No. 22-863

In the Supreme Court of the United States

RAFAEL DIAZ-RODRIGUEZ, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's conviction for felony child endangerment under California law was for a "crime of child abuse, child neglect, or child abandonment" under 8 U.S.C. 1227(a)(2)(E)(i).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-146a) is reported at 55 F.4th 697. A prior opinion of the court of appeals (Pet. App. 147a-193a) is reported at 12 F.4th 1126. The opinion of the Board of Immigration Appeals (Pet. App. 194a-197a) is unreported. The decision and order of the immigration judge (Pet. App. 198a-215a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 2022. The petition for a writ of certiorari was filed on March 8, 2023. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1996, Congress amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to provide that any noncitizen "who at any time after admission

is convicted of * * * a crime of child abuse, child neglect, or child abandonment is deportable." 8 U.S.C. 1227(a)(2)(E)(i).[1] The INA does not define the phrase "crime of child abuse, child neglect, or child abandonment." *Ibid.* But the Board of Immigration Appeals (Board) has construed that phrase in several published decisions.

In 2008, the Board concluded that the phrase encompasses "any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being, including sexual abuse or exploitation." *In re Velazquez-Herrera*, 24 I. & N. Dec. 503, 512. The Board also rejected the contention that the phrase was limited to crimes "necessarily committed by the child's parent or by someone acting in loco parentis." *Id.* at 513.

Two years later, the Board held that "'act[s] or omission[s] that constitute[] maltreatment of a child,'" as discussed in *Velazquez-Herrera*, are "not limited to offenses requiring proof of injury to the child." *In re Soram*, 25 I. & N. Dec. 378, 380-381 (2010) (citation omitted). The Board explained that maltreatment includes some conduct "that threaten[s] a child with harm or create[s] a substantial risk of harm to a child's health or welfare." *Id.* at 382. It clarified, however, that not all acts that pose a risk to a child's health or welfare would constitute maltreatment. *Id.* at 383. The Board explained that a case-by-case analysis is required "to determine whether the risk of harm required by the endangerment-type language in any given State statute

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[1] This brief uses "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020).

is sufficient" for an offense to qualify as a crime of child abuse, child neglect, or child abandonment. *Ibid.*

In 2016, the Board engaged in that analysis with respect to the New York child-endangerment statute, N.Y. Penal Law § 260.10(1) (McKinney Supp. 2016), which makes it a crime to "knowingly act[] in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old," *ibid.* See *In re Mendoza Osorio*, 26 I. & N. Dec. 703, 705-712 (B.I.A. 2016). Applying the "'categorical approach,'" which asks "whether 'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition," *Moncrieffe* v. *Holder*, 569 U.S. 184, 190 (2013) (citation omitted), the Board concluded that "section 260.10(1) of the New York Penal Law is categorically a 'crime of child abuse, child neglect, or child abandonment' under" the INA. *Mendoza Osorio*, 26 I. & N. Dec. at 712.

Citing New York appellate decisions, the Board explained that a conviction under Section 260.10(1) requires "a showing that the defendant knew that his actions were likely to result in physical, mental, or moral harm to a child," as well as "proof that the harm was 'likely to occur, and not merely possible.'" *Mendoza-Osorio*, 26 I. & N. Dec. at 706 (citation omitted). The Board further explained that there was no evidence that the New York statute criminalized actions such as "leaving a child unattended for a short period, driving with a suspended license in the presence of a child, [or] committing petit larceny in the presence of a child," *id.* at 707, and therefore no "'realistic probability' that section 260.10(1) would successfully be applied to conduct falling outside" the scope of child abuse or neglect, *id.* at 712 (citation omitted). The Board contrasted the

New York statute with California's misdemeanor child-endangerment statute, California Penal Code (CPC) § 273a(b) (West 2014), which "criminalizes conduct that places a child 'in a situation where his or her person or health *may* be endangered,'" and which the Board acknowledged "do[es] not require a sufficiently high risk of harm to a child to meet the definition of child abuse, neglect, or abandonment under the [INA]." *Mendoza-Osorio*, 26 I. & N. Dec. at 711 (citation omitted). In 2020, the Board applied the same analysis to conclude that the Oregon second-degree child-neglect statute is a "crime of child abuse, child neglect, or child abandonment" because it "requires a minimum mens rea of criminal negligence and a reasonable probability, or likelihood, or harm to a child." *In re Rivera-Mendoza*, 28 I. & N. Dec. 184, 190.

In sum, the Board's decisions in *Velazquez-Herrera*, *Soram*, *Mendoza Osorio*, and *Rivera-Mendoza* make clear that a "crime of child abuse, child neglect, or child abandonment" under 8 U.S.C. 1227(a)(2)(E)(i) includes crimes committed with criminal negligence, crimes that do not require proof of actual injury to the child (as long as they require a sufficiently high risk of harm), and crimes committed by caretakers other than a parent or legal guardian.

Lawful permanent residents of the United States who are removable as a result of a conviction for a crime of child abuse, child neglect, or child abandonment do not lose their eligibility for cancellation of removal if they otherwise satisfy the eligibility requirements. See 8 U.S.C. 1229b(a). The discretionary decision whether to award cancellation of removal turns on a balancing of factors, including duration of residence, family or business ties, good character, employment history, the na-

ture and circumstances of the grounds of removal, and the presence of other criminal violations or evidence of bad character. See *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998).

2. Petitioner is a native and citizen of Mexico who was admitted to the United States as a lawful permanent resident in 1990. Pet. App. 199a. In addition to convictions for second-degree burglary, battery, and driving under the influence, among other offenses, petitioner was convicted in 2009 of felony child endangerment under California law, stemming from an incident in which he was driving drunk with a child in the car. See *id.* at 202a-203a, 207a. The California felony child-endangerment statute provides:

> Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in the county jail not exceeding one year, or in the state prison for two, four, or six years.

CPC § 273a(a). The Supreme Court of California has construed "willfully" in that statute to require a showing of criminal negligence, which means "aggravated, culpable, gross, or reckless conduct that is such a departure from what would be the conduct of an ordinarily prudent or careful person under the same circumstances as to be incompatible with a proper regard for human life." *People* v. *Valdez*, 42 P.3d 511, 514 (2002) (brackets, citation, and ellipses omitted); see *id.* at 517.

On November 9, 2012, the Department of Homeland Security (DHS) issued petitioner a notice to appear. See Pet. App. 199a. DHS charged petitioner with removability on the ground that his conviction under CPC § 273a(a) was for a "crime of child abuse, child neglect, or child abandonment" under 8 U.S.C. 1227(a)(2)(E)(i). See Pet. App. 199a. An immigration judge sustained the charge of removability and denied petitioner's application for cancellation of removal as a matter of discretion. *Id.* at 198a-215a.

The Board affirmed. Pet. App. 194a-197a. Citing *Soram* and *Velazquez-Herrera*, the Board agreed that CPC § 273a(a) categorically is a crime of child abuse, child neglect, or child abandonment because the statute requires criminal negligence and a high likelihood of serious injury to the child. Pet. App. 194a-196a. The Board additionally upheld the immigration judge's denial of petitioner's application for cancellation of removal as a matter of discretion. *Id.* at 196a-197a.

3. The en banc court of appeals denied the petition for review. Pet. App. 1a-146a; cf. *id.* at 147a-193a.

a. A divided panel of the court of appeals initially granted the petition for review, holding that CPC § 273a(a) does not categorically qualify as a crime of child abuse, child neglect, or child abandonment. Pet. App. 147a-193a. The panel majority viewed the federal statute as unambiguously excluding child-endangerment offenses with a mens rea of criminal negligence based on dictionary definitions of the terms "child abuse," "neglect," and "abandonment," *id.* at 161a. The panel majority also stated that when 8 U.S.C. 1227(a)(2)(E)(i) was enacted in 1996, fourteen States "criminalized child endangerment committed with a *mens rea* of criminal negligence." Pet. App. 163a.

Judge Callahan dissented. Pet. App. 174a-193a. In her view, the INA provision does not unambiguously exclude child-endangerment offenses, and the Board had reasonably concluded in *Soram* that a "crime of child abuse, child neglect, or child abandonment" under Section 1227(a)(2)(E)(i) includes criminally negligent child endangerment. See *id.* at 191a-193a.

b. The court of appeals subsequently granted the government's petition for rehearing en banc, vacated the panel opinion, and denied the petition for review. Pet. App. 1a-146a.

i. Judge Ikuta, joined by three other judges in full and two more in part, held that the Board had reasonably concluded that petitioner's California conviction was a "crime of child abuse, child neglect, or child abandonment" under Section 1227(a)(2)(E)(i). Pet. App. 1a-63a. Judge Ikuta observed that under the categorical approach, the elements of the " 'least of the acts criminalized' by the state offense" must match (or be narrower than) the elements of the "federal generic offense" defined by the INA. *Id.* at 6a (citation omitted). She further observed that "the least of the acts criminalized by" the California statute "requires proof that a defendant (1) had care o[r] custody of a child, whether or not a parent or legal guardian; and (2) with criminal negligence, meaning in a manner that a reasonable person would have known creates a high risk of death or great bodily injury; (3) purposely put the child into an abusive situation in which the probability of serious injury was great." *Id.* at 12a-13a.

Petitioner had argued that the California statute is not a categorical match to the INA because "a crime of 'child abuse' require[s] the perpetrator to have a mens rea of at least recklessness, not mere criminal negli-

gence," Pet. App. 15a, as well as proof of "an actual injury to the child," *id.* at 17a; and that "an act of 'child neglect' or 'child abandonment' could be committed only by a parent or legal guardian," *id.* at 15a. Judge Ikuta explained that the INA is ambiguous with respect to whether it encompasses crimes committed with criminal negligence, crimes that do not require proof of actual injury to the child, and crimes committed by someone other than the child's parent or legal guardian. *Id.* at 16a-39a. She observed that although some contemporaneous dictionaries supported petitioner, others did not, see *id.* at 16a-21a; that surrounding provisions in the INA supported the Board's position, see *id.* at 21a-24a; that other federal statutes (albeit ones in the civil, not criminal, context) likewise supported the Board's view, see *id.* at 24a-29a; and that contemporaneous state criminal codes did not provide a consensus view, see *id.* at 29a-36a; see also *id.* at 33a-34a (observing that "in 1996 some 15 states criminalized crimes against children that involved a mens rea of criminal negligence, did not require any injury to the child, and did not require the perpetrator to be a parent or legal guardian").

Judge Ikuta further concluded that the Board reasonably resolved the ambiguity in concluding that the California felony child-endangerment statute is a categorical match to the INA. Pet. App. 45a-61a. She observed that the Board had appropriately considered the "ordinary, contemporary and common meaning," as well as the " 'established legal usage,' " of the federal statutory terms, "the federal policies underlying § 1227(a)(2)(E)(i)," other "federal statutes defining 'child abuse' and related concepts in effect in 1996," and contemporaneous "state statutes." *Id.* at 49a (citations omitted). Judge Ikuta reiterated that her own review

of those sources "showed that crimes of child abuse and child neglect can include offenses that may be committed with criminal negligence, where a child is not injured but placed at a substantial risk of harm, and where the perpetrator may be someone other than a parent or legal guardian." *Id.* at 54a. "Therefore," she concluded, the Board's "interpretation does not sharply depart from the relevant federal and state laws in place in 1996," and indeed "is consistent with the 'text, nature, and purpose of the [INA].'" *Id.* at 54a-55a (citation omitted).

Judge Ikuta observed that the Eleventh Circuit has held that the Board reasonably interpreted Section 1227(a)(2)(E)(i) to encompass "crimes that required a mens rea of criminal negligence and did not result in injury to the child," and that the Second, Third, Fifth, and Tenth Circuits have held that the Board reasonably interpreted the INA provision "as including crimes that do not result in injury to the child." Pet. App. 55a-56a. She acknowledged that the Tenth Circuit had held in *Ibarra* v. *Holder*, 736 F.3d 903 (2013), that the provision "does not cover" "criminally negligent conduct that does not result in injury." Pet. App. 56a-57a. But she "disagree[d] with the Tenth Circuit because it applied the wrong standard." *Id.* at 58a. Judge Ikuta explained that *Ibarra* had "determined that the [INA provision] was ambiguous," *id.* at 57a, but then failed to "defer to the [Board's] reasonable interpretation" of that provision, *id.* at 58a. She also explained that *Ibarra* "erred by giving undue weight to its state survey." *Id.* at 59a.

ii. Judge Collins, joined by Judge Bumatay, concurred in part and in the judgment. Pet. App. 69a-87a. In his view, a "crime of * * * child *neglect*," 8 U.S.C. 1227(a)(2)(E)(i) (emphasis added), unambiguously en-

compasses offenses committed in a criminally *negligent* manner. Pet. App. 74a-77a; see *id.* at 76a ("[T]he very concept of criminal neglect clearly indicates that criminal negligence is sufficient."). Judge Collins thus found that CPC § 273a(a) "is a categorical match." Pet. App. 86a.

iii. Judge Wardlaw, joined by four other judges, dissented. Pet. App. 88a-139a. In her view, CPC § 273a(a) defines a crime of "child endangerment," whereas Section 1227(a)(2)(E)(i) includes only the crimes of child abuse, child neglect, and child abandonment, and thus "unambiguously excludes child endangerment." Pet. App. 88a; see *id.* at 106a-119a.

ARGUMENT

Petitioner renews his contention (Pet. 26-35) that CPC § 273a(a) is not categorically a "crime of child abuse, child neglect, or child endangerment" under 8 U.S.C. 1227(a)(2)(E)(i) because it can be committed with criminal negligence and without actual injury to the child.[2] The court of appeals correctly rejected that contention, and although its decision conflicts with the Tenth Circuit's decision in *Ibarra* v. *Holder*, 736 F.3d 903 (2013), that conflict does not warrant this Court's review because the Tenth Circuit may well reconsider its position in light of subsequent developments, including an intervening decision of this Court.

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[2] Petitioner's counsel of record filed two other petitions for writs of certiorari on the same day as the petition in this case. The pending petition in *Bastias* v. *Garland*, No. 22-868 (filed Mar. 8, 2023), raises the same question with respect to a Florida child-endangerment statute. The pending petition in *Kerr* v. *Garland*, No. 22-867 (filed Mar. 8, 2023), presents the question whether Section 1227(a)(2)(E)(i) encompasses a crime committed with a mens rea of knowledge that does not require proof of injury to the child.

1. a. The court of appeals correctly held that the California felony child-endangerment statute, CPC § 273a(a), is a "crime of child abuse, child neglect, or child abandonment" under 8 U.S.C. 1227(a)(2)(E)(i). That INA provision states that a noncitizen is removable if, following admission, he "is convicted of *a crime* of domestic violence, *a crime* of stalking, or *a crime* of child abuse, child neglect, or child abandonment." *Ibid.* (emphases added). The particular repetition and placement of "a crime" in that provision makes clear that Congress intended to specify three distinct types of crime that would render such noncitizens removable—and, critically, that "child abuse, child neglect, or child abandonment" describes a *single* type of crime. As the Board has explained, the phrase "child abuse, child neglect, or child abandonment" thus describes a "unitary concept," and each of the terms should therefore inform the meaning of the others. *In re Soram*, 25 I. & N. Dec. 378, 381 (B.I.A. 2010) (citation omitted); see *In re Velazquez-Herrera*, 24 I. & N. Dec. 503, 518 (B.I.A. 2008) (Pauley, Board Member, concurring).

It follows that a crime need not involve actual harm to a child to qualify as a crime of child abuse, child neglect, or child abandonment; a "substantial risk of harm to a child's health or welfare" is sufficient. *Soram*, 25 I. & N. Dec. at 382. After all, the ordinary meanings of "neglect" and "abandonment" do not require actual physical or emotional injury, but instead encompass other types of mistreatment, including insufficient supervision, without regard to whether the mistreatment results in actual harm. See, *e.g.*, *Black's Law Dictionary* 1032 (6th ed. 1990) (defining "[n]eglect" as "to omit, fail, or forbear to do a thing," "an absence of care or attention in the doing or omission of a given act," or "a

designed refusal, indifference, or unwillingness to perform one's duty"); *id.* at 2 (defining "[a]bandonment" in this context as "[d]esertion or willful forsaking" and "[f]or[]going parental duties"). And when Congress enacted Section 1227(a)(2)(E)(i) in 1996, the most-recent version of *Black's Law Dictionary* further explained that "[a] child is 'neglected' when," among other things, he "is under such improper care or control *as to endanger* his morals or health." *Black's Law Dictionary* 1032 (emphasis added).

Those definitions make clear that endangering a child by creating a "substantial risk of harm to a child's health or welfare" constitutes child abuse, child neglect, or child abandonment. *Soram*, 25 I. & N. Dec. at 382. And as the Board has recognized, criminal negligence, unlike civil negligence, requires precisely such a heightened risk. See, *e.g.*, *In re Mendoza Osorio*, 26 I. & N. Dec. 703, 706 (2016). Petitioner's contrary view would read the terms "child neglect" and "child abandonment" out of the statutory text.

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

of 1990, Pub. L. No. 101-647, 104 Stat. 4789, defined "'child abuse'" to mean "the physical or mental injury, sexual abuse or exploitation, or *negligent treatment* of a child" both for purposes of protecting the rights of child victims and child witnesses, 18 U.S.C. 3509(a)(3) (emphasis added), and for purposes of requirements for reporting child abuse, 42 U.S.C. 13031(c)(1) (1994); see 34 U.S.C. 20341(c)(1) (current location of the same definition). Those statutory definitions reinforce the conclusion that the 1996 Congress intended for the INA's reference to a "crime of child abuse, child neglect, or child abandonment," 8 U.S.C. 1227(a)(2)(E)(i), to include crimes committed with criminal negligence.

b. At a minimum, the Board's conclusion that a "crime of child abuse, child neglect, or child abandonment" includes criminally negligent endangerment crimes—meaning crimes that require "a substantial risk of harm to a child's health or welfare," *Soram*, 25 I. & N. Dec. at 382—reflects a reasonable construction of the INA that warrants deference.[3] See, *e.g.*, *Sci-*

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[3] This Court has granted certiorari in *Loper Bright Enterprises* v. *Raimondo*, No. 22-451 (May 1, 2023), to consider whether to "overrule *Chevron* [*U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984)] or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency." Pet. at i-ii, *Loper Bright*, *supra* (No. 22-451). This case does not implicate any question about statutory silence because the INA contains an *express* delegation of authority, providing that the "determination and ruling by the Attorney General with respect to all questions of law" arising from "the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of" noncitizens "shall be controlling," 8 U.S.C. 1103(a)(1); cf. *City of Arlington* v. *FCC*, 569 U.S. 290, 317-322 (2013) (Roberts, C.J., dissenting) (explaining that *Chevron* is primarily about implicit delegation).

alabba v. *Cuellar de Osorio*, 573 U.S. 41, 57 (2014) (plurality opinion); *id.* at 79 (Roberts, C.J., concurring in the judgment); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999). As the courts of appeals considering Section 1227(a)(2)(E)(i) have uniformly concluded, the phrase "crime of child abuse, child neglect, or child abandonment" is ambiguous. See, *e.g.*, *Florez* v. *Holder*, 779 F.3d 207, 211 (2d Cir. 2015), cert. denied, 577 U.S. 1216 (2016); *Mondragon-Gonzalez* v. *Attorney General*, 884 F.3d 155, 159 (3d Cir. 2018); *Garcia* v. *Barr*, 969 F.3d 129, 133 (5th Cir. 2020); *Zarate-Alvarez* v. *Garland*, 994 F.3d 1158, 1164 (10th Cir. 2021) (per curiam); *Bastias* v. *U.S. Attorney General*, 42 F.4th 1266, 1272 (11th Cir. 2022), petition for cert. pending, No. 22-868 (filed Mar. 8, 2023). Congress did not define that phrase or its constituent terms in Section 1227 or any other portion of the INA. Moreover, "state and federal statutes, both civil and criminal, offer varied definitions of child abuse, and the related concepts of child neglect, abandonment, endangerment, and so on." *Florez*, 779 F.3d at 211; see Pet. App. 16a-39a (plurality opinion surveying dictionary definitions, surrounding INA provisions, other federal statutes, and state statutes in existence in 1996).

The Board adopted a reasonable construction of that ambiguous phrase when it concluded in *Soram* that it reaches convictions under some statutes that require proof of criminally negligent conduct that causes a sufficiently substantial risk to a child, without requiring proof of injury to the child. See 25 I. & N. Dec. at 381. In both civil and criminal contexts, the terms in Section 1227(a)(2)(E)(i) are commonly defined to include such conduct. See, *e.g., Velazquez-Herrera*, 24 I. & N. Dec. at 509-511 (surveying criminal statutes); *Soram*, 25 I. & N. Dec. at 382 (citing report of U.S. Department of

Health and Human Services compiling state definitions of child abuse and neglect); see also *Soram*, 25 I. &. N. Dec. at 386-387 (Filppu, Board Member, concurring) (surveying criminal child-abuse statutes in existence in 1996).

It was reasonable for the Board, as the entity exercising the Attorney General's authority to construe the INA, cf. 8 U.S.C. 1103(a); 28 U.S.C. 510; 8 C.F.R. 1003.1(a)(1), to conclude that those widespread definitions furnish the most appropriate construction of "crime of child abuse, child neglect, or child abandonment" for purposes of the INA. As the Board observed, Section 1227(a)(2)(E)(i) was enacted "as part of an aggressive legislative movement to expand the criminal grounds of deportability in general and to create a 'comprehensive statutory scheme to cover crimes against children' in particular," along with a provision making removable those who commit crimes involving sexual abuse of minors. *Velazquez-Herrera*, 24 I. & N. Dec. at 508-509 (quoting *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 994 (B.I.A. 1999) (en banc)); see *Soram*, 25 I. & N. Dec. at 383-384. Contrary to petitioner's suggestion (Pet. 31-32), the aim of protecting children through Section 1227(a)(2)(E)(i) would be disserved if the provision did not reach noncitizens convicted of placing children at substantial risk of harm—simply because of the fortuity that those noncitizens' criminally negligent conduct jeopardizing the safety of children did not ultimately lead to harm in those particular instances.

c. Petitioner's remaining arguments lack merit.

Echoing the dissenting judges below, petitioner contends (Pet. 27) that "dictionaries defined endangerment as a *separate* offense, not as a subset of 'abuse'

or 'neglect.'" Even if that were so, the relevant question here is whether the elements of a "crime of child abuse, child neglect, or child abandonment," 8 U.S.C. 1227(a)(2)(E)(i), categorically encompass the elements of CPC § 273a(a)—regardless of whether the California crime is *labeled* "endangerment," "abuse," or something else. In any event, as noted above, in 1996, various recent federal statutes and the most recent edition of *Black's Law Dictionary* all included neglect and endangerment in their definitions of "abuse." See pp. 11-13, *supra*.

Petitioner objects (Pet. 30) that the plurality below relied on a survey of civil, not criminal, state statutes in existence in 1996. That objection is misplaced for three reasons. First, petitioner provides no basis to believe that the phrase "child abuse, child neglect, or child abandonment" carries different meanings in the civil and criminal contexts—or that Congress believed it did in 1996.

Second, the requirement that a noncitizen is potentially rendered removable only if "convicted" of a "crime" falling within the INA category of "child abuse, child neglect, or child abandonment" itself has a substantial limiting effect. 8 U.S.C. 1227(a)(2)(E)(i). That requirement means that removal depends on the existence of a prior criminal conviction. It cannot be based upon a determination by an immigration judge that the noncitizen committed an act of child abuse, child neglect, or child abandonment (no matter how broadly defined); nor upon a determination of abuse, neglect, or abandonment that is made in child-custody or other civil proceedings.

Third, the decision below, which itself relied on the Board's holding in *Soram*, is amply supported by a

consideration of state criminal statutes alone. See 25 I. & N. Dec. at 387-388 (Filppu, Board Member, concurring) (surveying criminal provisions at the time Section 1227(a)(2)(E)(i) was enacted, and concluding that "child endangerment was part of the 'ordinary, contemporary, and common' meaning of a crime of child abuse, child neglect, or child abandonment in 1996") (citation omitted).

Petitioner's reliance (Pet. 29-30) on the "structure" of the INA is misplaced. According to petitioner, Congress could not have intended to classify any child-endangerment statute as a crime of child abuse, child neglect, or child abandonment because that would be inconsistent with Congress's decision to bar nonpermanent residents convicted of such offenses from seeking cancellation of removal. But in enacting Section 1227, Congress clearly intended to protect children and domestic partners—including by imposing harsh immigration consequences on noncitizens who commit crimes of domestic violence, stalking, or child abuse, neglect, or abandonment. 8 U.S.C. 1227(a)(2)(E)(i). Petitioner identifies nothing in the INA to suggest that Congress wanted that provision to be artificially narrowed to avoid the very consequences it wrote into law. Besides, those potential consequences have no relevance to this case: Petitioner was admitted as a lawful permanent resident and thus remained eligible for cancellation of removal notwithstanding his conviction for a crime of child abuse, child neglect, or child abandonment.

To the extent petitioner suggests (Pet. 32) that crimes resulting in "little, if any criminal punishment" are not crimes of child abuse, child neglect, or child abandonment under the INA, that suggestion is incor-

rect. When making different kinds of criminal convictions grounds of deportability, Congress has expressly specified when the potential or resulting punishment is relevant. Thus, in 8 U.S.C. 1227(a)(2)(A)(i), Congress has provided that a crime involving moral turpitude triggers removability only when "a sentence of one year or longer may be imposed." And in 8 U.S.C. 1227(a)(2)(A)(iii), it has made a conviction for an "aggravated felony" a basis for removal, and has in turn defined some kinds of offenses as aggravated felonies only when the term of imprisonment imposed is "at least one year," 8 U.S.C. 1101(a)(43)(F), (G), (R), and (S). But Congress did not specify in Section 1227(a)(2)(E)(i) that a prior conviction for a crime of child abuse, child neglect, or child abandonment qualifies only if it is punishable or punished by some minimum term of imprisonment, thus making clear that there is no such minimum.

Finally, petitioner contends (Pet. 30-31) that any ambiguity in a statutory provision involving deportation should be resolved in favor of the noncitizen, and he further suggests (Pet. 33-35) that courts should not accept the Board's resolution of any statutory ambiguities at all. That contention and suggestion lack merit. "Congress has charged the Attorney General with administering the INA," *Negusie* v. *Holder*, 555 U.S. 511, 516-517 (2009), and has expressly directed that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling," 8 U.S.C. 1103(a)(1). Congress has thus made clear that any ambiguity in the INA should be resolved by the Attorney General in the first instance. *Soram* and other decisions of the Board represent precisely such resolutions with respect to Section 1227(a)(2)(E)(i). Those

resolutions leave no residual ambiguity to which any "deportation canon" would apply.

2. Petitioner observes (Pet. 17-20) that the decision below conflicts with the Tenth Circuit's decision in *Ibarra*, *supra*. The court in *Ibarra* found that Section 1227(a)(2)(E)(i) "does contain *some* ambiguity," 736 F.3d at 910—but it then refused even to address whether the Board's resolution of that ambiguity was reasonable because it thought such an inquiry was needed only if "the 'traditional tools of statutory construction yield no relevant congressional intent,' " *ibid.* (citation omitted). The court then attempted to divine that intent by conducting its own survey of state criminal codes. See *id.* at 911-918. The court concluded that in 1996, "a clear majority of states did not criminalize [child abuse, child neglect, or child abandonment] when it was committed with only criminal negligence and resulted in no injury. Accordingly, [the noncitizen's] conviction" under a Colorado statute "for negligently permitting her children to be placed in a situation where they might have been injured, when no injury occurred, does not fit the generic federal definition of child 'abuse, neglect, or abandonment' in 8 U.S.C. § 1227(a)(2)(E)(i)." *Id.* at 918.

The conflict between *Ibarra* and the decision below does not warrant this Court's review because the Tenth Circuit may well reconsider its holding based on subsequent developments. First, *Ibarra* relied almost exclusively on a survey of state laws (one that Judge Ikuta viewed as flawed, see Pet. App. 49a). But this Court's intervening decision in *Esquivel-Quintana* v. *Sessions*, 581 U.S. 385 (2017), makes clear that such surveys are merely one tool among many to determine the elements of a federal crime listed in the INA for purposes of ap-

plying the categorical approach. See *id.* at 389-397. In *Esquivel-Quintana*, the Court relied on the statutory text and the "everyday understanding" of the terms, *id.* at 391 (citation omitted); contemporaneous dictionaries, *id.* at 392-393; "[s]urrounding provisions of the INA," *id.* at 393; other "closely related federal statute[s]," *id.* at 394; and—finally—"state criminal codes," *id.* at 395. *Ibarra*'s near-exclusive focus on a state survey is incompatible with the holistic analysis employed by *Esquivel-Quintana*.

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

Third, since the Tenth Circuit's decision in *Ibarra*, the Ninth and Eleventh Circuits have concluded that the Board reasonably determined that Section 1227(a)(2)(E)(i) encompasses crimes committed with criminal negligence without proof of injury to the child. See Pet. App. 1a-146a; *Bastias*, 42 F.4th at 1273-1276. That emerging consensus, which makes *Ibarra* even more of an outlier than it already was, see *Garcia*, 969

F.3d at 133, might also persuade the Tenth Circuit to reconsider *Ibarra*. Along with its own decision in *Zarate-Alvarez* and this Court's decision in *Esquivel-Quintana*, those significant intervening developments mean that this Court's review of the 2-1 conflict would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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