

# **PRACTICE ADVISORY**\*

## ***ESQUIVEL-QUINTANA V. SESSIONS: SUPREME COURT LIMITS REACH OF AGGRAVATED FELONY “SEXUAL ABUSE OF A MINOR” GROUND AND PROVIDES SUPPORT ON OTHER CRIM-IMM ISSUES***

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## EXECUTIVE SUMMARY

On May 30, the U.S. Supreme Court unanimously **ruled that the “sexual abuse of a minor” aggravated felony ground does not reach a state statutory rape offense focused solely on the age of the participants unless the offense categorically requires the younger participant to be under the age of 16.** *Esquivel-Quintana v. Sessions*, No. 16-54 (May 30, 2017). “Where sexual intercourse is abusive solely because of the ages of the participants, the victim must be younger than 16” for the offense to match the generic definition of a “sexual abuse of a minor” aggravated felony. Slip op. 11. The Court’s decision overrules the BIA’s holding below that the “sexual abuse of a minor” ground reaches statutory rape offenses as long as the younger participant is under age 18. *Matter of Esquivel-Quintana*, 26 I&N Dec. 469, 475 (BIA 2015) (citing its prior precedent decision in *Matter of V-F-D-*, 23 I&N Dec. 859 (BIA 2006)). The Court acknowledged that its decision does not address the entire range of the sexual abuse of a minor aggravated felony ground. *See* Section I of this advisory.

The Supreme Court’s decision also **suggests other limits on what offenses may be deemed “sexual abuse of a minor” aggravated felonies.** This is because, in identifying the correct generic definition of this aggravated felony ground, the Court did not refer to the civil law definition that the BIA treated as a “guide” in *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991, 926 (BIA 1999) and subsequent decisions. By requiring a generic definition, the Court rejected the BIA’s reasoning that a mere “guide” and not a legal definition would be sufficient and focused on what federal and state criminal codes penalized as sexual abuse of a minor as a matter of criminal liability at the time of the ground’s enactment, which covers a much a narrower range of conduct than the civil law “guide.” Thus, immigrants and their advocates may use the Supreme Court decision to support arguments that the generic definition of “sexual abuse of a minor” is more limited than what the BIA has previously determined. *See* Section II(A).

For those interested in the broader potential applicability of the Court’s decision, Section II(B) offers **arguments regarding other important crim-imm issues** including the process and sources for correctly identifying a generic definition for application of the categorical approach; when the realistic probability test/standard applies; application of the criminal rule of lenity in immigration cases; and application of aggravated felony grounds to non-felonies and other minor offenses.

Finally, this practice advisory discusses **suggested strategies** and provides a **sample motion to reconsider** for cases affected by the *Esquivel-Quintana* decision, which should be filed by **June 29, 2017.** *See* Section III.

## I. THE *ESQUIVEL-QUINTANA* DECISION

### A. Brief Summary of the Case

Juan Esquivel-Quintana was admitted to the United States as a lawful permanent resident (LPR) in 2000 at the age of 12. He lived in California and Michigan. His family, including his parents, four siblings and much of his extended family live in the U.S. either as citizens or LPRs.

In 2009, at age 21, Mr. Esquivel-Quintana pleaded no contest in California to “unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator” under Cal. Penal Code Ann. §261.5(c) (West 2014). The court sentenced him to 90 days. For purposes of that offense, California defines “minor” as “a person under the age of 18 years.” *Id.* At the time of his plea, case law of the U.S. Court of Appeals for the Ninth Circuit, governing cases arising in removal proceedings in California, dictated that Mr. Esquivel-Quintana’s conviction would not subject him to deportation under the Immigration and Nationality Act (INA) §101(a)(43)(A) “sexual abuse of a minor” aggravated felony ground. *See Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (en banc). The Ninth Circuit held that Cal. Penal Code §261.5(c) is not categorically sexual abuse of a minor based on the federal definition of “sexual abuse of a minor” in 18 U.S.C. §2243, which applies only when the younger participant is under age 16.

After he completed his sentence, however, Mr. Esquivel-Quintana moved to Michigan where the Department of Homeland Security (DHS) in 2013 initiated removal proceedings against him outside the jurisdiction of the Ninth Circuit. The Immigration Judge there found that the California conviction qualified categorically as a “sexual abuse of a minor” aggravated felony even though the California offense covered conduct that would not have constituted a crime under federal and most states’ statutory rape laws, *i.e.*, consensual sex with a person who was age 16 or 17. The Immigration Judge relied instead on the civil law definition that the BIA used as a “guide” in *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991, 996 (BIA 1999) (looked to 18 U.S.C. §3509(a), which relates to the rights of child abuse victims as witnesses, to conclude that “sexual abuse” of a “child” is “sexually explicit conduct” with “a person who is under the age of 18”).

Mr. Esquivel-Quintana appealed to the Board of Immigration Appeals (BIA), which upheld the Immigration Judge’s decision. *Matter of Esquivel-Quintana*, 26 I&N Dec. 469 (BIA 2015) (citing its prior precedent decision in *Matter of V-F-D-*, 23 I&N Dec. 859 (BIA 2006), in which the BIA held that the “sexual abuse of a minor” ground covers statutory rape offenses where the victim was under the age of 18, and finding that the California offense in addition required a “meaningful” age difference of three years between the “victim” and the “perpetrator” sufficient for an offense that includes 16 or 17 years to constitute “sexual abuse of a minor”). Mr. Esquivel-Quintana then petitioned for review to the U.S. Court of Appeals for the Sixth Circuit, which, in a divided opinion, deferred to the BIA and denied the petition. *Esquivel-Quintana v. Lynch*, 810 F.3d 1019 (2016); *see also id.* at 1027 (Sutton, J. concurring in part and dissenting in part).

## **B. Supreme Court Holding – State Statutory Rape Offenses Based Solely on the Age of the Participants May Not Be Deemed Sexual Abuse of Minor Unless the Offense Requires the Younger Participant to Be Under Age 16**

### **1. Supreme Court Decision**

In its May 30 decision, the Supreme Court reversed the Sixth Circuit and vacated Mr. Esquivel-Quintana’s removal order. Justice Thomas, writing for the unanimous Court, held that the INA “sexual abuse of a minor” aggravated felony ground does not reach state statutory rape offenses where the younger participant could have been age 16 or over, at least with respect to offenses focused solely on the age of the participants as opposed to those based also on a special relationship of trust between the participants, *e.g.*, parent/child. *Esquivel-Quintana v. Sessions*, No. 16-54 (U.S. May 30, 2017). For a list of examples of state statutory rape offenses that should no longer be deemed “sexual abuse of a minor” aggravated felonies under the Court’s holding, *see* Appendix A.

In its decision, the Court looked first to the text of the “sexual abuse of a minor” INA provision. Although the statute does not define this term, the Court found that, at the time Congress added this provision to the INA in 1996, the ordinary meaning of “sexual abuse” as it related to minors covered offenses involving sexual intercourse with a younger person under a specified age known as the “age of consent.” Slip op. 5. The Court then found that, although the age of consent for statutory rape purposes varies by jurisdiction, “reliable dictionaries” established that the “generic” age in 1996 and today is 16. Slip op. 5-6. During this discussion, the Court contrasted offenses predicated solely on the age of the participants with offenses predicated on a special relationship of trust between the victim and offender, which might have a different age requirement than the general age of consent. Slip op. 6.

The Court next found that interpreting the text as covering only offenses where the age of the victim is under age 16, at least in the context of statutory rape offenses predicated solely on the age of the participants, was confirmed by the structure of the INA. The Court explained that the INA lists “sexual abuse of a minor” as an “*aggravated felony*,” and furthermore lists the term in the same subparagraph as “murder” and “rape,” therefore suggesting that the term encompasses “only especially egregious felonies.” Slip op. 7-8 (emphasis original).

For further confirmation of the generic age 16 general cut-off for sexual abuse of a minor, the Court then relied on what is covered under the federal crime of “sexual abuse of a minor” at 18 U.S.C. §2243, which the Court found to be the only definition of the phrase in the United States Code. Slip op. 8.<sup>1</sup> The Court stated that the §2243 criminal statute “incorporates an age of

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<sup>1</sup> The Court’s reliance on the federal criminal definition of “sexual abuse of a minor” partially reflects the position advanced by amici, including IDP and NIP. *See* Brief for Immigrant Defense Project, Immigrant Legal Resource Center and National Immigration Project of the National Lawyers Guild as *Amici Curiae* in Support of Petitioner in *Esquivel-Quintana v. Sessions* (arguing that “sexual abuse of a minor” should be limited to offenses covered under the federal crimes described at 18 U.S.C. §§2243(a) (sexual abuse of a minor between the ages of 12 and 16) and 2241(c) (aggravated sexual abuse of a minor under age 12)) available at <https://www.immigrantdefenseproject.org/wp-content/uploads/Esquivel-Quintana-IDP-et-al-amicus-brief.pdf>.

consent of 16, at least in the context of statutory rape offenses predicated solely on the age of the participants.” Slip op. 8. And the Court noted that Congress amended §2243, which previously covered only cases involving victims between the ages of 12 and 16, also to include cases involving victims younger than 12 in the same omnibus law in which Congress added “sexual abuse of a minor” to the INA, which the Court found “suggests that Congress understood that phrase to cover victims under age 16.” Slip op. 8.

Finally, the Court also looked to state statutory rape offenses and found that when “sexual abuse of a minor” was added to the INA in 1996, 31 states and the District of Columbia set the age of consent at 16 for statutory rape offenses that hinged solely on the age of the participants.<sup>2</sup> Slip op. 9-10. The Court concluded: “[T]he general consensus from state criminal codes points to the same generic definition as dictionaries and federal law: Where sexual intercourse is abusive solely because of the ages of the participants, the victim must be younger than 16.” Slip op. 11. The Supreme Court’s holding thus affirms the Ninth Circuit’s conclusion in *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (en banc) that the Cal. Penal Code §261.5(c) statutory rape offense is not categorically sexual abuse of a minor because it covers conduct where the younger participant is age 16 or over.

## 2. Case Law Overruled by the Supreme Court

The Supreme Court’s holding overrules the BIA’s holding below that the “sexual abuse of a minor” ground reaches statutory rape offenses as long as the younger participant is under age 18. *Matter of Esquivel-Quintana*, 26 I&N Dec. 469, 475 (BIA 2015) (citing its prior precedent decision in *Matter of V-F-D-*, 23 I&N Dec. 859 (BIA 2006), in which the BIA relied principally on the civil law definition of “child” in 18 U.S.C. §3509(a)(2) to hold that the “sexual abuse of a minor” ground reaches offenses where the victim is under the age of 18). It also overrules federal Court of Appeals decisions reaching the same conclusion in deference to the BIA. See, e.g., *Velasco-Giron v. Holder*, 773 F.3d 774, 776-80 (7th Cir. 2014); *Mugalli v. Ashcroft*, 258 F.3d 52, 60 (2d Cir. 2001); see also *United States v. Rodriguez*, 711 F.3d 541, 559-60 (5th Cir. 2013) (en banc) (holding, for sentencing guideline purposes, that the generic meaning of “minor” in the phrase “sexual abuse of a minor” is a person under the age of 18).

## C. Questions Left Unresolved

The Supreme Court did not create a generic definition of sexual abuse of a minor even for statutory rape offenses, as the Court limited its holding to the under age 16 victim requirement. The narrowness of the Court’s holding means that there are many issues left unresolved for the creative practitioner, including the following:

### 1. Is an Age Difference Element Also Required for a State Offense to Be Deemed “Sexual Abuse of a Minor”?

Despite that the federal and most states’ statutory rape laws include a minimum age differential (in addition to an age of consent) in defining statutory rape, the Supreme Court did

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<sup>2</sup> As for the other states, Justice Thomas found that one set the age of consent at 14, two at 15, six at 17, and the remaining ten, including California, at 18.

not reach the question of whether the generic “sexual abuse of a minor” aggravated felony also requires a minimum age difference to qualify. Slip op. 11.

In its decision below in this case, the BIA had determined that a statutory rape offense that covers conduct where the younger participant is age 16 or over must contain a “meaningful age differential” to constitute “sexual abuse of a minor.” *Esquivel-Quintana*, 26 I&N Dec. at 475 (finding meaningful the three year differential required in Cal. Penal Code §261.5(c)). However, the BIA found that the age difference requirement is limited to statutes that include “16- and 17-year-olds as victims[,]” *id.*, which the Supreme Court has now found are categorically not “sexual abuse of a minor” aggravated felonies, regardless of age differential.

Nevertheless, there remains the question of whether an age differential is required for a statutory rape offense limited to cases where the victim is under age 16. Although the Supreme Court appeared reluctant to adopt the four year age differential required in the federal statutory rape statute at 18 U.S.C. §2243(a) for cases involving younger victims between the ages of 12 and 16, slip op. 9 (“[c]ombining that element with a 16-year age of consent would categorically exclude the statutory rape laws of most States”), the Supreme Court recognized that the laws of many states and of the federal government include a minimum age differential, slip op. 10, and left open the possibility that an age differential element may be required even if it might be less than the federal requirement of four years. Thus, an immigrant may argue that even a statutory rape offense limited to cases where the victim is under age 16 requires some minimum age difference to be deemed a “sexual abuse of a minor” aggravated felony. *See, e.g., United States v. Osborne*, 551 F.3d 718, 721 (7th Cir. 2009) (finding it hard to classify as “abusive” a state offense that makes it crime for one teenager to engage in sexual contact with another without an age differential).

## **2. Does a Special Trust Relationship Element Extend the “Sexual Abuse of a Minor” Ground to State Offenses Where the Younger Participant Might Be Age 16 or Older?**

The Supreme Court also did not reach the question of whether the generic crime of sexual abuse of a minor aggravated felony encompasses statutory rape offenses involving younger participants over the age of 16 that the Court indicated might be abusive because of a relationship of authority between the participants, *e.g.*, parent/child. Slip op. 11. The Court observed: “Many jurisdictions set a different age of consent for offenses that include an element apart from the age of the participants, such as offenses that focus on whether the perpetrator is in some special relationship of trust with the victim.” Slip op. 10. The Court then stated: “Accordingly, the generic crime of sexual abuse of a minor may include a different age of consent where the perpetrator and victim are in a significant relationship of trust.” Slip op. 10. Thus, although the Court did not resolve the question, immigrants should be aware that, even if a state offense is not limited to conduct where the younger participant is under age 16, there is some risk that an element of a special trust relationship between the participants may convert an offense into one that may be deemed “sexual abuse of a minor.” The same concerns may apply to a statute in which the victim lacks the capacity to consent to the conduct for some reason other than age alone.

## II. POTENTIAL BROADER IMPLICATIONS OF THE DECISION

The Supreme Court's decision in *Esquivel-Quintana* also has important potential broader implications on whether and what state offenses other than statutory rape offenses may be deemed "sexual abuse of a minor" and on other crim-imm issues beyond this particular aggravated felony ground. This section presents a preliminary analysis of some of these potential broader implications and arguments.

### A. Potential Impact on Whether and What State Offenses May Be Deemed "Sexual Abuse of a Minor"

#### 1. How Does the Supreme Court Define "Sexual Abuse of a Minor"?

In the *Esquivel-Quintana* decision, the Supreme Court did not adopt an overall generic definition for the "sexual abuse of a minor" aggravated felony provision, but the Court clearly rejected the broad definition the Solicitor General offered: that "sexual abuse of a minor" "most naturally connotes conduct that (1) is illegal, (2) involves sexual activity, and (3) is directed at a person younger than 18 years old." Brief for Respondent in *Esquivel-Quintana v. Sessions*, 17. The Court stated: "[T]he Government's definition turns the categorical approach on its head by defining the generic federal offense of sexual abuse of a minor as whatever is illegal under the particular law of the State where the defendant was convicted. Under the Government's preferred approach, there is no 'generic' definition at all." Slip op. 7 (citing *Taylor v. United States*, 495 U.S. 575, 591 (1990)).

Although the Supreme Court did not adopt an overall definition, it looked to 18 U.S.C. §2243(a), the federal crime of "sexual abuse of a minor," to help it in determining congressional intent as to an age of consent in the context of statutory rape offenses. Slip op. 8.<sup>3</sup> The Supreme Court observed that §2243 contains the only definition of that phrase in the United States Code and that Congress amended §2243 in the same omnibus law in which Congress added "sexual abuse of a minor" to the INA. Slip op. 8. However, the Court stated that it was not "import[ing] wholesale" the definition offered by §2243, at least in part, the Court explained, because "the INA does not cross-reference §2243(a), whereas many other aggravated felonies in the INA are defined by cross-reference to other provisions in the United States Code." Slip op. 8. The Court goes on to state: "Accordingly, we rely on §2243(a) for evidence of the meaning of sexual abuse of a minor, but not as providing the complete or exclusive definition." Slip op. 9.

Instead, the Supreme Court took its own look at the text of the statute and dictionary definitions of the terms employed and concluded in a very general and non-precise way: "[T]o

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<sup>3</sup> See also *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (en banc) (referencing §2243 in defining the scope of the sexual abuse of a minor aggravated felony ground); *Rangel-Perez v. Lynch*, 816 F.3d 591 (10th Cir. 2016) (same); dissenting opinion of Board Member Guendelsberger in *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991, 999-1005 (BIA 1999) (same); Brief for Immigrant Defense Project, Immigrant Legal Resource Center and National Immigration Project of the National Lawyers Guild as *Amici Curiae* in Support of Petitioner in *Esquivel-Quintana v. Sessions*, available at <https://www.immigrantdefenseproject.org/wp-content/uploads/Esquivel-Quintana-IDP-et-al-amicus-brief.pdf>.



qualify as sexual abuse of a minor, the statute of conviction must prohibit certain sexual acts based at least in part on the age of the victim.” Slip op. 5. The Court then stated that statutory rape laws, which it described as laws that “generally provide that an older person may not engage in sexual intercourse with a younger person under a specified age,” are “an example of this category of crimes.” *Id.* The Court narrowed the remainder of its discussion to the age requirement for statutory rape offenses to fall within the “sexual abuse of a minor” ground. Slip op. 5-11. This begs the question of whether and what other offenses may be covered by the “sexual abuse of a minor” ground.

## **2. Does *Matter of Rodriguez-Rodriguez*’ Reliance on the 18 U.S.C. §3509(a)(8) Civil Law Definition Survive?**

Over the years, in determining what offenses fall within the “sexual abuse of a minor” aggravated felony ground, the immigration agency has extended the reach of the ground well beyond what is covered under federal criminal law by relying on a federal civil law definition at 18 U.S.C. §3509(a)(8) as a “guide.” *See Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991, 996 (BIA 1999) (en banc). That civil law provision, relating to the rights of child sexual abuse victims as witnesses, broadly defines “sexual abuse” as “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.” 18 U.S.C. §3509(a)(8). In *Rodriguez-Rodriguez*, the BIA relied on this definition to extend coverage of the sexual abuse of a minor ground to a Texas indecency offense that does not require contact with the child and which would not have been covered as “sexual abuse of a minor” under the federal criminal law definition at §2243(a).

In *Esquivel-Quintana*, the Supreme Court did not reference the civil law §3509(a)(8) definition, relying instead on the text of the “sexual abuse of a minor” aggravated felony provision at 8 U.S.C. § 1101(a)(43)(A) and dictionary definitions of the terms at issue, and looking for confirmation in what is covered as sexual abuse under federal and states’ criminal codes. In fact, in its litigation position before the Supreme Court, the Solicitor General offered its own definition, likely realizing that the categorical approach requires a generic definition and not merely a guide, *see Velasco-Giron v. Holder*, 773 F.3d 774, 780 (7th Cir. 2014) (Posner, J., dissenting) (observing that, in *Rodriguez-Rodriguez*, the BIA adopted the §3509(a)(8) definition only as a guide and thus “the Board has not defined ‘sexual abuse of a minor’”), and that reliance on a civil law definition is in any event not appropriate when seeking to determine the scope of a deportation ground based on conviction of a crime. *See Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1152 n.2 (9th Cir. 2008) (en banc) (“Because Congress did not elect any of these options [e.g., specifying that the definition was not limited to the criminal definition], the logical inference is that Congress intended ‘sexual abuse of a minor’ to carry its standard criminal definition”). The Supreme Court’s decision thus undermines federal circuit court decisions that deferred to BIA reliance on the §3509(a)(8) civil law definition. *E.g.*, *Velasco-Giron v. Holder*, 773 F.3d 774, 776 (7th Cir. 2014); *Oouch v. Department of Homeland Security*, 633 F.3d 119, 122 (2d Cir. 2011); *Restrepo v. Attorney General*, 617 F.3d 787, 796 (3d Cir. 2010); *Bahar v. Ashcroft*, 264 F.3d 1309, 1312 (11th Cir. 2001); *Mugalli v. Ashcroft*, 258 F.3d 52, 60 (2d Cir. 2001).

### 3. Can the *Esquivel-Quintana* Decision Be Used to Support Defenses on Issues Relating to Other Offenses Charged as Sexual Abuse of a Minor?

By undermining past BIA and federal court reliance on the broad civil law §3509(a)(8) definition of “sexual abuse of a minor” to reach offenses other than the statutory rape conduct addressed in the federal criminal law definition of the phrase at §2243, the Supreme Court’s decision provides new support for challenges to agency determinations that certain other offenses may be categorically deemed “sexual abuse of a minor” aggravated felonies. While the success of these arguments should not necessarily be relied on by immigrants and their lawyers weighing alternative pleas or other options in *criminal proceedings*, these arguments may offer options for challenging removal in *immigration proceedings*. Possible examples of issues to be raised in removal defense include the following:

**What conduct is considered “sexual abuse”?** Immigrants and their advocates should be aware that, under the federal criminal code, “sexual abuse” is limited to certain “sexual acts” defined at 18 U.S.C. §2246(2). For example, under §2246(2), “sexual abuse” would not include touching through clothing. *Id. See also U.S. v. Martinez*, 786 F.3d 1227 (9th Cir. 2015) (state offense covering touching over clothing not categorically a sexual abuse of a minor aggravated felony). An offense involving a minor victim is also not necessarily “sexual abuse of a minor” if the offense covers conduct other than what may be deemed “sexual abuse” under more general understandings of the meaning of this term. *See, e.g., Amos v. Lynch*, 790 F.3d 512, 518-22 (4th Cir. 2015) (after declining to defer to BIA decision applying the federal definition at 18 U.S.C. §3509(a)(8) referenced in *Matter of Rodriguez-Rodriguez*, found that the failure to act to prevent sexual abuse minimum conduct covered under the Maryland statute of conviction at issue did not constitute “sexual abuse of a minor”); *Campbell v. Holder*, 698 F.3d 29 (1st Cir. 2012) (conviction of risk of injury to a minor does not categorically constitute sexual abuse of a minor because a child’s health could be endangered in other ways than sexual abuse); *James v. Mukasey*, 522 F.3d 250 (2d Cir. 2008) (“it is by no means clear that admitting to “sexual contact with a minor” under New York law [including a kiss on the mouth] would be enough to establish “sexual abuse of a minor” under the INA”); *U.S. v. Pallares-Galan*, 359 F.3d 1088 (9th Cir. 2004) (California annoying or molesting a child under 18 is not necessarily “sexual abuse of a minor”).

**Must there be actual harm to a child?** Immigrants and their advocates may be able to argue that federal and state criminal codes require that the child was actually harmed. *See Rebilas v. Keisler*, 506 F.3d 1161 (9th Cir. 2007) (attempted public sexual indecency to a minor does not constitute sexual abuse of a minor because the minor does not have to be touched or even aware of the offending conduct for a conviction); *Stubbs v. Atty. Gen. of the United States*, 452 F.3d 251 (3d Cir. 2006) (New Jersey endangering welfare of children is not necessarily “sexual abuse of a minor” since the record of conviction failed to establish that the petitioner engaged in sexual conduct with the child, or that the abusive conduct actually occurred).

**What mental culpability is required?** Immigrants and their advocates should be aware that, under the federal criminal code definition of “sexual abuse of a minor,” an individual has a defense where he or she “reasonably believed” that the minor was age 16 or older. *See* 18 U.S.C. §2243(c)(1). Thus, an immigrant may be able to argue that a state offense that does not require

knowledge of the age of the younger participant may not be deemed “sexual abuse of a minor.” See *Rangel-Perez v. Lynch*, 816 F.3d 591 (10th Cir. 2016) (based on 18 U.S.C. §2243 and other analogous federal offenses, found that “sexual abuse of a minor” requires proof of at least a knowing mens rea); see also *Gattem v. Gonzales*, 412 F.3d 758 (7th Cir. 2005) (Posner, J., dissenting) (offense involving mere solicitation of a sexual act without knowledge that the person solicited is a minor is not “sexual abuse of a minor”). Also, one may argue that an offense should not be deemed a “sexual abuse of a minor” aggravated felony if the state offense does not require the prosecution to prove knowledge of the offensive nature of the conduct in question. See *Gonzalez v. Ashcroft*, 369 F. Supp.2d 442 (S.D.N.Y. 2005) (state offense of use of a child in a sexual performance is not “sexual abuse of a minor if the offense does not require knowledge of the sexual nature of the performance).

In short, based on the Supreme Court’s approach in the *Esquivel-Quintana* decision, an immigrant should be able to challenge past case law that relied in part on the broad civil law §3509(a)(8) definition of “sexual abuse of a minor” and make any available arguments based on the text of the INA and dictionary definitions of the terms used, the structure of INA, and what was generally covered by federal and state criminal laws in place at the time of enactment of the provision. Even though the Court’s decision indicated that looking at federal and state criminal law is not required, the decision makes clear that adjudicators should look to federal and state criminal codes for evidence of the generic meaning of the phrase. Slip op. 8-11.

## **B. Possible Support for Arguments Relating to Other Crim-Imm Issues**

While the success of the arguments discussed below should also not be relied on by immigrants and their lawyers weighing alternative pleas or other options in *criminal proceedings*, these arguments may offer options for challenging removal in *immigration proceedings*.

### **1. How to Accurately Identify a Generic Definition under the Categorical Approach**

Observing that the “sexual abuse of a minor” aggravated felony ground, 8 U.S.C. § 1101(a)(43)(A), “does not expressly define sexual abuse of a minor,” the Supreme Court’s decision in *Esquivel-Quintana* identified its generic definition through “the normal tools of statutory interpretation.” Slip op. 4. In applying these rules of statutory interpretation in this case, the Court clarified the proper methodology for identifying the generic definition of a term whose definition is not found in the statute itself. The Court’s decision therefore significantly affects how to identify the proper generic definition for other immigration provisions that are not defined by statute. The decision also lends support to Court of Appeals decisions that have rejected decisions where the BIA misapplied the tools of statutory interpretation and arrived at the incorrect generic definition of other undefined INA removal grounds:

**“Obstruction of justice” aggravated felony**, see 8 U.S.C. § 1101(a)(43)(S). In *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 818-19 (9th Cir. 2016), the Ninth Circuit rejected the BIA’s expansion of the generic definition of the obstruction of justice aggravated felony ground to include offenses that do not require nexus to an “ongoing investigation or trial.” *Id.* at 812 (quoting *Matter of Valenzuela Gallardo*, 25 I&N Dec. 838, 841 (BIA 2012)). In finding that

the BIA’s interpretation of this aggravated felony term raised “grave constitutional doubts,” *id.* at 811, the Ninth Circuit focused on “the list of [federal] obstruction of justice crimes” at 18 U.S.C. §73, and found that it was not consistent with the BIA’s expanded definition of “obstruction of justice” for aggravated felony purposes. The Court found that “almost all of these obstruction of justice offenses . . . have as an element the interference with the proceedings of a tribunal” or “have as an element the intent to interfere with a specific act associated with a tribunal or investigation[.]” *Valenzuela Gallardo*, 818 F.3d at 821 (internal quotations omitted), and that these statutes shed “light on what Congress intended” in enacting the obstruction of justice aggravated felony ground. The Supreme Court in *Esquivel-Quintana* similarly consulted a federal statute criminalizing sexual abuse of a minor as a source of the scope of the generic definition of the aggravated felony ground, and in light of that statute rejected the BIA’s generic definition. *See supra* Section II(A)(1).

“**Crime of child abuse,**” *see* 8 U.S.C. § 1227(a)(2)(E). Congress did not define this statutory provision—which can affect deportability, *see id.*, and eligibility for relief such as cancellation of removal, *see e.g.*, 8 U.S.C. § 1229b(b)(1)(C)—anywhere in the INA. Several times the BIA has published its views on the generic definition of a crime of child abuse, *see Matter of Soram*, 25 I&N Dec. 378 (BIA 2010); *Matter of Velasquez-Herrera*, 24 I&N Dec. 503 (BIA 2008); *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999), but the Courts of Appeals have been largely critical of the BIA’s views on this generic definition, and in ways that mirror the Supreme Court’s decision in *Esquivel-Quintana*. The Tenth Circuit, in *Ibarra v. Holder*, 736 F.3d 903 (10th Cir. 2013), rejected the BIA’s decision in *Soram* to consult civil rather than criminal statutes to identify the generic definition of a *crime* of child abuse. The Court wrote, “Notably, the first word in the phrase ‘crime of child abuse’ . . . is ‘crime.’ ‘Crime’ means crime; not civil adjudication.” *Id.* at 910. The Court went on to say: “[T]he BIA relied in both *Velasquez* and *Soram* primarily on definitions of ‘child abuse’ and ‘child neglect’ from civil, not criminal, law to reach its present definition of ‘crime of child abuse’ . . . . That approach reads the words ‘crime of’ out of the statute, which we may not do. *Id.* at 911-12 (internal citations omitted). The Supreme Court’s decision in *Esquivel-Quintana*, which referenced only criminal statutes in identifying its generic definition of the “sexual abuse of a minor” aggravated felony, and nowhere referenced the civil law provision at 18 U.S.C. §3509 on which the BIA had relied in arriving at the generic definition, indicates the Court’s endorsement of the Tenth Circuit’s approach in *Ibarra* over the BIA’s approach in *Soram* and *Velasquez-Herrera*. Immigrants and advocates in all Circuits, including the Second Circuit which has deferred to the BIA’s decision in *Soram*, *see Florez v. Holder*, 779 F.3d 207 (2d Cir. 2015), should argue that *Esquivel-Quintana* abrogates the BIA’s decisions in *Soram* and *Velasquez-Herrera* insofar as those decisions impermissibly extend the generic definition of a crime of child abuse by relying on civil rather than criminal statutes.

## **2. Impact on the Categorical Approach and the Realistic Probability Test/Standard**

The Court’s decision in *Esquivel-Quintana* is yet another case where the Supreme Court has identified the least-acts-criminalized under a statute of conviction by consulting the statutory text without requiring any additional realistic probability showing. *See also, e.g., Mellouli v. Lynch*, 135 S. Ct. 1980, 1988 (2015) (Kansas drug conviction); *Mathis v. United States*, 136 S.

Ct. 2243, 2246 (2016); (Iowa burglary conviction); *Descamps v. United States*, 133 S. Ct. 2243, 2282 (2013) (California burglary conviction). The Court in *Esquivel-Quintana* stated:

Because Cal. Penal Code §261.5(c) criminalizes “unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator” and defines a minor as someone under age 18, the conduct criminalized under this provision would be, at a minimum, consensual sexual intercourse between a victim who is almost 18 and a perpetrator who just turned 21.

Slip op. 3-4. The Court relied only on the California statute’s express language to identify its least-acts-criminalized as consensual sex where the younger participant is between ages 16 and 18. The Court did not apply the realistic probability standard the BIA has sought to invoke in *Matter of Ferreira*, 26 I&N 415 (BIA 2014), and *Matter of Mendoza-Osorio*, 26 I&N Dec. 703 (BIA 2016). The Court does not mention the realistic probability standard even once, despite its ordered explanation of the functioning of the categorical approach. Slip op. 3. The Court’s decision in *Esquivel-Quintana* lends support to the well-recognized notion that where a State statute’s express language includes non-generic conduct, no further showing is required to establish the statute’s least-acts-criminalized for purposes of the categorical analysis. *See Swaby v. Yates*, 847 F.3d 62 (1st Cir. 2017); *Whyte v. Lynch*, 807 F.3d 463 (1st Cir. 2015); *Chavez-Solis v. Lynch*, 809 F.3d 1004 (9th Cir. 2015); *Ramos v. U.S. Atty. Gen.*, 709 F.3d 1066 (11th Cir. 2013); *Jean-Louis v. Attorney General of the U.S.*, 582 F.3d 462 (3d Cir. 2009); *Mendieta-Robles v. Gonzales*, 226 F. App’x 564 (6th Cir. 2007) (unpublished).

Where the government seeks to invoke the realistic probability requirement to impose immigration consequences based on a conviction that covers non-generic conduct, immigrants and advocates may cite to *Esquivel-Quintana* to show that, at a minimum, where non-generic conduct is included in a state statute’s express language, no further showing is required to establish the least-acts-criminalized. Immigrants and advocates should also push back on the BIA’s overreach in decisions like *Matter of Ferreira* and *Matter of Mendoza-Osorio*, which go far beyond the Supreme Court’s original introduction of a realistic probability standard in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), which is limited to instances where the suggested least-acts-criminalized are purely hypothetical and find no home in the statutory text, court decisions interpreting the statute, or other sources like criminal court documents and newspaper stories that show arrests and prosecutions for non-generic conduct. For more information about these arguments, please see IDP and NIP-NLG, *The Realistic Probability Standard: Fighting Government Efforts to Use It to Undermine the Categorical Approach* (2014) available at <https://immigrantdefenseproject.org/wp-content/uploads/2014/11/realistic-probability-advisory.pdf>.

### **3. Application of the Rule of Lenity When Construing the Immigration Laws**

While the Supreme Court found no need in *Esquivel-Quintana* to resolve the question of whether the criminal rule of lenity or *Chevron* deference applies when an immigration statute with criminal law implications is ambiguous because it found the statute at issue in the case to be

unambiguous, slip op. 11-12, immigrants and their advocates should continue to argue that the criminal rule of lenity applies in interpreting “hybrid” immigration statutes—those that have both civil and criminal applications—that are deemed ambiguous.

The rule of lenity mandates that where there is ambiguity in a criminal statute, the ambiguity must be resolved in favor of the criminal defendant. *See United States v. Bass*, 404 U.S. 336, 347 (1971). It is a “time-honored” rule for interpreting criminal statutes. *Crandon v. United States*, 494 U.S. 152, 158 (1990). The principle also applies, at a minimum, to construing the provisions of the immigration laws that explicitly have criminal implications. Two prominent examples are the “aggravated felony” terms at 8 U.S.C. §1101(a)(43) and the definition of the term “conviction” at 8 U.S.C. §1101(a)(48). Conviction for an aggravated felony can lead to criminal prosecution for, *inter alia*, assisting an inadmissible alien, *see* 8 U.S.C. §1327, and failing to depart pursuant to an order of removal, *see* 8 U.S.C. §1253(a)(1). Conviction for an aggravated felony also creates a statutorily mandated sentencing enhancement for defendants convicted of illegal reentry under 8 U.S.C. §1326. Similarly, the term “conviction,” which is defined at 8 U.S.C. §1101(a)(48) and has been the subject of litigation, *see, e.g., Orabi v. Attorney Gen. of the U.S.*, 738 F.3d 535 (3d Cir. 2014) (deciding whether the definition of “conviction” has a requirement that all appeals of right have been exhausted or waived), has explicit criminal implications. The term is pervasive, incorporated into every section of the INA that attaches a criminal penalty to a conviction. *See, e.g.,* 8 U.S.C. §§1253(a)(1), 1326, and 1327.

If found ambiguous, statutes that define terms like “aggravated felony” and “conviction” that themselves carry both civil and criminal consequences should not be resolved under the deference framework of *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). They are first examined under the normal rules of statutory construction, including the rule of lenity. If still ambiguous, the rule of lenity rather than step two of the *Chevron* framework is what resolves the question. *See Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005). Thus, as Judge Sutton had argued in dissenting in part in the Sixth Circuit decision below in *Esquivel-Quintana*, the rule of lenity, rather than the *Chevron* framework, applies to resolve ambiguities in hybrid statutes, including in the immigration context. He wrote: “Time, time, and time again, the Court has confirmed that the one-interpretation rule means that the criminal-law construction of the statute (with the rule of lenity) prevails over the civil-law construction of it.” *Esquivel-Quintana*, 810 F.3d at 1027-28 (Sutton, J. dissenting in part and concurring in part). For sample language and research regarding the applicability of the rule of lenity to hybrid statutes, specifically the immigration laws, please see Brief of National Association of Criminal Defense Lawyers as *Amici Curiae* in Support of the Petitioner in *Esquivel-Quintana v. Sessions*.

#### **4. Application of the Aggravated Felony Grounds to Non-Felonies and Other Minor Offenses**

In applying the tools of statutory construction to identify the limits on the “sexual abuse of a minor” aggravated felony ground, the Court looked to the “[s]urrounding provisions of the INA. Slip op. 7. In addition, the Court focused on the plain meaning of the terms “aggravated” and “felony” as informative as to threshold requirements for offenses to be deemed aggravated

felonies. Describing an “‘aggravated’ offense” as “one ‘made worse or more serious by circumstances such as violence, the presence of a deadly weapon, or the intent to commit another crime[.]’” the Court concluded that the “structure of the INA . . . suggests that sexual abuse of a minor encompasses only especially egregious felonies.” Slip op. 7 (quoting *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 574 (2010)).

Those convicted under misdemeanor or non-egregious statutes should thus use *Esquivel-Quintana* to support arguments that such convictions should not be deemed sexual abuse of a minor aggravated felonies. Advocates and immigrants should also argue that *Esquivel-Quintana*’s rationale applies more broadly, limiting the reach of other aggravated felony provisions to misdemeanors and non-egregious felonies. For example, the Court’s reasoning could be used in support of an argument that a petty theft conviction may not be deemed an aggravated felony theft offense under 8 U.S.C. §1101(a)(43)(G).

Advocates and immigrants can also extend this theory to determinations of whether certain state convictions trigger other immigration provisions under the categorical approach. In particular, this short section in *Esquivel-Quintana* supports the argument that the crime involving moral turpitude (CIMT) provisions of the INA may not be applied to *de minimis* conduct, even if their legal elements may otherwise correspond to those of the CIMT generic definition at issue. For example, the BIA has long taken the position that “[t]he term ‘moral turpitude’ generally refers to conduct that is ‘inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.’” *Matter of Silva-Trevino III*, 26 I&N Dec. 826, 833 (BIA 2016). The BIA takes the position that the lowest level theft offenses—even those that include shoplifting—are CIMTs. *See, e.g., Matter of Obeya*, 26 I&N Dec. 856 (BIA 2016). The government likewise takes the position that offenses such as turnstile jumping are CIMTs because their elements fall within those of the generic definition of a CIMT *theft offense*. But this cannot be reconciled with the BIA’s longstanding requirement that CIMTs be of a more serious nature. The Court’s similar reaction when applying the tools of statutory construction in *Esquivel-Quintana* provides support for this kind of challenge with respect to other provisions of the INA.

### **III. SUGGESTED STRATEGIES FOR CASES AFFECTED BY *ESQUIVEL-QUINTANA***

This section offers strategies to consider for individuals whose cases are affected by *Esquivel-Quintana*. Accompanying this advisory is a sample motion to reconsider for individuals who are seeking termination because they are no longer removable as a result of the *Esquivel-Quintana* decision. *See* Appendix B (Sample Motion to Reconsider to Terminate Removal Proceedings).

#### **A. Individuals in Pending Removal Proceedings**

Individuals who are in removal proceedings (either before an Immigration Judge (IJ) or on appeal at the BIA) and whose cases are affected by *Esquivel-Quintana* should promptly bring the decision to the attention of the IJ or BIA, explaining how the decision controls the removability or relief eligibility question at issue. For example, if a person is only charged with

deportability based on a charge of sexual abuse of a minor aggravated felony for a statutory rape offense based solely on the age of the participants where the younger participant could have been age 16 or over, the person could file a motion to terminate. *See* Section I(C). Or, if the person becomes eligible for a form of relief from removal (e.g., cancellation of removal) as a result of *Esquivel-Quintana*, the individual could argue that *Esquivel-Quintana* eliminates the prior bar to relief.

An individual could bring the *Esquivel-Quintana* decision to the attention of the IJ or BIA by filing a notice of supplemental authority, a motion to terminate (if appropriate), or a merits brief. If the case is on appeal at the BIA and the person is eligible for relief as a result of the decision, it is advisable to file a motion to remand *before* the BIA rules on the appeal to preserve his or her statutory right to later file *one* motion to reconsider and reopen.

## **B. Individuals with Final Orders**

*Petition for Review.* Individuals with pending petitions for review should consider filing a motion to summarily grant the petition or a motion to remand the case to the BIA, whichever is appropriate. The Department of Justice attorney on the case may even consent to such a motion. Regardless whether a motion to remand is filed, if briefing has not been completed, the opening brief and/or the reply brief should address *Esquivel-Quintana*. If briefing has been completed, the petitioner may file a letter under Federal Rule of Appellate Procedure (FRAP) 28(j) (“28(j) Letter”) informing the court of the decision and its relevance to the case.

*Denied Petition for Review.* If the court of appeals already denied a petition for review, and the time for seeking rehearing has not expired (*see* FRAP 35 and 40 and local rules), a person may file a petition for rehearing, explaining *Esquivel-Quintana*’s relevance to the case and its impact on the outcome. If the court has not issued the mandate, a person may file a motion to stay the mandate. *See* FRAP 41 and local rules. If the mandate has issued, the person may file a motion to recall (withdraw) the mandate. *See* FRAP 27 and 41, and local rules. Through the motion, the person should ask the court to reconsider its prior decision in light of *Esquivel-Quintana* and remand the case to the BIA. In addition, a person may file a petition for certiorari with the Supreme Court within 90 days of the issuance of the circuit court’s judgment (not mandate). The petition should request the Court grant the petition, vacate the circuit court’s judgment, and remand for further consideration in light of *Esquivel-Quintana*.

*Administrative Motion to Reconsider.* Regardless whether an individual sought judicial review, he or she may file a motion to reconsider or a motion to reopen with the BIA or the immigration court (whichever entity last had jurisdiction over the case).<sup>4</sup> As with all cases where a motion is filed, there may be some risk that DHS may arrest the individual (if the person is not detained). This risk may increase when the motion is untimely.

It generally is advisable to file the motion within 30 days of the removal order, or, if 30 days have passed, before the 90 day motion to reopen deadline. *See* 8 U.S.C. §§1229a(c)(6)(B) and 1229a(c)(7)(C)(i); *see also* 8 C.F.R. §103.5 (for individuals in administrative removal

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<sup>4</sup> There are strong arguments that fundamental changes in the law warrant reconsideration because they are “errors of law” in the prior decision. *See* 8 U.S.C. §1229a(c)(6)(C).



proceedings under 8 U.S.C. §1228(b), providing 30 days for filing a motion to reopen or reconsider a DHS decision).<sup>5</sup> If the time for filing has elapsed, motions should be filed, if at all possible, within 30 (or 90) days of May 30, 2017, the date the Court issued its decision in *Esquivel-Quintana*, i.e., by **June 29, 2017, or August 28, 2017**, respectively. Filing within this time period supports the argument that the statutory deadline should be equitably tolled. In order to show due diligence as required by the equitable tolling doctrine, individuals should file within 30 days after *Esquivel-Quintana* and argue that the filing deadline was equitably tolled until the Supreme Court issued its decision or until some later date. If the individual is *inside the United States* (and has not departed since the issuance of a removal order) and the statutory deadline has elapsed, counsel *might* consider making an *alternative* request for *sua sponte* reopening.<sup>6</sup>

### C. Additional Considerations for Individuals Abroad

An individual's physical location outside the United States *arguably* should not present an obstacle to returning to the United States if the Court of Appeals grants the petition for review. Such individuals should be "afforded effective relief by facilitation of their return." *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Thus, if the Court of Appeals grants a petition for review or grants a motion to stay or recall the mandate and then grants a petition for review, DHS *should* facilitate the petitioner's return to the United States.<sup>7</sup>

Noncitizens outside the United States may file administrative motions notwithstanding the departure bar regulations, 8 C.F.R. §§1003.2(d) and 1003.23(b), if removal proceedings were conducted within any judicial circuit, with the exception of removal proceedings conducted in the Eighth Circuit.<sup>8</sup> If filing a motion to reconsider or reopen in the Eighth Circuit, the BIA or

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<sup>5</sup> One court suggested that a person may file a petition for review if DHS denies the motion. *Ponta-Garca v. Ashcroft*, 386 F.3d 341, 343 n.1 (1st Cir. 2004). *But see Tapia-Lemos v. Holder*, 696 F.3d 687, 690 (7th Cir. 2012) (dismissing petition for review of denial of motion to reopen under 8 C.F.R. §103.5 for lack of jurisdiction).

<sup>6</sup> Note, however, that Courts of Appeals have held that they lack jurisdiction to review the BIA's denial of a *sua sponte* motion. *See Luis v. INS*, 196 F.3d 36, 40 (1st Cir. 1999); *Ali v. Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474-75 (3d Cir. 2003); *Mosere v. Mukasey*, 552 F.3d 397 (4th Cir. 2009); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 248-50 (5th Cir. 2004); *Harchenko v. INS*, 379 F.3d 405, 410-11 (6th Cir. 2004); *Pilch v. Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003); *Tamenut v. Mukasey*, 521 F.3d 1000, 1003-04 (8th Cir. 2008) (en banc) (per curiam); *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Belay-Gebru v. INS*, 327 F.3d 998, 1000-01 (10th Cir. 2003); *Anin v. Reno*, 188 F.3d 1273, 1279 (11th Cir. 1999).

<sup>7</sup> For more information about returning to the United States after prevailing in court or on an administrative motion, *see* NIP-NLG, NYU Immigrant Rights Clinic, and AIC, *Return to the United States After Prevailing on a Petition for Review or Motion to Reopen or Reconsider* (2015) available at [https://www.nationalimmigrationproject.org/PDFs/practitioners/practice\\_advisories/fed/2015\\_27Apr\\_return-advisory.pdf](https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/fed/2015_27Apr_return-advisory.pdf).

<sup>8</sup> Although the BIA interprets the departure bar regulations as depriving immigration judges and the BIA of jurisdiction to adjudicate post-departure motions, *see Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008), the Courts of Appeals (except the Eighth Circuit, which has not decided the issue) have invalidated the bar. *See Perez Santana v. Holder*, 731 F.3d 50 (1st Cir. 2013); *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Prestol Espinal v. AG of the United States*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499

immigration judge likely will refuse to adjudicate the motion for lack of jurisdiction based on the departure bar regulations. It is important to note that the cases invalidating the departure bar regulation involved statutory (not *sua sponte*) motions to reopen or reconsider. In those cases, the courts found the regulation is unlawful either because it conflicts with the motion to reopen or reconsider statute or because it impermissibly contracts the BIA's jurisdiction. Thus, whenever possible, counsel should make an argument that the motion qualifies under the motion statutes (8 U.S.C. §§1229a(c)(6) or 1229a(c)(7)), i.e., that the motion is timely filed or that the filing deadline should be equitably tolled, and impermissibly contracts the agency's congressionally-delegated authority to adjudicate motions. Counsel should consider arguing that the statutory deadline should be equitably tolled due to errors outside the noncitizen's control that are discovered with diligence or ineffective assistance of counsel. If the person did not appeal her or his case to the Board or circuit court, counsel may wish to include a declaration from the person explaining the reason, including lack of knowledge about the petition for review process or inability to afford counsel. Counsel should also review the record to determine whether the immigration judge, DHS counsel, or prior counsel led the noncitizen to believe that any further appeals would be futile.

Significantly for individuals who have been deported or who departed the United States, it may be advisable *not* to request *sua sponte* reopening because the departure bar litigation has not been as successful in the *sua sponte* context. *See, e.g., Desai v. AG of the United States*, 695 F.3d 267 (3d Cir. 2012); *Zhang v. Holder*, 617 F.3d. 650 (2d Cir. 2010); *Ovalles v. Holder*, 577 F.3d 288, 295-96 (5th Cir. 2009). In addition, as stated above (see n.6, *supra*), most Courts of Appeals have held that they lack jurisdiction to review *sua sponte* motions.<sup>9</sup>

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F.3d 329 (4th Cir. 2007); *Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011); *Contreras-Bocanegra v. Holder*, 678 F.3d 811 (10th Cir. 2012) (en banc); *Jian Le Lin v. United States AG*, 681 F.3d 1236 (11th Cir. 2012).

<sup>9</sup> For additional information on the departure bar regulations, *see* NIP-NLG and AIC, *Departure Bar to Motions to Reopen and Reconsider: Legal Overview and Related Issues* (2013) available at [https://www.nationalimmigrationproject.org/PDFs/practitioners/practice\\_advisories/gen/2013\\_20Nov\\_departure-bar.pdf](https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2013_20Nov_departure-bar.pdf).

## APPENDIX A

### **Examples of State Offenses that Should Not Be Deemed “Sexual Abuse of a Minor” Based on the *Esquivel-Quintana* Holding**

- **Arizona** – Ariz. Rev. Stat. Ann. § 13-1405(a) (Supp. 2016) (age 18 cutoff)
- **California** -- Cal. Penal Code §§ 261.5(a)-(c) (West Supp. 2014) (age 18 cutoff)
- **Delaware** – Del. Code Ann. tit. 11, §§ 768, 770(A)(2) (2015) (age 18 cutoff)
- **Florida** – Fla. Stat. § 794.05(1) (2017) (age 18 cutoff)
- **Idaho** – Idaho Code Ann. § 18-6101(2) (West 2016) (age 18 cutoff)
- **Illinois** – 720 Ill. Comp. Stat. Ann, 5/11-1.50(b), 5/11-1.50(c), 5/11-1.60(d) (West Supp. 2016) (age 17 cutoff)
- **Louisiana** – La. Rev. Stat. Ann. § 14:80(A)(1) (2012) (age 17 cutoff)
- **Missouri** – Mo. Rev. Stat. §§ 566.034, 566.064 (West Supp. 2016) (age 17 cutoff)
- **New Mexico** – N. M. Stat. Ann. § 30-9-11(G)(1) (Supp. 2016) (age 17 cutoff)
- **New York** – N. Y. Penal Law §§ 130.20(1) (see also §130.05(3)(a)), 130.25(2) (McKinney 2009) (age 17 cutoff)
- **Oregon** – Ore. Rev. Stat. §§ 163.315(1)(a), 163.415(1)(a)(B) (2015) (age 18 cutoff)
- **Tennessee** – Tenn. Code Ann. §§ 39-13-506(a), 39-13-506(b)(2), 39-13-506(c) (2014) (age 18 cutoff)
- **Texas** – Tex. Penal Code Ann. §§ 22.011(a)(2), (c)(1) (West 2011) (age 17 cutoff)
- **Utah** – Utah Code Ann. §§ 76-5-401.2(2)(a)(i)-(ii) (LexisNexis Supp. 2016)(age 18 cutoff)
- **Virginia** – Va. Code Ann. § 18.2-371(ii) (Supp. 2016) (age 18 cutoff)
- **Wisconsin** – Wis. Stat. Ann. §§ 948.01(1) (West Supp. 2016), 948.09 (West 2005) (age 18 cutoff)
- **Wyoming** – Wyo. Stat. Ann. § 6-2-316(a)(iv) (2015) (age 17 cutoff)

## **APPENDIX B**

### **SAMPLE MOTION TO RECONSIDER TO TERMINATE REMOVAL PROCEEDINGS (FOR FILING WITH THE BIA)**

This motion is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. It is not intended as, nor does it constitute, legal advice. DO NOT TREAT THIS SAMPLE MOTION AS LEGAL ADVICE.

This motion is applicable to:

Cases in which an aggravated felony for "sexual abuse of a minor" under INA § 101(a)(43)(A) was the sole ground of removability and, as a result of *Esquivel-Quintana v. Sessions*, the person is no longer deportable

Accordingly, the motion seeks reconsideration and termination of removal proceedings.

This sample motion is intended for filing with the Board of Immigration Appeals (BIA). If the person did not appeal to the BIA, the motion should be filed with the Immigration Court and different regulations apply.

In cases where the person was deportable based on an aggravated felony for sexual abuse of a minor *and* some other ground of removability, counsel should assess whether the person now is eligible for relief from removal as a result of *Esquivel-Quintana v. Sessions*. These respondents would need to seek reconsideration and the opportunity to apply for relief from removal.

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
BOARD OF IMMIGRATION APPEALS  
FALLS CHURCH, VIRGINIA

In the Matter of: )  
 )  
\_\_\_\_\_, ) A Number: \_\_\_\_\_  
 )  
Respondent. )  
 )  
In Removal Proceedings. )  
\_\_\_\_\_ )

**MOTION TO RECONSIDER AND TERMINATE  
IN LIGHT OF *ESQUIVEL-QUINTANA* v. *SESSIONS***

**I. INTRODUCTION**

Pursuant to § 240(c)(6) of the Immigration and Nationality Act (INA), Respondent, \_\_\_\_\_, hereby seeks reconsideration in light of the Supreme Court’s recent precedent decision in *Esquivel-Quintana v. Sessions*, No. 16-54, -- U.S. --, 2017 WL 2322840 (May 30, 2017). In *Esquivel-Quintana*, the Supreme Court held that the aggravated felony of “sexual abuse of a minor” does not reach state statutory rape offenses focused solely on the age of the participants where the younger participant could have been age 16 or over. 2017 WL 2322840 at \*10. Furthermore, the Court’s holding overrules the Board’s contrary decision in *Matter of Esquivel-Quintana*, 26 I&N Dec. 469 (BIA 2015).

The Board should reconsider its decision and terminate removal proceedings against Respondent because the Court’s decision in *Esquivel-Quintana* controls this case.

**II. STATEMENT OF FACTS AND STATEMENT OF THE CASE**

The Department of Homeland Security (DHS) alleged that Respondent was admitted as a lawful permanent resident on \_\_\_\_\_. See Notice to Appear, dated \_\_\_\_\_. DHS charged Respondent with deportability for an aggravated felony under INA § 101(a)(43)(A) for sexual abuse of a minor.

On \_\_\_\_\_, the Immigration Judge (IJ) found Respondent deportable as charged. See IJ Decision. This Board affirmed the IJ's decision on \_\_\_\_\_. See BIA Decision.

Pursuant to 8 C.F.R. § 1003.2(e), Respondent declares that:

(1) The validity of the removal order [has been or is OR has not been and is not] the subject of a judicial proceeding. [If applicable] The location of the judicial proceeding is:

\_\_\_\_\_. The proceeding took place on: \_\_\_\_\_.

The outcome is as follows \_\_\_\_\_.

(2) Respondent [is OR is not] currently the subject of a criminal proceeding under the Act. The current status of this proceeding is: \_\_\_\_\_.

(3) Respondent [is OR is not] currently the subject of any pending criminal proceeding under the Act.

### **III. STANDARD FOR RECONSIDERATION**

A motion to reconsider shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority. INA § 240(c)(6)(C); 8 C.F.R. § 1003.3(b)(1). In general, a respondent may file one motion to reconsider within 30 days of the date of a final removal order. INA § 240(c)(6)(A)&(B), 8 C.F.R. § 1003.2(b)(2).

[If motion is filed within 30 days of BIA's decision] The Board issued its decision in Respondent's case on \_\_\_\_\_. This motion is timely filed within 30 days of the date of that decision].

[If more than 30 have elapsed since the date of the Board's decision] The Board issued its decision in Respondent's case on \_\_\_\_\_. The Board should treat the instant motion as a timely filed statutory motion to reconsider because Respondent merits equitable tolling of the time [if applicable: and numeric] limitations. See § IV.B., *infra*; see also 8 C.F.R. § 1003.1(d)(1)(ii) ("a panel or Board member to whom a case is assigned may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case.").

#### IV. ARGUMENT

##### A. **As a Matter of Law, the Board Erred in Finding that Respondent's Conviction Categorically Qualified as an Aggravated Felony for "Sexual Abuse of a Minor."**

In *Esquivel-Quintana v. Sessions*, the Supreme Court addressed the aggravated felony of "sexual abuse of a minor," defined in INA § 101(a)(43)(A).

In 2009, Mr. Esquivel-Quintana pleaded no contest in California to "unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator" under Cal. Penal Code Ann. §261.5(c) (West 2014). *Esquivel-Quintana v. Sessions*, 2017 WL 2322840 at \*3. For purposes of that offense, California defines "minor" as "a person under the age of 18 years." *Id.* Notwithstanding that the California offense here involved or could have involved consensual sex with a person who was age 16 or 17, conduct which would not have constituted a crime under federal and most states' statutory rape laws, the IJ found that the conviction qualified categorically as an aggravated felony for "sexual abuse of a minor." *Id.* Both this Board and the Sixth Circuit Court of Appeals affirmed the IJ's deportability finding.

The Supreme Court reversed, concluding that the petitioner was not deportable for the aggravated felony of "sexual abuse of a minor." In doing so, the Court rejected the Board's erroneous conclusion that a statutory rape offense involving a 16- or 17-year-old victim could

qualify as “sexual abuse of a minor” where the statute required a meaningful age difference between the victim and offender. *Matter of Esquivel-Quintana*, 26 I&N Dec. 469, 477 (BIA 2015).

The Court concluded that in the context of statutory rape offenses that criminalize sexual intercourse based solely on the ages of the participants, the generic federal definition of “sexual abuse of a minor” requires the age of the victim to be less than 16. *Esquivel-Quintana v. Sessions*, 2017 WL 2322840 at \*10. The Court based its holding on the text of the statute, the structure of the INA, and evidence from the federal and state criminal codes, all of which confirmed that the generic age of consent in statutory rape laws is 16. *Id.* at \*5-9.

**[Insert if applicable]** Like the petitioner in *Esquivel-Quintana*, Respondent was charged with and found deportable for the aggravated felony of “sexual abuse of a minor,” under INA § 101(a)(43)(A). *See* BIA Decision at p. \_\_\_. As in *Esquivel Quintana*, Respondent’s statute of conviction covers statutory rape based solely on the age of the participants where the younger participant could have been age 16 or over. In light of the Supreme Court’s decision in *Esquivel-Quintana*, the Board should grant reconsideration and terminate removal proceedings against Respondent.

**[If more than 30 days have elapsed since the BIA’s decision, insert section B]**

**B. THE BOARD SHOULD TREAT THE INSTANT MOTION AS A TIMELY FILED STATUTORY MOTION BECAUSE RESPONDENT MERITS EQUITABLE TOLLING OF THE TIME AND NUMERICAL LIMITATIONS.**

**1. Standard for Equitable Tolling**



A motion to reconsider must be filed within 30 days of entry of a final administrative order of removal, INA § 240(c)(6)(B), or, under the doctrine of equitable tolling, as soon as practicable after finding out about an extraordinary circumstance that prevented timely filing.

The Supreme Court concisely and repeatedly has articulated the standard for determining whether an individual is “entitled to equitable tolling.” *See, e.g., Holland v. Florida*, 560 U.S. 631, 632 (2010). Specifically, an individual must show “‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.” *Id.* (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). *See also Credit Suisse Securities (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419 (2012); *Lawrence v. Florida*, 549 U.S. 327, 336 (2007). The Supreme Court also requires that those seeking equitable tolling pursue their claims with “reasonable diligence,” but they need not demonstrate “maximum feasible diligence.” *Holland*, 560 U.S. at 653 (internal quotations omitted).

The Supreme Court also has recognized a rebuttable presumption that equitable tolling is read into every federal statute of limitations. *Holland*, 560 U.S. at 631. Thus, ten courts of appeals have recognized that motion deadlines in immigration cases are subject to equitable tolling. *See Iavorski v. INS*, 232 F.3d 124, 134 (2d Cir. 2000) (Sotomayor, J.); *Borges v. Gonzales*, 402 F.3d 398, 407 (3d Cir. 2005); *Kuusk v. Holder*, 732 F.3d 302, 305 (4th Cir. 2013); *Lugo-Resendez v. Lynch*, 831 F.3d 337, 344 (5th Cir. 2016); *Mezo v. Holder*, 615 F.3d 616, 620 (6th Cir. 2010); *Pervaiz v. Gonzales*, 405 F.3d 488, 489 (7th Cir. 2005); *Ortega-Marroquin v. Holder*, 640 F.3d 814, 819-20 (8th Cir. 2011); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1184-85 (9th Cir. 2001); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002); *Avila-Santoyo v. AG*, 713 F.3d 1357, 1363 n.5 (11th Cir. 2013) (en banc); *cf. Bolieiro v. Holder*, 731 F.3d 32, 39 n.7 (1st Cir. 2013) (“Notably, every circuit that has addressed the issue thus far has held that equitable

tolling applies to . . . limits to filing motions to reopen.”). [If applicable] Similarly, federal courts recognize that the numeric limit on motions is subject to tolling. *See Jin Bo Zhao v. INS*, 452 F.3d 154 (2d Cir. 2006); *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002) Thus, the time and numeric limitations on motions to reconsider at issue in this case are subject to equitable tolling.

**2. Respondent Is Diligently Pursuing [Her/His] Rights and Extraordinary Circumstances Prevented Timely Filing of this Motion.**

The Supreme Court’s decision in *Esquivel-Quintana* constituted an extraordinary circumstance that prevented Respondent from timely filing a motion to reconsider and he/she pursued his/her case with reasonable diligence. Equitable tolling of the motion to reconsider deadline is warranted in this case.

The Supreme Court’s decision in *Esquivel-Quintana* rejected the Board’s erroneous interpretation of the aggravated felony of “sexual abuse of a minor,” defined in INA § 101(a)(43)(A), which was previously applied in Respondent’s case. *See [if applicable] Underlying decision (citing Matter of Esquivel-Quintana, 26 I&N Dec. 469 (BIA 2015)); supra Section IV.A. [Also include if there was a relevant binding courts of appeals decision that had an improper interpretation of the aggravated felony definition.]* This extraordinary circumstance prevented Respondent from timely filing his/her motion to reconsider.

*Esquivel-Quintana* was decided on May 30, 2017. Respondent has exhibited the requisite diligence both before and after learning of the decision. She/he first learned of the decision on \_\_\_\_\_ when \_\_\_\_\_. *See Declaration of Respondent.* She/he is filing the instant motion to reopen within \_\_\_ days of discovering that [she/he] is not deportable [insert if true] and within 30 days of the Supreme Court decision. As set forth in Respondent’s accompanying declaration, Respondent attempted to challenge the Immigration Judge’s decision

by appealing the decision to this Board, [if applicable] and later via Petition for Review to the U.S. Court of Appeals for the \_\_\_\_\_ Circuit. [If Respondent did not seek circuit review, explain the reason why and support claims with corroborating evidence if possible; If Respondent sought review, explained what happened]. [Include any other steps Respondent took to pursue case prior to the *Esquivel-Quintana* decision including contacting attorneys.] Respondent is filing this motion as soon as practicable after finding out about the decision and has displayed reasonable diligence in pursuing his/her rights.

**C. IN THE ALTERNATIVE, THE BOARD SHOULD RECONSIDER RESPONDENT’S REMOVAL ORDER SUA SPONTE.**

An immigration judge or the Board may reopen or reconsider a case on its own motion at any time. *See* 8 C.F.R. §§ 1003.23(b)(1); 1003.2(a). The Board invokes its authority to reopen or reconsider a case following fundamental changes in law. *See Matter of G-D-*, 22 I&N Dec. 1132, 1135 (BIA 1999). The Supreme Court’s decision in *Esquivel-Quintana* amounts to a fundamental change in law warranting sua sponte reopening or reconsideration. *See supra* Section IV.A. Reconsideration is especially warranted in this case because [include other equitable factors]. *See Respondent’s Declaration*.

**V. CONCLUSION**

The Board should reconsider its prior decision in this case and terminate removal proceedings against Respondent.

Dated: \_\_\_\_\_

Respectfully submitted,

\_\_\_\_\_

[Attach proof of service on opposing counsel]