No. 22-863

IN THE

Supreme Court of the United States

RAFAEL DIAZ-RODRIGUEZ,

Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondent.

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

BRIEF OF AILA, NACDL, AND NAPD AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The **American Immigration Lawyers Association** (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 and the Executive Office of Immigration Review (including the Board of Immigration Appeals (Board) and immigration courts), as well as before United States District Courts, United States Courts of Appeals, and the United States Supreme Court.

The **National Association of Criminal Defense Lawyers** (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide

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1 Pursuant to Supreme Court Rule 37, counsel for *amici* represents that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received timely notice of *amici*'s intent to file this brief.

membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL appears in support of review because the Board's over-broad and nebulous "risk of harm" approach creates unwarranted removal risks for clients and thus renders criminal defense advice to those clients uncertain.

The **National Association for Public Defense** (NAPD) is an association of more than 28,000 professionals who deliver the right to counsel throughout all U.S. states and territories. NAPD members include attorneys, investigators, social workers, administrators, and other support staff who are responsible for executing the constitutional right to effective assistance of counsel. NAPD's members are advocates in jails, in courtrooms, and in communities and are experts in not only theoretical best practices, but also in the practical, day-to-day delivery of legal services. Their collective expertise represents federal, state, county, and local systems through full-time, contract, and assigned counsel delivery mechanisms, dedicated juvenile, capital and appellate offices, and a diversity of traditional and holistic practice models. In addition, NAPD hosts

annual conferences and webinars where discovery, investigation, cross-examination, and prosecutorial duties are addressed. NAPD also provides training to its members concerning zealous pretrial and trial advocacy and strives to obtain optimal results for clients both at the trial level and on appeal.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici urge this Court to grant certiorari in this case. The question whether state court crimes of "child endangerment" are grounds for removal from this country is enormously important to noncitizens across the nation—far too important for its resolution to turn on the circuit in which the noncitizen's removal proceedings were initiated. *Amici* submit this brief to highlight two ways in which the question presented is important to *amici*'s members and their clients.

First, the question presented arises frequently, and often impacts noncitizens convicted of minor misdemeanors involving children and childcare. The Board of Immigration Appeals' (Board) decision in *Matter of Soram*, 25 I. & N. Dec. 378 (BIA 2010)—to which the Ninth Circuit plurality deferred—has transformed many minor state misdemeanors into removable offenses, even when those misdemeanors cover conduct like leaving a sleeping child home for fifteen minutes while buying groceries for dinner or leaving adolescent children in the car while running into a store to buy diapers. Such misdemeanor charges disproportionately impact single, working parents who face difficult choices in balancing work and childcare. Making such minor and frequently charged offenses grounds for removal results in separating numerous

children from generally caring and supportive parents based on isolated missteps.

Second, the standard the Board adopted in *Soram*—which makes endangerment crimes removable offenses if they require a "risk of harm" that the Board deems "sufficient," 25 I. & N. Dec. at 381-83—imposes an "I know it when I see it" approach to classifying endangerment offenses that is entirely subjective and impossible to anticipate, *see Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). This poses a particular problem for *amici*'s members, who are often called on to advise noncitizens charged with endangerment offenses of the immigration consequences of a potential guilty plea. It is, to put it bluntly, absurd to ask a criminal defense or immigration attorney to try to predict what "risk of harm" a given Appellate Immigration Judge will deem "sufficient" to warrant removal from this country. The vague and unpredictable standard that the Board is currently applying to answer the question presented heightens the importance of the question—and the need for this Court's review.

ARGUMENT

I. The Question Whether Child Endangerment Is A Removable Offense Is Enormously Important And Frequently Recurring.

The question presented is exceptionally important to noncitizens for two straightforward reasons: It impacts a wide range of child-related conduct, and it recurs with great frequency at the agency and across the circuits. A question that occurs so frequently, and that has such a dramatic impact when it arises, should not be answered differently for noncitizens due to the

happenstance of where their immigration proceedings are located.

A. The Question Presented is important because the agency's approach to child endangerment has made minor child-related mistakes grounds for removal.

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 addition to the Colorado statute that the Board deemed a removable offense in *Soram* itself, the Board has applied *Soram* in published opinions involving endangerment statutes from New York and Oregon, deeming both removable offenses. *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). It has done the same in unpublished decisions involving California and Florida offenses that have made their way to the Ninth and Eleventh Circuits. *See Diaz-Rodriguez v. Garland*, 55 F.4th 697 (9th Cir. 2022); *Martinez v. U.S. Att'y Gen.*, 413 F. App'x 163 (11th Cir. 2011). Looking at the type of conduct criminalized by the state statutes at issue in these cases makes clear that, despite *Soram*'s requirement that the "risk of harm" must be "sufficient," the practical impact of *Soram* is to classify the vast majority of state endangerment offenses as removable offenses, no matter how minor the conduct criminalized.

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 much broader.

Ms. Ibarra came to the United States when she was four years old and at the time of her offense was the mother of seven U.S.-citizen children. While at work, Ms. Ibarra 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. The Immigration Judge nevertheless was bound by *Soram* to deem this conduct child "abuse," "neglect," or "abandonment," and Ms. Ibarra would have been removed from this country—and likely permanently separated from her children—absent the Tenth Circuit's decision rejecting *Soram* in the context of negligent endangerment offenses.

2. Following *Soram*, the Board also has held 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. That statute also sweeps broadly: Perhaps most tellingly, it leads to only minor criminal penalties, with nearly 80% of convictions 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 smoking marijuana in the same apartment as a child, even if the child is unrelated to the defendant, *People v. Alvarez*, 860 N.Y.S.2d 745 (Crim. Ct. 2008), also suffice. This last example is a striking illustration 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.

The cases involving parents trusting their children to be left home alone are perhaps the most striking example of the breadth of New York's endangerment provision. In *Reyes*, a mother was charged for leaving her sleeping four-year-old child alone for fifteen minutes while buying groceries for dinner. 872 N.Y.S.2d 692. And *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.'"); *see also, 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). 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 data from the New York Division of Criminal Justice Services (CJS),[2] from 2000 to 2015, over 35% of endangerment convictions not accompanied by a separate felony charge resulted in a sentence of conditional

2 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 statewide data.

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*, 927 F.3d 606, 625 (2d Cir. 2019) (Carney, J., dissenting) ("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 happens 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); *see also id.* at 622 (majority op.). Absent the presence of a child, this conduct would not be grounds for removal.

3. The Board 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 a "likely" result of harm). Thus, the Oregon court sustained the conviction in *Obeidi* 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." *See id.* at 82-83.

4. The Board has not issued a published opinion regarding the California endangerment statute in this

case, California Penal Code § 273a(a), but it has classified that statute as a removable offense in numerous cases. That statute, too, encompasses a wide range of minor conduct. *See, e.g.*, Pet. App. 100a (Wardlaw, J., dissenting) (explaining how "prosecutors and law enforcement officers … have found simple parenting mistakes—such as failing to restrain a child properly in a car seat or falling asleep while children were in one's care—criminally negligent" and in violation of section 273a(a)); *see also* Pet. App. 100a-102a (describing other examples); *Matthews*, 927 F.3d at 633-34 (Carney, J., dissenting) (explaining how prosecutors' and law enforcement officers' understanding of the statute's scope are relevant in determining the minimum acts criminalized by the statute).

The Board has similarly not issued a published decision about the Florida endangerment statute at issue in the Eleventh Circuit's recent decision in *Bastias v. U.S. Attorney General*, 42 F.4th 1266 (11th Cir. 2022), but it has classified that statute as a removable offense in multiple cases that have reached the Eleventh Circuit. *E.g.*, *Martinez*, 413 F. App'x 163. That statute, too, has a broad reach. In *Martinez*, for instance, a mother of six U.S.-citizen children briefly followed her pastor's advice to allow her husband to return to her home despite his abuse of Ms. Martinez's daughter from a prior marriage. *Id.* at 168. No abuse occurred during the three-week period between when her husband returned home and when Ms. Martinez realized her mistake and permitted a church counselor to call the police, which led to both her husband's and her own arrest. *Ibid.* Ms. Martinez was charged with violating Florida law, specifically Fla. Stat. § 827.03(3)(a), (c). Ms. Martinez did not contest the

charges, and was sentenced to two days of confinement, with credit for two days served. *Martinez*, 413 F. App'x at 168. The Florida Department of Children and Family Services concluded that she should retain custody of her children. *Ibid*. Nevertheless, the immigration judge and Board applied *Soram* and found Ms. Martinez removable.

Before the Eleventh Circuit, Ms. Martinez's lawyers did not challenge *Soram*'s validity, and so the court held that it had no choice but to deny her petition for review. But the court went out of its way to criticize this outcome for removing Ms. Martinez even though "[t]here is no evidence that Martinez has ever been anything less than a caring parent." 413 F. App'x at 169. Indeed, the court described the case as "one of those difficult cases where the law yields a conclusion that is onerous and, at its core, inequitable," *id.* at 164, and wrote that "[w]hile we are constrained by the law to reach this result, because it yields a profoundly unfair, inequitable, and harsh result, we urge the Attorney General to closely review the facts of this heartbreaking case once again," *id.* at 168.

* * *

Congress enacted the "crime of child abuse, child neglect, or child abandonment" provision to protect children: In the words of the provision's sponsor, it was intended to "stop … vicious acts of stalking, child abuse, and sexual abuse," and to "prevent … the often justified fear [of such vicious acts] that too often haunts our citizens." 142 Cong. Rec. 10,067 (1996) (statement of Sen. Dole). Indeed, Congress recognized, in a separate provision of the INA addressing "special immigrant" status for certain children, that "abuse, neglect, [and] abandonment" is the type of conduct

that makes children's "reunification with … parents [] not viable." 8 U.S.C. § 1101(a)(27)(J)(i).

As the above discussion shows, however, the Board has strayed far beyond that purpose and classified state crimes as removable offenses even if they criminalize conduct by "a caring parent," *Martinez*, 413 F. App'x at 168, whose conduct amounts to, at most, a "mistake in judgment," *Ibarra*, 736 F.3d at 905 n.3. That expansion of the child-related grounds for removal has dramatic implications for noncitizens and their children—implications that are far too important to allow for differential application across the circuits.

B. The Question Presented is important because it arises incredibly frequently.

As the petition explains, Pet. 20-21, the question whether negligent child endangerment is a removable offense occurs incredibly frequently. In addition to the cases raising this issue in the Ninth Circuit and before the Board, *amici*'s members routinely confront this question in their practice across the country. That is because child endangerment is a frequently charged offense in many states. While data is not available for most states, the data from New York show that close to five thousand New Yorkers are charged with child endangerment every year in that state alone, and between two and three thousand people per year ultimately plead guilty. *See supra* p.9 & n.2. While New York's endangerment statute does not have a mens rea of criminal negligence, *amici*'s experience is that these numbers are, at a high level, representative of the frequency with which child endangerment is charged across the country, including in states like California,

Colorado, and Florida that have endangerment statutes with a mens rea of negligence.

A question that arises so frequently, and has such dramatic implications when it does arise, should be answered uniformly across circuits.

II. The Question Presented Is Also Important Because The Board's Decision In *Soram* Makes It Nearly Impossible For *Amici* And Their Members To Reliably Advise Noncitizens Of The Immigration Consequences Of Guilty Pleas.

The question presented is also important—and warrants this Court's review—because the subjective standard the Board adopted in *Soram* and that the Ninth Circuit plurality accepted in this case makes it practically impossible for immigration counsel, let alone a noncitizen like Mr. Diaz-Rodriguez, to predict with any degree of certainty when (if ever) an endangerment conviction will not be a removable offense. The Board held in *Soram* that an endangerment conviction is not a removable offense if it does not create a "risk of harm" that the Board deems "sufficient." This "I know it when I see it" approach, *Jacobellis*, 378 U.S. at 197 (Stewart, J., concurring), leaves immigration attorneys completely in the dark as to when a given Appellate Immigration Judge might deem a risk of harm insufficient—making it next to impossible to advise noncitizens about the consequences of a guilty plea beyond advising them that practically every endangerment conviction could lead to removal.

As this Court has recognized, "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." *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010) (footnote omitted). Thus, advising a client on the immigration consequences of a guilty plea is a critical part of *amici*'s members' role in providing effective assistance to their clients. *See ibid.*; *see also Mellouli v. Lynch*, 575 U.S. 798, 806 (2015) (explaining that one of the core functions of the categorical approach is to "enable[] 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."). *Amici* provide resources to help their members and other criminal defense attorneys carry out their duty to provide effective assistance to their clients. And because the Board and courts of appeals have not come close to addressing the specific consequences of conviction of every state endangerment crime, a crucial part of *amici*'s work is predicting how generic federal offenses will be interpreted *in the future*.

To the extent the Board's decision in *Soram* excludes any meaningful number of endangerment offenses from the child abuse, neglect, or abandonment provision—which is questionable—the Board's "standard" announced in *Soram* makes identifying those offenses practically impossible. The Board held that a child endangerment statute qualifies as "child abuse, child neglect, or child abandonment" if it requires a "sufficient risk" of harm. As one judge has rightly noted, that standard "floats, unmoored, on the fickle sea of child-rearing conventions." *Matthews*, 927 F.3d at 624 (Carney, J., dissenting) (citation omitted). *Amici* and their members cannot possibly predict the child-rearing mores of the Appellate Immigration

Judge (or court of appeals panel) that will ultimately be asked to decide whether the risk of harm required by a given state statute is "sufficient" to warrant removing anyone convicted of that statute from this country.

This problem is worsened because child endangerment offenses are treated so leniently for purposes of criminal law, making a guilty plea almost always advisable absent any adverse immigration consequences. Given the relatively low stakes, defendants facing child endangerment charges are more likely to be inclined to quickly accept a guilty plea than defendants facing charges with more severe punishments. Because immigration consequences will often be the most important question driving the decision whether to plead guilty to such a minor offense, it is critical that defense attorneys be able to predict the immigration consequences of such pleas: Mistakenly advising a noncitizen to plead guilty to a removable offense has devastating consequences to the noncitizen and her family, while mistakenly advising a noncitizen *not* to plead guilty if the offense will not lead to removal can lead to the needless complication of exceedingly minor cases. The Board's decision leaves defense attorneys little choice but to advise noncitizens in circuits governed by *Soram* that basically any endangerment conviction—no matter how minor—may well lead to removal.

These concerns are not merely hypothetical: *amici* have observed, on the ground, that the immigration consequences of child endangerment convictions are incredibly unpredictable after *Soram*. For example, the Ninth Circuit has held that Nevada's child neglect statute is broader than the generic federal child-abuse

crime because the generic offense requires "at least a 'reasonable probability' or a likelihood of harm to a child," whereas the Nevada statute criminalizes "only a 'reasonable foreseeability' of harm to a child." *Alvarez-Cerriteno v. Sessions*, 899 F.3d 774, 776-77, 783 (9th Cir. 2018). But the Board has 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. *Matter of Rivera-Mendoza*, 28 I. & N. Dec. at 190.

As another example, the Third Circuit has held that Pennsylvania's child endangerment statute is broader than the federal generic crime of child abuse, neglect, or abandonment, because it criminalizes "conduct that '*could* threaten' a child's 'welfare.'" *Zhi Fei Liao v. Att'y Gen. U.S.*, 910 F.3d 714, 717, 722 (3d Cir. 2018) (quoting *Commonwealth v. Martir*, 712 A.2d 327, 329 (Pa. Super. Ct. 1998)) (emphasis added). Yet the Board has held that New York's endangerment law qualifies as a generic child abuse, neglect, or abandonment crime, *Matter of Mendoza Osorio*, 26 I. & N. Dec. at 712, even though New York only requires the "*potential* for harm to a child" to violate the statute, *People v. Johnson*, 95 N.Y.2d at 372 (emphasis added).

These applications of *Soram*'s subjective standard are difficult if not impossible to reconcile in any coherent way, putting defense lawyers in an impossible position when it comes to advising their noncitizen clients of the potential immigration issues that might arise from pleading guilty to child-endangerment offenses.

Right now, those convicted of negligent endangerment in the Tenth Circuit need not worry about *Soram*'s uncertainties and can confidently plead guilty to negligent endangerment given the Tenth Circuit's decision in *Ibarra*. By contrast, those in the Ninth and Eleventh Circuits, which have deferred to *Soram*, are left largely in the dark as to when, if ever, the Board may deem the required risk of harm to be insufficient. And those working in other circuits do not yet know which side of the circuit conflict their circuits will join. Applying such disparate legal rules across the circuits on a frequently recurring question of utmost importance for so many noncitizens is deeply unfair—an unfairness that only this Court can resolve.

CONCLUSION

Amici respectfully urge the Court to grant the petition for a writ of certiorari.

April 10, 2023

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