No. 14-745

IN THE

Supreme Court of the United States

ALBERTO VELASCO-GIRON,

Petitioner,

v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Board of Immigration Appeals (BIA) held in this case that Petitioner's misdemeanor violation of California Penal Code § 261.5(c)—which prohibits sexual intercourse with those under age 18, conduct legal under federal law and in the overwhelming majority of states—is an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(A) as "sexual abuse of a minor." The BIA reached this conclusion without applying the methodology of *Taylor v. United States*, 495 U.S. 575 (1990), as the agency did not compare Petitioner's offense to a generic definition derived from the federal and state criminal codes, the Model Penal Code, and other sources. Instead, under *In re Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999), the BIA employed an ad hoc process that uses a civil statute as a "guide."

The government concedes (as it must) that the circuits are split on whether (1) the BIA must comply with *Taylor* to receive deference for its methodology and (2) Petitioner's misdemeanor in fact qualifies as "sexual abuse of a minor." Indeed, in contrast to the Seventh Circuit below, the en banc Ninth Circuit unanimously rejected both the BIA's approach to "sexual abuse of a minor" and the BIA's classification of Petitioner's *exact offense*. *See Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (en banc). Other circuits have joined both sides of both questions.

Unable to deny these divisions, and having no plausible vehicle objection, the government suggests that these splits might dissipate. Contrary to the government's claim, however, the Ninth Circuit has not "abandoned" *Estrada-Espinoza*—not even close.

And the government's suggestion that this Court should tolerate a split between immigration and sentencing cases ignores that these cases all concern the same statutory provision, which must be interpreted consistently.

Nor does *In re Esquivel-Quintana*, 26 I&N Dec. 469 (BIA 2015), make these splits go away. *Esquivel-Quintana*—which the BIA curiously issued on the heels of Petitioner seeking this Court's review—does not even *apply* in the Ninth Circuit, much less fix the flaws of *Rodriguez-Rodriguez*.

The government also suggests that these issues have limited prospective impact, because few appellate decisions concern Petitioner's California offense. But the questions presented implicate *every* potential aggravated felony, and certainly all crimes like Petitioner's California offense (which, in any event, is broadly relevant).

It is telling that the government's lead argument against certiorari is that the decision below is correct. Opp'n 10-15. Although the government is wrong there as well (as explained below), the circuits' disagreements on these issues are broad, mature, and ripe for this Court's review.

I. THERE IS NO DISPUTE THAT THE CIRCUITS ARE SPLIT ON BOTH QUESTIONS PRESENTED.

The government concedes that the circuits are split on both questions presented, regarding (1) whether the BIA's methodology should receive deference, and (2) whether Petitioner's misdemeanor for intercourse with an individual under 18 is an aggravated felony as "sexual abuse of a minor." The government's attempts to downplay these splits are unconvincing.

A. The Circuits Are Deeply and Irrevocably Divided Over the Board's Methodology.

Under *Taylor*, a generic crime "*must* have some *uniform definition*" reflecting the crime's "generic, contemporary meaning." 495 U.S. at 592, 598 (emphasis added). That meaning should be derived from the federal criminal code, state criminal codes, the Model Penal Code, and leading treatises. *See id.* at 592-96. However, the BIA, under *Rodriguez-Rodriguez*, construes "sexual abuse of a minor" with no generic definition and no regard to the sources used in *Taylor*. Instead, the BIA uses a federal civil statute to "guide" an ad hoc case-by-case process.

The Seventh Circuit has deferred to the BIA's approach repeatedly (though not without dissent). *See* Pet. App. 1a-18a; *Gattem v. Gonzales*, 412 F.3d 758, 763 (7th Cir. 2005); *id.* at 767-71 (Posner, J., dissenting); *Gaiskov v. Holder*, 567 F.3d 832, 835-38 (7th Cir. 2009); *Sharashidze v. Gonzales*, 480 F.3d 566, 568 n.4 (7th Cir. 2007); *Lara-Ruiz v. INS*, 241 F.3d 934, 938-39 (7th Cir. 2001). There is little chance of that court changing its views.

The Ninth Circuit disagreed in *Estrada-Espinoza*, a unanimous en banc decision. Although the government suggests that the Ninth Circuit has "abandoned" *Estrada-Espinoza* (Opp'n 16), *Estrada-Espinoza* remains the law of the Ninth Circuit.

To be sure, *Estrada-Espinoza* was not the Ninth Circuit's last word on the meaning of "sexual abuse of a minor." When rejecting the BIA's ad hoc approach, *Estrada-Espinoza* defined "sexual abuse of a minor" through the federal crime of the same name, 18 U.S.C. § 2243, which (like most states' laws) sets the

age of consent at 16. But sexual activity with children under the age of 12 is criminalized by neighboring statutes. *See, e.g.*, 18 U.S.C. § 2241(c) (defining crime of "aggravated sexual abuse"). Lest *Estrada-Espinoza*'s use of § 2243 be read to suggest the "absurd result" that sexual abuse of children under 12 is not "sexual abuse of a minor," the Ninth Circuit has clarified that—as *Estrada-Espinoza* stated—"'sexual activity with a younger child is certainly abusive.'" *United States v. Medina-Villa*, 567 F.3d 507, 515-16 (9th Cir. 2009) (quoting *Estrada-Espinoza*, 546 F.3d at 1153). Far from having been "abandoned," *Estrada-Espinoza* remains good law and has been followed in dozens of decisions in that circuit. *See, e.g.*, *United States v. Miranda-Herrera*, 570 F. App'x 634, 636 (9th Cir. 2014); *United States v. Caceres-Olla*, 738 F.3d 1051, 1056 (9th Cir. 2013).

Moreover, *Medina-Villa* only clarified the Ninth Circuit's *substantive understanding* of "sexual abuse of a minor." The government does not (and cannot) claim that the Ninth Circuit has retreated from its rejection of the *Rodriguez-Rodriguez* methodology. Indeed, the Ninth Circuit recently held—applying *Taylor*, just as in *Estrada-Espinoza,* 546 F.3d at 1157-58—that the BIA's construction of "conspiracy," 8 U.S.C. § 1101(a)(43)(U), wrongly "ignore[d] the *one* methodology properly applicable in this context—namely, the mode of analysis derived from *Taylor* and its progeny, which we use to determine generic crimes for the purposes of categorical analysis of prior convictions." *United States v. Garcia-Santana*, 774 F.3d 528, 543 (9th Cir. 2014).

The Second and Third Circuits also understand *Taylor* to require a generic definition; both courts,

however, upheld *Rodriguez-Rodriguez* on that basis, by treating the BIA's decision as providing a definition. Pet. 12-13. The Tenth Circuit also treats *Rodriguez-Rodriguez* as definitional. *See Vargas v. Dep't of Homeland Sec.*, 451 F.3d 1105, 1107-09 (10th Cir. 2006).

The Fifth Circuit, in contrast, requires the BIA to define "sexual abuse of a minor" through the term's plain meaning. *See United States v. Rodriguez*, 711 F.3d 541, 551-52 (5th Cir. 2013) (en banc). Because *Rodriguez-Rodriguez* does not do that, the Fifth Circuit has suggested that the decision is "not a reasonable" approach. *Contreras v. Holder*, 754 F.3d 286, 293 (5th Cir. 2014).

The Fourth and Eleventh Circuits have addressed the meaning of "sexual abuse of a minor" as well. *See United States v. Rangel-Castaneda*, 709 F.3d 373, 380-81 (4th Cir. 2013); *United States v. Chavarriya-Mejia*, 367 F.3d 1249, 1251 (11th Cir. 2004). These courts have reached divergent results, but without addressing the BIA's methodology.

There is no prospect of this division being resolved short of this Court's intervention. The circuit split requires review.

B. There is a Broad, Mature Split on the Scope of "Sexual Abuse of a Minor."

The government also does not dispute that the decision below creates a direct split with the Ninth Circuit on whether Petitioner's misdemeanor is "sexual abuse of a minor" and broadens a pre-existing split on that term's scope. The Ninth and Fourth Circuits hold that intercourse with someone under 18 is *not* categorically abusive, while the Second, Fifth, Seventh, and Tenth Circuits hold that it is. Pet. 19-21.

The Eleventh Circuit also sides with these latter circuits. *See Chavarriya-Mejia*, 367 F.3d at 1251.

Again, the government's suggestion that the Ninth Circuit has "retreated" from *Estrada-Espinoza* is wrong, as explained above. Moreover, the clarification that "sexual activity with a younger child is certainly abusive," *Medina-Villa*, 567 F.3d at 514, does not address sexual activity by older teenagers—and certainly that panel could not overturn the unanimous en banc decision in *Estrada-Espinoza*.

The Fourth Circuit agreed with the Ninth Circuit in *Rangel-Castanada*. Astonishingly, the government claims this should be ignored as a sentencing case. *See* Opp'n 15-16 & n.4. But the Sentencing Guidelines define "sexual abuse of a minor" through *the exact statutory provision* at issue here. *See* U.S.S.G. § 2L1.2 cmt. n.3(A) (stating that "'aggravated felony' has the meaning given that term in 8 U.S.C. § 1101(a)(43)"). A statute with "both criminal and noncriminal applications" must be interpreted "consistently, whether we encounter its application in a criminal or noncriminal context." *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004).

The government's argument for disregarding *Rangel-Castanada* is spurious. The government does not appear to contend that the BIA's views should receive deference in criminal cases. *Cf. Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J., statement respecting the denial of certiorari) (doubting whether "a court owe[s] deference to an executive agency's interpretation of a law that contemplates both criminal and administrative enforcement"). Instead, the government seems to suggest that

§ 1101(a)(43) may have different meanings for sentencing and immigration cases. *See* Opp'n 15-16 n.4.

But the purportedly "critical . . . distinction" between sentencing and immigration cases (suggested by divergent Third Circuit cases), Opp'n 16 n.4, is nonexistent. Statutes are not chameleons. *See Clark v. Martinez*, 543 U.S. 371, 378-80 (2005). The aggravated felony definition must mean the same thing in both contexts. Even the BIA so holds. *See In re Brieva-Perez*, 23 I&N Dec. 766, 769 (BIA 2005). Indeed, in *Lopez v. Gonzales*, this Court granted certiorari to resolve a circuit split on 8 U.S.C. § 1101(a)(43)(B) that spanned both immigration and sentencing cases, and it rejected the government's position as problematic for *both* "the law of alien removal, *see* 8 U.S.C. § 1229b(a)(3), and the law of sentencing for illegal entry into the country, *see* U.S.S.G. § 2L1.2." *See* 549 U.S. 47, 52 & n.3, 58 (2006).

In short, the split between the circuits on the scope of "sexual abuse of a minor" is broad, mature, and needs this Court's resolution.

II. THE BIA'S RECENT *ESQUIVEL-QUINTANA* DECISION DOES NOT LESSEN THE NEED FOR REVIEW.

The government also contends that review should be deferred due to the BIA's decision in *Esquivel-Quintana*. Issued after Petitioner sought this Court's review of the decision below, *Esquivel-Quintana* holds that "a statutory rape offense involving a 16- or 17-year old victim" is only "sexual abuse of a minor" when there is "a meaningful age difference between the victim and the perpetrator." 26 I&N Dec. at 477.

Methodologically, however, *Esquivel-Quintana* is just another guide. *See Esquivel-Quintana*, 26 I&N

Dec. at 477 (BIA will "evaluate statutes individually and define 'sexual abuse of a minor' under the Act on a case-by-case basis"). *Esquivel-Quintana* offers no generic definition for "sexual abuse of a minor," and cited the decision below as support for its ad hoc approach. *See id.*

Moreover, *Esquivel-Quintana* demonstrates how loosely *Rodriguez-Rodriguez* "guided" the BIA. Statutory rape offenses that now fall outside the *Esquivel-Quintana* guide (because they lack a "meaningful age difference," 26 I&N Dec. at 477) previously fell *inside* the *Rodriguez-Rodriguez* guide (which has no such constraint).

The government claims that this Court should give the Ninth Circuit "the opportunity to consider the impact of" *Esquivel-Quintana*. Opp'n 21-22. But as another "guide," *Esquivel-Quintana* cannot obtain deference in the Ninth Circuit. *See Estrada-Espinoza*, 546 F.3d at 1157 (requiring "a uniform definition"). And the Ninth Circuit holds that the term "sexual abuse of a minor" *unambiguously* excludes intercourse with individuals older than 16—which leaves no room for deference to the contrary conclusion in *Esquivel-Quintana*. *Id.* at 1157 n.7. To reverse course on either question, the Ninth Circuit would need to overrule its unanimous en banc decision.[1]

[1] Because the Ninth Circuit held "sexual abuse of a minor" to be unambiguous, *National Cable & Telecommunications Ass'n v. Brand X Internet Services* would not open the door to reconsideration. *See* 545 U.S. 967, 982-83 (2005) (a "court's prior judicial construction of a statute trumps an agency construction" when

The slim prospects of Ninth Circuit reconsideration (which could only rearrange the splits) are further reduced by the fact that *Esquivel-Quintana* applies only "outside of the Ninth Circuit," 26 I&N Dec. at 473. Indeed, this further highlights the lack of uniformity.

Thus, far from depriving the conceded circuit splits of "practical future significance" (Opp'n 20), *Esquivel-Quintana* confirms the utility of this Court's immediate review. The Board has doubled down on its approach, just as the circuits' positions have become more deeply entrenched. Delaying review will not further sharpen the questions presented or the circuits' divisions.

III. THE QUESTIONS PRESENTED ARE SIGNIFICANT.

This case presents important questions that have deeply divided the circuits. It does not ask "which court of appeals correctly parsed" *Rodriguez-Rodriguez*. Opp'n 16. The BIA clearly and concededly employs a guide, not a definition. Opp'n 13-14.[2] Rather, the parties and the circuits disagree on whether such an approach is permissible. That is a question of federal law for this Court to definitively answer.

The government suggests that this case is only relevant to Petitioner's offense. But whether and when

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the court "holds that its construction follows from the unambiguous terms of the statute").

[2] The Second and Third Circuits' strained approach can only be seen as reflecting *Taylor*'s need for a generic definition. *See* Pet. 12-13.

the BIA can receive deference matters for *all* aggravated felonies. *See Garcia-Santana*, 774 F.3d at 543 (rejecting BIA's methodology for construing conspiracy-based aggravated felonies).

Moreover, even if this case's relevance were limited to "sexual abuse of a minor," a Westlaw search shows that hundreds Court of Appeals decisions have addressed that precise category. And the law in California (the nation's largest state), though uncommon, is not unique. *See* Pet. 23-24 n.13.

Also, the government greatly understates the universe of "cases concerning the classification of" § 261.5(c). Opp'n 21. Cases involving this California statute obviously arise outside the Ninth Circuit. *See, e.g.*, Pet. App. 1a-18a; *United States v. Ascencion-Carrera*, 413 F. App'x 549 (3d Cir. 2011). Just as obviously, many immigration decisions are not appealed to the BIA, much less to the Courts of Appeals, by detained (and frequently pro se) immigrants. *See* 8 U.S.C. § 1226(c) (mandating detention of putative aggravated felons).[3] And the scope of "sexual abuse of a minor" matters for both immigration and sentencing. The questions presented are thus widely important.

IV. THE GOVERNMENT IS WRONG ON THE MERITS.

Finally, the government defends the merits of the decision below (Opp'n 10-15), but that is an argument about how to *resolve* the split, not a reason this Court

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[3] The government does not dispute the particular importance of uniformity in immigration law. *See* Pet. 17-19, 22-23.

should not address it. In any event, the government's position is incorrect.

Conceding *Taylor*'s relevance to whether Petitioner's misdemeanor is an aggravated felony, the government argues that "*Taylor* did not reject [a] case-by-case methodology." Opp'n 13. But *Taylor* states that generic crimes "*must* have some uniform definition," 495 U.S. at 592 (emphasis added), and this Court has stated that "sexual abuse of a minor" is such a crime. *See Nijhawan v. Holder*, 557 U.S. 29, 37 (2009) (citing *Estrada-Espinoza* with approval). Although some degree of case-by-case adjudication is proper (indeed, inevitable), a "uniform definition" is essential to the process. *Taylor*, 495 U.S. at 592.[4]

The government then contends that the BIA's approach is consistent with *Taylor* because the BIA chose a guide that supposedly reflected "common usage and aligned with congressional intent." Opp'n 14. But in *Taylor*, this Court defined a generic offense through the federal criminal code, the state criminal codes, the Model Penal Code, and leading treatises. *See* 495 U.S. at 592-96. *Rodriguez-Rodriguez* eschewed all of these sources. *See* 22 I&N Dec. at 994-96.

Nor is *Esquivel-Quintana* any better. There, the BIA considered the laws of "a number of States" with uncommonly broad statutory rape offenses, and opined that Congress did not "intend[] to exclude"

[4] The government argues that *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999), permits a "case-by-case approach." Opp'n 13. But *Aguirre-Aguirre* did not concern the meaning of a *generic crime*, as the government does not dispute. Pet. 15.

such offenses "from the aggravated felony definition." *Esquivel-Quintana*, 26 I&N Dec. at 474. That analysis bears little resemblance to *Taylor*. And the BIA's deliberately broad approach flouts the need to "err on the side of underinclusiveness" in this context. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1693 (2013); *see also* Pet. 26 (noting rule of lenity).

Moreover, even if deference could be available to the BIA's approach, Petitioner's offense—for which prosecution is possible only because the participants are not married to one another—falls well outside any reasonable understanding of "sexual abuse of a minor." *See* Pet. 24-25. Indeed, the federal crime of that name "roughly correspond[s] to the definitions . . . in a majority of the States' criminal codes," none of which criminalize such conduct. *Cf. Taylor*, 495 U.S. at 589.

Certainly, as the government notes, "Congress is free to make particular phrases terms of art" that do "not correspond to ordinary parlance." Opp'n 14 (citing *Stenberg v. Carhart*, 530 U.S. 914 (2000)). But without a "clear statutory command," *Lopez*, 549 U.S. at 55 n.6, this Court is "very wary" of applying the term "aggravated felony" in a way "the English language tells us not to expect." *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 575 (2010). The government does not claim that any "clear statutory command" exists here. Of the few states that even criminalize Petitioner's offense, most—including California—treat it as a *misdemeanor*. *See* Pet. 23 n.13. Such an offense is not naturally called an "aggravated felony."

The government defends the decision below based on deference to the BIA. But the BIA's classification of Petitioner's offense unreasonably disregards the

plain meaning of both "sexual abuse of a minor" and "aggravated felony." The Seventh Circuit's affirmance of that decision cannot stand.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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