

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JUAN ESQUIVEL-QUINTANA, :

4 Petitioner : No. 16-54

5 v. :

6 JEFFERSON B. SESSIONS, III, :

7 ATTORNEY GENERAL, :

8 Respondent. :

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10 Washington, D.C.

11 Monday, February 27, 2017

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13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 11:08 a.m.

16 APPEARANCES:

17 JEFFREY L. FISHER, ESQ., Stanford, Cal.; on behalf
18 of the Petitioner.

19 ALLON KEDEM, ESQ., Assistant to the Solicitor
20 General, Department of Justice, Washington, D.C.;;
21 on behalf of the Respondent.

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P R O C E E D I N G S

(11:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in case 16-54, Esquivel-Quintana v. Sessions.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

MR. FISHER: Mr. Chief Justice, and may it please the Court:

The key statutory term of the INA in this case is the word "abuse." And the Federal statute criminalizing sexual abuse of a minor, as well as the State statutes dealing with the same subject, dictate that sexual relations become abuse only -- on account of age, only when the younger partner in the activity is younger than 16.

At the very least, the Federal and State laws that I just mentioned dictate that California statute is well outside of that which Congress would

JUSTICE KAGAN: I'm --

MR. FISHER: -- have expected.

JUSTICE KAGAN: I'm sorry, Mr. Fisher. You just said something that I think you did not say in your briefs, so let me ask you about that.

You just gave us your definition of what the

1 generic offense is. It's understand 16. Because I
2 understood in your briefs you just said whatever the
3 generic offense is, it doesn't include this activity.
4 But do you have a definition of what the generic offense
5 is? And if so, did you just say it?

6 MR. FISHER: Justice Kagan, what we think is
7 that if you want to give a definition for sexual abuse
8 of a minor, at least in the context of the allegation of
9 abuse being due to age, that 16 would be the appropriate
10 cutoff. And we do say that in our reply brief in
11 response to the government's point that, at least its
12 arguments, that you need to go further than we argued in
13 our blue brief.

14 JUSTICE KAGAN: Do you have any further
15 views of what the generic offense is? Are there other
16 elements of the generic offense that you're willing to
17 tell us you think? I mean usually, in these cases,
18 first we define the generic offense, and then we see
19 whether the State statute in question fits within that
20 or doesn't.

21 And so what is the generic offense? It's
22 under 16. Anything else?

23 MR. FISHER: There are four elements,
24 Justice Kagan. There -- it has to be sexual in nature,
25 it has to be abuse, has to involve a minor, and then

1 presumably there's some mens rea involved. I think
2 those are four elements.

3 And so what we think is enough to decide
4 this case -- in fact, it's more than is necessary to
5 decide this case -- is to say, when dealing with the
6 elements of abuse, and the allegation is solely because
7 of the ages of the partners engaging in sexual relations
8 you have abuse, then 16 should be the age of consent.

9 Now, we didn't go that far in parts of our
10 briefing because we don't think the Court has to go that
11 far. In Duenas-Alvarez and other cases are examples
12 where the Court has said, we'll just look at a
13 particular element and say that as long as the State
14 statute falls outside of that element, that's enough.
15 So you could decide this case by saying that the seven
16 states that have laws like California's, at issue here,
17 but draw the age of consent at 18, automatically fall
18 outside of sexual abuse of a minor. And, remember, even
19 the seven states that have those laws, most of them are
20 misdemeanors, and only one of those seven states calls
21 that conduct abuse.

22 JUSTICE ALITO: Suppose that there were
23 no -- that the definition here -- the phrase here had no
24 criminal application. So it applies purely in
25 immigration; okay?

1 MR. FISHER: Uh-huh.

2 JUSTICE ALITO: And you're not asking us to
3 overrule Chevron.

4 MR. FISHER: No, no, no.

5 JUSTICE ALITO: All right. So why wouldn't
6 this phrase, "sexual abuse of a minor," be a phrase that
7 is sufficiently ambiguous to justify Chevron? Now, in
8 order to get around that, do you have to invoke
9 something like the rule of lenity?

10 MR. FISHER: No. We have other arguments,
11 Justice Alito.

12 JUSTICE ALITO: So that -- that is not an
13 ambiguous phrase by itself, "sexual abuse of a minor"?

14 MR. FISHER: Not in the way you've defined
15 "ambiguity," both in the categorical approach cases and
16 for purposes of Chevron. So let me turn to those one by
17 one.

18 In the categorical approach cases, starting
19 with Taylor, when the Court had confronted a generic
20 crime without a specific cross-reference definition,
21 what the Court has done is look across the sweep of
22 State laws and Federal laws criminalizing that conduct.
23 In a case like Perrin, where there were 42 states that
24 had a common core definition, the Court explicitly said
25 in a footnote in that case there's no ambiguity involved

1 in that situation, because we assume it's sufficiently
2 clear that that's what Congress would have been
3 intending to cover.

4 Even if I didn't win that argument --
5 JUSTICE ALITO: But you think that if we
6 look at this incredible array of State laws, it becomes
7 clear what Congress intended by "sexual abuse of a
8 minor"?

9 MR. FISHER: Well, we think "yes" for two
10 reasons. One is because, remember, Justice Alito, in
11 the very legislation this provision in the INA was
12 enacted, Congress amended Section 2243 of the criminal
13 code that uses precisely the same language, "sexual
14 abuse of a minor." So it is a precise definition in
15 Federal criminal law when Congress was criminalizing
16 this conduct. So I think the Court could actually hold
17 that is enough right there to find no ambiguity and to
18 find a common --

19 JUSTICE KENNEDY: Well -- well, before --
20 before you continue your answer and get into Chevron,
21 why -- suppose that there were -- the Federal statute is
22 the only one on the books. All the other State statutes
23 are -- are different. Would the Federal statute then
24 control, still?

25 MR. FISHER: I think that would be a harder

1 case, Justice Kennedy. What you'd have to ask in that
2 situation is, did you have an explicit or implicit
3 cross-reference? Is there strong-enough reason to
4 believe in that hypothetical that Congress was thinking
5 of only the Federal version of the crime? I think there
6 are strong reasons here to think that, for the reasons I
7 was just describing. But this is the easy case, Justice
8 Kennedy. So --

9 JUSTICE KAGAN: But why would you think
10 that, Mr. Fisher? I mean, there -- in this statute,
11 there are loads of cross-references. And this one is
12 not a cross-reference. So doesn't that tell us
13 something?

14 MR. FISHER: It's -- it's -- it's a canon,
15 Justice Kagan. I -- I will concede that. But the --
16 the immigration defense brief at page 13 posits a theory
17 as to why Congress may not have included a
18 cross-reference here where it did other places, and it
19 has to do with the jurisdictional nature of the element
20 in the Federal crime.

21 But even if you set that aside, what you
22 have is one canon, and you have other canons and another
23 canon that's very strong through the Court's cases. And
24 when Congress uses the identical phrase multiple places
25 in the same legislation, we assume it meant the same

1 thing.

2 And so that would be my argument, primarily,
3 as to why Congress here may well have been thinking of
4 Section 2243. But as I was just describing to Justice
5 Kennedy, this is the easy case. This is the case where
6 Section 2243 and the State multi-jurisdictional survey
7 plus the Model Penal Code leads you to the exact same
8 place. So it's enough in this case to say, at least
9 where those two things line up, it is certainly the case
10 that Congress would not have been intending to sweep in
11 a State statute like the one involved here.

12 You can leave for another day what might
13 happen in a hypothetical statute like Justice Kennedy
14 described, or even on this statute if you had a
15 situation where states covered certain conduct and
16 treated it as abuse that falls outside of Section 2243.

17 JUSTICE SOTOMAYOR: So what do we do with
18 Chevron if we think it's ambiguous?

19 MR. FISHER: So --

20 JUSTICE SOTOMAYOR: And it's not clear?

21 MR. FISHER: If you think -- I want to make
22 sure I understand the question. If you think that the
23 text is not clear for the reasons I've described so
24 far --

25 JUSTICE SOTOMAYOR: Exactly.

1 MR. FISHER: Then you would go --

2 JUSTICE SOTOMAYOR: Or sufficiently
3 unambiguous, to be --

4 MR. FISHER: Fair enough.

5 JUSTICE SOTOMAYOR: -- to be clear.

6 MR. FISHER: Then what I think you would do
7 is have one more set of questions you ask before you ask
8 the traditional Chevron reasonableness questions. And
9 that would be whether a traditional -- another
10 traditional canon of construction resolves the
11 ambiguity.

12 The Solicitor General acknowledges at
13 page 42 of its brief that other clear statement rules
14 and, of course, juris prudence, like the presumption
15 against preemption, the presumption against
16 retroactivity, come before you get to agency deference.

17 Likewise here, there are two such canons.
18 One is the rule of lenity, which Justice Alito
19 mentioned. And we think for the reasons in
20 Thompson-Center Arms Company and more recently in the
21 Abramski case, you have the separation of powers problem
22 by deferring on Chevron grounds to a statute like this
23 one that applies both in the civil and criminal realm.

24 And, secondly, even if you set that aside --
25 and I think that was Justice Alito's hypothetical --

1 then you'd have the -- the long-standing rule on
2 immigration law, which predates Chevron by decades, that
3 says deportation statutes, if they're ambiguous, should
4 be construed in the favor of the --

5 CHIEF JUSTICE ROBERTS: Well, but we've
6 always said, though, that the rule of lenity, or at
7 least most often said that the rule of lenity is
8 something you apply when you've already exhausted the
9 normal tools of statutory interpretation. So why is the
10 order of a battle the other way around? Why do you
11 apply the rule of lenity before you get to Chevron?

12 MR. FISHER: Well, I think you've said more
13 or less the same thing in the Chevron context, Mr. Chief
14 Justice. And the two things that I would cite to you
15 are, first, the Thompson-Center Arms Company case where
16 the Court said, we have an ambiguous statute, and now
17 we're going to turn to lenity, not to Chevron. And the
18 reason why is because in Chevron itself, the Court said
19 you exhaust all traditional canons because you assume
20 Congress legislated against those canons. There is no
21 more traditional canon of construction than the criminal
22 rule of lenity.

23 CHIEF JUSTICE ROBERTS: But I --

24 MR. FISHER: I --

25 CHIEF JUSTICE ROBERTS: -- I don't know how

1 the two of them can coexist. I mean, on the one hand,
2 you have in Chevron, you give the agency the broadest
3 possible deference to interpret an ambiguous provision.
4 And in the rule of lenity, you say, well, if it's
5 ambiguous, you don't apply it as strictly as -- as the
6 government may be arguing. They each point in the
7 opposite direction based on the same predicate, which is
8 a degree of ambiguity in the statutory provision.

9 MR. FISHER: I think that premise is
10 correct. And I think the Abramski case, from just a
11 couple of terms ago, answers that problem by saying it
12 would be a separation of powers violation to let the
13 executive define -- define criminal statutes. Remember,
14 we --

15 JUSTICE KAGAN: Are you suggesting,
16 Mr. Fisher, that if we turn Chevron off, we have to turn
17 lenity on? Couldn't there be a middle ground between
18 the two; in other words, some space where you say,
19 because of this -- the -- the criminal application of
20 this statute, we don't apply ordinary Chevron deference,
21 but at the same time, we don't go straight into the kind
22 of grievous ambiguity that -- that triggers lenity?
23 There's some middle area where the Court gets to decide
24 just what is -- it thinks is the best construction of
25 the statute?

1 MR. FISHER: It's hard for me to imagine
2 exactly how that works, but I'm happy with the --

3 JUSTICE KAGAN: It works -- it works, if you
4 think that ambiguity doesn't necessarily mean the same
5 thing for Chevron purposes and for lenity purposes.

6 MR. FISHER: I would --

7 JUSTICE KAGAN: The lenity purposes really
8 demands grievous ambiguity, and but there's some sense
9 in which there's -- there's a of lack clarity, a lack of
10 clear meaning that allows the Court to decide what the
11 best interpretation of the language is.

12 MR. FISHER: So if that were the situation
13 here, what I would tell the Court is when you do that
14 job as a court, you should take into account for any
15 ambiguity the rule against construing deportation
16 statutes against noncitizens. And, more generally, what
17 you should --

18 JUSTICE KAGAN: I don't really understand
19 that -- that canon, because that canon would suggest
20 that we never give the BIA deference as to its
21 interpretation of this statute. And, in fact, when it
22 comes to noncriminal things, we give the BIA very
23 substantial deference.

24 MR. FISHER: You have in other parts of the
25 INA, Justice Kagan. But the Court never deferred to the

1 INA in terms of construing what an aggravated felony is
2 for purposes of deportation. And in the same sphere,
3 the Court said that that canon applied in -- with
4 respect to, quote, deportation statutes. But even if
5 you set that aside and just -- I'd be more than happy
6 for the Court simply to ask what the best reading of
7 this statute is on its own terms.

8 JUSTICE ALITO: Can I take you back to
9 the -- the argument that Chevron isn't appropriate here
10 because the definition applies in both the criminal and
11 the civil context? And that was the point that Judge
12 Sutton made in his dissent, and it has kind of a -- it's
13 an appealing argument when you say it fast. But the
14 more I think of it, the less sense --

15 (Laughter.)

16 JUSTICE ALITO: -- the less sense it makes.

17 Now suppose that a -- there's an ambiguous
18 phrase in an immigration statute, and it applies only in
19 the civil -- it applies only in immigration and has no
20 criminal -- has no criminal applications. And suppose
21 that in that situation it would be appropriate to use
22 Chevron, okay, and then later Congress uses the same
23 phrase in a criminal statute.

24 Does that mean that the Chevron
25 deference that was applied in the civil -- previously in

1 the civil context goes away?

2 MR. FISHER: I think it --

3 JUSTICE ALITO: I -- I don't see anything
4 odd about having the same phrase interpreted using a
5 different methodology in a civil case and in a criminal
6 case.

7 MR. FISHER: I think it would go away and,
8 Justice Alito, I just cite this Court's case law to you.
9 Clark against Martinez is the foremost example, but
10 there's Thompson Center Arms Company. There are decades
11 ago, FCC against ABC, and the Court has said over and
12 over again that statutes are not chameleons.

13 JUSTICE ALITO: Well -- but I would like to
14 know why it makes sense, so something other than a
15 citation of cases, why would Chevron deference be
16 appropriate up to the point where Congress decides to
17 use the same phrase in a criminal statute and then it
18 disappears.

19 MR. FISHER: Because it would violate the
20 separation of powers. Congress creates --

21 JUSTICE SOTOMAYOR: I'm sorry.

22 MR. FISHER: -- similar --

23 JUSTICE SOTOMAYOR: How does -- I -- I --
24 I -- I'm having some of the difficulty that Justice
25 Alito is having, but just last term we decided a Fair

1 Labor Standards Act case involving car salesmen --

2 MR. FISHER: Uh-huh.

3 JUSTICE SOTOMAYOR: -- car repairs, that was
4 the dispute.

5 In that Act, a willful violation can be
6 criminally prosecuted. And yet we gave -- we talked
7 about Chevron as applying to that act and the board's
8 interpretation and sent it back for the board to give us
9 a proper reading of the statute or explain its reading.

10 How many statutes, administrative statutes
11 today, don't include a criminal sanction?

12 MR. FISHER: It's --

13 JUSTICE SOTOMAYOR: -- in part or in whole?
14 Almost all of them do. So where would Chevron be then?

15 MR. FISHER: I'm not sure empirically that's
16 correct. I think it's more of an unusual situation, but
17 here's what I would say about the kinds of cases I think
18 you're thinking of, Justice Sotomayor, where the Court
19 hasn't even thought about this issue, and the reason why
20 is because in those cases Congress has made it a crime
21 to violate a regulation issued by whatever agency has
22 control over that statute. So there Congress has
23 defined the crime, which is violating a regulation.

24 JUSTICE SOTOMAYOR: But --

25 MR. FISHER: Here --

1 JUSTICE SOTOMAYOR: -- most of the
2 regulations are interpretations of the statute.

3 MR. FISHER: That's right, but Congress has
4 created the crime of violating the regulation. Just
5 like if Congress says it's a crime to violate a court
6 order and the court issues an order, the court isn't
7 creating criminal law. Congress did.

8 I don't want to hang my whole case on the
9 Chevron question.

10 JUSTICE BREYER: No, but it is -- but it's
11 why I think people are discussing it and I may have --

12 MR. FISHER: Yeah.

13 JUSTICE BREYER: You don't have to accept my
14 view. My -- I may be the only one with this view, but
15 it -- and I'm curious to know what you actually think
16 about it. You have cases here a lot.

17 Chevron is not the tax code. We are not --
18 it is not a rule of tax law. It is a general kind of
19 standard which has judges asking what Congress would
20 have thought about a question they never thought about,
21 which is what kind of deference should a court give to
22 an agency interpretation, and the answer will vary
23 depending upon statute.

24 I would not even give you this lecture were
25 it not for the case that I believe this Court wrote this

1 view into its opinion in Mead, which I think is pretty
2 good law. And so if you're asking the question what
3 would a reasonable legislature think about that
4 question, which he never thought of, it's surprising to
5 me that he would think prosecutors should have deference
6 as to what the statute that they are prosecuting
7 somebody under means. I would find that surprising.

8 I would find surprising some aspects of
9 immigration law where the result is just about as bad.
10 The result is they leave without any discretion to keep
11 them here. And then I'd proceed case by case.

12 But I'm not asking what I think. I already
13 know. I want to know what you think.

14 MR. FISHER: What -- what I think and what
15 we're asking for today, if the Court reached the
16 question, is for a very small exception to Chevron. A
17 carveout to the extent it doesn't already exist in this
18 Court's law. I think it already does exist, but if it
19 didn't, it should, and that is where a statute has
20 criminal applications and Congress has not delegated to
21 the agency the authority to create crimes through its
22 own regulatory process, Chevron is off limits. It would
23 be very, very hard --

24 JUSTICE SOTOMAYOR: I'm sorry. I'm -- I'm
25 still having a problem as to why that distinction is

1 meaningful.

2 MR. FISHER: The reason --

3 JUSTICE SOTOMAYOR: I -- I -- most of the
4 crimes that are -- are set out in regulation almost
5 largely parrot the statutory language. And then explain
6 what the agency means and it makes it a crime to violate
7 the regulation which is really the statute. So it's a
8 distinction without meaning for me.

9 MR. FISHER: So two -- so two things about
10 that situation, Justice Sotomayor. The first is, if
11 you're just parroting the statutory language you don't
12 need Chevron at all, and the second answer is, if you
13 get to -- the only thing that matters is where the
14 agency is reading a statute under Chevron in a way that
15 is not the better reading. And in that situation almost
16 all the --

17 JUSTICE SOTOMAYOR: But that's if its
18 reading unreasonable.

19 MR. FISHER: Almost all -- that's right.
20 Almost all the examples you're thinking of are ones
21 where Congress has delegated the authority to create
22 crimes through the regulatory process.

23 Now, you don't have to reach that question
24 in this case. For all the reasons I started with, the
25 statute is unambiguously clear as the question presented

1 in this case. The California statute falls far outside
2 of what Federal law, the sweep of State laws, the amount
3 of penal code define sexual abuse of a minor.

4 Even if you were going to ask the question
5 under the traditional lens of Chevron, was the BIA
6 analysis reasonable, here I think it's helpful to point
7 out a few things. First is, the BIA in its definition
8 of sexual abuse of a minor looked to a different Federal
9 statute, Section 3509, which is a State -- which is a
10 section about witness testimony. This goes back to the
11 Rodriguez-Rodriguez case in 1999.

12 The Solicitor General no longer defends that
13 analysis, so the core of the BIA's reasoning that led it
14 to where we are today is something that is not being
15 defended anymore in this Court. So that's the first
16 thing.

17 The second thing is the BIA totally ignored
18 the State by State sweep, just saying that the lack of a
19 definition isn't enough in the statute itself, but that
20 runs directly into the Taylor case, into Duenas-Alvarez,
21 into all the other categorical approach cases where the
22 Court has said to -- to define a -- a generic crime, you
23 start and see if there's an express definition, but if
24 there isn't that's when you do multi-jurisdictional
25 surveys.

1 The other reason --

2 JUSTICE GINSBURG: Multi-jurisdictional
3 survey would yield age 16?

4 MR. FISHER: Justice Ginsburg, there are
5 two -- there would be two possible answers to your
6 multi-jurisdictional survey. The first and the easiest
7 answer is that any State statute like California
8 creating a -- a -- an 18 age of consent with a minor age
9 differential, a very small age differential, would be
10 well outside of the mainstream and 43 states do not even
11 criminalize the conduct at issue here, let alone make it
12 a serious crime.

13 Remember, we're asking at the end of the day
14 whether something's an aggravated felony, not just
15 whether it's criminal. You have an extraordinary case
16 here where the -- where the government is trying to
17 deport somebody for committing something that isn't even
18 a crime under Federal and the vast majority of states.

19 And, Justice Ginsburg, the second answer
20 about a multi-jurisdiction -- jurisdictional survey, if
21 you wanted to give more guidance or felt like the
22 Solicitor General's argument did a more comprehensive
23 definition is necessary was correct, would be the one I
24 started with and I talked to Justice Kagan about, which
25 would be, when you're dealing with an allegation of

1 abuse based on the ages alone, that 16 is the age of
2 consent and that is found in Federal law, it's found in
3 the modal Penal Code, it's found in the sweep of State
4 laws.

5 And, Justice, this is what Judge Wilkinson
6 did for the Fourth Circuit in Rangel-Castenada which is
7 cited in our briefs and we think that decision is
8 correct.

9 Even if what you did what the Solicitor
10 General asked you to do, which is ignore all of that and
11 simply pick up Black's Law Dictionary, as we've shown in
12 our reply brief you end up in the same place, because
13 Black's Law Dictionary, when it defines sexual abuse
14 says that it -- we're talking about illegal sexual
15 activity. And to define what is illegal you have to ask
16 what the age of consent is, and when you look in Black's
17 Law Dictionary, for the age of consent in this
18 situation, you find the number 16.

19 So this is, again, the very easy case where
20 all roads are going to lead you to the same place. You
21 don't have any of the interpretative difficulties of the
22 categorical approach that you normally have.

23 In fact, there's one other way where this is
24 an easier case than almost all categorical approaches
25 cases that you see. And that's because the consequences

1 here are so benign.

2 The ordinary categorical approach situation
3 involves a scenario, I think, where what a court is
4 sometimes worried about is that by virtue of the -- the
5 methodology there would be some State statutes that are
6 a little bit overbroad and that people have done some
7 very bad things that the Federal law would consider to
8 be aggravated felonies are going to get the benefit of
9 the way the categorical approach works and not be
10 subject to automatic removal.

11 And here that problem is taken care of in
12 the State laws like -- in the states like California
13 that have laws that reach up to 18, because as we've
14 shown in Footnote 1 of our reply brief, all of those
15 states have other statutory provisions that are in line
16 with the Federal law or very close to it.

17 So really, all you are dealing with this in
18 this case is a few outlier -- there's actually seven
19 outlier statutes that go further than the Federal aw,
20 and that have backup provisions that are going to still
21 allow the Federal government to seek automatic removal
22 or some other immigration remedy against people that
23 commit sexual offenses against minors.

24 Remember, the core -- the core of sexual
25 abuse of a minor, I think, are things like child

1 molestation and other really horrible things that nobody
2 is even talking about here. The only issue in this case
3 is how it applies to offenses like statutory rape. And
4 we think, working your way up to the Federal definition
5 of statutory rape, when age alone is the only thing that
6 justifies an allegation of abuse is the right way to
7 resolve that case and not go any further.

8 The Federal government's definition, as I
9 point out one more thing about it, it doesn't even track
10 the BIA. It's the Federal government's position, at
11 least as I understand it, is that any sexual activity
12 that's illegal is sexual abuse of a minor, as long as
13 the younger participant is under 18.

14 So under the Federal government's view, as I
15 understand it, the two States that criminalize sex
16 between two 17-year-olds would constitute an aggravated
17 felony. Even though only two States do it, even though
18 it is not commonly thought of in this country as abuse,
19 and even though it's a misdemeanor in both of those
20 situations. That's an extraordinary request out of this
21 Court, and we think goes far, far, far beyond what
22 Congress might have imagined when it was creating sexual
23 abuse of a minor subcategory.

24 If there are any other questions about the
25 presentation I've made thus far, I'm happy to answer

1 them. Otherwise, I'd like to reserve the remainder of
2 my time.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 Mr. Kedem.

5 ORAL ARGUMENT OF ALLON KEDEM

6 ON BEHALF OF THE RESPONDENT

7 MR. KEDEM: Mr. Chief Justice, and may it
8 please the Court:

9 Congress has charged the Attorney General
10 with responsibility to administer the INA to conduct
11 removal proceedings and to render controlling
12 interpretations of the statute within those proceedings.

13 In this case, the Board of Immigration
14 Appeals exercised that authority in a manner both
15 reasonable and consistent with the statute, and for that
16 reason, should be afforded deference. I think perhaps a
17 good place to begin is where Petitioner's counsel began,
18 with the idea of multi-jurisdictional surveys.

19 First of all, by my count, there are roughly
20 13 cases in which this Court, under the categorical
21 approach, was called upon to define or give meaning to a
22 Federal provision so that the categorical approach could
23 be applied to it.

24 In only two of those cases, Taylor and
25 Duenas-Alvarez, has the Court relied on something that

1 could be compared to a multi-jurisdictional survey. In
2 all of the other cases, the Court either didn't look at
3 multi-jurisdictional surveys at all or, as in Johnson,
4 basically specifically rejected the relevance of those
5 multi-jurisdictional surveys, saying that they would
6 shed no light on the central inquiry.

7 JUSTICE KAGAN: Well, Mr. Kedem, you don't
8 disagree, do you, with the premise that the first thing
9 that we should do is to define the generic crime; is
10 that right?

11 MR. KEDEM: That's correct. That's what we
12 consider to be step one of the categorical approach.

13 JUSTICE KAGAN: Okay. So you say that's
14 step one. And then you say, well, you define
15 the generic -- in this case you say the generic crime is
16 whatever is illegal under State law. That's one of
17 your --

18 MR. KEDEM: That's the first argument that
19 we make in our brief.

20 JUSTICE KAGAN: Yeah. So that seems to be
21 like just not what generic crimes are.

22 MR. KEDEM: Sure.

23 JUSTICE KAGAN: In other words, you're just
24 saying, well, it's whatever the States consider illegal,
25 when the whole idea of a generic crime is that it's not

1 just anything that's illegal, it's the prototypical
2 case, even though that differs from what some States do.

3 MR. KEDEM: Sure. A -- a couple responses.

4 First of all, it's certainly not whatever
5 States make illegal. It still has to have sexual
6 content that's directed at a minor; namely, someone
7 under the age of 18.

8 JUSTICE KAGAN: Yes. But you're carving out
9 one element, which is the age element --

10 MR. KEDEM: Sure.

11 JUSTICE KAGAN: -- and saying whatever a
12 State does goes. So I thought that that was sort of the
13 antithesis of the generic offense approach.

14 MR. KEDEM: I think not, because what we're
15 dealing here is not one crime. What we're dealing here
16 is an umbrella with -- with -- is an umbrella term that
17 applies to several different categories of crime.

18 And I think it's maybe most analogous to the
19 Court's Kawashima case in which the Court was
20 interpreting a provision of the INA's aggravated felony
21 definition, which didn't have a cross reference,
22 offenses involving fraud or deceit, which are sort of a
23 broad category of different types of crimes.

24 And to figure out what that means, the Court
25 did not look to a multi-jurisdictional survey. It

1 looked to the dictionary, to the context of the
2 provision, to what it understood to be the -- the
3 purpose of the provision and came up with a definition.

4 JUSTICE GINSBURG: Now -- now, it looked to
5 Federal law itself 2243(a). We're told that, in the
6 final form, it's the same here as -- as this provision.

7 MR. KEDEM: So --

8 JUSTICE GINSBURG: The same term, sexual
9 abuse of a minor.

10 MR. KEDEM: A couple -- couple of thoughts
11 about that provision.

12 First of all, it was adopted more than a
13 decade before the term "sexual abuse of a minor" was
14 added to the INA's definition of aggravated felony. It
15 has been amended a number of times, both before and
16 after the amendment that added the aggravated felony of
17 sexual abuse of a minor.

18 And the courts did not do what it did in a
19 number of other provisions, which is to include a cross
20 reference. So if anything, I think the inference is
21 that it did not want to tie the definition of sexual
22 abuse of a minor to that provision.

23 And Petitioner --

24 JUSTICE GINSBURG: Can you think of a
25 definition from -- from an evidentiary statute, a

1 statute designed to protect children who testify in
2 court. That seems a lot less close than 2243.

3 MR. KEDEM: So I -- I don't think it's
4 accurate to characterize the board's decision as
5 treating that as the definition.

6 And I think if you look at the board's
7 opinion, what it said is that is a pretty common-sense
8 definition for the type of activity that might be
9 covered. But it didn't otherwise rely on it. And the
10 board's decision below relied instead on a practical
11 construction of the word "abuse," the sort of intuition
12 that there are certain types of activity that, even
13 though they are ostensibly consensual, nevertheless,
14 they contain the potential for harm or risk because of
15 something about the relationship between the parties
16 involved, either the ages of the parties involved, or
17 because there's a familial relationship; for instance,
18 parent/child, or there's a relationship of authority or
19 trust, something like a student/teacher.

20 And what it said is when there's a
21 meaningful age difference, such that the perpetrator and
22 victim are not in the same age group, as a result of
23 that, the victim may not be able to advocate for
24 themselves, they may not be able to protect themselves
25 against certain risks, things like pregnancy or

1 sexually-transmitted diseases. And that was the basis.

2 JUSTICE GINSBURG: Why isn't an 18-year-old
3 in the same age group as a 21-year-old?

4 MR. KEDEM: I don't think we're dealing with
5 18-year-olds. I think in all instances we're talking
6 about people under the age of 18.

7 What the -- the board said --

8 JUSTICE KAGAN: It's really like a freshman
9 in college going out with a junior in college.

10 MR. KEDEM: It is true that sometimes there
11 are 17-year-olds who are in college. That's certainly
12 not the typical instance.

13 I think, to a certain extent, we're dealing
14 with a little bit of arbitrariness, no matter where you
15 draw the line. But if you draw the line, as the Federal
16 offense does, you essentially rule out statutes in
17 almost all of the 50 States because, first of all, there
18 are 19 States that set the age of consent either at 18
19 or at 17. So you'd be ruling them -- them out. And
20 most of the remaining ones set the age differential at
21 something less than four years.

22 And that's before you get into questions
23 about things like what about the mens rea? Do you have
24 to know that the victim was of a certain age.

25 JUSTICE BREYER: It's quite complicated,

1 which I agree. But do I understand the situation
2 correctly? In mid 1990s, Congress passed a law in
3 immigration statute, which is this 1101(a)(43), which
4 lists about 30 or 40 crimes. And it says if the person
5 has committed one of those, goodbye, and the Attorney
6 General can't stop it; is that right?

7 MR. KEDEM: It's right with this one caveat,
8 which is that the definition of aggravated felony
9 actually came much earlier and has been amended a number
10 of times.

11 JUSTICE BREYER: But what happened at that
12 time is they stuck in the words "sexual abuse of a
13 minor."

14 MR. KEDEM: That's correct.

15 JUSTICE BREYER: Okay. When they stuck in
16 those words in this long list of crimes, some of which
17 have cross references and some of which, like in that
18 very section, murder, rape, deceit, et cetera, do not.
19 At the time they did that, in 1996 -- I think it was
20 '96, or maybe '95 -- there was on the books a Federal
21 statute which had been passed in 1986. And that Federal
22 statute, by some amazing coincidence, which was a
23 criminal law, is entitled sexual abuse of a minor. And
24 then it has a definition.

25 So why not? And think when they use the

1 same word to do about the same thing, list a crime, they
2 meant to pick up the same definition, QED. End of case.
3 All right? Now, why not?

4 MR. KEDEM: First of all, if they intended
5 to do so, it would have been very easy to do what
6 they've done in other provisions, which is to include a
7 cross reference.

8 JUSTICE BREYER: Oddly enough --

9 MR. KEDEM: At least --

10 JUSTICE BREYER: -- I can list 10 or 15,
11 including deceit, rape, murder, a whole bunch in this
12 statute --

13 MR. KEDEM: Even Petitioner --

14 JUSTICE BREYER: -- which don't use cross
15 references.

16 MR. KEDEM: Even Petitioner does not claim
17 that sexual abuse of a minor is defined entirely by the
18 bounds of the Federal provision. And they couldn't,
19 because it would lead to some absurd results.

20 For instance, almost all States now, as they
21 did in 1996, have statutes dealing with sexual offenses
22 that are offenses because of a familial relationship, or
23 a relationship of trust or authority, such as
24 student/teacher. None of those offenses are picked up
25 by the Federal provision. And so you'd be disqualifying

1 those as well.

2 JUSTICE KAGAN: Mr. Kedem, you have here --
3 you have a federal statute. You have the Model Penal
4 Code, which goes the same way. You have 30-plus State
5 laws. So at the least, am I right that -- that you
6 concede that you can't win unless Chevron applies; is
7 that correct?

8 MR. KEDEM: No, certainly not.

9 JUSTICE KAGAN: You think it's unambiguous,
10 this kind of pragmatic construction about -- what did
11 you say -- like power differentials --

12 MR. KEDEM: No, no. I'm sorry. I didn't
13 mean to suggest that we would win because it's
14 unambiguous that it means only the government's first
15 argument. The point is simply that if you're going to
16 interpret the words that Congress wrote, the
17 interpretation that we put forward, we think, is a much
18 more meaningful one than the one that Petitioners put
19 forward, to the extent that they even offer any.

20 JUSTICE KAGAN: I -- I guess I don't
21 understand that. You're saying that it would be the --
22 the clearly better reading to go -- to -- to say
23 notwithstanding the Federal statute, notwithstanding
24 30-plus State statutes, notwithstanding the Model Penal
25 Code, we just know that when somebody talks about sexual

1 abuse of a minor, they're talking about age 18 with a
2 three-year differential?

3 MR. KEDEM: So I think I would just step
4 back to say that when this Court is giving content to
5 the Federal provision of the first step of the
6 categorical approach, it is engaging in a normal case of
7 statutory interpretation which brings to bear --

8 JUSTICE KAGAN: Well, I'm asking --

9 MR. KEDEM: -- all of the --

10 JUSTICE KAGAN: -- about normal statutory
11 interpretation.

12 MR. KEDEM: The normal --

13 JUSTICE KAGAN: The normal statutory
14 interpretation get you to think that out of, like -- out
15 of our heads pops 18 plus a three-year differential --

16 MR. KEDEM: I see. So now you're asking
17 about the board's interpretation.

18 JUSTICE KAGAN: -- looking at -- as opposed
19 to looking at 30-plus States, the Model Penal Code, and
20 the Federal statute, which all define it differently.

21 MR. KEDEM: Sure. So, first with respect to
22 all the different State laws, even in the two cases
23 under the categorical approach where this Court has
24 looked to multi-jurisdictional surveys, it did not apply
25 Petitioner's methodology. In other words, it did not

1 ask in Taylor whether second-degree burglary under
2 Missouri law would have been criminal under the penal
3 codes of 50 different States. And I think State surveys
4 can be relevant only insofar as you think that they will
5 tell you something about the words that Congress used.

6 JUSTICE ALITO: And this quest for the --
7 the generic offense of sexual abuse of a minor seems to
8 me to be a -- a meaningless quest. There's no "there"
9 there. It's not like burglary where there's a common
10 law definition. You've got some core. This is a phrase
11 that doesn't have a common law counterpart. And if you
12 look at all these State statutes and throw in all the
13 Federal statutes that you can find that have some
14 relation to this, what you have is a -- a big array of
15 very disparate statutes.

16 So this seems to me like a classic example
17 of Congress saying, we have this category sexual abuse
18 of a minor, and we know that there's all this array of
19 State laws. And so you, Attorney General, define what
20 should be within this for immigration purposes.

21 MR. KEDEM: We agree with that, Justice
22 Alito. Before we turn to issues of Chevron and
23 deference in general, I'd like to just identify --

24 JUSTICE KAGAN: Mr. Kedem, can I say that --

25 MR. KEDEM: Sure.

1 JUSTICE KAGAN: -- I think you disagree with
2 two parts of that. Because the first thing you said to
3 me was that you agree that the first thing that has to
4 be done is to define a generic offense.

5 MR. KEDEM: That's correct.

6 JUSTICE KAGAN: So Justice Alito was
7 suggesting that, in this case, we shouldn't do that at
8 all. So you disagree there. And then Justice Alito
9 said, in this case you just have to think like, what
10 does the BIA think about this?

11 MR. KEDEM: Correct.

12 JUSTICE KAGAN: But you said to me, even
13 without deference, you win. So -- so you're taking a
14 very different view than Justice Alito is. You're
15 saying that what the BIA interpretation was is the best
16 understanding of the generic offense.

17 MR. KEDEM: So maybe the best way to answer
18 that question is to describe what the government thinks
19 is the relationship between the two arguments that we
20 make in the brief.

21 The term "sexual abuse of a minor" would
22 naturally support the interpretation that we offer in
23 the first section of our brief to cover all sexual
24 activity directed at a minor under the age of 18 years
25 old. However, the board has chosen a more modest

1 interpretation based on a practical construction of the
2 word "abuse." And because the board exercises the
3 Attorney General's authority to interpret and give
4 meaning to the statute, because it chose a definition
5 that is both reasonable and consistent with the statute,
6 this Court should defer because that is what Congress
7 wanted. And so you are giving effect to what Congress
8 has intended when you defer to the board.

9 CHIEF JUSTICE ROBERTS: What about an
10 application --

11 MR. KEDEM: But because --

12 CHIEF JUSTICE ROBERTS: What about
13 application of the rule of lenity?

14 MR. KEDEM: So I think application of the
15 rule of lenity does coexist with Chevron in the
16 following sense: I think, first of all, before the
17 board, the board has recognized that lenity can come
18 into play, but it has conceived of it in the same
19 limited way that this Court has; namely, that you don't
20 apply lenity simply because the statute can be read in
21 more than one way. You apply it only when, after trying
22 everything else, you simply have to throw up your hands
23 because you cannot figure out what Congress wanted.
24 There is a grievous ambiguity that simply cannot be
25 resolved.

1 CHIEF JUSTICE ROBERTS: So you necessarily
2 apply Chevron before you apply the rule of lenity?

3 MR. KEDEM: I think -- I think that you do,
4 but I think there's still work for lenity to do even
5 after applying Chevron. Certainly, if the board has
6 spoken to the precise question at issue, then I think it
7 would be hard for you to be left at the end of the day
8 after giving that deference where it's a grievous
9 ambiguity. But often agencies speak only to a related
10 question or fill only part of a statutory gap, in which
11 case after giving appropriate deference to that answer,
12 you would still possibly be left with a different aspect
13 of the problem that you simply cannot resolve, in which
14 case lenity would apply.

15 But we don't think it makes sense to apply
16 lenity at the first step of the -- at the first step of
17 Chevron, because at that step, the Court is asking, are
18 the words sufficiently clear that there's really only
19 one way to read them? And it doesn't make sense to
20 apply a tie-breaking canon that says you only come into
21 play at the end of the process after you simply cannot
22 figure out what the words mean at all. And certainly,
23 this Court has never applied lenity in that way --

24 JUSTICE KENNEDY: I can understand Chevron
25 in the context of an agency that has special expertise

1 in regulating the environment or the forest service or
2 fisheries or nuclear power. Why does the INS have any
3 expertise in determining the meaning of a criminal
4 statute?

5 MR. KEDEM: So, first of all, Justice
6 Kennedy, I think it's important to orient ourselves
7 around the fact that this is a civil statute that's
8 being applied in a civil context. But I do agree with
9 your point that it's not as if the agency can read a
10 dictionary or look at legislative history any better
11 than any -- any courts certainly. And that's true of
12 agencies generally.

13 But when the agencies give meaning to a
14 statute, they bring to bear practical wisdom and
15 experience in ways that are important. And, for
16 instance, in this case, the Board of Immigration
17 Appeals, first of all, decided that because there are so
18 many -- so much variation among the different State
19 offenses that are involved here, it made sense to apply
20 an incremental approach to engage in case-by-case
21 adjudication rather than trying to cover the waterfront.

22 JUSTICE KENNEDY: But why is INS in any
23 better position to make that determination than the
24 American Bar Association or the forest service?

25 MR. KEDEM: So I think that the board

1 exercises delegated authority from the Attorney General,
2 who is administering the scheme in an administrative
3 capacity. And I think to a certain extent talking about
4 Chevron deference, while accurate, is actually a little
5 bit misleading. Because often when we're talking about
6 Chevron, we're talking about the concept that when
7 Congress gives an agency the power to engage in
8 rulemaking or formal adjudication, we basically assume
9 that that power comes along with the ability to
10 interpret the statute.

11 JUSTICE BREYER: What he's saying -- I think
12 what the question is, is this: There are many
13 agencies -- Social Security -- that have statutes that
14 are incredibly detailed and have to do rather directly
15 with how this program is being administered.

16 MR. KEDEM: Sure.

17 JUSTICE BREYER: And they see some words
18 over here in Part 1 on page 3860. And they know, but we
19 wouldn't know, that if you interpret it one way rather
20 than another, it's going to be much harder to do the
21 thing as a practical matter that they have over there on
22 page 842. All right? They'll know that; we won't know.

23 MR. KEDEM: Sure.

24 JUSTICE BREYER: But you've just listed
25 things that we seem to be able to know just as well as

1 they.

2 MR. KEDEM: So, Justice Breyer, one thing to
3 keep in mind is that the aggravated felony definition is
4 a spine that runs throughout the INA and determines a
5 whole range of administrative consequences, not merely
6 whether a person is removable, but whether they're
7 eligible, for instance, for cancelation of removal --

8 JUSTICE BREYER: Yeah.

9 MR. KEDEM: -- asylum, certain detention
10 consequences, voluntary departure, readmission.

11 And in this case we're dealing with a
12 delegation of interpretive authority that is not merely
13 implicit in the sort of general sense Chevron talks
14 about it, but an express provision 8 U.S.C. 1103(a),
15 which says that the Attorney General not only gets to
16 conduct removal proceedings, but gets to render
17 interpretations in those proceedings that are, quote,
18 "controlling." And this Court has relied in cases like
19 Aguirre-Aguirre and Negusie on that fact.

20 JUSTICE BREYER: Okay. So was there
21 anything else? Because what I asked -- I wanted my
22 first question, which you probably don't remember now.
23 But -- but I wanted to know why don't just look at 1143,
24 that's the end of it; okay?

25 MR. KEDEM: Sure.

1 JUSTICE BREYER: And you said one, because
2 there's no cross-reference, so I got that one. You said
3 two --

4 MR. KEDEM: Two --

5 JUSTICE BREYER: -- it would be because if
6 you go read the thing, 1140 -- is it 1143 or whatever --
7 2243 --

8 MR. KEDEM: Uh-huh.

9 JUSTICE BREYER: -- if I go read that, I'll
10 see that there are things that couldn't possibly apply.
11 That was your second. And I think you were going to
12 make a third. Was there a third? I want to know --

13 MR. KEDEM: So if there was a third, it
14 might have been that a 16-year age of consent and 4-year
15 age differential would disqualify statutes from most
16 States. Certainly, all of the States that set a higher
17 age of consent, but a number of the other States as
18 well.

19 If I could return just briefly to basically
20 the questions I've gotten about whether this statute
21 seems to be a bit of an outlier and why not just rule
22 out this statute. I think there are a few really
23 serious problems with that.

24 The first is that it would leave very patchy
25 and meager coverage because most State statutes are not

1 continuous. Meaning that they don't have one provision
2 for 13-year-old minors, a different one for 14-year-old
3 minors, and so on and so forth. They tend to clump them
4 into age ranges. And Arizona is a good example of this.
5 Arizona has one provision that covers minors' ages 15
6 and up; a different provision that covers minors 14 and
7 below. If this Court were to say that the 15 and up
8 provision is disqualified because it applies to 16 and
9 17-year-olds or because it has a 2-year age
10 differential, that would leave only the 14 and below
11 provision, which means that a 15-year-old minor would
12 get no coverage regardless of the age of the
13 perpetrator. And it's not alone. There are other State
14 statutes that are just like that; Virginia, North
15 Dakota.

16 Second of all, it's actually quite --

17 JUSTICE GINSBURG: Well, that's a good
18 reason to look at to 2243.

19 MR. KEDEM: Well, 2243 would disqualify even
20 more because, again, it requires a 16-year-old age of
21 consent, a 4-year age differential, and it includes a
22 reasonable mistake of age defense that most States don't
23 have.

24 I think it's also actually quite difficult
25 to determine what is or isn't an outlier. First of all,

1 because State statutes differ on a range of different
2 categories simultaneously. We've focused on four of
3 them; the age of the victim, the perpetrator, the age
4 differential, and the offense conduct. But, again,
5 there's a mens rea requirement that some States have and
6 other States don't. Some require an element of sexual
7 gratification that other States do not.

8 Moreover, it's difficult enough when you're
9 talking about current State statutes. You have to go to
10 all of the criminal -- go through all of the criminal
11 code of Alabama, Arkansas, Arizona, and so on and so
12 forth, and that's difficult because States don't label
13 these crimes the same way. But it's possible because
14 all States currently put those online.

15 But as Petitioner has conceded, we're
16 talking about State codes as they existed in 1996, which
17 means to do that, you really have to go to the statute
18 books. And Petitioner himself, for all his talk about
19 how this is the required methodology, hasn't even
20 performed that task for the statutes as they existed in
21 1996.

22 JUSTICE GINSBURG: There's one question
23 about your interpretation. You interpret the word
24 "abusive" to mean illegal.

25 MR. KEDEM: That -- that is under the first

1 argument that the government makes. It's -- it's -- the
2 term is not just abusive, it's sexual abuse, which has
3 its own definition under the dictionary and its own
4 understood meaning.

5 JUSTICE GINSBURG: And -- and you -- but you
6 say that sexual abuse means illegal sexual contact.

7 MR. KEDEM: Illegal sexual conduct, usually,
8 and the word "minor" added to the statutory provision,
9 sort of reinforces that we're just talking about minors
10 here.

11 So, in addition to the problems that I've
12 just been discussing with this multi-jurisdictional
13 survey and looking for outliers, it would also pull the
14 Court into a number of very difficult line-drawing
15 problems. For instance, what's the right numerical
16 threshold? Is it 50 percent? Two-thirds?
17 Three-quarters? Something else?

18 You also have to figure out how to deal with
19 State populations. Seems somewhat anomalous to treat
20 Wyoming's statute exactly the same as California's, even
21 though California's statute applies to more than 50
22 times the population.

23 You also have to figure out how to deal with
24 defenses, the element of sexual gratification that some
25 States have and other things.

1 JUSTICE KAGAN: So, Mr. Kedem, Mr. Fisher
2 said and I just want to make sure that this is right,
3 that you no longer rely on the statute that the BIA
4 relied on; is that correct?

5 MR. KEDEM: I think -- I think the BIA
6 itself relied on it only in a very general way. If you
7 read the decision below --

8 JUSTICE KAGAN: Okay. So the answer is no.

9 So what -- what do you rely on? What are
10 the sources that you rely on to generate this
11 definition? Because you're not relying on the Federal
12 statute. You're not relying on the most common State
13 statutes. You're not relying on the other Federal
14 statute that the BIA relied on. What are you relying on
15 to generate this definition?

16 MR. KEDEM: So we treat this as an ordinary
17 case of statutory interpretation. We rely --

18 JUSTICE KAGAN: I'm asking for ordinary --

19 MR. KEDEM: We -- we rely on the dictionary
20 definitions --

21 JUSTICE KAGAN: The term --

22 MR. KEDEM: -- the legislative history. We
23 rely on context of the provisions.

24 JUSTICE KAGAN: So the -- the dictionary
25 definition that you pull out is illegal sex acts

1 performed against a minor by a parent, guardian,
2 relative, or acquaintance. Is that the one?

3 MR. KEDEM: That is.

4 JUSTICE KAGAN: Yeah. But you're not using
5 by a parent, guardian, relative, or acquaintance; is
6 that right?

7 MR. KEDEM: No, that's not right. It
8 doesn't apply in this case because we're dealing with a
9 subset of those offenses just dealing with someone who's
10 a different age, but we would also think that it applies
11 to familial relationship offenses and I -- and I --

12 JUSTICE KAGAN: No, no, no, no, no. But
13 this -- this limits it to those relationships.

14 MR. KEDEM: I -- I --

15 JUSTICE KAGAN: That's what this does --

16 MR. KEDEM: That's right. It included -- it
17 included an acquaintance, which I'm pretty sure
18 Petitioner would have been in relation to his girlfriend
19 at the time.

20 JUSTICE KAGAN: Okay. Anything else?
21 Dictionary definition. What else?

22 MR. KEDEM: We point to legislative history,
23 which is relatively sparse, but I think it strongly
24 indicates that Congress wanted to get a lot tougher on
25 crimes involving children and to context in which other

1 INA provisions talk about minors as being people under
2 the age of 18.

3 JUSTICE KAGAN: What are -- what are those?

4 MR. KEDEM: So we cite two of them in -- in
5 the -- in this -- in our brief. I don't have the
6 citations at -- at my fingertips. There are provisions
7 dealing with different things, but they both said
8 the word "minor" --

9 JUSTICE KAGAN: One -- one's -- one deals
10 with the rights of child witnesses. The other is a rule
11 for calculating the duration of unlawful presence.

12 MR. KEDEM: That's right.

13 JUSTICE KAGAN: Are those the two?

14 MR. KEDEM: Those are two.

15 JUSTICE KAGAN: So those two, which really
16 have nothing to do with the generic meaning of sexual
17 abuse of a minor.

18 MR. KEDEM: That's correct.

19 JUSTICE KAGAN: A single dictionary -- a
20 single dictionary definition, and some legislative
21 history that even you indicate is sparse.

22 MR. KEDEM: I -- I think that that's
23 accurate. But if the Court engages in ordinary tools of
24 statutory interpretation, those are the sources that
25 usually it's relying on. And by usually rely on --

1 JUSTICE ALITO: Is it your understanding
2 anything other than -- if a stranger does anything to a
3 minor other than commit a rape, then that would not be
4 sexual abuse of a minor because the person wouldn't be a
5 relative or an acquaintance?

6 MR. KEDEM: I'm -- I'm not -- I'm not sure I
7 understand the question.

8 JUSTICE ALITO: I thought your definition
9 was it had to be a relative -- parent, relative, or
10 acquaintance; is that right?

11 MR. KEDEM: I think those are probably what
12 it targets. I'm -- I'm not sure that -- I would say
13 that if somebody isn't an acquaintance, it -- it doesn't
14 count.

15 JUSTICE BREYER: If -- of course. If
16 somebody meets someone at a bar and doesn't even know
17 them and -- and gets the person drunk and they go home
18 and they have sex, all right, that would sound much more
19 like sexual abuse of a minor than a -- a senior in
20 college dating and living with a -- a sophomore. Okay?

21 MR. KEDEM: So I -- I --

22 JUSTICE BREYER: That's my question.

23 MR. KEDEM: So I -- I think it would apply
24 in that case being an acquaintance.

25 JUSTICE BREYER: It would, but there's no

1 acquaintance.

2 MR. KEDEM: But if --

3 JUSTICE BREYER: Unless everyone is.

4 MR. KEDEM: If -- if I could turn to the
5 question of deference in this case. I think Petitioner
6 often raises separation of powers concerns but doesn't
7 actually explain why those come into play in this
8 instance. And I think -- let me give you the sort of
9 doctrinal response that the government has and then the
10 sort of more general response.

11 The narrow doctrinal response is that for
12 more than 100 years, this Court has upheld the statutory
13 schemes that impose criminal consequences on decisions
14 that are made by administrative agencies. Now, it may
15 be that there are concerns under that about notice or
16 concerns about delegation concerns, but Petitioner
17 himself obviously has no notice problems here given that
18 we're talking about a core administration in the civil
19 scheme, and that any criminal conduct that he might
20 engage in in the future, he would have very clear notice
21 that his prior State offense was an aggravated felony.

22 Perhaps there would be someone in some
23 hypothetical case who engaged in the offense conduct
24 before the board rendered its authoritative
25 interpretation, and maybe they would have an as-applied

1 due process challenge, but apart from that, we're not
2 aware of notice concerns ever coming into play.

3 JUSTICE GINSBURG: Don't you have the
4 problem that somebody in another State that did the same
5 thing that this defendant was -- this person was
6 convicted of would be no crime in another State?

7 MR. KEDEM: Sure.

8 JUSTICE GINSBURG: So --

9 MR. KEDEM: That -- that's true whenever you
10 have the categorical approach. So, for instance, in
11 Kawashima, this Court dealt with a provision covering
12 offenses involving fraud or deceit. It may be that
13 there are certain of those offenses that apply to -- in
14 one State that don't apply in another State, and that's
15 just a feature of the categorical approach.

16 I also think there are a number of features
17 of this case that distinguish it from maybe some of the
18 more problematic criminal applications that the Court
19 might have in mind.

20 First of all, we're talking about a core INA
21 provision. So if you're talking about which is the tail
22 and which is the dog, in this case, the civil
23 application is very much the dog. It is applied civilly
24 thousands of times a year. The number of applications
25 in the criminal context is vanishingly small.

1 Second of all -- second of all, we're
2 talking here about an explicit delegation of
3 interpretive authority, which is actually quite rare.
4 It is rare that Congress says that an agency explicitly
5 gets to render controlling interpretations of the
6 statute.

7 Furthermore, we're talking about only
8 instances of further culpable conduct. It is not a
9 violation of the board's decision alone that gets you
10 into criminal trouble. You have to engage in further
11 conduct, and that conduct has its own culpability.

12 And, finally, all of the potential criminal
13 consequences that we're talking about, these three
14 statutes, are ones that come for people who are trying
15 to violate and frustrate the civil scheme.

16 So Section 1253 talks about people who are
17 ordered to be removed but refuse to comply.

18 Section 1326 talks about people who have
19 been removed but then try illegally to reenter the
20 country.

21 And 1327 applies to people who try and
22 illegally assist others who are entering the country.

23 And so they are all directed at frustration
24 of the core civil scheme. So that would be another way
25 to distinguish this case from other, more problematic

1 instances.

2 Finally, I think part of what the Court is
3 reacting to, again, is the idea that drawing a line is
4 very difficult, and it's something that will be a little
5 bit arbitrary no matter what. I think that's a strong
6 reason to defer to the board, because administrative
7 agencies are actually quite good at drawing these sorts
8 of lines. And conversely, they're sort of problematic
9 for courts to do it.

10 And there's a layer of political
11 accountability that comes along when an agency does it,
12 because if the agency puts the -- the line in the wrong
13 place, if they make it too strenuous or too lenient,
14 then they can be held accountable for that.

15 If the Court has no further questions.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 Mr. Fisher, seven minutes.

18 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

19 ON BEHALF OF THE PETITIONER

20 MR. FISHER: Thank you. I'd like to cover
21 seven -- I'm sorry -- four topics.

22 (Laughter.)

23 MR. FISHER: Four topics.

24 First, as to multi-jurisdictional surveys,
25 the cases the government talks about where the Court has

1 not conducted those kinds of surveys are cases where the
2 Court did not have to define a generic offense. The two
3 cases that the Court has had to do that are Taylor and
4 in Duenas-Alvarez. And in both cases, they looked to --
5 this Court looked to multi-jurisdictional surveys.

6 And it's especially surprising to see the
7 government here criticizing multi-jurisdictional surveys
8 because that's precisely the approach the government
9 asked this Court to adopt in Duenas-Alvarez. And the
10 Court did, unanimously.

11 If I -- if I could just read one sentence of
12 that opinion, because it's not just a
13 multi-jurisdictional analysis, but it's conducting it in
14 the precise manner we asked the Court to conduct it
15 here.

16 The Court says at page 191, "To succeed,
17 Deunas-Alvarez must show something special about
18 California's version of the statute" -- that was a theft
19 statute -- "that criminalizes conduct that other States
20 would not consider illegal."

21 That's the question the Court posed at the
22 government's behest and answered in Duenas-Alvarez, and
23 that's the question we ask the Court to ask and answer
24 here today. And for good reason.

25 You don't just -- you need to have something

1 that's replicable and something that's objective when
2 you confront a provision that doesn't have an express
3 definition.

4 Imagine the person in his lawyer's office
5 saying, should I plead guilty to this crime or the other
6 crime? Which one is going to render me deportable? You
7 can't imagine a defendant's lawyer conducting his
8 Padilla duties, and having to imagine what the BIA might
9 come up with when it surveys family planning journals
10 from 20 years ago and imagines the kinds of things the
11 Solicitor General was describing. And so there are good
12 instrumental reasons for using multi-jurisdictional
13 surveys.

14 Finally, if you did end up in a situation
15 the Solicitor General would like you to believe exists
16 here, but we think doesn't, but if there were a
17 situation where you just had a scatter plot among the
18 States, and it were too difficult to find any common
19 core, what you would do in that situation is what the
20 Ninth Circuit, in a leading opinion by Judge Kozinski
21 did in a case called Anderson, which is revert back to
22 the Federal statute, defining that Federal offense, the
23 crime itself, where Congress acted like a criminal law
24 maker and said, here's what we want to cover.

25 Second, as to the topic of ruling out some

1 State statutes, depending on what rule the Court would
2 adopt here. We say, for the reasons in Footnote 1 of
3 our reply brief, that you actually don't have a serious
4 problem with overinclusiveness, because, yes, there are
5 some particular State laws that are going to get
6 rendered not aggravated felonies. All of those States
7 have laws dealing with 16 year olds, or -- or 15 year
8 old ages of consent, or slightly younger. So you're
9 still going to get the people that Congress most wanted
10 the law to apply to.

11 And just take an example like Georgia. It
12 has a law making it a crime for anyone to have sex with
13 somebody who's under 16, with no age differential at
14 all. Even if you wanted to pick up the age differential
15 in Section 2243, it still wouldn't be a problem in that
16 state because Georgia has a second law making it a
17 felony as opposed to a misdemeanor when there's a
18 four-year age differential. So you find this time and
19 again in the State laws that you don't have a serious
20 problem with consequences.

21 Next, the Solicitor General talked about
22 Section 2243 if you were to adopt that definition, in
23 leaving out things like familial abuse or abuse of
24 authority and the like.

25 Now we agree, or at least our position is

1 that you don't have to answer that question. I think,
2 in all candor, that is the hard case. It's the one that
3 falls outside of Section 2243, and the reason why you
4 don't necessarily have to choose in this case.

5 But there would be a good reason to choose
6 Section 2243, is because the structure of the BIA -- I'm
7 sorry -- the structure of the INA has other provisions
8 that make other things deportable offenses, most notably
9 child abuse or crimes against moral turpitude. So the
10 familial abuse, like my friend here is describing, would
11 be picked up in a separate subsection of the INA. So
12 you don't have to worry about that consequence either.

13 And then finally, as to statutory
14 construction and the rule of lenity. First, I'd say you
15 don't have to reach that difficult question about how
16 Chevron and the rule of lenity interact when it comes to
17 hybrid statutes. I think, if I understood the other
18 side's argument, all it's down to is a Black's Law
19 Dictionary citation, primarily. And -- and even that
20 has its problems for the reason Justice Alito pointed
21 out, when it deals with people who are not
22 acquaintances.

23 And secondly, because even that provision
24 itself uses the word "illegal." And to make the word
25 "illegal" have meaning, as Justice Kagan points out you

1 need to do, you turn to a different page in Black's Law
2 Dictionary to find out when sex is illegal based on age,
3 and it tells you that 16 is the age of consent. So even
4 Black's Law Dictionary leads to where we would have the
5 Court go, so the BIA's interpretation cannot possibly be
6 reasonable.

7 But if you did want to address or need to
8 address the question of how Chevron and the rule of
9 lenity interact, at the end of the day, the Solicitor
10 General has to be arguing one of two things to this
11 Court.

12 Either their position has to be that
13 statutes can be chameleons and mean one thing on
14 criminal side and a different thing in the civil side --
15 and that would be in the teeth of many of this Court's
16 cases -- or they have to be arguing that the BIA has the
17 power to -- to control -- I'm sorry -- to control what a
18 statute means, not just in civil settings, but in
19 criminal settings. And that would be a dramatic
20 departure from anything the Court has ever held, at
21 least where Congress hasn't delegated that power
22 expressly to the agency to control, not only civil
23 applications, but also the scope of criminal law.

24 If there's a problem with that, if you're
25 troubled by that consequence, remember, Congress can

1 always draft two separate statutes. At the end of the
2 day, it's Congress's choice whether to have a statute
3 apply in both settings. And I think it's reasonable to
4 conclude that if Congress has a statute applying in both
5 settings, it wants it, first of all, to mean the same
6 thing, and second of all, it doesn't intend the agency
7 to have power over that particular provision.

8 If the Court has any questions about our
9 approach or about what I've said, I'm happy to answer
10 them, otherwise I'll submit the case.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.
12 Case is submitted.

13 (Whereupon, at 12:07 p.m., the case in the
14 above-entitled matter was submitted.)

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