No. 17-58

IN THE
Supreme Court of the United States

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL,
Petitioner,

v.

RAFAEL ANTONIO LARIOS-REYES,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Immigration and Nationality Act (INA), the term "aggravated felony" is defined to include, *inter alia*, "sexual abuse of a minor." 8 U.S.C. § 1101(a)(43)(A) .

In *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 1572 (2017), this Court held that where consensual sexual intercourse is "abusive" solely because of the ages of the participants, a criminal statute must require a victim younger than 16 to qualify as sexual abuse of a minor.

In the decision below, the U.S. Court of Appeals for the Fourth Circuit held that MD. CODE ANN., CRIM. LAW § 3-307(a)(3) does not qualify as sexual abuse of a minor for an entirely separate reason: it criminalizes conduct that is not "sexual" in nature—*e.g.*, striking a minor's buttocks to cause pain or embarrassment.

The question presented is whether this Court should use its "GVR" authority to require the Fourth Circuit to reconsider its decision in light of *Esquivel-Quintana*.

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STATEMENT

A. The Court's "GVR" Authority

In *Lawrence v. Chater*, 516 U.S. 163 (1996) (per curiam), this Court clarified the framework it applies in determining whether to summarily grant a petition for certiorari, vacate the judgment below, and remand the record for further consideration. The Court stated that a "GVR" order is potentially appropriate when intervening developments "reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Id.* at 167. *See also Wellons v. Hall*, 558 U.S. 220, 225 (2010); *Lords Landing Vill. Condo. Council of Unit Owners v. Cont'l Ins. Co.*, 520 U.S. 893, 896 (1997).

The Court further stated that even when intervening developments reveal a reasonable probability that the lower court would reach a different conclusion, the appropriateness of a GVR "depends further on the equities of the case." *Id.* at 167-68. The Court stated that if the request for a GVR "is part of an unfair or manipulative litigation strategy, or if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate." *Id.* at 168. The Court emphasized that its "GVR power should be exercised sparingly" in light of "[r]espect for lower courts, the public interest in finality of judgments, and concern about [its] own expanding certiorari docket." *Id.* at 173.

B. The Proceedings Below

1. Respondent is a 22-year-old native and citizen of El Salvador. Administrative Record (A.R.) 822. He has lived in the United States since the age of four, when he was admitted as a lawful permanent resident (LPR). Respondent's parents and four siblings also lawfully reside in the United States. A.R. 693.

In May 2014, Respondent pleaded guilty to a third degree sexual offense under MD. CODE ANN., CRIM. LAW § 3-307(a)(3).[1] A.R. 760. The statute prohibits persons from engaging in "sexual contact" with a minor under 14 years of age if the person performing the sexual contact is at least four years older than the victim. *Id*. The statute is a "strict liability offense," Pet. App. 30a n.4, insofar as a perpetrator can violate the statute even if he erroneously believes the victim to be above the age of consent. *Matter of Jimenez-Cedillo*, 27 I&N Dec. 1, 4 (BIA 2017) (citing *Moore v. State*, 882 A.2d 256, 268 (Md. 2005)).

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[1] Respondent's conviction followed a series of incidents in which he induced the victim, who was then four years old, to touch and briefly fellate his penis. A.R. 767-68. Respondent immediately confessed when confronted with the allegations. A.R. 767. In light of Respondent's cooperation with authorities, his lack of prior criminal history, a psychologist's determination that he presented little risk of recidivism, and the trial judge's belief that Respondent should not be deported, Respondent received only a 364-day day sentence, the entirety of which was suspended. A.R. 760. Respondent failed to report to his probation officer due to his fear that he would be turned over to immigration authorities, but the trial judge elected not to modify the sentence after the probation violation. A.R. 760.

The Maryland statute defines the term "sexual contact" to include the touching of an "intimate area" either for "sexual arousal or gratification, or for the abuse of either party." MD. CODE ANN., CRIM. LAW § 3-301(f). The Maryland Court of Appeals has held that touching a minor's buttocks through his or her clothing may qualify as "sexual contact." *Bible v. State*, 982 A.2d 348, 358-59 (Md. 2009). Maryland appellate courts have also held that perpetrators who intend to "abuse" the victim need not act for purposes of "sexual arousal or gratification," *Dillsworth v. State*, 503 A.2d 734, 737-38 (Md. Ct. Spec. App. 1986), and that the term "abuse" does *not* require an intent to inflict sexual injury. *LaPin v. State*, 981 A.2d 34, 44 (Md. Ct. Spec. App. 2009). The statute could thus be applied to persons who strike a minor's buttocks to cause pain or embarrassment, such as a parent who spanks an unruly child or a high school senior who squeezes a freshman's buttocks to cause humiliation. *Id.* at 42 ("[T]he term 'abuse' includes a touching for the purpose of physical, mental, emotional, or sexual injury.").

2. On Oct. 16, 2014, the Department of Homeland Security (DHS) charged Respondent with deportability under 8 U.S.C. § 1227(a)(2)(A)(iii) for having been convicted of an aggravated felony—namely, "sexual abuse of a minor" under 8 U.S.C. § 1101(a)(43)(A). A.R. 822.

The Immigration Judge (IJ) sustained the charge of removal and ordered Respondent removed. Pet. App. 5a. Respondent appealed to the Board of Immigration Appeals (BIA), arguing, *inter alia*, that MD. CODE ANN., CRIM. LAW § 3-307(a)(3) did not qualify as "sexual abuse of a minor" because it did

not require offenders to act for purposes of sexual arousal or gratification. A.R. 26-31. Respondent also argued that MD. CODE ANN., CRIM. LAW § 3-307(a)(3) did not constitute sexual abuse of a minor because it contained no *mens rea* element with regard to the age of the victim. A.R. 34-40.

The BIA dismissed respondent's appeal. In an unpublished opinion issued by a single member, the BIA analogized § 3-307(a)(3) to the statutory rape offense at issue in *Matter of Esquivel-Quintana*, 26 I&N Dec. 469 (BIA 2015), which criminalized consensual sexual intercourse between a person under 18 and a person at least three years older. A.R. 4-5. While acknowledging that § 3-307(a)(3) did not require intercourse, the BIA found that it qualified as sexual abuse of a minor because it required a younger victim and greater age difference than the statute at issue in *Matter of Esquivel-Quintana*. Pet. App. 30a. The BIA also ruled that Respondent's "observation that an offense under section 3-307(a)(3) is a strict liability offense does not alter the result in this case." *Id.* at 30a n.4.

3. Respondent filed a petition for review with the Fourth Circuit, and the Fourth Circuit panel (Chief Judge Gregory, joined by Judges Niemeyer and Harris) granted the petition and vacated the order of removal. The Fourth Circuit first held that the BIA was not entitled to deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), because the BIA has never adopted a generic definition of sexual abuse of a minor. Pet. App. 15a-16a. The Fourth Circuit also declined to accord *Skidmore* deference because it found the BIA's analysis unpersuasive. Pet. App. at 17a-19a.

Applying *de novo* review, the Fourth Circuit held that the conduct prohibited under § 3-307(a)(3) is broader than the generic definition of sexual abuse of a minor. Assessing the "plain meaning" of the INA, the Fourth Circuit reasoned that "'sexual abuse of a minor' means the perpetrator's physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification." Pet. App. 20a, 22a (quoting *United States v. Diaz-Ibarra*, 522 F.3d 343, 352 (4th Cir. 2008) (quoting in turn *United States v. Padilla-Reyes*, 247 F.3d 1158, 1163 (11th Cir. 2001))). The Maryland statute at issue here, however, does not require offenders to act for a purpose associated with sexual gratification. Pet. App. at 22a-24a. Citing decisions of Maryland appellate courts, the Fourth Circuit noted that § 3-307(a)(3) could be applied to an offender who strikes a minor's buttocks for purposes of imposing physical (as opposed to sexual) abuse. Pet. App. 23a-24a (citing *Bible v. State*, 982 A.2d 348, 358 (Md. 2009); *LaPin v. State*, 981 A.2d 34, 43 (Md. Ct. Spec. App. 2009)). Accordingly, the Maryland statute is broader than the generic federal crime of sexual abuse of a minor. Pet. App. at 25a. The Fourth Circuit did not reach Respondent's *mens rea* argument.

The Government filed a petition for panel rehearing. The Government contended that the Fourth Circuit should have returned the case to the BIA pursuant to the "ordinary remand" rule in lieu of applying its own definition of sexual abuse of a minor. Pet. for Reh'g 4-9.[2] The Fourth Circuit denied

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[2] The Government also asserted for the first time in its petition for rehearing that Respondent may be deportable

the petition for rehearing without comment. Pet. App. 32a.

C. The Decision in *Esquivel-Quintana*

On May 30, 2017, this Court issued its decision in *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017). The question in *Esquivel-Quintana* was whether a California statutory rape statute criminalizing consensual sexual intercourse with persons under 18 years old qualified as "sexual abuse of a minor." *Id.* at 1567. The Court concluded that convictions under the statute do not qualify as sexual abuse of a minor, holding "[w]here sexual intercourse is abusive solely because of the ages of the participants, the victim must be younger than 16." *Id.* at 1572.

The Court made clear that it did not reach any other issues, such as whether a minimum age differential is required between the victim and perpetrator, or whether the age of consent may be older than 16 if the perpetrator and victim are in a significant relationship of trust. *Id.* at 1571. The Court also left open whether any interpretation the BIA might offer of "sexual abuse of a minor" is

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under 8 U.S.C. § 1227(a)(2)(E)(i) for having been convicted of a "crime of child abuse." Pet. for Reh'g 11. But that assertion obviously came far too late in this litigation, and the Solicitor General does not renew it here. The only way to seek to deport Respondent based on having committed child abuse would be to file a new notice to appear, subject to Respondent's ability to argue that principles of *res judicata* preclude the Government from initiating a second round of removal proceedings based upon a charge that it could have brought in the initial round of proceedings. *See, e.g.*, *Bravo-Pedroza v. Gonzales*, 475 F.3d 1358, 1358 (9th Cir. 2007)).

entitled to *Chevron* deference in cases where the intent of Congress is not clear. *Id.* at 1572. In the case before it, the Court found that "the statute, read in context, unambiguously foreclose[d] the Board's interpretation." *Id.*

REASONS FOR DENYING THE WRIT

I. *Esquivel-Quintana* Did Not Disturb the Fourth Circuit's Basis For Determining That Respondent Was Not Convicted of "Sexual Abuse of a Minor"

1. The holding of *Esquivel-Quintana* does not undermine the Fourth Circuit's holding that MD. CODE ANN., CRIM. LAW § 3-307(a)(3) does not qualify as sexual abuse of a minor. *Esquivel-Quintana* focused on the meaning of the term "abuse." Limiting itself to "the context of statutory rape offenses that criminalize sexual intercourse based solely on the age of the participants," the Court held that "[w]here sexual intercourse is *abusive* solely because of the ages of the participants, the victim must be younger than 16" for a statute to qualify as sexual abuse of a minor. 137 S. Ct. at 1568, 1572 (emphasis added). Because intercourse is inherently sexual in nature, *Esquivel-Quintana* had no need to address whether the generic definition of sexual abuse of a minor requires perpetrators to act for a purpose associated with sexual gratification.

By contrast, in holding that MD. CODE ANN., CRIM. LAW § 3-307(a)(3) does not constitute sexual abuse of a minor, the Fourth Circuit focused not on the age of the victim but on the meaning of the term "sexual." Specifically, the Fourth Circuit held that "sexual" abuse requires perpetrators to act with "a

purpose associated with sexual gratification." Pet. App. at 22a (quotation marks and citation omitted). And under the Maryland "sexual contact" statute at issue, "the State need not show that a defendant acted for the purpose of sexual gratification in order to be convicted, because acting for such a purpose is just one of the ways that a defendant's conduct might constitute 'sexual contact.'" Pet. App. at 23a (citing *Dillsworth v. State*, 503 A.2d 734, 737 (Md. Ct. Spec. App. 1986), *aff 'd*, 519 A.2d 1269 (Md. 1987)). Indeed, "a conviction could be sustained under § 3-307(a)(3) based on an adult's intentional touching of a minor's buttocks for a 'harmful, injurious or offensive'—but not sexually gratifying—purpose." *Id.*

2. Unable to argue that *Esquivel-Quintana*'s *holding* undermines the Fourth Circuit's here, the Solicitor General contends that the *interpretive methodology* this Court employed in *Esquivel-Quintana* creates a reasonable probability that the Fourth Circuit would reach a different conclusion should it again be tasked with considering whether MD. CODE ANN., CRIM. LAW § 3-307(a)(3) qualifies as sexual abuse of a minor. Pet. 10. The Solicitor General is incorrect.

a. *Esquivel-Quintana* began—and focused primarily on—"the language of the [INA]." 137 S. Ct. at 1568 (quotation marks and citation omitted). Surveying dictionary definitions of "sexual abuse of a minor," the Court concluded that "reliable" definitions dictated that when the ages of the participants is the sole cause of alleged "abuse," the victims must be younger than 16 years old. *Id.* at 1569. The Court also stressed that the umbrella term "aggravated felony"—and the placement of "sexual

abuse of a minor" alongside "murder" and "rape" in in 8 U.S.C. § 1101(a)(43)(A)—"suggests that sexual abuse of a minor encompasses only especially egregious felonies." *Id.*

So too here. The Fourth Circuit began—and focused primarily on—the "plain meaning" of the phrase sexual abuse of a minor. Whereas *Esquivel-Quintana* drilled down on the word "abuse," the Fourth Circuit, quoting Webster's, explained that the term "sexual" means "of or relating to the sphere of behavior associated with libidinal gratification." Pet. App. 20a (quoting *Webster's Third New Int'l Dictionary* 2082 (1986)). The term "therefore" requires perpetrators to act with "a purpose associated with sexual gratification." *Id.* And it does not encompass striking the victim's buttocks simply for physical punishment.

The Fourth Circuit also noted that MD. CODE ANN., CRIM. LAW § 3-307(a)(3) criminalizes conduct that is far from an "especially egregious felon[y]," *Esquivel-Quintana*, 137 S. Ct. at 1569. As the Fourth Circuit recognized, the Maryland statute encompasses a mere spanking—that is, the striking of the victim's buttocks for purpose of imposing physical (as opposed to sexual) abuse. Pet. App. 23a-24a (citing *Bible v. State*, 982 A.2d 348, 358 (Md. 2009); *LaPin v. State*, 981 A.2d 34, 43 (Md. Ct. Spec. App. 2009)). While spanking (or pinching) a minor's buttocks may be offensive or even illegal, speakers of the English language would not ordinarily rank such conduct as not just a felony, but an "especially egregious" one, akin to the two others that the INA lists alongside sexual abuse of a minor: "rape or murder." 8 U.S.C. § 1101(a)(43)(A).

b. That leaves the Solicitor General's contentions that *Esquivel-Quintana*'s references to federal criminal law and other state codes would persuade the Fourth Circuit to reverse itself here. Pet. 11-13. Hardly. Those references in *Esquivel-Quintana* did nothing more than "confirm" the conclusion this Court had already reached. 137 S. Ct. at 1570. Even so, those sources of potential guidance are perfectly consistent with the Fourth Circuit's holding here.

Esquivel-Quintana noted that 18 U.S.C. § 2243(a), which criminalizes "sexual abuse of a minor," "contains the only definition of that phrase in the United States Code." 137 S. Ct. at 1570. To violate § 2243(a), a perpetrator must engage in a "sexual act" with the victim. Congress defined "sexual act," in turn, to require the direct touching or penetration of the anus or genitalia, § 2246(2)(A)-(D)—conduct which the Government concedes is "inherently sexual in nature." Pet. at 12. By contrast, § 3-307(a)(3) requires only an indirect touching of the buttocks through the victim's clothing. *Bible v. State*, 982 A.2d 348, 358 (Md. 2009). Although such conduct may be sexual in nature, it is not *necessarily* sexual in nature—as is required under the categorical approach.

The Solicitor General responds that touching a minor's clothed buttocks is criminalized under a *separate* federal criminal statute that does not contain a sexual gratification requirement. Pet. at 12 (citing 18 U.S.C. § 2244(a)(3)). But § 2244 is not cited anywhere in *Esquivel-Quintana*, and it does not deal with "sexual abuse" of a minor. Furthermore, the maximum sentence for violating § 2244(a)(3) is a mere two years—hardly the type of sentence

befitting an "especially egregious felon[y]." *Esquivel-Quintana*, 137 S. Ct. at 1570.

Finally, *Esquivel-Quintana* observed that "a significant majority of jurisdictions [] set the age of consent at 16 for statutory rape offenses predicated exclusively on the age of the participants." 137 S. Ct. at 1571. But as the Government itself stressed in that case, "this sort of multijurisdictional analysis . . . is not required by the categorical approach." *Id.* at 1571 n.3. And the Government did not ask the Fourth Circuit in this case to conduct one. It is thus immaterial that it did not conduct a multi-jurisdictional survey to determine whether states typically require an intent to obtain sexual gratification to constitute sexual abuse of a minor.

At any rate, the Solicitor General—which bears the burden of establishing deportability—has provided no reason to believe such a survey would lead the Fourth Circuit to reach a contrary conclusion. To the contrary, the Solicitor General cites only seven jurisdictions with statutes similar to Maryland's here that do not require an element of sexual gratification. *Id.* at 14. Yet none of those statutes purport to criminalize "sexual abuse of a minor," as opposed to some other wrongful physical touching. And even if these statutes were relevant, and even assuming *arguendo* the Government's citations are correct, seven out of 51 jurisdictions does not make a majority—much less "[a] significant majority." *Esquivel-Quintana*, 137 S. Ct. at 1571.

The seven jurisdictions are also at odds with the Model Penal Code, which this Court has used in the past as a factor similar to a multijurisdictional analysis. *See Taylor v. United States*, 495 U.S. 575,

598 n.8 (1990). The Model Penal Code defines "sexual contact" as "touching of the sexual or other intimate parts of the person *for the purpose of arousing or gratifying sexual desire*." Model Penal Code 213.4 (emphasis added). As explained in the commentary to that provision, "[t]he requirement of a particular purpose to arouse or gratify sexual desire distinguishes sexual imposition from ordinary assault and from non-criminal touching." *Id.*, commentary at 400 (1980). Under Maryland law, by contrast, the definition of "sexual contact" encompasses garden variety battery upon the buttocks or any other area that is deemed "intimate" by Maryland courts.

In sum, nothing in *Esquivel-Quintana* suggests that the Fourth Circuit would reach a different conclusion if it was forced to reconsider Respondent's case. To the contrary, applying the tools of statutory construction referenced in *Esquivel-Quintana* merely confirms that the Fourth Circuit reached the correct conclusion. For this reason alone, the Government has failed to demonstrate a "reasonable probability" that the decision below would be reversed if this Court exercises its GVR authority.

II. An Independent, Alternative Basis Exists for Determining That Respondent Was Not Convicted of "Sexual Abuse of a Minor"

Even if *Esquivel-Quintana* undermined the basis for the Fourth Circuit's decision, vacating and remanding would not affect "the ultimate outcome of the litigation." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). MD. CODE ANN., CRIM. LAW § 3-307(a)(3) does not qualify as sexual abuse of a minor for an additional reason that the Fourth Circuit did not

need to address: it is a strict liability offense for which defendants may not raise a mistake-of-age defense.

As an initial matter, there is no dispute that "a defendant can be convicted under section[] 3-307(a)(3) . . . even if there was a reasonable mistake as to the victim's age." *Matter of Jimenez-Cedillo*, 27 I&N Dec. 1, 4 (BIA 2017) (citing *Moore v. State*, 882 A.2d 256, 268 (Md. 2005)); *see also Walker v. State*, 768 A.2d 631, 635-36 (Md. 2001); *Garnett v. State*, 632 A.2d 797, 804 (Md. 1993). The only question, therefore, is whether sexual abuse of a minor under the INA requires some level of knowledge regarding the victim's age.

No court of appeals has yet considered that precise issue. But in a decision last year that the Government did not appeal to this Court, the Tenth Circuit held that "the INA's generic 'sexual abuse of a minor' offense . . . has as an element proof that the defendant 'knowingly' committed the proscribed sex acts." *Rangel-Perez v. Lynch*, 816 F.3d 591, 604-05 (10th Cir. 2016). The Tenth Circuit explained that this conclusion "is consistent with the 'longstanding precept of criminal law . . . that, except in the case of public welfare or regulatory offenses, criminal statutory provisions should not be read to impose strict liability and should instead be construed as carrying a *mens rea* element when they are silent.'" *Id.* at 605 (citing *Staples v. United States*, 511 U.S. 600, 605-06 (1994)). The Tenth Circuit also noted that its holding tracked the requirements of 18 U.S.C. § 2243(a), which precludes conviction for "sexual abuse of a minor" where the defendant did not knowingly engage in a sexual act. *Rangel-Perez*,

816 F.3d at 604.

These same considerations compel the conclusion that the INA's generic sexual abuse of a minor offense excludes state statutes that allow convictions even where defendants believed the victims were not minors. First, the precept that criminal statutes should not impose strict liability applies equally here.

Second, although prosecutors need not demonstrate under 18 U.S.C. § 2243 that defendants knew the age of the victim, *see id.* § 2243(d)(1), defendants can raise an affirmative defense if they "reasonably believed that the other person had attained the age of 16 years." § 2243(c)(1). Given that § 2243 does not impose criminal liability on defendants who reasonably believed their victims had reached the age of consent, Respondent can conceive of no reason why Congress would want to impose virtually automatic removal on noncitizens convicted under statutes that lacked an affirmative defense.

Furthermore, under the Model Penal Code, defendants charged with misdemeanor sexual assault for engaging in sexual contact with a minor may raise an affirmative defense that they "reasonably believed the child to be above the critical age." Model Penal Code 213.6(1).[3] Pending amendments to the Model Penal Code would go further, requiring prosecutors to affirmatively prove that defendants acted at least recklessly in failing to

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[3] This affirmative defense is unavailable only if the victim was under 10 years old. Model Penal Code 213.6(1).

ascertain the victim's age. Resp. C.A. Brief, Add. C at 175 ("[T]he various age-based offenses under revised Article 213 all limit criminal liability to actors who have at least a reckless awareness that the complainant's age was below the prescribed level."). As the drafters of the amendments put it, "strict liability of any sort in this context is unconscionable and properly excluded as a basis for conviction." *Id.*

To hold that sexual offenses involving minors qualify as an aggravated felony even without the availability of a mistake-of-age defense would mean that longtime permanent residents could be subject to virtually automatic removal from the United States for engaging in sexual activity with minors who misrepresented their age. It strains credulity to believe that lawmakers wanted such aliens to be classified as aggravated felons.

III. The "Ordinary Remand" Rule Does Not Provide Any Basis for a GVR

As an alternative basis for seeking a GVR, the Solicitor General asserts that the Fourth Circuit violated the "ordinary remand" rule by applying its own definition of sexual abuse of a minor rather than affording the BIA an opportunity to craft a generic definition. Pet. at 14-18. This argument provides no basis for a GVR.

1. The Solicitor General's "ordinary remand" argument is an improper basis for seeking a GVR because it does not rely on any "intervening" authority or event. *Lawrence*, 516 U.S. at 607. Instead, the Fourth Circuit simply refused to apply a rule that the Government suggested in a fleeting footnote was applicable, *see* C.A.4 Resp. Br. 23 n.4,

but the Fourth Circuit obviously thought was not. The Solicitor General cites no case in which this Court has GVR'd with instructions to consider a longstanding general legal rule, and respondent is aware of none. GVR's are not used to tell courts of appeals to consider arguments merely because they did not explicitly reject them—especially when the party seeking the GVR hardly raised the argument below in the first place.[4]

2. At any rate, the Solicitor General's "ordinary remand" is meritless on its own terms. Under the ordinary remand rule, a remand is appropriate only when an agency has *not yet considered* the question at issue—not when an agency has failed to provide a satisfactory answer. Moreover, a remand to the BIA would be futile (and thus is unnecessary) because the Fourth Circuit's holding here is compelled by the plain text of the INA. Finally, even if the INA were ambiguous as to the question presented, the Solicitor General ignores that this Court in *Esquivel-Quintana* reserved the question whether the BIA's interpretation of the "sexual abuse of a minor" provision can ever be entitled to *Chevron* deference. The better reading of this Court's precedent is that it cannot.

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[4] The Solicitor General cites two cases in which this Court has summarily reversed a court of appeals for failure to apply the ordinary remand rule. Pet. 17 (citing *Gonzales v. Thomas*, 547 U.S. 183 (2006) (per curiam); *INS v. Orlando Ventura*, 537 U.S. 12 (2002) (per curiam)). But the Solicitor General does not request summary reversal. And for good reason. Summary reversal is appropriate only when it is absolutely plain that the court of appeals erred. For all of the reasons that follow, that is not the case here.

a. Numerous decisions of this Court make clear that the ordinary remand rule only applies when an agency has yet to even consider the question at issue. For instance, in *INS v. Orlando Ventura*, 537 U.S. 12 (2002), this Court reversed a decision of the Ninth Circuit because the court decided an issue that the BIA itself had yet to consider—*i.e.*, whether any past persecution the alien had suffered in Guatemala had been negated by changed country conditions. *Id.* at 13. Likewise, in *Gonzales v. Thomas*, 547 U.S. 183 (2006), this Court reversed a decision of the Ninth Circuit because the court held—again without prior consideration by the BIA—that the alien was eligible for asylum based on her membership in a "particular social group" consisting of members of her family. *Id.* at 184-85. Finally, in *Negusie v. Holder*, 555 U.S. 511 (2009), the Court remanded the record because the underlying BIA decision was premised upon a misreading of an earlier decision of this Court. The Court stated that "[w]hen the BIA *has not spoken* on 'a matter that statutes place primarily in agency hands,' our ordinary rule is to remand to 'giv[e] the BIA the opportunity to address the matter in the first instance in light of its own expertise.'" *Id.* at 517 (emphasis added) (quoting *Orlando Ventura*, 537 U.S. at 16-17).

In this case, the BIA has already "spoken" on whether Respondent's conviction under MD. CODE ANN., CRIM. LAW § 3-307(a)(3) qualified as "sexual abuse of a minor." Indeed, whether Respondent was convicted of an aggravated felony was the sole issue before the BIA. Although the Fourth Circuit was unpersuaded by the BIA's answer, it was under no obligation to send the case back to the agency. Taken

to its logical conclusion, the Government's interpretation of the ordinary remand rule would mean that the Fourth Circuit could *never* reverse a BIA determination that an offense qualified as sexual abuse of a minor. According to the Government, the Fourth Circuit could, at most, remand the record for the BIA to create and apply its own generic definition.

In truth, the Government's assertion that the Fourth Circuit deprived the BIA of an opportunity to create its own definition of sexual abuse of a minor is highly ironic. In the two decades since sexual abuse of a minor was added to the definition of aggravated felony, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 321(a)(i), 110 Stat. 3009–627, the BIA has twice explicitly *declined* to establish a generic definition of sexual abuse of a minor. *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991, 996 (BIA 1999) (en banc) (declining to adopt "a definitive standard or definition"); *Matter of Esquivel-Quintana*, 26 I&N Dec. 469, 477 (BIA 2015) (opting to "define 'sexual abuse of a minor' under the Act on a case-by-case basis"). And in this case, the BIA elected to issue an unpublished ruling signed by a single member—the type of decision that the Fourth Circuit correctly noted is not entitled to *Chevron* deference anyway. Pet. App. 16a. *See, e.g.*, *Rangel-Perez*, 816 F.3d at 597.

b. Even if the "ordinary remand" rule applied, it would not matter. It is hornbook law that an agency is powerless to interpret a federal statute in contravention of its plain meaning. *Chevron*, 467 U.S. at 842-43. And here, the Fourth Circuit held that the "plain meaning" of the word "sexual" in

"sexual abuse of a minor" requires perpetrators to act with "a purpose associated with sexual gratification." Pet. App. 20a. The Eleventh Circuit, whose position the Fourth Circuit adopted was even more explicit when holding that sexual abuse of a minor requires perpetrators to act with "a purpose associated with sexual gratification." *United States v. Padilla-Reyes*, 247 F.3d 1158, 1163 (11th Cir. 2001). The Eleventh Circuit explained that "the plain meaning of § 1101(a)(43)(A) is unambiguous" in this regard. *Id.* at 1164; *see also id.* ("the phrase 'sexual abuse of a minor' is not ambiguous").

c. Even if the Solicitor General could overcome the two hurdles just discussed, a GVR would still be inappropriate. In *Esquivel-Quintana*, this Court expressly left open whether *Chevron* deference can take precedence over the rule of lenity where, as here, a federal statute has not only civil but also criminal applications. 137 S. Ct. at 1572. Judge Sutton concluded in *Esquivel-Quintana* that it cannot, *see Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1027-32 (6th Cir. 2016) (opinion concurring in part and dissenting in part), and Justices Scalia, Thomas, and Gorsuch have adopted the same view, *see Whitman v. United States*, 135 S. Ct. 352, 352-54 (2014) (Scalia, J., joined by Thomas, J., respecting the denial of certiorari); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155-56 (10th Cir. 2016) (Gorsuch, J., concurring).

Respondent will not rehash all of the arguments and supporting precedent for why *Chevron* does not apply to "hybrid" statutes—all of which appear in the *Esquivel-Quintana* briefing. In a nutshell, a federal statute can have only one meaning, *Clark v.*

Martinez, 543 U.S. 371, 382 (2005), and it is settled that federal agencies have no license to resolve ambiguities in "criminal laws," *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014). Accordingly, when confronting a hybrid statute, the "lowest common denominator"—that is, the interpretation that gives the benefit of the doubt to criminal defendants—must govern. *Clark*, 543 U.S. at 380; *see also H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 255 (1989) (Scalia, J., joined by Rehnquist, C.J., and O'Connor and Kennedy, JJ., concurring in the judgment) ("RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws."); *FCC v. ABC*, 347 U.S. 284, 296 (1954) (same regarding another federal statute with dual applications).[5]

The key point, however, for present purposes is that a GVR under the "ordinary remand" rule would not be sensible without this Court's first resolving whether *Chevron* applies in this context, and the Solicitor General has not asked for this Court to do so. For that reason alone, this Court should decline

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[5] Furthermore, "*Chevron* deference is not required where the interpretation of a particular statute does not implicate agency expertise in a meaningful way." *Drakes v. Zimski*, 240 F.3d 246, 251 (3d Cir. 2001) (Barry, J.). Although the definition of "aggravated felony" is located in the INA, members of the BIA are no more capable than Article III judges of determining the meaning of "sexual abuse of a minor." Indeed, during oral argument in *Esquivel-Quintana*, Justices Kennedy and Breyer each expressed doubt that the BIA was better positioned than other jurists to determine the meaning of sexual abuse of a minor. Tr. at 38-40.

the Solicitor General's GVR request.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

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