No. 10-1334

In the Supreme Court of the United States

BERNARDO SALADO-ALVA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Board of Immigration Appeals reasonably concluded that the California offense of lewd and lascivious acts with a child under 14 qualifies as "sexual abuse of a minor" and therefore an "aggravated felony" under 8 U.S.C. 1101(a)(43)(A).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the *Federal Reporter* but is reprinted in 405 Fed. Appx. 229. The decisions of the Board of Immigration Appeals (Pet. App. 3-6) and the immigration judge (Pet. App. 7-12) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 2010. A petition for rehearing was denied on March 1, 2011 (Pet. App. 13). The petition for a writ of certiorari was filed on April 27, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, any alien who is convicted

of an "aggravated felony" is deportable. 8 U.S.C. 1227(a)(2)(A)(iii). As relevant here, an aggravated felony includes "sexual abuse of a minor." 8 U.S.C. 1101(a)(43)(A). The INA does not further define the term "sexual abuse of a minor."

2. Petitioner is a native and citizen of Mexico who was admitted to the United States as a lawful permanent resident in 1988. Pet. App. 4, 8. In 2000, petitioner was convicted of the offense of lewd and lascivious acts with a child under the age of 14, in violation of Cal. Penal Code § 288(a). Pet. App. 4, 11. At the time Section 288(a) provided, in pertinent part, that

> [a]ny person who willfully and lewdly commits any lewd or lascivious act * * * upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony * * * .

Cal. Penal Code § 288(a) (West Supp. 1999). Petitioner was sentenced to 180 days of imprisonment, suspended, and five years of probation. Pet. App. 4.

3. In 2007, the Department of Homeland Security (DHS) commenced removal proceedings against petitioner. Administrative Record (A.R.) 232. Based on the 2000 conviction, DHS charged that petitioner was removable pursuant to 8 U.S.C. 1227(a)(2)(A)(iii) as an alien convicted of an "aggravated felony" as described in 8 U.S.C. 1101(a)(43)(A), namely, "sexual abuse of a minor." Pet. App. 4, 9; A.R. 232.[1] Petitioner denied both

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[1] DHS later also charged that petitioner was removable under 8 U.S.C. 1227(a)(2)(A)(ii) as an alien convicted of two crimes involving moral turpitude, based on the 2000 conviction and a 1994 conviction for

the factual allegation regarding the conviction and the charge of removability (Pet. App. 9) while he pursued a collateral challenge to his conviction in the California courts, for which the immigration judge (IJ) granted five continuances. See A.R. 77-78, 82-83, 87-88, 91-93.[2]

The IJ found that petitioner had been convicted under Section 288(a), that a violation of that statute categorically was sexual abuse of a minor under the INA, and that petitioner was therefore removable as charged. Pet. App. 11-12. The IJ also noted that even if petitioner's offense of conviction were not categorically an aggravated felony, the IJ "would still find [petitioner] removable as charged," because the charging document in petitioner's criminal case "clearly establishes" that petitioner's offense "d[id] in fact constitute sexual abuse of a minor." *Id.* at 12 n.2.

The Board of Immigration Appeals (BIA) dismissed petitioner's appeal. Pet. App. 3-6. Petitioner conceded that he had been convicted under Section 288(a), but argued that Section 288(a) did not categorically constitute "sexual abuse of a minor" because not all possible violations of Section 288(a) would constitute "sexual abuse of a minor." *Id.* at 5; A.R. 11-13. After reviewing Ninth Circuit precedent on point, the BIA concluded that "under [Section] 288(a), the full range of conduct covered by that criminal statute falls within the meaning

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annoying or molesting a child under the age of 18, in violation of Cal. Penal Code § 647.6 (West 1988). DHS subsequently withdrew the moral-turpitude charge. Pet. App. 4; A.R. 230.

[2] In 2007, after the commencement of removal proceedings—and seven years after testifying at age 12 that his father had touched both him and his brother on their private parts in an inappropriate manner—petitioner's son signed an affidavit averring that the prior testimony was false. A.R. 137-144.

of sexual abuse of a minor, and meets the categorical approach for an aggravated felony." Pet. App. 5-6 (citing *United States* v. *Baron-Medina*, 187 F.3d 1144, 1146 (9th Cir. 1999), cert. denied, 531 U.S. 1167 (2001), and *United States* v. *Pallares-Galan*, 359 F.3d 1088, 1100 (9th Cir. 2004)).

4. The court of appeals denied a petition for review in an unpublished, per curiam opinion. Pet. App. 1-2. The court first dismissed for failure to administratively exhaust, as required by 8 U.S.C. 1252(d)(1), a claim by petitioner that the conviction documents in the record were insufficient to support the charge of removability. Pet. App. 1-2. The court then concluded that petitioner's challenge to the categorical characterization of his offense as sexual abuse of a minor was foreclosed by *United States* v. *Medina-Villa*, 567 F.3d 507 (9th Cir. 2009), cert. denied, 130 S. Ct. 1545 (2010). Pet. App. 2.[3]

The court of appeals stayed its mandate, and continued its stay of petitioner's removal, pending filing and disposition of a petition for a writ of certiorari.[4]

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[3] In 2010, petitioner also filed a motion with the BIA requesting that the BIA exercise discretion to reopen his case, even though the 90-day time limit had run, so that he could apply for adjustment of status. On September 28, 2010, the BIA denied the motion to reopen as untimely. Petitioner filed a petition for review of that decision. The government moved to consolidate that case with this one, but the court of appeals instead dismissed in part and summarily denied in part the second petition for review. Order, *Salado-Alva* v. *Holder*, No. 10-73142 (9th Cir. Feb. 8, 2011). On June 27, 2011, the BIA denied another motion to reopen based on allegedly ineffective assistance of counsel. A petition for review of that decision is now pending in the court of appeals as No. 11-72112 (filed July 26, 2011).

[4] On June 17, 2011, DHS removed petitioner to Mexico. We are informed that DHS was incorrectly advised by the office of the court of appeals' clerk that the stay of mandate had expired. Upon notification

ARGUMENT

Petitioner contends (Pet. 9-27) that the courts of appeals are in conflict concerning the proper interpretation of the term "sexual abuse of a minor," and that the court below has rendered conflicting decisions on that question. He further contends (Pet. 38-40) that under any of the competing approaches, his felony offense of lewd and lascivious acts with a child under the age of 14 is not sexual abuse of a minor. Petitioner overstates the degree of disagreement among the circuits and conflates immigration cases like this one—in which the BIA is entitled to deference in interpreting the INA's use of the term "sexual abuse of a minor"—with cases from other contexts that do not involve deference to the BIA. In any event, under any definition used by the courts of appeals, petitioner's California offense of lewd and lascivious acts with a child under the age of 14 would meet the generic definition of "sexual abuse of a minor." The use of young children for the gratification of sexual desires constitutes an abuse. No court of appeals considering a comparable statute has held to the contrary. Accordingly, further review is not warranted.[5]

1. The INA defines an aggravated felony as including "sexual abuse of a minor," but it neither expressly defines that term nor cross-references any other statute. 8 U.S.C. 1101(a)(43)(A); *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 993, 995-996 (B.I.A. 1999) (en banc). Accordingly, the BIA and all circuits

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from petitioner's counsel that the mandate was still stayed and petitioner was still subject to a stay of removal, DHS paroled petitioner back into the United States on June 21, 2011.

[5] A similar question is presented in *Monteiro* v. *Holder*, No. 11-37 (filed May 31, 2011).

that have examined the question have agreed that the term should be interpreted, in accordance with the categorical approach described in *Taylor* v. *United States*, 495 U.S. 575 (1990), to refer to a generic federal offense defined by the generally understood, everyday, ordinary, contemporary, or common meaning of the term, encompassing "any crime, regardless of its exact definition or label, having the basic elements of [the generic offense]." *Id.* at 599; see *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 996; *Emile* v. *INS*, 244 F.3d 183, 185-186, 187 (1st Cir. 2001); *Mugalli* v. *Ashcroft*, 258 F.3d 52, 56-59 (2d Cir. 2001); *Restrepo* v. *Attorney Gen. of U.S.*, 617 F.3d 787, 791-792, 796 (3d Cir. 2010); *United States* v. *Zavala-Sustaita*, 214 F.3d 601, 604 (5th Cir.), cert. denied, 531 U.S. 982 (2000); *Gattem* v. *Gonzales*, 412 F.3d 758, 763 (7th Cir. 2005); *United States* v. *Baron-Medina*, 187 F.3d 1144, 1146 (9th Cir. 1999), cert. denied, 531 U.S. 1167 (2001); *Bahar* v. *Ashcroft*, 264 F.3d 1309, 1311-1312 (11th Cir. 2001).

Petitioner contends (Pet. 32-34, 39-40) that the generic offense of sexual abuse of a minor is defined by one of several federal sexual-abuse statutes, 18 U.S.C. 2243, and that the generic offense draws two elements from Section 2243 that are missing from his state offense: a requirement that the minor victim of the crime suffer actual physical or psychological harm, and a requirement that the perpetrator be at least four years older than the victim. The court of appeals correctly rejected those contentions and held that petitioner's offense, committing lewd and lascivious acts on a child under the age of 14, satisfied the definition of sexual abuse of a minor. Furthermore, the court relied on circuit precedent reaching that conclusion in an analogous criminal context in which the court's review was de novo. To pre-

vail in this case, however, petitioner would also have to overcome the BIA's controlling interpretation. The BIA has authoritatively rejected petitioner's contentions, and that decision is entitled to deference.

a. The decision below relied on *United States* v. *Medina-Villa*, 567 F.3d 507 (9th Cir. 2009), cert. denied, 130 S. Ct. 1545 (2010), the latest in a series of cases in which the court of appeals has rejected the argument that 18 U.S.C. 2243 defines the generic crime of sexual abuse of a minor. Pet. App. 2. In *Medina-Villa*, the court concluded that the offense of which petitioner was convicted—committing lewd and lascivious acts on a child under the age of 14, in violation of Section 288(a)—is "sexual abuse of a minor" and therefore a "crime of violence" under Sentencing Guidelines § 2L1.2(b)(1)(A)(ii) & comment. (n.1(B)(iii)). The court explained that the term "abuse" connotes "'harmful or injurious conduct,'" inflicting "'physical or psychological harm' in light of the age of the victim in question." 567 F.3d at 513 (quoting *United States* v. *Baza-Martinez*, 464 F.3d 1010, 1015 (9th Cir. 2006)). Offenses against young children inflict such abuse, the court explained, because "[t]he use of young children for the gratification of sexual desires constitutes abuse." *Id.* at 515 (brackets in original; citation omitted).

The court explained that in another decision involving a statutory-rape offense, which encompassed sexual conduct involving children as old as 17, it had found 18 U.S.C. 2243 instructive in explaining what constitutes "abuse" of *older* minors. *Medina-Villa*, 567 F.3d at 514-516 (citing *Estrada-Espinoza* v. *Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (en banc)). In evaluating whether the strict-liability crime of statutory rape constitutes sexual abuse of a minor, the court stated, Section 2243 could be

instructive: Section 2243 does not apply to victims older than 16 or to victims who are less than four years younger than the defendant. The court of appeals therefore concluded that sexual contact with older adolescents was not necessarily "abusive," whereas "sexual activity with a younger child is certainly abusive." *Id.* at 514 (quoting *Estrada-Espinoza*, 546 F.3d at 1153). Thus, *Estrada-Espinoza*'s reliance on Section 2243 "was intended to define statutory rape laws only" and "in no way undermines [the court of appeals' repeated] conclusion that "[t]he use of young children for the gratification of sexual desires constitutes abuse." *Id.* at 515 (brackets in original; citation omitted). Because violation of Section 288(a) involves child victims who are 13 or younger, the court reiterated, the sexual conduct that Section 288(a) proscribes is categorically abusive.

The court also noted that an "absurd result" would occur if the generic offense of "sexual abuse of a minor" adopted wholesale the elements of 18 U.S.C. 2243 for *all* cases, not just statutory-rape offenses. Section 2243 requires that the victim be between the ages of 12 and 16. Thus, if the only offenses that counted as "sexual abuse of a minor" were those covered by Section 2243, "then no child under the age of twelve would be contemplated by the term 'minor,' and sexual crimes against children under twelve would not" satisfy the generic definition of "sexual abuse of a minor." *Medina-Villa*, 567 F.3d at 516. The court of appeals declined to ascribe to Congress the intent to force such a "bizarre result." *Ibid.*

b. Although *Medina-Villa* involved the Sentencing Commission's definition of a "crime of violence" in the commentary to the Sentencing Guidelines, the court below thought the reasoning of *Medina-Villa* fully appli-

cable to the question whether petitioner's offense was an aggravated felony under the INA.[6] Even if *Medina-Villa* did not apply, however, the court of appeals would have been obliged to apply the BIA's precedential decision in *Rodriguez-Rodriguez*, which squarely rejected petitioner's interpretation of the term "sexual abuse of a minor."

In *Rodriguez-Rodriguez*, the BIA pointed out that in construing the term "sexual abuse of a minor," it is "not obliged" to draw the generic definition from "a federal or state statutory provision." 22 I. & N. Dec. at 994. The BIA noted that Congress sometimes expressly cross-references a federal offense but did not do so in the provision defining "sexual abuse of a minor" as an aggravated felony. *Id.* at 994-995.

The BIA agreed that it would be appropriate to "look[] to a federal definition" of sexual abuse for guidance, if not a "definitive standard or definition." 22 I. & N. Dec. 995, 996. The BIA noted, however, that the provision on which petitioner relies, 18 U.S.C. 2243, is not the only federal definition of sexual abuse. Another provision of the federal criminal code dealing with mi-

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[6] The court of appeals has opined that cases interpreting the Guidelines commentary's use of "sexual abuse of a minor" are relevant in cases interpreting the INA's use of that phrase. *E.g.*, *Medina-Villa*, 567 F.3d at 511-512. That reasoning is problematic in some contexts, because the Guidelines and the INA present different structural and historical considerations. Moreover, the BIA authoritatively interprets the INA through case-by-case adjudication, and the Sentencing Commission authoritatively interprets the Guidelines through its written commentary. Because the BIA has resolved the question presented here in the same way that the court of appeals has resolved the corresponding question under the Guidelines commentary, this case does not call for the Court to examine when differing interpretations of the INA and the Guidelines commentary are appropriate.

nors, 18 U.S.C. 3509(a)(8), defines "sexual abuse" as "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." Section 3509 deals with the rights of children who are victims of crimes of sexual abuse, physical abuse, or exploitation, as well as those of child witnesses. 18 U.S.C. 3509(a)(2).

After considering the dictionary definition and common usage of the phrase "sexual abuse," the BIA concluded that Section 3509(a)(8) provides a "reasonable interpretation" of "the term 'sexual abuse of a minor' as it commonly is used." 22 I. & N. Dec. at 996. Section 2243, by contrast, uses a more limited definition that requires proof of physical contact as an element. See 18 U.S.C. 2246(a)(2). The BIA concluded that such a requirement does not accord with the definition and common usage of the term "abuse," which "do[] not indicate that contact is a limiting factor" but rather "include[] a broad range of maltreatment of a sexual nature." 22 I. & N. Dec. at 996. Section 3509(a)(8), in the BIA's view, "better captures th[e] broad spectrum of sexually abusive behavior" reflected in state laws, which "categorize and define sex crimes against children in many different ways." *Ibid.* Accordingly, the BIA used Section 3509(a)(8) as "a guide in identifying the types of crimes [the BIA] would consider to be sexual abuse of a minor"; the BIA made clear, however, that it was not "adopting [Section 3509(a)(8)] as a definitive standard or definition." *Ibid.*

c. Petitioner nonetheless contends (Pet. 32-37) that the plain meaning of "sexual abuse of a minor" necessar-

ily encompasses the elements of 18 U.S.C. 2243. That contention lacks merit.

First, petitioner suggests (Pet. 34-35, 37-38) that Section 2243's definition of a "sexual act," which requires physical contact, see 18 U.S.C. 2246(a)(2), is the only way to give effect to the term "abuse" in the statute. The court of appeals explained, however, that its reading gives effect to the term "abuse" just as petitioner's does. Compare Pet. 34 ("[A]buse is clearly defined as requiring physical or psychological harm.") with *Medina-Villa*, 567 F.3d at 513 ("[W]e define the term 'abuse' as 'physical or psychological harm' in light of the age of the victim in question.") (quoting *Baza-Martinez*, 464 F.3d at 1015). Petitioner does not disagree with the court of appeals' assessment that the use of young children for sexual gratification constitutes abuse, see *id.* at 515; rather, he contends only that the same may not be true for *older* children (Pet. 38), relying on *Estrada-Espinoza*, but the court of appeals has already explained that Section 288(a) (unlike the statute in *Estrada-Espinoza*) encompasses abusive conduct precisely because it affects only crimes against children 13 and younger. *Medina-Villa*, 567 F.3d at 515; see also *Baron-Medina*, 187 F.3d at 1147.

Second, petitioner contends (Pet. 36) that the *absence* of an express cross-reference is enough to show that Congress intended to adopt Section 2243 as the generic crime of sexual abuse of a minor. But as the BIA explained, Congress generally *does* include a cross-reference when it means to incorporate a federal crime. *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 994-995 & nn.1-2 (citing numerous provisions of the INA's aggravated-felony provision that do use cross-references).

Third, petitioner objects (Pet. 37) that Section 3509(a)(8) is an inappropriate guide to the meaning of "sexual abuse of a minor" because that provision regulates criminal procedures and does not create a criminal offense. The court of appeals did not need to rely on Section 3509(a)(8) to reject petitioner's interpretation of "sexual abuse of a minor" in the context of the Sentencing Guidelines. See *Medina-Villa*, 567 F.3d at 511-516; *United States* v. *Medina-Maella*, 351 F.3d 944, 947 (9th Cir. 2003), cert. denied, 542 U.S. 945 (2004); see also *Baron-Medina*, 187 F.3d at 1146-1147. And the BIA in any event appropriately considered that provision not to be a "definitive standard or definition," but only a "guide" that illustrates how broadly the ordinary, common meaning of the phrase can sweep. *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 996.

Fourth, petitioner asserts that the legislative history of the "sexual abuse of a minor" provision supports an implicit incorporation of Section 2243. But the modest amendment to Section 2243 that petitioner cites has no connection to the INA's aggravated-felony provision beyond its being included in the same omnibus legislation; the amendment to Section 2243 was not in the comprehensive immigration legislation, but in another division of the bill, 600 pages away, in a provision dealing with child pornography. Compare Amber Hagerman Child Protection Act of 1996, Pub. L. No. 104-208, Div. A, sec. 101(a), § 121(7)(c), 110 Stat. 3009-31, with Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 321(a)(1), 110 Stat. 3009-627. The two provisions' inclusion in the same omnibus legislation does not create any inference so strong as to overcome the BIA's exercise of its authority to interpret the INA.

d. Petitioner also asserts (Pet. 31-32) that the BIA is due no deference in this context. As an initial matter, the court of appeals resolved this question without needing to examine what level of deference is due the BIA. See Pet. App. 2; *Medina-Villa*, 567 F.3d at 511-516. In any event, petitioner is simply incorrect in asserting that Section 1101(a)(43)(A) is a criminal provision over which the BIA lacks interpretive authority.[7] The INA is not a criminal statute, and Congress has expressly conferred on the Attorney General (and his delegate, the BIA) the authority to resolve ambiguities in the INA in the first instance. 8 U.S.C. 1103(a)(1); see *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999); accord, *e.g.*, *Emile*, 244 F.3d at 185.

In *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), this Court stated that the rule of lenity would apply when interpreting a criminal statute that the INA merely incorporates by reference, *id.* at 11 n.8. This case, by contrast, is a civil case interpreting a civil statute. Although some criminal statutes do refer to Section 1101(a)(43), *Leocal* does not suggest that such references transform the INA's aggravated-felony definition into a criminal statute for all purposes; to the contrary, this Court has applied the rule of lenity only when "the critical language appears in a criminal statute," which is not the case here. *Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577, 2589 (2010).[8]

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[7] By contrast, Justice Scalia's concurrence in *Crandon* v. *United States*, 494 U.S. 152, 177 (1990), on which petitioner relies (Pet. 32), discussed the interpretation of 18 U.S.C. 209, a criminal statute.

[8] In any event, neither *Leocal* nor *Carachuri-Rosendo* considered whether the rule of lenity, a tiebreaker of last resort, trumps the BIA's authority to interpret Section 1101(a)(43). In *Leocal*, the BIA had affirmed the petitioner's order of removal based solely on the relevant

2. Petitioner contends that the proper interpretation of the term "sexual abuse of a minor" is the subject of both intercircuit and intracircuit conflicts. In fact, the courts of appeals have consistently resolved the issues presented here, and this Court's review is not warranted to resolve any conflict.

a. Petitioner relies principally on cases interpreting the term "sexual abuse of a minor" in the Sentencing Guidelines. The BIA's interpretation in *Rodriguez-Rodriguez* is not binding in such cases; in immigration cases like this one, however, the BIA's decision is controlling. Petitioner does not point to any decision from another court of appeals rejecting the BIA's interpretation in *Rodriguez-Rodriguez*.[9] Nor would a conflict over the interpretation of the Guidelines ordinarily warrant certiorari review, because the Sentencing Commission can and does update the Guidelines to resolve any interpretive issues that the courts identify. See *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991).

b. Petitioner contends (Pet. 12-15) that two courts of appeals, other than the court below, have adopted his position that the elements of Section 2243 should control the meaning of the generic "sexual abuse of a minor" offense. In fact, petitioner points to no decision relying on Section 2243 to hold that a crime is *not* categorically "sexual abuse of a minor."

In *Emile*, *supra*, the First Circuit held that a state conviction for indecent assault on a child younger than

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circuit precedent. See 543 U.S. at 5 n.2. In *Carachuri-Rosendo*, the Court agreed with the BIA. See 130 S. Ct. at 2583.

[9] In *Emile*, the First Circuit noted that the relevance of Section 3509(a)(8) was "debatable," but did not need to resolve that question because the alien's offense also fell within another federal sexual-abuse crime. See 244 F.3d at 186 & n.2.

14 *did* categorically qualify as sexual abuse of a minor even though (contrary to petitioner's suggestion, Pet. 13, 19) it did *not* qualify as sexual abuse under Section 2243. 244 F.3d at 185-187, 188. The court explained that if Emile's state offense had been prosecuted federally, it would have qualified only as "abusive sexual contact" under 18 U.S.C. 2244. See *id.* at 186. The First Circuit held that, "given the interpretive latitude afforded to the [BIA], it is hard to exclude from [Section 1101(a)(43)(A)] adult conduct that is directed against a minor and would unquestionably violate [the federal prohibition on abusive sexual contact] if it occurred on federal property." *Ibid.* But the court of appeals did not suggest that the state crime must match one of the federal crimes in 18 U.S.C. 2241-2248; to the contrary, the court suggested that such a match might be neither necessary nor sufficient. See 244 F.3d at 186 n.1. Rather, the court of appeals also pointed out that Emile's offense was consistent with "a lay understanding of sexual abuse of a minor," and it cited the Ninth Circuit's decision in *Baron-Medina*, a predecessor of the decision that controlled this case. See *id.* at 188. *Emile* thus does not create any conflict on the question presented. Furthermore, if there were any doubt, in a subsequent case under the Sentencing Guidelines, the First Circuit explicitly held that reliance on Section 2243 was "misplaced." *United States* v. *Londono-Quintero*, 289 F.3d 147, 153 (2002). In the absence of a statutory cross-reference, the court held, the "restrictive definition" of Section 2243 should not be imported into the generic offense of "sexual abuse of a minor." *Ibid.*

In *United States* v. *Medina-Valencia*, 538 F.3d 831, cert. denied, 555 U.S. 1079 (2008), the Eighth Circuit did not consider 8 U.S.C. 1101(a)(43)(A) at all, but instead

interpreted the term "sexual abuse of a minor" in the context of the interpretive guidance regarding the term "crime of violence." *Id.* at 834. In that context, the court considered 18 U.S.C. 2243 as an offense that the Sentencing Commission would have intended to include when it added the generic term "sexual abuse of a minor" in 2000. *Id.* at 835. *Medina-Valencia* did not limit the definition of "sexual abuse of a minor" to the elements of 18 U.S.C. 2243, but rather used three separate statutes as examples to illustrate various alternative requirements beyond "sexual contact" to "fit the ordinary, contemporary, common meaning of sexual abuse of a minor." *Ibid.* (citing 18 U.S.C. 2241 as requiring force; 18 U.S.C. 2242 as requiring non-consent; and 18 U.S.C. 2243 as requiring an age difference). The court did not even hold that only the age disparity in 18 U.S.C. 2243 would suffice, but rather observed that "[s]ome age difference may be necessary to qualify sexual contact as abuse where the statute reaches both consensual and non-consensual conduct."[10] 538 F.3d at 834.

Thus, every circuit that has addressed the issue has considered the generic, ordinary, contemporary, common meaning of "sexual abuse of a minor" as used in 8 U.S.C. 1101(a)(43)(A), and no circuit has limited that

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[10] Like the statute in *Medina-Valencia*, Section 288(a) contains no requirement of an age difference. But if petitioner's immigration case had been before the Eighth Circuit, and if the Eighth Circuit applied the same analysis in a case interpreting 8 U.S.C. 1101(a)(43)(A) that it did interpreting the Sentencing Guidelines commentary's definition of a "crime of violence," the court would still find that petitioner's conviction was an aggravated felony under the modified categorical approach, as it did in *Medina-Valencia*. See 538 F.3d at 835-836; pp. 18-19, *infra* (explaining why petitioner's conviction records demonstrate that he was more than four years older than the under-14 victim).

meaning to the elements of 18 U.S.C. 2243 and 2246. The conflict identified by petitioner does not exist.

c. Petitioner devotes considerable attention (Pet. 13-14, 19-20, 21-27) to an alleged conflict within the court of appeals on the question presented. This Court does not grant certiorari to review intracircuit conflicts, and this case presents no reason to make an exception to that rule.

First, petitioner contends that the decision below (and the line of cases on which it rests) is inconsistent with a rule that sexual abuse of a minor requires harm to the minor. He cites *Rebilas* v. *Mukasey*, 527 F.3d 783, 786 (9th Cir. 2008), which held that the Arizona offense of attempted public sexual indecency to a minor is not "sexual abuse of a minor" because the offense does not require a touching of the minor and the minor may be asleep or otherwise unaware of the lewd display. Here, by contrast, the statute that petitioner violated *does* require that the defendant either touch the child or cause the child to touch herself or another, and that the act be done for a sexual purpose. See *People* v. *Lopez*, 111 Cal. Rptr. 3d 232, 238 (Ct. App. 2010). As the court of appeals explained, the use of a child under age 14 for sexual gratification in that manner is abusive. *Medina-Villa*, 567 F.3d at 515. This case thus does not present any question regarding a requirement of harm to the minor.[11]

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[11] Although petitioner asserted in his petition for rehearing an argument based on a supposed requirement that the victim suffer a self-perceived psychological or physical injury, he does not press it here and it is not properly preserved. In any event, that issue is the subject of continuing debate within the Ninth Circuit. See *United States* v. *Baza-Martinez*, 481 F.3d 690 (2007) (Graber, J., dissenting from denial of rehearing en banc).

Second, petitioner contends that the precedents controlling this case are inconsistent with *Estrada-Espinoza*'s treatment of a statutory-rape offense. But the court of appeals has already harmonized its decisions. See *Medina-Villa*, 567 F.3d at 515; *Rivera-Cuartas* v. *Holder*, 605 F.3d 699, 701-702 (9th Cir. 2010). The court of appeals denied rehearing en banc in *Medina-Villa* without any judge calling for a poll, see Order, No. 07-50396 (9th Cir. Sept. 21, 2009), and this Court denied certiorari. There is no basis for a different result here. The court of appeals in *Estrada-Espinoza* did not consider a situation or an offense against a young child like petitioner's, and as explained above, the BIA has reasonably concluded that petitioner's offense cannot be excluded from the scope of "sexual abuse of a minor" by reference to elements of Section 2243. Thus, although there is tension between the reasoning of *Estrada-Espinoza* and the reasoning of other circuits considering statutory-rape offenses, any such divergence cannot benefit petitioner, because he cannot point to any circuit that has adopted a definition of "sexual abuse of a minor" that would exclude his offense.

3. Even if the courts were divided on the definition of "sexual abuse of a minor" under 8 U.S.C. 1101(a)(43)(A), this case would not warrant certiorari review. Petitioner likely would be removable even if this Court were to adopt 18 U.S.C. 2243 as the definition of "sexual abuse of a minor" under 8 U.S.C. 1101(a)(43)(A).

Petitioner's assertion to the contrary relies (Pet. 39-40) on the so-called "missing element" rule, under which some Ninth Circuit decisions held that when an offense is missing an element of the generic offense entirely, the modified categorical approach cannot be used to show that the defendant committed the generic offense. Thus,

petitioner contends that his offense is missing the element of proof that he was more than four years older than his victim.[12] But in a recent en banc decision, the Ninth Circuit—the only circuit to apply this "missing element" rule—overruled its previous precedents and adopted a different approach. *United States* v. *Aguila-Montes de Oca*, No. 05-50170, 2011 WL 3506442, at *11-*21 (Aug. 11, 2011). The government could therefore establish any element of age difference under the modified categorical approach. Petitioner's conviction records establish that he was 40 years old when he committed the offense, see A.R. 112-113, which by definition involved a child less than 14 years old, see Cal. Penal Code § 288(a) (West Supp. 1999).[13]

In addition, given petitioner's criminal record and developments in the law since the immigration court proceedings in this case, petitioner may also be removable under 8 U.S.C. 1227(a)(2)(A)(ii) for two or more crimes involving moral turpitude, or under 8 U.S.C. 1227(a)(2)(E)(i) for a crime of child abuse. Review of the question presented therefore would be unlikely to affect petitioner's removability.

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[12] Petitioner also asserts that his offense has no element of actual harm, but as set out above, the court of appeals explained why the use of a young child for sexual gratification does, in fact, constitute actual harm. See pp. 7-8, 11, *supra*.

[13] This case does not present any occasion to examine the nuances of the revised approach adopted by the court of appeals in *Aguila-Montes de Oca*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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