No. 18-3363

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSE ESTEBAN MARQUEZ,
Petitioner,

v.

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

On Petition For Review of a Decision of the Board of Immigration Appeals
Agency No. A 043-906-201

**BRIEF OF AMICI CURIAE
AMERICAN IMMIGRATION LAWYERS ASSOCIATION,
BROOKLYN DEFENDER SERVICES,
NEIGHBORHOOD DEFENDER SERVICE OF HARLEM,
NEW YORK LEGAL ASSISTANCE GROUP, AND
PRISONERS' LEGAL SERVICES OF NEW YORK,
IN SUPPORT OF PETITION FOR REHEARING EN BANC**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the undersigned counsel states that *amici curiae* American Immigration Lawyers Association, Brooklyn Defender Services, Neighborhood Defender Service of Harlem, New York Legal Assistance Group, and Prisoners' Legal Services of New York have no corporate parents, and no publicly held corporation holds 10% of any stock these entities might issue.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[*]

Amici are not-for-profit organizations that represent noncitizens in criminal and immigration proceedings, and advocate on behalf of immigration practitioners. Among other things, these organizations represent criminal defendants and noncitizens and provide criminal defense attorneys, immigration attorneys, criminal defendants, and noncitizens with expert advice and training on issues involving the interplay between criminal and immigration law. *Amici* have a particular interest in ensuring that laws relating to the immigration consequences of criminal convictions are interpreted clearly and correctly to allow *amici* to provide reliable advice to noncitizens accused of crimes. *See Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). *Amici* regularly appear as *amici curiae* before the U.S. Supreme Court and courts of appeals. Information regarding the individual *amici* is in the Appendix.

[*] All parties have consented to this filing. Neither party's counsel authored this brief and no one other than *amici*, their members, or their counsel contributed money to fund its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Supreme Court has recently and repeatedly emphasized that courts must "exhaust all the textual and structural clues bearing on [a statute's] meaning" before deferring to an agency's interpretation. *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021) (quotation marks omitted); *see also Pereira v. Sessions*, 138 S. Ct. 2105, 2110 (2018); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1569, 1572 (2017). This standard involves a serious probing of the text, not a "reflexive" grant of deference. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (quoting *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring)). As the Ninth Circuit recently held in *Diaz-Rodriguez v. Garland*, 12 F.4th 1126, 1133 (9th Cir. 2021), and as the petition explains, any meaningful application of traditional interpretive tools to the statute's text precludes deference to the Board of Immigration Appeals' (BIA) reading of the child-abuse provision at issue in this case. This Court should therefore reconsider its decision in *Florez v. Holder*, 779 F.3d 207 (2d Cir. 2015), which did not apply *any* interpretive tools before deeming the statute ambiguous.

Amici write to emphasize two specific, additional points that strongly support rehearing en banc. First, the question whether "child abuse, child neglect, or child abandonment" encompasses the distinct, lesser offense of child "endangerment" is exceptionally important to *amici* and their clients and members. Child endangerment offenses depend on shifting attitudes toward parental supervision that change over

time and between cultures. It is generally a *far* less serious offense than the crimes of child abuse, neglect, and abandonment—as reflected by the very low criminal penalties for misdemeanor child endangerment in New York. *See Matthews v. Barr*, 927 F.3d 606, 631 (2d Cir. 2019) (Carney, J., dissenting), *cert. denied*, 141 S. Ct. 158 (2020). Indeed, endangerment is often associated not with disregard of another's wellbeing, but with a lack of resources among parents who are genuinely committed to their children. *E.g.*, *Ibarra v. Holder*, 736 F.3d 903, 905 & n.3 (10th Cir. 2013). Thus, deporting a caring parent for child endangerment is likely to lead to a decidedly ironic outcome: The children of such a deportee are likely to end up in more danger, not less, from this unnecessary government intervention.

Second, rehearing en banc is critical to restore predictability and regularity to the process by which immigration attorneys and courts apply and advise clients about the meaning of the immigration laws. The Board's interpretation of the child-abuse provision rested on an unprecedent and unforeseeable survey of state *civil* laws in effect more than a *decade* after the statute's enactment. Allowing the BIA such a wide interpretive berth makes it exceedingly difficult for immigration and criminal defense attorneys to advise their clients concerning the immigration consequences of pleading guilty to relatively minor offenses. *See Padilla*, 559 U.S. at 366. And in cases like these that rarely lead to prison time, the immigration consequences of pleading guilty may be the *only* issue—determining, for example, whether a

conviction for leaving a child briefly unattended will result in a $50 fine or a lifetime of separation from a U.S. citizen child. *See Ibarra*, 736 F.3d 903; *Padilla*, 559 U.S. at 364. Accordingly, the whole point of the "categorical approach" is to make the immigration consequences of certain pleas predictable; it "enables aliens to anticipate the immigration consequences of guilty pleas in criminal court, and to enter 'safe harbor' guilty pleas that do not expose the alien defendant to the risk of immigration sanctions." *Mellouli v. Lynch*, 575 U.S. 798, 806 (2015) (cleaned up). The opposite results from decisions like *Florez*, allowing the BIA to use whatever interpretive tools it wants to reach whatever conclusions it wants. This Court should thus grant the petition, adopt the well-reasoned analysis of the Ninth Circuit in *Diaz-Rodriguez* and set this area of the law back on a sounder course.

ARGUMENT

I. This issue is important for the non-citizen parents and the (frequently, citizen) children most likely involved.

In *amici*'s experience, the issue raised in the petition is particularly important for two reasons.

First, child endangerment is a very different crime from child abuse, neglect, or abandonment. The latter crimes are far more serious and typically require both intentional wrongdoing and actual harm to the child; the former often results from parents having inadequate options for the care of children while they work to acquire

resources *for those children's care*. Congress did not write, and assuredly did not intend, this statute to treat them the same.

Second, the results of treating child endangerment the same as child abuse, neglect, or abandonment will result in the opposite of Congress's statute and its objectives. That is because there is a plain mismatch between the justifications for deporting a person determined to have abused a child and the likely results of deporting someone convicted of a simple endangerment offense.

One of the statutory objectives for deporting individuals with abuse and neglect convictions is to protect their victims from further harm. Although *amici* may not agree as a policy matter, Congress presumably intended to achieve the long-term separation of children from parents convicted of child abuse by removing the parent from the country. This is no doubt why the INA groups child abuse crimes with "[c]rimes of domestic violence, stalking, or violation of protection order[s]." *See* 8 U.S.C. §1227(a)(2)(E).

Child endangerment is not that kind of crime. As explained above, it is typically associated with caring parents who lack adequate resources and experience a lapse in judgment, even once. Child endangerment is thus far more likely to result in remedial parenting through state civil intervention than it is to result in permanent loss of parental rights. In fact, a separate provision of the INA grants "special immigrant" status to children whose "reunification with 1 or both of the immigrant's

parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law." 8 U.S.C. §1101(a)(27)(J)(i). This strongly indicates that, when Congress used the exact same terms in §1227(a)(2)(E), it had in mind the kind of offenses that would typically serve as a basis for permanently separating children from their parents. Indeed, this is one of the things that makes the BIA's reliance on state *civil* provisions *from decades after the INA* in defining "child abuse" so perverse: The expanded definition of such terms in contemporary civil law likely serves to open up state resources for the common benefit of parents and children whom the State intends to keep together, rather than to tear these families apart.

The result of treating child endangerment like an abuse offense is thus to separate children from parents who remain in the best position to care for them, and thus to endanger the children *more* than they would be absent this unnecessary government intervention. Frequently, the children of the lawful permanent residents most impacted by the BIA's mistaken reading of §1227(a)(2)(E) are likely to be U.S. citizens. It is beyond ironic to permanently deprive these U.S. citizens of their loving parents because those parents made a one-time mistake that state law would not usually regard as an appropriate basis for even a *temporary* separation.

The evidence also suggests that child welfare offenses are more often prosecuted against parents of color. Child Welfare Info. Gateway, *Child Welfare Practice to Address Racial Disproportionality and Disparity* (Apr. 2021),

https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf. Incorrectly treating endangerment offenses as deportable crimes is thus likely to fall particularly hard on communities of color, and to exacerbate patterns in which children in those communities are less likely to have the full support of both parents during their 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 the §1227(a)(2)(E) is a perfect example of precisely that phenomenon.

II. Overbroad deference to the BIA makes it exceedingly difficult for *amici* to provide their clients with reliable advice about the immigration consequences of guilty pleas.

This Court's failure to hold the BIA to standard interpretive methodologies is not only wrong, but also makes it extremely difficult for *amici* and others to help noncitizens predict the immigration consequences of their state criminal convictions. Indeed, if the BIA can interpret statutes however it wants, and worse apply that interpretation retroactively as it did in this case, then it will be extremely difficult for immigration counsel to even *approach* the question of determining the likely contours of a federal generic offense. Making the serious sanction of deportation so unpredictable is unacceptable.

As the Supreme Court recognized in *Padilla*, "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 specified crimes." 559 U.S. at 364. Advising a client as to the immigration consequences of a guilty plea is therefore a key part of providing effective assistance. *Ibid.* Because the BIA and courts of appeals have not resolved the consequences of every (or even close to every) state crime, one crucial part of *Amici*'s work is predicting how the BIA (and federal courts of appeals) will interpret generic federal offenses in the future—not just the "crime of child abuse" provision, but other generic federal offenses as well.

Even when the BIA applies standard interpretive methods correctly, it can be difficult for immigration and criminal defense attorneys to predict the exact scope of generic federal offenses, and hence to advise clients concerning the effects of their guilty pleas. But that task goes from difficult to nearly impossible when counsel cannot predict even the interpretive *approach* the BIA will take. Though we now know that the BIA chose to decide the child-endangerment issue based on a survey of 2009 civil laws, there was no way to predict such an unorthodox methodology. With no interpretive restraints, the BIA 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-dated the statute by a decade—none of which were at all relevant to the Supreme Court in *Esquivel-Quintana* or *Pereira*. Allowing the BIA such freedom leads to results that are not only incorrect, but also unpredictable, depriving noncitizens of the certainty the categorical approach is

intended to provide. This problem is only made worse when, as here, the BIA applies different interpretive methods to the same statutory provision across different cases. *See Matthews*, 927 F.3d at 634-35 (Carney, J., dissenting) (explaining, among other things, how the BIA relied on dictionary definitions of "child abuse" as limited to "cruelty to a child's physical, moral or mental well-being" before adopting its 2009-civil-law survey in *Matter of Soram*, 25 I. & N. Dec. 378 (BIA 2010)).

This case shows how unfair this unpredictability can be. As Judge Carney's dissent in *Matthews* explains, prior to *Soram* there was every reason to think that the BIA had interpreted the federal statute to exclude state child endangerment statutes—courts had reached that very conclusion. *E.g.*, *Fregozo v. Holder*, 576 F.3d 1030, 1037 (9th Cir. 2009). But even assuming that question were open, an attorney advising a client would have tried to answer it by applying the standard tools for defining generic federal offenses—looking to *contemporary* 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; *Taylor v. United States*, 495 U.S. 575 (1990). What an attorney could not have anticipated is that the BIA would instead 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.

The uncertainty created by the BIA's methodological wanderlust is only multiplied by the rule it adopted in *Soram*. Under that rule, the BIA makes an

apparently subjective judgment as to each state child-endangerment statute about whether the "risk" it requires is "sufficient." *Amici* cannot confidently predict how this 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 *any* state statute that the BIA has not already definitively addressed. For any criminal offense that seems to fall outside the most natural interpretation of a ground for removal or deportability, but for which there is not yet a settled BIA rule, counsel cannot have confidence that the BIA will not adopt an arbitrary interpretive methodology to turn that crime into a deportable offense. All that can achieve is the needless complication of exceedingly minor cases, and the prospect that immigrants—including long-time lawful permanent residents—who are ultimately deemed *non*-removable will nonetheless 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 broad statutes like New York's child endangerment law, which is often overcharged, with charges being dismissed before trial. Many defendants who pled guilty to child endangerment in New York prior to the BIA's decision in *Soram* could (and likely would) have pursued successful challenges to 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. This situation is bad enough on its own terms. But given that the ability to confidently predict immigration consequences is one of the core motivations for the categorical approach, *see Mellouli*, 575 U.S. at 806, the BIA's result should be recognized as positively self-defeating. The line between "merely risky" and "sufficiently risky" is a Rorschach test for individual BIA Board Members that immigration attorneys have little prospect of guessing in advance.

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 BIA's interpretive errors must be reviewed and corrected so that counsel may accurately advise their immigrant clients of the consequences of their pleas.

CONCLUSION

This Court should grant the petition for rehearing en banc.

Respectfully submitted,

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Dated: December 27, 2021

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because it contains 2,520 words, excluding the parts exempted by Fed. R. App. P. 32(f).

Undersigned counsel further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced 14-point Times New Roman typeface using Microsoft Word 2021.

/s/ Daniel Woofter
Daniel Woofter

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2021, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system. 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.

/s/ Daniel Woofter
Daniel Woofter

APPENDIX

The **American Immigration Lawyers Association** (AILA) is a national non-profit 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; 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. As part of its mission, AILA provides trainings, information, and practice advisories to practitioners providing direct services to noncitizens, and to counsel representing noncitizens accused of criminal offenses in federal and state courts.

The **Brooklyn Defender Services** (BDS) is a public defender organization that represents nearly 30,000 low-income individuals each year in criminal, family, civil, and immigration proceedings, providing interdisciplinary legal and social services since 1996. Since 2009, BDS has counseled or represented more than 15,000 clients in immigration matters including deportation defense, affirmative applications, and advisals, as well as immigration consequence consultations in Brooklyn's criminal court system. Since 2013, BDS has represented more than 1,500 detained immigrants in deportation defense in immigration court and federal habeas

corpus litigation through the New York Immigrant Family Unity Project, the first-in-the-nation assigned counsel program for detained immigrants.

The **Neighborhood Defender Service of Harlem** (NDS) is a community-based public defense office serving the residents of Northern Manhattan. NDS's unique holistic defense model provides clients with zealous, client-centered advocacy in addressing a wide array of legal issues. NDS advocates for clients in courthouses across New York City including criminal court, family court, housing court, and civil court, as well as in immigration and custody proceedings. NDS's Immigration Defense Team advises every noncitizen client that the organization represents in criminal proceedings about the adverse immigration consequences of the charges against them and any plea or conviction that may result. NDS has a strong interest in ensuring its clients and other New Yorkers avoid disproportional immigration consequences, which often are permanent and outweigh all other consequences of a criminal conviction, and can uproot and destabilize the lives of noncitizens, their families and their communities.

The **New York Legal Assistance Group** (NYLAG) was founded in 1990 and is a leading not-for-profit civil legal services organization advocating for adults, children, and families that are experiencing poverty or have low income. We tackle the legal challenges and systematic barriers that threaten our clients' economic stability, well-being, and safety. We are committed to diversity, equity, and inclusion

and constantly improving how we respond to systemic issues of racism that affect our clients in their pursuit of justice. We address emerging and urgent needs with comprehensive, free civil legal services, direct representation, impact litigation, policy advocacy, financial counseling, medical-legal partnerships, and community education and partnerships. Last year, we affected the lives of 90,800 people, 35,900 of whom are immigrants.

Prisoners' Legal Services of New York (PLS) is a nonprofit organization that has provided civil legal services for over forty-five years to indigent individuals incarcerated in New York State. As part of the New York Immigrant Family Unity Project, PLS provides free legal representation to noncitizens incarcerated in New York State prisons facing immigration removal proceedings under the Institutional Hearing Program, in addition to noncitizens held in immigration detention throughout Albany, Batavia, Plattsburgh, and Rensselaer, New York. PLS also provides detained immigrants with representation on habeas corpus petitions before the U.S. District Court for the Western District of New York, and on petitions for review and appeals before the U.S. Court of Appeals for the Second Circuit. PLS has a strong interest in protecting the due process rights of incarcerated and detained persons.