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## NINTH CIRCUIT V. BOARD OF IMMIGRATION APPEALS: DEFINING “SEXUAL ABUSE OF A MINOR” AFTER *ESTRADA-ESPINOZA V. MUKASEY*

Enoka Herat

*Abstract:* Under the Immigration and Nationality Act (INA), lawful permanent residents are rendered removable if they commit an “aggravated felony” at any time after they are admitted into the United States. Significant interpretive issues arise in determining whether a non-citizen’s state-based criminal conviction meets the INA’s definition of an aggravated felony. One aggravated felony enumerated in the INA is “sexual abuse of a minor.”<sup>1</sup> The Board of Immigration Appeals (BIA) has interpreted the phrase using a broad federal definition as a guide. In *Estrada-Espinoza v. Mukasey*,<sup>2</sup> however, the Ninth Circuit declined to defer to the BIA’s interpretation because the BIA’s decision was not a precedential opinion warranting deference. In reviewing whether a California statutory rape conviction constituted sexual abuse of a minor, the *Estrada-Espinoza* court applied a different federal definition and concluded there was no violation, and thus, Mr. Estrada-Espinoza was not deportable. The question of how to define “sexual abuse of a minor” will likely come before the Ninth Circuit on substantive grounds once the BIA issues a deference-warranting definition of the provision. This Comment argues that when the Ninth Circuit revisits the issue, it should not defer to the BIA, regardless of the definition it promulgates. Rather, the court should rule that the phrase “sexual abuse of a minor” is unambiguous based on its plain meaning, the Ninth Circuit’s precedent, holdings from sister circuits, and policy considerations. This holding would be consistent with the best interpretation of the statute, and *Chevron U.S.A. v. Natural Resources Defense Council*<sup>3</sup> and its progeny.

### INTRODUCTION

Juan Estrada-Espinoza had lived in the United States since he was twelve years old.<sup>4</sup> He was a lawful permanent resident—a greencard holder.<sup>5</sup> Juan first met Sonia Arredondo in 2001 when he was twenty and she was sixteen.<sup>6</sup> They soon developed a relationship, moved in together and began raising their child together.<sup>7</sup> Both of their parents

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1. Immigration and Nationality Act (INA) of 1952 § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A) (2006).

2. 546 F.3d 1147 (9th Cir. 2008).

3. 467 U.S. 837, 842–43 (1984).

4. *Estrada-Espinoza*, 546 F.3d at 1150.

5. *Id.*

6. Telephone Interview with Saad Ahmad, Attorney for Juan Estrada-Espinoza, Saad Ahmad & Assocs., (May 8, 2009).

7. *Estrada-Espinoza*, 546 F.3d at 1150.

approved of and supported their relationship, as did their friends.<sup>8</sup> The District Attorney of their small town, however, felt otherwise.<sup>9</sup> In 2004, after Sonia had turned eighteen, Juan was charged with statutory rape, convicted on four counts,<sup>10</sup> and sentenced to 365 days in jail.<sup>11</sup> Juan faced the jarring prospect of deportation due to his conviction for sexual abuse of a minor, an aggravated felony under the Immigration and Nationality Act (INA).<sup>12</sup> In 2005, an immigration judge, relying on Board of Immigration Appeals (BIA) precedent, ordered Juan deported for having consensual sex with his underage girlfriend.<sup>13</sup> The order was affirmed by the BIA.<sup>14</sup> Three years later, in *Estrada-Espinoza v. Mukasey*, the Ninth Circuit declined to follow the BIA and held that Juan was not deportable.<sup>15</sup>

Deportation<sup>16</sup> due to an aggravated felony carries severe immigration consequences, including a complete bar on returning to the United States.<sup>17</sup> In Juan's case, this would have meant never again visiting the country where he had spent nearly two decades of his life, the family he had nurtured here, or the friends and connections he had made.

Since the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),<sup>18</sup> the list of crimes constituting aggravated felonies for which an alien can be deported has grown considerably,<sup>19</sup> and is no longer limited to the most severe crimes.<sup>20</sup>

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8. *Id.*

9. Interview with Saad Ahmad, *supra* note 6.

10. *Estrada-Espinoza*, 546 F.3d at 1150–51.

11. *Id.* at 1151.

12. Immigration and Nationality Act (INA) of 1952 § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A) (2006).

13. *Estrada-Espinoza*, 546 F.3d at 1151.

14. *Id.*

15. *Id.* at 1160.

16. In 1996, the term “deportation” was changed to “removal” in the INA. However, the term “deportation” is still used as a general term and has lost its term-of-art status. “Deportation” will thus be used interchangeably with “removal” throughout this Comment. See Jaya Ramji-Nogales, *A Global Approach to Secret Evidence: How Human Rights Law Can Reform our Immigration System*, 39 COLUM. HUM. RTS. L. REV. 287, 350 n.8 (2008).

17. See INA § 212(a)(9)(A)(ii), 8 U.S.C. § 1182(a)(9)(A)(ii).

18. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996).

19. See Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime and Sovereign Power*, 56 AM. U. L. REV. 367, 384 (2006).

20. Compare Immigration and Nationality Act (INA) of 1952 § 101(a)(43)(A), 8 U.S.C. §

Instead, misdemeanors, such as shoplifting, can now serve as the basis to deport an immigrant as an aggravated felon, leading some scholars to observe that “a crime need not be either aggravated or a felony.”<sup>21</sup> In 1996, Congress added “sexual abuse of a minor” as an aggravated felony to the INA.<sup>22</sup>

The BIA has the authority to interpret the INA, including the scope of some of the deportability grounds such as aggravated felonies.<sup>23</sup> While some aggravated felony grounds are clearly defined by cross-reference to federal criminal statutes, others are not.<sup>24</sup> The deportation ground of “sexual abuse of a minor” falls into the latter category, lacking cross-referencing. In *Matter of Rodriguez-Rodriguez*,<sup>25</sup> the BIA used a federal statute as a guide for interpreting the phrase “sexual abuse of a minor.”<sup>26</sup>

If a non-citizen is convicted of an eligible crime, he or she may be charged with deportation by the Department of Homeland Security, which has prosecutorial power in the immigration context.<sup>27</sup> Then, if an immigration judge determines that the crime constitutes sexual abuse of a minor,<sup>28</sup> the non-citizen will be ordered removed as an aggravated

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1101(a)(43)(A) (1988) (including only murder, drug and weapons trafficking as aggravated felonies) with 8 U.S.C. § 1101(a)(43)(A) (2006) (including over twenty categories of crimes).

21. Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939 (2000). (“[A] conviction for simple battery or for shoplifting with a one-year suspended sentence—either of which would be a misdemeanor or a violation in most states—can be deemed an aggravated felony.”) (footnotes omitted).

22. IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-627, § 321 (a)(1) (codified as amended at 8 U.S.C. § 1101(a)(43)(A)).

23. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (“[T]he BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms [in the INA] concrete meaning.”).

24. *See, e.g.*, INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (2006) (enumerating as an aggravated felony “a crime of violence, as defined in 18 U.S.C. § 16.”).

25. 22 I. & N. Dec. 991 (BIA 1999).

26. *Id.* at 995 (quoting 18 U.S.C. § 3509(a)(8) (1994) (“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”)).

27. Immigration and Nationality Act (INA) of 1952 § 103(a)(1), 8 U.S.C. § 1103(a)(1) (2006) (“[The] Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter[.]”).

28. *See, e.g.*, *Lara-Ruiz v. INS*, 241 F.3d 934, 948 (7th Cir. 2001) (affirming categorization of sexual assault conviction involving a four-year-old victim as sexual abuse of a minor under the INA); *United States v. Mendoza-Irbe*, 198 F.3d 742, 745 (9th Cir. 1999) (affirming categorization of conviction for penetration of the genital or anal opening of a minor under the age of fourteen by a foreign object, section 289(j) of the California Penal Code, as sexual abuse of a minor).

felon. However, the non-citizen can appeal the removal order to the BIA.<sup>29</sup> If a non-citizen's crime fits within this definition, the BIA will affirm the immigration judge's order of removal.<sup>30</sup> The non-citizen can then appeal the decision to the circuit court of appeals in the jurisdiction where the case originated.<sup>31</sup>

Circuit courts of appeals have limited jurisdiction to review BIA orders of removal. IIRIRA stripped the judiciary of authority to review final orders of removal relating to aggravated felonies.<sup>32</sup> However, circuit courts retain jurisdiction over questions of law,<sup>33</sup> including the question of what constitutes a crime of "sexual abuse of a minor."<sup>34</sup>

Although circuit courts review questions of law *de novo*, the Supreme Court's decision in *Chevron U.S.A. v. Natural Resources Defense Council*<sup>35</sup> instructed the judiciary to defer to agency interpretations of statutes they administer.<sup>36</sup> This authority has been limited somewhat by *Chevron's* progeny, particularly where the agency's ruling does not carry the force of law.<sup>37</sup> Although the Court did not define "the force of law," it concluded that "interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."<sup>38</sup>

The Ninth Circuit in *Estrada-Espinoza v. Mukasey* reviewed whether statutory rape under section 261.5 of the California Penal Code is sexual abuse of a minor for immigration purposes.<sup>39</sup> The court did not apply the *Chevron* doctrine to the BIA's interpretation, because the BIA's ruling

29. 8 C.F.R. § 1003.1(j) (2008).

30. *E.g.*, *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1151 (9th Cir. 2008).

31. *Id.*

32. *See* 8 U.S.C. § 1252(a)(2)(C) (2000).

33. 8 U.S.C. § 1252(a)(2)(D) (2006) ("Nothing . . . which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.").

34. *See* *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1152 (9th Cir. 2008) ("We review *de novo* the legal question of whether a conviction under the relevant California statutes constitutes 'sexual abuse of a minor' within the meaning of 8 U.S.C. § 1101(a)(43)(A).").

35. 467 U.S. 837 (1984).

36. *Id.* at 843 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

37. *See* *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

38. *Id.*

39. *Estrada-Espinoza*, 546 F.3d at 1150.

did not carry the force of law.<sup>40</sup> Instead, the court applied a definition found in a federal criminal statute.<sup>41</sup>

Under the Supreme Court's *Chevron* jurisprudence, the BIA need only issue an opinion that does carry the force of law, thus making it eligible for *Chevron* deference, in order to set aside the Ninth Circuit's interpretation.<sup>42</sup> This is the likely course that the BIA will take, considering that it has issued precedential decisions defining other challenged terms in the INA.<sup>43</sup> If it does, the substantive issue of how to interpret "sexual abuse of a minor" will likely come before the Ninth Circuit.

Part I of this Comment analyzes judicial deference to interpretations of law by administrative agencies including immigration agencies under *Chevron* and its progeny. Part II addresses how the BIA has defined the "sexual abuse of a minor" provision of the INA. Part III provides background on the Ninth Circuit's handling of the phrase "sexual abuse of a minor," and the legal context in which the case *Estrada-Espinoza* arose. Part IV explores how other circuits have dealt with the issue. Finally, Part V notes that the issue will likely be brought to the Ninth Circuit on substantive grounds and argues that the Ninth Circuit should rule that the provision is unambiguous based on a plain meaning interpretation, the Ninth Circuit's case law, the findings of sister circuits, and policy considerations.

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40. *Id.* at 1151.

41. *Id.* at 1152.

42. *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005) ("The better rule is to hold judicial interpretations contained in precedents to the same demanding *Chevron* step one standard that applies if the court is reviewing the agency's construction on a blank slate: Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.").

43. *See, e.g.*, Matter of Velazquez-Herrera, 24 I. & N. Dec. 503 (BIA 2008) (defining the INA term "child abuse" issued after Ninth Circuit remand in the absence of a definition); Matter of Lopez-Meza, 22 I. & N. Dec. 1188 (BIA 1999) (defining the INA term "crime involving moral turpitude").

I. *CHEVRON* COMPELS COURTS TO DEFER TO REASONABLE AGENCY INTERPRETATIONS OF AMBIGUOUS STATUTES EVEN WITH REGARDS TO CONCLUSIONS OF LAW

Since *Marbury v. Madison*,<sup>44</sup> interpreting laws has traditionally been within the “province and duty” of the judicial branch.<sup>45</sup> Reviewing courts generally give deference to factual conclusions made by trial courts and juries, but determine legal conclusions de novo. In the modern administrative agency context, however, the Supreme Court has developed a doctrine where courts defer to agency interpretations of law in the face of ambiguity.<sup>46</sup>

In the landmark case, *Chevron U.S.A. v. Natural Resources Defense Council*, the Supreme Court explained how courts should determine whether deference to an agency interpretation is appropriate.<sup>47</sup> The Supreme Court in *Chevron* created a rule where deference is sometimes given to reasonable agency legal conclusions if the underlying statutory provision is ambiguous.<sup>48</sup> Aided by its progeny, *Chevron* has limited the judicial scope of review relating to a wide range of agency action.<sup>49</sup> However, some limits to the doctrine exist. For example, *Chevron* is not applied when an agency interprets a statute that it does not administer.<sup>50</sup> Additionally, under *Christensen v. Harris County*<sup>51</sup> and *United States v. Mead Corp.*,<sup>52</sup> agency actions that lack the force of law are not given

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44. 5 U.S. 137, 177 (1803).

45. *Id.*

46. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 189 (2006).

47. 467 U.S. 837, 844–45 (1984).

48. *Id.* at 844.

49. *Id.* Debate over *Chevron*'s impact continues. A recent empirical study of over 1000 Supreme Court cases in which the Court reviewed agency interpretations of statutes led its authors to conclude that “there has not been a *Chevron* ‘revolution’ at the Supreme Court level.” William N. Eskridge Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1090 (2008). Although this may be the overall trend, it may not be the case in the immigration context. A very recent Supreme Court decision applying *Chevron* recognized that it is well settled that “[j]udicial deference in the immigration context is of special importance.” *Negusie v. Holder*, 555 U.S. \_\_\_, 129 S. Ct. 1159, 1163–64 (2009).

50. *Chevron*, 467 U.S. at 842 (applying *Chevron* deference “[w]hen a court reviews an agency’s construction of the statute which it administers”).

51. 529 U.S. 576, 587 (2000).

52. 533 U.S. 218, 227–28 (2001).

deference. Where the *Chevron* doctrine does apply, appellate courts reviewing an administrative agency's interpretation of a statute that it administers may defer rather than interpret the statute de novo.

More recently, the Supreme Court clarified the extent of agency authority to interpret statutes. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,<sup>53</sup> the Court gave agency legal conclusions deference even when applicable circuit court precedent conflicted.<sup>54</sup> Subsequently, the Tenth Circuit Court of Appeals applied this rule when it deferred to an agency interpretation of an ambiguous immigration detention provision, rather than deferring to an existing Supreme Court interpretation.<sup>55</sup>

A. *Chevron Established a Framework that Affords Great Deference to Agency Statutory Interpretations*

*Chevron* is the landmark Supreme Court case on judicial deference to agency interpretations.<sup>56</sup> *Chevron* established a two-step test for courts to apply when reviewing an "agency's construction of the statute which it administers."<sup>57</sup> Under *Chevron* step one, courts must clarify whether "Congress has directly spoken to the precise question at issue."<sup>58</sup> If Congress has, then "that is the end of the matter; for the court and the agency must give effect to the unambiguously expressed intent of Congress."<sup>59</sup> Where the court determines that Congress has not directly addressed the precise question at issue, "the court does not simply impose its own construction on the statute."<sup>60</sup> Instead, the court must go on to *Chevron* step two and determine "whether the agency's answer is

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53. 545 U.S. 967 (2005).

54. *Id.* at 982–83.

55. *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1248 (10th Cir. 2008). The court concluded that "the holding of *Brand X* applies whether the judicial precedent at issue is that of a lower court or the Supreme Court." *Id.* In *Brand X*, Justice Stevens's concurring opinion recognized: "[A] court of appeals' interpretation of an ambiguous provision in a regulatory statute does not foreclose a contrary reading by the agency. That explanation would not necessarily be applicable to a decision by this Court that would presumably remove any pre-existing ambiguity." 545 U.S. at 1003 (Stevens, J., concurring).

56. Sunstein, *supra* note 46, 188–89.

57. *Chevron*, 467 U.S. at 842.

58. *Id.*

59. *Id.* at 842–43.

60. *Id.* at 843.



based on a permissible construction of the statute.”<sup>61</sup> If the agency’s interpretation is reasonable, then it stands.<sup>62</sup>

In *Chevron*, the Court recognized that “considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.”<sup>63</sup> This weighty deference is reiterated in *Mead*:

[A] reviewing court has no business rejecting an agency’s exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency’s chosen resolution seems unwise, but is obliged to accept the agency’s position if Congress has not previously spoken to the point at issue and the agency’s interpretation is reasonable.<sup>64</sup>

This strong language instructs courts to focus first on the question of statutory clarity and then on the question of reasonableness. This rule allows agencies, rather than reviewing courts, to make legal conclusions and interpret statutes. As administrative law scholar Cass Sunstein notes, this produces a climate of statutory interpretation that is at odds with *Marbury v. Madison* because “in the face of ambiguity, it is emphatically the province and duty of the *administrative* department to say what the law is.”<sup>65</sup> It is, however, the modern framework for determining interpretations of agency administered statutes.

B. *The Supreme Court Limited the Chevron Doctrine Somewhat Through a Clarification of Chevron Step Zero*

A number of cases, and much scholarship, have explored when *Chevron* deference does not apply, as well as its limitations when it does. Courts and scholars have sought to clarify what academics call *Chevron* step zero—the necessary conditions for a court to apply the *Chevron* framework.<sup>66</sup> One basic condition, stated in *Chevron* itself, is

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61. *Id.*

62. *Id.*

63. *Id.* at 844.

64. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

65. Sunstein, *supra* note 46, at 189. Some scholars disagree with Sunstein’s characterization of *Marbury v. Madison*. See, e.g., 1 Richard J. Pierce, Jr., *Administrative Law Treatise*, 144–45 (Aspen Law and Business 2002) (1994). To reconcile *Chevron* and *Marbury*, Pierce notes, “[o]nce an agency or a court concludes that *Chevron* step one does not apply because Congress did not resolve the issue in dispute, the dispute is one of policy rather than of law.” *Id.* at 145.

66. Sunstein, *supra* note 46, at 191 (“*Chevron* Step Zero—the initial inquiry into whether the

that the agency is interpreting a statute that it has been delegated authority to administer.<sup>67</sup> If the agency has not been given authority by Congress to administer the statute it is interpreting, reviewing courts do not need to defer to its interpretation. Courts, for example, need not defer to an agency's interpretation of criminal statutes because Congress has not delegated authority to any particular agency to interpret them.<sup>68</sup>

Another element of the step zero inquiry provides that deference is only available when an agency's interpretation carries the force of law. In *Christensen*, the Court held that an opinion letter was not deference-eligible because it did not carry "the force of law."<sup>69</sup> In *Christensen*, the Acting Administrator of the Department of Labor's Wage and Hour Division wrote an opinion letter responding to a sheriff department's inquiry about whether employer-compelled overtime leave violated the Fair Labor Standards Act.<sup>70</sup> Although the Department of Labor administers that Act, the Court held that deference was not warranted because the letter did not carry the force of law.<sup>71</sup> The Court reasoned that the opinion letter was not an interpretation "arrived at after, for

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*Chevron* framework applies at all").

67. *Chevron*, 467 U.S. at 842 (applying *Chevron* deference "[w]hen a court reviews an agency's construction of the statute which it administers").

68. The Attorney General and the Department of Justice have not been granted authority by Congress to interpret state or federal criminal statutes. See *Gonzalez v. Oregon*, 546 U.S. 243, 264 (2006) ("[T]he Attorney General must . . . evaluate compliance with federal [criminal] law in deciding whether to prosecute; but this does not entitle him to *Chevron* deference."); *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) ("The Justice Department . . . has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference."). Because Congress has not vested special authority in the Attorney General to interpret the federal criminal statutes (this may even implicate separation of powers if it were the case) the agencies under the Attorney General are not given deference in their interpretation of federal criminal statutes. Furthermore, the rule of lenity suggests that ambiguous statutes should be construed in favor of criminal defendants rather than agencies in the criminal context. In immigration cases, courts have not deferred to the BIA's interpretation of a federal criminal statute because Congress did not charge the BIA with administering it. See, e.g., *Oyebanji v. Gonzales*, 418 F.3d 260, 262 (3rd Cir. 2005) ("Because the BIA is not charged with administering 18 U.S.C. § 16 and has no special expertise regarding the interpretation of that criminal statute, we do not defer to the BIA's interpretation of that provision."). See generally Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 510 (1996), for more in-depth analysis.

69. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

70. *Id.* at 580–81.

71. *Id.* at 587.

example, a formal adjudication or notice-and-comment rulemaking.”<sup>72</sup> Although the Court did not define which agency interpretations carry the requisite “force of law,” it gave examples of rulings that do not: “interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”<sup>73</sup> Therefore, when an agency’s interpretation does not carry the force of law, it does not meet *Chevron* step zero and *Chevron* deference need not be given.

C. *Chevron Deference May Even Apply When There Is a Conflicting Judicial Precedent on Point*

Recently, the Supreme Court decided *Brand X* and gave deference to an agency’s interpretation even where there was circuit court precedent on point.<sup>74</sup> The Court in *Brand X* reviewed a Ninth Circuit Court of Appeals decision examining a statutory interpretation by the Federal Communications Commission that conflicted with relevant precedent.<sup>75</sup> The Ninth Circuit set aside the Commission’s ruling, even though it carried the force of law, and instead applied its existing precedent.<sup>76</sup> The Supreme Court reversed, concluding that “a court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”<sup>77</sup> Therefore, even if case law is already on point, courts should defer to an agency’s ruling, unless the court previously held the statute to be unambiguous.<sup>78</sup> The Tenth Circuit extended this rule to apply to judicial interpretations of ambiguous statutes made by the Supreme Court.<sup>79</sup>

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72. *Id.*

73. *Id.*

74. Nat’l Cable and Telecomm. Ass’n. v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

75. *Id.* at 979.

76. *Id.*

77. *Id.* at 982.

78. An unambiguous statute implies that Congress’s intent is clearly expressed in the statute, thus meeting *Chevron* step one. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984).

79. See *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1248 (10th Cir. 2008) (“[W]e conclude that the holding of *Brand X* applies whether the judicial precedent at issue is that of a lower court or the Supreme Court.”).

The *Brand X* Court also addressed the circumstance of agency silence on matters of statutory interpretation. In the absence of Congress's or an agency's interpretation, a court may use its own interpretation of the statute in question.<sup>80</sup> If the court holds that the statute is ambiguous, it must defer to a later agency interpretation carrying the force of law.<sup>81</sup> The Court noted that when Congress delegates authority to an agency, its interpretation is still given deferential weight regardless of "the order in which the judicial and administrative constructions occur."<sup>82</sup> In dicta, however, the Court stated that a prior judicial determination that a statute is unambiguous forecloses any future agency interpretations.<sup>83</sup> This is because an unambiguous statute "contains no gap for the agency to fill."<sup>84</sup> Thus when a court has previously determined that a statute is unambiguous this interpretation stands in the face of a later agency ruling that may provide a conflicting interpretation.<sup>85</sup>

*Chevron* and its progeny limit the role appellate courts play in interpreting statutes administered by agencies. Despite the traditional role of the judiciary, agencies, and not courts, are often given deference on issues of statutory interpretation and legal conclusions.<sup>86</sup>

*D. The BIA's Interpretations of the INA Are Deference-Eligible When Issued Through Precedential Opinions*

In the immigration context, *Chevron* deference is available to the BIA's construction of ambiguous terms in the INA.<sup>87</sup> Congress delegated authority to several federal agencies to administer the INA. Congress gave general interpretative authority to the Attorney General who then delegated authority to a number of agencies within the Department of Justice (DOJ).<sup>88</sup> Prosecutorial authority rests with the

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80. *Brand X*, 545 U.S. at 982.

81. *Id.*

82. *Id.* at 983.

83. *Id.*

84. *Id.*

85. *Id.* at 985.

86. *Id.* at 982 ("[A]llowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute . . . would allow a court's interpretation to override an agency's.").

87. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) ("[T]he BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms [in the INA] concrete meaning.").

88. Immigration and Nationality Act (INA) of 1952 § 103(g)(2), 8 U.S.C. § 1103(g)(2) (2006) ("The Attorney General shall establish such regulations, . . . review such administrative

Department of Homeland Security, which absorbed a number of duties formerly tasked to the Immigration and Naturalization Services.<sup>89</sup> Adjudicative authority is vested in the Executive Office for Immigration Review, a DOJ agency, which includes immigration courts and the BIA.<sup>90</sup> The BIA reviews cases adjudicated by immigration judges.<sup>91</sup>

Under the INA, lawful permanent residents are rendered removable if they commit an “aggravated felony” at any time after they are admitted to the United States.<sup>92</sup> The immigration consequences for having committed an aggravated felony are sweeping: it triggers “mandatory detention during deportation or removal proceedings, the elimination of discretionary relief from deportation or removal, and a permanent bar against reentry into the United States.”<sup>93</sup> Congress further expanded these consequences after the enactment of IIRIRA, which made the described provisions retroactive.<sup>94</sup> IIRIRA added a series of crimes to the aggravated felony provision, including “sexual abuse of a minor.”<sup>95</sup> This addition provides a severe consequence for aliens, “making aliens convicted of those crimes deportable and ineligible for most forms of immigration benefits or relief from deportation.”<sup>96</sup>

Determining whether a criminal conviction is an aggravated felony for immigration purposes requires interpretation of the INA, federal criminal statutes, and state criminal statutes, thus raising the issue of judicial deference to the BIA.<sup>97</sup> Congress defined a number of aggravated felonies by cross-referencing federal statutes. For example, a non-citizen convicted of “a crime of violence, as defined in 18 U.S.C. §

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determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section.”).

89. *Id.* § 103(a)(1), 8 U.S.C. § 1103(a)(1) (2006) (“Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter[.]”).

90. 8 C.F.R. § 3.1(d)(1) (2008).

91. 8 C.F.R. § 1003.1(j) (2008).

92. INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii).

93. Iris Bennet, Note, *The Unconstitutionality of Nonuniform Immigration Consequences of “Aggravated Felony” Convictions*, 74 N.Y.U. L. REV. 1696, 1701–02 (1999).

94. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-628, § 321(b) (1996).

95. *Id.* at § 321(a)(1).

96. H.R. REP. NO. 104-828, § 350, at 505–06 (1996) (Conf. Rep.).

97. See, e.g., *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1150 (9th Cir. 2008) (determining whether a state criminal conviction for statutory rape categorically constitutes sexual abuse of a minor under the INA as defined by the federal criminal definition of sexual abuse of a minor).

16,” is deportable as an aggravated felon.<sup>98</sup> Courts have recognized that “[b]ecause the BIA is not charged with administering 18 U.S.C. § 16” its interpretation of this provision does not warrant deference.<sup>99</sup> The aggravated felonies defined by cross-reference provide an example of BIA statutory interpretation that merits no deference under *Chevron*.

On the other hand, when the BIA issues an order relating to a term specific to the INA, it is acting within its authority. In *INS v. Aguirre-Aguirre*,<sup>100</sup> the Supreme Court determined that *Chevron* deference applied to BIA adjudications interpreting provisions of the INA.<sup>101</sup> Such adjudications by the BIA meet *Chevron* step zero because the Attorney General “has vested the BIA with power to exercise the ‘discretion and authority conferred upon the Attorney General by law’ in the course of ‘considering and determining cases before it.’”<sup>102</sup> Furthermore, the Court recognized that “the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms ‘concrete meaning through a process of case-by-case adjudication.’”<sup>103</sup> Thus, the BIA has been delegated authority from Congress, via the Attorney General,<sup>104</sup> to administer, adjudicate, and interpret provisions of the INA.<sup>105</sup> In addition, the Ninth Circuit has ruled that published decisions of the BIA<sup>106</sup> also meet the

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98. Immigration and Nationality Act (INA) of 1952 § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (2006).

99. *See, e.g.*, *Oyebanji v. Gonzalez*, 418 F.3d 260, 262 (3d Cir. 2005).

100. 526 U.S. 415 (1999).

101. *Id.* at 424 (“It is clear that principles of *Chevron* deference are applicable to this statutory scheme. The INA provides that ‘[t]he Attorney General shall be charged with the administration and enforcement’ of the statute and that the ‘determination and ruling by the Attorney General with respect to all questions of law shall be controlling.’” (quoting 8 U.S.C. § 1103(a)(1) (1994))).

102. *Id.* at 425 (citing 8 C.F.R. § 3.1(d)(1) (1998)).

103. *Id.* (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987)).

104. *See supra* note 88.

105. *See* 8 C.F.R. § 3.1(d)(1) (2003).

106. Notably, the BIA decision reviewed by the Supreme Court in *Aguirre-Aguirre* was unpublished. *See Godinez-Arroyo v. Mukasey*, 540 F.3d 848, 850–51 (8th Cir. 2008) (deferring to an unpublished BIA opinion in light of *Aguirre-Aguirre*). Although the Supreme Court did not discuss this aspect of the decision, it still chose to accord the BIA a great deal of deference. *Aguirre-Aguirre*, 526 U.S. at 424 (applying deference to an unpublished BIA opinion). Although there is not an affirmative ruling on whether unpublished BIA decisions deserve *Chevron* deference, courts have either given unpublished decisions deference following the Supreme Court’s example in *Aguirre-Aguirre*, or applied a narrower level of deference such as persuasive deference. *Godinez-Arroyo*, 540 F.3d at 850 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). *But see* 8 C.F.R. § 3.1(d)(1) (2003) (“[T]he Board, *through precedent decisions*, shall provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper

force of law test since they are binding on immigration judges.<sup>107</sup>

## II. THE BIA INTERPRETED THE INA PROVISION “SEXUAL ABUSE OF A MINOR” AND CHOSE A BROAD CONSTRUCTION OF THE TERM

The BIA addressed the interpretation of “sexual abuse of a minor” in *Matter of Rodriguez-Rodriguez*.<sup>108</sup> The Board issued an en banc opinion that articulated a guide for determining whether a conviction rises to sexual abuse of a minor under the INA.<sup>109</sup> The issue before the Board was whether a Texas conviction for indecent exposure in front of a child constituted sexual abuse of a minor and thus an aggravated felony.<sup>110</sup> In construing “sexual abuse of a minor,” the BIA looked to federal criminal definitions as persuasive authority.<sup>111</sup> The Board identified four federal statutes using the phrase “sexual abuse of a minor.”<sup>112</sup> Three are titled “Sexual abuse,” “Sexual abuse of a minor or ward,” and “Definitions for chapter.”<sup>113</sup> They each “require a sexual act, a component of which . . . is contact.”<sup>114</sup> The fourth statute, titled “Child victims’ and child witnesses’ rights,” 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.”<sup>115</sup> The Board found that this definition served as a “useful identification of the forms of sexual abuse.”<sup>116</sup>

Since the phrase does not cross-reference a specific federal statute, the Board stated that it was not bound to using any particular federal

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interpretation and administration of the Act and its implementing regulations.” (emphasis added)).

107. See *Renteria-Morales v. Mukasey*, 551 F.3d 1076, 1081 (9th Cir. 2008) (“We accord *Chevron* deference where there is ‘binding agency precedent on-point (either in the form of a regulation or a published BIA case).’” (quoting *Kharana v. Gonzales*, 487 F.3d 1280, 1283 n.4 (9th Cir. 2007))).

108. 22 I. & N. Dec. 991 (BIA 1999).

109. *Id.* at 996.

110. *Id.* at 991–92.

111. *Id.* at 994–95.

112. *Id.*

113. *Id.* (citing 18 U.S.C. §§ 2242, 2243, 2246 (1994)).

114. *Id.* at 995.

115. *Id.* (citing 8 U.S.C. § 3509(a)(8) (1994)).

116. *Id.* at 995.

statutory definition.<sup>117</sup> It thus went on to consider other statutory constructions, including a plain meaning analysis of the three words in question. Citing Black’s Law Dictionary, the Board noted that “the term ‘sexual abuse’ is commonly defined as ‘[i]llegal sex acts performed against a minor by a parent, guardian, relative, or acquaintance.’”<sup>118</sup> The Board also explored the definition of “abuse” in general, finding that “[a]buse is defined in relevant part as physical or mental maltreatment.”<sup>119</sup>

The Board chose to use the broadest federal definition.<sup>120</sup> Recognizing that “states categorize and define sex crimes against children in many different ways,”<sup>121</sup> the Board chose the sexual abuse definition found in the “Child victims’ and witnesses’ rights” statute.<sup>122</sup> It chose this definition in part because the other federal statutes limited abuse to conduct involving contact<sup>123</sup> and were therefore “too restrictive to encompass the numerous state crimes that can be viewed as sexual abuse.”<sup>124</sup> While the Board selected this definition to apply in Mr. Rodriguez-Rodriguez’s case, it expressly stated that it was “not adopting this statute as a definitive standard or definition but invok[ing] it as a guide in identifying the types of crimes we would consider to be sexual abuse of a minor.”<sup>125</sup>

Two dissenting opinions argued that the majority should have adopted a narrower definition or no definition at all. Board Member Filppu’s dissent, which three other members joined, argued against adopting any of the available federal definitions, noting: “Congress, it appears, has left us much room to define the contours of what amounts to ‘sexual abuse of a minor.’ I am ill at ease providing a comprehensive answer in our first effort to grapple with the question.”<sup>126</sup>

Board Member Guendelsberger’s dissent, which three other members

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117. *Id.* at 994.

118. *Id.* at 996 (citing BLACK’S LAW DICTIONARY 1375 (6th ed. 1990)).

119. *Id.*

120. *See* Dan Kesselbrenner and Lori D. Rosenberg, IMMIGRATION LAW AND CRIMES, §7:25, at 7-97 (Thomson West 2008) (1984).

121. *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 996.

122. *Id.* at 995 (applying 18 U.S.C. § 3509 (1994) (current version at 18 U.S.C. § 3509 (2006))).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 998 (Filppu, Bd. Member, dissenting).



joined, focused on the broadness of the majority's chosen definition and advocated for a narrower approach. First, it disagreed with the adoption of 18 U.S.C. § 3509 as the guide because that statute focuses on children's rights and "is a social welfare provision."<sup>127</sup> The dissent suggested that a statute whose purpose is to afford rights to children is not useful in determining whether or not a criminal conviction arises to the level of an aggravated felony.<sup>128</sup> Second, the dissent asserted that the severe consequences of removal ought to compel one of the narrower definitions considered and rejected by the majority.<sup>129</sup> Third, in the dissent's statutory interpretation, Board Member Guendelsberger asserted that "the decision by Congress to place 'sexual abuse of a minor' in section 101(a)(43)(A), alongside murder and rape, suggests that it was focusing on the most egregious offenses" and that a broad definition would be over-inclusive.<sup>130</sup>

The Guendelsberger dissent suggested using a more limited definition of sexual abuse of a minor.<sup>131</sup> It advocated for the use of a federal statute titled "Abusive sexual contact."<sup>132</sup> Included in this definition was sexual contact that involves "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."<sup>133</sup> The dissent pointed out that both this definition and the majority's result in an expansion of the aggravated felony provision and, therefore, the focus should be on which is the most appropriate<sup>134</sup> given the gravity of the consequences, including deportation,<sup>135</sup> and the phrase's placement alongside rape and murder.<sup>136</sup>

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127. *Id.* at 1000 (Guendelsberger, Bd. Member, dissenting).

128. *Id.*

129. *Id.*

130. *Id.* at 1002.

131. *Id.* at 1005.

132. *Id.* at 1000 (citing 18 U.S.C. § 2244(a) (1994) (current version at 18 U.S.C. § 2244(a) (2006))).

133. *Id.* (quoting 18 U.S.C. § 2244(a) (1994), which references 18 U.S.C. § 2246(3) (1994) (current versions at 18 U.S.C. §§ 2244(a), 2246(3) (2006))).

134. *Id.* at 1001.

135. *Id.* at 1000.

136. *Id.* at 1002.

### III. THE NINTH CIRCUIT REFUSED TO DEFER TO THE BIA'S DEFINITION OF "SEXUAL ABUSE OF A MINOR" ON PROCEDURAL GROUNDS

The docket for the Ninth Circuit Court of Appeals is saturated with immigration cases.<sup>137</sup> According to statements by one Ninth Circuit judge, immigration appeals accounted for approximately 46% of the Ninth Circuit's docket in 2007.<sup>138</sup> Like all circuit courts of appeals, the Ninth Circuit has jurisdiction to review immigration appeals from the BIA on matters of law, including whether a crime meets the definition of an aggravated felony.<sup>139</sup> The Ninth Circuit has reviewed a number of cases relating to the aggravated felony provision of "sexual abuse of a minor." There are two ways in which the court addresses aggravated felony determinations for immigration violations: as an immigration appeal from an order of deportation by the BIA<sup>140</sup> or as an appeal from a sentencing determination from federal district court.<sup>141</sup>

In the first circumstance, appeals from orders of deportation, circuit courts have jurisdiction to review legal determination made by the agency.<sup>142</sup> The other circumstance, appeals from sentencing, affects non-citizens who unlawfully re-entered the United States after deportation. The federal crime of unlawful re-entry carries a two-year maximum penalty.<sup>143</sup> However, if the non-citizen re-enters after having been

137. Both the Ninth Circuit and the Second Circuit are particularly "overwhelmed" with immigration cases. See John S. Baker, Article, *A Letter to Lou Dobbs: How to Reverse Illegal Immigration*, 22 GEO. IMMIGR. L.J. 373, 382 (2008).

138. *Id.* at 382 n.23 ("[In] the Second Circuit, twenty percent of its docket is immigration cases; in the Ninth Circuit, I think we are up to forty-six percent." (quoting Honorable Carlos T. Bea, Judge, Ninth Circuit Court of Appeals, Remarks at the 2007 National Lawyers Convention: Immigration Amnesty and the Rule of Law (Nov. 16, 2007))).

139. 8 U.S.C. § 1252(a)(2)(D) (2006) ("Nothing . . . which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section."); see, e.g., Valencia v. Gonzalez, 439 F.3d 1046, 1048 (9th Cir. 2006) ("We . . . have jurisdiction to consider the limited question of whether a crime is an aggravated felony.").

140. See, e.g., Estrada-Espinoza v. Mukasey, 546 F.3d 1147, 1151 (9th Cir. 2008) ("The BIA affirmed the [immigration judge]'s finding that Estrada-Espinoza had been convicted of an aggravated felony . . . . This timely petition for review followed.").

141. See, e.g., U.S. v. Baron-Medina, 187 F.3d 1144, 1145 (9th Cir. 1999) (determining whether a sentencing enhancement was warranted, "the district court, in sentencing appellant, took into consideration his 1987 conviction under California Penal Code Section 288(a)").

142. 8 U.S.C. § 1252(a)(2)(D).

143. See *id.* § 1326(a).

convicted of an aggravated felony, the sentence for the unlawful re-entry increases to a maximum of twenty years<sup>144</sup> and adds a sixteen-point sentencing enhancement.<sup>145</sup>

Because aggravated felony convictions apply retroactively, federal district court judges may have to determine whether a non-citizen's prior conviction constituted an aggravated felony, even if an immigration judge had not so determined.<sup>146</sup> In these cases, the non-citizen criminal defendant often argues on appeal that the phrase "sexual abuse of a minor" is ambiguous in order to trigger the rule of lenity and deference to the defendant's interpretation of the phrase.<sup>147</sup> However, the Fifth, Seventh, and Eleventh Circuit Courts of Appeals have found the phrase unambiguous.<sup>148</sup>

The issue of sexual abuse of a minor has arisen under both the BIA appeal and federal sentencing circumstances in the Ninth Circuit. The Ninth Circuit has held that its rulings from the sentencing cases may be applied in the immigration context.<sup>149</sup> *United States v. Baron-Medina*,<sup>150</sup> for example, arose in the criminal sentencing context rather than the immigration context; however, the court noted in a subsequent case that "for immigration judges, as well as for us, *Baron-Medina* controls when 'sexual abuse of a minor' is at issue."<sup>151</sup>

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144. *See id.* § 1326(b)(2).

145. U.S. SENTENCING GUIDELINES MANUAL, § 2L1.2(b)(1)(A) (2008) ("[A] conviction for a felony that is . . . a crime of violence . . . increase[s] [sentencing points] by 16 levels[.]"); *see also id.* § 2L1.2 cmt. n.1(B)(iii) (defining crime of violence as "the following offense[] under federal, state, or local law . . . sexual abuse of a minor[.]").

146. *See, e.g., Baron-Medina*, 187 F.3d at 1145 (determining whether a sentencing enhancement was warranted, "the district court, in sentencing appellant, took into consideration his 1987 conviction under California Penal Code Section 288(a)").

147. *See, e.g., Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1066 (9th Cir. 2003) ("[Petitioner] contends that the term 'sexual abuse of a minor' is ambiguous and so must be construed in his favor . . .").

148. *Lara-Ruiz v. INS*, 241 F.3d 934, 942 (7th Cir. 2001) ("We find that § 101(a)(43)(A) is not ambiguous."); *U.S. v. Padilla-Reyes*, 247 F.3d 1158, 1164 (11th Cir. 2001) ("We find that the plain meaning of § 1101(a)(43)(A) is unambiguous . . ."); *U.S. v. Zavala-Sustaita*, 214 F.3d 601, 607 n.11 (5th Cir. 2000) ("[W]e find that the phrase 'sexual abuse of a minor' is not ambiguous.").

149. *See Cedano-Viera*, 324 F.3d at 1067.

150. 187 F.3d 1144 (9th Cir. 1999).

151. *Cedano-Viera*, 324 F.3d at 1067.

A. *The Ninth Circuit Has Alternated Between Deferring to the BIA and Applying Its Own Construction of “Sexual Abuse of a Minor”*

A month before the BIA defined “sexual abuse of a minor” in *Rodriguez-Rodriguez*, the Ninth Circuit decided a case addressing the issue. In *United States v. Baron-Medina*, the court reviewed a district court’s determination of whether a conviction under California’s lewd or lascivious acts statute was sexual abuse of a minor and thus an aggravated felony for federal sentencing purposes.<sup>152</sup> In order to interpret “sexual abuse of a minor,” which at the time was unaddressed by the BIA, the court “employ[ed] the ordinary, contemporary, and common meaning of the words that Congress used.”<sup>153</sup> It then applied the definition to the elements of the state conviction, to see if a conviction under that statute constituted an aggravated felony for immigration purposes.<sup>154</sup> Because the conviction was for touching a child under the age of fourteen with a sexual intent, the court found that it “indisputably falls within the common, everyday meanings of the words ‘sexual’ and ‘minor’ [and] . . . [t]he use of young children for the gratification of sexual desires constitutes an abuse.”<sup>155</sup>

The next time the Ninth Circuit faced the issue, in *Afridi v. Gonzalez*,<sup>156</sup> it deferred to the BIA’s definition based on *Chevron* principles.<sup>157</sup> The Ninth Circuit reviewed a decision by the BIA and held that statutory rape was sexual abuse of a minor by deferring to the BIA’s definition of the crime in *Rodriguez-Rodriguez*.<sup>158</sup> In *Afridi*, an Afghani man solicited sex from a seventeen-year-old and was convicted under California’s statutory rape laws.<sup>159</sup> In interpreting the sexual abuse of a minor provision of the INA, the court stated that “[t]he BIA’s definition

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152. *Baron-Medina*, 187 F.3d at 1145.

153. *Id.* at 1146 (internal citations omitted).

154. *Id.*

155. *Id.* at 1147.

156. 442 F.3d 1212 (9th Cir. 2006). *Afridi* was overruled by a unanimous Ninth Circuit sitting en banc. *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1160 n.15 (9th Cir. 2008); *see infra* III.B.

157. *Afridi*, 442 F.3d at 1216 (“The BIA’s definition [of sexual abuse of a minor] was based on a permissible construction of the statute.”).

158. *Id.*

159. *Id.* at 1214.

was based on a permissible construction of the statute.”<sup>160</sup> The court applied the BIA’s definition and concluded that “[a] conviction under this statute meets the BIA’s interpretation of ‘sexual abuse of a minor’ as encompassing any offense that involves ‘the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in . . . sexually explicit conduct.’”<sup>161</sup>

In the sentencing context, the Ninth Circuit has defined sexual abuse of a minor based on its plain meaning, and has not included statutory rape of older teenagers. In one case, *United States v. Lopez-Solis*,<sup>162</sup> the court used the dictionary definition of the term “abuse”: “misuse . . . to use or treat so as to injure, hurt or damage . . . to commit indecent assault on.”<sup>163</sup> The court found this definition consistent with definitions adopted in other circuits and held it broad enough to encompass emotional and physical abuse.<sup>164</sup> In applying the definition to the statutory rape conviction, the court reasoned that “[c]onsensual sexual penetration of an individual between the ages of 17 and 18 by a 22 year old does not necessarily involve physical ‘misuse’ ‘injur[y],’ or ‘assault.’”<sup>165</sup> Furthermore, the court found that physical harm was not necessarily a result of the conduct.<sup>166</sup> In addition, it noted that “while consensual underage sex may be psychologically harmful to a young teen, it may not be harmful to an older one.”<sup>167</sup> The Ninth Circuit recognized that its earlier *Afridi* opinion resulted in the exact opposite conclusion—that statutory rape was sexual abuse of a minor.<sup>168</sup> But because that case arose in the immigration context and because the court “found the Board’s construction [of the phrase ‘sexual abuse of a minor’] permissible [it] had to defer to it.”<sup>169</sup>

Where the Ninth Circuit was not compelled to defer to the BIA’s

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160. *Id.* at 1216.

161. *Id.* at 1217 (citing *Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 995 (BIA 1999)).

162. 447 F.3d 1201 (9th Cir. 2006).

163. *Id.* at 1207 (citing *United State v. Pallares-Galan*, 359 F.3d 1088, 1100 (9th Cir. 2004)).

164. *Id.*

165. *Id.*

166. *Id.* Although the court did recognize that physical effects such as pregnancy or the spread of sexually transmitted diseases could still result. *Id.*

167. *Id.* at 1208 (internal citations omitted).

168. *Id.* at 1209.

169. *Id.* (alternations in original) (quoting *Afridi v. Gonzalez*, 442 F.3d 1212, 1216 (9th Cir. 2006)).

definition, it applied a plain language interpretation and then compared the state crime of conviction with the plain meaning of “sexual abuse of a minor.” By contrast, in the immigration context following the BIA’s interpretation of the phrase, the Ninth Circuit deferred to the BIA’s interpretation. This state of confusion, with different definitions attaching to the same term, persisted until the Ninth Circuit heard and then re-heard *Estrada-Espinoza v. Mukasey*.

*B. The Estrada-Espinoza v. Mukasey Court Declined to Follow the BIA on Procedural Grounds and Chose to Define “Sexual Abuse of a Minor” Using a Federal Statute*

Mr. Estrada-Espinoza was a lawful permanent resident.<sup>170</sup> When he was twenty, he began dating someone who was sixteen years old.<sup>171</sup> The two moved in together, first in his parents’ house and then into a house of their own.<sup>172</sup> They eventually had a child together.<sup>173</sup> The District Attorney filed fourteen sex-offense charges against Mr. Estrada-Espinoza, including statutory rape.<sup>174</sup> Mr. Estrada-Espinoza was convicted on four of those charges and sentenced to 365 days in jail.<sup>175</sup> DHS subsequently filed charges to have him deported for committing an aggravated felony.<sup>176</sup>

An immigration judge found that Mr. Estrada-Espinoza was removable as an aggravated felon under the sexual abuse of a minor clause, particularly because of his conviction under section 261.5(c) of the California Penal Code.<sup>177</sup> That provision regulates sexual intercourse between a person over eighteen years-old, with someone who is under eighteen and at least three years younger, where the two are not married.<sup>178</sup> Mr. Estrada-Espinoza appealed to the BIA, which affirmed the immigration judge’s order based on the definition of “sexual abuse

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170. *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1150 (9th Cir. 2008) (en banc).

171. Interview with Saad Ahmad, *supra* note 6.

172. *Estrada-Espinoza*, 546 F.3d at 1150.

173. *Id.*

174. *Id.* at 1150–51.

175. *Id.*

176. *Id.* at 1150. While waiting for a resolution of his case, Mr. Estrada-Espinoza was placed in immigration detention, where he stayed from May 2005 until he was released in October 2008. Interview with Saad Ahmad, *supra* note 6.

177. *Estrada-Espinoza*, 546 F.3d at 1151.

178. CAL. PENAL CODE § 261.5(c) (2008).

of a minor” it adopted in *Rodriguez-Rodriguez*.<sup>179</sup>

Mr. Estrada-Espinoza appealed to the Ninth Circuit, where a three-judge panel denied his petition in *Estrada-Espinoza v. Gonzalez*.<sup>180</sup> The panel ruled that the case was not distinguishable from *Afridi* because both cases involved the exact same criminal statute.<sup>181</sup> However, two of the three judges joined a concurring opinion stating that “*Afridi* was incorrectly decided and should be reconsidered.”<sup>182</sup> One year later, in *Estrada-Espinoza v. Mukasey*, the Ninth Circuit reheard the case en banc, overruled *Afridi*, and granted Mr. Estrada-Espinoza’s petition for review.<sup>183</sup>

In *Estrada-Espinoza v. Mukasey*, the Ninth Circuit examined whether a conviction under section 261.5(c) of the California Penal Code<sup>184</sup> constituted an aggravated felony under the INA’s “sexual abuse of a minor” provision.<sup>185</sup> The court first assessed the generic elements of the crime by looking to the elements enumerated in the federal offense of sexual abuse of a minor.<sup>186</sup> The court also used plain-meaning analysis to interpret the term.<sup>187</sup> Looking to the “ordinary, contemporary, and common meaning of the words,”<sup>188</sup> the court defined “abuse” as “physical or nonphysical misuse or maltreatment” or as “use or treat[ment] so as to injure, hurt, or damage.”<sup>189</sup>

The court chose the federal definition found under 18 U.S.C. § 2243, entitled “Sexual abuse of a minor or ward,”<sup>190</sup> stating that it is a specific crime that reflects the plain language of the INA.<sup>191</sup> The elements of this

179. *Estrada-Espinoza*, 546 F.3d at 1151.

180. 498 F.3d 933, 936 (9th Cir. 2007) (overruled by *Estrada-Espinoza*, 546 F.3d 1147).

181. *Id.*

182. *Id.* (S. Thomas, J., concurring).

183. *Estrada-Espinoza*, 546 F.3d at 1160 n.15.

184. This was the same statute under which Mr. Afridi was convicted. *See Afridi v. Gonzalez*, 442 F.3d 1212, 1214 (9th Cir. 2006).

185. *Estrada-Espinoza*, 546 F.3d at 1150.

186. *Id.* at 1152.

187. *Id.*

188. *Id.* (quoting *United States v. Baron-Medina*, 187 F.3d 1144, 1146 (9th Cir. 1999)).

189. *Id.* at 1153 (quoting *United States v. Lopez-Solis*, 447 F.3d 1201, 1207 (9th Cir. 2006)).

190. *Id.* at 1152 (“Whoever . . . 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.” (quoting 18 U.S.C. § 2243 (2006))).

191. *Id.* at 1156.

definition include “(1) a mens rea level of knowingly; (2) a sexual act; (3) with a minor between the ages of 12 and 16; and (4) an age difference of at least four years between the defendant and the minor.”<sup>192</sup> The court noted that these elements are also found in the Model Penal Code’s definition of statutory rape.<sup>193</sup> It further acknowledged that the age of consent in the majority of states is sixteen.<sup>194</sup> The court then compared the elements of the crime Mr. Estrada-Espinoza was convicted of to the generic federal definition to determine whether California’s statutory rape law categorically constitutes sexual abuse of a minor.<sup>195</sup> The court concluded that because the California statute requires an age difference of only three years, rather than four, it was broader than the generic federal definition and thus did “not categorically constitute ‘sexual abuse of a minor.’”<sup>196</sup> Based on this conclusion, the Ninth Circuit held that Mr. Estrada-Espinoza was not deportable as an aggravated felon.<sup>197</sup>

In a footnote, the court rejected the definition of sexual abuse used by the BIA in *Rodriguez-Rodriguez*.<sup>198</sup> It stated that the definition, taken from 18 U.S.C. § 3509(a)(8) “does not define a crime, but merely addresses the rights of child victims and witnesses.”<sup>199</sup> By contrast, section 2243 “is a criminal statute outlining the elements of the offense.”<sup>200</sup> The court stated that it was therefore more likely that Congress intended to incorporate the definition from section 2243 into the aggravated felony definition in the INA.<sup>201</sup>

The *Estrada-Espinoza* court briefly addressed the issue of deference to the BIA definition of sexual abuse of a minor, but decided that the

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192. *Id.* at 1152 (quoting 18 U.S.C. § 2243 (2006)).

193. *Id.* at 1153 (“A male who has sexual intercourse with a female not his wife, or any person who engages in deviate sexual intercourse or causes another to engage in deviate sexual intercourse, is guilty of an offense if: (a) the other person is less than [sixteen] years old and the actor is at least [four] years older than the other person . . . .” (quoting MODEL PENAL CODE § 213.3 (2001))).

194. *Id.* at 1153 (quoting *United States v. Lopez-Solis*, 447 F.3d 1201, 1207 (9th Cir. 2006) (internal quotation marks omitted)).

195. *Id.* at 1158 (applying the categorical approach as set out in *Taylor v. United States*, 495 U.S. 575, 602 (1990)).

196. *Id.* at 1159–60.

197. *Id.* at 1160.

198. *Id.* at 1152 n.2.

199. *Id.*

200. *Id.*

201. *Id.*



deference framework was inapplicable.<sup>202</sup> The court noted that it “accord[s] *Chevron* deference to interpretations in published BIA decisions within the BIA’s area of expertise.”<sup>203</sup> The court also noted that *Rodriguez-Rodriguez* “has the force of decisional law.”<sup>204</sup> However, the court declined to defer to the decision, because the BIA “did not interpret a statute within the meaning of *Chevron*, but only provided a ‘guide’ for later interpretation.”<sup>205</sup> In a footnote, the court noted that “[e]ven if we apply the familiar *Chevron* analysis, we would necessarily conclude, at step one, that the *Rodriguez-Rodriguez* guide does not warrant *Chevron* deference” because here, congressional intent is unambiguous.<sup>206</sup>

#### IV. OTHER CIRCUITS HAVE HELD THAT “SEXUAL ABUSE OF A MINOR” IS UNAMBIGUOUS BASED ON THE STATUTE’S PLAIN LANGUAGE

Although *Estrada-Espinoza* did not raise the ambiguity of “sexual abuse of a minor,” that issue was addressed by the Eleventh, Seventh, and Fifth Circuits in both the immigration appeal and unlawful re-entry sentencing contexts; all three circuits found the term unambiguous.<sup>207</sup> Each circuit decided these cases shortly after the BIA’s *Rodriguez-Rodriguez* decision and concluded that the phrase is unambiguous using a plain language analysis.<sup>208</sup>

In *United States v. Zavala-Sustaita*,<sup>209</sup> the Fifth Circuit addressed the clarity of the phrase “sexual abuse of a minor” in the sentencing

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202. *Id.* at 1156–57.

203. *Id.* at 1156 (citing *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1014 (9th Cir. 2006)); *Kaganovich v. Gonzales*, 470 F.3d 894, 897 (9th Cir. 2006)).

204. *Estrada-Espinoza*, 546 F.3d at 1157.

205. *Id.*

206. *Id.* at 1157 n.7.

207. *See* *United States v. Padilla-Reyes*, 247 F.3d 1158, 1164 (11th Cir. 2001); *Lara-Ruiz v. INS*, 241 F.3d 934, 942 (7th Cir. 2001); *United States v. Zavala-Sustaita*, 214 F.3d 601, 607 n.11 (5th Cir. 2000).

208. *Padilla-Reyes*, 247 F.3d at 1164 (“We find that the plain meaning of § 1101(a)(43)(A) is unambiguous . . . .”); *Lara-Ruiz*, 241 F.3d at 942 (“We find that § 101(a)(43)(A) is not ambiguous.”); *Zavala-Sustaita*, 214 F.3d at 607 n.11 (“[W]e find that the phrase ‘sexual abuse of a minor’ is not ambiguous . . . .”).

209. 214 F.3d 601 (5th Cir. 2000).

context.<sup>210</sup> It determined that a conviction under section 21.11(a)(2) of the Texas Penal Code for exposing oneself to children under thirteen years old was sexual abuse of a minor.<sup>211</sup> The court based its conclusion “on the clear language” of the statute, noting that the phrase was “not ambiguous.”<sup>212</sup> The court mentioned *Rodriguez-Rodriguez* briefly, noting that “the BIA addressed the exact issue presented here.”<sup>213</sup> The court took note of the broad federal definition used by the BIA and stated “[t]his definition would seemingly cover an offense” such as the one under the Texas statute at issue.<sup>214</sup> It did not, however, defer to the BIA’s decision.

Recently, the Fifth Circuit again addressed whether certain proscribed conduct constituted sexual abuse of a minor and similarly applied the “generic and contemporary meaning” of the phrase.<sup>215</sup> Like the *Zavala-Sustaita* court, it looked to “(1) whether the defendant’s conduct involved a ‘child’; (2) whether that conduct was ‘sexual’; and (3) whether the sexual conduct was ‘abusive.’”<sup>216</sup> This case did not mention *Rodriguez-Rodriguez*.

The Seventh Circuit addressed the clarity of the phrase “sexual abuse of a minor” in the immigration context.<sup>217</sup> It also found that the phrase “is not ambiguous . . . [b]y considering the ordinary meaning of the words.”<sup>218</sup> In a later opinion, the court examined and applied the BIA’s *Rodriguez-Rodriguez* definition.<sup>219</sup> The court noted that while the BIA used the broad federal statute “for illumination as to what constitutes sexual abuse of a minor, it did not intend that definition to be dispositive.”<sup>220</sup> It went on to “emphasize[] that Congress intended the phrase ‘sexual abuse of a minor’ to broadly incorporate all acts that fall within the ordinary, contemporary and common meaning of the

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210. *Id.* at 603.

211. *Id.* at 602–03.

212. *Id.* at 607, 607 n.11.

213. *Id.* at 608; *Rodriguez-Rodriguez*, 22 I. & N. Dec. 991,995 (BIA 1999).

214. *Zavala-Sustaita*, 214 F.3d 606 n.8.

215. *United States v. Najera-Najera*, 519 F.3d 509, 511 (5th Cir. 2008).

216. *Id.* (citing *Zavala-Sustaita*, 214 F.3d 601, 604–05 (5th Cir. 2000)).

217. *Lara-Ruiz v. INS*, 241 F.3d 934, 937 (7th Cir. 2001).

218. *Id.* at 942.

219. *Gattem v. Gonzales*, 412 F.3d 758, 764 (7th Cir. 2005).

220. *Id.*

words.”<sup>221</sup> The court found that a non-citizen’s conviction for soliciting oral sex from a minor fit into both the ordinary meaning and the BIA’s broad interpretation even though his conduct lacked physical contact or threat of harm.<sup>222</sup>

The Eleventh Circuit also found the phrase “sexual abuse of a minor” unambiguous.<sup>223</sup> This case arose in the sentencing for unlawful re-entry context and the defendant argued that the phrase “sexual abuse of a minor” was ambiguous because it was unclear “whether physical contact [was] a necessary element of the offense.”<sup>224</sup> The court held that the phrase was unambiguous and defined it as “a perpetrator’s physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification.”<sup>225</sup> The court noted that the lack of cross-referencing to federal statutes “indicate[d] Congress’s intent to rely on the plain meaning of the terms.”<sup>226</sup> A few months later, another Eleventh Circuit opinion addressing the scope of the phrase “sexual abuse of a minor” mentioned the BIA’s definition in *Rodriguez-Rodriguez*, but applied the circuit’s aforementioned definition.<sup>227</sup>

The circuit courts addressing the issue of sexual abuse of a minor have found that the phrase is unambiguous and have generally applied the plain meaning of the statute. While they may have referred to the BIA’s definition in order to support their ordinary meaning determinations, they did not defer to it.

#### V. THE NINTH CIRCUIT SHOULD RULE THAT “SEXUAL ABUSE OF A MINOR,” IS UNAMBIGUOUS WHEN FACED WITH A SUBSTANTIVE CHALLENGE TO THE BIA’S INTERPRETATION

By disregarding the BIA’s *Rodriguez-Rodriguez* definition on procedural grounds, the Ninth Circuit invites the BIA to issue an

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221. *Id.* (internal quotation marks and citations omitted).

222. *Id.* at 765.

223. *United States v. Padilla-Reyes*, 247 F.3d 1158, 1164 (11th Cir. 2001).

224. *Id.* at 1163.

225. *Id.*

226. *Id.* at 1164.

227. *Bahar v. Ashcroft*, 264 F.3d 1309, 1312 (11th Cir. 2001) (“We cannot say that the Board’s interpretation of section 1101(a)(43)(A) was unreasonable. Our recent decision in *Padilla-Reyes* also supports the Board’s view.”).

interpretive definition that carries the force of law. The BIA could issue the identical definition that it did in *Rodriguez-Rodriguez*, or it could issue a modified definition that is either broader or narrower than its earlier effort.<sup>228</sup> Regardless of what the BIA’s definition might be, the Ninth Circuit could and should rule that the phrase “sexual abuse of a minor” is unambiguous. There are a number of factors and arguments to support this holding. In particular, by looking at the plain meaning of the statute, prior precedent, decisions from sister circuits, and policy considerations, the Ninth Circuit should be confident in not deferring to the BIA.

A. *A Textual Interpretation of the Statute Indicates that It Is Unambiguous*

The Supreme Court’s aggravated felony decision in *Leocal v. Ashcroft*<sup>229</sup> calls for a common sense and plain language approach to statutory interpretations of the INA.<sup>230</sup> The Court determined that a DUI conviction was not a crime of violence under the INA based on the ordinary meaning of the phrase “crime of violence.”<sup>231</sup> It stated that “[w]hen interpreting a statute, we must give words their ‘ordinary or natural’ meaning.”<sup>232</sup> Similarly, in this context, the Ninth Circuit should determine whether non-citizen convictions fall within the ordinary and natural meaning of “sexual,” “abuse,” and “minor.”<sup>233</sup>

In *Estrada-Espinoza*, the Ninth Circuit flirted with stating that the definition is unambiguous. As it suggested in a footnote, the Ninth Circuit could have dismissed the BIA’s interpretation on the ground that the INA provision was unambiguous based on its plain meaning.<sup>234</sup> The Ninth Circuit explained that “sexual abuse of a minor” is defined by federal statute and is “a common title for offenses under state criminal

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228. See, e.g., Velazquez-Herrera, 24 I. & N. Dec. 503, 515 (BIA 2008) (issuing a ruling in light of a Ninth Circuit remand due to the absence of a definition of child abuse, “we agree with the DHS that Congress intended section 237(a)(2)(E)(i) [child abuse] to be construed broadly”).

229. 543 U.S. 1, 11 (2004).

230. *Id.* (using the “ordinary meaning of the term” in question).

231. *Leocal*, 543 U.S. at 11.

232. *Id.* at 9.

233. See Kesselbrenner and Rosenberg, *supra* note 120, at 7-64 (“The decision of *Leocal v. Ashcroft* may provide new authority to support a common sense construction of the statute . . .”).

234. See *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1157 n.7 (9th Cir. 2008).

codes.”<sup>235</sup> It went on to explain that the crime needed no cross-referencing because, like murder and rape,<sup>236</sup> which also lack cross-referencing, “the term already denotes a clearly defined criminal offense.”<sup>237</sup> Moreover, the court’s reference to *Chevron* suggested that it would later conclude that “Congress has spoken directly to the issue” and thus the court’s analysis would end at *Chevron* step one.<sup>238</sup>

*B. The Ninth Circuit’s Own Precedent Calls for an Unambiguous Reading of the Statute.*

The Ninth Circuit’s case law further confirms that a plain meaning analysis of the phrase demonstrates that it is unambiguous. In both *United States v. Lopez-Solis* and *United States v. Baron-Medina*, the court applied a plain meaning interpretation to the phrase.<sup>239</sup> In both cases, the court “employ[ed] the ordinary, contemporary and common meaning of the words that Congress used”<sup>240</sup> by “coupl[ing] the dictionary definition of ‘abuse’ with the common understanding of ‘sexual’ and ‘minor.’”<sup>241</sup> The court defined abuse as “misuse . . . to use or treat so as to injure, hurt, or damage . . . to commit indecent assault on.”<sup>242</sup> In an appeal from the BIA, where the non-citizen argued for relief under the theory that “sexual abuse of a minor” was ambiguous, the Ninth Circuit responded, “[A]s we held in *Baron-Medina*, the phrase is *not* ambiguous given its ‘ordinary, contemporary, and common meaning.’”<sup>243</sup> While *Brand X* held that a reasonable agency interpretation of an ambiguous statute trumps circuit court precedent, prior circuit court precedent holding that a statute is unambiguous forecloses a later agency interpretation of the statute.<sup>244</sup> Therefore, if the Ninth Circuit

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235. *Id.* at 1156.

236. *See* Immigration and Nationality Act (INA) of 1952 § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A) (2006).

237. *Estrada-Espinoza*, 546 F.3d at 1156.

238. *Id.* at 1157 n.7.

239. *United States v. Lopez-Solis*, 447 F.3d 1201, 1207 (2006); *United States v. Baron-Medina*, 187 F.3d 1144, 1146 (9th Cir. 1999).

240. *Baron-Medina*, 187 F.3d at 1146 (citation omitted).

241. *Lopez-Solis*, 447 F.3d at 1207 (internal quotation marks omitted).

242. *Id.*

243. *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1066 (9th Cir. 2003).

244. 545 U.S. 967, 982 (2005) (“A court’s prior judicial construction of a statute trumps an

reviewed the substantive question of interpreting “sexual abuse of a minor,” its prior holding that the phrase is unambiguous would trump even a reasonable agency interpretation.<sup>245</sup>

C. *Sister Circuits Have Also Found that a Plain Reading of the Statute Reveals Its Unambiguous Meaning*

The Ninth Circuit would be consistent with other circuit courts if it ruled that the statute was unambiguous. The Seventh, Eleventh, and Fifth Circuit Courts of Appeals have all found that “sexual abuse of a minor” under INA section 101(a)(43)(A) is unambiguous.<sup>246</sup> These courts opted for the plain, common understanding of the terms for applying the categorical approach, rather than relying on federal definitions or reading ambiguity into the provision. As these circuits discussed, a plain reading of the statute is appropriate. The Fifth Circuit provides a categorical analysis based on the plain meaning: “(1) whether the defendant’s conduct involved a ‘child’; (2) whether that conduct was ‘sexual’; and (3) whether the sexual conduct was ‘abusive.’”<sup>247</sup> These circuit courts, as well as the BIA, have found that abuse includes both physical and nonphysical maltreatment.<sup>248</sup> In examining the issue of whether sexual abuse of a minor is ambiguous, these circuit courts are consistent in finding that it is not.

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agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”).

245. *Id.* at 985.

246. *See* United States v. Padilla-Reyes, 247 F.3d 1158, 1164 (11th Cir. 2001); Lara-Ruiz v. INS, 241 F.3d 934, 942 (7th Cir. 2001); United States v. Zavala-Sustaita, 214 F.3d 601, 607 n.11 (5th Cir. 2000).

247. United States v. Najera-Najera, 519 F.3d 509, 511 (5th Cir. 2008).

248. *See* Gatterm v. Gonzales, 412 F.3d 758, 765 (7th Cir. 2005) (stating that abuse “can take the form of physical or mental mistreatment.”); *Padilla-Reyes*, 247 F.3d at 1163 (defining “sexual abuse of a minor” as “a perpetrator’s physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification”); *Zavala-Sustaita*, 214 F.3d at 605 (“Since psychological harm can occur without physical contact, a distinction based only on physical contact would miss the essential nature of ‘sexual abuse.’”); Rodriguez-Rodriguez, 22 I. & N. Dec. 991, 996 (BIA 1999).

D. *The Plain Meaning Definition of “Sexual Abuse of a Minor”  
Best Comports with the “Aggravated Felony” Label by  
Requiring Actual Abuse*

Perhaps most importantly, the plain meaning of “sexual abuse of a minor” and its application to a non-citizen’s conviction would achieve Congress’ intent: to remove those non-citizens who prey upon and abuse minors. As other circuits have discussed, physical or psychological maltreatment requiring demonstrable harm should be an element of “abuse.”<sup>249</sup> Thus, as in Juan and Sonia’s case, conduct that is not inherently abusive, such as consensual sex with an older teenager—a young adult—would not be sanctioned with banishment. This still protects minors by sanctioning those who abuse them. It would, however, limit the sweeping expanse of the already harsh category of aggravated felonies to those whose conduct Congress finds truly egregious.

## CONCLUSION

With the growing number of crimes being added to the list of aggravated felonies, the clash between BIA interpretations and circuit court interpretations will undoubtedly continue. *Estrada-Espinoza v. Mukasey* examines the impact that interpreting one crime, “sexual abuse of a minor,” can have on the immigration system, the judicial system, and the lives of non-citizens.

While debate on the impact of the *Chevron* doctrine continues, in the immigration context, both Congress and the Supreme Court have indicated that the doctrine is especially important. Where the BIA exercises its power to interpret provisions within its governing statute in published, precedential opinions, circuit courts should defer unless Congress’s intent is clear or the interpretation is unreasonable.

The Ninth Circuit properly declined deference to the BIA’s definition of “sexual abuse of a minor” because the agency had not issued a precedential opinion carrying the force of law. However, the BIA will likely issue a precedential opinion defining the term as it did with other contested phrases in the INA.

When faced with a substantive challenge to the BIA’s definition of “sexual abuse of a minor,” the Ninth Circuit should hold that the phrase

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249. *Padilla-Reyes*, 247 F.3d at 1164.

is unambiguous. This result is mentioned in *Estrada-Espinoza v. Mukasey* and is consistent with a plain meaning analysis of the statute.<sup>250</sup> It is also consistent with the Ninth Circuit's reading of the phrase elsewhere in its case law, as well as with interpretations in other circuits. The Ninth Circuit, in accordance with other circuits, has ruled in the past that the phrase "sexual abuse of a minor" in the INA is unambiguous. When this issue inevitably returns to the Ninth Circuit following a precedential BIA opinion, the court should join the other circuits in finding that Congress spoke clearly.

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250. *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1157 n.7 (9th Cir. 2008).