No. 16-54

IN THE

Supreme Court of the United States

JUAN ESQUIVEL-QUINTANA,

Petitioner,

v.

LORETTA E. LYNCH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

JEFFREY T. GREEN
CO-CHAIR, NACDL
AMICUS COMMITTEE
1660 L Street, NW
Washington, DC 20005
(202) 872-8600

BENJAMIN J. HORWICH
Counsel of Record
JOSHUA PATASHNIK
DAVID J. FEDER
SETH J. FORTIN
MUNGER, TOLLES & OLSON LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105
ben.horwich@mto.com
(415) 512-4000

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States representing attorneys practicing in the field of criminal defense—including private criminal-defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system. NACDL files numerous *amicus curiae* briefs each year in this Court and other courts. This Court has often cited NACDL *amicus curiae* briefs that address the everyday workings of the criminal-justice system and the implications of the Court's decisions in criminal justice and immigration cases.

NACDL and its members have an important professional interest in two of the issues raised in the petition for a writ of certiorari filed in this case. First, NACDL has a longstanding interest in the question of whether the rule of lenity applies when a court confronts an ambiguous statutory provision that has both civil and criminal applications and that an administrative agency has interpreted. NACDL filed an amicus brief in this Court on that subject last Term in *Luna*

[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for both parties received notice of amicus curiae's intention to file this brief at least 10 days prior to the due date. Petitioner and Respondent have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. No party authored this brief in whole or in part, and no person or entity, other than amicus curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

Torres v. Lynch, No. 14-1096. Second, NACDL and its members also have an interest in the correct application of the "categorical approach" of *Taylor v. United States*, 495 U.S. 575 (1990), and its progeny. NACDL has filed amicus briefs in numerous cases in this Court implicating the categorical approach.

Given NACDL's expertise in these matters, NACDL respectfully believes its perspective would be helpful to the Court in evaluating the importance of this case and determining whether to grant certiorari.

INTRODUCTION

This case concerns the meaning of the statutory term "sexual abuse of a minor," an "aggravated felony" listed in the Immigration and Nationality Act (INA). 8 U.S.C. § 1101(a)(43)(A) (defining "aggravated felony" to include "murder, rape, or sexual abuse of a minor"). As explained in the Petition for a Writ of Certiorari, the Sixth Circuit deepened an existing circuit split when it held that the petitioner's conviction under California Penal Code section 261.5(c)—which criminalizes consensual sexual conduct that is not even criminal in 43 states and is punishable as a felony in just three—ranked as an "aggravated felony." A grant of certiorari is warranted for all of the reasons laid out in the Petition. *Amicus* respectfully submits this brief to highlight two additional considerations that support a grant of certiorari.

First, certiorari is warranted to address an important and fundamental question of statutory interpretation and constitutional law: when a court confronts an ambiguous federal statutory provision that

has both civil and criminal applications and that an administrative agency has interpreted, does the rule of lenity apply, or is the agency's interpretation instead eligible for deference under *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)? Here, the Sixth Circuit declined to apply the rule of lenity and instead afforded *Chevron* deference to the Board of Immigration Appeals' (BIA's) interpretation of section 1101(a)(43).

That statutory provision, however, has extensive criminal applications in addition to its role in civil immigration law. This Court has held that criminal statutes must be interpreted according to the "rule of lenity," which resolves ambiguities in the defendant's favor, narrowing the potential punitive reach of the statute. *United States v. Santos*, 553 U.S. 507, 514 (2008). The Court has also held that statutory provisions with both civil and criminal applications (referred to here as "hybrid" statutes) must carry a single, unitary meaning in both the civil and criminal context. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004).

Put together, these two principles compel the conclusion that the rule of lenity must be applied to "hybrid" statutes even in civil cases, and the Court's opinions recognize as much. See *id.*; *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality opinion); *FCC v. ABC*, 347 U.S. 284, 296 (1954). Yet here, the Sixth Circuit—while recognizing that this rationale is "compelling," Pet. App. 8a—believed that a footnote in this Court's opinion in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704 n.18 (1995), obligated it to afford *Chevron* deference to the BIA's interpreta-

tion of section 1101(a)(43), notwithstanding that provision's criminal applications. Pet. App. 9a-10a.

This question—the relationship between *Chevron* and the rule of lenity in the context of "hybrid" statutes—is an important one that implicates basic principles of separation of powers and due process. See *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J., joined by Thomas, J., statement respecting denial of certiorari); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 729 (6th Cir. 2013) (Sutton, J., concurring). It is also a question with widespread practical consequences for criminal-defense and immigration attorneys and their clients. The Court should grant certiorari to resolve this question, and this case presents an appropriate vehicle for doing so.

Second, certiorari is warranted because the application below of the *Taylor* "categorical approach" departs dramatically from this Court's precedents and would have significant consequences for practitioners. Neither the Sixth Circuit nor the BIA attempted to define the relevant elements of the "generic crime" of "sexual abuse of a minor" and then to compare those elements to the elements of the statute of conviction, as this Court's case law requires. See *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013); *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1685 (2013). Rather, the BIA adopted a "case-by-case" approach to defining the generic offense of "sexual abuse of a minor." Pet. App. 40a.

This approach led the BIA astray. Instead of looking to sources such as federal law, state law, and the Model Penal Code to define the relevant elements of the generic offense, as this Court has instructed, the

BIA concluded that a conviction under California Penal Code section 261.5(c) categorically qualifies as "sexual abuse of a minor" based on other factors, such as the BIA's policy judgment and its understanding of congressional intent. This Court consistently has rejected this view of the categorical approach. See *Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016).

The BIA's understanding of the categorical approach, if followed elsewhere, would eliminate many of the substantial benefits of the categorical approach as this Court has defined it. An elements-focused approach to defining generic crimes provides certainty and predictability: it allows noncitizen criminal defendants and their attorneys to know in advance what the immigration consequences of potential convictions or guilty pleas will be. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015); see *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010). The approach followed here would take away that predictability and certainty, and would force attorneys advising clients to engage in guesswork and speculation about the BIA's possible future treatment of state criminal offenses. The Court should grant certiorari to reaffirm the elements-focused nature of defining generic crimes under the categorical approach.

ARGUMENT

I. The Court Should Grant Certiorari to Determine Whether the Rule of Lenity Applies When a Court Confronts a Federal Statutory Provision that Has Both Civil and Criminal Applications and that an Agency Has Interpreted

In addition to the compelling arguments advanced by petitioner, the Court should grant the petition for a writ of certiorari because the Sixth Circuit's opinion rests squarely on that court's holding that the BIA's interpretation of the statutory term "sexual abuse of a minor" (8 U.S.C. § 1101(a)(43)(A)) enjoys *Chevron* deference without resort to the rule of lenity, notwithstanding the many criminal applications of section 1101(a)(43). Pet. App. 4a-10a. That holding directly implicates a fundamental question of statutory interpretation and constitutional law: When an ambiguous federal statutory provision has both civil and criminal applications, and a court is asked to interpret that provision, should the court apply the rule of lenity to narrow the potential punitive reach of the statute, or should the court instead under *Chevron* defer to an agency's interpretation of the provision at issue without first resorting to the rule of lenity?

The Sixth Circuit, while acknowledging that there were "compelling reasons" to apply the rule of lenity, Pet. App. 8a, declined to do so and instead simply afforded *Chevron* deference to the BIA's interpretation of the statutory terms "aggravated felony" and "sexual abuse of a minor." But this Court's prior decisions and

the important legal principles underlying them compel the conclusion that the rule of lenity, rather than *Chevron* deference, must apply when a court interprets an ambiguous statutory provision that has both civil and criminal applications. The Court should grant certiorari to address that question.

A. Section 1101(a)(43) Has Extensive Criminal Applications, with Substantial Penal Consequences

Section 1101(a)(43), the INA provision at issue in this case, has numerous and significant criminal applications. For example, it is a felony to aid or assist "any alien inadmissible under section 1182(a)(2) (insofar as an alien inadmissible under such section has been convicted of an aggravated felony)." 8 U.S.C. § 1327. Likewise, the federal failure-to-depart statute makes it a felony for immigrants convicted of an aggravated felony to remain in the country. See *id.* §§ 1253(a)(1), 1227(a)(2)(A)(iii).

Section 1101(a)(43) also substantially increases the sentencing exposure of those convicted of certain federal criminal offenses. For example, the maximum penalty authorized by statute for illegal reentry under 8 U.S.C. § 1326 is two years for a "simple" offense, meaning no enhancements based on predicate convictions, but 20 years if the defendant has been convicted of an aggravated felony. See *id.* § 1326(b)(2) (also identifying an intermediate penalty for those with prior non-aggravated-felony convictions). Similarly, a federal criminal defendant faces a maximum prison term of four years for "simple" failure to depart under 8 U.S.C. § 1253(a)(1), but he or she faces a maximum 10-

year prison term if previously convicted of an aggravated felony. See *id.*; § 1227(a)(2)(A)(iii).

These criminal law consequences under section 1101(a)(43) have widespread impact. The illegal reentry statute is the second-most prosecuted felony (after illegal entry) in the federal courts. Transactional Records Access Clearinghouse ("TRAC"), TRAC Reports, Prosecutions for 2014 (Dec. 5, 2014).[2] In 2013, illegal reentry cases accounted for 26 percent of all federal criminal sentencings and 83.3 percent of sentencings involving immigration offenses. U.S. SENTENCING COMMISSION, ILLEGAL REENTRY OFFENSES 9 (April 2015).[3] Moreover, of the 18,498 illegal reentry defendants sentenced in 2013, "slightly more than 40 percent faced a statutory maximum of 20 years under § 1326(b)(2)" because of an aggravated felony conviction, instead of a two- or ten-year statutory maximum that otherwise would apply. *Id.*

Not surprisingly, then, federal courts routinely are called upon in criminal cases to determine what crimes rank as "aggravated felonies" within the meaning of section 1101(a)(43), including under the "sexual abuse of a minor" provision. See, *e.g.*, *United States v. Londono-Quintero*, 289 F.3d 147, 151 (1st Cir. 2002) (interpreting the aggravated felony of "sexual abuse of a minor," § 1101(a)(43)(A)); *United States v. Martinez*, 786 F.3d 1227, 1230-33 (9th Cir. 2015) (same); *United States v. Pacheco*, 225 F.3d 148, 153-55 (2d Cir. 2000) (interpreting the aggravated felony of "theft offense"

---

[2] http://tracfed.syr.edu/results/9x20548211252a.html.

[3] http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf.

§ 1101(a)(43)(G)); *United States v. Gamboa-Garcia*, 620 F.3d 546, 548-50 (5th Cir. 2010) (interpreting the aggravated felony of "an offense related to the obstruction of justice," § 1101(a)(43)(S)).

B. This Court Should Grant Certiorari to Reaffirm the Important Principle that the Rule of Lenity Applies When Courts Interpret Ambiguous Statutory Provisions Like Section 1101(a)(43) that Carry Both Civil and Criminal Applications

The question of whether the rule of lenity or *Chevron* applies when courts confront ambiguous statutory provisions that have both civil and criminal applications and that an agency has interpreted is an important one that warrants this Court's attention. See *Whitman*, 135 S. Ct. at 353-54 (Scalia, J., joined by Thomas, J., statement respecting denial of certiorari) (expressing "receptive[ness] to granting" a petition for certiorari "properly presenting the question"); *Carter*, 736 F.3d at 729 (Sutton, J., concurring) (noting that "this question will return sooner or later"); *Hosh v. Lucero*, 680 F.3d 375, 383 (4th Cir. 2012) ("Deciding whether to apply the rule of lenity or whether to instead give deference to an agency interpretation is no small task."). Both this Court's cases and fundamental constitutional principles compel the conclusion that, contrary to the Sixth Circuit's holding here, the rule of lenity applies in that setting.

The latter half of the twentieth century has been marked by a sharp increase in statutory crimes. See Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*,

85 GEO. L.J. 775, 783 (1997). There are so many federal crimes now that it is difficult to count them, but there are at least several thousand. See, *e.g.*, JOHN S. BAKER, JR., THE FEDERALIST SOC'Y FOR LAW & PUB. POLICY STUDIES, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION 3 (2004) (estimating that there are over 4,000 criminal statutes in the U.S. Code). Many of these federal statutes are "hybrid" statutes with both civil and criminal applications. Such statutes are especially prevalent in the regulatory context. Leading examples include the Clean Water Act, 33 U.S.C. § 1251 *et seq.*; the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*; the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*; and the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* See Margaret V. Sachs, *Harmonizing Civil and Criminal Enforcement of Federal Regulatory Statutes: The Case of the Securities Exchange Act of 1934*, 2001 U. ILL. L. REV. 1025, 1026.

This increasing overlap between civil and criminal regulatory statutes inevitably raises the question of how courts should go about construing ambiguous statutes with both civil and criminal applications.

It is a fundamental rule of statutory interpretation, "perhaps not much less old than construction itself," *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.), that in construing a criminal statute, the "rule of lenity" requires that ambiguities be resolved in the defendant's favor. *Santos*, 553 U.S. at 514. The rule has its roots in two foundational principles of American law: first that "'fair warning'" should be given to the public of what the law forbids, and second that "because of the seriousness of criminal penalties … legislatures and not courts should define

criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971). This same separation-of-powers principle underlies the Court's repeated emphasis that *Chevron* deference has no role to play when it comes to the interpretation of criminal statutes, which "are for courts, not for the Government, to construe." *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014).

It is also well established that, where a single statute has both civil and criminal applications, courts "must interpret the statute consistently, whether [they] encounter its application in a criminal or non-criminal context." *Leocal*, 543 U.S. at 11 n.8; see also, *e.g.*, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 16 (2011); *Clark v. Martinez*, 543 U.S. 371, 380 (2005); *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 408-09 (2003); *FCC v. ABC*, 347 U.S. 284, 296 (1954) ("There cannot be one construction for the Federal Communications Commission and another for the Department of Justice."). The rationale for this unitary-meaning principle is that, as Judge Sutton aptly put it, "[s]tatutes are not 'chameleons' that mean one thing in one setting and something else in another." Pet. App. 18a.

Putting these two rules together leads to the conclusion that the rule of lenity must be applied to "hybrid" statutes with both civil and criminal applications. The Court's opinions say as much. See *Leocal*, 543 U.S. at 11 n.8; *FCC v. ABC*, 347 U.S. at 296; *United States v. Thompson/Center Arms Co.*, 504 U.S. at 518 n.10 (plurality opinion) (rule of lenity applied to interpretation of civil tax provision with criminal applications); *id.* at 519 (Scalia, J., concurring in the judgment) (agreeing that the rule of lenity applies); cf. *Clark*, 543

U.S. at 380 ("It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern."). Indeed, in *Leocal*, the government itself acknowledged that deference to agency interpretation of a criminal statute is unwarranted even where that statute also has civil applications. See Brief for Respondent, *Leocal v. Ashcroft*, No. 03-583, 2004 WL 1617398 (July 14, 2004), at *32-33.[4]

Notwithstanding these authorities, federal courts often fail to follow this rule, as this case illustrates. They sometimes defer to agency interpretations of ambiguous "hybrid" statutory provisions, even in criminal cases, without applying the rule of lenity. See *Whitman*, 135 S. Ct. at 353 (Scalia, J., statement respecting denial of certiorari) (noting that Court of Appeals affirmed criminal conviction by deferring to interpretation of Securities and Exchange Commission); *United States v. Flores*, 404 F.3d 320, 326-27 (5th Cir. 2005); *United States v. Atandi*, 376 F.3d 1186, 1189 (10th Cir. 2004); see also Elliot Greenfield, *A Lenity Exception to Chevron Deference*, 58 BAYLOR L. REV. 1,

---

[4] In concluding otherwise, the Sixth Circuit placed dispositive weight on a footnote in this Court's opinion in *Babbitt*, 515 U.S. at 704 n.18. See Pet. App. 9a. For the reasons explained in Judge Sutton's dissent, however, the court's reliance on the *Babbitt* footnote is misplaced. See Pet. App. 23a-24a. Regardless, the fact that the Sixth Circuit believed its conclusion was compelled by one of this Court's cases—one at odds with the Court's other cases cited above—further highlights the need for this Court's intervention here. See *infra* at 15-16.

41 (2006) (noting that "[c]ourt of appeals decisions indicate a split of opinion on the issue of how *Chevron* interacts with the rule of lenity" and describing varying approaches taken by courts).

Applying *Chevron* instead of the rule of lenity poses a unique threat to important constitutional values, including separation of powers, due process, and equal protection. It would give Executive Branch officials the power to "in effect create (and uncreate) new crimes at will, so long as they do not roam beyond ambiguities that the laws contain." *Whitman*, 135 S. Ct. at 353 (Scalia, J., statement respecting denial of certiorari); see also *Carter*, 736 F.3d at 731 (Sutton, J., concurring) (noting that deference would "giv[e] unelected commissioners and directors and administrators carte blanche to decide when an ambiguous statute justifies sending people to prison"). It would also "turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity." *Crandon v. United States*, 494 U.S. 152, 178 (1990) (Scalia, J., concurring).

Deference to agency interpretation of "hybrid" statutes must be viewed in the context of other recent developments in criminal law. In particular, "a trend is evident toward the diminution of the mental element (or 'mens rea') in crime, particularly in many regulatory offenses." John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 198 (1991). Unclear mens rea requirements "create an environment of uncertainty and unpredictability over exactly what acts are criminal." BAKER, *supra*, at 3. Layering *Chevron* deference on top of this uncertainty and unpredictability would only exacer-

bate that trend. It would also raise serious equal protection concerns. "[W]hen the criminal code comes to cover so many facets of daily life, … prosecutors can almost choose their targets with impunity," Neil M. Gorsuch, *Law's Irony*, 37 Harv. J.L. & Pub. Pol'y 743, 748 (2014), a problem compounded by *Chevron* deference. Individuals disfavored by the government for one reason or another could well become the target of prosecutions based on ambiguous statutes. See WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 2-5 (2011). These weighty concerns underscore the importance of this issue and the need for this Court to provide guidance to lower courts.

C. This Case Is a Good Vehicle for Addressing the Applicability of the Rule of Lenity in Cases Involving "Hybrid" Civil–Criminal Statutory Provisions

For three reasons, this case presents an appropriate opportunity for the Court to clarify the applicability of the rule of lenity to "hybrid" statutes.

First, the Sixth Circuit's opinion unmistakably rests on its conclusion that *Chevron* deference trumps the rule of lenity in construing "hybrid" statutes. See Pet. App. 4a-5a; 11a. Indeed, it was the only point on which the majority opinion and the dissent disagreed. *Id.* at 16a. Neither the Sixth Circuit majority nor the government has suggested that the term "sexual abuse of a minor" *unambiguously* encompasses petitioner's California conviction. The other circuits whose positions align with the Sixth Circuit also rest their analyses on deference to the BIA's position under *Chevron*. See Pet. 13 (describing cases from the Second, Third,

and Seventh Circuits); see also *Contreras v. Holder*, 754 F.3d 286, 293 (5th Cir. 2014). Thus, unlike other cases in which the issue might have been raised, see *Whitman*, 135 S. Ct. at 354 (Scalia, J., statement respecting denial of certiorari) (noting that "the procedural history of the case … makes it a poor setting in which to reach the question"), here there will be no procedural obstacle to the Court in reaching the issue—unless, of course, the Court were to conclude that the California statute unambiguously does *not* constitute "sexual abuse of a minor," in which case a grant of certiorari is warranted on that question, for the reasons explained in the Petition.

Second, it is not just a hypothetical possibility that affording *Chevron* deference to the BIA's interpretation of "aggravated felony" and "sexual assault of a minor," will have implications in criminal cases. On the contrary, as discussed above, *supra* at 8, federal courts regularly are called upon to determine what crimes constitute "aggravated felonies" in criminal cases—including under the precise "sexual abuse of a minor" provision at issue here. See *Londono-Quintero*, 289 F.3d at 152-55; *Martinez*, 786 F.3d at 1230-33. The Sixth Circuit's opinion, if it remains on the books, will govern future criminal cases in that circuit under the unitary-meaning rule discussed above. *Supra* at 11. This case thus may be a better vehicle in which to address the issue than a case involving a federal statutory provision only rarely invoked or interpreted in criminal prosecutions.

Third, the issue now clearly is ripe for this Court's consideration. Both the Sixth Circuit majority opinion and the dissent extensively analyzed the interplay between the rule of lenity and *Chevron* deference, and

engaged in a Talmudic effort to parse and reconcile this Court's precedents. Only this Court can resolve the tension both the majority opinion and dissent below identified between the footnote in *Babbitt* and the rest of this Court's precedents. See Pet. App. 9a-10a, 23a-24a.

II. Certiorari Is Warranted Because the BIA's and the Sixth Circuit's Mistaken Understanding of the Categorical Approach Would Entail Significant Practical Consequences for Attorneys and Their Clients

As explained in the Petition (at 22-23), this case required the BIA and the Sixth Circuit to apply the "categorical approach" of *Taylor* and its progeny to determine whether a conviction under California Penal Code section 261.5(c) is categorically "sexual abuse of a minor." The BIA's and the Sixth Circuit's conclusion that a conviction under section 261.5(c) categorically *is* "sexual abuse of a minor" stems from a failure to apply the categorical approach in the way this Court has prescribed. Were the type of "categorical approach" applied here to be followed in other cases, it would transform an already-complex statutory scheme into a confusing maze that would significantly hamper both criminal-defense and immigration attorneys in giving sound advice to their clients.

A. The BIA and the Sixth Circuit Failed to Define the Relevant Elements of the Generic Offense of "Sexual Abuse of a Minor," Leading to the Erroneous Result in This Case

The BIA correctly recognized that this case calls for the application of the *Taylor* categorical approach. Pet. App. 31a-32a.[5] This approach asks "whether the elements of the crime of conviction sufficiently match the elements of [the] generic [crime], while ignoring the particular facts of the case." *Mathis*, 136 S. Ct. at 2248. To apply this approach, courts and agencies must "compare the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime—*i.e.*, the offense as commonly understood." *Descamps*, 133 S. Ct. at 2281. "The prior conviction qualifies" as a federal predicate crime "only if the statute's elements are the same as, or narrower than, those of the generic offense." *Id.*

The generic offense at issue here is "sexual abuse of a minor," which this Court has recognized is a type of generic offense for purposes of applying the categorical approach. *Nijhawan v. Holder*, 557 U.S. 29, 37 (2009). Because sexual abuse of a minor "is a 'generic crim[e]' … the categorical approach applies." *Moncrieffe*, 133 S. Ct. at 1685 (alteration in original).

---

[5] As the BIA recognized, this case does not call for application of the "modified categorical approach" (see *Mathis*, 136 S. Ct. at 2249) because "section 261.5(c) of the California Penal Code is not divisible as to the definition of sexual abuse of a minor." Pet. App. 31a.

The foundational step in applying the categorical approach is to define the relevant elements of the generic offense—otherwise, no "compar[ison]" of the elements to the crime of conviction is possible. *Descamps*, 133 S. Ct. at 2281; see also *id.* at 2283 (noting that the "key" to the categorical approach "is elements"). But neither the BIA nor the Sixth Circuit attempted to define the relevant elements of generic "sexual abuse of a minor." Rather, the BIA believed that "given the large number and variety of statutes that are potentially at issue" and could constitute "sexual abuse of a minor," "we must, as a practical matter, evaluate statutes individually and define 'sexual abuse of a minor' under the Act on a case-by-case basis." Pet. App. 40a. That reflects a basic misunderstanding of the categorical approach. While agencies no doubt may proceed through case-by-case adjudication, the very nature of the categorical approach *requires* an identification of the relevant elements of the generic crime *in every case*, so that the elements of the crime of conviction may be compared to it. See *Descamps*, 133 S. Ct. at 2283.

The BIA's and the Sixth Circuit's failure to define the relevant elements of generic "sexual abuse of a minor" led them astray in this case. To define the elements of a generic crime, courts must look to sources such as federal law, the laws of the 50 states, the Model Penal Code, and treatises. See, *e.g.*, *Taylor*, 495 U.S. at 596-99; *Scheidler*, 537 U.S. at 410. In this case, as explained in the Petition (at 23-26), consulting any of those sources—let alone all of them—would have pointed the BIA and the Sixth Circuit toward the correct conclusion that a conviction under California

Penal Code section 261.5(c) is not categorically "sexual abuse of a minor."

The California statute criminalizes consensual sex between a 21-year-old and a person just under 18. Yet federal law does not criminalize that conduct, and the federal crime labeled "sexual abuse of a minor" does not encompass it. See Pet. 23-24; 18 U.S.C. § 2243(a). The overwhelming majority of states do not criminalize such conduct either: it is entirely legal in 43 states; it is punishable as a felony in only three; and *only one state* (Oregon) characterizes it as "sexual abuse" (where it is "third degree" sexual abuse, punishable only as a misdemeanor). See Pet. 25-27 & n.7; Or. Rev. Stat. 163.415.[6] This is nowhere close to the level of consensus needed to define a generic offense. See, *e.g.*, *Taylor*, 495 U.S. at 598 ("We believe that Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes *of most States*.") (emphasis added); *United States v. Flores-Granados*, 783 F.3d 487, 493-95 (4th Cir. 2015) (Wilkinson, J.) (concluding that the generic definition of kidnapping requires some "element of heightened intent" because "only eight states and the District of Columbia do not include a heightened intent requirement" in their kidnapping statutes). Nor does the Model Penal Code criminalize the conduct at issue. See Pet. 26; Model Penal Code § 213.3(1)(a).

---

[6] It is not surprising that only a single jurisdiction describes this type of consensual sex as sexual abuse, since—as the BIA itself has recognized in other contexts—"abuse" necessarily entails some form of "cruelty" or "maltreatment." *In re Rodriguez-Rodriguez*, 22 I & N. Dec. 991, 996 (1999). California also does not describe the relevant conduct as "abuse." See Pet. 26; *In re Kyle F.*, 112 Cal. App. 4th 538, 543 (2003).

The BIA's failure to identify the relevant elements of generic "sexual abuse of a minor" allowed the agency to apply the categorical approach in a manner this Court has specifically rejected. The BIA did so in an open effort to evade the consequences of the categorical approach as defined by the Court. The BIA considered it "noteworthy" that "[i]f we were to conclude that the offense at issue here is not categorically 'sexual abuse of a minor,' sexual offenders who were prosecuted under this statute for victimizing children under the age of 16 would not be removable for having committed a 'sexual abuse of a minor' aggravated felony under the Act." Pet. App. 39a n.7. That flawed reasoning turns the categorical approach on its head. Rather than considering the *least* culpable conduct criminalized by a state statute and comparing that conduct to the generic offense, the BIA identified the *most* culpable conduct and justified its categorical treatment of section 261.5(c) on that basis. Yet a majority of the Court has rejected this criticism of the consequences of the categorical approach. Compare *Mathis*, 136 S. Ct. at 2268 & n.2 (Alito, J., dissenting), with *id.* at 2254 & n.5 (majority opinion).

The Court should grant the petition not just to resolve the deep split regarding the proper treatment of California Penal Code section 261.5(c) and similar state statutes, but also to clarify the proper application of the categorical approach and prevent further misapplications of it like the one in this case.

B. The Misapplication of the Categorical Approach in This Case Would Create Major Difficulties for Attorneys and Their Clients

The erroneous understanding of the categorical approach reflected in the Sixth Circuit's and BIA's opinions here would, if widely adopted, have a significant and detrimental impact on the practice of both criminal law and immigration law. A key rationale for the categorical approach is that "the practical difficulties and potential unfairness" of any other approach "are daunting." *Taylor*, 495 U.S. at 601; *Descamps*, 133 S. Ct. at 2289. The approach used in this case would invite such practical difficulties and unfairness.

Persons accused of crimes (and their lawyers) often are keenly interested in whether a potential conviction will trigger collateral consequences, such as an enhanced sentence under the Armed Career Criminal Act (ACCA) or, as here, mandatory removal under the INA. Indeed, criminal-defense attorneys have a duty to advise their noncitizen clients regarding the potential immigration consequences of criminal convictions. *Padilla*, 559 U.S. at 367. The categorical approach facilitates the performance of this duty: it "works to promote efficiency, fairness, and predictability in the administration of immigration law" by enabling noncitizens and their attorneys "to anticipate the immigration consequences of guilty pleas in criminal court, and to enter safe harbor guilty pleas that do not expose the alien defendant to the risk of immigration sanctions." *Mellouli*, 135 S. Ct. at 1987 (alterations and internal quotation marks omitted).

A categorical approach focused on generic crimes and elements achieves that end. An attorney who needs to determine whether a particular state conviction will qualify as an "aggravated felony" knows where to look: to federal law, the laws of the states, and the Model Penal Code. She can rely on the definition of generic crimes that she finds there. Under the Sixth Circuit's and the BIA's approach, by contrast, she would have no such certainty. The BIA might later conclude that a particular crime is an aggravated felony—notwithstanding (as here) the contrary guidance of at least 43 states, the federal government, and the Model Penal Code—based on sources that have nothing to do with the law.

In this case, for instance, the BIA's determination that a conviction under section 261.5(c) is "sexual abuse of a minor" rested largely on factors such as the BIA's understanding of congressional intent, see Pet. App. 12a, 38a, and its policy judgment. The BIA extensively discussed and cited an article in the *Journal of Family Planning Perspectives* in support of its conclusion that "the risk of coercion" in a sexual relationship "is particularly great when the victim is not in the same peer group," and "having an age differential of 'more than three years' helps ensure that the victim and the perpetrator are not in the same peer group … 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." Pet. App. 35a-36a. And the Sixth Circuit concluded that this approach warranted *Chevron* deference. *Id.* at 11a-12a.

This is not the way the definition of generic crimes works under the categorical approach. It is hardly

reasonable to expect criminal-defense attorneys to consult sources such as the *Journal of Family Planning Perspectives* in seeking to determine whether a criminal conviction constitutes an aggravated felony. Yet, under the BIA's and the Sixth Circuit's approach here, a diligent criminal-defense attorney would have to consider the possibility that far-flung sources like these might lead the BIA to deem a state crime an aggravated felony.

The BIA believed its "case-by-case" approach to defining the generic crime of "sexual abuse of a minor" was justified due to the "large number and variety of statutes that are potentially at issue." Pet. App. 40a. Far from supporting the BIA's rationale, this consideration highlights why an articulation of the generic elements of "sexual abuse of a minor" is *essential* to make the categorical approach work. Criminal-defense and immigration attorneys will be called upon to advise their clients whether that "large number and variety of statutes" will be deemed "sexual abuse of a minor" or any one of the other "aggravated felonies" defined in section 1101(a)(43)—a task made only more difficult by the "crazy-quilt" patchwork of different circuits' treatment of different states' penal statutes, see Pet. 19. Even crimes that are misdemeanors in most or all states—or that, like here, reach conduct generally not criminalized at all—might be deemed aggravated felonies.

In sharp contrast to the elements-focused approach to defining generic crimes that this Court's precedents require, the BIA's "case-by-case" approach will leave attorneys and their clients at sea without a compass in determining whether those multitude of crimes rank as aggravated felonies. And the problem is only made

worse when the BIA's "case-by-case" determinations are afforded *Chevron* deference.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JEFFREY T. GREEN
CO-CHAIR, NACDL
AMICUS COMMITTEE
1660 L Street, NW
Washington, DC 20005
(202) 872-8600

BENJAMIN J. HORWICH
Counsel of Record
JOSHUA PATASHNIK
DAVID J. FEDER
SETH J. FORTIN
MUNGER, TOLLES & OLSON LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105
ben.horwich@mto.com
(415) 512-4000

AUGUST 10, 2016