No. 22-868

IN THE
Supreme Court of the United States

ARIEL MARCELO BASTIAS,

Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh 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 PROCEEDING

Bastias v. Garland, No. 21-11416 (11th Cir.) (decision issued and judgment entered August 2, 2022; rehearing en banc denied November 7, 2022)

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Ariel Marcelo Bastias respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-22a) is reported at 42 F.4th 1266. The decisions of the Board of Immigration Appeals (Pet. App. 23a-30a) and the immigration judge (Pet. App. 31a-47a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 2022. A petition for panel rehearing and rehearing en banc was denied on November 7, 2022. On January 23, 2023, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including March 8, 2023. *See* No. 22A655. 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. Legal Framework

1. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress amended the Immigration and Nationality Act (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 of Immigration Appeals (Board) to decide which child-related offenses merit removal. Instead, Congress identified the three child-related "crime[s]" it wanted to target: "child abuse, child neglect, or child abandonment." 8 U.S.C. § 1227(a)(2)(E)(i).

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), and ineligibility for the separate cancellation provision for "battered spouse[s] or child[ren]," *id.* § 1229b(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)).

2. Rather than hew to the statute's focus on the three particularly serious child-related offenses in the statute, the Board has gradually expanded its interpretation of the "crime of child abuse, child neglect, or child abandonment" provision to include broad child-endangerment provisions that criminalize isolated and harmless mistakes involving children.

The Board's initial interpretations of the child-abuse provision required actual harm to the child.

See, e.g., *Matter of Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 996 (BIA 1999); *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503, 512 (BIA 2008). Multiple courts of appeals interpreted these decisions as excluding endangerment offenses—which require only a *risk* of harm to the child—from the scope of the generic federal offense. *See, e.g.*, *Fregozo v. Holder*, 576 F.3d 1030, 1037 (9th Cir. 2009); *Guzman v. Holder*, 340 Fed. Appx. 679, 682 (2d Cir. 2009).

In *Matter of Soram*, 25 I. & N. Dec. 378, 381 (BIA 2010), the Board reversed course and held that the generic offense of child "abuse," "neglect," or "abandonment" *does* encompass most convictions for child "endangerment." The Board left open the possibility that some particularly broad provisions might fall outside the federal offense. But the Board did not even try to set forth a coherent standard for distinguishing between different states' provisions. Instead, the Board held that endangerment provisions *are* categorically crimes of "abuse," "neglect," or "abandonment" *unless* the Board concludes, based on its own subjective determination, that a given endangerment statute requires a "risk of harm" that is not "sufficient." *Id.* at 381-83. The Board then applied this standard to the Colorado statute at issue and concluded that it required a "sufficient" risk of harm. *Id.* at 383-86.

B. Facts and Procedural History.

1. Petitioner Ariel Marcelo Bastias is a native and citizen of Chile. He is 44 years old. He came to the United States almost 30 years ago, when he was 15 years old, and he adjusted his status to that of a lawful permanent resident in February 1997. Pet. App. 31a. He has been with his partner, Ashley Horton, since 2006. Pet. App. 34a. Mr. Bastias has two children

with Ms. Horton who are 4 and 9 years old, and a third child, aged 18, with a prior partner. Pet. App.34a. Mr. Bastias's three children are all United States citizens, as is Ms. Horton. Pet. App. 34a. Mr. Bastias's parents also live in the United States; his father is a United States citizen, and his mother is a lawful permanent resident. Pet. App. 34a-35a. Mr. Bastias started a pool business in 2007 and has worked with the company ever since. Pet. App. 35a.

On October 4, 2019, Mr. Bastias was convicted of violating a Florida statute that, as relevant here, criminalizes negligent conduct that leads to "a single incident or omission 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); Pet. App. 2a.

2. In August 2020, the Department of Homeland Security filed a Notice to Appear with the immigration court, charging Mr. Bastias as removable based on his 2019 conviction. Pet. App. 32a. Applying *Soram*, the immigration judge held that Mr. Bastias was removable, Pet. App. 43a-47a, and denied his application for cancellation of removal, Pet. App. 32a-40a. The Board, also applying *Soram*, dismissed Mr. Bastias's appeal. Pet. App. 23a-29a.

3. Mr. Bastias then filed a petition for review with the Eleventh Circuit.

a. The Eleventh Circuit had previously addressed the immigration consequences of a negligent endangerment conviction under Fla. Stat. § 827.03 in its unpublished decision in *Martinez v. U.S. Attorney General*, 413 Fed. Appx. 163 (11th Cir. 2011). In that case,

Ms. Martinez had accepted *Soram* as a valid interpretation of the statute, but argued that the Florida endangerment provision was not a removable offense under *Soram*. *See* 413 Fed. Appx. at 166. The Eleventh Circuit rejected that argument. *Id.* at 167-68. The Eleventh Circuit lamented, however, that its decision led to a "profoundly unfair, inequitable, and harsh result": the removal of a mother who, aside from briefly allowing her abusive husband back into her home on her pastor's advice, had never "been anything less than a caring parent." *Id.* at 168-69. Applying the Board's decision in *Soram*, the court wrote, "yields a conclusion that is onerous and, at its core, inequitable." *Id.* at 164.

b. Unlike Ms. Martinez, Mr. Bastias did challenge whether *Soram* validly classified negligent child endangerment as a removable offense. But the Eleventh Circuit rejected that argument in a published opinion. Pet. App. 1a-2a.

Starting with *Chevron*'s first step, the court could "see good arguments going both ways" as to whether the statute unambiguously precludes the Board's interpretation of the statute. Pet. App. 9a. But the court held that it was bound to find the statute ambiguous based on its prior decision in *Pierre v. U.S. Attorney General*, 879 F.3d 1241, 1249 (11th Cir. 2018), which had found the statue ambiguous outside the context of child endangerment. Pet. App. 10a-11a.

Under *Chevron*'s second step—which, according to the court, permits "policy-based choices to adopt less-than-best readings" of a statute—the court concluded that the Board's decision that child "abuse," "neglect," or "abandonment" "include[s] culpably negligent con-

duct likely to result in harm is a reasonable interpretation of the statute" and thus entitled to deference. Pet. App. 11a-17a.

The court recognized that its decision conflicts with the Tenth Circuit's decision in *Ibarra v. Holder*, 736 F.3d 903 (10th Cir. 2013). That court had held that the statute precludes classifying "non-injurious criminally negligent conduct" as a crime of child "abuse," "neglect," or "abandonment." Pet. App. 5a. But the Eleventh Circuit "disagree[d]" with *Ibarra* because, according to the Eleventh Circuit, the Tenth Circuit failed to give sufficient deference to the agency. Pet. App. 13a-14a.

Judge Newsom concurred in his own panel decision to criticize the Eleventh Circuit's prior decision in *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." Pet. App. 19a (Newsom, J., concurring). Instead, the court in *Pierre* had held that because the INA "does not define 'child abuse,'" it was "silent on the issue," and therefore ambiguous. Pet. App. 19a (quoting *Pierre*, 879 F.3d at 1249). 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 v. Sessions*, 581 U.S. 385 (2017), which require that courts apply all canons of statutory interpretation before deeming a statute ambiguous. Pet. App. 20a-21a. It also conflicts with "the separation-of-powers principles that [this Court's] recent reinvigoration of step one embodies," which "make[] clear that our duty as judges to say

what the law is before declaring a statue ambiguous and ceding the interpretive function to an administrative agency is not so easily sidestepped." Pet. App. 18a-19a.

The Eleventh Circuit denied rehearing en banc. Pet. App. 48a.

REASONS FOR GRANTING THE WRIT

This petition for a writ of certiorari presents the same question as the petition in *Diaz-Rodriguez v. Garland*, No. ___ (filed Mar. 8, 2023), which is being filed concurrently with the petition in this case. Like the Ninth Circuit in *Diaz-Rodriguez*, the Eleventh Circuit in this case upheld the agency's conclusion that negligent non-injurious conduct falls within the scope of a "crime of child abuse, child neglect, or child abandonment" in 8 U.S.C. § 1227(a)(2)(E)(i).

As explained in the *Diaz-Rodriguez* petition, the Ninth Circuit's decision in *Diaz-Rodriguez* and the Eleventh Circuit's decision in this case directly conflict with the Tenth Circuit's decision in *Ibarra*, which held that the statute's text, read using traditional interpretive tools, precludes classifying "negligent non-injurious conduct" as child "abuse," "neglect," or "abandonment." 736 F.3d at 917-18; Pet. at 10-20, *Diaz-Rodriguez*, *supra* (No. __). That circuit conflict warrants review: The question presented will not resolve without this Court's intervention, it recurs frequently, and it is exceptionally important. Pet. at 19-21, *Diaz-Rodriguez*, *supra* (No. __); *see also Martinez*, 413 Fed. Appx. at 168-69 (explaining how the Board's classification of negligent endangerment as a removable offense led to the "profoundly unfair, inequitable, and harsh result" of removing a mother who, outside

of one mistake, had never "been anything less than a caring parent").

Moreover, the Ninth and Eleventh Circuit decisions are wrong, as they conflict with the statute's text read using traditional interpretive tools. Pet. at 26-35, *Diaz-Rodriguez*, *supra* (No. __). Notably, the Eleventh Circuit in this case saw "good arguments going both ways" as to whether the statute precludes the Board's interpretation at *Chevron*'s first step. Pet. App. 9a. But the court was prevented from analyzing those arguments by its prior decision in *Pierre*, which had already deemed the statute ambiguous. Pet. App. 10a-11a. As Judge Newsom explained, however, *Pierre*'s "blink and you miss it" approach to *Chevron*'s first step was "error": It relied on the very "reflexive" approach to agency deference that this Court has criticized, shirking the judiciary's "'duty of interpreting the laws,'" and "exacerbat[ing] the risk of the 'judicial power be[ing] shared with the Executive Branch,' in violation of Article III." Pet. App. 18a-22a (Newsom, J., concurring) (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2437 (2019) (Gorsuch, J., concurring in the judgment)).

The question presented therefore warrants review. Because the petition in *Diaz-Rodriguez* presents a suitable vehicle in which to address this important issue, the Court should hold the petition in this case pending the disposition in *Diaz-Rodriguez*, then dispose of this petition as appropriate in light of the Court's disposition of *Diaz-Rodriguez*.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's consideration of the petition in

Diaz-Rodriguez v. Garland, No. __ (filed Mar. 8, 2023), and any further proceedings in this Court, and then disposed of as appropriate in light of the Court's disposition of that case.

Respectfully submitted.

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