AN ANALYSIS OF THE APPLICATIONS AND IMPLICATIONS OF *CHEVRON* DEFERENCE IN IMMIGRATION

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I. INTRODUCTION

The Board of Immigration Appeals ("BIA" or "Board") is part of the Executive Office for Immigration Review ("EOIR") within the United States Department of Justice ("DOJ" or "Justice Department"). The BIA, as "the highest administrative body for interpreting and applying immigration laws," has "nationwide jurisdiction to hear appeals from certain decisions rendered by immigration judges" and certain Department of Homeland Security ("DHS") officers.[1] Moreover, "BIA decisions are binding on all DHS officers and immigration judges unless modified or overruled by the Attorney General or a federal court."[2]

As an administrative body, the BIA's decisions are entitled to judicial deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, unless the determination is "arbitrary, capricious, or manifestly contrary to the statute."[3] Under the *Chevron* framework, courts follow a two-step process for determining whether an agency's decision is entitled to deference. First, a court must determine whether the plain language of the statute is ambiguous.[4] If it is ambiguous, then the court must determine whether the administrative agency's decision was arbitrary or capricious.[5] If an agency's interpretation is reasonable, the court must "accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation."[6] However, an agency's interpretation must be based "on a permissible construction of the statute."[7]

The BIA has interpreted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), passed by Congress in 1996, which amended the Immigration and Nationality Act ("INA"). The provision of the IIRIRA at issue here is § 1227(a)(2)(E)(i), which makes a conviction for "a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment" a deportable offense.[8] Other criminal offenses that render an individual deportable include: crimes of moral turpitude, aggravated felonies, high speed flight from an immigration checkpoint, failure to register as a sex offender, drug or controlled substances violations, firearm offenses, and human trafficking, among others.[9] The code does not provide a definition for this term or further guidance as to which convictions qualify as "a crime of child abuse, child neglect, or child abandonment."[10]

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1. *Board of Immigration Appeals*, EXEC. OFFICE FOR IMMIGR. REV., U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/boardof-immigration-appeals (last updated October 15, 2018).
2. *Id.*
3. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).
4. *Id.* at 842-43.
5. *Id.* at 843-44.
6. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005).
7. *Chevron*, 467 U.S. at 843.
8. 8 U.S.C. § 1227(a)(2)(E) (2012).
9. 8 U.S.C. § 1227(a)(2)(A-D, F) (2012).
10. 8 U.S.C. § 1227(a)(2)(E) (2012).

A circuit split exists among the federal appellate courts as to whether the BIA's interpretation of the term "crime of child abuse, child neglect, or child abandonment" is entitled to deference under *Chevron*. This Article analyzes and compares these cases in detail.[11] Most recently, the Ninth Circuit deepened this split, joining the Second, Third, and Eleventh Circuits, in holding that the BIA's interpretation was entitled to deference. Currently, only the Tenth Circuit has declined to grant deference to the BIA's definition.

Recognizing the significance of the circuit split, this Article assesses the current and future implications of this legal question. Section II summarizes the BIA's interpretation of the operative statutory provision, which broadly encompasses many offenses in its construction of the term "child abuse" – even those where there is no injury to the child. Section III analyzes the application of the *Chevron* doctrine by the appellate courts that have addressed the legal question at issue in this circuit split, most of which have favored granting deference to the BIA's interpretation. Section IV presents the reasons the Tenth Circuit's approach in declining deference should be adopted. This Section refutes the speculative criticism levied by the Ninth Circuit, explains the importance of incorporating the immigration rule of lenity into the deference analysis, and expounds on the reasons why deference to the BIA contravenes *Chevron*'s underlying values. Section V reflects on recent Supreme Court opinions, its current dynamic, and the potential impact of a decision on these cases at the intersection of criminal and immigration law. Section VI provides a short summary and brief conclusion.

II. THE BOARD OF IMMIGRATION APPEALS' INTERPRETATION

The BIA developed its interpretation of § 1227(a)(2)(E)(i) in two seminal cases: *Velazquez-Herrera*[12] and *Soram*.[13] The circuit court opinions primarily rely on these BIA precedents. Understanding the BIA's interpretation of the statute is necessary for understanding the appellate courts' decisions.[14]

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11. *See infra* Section III.
12. *In re* Velazquez-Herrera, 24 I. & N. Dec. 503, 508 (BIA 2008).
13. *In re* Soram, 25 I. & N. Dec. 378, 381 (BIA 2010).
14. To reconcile federal statute and state law, courts apply the formal categorical approach which entails "looking only to the fact of conviction and the statutory definition of the predicate offense, rather than to the particular underlying facts." Taylor v. United States, 495 U.S. 575, 576 (1990). Essentially, courts look to the minimum conduct required to sustain a conviction under the state law and seek to match such conduct with the generic federal definition. *See Primer on Categorical Approach*, Office of General Counsel, U.S. Sentencing Commission (Feb. 2019), https://www.ussc.gov/sites/default/files/pdf/training/primers/2019_Primer_Categorical_Approach.pdf; *see also* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. Rev. 1669, 1670 (2011); Leah Litman, Melissa Murray, Jaime Santos & Kate Shaw, *Strict Scrutiny* (July 22, 2019), https://player.fm/series/strict-scrutiny/leg-day (describing the complications of applying the categorical approach to the Armed Career Criminal Act of 1984 ("ACCA"); noting that "part of the sheer number of ACCA cases also arises because the statute sweeps in fifty different states fifty different definitions of crimes, so there is a lot of diversity among how states define crimes and that is also going to create inevitable uncertainty in whether particular state crimes qualify as ACCA predicates").

In *Velazquez-Herrera*, the BIA began with a textual analysis. First, the BIA noted that the other operative term of the statute ("crime of domestic violence") was not only defined within the statute, but also within the same provision as the term "crime of child abuse." The BIA assessed Congress' effort to define the term "'crime of domestic violence' at considerable length, specifically cross-referencing one Federal criminal statute . . . and incorporating by reference a host of other laws (State, Federal, tribal, or local) that define the legal scope of domestic relationships."[15] By contrast, Congress' silence in defining "crime of child abuse" and other operative terms "trigger[ed] the negative inference that Congress deliberately left them open to interpretation."[16] The concurrence also noted that the inclusion of terms such as "child neglect" or "child abandonment" were "a subset of 'child abuse' and, although technically redundant, were likely inserted by Congress to assure coverage of such crimes, however denominated by the State."[17]

The BIA then looked to "the ordinary, contemporary, and common meaning of the term 'child abuse' [to] govern [its] analysis, that meaning is necessarily informed by the term's established legal usage."[18] The BIA relied on seven federal statutes defining "child abuse" in effect at the time when section 237(a)(2)(E)(i) was enacted to conclude "the weight of Federal authority . . . reflected an understanding that 'child abuse' encompassed the physical and mental injury, sexual abuse or exploitation, maltreatment, and negligent or neglectful treatment of a child."[19] Although acknowledging that the statutory definitions in the referenced federal statutes were not authoritative, the BIA determined "their common characteristics nonetheless provide [the BIA] with valuable insight into the types of conduct that Congress understood to be encompassed by the term 'crime of child abuse.'"[20] The BIA determined this understanding aligned with Black's Law Dictionary definition of the term as the "[i]ntentional or neglectful physical or emotional harm

15. *In re Velazquez-Herrera*, 24 I. & N. Dec. at 508.

16. *Id.*

17. *Id.* at 519 (citing Ali v. Federal Bureau of Prisons, 128 S. Ct. 831 (2008), which "discuss[es] the rule of superfluities in the context of Congress's inclusion of reference to certain specific types of law enforcement officers").

18. *Id.* at 508.

19. *Id.* at 509-511 ("Three of these seven statutes defined the term 'child abuse' identically to mean 'the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child;' a fourth defined it to mean 'physical or sexual abuse or neglect of a child;' and a fifth stated in much greater detail that the term includes . . . . 'skin bruising, bleeding, malnutrition, failure to thrive, burns, fracture of any bone, subdural hematoma, soft tissue swelling,' and . . . . 'sexual assault, sexual molestation, sexual exploitation, sexual contact, or prostitution.' A sixth statute defined the term 'child abuse and neglect' to mean 'the physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child,' but added limiting language confining the term to harms inflicted by 'a person who is responsible for the child's welfare, under circumstances which indicate that the child's health or welfare is harmed or threatened.' In contrast, the seventh statute, which defined the term 'child abuse *crime*' to mean 'a crime committed under any law of a State that involves the physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child,' specified that the term related to harms inflicted 'by *any* person.'" (emphasis in original) (citations omitted)).

20. *Id.* at 509.

inflicted on a child, including sexual molestation."[21]

In assessing congressional intent, the BIA concluded that the IIRIRA was enacted "as part of an aggressive legislative movement to expand the criminal grounds of deportability in general and to create a comprehensive statutory scheme to cover crimes against children in particular."[22] Recognizing that Congress also included "sexual abuse of a minor" in its expanded definition of "aggravated felony" in the IIRIRA, the BIA noted that the statute as a whole had the purpose of expanding the grounds of deportability to include a broad range of offenses.[23] The BIA's conclusion that Congress' purpose in passing the IIRIRA "was aimed at facilitating the removal of child abusers in particular" supports the BIA's expansive reading.[24]

On this basis, the BIA broadly interpreted the term "crime of child abuse" to mean "any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being, including sexual abuse or exploitation."[25] The BIA elaborated on its interpretation by noting:

> At a minimum, this definition encompasses convictions for offenses involving the infliction on a child of physical harm, even if slight; mental or emotional harm, including acts injurious to morals; sexual abuse, including direct acts of sexual contact, but also including acts that induce (or omissions that permit) a child to engage in prostitution, pornography, or other sexually explicit conduct; as well as any act that involves the use or exploitation of a child as an object of sexual gratification or as a tool in the commission of serious crimes, such as drug trafficking.[26]

However, as noted in the concurrence of *Velazquez-Herrera*, even under the BIA's broad definition, "it is unclear whether it extends to crimes in which a child is merely placed or allowed to remain in a dangerous situation, without any element in the statute requiring ensuing harm, e.g., a general child endangerment statute, or selling liquor to an underage minor, or failing to secure a child with a seatbelt." Thus, under *Velazquez-Herrera*, the BIA did not resolve whether a crime of child abuse required actual injury to a child.

The BIA closed this definitional gap in *Soram*. Relying on the same reasoning as *Velazquez-Herrera*, the BIA clarified its definition of "crime of child abuse" by stating it was "not limited to offenses requiring proof of

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21. *Id*. at 511 (quoting *Child Abuse*, BLACK'S LAW DICTIONARY (8th ed. 2004)).
22. *Id*. at 508-09 (internal quotation marks omitted) (referencing *In re* Rodriguez-Rodriguez, 22 I. & N. Dec. 991, 994 (BIA 1999)).
23. *See* United States v. Corona-Sanchez, 234 F.3d 449, 454 (9th Cir. 2000); H.R. Rep. No. 104-828, at 505-06 (1996) (Conf. Rep.) (Joint Explanatory Statement of the Committee of Conference).
24. *In re Velazquez-Herrera*, 24 I. & N. Dec. at 509.
25. *Id*. at 512.
26. *Id*.

injury to the child" and found "no convincing reason to limit offenses under section 237(a)(2)(E) of the Act to those requiring proof of actual harm or injury to the child."[27]

III. APPLICATION OF *CHEVRON*

Several of the appellate courts are currently split on the question of whether the BIA's definition of the term "crime of child abuse, child neglect, or child abandonment" is entitled to *Chevron* deference. This Section summarizes the reasoning articulated by the Ninth, Second, Third, and Eleventh Circuits in holding that the BIA's interpretation was entitled to deference and contrasts this to the analysis provided by the Tenth Circuit and Ninth Circuit dissent in declining to defer to the BIA's definition.

A. *Reasoning of the Majority of Appellate Courts Favoring Deference*

The Ninth Circuit used the BIA's interpretative history of 8 U.S.C. § 1227(a)(2)(E)(i) to consider the case of Marcelo Martinez-Cedillo, a legal permanent resident who was convicted in 2008 for driving under the influence ("DUI").[28] He was also convicted for felony child endangerment under California Penal Code § 273a(a), as at the time of the DUI "he had a child in his car who was not wearing a seatbelt."[29] The penal code criminalizes conduct "under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering."[30] The code also prohibits conduct that "willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered."[31] Accordingly, the "Department of Homeland Security initiated removal proceedings on the grounds that Martinez-Cedillo's conviction under California Penal Code § 273a(a) was a crime of child abuse, neglect, or abandonment under § 1227(a)(2)(E)(i)."[32] After an immigration judge ("IJ") entered a final order of removal, Martinez-Cedillo appealed to the BIA; although the BIA first remanded the case for reconsideration, on Martinez-Cedillo's second appeal, the BIA affirmed the IJ decision in full.[33]

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27. *In re* Soram, 25 I. & N. Dec. 378, 381 (BIA 2010).

28. Upon the vote of a majority of nonrecused active judges, it is ordered that this *602 case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. The three-judge panel disposition in this case shall not be cited as precedent by or to any court of the Ninth Circuit. The motion to dismiss this appeal as moot is GRANTED, and the order scheduling oral argument following the grant of rehearing en banc is VACATED. The three-judge panel disposition in this case, which was designated as non-precedential on March 13, 2019, is VACATED. The appeal is DISMISSED. Each party will bear its own costs. This order served on the agency shall constitute the mandate of this court. Martinez-Cedillo v. Barr, 923 F.3d 1162 (9th Cir. 2019).

29. Martinez-Cedillo v. Sessions, 896 F.3d 979, 982 (9th Cir. 2018).

30. CAL. PENAL CODE § 273a(a) (1998).

31. *Id.*

32. *Martinez-Cedillo*, 896 F.3d at 982.

33. *Id.*

In its analysis of *Chevron* Step One, the Ninth Circuit determined the INA's "language is broad and susceptible to multiple interpretations" and that "[e]very circuit court to have considered [the provision] has noted its ambiguity."[34]

Under *Chevron* Step Two, the court held the BIA's interpretation was entitled to deference because, although the BIA's precedent "may not represent the only permissible construction of the statutory language at issue, the BIA was not unreasonable."[35] The Ninth Circuit's rationale in *Martinez-Cedillo* relied heavily on the reasoning of the Second Circuit in *Florez v. Holder*, a case involving "a lawful permanent resident who was twice convicted of child endangerment, . . . most recently for driving under the influence of alcohol while his young children were in the car."[36] Florez was convicted under New York Penal Law § 260.10(1), which makes it a crime for a person to "knowingly act[] in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old."[37]

In analyzing *Chevron* Step Two, both the Second and Ninth Circuits reasoned that since "at least nine states had crimes called 'child abuse' (or something similar) for which injury was not a required element . . . the BIA acted reasonably in adopting a definition of child abuse 'consistent with the definitions used by the legislatures of Colorado, Kentucky, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, and Virginia.'"[38] Both courts also relied on the definition of "child abuse" provided in Black's Law Dictionary, which does not require injury, to support the BIA's interpretation as reasonable.[39] Finally, both courts embraced the BIA's reasoning in *Soram*, that "a *sufficiently high* risk of harm to a child ensured that the BIA's treatment of child-endangerment statutes would remain 'within the realm of reason.'"[40]

In *Mondragon-Gonzalez*, the Third Circuit also concluded the BIA's interpretation of a crime of child abuse was reasonable under *Chevron*. Mondragon-Gonzalez was convicted of violating 18 Pa. Cons. Stat. § 6318(a)(5), which prohibits intentional contact with a minor for the purpose of engaging in a prohibited activity, including "[s]exual abuse of children as defined in section 6312 (relating to sexual abuse of children)."[41] Relying on the BIA's legislative history analysis, the Third Circuit did "not find the BIA's interpretation in this

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34. *Id*. at 987.
35. *Id*. at 988.
36. Florez v. Holder, 779 F.3d 207, 208 (2d Cir. 2015).
37. N.Y. PENAL LAW § 260.10 (2010).
38. Martinez-Cedillo v. Sessions, 896 F.3d 979, 988 (9th Cir. 2018) (quoting *Florez*, 779 F.3d at 212).
39. *Id*. at 988 (quoting *Florez*, 779 F.3d 207 at 212 (citing *Child Abuse*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "child abuse" as "[a]n act or failure to act that presents an imminent risk of serious harm to a child"))).
40. *Id*. at 988 (quoting *Florez*, 779 F.3d 207 at 212) (emphasis in original).
41. 18 PA. CONS. STAT. § 6318(a)(5) (2007).

regard to be arbitrary, capricious, or manifestly contrary to the statute" because of "Congress' evident intent to make crimes that harm children deportable offenses" in enacting § 1227(a)(2)(E)(i).[42] The court agreed with the BIA that the statute "was enacted . . . as part of an aggressive legislative movement to expand the criminal grounds of deportability in general and to create a comprehensive statutory scheme to cover crimes against children in particular."[43]

The Eleventh Circuit also wrestled with this question in *Martinez v. U.S. Attorney General*. Martinez was convicted under a Florida statute that punishes an individual who "willfully or by culpable negligence neglects a child without causing great bodily harm, permanent disability, or permanent disfigurement to the child."[44] The court concluded that, under *Chevron*, it would "defer to the BIA's interpretation of 'crime of child abuse' so long as the law is ambiguous and the BIA's determination is reasonable and does not contradict the clear intent of Congress."[45] The court's *Chevron* analysis was perfunctory. The Eleventh Circuit determined "[t]here is no question that all of the conduct criminalized under Fla. Stat. § 827.03(3) constitutes a 'crime of child abuse' under the BIA's definition of that term in *Velazquez-Herrera* and *Soram*."[46] However, in this case, "because neither party challenge[d] *Velazquez-Herrera* or *Soram* as being unreasonable, [the court] assume[d] that the BIA's definition of a 'crime of child abuse' [wa]s reasonable," without further assessment.[47]

The Eleventh Circuit provided a more robust analysis of this issue under *Chevron*, albeit without reference to its own precedent in *Martinez*, in its recent determination in *Pierre v. U.S. Attorney General*, where it considered Jimmy Pierre's removability after his conviction under Florida Statute § 784.085.[48] Under this provision, a person who "knowingly cause[s] or attempt[s] to cause a child to come into contact with blood, seminal fluid, or urine or feces by throwing, tossing, projecting, or expelling such fluid or material" is guilty of criminal battery of a child.[49] As in its prior decision in *Martinez*, the court granted deference to the BIA's "definitions of 'child abuse' found in *Velazquez-Herrera* and *Soram* . . . as reasonable interpretations of the INA."[50] Like the Third Circuit, the Eleventh Circuit adopted the BIA's characterization of the INA's legislative history: that the child abuse section was "part of an aggressive legislative movement to expand the criminal grounds of deportability," to support the reasonableness of the BIA's

42. Mondragon-Gonzalez v. U.S. Att'y Gen., 884 F.3d 155, 159 (3d Cir. 2018).
43. *Id.* at 158 (internal quotation marks omitted) (citing *In re* Velazquez-Herrera, 24 I. & N. Dec. 503, 508 (BIA 2008)).
44. FLA. STAT. § 827.03(3)(c) (2017).
45. Martinez v. U.S. Att'y. Gen., 413 F. App'x 163, 166 (11th Cir. 2011).
46. *Id.* at 167.
47. *Id.* at 166.
48. Pierre v. U.S. Att'y Gen., 879 F.3d 1241 (11th Cir. 2018).
49. FLA. STAT. § 784.085 (2000).
50. *Pierre*, 879 F.3d at 1251.

broad interpretation of "child abuse."[51] Moreover, the court appeared to accept the BIA's assertion that Congress' choice to define certain statutory terms, like "crime of domestic violence," but not "crimes of child abuse," triggered the "inference that Congress deliberately left [the undefined terms] open to interpretation."[52] The court in *Pierre* concluded that "knowingly attempt[ing] to cause a child to come into contact with blood, seminal fluid, urine, or feces—whether or not the attempt is successful—carries a significant risk of physically injuring or harming the child" such that "this repugnant type of battery or attempted battery constitutes maltreatment of a child" under the BIA's reasonable interpretation of the INA.[53]

B. *Rationale of the Sole Appellate Court Declining Deference*

The approach of the Ninth, Second, Third, and Eleventh Circuits stands in contrast to the approach adopted by the Tenth Circuit in *Ibarra v. Holder*.[54] Elia Ibarra Rivas was convicted under a Colorado statute prohibiting conduct that "causes an injury to a child's life or health, or permits a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health, or engages in a continued pattern of conduct that results in malnourishment, lack of proper medical care, cruel punishment, mistreatment, or an accumulation of injuries that ultimately results in the death of a child or serious bodily injury to a child."[55] Ibarra was charged because her "children were unintentionally left home alone one evening while she was at work," the oldest of which was ten at the time.[56] However, as she testified to the immigration judge, Ibarra explained "she had left her children with her mother, who had gotten drunk and left the apartment." Although no child was injured, DHS initiated removal proceedings under § 1227(a)(2)(E)(i).

Under *Chevron* Step One,[57] the Tenth Circuit acknowledged that "the statutory text at issue here does contain *some* ambiguity."[58] However, under *Chevron* Step Two, the court determined the BIA's precedent was not entitled to deference, as "Congress's intent is not so opaque as to grant the BIA the sweeping interpretive license it has taken."[59]

Looking at the plain language of the statute, the Tenth Circuit began its textual analysis with the term "crime." The court determined that the BIA's interpretation of "child abuse" and "child neglect" in *Velazquez* and *Soram* relied "primarily on definitions from civil, not criminal, law to reach its

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51. *Id*. at 1249-50 (quoting *In re* Velazquez-Herrera, 24 I. & N. Dec. 503, 508 (BIA 2008)).
52. *Id*. at 1249 (quoting *In re Velazquez-Herrera*, 24 I. & N. Dec. at 509).
53. *Id*. at 1250 (referencing *In re* Soram, 25 I. & N. Dec. 378, 382-83 (BIA 2010)).
54. Ibarra v. Holder, 736 F.3d 903 (10th Cir. 2013).
55. COLO. REV. STAT. § 18-6-401 (2018).
56. *Ibarra*, 736 F.3d at 905.
57. The court itself does not utilize these terms. I have characterized the court's reasoning under the appropriate step of the *Chevron* analysis.
58. *Ibarra*, 736 F.3d at 910.
59. *Id*.

present definition."[60] As the court noted, "many states define 'child neglect' for family welfare purposes as something not requiring fault, but require that 'child neglect' be done 'willfully' or 'recklessly' to constitute the *crime* of child neglect."[61] Because these terms are defined differently in civil law than they are in criminal law, and in light of *Velazquez*'s reliance on federal civil statutes and *Soram*'s reference to a Department of Health and Human Services compendium of civil laws, the Tenth Circuit concluded that the BIA's interpretative approach was flawed. Reliance on these civil definitions impermissibly "reads the words 'crime of' out of the federal statute," which violates a court's duty to "give effect to every word of a statute wherever possible."[62] It would also circumvent the plain language and apparent intent of the statute to read out the term "crime" from the statute, as "Congress did not say that one who has committed 'child neglect' under family welfare law is removable; it said that one who has been 'convicted' of a 'crime of' child neglect is."[63]

With this understanding of the term "crime," and aided by the awareness that civil definitions of "child abuse" do not include a *mens rea*, or criminal intent, requirement, the Tenth Circuit conducted its own survey "to determine the majority approach [of states] in 1996."[64] The court surveyed "crimes called child abuse, neglect, and abandonment, but also state crimes denoted as child 'endangerment.'"[65] Crimes with shared elements, such as "cruelty to children" and "unlawful conduct toward child," were also included.[66] However, "nonsupport," "contributing to delinquency," and "enticement of minors," or "other sundry crimes involving children that state criminal codes may include" were not part of the Tenth Circuit's survey; crimes involving sexual abuse of a minor were also excluded from the analysis "because Congress made this a separately deportable offense under INA § 101(a)(43)(A)."[67]

The court's analysis revealed that the majority of states "did not criminalize endangering children or exposing them to a risk of harm absent injury if there was only a culpable mental state of criminal negligence."[68] Based on

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60. *Id*. at 911-12.

61. *Id*. at 911 n.9 ("For example, *compare* ALASKA STAT. § 47.17.290 (2012) (defining 'child neglect' for purposes of child welfare intervention as 'the failure by a person responsible for the child's welfare to provide necessary food, care, clothing, shelter, or medical attention for a child') *with* ALASKA STAT. § 11.51.100 (2012) (defining 'endangering the welfare of a minor' in the criminal code, as '*intentionally* desert[ing] the child . . . . under circumstances creating a substantial risk of physical injury to the child.'); *compare* OKLA. STAT. tit. 10a, § 1-1-105(47) (2012) (defining child 'neglect' for family welfare purposes) *with* OKLA. STAT. tit. 10, § 7115 (2012) (requiring that the neglect be 'willful' or 'malicious' to constitute a crime); *compare* TENN. CODE ANN. § 37-1-102(b)(1) (2012) (civil definition of child abuse not requiring knowing conduct) *with* TENN. CODE ANN. § 39-15-401 (2012) (criminal definition of child abuse requires knowingness)." (emphasis in original)).

62. *Id*. at 912 (quoting Leocal v. Ashcroft, 543 U.S. 1, 12 (2004)).

63. *Id*. at 911.

64. *Id*. at 914.

65. *Id*.

66. *Id*.

67. *Id*. at 914-15.

68. *Id*. at 915 ("In 1996, forty-eight states and the District of Columbia had statutes that criminalized endangering or neglecting children without facially requiring a resulting injury. But twenty-seven required a *mens rea* of knowing or intentional. Six required a minimum *mens rea* of recklessness. Only

this finding, the Tenth Circuit held that "criminally negligent conduct with no resulting injury to a child cannot serve as the generic federal definition for the 'crime of child abuse, child neglect, or child abandonment."[69] Therefore, because Ibarra's conviction under the Colorado statute did not require "injury nor a *mens rea* greater than criminal negligence," her conviction was "not categorically a crime of child abuse, child neglect, or child abandonment under 8 U.S.C. § 1227(a)(2)(E)(i)."[70]

IV. REASONS TO FAVOR THE MINORITY'S APPLICATION OF *CHEVRON*

In addition to dispelling the criticisms of the Ninth Circuit majority, there are several other reasons the Tenth Circuit's interpretation, which Judge Wardlaw paralleled and expanded upon in her dissent in the Ninth Circuit, is a preferable approach. As the Tenth Circuit recognized, statutes should not be interpreted to expand the class of criminal conduct absent clear signals from the legislature. Moreover, this reasoning better applies *Chevron*'s animating principles to the legal question at hand, including the values of agency expertise, delegation, and political accountability.

A. *Addressing the Criticisms of the Ninth Circuit*

The Ninth Circuit majority in *Martinez-Cedillo* not only decided to follow the reasoning of the Second Circuit, but also explicitly declined to follow the Tenth Circuit's reasoning. The following Section analyzes and refutes each of the justifications set forth by the Ninth Circuit.

First, the Ninth Circuit found "there [was] no inherent problem in the BIA relying partly on civil statutes to understand the" statutory term, even if "[i]t would be unreasonable for the BIA to interpret that phrase . . . to cover a purely civil action, such as child neglect proceedings brought by a state's child protective services."[71] The court concluded that the BIA's use of "civil definitions to inform its understanding of which *convictions* are crimes of child abuse, neglect, or abandonment . . . is not unreasonable."[72] The court appears unconcerned about the inclusion of civil definitions in a criminal context, reasoning that civil adjudications, such as determinations of parental rights, also implicate serious due process concerns.

However, the Ninth Circuit's assessment on this point is mistaken for five reasons. First, by collapsing criminal and civil definitions, the court ignored a principle that the *Ibarra* court recognized: "[t]he purpose of civil definitions is to determine when social services may intervene," as opposed to criminal

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eleven clearly criminalized non-injurious child endangerment where the culpable mental state was only criminal negligence. The minimum *mens rea* in the five remaining states was unclear where the conduct did not result in injury." (citations omitted)).

69. *Id*. at 915-16.
70. *Id*. at 916.
71. Martinez-Cedillo v. Sessions, 896 F.3d 979, 988-89 (9th Cir. 2018).
72. *Id*. at 989.

definitions that "determine when an abuser is criminally culpable."[73] The Ninth Circuit's definitional blurring also failed to take into account the "special duties of prosecutors and the unique interests at stake in a criminal action [which] do not parallel the duties and interests at stake in a civil child custody proceeding."[74] The court not only glossed over the distinct purposes and interests underlying the proceedings connected to the civil and criminal definitions, but also failed to consider their substantive distinction. As the dissent in *Martinez-Cedillo* observed, "[t]he civil codes encompass a broader array of conduct than their parallel criminal codes, which generally require a higher standard of culpability or a higher risk to the child."[75] Despite the majority's observation that some courts have "referred to terminating parental rights as" one of the most serious civil consequences, the Ninth Circuit's analysis ignored established differences "between civil child custody proceedings and criminal prosecutions."[76] Thus, by basing its rationale on the civil definitions, the BIA "unreasonably widens the net of people subject to removal proceeding."[77]

Second, the Ninth Circuit found "there is no requirement that the BIA interpret a generic offense in the INA to conform to how the majority of states might have interpreted that term at the time of amendment."[78] Such an assertion would appear to directly conflict with the Supreme Court's precedent in *Taylor v. United States*, in which the Court analyzed the term "burglary" in the context of a sentence-enhancement provision. In *Taylor*, the Court found the "generally accepted contemporary meaning" to determine the federal statute's "one generic meaning" by looking to "the criminal codes of most States."[79] The Supreme Court also found it "implausible that Congress intended the meaning of 'burglary' . . . to depend on the definition adopted by the State of conviction," as this "would mean that a person convicted of unlawful possession of a firearm would, or would not, receive a sentence enhancement based on exactly the same conduct, depending on whether the State of his prior conviction happened to call that conduct 'burglary.'"[80]

The Tenth Circuit heavily relied on this case in its analysis. The Ninth Circuit correctly noted that the Supreme Court in *Taylor* was not "reviewing an agency's interpretation of an ambiguous statute and did not purport to offer any guidance to lower courts employing *Chevron*'s two-step framework."[81] However, it is appropriate to apply the Court's reasoning and

73. Ibarra v. Holder, 736 F.3d 903, 911 (10th Cir. 2013).
74. *Martinez-Cedillo*, 896 F.3d at 1003 (Wardlaw, J., dissenting).
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 989 (majority opinion).
79. Taylor v. United States, 495 U.S. 575, 598 (1990).
80. *Id.* at 590.
81. *Martinez-Cedillo*, 896 F.3d at 990 (majority opinion).

methodology from *Taylor* to this case, which also seeks to interpret a criminal term that Congress left undefined. Applying *Taylor* is appropriate because the same concern is also present when interpreting "crime of child abuse" under various states' criminal laws.

The Tenth Circuit provided a cautionary example, noting that "in Missouri, but not Delaware, leaving a child alone in a parked car is criminal child endangerment even if the child is not harmed."[82] Applying *Taylor*, the court reasoned that "if a federally-listed crime meant whatever any state said it meant, that would lead to the 'odd results' of an immigrant who left her child in a parked car being a deportable criminal if she happened to make this questionable choice in Missouri, but not if she happened to do so in Delaware."[83] As in *Taylor*, the court here declined to "interpret Congress' omission of a definition . . . in a way that leads to odd results of this kind."[84]

Third, the Ninth Circuit in *Martinez-Cedillo* found that "the Tenth Circuit's ambitious, fifty-state survey was itself problematic [because] [t]he court categorized state laws according to the minimum they required for conviction of a crime not resulting in injury to a child."[85] Specifically, the Ninth Circuit found fault with the Tenth Circuit's characterization of the California statute in question in *Martinez-Cedillo*. The Tenth Circuit determined the statute "required a minimum *mens rea* of knowingness or intent for crimes not appearing to require a resulting injury to the child."[86] By contrast, the California Supreme Court, the ultimate authority in interpreting California state law, held the statute "requires only a minimum *mens rea* of criminal negligence."[87] Citing both Supreme Court and Ninth Circuit precedent, the Ninth Circuit's dissent explained that "the use of fifty-state surveys of contemporaneous state criminal laws . . . is a methodological hallmark of the categorical approach, regularly employed to derive the generic definition of a federal crime."[88] However, the Ninth Circuit attempted to invalidate the entire approach adopted by the *Ibarra* court because of a single error in its broader analysis. As "[e]ven the Second Circuit, which the [Ninth Circuit] majority joins, recognized as much, as it identified only nine states that define criminal child abuse as broadly as the Board."[89] Moreover, the BIA's "utter[] fail[ure] to perform a statutory interpretation analysis consistent with Supreme Court teachings" is far more concerning.[90]

Fourth, the Ninth Circuit defended the BIA's evolving definition of the statutory terms because "an agency need not give an answer to every conceivable

82. Ibarra v. Holder, 736 F.3d 903, 913 (10th Cir. 2013).
83. *Id*.
84. *Ibarra*, 736 F.3d at 913 (quoting *Taylor*, 495 U.S. at 591).
85. *Martinez-Cedillo*, 896 F.3d at 991.
86. *Ibarra*, 736 F.3d at 918.
87. *Martinez-Cedillo*, 896 F.3d at 1004 (Wardlaw, J., dissenting) (internal quotation marks omitted) (citing People v. Valdez, 42 P.3d 511, 517 (2002)).
88. *Id*.
89. *Id*. (referencing Florez v. Holder, 779 F.3d 207, 212 (2d Cir. 2015)).
90. *Id*. at 1005.

question in one decision."[91] The majority concluded that "it was reasonable for the BIA to decline to analyze all at once whether the myriad State formulations of endangerment-type child abuse offenses come within the ambit of 'child abuse' under the Act."[92] Yet, it is precisely because the BIA recognized "that different state statutes employ different language regarding their requisite level of risk and that even similar statutes have been interpreted differently by various state courts," that the BIA needed to undertake a comprehensive analysis to account for these variations when establishing a unitary definition for the statutory term.[93] The BIA's "fail[ure] to define the precise level of risk required" for a conviction to fall within the definition of the statute is patently unreasonable if the BIA itself recognized that interpreting the Act necessitated an assessment of the level of risk to the child contemplated by the various states' statutes.[94] This piecemeal analysis creates a definition that is not only "incomplete and confusing,"[95] but also creates an ever-shifting definitional target.

Finally, the Ninth Circuit asserted that "the BIA did not change its position: *Rodriguez*'s brief discussion of § 1227(a)(2)(E)(i) was dictum; *Velazquez* gave the first precedential interpretation of § 1227(a)(2)(E)(i) but left the issue of actual injury undecided; and *Soram* merely filled the gap that *Velazquez* left open."[96] However, the dissent reasoned, the BIA "unreasonably interpreted the phrase 'crime of child abuse, child neglect, and child abandonment,' having inexplicably changed its generic definition three times in the past two decades."[97] Judge Wardlaw noted three major areas of change: (1) definitional shift from an interpretation that requires infliction of physical, mental, or emotional harm to an interpretation that does not require proof of actual harm or injury to the child; (2) interpretative shift from a uniform, national definition to a state-by-state analysis in determining harm to the child; (3) conceptual shift in defining "crime of child abuse, child neglect, or child abandonment" as a unitary concept as opposed to individual terms such "crime of child abuse."[98] As a result, the Ninth Circuit's criticism does not recognize the ways in which the BIA's interpretation has shifted over time.

B. *Incorporation of the Immigration Rule of Lenity*

The immigration rule of lenity doctrine[99] originated in the Supreme Court's *Fong Haw Tan v. Phelan* decision, in which the Court had to

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91. *Id.* at 991 (majority opinion).
92. *Id.* at 991-92 (quoting *In re* Soram, 25 I. & N. Dec. 378, 383 (BIA 2010)) (internal quotation marks omitted).
93. *Id.* at 991 (referencing *In re Soram*, 25 I. & N. Dec. at 382-83).
94. *Id.* at 999 (Wardlaw, J., dissenting) (describing BIA's analysis in *In re Soram*, 25 I. & N. Dec. at 382).
95. *Id.* at 996.
96. *Id.* at 992 (majority opinion).
97. *Id.* at 995 (Wardlaw, J., dissenting).
98. *Id.* at 998.
99. The concept of lenity is not limited to the criminal sphere and has been understood to apply in the civil context. *See* WILLIAM ESKRIDGE, JR., PHILLLIP P. FRICKEY, ELIZABETH GARRETT & JAMES J.

determine if Fong Haw Tan's conviction of two separate criminal counts in the same proceeding rendered him deportable for being "sentenced more than once."[100] Finding in the immigrant's favor, the Court determined it must "not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used," "because deportation is a drastic measure and at times the equivalent of banishment or exile."[101] Accordingly, under the immigration rule of lenity, courts must rely on the narrowest meaning and resolve ambiguity in favor of the immigrant, "since the stakes are considerable for the individual."[102]

Although the judiciary established the immigration rule of lenity, the principle of lenity is rooted in the Constitution. The Supreme Court has described the rule of lenity as grounded in the Due Process Clause. Lenity operates as the "fair warning requirement" of due process,[103] "which mandate[s] that no individual be forced to speculate" about the consequences of their conduct.[104] Moreover, the "Court recognized that deportation caused by criminal convictions is 'intimately related to the criminal process' and held that criminal defense attorneys have an ethical obligation to correctly advise noncitizen defendants of the immigration consequences of a guilty plea."[105] This duty is imposed in recognition of the significant collateral consequences that can result from a criminal conviction.

The immigration rule of lenity requires courts to resolve ambiguities in favor of the immigrant. Here, that principle conflicts with the *Chevron* doctrine's requirement to give deference to agency interpretations. Under *Chevron*, where there is ambiguity, a court should defer to an agency's reasonable interpretation of a statute even if doing so would inflict greater punishment on immigrants. Conversely, the court is also under an obligation to resolve ambiguities in favor of the party against which enforcement is sought under the principle of lenity, in assessing whether an agency's interpretation runs afoul of the rule of lenity.

This tension is embedded in the definitional conflict at issue in this circuit split because the relationship between *Chevron* deference and the immigration rule of lenity is unclear.[106] Although the Supreme Court has "made clear that the rule of lenity persists in some form in post-*Chevron* jurisprudence," it has yet to clarify how these canons should interact.[107] As a result, the courts

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Brudney, Cases and Materials on Legislation and Regulation: Statutes and the Creation of Polublic Policy (5th ed. 2014) ("Rule of lenity may apply to civil sanction that is punitive or when underlying liability if criminal.").

100. David S. Rubenstein, *Putting the Immigration Rule of Lenity in Its Proper Place: A Tool of Last Resort After Chevron*, 59 ADMIN. L. REV. 479, 492 (2007).

101. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

102. *Id*.

103. United States v. Lanier, 520 U.S. 259, 266 (1997).

104. Dunn v. United States, 442 U.S. 100, 112 (1979).

105. Jennifer L. Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803, 1830-31 (2013) (characterizing *Padilla v. Kentucky*, 559 U.S. 356 (2010)).

106. Rubenstein, *supra* note 100, at 501.

107. *Id*.

have adopted a variety of approaches in applying these principles to statutory interpretation issues in the immigration context. One scholar categorized the various approaches that courts have followed:

> (1) applying *Chevron* and ignoring the rule of lenity; (2) applying the rule of lenity and ignoring *Chevron*; (3) recognizing both doctrines and not deferring to the agency's interpretation because the statute was clear on its face; (4) recognizing both doctrines and rejecting the principle of lenity because the statute was clear on its face; (5) applying the rule of lenity where *Chevron* was found not to apply; (6) considering the rule of lenity at *Chevron*'s first step in determining whether Congress's intent was clear; (7) considering the rule of lenity at *Chevron*'s second step in determining whether the agency's interpretation was reasonable; (8) applying *Chevron* deference and finding that the rule of lenity did not apply at step two because the agency's interpretation was otherwise reasonable; and (9) employing the rule of lenity after determining that the agency's construction was unreasonable.[108]

Courts have adopted "just about every conceivable approach [that] has been employed or suggested by the circuit[s]" in assessing the application of these doctrines in the immigration context.[109] Under these varying approaches, it is unclear whether courts should consider lenity separately from *Chevron*, during *Chevron* Step One as a guide to legislative intent, or during *Chevron* Step Two "as one factor in determining whether the agency's interpretation is reasonable."[110]

Despite this methodological confusion, courts should apply a simple principle: *lenity supersedes deference*. Courts have applied the principle of lenity, "[d]espite the extreme judicial deference traditionally given the political branches in immigration matters . . . in light of the harshness of deportation."[111] It is wrong to suggest that courts may only "consider the rule of lenity in construing the statute in favor of aliens if, and only if, the agency's interpretation is unreasonable."[112] Such an approach impermissibly eliminates lenity considerations from the court's analysis and fails to account for Supreme Court precedent that "has made it unequivocally clear that the Government is entitled to no deference for its interpretation of a criminal statute."[113] Although deportation is not exclusively a criminal penalty, it is a consequence that flows directly from the BIA's interpretation of a criminal

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108. *Id*. at 503-04.
109. *Id*. at 503.
110. Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L. J. 515, 575 (2003).
111. *Id*. at 516.
112. Rubenstein, *supra* note 100, at 518.
113. Erica Marshall, *The Rule of Lenity: A Five-Minute Guide to Navigating the Intersection of Administrative and Criminal Law*, FEDERALIST SOC'Y (May 1, 2017), https://fedsoc.org/commentary/blog-posts/the-rule-of-lenity-a-five-minute-guide-to-navigating-the-intersection-of-administrative-and-

statute. Like lenity in the criminal context, the governmental entity seeking enforcement should not be favored in its interpretation of a provision that should be sufficiently clear to give notice to the individual against which enforcement is sought.[114] This is especially true given that lenity is not limited to the criminal sphere.[115]

This is because *Chevron* applies to agencies' interpretations of regulatory statutes but not to prosecuting agencies' interpretation of criminal provisions.[116] Courts have reasoned that *Chevron* deference does not apply to criminal statutes because Congress did not delegate interpretative authority to the Department of Justice, instead making courts "the proper administrators of federal criminal statutes."[117] Courts have also recognized that criminal laws must be clear and that agency interpretative flexibility would violate this requirement.[118] Last and perhaps most self-evident, prosecutorial entities such as the Justice Department "would have too many incentives to interpret criminal statutes expansively."[119] These rationales apply with equal force to the interpretation of criminal provisions in the immigration context.[120]

With respect to the legal question at issue here, the Tenth Circuit is the *only* court in the circuit split that has applied the immigration rule of lenity to its analysis. The Tenth Circuit's critical assessment of the BIA's interpretation applies the rule of lenity to the realm of immigration law, requiring "that statutory ambiguities in deportation provisions be resolved in favor of the noncitizen."[121] Although the court did not use the term lenity by name, its reasoning elevated this principle, as it noted, "[t]he BIA's definition is particularly indefensible because . . . it is nongeneric in an overinclusive way despite the canon that 'ambiguity in criminal statutes referenced by the INA must be construed in the noncitizen's favor.'"[122]

By contrast, the Second Circuit explicitly rejected the application of the immigration rule of lenity in its assessment, reasoning that the principle is "set aside if the BIA has reasonably interpreted the INA in favor of removal."[123] The court held the doctrine of lenity need not "be applied whenever there is an ambiguity in an immigration statute because, if that were true, it would supplant the application of *Chevron* in the immigration

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criminal-law (referencing United States v. Apel, 134 S. Ct. 1144 (2014) and Abramski v. United States, 134 S. Ct. 2259 (2014)).

114. *See generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

115. ESKRIDGE ET AL., *supra* note 99.

116. Steven Croley, *The Scope of Chevron*, A.B.A. (July 2001) (unpublished manuscript), www.americanbar.org/ content/dam/aba/migrated/adminlaw/apa/chevronscopejuly.doc.

117. *Id*. (citing Crandon v. United States, 494 U.S. 152, 177 (1990)).

118. *Id*. (referencing United States v. McGoff, 831 F.2d 1071, 1077 (D.C. Cir. 1987)).

119. *Id*. (relying on *Crandon*, 494 U.S. at 177-78).

120. *Id*.

121. Slocum, *supra* note 110, at 516.

122. Ibarra v. Holder, 736 F.3d 903, 918 (10th Cir. 2013) (quoting Moncrieffe v. Holder, 569 U.S. 184 (2013)).

123. Florez v. Holder, 779 F.3d 207, 213 (2d Cir. 2015).

context."[124] This reading, however, fails to account for the myriad ways these canons can be jointly applied and eschews the court's responsibility to analyze both principles.

The Third Circuit also ignored lenity when it held the BIA's interpretation of the "crime of child abuse" was reasonable and entitled to deference because its definition was not "arbitrary, capricious, or manifestly contrary to the statute."[125] The court did not assess the role that lenity may play in interpreting statutory ambiguity.

The Eleventh Circuit referenced these considerations but nevertheless failed to apply lenity principles in its analysis in *Martinez*.[126] In that case, Lucia Medina Martinez was charged for allowing her husband and the father of four of her six children to re-enter their home after her oldest daughter accused him of molestation.[127] Authorities later substantiated the allegations; Martinez's husband was convicted of child molestation and sentenced to fifteen years in prison.[128] Even though "[t]here were no alleged incidents of molestation during the three weeks that Martinez allowed [her husband] to return to their home," the state still charged Martinez after she reported the incident.[129] She pled no contest, believing her plea "would allow her children to be returned to her care and custody as soon as possible."[130] Despite acknowledging these facts and recognizing that following the BIA's definition "yields a profoundly unfair, inequitable, and harsh result," the Eleventh Circuit concluded it was "constrained by the law" to rule against Martinez in this "heartbreaking case."[131] The court resigned itself to the conclusion that "this case calls for more mercy than the law permits this Court to provide," without ever considering or applying the immigration rule of lenity in its legal analysis.[132] Consequently, Martinez and her six young children will be removed to Mexico, a country in which they have no relatives. As the court acknowledged, doing so will "work an extreme hardship on a family that has already been forced to endure domestic abuse, the molestation of a child by her step-father, and the incarceration of a father and husband."[133]

Judge Wardlaw's dissent in *Martinez-Cedillo* warned that "[t]he Board's vague definition makes it unreasonably difficult for a lawful permanent resident to predict whether he will be subject to immigration consequences as a result of a state court conviction," particularly in cases of child endangerment

124. Ruiz-Almanzar v. Ridge, 485 F.3d 193, 198 (2d Cir. 2007).
125. Mondragon-Gonzalez v. U.S. Att'y Gen., 884 F.3d 155, 159 (3d Cir. 2018) (recognizing Chen v. Ashcroft, 381 F.3d 221, 224 (3d Cir. 2004) and *Florez*, 779 F.3d at 212).
126. Martinez v. U.S. Att'y Gen., 413 F. App'x 163, 164 (11th Cir. 2011).
127. *Id*. at 164-65.
128. *Id*. at 165.
129. *Id*.
130. *Id*.
131. *Id*. at 168.
132. *Id*. at 168-69.
133. *Id*. at 169.

where statutes permit conviction even if the child incurs no injury."[134] She observed the inherent unfairness of the majority opinion: although "many lawful permanent residents relied on the definition to make decisions about how to plead in criminal proceedings," the Board's ever-changing definition can arbitrarily impose heightened consequences after-the-fact.[135] The need to apply the rule of lenity in the face of the BIA's changing definition is best evidenced by the facts of *Martinez*:

> [He] pleaded guilty to a violation of section 273a(a) at the time that the Board's definition of "crime of child abuse" required an injury for purposes of deportation, and we know that Martinez's son was not injured. [. . .] [T]he state court that told him that his crime was not among the list of removable offenses[.][136]

Such a result is "contrary to familiar considerations of fair notice, reasonable reliance, and settled expectations," yet the Board refused to address the gaps and inconsistencies in its interpretation "despite knowing it was confusing at the time it was made[.]"[137] Without definitional clarity, immigrant-defendants cannot accurately ascertain the consequences of their plea or conviction to make informed decisions about their case and future.

C. *Alignment with Chevron's Animating Principles*

Lenity has an important role to play in interpreting immigration statutes, particularly when statutory interpretations are inextricably linked with criminal law. Nevertheless, the Tenth Circuit's determination not to grant the BIA's interpretation deference better aligns with the philosophical underpinnings of *Chevron*: reliance on agency expertise, efficient administrative delegation, and political accountability.

1. *Agency Expertise*

One rationale for granting *Chevron* deference is the value of an agency's technical expertise. As the Supreme Court reasoned, "those with great expertise and charged with responsibility for administering the provision would be in a better position" to provide interpretative guidance.[138] Although many administrative contexts, such as environmental, food and drug, and energy regulation "frequently require this type of technical decision-making," the BIA does not bring any expertise to bear regarding interpretation of relevant

134. Martinez-Cedillo v. Sessions, 896 F.3d 979, 1000 (9th Cir. 2018) (Wardlaw, J., dissenting).
135. *Id.*
136. *Id.* at 1001.
137. *Id.* at 1006 (internal quotation marks omitted) (relying on INS v. St. Cyr, 533 U.S. 289, 323-33 (2001)).
138. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

statutory terms.[139] Rather, when the BIA "draws directly on a particular federal statute or an amalgamation of federal and state provisions to produce a definition for a term, it does not perform a task outside the competence of the courts."[140] Thus, before applying the *Chevron* framework, courts should be cognizant that the federal judiciary is "best positioned to interpret the relationship between multiple statutes in the federal system," whereas the Board "does not draw on any of its expertise in the INA" in its reasoning.[141]

Both the Tenth Circuit opinion and Ninth Circuit dissent recognized this consideration. In *Ibarra*, the Tenth Circuit noted, as "*Velazquez*, *Soram*, and the present case illustrate, [that] the interpretation and exposition of criminal law is a task outside the BIA's sphere of special competence."[142] Accordingly, the dissent reasoned that where an agency's expertise does not in itself invite deference, *Chevron* should not compel the court to defer to the BIA's interpretation.[143] Likewise, as the Ninth Circuit dissent explained, the BIA's assertion that the IIRIRA was intended to be "enforcement oriented" provided an insufficient basis for the application of *Chevron*.[144] Judge Wardlaw's dissent similarly emphasized this rationale by stating, "[t]he BIA has no special expertise by virtue of its statutory responsibilities in construing state or federal criminal statutes."[145]

2. *Delegation*

Courts also invoke *Chevron* deference where Congress has made clear its intent to delegate authority.[146] This delegation allows agencies to interpret policy when Congress has indicated it is proper to "rely upon the incumbent administration's views of wise policy to inform its judgments."[147] Agency interpretations, however, must fall within the scope of delegated authority.[148] Thus, the Board's consideration of "whether it is wise policy to define 'crime of child abuse' in the INA to include criminally negligent non-injurious conduct" is secondary to the court's determination that such a policy is impermissible "because Congress gave no indication it intended the crimes it detailed."[149]

Even assuming Congress' delegation of authority is appropriate, it must still be consistent with the separation of powers underlying the constitutional

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139. Paul Chaffin, *Expertise and Immigration Administration: When Does Chevron Apply to BIA Interpretations of the INA?*, 69 N.Y.U. ANN. SURV. AM. L. 503, 532-33 (2013).
140. *Id*. at 578.
141. *Id*.
142. Ibarra v. Holder, 736 F.3d 903, 921 n.19 (10th Cir. 2013) (citations omitted) (internal quotation marks omitted) (citing Singh v. Ashcroft, 383 F.3d 144, 151 (3d Cir. 2004)).
143. Martinez-Cedillo v. Sessions, 896 F.3d 979, 1005 (Wardlaw, J., dissenting).
144. *Id*. (citations omitted) (internal quotation marks omitted) (citing *Ibarra*, 736 F.3d at 918).
145. *Martinez-Cedillo*, 896 F.3d at 1005.
146. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).
147. *Id*.
148. *See id*. at 865-66.
149. *Martinez-Cedillo*, 896 F.3d at 1005 (citing *Ibarra*, 736 F.3d at 917).

system wherein "laws are enacted by the legislature, administered by the executive, and interpreted by the judiciary."[150] At least one scholar has suggested applying the void for vagueness doctrine to statutory provisions "that lie at the crossroads of immigration and criminal law" because the canon's underwriting values of "providing reasonable notice and preventing arbitrary or discriminatory law enforcement practices—apply with exceptional force in immigration."[151]

A primary benefit of delegation is that agency interpretations "result in a more consistent national law."[152] Yet, as the Ninth Circuit's dissent wryly observed: "the ship has sailed on this justification," as the existing circuit split already foreclosed this possibility.[153] Although the current split has solidified and deepened the circuit divide on this issue, the BIA has also refused to resolve facial inconsistencies stemming from its decision to rely on varying state-dependent definitions in its interpretation of the INA; indeed, this policy caused the problem in the first place. The BIA's interpretation therefore undercuts the crucial, interconnected values of clarity and consistency.

3. *Political Accountability*

Another motivating rationale underpinning *Chevron* deference is political accountability.[154] As judges are not part of either political branch of government, policy choices should be left to legislative or executive authorities because these branches are accountable to the electorate.[155] Agencies, which are accountable to the public through the President, are well-positioned to resolve "the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."[156]

Although political accountability may at first seem to favor deference to the BIA, rote and unexacting review by the courts presents serious concerns with respect to transparency and accountability. The INA's vagueness, especially when combined with the wide berth granted to the BIA, creates the potential for abuse. Without closer scrutiny by courts, there is a significant risk that the BIA's interpretation of statutory terms is – or has the potential to become – overly broad.[157] To the extent that these decisions are a direct and

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150. *Separation of Powers—Delegation of Legislative Power*, NAT'L CONF. OF STATE LEGISLATURES (2019), http://www.ncsl.org/research/about-state-legislatures/delegation-of-power.aspx ("In Mistretta v. United States (1989), the U.S. Supreme Court applied the 'intelligible principle' test.").

151. Koh, *supra* note 105, at 1127.

152. Chaffin, *supra* note 139, at 534.

153. *Martinez-Cedillo*, 896 F.3d at 1005 (Wardlaw, J., dissenting).

154. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

155. *Id.*

156. *Id.* at 865-66.

157. *See supra* Section III (describing the BIA's broad interpretation that encompasses offenses in its interpretation of "child abuse" that includes crimes where there was no harm to the child).

intentional result of the administration's anti-immigrant stance, the courts must play a role in curbing arbitrary executive action.[158]

In a recent immigration case, Justice Gorsuch summarized this concern when he recognized that "[v]ague laws invite arbitrary power."[159] Contrary to the political accountability that *Chevron* seeks to promote, vague laws and broad interpretative discretion reduce transparency by allowing for discretion that may not be applied consistently. In quoting these words, Judge Wardlaw mounted a call to action in opposition to the majority in *Martinez-Cedillo*, which follows the majority of the courts that have weighed in on the existing circuit split. Judge Wardlaw condemned a trend that she characterizes as "an abdication of the Judiciary's proper role in interpreting federal statutes."[160] Courts must also ensure "the BIA's reasoning in these cases does not demonstrate accountability to permissible policy objectives of the Executive."[161] Simply put, "[c]ourts have a role in correcting arbitrary and capricious agency action."[162]

The need for critical examination of agency interpretations is most pronounced at the intersection of immigration and criminal law, where "the liberty stakes of the crime-based removal grounds are high, notice is critical, and the risk of arbitrariness and discrimination by government actors at multiple levels is acute."[163] This "independent analysis rather than mechanically and summarily adopting an agency interpretation, provid[es] guidance for future litigants, legislators, and the BIA."[164] Even if courts ultimately defer to the BIA's interpretation, in a culture of judicial vigilance "the BIA would have greater incentives to justify its decisions with immigration-specific rationales or statements of policy."[165]

V. THE SUPREME COURT, IMMIGRATION, AND *CHEVRON*

This circuit split is prime for Supreme Court review because the current divide on this question "means that people convicted of identical crimes in states in the Tenth Circuit will be permitted to remain in the United States, while those in states in the Second[, Third, Eleventh,] and Ninth Circuits will

158. In addition to the practical importance of judicial intervention, animus is also a legally significant consideration. The Supreme Court invalidated the Colorado Civil Rights Commission decision that a Christian baker had violated state civil rights law by refusing to bake a cake for a gay couple in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*. *See* Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 134 (June 1, 2019), https://harvardlawreview.org/2018/11/the-etiquette-of-animus/ (describing *Masterpiece* as the latest "in a line of [cases] that prohibit public officials from acting on the basis of prejudice, hatred, or the 'bare . . . . desire to harm' others").

159. Sessions v. Dimaya, 138 S. Ct. 1204, 1223 (2018) (Gorsuch, J., concurring).

160. Martinez-Cedillo v. Sessions, 896 F.3d 979, 1005 (Wardlaw, J., dissenting) (quoting Pereira v. Sessions, 201 L. Ed. 2d 433, 453 (2018) (Kennedy, J., concurring)).

161. Chaffin, *supra* note 139, at 562-85.

162. *Martinez-Cedillo*, 896 F.3d at 1005.

163. Koh, *supra* note 105, at 1127.

164. Chaffin, *supra* note 139, at 562-85.

165. *Id*.

be removed."[166] Although immigration cases are only a fraction of the Supreme Court's docket, the Court invoked *Chevron* deference as part of its review of agency legal conclusions in four immigration decisions since 2010: *Holder v. Martinez Gutierrez* and *Holder v. Sawyers* (2012), *Scialabba v. Cuellar de Osorio* (2014), *Mellouli v. Lynch* (2015), and *Esquivel Quintana v. Sessions* (2017).[167] Although dealing with a range of legal questions, "the first three cases were ultimately resolved at step two of the *Chevron* analysis," with the Court granting deference to the agency's interpretation in *Martinez Guttierez* and *Cuellar de Osorio*, but "finding the agency's definition unreasonable in *Mellouli*."[168] The Court declined to grant deference to the BIA's interpretation "on the grounds that it was unambiguously foreclosed by the statute" in *Esquivel Quintana*.[169]

These cases do not provide direct guidance in resolving the circuit split because none of these cases address the relationship between the principles of *Chevron* and lenity. The Supreme Court's resolution of this circuit split could potentially provide guidance for how courts should apply *Chevron* in the immigration context more broadly and clarify how these principles interrelate. As the *Ibarra* court observed, there are a number of crimes listed under § 1227(a)(2), including "crimes of moral turpitude; aggravated felonies; high speed flight from an immigration checkpoint; failure to register as a sex offender; . . . and crimes of domestic violence, stalking, or violation of protection order."[170] Were the Court to address this issue, the impact would likely extend to other cases where the BIA requested that courts defer to its interpretations of other criminal statutory provisions.

This question looms large, in part, because of the changed composition of the Supreme Court, notably the recent addition of Justice Brett Kavanaugh. Justice Kavanaugh's presence on the Court is significant, in part because he replaced Justice Anthony Kennedy, who was widely viewed as a swing vote on a number of key issues. His stance on this issue is also important because it is unclear how he would address an immigration issue turning on *Chevron*, which pits his hardline oppositional posture towards immigration against his skepticism towards agency deference established in *Chevron*. One scholar observed that Justice Kavanaugh has been a powerful critic of *Chevron* as "an abdication of the court's Article III duty to independently interpret the law, . . . [which] aggrandizes the power of the executive branch at the expense of both the legislative and the judicial."[171] Kavanaugh has described himself,

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166. *Martinez-Cedillo*, 896 F.3d at 1005.

167. Kate A. Rodriguez, *Eroding Immigration Exceptionalism: Administrative Law in the Supreme Court's Immigration Jurisprudence*, 86 U. CIN. L. REV. 215, 231-32 (2018).

168. *Id.*

169. *Id.*

170. Ibarra v. Holder, 736 F.3d 903, 906 (10th Cir. 2013) (quoting 8 U.S.C. § 1227(a)(2)(A)-(F) (2012)).

171. Michael McConnell, *Kavanaugh and the "Chevron Doctrine,"* HOOVER INST. (July 30, 2018), https://www.hoover.org/research/kavanaugh-and-chevron-doctrine.

not as "a skeptic of regulation," but as "a skeptic of illegal regulation, of regulation outside the bounds of what the laws passed by Congress have said."[172] Yet, Kavanaugh's skepticism for *Chevron* is at odds with the justice's unsympathetic and recalcitrant stance on immigration issues. In a recent case before the Court, Justice Kavanaugh adopted the position that federal law requires detention of "immigrants who had committed crimes, often minor ones, no matter how long ago they were released from criminal custody" even if individuals were held "without an opportunity for a bail hearing."[173]

However, Justice Neil Gorsuch could also wield influential voice on the resolution of this issue. Like Kavanaugh, Justice Gorsuch has been critical of the administrative state. Joined by Chief Justice John Roberts and Justice Clarence Thomas, Justice Gorsuch wrote a powerful dissent in *Gundy v. United States*.[174] In *Gundy*, the Court upheld Congress' delegation of authority to the Attorney General to determine whether people who offended before the Sex Offender Registration and Notification Act ("SORNA") became law must register pursuant to the provision's requirements.[175] In his dissent, Justice Gorsuch is critical of Congress' delegation of authority to the Attorney General as "simply pass[ing] the problem to the Attorney General."[176] This vast grant of authority, per Gorsuch, impermissibly imbues the "nation's chief prosecutor [with] the power to write a criminal code rife with his own policy choices[.]"[177] This criticism is partly based on his understanding of the intelligible doctrine principle, a central concept on which agency delegation is based. The current, "mutated" version of the doctrine, he argues, "has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked."[178] Yet, Justice Gorsuch's interpretation, on its own, is not the concern. Rather, Justice Samuel Alito's concurrence signaled a willingness to reconsider the intelligible doctrine principle, "strongly indicat[ing] that in a future case, with Kavanaugh's vote, the conservatives are coming for the intelligible principle doctrine — and may well smash one of the basic building blocks of administrative law."[179]

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172. Jeffrey Toobin, *The Deceptive Contrast between Trump and Kavanaugh*, NEW YORKER (Sept. 17, 2018), https://www.newyorker.com/magazine/2018/09/17/the-deceptive-contrast-between-trump-and-kavanaugh.

173. Adam Liptak, *At Immigration Argument, Justice Kavanaugh Takes Hard Line*, N.Y. TIMES (Oct. 10, 2018), https://www.nytimes.com/2018/10/10/us/politics/kavanaugh-immigration-supreme-court-case.html.

174. Gundy v. United States, 139 S. Ct. 2116, 2120 (2019) ("Kagan, J., announced the judgment of the Court and delivered an opinion, in which Ginsburg, Breyer, and Sotomayor, JJ., joined. Alito, J., filed an opinion concurring in the judgment. Gorsuch, J., filed a dissenting opinion, in which Roberts, C. J., and Thomas, J., joined. Kavanaugh, J., took no part in the consideration or decision of the case.").

175. *Id*.

176. *Id*. at 2132.

177. *Id*. at 2144.

178. *Id*. at 2139.

179. Noah Feldman, *This Supreme Court Decision Should Worry the EPA and FDA*, BLOOMBERG (June 22, 2019), https://www.bloomberg.com/opinion/articles/2019-06-22/supreme-court-s-gundy-decision-should-worry-administrative-state.

However, Justice Gorsuch's skepticism of the administrative state signals his broader distrust for government, as he has sided against the government in the criminal context.[180] In *United States v. Davis*, Gorsuch joined the liberal wing of the Court in a 5-4 decision "holding that a federal law imposing stricter sentences on some criminal defendants who use firearms is so vague as to be unconstitutional."[181] In *Davis*, Justice Gorsuch sides with the majority's conclusion "that the text, structure and context of [the provision in question] all suggest that the statute requires courts to look at a generic offense and assess the risk of that offense, rather than the defendant's conduct" and "ensures that the canon of constitutional avoidance can function as a sword for criminal defendants."[182] Justice Gorsuch and the majority's "concern about judges' broadening already expansive criminal statutes — is very different from the tone of Kavanaugh's dissent" and underscores the philosophical differences between the two Trump appointees to the Court.[183]

To the extent that the current split on the interpretation of a "crime of child abuse" pits the interests of the administrative state and of criminal defendants against one another, Justice Gorsuch's interpretation in resolving this conflict is likely to have a critical influence on the Supreme Court's decision. Yet, to the extent "Gorsuch's opinion [in *Davis*] often seems to blur the line between the uncontroversial proposition that courts should treat vague criminal laws with suspicion, and the much more radical proposition that any ambiguous law is constitutionally dubious," may signal that far more dramatic shifts in the legal landscape of the administrative state await.[184]

VI. CONCLUSION

The appellate courts are currently split as to whether the BIA's interpretation of "crime of child abuse, child neglect, or child abandonment" is entitled to deference under *Chevron*. Although the Second, Third, Ninth, and Eleventh Circuits deferred to the BIA's definition, the Tenth Circuit declined to grant deference to the BIA's interpretation.

The *Martinez-Cedillo* dissent summarized the reasoning of the Tenth Circuit's approach:

> Where the Board strayed far from congressional intent, adopted a definition that misrelied on non-contemporaneous civil code sections, failed to follow Supreme Court authority instructing courts how to define generic criminal offenses, changed its position without adequate

180. *See* United States v. Davis, 139 S. Ct. 2319, 2323 (2019).

181. Ian Millhiser, *So Why did Gorsuch Just Vote with the Four Liberal justices in a 5-4 Decision?*, THINK PROGRESS (June 24, 2019), https://thinkprogress.org/gorsuch-united-state-davis-supreme-court-agency-power-6beb6cb1e615/.

182. Leah Litman, *Opinion Analysis: Vagueness Doctrine as a Shield for Criminal Defendants*, SCOTUSBLOG (Jun. 24, 2019, 2:25 PM), https://www.scotusblog.com/2019/06/opinion-analysis-vagueness-doctrine-as-a-shield-for-criminal-defendants/.

183. *Id*.

184. Millhiser, *supra* note 181.

> explanation, and ignored the context, language, and purpose of the statute, deference is not appropriate. The BIA's generic definition of the crime of child abuse, neglect, and abandonment in *Soram* is unreasonable and an impermissible interpretation of the statute.[185]

Judge Wardlaw stressed that the "majority's willfully blind characterization of the Board's dithering definitions of this deportable offense does not match reality" and that the BIA's expansive definition, which she found at odds with both the statute's plain language and Congress' intent, was patently unreasonable.[186] Significantly, Judge Wardlaw noted, "[i]t should not be lost on us that, while we fault Martinez for endangering his son, we simultaneously condone the separation of a family, exiling a father of two children who has resided in the United States lawfully for more than twenty-five years. That Congress did not intend such a result is apparent from these facts."[187]

This legal question offers the Court the opportunity to clarify how the *Chevron* analysis should apply in the immigration context more broadly. The Tenth Circuit's approach is the best application of the *Chevron* doctrine, its underlying rationales and values, and the Supreme Court's precedent. Moreover, it avoids the pitfalls of the circuit split majority's reasoning and the irrational consequences of deferring to the BIA's incomplete and evolving definition. Finally, it "perfectly illustrates why we should be skeptical of ceding broad powers of interpretation to agencies with the authority to impose a 'civil death penalty.'"[188] In resolving this question, the Supreme Court, sister circuits, and district courts should look to this analysis as the foundation for how to apply these principles to analogous provisions at the intersection of immigration and criminal law.

185. Martinez-Cedillo v. Sessions, 896 F.3d 979, 1005-06 (9th Cir. 2018) (Wardlaw, J., dissenting).
186. *Id.* at 1002.
187. *Id.*
188. *Id.* at 1005.