No. 16-3145ag

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GERARD PATRICK MATTHEWS,

Petitioner,

v.

JEFFERSON B. SESSIONS III, United States Attorney General,

Respondent.

On Petition For Review of a Decision of the Board of Immigration Appeals
Agency No. A [redacted]

PETITIONER'S OPENING BRIEF

David J. Zimmer
GOODWIN PROCTER LLP
100 Northern Ave.
Boston, MA 02210
dzimmer@goodwinlaw.com
Tel.: 617.570.1192
Fax.: 617.523.1231

William M. Jay
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinlaw.com
Tel.: 202.346.4000
Fax.: 202.346.4444

THE LEGAL AID SOCIETY
Seymour W. James, Jr., Attorney-in-Chief
Hasan Shafiqullah, Attorney-in-Charge, Immigration Law Unit
Ward J. Oliver, Supervising Attorney, Immigration Law Unit
199 Water Street
New York, NY 10038
Tel.: 212.577.3300

Counsel for Petitioner

November 15, 2017

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Federal Statutes and Regulations

State Statutes

Other Authorities

INTRODUCTION

In 1996, Congress amended the Immigration and Nationality Act ("INA") to make noncitizens, including lawful permanent residents, removable if convicted of one of three specific crimes against children: a "crime of child abuse, child neglect, or child abandonment." 8 U.S.C. § 1227(a)(2)(E)(i). The question in this case is whether that provision also makes a noncitizen removable if convicted of a crime of "child endangerment"—a different, less serious crime against children that punishes conduct that places a child at a *risk* of harm. That question determines whether lawful permanent residents and other noncitizens can be forced to leave their lives in the United States based solely on convictions for misdemeanors that criminalize even small missteps around children—for instance, committing minor criminal acts like smoking marijuana in the presence of children or leaving children unattended for as short as fifteen minutes.

[redacted] The government seeks to remove Matthews from the country based on two convictions for misdemeanor child endangerment under New York Penal Law § 260.10(1). [redacted] The government claims that Matthews's

misdemeanor endangerment convictions were convictions for a categorical "crime of child abuse, child neglect, or child abandonment," and Matthews must therefore leave the country—[redacted]

The question whether endangerment categorically qualifies as "abuse," "neglect," or "abandonment" has a major impact on many lawful permanent residents and other noncitizens convicted of minor criminal conduct. New York's endangerment provision is incredibly broad—so broad that *nearly eighty percent* of convictions result in *no imprisonment at all*. As Matthews's case shows, the statute covers committing practically any criminal act, no matter how minor, in the presence of children. *See People v. Alvarez*, 860 N.Y.S.2d 745, 749 (Crim. Ct. 2008). New York authorities often add child endangerment charges to charges for other minimal misdemeanor offenses when those offenses occurred around children—offenses like driving on a suspended license, shoplifting, or smoking marijuana, including in a public park. New York's endangerment statute also criminalizes leaving children unattended even briefly—for instance, leaving a sleeping child alone for fifteen minutes while getting groceries for dinner, *People v. Reyes*, 872 N.Y.S.2d 692 (Crim. Ct. 2008). If misdemeanor endangerment

provisions like New York's are crimes of child "abuse," "neglect," or "abandonment," then any lawful permanent resident convicted under such statute is removable, and any non-permanent resident is both removable and ineligible for cancellation of removal.

Despite the breadth of New York's endangerment provisions, and the dramatic implications of classifying endangerment as a removable offense, the Board of Immigration Appeals ("BIA") held, through two precedential decisions, that New York's misdemeaner endangerment provision is categorically a "crime of child abuse, child neglect, or child abandonment" under 8 U.S.C. § 1227(a)(2)(E)(i).[1] In *Matter of Soram*, 25 I. & N. Dec. 378, 381-82 (BIA 2010), the BIA held that crimes of "child endangerment" are, generally, categorical crimes of child abuse, unless they require a sufficiently low "risk of harm." And in *Matter of Mendoza Osorio*, 26 I. & N. Dec. 703 (BIA 2016), the BIA concluded that, under *Soram*, New York's endangerment statute requires a sufficient risk of harm to constitute a categorical crime of child abuse. The final order of removal against Matthews rested entirely on *Soram* and *Mendoza Osorio*.

This Court should reject *Soram* and *Mendoza-Osorio* as an impermissible expansion of the "crime of child abuse" provision to encompass state offenses the statutory text plainly does *not* make removable. First, the Supreme Court's recent

[1] This brief at times uses "crime of child abuse" to refer to this entire provision.

decision in *Esquivel-Quintana v. Sessions* held that courts must apply the "normal tools of statutory interpretation"—including dictionary definitions of the statutory terms, the statutory structure, the majority approach in state criminal laws, and related federal statutes—in determining whether the BIA's interpretation of a generic federal offense is consistent with the statutory text under *Chevron*'s first step. 137 S. Ct. 1562, 1568-72 (2017). Applying the same analysis the Supreme Court applied in *Esquivel-Quintana*, it is clear that generic crimes of "child endangerment" are *not* "crimes of child abuse, child neglect, or child abandonment" under 8 U.S.C. § 1227(a)(2)(E)(i). This Court's decision in *Florez v. Holder*, 779 F.3d 207 (2d Cir. 2015)—which deferred to the BIA's decision in *Soram* before the Supreme Court decided *Esquivel-Quintana*—is no longer binding because its reasoning directly conflicts with the Supreme Court's more recent decision.

Second, even if deference to *Soram* is still somehow warranted, this Court should conclude that the BIA could not reasonably apply *Soram* to classify New York's child endangerment provision as a categorical crime of child abuse—an issue *Florez* explicitly left open. The BIA's contrary conclusion in *Mendoza Osorio* rested on legal errors in applying the categorical approach and interpreting the New York statute. This Court already suggested in *Guzman v. Holder*, 340 F. App'x 679, 682 (2d Cir. 2009), that because New York's endangerment statute is

"extraordinarily broad," it is unreasonable to classify it as a categorical crime of child abuse. Such a classification would separate families based on a parent's single parenting mistake—including many decisions, like leaving a child briefly home alone, often made by single, working parents who have little choice. The Court should now affirm its analysis in *Guzman*, and hold that the BIA cannot permissibly classify an endangerment statute as broad as New York's as child abuse.

For these reasons, the Court should grant the petition for review.

JURISDICTIONAL STATEMENT

Matthews petitions for review of the BIA's order dismissing his appeal of the IJ's decision, which found him removable and denied his applications for adjustment of status and cancellation of removal. The BIA had jurisdiction over Matthews's appeal under 8 C.F.R. § 1003.1(b). The IJ's removal order became final upon entry of the BIA's August 30, 2016 decision. Matthews timely petitioned this Court for review on September 12, 2016. 8 U.S.C. § 1252(b)(1). This Court has jurisdiction to review whether Matthews was convicted of a "crime of child abuse" under 8 U.S.C. § 1227(a)(2)(E)(i). *See* 8 U.S.C. § 1252(a)(1), (a)(2)(D).

ISSUES PRESENTED FOR REVIEW

1. The Supreme Court held in *Esquivel-Quintana* that courts must apply

the "normal tools of statutory construction" in determining whether the BIA's interpretation of a generic federal offense under the INA is permissible under *Chevron*'s first step. 137 S. Ct. at 1569. When the statute is construed applying those tools, did the BIA impermissibly conclude that broad child endangerment offenses like New York's are categorically crimes of "child abuse, child neglect, or child abandonment" under 8 U.S.C. § 1227(a)(2)(E)(i)?

2. N.Y. Penal Law § 260.10(1) criminalizes conduct with low risk of harm to a child, like leaving a sleeping child home for fifteen minutes while getting groceries for dinner or committing minor criminal conduct in the presence of a child. Even if the BIA's decision in *Soram* that child endangerment offenses are generally crimes of "child abuse, child neglect, or child abandonment" is permissible under *Chevron*'s first step, did the BIA err in failing to recognize the true breadth of New York's endangerment provision, and in classifying an endangerment statute as broad as New York's as a categorical "crime of child abuse, child neglect, or child abandonment"?

STATEMENT OF THE CASE

[redacted]

[redacted]

[redacted]

[2] Section 260.10(1) also makes a person guilty of child endangerment when he or she "directs or authorizes such child to engage in an occupation involving a substantial risk of danger to his or her life or health." This provision is "an alternative offense," with different elements from the provision quoted in the text. *United States v. Beardsley*, 691 F.3d 252, 268 n.11 (2d Cir. 2012). Under the modified categorical approach, Matthews was convicted under the general endangerment provision, not this "alternative" offense.

[redacted]

C. Based On His Child Endangerment Convictions, Matthews Is Charged As Removable For Being Convicted Of A "Crime Of Child Abuse, Child Neglect, Or Child Abandonment," A Provision The BIA And Courts Have Struggled To Define.

Matthews was issued a Notice to Appear charging that his endangerment convictions make him removable as an "alien who . . . is convicted of . . . a crime of child abuse, child neglect, or child abandonment." 8 U.S.C. § 1227(a)(2)(E)(i). AR 2037-39. In order to sustain that charge, the government had to prove that New York's endangerment provision "categorically" falls within the generic federal offense—in other words, that the "minimum conduct criminalized" by the

New York endangerment statute falls within the generic federal definition of "child abuse, child neglect, or child abandonment." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013); *see also Akinsade v. Holder*, 678 F.3d 138, 143-44 (2d Cir. 2012).

The INA does not define a "crime of child abuse, child neglect, or child abandonment," and the BIA originally appeared to define those terms as requiring actual harm to a child: it limited those terms to "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." *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503, 512 (BIA 2008). In *Guzman*, the petitioner was convicted under the same New York endangerment provision at issue in this case, and ordered removed. In remanding to the BIA for more complete analysis, this Court wrote that conduct that "did not actually *harm* a child" is likely not a crime of child abuse under *Velazquez-Herrera*. 340 F. App'x at 682 (emphasis added). The Court described New York's endangerment provision as "extraordinarily broad," and suggested that it "may not be reasonable to interpret the term 'crime of child abuse' as encompassing the minimal conduct covered by" that statute. *Id.* The Ninth Circuit explicitly held that, to qualify as a crime of child abuse, a state statute must require that defendant "actually inflict[ed] *some* form of injury on a child." *Fregozo v. Holder*, 576 F.3d 1030, 1037 (9th Cir.

2009).

In *Soram*, the BIA rejected the Ninth Circuit's decision in *Fregozo* and held that "endangerment-type crime[s]" generally *do* qualify as crimes of child abuse. 25 I. & N. Dec. at 380-81. *Soram* rested on a rough survey of states' *civil* statutes from *2009*. The BIA left open the possibility that if an endangerment statute required a sufficiently low "risk of harm," the BIA might hold that it was not categorically a crime of "'child abuse' under the [INA]." *Id.* at 383.

Soram's expansion of the "crime of child abuse" provision to include endangerment was quickly criticized by the Courts of Appeals. In a Tenth Circuit case, a mother pled guilty to misdemeanor child endangerment after her caregiver briefly left her children at home alone while the mother was at work. *Ibarra v. Holder*, 736 F.3d 903, 905 & n.3 (10th Cir. 2013). The BIA ordered the mother removed pursuant to *Soram*. The Tenth Circuit refused to defer to *Soram* and granted the mother's petition for review. *Id.* at 918. The court reasoned that *Soram* adopted a definition of a "crime of child abuse" that was at odds with the criminal laws of a majority of states at the time Congress adopted the child abuse provision in 1996. *Id.*; *see also Martinez v. U.S. Att'y Gen.*, 413 F. App'x 163, 168-69 & n.3 (11th Cir. 2011) (ordering mother removed under *Soram*, but describing result as "profoundly unfair, inequitable, and harsh," and ordering the Clerk of the Court "to send a copy of this opinion directly to the Attorney General

of the United States" to "closely review the facts of this heartbreaking case").

In *Florez*, this Court split with the Tenth Circuit and held that *Soram* is entitled to deference. 779 F.3d at 210-12. The Court held that classifying most endangerment statutes as crimes of "abuse," "neglect," or "abandonment" was consistent with the statute's text under *Chevron*'s first step because the INA does not define the statutory terms, and a *minority* of states define one of those terms to include some form of endangerment. *Id.* at 211. The Court then held that, under *Chevron*'s second step, the BIA's statutory interpretation was "reasonable"—even if not "the best interpretation," or the interpretation adopted by a "majority" of states. *Id.* at 211-12. In finding *Soram* reasonable, however, the Court relied heavily on the fact that *Soram*'s interpretation was, according to the BIA, "not unlimited" but "requires, as an element of the crime, a sufficiently high *risk* of harm to a child." *Id.* at 212 (emphasis in original). Though the petitioner in *Florez* was convicted under § 260.10(1), he had not preserved the question whether the BIA could permissibly classify an endangerment statute with a risk of harm as low as New York's as a categorical "crime of child abuse, child neglect, or child abandonment." The Court therefore did not reach that issue. *Id.*

Shortly after this Court decided *Florez*, the BIA held in *Mendoza Osorio* that New York's endangerment provision *is* a categorical crime of child abuse. That decision was based on the BIA's review of an incomplete selection of New York

cases; the BIA explicitly refused to consider any other evidence of the scope of the New York endangerment provision, such as charging documents showing how New York police and prosecutors apply that provision. 26 I & N. Dec. at 707 n.4.

Also after this Court decided *Florez*, the Supreme Court decided *Esquivel-Quintana*. As discussed below, that decision made clear that evaluating whether the BIA's interpretation of a generic federal offense fails at *Chevron*'s first step requires the court to apply the "normal tools of statutory interpretation"—tools this Court had *not* applied in *Florez*. Indeed, the Court held that the BIA's interpretation of the generic offense of "sexual abuse of a minor" *failed Chevron*'s first step even where there was no statutory definition, and where the BIA's interpretation was consistent with a minority of state criminal laws. 137 S. Ct. at 1569, 1571.

D. The IJ Finds Matthews Removable But Grants Matthews Relief From Removal; The BIA Reverses; This Court Grants Matthews's Petition For Review.

Matthews was charged as removable in 2011, shortly after the BIA decided *Soram*. Matthews denied removability before the Immigration Judge ("IJ"), arguing that a conviction under New York's endangerment statute is not categorically a crime of child abuse. AR 1897-1910. With only cursory reasoning, the IJ disagreed and held that Matthews was removable. AR 1220-21.

Seeking relief from removal, Matthews applied for cancellation of removal

and adjustment of status to lawful permanent resident. AR 1844-52, 1705-24; *see* 8 U.S.C. §§ 1229b(a), 1255(a).

[redacted]

Matthews timely petitioned this Court for review.

SUMMARY OF THE ARGUMENT

I. The BIA's interpretation of a "crime of child abuse, child neglect, or child abandonment" to include the separate offense of child endangerment conflicts with the statute's unambiguous text. In *Esquivel-Quintana*, the Supreme Court held that courts must apply the "normal tools of statutory interpretation" at *Chevron*'s first step before finding a statute ambiguous; it therefore considered dictionary definitions of the statutory terms, the statutory structure, other federal statutes, and contemporary state criminal codes. 137 S. Ct. at 1568-72. Applying those tools here, the statute unambiguosly bars the BIA from classifying endangerment as "abuse," "neglect," or "abandonment." Contemporary dictionaries defined "abuse," "neglect," and "abandonment" in ways that exclude endangerment offenses like New York's; the statutory structure shows that Congress targeted only particularly serious crimes against children; the vast majority of states in 1996 did not define the statutory terms to include "endangerment," and indeed did not broadly criminalize endangerment *at all*; and related federal statutes define "abuse" and "neglect" to exclude broad endangerment offenses. This Court is no longer bound by the Court's earlier decision in *Florez* that the crime of child abuse provision is ambiguous, because the reasoning in *Florez* is contrary to the Supreme Court's subsequent decsion in

Esquivel-Quintana.

II. Even under *Soram*, the BIA erred in concluding that New York's endangerment provision is categorically a crime of child abuse. First, the BIA legally erred in determining that provision's scope. The BIA refused to even consider state court charging documents in determining whether there is a "realistic probability" the state statute covers conduct outside the federal "crime of child abuse" provision even though the Supreme Court held in *Moncrieffe* that the "realistic probability" inquiry looks to how "the State *actually prosecutes* the relevant offense." 133 S. Ct. at 1693 (emphasis added). Those charging documents demonstrate that police and prosecutors charge a far broader range of conduct under § 260.10(1) than the BIA acknowledged—conduct like driving on a suspended license with a child in the car. Even within the universe of reported decisions to which the BIA constrained itself, the BIA ignored many of the broadest New York cases, including cases upholding charges like leaving a sleeping child alone for fifteen minutes while getting groceries for dinner, *Reyes*, 872 N.Y.S.2d at 692.

Second, the BIA cannot reasonably conclude that New York's endangerment provision, properly understood, is categorically a crime of child abuse. This Court suggested as much in *Guzman*, where it wrote that because that provision is "extraordinarily broad," it "may not be reasonable" for the BIA to classify it as a

"crime of child abuse." 340 F. App'x at 682. *Guzman* was right. Removing parents for harmless parenting mistakes, and for other minor misconduct around children, will lead to the separation of families, and will hurt the very children Congress was trying to protect.

STANDARD OF REVIEW

This Court reviews the BIA's legal holdings *de novo*, and its factual findings for substantial evidence. *Islam v. Gonzales*, 469 F.3d 53, 55 (2d Cir. 2006).

This Court reviews the BIA's published interpretations of the "crime of child abuse" provision under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). *Pierre v. Holder*, 588 F.3d 767, 772 (2d Cir. 2009). Under *Chevron*'s first step, the Court applies the "normal tools of statutory interpretation" to determine whether the statute permits the BIA's construction—if "the statute, read in context, unambiguously forecloses the Board's interpretation," then this Court must reject it. *Esquivel-Quintana*, 137 S. Ct. at 1569, 1572. If the BIA's interpretation is not foreclosed by the statute, the Court defers to the BIA's interpretation if it is "reasonable," *Chevron*, 467 U.S. at 844, but not if it makes "scant sense," *Mellouli v. Lynch*, 135 S. Ct. 1980, 1989 (2015).

This Court reviews the BIA's construction of state criminal laws (like New York Penal Law § 260.10(1)) *de novo*. *Wala v. Mukasey*, 511 F.3d 102, 105 (2d Cir. 2007); *Vargas-Sarmiento v. U.S. Dep't of Justice*, 448 F.3d 159, 165 (2d Cir.

2006).

ARGUMENT

The INA does not make every crime related to children a removable offense. Nor does the INA delegate to the BIA authority to classify whatever child-related crimes it dislikes as removable offenses. Instead, Congress made noncitizens removable if convicted of one of three specific, and particularly serious, crimes against children: "abuse," "neglect," or "abandonment." The task for the BIA is to decide what those words meant in 1996, when Congress added this provision to the statute.[3]

That is not what the BIA has done. Instead, with barely a nod to the statute's text or any of the standard interpretive tools, the BIA in *Soram* held that "general child endangerment statute[s]" are removable offenses unless the BIA determines, based on its own subjective determination, that the "risk of harm" is not "sufficient" to turn "endangerment" into "abuse," "neglect," or "abandonment." 25 I. & N. Dec. at 382-83. The BIA then, in *Mendoza Osorio*, concluded that the "risk of harm" required by New York's endangerment provision *is* sufficient to turn endangerment into abuse—but did so only by failing to recognize the full breadth of that state-law provision.

Had the BIA correctly interpreted the INA and New York law, it could not

[3] The provision was added as part of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009 (1996).

have concluded that New York's endangerment provision is categorically a "crime of child abuse, child neglect, or child abandonment." This Court should grant the petition for review.

I. The BIA's Conclusion That Broad Child Endangerment Provisions Like New York's Are Categorically Crimes Of Child "Abuse," "Neglect," Or "Abandonment" Conflicts With The Statute's Text.

The BIA first went wrong in *Soram*. *Soram*'s decision that crimes of "endangerment" are generally crimes of "abuse," "neglect," or "abandonment" rested entirely on the fact that, according to the BIA, many states *in 2009* included some form of child endangerment in their *civil* definition of "child abuse" or "neglect." 25 I. & N. Dec. at 381. The BIA simply ignored the fact that Congress added the "crime of child abuse" provision in 1996, not 2009, and specifically limited removability to *convictions* for *crimes* of "abuse," "neglect," or "abandonment"—it did not make noncitizens removable for civil or family law offenses, which often define the relevant terms more broadly. Further, the BIA made no attempt to ground its conclusion in the statute's text—it did not even consider any contemporary dictionary definitions of the key terms, nor did it consider how Congress used those terms in other contexts.

In *Esquivel-Quintana*, the Supreme Court held that courts reviewing a BIA decision, like *Soram*, that interprets a generic federal offense must apply the "normal tools of statutory construction" to determine whether the BIA's

interpretation is permissible given the statutory text. These tools include dictionary definitions of the statutory terms, the statutory structure, the majority approach in state criminal laws, and related federal statutes. It is only *after* applying these tools that courts can consider, under *Chevron*'s second step, whether the BIA's interpretation is "reasonable." Thus the Court held in *Esquivel-Quintana* that the statute unambiguously foreclosed the BIA's interpretation of "sexual abuse of a minor" to include consensual sexual intercourse with a victim between sixteen and eighteen years old, even though the INA did not define "sexual abuse of a minor," and a minority of states criminalized such conduct. 137 S. Ct. at 1567.

Using the tools the Supreme Court identified in *Esquivel-Quintana*, the BIA's classification of broad endangerment offenses like New York's as categorical crimes of "abuse," "neglect," or "abandonment" is unambiguously foreclosed by the statutory text. This Court's contrary conclusion in *Florez* is no longer binding, as it employed an approach to *Chevron*'s first step that directly conflicts with *Esquivel-Quintana*.

A. The INA's Text, Construed Using The Normal Tools Of Statutory Interpretation, Unambiguously Forecloses The BIA From Classifying An Endangerment Provision As Broad As New York's As Abuse, Neglect, Or Abandonment.

The statutory text unambiguously forecloses the BIA's interpretation of a "crime of child abuse, child neglect, or child abandonment" to include broad child

endangerment offenses—*i.e.* offenses that criminalize any conduct that creates a risk of harm to a child. Even if some endangerment-like offenses may be sufficiently limited to fall within "abuse," "neglect," or "abandonment"—an issue this Court need not decide—New York's endangerment offense is certainly not one of them.

1. The Ordinary Meanings Of "Abuse," "Neglect," And "Abandonment" Exclude Endangerment.

Statutory interpretation "begins with the language of the statute." *Esquivel-Quintana*, 137 S. Ct. at 1569. In 1996, the ordinary meaning of "child abuse," "child neglect," and "child abandonment" did not encompass generic "child endangerment" offenses.[4]

Dictionary definitions—from the same dictionaries on which the Supreme Court relied in *Esquivel-Quintana*—make clear that, in 1996, the ordinary meanings of abuse, neglect, and abandonment did not encompass generic child endangerment. *See Esquivel-Quintana*, 137 S. Ct. at 1569. Merriam-Webster's Dictionary of Law defined "abuse" in the context of children as "the infliction of

[4] In *Soram*, the BIA held that the phrase "crime of child abuse, child neglect, or child abandonment" denotes a "unitary concept." 25 I. & N. Dec. at 381. Even if that is right, the interpretation of that concept must "reflect the 'cluster of ideas' behind the terms Congress actually used." *Ibarra*, 736 F.3d at 915 (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)). The BIA cannot add non-enumerated child-related offenses as grounds for removal unless Congress would have understood those offenses as subsumed within "abuse," "neglect," and "abandonment."

physical or emotional injury; *also*: the crime of inflicting such injury." Merriam-Webster's Dictionary of Law 4, 76 (1996). It defined "neglect" as "a disregard of duty resulting from carelessness, indifference, or willfulness; *esp.*: a failure to provide a child under one's care with proper food, clothing, shelter, supervision, medical care, or emotional stability." *Id.* at 324. And it defined "abandonment," in the context of children, as "failure to communicate with or provide financial support for one's child over a period of time that shows a purpose to forgo parental duties and rights." *Id.* at 1. Garner's A Dictionary of Modern Legal Usage defined "neglect" and "abandonment" similarly, though it did not include a definition of "abuse." B. Garner, A Dictionary of Modern Legal Usage 585, 3 (2d ed. 1995) ("neglect" requires that "a person has not performed a duty"; "abandon" means "leav[ing] children or a spouse willfully and without an intent to return"). None of those definitions encompasses an individual act, including an act committed by someone other than the child's parent or guardian, that creates some risk of harm to a child's "physical, mental or moral welfare," N.Y. Penal Law § 260.10(1); the definitions do not encompass, for instance, conduct like leaving a child briefly unattended or committing minor criminal acts in the presence of children.

Black's Law Dictionary also recognized that "abuse," "neglect," and "abandonment" did not encompass generic "endangerment" offenses. It defined "[c]hild abuse" as "[a]ny form of cruelty to a child's physical, moral or mental

well-being. Also used to describe form of sexual attack which may or may not amount to rape." *Black's Law Dictionary* 239 (6th ed. 1990). It defined a "[n]eglected child" as one whose "parent or custodian, by reason of cruelty, mental incapacity, immorality or depravity, is unfit properly to care for him, or neglects or refuses to provide necessary physical, affectional, medical, surgical, or institutional or hospital care for him," or whose "morals or health" are "endanger[ed]" by "improper care or control." *Id.* at 1032. And it defined "abandonment," in the context of children, as "[d]esertion or willful forsaking. Foregoing parental duties." *Id.* at 2. Although *Black's* definition of "neglect" includes some conduct that does not necessarily harm a child, that conduct is not "neglect" unless the danger is caused by a *parent's or custodian's* general failure to exercise "improper care or control," not when *any* adult, whether or not the parent or custodian of the child, engages in *any* conduct that creates some risk of harm to a child.

The BIA in *Soram* failed to grapple with the statutory terms' "ordinary meaning." *Esquivel-Quintana*, 137 S. Ct. at 1569. *Soram* did not discuss the ordinary meaning of the statutory language at all, but relied only on its flawed analysis of contemporary state civil statutes. 25 I. & N. Dec. at 381-83.[5]

[5] This Court in *Florez* cited the *2009 edition* of *Black's*, which defined "child abuse" to encompass "[a]n act or failure to act that presents an imminent risk of serious harm to a child." *Florez*, 779 F.3d at 212 (quoting *Black's Law Dictionary* 11 (9th ed. 2009)). But that definition first appeared more than a decade after Congress adopted IIRIRA—it does not appear in the version of *Black's* in

2. The INA's Structure Confirms That Congress Did Not Intend To Make Standard Endangerment Provisions Removable Offenses.

The INA's structure also suggests that Congress intended to target particularly serious child-related offenses, not isolated instances when there is some risk of harm to a child. *See Esquivel-Quintana*, 137 S. Ct. at 1570.

First, the harsh immigration consequences Congress imposed for non-citizens convicted of a crime of "child abuse, child neglect, or child abandonment" are inconsistent with interpreting that phrase to encompass generic endangerment crimes like New York's, which rarely result in any punishment under state law. *See* pp. 41-42, *infra*. Not only does a conviction for "abuse," "neglect," or "abandonment" make non-citizens removable, it also makes non-permanent residents ineligible for cancellation of removal, the safety valve for cases where removal "would result in exceptional and extremely unusual hardship to the alien's spouse, parent or child who is a citizen" or lawful permanent resident. 8 U.S.C. § 1229b(b)(1)(C), (D). An "abuse," neglect," or "endangerment" conviction also makes non-permanent residents ineligible for the separate cancellation provision for "battered spouse[s] or child[ren]." *Id.* § 1229b(b)(2)(A)(iv). It is highly

---

circulation in 1996. Further, even that 2009 definition includes endangerment only in very limited circumstances: it requires that the risk of harm be "imminent" *and* that the threatened harm be "serious," neither of which is a requirement of New York's or most other states' endangerment provisions. *See* pp. 27-33, *infra*.

unlikely Congress intended to impose such harsh immigration consequences for conviction of an offense, like New York's, that often does not even result in a sentence of probation. *See* pp. 41-42, *infra*.

Second, Congress included the "abuse," "neglect," and "abandonment" provision in the same subparagraph as the provisions making non-citizens removable if convicted of "domestic violence" or "stalking"—crimes that require the use or threat of violence against the victim. 8 U.S.C. § 1227(a)(2)(E)(i); *see* 18 U.S.C. § 16; *Matter of Sanchez-Lopez,* 26 I. & N. Dec. 71, 73-74 (BIA 2012). Combining the three child-related offenses with such "heinous crimes" further suggests that Congress did not intend those child-related offenses to include broad endangerment provisions. *See Esquivel-Quintana,* 137 S. Ct. at 1571.

3. Most State Criminal Codes In 1996 Did Not Classify Endangerment As Abuse, Neglect, Or Abandonment.

State criminal codes in 1996 provide further evidence that Congress did not intend to make non-citizens removable based on a conviction under a standard child endangerment offense, let alone an unusually broad endangerment offense like New York's. *See Esquivel-Quintana*, 137 S. Ct. at 1571-72.

In 1996 only twelve states plus the District of Columbia had laws criminalizing "abuse," "neglect," or "abandonment" (or close variations like

"cruelty to children") that included endangerment provisions like New York's.[6] An additional seventeen states made "endangerment" a separate, generally less serious offense than "abuse," "neglect" or "abandonment."[7] And twenty-one states either did not criminalize any form of child endangerment at all, or limited it to such narrow situations—like allowing a child to engage in dangerous labor or witness a forcible felony—that it bears no resemblance to the broad endangerment provision at issue in this case.[8] The fact that only twelve states in 1996 defined

---

[6] Ariz Rev. Stat. § 13-3623; Cal. Pen. Code § 273a(b); Colo. Rev. Stat. § 18-6-401(1) ; D.C. Code § 22-1101; Idaho Code Ann. § 18-1501(2); Ind. Code Ann. § 35-46-1-4(a); Neb. Rev. Stat. § 28-707; N.M. Stat. Ann. § 30-6-1(C); N.C. Gen. Stat. § 14-318.2; Or. Rev. Stat. § 163.545 ; S.C. Code § 20-7-50; Vt. Stat. Ann. tit. 13 § 1304; Va. Code §§ 18.2-371, 16.1-228. All citations in nn. 6-8 and 13-14 are to versions in force in 1996.

[7] Ark. Code Ann § 5-27-204; Conn. Gen. Stat. § 53-21; Del. Code Ann. Tit. 11 § 1102(a)(1)(a); HRS § 709-904; 720 Ill. Comp. Stat. Ann. 5/12-21.6; Iowa Code § 726.6; K.S.A. 21-3608; Me. Rev. Stat. tit. 17-A, § 554; Minn. Stat. § 609.378(b); Mo. Rev. Stat. § 568.050; Mont. Code Ann. 45-5-622; N.H. Rev. Stat. Ann. 639:3; N.Y. Penal Law § 260.10(1); Ohio Rev. Code Ann. § 2919.22(A); 18 Pa. Cons. Stat. 4304; Tex. Penal Code Ann. § 22.041(c); Wyo. Stat. Ann. § 6-4-403(a)(ii).

[8] Ala. Code § 13A-13-6 (limited to dangerous child labor and allowing child to become delinquent); Alaska Stat. 11.51.100 (limited to parent or guardian "desert[ing]" the child); Ga. Code § 16-5-70 (limited to parent or guardian "willfully depriv[ing] the child of necessary sustenance" or anyone "intentionally allow[ing] a minor to witness the commission of a forcible felony"); Ky. Rev. Stat. Ann. § 530.060 (limited to child becoming a "neglected, dependent, or delinquent child"); Nev. Rev. Stat. Ann. 200.508 (limited to leaving child in potentially abusive situation); N.J.S.A. 2C:24-4 (limited to sex crimes); Okla. Stat. tit. 10 § 852.1 (limited to knowingly permitting physical or sexual abuse of child); Tenn Code Ann § 39-15-401(c) (limited to conduct resulting in "physical injury to the child"); Wash. Rev. Code 9A.42.030 (limited to parent or guardian withholding "basic necessities of life" leading to "an imminent and substantial risk of death or

any of the three specified offenses to include a general endangerment provision strongly suggests that Congress did not intend the generic federal version of those offenses to include endangerment. After all, in *Esquivel-Quintana*, the Supreme Court held that the statute *unambiguously* established the age of consent for the federal generic crime at 16 even though *sixteen* states set a higher age. 137 S. Ct. at 1571. Here only *twelve* states (plus the District of Columbia) defined the three child-related offenses Congress listed in the statute as including child endangerment.

The BIA in *Soram* failed to grapple with these 1996 criminal laws. Instead of looking to state *criminal* laws in effect *in 1996*, the BIA looked to *civil* laws in effect *in 2009*. 25 I. & N. Dec. at 382. The Tenth Circuit relied on this misinterpretation of the statute in refusing to defer to *Soram* and holding that Colorado's endangerment provision is *not* a removable offense. *Ibarra*, 736 F.3d at 910-12. And *Esquivel-Quintana* makes clear that the BIA's focus on contemporary civil laws is wrong. 137 S. Ct. at 1571 (relevant inquiry is into "state criminal codes" from the time the relevant provision "was added to the INA").

---

great bodily harm"); W.V. Code § 61-8D-4(e) (limited to situations where "gross[] neglect" creates "a substantial risk of serious bodily injury or of death"). Florida, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, North Dakota, Rhode Island, South Dakota, Utah and Wisconsin did not have endangerment provisions at all in 1996.

The BIA's flawed inquiry necessarily skewed its conclusion. As the Tenth Circuit recognized, phrases like "child abuse" are defined more broadly for civil purposes, because "[t]he purpose of civil definitions is to determine when social services may intervene," whereas "[t]he purpose of criminal definitions is to determine when an abuser is criminally liable." *Ibarra*, 736 F.3d at 911. Further, concepts of child "abuse," "neglect," and "abandonment" evolved between 1996 and 2009. During that time, many states expanded their criminalization of child endangerment, some by adopting their first statutes criminalizing some form of child endangerment during that period,[9] others by expanding criminal laws to cover, for instance, parents who leave their children unattended in a car.[10] Legal dictionaries reflect that expansion. For instance, while the version of *Black's* in circulation in 1996 defined "child abuse" as limited to "cruelty to a child's physical, moral or mental well-being," by the 2009 version the term had expanded to cover "[a]n act or failure to act that presents an imminent risk of serious harm to a child." *Black's Law Dictionary* 239 (6th ed. 1990); *Black's Law Dictionary* 11

[9] Fla Stat. Ann. § 827.03(b)(2) (adopted 1996); Md. Code Ann., Crim. Law §§ 3-602.1, 3-601.1 (adopted 2011 and 2014); Mass. Gen. Laws ch. 265, § 13L (adopted 2002); Mich. Comp. Laws § 750.136b(7)(b) (adopted 2008); Utah Code Ann. §§ 76-5-109.1, 76-5-112.5 (adopted 1997 and 2000).

[10] *E.g.*, Cal. Veh. Code § 15620 (adopted 2001); Conn. Gen. Stat. § 53-21a (adopted 1997); Fla. Stat. Ann. § 316.6135 (adopted 2007; leaving children in car converted from traffic infraction to misdemeanor); Idaho Code Ann. § 18-1501(3) (adopted 1997); La. Rev. Stat. Ann. § 32:295.3 (adopted 2003); Mich. Comp. Laws § 750.135a (adopted 2008).

(9th ed. 2009). As *Esquivel-Quintana* makes clear, the BIA's focus must be on the ordinary meaning of the terms *at the time Congress used them*. Updating the bases for removal is not the BIA's job.[11]

After deciding that endangerment provisions can be removable offenses based on its analysis of contemporary civil statutes, the BIA further erred in adopting a standard for determining *when* endangerment provisions constitute removable offenses that is entirely divorced from the statute's text. Instead of using normal tools of statutory interpretation to determine *which* (if any) forms of endangerment Congress classified as "abuse," "neglect," or "abandonment," the BIA elected to decide which endangerment provisions require a sufficient risk of harm based on its own subjective judgment. Thus the BIA in *Mendoza Osorio* did not even consider the extent to which states in 1996 criminalized endangerment as broadly as the New York statute—for instance, not limiting endangerment to parents and guardians; not specifying any *degree* of potential harm; and sweeping in potential harm to a child's "moral" welfare. Instead, the BIA just decided whether the level of risk required by the statute met some unarticulated bar the

[11] Though the concurrence in *Soram* claimed to apply 1996 criminal laws, it actually cited many civil provisions, and misunderstood many of the provisions on which it relied. *See Ibarra*, 736 F.3d at 912 & nn. 10, 11.

BIA made up.[12] *Esquivel-Quintana* makes clear that the BIA cannot adopt *its own* preferred interpretation of the statute when the normal tools of statutory interpretation reveal what meaning *Congress* adopted.

In 1996, only a small minority of states criminalized endangerment as broadly as New York. Even looking to all 1996 state child endangerment provisions—whether freestanding or included within a statute criminalizing "abuse," "neglect," or "abandonment"—only *sixteen* states had criminal endangerment provisions that, like New York's, lacked any significant restriction on liability.[13] Other state endangerment provisions restricted liability in important ways missing in New York's—for instance, by requiring that the defendant be the parent or guardian of the child; requiring that the conduct violate some pre-existing

[12] The vagueness of *Soram*'s level-of-risk inquiry makes it difficult, if not impossible, for immigration and criminal defense attorneys to advise clients concerning whether a given endangerment statute qualifies as a crime of child abuse. Indeed, prior to *Mendoza Osorio*, the BIA, in unpublished decisions, held that § 260.10(1) is *not* a categorical crime of child abuse under *Soram*. *E.g.*, AR 37-39. *Soram*'s indeterminacy undermines one of the key purposes of the categorical approach: "enabl[ing] aliens to anticipate the immigration consequences of guilty pleas in criminal court, and to enter 'safe harbor' guilty pleas that do not expose the alien defendant to the risk of immigration sanctions." *Mellouli*, 135 S. Ct. at 1987 (internal quotation marks and alterations omitted).

[13] Ariz Rev. Stat. § 13-3623; Cal. Pen. Code § 273a(b); Colo. Rev. Stat. § 18-6-401(1); Conn. Gen. Stat. § 53-21; Del. Code Ann. Tit. 11 § 1102(a)(1)(a); Idaho Code Ann. § 18-1501(2); 720 Ill. Comp. Stat. Ann. 5/12-21.6; Ind. Code Ann. § 35-46-1-4(a); K.S.A. 21-3608; Minn. Stat. § 609.378(b); Neb. Rev. Stat. § 28-707; N.M. Stat. Ann. § 30-6-1(C); N.Y. Penal Law § 260.10(1); Or. Rev. Stat. § 163.545; S.C. Code § 20-7-50; Vt. Stat. Ann. tit. 13 § 1304.

duty of protection; imposing a heightened level of risk like "grave," "imminent," or "substantial"; or requiring that the threatened harm be particularly serious.[14] Thus not only did most states in 1996 define abuse, neglect, and abandonment to exclude child endangerment, most states in 1996 did not classify the type of endangerment that falls under New York's statute as a crime *at all*.

[14] Ark. Code Ann § 5-27-204 (conduct must create "substantial risk of serious harm"); D.C. Code § 22-1101 (conduct must create "grave risk of bodily injury"); HRS § 709-904 (conduct must "violat[e] or interfere[] with any legal duty of care or protection"); Iowa Code § 726.6 (defendant must be the "parent, guardian, or person having custody or control over a child"); Me. Rev. Stat. tit. 17-A, § 554 (conduct must "violat[e] a duty of care or protection"); Mo. Rev. Stat. § 568.050 (conduct must create "substantial risk" to "the life, body or health of a child"); Mont. Code Ann. 45-5-622 (defendant must be "parent, guardian, or other person supervising the welfare of a child"; conduct must "violat[e] a duty of care, protection, or support"); N.H. Rev. Stat. Ann. 639:3 (conduct must "violat[e] a duty of care, protection or support he owes to such child"); N.C. Gen. Stat. § 14-318.2 (defendant must be the "parent of a child less than 16 years of age, or any other person providing care to or supervision of such child"; conduct must create a "substantial risk of physical injury"); Ohio Rev. Code Ann. § 2919.22(A) (defendant must be the "parent, guardian, custodian, person having custody or control, or person in loco parentis of a child"; conduct must "create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support"); 18 Pa. Cons. Stat. 4304 (defendant must be "parent, guardian, or other person supervising the welfare of a child"; conduct must "violat[e] a duty of care, protection or support"); Tex. Penal Code Ann. § 22.041(c) (conduct must place "a child younger than 15 years in imminent danger of death, bodily injury, or physical or mental impairment"); Va. Code §§ 18.2-371, 16.1-228 (conduct must "create[] a substantial risk of death, disfigurement or impairment of bodily or mental functions"); Wyo. Stat. Ann. § 6-4-403(a)(ii) (defendant must be the "parent, guardian or custodian of a child"; conduct must "violat[e] a duty of care, protection or support").

4. A Related INA Provision Suggests That Congress Did Not Use Abuse Or Neglect To Encompass Endangerment.

A closely related federal statute, 8 U.S.C. § 1184(d)(3)(A), "provides further evidence that the generic federal definition" of a "crime of child abuse, child neglect, or child abandonment" does not include generic child endangerment provisions like New York's. *Esquivel-Quintana*, 137 S. Ct. at 1570.

Section 1184 requires that, before a fiancé or marriage visa issues, the petitioner must provide DHS with information regarding "criminal convictions" for, among other things, "child abuse and neglect." 8 U.S.C. § 1184(d)(1), (d)(3)(B), (r)(1), (r)(5)(B). The cross-referenced definition states that "'child abuse and neglect' means any recent act or failure to act on the part of a parent or caregiver with intent to cause death, serious physical or emotional harm, sexual abuse, or exploitation, or an act or failure to act which presents an imminent risk of serious harm." *See id.* §§ 1184(d)(3)(A), (r)(5)(A); Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 3, 119 Stat. 2960, 2964. This definition is far narrower than the definition the BIA adopted in *Soram*. While this definition includes some conduct that creates only the threat of harm to a child, the scope of that conduct is severely restricted: it must create the *imminent* risk of *serious* harm.

While the definition of "abuse" and "neglect" in the visa provision was only adopted in 2005, it nevertheless provides evidence of the meaning of

§ 1227(a)(2)(E)(i). As discussed previously, p. 30, *supra*, ordinary understandings of "abuse" and "neglect" *expanded* after 1996, and thus, to the extent Congress intended that the terms have a different meaning in § 1184 than § 1227, it was likely a *broader*, not narrower, meaning. Congress was particularly likely to have given these terms a broader meaning in § 1184 given that the visa provision imposes no negative immigration consequences—it simply seeks information for DHS to use when considering whether to issue a visa. Congress may well have wanted to sweep more broadly in collecting information for DHS than in imposing the harsh immigration consequences affiliated with conviction of a "crime of child abuse, child neglect, or child abandonment." Thus at the very least, the definition of "abuse" and "neglect" in § 1184 sets the outer bounds of what Congress could have intended "abuse" and "neglect" to mean in § 1227. Those outer bounds exclude generic child endangerment provisions, which do not require that the risk be "imminent" and that the harm be "serious."[15]

[15] Several other federal statutes have also defined "abuse" and "neglect" in ways that exclude standard endangerment provisions. For instance, the Child Abuse Prevention and Treatment and Adoption Reform Act currently defines a "child abuse crime" as "a crime committed under any law of a State that involves the physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child by any person." 34 U.S.C. § 40104 (formerly 42 U.S.C. § 5119c). Though that provision was adopted after IIRIRA, a prior version of the statute, adopted at the same time as IIRIRA, defined "child abuse and neglect" similarly to the definition referenced in 8 U.S.C. § 1184, though that 1996 definition was not limited to the criminal context. *See* CAPTA Amendments of 1996, Pub. L. No. 104–235, § 110, 110 Stat. 3063. In 1990, Congress also adopted

5. Read Using The Normal Tools Of Statutory Interpretation, The INA Unambiguously Forecloses The BIA's Classification Of New York's Endangerment Provision As A Categorical Crime Of Child Abuse, Child Neglect, Or Child Abandonment.

The statute's ordinary meaning, the statutory structure, the relevant state criminal codes, and related federal provisions all point towards the same generic definition: a general child endangerment provision is not categorically a "crime of child abuse, child neglect, or child abandonment." Thus, as in *Esquivel-Quintana*, "the statute, read in context, unambiguously forecloses the Board's [contrary] interpretation." 137 S. Ct. 1572.

At the very least, the statute unambiguously forecloses the Board's classification of *New York's broad endangerment offense* as a "crime of child abuse, child neglect, or child abandonment." Some other states' endangerment provisions include limitations that could, arguably, bring them closer to 1996 understandings of "abuse" or "neglect," such as limiting defendants to parents or guardians; requiring that the conduct violate some pre-existing duty of protection; imposing a heightened level of risk like "grave," "imminent," or "substantial"; or requiring that the threatened harm be particularly serious. *See* pp. 32-33, *supra*.

---

a definition of "child abuse" that excludes endangerment in the context of mandatory reporting by certain federal employees. 8 U.S.C. § 13031(c)(1). Notably, that statute only requires reporting to *criminal*, rather than civil, authorities if there are allegations of "sexual abuse, serious physical injury, or life-threatening neglect of a child," *id.* § 13031(d), consistent with the limited scope of "abuse" and "neglect" in the criminal context.

But New York's provision has none of these limitations; while the statute states that the harm must be "likely," the New York Court of Appeals has interpreted "likely" to mean only the "potential" for harm. *People v. Johnson*, 95 N.Y.2d 368, 372 (2000). And, as this case demonstrates, the defendant does not need to have any relationship to the victim—the victim can simply be a child in public who witnesses some other, minor (and non-removable) offense. New York's endangerment provision is therefore not a crime of child "abuse," "neglect," or "abandonment," as Congress understood those terms. As in *Esquivel-Quintana*, 137 S. Ct. at 1571-72, this Court need not decide which, if any, additional limitations might bring a state endangerment statute within the generic federal definition.

B. This Court's Decision In *Florez* Is No Longer Binding Because It Conflicts With The Supreme Court's Decision In *Esquivel-Quintana*.

When an intervening Supreme Court decision undermines the reasoning of one of this Court's cases, a panel should follow the Supreme Court precedent and reconsider this Court's precedent. *E.g.*, *Doscher v. Sea Port Group Sec., LLC*, 832 F.3d 372, 378 (2d Cir. 2016). The intervening Supreme Court decision does not need to "address the precise issue decided by the panel." *In re Zarnel*, 619 F.3d 156, 168 (2d Cir. 2010); *Doscher*, 832 F.3d at 378. "Even if the effect of a Supreme Court decision is 'subtle,' it may nonetheless alter the relevant analysis

fundamentally enough to require overruling prior, 'inconsistent' precedent." *Doscher*, 832 F.3d at 378 (quoting *Wojchowski v. Daines*, 498 F.3d 99, 108 (2d Cir. 2007)). That is what this Court should do here. The Supreme Court's *Chevron*-step-one analysis in *Esquivel-Quintana* directly conflicts with this Court's step-one analysis in *Florez*. The two decisions confronted nearly identical questions: Both decisions reviewed BIA interpretations of undefined statutory removability grounds, where state criminal laws attributed different meanings to the statutory terms. But this Court's approach to that question in *Florez* is fundamentally at odds with the Supreme Court's approach in *Esquivel-Quintana*.

As discussed previously, p. 12, *supra*, this Court in *Florez* held that the lack of a statutory definition, combined with varying approaches in state criminal laws, was enough to create ambiguity under *Chevron*'s first step. 779 F.3d at 211. Applying *Chevron*'s second step, *Florez* held that the BIA could reasonably adopt a definition of the generic federal offense that conflicted with the majority state interpretation, even where adopting that minority position is not "the best interpretation of the [federal] statute." *Id.* at 212.

The Supreme Court in *Esquivel-Quintana*, by contrast, held that the BIA's definition of a generic federal offense was foreclosed by the statutory text under *Chevron*'s first step even though Congress did not adopt an express definition, and even though the BIA's definition was consistent with a minority of state criminal

laws. *Esquivel-Quintana* concerned the INA provision making non-citizens removable if convicted of "sexual abuse of a minor." The question presented was whether that provision covered convictions under statutory rape laws that criminalized consensual sexual intercourse with a victim between sixteen and eighteen years old. 137 S. Ct. at 1567. The "sexual abuse of a minor" provision, like the "crime of child abuse" provision, was added to the INA as part of IIRIRA in 1996. Also like the "crime of child abuse" provision, the INA does not define "sexual abuse of a minor," and state statutory rape provisions included a wide range of ages for consent. The BIA interpreted "sexual abuse of a minor" to include statutory rape offenses involving 16 or 17 year old victims if the state statute "require[s] a meaningful age difference between the victim and the perpetrator." *Id.* at 1567 (quoting *Matter of Esquivel-Quintana*, 26 I. & N. Dec. 469, 477 (BIA 2015)). The Sixth Circuit deferred to the BIA's interpretation of the statute as reasonable under *Chevron*. *Id.*

The Supreme Court unanimously reversed, in an opinion by Justice Thomas. The Court concluded that the BIA's interpretation failed *Chevron*'s first step because the "statute, read in context, unambiguously foreclose[d] the Board's interpretation" by "requir[ing] the age of the victim to be less than 16." *Id.* at 1572-73. The Court found the statute unambiguous on this point even though Congress did not define the statutory phrase, *id.* at 1569, and even though sixteen

states set the age of consent for statutory rape at 17 or 18, *id.* at 1571. The Court found no ambiguity because, before finding a statute ambiguous, courts must apply "the normal tools of statutory interpretation." *Id.* at 1569. The Court held that regardless of any ambiguity in the statutory language alone, when that language is "read in context," using the normal tools of statutory interpretation, the statute "unambiguously foreclose[d] the Board's interpretation." *Id.* at 1572.

Esquivel-Quintana reduces *Florez* to "a question and an answer but no intervening reasoning." *Doscher*, 832 F.3d at 381. *Esquivel-Quintana* makes clear that in applying *Chevron*'s first step, courts must apply all of the "normal tools of statutory interpretation" before they may conclude that the BIA's statutory interpretation is compatible with the statute's text—a lack of statutory definition and varying state criminal laws do not alone establish ambiguity. But the lack of a statutory definition and varying state approaches was the entire basis for this Court's *Chevron*-step-one analysis in *Florez*.

Because *Esquivel-Quintana* fatally undermines *Florez*'s step-one reasoning, this Court is no longer bound by the prior panel's holding.[16] Because the BIA's statutory interpretation in *Soram* is unambiguously foreclosed by the statute's text,

[16] In *Richards v. Sessions*, a panel of this Court that included two members of the *Florez* panel suggested that *Esquivel-Quintana* might have changed the law. __ F. App'x __, 2017 WL 4607232, at *2 (2d Cir. Oct. 16, 2017) ("[T]he BIA may, in its discretion, wish to consider on remand whether [*Esquivel-Quintana*] impacts the scope or framing of the BIA's decision in [*Soram*], and if so, how.").

correctly understood, this Court should grant the petition for review.

II. Even If The BIA's Classification Of Endangerment Generally As A Crime Of Child Abuse Is Consistent With The Statute, The BIA Erred In Holding That New York's Endangerment Provision Is Categorically A Crime Of Child Abuse.

Even if *Soram*'s statutory interpretation is still, somehow, permissible, the BIA could not reasonably conclude that a child endangerment statute as broad as New York's qualifies as a "crime of child abuse, child neglect, or child abandonment." On its face, misdemeanor child endangerment under § 260.10(1) is extremely broad, prohibiting conduct that creates a risk not just to a child's physical, but also his "mental or moral" welfare. The required risk need not be great. Though the statute uses the word "likely," courts interpret "likely" harm to mean only the "potential for harm to a child." *Johnson*, 95 N.Y.2d at 372; *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"). Courts have therefore held that leaving children home alone for periods as short as fifteen minutes can violate the statute. *Reyes*, 872 N.Y.S.2d at 692. So does giving an eighth grader three cigarettes. *Cardona*, 973 N.Y.S.2d at 198. Courts similarly interpret risks to children's "mental or moral" welfare broadly to cover engaging in practically any criminal activity, no matter how minor, with children in the general vicinity. *Alvarez*, 860 N.Y.S.2d at 749.

Charges for minor conduct under the New York statute are the norm, not the

exception, as New York judges deem the vast majority of endangerment convictions to be unworthy of *any* imprisonment. According to data from the New York Division of Criminal Justice Services ("CJS"),[17] from 2000 through July 2015, over 35% of endangerment convictions that were not accompanied by a felony charge at the time of arrest resulted in a sentence of conditional discharge, which requires a finding that "neither the public interest nor the ends of justice would be served by a sentence of imprisonment" or even probation. N.Y. Penal Law § 65.05(1). An additional 43% of convictions led to either fines or probation, but no imprisonment. In total, during this period *fewer than 25%* of these convictions resulted in *any* imprisonment.

In concluding in *Mendoza Osorio* that this misdemeanor child-endangerment provision requires a sufficiently high risk of harm to categorically classify as a "crime of child abuse," the BIA committed two significant legal errors. First, the BIA focused only on reported decisions and refused to consider other evidence—like charging documents—that demonstrates how broadly § 260.10(1) is applied by New York authorities. This led to a highly distorted view of the statute, excluding from view the numerous charges based on minor conduct that result in guilty pleas,

[17] These government data were made public as a result of a request for information filed by the Immigrant Defense Project and are available at http://www.immdefense.org/new-york-state-data-child-endangerment-arrests-prosecutions/. The percentages were calculated based on the state-wide data.

sentences with no jail time, and no reported decision. Second, even considering only reported decisions, the BIA misunderstood the full scope of § 260.10(1), ignoring decisions upholding charges based on the most minimal conduct—like leaving a child home alone for fifteen minutes.

Properly understood, New York's endangerment statute cannot qualify as a categorical crime of child abuse, as this Court already suggested in *Guzman*. Removing parents for harmless mistakes—mistakes often the result of difficult choices that face single, working parents—will break up families, and ultimately harm the very children Congress was trying to protect.

A. The BIA Legally Erred In Determining The Scope Of New York's Endangerment Statute.

The BIA's interpretation of New York's endangerment statute in *Mendoza Osorio* rested on two legal errors. First, the BIA erroneously considered only reported state court decisions in determining whether there is a "realistic probability" that New York's endangerment provision criminalizes conduct outside the federal definition of a crime of child abuse. Second, the BIA failed to adequately appreciate the scope of even *reported* New York decisions, which demonstrate that New York's endangerment provision has a far greater scope than the BIA recognized.

1. The BIA Misapplied The "Realistic Probability" Inquiry By Considering Only Reported Decisions.

In concluding that there is no "realistic probability" that New York's endangerment provision prohibits conduct that is not a "crime of child abuse," the BIA considered only reported state decisions, and refused to consider evidence like misdemeanor complaints charging endangerment. *See Mendoza Osorio*, 26 I. & N. Dec. at 707 & n.4. That conclusion contradicts Supreme Court precedent describing the "realistic probability" inquiry and leads inevitably to a skewed understanding of the scope of state law.

Because New York's endangerment provision is so broad, only a fraction of endangerment charges result in reported decisions. As discussed above, pp. 41-42, *supra*, few endangerment convictions result in *any* imprisonment, and many result in a conditional discharge that does not even include probation. Unsurprisingly given these figures, the CJS data 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.

Given that reported decisions are not representative of the statute's on-the-ground scope, noncitizens regularly introduce misdemeanor complaints in removal proceedings to demonstrate how broadly § 260.10(1) is applied by police and prosecutors. These charging documents do not contradict reported decisions; they confirm that police and prosecutors take expansive reasoning in reported decisions

seriously when making charging decisions. The minor conduct regularly charged is also consistent with the sentencing data.

For instance in *Alvarez*, 860 N.Y.S.2d at 748-49, the court stated broadly that "engaging in criminal activity while children are present is likely to endanger their physical, mental or moral welfare," focusing especially on the "broad[]" scope of "moral welfare." Many charging documents show that police and prosecutors take *Alvarez* at its word, adding endangerment charges to minor criminal conduct whenever a child happened to be present. This case is a good example, as Matthews's endangerment charges were tacked-on to public lewdness charges when children were present. We understand that *amici* intend to file a brief in this case explaining that charging documents in other cases show that this is a common practice—*amici* will show charges for driving on a suspended license with a child in the car, smoking marijuana in a public park where children happened to be present, and numerous charges of shoplifting (including from grocery stores) in the presence of young children. Absent the presence of a child, this conduct would not be grounds for removal.

New York courts have also upheld charges for leaving children alone for as short as fifteen minutes, on the vague theory that the court could "imagine many other ways that a young child or infant left alone for as short a time as fifteen minutes might suffer harm." *Reyes*, 872 N.Y.S.2d at 692; *see also People v.*

Gulab, 886 N.Y.S.2d 68 (Crim. Ct. 2009); *People v. Eury*, 7 N.Y.S.3d 244 (Crim. Ct. 2015). Charging documents show that police and prosecutors take such decisions to heart, charging, for instance, a woman for leaving her nine-year-old and sleeping five-year-old in a car for ten minutes while she ran into a store.[18]

The BIA's refusal to even *consider* this evidence conflicts with Supreme Court precedent. The BIA held in *Mendoza Osorio* that it could not consider charging documents as part of the "realistic probability" inquiry because "a judge or jury *may* have found that the facts as charged were insufficient to support a conviction." 26 I. & N. Dec. at 707 n.4 (emphasis added). But in *Moncrieffe*, the Supreme Court wrote that the "realistic probability" inquiry looks to how "the State *actually prosecutes* the relevant offense," and nothing could be more probative of that inquiry than charging documents filed by prosecutors. 133 S. Ct. at 1693 (emphasis added). Furthermore, the fact that many of those convicted of

[18] There was recently significant publicity concerning *People v. Cheung*, in which 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* Lenore Skenazy, Napping Child Left in Car While Parents Run Quick Errand, Everyone Loses Their Minds, Hit & Run Blog, Dec. 14, 2016, http://reason.com/blog/2016/12/14/napping-child-left-in-car-while-parents (last visited November 15, 2017); *People v. Cheung*, Nassau First District Court No. CR-032528-16NA (docket information, including § 260.10(1) charge, available at https://iapps.courts.state.ny.us/webcrim_attorney/AttorneyWelcome (last visited November 15, 2017)); *see also* Lucy Denyer, *It's fine to leave your child in the car – as long as the window's down*, The Telegraph (March 14, 2016), available at http://www.telegraph.co.uk/opinion/2016/03/28/its-fine-to-leave-your-child-in-the-car--as-long-as-the-windows/.

New York's child endangerment provision are not sentenced to *any* jail time suggests that the minimal conduct in these charging documents is *precisely* the type of conduct that forms the basis of numerous endangerment convictions.

The BIA's refusal to consider these documents also conflicts with the purpose of the realistic-probability inquiry. That inquiry was designed to prevent litigants from using their "legal imagination" to concoct hypothetical interpretations of state statutes that would extend the statute beyond the relevant federal provision, regardless whether that hypothetical interpretation was how the state actually interpreted the provision. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). The Supreme Court therefore required a "realistic probability, not a theoretical possibility" that the state statute covered specific conduct before concluding that the state statute was not categorically a removable offense. *Id.* This Court similarly described the purpose of the realistic-probability inquiry as ensuring that "the categorical approach [is] grounded in reality, logic, and precedent, not flights of fancy." *United States v. Hill*, 832 F.3d 135, 140 (2d Cir. 2016). This reasoning *supports* consideration of evidence like charging documents because that evidence carries the analysis away from "legal imagination" and "flights of fancy" to the practical reality of how a state statute is applied on the ground. This is especially true when, as here, the charging documents are supported by reasoning in reported decisions and evidence that most convictions

result in no imprisonment.

Even the BIA recognized that it cannot refuse to consider the facts of any case in which "a judge or jury *may* have [ultimately] found that the facts as charged were insufficient to support a conviction." *Mendoza Osorio*, 26 I. & N. Dec. at 707 n.4 (emphasis added). For instance, the BIA considered reported decisions denying a motion to dismiss a criminal complaint, even though a jury "may" ultimately have acquitted the defendant. *Id.* at 709 n.6. And the BIA considered state *lower* court decisions, even though those decisions could ultimately be reversed.

The BIA's analysis also inappropriately dismisses the considered judgment of police and prosecutors. The BIA presumed that New York police and prosecutors regularly file endangerment charges against innocent people, who have not violated the statute as a matter of law. That presumption is backwards, as this Court has recognized a "presumption of regularity support[ing] … prosecutorial decisions." *United States v. Sanchez*, 517 F.3d 651, 671 (2d Cir. 2008) (quoting *United States v. Armstrong*, 517 U.S. 456, 464 (1996)) (internal quotation marks omitted).

The BIA's exclusive focus on reported decisions leads to a distorted understanding of state law. Under any criminal statute, defendants prosecuted based on minor conduct have an incentive to plead guilty, avoiding reported

decisions, while defendants charged with more serious conduct, and who could face significant imprisonment, have incentives to challenge the charges. The likelihood that convictions for the most minor conduct will not be reported is especially high for a misdemeanor provision like § 260.10(1), where the vast majority of convictions come from guilty pleas, and many convictions result in *no* imprisonment at all. Considering only reported decisions inevitably leads the BIA to an incorrect understanding of the statute's scope. That is why the Supreme Court described the "realistic probability" inquiry as going to how "the State *actually prosecutes* the relevant offense," not limiting it to the fact patterns in reported decisions. *Moncrieffe*, 133 S. Ct. at 1693 (emphasis added).

Comparing the BIA's decision in *Soram* with the Tenth Circuit's subsequent decision in *Ibarra* demonstrates this distortion. *Soram* held that Colorado's endangerment statute is categorically a "crime of child abuse" based on the dramatic facts in reported Colorado decisions. *E.g.*, 25 I. & N. Dec. at 385 (describing case in which a man kidnapped his girlfriend's son and locked him in a car in the middle of the night). However the facts in *Ibarra*—in which DHS sought to remove a mother for a guilty plea to the same Colorado statute[19]—bore no resemblance to any case discussed in *Soram*: while at work, Ms. Ibarra had

[19] Though the cases involved subsections with different *mens rea* requirements, *Soram* recognized its analysis would apply to both subsections. *See* 25 I. & N. Dec. at 383; *see also Ibarra*, 736 F.3d at 909.

briefly, and unintentionally, left her unharmed children home alone in the care of her oldest child, who was ten. 736 F.3d at 905 & n.3. Such a case will rarely (if ever) result in a reported decision because the minimum penalty for a conviction is a fifty-dollar fine, and thus the most sympathetic defendants, like Ms. Ibarra, have no reason to challenge the charge. 736 F.3d at 908. Considering only reported decisions will systematically shield from view such cases, even though those are precisely the cases that demonstrate the minimum conduct criminalized by state statutes.

2. Even Considering Only Reported Decisions, The BIA Misstated The Scope Of New York's Endangerment Provision.

The BIA also misunderstood the scope of the reported decisions to which it confined itself. The BIA discussed cases with dramatic facts, while ignoring numerous cases showing that more minimal conduct falls within the statute's reach. Looking at the full universe of reported decisions shows that New York's endangerment provision criminalizes minor missteps around children, including acts many would consider simply "bad parenting."

First, the BIA misinterpreted the scope of the New York decisions criminalizing parents' decisions to leave children alone for short periods of time. For instance, the BIA did not acknowledge the decision in *Reyes*, where the court upheld endangerment charges when a woman left a sleeping four-year-old child

alone for fifteen minutes while getting groceries for dinner. 872 N.Y.S.2d at 692. The *Reyes* court's reasoning was exceptionally broad, concluding vaguely that it "is reasonable to imagine the wide range of harm that might befall a four year old child left alone," even "for as short a time as fifteen minutes." *Id.* The BIA also ignored *Gulab*, 886 N.Y.S.2d at 68, where the court upheld charges based on a mother leaving two children, aged five and ten, home alone for two hours. The court recognized that some might consider the mother's decision as "solely an act of 'bad parenting.'" But the court held that the mother's decision was nevertheless "an act proscribed by the statute." *Id.*

The BIA thus failed to recognize that New York's endangerment provision criminalizes conduct at the heart of an ongoing debate concerning when children are old enough to be left alone, and for how long. Instead, the BIA simply cited cases upholding charges based on far greater risk (*e.g.*, leaving "young children unsupervised in a car on a New York City street for more than 2 hours"), and dismissing charges based on conduct that would pose little, if any, risk at all (*e.g.*, leaving an "infant son in the care of a responsible adult neighbor for about 20 hours"). *Mendoza Osorio*, 26 I. & N. Dec. at 707 n.3, 711 n.7.

The BIA also ignored other reported New York decisions that demonstrate that § 260.10(1) covers a wide array of parenting mistakes or other minor missteps around children. For instance, while the BIA briefly acknowledged the result in

Alvarez—upholding an endangerment charge based on smoking an unspecified amount of marijuana in an apartment where children were present—it did not acknowledge the reasoning of that opinion, which was that "engaging in criminal activity while children are present is likely to endanger their physical, mental or moral welfare," 860 N.Y.S.2d at 749. That reasoning justifies charges for *any* criminal conduct, no matter how minor, when children are present—like driving on a suspended license or, in this case, public lewdness—even if the children were not aware the conduct had occurred.

The BIA repeatedly emphasized that there are limits on § 260.10(1)'s scope. But the question is not whether there are *any* limits, but whether there are sufficient limits to ensure that *every* violation of the statute is a "crime of child abuse" under federal law. By ignoring New York decisions holding that the statue can be violated by arguably bad parenting (leaving children briefly alone) and other relatively minor mistakes around children, the BIA legally erred in characterizing the degree of risk necessary to violate § 260.10(1).

B. The BIA Could Not Reasonably Conclude That New York's Child Endangerment Provision, Correctly Understood, Is Categorically A Crime Of Child Abuse.

This Court has already suggested that, even if *Soram* is permissible, applying *Soram* to classify § 260.10(1) as child abuse is not. Thus in *Florez*, this Court found *Soram* reasonable only because its interpretation of child abuse is "not

unlimited" but "requires, as an element of the crime, a sufficiently high *risk* of harm to a child." *Id.* (emphasis in original). Judge Lohier, concurring in the denial of panel rehearing, further emphasized the importance of *Soram*'s limits, describing the Court's decision as "extremely limited" because it confronted only the "very narrow question" concerning *Soram*'s general validity, not more specific questions concerning whether the BIA could permissibly classify statutes that require only limited degrees of risk, like § 260.10(1), as categorical crimes of child abuse. *Florez v. Holder*, No. 14-874, ECF No. 128, at 1 (2d Cir. July 13, 2015) (Lohier, J., concurring in denial of panel rehearing). Indeed in *Guzman*, this Court had explicitly suggested that because § 260.10(1) is "extraordinarily broad," it "may not be reasonable" for the BIA to classify it as a "crime of child abuse." 340 F. App'x at 682.

This Court's suggestion in *Guzman* was right. In adopting the "crime of child abuse" provision, Congress wanted to protect children by targeting "those who have been convicted of maltreating or preying upon children." *Velazquez-Herrera*, 24 I. & N. Dec. at 509; *see also* 142 Cong. Rec. 10067 (1996) (statement of Sen. Dole) (supporting the "crime of child abuse" provision "to stop the vicious acts of stalking, child abuse, and sexual abuse" and prevent the "often justified fear that too often haunts our citizens"). But Congress also wanted to "encourage the preservation of families." *Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 312 (2d Cir.

2007) (en banc); *see also Nwozuzu v. Holder*, 726 F.3d 323, 332 (2d Cir. 2013) ("the prevailing purpose of the INA" is "'the preservation of the family unit'" (quoting H.R. Rep. No. 82-1365 (1952))). Categorically classifying a misdemeanor endangerment statute that criminalizes single incidents of arguably bad parenting ultimately hurts the very children Congress was trying to protect. Because such a conclusion makes "scant sense," this Court should reject it. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1989 (2015).

1. At what age, and for how long, parents can safely leave their children alone is hotly disputed. *See, e.g.*, KJ Dell'Antonia, *Home Alone? Don't Tell the Neighbors*, N.Y. Times Motherlode, June 28, 2012, http://parenting.blogs.nytimes.com/2012/06/28/home-alone-dont-tell-the-neighbors/. Many parents feel comfortable leaving children between eight and twelve years old home alone for short periods of time, including with younger siblings; others think that is unsafe. *Id.* (discussing these positions, and also noting that children are significantly more likely to be injured in car accidents than being left home alone). New York courts have interpreted § 260.10(1) to control at least part of this debate by deciding, in cases like *Gulab*, that leaving a ten-year-old and five-year-old alone for several hours is a misdemeanor, not just "bad parenting." 886 N.Y.S.2d at 68. But it is one thing to deem such conduct *misdemeanor child endangerment* that will likely result in no jail time; it is quite another to deem such

conduct a "crime of child abuse" leading to the parents' deportation and separation from their children. When Congress took aim at those who "prey[] upon children," it surely did not intend to separate a ten-year-old from his mother because on one occasion she trusted him to care for himself and his five-year-old sibling for two hours. It simply makes no sense to turn a few hours, or even a few minutes, of voluntary separation into a lifetime of involuntary separation.

This is most likely to be a problem for single, working parents who often have to make difficult decisions between, for instance, waking a sleeping child to go buy groceries, or running quickly to the store and hoping the child does not wake up. *See Reyes*, 872 N.Y.S.2d at 692. Even the IJ in *Ibarra* admitted he sometimes faced this predicament, stating that he had struggled with "at what point you can leave your kids alone," and that at times he would "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" with kids alone in his apartment. 736 F.3d at 905 n.3. Raising the stakes of these difficult decisions faced by working parents to the point where one misstep (as seen from the perspective of a New York police officer, prosecutor, judge and, on rare occasions, jury) makes the parent removable is not only unfair but also nonsensical.[20]

[20] The CJS data discussed above, pp. 41-42, *supra*, also show that child endangerment is disproportionately enforced against racial minorities. Over 92% of those arrested for endangerment in the Bronx under were African American or

2. Categorically classifying New York's endangerment provision as a "crime of child abuse" would also lead to removal of parents and other adults who make relatively minor mistakes around children. It is hard to imagine, for instance, that when Congress made noncitizens removable for committing a "crime of child abuse" it intended to deport those who committed *any* minor criminal conduct around even very young children—including smoking marijuana in a park, driving on a suspended license with a child in the car, and shoplifting from a grocery store. *See* p. 45, *supra*. This is especially true given that Congress specifically *exempted* some of this conduct from removability. *E.g.*, 8 U.S.C. § 1227(a)(2)(B)(i) (excluding possession of a small amount of marijuana as a grounds of removal).

3. The implications of categorically classifying misdemeanor endangerment provisions like New York's as "crime[s] of child abuse" go beyond finding permanent residents removable. A conviction for a "crime of child abuse" also makes non-permanent residents ineligible for cancellation of removal—the safety valve that allows noncitizens to remain in the country if their "removal

---

Hispanic, and only 4% were white. According to the 2016 U.S. Census Bureau estimate, 45% of the population of the Bronx is white. Similarly, in Kings County (Brooklyn), over 84% of those arrested were African American or Hispanic and approximately 12% were white, although 49% of the population is white. And in Queens, over 71% of those arrested were African American or Hispanic and 14% were white, although 48% of the population is white. *See* United States Census Bureau QuickFacts, http://www.census.gov/quickfacts/table/PST045215/36081,36047,36005,00 (last visited November 15, 2017).

would result in exceptional and extremely unusual hardship to [their] spouse, parent, or child, who is a" U.S. citizen or permanent resident. 8 U.S.C. § 1229b(b)(1)(C), (D). It also makes a non-permanent resident ineligible for the separate cancellation provision for "battered spouse[s] or child[ren]." *Id.* § 1229b(b)(2)(A)(iv). Making provisions designed to protect the most sympathetic cases unavailable to parents who make a single parenting mistake risks harming the very children Congress was trying to protect.

CONCLUSION

The Court should grant the petition for review.

Respectfully submitted,

/s/ David J. Zimmer

David J. Zimmer
GOODWIN PROCTER LLP
100 Northern Ave.
Boston, MA 02210
dzimmer@goodwinlaw.com
Tel.: 617.570.1192
Fax.: 617.523.1231

William M. Jay
GOODWIN PROCTER LLP
901 New York Ave. NW
Washington, DC 20001
wjay@goodwinlaw.com
Tel.: 202.346.4000
Fax.: 202.346.4444

THE LEGAL AID SOCIETY
Seymour W. James, Jr., Attorney-in-Chief
Hasan Shafiqullah, Attorney-in-Charge,
Immigration Law Unit
Ward J. Oliver, Supervising Attorney,
Immigration Law Unit
199 Water Street
New York, New York 10038
Telephone: (212) 577-3300

Counsel for Petitioner

Dated: November 15, 2017

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE SYTLE REQUIREMENTS

This brief complies with the type-volume limitation of Second Circuit Local Rule 32.1(a)(4). The brief contains 13,984 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman font, using Microsoft Word 2010.

November 15, 2017

/s/ David J. Zimmer
David J. Zimmer

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing brief with the Clerk of the United States Court of Appeals for the Second Circuit via the CM/ECF system this 15th day of November, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

November 15, 2017

/s/ David J. Zimmer
David J. Zimmer

Counsel for Petitioner