No. 14-745

In the Supreme Court of the United States

ALBERTO VELASCO-GIRON, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Board of Immigration Appeals permissibly concluded that petitioner's conviction for "unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator," in violation of California Penal Code § 261.5(c) (West 2014), was a conviction for "sexual abuse of a minor," 8 U.S.C. 1101(a)(43)(A).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 773 F.3d 774. The opinions of the Board of Immigration Appeals (Pet. App. 19a-26a) and the immigration judge (Pet. App. 27a-29a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 2014. The petition for a writ of certiorari was filed on December 23, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

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

1227(a)(2)(A)(iii). In addition, aliens convicted of aggravated felonies are not eligible for the discretionary form of relief known as cancellation of removal. See 8 U.S.C. 1229b(a)(3). As relevant here, an aggravated felony includes "sexual abuse of a minor." 8 U.S.C. 1101(a)(43)(A). The INA does not further define the term "sexual abuse of a minor."

2. Petitioner, a native and citizen of Mexico, was admitted to the United States in January 2003. Pet. App. 1a-2a, 19a, 28a. Two years later, he pleaded guilty to "unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator," in violation of California Penal Code § 261.5(c) (West 2014); see *id.* § 261.5(a) (defining "minor" as "a person under the age of 18 years"). Administrative Record (A.R.) 100-101.[1]

After that conviction, petitioner was convicted of a number of additional crimes. In 2010, he was convicted of harassment based on domestic violence, in violation of Colorado law, and of violating a protective order, also in violation of Colorado law. See A.R. 100, 103, 115-117, 138. In 2011, he was convicted of violating the terms of a protective order, in violation of Colorado law, based on an additional act of domestic violence, A.R. 105, 121-124. In addition, petitioner was twice convicted of driving under the influence of alcohol. See A.R. 100.

The Department of Homeland Security (DHS) instituted removal proceedings after petitioner's 2010 convictions. Pet. App. 1a-2a, 19a-20a, 28a; A.R. 205-

[1] The conviction record before the Board of Immigration Appeals does not contain details concerning the facts underlying the conviction, such as petitioner's age or the age of his victim. See A.R. 101.

207. Petitioner contended in the removal proceedings that his conviction for "unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator," Cal. Penal Code § 261.5(c) (West 2014), did not constitute "sexual abuse of a minor" under the INA, see 8 U.S.C. 1101(a)(43)(A). Petitioner conceded that he was removable from the United States only based on his other, later convictions, Pet. App. 28a, which triggered different removal provisions that would have permitted him to seek cancellation of his removal, see 8 U.S.C. 1227(a)(2)(E)(i) (domestic violence); 8 U.S.C. 1227a(2)(E)(ii) (violating a protective order).

3. An immigration judge rejected petitioner's contention that his conviction for "unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator," Cal. Penal Code § 261.5(c) (West 2014), did not constitute "sexual abuse of a minor" under the INA. Pet. App. 28a-29a. In concluding that petitioner's conviction was for "sexual abuse of a minor," the immigration judge relied on the published decision of the Board of Immigration Appeals (Board) construing that INA term, *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991 (1999) (en banc). Pet. App. 28a-29a. The immigration judge found petitioner ineligible for cancellation of removal, because that relief is unavailable to aliens convicted of crimes constituting aggravated felonies, including any crime that is "sexual abuse of a minor." *Id.* at 29a. Petitioner was ordered removed to Mexico. *Ibid.*

4. The Board dismissed petitioner's appeal, agreeing that petitioner's conviction under California Penal Code § 261.5(c) (West 2014) was a conviction for "sexual abuse of a minor" under the INA. Pet. App. 19a-26a.

The Board began with its decision in *Rodriguez-Rodriguez*. It noted that in that case, after finding the term "sexual abuse of a minor" in the INA ambiguous, the Board had concluded that the definition most accurately capturing the term's meaning was 18 U.S.C. 3509(a)(8), which defines "sexual abuse" to include "the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children." See Pet. App. 22a.[2] The Board enumerated reasons that the Board in *Rodriguez-Rodriguez* concluded that this definition furnished an appropriate guide: the definition, it found, captured the common usage of "sexual abuse" and best accorded with Congress's purpose in the INA of "provid[ing] a comprehensive scheme in the Act to cover crimes against children." *Id.* at 22a-23a (citation omitted).

Petitioner, the Board noted, bore the burden of establishing his eligibility for cancellation of removal. Pet. App. 21a (citing 8 C.F.R. 1240.8(d)). In seeking to establish his eligibility for that relief, petitioner did not dispute that his conviction would qualify as "sexual abuse of a minor" if 18 U.S.C. 3509(a)(8) were used as a guide to that term's meaning as prescribed by *Rodriguez-Rodriguez*. See A.R. 25-34. Petitioner instead argued that the Board should jettison *Rodriguez-Rodriguez* and hold that "sexual abuse of a minor" under the INA encompasses only offenses that would constitute a federal crime under 18 U.S.C. 2243—an approach to which the Ninth Circuit briefly adhered.

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[2] Federal law also defines "minor" as a person under the age of 18. See 18 U.S.C. 2256(1), 2423(a); see also Pet. App. 2a.

A.R. 30-32; see pp. 16-17, *infra*. The Board, however, was "not persuaded" by petitioner's request that it depart from *Rodriguez-Rodriguez*. Pet. App. 23a-24a. It therefore agreed with the immigration judge that petitioner was "subject to removal" based on his conviction under California Penal Code § 261.5(c) (West 2014). Pet. App. 25a. Since aggravated-felony removal grounds are not subject to cancellation of removal, the Board affirmed the immigration judge's denial of that relief. *Ibid.*

5. The Seventh Circuit denied a petition for review, accepting the Board's determination that petitioner's conviction under California Penal Code § 261.5(c) (West 2014) was a conviction for "sexual abuse of a minor" under the INA. Pet. App. 1a-18a.

The court of appeals first concluded that the Board's decision in *Rodriguez-Rodriguez* to use 18 U.S.C. 3509(a) as a guide to interpreting "sexual abuse of a minor" under the INA was permissible under the framework for deference set out in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). At the first stage of *Chevron* analysis, the court of appeals found that the term "sexual abuse of a minor" is ambiguous. It noted that the INA did not "suppl[y] its own definition of 'sexual abuse of a minor.'" Pet. App. 3a. Nor did Congress cross-reference another federal provision—as Congress had done when identifying certain crimes as aggravated felonies. *Ibid.* As a result, the court wrote, "the Board had to choose" a definition from possibilities that included the definition of "sexual abuse" in 18 U.S.C. 3509(a)(8); the definition petitioner preferred, in 18 U.S.C. 2243(a), "a few other sections in the Criminal Code, and a definition of the Board's invention." Pet. App. 3a.

At the second stage of *Chevron* analysis, the court of appeals explained that the Board had reasonably exercised its interpretive discretion in concluding that the definition of sexual abuse in 18 U.S.C. 3509(a)(8), and the definition of minor in 18 U.S.C. 2256(1) and 2423(a), were the most appropriate guides to the construction of "sexual abuse of a minor" in the INA. Pet. App. 3a-4a. Petitioner had argued that the Board should have construed this INA ground to cover only conduct that could be federally prosecuted under 18 U.S.C. 2243—an approach that the Ninth Circuit followed for a time, based on *Estrada-Espinoza* v. *Mukasey*, 546 F.3d 1147 (2008) (en banc), overruled in part on other grounds by *United States* v. *Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc) (per curiam), abrogated by *Descamps* v. *United States*, 133 S. Ct. 2276 (2013). See Pet. App. 5a. The Seventh Circuit noted it was reasonable for the Board to rely on Section 3509(a)(8) to define the INA term instead: it noted that the narrow federal crime in 18 U.S.C. 2243(a) did not include many of the offenses traditionally regarded as "statutory rape," and further noted that because the federal criminal provision covers only offenses against children 12 to 15 years of age, use of that definition to construe the INA term would omit (among other crimes naturally described as sexual abuse) all convictions under statutes that extended to crimes against "persons aged 11 and under." Pet. App. 4a.

The court of appeals noted that its prior decisions had also concluded that the use of Section 3509(a)(8) "as the starting point for understanding 'sexual abuse'" was reasonable under the *Chevron* framework. Pet. App. 5a. So had the other courts of appeals to address that question, aside from the Ninth Circuit. *Id.* at 7a

(citing *Oouch* v. *DHS*, 633 F.3d 119, 122 (2d Cir. 2011); *Mugalli* v. *Ashcroft*, 258 F.3d 52, 60 (2d Cir. 2001); *Restrepo* v. *Attorney Gen. of the U.S.*, 617 F.3d 787, 796 (3d Cir. 2010)).

The court of appeals found unpersuasive the reasoning of the Ninth Circuit in *Estrada-Espinoza*, on which petitioner relied. *Estrada-Espinoza* had found at the first stage of *Chevron* analysis that the term "sexual abuse of a minor" in the INA was unambiguous, concluding that it was a reference to the federal crime in Section 2243. Pet. App. 5a. The Seventh Circuit reasoned that *Estrada-Espinoza*'s conclusion that the statute had left the agency no ambiguity to resolve was circular. *Ibid.* Nothing in the statute indicated that the INA's reference to sexual abuse of a minor was meant to be keyed to Section 2243(a), and to foreclose reliance on the broader definition in Section 3509(a)(8). *Ibid.* "[T]he Board," the court wrote, "was entitled to find that Congress omitted a statutory reference from [Section] 1101(a)(43)(A) precisely in order to leave discretion for the agency." *Id.* at 6a.

The court of appeals also found unpersuasive the Ninth Circuit's view "that *Chevron* is inapplicable" to the Board's construction of the INA in *Rodriguez-Rodriguez* "because the Board adopted a standard rather than a rule." Pet. App. 6a. The court concluded that the Ninth Circuit's view that *Rodriguez-Rodriguez* did not adopt a "rule" misunderstood what the Board did, which was to take the definition in Section 3509(a)(8) as its guide. *Ibid.* While the Board's use of Section 3509(a)(8) as a guide still required the Board to "classify one state statute at a time," leaving "room for debate about whether a particular state crime is in or out," the court noted that "many statutes and regula-

tions adopt criteria that leave lots of cases uncertain." *Ibid.*

In any event, the court of appeals explained, *Chevron* deference is not limited to rules. Pet. App. 6a. To the contrary, the court found it well-settled that agency decisions are entitled to deference even if they do not set out rules. *Id.* at 9a (citing, as several of "[m]any" examples, this Court's deference to the National Labor Relations Board's case-by-case specifications of "unfair labor practices," as well as to the Environmental Protection Agency's approach in *EPA* v. *EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014)). Perhaps most analogously, the court of appeals noted, this Court previously reversed a Ninth Circuit decision for failing to accord *Chevron* deference to the Board's construction of an INA term in "common-law fashion, ruling one crime at a time." *Ibid.* (citing *Immigration & Naturalization Serv.* v. *Aguirre-Aguirre*, 526 U.S. 415 (1999)). All of those decisions reflected "one of the earliest principles developed in American administrative law," *id.* at 10a (citation omitted), that "[w]hen an agency chooses to address topics through adjudication, it may proceed incrementally; it need not resolve every variant (or even several variants) in order to resolve one variant." *Ibid.* (citing *Securities Exch. Comm'n* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947) and *Heckler* v. *Ringer*, 466 U.S. 602, 617 (1984)).

Judge Posner dissented. Pet. App. 12a-18a. His dissent relied on a reading of *Rodriguez-Rodriguez* as adopting a case-specific approach—rather than categorical approach—to determining whether a crime is "sexual abuse of a minor." In light of *Chevron* deference, he acknowledged that "if *Rodriguez-Rodriguez* had adopted the definition in [S]ection 3509(a)(8)" to

define sexual abuse of a minor in the INA, "that would be the end of this case." *Id.* at 13a-14a. But Judge Posner believed that the panel misread *Rodriguez-Rodriguez*, which he understood to hold that each alien's case should be analyzed on its facts—rather than categorically—to determine whether it was best described as "sexual abuse of a minor" under the INA. *Id.* at 15a. He concluded that the Board's decision in petitioner's case was erroneous because it failed to follow what he saw as *Rodriguez-Rodriguez*'s case-specific approach. *Ibid.*; see *id.* at 17a.

Petitioner was removed to Mexico following the dismissal of his appeal. See Pet. 7 n.4.

ARGUMENT

Petitioner challenges the court of appeals' upholding of the Board's classification of his conviction for "unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator," Cal. Penal Code § 261.5(c) (West 2014), as "sexual abuse of a minor" under 8 U.S.C. 1101(a)(43)(A), based on deference to the Board's interpretation of that term in *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991 (B.I.A. 1999) (en banc). The court of appeals correctly affirmed the Board's conclusion on that question. And while the Ninth Circuit reached a contrary conclusion in *Estrada-Espinoza* v. *Mukasey*, 546 F.3d 1147 (2008) (en banc), overruled in part on other grounds by *United States* v. *Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc) (per curiam), abrogated by *Descamps* v. *United States*, 133 S. Ct. 2276 (2013), the disagreement does not warrant this Court's intervention. The Ninth Circuit has already substantially "retreated from its position in *Estrada-Espinoza*." See *Restrepo* v. *Attorney Gen. of the U.S.*, 617 F.3d

787, 799 (3d Cir. 2010). And the Board has recently issued a published decision that both addresses the specific state statute here and announces a rule that particularizes "sexual abuse of a minor" in the manner that the Ninth Circuit previously found lacking. That decision makes particularly unwarranted this Court's intervention to resolve a disagreement concerning whether the Board's *prior* guidance in *Rodriguez-Rodriguez* was sufficiently particularized to warrant deference.

1. The court of appeals correctly affirmed the Board's determination that petitioner's crime of conviction qualified as "sexual abuse of a minor" under the INA. Petitioner does not dispute that (as this Court's decisions establish) the Board is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) in its construction of ambiguous terms in the INA. See, *e.g, Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality opinion); see also *id.* at 2214 (Roberts, C.J., concurring in the judgment). The term "sexual abuse of a minor" is ambiguous. It is not defined in the INA, and other provisions of federal and state law that could serve as guideposts have different scopes. See *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 995 (cataloging relevant provisions); see also Pet. App. 2a-3a. While some other portions of the INA contain cross-references that direct the Board to borrow a definition from a particular source, the provision concerning "sexual abuse of a minor" does not. As the court of appeals put it, because the INA does not "suppl[y] its own definition of 'sexual abuse of a minor'" "the Board had to choose" a definition, "and the possibilities include § 3509(a)(8), § 2243(a), a few

other sections in the Criminal Code, and a definition of the Board's invention." *Id.* at 3a; see *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 994-995.

At the second stage of *Chevron* analysis, the Board's construction of the term "sexual abuse of a minor" in *Rodriguez-Rodriguez*—which the Board applied in this case—was a reasonable one. *Rodriguez-Rodriguez* reasonably determined that 18 U.S.C. 3509(a)(8) was an appropriate guide for interpreting "sexual abuse of a minor" in the INA, by relying on sources on which this Court has relied in construing ambiguous terms. First, the Board concluded that, as a general matter, the definition in Section 3509(a)(8) corresponded to the "common usage" of the term "sexual abuse," 22 I. & N. Dec. at 996 (citing *Black's Law Dictionary* 239, 1375 (6th ed. 1990)). Second, the Board found use of that definition supported by a review of state laws and by considerations of congressional intent. *Ibid.* After noting "that states categorize and define sex crimes against children in many different ways," the Board concluded that the definition in "18 U.S.C. § 3509(a) better captures th[e] broad spectrum of sexually abusive behavior" as that concept was understood in state sources than alternatives. *Ibid.* In contrast, the narrower definition in 18 U.S.C. 2243 would not reach obvious sexually abusive conduct, such as abuse by aliens convicted under statutes that encompass sexual abuse of victims under age 12. Under these circumstances, the Board concluded that use of the definition in Section 3509(a) accorded with Congress's intent to provide "a comprehensive scheme to cover crimes against children." *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 996. In contrast, the Board explained, use of the narrower definition in

Section 2243 was "not consistent with Congress' intent to remove aliens who are sexually abusive toward children." *Ibid.*[3]

Petitioner's attacks on the approach of *Rodriguez-Rodriguez* lack merit. Petitioner first contends (Pet. 14-16) that *Rodriguez-Rodriguez* is inconsistent with the "categorical approach" to defining statutory terms in *Taylor* v. *United States*, 495 U.S. 575 (1990). But the Board's approach to "sexual abuse of a minor" is consistent with *Taylor*. In the portion of *Taylor* on which petitioner relies, this Court held that the meaning of "burglary" should be uniform across States, rejecting the approach of the decision before it, which had treated the federal definition of "burglary" in a recidivism-enhancement provision for criminal sentencing as varying depending on how "burglary" was defined in the law of the State where a defendant was convicted. *Id.* at 590-591. It was "implausible," this Court concluded, "that Congress intended the meaning of 'burglary' for purposes of [that statute] to depend on the definition adopted by the State of conviction." *Id.* at 590. The approach to "sexual abuse of a minor" in *Rodriguez-Rodriguez* is consistent with that aspect of the "categorical approach" to statutory interpretation. Rather than suggesting that the meaning of "sexual abuse of a minor" could vary from State to State, the Board established that the meaning of the term in the INA would be guided by a federal definition in 18 U.S.C. 3509(a), which the Board found

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[3] Using Section 3509(a) as a guide in *Rodriguez-Rodriguez*, the Board concluded that an alien convicted of violating a Texas prohibition on sexual contact with minors under the age of 17, by perpetrators at least three years older, committed "sexual abuse of a minor" under the INA. 22 I. & N. Dec. at 996, 998.

corresponded to, *inter alia*, common usage and congressional intent.

Petitioner appears to view the Board's approach as inconsistent with *Taylor* because *Rodriguez-Rodriguez* invoked Section 3509(a)(8) as a "guide," 22 I. & N. Dec. at 996, and therefore did not foreclose the possibility that application of the term to particular state statutes might further depend upon considerations of ordinary usage, indicia of congressional intent, or other appropriate factors bearing on the INA term's meaning. But *Taylor* did not reject the case-by-case methodology that is a basic mode of agency interpretation—or, indeed, address in any way the methods through which federal agencies may permissibly develop the meaning of statutory terms. See Pet. App. 10a (citing *Securities Exch. Comm'n* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947); *Heckler* v. *Ringer*, 466 U.S. 602, 617 (1984)); see also *Immigration & Naturalization Serv.* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999) (sanctioning case-by-case approach in construing INA term).

Petitioner next suggests (Pet. 15) that the Board in *Rodriguez-Rodriguez* unreasonably construed "sexual abuse of a minor" in the INA because it used a federal provision—in a statute that defines protections for minor victims of sexual abuse—as a guide. Use of this statute as a guide, petitioner asserts, "eschewed the sources used in *Taylor* to shed light on a crime's elements." *Ibid.*; see also *ibid.* (asserting that because the Board used a federal "civil statute" as a guide, its analysis was "a far cry from this Court's analysis in *Taylor*, which derived a generic definition of 'burglary' by looking to the criminal codes of most states, the Model Penal Code, federal law, and leading treatis-

es"). Petitioner overlooks that the Board determined that Section 3509(a) was an appropriate guide precisely *because* that term accurately reflected the meaning of "sexual abuse of a minor" in common usage and aligned with congressional intent. See *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 995-997; see also *Mugalli* v. *Ashcroft*, 258 F.3d 52, 58 (2d Cir. 2001) (noting that use of Section 3509(a)(8) was reasonable because that definition "is consonant with the generally understood broad meaning of the term 'sexual abuse' as reflected in" *Black's Law Dictionary* and was "also supported by the BIA's reading of Congressional intent to 'provide . . . a comprehensive scheme to cover crimes against children'") (citation omitted); *Restrepo*, 617 F.3d at 796 (noting "consonance between th[e] statutory provision [in Section 3509(a)(8)] and the commonly accepted definition of 'sexual abuse'"). In sum, *Rodriguez-Rodriguez* reasonably relied on appropriate sources in construing "sexual abuse of a minor."

Petitioner also suggests (Pet. 24-26) that his violation of California Penal Code § 261.5(c) (West 2014) cannot be the "aggravated felony" of "sexual abuse of a minor" because California classified his crime as a misdemeanor. But this Court has emphasized that Congress is free to make particular phrases terms of art through express definitions—and that those definitions need not correspond to ordinary parlance. See, *e.g.*, *Stenberg* v. *Carhart*, 530 U.S. 914, 942 (2000). As the Board and the courts of appeals to consider the question have held, "aggravated felony" is one such term of art—expressly defined to include all convictions for particular types of conduct (such as "sexual abuse of a minor"). See *Biskupski* v. *Attorney Gen. of*

the U.S., 503 F.3d 274, 280 (3d Cir. 2007), cert. denied, 555 U.S. 820 (2008); see also *Blandino-Medina* v. *Holder*, 712 F.3d 1338, 1345 n.6 (9th Cir. 2013); *Guerrero–Perez* v. *Immigration & Naturalization Serv.*, 242 F.3d 727, 736 (7th Cir. 2001). Accordingly, so long as petitioner's offense was one of "sexual abuse of a minor," it qualifies as an aggravated felony under federal law—regardless of whether California labels the crime a felony under its law.

2. This Court's review is not now warranted of whether the Board reasonably concluded that violations of California Penal Code § 261.5(c) (West 2014) are "sexual abuse of a minor," 8 U.S.C. 1101(a)(43)(A).

There is a shallow disagreement on this question that predates the Board's most recent guidance. The Ninth Circuit is the sole court of appeals to reject the classification of California Penal Code § 261.5(c) (West 2014) as "sexual abuse of a minor," after declining to defer to *Rodriguez-Rodriguez. Estrada-Espinoza,* 546 F.3d at 1152-1158. That court's decision conflicts with the decision in this case, which affirmed the Board's classification of petitioner's conviction under the same statute, after affording *Chevron* deference to *Rodriguez-Rodriguez*. Pet. App. 1a-11a. No other court has considered the classification of Section 261.5(c) under the INA. But the Second and Third Circuits have indicated in the context of other state offenses that, under the *Chevron* doctrine, *Rodriguez-Rodriguez* permissibly used the definition of "sexual abuse" in 18 U.S.C. 3509(a) as a guide to the term "sexual abuse of a minor" in the INA. *Mugalli*, 258 F.3d at 60; *Restrepo*, 617 F.3d at 796.[4]

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[4] Petitioner suggests (Pet. 20-21) that a Fourth Circuit decision construing the United States Sentencing Guidelines supports his

This disagreement does not warrant this Court's review, because it turns principally on how a since-clarified Board decision is understood. The Ninth Circuit initially held in *Estrada-Espinoza* that deference was unwarranted to the Board's construction of "sexual abuse of a minor" because that phrase in the INA, the court believed, was an unambiguous reference to the narrow offense given the label "sexual abuse of a minor" in a section of the federal criminal code, 18 U.S.C. 2243(a). 546 F.3d at 1152-1155, 1158. But the Ninth Circuit quickly abandoned that holding, concluding that construing "sexual abuse of a minor" as limited to the offenses encompassed by that prohibition would lead to an "absurd result." *United States* v. *Medina-Villa*, 567 F.3d 507, 515-516 (9th Cir. 2009), cert. denied, 559 U.S. 954 (2010); see *Restrepo*, 617

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view, but he is mistaken. *United States* v. *Rangel-Castanada*, 709 F.3d 373 (2013), addressed the construction of the term "sexual abuse of a minor," but not in the INA—and it accordingly did not use the *Chevron* deference principles that apply to the Board's interpretations of the INA. *Id.* at 380-381 (considering whether violation of Tennessee statute qualified as "sexual abuse of a minor" under Sentencing Guideline § 2L1.2 (2012)). The critical nature of this distinction is illustrated by the Third Circuit's jurisprudence: While that court has suggested that it would not construe the term "sexual abuse of a minor" in the Sentencing Guidelines to extend to statutes that apply to sexual intercourse with 16 and 17 year olds, it has concluded (under *Chevron*) that the Board permissibly defined "sexual abuse of a minor" to reach such statutes. Compare *Restrepo*, 617 F.3d at 796 ("[T]he BIA's definition of sexual abuse of a minor is a reasonable one and * * * it is appropriate to exercise *Chevron* deference.") with *United States* v. *Ascencion-Carrera*, 413 Fed. Appx. 549, 551 n.4 (3d Cir. 2011) (suggesting violations of California Penal Code would "likely not categorically qualify as sexual abuse of a minor" under the Sentencing Guidelines).

F.3d at 799 ("We note with interest that the Ninth Circuit recently retreated from its position in *Estrada-Espinoza*."); *Oouch* v. *DHS*, 633 F.3d 119, 122 n.3 (2d Cir. 2011) (also noting "retreat[]" from analysis in that case).

The Ninth Circuit's remaining rationale for declining to accept the Board's classification of California Penal Code § 261.5(c) (West 2014) based on *Chevron* deference was that it adopted a different understanding of *Rodriguez-Rodriguez*—the then-relevant Board decision construing "sexual abuse of a minor"—than the other courts of appeals to interpret the Board's decision. *Estrada-Espinoza* concluded that *Rodriguez-Rodriguez* (which did not address Section 261.5(c)) "hasn't done anything to particularize the meaning of" the term "sexual abuse of a minor," with the result that *Chevron* deference to *Rodriguez-Rodriguez* "has no practical significance." 546 F.3d at 1157 (citation omitted); see also *ibid.* (describing *Rodriguez-Rodriguez* as providing nothing more than "an advisory guideline for future case-by-case interpretation"). It also concluded that the Board's decision in *Estrada-Espinoza* itself classifying the conviction under Section 261.5(c) as "sexual abuse of a minor" was not entitled to deference because the decision was unpublished. *Id.* at 1156-1157.

In contrast, the Second, Third and Seventh Circuits (which all deferred to the Board's interpretation of "sexual abuse of a minor") construed *Rodriguez-Rodriguez* to particularize the meaning of "sexual abuse of a minor" in the manner that the Ninth Circuit found absent. Those courts understood *Rodriguez-Rodriguez* to align the INA term's meaning with that of 18 U.S.C. 3509(a). Pet. App. 6a; *Restrepo*, 617 F.3d

at 796-797; *Oouch*, 633 F.3d at 121-122; see Pet. 12 (stating that "[t]he Second and Third Circuits * * * treat [*Rodriguez-Rodriguez*] as a *definition*, and not as a 'guide'"). The dispute concerning which court of appeals correctly parsed the Board's decision in *Rodriguez-Rodriguez*—which underlies the contrasting results concerning Section 261.5(c)—is not a question that would ordinarily warrant this Court's intervention, as the Board can resolve uncertainty concerning the meaning of its decisions. Cf. *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991) (explaining that the Court will not generally review disagreements concerning provisions of the United States Sentencing Guidelines, which can be resolved by the United States Sentencing Commission).

Review would be especially unwarranted here, because the Board has *already* clarified its approach in a published decision issued just months ago. *In re Esquivel-Quintana*, 26 I. & N. Dec. 469, 470-472 (B.I.A. 2015), revisited the meaning of "sexual abuse of a minor," setting out a rule for when state statutory-rape statutes that extend to 16 and 17 year old victims do (and do not) satisfy the INA's definition. The Board first explained that some statutory rape statutes reach conduct properly characterized as abusive—including, in some cases, when those statutes bar adults from having sexual intercourse with 16 and 17 year olds. It noted the "inherent risk of exploitation, if not coercion, when an adult solicits a minor to engage in sexual activity"—finding the risk of coercion "particularly great" when age differences mean that the victim and perpetrator are not in the same peer group. *Id.* at 473-474 (citing cases and study). Accordingly, the Board held that violations of statuto-

ry-rape laws extending to sexual conduct with 16 and 17 year olds are appropriately described as "sexual abuse of a minor" if such statutory-rape laws "require a meaningful age difference between the victim and the perpetrator." *Id.* at 477; see *id.* at 475. The Board further determined that violations of California Penal Code § 261.5(c) (West 2014), which requires that the "minor victim be 'more than three years younger' than the perpetrator," satisfy that standard. 26 I. & N. Dec. at 477 (citation omitted).

This further elaboration on the meaning of "sexual abuse of a minor"—in a published opinion specifically addressing California Penal Code § 261.5(c) (West 2014)—renders the question on which courts of appeals divided concerning deference to *Rodriguez-Rodriguez* a question without prospective significance. First, as a published decision addressing Section 261.5(c) itself, *Esquivel-Quintana* triggers deference to the Board's classification of violations of that particular statute—in the manner that the Ninth Circuit in *Estrada-Espinoza* found lacking for an unpublished Board decision addressing Section 261.5(c). See 546 F.3d at 1156-1157 (declining *Chevron* deference to Board's classification of Section 261.5(c) because it came in an unpublished opinion). Second, in light of *Esquivel-Quintana*'s clear standard concerning classification of statutory-rape crimes, the Board has "particularize[d] the meaning of" the term "sexual abuse of a minor" going forward—addressing the Ninth Circuit's ground for concluding that the Board's general approach in *Rodriguez-Rodriguez* did not warrant deference. *Id.* at 1157 (citation and internal quotation marks omitted). Because the approach in *Esquivel-Quintana* (not *Rodriguez-Rodriguez*) will be the ap-

proach that does (or does not) receive deference in future cases, the past disagreement concerning whether *Rodriguez-Rodriguez* was sufficiently specific to warrant *Chevron* deference is one with little practical future significance.[5]

3. This Court's review concerning the classification of California Penal Code § 261.5(c) (West 2014) is unwarranted for the additional reason that questions concerning the classification of that statute have not been widespread—particularly outside of the Ninth Circuit.

The question whether California Penal Code § 261.5(c) (West 2014) qualifies as "sexual abuse of a minor" under the INA arises relatively infrequently—

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[5] Petitioner has not had the opportunity to address *Esquivel-Quintana* because of the recency of that published opinion. Given his view of the preconditions for deference below, however, petitioner may assert that deference would be unwarranted to *Esquivel-Quintana* as well. See Pet. App. 11a (Seventh Circuit's characterization of petitioner's position as being that deference is conditioned on "rules that are complete and self-contained," so that "until the Board has solved *every* interpretive problem in the phrase 'sexual abuse of a minor,' and shown how *every* possible state crime must be classified, it cannot decide how *any* state conviction can be classified."). But such a view of the prerequisites for deference requires more than the Ninth Circuit demanded in *Estrada-Espinoza* when it suggested that the flaw in the Board's prior decision, for *Chevron* purposes, was that it failed to particularize the meaning of the term "sexual abuse of a minor" at all. No court of appeals has endorsed the proposition that a Board interpretation must effectively classify every state statute on a subject in order to receive *Chevron* deference. And, at a minimum, courts of appeals should have the opportunity to consider the Board's clarified approach (and any new challenges to it) in the first instance. See, *e.g.*, *Nautilus, Inc.* v. *Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2131 (2014) ("[W]e are a court of review, not of first view.") (citation omitted).

with a Westlaw search identifying nine federal decisions considering the question.[6] This infrequency counsels against this Court's intervention as a general matter, and particularly counsels against this Court's intervention before the courts of appeals have had the opportunity to consider the Board's published decision directly addressing the statute at issue here.

This is particularly so because the cases that have arisen concerning classification of California Penal Code § 261.5 (West 2014) under the INA are overwhelmingly within the Ninth Circuit. Of the nine decisions identified through a Westlaw search that address whether convictions under Section 261.5(c) are for "sexual abuse of a minor" under the INA, eight cases—all except the decision below—arose within the Ninth Circuit. See note 6, *supra*. As discussed above, that court is the lone court to have found the Board's prior published decision in *Rodriguez-Rodriguez* concerning "sexual abuse of a minor" (which did not directly address Section 261.5(c)) did not adequately particularize "sexual abuse of a minor" in a manner that would trigger *Chevron* deference—albeit in a decision from which it has already retreated in substantial part. Given the paucity of cases concerning the classification of this statute that arise outside the Ninth Circuit, there is no reason for this Court to

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[6] See Pet. App 1a-11a; *Estrada-Espinoza*, 546 F.3d at 1147; *Han* v. *Mukasey*, 305 Fed. Appx. 479 (9th Cir. 2008); *Xiong* v. *Mukasey*, 300 Fed. Appx. 511 (9th Cir. 2008); *Estrada-Espinoza* v. *Gonzales*, 498 F.3d 933 (9th Cir. 2007) (per curiam), petition granted on reh'g en banc, 546 F.3d 1147 (9th Cir. 2008); *Afridi* v. *Gonzales*, 442 F.3d 1212 (9th Cir. 2006), overruled by 546 F.3d 1147; see 546 F.3d at 1160 & n.15; *Tabalanza* v. *Gonzales*, 131 Fed. Appx. 542 (9th Cir. 2005); *Tabalanza* v. *Ashcroft*, 109 Fed. Appx. 995 (9th Cir. 2004); *Valdez-Camacho* v. *Ashcroft*, 110 Fed. Appx. 808 (9th Cir. 2004).

grant review before the Ninth Circuit has had the opportunity to consider the impact of the Board's recent published decision in *Esquivel-Quintana* developing the meaning of the relevant INA term and directly addressing the classification of Section 261.5.

Petitioner suggests (Pet. 18) that immediate review is appropriate concerning the classification of California Penal Code § 261.5(c) (West 2014) because DHS is not statutorily constrained in determining where detained aliens are housed during removal proceedings—leading petitioner to speculate that DHS could transport detained aliens out of the Ninth Circuit to obtain favorable governing precedent. On the contrary, DHS policy is to minimize transfers of detained aliens. See U.S. Immigration & Customs Enforcement, *Policy 11022.1: Detainee Transfers* § 5.2 (Jan. 4, 2012), http://www.ice.gov/doclib/detention-reform/pdf/hd-detainee-transfers.pdf (requiring high-level approvals to transfer detained alien out of jurisdiction where removal proceedings have started, area in which alien has immediate family, or area in which alien's attorney of record is located). This Court's review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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