No. 16-54

In the Supreme Court of the United States

JUAN ESQUIVEL-QUINTANA, PETITIONER

v.

LORETTA E. LYNCH, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Board of Immigration Appeals permissibly concluded that petitioner's conviction for "unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator," in violation of California Penal Code § 261.5(c) (West 2009), was a conviction for "sexual abuse of a minor," 8 U.S.C. 1101(a)(43)(A).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 810 F.3d 1019. The decision of the Board of Immigration Appeals (Pet. App. 27a-41a) is reported at 26 I. & N. Dec. 469. The decision of the immigration judge is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 2016. A petition for rehearing was denied on April 12, 2016 (Pet. App. 42a). The petition for a writ of certiorari was filed on July 11, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien who is convicted of an aggravated felony is deportable. See 8 U.S.C. 1227(a)(2)(A)(iii). In addition, an alien convicted of an

aggravated felony is not eligible for various discretionary forms of relief such as cancellation of removal. See 8 U.S.C. 1229b(a)(3). As relevant here, an aggravated felony includes "sexual abuse of a minor." 8 U.S.C. 1101(a)(43)(A). The INA does not further define "sexual abuse of a minor."

2. a. In 2000, petitioner, a native and citizen of Mexico, was admitted to the United States as a lawful permanent resident. Pet. App. 28a. In 2009, he was charged with two felony counts of unlawful sexual intercourse with a minor, in violation of California Penal Code § 261.5(c) (West 2009). Administrative Record (A.R.) 214-215. Section 261.5(c) makes it illegal for a person to engage in sexual intercourse with a minor if the perpetrator is more than three years older than the minor and is not the minor's spouse. California Penal Code § 261.5(c) (West 2009). A minor is defined as a person under age 18. *Id.* § 261.5(a). It is a defense that the perpetrator reasonably believed the victim was at least 18 years old. 1 B.E. Witkin & Norman L. Epstein, *California Criminal Law, Defenses*, § 53, at 488-490 (4th ed. 2012). Petitioner was 21 years old at the time of the acts charged in the complaint, and the victim was 16 years old. A.R. 214-215.

Petitioner pleaded no contest to one felony count. A.R. 209; see Pet. App. 28a. He was sentenced to 90 days in jail and five years' probation. Pet. App. 28a. He was also ordered to have no contact with the victim for three years and prohibited from "be[ing] in the presence of any minor under the age of 18 without a responsible adult present" during his five years of probation. A.R. 210.

b. In 2013, the U.S. Department of Homeland Security (DHS) served petitioner with a Notice to Appear, charging that petitioner was removable because his conviction for unlawful sexual intercourse with a minor constituted a conviction for "sexual abuse of a minor," an aggravated felony. Pet. App. 3a; A.R. 281-282; see 8 U.S.C. 1101(a)(43)(A); 8 U.S.C. 1227(a)(2)(A)(iii). An immigration judge found petitioner removable as charged. A.R. 150-158.

c. The Board of Immigration Appeals (BIA or Board) dismissed petitioner's appeal of the immigration judge's decision in a published decision clarifying the status of statutory-rape convictions under 8 U.S.C. 1101(a)(43)(A) and 8 U.S.C. 1227(a)(2)(A)(iii). Pet. App. 27a-41a.

The Board explained at the outset that its prior decisions shed light on, but did not resolve, whether convictions for unlawful sexual intercourse with a minor in violation of California Penal Code § 261.5(c) (West 2009) qualified as "sexual abuse of a minor" for purposes of those INA provisions. Pet. App. 29a-30a. The Board noted that *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 995-996 (B.I.A. 1999) (en banc), which addressed an indecent-exposure conviction, had concluded that the definition of "sexual abuse" in 18 U.S.C. 3509(a)(8) (1994) "provided useful guidance on the crimes that can reasonably be considered 'sexual abuse of a minor' for purposes of" Section 1101(a)(43)(A). Pet. App. 30a. And it noted that *In re V-F-D-*, 23 I. & N. Dec. 859 (B.I.A. 2006), had held that "a victim of sexual abuse who is under the age of 18 is a 'minor' for purposes of" the same section. Pet. App. 30a. The Board stated that its task in petitioner's case was to "expand upon these decisions and

consider whether a violation of a statute that involves unlawful sexual intercourse and presumes a lack of consent based on the age of the victim"—a statutory-rape statute—"is 'sexual abuse of a minor.'" *Ibid.*

Using the statute-by-statute "categorical approach" set out in *Descamps* v. *United States*, 133 S. Ct. 2276 (2013), and other cases, the Board concluded that convictions for unlawful sexual intercourse with a minor in violation of California Penal Code § 261.5(c) (West 2009) qualified as convictions for "sexual abuse of a minor" under 8 U.S.C. 1101(a)(43)(A). Pet. App. 34a-40a. The Board explained that statutory-rape statutes reflected the understanding that "there is an inherent risk of exploitation, if not coercion, when an adult solicits a minor to engage in sexual activity" because "[m]inors as a group have a less well-developed sense of judgment than adults, and thus are at greater peril of making choices that are not in their own best interests." *Id.* at 35a (brackets in original) (quoting *Gattem* v. *Gonzales*, 412 F.3d 758, 765 (7th Cir. 2005)). This "risk of coercion," the Board observed, "is particularly great when the victim is not in the same peer group." *Id.* at 36a; see *ibid.* (citing study that "classif[ies] a woman's partner as not peer-aged if he is 3 or more years older because of the likelihood that they are in different school settings or, if in the same school, have a different status, such as freshman and senior").

The Board concluded that statutory-rape crimes that include a requirement of a significant age differential between a perpetrator and a minor victim constitute crimes involving sexual abuse of a minor, including when the statute at issue reached conduct with 16 and 17 year old victims. Victims aged 16 and

17 years old, the Board noted, were minors as that term is generally understood. Pet. App. 37a (citing *In re V-F-D-*, 23 I. & N. Dec. at 862). And the Board reasoned that so long as a statutory-rape statute reaching such minors required a meaningful age differential, it reached only conduct that "constitutes 'abuse' as that term is commonly used." *Id.* at 40a. The age-differential requirement, the Board further explained, accorded with congressional intent "to remove aliens who are sexually abusive toward children," while also ensuring that aliens were not made removable based on "nonabusive consensual intercourse between older adolescent peers." *Id.* at 38a (citation omitted). Since California Penal Code § 261.5(c) (West 2009) "requires that the minor victim be 'more than three years younger' than the perpetrator," the Board concluded that a conviction under Section 261.5(c) was a conviction for sexual abuse of a minor. Pet. App. 40a.

d. i. The court of appeals denied a petition for review. Pet. App. 1a-15a. The court first noted that *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "supplies the appropriate framework for reviewing the Board's interpretation of 'sexual abuse of a minor,'" because "[t]he Supreme Court and Sixth Circuit have repeatedly held that *Chevron* deference applies to the Board's interpretations of immigration laws." Pet. App. 4a.

The court of appeals rejected petitioner's arguments that it was required to "create [its] own definition of 'sexual abuse of a minor,'" rather than using the *Chevron* framework, because this Court in *Taylor* v. *United States*, 495 U.S. 575 (1990), had formulated its own definition of "burglary" in the Armed Career

Criminal Act of 1984, 18 U.S.C. 924(e). Pet. App. 6a. The court of appeals noted that "*Taylor* involved the Armed Career Criminal Act, not the Immigration and Nationality Act," as to which the Attorney General receives deference. *Ibid.* Moreover, the court noted that the definition of "burglary" adopted in *Taylor* relied heavily on legislative history that was specific to the meaning of that term in the Armed Career Criminal Act. *Id.* at 6a-7a.

The court of appeals also rejected petitioner's contention that the Attorney General was not entitled to *Chevron* deference in construing the INA provision here because the provision has civil and criminal applications. Pet. App. 7a-8a. The court noted that this Court had previously applied deference principles in interpreting a statute that could be enforced with criminal penalties, in a case in which it expressly considered and rejected the rule of lenity as an alternative method of resolving ambiguity. *Id.* at 9a (discussing *Babbitt* v. *Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 703-704 (1995)).

The court of appeals next concluded that the precedential Board decision in petitioner's case permissibly construed the term "sexual abuse of a minor" to include violations of California Penal Code § 261.5(c) (West 2009). Pet. App. 11a. It noted that the phrase "sexual abuse of a minor" was "ambiguous," and that Congress did not "specify the definitions of 'sexual abuse' or 'minor'" in the INA. *Ibid.* To give content to those terms, the court noted, the Board had reasonably relied on other federal statutory provisions. *Id.* at 11a-14a. In particular, the court noted, the Board had relied in part on the definition of "sexual abuse" in 18 U.S.C. 3509(a)(8) as "the employment,

use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children," *ibid.*; see Pet. App. 11a. And it had looked to the definition of a minor as a person under age 18 that is contained in 18 U.S.C. 2243(a) and other statutes. Pet. App. 11a; see *id.* at 12a-13a.

The court of appeals concluded that not only did "[n]othing forbid[]" the Board's construction of "sexual abuse of a minor" in the INA, but "strong arguments" supported that construction. Pet. App. 12a. The court noted that "minor" was commonly defined as a person under 18, including in numerous federal provisions dealing with sex crimes. *Id.* at 12a-13a (citing 18 U.S.C. 2251 and 2256(1), defining the crime of "sexual exploitation and other abuse of children"; 18 U.S.C. 2423(a), defining the crime of transporting a minor with intent to engage in criminal sexual activity; and case law addressing a U.S. Sentencing Guidelines provision concerning "sexual abuse of a minor"). "With so many sources defining the age of majority as eighteen," the court wrote, "the Board's interpretation [of minor] certainly qualifies as permissible." *Id.* at 13a.

Further, the court of appeals noted, an alternative federal provision defining "[s]exual abuse of a minor or ward" was an inappropriate guide to the meaning of the generic INA term. Pet. App. 12a-13a (discussing 18 U.S.C. 2243(a)). In the context of creating a particular federal offense, that provision defined "sexual abuse of a minor or ward" as limited to acts in which "the sexual-abuse victim is at least twelve years old." *Id.* at 13a. Using that unusual definition of "minor"

keyed to a particular federal crime to define "sexual abuse of a minor" under the INA would lead to the absurd result "that abuse against an eleven-year-old [would] not constitute 'sexual abuse of a minor.'" *Ibid.* Finding no evidence that Congress intended that unconventional definition to govern an INA provision enacted ten years later, the court wrote that it "should not haphazardly import the requirements of [Section] 2243(a) into a completely different statute." *Ibid.*

The court of appeals further noted that Congress could easily have given the term "sexual abuse of a minor" the limited meaning set forth at Section 2243(a) through use of a statutory cross-reference. Pet. App. 14a. Indeed, the INA is "replete with cross-references to federal statutes defining crimes that count as aggravated felonies." *Ibid.* The absence of a cross-reference supported the inference that Congress "wanted to sweep in a broad array of state-law convictions" for abusive sexual conduct toward minors, rather than only those convictions that matched a particular federal crime. *Ibid.*

The court of appeals noted that its decision accorded with decisions of the Second, Third, and Seventh Circuits, which had "all explicitly considered and rejected the argument that 'sexual abuse of a minor' is limited to statutes that go no further than [Section] 2243(a)." Pet. App. 14a-15a (citing *Mugalli* v. *Ashcroft*, 258 F.3d 52, 60 (2d Cir. 2001); *Restrepo* v. *Attorney Gen. of the U.S.*, 617 F.3d 787, 794 (3d Cir. 2010); *Velasco-Giron* v. *Holder*, 773 F.3d 774, 777 (7th Cir. 2014), cert. denied, 135 S. Ct. 2072 (2015)). In contrast, the court wrote, the decisions that had not deferred to the Board's construction of "sexual abuse of

a minor" were inapposite, because neither decision had addressed "a published, precedential BIA opinion interpreting the relevant state statute." *Id.* at 5a (discussing *Amos* v. *Lynch*, 790 F.3d 512, 518-520 (4th Cir. 2015); *Estrada-Espinoza* v. *Mukasey*, 546 F.3d 1147, 1152-1158 (9th Cir. 2008) (en banc), overruled in part on other grounds by *United States* v. *Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc) (per curiam), and abrogated by *Descamps* v. *United States*, 133 S. Ct. 2276 (2013)).

ii. Judge Sutton concurred in part and dissented in part. Pet. App. 16a-26a. Judge Sutton agreed with the majority that the term "sexual abuse of a minor" in the INA is ambiguous, but would have applied the rule of lenity to resolve the ambiguity in favor of petitioner. *Id.* at 21a.

e. The court of appeals denied rehearing, with no judge calling for a vote regarding whether to rehear the case en banc. Pet. App. 42a.[1]

ARGUMENT

Petitioner contends (Pet. 18-22) that the court of appeals erred in accepting the Board of Immigration Appeals' classification of his conviction for unlawful sexual intercourse with a minor more than three years younger than the perpetrator, in violation of California Penal Code § 261.5(c) (West 2009), as a conviction for "sexual abuse of a minor" under 8 U.S.C. 1101(a)(43)(A). The court correctly rejected petitioner's contention, and its decision does not implicate an ongoing conflict warranting this Court's intervention. Following issuance of the precedential Board decision

[1] DHS informs this Office that petitioner was removed from the United States to Mexico on January 20, 2015.

in this case, this Court denied review of a petition for a writ of certiorari seeking review of the identical question presented, *Velasco-Giron* v. *Lynch*, 135 S. Ct. 2072 (2015) (No. 14-745), and the same result is warranted here.

1. The court of appeals correctly affirmed the Board's precedential decision construing "sexual abuse of a minor" in Section 1101(a)(43)(A) to reach convictions under California Penal Code § 261.5(c) (West 2009). The Board is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in its construction of the INA. *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) ("Principles of *Chevron* deference apply when the BIA interprets the immigration laws.") (plurality opinion) (citation omitted); *id.* at 2214 (Roberts, C.J., concurring in the judgment); see *Negusie* v. *Holder*, 555 U.S. 511, 516-517 (2009); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999). These holdings reflect the INA's express direction that "[t]he Attorney General shall be charged with the administration and enforcement" of the INA with respect to the adjudication of removal proceedings and that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." *Aguirre-Aguirre*, 526 U.S. at 424 (brackets in original) (quoting 8 U.S.C. 1103(a)(1) (Supp. III 1997)).

Petitioner errs in contending (Pet. 29-31)—in an argument that has not been accepted by any court—that *Chevron* deference is inapplicable to the numerous INA terms that have relevance under statutes that criminalize immigration misconduct. That argument is contrary to this Court's decisions. This Court

has applied deference principles when an agency interprets a term in a statute that it is charged with administering, even when the term has criminal relevance. *United States* v. *O'Hagan*, 521 U.S. 642, 673 (1997) (deferring to regulation adopted by the U.S. Securities and Exchange Commission in a criminal case); *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 703-704 (1995) (deferring to U.S. Secretary of the Interior's definition of the term "take," as used in the provision of the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, that makes it unlawful to "take" endangered species); see *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 14-16 (2011) (according deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944), to agencies' consistent views in briefs and manuals concerning the anti-retaliation provision in the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, although "those who violate the antiretaliation provision * * * are subject to criminal sanction").

Petitioner asserts (Pet. 30) that his contrary view of *Chevron* is supported by *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004). But *Leocal* simply concluded (as the government agreed) that the Board does not receive deference concerning terms in statutes that the Board is *not* charged with administering, merely because those terms are cross-referenced in the INA. See *id.* at 11 n.8 (addressing meaning of "crime of violence" in Title 18 of the United States Code, which is cross-referenced in the INA); Gov't Br. at 33, *Leocal*, *supra* (No. 03-583). *Leocal* lacks relevance when an agency interprets terms within a statute that it is charged with administering. The other cases cited by petitioner undercut his argument. Although this Court re-

ferred to the potential applicability of the rule of lenity in *Kasten* (see Pet. 30-31), the Court did so only to reject that rule's relevance based on the fact that the agency's interpretation of the anti-retaliation provision at issue was reasonable and thus entitled to *Skidmore* deference. *Kasten*, 563 U.S. at 15-16. Nor does *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505 (1992) (opinion of Souter, J.), aid petitioner, as Justice Souter's plurality opinion in that case applied the rule of lenity only *after* concluding that the relevant agency rulings did not address the issue to be resolved, and thus that principles of deference were irrelevant. *Id.* at 518 n.9.

The Board's interpretation of the phrase "sexual abuse of a minor" to include statutory-rape convictions under California Penal Code § 261.5(c) (West 2009) is a reasonable one—and indeed reflects the most appropriate construction of that INA term. "Minor" generally refers to a person under the age of 18. See *In re V-F-D-*, 23 I. & N. Dec. 859, 862 (B.I.A. 2006) (citing *Black's Law Dictionary* 899 (5th ed. 1979)); see also Pet. App. 12a-13a (compiling federal laws relating to sexual offenses using that definition of "minor"). And the Board's conclusion that "sexual abuse" offenses against minors include statutory-rape offenses under laws that require a meaningful age differential accords with common usage, including with the definition that Congress used in a statute protecting minor victims of sexual abuse. See 18 U.S.C. 3509(a)(8) (defining "sexual abuse" to "include[] the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in * * * sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of

children, or incest with children"). As the Board explained, and courts have noted, the definition in Section 3509(a)(8) is consistent with ordinary understanding and appropriately aligns with Congress's intent of reaching a comprehensive set of sexual crimes against minors. *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 996 (B.I.A. 1999) (en banc) (citing *Black's Law Dictionary* 1375 (6th ed. 1990)); *Mugalli* v. *Ashcroft*, 258 F.3d 52, 58-59 (2d Cir. 2001) (noting that use of Section 3509(a)(8) was reasonable because that definition "is consonant with the generally understood broad meaning of the term 'sexual abuse' as reflected in" *Black's Law Dictionary* and was "also supported by the BIA's reading of Congressional intent to 'provide . . . a comprehensive scheme to cover crimes against children'") (citation omitted); *Restrepo* v. *Attorney Gen. of the U.S.*, 617 F.3d 787, 796 (3d Cir. 2010) (noting "consonance between" Section 3509(a)(8) "and the commonly accepted definition of 'sexual abuse'"). And it reflects the reality that when an older person solicits a minor not in his peer group to engage in sexual activity, that conduct presents significant risks of exploitation, coercion, and harm toward the minor victim. Pet. App. 35a-36a (citing *Bellotti* v. *Baird*, 443 U.S. 622, 635 (1979) (opinion of Powell, J.); *Gattem* v. *Gonzales*, 412 F.3d 758, 765 (7th Cir. 2005); and Kim S. Miller et al., *Sexual Initiation with Older Male Partners and Subsequent HIV Risk Behavior Among Female Adolescents*, 29 Fam. Plan. Persp. 212, 214 (1997)).

Petitioner errs in suggesting (Pet. 23-24, 31) that the Board erred in relying on these sources instead of the federal offense of "[s]exual abuse of a minor or ward," 18 U.S.C. 2243(a), as the most pertinent guide

to the relevant INA term. Section 2243(a) is an inappropriate guide. To begin with, Section 2243(a) does not define a generic category meant to cover state, federal, and local offenses, but instead creates a discrete federal crime. The generic function of the term "sexual abuse" in both Section 3509(a)(8) and the INA subsection here makes the definition of "sexual abuse" with respect to minors in Section 3509(a)(8) more relevant to interpreting the INA term than the discrete federal crime in Section 2243(a).

Moreover, while Section 2243(a) treats acts of statutory rape as sexual abuse (consistent with the Board's decision here), Section 2243(a) employs a very unusual definition of "minor" that reaches only individuals age 12 to 16. As the court below (and others) have explained, using that atypical definition to set the boundaries of "sexual abuse of a minor" under the INA would yield irrational results, for it would mean that sexual abuse of an eleven year old does not constitute "sexual abuse of a minor" for purposes of the INA. Pet. App. 13a. Indeed, this "absurd result" led the sole court that initially concluded Congress intended Section 2243(a) to supply the definition of "sexual abuse of a minor" in the INA to abandon that conclusion. *United States* v. *Medina-Villa*, 567 F.3d 507, 516 (9th Cir. 2009), cert. denied, 559 U.S. 954 (2010); see *id.* at 515-516. Given the under-inclusiveness of the definition in Section 2243(a), it was reasonable for the Board to treat Section 3509(a)(8)—combined with other sources—as a more pertinent guide to Congress's understanding of the generic meaning of sexual abuse of a minor.

Petitioner alternatively suggests (Pet. 23-28) that the Board was required to define "sexual abuse of a

minor" by tallying the age ranges covered by statutory-rape provisions in state, federal, and model provisions, and then excluding convictions under statutory-rape laws in States that have the highest ages of consent for minors. But that method would be impracticable in the context of "sexual abuse of a minor" and would ill serve Congress's goals. When Congress enacted Section 1101(a)(43)(A), it sought to provide "a comprehensive scheme to cover crimes against children," against the backdrop of state sexual-abuse laws that varied widely in their details. *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 996. There was "no consensus among the States on the exact age of consent for statutory rape," and a number of States extended their statutes to offenses against 16 and 17 year old victims (as a number of States still do). Pet. App. 35a; see *id.* at 39a (noting that States "define sex crimes against children in many different ways,'" so that "it is 'difficult, if not impossible, to determine whether a majority consensus exists with respect to the element components of an offense category or the meaning of those elements'") (citation omitted). In other words, state laws were (and are) "so widely divergent that it would be difficult, if not impossible, to glean a consensus as to the common elements of those offenses." *Rangel-Perez* v. *Lynch*, 816 F.3d 591, 603 (10th Cir. 2016).

Moreover, as a result of that diversity, treating laws aimed at sexual misconduct with children as barring "sexual abuse of a minor" only when their elements reflect a majority approach would undercut Congress's objective of providing "a comprehensive scheme to cover crimes against children." *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 996. The Board was

correct—and at a minimum, reasonable—in instead relying on a generic federal definition, common parlance, and other sources to give meaning to the term "sexual abuse of a minor" in the INA.

Petitioner next suggests (Pet. 28) that the Board's construction was impermissible because aggravated-felony categories under the INA should be interpreted "to cover only truly abhorrent criminal conduct," and, in petitioner's view, statutory-rape offenses by non-peer age perpetrators against 16 and 17 year olds do not rise to that level. But while the aggravated felony provision includes conduct such as murder and rape, see 8 U.S.C. 1101(a)(43)(A), it also includes "such comparatively minor offenses as operating an unlawful gambling business, see [Section] 1101(a)(43)(J), and possessing a firearm not identified by a serial number, see [Section] 1101(a)(43)(E)(iii)." *Torres* v. *Lynch*, 136 S. Ct. 1619, 1628 (2016). Statutory rape is, at a minimum, no less serious than these crimes. Cf. *Velasco-Giron*, 773 F.3d at 776 (stating that statutory rape as defined in Section 261.5(c) "fits comfortably next to 'rape' in [Section] 1101(a)(43)(A)").

Petitioner's final objections misunderstand the Board's decision. Petitioner contends (Pet. 31-32) that the Board erroneously failed to consider "the least of th[e] acts criminalized" under the California statute at issue here to "determine whether even those acts are encompassed by the generic federal offense." Pet. 31 (brackets in original) (quoting *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684 (2013)). Petitioner bases that conclusion (Pet. 32) on a portion of the Board's decision that used clear "example[s]" to demonstrate that "sexual abuse of a minor" can include acts perpetrated against 16 or 17 year old victims. Pet. App. 34a n.4.

But petitioner fails to acknowledge that after using examples to make that point, the Board went on to apply the categorical approach defined in *Moncrieffe* and other cases. The Board stated that it would "look only to the minimum conduct that has a realistic probability of being prosecuted under the California statute." *Id.* at 32a (citing *Moncrieffe*, 133 S. Ct. at 1684-1685). It then concluded that a statutory-rape statute covering intercourse with 16 and 17 year old victims reaches only conduct properly classified as abusive, so long as the statute requires a meaningful age differential between victim and perpetrator. *Id.* at 37a ("In our view, an age differential is the key consideration in determining whether sexual intercourse with a 16- or 17-year-old is properly viewed as categorically 'abusive'"); *id.* at 40a (concluding that the requirement of a meaningful age differential "ensur[es] that the offense under the statute we consider in a categorical manner actually constitutes 'abuse' as that term is commonly used."). The Board did not depart from the categorical approach.

Lastly, petitioner briefly suggests (Pet. 32-33) that the Board committed legal error by "adopting a geographically variable definition of 'sexual abuse of a minor.'" The Board adopted no geographically variable definition. It concluded that "the crime of unlawful intercourse with a minor in violation of [S]ection 261.5(c) of the California Penal Code *categorically constitutes* 'sexual abuse of a minor' and is an aggravated felony under [S]ection 101(a)(43)(A) of the [INA]." Pet. App. 41a (emphasis added). The Board's statement's regarding geographic scope simply recognized that the Board was "not bound by [a] Ninth Circuit[] decision" on which petitioner had

relied in a case arising in the Sixth Circuit, *id.* at 33a, even though the Board typically adheres to controlling authority in the jurisdiction where a case arises, *In re Anselmo*, 20 I. & N. Dec. 25, 31 (B.I.A. 1989).

2. As the government recently explained in opposing review of the same question that is presented here, there is no conflict that warrants this Court's intervention in light of the Board's published decision in this case. See Br. in Opp. at 15-20, *Velasco-Giron*, *supra* (No. 14-745).

a. There existed a shallow conflict before the decision below concerning the classification of statutory-rape statutes such as California Penal Code § 261.5(c) (West 2009), which turned on whether the Board's prior precedential definition of "sexual abuse of a minor" was adequately developed. The precedential decision below, however, eliminates the ground for declining deference in the Ninth Circuit—the only court to have previously declined deference to the Board's treatment of statutory-rape crimes.

Prior to the decision below, the Second, Third, and Seventh Circuits had given deference to the Board in the context of nonprecedential decisions classifying statutory-rape convictions as convictions for "sexual abuse of a minor." *Mugalli*, 258 F.3d at 60; *Restrepo*, 617 F.3d at 796; *Velasco-Giron*, 773 F.3d 774, 776-777 (7th Cir. 2014), cert. denied, 135 S. Ct. 2072 (2015). Those courts had treated the Board's precedential decision in *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 995-996, as providing sufficient guidance concerning the meaning of "sexual abuse of a minor" to warrant deference to the Board's applications of that decision in the context of statutory-rape offenses.

The Ninth Circuit, in contrast, had vacated an unpublished Board decision that treated a conviction under Section 261.5(c) as "sexual abuse of a minor." *Estrada-Espinoza* v. *Mukasey*, 546 F.3d 1147, 1152-1158 (2008) (en banc), overruled in part on other grounds by *United States* v. *Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc) (per curiam), and abrogated by *Descamps* v. *United States*, 133 S. Ct. 2276 (2013). The Ninth Circuit initially held that deference was unwarranted to the Board's construction of "sexual abuse of a minor" on the ground that the phrase in the INA was an unambiguous reference to the narrow offense labeled "sexual abuse of a minor" in 18 U.S.C. 2243(a). *Estrada-Espinoza*, 546 F.3d at 1152-1155, 1157 n.7, 1158. But the Ninth Circuit quickly abandoned that holding, concluding that construing "sexual abuse of a minor" as limited to the offenses encompassed by that prohibition would lead to an "absurd result." *Medina-Villa*, 567 F.3d at 516; see *id.* at 515-516.

The Ninth Circuit's remaining rationale for declining to accept the Board's classification of Section 261.5(c) was that deference principles were inapplicable because the Board had not issued a precedential decision establishing that the statutory-rape offense at issue constituted "sexual abuse of a minor." *Estrada-Espinoza* emphasized that the decision before it classifying a conviction under Section 261.5(c) as "sexual abuse of a minor" was not entitled to deference because that decision—in contrast to the Board decision in this case—was non-precedential. 546 F.3d at 1156 ("*Chevron* deference does not apply to unpublished, non-precedential BIA decisions.") (citation omitted). And while the Board's precedential decision

in *Rodriguez-Rodriguez* had construed "sexual abuse of a minor" in the context of an indecent-exposure offense, the Ninth Circuit concluded that decision "ha[d]n't done anything to particularize the meaning" of the term "sexual abuse of a minor," with the result that *Chevron* deference to the decision "has no practical significance." *Id.* at 1157 (citation omitted); see also *ibid.* (describing *Rodriguez-Rodriguez* as providing nothing more than "an advisory guideline for future case-by-case interpretation").

Because the Board's issuance of a precedential decision addressing statutory-rape convictions under Section 261.5(c) eliminates that basis for withholding *Chevron* deference, there is no current conflict warranting this Court's intervention. Indeed, the court below noted as much. See Pet. App. 5a (noting that the Ninth Circuit's outlier decision in *Estrada-Espinoza* "offer[s] little guidance" in light of the Board's published decision because it did not "involve[] a published, precedential BIA opinion interpreting the relevant state statute."); see also Gov't Br. in Opp., *Velasco-Giron*, *supra*.[2]

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[2] Petitioner also claims a conflict (Pet. 15) between the decision below and *United States* v. *Rangel-Castaneda*, 709 F.3d 373 (4th Cir. 2013), but he is mistaken. *Rangel-Castaneda* addressed the construction of the term "sexual abuse of a minor" not in the INA but in a Sentencing Guidelines provision. *Id.* at 380-381 (considering whether a violation of a Tennessee statute qualified as "sexual abuse of a minor" for purposes of a Sentencing Guidelines provision that specified that "[c]rime[s] of violence" include "sexual abuse of a minor," Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)) (2012)). The court of appeals accordingly construed "sexual abuse of a minor" without applying *Chevron* deference. *Rangel-Castaneda*, 709 F.3d at 380-381. The critical nature of this distinction is illustrated by the Third Circuit's decisions: While that court

b. Petitioner errs in contending (Pet. 16-18) that it is "clear that the BIA's decision here is incapable of resolving" the disagreement that previously existed. Pet. 16.

Petitioner first asserts (Pet. 16-17) that a conflict exists on the question presented even after the precedential decision below as a result of *Rangel-Perez*, *supra*. But *Rangel-Perez* did not address Section 261.5(c), age requirements under statutory-rape statutes, or any substantive aspect of the decision below. Instead, it addressed a question that no precedential Board decision has yet considered—the mens rea requirement for "sexual abuse of a minor" under Section 1101(a)(43)(A). *Rangel-Perez*, 816 F.3d at 601-606. The Tenth Circuit concluded that the generic term "sexual abuse of a minor" contains a mens rea requirement and remanded the case to the Board, expressly declining to reach any issue related to the definition of "minor" or the required age differential between victim and perpetrator. *Id.* at 606-607. *Rangel-Perez* thus lacks relevance to the question presented in this case.[3]

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concluded (under *Chevron*) that the Board permissibly defined "sexual abuse of a minor" under the INA to reach statutes that apply to sexual intercourse with 16 and 17 year olds, it also indicated it would not construe the term "sexual abuse of a minor" in the Sentencing Guidelines in that way. Compare *Restrepo*, 617 F.3d at 796 ("[T]he BIA's definition of sexual abuse of a minor is a reasonable one and * * * it is appropriate to exercise *Chevron* deference."), with *United States* v. *Ascencion-Carrera*, 413 Fed. Appx. 549, 551 n.4 (3d Cir. 2011) (suggesting violations of Section 261.5(c) would "likely not categorically qualify as sexual abuse of a minor" under the Sentencing Guidelines).

[3] Because the Utah statute at issue in *Rangel-Perez* defined "minor" as an individual under the age of 16, the victim-age issue

Unsurprisingly, under these circumstances, the interpretation that the Tenth Circuit asserted would make "scant sense" in its mens rea analysis was not the Board's holding in this case regarding victim ages. *Rangel-Perez*, 816 F.3d at 601 (citation omitted). Instead, *Rangel-Perez* stated that if the court could read the Board's earlier decision in *Rodriguez-Rodriguez* "to establish [Section] 3509(a) as the exclusive touchstone for defining all of the elements of the INA's generic 'sexual abuse of a minor' offense,"—a reading the court rejected—that wholesale importation "would make 'scant sense.'" *Ibid.* (citation omitted). The Board's decision in this case, of course, establishes that the Tenth Circuit was correct that "*Rodriguez-Rodriguez* did not establish [Section] 3509(a) as the exclusive touchstone for defining the elements of" sexual abuse of a minor, *ibid.*, because the decision below relied on multiple sources—not simply Section 3509(a)—in resolving the victim-age question, Pet. App. 34a-38a, which the Board explained had been an open one after *Rodriguez-Rodriguez*, *id.* at 30a. And while the Tenth Circuit rejected an argument that the mens rea question before it should be resolved by reference to Section 3509(a)—emphasizing that it was of "particular importance" that Section 3509(a) "does not address mens rea at all," *Rangel-Perez*, 816 F.3d at 605—the Tenth Circuit had no occasion to consider whether the Board could reasonably look to Section 3509(a), along with other sources, to answer the victim-age issue addressed below.

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addressed in the precedential decision below was not implicated in *Rangel-Perez*. See 816 F.3d at 595 (citing Utah Code Annotated § 76-5-401 (LexisNexis 2012)).

Petitioner alternatively contends (Pet. 17) that review should be granted before the Ninth Circuit has the opportunity to consider whether to defer to the precedential decision here because the BIA's decision will render it impossible for the Ninth Circuit to consider that question. That contention is incorrect. Section 1101(a)(43)(A)'s meaning (and the vitality of *Estrada-Espinoza*) are consistently put before the Ninth Circuit in cases other than appeals from the Board's aggravated-felony decisions. The decisions since the issuance of *Estrada-Espinoza* in which the Ninth Circuit has had occasion to either limit or apply that decision demonstrate as much. See, *e.g.*, *Medina-Villa*, 567 F.3d at 514-516 (limiting *Estrada-Espinoza* in Sentencing Guidelines case turning on construction of Section 1101(a)(43)(A)); see also *United States* v. *Farmer*, 627 F.3d 416, 421 (9th Cir. 2010) (clarifying *Estrada-Espinoza* in context of child-pornography prosecution), cert. denied, 564 U.S. 1040 (2011); *United States* v. *Valencia-Barragan*, 608 F.3d 1103, 1106-1107 (9th Cir.), cert. denied, 562 U.S. 1017 (2010) (applying *Estrada-Espinoza* in Sentencing Guidelines case turning on construction of Section 1101(a)(43)(A)). Accordingly, the court of appeals will have ample opportunity to consider the Board's precedential decision here regardless of whether the Board applies *Estrada-Espinoza* within the Ninth Circuit.[4] Having

[4] The Board has not yet decided whether to apply its decision here in the Ninth Circuit. Under *In re Anselmo*, *supra*, the Board generally declines to apply its own statutory interpretation if controlling precedent in the relevant circuit rejects the interpretation in question. The decision below correctly found no basis for invoking that principle in petitioner's case, because the appellate authority that petitioner relied on—*Estrada-Espinoza*—came

denied the petition for a writ of certiorari in *Velasco-Giron*, in which the government urged that the Ninth Circuit be afforded the opportunity to consider the precedential decision below, there is no reason to now grant certiorari before that court of appeals has had the opportunity to do so.

c. The National Association of Criminal Defense Lawyers alternatively urges that this Court should grant review to address the applicability of deference principles to INA terms that have criminal applications. This Court's intervention to address that subject is also unwarranted. There is no conflict among courts of appeals concerning that question.[5] And this case would be a poor vehicle in which to consider it.

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from outside petitioner's circuit. Pet. App. 33a-34a. The Board did not have occasion to decide in petitioner's case whether the Board should adhere to *Estrada-Espinoza* within the Ninth Circuit. But the Board could well decide, when a case within the Ninth Circuit comes before it, that its precedential decision in this case should also apply there, in light of the deference principles set out in *National Cable Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."). The Board has applied *Brand X* in that manner in prior cases. See, *e.g.*, *In re Douglas*, 26 I. & N. Dec. 197 (B.I.A. 2013).

[5] Courts of appeals have uniformly afforded the Board deference when construing terms within the INA that have civil and criminal applications. *Soto-Hernandez* v. *Holder*, 729 F.3d 1, 4 (1st Cir. 2013); *Mugalli*, 258 F.3d at 56; *Restrepo*, 617 F.3d at 795-796; *Espinal-Andrades* v. *Holder*, 777 F.3d 163, 169 (4th Cir. 2015), cert. denied, 136 S. Ct. 2386 (2016); *Alwan* v. *Ashcroft*, 388 F.3d 507, 513-515 (5th Cir. 2004); *Velasco-Giron*, 773 F.3d at 776; *Spacek* v. *Holder*, 688 F.3d 536, 538 (8th Cir. 2012); *Renteria-Morales* v. *Mukasey*, 551 F.3d 1076, 1081 (9th Cir. 2008); *Balogun*

Because courts of appeals uniformly hold *Chevron* deference applicable to the Board's interpretation of the INA provisions that have criminal relevance, the question whether *Chevron* deference is warranted in such contexts comes before this Court regularly—including in cases in which there is a bona fide conflict regarding an INA provision that itself requires this Court's intervention. Indeed, the applicability of *Chevron* deference has been briefed and argued on the merits in the context of such conflicts twice in the past eight years, including last Term. Pet. Br. at 36-47, *Torres*, *supra* (No. 14-1096); Gov't Br. at 45-52, *Torres*, *supra* (No. 14-1096); Pet. Br. at 48-55, *Nijhawan* v. *Holder*, 557 U.S. 29 (2009) (No. 08-495); Gov't Br. at 45-50, *Nijhawan*, *supra* (No. 08-495). Accordingly, a statutory-interpretation case that does not otherwise require this Court's intervention is a poor vehicle for addressing the applicability of deference principles.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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v. *U.S. Attorney Gen.*, 425 F.3d 1356, 1361 (11th Cir. 2005), cert. denied, 547 U.S. 1113 (2006).