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

In the Matter of **Amicus Invitation No. 19-11-6**	

REQUEST TO APPEAR AS *AMICUS CURIAE*

Pursuant to Board of Immigration Appeals Practice Manual Chapter 2.10, the American Immigration Lawyers Association respectfully requests leave to file the accompanying *amicus* brief in response to the Board's *Amicus* Invitation No. 19-11-6.

Proposed *amicus curiae* 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. AILA and its members possess experience in issues of removability and in the relation between state criminal and federal immigration law, and AILA submits this brief to provide the Board perspective on the issues presented in the *Amicus* Invitation based on its extensive relevant expertise.

Dated: December 5, 2019

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PROPOSED BRIEF OF *AMICUS CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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STATEMENT OF INTERESTS OF AMICUS CURIAE

Amicus curiae American Immigration Lawyers Association ("AILA") possesses expertise in removability issues and in the relation between state criminal and federal immigration law. AILA and its members regularly represent and advocate on behalf of noncitizens convicted of state criminal offenses in subsequent federal immigration proceedings. AILA and its members also regularly conduct trainings for attorneys representing noncitizens in immigration proceedings, author practice advisories, and speak nationally on issues related to the ones presented in the Board's *Amicus* Invitation. Informed by its extensive experience in these matters, AILA respectfully submits this brief to provide the Board perspective on the issues presented in the *Amicus* Invitation.

STATEMENT OF ISSUES

This brief addresses the question presented by the Board's *Amicus* Invitation: "Does the U.S. Supreme Court's opinion in *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017), affect the meaning of the term 'crime of child abuse' under section 237(a)(2)(E)(i) of the [Immigration and Naturalization Act (the "INA")] as applied to 'statutory rape' convictions? If so, why and how? And if not, why not?"

INTRODUCTION AND SUMMARY OF ARGUMENT

Even the narrowest reading of *Esquivel-Quintana* requires holding that the Supreme Court's opinion in that case controls the interpretation of the "crime of child abuse" provision as applied to statutory rape convictions.

In *Esquivel-Quintana*, the Court considered when *consensual* sex constitutes "abuse" for purposes of a generic federal immigration offense based *only* on the age of one of the participants. *Esquivel-Quintana* held that the general understanding as of 1996 was that the "age

of consent"—*i.e.*, the age at which a person can legally consent to sex—was 16 years old. Hence, under the categorical approach, a state statute criminalizing consensual sex *only* because one of the participants was 16 or 17 years old is not "sexual *abuse* of a minor" for purposes of federal immigration law. *Esquivel-Quintana* stands for the straightforward proposition that consensual sex with someone legally authorized to consent to sex is not "abuse."

For exactly the same reason, consensual sex with someone older than 16 is not a "crime of child abuse" under the categorical approach. 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 16 years old applies as much to "child abuse" as to "sexual abuse of a minor." And, given that a 16-year-old can legally consent to sex, consensual sex with a 16- or 17-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 16 or 17 years old. A state statute that criminalizes consensual sex with a 16-year-old or 17-year-old, without more, thus criminalizes conduct that is not "child *abuse*," and hence is not categorically a "crime of child abuse."

Amicus is aware that, in at least two unpublished decisions, the Board has held that *Esquivel-Quintana* does not apply to the "crime of child abuse" provision and hence that consensual sex with a 16- or 17-year-old *is* "abuse" for purposes of the "crime of child abuse" provision, even though it is *not* "abuse" for purposes of the "sexual abuse of a minor" provision. The rationales of these decisions do not justify departing from controlling Supreme Court precedent, or applying such flatly inconsistent meanings to the word "abuse," and the Board should not accept them here.

First, the Board has asserted that the consequences of a conviction for "sexual abuse of a minor" are materially more severe than those for a conviction of a "crime of child abuse." That is both immaterial to the question presented and inaccurate. The Supreme Court's decision in *Esquivel-Quintana* turned on the fact that consensual sex with someone who can legally consent to sex is not *abuse*. Although the Court cited the consequences of a conviction for "sexual abuse of a minor" to confirm its conclusion that the provision should be interpreted narrowly, those consequences in no way drove the decision. Moreover, the consequences for a "crime of child abuse" conviction are *also* incredibly severe, including not only removability but also ineligibility for many of the most important forms of immigration relief.

Second, the Board has suggested that consensual sex with a participant above the generic age of consent may be exploitative even if it is not abusive and hence may count as a "crime of child abuse." But the generic federal offense is explicitly limited to "child *abuse*," not child exploitation, and the Supreme Court unambiguously held in *Esquivel-Quintana* that consensual sex with someone 16 or older is *not* abuse. Whether such conduct is *exploitative* is irrelevant, given that the Supreme Court has held that it is not *abusive*.

Third, the Board has noted that states that set their age of consent at 17 or 18 have criminalized consensual sex with a 16- or a 17-year-old. But the whole point of the categorical approach is that what *state* criminal law deems to be the age of consent is not the relevant question for removability—the relevant question is the age of consent *under the INA*. The fact that some states set a higher age of consent than the generic age of consent for the INA established by *Esquivel-Quintana* is precisely why those states' statutory rape statutes are overbroad, and not categorically limited to "abuse" as that term is defined for purposes of generic federal immigration offenses.

The Board should hold that *Esquivel-Quintana* controls interpretation of the "crime of child abuse" provision as applied to statutory rape convictions, and accordingly that conviction under a state statutory rape provision that proscribes consensual sex with a person based solely on that person's being 16 or older is not a "crime of child abuse" under the INA.

ARGUMENT

I. The Supreme Court's Decision In *Esquivel-Quintana* Answers The Question Presented By The Board's *Amicus* Invitation.

In *Esquivel-Quintana*, the Supreme Court answered the question presented in the Board's *Amicus* invitation—whether a state statutory rape provision that penalizes otherwise consensual sex with persons above the age of 16 can qualify under the categorical approach as a predicate crime of sexual "abuse" triggering removability under the INA. The Supreme Court held that it cannot: Because a 16-year-old can legally consent to sex, consensual sex with someone 16 or older, without more, is not sexual "abuse" under the INA. That holding plainly applies equally to the "child abuse" provision at issue in the question presented by the *Amicus* Invitation, 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 Under The Categorical Approach, A State Statutory Rape Offense Only Qualifies As "Abuse" When The Age Of Consent Is Sixteen Or Younger.

The issue in *Esquivel-Quintana* was whether a conviction under Cal. Penal Code § 261.5(c) is a conviction of "sexual abuse of a minor" triggering removability under the INA. 137 S. Ct. at 1567; *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). Cal. Penal Code § 261.5(c) criminalizes "unlawful sexual intercourse with a minor who is more than

three years younger than the perpetrator." Cal. Penal Code Ann. § 261.5(c); *see also id.* § 261.5(a) ("Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor."). And it defines a "minor" as "a person under the age of 18 years." *Id.* § 261.5(a). The statute thus criminalizes consensual sex between someone about to turn 18 years old and someone who just turned 21 years old.

The petitioner in *Esquivel-Quintana*, a native of Mexico and lawful permanent resident of the United States, pleaded no contest to a violation of Cal. Penal Code § 261.5(c). 137 S. Ct. at 1567. The Department of Homeland Security initiated removal proceedings based on the conviction, and an Immigration Judge held that the conviction constituted "sexual abuse of a minor" under the INA. *Id.* The Board dismissed the petitioner's appeal, and a divided Sixth Circuit panel denied his petition for review. *Id.*

The Supreme Court unanimously reversed, in an opinion by Justice Thomas. *Id.* The Court noted that the "sexual abuse of a minor" provision "makes aliens removable based on the nature of their convictions, not based on their actual conduct," and so the categorical approach applies. *Id.* at 1567–68. The categorical approach requires that a court "presume that the state conviction 'rested upon . . . the least of th[e] acts' criminalized by the statute, and then . . . determine whether that conduct would fall within the federal definition of the crime." *Id.* at 1568 (first and second alterations in original) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)). The question, then, was whether "the least of the acts criminalized by [Cal. Penal Code § 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.*

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.* 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 'the 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 1569 (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.*

The Court first looked to "reliable dictionaries," concluding that such dictionaries showed that 16 was the age of consent. *Id.* Notably, the Court rejected the government's argument that the relevant age of consent was 18 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 1570. The Court also rejected the government's argument that the question should turn on the age of consent in the relevant state. That argument, the Court noted, would "turn[] 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." *Id.*

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 "sexual abuse of a minor" was listed among aggravated felonies in the INA; and another federal criminal statute, 18 U.S.C. § 2243, which criminalizes "[s]exual abuse of a minor or ward" and was amended through the same omnibus bill that added the "sexual abuse of a minor" provision to the INA, sets the age limit for victims at 16. *Id.* at 1570–71. 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 16, three states set the age of consent below 16, and sixteen set the age of consent above 16 (six at 17, the other ten at 18). *Id.* at 1571. 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 1572.

Accordingly, a state statutory rape provision that criminalizes consensual sex between persons over 16, without more, is not limited to "abuse" for purposes of the generic federal offense, and hence is not "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 16, then otherwise consensual sex between persons above that age, without more, cannot be *abusive* conduct under the INA. And because Cal. Penal Code § 261.5(c) criminalizes otherwise consensual sex with persons younger

than 18, it fails to qualify as "sexual abuse of a minor" under the categorical rule. *Id.* at 1572–73.

B. *Esquivel-Quintana* Controls The Interpretation Of The "Crime Of Child Abuse" Provision As Applied To State Statutory Rape Convictions.

Even under the narrowest reading of *Esquivel-Quintana*. the answer to the question presented by the *Amicus* Invitation is clear: Because *Esquivel-Quintana* already held that otherwise consensual sex between persons above 16, without more, is not *abusive* under the INA, a conviction under a state statutory rape provision criminalizing consensual sex with a participant above 16, without more, is not categorically a "crime of child *abuse*" under the INA for the same reason it is not a categorical crime of "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*, 137 S. Ct. at 1567, the categorical approach applies to it, *see Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503, 513 (BIA 2008) (applying categorical approach to section 237(a)(2)(E)(i) of the INA).

The analysis is therefore materially indistinguishable from the one conducted in *Esquivel-Quintana*. The inquiry "begin[s]" and ends with the plain text of the statutory provision. 137 S. Ct. at 1568. By its express terms, the "crime of child abuse" provision reaches only crimes of "abuse." And "[b]y providing that the abuse must be [of a child], the INA focuses on age." *Id.* at 1569. Statutory rape offenses, which penalize an older person having what would otherwise be consensual sex with a younger person who is under the age of consent, constitute one

category of age-based sexual-abuse crimes. *Id.* And "[a]lthough the age of consent for statutory rape purposes varies by jurisdiction, reliable dictionaries provide evidence that the 'generic' age—in 1996 and today—is 16." *Id.* (internal citation omitted) (collecting definitions). Sex between persons above that generic age of consent, without more, is not "abuse." *Id.* at 1572.

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 16 or younger. A state statutory rape law that sets the age of consent above 16 does not qualify as a "crime of child abuse" for the exact same reason that the Court in *Esquivel-Quintana* held that such a law is not "sexual abuse of a minor": The state statute 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 issue.[1]

II. There Are No Convincing Reasons For Departing From *Esquivel-Quintana*.

Despite *Esquivel-Quintana*, *amicus* is aware that, in at least two unpublished opinions, the Board has held that *Esquivel-Quintana* does not control the question of whether a state statutory rape law that sets the age of consent above 16 is a "crime of child abuse" under the INA. *See generally In re Arias Benitez*, No. A045-128-308 (BIA June 19, 2018) (declining to apply *Esquivel-Quintana* to question of whether conviction under Texas Penal Code § 22.011(a)(2) is a "crime of child abuse"); *In re Blanco-Hernandez*, No. A038-087-301 (BIA Sept. 28, 2018) (declining to apply *Esquivel-Quintana* to question of whether conviction under Cal. Penal Code § 261.5(c) is a "crime of child abuse"). In its unpublished opinions, the Board has offered three justifications for not applying *Esquivel-Quintana* when analyzing whether

[1] 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 16, but the Court did not resolve that question. *Esquivel-Quintana*, 137 S. Ct. at 1572. The Board similarly need not resolve that issue here as to the "crime of child abuse" provision.

conviction under a state statutory rape law qualifies as a "crime of child abuse": 1) the "crime of child abuse" provision, unlike the "sexual abuse of a minor" provision, is not an aggravated felony under the INA, and it entails less drastic consequences than the "sexual abuse of a minor" provision: 2) the "crime of child abuse" provision. unlike the "sexual abuse of a minor" provision. prohibits exploitation of children as well as abuse of children. and sex above the generic age of consent may be exploitative even if it is not abusive; and 3) state statutory rape laws may evince a legislative intent to proscribe otherwise consensual sex where a participant is above 16. These rationales fail to offer a convincing reason for departing from *Esquivel-Quintana*, and the Board should decline to accept them here.

A. The Differences Between The Consequences Of The "Crime Of Child Abuse" And "Sexual Abuse Of A Minor" Provisions Are Irrelevant And Immaterial.

The Board has justified its previous decisions to depart from *Esquivel-Quintana* based on purportedly material differences between the "crime of child abuse" and "sexual abuse of a minor" provisions. The Board has observed that "the Supreme Court emphasized that sexual abuse of a minor is an aggravated felony, and that it is listed in the same provision as murder and rape, suggesting that the provision is intended to encompass only 'especially egregious felonies.'" *In re Arias Benitez*, No. A045-128-308, at 2 (quoting *Esquivel-Quintana*, 137 S. Ct. at 1570), *see also In re Blanco-Hernandez*, No. A038-087-301, at 2–3. Whereas conviction for aggravated felonies under the INA entails "serious consequences," "including making a respondent ineligible for asylum, cancellation of removal, and voluntary departure," the Board has reasoned that the "crime of child abuse" provision "is not an aggravated felony ground of removal" and so "does not carry the same serious consequences as aggravated felonies." *In re Arias Benitez*, No. A045-128-308, at 2–3.

These distinctions are immaterial to the question presented here, and they do not accurately characterize the "crime of child abuse" provision. First, the severity of consequences entailed in a violation of the "sexual abuse of a minor" provision did not compel the Supreme Court's holding in *Esquivel-Quintana*. The categorical approach did. True, the Court noted that "[t]he structure of the INA," including the designation of "sexual abuse of a minor" as an aggravated felony, helped to "*confirm*" the Court's conclusion. 137 S. Ct. at 1570 (emphasis added). But, as with the Court's examination of another federal provision criminalizing "[s]exual abuse of a minor or ward" and its survey of state statutory rape laws, the status of "sexual abuse of a minor" as an aggravated felony only served as additional evidence to bolster its analysis under the categorical approach. Given that it is undisputed that the categorical approach applies to both provisions equally, and given that the categorical approach does not vary based on the consequences of the relevant federal provision, any purported difference in the severity of consequences for violating the provisions does not justify giving the exact same word—"abuse"—entirely different meanings in the two statutory provisions.

Second, the comparison inaccurately suggests that the consequences for violating the "crime of child abuse" provision are not severe. Not so: Violation of the provision in fact carries myriad harsh penalties. For one thing, it triggers the same consequence that was at issue in *Esquivel-Quintana*: removability. And not only does a conviction for "child abuse" make non-citizens removable, it also makes non-permanent residents ineligible for cancellation of removal, the safety valve for cases where 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 "crime of child abuse" conviction also makes non-permanent residents ineligible for the separate cancellation provision for "battered spouse[s] or

child[ren]." *Id.* § 1229b(b)(2)(A)(iv); *see also Matthews v. Barr*, 927 F.3d 606, 625–26, 635–37 (2d Cir. 2019) (Carney, J., dissenting) (detailing the "harsh results" flowing from violation of the "crime of child abuse" provision). Given the high stakes involved, there is no excuse, either legally or pragmatically, for applying some less rigorous version of the categorical approach to the "crime of child abuse" provision.

B. Because The Generic Federal Offense Is Limited To Child *Abuse*, Whether The Conduct At Issue Is Exploitative Is Irrelevant.

The Board's rationale for declining to apply *Esquivel-Quintana* on the ground that consensual sex with a 16- or 17-year-old may be exploitative even if it is not abusive is also unpersuasive, as the statutory provision is plainly limited to *abuse*. The Board has noted that, under its prior decisions, the "crime of child abuse" provision, unlike the "sexual abuse of a minor" provision, encompasses sexual *exploitation* of children; that *exploitation*, as opposed to *abuse*, may somehow be committed on a person above the legal age of consent; and that therefore conviction under a state statutory rape law[2] may "serve[] a distinct purpose from establishing an age of sexual consent" by "protect[ing] persons [older than 16 but younger than some higher age limit] from sexual exploitation." *In re Arias Benitez*, No. A045-128-308, at 3; *see also In re Blanco-Hernandez*, No. A038-087-301, at 3–4.

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[2] That Texas Penal Code § 22.011(a)(2), which *amicus* understands to be the state statute at issue in the appeal to which the Board's *Amicus* Invitation is related, is a statutory rape provision is apparent from the plain language of the statute. The statute proscribes otherwise consensual sex with a participant solely because the participant is a "child" and therefore below the age of consent. Texas Penal Code Ann. § 22.011(a)(2); *see also id.* § 22.011(c)(1) (defining "child" as "a person younger than 17 years of age"). And the Supreme Court has recognized the Texas statute as a statutory rape law—it is included in the appendix to *Esquivel-Quintana* that surveys state provisions "criminalizing sexual intercourse solely because of the age of the participants" as of the date of the addition of the "sexual abuse of a minor" and "crime of child abuse" provisions to the INA. *See* 137 S. Ct. at 1572, 1576.

The Board's conclusion—that state statutory rape laws reaching consensual sex with a 16- or 17-year-old count as "crime[s] of child abuse," because they criminalize conduct that is exploitative, but not abusive—is foreclosed by *Esquivel-Quintana*'s interpretation of the INA's plain text. The relevant generic federal offense in the INA is a "crime of child *abuse*," not a crime of child "exploitation." And the Supreme Court in *Esquivel-Quintana* has held that state statutory rape laws that criminalize otherwise consensual sex with a person over 16, without more, proscribe conduct that is not *abusive* under the INA. Given that the Supreme Court has held that such laws criminalize conduct that is not abusive, it is beside the point whether such conduct could be exploitative—even if exploitation were a broader concept than abuse, the statutory provision cannot be stretched beyond the limit of its plain terms.[3]

C. Consideration Of Legislative Purpose Is Contrary To The Categorical Approach.

The Board has further justified its departure from *Esquivel-Quintana* by noting that state statutory rape laws evince a purpose to protect 16- or 17-year-olds from sexual coercion or predation by an older person. See *In re Arias Benitez*, No. A045-128-308, at 3; *In re Blanco-Hernandez*, No. A038-087-301, at 4. In other words, the Board has reasoned that because state statutory rape laws were *intended* to reach otherwise consensual sexual sex involving persons under the age of 17 or 18, conviction under those statutes should count as a "crime of child abuse" under the INA, regardless of the generic age of consent.

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[3] Similarly, the Board has attempted to justify departing from *Esquivel-Quintana* because the "crime of child abuse" provision reaches forms of abuse not comprehended by the "sexual abuse of a minor" provision. *See In re Blanco-Hernandez*, No. A038-087-301, at 3 n.3. This distinction is likewise immaterial—there is no question that the conduct proscribed by statutory rape laws, if it is to be considered "abusive" in any sense, must be *sexually* abusive, and *Esquivel-Quintana* has already held that consensual sex with a person over 16, without more, is not sexually abusive under the INA. The fact that the "crime of child abuse" provision also reaches *non-sexual* abuse makes no difference here.

This analysis "turns the categorical approach on its head by defining the generic federal offense of ['crime of child abuse'] as whatever is illegal under the particular law of the State where the defendant was convicted." *Esquivel-Quintana*, 137 S. Ct. at 1570. Indeed, the Supreme Court first articulated the categorical approach after rejecting as "implausible" the proposition "that Congress intended the meaning of [the relevant offense] to depend on the definition adopted by the State of conviction." *Taylor v. United States*, 495 U.S. 575, 590–91 (1990). The problem with such an approach is that it puts federal law at the mercy of the vagaries of state criminal codes and state legislative intent. The categorical approach instead aims to establish a "uniform definition [for the relevant offense] independent of the labels employed by the various States' criminal codes." *Id.* at 592. Accordingly, the Board should apply the categorical approach without reference to state legislative intent.

CONCLUSION

The Board should hold that *Esquivel-Quintana* controls interpretation of the "crime of child abuse" provision as applied to statutory rape law convictions, and accordingly that conviction under a state statutory rape provision that proscribes consensual sex with a person based solely on that person's being 16 or older is not a "crime of child abuse" under the INA.

Dated: December 5, 2019

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PROOF OF SERVICE

I, David J. Zimmer, certify that on December 5, 2019, I caused three copies of the foregoing request to file amicus brief and proposed brief to be delivered to the Board of Immigration Appeals at the following address:

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Dated: December 05, 2019

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