

In the
United States Court of Appeals
for the Second Circuit

AUGUST TERM 2025

No. 24-2956-cr

UNITED STATES OF AMERICA,
Appellee,

v.

STEVEN VALDER,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of New York

ARGUED: SEPTEMBER 24, 2025

DECIDED: AUGUST 18, 2026

Before: LOHIER, *Chief Judge*, RAGGI, and PARK, *Circuit Judges*.

On appeal from a judgment of conviction entered in the Northern District of New York (D’Agostino, J.), defendant Steven Valder challenges the concurrent terms of mandatory life imprisonment imposed pursuant to 18 U.S.C. § 3559(e)(1) on his first two counts of conviction for sexual exploitation of a child in violation of 18 U.S.C. § 2251(a). Valder submits that the district court erred in sentencing him pursuant to § 3559(e)(1) because his prior state conviction for a criminal sexual act in the first degree in violation of N.Y. Penal Law § 130.50(1) (2010) did not categorically qualify as “a prior sex conviction in which a minor was the victim,” the predicate required by § 3559(e)(1). Some of Valder’s supporting arguments are reviewed *de novo*; others only for plain error. None persuades.

AFFIRMED.

Chief Judge Lohier concurs in a separate opinion.

JAMES P. EGAN (Melissa A. Tuohey, *on the brief*), Assistant Federal Public Defenders, Office of the Federal Public Defender, Syracuse, NY, *for Defendant-Appellant*.

THOMAS R. SUTCLIFFE (Lisa M. Fletcher, *on the brief*), Assistant United States Attorneys, *for John A. Sarcone III, United States Attorney for the Northern District of New York, Syracuse, NY, for Appellee*.

REENA RAGGI, *Circuit Judge*:

Defendant Steven Valder stands convicted following a jury trial in the United States District Court for the Northern District of New York (Mae A. D’Agostino, *Judge*) on two counts of sexual exploitation of a child, *see* 18 U.S.C.

§ 2251(a); one count of receipt of child pornography, *see id.* § 2252A(a)(2)(A); and one count of committing a felony offense while a registered sex offender, *see id.* § 2260A. On this appeal, Valder does not dispute the adjudication of his culpability. Nor does he challenge the 480-month (40-year) prison sentence imposed for his receipt of child pornography or the consecutive 120-month (10-year) prison sentence imposed for committing a felony while a registered sex offender. Rather, Valder appeals only so much of the judgment entered on October 30, 2024, as sentenced him further to concurrent terms of mandatory life imprisonment pursuant to 18 U.S.C. § 3559(e)(1) for his two sexual-exploitation-of-a-child crimes. He submits that the district court erred in so sentencing him because his prior state conviction for a criminal sexual act in the first degree, *see* N.Y. Penal Law § 130.50(1) (2010)—his forcible anal rape of a 14-year-old boy, *see infra* at 5 n.4—does not *categorically* qualify as “a prior sex conviction in which a minor was the victim,” the predicate required by § 3559(e)(1) to mandate a life sentence for his most recent sex crimes against two other minor victims.¹ To the extent Valder relies on arguments raised and rejected in the district court, these fail on the merits. To the extent Valder submits arguments not raised in the district court, particularly those not raised until his reply brief in this court, our review is limited to plain error, which Valder fails to demonstrate. That conclusion is particularly warranted here, where the district court carefully explained why, even in the absence of § 3559(e)(1) mandatory life sentences, it would have

¹ Effective September 1, 2024, N.Y. Penal Law § 130.50’s provisions were transferred to and amended in N.Y. Penal Law § 130.35. In this opinion, when referring to the state statute of Valder’s conviction, we continue to use N.Y. Penal Law § 130.50, as this is the version of law required for comparison under the categorical approach. *See United States v. Gibson*, 55 F.4th 153, 162, 166 (2d Cir. 2022) (holding that categorical approach requires comparing state law at time of state conviction with federal law at time of either defendant’s federal offense or sentencing).

imposed a total sentence of “150 years,” *i.e.*, “more than a lifetime term of imprisonment.” App’x at 130. Accordingly, we affirm the challenged judgment.²

BACKGROUND

I. The Instant Crime of Conviction

On May 17, 2023, while Valder was under federal supervision for a 2010 child pornography conviction in the Northern District of New York,³ United States Probation Officers found him in possession of an unauthorized smartphone. Forensic analysis of that phone, conducted pursuant to a judicial warrant, revealed 142 pornographic images of a minor, specifically, a 13-year-old boy (“MV1”), and 42 pornographic images and 13 pornographic videos depicting other minors. In the course of further investigation, including interviews with MV1 and his 11-year-old brother (“MV2”), federal authorities discovered that Valder had repeatedly sexually abused these two children between approximately February and May 2023.

In the indictment charging Valder with the four crimes of conviction, the two counts alleging sexual exploitation of MV1 and MV2 referenced not only 18

² Hereafter in this opinion, to minimize confusion between federal and state laws, we short cite by section number only sections of the United States Code. New York laws are always cited in full.

³ Valder was federally convicted in 2010 for the unlawful transportation and possession of child pornography, *see* 18 U.S.C. § 2252A(a)(1), (a)(5)(b), crimes for which he was sentenced to a total of 180 months’ (15 years’) incarceration, to be followed by lifetime supervision. As the district court noted in imposing the life sentences at issue in this case, this prior 15-year sentence represented a significant downward variance from the 30-year prison sentence recommended by the Sentencing Guidelines.

U.S.C. § 2251(a), which criminalizes such exploitation, but also 18 U.S.C. § 3559(e)(1), which states in pertinent part that,

[a] person who is convicted of a Federal sex offense in which a minor is the victim shall be sentenced to life imprisonment if the person has a prior sex conviction in which a minor was the victim, unless the sentence of death is imposed.

The indictment alleged that Valder had such a “prior sex conviction,” specifically, a 2010 New York State conviction for Criminal Sexual Act in the first degree by forcible compulsion, *see* N.Y. Penal Law § 130.50(1), an offense that, in Valder’s case, “involved anal sexual conduct by forcible compulsion with a 14-year-old minor male child.” App’x at 19.⁴

Prior to trial, Valder moved for the district court to rule as a matter of law that he was not subject to a mandatory life sentence under § 3559(e)(1) because his 2010 state conviction did not qualify as the necessary predicate “prior sex conviction in which a minor was the victim.” In support, Valder advanced two arguments: (1) that N.Y. Penal Law § 130.50(1) does not require the victim of that crime to be a minor, and (2) that N.Y. Penal Law § 130.50(1) is not a categorical match with any of the federal statutes listed in 18 U.S.C. § 3559(e)(2)(A)’s

⁴ The New York State information to which Valder pleaded guilty alleged that, in July 2008, he “engaged in anal sexual conduct with C.H. by forcible compulsion when he forced his penis into C.H.’s anus while C.H. tried to get away.” App’x at 46 (internal quotation marks omitted). C.H. is Valder’s stepbrother, who was then 14 years old. The state court sentenced Valder to 10 years’ imprisonment for this crime, that term to run concurrently with the 15-year sentence imposed for his 2010 federal conviction. As the district court here noted, the investigation of Valder’s state crime suggested his possible further sexual abuse of two minor girls, aged 9 and 13, but as no charges were filed in that respect, the district court specifically did not assign any weight to these abuse reports in calculating Valder’s Guidelines for the conviction here at issue.

definition of a “Federal sex offense.”⁵ As to the latter point, Valder asserted that the state law is not a categorical match with 18 U.S.C. § 2241(a) (aggravated sexual abuse) because the compulsion element of N.Y. Penal Law § 130.50(1) can be proved, *inter alia*, by threat of “physical injury,” which reaches more broadly than § 2241(a), which permits compulsion to be proved, *inter alia*, by threat only of “serious” bodily injury. App’x at 28. Nor was the state law a categorical match with 18 U.S.C. § 2242(1) (sexual abuse) because the state law permits compulsion to be proved, *inter alia*, by use of force, while § 2242(1) “is violated only through means not involving physical force.” *Id.*⁶ In a “text order,” the district court denied the motion without explanation, but “without prejudice” to renewal. *Id.* at 7.

After a four-day trial, a jury found Valder guilty on all four counts charged, finding specifically with respect to the two exploitation counts that Valder committed these crimes after his 2010 New York “sex conviction in which a minor who had not attained the age of 17 years was the victim.” *Id.* at 51–52.

In a pre-sentence submission to the district court, Valder again disputed the applicability of a § 3559(e)(1) mandatory life sentence but, by contrast to his earlier two-fold argument, he now asserted only that “[t]he state statute under which [he] was convicted,” *i.e.*, N.Y. Penal Law § 130.50(1), “does not require that the victim be a minor.” *Id.* at 77. Nowhere in his pre-sentence submission or anytime at sentencing did Valder argue that his state crime of conviction was not a categorical match for a “Federal sex offense” as defined in § 3559(e)(2)(A).

Rejecting Valder’s § 3559(e)(1) challenge as presented in his pre-sentence submission, the district court sentenced him pursuant to that statute to concurrent

⁵ See *infra* at 11–12 (citing listed statutes).

⁶ See *infra* at 16 (quoting § 2241(a) and § 2242(1) in relevant part).

mandatory terms of life imprisonment on his two child-exploitation counts of conviction, a concurrent prison term of 40 years (the statutory maximum) on his receipt-of-child-pornography count of conviction, and a mandatory consecutive prison term of 10 years for committing a felony involving a minor while a registered sex offender. In so sentencing Valder, the district court stated that “even if the [§ 3559(e)(1)] mandatory life term of imprisonment did not apply,” it would have effectively sentenced Valder to life imprisonment, specifically, a total prison term of “150 years,” which “equates to more than a lifetime term of imprisonment obviously.” App’x at 130.⁷

In so stating, the district court noted, *inter alia*, the particularly “gruesome” and “painful nature” of Valder’s sexual abuse of the two victims of his exploitation crimes, which took place on “multiple occasions over a period of several months,” *id.* at 125 (referencing details provided in Pre-Sentence Report); the further trauma experienced by the child victim who came forward to testify at trial, *see id.* at 127–28; Valder’s commission of these crimes following a lengthy term of incarceration for federal child pornography and state child abuse crimes, *see id.* at 126, and while

⁷ As the district court explained, if a mandatory life sentence were not to apply to Valder’s two exploitation crimes of conviction,

the statutory minimum sentence on each of those counts would have been 25 years, and the statutory maximum on each of those counts would have been 50 years, based upon the defendant’s prior convictions. With a Guideline range of life and no count of conviction authorizing a term of life, the combined total guideline imprisonment range would have been 1800 months, which consists of the combined statutory maximums for Counts 1, 2, and 4, pursuant to Guideline 5G1.1(a), plus [a statutorily mandated] 120 months consecutive on Count 3, for a total term of imprisonment of 1800 months, or 150 years.

App’x at 130; *see* 18 U.S.C. §§ 2251(e), 2252A(b)(1), 2260A; U.S.S.G. §§ 2A3.6(b), 2G2.1, 2G2.2, 3A1.1(b), 3D1.1, 3D1.4, 4B1.5, 5G1.1(a), 5G1.2(a), Ch. 5, Pt. A, cmt. n.2.

on federal and state supervision, *see id.* at 129; the numerous opportunities offered Valder for sex offender and mental health treatment, *see id.* at 127–28; and his repeated failure to accept responsibility for his conduct, *see id.* at 127. This prompted the district court to conclude that Valder “present[s], and in the court’s view, will present *forever*, a danger to the community, and a danger to the most innocent among us, the children in our communities who should never, ever be subjected to this type of unspeakable sexual abuse.” *Id.* at 129 (emphasis added).

This timely appeal followed.

DISCUSSION

I. Standard of Review

In challenging the life sentences imposed on his child-exploitation counts of conviction pursuant to 18 U.S.C. § 3559(e)(1), Valder argues that his 2010 state conviction for Criminal Sexual Act in the first degree, *see* N.Y. Penal Law § 130.50(1), cannot qualify as a “prior sex conviction in which a minor was the victim,” the predicate required by § 3559(e)(1).⁸ In support, he asserts (1) that N.Y. Penal Law § 130.50(1) is not a categorical match with any of the federal statutes listed in § 3559(e)(2)(A) to define a “Federal sex offense,” and (2) that the state law can be violated without the crime victim being a minor.

As to his first assertion, Valder reargues a point raised in his pre-trial motion but not renewed after trial. He submits that N.Y. Penal Law § 130.50(1) is not a categorical match with 18 U.S.C. § 2241(a) (aggravated sexual abuse) because the state law reaches more broadly in permitting compulsion to be proved by a threat of less-than-serious bodily injury.

⁸ *See supra* at 5 (quoting relevant statutory text).

Valder further seeks to support this categorical-match challenge with two new arguments first raised in his reply brief. He submits that N.Y. Penal Law § 130.50(1) reaches more broadly than § 2241(a) and § 2242(1) (sexual abuse) in permitting compulsion to be proved by a threat that instills fear not only in the crime victim but also, and even only, in a third party, whereas the federal laws require fear to be instilled in the compelled victim. He also asserts that the “sexual conduct” proscribed by N.Y. Penal Law § 130.50(1) reaches more broadly than the “sexual act” proscribed by § 2241(a) and § 2242(1) in that the state law permits conviction without proof of “penetration,” which he submits these federal laws require.⁹

Insofar as Valder’s arguments raise questions of law, our standard of review would normally be *de novo*. See, e.g., *United States v. Thompson*, 961 F.3d 545, 549 (2d Cir. 2020). *De novo* review clearly applies to Valder’s second assertion, *i.e.*, his minor-victim argument, Valder having preserved that challenge by raising it in the district court both pre-trial and, after its rejection without prejudice to renewal, pre-sentence.

The same conclusion, however, does not obtain with respect to his first assertion, *i.e.*, the challenge to a categorical match with a Federal sex offense. While Valder argued that point pre-trial with respect to the degree of threatened injury, following its rejection without prejudice to renewal, he failed to reassert it before sentencing. This forfeited the point, such that we review it now only for plain error. See, e.g., *United States v. Sweig*, 441 F.2d 114, 119 (2d Cir. 1971)

⁹ Although Valder focused these arguments on § 2242(1), they apply equally to § 2241(a), as both statutes require that a defendant “causes *another person* to engage in a sexual act . . . by threatening or placing *that other person* in fear” of the stated harm, and both proscribe “knowingly caus[ing] another person to engage in *a sexual act*” through certain means. 18 U.S.C. § 2241(a) (emphases added)); see *id.* § 2242(1) (same).

(applying plain-error review to claim made in motion that district court denied “without prejudice”—thus indicating “willingness to reconsider the question”—where “defense never raised the issue again”). To demonstrate plain error, a defendant must show “(1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the defendant’s substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *United States v. Lewis*, 125 F.4th 69, 74 (2d Cir. 2025) (alterations adopted) (internal quotation marks omitted); see *Puckett v. United States*, 556 U.S. 129, 135 (2009) (stating that if first “three [plain error] prongs are satisfied, the court of appeals has the *discretion* to remedy the error—discretion which ought to be exercised only if” fourth prong is also satisfied (emphasis in original)).

As for the categorical-match challenges first raised by Valder only in his reply brief—with respect to the fear instilled and the sexual conduct proscribed—this court generally declines to consider such belated arguments, see *United States v. Kandic*, 134 F.4th 92, 102–03 (2d Cir. 2025) (declining to consider argument “not br[ought] . . . before the district court” and “raised for the first time in a reply brief” (internal quotation marks omitted)). Insofar as we have the discretion to do so, we will exercise that discretion only on a showing of “manifest injustice,” which may be established by a convincing showing of plain error. *United States v. Draper*, 553 F.3d 174, 179 & n.2 (2d Cir. 2009); see *United States v. Spero*, 331 F.3d 57, 62 n.3 (2d Cir. 2003) (declining to consider claim not raised in district court or defendant’s main appellate brief where “no plain error is apparent”); see also *United States v.*

Dussard, 967 F.3d 149, 156 (2d Cir. 2020) (stating that defendant bears burden to demonstrate plain error).¹⁰

We proceed now to consider Valder’s arguments in light of these standards.

II. Valder’s Categorical-Match Challenges to His § 3559(e)(1) Life Sentences

As relevant here, 18 U.S.C. § 3559(e)(1) states that “[a] person who is convicted of a Federal sex offense in which a minor is the victim shall be sentenced to life imprisonment if the person has a prior sex conviction in which a minor was the victim.” In other words, the statute mandates a life sentence when (1) the crime of conviction for which sentence is being imposed is “a Federal sex offense”; and (2) the defendant has (a) “a prior sex conviction,” (b) “in which a minor was the victim.” 18 U.S.C. § 3559(e)(1).

As to the first requirement, Valder does not—and cannot—dispute that his two sexual exploitation convictions in this case under 18 U.S.C. § 2251(a) satisfy the “Federal sex offense” requirement of § 3559(e)(1). *See* Appellant’s Br. at 22 (conceding point). The latter statute specifically references § 2251 in defining “Federal sex offense” to mean,

¹⁰ To the extent Valder seeks to avoid his plain-error burden as to arguments first raised in his reply brief by submitting that they respond to points raised by the government on appeal, we are not persuaded. While we will sometimes consider “*arguments* raised in response to arguments made in the appellee’s brief,” we generally “will not consider *issues* raised only in reply briefs.” *United States v. Bari*, 599 F.3d 176, 180 n.6 (2d Cir. 2010) (emphases in original). The arguments first advanced by Valder in his reply brief all relate to the *issue* that he forfeited in the district court, *i.e.*, whether his 2010 conviction under N.Y. Penal Law § 130.50(1) is a categorical match for a “Federal sex offense” as defined in § 3559(e)(2)(A). Accordingly, any arguments pertaining to that forfeited issue are properly reviewed only for plain error whether first raised in Valder’s opening brief on appeal or in his reply brief.

an offense under section 1591 (relating to sex trafficking of children), 2241 (relating to aggravated sexual abuse), 2242 (relating to sexual abuse), 2244(a)(1) (relating to abusive sexual contact), 2245 (relating to sexual abuse resulting in death), 2251 (*relating to sexual exploitation of children*), 2251A (relating to selling or buying of children), 2422(b) (relating to coercion and enticement of a minor into prostitution), or 2423(a) (relating to transportation of minors).

18 U.S.C. § 3559(e)(2)(A) (emphasis added).

Instead, Valder focuses on the second requirement, arguing that his 2010 New York State conviction for a Criminal Sexual Act in the first degree, *see* N.Y. Penal Law § 130.50(1), does not categorically satisfy either the “prior sex conviction” or minor-victim prongs of the predicate offense requirement of § 3559(e)(1). He is mistaken.

A. Valder’s 2010 New York State Conviction for a Criminal Sexual Act in the First Degree Qualifies as a “Prior Sex Conviction” Under § 3559(e)(1)

Title 18 U.S.C. § 3559(e)(2)(C) defines the “prior sex conviction” required for a § 3559(e)(1) life sentence as “a conviction [1] for which the sentence was imposed before the conduct occurred constituting the subsequent Federal sex offense, and [2] which was for a Federal sex offense or a State or Military sex offense.” Valder does not dispute the first requirement. He argues only that his 2010 conviction under N.Y. Penal Law § 130.50(1) does not satisfy the second “State . . . sex offense” requirement. *Id.* § 3559(e)(2)(C).

The federal statute defines a “State . . . sex offense” as “an offense under State law . . . that is punishable by more than one year in prison and consists of *conduct that would be a Federal sex offense*” if there were a basis for federal jurisdiction. *Id.* § 3559(e)(2)(B) (emphasis added). As earlier noted, § 3559(e)(2)(A)

identifies the federal statutes violation of which constitute a “Federal sex offense.” *See supra* at 11–12.

This court has held that the inquiry into whether a prior state crime of conviction qualifies as a “Federal sex offense” is categorical, *i.e.*, “to determine whether a state offense is equivalent to a federal offense, courts must compare the elements of the state offense to the elements of the federal offense.” *United States v. Rood*, 679 F.3d 95, 98 (2012), *abrogated in part on other grounds by Descamps v. United States*, 570 U.S. 254, 278 (2013); *accord United States v. Kroll*, 918 F.3d 47, 55 (2d Cir. 2019) (stating that *Rood*’s “assertion that we apply the categorical approach to § 3559[(e)] stands”). Only if the elements of the state offense are “the same as, or narrower than,” those of a federal offense identified in § 3559(e)(2)(A) can the state offense qualify as a predicate “prior sex conviction” under § 3559(e)(1). *Descamps v. United States*, 570 U.S. at 257; *see United States v. Scott*, 990 F.3d 94, 104 (2d Cir. 2021) (*en banc*) (observing that categorical approach involves “determin[ing] the minimum criminal conduct necessary to satisfy the elements of a crime, without regard to whether the defendant himself engaged in more egregious conduct”).

For “divisible” statutes, *i.e.*, statutes that “list elements in the alternative, and thereby define multiple crimes,” *Mathis v. United States*, 579 U.S. 500, 505 (2016), we apply a “‘modified’ categorical approach” under which we “examine a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of,” after which we “return to the categorical analysis,” *United States v. Davis*, 74 F.4th 50, 53 (2d Cir. 2023) (internal quotation marks omitted).

No party here disputes that N.Y. Penal Law § 130.50’s numbered subsections identify distinct elements, thereby making the statute divisible into four parts:

A person is guilty of criminal sexual act in the first degree when he or she engages in oral sexual conduct or anal sexual conduct with another person: 1. By forcible compulsion; or 2. Who is incapable of consent by reason of being physically helpless; or 3. Who is less than eleven years old; or 4. Who is less than thirteen years old and the actor is eighteen years old or more.

Further, the parties agree that Valder was convicted under subpart 1, which states a “forcible compulsion” element for the proscribed sexual conduct. Thus, we here need decide only whether N.Y. Penal Law § 130.50(1) is a categorical match for a “Federal sex offense” listed in § 3559(e)(2)(A) so as to qualify as a “prior sex conviction” warranting a § 3559(e)(1) life sentence.

1. New York Penal Law § 130.50(1)’s “Forcible Compulsion” Element Is a Categorical Match for Conduct that Would Be a “Federal Sex Offense”

Valder submits that his 2010 conviction under N.Y. Penal Law § 130.50(1) is not a categorical match for a “Federal sex offense” as identified in § 3559(e)(2)(A) because the state crime’s forcible compulsion element reaches more broadly than that of any of the listed federal crimes. Because the argument fails on the merits, Valder cannot demonstrate error, much less the plain error required to support an argument that he forfeited by not renewing it at sentencing in the district court.

To explain, we begin with the term “forcible compulsion” as used in N.Y. Penal Law §130.50(1). New York has statutorily defined that term to mean,

to compel by either: a. use of physical force; or b. a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person, or in fear that he, she or another person will immediately be kidnapped.

N.Y. Penal Law § 130.00(8) (2010).¹¹

New York’s Third and Fourth Appellate Divisions have construed these “use” and “threat” phrases as alternative means of committing a single offense rather than as distinct elements of different offenses; the state’s highest court has declined to review these decisions; and no New York court appears to have ruled otherwise.¹² In these circumstances, and in the absence of any contrary ruling from New York’s highest court, we will assume for purposes of this appeal that N.Y. Penal Law § 130.50(1) is not divisible based on whether “forcible compulsion” is proved by the proscribed “use” or “threat.” *Cf. Mathis v. United States*, 579 U.S. at 517–18 (instructing that divisibility of state statute may be resolved by ruling of state’s highest court construing statutory components as “alternative methods of committing one offense” (alteration adopted) (internal quotation marks omitted)).

With that understanding of the forcible compulsion element of N.Y. Penal Law § 130.50(1), we consider the two most analogous statutes listed in § 3559(e)(1)(A)’s definition of “Federal sex offense.”

¹¹ Hereafter in this opinion, all references to N.Y. Penal Law § 130.00 are to this 2010 version, unless otherwise noted, as this is the proper comparator under the categorical approach. *See United States v. Gibson*, 55 F.4th at 162, 166.

¹² *See People v. Horton*, 181 A.D.3d 986, 996, 119 N.Y.S.3d 296, 308 (3d Dep’t) (holding N.Y. Penal Law § 130.50(1)’s “element of forcible compulsion may be proven by either physical force or by express or implied threats and does not establish separate offenses for these alternate forms of proof”), *leave to appeal denied*, 35 N.Y.3d 1045 (2020); *People v. Boyce*, 305 A.D.2d 1022, 1023, 758 N.Y.S.2d 589, 590 (4th Dep’t) (listing “element” of forcible compulsion for § 130.50(1) crime as singular despite reference to evidence of both “use” and “threat” as “legally sufficient” means of commission), *leave to appeal denied*, 100 N.Y.2d 560 (2003); *see also People v. Bonilla*, 229 A.D.3d 850, 853, 214 N.Y.S.3d 505, 510 (3d Dep’t) (describing “implied threat” as “means” of “element of forcible compulsion”), *leave to appeal denied*, 42 N.Y.3d 1018 (2024).

The first, 18 U.S.C. § 2241(a), criminalizes “aggravated sexual abuse,” defined in relevant part as,

knowingly caus[ing] another person to engage in a sexual act—

(1) by using force against that other person; or

(2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping.

The second statute, 18 U.S.C. § 2242, criminalizes simple “sexual abuse,” defined in relevant part as,

knowingly—

(1) caus[ing] another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping).

As the quoted state and federal statutory texts indicate, N.Y. Penal Law § 130.50(1) and 18 U.S.C. § 2241(a) both proscribe compelling sexual acts (1) by the use of force, or (2) by threats of immediate death or kidnapping. Where the two statutes differ is in their treatment of threats of physical injury, with § 2241(a) requiring a threat of “serious bodily injury” to prove the compulsion necessary for aggravated sexual abuse, and N.Y. Penal Law § 130.50(1) identifying a threat of any “physical injury,” N.Y. Penal Law § 130.00(8), as sufficient to prove forcible compulsion for a Criminal Sexual Act in the first degree. *Contrast* 18 U.S.C. § 2246(4) (defining “serious bodily injury” as injury involving “substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty”), *with* N.Y. Penal Law § 10.00(9) (2010)

(defining “physical injury” as “impairment of physical condition or substantial pain”). The fact that N.Y. Penal Law § 130.50(1) thus reaches more broadly than § 2241(a) as to the sort of threats that can demonstrate the requisite compulsion does not, however, conclude our consideration of whether § 130.50(1) is a categorical Federal sex offense.

As the above-quoted provisions further show, compelling a sexual act by a threat of less-than-serious bodily injury is still a Federal sex offense, only under the compulsion element of § 2242(1) rather than that of § 2241(a). In sum, *any* means proved to satisfy the “forcible compulsion” element of N.Y. Penal Law § 130.50(1) is necessarily a categorical match for a Federal sex offense: either aggravated sexual abuse under § 2241(a) if force is used or if immediate murder, kidnapping, or serious bodily injury is threatened; or simple sexual abuse under § 2242(1) if some lesser bodily injury is threatened. Put another way, N.Y. Penal Law § 130.50(1) is a categorical match for a “Federal sex offense” because there is no form of compulsion a person can use to commit that state crime without necessarily engaging in compulsive conduct that would be a Federal sex offense, whether defined by § 2241(a) or § 2242(1).

In urging otherwise, Valder argues that the government’s failure to rely on § 2242(1) in the district court waived its ability to do so now. We are not persuaded. Even assuming that the government’s omission can be faulted—debatable given Valder’s failure to renew his § 3559(e)(1) challenge before judgment—the record is more suggestive of government forfeiture than true waiver. *See, e.g., United States v. Spruill*, 808 F.3d 585, 596–97 (2d Cir. 2015) (distinguishing waiver (requiring intent) from forfeiture (which may reflect negligence or inadvertence)). In the absence of true waiver, this court is, of course, “free to affirm on any ground that finds support in the record, even if it was not the ground upon which the trial court relied.” *United States v. Avenatti*, 81 F.4th

171, 210 n.42 (2d Cir. 2023) (internal quotation marks omitted), *cert. denied*, 144 S. Ct. 2598 (2024). Thus, we consider § 2242(1) as well as § 2241(a) in determining whether N.Y. Penal Law § 130.50(1) categorically qualifies as a “Federal sex offense.”

Nor are we persuaded otherwise by Valder’s observation that jurors can find the forcible compulsion element of N.Y. Penal Law § 130.50(1) without stating (or even being unanimous as to) the means established, *i.e.*, whether use of force, threat of immediate death or kidnapping, or threat of physical injury. This misses the point critical to our identification of N.Y. Penal Law § 130.50(1) as a categorical Federal sex offense, *i.e.*, a defendant *cannot* violate N.Y. Penal Law § 130.50(1) without using some means of compulsion also proscribed by a law constituting a Federal sex offense, whether § 2241(a) or § 2242(1). Which law does not matter as both are statutorily listed Federal sex offenses. It is for that reason that the state crime’s compulsion element does not render it categorically broader than a Federal sex offense.

Valder nevertheless insists that we cannot reach this conclusion by looking to more than one of the crimes listed in § 3559(e)(2)(A). He submits that if N.Y. Penal Law § 130.50(1) is compared only with § 2241(a), there can be no categorical match because the state law recognizes any threat of physical injury as sufficient to satisfy its compulsion element, whereas § 2241(a) demands a threat of serious bodily injury to prove the compulsion it proscribes. Further, if N.Y. Penal Law § 130.50(1) is compared only with § 2242(1), Valder suggests that there can be no categorical match because the state law compulsion element can be proved by use of physical force, or by a threat of immediate death, kidnapping, or serious bodily injury, conduct that § 2242(1) expressly excludes from its compulsion element.¹³

¹³ See *supra* at 16 (quoting text of § 2241(a) and § 2242(1)).

That misunderstands the categorical approach, which looks to “the minimum criminal conduct necessary to satisfy the elements” of the predicate state offense, and then determines whether that minimum conduct sufficiently matches the elements of the comparator federal crime. *United States v. Scott*, 990 F.3d at 104; accord *Mathis v. United States*, 579 U.S. at 503. That one can violate N.Y. Penal Law § 130.50(1) by *exceeding* the conduct criminalized under one “Federal sex offense”—§ 2242(1)—does not disturb our conclusion because such conduct is *also* criminalized under a different “Federal sex offense”—§ 2241(a). Moreover, Valder’s argument overlooks the reason for § 2242(1)’s exclusion of compulsion by “threatening or placing” the victim “in fear” of “death, serious bodily injury, or kidnapping,” which is hardly that such compulsion is no part of a “Federal sex offense” but, rather, that such compulsion, in fact, proves *aggravated* sexual abuse in violation of § 2241(a). This only reinforces our conclusion that there is no way a defendant can be found guilty of compelling sexual conduct in violation of N.Y. Penal Law § 130.50(1) without also being guilty of a “Federal sex offense” based on compulsion, whether under § 2241(a) or § 2242(1).

As Valder himself acknowledges, three of our sister circuits have rejected the idea that a categorical determination about a particular crime can be made only by reference to a single potential comparator. See *United States v. Scott*, 14 F.4th 190, 196 (3d Cir. 2021) (stating “nothing in the Guidelines or related authorities suggests a court is limited to considering only a single corresponding crime of violence when evaluating a state statute under the categorical framework” with regard to U.S.S.G. § 4B1.2(a), which “define[s] crime of violence as *any* of the enumerated offenses under federal or state law” (alterations adopted) (emphasis in original) (internal quotation marks omitted)); *United States v. Castillo*, 811 F.3d 342, 347 (10th Cir. 2015) (same regarding U.S.S.G. § 2L1.2); *United States v. Becerril-Lopez*, 541 F.3d 881, 892 (9th Cir. 2008) (stating that if conviction under state law “involved a threat not encompassed by generic robbery, it would necessarily

constitute generic extortion and therefore be a ‘crime of violence’ under U.S.S.G. 2L1.2”).¹⁴

Valder seeks to distinguish these cases on the ground that they pertain to Sentencing Guidelines, which, at the relevant time, used the word “any” to introduce lists of comparator crimes, thus permitting at least one court to conclude that this “plain language does not limit the comparison of the crime of conviction to only one of the enumerated crimes of violence.” *United States v. Castillo*, 811 F.3d at 347 (finding further support for conclusion in Guidelines’ broad residual clause). Section 3559(e)(2)(A), Valder notes, does not use the word “any” in listing statutes defining “Federal sex offense.” Rather, § 3559(e)(2) repeatedly uses the indefinite articles “a” or “an” in defining terms pertinent to its life-imprisonment mandate. *See, e.g.*, 18 U.S.C. § 3559(e)(2)(C) (stating that “prior sex conviction” referenced in sentencing mandate means conviction “for *a* Federal sex offense or *a* State or Military sex offense”); *id.* § 3559(e)(2)(B) (stating that “State . . . sex offense” means “*an* offense under State law . . . punishable by more than one year in prison” that “consists of conduct that would be *a* Federal sex offense”); *id.* § 3559(e)(2)(A) (defining “Federal sex offense” as “*an* offense under” enumerated statutes) (all parenthetical emphases added). This, he submits, indicates that, for purposes of categorical comparison, a state sex offense can be considered by reference to only a single statute listed in § 3559(e)(2)(A).

We are not convinced. Depending on context, the indefinite articles “a” or “an” can, in fact, be generic or specific, functioning in the former capacity much as

¹⁴ The particular categorical determinations in *Castillo* and *Becerril-Lopez* have been superseded by a Guidelines amendment narrowing the definition of “exploitation.” *See United States v. O’Connor*, 874 F.3d 1147, 1154 n.11 (10th Cir. 2017); *United States v. Bankston*, 901 F.3d 1100, 1103–04 (9th Cir. 2018). But we do not understand those courts to have abandoned the reasoning supporting their pre-amendment determinations.

the word “any.”¹⁵ As used in § 3559(e)(2)(A) to define “Federal sex offense” in the phrase “*an* offense under section 1591 . . . , 2241 . . . , 2242 . . . , 2244(a)(1) . . . , 2245 . . . , 2251 . . . , 2251A . . . , 2422(b) . . . , or 2423(a)” (emphasis added), the indefinite article appears to be generic rather than specific, certainly insofar as “*an* offense” can be understood to reference *any* offense violative of each listed statutory section. Construing “a” to mean “any” in that respect, however, does not tell a court whether it can look only to one or to more than one of these statutory sections in determining whether a prior state conviction qualifies categorically as “a Federal sex offense.”

More helpful to that determination is language in § 3559(e)(2)(B) stating that for a prior state conviction to support a § 3559(e)(1) sentence, the state crime of conviction must “consist[] of conduct that would be a Federal sex offense.” In this text, not only do we understand the indefinite article “a” to refer to *any* Federal sex offense identified by the statutes listed in § 3559(e)(2)(A), but also, we understand the relevant inquiry to be whether the state crime consists of

¹⁵ See *The Chicago Manual of Style* §§ 5.76–5.77 (18th ed. 2024) (stating that “indefinite article points to a nonspecific object, thing, or person that is not distinguished from the other members of a class,” such as “[a student at Princeton],” but that “[i]n a few usages, the indefinite article provides a specific reference [I saw **a great movie** last night]” (emphases in original)); *Webster’s Third New Int’l Dictionary (Unabridged)* 1 (2002) (illustrating specific use of indefinite article with example of “*a* man walked past him” and generic use with example of “*a* man guilty of kidnapping wins scant sympathy” and “*a* man who is sick can’t work well” (emphases in original)). Thus, when the Constitution states that “[a]ll legislative Powers herein granted shall be vested in *a* Congress of the United States, which shall consist of *a* Senate and House of Representatives,” U.S. CONST. art. I, § 1 (emphases added), one understands the indefinite article to be specific in referencing a definite Congress and its definite component Senate and House of Representatives. But when the Constitution further states that “Congress shall make no law respecting *an* establishment of religion,” *id.* amend. I (emphasis added), one understands the indefinite article to be generic, prohibiting laws respecting *any* establishment of religion.

“conduct” that would be a Federal sex offense under any of the listed statutes. To be sure, the comparative inquiry is always categorical, *i.e.*, focused on the elements of the state crime and those of any federal comparators. *See United States v. Rood*, 679 F.3d at 98; *accord United States v. Kroll*, 918 F.3d at 55. But, at the same time, courts engaging in such an inquiry are properly mindful that state and federal governments may criminalize the same conduct differently, not only in the labels they attach to crimes but also in the number of crimes used to address proscribed conduct. *See Mathis v. United States*, 579 U.S. at 509 (stating that label State assigns to crime is irrelevant to whether offense is categorical predicate); *see also Shular v. United States*, 589 U.S. 154, 160 (2020) (stating that court must look to “state offense’s elements, not . . . labels pinned to the state conviction” in applying categorical approach). Thus, one jurisdiction may proscribe various actions as alternative means of satisfying an element of a particular crime. Another jurisdiction may proscribe the same actions but as elements of distinct crimes. That is the case here.

Both New York and the United States criminalize conduct that *compels* a sexual act. Further, both New York and the United States proscribe compulsion achieved by physical force, or by threat of immediate death, kidnapping, or any physical injury. It is simply that New York criminalizes such compulsion in a single statute, *see* N.Y. Penal Law § 130.50(1), while the United States uses two statutes to the same effect, labeling compulsion proved by use of force or by threat of death, kidnapping, or *serious* bodily injury “aggravated sexual abuse,” 18 U.S.C. § 2241(a); and labeling compulsion proved by other means, including a threat of less-than-serious bodily injury, as simple “sexual abuse,” *id.* § 2242(1). If only one of these federal statutes were listed in § 3559(e)(2)(A)’s definition of “Federal sex offense,” there might be a serious question as to whether Valder’s 2010 conviction under N.Y. Penal Law § 130.50(1) qualifies as the categorical equivalent of a Federal sex offense. But, because both § 2241(a) and § 2242(1) are so listed, N.Y.

Penal Law § 130.50(1) categorically qualifies as a “Federal sex offense” because its compulsion element proscribes the very same conduct—*i.e.*, use of physical force or threat of immediate death, kidnapping, or physical injury—that constitutes compulsion as a “Federal sex offense” under one or the other of these federal laws. To reiterate, a person cannot commit forcible compulsion in violation of N.Y. Penal Law § 130.50(1) in any way that reaches more broadly than a “Federal sex offense,” whether under § 2241(a) or § 2242(1).¹⁶

Thus, Valder’s categorical-match challenge to the forcible compulsion element of his 2010 New York State conviction fails at the first step of plain error review.

2. The Fear Component of N.Y. Penal Law § 130.50(1) Is Not Clearly Broader than that of a Listed Federal Sex Offense

As noted *supra* at 14–15, the “forcible compulsion” element of N.Y. Penal Law § 130.50(1) can be proved by showing that a defendant compelled oral or anal sexual conduct by “a threat, express or implied, which places *a person* in fear of immediate death or physical injury to himself, herself or another person, or in fear

¹⁶ The Ninth Circuit summarily reached a similar conclusion with respect to N.Y. Penal Law § 130.35(1), which prohibited the use of “forcible compulsion” as defined in *id.* § 130.00(8) to coerce sexual intercourse. *United States v. Reczko*, 818 Fed. App’x 701, 704–05 (9th Cir. 2020). In affirming a life sentence imposed under 18 U.S.C. § 3559(e)(1), that court held that defendant’s § 130.35(1) conviction qualified as a “prior sex conviction” under the federal statute because 18 U.S.C. § 2241(a) and § 2242, “two of the sections specified by § 3559(e) as establishing the types of offenses that qualify as ‘prior sex convictions,’” when taken “[t]ogether, . . . cover the full range of threats proscribed by the New York provision under which [defendant] was previously convicted.” *Id.* The decision is not controlling here, or even in the Ninth Circuit given its pronouncement in an unpublished disposition. *See* 9th Cir. R. 36-3(a). Nevertheless, we find the Ninth Circuit’s reasoning in *Reczko* convincing, and Valder points to no contrary persuasive authority.

that he, she or another person will immediately be kidnapped.” N.Y. Penal Law § 130.00(8) (emphasis added). To prove sexual abuse, whether aggravated or simple, in violation of federal law, both 18 U.S.C. § 2241(a) and § 2242(1) require evidence that a defendant “cause[d] *another person* to engage in a sexual act by threatening or placing *that other person* in fear” of stated harm. 18 U.S.C. § 2242(1) (emphases added); *see id.* § 2241(a)(2) (same).

For the first time in his reply brief on appeal, Valder argues that the emphasized language shows that New York law reaches more broadly than federal law because the quoted federal statutes require that the victim of compelled abuse have been the person placed in fear of harm, while state law can be satisfied by placing a third party in fear of harm. He submits that, as long as that third party’s fear compels a sexual act with the victim, New York does not require that the victim be placed in any fear. We are not persuaded by Valder’s urged reading of New York law.

New York Penal Law § 130.50(1) proscribes oral or anal sexual conduct “with another person” by forcible compulsion. New York defines “forcible compulsion” to mean “to compel” by physical force or a threat that “places a person in fear” of immediate death, kidnapping, or physical injury to “himself, herself or another person.” N.Y. Penal Law § 130.00(8). The quoted phrase “with another person” clearly refers to a person other than the defendant, specifically, the victim of the forcibly compelled sexual conduct. Viewed in context, “a person [placed] in fear” is properly understood to refer to the person subjected to the “threat” instilling the fear effecting compulsion, *i.e.* the victim of the forcible compulsion, not a *third person*. As the New York Court of Appeals has explained, the “inquiry required in determining whether threats amount to forcible compulsion is . . . what *the victim* . . . *feared* [the defendant] would or might do if the victim did not comply with his demands,” as “[t]he proper focus is on the state of

mind produced in the victim by the defendant's conduct." *People v. Thompson*, 72 N.Y.2d 410, 415–16 (1988) (alterations adopted) (emphases added) (internal quotation marks omitted). While *Thompson* did not involve a threat to a third party, *see id.* at 414–15, even in that context New York courts have focused on the fear such a threat generates in the compelled victim, *see People v. Coleman*, 42 N.Y.2d 500, 505–06 (1977) (rejecting sufficiency challenge to conviction for sodomy committed by forcible compulsion where evidence showed *victim* “*feared* for her life and the life of her son” based on implicit threat to both (emphasis added));¹⁷ *People v. Locke*, 70 A.D.2d 686, 687, 416 N.Y.S.2d 381, 382 (3d Dep’t 1979) (holding “threatening statements . . . that placed [*victim*] *in fear* of serious physical injury to herself and her children” sufficed to prove forcible compulsion of victim (emphasis added)); *People v. Nailor*, 268 A.D.2d 695, 697, 701 N.Y.S.2d 476, 479 (3d Dep’t 2000) (holding that “lasting effects” on young victim of defendant’s threat to harm mother sufficed to prove forcible compulsion of victim). Indeed, it is difficult to imagine how the prosecution could prove that the alleged victim of a N.Y. Penal Law § 130.50(1) crime was compelled to participate in a sexual act by a threat of harm to a third person unless that threat also instilled fear in the victim of harm to the third person. Ignorance or indifference to a threat of harm to a third person would hardly be understood to “compel” a victim.

Thus, the harm threatened under N.Y. Penal Law § 130.50(1) may be harm to the compulsion victim or to “another person.” Indeed, it is that reference to “another person” that recognizes that a victim’s participation in sexual conduct may be compelled by the victim’s fear of threatened harm to a third person. But the statutory text does not suggest that compulsion of a victim can be proved by

¹⁷ The convictions in *Coleman* were reversed and the case remanded on other grounds, specifically, error in the admission of defendants’ joint statement at the time of arrest. *See* 42 N.Y.2d at 506–09.

instilling fear in a third party in the absence of any fear in the victim. Certainly, Valder points to no New York precedents supporting such a contention as necessary to carry his burden at the first two steps of plain error. *See United States v. Dussard*, 967 F.3d at 156.

Valder having failed to carry his burden, we reject his belatedly raised reply argument that the fear component of the compulsion element of N.Y. Penal Law § 130.50(1) allows that statute to reach more broadly than § 2241(a) and § 2242(1).

3. The “Sexual Conduct” Proscribed by N.Y. Penal Law § 130.50(1) Does Not Reach More Broadly than the “Sexual Act” Proscribed by 18 U.S.C. § 2241(a) and § 2242(1)

Also for the first time in his reply brief, Valder argues that N.Y. Penal Law § 130.50(1) is not a categorical match for 18 U.S.C. § 2241(a) and § 2242(1) because those federal laws require penetration, however slight, to prove the proscribed “sexual act,” while the state law permits conviction for “sexual conduct” not involving penetration. Here again, Valder cannot demonstrate plain error, particularly at the last two steps of such review.

To explain, we begin our consideration of error with the relevant statutory texts. As earlier noted, N.Y. Penal Law § 130.50(1) makes it a state crime to engage in oral or anal “sexual conduct with another person” “[b]y forcible compulsion.” *See supra* at 13–14 (quoting statute). New York defines “oral sexual conduct” as “conduct between persons consisting of contact between the mouth and the penis, . . . the anus, or . . . the vulva or vagina.” N.Y. Penal Law § 130.00(2)(a). It defines “anal sexual conduct” as “consisting of contact between the penis and anus.” *Id.* § 130.00(2)(b). As to the latter, one New York intermediate court has concluded that evidence of “intercourse or penetration is not required” to prove “anal sexual conduct.” *People v. Green*, 208 A.D.3d 1539, 1542, 175 N.Y.S.3d 355, 360 (3d Dep’t

2022).¹⁸ We generally look to the New York Court of Appeals, the state’s highest court, for definitive constructions of state law, and we will not readily assume from a single intermediate court decision that the Court of Appeals would reach the same conclusion. *See Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 739 F.3d 45, 48 (2d Cir. 2013); *United States v. Morrison*, 686 F.3d 94, 103 (2d Cir. 2012). Nevertheless, because the government here conceded at oral argument that a person can be convicted under N.Y. Penal Law § 130.50(1) without any evidence of penetration, for purposes of this appeal, we assume that, in fact, to be New York law, as Valder urges.

By comparison, 18 U.S.C. § 2241(a) and § 2242(1) each proscribe knowingly causing another person to engage in a “sexual act” through certain types of threats. Title 18 U.S.C. § 2246(2)(A) defines “sexual act” as, *inter alia*, “contact between . . . the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon *penetration, however slight*.” (emphasis added). Valder submits that the emphasized language identifies “penetration, however slight,” as a requirement for proving the “sexual act” element of either a § 2241(a) or § 2242(1) crime. The government maintains that the language is illustrative rather than exhaustive, clarifying that even slight penetration can satisfy the element, without foreclosing the possibility of “contact” not involving penetration also doing so.

¹⁸ Another intermediate New York court, considering different statutes, observed that a charged course of sexual conduct against a child in the first degree, *see* N.Y. Penal Law § 130.75 (2009) (requiring showing, *inter alia*, of “at least one act of sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual contact”), did “require[] a finding of penile-vaginal and/or *penile-anal penetration*, and/or penile-oral contact,” whereas the same crime in the second degree, *see* N.Y. Penal Law § 130.80 (2009) (not requiring showing of, *inter alia*, anal sexual conduct), “did not require such a finding.” *People v. Diaz*, 85 A.D.3d 1047, 1049, 926 N.Y.S.2d 128, 130 (2d Dep’t 2011) (emphasis added), *aff’d* 20 N.Y.3d 569 (2013).

We need not here resolve this dispute. Rather, we assume its resolution in Valder's favor and, therefore, further assume—without deciding—that it would be error to view the “sexual conduct” proscribed by N.Y. Penal Law § 130.50(1) as a categorical match for the “sexual act” proscribed by 18 U.S.C. § 2241(a) and § 2242(1).

Nevertheless, Valder must still show that the error is *plainly* established. “We typically will not find an error plain under current law where the operative legal question is unsettled by binding precedent from the Supreme Court or this court.” *United States v. Dennis*, 132 F.4th 214, 237 (2d Cir. 2025), *cert. denied*, 146 S. Ct. 837 (2025), *reh'g denied*, 146 S. Ct. 1592 (2026). That is the case here where neither the Supreme Court nor this court has thus far addressed the question of whether penetration, however slight, must always be proved to demonstrate a “sexual act” proscribed by § 2241(a) or § 2242(1).

We have on occasion, however, recognized plain error where the law is effectively well established by consistent precedents from other courts. *See, e.g., United States v. Gore*, 154 F.3d 34, 43, 47 (2d Cir. 1998) (holding “district court’s error was clear and obvious” under plain error review where “other circuits ha[d] uniformly decided” issue even though this court had “not yet addressed [it] directly”). When we did so in *Gore*, however, we noted that this court had ruled on the question at issue “in a different context” and “in dicta” in other cases. *Id.* at 43 & n.4. That is not the case here with respect to the need to demonstrate penetration to prove a § 2246(2)(A) “sexual act.” In *United States v. Whab*, we also acknowledged the propriety of finding an error “plain” where “other circuits have uniformly taken a position on an issue that has never been squarely presented to this Court.” 355 F.3d 155, 158 (2d Cir. 2004). But there we observed that doing so was properly limited to “exceedingly rare cases where error is so egregious and

obvious as to make the trial judge and prosecution derelict in permitting it, despite the defendant's failure to object." *Id.* at 158 n.1 (internal quotation marks omitted).

Here, a number of our sister circuits have construed a "sexual act," as defined in § 2246(2)(A), to require penetration, however slight. *See United States v. J.A.S., Jr.*, 862 F.3d 543, 545–46 (6th Cir. 2017) (stating that, "for purposes of § 2241 [contact between penis and vulva] means 'penetration, however slight,'" and rejecting sufficiency challenge to evidence of penetration (quoting 18 U.S.C. § 2246(2)(A))); *United States v. IMM*, 747 F.3d 754, 771 (9th Cir. 2014) (rejecting sufficiency challenge to § 2241(c) and § 2246(2)(A) conviction because evidence, viewed in light most favorable to government, was sufficient to prove anal penetration);¹⁹ *United States v. Williams*, 89 F.3d 165, 168 (4th Cir. 1996) (recognizing "penetration . . . is the sine qua non of" § 2241(a) and § 2242(2)(B) crimes); *United States v. Plenty Arrows*, 946 F.2d 62, 65 (8th Cir. 1991) (reversing § 2241(c) conviction where evidence was "too vague" to support inference that "contact involving penetration occurred").²⁰ We need not conclusively decide whether these

¹⁹ The conviction in *IMM* was reversed and the case remanded on other grounds, specifically, error in the admission of inculpatory statements obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). *See United States v. IMM*, 747 F.3d at 772.

²⁰ Decisions from other circuits are less clear on the point. *See Schneider v. United States*, 864 F.3d 518, 520, 522 (7th Cir. 2017) (noting in *dicta* that "'sexual act' is defined in 18 U.S.C. § 2246(2)(A) as penetration 'between the penis and the vulva or the penis and the anus,'" but later stating "'sexual act' is defined as 'contact between the penis and the vulva or the penis and the anus'" without reference to penetration (quoting 18 U.S.C. § 2246(2)(A))). Other cases appear to reference the range of conduct included in the federal definition of "sexual act," *see* 18 U.S.C. § 2246(2)(A)–(D), without addressing the specific question of whether the "contact" referenced in § 2246(2)(A) can ever be satisfied without penetration. *See Johnson v. White*, 989 F.3d 913, 917–18 (11th Cir. 2021) (listing in

decisions can be understood to have taken a sufficiently uniform position as to a penetration requirement for § 2241(a) and § 2242(1) to support a finding of clearly established error in Valder's case. But because the government has pointed us to no case to the contrary, we will assume *arguendo* at the second step of plain error review that it is clearly established in law that a sexual act, as defined by § 2246(2)(A) and proscribed by § 2241(a) or § 2242(1), requires proof of penetration, however slight.

Even assuming Valder's satisfaction of the first two requirements for plain error, however, it does not appear that he can satisfy the third and fourth by showing that, absent vacatur of his § 3559(e)(1) life sentences, he will be adversely affected in his substantial rights and that "the fairness, integrity, or public reputation of judicial proceedings" will be impugned. See *United States v. Lewis*, 125 F.4th at 74 (internal quotation marks omitted). That is because the district court here clearly stated that, even if it were not statutorily required to sentence Valder to life imprisonment for his crimes in this case, it would effectively have

dicta "penile or digital penetration, vaginal, anal, or oral intercourse, and unconsented, under-the-clothes touching of minors" as misconduct that characterizes sexual acts under § 2246(2)); *United States v. Dahl*, 833 F.3d 345, 355 (3d Cir. 2016) (holding state convictions for unlawful sexual contact with minors not categorical match with aggravated sexual abuse under § 2241 because, *inter alia*, state law could be violated by touching "through clothing" while federal "sexual act" requires "penetration or actual skin-to-skin contact" or in case of minor, skin-to-skin contact, not through clothing, done with specified intent (internal quotation marks omitted)); *United States v. Zavala-Sustaita*, 214 F.3d 601, 606 n.8 (5th Cir. 2000) (describing § 2246(2) in *dicta* as "defining 'sexual act' in terms of 'contact,' 'penetration,' or 'intentional touching'").

done so by sentencing him to a total of 150 years, which “equates to more than a lifetime term of imprisonment obviously.” App’x at 130.²¹

Valder submits that the sentences cannot be equated because he would be eligible for good-time credit on a 150-year sentence, but not on a statutorily mandated life sentence. *See* 18 U.S.C. § 3624(b) (affording prisoner serving more than one-year sentence (but not life imprisonment) “up to 54 days credit for each year of the prisoner’s sentence,” subject to “exemplary compliance with institutional disciplinary regulations”). The distinction does not support a finding of plain error here. In applying § 3624(b), the Bureau of Prisons “initially determine[s] a projected release date by calculating the maximum [good-time] credit possible.” 28 C.F.R. § 523.20(b)(1). The maximum good-time credit possible on a 150-year sentence is 8,100 days, or just over 22 years, precluding a release date earlier than 127 years, still effectively more than a life sentence for Valder, who was 34 at the time of sentencing. Thus, Valder cannot show prejudice to his substantial rights or a serious effect on the fairness, integrity, or public reputation of judicial proceedings based on asserted error in sentencing him to life imprisonment under § 3559(e)(1) rather than affording him the opportunity for § 3624(b) good-time credit on a 150-year sentence.

United States v. Kroll, 918 F.3d 47 (2d Cir. 2019), warrants no contrary conclusion. There, this court vacated a § 3559(e)(1) mandatory life sentence predicated on the defendant’s prior state conviction for second-degree sodomy

²¹ This court has summarily recognized a 150-year term of incarceration to equate to a life sentence. *See United States v. Hamilton*, 548 F. App’x 728, 730 (2d Cir. 2013) (observing that “cumulative sentence of 1,800 months,” *i.e.* 150 years, is “equivalent to a life sentence” as “[a]ny sentence that extends beyond [defendant’s] maximum conceivable life expectancy has no practical effect on him”).

with a minor under the age of 14, *see* N.Y. Penal Law § 130.45 (1993), concluding that the state law reached more broadly than the comparator federal crime, 18 U.S.C. § 2241(c) (proscribing knowing engagement in sexual act with person under age of 12). *See United States v. Kroll*, 918 F.3d at 51–52, 57. In concluding that the error, if uncorrected, satisfied the prejudice prong of plain error, this court emphasized the district court’s mistaken belief that it “lack[ed] any discretion to impose a sentence other than a mandatory minimum life sentence.” *Id.* at 57 (stating that Supreme Court’s recognition that Guidelines error can satisfy prejudice prong of plain error “applies with even greater force” to error regarding statutory sentencing mandate (citing *Molina-Martinez v. United States*, 578 U.S. 189, 200 (2016))).

The government urged otherwise, arguing that Kroll was not prejudiced by any erroneous imposition of a § 3559(e)(1) life sentence because the district court indicated it would have sentenced him to life imprisonment in any event. *See id.* at 56; *id.* at 51 (quoting district court’s statement that it had “no authority to go under” the statutorily mandated life sentence “even if I wanted to, *which I don’t*” (emphasis added)). This court was unpersuaded that the emphasized language could bear the weight urged. In reaching that conclusion, it acknowledged that a “lack of prejudice due to a procedural error at sentencing may be apparent” where, for example, “a detailed explanation of the reasons makes it clear that the judge based the sentence on factors independent of the error.” *Id.* at 57 (alteration adopted) (internal quotation marks and ellipses omitted). But, the district court in *Kroll* had provided no such detailed explanation. Notably, it “did not discuss how it would have applied the Sentencing Guidelines or balanced the 18 U.S.C. § 3553(a) factors had it not determined that a life sentence was mandatory under § 3559(a).” *Id.*

By contrast, here, the district court did just that. It specifically identified the minimum 25-year and maximum 50-year statutory sentencing range that would apply to Valder's exploitation counts in the absence of a § 3559(e)(1) mandate. *See* App'x at 130; 18 U.S.C. § 2251(e). Further, it calculated Valder's Guidelines range, initially noting a recommended term of "life imprisonment" but then observing that if "no count of conviction authoriz[ed] a term of life," Valder's "total guideline imprisonment range" would be 1800 months (150 years), achieved by combining the 50-year maximum sentences for each of his exploitation counts of conviction with the 40-year maximum for his receipt-of-child-pornography count, and the mandated 10-year term for his felony-by-a-registered-sex-offender count. *See* App'x at 130 (citing U.S.S.G. § 5G1.1(a)); *see also* 18 U.S.C. § 2251(e), § 2260A, and § 2252A(b)(1).²²

In explaining why, in the absence of a statutory mandate, it would have sentenced Valder to his 1800 months' Guidelines range, the district court carefully reviewed relevant aggravating and mitigating factors properly considered under 18 U.S.C. § 3553(a). As to aggravating factors, it specifically noted the "egregious" and "painful" nature of Valder's two exploitation crimes, which had taken place on "multiple occasions" over "several months" and whose "gruesome details" were stated in the Pre-Sentence Report. App'x at 125.²³ It further noted the traumatic effect of Valder's crimes on his young victims, particularly noting that one "very brave young victim" who testified at trial "undoubtedly experienced more trauma" in recounting "the evil things that were done to him." *Id.* at 124, 127–28.²⁴ The court also observed that Valder "repeatedly failed to accept

²² Valder identifies no error in these Guidelines calculations.

²³ *See* 18 U.S.C. § 3553(a)(1) ("nature and circumstances of the offense"); *id.* § 3553(a)(2)(A) ("seriousness of the offense"; "just punishment").

²⁴ *See id.* § 3553(a)(1).

responsibility for his conduct,” and at trial had even tried to blame a friend for some of Valder’s own actions. *Id.* at 127.²⁵ The court further detailed Valder’s disturbing record of federal and state convictions for child pornography and child sexual abuse, including the N.Y. Penal Law § 130.50(1) crime already discussed in this opinion, which it noted involved the use of force to compel anal sexual intercourse with a 14-year-old boy. *See id.* at 126.²⁶ Moreover, the court observed that Valder had been sentenced to concurrent terms of 15 and 10 years for these crimes, and afforded sex-offender and mental health treatment opportunities in and out of prison; nevertheless, he committed the crimes for which he was about to be sentenced while on federal and state supervision and enrolled in treatment. *See id.* at 125–28.²⁷

At the same time, the district court was careful to note mitigating factors, including sexual abuse that Valder had sustained as a child, some by his own father. *See id.* at 128.²⁸ It further acknowledged Valder’s struggles over the years with mental health and emotional disorders, learning disabilities, and developmental and behavioral problems. *See id.*²⁹ Nevertheless, the district court specifically found that “none of the defendant’s mitigating factors could possibly warrant a lower sentence” than 150 years given the cited aggravating factors. *Id.* at 130.³⁰ We defer to district courts in the “particular weight” they assign

²⁵ *See id.* (“characteristics of the defendant”); *id.* § 3553(a)(2)(A) (“promote respect for the law”).

²⁶ *See id.* § 3553(a)(1) (“history” and “characteristics” of “defendant”).

²⁷ *See id.* § 3553(a)(1), (a)(2)(A).

²⁸ *See id.* § 3553(a)(1).

²⁹ *See id.*

³⁰ *See id.* § 3553(a)(2)(A).

aggravating and mitigating factors relevant to sentencing, *United States v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012), and identify no abuse of discretion here.

On this detailed record, it is evident that it was these § 3553(a) factors, independent of any § 3559(e)(1) mandate, that led the court to conclude both (1) that Valder “will present *forever*, a danger to the community, and a danger to the most innocent among us, the children in our communities who should never, ever be subjected to this type of unspeakable sexual abuse,” App’x at 129 (emphasis added);³¹ and (2) that “even if the mandatory life term of imprisonment did not apply,” it would impose a sentence of “150 years,” which “equates to more than a lifetime term of imprisonment obviously,” *id.* at 130. Thus, here, unlike in *Kroll*, the “lack of prejudice” to Valder from any possible § 3559(e)(1) sentencing error is “apparent” because the district court’s “detailed explanation of the reasons” for imposing a 150-year prison sentence in any event is plainly based “on factors independent of the error.” *United States v. Kroll*, 918 F.3d at 57 (internal quotation marks omitted).

To the extent Valder urges otherwise by hypothesizing changes in law that might allow for a future reduction in a non-mandated 150-year sentence that would be inapplicable to a mandated life sentence; or the potential vacatur of his child-pornography and sex-offender counts of conviction, we here reiterate what we have previously stated summarily: such speculation is insufficient to demonstrate the prejudice required at the third step of plain error review. *See United States v. Capers*, No. 23-6087, 2024 WL 5053263, at *2 (2d Cir. Dec. 10, 2024) (summary order) (rejecting argument that erroneous application of “career offender status may preclude [defendant] from benefitting from future changes in law or policy” because possibility is too “uncertain,” “indeterminate,” and

³¹ *See id.* § 3553(a)(2)(B) (“afford adequate deterrence to criminal conduct”); *id.* § 3553(a)(2)(C) (“protect . . . public from further crimes of . . . defendant”).

“speculative” to permit conclusion that defendant’s substantial rights have been affected at third step of plain error (internal quotation marks omitted)), *cert. denied*, 146 S. Ct. 1490 (2026).

As to the final requirement for plain error, Valder cannot show that a failure to vacate the § 3559(e)(1) life sentences in his case would impugn the fairness, integrity, or public reputation of judicial proceedings. In identifying such a concern in *Kroll* based on the imposition of a life sentence mandated by “a statute that did not apply,” we highlighted the district court’s failure there to make “an individualized determination as to whether a life sentence was warranted” in any event. *United States v. Kroll*, 918 F.3d at 57. But, as the preceding discussion makes clear, the district court here made just such a determination supported by detailed explanation before concluding that it would have sentenced Valder to 150 years’ imprisonment, more than a life sentence in any event.

Nor is a contrary conclusion warranted by the fact that the district court referenced Valder’s 2010 conviction under N.Y. Penal Law § 130.50(1) in reaching its alternative 150-year sentencing conclusion. Even assuming *arguendo* that this state conviction could not serve as the predicate for a § 3559(e)(1) sentence, the district court was entitled to consider not only the conviction but also its underlying facts—*i.e.*, Valder’s forcible anal rape of a 14-year-old boy—in deciding that a 150-year sentence was warranted in any event. Title 18 U.S.C. § 3661 clearly states that “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.” See *United States v. Cavera*, 550 F.3d 180, 190–91 (2d Cir. 2008) (*en banc*) (citing § 3661 in noting that “we will not categorically proscribe any factor concerning the background, character, and conduct of the defendant, with the exception of invidious factors” (internal quotation marks omitted)). Thus,

consideration of Valder's state conviction in explaining the district court's alternative sentence was not error, much less error impugning the fairness, integrity, or public reputation of judicial proceedings in this case.³²

³² Whether this court may also consider the specific facts of Valder's 2010 state conviction at the fourth step of plain error review of his categorical challenge is not something we need decide on this appeal. We note, however, that in *Puckett v. United States*, the Supreme Court explained that the fourth requirement "is meant to be applied on a case-specific and fact-intensive basis." 556 U.S. at 142. Citing *Puckett*, this court recently observed that "even in circumstances where 'the integrity of the system may be called into question' there may be key 'countervailing factors in particular cases' that nonetheless excuse the unpreserved error." *United States v. Mendonca*, 88 F.4th 144, 155 (2d Cir. 2023) (quoting *Puckett v. United States*, 556 U.S. at 142–43). While these cases did not involve categorical challenges, if their reasoning applies in that context, then, at the first step of plain error review of Valder's categorical "penetration" challenge, we would continue to consider only the minimum proof necessary to support a conviction under N.Y. Penal Law § 130.50(1) without regard to Valder's specific conduct. See *United States v. Rood*, 679 F.3d at 98. But at the fourth step of review, in deciding whether correction of error is necessary to avoid impugning the fairness and integrity of judicial proceedings, we might well consider the facts of Valder's particular § 130.50(1) crime, which clearly establish his forcible penile penetration of the anus of his 14-year-old victim, see *supra* at 5 n.4, conduct falling within 18 U.S.C. § 2241(a).

Some other circuit courts have adopted this case-specific approach to categorical challenges at the fourth step of plain error, albeit in non-precedential decisions. See, e.g., *United States v. Flores*, 601 F. App'x 242, 247 n.3 (5th Cir. 2015) ("[W]hen employing the categorical approach to determine whether a conviction constitutes a crime of violence, we do not look to the defendant's actual criminal conduct. However, when determining whether to exercise our discretion to remand for resentencing under the fourth prong of the plain error test, the inquiry is conducted on a 'case-specific and fact-intensive basis.'" (citation omitted) (quoting *Puckett v. United States*, 556 U.S. at 142)); *United States v. Pina-Nunez*, 167 F. App'x 66, 68–69 (10th Cir. 2006) (holding categorical challenge did not manifest plain error because, even though government conceded first three requirements for plain error, defendant could not satisfy the last in light of his admission of facts

In sum, even if we give Valder the benefit of the doubt at the first two steps of plain error review, *see supra* at 28, 30, we conclude that he cannot carry his burden as to the remaining two steps of that standard. Accordingly, he cannot secure relief from judgment based on his belated argument that the “anal sexual conduct” element of N.Y. Penal Law § 130.50(1) reaches more broadly than the “sexual act” element of 18 U.S.C. § 2241(a) and § 2242(1).

B. Valder’s 2010 State Conviction Satisfies § 3559(e)(1)’s Minor-Victim Requirement, Which Is Circumstance-Specific Rather than Categorical

Valder argues on appeal, as he did in the district court, that he is not subject to a mandatory life sentence under 18 U.S.C. § 3559(e)(1) because that statute requires a defendant to have a “prior sex conviction *in which a minor was the victim*,” *id.* (emphasis added), and N.Y. Penal Law § 130.50(1), the subject of his 2010 state conviction, does not categorically require proof of a victim’s minority. On *de novo* review, we reject the argument as without merit because § 3559(e)(1)’s minority requirement is not categorical but circumstance-specific and there is no question that the victim of Valder’s state crime was a minor.

Thus far, this court has not needed to decide whether § 3559(e)(1)’s minor-victim requirement is properly construed as categorical or circumstance-specific. *See United States v. Kroll*, 918 F.3d at 54 n.6 (observing that court “need not reach”

supporting challenged U.S.S.G. § 2L1.2(b)(1)(A) enhancement); *United States v. Banda-Vasquez*, 64 F. App’x 417, 417 (5th Cir. 2003) (declining to correct assumed categorical-approach error at fourth step of plain error review because defendant did not dispute that his particular offense was committed for profit). But, as noted, we need not conclusively decide whether to do so here, because, for other reasons stated in text, we already conclude that Valder does not carry his burden at the fourth step of plain error review. We simply note this open question as to the fourth step of plain error for possible future review.

that question). In now concluding that the requirement is circumstance-specific, we look to the Supreme Court decision in *Nijhawan v. Holder*, 557 U.S. 29 (2009).

In that case, petitioner Nijhawan argued that his prior conviction for fraud did not constitute an “aggravated felony” subjecting him to deportation under 8 U.S.C. § 1227(a)(2)(A) because the jury had not been required to find his fraud to have caused a loss exceeding \$10,000. He maintained such a loss amount was a categorical requirement for a fraud to constitute an aggravated felony. *See id.* at 35–36. In rejecting that argument, the Supreme Court acknowledged that federal immigration law defines “aggravated felony” to include, *inter alia*, “an offense that . . . involves fraud or deceit *in which the loss to the victim or victims exceeds \$10,000.*” 8 U.S.C. § 1101(a)(43)(M)(i) (emphasis added). Nevertheless, the Court construed the emphasized language not as categorical—*i.e.*, it “does not refer to an element of the fraud or deceit crime” qualifying as an aggravated felony—but, rather, as circumstance-specific—*i.e.*, it “refers to the particular circumstances in which an offender committed a (more broadly defined) fraud or deceit crime on a particular occasion.” *Nijhawan v. Holder*, 557 U.S. at 32. In so holding, the Court observed that “the words ‘in which’ (which modify ‘offense’) can refer to the conduct involved ‘in’ the commission of the offense of conviction, rather than to the elements of the offense.” *Id.* at 39 (emphases in original).

This reasoning applies equally to 18 U.S.C. § 3559(e)(1). That statute mandates a life sentence for a defendant who commits a “Federal sex offense” after a “prior sex conviction in which a minor was the victim.” 18 U.S.C. § 3559(e)(1). As our previous discussion indicates, conviction for a state crime qualifies as a “prior sex conviction” if it categorically matches a federal sex offense as defined in § 3559(e)(2)(A). *See supra* at 13. Like the “in which” clause at issue in *Nijhawan*, however, § 3559(e)(1)’s “in which” clause—*i.e.*, “in which a minor was the victim”—is correctly understood to modify an offense, specifically, the offense supporting

defendant's "prior sex conviction." The clause does not state an element of that offense categorically required for conviction. Rather, as in *Nijhawan*, it identifies "the specific circumstances surrounding an offender's commission of [a prior offense] on a specific occasion." *Nijhawan v. Holder*, 557 U.S. at 40.

Valder argues that this case is distinguishable from *Nijhawan* because the removal there at issue was in the context of a civil proceeding in which the government was not required to prove its aggravated felony claim beyond a reasonable doubt. By contrast, he submits that the fact that a defendant's prior offense of conviction involved a minor must be proved beyond a reasonable doubt for § 3559(e)(1)'s life-sentence mandate to apply. The argument does not persuade. The government's burden to prove beyond a reasonable doubt that the victim of a prior sex offense was a minor is a requirement for enhancing the sentence to be imposed on the pending "Federal sex offense," here, Valder's two sexual exploitation crimes. It is not a required element of the crime supporting the "prior sex conviction," here, Valder's 2010 New York state conviction. As the Supreme Court observed in *Nijhawan*, the government there acknowledged that where a fraud identified by a particular loss amount is the aggravated felony supporting a criminal prosecution for illegal reentry, the loss amount would have to be proved beyond a reasonable doubt to avoid constitutional concerns as to the illegal reentry conviction. *Id.* Nevertheless, the Court did not retreat from its conclusion that the loss amount did not apply categorically to the generic crime of fraud, but only specifically to the "circumstances surrounding an offender's commission of a fraud . . . on a specific occasion." *Id.* We reach the same conclusion with respect to the minor-victim requirement for a "prior sex conviction" to support a § 3559(e)(1) sentence. That requirement does not apply categorically to the crime underlying the prior sex conviction, but only to the specific circumstances surrounding a defendant's commission of the crime.

Further, in *Nijhawan* the Supreme Court supported its circumstance-specific conclusion by pointing to 18 U.S.C. § 1101(a)(43)(K)(ii), which identifies “offense[s] . . . described in section 2421, 2422, or 2423 of title 18 (relating to transportation for the purpose of prostitution) *if committed for commercial advantage*” as “aggravated felonies.” *Nijhawan v. Holder*, 557 U.S. at 38 (alteration and ellipsis in original) (emphasis in original). The Court concluded that the emphasized language “certainly seems to call for [a] circumstance-specific” approach because “only one subsection” of one of the referenced statutes, *i.e.* § 2423(d), “says anything about *commercial advantage*.” *Id.* (emphasis in original). “Thus, unless the ‘commercial advantage’ language [in § 1101(a)(43)(K)(ii)] calls for circumstance-specific application, the statute’s explicit references to §§ 2421 and 2422 would be pointless.” *Id.* Similarly with § 3559(e), several of the federal statutes listed in the definition of “Federal sex offense,” which a state crime of conviction must categorically match to qualify as a “prior sex conviction,” *see* 18 U.S.C. § 3559(e)(2)(B)–(C), do not have age as an element.³³ Following *Nijhawan*’s reasoning, construing the minor-victim requirement as a categorical, rather than circumstance-specific, feature of the “prior sex offense” referenced in § 3559(e)(1) would render “pointless” the federal statutes listed in § 3559(e)(2)(A) that do not themselves have an age element.

³³ Contrast 18 U.S.C. § 2241(a)–(b) (proscribing certain kinds of aggravated sexual abuse with no reference to age); *id.* § 2242 (proscribing sexual abuse with no reference to age); *id.* § 2244(a)(1) (proscribing abusive sexual contact with no reference to age); and *id.* § 2245 (providing enhanced penalties for murder in course of certain offenses, including § 2241(a)–(b), § 2242, and § 2244(a)(1), which do not reference age), with *id.* § 1591 (relating to sex trafficking of children); *id.* § 2251 (relating to sexual exploitation of children); *id.* § 2251A (relating to selling or buying of children); *id.* § 2422(b) (relating to coercion and enticement of a minor into prostitution); and *id.* § 2423(a) (relating to transportation of minors).

We note that the Ninth Circuit has also construed § 3559(e)(1)'s minor-victim requirement as circumstance-specific rather than categorical. See *United States v. Doss*, 630 F.3d 1181, 1197 (9th Cir. 2011), *as amended on reh'g in part* (Mar. 15, 2011). The court there observed that “§ 3559(e) presents a ‘hybrid’ situation” whereby “[t]he first portion of the sentencing enhancement—whether defendant has a prior ‘sex offense’ conviction—involves . . . a comparison of generic elements” while, “in light of *Nijhawan*, . . . Congress intended courts applying § 3559(e) to then look to the specific circumstances of that conviction to determine whether it involved a minor.” *Id.* We agree.

Several other circuit courts have taken a similar approach in considering the “tiers” of sex offender categories established by the Sex Offender Registration and Notification Act (“SORNA”). See 34 U.S.C. § 20911(2)–(4). For example, a person is denominated a Tier II offender if his offense of conviction is “comparable to or more severe than[, *inter alia*,] . . . abusive sexual contact (as described in section 2244 of title 18)” and is “committed against a minor.” *Id.* § 20911(3)(A). Courts have construed “committed against a minor” to require “a circumstance-specific analysis of the victim’s age on top of the otherwise categorical comparison between the state and federal offenses.” *United States v. Walker*, 931 F.3d 576, 579–80 (7th Cir. 2019) (Barrett, J.) (citing *United States v. White*, 782 F.3d 1118, 1135 (10th Cir. 2015) (“Congress intended courts to apply a categorical approach to sex offender tier classifications designated by reference to a specific federal criminal statute, but to employ a circumstance-specific comparison for the limited purpose of determining the victim’s age.”); *United States v. Berry*, 814 F.3d 192, 196–98 (4th Cir. 2016) (same)); see also *United States v. Escalante*, 933 F.3d 395, 401–02 (5th Cir. 2019) (construing “committed against a minor,” as used in sex offender tier definition, to authorize “circumstance-specific inquiry” into victim’s age); *United States v. Byun*, 539 F.3d 982, 992 (9th Cir. 2008) (stating Tier II “clearly permits a non-categorical approach to determining the age of the victim of the crime”).

Conducting a circumstance-specific inquiry here requires little discussion. The record shows, and the parties agree, that, in returning a guilty verdict against Valder in this case, the jury specifically found the victim of his 2010 New York crime to have been “a minor who had not attained the age of 17 years.” App’x at 51–52 (Jury Verdict Form); *see* Appellant Br. at 8–9; Appellee Br. at 40–41; 18 U.S.C. § 3559(e)(2)(D) (defining “minor” as “individual who has not attained the age of 17 years”).

In sum, because Valder’s preserved challenge to his § 3559(e)(1) life sentences fails on the merits, and his unpreserved challenges to these sentences fail plain error review, we hereby affirm the judgment of conviction.

CONCLUSION

For the foregoing reasons, we reject Valder’s challenges to the life sentences imposed pursuant to 18 U.S.C. § 3559(e)(1) based on his prior conviction under N.Y. Penal Law § 130.50(1). Specifically, we conclude,

1. Valder fails to demonstrate that it was plain error to recognize his N.Y. Penal Law § 130.50(1) conviction as a categorical match for a “Federal sex offense” as defined by 18 U.S.C. § 3559(e)(2)(A).
 - a. Valder’s contention that the forcible compulsion element of N.Y. Penal Law § 130.50(1) is categorically broader than that of a “Federal sex offense” fails at the first step of plain error review because there is no form of compulsion that can be used to commit the state offense that does not satisfy the compulsion element of a Federal sex offense, either 18 U.S.C. § 2241(a) (aggravated sexual abuse) or § 2242(1) (sexual abuse).
 - b. Valder’s contention that the fear element of N.Y. Penal Law § 130.50(1) is categorically broader than that of a Federal sex

offense fails at the first two steps of plain error review because there is no basis in text or clearly established precedent to conclude, as Valder urges, that the state law can be satisfied by instilling fear in a third party in the absence of any fear in the compulsion victim.

- c. Valder's contention that N.Y. Penal Law § 130.50(1) is categorically broader than a Federal sex offense because its "sexual conduct" element can be satisfied without the penetration required by the "sexual act" element of 18 U.S.C. § 2241(a) and § 2242(1) fails plain error review because, even assuming *arguendo* the first two plain error steps in Valder's favor, he cannot satisfy the third and fourth steps given the district court's careful explanation for why, even in the absence of a § 3559(e)(1) mandate, it would have sentenced Valder to 150 years' imprisonment, effectively a life sentence.
2. Valder fails to demonstrate error in the application of § 3559(e)(1)'s minor-victim requirement to his case because that requirement is circumstance-specific, rather than categorical, and the circumstances of Valder's prior New York State sex offense satisfy the minor-victim requirement.

Accordingly, we **AFFIRM** the challenged judgment.

LOHIER, *Chief Judge*, concurring:

Until now, no federal court has even suggested (let alone held) in a published decision that the categorical approach can be abandoned at the fourth step of plain error review. As I’ve previously noted, the categorical approach, though “complicated,” has genuine benefits and reflects the determined will of Congress. *United States v. Morris*, 61 F.4th 311, 321-22 (2d Cir. 2023) (Lohier, J., concurring). For these reasons I join the majority’s opinion except as to footnote 32, which, as the majority will not dispute, consists entirely of dicta.