IMMIGRATION LAW — FOURTH CIRCUIT PROVIDES ITS OWN DEFINITION OF "SEXUAL ABUSE OF A MINOR" — *Amos v. Lynch*, 790 F.3d 512 (4th Cir. 2015).

An alien admitted to the United States is subject to removal if convicted of an aggravated felony, as defined in the Immigration and Nationality Act (the Act).[1] A noncitizen falls under the "sexual abuse of a minor" subcategory of the aggravated felony statute in the Act if convicted of a federal or state statute that conforms to the Board of Immigration Appeals' (BIA) or the circuit courts' definition of "sexual abuse of a minor."[2] The United States Court of Appeals for the Fourth Cir-

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1. 8 U.S.C. § 1227(a)(2)(A)(iii) (2008) (stating "[a]ny alien convicted of an aggravated felony at any time after admission is deportable"); 8 U.S.C. § 1101(a)(43) (2008) (defining what crimes or acts constitute aggravated felonies). Under the Immigration and Nationality Act (the Act), a conviction that constitutes "sexual abuse of a minor" is an aggravated felony that mandates removal from the United States. 8 U.S.C. § 1101(a)(43)(A). Below are some examples of conduct and convictions that constitute aggravated felonies:

> (A) murder, rape, or sexual abuse of a minor;
> (B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);
> (C) illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title);
> (D) an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;
> (E) an offense described in—
> (i) section 842(h) or (i) of Title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);
> (ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of Title 18 (relating to firearms offenses); or
> (iii) section 5861 of Title 26 (relating to firearms offenses);
> (F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year;
> (G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year . . . .

8 U.S.C. § 1101(a)(43).

2. *See* Matter of Rodriguez-Rodriguez, 22 I. & N. Dec. 991 (BIA 1999) (providing Board of Immigration Appeals' description of what constitutes "sexual abuse of a minor"). The Board of Immigration Appeals (BIA) used a federal criminal statute that "includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct

cuit, in *Amos v. Lynch*,[3] addressed whether the former Maryland statute qualifies as "sexual abuse of a minor" under the aggravated felony statute in the Act.[4] The Fourth Circuit did

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or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children" as a broader guide to determine if a Texas statute was "sexual abuse of a minor" for immigration purposes. *Id.* at 995-96 (citing 18 U.S.C. § 3509(a)(8) (1994)). *See also* Mugalli v. Ashcroft, 258 F.3d 52, 58-59 (2d. Cir. 2001) (adopting BIA's definition of "sexual abuse of a minor"); Restrepo v. Attorney Gen., 617 F.3d 787, 792, 795-96 (3d. Cir. 2010) (applying 18 U.S.C. § 3509(a)(8), as did BIA); Velasco-Giron v. Holder, 773 F.3d 774, 776 (7th Cir. 2014) (declaring BIA's definition of "sexual abuse of a minor" reasonable). *But see* Amos v. Lynch, 790 F.3d 512, 520 (4th Cir. 2015) (holding BIA never provided definition of "sexual abuse of a minor" in *Matter of Rodriguez-Rodriguez* (*Rodriguez-Rodriguez*)); Estrada-Espinoza v. Mukasey, 546 F.3d 1147, 1152 (9th Cir. 2008) (explaining BIA in *Rodriguez-Rodriguez* put forth merely one guideline). *See generally* Contreras v. Holder, 754 F.3d 286 (5th Cir. 2014) (creating its own analysis because it rejects defining generic offenses); Loeza-Dominguez v. Gonzalez, 428 F.3d 1156 (8th Cir. 2005) (declaring BIA's common definition of child abuse appropriate); Emile v. I.N.S., 244 F.3d 183 (1st Cir. 2001) (acknowledging BIA's general definition must receive deference if found reasonable).

3. 790 F.3d 512 (4th Cir. 2015).

4. *See id.* at 521 (analyzing Maryland statute in immigration context). *See* MD. CODE ANN., ART. 27 § 35A (1988) (repealed 2002), *reprinted in Amos*, 790 F.3d at 515 (outlining conduct in "causing abuse to a child" statute). The Maryland statute provided:

> (a) Definitions—
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> (1) In this section the following words have the meanings indicated.
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> (2) "Abuse" means:
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> (i) The sustaining of physical injury by a child as a result of cruel or inhumane treatment or as a result of a malicious act by any parent or other person who has permanent or temporary care or custody or responsibility for supervision of a child under circumstances that indicate that the child's health or welfare is harmed or threatened thereby; or
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> (ii) Sexual abuse of a child, whether physical injuries are sustained or not.
>
> (3) "Child" means any individual under [18 years].
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> (4)(i) "Sexual abuse" means any act that involves sexual molestation or exploitation of a child by a parent or other person who has permanent or temporary care or custody or responsibility for supervision of a child. (ii) "Sexual abuse" includes, but is not limited to: 1. Incest, rape, or sexual offense in any degree; 2. Sodomy; and 3. Unnatural or perverted sexual practices.
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> (b) Violation constitutes felony; penalty.—A parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a child who causes abuse to the child is guilty of a felony and on conviction is subject to imprisonment in the penitentiary not exceeding 15 years.

MD. CODE ANN., ART. 27 § 35A (1988) (repealed 2002), *reprinted in Amos*, 790 F.3d at 515. According to the United States Court of Appeals for the Fourth Circuit, the

not defer to the BIA's definition and instead determined that the Maryland statute did not constitute "sexual abuse of a minor" under the aggravated felony statute in the Act.[5]

Richard Jesus Amos (Amos), a native and citizen of the Philippines, came to the United States in 1980.[6] Amos was admitted to the United States as a lawful permanent resident at the age of nine years old.[7] Ten years after his arrival in the United States as a lawful permanent resident, he was convicted of causing abuse to a child in Maryland.[8] Amos was sentenced to eighteen months imprisonment, which was suspended for three years of probation.[9]

In 2008, the Department of Homeland Security initiated removal proceedings against Amos.[10] Amos was charged as being removable from the United States for having been convicted of a crime that constitutes an aggravated felony, namely, "sexual abuse of a minor."[11] At the hearing before an immigration judge, Amos was ordered removed from the United States.[12] The BIA affirmed the order of removal.[13] After the BIA affirmed the decision, Amos filed a motion to reconsider, which the BIA denied.[14] Amos petitioned the Fourth Circuit to review

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least culpable conduct under section 35A is an "omission or failure to act to prevent molestation or exploitation when it is reasonably possible to act." *See Amos*, 790 F.3d at 522 (citing Degren v. State, 722 A.2d 887, 899 (Md. Ct. App. 1999)). In *Degren v. State*, the Maryland Court of Appeals was faced with a defendant-petitioner who appealed her conviction under section 35A where she allegedly sat on a bed and watched but did not stop her husband from sexually abusing a minor child in her care. *Id.* at 899-900. The court held the defendant was guilty of "sexual abuse of a minor" under the statute. *Id.* at 899. The court reasoned that because the defendant had "temporary or permanent custody of a child," she had a duty or responsibility to act and thus, participated in the sexual abuse by watching and allowing men to engage in intercourse with the minor. *Id.* at 899-900.

5. *See Amos*, 790 F.3d at 514 (conducting its own immigration analysis); *see also supra* note 2 (explaining BIA's analysis of "sexual abuse of a minor" statutes).

6. *Amos*, 790 F.3d at 514 (providing factual background of respondent in removal proceedings).

7. *Id.* (describing Richard Jesus Amos (Amos)'s background).

8. *Id.* After review of the case, the Fourth Circuit determined the underlying facts of the criminal conviction were that Amos inserted the five-year-old victim's penis into his mouth. *Id.* at 516. *See also supra* note 4 (noting language of Maryland statute applied in conviction of Amos).

9. *Amos*, 790 F.3d at 515 (stating length of sentence imposed).

10. *Id.* (acknowledging commencement of immigration removal proceedings).

11. *Id.* (listing basis for charge of removability).

12. *Id.* (summarizing immigration judge's decision at initial removal hearing).

13. *Id.* (describing BIA's disposition).

14. *Id.* (reaffirming BIA's prior determination).

the BIA's affirmation of the order of removal, as well as the denial of the motion to reconsider, both of which were consolidated into one case, and eventually resulted in the Court's decision to vacate the order of removal.[15]

Congress enacted the aggravated felony statute to remove aliens who were convicted of the most heinous crimes and attached the most severe consequences for convictions of those crimes.[16] Certain conduct under the aggravated felony statute is defined in the Act by referencing one or multiple federal criminal statutes; "sexual abuse of a minor," however, does not have a reference statute.[17] To fill the gap left by Congress, the BIA issued a precedential decision in *Matter of Rodriguez-Rodriguez* (*Rodriguez-Rodriguez*),[18] which sought to define "sexual abuse

15. *Amos*, 790 F.3d at 516, 522 (articulating Fourth Circuit's consolidation of Amos's petitions into one case).

16. *See* 8 U.S.C. § 1101(a)(43)(A) (2014) (delineating murder, rape, and "sexual abuse of a minor" as initial conduct constituting aggravated felonies); 8 U.S.C. § 1227(a)(2)(A)(iii) (2015) (mandating deportation of noncitizens convicted of aggravated felonies); 8 U.S.C. § 1182(a)(9)(A)(i) (2015) (creating permanent bar of admission to United States for aliens previously deported as aggravated felons); *see also* Lauren Gearty, Comment, *Second Drug Offense Not Aggravated Felony Merely Because of Possible*, 43 SUFFOLK U. L. REV. 277, 278 (2009) (describing multitude of adverse consequences for aggravated felons); William J. Johnson, *When Misdemeanors Are Felonies: The Aggravated Felony of Sexual Abuse of a Minor*, 52 N.Y.L. SCH. L. REV. 419, 419-21 (2007) (explaining how both misdemeanors and felonies can constitute aggravated felonies); William E. McAlvanah, *Strategies for Avoiding Adverse Immigration Consequences When Representing Foreign-Born Defendants*, 227 N. J. LAW., APR. 2004, 30, 32 (indicating only few options of forms of relief from removal for aliens convicted of aggravated felonies). *See generally* Erica Steinmiller-Perdomo, Note, *Consequences Too Harsh for Noncitizens Convicted of Aggravated Felonies?*, 41 FLA. ST. U. L. REV. 1173 (2014) (explaining harsh consequences for aggravated felons). The U.S. Senate Committee on the Judiciary stated the purposes for the expansion of the aggravated felony statute are "decreasing the number of persons becoming part of the U.S. population in violation of this country's immigration law; . . . expediting the removal of excludable and deportable aliens, especially criminal aliens; and reducing the abuse of parole and asylum provisions." S. REP. NO. 104-249, at 2 (1996). *See generally* Michael S. Vastine, *From Bristol, to Hollywood, to a Land Far, Far Away: Considering the Immigration Consequences of Statutory Rape*, 7 RUTGERS J. L. & PUB. POL'Y 289 (2010) (expressing concern over inconsistent statutory rape laws constituting sexual abuse of minor).

17. *See* 8 U.S.C. § 1101(a)(43)(A-U) (2014) (outlining conduct falling under aggravated felony statute). Some of the conduct described as constituting aggravated felonies reference federal criminal statutes. *Id.* For example, "illicit trafficking in a controlled substance" cross-references both 21 U.S.C. § 802 and 18 U.S.C. § 924(c) to provide a more succinct definition. *Id.* When Congress includes defining language in one area but omits it in another, it is presumed that Congress intentionally omitted the language. INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987).

18. 22 I. & N. Dec. 991 (BIA 1999).

of a minor."[19] The BIA's decision invoked the 18 U.S.C. § 3509(a)(8) and *Black's Law Dictionary* definitions of sexual abuse because both permit conduct lacking physical contact to be an offense, unlike other federal statutes.[20] When attempting to determine if a statute fits within the definition of "sexual abuse of a minor" under the Act, a court will conduct an inquiry to determine what portion of the statute the individual was convicted of and what is the least level of conduct criminalized under that specific portion of the statute.[21] In Maryland, the

19. *Id.* at 995-96. *See also* 8 U.S.C. § 1103(a)(1) (2009) (declaring rulings of Attorney General controlling).

20. *See* 18 U.S.C. § 3509(a)(8); *supra* note 2 (providing definition of statute); *see also Rodriguez-Rodriguez*, 22 I. & N. Dec. at 996 (specifying certain federal statutes as too narrow to define "sexual abuse of a minor"). The BIA indicated that 18 U.S.C. §§ 2243, 2244, and 2246 all were federal criminal statutes that could be used to define "sexual abuse of a minor" but chose not to use them because the statutes required contact as an element. *Id.* The BIA also considered the mental culpability required to be convicted of the Texas statute as well as the potential punishment. *Id.* In a more formal context, "sexual abuse" was defined as "illegal sex acts performed against a minor by a parent guardian, relative, or acquaintance." BLACK'S LAW DICTIONARY 1375 (6th ed. 1990).

21. *See* Taylor v. United States, 495 U.S. 575, 597 (1990) (comparing elements of statutory conviction with elements of offense as commonly understood). Using the categorical approach, the Court would not look into the facts underlying the conviction but would only look at the statutory construction. *Id.* at 597. Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 262 (2012) (discussing use of categorical approach in immigration context). It was suggested that the categorical approach, although not the best option, "allows some noncitizens to escape the otherwise harsh and blunt statutory rules." *Id.* at 303. Instead, an alternative approach would be to diminish some removal grounds based on aggravated felony convictions so "removal provisions are triggered by only genuinely serious crimes." *Id.* at 311. *See also* Descamps v. United States, 133 S.Ct. 2276, 2281 (2013) (finding courts can consult certain documents to determine what portion of statute one convicted of). A court will apply the modified categorical analysis only when the statute in question has multiple alternative elements. *Id.* at 2279, 2281. Moncrieffe v. Holder, 133 S.Ct. 1678, 1680 (2013) (emphasizing reviewing courts' instruction to review statutory elements, not underlying facts when conducting categorical analysis). A court in reviewing the statute must determine what conduct is necessarily involved in the statute. *Id.* at 1685. *See also* Johnson v. United States, 559 U.S. 133, 137 (2010) (reviewing least conduct criminalized by statute in making determination). To determine what the least conduct criminalized by the statute is, the reviewing courts will look to statute and case law to find what the state or federal courts criminalize. *Id.* at 136-137. *See also* Shepard v. United States, 544 U.S. 13, 17 (2005) (expounding on *Taylor v. United States*; noting judges can consult record of conviction in categorical inquiry). The Supreme Court of the United States indicated courts could review "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant

least level of conduct criminalized under the specific portion of the sexual abuse statute was delineated in *Degren v. State*.[22]

The Supreme Court of the United States has identified two levels of deference that could be accorded to federal administrative agencies and some instances where such agencies are to be accorded no deference.[23] As described in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,[24] a reviewing court must defer to the federal administrative agency's statutory interpretation where: (1) Congress's intent is unclear and (2) the agency's interpretation is reasonable.[25] Under *Skidmore v. Swift & Co.*,[26] the reviewing court will consider multiple factors when deciding

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assented." *Id.* at 16. *See generally* Nijhawan v. Holder, 557 U.S. 29 (2009) (clarifying modified categorical analysis also used in immigration and criminal proceedings).

22. 722 A.2d 887, 899 (Md. Ct. App. 1999) (outlining least culpable conduct under section 35A). The Maryland court held that section 35A contained the conduct of watching and failing to intervene during the sexual abuse of a minor, where a duty to intervene existed. *Id.*

23. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984) (finding courts must give deference to reasonable agency statutory interpretations when Congress silent); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (describing when courts may give deference to agency's statutory interpretation); *see also* INS v. Abudu, 485 U.S. 94, 110 (1988) (noting judicial deference to Executive Branch in immigration context where foreign relations appear implicated); 8 C.F.R. § 1003.1(a)(1) (2015) (vesting authority of Attorney General in BIA). *See generally* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833 (2001) (discussing history and application of deference afforded to agency statutory interpretations).

24. 467 U.S. 837 (1984).

25. *See id.* at 842-43 (outlining Supreme Court's two-step analysis of agency determinations). Congress enacted the Clean Air Act Amendments of 1977 and part of the legislation required states that failed to meet the standards put forth by the Environmental Protection Agency (EPA) "to establish a permit program regulating 'new or modified major stationary sources' of air pollution." *Id.* at 837. The amended Clean Air Act of 1977 did not specifically define "stationary sources." *Id.* To fill the void left by Congress, the EPA provided a definition of "stationary sources" through regulations. *Id.* The United States Court of Appeals for the District of Columbia Circuit refused to apply the definition set forth by the administrative agency and instead conducted its own analysis. *Id.* at 841-42. The Supreme Court faced the question of how much deference, if any, should be afforded to administrative interpretations of statutes. *Id.* The Court held that when Congress expressly or implicitly delegates authority to an administrative agency to formulate policy and rules, the agency's determinations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-44. The Supreme Court afforded deference to agency interpretations because the agencies are entrusted to administer the statutes as well as "the principle of deference to administrative interpretations." *Id.* at 844.

26. 323 U.S. 134 (1944).

what amount of deference to afford an administrative agency.[27] In *INS v. Aguirre-Aguirre*,[28] the Supreme Court made it clear that precedential BIA decisions interpreting the Act should be given *Chevron* deference.[29] Notwithstanding the *Aguirre-Aguirre* decision, circuit courts vary as to how much deference, if any, to afford BIA precedential decisions.[30]

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27. *See id.* at 140. In *Skidmore v. Swift & Co.*, the U.S. Supreme Court analyzed whether deference should be afforded by courts to administrator's rulings applying the Fair Labor Standards Act. *Id.* at 139-40. The Court held that "rulings, interpretations and opinions of the Administrator under this Act" are not controlling but are persuasive depending on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 140. The Court reasoned that while agencies have authority to make policy determinations, they are regarded only as persuasive, not controlling. *Id.* at 139. *See also* Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (affording *Skidmore* deference to agency interpretation). The U.S. Supreme Court noted that the lower level of *Skidmore* deference is warranted when the agency has put forth an opinion letter. *Id.* at 587. The modern era of *Skidmore* deference notes factors such as the "degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." United States v. Mead Corp., 533 U.S. 218, 228 (2001) (citations omitted) (footnotes omitted).

28. 526 U.S. 415 (1999).

29. *Id.* at 424. The United States Court of Appeals for the Ninth Circuit created a statutory definition of "serious nonpolitical crime" in the face of the BIA's statutory interpretation. *Id.* at 424. The U.S. Supreme Court rejected the Ninth Circuit's definition and indicated that the Ninth Circuit should have used the BIA's statutory interpretation as it was due *Chevron* deference. *Id.* at 425. *See also* Michael Dorfman-Gonzalez, Note, Chevron*'s Flexible Agency Expertise Model: Applying the* Chevron *Doctrine to the BIA's Interpretation of the INA's Criminal Law—Based Aggravated Felony Provision*, 82 FORDHAM L. REV. 973, 996-97 (2013) (highlighting how reviewing courts must afford BIA precedent cases *Chevron* deference). *See generally* Molly Hennessy-Fiske, *What Happened to the President's Immigration Programs?*, L.A. TIMES, Oct. 20, 2015, http://www.latimes.com/nation/nationnow/la-na-nn-immigration-executive-action-20151019-story.html (explaining judicial order stopping President Obama's executive action initiatives); Burgess Everett & Seung Min Kim, *Immigration Reform Looks Dead*, POLITICO, Mar. 9, 2015, *available at* http://www.politico.com/story/2015/03/immigration-reform-congress-115880 (addressing Congress's current state of inaction regarding immigration reform); Max Ehrenfreund, *Your Complete Guide to Obama's Immigration Executive Action*, WASH. POST, Nov. 20, 2014, http://www.washingtonpost.com/news/wonkblog/wp/2014/11/19/yourcomplete-guide-to-obamas-immigration-order/ (summarizing President Obama's executive actions).

30. *See supra* note 2 (outlining circuit split regarding BIA precedent decision in *Rodriguez-Rodriguez*); *e.g.*, Mayra E. Varela, Comment, *No Child Left Behind?: Why the Supreme Court Erred in Interpreting the Scope of § 1153(H)(3) of the Child Status Protection Act in* Scialabba v. Cuellar De Osorio, 47 TEX. TECH L. REV. 367, 385-91 (2015) (addressing various circuit courts' decisions to adopt or reject BIA precedent decision). *See generally* Paul Chaffin, *Expertise and Immigration Administration: When Does* Chevron *Apply to BIA Interpretations of the INA?*, 69 N.Y.U. ANN.

While the BIA interpretations of the Act are to be afforded *Chevron* deference by federal courts, the circuit courts are split as to what deference should be afforded to the BIA's statutory interpretation of "sexual abuse of a minor" delineated in *Rodriguez-Rodriguez*.[31] After the BIA outlined the framework of how to determine if a state conviction constitutes "sexual abuse of a minor" under the Act, the United States Courts of Appeals for the Second, Third, and Seventh Circuits gave *Chevron* deference to the decision.[32] On the other hand, the United States Court of Appeals for the Ninth Circuit chose not to give *Chevron* deference to the BIA's definition of "sexual abuse of a minor" in *Rodriguez-Rodriguez* even though the Supreme Court stated BIA precedent cases require *Chevron* deference.[33] The inconsistent enforcement of immigration laws has triggered both an unsuccessful call to Congress to conduct comprehensive immigration reform as well as failed attempts at executive action by President Obama.[34]

The Fourth Circuit, in *Amos v. Lynch*, faced the same predicament of what deference, if any, to afford the BIA's statutory interpretation of "sexual abuse of a minor" put forth in *Rodriguez-Rodriguez*.[35] The Fourth Circuit acknowledged its duty to give *Chevron* deference to the BIA's precedent decisions, but noted that the *Amos* case was an unpublished decision and thus,

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SURV. AM. L. 503 (2013) (stating inconsistent circuit courts application of *Chevron* deference results in inconsistent immigration law).

31. *See supra* note 2 and accompanying text (outlining circuit split on whether BIA defined "sexual abuse of a minor").

32. *See supra* note 2 (discussing circuit courts following Supreme Court's direction affording *Chevron* deference to BIA). Here, the circuit courts adhered to the order of the Supreme Court's decision in *Aguirre-Aguirre* and afforded *Chevron* deference to the BIA's precedential decision in *Rodriguez-Rodriguez*. *See supra* note 2 (listing cases applying BIA's statutory interpretation). The circuit courts also managed to align with Congress's intent in expanding the aggravated felony statute. *See supra* note 16 (describing aggravated felony statute and consequences).

33. *See Estrada-Espinoza*, 546 F.3d at 1152 (describing Ninth Circuit's decision to reject BIA's statutory interpretation of "sexual abuse of a minor"). The Ninth Circuit decided not to afford *Chevron* deference because it determined the BIA never provided a statutory definition of "sexual abuse of a minor" in *Rodriguez-Rodriguez*. *Id.* at 1152. The Ninth Circuit decided to conduct its own analysis to provide a statutory interpretation of "sexual abuse of a minor" in its own particular circuit. *Id.*

34. *See supra* note 29 (describing political dysfunction regarding immigration laws). President Obama's executive actions would not necessarily address the issue of inconsistent enforcement of immigration laws in the circuit courts but would provide enforcement priorities to the enforcement authorities. *See supra* note 29.

35. *See Amos*, 790 F.3d at 515 (highlighting issues presented).

did not require such deference.[36] The BIA's foundation for its decision rested on the precedential decision in *Rodriguez-Rodriguez*, which the Fourth Circuit acknowledged as potentially deserving of *Chevron* deference.[37] The Court noted that in *Rodriguez-Rodriguez,* the BIA determined that 18 U.S.C. §§ 2243, 2244, and 2246 all were considered to be too narrow to include all of the state crimes related to "sexual abuse of a minor."[38] The Fourth Circuit then acknowledged that *Rodriguez-Rodriguez* "discussed" 18 U.S.C. § 3509(a)(8) but did not go so far to say *Rodriguez-Rodriguez* adopted it as a definition.[39] It did note, however, that the Second, Third, and Seventh Circuits concluded that the BIA adopted § 3509(a)(8) as a definition of "sexual abuse of a minor" but that the Ninth Circuit came to a disparate conclusion.[40]

After its analysis of other circuits' approaches, the Fourth Circuit narrowed its focus to the BIA's language stating it was "not adopting [that] statute as a definitive standard or definition," but that § 3509(a)(8) was invoked "as a guide in identifying the types of crimes [it] would consider to be sexual abuse of a minor."[41] The Court decided that the BIA decision was to be afforded *Skidmore* deference rather than *Chevron* deference

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36. *Id.* at 518 (contrasting BIA's unpublished decision from precedent case). The Court acknowledged that the BIA's decision in *Rodriguez-Rodriguez* did not offer analysis to be afforded precedential deference but that its reasoning rested on analysis used in a prior decision. *Id.*

37. *See id.* at 519 (admitting BIA's statutory interpretations, when authorized by Congress, deserve *Chevron* deference). By qualifying the courts' analysis from the beginning, it left open the possibility of not affording *Chevron* deference but rather a lesser deserving form of deference. *Id.*

38. *Id.* (explaining BIA's decision not to choose certain criminal statutes as they appeared too narrow). The various federal criminal statutes were rejected because they could have potentially limited the breadth of the "sexual abuse of a minor" statute only to crimes that included physical contact. *Id.*

39. *Id.* (suggesting BIA's decision to use § 3509(a)(8) not chosen as statutory interpretation). Reviewing the BIA's decision in *Rodriguez-Rodriguez*, the Court extracted language where the BIA chose not to use § 3509(a)(8) as the sole definition of "sexual abuse of a minor." *Id.*

40. *See id.* at 519-20 (reviewing other circuit courts' approaches in deciding whether to afford BIA decisions *Chevron* deference). The Court noted that it disagreed with the conclusion of the circuit courts that deferred to the BIA's adoption of § 3509(a)(8) as a definition of "sexual abuse of a minor." *Id.* Next, the Court cited the Ninth Circuit's determination that the BIA did not define "sexual abuse of a minor" in *Rodriguez-Rodriguez*, finding it only provided an "'advisory guideline' rather than a 'uniform definition' of 'sexual abuse of a minor.'" *Id.* at 520.

41. *See Amos*, 790 F.3d at 519-20 (focusing analysis on "guide" and refusing to consider it interpretive of "sexual abuse of a minor"). The Court went on to note how

based off of the BIA's use of the word "guide" in the *Rodriguez-Rodriguez* decision.[42] The Court reasoned that because the BIA did not provide a definition, a categorical analysis could not be conducted.[43] As a result, it conducted its own inquiry into the least culpable conduct under the Maryland statute and found that it included both "the affirmative acts of watching and failing to intervene," as well as "an omission or failure to act when a child is being sexually abused."[44] In reviewing the least culpable conduct under the Maryland statute, the Fourth Circuit concluded that even when using § 3509(a)(8) as a "guide," the "omission or failure to act" under the Maryland statute could not be considered "sexual abuse of a minor" because it contained levels of culpability lower than that in § 3509(a)(8).[45] As a result, Amos could not be ordered removed as a noncitizen convicted of an aggravated felony specifically for "sexual abuse of a minor."[46]

First, the Fourth Circuit in its analysis of the BIA's precedent decision in *Rodriguez-Rodriguez* strategically circumvented the order of the Supreme Court in *Aguirre-Aguirre* to afford BIA precedent decisions *Chevron* deference when the agency was given the authority to interpret statutes.[47] In *Amos*,

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"the BIA did not provide direction regarding the elements of the generic federal crime of 'sexual abuse of a minor.'" *Id.* at 520.

42. *See id.* at 521 (maintaining decision BIA provided guidelines and thus, deserved *Skidmore* deference). The Fourth Circuit then indicated the methodology that the BIA used in *Rodriguez-Rodriguez* was much different than a prior approach taken where a specific definition of a federal crime with distinct elements was adopted. *Id.* at 520 (citations omitted). The Court contrasted the prior methodology with the methodology used by the BIA in the *Rodriguez-Rodriguez* case. *Id.*

43. *See id.* at 520 (indicating court could not conduct categorical inquiry without statutory definition). The Court could not compare elements of two statutes when only one statute contained definitive elements. *Id.* Without a statutory interpretation from the BIA, the Court had to conduct its own analysis. *Id.*

44. *See id.* at 522 (analyzing conduct encompassed in Maryland statute). The Court relied heavily on the dicta in *Degren* where the Maryland court noted the sexual abuse statute included an "omission or failure to act to prevent molestation or exploitation when it is reasonably possible to act." *Id.* at 522 (citing *Degren*, 722 A.2d at 899). It did go on to state as well that the sexual abuse statute included "the affirmative acts of watching and failing to intervene." *Id.*

45. *See id.* (suggesting Maryland statute did not constitute "sexual abuse of a minor" under the Act). Using the analysis from *Degren*, the Court decided that failing to stop sexual abuse was not conduct encompassed in § 3509(a)(8). *Id.*

46. *See id.* at 522 (concluding § 3509(a)(8) did not encompass Amos's Maryland conviction).

47. *See supra* notes 29, 41-45 and accompanying text (articulating authority given to BIA to provide statutory interpretations of the Act when Congress permits).

the Fourth Circuit admitted the BIA rejected the use of various criminal statutes as being too narrow and restrictive; in *Rodriguez-Rodriguez*, however, the Court chose to use the word "discussed" to refer to the BIA's choice of § 3509(a)(8) rather than as a statutory interpretation of "sexual abuse of a minor."[48] The Court also focused on the BIA's decision to refer to its use of § 3509(a)(8) as a "guide" in order to lessen its precedential authority.[49] The BIA's decision to use the word "guide" should not lessen the deference it should be afforded.[50] A statute is, necessarily, a guide for factfinders to use to analyze the conduct of an individual to determine if the individual committed a crime.[51] Here, the BIA used § 3509(a)(8) as a "guide" for factfinders to determine if a state or federal statute constitutes "sexual abuse of a minor" and, therefore, should have been afforded *Chevron* deference.[52]

Second, the Fourth Circuit's analysis in *Amos* of the least culpable conduct under the Maryland statute described in *Degren* tactfully omitted an important part from the *Degren* decision.[53] The Court included "when it is reasonably possible to

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48. *See supra* note 40 and accompanying text (circumventing obligation to give *Chevron* deference by focusing on semantics over substance).

49. *See supra* note 42 and accompanying text (focusing analysis on BIA's choice to use "guide" in its precedent decision). The Court chose to focus on the word "guide" to assure an administrative agency like the BIA would not restrict its analysis. *Id.*

50. *See Amos*, 790 F.3d at 522 (leaving path open to conduct its own interpretive analysis).

51. *See supra* note 2 (listing circuit courts giving *Chevron* deference to BIA's statutory interpretation of "sexual abuse of a minor"). Section 3509(a)(8) provides a multitude of examples of what conduct could constitute "sexual abuse of a minor" that a reviewing court can compare to a state statute. *See Rodriguez-Rodriguez*, 22 I. & N. Dec. at 995-96. The federal statute selected by the BIA contains various forms of conduct precisely to include the conduct outlined in *Degren* as well as in *Amos*. *See id.* (illustrating non-physical conduct constituted sexual abuse under Maryland statute).

52. *See supra* notes 2, 23, 29 (explaining why reviewing courts should afford BIA precedent decisions interpreting statutes *Chevron* deference). The BIA's decision to use the word "guide" was not to lessen the reach of their decision but was to extend it. *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 995-96. The BIA intentionally used the definition in § 3509(a)(8) in a precedential decision for reviewing courts to use so as to not exclude sexually abusive crimes that did not include physical contact. *Id.*

53. *See Amos*, 790 F.3d at 522 (omitting important language from Maryland case). In *Degren*, the Maryland court examined if a defendant failed to intervene during the sexual abuse of a minor where a duty to intervene existed. *See Degren*, 722 A.2d at 899. When the Fourth Circuit extracted language from the *Degren* case for its

act" but failed to include "when a duty to do so exists."[54] By omitting the language, an inference could be drawn that a person with no duty to act when a minor is being sexually abused could be criminally punished under the Maryland statute, which is inaccurate.[55] The actual conduct considered the least culpable conduct criminalized under the Maryland statute and described in *Degren* is intended for those who have a duty to act when reasonable but instead, watch and fail to act when a child is being sexually abused.[56] Further, the Court took language from *Degren*, fusing dictum, the "omission or failure to act when a child is being sexually abused," with law, "the affirmative acts of watching and failing to intervene."[57] Even using the dictum in *Degren*, as the Court did in *Amos*, the "omission or failure to

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own opinion, it omitted that a duty to intervene during the abuse is an essential element. *See Amos*, 790 F.3d at 522.

54. *See Amos*, 790 F.3d at 516 (depicting Maryland court's reasoning in manner to support its own analysis). By omitting the element, it created a perception that a lower level of culpability existed. *See id.* at 520.

55. *See id.* (portraying Maryland decision as including much lower level of culpability than in the Act). Whether intentional or not, the failure to include the language from the case results in a drastic communication error. *See id.* (omitting portion of Maryland statute in Fourth Circuit's analysis).

56. *See supra* note 4 (tracing Maryland child abuse statute and examining least level of criminalized conduct under statute). It is reasonable to suggest that watching and failing to stop the sexual abuse of a child by another when a duty to do so exists, like in *Degren*, is tantamount to assisting another in the "sexual abuse of a minor" under § 3509(a)(8). *See Rodriguez-Rodriguez*, 22 I. & N. Dec. at 995-96; *Degren*, 722 A.2d at 899.

57. *See Amos*, 790 F.3d at 522 (describing Fourth Circuit's reasoning how § 3509(a)(8) did not encompass Maryland sexual abuse statute). In *Degren*, the Maryland court held that an adult who watched and failed to intervene during the "sexual abuse of a minor" where a duty existed constituted sexual abuse under the Maryland statute. *See* 722 A.2d at 899. Merely as dictum, the Maryland court expressed the belief that the "omission or failure to act when a child is being sexually abused" would also constitute "sexual abuse of a minor." *Id.* The court in *Amos* should have focused its analysis on the law from *Degren*, which likely would have resulted in a different outcome. *See id.* (holding watching and failing to intervene where duty exists during sexual abuse constituted sexual abuse). Watching the minor engage in intercourse with another adult constitutes sexual abuse in numerous sections separated disjunctively. *See* § 3509(a)(8). One possibility is that the conduct of watching the minor engage in intercourse with another adult is the "use . . . of a child to engage in . . . sexually explicit conduct." *See id.* The use would be the defendant watching the intercourse for her own benefit or interest. *See id.* Another interpretation could be the act of watching the abuse was an "inducement . . . of a child to engage in . . . sexually explicit conduct." *See id.* By watching the intercourse, the defendant validated the conduct, which certainly could influence, persuade, or *induce* the minor to engage in the sexual abuse. *See id.* (including inciting as affirmative conduct constituting sexual abuse).

act" when one has a duty to reasonably do so constitutes assistance of "another person to engage in, sexually explicit conduct . . . with children" because the failure to act when a duty exists allows for the perpetration of the sexual abuse.[58]

Lastly, the decision of the Fourth Circuit to stray from the BIA's interpretation causes U.S. immigration law to be exceedingly dysfunctional.[59] Instead of deferring to the BIA to interpret the Act, the circuit courts across the United States continually interject their own opinions that often contrast with the BIA's decisions.[60] Circuit courts' departure from the Supreme Court's instruction to afford *Chevron* deference in a consistent manner created the current reality where sections of the Act are interpreted in a chaotic and unpredictable fashion.[61]

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58. *See Amos*, 790 F.3d at 522 (using dictum as part of court's analysis). Using the dictum from *Degren*, the Court still should have found the least culpable conduct under the former Maryland sexual abuse statute to constitute "sexual abuse of a minor" under the Act. *See* § 3509(a)(8) (designating various forms of conduct constituting sexual abuse); *Amos*, 790 F.3d at 522 (comparing respondent's sexual abuse of minor with least culpable conduct under Maryland statute). The "omission or failure to act" when reasonable to do so and a duty is attached should equate to the assistance of "another person to engage in, sexually explicit conduct." *See* § 3509(a)(8) (describing conduct criminalized). *But see Amos*, 790 F.3d at 522 (expressing § 3509(a)(8) did not encompass Maryland sexual abuse statute). Although the individual could not have assisted in the sexual abuse prior to being reasonably able to act, once the duty is triggered, any "omission or failure to act" assists in the continuing perpetration of the sexual abuse. *See* § 3509(a)(8) (denoting assistance of another engaging in sexual conduct with minors as sexual abuse). *But see Amos*, 790 F.3d at 522 (holding watching and failing to intervene during sexual abuse of child where duty exists not abuse).

59. *See supra* note 2 (examining inherent dysfunction in immigration law); *see also* Chaffin, *supra* note 30 (discussing immigration law varies by circuit because courts afford *Chevron* deference differently).

60. *See* Varela, *supra* note 30, at 385-91 (displaying examples where circuit court and BIA decisions differ); *supra* note 2 (displaying differing circuit courts' interpretations of the Act). *See generally* Chaffin, *supra* note 30. The circuit courts could not come to an agreement as to whether or not the BIA offered a definition of "sexual abuse of a minor" in *Rodriguez-Rodriguez*. *See supra* note 2 (listing disparate circuit court decisions).

61. *See* Varela, *supra* note 30, at 385-91 (outlining unpredictable circuit court decisions); *supra* note 2 (laying out instances of inconsistent enforcement of immigration laws). The circuit courts that do not give BIA precedential decisions *Chevron* deference when required to do so, violate the order of the U.S. Supreme Court. *See Aguirre-Aguirre*, 526 U.S. at 415 (mandating circuit courts to defer to BIA's statutory interpretations). As a result, individuals subjected to the same federal statutes across the nation could have drastically different experiences, something the legislature certainly did not intend. *See supra* note 16 (providing examples of inconsistent immigration consequences across United States). *See generally* Chaffin, *supra* note 30 (proposing more streamlined approach to interpreting immigration laws).

Unfortunately, the United States is stuck with an inconsistent and broken immigration system because of President Obama's inability to enforce the current immigration laws, Congress's disinterest in comprehensive immigration reform, and the Judiciary's inconsistent rulings.[62] The result is that an adult who sexually abused a five-year-old did not get convicted of a crime constituting "sexual abuse of a minor" in the Fourth Circuit, while a teenager who was convicted of having sex with his girlfriend less than five years younger than him in the Seventh Circuit was found to have been convicted of a crime constituting that same aggravated felony under the Act.[63]

In *Amos v. Lynch*, the Fourth Circuit considered whether the BIA in *Rodriguez-Rodriguez* defined "sexual abuse of a minor" under 8 U.S.C. § 1101(a)(43)(A). After reviewing the BIA and other circuit courts' decisions, the Fourth Circuit held *Rodriguez-Rodriguez* was only entitled to *Skidmore* deference and that section 35A of the former Maryland Code did not constitute "sexual abuse of a minor" under the Act. As a result, the Fourth Circuit joined the Ninth Circuit in circumventing its duty to afford *Chevron* deference to BIA precedent cases, as well as ignoring Congress's intent regarding a serious issue of national security. The Fourth Circuit's decision increasingly divided the

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62. *See supra* notes 2, 29 and accompanying text (touching on U.S. government's collective failure to create or enforce immigration laws effectively). Although President Obama's executive actions would not have directly addressed the inconsistent interpretation of the Act, the administration has put forth enforcement priorities that essentially direct agencies to enforce the immigration laws on certain individuals. *See supra* note 29 (providing summaries of President Obama's executive actions). In the legislative branch, Congress has not put forth any resolution in the form of comprehensive immigration reform to address the ineffective state of U.S. immigration laws. *See* Everett & Kim, *supra* note 29 (characterizing Congress's futile efforts at comprehensive immigration reform). Federal circuit courts' decisions to stray from the Supreme Court's decision to afford *Chevron* deference to BIA precedential cases when appropriate are the last to contribute to the flawed immigration system. *See supra* note 2 (detailing federal circuits divergent application of immigration statute).

63. *See supra* notes 2, 29 (describing circuit court cases analyzing "sexual abuse of a minor"). In the Fourth Circuit, Amos did not get convicted of a crime constituting "sexual abuse of a minor" even though he inserted a five-year-old child's penis into his mouth. *Amos*, 790 F.3d at 516. In the Seventh Circuit, a nineteen-year-old who was convicted of having sex with his girlfriend less than five years younger than him was found to have been convicted of a crime constituting the same aggravated felony that Amos was determined not to have committed. *Compare* Johnson, *supra* note 16, at 435 (holding teenager removable for sexual relationship with girlfriend four years younger) *with Amos*, 790 F.3d at 516 (declaring conviction for insertion of five-year-old's penis into Amos's mouth not removable offense).

circuit courts in their views of how to approach the "sexual abuse of a minor" statute under the Act and further muddled U.S. immigration law.

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