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22-863

No.

IN THE

Supreme Court of the United States

RAFAEL DIAZ-RODRIGUEZ,

Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Immigration and Nationality Act provides that noncitizens may be removed, and are ineligible for many forms of discretionary relief from removal, if they have been "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 conviction for a state crime of child endangerment that criminalizes a negligent act that creates a risk of harm to a child, even if no harm actually ensues.

PARTIES TO THE PROCEEDING

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

RELATED PROCEEDINGS

Diaz-Rodriguez v. Garland, No. 13-73719 (9th Cir.) (en banc decision issued and judgment entered December 8, 2022)

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Rafael Diaz-Rodriguez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

The Ninth Circuit's highly-fractured en banc decision in this case deepens an acknowledged circuit conflict on an issue of great importance to many noncitizen parents and their children: Whether a misdemeanor conviction based on a single, negligent act that creates a *risk* of harm to a child makes a lawful permanent resident removable and a non-permanent resident ineligible for many forms of immigration relief even if no harm actually ensues. The Ninth Circuit's interpretation of the statute leads to results that other courts of appeals have described as "profoundly unfair, inequitable, and harsh," *Martinez v. U.S. Att'y Gen.*, 413 Fed. Appx. 163, 168 (11th Cir. 2011), such as ordering that a single mother be removed for leaving her unharmed children alone when she went to work, *Ibarra v. Holder*, 736 F.3d 903, 905 & n.3 (10th Cir. 2013). This Court should grant certiorari to resolve the circuit conflict and reverse the Ninth Circuit.

The Immigration and Nationality Act (INA) makes noncitizens removable, and ineligible for many forms of relief from removal, if they have been convicted of one of three specific crimes against children: "a crime of child abuse, child neglect, or child abandonment." 8 U.S.C. § 1227(a)(2)(E)(i). The Board of Immigration Appeals (Board) has interpreted that decision to sweep in most convictions for state crimes of child "endangerment." *Matter of Soram*, 25 I. & N. Dec. 378 (BIA 2010). These endangerment statutes are generally misdemeanors that result in little, if any, criminal punishment. *See, e.g.*, *Matthews v. Barr*, 927 F.3d

606, 631 (2d Cir. 2019) (Carney, J., dissenting) (explaining that fewer than twenty percent of convictions for New York's endangerment offense lead to any imprisonment). Though endangerment statutes vary in certain ways—including, for instance, the required mens rea and whether the defendant must have some relationship with the child—the unifying feature of endangerment crimes is that they criminalize an act that, according to a judge or jury, created a risk of harm to a child, even if the child is never actually harmed. *See* Merriam-Webster's Dictionary of Law 160 (1996) ("endangerment" means "the crime or tort of exposing others to possible harm or danger").

There is a recognized circuit conflict concerning whether the Board has permissibly classified endangerment offenses with a mens rea of criminal negligence as crimes of child "abuse," "neglect," or "abandonment." The Tenth Circuit held—in a case involving a single mother who inadvertently left her children alone when she went to work—that the "statutory text" does not "grant the BIA the sweeping interpretive license it has taken" by reading the statute to encompass negligent endangerment. *Ibarra*, 736 F.3d at 910. The Eleventh Circuit subsequently "disagree[d]" with the Tenth Circuit and deferred to the Board. *Bastias v. U.S. Att'y Gen.*, 42 F.4th 1266, 1272-74 (11th Cir. 2022).

The Ninth Circuit's fractured en banc decision in this case deepens that acknowledged split. A four-judge plurality found the statute "susceptible" to multiple interpretations and deferred to the Board—and, in doing so, "join[ed] the Eleventh Circuit" and "disagree[d] with the Tenth Circuit." Pet. App. 55a, 58a. A two-judge concurrence identified its own set of

elements for the generic offense of "child neglect" and held that California's endangerment statute falls within that generic definition. Pet. App. 77a, 86a (Collins, J., concurring in the judgment). Five judges dissented, agreeing with the Tenth Circuit that the statute's text precludes classifying negligent endangerment as a removable offense. Pet. App. 138a-139a (Wardlaw, J., dissenting).

This Court should grant certiorari to resolve this conflict. The question whether a conviction for negligent endangerment is a removable offense arises frequently: It has been the subject of multiple published decisions in recent months and is at issue in at least a half-dozen other appeals currently pending in the Ninth Circuit alone. When the question presented does arise, it is incredibly important, as it often determines whether noncitizen parents can remain in this country to raise their children. Ms. Ibarra, for instance, would likely have been separated from her U.S.-citizen children, possibly forever, were it not for the Tenth Circuit's decision. Mr. Diaz-Rodriguez, by contrast, will be separated from his long-time partner, children and grandchildren—who he lives with and works to support—absent action from this Court. Mr. Diaz-Rodriguez should not suffer a different fate from Ms. Ibarra simply because he lives in California instead of Colorado.

Certiorari is particularly important because the Ninth Circuit is wrong. Traditional interpretive tools make clear that "endangerment" is not a subset of "abuse," "neglect," or "abandonment." It is instead a distinct child-related offense—one that the statute does *not* identify as removable offense.

Notably, even the courts that have deferred to the Board's classification of child endangerment as a removable offense have recognized that the Board *may well be wrong*. The Eleventh Circuit in *Bastias* recognized that there are "good arguments going both ways" on the merits, but deferred to the agency without weighing those arguments. 42 F.4th at 1272. The Ninth Circuit plurality in this case concluded that the statute was "susceptible" to a reading that excluded negligent endangerment, but rejected that reading because the agency is free, in "formulat[ing] ... policy," to adopt an interpretation that is not "the one a court might think best." Pet. App. 37a, 46a-48a. And the Second Circuit, in considering a closely related question, wrote that it was "unlikely" that the Board's interpretation was correct, but held that because the agency had provided an "authoritative" interpretation, the court's interpretation was "irrelevant." *Florez v. Holder*, 779 F.3d 207, 214 (2d Cir. 2015). Such deference improperly "shirk[s] [judges'] 'duty of interpreting the laws,'" hence "exacerbat[ing] the risk of the 'judicial power be[ing] shared with the Executive Branch' in violation of Article III.'" *Bastias*, 42 F.4th at 1278 (Newsom, J., concurring) (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2437 (2019) (Gorsuch, J., concurring in the judgment)).

This Court should grant the petition.

OPINIONS BELOW

The en banc decision of the court of appeals (Pet. App. 1a-146a) is reported at 55 F.4th 697. The decision of the three-judge panel of the court of appeals (Pet. App. 147a-193a) is reported at 12 F.4th 1126. The decisions of the Board of Immigration Appeals

(Pet. App. 194a-197a) and the immigration judge (Pet. App. 198a-215a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION 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. * * * *

STATEMENT

A. The circuits are divided on whether negligent child endangerment is a removable offense.

1. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress amended the INA to make noncitizens 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 Board to decide which child-related offenses merit removal. Instead, the statute identifies three child-related "crime[s]": "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. As Senator Dole, one of the sponsors of the provision, put it, the child-abuse provision was intended "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: "stalking" and "crime[s] 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), (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)). It also ensured that isolated mistakes 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 Matthews*, 927 F.3d at 636-37 (Carney, J., dissenting).

2. Rather than hew to the child-related offenses the statute enumerates, the Board has gradually

expanded its interpretation of the statute to include broad child-endangerment provisions that criminalize harmless mistakes.

a. The Board's initial interpretations of the child-abuse provision required actual harm to the child. 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)); *see also* Black's Law Dictionary 377 (6th ed. 1990) (defining "cruelty" as "the wanton, malicious, and unnecessary infliction of pain upon the body, or the feelings and emotions"). Similarly, in *Velazquez-Herrera*, 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." 24 I. & N. Dec. at 512.

By requiring "cruelty," "maltreatment," or "impair[ment]" of a child's "well-being," these decisions implied 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. *Fregozo v. Holder*, 576 F.3d 1030, 1037 (9th Cir. 2009) (under *Velazquez-Herrera*, "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 Fed. Appx. 679, 682 (2d Cir. 2009)

(suggesting that child endangerment "go[es] beyond even the BIA's definition of child abuse" in *Velazquez-Herrera*).

b. 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 the terms were defined in comparable statutes. *See Esquivel-Quintana v. Sessions*, 581 U.S. 385, 395-98 (2017) (applying these interpretive tools to conclude that the INA unambiguously precluded 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.

The Board ultimately concluded that the INA's child-abuse provision sweeps in state endangerment offenses unless the Board determines that the state offense does not require a "risk of harm" that the Board deems "sufficient." *Id.* at 381-83. Whether a given state statute is a removable offense thus turns on a Board member's subjective determination as to what "risk of harm" is "sufficient" to warrant removal. *Id.* at 383-86. The Board held that the Colorado statute at issue in *Soram* requires a "sufficient" risk. *Id.*

c. Since *Soram*, the Board has made clear that "sufficient" risk is a low bar, holding that broad endangerment statutes in New York, *Matter of Mendoza*

Osorio, 26 I. & N. Dec. 703 (BIA 2016), and Oregon, *Matter of Rivera-Mendoza*, 28 I. & N. Dec. 184 (BIA 2020), are removable offenses.

Mendoza Osorio addressed New York's endangerment provision—N.Y. Penal Law § 260.10(1)—which 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." New York's highest court has interpreted this statute broadly. *E.g.*, *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. *People v. Reyes*, 872 N.Y.S.2d 692 (Crim. Ct. 2008). Fewer than twenty percent of convictions lead to *any* imprisonment. *Matthews*, 927 F.3d at 631 (Carney, J., dissenting). Nevertheless, the Board held that the New York statute requires a "sufficiently high risk of harm" to qualify as a removable offense under *Soram*. *Mendoza-Osorio*, 28 I. & N. Dec. at 705-12.

Rivera-Mendoza addressed Oregon's endangerment provision—O.R.S. § 163.545(1)—which makes it a misdemeanor to, "with criminal negligence, ... leave[] [a] child [under 10 years of age] unattended in or at any place for such period of time as may be likely to endanger the health or welfare of such child." Consistent with its broad "may be likely to endanger" standard, that statute criminalizes, for instance, leaving children in a car for twenty to thirty minutes while going into a store to buy diapers for those children. *State v. Obeidi*, 155 P.3d 80, 81 (Or. Ct. App. 2007). Again, the Board held that the statute requires a

"sufficient" risk of harm to be a removable offense. *Rivera-Mendoza*, 28 I. & N. Dec. at 190.

3. Even before the Ninth Circuit's en banc decision in this case, the Tenth and Eleventh Circuits disagreed as to whether the Board's decision in *Soram* permissibly classifies negligent child endangerment as a removable offense.

a. In *Ibarra*, the Tenth Circuit held that the INA's text does not permit the Board to classify negligent endangerment as a removable offense. Ms. Ibarra was a mother who, when she went to work, left her children with their grandmother 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. Based on this incident, Ms. Ibarra pleaded guilty to one count of negligent endangerment under Colorado law. 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 the 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 negligent endangerment as a removable offense is foreclosed by the "plain language of the statute" as interpreted using "traditional tools of statutory construction." *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 Board relied on state *civil* statutes to justify its interpretation. *Id.* at 912-13. Surveying state criminal law as of 1996, the Tenth Circuit concluded that the Board could not permissibly classify "criminally negligent non-injurious conduct" as child abuse, neglect, or abandonment.[1] *Id.* at 917-18.

b. The Eleventh Circuit in *Bastias* considered a Florida statute that criminalizes "a single incident or omission," involving a mens rea of criminal negligence, that "could reasonably be expected to result in[] serious physical or mental injury, or a substantial risk of death, to a child." Fla. Stat. §§ 827.03(1)(e), (2)(d). The court recognized that this statute would not be a removable offense under the Tenth Circuit's decision in *Ibarra*. But the Eleventh Circuit "disagree[d]" with the Tenth Circuit. 42 F.4th at 1274. The court could "see good arguments going both ways" as to whether the statute unambiguously precludes the Board's construction at *Chevron*'s first step. *Id.* at 1272. But the Eleventh Circuit had previously described the "child abuse, child neglect, or child abandonment" provision as "ambiguous" in *Pierre v. U.S. Attorney General*, 879 F.3d 1241, 1249 (11th Cir. 2018), a case that did not involve child endangerment. The *Bastias* court held that it was bound by *Pierre* to find the statute ambiguous. 42 F.4th at 1272. Turning to *Chevron*'s second step—which, according to the court, permits "policy-

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[1] The Tenth Circuit has subsequently held that the Board permissibly classified *reckless* endangerment as a removable offense. *Zarate-Alvarez v. Garland*, 994 F.3d 1158, 1165-66 (10th Cir. 2021). But that decision reinforced *Ibarra*'s holding that "non-injurious criminally negligent conduct" falls outside the statute's reach. *Id.* at 1164 (quoting *Ibarra*, 736 F.3d at 918).

based choices to adopt less-than-best readings" of a statute—the court concluded that the Board's decision was sufficiently reasonable to warrant deference. *Id.* at 1273-76.

Judge Newsom concurred in his own panel decision to criticize *Pierre*. As Judge Newsom explained, the Court had found the statute ambiguous in *Pierre* with two largely conclusory sentences of analysis that included "[n]o assessment of ordinary meaning, no consideration of the canons, no analysis of statutory structure—no nothing." 42 F.4th at 1276 (Newsom, J., concurring). This "blink and you miss it" approach to *Chevron*'s first step, Judge Newsom argued, conflicts with this Court's decisions in cases like *Esquivel-Quintana* as well as the separation of powers. *Id.* at 1276-78.

The Eleventh Circuit denied rehearing en banc.[2]

c. While other courts of appeals have not yet weighed in on the precise circuit conflict presented here, the Second Circuit has repeatedly considered whether the Board permissibly classified New York's endangerment offense—which has a mens rea of knowledge, not negligence—as a removable offense. *E.g.*, *Kerr v. Garland*, __ Fed. Appx. __, 2023 WL 193629, at *1 (2d Cir. 2023); *Matthews*, 927 F.3d at 610; *Richards v. Sessions*, 711 Fed. Appx. 50, 53 (2d Cir. 2017); *Florez v. Holder*, 779 F.3d 207 (2d Cir.

[2] A petition for a writ of certiorari is being filed in *Bastias* seeking a hold pending disposition of this petition.

2015); *Guzman v. Holder*, 340 Fed. Appx. 679 (2d Cir. 2009).[3]

Most notably, the Second Circuit in *Florez* deferred to the Board's decision in *Soram* based on reasoning that, in the Second Circuit's view, created a "direct conflict" with the Tenth Circuit's decision in *Ibarra*. 779 F.3d at 212. But while the Second Circuit deferred to the Board's interpretation, it did not endorse it. To the contrary, the Second Circuit's opinion concluded: "Whether we would have read the statutory wording the same way in the absence of an authoritative interpretation by the BIA is *unlikely but irrelevant*." *Id.* at 214 (emphasis added).[4]

B. The Ninth Circuit's fractured en banc decision in this case deepens the circuit conflict.

1. Petitioner Rafael Diaz-Rodriguez is a native and citizen of Mexico. He is fifty-two years old. Pet. App. 201a. He was admitted to the United States as a lawful permanent resident more than thirty years ago, in 1990. Pet. App. 201a. He has been with his partner, Ruth De La Rosa, for twenty-five years. Pet. App. 201a. They have two children together, Rafael Jr., who is twenty-five years old, and Paula, who is nineteen years old. Pet. App. 201a. His parents, eight

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[3] Other courts of appeals have found the statute ambiguous and deferred to the Board's decision in *Soram*. *E.g.*, *Garcia v. Barr*, 969 F.3d 129, 133-34 & n.1 (5th Cir. 2020); *Mondragon-Gonzalez v. U.S. Att'y Gen.*, 884 F.3d 155, 158-59 (3d Cir. 2018). None of those cases, however, involved an endangerment provision—let alone a negligent endangerment provision—and they are thus largely irrelevant to the question presented here.

[4] A petition for a writ of certiorari from the Second Circuit's latest decision on this issue—*Kerr v. Garland*—is being filed contemporaneously with this petition.

siblings, and dozens of nieces and nephews all live in the United States, and almost all of them are citizens or lawful permanent residents. Pet. App. 201a. Since coming to this country, Mr. Diaz-Rodriguez has worked in construction to support his family. Pet. App. 204a.

When he was younger, Mr. Diaz-Rodriguez suffered from alcoholism, and during that time was convicted of several offenses related to his drinking. Pet. App. 202a-203a; *see also* Pet. App. 212a (immigration judge noting that "nearly all of his arrests and criminal convictions have involved alcohol"). As relevant here, Mr. Diaz-Rodriguez was twice convicted, in 2003 and 2009, of driving under the influence of alcohol. No one was injured. Because, on each occasion, one of his children was in the car with him, he also was charged with and pleaded guilty to child endangerment under California Penal Code § 273a(a). That statute makes it a crime for anyone "having the care or custody of any child" to, "under circumstances or conditions likely to produce great bodily harm or death, ... willfully cause[] or permit[] that child to be placed in a situation where his or her person or health is endangered." Though the California statute uses the word "willfully," the statute requires only criminal negligence, such that the defendant need not be subjectively aware of the risk involved. *People v. Valdez*, 42 P.3d 511, 513-14, 518-19 (Cal. 2002). The statute is a "wobbler," meaning that it can be charged as either a felony or misdemeanor. *People v. Mincey*, 827 P.2d 388, 416 (Cal. 1992). On each occasion, Mr. Diaz-Rodriguez was charged with only a misdemeanor. A.R. 228-30, 393-94.

In 2012, Mr. Diaz-Rodriguez began taking classes to address his alcoholism. Pet. App. 203a-204a. During the decade since he began those classes, Mr. Diaz-Rodriguez has not had a single alcoholic drink and has had no interaction with law enforcement. *See* C.A. Decl. in Support of Mot. to Stay Mandate, ECF 107-2, at 2. He currently lives with Ruth, Rafael Jr., and two of his grandchildren, who are three and four years old. *Id.* His daughter, Paula, serves in the U.S. Army. *Id.* Mr. Diaz-Rodriguez continues to work in construction to support his family. *Id.*

2. In November 2012, the Department of Homeland Security served Mr. Diaz-Rodriguez with a Notice to Appear, charging him as removable based on his 2009 endangerment conviction. Pet. App. 199a. Applying *Soram*, the immigration judge held that Mr. Diaz-Rodriguez was removable and denied his application for cancellation of removal. Pet. App. 206a-215a. The Board, also applying *Soram*, dismissed Mr. Diaz-Rodriguez's appeal. Pet. App. 194a-197a.

3. a. A three-judge panel of the Ninth Circuit granted Mr. Diaz-Rodriguez's petition for review in a split decision. Pet. App. 147a-193a. As Judge Watford's majority opinion recognized, the Ninth Circuit had previously deferred to *Soram* in its split panel decision in *Martinez-Cedillo v. Sessions*, 896 F.3d 979 (9th Cir. 2018). Pet. App. 148a. But the court had granted rehearing en banc in that case and ultimately vacated the panel's decision when the petitioner passed away. Pet. App. 148a. That decision was therefore not binding. Pet. App. 150a-154a.

Reviewing the question afresh, the court held that the statute's text unambiguously precluded the Board's classification of negligent endangerment

offenses like California's as crimes of child "abuse," "neglect," or "abandonment." Pet. App. 154a-166a. The court applied the same interpretive tools this Court had applied in *Esquivel-Quintana*—including dictionary definitions, statutory structure, and state criminal codes—and "agree[d] with the Tenth Circuit[]" that "Congress's intent is not so opaque as to grant the BIA the sweeping interpretive license it has taken." Pet. App. 165a-166a (quoting *Ibarra*, 736 F.3d at 910).

Judge Callahan dissented, arguing that the court remained bound by *Martinez-Cedillo* and that, even if it were not, the statute is ambiguous and the Board's interpretation is entitled to deference. Pet. App. 174a-193a.

b. The Ninth Circuit then granted rehearing en banc. The en banc court denied the petition for review in a six-to-five vote, though no opinion received a majority.

A four-judge plurality opinion "disagree[d] with the Tenth Circuit" and "join[ed] the Eleventh Circuit," finding the statute ambiguous and the Board's interpretation entitled to deference. Pet. App. 55a, 58a. After applying standard interpretive tools, the plurality concluded that the statute is "susceptible to an interpretation of 'child abuse' as being limited to offenses where the perpetrator has a mens rea of at least recklessness and engages in conduct that actually injures a child, and to an interpretation of 'child neglect' as an offense that can be committed only by a parent or legal guardian"—an interpretation under which Mr. Diaz-Rodriguez would prevail. Pet. App. 37a. But the plurality concluded that the statute is also "susceptible" to a broader construction that would

encompass California's negligent endangerment offense. Pet. App. 37a. The plurality therefore deemed the statute ambiguous and moved on to *Chevron*'s second stop—which, according to the plurality, permits the agency to "formulat[e] ... policy" and adopt interpretations that are not "the one a court might think best." Pet. App. 46a-48a. The plurality deemed the agency's approach sufficiently reasonable to survive that deferential review. Pet. App. 48a-61a.

A two-judge concurrence disagreed with the plurality's reasoning but reached the same conclusion. Pet. App. 69a-87a (Collins, J., concurring in the judgment). Rather than evaluate the agency's decision, the plurality came up with its own elements for a "crime of ... child neglect"—elements that appear nowhere in any Board decision—and concluded that the California endangerment offense is a categorical match for those elements. Pet. App. 86a.

Five judges dissented, agreeing with the Tenth Circuit and the three-judge panel majority that the statute's text, read using traditional interpretive tools, does not permit the Board's classification of negligent endangerment as a removable offense. Pet. App. 88a-139a (Wardlaw, J., dissenting).

REASONS FOR GRANTING THE WRIT

I. The courts of appeals are divided on whether negligent child endangerment is a removable offense.

There is an acknowledged circuit conflict concerning whether negligent child endangerment is a categorical "crime of child abuse, child neglect, or child abandonment." 8 U.S.C. § 1227(a)(2)(E)(i). Because of that conflict, whether noncitizens like Mr. Diaz-Rodriguez

can stay in this country with their families currently turns on the happenstance of where their immigration proceedings took place. That conflict—and the unfairness it creates—cannot be resolved without this Court's intervention.

There is indisputably a circuit conflict on the question presented. The Tenth Circuit held in *Ibarra* that a state statute that "includes non-injurious criminally negligent conduct" is not a categorical match for the generic immigration offense of a "crime of child abuse, child neglect, or child abandonment." 736 F.3d at 918. It thus held that Colorado's negligent endangerment statute, which encompasses "negligently permitting [a child] to be placed in a situation where they might have been injured, when no injury occurred, does not fit the generic federal definition of child 'abuse, neglect, or abandonment.'" *Id.*

The Eleventh and Ninth Circuits have both "disagree[d]" with that decision. *Bastias*, 42 F.4th at 1273; Pet. App. 58a. Both courts considered state endangerment statutes that, like the Colorado statute at issue in *Ibarra*, "include[] non-injurious criminally negligent conduct." *Ibarra*, 736 F.3d at 918; *see Bastias*, 42 F.4th at 1271 (citing Fla. Stat. § 827.03(2)(d)); Pet. App. 7a, 10a (citing Cal. Pen. Code § 273a(a)). But both courts rejected the Tenth Circuit's holding that negligent endangerment falls outside the generic immigration offense, holding instead that the agency permissibly classified negligent endangerment statutes as categorical matches for the generic crime of child abuse, neglect, or abandonment. *Bastias*, 42 F.4th at 1273 ("Bastias argues that we should follow the *Ibarra* court.... We disagree."); Pet. App. 56a-58a ("Diaz-Rodriguez urges us to follow the Tenth Circuit,

which has declined to defer to the BIA's interpretation of 'crime of child abuse, child neglect, or child abandonment' as including criminally negligent conduct that does not result in injury ... We disagree with the Tenth Circuit[.]"). Neither the Ninth nor the Eleventh Circuit tried to distinguish *Ibarra*. Nor did they dispute that Mr. Bastias and Mr. Diaz-Rodriguez would have prevailed had their immigration proceedings been venued within the Tenth Circuit. The Ninth and Eleventh Circuits simply rejected the Tenth Circuit's interpretation of the statute. *Bastias*, 42 F.4th at 1273; Pet. App. 58a.

That circuit conflict inevitably leads to deeply unfair results. If Mr. Diaz-Rodriguez lived in Colorado, he would not be removable, and could stay in this country with his partner, children, grandchildren, and large extended family. *See* Pet. App. 201a. Indeed, because venue in immigration cases depends on where the government initiates removal proceedings, 8 U.S.C. § 1252(b)(2); 8 C.F.R. § 1003.14(a), Mr. Diaz-Rodriguez would not have been removable if he had been detained by DHS while visiting Denver, rather than at home in Los Angeles. Only this Court can alleviate the inequities caused by the circuits' disparate interpretations of the phrase "crime of child abuse, child neglect, or child abandonment."

This conflict will not resolve without this Court's intervention. The Tenth Circuit is unlikely to ever face the question presented again: The Board is bound to apply *Ibarra* in the Tenth Circuit, so those convicted of negligent child endangerment within the Tenth Circuit simply will not be ordered removed. The Ninth and Eleventh Circuits have also made clear that they will not change positions. Both courts considered and

"disagree[d]" with the Tenth Circuit's decision. *Bastias*, 42 F.4th at 1273; Pet. App. 58a. The Eleventh Circuit denied rehearing en banc in *Bastias* without recorded dissent. And the Ninth Circuit's decision was reached by the en banc court.

II. This Court should grant certiorari to resolve the circuit conflict.

Certiorari is particularly warranted given how frequently the question presented arises and the high stakes for noncitizens and their families when it does arise. Especially given how thoroughly this question has now been addressed in the courts of appeals, there is no persuasive reason to leave the circuit conflict in place.

A. The question presented recurs frequently and is incredibly important.

The question whether negligent child endangerment is categorically a "crime of child abuse, child neglect, or child abandonment" occurs frequently in the agency and the courts of appeals. The question has arisen numerous times in the Ninth Circuit in recent years, even beyond *Martinez-Cedillo* and this case. *E.g.*, *Sanghera v. Sessions*, 736 Fed. Appx. 175, 176 (9th Cir. 2018); *Alvarez-Cerriteno v. Sessions*, 899 F.3d 774 (9th Cir. 2018); *Tongco-Andrade v. Holder*, 596 Fed. Appx. 585 (9th Cir. 2015). And the issue continues to recur frequently: Mr. Diaz-Rodriguez is aware of at least a half-dozen cases in the Ninth Circuit alone that are currently being held pending issuance of the mandate in this case, and there may well be more. The issue also recurs frequently before the agency and in other courts of appeals—in the last few years alone, the Eleventh Circuit confronted this

question in *Bastias* and the Board confronted it in *Rivera-Mendoza*. The immigration consequences of a type of conviction that arises so frequently should not vary across the circuits.

When the issue does arise, it is incredibly important, as it often determines whether noncitizen parents can remain in this country to raise their children. *Ibarra* is a good example: Ms. Ibarra is the mother of seven U.S.-citizen children, and was ordered removed by the agency because she unintentionally left the children alone while she went to work. 736 F.3d at 905 & n.3. Were it not for the Tenth Circuit's decision, she would have been ordered removed from the country and separated from those children, possibly forever. Mr. Diaz-Rodriguez is the father of two U.S.-citizen children, who were six and twelve at the time of his 2009 negligent endangerment conviction. Had he been removed at that time, his children likely would have been raised without a father. Instead, he has been able to stay, address his problems with alcohol, and support his children financially and emotionally; his daughter now serves in the U.S. Army and his son and grandchildren still live with Mr. Diaz-Rodriguez and his partner, Ruth. A question that determines whether noncitizen parents like Ms. Ibarra and Mr. Diaz-Rodriguez can stay in this country to raise their children should not turn on where the noncitizen's removal proceedings took place.

B. There is no persuasive reason to leave the circuit conflict in place.

Given the acknowledged circuit conflict on a frequently recurring and important question, there is no reason to leave the circuit conflict in place.

1. The fact that the circuit conflict is 2-to-1 does not lessen the need for certiorari. This Court regularly validates the position of one circuit in a split, especially in the immigration context. *See, e.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 n.4 (2018); *Judulang v. Holder*, 565 U.S. 42, 52 n.6 (2011). Moreover, the three circuits that have addressed this issue handle a significant majority—approximately 63%—of petitions for review from the Board.[5] For most noncitizens, the question presented has been resolved by the relevant court of appeals.

Moreover, describing the split as 2-to-1 brushes over the significant disagreement within the circuits that have sided with the Board. The Ninth Circuit has been especially sharply divided on whether negligent endangerment is a removable offense. The court initially addressed the question presented in its split panel decision in *Martinez-Cedillo*, which rejected the Tenth Circuit's decision in *Ibarra*. 896 F.3d at 989. The court then granted rehearing en banc from that decision and ultimately vacated the decision and dismissed the appeal when the petitioner passed away. 918 F.3d 601 (9th Cir. 2019); 923 F.3d 1162 (9th Cir. 2019). The three-judge panel in this case reached the opposite conclusion from the *Martinez-Cedillo* panel, again in a split decision, and the court again granted rehearing en banc and issued its fractured 6-to-5 ruling.

Indeed, the Ninth Circuit has been sufficiently divided that, due to the Ninth Circuit's limited en banc

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[5] *See* U.S. Courts, Judicial Business, Table B-3 (2019), available at https://www.uscourts.gov/statistics/table/b-3/judicial-business/2019/09/30.

procedure, *see* Ninth Cir. Rule 35-3, the ultimate resolution of this case was due in large part to pure luck. The three-judge panel included two active judges who disagreed; the deciding vote was cast by a visiting district judge. Pet. App. 147a. The panel dissenter, but not the author of the panel majority, was then drawn for the en banc panel. Had the author of the panel majority been drawn for the en banc panel instead of the panel dissenter, the case would have come out the other way, and Mr. Diaz-Rodriguez could have remained in this country with his family.

Even in the Eleventh Circuit, the question was closely contested. The Eleventh Circuit's *Chevron*-step-one analysis in *Bastias* rested entirely on its prior decision in *Pierre*. 42 F.4th at 1272. Judge Newsom's concurrence explained, in detail, why *Pierre*'s approach to *Chevron*'s first step was wrong. *Id.* at 1276-78 (Newsom, J., concurring). And the *Bastias* panel wrote that, were it free to consider the step-one analysis on its own, it could "see good arguments going both ways." *Id.* at 1272 (majority opinion).

The net result is that, were the Eleventh Circuit in *Bastias* not bound by its deeply flawed precedent in *Pierre*, and had the Ninth Circuit en banc panel included the author of the three-judge panel's majority instead of its dissent, the circuit lineup on the question presented could have been 3-to-0 *against* the government. The extent of the division on this question heightens the need for review of the current 2-to-1 split in the government's favor.

2. Further percolation would not benefit this Court. The competing positions on the question presented in this case have been thoroughly aired in the lengthy plurality, concurring, and dissenting opinions

in this case, as well as by the Tenth Circuit's decision in *Ibarra*, the Eleventh Circuit's decision in *Bastias*, the Ninth Circuit majority and dissenting opinions in *Martinez-Cedillo*, and the Ninth Circuit majority and dissenting opinions at the three-judge panel stage of this case.

Waiting for other circuits to align with one of these opinions would serve little purpose. Whatever other circuits do, a split will remain that warrants this Court's intervention. *See* pp. 17-21, *supra*. And there is little left to be said on the merits beyond what has already been written.

3. The fact that this Court denied certiorari in *Matthews* and *Florez*—which addressed whether New York's endangerment statute is a categorical "crime of child abuse, child neglect, or child abandonment"—does not weigh against granting certiorari here. *See Matthews v. Barr*, 141 S. Ct. 158 (2020) (mem.); *Florez v. Lynch*, 577 U.S. 1216 (2016) (mem.). New York's endangerment statute has a mens rea of knowledge, not negligence. *See Matthews*, 927 F.3d at 619. And the government opposed certiorari in those cases principally because of the difference in mens rea between the New York statute and the Colorado statue at issue in *Ibarra*, arguing that there was no conflict concerning "child endangerment offenses requiring a mens rea beyond negligence." Br. in Opp. at 17, *Matthews*, *supra* (No. 19-1022); Br. in Opp. at 16, *Florez*, *supra* (No. 15-590).

The government's argument against certiorari in those cases does not apply here because the California endangerment statute requires only negligence. P. 14, *supra*. Thus, while it may have been unclear whether the petitioners in *Matthews* and *Florez* would

have prevailed in the Tenth Circuit, it is clear that Mr. Diaz-Rodriguez would have prevailed there. This case thus implicates the precise split the government argued was missing in *Matthews* and *Florez*.

4. The Tenth Circuit's post-*Ibarra* holding that endangerment offenses with a mens rea of recklessness are removable offenses does not undermine the case for certiorari here. *See Zarate-Alvarez*, 994 F.3d at 1164. The Tenth Circuit in *Zarate-Alvarez* did not purport to reverse *Ibarra*, nor could it have. To the contrary, *Zarate-Alvarez* reaffirmed *Ibarra*'s holding that "non-injurious criminally negligent conduct" falls outside the generic immigration offense. *Id.* (quoting *Ibarra*, 736 F.3d at 918). The court held, however, that a state statute criminalizing non-injurious *reckless* conduct raised "an entirely different question than the one raised in *Ibarra*." *Id.* Regardless whether the Tenth Circuit was right or wrong in *Zarate-Alvarez*, that decision reinforces, rather than undermines, the circuit conflict concerning *negligent* endangerment.

C. This case is an ideal vehicle in which to resolve the circuit conflict.

The question presented is squarely raised by and dispositive of this case. Prior to the agency's final order of removal, Mr. Diaz-Rodriguez was a lawful permanent resident. The sole basis for the agency's charge of removability was Mr. Diaz-Rodriguez's 2009 conviction for violating California Penal Code § 273a(a). A.R. 417. That statute undisputedly criminalizes "non-injurious criminally negligent conduct"—precisely the conduct that, in the Tenth Circuit, falls outside the generic immigration offense. *Ibarra*, 736 F.3d at 918. Thus, if this Court were to

grant certiorari and agree with the Tenth Circuit, Mr. Diaz-Rodriguez would retain his lawful permanent resident status and could stay in this country with his family.

III. The Ninth Circuit's decision is wrong.

This Court's review is particularly necessary because the Ninth Circuit's decision is wrong.

A. The statute's text, read using traditional interpretive tools, precludes classifying negligent child endangerment as a crime of child abuse, neglect, or abandonment.

The Ninth Circuit plurality agreed that negligent endangerment is not a form of child "abandonment." Pet. App. 21a. But it held that it could be a form of child "abuse" or "neglect," and hence that the Board is entitled to deference. But the statute's text, read using the same interpretive tools that this Court applied in *Esquivel-Quintana*, precludes that conclusion.

1. Contemporaneous dictionary definitions make clear that, when the statute was enacted in 1996, the ordinary meanings of "abuse" and "neglect" did not encompass the distinct, lesser offense of negligent child endangerment. Definitions of "abuse" required actual harm. *E.g.*, Merriam-Webster's Dictionary of Law 4, 76 (1996); Black's Law Dictionary 239, 377 (6th ed. 1990). And Black's definition of "neglect" required conduct by a "parent or custodian" that is sufficiently extreme or sustained that it violates a legal duty and makes the parent or custodian "unfit" to care for the child. Black's Law Dictionary 1032 (6th ed. 1990) (defining "neglected child"); *see also, e.g.*, Black's Law Dictionary 233 (7th ed. 1999). These definitions do not sweep in every criminally negligent act that

creates a risk of harm by anyone who cares for a child even for a brief period of time. *See People v. Perez*, 164 Cal. App. 4th 1462, 1471 (2008) (California statute encompasses people with even less responsibility for child's care than a babysitter).

Moreover, these dictionaries defined endangerment as a *separate* offense, not as a subset of "abuse" or "neglect." *See, e.g.*, Merriam-Webster's Dictionary of Law 160 (defining endangerment as "the crime or tort of exposing others to possible harm or danger"); Black's Law Dictionary 233 (7th ed. 1999) (defining endangerment as "[t]he placing of a child in a place or position that exposes him or her to danger to life or health"). These separate "endangerment" definitions would have been pointless if endangerment was categorically encompassed by "abuse" or "neglect."

The Board ignored these dictionary definitions and the Ninth Circuit misunderstood them. Perhaps most importantly, neither the Ninth Circuit plurality nor the concurrence even acknowledged that "endangerment" was a separately defined term.

With respect to "abuse," the plurality identified two definitions that, in its view, defined "child abuse" without reference to actual injury. Pet. App. 17a-18a. But one of those definitions requires "conditions injurious to the child's health," and the other requires a child to be adversely affected in a "physical, sexual, verbal, or emotional" form. Pet. App. 17a-18a (quoting Webster's II New College Dictionary 194 (1995) and Ballentine's Legal Dictionary and Thesaurus 96 (1995)). Both plainly require actual injury. *See* Pet. App. 108a-109a (Wardlaw, J., dissenting).

As for "neglect," the plurality and concurrence ignored Black's definitions of "neglected child" cabining the term to "parents or legal custodians" who engage in conduct sufficiently sustained or extreme to make them "unfit" to perform their duties. Black's Law Dictionary 1032 (6th ed. 1990); Black's Law Dictionary 233 (7th ed. 1999). The plurality focused on definitions of "child neglect" as a "disregard of duty" through "failure to provide a child under one's care with proper food, clothing, shelter, supervision, medical care, or emotional stability." Pet. App. 19a (quoting Merriam-Webster's Dictionary of Law 324 (1996)). But that is precisely the type of support typically provided by a parent or guardian. Pet. App. 114a (Wardlaw, J., dissenting). Moreover, the definitions the plurality cites do not sweep in every negligent act—even by an otherwise caring parent—that creates a risk of harm, even if that risk is a serious one. Pet. App. 114a-115a. If "neglect" swept that broadly, there would have been no need to define "endangerment" as a distinct form of child-related conduct. And yet contemporary dictionaries did just that. The concurrence, by contrast, largely eschewed definitions of "child neglect" (or the related term "neglected child") altogether, focusing instead on the word "neglect" in the abstract. Pet. App. 74a. That is wrong. *FCC v. AT&T Inc.*, 562 U.S. 397, 406 (2011) ("[T]wo words together may assume a more particular meaning than those words in isolation.").

2. State criminal codes in effect in 1996 offer "additional evidence" that the statute does not make negligent child endangerment a removable offense. *Esquivel-Quintana*, 581 U.S. at 395-97.

In *Esquivel-Quintana*, this Court held that the statute's text precluded the Board's interpretation of the INA where it was inconsistent with the law in 34 states, which this Court described as a "general consensus" rejecting the Board's position. *Id.* Here, there was an even stronger "general consensus" across state criminal laws that negligent child endangerment was not a "crime" of "child abuse, child neglect, or child abandonment." Specifically, as of 1996, 36 states did not criminalize negligent endangerment. *See* Pet. App. 128a-129a (Wardlaw, J., dissenting).

The plurality acknowledged that its decision was inconsistent with most contemporary state criminal codes. Pet. App. 33a-34a. But the plurality held that this did not matter because Congress may have intended to sweep in an offense criminalized in a *minority* of states, especially because those states included "the most populous regions of our nation." Pet. App. 34a. That reasoning is directly at odds with this Court's analysis in *Esquivel-Quintana*, which found a "general consensus" based on the law of only 34 states and did not weight its state survey by population size. *See Esquivel-Quintana*, 581 U.S. at 397; *see also* Pet. App. 129a-132a (Wardlaw, J., dissenting).

3. The "structure of the INA" further demonstrates that negligent child endangerment is not a form of child abuse, neglect, or abandonment. *Esquivel-Quintana*, 581 U.S. at 393. Most importantly, the statute makes a non-permanent resident with a child-abuse conviction ineligible for cancellation of removal, a form of relief for noncitizens whose removal would cause "exceptional and extremely unusual hardship" to a child, spouse, or parent. *See* 8 U.S.C. § 1229b(b)(1)(D). It would make little sense to bar a

noncitizen from this form of relief because she negligently endangered a child when the noncitizen's removal would cause "exceptional and extremely unusual hardship" to that same child. Contrary to the plurality, the point is not that the Board is being insufficiently "family-friendly." Pet. App. 24a n.7. The point is that the Board's expansive interpretation of the child-abuse provision is in significant tension—if not outright conflict—with Congress's decision to make a child-abuse conviction grounds for cancellation ineligibility for non-permanent residents. Pet. App. 120a-124a (Wardlaw, J., dissenting).

4. The plurality and concurrence placed considerable weigh on civil statutes unrelated to immigration that defined somewhat analogous terms. Pet. App. 24a-29a; Pet. App. 80a-82a (Collins, J., concurring in the judgment). Even the plurality recognized, however, that these statutes provide "little guidance." Pet. App. 29a n.12. Indeed, there are numerous reasons these terms would be understood more broadly outside the criminal context. *See* Pet. App. 124a-127a (Wardlaw, J., dissenting). And even the provisions the plurality cites do not obviously encompass the type of negligent endangerment offense at issue here. *E.g.*, Pet. App. 28a ("failure to provide adequate food, clothing, shelter, or medical care" (quoting 45 C.F.R. § 11340.2(d)(2)(i)).

5. Finally, even if some ambiguity remains after applying the foregoing interpretive tools, the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien" weighs against the Board's decision. *INS v. St. Cyr*, 533 U.S. 289, 320 (2001); *c.f. also Bittner v. United States*, __ S. Ct. __, 2023 WL 2247233, at *9-

10 (2023) (opinion of Gorsuch, J.) (lenity applies to interpretation of statute imposing civil penalties where "doubt persists" after applying traditional interpretive tools). That "accepted principle[] of statutory construction" requires courts to adopt the "narrowest of several possible meanings" given the "drastic" nature of deportation, *e.g.*, *Costello v. INS*, 376 U.S. 120, 128 (1964), and it weighs strongly against the Board's decision here.

B. Even if the statute contains some ambiguity, this Court should not defer to the Board of Immigration Appeals.

Even if the statute's text left some room for uncertainty, the Board's reading of the statute is not the best one—indeed, it does not even "fall within the bounds of reasonable interpretation." *Kisor*, 139 S. Ct. at 2416 (quotation marks omitted).

1. The Board's decision was unreasonable.

Even if the statute contains some ambiguity, the Board's classification of negligent endangerment as a removable offense is unreasonable. As discussed above, traditional interpretive tools weigh strongly—if not definitively—against the Board's interpretation. Moreover, classifying negligent child endangerment provisions like California's as crimes of child "abuse" or "neglect" hurts the very children Congress was trying to protect. *See* pp. 6, 29-30, *supra*. The Board's interpretation means that "individuals who for reasons of poverty, cultural difference, work schedules, or bad luck make parenting mistakes may be permanently separated from their families." Pet. App. 138a (Wardlaw, J., dissenting); *see also, e.g.*, *Ibarra*, 736

F.3d at 905-06 (Board's decision would remove single mother for leaving children alone while at work); *Martinez*, 413 Fed. Appx. at 168-69 (Board's "heartbreaking" decision removed "caring parent," a "profoundly unfair, inequitable, and harsh" result). 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 "needless and potentially permanent separation of children from their parents." *Matthews*, 927 F.3d at 637 (Carney, J., dissenting). That "[p]aradoxical[]" result would harm the very children the statute was intended to protect, and "inflict needless suffering on some of the most vulnerable members of our society." *Id.* at 636-37.

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 to a child is "sufficient." That standard is not only vague—"float[ing], unmoored, on the fickle sea of child-rearing conventions," *Matthews*, 927 F.3d at 624 (Carney, J., dissenting)—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. 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*, 575 U.S. 798, 806 (2015) (internal quotation marks and alterations omitted). It is not reasonable for the agency to adopt

a standard that, on its own terms, turns entirely on each Board member's subjective judgment as to what risk of harm should be "sufficient" for an endangerment offense to lead to removal and ineligibility for discretionary relief. *Cf. Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018) (Gorsuch, J., concurring) ("Vague laws invite arbitrary power.").

2. If necessary, this Court should reconsider whether it must defer to a Board decision that does not adopt the best interpretation of the statute.

If necessary, this case also provides a strong basis for this Court to reconsider whether it must accept the Board's interpretation of the INA even where, in this Court's view, that interpretation is not actually the best way to read the statute.

"[T]he theoretical foundations for *Chevron* deference are perhaps most precarious with respect to immigration adjudication." Wadhia & Walker, *The Case Against* Chevron *Deference in Immigration Adjudication*, 70 Duke L.J. 1197, 1242 (2021); *Mirza v. Garland*, 996 F.3d 747, 750 n.2 (5th Cir. 2021) ("There is a good argument that *Chevron* should not apply to immigration adjudications[.]"). After all, *Chevron*'s concern that "[j]udges are not experts in the field," 467 U.S. at 865, has little application given that most reviewable Board decisions involve "pure question[s] of statutory construction," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987), on which judges *are* experts. *See Debique v. Garland*, 58 F.4th 676, 686 (2d Cir. 2023) (Park, J., concurring) ("Our job in this case is to interpret the phrase 'sexual abuse of a minor,' a task that we as '[j]udges are trained to do' and that 'can be done in a neutral and impartial manner.'... We should do

our job." (quoting Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2154 (2016)); *Da Silva v. U.S. Att'y Gen.*, 948 F.3d 629, 635 (3d Cir. 2020) (questioning whether *Chevron* should apply to the Board's resolution of a "pure question of statutory construction"). *Chevron*'s deliberative-process justification is similarly inapplicable, as the Board often publishes decisions with enormous ramifications—and potentially retroactive effect—with *no* public input. *See* Wadhia, *supra*, at 1224-1232; *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1146-1147 (10th Cir. 2016) (Gorsuch, J., concurring).

These problems are exemplified here. The Board's decision in *Soram* involved a pure question of statutory interpretation and the decision was published without any notice and comment or other form of public input. By endorsing that decision without resolving whether it actually represents the best reading of the statute, the Ninth Circuit plurality "ced[ed] vast power to an agency," Pet. App. 138a (Wardlaw, J., dissenting), and risks "offending separation of powers," *Debique*, 58 F.4th at 687 (Park, J., concurring).

This Court has, of course, applied *Chevron* to Board decisions. *E.g.*, *Cardoza-Fonseca*, 480 U.S. at 446-47. But traditional stare decisis principles have little application to the judge-made deference rule at issue here, especially given that this Court has deferred to Board decisions relatively infrequently and there are few (if any) reliance interest at stake. *See Pearson v. Callahan*, 555 U.S. 223, 233 (2009). Especially given the complex constitutional questions raised by deferring to incorrect agency interpretations of federal statutes—*see, e.g.*, *Buffington v. McDonough*, 143 S. Ct. 14, 19 (2022) (Gorsuch, J., dissenting from denial of

certiorari); *Pereira*, 138 S. Ct. at 2120-21 (Kennedy, J., concurring); *Michigan v. EPA*, 576 U.S. 743, 760 (2015) (Thomas, J., concurring)—there is no reason this Court should continue to defer in a context where the justifications for such deference are so weak.

Whether courts should defer to an incorrect agency interpretation is particularly important here given that practically every court that has deferred to the Board has recognized that its classification of child endangerment as a removable offense *may well be wrong*. *Florez*, 779 F.3d at 214 ("unlikely" that the Board was correct); *Bastias*, 42 F.4th at 1272 ("good arguments going both ways"); Pet. App. 37a (statute is "susceptible" to a reading that excludes negligent endangerment). The lives of lawful permanent residents like Mr. Diaz-Rodriguez should not be inalterably transformed based on an agency interpretation of a statute that rests on such questionable legal footing.

Ultimately, however, the Court need not reach this issue. The statute is clear enough to preclude the agency's interpretation outright, and at the very least that interpretation is not reasonable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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