No. 19-1022

In the Supreme Court of the United States

GERARD PATRICK MATTHEWS, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior convictions for child endangerment under New York law were for crimes of "child abuse, child neglect, or child abandonment" under 8 U.S.C. 1227(a)(2)(E)(i).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-63a) is reported at 927 F.3d 606. A prior opinion of the court of appeals (Pet. App. 102a-107a) is not published in the Federal Reporter but is reprinted at 590 Fed. Appx. 75.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 2019. A petition for rehearing was denied on September 18, 2019 (Pet. App. 119a). On October 22, 2019, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including February 14, 2020, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that "[a]ny alien * * * in

and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the" classes of removable aliens specified under 8 U.S.C. 1227. 8 U.S.C. 1227(a). As relevant here, "[a]ny alien who at any time after admission is convicted of * * * a crime of child abuse, child neglect, or child abandonment is deportable." 8 U.S.C. 1227(a)(2)(E)(i).

Neither the INA nor any other federal statutory provision defines "crime of child abuse, child neglect, or child abandonment." The Board of Immigration Appeals, however, has construed this phrase in several published decisions. In 2008, the Board concluded that the phrase encompasses "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." *In re Velazquez-Herrera*, 24 I. & N. Dec. 503, 512 (B.I.A. 2008).

Two years later, the Board held that "'act[s] or omission[s] that constitute[] maltreatment of a child,'" as discussed in *Velazquez-Herrera*, are "not limited to offenses requiring proof of injury to the child." *In re Soram*, 25 I. & N. Dec. 378, 380-381 (B.I.A. 2010) (citation omitted). The Board explained that maltreatment includes some conduct "that threaten[s] a child with harm or create[s] a substantial risk of harm to a child's health or welfare." *Id.* at 382. It clarified, however, that not all acts that pose a risk to a child's health or welfare would constitute maltreatment. *Id.* at 383. The Board explained that it would undertake "a State-by-State analysis" in order "to determine whether the risk of harm required by the endangerment-type language in any given State statute is sufficient" for an offense to

qualify as a crime of child abuse, child neglect, or child abandonment. *Ibid.*

In 2016, the Board applied that analysis to the New York child-endangerment statute, N.Y. Penal Law § 260.10(1) (McKinney Supp. 2013), which makes it a crime 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," *ibid.* See *In re Mendoza Osorio*, 26 I. & N. Dec. 703, 705-712 (B.I.A. 2016). Applying the "'categorical approach,'" which asks "whether 'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition," *Moncrieffe* v. *Holder*, 569 U.S. 184, 190 (2013) (citation omitted), the Board concluded that "section 260.10(1) of the New York Penal Law is categorically a 'crime of child abuse, child neglect, or child abandonment' under" the INA. *Mendoza Osorio*, 26 I. & N. Dec. at 712. Citing New York appellate decisions, the Board explained that a conviction under Section 260.10(1) requires "a showing that the defendant knew that his actions were likely to result in physical, mental, or moral harm to a child," as well as "proof that the harm was 'likely to occur, and not merely possible.'" *Id.* at 706 (citation omitted). The Board further explained that there was no evidence that the New York statute criminalized actions such as "leaving a child unattended for a short period, driving with a suspended license in the presence of a child, [or] committing petit larceny in the presence of a child," *id.* at 707, and therefore no "'realistic probability' that section 260.10(1) would successfully be applied to conduct falling outside" the scope of child abuse or neglect, *id.* at 712 (citation omitted).

Lawful permanent residents who are removable as a result of a conviction for a crime of child abuse, child

neglect, or child abandonment do not lose their eligibility for cancellation of removal if they otherwise satisfy the eligibility requirements. See 8 U.S.C. 1229b(a). The discretionary decision whether to award cancellation of removal turns on a balancing of factors, including duration of residence, family or business ties, good character, employment history, the nature and circumstances of the grounds of removal, and the presence of other criminal violations or evidence of bad character. See *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998).

2. Petitioner, a native and citizen of Ireland, initially entered the United States in 1987 and became a lawful permanent resident in 1989. Pet. App. 70a, 74a. Since then, petitioner has accumulated at least 15 convictions, including a pair of convictions in 2002 and 2003 for violating the New York child-endangerment statute. See *id.* at 75a, 81a-82a. On the first occasion, petitioner exposed himself in a parking lot while a nine-year-old child rode by on a bicycle, and then followed that child while masturbating. *Id.* at 75a-76a, 91a. On the second occasion, petitioner parked near a school, exposed himself, and masturbated in his car in front of two minors. *Id.* at 76a, 91a. Petitioner pleaded guilty on both occasions to violating the New York child-endangerment statute. See *id.* at 75a.

In 2011, the Department of Homeland Security initiated removal proceedings, charging that petitioner was subject to removal under 8 U.S.C. 1227(a)(2)(E)(i) based on those two New York child-endangerment convictions. Pet. App. 70a. An immigration judge initially found petitioner removable, but granted petitioner a waiver of inadmissibility and adjustment of status (a discretionary form of relief from removal). *Id.* at 118a. The Board reversed that grant of discretionary relief

after finding that petitioner had not demonstrated the requisite level of hardship to his U.S. citizen spouse. See *id.* at 109a-111a. The Board also held that petitioner was ineligible for cancellation of removal because he had been convicted in 1990 and 1991 of crimes involving moral turpitude (public lewdness), thereby terminating his accrual of continuous residence well short of the seven years required for that form of discretionary relief, see 8 U.S.C. 1229b(a)(2) and (d)(1). Pet. App. 111a-112a.

The Second Circuit granted petitioner's subsequent petition for review and remanded for a fuller explanation why those public-lewdness convictions were for crimes involving moral turpitude. Pet. App. 105a-106a. On remand, the immigration judge found petitioner removable by virtue of his New York child-endangerment convictions under *Mendoza Osorio*, *Soram*, and *Velazquez-Herrera*, *id.* at 83a, but also found that the public-lewdness convictions were not for crimes involving moral turpitude, *id.* at 87a, thereby rendering petitioner eligible for discretionary relief from removal, see *id.* at 88a-89a, 94a-96a.

The immigration judge nevertheless declined to grant adjustment of status or cancellation of removal, finding that petitioner "does not merit a favorable exercise of discretion" for either of those forms of discretionary relief in light of "his lengthy and extensive criminal history." Pet. App. 90a; see *id.* at 97a. The immigration judge was especially "disturbed by [petitioner's] conduct as it relates to children," finding that petitioner's "attempt to minimize his culpability is indicative of his lack of rehabilitation." *Id.* at 91a. The Board affirmed the immigration judge's decision and

dismissed petitioner's subsequent appeal. *Id.* at 64a-68a.

3. The court of appeals affirmed. Pet. App. 1a-62a.

a. The court of appeals observed that the Board had determined in *Velazquez-Herrera* and *Soram* that a "'crime of child abuse, child neglect, or child abandonment" under the INA "also covers child endangerment offenses where no actual harm or injury occurs, so long as the state statute requires a sufficient risk of harm to a child." Pet. App. 7a-8a (citation omitted). The court explained that in *Florez* v. *Holder*, 779 F.3d 207 (2d Cir. 2015), cert. denied, 136 S. Ct. 1450 (2016), it already had "found the phrase 'crime of child abuse, child neglect, or child abandonment' to be ambiguous," and thus "deferred to the [Board's] conclusion in *Soram* that this phrase encompassed at least some child endangerment offenses" under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 9a. The court further explained that in *Florez*, it had warned that only statutes that "require[], as an element of the crime, a sufficiently high risk of harm to a child" would satisfy the INA's requirements. *Id.* at 10a (citation and emphasis omitted). It observed that the Board "agreed with this position" in *Mendoza Osorio*, *supra*, which held that the New York statute at issue here is a "crime of child abuse, child neglect, or child abandonment" under the INA. Pet. App. 9a; see *id.* at 10a-11a.

The court of appeals rejected petitioner's request to revisit *Florez* in light of *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562 (2017), explaining that *Esquivel-Quintana* simply "reminds courts to use all available tools of statutory construction in order to discern Congress's intent before concluding that a statutory term is ambiguous

and deferring to the implementing agency's interpretation," which "does not cast doubt on *Florez*." Pet. App. 14a-15a. The court also explained that under the "categorical approach," to determine whether a state statute satisfies the INA's definition of a "crime of child abuse, child neglect, or child abandonment," 8 U.S.C. 1227(a)(2)(E)(i), "the adjudicator must 'presume that the conviction rested upon nothing more than the least of the acts criminalized' under the state statute." Pet. App. 17a-18a (citation omitted). The court clarified, however, that "the categorical approach's 'focus on the minimum conduct criminalized by the state statute is not an invitation to apply "legal imagination" to the state offense; there must be a "realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the federal definition of a crime."'" *Id.* at 18a (brackets and citations omitted); *Moncrieffe*, 569 U.S. at 191.

After analyzing New York case law applying the State's child-endangerment statute, the court of appeals concluded that a conviction under the statute required proof of "a knowing mental state coupled with an act or acts creating a likelihood of harm to a child" and was thus a categorical match to a crime of child abuse, child neglect, or child abandonment under the INA. Pet. App. 24a (citation omitted); see *id.* at 20a-24a. The court then held that petitioner had not demonstrated a realistic probability that the New York statute would be applied to conduct that did *not* create a likely risk of harm to a child, such as "in situations that may be illustrative of 'bad parenting' or other 'minor missteps,'" such as "'home alone' cases." *Id.* at 25a. The court explained that under New York case law, "courts are cog-

nizant of the line between 'bad parenting' and child endangerment," and that nobody had identified a "New York appellate decision * * * that has upheld a conviction that sweeps more broadly than the [Board's] definition" of a crime of child abuse, child neglect, or child abandonment under the INA. *Id.* at 26a-27a.

b. Judge Carney dissented. She accepted that the court of appeals was bound by its prior decision in *Florez*, and therefore the determination that a crime of child abuse, child neglect, or child abandonment under the INA includes offenses that criminalize acts or omissions creating a likelihood of harm to a child. See Pet. App. 32a-33a. But in her view, the New York statute swept more broadly than that definition in light of "publicly available data and evidence of prosecutions under the statute," notwithstanding the lack of published appellate decisions. *Id.* at 34a; see *id.* at 43a-62a (reviewing publicly available crime statistics and charging documents).

ARGUMENT

Petitioner renews his contention (Pet. 23-34) that a conviction under the New York child-endangerment statute is not one for a "crime of child abuse, child neglect, or child abandonment" under 8 U.S.C. 1227(a)(2)(E)(i). The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. a. The court of appeals correctly held that the New York child-endangerment statute, N.Y. Penal Law § 260.10(1) (McKinney 1999), is a "crime of child abuse, child neglect, or child abandonment" under 8 U.S.C. 1227(a)(2)(E)(i). That INA provision states that an alien is removable if, following admission, he "is convicted

of *a crime* of domestic violence, *a crime* of stalking, or *a crime* of child abuse, child neglect, or child abandonment." *Ibid.* (emphasis added). The particular repetition and placement of "a crime" in that provision makes clear that Congress intended to specify three distinct crimes that would render such aliens removable—and, critically, that "child abuse, child neglect, or child abandonment" describes a *single* type of crime. As the Board has explained, the phrase "child abuse, child neglect, or child abandonment" thus describes a "unitary concept," and each of the terms should therefore inform the meaning of the others. *In re Soram*, 25 I. & N. Dec. 378, 381 (B.I.A. 2010); see *In re Velazquez-Herrera*, 24 I. & N. Dec. 503, 518 (B.I.A. 2008) (Pauley, Board Member, concurring).

It follows that a crime need not involve actual harm to the child to qualify as a crime of child abuse, child neglect, or child abandonment; a "substantial risk of harm to a child's health or welfare" is sufficient. *Soram*, 25 I. & N. Dec. at 382. After all, the ordinary meanings of "neglect" and "abandonment" do not require actual physical or emotional injury, but instead encompass other types of mistreatment, including insufficient supervision, without regard to whether the mistreatment results in actual harm. See, *e.g.*, *Black's Law Dictionary* 1032 (6th ed. 1990) (*Black's*) (defining "[n]eglect" as "to omit, fail, or forbear to do a thing," "an absence of care or attention in the doing or omission of a given act," or "a designed refusal, indifference, or unwillingness to perform one's duty"); *id.* at 2 (defining "[a]bandonment" in this context as "[d]esertion or willful forsaking" and "[f]or[]going parental duties").

Even petitioner acknowledges that contemporary definitions of "neglect" and "abandonment" in this context include the failure to perform parental acts without regard to whether it results in actual physical or emotional injury to the child. See Pet. 26-27 (citing *Merriam-Webster's Dictionary of Law* (1996) and Bryan A. Garner, *A Dictionary of Modern Legal Usage* (2d ed. 1995)). And the version of *Black's Law Dictionary* in effect in 1996 explains that "[a] child is 'neglected' when," among other things, he "is under such improper care or control *as to endanger* his morals or health." *Black's* 1032 (emphasis added). Those definitions make clear that endangering a child by creating a "substantial risk of harm to a child's health or welfare" constitutes child abuse, child neglect, or child abandonment. *Soram*, 25 I. & N. Dec. at 382. Petitioner's contrary view would read the terms "child neglect" and "child abandonment" out of the statutory text.

At a minimum, the Board's conclusion that "a crime of child abuse, child neglect, or child abandonment" includes endangerment crimes that require "a substantial risk of harm to a child's health or welfare," *Soram*, 25 I. & N. Dec. at 382, is a reasonable construction of the statute under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See *Scialabba* v. *Cuellar de Osorio*, 573 U.S. 41, 56 (2014) (plurality opinion) ("Principles of *Chevron* deference apply when the BIA interprets the immigration laws."); see also *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999). As courts considering Section 1227(a)(2)(E)(i) have uniformly concluded, the phrase "crime of child abuse, child neglect, or child abandonment" is ambiguous. See, *e.g.*, *Florez* v. *Holder*, 779 F.3d 207, 211 (2d Cir. 2015), cert. denied, 136 S. Ct. 1450 (2016); *Ibarra* v.

Holder, 736 F.3d 903, 910 (10th Cir. 2013); *Hackshaw* v. *Attorney General of the United States*, 458 Fed. Appx. 137, 139 (3d Cir. 2012); *Martinez* v. *United States Attorney General*, 413 Fed. Appx. 163, 166 (11th Cir. 2011). Congress did not define that phrase or its constituent terms in Section 1227 or any other portion of the INA. Moreover, "state and federal statutes, both civil and criminal, offer varied definitions of child abuse, and the related concepts of child neglect, abandonment, endangerment, and so on." *Florez*, 779 F.3d at 211.

The Board adopted a reasonable construction of that ambiguous phrase when it concluded in *Soram*, *supra*, that it reaches convictions under some statutes that require proof of conduct that caused a sufficiently substantial risk to the child, without requiring proof of injury to a child. See 25 I. & N. Dec. at 381. In both civil and criminal contexts, the terms in Section 1227(a)(2)(E)(i) are commonly defined to include such conduct. See, *e.g.*, *Velazquez-Herrera*, 24 I. & N. Dec. at 509-511 (surveying criminal statutes); *Soram*, 25 I. & N. Dec. at 382 (citing report of U.S. Dep't of Health and Human Services compiling state definitions of child abuse and neglect); see also *Soram*, 25 I. &. N. Dec. at 386-387 (Filppu, Board Member, concurring) (surveying criminal child abuse statutes at the time of enactment of Section 1227(a)(2)(E)(i)).

It was reasonable for the Board, as the agency charged with administering the INA, to conclude that those widespread definitions furnished the most appropriate construction of "crime of child abuse, child neglect, or child abandonment" under the INA. As the Board observed, Section 1227(a)(2)(E)(i) was enacted "as part of an aggressive legislative movement to expand the criminal grounds of deportability in general

and to create a 'comprehensive statutory scheme to cover crimes against children' in particular," along with a provision making removable those who commit crimes involving sexual abuse of minors. *Velazquez-Herrera*, 24 I. & N. Dec. at 508-509 (quoting *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 994 (B.I.A. 1999) (en banc)); see *Soram*, 25 I. & N. Dec. at 383-384. Contrary to petitioner's suggestion (Pet. 32), the aim of protecting children through Section 1227(a)(2)(E)(i) would be disserved if the provision did not reach aliens convicted of knowingly placing children at substantial risk of harm—simply because of the fortuity that those aliens' willful conduct jeopardizing the safety of children did not ultimately lead to harm in a particular case.

b. Petitioner objects (Pet. 29-30) that the Board's decision in *Soram* relied on a survey of civil, not criminal, state statutes in existence in 1996. That objection is misplaced for three reasons. First, petitioner provides no basis to believe that the phrase "child abuse, child neglect, or child abandonment" carries different meanings in the civil and criminal contexts—or that Congress believed it did in 1996.

Second, the requirement that an alien is potentially rendered removable only if "convicted" of a "crime" falling within the INA category of "child abuse, child neglect, or child abandonment" itself has a substantial limiting effect. 8 U.S.C. 1227(a)(2)(E)(i). That requirement means that removal cannot be based upon an immigration judge's determination that the alien committed acts of child abuse, child neglect, or child abandonment (no matter how broadly defined); based upon a determination of abuse, neglect, or abandonment in child custody or other civil proceedings; or based on anything short of a "convict[ion]" for a "crime" that satisfies the

meaning of "child abuse, child neglect, or child abandonment" in the INA.

Third, *Soram*'s holding is amply supported by consideration of state criminal statutes alone. See *Soram*, 25 I. & N. Dec. at 387-388 (Filppu, Board Member, concurring) (surveying criminal provisions at the time Section 1227(a)(2)(E)(i) was enacted, and concluding that "child endangerment was part of the 'ordinary, contemporary, and common' meaning of a crime of child abuse, child neglect, or child abandonment in 1996") (citation omitted); see also *Ibarra*, 736 F.3d at 915 (finding that in 1996, 48 states and the District of Columbia "had statutes that criminalized endangering or neglecting children without facially requiring a resulting injury," but that most States required a mens rea above criminal negligence).

Petitioner's reliance (Pet. 30-31) on the "structure" of the INA is misplaced. According to petitioner, Congress could not have intended to classify any child-endangerment statute as a crime of child abuse, child neglect, or child abandonment because of the "drastic immigration consequences" of suffering a conviction for such a crime, Pet. 30, including "mak[ing] non-permanent residents ineligible for cancellation of removal," Pet. 21. But in enacting Section 1227, Congress clearly intended to protect children and domestic partners—including by imposing harsh immigration consequences on aliens who commit crimes of domestic violence, stalking, or child abuse, neglect, or abandonment. 8 U.S.C. 1227(a)(2)(E)(i). Petitioner identifies nothing in the INA to suggest that Congress wanted that provision to be artificially narrowed to avoid the very consequences it wrote into law. Moreover, petitioner himself was not subject to the "drastic immigration consequences" of

which he complains: he was admitted as a lawful permanent resident and thus remained eligible for cancellation of removal notwithstanding his convictions for crimes of child abuse, child neglect, or child abandonment under Section 1227. See Pet. App. 90a-97a.

To the extent petitioner suggests (Pet. 31) that crimes resulting "in no meaningful criminal punishment" are not crimes of child abuse, child neglect, or child abandonment under the INA, that suggestion is incorrect. When Congress intends the seriousness of a prior crime, or the severity of the resulting punishment, to affect removability, it says so expressly. *E.g.*, 8 U.S.C. 1101(a)(43)(F) (requiring a crime of violence to have a one-year sentence to constitute an aggravated felony); 8 U.S.C. 1101(a)(43)(G) (same, for a theft offense); 8 U.S.C. 1227(a)(2)(A)(i) (requiring a prior crime involving moral turpitude to have been punishable by a sentence of one year or longer to constitute a removable offense). That Congress did not specify that a prior conviction for a crime of child abuse, child neglect, or child abandonment under 8 U.S.C. 1227(a)(2)(E)(i) be either punishable or punished by some minimum term of imprisonment to render an alien removable strongly suggests that no such minimum applies.

Petitioner's reliance (Pet. 31) on 8 U.S.C. 1184(d)(3)(A) also is misplaced. That provision—enacted nearly a decade after Section 1227(a)(2)(E)(i)—states that for purposes of determining whether a citizen's fiancée or fiancé should be issued a visa, the term "'child abuse and neglect' * * * ha[s] the meaning given such term[] in section 3 of the Violence Against Women and Department of Justice Reauthorization Act of 2005." 8 U.S.C. 1184(d)(3)(A). That provision, in turn, defines "child abuse and neglect" to include, among other things, "an

act or failure to act which presents an imminent risk of serious harm." Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 3(a), 119 Stat. 2964; see 34 U.S.C. 12291(a)(3).

As petitioner acknowledges (Pet. 31), that definition makes clear that "child abuse and neglect" can include acts that create a risk of harm to the child even when no harm actually has materialized—thereby undermining the central premise of petitioner's argument here. Cf. Pet. 27 (suggesting that "'child abuse'" should be "interpreted to require actual harm") (brackets and citation omitted). And whether or not petitioner is correct to assert (Pet. 31) that the 2005 statute expressly defines a higher threshold of risk, it has no bearing on the ordinary meaning of "child abuse, child neglect, or child abandonment" in 1996, or whether the Board's construction of that phrase is reasonable. Cf. *Massachussetts* v. *EPA*, 549 U.S. 497, 530 n.27 (2007) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.") (citation omitted). Indeed, to the extent other statutes are relevant, a more contemporaneous statute addressing domestic violence on Indian reservations defined "child neglect" to include "negligent treatment or maltreatment * * * under circumstances which indicate the child's health or welfare is harmed *or threatened* thereby." Indian Child Protection and Family Violence Prevention Act, Pub. L. No. 101-630, Tit. IV, § 403(4), 104 Stat. 4546 (25 U.S.C. 3202(4)) (emphasis added). That definition is consonant with the Board's interpretation of the similar term in the INA to require a "substantial risk of harm to a child's health or welfare." *Soram*, 25 I. & N. Dec. at 382.

Contrary to petitioner's repeated assertions (Pet. 19, 22, 24-26, 28-32), the decision below does not conflict with this Court's decisions in *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562 (2017), or *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019). In *Esquivel-Quintana*, this Court addressed whether a California statute "criminalizing consensual sexual intercourse between a 21-year-old and a 17-year-old qualifies as sexual abuse of a minor under" 8 U.S.C. 1101(a)(43)(A). 137 S. Ct. at 1567. Because the INA does not define "sexual abuse of a minor," this Court looked to "normal tools of statutory interpretation," starting with "the ordinary meaning" of the text. *Id.* at 1569. The Court observed that in 1996, "the ordinary meaning of 'sexual abuse' included 'the engaging in sexual contact with a person who is below a specified age or who is incapable of giving consent because of age,'" and that the "'generic'" age of consent in 1996 was 16. *Ibid.* (citation omitted). Accordingly, the Court held that the California statute did not qualify as "sexual abuse of a minor" under the INA because "the least of the acts criminalized by the state statute," *id.* at 1568, including engaging in sexual contact with a 17-year-old. See *id.* at 1569-1570. The Court confirmed that conclusion by analyzing "[t]he structure of the INA, a related federal statute, and evidence from state criminal codes." *Id.* at 1570; see *id.* at 1570-1572.

Nothing in the decision below, the Second Circuit's earlier decision in *Florez*, or the Board's decisions in *In re Mendoza Osorio*, 26 I. & N. Dec. 703 (B.I.A. 2016), *Soram*, or *Velazquez-Herrera* conflicts with the mode of analysis set forth in *Esquivel-Quintana*. To the contrary, as explained above, the ordinary meaning of "child abuse, child neglect, or child abandonment" in 1996 necessarily encompasses acts that place a child at

risk of harm, even if the harm does not materialize, thus including child endangerment. And consistent with *Esquivel-Quintana*, the Board considered the INA's structure, other federal statutes, and state statutes in 1996 to reach that same determination. See *Velazquez-Herrera*, 24 I. & N. Dec. at 508-512; *Soram*, 25 I. & N. Dec. at 382-383. The Second Circuit's decision to accept that analysis and conclusion as reasonable therefore does not conflict with *Esquivel-Quintana*. Cf. *Correa-Diaz* v. *Sessions*, 881 F.3d 523, 528 (7th Cir.), cert. denied, 139 S. Ct. 224 (2018) ("[W]e do not believe *Esquivel-Quintana*'s limited holding overruled all of this Court's previous decisions deferring to [the Board's] interpretation of 'sexual abuse of a minor.'").

Likewise, the decision below does not conflict with *Kisor*. There, the Court addressed the deference an agency should receive for its interpretations of its own regulations. See *Kisor*, 139 S. Ct. at 2408. That issue is inapposite here; the court of appeals previously deferred to the Board's interpretation of the INA under *Chevron*, *supra*, not to an interpretation of an ambiguous regulation.

2. Contrary to petitioner's assertion (Pet. 19-23), this case does not implicate a conflict between courts of appeals, because there is no such conflict concerning whether child endangerment offenses requiring a mens rea beyond negligence—such as petitioner's conviction under a statute with a "knowingly" mens rea—provide grounds for removability.

The sole decision on which petitioner relies in asserting a circuit conflict, the Tenth Circuit's decision in *Ibarra*, *supra*, found unreasonable the Board's approach to *negligent* child endangerment offenses—not child endangerment offenses such as petitioner's that require a

more culpable mens rea. *Ibarra* addressed whether it was reasonable for an alien to have been found removable for a child endangerment offense that "fell into the lowest level in both the mens rea and result categories" —an offense involving a negligent act that caused no harm to a child. 736 F.3d at 908 (emphasis omitted). The Tenth Circuit found that Section 1227(a)(2)(E)(i) could not reasonably be construed to extend to such offenses, reasoning that States generally did not criminalize conduct that was both "non-injurious" and also "done with a mens rea of only criminal negligence" when Section 1227(a)(2)(E)(i) was enacted. *Id.* at 915 (emphasis omitted).

In contrast, the Tenth Circuit noted that when Section 1227(a)(2)(E)(i) was enacted, the vast majority of States "had statutes that criminalized endangering or neglecting children without facially requiring a resulting injury" if a more culpable mens rea was established, *Ibarra*, 736 F.3d at 915; see *id.* at 918-921 (appendices categorizing state statutes), although the court noted that "[b]ecause it was unnecessary, we have not assessed whether most states actually interpreted the laws we include in the Appendices to be no-injury crimes," *id.* at 915 n.15.

Because the Tenth Circuit made quite plain in *Ibarra* that it was addressing only the classification of convictions for conduct "committed with only criminal negligence and [that] resulted in no injury," *Ibarra* does not generate a conflict concerning the classification of convictions such as petitioner's that arise under statutes requiring the mens rea of knowledge, rather than mere "criminal negligence." 736 F.3d at 918; see N.Y. Penal Law § 260.10(1) (McKinney Supp. 2013) (making it ille-

gal to "knowingly act[] in a manner likely to be injurious" to a child). Accordingly, petitioner is incorrect in suggesting that the classification of his offense is the subject of a circuit conflict.

To be sure, the Second Circuit's statement in *Florez* that its approach conflicts with that of *Ibarra*, and its criticism of the *Ibarra* decision, see 779 F.3d at 212-213, indicate that the court below may disapprove of *Ibarra*'s treatment of negligence offenses. But because the *Florez* court—like the panel here—had before it only an offense involving a mens rea of knowledge, it did not have the occasion to fully address arguments for the exclusion of negligence offenses from Section 1227(a)(2)(E)(i). And to the extent that either the decision below or *Florez* itself suggests the possibility of a disagreement concerning the treatment of negligence offenses, this would be an inappropriate vehicle to resolve that conflict because a negligence offense is not at issue in petitioner's case.

Finally, the specific question at issue here—whether the New York child-endangerment statute is a "crime of child abuse, child neglect, or child abandonment" under 8 U.S.C. 1227(a)(2)(E)(i)—depends critically on how that statute is interpreted and applied under New York law. See *Moncrieffe* v. *Holder*, 569 U.S. 184, 194-195 (2013); *Mendoza Osorio*, 26 I. & N. Dec. at 706. This Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located." *Elk Grove Unified School District* v. *Newdow*, 542 U.S. 1, 16 (2004); see *Bowen* v. *Massachusetts*, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the

construction of state law."). No sound reason exists to depart from that "settled and firm policy" here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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