenth Circuit.

Petitioner contends (Pet. 19-22) that, under "a consistent line of Eighth Circuit decisions," any prior state conviction must involve a minor victim in order to trigger the Section 2252(b)(2) enhancement. In fact, the Eighth Circuit has never explicitly addressed that question. In United States v. Hunter, 505 F.3d 829 (2007), the defendant argued that his prior state-law conviction for incest could not be used to enhance his sentence under Section 2252A(b)(2) because, although he had previously admitted that the offense involved minors, the elements of the offense did not require a minor victim. Id. at 830-831. Like the Tenth Circuit in McCutcheon (see p. 15, supra), the court of appeals rejected that contention, holding that "[the] district court may go beyond the elements of [the] crime" to determine whether the prior offense involved a minor. Id. at 831. Similarly in United States v. Linngren, 652 F.3d 868 (2011), cert. denied, 132 S. Ct. 1594 (2012), the Eighth Circuit, without analyzing the language of Section 2252(b)(2), assumed that a prior state-law conviction for "sexual abuse" required "that the victim be a minor" to trigger the sentence enhancement. Id. at 870. As in Hunter, however, the court

denied the defendant relief because it viewed the evidence as showing that the prior offense did "relat[e] to sexual abuse of a minor." Id. at 871.[2]

As the court below explained in this case (Pet. App. 15-16), the Eighth Circuit's assumption in Hunter and Linngren "made little difference * * * since the predicate violations at issue involved minor victims." The Eighth Circuit thus has not squarely addressed, in a case where resolution of the question presented here would be outcome-determinative, whether prior state-law "sexual abuse" or "aggravated sexual abuse" convictions involving adult victims would trigger the ten-year minimum sentence under Section 2252(b)(2) or a similar enhancement provision. If that question is squarely presented in a future case, the Eighth Circuit would not likely view Hunter and Linngren as foreclosing the court from adopting the government's view of the statute. See Prince v. Kids Ark

[2] Petitioner also relies (Pet. 19-21) on United States v. Trogdon, 339 F.3d 620 (8th Cir. 2003), and United States v. Weis, 487 F.3d 1148 (8th Cir. 2007). In those cases, the Eighth Circuit considered only whether the prior offenses were "conviction[s] relating to * * * abusive sexual conduct involving a minor," the category of state-law offenses that both parties agree must involve a minor victim. Trogdon, 339 F.3d at 621; Weis, 487 F.3d at 1151 (internal quotation marks omitted). As in Hunter and Linngren, moreover, the defendants' prior offenses in both cases were found to have involved minor victims. Trogdon, 339 F.3d at 621; Weis, 487 F.3d at 1149.

Learning Center, LLC, 622 F.3d 992, 995 n.4 (8th Cir. 2010) (suggestion in prior decision does not control if relevant question was not actually at issue); see Brecht v. Abrahamson, 507 U.S. 619, 630-31 (1993) ("[S]ince we have never squarely addressed the issue, and have at most assumed [the answer], we are free to address the issue on the merits."). Accordingly, although petitioner asserts (Pet. 22) that "similarly situated defendants" are presently suffering "disparate penalties," petitioner identifies no case in which a court has declined to apply Section 2252(b)(2) or a similar sentence-enhancement provision on the ground that the defendant's prior state sexual-abuse conviction involved an adult victim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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