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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

RESPONSE TO AMICUS INVITATION 19-11-6	)	**File No.:**
In the Matter of:	)	
[redacted]	)	**A#** [redacted]
In Removal Proceedings	)	

BRIEF FOR OREGON JUSTICE RESOURCE CENTER IMMIGRANT RIGHTS PROJECT AS AMICUS CURIAE RESPONDING TO INVITATION NO. 19-11-6

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COVERSHEET

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STATEMENT OF THE ISSUE

Does the U.S. Supreme Court's opinion in Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017), affect the meaning of the term "crime of child abuse" under section 237(a)(2)(E)(i) of the Act as applied to "statutory rape" convictions? If so, why and how? And if not, why not?

INTEREST OF *AMICUS CURIAE*

The Oregon Justice Resource Center (OJRC) is a Portland based, non-profit organization founded in 2011. OJRC works to promote civil rights and improve legal representation to traditionally underserved communities, including non-citizens. OJRC serves this mission by focusing on the principle that our justice system should be founded on fairness, accountability, and evidence-based practices. The OJRC's Immigrant Rights Project (IRP) provides personalized advice to

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public defense providers regarding the immigration consequences of pleas and convictions for non-citizens. It is imperative to the interests of noncitizens involved in the justice system, and their families, that the body of case law regarding the grounds of deportation and inadmissibility, including INA § 237(a)(2)(E)(i), be clear, consistent, and fairly applied.

SUMMARY OF ARGUMENT

On November 11, 2019, the Immigration Judge in this case denied Respondent's motion to terminate and sustained a charge of removability under INA § 237(A)(2)(E)(i), on the basis that the Respondent's conviction for violation of Texas Penal Code § 22.11, Sexual Assault, was a "crime of child abuse," as defined for immigration purposes by the Board of Immigration Appeals. The Immigration Judge rejected the Respondent's arguments that the recent United States Supreme Court case *Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562 (2017), was relevant (and in fact dispositive) of this case.

In *Esquivel-Quintana*, the Supreme Court found that a conviction for violation of California Penal Code § 261.5(c) could not be considered an aggravated felony "sexual abuse of a minor" offense, since the phrase "sexual abuse of a minor" did not include persons over the age of sixteen, *at least* in the context of "statutory rape" convictions. *Ibid.* Respondent argued that the term "child abuse," as used in INA § 237(a)(2)(E)(i), also should not be applied to persons over the age of 16, at least in the context of statutory rape offenses, given the holding of *Esquivel-Quintana*. (Respondent's Brief on Appeal, pgs. 4-9).

Amicus submits the following arguments in answer to the Board's question of whether *Esquivel v. Sessions* "affects the meaning of the term 'crime of child abuse' under section 237(a)(2)(E)(i) of the Act as applied to 'statutory rape' convictions." Amicus agrees with Respondent that *Esquivel-Quintana* affects the meaning of the term "child abuse," because that case: (1)

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confirms the "categorical approach" is the proper method of analysis; (2) describes and applies the proper method for determining and applying the "generic" definition of "crime of child abuse"; (3) makes clear that consensual intercourse with a minor one day shy of 17 is not included in the definition of "crime of child abuse," particularly because such conduct is not categorically "abuse," and (4) the phrase "crime of child abuse," is not necessarily ambiguous in context and the Board lacks any special expertise in creating a "generic definition" of the term.

ARGUMENT

I. *Esquivel-Quintana* affects the meaning of "crime of child abuse" by confirming that the categorical analysis must be applied.

The United States Supreme Court recognized, without controversy, that "to determine whether an alien's conviction qualifies as an aggravated felony under [INA § 101(a)(43)(A)], we 'employ a categorical approach by looking . . . to the statute of conviction, rather than to the specific facts underlying the crime.'" *Esquivel-Quintana*, at 1567-1568. The Court cited *Kawashima v. Holder*, 565 U.S. 478, 483 (2012) (federal convictions for violation of 26 U.S.C. 7206(a), and 26 U.S.C. 7206(2), constituted aggravated felony fraud offenses under INA § 101(a)(43)(M)(i) as crimes involving fraud or deceit in which the loss to the victim(s) exceeds $10,000), *without* reference to another aggravated felony fraud decision, *Nijhawan v. Holder*, 557 U.S. 29, 34 (2009), where the Supreme Court first applied the "circumstance specific approach" to determine the applicable amount of loss for purposes of INA § 101(a)(43)(M)(i). While the Supreme Court was aware of the "circumstance specific" approach in the context of the INA, the Court found no reason to apply the circumstance specific approach to the term "sexual abuse of a minor."

As described in *Nijhawan*, this is because the phrase "sexual abuse of a minor" refers to a "generic crime" without any "qualifying language," that would call for a circumstance specific

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approach. *Nijhawan*, at 37. Notably, in *Esquivel-Quintana*, the Supreme Court did not see the phrase "sexual abuse *of a minor*" as an invitation to go beyond the confines of a state's sexual abuse statute to look behind the record to determine the age of the victim. There is no reason to treat the phrase "crime of child abuse" differently in this respect.

The Board has, in fact, recognized that "'child abuse' is a well-recognized legal concept . . . and we presume Congress intended it to be construed as such." *Matter of Velasquez-Herrera*, 24 I&N Dec. 503, 508 (BIA 2008). Unlike INA § 101(a)(43)(M)(i), "there is nothing in the language of the 'crime of child abuse' clause of section 237(a)(2)(E)(i) that invites inquiry into facts unrelated to an alien's 'convicted conduct.'" *Id.*, at 515.

Unlike in *Matter of Estrada*, 26 I&N Dec. 749 (2016), where the Board determined to use the circumstance specific approach to determine the existence of a domestic relationship between the perpetrator of a crime of violence and the victim, it is *not* the case that, "two-thirds of the States did not have laws that specifically proscribed" child abuse in 1996.[1] Compare *Id.*, at 753 (citing *United States v. Hayes*, 555 U.S. 415, 426 (2009)). Congress had, in fact, tied federal funding to the creation of child abuse prevention statutes in 1974, prompting any states that had not had criminal statutes punishing "child abuse" previously to pass them. *See Matter of Velasquez-Herrera*, at 512 (discussing the federal Child Abuse Prevention and Treatment Act of 1974).

Esquivel-Quintana recognized and accepted that "sexual abuse of a minor" is a "generic" offense to which the "categorical analysis" must be applied. The underlying reasoning of this, as discussed in *Nijhawan*, *supra*, applies equally to the phrase "crime of child abuse," as discussed in *Matter of Velasquez-Herrera*, *supra*.

Applying the categorical analysis to the present case, this means that the issue of

[1] *Esquivel-Quintana* recognized that, in 1996, all fifty states and the District of Columbia had "statutory rape" statutes. *Id.*, at 1571.

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removability depends upon the minimum conduct punishable under the plain language of Texas Penal Code § 22.11(a)(2), which is consensual sexual intercourse, or oral sexual intercourse,[2] between a minor one day shy of 17, with a person more than three years older than the victim (i.e. a person who is 20 years old or older). See *Esquivel-Quintana*, at 1568 (presuming the conviction rests upon the "least of the acts criminalized"). Thus, the minimum conduct includes two students who met in high-school engaging in intercourse or oral sex as part of a consensual relationship, and also includes situations where the older actor is unaware of the age of the younger. Tex. Pen. Code § 22.11(a)(2), (e)(1). See also, *Jackson v. State*, 889 S.W.2d 615 (App. 14 Dist. 1994) (mistake of age is not a defense).

II. *Esquivel-Quintana* affects the meaning of "crime of child abuse" by demonstrating the proper method for determining and applying the "generic definition" of the term.

In *Esquivel-Quintana*, the Court found that "in the context of statutory rape offenses that criminalize sexual intercourse based on the age of the participants, the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16." *Id.*, at 1568. The Court came

[2] By including oral sex, the Texas statute is not necessarily concerned with "harm" caused by pregnancy. See *United States v. Lopez-Solis*, 447 F.3d 1201, 1208 (9th Cir. 2006). All decisions published by the Board defining "crime of child abuse" have required *at least* that the state statute of conviction require proof as an element of a "sufficiently high risk of harm" to the child, and the circuit courts have followed suit. See, e.g., *Liao v. A.G. United States*, 910 F.3d 714 (3d Cir. 2018) (Pennsylvania conviction of endangering the welfare of a child, in violation of 18 Pa. Cons. Stat. § 4304(a)(1), did not categorically constitute "a crime of child abuse," so as to trigger deportation under 8 U.S.C. § 1227(a)(2)(E)(i), because the definition of the offense was overbroad with respect to the removal ground, because it fails to require "any particular likelihood of harm to a child"); following *Matter of Mendoza Osorio*, 26 I. & N. Dec. 703, 706 (BIA 2016) (New York conviction of child endangerment, [a knowing mental state coupled with an act or acts creating a likelihood of harm to a child], fell within the ambit of "child abuse" since it required that the actor's conduct "create [a] particular likelihood of harm to the child" that rises above "conduct that creates only the bare potential for nonserious harm. . . ."). While the Board might find that statutory rape involving minors under 14 is inherently abusive, cf. *United States v. Valencia–Barragan*, 608 F.3d 1103, 1107 (9th Cir. 2010) (sexual contact with a minor under 14 is inherently abusive for purposes of the federal sentencing guidelines), nothing about Tex. Pen. Code § 22.11(a)(2) requires actual injury, any finding of "risk" of harm (much less a "sufficiently high" risk of harm), and the minimum conduct cannot be found to be "inherently abusive," since it includes conduct that *Esquivel-Quintana* has found is not abusive. To find otherwise would be contrary to Board precedent.

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to this conclusion after taking the following steps to define the scope of the "generic" offense of "sexual abuse of a minor":

1. Examining the language of the statute;
2. Examining the context and time (1996) at which the language was added to the statute;
3. Examining the "ordinary meaning" of the term as defined in 1996;
4. Examining federal *criminal* statutes using the same term in 1996; and
5. Examining state *criminal* codes to determine how *the majority* of states defined the term in 1996.

The Court also held that once identified, the same "generic definition" should apply to all convictions, regardless of the state in which the conviction arose. *Esquivel-Quintana*, at 1570.

Just as there is no reason apparent in the phrase "crime of child abuse" to depart from applying the categorical approach, there is no reason to depart from using the Supreme Court's method of statutory interpretation to determine the "generic definition" of "crime of child abuse" in the context of statutory rape offenses. *Esquivel-Quintana* thus affects the meaning of "crime of child abuse," because it describes the proper steps to take to *create*, or at least determine the scope of, that generic definition, as well as how to apply that definition to a state statute.

As the Tenth Circuit described in *Ibarra v. Holder*, 736 F.3d 903 (10th Cir. 2013), the Board failed to apply this analysis when it determined the current definition of "crime of child abuse," in *Matter of Velasquez-Herrera*, *supra*, and *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010). In *Ibarra*, the Tenth Circuit found that a violation of Colorado Revised Statutes § 18-6-401, which proscribed negligently permitting a child to be placed in a situation that poses a threat of injury, was not categorically a "crime of child abuse." The Court found the Board's definition of "crime of child abuse" to be impermissibly broad, and due no deference, since the Board went beyond Congressional intent by looking to *civil* statutes in coming to a definition, thereby ignoring Congress's intent to limit the

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ground of removal to "crimes" of child abuse. *Id.*, at 910-912. The Court also found the BIA unreasonably looked to the states with the *broadest* interpretation of child abuse in 1996, rather than applying the "generic" definition applied by the *majority* of the states at that time. *Id.* at 909, 917. The Court noted that, "[w]hen a state law "criminalizes conduct that most other States would not consider" to be a crime, a conviction under such a law cannot be a deportable offense." *Id.* at 914, citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 190-191 (2007). The Court looked to an appendix of the criminal "child abuse" statutes in effect in 1996 to find that the majority of states would *not* have considered the minimum conduct punishable under the Colorado statute to be criminally liable as "child abuse." *Id.* at 914-916, 918-921.

The Tenth Circuit's analysis of *Matter of Velasquez-Herrera* and *Matter of Soram*, was remarkably similar to the Supreme Court's analysis rejecting the BIA's definition of "sexual abuse of minor" in *Matter of Esquivel-Quintana*, 24 I&N Dec. 469 (BIA 2015). As in *Matter of Velasquez-Herrera*, the BIA came to its definition of "sexual abuse of a minor" by adopting the rule applied by the broadest minority (of ten states), rather than the majority. *Matter of Esquivel-Quintana*, 26 I&N Dec. at 474. The BIA also drew from the civil context. *Id.* at 474 (citing *Bellotti v. Baird*, 443 U.S. 622 (1979) (an abortion case)).[3] Like the Tenth Circuit, the Supreme Court found that the proper method to settle upon a "generic" definition was instead to look to how the term was defined in the majority of the state's *criminal* statutes in 1996, as well as federal criminal law, rather than looking to *civil* definitions. *Esquivel-Quintana*, at 1570-1573. Like the Tenth Circuit, the Supreme Court rejected the Government's proposed definition, because that definition went far beyond the understanding of the term in 1996, as applied by state courts in the criminal context. *Id.* at 1569-1570.

[3] See also *Matter of Velasquez-Herrera*, 24 I&N Dec. at 512 n. 15. In this footnote the Board lists several non-criminal federal statutes, e.g. 18 U.S.C. § 3509(a)(2) (1996), which concerns victims' rights; and several state statutes from the civil, rather than criminal context, see e.g. 325 Ill. Comp. Stat 5/3 (1996); Mo. Ann. Stat. § 210.110(3) (1996); R.I. Gen. Laws § 40-11-2(2) (1996). Only two of the states cited in that footnote actually punished statutory rape of a minor over 17 as a criminal act in 1996. See *Esquivel-Quintana* at 173 (Appendix).

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The Supreme Court's decision in *Esquivel-Quintana* demonstrates that the Tenth Circuit was correct in its analysis of the definition of "child abuse," since both apply the same method of statutory interpretation. While *Esquivel-Quintana* and *Ibarra* did not conclusively define "sexual abuse" or "child abuse" under the Act, they both recognized the Board's definitions went beyond the pale. Whatever the best generic definition of "crime of child abuse" may be, it does not include conviction under a "statutory rape" statute where the minimum conduct includes two students engaging in intercourse or oral sex as part of a consensual relationship, which would have not even been considered illegal by the majority of states in 1996.

Esquivel-Quintana and *Ibarra* also demonstrate that it is not necessary to create a specific definition of "crime of child abuse," to make a specific finding that Tex. Pen. Code § 22.11(a)(2) does not *fit* that definition. While the Supreme Court did not specifically create a definition of "sexual abuse of a minor," and left open certain questions regarding the scope of that definition, the Court was still able to find that, whatever the definition, statutory rape of a person over the age of 16 was not "sexual abuse of a minor." See *Esquivel-Quintana*, at 1572. The courts are likewise capable of finding that statutory rape of a person under 17 is likewise outside the definition of "crime of child abuse," without explicitly defining the full scope of the definition. See also *Ibarra*, at 918.

III. Applying the proper methodology described by *Esquivel-Quintana* the meaning of "crime of child abuse" cannot include consensual intercourse with a minor one day shy of 17.

Applying the proper analysis, the generic definition of "crime of child abuse," does not include sexual intercourse or oral intercourse between a person one day shy of 17 and another person barely three years older:

Step 1: Examine the language of the statute.

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Looking to the phrase "crime of child abuse," the offense must be first a *crime*. As pointed out in *Ibarra*, this means looking to criminal, not civil, law for definitions of "child abuse." It also means that the majority of the states' *criminal* statutes should inform the definition.[4] In the context of "statutory rape" offenses, *Esquivel-Quintana* has already done this analysis, finding that the majority of the states' *criminal* statutes did not consider the minimum conduct punishable under Tex. Pen. Code § 22.11(a)(2) to be criminally liable as statutory rape. *Esquivel-Quintana*, at 1571-1572. Just because a few states might consider a particular act with a minor of a particular age to be "child abuse" in the *civil* context, does not mean that the "generic definition" of "*crime* of child abuse" necessarily includes those same acts. As stated in *Ibarra*, at 912, looking to civil, rather than criminal law to reach a "generic definition" of "crime of child abuse," "reads the words 'crime of' out of the federal statute, which we may not do."

Step 2: Examine the legal context when passed.

The "generic definition" should be framed in the context of the state of the law when the statute was passed. As *Esquivel-Quintana* has already demonstrated, the majority of states in 1996 did not consider the minimum conduct punishable under Tex. Pen. Code. § 22.11(a)(2) to be "child abuse." *Esquivel-Quintana*, at 1571-1572.

Congress added both the aggravated felony sexual abuse of a minor definition and the "crime of child abuse" grounds of removal as part of IIRAIRA in 1996. Clearly, Congress expected that criminal offenses involving "child abuse" would trigger deportation, while crimes of child abuse committed with sexual intent or by sexual acts would be treated more seriously as "sexual abuse of a minor." In other words, Congress designated "sexual abuse of a minor" to be a more serious subcategory of "child abuse."

[4] Cf. *Matter of R*, 6 I. & N. Dec. 444, 452 (BIA 1954) ("It would seem that moral turpitude should not be attached to the commission of an act which though immoral is not even regarded as a crime in some communities").

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The Government may argue that *Esquivel-Quintana* is irrelevant because even if a sexual offense involving a person under the age of 17 does not constitute "sexual abuse of a minor" it may still constitute "child abuse." However, this does not logically follow. *Esquivel-Quintana* found that statutory rape involving a person over 16 was not "sexual abuse of a minor" because it was not *abusive*, not because it was not *sexual*. The difference between "sexual abuse of a minor" and "child abuse" is a difference of method, rather than severity. Thus, an act that is determined not to be "abusive" in the sexual abuse of a minor context should likewise not be considered "child abuse." It is not the lack of a *sexual* element that makes the minimum conduct under Tex. Pen. Code § 22.11(a)(2) fall outside the generic definition of "child abuse," it is the lack of abuse. Congress clearly did not intend an act that was not considered "abusive" (or even illegal in the majority of states) in 1996 to be considered "child abuse" simply because the offense involved sex.

Step 3: Examine the "ordinary meaning" of the term when passed.

The meaning of "child" differs depending on the context. In the immigration context, for example, "child" means an unmarried person under twenty-one. INA § 101(b)(1). In 1996, Black's Law Dictionary defined "child," "at common law [as] one who had not attained the age of fourteen years, though the meaning now varies in different statutes." *Black's Law Dictionary*, 239 (6th Ed. 1990). The ordinary meaning of "minor" in the context of statutory rape in 1996 was the age of consent, not the age of legal competence. *Esquivel-Quintana* at 1570. As is clear in these examples, "a person one day shy of 18" was not the "generic" definition of "child," in 1996.

Just because a person may be considered a "child" in civil context, does not mean that same person would be considered a "child" for purposes of criminal "child abuse" or sex offenses. *Ibid.* *Esquivel-Quintana* thus makes clear that the Board erred in *Matter of Velasquez-Herrera,* in referring to federal and state *civil* statutes to determine the generic definition of child for *criminal* purposes. Compare *Matter of Velasquez-Herrera,* 24 I&N Dec. 503, 510, nn. 5-6, 512 n. 15 (citing

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several federal and state civil statutes), and *Matter of Soram,* 25 I&N Dec. 378, 382 (BIA 2010) (citing a 2009 Dept. of Health and Human Services compendium of the civil laws of 38 states), with *Esquivel-Quintana* at 1568.

Step 4: Examine the federal criminal statutes in effect when passed.

Federal *criminal* statutes did not necessarily punish the minimum conduct punishable under Tex. Pen. Code § 22.11(a)(2) as "child abuse" or "sexual abuse of a minor." *Esquivel-Quintana* at 1570-1571, notes that the most similar Federal criminal statute only applied to minors under the age of 16, while *Ibarra* noted that there were no general federal "child abuse" criminal statutes in 1996. *Ibarra* at 912.

Step 5: Examine the state criminal statutes in effect when passed.

As described in *Esquivel-Quintana,* the majority of states defined the age of consent at 16, meaning that the majority of states did not punish the minimum conduct under Tex. Pen. Code § 22.11(a)(2). *Esquivel-Quintana* at 1571-1572. In 1996, the majority of states either did not consider persons over 16 to be "minors," (or in other words, children, for purposes of sexual intercourse), or did not consider the minimum conduct punishable under Tex. Pen. Code § 22.11(a)(2) to be sufficiently serious to criminally prosecute (in other words, not abusive), or both.

Application: Apply the same "generic definition" regardless of the state statute.

The categorical analysis requires comparing the relevant statute of conviction to a clearly defined federal "generic definition," rather than stretching a vague administrative standard to cover the various states statutes. *Ibarra* rejected the Board's *ex post* approach of defining "child abuse" for immigration purposes as essentially whatever the noncitizen had been convicted of in state court, which both robbed noncitizens of adequate notice in making decisions in criminal court and made the federal ground of removal subservient to the various laws of the states. *Ibarra,* at 910, 913, 916. The Supreme Court likewise rejected the Board's *ex post* method and held it would be clearly

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improper to "define 'sexual abuse of a minor' under the Act on a case-by-case basis."[5]

Applying the proper analysis described above, it is clear that whatever the "generic" definition of "crime of child abuse" may be, it does not include consensual intercourse between a minor one day shy of 17 and someone barely three years older.

IV. *Esquivel-Quintana* affects the meaning of "crime of child abuse" because that case and others have already found that consensual sexual intercourse with a person over sixteen is not necessarily "abuse."

Esquivel-Quintana and the Board's own cases show that Congress did not intend the minimum conduct punishable under Texas Penal Code § 22.11(a)(2) to trigger removal. Under the reasoning of *Esquivel-Quintana*, *supra*, we already understand that a conviction for violation of Texas Penal Code § 22.11(a)(2) would not be considered aggravated felony "sexual abuse of a minor," since the generic definition does not include consensual intercourse with a person over the age of sixteen. The Supreme Court recognized that a significant majority of states in 1996 had set the age of consent to 16 – meaning that a significant majority of the states believed that persons over the age of 16 were capable of consenting to sexual intercourse, and that such acts were not necessarily "abuse." *Esquivel-Quintana* at 1566.

In the federal sentencing context, courts have similarly found that the definition of "sexual abuse of a minor," and "child abuse" depends in part upon the age of the minor in question (or more specifically the age range indicated by the statute of conviction). See *United States v. Baron-Medina*, 567 F.3d 507, 513-514 (9th Cir. 2010); *United States v. Lopez-Solis*, 447 F.3d 1201, 1206 (9th Cir. 2006) ("The age affects whether the conduct the statutory rape law covers constitutes 'abuse'"; sexual penetration of a person between the ages of 17 and 18 by a 22 year old does not constitute

[5] Compare *Matter of Esquivel-Quintana*, 26 I&N Dec. 469, 477 (BIA 2015) with *Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562, 1566 ("the Government's definition turns the categorical approach on its head by defining the generic federal offense as whatever is illegal under the law of the State of conviction.").

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"abuse"); *United States v. Munoz–Ortenza*, 563 F.3d 112, 114–16 (5th Cir. 2009) (relying on definitions in the majority of state codes, the Model Penal Code, and federal law to conclude that the "generic, contemporary meaning" of "minor" was sixteen for the purposes of applying the "sexual abuse of a minor" category in § 2L1.2 to prior convictions involving oral copulation);[6] *United States v. Rangel-Castaneda*, 709 F.3d 373 (4th Cir. 2013) (statutory rape of person under 18 does not fit the generic definition of statutory rape, forcible sex offense, or sexual abuse of a minor for federal sentencing purposes).

The Board has made clear that the same offense would also not be considered a "crime involving moral turpitude" (CMT). See *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008) (Texas conviction for violation of Tex. Pen. Code § 21.11(a)(1), sexual contact with a minor under the age of 17, by an actor more than three years older, regardless of whether the actor knows of the age of the minor, is not a crime involving moral turpitude). In *Silva-Trevino* the Attorney General decided that intentional sexual contact by an adult with a child over 16 is not necessarily a CMT[7] if the perpetrator did not know the age of the victim.[8]

In *Matter of Jimenez-Cedillo*, 27 I&N Dec. 1, 5 (2017), the Board held that to be a crime of moral turpitude, a sexual offense either had to involve a minor *under the age 14*, or, where the minor was under the age of 16, the statute also required a significant age differential between the

[6] While *Munoz-Ortenza* was abrogated by a later decision, *U.S. v. Rodriguez*, 711 F.3d 541 (5th Cir. 2013) (applying a plain-meaning approach rather than looking to the majority of state cases), the Fifth Circuit has recognized that *Esquivel-Quintana* abrogated *U.S. v. Rodriguez.* See *U.S. v. Escalante*, 933 F.3d 395, 398 (5th Cir. 2019); *Shroff v. Sessions*, 890 F.3d 542 (5th Cir. 2018). This would suggest that if the Fifth Circuit were to examine this case on appeal, the Court would apply the reasoning of *Munoz-Ortenza* and *Esquivel-Quintana* in addressing whether "statutory rape" of a person one day shy of 17 is a "crime of child abuse," by looking to the law of the majority of states criminal statutes in 1996.

[7] *Matter of Guevara-Alfaro*, 25 I&N Dec. 417, 421 (BIA 2011), is not to the contrary, since the statute at issue in that case only applied to minors *under* the age of sixteen.

[8] The Attorney General rejected the Board's reliance upon the "severity" of the sexual contact, so the distinction between consensual sexual contact and consensual sexual oral intercourse is irrelevant. *Matter of Silva-Trevino*, 24 I&N Dec., at 705.

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perpetrator and the victim. The Board held that in such situations, the culpable mental state would be considered "implicitly satisfied" by the commission of the act. *Id.,* at 6.

Matter of Silva-Trevino and *Matter of Jimenez-Cedillo* both concluded that sexual offenses involving persons *over* the age of 16 were not necessarily *abusive*, i.e. that those offenses did not *necessarily* "contravene society's interest in protecting children from sexual exploitation,"[9] or intrude "upon the rights of that child, whether or not the child consents."[10] Thus again, where the statute involves a minor just a day shy of 17; does not require a significant age differential (only three years); and also does not contain any explicit element of sexual gratification, abuse or intent to cause harm, then the reasoning of these cases would suggest that consensual sexual intercourse with a person just shy of 17 with a person barely 20 would not be considered a "crime of moral turpitude."

The Government might argue that the determination of whether the offense is a CMT is irrelevant to whether the offense is a "crime of child abuse" because, in the CMT context, it is the intent and knowledge of the actor that matters most, rather than the harm suffered by the child. However, in *Silva-Trevino*, which considered minimum conduct in which the minor was just shy of 17, the Attorney General found that such an offense would *only* be considered a CMT if the actor *also* knew the age of the victim. *Matter of Silva-Trevino,* 24 I&N Dec. at 705. This implies, at least, that the Attorney General did not believe that sexual contact with a minor under 17 was *per se* abusive. In *Matter of Jimenez-Cedillo*, the Board likewise only considered sexual acts to be *inherently* abusive if committed against *younger* children or committed with somewhat older children by significantly older adults. *Id.* At 5. The Board did *not* go so far as to say that consensual sexual contact with a 17-year-old by a person only a few years older was a CMT. Rather, the Board recognized that such activity was not necessarily abuse.

[9] *Matter of Jimenez-Cedillo* at 5.
[10] *Ibid*, citing *Matter of Olquin*, 23 I&N Dec. 896, 897 (BIA 2006).

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Any argument by the Government that *Esquivel-Quintana* should not apply to the "crime of child abuse" ground because aggravated felony sexual abuse of a minor has "especially egregious" removal consequences fails in the face of these CMT cases, since conviction of a CMT might not trigger removal *at all*. See, e.g. INA § 237(a)(2)(A)(i) (deportable for a CMT *if* committed within five years of admission, and punishable by a year or more). By the Government's logic, the definition of "crime of child abuse," should be *narrower* than the scope of the CMT definition as applied to sex offenses involving minors, because the consequences of a conviction are more egregious.

Esquivel-Quintana and the CMT cases discussed above mean that the minimum conduct punishable under Tex. Pen. Code § 22.11(a)(2) cannot be considered a categorical "crime of child abuse," because that minimum conduct is not necessarily "abuse." The U.S. Supreme Court and the Board of Immigration Appeals have *already found* that such conduct is not necessarily abusive. These cases have all determined that, whatever the generic definition of "child abuse" might be, that definition does not include the minimum conduct punishable under Tex. Pen. Code § 22.11(a)(2). It would be contrary to *Esquivel-Quintana*, *Matter of Silva-Trevino,* and *Matter of Jimenez-Cedillo* to hold otherwise.

The question here also is a limited one – i.e. whether consensual sexual intercourse or oral sex is necessarily a "crime of child abuse," where one person is one day shy of 17 and the actor (who may not know his partner's age) is barely three years older. *Esquivel-Quintana* is relevant to this question because the Supreme Court was considering nearly the same (but in fact, more serious) minimum conduct. While statutory rape laws may not be the only avenue through which states criminalize child abuse, statutory rape is the only form of alleged "abuse" relevant to *this* case. This makes other cases the Government may rely upon *irrelevant* to this particular issue.

For example, *Mondragon-Gonzales v. U.S. Atty' Gen.*, 884 F.3d 155 (3d Cir. 2018), dismissed the relevance of *Esquivel-Quintana* where the Third Circuit was considering whether

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contacting a minor for purposes of producing *child pornography* was a "crime of child abuse." See *Mondragon-Gonzales*, at 157 (examining a Pennsylvania conviction for 18 Pa. Cons. Stat. § 6318(a)(5), contacting a minor with intent to commit a violation of § 6312, which relates specifically to the production of child pornography). Although the Ninth Circuit found, in *Jimenez-Juarez v. Holder*, 635 F.3d 1169 (9th Cir. 2011), that a Washington State felony conviction for violation of Rev. Code Wash. § 9A.44.089 was a crime of "child abuse," the Washington state statute specifically punished contact with a person *under* 14 or 15 years of age, when committed by an actor at least four years older. *Id.*, at 1170. While several courts have found that sexual contact with a minor *under fourteen* is inherently abusive,[11] that is not the issue before the court today.

V. *Esquivel-Quintana* affects the meaning of "crime of child abuse" by showing that, in context, the term is not ambiguous, and is not a term over which the Board has any special expertise.

Esquivel-Quintana makes clear that the phrase "sexual abuse of a minor" is not within the special expertise of the Board of Immigration Appeals, the Board's definition should not be owed any special deference, and that the term is not ambiguous if viewed in the proper context. *Esquivel-Quintana*, at 1570-1572. *Esquivel-Quintana* also suggests that the term "crime of child abuse," is not necessarily ambiguous if subject to the proper analysis:

> We have no need to resolve whether the rule of lenity or *Chevron* receives priority in this case <u>because the statute, read in context, unambiguously forecloses the Board's interpretation. Therefore, neither the rule of lenity nor *Chevron* applies</u>.

Esquivel-Quintana, supra, at 1572 (<u>emphasis added</u>).

The Court explicitly found that *Chevron deference was not due*, because the statute was unambiguous when viewed in context of legislative history, the law in effect at the time, and as applied

[11] See, e.g., *United States v. Valencia–Barragan*, 608 F.3d 1103, 1107 (9th Cir. 2010).

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to the criminal statute at issue. *Esquivel-Quintana*, at 1570-1573. The phrase "crime of child abuse" likewise "read in context, unambiguously forecloses" an interpretation that includes the minimum conduct punishable under Tex. Pen. Code § 22.11(a)(2), for the reasons stated in *Equivel-Quintana* and *Ibarra*.[12]

While the Board has attempted to create a "generic" definition of "child abuse," in *Matter of Velasquez-Herrera*, *supra*, and subsequent cases, the Board has yet to specifically address whether an offense involving sexual contact with a minor or "statutory rape" is a "crime of child abuse," in a published decision. *Matter of Velazquez-Herrera* addressed fourth degree assault, not sexual contact,[13] and so should have little, if any, impact on the present case.[14]

Just as the Board has not been specifically delegated the authority to define "crime of violence,"[15] the Board does not have any special expertise over the term "crime of child abuse."[16] *Ibarra* thus found the Board's definition of "crime of child abuse" was not due deference:

> [A]s *Velazquez*, *Soram*, and the present case illustrate, "the interpretation and exposition of criminal law is a task outside the BIA's sphere of special competence. *Chevron* deference is not required where the interpretation of a particular statute does not implicate agency expertise in a meaningful way...." *Singh v. Ashcroft*, 383 F.3d 144, 151 (3d Cir. 2004) (internal quotation marks, alterations, and citations omitted).

Ibarra v. Holder, 736 F.3d 903, 918, n. 19 (10th Cir. 2013). See also, *Marmolejo-Campos v. Holder*, 558 F.3d 903, 907 (9th Cir. 2009) (en banc) (no deference owed to BIA interpretations of

[12] See also, *Ledezma-Galicia v. Holder*, 599 F.3d 1055, 1062 ("the BIA's interpretation of IMMAct 602(c) merits no deference because, when read in light of the applicable principles of statutory interpretation, that provision is not ambiguous in the respect the BIA supposed that it was."), opinion superseded and amended upon denial of rehearing *en banc* by *Ledezma-Galicia v. Holder*, 636 F.3d 1059 (9th Cir. 2010) (still finding the BIA not due deference because the statute was not ambiguous, but specifically because of the presumption against retroactivity).

[13] *Matter of Velasquez-Herrera*, 24 I. & N. Dec. at 516.

[14] For *Chevron* deference to apply, a Board decision must be on-point with the issue before the court. See *Retuta v. Holder*, 591 F.3d 1181, 1187 (9th Cir. 2010) (to warrant *Chevron* deference, as a "binding agency precedent on-point," a BIA precedent must be on-point).

[15] See *Singh v. Gonzales*, 432 F.3d 533, 538 (3d Cir. 2006).

[16] An agency must have been delegated authority with respect to the provision in question. *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). The Board has no special expertise where the agency is not the sole body with jurisdiction over the issue. See *Minasyan v. Gonzales*, 401 F.3d 1069, 1074 (9th Cir. 2005) (no *Chevron* deference to agency interpretation of citizenship laws since INA gave jurisdiction of nationality claims to the courts of appeals and district courts).

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criminal statutes). The Board is far from the only agency concerned with crimes of child abuse, and there is nothing in the realm of immigration law that gives the Board any more expertise in the area than the federal and state legislative bodies that pass the laws prohibiting child abuse.

The Board, therefore, should defer to *Esquivel-Quintana* and follow the Supreme Court's method of statutory interpretation when considering the "generic definition" of "crime of child abuse."

CONCLUSION

Esquivel-Quintana makes clear that the Board must look to the majority of the states' criminal statutes, in effect in 1996, in coming to a "generic definition" of "crime of child abuse," because the Board lacks any special expertise in this area. In looking to the majority of state's criminal statutes, it is clear that whatever the "generic definition" of "crime of child abuse" may be, that definition does not include consensual sexual contact with a person one day shy of 17, by a person barely three years older, who may not even know the age of her partner. The Supreme Court and the Board's own precedent make clear that such conduct is not categorically abusive, and that – at least in the context of statutory rape offenses – the generic age of consent is sixteen.

For the reasons stated above, the Board should apply both the reasoning and holding of *Esquivel-Quintana* to find that the generic definition of "crime of child abuse" does not include the minimum conduct punishable under Tex. Pen. Code § 22.11(a)(2).

December ____, 2019

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

RESPONSE TO	)	
AMICUS INVITATION 19-11-6	)	**File No.:**
	)	
In the Matter of:	)	
[redacted]	)	**A#** [redacted]
	)	
In Removal Proceedings	)	
_____	)	

CERTIFICATE OF SERVICE

On _____, I, **Joseph Justin Rollin**, served the following documents on the following parties:

[redacted] and

DHS/ICE Office of Chief Counsel – POK, at 126 Northpoint Dr., Suite 2020, Houston, TX 77060,

by first-class mail.

BRIEF FOR OREGON JUSTICE RESOURCE CENTER IMMIGRANT RIGHTS PROJECT AS AMICUS CURIAE RESPONDING TO INVITATION NO. 19-11-6
CERTIFICATE OF SERVICE

_____

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