

No. 11-37

In the Supreme Court of the United States

ALFREDO DE PINA SILAS MONTEIRO, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

DONALD B. VERRILLI, JR.
*Solicitor General
Counsel of Record*

TONY WEST
Assistant Attorney General

DONALD E. KEENER
CAROL FEDERIGHI
Attorneys

*Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217*

QUESTION PRESENTED

Whether the Board of Immigration Appeals reasonably concluded that the Massachusetts offense of inducing a chaste minor to engage in unlawful sexual intercourse qualifies as “sexual abuse of a minor” and therefore an “aggravated felony” under 8 U.S.C. 1101(a)(43)(A).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	16

TABLE OF AUTHORITIES

Cases:

<i>Bahar v. Ashcroft</i> , 264 F.3d 1309 (11th Cir. 2001)	5
<i>Carachuri-Rosendo v. Holder</i> , 130 S. Ct. 2577 (2010) . . .	11
<i>Commonwealth v. Foley</i> , 506 N.E.2d 1160 (Mass. App. Ct. 1987)	13, 15
<i>Commonwealth v. Matos</i> , 941 N.E.2d 645 (Mass. App. Ct. 2011)	13
<i>Emile v. INS</i> , 244 F.3d 183 (1st Cir. 2001)	3, 4, 15
<i>Estrada-Espinoza v. Mukasey</i> , 546 F.3d 1147 (9th Cir. 2008)	12, 13
<i>Ganzhi v. Holder</i> , 624 F.3d 23 (2d Cir. 2010)	7
<i>Gattem v. Gonzales</i> , 412 F.3d 758 (7th Cir. 2005) . . .	4, 7, 12
<i>INS v. Aguirre-Aguirre</i> , 526 U.S. 415 (1999)	9, 11
<i>Lara-Ruiz v. INS</i> , 241 F.3d 934 (7th Cir. 2001)	6
<i>Leocal v. Ashcroft</i> , 543 U.S. 1 (2004)	10, 11
<i>Mugalli v. Ashcroft</i> , 258 F.3d 52 (2d Cir. 2001) . . .	4, 6, 8, 12
<i>Negusie v. Holder</i> , 555 U.S. 511, 129 S. Ct. 1159 (2009)	11
<i>Nijhawan v. Holder</i> , 129 S. Ct. 2294 (2009)	3, 7, 9, 10
<i>Pelayo-Garcia v. Holder</i> , 589 F.3d 1010 (9th Cir. 2009)	14

IV

Cases—Continued:	Page
<i>Restrepo v. Attorney Gen. of U.S.</i> , 617 F.3d 787 (3d Cir. 2010)	4, 7, 10, 12
<i>Rivera-Cuartas v. Holder</i> , 605 F.3d 699 (9th Cir. 2010)	12, 13
<i>Rodriguez-Rodriguez, In re</i> , 22 I. & N. Dec. 991 (B.I.A. 1999)	3, 4, 5, 6, 8, 9
<i>Russello v. United States</i> , 464 U.S. 16 (1983)	8
<i>Salado-Alva v. Holder</i> , cert. denied, No. 10-1334 (Oct. 3, 2011)	12
<i>Silva v. Gonzales</i> , 455 F.3d 26 (1st Cir. 2006)	14
<i>Taylor v. United States</i> , 495 U.S. 575 (1990)	4, 9, 10
<i>United States v. Baron-Medina</i> , 187 F.3d 1144 (9th Cir. 1999), cert. denied, 531 U.S. 1167 (2001)	4
<i>United States v. Gonzales-Vela</i> , 276 F.3d 763 (6th Cir. 2001)	4
<i>United States v. Hayes</i> , 555 U.S. 415, 129 S. Ct. 1079 (2009)	10
<i>United States v. Londono-Quintero</i> , 289 F.3d 147 (1st Cir. 2002)	14
<i>United States v. Medina-Villa</i> , 567 F.3d 507 (9th Cir. 2009), cert. denied, 130 S. Ct. 1545 (2010)	10
<i>United States v. Zavala-Sustaita</i> , 214 F.3d 601 (5th Cir.), cert. denied, 531 U.S. 982 (2000)	4
<i>Vargas v. DHS</i> , 451 F.3d 1105 (10th Cir. 2006)	7
 Statutes:	
Immigration and Nationality Act (INA), 8 U.S.C. 1101 <i>et seq.</i> :	
8 U.S.C. 1101(a)(43)	8, 10, 11

Statutes—Continued:	Page
8 U.S.C. 1101(a)(43)(A)	2, 4, 8, 10, 15
8 U.S.C. 1103(a)(1)	11
8 U.S.C. 1227(a)(2)(A)(iii)	1, 2
18 U.S.C. 2241-2246 (2006 & Supp. I 2007)	15
18 U.S.C. 2243 (2006 & Supp. I 2007)	3, 5, 8, 9, 10
18 U.S.C. 2246(a)(2)	6
18 U.S.C. 3509(a)(2)	5
18 U.S.C. 3509(a)(8)	3, 5, 6, 7, 8, 15
Mass. Gen. Laws Ann. (West 2000):	
Ch. 265, § 23	2
Ch. 272, § 4	2, 6, 14
Ch. 274, § 1	2
1998 Mass. Legis. Serv. 1051-1052 (West)	14
Miscellaneous:	
<i>Webster's Third New International Dictionary</i> (1971) ..	13

In the Supreme Court of the United States

No. 11-37

ALFREDO DE PINA SILAS MONTEIRO, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unreported. The decisions of the Board of Immigration Appeals (Pet. App. 4a-8a) and the immigration judge (Pet. App. 9a-12a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 2011. The petition for a writ of certiorari was filed on May 31, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, any alien who is convicted of an “aggravated felony” is deportable. 8 U.S.C. 1227(a)(2)(A)(iii). As relevant here, an aggravated fel-

ony includes “sexual abuse of a minor.” 8 U.S.C. 1101(a)(43)(A). The INA does not further define the term “sexual abuse of a minor.”

2. Petitioner is a native and citizen of Cape Verde who was admitted to the United States as a lawful permanent resident in 1995. Pet. App. 5a, 10a. In 2007, when he was 17, he was charged with three violations of Mass. Gen. Laws Ann. ch. 265, § 23 (West 2000), which punishes “[w]hoever unlawfully has sexual intercourse or unnatural sexual intercourse and abuses, a child under sixteen years of age.” Administrative Record (A.R.) 155. The offense was based on a nonconsensual sexual encounter between petitioner and a 14-year-old victim whom he contacted on the “Myspace” Internet site. A.R. 246.

Petitioner eventually pleaded guilty as an adult to three counts of “induc[ing] any person under 18 years of age of chaste life to have unlawful sexual intercourse,” in violation of Mass. Gen. Laws Ann. ch. 272, § 4 (West 2000). Violation of this statute is a felony. Mass. Gen. Laws Ann. ch. 274, § 1 (West 2000). Petitioner was sentenced to five years of probation. A.R. 157.

3. In 2009, the Department of Homeland Security (DHS) commenced removal proceedings against petitioner. A.R. 325-329. Based on the 2007 conviction, DHS charged that petitioner was removable pursuant to 8 U.S.C. 1227(a)(2)(A)(iii) as an alien convicted of an “aggravated felony” as described in 8 U.S.C. 1101(a)(43)(A), namely, “sexual abuse of a minor.” Pet. App. 4a, 9a. Petitioner admitted the factual allegations but denied the charge of removability, arguing that his offense did not qualify as “sexual abuse of a minor.” *Id.* at 10a.

The immigration judge (IJ) concluded that the plain language of the Massachusetts statute under which petitioner was convicted constitutes “sexual abuse of a minor,” and that petitioner was therefore removable as charged. Pet. App. 10a-12a.

The Board of Immigration Appeals (BIA or Board) dismissed petitioner’s appeal. Pet. App. 4a-8a. The BIA concluded that, under Board precedent, petitioner’s offense constitutes sexual abuse of a minor because it “falls within the definition of sexual abuse found at 18 U.S.C. § 3509(a)(8).” *Id.* at 6a (citing *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991 (1999) (en banc)). The BIA observed that “[t]he federal statute includes the ‘inducement . . . of a child to engage in . . . sexually explicit conduct . . . ,’” which accurately described the Massachusetts offense of inducing a chaste minor to have sexual intercourse. *Ibid.* (quoting 18 U.S.C. 3509(a)(8)). The BIA rejected petitioner’s argument that the Board should apply the definition of sexual abuse of a minor from 18 U.S.C. 2243 (2006 & Supp. I 2007), because that definition “is too narrow” and contrary to First Circuit precedent. Pet. App. 7a (citing *Emile v. INS*, 244 F.3d 183, 186 (2001)).

4. The court of appeals dismissed the petition for review in an unpublished, per curiam opinion. Pet. App. 1a-2a. The court rejected petitioner’s contentions that the BIA’s decision did not warrant deference because it conflicted with *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), that the categorization of his offense under Massachusetts law should control, and that the court should follow the Ninth Circuit in using the definition of “sexual abuse of a minor” set forth in Section 2243.

ARGUMENT

Petitioner contends (Pet. 13-17) that his Massachusetts convictions for inducing a chaste minor to have sexual intercourse do not constitute “sexual abuse of a minor” under 8 U.S.C. 1101(a)(43)(A). The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or implicate any circuit conflict worthy of this Court’s review. Further review is unwarranted at this time.

1. a. The INA defines an aggravated felony as including “sexual abuse of a minor,” but it neither expressly defines that term nor cross-references any other statute. 8 U.S.C. 1101(a)(43)(A); *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 993, 995-996 (B.I.A. 1999) (en banc). Accordingly, the BIA and all circuits that have examined the question have agreed that the term should be interpreted, in accordance with the categorical approach described in *Taylor v. United States*, 495 U.S. 575 (1990), to refer to a generic federal offense defined by the generally understood, everyday, ordinary, contemporary, or common meaning of the term, encompassing “any crime, regardless of its exact definition or label, having the basic elements of [the generic offense].” *Id.* at 599; see *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 996; *Emile v. INS*, 244 F.3d 183, 185-186, 187 (1st Cir. 2001); *Mugalli v. Ashcroft*, 258 F.3d 52, 56-59 (2d Cir. 2001); *Restrepo v. Attorney Gen. of U.S.*, 617 F.3d 787, 791-792 (3d Cir. 2010); *United States v. Zavala-Sustaita*, 214 F.3d 601, 604 (5th Cir.), cert. denied, 531 U.S. 982 (2000); *United States v. Gonzales-Vela*, 276 F.3d 763, 766 (6th Cir. 2001); *Gattem v. Gonzales*, 412 F.3d 758, 763 (7th Cir. 2005); *United States v. Baron-Medina*, 187 F.3d 1144, 1146 (9th Cir. 1999), cert.

denied, 531 U.S. 1167 (2001); *Bahar v. Ashcroft*, 264 F.3d 1309, 1311 (11th Cir. 2001).

In *Rodriguez-Rodriguez*, the BIA considered the proper definition of “sexual abuse of a minor” under 8 U.S.C. 1101(a)(43)(A). The BIA pointed out that in construing the term “sexual abuse of a minor,” it is “not obliged” to draw the generic definition from “a federal or state statutory provision.” 22 I. & N. Dec. at 994. The BIA noted that Congress sometimes expressly cross-references a federal offense but did not do so in the provision defining “sexual abuse of a minor” as an aggravated felony. *Id.* at 994-995.

The BIA agreed that it would be appropriate to “look[] to a federal definition” of sexual abuse for guidance, if not a “definitive standard or definition.” *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 995, 996. The BIA noted, however, that the provision on which petitioner relies, 18 U.S.C. 2243 (2006 & Supp. I 2007), is not the only federal definition of sexual abuse of minors. Another provision of the federal criminal code dealing with minors, 18 U.S.C. 3509(a)(8), defines “sexual abuse” as “the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children.” Section 3509 deals with the rights of children who are victims of crimes of sexual abuse, physical abuse, or exploitation, as well as those of child witnesses. 18 U.S.C. 3509(a)(2).

After considering the dictionary definition and common usage of the phrase “sexual abuse,” the BIA concluded that Section 3509(a)(8) provides a “reasonable interpretation” of “the term ‘sexual abuse of a minor’ as

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

b. The BIA correctly applied its precedent in this case and concluded that petitioner’s Massachusetts offense, “induc[ing a] person under 18 years of age of chaste life to have unlawful sexual intercourse,” Pet. App. 6a (quoting Mass. Gen. Laws Ann., ch. 272, § 4 (West 2000)), involves the persuasion, inducement or enticement of a minor to engage in sexually explicit activity, 18 U.S.C. 3509(a)(8), and thus constitutes sexual abuse of a minor under the common usage of that term. Accordingly, the court of appeals properly dismissed the petition for review.

The court’s decision in this case is consistent with decisions in other circuits, which have concluded that “sexual abuse of a minor” reaches a “broad” range of sexual behavior. *Lara-Ruiz v. INS*, 241 F.3d 934, 942 (7th Cir. 2001); see also *Mugalli*, 258 F.3d at 60;

Restrepo, 617 F.3d at 798 (discerning congressional intent “to ensure the incorporation of a broad range of diverse state statutory definitions”). Of pertinence here, courts have concluded that “sexual abuse of a minor” includes engaging in sexual intercourse with a person under the age of 17, *Ganzhi v. Holder*, 624 F.3d 23 (2d Cir. 2010); solicitation of a sexual act when the victim was under 17, *Gattem*, 412 F.3d 758; and inducing, aiding, or encouraging a child to engage in unlawful sexual contact, *Vargas v. DHS*, 451 F.3d 1105 (10th Cir. 2006).

2. a. Petitioner contends (Pet. 4, 13-15) that *Rodriguez-Rodriguez*, and therefore the court of appeals’ decision in this case, improperly “jettison[]” the categorical approach laid out by this Court in *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), by failing to provide an adequate generic federal definition of the offense of “sexual abuse of a minor.” Petitioner argues that the statute relied upon by *Rodriguez-Rodriguez*, 18 U.S.C. 3509(a)(8), “does not define the generic elements of the federal crime of ‘sexual abuse of a minor’” or, indeed, of any crime. Pet. 14. On the other hand, he continues, Section 2243 defines a “substantive” crime (Pet. 2-3) consisting of required elements and therefore provides the necessary “well-defined elements of the generic offense” allegedly required by *Nijhawan*. Pet. 14. Petitioner’s contention is incorrect.

First, to the extent petitioner complains that Section 3509(a)(8) does not by itself define a substantive crime, that is beside the point. The decision in *Rodriguez-Rodriguez* makes clear that the BIA was not singling out Section 3509(a)(8) as setting forth the full generic crime of “sexual abuse of a minor.” Rather, the BIA explained that it was looking to Section 3509(a)(8) as a guide for definitional purposes to the range of con-

duct encompassed by the term “sexual abuse of a minor.” 22 I. & N. Dec. at 996. The BIA made clear that it viewed the generic crime to be defined more by common usage than by a specific federal statute and that it looked to Section 3509(a)(8)’s definition of “sexual abuse” because that definition encapsulated the ordinary meaning of the term. *Ibid.*; see also *Mugalli*, 258 F.3d at 58 (agreeing that “the § 3509(a) definition is appropriate not simply because it appears somewhere in the United States Code, but because it is consonant with the generally understood broad meaning of the term ‘sexual abuse’”).

Thus, to the extent petitioner contends that Section 1101(a)(43)(A) requires the BIA and courts to adopt a pre-existing federal criminal definition of “sexual abuse of a minor,” that is incorrect. See, e.g., *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 994; see also *id.* at 998 (dissenting opinion of Member Filppu). When Congress has intended to incorporate a federal definition of a particular offense, it has done so explicitly. Thus, a number of the subparagraphs of the aggravated felony definition in 8 U.S.C. 1101(a)(43) explicitly cross-reference certain federal criminal definitions. See *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 995 nn.1-2 (citing numerous provisions of the INA’s aggravated-felony provision that include a cross-reference). Section 1101(a)(43)(A) includes no such cross-reference. Had Congress intended to limit the phrase “sexual abuse of a minor” to conduct that would violate a particular federal criminal statute, such as 18 U.S.C. 2243 (2006 & Supp. I 2007), it would have inserted such language. That omission should be given effect. See, e.g., *Russello v. United States*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another

section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (brackets in original; citation omitted).

Second, to the extent petitioner claims that Section 3509(a)(8) and/or the BIA’s definition in *Rodriguez-Rodriguez* are not sufficiently specific to provide an adequate generic definition and to warrant deference (Pet. 3-4), that claim lacks merit. As an initial matter, although *Rodriguez-Rodriguez* did not purport to advance a comprehensive construction of the term “sexual abuse of a minor,” it conclusively rejected the primary argument petitioner makes here (Pet. 10): that “sexual abuse of a minor” is limited to offenses defined in 18 U.S.C. 2243 (2006 & Supp. I 2007). See *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 995-996. That decision represents a reasonable construction of the statute the BIA administers, and it is entitled to deference. See *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999).

In any event, no more specific definition than the BIA’s reliance on Section 3509(a)(8) as a guide is necessary for application of the categorical approach described in *Nijhawan*. The case law illustrates that the definitions of generic offenses used for application of the categorical approach may take a variety of forms and need not be expressed as a precise formulation. For example, in *Taylor*, 495 U.S. at 599, the Court rejected an “exact formulation” for the generic crime of “burglary” in favor of a more open-ended one that set forth only “the basic elements of [the crime].” Moreover, the Court has recognized that “the categorical method is not always easy to apply” and that the definition of some generic crimes may pose “greater interpretive difficulty” than exist for other generic crimes. *Nijhawan*,

129 S. Ct. at 2299, 2300; see also *Restrepo*, 617 F.3d at 798 (opining that Congress “eschewed [statutory] cross references for crimes identified only by common parlance, such as murder, rape, sexual abuse of a minor, and theft because these terms are *not* clearly defined and *cannot* be clearly defined by a simple cross-reference”). The Court has made clear that these hurdles do not foreclose the use of the categorical approach, *Nijhawan*, 129 S. Ct. at 2300, and that flexibility is necessary to take into account the variety of ways States criminalize the same conduct. *Taylor*, 495 U.S. at 591; see also *Restrepo*, 617 F.3d at 798.

Practical considerations also weigh strongly against petitioner’s proposal that Section 1101(a)(43)(A)’s reference to “sexual abuse of a minor” be confined to the definition set forth in 18 U.S.C. 2243 (2006 & Supp. I 2007). Cf. *United States v. Hayes*, 555 U.S. 415, 129 S. Ct. 1079, 1087 (2009). Section 2243 requires that the victim be between the ages of 12 and 16. Thus, as even the Ninth Circuit has acknowledged, if the only offenses that counted as “sexual abuse of a minor” were those covered by Section 2243, “then no child under the age of twelve would be contemplated by the term ‘minor,’ and sexual crimes against children under twelve would not” satisfy the generic definition of “sexual abuse of a minor.” *United States v. Medina-Villa*, 567 F.3d 507, 516 (2009), cert. denied, 130 S. Ct. 1545 (2010). Congress would not have intended such a “bizarre result.” *Ibid.*

b. Petitioner further contends (Pet. 6, 15-17) that the court of appeals’ decision overlooks the role of the “rule of lenity” in immigration cases. That rule is inapplicable here. In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), this Court stated that the rule of lenity would apply when interpreting a criminal statute that the INA incor-

porates by reference. *Id.* at 11 n.8. This case, by contrast, is a civil case interpreting a civil statute. Although some criminal statutes do refer to Section 1101(a)(43), *Leocal* does not suggest that such references transform the INA’s aggravated-felony definition into a criminal statute for all purposes; to the contrary, this Court has applied the rule of lenity only when “the critical language appears in a criminal statute,” which is not the case here. *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2589 (2010).¹

Moreover, Congress has expressly conferred on the Attorney General (and his delegate, the BIA) the authority to resolve ambiguities in the INA in the first instance. 8 U.S.C. 1103(a)(1); see *Aguirre-Aguirre*, 526 U.S. at 424-425. A court thus properly considers whether statutory ambiguities should be resolved in favor of the alien only after the court has used every interpretative tool at its disposal, including application of deference principles. Cf. *Negusie v. Holder*, 555 U.S. 511, 129 S. Ct. 1159, 1164 (2009) (the “rule of lenity” may be relevant in reviewing agency action for reasonableness, but does not establish that a statute is unambiguous such that deference is unwarranted).

3. Petitioner contends (Pet. 4-5, 10-13) that the courts of appeals are in conflict on the proper interpretation of the term “sexual abuse of a minor” as it relates

¹ In any event, neither *Leocal* nor *Carachuri-Rosendo* considered whether the rule of lenity, a tiebreaker of last resort, trumps the BIA’s authority to interpret Section 1101(a)(43). In *Leocal*, the BIA had affirmed the petitioner’s order of removal based solely on the relevant circuit precedent. See 543 U.S. at 5 n.2. In *Carachuri-Rosendo*, the Court agreed with the BIA. See 130 S. Ct. at 2583.

to state statutory-rape offenses.² Petitioner correctly notes (Pet. 4, 11) that the Ninth Circuit has looked to Section 2243 to determine whether statutory-rape offenses constitute “sexual abuse of a minor” under the INA. See *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (2008) (en banc). *Estrada-Espinoza* involved statutory-rape offenses that encompassed sexual conduct involving children as old as 17, and the court found Section 2243 instructive in explaining what constitutes “abuse” of older minors. *Id.* at 1152-1155. In evaluating whether the strict-liability crime of statutory rape constitutes sexual abuse of a minor, the court noted that Section 2243 does not apply to victims older than 16 or to victims who are less than four years younger than the defendant. *Id.* at 1152. The court therefore concluded that sexual contact with older adolescents was not necessarily “abusive,” whereas “sexual activity with a younger child is certainly abusive.” *Id.* at 1153; see also *Rivera-Cuartas v. Holder*, 605 F.3d 699, 701-702 (9th Cir. 2010) (holding that the offense of “intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age” was not “sexual abuse of a minor”). Other courts of appeals have either adopted or agreed with the BIA’s interpretation of “sexual abuse of a minor” as encompassing a broader range of conduct than Section 2243, including for statutory-rape offenses. See, e.g., *Mugalli*, 258 F.3d at 60; *Restrepo*, 617 F.3d at 795-796; *Gattem*, 412 F.3d at 764. This case presents a poor vehicle to address the Ninth Circuit’s aberrant approach.

² The Court recently denied a petition for a writ of certiorari raising a similar issue. See *Salado-Alva v. Holder*, cert. denied, No. 10-1334 (Oct. 3, 2011).

First, this case does not create a square conflict with Ninth Circuit precedent on statutory-rape offenses. The statutes at issue in the Ninth Circuit cases criminalized the mere act of having sexual intercourse or sexual contact with a minor under the legal age of consent. See *Rivera-Cuartas*, 605 F.3d at 701-702 (“intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age”); *Estrada-Espinoza*, 546 F.3d at 1158-1159 (“engag[ing] in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator,” “participat[ing] in an act of sodomy” with a minor, “participat[ing] in an act of oral copulation” with a minor, and “participat[ing] in an act of sexual penetration” with a minor) (footnote and citations omitted); see also *id.* at 1154 (describing one of the offenses at issue as “criminaliz[ing] completely voluntary conduct by two consenting parties”).

In contrast, the statute here criminalizes “inducing” a minor “of chaste life” to have sexual intercourse. The verb “induce” was not present in the statutes at issue in *Rivera-Cuartas* or *Estrada-Espinoza*. The use of this term suggests that there must be proof that the offender somehow took advantage of the minor’s lack of maturity and perhaps overcame his or her resistance. See, e.g., *Commonwealth v. Matos*, 941 N.E.2d 645, 653 n.14 (Mass. App. Ct. 2011) (noting that “in connection with crimes related to inducing a minor, ‘induce’ appears to be used interchangeably with ‘entice,’ ‘lure,’ ‘persuade,’ ‘tempt,’ ‘incite,’ ‘solicit,’ ‘coax,’ or ‘invite’”); *Commonwealth v. Foley*, 506 N.E.2d 1160, 1161 n.1 (Mass. App. Ct. 1987) (citing as the definition for “induce,” “to move and lead (as by persuasion or influence); prevail upon; influence, persuade” (quoting *Webster’s Third New In-*

ternational Dictionary (1971), first definition); see also 1998 Mass. Legis. Serv. 1051-1052 (West) (amending Mass. Gen. Laws Ann., ch. 272, § 4, via a bill entitled “An Act Relative to the Prevention of Drug Induced Rape and Kidnapping”). This language therefore suggests an element of “abuse” not present in the offenses at issue in *Rivera-Cuartas* or *Estrada-Espinoza*. Even under Ninth Circuit precedent, a crime that is not strictly a statutory-rape crime may qualify as “sexual abuse of a minor” if it involves some type of abuse. See *Pelayo-Garcia v. Holder*, 589 F.3d 1010, 1013-1014 (2009) (explaining that “a crime that is not a statutory rape crime under *Estrada-Espinoza* may qualify as the federal generic offense of ‘sexual abuse of a minor’ if * * * the statute requires abuse”). The statutory requirement of inducement distinguishes the Massachusetts statute from those at issue in the Ninth Circuit cases and vitiates any apparent conflict.

Second, the First Circuit has not yet adopted a definitive standard for “sexual abuse of a minor” or concluded that a broad definition would be appropriate in a case involving a typical statutory-rape statute. The most recent published decision on the issue, although explaining that reliance on Section 2243 is “misplaced,” expressly declined to “sett[l]e on any particular definition” of the term. *United States v. Londono-Quintero*, 289 F.3d 147, 153-154 (2002). Because that case was a criminal sentencing case interpreting the Sentencing Guidelines, the Court did not consider the reasonableness of the BIA’s current interpretation. In the only other relevant published First Circuit decision,³ the court de-

³ The case cited by petitioner, *Silva v. Gonzales*, 455 F.3d 26 (1st Cir. 2006), is not relevant as it addressed whether a Massachusetts offense

ferred to the BIA's decision to "regard conduct that * * * would violate the federal sexual abuse statutes [i.e., *all* of the provisions at 18 U.S.C. 2241-2246 (2006 & Supp. I 2007)], where the victim was a minor, as 'sexual abuse of a minor.'" *Emile*, 244 F.3d at 185-186. The BIA's decision in that case did not rely on Section 3509(a)(8) or *Rodriguez-Rodriguez*, and therefore the court did not rule on the reasonableness of that interpretation, or adopt it. The court stated in dicta that the relevance of Section 3509(a)(8) was "debatable," but it did not need to address that question because the alien's conduct also fell within another federal criminal sexual abuse statute. *Id.* at 186 n.2. In this case, the court rejected petitioner's argument that Section 2243 should furnish the definition of "sexual abuse of a minor" without articulating the definition that should be applied. Pet. App. 1a-2a. And in any event, the court of appeals' decision in this case is unpublished, so it does not create binding precedent.

Finally, the statute at issue here appears to be rarely used in Massachusetts. An examination of the cases published on Westlaw reveals only one case involving this statute. See *Commonwealth v. Foley, supra* (reversing defendant's conviction for attempted inducement). If the Court were inclined to address the definition of "sexual abuse of a minor" as it relates to statutory-rape-type offenses, it should not do so in a case involving a statute so rarely applied that its precise application is unknown.

denominated "Rape and Abuse of a Child" (the original offense with which petitioner here was charged) constituted "rape" under Section 1101(a)(43)(A), not whether it constituted "sexual abuse of a minor."

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

TONY WEST
Assistant Attorney General

DONALD E. KEENER
CAROL FEDERIGHI
Attorneys

OCTOBER 2011