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

REPLY BRIEF FOR PETITIONER

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The Immigration and Nationality Act ("INA") targets those convicted of three specific child-related offenses for removal: "abuse," "neglect," and "abandonment." The Board of Immigration Appeals ("BIA"), however, has held that those convicted of a distinct, lesser child-related crime—"endangerment"—are also removable unless the BIA decides that, in its subjective judgment, the "risk of harm" required by a specific state endangerment provision is not "sufficient." *Matter of Soram*, 25 I. & N. Dec. 378, 382-83 (BIA 2010). The result is the "needless and potentially permanent separation of children from their parents" based on isolated missteps around children that hurt no one and do not even merit *probation* under state law. Pet. App. 48a-49a, 61a (Carney, J., dissenting).

Multiple courts of appeals and the BIA itself have recognized that the circuits are in "direct conflict" concerning whether the BIA's treatment of "endangerment" offenses is permissible. *Florez v. Holder*, 779 F.3d 207, 212 (2d Cir. 2015); *see also Martinez-Cedillo v. Sessions*, 896 F.3d 979, 981-82 (9th Cir. 2018) ("circuits have split on this precise issue"); *Matter of Mendoza Osorio*, 26 I. & N. Dec. 703, 704-05 (BIA 2016). As *amici* explain, that conflict has enormous ramifications for the unity of thousands of immigrant families, including families with U.S.-citizen children. AILA Br. 11-13; *see also* Pet. 21.

The conflict does not, as the government claims (at 17-19), turn on the *mens rea* of the particular state endangerment offense at issue. Instead, it focuses on whether *Soram* sets forth a permissible *framework* for classifying state endangerment offenses. Had this

case arisen in the Tenth Circuit, the court would have applied traditional interpretive tools to determine whether New York's endangerment statute constitutes a "crime" of child "abuse," "neglect," or "abandonment," as those terms were understood in 1996. That is the approach consistent with this Court's decision in *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017). But because this case arose in the Second Circuit, the court considered only whether the BIA reasonably determined that the required "risk of harm" was "sufficient[]." Pet. App. 16a.

These two approaches are not just fundamentally different; for Mr. Matthews and likely thousands of other noncitizens convicted of mine-run endangerment misdemeanors, they are also fully dispositive of removability (and eligibility for relief). The government does not seriously defend the Second Circuit's reflexive deference to the agency. And, in attempting to provide the textual analysis the court of appeals refused to give, the government attacks a straw man, arguing only that the statute does not always require actual harm to a child. That is irrelevant. It may be that some "neglect" or "abandonment" statutes do not require harm. But the offense here is *not* "neglect" or "abandonment"; it is a separate child-related offense—*endangerment*—that criminalizes isolated acts, separate from a pattern of neglect or abandonment, that put a child at some risk of harm. As the petition explained (at 26-34), classifying such offenses as a basis for removal conflicts with the statute's text and unreasonably hurts the very children Congress was trying to protect.

This Court should resolve the conflict and reverse the Second Circuit.

I. The Court should resolve the acknowledged circuit split concerning a frequently recurring issue of enormous importance to immigrant families.

1. The government's assertion (at 17) that "this case does not implicate a conflict between courts of appeals" flies in the face of what those courts and even the BIA have recognized. In *Florez*, the Second Circuit acknowledged that its deference to *Soram* placed it "in direct conflict with the Tenth Circuit's recent decision in *Ibarra*." 779 F.3d at 212; *see Ibarra v. Holder*, 736 F.3d 903 (10th Cir. 2013). The Ninth Circuit agreed: Facing the question whether to defer to *Soram*, the court recognized that "the circuits have split on this precise issue." *Martinez-Cedillo*, 896 F.3d at 981-82. It then "join[ed] the Second Circuit in deferring to [*Soram*]," *id.*, though it granted rehearing en banc and ultimately dismissed the petition as moot after the petitioner passed away, 923 F.3d 1162 (9th Cir. 2019).

The BIA, too, has recognized that, because of the circuit split, its approach to endangerment convictions varies depending on the circuit from which the case arose. In *Mendoza Osorio*, the BIA observed that it could apply *Soram* to the New York endangerment provision at issue only because, *unlike the Tenth Circuit*, the Second Circuit "held that our precedent decisions provided a reasonable interpretation of a statutory ambiguity and accorded them deference under *Chevron*." 26 I. & N. Dec. at 704.

The government wrongly contends (at 17-20) that the circuit conflict only implicates endangerment provisions with a *mens rea* of negligence. As the courts of appeals themselves recognize, the conflict is whether

Soram permissibly interpreted the statute as to the *class* of child-endangerment provisions—*i.e.* provisions criminalizing single incidents in which a child is placed at some risk of harm. The Tenth Circuit held that it does not, and that the correct classification of an endangerment provision turns on evaluating whether the given provision constitutes a "crime" of child "abuse," "neglect," or "abandonment" as those terms were understood at the time the statute was enacted. The Second Circuit, by contrast, deferred to *Soram* without meaningfully engaging with the statute's text, and hence reviews only whether the BIA reasonably applied that decision. The Second Circuit thus recognized a "direct conflict" with *Ibarra* even though the court in *Florez* was considering a challenge to *Soram*'s approach to endangerment *generally*, outside the context of *any* specific endangerment provision. *Florez*, 779 F.3d at 209. And the BIA, in evaluating the precise endangerment provision at issue here, recognized that it must apply a different approach to endangerment depending on whether a case arises from inside or outside the Tenth Circuit. *Mendoza Osorio*, 26 I. & N. Dec. at 704.

It is true that, as the government notes (at 18-19), the Tenth Circuit analyzed a negligent endangerment offense. But that does not minimize the relevance of the circuit conflict. Had this case arisen in the Tenth Circuit, the court would have applied traditional interpretive tools to evaluate whether the type of mine-run endangerment offense at issue qualified as a "crime" of child "abuse," "neglect," or "abandonment." But because this case arose in the Second Circuit, the court considered only whether the BIA permissibly applied *Soram*—*i.e.*, permissibly concluded that the "risk of harm" required by New York's endangerment

provision was, in some abstract sense, "sufficient." That is a fundamentally different inquiry—and the difference was dispositive here. *See* Pet. 26-32; pp. 7-11, *infra*.[1]

2. Certiorari is also warranted given the blatant conflict between the Second Circuit's decision and this Court's decision in *Esquivel-Quintana*. As the petition explained (at 16, 24-25), *Esquivel-Quintana* concerned a question that is structurally identical to the one presented here, but this Court's decision is irreconcilable with the Second Circuit's decision in *Florez*. *Esquivel-Quintana* held that the INA, read using traditional interpretive tools, unambiguously precluded the BIA's interpretation of a generic immigration offense *even though* the statutory phrase was undefined and state laws differed, whereas the Second Circuit in *Florez* held that the INA was ambiguous *solely because* the statutory phrase was undefined and state laws differed. While *Florez* pre-dated *Esquivel-Quintana*, the Second Circuit in this case refused to revisit *Florez* in light of this Court's decision. Pet. App. 15a; *see* Pet. 16.

Tellingly, the government does not even try to reconcile the Second Circuit's "reflexive" deference with *Esquivel-Quintana*. Instead, the government claims (at 17) that the *BIA* applied the correct interpretive tools. That is simply wrong: *Soram* ignores all traditional interpretive tools, relying instead on a survey

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[1] For similar reasons, the government is wrong (at 19-20) that the question presented turns on interpretation of New York law. The question is about the meaning *of the INA*—specifically, whether the INA classifies mine-run state endangerment offenses (of which New York's is one example) as removable offenses.

of state *civil* law in force *more than a decade* after Congress enacted the relevant provision of the INA. *See* Pet. 8, 26-32. And, in endorsing the BIA's extra-statutory decision, the Second Circuit did not "exhaust[] all the 'traditional tools' of construction" by "carefully consider[ing] the text, structure, history, and purpose," as this Court's precedents require. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019).[2] The court simply decided that, because the interpretive question appeared "difficult," it would defer to any "reasonable" agency interpretation, even if that interpretation was not "the best interpretation, or the majority interpretation" of the statutory terms at the time the statute was enacted. *Florez*, 779 F.3d at 211-12. That is a particularly egregious example of the type of "reflexive" deference to the agency that this Court has repeatedly rejected—both inside and outside the immigration context. *Kisor*, 139 S. Ct. at 2415; *see also Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

3. Immediate review is also necessary because—as the government does not dispute—the issue recurs frequently and is of great importance to immigrant families. There are more than four thousand endangerment arrests per year in New York, and undoubtedly thousands more in other states. Pet. 20; Pet App. 63a. Those arrests are often for minor missteps by otherwise conscientious parents—such as leaving children briefly unattended—and often do not even merit probation under state law. Pet. 9, 21; Pet. App. 47a-49a, 63a. Thus, as the dissent below, other courts

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[2] Though *Kisor* involved the interpretation of regulations, Opp. 17, it explicitly invoked the *Chevron* framework. 139 S. Ct. at 2415.

of appeals, and *amici* family and domestic violence groups have all recognized, the BIA and Second Circuit opinions lead to results that are "profoundly unfair, inequitable, and harsh," *Martinez v. U.S. Att'y Gen.*, 413 F. App'x 163, 168 (11th Cir. 2011), exposing children to "more danger, not less," AILA Br. 5, and "inflict[ing] needless suffering on some of the most vulnerable members of our society," Pet. App. 61a-62a (Carney, J., dissenting).

4. The government does not dispute that, given the entrenched disagreement on *Soram*'s validity and the numerous, thorough opinions addressing both sides of the issue, further percolation would serve no purpose. Pet. 22-23. Similarly, the government does not dispute that this case is a good vehicle for addressing the question presented: Petitioner preserved the issue throughout his proceedings, and it is dispositive of his removability.[3] Pet. 34-35.

II. The Second Circuit's decision is wrong.

A. The statute, read using traditional interpretive tools, precludes classifying mine-run endangerment provisions like New York's as removable offenses.

The government does not—and could not—defend the Second Circuit's refusal to engage with the statute before deeming it ambiguous. *See* Pet. 23-26. Instead,

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[3] The government's characterization (at 4) of Mr. Matthews's conduct is irrelevant and misleading, as it rests entirely on unsubstantiated allegations in police reports. As this Court recognized in *Shepard v. United States*, 544 U.S. 13, 21-23 (2005), Mr. Matthews's guilty plea did not necessarily admit those facts, and Mr. Matthews has consistently and strenuously denied them, *e.g.*, A.R. 1286-1290.

the government spends most of its opposition refuting an argument petitioner never made, arguing that the "crimes" of child "abuse," "neglect," or "abandonment" do not always require harm. But petitioner's argument is not that the generic federal offense *always* requires harm. Petitioner's argument is that the generic offense does not include mine-run offenses of child *endangerment*—a distinct, lesser type of child-related offense than those specified in the statute that criminalizes individual acts that place a child at some risk of harm. The government does not, and cannot, seriously contest that the statute's text, read using the very interpretive tools this Court applied in *Esquivel-Quintana*, precludes classifying the minor missteps criminalized by endangerment as a basis for removal.

1. Contemporary dictionary definitions of the statutory terms do not encompass the type of generic endangerment offense at issue here. Pet. 26-27. The government notes (at 10-11) that definitions of "neglect" and "abandonment" include some non-injurious conduct, but that misses the point. Those definitions encompass non-injurious conduct only in limited situations, such as when a child is "under … improper care or control" or is "[d]esert[ed] or willful[ly] forsak[en]." Opp. 9-10. Not one definition of the statutory terms encompasses an endangerment offense like New York's that criminalizes isolated acts, including by an otherwise-responsible parent, that place a child at risk of harm—acts like leaving a sleeping child briefly unattended while buying groceries for dinner, *People v. Reyes*, 872 N.Y.S.2d 692 (N.Y. Crim. Ct.

2008), or leaving children in the care of a grandparent while at work, *Ibarra*, 736 F.3d at 905 & n.3.[4]

2. Only fifteen states and the District of Columbia defined the statutory terms in 1996 to encompass endangerment; the other thirty-five states either defined endangerment as a separate offense or did not criminalize endangerment at all. Pet. 28-30. Even the Second Circuit recognized that *Soram*'s treatment of endangerment crimes conflicts with the majority approach in 1996. *Florez*, 779 F.3d at 212. The government identifies no error in the petition's classification of these state offenses.

Rather than engage with the petition's analysis, the government claims (at 13) that the concurrence in *Soram* and the Tenth Circuit in *Ibarra* reached different conclusions. But, as the Tenth Circuit recognized, the concurring Board Member in *Soram* "relied on several non-criminal laws and unfortunately misunderstood many of the criminal child endangerment laws he did cite." *Ibarra*, 736 F.3d at 912. The government's reliance (at 13) on *Ibarra* is even further off-base, as *Ibarra*'s analysis was not limited to endangerment, but considered whether endangerment *or neglect or abandonment* statutes had a *mens rea* of criminal negligence. Nothing in *Ibarra* suggests that most states in 1996 defined "abuse," "neglect," or "abandonment" to encompass the type of mine-run endangerment offense at issue here. The petition's classifications—which, again, the government does not challenge—

[4] Whether the statute identifies three separate generic crimes or, as the government insists (at 9), a "unitary concept," is irrelevant. Either way, the generic offense(s) cannot encompass state offenses that are broader than "abuse," "neglect," and "abandonment."

correctly characterize the 1996 state criminal laws, and show that they generally excluded generic endangerment from "abuse," "neglect," and "abandonment."

3. The structure of the INA—which groups the relevant provision with other serious offenses, all of which lead to drastic immigration consequences—also shows that Congress did not intend the provision to sweep in misdemeanor endangerment provisions that criminalize minor conduct and are often associated with no meaningful punishment. Pet. 30-31; AILA Br. 11-12. The government responds (at 13) that Congress intended to "protect children," but cannot explain why removing children from their parents based on minor, one-off parenting mistakes achieves, rather than undermines, that goal.

The government points (at 4, 14) to cancellation of removal as mitigating this harsh result. But it ignores that a conviction for abuse, neglect, or abandonment makes most noncitizens ineligible for cancellation, including cancellation for "battered spouse[s] or child[ren]." Pet. 5-6.

4. Another federal statute defines "criminal convictions" for "child abuse and neglect" as limited to conduct that creates "an imminent risk of serious harm"—a far more limited set of conduct than required by New York's (or any other state's) generic endangerment provision. Pet. 31-32. The government contends (at 15) that this favors its position, but misunderstands the argument: as explained above, petitioner argues *not* that actual harm is required, but that generic endangerment provisions like New York's stretch far beyond the "abuse," "neglect," and "abandonment" identified in the statute. While the government is right that, as the petition acknowledged (at

31), this provision was enacted in 2005, the government offers no reason to think that Congress intended that the *exact same terms* have different meanings in different parts of immigration law. Indeed, if anything, child "abuse" and "neglect" should be read more *narrowly* in an offense that leads to removal and other drastic immigration consequences than in a provision impacting only visa eligibility. Pet. 31-32.

The government's reliance (at 15) on a definition of *civil* neglect in Indian law is misplaced. That provision is understandably broad given that it is not limited to *crimes* of neglect and was intended simply to collect information and allocate resources. *See* 25 U.S.C. §§ 3201, 3203. Moreover, even that definition is not "consonant" with *Soram*, Opp. 15, as it does not encompass isolated acts, but only overall "negligent treatment or maltreatment" of a child.

In sum, every interpretive tool this Court applied in *Esquivel-Quintana* shows that the statute precludes the BIA's attempt to classify most mine-run endangerment offenses as crimes of child "abuse," "neglect," or "abandonment."

B. The BIA's decision is not reasonable.

Even if there were relevant ambiguity, *Soram* is unreasonable for at least two reasons. First, the BIA's decision has the perverse effect of harming the very children Congress was trying to protect. Pet. 32-33. As *amici* explain, the BIA's decision "separate[s] children from parents who remain in the best position to care for them," thus placing children in "*more* [danger] than they would be [in] absent this unnecessary government intervention." AILA Br. 12. Judge Carney similarly recognized that *Soram* causes "the needless

and potentially permanent separation of children from their parents." Pet. App. 61a-62a. Tellingly, the government neither disputes that *Soram* leads to the separation of children from generally-caring parents nor attempts to reconcile that result with Congress's undisputed goal of "protect[ing] children." Opp. 13.

Second, *Soram*'s subjective focus on whether the BIA deems the required "risk of harm" to be "sufficient" undermines a key goal of the categorical approach by making it practically impossible to predict how the BIA (or a court of appeals that defers to *Soram*) will treat a given state endangerment provision. Pet. 33-34. As *amici* explain at length (at 13-17), "the line between 'merely risky' and 'sufficiently risky' is a Rorschach test for individual BIA Board Members" that no one can answer in advance—especially not a layperson deciding whether to plead guilty. Again, the government offers no response.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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