No. 22-863

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

BRIEF OF THE NATIONAL COALITION FOR CHILD PROTECTION REFORM AND PROFESSOR DAVID PIMENTEL, SCHOLAR OF PARENTAL RIGHTS LAW AND CHILD WELFARE LAW, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

Amicus curiae The National Coalition for Child Protection Reform ("NCCPR") is an organization of professionals, drawn from the fields of law, academia, psychology and journalism, who are dedicated to improving child welfare systems through public education and advocacy. NCCPR, a tax-exempt non-profit organization founded at a 1991 meeting at Harvard Law School, is incorporated in Massachusetts and headquartered in Alexandria, Virginia. NCCPR devotes much of its attention to public education concerning widespread public misconceptions about the child protective system and its impact on the children it is intended to serve. Lawyer members of NCCPR also individually have litigated numerous precedential cases involving child protection policies and proceedings.

Amicus curiae David Pimentel is a professor of law and advocate for the legal protection of parents' and children's rights. He seeks to participate in this case out of concern that the decision below would render noncitizen parents deportable for actions that neither reflect their fitness as parents nor should be criminalized at all.

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[1] Counsel for *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission. Sup. Ct. R. 37.6. All parties have been notified of the filing of this brief. Sup. Ct. R. 37.2(a).

INTRODUCTION & SUMMARY OF ARGUMENT

The Immigration and Nationality Act (INA) renders removable all persons convicted of a "crime of child abuse, child neglect, or child abandonment." 8 U.S.C. § 1227(a)(2)(E)(i). The subject of Petitioner Rafael Diaz-Rodriguez's petition for a writ of certiorari ("Petition") is how this phrase applies to a new genre of state-law crimes punishing one-time negligence that results in no harm to the child. While the federal circuits are split on the issue, none has given sufficient attention to the meaning of "child endangerment" in 1996, when Congress amended the INA to include the pertinent language. *See* Pub. L. No. 104-208, § 350, 110 Stat. 3009-546, 3009-640.

The law of child endangerment looks very different today than it did back then. States have expanded such laws over the past 30 years, mirroring increasingly stringent parenting standards. Under those prevailing standards, safety is paramount; parental supervision is required at all times; and even vanishingly small risks to the child are criminalized. This philosophy has shifted the ground underneath vague child-endangerment standards, which uniformly turn on perceptions of risk. Today, these laws capture behaviors that were commonplace only a generation ago: letting children walk home from school alone; dropping them off at a local mall; permitting them to play on a playground unsupervised, and so forth. All these behaviors are now prosecuted as child endangerment. Of course, not all such prosecutions punish reasonable and well-intentioned parenting. But many prosecutions are

just that—and far more than most would expect. Congress could never have anticipated this development and surely did not intend to make such conduct removable when it enacted § 1227(a)(2)(E)(i).

Few published decisions illuminate the true practical scope of this issue. Because the penalties are generally minimal, most parents charged with such offenses plead guilty. Often, a guilty plea is all but assured by threats of child-welfare investigations and family separation. As a result, cases targeting minor acts of child endangerment rarely proceed to trial, and even fewer make their way to appellate courts. Published decisions today thus fail to illuminate, let alone police, the outer limits of child-endangerment laws.

At the same time, the immigration consequences for such offenses have become more severe for some parents, in some jurisdictions. Under the Ninth and Eleventh Circuits' decisions,[2] but not the Tenth,[3] noncitizen parents who either reject the "intensive parenting" philosophy or unknowingly fail to comply with it now face mandatory deportation. This Amicus Brief explains how Congress could not have intended that outcome when it enacted § 1227(a)(2)(E)(i).

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[2] *See Diaz-Rodriguez v. Garland*, 55 F.4th 697, 721 (9th Cir. 2022); *Pierre v. U.S. Attorney General*, 879 F.3d 1241, 1249 (11th Cir. 2018).

[3] *See Ibarra v. Holder*, 736 F.3d 903, 918 (10th Cir. 2018).

ARGUMENT

I. THE DEFINITION OF CHILD ENDANGERMENT HAS EXPANDED DRAMATICALLY SINCE 1996

The plurality and dissenting opinions in *Diaz-Rodriguez* agree that, in 1996, a substantial majority of U.S. states did not criminalize negligent child endangerment where the child sustained no harm. *Diaz-Rodriguez*, 55 F.4th at 721, 765. This consensus is significant, of course, because it speaks to whether Congress thought such conduct constituted a "crime" of "child abuse, child neglect, or child abandonment" under 8 U.S.C. § 1227(a)(2)(E)(i)—the key question presented by Mr. Diaz-Rodriguez's Petition.[4] In making these offenses categorically removable and disqualifying persons convicted of from obtaining discretionary relief,[5] Congress placed these "crime[s]" alongside "domestic violence" and "stalking" in the statutory scheme. 8 U.S.C. § 1227(a)(2)(E)(i).[6] As former Senator Bob Dole, the co-author of the bill that amended the INA to add these deportable crimes, put it on the Senate floor, Congress viewed "stalking,

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[4] *See Esquivel-Quintana v. Sessions*, 581 U.S. 385, 395-97 & n.3 (2017) (multijurisdictional surveys are "useful" where they "shed light on" the meaning of "federal provision[s] being interpreted").

[5] *See* 8 U.S.C. § 1229b(b)(1) (foreclosing discretionary relief where removal would inflict "exceptional" hardship against persons convicted of offenses enumerated in § 1227(a)(2)).

[6] *See Esquivel-Quintana*, 581 U.S. at 394 ("[T]he INA lists sexual abuse of a minor in the same subparagraph as "murder" and "rape" . . . . The structure of the INA therefore suggests that sexual abuse of a minor encompasses only especially egregious felonies.").

child abuse, and sexual abuse" as "vicious acts" that "too often haunt[] our citizens." 142 Cong. Rec. S4613 (daily ed. May 2, 1996) ("Congressional Record I"). According to Senator Dole, this law was needed to "protect our citizens against these assaults" and "violent act[s]." 104 Cong. Rec. S4059 (daily ed. Apr. 24, 1996) ("Congressional Record II").

But neither the letter of the law nor the legislative record fully captures Congress's thinking on whether negligent child endangerment comprised a "crime of child abuse, child neglect, or child abandonment" in 1996. That is because the term "child endangerment" means something very different today than it did to generations past, due to both expanding state laws and evolving parenting standards. Child endangerment statutes uniformly turn on the perceived "risk" that a child encountered as a result of the caretaker's conduct. *See, e.g.*, Mo. Rev. Stat. § 568.050.1(1) (criminalizing conduct that "creates a substantial risk" to health); Ariz. Rev. Stat. § 13-3623(B) (criminalizing conduct that "endanger[s]" a child under conditions "likely" to produce "serious physical injury"). The statute under which Mr. Diaz-Rodriguez was convicted is no exception. It criminalizes the "endanger[ment]" of a child under conditions "likely to produce" great bodily harm. Cal. Penal Code § 273a(a). On its face, the statute directs police, prosecutors, juries, and courts to evaluate how "likely" certain parenting behavior posed a risk of injury to a child, although none ensued.

These standards are not only vague but inherently subjective. They turn on individuals' intuitions about what constitutes "good" parenting and when a risk of

harm to a child becomes intolerable. Neither question has a straightforward, or fixed, answer. Instead, parents' caretaking standards and risk tolerance have shifted considerably over the past thirty years.

A. "Intensive Parenting" Has Become The Norm

The last several decades have seen the emergence of a "societal trend" in favor of "intensive parenting," where "parents assert far greater control and far closer supervision of their children's activities than ever before." David Pimentel, *Fearing the Bogeyman: How the Legal System's Overreaction to Perceived Danger Threatens Families and Children*, 42 PEPP. L. REV. 235, 248 (2015) ("*Overreaction*"); *see also* Lynda Laughlin, *Who's Minding the Kids? Child Care Arrangements: Spring 2011*, U.S. CENSUS BUREAU (April 2013) (noting a 42% drop from 1997 to 2011 in grade-school children with single working parents who spend time at home alone). A principal theme of this trend is an obsession with safety—and especially with preventing children from suffering horrific yet exceeding unlikely fates, such as stranger abduction. Pimentel, *Overreaction*, *supra*, at 248; *see also* Christie Barnes, THE PARANOID PARENTS GUIDE: WORRY LESS, PARENT BETTER, AND RAISE A RESILIENT CHILD 38-39 (2010) (top concerns of parents include kidnapping, "stranger danger," snipers, and terrorism). Parents adhering to this philosophy often forbid their children from roaming neighborhoods freely, walking to school, or playing unsupervised. Pimentel, *Overreaction*, *supra*, at 250-51. What's driving this phenomenon appears to be "a new

'culture of fear' and especially widely publicized stories of kidnapping" and the like. *Id.* at 250.

These fears do not map neatly onto empirical reality. While surveys show that most people believe their communities are more dangerous today than ever, overwhelming evidence shows the opposite. *See, e.g.*, Daniel Gardner, THE SCIENCE OF FEAR: WHY WE FEAR THE THINGS WE SHOULDN'T—AND PUT OURSELVES IN GREATER DANGER 290-304 (2008). Humans are struck by lightning more than three times as often as children are abducted by strangers. David Pimentel, *Criminal Child Neglect and the "Free Range Kid": Is Overprotective Parenting the New Standard of Care?*, 2012 UTAH L. REV. 947, 960 & n.67 (2012) ("*Child Neglect*") (citations omitted).

B. "Free Range" Parents Have Pushed Back —And Suffered The Consequences

Not all parents embrace "intensive parenting," however. Some eschew excessive supervision, arguing that it deprives children of opportunities to develop independence, responsibility, and self-reliance. Pimentel, *Child Neglect, supra*, at 958-59. In the view of these "free range" parents, children who are denied opportunities to exercise independence will develop with a diminished sense of personal responsibility and self-sufficiency. *See* Lenore Skenazy, FREE-RANGE KIDS: GIVING OUR CHILDREN THE FREEDOM WE HAD WITHOUT GOING NUTS WITH WORRY, xxi (2009). A growing body of empirical literature lends credence to their views. *See, e.g.*, Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 U.C. DAVIS L. REV. 1221, 1274-78 (2011) (outlining psychological effects of "intensive parenting,"

including dependency, difficulty coping, and reduced self-sufficiency).

Nevertheless, under the current legal landscape, parents on the "free range" end of the continuum face non-negligible risks of criminal prosecution for child endangerment. In December 2014, for instance, Danielle and Alexander Meitiv, two parents of the "free range" school of thought, made the conscious decision to allow their two children, ten and six years old, to walk home unsupervised from the playground. Danielle Meitiv, Opinions, *When Letting Your Kids Out of Your Sight Becomes a Crime*, WASHINGTON POST, Feb. 13, 2015. Police spotted the children, detained them, and then alerted child protective services (CPS). *Id.*

The Meitivs' experience is far from an isolated occurrence. Two years earlier in Jonesboro, Arkansas, a mother was convicted of child endangerment after making her ten-year-old son walk to school, a consequence she imposed after he was kicked off the school bus for the fifth time. Pimentel, *Overreaction*, *supra*, at 258. A few years before that, Montana professor Bridget Kevane was charged with child endangerment after dropping off her children and their friends, ages twelve, twelve, eight, seven, and three, at a local mall. Bridget Kevane, *Guilty as Charged*, BRAIN, CHILD (Jan. 14, 2014). Intent on opposing the charge, Professor Kevane's counsel submitted her case to a mock trial. *Id.* But after seeing the jury bitterly divide on the case, she decided to enter a guilty plea. *Id.* "[C]ases like this are certainly on the rise." Pimentel, *Overreaction*, *supra*, at 260.

C. The Current Paradigm Reaches Conduct Driven By Culture And Poverty, Too

"The problem is not limited to those who consciously identify themselves—like the Meitivs—as 'free-range' parents." David Pimentel, *Protecting the Free-Range Kid: Recalibrating Parents' Rights and the Best Interest of the Child*, 38 CARDOZO L. REV. 1, 12 (2016) ("*Recalibrating*"). Rather, parents of different cultural traditions and those facing financial hardships, are also at risk. *See id.* at 12-19.

Parenting philosophies often reflect a family's culture—their traditions, their religious views, their upbringings. *Id.* at 15. In our multicultural society, these values sometimes converge with modern parenting standards. For many Scandinavians, for example, "outdoor napping" is a tradition in which parents place their children outside for naps, even in sub-freezing conditions. Helena Lee, *The Babies Who Nap in Sub-Zero Temperatures*, BBC NEWS (Feb. 22, 2013). "The theory behind" this custom is that "children exposed to fresh air . . . are less likely to catch coughs and colds." *Id.* Consistent with the tradition, it is customary for Scandinavians to leave sleeping babies in their carriages outside a store or café while the parent runs inside. Emily Lodish, *Global Parenting Habits That Haven't Caught On in the U.S.*, NPR (Aug. 12, 2014). One Danish mother was arrested after doing so in New York City. Tony Marcano, *Toddler, Left Outside Restaurant, Is Returned to Her Mother*, N.Y. TIMES, May 14, 1997.

Another tradition in tension with evolving child-welfare standards in America, "[f]amilies in Hispanic and Native American communities are far more likely

to expect older children to take responsibility for younger children." Pimentel, *Recalibrating*, *supra*, at 18. But as the Meitivs and Professor Kevane found out, doing so can subject them to prosecution under state child-welfare statutes.

Culture aside, child-endangerment laws also reach "conduct driven by poverty, such as leaving a child at home alone while a parent leaves for a brief errand or unintentionally failing to secure a babysitter for a child while the parent is at work." *Martinez-Cedillo v. Sessions*, 896 F.3d 979, 1002 (9th Cir. 2018) (Wardlaw, J., dissenting), *rehearing granted by* 918 F.3d 601 (9th Cir. 2019) and *vacated by* 923 F.3d 1162 (9th Cir. 2019). These concerns are not academic. In 2014, an unemployed Arizona parent left her two children in a car long enough to interview for a job, only to be arrested when she returned. Fernanda Santos, *18 Years' Probation for Arizona Woman Who Left Sons in Car*, NY TIMES, May 15, 2015. She ultimately pled guilty to child abuse charges and received eighteen years' probation. *See id.* Around the same time, a South Carolina mother was jailed and her daughter put in foster care for almost three weeks, after letting her nine-year-old play at a park while the mother worked her shift at McDonalds. Meitiv, *supra*; *see also* Diana Reese, *South Carolina Mom Who Left Daughter At Park Sues TV Station*, WASHINGTON POST, August 14, 2014.

Jail time might seem like a harsh penalty. But it pales in comparison to deportation. Consider the facts in *Ibarra v. Holder*, the Tenth Circuit decision rejected by the Ninth Circuit plurality below. Ms. Ibarra immigrated to the U.S. from Mexico at age

four, residing here lawfully for nearly three decades. 736 F.3d at 905. One evening, Ms. Ibarra left her seven children, ages ten and below, with their grandmother and went to work. *Id.* at 905 & n.3. Unbeknownst to her, the grandmother became intoxicated and left the children home alone. *Id.* Ms. Ibarra was charged with, and pled guilty to, a low-level misdemeanor under Colorado's crime punishing "child abuse—negligence—no injury." *Id.* at 905. After removal proceedings were initiated, the Board of Immigration Appeals (BIA) held that the offense qualified as a "crime of child abuse, child neglect, or child abandonment" under the INA, and affirmed Ms. Ibarra's removal. *Id.* But for the Tenth Circuit's intervention, *id.* at 918, she would have been deported to a country in which she had not lived since she was a toddler—separating her (perhaps permanently) from her seven children, all of whom are U.S. citizens. She confronted that outcome solely because she entrusted her children's care to her mother so she could go to work. *See id.* at 905 & n.3.

D. Child-Endangerment Statutes Capture Parenting Behaviors Today That Were Commonplace In 1996

As the many "crimes" detailed above make clear, parental choices that were common only a few decades ago now fall within modern state child-endangerment statutes. Judge Susan Carney recognized the issue in her impassioned dissent in *Matthews v. Barr*, 927 F.3d 606 (2d Cir. 2019), where she voiced concerns over the breadth of child-endangerment laws and how they are construed in practice. The statute in question, New York Penal

Law ("NYPL") § 260.10(1), criminalizes the endangerment of a child when the caretaker "knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare" of a child. Surveying the law in practice, Judge Carney cited convictions under § 260.10(1) where the parents (1) left "a sleeping child unattended in an apartment for at least fifteen minutes," (2) directed "vulgar remarks at a toddler," and (3) possessed marijuana "in proximity to children." *Matthews*, 927 F.3d at 624 (Carney, J., dissenting; citations omitted). As with all child-endangerment laws, the linchpin of a § 260.10(1) analysis is the "risk of harm" to the child. *Id.* But whether a risk is "sufficient[]" to support liability, Judge Carney observed, is a standard that "floats, unmoored, on the fickle sea of child-rearing conventions." *Id.*

That is to say, interpretations of phrases like "substantial risk" to health in the context of childrearing, Mo. Rev. Stat. § 568.050.1(1), can unquestionably elicit a broad range of opinions. Does a 10-year-old face a more "substantial risk" to their health in walking home from a playground or playing ice hockey? The answer is almost certainly the latter, but no reasonable law enforcement officer would stake out a local rink, round up the participants' parents, and refer them for charges.

Intensive parenting is the new normal. But when Congress passed a law to "protect [] citizens" against "vicious" and "violent acts," *supra* at 5, it could not have imagined this parenting-standard sea change. Much less could it have intended the statute to reach and render categorically removable parents who—

say, let their ten-year-old walk to school unsupervised. Pimentel, *Overreaction*, *supra*, at 258.

E. The Board's Interpretation Of § 1227(a)(2)(E)(i) Has Expanded In Parallel With "Intensive Parenting"

Just as society has broadened its understanding of child-welfare offenses over the past 30 years, so have state legislatures and the Board of Immigration Appeals.

On its first occasion to consider the phrase "crime of child abuse, child neglect, or child abandonment" under § 1227(a)(2)(E)(i), the Board defined the term to require an intentional act involving some "form of ***cruelty*** to a child's physical, moral, or mental well-being." *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 996 (BIA 1999) (citing BLACK'S LAW DICTIONARY 239 (6th ed. 1990)) (emphasis added). And, according to the source it relied upon in reaching that conclusion—"cruelty" means "[t]he intentional and malicious infliction of mental or physical suffering upon living creatures." Cruelty, BLACK'S LAW DICTIONARY 377 (6th ed. 1990). The Board went on to reaffirm that interpretation in *Matter of Ochieng*, Appeal No. 07-9530 (BIA 2007); *see Ochieng v. Mukasey*, 520 F.3d 1110, 1114-15 (10th Cir. 2008) ("The BIA applied that definition in this case as well").

The Board nevertheless jettisoned that interpretation the following year in *Matter of Velazquez-Herrera*. That provision, the Board held, was no longer limited to intentional cruelty, but rather encompassed any "negligent act or omission

that constitutes maltreatment of a child or that impairs a child's physical or mental well-being." 24 I. & N. Dec. 503, 517 (BIA 2008). In so holding, the Board relied on a handful of statutes, including ***civil*** laws, defining "child abuse" and "child neglect," *id.*, even though § 1227(a)(2)(E)(i) is expressly limited to "***crime[s] of***" child abuse, child neglect, and child abandonment. As the Tenth Circuit put it, this approach "reads the words 'crime of' out of the federal statute." *Ibarra*, 736 F.3d at 912. The Ninth Circuit, for its part, construed *Velazquez-Herrera* to cover negligent acts only where the noncitizen's conduct "actually inflict[s] some form of injury on a child." *Fregozo v. Holder*, 576 F.3d 1030, 1037 (9th Cir. 2009) (abrogation recognized by *Diaz-Rodriguez*).

But just a year later, the Board went even further. In *Matter of Soram*, it held that "child abuse, neglect, and abandonment" constitutes a "unitary concept," and covers child endangerment—even where the act does not result in any "actual harm" to the child—so long as the act creates a "sufficient" "risk of harm." 25 I. & N. Dec. at 380-83 (BIA 2010). Again the Board relied on civil definitions of "child abuse" and "neglect." *Id.* at 382. Only this time, it looked to a survey of civil and criminal laws that existed "as of July 2009." *Id.* That approach is at odds with this Court's guidance in *Esquivel-Quintana*. 581 U.S. at 395 (looking at state criminal codes that existed "in 1996"). Indeed, the state of the law in 2009 does not speak to Congress's intentions three decades earlier—especially given the gradual expansion of state child-endangerment offenses over that period. *Compare Diaz-Rodriguez*, 55 F.4th at 721 (plurality) ("our

survey indicates that in 1996 some 15 states criminalized crimes against children that involved a mens rea of criminal negligence, did not require any injury to the child") *with Matter of Soram*, 25 I. & N. Dec. at 382 ("as [of] July 2009, some 38 States . . . included in their civil definition of 'child abuse,' or 'child abuse or neglect,' acts or circumstances that threaten a child with harm or create a substantial risk of harm to a child's health or welfare"). Worse, the Board's "sufficient" "risk of harm" standard left future Immigration Judges without guidance on when a "risk of harm" is too great to bear. *Matter of Soram*, 25 I. & N. Dec. at 383.

Congress could not have anticipated this expansion of state laws—and the Board's ballooning interpretation of § 1227(a)(2)(E)(i)—when it enacted the provision in 1996. Nor could it have foreseen that child-endangerment laws would be stretched to encompass such innocuous conduct as allowing a nine-year-old to play in a park unsupervised. Meitiv, *supra*. Put more simply, Congress could not have seen that harmless, childcare negligence offenses would be cited to permanently separate parents from their children.

II. PUBLISHED OPINIONS FAIL TO POLICE THE OUTER LIMITS OF CHILD-ENDANGERMENT LAWS BECAUSE PARENTS FACE POWERFUL PRESSURES TO PLEAD GUILTY

Parents charged with minor child-welfare offenses face unusually strong incentives to plead guilty rather than test the outer limits of criminal-negligence statutes. Challenging such charges often

means prolonged CPS investigations, forced separation from their children, and pretrial detention. On the other hand, the penalties for minor child endangerment are typically minimal. As a result, the overwhelming majority of parents charged with minor child-endangerment offenses plead guilty. But under the Board's decision in *Matter of Soram*—and the Ninth and Eleventh Circuit decisions deferring to that decision[7]—the consequences are far more grave.

A. Noncitizen Parents Charged With Minor Acts Of Child Endangerment Face Enormous Pressures To Plead Guilty

"[T]he vast majority of child endangerment charges result in guilty pleas and minimal sentence." *Matthews*, 927 F. 3d at 622-23. Of the convictions obtained in 2008 under New York's child-endangerment statute, "***over 99%*** were obtained by guilty plea." *Id.* at 631 (Carney, J., dissenting; emphasis in original). Child-endangerment cases are thus "overwhelmingly unlikely to go to trial (and, consequently, even less likely to present a sufficiency challenge for appellate review)." *Id.* at 630 (Carney, J. dissenting).

All fifty states impose some type of "mandatory reporting" requirement on law enforcement, requiring them to report suspected child-welfare offenses to CPS. Frank Edwards, *Family Surveillance: Police and the Reporting of Child Abuse and Neglect*, 5 RUSSELL SAGE FOUND. J. SOC. SCIS. 50, 50 (2019); *see, e.g.*, Cal. Penal Code § 11166(k) (requiring law

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[7] *Supra* note 2.

enforcement to "report" every "suspected instance of child abuse or neglect"); Minn. Ann. Stat. § 626.556 (requiring law enforcement to "immediately notify the local welfare agency" upon receipt of reports of child abuse or neglect). These laws ensure CPS involvement in most investigations of child-welfare offenses. Pimentel, *Overreaction*, *supra*, at 267.

Surveys show that parents tend to fear CPS more than law enforcement. *Id.* Their fears are not unfounded. Child protective agencies, often acting "on tips, or mere suspicion of child endangerment," "are empowered to remove children from their parents and homes without notice or hearing," and they are known to "subject even very young children to questioning and invasive physical examinations." *See* David Pimentel, *Punishing Families for Being Poor: How Child Protection Interventions Threaten the Right to Parent While Impoverished*, 71 OKLA. L. REV. 885, 886 (2019). It is well documented that CPS officials routinely pressure parents into entering "voluntary" temporary separation agreements while investigations are pending. *See* Katherine C. Pearson, *Cooperate or We'll Take Your Child: The Parents' Fictional Voluntary Separation Decision and a Proposal for Change*, 65 TENN. L. REV. 835, 836 (1998). Officials often extract such agreements by threatening parents who refuse to cooperate with more harsh consequences, such as forcibly placing their children in foster care or instituting formal custody proceedings. *See* Soledad A. McGrath, *Differential Response in Child Protection Services: Perpetuating the Illusion of Voluntariness*, 42 U. MEM. L. REV. 629, 667 (2012).

At the same time, law enforcement and prosecutorial officials pressure parents facing child-welfare offenses into pleading guilty. Scholars have reported, for instance, that police frequently threaten parents with official action, such as obtaining court orders to remove children from their homes if the parent refuses to cooperate. *See e.g.,* Mark Hardin, *Legal Barriers in Child Abuse Investigations: State Powers and Individual Rights*, 63 WASH. L. REV. 493, 503 (1988). Published cases also reveal that police sometimes threaten parents that refusing to cooperate might trigger child-welfare investigations or result in separation from their children. *See, e.g.*, *United States v. Patayan Soriano*, 361 F. 3d 494 (9th Cir. 2004) (upholding a police officer's search as voluntary despite the officer's threat to seize the subject's children if she failed to cooperate).

These pressures are amplified by structural disadvantages, such as poverty and noncitizen status. Beyond necessitating child care, time off work, and transportation costs, consequences like pretrial detention can cost parents their jobs. Ryan Charles McEvoy, *The Parent Trap: Rebalancing Parallel Enforcement Between Child Protective Services and Law Enforcement*, 169 U. PA. L. REV. 867, 897-98 (2021). And potentially removable noncitizens face "tremendous pressure" to "take almost any plea offer that avoids contact with ICE, regardless of the future immigration problems that may be triggered by the conviction, the strength of the prosecutor's case, or even their own culpability." Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1755 (2013). Parents who

elect to defend against charges of child endangerment and other offenses might spend months in jail awaiting trial, separated from their families, while risking enhanced charges and penalties. Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1133 (2008).

On the other hand, parents facing minor child-endangerment charges typically perceive the costs of cooperating to be slight, especially when charged with minor child-related offenses. From 2000 to 2015, less than 20% of convictions under NYPL § 260.10(1) resulted in any term of imprisonment. *Matthews*, 927 F.3d at 631 (Carney, J., dissenting). Nearly half of all convictions "led only to probation or a fine," and over 35% resulted in "conditional discharge," meaning the defendant avoided both imprisonment and probation. *Id.* Similarly, the statute under which Ms. Ibarra pled guilty was a "class 3 misdemeanor," "the least serious type of misdemeanor in Colorado," which carried "a minimum penalty of a fifty dollar fine." *Ibarra*, 736 F.3d at 908 (citing Colo. Rev. Stat. § 18-1.3-501). California Penal Code § 273a(a), under which Mr. Diaz-Rodriguez was convicted, is classified as a "wobbler," meaning prosecutors can charge offenses under the statute as misdemeanors or felonies. *People v. Mincey*, 827 P.2d 388, 416 (Cal. 1992). Both of Mr. Diaz-Rodriguez's offenses were charged as misdemeanors. Pet. 14.

These circumstances compel the vast majority of persons charged with minor acts of child endangerment to plead guilty. In the face of child-endangerment charges, parents correctly believe that cooperating with officials is generally the safest

course for avoiding separation from their child and myriad other collateral consequences.

B. Child-Endangerment Statutes Lack Meaningful Constraints

Because the overwhelming majority of minor offenses charged under state child-endangerment statutes result in guilty pleas that evade appellate review, courts are left without any meaningful guidance on the lower limits of conduct criminalized by these statutes. As the dissent recognized below, the examples of child endangerment discussed by the plurality in *Diaz-Rodriguez* "tell us nothing about the lower-bound of liability embraced by the criminal negligence standard." 55 F.4th at 752 (Wardlaw, J., dissenting). They exemplify only conduct that "is sufficient for liability under" the law. *Id.* Indeed, the "data and decisions" discussed above "paint a picture of prosecutions and guilty pleas showing that" the "broad and ambiguous language" of child-endangerment statutes are "enforced in a far more expansive, flexible, and subjective fashion than the reported case law might lead one to expect." *Matthews*, 927 F.3d at 625 (Carney, J., dissenting).

CONCLUSION

In the last 30 years, parenting norms, state child-welfare laws, and the Board of Immigration Appeals' interpretations of these laws have all expanded in tandem. The result has been a dramatic shift in the definition of child endangerment. Parenting decisions commonplace a generation ago are now exposing well-intentioned parents to child-endangerment prosecutions. Under the Board's

decision in *Matter of Soram* and the Ninth Circuit's decision below, convictions for such unconventional choices or minor lapses will permanently separate parents from their children. That outcome contravenes Congress's intent in enacting § 1227(a)(2)(E)(i) and is at war with the INA's purpose of "keeping families . . . united." *Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977) (quotations omitted).

Respectfully submitted,

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