No. 16-54

IN THE

Supreme Court of the United States

JUAN ESQUIVEL-QUINTANA,

Petitioner,

v.

LORETTA E. LYNCH,

Respondent.

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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Under federal law, the Model Penal Code, and the laws of 43 states and the District of Columbia, consensual sexual intercourse between a 21-year-old and someone almost 18 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provision

Statutes

Other Authorities

BRIEF FOR PETITIONER

Petitioner Juan Esquivel-Quintana respectfully requests that this Court reverse 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. The opinion of the Board of Immigration Appeals, Pet. App. 27a, is reported at 26 I. & N. Dec. 469. The decision of the Immigration Judge, which appears at pages 150-58 of the Certified Administrative Record, 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. 42a. 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.
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> (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. 43a-65a.

STATEMENT OF THE CASE

The Immigration and Nationality Act (INA) categorizes certain crimes as "aggravated felonies." When there is no readily apparent uniform definition for a specified crime, this Court has instructed that it should be construed according to the definition that predominates among criminal codes. Yet in this case, the Sixth Circuit accepted the BIA's determination that conduct that is *legal* under federal law, the Model Penal Code, and the laws of 43 states plus the District of Columbia constitutes an aggravated felony. Specifically, the Sixth Circuit held that the INA provision listing "sexual abuse of a minor" as an aggravated felony includes consensual sex between a 21-year-old and someone almost 18—thereby subjecting petitioner to mandatory removal.

A. Legal Background

1. Under the INA, lawful permanent residents (and other noncitizens) convicted of certain crimes can be subject to adverse immigration consequences, including deportation. *See* 8 U.S.C. § 1227(a)(2). These noncitizens may typically ask the Attorney General for certain forms of discretionary relief from removal. *See id.* §§ 1158 (asylum), 1229b (cancellation of removal), 1229c (voluntary departure).

But discretionary relief from deportation is not an option if the noncitizen is convicted, under state or federal law, of a crime that the INA classifies as an "aggravated felony." Noncitizens convicted of aggravated felonies are subject to mandatory removal, meaning they are ineligible for any form of relief. *See* 8 U.S.C. §§ 1158(b)(2), 1229b(a)(3), 1229c(a)(1); *see also id.* § 1227(a)(2)(A)(iii). Once removed from the United States, an individual convicted of an aggravated felony is barred from readmission or naturalization. *See id.* §§ 1182(a)(9)(A), 1101(f)(8), 1427(a). And if such individuals are convicted of reentering illegally, they may receive up to 20-year sentences. *Id.* § 1326(b)(2).

The INA defines "aggravated felony" to include a list of criminal offenses—for example, "murder" and "drug trafficking." *See* 8 U.S.C. § 1101(a)(43). But state laws defining certain crimes sometimes differ from one another in their particulars, and can differ from their federal law analogs as well. Furthermore, it is often difficult, sometimes impossible, for courts to ascertain the exact facts underlying prior convictions. *See, e.g.*, *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986-87 (2015). Thus questions frequently arise

concerning whether a conviction under a state law proscribing conduct seemingly similar to an offense listed under Section 1101(a)(43) constitutes an "aggravated felony" and thus is grounds for mandatory deportation.

2. To resolve whether a state conviction qualifies as an "aggravated felony" under the INA, this Court employs what is known as the "categorical approach"—an interpretive method also used under certain sentencing enhancement statutes. *See, e.g.*, *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). Under the categorical approach, the "actual conduct" that led to a noncitizen's conviction is "irrelevant." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (quoting *United States ex rel. Guarino v. Uhl*, 107 F.2d 399, 400 (2d Cir. 1939) (Hand, J.)). Instead, courts focus on the elements of the state statute of conviction to determine whether "the least of th[e] acts criminalized" by the statute necessarily falls within the offense referenced in the INA. *Id.* (alteration in original) (quotation marks omitted). And when there is not a "readily apparent" uniform federal definition of the referenced offense, courts conduct this analysis against the "generic" conception of the offense—the archetypal version of the crime representing "[t]he prevailing view [of the offense] in the modern codes." *Taylor v. United States*, 495 U.S. 575, 580, 598 (1990) (quotation marks omitted). If the state statute of conviction sweeps in conduct that would not fit within the generic offense, then a conviction under that statute does not constitute an

aggravated felony. *See Moncrieffe*, 133 S. Ct. at 1684.[1]

This Court's decision in *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. The state where the defendant had been convicted had a statute criminalizing not only unauthorized entries into buildings and structures, but also unauthorized entries into vessels and railroad cars. *Id.* at 599. Yet after consulting the Model Penal Code and surveying criminal codes across the country, this Court concluded that "generic" burglary covers entries only into buildings or structures. *Id.* at 598-99, 598 n.8. Accordingly, the state statute swept more broadly than the generic definition. And so, convictions under that statute—regardless of the actual facts leading to them—could not be treated as convictions for "burglary" under the federal statute at issue. *See id.* at 599, 602.

The categorical approach "has a long pedigree in our Nation's immigration law." *Moncrieffe*, 133 S. Ct. at 1685; *see also Mellouli*, 135 S. Ct. at 1986. Federal courts and immigration judges have applied the approach in immigration proceedings for nearly a

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[1] There are more complicated versions of the categorical approach, such as the "modified categorical approach" for dealing with "divisible" state statutes. *Mathis*, 136 S. Ct. at 2249. But this case involves the "straightforward" situation where this Court asks simply whether the state-law offense of conviction is in some way broader than the "generic" offense. *Id.* at 2248; *see also* Pet. App. 31a (noting that Cal. Penal Code § 261.5(c) is not divisible).

century. *See Moncrieffe*, 133 S. Ct. at 1685. And the categorical approach's method of "err[ing] on the side of underinclusiveness," *id.* at 1693, "works to promote efficiency, fairness, and predictability in the administration of immigration law," *Mellouli*, 135 S. Ct. at 1987.

B. Factual and Procedural Background

1. When petitioner Juan Esquivel-Quintana was 12 years old, he moved with his parents to the United States with an immigrant visa and became a lawful permanent resident. Pet. App. 3a, 28a; 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 of all state laws governing sexual relations when one partner is under a certain age. It criminalizes consensual "sexual intercourse" with an individual "under the age of 18 years" whenever the parties are "more than three years" apart in age. Cal. Penal Code § 261.5(a), (c). According to the State's charging papers, Esquivel-Quintana had consensual sex with his 16-year-old girlfriend beginning when he was 20 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, an en banc panel of the Ninth Circuit had unanimously 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). The Ninth Circuit explained that 18 U.S.C. § 2243 (the federal law criminalizing "sexual abuse of a minor"), the Model Penal Code's counterpart to that offense, and the laws of 43 states exclude the least culpable of the acts criminalized under Cal. Penal Code § 261.5(c)—"sexual intercourse between a 21-year-old and someone about to turn 18"—from their reach. *See id.* at 1152-53. Consequently, that statute sweeps more broadly than the generic definition of "sexual abuse of a minor." *Id.* at 1158-59.

Against this backdrop, Esquivel-Quintana pleaded no contest to the Cal. Penal Code § 261.5(c) charge. CAR 209. He was sentenced to 90 days in jail and five years' probation. Pet. App. 29a; CAR 209.

2. After being released from jail, Esquivel-Quintana moved from California to Michigan, where some members of his family live. Pet. App. 3a; CAR 217-18. In Michigan, as under federal law, the conduct underlying Esquivel-Quintana's California conviction is not a crime. *See* Mich. Comp. Laws § 750.520d.

Having apparently learned from a California probation officer that Esquivel-Quintana had moved, the Government arrested him 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 hold that his conviction did

not constitute "sexual abuse of a minor" under the INA. 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.* 152, 189-91.

The IJ adopted the Government's position and ordered Esquivel-Quintana removed from the United States. Pet. App. 3a; CAR 153-58. The IJ acknowledged that this Court's precedent required her to "appl[y] the categorical approach" to determine whether a conviction under Cal. Penal Code § 261.5(c) falls within "the generic federal definition" of "sexual abuse of a minor." CAR 153, 155. But the IJ did not consult a multi-jurisdictional survey along the lines of those in *Taylor* and other cases. Instead, she reasoned that because "states categorize and define sex crimes against children in many different ways," it was permissible to look elsewhere for guidance in discerning the boundaries of the generic crime of "sexual abuse of a minor." *Id.* 156 (quoting *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 996 (B.I.A. 1999)).[2] Taking that license, the IJ looked to 18 U.S.C. § 3509(a), a statute establishing various procedural rights (such as the right to testify via closed-circuit television) for victims of sexual abuse. Because that statute defines "sexual abuse" of a

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[2] *Rodriguez-Rodriguez* involved the question whether generic crime of "sexual abuse of a minor" requires physical contact. *See* 22 I. & N. Dec. at 991-92. A dissent from the BIA's holding that it does not faulted the majority for refusing to resolve that issue consistently with the federal criminal definition of "sexual abuse of a minor" in 18 U.S.C. § 2243 and the vast majority of states' criminal codes. *See id.* at 1000-01 (Guendelsberger, dissenting).

"child" as "sexually explicit conduct" with "a person who is under the age of 18," *see* 18 U.S.C. § 3509(a)(2)(A), (a)(8), the IJ held that the aggravated felony of "sexual abuse of a minor" does too, *see* CAR 156-57, 156 n.2; *see also id.* 190.

3. A three-member panel of the BIA affirmed. Like the IJ, the BIA purported to apply the categorical approach. Pet. App. 32a. But also like the IJ, the BIA declined to consult any multi-jurisdictional compilation of the relevant criminal laws. The variations among state statutes, the BIA asserted, would make it "difficult, if not impossible, to determine whether a majority consensus exists" with respect to *every* element of "sexual abuse of a minor." *Id.* 39a (quotation marks omitted). So the BIA concluded it did not need to determine whether a consensus exists with respect to *any* element. *Id.* 40a.

Freed from the strictures of *Taylor* and its progeny, the BIA consulted a smattering of sources besides substantive criminal laws to determine the maximum age and age differential elements of "sexual abuse of a minor." *See* Pet. App. 29a-39a. First and foremost, the BIA referenced one of its own prior decisions, *In re V-F-D-*, 23 I. & N. Dec. 859 (B.I.A. 2006), which had defined "minor" as someone under 18 because Section 3509(a)(2)'s definition of "child" does so. Pet. App. 30a; *see also V-F-D-*, 23 I. & N. Dec. at 861-62. The BIA also pointed to a judicial opinion in a civil case involving abortion rights and an article in a 20-year-old family planning journal discussing HIV prevention, which had both expressed concern for women who engage in sexual activity before the age of 18. Pet. App. 35a-36a (citing *Bellotti v. Baird*, 443 U.S. 622, 635 (1979); 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)).

The BIA acknowledged that consensual sex involving 16- or 17-year-olds is not "categorically 'abusive'"—another requirement for "sexual *abuse* of a minor." Pet. App. 36a-37a (emphasis added). But the BIA stressed that such conduct is abusive "in certain circumstances," such as when "a 16-year-old high school student" has sex with "his or her school teacher." *Id.* 34a & n.4. From this, the BIA concluded that "outside of the Ninth Circuit," the generic crime of "sexual abuse of a minor" covers sex with someone under 18 so long as there is a "meaningful" age differential between the two partners. *Id.* 34a, 40a. The BIA then held that the three-year differential that Cal. Penal Code § 261.5(c) requires is "sufficient" to be "meaningful." *Id.* 40a.

4. A divided panel of the Sixth Circuit denied Esquivel-Quintana's petition for review. Like the IJ and the BIA, the Sixth Circuit never consulted a multi-jurisdictional survey. Instead, the majority simply declared that, because the INA does not define the phrase "sexual abuse of a minor," the parameters of that generic crime are "ambiguous." Pet. App. 11a.

Faced with that ostensible ambiguity, the majority considered whether to apply the framework of *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 hold that the rule of lenity foreclosed resorting to *Chevron*—and thus to hold that the

ambiguity it perceived here had to be resolved in Esquivel-Quintana's favor. Pet. App. 8a. But it nonetheless deferred to the BIA's resolution of the ambiguity against him. 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 a Department of the Interior regulation having both civil and criminal applications, *see id.* at 704 n.18, the majority announced it "must follow *Chevron* in cases involving the Board's interpretation[] of immigration laws," even where, as here, those laws have criminal applications, Pet. App. 10a.

Applying *Chevron*, the Sixth Circuit held the BIA's conclusion that Cal. Penal Code § 261.5(c) falls within the generic crime of "sexual abuse of a minor" was "permissible" because various statutes define "minor" as someone under 18. Pet. App. 11a-13a. The majority did not consider at any length whether it was reasonable to conclude that sex between a 21-year-old and someone almost 18 falls within the generic meaning of "sexual abuse."

Judge Sutton disagreed with the majority that a conviction under Cal. Penal Code § 261.5(c) constitutes "sexual abuse of a minor." Pet. App. 16a-26a (opinion concurring in part and dissenting in part). He deemed this case "a classic occasion for applying the rule of lenity" because the rule of lenity applies to all criminal statutes, and this case involves an ambiguous statute with both removal and criminal applications. *Id.* 21a. And Judge Sutton saw nothing in this Court's precedent precluding this conclusion. To the contrary, Judge Sutton noted that "an entire line of cases" forecloses resorting to

Chevron in this setting, and that *Babbitt* "expressly limits itself" to facial challenges to agency regulations. *Id.* 23a-24a.

5. The Sixth Circuit denied Esquivel-Quintana's petition for rehearing en banc. Pet. App. 42a.

6. This Court granted certiorari. 137 S. Ct. 368 (2016).

SUMMARY OF ARGUMENT

Petitioner's conviction under Cal. Penal Code § 261.5(c) does not constitute the "aggravated felony" of "sexual abuse of a minor" under 8 U.S.C. § 1101(a)(43)(A) of the INA.

I. The question whether a state conviction constitutes an "aggravated felony" turns on whether the least culpable acts criminalized under the statute necessarily fall within the crime the INA references. And where there is no readily apparent uniform federal definition of that crime, this Court conducts the categorical approach against the "generic" definition of that crime. The generic definition of a crime, in turn, depends on the prevailing way the offense is defined under federal and state criminal laws, as well as the Model Penal Code.

A multi-jurisdictional analysis here shows that federal law, the Model Penal Code, and the laws of 43 states consider the least of the acts criminalized under Cal. Penal Code § 261.5(c)—consensual sex between a 21-year-old and someone almost 18—to be entirely lawful. Six of the seven remaining states deem it not sufficiently serious to be treated as "sexual abuse." And the text and structure of the INA reinforce the soundness of excluding this conduct from the reach of the aggravated felony of "sexual

abuse of a minor." Accordingly, whatever the full generic definition of "sexual abuse of a minor" may be, it must exclude consensual sex between a 21-year-old and someone almost 18.

The Sixth Circuit and the BIA reached a different conclusion only by declining to use a multi-jurisdictional survey and instead consulting a smattering of procedural and civil sources that do not even purport to define crimes. But this Court's precedent precludes such a freewheeling approach. Even if it did not, allowing courts and the BIA to proceed in this manner would create massive administrative difficulties and drain the categorical approach of the efficiency and predictability it is designed to guarantee.

II. The BIA's determination that convictions under Cal. Penal Code § 261.5(c) constitute "sexual abuse of a minor" under the INA is not entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Chevron does not come into play unless a statute is ambiguous after courts have exhausted all traditional tools of statutory construction. And here, the time-honored categorical approach yields a clear answer to the question whether a conviction under Cal. Penal Code § 261.5(c) constitutes "sexual abuse of a minor." Even if this Court were to conclude that the categorical approach does not dictate the outcome here, two other traditional tools of interpretation would resolve any remaining ambiguity. First, this Court has stressed time and again that ambiguity in statutes triggering deportation must be construed in favor of the noncitizen. Second, the longstanding rule of lenity requires ambiguities in statutes with

criminal applications to be construed narrowly. Even though the INA's "sexual abuse of a minor" provision is being applied here in a civil setting, the criminal rule of lenity applies because that provision also has criminal applications. A "hybrid" statute like this cannot mean different things in different settings; the least common denominator must govern.

Even if ambiguity triggering *Chevron* somehow existed, the BIA's determination here would still not be entitled to deference because the BIA's construction of Section 1101(a)(43)(A) is unreasonable. The BIA ignored the requirement that it assess the parameters of generic crimes according only to substantive criminal statutes. The BIA also flouted the categorical approach's requirement to compare those parameters only to the least of the acts criminalized under the state statute at issue. Finally, the BIA failed to resolve any lingering ambiguities against requiring deportation.

ARGUMENT

The first step in any statutory interpretation case is to determine whether traditional tools of statutory interpretation provide a clear answer to the issue. Here, a straightforward application of the categorical approach fully resolves this case. Even if it did not, the Sixth Circuit's holding would still be incorrect.

I. The Categorical Approach Dictates that a Conviction Under Cal. Penal Code § 261.5(c) Does Not Constitute "Sexual Abuse of a Minor."

The categorical approach dictates that, whatever the full generic definition of "sexual abuse of a minor" may be, the definition excludes the least culpable conduct criminalized under Cal. Penal Code

§ 261.5(c): consensual sex between a 21-year-old and a person who is almost 18.

A. A Multi-Jurisdictional Survey Demonstrates that the Least Culpable Acts Criminalized Under Cal. Penal Code § 261.5(c) Fall Outside the Generic Definition of "Sexual Abuse of a Minor."

1. Where there is no "readily apparent" uniform federal definition of a designated aggravated felony, the categorical approach requires comparing the elements of the state statute of conviction against the "generic" conception of the designated offense—the archetypal version of the crime representing "[t]he prevailing view in the modern codes." *Taylor v. United States*, 495 U.S. 575, 580, 598 (1990) (quotation marks omitted); *see also Mathis v. United States*, 136 S. Ct. 2243, 2247 (2016) ("generic" offense means "the offense as commonly understood"). Thus, inasmuch as "sexual abuse of a minor" is a generic offense, this Court's precedent instructs that its parameters must be derived from a survey of federal criminal law, the Model Penal Code, and states' criminal codes. *See, e.g.*, *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186, 189 (2007); *Taylor*, 495 U.S. at 596-98, 598 n.8. And if that survey reveals a consensus regarding the generic crime that excludes conduct covered by the state statute at issue, that consensus controls. *See Taylor*, 495 U.S. at 598-99.

Taylor is the foundational case in this respect. There, "41 states" and the Model Penal Code included within the definition of "burglary" any illegal entry into a building or similar structure. U.S. Br. 16 & n.7, *Taylor v. United States*, 495 U.S. 575 (1990) (No. 88-

7194) (50-state survey); *see also Taylor*, 495 U.S. at 598-99, 598 n.8. That consensus did not extend to illegal entries into other types of places, such as railway cars or boats. *Taylor*, 495 U.S. at 599. In light of this limitation "in the criminal codes of most states," this Court held that a state law criminalizing illegal entries into places besides buildings or structures fell outside of the generic crime of burglary. *See id.* at 598-99, 602.

Taylor grounded this analysis in precedent interpreting the Travel Act, 18 U.S.C. § 1952, a criminal statute that likewise requires courts to determine generic definitions of certain crimes. *See Taylor*, 495 U.S. at 592. Most notably, in *Perrin v. United States*, 444 U.S. 37 (1979), the Court had to determine whether, under the Travel Act, the generic crime of "bribery" encompassed bribery of private individuals. *Id.* at 41-42. A total of "42 States and . . . federal legislation," as well as the Model Penal Code, defined the crime to include such individuals. *Id.* at 45 & n.11. That consensus dictated that a conviction under a state statute criminalizing "commercial bribery" qualified as a conviction for "bribery" within the meaning of the Travel Act. *Id.* at 45, 50.

This Court has likewise conducted multi-jurisdictional analyses when applying the categorical approach under the INA. In *Duenas-Alvarez*, for example, the Court used a "comprehensive" analysis of state and federal laws—complete with appendices listing the relevant laws of every state—to determine whether California's "aiding and abetting" doctrine for "theft" was broader than that for the INA's generic counterpart. 549 U.S. at 189-90; *see also id.* at 195-98 (Appendices A-C). That survey showed that

40 states defined "aiding and abetting" consistently with California law. *Id.* at 190-93; *see also id.* at 196 (Appendix B). Accordingly, this Court held "generic theft" tracked that 40-state consensus. *Id.* at 190-91.

2. A multi-jurisdictional analysis is even more decisive here. Under federal law, the Model Penal Code, and the criminal laws of 43 states, the least of the acts criminalized under Cal. Penal Code § 261.5(c)—consensual sex between a 21-year-old and a partner just under 18—is entirely lawful. Furthermore, six of the seven remaining states exclude that conduct from their conceptions of "sexual abuse."

a. *Federal law*. 18 U.S.C. § 2243, which criminalizes "sexual abuse of a minor," contains the only definition of that phrase in the U.S. Code. That statute requires that the victim be under 16 years old and that the defendant be at least four years older. *Id.* § 2243(a).

The Sixth Circuit deemed consulting Section 2243 "neither compelled nor sensible," Pet. App. 13a, but it was wrong. The Sixth Circuit first noted that, in contrast to other "aggravated felonies" listed in the INA that cross-reference particular federal criminal statutes, "sexual abuse of a minor" does not cross-reference Section 2243. *Id.* 14a. But the lack of a cross-reference is unremarkable. Petitioner does not contend that "sexual abuse of a minor" in the INA must be defined exclusively according to the federal statute criminalizing that conduct. Rather, as with "murder," "rape," "burglary," "theft," and other crimes in the INA that lack such cross-references, *see* 8 U.S.C. § 1101(a)(43)(A), (G), petitioner contends only that insofar as "sexual abuse of a minor" establishes

a "generic crime," its parameters turn on the "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 touchstone for that analysis.[3]

The Sixth Circuit also pronounced Section 2243 an improper guidepost because it does not presently encompass sexual abuse of children under the age of 12. *See* Pet. App. 13a. But the categorical approach directs courts to consider the criminal law as it existed "at the time Congress enacted" the statute at issue. *Perrin*, 444 U.S. at 42; *see also* U.S. Reply Br. 6, *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) (No. 05-1629) ("The most relevant time" for surveying the landscape is when the aggravated felony was added to the INA. (quotation marks omitted)). And in the same legislation in which Congress added the phrase "sexual abuse of a minor" to the INA, it amended Section 2243 to encompass acts against children under the age of 12. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, §§ 121, 321, 110 Stat. 3009, 3009-31, 3009-627 (1996). The INA's reference to "sexual abuse of a

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[3] Should the Court conclude that "sexual abuse of a minor" is not a generic crime in the sense just described, then it should treat that statutory term as one for which Congress provided a readily apparent definition in Section 2243. That section's definition of the term (now supplemented, as explained just below, by 18 U.S.C. § 2241(c)) would dictate—just like a multi-jurisdictional analysis—that the least of the acts criminalized under Cal. Penal Code § 261.5(c) does not constitute "sexual abuse of a minor." *See* Amicus Br. of IDP and NIP.

minor" should therefore be construed to track the meaning of the "identical words" enacted that same day in Section 2243. *See Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007).

It is true that Congress has since amended Section 2243 to cease its coverage of crimes against children under 12. But Congress did so for a reason having nothing to do with its conception of "sexual abuse of a minor": The coverage created a "redundancy." Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, § 301(b), 112 Stat. 2974, 2979. 18 U.S.C. § 2241(c) punishes (in the words of the same Congress that enacted the INA provision at issue here) "aggravated sexual abuse of a minor," Amber Hagerman Child Protection Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009-31, 3009-31. And that statute covers sexual acts against children who have "not attained the age of 12 years." 18 U.S.C. § 2241(c). Sections 2243 and 2241 are part of a single whole, Chapter 109A, which "criminalizes a range of sexual-abuse offenses involving adults or minors and wards." *Lockhart v. United States*, 136 S. Ct. 958, 964 (2016) (emphasis omitted). Accordingly, there is no doubt that using Section 2243 as a guidepost here still enables convictions for sexual abuse of minors under 12 to fall within the INA's generic crime of "sexual abuse of a minor."[4]

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[4] There is nothing unusual about using a complementary statute, such as 18 U.S.C. § 2241(c), to punish sex with young children as a more serious offense. Many state criminal codes do that as well. *See* Pet. Reply 7 n.1 (collecting state statutes).

b. *The Model Penal Code*. Just like the U.S. Code, the Model Penal Code's relevant prohibition requires that the victim be under 16 and at least four years younger than the defendant. *See* Model Penal Code § 213.3(1)(a) (Am. Law Inst. 1962). Therefore, the least culpable conduct at issue here is perfectly lawful under the Model Penal Code—and certainly not any form of "abuse."

c. *State law*. Federal criminal law and the Model Penal Code are consistent with "the criminal codes of most States," *Taylor*, 495 U.S. at 598. Consensual sex between a 21-year-old and someone almost 18 is legal under the criminal laws of 43 states and the District of Columbia. Pet. App. 66a-67a (appendix with 50-state survey).[5]

In fact, even the number 43 understates the consensus among the states on the question presented. Six of the seven states that criminalize consensual sex between partners who are 21 years old and almost 18 reserve the term "sexual abuse"—like states in the majority—to describe transgressions different from the least culpable conduct at issue here. Specifically, six of the seven states define "sexual abuse" to encompass sexual activity involving persons younger than a certain age only where the offender holds a position of authority over the victim or the victim is younger than 16.

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[5] Colorado is inadvertently listed twice in the appendix to the petition for a writ of certiorari. It should be listed only in category two, which collects states in which consensual sex between a 21-year-old and a 17-year-old (but not necessarily a 16-year-old) is legal. *See* Pet. App. 66a.

Virginia, for example, considers a minor to be sexually "abused" only when his "parents" or someone else "responsible for his care" commit or facilitate the illegal sexual acts, Va. Code § 16.1-228.4, or an adult has contact with a minor under 15, *id.* § 18.2-67.4:2. Arizona and North Dakota similarly limit their definition of "sexual abuse" to sexual contact with children younger than 14 or 15, respectively. *See* Ariz. Rev. Stat. § 13-1417; N.D. Cent. Code § 12.1-20-03.1. California, Idaho, and Wisconsin limit their definition of "sexual abuse" to sex with someone who is under 16. 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)). Lest there be any doubt that the least culpable conduct at issue here does not constitute "sexual abuse" in the eyes of California, the State has explicitly declared that it does *not* consider a 16-year-old who "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. Att'y Gen. 235 (June 1, 1984) (same).

All told, only *one* state characterizes consensual sex between someone almost 18 and a person just over three years older as "sexual abuse." *See* Or. Rev. Stat. § 163.415(1)(a)(B). 49 states do not. Given that the Court has held that agreements among 40 states (*Duenas-Alvarez*), 41 states (*Taylor*), and 42 states (*Perrin*) dictate the parameters of generic crimes, *see supra* at 15-17, the overwhelming consensus here should be conclusive.

3. Notwithstanding this Court's instruction to construe generic crimes according to multi-jurisdictional surveys, the Sixth Circuit and the BIA

declared that methodology inapplicable to this case. Neither reason the Sixth Circuit and the BIA gave for this evasion withstands scrutiny.

a. The Sixth Circuit first declined to follow the methodology laid out in *Taylor* on the ground that *Taylor* involved deriving a generic crime under "the Armed Career Criminal Act" (ACCA), 18 U.S.C. § 924(e), not the INA. Pet. App. 6a-7a. The Government did not defend this reasoning at the certiorari stage. And for good reason: The Court has made clear that the categorical approach operates the same way under the INA as it does under ACCA. Indeed, in *Duenas-Alvarez*, where this Court applied the categorical approach to the INA's "aggravated felony" provisions, it directly imported the multi-jurisdictional-survey approach from *Taylor* and its progeny. 549 U.S. at 186-87.

Ever since then, the Court has elucidated the categorical approach interchangeably in ACCA and INA cases. *See, e.g.*, *Mathis*, 136 S. Ct. at 2251 n.2 (explaining that the categorical approach is often used "outside the ACCA context—most prominently, in immigration cases"); *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015) (using ACCA and INA case law to conduct a categorical analysis in an INA case); *Descamps v. United States*, 133 S. Ct. 2276 (2013) (same) (using ACCA and INA case law to conduct a categorical analysis in an ACCA case); *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013) (same as *Mellouli*).

b. The BIA asserted that there is no need to conduct a multi-jurisdictional survey where, as here, states define the crime at issue "in many different ways" and variations among the relevant statutes make it "difficult, if not impossible, to determine

whether a majority consensus" exists with respect to every aspect of the generic offense. Pet. App. 39a (quotation marks omitted). The Sixth Circuit accepted this reasoning, holding that the BIA permissibly construed "sexual abuse of a minor" according to a variety of non-criminal sources—most notably, 18 U.S.C. § 3509, which establishes various procedural rights for child witnesses. *See id.* 11a-12a, 29a-30a, 35a-36a. This reasoning is no more correct than the Sixth Circuit's assertion that *Taylor* applies only in ACCA cases.

i. This Court has clearly and repeatedly held that *Taylor*'s methodology applies even when states have divergent definitions of the crime at issue. Indeed, the whole purpose of the categorical approach is to derive a "uniform definition" when jurisdictions define a referenced crime in various ways. *Taylor*, 495 U.S. at 580, 592; *see also Moncrieffe*, 133 S. Ct. at 1684.

In *Taylor* itself, this Court noted that "[s]tates define burglary in many different ways." *Taylor*, 495 U.S. at 580. Yet the Court still looked to "the generic sense in which the term is now used in the criminal codes of *most* States," federal law, and the Model Penal Code. *Id.* at 598 (emphasis added).

The Court also faced varied state laws in *Duenas-Alvarez* and *Perrin*. Yet multi-jurisdictional surveys concerning particular elements were still decisive in those cases. *See supra* at 16-17; *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." (emphasis added)); *United States v. Palomino Garcia*, 606 F.3d 1317,

1331-34 (11th Cir. 2010) (same for "aggravated assault"). Regardless of whether jurisdictions' definitions are so varied that deducing a consensus on every element might be difficult, courts must examine whether a consensus exists as to the element(s) at issue. *See United States v. Rangel-Castaneda*, 709 F.3d 373, 380-81 (4th Cir. 2013) (Wilkinson, J.) (applying this approach to "sexual abuse of a minor").

ii. Even if it somehow were not already settled that multi-jurisdictional analyses dictate the parameters of generic crimes, this Court should still follow that method here instead of construing "sexual abuse of a minor," as the BIA did, according to procedural statutes such as Section 3509, civil case law, and decades-old periodicals.

For starters, the text of the INA directs courts to draw guidance from substantive criminal laws, rather than procedural or civil statutes. As this Court has explained, "the relevant statutory hook" in the INA's "aggravated felony" regime is the word "convicted." *Moncrieffe*, 133 S. Ct. at 1685 (quotation marks omitted) (referencing 8 U.S.C. § 1227(a)(2)(A)(iii)); *see also Chambers v. United States*, 555 U.S. 122, 125 (2009) (reasoning that ACCA's use of the word "felony" is key). The word "convicted" directs courts' attention to "criminal codes" to determine the aspects of generic crimes. *See Taylor*, 495 U.S. at 575, 598 & n.8.

This directive makes sense. Statutory terms can have particularized meanings when used to define substantive criminal offenses that are narrower than their meanings in other contexts. This Court has explained, for instance, that the word "willfully" is "a

word of many meanings whose construction is often dependent on the context in which it appears"—specifically, on whether it is being used to define a criminal offense or a civil-law concept. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57-59 (2007) (quotation marks omitted); *see also, e.g.*, *Beck v. Prupis*, 529 U.S. 494, 500-02 & n.6 (2000) (contrasting different meanings of "conspiracy" in criminal and civil contexts). Accordingly, when the INA uses words to identify a generic crime, the only sure way to accurately assess their meanings is to survey substantive criminal laws, not other sources.

Finally, using multi-jurisdictional surveys of substantive criminal laws serves the categorical approach's objectives of "promot[ing] efficiency, fairness, and predictability." *Mellouli*, 135 S. Ct. at 1987; *see also Moncrieffe*, 133 S. Ct. at 1692 n.11 (categorical approach should "ensure[] that all defendants . . . will be treated consistently, and thus predictably, under federal law"). Multi-jurisdictional surveys limit the relevant sources to a collection that is definite and knowable: federal and state substantive criminal laws and the Model Penal Code. This limited universe of materials enables noncitizens and lawyers objectively to discern the immigration consequences of criminal convictions. It also promotes uniformity and judicial restraint. A judge cannot cherry-pick sources when a fifty-state survey is required.

Multi-jurisdictional analyses are also workable as a practical matter. Even apart from the INA, ACCA, and the Travel Act, this Court has employed multi-jurisdictional surveys across a range of contexts. *See, e.g.*, *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S.

393, 410-11 (2003) (holding that "extortion" in the context of the Racketeer Influenced and Corrupt Organizations Act (RICO) tracks how "a majority of States" define the offense); *Enmund v. Florida*, 458 U.S. 782, 789 (1982) (analyzing whether felony-murder constitutes "cruel and unusual punishment" under the Eighth Amendment). Multi-jurisdictional surveys of criminal laws are typically readily available for such uses. In its decision addressing the question presented here, for example, the Ninth Circuit cited two pre-existing 50-state surveys compiling statutory rape laws. *See Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1153 (9th Cir. 2008) (en banc) (citing The Lewin Grp., *Statutory Rape: A Guide to State Laws and Reporting Requirements* (2004) (prepared for U.S. Dep't of Health & Human Servs.); Conn. Office of Legislative Research, *Statutory Rape Laws by State* (2003)).[6]

By contrast, the Sixth Circuit's and BIA's approach of looking to procedural statutes, civil-law cases, and policy-based periodicals is unpredictable and unwieldy. One need look no further than this case to see why this is so.

Start with the notion of consulting statutes, such as Section 3509, that do things other than define

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[6] Even if an on-point compilation does not already exist, multiple legal research tools—such as Lexis, Westlaw, and HeinOnline—provide databases of 50-state surveys of criminal laws. Moreover, the Government—as the party seeking deportation in "aggravated felony" cases like this one—has ample resources to marshal the relevant information. *See, e.g.,* U.S. Br. in *Duenas-Alvarez*, 549 U.S. 183 (No. 05-1629) (attaching appendix with 50-state survey).

crimes. Once one looks in the U.S. Code beyond the two statutes that criminalize sexual abuse of a minor—Sections 2241 and 2243—one discovers there are at least 47 other federal statutes that address "sexual abuse" of "minors" or (as in Section 3509) "children."[7] These statutes reside in titles ranging from Education (Title 20) to Public Health and Welfare (Title 42).

It is a mystery why Section 3509 provides better guidance on the question presented than some of these other provisions. Section 3509 establishes "[c]hild victims' and child witnesses' rights" in court—rights such as the ability to testify via closed-circuit television, the right to protective orders concealing their identity, and access to guardians ad litem. *See* 18 U.S.C. § 3509(d)(3), (b)(1), (h). It defines the phrase "sexual abuse" but offers no explicit guidance on whether or when the type of conduct at issue here qualifies. *See id.* § 3509(a)(8). To provide just one example of another federal statute that would seem more precise and instructive: 42 U.S.C. § 5106g(4)(B) defines "sexual abuse" (for purposes of administering various grants and programs to fight such abuse) in a manner making clear that "statutory rape" constitutes "sexual abuse" only "in cases of caretaker or inter-familial relationships."

The shortcomings of the Sixth Circuit's and BIA's freewheeling approach multiply when one considers

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[7] This figure derives from a Westlaw search of the U.S. Code Unannotated for "'sex! abuse' /s child! or minor." This figure leaves aside dozens more search results in the U.S. Sentencing Guidelines and the Code of Federal Regulations.

the challenges of using civil case law to formulate the parameters of generic crimes. The BIA claimed to find support for treating statutes that cover consensual sex between a 21-year-old and someone almost 18 as criminalizing "sexual abuse of a minor" in *Bellotti v. Baird*, 443 U.S. 622 (1979), a case involving minors' access to abortion. *See* Pet. App. 35a. That decision assumed, per the state law at issue, that a "minor" is someone under 18. *Bellotti*, 443 U.S. at 625 (plurality opinion). But the opinion says *nothing* about whether consensual sex with someone under 18 constitutes "abuse." To the extent the opinion signals anything at all about consensual sex, it suggests that women under 18 sometimes have "sufficient maturity" to make such important decisions. *Id.* at 650 (plurality opinion). More fundamentally, though, the whole exercise of seeking guidance from a civil case about abortion—or from similarly unrelated case law—concerning the parameters of a generic crime is a fool's errand.

When one imagines holding noncitizens—or even immigration lawyers—also responsible for gleaning clues from periodicals and other secondary sources, the BIA's alternative to conducting multi-jurisdictional analyses becomes truly impossible to accept. The BIA here referenced an article in a family planning journal discussing whether "female adolescents who experienced their first voluntary sexual intercourse with an older partner" are at greater risk for contracting HIV. Kim S. Miller et al., *Sexual Initiation with Older Male Partners and Subsequent HIV Risk Behavior Among Female Adolescents*, 29 Fam. Plan. Persp. 212, 212 (1997), *cited in* Pet. App. 35a-36a. If this 20-year-old study is relevant here, then *thousands* of other studies must

be too—studies that might suggest widely disparate notions of what qualifies as "sexual abuse of a minor." *See, e.g.*, Theresa E. Senn et al., *Characteristics of Sexual Abuse in Childhood and Adolescence Influence Sexual Risk Behavior in Adulthood*, 36 Archives Sexual Behav. 637, 639 (2007) (discussing the concept of "childhood/adolescent sexual abuse," which is defined in the context of consensual sexual activity as a person's having sex "before age 13 with someone 5 or more years older" or "between ages 13 and 16 with someone 10 or more years older").

No sensible legal methodology would permit or require judges to scan vast archives of social science research and other secondary sources to find whatever random article might support a certain conception of a generic criminal offense. The only predictable, objective, and fair way to employ the categorical approach is to stick to statutes defining substantive crimes.

B. Other Tools of Statutory Interpretation Confirm that Consensual Sex Between a 21-Year-Old and Someone Almost 18 Does Not Constitute "Sexual Abuse of a Minor."

For all of the reasons just stated, a multi-jurisdictional analysis dictates that the generic offense of "sexual abuse of a minor" excludes the least culpable conduct encompassed within Cal. Penal Code § 261.5(c). But even if this Court looks beyond that precise methodology, the text and structure of the INA confirm that consensual sex between a 21-year-old and someone almost 18 does not constitute "sexual abuse of a minor."

1. Three aspects of the text of the INA reinforce that consensual sex between partners who are 21 and almost 18 does not constitute "sexual abuse of a minor."

a. The "ordinary, commonsense meaning," *United States v. Johnson*, 529 U.S. 53, 57 (2000), of the term "sexual abuse" in Section 1101(a)(43)(A) excludes consensual sex between a 21-year-old and someone almost 18. Such individuals are often in the same peer groups. For instance, college campuses around the country are filled with individuals across this age range—often occupying overlapping social circles from college choirs to campus newspapers. Not even the most aggressive codes of conduct would characterize a consensual sexual relationship between such individuals as "sexual abuse." Nor would a typical American call what happened here—consensual sex between a boyfriend and girlfriend, both at least 16 and only about four years apart—"sexual abuse."

This is more than just a labeling argument. States with expansive statutory rape statutes like Cal. Penal Code § 261.5(c) do not themselves see such provisions as dealing with sexual abuse. Instead, these laws, as the State of California has explained, are designed to serve the social welfare mission of "prevent[ing] illegitimate teenage pregnancy by providing an additional deterrent." *Michael M. v. Superior Court*, 450 U.S. 464, 475 (1981) (plurality opinion); *see also People v. Magpuso*, 28 Cal. Rptr. 2d 206, 209 (Ct. App. 1994) ("The public policy supporting section 261.5 is a societal interest in preventing unwanted teenage pregnancy."). Different state laws—such as those covering sex with children

under 16 or offenders holding positions of authority over victims—are designed to punish the "amoral and unscrupulous" conduct commonly understood as abusive. *Magpuso*, 28 Cal. Rptr. 2d at 209; *see supra* at 21 (other states' laws).

b. Section 1101(a)(43)(A)'s pairing of "sexual abuse of a minor" with two other violent offenses—"murder" and "rape"—buttresses the conclusion that the generic crime is meant to cover conduct more severe than the least culpable conduct falling within Cal. Penal Code § 261.5(c). A standard interpretive principle is that a "word is known by the company it keeps (the doctrine of *noscitur a sociis*)." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). This canon helps to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'" *Id.* (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)).

This principle is telling here. Murder is so horrific that it is 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) (plurality opinion) (citation omitted). That "sexual abuse of a minor" is the only other generic crime in the statutory clause with these two extreme offenses imbues the crime with "more precise content," *United States v. Williams*, 553 U.S. 285, 294 (2007), and indicates that it is likewise meant to cover only truly abhorrent acts. Consensual sex between a 21-year-old and someone almost 18 does not rise to that level.

The legislative history of this particular grouping of offenses underscores that reading "sexual abuse of

a minor" to cover the most expansive and technical restrictions on who may engage in consensual sex would contravene Congress's conception of the offenses as similarly egregious aggravated felonies. Prior to 1994, the INA's "aggravated felony" list appeared in one unbroken paragraph starting with "murder." 8 U.S.C. § 1101(a)(43) (1988). A 1994 amendment expanded that list and divided it into separate clauses. *See* Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4320-22. "Murder" appeared first and alone. *See id.* When the Illegal Immigration Reform and Immigrant Responsibility Act added "rape" and "sexual abuse of a minor" in 1996, these offenses and no others were placed next to murder. *See* Pub. L. No. 104-208, § 321, 110 Stat. 3009-546, 3009-627 (1996). That Congress elected to place "sexual abuse of a minor" in an exclusive group with "murder" and "rape" as it expanded the INA's list of aggravated felonies indicates it conceived of these above all others in the list as the most serious.

c. Finally, this Court has stressed the need to be "very wary" of construing the INA's term "aggravated felony" in a manner that "the English language tells us not to expect." *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 575 (2010) (quotation marks omitted); *see also Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (same with respect to "crime of violence"). In *Moncrieffe*, 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." 133 S. Ct. at 1689. And in *Carachuri-Rosendo*, the Court reasoned that even though the U.S. Code categorizes "simple drug possession" as a felony, it would have been

"unorthodox" to treat it—as the Government urged—as an "*aggravated* felony." 560 U.S. at 574 (quotation marks omitted). An "aggravated" felony, this Court explained, is one "made worse or more serious by circumstances such as violence, the presence of a deadly weapon, or the intent to commit another crime." *Id.* (quotation marks omitted).

The Government's position here is even more outlandish than in either of those cases. The least of the acts covered by Cal. Penal Code § 261.5(c) is *not even a crime* under federal criminal law—not to mention in the vast majority of states. *See supra* at 17-21. And even among the seven states that criminalize the conduct, the majority demand it be charged as a misdemeanor.[8] Surely conduct that is lawful in nearly all jurisdictions and a misdemeanor in most others cannot be an "aggravated felony."

2. Construing "sexual abuse of a minor" to exclude the least culpable acts under Cal. Penal Code § 261.5(c) comports with the structure of the INA. As in *Moncrieffe*, *see* 133 S. Ct. at 1692-93, this Court need not stretch the meaning of the aggravated felony at issue to ensure that serious offenders are subject to deportation. Noncitizens who are convicted of serious sex offenses against minors—including in California—will still be subject to this consequence.

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[8] *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, *see* Cal. Penal Code § 261.5(c).

First and foremost, construing the generic crime of "sexual abuse of a minor" to exclude consensual sex between a 21-year-old and someone almost 18 still leaves the generic crime covering a "broad array of state-law convictions," Pet. App. 14a. Even the seven states with statutes criminalizing that conduct have separate statutes criminalizing sexual activity with children under 16 or 15. In California, for instance, a statute right next to Cal. Penal Code § 261.5(c) makes it a crime—almost exactly like 18 U.S.C. § 2243—for "[a]ny person 21 years of age or older [to] engage[] in an act of unlawful sexual intercourse with a minor who is under 16 years of age." Cal. Penal Code § 261.5(d).[9] Convictions under these statutes may still serve as a basis for mandatory deportation.

And the "sexual abuse of a minor" provision is not the only subsection of the INA that subjects noncitizens who commit sex offenses against children to mandatory deportation. "Child pornography" and "trafficking in persons" are also aggravated felonies. 8 U.S.C. § 1101(a)(43)(I), (K). Noncitizens convicted of state-law offenses falling within these denoted offenses are subject to mandatory removal.

Lastly, even for those convicted of sex offenses that do not constitute aggravated felonies, "[e]scaping aggravated felony treatment does not mean escaping deportation." *Moncrieffe*, 133 S. Ct. at 1692. "It means only avoiding mandatory removal." *Id.* Such

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[9] *See also* Ariz. Rev. Stat. §§ 13-1410, 13-1404; Idaho Code § 18-1506(1)(a); N.D. Cent. Code § 12.1-20-03.1; Or. Rev. Stat. § 163.355; Va. Code §§ 18.2-67.4:2, 18.2-61; Wis. Stat. 948.02(2).

individuals may still be subject to the deportability grounds of the INA if their offenses constitute "crime[s] involving moral turpitude" or "child abuse." 8 U.S.C. § 1227(a)(2)(A)(i), (E)(i); *see also, e.g.*, *Rohit v. Holder*, 670 F.3d 1085, 1089 (9th Cir. 2012) (holding solicitation is a "crime of moral turpitude"); *In re Velazquez-Herrera*, 24 I. & N. Dec. 503, 517 (B.I.A. 2008) (holding "child abuse" includes sexual abuse or exploitation).

II. The BIA's Determination to the Contrary Is Not Entitled to *Chevron* Deference.

Taking its cue from the Government, *see* U.S. CA6 Br. 15-16, the Sixth Circuit declared the phrase "sexual abuse of a minor" to be "ambiguous," Pet. App. 11a. In response to this ostensible ambiguity, the Sixth Circuit invoked *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to defer to the BIA's view in this case that "sexual abuse of a minor" encompasses convictions under Cal. Penal Code § 261.5(c). Pet. App. 11a-15a. But the Sixth Circuit was wrong to deem the INA ambiguous concerning the question presented. And even if ambiguity somehow existed, the BIA's view would not be entitled to *Chevron* deference because its construction of the INA is unreasonable.

A. No Ambiguity Within the Meaning of *Chevron* Exists Here.

1. The Sixth Circuit deemed Section 1101(a)(43)(A) ambiguous for *Chevron* purposes solely because "[n]owhere in the statute did Congress specify the definitions of 'sexual abuse' or 'minor.'" Pet. App. 11a. In other words, the Sixth Circuit used the textual imprecision that ordinarily triggers the

categorical approach as justification for skipping straight to *Chevron* deference.

This reasoning ignores the rule that a statute cannot be pronounced ambiguous for *Chevron* purposes until all "traditional tools of statutory construction" have been exhausted. *Chevron*, 467 U.S. at 843 n.9; *see also Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context."). Under this basic precept of *Chevron*, "[t]he lack of a statutory definition of a word does not necessarily render" a statute "ambiguous." *Goldstein v. SEC*, 451 F.3d 873, 878 (D.C. Cir. 2006). "[A] statute may foreclose an agency's preferred interpretation despite . . . textual ambiguities" if another traditional tool of statutory interpretation "makes clear what its text leaves opaque." *Catawba County v. EPA*, 571 F.3d 20, 35 (D.C. Cir. 2009).

Such is the case with respect to the categorical approach as an interpretive tool. The very function of the categorical approach in INA cases is to resolve any "[a]mbiguity" that resides in deportation provisions—and to "err on the side of underinclusiveness." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1687, 1693 (2013). It thus comes as no surprise that even though the Government has sometimes asked this Court to defer to the BIA's assessments of the parameters of generic crimes, this Court has never done so. *See, e.g.*, *id.* at 1684-89 (determining the parameters of an aggravated felony without reference to *Chevron*); *Luna Torres v. Lynch*, 136 S.

Ct. 1619 (2016) (same); *Nijhawan v. Holder*, 557 U.S. 29 (2009) (same).[10]

At the very least, the categorical approach resolves any ambiguity *in this case*. For the reasons stated in Part I, the categorical approach yields a pellucidly clear answer to the question whether the generic definition of "sexual abuse of a minor" encompasses the least culpable conduct under Cal. Penal Code § 261.5(c). The multi-jurisdictional survey here reveals that the federal government, the Model Penal Code, and 43 states deem this conduct perfectly legal; 49 states do not think it rises to the level of "sexual abuse." *See supra* at 17, 20-21. And to the extent applicable, other textual and structural analyses reinforce the sensibility of this consensus. This overwhelming agreement is even more decisive than in *Perrin v. United States*, 444 U.S. 37 (1979), where the Court held that no "genuine ambiguity" remained because federal legislation, the Model Penal Code, and 42 states agreed on the element of the crime at issue. *Id.* at 45 & n.11, 49 n.13.

2. Even if the categorical approach did not yield a definitive answer to the question presented, this Court would still need to exhaust traditional tiebreaking canons before declaring the statute "ambiguous" within the meaning of *Chevron*. In

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[10] As the Sixth Circuit noted, this Court has deferred to the BIA's interpretations of certain immigration laws. Pet. App. 4a-5a (citing *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality opinion); *Negusie v. Holder*, 555 U.S. 511, 516-17 (2009); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999)). But none of those cases involved the categorical approach.

INS v. St. Cyr, 533 U.S. 289 (2001), for instance, this Court had to decide whether certain statutory changes to the INA applied retroactively. Because the statutory text provided no clear answer to that question, the Government urged the Court to "extend deference under *Chevron* to the BIA's interpretation" that the new provisions applied retroactively. *Id.* at 320 n.45 (citation omitted). The Court rejected the argument, explaining that when, as in that case, a traditional presumption dictates a particular reading of seemingly "ambiguous" text, "there is, for *Chevron* purposes, no ambiguity in [the] statute for an agency to resolve." *Id.*[11]

So too here. Even if ambiguity somehow remained after employing the categorical approach, two traditional tiebreaking rules of statutory construction would independently foreclose deferring to the BIA's construction of "sexual abuse of a minor."

a. Because mandatory deportation follows from deeming a conviction to constitute "sexual abuse of a minor" under the INA, "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien" applies here. *St. Cyr*, 533 U.S. at 320 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)); *see also Kawashima v. Holder*, 132 S. Ct. 1166, 1176 (2012) (noting the Court has

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[11] For other examples of applying presumptions and related tiebreaking canons to resolve ambiguities without turning to *Chevron*, see *Wyeth v. Levine*, 555 U.S. 555, 576-77 (2009) (presumption against preemption); *Alexander v. Sandoval*, 532 U.S. 275, 290-91 (2001) (presumption against implied rights of action); *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (constitutional avoidance).

long "construed ambiguities in deportation statutes in the alien's favor"); *INS v. Errico*, 385 U.S. 214, 225 (1966) ("Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien.").

This "accepted principle[] of statutory construction," *Costello v. INS*, 376 U.S. 120, 128 (1964), stems from the nature of deportation. This Court has explained time and again that "deportation is a drastic measure and at times the equivalent of banishment or exile." *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (citing *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947)); *see also Padilla v. Kentucky*, 559 U.S. 356, 373-74 (2010) (recognizing "the seriousness of deportation" and the "concomitant impact of deportation on families living lawfully in this country"). Here, for example, Esquivel-Quintana—who has called the United States his home since he was 12 years old—faces permanent separation from his parents and siblings, all of whom reside lawfully in the United States. Deporting individuals in this situation can strip them of "all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). Thus, courts should "not assume that Congress meant to trench on [a noncitizen's] freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Fong Haw Tan*, 333 U.S. at 10.

This presumption against construing statutes to trigger deportation also helps ensure noncitizens understand when guilty pleas or other criminal convictions might subject them to removal. As this Court recently observed, it is of "great importance" that noncitizens know when criminal convictions

might trigger "exile from this country and separation from their families." *Padilla*, 559 U.S. at 370; *accord Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015). Indeed, this imperative "has never been more important" as changes in immigration law have eliminated certain procedural protections—including judicial discretion to prevent removal—for particular classes of offenses. *Padilla*, 559 U.S. at 360-64.

Accordingly, if any ambiguities remained here after applying the categorical approach, they would need to be resolved in petitioner's favor. The Government has never claimed that the phrase "sexual abuse of a minor" puts people like Esquivel-Quintana clearly on notice that convictions under statutes such as Cal. Penal Code § 261.5(c) would subject them to mandatory deportation. To the contrary, the Government told the Sixth Circuit—and has previously told this Court as well—that "[t]he term 'sexual abuse of a minor' is an ambiguous term." U.S. CA6 Br. 9; *see also* BIO 10, *Velasco-Giron v. Holder*, 135 S. Ct. 2072 (2015) (No. 14-745) (same). (Worse yet, Ninth Circuit law at the time Esquivel-Quintana pleaded guilty to violating Cal. Penal Code § 261.5(c) advised him that the offense did *not* constitute "sexual abuse of a minor" under the INA. *See Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1160 (9th Cir. 2008) (en banc).) Even if the Government were correct, therefore, that Section 1101(a)(43)(A) is ambiguous, this Court would still be "constrained" to resolve the uncertainty in favor of noncitizens such as Esquivel-Quintana. *Costello*, 376 U.S. at 128.

b. The meaning of "sexual abuse of a minor" in the INA determines criminal liability as well as

immigration consequences. *See* Pet. App. 7a. This is because "aggravated felony" convictions serve as predicates for federal criminal prosecutions and sentencing enhancements. For instance, noncitizens convicted of illegally reentering the country may generally receive two-year prison sentences, but those previously convicted of an "aggravated felony" under the INA who reenter illegally are subject to 20-year sentences. 8 U.S.C. § 1326(b)(2); *United States v. Rangel-Castaneda*, 709 F.3d 373, 380-81 (4th Cir. 2013). Noncitizens convicted of "aggravated felonies" are also subject to heightened 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.

In light of these criminal applications, any ambiguity in Section 1101(a)(43)(A) would also trigger the criminal rule of lenity—another "time-honored interpretive guideline," *Crandon v. United States*, 494 U.S. 152, 158 (1990) (quoting *Liparota v. United States*, 471 U.S. 419, 427 (1985)). Indeed, two of this Court's Justices have already strongly suggested that when dealing with "hybrid" civil-criminal statutes, the criminal rule of lenity forecloses resorting to *Chevron* deference. *See Whitman v. United States*, 135 S. Ct. 352, 352-54 (2014) (Scalia, J., joined by Thomas, J., respecting the denial of certiorari). Judge Sutton reached that conclusion here as well. Pet. App. 18a-19a (Sutton, J., concurring in part and dissenting in part).

i. A simple three-step syllogism establishes that the criminal rule of lenity applies to the construction of hybrid statutes such as the INA's "sexual abuse of a minor" provision.

First, where a criminal statute has ambiguous terms, the rule of lenity requires courts to resolve the ambiguity in favor of defendants. *See, e.g.*, *Skilling v. United States*, 561 U.S. 358, 410 (2010); *Perrin*, 444 U.S. at 49 n.13. This rule ensures "that there is fair warning of the boundaries of criminal conduct." *Crandon*, 494 U.S. at 158. It also guarantees "that legislatures, not courts" or the executive branch, "define criminal liability." *Id.*; *see also Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014).

Second, statutes are not "chameleon[s]." *Clark v. Martinez*, 543 U.S. 371, 382 (2005). That is, the meaning of a hybrid statute cannot be "subject to change" depending on the context in which it is being applied. *Id.*; *see also, e.g.*, *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("[W]e must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context . . . ."); *FCC v. ABC*, 347 U.S. 284, 296 (1954) ("There cannot be one construction for the Federal Communications Commission and another for the Department of Justice.").

Third, because ambiguities in criminal statutes must be construed against the Government and a hybrid statute must mean the same thing in both its civil and criminal applications, the criminal construction—as the "lowest common denominator"—"must govern." *Martinez*, 543 U.S. at 380; *see also H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 255 (1989) (Scalia, J., joined by Rehnquist, C.J., and O'Connor and Kennedy, JJ., concurring in the judgment) ("RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws.").

An agency's expansive construction is "not relevant at all." *Abramski*, 134 S. Ct. at 2274. Put another way, "the one-interpretation rule means that," in the context of an "aggravated felony provision" with immigration and criminal applications, "the criminal-law construction of the statute (with the rule of lenity) prevails over [any alternative BIA] construction of it (without the rule of lenity)." Pet. App. 18a (Sutton, J., concurring in part and dissenting in part). Any other outcome would "collide with the norm that legislatures, not executive officers, define crimes." *Whitman*, 135 S. Ct. at 353 (Scalia, J., joined by Thomas, J., respecting the denial of certiorari).

ii. The Sixth Circuit's majority agreed there are "compelling reasons" for holding that the rule of lenity forecloses resorting to *Chevron* when interpreting hybrid statutes. Pet. App. 8a. Indeed, the majority explained that "deference to agency interpretations of laws with criminal applications threatens a complete undermining of the Constitution's separation of powers." *Id.* The majority nevertheless held that the BIA's interpretation of Section 1101(a)(43)(A) is eligible for *Chevron* deference because it believed *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), requires this result. Pet. App. 9a-10a.

The majority's allegiance to *Babbitt* was unwarranted. The *Babbitt* language the Sixth Circuit cited appeared in a "drive-by" footnote that "deserves little weight." *Whitman*, 135 S. Ct. at 354 (Scalia, J., joined by Thomas, J., respecting the denial of certiorari). In the footnote, this Court rejected the argument that "the rule of lenity should provide the

standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." *Babbitt*, 515 U.S. at 704 n.18. But, as Members of this Court have pointed out, this ruling "contradicts the many cases before and since holding that, if a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings" and forecloses *Chevron* deference. *Whitman*, 135 S. Ct. at 353-54 (Scalia, J., joined by Thomas, J., respecting the denial of certiorari) (citing *Leocal*, 543 U.S. at 11 n.8; *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality opinion)); *see also Moncrieffe*, 133 S. Ct. at 1693; *Kasten v. Saint-Gobain Performance Plastic Corp.*, 563 U.S. 1, 16 (2011).

At any rate, the *Babbitt* footnote is expressly limited to a context far removed from the one at issue here. *Babbitt* involved a declaratory judgment action claiming that a 20-year-old regulation implementing a civil provision of the Endangered Species Act was facially invalid. *Babbitt*, 515 U.S. at 704 n.18. Because the regulation gave ample prospective notice of the Act's reach, this Court stressed in the relevant footnote that affording *Chevron* deference to it did not raise any "fair warning" concern. *Id.* Nor did *Chevron* deference contravene the separation of powers. Congress had made it a crime to violate the regulation, *see* 16 U.S.C. § 1540(b)(1), so the legislature, not the agency, defined the criminal conduct.

Here, by contrast, the agency's view of the statute at issue stems from evolving "case-by-case adjudication," with the specific decision here dating

back just to 2015. Pet. App. 15a. Deferring to this 2015 decision (not to mention future elaborations of the BIA's views) would leave criminal defendants prosecuted for acts committed prior to 2015 with the sort of "inadequate notice of potential [criminal] liability" that *Babbitt* itself suggested would "offend the rule of lenity." 515 U.S. at 704 n.18.

Furthermore, *Chevron* deference in this case would violate the separation of powers. Even if, as in *Babbitt*, "Congress may make it a crime to violate a regulation," it would be "quite a different matter" for an agency's construction of a statute to determine the scope of criminal liability, as here, in the absence of such a delegation. *Whitman*, 135 S. Ct. at 353 (Scalia, J., joined by Thomas, J., respecting the denial of certiorari). Doing so would transgress the fundamental rule that "criminal laws are for courts, not for the Government, to construe." *Abramski*, 134 S. Ct. at 2274.

B. Even if There Were Ambiguity Triggering *Chevron*, the BIA's Construction Would Still Not Warrant Deference Because It Is Unreasonable.

Even if the BIA's adjudicatory decisions applying INA Section 1101(a)(43)(A) were eligible for *Chevron* deference, its construction of the statute here would still not warrant deference because it is not "a reasonable construction." *Chevron,* 467 U.S. at 840. The BIA committed three basic legal errors in reaching its conclusion that convictions under Cal. Penal Code § 261.5(c) constitute "sexual abuse of a minor."

1. The BIA inverted the categorical approach in exactly the way this Court warned against in

Moncrieffe. Under the categorical approach, an adjudicator "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 (alterations in original) (emphasis added) (quotation marks omitted) . Despite that directive, 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 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. 2243, 2251, 2257 (2016) (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 made the same legal error. Despite reciting the rule that tethers analysis under the categorical approach exclusively to the least culpable conduct, *see* Pet. App. 32a, the BIA noted that Cal. Penal Code § 261.5(c) would cover "sexual intercourse between a 16-year-old high school student and his or her school teacher," *id.* 34a n.4. With this conduct in mind, the BIA declared it was "not prepared to hold that a 16- or 17-year-old categorically cannot be the victim of sexual abuse." *Id.* 34a. This reasoning turns the categorical approach on its head: It holds that a state statute falls within a generic crime based on an

example of the *worst* conduct the statute could cover, instead of focusing on "the *least* of th[e] acts criminalized," *Moncrieffe*, 133 S. Ct. at 1684 (emphasis added) (quotation marks omitted).

2. The BIA incorrectly sought guidance from a procedural statute and non-criminal sources to determine elements of the generic definition of "sexual abuse of a minor." As explained above, the categorical approach requires adjudicators to confine themselves to substantive criminal laws when seeking guidance concerning the parameters of generic crimes. *See supra* at 23-26. And those sources demonstrate here that Cal. Penal Code § 261.5(c) encompasses conduct beyond the generic crime of sexual abuse of a minor. *See supra* at 17-21.

3. Even if Section 1101(a)(43)(A) remained genuinely ambiguous after applying the categorical approach, the BIA should have resolved that ambiguity by applying either the presumption that deportation statutes should be construed narrowly or the criminal rule of lenity. *See supra* at 37-45. The BIA's failure to do so renders its holding here unreasonable. *See Okeke v. Gonzales*, 407 F.3d 585, 593-97 (3d Cir. 2005) (Ambro, J., concurring) (finding the BIA's interpretation to be unreasonable in part because it failed to resolve ambiguities in a deportation statute in favor of the noncitizen); *Rosario v. INS*, 962 F.2d 220, 225 (2d Cir. 1992) (concluding that "the INS' interpretation is unreasonable" because it contravened "the principle that in light of the harshness of deportation, ambiguous deportation provisions should be construed in favor of the alien.").

The BIA, in short, should at least have to abide by the same fair-notice principles that courts and Congress do. And those principles render it impermissible to hold that conduct that is legal under federal law, the Model Penal Code, and the laws of the vast majority of states constitutes an "aggravated felony" under the INA.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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