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

REPLY BRIEF FOR PETITIONER

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The government's opposition reads more like a merits brief than a brief opposing certiorari. The government agrees that the question presented implicates a circuit split—and thus that Mr. Diaz-Rodriguez could remain in this country with his long-time partner, children and grandchildren if only he lived in Colorado, not California. And the government does not dispute that the question on which the circuits are divided recurs frequently and is exceptionally important. Nor could it: The leading national organizations representing immigration lawyers, criminal defense lawyers, public defenders, and advocates of child protection reform all urge this Court to grant certiorari precisely because the question presented "recurs with great frequency" and is "exceptionally important" to noncitizens, AILA/NACDL/NAPD Br. 4, and determines whether "minor lapses" in parenting "will permanently separate parents from their children," NCCPR Br. 21.

The government nevertheless urges this Court to deny certiorari based on speculation that the Tenth Circuit might someday reverse its decision in *Ibarra v. Holder*, 736 F.3d 903 (10th Cir. 2013). But as the petition explained (at 19), it is unlikely that the Tenth Circuit will ever have the opportunity to revisit *Ibarra*. The government offers no response to this argument. The government also identifies no persuasive reason to think the Tenth Circuit might revisit *Ibarra* (if it had the opportunity to do so). This Court's decision in *Esquivel-Quintana v. Sessions*, 581 U.S. 385 (2017), and the Tenth Circuit's decision in *Zarate-Alvarez v. Garland*, 994 F.3d 1158 (10th Cir. 2021),

support, not undermine, *Ibarra*. And the Ninth Circuit's fractured, 6-5 decision in this case and the Eleventh Circuit's reluctant deference to the Board in *Bastias v. U.S. Attorney General*, 42 F.4th 1266 (11th Cir. 2022), hardly represent an "emerging consensus," Opp. 20, that would compel the Tenth Circuit to change its mind. *See* Pet. 22-23. Ultimately, the government's speculation as to what the Tenth Circuit might do in the future is no basis for leaving in place a circuit split that, right now, is leading noncitizen families to be separated based solely on geographic happenstance.

All that being said, while certiorari is certainly warranted under current law, this Court recently granted certiorari in *Loper Bright Enterprises v. Raimondo*, No. 22-451, to consider, in relevant part, whether to "overrule *Chevron*." Pet. at i-ii, *Loper Bright Enterprises*, *supra* (No. 22-451). The Ninth Circuit plurality opinion depended entirely on *Chevron*: The plurality did not hold that the Board's decision was the best reading of the statute, but only that it was a reasonable policy choice given the statute's purported ambiguity. Given that the decision below depends entirely on *Chevron*, this Court should hold this petition pending its decision in *Loper Bright Enterprises*. If this Court overrules or significantly modifies *Chevron* in *Loper Bright Enterprises*, then the Court should grant this petition, vacate the decision below, and remand. If the Court does not overrule or significantly modify *Chevron*, then it should grant plenary review in this case to resolve the circuit conflict.

I. This Court should hold this case pending its decision in *Loper Bright Enterprises* and, if the Court overrules or modifies *Chevron*, grant, vacate and remand this case.

After Mr. Diaz-Rodriguez filed his petition, this Court granted certiorari in *Loper Bright Enterprises* to decide "[w]hether the Court should overrule *Chevron v. Natural Resources Defense Council*, 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 Enterprises*, *supra* (No. 22-451). Given that the Ninth Circuit's decision below rests entirely on *Chevron*, this Court should hold this petition pending its decision in *Loper Bright Enterprises*.

The decision below depended entirely on *Chevron*. Specifically, the plurality held that the "crime[s] of child abuse, child neglect, or child abandonment" are "susceptible to multiple reasonable interpretations and therefore are ambiguous." Pet. App. 37a. "The statute," the plurality held, 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." *Id.* Under that interpretation, Mr. Diaz-Rodriguez would prevail. But, the plurality held, the statute is also "susceptible to an interpretation of 'child abuse' and 'child neglect' as requiring no more than a mental state of criminal negligence and conduct that puts a child at risk of serious harm by someone who may have only temporary responsibility for a

child's care." *Id.* Under that interpretation, the government would prevail. The plurality did not decide which of those interpretations was the *best* reading of the statute, as it would in a non-agency case. Instead, the plurality applied "the principles described in *Chevron*" and decided merely that the agency's pro-government interpretation was "reasonable" and hence "compels our deference." Pet. App. 45a.

The plurality recognized that "the future of the *Chevron* deference doctrine has been called into question" in "recent years," as "several justices have called for the Court to reexamine *Chevron* deference or proposed narrowing its scope." Pet. App. 48a n.30. Nevertheless, the plurality held, "we remain bound by past decisions of the Supreme Court until it overrules those decisions ... , so we must apply *Chevron*." Pet. App. 48a n.30.

If this Court overrules *Chevron*, the Ninth Circuit's opinion plainly cannot survive. Without *Chevron*, the Ninth Circuit plurality would have had to choose the better of the two interpretations to which the statute is (according to the plurality) "susceptible," rather than defaulting to the agency's preferred interpretation. Indeed, the petition argues that this Court should hold that *Chevron* does not apply to the Board's interpretation of the Immigration and Nationality Act, Pet. 33-35—an argument the government completely ignores and that *Loper Bright Enterprises* could render moot.

The proper course is thus to hold this petition pending this Court's decision in *Loper Bright Enterprises* and, if this Court overrules *Chevron* or modifies it in a relevant way, grant this petition, vacate the decision below, and remand to the Ninth Circuit. That

approach is especially appropriate given that a certiorari petition from the Eleventh Circuit's decision on this issue—which also depends entirely on *Chevron*—is also pending before this Court. *See* Pet. at 5-7, *Bastias v. Garland*, No. 22-868 (filed Mar. 8, 2023). If this Court overrules *Chevron*, it could grant, vacate, and remand both this case and *Bastias*, resolving the circuit conflict.

Remarkably, despite all of this, the government addresses *Loper Bright Enterprises* only in a footnote. Opp. 13 n.3. According to the government, *Loper Bright Enterprises* is irrelevant because this case "does not implicate any question about statutory silence because the INA contains an *express* delegation of authority." Opp. 13 n.3. But that addresses only the second half of the question presented in *Loper Bright Enterprises* (*i.e.*, whether "statutory silence ... does not constitute an ambiguity"). This Court also granted certiorari to decide "[w]hether the Court should overrule *Chevron*." The government does not—and cannot—explain why this Court should not hold this case until the Court decides whether to "overrule *Chevron*."

II. If the Court declines to hold this case or reaffirms *Chevron* in *Loper Bright Enterprises*, the Court should grant certiorari in this case to resolve the circuit conflict.

A. Absent a hold or GVR, the Court should grant certiorari in this case to resolve the circuit split concerning the question presented here: whether a conviction for negligent child endangerment is categorically a conviction for a "crime of child abuse, child neglect or child abandonment," 8 U.S.C. § 1227(a)(2)(E)(i), making a noncitizen removable and

ineligible for many vital forms of discretionary relief. As the petition explained, this issue recurs frequently and is incredibly important. *See* Pet. 17-26.

The government disputes none of these compelling reasons to grant certiorari. Most importantly, the government agrees that there is a circuit split. *E.g.*, Opp. 10 (recognizing that the decision below "conflicts with the Tenth Circuit's decision in *Ibarra*"); Opp. 21 (acknowledging a "2-1 conflict"). As the petition explained (at 22-23), the 2-1 nature of the split significantly understates the depth of disagreement on the question presented given the divisions within the circuits that have ruled for the government. The government does not disagree.

The government also does not dispute that the question presented is important and arises frequently. Nor could it. The leading national organizations that represent immigration lawyers, criminal defense lawyers, public defenders, and child protection reform advocates all ask this Court to grant certiorari for precisely these reasons.

The American Immigration Lawyers Association, the National Association of Criminal Defense Lawyers, and the National Association for Public Defense write that they "routinely confront this question in their practice across the country," as "child endangerment is a frequently charged offense in many states." AILA/NACDL/NAPD Br. 14. And they explain, in detail, how the question presented determines whether minor missteps involving children will lead to removal and family separation. *Id.* at 5-14.

In a separate brief, child protection reform advocates explain that child endangerment statutes that

are removable offenses under the Board's interpretation of the statute are being used to criminalize parenting decisions that were "commonplace only a generation ago." NCCPR Br. 2. Moreover, endangerment provisions encompass far more minor conduct than it may appear from published opinions. Parents often face enormous pressure to plead guilty to criminal charges based on minor conduct, as pleading guilty may be the only way to avoid losing their children. *Id.* at 15. There should be a uniform national answer to the question whether such minor conduct is grounds for removal and family separation.

In sum, there is no dispute that the circuits are divided on a frequently recurring and important question. This Court should resolve that dispute.

B. The government opposes certiorari based only on its hope that the Tenth Circuit may one day reverse its decision in *Ibarra*. That speculation provides no basis for denying certiorari. As an initial matter, it is not clear the Tenth Circuit will ever have the opportunity to reconsider *Ibarra*: As the petition explained (at 19), the agency will not order noncitizens in the Tenth Circuit removed based on negligent child endangerment convictions, so those noncitizens' cases will never come before the Tenth Circuit. The government ignores this issue.

Even if the Tenth Circuit had the chance to reconsider *Ibarra*, the government's arguments as to why it would choose to do so are meritless. First, the government speculates that the Tenth Circuit might reconsider *Ibarra* based on this Court's decision in *Esquivel-Quintana v. Sessions*, 581 U.S. 385 (2017). The government reasons that *Ibarra* relied "almost exclusively on a survey of state laws" and cites a footnote

in *Esquivel-Quintana* for the proposition that "such surveys are merely one tool among many to determine the elements of a federal crime listed in the INA." Opp. 19. But *Esquivel-Quintana* itself relied heavily on a survey of state laws. *See* 581 U.S. at 395-96. Moreover, all the other tools of statutory interpretation identified in *Esquivel-Quintana* favor the Tenth Circuit's decision in *Ibarra*, too. *See* Pet. 26-31. The government largely ignores those arguments. Thus, *Esquivel-Quintana* as a whole *supports* the Tenth Circuit's position.

Second, the government argues (at 20) that the Tenth Circuit's decision in *Zarate-Alvarez v. Garland*, 994 F.3d 1158 (10th Cir. 2021), is "incompatible with *Ibarra*'s approach," creating an "internal conflict" the Tenth Circuit may resolve. But the Tenth Circuit does not see the two cases as "incompatible." *Zarate-Alvarez* reaffirmed *Ibarra's* holding that "non-injurious criminally negligent conduct" falls outside the generic immigration offense. *Id.* at 1164 (quoting *Ibarra*, 736 F.3d at 918). The court held that a state statute criminalizing non-injurious *reckless* conduct raised "an entirely different question than the one raised in *Ibarra*." *Id.*

Finally, the government argues that there is an "emerging consensus" that *Ibarra* was wrong, which "might also persuade the Tenth Circuit to reconsider *Ibarra*." Opp. 20-21. But that putative "consensus" consists of (1) the Ninth Circuit's fractured 6-5 en banc decision in this case, in which no opinion was joined by a majority of judges, and (2) the Eleventh Circuit's begrudging deference to the agency in *Bastias*, in which the panel recognized that it might have ruled against the government were it not bound by a

prior, largely unreasoned decision that the authoring judge concluded was incorrect. *See* Pet. 22-23. The notion that the Tenth Circuit would view these two opinions as a "consensus" that requires reconsideration of *Ibarra* defies credulity. Indeed, as the petition explained (at 22-23), were it not for the quirks of the Ninth Circuit's limited en banc procedure and the existence of deeply flawed pre-*Bastias* Eleventh Circuit precedent, the circuit lineup on the question presented could have been 3-to-0 *against* the government.

There is thus no reason to think the Tenth Circuit will change positions—and hence no reason to deny certiorari.

III. The Ninth Circuit's decision is wrong.

The government's opposition focuses largely on why it should win on the merits. Its arguments are both irrelevant to whether this Court should grant certiorari and also wrong.

A. The government's only argument as to why the agency was correct—as opposed to why the agency is entitled to deference—has been rejected by every court to consider it, including the Ninth Circuit below. The government echoes the agency's view that the phrase "crime of child abuse, child neglect, or child abandonment" is a "unitary concept" that sweeps in conduct that does not actually qualify as "child abuse," "child neglect," or "child abandonment." Thus, according to the government, because "neglect" and "abandonment" do not require actual injury and because "abuse" encompasses negligent conduct, the "unitary concept" encompasses negligent endangerment. That would be true, according to the government, even if negligent endangerment does not qualify as *either*

"child abuse" (because, for instance, it does not require harm) *or* "child neglect" or "child abandonment" (because, for instance, it does not require that the defendant be a parent or guardian). *Id.* at 11-13.

Not a single court of appeals has agreed with this argument. Judge Collins's two-judge concurrence below dismissed it out of hand, writing that "it is clear that the three phrases do not have the same meaning and cannot be reduced to a unitary formula." Pet. App. 74a n.2. The five-judge dissent agreed. Pet. App. 118a. So, too, did the Tenth Circuit in *Ibarra*. 736 F.3d at 914.

The courts' unanimous rejection of the government's position is unsurprising. Congress could have swept in crimes "related" or "similar" to abuse, neglect, and abandonment, as it did elsewhere in the statute. *See* 8 U.S.C. § 1101(a)(27)(J)(i) ("abuse, neglect, abandonment, or a similar basis found under State law"). Instead, Congress identified *only* the specific "crime[s]" of "child abuse," "child neglect," and "child abandonment" themselves. The relevant inquiry is therefore limited to what those words mean and whether a given state offense categorically falls within one of those buckets. The government cannot pick and choose elements that it likes from each enumerated offense, ignore the elements it does not like, and create a new offense that appears nowhere in the statute.

B. The government, like the Ninth Circuit plurality, ultimately falls back on *Chevron* deference, arguing that the agency's interpretation, while perhaps not the best one, is at least reasonable. Opp. 13-15. Even if *Chevron* survives *Loper Bright Enterprises*, this arguments fails.

As an initial matter, the government largely ignores the petition's argument the statute *unambiguously* excludes negligent endangerment. Pet. 26-31. The government skips past most of the dictionary definitions and misleadingly excerpts some that it does cite. *E.g.*, Opp. 12 (quoting the definition of "neglected child" from 1990 version of *Black's Law Dictionary*, but omitting language limiting the term to conduct by a "parent or custodian"). The government does not dispute that most states in 1996 did not classify negligent endangerment as a form of "abuse," "neglect," or "abandonment." And the government cannot explain why Congress, in listing a series of extremely serious domestic offenses, would have intended to smuggle in the non-enumerated offense of child endangerment that criminalizes minor conduct and is treated incredibly leniently under state criminal law. Pet. 29-30; AILA/NACDL/NAPD Br. 5-14.

Even if the Court were to reach step two, the government is also wrong that the Board's interpretation is reasonable because it furthers Congress's purpose of "protecting children." Opp. 15, 17. The leading advocates for child protection reform have appeared as amici to explain why the government's position will often *harm* children by separating them from their parents based on choices and "minor lapses" that do not "reflect [the noncitizens'] fitness as parents" and were "commonplace only a generation ago." NCCPR Br. 1-2, 21. It would not have been "protecting children" to deport Ms. Ibarra, a single mother who, on one occasion, left her unharmed children alone while she went to work. AILA/NACDL/NAPD Br. 6-7. And it was not "protecting children" to deport Ms. Martinez, a "caring parent." *Martinez v. U.S. Att'y Gen.*, 413 Fed. Appx. 163, 168-69 (11th Cir. 2011)

(describing Ms. Martinez's deportation as "profoundly unfair, inequitable, and harsh"); *see also* AILA/NACDL/NAPD Br. 12-13. It is the government's position, not petitioner's, that "harm[s] the very children the statute was intended to protect," and "inflict[s] needless suffering on some of the most vulnerable members of our society." *Matthews v. Barr*, 927 F.3d 606, 636-37 (2d Cir. 2019) (Carney, J., dissenting).

CONCLUSION

The petition for a writ of certiorari in this case should be held pending this Court's decision in *Loper Bright Enterprises*. If this Court overrules or modifies *Chevron*, the petition in this case should be granted, the judgment below should be vacated, and the case should be remanded for further consideration in light of *Loper Bright Enterprises*.

If this Court does not hold this case or if this Court reaffirms *Chevron* in *Loper Bright Enterprises*, then the Court should grant the petition for a writ of certiorari in this case.

Respectfully submitted.

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