No. 16-___

IN THE

Supreme Court of the United States

JUAN ESQUIVEL-QUINTANA,

Petitioner,

v.

LORETTA E. LYNCH,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under federal law, the Model Penal Code, and the laws of forty-three states and the District of Columbia, consensual sexual intercourse between a twenty-one-year-old and someone almost eighteen is legal. Seven states have statutes criminalizing such conduct.

The question presented is whether a conviction under one of those seven state statutes constitutes the "aggravated felony" of "sexual abuse of a minor" under 8 U.S.C. § 1101(a)(43)(A) of the Immigration and Nationality Act – and therefore constitutes grounds for mandatory removal.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Juan Esquivel-Quintana respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, Pet. App. 1a, is reported at 810 F.3d 1019 (6th Cir. 2016). The opinion of the Board of Immigration Appeals, Pet. App. 28a, is reported at 26 I. & N. Dec. 469 (B.I.A. 2015). The decision of the Immigration Judge is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 15, 2016. The court of appeals denied a timely petition for rehearing en banc on April 12, 2016. Pet. App. 43a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 101(a)(43) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43), provides in relevant part: "The term 'aggravated felony' means – (A) murder, rape, or sexual abuse of a minor."

Cal. Penal Code § 261.5 provides in relevant part:

> (a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a "minor" is a person under the age of 18 years . . . .

. . .

(c) Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170.

(d) Any person 21 years of age or older who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years.

Other relevant provisions of the U.S. Code – specifically, 18 U.S.C. §§ 2241, 2243, and 3509 – are reproduced at Pet. App. 44a-66a.

STATEMENT OF THE CASE

The Board of Immigration Appeals (BIA) has deemed conduct that is *legal* under federal law, the Model Penal Code, and the laws of forty-three states and the District of Columbia to be an "aggravated felony" under the Immigration and Nationality Act (INA). Specifically, the BIA has held that the INA's subsection categorizing "sexual abuse of a minor" as an aggravated felony covers not only convictions for sexually abusive conduct toward victims under sixteen but also convictions in the seven states that proscribe consensual sex between a twenty-one-year-old and someone under eighteen. Two federal courts of appeals have expressly rejected this position and

another circuit has adopted reasoning that would demand it do the same. But four others, including the Sixth Circuit in a divided opinion here, have accepted the BIA's view.

A. Legal Background

1. The INA subjects lawful permanent residents who are convicted of certain crimes to adverse immigration consequences, including removal. *See* 8 U.S.C. § 1227(a). These noncitizens may typically seek discretionary relief to remain in the United States. *See id.* §§ 1158, 1182(h), 1229b, 1229c.

But relief from removal is not an option for lawful permanent residents convicted, under state or federal law, of a crime the INA classifies as an "aggravated felony." Lawful permanent residents (and other lawfully present noncitizens) convicted of an "aggravated felony" are ineligible for virtually all forms of discretionary relief from removal. *See id.* §§ 1158(b)(2) (no asylum), 1182(h) (no waiver), 1229b(a)(3) (no cancellation of removal), 1229c(a)(1) (no voluntary departure). And once removed from the United States, an "aggravated felon" is ineligible for readmission or naturalization. *Id.* § 1182(a)(9)(A).

2. The INA contains a list of types of criminal offenses – such as murder and drug trafficking – that constitute "aggravated felonies." 8 U.S.C. § 1101(a)(43). State laws defining certain crimes, however, sometimes differ from one another in their particulars, and from their federal analogs as well. Questions thus frequently arise concerning whether a conviction under a state law proscribing conduct seemingly similar to that referenced in the INA qualifies as an "aggravated felony."

To answer these questions, this Court employs the "categorical approach." Under that approach, courts must first determine the elements of the aggravated felony's "generic" definition of the crime. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007)). This definition is derived from the contemporary, "generic sense in which the term is now used in the criminal codes of most States," federal law, and the Model Penal Code. *Taylor v. United States*, 495 U.S. 575, 598 (1990). If the elements of the state statute of conviction fall within the generic definition, then the conviction constitutes an aggravated felony. *Id.* But if the state statute is "overbroad" – that is, if it criminalizes conduct that the generic federal definition does not – then a conviction under that statute is not an aggravated felony. *Descamps v. United States*, 133 S. Ct. 2276, 2292 (2013). Under this approach, then, the "facts underlying the case" are irrelevant; courts look solely to "the least of the acts criminalized" by the state statute and compare them to the elements of the generic federal definition. *Moncrieffe*, 133 S. Ct. at 1684 (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010) (internal quotation mark and alteration omitted)).

Taylor illustrates the categorical approach at work. There, this Court considered whether a state burglary conviction satisfied the generic definition of "burglary." 495 U.S. at 579-80. Looking to criminal codes across the country and the Model Penal Code, this Court concluded that the "contemporary meaning of burglary" required that the perpetrator unlawfully enter into a "building or structure" with intent to commit a crime. *Id.* at 598-99 & n.8. But the

state statute under which the defendant had been convicted criminalized not only entries into buildings and structures but also unauthorized entries into vessels and railroad cars. *Id.* at 599. Accordingly, the state statute swept more broadly than the generic definition. And so, the defendant's conviction – regardless of the actual facts that led to it – could not be treated as one for "burglary" under the federal statute at issue. *Id.* at 602.[1]

Through analyses like this, the categorical approach brings uniformity to the law and relieves courts of the arduous – and sometimes impossible – task of discerning the exact facts underlying prior convictions. *Taylor*, 495 U.S. at 601; *see also Moncrieffe*, 133 S. Ct. at 1693 & n.11. The categorical approach's method of "err[ing] on the side of underinclusiveness," *Moncrieffe*, 133 S. Ct. at 1693, also "promote[s] efficiency, fairness, and predictability in the administration of immigration law," *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015).

B. Factual and Procedural Background

1. When petitioner Juan Esquivel-Quintana was twelve years old, he moved to the United States with his parents and became a lawful permanent resident.

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[1] There are more complicated variations of the categorical approach, such as the "modified categorical approach" and tools for dealing with "divisible" state laws. *Mathis v. United States*, 136 S. Ct. ___ (2016) (slip op. at 3-4). But this case involves the "straightforward" version of the approach where this Court discerns the elements of the "generic" offense referenced in the INA and "then lines up [the state-law] crime's elements alongside those of the generic offense[]" to see if the former are broader. *Id.* at 2-3.

Pet App. 3a; Certified Administrative Record (CAR) 217. His parents, four siblings, and much of his extended family currently live in the United States. CAR 217-18. All of them are either lawful permanent residents or U.S. citizens. *Id.*

Esquivel-Quintana had no trouble with the law until 2009, when, while living outside of Sacramento, California, he was charged with violating Cal. Penal Code § 261.5(c). That statute is among the strictest laws in the Nation proscribing sexual intercourse with persons who have not attained a certain age; the statute criminalizes sex with an individual "under the age of 18 years" whenever the age difference between the parties is more than three years. Cal. Penal Code § 261.5(c). According to the State's charging papers, Esquivel-Quintana had consensual sex with his sixteen-year-old girlfriend while he was twenty and twenty-one years old. CAR 66-67, 214.

The INA defines "aggravated felony" to include "murder, rape, or *sexual abuse of a minor*." 8 U.S.C. § 1101(a)(43)(A) (emphasis added). Before Esquivel-Quintana was charged, the Ninth Circuit held that a conviction under Cal. Penal Code § 261.5(c) does not constitute "sexual abuse of a minor." *See Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1160 (9th Cir. 2008) (en banc). Surveying federal and state laws on the subject, the Ninth Circuit determined that the generic definition of "sexual abuse of a minor" requires victims to be under sixteen and at least four years younger than the perpetrator. *Id.* at 1152-55. The least of the acts criminalized under Cal. Penal Code § 261.5(c) – consensual sex between a twenty-one-year-old and a person just shy of eighteen – falls outside of those generic elements.

Against this backdrop, Esquivel-Quintana pleaded no contest to the Cal. Penal Code § 261.5(c) charge. CAR 209. He was sentenced to ninety days in jail and five years' probation. Pet. App. 29a; CAR 209.

After completing his jail term, Esquivel-Quintana moved from California to Michigan to be closer to his family. CAR 217-18. In Michigan, as under federal law, the conduct underlying Esquivel-Quintana's California conviction is not a crime. *See* 18 U.S.C. § 2243; Mich. Comp. Laws § 750.520d.

2. The Government arrested Esquivel-Quintana in Michigan and initiated removal proceedings against him. The Government alleged that his California conviction constituted the "aggravated felony" of "sexual abuse of a minor." Pet. App. 3a.

Esquivel-Quintana urged the Immigration Judge (IJ) to follow the Ninth Circuit's reasoning in *Estrada-Espinoza* and declare that his conviction did not constitute "sexual abuse of a minor" under Section 1101(a)(43)(A). CAR 154. The Government reminded the IJ she was sitting within the Sixth Circuit and urged her to reject the Ninth Circuit's analysis. *Id.* 189-91. Specifically, the Government asked the IJ to hold that "sexual abuse of a minor" encompasses sexual activity with "anyone under the age of 18 years old." *Id.* 190. The IJ adopted the Government's position and ordered Esquivel-Quintana removed from the United States. *Id.* at 158, 195-96; Pet. App. 3a.

3. A three-member panel of the BIA affirmed. The BIA, like the IJ, began by acknowledging that a conviction under Cal. Penal Code § 261.5(c) does not constitute "sexual abuse of a minor" in the Ninth Circuit. Pet. App. 34a (citing *Estrada-Espinoza*, 546

F.3d at 1159). But the BIA stressed that it was "not bound" in this case by Ninth Circuit precedent. *Id.* 34a. The BIA then concluded that "outside of the Ninth Circuit," a conviction under Cal. Penal Code § 261.5(c) constitutes the "aggravated felony" of "sexual abuse of a minor." *Id.* 35a, 41a-42a.

In holding that a conviction under Cal. Penal Code § 261.5(c) necessarily falls within the generic definition of "sexual abuse of a minor," the BIA purported to apply the categorical approach. Pet. App. 33a. But the BIA ignored the fact that only seven states criminalize consensual sex between a twenty-one-year-old and someone almost eighteen, as California does. *See* Pet. App. 67a-68a (collecting state statues). And the BIA never asked whether federal law or the Model Penal Code criminalizes such conduct. If it had, it would have been forced to acknowledge that the federal statute criminalizing "sexual abuse of a minor" does not prohibit consensual sex with someone sixteen or older. 18 U.S.C. § 2243(a)(1). Nor does the Model Penal Code. *See* Model Penal Code § 213.3(1)(a) (Am. Law Inst. 1962).

Instead, the BIA looked to 18 U.S.C. § 3509, a statute that establishes procedural rules for child witnesses in criminal trials where the child has been a victim of, among other things, "sexual abuse." This statute defines "child" as someone under eighteen. *Id.* § 3509(2). Consequently, the BIA held that the word "minor" in Section 1101(a)(43)(A) must refer to someone under eighteen. Pet. App. 31a.

The BIA acknowledged that consensual sex involving sixteen- or seventeen-year-olds is not necessarily "abusive" – another requirement for

"sexual *abuse* of a minor." Pet. App. 38a-39a (emphasis added). But the BIA thought that such conduct is abusive "in certain circumstances," such as when "a 16-year-old high school student" has consensual sex with "his or her school teacher." *Id.* 35a & n.4. From this, the BIA concluded that "outside the Ninth Circuit," the generic definition of "sexual abuse of a minor" covers statutes criminalizing sex with someone under eighteen, so long as there is "meaningful" age differential between the two participants. *Id.* 35a, 39a.

Comparing those generic elements to California law, the BIA held that convictions under Cal. Penal Code § 261.5(c) necessarily constitute "sexual abuse of a minor." The California law criminalizes sex between someone under eighteen (the BIA's definition of "minor") and another person at least three years older – an age differential the BIA found "sufficient" to be "meaningful." Pet. App. 41a-42a.

4. A divided panel of the Sixth Circuit denied Esquivel-Quintana's petition for review. It noted that "[t]he Second, Third, and Seventh Circuits" have held that "sexual abuse of a minor" means engaging in a sexual act with anyone under eighteen, while "[t]wo circuits" – the Ninth and the Fourth – "have reached a different conclusion." Pet. App. 5a, 14a. The Sixth Circuit "join[ed]" the former camp. *Id.* 15a.

Like the BIA, the Sixth Circuit never canvassed state law or the Model Penal Code to ascertain a generic, contemporary definition of "sexual abuse of a minor." Nor did the majority ascribe much significance to the fact that the federal criminal code limits its definition of that offense to situations where the minor is under sixteen and at least four years

younger than the defendant. *See* Pet. App. 12a (referencing 18 U.S.C. § 2243). Instead, the majority simply declared that, because the INA does not explicitly cross-reference the federal criminal code or otherwise define the phrase "sexual abuse of a minor," the generic definition of that crime is "ambiguous." Pet. App. 11a.

Faced with that perceived ambiguity, the majority turned to whether to apply the framework in *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which requires courts in certain settings to defer to agencies' "reasonable construction[s]" of ambiguous statutes. *Id.* at 840. The Sixth Circuit saw "compelling reasons" to apply the rule of lenity instead of *Chevron* – and thus to resolve the ambiguity here in Esquivel-Quintana's favor. Pet. App. 8a. But it did not do so. Citing *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), an environmental case where this Court afforded deference to the EPA's interpretation of a statute having both civil and criminal applications, *see id.* at 703-04 & n.18, the majority asserted it was "requir[ed] . . . to follow *Chevron* in cases involving the Board's interpretations of immigration laws." Pet. App. 10a.

Applying *Chevron*, the Sixth Circuit found the BIA's conclusion that Cal. Penal Code § 261.5(c) falls within the generic crime of "sexual abuse of a minor" to be "permissible." Pet. App. 11a-15a. In the majority's view, the BIA reasonably defined the word "minor" according to the federal statute (18 U.S.C. § 3509) establishing rules for child witnesses in sexual abuse prosecutions. *Id.* 11a-12a. The majority

acknowledged that the federal *criminal* statute proscribing "sexual abuse of a minor," 18 U.S.C. § 2243, defines "minor" as someone between twelve and sixteen. *Id.* 13a. But the majority found that definition unacceptable because it does not cover "abuse against an eleven-year-old" – although the majority later conceded that a neighboring criminal statute, 18 U.S.C. § 2241, titled "aggravated sexual abuse," covers such conduct with persons under twelve. *Id.* 13a-14a.

Judge Sutton wrote an opinion concurring in part and dissenting in part, concluding that Esquivel-Quintana's conviction was not an "aggravated felony." He deemed this case a "classic occasion for applying the rule of lenity" because it involves an ambiguous statute with criminal and removal consequences, and this Court instructed in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), that "whether we encounter [such a statute] in a criminal or noncriminal context, the rule of lenity applies." Pet. App. 21a, 24a (quoting *Leocal*, 543 U.S. at 11 n.8). Indeed, applying *Chevron* to statutes with both criminal and immigration consequences, he warned, "threatens a complete undermining of the Constitution's separation of powers," *id.* 22a (quoting *id.* 9a), and denies people "fair notice of criminal consequences," *id.* 22a. Finally, Judge Sutton saw nothing in *Babbitt* precluding this conclusion. The opinion in that environmental case, he explained, "expressly limits itself to 'facial challenges'" to agency regulations. *Id.* 24a.

5. The Sixth Circuit denied Esquivel-Quintana's petition for rehearing en banc. Pet. App. 43a.

REASONS FOR GRANTING THE WRIT

Federal courts of appeals are intractably divided over whether convictions under state statutes criminalizing consensual sex between a twenty-one-year-old and a person under eighteen constitute "sexual abuse of a minor" under 8 U.S.C. § 1101(a)(43)(A) of the INA. Indeed, they are divided over whether a conviction under the very state statute at issue in this case – Cal. Penal Code § 261.5(c) – constitutes "sexual abuse of a minor." Resolving this conflict is critical for millions of lawful permanent residents and other lawfully present noncitizens, as well as for litigants and courts struggling to discern in immigration and criminal proceedings when this provision of the INA applies. The Sixth Circuit's holding here is also wrong. Convictions under Cal. Penal Code § 261.5(c) and parallel state laws are not what Congress had in mind when it categorized "sexual abuse of a minor" as an "aggravated felony" under the INA. And even if there were any doubt on Section 1101(a)(43)(A)'s meaning, the Sixth Circuit should have resolved that ambiguity by ruling in favor of the noncitizen, not by deferring to the Board of Immigration Appeals (BIA).

I. The Courts of Appeals Are Intractably Divided Over Whether Convictions Under State Statutes Criminalizing Sex Between Twenty-One-Year-Olds and Persons Under Eighteen Constitute "Sexual Abuse of a Minor" Under the INA.

1. The courts of appeals are divided four-to-three over whether convictions under state statutes like Cal. Penal Code § 261.5(c) constitute "sexual abuse of a minor."

a. In addition to the Sixth Circuit's holding here, the Seventh Circuit has held that the BIA has permissibly concluded that convictions under Cal. Penal Code § 261.5(c) constitute "sexual abuse of a minor." *Velasco-Giron v. Holder*, 773 F.3d 774, 779-80 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 2072 (2015). The Seventh Circuit acknowledged that "most states treat persons 16 and older as adults for the purpose of defining sex offenses." *Id.* at 778. But it nonetheless concluded – over the dissent of Judge Posner – that the meaning of "sexual abuse of a minor" was ambiguous, and that "no matter how many states use a different age demarcation," the BIA's position is entitled to *Chevron* deference. *Id.* at 776-78. *But see id.* at 780-83 (Posner, J., dissenting).

The Second and Third Circuits likewise deem convictions for having sex with a person less than eighteen to constitute "sexual abuse of a minor." In *Mugalli v. Ashcroft*, 258 F.3d 52 (2d Cir. 2001), the Second Circuit found Section 1101(a)(43)(A) to be ambiguous and then concluded that the BIA's definition of "minor" as someone under the age of eighteen is reasonable and entitled to *Chevron* deference. *Id.* at 55-60. And in *Restrepo v. Attorney General*, 617 F.3d 787 (3d Cir. 2010), the Third Circuit "agree[d]" with this analysis. *Id.* at 796.[2]

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[2] Although the Fifth Circuit has not squarely weighed in on the question presented, its precedent indicates it would likewise hold that a conviction like Esquivel-Quintana's falls within Section 1101(a)(43)(A). The Fifth Circuit has held that if statutes criminalizing sex with minors define "minor" as a person under eighteen, they "comport with the generic meaning of 'minor'" in Section 1101(a)(43)(A). *Contreras v. Holder*, 754

b. In direct contrast, an eleven-judge en banc panel of the Ninth Circuit unanimously held in *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008), that convictions under Cal. Penal Code § 261.5(c) do not constitute "sexual abuse of a minor." *Id.* at 1160. The Ninth Circuit began by observing that federal law criminalizes consensual sex only when the minor is under sixteen and is at least four years younger than the defendant. *Estrada-Espinoza*, 546 F.3d at 1152 & n.2 (discussing 18 U.S.C. § 2243). The Ninth Circuit next observed that the Model Penal Code and the law in "the vast majority of states" also dictate that "consensual sexual intercourse with a 17-year-old . . . is not necessarily abusive under the ordinary, contemporary, and common meaning of 'abuse.'" *Id.* at 1153 (footnote omitted). Given the clarity with which all of these sources exclude sex between twenty-one-year-olds and persons almost eighteen from the generic meaning of "sexual abuse of a minor," the Ninth Circuit held that "*Chevron* deference does not apply." *Id.* at 1157 n.7. When "Congress has spoken directly to the issue, as it has here, our inquiry is over." *Id.*

After *Estrada-Espinoza*, the Ninth Circuit explained that its reference in that opinion to 18 U.S.C. § 2243's definition of "minor" as someone between twelve and sixteen was not intended to suggest that sexual abuse of someone *younger* than

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F.3d 286, 294 (5th Cir. 2014) (citing *United States v. Rodriguez*, 711 F.3d 541, 560 (5th Cir. 2013) (en banc)). It did not reach the question, however, whether a certain age differential is necessary for a state-law conviction to constitute an "aggravated felony" or, if so, what that differential would be. *Id.* at 295.

twelve does not constitute "sexual abuse of a minor" under the INA. *United States v. Medina-Villa*, 567 F.3d 507, 515-16 (9th Cir. 2009); *see also Restrepo*, 617 F.3d at 799 (noting that the Ninth Circuit "retreated" from any such suggestion). But the Ninth Circuit has never wavered from its position that consensual sex with someone *older* than sixteen cannot constitute the "aggravated felony" of "sexual abuse of a minor." To the contrary, the Ninth Circuit has repeatedly confirmed that the age maximum and age differential established in *Estrada-Espinoza* are elements of the generic definition of "sexual abuse of a minor." *See, e.g.*, *United States v. Martinez*, 786 F.3d 1227, 1231 (9th Cir. 2015); *United States v. Gomez*, 757 F.3d 885, 903-04 (9th Cir. 2014); *Rivera-Cuartas v. Holder*, 605 F.3d 699, 701 (9th Cir. 2010); *Pelayo-Garcia v. Holder*, 589 F.3d 1010, 1013 (9th Cir. 2009).

The Fourth Circuit also holds that the generic definition of "sexual abuse of a minor" excludes convictions under statutes like Cal. Penal Code § 261.5(c). In *United States v. Rangel-Castaneda*, 709 F.3d 373 (4th Cir. 2013), the Fourth Circuit interpreted the phrase "sexual abuse of a minor" in the federal sentencing guidelines, which takes its definition from the INA. *Id.* at 381. *See* U.S.S.G. § 2L1.2 cmt. N.3(A) ("For purposes of subsection (b)(1)(C), 'aggravated felony' has the meaning given that term in 8 U.S.C. 1101(a)(43)."). The Fourth Circuit (per Judge Wilkinson) reasoned that conduct that is "entirely lawful" under federal law and in the majority of states cannot be an "aggravated felony." *Id.* at 381. Citing *Estrada-Espinoza* approvingly, the Fourth Circuit thus determined that while "the word 'minor' may vary depending on legal context," the age

limit for minority "is sixteen for purposes" of the "aggravated felony" of "sexual abuse of a minor." *Id.* at 380.

Finally, Tenth Circuit law dictates that a conviction under Cal. Penal Code § 261.5(c) does not constitute "sexual abuse of a minor." *Id.* at 598-99. In *Rangel-Perez v. Lynch*, 816 F.3d 591 (10th Cir. 2016), issued after the Sixth Circuit's decision here, the Tenth Circuit addressed whether the generic offense of "sexual abuse of a minor" has a mens rea requirement. *Id.* at 597-98. In defining the generic elements of that offense, the Tenth Circuit followed the elements in 18 U.S.C. §§ 2241 and 2243. *Id.* at 604 (citing *Estrada-Espinoza* for support). Noting that the BIA interpretation of "sexual abuse of a minor" was derived from the witness protections that 18 U.S.C. § 3509 affords to children, the Tenth Circuit held it "would not defer" to the BIA's analysis because it makes "scant sense" to rely in this context on a "procedural statute" over others that "define a substantive criminal offense." *Id.* at 598-601 (quoting *Mellouli v. Lynch*, 135 S. Ct. 1980, 1989 (2015)).

2. This conflict is ripe for review. Two terms ago, this Court denied certiorari in *Velasco-Giron*, which raised the issue presented here. *See* 135 S. Ct. 2072 (2015). The Government opposed review, noting that the BIA had just published its decision in this case and urging this Court to give the courts of appeals an opportunity to consider the effect of that decision. Brief in Opposition at 21-22, *Velasco-Giron v. Holder*, 135 S. Ct. 2072 (2015) (No. 14-745). It is now clear that the BIA's decision here is incapable of resolving the conflict.

a. Since the BIA issued its opinion here, the Sixth Circuit has deferred to the agency's interpretation of "sexual abuse of a minor," Pet. App. 2a, while the Tenth Circuit has rejected that interpretation as making "scant sense," *Rangel-Perez*, 816 F.3d at 601 (quoting *Mellouli*, 135 S. Ct. at 1989). Thus, the split over the meaning of 8 U.S.C. § 1101(a)(43)(A) has only deepened since the Government's request for forbearance.

b. More fundamentally, the BIA's decision itself renders the split incapable of resolution absent this Court's intervention. The BIA held that, "outside of the Ninth Circuit," convictions under state laws criminalizing sex between twenty-one-year-olds and persons almost eighteen constitute "sexual abuse of a minor." Pet. App. 35a. But inside the Ninth Circuit, the BIA itself has decided not to treat convictions like Esquivel-Quintana's as "sexual abuse of a minor." *Id.* Thus, under the BIA's own view of the law, the Ninth Circuit will not see any cases involving whether convictions under Cal. Penal Code § 261.5(c) or parallel laws constitute aggravated felonies under the INA.

Furthermore, even if the Ninth Circuit were again somehow confronted with this issue, no BIA decision could change its position. The Ninth Circuit (in its unanimous en banc decision) concluded that Section 1101(a)(43)(A) *unambiguously* excludes convictions like Esquivel-Quintana's. *Estrada-Espinoza*, 546 F.3d at 1157 n.7; *see also Velasco-Giron*, 773 F.3d at 777 (noting that the Ninth Circuit held that the BIA's position "flunks Step One of *Chevron*"). And when a court's construction "follows from the unambiguous terms of the statute," that

judicial construction "trumps" any future agency constructions to the contrary. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005).

II. The Question Presented Is Extremely Important, and This Case Is an Ideal Vehicle for Resolving It.

1. This Court has frequently granted certiorari to clarify the scope of generic offenses enumerated as "aggravated felonies" under the INA. *See, e.g.*, *Luna Torres v. Lynch*, 136 S. Ct. 1619 (2016); *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013); *Kawashima v. Holder*, 132 S. Ct. 1166 (2012); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Nijhawan v. Holder*, 557 U.S. 29 (2009); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004). Here, too, resolving the conflict over the meaning of "sexual abuse of a minor" is vitally important for this country's millions of lawfully permanent residents and other noncitizens – as well as for courts, prosecutors, and criminal defense attorneys alike.

a. For lawful permanent residents such as Esquivel-Quintana, the import of whether a conviction constitutes an "aggravated felony" – thus subjecting them to "mandatory removal," *Moncrieffe*, 133 S. Ct. at 1692 – can hardly be overstated. "Deportation can be the equivalent of banishment or exile." *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947); *see also Padilla v. Kentucky*, 559 U.S. 356, 365 (2010). It "visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). These consequences are all the more serious for people – like Esquivel-

Quintana – who came here as children and now face permanent banishment from the country where they built their lives and their extended family resides.

Because the stakes are so "high and momentous," removal decisions should not depend upon "fortuitous and capricious" circumstances or subject noncitizens to "irrational" hazards. *Delgadillo*, 332 U.S. at 391. Yet the BIA and the courts of appeals here have created exactly this sort of irrational scheme: Noncitizens may suddenly become removable just by stepping across state lines. Esquivel-Quintana, for instance, was convicted of unlawful sexual intercourse in California but was not subject to removal as long as he continued to live there. Only when he moved to Michigan to be closer to his family did he become an "aggravated felon" – even though the conduct for which he was convicted is not even a crime in Michigan.

Given this crazy-quilt situation, noncitizens convicted under Cal. Penal Code § 261.5(c) and parallel state laws face serious restrictions on their freedom of mobility. They face a threat of removal if they live in, work in, or even visit thirteen states – including highly populated centers of commerce such as New York and Michigan.[3] But they are free to enter twenty other states.[4] They may reside or pass

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[3] The thirteen states are: Connecticut, Delaware, Illinois, Indiana, Kentucky, Michigan, New Jersey, New York, Ohio, Pennsylvania, Tennessee, Vermont, and Wisconsin (in the Second, Third, Sixth, and Seventh Circuits).

[4] The twenty states are: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Kansas, Maryland, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, South

through any of the other seventeen states at their own risk, depending on what an immigration judge or court may later decide.

b. Resolving the question presented is also necessary to give guidance to courts, prosecutors, and defense attorneys with regard to prosecutions involving sex with minors.

As noted above, seven states have laws criminalizing sexual intercourse between a twenty-one-year-old and someone under eighteen: Arizona, California, Idaho, North Dakota, Oregon, Virginia, and Wisconsin. *See* Pet. App. 67a-68a (collecting state statutes). In just one year in California alone, prosecutors filed almost 3,000 cases under its law regulating this and other forms of "statutory rape." Governor's Office of Criminal Justice Planning, *Statutory Rape Vertical Prosecution: Fourth Year Report* 3 (2000).

Resolving whether convictions under these statutes constitute "aggravated felonies" under the INA would enable prosecutors to make charging and plea bargaining decisions with full knowledge of the immigration consequences. Indeed, some states impose on prosecutors explicit statutory or ethical duties to consider the immigration consequences of potential plea agreements. *See, e.g.*, Cal. Penal Code § 1016.3(b); Va. State Bar Legal Ethics, Formal Op. 1876 (2015). Prosecutors cannot do that effectively against the current backdrop of uncertainty.

Carolina, Utah, Virginia, Washington, West Virginia, and Wyoming (in the Fourth, Ninth, and Tenth Circuits).

Defense attorneys also need clarity in this area. The categorical approach is designed partly to enable noncitizens "to anticipate the immigration consequences of guilty pleas in criminal court, and to enter safe harbor guilty pleas." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015) (internal quotation marks omitted). And defense counsel have a duty to advise clients as to which crimes are "aggravated felonies" and which are not. *See Padilla*, 559 U.S. at 367. Yet defense lawyers cannot provide that advice when the circuits are in disarray.

c. The question presented is also salient for the criminal justice system more widely. "Aggravated felony" convictions serve as predicates for federal criminal prosecutions and sentencing enhancements. For instance, noncitizens who illegally reenter the country may generally receive a two-year prison sentence, but noncitizens who have been convicted of "aggravated felonies" who reenter illegally may receive up to twenty years. 8 U.S.C. § 1326(b)(2); U.S. Sentencing Guidelines § 2L1.2 cmt. n.3(A) (2015). Noncitizens convicted of "aggravated felonies" are also subject to criminal sanctions if they disobey orders of removal, *see* 8 U.S.C. § 1253(a)(1), as are individuals who help "aggravated felon[s]" illegally enter the country, *id.* § 1327.

These criminal consequences arise frequently. Illegal reentry alone constitutes 26% of all federal criminal cases. U.S. Sentencing Comm'n, *Illegal Reentry Offenses* 8 (Apr. 2015). And approximately 7,500 federal criminal cases are brought every year against noncitizens convicted of aggravated felonies

for reentering the country. *Id.* at 8-9.[5] Courts need to know when these prosecutions are properly charged and when they are not.

2. This case is an excellent vehicle for resolving whether "sexual abuse of a minor" covers convictions such as Cal. Penal Code § 261.5(c). The question presented has been fully litigated at each stage in this proceeding. It has also yielded a precedential BIA opinion and a published Sixth Circuit opinion with a lengthy dissent. And the question presented is outcome determinative for Esquivel-Quintana.

III. The Sixth Circuit's Decision Is Incorrect.

The Sixth Circuit's holding – that Esquivel-Quintana's conviction constitutes "sexual abuse of a minor" under the INA – is incorrect. Regardless of whether *Chevron* applies, the first step in any statutory interpretation case is to determine whether the statute dictates a clear answer to the issue. Here, the generic federal definition of "sexual abuse of a minor" clearly excludes the least culpable conduct under Cal. Penal Code § 261.5(c) – consensual sex between a twenty-one-year-old and a person almost eighteen. So the Sixth Circuit's analysis should have ended there.

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[5] The Sentencing Commission has proposed an amendment to U.S. Sentencing Guidelines § 2L1.2 that would decouple the level of sentencing enhancements from the "aggravated" nature of the prior conviction. *See* 81 Fed. Reg. 27,262, 27,273 (May 5, 2016). Regardless of whether Congress approves this amendment, the definition of the term will remain critical in illegal reentry cases where the Government seeks a sentence enhancement exceeding ten years. *See* 8 U.S.C. § 1326(b)(1).

But even if the phrase "sexual abuse of a minor" were ambiguous as to whether it covers convictions under statutes like Cal. Penal Code § 261.5(c), it would not matter. This Court has never deferred to the BIA's generic definition of an "aggravated felony," and *Chevron* deference is clearly improper where, as here, an agency is interpreting a civil statute with criminal applications. Finally, even if *Chevron* deference were permissible in these circumstances, the BIA's interpretation is unreasonable and so it still would not be worthy of deference.

A. Interpretive Tools Clearly Dictate That Sex Between a Twenty-One-Year-Old and Someone Almost Eighteen Does Not Constitute "Sexual Abuse of a Minor."

A straightforward application of the categorical approach resolves this case. Under that approach, courts look to federal and state criminal laws, as well as the Model Penal Code, to determine the "generic" federal definition of the "aggravated felony" at issue. *Taylor v. United States*, 495 U.S. 575, 596-98 & n.8 (1990). According to each of these guides, as well as customary tools of statutory interpretation, the least of the acts criminalized under Cal. Penal Code § 261.5(c) is clearly not "sexual abuse of a minor."

1. Federal law, the vast majority of states, and the Model Penal Code all deem consensual sex between twenty-one-year-olds and persons under eighteen to be legal; only one state deems it "sexual abuse."

a. *Federal law.* 18 U.S.C. § 2243 contains the only definition of "sexual abuse of a minor" in the U.S. Code. That statute requires that a victim be

under sixteen years old and that the defendant be at least four years older. (A second statute, titled "aggravated sexual abuse" criminalizes sexual acts with anyone younger than twelve. *See* 18 U.S.C. § 2241(c).)

The Sixth Circuit deemed Section 2243 inappropriate as a guide for two reasons, but neither withstands scrutiny. First, the Sixth Circuit maintained that the BIA had permissibly looked to 18 U.S.C. § 3509 instead of Section 2243 to determine the meaning of "minor." Pet. App. 12a. But Section 3509 establishes "[c]hild victims' and child witnesses' rights" in court – for example, the right of child-abuse victims to testify via closed-circuit television. *See* 18 U.S.C. § 3509. It does not establish any crime or even define the word "minor." Section 2243's criminal prohibition, therefore, is the only pertinent provision of federal law here.

Second, the Sixth Circuit noted that, in contrast to other "aggravated felonies" listed in the INA that cross-reference particular federal criminal statutes, Section 1101(a)(43)(A)'s listing of "sexual abuse of a minor" does not cross-reference Section 2243. Pet. App. 14a. But the lack of a cross-reference is unremarkable. The meaning of "sexual abuse of a minor" does not derive exclusively from Section 2243. Rather, as with "murder," "rape," "burglary," "theft" and other crimes in the INA that are not defined by cross-reference, *see* 8 U.S.C.§§ 1101(a)(43)(A) & (G), "sexual abuse of a minor" is defined according to the "generic sense in which the term is now used" under federal law, state law, and the Model Penal Code, *Taylor*, 495 U.S. at 598. Section 2243 is simply the most relevant federal source for *that* inquiry.

b. *State law*. The restrictive definition of "sexual abuse of a minor" under federal criminal law is consistent with "the criminal codes of most States," *Taylor*, 495 U.S. at 598. While every state criminalizes sex between someone under sixteen and a person more than four years older, only seven states criminalize the least culpable conduct at issue here: sex between someone who is twenty-one and another who is almost eighteen. *See* Pet. App. 67a-68a (collecting state statues).

But even the number seven substantially over-counts the number of states that deem consensual sex between a twenty-one-year-old and someone under eighteen to be "sexual abuse." Within the seven states that criminalize that behavior, state law still typically reserves the label "abuse" to describe separate sex crimes where the offender holds a position of authority over the victim or the victim is younger than sixteen. Virginia, for example, considers a minor to be sexually "abused" only when his "parents" or someone else "responsible for his care" commits or facilitates the illegal sexual acts, Va. Code § 16.1-228.4, or the minor is under fifteen, *id.* 18.2-67.4:2. Arizona and North Dakota similarly limit their definition of "sexual abuse" to sexual contact with children younger than fourteen or fifteen, respectively. *See* Ariz. Rev. Stat. § 13-1417; N.D. Cent. Code § 12.1-20-03.1. California, Idaho and Wisconsin likewise limit their definition of "sexual abuse" to sex with someone who is under sixteen. Cal. Penal Code § 261.5(d) (cross-referenced in *id.* § 11165.1(a)); Idaho Code § 18-1506; Wis. Stat.

948.02(2) (cross-referenced in *id.* § 971.37(1)).[6] Lest there be any doubt, California has explicitly stated that it does *not* consider a sixteen-year-old who, as here, "voluntarily engages in sexual intercourse" to be a victim of "abuse." *In re Kyle F.*, 5 Cal. Rptr. 3d 190, 194 (Ct. App. 2003); *see also Opinion No. 83-911*, 67 Ops. Cal. Atty. Gen. 235 (1984) (same).

In fact, only *one* state appears to characterize consensual sex between someone almost eighteen and a person just three years older as " sexual abuse." *See* Or. Rev. Stat. § 163.415(1)(B). Under these circumstances, the notion that the generic definition of "sexual abuse of a minor" encompasses consensual sex between someone almost eighteen and a person just three years older is hard to fathom.

c. *The Model Penal Code*. Like the U.S. Code and the vast majority of state codes, the Model Penal Code's provision criminalizing sex with persons less than a certain age requires that the victim be under sixteen and at least four years younger than the defendant. *See* Model Penal Code § 213.3(1)(a) (Am. Law Inst. 1962). The least culpable conduct at issue here is perfectly legal under the Model Penal Code – and is certainly not any form of "abuse."

2. Surrounding language in the INA reinforces that "sexual abuse of a minor" does not cover consensual sex between a twenty-one-year-old and someone just shy of eighteen.

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[6] In California, the perpetrator must also be older than twenty-one. *See* Cal. Penal Code § 261.5(d) (cross-referenced in *id.* § 11165.1(a)).

First, it is vital to bear in mind that Congress has classified "sexual abuse of a minor" as an "aggravated felony," as opposed to a lesser transgression. This Court is "very wary" of defining "aggravated felony" in a manner that "the English language tells us not to expect." *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 575 (2010) (internal quotation marks omitted). In *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), for example, the Court deemed it a "fundamental flaw" for the Government to argue that "even an undisputed misdemeanor [under federal law was] an aggravated felony." *Id.* at 1689.

The Sixth Circuit's position here is even more outlandish. Federal law *does not even criminalize* the least culpable conduct at issue. Nor do the vast majority of other states. And even among the seven states that criminalize the conduct, four demand it be charged as a misdemeanor.[7] Surely conduct that is *legal* in nearly all jurisdictions and a misdemeanor in most others cannot be an "aggravated felony."

Moreover, Congress's placement of the phrase "sexual abuse of a minor" alongside "murder" and "rape" underscores that it is meant to cover only grave and inhumane felonies, not the most expansive and technical restrictions on who may engage in consensual sex. Murder is so horrific that it is

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[7] *See* N.D. Cent. Code § 12.1-20-05.1; Or. Rev. Stat. § 163.415(2); Va. Code § 18.2-371(ii); Wis. Stat. § 948.09. Only Arizona and Idaho categorize the crime as a felony, *see* Ariz. Rev. Stat. § 13-1405; Idaho Code § 18-6101(2), and California allows it to be charged as a felony (as it was here) at the prosecutor's discretion, Cal. Penal Code § 261.5(c).

sometimes punishable by death. And this Court has recognized that "[s]hort of homicide, [rape] is the 'ultimate violation of self.'" *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (citation omitted). That "sexual abuse of a minor" keeps company with these two serious offenses imbues the term with "more precise content," *United States v. Williams*, 553 U.S. 285, 294 (2008), and indicates that it is likewise meant to cover only truly abhorrent criminal conduct. Consensual sex between a twenty-one-year-old and someone barely three years younger does not rise to that level.

B. Even If the Statute Were Unclear, *Chevron* Deference Would Still Be Inappropriate Here.

Even if it were unclear whether Section 1101(a)(43)(A) covers convictions under Cal. Penal Code § 261.5(c), the Sixth Circuit's decision would still be incorrect.

1. This Court has never deferred to the BIA when using the categorical approach to formulate the generic definition of an "aggravated felony" listed in the INA. *See Luna Torres v. Lynch*, 136 S. Ct. 1619 (2016) (determining the generic definition of aggravated felonies described in the INA without reference to *Chevron*); *Lopez v. Gonzales*, 549 U.S. 47 (2006) (same). *Compare also* Brief for Respondent at 45-49, *Nijhawan v. Holder*, 557 U.S. 29 (2009) (urging the Court to defer to the BIA's generic definition), *with Nijhawan v. Holder*, 557 U.S. 29 (2009) (interpreting statute without giving deference).

This makes sense. The BIA has no special expertise in defining generic crimes or applying other aspects of the categorical approach. At the same time,

the categorical approach "has a long pedigree in our Nation's immigration law" – predating *Chevron* by decades. *Moncrieffe*, 133 S. Ct. at 1685. It is designed to "promote efficiency, fairness, and predictability." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015). The categorical approach also accords with the "longstanding principle" – similar to the rule of lenity in the criminal context – "of construing any lingering ambiguities in deportation statutes in favor of the alien." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *see also Kawashima v. Holder*, 132 S. Ct. 1166, 1175-76 (2012) (noting practice of "construe[ing] ambiguities in deportation statutes in the alien's favor"). Therefore, when confronted with any "ambiguity" concerning the scope of the generic definition of an "aggravated felony," courts should simply apply the categorical approach so as to "err on the side of underinclusiveness." *Moncrieffe*, 133 S. Ct. at 1687, 1693.

The Sixth Circuit resisted resolving the case in this manner, suggesting that the categorical approach applies differently in immigration cases than in criminal cases. *See* Pet. App. 6a-7a. But the Sixth Circuit was clearly mistaken. This Court has made clear time and again that the categorical approach operates the same way – and leaves it to courts independently to ascertain the generic definition of crimes – in both contexts. *See, e.g.*, *Mathis v. United States*, 136 S. Ct. ___ (2016) (slip op. at 8-9 n.2); *Moncrieffe*, 133 S. Ct. at 1684.

At any rate, as Judge Sutton explained in dissent below (Pet. App. 16a-27a), *Chevron* deference is plainly off-limits here because the particular provision of the INA at issue here, 8 U.S.C.

§ 1101(a)(43)(A), dictates not only civil consequences but criminal liability as well. *See supra* at 21. When construing a statute that imposes criminal liability, the rule of lenity requires courts to interpret ambiguity in favor of defendants. *Skilling v. United States*, 561 U.S. 358, 410 (2010). Federal agencies, in other words, have no license to resolve ambiguities in "criminal laws." *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014). And because courts "must interpret [a] statute consistently" whether they encounter it "in a criminal or noncriminal context," the rule of lenity must apply when interpreting statutes with criminal and civil consequences. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004).

The Sixth Circuit nevertheless applied *Chevron* instead of the rule of lenity here because it believed *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), required it to do so. Pet. App. 9a. The Sixth Circuit was mistaken. *Babbitt* involved a "facial challenge[]" to an administrative regulation that was on the books at the time of the conduct at issue. 515 U.S. at 704 n.18. Under those circumstances, this Court held that the regulation provided the "fair warning" the rule of lenity is designed to guarantee. *Id.*

Here, Esquivel-Quintana is not raising a facial challenge to any regulation, nor was there any clear BIA agency statement at the time of the conduct at issue. Furthermore, where ambiguous civil statutes carry criminal consequences, this Court has indicated in several cases in addition to *Leocal* that lenity (not *Chevron*) applies. *See, e.g.*, *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality opinion); *Kasten v. Saint-Gobain*

Performance Plastic Corp., 563 U.S. 1, 16 (2011). If forced to choose between that case law and *Babbitt*, this Court should choose the former and hold the rule of lenity requires Section 1101(a)(43)(A) to be construed to exclude convictions under statutes such as Cal. Penal Code § 261.5(c).

2. Even if *Chevron* did apply, the BIA's interpretation would still not warrant deference because it is not "a reasonable construction" of the INA. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984). The BIA made three key errors in holding that Esquivel-Quintana's California conviction constitutes "sexual abuse of a minor."

First, as noted above, the BIA determined the elements of the generic crime of "sexual abuse of a minor" by looking to a witness-protection statute, 8 U.S.C. § 3509, rather than the definition of "sexual abuse of a minor" in the federal criminal code, 18 U.S.C. § 2243. *See supra* at 24-25. The categorical approach requires courts to seek guidance in comparable *criminal* laws, not procedural statutes.

Second, the BIA inverted the categorical approach in exactly the way this Court warned against in *Moncrieffe*. Under the categorical approach, a court "must presume that the conviction rested upon [nothing] more than the least of th[e] acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Moncrieffe*, 133 S. Ct. at 1684 (internal quotation marks omitted and alterations in original). Nevertheless, in *Moncrieffe*, the Government complained that narrowly construing the INA's reference to drug trafficking would allow some

offenders unfairly to "avoid 'aggravated felony' determinations" because many are convicted under state laws covering wide ranges of conduct, some of which is quite serious. *Id.* at 1692-93. The Court responded that the Government's "objection to that underinclusive result [was] little more than an attack on the categorical approach itself." *Id.*; *see also Mathis v. United States*, 136 S. Ct. ___ (2016) (slip op. at 1, 7) (admonishing that "[f]or more than 25 years," and "in no uncertain terms," this Court has made clear that a state crime does not satisfy the categorical approach "if its elements are broader than those of a listed generic offense").

Here, the BIA committed the same error. Instead of identifying the least of the acts criminalized under Cal. Penal Code § 261.5(c), the BIA hypothesized particularly egregious conduct that might serve as a basis for conviction under the California law: "sexual intercourse between a 16-year-old high school student and his or her school teacher." Pet. App. 35a n.4. Because it believed that *that* conduct constitutes sexual abuse of a minor, the BIA held that *all* convictions under California's statute constitute "sexual abuse of a minor." *Id.* at 35a. This reasoning turns the categorical approach on its head.

Finally, the BIA contravened the categorical approach by adopting a geographically variable definition of "sexual abuse of a minor." The categorical approach requires "*uniform*, categorical definitions to capture all offenses of a certain level of seriousness." *Taylor*, 495 U.S. at 590 (emphasis added); *see also Moncrieffe*, 133 S. Ct. at 1693 n.11 (uniformity is the categorical approach's "chief concern"). The BIA flouted this principle, holding

that "outside of the Ninth Circuit," a violation of Cal. Penal Code § 261.5(c) is "sexual abuse of a minor," while inside the Ninth Circuit it is not. Pet. App. 35a. The BIA's holding thus sews into the INA the "odd result[]" that the categorical approach expressly rejects: A state-law conviction is an aggravated felony in some areas of the country but not others. *See Taylor*, 495 U.S. at 591. This is not only inequitable but also impermissible under this Court's precedent.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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