No. 16-54

In the Supreme Court of the United States

JUAN ESQUIVEL-QUINTANA, PETITIONER

v.

LORETTA E. LYNCH, ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the Board of Immigration Appeals permissibly concluded that petitioner's conviction for "unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator," in violation of California Penal Code § 261.5(c) (West 2009), was a conviction for "sexual abuse of a minor," 8 U.S.C. 1101(a)(43)(A).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 810 F.3d 1019. The decision of the Board of Immigration Appeals (Pet. App. 27a-41a) is reported at 26 I. & N. Dec. 469. The decision of the immigration judge is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 2016. A petition for rehearing was denied on April 12, 2016 (Pet. App. 42a). The petition for a writ of certiorari was filed on July 11, 2016. The petition was granted on October 28, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 10a-34a.

STATEMENT

1. "The assessment of criminal convictions has been a necessary feature of the federal immigration system for over a century." Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. Rev. 1669, 1689 (2011) (Das). In 1891, Congress first mandated the exclusion of "persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude." Act of Mar. 3, 1891, ch. 551, § 1, 26 Stat. 1084. Since that time, Congress has on multiple occasions added to the list of convictions that subject an alien not only to exclusion, but also to deportation or other immigration consequences. See Das 1672 & n.9, 1688.

In its present form, the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides numerous grounds for removal of aliens whose continued presence Congress has deemed contrary to public safety and welfare, including conviction of offenses falling within various specified categories. 8 U.S.C. 1227(a)(2). As relevant here, the INA renders deportable an alien who has been convicted of an "aggravated felony." 8 U.S.C. 1227(a)(2)(A)(iii). Such an alien is also 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).[1] The INA defines what "[t]he term 'aggravated felony' means" by identifying covered offenses "whether [committed] in violation of

[1] An aggravated felony conviction does not categorically disqualify an alien from obtaining certain other forms of relief. See U.S. Br. at 2 n.1, *Torres* v. *Lynch*, 136 S. Ct. 1619 (No. 14-1096).

Federal or State law." 8 U.S.C. 1101(a)(43). The provision at issue here, Section 1101(a)(43)(A), includes "murder, rape, or sexual abuse of a minor." The INA does not further define "sexual abuse of a minor."

2. In 2000, petitioner, a native and citizen of Mexico, was admitted to the United States as a lawful permanent resident. Pet. App. 28a. In 2009, he was charged with two felony counts of unlawful sexual intercourse with a minor in violation of California Penal Code § 261.5(c).[2] See Administrative Record (A.R.) 214-215. That provision makes it unlawful for a person to engage in sexual intercourse with a minor who is not the perpetrator's spouse and "is more than three years younger than the perpetrator." See Cal. Penal Code § 261.5(a) ("'minor' is a person under the age of 18 years"). Petitioner pleaded no contest to one felony count and was sentenced to 90 days in jail and five years of probation. Pet. App. 28a; see A.R. 209. The offense conduct spanned a five-month period in which the victim was 16 years old and petitioner was 20 or 21 years old. A.R. 209, 214.

a. In 2013, the Department of Homeland Security served petitioner with a Notice to Appear, charging that petitioner was removable because his conviction for unlawful sexual intercourse with a minor was an aggravated felony. A.R. 281-282; see Pet. App. 3a. Petitioner contested the charge of removability, arguing that his conviction did not constitute "sexual abuse of a minor." A.R. 216-225. An immigration judge rejected petitioner's argument and ordered him removed. A.R. 150-158.

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[2] Unless otherwise noted, all references to state statutes are to the version currently in effect.

b. In a published, precedential decision, the Board of Immigration Appeals (BIA or Board) dismissed petitioner's appeal. Pet. App. 27a-41a.

At the outset, the Board noted that two of its precedents helped shed light on the "ordinary meaning" of "sexual abuse of a minor." Pet. App. 29a. In *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991 (1999), the Board had found "useful guidance" for construing "sexual abuse" in a federal provision that defined the term to mean "the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children." Pet. App. 30a (quoting 18 U.S.C. 3509(a)(8)). And in *In re V-F-D-*, 23 I. & N. Dec. 859 (2006), the Board had held that "a victim of sexual abuse who is under the age of 18 is a 'minor'" as that term is commonly understood. Pet. App. 30a. In petitioner's case, the Board stated, its task was to "expand upon these decisions and consider whether a violation of a statute that involves unlawful sexual intercourse and presumes a lack of consent based on the age of the victim is 'sexual abuse of a minor.'" *Ibid.*

For several reasons, the Board determined that it is. First, the Board explained that such offenses reflect the understanding that "there is an inherent risk of exploitation, if not coercion, when an adult solicits a minor to engage in sexual activity." Pet. App. 35a (citation omitted). Among other things, "minors as a group have a less well-developed sense of judgment than adults, and thus are at greater peril of making choices that are not in their own best interests." *Ibid.*

(brackets omitted) (quoting *Gattem* v. *Gonzales*, 412 F.3d 758, 765 (7th Cir. 2005)). That "risk of coercion," the Board observed, "is particularly great when the victim is not in the same peer group" as the perpetrator. *Id.* at 36a. And the Board determined that "having an age differential of 'more than three years' helps ensure that the victim and the perpetrator are not in the same peer group." *Ibid.*; see *ibid.* (citing study "classifying a woman's partner as not peer-aged if he is 3 or more years older because of the likelihood that they are in different school settings or, if in the same school, have a different status, such as freshman and senior").

The Board accordingly concluded that statutory-rape crimes may, under certain circumstances, involve "conduct that constitutes 'sexual abuse' as that term is commonly used." Pet. App. 37a. In particular, for "offenses involving older adolescents"—such as offenses involving intercourse with 16- or 17-year-old victims—"the key consideration" is whether the crime involved "a meaningful age differential" between the perpetrator and the victim. *Id.* at 36a-37a. Such an age differential, the Board explained, helps distinguish "sexual acts that are 'abusive'" from those "that are not 'abusive' because they occur between high school peers who are separated in age by, for example, only 2 years." *Id.* at 37a. Thus, the Board determined, a statutory-rape offense involving intercourse with a 16- or 17-year old "categorically constitut[es] sexual 'abuse'" only where the statute of conviction requires at least a three-year difference between the victim's age and the perpetrator's. *Ibid.* That definition, the Board reasoned, accords with Congress's intent "to remove aliens who are sexually abusive toward children," while also

ensuring that aliens are not found to be removable based on "nonabusive consensual intercourse between older adolescent peers." *Id.* at 38a (citation omitted).

The Board recognized that its articulation of a definition was necessarily "limited" by the task in which that definition would be applied: Under the "categorical approach," any definition the Board adopted would be applied to the statutory elements of particular state offenses without regard to "the actual age of the victim, the age differential between the parties, or any other facts, even if they are undisputed in the judicially recognized documents that underlie the conviction." Pet. App. 38a. The Board therefore found it necessary to adopt a definition that could be applied "categorically" to a range of different offenses. *Ibid.* Yet States "categorize and define crimes against children in many different ways," making it "difficult, if not impossible, to determine whether a majority consensus exists with respect to the element components of an offense category or the meaning of those elements." *Id.* at 39a (citations omitted). Even when limited to "the subset of sex crimes referred to as 'statutory rape,'" the Board observed, "[m]ost States have multiple provisions governing this type of offense and vary widely in both the extent and existence of age gaps." *Id.* at 39a-40a. The Board therefore found it appropriate to "proceed incrementally," rather than attempt to devise a single definition covering all crimes involving minors. *Id.* at 40a.

Finally, the Board applied its definition of "sexual abuse of a minor" to petitioner's offense under California Penal Code § 261.5(c). Since that statute "requires that the minor victim be 'more than three years younger' than the perpetrator," the Board explained,

any conviction "categorically constitutes 'sexual abuse of a minor' and is an aggravated felony" under the INA. Pet. App. 40a-41a. The Board thus determined that petitioner's conviction "renders him removable," and it dismissed his appeal. *Id.* at 41a.

c. The court of appeals denied a petition for review. Pet. App. 1a-15a.

The court of appeals first determined that *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "supplies the appropriate framework for reviewing the Board's interpretation of 'sexual abuse of a minor.'" Pet. App. 4a; see *ibid.* ("The Supreme Court and Sixth Circuit have repeatedly held that *Chevron* deference applies to the Board's interpretations of immigration laws."); see also *id.* at 4a-5a (citing cases). Although petitioner urged the court instead to "ignore *Chevron* and create [its] own definition of 'sexual abuse of a minor,'" the court found that proposition to be "at odds with basic black-letter administrative law." *Id.* at 5a-6a. The court also rejected petitioner's contention that the Attorney General was not entitled to deference in construing the INA's aggravated felony definition because the definition has criminal as well as civil applications, which, petitioner contended, required the court to resolve ambiguity through principles of lenity instead. *Id.* at 7a-8a. The court explained that that argument was expressly rejected in *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703-704 (1995), in which the Court deferred to the Secretary of the Interior's interpretation of a statute enforceable through criminal penalties as well as civil measures. Pet. App. 9a.

Next, the court of appeals concluded that the Board's precedential decision in this case had permissibly construed the term "sexual abuse of a minor" to include violations of California Penal Code § 261.5(c). Pet. App. 11a. The court noted that that phrase, which is not defined in the INA, is "ambiguous." *Ibid.* To give content to the terms "sexual abuse" and "minor," therefore, the Board had reasonably relied on definitions drawn from other federal laws. *Id.* at 11a-12a (citing 18 U.S.C. 3509(a)(2) and (8)). The Board had been "sensible," moreover, to decline petitioner's invitation to adopt "the narrow definition of 'minor' in" a different federal provision, 18 U.S.C. 2243(a), which applies to children only between the ages of 12 and 16 years old. Pet. App. 13a; see *ibid.* ("We should not haphazardly import the requirements of § 2243(a) into a completely different statute."). Finally, the court noted that the "sexual abuse of a minor" provision, unlike the provisions identifying some other aggravated felonies, does not cross-reference any other federal law. That choice suggested that Congress "wanted to sweep in a broad array of state-law convictions" for abusive sexual conduct toward minors, rather than only those convictions that matched a particular federal crime. *Id.* at 14a.

Judge Sutton concurred in part and dissented in part. Pet. App. 16a-26a. He agreed with the majority that the statute was ambiguous. See *id.* at 19a-21a. Rather than apply *Chevron* deference, however, Judge Sutton would have applied the rule of lenity to resolve the ambiguity in petitioner's favor. *Id.* at 21a. In his view, a statute with both civil and criminal applications must be interpreted in the same manner in both contexts, such that "the 'lowest common denominator'

—including all rules applicable to the interpretation of criminal laws—governs all of [the statute's] applications." *Id.* at 18a (citation omitted); see *id.* at 21a-23a. Judge Sutton also disagreed with the majority's reading of *Sweet Home*, *id.* at 23a-24a, and argued that his approach was consistent with other circumstances in which *Chevron* deference has been found to be "categorically unavailable," *id.* at 25a-26a.

SUMMARY OF ARGUMENT

Under the categorical approach, petitioner's prior conviction under California law constitutes "sexual abuse of a minor," 8 U.S.C. 1101(a)(43)(A), and therefore qualifies as an aggravated felony.

A. 1. The first step of the categorical approach requires interpreting the federal provision at issue. The term at issue here, "sexual abuse of a minor," is most naturally read to encompass all sexual crimes committed against those under age 18. That meaning is most consistent with contemporary dictionary definitions and with the "everyday understanding" of the phrase. *Lopez* v. *Gonzales*, 549 U.S. 47, 53 (2006). It is consistent as well with the provision's legislative history, which is sparse but generally indicates that Congress intended to reach a wide range of sexual misconduct involving children. Although this Court has sometimes looked to state law to help determine the meaning of a federal provision, doing so is not helpful here: The term "sexual abuse of a minor" lacks common law roots or an established meaning in state law; and statutes that protect minors from sexual misconduct vary widely in their elements.

2. Petitioner does not attempt to define the term "sexual abuse of a minor." Instead, he argues that, *whatever* the term's meaning, his California conviction

must be excluded based on the following proposed methodology: He asks whether the "least culpable conduct" proscribed by his California offense—sex between a 17-year-old victim and a perpetrator who is three years older—would be illegal under the current laws of most States, looking as well at the Model Penal Code and an analogous federal criminal statute, 18 U.S.C. 2243(a). Because it would not, he argues that Section 1101(a)(43)(A) must be read to exclude his California conviction. For several reasons, petitioner's proposed methodology is flawed.

First, petitioner misunderstands the role of multi-jurisdictional surveys in this Court's jurisprudence. Such surveys can sometimes be useful when interpreting a federal provision that has a well-established meaning under state law. The Court has thus looked to state law when interpreting statutory terms derived from the common law. See, *e.g.*, *Taylor* v. *United States*, 495 U.S. 575, 598-599 (1990) (burglary). But a multi-jurisdictional analysis is in no way *required* when the meaning of a federal provision is being determined at step one of the categorical approach. And indeed, most of this Court's categorical-approach cases have not looked at state law when interpreting federal statutory language.

Second, petitioner's proposed methodology conflates the distinct steps of the categorical approach. Step one requires interpreting the federal provision at issue; step two requires comparing the elements of the prior state offense with the federal provision. At the second step, the Court presumes that the state conviction "rested upon nothing more than the least of the acts criminalized, and then determine[s] whether even those acts are encompassed by the generic federal

offense." *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684 (2013) (brackets, citation, and internal quotation marks omitted). Petitioner's methodology, by contrast, merges the two steps: Rather than asking what the federal provision means, and then comparing it to the elements of his state offense, petitioner would compare the elements of his state offense directly against the laws *of other States*. In other words, petitioner seeks to determine whether his California offense is a categorical match—not with the federal provision—but with other States' statutes. That methodology is inherently skewed towards the lowest common denominator: When state statutes vary along multiple dimensions (as they do for state laws that protect minors from sexual abuse), petitioner's proposed test would exclude all but the most basic state offenses. That is not what Congress intended.

Third, petitioner's proposed methodology would be burdensome to apply, because it never gives content to the federal provision at issue—here, Section 1101(a)(43)(A)—other than by ruling in or out particular state offenses by means of a multi-jurisdictional survey. As a consequence, his methodology would require a new 50-State survey for each state offense under consideration. For instance, a different survey would be required for each of the dozen or so provisions of California law that protect minors against sexual abuse.

3. Even if the Court determines that the term "sexual abuse of a minor" does not yield a clear answer to the question of statutory interpretation at issue here, any uncertainty is properly resolved by principles of deference. The Board of Immigration Appeals—which exercises the Attorney General's au-

thority to conduct removal proceedings and construe the INA in doing so—has authority "to fill [the] gap" with a reasonable construction under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (citation omitted). In this case, the Board determined, based on textual indications, practical considerations, and logical reasoning, that unlawful "sexual intercourse with a 16- or 17-year-old is properly viewed as categorically 'abusive'" where there is "a meaningful age differential" of more than three years between the victim and perpetrator. Pet. App. 37a. That reading is "a permissible construction of the statute," which merits judicial deference. *Chevron*, 467 U.S. at 843.

Petitioner's arguments against deference are unpersuasive. First, he argues that deference is incompatible with the categorical approach, which he asserts must "err on the side of underinclusiveness." *Moncrieffe*, 133 S. Ct. at 1693. But that feature of the categorical approach comes from the second step, at which the elements of the state offense are compared with the federal provision to see whether even "the least of the acts criminalized" under state law are a categorical match. *Id.* at 1684 (brackets, citation, and internal quotation marks omitted). At the first step, when the federal provision is being construed, normal interpretive tools are brought to bear—and that includes *Chevron* deference.

Second, petitioner argues that affording deference would conflict with the principle that any lingering ambiguity in deportation statutes should be construed in favor of the alien. That principle, like the rule of lenity in criminal cases, comes into play only at the end of the process, after other interpretive aids have

been exhausted. And, as this Court's cases illustrate, deference to an agency's reasonable interpretation is a normal tool for ascertaining a federal statute's meaning.

Third, petitioner argues that deference is inapplicable because the provision being interpreted, Section 1101(a)(43)(A), has potential criminal applications: The INA imposes criminal punishment for certain misconduct committed by, or with respect to, aliens previously convicted of aggravated felonies. See 8 U.S.C. 1253(a)(1), 1326(b)(2), and 1327. Petitioner argues that Section 1101(a)(43)(A) should accordingly be treated as if it were a criminal statute, which the Attorney General would get no deference in interpreting.

Petitioner is incorrect. For one thing, a defendant will not face criminal consequences unless he commits further, wrongful conduct, beyond the aggravated felony itself. Petitioner's argument would also elevate the relatively rare role that the aggravated felony definition plays in criminal proceedings compared to the definition's central role in civil removal proceedings, where it is applied thousands of times a year. Moreover, his argument is inconsistent with several decisions in which this Court applied deference to an agency's reasonable construction of a civil statute notwithstanding the statute's potential criminal applications. Finally, petitioner's argument could upend the Attorney General's traditional function in interpreting the INA: Numerous provisions of the INA—dealing with everything from "moral turpitude" to terrorism—have potential criminal applications.

B. The second step of the categorical approach involves a determination whether the elements of the state offense fall within the federal provision. In this case, petitioner's California offense qualifies either

under a plain-language interpretation of Section 1101(a)(43)(A) or under the Board's reasonable interpretation of that provision.

ARGUMENT

UNDER THE CATEGORICAL APPROACH, PETITIONER'S CALIFORNIA CONVICTION IS AN AGGRAVATED FELONY

"Because Congress predicated deportation 'on convictions, not conduct,'" the categorical approach is used to determine whether a state conviction qualifies as an "aggravated felony" under the INA. *Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1986 & n.3 (2015) (quoting Das 1701). That approach consists of a two-step process: First, it is necessary to interpret the federal provision under consideration. See, *e.g.*, *Taylor* v. *United States*, 495 U.S. 575, 598 (1990) (identifying "the generic, contemporary meaning" of the federal statutory term "burglary"). Second, "looking only to the statutory" elements of the state offense, a comparison must be made to determine whether a conviction under that state statute "necessarily implies that the defendant has been found guilty" of an offense that falls within the federal provision. *Id.* at 599-600. A categorical match will occur "if, but only if," the state statute sweeps no more broadly than the federal provision, such that every conviction under the former will also satisfy the latter. *Mathis* v. *United States*, 136 S. Ct. 2243, 2247 (2016). Following that framework resolves this case.

A. Step One: Interpreting "Sexual Abuse Of A Minor"

"Our analysis begins with the language of the statute." *Leocal* v. *Ashcroft*, 543 U.S. 1, 8 (2004). The term at issue here is "sexual abuse of a minor." 8 U.S.C. 1101(a)(43)(A). Familiar tools of statutory in-

terpretation may be used to determine its "ordinary meaning." *Leocal*, 543 U.S. at 11. Under a plain-language interpretation, "sexual abuse of a minor" is most naturally construed to encompass all sexual crimes committed against individuals less than 18 years old. To the extent that "Congress has not directly addressed the precise question at issue," *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984), the term is subject to a reasonable construction by the agency that administers it. Accordingly, the Board of Immigration Appeals—the entity that exercises the Attorney General's authority to conduct removal proceedings and interpret the INA—has authority "to fill [that] gap" with a reasonable construction. *Ibid.* (citation omitted).

1. The plain language of Section 1101(a)(43)(A) applies to illegal sexual acts involving minors

In past cases, this Court has used a variety of tools to determine the meaning of terms listed in the INA. In this case, those tools point to a broad interpretation of the term "sexual abuse of a minor."

a. "[W]e begin by looking at the terms of the provisions and the 'commonsense conception' of those terms." *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 573-574 (2010) (quoting *Lopez* v. *Gonzales*, 549 U.S. 47, 53 (2006)). Unlike other aggravated felonies such as "burglary" or "perjury," see 8 U.S.C. 1101(a)(43)(G) and (S), "sexual abuse of a minor" is neither a common law offense nor a legal term of art. See Wayne R. LaFave, *Criminal Law* § 2.1(b), at 79-80 (5th ed. 2010) (identifying a list of common law crimes but not including either sexual abuse of a minor or statutory rape); *id.* § 17.4(c), at 920 ("Under early English common law, sexual relations with a child, no matter

how young, was not regarded as rape if the child consented."). Nor did Congress define the term by means of a cross-reference to another federal statute, as it did for several other aggravated felonies. See, *e.g.*, 8 U.S.C. 1101(a)(43)(D) ("an offense described in section 1956 of title 18"). The most probative evidence of "what Congress probably meant," therefore, is the term's "regular usage." *Lopez*, 549 U.S. at 53. Indeed, because Congress has not itself defined "sexual abuse of a minor" in the INA, "the everyday understanding of" that term "should count for a lot here." *Ibid.*

Congress added "sexual abuse of a minor" to the INA in 1996, as part of a comprehensive overhaul of the Nation's immigration laws. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. III, Subtit. B, § 321(a)(1), 110 Stat. 3009-627. At that time, the commonly accepted definition of "sexual abuse" was "[i]llegal sex acts performed against a minor by a parent, guardian, relative, or acquaintance." See *Black's Law Dictionary* 1375 (6th ed. 1990) (*Black's*); cf. 15 *Oxford English Dictionary* 108 (2d ed. 1989) (defining "sex offense" as "a breach of law * * * involving sex"). The term "minor," in turn, was defined as "[a]n infant or person who is under the age of legal competence," which "[i]n most states" was 18 years old. *Black's* 997. That commonsense definition is also consistent with the use of "minor" in other provisions of the immigration laws. See 8 U.S.C. 1182(a)(9)(B)(iii)(I) (exception for accruing of unlawful presence by "Minors": "No period of time in which an alien is under 18 years of age shall be taken into account"); 8 U.S.C. 1232(c)(2)(B) (Supp. III 2015) (place-

ment for unaccompanied alien child who arrives as a "minor" but then "reaches 18 years of age").

Contemporary definitions of "sexual abuse of a minor" thus suggest a "common usage of the term [that] includes a broad range of maltreatment of a sexual nature." *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 996 (B.I.A. 1999). The language most naturally connotes conduct that (1) is illegal, (2) involves sexual activity, and (3) is directed at a person younger than 18 years old. Absent indications that Congress intended to depart from the term's "regular usage," then, that is "what Congress probably meant." *Lopez*, 549 U.S. at 53; see *Kawashima* v. *Holder*, 132 S. Ct. 1166, 1172 (2012) (relying on dictionary definition from "[w]hen subparagraph (M) was enacted" to determine its meaning).

b. Relevant legislative history is sparse but generally supports a broad interpretation of "sexual abuse of a minor" in Section 1101(a)(43)(A). At the same time that Congress added that provision to the definition of "aggravated felony," it also added, as a grounds for deportation, a conviction for "a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment." IIRIRA § 350(a), 110 Stat. 3009-639 (8 U.S.C. 1227(a)(2)(E)(i)). Congress thus adopted multiple, overlapping provisions providing for removal of aliens who commit offenses against minors. That was no coincidence, see H.R. Rep. No. 828, 104th Cong., 2d Sess. 228 (1996), but rather was part of a larger, deliberate attempt to create a "comprehensive statutory scheme to cover crimes against children." *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 994. Reading the term "sexual abuse of a minor" to include the full range of sexual crimes

against those under the age of 18 therefore "best reflects * * * the intent of Congress in expanding the definition of aggravated felony to protect children." *V-F-D-*, 23 I. & N. Dec. at 862.

c. This Court, in other cases involving the categorical approach, has sometimes looked to state law to help determine the meaning of the federal provision at issue. See *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 189 (2007); *Taylor*, 495 U.S. at 598. That methodology is most useful where Congress has chosen a term that carries an established "common-law meaning" or a "specialized legal usage," *Johnson* v. *United States*, 559 U.S. 133, 139 (2010), or where state law "uniformly treats" the conduct in a particular manner, *Duenas-Alvarez*, 549 U.S. at 190. But such is not the case here: The term "sexual abuse of a minor" does not have a specialized legal meaning, and statutes addressing sexual offenses against children vary considerably in their particulars.

States protect minors from sexual abuse under a wide variety of criminal provisions. Some forbid sexual contact with minors who are related to the perpetrator, see, *e.g.*, Or. Rev. Stat. § 163.375(1)(c); others apply to minors who are connected to the perpetrator by a relationship of trust or authority, see, *e.g.*, Conn. Gen. Stat. Ann. § 53a-71(a)(9)(B). Still other offenses are based on the victim's age alone, under the premise that persons below a certain minimum age are unable to provide legally meaningful consent to sexual activity. Those offenses, often referred to as "statutory rape," see *Black's* 1412, typically vary across at least four different dimensions: (1) the age of the victim; (2) the age of the offender; (3) the age differential

between the victim and offender; and (4) the offense conduct.

Victim's age. All States have chosen an age of the victim below which some sexual conduct is forbidden but above which consensual sexual contact is permitted —the so-called "age of consent." See *Black's* 65. Jurisdictions variously set the age at 18 years old (12 States), 17 years old (7 States), and 16 years old (31 States and the District of Columbia). See App., *infra*, 1a-9a (table listing all States by their ages of consent).

Offender's age. Many state statutes set a minimum age for the offender. Examples include 16 years old,[3] 17 years old,[4] 18 years old,[5] 19 years old,[6] 20 years old,[7] 21 years old,[8] 24 years old,[9] 25 old years,[10] and 30 years old.[11]

Age differential. Some state statutes impose criminal liability without regard to whether the partici-

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[3] Iowa Code Ann. § 709.8(1); S.D. Codified Laws § 22-22-7; W.Va. Code Ann. § 61-8B-5(a)(2).

[4] Alaska Stat. §§ 11.41.436(a)(1), 11.41.438(a); 720 Ill. Comp. Stat. Ann. 5/11-1.40(a)(1), 5/11-1.60(c)(1); Miss. Code Ann. § 97-3-65(1)(a).

[5] Del. Code Ann. tit. 11, §§ 772(a)(2)(g), 773(a)(5); Ky. Rev. Stat. Ann. § 510.050; Okla. Stat. Ann. tit. 21, § 1114.A.1.

[6] Ariz. Rev. Stat. Ann. §§ 13-1405, 13-1407(F); Del. Code Ann. tit. 11, § 771(a)(1); Neb. Rev. Stat. Ann. §§ 28-319(1)(c), 28-319.01(1)(a), 28-320.01(1).

[7] Ark. Code Ann. § 5-14-127(a)(1).

[8] Ind. Code Ann. § 35-42-4-3(a)(1); Mo. Ann. Stat. §§ 566.034, 566.064; Or. Rev. Stat. § 163.425(1)(b).

[9] Fla. Stat. Ann. § 794.05(1).

[10] Neb. Rev. Stat. Ann. § 28-319.01(1)(b).

[11] Del. Code Ann. tit. 11, § 770(a)(2).

pants are of different ages.[12] Other statutes require age differentials of varying lengths: at least one day,[13] at least 2 years,[14] at least 3 years,[15] at least 4 years,[16] at least 5 years,[17] between 4 and 7 years,[18] between 4 and 9 years,[19] between 5 and 9 years,[20] at least 6 years,[21] at least 7 years,[22] between 7 and 10 years,[23] between 8 and 11 years,[24] and at least 10 years.[25] See App., *infra*, 1a-9a (listing required age differentials for state offenses involving minors just under the age of consent).

Offense conduct. States prohibit a wide range of sexual behavior with minors, including: sexual inter-

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[12] Colo. Rev. Stat. § 18-3-404(1.5); Del. Code Ann. tit. 11, § 768; S.D. Codified Laws § 22-22-7.3.

[13] Va. Code Ann. § 18.2-371 (outlawing sexual contact with a "Child" by "[a]ny person 18 years of age or older"); see *id.* § 1-207 (defining "child" as "a person less than 18 years of age").

[14] Ariz. Rev. Stat. Ann. § 13-1407(F); Minn. Stat. Ann. § 609.344.1(b); Miss. Code Ann. §§ 97-3-65(1)(b), 97-3-95(1)(d).

[15] Idaho Code Ann. § 18-6101(2); La. Rev. Stat. Ann. § 14:43.1(A)(2); Me. Rev. Stat. Ann. tit. 17-A, § 255-A(1)(E) to (F-1).

[16] Del. Code Ann. tit. 11, § 778(3); N.M. Stat. Ann. § 30-9-11(G)(1); Utah Code Ann. § 76-5-401.1(2).

[17] Me. Rev. Stat. Ann. tit. 17-A, §§ 254(1)(A), 260(1)(C); Mass. Ann. Laws ch. 265, § 23A(a); N.H. Rev. Stat. Ann. § 632-A:4(I)(b).

[18] 18 Pa. Cons. Stat. Ann. § 3122.1(a)(1).

[19] Tenn. Code Ann. § 39-13-506(b)(1).

[20] Tenn. Code Ann. § 39-13-506(b)(2).

[21] N.C. Gen. Stat. §§ 14-27.25(a), 14-27.30(a).

[22] Cal. Penal Code § 269.

[23] Utah Code Ann. § 76-5-401.2(2)(a)(i).

[24] 18 Pa. Cons. Stat. Ann. § 3122.1(a)(2).

[25] Del. Code Ann. tit. 11, § 771(a)(1); Mass. Ann. Laws ch. 265, § 23A(b); Tenn. Code Ann. § 39-13-506(c).

course,[26] any sexual penetration,[27] sodomy and deviate sexual intercourse,[28] sexual contact (including touching over clothes),[29] sexual battery,[30] oral sexual acts,[31] sexual acts with objects,[32] lewd and lascivious conduct,[33] fondling or molestation,[34] and indecent exposure.[35]

Even limiting the inquiry to the subset of statutory-rape offenses that cover sexual intercourse with minors who are close to the age of majority, commonalities are hard to perceive. Twelve States currently set an age of consent at 18 years old, and those States make up approximately 32% of the total United States population; seven States, comprising an additional 23% of the population, have set the age of consent at

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[26] Ga. Code Ann. § 16-6-3; Mont. Code Ann. § 45-5-503; Wash. Rev. Code Ann. §§ 9A.44.076, 9A.44.079.

[27] Haw. Rev. Stat. Ann. § 707-730(1)(b) and (c); Tenn. Code Ann. § 39-13-531; Tex. Penal Code Ann. § 22.011.

[28] Kan. Stat. Ann. § 21-5504(a)(3); N.Y. Penal Code §§ 130.40(2), 130.45(1), 130.50(3) and (4); Va. Code Ann. § 18.2-67.2(A)(1).

[29] Conn. Gen. Stat. Ann. § 53a-73a(a)(1)(A); Mich. Comp. Laws Ann. § 750.520c(1); W.Va. Code Ann. §§ 61-8B-7(a)(3), 61-8B-9.

[30] Fla. Stat. Ann. § 794.011(2); Mass. Ann. Laws ch. 265, § 13B; S.C. Code Ann. § 16-3-655(A)(1) and (B)(1).

[31] Cal. Penal Code §§ 288a(b); 288.7(b), La. Rev. Stat. Ann. § 14:43.1(A)(2); N.Y. Penal Code §§ 130.40(2), 130.45(1), 130.50(3) and (4).

[32] N.Y. Penal Code §§ 130.66(1)(c), 130.70(1)(c); Okla. Stat. Ann. tit. 21, § 1111.1.A; Utah Code Ann. § 76-5-402.3(1).

[33] Fla. Stat. Ann. § 800.04(4)(a); Iowa Code Ann. § 709.8, 709.14; S.C. Code Ann. § 16-3-655(C).

[34] Ind. Code Ann. § 35-42-4-9(b); Kan. Stat. Ann. § 21-5506(a), (b)(2), and (b)(3); Miss. Code Ann. § 97-5-23.

[35] Fla. Stat. Ann. § 800.04(7); Ind. Code Ann. § 35-45-4-1(b); Ky. Rev. Stat. Ann. § 510.148.

17 years old.[36] See p. 19, *supra*. Looking collectively at those States' laws, the minimum age differential under almost two-thirds of them (12 of 19) is three years or less. See App, *infra*, 1a-4a. At the time that the term "sexual abuse of a minor" was added to Section 1101(a)(43)(A), several of those States had imposed an even shorter age-differential requirement or had required none at all. See, *e.g.*, Idaho Code Ann. § 18-6101 (1996) (none); Wyo. Stat. Ann. § 14-3-105 (1996) (none).

Thus, as courts of appeals have recognized, state statutes protecting minors exhibit "wide variations in prohibited conduct * * * [that] make it difficult, if not impossible, to determine whether a majority consensus exists with respect to the element components of [the] offense." *United States* v. *Rodriguez*, 711 F.3d 541, 556 (5th Cir.) (en banc), cert. denied, 134 S. Ct. 512 (2013). State laws do not prescribe "uniform[] treat[ment]" for such conduct, *Duenas-Alvarez*, 549 U.S. at 190, nor can such laws be distilled into a common set of "basic elements," *Taylor*, 495 U.S. at 599. Accordingly, there is no reason to assume that Congress intended—in using general terms ("sexual abuse" and "minor") that have ordinary and commonly understood meanings—to track any particular formulation under state law. See *Johnson*, 559 U.S. at 139 ("[W]e do not assume that a statutory word is used as a term of art where that meaning does not fit.").

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[36] Figures calculated based on U.S. Census Bureau population data, http://www2.census.gov/programs-surveys/popest/tables/2010-2016/state/totals/nst-est2016-01.xlsx.

2. Petitioner's alternative approach to interpreting Section 1101(a)(43)(A) is erroneous

Petitioner makes no attempt to define the term "sexual abuse of a minor," even with regard to the subset of statutory-rape offenses. Instead, petitioner argues (Br. 14), *whatever* the meaning of that term, his prior conviction under California law does not qualify because most state jurisdictions currently do not criminalize the "least culpable conduct" proscribed by that California law. He also faults (Br. 22-23) the Board and the court of appeals for failing to "conduct a multi-jurisdictional survey," which he describes (*ibid.*) as a key part of "*Taylor*'s methodology." Finally, petitioner claims (Br. 17) that his California offense cannot be an aggravated felony because it is broader than an analogous provision in the Model Penal Code and a federal criminal statute, 18 U.S.C. 2243(a). Petitioner's arguments are unpersuasive.

a. As an initial matter, petitioner misunderstands the role of multi-jurisdictional surveys in this Court's jurisprudence. The first step of the categorical approach requires interpretation of the federal provision at issue, a task that involves normal tools of statutory construction. See *Taylor*, 495 U.S. at 596-597 (considering and rejecting a proposed construction of "burglary" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), because "it is not supported by the language of the statute or the legislative history"). A multi-jurisdictional survey can sometimes be useful insofar as it helps shed light on the "common understanding and meaning" of the federal provision being interpreted. *Perrin* v. *United States*, 444 U.S. 37, 45 (1979). This Court has accordingly undertaken multi-jurisdictional analyses in some of its categorical-

approach cases when attempting to define a term with common law roots. See *Duenas-Alvarez*, 549 U.S. at 189-190 (theft); *Taylor*, 495 U.S. at 598-599 (burglary). But so, too, has the Court surveyed state law, in cases unrelated to the categorical approach, when interpreting statutory terms derived from the common law. See, *e.g.*, *Evans* v. *United States*, 504 U.S. 255, 262-264 & n.13 (1992) (surveying state law in defining "extortion" under the Hobbs Act); *Perrin*, 444 U.S. at 43-45 (bribery under the Travel Act); *United States* v. *Nardello*, 393 U.S. 286, 293-294 (1969) (extortion under the Travel Act); see also *Morissette* v. *United States*, 342 U.S. 246, 262 & nn.20 & 21 (1952) (using "exhaustive studies of state court cases" to determine "definition" of prohibition against "steal[ing]" government property under 18 U.S.C. 641, an offense "incorporated from the common law"); cf. *Moskal* v. *United States*, 498 U.S. 103, 115 (1990) (declining to interpret federal statutory term by reference to its use under state law where litigant "failed to demonstrate that there was, in fact, an 'established' meaning of [the term] at common law"). The relevant question —in either context—is whether a survey of state law will help "determine the meaning" of the statutory language at issue. *Taylor*, 495 U.S. at 577.

Nothing about the categorical approach *requires* a multi-jurisdictional analysis, however. To the contrary, this Court has often resolved its categorical-approach cases without doing so—particularly where the federal provision at issue does not use a common law term. See, *e.g.*, *Torres* v. *Lynch*, 136 S. Ct. 1619, 1626 (2016) (using "contextual considerations" to determine what it means for an offense to be "described in" Section 1101(a)(43)); *Carachuri-Rosendo*, 560 U.S. at 573-574

(interpreting "aggravated felony" and "illicit trafficking" based on "the everyday understanding of those terms") (citation and internal quotation marks omitted); *Lopez*, 549 U.S. at 53 (interpreting aggravated felony of "illicit trafficking" under the INA based on the "everyday understanding" of that term); *Leocal*, 543 U.S. at 8-9 (construing "use of physical force" in crime of violence definition, 18 U.S.C. 16, based on statute's "language" and "context"). And in *Johnson*, the Court explicitly rejected the relevance of state law when interpreting the word "force" under the ACCA's elements clause, 18 U.S.C. 924(e)(2)(B)(i), because the Court was unpersuaded that Congress intended to give the word "the specialized meaning that it bore" under the common law. 559 U.S. at 139. Petitioner is thus wrong to insist (Br. 15) that the "parameters" of a federal provision "must be derived" from a survey of state criminal codes.

b. Petitioner's proposed methodology (Br. 17) for conducting a "multi-jurisdictional analysis" also conflates the distinct steps of the categorical approach. The primary question in this case is what Congress meant when it used the term "sexual abuse of a minor" in Section 1101(a)(43)(A). Answering that question is the first step of the categorical approach. See pp. 14-15, *supra*. Petitioner, however, would ask (Br. 17) a far different question—namely, whether "the least of the acts criminalized under" his prior California offense would be "lawful" in most States. But consideration of the elements of the state offense takes place at the *second* step of the categorical approach, in determining whether the state offense falls within the federal provision. At that step, the Court "presume[s] that the [state] conviction 'rested upon

nothing more than the least of the acts' criminalized, and then determine[s] whether even those acts are encompassed by the generic federal offense." *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684 (2013) (brackets omitted) (quoting *Johnson*, 559 U.S. at 137). Viewing the state conviction in that restrictive way helps answer the question whether a categorical match exists: If even the least of the acts criminalized by the state statute falls within the federal provision, then conviction of the state offense "necessarily implies" that the federal provision has been satisfied. *Taylor*, 495 U.S. at 599; see *Descamps* v. *United States*, 133 S. Ct. 2276, 2281 (2013).

Before the state and federal provisions can be compared, however, it must first be determined what the federal provision *means*—a question as to which an analysis of the acts covered by the state offense offers little guidance. Petitioner's proposed methodology is thus a strange hybrid of the two different steps of the categorical approach: Petitioner would compare what he regards as the "least culpable conduct" punishable under his California offense, not against the federal provision at issue, but against the laws *of other States*. In other words, petitioner essentially seeks to determine whether his state conviction is a categorical match with all (or almost all) other States' statutes. This Court has never adopted such a test or undertaken that task, even in its decisions that generally surveyed state law. And petitioner's methodology would skew the results to the lowest common denominator and magnify even small differences in state law.

To illustrate why, consider three different statutory-rape laws. In Georgia, intercourse with a person

younger than 16 years old is illegal regardless of the perpetrator's age. Ga. Code Ann. § 16-6-3(a). Missouri prohibits sex with a person younger than 17 years old, but only if the perpetrator is at least 21 years old. Mo. Ann. Stat. § 566.034. And Florida makes sex with a person younger than 18 years old illegal for perpetrators who are at least 24 years old. Fla. Stat. Ann. § 794.05(1).

State	*Age of victim*	*Age of perpetrator*
Georgia	15 or younger	no minimum
Missouri	16 or younger	21 or older
Florida	17 or younger	24 or older

Comparing those offenses under petitioner's methodology would mean that *none* of those statutes would be a match with the others, since the "least culpable conduct" under each State's formulation of the offense would not be illegal under the other two States' statutes: The least-culpable conduct under the Florida offense (sex between a 17-year-old victim and a 24-year-old perpetrator) would be illegal only in Florida. The same is true for the least-culpable conduct under the Missouri statute (16-year-old victim, 21-year-old perpetrator) and under the Georgia statute (sex between two 15 year olds). Under petitioner's methodology, only a state statute that adopted the "lowest common denominator"—incorporating *both* Georgia's 16-year-old age of consent *and* Florida's 24-year-old perpetrator requirement—would be a categorical match to all three.

Petitioner's methodology thus uses variation among the States as a way to narrow the meaning of the

federal provision, Section 1101(a)(43)(A). And, as noted above, insofar as state statutes prohibiting sexual contact with minors are concerned, variation abounds. See pp. 18-22, *supra*. No reason exists to think that Congress selected the phrase "sexual abuse of a minor" as a means of singling out only the lowest-common-denominator state offenses—*i.e.*, only the abusive conduct directed at minors as to which States happen to have legislated uniformly. To the contrary, Congress's choice of broad and general language, not tied to any particular federal statute or legal term of art, indicates that it intended to include state offenses that address the full range of sexually abusive conduct.

c. Petitioner's methodology would also be difficult and burdensome to apply, because it would require a new 50-State survey for each state offense under consideration. This Court's normal approach, in which traditional tools of statutory interpretation are used to construe the federal provision at issue, is consistent with the way federal statutes are typically interpreted. Once the meaning of that federal provision is determined (step one), it can be compared with relative ease against a wide variety of state statutes to test for a categorical match (step two). Petitioner's methodology, by contrast, never gives interpretive content to the federal provision, other than by ruling in or out particular state offenses by means of a "Multi-Jurisdictional Survey." Pet. Br. 15. As a result, each time a new state offense is at issue, a new multi-State survey would be required to check for a "consensus." *Ibid.*

For instance, even after this Court resolves whether petitioner's conviction under California Penal Code § 261.5(c) counts as "sexual abuse of a minor," a new

multi-jurisdictional survey would have to be conducted for an offender who was convicted under Subsection (d), which sets different ages for the perpetrator (21 years or older) and victim (less than 16 years); or for an offender who was convicted under any of the myriad other felony provisions of California law that protect minors. See California Penal Code §§ 269(a)(3), (4), and (5), 286(b)(2) and (c)(1), 288(a), (c)(1), and (c)(2), 288a(b)(2) and (c)(1), 288.5(a), 288.7(a) and (b). And because, in petitioner's view, "the categorical approach directs courts to consider the criminal law as it existed 'at the time Congress enacted' the statute at issue," Pet. Br. 18 (quoting *Perrin*, 444 U.S. at 42), he apparently would require that each state offense be compared against all other States' law "as [they] existed" when the relevant aggravated felony provision was adopted. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VII, § 7342, 102 Stat. 4469 (creating the aggravated felony definition); Immigration Act of 1990, Pub. L. No. 101-649, Tit. V, § 501, 104 Stat. 5048 (expanding the definition); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, Tit. II, § 222, 108 Stat. 4320 (same); IIRIRA § 321, 110 Stat. 3009-627 (same); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No 108-193, § 4(b)(5), 117 Stat. 2879 (same). Even petitioner has not undertaken that onerous task.[37]

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[37] Although in 1996, as today, no consensus existed as to the elements of state statutory-rape offenses, there are some meaningful differences between the two time periods. For instance, whereas Mississippi's current statute sets the age of consent at 16 years old and requires a 3-year age differential, see Miss. Code. Ann. § 97-3-65(1)(a), in 1996 the State set the age of consent at 18 years old and required only that the perpetrator be "older" than the victim, *id.*

This Court should not require immigration judges and the Board—and, on judicial review, the courts—to conduct 50-State surveys of now-defunct state statutes. Nor could that methodology meaningfully accomplish petitioner's asserted purpose of "put[ting] people like [petitioner] clearly on notice" about which state convictions are or are not aggravated felonies. Pet. Br. 40.

d. Petitioner further errs in arguing (Br. 20-21) that a "consensus" exists on the question presented because the States whose statutes categorically match California's generally reserve the term "abuse" for other crimes. Virginia, for instance, uses the term "abused" only where a minor suffers misconduct at the hands of a parent or "other person responsible for his care." Va. Code Ann. § 16.1-228.4. But Virginia also prohibits "[a]ny person 18 years of age or older" from "engag[ing] in consensual sexual intercourse" with a "child," *id.* § 18.2-371(ii), defined by statute to mean "a person less than 18 years of age," *id.* § 1-207. Thus, even under petitioner's erroneous methodology, his California conviction is a categorical match with Virginia's statutory-rape law. The result is no different simply because Virginia decided to label that crime something other than "abuse." See *Taylor*, 495 U.S. at 592 ("We think that 'burglary' in § 924(e) must have some uniform definition independent of the labels employed by the various States' criminal codes."); see also *Johnson*, 559 U.S. at 138 (determining whether the level of force required by a state statute constitutes "physical force" under federal law "is a question

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§ 97-3-67 (1994). Compare, *e.g.*, Wyo. Stat. Ann. § 6-2-316(a)(iv) (17-year-old age of consent, 4-year age differential), with *id.* § 14-3-105 (1996) (18-year-old age of consent, no age differential).

of federal law, not state law"). Indeed, petitioner even claims (Br. 21) that *California itself* is evidence for his position because a judicial opinion from an intermediate state court, see *In re Kyle F.*, 5 Cal. Rptr. 3d 190, 194 (Cal. Ct. App. 2003), and an opinion letter from the State's attorney general, see Opinion No. 83-911, 67 Op. Cal. Att'y Gen. 235 (June 1, 1984), refrain from using the word "abuse" to describe sex involving a 16 year old. The notion that Congress tethered federal law to those sources when it chose language for Section 1101(a)(43)(A) is unfounded.

This is not a case in which Congress borrowed a term with a well-established, durable, and uniform meaning in state law. Cf. *Taylor*, 495 U.S. at 598. Only four States and the District of Columbia have offenses titled "sexual abuse of a minor," and they differ substantially with one another as to the characteristics of the perpetrator and victim and as to the scope of covered conduct. See Alaska Stat. §§ 11.41.434-11.41.440; D.C. Code §§ 22-3009.01, 22-3009.02, 22-3010.01; Me. Rev. Stat. Ann. tit. 17-A, § 254; Utah Code Ann. § 76-5-401.1; Wyo. Stat. Ann. §§ 6-2-314 to 6-2-317. The "paucity" of state statutes using the term, and the variation among them, make it "highly improbable" that Congress sought to tie the INA's aggravated felony definition to the laws of those States. *United States* v. *Hayes*, 555 U.S. 415, 427 (2009); see *Lopez*, 549 U.S. at 54 (in construing aggravated felony of "illicit trafficking" in a controlled substance, declining to equate felony treatment with "trafficking," because "several States deviate significantly from th[at] pattern").

e. Petitioner's other interpretive arguments are similarly misguided.

i. Petitioner insists (Br. 12) that the "generic definition of a crime" depends in part on the "way the offense is defined under * * * the Model Penal Code." He notes (Br. 15-16) that the Court cited the Code as confirmation for its interpretation of the federal provisions at issue in *Taylor* and *Perrin*, *supra*. And, because the Code creates a model offense that includes a 16-year-old age of consent and a 4-year age differential, see Model Penal Code § 213.3(1)(a) (1985) ("Corruption of Minors and Seduction"), petitioner argues that Congress must have wanted Section 1101(a)(43)(A) to apply only to state offenses that reach the same conduct.

Petitioner fails to mention, however, that the Court did *not* consult the Model Penal Code in categorical-approach decisions such as *Mellouli*, *Duenas-Alvarez*, *Leocal*, *Carachuri-Rosendo*, and *Kawashima*, *supra*. Cf. *Johnson*, 559 U.S. at 141 (citing the Model Penal Code, but not to confirm its consistency with the Court's interpretation of the federal provision at issue). In any event, *Taylor* and *Perrin* did not rely on the Code because of its special relevance to the categorical approach. (Indeed, *Perrin* was not a categorical-approach case.) The Court cited the Code in those cases to confirm the "contemporary meaning" of common law terms used by Congress: "burglary" in *Taylor*, 495 U.S. at 598 & n.8, and "bribery" in *Perrin*, 444 U.S. at 45 & n.11. But "sexual abuse of a minor" is not a common law term, see pp. 15-16, *supra*, nor is it a term that the Code itself uses.

Moreover, the drafters of the Model Penal Code, in crafting their model offense, did not maintain that their proposal reflected a consensus among state statutory-rape laws. To the contrary, the drafters

explained that "[m]odern revised statutes" exhibit "considerable variation in the age of the female victim that has been selected as the appropriate measure of ability to give effective consent." Model Penal Code & Commentaries § 213.3 cmt. 2, at 380 (1980). Since "there is no magic in the number 16" as the age of consent, the drafters "enclose[d] the figure in brackets in order to indicate that reasonable legislators might differ as to the precise age limit." *Ibid.*; see *id.* at 382 ("[T]he brackets surrounding the number 16 in Section 213.3 are meant to indicate, in addition to uncertainty about the proper age that should be selected, that it may also be proper to select a higher age in the case of deviate sexual relations."). Similarly, the drafters referred to the 4-year age differential as an "innovation" and explained that "[t]he age is bracketed * * * to indicate that the precise differential is one on which reasonable people may disagree." *Id.* at 386. Under these circumstances, the Model Penal Code does not support petitioner's view of Congress's intent in using the phrase "sexual abuse of a minor." To the contrary, the Code supports the Board's conclusion that the phrase should be interpreted in a way that respects and accommodates the variation among state statutes.

ii. Petitioner also emphasizes (Br. 17-19) that his California offense is not a categorical match with 18 U.S.C. 2243(a), a federal criminal prohibition titled "Sexual abuse of a minor or ward," which prohibits sexual acts where the victim is less than 16 years old and the perpetrator is "at least four years older" than the victim. That provision, petitioner reasons (Br. 17), "contains the only definition of [sexual abuse of a minor] in the U.S. Code." He argues (Br. 19) that the

provision should accordingly serve "as a guidepost" for interpreting the same language as it appears in Section 1101(a)(43)(A).

As an initial matter, petitioner does not contend that "sexual abuse of a minor" under the INA must be "define[d]" by 18 U.S.C. 2243(a). Pet. Br. 17. Nor could he, given that Section 1101(a)(43)(A), unlike other aggravated felony provisions, contains no cross-reference. Instead, petitioner argues that 18 U.S.C. 2243(a) "is simply the most relevant federal touchstone" for determining "the 'sense in which the term is now used.'" Pet. Br. 18 (quoting *Taylor*, 495 U.S. at 598). But the phrase "[s]exual abuse of a minor" is simply the title of 18 U.S.C. 2243, not a defined term used in its operative provisions. Thus, while "[s]exual abuse of a minor" is certainly an apt *description* of the conduct Congress chose to prohibit under that statute, there is no reason to think that the choice of title represented a determination by Congress of what the quoted phrase must *mean* in all of the other places it may be used. And as noted above, see pp. 15-16, *supra*, "sexual abuse of a minor" is *not* a term with an established common usage, and 18 U.S.C. 2243(a) is not consistent with the few state statutes that bear a similar title. See, *e.g.*, D.C. Code §§ 22-3009.01 and .02 (forbidding sexual contact by any adult "in a significant relationship" with a person less than 18 years old).

Nor is there evidence that Congress, in choosing a 16-year maximum for the victim's age and a 4-year age differential for the federal offense, was attempting to reflect the "the criminal codes of most States." *Taylor*, 495 U.S. at 598. Indeed, comparing state statutory-rape laws to 18 U.S.C. 2243(a) under petitioner's "least culpable conduct" methodology would

disqualify the laws of most States: 19 States set the age of consent at 17 or 18 years old, see pp. 19, 21-22, *supra*; see also App., *infra* 1a-4a; and of the States that set the age of consent at 16 or below, most prohibit sexual conduct with a perpetrator who is within 4 years of the victim's age. See, *e.g.*, Alaska Stat. § 11.41.434(a)(1) (3 years); Conn. Gen. Stat. Ann. § 53a-71(a)(1) (3 years); Ind. Code Ann. 35-42-4-9(a) and (b) (3 years); Ala. Code § 13a-6-62 (2 years); Ga. Code Ann. §§ 16-6-3(a), 16-6-4 (none); Mont. Code Ann. §§ 45-5-502(1), 45-5-503(1) (none), N.H. Rev. Stat. Ann. § 632-A:4(I)(c) (none); Vt. Stat. Ann. tit. 13, § 3252(c) (none).[38] Using 18 U.S.C. 2243 as a "guidepost" for defining "sexual abuse of a minor" would thus cause Section 1101(a)(43)(A) "to apply in so limited and so haphazard a manner" that it cannot be what Congress intended. *Nijhawan* v. *Holder*, 557 U.S. 29, 40 (2009).

iii. Petitioner argues (Br. 31) that the pairing in Section 1101(a)(43)(A) of "sexual abuse of a minor" with "murder" and "rape" demonstrates that "the generic crime is meant to cover" only unusually severe conduct. As this Court observed in *Torres*, however, while the list of aggravated felonies does include particularly egregious conduct such as murder and rape, it also includes "such comparatively minor offenses as operating an unlawful gambling business, see [8 U.S.C.] § 1101(a)(43)(J), and possessing a firearm not identified by a serial number, see [8 U.S.C.] § 1101(a)(43)(E)(iii)." 136 S. Ct. at 1628. Statutory rape is no less serious than those and other listed

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[38] The federal offense is an outlier in another respect: It contains a defense for a perpetrator who "reasonably believed" the victim was 16 or older. 18 U.S.C. 2243(c)(1). Relatively few States authorize a reasonable-mistake defense.

offenses, which Congress has indisputably declared to be aggravated felonies. Nor, contrary to petitioner's assertion (Br. 31-32), is there evidence in the legislative history that when Congress added "sexual abuse of a minor" to a substantially expanded list of aggravated felonies under IRIIRA, it had anything other than a commonsense understanding of the term in mind. See pp. 17-18, *supra*. To the contrary, as the Third Circuit has observed, "[t]he comprehensive severity" of IRIIRA "strongly suggests that [a] narrow definition of 'sexual abuse of a minor' * * * is inconsistent with congressional intent." *Restrepo* v. *Attorney Gen. of the U.S.*, 617 F.3d 787, 795 n.8 (3d Cir. 2010).

3. The Board's reasonable interpretation of "sexual abuse of a minor" merits deference under Chevron

The term "sexual abuse of a minor" is thus most naturally read, based on its plain language and contemporary meaning, as applying to illegal sexual conduct directed at someone less than 18 years old. Even assuming, however, that "Congress has not directly addressed the precise question at issue," *Chevron*, 467 U.S. at 843, any uncertainty is properly resolved by the agency to which Congress has entrusted the statute's interpretation and administration. "[T]he question for the court" then becomes whether the "agency's construction of the statute which it administers * * * is based on a permissible construction of the statute." *Id.* at 842-843. Because the Board, on behalf of the Attorney General, has adopted a reasonable construction of Section 1101(a)(43)(A), deference to that interpretation is required.

a. "It is 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),[39] 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 her 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). Indeed, "[j]udicial deference in the immigration context is of special importance, for executive officials exercise especially sensitive political functions that implicate questions of foreign relations." *Negusie*, 555 U.S. at 517 (internal quotation marks omitted).

Accordingly, as courts of appeals have uniformly held, the Board is entitled to deference when it interprets the meaning of the term "aggravated felony" in the INA. See *Soto-Hernandez* v. *Holder*, 729 F.3d 1,

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[39] Some functions formerly performed by the Immigration and Naturalization Service, or otherwise vested in the Attorney General, have been transferred to officials of the Department of Homeland Security. See *Clark* v. *Martinez*, 543 U.S. 371, 374 n.1 (2005).

3-4 (1st Cir. 2013); *Mugalli* v. *Ashcroft*, 258 F.3d 52, 56 (2d Cir. 2001); *Restrepo*, 617 F.3d at 796-797 (3d Cir.); *Espinal-Andrades* v. *Holder*, 777 F.3d 163, 169 (4th Cir. 2015), cert. denied, 136 S. Ct. 2386 (2016); *Alwan* v. *Ashcroft*, 388 F.3d 507, 513-515 (5th Cir. 2004); *Velasco-Giron* v. *Holder*, 773 F.3d 774, 776 (7th Cir. 2014), cert. denied, 135 S. Ct. 2072 (2015); *Spacek* v. *Holder*, 688 F.3d 536, 538 (8th Cir. 2012); *Renteria-Morales* v. *Mukasey*, 551 F.3d 1076, 1081 (9th Cir. 2008); *Balogun* v. *U.S. Att'y Gen.*, 425 F.3d 1356, 1361 (11th Cir. 2005), cert. denied, 547 U.S. 1113 (2006); cf. *Rangel-Perez* v. *Lynch*, 816 F.3d 591, 597-601 (10th Cir. 2016) (assuming the applicability of *Chevron*, but concluding there was no relevant agency decision to which to defer).

In this case, the Board reasonably gave concrete meaning to the term "sexual abuse of a minor" in Section 1101(a)(43)(A). The Board found "useful guidance" for interpreting that term in a federal provision that defines "sexual abuse" to mean "'the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children.'" Pet. App. 30a (quoting 18 U.S.C. 3509(a)(8)). As the Board has explained, that definition is consistent both with contemporary dictionary definitions, see *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 996 (citing *Black's* 1375), and with "common usage of the term," *ibid.* The Board further determined that "[a] victim of sexual abuse who is under the age of 18 is a 'minor'" for purposes of Section 1101(a)(43)(A). *V-F-D-*, 23 I. & N. Dec. at 859. That definition accords with other statu-

tory definitions, including a nearby provision of the INA, see *id.* at 861-862 & n.8 (citing 8 U.S.C. 1182(a)(9)(B)(iii)(I) and 18 U.S.C. 3509(a)(2)), as well as with dictionary definitions, see *id.* at 862. It also "best reflects the diverse State laws that punish sexually abusive behavior toward children, the common usage of the word 'minor,' and the intent of Congress in expanding the definition of an aggravated felony to protect children." *Ibid.*

To give further content to Section 1101(a)(43)(A) in the specific context of this case, the Board observed that certain sexual crimes against minors are abusive because they involve "exploitation." Pet. App. 35a (citation omitted). In particular, "there is an inherent risk of exploitation, if not coercion, when an adult solicits a minor to engage in sexual activity because minors as a group have a less well-developed sense of judgment than adults, and thus are at greater peril of making choices that are not in their own best interests." *Ibid.* (brackets, citation, and internal quotation marks omitted). That risk "is particularly great when the victim is not in the same peer group" as the perpetrator, the Board explained, because minors "'may not have the negotiation skills needed to promote self-protective behavior during sexual encounters, particularly with older, more experienced partners.'" *Id.* at 35a-36a (quoting Kim S. Miller et al., *Sexual Initiation with Older Male Partners And Subsequent HIV Risk Behavior Among Female Adolescents*, 29 Fam. Plan. Persp. 212, 214 (1997)). For cases involving intercourse with a 16- or 17-year-old minor, therefore, the Board determined that a 3-year age differential is "significant" because, in such cases, "the victim and the perpetrator are not in the same peer group." *Id.*

at 36a (citing Miller 214). In the Board's view, giving content in that manner to the term "sexual abuse of a minor" properly accounts for "the large number and variety of statutes that are potentially at issue," *id.* at 40a, without improperly sweeping in non-abusive behavior such as consensual intercourse "between high school peers who are separated in age by, for example, only 2 years," *id.* at 37a.

In sum, the Board reasonably interpreted the phrase "sexual abuse of a minor" in light of its plain language, legislative history and purpose, and context. To the extent that the Court finds the scope of Section 1101(a)(43)(A) to be ambiguous, the agency's "permissible construction of the statute" must be given effect. *Chevron*, 467 U.S. at 843.

b. Petitioner offers three arguments as to why *Chevron* deference can never be applied to the Board's reading of Section 1101(a)(43)(A). All three of his arguments are inconsistent with this Court's case law, and petitioner's arguments would significantly curtail the Attorney General's authority to interpret the INA.

i. Petitioner's first argument is that deference to the Board's interpretation is fundamentally incompatible with the categorical approach, because "[t]he very function of the categorical approach in INA cases is to resolve any 'ambiguity' that resides in deportation provisions—and to 'err on the side of underinclusiveness.'" Pet. Br. 36 (brackets omitted) (quoting *Moncrieffe*, 133 S. Ct. at 1687, 1693). That argument is based on the same misunderstanding described above regarding the distinct steps of the categorical approach. See pp. 25-28, *supra*. The first step is to interpret the federal provision at issue. At the second step, a comparison is made between the federal provi-

sion and the state conviction, "presum[ing] that the conviction rested upon nothing more than the least of the acts criminalized, and then determin[ing] whether even those acts are encompassed by the generic federal offense." *Moncrieffe*, 133 S. Ct. at 1684 (brackets, citation, and internal quotation marks omitted). That "least of the acts" feature of the second step is what led the Court in *Moncrieffe* to say that the categorical approach resolves "ambiguity" in the alien's favor. See *id.* at 1686-1687 ("Moncrieffe's conviction could correspond to either the [Controlled Substances Act (CSA)] felony or the CSA misdemeanor. Ambiguity on this point means that the conviction did not 'necessarily' involve facts that correspond to an offense punishable as a felony under the CSA."). But that inherent feature of the second step provides no reason to displace normal tools of statutory construction when interpreting the federal provision at step one; nor does it suggest that *Chevron* deference is somehow incompatible with that basic interpretive mission.

ii. Petitioner next argues that deference is precluded by "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." Pet. Br. 38 (quoting *INS* v. *St. Cyr*, 533 U.S. 289, 320 (2001)). That principle, he contends (*ibid.*), is a "tiebreaking rule[] of statutory construction" that must be given effect *before* the Court concludes that any ambiguity remains for the agency to resolve under *Chevron*. And once the tie is broken in the alien's favor, he argues, "there is, for *Chevron* purposes, no ambiguity in the statute for an agency to resolve." *Ibid.* (brackets omitted) (quoting *St. Cyr*, 533 U.S. at 321 n.45).

Petitioner is correct that this Court has recognized that certain interpretive principles must be applied to a statute before deciding whether any "gap" remains for the agency to fill under *Chevron*, 467 U.S. at 843. In *St. Cyr*, for instance, the Court applied the "presumption against retroactive legislation" in determining that Congress had not intended, under IIRIRA and the Antiterrorism and Effective Death Penalty Act, to retroactively eliminate certain avenues of discretionary relief for an alien who had pleaded guilty prior to the statutes' enactment. 533 U.S. at 316 (citation omitted). The government argued that the Court should defer to the Board's interpretation of IIRIRA, but the Court responded that such deference was unwarranted: "Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective, * * * there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve." *Id.* at 321 n.45. The Court applied analogous reasoning in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), reading the INA to implicitly require a reasonable-time limitation on post-removal detention under principles of constitutional avoidance. See *id.* at 689 ("It is a cardinal principle of statutory interpretation * * * that when an Act of Congress raises a serious doubt as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.") (brackets and internal quotation marks omitted). Petitioner argues that a similar order-of-operations applies here.

The proposition that petitioner invokes, however, is of a different order. Even the rule of lenity in *criminal* cases is not applicable unless there is a "grievous

ambiguity or uncertainty in the language and structure of the Act, * * * such that even after a court has seized every thing from which aid can be derived, it is still left with an ambiguous statute." *Chapman* v. *United States*, 500 U.S. 453, 463 (1991) (brackets, citations, and internal quotation marks omitted). In the immigration context, any application of the analogous proposition must come only *after* the Attorney General has had an opportunity to interpret the relevant statutory provision—which is one of the "thing[s] from which aid can be derived," *ibid.*—and the courts have given appropriate deference to that interpretation. Any other approach would usurp the Attorney General's expressly conferred authority to resolve statutory ambiguities in the first instance.

Indeed, if petitioner were correct that even *Chevron*-step-two questions must always be answered in the alien's favor, it is hard to imagine when deference would *ever* apply to the Attorney General's interpretation of the INA: Under petitioner's, any dispute over the meaning of an INA provision would have to be resolved in the alien's favor unless the Board's contrary interpretation were unambiguously correct—in which case deference would be unnecessary. Yet this Court has consistently instructed that "the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication.'" *Negusie*, 555 U.S. at 517 (quoting *Aguirre-Aguirre*, 526 U.S. at 425).

This Court's cases have thus applied standard principles of deference despite calls by aliens to resolve statutory ambiguities in their favor. For instance, in *Scialabba*, *supra*, the Court confronted a "Janus-faced" provision concerning immigrant visas that

could be read to support either the Board's interpretation or the respondents'. 134 S. Ct. at 2203 (opinion of Kagan, J.). Since both were "reasonable constructions," the Court explained, "*Chevron* dictates that a court [must] defer to the agency's choice." *Ibid.*; see *id.* at 2215 (Roberts, C.J., concurring in the judgment) (agreeing that *Chevron* deference was appropriate because "Congress did not speak clearly" and the Board's interpretation was "reasonable"); *id.* at 2217, 2219-2220 (Sotomayor, J., dissenting) (applying *Chevron* framework but finding statute unambiguous at step one). In *Judulang* v. *Holder*, 132 S. Ct. 476 (2011), after the Court invalidated as arbitrary and capricious the Board's approach to an INA provision governing a waiver of excludability and its application to grounds for deportation, the Court recognized the Board's prerogative on remand "to devise another" approach, observing that the alien's proposed approach "may not be the only alternative." *Id.* at 490. And in *Negusie*, the Court concluded that the provision at issue "ha[d] an ambiguity," 555 U.S. at 517, but did not then adopt the narrowing construction advocated by the alien. Instead, it remanded to give the agency an opportunity to adopt its own construction. *Id.* at 523-524. Those holdings cannot be reconciled with petitioner's argument.

Petitioner fares no better with his argument (Br. 39) that ambiguous immigration statutes must be interpreted in aliens' favor to "help[] ensure noncitizens understand when guilty pleas or other criminal convictions might subject them to removal." Petitioner cannot maintain that greater clarity is required here than in the criminal context, where only "grievous ambiguity" is resolved in a defendant's favor. And insofar as

petitioner claims that he lacked notice of the Board's position, the Court rejected a similar contention in *Judulang*. There, the alien argued that he had lacked adequate notice, when pleading guilty, that the Board would later adopt a construction of the INA that rendered him ineligible for discretionary relief from deportation. See Pet. Br. at 31, *Judulang*, *supra* (No. 10-694) ("The BIA's Change In Law Was Impermissibly Retroactive"); *id.* at 31-38. "To succeed on that theory," the Court explained, "Judulang would have to show, at a minimum, that in entering his guilty plea, he had reasonably relied on a legal rule from which [the relevant Board decisions] departed." 132 S. Ct. at 489 n.12. But "[t]he instability of the BIA's prior practice prevent[ed] Judulang from making th[at] showing." *Ibid.* Petitioner's fair-notice argument stands on even weaker ground in this case, given that the Board's *Rodriguez* and *V-F-D-* decisions had already put him on notice, before he pleaded guilty in 2009, that the Board read Section 1101(a)(43)(A) based on its plain language as applying to sexual crimes involving 16- and 17-year-old minors.

iii. Petitioner further argues (Br. 40-41) that principles of deference do not apply to the Board's interpretation of Section 1101(a)(43)(A) because the scope of that provision "determines criminal liability as well as immigration consequences." Criminal consequences may attach to certain misconduct when committed by (or with respect to) aliens previously convicted of aggravated felonies. Petitioner identifies three such crimes, see Pet. Br. 41 (citing 8 U.S.C. 1253(a)(1)), 1326(b)(2), and 1327). Because of those potential criminal applications, petitioner argues (Br. 42) that the Court should apply the criminal rule of lenity, which

"requires courts to resolve [any] ambiguity in favor of defendants." And he contends that, because Section 1101(a)(43)(A) "must mean the same thing in both its civil and criminal applications," the Court must resolve this case as if it arose in the criminal context, where the Board's "expansive construction is 'not relevant at all.'" Pet. Br. 42-43 (quoting *Abramski* v. *United States*, 134 S. Ct. 2259, 2274 (2014)).

Petitioner's argument is based on purported concerns about "inadequate notice of potential criminal liability." Pet. Br. 45 (brackets and citation omitted). Yet all three of the criminal provisions that are tied to the aggravated felony definition impose consequences only upon the commission of further, wrongful conduct in addition to the aggravated felony itself. Under 8 U.S.C. 1326(b)(2), an alien who illegally reenters the country following removal faces a higher maximum sentence if the "removal was subsequent to a conviction for commission of an aggravated felony." Under 8 U.S.C. 1253(a)(1), an alien who is subject to a final order of removal but "willfully" fails or refuses to depart the country, to present himself for removal, or to timely apply for necessary travel documents for removal, or an alien who conspires to thwart removal, may face a greater maximum sentence if the alien has been convicted of an aggravated felony. And 8 U.S.C. 1327 imposes criminal liability on "[a]ny person who knowingly aids or assists any alien" who is inadmissible by virtue of an aggravated felony conviction or inadmissible on national security grounds. Those provisions apply only to defendants whose conduct violates additional legal requirements.

Petitioner's argument is also out of all proportion to the role the INA's definition of "aggravated felony"

plays in the enforcement of the Nation's immigration laws. Overwhelmingly, the definition has meaningful application only in civil removal proceedings, where it is applied thousands of times annually as a ground for removal or a bar to discretionary relief. See Office of Immigration Statistics, Department of Homeland Security, *Annual Flow Report* at 6 (Dec. 2016) (more than 8000 removals and other departures in fiscal year 2016 involving aliens convicted of aggravated felonies).[40] By contrast, available statistics indicate that the definition does not play much, if any, role in prosecutions under the criminal provisions cited by petitioner. In fiscal year 2013, for instance, there were only 13 *total* convictions under 8 U.S.C. 1253 and only 27 *total* convictions under 8 U.S.C. 1327.[41] Convictions under the illegal reentry provision, 8 U.S.C. 1326, are far more frequent. Violation of that provision ordinarily carries a maximum sentence of two years, 8 U.S.C. 1326(a), which increases to 10 years under certain circumstances, 8 U.S.C. 1326(b)(1), (3), and (4). Yet even though Subsection (b)(2) authorizes up to a 20-year sentence for an alien who illegally reenters the country after being removed after conviction of an aggravated felony offense, the average sentence for illegal reentry in 2013 was 18 months and the median sentence was 12 months—both below the two-year generally authorized sentence. See U.S. Sent. Comm'n,

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[40] https://www.dhs.gov/sites/default/files/publications/DHS%20Immigration%20Enforcement%202016.pdf.

[41] Data acquired from the Office of Justice Programs, Bureau of Justice Statistics, *Federal Criminal Case Processing Statistics*, available at http://www.bjs.gov/fjsrc/tsec.cfm. The data do not indicate how often aggravated felony status was invoked in those cases.

Illegal Reentry Offenses 9 (Apr. 2015). Indeed, as the Sentencing Commission noted in its 2015 report, "*[o]nly two* of the 18,498 illegal reentry offenders sentenced in fiscal year 2013 received a sentence above ten years" based on the aggravated felony enhancement. *Id.* at 10 (emphasis added). The rare prospect that aggravated felony status may cause criminal liability or an enhanced sentence furnishes no basis for foreclosing *Chevron* deference to the Board's interpretation in the fundamentally different context of administrative removal proceedings.

Moreover, petitioner's argument runs headlong into this Court's precedents. In *United States* v. *O'Hagan*, 521 U.S. 642 (1997), the Court considered a criminal defendant's challenge to convictions that were based on his violation of Sections 10(b) and 14(e) of the Securities Exchange Act of 1934 under two rules promulgated by the Securities and Exchange Commission. *Id.* at 647 (citing Rule 10b-5 and Rule 14e-3(a)). The Court upheld the convictions. See *id.* at 653, 666-667. The Court explicitly relied on *Chevron* deference to Rule 14e-3(a) in upholding the convictions based on Section 14(e). See *id.* at 666-667 ("A sole question is before us as to these convictions: Did the Commission * * * exceed its rulemaking authority under § 14(e) when it adopted Rule 14e-3(a) without requiring a showing that the trading at issue entailed a breach of fiduciary duty?"); see also *id.* at 673 ("Because Congress has authorized the Commission, in § 14(e), to prescribe legislative rules, * * * we must accord the Commission's assessment 'controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute.'") (brackets omitted) (quoting *Chevron*, 467 U.S. at 844).

The Court similarly applied *Chevron* deference in *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), deferring to the Secretary of the Interior's definition of a provision, under the Endangered Species Act of 1973 (ESA), that made it unlawful to "take" any threatened or endangered species. *Id.* at 703-704. The respondents had argued "that the rule of lenity should foreclose any deference to the Secretary's interpretation of the ESA because the statute includes criminal penalties." *Id.* at 704 n.18. The Court rejected that contention, noting that it had "never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." *Ibid.* The Court further observed that, even assuming the rule of lenity might be offended by inadequate notice from a regulation interpreting a statute with criminal as well as civil sanctions, the regulation at issue there had existed for two decades and gave "a fair warning of its consequences." *Ibid.*[42]

The Court also applied deference principles in *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011), where the Court addressed whether,

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[42] In the same footnote in *Sweet Home*, the Court distinguished *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505 (1992), in which lenity was applied to a tax statute in a civil setting, where the statute "ha[d] criminal applications that carr[ied] no additional requirement of willfulness," *id.* at 517 (opinion of Souter, J.), and "where no regulation was present," *Sweet Home*, 515 U.S. at 704 n.18. See *Thompson/Center Arms*, 504 U.S. at 518 n.9 (opinion of Souter, J.) (declining "to defer to an agency interpretation contained in two longstanding Revenue Rulings" because "neither of the rulings * * * goes to the narrow question presented here"); see *id.* at 523 (Scalia, J., concurring in the judgment).

under the Fair Labor Standards Act of 1938, protection for an employee who "'filed any complaint' include[d] oral as well as written complaints within its scope." *Id.* at 4. In answering yes to that question, the Court observed that Congress had delegated "enforcement powers" to the Secretary of Labor and the Equal Employment Opportunity Commission, requiring the Court to "give a degree of weight to their views about the meaning of this enforcement language." *Id.* at 14-15. Both agencies had agreed that the statute covered oral complaints. *Id.* at 15. Since the agencies' "views [we]re reasonable" and "consistent with the act," the Court explained, "they consequently add force to our conclusion." *Id.* at 15-16 (citing *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)). Next, the Court addressed the defendant's argument that the statutory prohibition should be read narrowly under principles of lenity because "those who violate the antiretaliation provision * * * are subject to criminal sanctions." *Id.* at 16. Although the Court agreed that the rule of lenity can apply when a statute with criminal sanctions is applied in a noncriminal context, no work remained for it to do: "[A]fter engaging in traditional methods of statutory interpretation, we cannot find that the statute remains sufficiently ambiguous to warrant application of the rule of lenity here." *Ibid.*

Those decisions are fundamentally inconsistent with petitioner's argument that when an agency has been given authority, through rulemaking or adjudication, to administer and interpret a civil statute with potential criminal applications, principles of lenity must be applied to the *exclusion* of deference to an authoritative agency interpretation. Instead, they in-

dicate that the Court should apply lenity, where appropriate, only "*after* engaging in traditional methods of statutory interpretation"—including deference to the agency's reasonable construction of a statute. *Kasten*, 563 U.S. at 16 (emphasis added). Treating lenity as a tool of last resort in the immigration context is consistent with its application in the criminal context, where the rule "comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan* v. *United States*, 364 U.S. 587, 596 (1961). And it ensures as well that lenity comes into play only if, after other interpretive methods have been exhausted, "there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." *United States* v. *Castleman*, 134 S. Ct. 1405, 1416 (2014) (quoting *Barber* v. *Thomas*, 560 U.S. 474, 488 (2010)); see *Abramski*, 134 S. Ct. at 2272 n.10 ("The dissent would apply the rule of lenity here because the statute's text, taken alone, permits a narrower construction, but we have repeatedly emphasized that is not the appropriate test.").

Petitioner seeks (Br. 44) to distinguish *Sweet Home*—though not *O'Hagan* or *Kasten*—on the ground that the ESA regulation at issue in that case had been promulgated decades earlier, such that "the regulation gave ample prospective notice of the Act's reach." By contrast, petitioner argues (Br. 45), the agency views at issue here were expressed by the Board in 2015, creating the possibility that "criminal defendants [might be] prosecuted for acts committed prior to 2015." Allowing the Board to define the scope of Section 1101(a)(43)(A), he asserts, would thus leave de-

fendants "with the sort of 'inadequate notice of potential criminal liability' that [*Sweet Home*] itself suggested would 'offend the rule of lenity.'" *Ibid.* (brackets omitted) (quoting *Sweet Home*, 515 U.S. at 704 n.18).

Whatever retroactivity or notice concerns a hypothetical defendant might reasonably raise in a criminal proceeding regarding the application of a Board decision to pre-decision conduct, *petitioner* can raise no such concerns: He is charged here with removability in a civil proceeding. See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country."); *Marcello* v. *Bonds*, 349 U.S. 302, 314 (1955) (alien had no right to be "forewarned of all the consequences of his criminal conduct" and was deportable based on a prior conviction that "was not [a] ground for deportation at the time he committed the offense"). If petitioner were to reenter the country illegally following his removal and were prosecuted for doing so—and in the remote possibility that his aggravated felony conviction even played a role, see pp., 46-48, *supra*—petitioner could hardly claim lack of fair notice that his California conviction was an aggravated felony.

Finally, the real-world impact of accepting petitioner's argument could be profound. The list of aggravated felonies, by itself, contains numerous undefined terms such as "purely political offense," "prostitution business," and "commercial advantage." See 8 U.S.C. 1101(a)(43)(F), (K)(i), and (K)(ii). But the Board's authority to make a far broader range of decisions currently assigned to the agency by statute could also be affected, including: whether an alien is

removable because he has participated in or encouraged smuggling (Section 1227(a)(1)(E)), because he has been convicted of a "crime involving moral turpitude" or any other criminal-related ground of removability (Section 1227(a)(2)), because he has committed document fraud or misuse (Section 1227(a)(3)), or because he poses a risk to national security or public safety (Section 1227(a)(4)). All of those determinations have potential criminal consequences. See 8 U.S.C. 1253(a)(1) (imposing up to ten-year sentence for a willful failure to depart "if the alien is a member of any of the classes described in paragraph (1)(E), (2), (3), or (4) of section 1227(a)"). And if petitioner's argument were pressed to its logical extreme, the Board could similarly be deprived of deference over all security and terrorism-related grounds of inadmissibility, 8 U.S.C. 1182(a)(3), since helping an alien who is inadmissible for that reason is a criminal offense. See 8 U.S.C. 1327; see also 8 U.S.C. 1326(b)(3) (mandatory sentence for illegal entry by alien who is excludable on terrorism-related grounds).

Petitioner's theory could thus strip the Board of discretion to interpret bedrock immigration provisions —including those related to keeping terrorists from entering or remaining in the country. Some of those bedrock provisions are applied thousands of times a year. Rather than endorse such a radical reworking of our Nation's immigration system, this Court should instead address concerns about the retroactive application of Board decisions to criminal proceedings (if such a scenario ever arose) on an as-applied basis.

c. Petitioner also argues (Br. 45) that even if *Chevron* applies, the Board's interpretation is undeserving of deference because the Board "committed three ba-

sic legal errors in reaching its conclusion." See Pet. Br. 45-48. Petitioner is wrong as to all three.

i. Petitioner argues that the Board, by declaring itself "not prepared to hold that a 16- or 17-year-old categorically cannot be the victim of sexual abuse" under Section 1101(a)(43)(A), Pet. Br. 46 (quoting Pet. App. 34a), erroneously focused on "the *worst* conduct the statute could cover, instead of focusing on 'the *least* of the acts criminalized,'" *id.* at 47 (brackets omitted) (quoting *Moncrieffe*, 133 S. Ct. at 1684). That argument yet again reflects petitioner's misunderstanding concerning the distinct steps of the categorical approach. See pp. 25-28, *supra*. The "least of the acts" analysis applies at step two, to determine whether the state offense falls under the federal provision at issue. But the Board acted properly when, at step one, it declined to construe Section 1101(a)(43)(A) in a manner that would have ruled out all sexual crimes involving 16- and 17-year-old minors. And notably, petitioner does not claim that such crimes may never qualify as "sexual abuse of a minor."

ii. Petitioner contends (Br. 47) that the Board improperly "sought guidance from a procedural statute and non-criminal sources to determine elements of the generic definition of 'sexual abuse of a minor,'" whereas "the categorical approach requires adjudicators to confine themselves to substantive criminal laws." Yet the most common source consulted by this Court when construing federal provisions at step one is the dictionary. See, *e.g.*, *Torres*, 136 S. Ct. at 1625 & nn.3 & 4; *Mellouli*, 135 S. Ct. at 1991; *Kawashima*, 132 S. Ct. at 1172; *Carachuri-Rosendo*, 560 U.S. at 574; *Johnson*, 559 U.S. at 139-140; *Lopez*, 549 U.S. at 53-54. The Board pointed to the definition of "sexual

abuse" contained in 18 U.S.C. 3509(a)(8) merely because it provided "useful guidance" for determining the term's commonsense, contemporary meaning. Pet. App. 30a. As the Board noted, that federal provision is consistent as well with the term's dictionary definition. *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 996 (citing *Black's* 1375).

iii. Petitioner argues (Br. 47) that the Board at least should have resolved any lingering ambiguity in his favor, either under "the presumption that deportation statutes should be construed narrowly or [under] the criminal rule of lenity." But the factual premise for that argument is erroneous: The Board had no occasion to apply those last-resort canons because it did not find, "after considering text, structure, history, and purpose, [that] there remain[ed] a grievous ambiguity or uncertainty in the statute," such that it was forced to "guess as to what Congress intended." *Castleman*, 134 S. Ct. at 1416 (citation omitted).

B. Step Two: Petitioner's State Conviction Categorically Qualifies As Sexual Abuse Of A Minor

Petitioner's conviction under California Penal Code § 261.5(c) categorically falls under the federal provision at issue, "sexual abuse of a minor," both under a plain-language interpretation and under the Board's construction. The California statute criminalizes "an act of sexual intercourse" with "a person under the age of 18" if the minor "is more than three years younger than the perpetrator." *Id.* § 261.5(a) and (c). Even the "least of the acts criminalized" by that law involve illegal sexual activity directed at a person younger than 18 years old. *Moncrieffe*, 133 S. Ct. at 1684 (brackets and internal quotation marks omitted). And every violation also necessarily involves "a mean-

ingful age difference" of at least three years between the perpetrator and the victim. Pet. App. 40a. Petitioner's state offense is therefore an aggravated felony under Section 1101(a)(43)(A).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

This table lists statutory rape offenses according to the age at which sexual contact is no longer illegal (*i.e.*, the age of consent) and also indicates whether the offense requires a differential in age between the perpetrator and victim.

18 YEARS		*Age Differential*
Arizona Ariz. Rev. Stat. Ann.	§ 13-1405 (Supp. 2016)	2 years § 13-1407(F) (2010)
California Cal. Penal Code	§ 261.5(a) and (b) (West 2014)	None
	§ 261.5(a) and (c) (West 2014)	3 years
Colorado Colo. Rev. Stat.	§ 18-3-404(1.5) (2015)	None
Delaware Del. Code Ann. tit. 11	§ 768 (2015)	None
	§ 770(a)(2) (2015)	12 years
Florida Fla. Stat. Ann.	§ 794.05(1) (West Supp. 2017)	6 years
Idaho Idaho Code Ann.	§ 18-6101(2) (2016)	3 years

North Dakota N.D. Cent. Code	§§ 12.1-20-05(1) (2012), 14-10-01 (2009)	None
Oregon Or. Rev. Stat.	§§ 163.315(1)(a), 163.415(1)(a)(B) (2015)	3 years § 163.345(1) (2015)
Tennessee Tenn. Code Ann.	§ 39-13-506(a) (2014)	4 years
	§ 39-13-506(b)(2) (2014)	5 years
	§ 39-13-506(c) (2014)	10 years
Utah Utah Code Ann.	§ 76-5-401.2(2)(a)(i) (LexisNexis Supp. 2016)	7 years
	§ 76-5-401.2(2)(a)(ii) (LexisNexis Supp. 2016)	10 years
Virginia Va. Code Ann.	§ 18.2-371 (Supp. 2016)	1 day
Wisconsin Wis. Stat. Ann.	§§ 948.01(1) (West Supp. 2016), 948.09 (West 2005)	None

17 YEARS		*Age Differential*
Illinois 720 Ill. Comp. Stat. Ann.	§ 5/11-1.50(b) (West Supp. 2016)	None
	§ 5/11-1.50(c) (West Supp. 2016)	
	§ 5/11-1.60(d) (West Supp. 2016)	5 years
Louisiana La. Rev. Stat. Ann.	§ 14:80 (2012)	4 years
Missouri Mo. Ann. Stat.	§ 566.034 (West Supp. 2016)	4 years
	§ 566.064 (West Supp. 2016)	
New Mexico N.M. Stat. Ann.	§ 30-9-11(G)(1) (Supp. 2016)	4 years
New York N.Y. Penal Law	§§ 130.05(3)(a) (McKinney Supp. 2016), 130.20(1) (McKinney 2009)	None
	§§ 130.05(3)(a) (McKinney Supp. 2016), 130.25(2) (McKinney 2009)	4 years

Texas Tex. Penal Code Ann.	§ 22.011(a)(2) and (c)(1) (West 2011)	3 years § 22.011(e)(2)(A) (West 2011)
Wyoming Wyo. Stat. Ann.	§ 6-2-316(a)(iv) (2015)	4 years

16 YEARS		*Age Differential*
Alabama Ala. Code	§ 13A-6-62(a)(1) (LexisNexis 2015)	2 years
	§ 13A-6-64(a)(1) (LexisNexis 2015)	None
Alaska Alaska Stat.	§ 11.41.436(a)(1) (2014)	4 years
Arkansas Ark. Code Ann.	§ 5-14-127(a)(1) (2013)	4 years
Connecticut Conn. Gen. Stat. Ann.	§ 53a-71(a)(1) (West Supp. 2016)	3 years

District of Columbia D.C. Code	§§ 22-3001(3) (LexisNexis 2012), 22-3008 (LexisNexis Supp. 2016)	4 years
	§§ 22-3001(3) (LexisNexis 2012), 22-3009 (LexisNexis Supp. 2016)	
Georgia Ga. Code Ann.	§ 16-6-3(a) and (b) (2011)	None
	§ 16-6-3(a) and (c) (2011)	4 years
	§ 16-6-4(a) and (b)(1) (2011)	None
	§ 16-6-4(a) and (b)(2) (2011)	4 years
Hawaii Haw. Rev. Stat. Ann.	§ 707-730(1)(c) (LexisNexis 2016)	5 years
Indiana Ind. Code Ann.	§ 35-42-4-9 (LexisNexis Supp. 2016)	4 years § 35-42-4-9(e) (LexisNexis Supp. 2016)

Iowa Iowa Code Ann.	§ 709.4(1)(b)(3)(d) (West Supp. 2016)	4 years
Kansas Kan. Stat. Ann.	§ 21-5504(a)(3) (Supp. 2015)	None
	§ 21-5506(a) and (b)(1) (Supp. 2015)	
Kentucky Ky. Rev. Stat. Ann.	§§ 510.020(3)(a), 510.060(1)(b) (LexisNexis 2014)	5 years
Maine Me. Rev. Stat. Ann. tit. 17-A	§ 254(1)(A) (West Supp. 2016)	5 years
	§ 254(1)(A-2) (West Supp. 2016)	10 years
Maryland Md. Code Ann. Crim. Law	§ 3-307(a)(4) and (5) (LexisNexis Supp. 2016)	5 years
	§ 3-308(b)(2) and (3) (LexisNexis Supp. 2016)	4 years
Massachusetts Mass. Ann. Laws ch. 265	§ 23 (LexisNexis 2010)	None

Michigan Mich. Comp. Laws Ann.	§ 750.520d(1)(a) (West Supp. 2016)	None
Minnesota Minn. Stat. Ann.	§ 609.344.1(b) (West Supp. 2016)	2 years
	§ 609.345.1(b) (West Supp. 2016)	4 years
Mississippi Miss. Code Ann.	§ 97-3-65(1)(a) (West 2011)	3 years
Montana Mont. Code Ann.	§§ 45-5-501(1)(a)(ii)(D), 45-5-503(1) (2015)	None
	§§ 45-5-501(1)(a)(ii)(D), 45-5-503(3)(a) (2015)	4 years
Nebraska Neb. Rev. Stat. Ann.	§ 28-319(1)(c) (LexisNexis 2015)	3 years
	§ 28-319.01(1)(b) (LexisNexis 2015)	9 years
Nevada Nev. Rev. Stat. Ann.	§§ 200.364(6), 200.368 (LexisNexis Supp. 2016)	4 years

New Hampshire N.H. Rev. Stat. Ann.	§ 632-A:3(II) (LexisNexis 2015)	4 years
	§ 632-A:4(I)(b) (LexisNexis 2015)	5 years
	§ 632-A:4(I)(c) (LexisNexis 2015)	None
New Jersey N.J. Stat. Ann.	§ 2C:14-2(c)(4) (West 2015)	4 years
North Carolina N.C. Gen. Stat.	§ 14-27.25 (2015)	6 years
	§ 14-27.30 (2015)	
Ohio Ohio Rev. Code Ann.	§ 2907.04(A) (LexisNexis 2014)	2 years
Oklahoma Okla. Stat. Ann. tit. 21	§ 1111.A.1 (West Supp. 2017)	2 years § 1112 (West 2015)
Pennsylvania 18 Pa. Cons. Stat. Ann.	§ 3122.1 (West 2015)	4 years
	§ 3123(a)(7) (West 2015)	
	§ 3125(a)(8) (West 2015)	

Rhode Island R.I. Gen. Laws	§ 11-37-6 (2002)	2 years
South Carolina S.C. Code Ann.	§ 16-3-655(C) (2015)	3 years
South Dakota S.D. Codified Laws	§ 22-22-1(5) (Supp. 2016)	3 years
Vermont Vt. Stat. Ann. tit. 13	§ 3252(c) (2009)	3 years
Washington Wash. Rev. Code Ann.	§ 9A.44.079 (West 2015) § 9A.44.089 (West 2015)	4 years
West Virginia W. Va. Code Ann.	§ 61-8B-5(a)(2) (LexisNexis 2014)	4 years

APPENDIX B

1. 8 U.S.C. 1101(a)(43) provides:

Definitions

(a) As used in this chapter—

(43) The term "aggravated felony" means—

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

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in—

(i) section 842(h) or (i) of title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (*o*), (p), or (r) or 924(b) or (h) of title 18 (relating to firearms offenses); or

(iii) section 5861 of title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment at[5] least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at[5] least one year;

(H) an offense described in section 875, 876, 877, or 1202 of title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of title 18 (relating to child pornography);

(J) an offense described in section 1962 of title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that—

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

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[5] So in original. Probably should be preceded by "is".

(iii) is described in any of sections 1581-1585 or 1588-1591 of title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in—

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18;

(ii) section 421 of title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of title 50 (relating to protecting the identity of undercover agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child,

or parent (and no other individual) to violate a provision of this chapter[6]

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

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[6] So in original. Probably should be followed by a semicolon.

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

2. 8 U.S.C. 1227(a)(1)-(4) provides:

Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(1) Inadmissible at time of entry or of adjustment of status or violates status

(A) Inadmissible aliens

Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.

(B) Present in violation of law

Any alien who is present in the United States in violation of this chapter or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 1201(i) of this title, is deportable.

(C) Violated nonimmigrant status or condition of entry

(i) Nonimmigrant status violators

Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 1258 of this title, or to comply with the conditions of any such status, is deportable.

(ii) Violators of conditions of entry

Any alien whom the Secretary of Health and Human Services certifies has failed to comply with terms, conditions, and controls that were imposed under section 1182(g) of this title is deportable.

(D) Termination of conditional permanent residence

(i) In general

Any alien with permanent resident status on a conditional basis under section 1186a of this title (relating to conditional permanent resident status for certain alien spouses and sons and daughters) or under section 1186b of this title (relating to conditional permanent resident status for certain alien entrepreneurs, spouses, and children) who has had such status terminated under such respective section is deportable.

(ii) Exception

Clause (i) shall not apply in the cases described in section 1186a(c)(4) of this title (relating to certain hardship waivers).

(E) Smuggling

(i) In general

Any alien who (prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable.

(ii) Special rule in the case of family reunification

Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on

May 5, 1988, and is seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) Waiver authorized

The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) in the case of any alien lawfully admitted for permanent residence if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(F) Repealed. Pub. L. 104-208, div. C, title VI, § 671(d)(1)(C), Sept. 30, 1996, 110 Stat. 3009-723

(G) Marriage fraud

An alien shall be considered to be deportable as having procured a visa or other documentation by fraud (within the meaning of section 1182(a)(6)(C)(i) of this title) and to be in the United States in violation of this chapter (within the meaning of subparagraph (B)) if—

(i) the alien obtains any admission into the United States with an immigrant visa or other documentation procured on the basis of a marriage entered into less than 2 years prior to such admission of the alien and which, within 2 years subsequent to any admission of the alien in the United States, shall be judicially annulled or terminated, unless the alien establishes to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws, or

(ii) it appears to the satisfaction of the Attorney General that the alien has failed or refused to fulfill the alien's marital agreement which in the opinion of the Attorney General was made for the purpose of procuring the alien's admission as an immigrant.

(H) Waiver authorized for certain misrepresentations

The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens described in section 1182(a)(6)(C)(i) of this title, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who—

(i)(I) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(II) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 1182(a) of this title which were a direct result of that fraud or misrepresentation.

(ii) is a VAWA self-petitioner.

A waiver of removal for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation.

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

(iv) High speed flight

Any alien who is convicted of a violation of section 758 of title 18 (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Failure to register as a sex offender

Any alien who is convicted under section 2250 of title 18 is deportable.

(vi) Waiver authorized

Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy

or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts

Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18) in violation of any law is deportable.

(D) Miscellaneous crimes

Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate—

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of title 18 for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of title 18;

(iii) a violation of any provision of the Military Selective Service Act (50 U.S.C. App. 451 et seq.) or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.); or

(iv) a violation of section 1185 or 1328 of this title,

is deportable.

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and

(i) Domestic violence, stalking, and child abuse

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any

State, Indian tribal government, or unit of local government.

(ii) Violators of protection orders

Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

(F) Trafficking

Any alien described in section 1182(a)(2)(H) of this title is deportable.

(3) Failure to register and falsification of documents

(A) Change of address

An alien who has failed to comply with the provisions of section 1305 of this title is deportable, unless the alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful.

(B) Failure to register or falsification of documents

Any alien who at any time has been convicted—

(i) under section 1306(c) of this title or under section 36(c) of the Alien Registration Act, 1940,

(ii) of a violation of, or an attempt or a conspiracy to violate, any provision of the Foreign Agents Registration Act of 1938 (22 U.S.C. 611 et seq.), or

(iii) of a violation of, or an attempt or a conspiracy to violate, section 1546 of title 18 (relating to fraud and misuse of visas, permits, and other entry documents),

is deportable.

(C) Document fraud

(i) In general

An alien who is the subject of a final order for violation of section 1324c of this title is deportable.

(ii) Waiver authorized

The Attorney General may waive clause (i) in the case of an alien lawfully admitted for permanent residence if no previous civil money penalty was imposed against the alien under section 1324c of this title and the offense was incurred solely to assist, aid, or support the alien's spouse or child (and no other individual). No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this clause.

(D) Falsely claiming citizenship

(i) In general

Any alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1324a of this title) or any Federal or State law is deportable.

(ii) Exception

In the case of an alien making a representation described in clause (i), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be deportable under any provision of this subsection based on such representation.

(4) Security and related grounds

(A) In general

Any alien who has engaged, is engaged, or at any time after admission engages in—

(i) any activity to violate any law of the United States relating to espionage or sabotage or to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other criminal activity which endangers public safety or national security, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means,

is deportable.

(B) Terrorist activities

Any alien who is described in subparagraph (B) or (F) of section 1182(a)(3) of this title is deportable.

(C) Foreign policy

(i) In general

An alien whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is deportable.

(ii) Exceptions

The exceptions described in clauses (ii) and (iii) of section 1182(a)(3)(C) of this title shall apply to deportability under clause (i) in the same manner as they apply to inadmissibility under section 1182(a)(3)(C)(i) of this title.

(D) Participated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing

Any alien described in clause (i), (ii), or (iii) of section 1182(a)(3)(E) of this title is deportable.

(E) Participated in the commission of severe violations of religious freedom

Any alien described in section 1182(a)(2)(G) of this title is deportable.

(F) Recruitment or use of child soldiers

Any alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of title 18 is deportable.

3. 8 U.S.C. 1253(a)(1)-(2) provides:

Penalties related to removal

(a) Penalty for failure to depart

(1) In general

Any alien against whom a final order of removal is outstanding by reason of being a member of any of the classes described in section 1227(a) of this title, who—

(A) willfully fails or refuses to depart from the United States within a period of 90 days from the date of the final order of removal under administrative processes, or if judicial review is had, then from the date of the final order of the court,

(B) willfully fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure,

(C) connives or conspires, or takes any other action, designed to prevent or hamper or with the purpose of preventing or hampering the alien's departure pursuant to such, or

(D) willfully fails or refuses to present himself or herself for removal at the time and place required by the Attorney General pursuant to such order,

shall be fined under title 18, or imprisoned not more than four years (or 10 years if the alien is a member of any of the classes described in paragraph (1)(E), (2), (3), or (4) of section 1227(a) of this title), or both.

(2) Exception

It is not a violation of paragraph (1) to take any proper steps for the purpose of securing cancellation of or exemption from such order of removal or for the purpose of securing the alien's release from incarceration or custody.

4. 8 U.S.C. 1326(a)-(b) provides in pertinent part:

Reentry of removed aliens

(a) In general

Subject to subsection (b) of this section, any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission;

or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—

* * * * *

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

* * * * *

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

5. 8 U.S.C. 1327 provides:

Aiding or assisting certain aliens to enter

Any person who knowingly aids or assists any alien inadmissible under section 1182(a)(2) (insofar as an alien inadmissible under such section has been convicted of an aggravated felony) or 1182(a)(3) (other than subparagraph (E) thereof) of this title to enter the United States, or who connives or conspires with any person or

persons to allow, procure, or permit any such alien to enter the United States, shall be fined under title 18, or imprisoned not more than 10 years, or both.

6. 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.

7. 18 U.S.C. 3509(a) provides:

Child victims' and child witnesses' rights

(a) DEFINITIONS.—For purposes of this section—

(1) the term "adult attendant" means an adult described in subsection (i) who accompanies a child throughout the judicial process for the purpose of providing emotional support;

(2) the term "child" means a person who is under the age of 18, who is or is alleged to be—

(A) a victim of a crime of physical abuse, sexual abuse, or exploitation; or

(B) a witness to a crime committed against another person;

(3) the term "child abuse" means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child;

(4) the term "physical injury" includes lacerations, fractured bones, burns, internal injuries, severe bruising or serious bodily harm;

(5) the term "mental injury" means harm to a child's psychological or intellectual functioning which may be exhibited by severe anxiety, depression, withdrawal or outward aggressive behavior, or a combination of those behaviors, which may be demonstrated by a change in behavior, emotional response, or cognition;

(6) the term "exploitation" means child pornography or child prostitution;

(7) the term "multidisciplinary child abuse team" means a professional unit composed of representatives from health, social service, law enforcement, and legal service agencies to coordinate the assistance needed to handle cases of child abuse;

(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;

(9) the term "sexually explicit conduct" means actual or simulated—

(A) sexual intercourse, including sexual contact in the manner of genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or of opposite sex; sexual contact means the intentional touching, either directly or through 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 sexual desire of any person;

(B) bestiality;

(C) masturbation;

(D) lascivious exhibition of the genitals or pubic area of a person or animal; or

(E) sadistic or masochistic abuse;

(10) the term "sex crime" means an act of sexual abuse that is a criminal act;

(11) the term "negligent treatment" means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to seriously endanger the physical health of the child; and

(12) the term "child abuse" does not include discipline administered by a parent or legal guardian to his or her child provided it is reasonable in manner and moderate in degree and otherwise does not constitute cruelty.

8. Cal. Penal Code § 261.5(a)-(d) (West 2014) provides:

Unlawful sexual intercourse with person under 18; age of perpetrator; civil penalties

(a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a "minor" is a person under the age of 18 years and an "adult" is a person who is at least 18 years of age.

(b) Any person who engages in an act of unlawful sexual intercourse with a minor who is not more than three years older or three years younger than the perpetrator, is guilty of a misdemeanor.

(c) Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170.

(d) Any person 21 years of age or older who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years.