No. 23-189

In the Supreme Court of the United States

WAYNE PATRICK DEBIQUE, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's conviction for "sexual abuse in the second degree" of a person who was "[l]ess than fourteen years old," N.Y. Penal Law § 130.60(2) (McKinney 2019), constituted "sexual abuse of a minor," 8 U.S.C. 1101(a)(43)(A), and was therefore an "aggravated felony" under the immigration laws, 8 U.S.C. 1227(a)(2)(A)(iii).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 58 F.4th 676. The opinion of the Board of Immigration Appeals (Pet. App. 24a-29a) is unreported. The decision and order of the immigration judge (Pet. App. 30a-34a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 2023. A petition for rehearing was denied on May 31, 2023 (Pet. App. 35a-36a). The petition for a writ of certiorari was filed on August 25, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that a noncitizen "who is

convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. 1227(a)(2)(A)(iii).[1] The INA defines several offenses that qualify as aggravated felonies "whether [committed] in violation of Federal or State law." 8 U.S.C. 1101(a)(43).

To determine whether a noncitizen's conviction qualifies as one for an aggravated felony, agencies and courts "employ a 'categorical approach,'" which asks "whether 'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition." *Moncrieffe* v. *Holder*, 569 U.S. 184, 190 (2013) (citation omitted). The inquiry "focus[es] solely on whether the elements of the crime of conviction sufficiently match the elements of [the INA offense], while ignoring the particular facts of the case." *Mathis* v. *United States*, 579 U.S. 500, 504 (2016). "The prior conviction qualifies as an [aggravated felony] only if the statute's elements are the same as, or narrower than, those of the" aggravated-felony offense listed in the INA. *Descamps* v. *United States*, 570 U.S. 254, 257 (2013).

In addition to being deportable, a noncitizen with an aggravated-felony conviction is ineligible for many forms of discretionary relief, including cancellation of removal, 8 U.S.C. 1229b(a)(3) and (b)(1)(C); asylum, 8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i); and voluntary departure, 8 U.S.C. 1229c(b)(1)(C). An aggravated-felony conviction does not, however, disqualify a noncitizen from withholding of removal under the statute or under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), adopted Dec. 10, 1984, S. Treaty Doc. No. 20, 100th

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[1] This brief uses "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020).

Cong., 2d Sess. 19 (1988), 1465 U.N.T.S. 85, unless the conviction is deemed to be for "a particularly serious crime." 8 U.S.C. 1231(b)(3)(B)(ii); 8 C.F.R. 1208.16(d)(2). A noncitizen with an aggravated-felony conviction also may obtain deferral of removal under the CAT. See 8 C.F.R. 1208.16(d)(2). Furthermore, a noncitizen convicted of an aggravated felony is generally barred from seeking readmission for 20 years following removal, 8 U.S.C. 1182(a)(9)(A)(i) and (ii), but that bar is subject to waiver, 8 U.S.C. 1182(a)(9)(A)(iii).

b. In 1996, Congress expanded the definition of "'aggravated felony'" to include "sexual abuse of a minor." 8 U.S.C. 1101(a)(43)(A); see Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 321(a)(1), 110 Stat. 3009-627. The INA does not define the phrase "sexual abuse of a minor." The INA does, however, provide that the "determination and ruling by the Attorney General with respect to all questions of law" with respect to the "administration and enforcement" of the INA "shall be controlling," 8 U.S.C. 1103(a)(1), and the Attorney General has delegated that interpretive authority to the Board of Immigration Appeals (BIA or Board), 8 C.F.R. 1003.0; see 28 U.S.C. 510.

In its precedential decision in *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991 (B.I.A. 1999) (en banc), the Board adopted a broad interpretation of the type of conduct that could qualify as "sexual abuse of a minor," explaining that the phrase is not "limited to crimes requiring contact as an element." *Id.* at 996. The Board explained that "[b]ecause Congress did not provide a definition of the term 'sexual abuse of a minor,' we begin our analysis by looking to principles of statutory construction." *Id.* at 993. The Board noted that although

most of the aggravated felonies in Section 1101(a)(43) are defined by reference to other federal statutes, "sexual abuse of a minor" is not. See *id.* at 994-995. The Board also observed that in light of the statutory and legislative history, the phrase should be defined consistent with Congress's intent "to provide a comprehensive statutory scheme to cover crimes against children." *Id.* at 994. Consulting a contemporaneous dictionary, the Board observed that "[t]he term 'sexual abuse' is commonly defined as 'illegal sex acts performed against a minor by a parent, guardian, relative, or acquaintance,'" and that "[b]y its common usage, 'child abuse' encompasses actions or inactions that also do not require physical contact." *Id.* at 996 (citing *Black's Law Dictionary* (6th ed. 1990)) (brackets omitted).

The Board also found relevant the broad definitions of "child abuse" and "sexual abuse" in 18 U.S.C. 3509(a), which encompass a wide range of conduct beyond physical contact. See *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 995-996. The Board explained that those definitions reflected "a more complete interpretation of the term 'sexual abuse of a minor' as it commonly is used, and therefore [is] a reasonable interpretation of that term." *Id.* at 996; see 18 U.S.C. 3509(a) (1994). In contrast, the Board explained that the narrower definitions of "sexual abuse" contained in 18 U.S.C. 2242, 2243, and 2246 were "too restrictive," did not reflect "the diverse types of conduct that would fit within the term as it commonly is used," and were "not consistent with Congress' intent to remove aliens who are sexually abusive toward children." *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 996. The Board made clear that it was "not adopting [Section 3509(a)] as a definitive standard or definition but invok[ing] it as a guide in identifying the types of crimes

[it] would consider to be sexual abuse of a minor" under the INA. *Ibid.* Applying that construction of "sexual abuse of a minor," the Board held that a Texas conviction for indecency with a child by exposure constituted sexual abuse of a minor, and thus an aggravated felony, under the INA. *Ibid.*

In 2002, the Board explained that an "aggravated felony" under the INA can include state misdemeanor offenses as long they satisfy the criteria in Section 1101(a)(43). *In re Small*, 23 I. & N. Dec. 448, 450 (B.I.A. 2002) (en banc). *Small* thus held that a noncitizen's conviction for sexual abuse in the second degree, in violation of N.Y. Penal Law § 130.60(2) (McKinney 2000), was an "aggravated felony" under the INA because the elements of the state offense were a categorical match to "sexual abuse of a minor," even though the state offense was only a class A misdemeanor. 23 I. & N. Dec. at 449.

In *Esquivel-Quintana* v. *Sessions*, 581 U.S. 385 (2017), this Court addressed a different aspect of the phrase "sexual abuse of a minor" under the INA: namely, whether it requires the victim to be under a certain age when the crime is defined solely by the age of the participants. See *id.* at 390. After analyzing the text of the INA, other provisions of federal law, and contemporaneous state statutes, the Court concluded that "in the context of statutory rape offenses focused solely on the age of the participants, the generic federal definition of 'sexual abuse of a minor' under § 1101(a)(43)(A) requires the age of the victim to be less than 16." *Id.* at 398; see *id.* at 390-398. The Court also explained that "because the statute, read in context, unambiguously forecloses" a different age threshold, the Court would not defer under *Chevron U.S.A. Inc.* v. *Natural Re-*

sources Defense Council, Inc., 467 U.S. 837 (1984), to the government's position that the victim's age need only be less than 18. *Esquivel-Quintana*, 581 U.S. at 397-398.

2. Petitioner is a native and citizen of Trinidad and Tobago who entered the United States as a visitor in 2001 and became a lawful permanent resident in 2015. Pet. App. 30a. In 2019, petitioner was convicted in New York state court of "sexual abuse in the second degree," in violation of N.Y. Penal Law § 130.60(2) (McKinney 2019). See Pet. App. 31a. That statute requires proof that the defendant "subject[ed] another person to sexual contact" when the other person was "[l]ess than fourteen years old." N.Y. Penal Law § 130.60(2). New York law defines "sexual contact" to mean "any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party," including "directly or through clothing." § 130.00(3).

In March 2020, the Department of Homeland Security (DHS) initiated removal proceedings against petitioner, charging him with being removable on the ground that his New York conviction constituted "sexual abuse of a minor," and thus an "aggravated felony," under the INA. Pet. App. 31a; see 8 U.S.C. 1101(a)(43)(A), 1227(a)(2)(A)(iii). DHS also maintained that petitioner was removable on the independent ground that the New York conviction was for a crime of "child abuse, child neglect, or child abandonment" under 8 U.S.C. 1227(a)(2)(E)(i). See Pet. App. 32a. The immigration judge found "that both charges of removability have been sustained" and ordered petitioner removed. *Ibid.*

3. The Board dismissed petitioner's appeal. Pet. App. 24a-29a. The Board agreed with the immigration judge's determination that Section 130.60(2) "is cate-

gorically an aggravated felony involving sexual abuse of a minor." *Id.* at 26a. The Board explained that under *Rodriguez-Rodriguez*, *supra*, "we interpret 'sexual abuse of a minor' to encompass '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.'" Pet. App. 26a-27a (citation omitted). The Board concluded that petitioner's conviction "categorically fits within the meaning of either the use of a child to engage in sexually explicit conduct or the molestation or sexual exploitation of children." *Id.* at 27a.

The Board also relied (Pet. App. 27a) on the Second Circuit's decision in *Rodriguez* v. *Barr*, 975 F.3d 188 (2020) (per curiam), cert. denied, 141 S. Ct. 1705 (2021), which held that a conviction under N.Y. Penal Law § 130.65(3) (McKinney 2010) constitutes "sexual abuse of a minor" under the INA because the state statute "requires both that the victim be under the age of eleven and that the perpetrator's contact with the victim be 'for the purpose of gratifying sexual desire.'" 975 F.3d at 194 (citation omitted). The Board observed that the language of Section 130.65(3) "is identical to that of" Section 130.60(2), save for the age of the victim (less than 11 in the former, less than 14 in the latter). Pet. App. 27a. The Board explained that "[t]his is a distinction without a difference for purposes of the aggravated felony definition, as the Supreme Court has held that sexual abuse of a minor requires the victim to be under 16 years old." *Ibid.* (citing *Esquivel-Quintana*, *supra*).

The Board also agreed with the immigration judge's determination that petitioner was removable because

his New York conviction was for "a crime of child abuse, child neglect, or child abandonment" under 8 U.S.C. 1227(a)(2)(E)(i). Pet. App. 28a.

4. The court of appeals dismissed petitioner's petition for review in part and denied it in part. Pet. App. 1a-23a.

a. The court of appeals dismissed the petition for review insofar as the petition challenged the Board's holding that petitioner's New York conviction constituted sexual abuse of a minor, and thus an aggravated felony, under the INA. Pet. App. 7a-15a. Although the INA provides that "no court shall have jurisdiction to review any final order of removal" if the noncitizen is removable by virtue of having committed an aggravated felony, 8 U.S.C. 1252(a)(2)(C), the court explained that it had jurisdiction "to determine whether this jurisdictional bar applies—*i.e.*, whether [petitioner's] New York state conviction * * * constitutes 'sexual abuse of a minor,' thereby making it an 'aggravated felony,'" Pet. App. 8a.

The court of appeals observed that in *Mugalli* v. *Ashcroft*, 258 F.3d 52 (2d Cir. 2001), it had "afforded *Chevron* deference to *Rodriguez-Rodriguez*'s interpretation of 'sexual abuse of a minor.'" Pet. App. 6a; see *id.* at 9a-10. The court acknowledged that this Court did not rely on *Chevron* deference in interpreting "sexual abuse of a minor" in *Esquivel-Quintana*, but explained that the holding in that case "was confined to 'the context of statutory rape offenses focused solely on the age of the participants,' 'leaving for another day' the interpretation of the 'generic offense' of 'sexual abuse of a minor.'" *Id.* at 10a (quoting *Esquivel-Quintana*, 581 U.S. at 397-398) (brackets omitted). The court also observed that in *Acevedo* v. *Barr*, 943 F.3d 619 (2d Cir. 2019), which was decided two years after *Esquivel-*

Quintana, it had "reaffirmed '[its] decision in *Mugalli* to grant deference'" under *Chevron* to the Board's decision in *Rodriguez-Rodriguez*, *supra*. Pet. App. 10a (citation omitted). Finally, the court explained that in *Rodriguez*, *supra*, it had "recently held that a substantively identical provision" of New York Law—Section 130.65(3)—"constitutes 'sexual abuse of a minor.'" *Id.* at 11a-12a (citation omitted).

Applying those precedents, the court of appeals determined that "[petitioner's] conviction under N.Y. Penal Law § 130.60(2) is 'sexual abuse of a minor' under the INA." Pet. App. 12a. The court observed that *Rodriguez* had already held that the state statute's definition of "sexual contact" "is a categorical match to the generic federal offense," as interpreted by the Board. *Ibid.* The court explained that the only difference between the statute at issue in this case and the one in *Rodriguez* "is the element concerning the victim's age," which "makes no difference" for "present purposes" in light of *Esquivel-Quintana*'s holding that "sexual abuse of a minor" encompasses crimes committed against victims under 16. *Ibid.*; see *id.* at 12a-13a. The court also explained that the Board had already held in *Small* "that a conviction under N.Y. Penal Law § 130.60 is 'sexual abuse of a minor' under the INA." *Id.* at 13a (citing *Small*, 23 I. & N. Dec. at 449). The court thus dismissed the petition for review with respect to that challenge. *Id.* at 15a.

The court of appeals then denied the petition for review to the extent that the petition challenged the Board's conclusion that petitioner was removable because his New York conviction was "a crime of child abuse, child neglect, or child abandonment" under 8 U.S.C. 1227(a)(2)(E)(i). Pet. App. 16a-18a. The court

explained that petitioner "ha[d] abandoned any argument" to that effect. *Id.* at 16a.

b. Judge Park concurred in the judgment. Pet. App. 19a-23a. In his view, the court of appeals' prior decision in *Acevedo* "erred in deferring to the BIA in light of [this] Court's decision in *Esquivel-Quintana*." *Id.* at 19a. Judge Park explained, however, that the court of appeals' deference to the Board on the interpretive question here is "likely harmless to the outcome of this case." *Id.* at 21a.

ARGUMENT

Petitioner renews his contention that his state conviction for "sexual abuse in the second degree" of a person who is "[l]ess than fourteen years old," N.Y. Penal Law § 130.60(2) (McKinney 2019), does not qualify as "sexual abuse of a minor" under the INA, 8 U.S.C. 1101(a)(43)(A). The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Petitioner's contention that the court of appeals improperly deferred to the Board's reasonable interpretation of "sexual abuse of a minor" also lacks merit, and the only appellate decision refusing to afford such deference—the Ninth Circuit's 2008 decision in *Estrada-Espinoza* v. *Mukasey*, 546 F.3d 1147 (en banc)—relied on reasoning that is incompatible with this Court's subsequent decision in *Esquivel-Quintana* v. *Sessions*, 581 U.S. 385 (2017).

Finally, this Court need not hold the petition for a writ of certiorari pending the forthcoming decisions in *Loper Bright Enterprises* v. *Raimondo*, No. 22-451 (oral argument scheduled for Jan. 17, 2024), and *Relentless, Inc.* v. *Department of Commerce*, No. 22-1219 (oral argument scheduled for Jan. 17, 2024), because the in-

terpretation of the INA adopted and applied by the court of appeals is the best interpretation even without deference to the Board. Nevertheless, the Court appears to be holding other petitions raising similar questions under the INA for *Loper Bright* and *Relentless*, and the Court could take that course here.

1. The court of appeals correctly held that a New York conviction under Section 130.60(2) qualifies as "sexual abuse of a minor" under the INA, 8 U.S.C. 1101(a)(43)(A).

a. As this Court recognized in *Esquivel-Quintana*, because the INA "does not expressly define sexual abuse of a minor," that phrase should be interpreted "using the normal tools of statutory interpretation." 581 U.S. at 391. In *Esquivel-Quintana*, the Court relied on the "everyday understanding" of the term, *ibid.* (citation omitted); contemporaneous dictionaries, *id.* at 392-393; "[s]urrounding provisions of the INA," *id.* at 393; other "closely related federal statute[s]," *id.* at 394; and "state criminal codes," *id.* at 395.

Here, those tools support the court of appeals' conclusion that "sexual abuse of a minor" includes, at a minimum, sexual contact with a minor "with intent to arouse or gratify the sexual desire of any person." *Rodriguez* v. *Barr*, 975 F.3d 188, 192 (2d Cir. 2020) (per curiam) (quoting *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 998 (B.I.A. 1999) (en banc)), cert. denied, 141 S. Ct. 1705 (2021); see Pet. App. 15a (relying on *Rodriguez*). This Court itself observed that, when the phrase was added to the INA in 1996, "the ordinary meaning of 'sexual abuse' included 'the engaging in sexual contact with a person who is below a specified age.'" *Esquivel-Quintana*, 581 U.S. at 391 (quoting *Merriam-Webster's Dictionary of Law* 454 (1996)).

As the court of appeals recognized, other federal laws support that understanding of "sexual abuse of a minor." See *Rodriguez*, 975 F.3d at 191. For example, 18 U.S.C. 3509 (1994) defined "sexual abuse" to include the "use * * * of a child to engage in sexually explicit conduct," and in turn defined "sexually explicit conduct" to include certain types of "intentional touching" with an intent to "arouse or gratify the sexual desire of any person." *Rodriguez*, 975 F.3d at 191-192 (brackets, citations, and ellipsis omitted). And the chapter of the federal criminal code entitled "sexual abuse" (Chapter 109A of Title 18) prohibited unlawful "sexual contact," see 18 U.S.C. 2244(b) (1994), which in turn was defined to include certain types of "intentional touching" with an intent to "arouse or gratify the sexual desire of any person," 18 U.S.C. 2246(3) (1994); cf. 18 U.S.C. 2246(2)(D) (1994) (defining "sexual act" to include certain types of "intentional touching" of "another person who has not attained the age of 16 years with an intent to * * * arouse or gratify the sexual desire of any person"). As this Court recognized in *Esquivel-Quintana*, those federal criminal provisions serve as helpful "evidence of the meaning of sexual abuse of a minor" in the INA. 581 U.S. at 395.

Finally, as the government explained in its brief in *Esquivel-Quintana*, States have protected minors from sexual abuse under a wide variety of criminal prohibitions proscribing a wide variety of conduct, including "sexual contact (including touching over clothes)," "lewd and lascivious conduct," "fondling or molestation," and "indecent exposure," among others. Gov't Br. at 21, *Esquivel-Quintana*, *supra* (No. 16-54).[2] Those

[2] As examples of those prohibitions, the government cited the following state statutes: Conn. Gen. Stat. Ann. § 53a-73a(a)(1)(A);

state laws further support the conclusion that "sexual abuse of a minor" under the INA includes, at a minimum, sexual contact with a minor for the purpose of gratifying sexual desire.

Given that definition, petitioner's New York conviction for second-degree sexual abuse categorically qualifies as "sexual abuse of a minor" under the INA. The state statute prohibits "subject[ing] another person to sexual contact" when "such other person is" "[l]ess than fourteen years old." N.Y. Penal Law § 130.60(2) (McKinney 2019). Those elements categorically fit within "sexual abuse of a minor" in the INA, which this Court has said "include[s] 'the engaging in sexual contact with a person who is below a specified age.'" *Esquivel-Quintana*, 581 U.S. at 391 (citation omitted). New York's definition of "sexual contact," as interpreted by New York courts and the Second Circuit, sweeps no broader than the definition of that term under federal law, especially given that the state law defines the proscribed conduct "by not only the physical act but also by the *mens rea* of the wrongdoer." *Rodriguez*, 975 F.3d at 194; see *id.* at 193-194; see also N.Y. Penal Law § 130.00(3). And *Esquivel-Quintana* held that even with respect to statutory-rape offenses "based solely on the age of the participants, the victim must be younger than 16" for the offense to qualify as "sexual abuse of a minor" under the INA. 581 U.S. at

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Mich. Comp. Laws Ann. § 750.520c(1); W. Va. Code Ann. §§ 61-8B-7(a)(3), 61-8B-9; Fla. Stat. Ann. § 800.04(4)(a) and (7); Iowa Code Ann. §§ 709.8, 709.14; S.C. Code Ann. § 16-3-655(C); Ind. Code Ann. § 35-42-4-9(b); Kan. Stat. Ann. § 21-5506(a), (b)(2), and (b)(3); Miss. Code Ann. § 97-5-23; Ind. Code Ann. § 35-45-4-1(b); and Ky. Rev. Stat. Ann. § 510.148. See Gov't Br. at 21 nn.29, 33, 34, 35, *Esquivel-Quintana*, *supra* (No. 16-54).

393. Section 130.60(2), which requires the victim to be younger than 14, categorically qualifies on that score as well. See *Rodriguez*, 975 F.3d at 194-195 (holding that New York first-degree sexual abuse categorically is sexual abuse of a minor under the INA).

Indeed, petitioner does not seriously dispute that, given the court of appeals' interpretation of "sexual abuse of a minor" under the INA, his New York conviction categorically qualifies as such. And even if he did, such a dispute would not warrant this Court's review in light of the Court's "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law." *Bowen* v. *Massachusetts*, 487 U.S. 879, 908 (1988); see *Elk Grove Unified School District* v. *Newdow*, 542 U.S. 1, 16 (2004) (reiterating that the Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located").

b. Instead, petitioner contends (Pet. 21-26) that "sexual abuse of a minor" under the INA is narrower than the interpretation adopted by the court of appeals. Petitioner principally contends (Pet. 23-25) that "sexual abuse of a minor" under the INA requires commission of a "sexual act," as defined in 18 U.S.C. 2246 (1994), because both 18 U.S.C. 2243 (1994), entitled "[s]exual abuse of a minor," and 18 U.S.C. 2241 (1994), entitled "[a]ggravated sexual abuse," required commission of a "sexual act." According to petitioner, because portions of Sections 2241 and 2243 were amended "in the 'same omnibus law that added sexual abuse of a minor to the INA,'" "'it is appropriate to presume that Congress intended'" the INA's reference to "sexual abuse" to include only conduct satisfying "the definition of 'sexual act' in § 2246." Pet. 24-25 (citations omitted).

That contention lacks merit. As a threshold matter, this Court has already held that in 1996, "the ordinary meaning of 'sexual abuse' included 'the engaging in *sexual contact* with a person who is below a specified age.'" *Esquivel-Quintana*, 581 U.S. at 391 (emphasis added; citation omitted). And Section 2246 itself defined "sexual contact" in a way that encompasses conduct prohibited by the New York statute under which petitioner was convicted. See 18 U.S.C. 2246(3) (1994); *Rodriguez*, 975 F.3d at 193-194. Petitioner's attempt to limit "sexual abuse" to conduct that constitutes a "sexual act," while excluding "sexual contact," therefore cannot be squared with the ordinary meaning of "sexual abuse of a minor," as set forth in *Esquivel-Quintana*.

Even setting that aside, this Court has already rejected the contention that the definitions in the federal criminal code "must be imported wholesale into the INA." *Esquivel-Quintana*, 581 U.S. at 395. In contrast to many other aggravated felonies defined in Section 1101(a)(43), which "are defined by cross-reference to other provisions of the United States Code," Subparagraph (A) of that section ("murder, rape, or sexual abuse of a minor") "does not cross-reference" another statutory provision. *Ibid.* In *Esquivel-Quintana*, the Court observed that it would be inappropriate simply to incorporate into the INA the victim-age component of Section 2243, for that would "categorically exclude the statutory rape laws of most States" and thus "'come close to nullifying'" the inclusion of "sexual abuse of a minor" in the INA. 581 U.S. at 395 (citation omitted). That such incorporation would have that effect is not surprising; federal criminal prohibitions serve purposes different from those of the INA, and Congress could reasonably conclude that the kinds of conduct that war-

rant federal imprisonment should be more severe than those that trigger removability of a noncitizen who has a state-law conviction.

Accordingly, the Court determined that Section 2243 provides merely "evidence of the meaning of sexual abuse of a minor," not "the complete or exclusive definition." *Esquivel-Quintana*, 581 U.S. at 395. The same should be true of the other provisions in Chapter 109A of the federal criminal code, on which petitioner relies. As noted above, to the extent those provisions are relevant as "evidence of the meaning of sexual abuse of a minor," *ibid.*, one of them expressly proscribed "sexual contact," 18 U.S.C. 2244(b) (1994), which comfortably encompasses the New York statute under which petitioner was convicted. So petitioner's reliance on the criminal provisions in Chapter 109A actually supports, not undermines, the reading of "sexual abuse of a minor" that the court of appeals adopted here.

Finally, petitioner contends that "[t]he 'structure of the INA' also favors a narrow construction of 'sexual abuse of a minor.'" Pet. 25 (citation omitted). According to petitioner, because that phrase appears alongside "murder" and "rape," "Congress's clear intent here was to target 'only especially egregious felonies' on par with murder and rape." *Ibid.* (citation omitted). That contention lacks merit.

As a threshold matter, as this Court has observed, nearly all of the aggravated felonies listed in Section 1101(a)(43) are "defined by cross-reference to other provisions of the United States Code." *Esquivel-Quintana*, 581 U.S. at 395. But "murder" in Subparagraph (A) is not defined by such a reference; it instead sets forth a generic offense. 8 U.S.C. 1101(a)(43)(A) (1994). Accordingly, Congress might have chosen to

"insert[] ', rape, or sexual abuse of a minor' after 'murder'" in Subparagraph (A) because that was the subparagraph containing generic crimes, and not because Congress wanted to limit "sexual abuse of a minor" to the subset of such abuse that would be considered as egregious as rape and murder. IIRIRA § 321(a)(1), 110 Stat. 3009-627.

Even setting that aside, Congress could easily conclude that sexual contact with an intent to arouse or gratify sexual desire is an especially serious offense when committed against children younger than 16, who constitute a particularly vulnerable group. As petitioner himself observes (Pet. 25), when IIRIRA added "sexual abuse of a minor" to the INA's expanded list of aggravated felonies, the same omnibus act included other laws that addressed sexual harms to children. See Child Pornography Prevention Act of 1996, Pub. L. No. 104-28, Div. A, Tit. I, § 121, 110 Stat. 3009-26; Amber Hagerman Child Protection Act of 1996, Pub. L. No. 104-208, Div. A, Tit. I, § 121(7), 110 Stat. 3009-31. Congress was manifestly concerned about the gravity of such conduct.

In addition, Congress added "sexual abuse of a minor" to the INA as part of a series of enlargements of the types of convictions and conduct that would qualify as aggravated felonies. For example, Congress reduced the amount of funds necessary for money-laundering offenses to qualify as aggravated felonies from $100,000 to $10,000, and for fraud and tax-evasion offenses from $200,000 to $10,000. See IIRIRA § 321(a)(2) and (7), 110 Stat. 3009-627 to 3009-628. It reduced the minimum term of imprisonment for a variety of offenses—including run-of-the-mill crimes like simple theft, document fraud, and trafficking in vehicles with altered

identification numbers—from five years to one year. See § 321(a)(3), (4), (10), and (11), 110 Stat. 3009-627 to 3009-628. And it expressly made all aspects of the definition of aggravated felony applicable "regardless of whether the conviction was entered before, on, or after [IIRIRA's effective date]." § 321(b), 110 Stat. 3009-628. In other words, Congress's "comprehensive immigration reform" efforts, *Esquivel-Quintana*, 581 U.S. at 391, resulted in a substantial expansion of the circumstances in which noncitizens would be rendered removable and ineligible for cancellation of removal—reaching far beyond convictions for crimes "on par with murder and rape" (Pet. 25). Petitioner's narrow interpretation of "sexual abuse of a minor" is inconsistent with Congress's handiwork.

c. Petitioner suggests (Pet. 19-21) that the court of appeals nevertheless erred because it had adopted its interpretation of "sexual abuse of a minor" by deferring under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the Board's reasonable interpretation, in *Rodriguez-Rodriguez*, *supra*, of that statutory phrase. As a threshold matter, that issue does not warrant this Court's review because, as explained above, the Board has adopted the best reading of the statutory text: The phrase "sexual abuse of a minor" unambiguously encompasses sexual contact with a victim under 14 for the purpose of gratifying sexual desire. Accordingly, the court of appeals would have reached the same conclusion even had it not deferred to the Board.

In any event, the court of appeals did not err in applying *Chevron*. The decision below simply applied the court's 2001 holding in *Mugalli* v. *Ashcroft*, 258 F.3d 52 (2d Cir.), which itself followed this Court's unanimous

1999 decision in *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, holding "that the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication." *Mugalli*, 258 F.3d at 55 (quoting *Aguirre-Aguirre*, 526 U.S. at 425).

That holding gives effect to Congress's express directive that the "determination and ruling by the Attorney General with respect to all questions of law [under the INA] shall be controlling." *Aguirre-Aguirre*, 526 U.S. at 424 (citation omitted); see 8 U.S.C. 1103(a)(1); 8 C.F.R. 1003.0 (delegating authority to the Board). It also reflects the principle "that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" *Aguirre-Aguirre*, 526 U.S. at 425 (citation omitted). Since the unanimous decision in *Aguirre-Aguirre*, this Court has consistently held that courts should defer to the Board's reasonable interpretations of ambiguous INA provisions. See, *e.g.*, *Holder* v. *Martinez Gutierrez*, 566 U.S. 583, 591 (2012); *Negusie* v. *Holder*, 555 U.S. 511, 516-517 (2009); see also, *e.g.*, *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2122 (2018) (Alito, J., dissenting); *Scialabba* v. *Cuellar de Osorio*, 573 U.S. 41, 56 (2014) (plurality opinion); *Cuellar de Osorio*, 573 U.S. at 76 (Roberts, C.J., concurring in the judgment); *Cuellar de Osorio*, 573 U.S. at 82 (Sotomayor, J., dissenting).

Petitioner contends (Pet. 1-2, 19-21) that *Esquivel-Quintana* forecloses *Chevron* deference in this context. But this Court has made clear that whether to defer under *Chevron* first requires asking "whether Congress has directly spoken to the *precise* question at issue."

Chevron, 467 U.S. at 842 (emphasis added); see *id.* at 843 & n.9. In *Esquivel-Quintana*, the Court addressed the precise question of whether "sexual abuse of a minor" encompasses "statutory rape offenses focused solely on the age of the participants" where the victim is 16 or older. 581 U.S. at 398. The Court determined that the INA unambiguously excludes such offenses. *Ibid.* This case, by contrast, involves a different question: whether "sexual abuse of a minor" categorically excludes sexual contact with a victim under 14 for the purpose of gratifying sexual desire. Because those are different questions, the Court's decision in *Esquivel-Quintana* does not foreclose *Chevron* deference here. See *Acevedo* v. *Barr*, 943 F.3d 619, 623 (2d Cir. 2019) (explaining that the court's "decision in *Mugalli* to grant deference to the BIA in its" interpretation of sexual abuse of a minor "survives *Esquivel-Quintana*").

Contrary to petitioner's contention, the Second Circuit in *Mugalli* did not "reflexive[ly]" defer to the Board's interpretation by "'wav[ing] the white flag of ambiguity.'" Pet. 19 (citation omitted). *Mugalli* made clear its understanding that *Chevron* deference is unwarranted if "Congress's intent is clear" *after* "employing traditional tools of statutory interpretation." 258 F.3d at 55 (citation omitted). The Second Circuit applied those traditional tools, looking to the statutory text and surrounding provisions of federal law. See *id.* at 55-56. Moreover, the court spent four pages discussing the Board's own application of those traditional tools, recounting the agency's analysis of the text, contemporaneous dictionaries, related provisions of federal law, common usage, and relevant legislative history. See *id.* at 56-60. That was hardly a reflexive deference.

2. Petitioner does not contend that the holding below conflicts with any decision of this Court or another court of appeals. Indeed, he does not identify any court that has held that "sexual abuse of a minor" under the INA categorically *excludes* offenses requiring sexual contact with a victim under 14 for the purpose of gratifying sexual desire. Cf. *Esquivel-Quintana*, 581 U.S. at 391 (explaining that sexual abuse of a minor under the INA "include[s] 'the engaging in sexual contact with a person who is below a specified age'") (citation omitted).

Instead, petitioner asserts that there is a "deep and intractable conflict" in the lower courts on whether to defer to the Board's reasonable interpretation of sexual abuse of a minor. Pet. 11 (capitalization omitted); see Pet. 11-16. That assertion is incorrect because petitioner identifies only one court of appeals (the Ninth Circuit) that has refused to defer to the Board's interpretation of "sexual abuse of a minor," and that court's reasoning has been undermined by this Court's subsequent decision in *Esquivel-Quintana*.

Petitioner erroneously contends (Pet. 13-14) that the Fourth, Eighth, and Tenth Circuits have refused to defer to the Board when interpreting "sexual abuse of a minor." In fact none of those courts has rejected deference. In *Amos* v. *Lynch*, 790 F.3d 512 (2015), the Fourth Circuit simply "disagree[d]" with other courts of appeals about the scope of the Board's holding in *Rodriguez-Rodriguez*. *Id.* at 519. *Amos* viewed the Board as having decided only that the generic federal offense of sexual abuse of a minor under the INA (1) "does not require as an element that the perpetrator have physical contact with the victim," and (2) categorically encompasses the Texas offense at issue there. *Id.*

at 520. As to those holdings, *Amos* was clear that it *would* defer under *Chevron*. See *ibid.* The same is true of the Tenth Circuit's decision in *Rangel-Perez* v. *Lynch*, 816 F.3d 591, 598 (2016). And the Eighth Circuit in *Garcia-Urbano* v. *Sessions*, 890 F.3d 726 (2018), did not discuss *Chevron* or deference at all; the closest it came was its observation that "Congress did not define 'sexual abuse of a minor,' and the Board has interpreted the phrase through case-by-case adjudication." *Id.* at 728. None of those decisions supports petitioner's contention that "[t]he Board's overbroad interpretation of 'sexual abuse of a minor' receives no deference in [those] circuits." Pet. 12.

The only decision that supports petitioner's contention is the Ninth Circuit's 2008 decision in *Estrada-Espinoza*, *supra*, but that case no longer retains vitality. There, the Ninth Circuit held that it did not need to determine the "the generic elements of the crime 'sexual abuse of a minor'" in the INA because "Congress has enumerated the elements of the offense of 'sexual abuse of a minor' at 18 U.S.C. § 2243." 546 F.3d at 1152; see *ibid.* (stating that "Congress has already supplied [the definition]" of sexual abuse of a minor in Section 2243); *id.* at 1155 (stating that "Congress has defined the crime of 'sexual abuse of a minor'" in Section 2243). On that basis, the court reasoned that under "the familiar *Chevron* analysis, [it] would necessarily conclude, at step one," that *Rodriguez-Rodriguez* does not warrant deference because "Congress has spoken directly to the issue." *Id.* at 1157 n.7. But in *Esquivel-Quintana*, this Court made clear that Section 2243 and other federal criminal provisions can serve as helpful "evidence of the meaning of sexual abuse of a minor" in the INA—but they do not themselves define that phrase. 581 U.S. at

395. The Ninth Circuit's holding in *Estrada-Espinoza* is thus incompatible with this Court's subsequent decision in *Esquivel-Quintana*.

The Ninth Circuit also refused to defer on the ground that "*Rodriguez-Rodriguez* did not interpret a statute within the meaning of *Chevron*, but only provided a 'guide' for later interpretation." *Estrada-Espinoza*, 546 F.3d at 1157. In the court's view, that made the Board's decision more akin to a "policy statement[]"that "lack[s] the force of law." *Ibid.* (citation omitted). That reasoning is unconvincing. As this Court has made clear, *Chevron* deference is warranted for case-by-case agency determinations that are "the fruits of * * * formal adjudication," as the published and precedential decision in *Rodriguez-Rodriguez* was. *United States* v. *Mead Corp.*, 533 U.S. 218, 230 (2001); see *id.* at 230 n.12 (citing *Aguirre-Aguirre*, 526 U.S. at 423-425); 8 C.F.R. 1003.1(g) (providing that decisions designated by the Board as precedential "will be published and serve as precedents in all proceedings involving the same issue or issues").

Moreover, the Ninth Circuit did not cite *In re Small*, 23 I. & N. Dec. 448 (B.I.A. 2002) (en banc)—a precedential decision squarely holding that an offense under N.Y. Penal Law § 130.60(2) (McKinney 2000) constitutes "sexual abuse of a minor," and thus an "aggravated felony," under the INA. *Small*, 23 I. & N. Dec. at 449. So even under the Ninth Circuit's cramped view, the Board's decision in *Small* would be entitled to deference in that court. And because petitioner's conviction was under the same statute that the Board addressed in *Small*, he would not be entitled to relief even if his case had arisen in the Ninth Circuit. That is yet another reason that the outlier decision in *Estrada-*

Espinoza does not create a circuit conflict with the decision below that would warrant this Court's review.

3. In any event, even if the Court were inclined to review a perceived conflict, this case would be an inappropriate vehicle in which to do so because, as explained above, the INA unambiguously encompasses petitioner's New York offense. Accordingly, petitioner would not be entitled to relief even if *Chevron* deference were entirely rejected, as Judge Park recognized in his opinion concurring in the judgment. See Pet. App. 21a (explaining that even if the majority was too "quick" to "resort to statutory ambiguity and agency deference," it was "likely harmless to the outcome of this case").

Indeed, even the circuits on which petitioner relies seem to have been willing to accept the proposition that "sexual abuse of a minor" under the INA includes offenses that do not require the perpetrator to make physical contact with the victim. See, *e.g.*, *Rangel-Perez*, 816 F.3d at 600; *Amos*, 790 F.3d at 521. It follows *a fortiori* that those circuits would accept that "sexual abuse of a minor" under the INA includes offenses, like the New York statute under which petitioner was convicted, requiring sexual contact with a victim under 14 for the purpose of gratifying sexual desire.

4. Finally, petitioner requests (Pet. 10-11) that the petition for a writ of certiorari be held pending this Court's decision in *Loper Bright*, *supra* (No. 22-451), in which the Court will consider whether to "overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency." Pet. at i-ii, *Loper Bright*, *supra* (No. 22-451). The Court will

consider a materially identical question in *Relentless*, *supra* (No. 22-1219).

There is no need to hold this petition for the decisions in those cases. This case obviously does not implicate any question about statutory silence or controversial powers because the INA contains an *express* delegation of authority, providing that the "determination and ruling by the Attorney General with respect to all questions of law" arising from "the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of" noncitizens "shall be controlling." 8 U.S.C. 1103(a)(1). And even if the Court were to overrule *Chevron* in its entirety, it would not make a difference to the outcome of petitioner's case because, as already explained, "sexual abuse of a minor" under the INA unambiguously encompasses sexual contact with a victim under 14 for the purpose of gratifying sexual desire. See *Esquivel-Quintana*, 581 U.S. at 391 (explaining that sexual abuse of a minor under the INA "include[s] 'the engaging in sexual contact with a person who is below a specified age'") (citation omitted).

That said, the Court appears to be holding other petitions for writs of certiorari posing somewhat similar interpretive questions under the INA, presumably pending the forthcoming decisions in *Loper Bright* and *Relentless*. See, *e.g.*, *Diaz-Rodriguez* v. *Garland*, No. 22-863 (filed Mar. 8, 2023); *Bastias* v. *Garland*, No. 22-868 (filed Mar. 8, 2023); *Kerr* v. *Garland*, No. 22-867 (filed Mar. 8, 2023). Accordingly, the Court may wish to take the same course here.

CONCLUSION

The petition for a writ of certiorari should be denied. Alternatively, the Court may wish to hold the petition pending the decisions in *Loper Bright Enterprises* v. *Raimondo*, No. 22-451 (oral argument scheduled for Jan. 17, 2024), and *Relentless, Inc.* v. *Department of Commerce*, No. 22-1219 (oral argument scheduled for Jan. 17, 2024), and dispose of it as appropriate thereafter.

Respectfully submitted.

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