No. 19-1022

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

BRIEF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION, HER JUSTICE, THE NEIGHBORHOOD DEFENDER SERVICE OF HARLEM, AND SANCTUARY FOR FAMILIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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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.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. This Court's review is necessary because the court of appeals failed to follow the directly applicable precedent of this Court 7

II. This issue is important for the non-citizen parents and the (frequently, citizen) children most likely involved 11

III. Overbroad deference to the BIA makes it impossible for *amici* to provide their clients with reliable advice about the immigration consequences of guilty pleas 13

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) 7, 9, 10

Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017) .... *passim*

Florez v. Holder, 779 F.3d 211 (2d Cir. 2015) 10

Fregozo v. Holder, 576 F.3d 1030 (9th Cir. 2009) 15

Ibarra v. Holder, 736 F.3d 903 (10th Cir. 2013) 6

Kisor v. Wilkie, 139 S. Ct. 2400 (2019) 4, 8, 9, 10

Matter of Soram, 25 I. & N. Dec. 378 (BIA 2010) 4, 10, 15

Mellouli v. Lynch, 135 S. Ct. 1980 (2015) 6, 16

Padilla v. Kentucky, 559 U.S. 356 (2010) 1, 5, 6, 14

Pereira v. Sessions, 138 S. Ct. 2105 (2018) 4, 7, 9, 15

Taylor v. United States, 495 U.S. 575 (1990) 15

Statutes

8 U.S.C. §1101(a)(27)(J)(i) 12

8 U.S.C. §1227(a)(2)(E) 12, 13

8 U.S.C. §1227(a)(2)(E)(i) 4

Colo. Rev. Stat. §18-1.3-501 6

Other Authorities

Child Welfare Info. Gateway,
Racial Disproportionality and Disparity in Child Welfare (Nov. 2016),
https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf 13

INTEREST OF *AMICI CURIAE*

Amici are not-for-profit organizations that represent and advocate on behalf of both criminal defense attorneys and immigration advocates. Among other things, these organizations provide criminal defense attorneys, immigration attorneys, criminal defendants, and noncitizens with expert advice and training on issues involving the interplay between criminal and immigration law. *Amici* have a particular interest in ensuring that laws relating to the immigration consequences of criminal convictions are interpreted clearly and correctly to allow *amici* and their members to provide reliable advice to noncitizens accused of crimes. *See Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). *Amici* regularly appear as *amici curiae* before the U.S. Supreme Court and courts of appeals.[*]

The American Immigration Lawyers Association (AILA) is a national non-profit association with more than 15,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and natural-

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[*] Pursuant to Supreme Court Rule 37, counsel of record for petitioner and respondent received timely notice of the intent to file this brief and consent to its filing. No counsel for a party authored this brief in whole or in part. No person other than *amici* and their counsel, and no party or counsel for a party, made a monetary contribution intended to fund the preparation or submission of this brief.

ization matters. As part of its mission, AILA provides trainings, information, and practice advisories to practitioners providing direct services to noncitizens, and to counsel representing noncitizens accused of criminal offenses in federal and state courts.

Since 1993, Her Justice has been dedicated to making a real and lasting difference in the lives of women living in poverty in New York City, many of whom are victims of gender-based violence, by offering them legal services designed to foster equal access to justice and an empowered approach to life. Her Justice recruits volunteer attorneys from New York City's law firms to stand side-by-side with women who cannot afford to pay for a lawyer, giving them a real chance to obtain legal protections that transform their lives. In 2019 alone, Her Justice provided advice and counsel, assistance with court documents, and legal representation in the areas of family, matrimonial and immigration law to more than 8,600 women and children living in poverty in New York City. Informed by clients' experiences, Her Justice works to reform the civil justice system such that it produces the most favorable outcomes for women like our clients, through processes that are as equitable, empowering, and as efficient as possible.

Neighborhood Defender Service of Harlem (NDS) is a community-based public defense office serving the residents of Northern Manhattan. NDS's unique holistic defense model provides clients with zealous, client-centered advocacy in addressing a wide array of legal issues. NDS advocates for clients in courthouses across New York City including criminal court, family court, and civil courts, including immigration proceedings. NDS has a strong interest in protecting its

clients and all New Yorkers from harmful separation from their families and communities.

Sanctuary for Families (Sanctuary) is New York State's largest dedicated service provider and advocate for survivors of domestic violence, human trafficking, and related forms of gender violence. Each year, Sanctuary provides legal, clinical, shelter, and economic empowerment services to approximately 15,000 survivors. Sanctuary's Immigration Intervention Project provides free legal assistance and direct representation to thousands of immigrant survivors every year in a broad range of humanitarian immigration matters, including asylum, special rule cancellation of removal, Special Immigrant Juvenile Status, Violence Against Women Act self-petitions, and petitions for U and T nonimmigrant status. In addition, Sanctuary provides training on domestic violence and trafficking to community advocates, pro bono attorneys, law students, service providers, and the judiciary, and plays a leading role in advocating for legislative and public policy changes that further the rights and protections afforded to survivors and their children.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court's administrative-law doctrines grant considerable deference to agencies like the Board of Immigration Appeals (BIA) in resolving textual ambiguities in the statutes and rules they administer. But this Court has recently and repeatedly emphasized that, before simply deferring to these agencies' interpretations, courts are obligated to first use all their interpretive tools to determine whether the relevant legal text permits the agency's reading. If not, the courts must reject the agency's interpretation in favor

of the one the statute requires. The BIA's interpretations of the Immigration and Nationality Act (INA) have failed multiple times in this Court under this standard in recent years. *See, e.g.*, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1569, 1572 (2017); *Pereira v. Sessions*, 138 S. Ct. 2105, 2110 (2018). Meanwhile, this Court has made increasingly clear that this standard involves a serious probing of the agency's reading, not a "reflexive" grant of deference. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (quoting *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring)).

Any serious application of that standard precludes the deference the decision below showed to the BIA's reading of the INA's child-abuse provision. That statutory text makes aliens—including lawful permanent residents—removable for a "crime of child abuse, child neglect, or child abandonment." *See* 8 U.S.C. §1227(a)(2)(E)(i). The basic tools of statutory interpretation demonstrate that those three carefully enumerated classes of child-related crimes do not include the fourth, separate class of simple "child endangerment" crimes—offenses whose elements require neither that anyone intend to harm a child, nor that any such harm occur. The BIA's contrary decision in *Matter of Soram*, 25 I. & N. Dec. 378 (BIA 2010), failed to apply the very interpretive tools this Court has applied in essentially identical cases. The Second Circuit's decision to resolve this case by giving deference to *Soram* thus cannot be squared with the guidance this Court has provided on agency review in three consecutive Terms. *See Kisor*, 139 S. Ct. at 2415; *Pereira*, 138 S. Ct. at 2110; *Esquivel-Quintana*, 137 S. Ct. at 1569. And given that the decision below reinforced a disagreement with the Tenth Circuit, this Court should grant

review to once again correct both a BIA interpretation of the INA that fails to correctly apply the basic tools of statutory construction, and a judicial attitude towards BIA decisionmaking that fails to enforce the terms of the statute the agency is interpreting.

Correcting this statutory error is important in its own right. Child endangerment is a crime of carelessness that depends upon shifting attitudes toward parental supervision, and it is generally a *far* less serious offense than are the intentional crimes of child abuse, child neglect, and child abandonment. The former is most closely associated not with wanton disregard of another's wellbeing, but with a lack of resources among parents who are genuinely committed to their children. Simply put, child endangerment is a crime most likely to be committed by the single parent of limited means. And deporting a caring parent—including a lawful permanent resident with citizen children—for child endangerment is likely to lead to decidedly ironic outcomes: The children of such a deportee are likely to end up in more danger, not less, from this unnecessary government intervention.

That said, this Court's review is critical here not just to correct the BIA's specific statutory error, but to restore predictability and regularity to the process by which immigration attorneys and courts apply and advise clients about the meaning of the immigration laws. Allowing the BIA such a wide interpretive berth makes it all but impossible for immigration and criminal defense attorneys to advise their clients concerning the immigration consequences of pleading guilty to relatively minor offenses. *See Padilla*, 559 U.S. at 366. Any time a noncitizen considers such a plea, removability is likely to be a key issue. *See id.* Indeed, in

cases like these that rarely lead to prison time, it may be the *only* issue—determining, for example, whether a conviction for leaving a child briefly unattended will result in a $50 fine or a lifetime of separation from a U.S. citizen child. *See Ibarra v. Holder*, 736 F.3d 903 (10th Cir. 2013); Colo. Rev. Stat. §18-1.3-501; *Padilla*, 559 U.S. at 364. Accordingly, the whole point of this Court's "categorical approach" is to make the immigration consequences of certain pleas predictable; as this Court has said, it "enables 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). And yet massive unpredictability about the consequences of such pleas is exactly what results from decisions like this one, allowing the BIA to use whatever interpretive tools it wants to reach whatever conclusions it wants, about statutes that this Court will no doubt deem unambiguous using precisely the same tools. This Court should thus grant the petition, adopt the well-reasoned analysis of Judge Carney's dissent below, and set this area of the law back on a sounder course.

ARGUMENT

I. This Court's review is necessary because the court of appeals failed to follow the directly applicable precedent of this Court.

The petition fully explains that the decision below conflicts with the decision of the Tenth Circuit, and that the Ninth Circuit likewise entered a divided opinion on the same issue and granted rehearing *en banc*, only for the case to be mooted by the death of the petitioner. Pet. 10, 19-20, 22-23. This discussion demonstrates both that there is an active disagreement among the courts of appeals that requires this Court's resolution, and that the positions on both sides have been developed by multiple judicial opinions, making the issue ripe for this Court's review. That posture alone suffices as a good reason to grant certiorari.

It is also notable, however, that the Second Circuit's decision is in the teeth of this Court's recent decisions explaining how to apply deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in reviewing BIA interpretations of the INA. *Esquivel-Quintana*, 137 S. Ct. at 1569-72; *Pereira*, 138 S. Ct. at 2113-2120. Those cases make clear that the *Chevon* question is not whether the statutory provision at issue contains some ambiguity, but whether the statute's text, read using traditional interpretive tools, "unambiguously forecloses" the particular agency interpretation the Court has been asked to review. *Esquivel-Quintana*, 137 S. Ct. at 1572. In other words, "the court must make a conscientious effort to determine, based on indicia like text, structure, history, and purpose," whether the language "really has more than one reasonable meaning."

Kisor, 139 S. Ct. at 2424; *see also id.* at 2423 (court of appeals "jumped the gun" in finding regulation ambiguous before "bring[ing] all its interpretive tools to bear"). The fact that the language is facially broad or unclear does not remotely suffice.

The Second Circuit's decision cannot be reconciled with this precedent. Indeed, the question in this case is nearly identical to the question in *Esquivel-Quintana*: Both cases involved BIA interpretations of undefined statutory removability grounds, where state criminal laws gave the statutory terms different meanings. Plainly, the BIA should be required to apply the same interpretive tools this Court found dispositive in *Esquivel-Quintana*, and yet the Second Circuit's approach failed to require just that from the agency, or from the court itself.

As the petition explains (at 24), *Esquivel-Quintana* clarified that, before finding a statute ambiguous, courts must apply "the normal tools of statutory interpretation" that are used to determine the meaning of legal texts. *See* 137 S. Ct. at 1569. It then applied several interpretive tools that would lead to an identical result in this case. For example, this Court found that the BIA's definition of "sexual abuse of a minor" conflicted with definitions of the relevant terms from *1996 versions* of legal dictionaries. *Id.* Meanwhile, the INA's structure suggested that Congress intended to target particularly serious offenses, which did not include the statutory rape offenses at issue. And finally—and perhaps most importantly—this Court observed that the *majority* of state *criminal* codes *in 1996* had rejected the BIA's position. *Id.* at 1570-72. These sources of interpretive meaning allowed this Court to conclude that the BIA's interpretation was

"unambiguously foreclose[d]," even though the statute's words of course did not address the precise age cut-off for statutory rape offenses. *Id.* at 1572.

One Term later, this Court again emphasized in *Pereira* that courts must apply the standard tools of interpretation before concluding that the INA contains an ambiguity for the BIA to resolve. Justice Kennedy's concurrence voiced particular exasperation at the courts of appeals' willingness to "abdicate the Judiciary's proper role in interpreting federal statutes" by engaging in only "cursory" statutory interpretation before deferring under *Chevron*. *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring). And this Court then tripled down on this guidance one Term later in *Kisor*, making clear that, under *Chevron*, "before concluding that a rule is genuinely ambiguous, a court *must exhaust all the 'traditional tools' of construction*." 139 S. Ct. at 2415 (quoting *Chevron*, 476 U.S. at 843 n.9) (emphasis added).

The court of appeals' view here that "*Esquivel-Quintana* was narrow and its decision did not … mandate any particular approach to statutory interpretation," Pet. App. 15a, is therefore untenable. The Second Circuit's previous decisions on this issue refused to apply *the very tools* that *Esquivel-Quintana* found dispositive, and gave the BIA the exact kind of "reflexive" deference that this Court condemned—*twice*—in two subsequent Terms. There is thus ample ground to recognize that the very method of analysis this Court now requires in *Chevon* cases was not applied by the Second Circuit here or in the previous Second Circuit cases from which the panel below refused to break. *See id.* at 15a-16a (asserting that the panel remained bound by *Florez v. Holder*, 779 F.3d 211 (2d Cir.

2015)). And that alone is reason enough to grant certiorari review and bring the Second Circuit's analysis in line with this Court's.

That said, it is not just the Second Circuit's analytical approach that is irreconcilable with recent precedent; is also clear that the court of appeals' outcome is irreconcilable with *Esquivel-Quintana*. As the petition (at 24-25) explains, applying the exact same interpretive tools this Court employed in *Esquivel-Quintana* leads to the same result here, and demonstrates in the exact same way that the BIA's interpretation of the INA in *Soram* is foreclosed by the statute. And given the conflict with the Tenth Circuit on the precise question presented, this Court's review is necessary and appropriate to correct not only a flawed method, but also this flawed result.

Ultimately, there can be no dispute that *Esquivel-Quintana* represents this Court's most clear instruction to courts of appeal as to how BIA interpretations of generic federal offenses should be analyzed under *Chevron*. And since that decision, this Court has only reaffirmed that "the possibility of deference can arise only if a regulation is genuinely ambiguous," and that when it "use[s] that term, [it] mean[s] it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation." *Kisor*, 139 S. Ct. at 2414. Nonetheless, the Second Circuit has refused on *multiple* occasions to apply *Esquivel-Quintana*'s teachings to the question presented here, and has never taken full account of its (since repeated) methodological instructions. Accordingly, this Court has an obligation to grant review and bring the Second Circuit into line with those instructions and the outcomes in other circuits.

II. This issue is important for the non-citizen parents and the (frequently, citizen) children most likely involved.

In *amici*'s experience, the question presented is particularly important for two, related reasons.

First, child endangerment really is a very different kind of offense from child abuse, child neglect, and child abandonment, and *amici* view it as decidedly unlikely that Congress intended (or wrote) this statute to treat them the same. The latter crimes are far more serious, and will (at least typically) require both intentional wrongdoing and actual harm to the child; the former is a non-intentional offense that does not require actual harm and whose most proximate cause is frequently a lack of resources. Indeed, the endangerment often results from parents having inadequate options for the care of children while they work to acquire resources *for those children's care*.

Second, the results of treating child endangerment the same as child abuse, neglect, or abandonment are likely to be decidedly ironic from the perspective of Congress's statute and its objectives. That is because there is a plain mismatch between the justifications for deporting a person determined to have abused a child and the likely results of deporting someone convicted of a simple endangerment offense.

As to the statutory objectives, there is no doubt that one of the reasons for deporting abusive parents is to protect their victims from further harm. Congress presumably intended to achieve the long-term separation of children from parents convicted of child abuse by removing the parent from the country. This is no doubt why the INA groups child abuse crimes

with "crimes of domestic violence, stalking, or violation of protection orders." *See* 8 U.S.C. §1227(a)(2)(E). Indeed, a separate provision of the INA grants "special immigrant" status to children whose "reunification with one or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law." *Id.* §1101(a)(27)(J)(i). This is a strong indication that, when Congress used the exact same terms in §1227(a)(2)(E), it had in mind the kind of offenses that would typically serve as a basis for permanently separating children from their parents.

Child endangerment is not that kind of crime. As explained above, it is typically associated with caring parents who lack adequate resources and accidentally allow their children to end up in dangerous situations. Child endangerment is thus far more likely to result in remedial parenting through state civil intervention than it is to result in permanent loss of parental rights. Indeed, this is one of the things that makes the BIA's reliance on state *civil* provisions *from decades after the INA* in defining "child abuse" so perverse: The expanded definition of such terms in contemporary civil law likely serves to permit expending state resources for the common benefit of parents and children whom the State intends to keep together, rather than to permit tearing these families apart.

The result of treating child endangerment like an abuse offense is thus to separate children from parents who remain in the best position to care for them, and thus to endanger the children *more* than they would be absent this unnecessary government intervention. Frequently, the children of the lawful permanent residents most impacted by the BIA's mistaken reading

of §1227(a)(2)(E) are likely to be U.S. citizens. It is beyond ironic to permanently deprive these U.S. citizens of their loving parents because those parents made a mistake that, frequently, state law would not regard as an appropriate basis for even a *temporary* separation of parent and child.

The evidence also suggests that child welfare offenses are more often prosecuted against parents of color. Child Welfare Info. Gateway, *Racial Disproportionality and Disparity in Child Welfare* (Nov. 2016), https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf. Incorrectly treating endangerment offenses as deportable crimes is thus likely to fall particularly hard on communities of color, and to exacerbate patterns in which children in those communities are less likely to have the full support of both parents during their formative years. Breaking such cycles frequently depends on identifying and correcting areas where the default approach is unnecessarily punitive. And the BIA's interpretation of the §1227(a)(2)(E) is undoubtedly an example of precisely that phenomenon.

III. Overbroad deference to the BIA makes it impossible for *amici* to provide their clients with reliable advice about the immigration consequences of guilty pleas.

The Second Circuit's refusal to hold the BIA to standard interpretive methodologies is not only wrong, but also makes it impossible for *amici* and others to help noncitizens predict with any reasonable certainty the immigration consequences of their state criminal convictions. Indeed, if the BIA can interpret statutes however it wants—ignoring not only the law's clear meaning, but even this Court's standard

interpretive methods—then immigration counsel will not even know how to *approach* the question of determining the likely contours of a federal generic offense. Making the serious sanction of deportation so unpredictable is unacceptable.

As this Court recognized in *Padilla*, "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." 559 U.S. at 364. Advising a client as to the immigration consequences of a guilty plea is therefore a key part of providing effective assistance. *Id. Amici* and their members, along with other criminal defense and immigration attorneys nationwide, strive to provide resources to allow defense attorneys to carry out these duties. Because the BIA and courts of appeals have not resolved the consequences of every (or even close to every) state crime, one crucial part of that work is predicting how the BIA (and federal courts of appeals) will interpret generic federal offenses in the future—not just the "crime of child abuse" provision, but other generic federal offenses as well.

Even where the BIA correctly applies standard interpretive methods, it can be difficult for immigration and criminal defense attorneys to predict the exact scope of generic federal offenses, and hence to advise clients concerning the effects of their guilty pleas. But those difficulties multiply exponentially when it is impossible to predict even the interpretive *approach* the BIA will take. Though we now know that the BIA chose to decide the child-endangerment issue based on a survey of 2009 civil laws, there was no way to predict such an unorthodox methodology. With no interpretive restraints, the BIA could just as easily have

interpreted the statute based on a *minority* of 1996 criminal laws; based on the practices of one specific State; or based on dictionaries that post-dated the statute by a decade—none of which were in any way relevant to this Court in *Esquivel-Quintana* or *Pereira*. Allowing the BIA such freedom leads to results that are not only incorrect, but also completely unpredictable, depriving noncitizens of the certainty the categorical approach is intended to provide. And this problem is only made worse when, as here, the BIA applies different interpretive methods to the same statutory provision across different cases. *See* Pet. App. 56a-57a (Carney, J., dissenting) (explaining, among other things, how the BIA relied on dictionary definitions of "child abuse" as limited to "cruelty to a child's physical, moral or mental well-being" before adopting its 2009-civil-law survey in *Soram*).

This case shows how unfair this unpredictability can be. As Judge Carney's dissent explains, prior to *Soram* there was every reason to think that the BIA had interpreted the federal statute to exclude state child endangerment statutes—indeed, courts had reached that very conclusion. *E.g.*, *Fregozo v. Holder*, 576 F.3d 1030, 1037 (9th Cir. 2009). But even assuming that question were open, an attorney advising a client would have tried to answer it by applying the standard tools for defining generic federal offenses—looking to *contemporary* dictionaries and state *criminal* codes, other federal definitions of the key terms, and the overall statutory context. *See Esquivel-Quintana*, 137 S. Ct. at 1569-72; *Taylor v. United States*, 495 U.S. 575 (1990). What an attorney could never have anticipated is that the BIA would ignore all these standard tools and apply a never-before-seen survey of

civil laws in effect on a random date more than a decade after Congress enacted the relevant provision.

The uncertainty created by the BIA's methodological wanderlust is only multiplied by the rule it adopted in *Soram*. Under that rule, the BIA makes an apparently subjective judgment as to each state child-endangerment statute about whether the "risk" it requires is "sufficient." *Amici* do not believe that they can confidently predict how this standard, which "floats, unmoored, on the fickle sea of child-rearing conventions," Pet. App. 34a (Carney, J., dissenting), will be applied to *any* state statute that the BIA has not already definitively addressed. That leaves counsel one option only: to advise clients *never* to plead guilty to even the most minor child-endangerment misdemeanor with respect to any state statute where the question is still open. All that can achieve is the needless complication of exceedingly minor cases, and the prospect that immigrants—including long-time lawful permanent residents—who are ultimately deemed *non*-removable will nonetheless spend time in jail because of their refusal to accept a plea they would happily have accepted had they known the immigration consequences with any confidence.

This situation is bad enough on its own terms. But given that the ability to confidently predict immigration consequences is one of the core motivations for the categorical approach, *see Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015), the BIA's result should be recognized as positively self-defeating. The line between (typically, willful) child *abuse* and (typically, careless) child *endangerment* is easy enough to draw; the line between "merely risky" and "sufficiently risky" is a Rorschach test for individual BIA Board Members that

immigration attorneys have no prospect of guessing in advance. And given the deference the Second Circuit seems willing to grant to the BIA on this score, there is no way to guarantee that the Board won't just change its mind on the meaning of any given state offense, or the generic federal offense itself, from year to year or administration to administration.

Amici do not want to leave their clients at the mercy of such an unpredictable interpretive process on an issue of such incredible consequence for them and their families. Unless the BIA's interpretive errors in cases like these are reviewed and corrected, it is not clear that counseling an immigrant client to plead guilty—even to the barest of misdemeanor offenses—will ever be good advice.

CONCLUSION

This Court should grant certiorari, and reverse.

Respectfully submitted,

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