No. 22-867

IN THE

Supreme Court of the United States

KADEEN KAMAR KERR,

Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

After Mr. Kerr filed his petition in this case, this Court 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 Second Circuit decision below depended entirely on *Chevron*: The court relied on a line of Second Circuit precedent that deferred to the Board's interpretation of the "crime of child abuse, child neglect, child abandonment" provision because the agency's view was "at least grounded in reason"; the court described it as "unlikely" that the court "would have read the statutory wording the same way" absent *Chevron*. *See Florez v. Holder*, 779 F.3d 207, 212, 214 (2d Cir. 2015); 8 U.S.C. § 1227(a)(2)(E)(i). This Court should therefore 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 this Court does not hold this case for *Loper Bright Enterprises*, or if the Court holds this case and ultimately reaffirms *Chevron*, then this Court should grant the petition in *Diaz-Rodriguez v. Garland*, No. 22-863 (filed Mar. 8, 2023), grant the petition in this case, and consolidate the two cases for argument. The government makes no compelling argument against granting certiorari in both cases. The government's primary argument is that there is no circuit split on the precise question presented in this case. That misses the point. Mr. Kerr is only asking this Court to grant certiorari in this case if it

also grants certiorari in *Diaz-Rodriguez*. The government concedes that there *is* a split on the question presented in *Diaz-Rodriguez,* and does not dispute that granting certiorari in this case as well as *Diaz-Rodriguez* would allow this Court to interpret the phrase "crime of child abuse, child neglect, or child abandonment" in fuller view of the range of state child endangerment offenses. Indeed, the government itself has sought certiorari in analogous circumstances.

Moreover, the government does not dispute that the question presented in this petition is frequently recurring and exceedingly important. Nor could it. New York's misdemeanor endangerment statute is charged incredibly frequently, including based on exceedingly minor conduct that results in effectively no criminal penalty. Pet. 7-9. Both amicus briefs filed in *Diaz-Rodriguez* single out the New York endangerment statute at issue in this case as an example of a statute that targets minor conduct that was commonplace only a generation before. AILA/NACDL/NAPD Br. at 7-11, *Diaz-Rodriguez*, *supra* (No. 22-863); NCCPR Br. at 11-12, 16, 19, *Diaz-Rodriguez*, *supra* (No. 22-863). Thus, if this Court grants certiorari in *Diaz-Rodriguez*, it should also grant certiorari in this case; at a minimum, the Court should hold this case pending its resolution of *Diaz-Rodriguez.*

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. Kerr filed his petition, this Court granted certiorari in *Loper Bright Enterprises* to de-

cide "[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 Second Circuit's decision below—and the government's merits argument in its opposition—depend on *Chevron*, this Court should hold this petition pending its decision in *Loper Bright Enterprises*.

The Second Circuit's decision in *Florez* to defer to the agency's classification of most endangerment offenses as crimes of "child abuse, child neglect, or child endangerment" depended entirely on *Chevron*—and was the foundation for the court's decision in this case. Specifically, the Second Circuit held in *Florez* that the statutory phrase "crime of child abuse, child neglect, or child abandonment" is "ambiguous" and thus that the court was required to defer to the agency's interpretation because "the BIA's definition—broad as it is—is at least grounded in reason." 779 F.3d at 212. Notably, the Second Circuit described it as "unlikely" that the agency's decision was actually correct—*i.e.*, that it was the interpretation that the court itself would have adopted. *Id.* at 214. But the court held that its interpretation of the statute was "irrelevant" in light of the agency's "authoritative" view. *Id.*

The Second Circuit reaffirmed *Florez*'s *Chevron*-based holding in *Matthews v. Barr*, 927 F.3d 606, 618-20 (2d Cir. 2019). And the court's unpublished decision in this case rested entirely on *Matthews* for the proposition that the court must defer to the

agency's classification of most child endangerment offenses, including New York's, as crimes of child abuse, neglect, or abandonment. Pet. App. 4a-5a.

If this Court overrules *Chevron*, the Second Circuit's decision in this case plainly cannot survive. Without *Chevron*, the court in *Florez* would have had to reach its own conclusion about how to "read the statutory wording"; the court could not have just treated the agency's interpretation as "authoritative" even though, according to the court, that interpretation was "[]likely" wrong. *Florez*, 779 F.3d at 214. And the court below simply applied *Florez*, as reaffirmed in *Matthews*. Pet. App. 4a-5a.

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 Second Circuit.

Remarkably, despite all of this, the government addresses *Loper Bright Enterprises* only in a footnote. Opp. 10 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." *Id.* 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 this 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 *Diaz-Rodriguez* and this case and consolidate the cases for argument.

A. Absent a hold or GVR, the Court should grant certiorari in *Diaz-Rodriguez* and this case and consolidate the two cases for argument. As the petition explained in detail, this case presents a question that is closely related to the question presented in *Diaz-Rodriguez*. Pet. 17-19. While New York's misdemeanor statute has a mens rea of knowledge, not just negligence, the New York endangerment statute does not require that the defendant have any relationship to the child and does not require that the child face any particular degree of harm. Pet. 18. Granting certiorari in both cases would thus give the Court the opportunity to interpret the statute with a fuller view of the range of state endangerment offenses.

Moreover, the question presented in this case, like the closely related question presented in *Diaz-Rodriguez*, is frequently recurring and exceptionally important. Pet. 19-20; *see also* AILA/NACDL/NAPD Br. at 7-11, *Diaz-Rodriguez*, *supra* (No. 22-863); NCCPR Br. at 2, 11-12, *Diaz-Rodriguez*, *supra* (No. 22-863). And, while there may not be a circuit split on the precise question presented in this case, it has led to significant confusion and disagreement within the Second Circuit. Pet. 20-21. Granting certiorari in this case in addition to *Diaz-Rodriguez* would thus give this Court the opportunity not only to interpret the "crime of child abuse, child neglect, or child abandonment" provision in fuller view of the range of

state child endangerment offenses but also to resolve an important and frequently recurring question that has vexed court of appeals judges.

The government disputes none of this. Instead, its primary argument against certiorari is that the circuits are not divided on the precise question at issue in this case and that this Court previously denied certiorari in *Florez* and *Matthews*. Opp. 13. That misses the point. Mr. Kerr is not asking this Court to grant certiorari in this case standing alone. Rather, Mr. Kerr argues that *if* the Court were to grant certiorari in *Diaz-Rodriguez* to resolve the conceded circuit conflict at issue in that case, then it should grant certiorari here, too, given how closely related, important, and frequently recurring the two questions are.

Notably, the government itself is currently seeking certiorari under very similar circumstances. In its petition in *Garland v. Singh*, the government identified three, closely related "factual scenarios." Pet. at 25-26, *Garland v. Singh*, No. 22-884 (filed Mar. 10, 2023). The circuits have divided in cases presenting two of those three factual scenarios; the third scenario, however, has only been addressed in a single, unpublished opinion. *Id.* at 20-22. Nevertheless, the government is urging this Court to grant certiorari in cases presenting all three scenarios so the Court can interpret the statute "in full view of the considerations raised by [all] three scenarios[,]" especially because each scenario (according to the government) "recurs frequently." *Id.* at 25-26. That same reasoning weighs strongly in favor of granting certiorari in this case in addition to *Diaz-Rodriguez*.

B. At the very least, if this Court grants certiorari in *Diaz-Rodriguez*, it should hold this case pending its decision in *Diaz-Rodriguez*. It is highly likely that, in interpreting the "crime of child abuse, child neglect, or child abandonment" provision in *Diaz-Rodriguez*, this Court would provide guidance relevant to the question presented in this case. Indeed, as the petition explained—and the government does not dispute—Mr. Kerr likely would have prevailed before the Ninth Circuit panel in *Diaz-Rodriguez*. Pet. 22-23.

III. The decision below 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 wrong.

A. On the merits, the government primarily argues 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." For the reasons given in the reply in *Diaz-Rodriguez*, that argument is meritless and has been rejected by every court to consider it. *See* Reply at 9-10, *Diaz-Rodriguez*, *supra* (No. 22-863).

Indeed, the government's application of its "unitary concept" theory in this case shows just how bizarre that theory is. The New York misdemeanor statute at issue criminalizes conduct that puts a child at a risk of harm, even if the defendant has no relationship to the child. Pet. 18. As the petition explained, and the government does not seriously dispute, when Congress enacted the "crime of child

abuse, child neglect, or child abandonment" provision, non-injurious conduct by a total stranger would not have qualified as "child abuse," "child neglect," or "child abandonment." That is because "child abuse" required harm and "child neglect" and "child abandonment" required some relationship between the defendant and the child. *See* Pet. at 22-23. A majority of the Ninth Circuit judges on the *Diaz-Rodriguez* en banc panel appeared to agree with this argument. *See* Pet. 22-23.

The government nevertheless argues that, while the conduct might not be "child abuse," "child neglect," or "child abandonment," it is nevertheless "child abuse, child neglect or child abandonment." That is so, according to the government, because abuse does not require a relationship with the child and neglect and abandonment do not require harm. Opp. 8-10. But nothing about the fact that the three child-related offenses are listed together allows the government to pick and choose elements in this way, concocting a fourth type of child-related offense that is broader than any offense that appears in the statute.

B. The government ultimately falls back on *Chevron* deference, arguing that the agency's interpretation, while perhaps not the best one, is at least reasonable. Opp. 10-12. Even if *Chevron* survives *Loper Bright Enterprises*, this arguments fails.

As an initial matter, the government largely ignores the petition's argument that the statute *unambiguously* excludes a child endangerment offense that requires no particular degree of potential harm and can be committed by a defendant with no relationship to the child. Pet. 21-23. The government

does not even try to defend the Second Circuit's "blink and you miss it" approach to *Chevron*'s first step—an approach that flatly conflicts with this Court's decision in *Esquivel-Quintana v. Sessions*, 581 U.S. 385 (2017). Pet. 22 (quoting *Bastias v. U.S. Att'y Gen*, 42 F.4th 1266, 1276 (11th Cir. 2022) (Newsom, J., concurring)); *see also Debique v. Garland*, 58 F.4th 676, 685-87 (2d Cir. 2023) (Park, J., concurring in the judgment). The government does not meaningfully engage with contemporary dictionaries and state criminal codes, which make clear that non-injurious conduct by a total stranger is neither "abuse" (because abuse requires harm) nor "neglect" or "abandonment" (because neglect and abandonment require some relationship between the defendant and the child). Pet. 22. And, finally, the government does not dispute that a majority of the judges on the Ninth Circuit en banc panel in *Diaz-Rodriguez*—the two concurring and five dissenting judges—likely would have held that New York's endangerment statute is unambiguously *not* a removable offense. Pet. 22-23.

Even if the Court were to reach step two, the government's argument (at 12) that Congress's goal of "protecting children" would be "disserved" if it did not reach New York's misdemeanor endangerment statute is wrong. In reality, exactly the opposite is true. The petition explained in detail just how broadly New York's misdemeanor endangerment statute sweeps—encompassing conduct that often does not even warrant probation, let alone imprisonment. Pet. 7-9, 18. And the National Coalition for Child Protection Reform, an organization dedicated to improving child welfare, highlights in an amicus brief filed in *Diaz-Rodriguez* the minor conduct the New York statute criminalizes: leaving "a sleeping

child unattended in an apartment for at least fifteen minutes"; directing "vulgar remarks at a toddler"; and possessing marijuana "in proximity to children." NCCPR Br. at 12, *Diaz-Rodriguez*, *supra* (No. 22-863) (quoting *Matthews*, 927 F.3d at 624). As amici explain, deporting parents for this type of conduct will often *harm* children and families by deporting "well-intentioned parents" and separating families for "minor lapses." *Id.* at 2-3, 21.

CONCLUSION

The petition for a writ of certiorari in this case should be held pending this Court's decision in *Loper Bright Enterprises v. Raimondo*, No. 22-451. If this Court overrules or modifies *Chevron* in *Loper Bright Enterprises*, 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 pending its decision in *Loper Bright Enterprises*, or if this Court reaffirms *Chevron* in *Loper Bright Enterprises* (or does not modify it in any way relevant to this case), then the petition for a writ of certiorari in this case should be granted; in the alternative, it should be held pending this Court's consideration of the petition in *Diaz-Rodriguez v. Garland*, No. 22-863 (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 *Diaz-Rodriguez*.

Respectfully submitted.

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