No. 16-54

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Government has adopted a position that defies reason. The categorical approach requires courts to define generic "aggravated felonies" by surveying federal and state criminal statutes and the Model Penal Code. Yet according to the Government, conduct that is *not even criminal* under federal law, the Model Penal Code, the laws of forty-three states, or District of Columbia law—and that is characterized as "abuse" in *only one state*—falls within the generic definition of "sexual abuse of a minor."

Judges Wilkinson, Posner, and Sutton and Chief Judge Sidney Thomas have all rejected this argument—either alone or for panels of the Fourth and Ninth and Circuits. The Tenth Circuit has also rejected the argument's essential premise: that civil law sometimes treating people under eighteen as "children" trumps the specific criminal laws deeming people victims of "sexual abuse of a minor" only when under sixteen and at least four years younger than perpetrators. But four other circuits have accepted the Government's position.

The Government now tries to blur the split of authority and defend the Sixth Circuit's adoption of its misguided theory. But neither effort is convincing. This Court should grant certiorari.

I. The Conflict over the Question Presented Is Real and Ripe for Review.

The Government's attempts to minimize the circuit split are unsuccessful.

1. The Ninth Circuit held in *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (en banc),

that convictions under Cal. Penal Code § 261.5(c) do not constitute the aggravated felony of "sexual abuse of a minor." And the Government does not dispute that *Estrada-Espinoza* concluded that the Board of Immigration Appeals' (BIA's) views on the issue were irrelevant because "Congress has spoken directly to the issue," *id.* at 1157 n.7. The Government nevertheless suggests that certiorari should be postponed because the BIA's decision here might cause the Ninth Circuit to reconsider its unanimous en banc holding in *Estrada-Espinoza*. This argument ignores the real-world consequences of allowing the conflict here to persist, *see* Pet. 18-22, and strains credulity even on its own terms.

The Ninth Circuit will not see a future immigration case presenting the question presented here. The BIA's "precedential decision" below, BIO 20, applies only "outside of the Ninth Circuit." Pet. App. 34a. And the Government expresses no plans to try to initiate any future removal proceedings in the teeth of that restriction and *Estrada-Espinoza* itself.

The Government suggests the Ninth Circuit might "consider whether to defer to the [BIA's] precedential decision here" in a future *criminal* case, where the Sentencing Guidelines "turn[] on [a] construction of Section 1101(a)(43)(A)," BIO 23. Yet as the Government highlights only three pages earlier, the BIA's views are not accorded deference in the context of applying "a Sentencing Guidelines provision." BIO 20 n.2. So the Ninth Circuit will unquestionably adhere to *Estrada-Espinoza* in all future criminal cases, regardless of the BIA's views. The conflict is truly cemented.

Even if the Ninth Circuit did encounter an opportunity to reconsider *Estrada-Espinoza* in light of the BIA's decision here, it would not matter. The Government says the Ninth Circuit might reconsider *Estrada-Espinoza* because that decision relied on 18 U.S.C. § 2243—the federal statute criminalizing "sexual abuse" of victims aged twelve through fifteen—and the Ninth Circuit later clarified that Section 2243 does not "provide[] the only relevant definition" for deducing the elements of the aggravated felony of "sexual abuse of a minor." *United States v. Medina-Villa*, 567 F.3d 507, 516 (9th Cir. 2009). Other statutes, the Ninth Circuit later explained, dictate that abusing children under twelve also falls within 8 U.S.C. § 1101(a)(43)(A). *See Medina-Villa*, 567 F.3d at 515-16.

But as petitioner has explained, the Ninth Circuit has expressly reaffirmed the *Chevron* step-one holding in *Estrada-Espinoza* that convictions under statutes criminalizing sex with people *older* than sixteen do not constitute "sexual abuse of a minor" under the INA. Pet. 14-15; *see also Medina-Villa*, 567 F.3d at 515 (*Estrada-Espinoza* continues to govern "statutory rape crimes"); *United States v. Gomez*, 757 F.3d 885, 903-04 (9th Cir. 2014) (same). And justifiably so: Section 2243 explicitly requires a victim "not [have] attained the age of 16 years" (and to be "at least four years younger" than the perpetrator). 18 U.S.C. § 2243. At any rate, the other relevant touchstones under the categorical approach for defining generic crimes are "the vast majority of states" and "[t]he Model Penal Code"; those sources are "in accord" with Section 2243. *Estrada-Espinoza*, 546 F.3d at 1153, 1155; *see also id.* at 1152 n.2.

2. The Government cannot deny that the Fourth Circuit held in *United States v. Rangel-Castaneda*, 709 F.3d 373 (4th Cir. 2013), that convictions under state statutes criminalizing sex with persons over sixteen do not meet Section 1101(a)(43)(A)'s definition of "sexual abuse of a minor." But because *Rangel-Castaneda* construed Section 1101(a)(43)(A) for purposes of applying the Sentencing Guidelines, where *Chevron* is indisputably inapplicable, the Government treats the case as irrelevant. BIO 20 n.2.

The Government is mistaken. The Fourth Circuit held in *Rangel-Castaneda* that it "*must* accept th[e] broad consensus" of criminal statutes limiting "sexual abuse of a minor" to sex with someone under sixteen because "the gap between an age of consent of sixteen versus eighteen is simply too consequential to disregard, and the majority of states adopting the former age is too extensive to reject." 709 F.3d at 379; *see also id.* at 380-81. That reasoning does not bespeak a court that would find an agency determination to the contrary reasonable, even if it believed deference might otherwise be permissible.

3. Finally, the Tenth Circuit has held that even if *Chevron* applied in this context, it "would not defer" to the BIA's determination that 18 U.S.C. § 3509 dictates "the elements of the INA's generic 'sexual abuse of a minor' offense." *Rangel-Perez v. Lynch*, 816 F.3d 591, 601 (10th Cir. 2016). The Government argues this holding would not compel the Tenth Circuit to reject the BIA's view in this case because here the BIA "relied on multiple sources—not simply Section 3509(a)—in resolving the victim-age question." BIO 22. Again, the Government's contention falls flat.

The Tenth Circuit rejected the BIA's approach to construing Section 1101(a)(43)(A) because it was "unreasonable" for the BIA to rely on civil law instead of "substantive criminal statutes." *Rangel-Perez*, 816 F.3d at 605-06; *see also Ibarra v. Holder*, 736 F.3d 903, 911-18 (10th Cir. 2013) (rejecting BIA's definition of "child abuse" because it relied "primarily on definitions . . . from civil, not criminal law"). The sources besides Section 3509 on which the BIA relied here—an article from a family planning journal and a few civil cases generally observing that minors have a less-developed sense of judgment than adults, Pet. App. 35a-36a—do nothing to address the Tenth Circuit's reasoning. Accordingly, there is no doubt petitioner would have prevailed in the Tenth Circuit.

II. The Sixth Circuit's Decision Is Incorrect.

Regardless of whether *Chevron* applies, the first step in any statutory interpretation dispute is whether the statute dictates a clear answer to the issue. That first step—which here involves applying the categorical approach and other tools of construction to Section 1101(a)(43)(A)—resolves this case. But even if the statute were ambiguous, the Sixth Circuit's holding that the generic definition of "sexual abuse of a minor" covers consensual sex between a twenty-one-year-old and someone almost eighteen would still be incorrect.

1. The Government does not dispute that "the least of th[e] acts criminalized," *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (alteration in original) (internal quotation mark and citation omitted), under Cal. Penal Code § 261.5(c)—consensual sex between a twenty-one-year-old and someone almost eighteen—is entirely legal under federal law, the Model Penal

Code, and the laws of forty-three states and the District of Columbia. *See* Pet. 23-26. Nor does the Government deny that only one of the seven states that criminalizes that conduct deems it "sexual abuse." *See id.* 25-26. But the Government still insists for various reasons that the generic crime of "sexual abuse of a minor" includes consensual sex between a twenty-one-year-old and someone almost eighteen. The Government is mistaken.

a. The Government initially contends that statutes criminalizing sexual relations with minors are less instructive here than the federal statute regulating the testimony of abused children, 18 U.S.C. § 3509, a handful of civil law sources, and a journal article discussing risk factors for contracting the HIV virus. BIO 12-13. Not so. Generic definitions of crimes under the categorical approach turn on typical usage "in the *criminal* codes" of the states, the federal government, and the model rules. *Taylor v. United States*, 495 U.S. 575, 598 & n.8 (1990) (emphasis added); *see also Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 190 (2007) (surveying a "comprehensive account of the [criminal] law of all States and federal jurisdictions"). They do not turn on civil law, much less family planning journals.

b. The Government suggests a "tallying" of criminal codes cannot provide definitive guidance when there is "no consensus among the States" regarding the exact elements of an offense. BIO 15 (quoting Pet. App. 35a). The Government again makes a basic error. The whole purpose of the categorical approach is to derive a "uniform definition" when jurisdictions define a designated crime "in many different ways." *Taylor*, 495 U.S. at

580, 592; *see also Moncrieffe*, 133 S. Ct. at 1684. Courts, therefore, may not simply throw up their hands where state laws "var[y] widely in their details," BIO 15. That is precisely when a court must determine how the designated offense is defined "in the criminal codes of *most* States." *Taylor*, 495 U.S. at 598 (emphasis added); *see also United States v. De Jesus Ventura*, 565 F.3d 870, 876 (D.C. Cir. 2009) ("*Taylor* instructs us to determine the elements of kidnapping that are common to most states' definitions of that crime."); *United States v. Palomino Garcia*, 606 F.3d 1317, 1331-34 (11th Cir. 2010) (same). And where, as here, states (as well as the federal government and the Model Penal Code) overwhelmingly agree regarding particular elements, that agreement controls. *Taylor*, 495 U.S. at 598.

c. The Government next tries to marginalize the federal statute criminalizing "sexual abuse of a minor," 18 U.S.C. § 2243, as "very unusual" because it proscribes sex with minors only from ages "12 to 16." BIO 14. But there is nothing unusual about dictating that consensual sex with someone *over* sixteen is legal; that determination comports with the law in most states. Pet. App. 66a. Nor is it odd to leave it to a separate statute (18 U.S.C. § 2241) to criminalize sex with young children as a more serious offense. A great many state laws do that as well.[1]

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[1] *See, e.g.*, Ala. Code § 13A-6-62(a)(1) (12- to 15-year-olds) & *id.* § 13A-6-61(a)(3) (less than 12-year-olds); Alaska Stat. § 11.41.436(a)(1) (13- to 15-year-olds) & *id.* § 11.41.434(a)(1) (less than 13-year-olds); Conn. Gen. Stat. § 53a-71(a)(1) (13- to 15-year-olds) & *id.* § 53a-70(a)(2) (less than 13-year-olds); Ind. Code § 35-42-4-9(a) (14- and 15-year-olds) & *id.* § 35-42-4-3(a)

The Government is thus incorrect that taking guidance from Section 2243 "would mean that sexual abuse of an eleven year old does not constitute 'sexual abuse of a minor' for purposes of the INA." BIO 14. Section 2243 helps determine the *maximum* age for triggering the generic crime, while Section 2241 and its state counterparts make clear that there is no *minimum* age for committing "sexual abuse of a minor." *See* Pet. 23-24.

(less than 14-year-olds); Kan. Stat. § 21-5506(b)(1) (14- and 15-year-olds) & *id.* § 21-5503(a)(3) (less than 14-year-olds); La. Stat. § 14:80(A)(1) (13- to 16-year-olds) & *id.* § 14:42(A)(4) (less than 13-year-olds); Me. Rev. Stat. tit. 17-A, § 254(1)(A) (14- and 15-year-olds) & *id.* § 253(1)(B) (less than 14-year-olds); Mich. Comp. Laws § 750.520d(1)(a) (13- to 15-year-olds) & *id.* § 750.520b(1)(a) (less than 13-year-olds); Nev. Rev. Stat. §§ 200.364(6), 368 (14- and 15-year-olds) & *id.* § 200.366(1)(b) (less than 14-year-olds); N.M. Stat. § 30-9-11(G)(1) (13- to 16-year-olds) & *id.* § 30-9-11(D) (less than 13-year-olds); N.D. Cent. Code § 12.1-20-05(1) (15- to 17-year-olds) & *id.* § 12.1-20-03(1)(d) (less than 15-year-olds); Ohio Rev. Code § 2907.04(A) (13- to 15-year-olds) & *id.* § 2907.02(A)(1)(b) (less than 13-year-olds); 11 R.I. Gen. Laws § 11-37-6 (15-year-olds) & *id.* § 11-37-8.1 (less than 15-year-olds); S.C. Code § 16-3-655(B)(1) (11- to 14-year-olds) & *id.* § 16-3-655(A)(1) (less than 11-year-olds); Tenn. Code § 39-13-506(b)(2) (15- to 17-year-olds), *id.* § 39-13-506(b)(1) (13- and 14-year-olds) & *id.* § 39-13-504(a)(4) (less than 13-year-olds); Utah Code § 76-5-401.2 (16- and 17-year-olds), *id.* § 76-5-401.1 (14- and 15-year-olds) & *id.* § 76-5-402.1(1) (less than 14-year-olds); Va. Code § 18.2-371 (15- to 17-year-olds), *id.* § 18.2-63(A) (13- and 14-year-olds) & *id.* § 18.2-61(A)(iii) (less than 13-year-olds); Wash. Rev. Code § 9A.44.079(1) (14- and 15-year-olds), *id.* § 9A.44.076(1) (12- and 13-year-olds) & *id.* § 9A.44.073(1) (less than 12-year-olds); Wyo. Stat. § 6-2-315(a)(i) (13- to 15-year-olds) & *id.* § 6-2-314(a)(i) (less than 13-year-olds).

2. Even if Section 1101(a)(43)(A) left ambiguity regarding what constitutes the aggravated felony of "sexual abuse of a minor," the Sixth Circuit's holding would still be incorrect. The Sixth Circuit was wrong to apply *Chevron* deference, and the BIA's analysis would fail the reasonableness test in any event.

a. Petitioner argues *Chevron* does not apply here for two reasons: (i) the categorical approach itself requires courts to resolve "ambiguit[ies]" by "err[ing] on the side of underinclusiveness," *Moncrieffe*, 133 S. Ct. 1693; *see also Taylor*, 495 U.S. at 590-602; and (ii) ambiguities in immigration statutes that also define criminal sanctions must be resolved against the Government. Pet. 28-31. The Government does not defend the Sixth Circuit's rejection of the first argument. This alone provides reason to grant certiorari and rule in petitioner's favor.

The Government's response to the second argument makes granting certiorari all the more essential. According to the Government, ambiguous provisions in the INA's list of aggravated felonies may be resolved *in favor of* the Government when invoked in immigration cases even though they must be resolved *against* the Government when invoked in criminal cases. BIO 10-11, 20 n.2. That is a remarkable proposition.

It also flouts this Court's precedent. Shortly after the rise of the administrative state, this Court held: "There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give [a statute] the broad construction urged by the Commission, the same construction would likewise apply in criminal cases." *FCC v. ABC*, 347 U.S. 284, 296 (1954).

Modern decisions concur. *See Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004) ("[W]e must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context."); *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality opinion) (same).

The Government tries to distinguish *Leocal* and *Thompson/Center* on their facts. BIO 11-12. The legal principle those cases espouse, however, should be unimpeachable. As Judge Sutton explained below, "[s]tatutes are not 'chameleon[s]' that mean one thing in one setting and something else in another." Pet. App. 18a (second alteration in original) (quotation marks and citation omitted); *see also* NACDL Br. 9-14. And that principle applies with full force here.

Finally, the Government protests that no lower court has held that the INA's "aggravated felony" provisions must mean the same thing in immigration proceedings as in criminal cases. BIO 10. But the Ninth Circuit follows this rule respecting the very provision at issue here. *See also Medina-Villa*, 567 F.3d at 512 ("[W]e must interpret [Section 1101(a)(43)(A)] consistently, whether we encounter its application in a criminal or noncriminal context." (quoting *Leocal*, 543 U.S. at 12 n.8)). The Fifth Circuit likewise rejects the notion that classifying a conviction under the INA "depends upon whether 'aggravated felony' is being applied in sentencing or in the immigration context." *United States v. Hernandez-Avalos*, 251 F.3d 505, 509-10 & 509 n.2 (5th Cir. 2001), *overruled on other grounds by Lopez v. Gonzales*, 549 U.S. 47 (2006). So not only this Court's precedent, but also lower court case law, supports review here.

b. In any event, the BIA's interpretation of Section 1101(a)(43)(A) is unreasonable. The BIA improperly construed the phrase "sexual abuse of a minor" by reference to civil instead of criminal law, *see supra* at 6-8, and made two other errors.

First, citing the example of a sixteen-year-old having sex with "his or her school teacher," the BIA deemed convictions under Cal. Penal Code § 261.5(c) to constitute "sexual abuse of a minor" because it was "not prepared to hold that a 16- or 17-year-old *categorically cannot* be the victim of sexual abuse." Pet. App. 34a & n.4 (emphasis added). This turns the categorical approach upside down. A state-law conviction is an "aggravated felony" under the INA only if *every* violation of the state law falls within the generic definition of the crime, not if *any conceivable* violation might. *See* Pet. 31-32.

The Government notes that the BIA elsewhere recited the rule that adjudicators applying the categorical approach should "look only to the minimum conduct" criminalized under the state law. BIO 17 (quoting Pet. App. 32a). But the Government fails to come to grips with the fact that the BIA did not follow that rule.

Second, the BIA concluded that convictions under Cal. Penal Code § 261.5(c) and parallel state laws subject noncitizens to automatic removal in some areas of the country but not within others—specifically, "the Ninth Circuit." Pet. App. 34a. The Government responds that this geographical variance owes simply to the Board's practice of "adher[ing] to controlling authority in the jurisdiction where a case arises." BIO 17-18 (citing *In re Anselmo*, 20 I. & N. Dec. 25, 31 (B.I.A. 1989)). Be that as it may, it

remains that the BIA's decision makes deportability turn on where in the country a noncitizen resides. That thwarts the categorical approach's vital goal of uniformity and calls out for this Court's intervention.

CONCLUSION

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

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September 28, 2016