No. 17-58

In the Supreme Court of the United States

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL,
PETITIONER

v.

RAFAEL ANTONIO LARIOS-REYES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

In the Supreme Court of the United States

No. 17-58

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL,
PETITIONER

v.

RAFAEL ANTONIO LARIOS-REYES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

After the court of appeals determined that respondent's prior state offense did not constitute "sexual abuse of a minor" within the meaning of 8 U.S.C. 1101(a)(43)(A), this Court construed the same term in *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562 (2017). Because the reasoning applied in *Esquivel-Quintana* differs substantially from that applied below, there is a "reasonable probability" that the court of appeals, "if given the opportunity for further consideration" in light of *Esquivel-Quintana*, would reach a different result. *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam). The proper disposition is accordingly to grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand for further proceedings in light of *Esquivel-Quintana*.

Respondent argues that the court of appeals *might* have reached the same conclusion under *Esquivel-*

Quintana, or that it *might* reach the same result on other grounds on remand. Even if correct, respondent's arguments do not undermine the propriety of a "grant, vacate, and remand" (GVR) order. And in any event, those arguments are unpersuasive on their own terms.

1. a. Respondent first argues (Br. in Opp. 7-8) that the ruling below is unaffected by *Esquivel-Quintana* because the two decisions addressed different aspects of the phrase "sexual abuse of a minor." Respondent contends (*id.* at 7) that, whereas "*Esquivel-Quintana* focused on the meaning of the term 'abuse," the decision below "focused * * * on the meaning of the term 'sexual.'" Neither part of that argument is correct.

The decision below did not rest on the meaning of the word "sexual" alone. The court of appeals, in defining "sexual abuse of a minor," relied on the definition it had previously adopted in *United States* v. *Diaz-Ibarra*, 522 F.3d 343 (4th Cir. 2008), in the context of the federal Sentencing Guidelines. See Pet. App. 22a ("We now hold that the generic federal definition of 'sexual abuse of a minor' set forth in *Diaz-Ibarra* is applicable to the [Immigration and Nationality Act]."). That definition addressed the meaning of the entire phrase: *Diaz-Ibarra* held that "the phrase 'sexual abuse' means the use or misuse of a person for purposes of sexual gratification." 522 F.3d at 350. Indeed, the very basis on which the decision below rested—a supposed requirement that the perpetrator must be motivated by sexual desire—derives from *Diaz-Ibarra*'s determination that "'sexual abuse' is an intent-centered phrase." *Ibid.*

Esquivel-Quintana similarly did not focus solely on the meaning of the word "abuse," separate and apart from the integrated phrase "sexual abuse." To the contrary, the Court looked at a contemporary dictionary definition of the entire phrase as a means to determine "the ordinary meaning of 'sexual abuse.'" 137 S. Ct. at 1569; see *ibid.* (defining "sexual abuse" as "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") (quoting *Merriam-Webster's Dictionary of Law* 454 (1996)). As noted in the certiorari petition (at 13-14), that definition does not require—or even suggest—that the prohibited contact must be motivated by a desire for sexual gratification.

b. Although *Esquivel-Quintana* and the decision below construed the same phrase, they did so under different reasoning. In addition to the dictionary definition just discussed, *Esquivel-Quintana* relied, as "evidence" of the phrase's meaning, on a "closely related federal statute, 18 U.S.C. § 2243," as well as state criminal codes. 137 S. Ct. at 1570-1571. The court of appeals in this case did not consider those sources. Had it done so, the court likely would have concluded that a desire for sexual gratification is not an element of "sexual abuse of a minor" here. See Pet. 10-14.[1]

---

[1] Respondent asserts that *Esquivel-Quintana*'s discussion of federal and state statutes "did nothing more than 'confirm' the conclusion this Court had already reached." Br. in Opp. 10 (quoting 137 S. Ct. at 1570). Even if true, that "conclusion" was based primarily on a dictionary definition of "sexual abuse" that did not require proof of the perpetrator's motivation. And in any event, the Court made clear that the other sources it discussed did indeed

Respondent further contends (Br. in Opp. 10-12) that, even if the court of appeals had addressed the considerations examined in *Esquivel-Quintana*, it likely would have come to the same conclusion regarding whether his prior state offense constituted "sexual abuse of a minor." That argument misses the mark. This Court's GVR authority is not confined to circumstances in which the Court is convinced, after undertaking its own plenary review, that an intervening development would have been decisive. See *Lawrence*, 516 U.S. at 174 ("Indeed, it is precisely because we are uncertain, without undertaking plenary analysis, of the legal impact of a new development, especially one * * * which the lower court has had no opportunity to consider, that we GVR."). In any event, respondent's arguments are based on a flawed analysis of *Esquivel-Quintana*.

First, *Esquivel-Quintana* drew upon Section 2243, which prohibits engaging in a sexual act with a person between the ages of 12 and 16 if the perpetrator is more than four years older than the victim. The state offense at issue in this case, Md. Code Ann., Crim. Law § 3-307(a)(3) (LexisNexis 2012), includes the same age differential as Section 2243 (four years) but adopts an even lower age of the victim (14 rather than 16). See Pet. 10-11. Both statutes also apply where the offender is motivated by "an intent to abuse," not only when motivated by a desire to "arouse or gratify [his] sexual desire." 18 U.S.C. 2246(2)(C); see Md. Code Ann., Crim. Law § 3-301(f)(1) (LexisNexis 2012). Given the significance that *Esquivel-Quintana* at-

---

matter. See 137 S. Ct. at 1570 (analogous federal statute "provides further evidence"); *id.* at 1571 ("[W]e look to state criminal codes for additional evidence.").

tached to Section 2243, therefore, the comparison suggests here that § 3-307(a)(3) similarly constitutes sexual abuse of a minor.

In response, respondent correctly notes (Br. in Opp. 10) that the offense conduct covered by Section 2243 appears somewhat more sexual in nature than § 3-307: The federal statute applies to "penetration, however slight," of the victim's anus, 18 U.S.C. 2246(2)(C), whereas the state statute may be violated by touching the anus or buttocks through clothing. *Bible* v. *State*, 982 A.2d 348, 359 (Md. 2009). But as construed by Maryland courts, the state offense "does not criminalize any touching; it requires a sexually oriented touching." *Lapin* v. *State*, 981 A.2d 34, 44 (Md. Ct. Spec. App. 2009); see *id.* at 43 ("an unpermitted touching that was sexually based"). Both the state and federal offenses thus have an inherent sexual component.

Second, even if respondent were correct that § 3-307 should not be compared to Section 2243—because that federal offense, unlike the state offense, excludes touching through clothing—another federal offense applies where touching occurs "either directly or through the clothing." 18 U.S.C. 2246(3) (defining "sexual contact"); see 18 U.S.C. 2244(a)(3) (prohibiting "sexual contact" between a minor less than 16 years of age and a person more than four years older). Like § 3-307, Section 2244(a)(3) may be violated where the offender seeks to "abuse" rather than to gratify sexual desire. See 18 U.S.C. 2246(3). Federal law thus protects minors against precisely the same offense conduct, engaged in with the same motivation, as the state offense.

Respondent counters by noting (Br. in Opp. 10) that "[Section] 2244 is not cited anywhere in *Esquivel-Quintana*, and it does not deal with 'sexual abuse' of a minor." The relevant question under *Esquivel-Quintana*, however, is whether Section 2244 provides "evidence of the meaning of sexual abuse of a minor." 137 S. Ct. at 1571. Section 2244 is entitled "abusive sexual contact," making clear that Congress considered conduct in violation of that provision to be both "abusive" and "sexual." Because conduct that violates § 3-307 necessarily violates Section 2244(a)(3) as well, the reasoning of *Esquivel-Quintana* suggests that such conduct constitutes "sexual abuse of a minor" under 8 U.S.C. 1101(a)(43)(A).

Third, *Esquivel-Quintana* "look[ed] to state criminal codes for additional evidence about the generic meaning of sexual abuse of a minor." 137 S. Ct. at 1571. The court of appeals in this case failed to undertake that task. See Pet. 13. Respondent describes that failure (Br. in Opp. 11) as "immaterial" because the government "did not ask" the court of appeals to engage in a multi-jurisdictional analysis. Yet this Court's GVR authority is not limited to circumstances in which a litigant in the court of appeals correctly anticipates the reasoning of a later-issued Supreme Court decision. It suffices that *Esquivel-Quintana* "clarified the governing legal principles in a way that could possibly alter the decision of the lower court." *Flowers* v. *Mississippi*, 136 S. Ct. 2157, 2157 (2016) (Alito, J., dissenting from the decision to grant, vacate, and remand). *Esquivel-Quintana*'s reliance on a

multi-jurisdictional analysis as one tool in interpreting "sexual abuse of a minor" fits that description.[2]

Respondent also argues (Br. in Opp. 11) that, even assuming the relevance of state statutes, the government has failed to carry its "burden" because it cited only seven of them. See Pet. 13 (citing three state statutes that "prohibited sexual contact with young minors for *any* reason" and four others that "prohibited such contact for the purpose of sexual gratification *or* for another purpose"). Respondent has not accurately described the government's "burden" in simply seeking a GVR in light of an intervening decision of this Court. Nor is respondent correct in suggesting that the relevant merits question—upon remand to the court of appeals—will be whether a "majority" or "significant majority" of jurisdictions *lack* a sexual-gratification requirement. Br. in Opp. 11 (citation omitted). The correct question will be whether it makes sense to *adopt* such a requirement, notwithstanding the fact that "several States deviate significantly from [any such] pattern." *Lopez* v. *Gonzales*, 549 U.S. 47, 54 (2006). A reasonable probability exists that the court will conclude otherwise.

Finally, and in any event, when "sexual abuse of a minor" was added to the list of removable offenses in 1996, 21 states and the District of Columbia *did not* require proof that the illicit conduct was motivated by a desire for sexual gratification. See App., *infra*, 1a-

---

[2] Respondent also references the government's own argument in *Esquivel-Quintana* that "this sort of multijurisdictional analysis is not required by the categorical approach." Br. in Opp. 11 (citation and ellipsis omitted). Yet this Court did in fact undertake such an analysis, which it deemed "useful." 137 S. Ct. at 1571 n.3. The court of appeals may find it "useful" as well.

4a.[3] Thus, unlike in *Esquivel-Quintana*, there is no "general consensus from state criminal codes." 137 S. Ct. at 1572.

c. Respondent further argues that § 3-307 is insufficiently "egregious" to qualify as "sexual abuse of a minor" because "the Maryland statute encompasses a mere spanking." Br. in Opp. 9 (citation omitted); see *id.* at 3 ("a parent who spanks an unruly child"). Yet respondent has identified no actual case in which § 3-307 was applied because a minor was spanked—by a parent or anyone else—and this Court has already made clear that state statutes are not overbroad merely because extreme cases can be hypothesized:

> [T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute * * * requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic probability, an offender * * * must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.

---

[3] Respondent argues (Br. in Opp. 11) that "none of those statutes purport to criminalize 'sexual abuse of a minor,' as opposed to some other wrongful physical touching." That is incorrect. See Alaska Stat. § 11.41.438(a)(1) (1996) ("Sexual abuse of a minor in the third degree"). In any event, a similar argument could have been made about the state statutes upon which the Court relied in *Esquivel-Quintana*, almost none of which were entitled "sexual abuse of a minor." See 137 S. Ct. 1573-1576. What matters, for purposes of the categorical approach, is whether the state offenses share "certain common characteristics * * * regardless of how they [a]re labeled by state law." *Taylor* v. *United States*, 495 U.S. 575, 589 (1990).

Gonzales v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007).[4] Respondent was punished under § 3-307, not because he spanked his own child, but because he induced an unrelated four-year-old to perform oral sex on him. See Pet. 4.

2. The court of appeals' decision should also be vacated for failure to apply "the ordinary remand rule," which requires a reviewing court, upon finding that an agency has failed to articulate an adequate basis for its decision, to "remand to the agency for additional investigation and explanation." *Gonzalez* v. *Thomas*, 547 U.S. 183, 186-187 (2006) (per curiam) (citations and internal quotation marks omitted). The court of appeals acknowledged that it was bound to defer under *Chevron* to the Board of Immigration Appeals' interpretation of "sexual abuse of a minor," but it found that the Board "did not adopt a federal generic definition" of that term. Pet. App. 14a-16a. Rather than remanding to the Board to allow it to do so, however, the court devised and applied its own interpretation. *Id.* at 19a-24a.

Respondent argues that a violation of the ordinary remand rule is "an improper basis for seeking a GVR" because that rule is well-established rather than an "'intervening'" legal development. Br. in Opp. 15 (quoting *Lawrence*, 516 U.S. at 167). But as respondent himself notes (*id.* at 1), the propriety of a GVR order depends in part on "the equities of the case," including the potential effect on "the ultimate outcome of the litigation" and whether "further consideration" below might "assist[] this Court." *Lawrence*, 516 U.S. at 167-168. An order vacating the decision below in light of

---

[4] The State of Maryland, moreover, has deemed § 3-307 sufficiently serious as to punish a violation by up to ten years of imprisonment. Md. Code Ann., Crim. Law § 3-307(b) (LexisNexis 2012).

Esquivel-Quintana and the ordinary remand rule—thereby facilitating review in the first instance by the responsible agency—would satisfy those criteria.

Respondent also contends (Br. in Opp. 17) that the ordinary remand rule "only applies when an agency has yet to even consider the question at issue." That is incorrect. It applies as well where, as in *Negusie* v. *Holder*, 555 U.S. 511 (2009), a court determines that the agency's decision was premised on "error," *id.* at 521; see *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 657 (2007) ("[I]f the EPA's action was arbitrary and capricious, as the Ninth Circuit held, the proper course would have been to remand to the Agency for clarification of its reasons."). In any event, the court of appeals declined to defer to the Board because, in the court's view, the Board "did not adopt a federal generic definition of 'sexual abuse of a minor.'" Pet. App. 16a; see *id.* at 15a ("[T]here was no statutory interpretation to which to defer."). The ordinary remand rule thus applies here even under respondent's conception of it.

Respondent further contends (Br. in Opp. 18-20) that the ordinary remand rule would have no effect here because "sexual abuse of a minor" unambiguously requires that the offense be motivated by a desire for sexual gratification, and because *Chevron* deference does not apply to the grounds for removability listed in 8 U.S.C. 1101(a)(43). Those arguments are wrong, but they are also beside the point: The court of appeals viewed the statute as "silent or ambiguous" on the relevant issue and also believed that the court would be "required to defer" to the Board's interpretation of it (if, in the court's view, the Board had adopted an interpretation). Pet. App. 14a (citation omitted); see *id.* at

16a n.7 (Board's interpretation is "entitled to *Chevron* deference"). There is accordingly no doubt that a remand here would serve the purpose of the remand rule—enabling the responsible agency, "through informed discussion and analysis, [to] help a court later determine whether its decision exceeds the leeway that the law provides." *Negusie*, 555 U.S. at 524 (quoting *Thomas*, 547 U.S. at 186-187). Respondent's suggestion (Br. in Opp. 20) that *this* Court, prior to remanding, would need to "first resolv[e] whether *Chevron* applies in this context" puts the cart before the horse.

3. Finally, respondent contends (Br. in Opp. 12-15) that an "alternative" argument, based on the lack of a defense in § 3-307 for a reasonable mistake as to the victim's age, would support the judgment below. Yet the court of appeals did not address that argument; and as far as respondent and we are aware, "[n]o court of appeals has." *Id.* at 13. This Court's usual GVR practice is not to evaluate for itself an alternative argument in support of the judgment below, but rather to grant, vacate, and remand for consideration in the first instance by the court of appeals. See, *e.g.*, *Wellons* v. *Hall*, 558 U.S. 220 (2010) (per curiam); *Price* v. *United States*, 537 U.S. 1152 (2003); *Stutson* v. *United States*, 516 U.S. 193 (1996) (per curiam); *Lawrence*, *supra*. The Court should follow that practice here.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of *Esquivel-Quintana* and the ordinary remand rule.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

SEPTEMBER 2017

APPENDIX

This table lists state offenses that, in 1996, criminalized sexual contact with minors without requiring that the contact be motivated by a desire for sexual gratification.

Alaska Alaska Stat. (1996)	§§ 11.41.436(a)(2), 11.81.900(b)(54)
	§§ 11.41.438(a)(1), 11.81.900(b)(54)
	§§ 11.41.440(a)(1), 11.81.900(b)(54)
Arizona Ariz. Rev. Stat. Ann. (Supp. 1996)	§§ 13-1401(2), 13-1404
	§§ 13-1401(2), 13-1410
Colorado Colo. Rev. Stat. (Supp. 1996)	§§ 18-3-401(4), 18-3-405(1)
Connecticut Conn. Gen. Stat. Ann. (1995)	§§ 53a-65(3), 53a-73a(a)
Delaware Del. Code Ann. tit. 11 (Supp. 1995)	§§ 761(f), 768

District of Columbia D.C. Code (LexisNexis 1996)	§§ 22-4101(9), 22-4109
Florida Fla. Stat. (1997)	§ 800.04(1) and (2)
Hawaii Haw. Rev. Stat. Ann. (1993)	§§ 707-700, 707-732(1)(b)
Louisiana La. Rev. Stat. (Supp. 1996)	§ 14:43.1
Maine Me. Rev. Stat. Ann. tit. 17-A (Supp. 1996)	§§ 251(1)(D), 255(1)(C)
Maryland Md. Code Ann., Art. 27 (LexisNexis 1996)	§§ 461(f), 464B(a)(3)

Massachusetts Mass. Gen. Laws ch. 265 (1996)	§ 13B
Minnesota Minn. Stat. (1996)	§§ 609.341(11)(a), 609.343(1)(a)
	§§ 609.341(11)(a), 609.345(1)(a)
New Jersey N.J. Stat. Ann. (West 1995)	§§ 2C:14-1(d), 2C:14-2(b)
	§§ 2C:14-1(d), 2C:14-3(b)
New Mexico N.M. Stat. Ann. (1996)	§ 30-9-13
North Dakota N.D. Cent. Code (1985 & Supp. 1995)	§§ 12.1-20-02(4), 12.1-20-03(2)(a)
	§§ 12.1-20-02(4), 12.1-20-07(1)(f)
Oklahoma Okla. Stat. Ann. tit. 21 (West Supp. 1996)	§ 1123(A)(2), (A)(4), and (B)

Rhode Island R.I. Gen. Laws (1994 & Supp. 1996)	§§ 11-37-1(7), 11-37-8.3
Utah Utah Code Ann. (LexisNexis 1996)	§ 76-5-404
	§ 76-5-404.1(1)
Virginia Va. Code Ann. (1996)	§§ 18.2-67.10(6), 18.2-67.3(A)(1)
Wisconsin Wis. Stat. Ann. (West 1996)	§§ 948.01(5), 948.02
Wyoming Wyo. Stat. Ann. (1977 & Supp. 1986)	§§ 6-2-301(a)(vi), 6-2-304(a)(ii)
	§§ 6-2-301(a)(vi), 6-2-305