No.

IN THE

Supreme Court of the United States

GERARD PATRICK MATTHEWS,

Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Immigration and Nationality Act provides that non-citizens may be removed and are ineligible for many forms of discretionary relief if "convicted of … a crime of child abuse, child neglect, or child abandonment." 8 U.S.C. § 1227(a)(2)(E)(i). The question presented in this case is whether that provision encompasses a crime of "child endangerment," a different child-related offense that criminalizes an individual act—like leaving a child briefly unattended—that creates some risk of potential harm to a child, even if no harm results.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Second Circuit:

Matthews v. Barr, No. 16-3145 (June 18, 2019)

Matthews v. Holder, Nos. 13-2098, 13-3956 (Jan. 13, 2015)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gerard Patrick Matthews respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-63a) is reported at 927 F.3d 606. The opinions of the Board of Immigration Appeals (Pet. App. 64a-68a) and the immigration judge (Pet. App. 69a-98a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 2019. Pet. App. 1a. A petition for rehearing was denied on September 18, 2019 (Pet. App. 119a). On October 22, 2019, Justice Ginsburg extended the time to file a petition for a writ of certiorari until February 14, 2020. No. 19A439. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1227(a)(2)(E)(i) provides in relevant part:

> **Domestic violence, stalking, and child abuse.** Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. * * * *

INTRODUCTION

This case presents a "direct conflict" in the courts of appeals concerning an important question of immigration law. *Florez v. Holder*, 779 F.3d 207, 212 (2d Cir. 2015). Since 1996, the Immigration and Nationality Act ("INA") has rendered non-citizens removable and ineligible for many forms of discretionary relief if convicted of one of three specific "crime[s]" against children: "child abuse, child neglect, or child abandonment." 8 U.S.C. § 1227(a)(2)(E)(i). The question in this case is whether that provision encompasses convictions for crimes of "child endangerment," which criminalize individual acts that put a child at some *risk* of harm, like leaving a child briefly unattended.

Standard interpretive tools unambiguously show that "child endangerment" is a distinct offense that is less serious than the child-related offenses identified in the statute. Among other things, contemporary dictionary definitions of the statutory terms did not encompass endangerment; the vast majority of state criminal codes at the time either defined endangerment as a distinct offense or did not criminalize endangerment at all; and the structure of the INA suggests that Congress was targeting particularly serious offenses against children, not misdemeanor endangerment provisions that criminalize relatively minor conduct and that generally lead to minimal, if any, punishment.

Nevertheless, the Board of Immigration Appeals ("BIA" or "Board") has held, with practically no analysis of the statute's text, that child-endangerment offenses *are* crimes of child abuse, neglect, or abandonment unless the Board concludes, based on its own subjective judgment, that a particular statute does

not require a "risk of harm" that the Board deems "sufficient." *Matter of Soram*, 25 I. & N. Dec. 378, 382-83 (BIA 2010).

In applying this extra-statutory, "I know it when I see it" approach, *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), the Board has made clear that the "risk of harm" required by state endangerment statutes almost always *is* "sufficient." For instance, the Board held that a Colorado provision categorically falls within the generic federal offense even though it criminalizes a working mother's decision to leave her children with their own grandmother, who in turn left the children unattended, but unharmed. *Ibarra v. Holder*, 736 F.3d 903, 905 & n.3 (10th Cir. 2013). And the Board has held that the New York misdemeanor at issue in this case is a categorical match even though it criminalizes, for instance, a mother's decision to leave a sleeping child alone for fifteen minutes while buying groceries for dinner, *People v. Reyes*, 872 N.Y.S.2d 692 (N.Y. Crim. Ct. 2008), and even though convictions under that misdemeanor rarely result in *any* imprisonment, Pet. App. 48a-49a. The result, as Judge Carney's dissent below explained, is "the needless and potentially permanent separation of children from their parents," inflicting "needless suffering on some of the most vulnerable members of our society." Pet. App. 61a; *see also Martinez v. U.S. Att'y Gen.*, 413 F. App'x 163, 168 (11th Cir. 2011) (describing the impact of the Board's decision as "profoundly unfair, inequitable, and harsh").

The courts of appeals have disagreed concerning whether the Board permissibly expanded the generic federal offense to encompass the minimal conduct criminalized under state endangerment provisions.

The Tenth Circuit rejected the Board's interpretation as conflicting with the statute's unambiguous text, read using traditional interpretive tools. *Ibarra*, 736 F.3d at 917-18. The Second Circuit, however, created a "direct conflict" with the Tenth Circuit's decision. *Florez*, 779 F.3d at 212; *see also* Pet. App. 12a-16a (refusing to revisit *Florez*). Largely bypassing *Chevron*'s first step, the court found the statute "ambiguous" because interpreting it appeared "difficult." *Florez*, 779 F.3d at 210-11. The court then found the Board's interpretation "reasonable," despite recognizing that it was not the "majority" interpretation of the statutory terms as of 1996. *Id.* at 212. A divided Ninth Circuit panel recognized that the "circuits have split" and "join[ed] the Second Circuit," *Martinez-Cedillo v. Sessions*, 896 F.3d 979, 981-82 (9th Cir. 2018), though the Ninth Circuit then granted rehearing en banc and ultimately dismissed the petition as moot after the petitioner passed away, 923 F.3d 1162 (9th Cir. 2019).

This Court should resolve this acknowledged circuit conflict. Endangerment is charged many thousands of times each year. *E.g.*, Pet. App. 63a. When the defendant is a non-citizen, the question presented here will be enormously consequential, as it will determine whether pleading guilty to the often minimal conduct charged will lead to removal—and, often, family separation. Pet. App. 44a-48a. The answer to that question should not turn on whether immigration proceedings were initiated in Manhattan, Kansas or Manhattan, New York. Making matters worse, the Second and Ninth Circuit decisions rest on precisely the "reflexive" deference this Court has recently, and repeatedly, rejected. *E.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). This Court should grant certiorari and reverse the Second Circuit.

STATEMENT

A. Non-citizens are removable if convicted of one of three specific crimes against children: abuse, neglect, or abandonment.

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress amended the INA to make non-citizens removable, and ineligible for many forms of immigration relief, if convicted of certain child-related offenses. Pub. L. No. 104-208, § 350, 110 Stat. 3009-546, 3009-639-40. Congress did not, however, make *all* child-related offenses grounds for removal, nor did it empower the BIA to decide which child-related offenses merit removal. Instead, Congress identified the three child-related "crime[s]" it wanted to target: "child abuse, child neglect, or child abandonment." 8 U.S.C. § 1227(a)(2)(E)(i).

Focusing on these three, particularly-serious offenses was not an accident. The child-abuse provision was not intended to make any misstep around a child grounds for removal, but instead "to stop … vicious acts of stalking, child abuse, and sexual abuse" and to "prevent … the often justified fear [of such vicious acts] that too often haunts our citizens." 142 Cong. Rec. 10,067 (1996) (statement of Sen. Dole); *see also Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503, 509 (BIA 2008) ("Congress clearly intended to single out those who have been convicted of maltreating or preying upon children."). Congress thus grouped the child-abuse provision together with other serious domestic offenses like a "crime of domestic violence." 8 U.S.C. § 1227(a)(2)(E)(i). And Congress imposed serious immigration consequences for a child-abuse conviction beyond removability, including ineligibility for

cancellation of removal for non-permanent residents, *id.* § 1229b(b)(1)(C), and ineligibility for the separate cancellation provision for "battered spouse[s] or child[ren]," *id.* § 1229b(b)(2)(A)(iv).

Focusing on particularly-serious child-related offenses ensured that the child-abuse provision was consistent with one of the INA's primary goals: ensuring "the preservation of the family unit" and "keeping families of United States citizens and immigrants united." *Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977) (quoting H.R. Rep. 85-1199, 7 (1957) and H.R. Rep. 82-1365, 29 (1952)). Focusing on serious child-related offenses ensured that minor missteps around children by generally caring and supportive parents would not lead to family separation—a result that would hurt the very children Congress was trying to protect. *See* Pet. App. 61a.

B. The BIA holds that non-citizens are also removable if convicted of the distinct, lesser offense of child "endangerment."

Because the INA does not define the phrase "child abuse, child neglect, or child abandonment," the meaning of that generic federal offense turns on the general understanding of those terms in 1996, when the provision was enacted. *See Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1569 (2017); *Taylor v. United States*, 495 U.S. 575, 598 (1990). Though the BIA's interpretation of the statute initially seemed to be appropriately cabined to "abuse," "neglect," and "abandonment," the Board ultimately expanded its interpretation to include broad child-endangerment provisions that criminalize isolated and harmless missteps around children.

1. The Board's initial interpretations of the child-abuse provision required actual harm to the child. For instance, in *Matter of Rodriguez-Rodriguez*, the BIA adopted the definition of "child abuse" from the version of *Black's Law Dictionary* in circulation in 1996, which defined that term as "[a]ny form of cruelty to a child's physical, moral or mental well-being." 22 I. & N. Dec. 991, 996 (BIA 1999) (quoting *Black's Law Dictionary* 1375 (6th ed. 1990)). Similarly, in *Velazquez-Herrera*, 24 I. & N. Dec. at 512, the Board interpreted the generic offense as including "any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being, including sexual abuse or exploitation."

By requiring "cruelty," "maltreatment," or "impair[ment]" of a child's "well-being," these decisions strongly suggested that broad endangerment offenses that criminalize individual acts creating a mere *risk* of harm to a child fall outside the generic offense. Indeed, multiple courts of appeals interpreted these decisions as excluding endangerment offenses from the scope of the generic federal offense. *Fregozo v. Holder*, 576 F.3d 1030, 1037 (9th Cir. 2009) (under *Velazquez-Herrera*, "although 'child abuse' is not limited to the infliction of physical harm, the perpetrator's actions, either intentional or criminally negligent, must actually inflict *some* form of injury on a child" (emphasis in original)); *Guzman v. Holder*, 340 F. App'x 679, 682 (2d Cir. 2009) (suggesting that a broad endangerment provision "go[es] beyond even the BIA's definition of child abuse" in *Velazquez-Herrera*).

2. In *Soram*, the Board reversed course and held that the generic offense of child "abuse," "neglect," or

"abandonment" *does* encompass most convictions for child "endangerment." That conclusion did not rest on what the words "abuse," "neglect," or "abandonment" meant in 1996. The Board did not rely on a single dictionary definition of those terms; did not survey state criminal codes in 1996; and did not look to the way those terms were defined in comparable statutes. *See Esquivel-Quintana*, 137 S. Ct. at 1568-72 (applying these interpretive tools to conclude that the INA unambiguously precludes the Board's construction of "sexual abuse of a minor"). Instead, though the statute explicitly targets "crime[s]," the Board rested on a survey of state *civil* codes in effect *in 2009*, more than a decade after Congress added the relevant provision to the INA. *Soram*, 25 I. & N. Dec. at 381-83.

From this survey of 2009 civil law, the Board concluded that endangerment convictions generally fall within the generic federal offense. The Board left open the possibility that some particularly broad provisions might fall outside the federal offense. But the Board did not even try to set forth a coherent standard for distinguishing between different states' provisions. Instead, the Board decided endangerment provisions *are* categorically crimes of "abuse," "neglect," or "abandonment" *unless* the Board concludes, based on its own subjective determination, that a given endangerment statute requires a "risk of harm" that is not "sufficient." *Id.* at 381-83. The Board then applied this standard to the Colorado statute at issue and concluded that it required a "sufficient" risk of harm. *Id.* at 383-86.

3. The Board's subsequent application of *Soram* in *Matter of Mendoza Osorio*, 26 I. & N. Dec. 703 (BIA 2016), shows both the haphazard nature of the

Board's inquiry, and the fact that the Board will rarely deem the required "risk of harm" to be insufficient.

Mendoza Osorio addressed whether New York's endangerment provision—N.Y. Penal Law § 260.10(1)—is categorically a crime of child "abuse," "neglect," or "abandonment." That New York provision makes it a misdemeanor to "knowingly act[] in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old."[1] New York's highest court has interpreted this provision incredibly broadly, explaining that it requires only the "potential" for harm to a child, and describing the statute's "broad[]," "mere 'likelihood'" standard that gives juries discretion to convict based on conduct that the jury believes "may likely" lead to harm. *People v. Johnson*, 740 N.E.2d 1075, 1076 (N.Y. 2000). New York trial courts have thus upheld charges based on, for instance, leaving a sleeping child alone for fifteen minutes to get groceries for dinner, *Reyes*, 872 N.Y.S. 2d 692, and smoking marijuana in an apartment in which children were present in a different room, *People v. Alvarez*, 860 N.Y.S.2d 745 (N.Y. Crim. Ct. 2008). Consistent with the minimal conduct criminalized by the New York provision, convictions under New York's endangerment provision rarely lead to *any* imprisonment, and often do not even lead to probation. Pet. App. 48a-49a, 63a.

Some unpublished agency decisions following *Soram* initially held that the New York statute's breadth

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[1] The statute also has a second, divisible clause that makes it a crime to "authorize[] such child to engage in an occupation involving a substantial risk of danger to his or her life or health." *United States v. Beardsley*, 691 F.3d 252, 268 n.11 (2d Cir. 2012).

left it outside the scope of the generic federal offense. *E.g.*, A.R. 37-39. In *Mendoza-Osorio*, however, the Board canvassed a subset of New York cases and concluded that the statute does, in fact, require a "sufficient" risk of harm to fall within the generic federal offense. 26 I. & N. Dec. at 707. As in *Soram*, the Board did not attempt to ground this analysis in the statutory text, but simply applied its own subjective judgment in determining what risk is "sufficient." Moreover, the Board ignored many of the broadest applications of the New York statute, like leaving a child alone for fifteen minutes as in *Reyes*.

C. The courts of appeals disagree as to whether the BIA permissibly interpreted the statute to encompass endangerment.

The BIA's extra-statutory approach to child endangerment has led to division and confusion in the courts of appeals. The Tenth Circuit quickly rejected the Board's approach, holding that the Board's decision in *Soram* conflicts with the statute's plain text. *Ibarra*, 736 F.3d at 907, 910-13. The Second Circuit then created what it recognized as a "direct conflict" with *Ibarra*, concluding that *Soram* is a reasonable interpretation of ambiguous statutory text. *Florez*, 779 F.3d at 212. A divided Ninth Circuit panel subsequently recognized that the "circuits have split" and "join[ed] the Second Circuit in deferring to [*Soram*]," *Martinez-Cedillo*, 896 F.3d at 981-82, though that decision was vacated after the court granted rehearing en banc, and the petition was dismissed as moot after the petitioner passed away before en banc argument.

1. In *Ibarra*, the Tenth Circuit rejected the framework the Board established in *Soram*. The petitioner

in *Ibarra* had pleaded guilty to one count of endangerment under Colorado law. The petitioner was a mother who, when she went to work, left her children with her mother who, in turn, left the children unattended. 736 F.3d at 905 & n.3. The oldest child was ten and no child was injured. *Id.* at 905. The immigration judge characterized this as at most a "mistake in judgment," recognizing that there are no "clear guidelines" as to when children can be left unattended and for how long, and explaining that the immigration judge had, in fact, similarly left children alone. *Id.* at 905 n.3. Nevertheless, because the case involved the same Colorado statute at issue in *Soram*, the immigration judge and Board held that Ms. Ibarra had been convicted of a categorical crime of child abuse, neglect, or abandonment. *Id.* at 906.

The Tenth Circuit granted the petition for review and held that *Soram*'s classification of endangerment as a removable offense is foreclosed by the "plain language of the statute" as interpreted using "traditional tools of statutory construction," and hence is invalid under the first step of *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Ibarra*, 736 F.3d at 907, 910-13 (citation and internal quotation marks omitted). The court noted that "the first word in the [statutory phrase] … is 'crime,'" yet the BIA relied on state *civil* statutes to justify its interpretation. *Id.* at 912-13. Further, the Board ignored this Court's direction in *Taylor* that review should focus on the majority view of state criminal law as it existed when Congress enacted the federal provision. *Ibarra*, 736 F.3d at 917. Surveying state criminal law as of 1996, the Tenth Circuit concluded that the Board could not permissibly classify the Colorado

endangerment statute at issue as a categorical crime of child abuse, neglect, or abandonment. *Id.* at 918.

2. In *Florez*, the Second Circuit created a "direct conflict" with the Tenth Circuit and deferred to the Board's decision in *Soram*. 779 F.3d at 212. With practically no analysis, the court found the statute "ambiguous" for purposes of *Chevron*'s first step. According to the court, because the statute does not define the phrase "child abuse, child neglect, or child abandonment," and because federal and state statutes offered "varied definitions" of the statutory terms, it is "difficult to know precisely which sort of convictions Congress had in mind." *Id.* The court did not apply *any* traditional interpretive tools to try to resolve this "difficult[y]," but moved straight to *Chevron*'s second step.

At that second step, the court concluded that the Board's definition, despite being "broad" and "aggressive," was nevertheless "grounded in reason" because a *minority* of states in 1996 had criminal child-abuse laws that did not require injury to the child. *Id.* at 212. The court did not dispute that adopting the *minority* state position conflicts with *Taylor*, but concluded that, under *Chevron*, the agency does not need to adopt "the best interpretation, or the majority interpretation." *Id.* at 212.

A divided Ninth Circuit panel considering California's child-endangerment provision recognized that the "circuits have split" on this issue, and agreed with the Second Circuit. *Martinez-Cedillo*, 896 F.3d at 981-82, 987. Like the Second Circuit, the majority made no effort to exhaust the tools of construction—rather, it quickly asserted that the statute is ambiguous without any meaningful analysis. *Id.* Going

straight to *Chevron*'s second step, the court again agreed with the Second Circuit that *Soram*'s interpretation of the statute was reasonable. *Id.* at 988.

Judge Wardlaw dissented, criticizing the majority and the Board for not engaging with the language of the provision; for considering state civil laws, when the provision is limited on its face to "crime[s]"; and for failing to "define[] the precise level of risk required" for a statute to be a categorical match with the provision. *Id.* at 998-99 (Wardlaw, J., dissenting); *see also Alvarez-Cerriteno v. Sessions*, 899 F.3d 774, 785 (9th Cir. 2018) (Berzon, J., concurring) (agreeing with Judge Wardlaw's dissent).

The Ninth Circuit then granted rehearing en banc, vacating the panel's decision. 918 F.3d 601 (9th Cir. 2019). Before en banc argument, however, Mr. Martinez-Cedillo passed away, mooting his petition. 923 F.3d 1162 (9th Cir. 2019).

D. The Second Circuit reinforces the circuit conflict in this case.

Petitioner Gerard Matthews pleaded guilty to the same New York endangerment offense at issue in *Mendoza-Osorio* and *Florez*. But between *Florez* and Mr. Matthews's petition for review at the Second Circuit, this Court decided *Esquivel-Quintana*. The question in *Esquivel-Quintana* was whether the generic immigration offense of "sexual abuse of a minor" encompasses consensual sex between a seventeen-year-old and a twenty-one-year-old. As with the "crime of child abuse" provision, the statute does not define "sexual abuse of a minor," and states had adopted varying definitions. Yet this Court's approach could not have been more different than the

Second Circuit's approach in *Florez*: whereas the Second Circuit simply threw up its hands and deferred to the Board, this Court applied traditional interpretive tools and held that the statute unambiguously precludes the Board's approach. Nevertheless, the Second Circuit in this case refused to reconsider *Florez* in light of *Esquivel-Quintana*, and upheld the Board's determination that New York's endangerment provision is categorically a crime of child abuse, neglect, or abandonment.

1. Mr. Matthews came to the United States from Ireland as a lawful permanent resident more than thirty years ago. After a childhood during which he suffered significant physical and sexual abuse, he found a "fresh beginning" in the United States: he started work as a carpenter, and in 1997, he met his wife Laura, an American citizen, whom he married in 2001. Pet. App. 37a-38a; A.R. 78, 146. But Mr. Matthews could not fully escape his childhood traumas. He has at times struggled with alcohol, a coping mechanism he began using as a boy, and psychological damage from the sexual abuse he suffered in Ireland caused him to at times expose himself in public, which led to misdemeanor convictions for public lewdness. Pet. App. 37a-38a, 114a. On two of these occasions, children were present, and Mr. Matthews thus pleaded guilty both to misdemeanor public lewdness and misdemeanor child endangerment under New York law. Pet. App. 114a. Mr. Matthews has never been charged with, accused of, or committed any act of abuse, against a child or anyone else. *See* Pet. App. 114a.

2. The government instituted removal proceedings, arguing that these convictions for child

endangerment were convictions for a "crime of child abuse, child neglect, or child abandonment" under section 1227(a)(2)(E)(i). Mr. Matthews disputed his removability; sought a waiver of inadmissibility and adjustment of status; and applied for cancellation of removal. The IJ granted Mr. Matthews's application for a waiver of inadmissibility and adjustment of status, recognizing the hardship Mr. Matthews's removal would cause to his wife, as well as Mr. Matthews's significant efforts at rehabilitation. Pet. App. 113a-118a.

The Board, however, reversed this decision, concluding that Mr. Matthews had not shown sufficient hardship to his wife or that he deserved a favorable exercise of discretion. Pet. App. 109a-111a. The Board also held, with no analysis, that Mr. Matthews was ineligible for cancellation of removal because his public lewdness convictions qualified as crimes involving moral turpitude. Pet. App. 111a-112a.

The Second Circuit granted Mr. Matthews's petition for review and remanded for the BIA to further explain its conclusion that New York's public lewdness provision was a categorical crime involving moral turpitude. Pet. App. 103a-107a. The court did not consider Mr. Matthews's argument that his child-endangerment convictions did not render him removable, but noted that Mr. Matthews could renew that argument on remand. Pet. App. 106a-107a.

On remand, the IJ applied *Mendoza-Osorio* and held that Mr. Matthews's endangerment convictions are removable crimes of child abuse, neglect, or abandonment. Pet. App. 81a-83a. The IJ held that New York's public lewdness provision is *not* categorically a crime involving moral turpitude, and hence that Mr. Matthews was eligible for cancellation of removal and

adjustment of status. Pet. App. 83a-87a, 94a-96a. But the IJ denied Mr. Matthews's applications for cancellation of removal and adjustment of status on the merits. Pet. App. 96a-98a. The Board affirmed. Pet. App. 64a-68a.

3. A divided Second Circuit panel denied Mr. Matthews's petition for review and held that New York's endangerment provision is a categorical crime of child abuse, neglect or abandonment. The majority first reaffirmed the court's prior ruling that *Soram* is entitled to deference—and hence reaffirmed the "direct conflict" with the Tenth Circuit, *Florez*, 779 F.3d at 212. Pet. App. 12a-16a. The majority held that this Court's intervening decision in *Esquivel-Quintana* did not require revisiting *Florez*. *Esquivel-Quintana* held that the statute, read using traditional interpretive tools, unambiguously precluded the Board's interpretation of a generic immigration offense *even though* the statutory phrase was undefined and state laws differed, whereas the Second Circuit in *Florez* had held that the statute was ambiguous *solely because* the statutory phrase was undefined and state laws differed. *Esquivel-Quintana*, 137 S. Ct. at 1569; *Florez*, 779 F.3d at 211. Nevertheless, the majority dismissed *Esquivel-Quintana* as a "narrow" decision, and refused to apply interpretive tools to analyze whether the Board permissibly interpreted the terms "abuse," "neglect," and "abandonment" to encompass "endangerment." Pet. App. 15a.

The majority then held, applying *Soram*, that the Board had permissibly concluded that New York's endangerment provision is categorically a removable offense—an issue that had not been raised in *Florez*. *See* Pet App. 20a; *Florez*, 779 F.3d at 212.

Judge Carney dissented. Though she agreed that the panel remained bound by the court's prior decision in *Florez*, she concluded that it is not reasonable to interpret an endangerment provision like New York's as a categorical crime of child abuse, neglect, or abandonment. Pet. App. 61a. As Judge Carney explained, New York's endangerment provision criminalizes relatively minor parenting mistakes. Pet. App. 44a-52a. Moreover, the fact that New York endangerment convictions rarely result in imprisonment and often do not even result in probation shows that charges for minimally-culpable conduct are the norm, rather than the exception. Pet. App. 48a-49a, 63a.

Judge Carney concluded that the result of the Board's decision will be the "needless and potentially permanent separation of children from their parents," and the infliction of "needless suffering on some of the most vulnerable members of our society." Pet. App. 61a. It is "children who will suffer harm under the agency's interpretation," even though the law was "intended for their protection." Pet. App. 58a-59a.

4. The Second Circuit denied rehearing en banc. Pet. App. 119a.

REASONS FOR GRANTING THE WRIT

This case presents a "direct conflict" between the courts of appeals regarding an issue of exceptional importance to non-citizen families across the country. *Florez*, 779 F.3d at 212. Prosecutors bring many thousands of misdemeanor child-endangerment charges per year—including for minimal conduct like leaving children briefly unattended—and the immigration consequences of pleading guilty to such a charge should not turn on the circuit in which immigration

proceedings were brought. The circuit conflict will not resolve without this Court's intervention. And there is no reason to wait for further percolation given the importance of the question presented and the lengthy opinions on both sides of the conflict in the Second, Ninth, and Tenth Circuits.

Certiorari is especially warranted because the Second Circuit's approach so blatantly conflicts with this Court's precedent. This Court has recently and repeatedly made clear that the courts of appeals should not "reflexively" defer to agency decisions at *Chevron*'s first step, but must exhaust all interpretive tools before deeming the statute ambiguous and giving the agency free rein to adopt any "reasonable" interpretation. The Second Circuit, however, refused to apply *any* interpretive tools, and deferred to the agency simply because the interpretive question was "difficult." *Florez*, 779 F.3d at 211. Such an "abdication of the Judiciary's proper role in interpreting federal statutes" is plainly impermissible. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

Applying traditional interpretive tools leaves little doubt that the generic federal offense does *not* encompass child endangerment. Congress did not make *all* child-related crimes the basis for removal, but instead targeted three *specific* child-related offenses: "abuse," "neglect," and "abandonment." The ordinary understanding of those terms in 1996, contemporary state criminal codes, the structure of the INA, and a related federal statute all show that those terms did *not* encompass the distinct, lesser offense of "endangerment." Moreover, even if the statute contains some ambiguity, the Board's interpretation unreasonably harms the very children Congress was trying to

protect and undermines the core purpose of the categorical approach.

I. This Court should resolve the circuit conflict regarding an often-recurring issue of vital importance to immigrant families.

1. The Second Circuit has itself recognized that its deference to *Soram* puts it in "direct conflict" with the Tenth Circuit. *Florez*, 779 F.3d at 212; *see also Martinez-Cedillo*, 896 F.3d at 981-82 (recognizing that the "circuits have split on this precise issue"). Those courts adopted completely different approaches to analyzing the Board's decision, with completely different results. In *Ibarra*, the Tenth Circuit refused to defer to the BIA's definition of the generic federal offense "until the traditional tools of statutory construction yield no relevant congressional intent," 736 F.3d at 911 (citation and internal quotation marks omitted)—precisely the rigorous approach to *Chevron*'s first step mandated by this Court's decisions. *E.g.*, *Chevron*, 467 U.S. at 843 n.9; *Esquivel-Quintana*, 137 S. Ct. at 1569; *Kisor*, 139 S. Ct. at 2415. The Second Circuit, by contrast, dedicated only a few sentences to its step-one analysis, refusing to engage in any meaningful attempt to interpret the statute because it found the interpretive question "difficult." *Florez*, 779 F.3d at 211.

Unsurprisingly, these conflicting approaches led to conflicting results. After applying traditional interpretive tools, the Tenth Circuit held that the statute's text foreclosed *Soram*'s approach to child-endangerment provisions. *Ibarra*, 736 F.3d at 917-18. The Second Circuit, by contrast, concluded that, while *Soram* might not represent the "best interpretation of the statute," and is, in fact, inconsistent with the

"majority interpretation" of the statutory terms in 1996, it is nevertheless "reasonable" under *Chevron*'s second step. *Florez*, 779 F.3d at 212; *see also* Pet. App. 12a-16a.

This circuit conflict inevitably produces arbitrary and unfair results to non-citizens and their families. If Mr. Matthews's removal proceedings were initiated in Kansas rather than New York, he would not be removable, and could remain as a lawful permanent resident in this country with his U.S.-citizen wife.

2. The circuit conflict at issue is especially pernicious given the frequency with which the issue arises and the often enormous stakes for children and families when it does arise.

In New York alone, more than four thousand arrests are made *each year* for child endangerment. Pet. App. 63a. Similar child endangerment provisions currently exist, in some form, in virtually every state's criminal code, leading to likely tens of thousands of endangerment charges annually. The immigration consequences of a guilty plea to such a frequent charge should not turn on where in the country the charge is brought.

Indeed, the circuit conflict creates not just unfairness, but also uncertainty, as non-citizens considering whether to plead guilty to child endangerment outside the Second and Tenth Circuits have little, if any, way of predicting whether their governing circuit will ultimately defer to *Soram*. The proceedings in the Ninth Circuit—in which a split panel decision ultimately led to an en banc grant—demonstrate how closely disputed this question is, and how difficult, if not impossible, it is for a non-citizen facing an endangerment

charge to predict whether a guilty plea will have practically no impact on her life, or whether it will completely upend it, leading to removal from the United States and separation from children, spouses, and parents.

The need for certiorari is heightened by the fact that, as Judge Carney explained, the charged conduct often involves isolated, harmless parenting mistakes. *E.g.,* Pet. App. 44a-47a. In *Ibarra*, for instance, a mother was charged with endangerment for going to work and leaving her children in the care of her own mother, who then left the children alone in the care of the oldest child, who was ten years old. 736 F.3d at 905 & n.3. In *Martinez*, the petitioner was the mother of six U.S.-citizen children who was a "caring parent" who had been charged with endangerment based on a single misstep. 413 F. App'x at 169. Though the petitioner in *Martinez* did not challenge *Soram*'s validity, the court described the application of *Soram* as "profoundly unfair, inequitable, and harsh," and urged the Attorney General "to closely review the facts of this heartbreaking case." *Id.* at 168. Because of the circuit conflict, Ms. Martinez's mistake was treated as a categorical match to the federal offense while Ms. Ibarra's was not—a dramatically different outcome that was driven by nothing more than the happenstance of where each woman lived.

The fact that a conviction for a crime of child abuse, neglect, or abandonment has significant immigration consequences beyond removability also weighs in favor of certiorari. Most importantly, such a conviction makes non-permanent residents ineligible for cancellation of removal, one of the most important forms of discretionary relief available in immigration law that

allows non-permanent residents to remain if their removal "would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen" or lawful permanent resident. 8 U.S.C. § 1229b(b)(1)(C), (D). A conviction for a crime of child abuse, neglect, or abandonment also results in ineligibility for the separate cancellation provision for "battered spouse[s] or child[ren]." *Id.* § 1229b(b)(2)(A)(iv); *see also* Pet. App. 59a-63a (describing how *Soram*'s definition "inflicts an array of troubling collateral consequences on a broad class of non-citizens").

In sum, given that *Soram* arises frequently and has enormous consequences on non-citizens and their families, there is a particularly strong reason that it should either be applied, or not be applied, uniformly throughout the country.

3. This Court should not wait for the split to develop further before granting certiorari.

Given the entrenched disagreement on the question presented, the circuit split will not resolve without this Court's intervention. The Tenth Circuit refused to defer to *Soram* shortly after it was decided, and has shown no indication of reversing course. The Second Circuit has also stuck steadfastly to its deference to *Soram* and its "direct conflict" with the Tenth Circuit. Not only did the panel refuse to reconsider *Florez* despite this Court's intervening instruction in *Esquivel-Quintana* and *Kisor* that courts must exhaust all traditional interpretive tools before deeming a statute ambiguous, but the court also refused to grant rehearing en banc. *Esquivel-Quintana*, 137 S. Ct. at 1568-72; *Kisor*, 139 S. Ct. at 2415; Pet. App. 12a-16a, 119a. The Ninth Circuit proceedings in *Martinez-Cedillo*

also underscore the intractable disagreement on this issue, with a split Ninth Circuit panel adopting the Second Circuit's view, over a strong dissent, and the court then agreeing to rehear the case en banc. *Martinez-Cedillo*, 896 F.3d 979; *Martinez-Cedillo*, 918 F.3d 601; *see also Alvarez-Cerriteno*, 899 F.3d at 785 (Berzon, J., concurring) (agreeing with Judge Wardlaw's panel dissent). Given this widespread and deep-seated disagreement, this Court will inevitably have to resolve the conflict.

Second, given the extensive analysis in the existing appellate decisions, there would be minimal, if any, benefit to this Court of waiting for additional percolation. In considering this issue, this Court would have the benefit of the Tenth and Second Circuit decisions in *Ibarra* and *Florez*; the majority and dissenting opinions in this case; and the extensive majority and dissenting opinions from the *Martinez-Cedillo* Ninth Circuit panel. The relevant arguments have therefore all been aired at the courts of appeals, and this Court should grant certiorari to resolve the competing appellate positions.

II. Certiorari is particularly necessary because the Second Circuit's decision is wrong.

A. The Second Circuit's refusal to engage with the statute before deeming it ambiguous conflicts with this Court's precedent.

Since *Chevron* itself, this Court has required that courts "employ[the] traditional tools of statutory construction" to rigorously analyze a statute before deeming the statute ambiguous and allowing the agency to adopt any "reasonable" interpretation. *Chevron*, 467

U.S. at 843 n.9. This Court's recent decisions have repeatedly emphasized this point, criticizing courts of appeals for deferring too quickly to the agency. *E.g.*, *Esquivel-Quintana*, 137 S. Ct. at 1569-72; *Kisor*, 139 S. Ct. at 2415; *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring). The Second Circuit's decisions in *Florez* and in this case fly in the face of this Court's decisions. By refusing to try to interpret the statute because it thought such interpretation would be "difficult," 779 F.3d at 211, the court engaged in precisely the "reflexive deference" to the agency that this Court has repeatedly rejected, *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring); *see also Kisor*, 139 S. Ct. at 2415.

Esquivel-Quintana is particularly instructive, as it addressed a structurally identical issue to the one presented here: whether the Board permissibly held that consensual sex between a 17-year-old and a 21-year-old falls within the INA's generic offense of "sexual abuse of a minor." Like the crime of child abuse provision, that generic offense is not defined in the INA and a minority of contemporary state criminal laws supported the BIA's position. *Esquivel-Quintana*, 137 S. Ct. at 1569, 1571-72. But this Court nevertheless rejected the Board's interpretation of the generic federal offense because the "statute, read in context, unambiguously foreclose[d] the Board's interpretation." *Id.* at 1572. Specifically, the "normal tools of statutory interpretation"—dictionary definitions, structure, the majority view of contemporary criminal codes, and related federal law—demonstrated that the phrase "sexual abuse of a minor" excluded the conduct at issue. *Id.* at 1569.

There is no way to reconcile this Court's analysis in *Esquivel-Quintana* with the Second Circuit's analysis in *Florez*. *Florez* found the statute ambiguous *entirely* because the statutory phrase was not defined and states laws differed, whereas *Esquivel-Quintana* found an analogous phrase *un*ambiguous *even though* the statutory phrase was not defined and state laws differed. Indeed, as discussed below, pp. 26-32, *infra*, the *exact same* interpretive tools that this Court applied in *Esquivel-Quintana* reveal that the statute unambiguously precludes the Board's conclusion that endangerment constitutes abuse, neglect, or abandonment.

This Court's decision in *Kisor* makes clear that the "careful[]" step-one analysis of "text, structure, history, and purpose" this Court carried out in *Esquivel-Quintana* is always required. 139 S. Ct. at 2415. In *Kisor*, this Court criticized appellate courts' "reflexive" deference without meaningful analysis, instructing the courts of appeals to "exhaust[] all the 'traditional tools' of construction" and "carefully consider the text, structure, history, and purpose" before finding ambiguity. *Id.* That is precisely what the Second Circuit in *Florez* refused to do.

The Second Circuit in this case nevertheless reaffirmed *Florez* because *Esquivel-Quintana* did not "reject *Chevron* outright." Pet. App. 14a. That misses the point. The problem with *Florez* is not that it applied *Chevron*—the problem is that it did not *even try* to interpret the statute at *Chevron*'s first step. *Kisor* made this failure even more glaring by emphasizing that courts *must* "exhaust[] all the 'traditional tools' of construction" and "carefully consider the text, structure, history, and purpose" of the statute before

finding ambiguity. 139 S. Ct. at 2415 (alteration and internal quotation marks omitted). The Second Circuit simply did not do what this Court requires.

B. The statute's text, interpreted using traditional interpretive tools, forecloses the Board's classification of "endangerment" as "abuse," "neglect," or "abandonment."

Applying the very interpretive tools that this Court applied in *Esquivel-Quintana* shows that the statute's text unambiguously precludes the Board's decision in *Soram* that the terms "abuse," "neglect," and "abandonment" encompass "endangerment."

1. The same dictionaries on which this Court relied in *Esquivel-Quintana* make clear that, in 1996, the ordinary meanings of "abuse," "neglect," and "abandonment" did not encompass the distinct, lesser offense of child endangerment. *Merriam-Webster's Dictionary of Law* defined "abuse" in the context of children as "the infliction of physical or emotional injury; *also*: the crime of inflicting such injury." Merriam-Webster's Dictionary of Law 4, 76 (1996). It defined "neglect" as "a disregard of duty resulting from carelessness, indifference, or willfulness; esp.: a failure to provide a child under one's care with proper food, clothing, shelter, supervision, medical care, or emotional stability." *Id.* at 324. And it defined "abandonment," in the context of children, as "failure to communicate with or provide financial support for one's child over a period of time that shows a purpose to forgo parental duties and rights." *Id.* at 1.

Similarly, Garner's *A Dictionary of Modern Legal Usage* did not include a definition of "abuse," but gave definitions for "neglect" and "abandonment" that were

consistent with those in *Merriam-Webster*. B. Garner, A Dictionary of Modern Legal Usage 585, 3 (2d ed. 1995) ("neglect" requires that "a person has not performed a duty"; "abandon" means "leav[ing] children or a spouse willfully and without an intent to return").

The relevant edition of *Black's Law Dictionary* defined "[c]hild abuse" as "[a]ny form of cruelty to a child's physical, moral or mental well-being" and a "form of sexual attack which may or may not amount to rape," a definition that the courts of appeals interpreted to require actual harm. *See Black's Law Dictionary* 239 (6th ed. 1990); *Fregozo*, 576 F.3d at 1036, 1038.

These contemporary dictionary definitions plainly do not encompass child-endangerment provisions like the one at issue here, which criminalizes isolated acts that place a child at some *risk* of harm.

Neither the Board nor the Second Circuit engaged with these definitions. *Florez*, in finding *Soram*'s interpretation reasonable, made passing reference to a definition from *the 2009 edition* of *Black's Law Dictionary*, which defined "child abuse" as encompassing "[a]n act or failure to act that presents an imminent risk of serious harm to a child," 779 F.3d at 212 (quoting *Black's Law Dictionary* 11 (9th ed. 2009)). However, that dictionary was published *thirteen years* after the relevant provision was added to the INA, and incorporates concepts of endangerment missing from the "cruelty" required by the earlier, relevant definition. The question, after all, is what the statutory terms meant "at the time Congress enacted the statute"; updating "old statutory terms with new meanings" risks impermissibly "amending legislation."

New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539-40 (2019). Moreover, even the 2009 definition is limited to conduct that creates the "*imminent*" risk of "*serious*" harm—a far more limited set of conduct than is criminalized by misdemeanor endangerment provisions like New York's that *Soram* sweeps into the generic federal offense.

2. State criminal codes in effect in 1996 offer "additional evidence" that Congress did not intend to include generic child endangerment in the crime of child abuse provision. *Esquivel-Quintana*, 137 S. Ct. at 1571-72. As of 1996, only fifteen States and the District of Columbia had laws criminalizing "abuse," "neglect," or "abandonment" (or similar conduct, such as "cruelty to children") that included child endangerment.[2] Fifteen other States made "endangerment" a separate offense.[3] Nine additional States also had separate "endangerment" statutes, but limited them to specific situations, like allowing a child to engage

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[2] Ariz. Rev. Stat. § 13-3623; Cal. Pen. Code § 273a(b); Colo. Rev. Stat. § 18-6-401(1); D.C. Code § 22-1101; Fla. Stat. § 827.03; Idaho Code Ann. § 18-1501(2); Ind. Code Ann. § 35-46-1-4(a); Iowa Code §§ 726.3, 726.6; Neb. Rev. Stat. § 28-707; N.M. Stat. Ann. § 30-6-1(C); N.C. Gen. Stat. § 14-318.2; Ohio Rev. Code Ann. § 2919.22; Or. Rev. Stat. § 163.545; S.C. Code § 20-7-50; Vt. Stat. Ann. tit. 13 § 1304; Va. Code §§ 18.2-371, 16.1-228. The citations in nn. 2-4 all refer to the statutes as of 1996.

[3] Ark. Code Ann. § 5-27-204; Conn. Gen. Stat. § 53-21; Del. Code Ann. Tit. 11 § 1102(a)(1)(a); Haw. Rev. Stat. § 709-904; 720 Ill. Legis. Serv. 5/12-21.6; Kan. Stat. Ann. 21-3608; Me. Rev. Stat. tit. 17-A, § 554; Minn. Stat. § 609.378(b); Mo. Rev. Stat. § 568.050; Mont. Code Ann. § 45-5-622; N.H. Rev. Stat. Ann. § 639:3; N.Y. Penal Law § 260.10(1); 18 Pa. Cons. Stat. § 4304; Tex. Penal Code Ann. § 22.041(c); Wyo. Stat. Ann. § 6-4-403(a)(ii).

in dangerous labor or witness a forcible felony.[4] Eleven States did not criminalize child endangerment at all.[5] That thirty-five States did not define any of the three offenses listed in the crime of child abuse provision to include child endangerment as of 1996 strongly suggests that Congress did not intend those terms to encompass endangerment. *See Esquivel-Quintana*, 137 S. Ct. at 1571 (fact that thirty-four States set the age of consent at 16 or below confirmed that statute unambiguously foreclosed BIA's interpretation).

Neither the Board nor the Second Circuit grappled with these 1996 criminal provisions. Rather than consider 1996 criminal laws, the Board looked to *civil* laws in effect *in 2009*. *Soram*, 25 I. & N. Dec. at 382. That is wrong. *See Esquivel-Quintana*, 137 S. Ct. at 1571 (proper inquiry is into "state criminal codes"

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[4] Ala. Code § 13A-13-6 (limited to dangerous child labor and allowing child to become delinquent); Alaska Stat. § 11.51.100 (limited to parent or guardian "desert[ing]" the child); Ga. Code § 16-5-70 (limited to parent or guardian "willfully depriv[ing] the child of necessary sustenance" or anyone "intentionally allow[ing] a minor to witness the commission of a forcible felony"); Ky. Rev. Stat. Ann. § 530.060 (limited to child becoming a "neglected, dependent, or delinquent child"); Nev. Rev. Stat. Ann. § 200.508 (limited to leaving child in potentially abusive situation); N.J. Stat. Ann. § 2C:24-4 (limited to sex crimes); Okla. Stat. tit. 21, § 852.1 (limited to knowingly permitting physical or sexual abuse of child); Wash. Rev. Code § 9A.42.030 (limited to parent or guardian withholding "basic necessities of life" leading to "an imminent and substantial risk of death or great bodily harm"); W. Va. Code § 61-8D-4(e) (limited to situations where "gross[] neglect" creates "a substantial risk of serious bodily injury or of death").

[5] Louisiana, Maryland, Massachusetts, Michigan, Mississippi, North Dakota, Rhode Island, South Dakota, Tennessee, Utah, and Wisconsin.

from time the relevant provision "was added to the INA"). Civil laws, which serve different purposes and generally entail less serious consequences, often set a lower standard for abuse, neglect, or abandonment. *See Ibarra*, 736 F.3d at 911. Moreover, concepts of child abuse expanded between 1996 and 2009. *See* pp. 26-28, *supra*. *Esquivel-Quintana* makes clear that the BIA's focus must be on the ordinary meaning of the terms *at the time Congress used them*. Updating the bases for removal is not the BIA's job.

Unlike the Board, the Second Circuit in *Florez* acknowledged that its decision was inconsistent with the understanding of the statutory terms in most contemporary state criminal laws. 779 F.3d at 212. But the Second Circuit held that this did not matter because the Board could construe the meaning of the federal statute to follow the minority of state criminal codes, *id.*—a conclusion directly at odds with this Court's analysis in *Esquivel-Quintana*.

3. The "structure of the INA" further demonstrates that Congress did not classify broad child-endangerment provisions as child abuse, neglect, or abandonment. *Esquivel-Quintana*, 137 S. Ct. at 1570. As already described, pp. 21-22, *supra*, a conviction that qualifies under the "crime of child abuse" provision triggers drastic immigration consequences. In addition, the three child-related offenses Congress targeted are included in the same subsection as "crime[s] of domestic violence" and "crime[s] of stalking," which require the use or threat of violence. 8 U.S.C. § 1227(a)(2)(E)(i); 18 U.S.C. § 16. It is exceedingly unlikely that Congress intended to include among such "heinous crimes," *Esquivel-Quintana*, 137 S. Ct. at 1570, broad child-endangerment laws that

criminalize one-off parenting mistakes and often result in no meaningful criminal punishment. *See* Pet. App. 44a-49a, 63a.

4. Finally, "[a] closely related federal statute," 8 U.S.C. § 1184(d)(3)(A), "provides [yet] further evidence that the generic federal definition[s] of" child abuse and child neglect do not include generic child endangerment. *Esquivel-Quintana*, 137 S. Ct. at 1570. Section 1184 requires that, before a fiancé or marriage visa issues, a petitioner must provide DHS with information regarding "criminal convictions" for, among other things, "child abuse and neglect," which is defined as "any recent act or failure to act on the part of a parent or caregiver with intent to cause death, serious physical or emotional harm, sexual abuse, or exploitation, or an act or failure to act which presents an imminent risk of serious harm." 8 U.S.C. § 1184(d)(3)(A), (r)(5)(A); Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 3, 119 Stat. 2960, 2964.

This definition is much narrower than the one in *Soram*, as it is limited to conduct by "a parent or caregiver" with the *intent* to cause *serious* harm, or that poses an *imminent* threat of *serious* harm. And while the definition of "abuse" and "neglect" in the visa provision was only adopted in 2005, it nevertheless sheds light on the meaning of the crime of child abuse provision: given that state criminal codes and the ordinary meaning of the statutory language *expanded* after 1996, it is significant that Congress still adopted a definition narrower than *Soram*'s in 2005 for a visa provision that imposes no negative immigration consequences and thus is likely to define these terms *more*

broadly than a removal provision that has far more drastic implications.

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In sum, the same interpretive tools this Court applied in *Esquivel-Quintana* to conclude that the statute unambiguously precluded the Board's interpretation similarly show that the statute precludes the Board's interpretation here.

C. The Board's interpretation of the statute is not reasonable.

Even if the statute contains some ambiguity, the Board's treatment of endangerment provisions in *Soram* is not reasonable.

1. Classifying a broad endangerment statute like New York's as a crime of child abuse runs directly contrary to the purpose of the "crime of child abuse" provision: to protect children. *See* pp. 5-6, *supra*. State courts have recognized that child endangerment reaches conduct that some might consider "solely an act of 'bad parenting.'" *E.g.*, *People v. Gulab*, 886 N.Y.S.2d 68 (Crim. Ct. 2009) (upholding charges where mother left five- and ten-year-old children home alone for two hours). This includes not only leaving children unattended, but also committing minor criminal conduct, like smoking marijuana in the same apartment as children. *E.g.*, *Alvarez*, 860 N.Y.S.2d 745. There may be reasons for states to classify such conduct as a misdemeanor that results in little, if any, criminal punishment. But it is entirely unreasonable to classify such conduct as a removable offense that, in many cases, will lead to the separation of parents from children. As Judge Carney explained, that "[p]aradoxical[]" result would inflict harm on the

very children the statute was intended to protect. Pet. App. 58a-59a.

2. The Board's approach in *Soram* also unreasonably rests the ultimate classification of each endangerment statute on the Board's subjective determination as to whether the required risk is "sufficient." That standard not only, in Judge Carney's words, "floats, unmoored, on the fickle sea of child-rearing conventions," Pet. App. 34a (dissenting opinion), it also has no basis in the statute's text, and gives noncitizens no ability to predict whether a guilty plea to a particularly broad endangerment provision will be grounds for removal.

Unsurprisingly given the inherently subjective nature of *Soram*'s inquiry, the Board and reviewing courts have struggled to give *Soram* any coherent meaning. As discussed above, pp. 9-10, *supra*, different Board panels come to different conclusions about whether the *same* state endangerment provision is a categorical match with the generic federal offense.

In addition, the courts of appeals, in an attempt to rein in the Board's exceptionally low bar for what risk is "sufficient," have rejected the Board's classification of certain endangerment offenses. The Ninth Circuit, for example, held that Nevada's endangerment statute fell outside *Soram*'s definition because it requires only "reasonably *foreseeable*" harm, rather than a "reasonable *probability*" of harm. *Alvarez-Cerriteno*, 899 F.3d at 777 (emphases added). And the Third Circuit rejected the Board's application of *Soram* to a Pennsylvania child-endangerment statute because it required only "conduct that '*could* threaten'" injury, rather than "a *likelihood* of injury." *Zhi Fei Liao v. Att'y Gen.*, 910 F.3d 714, 722 (3d Cir. 2018) (emphases

added; citations omitted). While such decisions may limit some of the harshness of the Board's approach, they have produced no articulable standard—it is unclear, for instance, whether the Nevada or Pennsylvania provisions at issue are, in reality, any broader that New York's endangerment provision, which allows juries to convict based on conduct that "*may* likely" lead to harm. *Johnson*, 740 N.E.2d at 1076 (emphasis added).

The inevitable result of the Board's subjective, extra-statutory inquiry is therefore that a non-citizen considering a guilty plea to a broad endangerment statute has no option but to assume that a guilty plea will lead to removal unless the Board or a court of appeals has definitively ruled that the relevant offense does not require a "sufficient" risk of harm. This uncertainty undermines one of the core functions of the categorical approach: to "enable[] aliens to anticipate the immigration consequences of guilty pleas in criminal court, and to enter 'safe harbor' guilty pleas that do not expose the alien defendant to the risk of immigration sanctions." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015) (internal quotation marks and alterations omitted). Put simply, it is not reasonable for the agency to adopt a standard that, on its own terms, turns entirely on individual Board Members' subjective judgment as to what risk of harm should be "sufficient" for an endangerment offense to lead to removal and ineligibility for discretionary relief.

III. This case is an ideal vehicle to resolve the circuit conflict.

1. Mr. Matthews has maintained throughout his removal proceedings that his endangerment

convictions are not categorically "crime[s] of child abuse, child neglect, or child abandonment." He made the argument to the IJ in his initial removal proceedings, A.R. 1897-1910, and again when the case was remanded back to the immigration court, A.R. 689-711. Mr. Matthews raised the argument on appeal to the BIA, Pet. App. 65a-67a, and preserved the issue in his petition for review before the Second Circuit, Pet. App. 12a, 16a-24a.

2. The question whether a conviction under section 260.10(1) is categorically a "crime of child abuse, child neglect, or child abandonment" is dispositive of Mr. Matthew's removability. It is the only basis on which the IJ, on remand, found Mr. Matthews removable. Pet. App. 81a-87a. Accordingly, a decision in Mr. Matthews's favor on the crime-of-child-abuse issue would end the proceedings and allow Mr. Matthews to remain in the country he has called home for three decades, together with his U.S.-citizen wife.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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