

No. 13-73719

United States Court of Appeals for the Ninth Circuit

RAFAEL DIAZ-RODRIGUEZ,
Petitioner,

v.

MERRICK B. GARLAND, United States Attorney General,
Respondent.

On Petitioner For Review of a Decision of the
Board of Immigration Appeals,
Agency No. A093-193-920

**BRIEF OF *AMICI CURIAE* IDP AND AILA
IN SUPPORT OF PETITIONER**

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INTERESTS OF *AMICI CURIAE*¹

AILA is a national association with more than 15,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. Members of AILA practice regularly before the Department of Homeland Security (DHS) and the Executive Office of Immigration Review (including the Board of Immigration Appeals (BIA) and immigration courts), as well as before United States District Courts, United States Courts of Appeals, and the United States Supreme Court.

Immigrant Defense Project (IDP) is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for

¹ No person other than *amici*, their members, or their counsel contributed money intended to fund preparing or submitting this brief. No party or party's counsel authored the brief in whole or in part, and all parties have consented to its filing.

immigrants having contact with the criminal legal and immigration detention and deportation systems. IDP provides defense attorneys, immigration attorneys, immigrants, and judges with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP seeks to improve the quality of justice for immigrants accused of crimes and therefore has a keen interest in ensuring that immigration law is correctly interpreted to give noncitizens the full benefit of their constitutional and statutory rights. IDP has submitted *amicus curiae* briefs in many key cases before the U.S. Supreme Court and Courts of Appeals involving the interplay between criminal and immigration law. *See, e.g., Pereida v. Wilkinson*, 141 S. Ct. 754 (2021); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *INS v. St. Cyr*, 533 U.S. 289, 322-23 (2001) (citing IDP brief); *Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016) (en banc); *Matthews v. Barr*, 927 F.3d 606 (2d Cir. 2019).

INTRODUCTION

The question before this Court is whether lawful permanent residents and other non-citizens can be forced to leave their lives in the United States based solely on convictions for misdemeanors that

criminalize small missteps around children—for instance, leaving a child unattended for fifteen minutes or committing a minor criminal act (like smoking marijuana) in the presence of a child. Mr. Diaz-Rodriguez’s brief explains in detail why the answer to that question is “no.” As his brief explains, the Board’s decision in *Matter of Soram*, 25 I. & N. Dec. 378 (BIA 2010)—which holds that crimes of “child endangerment” are generally categorical crimes of child abuse that render a non-citizen deportable—cannot be squared with the text of the INA. Put simply, the INA requires a “crime of child abuse, child neglect, or child abandonment,” and the common understanding of those terms when Congress enacted the statute did *not* encompass “child endangerment,” which was understood as a distinct, lesser offense.

Amici submit this brief to provide context about the impacts of the Board’s decision in *Soram* on non-citizen parents in this country. The Board’s decision has made convictions for minor misdemeanors grounds for removability and ineligibility for vital forms of relief, resulting in generally caring and responsible parents being separated from their children. The decision has had a particular impact on single, working parents who often face difficult choices surrounding balancing work and

childcare. Moreover, the decision imposes a standard that turns on the Board's subjective determination as to whether an endangerment offense that carries a "sufficient" "risk of harm," which makes it impossible to predict with any reasonable confidence what crimes will be considered child abuse crimes. The government has not remotely justified either outcome under the text of 8 U.S.C. § 1227(a)(2)(E)(i).

ARGUMENT

I. *Soram* Sweeps In An Enormous Amount Of Minor Conduct Related To Children As "Child Abuse, Child Neglect, Or Child Abandonment."

The Board in *Soram* extended the statutory phrase "crime of child abuse, child neglect, or child abandonment" far beyond the scope of the conduct inherent in such criminal activity. While *Soram* purports to exclude endangerment laws that do not require a sufficient risk of harm, this limitation has proven largely illusory: The Board has, in published decisions, applied *Soram* to child endangerment misdemeanors in Colorado, Oregon, and New York that criminalize an extremely broad range of conduct. And given that misdemeanor endangerment laws disproportionately target low-income parents, and in particular Black

and Latinx parents, *Soram* perpetuates systemic inequities by permanently separating these parents from their children.

A. The Board has applied *Soram* to state endangerment statutes that criminalize an incredibly broad range of conduct.

Soram held that state endangerment statutes will generally qualify as crimes of “child abuse, child neglect, or child abandonment” unless the Board determines, based on its subjective judgment, that the “risk of harm” required by the statute is not “sufficient.” 25 I. & N. Dec. at 382. In *Soram* itself, the Board held that Colorado’s child endangerment statute is a removable offense under that inquiry. *Ibid.* And it has since applied *Soram* to make convictions under New York’s and Oregon’s endangerment statutes removable offenses as well. *Matter of Mendoza Osorio*, 26 I. & N. Dec. 703 (BIA 2016) (New York); *Matter of Rivera-Mendoza*, 28 I. & N. Dec. 184, 187 (BIA 2020) (Oregon). The incredibly broad range of conduct criminalized by these three statutes—and the correspondingly minimal criminal penalties associated with them—fall far outside any conceivable understanding of “crime[s]” of “child abuse, child neglect, or child abandonment.”

1. Colorado’s endangerment statute criminalizes negligently “permit[ting] a child to be unreasonably placed in a situation that poses a threat of injury to the child’s life or health,” even if no injury results. *See Ibarra v. Holder*, 736 F.3d 903, 907 (10th Cir. 2013). The minimum penalty is a \$50 fine. *Id.* at 908.

To reach its holding that this statute is categorically a “crime of child abuse,” the Board reviewed only the most dramatic facts in reported Colorado criminal decisions. *See Soram*, 25 I. & N. Dec. at 385. However, the facts in *Ibarra*—which involved the same Colorado statute, *compare Soram* 25 I. & N. Dec. at 383, *with Ibarra*, 736 F.3d at 909—bore no resemblance to any case discussed in *Soram*, and show that the Colorado offense is actually much broader.

Ms. Ibarra had come to the United States when she was four years old, and was the mother of seven U.S.-citizen children. While at work, Ms. Ibarra had briefly and unintentionally left her unharmed children home alone in the care of her oldest child. 736 F.3d at 905 & n.3. Even the Immigration Judge recognized that this was at most a “mistake in judgment,” one that he might have made himself:

She made a mistake in judgment, but I’ve often wondered. You know, I have two, I’ve raised up two kids and you wonder at

what point can you leave your kids alone. I mean, when we lived on the second floor of a co-op for a long, long time, and the laundry was in the basement, so I'd have to leave them in the apartment and run down to the basement to move the clothes over from the dryer to the, or from the washer to the dryer. So, how long do you leave the kids and at what age can you do that, and every once in a while I'd need to go to the corner store to get something and so I would actually leave the house and go down the street a little ways. And, you know, I don't believe there's any real clear guidelines at what age you can leave children and what age you can leave them with their older siblings. So, I don't think this was a crime involving moral turpitude and I don't think it was a particularly, you know, reprehensible mistake that she made.

Ibarra, 736 F.3d at 905 n.3. This conduct was not “child abuse, child neglect, or child abandonment” under any coherent understanding of those terms.

2. Following *Soram*, the BIA also has concluded that New York's misdemeanor endangerment statute demands a “sufficient” risk of harm to constitute a categorical crime of child abuse. *Mendoza Osorio*, 26 I. & N. Dec. at 703. But that statute also sweeps broadly and results in only minor criminal penalties, with nearly 80% of convictions under New York's child endangerment provision resulting in no imprisonment at all.

New York's child endangerment statute prohibits conduct that creates a risk of injury not just to a child's physical welfare, but also to his “mental or moral” welfare. N.Y. Penal Law § 260.10(1). And the risk

can be minor. Although the statute requires that the charged conduct “likely” result in injury, courts have interpreted “likely” to mean only that there is a “*potential* for harm to a child.” *People v. Johnson*, 95 N.Y.2d 368, 372 (2000) (emphasis added); *see also People v. Cardona*, 973 N.Y.S.2d 915, 917 (Crim. Ct. 2013) (standard is whether defendant was “aware[] of the *potential* for harm”) (emphasis added).

Applying this standard, New York courts have held that leaving children home alone for periods as short as fifteen minutes can violate New York’s child endangerment statute. *People v. Reyes*, 872 N.Y.S.2d 692 (Crim. Ct. 2008). So does giving an eighth grader three cigarettes. *Cardona*, 973 N.Y.S.2d at 198. Repeatedly directing vulgar remarks at a toddler, *People v. Simmons*, 92 N.Y.2d 829 (1998), and possessing marijuana in the same residence as a child, *People v. Alvarez*, 860 N.Y.S.2d 745 (Crim. Ct. 2008), also suffice. This last example is a striking example of how New York courts interpret risks to children’s “mental or moral” welfare broadly, to include engaging in practically any criminal activity, no matter how minor, with children nearby.

Reyes is just one of many examples of cases where New York courts have held that individuals may be prosecuted under the State’s child

endangerment provision for leaving children of all ages home alone, often for short periods of time. *See People v. Cenat*, 671 N.Y.S.2d 578, 580 & n.2 (Crim. Ct. 1997) (“Over the past few years the Criminal Court has seen a flood of cases charging Endangering the Welfare of a Child for leaving children of various ages ‘home alone.’”).² Recently, in *People v. Cheung*, a Long Island man was charged under § 260.10(1) for briefly leaving his napping (and unharmed) child in the car while buying Christmas lights at Home Depot. *See, e.g., Lenore Skenazy, Napping Child Left in Car While Parents Run Quick Errand, Everyone Loses Their Minds*, Reason (Dec. 14, 2016), <https://tinyurl.com/2p83fsw2>.

Sentencing data confirm that the vast majority of conduct for which defendants are convicted of child endangerment in New York is minor—so minor, in fact, that it is unworthy of *any* imprisonment. According to

² *See, e.g., People v. Hot*, 94 N.Y.S.3d 539 (Crim. Ct. 2018) (toddler left sleeping in car while mother shopped nearby); *People v. Fielden*, 18 N.Y.S.3d 581 (Crim. Ct. 2015) (infant left awake in hotel room for one hour); *People v. Eury*, 7 N.Y.S.3d 244 (Crim. Ct. 2015) (four or five children aged under ten left alone in apartment for about 40 minutes); *People v. Gulab*, 886 N.Y.S.2d 68 (Crim. Ct. 2009) (two children ages five and ten home alone for two hours); *People v. Fraser*, 875 N.Y.S.2d 822 (Crim. Ct. 2008) (security officer saw infant child in stroller in an apartment building hallway; defendant stated that she was “down the hall watching”); *People v. Watson*, 700 N.Y.S.2d 651, 655 (Crim. Ct. 1999) (seven-year-old child home alone awake for two-and-a-half hours).

data from the New York Division of Criminal Justice Services (“CJS”),³ from 2000 to 2015, over 35% of endangerment convictions not accompanied by a separate felony charge resulted in a sentence of conditional discharge, which requires a finding that “neither the public interest nor the ends of justice would be served by a sentence of imprisonment” or probation. N.Y. Penal Law § 65.05(1). An additional 43% of convictions led to fines or probation, but no imprisonment. This means during that fifteen-year period *fewer than 25%* of convictions resulted in a sentence of any length of imprisonment.

Unsurprisingly given these figures, the CJS data also report that over 99% of convictions were the result of guilty pleas. Defendants facing more significant sentences, with an incentive to challenge their cases to a reported decision, are the exception. And charging documents and unpublished decisions—of which there are many—show that the statute is interpreted “in a far more expansive, flexible, and subjective fashion than the reported case law might lead one to expect.” *Matthews v. Barr*,

³ This Information was made public as a result of a request for information filed by the Immigrant Defense Project and is available at <https://tinyurl.com/54n43y5y>. The percentages were calculated based on the state-wide data.

927 F.3d 606, 625 (2d Cir. 2019) (Carney, J., dissenting) (The “data and decisions paint a picture of prosecutions and guilty pleas showing that the statute’s broad and ambiguous language is enforced in a far more expansive, flexible, and subjective fashion than the reported case law might lead one to expect. To overlook this material is to rely on a flawed foundation in concluding that, as prosecuted, New York misdemeanor ‘child endangerment’ is equivalent to the INA’s definition of ‘child abuse.’”).

Given that reported decisions are not representative of the statute’s scope, noncitizens regularly introduce misdemeanor complaints in removal proceedings to demonstrate how broadly § 260.10(1) is applied. These charging documents confirm that police and prosecutors take seriously the directive that the statute is to be interpreted “broadly,” see *Alvarez*, 860 N.Y.S.2d at 748-49, adding endangerment charges to minor criminal conduct whenever a child happened to be present. Thus, in New York, charges for driving on a suspended license with a child in the car, smoking marijuana in a public park with children nearby, and numerous charges of shoplifting (including from grocery stores) in the presence of young children, are all charged as child endangerment. See *Matthews*,

927 F.3d at 633 (Carney, J., dissenting) (noting “several arrest reports, complaints, and misdemeanor informations” charging such conduct). Absent the presence of a child, this conduct would not be grounds for removal.

3. The BIA has also concluded that negligently leaving a child under ten unattended in a way that “may be likely to endanger the health or welfare of such child”—a misdemeanor in Oregon, Or. Rev. Stat. § 163.545(1)—is categorically a child-abuse offense. *Rivera-Mendoza*, 28 I. & N. Dec. at 187.

Like the endangerment statutes of Colorado and New York, Oregon’s law sweeps broadly. For example, it results in a conviction for leaving children in a car for twenty to thirty minutes while going into a store to buy diapers for those children. *State v. Obeidi*, 155 P.3d 80, 81 (Or. Ct. App. 2007). That is because “‘may be likely to endanger’” in the statute “refers to the likelihood of *exposure* to harm, rather than the probability” of harm “actually occurring.” *Id.* at 82. Put differently, there need not be a “probability” of harm under Oregon’s statute. *Id.* at 83 n.3 (contrasting Oregon statutes that require “likely” result of harm). Based on the state prosecutor’s contention that “abduction was a real concern,

because the children were in a vehicle in a parking lot with a high volume of traffic in a high-crime area,” the Oregon court sustained the conviction. *See id.* at 82-83.

B. The impact of *Soram*’s breadth falls disproportionately on working parents.

In *amici*’s experience, child endangerment laws go to the heart of judgments over child-rearing and the criminalization of poverty that disproportionately affects Black, Latinx, Asian, and Indigenous community members. Given the breadth of provisions like those in Colorado, New York, and Oregon, parents can be charged with endangerment based on their decisions concerning when their own children can be left alone—decisions that can be especially complicated for single, working parents. *Soram* makes these decisions far worse for noncitizens, transforming the cost of a State second-guessing a parenting decision from a small fine to deportation and family separation.

1. Given that child endangerment can be charged against parents leaving their children even briefly unattended, *Soram* imposes drastic immigration consequences based on a State’s disagreement with parents’ judgments concerning whether their kids can safely be left alone. Some of these disagreements can be almost entirely cultural—some

parents are willing to tolerate more risk because they believe children benefit from increased independence. *See, e.g.,* Jerriann Sullivan, *Your Complete Guide to the Free-Range Parenting Debate*, FamilyMinded (Oct. 22, 2018), <https://tinyurl.com/2t9v3hys>. Some parents are forced to make difficult choices about leaving children unattended based on work or other, related pressures—like the petitioner in *Ibarra*. *See supra* pp. 6-7.

The stories on this issue abound. A single mother working at a McDonald's all day to support her family was arrested and charged under a classic endangerment statute that is almost certainly a removable offense under *Soram*, when she makes the difficult choice of allowing her child to play alone at the park rather than sit in the fast-food restaurant for her entire shift. Conor Friedersdorf, *Working Mom Arrested for Letting Her 9-Year-Old Play Alone at Park*, The Atlantic (July 15, 2014), <https://tinyurl.com/4etvhctw>; *see also* Corey Adwar, *Attorney: McDonald's Mom Who Let Her Child Play In Park Did Not Put Her In Harm's Way*, Insider (July 17, 2014), <https://tinyurl.com/2p8vp9hd>. So too, a perfectly loving mother runs into a grocery store for just a few minutes and finds herself similarly charged, facing months of criminal process for a split-second decision to leave her child unattended for just

five minutes. Kim Brooks, *The day I left my son in the car*, Salon (June 3, 2014), <https://tinyurl.com/2ezm3fsy>. Another woman, widowed at age thirty-five with four children, had all her children taken from her after leaving them at home so that she could attend classes for a few hours, when she had no other option. Conor Friedersdorf, *This Widow's 4 Kids Were Taken After She Left Them Home Alone*, The Atlantic (July 16, 2014), <https://tinyurl.com/384ccdsz>. Not even the COVID-19 pandemic spared otherwise loving parents who had to make difficult parenting decisions in the face of government-imposed lockdowns. One mother found herself handcuffed and jailed for allowing her 14-year-old to babysit her other children, after their daycare was shut down in May of 2020 and she still had to go to work to support the family. Lenore Skenazy, *Mom Handcuffed, Jailed for Letting 14-Year-Old Babysit Kids During COVID-19*, Reason (Feb. 8, 2022), <https://tinyurl.com/4s2yzsc4>.

Criminal endangerment convictions for this type of conduct are not infrequent. See David Pimental, *Fearing the Bogeyman: How the Legal System's Overreaction to Perceived Danger Threatens Families and Children*, 42 Pepp. L. Rev. 235, 258-61 (2015) (explaining that the “prospect of criminal prosecution is not as far-fetched as it may seem”).

In 2012, for example, an Arkansas mother “was charged with and convicted of child endangerment for making her ten-year-old walk to school” after “he had been kicked off the school bus for misbehavior on it (his fifth offense).” *Id.* at 258. When questioned about the arrest, a police department spokesperson responded to why the mother was arrested by saying “if you wouldn’t want your child doing it, you probably don’t need some (other) child doing it.” *Ibid.* Of course, differences of opinion about proper, or ideal, parenting abound. Yet the message is clear: “the threat of criminal prosecution is real if your parenting does not measure up to others’ perceptions of adequate protection.” *Id.* at 260 (describing three other cases from summer of 2014 and noting that “such cases have probably been happening for some time and have simply been avoiding the media spotlight”).

This Court need not decide whether States should be using criminal law to regulate parenting decisions in this way—albeit criminal laws with minor penalties. But the Board’s conclusion that this type of conduct is grounds not only for a fine but for *removal and family separation* makes little sense, and conflicts with the careful decision Congress made to

target only the crimes of “child abuse, child neglect, and child abandonment.”

2. The evidence also suggests that child endangerment offenses are more often prosecuted against parents of color. *See, e.g.,* Child Welfare Info. Gateway, *Child Welfare Practice to Address Racial Disproportionality and Disparity* (Apr. 2021), <https://tinyurl.com/2e36sjsy>. Incorrectly treating endangerment offenses as deportable crimes is thus likely to fall particularly hard on communities of color, and to deny children in those communities the full support of both parents during formative years. Breaking such cycles frequently depends on identifying and correcting areas where the default approach is unnecessarily punitive. And the BIA’s interpretation of § 1227(a)(2)(E) is a perfect example of precisely that phenomenon.

This is not just speculation. The CJS data cited above show that child endangerment is disproportionately enforced against people who are Black or Latinx. In New York City, for example, over 92% of those arrested for endangerment in the Bronx were Black or Latinx, and only 4% were white. According to the 2020 U.S. Census Bureau estimate, though, 45% of the population of the Bronx is white. Similarly, in Kings

County (Brooklyn), over 84% of those arrested were Black or Latinx, and approximately 12% were white—underrepresenting the 50% of the population of whites in that area. *See* United States Census Bureau QuickFacts, <https://tinyurl.com/mtxkv4fm> (last visited May 20, 2022).

* * *

In sum, the stakes of this case extend far beyond the specific California statute at issue. The *Soram* framework on which the Board’s decision rested makes practically *all* endangerment convictions grounds for removal, ineligibility for many forms of relief, and, often, family separation. This Court should not endorse that framework, which sweeps in not just one-off parenting mistakes, but also States’ use of criminal law to second guess parents’ decisions about how much to trust their children—decisions that are often made more difficult in the context of single, working parents.

II. *Soram* Makes It Nearly Impossible For *Amici* To Reliably Advise Noncitizens Of The Immigration Consequences Of Guilty Pleas, Including But Not Limited To Child Endangerment.

The Board’s decision in *Soram* also makes it difficult for a non-citizen like Mr. Diaz-Rodriguez and immigration attorneys (like *amici* and many of their members) to predict with any degree of certainty the

immigration consequences of a criminal conviction. The reason is two-fold. First, if the Board can, as it did in *Soram*, interpret federal statutes however it wishes on an *ad hoc* basis—without regard to standard interpretive principles—then the range of potential interpretations of other generic federal offenses is limitless and unpredictable. Second, the Board’s specific holding in *Soram* that “child abuse, child neglect, or child abandonment” includes any child endangerment offense that creates a “sufficient” “risk of harm” establishes a vague, subjective standard that makes it difficult to predict whether any particular endangerment offense would qualify. Indeed, as *amici* have seen in the agency’s application of *Soram* under this standard, there is really no telling what the Board might conclude with regard to any particular state statute.

1. The Supreme Court recognized in *Padilla* that “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specific crimes.” 559 U.S. at 364. Thus, advising a client as to the immigration consequences of a guilty plea is a key part of *amici*’s role in providing effective assistance to their constituents. *Ibid.* *Amici* and their members, along with other criminal defense and immigration attorneys

nationwide, strive to provide resources to allow defense attorneys to carry out these duties. And because the Board and courts of appeals have not come close to resolving the consequences of every state crime, one crucial part of that work is predicting how the Board and federal courts of appeals will interpret generic federal offenses in the future—not just the “crime of child abuse, child neglect, or child abandonment” provision at issue in this case, but also other generic federal offenses to which the categorical approach applies as well. *See, e.g., Esquivel-Quintana*, 137 S. Ct. at 1568 (reversing Board interpretation that California conviction for “unlawful sexual intercourse with a minor” categorically qualifies as removable generic offense of “sexual abuse of a minor”); *Valenzuela Gallardo v. Barr*, 968 F.3d 1053, 1068 (9th Cir. 2020) (reversing Board interpretation that California’s accessory-after-the-fact statute categorically qualifies as removable generic “offense relating to obstruction of justice”).

This is a challenging endeavor even when the Board follows the correct interpretive approach prescribed by the Supreme Court. But predicting the exact scope of a generic federal offense so as to advise clients concerning the effects of their guilty pleas goes from challenging

to unmanageable when it is impossible to predict even the *interpretive approach* that the Board will use in any given case. Though we now know that the Board chose to decide the child-endangerment issue based on a survey of 2009 civil laws, there was no way to predict that the Board would adopt that unorthodox methodology when it handed down its decision in *Soram*.

Since the Board recognizes none of the interpretive restraints that the Supreme Court requires, the agency could just as easily have interpreted the statute based on a *minority* of 1996 criminal laws; based on the practices of one specific State; or based on dictionaries that post-date the INA by a decade. As *Soram* and *Mendoza Osorio* show, the Board might even *ignore* the established prosecutorial practices of a State to decide that child endangerment has a sufficient risk pursuant to the Board's "I know it when I see it" approach. Allowing the Board such freedom leads to results that are not only incorrect, but also completely unpredictable, depriving noncitizens, their counsel, and other criminal system stakeholders like prosecutors and judges of the stability that the categorical approach is intended to provide.

Soram exposes how unfair this unpredictability can be. Prior to *Soram*, there was every reason to think that the Board had interpreted the INA's child abuse, neglect, or abandonment provision to exclude state child endangerment statutes—indeed, that is the exact conclusion this Court had reached in *Fregozo v. Holder*, 576 F.3d 1030, 1037 (9th Cir. 2009). Whether or not this Court thinks the *Fregozo* panel correctly interpreted the Board's prior precedent on this question in *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503 (BIA 2008), a defense attorney advising a noncitizen client on whether to plead guilty would certainly have reasonably taken this Court at its published word. But even assuming it were an open question, such attorney advising a client would have tried to answer the question by applying the standard tools for defining generic offenses under the categorical approach—looking to contemporary (*i.e.*, 1996) dictionaries and state criminal codes, other federal definitions of the key terms, and the overall statutory context. See *Esquivel-Quintana*, 137 S. Ct. at 1569-72; see also *Taylor v. United States*, 495 U.S. 575 (1990).

What any diligent attorney would *not* have anticipated was that the Board would ignore those standard interpretive methods and apply a

never-before-seen survey of *civil* laws in effect on a random date more than a decade after Congress enacted the relevant provision. Because the Board’s decision was completely unforeseeable, thousands of citizens like Mr. Diaz-Rodriguez entered what they thought were “‘safe harbor’ guilty pleas that do not expose the [noncitizen] defendant to the risk of immigration sanctions,” *Mellouli v. Lynch*, 575 U.S. 798, 806 (2015), but were in reality ticking time bombs that would, after *Soram*, lead to removal and, for many, family separation. An attorney’s inability to predict the Board’s 2009-civil-law approach is heightened by the fact that the Board *changed* interpretive approaches across cases—from relying on dictionary definitions of “child abuse” as limited to “cruelty to a child’s physical, moral, or mental well-being” in *Velazquez-Herrera* to its 2009-civil-law survey in *Soram*.

The government defends its approach, arguing the Board was not required to limit itself to the understanding of those terms in 1996, when they were codified. *See* Gov’t Br. 37-38 & n.14 (“[T]he Board should not be constrained to consider sources from the time of enactment in 1996.”). The government relies, for example, on its claim that some States “later” included endangerment conduct within their definitions of child abuse.

Ibid. But the government’s argument is both wrong and internally inconsistent. *See, e.g., Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020) (“we turn to the phrase’s plain meaning at the time of enactment”). The government understands that the Supreme Court requires that “words generally should be interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute,” Gov’t Br. 33 (quoting *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018)), and the government has provided no good reason to depart from that general requirement here.

2. The uncertainty created by the Board’s methodological wanderlust in *Mendoza Osorio* is exacerbated by the rule it adopted in *Soram*. *Amici* cannot confidently predict how the Board’s subjective judgment based on a “sufficient” “risk” standard, which “floats, unmoored, on the fickle sea of child-rearing conventions,” *Matthews*, 927 F.3d at 24 (Carney, J., dissenting), will be applied to a state statute that the Board has not yet definitively addressed.

Correctly advising clients on the immigration consequences of a guilty plea is particularly important in the context of a minor offense like child endangerment—which can result in nothing more than a fine.

Given these low stakes, defendants facing such charges are likely to be inclined to quickly accept a guilty plea. It is therefore critical that defense attorneys be able to predict the immigration consequences of such pleas before they are thoughtlessly accepted.

But while certainty is needed, *Soram* and its progeny provide the opposite, by imposing a vague “sufficient” “risk of harm” test for determining whether a criminal conviction qualifies as a crime of child abuse, neglect, or abandonment. This test depends entirely on the Board’s subjective judgment of what is “sufficient,” and a “State-by-State analysis” under which the Board selectively surveys evidence of how States prosecute these crimes.

The government’s suggestion (at 35) that *Soram*’s subjective, sufficient-risk-of-harm standard “draws a clear line” is, quite frankly, absurd. It is completely unrealistic for anyone to be able to predict whether a statute requires, as the government puts it, a “reasonable probability” of harm (child abuse) or merely a “potential or possibility of harm” (*not* child abuse). The Board’s treatment of New York’s endangerment statute is a telling example. For years, the BIA issued conflicting unpublished opinions regarding whether New York’s

endangerment statute has a “sufficient” “risk of harm,” making the removal consequences of a conviction under that statute a matter of luck of the draw. Then, the Board issued a published decision in *Mendoza Osorio* holding that the statute *does* criminalize conduct with a sufficient risk of harm; but that decision relied on a random survey of New York cases that no one could have predicted, completely ignoring cases like *Reyes* and others discussed above that upheld charges based on leaving children unattended for short periods of time. *Supra* pp. 8-9 & n.2.

Given this, counsel can have little confidence in advising a noncitizen client that *any* endangerment offense the Board has not addressed could not be treated as a child-abuse offense. This will result in the needless complication of exceedingly minor cases. And non-citizens—including long-time lawful permanent residents—who are ultimately deemed *non*-removable will spend time in jail because of their refusal to accept a plea they may have accepted had they known the immigration consequences with any confidence. Having clear notice about the immigration consequences is particularly important for broadly worded statutes (like New York’s child endangerment law), which are often overcharged. Many defendants who pleaded guilty to

child endangerment in New York prior to the Board's decision in *Soram* could (and likely would) have successfully challenged the sufficiency of their charges had they known the consequences they might face. Having a clear sense of the immigration consequences is critical to defense counsel trying to advise clients in situations like this.

Already we have seen how unpredictable this can be. Just a few years ago, this Court held that Nevada's child neglect statute is broader than the generic federal crime of "child abuse, child neglect, or child abandonment" in the INA. *Alvarez-Cerriteno v. Sessions*, 899 F.3d 774, 776-77 (9th Cir. 2018). That is so, this Court reasoned, because the generic federal offense requires "at least a 'reasonable probability' or a likelihood of harm to the child," whereas the Nevada statute criminalizes "only a 'reasonable foreseeability' of harm to a child." *Id.* at 783. It is hard to see the daylight between the Nevada statute and the Oregon statute described above. *Obeidi*, 155 P.3d at 82-83 & n.3.

Similarly, the Third Circuit has held that Pennsylvania's child endangerment statute is broader than the federal generic crime of child abuse, neglect, or abandonment. *See Zhi Fei Liao v. Att'y Gen. United States of Am.*, 910 F.3d 714, 717 (3d Cir. 2018). Because the Pennsylvania

endangerment statute criminalizes “conduct that ‘could threaten’ a child’s ‘welfare,’” *id.* at 722 (quoting *Com. v. Martir*, 712 A.2d 327, 329 (Pa. Super. Ct. 1998)), the Third Circuit reasoned that it did not have “an element requiring proof of a ‘sufficiently high risk of harm’” to qualify for removability under the INA, *id.* (quoting *Mendoza Osorio*, 26 I. & N. Dec. at 706). This is hard to square with *Mendoza Osorio* itself, which held that New York’s endangerment law qualifies as a generic child abuse, neglect, or abandonment crime even though it requires only the “*potential* for harm to a child.” *Johnson*, 95 N.Y.2d at 372 (emphasis added). If there is a difference of scope between Pennsylvania’s criminalization of conduct that “could threaten” a child’s welfare and New York’s criminalization of conduct that has the “potential for harm” to a child, it would be impossible to predict *ex ante*—and ought not make a difference for purposes of removability.

These inconsistent outcomes show the impossible situation that defense lawyers have been put in when it comes to advising their clients of the potential immigration issues that might arise from pleading guilty to these seemingly minor offenses. *Amici* do not want to leave their clients and members at the mercy of such an unpredictable interpretive

process on an issue of such incredible consequence for them and their families. The Board's interpretive errors must be reviewed and corrected so that counsel may accurately advise their immigrant clients of the consequences of their pleas.

III. The Government Has Not Remotely Justified *Soram* As A Permissible Interpretation Of The Statute.

Rather than engage in a fulsome statutory analysis at *Chevron's* first step, the government manufactures statutory ambiguity so it can beg for deference at *Chevron's* second step. *See* Gov't Br. 25-32. The government's desire to direct the Court away from actually interpreting the statute is as good an indication as any that the government has no legitimate basis to contend that the removability provision for "crime[s] of child abuse, child neglect, and child abandonment" includes an extra-statutory fourth category of offenses: child endangerment. Its assertions of ambiguity suffer from two particular flaws.

1. The government seems to believe that Congress's intent with regard to what constitutes a "crime of child abuse, child neglect or child abandonment" is not discernible because Congress did not define these terms. Gov't Br. 31-32. Indeed, the government seems to suggest that *every* undefined legislative term would be left to agencies to gap-fill, with

only reasonableness to constrain them—obviously an absurd result. Unsurprisingly, then, the government points to no context or case in which the federal courts conclude that the absence of a statutory definition means that a term is incurably ambiguous.

Instead, the Supreme Court has repeatedly instructed that, in the face of an undefined term or other lack of clarity on the face of the statute, a court should apply standard interpretive tools to identify congressional intent, rather than throwing up its hands and deferring to the agency. *See, e.g., Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (“Where, as here, the canons supply an answer, *Chevron* leaves the stage.”). Indeed, the term at issue in *Esquivel-Quintana* itself *was undefined*. The Court did not conclude that, because the term was undefined, it should move on to step two. Instead, it held that the statute “does not expressly define sexual abuse of a minor, *so we interpret that phrase using the normal tools of statutory interpretation.*” 137 S. Ct. at 1569 (emphasis added). Applying those tools, the Supreme Court did not hesitate to find clarity in interpreting the removability term in that case. *See ibid.* There is no plausible reason that this Court should do anything different here.

The government attempts to distinguish *Esquivel-Quintana* (at 30-31) by arguing that there, unlike here, the generic meaning of the term “sexual abuse of a minor” was “easily ascertained,” and the Board’s interpretation was “unambiguously foreclosed.” If so, it is curious why the government insisted in that case—as it does again now—that “the Board’s interpretation of sexual abuse of a minor” as including statutory rape of any age “[wa]s entitled to deference under *Chevron*.” *Ibid*. But this suggested standard—that meaning be “easily ascertained”—is of the government’s creation and, again, plainly precluded by the Supreme Court’s decisive views on statutory interpretation in cases of agency review. Why else would the Supreme Court caution that “deference can arise only if a regulation is genuinely ambiguous. And when we use that term, we mean it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation.” *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019). As Petitioner has demonstrated, as the Panel in this case held, and as the Supreme Court exemplified in *Esquivel-Quintana*, courts use a range of interpretive principles to ascertain the meaning of plain text, and the government’s suggestion to curtail this exercise is ahistorical and without merit.

Furthermore, the government, in conflict with its own prior position in *Esquivel-Quintana*, now says that was an easy case of interpretation and *this case* presents insurmountable challenges to identifying an unambiguous statutory meaning. This argument has no merit. In fact, as compared to the “sexual abuse of a minor” term at issue in *Esquivel-Quintana*, here Congress provided *even more* guidance as to the type of offenses it sought to legislate, because it provided *three specific* crimes in the removal provision—“crime[s] of child abuse, child neglect, or child abandonment”—and specifically chose not to enumerate the crime of “child endangerment.” And the dictionary definitions of the key terms, and state criminal law treatment of them, are *more* conclusive here. The dictionaries in *Esquivel-Quintana* stated only that the age of consent was “*usually*” sixteen, and sixteen statutes adopted a higher age of consent. 137 S. Ct. at 1569 (alterations omitted; emphasis added). Here the dictionaries provide no qualifications, and the Board’s decision conflicts with the criminal laws of even more States. *See* Pet. Br. 14-23.

The government also suggests (at 23 n.9) that “dual application” definitions like that at issue in *Esquivel-Quintana* are different, and that the ground for removability here is entitled to greater deference because

it is a “ground of removability solely for immigration purposes.” *See also* Gov’t Br. 31-32. But nothing in *Esquivel-Quintana* suggests that this would be a reason not to bring all the “normal tools of statutory interpretation” to bear before finding ambiguity in a statute. *See id.* at 1569. In fact, the Court has made increasingly clear that courts must seriously probe the agency’s reading rather than revert to a “reflexive” grant of deference to the agency’s view, as was more commonly the case in the past. *See Kisor*, 139 S. Ct. at 2415 (quoting *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J. concurring)).

2. The government argues that Congress’s “child abuse, child neglect, or child abandonment” term is a unitary concept intended to cover a broad array of crimes against children. For this point, the government relies principally on the headings in the statute. *See* Gov’t Br. 35-36 (referring to the phrases “crimes against children” and “child abuse” in the removability provision’s section headings). But “the title of a statute and the heading of a section cannot limit the plain meaning of the text.” *Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 528-29 (1947). While titles and headings may be informative in the event of irresolvable ambiguity in the statute’s operative text,

“headings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis.” *Id.* at 528. “Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner[.]” *Ibid.*; see also *Cornell v. Coyne*, 192 U.S. 418, 430 (1904) (“[T]he title is no part of an act, and cannot enlarge or confer powers, or control the words of the act unless they are doubtful or ambiguous.”).

Here, Congress was specific and descriptive of the convictions it intended to cause removability: “child abuse, child neglect, [and] child abandonment.” The heading “crimes against children” on which the government so heavily depends is the quintessential “short-hand reference to the general subject matter involved.” *Brotherhood of R.R. Trainmen*, 331 U.S. at 528. It is not an indication of a “broad[]” removability provision that the government suggests. Gov’t Br. 35. The consequence of the government’s misreading of the statute has been deportations and denials of immigration relief that Congress plainly did not intend.

CONCLUSION

Amici respectfully urge the Court to grant the petition for review.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This motion complies with the length limits permitted by Ninth Circuit Rule 29-2(c)(3). The brief is 6,999 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 NewCenturySchlbk LT Std 14-point font.

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May 20, 2022

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 20, 2022. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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May 20, 2022