No. 22-868

In the Supreme Court of the United States

ARIEL MARCELO BASTIAS, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's conviction for aggravated child abuse under Florida 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-22a) is reported at 42 F.4th 1266. The opinion of the Board of Immigration Appeals (Pet. App. 23a-30a) is unreported. The decision of the immigration judge (Pet. App. 31a-40a) is unreported. A prior decision of the immigration judge (Pet. App. 41a-47a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 2022. A petition for rehearing was denied on November 7, 2022 (Pet. App. 48a). 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, and the petition was filed on that date. 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. 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 (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

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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).

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.*

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 (CPC) § 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 Chile who was admitted to the United States as a lawful permanent resident in 1997. Pet. App. 42a. In addition to multiple arrests or convictions for battery and driving under the influence, among other offenses, petitioner was convicted in 2019 of aggravated child abuse under Florida law, stemming from an incident in which he punched his 13-year-old son more than five times, resulting in a fractured skull, bleeding in the ear canal, and other injuries. See *id.* at 35a-36a, 43a-44a.

The Florida statute under which petitioner was convicted defines four felony offenses. See Fla. Stat. Ann. § 827.03(2)(a)-(d) (West 2023). Aggravated child abuse, defined in paragraph (a), see *id.* § 827.03(2)(a), is a first-degree felony and generally requires knowing or willful conduct and resulting injury to the child, see *id.* § 827.03(1)(a). As relevant here, the least severe crime in the statute, set forth in paragraph (d), provides that a "person who willfully or by culpable negligence neglects a child without causing great bodily harm, permanent disability, or permanent disfigurement to the child commits a felony of the third degree." *Id.* § 827.03(2)(d). The Supreme Court of Florida has stated that "culpable negligence" requires proof of "reckless indifference or grossly careless disregard of the safety of others." *Florida* v. *Greene*, 348 So. 2d 3, 4

(1977). And the statute defines "'[n]eglect of a child'" to mean a "caregiver's failure or omission to provide a child with the care, supervision, and services necessary to maintain the child's physical and mental health" or "to make a reasonable effort to protect a child from abuse, neglect, or exploitation by another person," and such neglect "may be based on repeated conduct or on a single incident or omission that results in, or could reasonably be expected to result in, serious physical or mental injury, or a substantial risk of death, to a child." Fla. Stat. Ann. § 827.03(e).

On August 4, 2020, the Department of Homeland Security (DHS) issued petitioner a notice to appear. Pet. App. 42a. DHS charged petitioner with removability on the ground that his aggravated child-abuse conviction under Fla. Stat. Ann. § 827.03(2)(a) was a "crime of child abuse, child neglect, or child abandonment" under Section 1227(a)(2)(E)(i). See Pet. App. 42a. Petitioner filed a motion to terminate proceedings with the immigration judge, arguing that one of the documents in his Florida conviction records "describes the offense as child neglect under section 827.03," not aggravated child abuse under Section 827.03(2)(a). *Id.* at 43a; see *id.* at 2a-3a (describing the ambiguity in conviction records). The judge rejected that argument, explaining that petitioner "overlooks the judgment and information in the record of conviction, which unambiguously list [petitioner's] conviction as a conviction of aggravated child abuse." *Id.* at 43a-44a. The judge sustained the charge of removability, *id.* at 41a-47a, and denied petitioner's application for cancellation of removal as a matter of discretion, *id.* at 31a-40a.

The Board affirmed. Pet. App. 23a-30a. The Board appeared to accept petitioner's argument that "DHS

did not meet its burden to establish by clear and convincing evidence the specific offense" among the "four enumerated offenses under section 827.03(2)" to which petitioner had pleaded guilty. *Id.* at 24a. Accordingly, the Board assumed that petitioner's Florida conviction was for child neglect under Section 827.03(2)(d) rather than aggravated child abuse under Section 827.03(2)(a). See *id.* at 26a. Citing *Soram*, *Velazquez-Herrera*, and *Rivera-Mendoza*, among other decisions, the Board held that Fla. Stat. Ann. § 827.03(2)(d) categorically is a crime of child abuse, child neglect, or child abandonment because the state statute requires "criminal negligence and the reasonable expectation to cause serious injury or substantial risk of death—so significantly endangers the safety and welfare of a child as to qualify as 'child abuse' within the meaning [of] *Rivera-Mendoza*." Pet. App. 28a. The Board additionally upheld the immigration judge's denial of petitioner's application for cancellation of removal as a matter of discretion. *Id.* at 28a-29a.

3. The court of appeals unanimously denied the petition for review. Pet. App. 1a-22a.

a. The court of appeals explained that it would "apply the 'categorical approach' to determine whether [petitioner] was convicted of a 'crime of child abuse, child neglect, or child abandonment' within the meaning of the INA." Pet. App. 6a. Under that approach, the court would "'consider only the fact of conviction and the statutory definition of the offense,'" with a "focus on 'the least culpable conduct necessary to sustain a conviction under the statute' under which [petitioner] was convicted." *Id.* at 6a-7a (citation omitted). The court noted that petitioner had "agree[d] that the least culpable conduct criminalized by the Florida statute under which

[he] was convicted—culpably negligent child neglect" categorically was a crime of child abuse, child neglect, or child abandonment under the Board's decisions interpreting Section 1227(a)(2)(E)(i). *Id.* at 2a. The court explained that because prior circuit precedent had already held that Section 1227(a)(2)(E)(i) is ambiguous, "[t]he question, then, is whether the [Board's] reading of that provision is permissible." *Ibid.*

The court of appeals held that the Board's interpretation of Section 1227(a)(2)(E)(i) as "includ[ing] culpably negligent conduct likely to result in harm is a reasonable interpretation of the [INA]." Pet. App. 11a. The court so concluded for "two main reasons." *Id.* at 15a. First, the court explained that the "ordinary meaning of the statutory text" of the INA is "consistent with criminally negligent conduct; it doesn't require intent or the subjective awareness of risk." *Ibid.* Second, the court observed that the Board's "interpretation is consistent with the approach taken by a sizable minority of states and by other federal statutes." *Id.* at 16a; see *id.* at 15a-16a. The court rejected petitioner's argument that the Board's interpretation was unreasonable because "it encompasses conduct that most states didn't criminalize in 1996," explaining that "the Supreme Court * * * 'has never suggested that an *administrative agency* must [survey state criminal codes] to construe an ambiguous federal term that references state crimes.'" *Id.* at 13a-14a (citation omitted). "The agency," the court of appeals explained, "is required to adopt a reasonable interpretation—not to proceed by any particular interpretive method." *Id.* at 14a (citation omitted).

b. Judge Newsom, who authored the court of appeals' opinion, concurred. Pet. App. 18a-22a. In his

view, prior circuit precedent had "too quickly" concluded that Section 1227(a)(2)(E)(i) was ambiguous, Pet. App. 18a, although he acknowledged that the court "might still have concluded that the statute is ambiguous" even had it undertaken a more thorough examination, *id.* at 22a.

ARGUMENT

Petitioner renews his contention (Pet. 7-8) that Fla. Stat. Ann. § 827.03 is not categorically a "crime of child abuse, child neglect, or child endangerment" under 8 U.S.C. 1227(a)(2)(E)(i) because the offense described in Subsection (2)(d) of the Florida statute can be committed with criminal negligence and without actual injury to the child.[2] The court of appeals correctly rejected that contention, and although its decision conflicts with the Tenth Circuit's decision in *Ibarra* v. *Holder*, 736 F.3d 903 (2013), that conflict does not warrant this Court's review because the Tenth Circuit may well reconsider its position in light of subsequent developments, including an intervening decision of this Court.

1. a. The court of appeals correctly held that the Florida child-abuse statute, Fla. Stat. Ann. § 827.03, 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

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[2] Petitioner's counsel of record filed two other petitions for writs of certiorari on the same day as the petition in this case. The pending petition in *Diaz-Rodriguez* v. *Garland*, No. 22-863 (filed Mar. 8, 2023), raises the same question with respect to a California child-endangerment statute. The pending petition in *Kerr* v. *Garland*, No. 22-867 (filed Mar. 8, 2023), presents the question whether Section 1227(a)(2)(E)(i) encompasses a crime committed with a mens rea of knowledge that does not require proof of injury to the child.

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 (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.

Moreover, even the term "child abuse" encompasses criminally negligent treatment irrespective of the surrounding terms. Although Congress did not define the term "child abuse" in the INA, definitions of that or similar terms in other federal statutes enacted in the few years before 1996 encompassed criminally negligent treatment of a child. For example, the National Child Protection Act of 1993, Pub. L. No. 103-209, 107 Stat. 2490, defined a "'child abuse crime'" to be one "that involves the physical or mental injury, sexual abuse or exploitation, *negligent treatment*, or maltreatment of a child by any person." 42 U.S.C. 5119c(3) (1994) (emphasis added); see 34 U.S.C. 40104(3) (current location of the same definition). Similarly, the Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789, defined "'child abuse'" to mean "the physical or mental injury, sexual abuse or exploitation, or *negligent treatment* of a child" both for purposes of protecting the rights of child victims and child witnesses, 18 U.S.C. 3509(a)(3)

(emphasis added), and for purposes of requirements for reporting child abuse, 42 U.S.C. 13031(c)(1) (1994); see 34 U.S.C. 20341(c)(1) (current location of the same definition). Those statutory definitions reinforce the conclusion that the 1996 Congress intended for the INA's reference to a "crime of child abuse, child neglect, or child abandonment," 8 U.S.C. 1227(a)(2)(E)(i), to include crimes committed with criminal negligence.

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.*, *Sci-alabba* 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

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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).

"crime of child abuse, child neglect, or child abandonment" is ambiguous. See, *e.g.*, *Florez* v. *Holder*, 779 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 criminally negligent conduct that causes a sufficiently substantial risk to a child, without requiring proof of injury to the child. See 25 I. & N. Dec. at 381. 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 furnish 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.

c. The petition simply incorporates by reference (Pet. 7-8) the contrary arguments set forth in the petition for a writ of certiorari in *Diaz-Rodriguez*, *supra* (No. 22-863). Those arguments 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 15-19, *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 observes (Pet. 17-20) that the decision below conflicts with the Tenth Circuit's decision in *Ibarra*, *supra*. The court in *Ibarra* found that Section 1227(a)(2)(E)(i) "does contain *some* ambiguity," 736

F.3d at 910—but it then refused even to address whether the Board's resolution of that ambiguity was reasonable because it thought such an inquiry was needed only if "the 'traditional tools of statutory construction yield no relevant congressional intent,'" *ibid.* (citation omitted). The court then attempted to divine that intent by conducting its own survey of state criminal codes. See *id.* at 911-918. The court concluded that in 1996, "a clear majority of states did not criminalize [child abuse, child neglect, or child abandonment] when it was committed with only criminal negligence and resulted in no injury. Accordingly, [the noncitizen's] conviction" under a Colorado statute "for negligently permitting her children to be placed in a situation where they might have been injured, when no injury occurred, does not fit the generic federal definition of child 'abuse, neglect, or abandonment' in 8 U.S.C. § 1227(a)(2)(E)(i)." *Id.* at 918.

The conflict between *Ibarra* and the decision below does not warrant this Court's review because the Tenth Circuit may well reconsider its holding based on subsequent developments. First, *Ibarra* relied almost exclusively on a survey of state laws (one that the *Diaz-Rodriguez* plurality viewed as flawed, see 55 F.4th at 734). But this Court's intervening decision in *Esquivel-Quintana* v. *Sessions*, 581 U.S. 385 (2017), makes clear that such surveys are merely one tool among many to determine the elements of a federal crime listed in the INA for purposes of applying the categorical approach. See *id.* at 389-397. In *Esquivel-Quintana*, the Court relied on the statutory text and the "everyday understanding" of the terms, *id.* at 391 (citation omitted); contemporaneous dictionaries, *id.* at 392-393; "[s]urrounding provisions of the INA," *id.* at 393; other "closely re-

lated federal statute[s]," *id.* at 394; and—finally—"state criminal codes," *id.* at 395. *Ibarra*'s near-exclusive focus on a state survey is incompatible with the holistic analysis employed by *Esquivel-Quintana*.

Second, the Tenth Circuit has subsequently recognized that it should uphold the Board's reasonable interpretation of Section 1227(a)(2)(E)(i) without attempting to divine "congressional intent," as *Ibarra* did, 736 F.3d at 910 (citation omitted). See *Zarate-Alvarez*, 994 F.3d at 1164. As the Fifth Circuit has observed, *Ibarra* is "the only case that hasn't deferred to the Board's interpretation" of Section 1227. *Garcia*, 969 F.3d at 133. Although *Zarate-Alvarez* did not overrule *Ibarra*, its approach to addressing the Board's precedential decisions is incompatible with *Ibarra*'s approach. The Tenth Circuit thus may well resolve that internal conflict in the future. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

Third, since the Tenth Circuit's decision in *Ibarra*, the Ninth and Eleventh Circuits have concluded that the Board reasonably determined that Section 1227(a)(2)(E)(i) encompasses crimes committed with criminal negligence without proof of injury to the child. See Pet. App. 1a-22a; *Diaz-Rodriguez*, *supra*. That emerging consensus, which makes *Ibarra* even more of an outlier than it already was, see *Garcia*, 969 F.3d at 133, might also persuade the Tenth Circuit to reconsider *Ibarra*. Along with its own decision in *Zarate-Alvarez* and this Court's decision in *Esquivel-Quintana*, those significant intervening developments mean that this Court's review of the 2-1 conflict would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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