No. 15-590

In the Supreme Court of the United States

NILFOR YOSEL FLOREZ, AKA NILFOR YOSEL FLORES,
PETITIONER

v.

LORETTA E. LYNCH, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board of Immigration Appeals permissibly concluded that a removal provision applicable to aliens convicted of any "crime of child abuse, child neglect, or child abandonment," 8 U.S.C. 1227(a)(2)(E)(i), reaches some convictions for placing a child at risk of harm, or whether the Board was required to conclude that the removal provision reaches only convictions under statutes that require proof of injury.

2. Whether petitioner is entitled to relief from an immigration judge's classification of his conviction under New York Penal Law § 260.10(1) (2010) as a removable offense, when petitioner's sole argument below was that an alien cannot be removable under 8 U.S.C. 1227(a)(2)(E)(i) based on a conviction for placing a child at risk of harm unless the statute of conviction requires proof of injury.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 779 F.3d 207. The decisions of the Board of Immigration Appeals (Pet. App. 20a-22a) and the immigration judge (Pet. App. 23a-43a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 2015. A petition for rehearing en banc was denied on August 7, 2015 (Pet. App. 15a). The petition for a writ of certiorari was filed on November 5, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that "[a]ny alien * * *

in and admitted to the United States shall, upon order of the Attorney General, be removed if the alien is within one or more of the" classes of removable alien specified under 8 U.S.C. 1227. 8 U.S.C. 1227(a). As relevant to this case, "[a]ny alien 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).

Neither the INA nor any other federal provision defines "crime of child abuse, child neglect, or child abandonment." The Board of Immigration Appeals (Board), however, has construed this 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.

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, 381 (B.I.A. 2010). The Board stated 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 further stated, however, that not all acts that pose a risk to a child's health or welfare would constitute maltreatment. *Id.* at 383. The Board stated that it would undertake "a State-by-State analysis" in order "to determine whether the risk of harm required by the endangerment-type language in any given State statute is sufficient" for an offense to

qualify as a crime of child abuse, child neglect, or child abandonment. *Id.* at 383.

Lawful permanent residents such as petitioner who are removable as a result of a criminal conviction described in Section 1227(a)(2)(E)(i) do not lose their eligibility for the discretionary relief known as cancellation of removal, if they meet duration of residency and status requirements. See 8 U.S.C. 1229b. The 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 nature 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. a. Petitioner, a native and citizen of Honduras, was admitted to the United States in 1993 as a lawful permanent resident. Pet. App. 24a. Since then, petitioner has accumulated a "lengthy and serious criminal history." Certified Administrative Record (A.R.) 253. His record includes two separate convictions for violating New York Penal Law § 260.10(1) (McKinney 2010), 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 Pet App. 30a-31a.[1]

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[1] A second portion of New York Penal Law § 260.10(1) (2010) makes it illegal to direct or authorize a child "to engage in an occupation involving a substantial risk of danger to his or her life or health." Petitioner acknowledges that the statute under which he was convicted is divisible, see Pet. App. 28a; A.R. 49, and that he was convicted under the first portion of the statute, see Pet. App. 6a, 30-31a; see also A.R. 251-252, 260 (Certificate of Disposition of Indictment), 266 (Criminal Information).

The first of these convictions, in 2004, arose from petitioner's having "'act[ed] in concert with another person' in the rape of a teenage girl." Pet. App. 3a; see *id.* at 31a, 37a; A.R. 260. Petitioner's "precise role" in the underlying offense was "not clear." Pet. App. 3a. While petitioner was questioned about his role in connection with his application for cancellation of removal, petitioner was "very reticent in his testimony before [the immigration judge] regarding the underlying facts and circumstances regarding that case." *Id.* at 37a-38a (findings of immigration judge).

Following several additional convictions under other statutes, petitioner was convicted a second time, in 2010, of endangering the welfare of a child in violation of New York Penal Law § 260.10(1) (2010). Pet. App. 39a-40a. That conviction was based on petitioner's driving while intoxicated with his one-year-old and nine-year-old children in the vehicle. *Id.* at 31a, 39a-40a; A.R. 265, 266. Petitioner was initially sentenced to six months of imprisonment to be followed by five years of probation, but after he violated the terms of his probation, he was sentenced to one year of imprisonment for the offense. Pet. App. 40a.

b. The Department of Homeland Security initiated removal proceedings, charging that petitioner was subject to removal under 8 U.S.C. 1227(a)(2)(E)(i) based on his two convictions for endangering the welfare of a child in violation of New York Penal Law § 260.10(1) (2010). Pet. App. 24a-25a; A.R. 287-290. An immigration judge determined that petitioner was removable based on those convictions under *Velazquez-Herrera* and *Soram*. Pet. App. 30a-32a. The immigration judge emphasized that rather than having merely been convicted of a negligent act, peti-

tioner had been convicted of knowingly acting in a manner likely to be injurious to the physical, mental or moral welfare of a child less than 17 years old, which, the immigration judge concluded, "reflects the mens rea contemplated by the Board in *Soram* of a knowing act." *Id.* at 30a (emphasis omitted).

The immigration judge denied petitioner's application for cancellation of removal based on a lengthy analysis of petitioner's positive and negative equities. Pet. App. 34a-42a. The immigration judge acknowledged petitioner's family ties in the United States and duration of residency, but found them outweighed by the need to protect public safety, *id.* at 41a, in light of petitioner's extensive criminal record, consisting of convictions that were "numerous" and "recent," *id.* at 37a; see *id.* at 37a-40a.

c. The Board affirmed in a brief non-precedential order. Pet. App. 20a-22a.

Before the Board, petitioner raised only a limited challenge to the classification of his knowing child endangerment offense as a ground for removal. He argued that *no* child endangerment offenses can form a basis for removal under Section 1227(a)(2)(E)(i) unless the offense requires as an element "actual injury to the child." A.R. 25-29. In addition, he argued that because his guilty pleas predated *Soram*, that decision should not be applied to his case. See A.R. 29-33. However, he expressly declined to make any argument that "the risk of harm required by the endangerment-type language in" New York Penal Law § 260.10(1) (2010) was not sufficient to make his offense removable under the "State-by-State analysis" contemplated in *Soram*, 25 I. & N. Dec. at 383. See A.R. 24.

The Board rejected petitioner's challenge and dismissed petitioner's appeal in a brief unpublished order. Pet. App. 20a-22a. The order principally concluded that application of *Soram* to petitioner's case was not impermissibly retroactive, and stated that "[a]ccordingly, we agree with the Immigration Judge's conclusion" that petitioner was removable under *Soram*. *Id.* at 22a.

3. The court of appeals affirmed. Pet. App. 1a-14a. The court noted that under the framework of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), a court reviewing an agency's construction of a statute that it administers must defer to the agency's construction if the statute is ambiguous and the agency's construction is reasonable. Pet. App. 7a. The court "ha[d] little trouble concluding that" Section 1227(a)(2)(E)(i) "is ambiguous." *Ibid.* While the INA defines many terms contained in the immigration laws, the court noted that the INA does not include a definition for "crime of child abuse," and "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." *Id.* at 7a-8a. For that reason, the court noted, "all three Courts of Appeals to have considered the question" had found the provision ambiguous. *Id.* at 8a.

At the second step of the *Chevron* analysis, the court of appeals rejected petitioner's contention that the Board had unreasonably interpreted Section 1227(a)(2)(E)(i) by concluding that the section reaches at least some offenses that involve conduct causing a serious risk of harm to children, without actual injury. Pet. App. 8a-11a. The court noted that at least nine

States at the time of the enactment of Section 1227(a)(2)(E)(i) had included such offenses within their definition of child abuse (or within a similarly defined offense). *Id.* at 9a-10a. Although other States required injury for an offense to constitute child abuse, the court explained that the Board was not required to adopt "the best interpretation, or the majority interpretation—only a reasonable one." *Id.* at 10a. The court concluded that the Board's adoption of a definition used by a number of States at the time of Section 1227(a)(2)(E)(i)'s enactment was reasonable. *Ibid.*

The court of appeals emphasized that under the Board's decision in *Soram*, not all offenses involving risk of injury to a child constitute a ground for removal under Section 1227(a)(2)(E)(i). Rather, the Board had held in *Soram* that a state statute must reach only conduct involv[ing] "a sufficiently high risk of harm to a child" to be among those covered by Section 1227(a)(2)(E)(i). Pet. App. 10a (quoting *Soram*, 25 I. & N. Dec. at 385). The court explained that "as a general proposition, this limitation ensures that the BIA's treatment of state child-endangerment statutes remains within the realm of reason." *Id.* at 11a.

Petitioner, the court of appeals noted, had not "disputed that the conduct criminalized by New York Penal Law § 260.10(1) rises to the level of risk contemplated in *Soram*, and the Immigration Judge did not explicitly conduct this inquiry." Pet. App. 10a-11a. Accordingly, the court limited itself to considering whether the *Soram* framework was reasonable, *id.* at 6a, and did not consider whether violations of New York Penal Law § 260.10(1) (2010) presented a suffi-

ciently high degree of risk to constitute grounds for removal, Pet. App. 10a-11a.

c. The court of appeals denied panel rehearing, Pet. App. 16a-19a, and rehearing en banc, *id.* at 15a.

In an opinion concurring in the denial of panel rehearing, Judge Lohier explained that the panel decision had been "extremely limited" as a result of "the very narrow question presented to th[e] Court by [petitioner's] former counsel." Pet. App. 18a. Judge Lohier emphasized that petitioner challenged only the reasonableness of *Soram* and its predecessor, *Velazquez-Herrera*, and not whether his conviction under New York Penal Law § 260.10(1) (2010) was a "crime of child abuse" under the principles of statute-by-statute risk analysis established in the *Soram* decision. Pet. App. 18a-19a. Judge Lohier contrasted the narrow challenge in petitioner's case with the broader question being litigated in *Guzman* v. *Holder*, 340 Fed. Appx. 679, 682 (2d Cir. 2009), a case remanded to the Board for analysis of whether convictions under New York Penal Law § 260.10(1) (2010) entailed a level of risk to children that was sufficient to establish removability under *Velazquez-Herrera* and *Soram*. Pet. App. 18a-19a.

d. According to the Department of Homeland Security, petitioner was removed from the United States on April 24, 2015.

ARGUMENT

Petitioner renews his challenge (Pet. 20-31) to the Board's classification of his conviction for knowingly acting in a manner likely to be injurious to a child as a "crime of child abuse, child neglect, or child abandonment" under 8 U.S.C. 1227(a)(2)(E)(i). The court of appeals correctly rejected petitioner's challenge, and

there is no disagreement among the courts of appeals concerning the classification of child endangerment offenses such as petitioner's, which require a mens rea more culpable than negligence. Further review is unwarranted.

1. a. The court of appeals correctly upheld under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Board's determination that Section 1227(a)(2)(E)(i) of the INA reaches at least some crimes requiring risk of injury to a child but not proof of actual injury. See *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality opinion) ("Principles of *Chevron* deference apply when the BIA interprets the immigration laws."); see also *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999).

Section 1227(a)(2)(E)(i) of the INA makes removable "[a]ny alien who at any time after admission is convicted of * * * a crime of child abuse, child neglect, or child abandonment." 8 U.S.C. 1227(a)(2)(E)(i). As courts considering this provision have uniformly concluded, the phrase "crime of child abuse, child neglect, or child abandonment" is ambiguous. See Pet. App. 8a (citing *Ibarra* v. *Holder*, 736 F.3d 903, 910 (10th Cir. 2013); *Hackshaw* v. *Attorney Gen. of U.S.*, 458 Fed. Appx. 137, 139 (3d Cir. 2012); *Martinez* v. *U.S. Attorney Gen.*, 413 Fed. Appx. 163, 166 (11th Cir. 2011)). 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." *Id.* at 7a-8a.

The Board adopted a reasonable construction of that ambiguous phrase when it concluded in *In re Soram*, 25 I. & N. Dec. 378 (B.I.A. 2010), that it reaches convictions under some statutes that require proof of conduct that caused a substantial risk to a child, without requiring proof of injury to a child. See *id.* 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.*, *In re Velazquez-Herrera*, 24 I. & N. Dec. 503, 509-511 (B.I.A. 2008) (surveying criminal statutes); *Soram*, 25 I. & N. Dec. at 382 (citing report of U.S. Dep't 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 at the time of enactment of Section 1227(a)(2)(E)(i)).

It was reasonable for the Board, as the agency charged with administering the INA, to conclude that those widespread definitions were the most appropriate construction of "crime of child abuse, child neglect, or child abandonment" under 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)); see *Soram*, 25 I. & N. Dec. at 383-384. The aim of protecting children through Section 1227(a)(2)(E)(i) would be disserved if the provision did not reach aliens convict-

ed of knowingly placing children at substantial risk of harm—simply because of the fortuity that those aliens' willful conduct jeopardizing the safety of children did not ultimately lead to harm in a particular case.

Petitioner's attacks on the Board's decision in *Soram* lack merit. Petitioner first asserts (Pet. 20-23, 25-27) that it was unreasonable for the Board to construe Section 1227(a)(2)(E)(i) to reach at least some convictions for conduct that places children at risk, without regard to whether injury occurred, because in reaching this conclusion, the Board considered both civil and criminal definitions of child abuse. But no rule of statutory interpretation forbids an agency from examining a range of provisions that use a particular word or phrase in discerning its meaning.

Contrary to petitioner's suggestion (Pet. 20-22), the Board's consideration of both civil and criminal statutes to construe the terms of Section 1227(a)(2)(E)(i) does not contradict the requirement that an alien must be "convicted of" a "crime of child abuse, child neglect, or child abandonment" in order to be removable. Whether a broader or narrower definition of "child abuse, child neglect, or child abandonment" is used, the requirement that an alien may be removed only if "convicted" of a "crime" falling within the INA category of "child abuse, child neglect, or child abandonment" has substantial limiting effect. Those requirements mean that removal cannot be based upon an immigration judge's determination that the alien committed acts of child abuse, neglect or abandonment (broadly or narrowly defined); based on a determination of abuse, neglect, or abandonment in child custody or other civil proceedings; or based on any-

thing short of a "convict[ion]" for a "crime" that satisfies the meaning of the term "child abuse, child neglect, or child abandonment" that is contained in the INA.

In any event, while the Board's construction of "crime of child abuse, child neglect, or child abandonment" corresponds to common usage in both civil and criminal statutes, the definition the Board found most appropriate is also amply supported by consideration of criminal statutes alone. See *Soram*, 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); see also *Ibarra*, 736 F.3d at 915 (finding that forty-eight states and the District of Columbia in 1996 "had statutes that criminalized endangering or neglecting children without facially requiring a resulting injury," but that most States required a mens rea above criminal negligence); cf. Pet. 25-27 (conceding that in 1996, "thirteen states defined 'abuse,' 'neglect' or 'abandonment' (or close variations like 'cruelty to children') to include endangerment provisions like New York's"; an additional three states had separate child "endangerment provisions" like New York's; and still others criminalized placing children at some "heightened level of risk like 'grave,' 'imminent' or 'substantial'").

Petitioner next asserts (Pet. 22-25) that the Board was required to adopt a construction of "crime of child abuse, child neglect, or child abandonment" that excluded even convictions for knowing acts of child en-

dangerment because the Board was required to simply count the number of States that adopted each of the possible meanings of these terms and to adopt for purposes of the INA the definition that was most common among the States. Setting aside the question of whether such a methodology would even support petitioner's contention that Section 1227(a)(2)(E)(i) requires injury, see *Ibarra*, 736 F.3d at 915, 918-921 (noting substantial majority of state statutes in 1996 appeared to reach "endangering or neglecting children without facially requiring a resulting injury"), this Court has never held that ambiguous terms in a federal statute must categorically be interpreted solely by means of such a mechanistic method. And it has certainly "never suggested that an *administrative agency* must employ that method to construe an ambiguous federal term that references state crimes." Pet. App. 11a-12a; see *Holder* v. *Martinez Gutierrez*, 132 S. Ct. 2011, 2017 (2012) (explaining that Board is entitled to adopt any "reasonable construction of the [INA], whether or not it is the only possible interpretation or even the one a court might think best").

Petitioner's majority-rule approach to reviewing the reasonableness of an agency's interpretation is not, contrary to petitioner's suggestion, commanded by *Taylor* v. *United States*, 495 U.S. 575 (1990). *Taylor* interpreted "burglary" in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), to carry the meaning accepted in most States at the time of the ACCA's enactment. The Court adopted this construction, however, not because it held that ambiguous federal terms must invariably carry the meaning that prevailed in most States, but rather because it found the state-majority meaning of burglary was the best

reading based on multiple interpretive principles. See, *e.g.*, *Taylor*, 495 U.S. at 593-594 (rejecting common law meaning as too narrow to "comport with the purposes of the" ACCA and as "ill suited to [the ACCA's] purposes"); *id.* at 596-597 (analyzing legislative history). And the Court certainly did not suggest application of a state-majority rule must take preeminence over other interpretive tools when (unlike in *Taylor*), an administrative agency is entitled under *Chevron* principles to choose among reasonable interpretations of an ambiguous term.

Petitioner next asserts (Pet. 27-31) that the Board's interpretation of Section 1227(a)(2)(E)(i) is unreasonable because, in his view, it "hurts * * * children" to disrupt the unity of some families by making aliens removable when convicted of child abuse offenses that involve risk of injury to a minor. But petitioner's contention that the Board acted unreasonably because it did not give controlling weight to family-unity interests disregards the child-protection and public-safety interests on the other side of the balance. When Congress amended the INA to allow the removal of aliens convicted of child abuse crimes, it made the judgment that the objective of protecting children (and the public) supports the removal of aliens who place children in danger, see *Velazquez-Herrera*, 24 I. & N. Dec. at 509 (quoting *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 994); *Soram*, 25 I. & N. Dec. at 383-384—even though such removals might result in the loss of family unity in particular cases.

The Board's interpretation of Section 1227(a)(2)(E)(i) best serves the public-safety objective that drove the provision's enactment. Congress's aim of protecting

children through Section 1227(a)(2)(E)(i) would be undermined if immigration authorities were powerless to act against aliens such as petitioner who are convicted of repeatedly and knowingly placing children at risk. Since the Board's construction substantially furthers the child-safety objective that drove the enactment of Section 1227(a)(2)(E)(i), petitioner's policy arguments do not support setting aside the Board's construction under *Chevron.*[2]

b. Petitioner also urges this Court to review "[w]hether New York's child endangerment statute, New York Penal Law § 260.10(1), is categorically a 'crime of child abuse.'" Pet. i. But the court below properly declined to decide the ultimate question of whether a violation of New York Penal Law § 260.10(1) (2010) is a "crime of child abuse, child neglect, or child abandonment," 8 U.S.C. 1227(a)(2)(E)(i). The court instead considered only the narrower question whether *Soram* unreasonably construed Section 1227(a)(2)(E)(i) to reach some en-

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[2] The construction adopted in *Soram* reflects a particularly reasonable accommodation of public-safety and family-unity considerations because of the limited nature of the Board's holding and the means that remains available to protect family unity. First, while the Board's construction allows removal of aliens convicted of placing children at serious risk, the Board has explained that not all endangerment statutes involve risks sufficient to constitute grounds for removal. See *Soram*, 25 I. & N. Dec. at 383. Second, even when an alien is convicted of violating a child abuse statute that involves the requisite level of risk to children, cancellation of removal remains available to lawful permanent residents who have held their status for a specified period. See 8 U.S.C. 1229b. Family ties are a factor to be considered in determining whether to grant cancellation of removal, along with the nature of the alien's underlying offense. *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998).

dangerment offenses that do not result in injury, as a result of petitioner's concessions before the Board and the court of appeals that the conduct covered by New York Penal Law § 260.10(1) (2010) poses a degree of risk supporting removability under *Soram*. See Pet. App. 4a (stating that petitioner "concedes that *Soram*'s definition of 'a crime of child abuse' is broad enough to include convictions under New York Penal Law § 260.10(1)—so we assume (without deciding) that it is"); see also *id.* at 6a, 10a-11a (relying on petitioner's concession); *id.* at 18a-19a (Lohier, J., concurring in the denial of panel rehearing) (noting limited scope of panel decision as a result of concession). Since the court of appeals correctly did not decide any statute-specific arguments because of petitioner's express concessions, petitioner's case is not an appropriate vehicle for deciding the ultimate question of whether a conviction under New York Penal Law § 260.10(1) (2010) is a ground for removability under Section 1227(a)(2)(E)(i).

2. a. Contrary to petitioner's contention (Pet. 15-20), petitioner's case does not implicate a conflict between courts of appeals, because there is no conflict concerning whether child endangerment offenses requiring a mens rea beyond negligence—such as petitioner's conviction under a statute with a "knowingly" mens rea—provide grounds for removability.

The sole decision on which petitioner relies in asserting a circuit conflict, *Ibarra* v. *Holder*, 736 F.3d 903 (10th Cir. 2013), found unreasonable the Board's approach to *negligent* child endangerment offenses—not child endangerment offenses such as petitioner's that require a more culpable mens rea. The Tenth Circuit in *Ibarra* addressed whether it was reasonable

for an alien to have been found removable for a child endangerment offense that "fell into the lowest level in both the mens rea and result categories"—an offense involving a negligent act that caused no harm to a child. *Id.* at 908 (emphasis omitted). The court found that Section 1227(a)(2)(E)(i) could not reasonably be construed to extend to such offenses, reasoning that States generally did not criminalize conduct that was both "non-injurious" and also "done with a mens rea of only criminal negligence" when Section 1227(a)(2)(E)(i) was enacted. *Id.* at 915 (emphasis omitted). In contrast, the Tenth Circuit noted that when Section 1227(a)(2)(E)(i) was enacted, the vast majority of States "had statutes that criminalized endangering or neglecting children without facially requiring a resulting injury" if a more culpable mens rea was established, *ibid.*; see *id.* at 918-921 (appendices categorizing state statutes), although the court noted that "[b]ecause it was unnecessary, we have not assessed whether most states actually interpreted the laws we include in the Appendices to be no-injury crimes," *id.* at 915 n.15.

Because the Tenth Circuit made quite plain in *Ibarra* that it was addressing only the classification of convictions for conduct "committed with only criminal negligence and [that] resulted in no injury," *Ibarra* does not generate a conflict concerning the classification of convictions such as petitioner's that arise under statutes requiring the mens rea of knowledge, rather than mere "criminal negligence." 736 F.3d at 918; see New York Penal Law § 260.10(1) (2010) (making it illegal to "knowingly act[] in a manner likely to be injurious" to a child). Accordingly, petitioner is incor-

rect in suggesting that the classification of his offense is the subject of a circuit conflict.

To be sure, the Second Circuit's statement that its approach conflicts with that of *Ibarra*, and its criticism of the *Ibarra* decision, see Pet. App. 11a-13a, indicate that the panel below disapproves of *Ibarra*'s treatment of negligence offenses. But because the panel had before it only an offense involving a mens rea of knowledge, it did not have the occasion to fully address arguments for the exclusion of negligence offenses from Section 1227(a)(2)(E)(i). And to the extent that the decision below suggests the possibility of a conflict in the treatment of negligence offenses even though negligence offenses were not before the panel, petitioner's case would be an inappropriate vehicle to resolve that conflict. That is because a decision in a case involving classification of an offense with a mens rea of knowledge would not necessarily resolve any conflict in the treatment of offenses with the less culpable mens rea of negligence.

b. This Court's review of the Board's construction of Section 1227(a)(2)(E)(i) would in any event be premature. Not only has the Board's construction in *Soram* been the subject of only two precedential appellate decisions, but the Board's construction of Section 1227(a)(2)(E)(i) remains open in critical respects. The Board explained in *Soram* that there is considerable variation among state statutes criminalizing "acts or circumstances that threaten a child with harm or create a substantial risk of harm to a child's health or welfare." 25 I. & N. Dec. at 382-383. The Board then held that violations of *some* statutes of this type trigger removability because the statutes encompass only conduct that poses a "risk of harm * * * sufficient to

bring an offense within the definition of 'child abuse' under the Act," *id.* at 383, and further held that one particular state statute triggered removability, *id.* at 384-385. But the Board has not yet further addressed the risk of harm to children that a removable offense must encompass. As Judge Lohier noted (Pet. App. 18a-19a), the Board has before it a case that may shed light on the Board's view on this question. See *Guzman* v. *Holder*, 340 Fed. Appx. 679, 682 (2d Cir. 2009) (remanding a case to the Board for further proceedings "to clarify the meaning of 'crime of child abuse'" because *Soram* had not elucidated the level of risk necessary under the Board's interpretation). In these circumstances, this Court's intervention to consider the classification of endangerment offenses under Section 1227(a)(2)(E)(i) would be premature.

Indeed, even if this Court were inclined to consider the scope of Section 1227(a)(2)(E)(i) prior to further development by the Board, petitioner's case would be a poor vehicle for doing so, because of the narrow, all-or-nothing challenge that petitioner has preserved. While petitioner now seeks to argue that the Board's interpretation unreasonably reaches state statutes criminalizing conduct that involves only a small risk to children—conduct that petitioner characterizes as harmless "parenting mistake[s]," Pet. 2; see, *e.g.*, Pet. 3, 16—petitioner has preserved only a claim that Section 1227(a)(2)(E)(i) reaches *no* child endangerment statutes without proof of injury, not a claim that the Board's view of endangerment erroneously sweeps in low-risk crimes. See Pet. App. 4a, 6a, 10a-11a, 18a-19a. The limited scope of the claim preserved and passed upon below makes this case an inappropriate vehicle for addressing any arguments regarding pur-

portedly low-risk offenses, and a poor vehicle for considering the scope of Section 1227(a)(2)(E)(i) as a general matter.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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