

No. 21-6638, 22-6312

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ISRAEL NEGRIEL,

Petitioner,

v.

MERRICK B. GARLAND, U.S. Attorney General,

Respondent.

On Petition For Review of a
Decision of the Board of Immigration Appeals

**BRIEF OF AMICUS CURIAE
AMERICAN IMMIGRATION LAWYERS ASSOCIATION
IN SUPPORT OF PETITIONER**

David J. Zimmer
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
Tel.: 617.570.1000
Fax.: 617.523.1231

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the undersigned counsel states that *amicus curiae* the American Immigration Lawyers Association has no corporate parent, and no publicly held corporation holds 10% of any stock it might issue.

Respectfully submitted,

/s/ David J. Zimmer
David J. Zimmer
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
Tel.: 617.570.1000
Fax.: 617.523.1231

Counsel for Amicus Curiae

Dated: January 25, 2023

TABLE OF CONTENTS

INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	6
I. The Supreme Court’s decision in <i>Esquivel-Quintana</i> answers the question presented.	6
A. In <i>Esquivel-Quintana</i> , the Supreme Court held that a statutory rape offense categorically qualifies as “abuse” only when the age of consent is sixteen or younger.	7
B. <i>Esquivel-Quintana</i> controls this case.	11
II. The Board’s reasons for departing from <i>Esquivel-Quintana</i> are meritless.	14
A. The Board erred by focusing on the word “child” instead of the word “abuse.”	15
B. The Board erred by relying on its own precedent and precedent from the courts of appeals that did not specifically address <i>Esquivel-Quintana</i> ’s application in this context.	17
C. The fact that a “crime of child abuse” is not an “aggravated felony” cannot justify giving the word “abuse” a fundamentally different meaning in two related, contemporaneously-enacted provisions.	20
CONCLUSION	23
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Matter of Aguilar-Barajas</i> , 28 I. & N. Dec. 354 (BIA 2021)	<i>passim</i>
<i>Esquivel-Quintana v. Sessions</i> , 581 U.S. 385 (2017).....	<i>passim</i>
<i>Garcia v. Barr</i> , 969 F.3d 129 (5th Cir. 2020).....	18, 19
<i>Matthews v. Barr</i> , 927 F.3d 606 (2d Cir. 2019)	19, 20, 21
<i>Mondragon-Gonzalez v. Att’y Gen. of the U.S.</i> , 884 F.3d 155 (3d Cir. 2018)	19, 20
<i>Matter of Sanchez-Lopez</i> , 27 I. & N. Dec. 256 (BIA 2018)	22
<i>Matter of Velazquez-Herrera</i> , 24 I. & N. Dec. 503 (BIA 2008)	<i>passim</i>
Federal Statutes	
8 U.S.C. § 1227(a)(2)(A)(iii)	7
8 U.S.C. § 1227(a)(2)(E)(i)	2, 11, 22
8 U.S.C. § 1229b(b)(1)(C).....	22
8 U.S.C. § 1229b(b)(1)(D)	22
18 U.S.C. § 16	22
18 U.S.C. § 2243	10
Illegal Immigration Reform and Immigrant Responsibility	
Act of 1996, Public L. No. 104-208, 110 Stat. 3009-546.....	12

State Statutes

Cal. Penal Code § 261.5(c).....	7, 8, 11
N.Y. Penal Law § 130.25(2).....	2, 11, 13

Other Authorities

Merriam-Webster's Dictionary of Law (1996)	9
--------------------------------------------------	---

INTEREST OF *AMICUS CURIAE*¹

The American Immigration Lawyers Association (“AILA”) is a national non-profit association with more than 15,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. As part of its mission, AILA provides trainings, information, and practice advisories to practitioners providing direct services to noncitizens, and to counsel representing noncitizens accused of criminal offenses in federal and state courts.

¹ All parties have consented to the filing of this brief. Neither party’s counsel authored this brief in whole or in part, and no one other than *amicus*, its members, or its counsel contributed money to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question before this Court is whether every twenty-one-year-old who engages in consensual sex with a sixteen-year-old commits a “crime of child abuse” under the Immigration and Nationality Act (INA). See N.Y. Penal Law § 130.25(2); 8 U.S.C. § 1227(a)(2)(E)(i). Even the narrowest reading of the Supreme Court’s decision in *Esquivel-Quintana v. Sessions*, 581 U.S. 385 (2017), definitively resolves that question. The Supreme Court held that, because a sixteen-year-old can consent to sex, consensual sex with a sixteen-year-old is not categorically “abuse.” That holding plainly controls here: Conduct that is not categorically “abuse” cannot categorically qualify as a “crime of child abuse.” This Court is bound by *Esquivel-Quintana*, and should grant the petition for review.

Esquivel-Quintana concerned the meaning of the phrase “sexual abuse of a minor” in the INA, and raised the question of when consensual sex constitutes “abuse” based *only* on the age of one of the participants. *Esquivel-Quintana* held that the general understanding as of 1996—the year the “sexual abuse of a minor” provision was added to the statute—was that the “age of consent” (*i.e.*, the age at which a person can legally consent to sex) was sixteen years old. For that reason, a state statute

that criminalizes consensual sex *only* because one of the participants was sixteen years old (or older) sweeps in conduct that is not “abuse” for purposes of federal immigration law, and is not categorically “sexual abuse of a minor.” *Esquivel-Quintana* thus stands for a straightforward proposition: “Where sexual intercourse is abusive solely because of the ages of the participants, the victim must be younger than 16.” 581 U.S. at 397.

For exactly the same reason, consensual sex with someone sixteen or older is not a “crime of child abuse.” The “crime of child abuse” provision, like the “sexual abuse of a minor” provision, was added to the INA in 1996. Thus, the Supreme Court’s holding that the generic “age of consent” in 1996 was sixteen years old applies as much to “child abuse” as to “sexual abuse of a minor.” And, given that a sixteen-year-old can legally consent to sex, consensual sex with a sixteen- or seventeen-year-old cannot be a “crime of child abuse” any more than it can be “sexual abuse of a minor.” Put simply, *Esquivel-Quintana* makes clear that consensual sex is not “abuse” only because one of the participants is sixteen years old. Because the New York statute at issue in this case

criminalizes such consensual sex, it criminalizes conduct that is not “abuse,” and hence is not categorically a “crime of child abuse.”

The Board of Immigration Appeals (Board) reached a contrary conclusion in its split decision in *Matter of Aguilar-Barajas*, 28 I. & N. Dec. 354 (BIA 2021). The Board majority made essentially three attempts to avoid *Esquivel-Quintana*, but, as the dissenting Judge explained in detail, none withstands even minimal scrutiny. First, the Board majority relied on its prior holding that the word “child” in the phrase “crime of child abuse” means an individual under eighteen years old. 28 I. & N. Dec. at 359-60. But that focuses on the wrong word in the statute: The key question in this case is not whether a sixteen-year-old is a “child,” but whether consensual sex with a sixteen-year-old is categorically “abuse.” *See id.* at 370 (Petty, A.I.J., dissenting). That is exactly the question the Supreme Court answered in *Esquivel-Quintana*.

Second, the Board majority relied on its decision in *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503, 512 (BIA 2008), which interpreted the child-abuse provision to encompass “maltreatment of a child.” *Aguilar-Barajas*, 28 I. & N. Dec. at 361-62. But the Board majority never explained why consensual sex with someone free to give

their consent is categorically “maltreatment” any more than it is categorically “abuse.” And, more fundamentally, the Supreme Court held in *Esquivel-Quintana* that the *statutory* term “abuse” does *not* categorically encompass consensual sex with a sixteen-year-old. Regardless what the Board wrote in *Velazquez-Herrera*, the Board cannot expand the meaning of the word “abuse” beyond what the Supreme Court has deemed to be its unambiguous meaning.

Third, the Board majority relied on the fact that the “crime of child abuse” provision is not an aggravated felony, so some of the statutory context on which the Supreme Court relied in *Esquivel-Quintana* differs between the two provisions. 28 I. & N. Dec. at 356-57; *see also Esquivel-Quintana*, 581 U.S. at 393-94. But the context the Court cited in *Esquivel-Quintana* formed only a minor part—just one short paragraph—of the Court’s overall analysis. *See* 581 U.S. at 393-94. Every other interpretive tool the Court employed—most notably, dictionaries, state criminal codes, and a related federal statute—applies equally to meaning of “abuse” in both “sexual abuse of a minor” and “crime of child abuse.” Moreover, the two provisions actually *share* their key contextual features: Like a conviction for “sexual abuse of a minor,”

a conviction for a “crime of child abuse” has among the most serious immigration consequences imaginable and is paired in the statute with other “heinous” crimes. 581 U.S. at 394. Any minor differences in statutory context are nowhere near enough to justify adopting different definitions of the word “abuse” across two related provisions enacted in the same statute.

This Court should therefore grant the petition for review and reject the Board majority’s decision in *Aguilar-Barajas*.

ARGUMENT

I. The Supreme Court’s decision in *Esquivel-Quintana* answers the question presented.

In *Esquivel-Quintana*, the Supreme Court answered a question that was, in every material respect, the same as the one in this case—whether a California statutory rape law that criminalizes consensual sex with a sixteen-year-old qualifies as a categorical crime of “sexual abuse of a minor” under the INA. The Supreme Court held that it does not: Because a sixteen-year-old can legally consent to sex, the Court held, consensual sex with someone sixteen or older, without more, is not categorically sexual “abuse” under the INA. That holding plainly applies equally to the “child abuse” provision at issue here, as consensual sex

with a person who can legally consent to sex is no more abusive in the context of “child abuse” than in the context of “sexual abuse of a minor.”

A. In *Esquivel-Quintana*, the Supreme Court held that a statutory rape offense categorically qualifies as “abuse” only when the age of consent is sixteen or younger.

The issue in *Esquivel-Quintana* was whether a conviction under California Penal Code section 261.5(c) categorically qualifies as “sexual abuse of a minor” under the INA. 581 U.S. at 387-88; *see also* 8 U.S.C. § 1227(a)(2)(A)(iii) (providing that “[a]ny alien who is convicted of an aggravated felony at any time after admission” to the United States may be deported); *id.* § 1101(a)(43)(A) (listing “sexual abuse of a minor” as an aggravated felony). California Penal Code section 261.5(c) criminalizes “unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator.” Cal. Penal Code. § 261.5(c). And the statute defines a “minor” as “a person under the age of 18 years.” *Id.* § 261.5(a). The California statute thus criminalizes consensual sex between someone about to turn eighteen years old and someone who just turned twenty-one years old solely based on their ages.

The petitioner in *Esquivel-Quintana*, a native of Mexico and lawful permanent resident of the United States, pleaded no contest to a violation

of section 261.5(c). 581 U.S. at 388. After the agency ordered him removed and the Sixth Circuit denied his petition for review, the Supreme Court unanimously reversed, in an opinion by Justice Thomas. *Id.* at 388-89. Under the categorical approach, the Court explained, the question was whether “the least of the acts criminalized by [California Penal Code section 261.5(c)] falls within the generic federal definition of sexual abuse of a minor”—in other words, whether the generic federal offense of “sexual abuse of a minor” encompasses “consensual sexual intercourse between a victim who is almost 18 and a perpetrator who just turned 21.” *Id.* at 389-90.

The Court held that, “in the context of statutory rape offenses that criminalize sexual intercourse based solely 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 390-91. The Court noted that, like the “crime of child abuse” provision, the “sexual abuse of a minor” provision was added to the INA in 1996, and that “[a]t that time, the ordinary meaning of ‘sexual abuse’ included ‘engaging in sexual contact with a person who is below a specified age or who is incapable of giving consent

because of age or mental or physical incapacity.” *Id.* at 391 (quoting Merriam-Webster’s Dictionary of Law 454 (1996)).

The question before the Court was therefore at what age a person could consent to sex such that consensual sex with that person is not abusive. The Court squarely held that, while the age of consent varies somewhat by jurisdiction, “the ‘generic’ age [of consent]—in 1996 and today—is 16.” *Id.* at 392. For that reason, “[w]here sexual intercourse is abusive solely because of the ages of the participants, the victim must be younger than 16.” *Id.* at 397.

The Court first looked to “reliable dictionaries,” concluding that such dictionaries showed that sixteen was the age of consent. *Id.* at 392. Notably, the Court rejected the government’s argument that the relevant age of consent was eighteen years old because that was the standard definition of a “minor” at that time. As the Court explained, the relevant question, in this context, looked “not to the age of legal competence (when a person is legally capable of agreeing to a contract, for example), but to the age of consent (when a person is legally capable of agreeing to sexual intercourse).” *Id.* at 393.

The Court further observed that “[t]he structure of the INA, a related federal statute, and evidence from state criminal codes confirm that, for a statutory rape offense to qualify as sexual abuse of a minor under the INA based solely on the age of the participants, the victim must be younger than 16.” *Id.* The Court noted that another federal criminal statute that criminalizes “[s]exual abuse of a minor or ward” was amended through the same omnibus bill that added the “sexual abuse of a minor” provision to the INA and set the age limit for victims at sixteen. *Id.* at 394 (citing 18 U.S.C. § 2243). In addition, as of 1996, the “significant majority of jurisdictions . . . set the age of consent at 16 for statutory rape offenses predicated exclusively on the age of the participants”: Thirty-one states and the District of Columbia had set the age of consent at sixteen, three states set the age of consent below sixteen, and sixteen set the age of consent above sixteen (six at seventeen, the remaining ten at eighteen). *Id.* at 395-96. The Court concluded from this survey that state law generally reinforced its conclusion that “[w]here sexual intercourse is abusive solely because of the ages of the participants, the victim must be younger than 16.” *Id.* at 397.

Accordingly, a state statutory-rape provision that criminalizes consensual sex between persons sixteen or older, without more, is not limited to “abuse” for purposes of the generic federal immigration offense, and hence is not categorically “sexual abuse of a minor” under the INA. *Id.* The logic of the holding is simple: If the generic age of consent under the INA is sixteen, then consensual sex between persons sixteen and above, without more, cannot be *abusive* conduct under the INA. Because California Penal Code section 261.5(c) criminalizes consensual sex with persons sixteen and older, it fails to qualify as “sexual abuse of a minor” under the categorical approach. *Id.* at 398.

B. *Esquivel-Quintana* controls this case.

New York Penal Law section 130.25(2) criminalizes consensual sex between someone about to turn seventeen and someone who just turned twenty-one. The question presented in this case is whether that provision is a categorical “crime of child abuse” under the INA. *See* 8 U.S.C. § 1227(a)(2)(E)(i) (“Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime

of child abuse, child neglect, or child abandonment is deportable.”).² Even the narrowest reading of *Esquivel-Quintana* answers that question: Because *Esquivel-Quintana* already held that consensual sex with a sixteen-year-old is not categorically “abuse,” a conviction under the New York statute at issue is not categorically a “crime of child *abuse*” any more than it is categorically “sexual *abuse* of a minor.”

Like the “sexual abuse of a minor” provision, the “crime of child abuse” provision was added to the INA in 1996. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Public L. No. 104-208, § 350, 110 Stat. 3009-546, 3009-639–40. As with “sexual abuse of a minor,” the INA does not define “crime of child abuse.” And as the Board has recognized, because the “crime of child abuse” provision “makes aliens removable based on the nature of their convictions, not based on their actual conduct,” *Esquivel-Quintana*, 581 U.S. at 389, the categorical approach applies to it, *see Velazquez-Herrera*, 24 I. & N. Dec. at 513.

The question in this case is therefore materially indistinguishable from the question the Supreme Court answered in *Esquivel-Quintana*.

² *Amicus* understands that neither the Board nor the government has argued that the conduct at issue could qualify as a crime of child “neglect” or “abandonment.”

By its express terms, the “crime of child abuse” provision reaches only conduct that qualifies as “abuse.” And, like the California statute in *Esquivel-Quintana*, the New York statute at issue criminalizes consensual sexual conduct based solely on the ages of the participants. See N.Y. Penal Law § 130.25(2). So, as in *Esquivel-Quintana*, the question is whether consensual sex with a sixteen-year-old would have been categorically understood in 1996 to constitute “abuse.” The Supreme Court unequivocally answered that question in *Esquivel-Quintana*: The “general consensus” in 1996, as seen in “state criminal codes[,] ... dictionaries and federal law,” was that, “[w]here sexual intercourse is abusive solely because of the ages of the participants, the victim must be younger than 16.” 581 U.S. at 397.

Accordingly, under the categorical approach, a conviction under a state statutory rape law *only* qualifies as a “crime of child abuse” under the INA *if* it sets the age of consent at sixteen or younger. New York Penal Law section 130.25(2) does not meet this criterion because it sets the age of consent at seventeen: “[T]he conduct criminalized under th[e] provision would be, at a minimum, consensual sexual intercourse between a victim who is almost [17] and a perpetrator who just turned

21.” *Esquivel-Quintana*, 581 U.S. at 390. It therefore is not a “crime of child abuse,” for the exact same reason it is not “sexual abuse of a minor”: It criminalizes sexual conduct that is not abusive under the INA and therefore fails under the categorical approach. That is all this Court needs to resolve this case.³

II. The Board’s reasons for departing from *Esquivel-Quintana* are meritless.

In *Aguilar-Barajas*, the Board considered whether an offense that criminalizes consensual sex with a sixteen-year-old is categorically a “crime of child abuse,” even though it is not categorically “sexual abuse of a minor.” Judge Petty, in dissent, recognized that the Supreme Court left the Board “no other option” but to hold that the offense is not a categorical “crime of child abuse.” 28 I. & N. Dec. at 365. As Judge Petty explained, *Esquivel-Quintana* held that “consensual sexual activity between an adult and a minor over 16 is not categorically ‘abuse,’” and

³ The Supreme Court noted that, in specific contexts, like where there is a special relationship of trust, the age of consent for purposes of “sexual abuse of a minor” may be higher than sixteen, but the Court did not resolve that question. *Esquivel-Quintana*, 581 U.S. at 397. This Court similarly need not resolve whether a statute requiring a special relationship of trust categorically qualifies as a “crime of child abuse” given that no such relationship of trust is required to violate the relevant New York provision.

“[t]here can be no categorical ‘child abuse’ where the criminalized conduct is not categorically abusive.” *Id.*

The Board majority, however, eschewed this straightforward conclusion and held that consensual sex with a sixteen-year-old is categorically a “crime of child abuse” even though it is not categorically “sexual abuse of a minor.” As Judge Petty explained, however, the Board majority’s conclusion is impossible to reconcile with *Esquivel-Quintana*.

A. The Board erred by focusing on the word “child” instead of the word “abuse.”

The Board majority primarily relied on the fact that the Board had previously interpreted the word “child” in the phrase “crime of child abuse” to mean “an individual under 18.” 28 I. & N. Dec. at 360. But as Judge Petty explained, that completely misses the point. *Id.* at 370 (Petty, A.I.J., dissenting). The relevant question is not whether a sixteen-year-old is a “child,” but whether consensual sex with a sixteen-year-old is “abuse.” Unlike the question of whether someone is a “child,” the question of whether conduct constitutes “abuse” depends on the precise age of the person in question. As Judge Petty explained, the Board has repeatedly recognized that “conduct that may be abusive or neglectful with respect to younger children may not be abusive or

neglectful with respect to those who are older.” *Id.* To take an obvious example, a sixteen-year-old and sixteen-month-old may both be children, but leaving a sixteen-year-old at home alone is far different than leaving a sixteen-month-old at home alone. Similarly, under *Esquivel-Quintana*, consensual sex with a sixteen-year-old is not categorically “abuse,” even if a sixteen-year-old falls under the statute’s definition of a “child.”

Indeed, the Board majority’s reliance on the definition of a “child” flatly conflicts with *Esquivel-Quintana*, which rejected an almost identical argument based on the word “minor.” Specifically, the government argued in *Esquivel-Quintana* that because the word “minor” was generally understood to mean someone under eighteen years old, then consensual sex with a sixteen- or seventeen-year-old must be “sexual abuse of a minor.” 581 U.S. at 392. The Supreme Court did not dispute the premise of the governments’ argument—*i.e.*, that “minor” generally meant someone under eighteen. But the Supreme Court nevertheless rejected the government’s position because the relevant question was *not* the age at which a person stopped being a “minor,” but the “age of consent (when a person is legally capable of agreeing to sexual intercourse).” *Id.* at 393. The Board’s reliance on the meaning of “child”

fails for the same reason as the government’s reliance on the word “minor”: The question in this case is not when a person stops being a “child,” but when a person can legally consent to sex such that consensual sex with that person is not categorically “abuse.” That is exactly the question the Supreme Court answered in *Esquivel-Quintana*.

B. The Board erred by relying on its own precedent and precedent from the courts of appeals that did not specifically address *Esquivel-Quintana*’s application in this context.

The Board also relied heavily on its prior decision in *Velazquez-Herrera*, which interpreted the child-abuse provision to encompass acts of “maltreatment of a child or [impairment of] a child’s physical or mental well-being.” 28 I. & N. Dec. at 361 (quoting *Velazquez-Herrera*, 24 I. & N. Dec. at 512) (alteration in original). But the Board never explained why consensual sex with someone who, under binding Supreme Court precedent, was free to give it categorically constitutes “maltreatment” or “impairment of . . . well-being” any more than it constitutes “abuse.”

More fundamentally, though, the Board cannot interpret its decision in *Velazquez-Herrera* in a way that expands the word “abuse” beyond what the Supreme Court has deemed to be its unambiguous meaning. As Judge Petty eloquently put it, “whether the [state] statute

could be said to fall within a linguistic formula of our own creation is immaterial if it does not also categorically meet the statutory requirement of ‘abuse.’” 28 I. & N. Dec. at 367 n.3 (Petty, A.I.J., dissenting). Given that the conduct at issue falls outside what the Supreme Court has held to be the unambiguous meaning of “abuse,” it simply does not matter whether that conduct constitutes “maltreatment” or “impairment.”

Relatedly, the Board majority’s reliance on the Fifth Circuit’s decision in *Garcia v. Barr*, 969 F.3d 129 (5th Cir. 2020), was misplaced. *See Aguilar-Barajas*, 28 I. & N. Dec. at 357, 361-62. While *Garcia* did affirm an unpublished Board decision holding that a statutory rape offense with an age of consent of seventeen qualifies as a “crime of child abuse,” *Garcia* never considered whether that holding is consistent *Esquivel-Quintana*’s definition of “abuse.” That is because the petitioner never made that argument in *Garcia*: As Judge Petty explained, the petitioner in *Garcia* argued only that *Esquivel-Quintana* undermined the validity of the *Velazquez-Herrera as a whole*. *Aguilar-Barajas*, 28 I. & N. Dec. at 370-71 (Petty, A.I.J., dissenting). The Fifth Circuit rejected that broad argument. *Garcia*, 969 F.3d at 134. But the Fifth Circuit never

considered the narrower argument that *Esquivel-Quintana* is dispositive as to the meaning of “abuse” in the context of statutory rape offenses that define consensual sexual conduct as illegal based solely on the participants’ ages. As Judge Petty explained, accepting that narrower argument does not require jettisoning *Velazquez-Herrera* altogether (as the petitioner in *Garcia* urged), but simply interpreting the terms “maltreatment” and “impairment” in *Velazquez-Herrera* in a manner consistent with the Supreme Court’s interpretation of “abuse” in *Esquivel-Quintana*. *Aguilar-Barajas*, 28 I. & N. Dec. at 371 (Petty, A.I.J., dissenting).

The Board majority also cited cases from this Court and the Third Circuit that refused to revisit *Velazquez-Herrera* and other Board precedent relating to the child-abuse provision in light of *Esquivel-Quintana*. *Id.* at 357 (majority op.) (citing *Matthews v. Barr*, 927 F.3d 606 (2d Cir. 2019) and *Mondragon-Gonzalez v. Att’y Gen. of the U.S.*, 884 F.3d 155 (3d Cir. 2018)). But, like the Fifth Circuit in *Garcia*, those decisions concerned broader questions about the scope of a “crime of child abuse” that were unrelated to the age of consent for statutory rape. Nothing about Petitioner’s argument in this case requires revisiting

Matthews because nothing in *Matthews* (or *Mondragon-Gonzalez*) suggests that consensual sex with a sixteen-year-old categorically constitutes “abuse” for purposes of a “crime of child abuse” but not for purposes of “sexual abuse of a minor.” Indeed, as far as *Amicus* is aware, no court of appeals has ever considered that precise question before, let alone endorsed the Board’s view that the word “abuse” could take on such different meanings in related provisions enacted in the same statute.

C. The fact that a “crime of child abuse” is not an “aggravated felony” cannot justify giving the word “abuse” a fundamentally different meaning in two related, contemporaneously-enacted provisions.

The Board also placed far too much weight on a single paragraph in *Esquivel-Quintana* that focused on “[s]urrounding provisions of the INA”—specifically, the fact that “sexual abuse of a minor” is an “aggravated felony” and is listed in the “same paragraph” as “heinous” offenses like murder and rape. 28 I. & N. Dec. at 356-57 (quoting *Esquivel-Quintana*, 581 U.S. at 393-94). The Board’s attempt to distinguish *Esquivel-Quintana* based on this one paragraph fails twice over.

First, this paragraph was a minor part of the Supreme Court’s decision—it merely supplemented the Court’s extensive discussion of

dictionary definitions, state criminal codes, and a related federal statute, all of which pointed unambiguously to an age of consent of sixteen. Indeed, the Court seemed to view the dictionaries themselves as all-but dispositive, writing that the other interpretive tools merely “confirm[ed]” what the dictionaries themselves made clear. *Id.* at 393. There is no way to read the Court’s brief discussion of surrounding INA provisions as being dispositive in the Court’s analysis when the Court concluded that every other interpretive tool at its disposal *also* indicated that consensual sex with a sixteen-year-old is not categorically abusive because a sixteen year old can consent to sex.

Second, the paragraph on which the Board relied actually *undermines* the Board’s attempt to distinguish *Esquivel-Quintana* because the statutory context indicates that, like the “sexual abuse of a minor” provision, the “crime of child abuse” provision targets “only especially egregious felonies.” 581 U.S. at 394. A child-abuse conviction carries significant immigration consequences. *See Matthews*, 927 F.3d at 625-26, 635-37 (Carney, J., dissenting) (detailing the “harsh results” flowing from violation of the “crime of child abuse” provision). Most importantly, a child-abuse conviction makes even lawful permanent

residents removable, and makes non-permanent residents ineligible for cancellation of removal, one of the most important forms of discretionary relief available in immigration law that allows non-permanent residents to remain in this country if their removal “would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen” or lawful permanent resident. 8 U.S.C. § 1229b(b)(1)(C), (D). A child-abuse conviction also results in ineligibility for the separate cancellation provision for “battered spouse[s] or child[ren].” *Id.* § 1229b(b)(2)(A)(iv).

Moreover, the child-abuse provision is also paired with other heinous offenses. Specifically, it is included in the same subsection as “crime[s] of domestic violence” and “crime[s] of stalking”. 8 U.S.C. § 1227(a)(2)(E)(i).” Each of those provisions requires the use or threat of violence against the victim. *See* 18 U.S.C. § 16; *Matter of Sanchez-Lopez*, 27 I. & N. Dec. 256, 258 (BIA 2018).

Thus, while the structural context is not precisely identical, it is very similar and provides strong reasons to think that Congress understood *both* the “sexual abuse of a minor” *and* “crime of child abuse” provisions to target especially egregious conduct. Certainly, the

structural context is not so different to justify interpreting the word “abuse” to have entirely different meanings across the two provisions, especially in the face of dictionary definitions, state statutes, and related federal statutes that all indicate that, as to both provisions, consensual sex with a sixteen-year-old is not categorically abusive.

CONCLUSION

Because the Supreme Court’s decision in *Esquivel-Quintana* controls the question before this Court, this Court should grant the petition for review.

Respectfully submitted,

/s/ David J. Zimmer

David J. Zimmer

GOODWIN PROCTER LLP

100 Northern Avenue

Boston, MA 02210

Tel.: 617.570.1000

Fax.: 617.523.1231

Counsel for Amicus Curiae

Dated: January 25, 2023

RULE 32(g) CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(1)(5), 32(a)(7)(B), and Second Circuit Rule 29.1 because it contains 4,529 words, excluding the parts of the response exempted by Fed. R. App. P. 32(f).

Undersigned counsel further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced 14-point Century Schoolbook typeface using Microsoft Word 2010.

/s/ David J. Zimmer

David J. Zimmer

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2023, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ David J. Zimmer
David J. Zimmer