No. 17-58

In the Supreme Court of the United States

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL,
PETITIONER

v.

RAFAEL ANTONIO LARIOS-REYES

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Board of Immigration Appeals permissibly concluded that respondent's conviction for violating Md. Code Ann., Crim. Law § 3-307(a)(3) (LexisNexis 2012), which prohibits "sexual contact with another if the victim is under the age of 14 years, and the person performing the sexual contact is at least 4 years older than the victim," was a conviction for "sexual abuse of a minor," 8 U.S.C. 1101(a)(43)(A).

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The Acting Solicitor General, on behalf of the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-25a) is reported at 843 F.3d 146. The decision of the Board of Immigration Appeals (App., *infra*, 26a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 2016. A petition for rehearing was denied on February 7, 2017 (App., *infra*, 32a). On May 1, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 7, 2017. On May 24, 2017, the Chief Justice further extended

the time to and including July 7, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this petition. App., *infra*, 33a-39a.

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, any alien who is convicted after admission into the United States of an "aggravated felony" is deportable. 8 U.S.C. 1227(a)(2)(A)(iii). Congress has further provided that an alien convicted of an aggravated felony is ineligible for certain forms of discretionary relief from removal, 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). The INA defines "aggravated felony" to include "murder, rape, or sexual abuse of a minor." 8 U.S.C. 1101(a)(43)(A). The INA does not further define "sexual abuse of a minor."

The Board of Immigration Appeals (BIA or Board) has interpreted the statutory phrase "sexual abuse of a minor" in a series of published decisions. First, the Board interpreted the term "sexual abuse" by reference to the definition provided by 18 U.S.C. 3509(a)(8), 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." *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 995-996 (B.I.A. 1999) (quoting 18 U.S.C. 3509(a)(8)). Second, the Board concluded that the term "minor," as used in 8 U.S.C. 1101(a)(43)(A), denotes an individual under

18 years of age. *In re V-F-D-*, 23 I. & N. Dec. 859, 861-863 (B.I.A. 2006).

Finally, the Board applied those guiding definitions to the subset of "sexual abuse of a minor" offenses commonly referred to as "statutory rape." *In re Esquivel-Quintana*, 26 I. & N. Dec. 469, 469 (B.I.A. 2015). The Board concluded that a statutory provision that encompasses 16- and 17-year-old victims must contain an age differential of at least three years between victim and perpetrator in order for that offense to categorically constitute "sexual abuse of a minor" under the INA's aggravated felony definition. *Id.* at 473-477. Following the Board's decision in that case, the Sixth Circuit denied a petition for review. See *Esquivel-Quintana* v. *Lynch*, 810 F.3d 1019 (2016).

This Court granted a petition for a writ of certiorari in that case and reversed. *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1567 (2017). The Court determined that, "in the context of statutory rape offenses that criminalize sexual intercourse based solely on the age of the participants, the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16." *Id.* at 1568. For that conclusion, the Court relied on a variety of factors, including a dictionary definition showing that the age of consent for statutory rape offenses in 1996—when the term "sexual abuse of a minor" was added to the INA—was typically understood to be 16 years old, *id.* at 1569, as well as the structure of the INA, which "suggests that sexual abuse of a minor encompasses only especially egregious felonies," *id.* at 1570.

Of particular note for present purposes, the Court also looked to "[a] closely related federal statute, 18 U.S.C. § 2243," which in the Court's view "provide[d]

further evidence" of the meaning of the term "sexual abuse of a minor." *Esquivel-Quintana*, 137 S. Ct. at 1570; see *ibid.* (Section 2243 "contains the only definition of that phrase in the United States Code."). As originally enacted, Section 2243 prohibited sexual activity with a person between the ages of 12 and 16 years old "if the perpetrator was at least four years older than the victim," and the provision was expanded in 1996 to include victims younger than 12 years of age. *Ibid.* Although the Court did not look to Section 2243 to "provid[e] the complete or exclusive definition" of sexual abuse of a minor, the Court found its adoption of a 16-year age of consent to be significant. *Id.* at 1571. Finally, the Court noted that laws of most States, as they existed in 1996, set an age of consent at 16 years for statutory rape offenses predicated solely on the age of the participants. *Id.* at 1571-1572.

2. Respondent, a native and citizen of El Salvador, was admitted to the United States as a lawful permanent resident in 1999. Administrative Record (A.R.) 822. In August 2013, respondent was charged with committing sexual crimes against a child for whom his mother babysat. A.R. 762-763, 765, 767. Respondent admitted that, when the child was approximately three years old, respondent had her touch his genitals. A.R. 767. On another occasion, when the child was four years old, respondent induced the child to perform oral sex on him. A.R. 768. Respondent was 18 years old at the time. *Ibid.*

In May 2014, respondent pleaded guilty to the felony of "Sexual offense in the third degree" under Md. Code Ann., Crim. Law § 3-307 (LexisNexis 2012). See App., *infra*, 2a. A conviction under that provision authorizes a sentence of up to ten years of imprisonment.

Md. Code Ann., Crim. Law § 3-307(b) (LexisNexis 2012). Respondent received a suspended sentence of 364 days and a five-year term of probation. A.R. 772. Respondent was ordered to refrain from any unsupervised contact with females under the age of 16 years and was ordered to register as a sex offender and receive treatment from a medical professional. A.R. 772-773.

3. In July 2014, respondent failed to report to his probation officer or to register as a sexual offender, A.R. 775-781, and he was arrested approximately one month later, A.R. 757. Following his arrest, the Department of Homeland Security charged respondent with being removable as an alien convicted of an aggravated felony offense—namely, sexual abuse of a minor. A.R. 822. An immigration judge sustained the charge of removal and ordered respondent removed. App., *infra*, 5a.

4. The Board dismissed respondent's appeal. App., *infra*, 26a-31a. The Board held that the statute under which he had been convicted (§ 3-307) is a divisible statute and that the available documents of conviction established that respondent had been convicted under Subsection (a)(3) of § 3-307. *Id.* at 29a. That provision forbids any person from "engag[ing] in sexual contact with another if the victim is under the age of 14 years, and the person performing the sexual contact is at least 4 years older than the victim." The Board noted that, in its prior decision in *In re Esquivel-Quintana*, the Board had held that an offense involving sexual intercourse with a minor under the age of 18 categorically constitutes "sexual abuse of a minor," so long as there is an age differential of at least three years between the victim and perpetrator. *Id.* at 29a-30a. The Board thus con-

cluded that respondent's offense categorically constitutes "sexual abuse of a minor," notwithstanding that the Maryland law is not limited to intercourse but rather includes "sexual contact." *Id.* at 30a.

5. The court of appeals granted a petition for review of the Board's decision. App., *infra*, 1a-25a. The court agreed with the Board that, under the modified categorical approach, § 3-307 is divisible into "alternative sets of elements that create multiple versions of the crime of third-degree sexual offense." *Id.* at 11a. Reviewing the documents of conviction in respondent's case, the court further held that those documents established that respondent had pleaded guilty to violating Subsection (a)(3) of the statute. *Id.* at 12a-13a.

In deciding whether a conviction under § 3-307(a)(3) categorically encompasses conduct that constitutes "sexual abuse of a minor" under 8 U.S.C. 1101(a)(43)(A), the court of appeals declined to defer to the Board's prior decisions laying out a framework for determining whether a state offense qualifies as "sexual abuse of a minor." App., *infra*, 14a-19a. Deference was not warranted, according to the court, because the Board had not offered a generic definition of the offense, but instead had only pointed to provisions to "guide" its decision-making, on a case-by-case basis, in determining whether a specific state statute encompassed the relevant conduct. *Id.* at 16a.

The court of appeals then proceeded to apply its own definition of "sexual abuse of a minor." App., *infra*, 19a-24a. The court relied on its prior decision in *United States* v. *Diaz-Ibarra*, 522 F.3d 343 (4th Cir. 2008), which had construed that term, as used in the United States Sentencing Guidelines, to mean the "perpetrator's physical or nonphysical misuse or maltreatment of

a minor for a purpose associated with sexual gratification." *Id.* at 352 (quoting *United States* v. *Padilla-Reyes*, 247 F.3d 1158, 1163 (11th Cir.), cert. denied, 534 U.S. 913 (2001)); see App., *infra*, 19a-22a.

Applying that definition to the Maryland statute, the court of appeals held that § 3-307(a)(3) was not a categorical match with "sexual abuse of a minor." App., *infra*, 22a-24a. Under Maryland law, "sexual contact" is defined disjunctively to include "an intentional touching of the victim's or actor's genital, anal, *or other intimate area* for sexual arousal or gratification, *or for the abuse of either party*." Md. Code Ann., Crim. Law § 3-301(f)(1) (LexisNexis 2012) (emphasis added). Based on its review of Maryland case law, the court concluded that the "buttocks are an intimate area within the meaning of" the statute. App., *infra*, 23a (quoting *Bible* v. *State*, 982 A.2d 348, 358 (Md. 2009)). The court also determined that, under Maryland law, "a touching for the purpose of 'abuse' under § 3-307 refers to * * * a touching of another person's intimate area for a purpose that is harmful, injurious or offensive." *Ibid.* (brackets omitted) (quoting *LaPin* v. *State*, 981 A.2d 34, 43 (Md. Ct. Spec. App. 2009)). Thus, the court explained, "a conviction could be sustained under § 3-307(a)(3) based on an adult's intentional touching of a minor's buttocks for a 'harmful, injurious or offensive'—but not sexually gratifying—purpose." *Ibid.* Because a conviction may be entered under § 3-307(a)(3) even where an element of sexual gratification is absent, the court concluded that such a conviction is not a categorical match to the generic offense of "sexual abuse of a minor." *Id.* at 24a. The court therefore vacated the order of removal. *Id.* at 25a.

6. The government filed a petition for panel rehearing. Among other things, the government argued that the court of appeals' decision failed to comply with the "ordinary remand rule." Pet. for Reh'g 1. Under that rule, "once a reviewing court finds agency error, 'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" *Ibid.* (brackets omitted) (quoting *INS* v. *Orlando Ventura*, 537 U.S. 12, 16 (2002) (per curiam)). The government argued that, in accordance with the ordinary remand rule, after the court determined that the Board had not yet exercised its interpretive authority to define "sexual abuse of a minor," the court should have remanded for further agency proceedings, rather than create and apply its own definition of the term in the first instance. *Id.* at 1-2, 4-9. The panel denied the government's rehearing petition without comment on February 7, 2017. App., *infra*, 32a.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals should be vacated, and the case should be remanded for further proceedings in light of this Court's ruling in *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562 (2017).[*] In *Esquivel-Quintana*, the Court addressed the meaning of the term "sexual abuse of a minor" in 8 U.S.C. 1101(a)(43)(A), the same INA provision under which the Board found respondent to be removable, and it identified several considerations relevant to that term's

[*] See, *e.g.*, *Flores* v. *United States*, No. 16-6059, 2017 WL 2407470 (June 5, 2017) (granting the petition, vacating the judgment below, and remanding "for further consideration in light of *Esquivel-Quintana*"); *Lauriano-Esteban* v. *United States*, No. 16-7553, 2017 WL 132400 (June 5, 2017) (same); *Paz-Cruz* v. *United States*, No. 16-6747, 2017 WL 2407472 (June 5, 2017) (same).

proper interpretation. The court of appeals, which issued its decision in this case before *Esquivel-Quintana*, should be given an opportunity to reconsider its judgment in light of that intervening development.

In addition, in disposing of this case, the court of appeals failed to apply the "ordinary remand rule." *Gonzales* v. *Thomas*, 547 U.S. 183, 187 (2006) (per curiam) (internal quotation marks omitted). Having concluded that the Board had not properly exercised its authority in interpreting Section 1101(a)(43)(A), the court should have "remand[ed] to the agency for additional * * * explanation." *Id.* at 186 (quoting *INS* v. *Orlando Ventura*, 537 U.S. 12, 16 (2002) (per curiam)). Instead, the court devised and applied its own interpretation of "sexual abuse of a minor." That error furnishes an additional reason for vacating the court's decision.

1. As this Court has explained, "[w]here intervening developments * * * reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR [grant, vacate, and remand] order is * * * potentially appropriate." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam). Accordingly, the "Court often 'GVRs' a case * * * when [it] believe[s] that the lower court should give further thought to its decision in light of an opinion of this Court that (1) came after the decision under review and (2) changed or clarified the governing legal principles in a way that could possibly alter the decision of the lower court." *Flowers* v. *Mississippi*, 136 S. Ct. 2157, 2157 (2016) (Alito, J., dissenting from the decision to grant, vacate, and remand); see *Lawrence*, 516 U.S. at 168-169.

This case meets that standard. The court of appeals ruled in this case that respondent's prior state offense under Md. Code Ann., Crim. Law § 3-307(a)(3) (LexisNexis 2012) did not constitute "sexual abuse of a minor," within the meaning of 8 U.S.C. 1101(a)(43)(A), because "a conviction could be sustained under § 3-307(a)(3) based on an adult's intentional touching of a minor's buttocks for a 'harmful, injurious or offensive' —but not sexually gratifying—purpose." App., *infra*, 23a. After that ruling, this Court issued its decision in *Esquivel-Quintana* interpreting the same federal provision. In so doing, the Court relied on factors that the court of appeals in this case did not consider. There is thus "a reasonable probability that the decision below" would have come out differently if the court of appeals had the benefit of this Court's guidance at the time of its ruling. *Lawrence*, 516 U.S. at 167.

Most significantly, the Court in *Esquivel-Quintana* relied on "[a] closely related federal statute, 18 U.S.C. § 2243," which in the Court's view "provide[d] * * * evidence" of the meaning of the term "sexual abuse of a minor." 137 S. Ct. at 1570. As the Court explained, Section 2243 "contains the only definition of that phrase [*i.e.*, 'sexual abuse of a minor'] in the United States Code." *Ibid.* As originally enacted, Section 2243 prohibited sexual acts "with a person between the ages of 12 and 16 if the perpetrator was at least four years older than the victim," and the provision was amended in 1996 to cover victims younger than 12 years old. *Ibid.* The Court thus viewed the 16-year age of consent adopted by Section 2243 as providing useful "evidence of the meaning of sexual abuse of a minor," at least as applied to state offenses that forbid sexual intercourse "predicated solely on the age of the participants." *Id.* at 1570-

1571. The Court declined to rely on Section 2243 as "providing the complete or exclusive definition" of the term, however, particularly in regard to the four-year age differential required by that provision: "Combining that element with a 16-year age of consent would categorically exclude the statutory rape laws of most States." *Id.* at 1571.

In this case, the court of appeals did not consider the relevance of Section 2243. Had it done so, there is a substantial probability that it would have reached a different conclusion: *Esquivel-Quintana* suggests that the term "sexual abuse of a minor" encompasses (though is not limited to) offenses that share the key features of Section 2243—*i.e.*, at a minimum it includes offenses that involve sexual activity with minors less than 16 years old if the perpetrator is more than four years older than the victim. The state offense at issue in this case (§ 3-307(a)(3)) forbids "sexual contact with another if the victim is under the age of 14 years, and the person performing the sexual contact is at least 4 years older than the victim." Respondent's state offense thus includes the same age differential as Section 2243 (four years) but a substantially *lower* age of consent (14 rather than 16 years old). Under the reasoning of *Esquivel-Quintana*, the comparison with Section 2243 suggests that § 3-307(a)(3) constitutes sexual abuse of a minor. Indeed, in that case the Court expressly declined to adopt Section 2243 as "the complete or exclusive definition" of sexual abuse of a minor out of concern that doing so would produce an unduly *stringent* definition. 137 S. Ct. at 1571.

The Court's focus in *Esquivel-Quintana* on analogous federal criminal provisions also undermines the court of appeals' decision in this case in a more specific

way. The court of appeals concluded that § 3-307(a)(3) does not constitute sexual abuse of a minor because it permits conviction absent proof that the conduct was motivated by a desire for sexual gratification, which the court described as "central to the offense of sexual abuse of a minor." App., *infra*, 24a (quoting *United States* v. *Alfaro*, 835 F.3d 470, 476 (4th Cir. 2016)). Section 2243(a) does not require such proof, likely because it covers conduct ("a sexual act") that is thought to be inherently sexual in nature. See 18 U.S.C. 2246(2) (defining "sexual act"). A neighboring federal offense, however, prohibits "sexual contact" between a minor less than 16 years of age and a person more than four years older. 18 U.S.C. 2244(a)(3) ("Abusive sexual contact"). "[T]he term 'sexual contact,'" in turn, is defined to include "the intentional touching, either directly or through the clothing," of another's buttocks with the intent to gratify the perpetrator's sexual desires *or* "with an intent to abuse, humiliate, harass, [or] degrade." 18 U.S.C. 2246(3). Federal law thus protects minors against "sexual contact"—defined to include the touching of a minor's buttocks—even where no element of sexual gratification is present, such that conduct that violates § 3-307(a)(3) necessarily violates Section 2244(a)(3) as well.

Additionally, the Court's decision in *Esquivel-Quintana* "look[ed] to state criminal codes for additional evidence about the generic meaning of sexual abuse of a minor." 137 S. Ct. at 1571. The Court noted that, in 1996, 31 States and the District of Columbia "set the age of consent at 16 for statutory rape offenses that hinged solely on the age of the participants." *Ibid.* The prevalence in state statutes of a 16-year age of consent, the Court explained, "offer[ed] useful context" that

helped "aid [its] interpretation of 'sexual abuse of a minor.'" *Id.* at 1571 n.3; see *id.* at 1571-1572.

The court of appeals in this case, however, did not look to the state criminal codes in effect at the time that "sexual abuse of a minor" was added to the aggravated felony definition. The court did not ask, for instance, whether an element of "intent to gratify sexual urges" was a common feature of such state statutes. App., *infra*, 24a (quoting *Alfaro*, 835 F.3d at 476). In fact, it appears that in 1996, some States prohibited sexual contact with young minors for *any* reason, see, *e.g.*, Alaska Stat. §§ 11.41.438(a)(1), 11.81.900(b)(54) (1996); Haw. Rev. Stat. §§ 707-732(1)(b), 707-700 (1993); N.M. Stat. Ann. § 30-9-13(A)(1) (LexisNexis 1994), while many others prohibited such contact for the purpose of sexual gratification *or* for another purpose, such as to abuse, offend, or injure, see, *e.g.*, Conn. Gen. Stat. §§ 53a-73a(a)(1)(A), 53a-65(3) and (8) (1995); D.C. Code §§ 22-4109, 22-4101(9) (1996); Me. Rev. Stat. Ann. tit. 17-A, §§ 255(1)(C), 251(1)(D) (Supp. 1996); Minn. Stat. §§ 609.345(1)(a) and (b), 609.341(5) and (11) (1996). See also *United States* v. *Perez-Perez*, 737 F.3d 950, 958 (4th Cir. 2013) (Davis, J., concurring) (criticizing the Fourth Circuit's interpretation "of sexual abuse of a minor [as being] untethered even from the criminal law of [the] several states"), cert. denied, 135 S. Ct. 102 (2014).

Finally, requiring an element of sexual gratification is inconsistent with the "ordinary meaning of 'sexual abuse,'" as described by this Court in *Esquivel-Quintana*. 137 S. Ct. at 1569. There, the Court relied on a contemporary dictionary that defined the term to include "engaging in sexual contact with a person who is below a specified age or who is incapable of giving consent because of age or mental or physical incapacity." *Ibid.*

(quoting *Merriam-Webster's Dictionary of Law* 454 (1996)). That definition, which matches the conduct criminalized by § 3-307(a)(3), does not require—or even suggest—that the prohibited contact must be motivated by a desire for sexual gratification.

In sum, *Esquivel-Quintana* clarified the governing legal principles for determining what constitutes "sexual abuse of a minor" under 8 U.S.C. 1101(a)(43)(A). "[I]f given the opportunity for further consideration" in light of *Esquivel-Quintana*, there is a "reasonable probability" that the court of appeals would render a different ruling. *Lawrence*, 516 U.S. at 167. The "appropriate" course under these circumstances is therefore to vacate the judgment below and remand to the court of appeals for further proceedings. *Ibid.* That court may then consider the effect on its decision of the legal principles articulated in *Esquivel-Quintana*. In the alternative, the court of appeals may—and, for the reasons stated in the next section, we believe the court should—remand the case to the Board to permit further agency consideration in the first instance.

2. Vacatur of the court of appeals' decision is also warranted because of its failure to apply the "ordinary remand rule." *Thomas*, 547 U.S. at 187 (internal quotation marks omitted).

This Court has declared it "well settled that 'principles of *Chevron* deference are applicable to this statutory scheme.'" *Negusie* v. *Holder*, 555 U.S. 511, 516 (2009) (quoting *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999)); see *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (opinion of Kagan, J.) ("Principles of *Chevron* deference apply when the BIA interprets the immigration laws."); *id.* at 2214-2216 (Roberts, C.J.,

concurring in the judgment). The INA expressly confers upon the Attorney General the authority and responsibility to conduct removal proceedings, see 8 U.S.C. 1103(g), 1229a(a), and it provides that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling," *Aguirre-Aguirre*, 526 U.S. at 424 (quoting 8 U.S.C. 1103(a)(1)). Because the Attorney General has vested his adjudicative and interpretive authority in the Board (while retaining ultimate authority), "the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication." *Id.* at 425 (citation and internal quotation marks omitted).

While a final order of removal issued by the Attorney General or his designee (the Board) is subject to judicial review, 8 U.S.C. 1252(a), established principles of administrative law limit the judicial role. "[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration." *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952). Thus, "[w]hen the BIA has not spoken on 'a matter that statutes place primarily in agency hands,' [the] ordinary rule is to remand to 'give the BIA the opportunity to address the matter in the first instance in light of its own expertise.'" *Negusie*, 555 U.S. at 517 (brackets omitted) (quoting *Orlando Ventura*, 537 U.S. at 16-17); see *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985) ("[T]he proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."). That principle, known as the ordinary remand rule, ensures that judicial review of administrative authority is confined to its proper scope, in recognition that "judicial

judgment cannot be made to do service for an administrative judgment." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943); see *Orlando Ventura*, 537 U.S. at 16 ("Nor can an appellate court intrude upon the domain which Congress has exclusively entrusted to an administrative agency.") (citation, ellipsis, and internal quotation marks omitted).

This Court has applied the ordinary remand rule in cases in which an order of removal issued by the Board has been determined to rest on a legally erroneous ground, or where the Board has otherwise failed to properly exercise its authority. In *Negusie*, for example, the Court determined that the Board had incorrectly believed itself to be bound by a prior decision of this Court interpreting a statutory bar to asylum or withholding of removal. See 555 U.S. at 516-523. After holding that the agency's decision was erroneous, however, the Court did not attempt itself to interpret the statute; rather, the Court remanded to afford the Board an opportunity to exercise its interpretive authority in the first instance: "Having concluded that the BIA has not yet exercised its *Chevron* discretion to interpret the statute in question, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Id.* at 523 (citations and internal quotation marks omitted). That course was called for, the Court explained, not only by well-established administrative law principles, but also by important practical considerations:

> The agency's interpretation of the statutory meaning * * * may be explained by a more comprehensive definition, one designed to elaborate on the term in anticipation of a wide range of potential conduct; and that expanded definition in turn may be influenced

> by how practical, or impractical, the standard would be in terms of its application to specific cases. These matters may have relevance in determining whether its statutory interpretation is a permissible one.

Id. at 524. For similar reasons, the Court has summarily reversed decisions in which a court of appeals, having decided that the Board did not properly exercise its interpretive discretion, endeavored itself to interpret the relevant INA provision rather than remanding for further agency review. See *Thomas*, 547 U.S. at 187 ("We can find no special circumstance here that might have justified the Ninth Circuit's determination of the matter in the first instance."); *Orlando Ventura*, 537 U.S. at 14 ("We agree with the Government that the Court of Appeals should have remanded the case to the BIA. And we summarily reverse its decision not to do so.").

In this case, the court of appeals failed to follow the ordinary remand rule. The court acknowledged that principles of *Chevron* deference apply to the Board's interpretation of the INA. App., *infra*, 14a. But the court concluded that the Board had failed to "adopt a federal generic definition of 'sexual abuse of a minor.'" *Id.* at 16a. Under those circumstances, the proper disposition of the case was to remand to the agency, "giving the BIA the opportunity to address the matter in the first instance." *Orlando Ventura*, 537 U.S. at 17. Instead, the court adopted and applied its *own* interpretation of "sexual abuse of a minor" under Section 1101(a)(43)(A), importing a definition that the court had previously adopted in "the sentencing context" and concluding "that the definition is equally applicable" to the INA. App., *infra*, 19a; see *id.* at 21a (relying on "Commentary to the Sentencing Guidelines"). By so doing, the court

"independently created potentially far-reaching legal precedent * * * without giving the BIA the opportunity to address the matter in the first instance in light of its own expertise." *Orlando Ventura*, 537 U.S. at 17. The court thus "committed clear error." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562 (2017), and the ordinary remand rule under *INS* v. *Orlando Ventura*, 537 U.S. 12 (2002) (per curiam).

Respectfully submitted.

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JULY 2017

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-2170

RAFAEL ANTONIO LARIOS-REYES, A/K/A
RAFAEL A. REYES

v.

LORETTA E. LYNCH, ATTORNEY GENERAL,
RESPONDENT

Argued: Sept. 21, 2016
Decided: Dec. 6, 2016

On Petition for Review of an Order of the Board of Immigration Appeals

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Before GREGORY, Chief Judge, and NIEMEYER and HARRIS, Circuit Judges.

Petition for review granted and order of removal vacated by published opinion. Chief Judge Gregory wrote the opinion, in which Judge Niemeyer and Judge Harris joined.

GREGORY, Chief Judge:

Rafael Antonio Larios-Reyes, a native and citizen of El Salvador, seeks review of the decision of the Board of Immigration Appeals ("BIA") finding him removable based on his conviction for "Third Degree Sex Offense" under Maryland Criminal Law Article § 3-307. The BIA

determined that Larios-Reyes's state conviction qualifies as the aggravated felony of "sexual abuse of a minor" under § 1101(a)(43)(A) of the Immigration and Nationality Act ("INA") and affirmed the immigration judge's finding that Larios-Reyes is therefore removable. We find that the BIA erred as a matter of law and hold that Larios-Reyes's conviction does not constitute the aggravated felony of "sexual abuse of a minor" under the INA because Maryland Criminal Law Article § 3-307 proscribes more conduct than does the generic federal offense. We therefore grant Larios-Reyes's petition for review, vacate the order of removal, and order his immediate release from Department of Homeland Security ("DHS") custody.

I.

Larios-Reyes entered the United States as a lawful permanent resident in 1999, when he was four years old. Administrative Record ("A.R.") 450. On August 5, 2013, Larios-Reyes was charged with "Sex Offense Second Degree" in violation of Maryland Criminal Law Article § 3-306 and "Sex Abuse Minor" in violation of § 3-602(b)(1). Id. at 765. On September 13, 2013, Larios-Reyes was indicted on both counts. Id. at 762-63.

In May 2014, Larios-Reyes and the State of Maryland reached a plea agreement. The State dismissed the "Sex Abuse Minor" charge and amended the "Sex Offense Second Degree" charge to the lesser charge of "Third Degree Sex Offense" under § 3-307. Id. at 756, 769. Larios-Reyes pleaded guilty to the amended second charge, which states that

> RAFAEL ANTONIO REYES (date of birth 09/16/94), on or about and between November 1, 2012, and

> November 30, 2012[,] . . . in Montgomery County, Maryland, did commit a sexual offense in the third degree on [victim] (date of birth 05/23/08), to wit: fellacio, in violation of Section 3-307 of the Criminal Law Article against the peace, government, and dignity of the State.

Id. at 763.

The Maryland statute under which Larios-Reyes was convicted provides that

> (a) A person may not:
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> (1) (i) engage in sexual contact with another without the consent of the other; and
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> (ii) 1. employ or display a dangerous weapon, or a physical object that the victim reasonably believes is a dangerous weapon;
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> 2. suffocate, strangle, disfigure, or inflict serious physical injury on the victim or another in the course of committing the crime;
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> 3. threaten, or place the victim in fear, that the victim, or an individual known to the victim, imminently will be subject to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping; or
>
> 4. commit the crime while aided and abetted by another;

(2) engage in sexual contact with another if the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual;

(3) engage in sexual contact with another if the victim is under the age of 14 years, and the person performing the sexual contact is at least 4 years older than the victim;

(4) engage in a sexual act with another if the victim is 14 or 15 years old, and the person performing the sexual act is at least 21 years old; or

(5) engage in vaginal intercourse with another if the victim is 14 or 15 years old, and the person performing the act is at least 21 years old.

Md. Code Ann., Crim. Law § 3-307 (2002).

The Circuit Court for Montgomery County, Maryland, sentenced Larios-Reyes to 364 days in prison, all suspended, and five years of supervised probation and medical treatment. It also ordered him to register as a sexual offender. A.R. 769-73. In July 2014, when Larios-Reyes failed to report to his probation officer or register as a sexual offender, the court issued a warrant for his arrest. Id. at 778-81. Larios-Reyes was arrested approximately one month later and ordered held without bond. Id. at 757.

In October 2014, DHS issued Larios-Reyes a notice to appear. DHS charged him with removability based on his conviction under § 3-307, which DHS contended constituted the aggravated felony of "sexual abuse of a minor" under § 1101(a)(43)(A) of the INA. Id. at 822. On March 27, 2015, the immigration judge upheld the charge of removability and ordered Larios-Reyes removed from the United States to El Salvador. Id. at 397. Larios-Reyes appealed to the BIA.

There was no dispute on appeal that a conviction under § 3-307—without more information on what part of § 3-307 Larios-Reyes violated—would not constitute "sexual abuse of a minor" under the INA. What the parties contested was whether the BIA could consider a narrower portion of § 3-307 to determine if the particular elements of Larios-Reyes's conviction constituted "sexual abuse of a minor." The questions for the BIA, then, were (1) whether § 3-307 is a divisible statute, meaning that it creates multiple alternative offenses, at least one of which constitutes "sexual abuse of a minor," and if so, (2) what portion of § 3-307 Larios-Reyes was necessarily convicted of, and (3) whether the elements of Larios-Reyes's conviction matched the elements of the generic federal offense.

In an unpublished opinion issued by a single member, the BIA first concluded that § 3-307 is a divisible statute because it "create[s] multiple versions of the crime of sexual offense in the third degree." Id. at 4. The BIA then reviewed the record of conviction and concluded that Larios-Reyes was convicted under § 3-307(a)(3). The BIA enumerated the "essential elements of an offense under § 3-307(a)(3)" as "that the defendant had sexual contact with the victim, that the

victim was under 14 years of age at the time of the act, and that the defendant was at least 4 years older than the victim." Id. It further found that although the conduct specified in the indictment—fellatio—falls within the definition of "sexual act" under Maryland law, "such conduct is also encompassed by the definition of 'sexual contact,'" id. at 4 n.3, which is the conduct element in § 3-307(a)(3).

The BIA then concluded that an offense under § 3-307(a)(3) categorically constitutes "sexual abuse of a minor" under the INA. Id. at 5. In reaching this conclusion, the BIA did not adopt a definition of the generic federal offense. Nor did it refer directly to any interpretations set forth in either BIA or Fourth Circuit precedent. Instead, it compared § 3-307(a)(3)'s elements to the elements of a California statute that the BIA had determined constituted the federal generic offense of "sexual abuse of a minor" in In re Esquivel-Quintana, 26 I. & N. Dec. 469 (B.I.A. 2015), aff'd, Esquivel-Quintana v. Lynch, 810 F.3d 1019 (6th Cir. 2016), cert. granted, No. 16-54, 2016 WL 3689050 (U.S. Oct. 28, 2016). A.R. 4-5. The BIA here held that because § 3-307(a)(3)'s elements are narrower than the California statute's, § 3-307(a)(3) also categorically matches the generic federal offense.

The BIA accordingly affirmed the immigration judge's determination that Larios-Reyes is removable as an alien convicted of an aggravated felony under § 1101(a)(43)(A) of the INA, and it dismissed his appeal. Larios-Reyes timely filed this petition for review of the BIA's decision.

II.

We generally lack jurisdiction to review any final order of removal against an alien removable as an aggravated felon. 8 U.S.C. § 1252(a)(2)(C); Kporlor v. Holder, 597 F.3d 222, 225-26 (4th Cir. 2010). We have limited jurisdiction, however, to review constitutional claims or questions of law, including whether a conviction qualifies as an aggravated felony. 8 U.S.C. § 1252(a)(2)(D); Amos v. Lynch, 790 F.3d 512, 517 (4th Cir. 2015). We review this question of law de novo. Castillo v. Holder, 776 F.3d 262, 267 (4th Cir. 2015).

A.

Under the INA, an alien is removable if he or she is "convicted of an aggravated felony at any time after admission." 8 U.S.C. § 1227(a)(2)(A)(iii). The INA contains a long list of crimes that qualify as an "aggravated felony," including "sexual abuse of a minor." 8 U.S.C. § 1101(a)(43)(A).

To determine whether Larios-Reyes's conviction under § 3-307 qualifies as "sexual abuse of a minor" under the INA, we would usually apply the categorical approach set forth in Taylor v. United States, 495 U.S. 575 (1990). Under this approach, we ask whether "'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a corresponding aggravated felony." Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013) (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 186 (2007)). We answer this by first considering the elements of the generic federal crime. See Taylor, 495 U.S. at 590. The state statute is a categorical match with the federal definition "only if a conviction of the state offense '"necessarily" involved

. . . facts equating to [the] generic [federal offense].'" Moncrieffe, 133 S. Ct. at 1684 (quoting Shepard v. United States, 544 U.S. 13, 24 (2005)) (alterations in original). We therefore "focus on the minimum conduct necessary for a violation of the state statute, while ensuring that there is a 'realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.'" Castillo, 776 F.3d at 267-68 (quoting Gonzales, 549 U.S. at 193). We look to the decisions of Maryland's appellate courts to see both the minimum conduct to which the statute has been applied and those courts' pronouncements on the minimum conduct to which the statute might be applied. See id. at 268. And "'[t]o the extent that the statutory definition of [§ 3-307(a)(3)] has been interpreted' by the state's appellate courts, 'that interpretation constrains our analysis of the elements of state law.'" Id. (quoting United States v. Aparicio-Soria, 740 F.3d 152, 154 (4th Cir. 2014)).

Here, the parties do not dispute that under the categorical approach, § 3-307 is broader than any conceivable federal definition of "sexual abuse of a minor" because § 3-307 enumerates several offenses that do not require the victim to be a minor. See Md. Code Ann., Crim. Law § 3-307(a)(1), (2). Under the categorical approach, then, Larios-Reyes would easily prevail. But the Supreme Court has recognized a "narrow range of cases" in which courts, when faced with an overbroad but "divisible" statute, may consider whether a portion of the statute is a categorical match to the federal generic definition. Descamps v. United States, 133 S. Ct. 2276, 2284 (2013) (quoting Taylor, 495 U.S. at 602). This is called the "modified categorical approach."

In order for a court to apply the modified categorical approach, a statute must be "divisible." A statute is divisible when it (1) "sets out one or more elements of the offense in the alternative," and (2) at least one of those elements or sets of elements corresponds to the federal definition at issue. Id. at 2281; see also United States v. Cabrera-Umanzor, 728 F.3d 347, 352 (4th Cir. 2013) (stating that "general divisibility [] is not enough; a statute is divisible . . . only if at least one of the categories . . . constitutes, by its elements, [an aggravated felony]"). For the first prong, the focus is on the statute's elements, not the facts of the crime. Then, the inquiry is whether the statute has listed "multiple, alternative elements, . . . effectively creat[ing] 'several different . . . crimes.'" Descamps, 133 S. Ct. at 2285 (quoting Nijhawan v. Holder, 557 U.S. 29, 41 (2009)). The Supreme Court has emphasized that a statute setting forth merely alternative means of committing an offense will not satisfy this requirement. Mathis v. United States, 136 S. Ct. 2243, 2255 (2016). This is because a federal penalty may be imposed based only on what a jury necessarily found or what a defendant necessarily pleaded guilty to, and the means of commission is not necessary to support a conviction. Id.

If a statute is divisible, then the modified categorical approach is appropriate. This approach permits courts to "examine a limited class of documents," known as Shepard documents,[1] "to determine which of a statute's

[1] Shepard documents "includ[e] charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms." Johnson v. United States, 559 U.S. 133, 144 (2010); see

alternative elements formed the basis of the defendant's prior conviction." Descamps, 133 S. Ct. at 2284. It is then possible to compare the particular elements of the conviction, rather than the elements of the statute as a whole, to the federal generic definition.

The Supreme Court has "underscored the narrow scope of" the modified categorical approach. Id. It is "to identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense." Id. at 2285. The Court has made clear that review under this approach "does not authorize a sentencing court to substitute [] a facts-based inquiry for an elements-based one. A court may use the modified approach only to determine which alternative element in a divisible statute formed the basis of the defendant's conviction." Id. at 2293. Once a court has made this determination, it can compare that part of the statute to the generic federal offense using the traditional categorical approach, which remains centered on elements, not facts. Id. at 2285 (stating that the modified categorical approach "preserves the categorical approach's basic method"). And where an element of the conviction is defined to include multiple alternative means, courts must consider all of those means; an element is not further divisible into its component parts. See id. at 2291; see also Mathis, 136 S. Ct. at 2255-57.

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also Shepard, 544 U.S. at 26 (listing documents that a reviewing court may consider). And in this Circuit, courts may also consider applications for statements of charges and statements of probable cause, so long as the statements are expressly incorporated into the statement of charges itself. United States v. Donnell, 661 F.3d 890, 894-96 (4th Cir. 2011).

To begin this analysis, we must determine whether § 3-307 is a divisible statute. We agree with the BIA that it is. We recently held in United States v. Alfaro, 835 F.3d 470, 473 (4th Cir. 2016), that § 3-307 lists alternative sets of elements that create multiple versions of the crime of third-degree sexual offense. Alfaro thus confirms that § 3-307 meets the first prong of the divisibility inquiry. Alfaro does not, however, resolve the second prong of the divisibility test, which is whether any set of elements in § 3-307 constitutes "sexual abuse of a minor."

In Alfaro, we held that § 3-307 is divisible, but we were comparing § 3-307 to "crime of violence" under the Sentencing Guidelines. Id. Here, we must determine whether any set of elements in § 3-307 constitutes an "aggravated felony" under the INA—a question not answered by Alfaro. We emphasize the point that a statute might be divisible as compared to one federal statute and not divisible as compared to another. Whether any set of elements meets the generic federal definition will vary depending on the generic federal definition at issue. The second prong of the divisibility inquiry sometimes merits less discussion, see id., but it is an important—and required—step in the analysis.[2] Here, at least one set of elements in § 3-307 must qualify as "sexual abuse of a minor" in order for the statute to be divisible.

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[2] Indeed, had the petitioner here recognized that Alfaro only answered the first prong of the divisibility inquiry, he might not have conceded at oral argument that Alfaro conclusively establishes that § 3-307 is a divisible statute in this case.

We find that at least the set of elements in § 3-307(a)(5) constitutes "sexual abuse of a minor" under the INA. Section 3-307(a)(5) prohibits "engag[ing] in vaginal intercourse with another if the victim is 14 or 15 years old, and the person performing the act is at least 21 years old." This clearly constitutes "sexual abuse of a minor" under any conceivable federal generic definition.[3] Because at least one set of elements matches the generic federal offense, the second prong of the divisibility inquiry is satisfied. Section 3-307 is thus a divisible statute for purposes of its comparison with INA § 1101(a)(43)(A), and we may use the modified categorical approach to determine which statutory elements formed the basis of Larios-Reyes's conviction and whether those elements match the federal generic definition.

The Shepard documents show that Larios-Reyes was convicted under the elements listed in § 3-307(a)(3), "sexual contact with another if the victim is under the age of 14 years, and the person performing the sexual contact is at least 4 years older than the victim." The factual basis for Larios-Reyes's plea details one instance in which Larios-Reyes asked the victim to touch his erect penis, which she did for 2-3 minutes, and two instances in which Larios-Reyes asked the victim to perform fellatio on him, which she did for 2-3 seconds each time. A.R. 767-68. Fellatio is specifically categorized as a "sexual act" under Maryland law. See Md. Code Ann., Crim. Law § 3-301(d)(1). Fellatio could also qualify as "sexual contact," which Maryland defines as "an intentional touching of the victim's or actor's

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[3] And it certainly matches the definition that we proceed to adopt here in Section II.C.

genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party." Id. § 3-301(e)(1); see Partain v. State, 492 A.2d 669, 672-73 (Md. Ct. Spec. App. 1985) (holding that cunnilingus constitutes both "sexual act" and "sexual contact"). The Shepard documents thus reveal that an element of Larios-Reyes's conviction was either "sexual act" or "sexual contact." The Shepard documents also establish the age elements of the offense. Larios-Reyes was eighteen years old, and the victim was four years old. Therefore, Larios-Reyes necessarily pleaded guilty to all of § 3-307(a)(3)'s elements,[4] and we affirm the BIA's finding that Larios-Reyes was convicted under § 3-307(a)(3).

B.

Having established that § 3-307 is a divisible statute and that Larios-Reyes was convicted under § 3-307(a)(3), we now turn to whether § 3-307(a)(3)'s elements cate-

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[4] The Shepard documents eliminate § 3-307(a)(4) and (a)(5) as the basis for the conviction because they both require that the victim be "14 or 15 years old" and that "the person performing the sexual act [be] at least 21 years old." Neither element is satisfied here, because at the time of the offense, the victim was four years old and Larios-Reyes was eighteen years old. The Shepard documents also reveal that Larios-Reyes was not convicted under § 3-307(a)(1) or (a)(2). The documents do not indicate that Larios-Reyes engaged in sexual contact with the victim under any of the aggravating circumstances listed in § 3-307(a)(1). Nor do the documents contain any evidence that the victim was "a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual," as required by § 3-307(a)(2). Therefore, there is no factual basis to support the conclusion that Larios-Reyes was necessarily convicted under any of these subsections.

gorically match the elements of the generic federal definition of "sexual abuse of a minor." A threshold question that we must answer before we can compare these statutes is how to define "sexual abuse of a minor." The INA does not define it, and this Court has not done so in a published opinion interpreting the INA. Therefore, we must consider the BIA's interpretation of this generic federal offense, because under Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984), we are required to defer to the BIA's precedential interpretation of a "silent or ambiguous" statute so long as that interpretation is not "arbitrary, capricious, or manifestly contrary to the statute," id. at 844.

Although the BIA's decision here is not precedential because it is unpublished and was issued by a single Board member, it relied on a precedential BIA decision, Esquivel-Quintana. We therefore must determine whether that decision warrants deference. See Hernandez v. Holder, 783 F.3d 189, 192 (4th Cir. 2015).

The BIA in Esquivel-Quintana considered whether the California offense of "unlawful intercourse with a minor" categorically constitutes "sexual abuse of a minor" under the INA. 26 I. & N. Dec. 469. In concluding that it was a categorical match, the BIA did not adopt a definition of the federal offense to which we might defer here. Instead, it relied on the interpretive framework set forth in In re Rodriguez-Rodriguez, 22 I. & N. Dec. 991, 996 (B.I.A. 1999). Esquivel-Quintana, 26 I. & N. Dec. at 470-71. We therefore must consider that framework.

In Rodriguez-Rodriguez, the BIA looked to 18 U.S.C. § 3509(a)(8)—a statute that provides procedural protections for child victims and witnesses and that lists

crimes constituting "sexual abuse"—and determined that it might serve "as a guide in identifying the types of crimes [the BIA] would consider to be sexual abuse of a minor."[5] Rodriguez-Rodriguez, 22 I. & N. Dec. at 996. The BIA expressly stated that it was "not adopting [that] statute as a definitive standard or definition" for purposes of § 1101(a)(43)(A) of the INA. Id. For that reason, we held in Amos v. Lynch that there was no statutory interpretation to which to defer under Chevron and that 18 U.S.C. § 3509(a)(8) might provide guidance but was not the "interpretive touchstone" for determining whether a state conviction qualifies as a removable offense.[6] 790 F.3d at 519-20. We also

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[5] Under 18 U.S.C. § 3509(a)(8), "the term 'sexual abuse' includes 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."

[6] The Ninth and Tenth Circuits have similarly declined to give Chevron deference to Rodriguez-Rodriguez. Rangel-Perez v. Lynch, 816 F.3d 591, 598-99 (10th Cir. 2016) (citing Amos and agreeing that "Rodriguez-Rodriguez . . . did not establish 18 U.S.C. § 3509(a) as the exclusive touchstone for defining the elements of the INA's 'sexual abuse of a minor' category of 'aggravated' felonies"); Estrada-Espinoza v. Mukasey, 546 F.3d 1147, 1157 (9th Cir. 2008) (en banc), overruled 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, 133 S. Ct. 2276 ("Chevron deference does not apply in these circumstances because Rodriguez-Rodriguez did not interpret a statute within the meaning of Chevron, but only provided a 'guide' for later interpretation.").

We acknowledge that three of our sister circuits have held that Rodriguez-Rodriguez adopted § 3509(a) as the definition of "sexual abuse of a minor" under the INA. See Velasco-Giron v. Holder,

pointed out that because § 3509(a)(8) "includ[es] 'a broad range of maltreatment of a sexual nature,'" it "does not clarify the scope of the generic federal crime" of "sexual abuse of a minor." Id. at 522 (quoting Rodriguez-Rodriguez, 22 I. & N. Dec. at 996). Accordingly, we cast serious doubt on the usefulness of Rodriguez-Rodriguez's interpretive approach.

In Esquivel-Quintana, the BIA relied on Rodriguez-Rodriguez to support its conclusion and did not adopt a definition of the generic federal offense of "sexual abuse of a minor." Esquivel-Quintana, 26 I. & N. Dec. at 470-71. Therefore, we need not give Chevron deference to Esquivel-Quintana for the same reason we declined to give it to Rodriguez-Rodriguez: the BIA did not adopt a federal generic definition of "sexual abuse of a minor." Indeed, the Sixth Circuit confirmed that the BIA's approach is "to interpret ['sexual abuse of a minor'] through case-by-case adjudication." Esquivel-Quintana, 810 F.3d at 1026.

In sum, the BIA here issued a nonprecedential decision to which we need not defer. The BIA did rely on a precedential decision, Esquivel-Quintana, that might guide our review, but we already held in Amos that this approach is not due any Chevron deference. Therefore, we are not required to give Chevron deference to either the BIA's opinion here or to Esquivel-Quintana.[7]

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773 F.3d 774, 776 (7th Cir. 2014), cert. denied sub nom. Velasco-Giron v. Lynch, 135 S. Ct. 2072 (2015); Restrepo v. Attorney Gen., 617 F.3d 787, 792, 795-96 (3d Cir. 2010); Mugalli v. Ashcroft, 258 F.3d 52, 58-59 (2d Cir. 2001). But as we stated in Amos, we respectfully disagree with these circuits' decisions. 790 F.3d at 519.

[7] The BIA's other findings in Esquivel-Quintana are entitled to Chevron deference, but they do not concern the issue here. These

We are thus left to consider the BIA's determination that § 3-307(a)(3) constitutes "sexual abuse of a minor" under the INA using the principles outlined in Skidmore v. Swift & Co., 323 U.S. 134 (1944). Under the Skidmore framework, which prescribes a more modest amount of deference, "we may defer to the agency's opinion, based on the agency's 'body of experience and informed judgment,'" but "the degree of deference that we accord depends on our consideration of the persuasiveness of the BIA's analysis as demonstrated by its thoroughness, validity of reasoning, and consistency with other decisions." Amos, 790 F.3d at 521 (quoting Skidmore, 323 U.S. at 140).

We are not persuaded by the BIA's analysis. Before the BIA could answer the question whether a conviction under § 3-307(a)(3) constitutes the aggravated felony of "sexual abuse of a minor," it had to compare § 3-307(a)(3)'s elements to the elements of the federal offense. But here, the BIA did not establish the elements of the federal offense. In fact, it did not even explain what federal definition it was using. Instead, the BIA compared § 3-307(a)(3)'s elements to the elements of a California statute that was found to constitute "sexual abuse of a minor."

This approach is problematic for two reasons. First, the California statute was found to be a categorical match using the Rodriguez-Rodriguez framework, which we have held is neither due any deference nor is

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include that (1) the generic federal offense of "sexual abuse of a minor" requires a meaningful age difference between the victim and the perpetrator, and (2) California Penal Code § 261.5(c) categorically constitutes "sexual abuse of a minor" under § 1101(a)(43)(A) of the INA. Esquivel-Quintana, 26 I. & N. Dec. at 477.

particularly useful as an interpretive tool. See Amos, 790 F.3d at 521-22. And second, the Supreme Court has made clear that the categorical approach requires a comparison of the elements of the state statute of conviction to the elements of the generic federal offense, see Moncrieffe, 133 S. Ct. at 1684, not to the elements of another state's statute of conviction. By attempting to fit § 3-307(a)(3) within the elements of a California statute, the BIA essentially used California law to determine whether a Maryland conviction constituted a removable offense under federal law.

Even if this type of statutory comparison was a reasonable way to determine whether § 3-307(a)(3) matches the generic federal definition of "sexual abuse of a minor," the BIA erred in its analysis. It failed to determine what conduct the California statute encompassed and whether that conduct was also proscribed by § 3-307(a)(3). Had the BIA done so, it might have seen its mistake.

The BIA concluded that because the "offense [in Esquivel-Quintana] with the elements of '(1) unlawful sexual intercourse (2) with a minor under 18 years old (3) who is more than 3 years younger than the perpetrator' categorically constitutes sexual abuse of a minor," then § 3-307(a)(3), which "include[s] a younger victim and a greater age difference than the corresponding elements in the statute at issue in Matter of Esquivel-Quintana," also constitutes "sexual abuse of a minor" under the INA. A.R. 4-5. The BIA held this "notwithstanding that the 'sexual contact' proscribed by [§ 3-307(a)(3)] may potentially be less egregious than the 'unlawful sexual intercourse'" in Esquivel-Quintana. Id. at 5. This is entirely incorrect. That § 3-307(a)(3)

criminalizes "potentially . . . less egregious" conduct than the California statute in Esquivel-Quintana is precisely the reason that the California statute has no utility as a comparator—and in fact suggests that § 3-307(a)(3) is more likely not to constitute the generic federal offense.

Ultimately, we conclude that the BIA's decision on this question is not entitled to Skidmore deference. While we recognize that the agency has a wealth of immigration expertise, we find that the BIA was neither thorough in its analysis, valid in its reasoning, nor consistent with precedent in the BIA or the Fourth Circuit. See Amos, 790 F.3d at 521 (citing Skidmore, 323 U.S. at 140). Accordingly, we proceed to consider this question of law de novo, without deferring to the BIA's determinations in this case.

C.

We begin by defining "sexual abuse of a minor." We agree with the petitioner that this Court has already established a generic federal definition of "sexual abuse of a minor" in the sentencing context and that the definition is equally applicable here. In United States v. Diaz-Ibarra, we defined "sexual abuse of a minor" for purposes of applying the Sentencing Guidelines. 522 F.3d 343 (4th Cir. 2008). We looked to the Eleventh Circuit's reasoning in United States v. Padilla-Reyes, 247 F.3d 1158 (11th Cir. 2001), an immigration case, and we adopted that court's definition wholesale. See Diaz-Ibarra, 522 F.3d at 351-52.

In Padilla-Reyes, the court looked to the common meaning of the phrase "sexual abuse of a minor." 247 F.3d at 1163-64. It determined that it made more

sense to consider the phrase's plain meaning than to cross-reference other federal statutes, because "where Congress intended an aggravated felony subsection to depend on federal statutory law it explicitly included the statutory cross-reference," and so "the lack of an explicit statutory reference in the § 1101(a)(43)(A) subsection indicates Congress's intent to rely on the plain meaning of the terms." Id. at 1164.

The Padilla-Reyes court explained that "[a]mong the relevant definitions for abuse, Webster's includes 'misuse[;] . . . to use or treat so as to injure, hurt, or damage[;] . . . to commit indecent assault on[;] . . . the act of violating sexually[;] . . . [and] rape or indecent assault not amounting to rape.'" Id. at 1163. And "for sexual, Webster's includes 'of or relating to the sphere of behavior associated with libidinal gratification.'" Id. The court concluded that "the word 'sexual' in the phrase 'sexual abuse of a minor' indicates that the perpetrator's intent in committing the abuse is to seek libidinal gratification," and that the common understanding of "abuse" in this context is that it does not require physical contact. Id. The court therefore concluded that "the phrase 'sexual abuse of a minor' means a perpetrator's physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification." Id.

Significantly, the Eleventh Circuit in Padilla-Reyes crafted the definition of "sexual abuse of a minor" in the immigration context—under § 1101(a)(43)(A) of the INA. In Diaz-Ibarra, we held that the Padilla-Reyes definition also applies to "sexual abuse of a minor" under the Sentencing Guidelines. 522 F.3d at 351-52. In doing so, we implied that the federal generic defini-

tion of "sexual abuse of a minor" is the same in the sentencing and immigration contexts.

This is further confirmed by the Commentary to the Sentencing Guidelines in effect at the time, which stated that "aggravated felony" under the Guidelines "has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43))." U.S. Sentencing Guidelines Manual § 2L1.2 cmt. n.3(A) (U.S. Sentencing Comm'n 2007).[8] Because the crime is the same under the Sentencing Guidelines and the INA, the definition of "sexual abuse of a minor" adopted by this Court in the sentencing context is also applicable in the immigration context.[9] And this makes sense, because the utility of a "generic" definition is that it applies in different contexts. To find otherwise would mean "sexual abuse of a minor" has multiple "generic" federal definitions, an outcome that

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[8] The current Commentary to the Sentencing Guidelines retains this language. See U.S. Sentencing Guidelines Manual § 2L1.2 cmt. n.3(A) (U.S. Sentencing Comm'n 2015).

[9] The Fifth Circuit has made a similar observation in an unpublished opinion. See Ramos-Garcia v. Holder, 483 F. App'x 926, 929 n.14 (5th Cir. 2012) (acknowledging that "[m]ost of the cases discussing the definition of 'sexual abuse of a minor' under § 1101(a)(43) do so in a sentencing rather than an immigration context," but noting that it could find "no reason . . . why those cases are not applicable [to the INA] for purposes of determining the generic meaning of 'sexual abuse of a minor' under the same statutory provision"). And in two unpublished opinions, we have applied the Diaz-Ibarra definition to "sexual abuse of a minor" under the INA. See Waffi v. Mukasey, 285 F. App'x 26, 27 (4th Cir. 2008) (using Diaz-Ibarra's definition of "sexual abuse of a minor" to determine whether the statute at issue categorically matched the offense under the INA); Alvarado v. Holder, 398 F. App'x 942, 943 (4th Cir. 2010) (same).

ordinarily will contravene both the categorical approach's governing principles and common sense.

We now hold that the generic federal definition of "sexual abuse of a minor" set forth in Diaz-Ibarra is applicable to the INA. Therefore, under the INA, "'sexual abuse of a minor' means the 'perpetrator's physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification.'" Diaz-Ibarra, 522 F.3d at 352 (quoting Padilla-Reyes, 247 F.3d at 1163). And because we now have a definition of the federal generic offense, we can determine whether a conviction under § 3-307(a)(3) categorically qualifies as that federal offense.

D.

We reiterate that at this step in the analysis, our task is to compare statutory elements only. We do not consider whether Larios-Reyes's actual conduct constitutes "sexual abuse of a minor"; we ask only whether § 3-307(a)(3) matches the generic federal definition. Shepard documents serve the limited purpose of clarifying which element or set of elements create the basis for the conviction. They have no role to play in our subsequent comparison of that portion of the statute to the generic federal offense. Accordingly, we now turn to consider the scope of § 3-307(a)(3)'s elements.

Under Maryland law, "'sexual contact,' as used in [§] 3-307[(a)(3)] . . . , means an intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party." Md. Code Ann., Crim. Law § 3-301(e)(1) (emphasis added). "Sexual contact" is defined in the disjunctive, meaning that there are mul-

tiple ways to accomplish it. Maryland courts have held that the State need not show that a defendant acted for the purpose of sexual gratification in order to be convicted, because acting for such a purpose is just one of the ways that a defendant's conduct might constitute "sexual contact." See, e.g., Dillsworth v. State, 503 A.2d 734, 737 (Md. Ct. Spec. App. 1986), aff'd, 519 A.2d 1269 (Md. 1987) (rejecting defendant's argument that his conduct did not constitute "sexual contact" because there was no evidence that he acted for the purpose of "sexual arousal or gratification," and stating that "[t]o include the necessity to show sexual arousal or gratification as a requisite of 'abuse' would be to require an unnecessary redundancy—to use the words 'for abuse' in vain"). A showing that a defendant acted with the intent to abuse could also sustain a conviction.

The Maryland Court of Special Appeals has interpreted "abuse" in § 3-307 as not limited to "a physical attack intended to inflict sexual injury." LaPin v. State, 981 A.2d 34, 43 (Md. Ct. Spec. App. 2009). Rather, "a touching for the purpose of 'abuse' [under § 3-307] refers to a wrongful touching, a touching of another person's intimate area for a purpose that is harmful, injurious or offensive." Id. The Maryland Court of Appeals has further recognized that "the buttocks are an intimate area within the meaning of [§] 3-301[]," finding specifically that "[t]he touching of the buttocks is therefore proscribed by [§] 3-307(a)(3)." Bible v. State, 982 A.2d 348, 358 (Md. 2009). Hence, a conviction could be sustained under § 3-307(a)(3) based on an adult's intentional touching of a minor's buttocks for a "harmful, injurious or offensive"—but not sexually gratifying—purpose. See Alfaro, 835 F.3d at 473 n.1

(recognizing this interpretation of "sexual contact" as used in § 3-307).

Under the federal generic definition of "sexual abuse of a minor," acting for the purpose of sexual gratification is an element of the offense. Indeed, in Alfaro, we emphasized that "sexual abuse of a minor" as defined in Diaz-Ibarra "is a 'broad' phrase 'capturing physical or nonphysical conduct,' and it is the sexual-gratification element that polices the line between lawful and unlawful conduct." Alfaro, 835 F.3d at 476 (quoting United States v. Perez-Perez, 737 F.3d 950, 953 (4th Cir. 2013)) (citation omitted). We went on, "[T]he intent to gratify sexual urges is central to the offense of sexual abuse of a minor . . . and therefore is part of the ordinary meaning of the phrase 'sexual abuse.'" Id. at 476-77.

In Maryland, a perpetrator need not act for the purpose of sexual gratification in order to be convicted under § 3-307(a)(3). Acting for the purpose of abuse is enough. And Maryland's appellate courts have interpreted "abuse" to include much more conduct than what the INA criminalizes. Because we are constrained by Maryland's interpretation of the scope of its own laws, see Castillo, 776 F.3d at 268, we find that § 3-307(a)(3) is broader than the federal generic offense of "sexual abuse of a minor." Accordingly, we hold that a conviction for "Third Degree Sex Offense" under Maryland Criminal Law Article § 3-307(a)(3) does not constitute the aggravated felony of "sexual abuse of a minor" under § 1101(a)(43)(A) of the INA.

III.

The BIA erred as a matter of law in finding that Larios-Reyes's conviction under Maryland Criminal Law Article § 3-307 constitutes the aggravated felony of "sexual abuse of a minor" under the INA. We therefore grant Larios-Reyes's petition for review, vacate the order of removal, and order his immediate release from DHS Custody.

PETITION FOR REVIEW GRANTED
AND ORDER OF REMOVAL VACATED

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF
IMMIGRATION APPEALS
Falls Church, Virginia 22041

File: A046 916 967—Baltimore, MD

IN RE: RAFAEL ANTONIO LARIOS-REYES A.K.A.
RAFAEL A. REYES

Date: [Sept. 23, 2015]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Benjamin Ross Winograd, Esquire

ON BEHALF OF DHS:
Billy J. Sapp
Senior Attorney

CHARGE:
Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)]—Convicted of aggravated felony under section 101(a)(32)(A)

APPLICATION:
Termination

The respondent, a native and citizen of El Salvador and lawful permanent resident of the United States, appeals from the Immigration Judge's March 27, 2015, decision finding him removable as an alien convicted of an aggravated felony under section 101(a)(43)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(A). The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent has not challenged on appeal the Immigration Judge's determination that he was convicted in 2014 of sexual offense in the third degree in violation of section 3-307 of the Maryland Criminal Code (I.J. at 2). While there is no dispute that an offense under section 3-307 does not categorically constitute sexual abuse of a minor under section 101(a)(43)(A) of the Act, the respondent challenges the Immigration Judge's conclusion that section 3-307 is divisible (Respondent's Brief at 7-12). The respondent relies on *Biggus v. State*, 593 A.2d 1060 (Md. App. 1991) to support this assertion. We are not persuaded that the analysis in that case, which does not arise in the divisibility context, applies here.[1]

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[1] In *Biggus v. State*, the Maryland Court of Appeals determined that a defendant who was convicted for the same act under two

Rather, we agree with the Immigration Judge that section 3-307 is divisible (I.J. at 4). It is divisible because it includes delineated subsections that set out elements of the offense in the alternative and thus create multiple versions of the crime of sexual offense in the third degree. *Omargharib v. Holder*, 775 F.3d 192, 198 (4th Cir. 2014); *Matter of Chairez*, 26 I&N Dec. 478, 480-81 (BIA 2015) (discussing divisibility under *Descamps v. United States*, 133 S. Ct. 2276 (2013)). These multiple versions of the offense differ in the level of conduct that must be proven as well as in other elements the state must prove, as reflected by the three different jury instructions that may be used when an offense under section 3-307 is charged.[2] For example, in one set of jury instructions, the state must prove elements relating to the ages of the victim and the defendant, but in another, the state must prove elements relating to aggravating factors, such as the use of a weapon or threats or the commission of another crime. *Compare* MD-JICRIM 4:29.8, *with* MD-JICRIM 4:29.7; *see also* MD-JICRIM 4:29.8A *and* MD-JICRIM 4:29.9. We therefore conclude that the Immigration Judge correctly found that section 3-307 is divisible.

We likewise agree with the Immigration Judge that the DHS has established that the respondent was con-

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subsections of the precursor statute to section 3-307 should not be sentenced to two consecutive prison terms.

[2] Subsections (a)(1), (a)(2), and (a)(3) proscribe "sexual contact" under the circumstances described. Md. Code Ann., Crim. Law § 3-301(f)(1) (2014). Subsection (a)(4) proscribes a "sexual act" under the circumstances described. Md. Code Ann., Crim. Law § 3-301(e)(1) (2014). Subsection (a)(5) proscribes "vaginal intercourse" under the circumstances described. Md. Code Ann., Crim. Law § 3-301(g)(1) (2014).

victed under section 3-307(a)(3). The amended count two of the Indictment alleges that the respondent, whose date of birth is reflected as 9/16/94, committed "a sexual offense in the third degree on [victim] (date of birth 5/23/08, to wit: fella[t]io." The record of conviction reflects that the respondent pled guilty to amended count two (I.J. at 5; Exh. 2). The amended count two includes all the essential elements of an offense under section 3-307(a)(3). These elements are that the defendant had sexual contact with the victim, that the victim was under 14 years of age at the time of the act, and that the defendant was at least 4 years older than the victim.[3]

In *Matter of Esquivel-Quintana*, 26 I&N Dec. 469 (BIA 2015), we held that an offense with the elements of "(1) unlawful sexual intercourse (2) with a minor under 18 years old (3) who is more than 3 years younger than the perpetrator" categorically constitutes sexual abuse of a minor. *Matter of Esquivel-Quintana*, *supra*, at 470, 474. In that case, which essentially dealt with statutory rape, the age of the victim and the age dif-

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[3] We acknowledge the DHS's contention on appeal that because the charging document specifies conduct, fellatio, that falls within the definition of a "sexual act" under section 3-301(e)(1) of the Maryland Criminal Code, the respondent was convicted under section 3-307(a)(4) (DHS's Brief at 2-3). We note that such conduct is also encompassed by the definition of "sexual contact." *See Partain v. State*, 492 A.2d 669, 672-73 (Md. App. 1985) (holding that cunnilingus can constitute sexual contact as well as a sexual act). We likewise acknowledge but are unpersuaded by the respondent's assertion that because the DHS put forth this argument regarding section 3-307(a)(4), it waived the contention that the respondent was convicted under section 3-307(a)(3) (Respondent's Brief at 12-13).

ference between the defendant and the victim were central to our determination that the offense categorically constituted sexual abuse of a minor. *Matter of Esquivel-Quintana, supra*; *see also Matter of V-F-D-*, 23 I&N Dec. 859 (BIA 2006).

In the instant case, the respondent was convicted of having sexual contact, defined as "an intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party," with a victim under 14 years of age when the respondent himself was at least 4 years older than the victim. Md. Code Ann., Crim. Law §§ 3-301(f)(1), 3-307(a)(3). Thus the elements of section 3-307(a)(3) include a younger victim and a greater age difference than the corresponding elements in the statue at issue in *Matter of Esquivel-Quintana*. Accordingly, notwithstanding that the "sexual contact" proscribed by section 3-307(a)(3) of the Maryland Criminal Code may potentially be less egregious than the "unlawful sexual intercourse" addressed in *Matter of Esquivel-Quintana*, we conclude that an offense under section 3-307(a)(3) of the Maryland Criminal Code categorically constitutes sexual abuse of a minor within the meaning of section 101(a)(43)(A) of the Act.[4]

We acknowledge the decision of the United States Court of Appeals for the Fourth Circuit in *Amos v. Lynch*, 790 F.3d 512 (4th Cir. 2015), which was decided

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[4] The respondent's assertion that his conviction was not for a crime of moral turpitude has no bearing on the question of whether the offense constitutes an aggravated felony (Respondent's Brief at 27-28). Likewise, his observation that an offense under section 3-307(a)(3) is a strict liability offense does not alter the result in this case (Respondent's Brief at 23-27).

after the Immigration Judge issued her decision in this case, but conclude that it does not affect the result here. In *Amos v. Lynch*, the Court determined that the Board's reliance on *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999), was insufficient to support a finding that the alien had been convicted of sexual abuse of a minor "[b]ecause the Board did not supply a definition of the crime of 'sexual abuse of a minor' . . . ." *Amos*, 790 F.3d at 520.[5] The Court concluded that the Board erred by concluding that sexual abuse of a minor under section 101(a)(43)(A) of the Act "necessarily encompasses the failure to act to prevent sexual abuse, the least culpable conduct" under the Maryland statue at issue in the case. *Id.* at 522. The respondent's case involves no such issue. Here, the respondent was convicted of having sexual contact with a victim who was under 14 years of age and at least 4 years younger than himself.

For these reasons, we affirm the Immigration Judge's determination that the respondent is removable as an alien convicted of an aggravated felony under section 101(a)(43)(A) of the Act. The appeal will be dismissed.

ORDER: The appeal is dismissed.

/s/ ILLEGIBLE
FOR THE BOARD

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[5] Contrary to the respondent's assertion on appeal, we agree with the Immigration Judge that *United States v. Diaz-Ibarra*, 522 F.3d 343 (4th Cir. 2008) does not set forth a definition of "sexual abuse of a minor" that is applicable to this case (Respondent's Brief at 14-18). We note that the Fourth Circuit's decision in *Amos v. Lynch, supra*, does not refer to *United States v. Diaz-Ibarra*.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-2170
(A046-916-967)

RAFAEL ANTONIO LARIOS-REYES, A/K/A
RAFAEL A. REYES, PETITIONER

v.

DANA JAMES BOENTE, ACTING ATTORNEY GENERAL,
RESPONDENT

Filed: Feb. 7, 2017

ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Chief Judge Gregory, Judge Niemeyer, and Judge Harris.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX D

1. 8 U.S.C. 1101 provides in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(43) The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

* * * * *

2. 18 U.S.C. 2243 provides:

Sexual abuse of a minor or ward

(a) OF A MINOR.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who—

(1) has attained the age of 12 years but has not attained the age of 16 years; and

(2) is at least four years younger than the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(b) OF A WARD.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a

Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who is—

(1) in official detention; and

(2) under the custodial, supervisory, or disciplinary authority of the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(c) DEFENSES.—(1) In a prosecution under subsection (a) of this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years.

(2) In a prosecution under this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the persons engaging in the sexual act were at that time married to each other.

(d) STATE OF MIND PROOF REQUIREMENT.—In a prosecution under subsection (a) of this section, the Government need not prove that the defendant knew—

(1) the age of the other person engaging in the sexual act; or

(2) that the requisite age difference existed between the persons so engaging.

3. 18 U.S.C. 2244 provides:

Abusive sexual contact

(a) SEXUAL CONDUCT IN CIRCUMSTANCES WHERE SEXUAL ACTS ARE PUNISHED BY THIS CHAPTER.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in or causes sexual contact with or by another person, if so to do would violate—

(1) subsection (a) or (b) of section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than ten years, or both;

(2) section 2242 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than three years, or both;

(3) subsection (a) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both;

(4) subsection (b) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both; or

(5) subsection (c) of section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title and imprisoned for any term of years or for life.

(b) IN OTHER CIRCUMSTANCES.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in sexual contact with another person without that other person's permission shall be fined under this title, imprisoned not more than two years, or both.

(c) OFFENSES INVOLVING YOUNG CHILDREN.—If the sexual contact that violates this section (other than subsection (a)(5)) is with an individual who has not attained the age of 12 years, the maximum term of imprisonment that may be imposed for the offense shall be twice that otherwise provided in this section.

4. 18 U.S.C. 2246 provides:

Definitions for chapter

As used in this chapter—

(1) the term "prison" means a correctional, detention, or penal facility;

(2) the term "sexual act" means—

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(3) the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(4) the term "serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty;

(5) the term "official detention" means—

(A) detention by a Federal officer or employee, or under the direction of a Federal officer or employee, following arrest for an offense; following surrender in lieu of arrest for an offense; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following civil commitment in lieu of criminal proceedings or pending resumption of criminal proceedings that are being

held in abeyance, or pending extradition, deportation, or exclusion; or

(B) custody by a Federal officer or employee, or under the direction of a Federal officer or employee, for purposes incident to any detention described in subparagraph (A) of this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation;

but does not include supervision or other control (other than custody during specified hours or days) after release on bail, probation, or parole, or after release following a finding of juvenile delinquency; and

(6) the term "State" means a State of the United States, the District of Columbia, and any commonwealth, possession, or territory of the United States.

5. Md. Code Ann., Crim. Law § 3-307 (LexisNexis 2012) provides:

Sexual offense in the third degree.

(a) *Prohibited.* — A person may not:

(1) (i) engage in sexual contact with another without the consent of the other; and

(ii) 1. employ or display a dangerous weapon, or a physical object that the victim reasonably believes is a dangerous weapon;

2. suffocate, strangle, disfigure, or inflict serious physical injury on the victim or another in the course of committing the crime;

3. threaten, or place the victim in fear, that the victim, or an individual known to the victim, immi-

nently will be subject to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping; or

4. commit the crime while aided and abetted by another;

(2) engage in sexual contact with another if the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual;

(3) engage in sexual contact with another if the victim is under the age of 14 years, and the person performing the sexual contact is at least 4 years older than the victim;

(4) engage in a sexual act with another if the victim is 14 or 15 years old, and the person performing the sexual act is at least 21 years old; or

(5) engage in vaginal intercourse with another if the victim is 14 or 15 years old, and the person performing the act is at least 21 years old.

(b) *Penalty*. — A person who violates this section is guilty of the felony of sexual offense in the third degree and on conviction is subject to imprisonment not exceeding 10 years.