No. 22-867

In the Supreme Court of the United States

KADEEN KAMAR KERR, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

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

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is not published in the Federal Reporter but is available at 2023 WL 193629. The opinion of the Board of Immigration Appeals (Pet. App. 10a-15a) is unreported. The decision of the immigration judge (Pet. App. 16a-20a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 2023. The petition for a writ of certiorari was filed on March 8, 2023. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1996, Congress amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to provide that any noncitizen "who at any time after admission is convicted of * * * a crime of child abuse, child

neglect, or child abandonment is deportable." 8 U.S.C. 1227(a)(2)(E)(i).[1] The INA does not define the phrase "crime of child abuse, child neglect, or child abandonment." *Ibid.* But the Board of Immigration Appeals (Board) has construed that phrase in several published decisions.

In 2008, the Board concluded that the phrase encompasses "any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being, including sexual abuse or exploitation." *In re Velazquez-Herrera*, 24 I. & N. Dec. 503, 512 (B.I.A. 2008). The Board also rejected the contention that the phrase was limited to crimes "necessarily committed by the child's parent or by someone acting in loco parentis." *Id.* at 513.

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

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[1] This brief uses "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020).

In 2016, the Board engaged in that analysis with respect to the New York child-endangerment statute, N.Y. Penal Law § 260.10(1) (McKinney Supp. 2016), which makes it a crime to "knowingly act[] in a manner likely to be injurious to the physical, mental, or moral welfare of a child less than seventeen years old," *ibid.* See *In re Mendoza Osorio*, 26 I. & N. Dec. 703, 705-712 (B.I.A. 2016). Applying the "'categorical approach,'" which asks "whether 'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition," *Moncrieffe* v. *Holder*, 569 U.S. 184, 190 (2013) (citation omitted), the Board concluded that "section 260.10(1) of the New York Penal Law is categorically a 'crime of child abuse, child neglect, or child abandonment' under" the INA. *Mendoza Osorio*, 26 I. & N. Dec. at 712.

Citing New York appellate decisions, the Board explained that a conviction under Section 260.10(1) requires "a showing that the defendant knew that his actions were likely to result in physical, mental, or moral harm to a child," as well as "proof that the harm was 'likely to occur, and not merely possible.'" *Mendoza-Osorio*, 26 I. & N. Dec. at 706 (citation omitted). The Board further explained that there was no evidence that the New York statute criminalized actions such as "leaving a child unattended for a short period, driving with a suspended license in the presence of a child, [or] committing petit larceny in the presence of a child," *id.* at 707, and therefore no "'realistic probability' that section 260.10(1) would successfully be applied to conduct falling outside" the scope of child abuse or neglect, *id.* at 712 (citation omitted). The Board contrasted the New York statute with California's misdemeanor child-endangerment statute, California Penal Code § 273a(b)

(West 2014), which "criminalizes conduct that places a child 'in a situation where his or her person or health *may* be endangered,'" and which the Board acknowledged "do[es] not require a sufficiently high risk of harm to a child to meet the definition of child abuse, neglect, or abandonment under the [INA]." *Mendoza-Osorio*, 26 I. & N. Dec. at 711 (citation omitted). In 2020, the Board applied the same analysis to conclude that the Oregon second-degree child-neglect statute is a "crime of child abuse, child neglect, or child abandonment" because it "requires a minimum mens rea of criminal negligence and a reasonable probability, or likelihood, or harm to a child." *In re Rivera-Mendoza*, 28 I. & N. Dec. 184, 190.

In sum, the Board's decisions in *Velazquez-Herrera*, *Soram*, *Mendoza Osorio*, and *Rivera-Mendoza* make clear that a "crime of child abuse, child neglect, or child abandonment" under 8 U.S.C. 1227(a)(2)(E)(i) includes crimes committed with criminal negligence, crimes that do not require proof of actual injury to the child (as long as they require a sufficiently high risk of harm), and crimes committed by caretakers other than a parent or legal guardian.

Lawful permanent residents of the United States who are removable as a result of a conviction for a crime of child abuse, child neglect, or child abandonment do not lose their eligibility for cancellation of removal if they otherwise satisfy the eligibility requirements. See 8 U.S.C. 1229b(a). The discretionary decision whether to award cancellation of removal turns on a balancing of factors, including duration of residence, family or business ties, good character, employment history, the nature and circumstances of the grounds of removal, and the presence of other criminal violations or evidence of

bad character. See *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998).

2. Petitioner is a native and citizen of Jamaica who was admitted to the United States as a lawful permanent resident in 2007. See Pet. 14. In addition to convictions for unlawful possession of weapons and drugs, among other offenses, petitioner was convicted in 2016 of violating N.Y. Penal Law § 260.10(1), the same New York child-endangerment statute at issue in *Mendoza Osorio*, *supra*. Pet. App. 11a, 17a, 19a.

On January 13, 2020, the Department of Homeland Security (DHS) issued petitioner a notice to appear. Pet. App. 16a. As relevant here, DHS charged petitioner with removability on the ground that his conviction under N.Y. Penal Law § 260.10(1) is a "crime of child abuse, child neglect, or child abandonment" under Section 1227(a)(2)(E)(i). See Pet. App. 17a. Citing the Second Circuit's decision in *Matthews* v. *Barr*, 927 F.3d 606 (2019), cert. denied, 141 S. Ct. 158 (2020) (No. 19-1022), which held that the same New York statute was a crime of child abuse, child neglect, or child abandonment under Section 1227 of the INA, an immigration judge sustained the charge of removability. Pet. App. 16a-20a.

The Board dismissed the appeal. Pet. App. 10a-15a. Citing *Matthews* and *Mendoza Osorio*, the Board observed that "[t]here is no dispute that, under the law of the Second Circuit, and this Board, [petitioner's] conviction under section 260.10(1) is categorically a crime of child abuse" under the INA. Pet. App. 12a. Petitioner had argued that notwithstanding the categorical match, there was "a realistic probability that the [New York] statute would criminalize conduct that would fall outside a crime of child abuse," as demonstrated by his

own conviction. *Id.* at 11a; see *id.* at 11a-12a. The Board rejected that argument, observing that petitioner's conviction involved his "keeping a large amount of marijuana, ammunition, and multiple loaded firearms in his room of an apartment he shared with others, including an infant minor," which created "a substantial likelihood the minor would be exposed to these materials and be harmed" given "the amount of these materials, the length of time the minor was present in the home, and the relative accessibility of [petitioner's] room." *Id.* at 14a. The Board thus concluded that petitioner's "own case does not establish that there is a realistic probability that conduct punished by the state statute is overbroad as to the [INA]." *Id.* at 15a.

3. The court of appeals denied the petition for review in an unpublished summary order. Pet. App. 1a-9a. The court explained that "to determine whether a state conviction is a removable offense as included on the INA's list, we employ the 'categorical approach,' in which we 'look not to the facts of the particular prior case, but instead to whether the state statute defining the crime of conviction categorically fits within the generic federal definition.'" *Id.* at 3a-4a (brackets and citation omitted). The court further explained that it had already held in *Matthews*, *supra*, that N.Y. Penal Law "§ 260.10(1) is an apparent categorical match to the [Board's] definition of a crime of child abuse" under Section 1227 of the INA. Pet. App. 4a.

The court of appeals also held that petitioner had not demonstrated a "realistic probability" that "'the State actually prosecutes the relevant offense in cases' that fall outside the federal definition." Pet. App. 5a (citation omitted). The court observed that petitioner "was convicted by a jury of endangering the welfare of his in-

fant half-sister after the police found large quantities of marijuana, loaded firearms, ammunition, and cash in his bedroom," including "a loaded firearm and bags on marijuana on top of [his] dresser" when "the bedroom door was open." *Id.* at 6a-7a. The court further observed that "the jury was instructed" that to convict petitioner it had to find that he "'acted in a manner likely to be injurious to the physical, mental or moral welfare of his infant half-sister and that [he] did so knowingly.'" *Id.* at 7a (brackets and citation omitted). That evidence and jury instruction, the court concluded, "demonstrate that [petitioner's] conviction falls squarely within the [Board's] generic definition of a crime of child abuse" under the INA. *Ibid.*

ARGUMENT

Petitioner renews his contention that N.Y. Penal Law § 260.10(1) is not categorically a "crime of child abuse, child neglect, or child endangerment" under 8 U.S.C. 1227(a)(2)(E)(i) because it can be committed without actual injury to the child and by "someone with *no* caretaking responsibility for the child." Pet. 22; see Pet. 21-23.[2] The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. This Court has twice denied petitions seeking review of the question presented. See *Matthews* v. *Barr*, 141 S. Ct.

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[2] The pending petitions for writs of certiorari in *Diaz-Rodriguez* v. *Garland*, No. 22-863 (filed Mar. 8, 2023), and *Bastias* v. *Garland*, No. 22-868 (filed Mar. 8, 2023)—both of which were filed by petitioner's counsel of record on the same day as the petition in this case—present the question whether Section 1227(a)(2)(E)(i) encompasses child-neglect crimes committed with a mens rea of criminal negligence.

158 (2020) (No. 19-1022); *Florez* v. *Lynch*, 577 U.S. 1216 (2016) (No. 15-590). The same result is warranted here.

1. a. The court of appeals correctly held that the New York child-endangerment statute, N.Y. Penal Law § 260.10(1), is a "crime of child abuse, child neglect, or child abandonment" under 8 U.S.C. 1227(a)(2)(E)(i). That INA provision states that a noncitizen is removable if, following admission, he "is convicted of *a crime* of domestic violence, *a crime* of stalking, or *a crime* of child abuse, child neglect, or child abandonment." *Ibid.* (emphasis added). The particular repetition and placement of "a crime" in that provision makes clear that Congress intended to specify three distinct types of crime that would render such noncitizens removable—and, critically, that "child abuse, child neglect, or child abandonment" describes a *single* type of crime. As the Board has explained, the phrase "child abuse, child neglect, or child abandonment" thus describes a "unitary concept," and each of the terms should therefore inform the meaning of the others. *In re Soram*, 25 I. & N. Dec. 378, 381 (B.I.A. 2010); see *In re Velazquez-Herrera*, 24 I. & N. Dec. 503, 518 (B.I.A. 2008) (Pauley, Board Member, concurring).

It follows that a crime need not involve actual harm to a child to qualify as a crime of child abuse, child neglect, or child abandonment; a "substantial risk of harm to a child's health or welfare" is sufficient. *Soram*, 25 I. & N. Dec. at 382. After all, the ordinary meanings of "neglect" and "abandonment" do not require actual physical or emotional injury, but instead encompass other types of mistreatment, including insufficient supervision, without regard to whether the mistreatment results in actual harm. See, *e.g.*, *Black's Law Dictionary* 1032 (6th ed. 1990) (defining "[n]eglect" as "to omit,

fail, or forbear to do a thing," "an absence of care or attention in the doing or omission of a given act," or "a designed refusal, indifference, or unwillingness to perform one's duty"); *id.* at 2 (defining "[a]bandonment" in this context as "[d]esertion or willful forsaking" and "[f]or[]going parental duties"). And when Congress enacted Section 1227(a)(2)(E)(i) in 1996, the most-recent version of *Black's Law Dictionary* further explained that "[a] child is 'neglected' when," among other things, he "is under such improper care or control *as to endanger* his morals or health." *Black's Law Dictionary* 1032 (emphasis added).

Those definitions make clear that endangering a child by creating a "substantial risk of harm to a child's health or welfare" constitutes child abuse, child neglect, or child abandonment. *Soram*, 25 I. & N. Dec. at 382. And as the Board has recognized, criminal negligence, unlike civil negligence, requires precisely such a heightened risk. See, *e.g.*, *In re Mendoza Osorio*, 26 I. & N. Dec. 703, 706 (B.I.A. 2016). Petitioner's contrary view would read the terms "child neglect" and "child abandonment" out of the statutory text.

Similarly, petitioner errs in asserting (Pet. 16) that a crime of child abuse, child neglect, or child abandonment can be committed only by someone with "caretaking responsibility for the child." Contemporaneous definitions of "child abuse" focus exclusively on the harm to the child, with no mention of a relationship to the perpetrator. See *Black's Law Dictionary* 239 (defining "child abuse" as "[a]ny form of cruelty to a child's physical, moral or mental well-being"). Indeed, there is little doubt that a stranger may abuse a child by causing the child harm. See, *e.g.*, *United States* v. *Zavala-Sustaita*, 214 F.3d 601, 605 n.5 (5th Cir. 2000) (citing the *Black's*

Law Dictionary definition of "child abuse" and other sources to reject suggestion that "sexual abuse of a minor" required a relationship between the child and adult). Petitioner provides no explanation for why that same proposition does not apply to the broader concept of maltreatment of a child.

b. At a minimum, the Board's conclusion that a "crime of child abuse, child neglect, or child abandonment" includes criminally negligent endangerment crimes—meaning crimes that require "a substantial risk of harm to a child's health or welfare," *Soram*, 25 I. & N. Dec. at 382—reflects a reasonable construction of the INA that warrants deference.[3] See, *e.g.*, *Scialabba* v. *Cuellar de Osorio*, 573 U.S. 41, 56 (2014) (plurality opinion); *id.* at 79 (Roberts, C.J., concurring in the judgment); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999). As the courts of appeals considering Section 1227(a)(2)(E)(i) have uniformly concluded, the phrase "crime of child abuse, child neglect, or child abandonment" is ambiguous. See, *e.g.*, *Florez* v. *Holder*, 779

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[3] This Court has granted certiorari in *Loper Bright Enterprises* v. *Raimondo*, No. 22-451 (May 1, 2023), to consider whether to "overrule *Chevron* [*U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984)] or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency." Pet. at i-ii, *Loper Bright*, *supra* (No. 22-451). This case does not implicate any question about statutory silence because the INA contains an *express* delegation of authority, providing that the "determination and ruling by the Attorney General with respect to all questions of law" arising from "the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of" noncitizens "shall be controlling," 8 U.S.C. 1103(a)(1); cf. *City of Arlington* v. *FCC*, 569 U.S. 290, 317-322 (2013) (Roberts, C.J., dissenting) (explaining that *Chevron* is primarily about implicit delegation).

F.3d 207, 211 (2d Cir. 2015), cert. denied, 577 U.S. 1216 (2016); *Mondragon-Gonzalez* v. *Attorney General*, 884 F.3d 155, 159 (3d Cir. 2018); *Garcia* v. *Barr*, 969 F.3d 129, 133 (5th Cir. 2020); *Diaz-Rodriguez* v. *Garland*, 55 F.4th 697, 723-724 (9th Cir. 2022) (en banc) (plurality opinion), petition for cert. pending, No. 22-863 (filed Mar. 8, 2023); *Zarate-Alvarez* v. *Garland*, 994 F.3d 1158, 1164 (10th Cir. 2021) (per curiam). Congress did not define that phrase or its constituent terms in Section 1227 or any other portion of the INA. Moreover, "state and federal statutes, both civil and criminal, offer varied definitions of child abuse, and the related concepts of child neglect, abandonment, endangerment, and so on." *Florez*, 779 F.3d at 211; see *Diaz-Rodriguez*, 55 F.4th at 713-723 (plurality opinion surveying dictionary definitions, surrounding INA provisions, other federal statutes, and state statutes in existence in 1996).

The Board adopted a reasonable construction of that ambiguous phrase when it concluded in *Soram* that it reaches convictions under some statutes that require proof of conduct that causes a sufficiently substantial risk to a child, without requiring proof of injury to the child or a caretaker relationship between the defendant and the child. See 25 I. & N. Dec. at 381; see also *Velazquez-Herrera*, 24 I. & N. Dec. at 512-513. In both civil and criminal contexts, the terms in Section 1227(a)(2)(E)(i) are commonly defined to include such conduct. See, *e.g.*, *Velazquez-Herrera*, 24 I. & N. Dec. at 509-511 (surveying criminal statutes); *Soram*, 25 I. & N. Dec. at 382 (citing report of U.S. Department of Health and Human Services compiling state definitions of child abuse and neglect); see also *Soram*, 25 I. &. N. Dec. at 386-387 (Filppu, Board Member, concurring)

(surveying criminal child abuse statutes in existence in 1996).

It was reasonable for the Board, as the entity exercising the Attorney General's authority to construe the INA, cf. 8 U.S.C. 1103(a); 28 U.S.C. 510; 8 C.F.R. 1003.1(a)(1), to conclude that those widespread definitions furnished the most appropriate construction of "crime of child abuse, child neglect, or child abandonment" for purposes of the INA. As the Board observed, Section 1227(a)(2)(E)(i) was enacted "as part of an aggressive legislative movement to expand the criminal grounds of deportability in general and to create a 'comprehensive statutory scheme to cover crimes against children' in particular," along with a provision making removable those who commit crimes involving sexual abuse of minors. *Velazquez-Herrera*, 24 I. & N. Dec. at 508-509 (quoting *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 994 (B.I.A. 1999) (en banc)); see *Soram*, 25 I. & N. Dec. at 383-384. The aim of protecting children through Section 1227(a)(2)(E)(i) would be disserved if the provision did not reach noncitizens convicted of placing children at substantial risk of harm—simply because of the fortuity that those noncitizens' conduct jeopardizing the safety of children did not ultimately lead to harm in those particular instances, or that the noncitizens did not have legal custodial relationships to the children.

c. The petition simply incorporates by reference (Pet. 16, 23) certain contrary arguments set forth in the petition for a writ of certiorari in *Diaz-Rodriguez*, *supra* (No. 22-863). *Diaz-Rodriguez*, however, is largely inapposite because it involves a California statute that requires that the defendant act with criminal negligence and have "care or custody" of the child. 55 F.4th

at 708 (citation omitted). The New York statute here, by contrast, requires a mens rea of knowledge and does not require a custodial relationship. In any event, to the extent the noncitizen's arguments in *Diaz-Rodriguez* are relevant, they lack merit for the reasons given in the government's brief in opposition to certiorari in *Diaz-Rodriguez*, which is being filed on the same day as this brief. See Br. in Opp. at 11-19, *Diaz-Rodriguez*, *supra* (No. 22-863) (filed May 23, 2023). Petitioner's counsel of record will be served with a copy of that brief because Diaz-Rodriguez is represented by the same counsel.

2. Petitioner does not assert that the decision below conflicts with any decision of this Court or another court of appeals. Instead, he urges (Pet. 17) the Court to grant certiorari if it also grants the petition for a writ of certiorari in *Diaz-Rodriguez*, *supra*, in order to provide "a fuller view of the range of state endangerment offenses." But every court of appeals to have considered the issue has concluded that the Board reasonably interpreted Section 1227(a)(2)(E)(i) to encompass reckless, knowing, or intentional child-endangerment crimes that do not require proof of injury to the child, as long as the defendant's actions created a sufficiently high risk of harm. See *e.g.*, *Florez*, 779 F.3d at 211 (2d Cir.); *Mondragon-Gonzalez*, 884 F.3d at 158-159 (3d Cir.); *Garcia*, 969 F.3d at 133 (5th Cir.); *Zarate-Alvarez*, 994 F.3d at 1164 (10th Cir.); cf. *Diaz-Rodriguez*, 55 F.4th at 732 (9th Cir.) (criminally negligent crimes); *Bastias*, 42 F.4th at 1272 (11th Cir.) (same). Petitioner offers no sound basis for this Court to grant review given that consensus in the lower courts. This Court denied the petitions in *Matthews*, *supra* (No. 19-1022), and *Florez*, *supra* (No. 15-590), both of which presented

the same question with respect to the same New York statute. The same course is warranted here.

Finally, to the extent petitioner continues to maintain (Pet. 20-21) that the New York statute is overbroad, that factbound question, which turns on an interpretation of state law, does not warrant this Court's review. See *Elk Grove Unified School District* v. *Newdow*, 542 U.S. 1, 16 (2004) (explaining that this Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located"); *Bowen* v. *Massachusetts*, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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