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**United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals**

Amicus Invitation No. 19-11-6
Criminal Issue

Request to Appear as *Amicus Curiae*

Pursuant to Rules 2.10 and 4.6 of the Practice Manual of the Board of Immigration Appeals (Board), the Immigration Reform Law Institute (IRLI), on behalf of its client, the Federation for American Immigration Reform (FAIR), hereby requests leave to file an *amicus curiae* brief in response to *Amicus* Invitation No. 19-11-6. The *amicus curiae* brief is submitted with this request.

FAIR is a nonprofit public interest membership organization of concerned citizens who share a common belief that our nation's immigration policies must be reformed to serve the national interest. Specifically, FAIR seeks to improve border security, stop illegal immigration, and promote immigration levels consistent with the national interest.

The Board has solicited *amicus* briefs from FAIR for more than twenty years. See e.g., *Matter of Q— T— M— T—*, 21 I. & N. Dec. 639 (B.I.A. 1996) (“The Board acknowledges with appreciation the brief submitted by *amicus curiae*” FAIR). Therefore, *Amicus* FAIR respectfully requests leave to file the brief accompanying this motion to assist the Board with the issue presented.

Respectfully submitted,



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**Brief of *Amicus Curiae*
Federation for American Immigration Reform**

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ISSUE PRESENTED

The Board's issue presented:

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

SUMMARY OF THE ARGUMENT

Esquivel-Quintana affects the meaning of the term "crime of child abuse" under section 237(a)(2)(E)(i).

Under that case, the generic definition of statutory rape excludes state crimes that proscribe sexual intercourse with a minor not under the age of sixteen without regard to the age of the perpetrator or his relationship with the victim. With the notable exception of the Fifth Circuit, the circuits have not interpreted *Esquivel-Quintana* as changing anything else in regard to statutory rape. The Fifth Circuit is an outlier in holding that *Esquivel-Quintana* defined a minor as being under sixteen in all crimes of abuse of a minor.

ARGUMENT

I. *Esquivel-Quintana* affects the meaning of child abuse under the Immigration and Nationality Act.

Congress has not defined the term "sexual abuse of a minor" in the context of § 237(a)(2)(E)(i) of the Immigration and Nationality Act ("INA"). *E.g.*, *Correa-Diaz v. Sessions*, 881 F.3d 523, 526 (7th Cir. 2018). The definition of this term is an ambiguity that the Board of Immigration Appeals ("Board") has the authority to resolve because § 237(a)(2)(E)(i) does not impose a criminal penalty. *Emile v. INS*, 244 F.3d 183, 185 (1st Cir. 2001). Accordingly, the Board has defined sexual abuse of a minor to include the crime of statutory rape. *In*

re Rodiriguez-Rodriguez, 22 I. & N. Dec. 991 (B.I.A. September 16, 1999). More specifically, the Board defined statutory rape to include the crime of consensual sexual intercourse with a minor under age 18. *Matter of Esquivel-Quintana*, 26 I. & N. Dec. 469 (B.I.A. January 9, 2015).

But the Supreme Court of the United States reversed the Board’s decision. In *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017), the Supreme Court held that a conviction for the crime of engaging in consensual sex with someone sixteen or older does not in itself qualify as sexual abuse of a minor under § 237(a)(2)(E)(i) of the INA. But the Court expressly declined to decide whether such a crime constitutes sexual abuse of a minor when the crime also entails other elements, such as a substantial age difference between the perpetrator and his victim or a relationship of trust between the two parties. *Esquivel-Quintana*, 137 S. Ct. at 1570–73

Therefore, the Court’s opinion in *Esquivel-Quintana* “affect[s] the meaning of the term ‘crime of child abuse’ under section 237(a)(2)(E)(i) of the Act as applied to ‘statutory rape’ convictions.” But *Esquivel-Quintana* does not affect the Board’s discretion to define sexual abuse of a minor to include offenses where the minor is under sixteen *and also* subject to other factors, such as a culpability-creating age difference or relationship between the perpetrator and his victim.

II. The effect of *Esquivel-Quintana* is limited.

Esquivel-Quintana has been interpreted as narrowly as it was written. Circuits have declined to interpret *Esquivel-Quintana* as categorically excluding statutory rape from constituting a crime of child abuse. *E.g.*, *Correa-Diaz v. Sessions*, 881 F.3d 523, 529 (7th Cir. 2018); *Bedolla-Zarate v. Sessions*, 892 F.3d 1137, 1141–42 (10th Cir. 2018); *see also United States v. Gonzalez*, No. 17-

cr-3557-JAH-RBB, 2018 U.S. Dist. LEXIS 100823, at *8-9 (S.D. Cal. June 15, 2018) (denying a motion to dismiss because *Esquivel-Quintana* did not invalidate Ninth Circuit precedent holding statutory rape was a crime of child abuse).

Only the Eight Circuit addressed the question of whether *Esquivel-Quintana* applies when there also exists a significant age difference between the perpetrator and his victim. It held that it did not, because the state statute in that case applied only when the victim was under sixteen. *Garcia-Urbano v. Sessions*, 890 F.3d 726, 729 (8th Cir. 2018).

The Fourth Circuit is the only circuit to address the victim–perpetrator relationship question also left open in *Esquivel-Quintana*. In *Thompson v. Barr*, the Fourth Circuit held that a Virginia statute criminalizing sexual conduct with a minor under the age of eighteen where there was a custodial relationship constituted sexual abuse of a minor. 922 F.3d 528, 534–35 (4th Cir. 2019); see also *Mondragon-Gonzalez v. AG of the United States*, 884 F.3d 155, 160 (3d Cir. 2018) (stating in dicta that “the [Supreme] Court indicated that consensual sex that occurred as a result of the perpetrator abusing a position of trust could qualify as ‘sexual abuse of a minor’ even if the victim is 17 years-old.”).

The sole outlier in interpreting *Esquivel-Quintana* is the Fifth Circuit. That Court interpreted *Esquivel-Quintana* broadly to exclude statutory rape crimes from the definition of sexual abuse of a minor when the victim is not under sixteen years of age. *Shroff v. Sessions*, 890 F.3d 542, 545–46 (5th Cir. 2018). No other circuit has followed the Fifth Circuit on this point. *E.g.*, *Matthews v. Barr*, 927 F.3d 606 (2d Cir. 2019) (holding the New York crime of Endangering the Welfare of a Child that applied to minors up to age seventeen fit the generic crime of child abuse); *Mondragon-Gonzalez*, 884 F.3d at 160; 922 F.3d at 534–35; *Garcia-Urbano*, 890 F.3d at 730. The rest of the nation follows *Esquivel-*

Quintana's express holding, which does not limit statutory rape crimes if the perpetrator satisfies other criminal elements in addition to the criminal element of his minor victim's age.

CONCLUSION

The Supreme Court's opinion in *Esquivel-Quintana* affects the meaning of "crime of child abuse" under section 237(a)(2)(E)(i) by excluding state statutory rape statutes that criminalize consensual intercourse with a minor not under sixteen solely based upon the victim's age. Because the Supreme Court explicitly did not affect crimes where there is a special relationship or age difference between the perpetrator and his victim, the Board retains the discretion to define such crimes as sexual abuse of a minor even when that minor is not under the age of sixteen.

Respectfully submitted,



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