

## SIXTH CIRCUIT REVIEW

## “Sticker Shock”: Driving Around *Chevron* and the Rule of Lenity in Immigration Removal

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Commenting on *Esquivel-Quintana v. Lynch*, 810 F.3d 1019 (6th Cir. 2016).

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### I. INTRODUCTION

In *Esquivel-Quintana v. Lynch*, the Sixth Circuit upheld the removal of a resident based on a violation of a vague immigration statute.<sup>1</sup> The Sixth Circuit’s decision does not give a definition to the statute, however, but brings into question statutory construction as the court based its decision on *Chevron* deference.<sup>2</sup> Both the majority and spirited dissent by Judge Sutton express a doctrinal argument over the proper relationship between the rule of lenity and *Chevron* deference when a statute has criminal and civil liability. In this case, Juan Esquivel-Quintana, a permanent resident, violated a California statute for “unlawful sexual intercourse with a minor.”<sup>3</sup> For that violation, the Board of Immigration Appeals (BIA) found him removable from the United States under federal law.<sup>4</sup> This decision, when appealed to the Sixth Circuit, led to the entanglement of two important values—between reading laws with

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<sup>1</sup> *Esquivel-Quintana v. Lynch*, 810 F.3d 1019 (6th Cir. 2016).

<sup>2</sup> *Id.* at 1021.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

criminal ramifications strictly, and deferring to agencies entitled to enforce the law.

The rule of lenity, which requires ambiguous criminal statutes to be read in favor of the accused, has a rich history in the United States, but also a difficult one as courts have wrestled with the proper scope of the doctrine.<sup>5</sup> *Chevron* deference, while lacking the older rule's pedigree, makes up for it by being one of the most cited opinions ever, with a vast quantity of judicial and academic commentary.<sup>6</sup> The distinct values each hold necessarily creates pressure when they are brought into dispute.<sup>7</sup>

The decision in *Esquivel-Quintana* aggravates a Circuit split not only in what "sexual abuse of a minor" means for the purposes of 8 U.S.C. § 1227, but also over the proper level of deference given to the BIA interpretation of statutes.<sup>8</sup> Past the practical problem of whether *Esquivel-Quintana* violated § 1227 and the doctrinal problem of deciding between the rule of lenity and *Chevron* deference, it raises the theoretical dilemma of how a lower court receives direction from the Supreme Court in interpreting statutes. The majority in *Esquivel-Quintana* found it difficult to derive a standard from the secondhand manner in which the Supreme Court has used *Chevron* deference in decisions involving statutes with both criminal and civil applications.<sup>9</sup> Even with this difficulty, however, the court was still willing to give a strong reading from its understanding of the precedent. The conflict between these two rules has already been noted by academic commentators in immigration law and other fields.<sup>10</sup> The murky nature of *Chevron*'s relationship with the

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<sup>5</sup> See generally Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 86–122 (1998), for a comprehensive history of the doctrine in the United States.

<sup>6</sup> See Peter M. Shane & Christopher J. Walker, Symposium, *Chevron at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475, 475 (2014).

<sup>7</sup> Cf. Elliot Greenfield, *A Lenity Exception to Chevron Deference*, 58 BAYLOR L. REV. 1, 61 (2006) ("*Chevron* deference respects a valid delegation of authority by Congress and empowers agencies to achieve their policy goals more easily. The rule of lenity, however, protects core constitutional rights—the due process requirement of fair warning and the primacy of Congress in defining criminal behavior.").

<sup>8</sup> This circuit split has appeared in other BIA readings of criminal statutes. See David A. Luigs, Note, *The Single-Scheme Exception to Criminal Deportations and the Case for Chevron's Step Two*, 93 MICH. L. REV. 1105, 1108 (1995).

<sup>9</sup> Cf. Greenfield, *supra* note 7, at 38; Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 559 (2003).

<sup>10</sup> See, e.g., Patricia G. Chapman, *Has the Chevron Doctrine Run Out of Gas? Senza Ripieni Use of Chevron Deference or the Rule of Lenity*, 19 MISS. C. L. REV. 115 (1998); Greenfield, *supra* note 7, at 1; Luigs, *supra* note 8, at 1105; 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, 482 (2007); Slocum, *supra* note 9, at 515; see also Kristin E. Hickman, *Of Lenity, Chevron, and KPMG*, 26 VA. TAX REV. 905 (2007) (dealing with rule of lenity and Chevron problems in tax shelter cases); Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law*, 110 HARV. L. REV. 469, 489–90 (1996) (arguing that *Chevron* deference should even be given to the Department of Justice when interpreting criminal statutes).

rule of lenity, however, is not limited just to immigration. Agencies often interpret civil statutes with criminal ramifications that would require courts to ask whether to defer or apply the rule of lenity.<sup>11</sup> Unfortunately, the level of abstraction the majority and dissent reaches in *Esquivel-Quintana*, treating the conflict as a purely doctrinal question, made it more difficult to solve as there is no good comprehensive rule on when lenity should overrule *Chevron*.<sup>12</sup> Instead of giving a simple reading of the statute, the Supreme Court could use this or a similar case to give lower courts direction on the use of *Chevron* deference when the agency goes against the traditional tools of statutory construction.

This Case Comment will show how a simple statutory construction problem created a myriad of solutions. Part II will describe how the case arrived at the Sixth Circuit and how the majority handled it in a doctrinal manner that opens up this debate. Part III will look at the passionate dissent by Judge Sutton challenging the underlying values found in the opinion and how his argument relates to the current academic commentary on the subject. Part IV will look at how other circuits have dealt with this specific issue, showing the divergent ways courts could decide cases where an agency interprets a statute with criminal and civil elements and how distinct the court's reasoning in *Esquivel-Quintana* appears compared to its peers. Part V will explain how this multitude of options makes it difficult to predict how a future Supreme Court would handle all the issues raised in the case—such as how to interpret § 1227 and § 1101—using the level of deference given to the BIA in interpreting those statutes, and whether the rule of lenity applies to situations where a statute has both criminal and civil outcomes.

## II. *ESQUIVEL-QUINTANA* AT THE AGENCY AND THE COURTS

The path taken by the BIA and the Sixth Circuit's review of that order shows different approaches. The agency interprets the statute on the basis of the Board's precedent. The majority, instead of parroting the Board or de novo reviewing the statute, sees itself constrained by the *Chevron* doctrine.

### A. *Board of Immigration Appeal*

Juan Esquivel-Quintana was arrested and convicted of violating section 261.5(c) of the California Penal Code<sup>13</sup> in 2009 for having sexual relations

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<sup>11</sup>Greenfield, *supra* note 7, at 5 (pointing out the dilemma can be found in EPA, OSHA, SEC, BOP, and NLRB cases).

<sup>12</sup>Greenfield, *supra* note at 7, at 61 (“It is important, therefore, to approach the problem not simply as an abstract debate over methods of statutory interpretation, but as a conflict between two policies that serve distinct sets of values.”).

<sup>13</sup>“Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony . . . .” CAL. PENAL CODE § 261.5(c) (West 2014).

with a girl at least 3 years younger than himself.<sup>14</sup> In 2013, after he moved to Michigan, an Immigration Judge held that this conviction made Esquivel-Quintana removable because it constituted an “aggravated felony,” which, under federal law, is cause for civil deportation.<sup>15</sup> The statute’s definition section for “aggravated felony” includes the dispositive phrase “sexual abuse of a minor” without further explanation.<sup>16</sup>

Lacking a statutory definition of “sexual abuse of a minor,” the Board turned to its own precedent.<sup>17</sup> In an earlier decision, *In re Rodriguez-Rodriguez*, the BIA concluded that it did not necessarily need to give a definite meaning to “sexual abuse of a minor” on the basis of any prior federal statute.<sup>18</sup> The BIA instead decided to be merely “guided” by a federal statutory definition for sexual abuse dealing with the proper treatment of child victims testifying at their abusers’ trials.<sup>19</sup> The Board in *Esquivel-Quintana* on the basis of this earlier decision, concluded that while sixteen- or seventeen-year-olds might not always be included in the definition of “minor” for the purposes of § 1227, they would be if the state includes a reasonable age difference in its statute.<sup>20</sup> The Californian statute stated a victim had to be more than “three years younger than the perpetrator,” so the statute passed the Board’s test—Esquivel-Quintana’s victim was a minor.<sup>21</sup> As such, the BIA upheld the Immigration Judge’s decision.

### B. *The Sixth Circuit and the Chevron Doctrine*

The Sixth Circuit, in an opinion by Judge Boggs, upheld the BIA’s decision, structuring its analysis on *Chevron* deference.<sup>22</sup> As laid out by the Supreme Court, the *Chevron* doctrine requires courts to follow a two-step process: first, ask if the law specifically speaks on an issue and then, if it does not, ask whether the agency’s interpretation is a permissible reading of that ambiguity.<sup>23</sup> The Supreme Court already held that the BIA is allowed to make basic asylum decisions,<sup>24</sup> partially on the basis of *Chevron*.<sup>25</sup> The Sixth Circuit

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<sup>14</sup> *In re Esquivel-Quintana*, 26 I & N Dec. 469, 470 (B.I.A. 2015).

<sup>15</sup> *Id.*; see also 8 U.S.C. § 1227(a)(2)(A)(iii) (2012).

<sup>16</sup> 8 U.S.C. § 1101(a)(43)(A) (2012).

<sup>17</sup> *In re Esquivel-Quintana*, 26 I & N Dec. at 470.

<sup>18</sup> *In re Rodriguez-Rodriguez*, 22 I & N Dec. 991, 994 (BIA 1999).

<sup>19</sup> *Id.* at 995–96. The term “sexual abuse” 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 or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children.” *Id.* (citing 18 U.S.C. § 3509(a)(8) (1994)).

<sup>20</sup> *In re Esquivel-Quintana*, 26 I & N Dec. at 475.

<sup>21</sup> *Id.* at 477.

<sup>22</sup> *Esquivel-Quintana*, 810 F.3d at 1021–22.

<sup>23</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.* 467 U.S. 837, 842–43 (1984).

<sup>24</sup> *INS v. Ventura*, 537 U.S. 12, 16 (2002) (per curiam).

<sup>25</sup> *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424–25 (1999).

also noted that three other circuits have already applied *Chevron* analysis to the BIA's definition of sexual abuse.<sup>26</sup> However, there is a circuit split on whether nonprecedential BIA opinions deserve deference.<sup>27</sup> The Sixth Circuit directly disagreed with the Fourth and Ninth Circuit decisions by holding that unpublished BIA precedent deserves *Chevron* deference. "There is not 'a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field.'"<sup>28</sup> Applying this framework, the Court moved on to analyze the petitioner's argument. The Sixth Circuit quickly ruled out creating a definitive "generic-definition" for sexual abuse of a minor because the Petitioner had built this argument around a case dealing with an easily distinguishable statute.<sup>29</sup> The Court also rejected Esquivel-Quintana's preferred interpretation of "minor"—relying on 18 U.S.C. § 2243<sup>30</sup>—as unreasonable, pointing out that using it would limit the definition of "minor" to children over the age of twelve.<sup>31</sup>

### C. A Tale of Two Footnotes

The Court outlined the benefits of applying the rule of lenity to statutes with criminal and civil applications,<sup>32</sup> which includes stopping agencies from creating new crimes through enforcement, ensures the legislature creates

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<sup>26</sup> *Esquivel-Quintana*, 810 F.3d at 1022 (citing *Velasco-Giron v. Holder*, 773 F.3d 774, 776 (7th Cir. 2014); *Restrepo v. Attorney Gen. of the U.S.*, 617 F.3d 787, 796 (3d Cir. 2010); *Mugalli v. Ashcroft*, 258 F.3d 52, 60 (2d Cir. 2001)).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (quoting *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013)).

<sup>29</sup> *Id.* at 1022–23 (deciding a "generic" meaning was created for robbery in *Taylor v. U.S.*, 495 U.S. 575 (1990), on the basis of legislative history of the particular law in question).

<sup>30</sup> The statute states:

(a) Of a Minor.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who—

(1) has attained the age of 12 years but has not attained the age of 16 years; and

(2) is at least four years younger than the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

18 U.S.C. § 2243(a) (2012).

<sup>31</sup> *Id.* at 1025–26.

<sup>32</sup> Oddly, neither the majority nor dissent considered the statutory canon presumption against deportation (the immigration rule of lenity) as being distinguishable from the criminal rule of lenity. See Rubenstein, *supra* note 10, at 491 (arguing the immigration rule of lenity is weaker than the criminal one) *cf.* Slocum, *supra* note 9, at 519–22 (tracing the history of the immigration rule of lenity through Supreme Court precedent).

criminal statutes, and leaves courts as the final arbitrator of what criminal statutes mean.<sup>33</sup> Despite commending the rule of lenity, the Court considered itself constrained by a footnote in the Supreme Court decision *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, which seemed to limit the application of the rule of lenity.<sup>34</sup> Meanwhile, a later footnote that appeared in *Leocal v. Ashcroft*, while a strong statement in support of rule of lenity, was dismissed by the Sixth Circuit as dicta.<sup>35</sup> That Court did not consider the *Leocal* footnote to have any effect on their reading of *Babbitt* or at least not enough to overturn what it claimed to be an explicit directive from the Supreme Court.<sup>36</sup>

### III. DISSENTING ARGUMENTS

In his opinion, Judge Sutton limits how much he really disagrees with the majority, going so far as to concur in part instead of directly dissenting.<sup>37</sup> However, his criticism of the court's use of *Chevron* is harsh, writing that its use challenges the separation of powers principle by allowing an agency to enforce and interpret a law.<sup>38</sup> Sutton starts his disagreement by arguing that a statute with criminal and civil application must be given only one

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<sup>33</sup> *Esquivel-Quintana*, 810 F.3d at 1023–24.

<sup>34</sup> *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 704 n.18 (1995). The footnote, after listing the value of rule of lenity concluded:

We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement. Even if there exist regulations whose interpretations of statutory criminal penalties provide such inadequate notice of potential liability as to offend the rule of lenity, the “harm” regulation, which has existed for two decades and gives a fair warning of its consequences, cannot be one of them.

*Id.*

<sup>35</sup> *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004). There, the court stated:

Even if § 16 lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute in petitioner's favor. Although here we deal with § 16 in the deportation context, § 16 is a criminal statute, and it has both criminal and noncriminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.

*Id.*

<sup>36</sup> *Esquivel-Quintana*, 810 F.3d at 1024 (“While the Court has begun to distance itself from *Babbitt*, we do not read dicta in *Leocal* and subsequent cases as overruling *Babbitt*, or requiring that we apply the rule of lenity here in *Esquivel-Quintana*'s civil removal proceeding. As an ‘inferior’ court, our job is to adhere faithfully to the Supreme Court's precedents.”).

<sup>37</sup> *Id.* at 1027 (Sutton, J., concurring in part and dissenting in part).

<sup>38</sup> *Id.*

interpretation—the criminal law construction.<sup>39</sup> On whether or not California’s definition of statutory rape is included under federal law, Sutton notes that the circuit split must mean the federal law is, at least, ambiguous on this point.<sup>40</sup> Sutton goes on to point out the definition of “minor” in other federal statute involving sexual abuse has contradictory meanings—in one case where the victim must be under sixteen-years-old, but eighteen in another.<sup>41</sup> Further, Sutton contends that “sexual abuse” might qualify the meaning of minor in a way that would otherwise mean persons under the age of eighteen.<sup>42</sup> Having shown that there must be ambiguity in the interpretation, Sutton goes on to explain that lenity, not *Chevron* deference to the BIA’s conclusion, should be the controlling decider for that ambiguity.<sup>43</sup> For him, the Court deciding otherwise reads too much into one footnote.<sup>44</sup>

Judge Sutton tries to quell fears about “the potential sticker shock of transforming a government-always-wins canon (*Chevron*) into a government-always-loses canon (rule of lenity).”<sup>45</sup> He gives a highly nuanced approach where “ambiguity” might mean one thing for *Chevron* analysis, and another for the rule of lenity.<sup>46</sup> This approach would allow for some agency interpretations of statutes to not necessarily require rule of lenity analysis if those statutes are not ambiguous for the specific purposes of the rule of lenity.<sup>47</sup> Judge Sutton’s difficulty in choosing one definition for “ambiguity” might underscore an innate problem with the statutory canons. Scholars challenge whether the canons are by themselves comprehensive enough to create clear results.<sup>48</sup> Canons are often too generalized to help without precedent to establish the meaning of statutory language as they “ignore crucial differences in structure that characterize modern legislation.”<sup>49</sup> The

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<sup>39</sup> *Id.* at 1028. Sutton’s argument closely tracks the statement made by Justice Scalia in *Whitman v. United States*, 135 S. Ct. 352 (2014) (statement respecting the denial of certiorari). In that statement, Scalia expressed that he agreed with the denial because he thought *Whitman* would serve as “a poor setting in which to reach the question.” *Id.* at 354. But he concluded that the Court should accept a case with the proper question. *Id.* Judge Sutton likely thinks *Esquivel-Quintana* serves as that case. See also *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 729–36 (6th Cir. 2013) (Sutton, J., concurring).

<sup>40</sup> *Esquivel-Quintana*, 810 F.3d at 1029 (Sutton, J., dissenting).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1030.

<sup>45</sup> *Id.* at 1031.

<sup>46</sup> *Esquivel-Quintana*, 810 F.3d at 1031 (“If American Inuits have more than one way to describe snow, American lawyers may have more than one way to describe ambiguity.”).

<sup>47</sup> *Id.*; see also Greenfield, *supra* note 7, at 14–15 (outlining the different levels of ambiguity the rule of lenity had been applied to before).

<sup>48</sup> James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 6–7 (2005).

<sup>49</sup> Edward L. Rubin, Symposium, *Modern Statutes, Loose Canons, and the Limits of Practical Reason: A Response to Farber and Ross*, 45 VAND. L. REV. 579, 586 (1992).

lack of precedent that so bothered the majority opinion that it felt constrained to find against *Esquivel-Quintana*, might be the same reason Sutton tries to supply a formless guidance on how to direct lower courts to use the rule of lenity situations. Yet, his thesis taps into the ongoing academic debate.

Commentators dealing with the *Chevron* and lenity contradiction have suggested that lenity should be applied either at “step one” on whether the statute is ambiguous or at “step two” where the question is whether the construction offered by the agency is permissible.<sup>50</sup> If a step one approach was adopted, a court would interpret a statute to have the clear congressional intent of having lenity read into it, removing the ambiguity for the agency to have interpreted.<sup>51</sup> Under a step two approach, it would serve as a factor to take into account as to whether the agency’s reading was acceptable.<sup>52</sup> Finally, there has been one suggestion that the rule of lenity only serves a role after a court concludes that an agency, by giving an unreasonable interpretation, failed *Chevron* at step two. At that point, the court would independently interpret the statute and therefore would use the rule of lenity.<sup>53</sup> While Judge Sutton does not adopt any of these approaches in his dissent, they do follow his idea that lenity has a role to play even when an agency is meant to be the main interpreter of a statute.

#### IV. OTHER CIRCUITS, OTHER REASONING

The approach adopted by the majority and the dissent in *Esquivel-Quintana* is just a small sliver on how to handle the Board’s interpretation of “sexual abuse of a minor.” While academic commentators have been quick to notice the divergence between rule of lenity and *Chevron* deference, the other Circuits have expressed multiple methods on how to interpret the statutes at issue in *Esquivel-Quintana*. What might be surprising is how none of them expressly deal with the rule of lenity.

The Ninth Circuit in its reading of § 1101(a) refused to give *Chevron* deference to “unpublished, non-precedential” BIA orders.<sup>54</sup> The court considered *Rodriguez-Rodriguez* to be a guide to read “sexual abuse of a minor” instead of a definite interpretation that could be given *Chevron* deference.<sup>55</sup> Instead, it created its own generic definition of the term “sexual abuse of a minor” to be followed by the agency.<sup>56</sup> Like the Ninth Circuit, the

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<sup>50</sup> Rubenstein, *supra* note 10, at 482; Slocum, *supra* note 9, at 577 (“This proposal would modify lenity somewhat from a dispositive tiebreaker canon to a canon that acts as a factor.”); *see also* Greenfield, *supra* note 7, at 47–51.

<sup>51</sup> Luigs, *supra* note 8, at 1131 n.110.

<sup>52</sup> Slocum, *supra* note 9, at 576–77.

<sup>53</sup> Rubenstein, *supra* note 10, at 518.

<sup>54</sup> *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1156 (9th Cir. 2008) (en banc).

<sup>55</sup> *Id.* at 1157.

<sup>56</sup> *Id.* at 1158. The court lists the elements of “sexual abuse of a minor” to be met to reach the statutory definition: “(1) a mens rea level of knowingly; (2) a sexual act; (3) with

Fourth Circuit “conclude[d] that the BIA did not adopt in *Rodriguez-Rodriguez* a particular definition of the generic federal crime of ‘sexual abuse of a minor’ for application of Subsection A.”<sup>57</sup> Holding that the BIA’s interpretation was only entitled to *Skidmore* deference, the Court went on to reverse the BIA’s decision for removal.<sup>58</sup> The Fifth Circuit decided that a plain reading of the statute included the petitioner’s actions.<sup>59</sup> It also concluded that while *Chevron* step one might be met by the BIA’s reading of the statute, step two failed because BIA’s construction went against the Circuit’s precedent for statutory construction.<sup>60</sup> For its part, the Seventh Circuit rejected these approaches, believing that the Supreme Court precedent dictated that agencies can choose between rulemaking and adjudication to apply *Chevron* deference to agency adjudication like the guidance found in *Rodriguez-Rodriguez*.<sup>61</sup> Sexual abuse of a minor would have to be determined by a common law approach best left to the BIA, not the courts.<sup>62</sup> None of these cases expressly considered the rule of lenity.

## V. THE PATH(S) AHEAD

The Sixth Circuit staking its analysis completely on *Chevron* instead of a de novo reading of the statute could provide a unique challenge to the Supreme Court on the meaning of the doctrine if it was to review the case. The Supreme Court might otherwise give an equivocal answer where they upheld the removal on the basis of the plain meaning of the statute, without expressly saying if *Chevron* deference was necessary. It might also adopt the Ninth Circuit approach where courts do not adopt an agency’s “guidance” on what a statute means, but only a bright-line rule with specific boundaries to categorize behavior.<sup>63</sup> It could adopt the Seventh Circuit’s reasoning that the BIA can take a common law approach in enforcing the statute.<sup>64</sup> However, the Court has recently made a strong statement that an agency interpretation of criminal statutes does not deserve deference.<sup>65</sup> It might consider including civil–criminal statutes within that category. There is reason to suspect that even a favorable decision against the use of *Chevron* deference would not overturn the ruling, as happened in the Fifth Circuit. The Supreme Court recently

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a minor between the ages of 12 and 16; and (4) an age difference of at least four years between the defendant and the minor.”

<sup>57</sup> *Amos v. Lynch*, 790 F.3d 512, 520 (4th Cir. 2015).

<sup>58</sup> *Id.* at 521.

<sup>59</sup> *Contreras v. Holder*, 754 F.3d 286, 296 (5th Cir. 2014).

<sup>60</sup> *Id.* at 293.

<sup>61</sup> *Velasco-Giron v. Holder*, 773 F.3d 774, 779 (7th Cir. 2014).

<sup>62</sup> *Id.*

<sup>63</sup> *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1157 (9th Cir. 2008) (en banc).

<sup>64</sup> *Velasco-Giron*, 773 F.3d at 779.

<sup>65</sup> *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014). (“Whether the Government interprets a criminal statute too broadly (as it sometimes does) or too narrowly . . . a court has an obligation to correct its error.”).

restated a very narrow standard for applying the rule of lenity—it is only to be used where, “after considering text, structure, history and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended.”<sup>66</sup> The Supreme Court could conclude that even under a lenity approach, Esquivel-Quintana was removable because of his prior conviction. The recent passing of Justice Scalia casts even more uncertainty on how the Supreme Court would handle this case, as he was one of the strongest voices on the Supreme Court supporting the use of the rule of lenity in *Chevron* situations.<sup>67</sup> However, a pure review of *Esquivel-Quintana* will likely require the Court to settle the “debate” between the footnotes in *Babbitt* and *Leocal*.

## VI. CONCLUSION

No matter the Supreme Court’s stance, the Sixth Circuit has opened a Pandora’s Box about the nature of statutory construction and the canons of interpretation. While wrestling with mixed messages from the Supreme Court, the Sixth Circuit ironically felt constrained into making an expansive statement on the powers agencies hold over immigrants facing deportation. This strong statement will likely make it more difficult for lenity to overrule *Chevron* in future Sixth Circuit cases involving other agencies—showing that the tools of statutory construction, as forged and shaped by the Supreme Court, are often as malleable or rigid as the lower courts choose to see them.

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<sup>66</sup> *Id.* at 2272 n.10 (quoting *Maracich v. Spears*, 133 S. Ct. 2191 (2013)).

<sup>67</sup> *See* *Whitman v. United States*, 135 S. Ct. 352, 354 (2014) (Scalia, J., statement respecting denial of certiorari, joined by Thomas, J.) (“*Babbitt*’s drive-by ruling, in short, deserves little weight.”); Greenfield, *supra* note 7, at 6.