No. 13-73719

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAFAEL DIAZ-RODRIGUEZ,
(Not Detained),

Petitioner,
v.

MERRICK B. GARLAND, Attorney General of the United States,

Respondent.

ON PETITION FOR REVIEW OF A FINAL ORDER
OF THE BOARD OF IMMIGRATION APPEALS
(Agency No. A093-193-920)

RESPONDENT'S PETITION FOR REHEARING EN BANC OR PANEL REHEARING

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INTRODUCTION

Since its enactment, adjudicators have grappled with how to interpret the statutory phrase "crime of child abuse, child neglect, or child abandonment" in 8 U.S.C. § 1227(a)(2)(E)(i). But until this case, no federal judge had found that phrase to be unambiguous in any respect. And every court has deferred to the Board's authoritative interpretation, although some judges limit its reach, or would do so. Rather than follow this universal approach in this case, the panel majority held that: (1) it is an open question whether this Court owes deference to the Board's generic definition, which specifies, after *Matter of Soram*, that endangerment offenses which require a sufficiently high risk of harm qualify as crimes of child abuse, neglect, or abandonment; (2) the statutory text unambiguously forecloses criminally negligent endangerment offenses from inclusion within the term's meaning; and (3) felony child endangerment under Cal. Penal Code § 273a(a) is not categorically a child abuse offense because it includes negligent conduct with no resultant harm. *Diaz-Rodriguez v. Garland*, 12 F.4th 1126 (9th Cir. 2021). En banc rehearing is necessary because the decision conflicts with this Court's established "child abuse" jurisprudence, conflicts with decisions from other courts of appeals, and is erroneous. This Court previously concluded in *Martinez-Cedillo v. Barr*, 918 F.3d 601 (9th Cir. 2019), that en banc

review was warranted to address this exceptionally important issue – the protection of child-victims. It should do so again here.

RELEVANT BACKGROUND

1. Mr. Diaz-Rodriguez was admitted from Mexico in 1990 as a lawful permanent resident. He was twice convicted, in 2003 and 2009, of felony child endangerment under Cal. Penal Code § 273a(a). An immigration judge found him removable under 8 U.S.C. § 1227(a)(2)(E)(i), for having been convicted of a crime of child abuse, neglect, or abandonment, and denied his application for cancellation of removal as a matter of discretion.[1] The Board agreed and dismissed his appeal.

2. In 1996, Congress added certain criminal offenses as grounds of removability, including "[c]rimes of domestic violence, stalking, or violation of protection order, crimes against children and."[2] 8 U.S.C. § 1227(a)(2)(E). Under subpart (i), a noncitizen is removable if convicted for "a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment." 8 U.S.C. § 1227(a)(2)(E)(i). Congress did not define, "a crime of

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[1] His convictions did not bar his application for cancellation of removal. 8 U.S.C. § 1229b(a).

[2] So in original.

child abuse, child neglect, or child abandonment," though it defined neighboring terms in 8 U.S.C. § 1227(a)(2)(E).

Ten years later, rather than construing "child abuse" in the first instance, this Court remanded with instruction to the Board to define the phrase. *Velazquez-Herrera v. Gonzales*, 466 F.3d 781, 782-83 (9th Cir. 2006). In response, the Board issued precedent in *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503 (BIA 2008), construing the term broadly: "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." 24 I. & N. Dec. at 512.

In *Fregozo v. Holder*, 576 F.3d 1030 (9th Cir. 2009), this Court examined the statute, the Board's definition, and its application to California's misdemeanor child endangerment offense. It affirmed that "crime of child abuse" is ambiguous and deferred to the Board. 576 F.3d at 1034-36; *see Jimenez-Juarez v. Holder*, 635 F.3d 1169, 1171 (9th Cir. 2011) (acknowledging deference); *see also Alvarez-Cerriteno v. Sessions*, 899 F.3d 774, 779 (9th Cir. 2018) (same). The Court disagreed, however, that the misdemeanor qualified, because it requires only a "bare potential for nonserious harm." *Fregozo*, 576 F.3d at 1036-38. Although this Court suggested that actual injury is required to qualify as "child abuse," it

strongly suggested the felony provision would qualify. It distinguished the misdemeanor provision from the felony provision, observing that the misdemeanor "does not require that the perpetrator *actually* endanger" a child, and applies "under circumstances or conditions *other than those* likely to produce great bodily harm or death." *Fregozo*, 576 F.3d at 1037-38 & n.5 (quoting and comparing Cal. Penal Code § 273a(a) & (b) (emphasis in original)). The Court stated that "[n]egligent or intentional conduct that places a child in situations in which *serious* harm is imminently likely could fairly constitute 'impairment' of a child's well-being." *Id*. at 1038 (emphasis in original).

In response to *Fregozo*, the Board issued *Matter of Soram*, 25 I. & N. Dec. 378 (BIA 2010), to clarify its interpretation. The Board explained that actual injury is not required; the maltreatment requirement may be satisfied through conduct that does not result in injury. *Matter of Soram*, 25 I. & N. Dec. at 380-81. The Board determined that the statutory phrase "crime of child abuse, child neglect, or child abandonment" is a "unitary concept," and that the definition announced in *Velazquez-Herrera* encompasses this entire phrase. *Id*. at 381-82. It explained that endangerment-type offenses which require a sufficiently high risk of harm to a child satisfy the maltreatment requirement. *Id*. at 383. Thus, the essential elements of the Board's definition and least acts remained the same,

requiring: (1) a negligent act or omission; (2) constituting maltreatment; (3) of a child.

In *Matter of Mendoza Osorio*, the Board applied *Soram*, holding that a New York child endangerment statute, which requires that the defendant placed a child in a situation "likely" to result in harm, satisfies the definition. 26 I. & N. Dec. 703, 706-07, 711 (BIA 2016). The Board contrasted the statute with California's misdemeanor endangerment statute, agreeing with *Fregozo* that Cal. Penal Code § 273a(b) does not qualify because the required risk of harm is minimal. *Id*. at 711; *cf. Diaz-Rodriguez*, 12 F.4th at 1150 n.8 (Callahan, J., dissenting); *see also Matter of Rivera-Mendoza*, 28 I. & N. Dec. 184, 186-87 (BIA 2020) (an endangerment statute "must require proof of a 'likelihood' or 'reasonable probability' that a child will be harmed, not a mere possibility or potential for harm.").

3. California's felony child endangerment statute provides:

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

Cal. Penal Code § 273a(a). "[W]illfully" means the perpetrator had "a purpose or willingness to commit the act," not that he intended the outcome or intended to commit a crime. Cal. Penal Code § 7(1); *People v. Valdez*, 42 P.3d 511, 517 (2002). The statute includes crimininally negligenct conduct. *Valdez*, 42 P.3d at 517. An act is "likely" to cause great bodily harm or death, where it poses "a substantial danger, i.e., a serious and well-founded risk." *People v. Wilson*, 41 Cal. Rptr. 3d 919, 924 (Cal. Ct. App. 2006).

4. Confronted with the *Soram* clarification and this California felony the first time, a panel of this Court reached conclusions contrary to those later reached in this case. *Martinez-Cedillo v. Sessions*, 896 F.3d 979 (9th Cir. 2018). This Court granted Martinez-Cedillo's petition for en banc rehearing, *Martinez-Cedillo v. Barr*, 918 F.3d 601 (9th Cir. 2019), and vacated the published decision after being informed that he died while the case was pending. *Martinez-Cedillo v. Barr*, 923 F.3d 1162 (9th Cir. 2019). Prior to its vacatur, this Court twice relied on *Martinez-Cedillo* and deferred to and applied the Board's clarified definition in *Soram*. *Menendez v. Whitaker*, 908 F.3d 467, 474 (9th Cir. 2018); *Alvarez-Cerriteno*, 899 F.3d at 781.

5. In its opinion in this case, the panel majority acknowledged that *Menendez* and *Alvarez-Cerriteno* relied on *Martinez-Cedillo* in deferring to *Matter*

of Soram, but it held that, because neither case had independently examined the deference question, and due to the "unique sequence of events," they were not binding on the question. *Diaz-Rodriguez*, 12 F.4th at 1129-31. Thus, the majority addressed the deference question anew. Relying on the Supreme Court's decision in *Esquivel-Quintana v. Sessions,* 137 S. Ct. 1562 (2017), the majority employed ordinary tools of statutory construction to hold that the statute is unambiguous as to negligent endangerment offenses. *Id*. It consulted dictionary definitions for "child abuse," "child neglect," and "child abandonment," and found that none covered "endangerment." *Id*. at 1133-34. In looking at statutory structure, the majority suggested that Congress must have intentionally omitted "endangerment" because it viewed negligent endangerment as an "unacceptable basis under the immigration laws for separating parents from their children." *Id*. at 1134. Conducting its own state survey, the majority found a consensus that negligent endangerment is not child abuse, neglect, or abandonment, despite 14 states criminalizing negligent endangerment. *Id*. at 1135. The majority acknowledged that four other courts of appeals had deferred to *Matter of Soram*, but found the decisions unpersuasive. *Id*. at 1136. It "agree[d]" with the Tenth Circuit's decision in *Ibarra v. Holder*, 736 F.3d 903 (10th Cir.). *Id*. at 1136. Finally, after identifying the "least acts criminalized" under Cal. Penal Code § 273a(a) as conisisting of "causing or

permitting a child 'to be placed in a situation where his or her person or health is endangered,' committed with a *mens rea* of criminal negligence," *id*. at 1131, the majority held that this endangerment offense "criminalizes conduct that falls outside the generic federal definition." *Id*. at 1136.

6. Judge Callahan dissented. First, she contended that *Menendez* and *Alvarez-Cerriteno* remained binding and disposed of the deference question. *Id*. at 1142-44. Second, Judge Callahan criticized the majority's holding that the statute is unambiguous, noting that this was the "first suggestion [in any court opinion] that the statute is unambiguous." *Id*. at 1144-46. Finally, Judge Callahan disagreed with the majority's reliance on *Esquivel-Quintana* to decide the *Chevron* deference issues at step one, criticizing its analysis as incomplete and unpersuasive. *Id*. at 1146-50.

ARGUMENT

I. The Decision Conflicts with This Court's Precedent that "Crime of Child Abuse" is Ambiguous and that the Board's Definition is Entitled to Deference

In *Fregozo*, this Court already held that the statutory phrase "crime of child abuse" is ambiguous, and that the Board's interpretation in *Velazquez-Herrera* is entitled to deference. 576 F.3d at 1035-36; *see Alvarez-Cerritino*, 899 F.3d at 779; *Jimenez-Juarez*, 635 F.3d at 1171. The panel majority's belief that it was free to

resolve the deference question in this case at *Chevron* step one is in direct conflict with *Fregozo*, yet the majority neither acknowledged *Fregozo*'s holding nor distinguished it. *Cf. Diaz-Rodriguez*, 12 F.4th at 1128 n.1 (mentioning *Fregozo* in explaining the contours of the endangerment statutes).

The panel's holding conflicts with *Fregozo* in two important ways. First, like this case, *Fregozo* examined the meaning of the statutory phrase "crime of child abuse" in the context of a child endangerment statute that allows for a negligent mens rea – California's misdemeanor statute, Cal. Penal Code § 273a(b). 576 F.3d at 1034-35. *Fregozo* thus had already squarely confronted the question of whether the statutory phrase "crime of child abuse" includes negligent endangerment, and it held that the term is ambiguous on that point. *Id*. at 1036-38. Second, *Fregozo* deferred to the Board's interpretation that child abuse includes criminally negligent acts or omissions that constitute maltreatment. *Id*. at 1036-37; *Matter of Velazquez Herrera*, 24 I. & N. Dec. at 512. The intervening decision in *Soram* did nothing to call the Court's analysis into question. To be sure, the Board did not announce a new definition in *Soram* or change it. Instead, it clarified that the definition in *Velazquez-Herrera* encompasses the entire statutory phrase ("crime of child abuse, child neglect, or child abandonment") – which is a unitary concept – and concluded that endangerment offenses requiring a reasonable

probability of harm constitute maltreatment, falling within the extant definition. *Id*. at 383-85. Therefore, *Fregozo* essentially addressed the same definition, and in the same context.

In holding that "crime of child abuse" is ambiguous and the Board's construction is reasonable, *Fregozo* necessarily resolved that criminal negligence is an appropriate mens rea, a holding that has been relied on in this Court's subsequent decisions. *See Alvarez-Cerritino*, 899 F.3d at 779; *Jimenez-Juarez*, 635 F.3d at 1171. The majority overlooked these holdings in analyzing the statutory phrase anew in this case, without explaining why *Fregozo* is not still binding precedent. The resulting intra-circuit conflict leaves the Court's "child abuse" precedents uncertain and its analysis difficult to unravel. *Diaz-Rodriguez*, 12 F.4th at 1142-45 & n.4 (Callahan, J., dissenting) (noting the conflict with *Menendez* and *Alvaraz-Cerriteno*).[3]

If the panel had recognized that it was bound by *Fregozo*, the only open questions would have been: (1) whether the Board in *Soram* reasonably

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[3] Respondent notes an oversight by the majority. *Diaz-Rodriguez*, 12 F.4th at 1130. The government filed a petition for en banc rehearing in *Rodriguez-Castellon*, a decision which was consolidated for publication in *Menendez*, 908 F.3d 467. Notably, the petition was initially filed *prior* to the en banc rehearing grant in *Martinez-Cedillo*. On the government's motion, the Court held the petition for that en banc decision, and the government later amended its petition in light of the vacatur of *Martinez-Cedillo*. *Id*.

concluded, in its clarifying decision, that endangerment offenses requiring a probability of harm can qualify as maltreatment; and (2) if so, whether Cal. Penal Code § 273a(a) meets the Board's maltreatment standard. In the context of the instant felony statute, requiring "likely" great bodily harm to or death of a child, the panel should have easily determined that the Board's *Soram* definition was reasonable, and properly applied.

Indeed, *Fregozo* strongly suggests that the felony statute in this case would easily satisfy the Board's definition, 576 F.3d at 1037-38, yet the holding in this case contrasts sharply with the *Fregozo* analysis. Although the majority initially acknowledged that the felony offense requires proof of "circumstances or conditions likely to produce great bodily harm or death," *Diaz-Rodriguez*, 12 F.4th at 1128 n.1, it overlooked this important element when it identified the least acts criminalized, *id*. at 1131. Along with the requirement that a child "*is* endangered" these elements demonstrate the serious nature of the felony offense. *Compare* Cal. Penal Code § 273a(a) (emphasis added), *with* § 273a(b); *see Fregozo*, 576 F.3d at 1037-38. The majority's treatment of the felony provision as a standard "child endangerment" statute, *Diaz-Rodriguez*, 12 F.4th at 1131, thus conflicts with *Fregozo*.

II. The Decision Conflicts with All Other Circuits to Have Reached the Question of Whether the Board's Definition Warrants Deference

All other circuits to have addressed the question of ambiguity – the Second, Third, Fifth, Tenth, and Eleventh Circuits – have determined that the statute is ambiguous and that the Board's construction is entitled to deference. *See Zarate-Alvarez v. Garland*, 994 F.3d 1158, 1164 (10th Cir. 2021) (deferring to the Board's definition as including knowing or reckless child endangerment); *Garcia v. Barr*, 969 F.3d 129, 133 (5th Cir. 2020); *Mondragon-Gonzalez v. Att'y Gen. of the U.S*, 884 F.3d 155, 158 (3d Cir. 2018); *Pierre v. U.S. Att'y Gen.*, 879 F.3d 1241, 1249 (11th Cir. 2018); *Florez v. Holder*, 779 F.3d 207, 211 (2d Cir. 2015). As to the Second, Third, Fifth, and Eleventh Circuits, the panel majority found their decisions "distinguishable and unpersuasive," concluding that "none had engaged in any meaningful analysis of the text." *Diaz-Rodriguez*, 12 F.4th at 1136. That is not so.

For example, the Fifth Circuit found ambiguity and that a *Chevron* step two inquiry was required because: (1) Congress defined the companion term, "crime of domestic violence"; (2) Congress left the phrase "crime of child abuse, child neglect, or child abandonment" undefined; (3) there are no "widely accepted definitions" of the statutory terms; and (4) "[e]very circuit to consider this issue has found the statute silent or ambiguous on the meaning." *Garcia*, 969 F.3d at

133. The court also concluded, "*Esquivel-Quintana* has no application here[,]" because it "didn't relate to the child-abuse provision . . . mandate a particular approach to statutory interpretation, or cast doubt on the Board's definition." *Id*. Likewise, the Second Circuit "had little trouble concluding that the statutory provision is ambiguous." *Florez*, 779 F.3d at 211. The court explained: while Congress defined "'crime of domestic violence,'" it left "'crime of child abuse'" undefined, and state and federal statutes offer varying definitions of "child abuse" and "the related concepts of child neglect, abandonment, endangerment, and so on." *Id*. Later, the court reaffirmed *Florez* as binding because *Esquivel-Quintana* "did not reject *Chevron* outright or mandate any particular approach to statutory interpretation," nor did it "cast doubt on *Florez*." *Matthews v. Barr*, 927 F.3d 606, 615-16 (2d Cir. 2019).

The panel majority sought to distinguish the authority of the sister circuits by noting that none of the cases where the courts proceeded to *Chevron* step two involved the question of deference in the context of negligent endangerment. *Diaz-Rodriguez*, 12 F.4th at 1136. In so doing, the majority "agree[d]" with the Tenth Circuit in *Ibarra*, which held that deference was not warranted in the context of negligent endangerment. *Id*. at 1135-36 & n.6. But the majority misapprehended that the Tenth Circuit decided that the plain language of the

statute, at *Chevron* step one, precluded inclusion of negligent child endangerment offenses within the meaning of the statute. *Id*. at 1135-36 & n.6. Indeed, the Tenth Circuit recently explained that its holding in *Ibarra*, that the term contains "some ambiguity," meant the Board's precedent decisions were "candidates for *Chevron* deference," and it declined to defer to inclusion of negligent conduct without resultant injury as unreasonable. *Zarate-Alvarez*, 994 F.3d at 1164. Thus, contrary to the majority's reading, the Tenth Circuit resolved the issue of negligent endangerment at *Chevron* step two. Thus, *all* of these decisions of the sister circuits are in direct conflict with deciding at step one that the statutory term unamibiguously forecloses inclusion of a type of crime against a child.

Moreover, although the majority aligned itself with the Tenth Circuit in excluding negligent endangerment offenses, its decision exacerbates the conflict the Tenth Circuit had with the Second Circuit, and is at least in tension with the Fifth Circuit, disagreeing that any aspect of the Board's definition is unreasonable. In *Florez*, the Second Circuit described its decision to defer to the Board's clarified definition as "in direct conflict" with *Ibarra*, and it criticized that decision. 779 F.3d at 212-13. The Fifth Circuit similarly criticized the failure in *Ibarra* to recognize that the agency need not arrive at the *best* conclusion, but merely a *reasonable* one. *Garcia*, 969 F.3d at 134.

As Judge Callahan observed, this Court in *Martinez-Cedillo* considered the decisions of the sister circuits and criticized *Ibarra* as flawed in its analysis. *Diaz-Rodriguez*, 12 F.4th at 1147-48 (Callahan, J., dissenting). While *Martinez-Cedillo* is of course not binding, that the majority decided the issue without addressing Judge Bybee's reasoning and that of the sister circuits undermines its conclusions. *Id*.

III. The Decision is Erroneous

The panel majority's reliance on *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017), to conclude that the statutory phrase is unambiguous is erroneous. In *Esquivel-Quintana* the scope of the Supreme Court's inquiry was extremely narrow and discreet: to define the generic age of consent for a statutory rape offense to qualify as a "sexual abuse of a minor" aggravated felony under 8 U.S.C. § 1101(a)(43(A). 137 S. Ct. at 1569. The Court recognized that statutory rape offenses could qualify within the ordinary meaning, and it did not attempt to construe the entire statutory term or its full scope; it instead examined the meaning of age of consent to generically define "minor" for its limited purpose. *Id*. As borne out by the Court's analysis, statutory rape and age of consent are well- and long-understood legal concepts. Thus, the meaning of the term in the sources consulted was easily ascertained, and the relevant statutory tools of construction

converged on a clear answer: age 16. *Id*. at 1569-72. These circumstances are far from comparable to those here. None of the offenses and terms at issue are universally defined or carry ordinary meaning; none are criminalized in a consistent manner. *See Diaz-Rodriguez*, 12 F.4th at 1150 (Callahan, J., dissenting). Additionally, there is no federal crime for comparison. And to answer the question before it, the majority had to construe the entire statutory phrase and concepts rather than discern the meaning of a single concept like "minor" for purposes of statutory rape.

Moreover, the majority's statutory assessment is incomplete, in any event, and does not reveal a clear answer. *See id*. at 1146-50. First, its review of dictionary definitions is inconclusive. As the majority recognized, the definition of "neglected child" includes a child who "is under such improper care or control as to *endanger* his morals or health," and the definition of "abuse" includes injury to a child's "moral or mental well-being." *Diaz-Rodriguez*, 12 F.4th at 1133 (quoting *Black's Law Dictionary* (6th ed. 1990)) (emphasis added). And, looking to *Fregozo*, negligently endangering a child's life can readily be described as injurious to the child's physical or mental well-being. 576 F.3d at 1038.

As for examining statutory structure, the majority overlooked the phrasing of child abuse and how it is situated in the statute. Its focus on examining child

"abuse," "neglect," and "abandonment" as separate concepts is not supported by the statutory structure. *Diaz-Rodriguez*, 12 F.4th at 1134. First, the statute's heading for this removability provision refers broadly to, "Crimes of domestic violence, stalking, or violation of protection order, *crimes against children*." 8 U.S.C. § 1227(a)(2)(E) (emphasis added). Second, the heading to subpart (i) is entitled, "Domestic violence, stalking and child abuse." This indicates that the full phrase in subpart (i), "convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment," delineates three offenses to protect vulnerable victims. 8 U.S.C. § 1227(a)(2)(E)(i). The use in the headings of "crimes against children" and "child abuse," along with the repetition of "crime of" in the text of (i), indicates that "crime of child abuse, child neglect, or child abandonment" denotes a unitary concept that includes a wide variety of offenses against children. *See Matter of Velazquez-Herrera,* 24 I. & N. Dec. at 518 & n.3 (concurring opinion). The majority also ignored a clear signal that Congress left a void for the agency to fill: although it defined the neighboring expressions "crime of domestic violence" and "violation of protective order," it left "crime of child abuse, child neglect, and child abandonment" undefined. *See* 8 U.S.C. § 1227(a)(2)(E); *but see Jimenez-Juarez*, 635 F.3d at 1171 (recognizing that because the term was undefined, the *Fregozo* Court deferred to the Board's

reasonable definition); *Fregozo*, 576 F.3d at 1035; *Velasquez-Herrera*, 466 F.3d at 782-83. Instead, having concluded that Congress intentionally omitted "endangerment" crimes, the majority speculated that Congress did not want potential family separation to result based on a possible "single lapse in parental judgement, such as leaving young children at home alone." *Diaz-Rodriguez*, 12 F.4th at 1134. This speculation is especially perplexing in the context of California's felony statute, which requires life-threatening circumstances.

Additionally, the majority declined to consider federal civil laws on the summary basis that they are civil. *Diaz-Rodriguez*, 12 F.4th at 1132-33. Its refusal is significant, especially where no federal criminal statutes existed to influence Congress. Notably, the Board in *Velazquez-Herrera* found that the "common characteristics" in several federal statutes provide much insight, and none of this Court's earlier decisions criticize reference to civil statutes. *See Fregozo*, 536 F.3d at 1036.

Lastly, the Supreme Court was clear that a state survey is neither a required task, nor conclusive. *Esquivel-Quintana*, 137 S. Ct. at 1571 & n.3. The majority's conclusion that negligent endangerment is plainly excluded from the generic meaning is hardly obvious from its survey, especially where nearly a third of the

states criminalize negligent child endangerment. These errors explain why this Court's decision stands alone among the circuits.

IV. Child Abuse Cases are Exceptionally Important

The panel's decision in this case has the potential to sweep broadly and could significantly restrict the applicability of the "crime of child abuse, child neglect, or child abandonment" ground of removal as to child endangerment offenses. Protection of children was a high priority in 1996 when this provision was added to the statute, and Congress intended it to be broadly construed. *Matter of Velazquez-Herrera*, 24 I. & N. Dec. at 508-12. Indeed, Congress viewed these offenses as important enough to make it a new and separate ground of removability, rather than adding it to a pre-existing definition or ground of removability. Creating this new removal ground was a strong statement that people who maltreat children should be removed. This decision overrides that intent by interpreting the statutory term as unambiguously excluding all child endangerment offenses which *could* be committed negligently.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing en banc.

Respectfully submitted,

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December 14, 2021

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rules 35-4(a) and 40-1, the attached petition for rehearing or rehearing en banc contains 4,178 words, and is prepared in a format, type face, and type style that complies with Fed. R. App. Pr. 32(a)(4)-(6).

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December 14, 2021

APPENDIX A

- *Diaz-Rodriguez v. Garland*, 12 F.4th 1126 (9th Cir. 2021)

12 F.4th 1126
United States Court of Appeals, Ninth Circuit.

Rafael DIAZ-RODRIGUEZ, Petitioner,
v.
Merrick B. GARLAND, Attorney General, Respondent.

No. 13-73719
|
Argued and Submitted January 13, 2021
Pasadena, California
|
Filed September 10, 2021

Synopsis

Background: Noncitizen, a lawful permanent resident, petitioned for review of order of Board of Immigration Appeals (BIA) determining that his California offense of felony child endangerment was a ground for removal.

Holdings: In a case of first impression, the Court of Appeals, Watford, Circuit Judge, held that:

BIA's interpretation of crime of child abuse, neglect, or abandonment to include negligent endangerment was not entitled to *Chevron* deference, and

felony child endangerment is not a crime of child abuse, neglect, or abandonment as a ground for removal.

Petition granted.

Callahan, Circuit Judge, filed dissenting opinion.

Procedural Posture(s): Review of Administrative Decision.

***1127** On Petition for Review of an Order of the Board of Immigration Appeals, Agency No. AXXX-XX3-920

Attorneys and Law Firms

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Erica B. Miles (argued) and M. Jocelyn Lopez Wright, Senior Litigation Counsel; Sara J. Bayram, Trial Attorney; Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, D.C.; for Respondent.

Before: Consuelo M. Callahan and Paul J. Watford, Circuit Judges, and Jed S. Rakoff,* District Judge.

* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

Dissent by Judge Callahan

OPINION

WATFORD, Circuit Judge:

***1128** We confront in this appeal the same issue that arose in *Martinez-Cedillo v. Sessions*, 896 F.3d 979 (9th Cir. 2018). There, a divided three-judge panel held that California Penal Code § 273a(a) constitutes "a crime of child abuse, child neglect, or child abandonment" within the meaning of 8 U.S.C. § 1227(a)(2)(E)(i). A majority of the non-recused active judges voted to rehear *Martinez-Cedillo* en banc, but before the en banc court could issue a decision, the petitioner passed away. The en banc court therefore dismissed the appeal as moot and vacated the three-judge panel decision. Without binding precedent on point, we must revisit whether California Penal Code § 273a(a) qualifies as "a crime of child abuse, child neglect, or child abandonment." We hold that it does not.

I

Rafael Diaz-Rodriguez has been a lawful permanent resident of the United States since 1990. He and his partner have two children together, both of whom are U.S. citizens. In 2003 and 2009, Diaz-Rodriguez was stopped by the police while driving under the influence of alcohol with one of his children in the car. On both occasions, he was convicted of felony child endangerment in violation of California Penal Code § 273a(a). As relevant here,

that statute punishes anyone who, "having the care or custody of any child," and under circumstances likely to produce great bodily harm or death, "willfully causes or permits that child to be placed in a situation where his or her person or health is endangered." Cal. Penal Code § 273a(a).[1] Although the statute requires the defendant to act "willfully," the California Supreme Court has held that criminal negligence suffices, such that the defendant need not be subjectively aware of the risk of harm involved. *People v. Valdez*, 27 Cal.4th 778, 118 Cal.Rptr.2d 3, 42 P.3d 511, 513–14, 518–19 (2002).

1 California Penal Code § 273a(a) provides in full:

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

The statute contains a separate provision punishing as a misdemeanor the same acts when committed "under circumstances or conditions other than those likely to produce great bodily harm or death." Cal. Penal Code § 273a(b); *see* *Fregozo v. Holder*, 576 F.3d 1030, 1037–38 (9th Cir. 2009).

In 2012, the Department of Homeland Security initiated removal proceedings against Diaz-Rodriguez based on his 2009 child endangerment conviction. The agency alleged that the conviction rendered Diaz-Rodriguez removable under 8 U.S.C. § 1227(a)(2)(E)(i), a provision of the Immigration and Nationality Act (INA) authorizing the removal of a non-citizen who "at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment." An immigration judge held that a conviction under California Penal Code § 273a(a) qualifies ***1129** as a conviction for "a crime of child abuse, child neglect, or child abandonment," thus rendering Diaz-Rodriguez removable. The judge also denied Diaz-Rodriguez's application for cancellation of removal under 8 U.S.C. § 1229b(a) as a matter of discretion. The Board of Immigration Appeals (BIA) affirmed the immigration judge's rulings. Diaz-Rodriguez petitions for review of the BIA's decision, challenging only the determination that he is removable based on his conviction under California Penal Code § 273a(a).

II

As noted at the outset, a prior panel of this court confronted the same issue before us. The three-judge panel in *Martinez-Cedillo* was asked to decide whether California Penal Code § 273a(a) qualifies as "a crime of child abuse, child neglect, or child abandonment" under 8 U.S.C. § 1227(a)(2)(E)(i). 896 F.3d at 982. In determining the elements of the generic federal offense described by the phrase "a crime of child abuse, child neglect, or child abandonment," the panel applied the two-step framework from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). At step one, the panel held that the phrase is ambiguous as to whether it includes criminal offenses, such as California Penal Code § 273a(a), that punish negligent endangerment of a child. 896 F.3d at 987. At step two, over a dissent by Judge Wardlaw, the panel deferred to the BIA's interpretation of that phrase in *Matter of Soram*, 25 I. & N. Dec. 378 (BIA 2010). In *Soram*, the BIA held that the phrase "a crime of child abuse, child neglect, or child abandonment" is sufficiently capacious to encompass child endangerment offenses committed with a *mens rea* of at least criminal negligence. *Id.* at 380–81. After deferring to the BIA's definition of the generic federal offense, the panel in *Martinez-Cedillo* concluded that a conviction under California Penal Code § 273a(a) qualifies categorically as a conviction for "a crime of child abuse, child neglect, or child abandonment." 896 F.3d at 992–94.

We are not bound by *Martinez-Cedillo*'s resolution of this issue. The three-judge panel's decision was rendered non-precedential when the full court agreed to rehear the case en banc, 918 F.3d 601 (9th Cir. 2019), and the en banc court later vacated the panel's decision when it dismissed the appeal as moot, 923 F.3d 1162 (9th Cir. 2019). Given these developments, all agree that *Martinez-Cedillo* itself is no longer binding precedent.

During the interval between the three-judge panel's

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decision in *Martinez-Cedillo* and the full court's decision to rehear the case en banc, two other panels issued published opinions that relied on *Martinez-Cedillo* in holding that the BIA's decision in *Soram* is entitled to deference under *Chevron*. *See* *Menendez v. Whitaker*, 908 F.3d 467, 474 (9th Cir. 2018); *Alvarez-Cerriteno v. Sessions*, 899 F.3d 774, 781 (9th Cir. 2018). Those decisions have not been vacated. As a three-judge panel, we are ordinarily bound to follow published decisions issued by prior panels. *See* *Miller v. Gammie*, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc). The unusual circumstances presented here, however, lead us to conclude that this case falls outside the scope of the general rule.

Both *Alvarez-Cerriteno* and *Menendez* were decided shortly after issuance of the opinion in *Martinez-Cedillo*, during the period in which en banc review in *Martinez-Cedillo* was under consideration.[2] Both decisions ***1130** simply cited *Martinez-Cedillo* as having settled that *Soram* is entitled to deference under *Chevron*; neither engaged in any independent analysis of the issue. The panels were not free to engage in any such analysis, for they were bound at the time to follow *Martinez-Cedillo*. Indeed, one of the panel members in *Alvarez-Cerriteno* expressly noted that, had she *not* been bound by *Martinez-Cedillo*, she would have "rule[d] in accord with Judge Wardlaw's dissent in that case." 899 F.3d at 785 (Berzon, J., concurring).

2 *Martinez-Cedillo* was decided on July 23, 2018, *Alvarez-Cerriteno* on August 8, 2018, and *Menendez* on November 8, 2018. The petitioner in *Martinez-Cedillo* filed his petition for rehearing en banc on October 22, 2018, shortly before *Menendez* was decided. The full court agreed to rehear *Martinez-Cedillo* en banc on March 18, 2019.

In both cases, despite following *Martinez-Cedillo* and deferring to *Soram*'s definition of "a crime of child abuse, child neglect, or child abandonment," the panels nonetheless ruled in the petitioners' favor on the ground that the offenses in question were broader than the generic federal offense, even as defined by the BIA. *Menendez*, 908 F.3d at 474–75; *Alvarez-Cerriteno*, 899 F.3d at 783–84. Not surprisingly, neither of the petitioners sought en banc review. Nor was there any reason for an off-panel judge to call for rehearing en banc *sua sponte* so that those cases could be held pending the outcome of en banc proceedings in *Martinez-Cedillo*. Even if the en banc court had ultimately adopted the position of the dissent in *Martinez-Cedillo*, doing so would not have affected the outcome in either *Alvarez-Cerriteno* or *Menendez*. Moreover, during the window in which a *sua sponte* en banc call could have been made in those cases, no one could have anticipated that *Martinez-Cedillo* would eventually be dismissed as moot, thereby precluding the full court from resolving whether the BIA's decision in *Soram* should receive deference under *Chevron*.

Given this unique sequence of events, we do not think *Alvarez-Cerriteno* or *Menendez* can now be viewed as binding circuit precedent on whether *Soram* is entitled to *Chevron* deference, any more than *Martinez-Cedillo* itself can. Both *Alvarez-Cerriteno* and *Menendez* simply followed *Martinez-Cedillo* as then-binding circuit precedent without engaging in any independent analysis of the deference issue, and both decisions were effectively insulated from en banc review on the legal issue decided in *Martinez-Cedillo*. As a result, their status as circuit precedent on whether *Soram* is entitled to deference rises or falls with the status of *Martinez-Cedillo*. Since the opinion in *Martinez-Cedillo* was vacated and deemed non-precedential by the en banc court, we must decide anew whether Diaz-Rodriguez's conviction under California Penal Code § 273a(a) renders him removable under 8 U.S.C. § 1227(a)(2)(E)(i).

The dissent takes issue with this treatment of *Alvarez-Cerriteno* and *Menendez*, arguing that it runs afoul of this circuit's rule "that a three-judge panel is 'bound by the prior decision of another three-judge panel,' " which " 'gives way when, but only when, the earlier decision is clearly irreconcilable with the holding or reasoning of intervening authority from our court sitting en banc or the Supreme Court.' " Dissent at 1143 (quoting *Aleman Gonzalez v. Barr*, 955 F.3d 762, 765 (9th Cir. 2020), *cert. granted*, ––– U.S. ––––, ––– S.Ct. ––––, ––– L.Ed.2d ––––, 2021 WL 3711642 (U.S. Aug. 23, 2021) (No. 20-322)). But the decisions in *Alvarez-Cerriteno* and *Menendez* are in fact irreconcilable with a subsequent decision of the court sitting en banc: As already stated, their reliance on the

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decision of the three-judge panel in *Martinez-Cedillo* is in direct conflict with the en banc court's decision to designate that decision as non-precedential—a designation explicitly noted in the order of the en banc court dismissing the appeal as moot. *See* 923 F.3d at 1162. As a result, the ***1131** circumstances here, though unusual, are such that the otherwise standard rule of precedent gives way.[3]

3 The dissent also claims that this approach to *Alvarez-Cerriteno* and *Menendez* is "not sound as a practical matter" because an attorney looking to see whether *Martinez-Cedillo* "remains good law" would learn "only that [the decision] was vacated," and not that an en banc decision undercut it. Dissent at 1144. But this is not correct. Because the en banc order dismissing the appeal explicitly states that the "three-judge panel disposition ... was designated as non-precedential," 923 F.3d at 1162, an attorney conducting an appropriate review of the *Martinez-Cedillo* decision would be confronted with the fact that an en banc court subsequently deemed the decision one that could not properly be relied upon.

III

To determine whether a conviction under California Penal Code § 273a(a) constitutes a conviction for "a crime of child abuse, child neglect, or child abandonment," we employ the now-familiar categorical approach. Under that approach, we ask whether "the least of the acts criminalized by the state statute" falls within the definition of the federal offense. *Esquivel-Quintana v. Sessions*, ––– U.S. ––––, 137 S. Ct. 1562, 1568, 198 L.Ed.2d 22 (2017). If so, the two offenses are a categorical match and the state conviction may serve as a ground for removal. *Id.*

Identifying the least of the acts criminalized under California Penal Code § 273a(a) is straightforward. It consists of causing or permitting a child "to be placed in a situation where his or her person or health is endangered," committed with a *mens rea* of criminal negligence.[4] Such an offense, involving a serious risk of harm to the child but no resulting injury, is commonly referred to as a child endangerment offense. That is the sense in which we use the term "child endangerment" here.

4 Because California Penal Code § 273a(a) is not divisible, *see Ramirez v. Lynch*, 810 F.3d 1127, 1138 (9th Cir. 2016), we need not consider application of the so-called modified categorical approach. *See Esquivel-Quintana*, 137 S. Ct. at 1568 n.1.

Identifying the elements of the federal offense at issue is more complicated. Congress enacted 8 U.S.C. § 1227(a)(2)(E)(i) as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Pub. L. No. 104-208, § 350(a), 110 Stat. 3009-546, 3009-640. Without further defining the phrase, § 1227(a)(2)(E)(i) added "a crime of child abuse, child neglect, or child abandonment" to the list of offenses that render non-citizens removable from the United States. When a federal statute specifies an offense by name without further defining its elements, we assume that Congress intended to rely on a uniform, generic version of the offense, drawn from the ordinary meaning of the term at the time Congress enacted the statute. *Esquivel-Quintana*, 137 S. Ct. at 1569; *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979). We share the task of identifying the elements of the generic federal offense with the BIA because it is the agency charged with implementing statutory provisions specifying the grounds for removal.

In two decisions, the BIA has attempted to formulate a definition of the generic federal offense described by the phrase "a crime of child abuse, child neglect, or child abandonment." In *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503 (BIA 2008), the agency interpreted "crime of child abuse" to mean "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." *Id.* at 512. The Board left open ***1132** whether this definition included state offenses "in which a child is merely placed or allowed to remain in a dangerous situation, without any element in the statute requiring ensuing harm." *Id.* at 518 n.2 (Pauley, concurring). The BIA answered that question soon afterward in *Matter of Soram*, 25 I. & N. Dec. 378 (BIA 2010), where it held that "the term 'crime of child abuse,' as described in *Velazquez-Herrera*, is not limited to offenses requiring proof of injury to the child." *Id.* at 381. The agency also clarified that, in its view, the phrase "a crime of child abuse, child neglect, or child abandonment" "denotes a unitary concept," such that the agency's "broad definition of child abuse describes the

entire phrase." *Id.* After *Soram*, then, non-citizens convicted of negligent child endangerment offenses were subject to removal under 8 U.S.C. § 1227(a)(2)(E)(i).

Unlike the three-judge panel in *Martinez-Cedillo*, we do not think the BIA's decision in *Soram* is entitled to deference on the question whether negligent child endangerment offenses are encompassed within the phrase "a crime of child abuse, child neglect, or child abandonment." In our view, as to that specific question, "Congress has supplied a clear and unambiguous answer," precluding deference under *Chevron* step one. *Pereira v. Sessions*, ––– U.S. ––––, 138 S. Ct. 2105, 2113, 201 L.Ed.2d 433 (2018).

In deciding whether deference is owed under *Chevron*, we are guided by the Supreme Court's resolution of a similar issue in *Esquivel-Quintana*. There, the Court addressed another conviction-based provision enacted as part of IIRIRA, this one making conviction for "sexual abuse of a minor" grounds for removal. 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1101(a)(43)(A). The question before the Court was whether the generic federal definition of this offense, as applied to the crime of statutory rape, requires the victim to be younger than 16. The BIA had held that the generic federal definition included crimes in which the victim was 16 or 17, as long as there was "a meaningful age difference between the victim and the perpetrator." *Esquivel-Quintana*, 137 S. Ct. at 1567 (quoting *Matter of Esquivel-Quintana*, 26 I. & N. Dec. 469, 477 (BIA 2015)). The Court rejected the BIA's interpretation under *Chevron* step one and held that the generic federal definition of sexual abuse of a minor "requires the age of the victim to be less than 16." *Id.* at 1572–73.

Although the precise holding of *Esquivel-Quintana* has no direct bearing on the issue before us, the Court's reasoning is nonetheless highly instructive. After observing that Congress had not defined the term "sexual abuse of a minor," *id.* at 1569, the Court did not throw up its hands and declare the statute ambiguous with respect to the specific question raised there. The Court instead relied on "the normal tools of statutory interpretation" to determine whether the statute provided a clear answer. *Id.* The Court looked to definitions from contemporary legal dictionaries, statutory structure, state criminal codes in effect at the time of IIRIRA's enactment, and a related federal criminal statute. *Id.* at 1569–72. Based on its review of those sources, the Court concluded that "the statute, read in context, unambiguously forecloses the Board's interpretation," rendering deference to the agency under *Chevron* unwarranted. *Id.* at 1572.

As discussed below, three of the four sources of statutory meaning the Court consulted in *Esquivel-Quintana*—contemporary legal dictionaries, statutory structure, and contemporary state criminal codes—support the conclusion that § 1227(a)(2)(E)(i) unambiguously forecloses the BIA's interpretation of the statute in *Soram*. (The fourth source, related federal criminal statutes, does not aid our analysis. ***1133** While there are various federal statutes defining child abuse and neglect, *see Velazquez-Herrera*, 24 I. & N. Dec. at 509–11, they all arise in the civil context and do not purport to define criminal conduct.)

Legal dictionaries. Contemporary legal dictionaries from shortly before and after IIRIRA's enactment indicate that child abuse, child neglect, and child abandonment were well-understood concepts with distinct meanings that do not encompass negligent child endangerment offenses.

The common meaning of "child abuse" in 1996 required the infliction of some form of injury upon the child. One of the principal dictionaries cited by the Court in *Esquivel-Quintana* defines the term as "the infliction of physical or emotional injury" on a child, including sexual abuse. Merriam-Webster's Dictionary of Law 4, 76 (1996). The two editions of Black's Law Dictionary that bookend IIRIRA's enactment contain similar definitions. The Sixth Edition defines "child abuse" as "[a]ny form of cruelty to a child's physical, moral or mental well-being," with "cruelty" defined as "[t]he intentional and malicious infliction of physical or mental suffering." Black's Law Dictionary 239, 377 (6th ed. 1990) (Black's Sixth Edition). The Seventh Edition defines "child abuse" as "[a]n intentional or neglectful physical or emotional injury imposed on a child, including sexual molestation." Black's Law Dictionary 10, 233 (7th ed. 1999) (Black's Seventh Edition). Each of these definitions excludes the child endangerment offense described in California Penal Code § 273a(a) because that offense does not require the infliction of any injury on the child.

The common meaning of the term "child neglect" in 1996 required a sustained failure by a child's caregiver to provide for the child's basic needs. For example, Merriam-Webster's defines "neglect" to mean "a failure to provide a child under one's care with proper food,

clothing, shelter, supervision, medical care, or emotional stability." Merriam-Webster's Dictionary of Law 324. The Sixth Edition of Black's Law Dictionary does not define the term "child neglect" directly, but it defines "neglected child" to mean a child 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 he is in such condition of want or suffering, or is under such improper care or control as to endanger his morals or health." Black's Sixth Edition 1032. The Seventh Edition defines "child neglect" to mean "[t]he failure of a person responsible for a minor to care for the minor's emotional or physical needs." Black's Seventh Edition 233; *see also id.* (defining "neglected child" as: "1. A child whose parents or legal custodians are unfit to care for him or her for reasons of cruelty, immorality, or incapacity. 2. A child whose parents or legal custodians refuse to provide the necessary care and medical services for the child."). These definitions exclude child endangerment offenses, such as California Penal Code § 273a(a), that punish one-time negligent acts or omissions exposing a child to the risk of harm.

The same is true of the common meaning in 1996 of "child abandonment," a term that was understood to involve the forsaking of one's parental duties. As relevant here, Merriam-Webster's defines "abandonment" as the "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." Merriam-Webster's Dictionary of Law 1; *see also* Black's Sixth Edition 2 (defining "abandonment" with respect to children as "[d]esertion or willful forsaking"; "[f]oregoing parental duties"). The ***1134** Seventh Edition of Black's Law Dictionary defines abandonment more simply as "[t]he act of leaving a spouse or child willfully and without an intent to return." Black's Seventh Edition 2; *see also* Bryan A. Garner, A Dictionary of Modern Legal Usage 3 (2d ed. 1995) (abandon: "in family law, to leave children or a spouse willfully and without an intent to return"). No one contends that one-time negligent acts or omissions exposing a child to the risk of harm fall within the common meaning of "child abandonment."

Statutory structure. The contemporary definitions of child abuse, child neglect, and child abandonment make clear that the ordinary meaning of those terms in 1996 did not encompass negligent child endangerment offenses. The question becomes whether Congress's omission of child endangerment from the list of crimes specified in § 1227(a)(2)(E)(i) was the product of deliberate choice or instead mere inadvertence, thereby leaving a gap in the statute for the BIA to fill. Statutory structure sheds light on that inquiry.

Under the common meaning of the terms child abuse, child neglect, and child abandonment discussed above, non-citizens convicted of those crimes have either inflicted harm on a child or forsaken their parental responsibilities altogether. Making such conduct a ground for removal will in many cases result in separation of the victims of those offenses from the convicted parent, at least in cases where (as here) the children are U.S. citizens or otherwise have lawful status in the United States. Congress could readily have viewed the forced separation of parent and child—and its impact on the child's future well-being—with less concern when the child has been abused, neglected, or abandoned by the very parent facing removal.

We do not think the same can be said when the parent in question has been convicted of negligent child endangerment. That offense can be predicated on a single lapse in parental judgment, such as leaving young children at home alone while the parent is at work. *See, e.g.*, *Ibarra v. Holder*, 736 F.3d 903, 905 & n.3 (10th Cir. 2013). It is easy to see why Congress could have viewed this less-serious form of misconduct as an unacceptable basis under the immigration laws for separating parents from their children.

A neighboring provision of the INA suggests that Congress deliberately omitted child endangerment from the list of offenses specified in § 1227(a)(2)(E)(i). To ameliorate the harshness of the removal sanction, Congress has provided a form of discretionary relief known as cancellation of removal. *See* 8 U.S.C. § 1229b. Non-citizens who are not lawful permanent residents are eligible for cancellation of removal if they can show, among other things, that their removal would result in "exceptional and extremely unusual hardship" to their child, provided the child is a U.S. citizen or lawful permanent resident. § 1229b(b)(1)(D). However, a conviction for "a crime of child abuse, child neglect, or child abandonment" under § 1227(a)(2)(E)(i) not only renders a non-citizen removable but also makes him or her statutorily ineligible for this discretionary form of relief. § 1229b(b)(1)(C). Thus, under the BIA's reading of § 1227(a)(2)(E)(i), a non-citizen convicted of negligently endangering her child on a single occasion is categorically ineligible for cancellation of removal even if she can prove that "separation would cause 'exceptional and extremely unusual hardship' to that same child."

Matthews v. Barr, 927 F.3d 606, 625 (2d Cir. 2019) (Carney, J., dissenting). Mandating separation of parent and child in those circumstances would be decidedly at odds with the otherwise child-protective aim of § 1227(a)(2)(E)(i).

***1135** *State criminal codes*. The Supreme Court has held that a survey of state criminal codes as they stood at the time Congress enacted the statute in question provides useful context when arriving at the generic federal definition of an offense. *See, e.g.*, *Esquivel-Quintana*, 137 S. Ct. at 1571 & n.3; *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189–90, 127 S.Ct. 815, 166 L.Ed.2d 683 (2007); *Perrin*, 444 U.S. at 44–45, 100 S.Ct. 311. Here, we need not consult state criminal codes to decide whether *all* child endangerment offenses are included within the generic federal definition of "a crime of child abuse, child neglect, or child abandonment." The narrower question in this case is whether *negligent* child endangerment offenses are included within the generic definition, since that is the least of the acts criminalized under California Penal Code § 273a(a).

In 1996, only a handful of States criminalized conduct that would constitute child endangerment under statutes proscribing "abuse," "neglect," or "abandonment." But to err on the side of caution, we conducted a survey of state criminal codes to identify any State that criminalized negligent child endangerment irrespective of the label used. Such a survey confirms that, even when broadly construed, the phrase "a crime of child abuse, child neglect, or child abandonment" does not encompass negligent child endangerment offenses.

At the time of IIRIRA's enactment, only 14 States criminalized child endangerment committed with a *mens rea* of criminal negligence. *See* Appendix A. The other 36 States did not criminalize such conduct. Twenty-three States, along with the District of Columbia, criminalized child endangerment only if committed with a *mens rea* of at least recklessness, *see* Appendix B, while the remaining 13 States did not criminalize child endangerment at all, *see* Appendix C.[5]

[5] The Tenth Circuit reported slightly different numbers in *Ibarra* because its survey focused on all offenses against children not requiring a resulting injury to the child, including offenses constituting child neglect or child abandonment. *See* *Ibarra*, 736 F.3d at 918–21. Our survey, by contrast, focuses solely on child endangerment offenses because that is the offense for which Diaz-Rodriguez was convicted.

The general consensus drawn from state criminal codes supports the conclusion that § 1227(a)(2)(E)(i) unambiguously forecloses the BIA's interpretation of the statute in *Soram*. *See* *Esquivel-Quintana*, 137 S. Ct. at 1572. In *Esquivel-Quintana*, 16 States set the age of consent for statutory rape offenses at 17 or 18, whereas 31 States and the District of Columbia set the age of consent at 16. *Id.* at 1571. The Supreme Court held that the consensus view of 31 States and the District of Columbia supported the conclusion that Congress unambiguously foreclosed the BIA's attempt to define the generic offense of sexual abuse of a minor to include an age of consent of 18. *Id.* at 1571–72. Here, the consensus view of the States cuts even more strongly against the BIA's interpretation, as 36 States and the District of Columbia excluded negligent child endangerment from the realm of conduct that could be deemed covered by the phrase "a crime of child abuse, child neglect, or child abandonment."

* * *

We conclude that the text of 8 U.S.C. § 1227(a)(2)(E)(i) unambiguously forecloses the BIA's interpretation of "a crime of child abuse, child neglect, or child abandonment" as encompassing negligent child endangerment offenses. *See* *Ibarra*, 736 F.3d at 917–18 (reaching same conclusion); *cf. Zarate-Alvarez v. Garland*, 994 F.3d 1158, 1164–65 (10th Cir. 2021) (per curiam) (reaching opposite conclusion as to child endangerment offense requiring knowing or reckless conduct). As in ***1136** *Esquivel-Quintana*, 137 S. Ct. at 1572, deference under *Chevron* is therefore unwarranted.

While several of our sister circuits have deferred to the BIA's decision in *Soram*, we find those decisions both distinguishable and unpersuasive. They are distinguishable because none involved a negligent child endangerment offense, the specific offense addressed here, and they are unpersuasive because none engaged in any meaningful analysis of the text of § 1227(a)(2)(E)(i) at step one of the *Chevron* analysis. *See* *Garcia v. Barr*, 969 F.3d 129, 133–34 & n.1 (5th Cir. 2020); *Mondragon-Gonzalez v. Attorney General*, 884 F.3d 155, 158–59 (3d Cir. 2018); *Pierre v. U.S. Attorney General*, 879 F.3d 1241, 1249–50 (11th Cir.

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2018); *Florez v. Holder*, 779 F.3d 207, 209, 211 (2d Cir. 2015). After noting that Congress did not define the phrase "a crime of child abuse, child neglect, or child abandonment," they declared the statute ambiguous without first "exhaust[ing] all the 'traditional tools' of construction." *Kisor v. Wilkie*, ––– U.S. ––––, 139 S. Ct. 2400, 2415, 204 L.Ed.2d 841 (2019) (quoting *Chevron*, 467 U.S. at 843 n.9, 104 S.Ct. 2778). In our view, this "cursory analysis" of statutory text, *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring), cedes too much power to the BIA to expand the grounds for removal beyond those specified by Congress. We agree with the Tenth Circuit's observation that "while the statutory text at issue here does contain *some* ambiguity, Congress's intent is not so opaque as to grant the BIA the sweeping interpretive license it has taken." *Ibarra*, 736 F.3d at 910.[6]

6 The dissent suggests that the Tenth Circuit, in *Ibarra*, "implicitly recognized the statute's ambiguity" even as it ultimately declined to defer to the BIA's interpretation. Dissent at 1145 (citing *Ibarra*, 736 F.3d at 910). However, while the *Ibarra* court did recognize that the statute contains "*some* ambiguity," it ultimately held that the "plain language of the statute"—a *Chevron* step one inquiry—precluded deference to the BIA on the interpretation of the particular language at issue. 736 F.3d at 910.

Because California Penal Code § 273a(a) criminalizes conduct that falls outside the generic federal definition, it is not a categorical match for "a crime of child abuse, child neglect, or child abandonment." Contrary to the BIA's ruling, Diaz-Rodriguez's conviction under that statute does not render him removable from the United States under 8 U.S.C. § 1227(a)(2)(E)(i).

PETITION FOR REVIEW GRANTED.

APPENDIX A

In 1996, the following 14 States criminalized child endangerment committed with a *mens rea* of negligence:

***1137**

Alabama	Ala. Code §§ 12-15-1(10)(f), 13A-13-6(a)(2); *see Pearson v. State,* 601 So. 2d 1119, 1126 (Ala. Crim. App. 1992)
Arizona	Ariz. Rev. Stat. Ann. § 13-3623(B)(3), (C)(3)
California	Cal. Penal Code § 273a; *see People v. Valdez*, 27 Cal.4th 778, 118 Cal.Rptr.2d 3, 42 P.3d 511, 517–18 (2002)
Colorado	Colo. Rev. Stat. Ann. § 18-6-401(1), (7)(b)(II)
Missouri	Mo. Rev. Stat. § 568.050(1)
Nebraska	Neb. Rev. Stat. § 28-707(1)(a)

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New Mexico	N.M. Stat. Ann. § 30-6-1(C)(1)
New York	N.Y. Penal Law § 260.10(2); N.Y. Fam. Ct. Act § 1012(e), (f); *see People v. Scully*, 134 Misc.2d 906, 513 N.Y.S.2d 625, 627 (Crim. Ct. 1987)
Oregon	Or. Rev. Stat. § 163.545(1)
South Carolina	S.C. Code Ann. § 20-7-50(A)(1); *see* *State v. Fowler*, 322 S.C. 157, 470 S.E.2d 393, 396 (S.C. Ct. App. 1996)
South Dakota	S.D. Codified Laws §§ 26-8A-2(6), 26-9-1
Texas	Tex. Penal Code Ann. § 22.041(c)
Virginia	Va. Code Ann. §§ 16.1-228(1), 18.2-371; *see* *Miller v. Commonwealth*, 64 Va.App. 527, 769 S.E.2d 706, 713–14 (2015)
Wyoming	Wyo. Stat. Ann. § 6-4-403(a)(ii)

APPENDIX B

In 1996, the following 23 States and the District of Columbia criminalized child endangerment if committed with a *mens rea* of at least recklessness:

***1138**

Arkansas	Ark. Code Ann. § 5-27-204(a)
Connecticut	Conn. Gen. Stat. § 53-21(1); *see State v.*

	Dennis, 150 Conn. 245, 188 A.2d 65, 66–67 (1963)*State v. Dennis*, 150 Conn. 245, 188 A.2d 65, 66–67 (1963)
Delaware	Del. Code Ann. tit. 11, § 1102(a)
District of Columbia	D.C. Code § 22-1101(b)
Hawaii	Haw. Rev. Stat. § 709-904(2)
Idaho	Idaho Code § 18-1501(1)–(2); *see State v. Young*, 138 Idaho 370, 64 P.3d 296, 299 (2002)
Illinois	720 Ill. Comp. Stat. 5/12-21.6; *see People v. Jordan*, 218 Ill.2d 255, 300 Ill.Dec. 270, 843 N.E.2d 870, 879 (2006)
Indiana	Ind. Code § 35-46-1-4(a)(1)
Iowa	Iowa Code § 726.6(1)(a)
Kansas	Kan. Stat. Ann. § 21-3608(a)
Kentucky	Ky. Rev. Stat. Ann. §§ 530.060(1), 600.020(1)
Maine	Me. Stat. tit. 17-A, § 554(1)(C)
Minnesota	Minn. Stat. § 609.378(b)(1)
Montana	Mont. Code Ann. § 45-5-622(1)

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New Hampshire	N.H. Rev. Stat. Ann. § 639:3(I)
North Carolina	N.C. Gen. Stat. § 14-318.2(a); *see State v. Hunter*, 48 N.C.App. 656, 270 S.E.2d 120, 122 (1980)
Ohio	Ohio Rev. Code Ann. § 2919.22(A); *see State v. Barton*, 71 Ohio App.3d 455, 594 N.E.2d 702, 707 n.1 (1991)
Oklahoma	Okla. Stat. tit. 10, §§ 7102(B)(1), 7115; *see Ball v. State*, 173 P.3d 81, 92 (Okla. Crim. App. 2007)
Pennsylvania	18 Pa. Cons. Stat. § 4304(a)
Tennessee	Tenn. Code Ann. §§ 37-1-102(b)(1), (b)(12)(G); 37-1-157(a); *see Konvalinka v. Chattanooga-Hamilton County Hospital Authority*, 249 S.W.3d 346, 357 (Tenn. 2008)
Vermont	Vt. Stat. Ann. tit. 13, § 1304; *see State v. Amsden*, 194 Vt. 128, 75 A.3d 612, 624 (2013)
Washington	Wash. Rev. Code § 9A.42.030(1)
West Virginia	W. Va. Code Ann. §§ 61-8D-1(6), 61-8D-4(e); see 2014 W. Va. Acts 451
Wisconsin	Wis. Stat. §§ 948.03(4), 948.04(2)

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endangerment at all. The cited statutory provisions refer to the jurisdiction's other crimes against children.

***1140**

***1139 APPENDIX C**

In 1996, the following 13 States did not criminalize child

Alaska	Alaska Stat. §§ 11.51.100 (intentional desertion), 11.51.120 (criminal nonsupport)
Florida	Fla. Stat. §§ 39.01 (definitions), 827.04 (abuse), 827.05 (neglect)
Georgia	Ga. Code Ann. §§ 16-5-70 (abuse and neglect), 19-10-1 (abandonment)
Louisiana	La. Stat. Ann. § 14:79.1 (abandonment)
Maryland	Md. Code Ann., Art. 27, § 35C (abuse); Cts. & Jud. Proc. § 3-831 (contribution to delinquency); Fam. Law §§ 10-203 (nonsupport and desertion), 10-219 (desertion)
Massachusetts	Mass. Gen. Laws ch. 119, § 39; ch. 273, § 1 (abandonment)
Michigan	Mich. Comp. Laws §§ 750.135 (abandonment), 750.136b (abuse)
Mississippi	Miss. Code Ann. §§ 43-21-105(m) (defining "abused child"); 97-5-1 (abandonment); 97-5-39(1), (2) (contributing to neglect; abuse)
Nevada	Nev. Rev. Stat. §§ 200.508, 432B.140 (abuse and neglect)

New Jersey	N.J. Stat. Ann. §§ 2C:24-4 (moral or sexual endangerment); 9:6-1, 9:6-3 (abuse, abandonment, cruelty, and neglect)
North Dakota	N.D. Cent. Code §§ 14-07-15 (abandonment), 14-09-22 (abuse and neglect)
Rhode Island	R.I. Gen. Laws §§ 11-2-1 (abandonment), 11-9-5 (cruelty and neglect), 11-9-5.3 (abuse)
Utah	Utah Code Ann. § 76-5-109 (abuse)

CALLAHAN, Circuit Judge, dissenting:

***1141** I am compelled to dissent for two reasons. First, I do not agree that despite the "unique sequences of events" resulting in *Martinez-Cedillo v. Sessions*, 896 F.3d 979 (9th Cir. 2018), being vacated, 918 F.3d 601 (9th Cir. 2019), we as a three-judge panel may disregard our published decisions in *Menendez v. Whitaker*, 908 F.3d 467 (9th Cir. 2018), and *Alvarez-Cerriteno v. Sessions*, 899 F.3d 774 (9th Cir. 2018). Second, even if the issue were properly before us, I do not agree with the majority's peculiar reading of "a crime of child abuse, child neglect, or child abandonment" as not encompassing a child endangerment offense committed with a mens rea of at least criminal negligence. The majority's suggestion that 8 U.S.C. § 1227(a)(2)(E)(i)[1] is unambiguous is contrary to our precedent and the unanimous opinions of our sister circuits. Moreover, the majority fails to recognize that our task is limited to reviewing the agency's interpretation for "reasonableness." Instead, the majority proffers its own definition of "crime of child abuse," based primarily on selected dictionary definitions and its own research. The majority justifies its creative approach by urging that negligent child endangerment should not be a basis for separating parents from their children. But this is an issue on which reasonable minds may differ and the majority's approach misperceives our limited role in reviewing agency decisions.

[1] The statute provides that a person shall be removed "who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment."

I.

Although the majority is concerned that a "single lapse in parental judgment" might force the separation of parent and child (Maj. at 1134), this is not such a case. Diaz-Rodriguez has an extensive history of alcohol abuse and has been convicted twice for felony child abuse. In 1989, Diaz-Rodriguez pleaded guilty to driving drunk with a blood alcohol content (BAC) of .16. In 1994, he pleaded guilty to driving drunk when his BAC was .12. In 2003, Diaz-Rodriguez drove drunk with his five-year-old son, Rafael, in the car with a blood alcohol level of .20, over twice the legal limit. As a result, he was convicted of drunk driving and felony child abuse under ***1142** Cal. Penal Code (CPC) § 273a(a). Diaz-Rodriguez picked up another DUI conviction that same year. In 2009, six years later, Diaz-Rodriguez committed the same crime when he drove drunk with his six-year-old daughter, Paula, in the car. As a result, he was again convicted of child abuse

under CPC § 273a(a) and drunk driving. When asked why he would drive drunk with his child in the car after being convicted for that same offense before, he reasoned, "I wasn't feeling like I was drunk or I wasn't feeling bad as far as after having had those beers." The Department of Homeland Security initiated removal proceedings against Diaz-Rodriguez based on his 2009 child endangerment conviction.

II.

In *Martinez-Cedillo*, 896 F.3d 979 (9th Cir. 2018), vacated 923 F.3d 1162 (9th Cir. 2019), we held that California Penal Code § 273a(a) was "categorically a crime of child abuse, neglect, or abandonment as interpreted by the BIA." *Id.* at 981. We found that the BIA's opinions in *Matter of Velasquez-Herrera*, 24 I. & N. Dec. 503 (BIA 2008), and *Matter of Soram*, 25 I. & N. Dec. 378 (BIA 2010), which expanded the definition of child abuse to include an offense that did not result in actual harm or injury to the child, were reasonable constructions of ambiguous statutory language. *Martinez-Cedillo*, 896 F.3d at 992.

We revisited *Soram* in *Alvarez-Cerriteno v. Sessions*, 899 F.3d 774 (9th Cir. 2018). We applied the *Chevron* two-step analysis which "asks if (1) the INA is ambiguous with regard to what constitutes a 'crime of child abuse' and (2) the BIA's construction in *Soram* reasonably resolves the ambiguity." *Id.* at 781. We then recognized that, in *Martinez-Cedillo*, we had held that "the BIA's interpretation of the generic crime in *Soram* is entitled to *Chevron* deference" and that we were bound by this precedent. *Id.* (citing *Miller v. Gammie,* 335 F.3d 889, 899 (9th Cir. 2003) (en banc)). Thus, the generic " 'crime of child abuse,' as used in the INA, includes acts and omissions that (1) are criminally negligent and (2) create at least a 'reasonable probability' that a child will be harmed." *Id.* (citing *Soram*, 25 I & N. Dec. at 385–86).

Alvarez-Cerriteno proceeded to hold that the Nevada statute in issue was broader than the federal generic crime because it included instances in which there was only a ' "reasonably foreseeable' risk of harm to a child." *Id.* at 784.

We also considered deference to the BIA's interpretation in *Menendez v. Whitaker*, 908 F.3d 467 (9th Cir. 2018). One issue concerned whether a conviction under California Penal Code § 288(c)(1) was a crime of child abuse. We deferred to the BIA's definition of "crime of child abuse" as set out in *Velazquez-Herrera*, 24 I. & N. Dec. 503, and *Soram*, 25 I. & N. Dec. 370, citing *Martinez-Cedillo*. *Id.* at 474. We held that, read together, "*Velazquez-Herrera* and *Soram* require (1) a mens rea that rises at least to the level of criminal negligence; and (2) 'maltreatment' that results in either actual injury to a child, or a 'sufficiently high risk of harm' to a child." *Id.*

Menendez ultimately found that § 288(c)(1) was broader than the generic federal definition of "crime of child abuse" because it did not require a mens rea of at least criminal negligence and did not require proof of actual injury "or a 'sufficiently high risk of harm' as an element of the offense." *Id.* at 475.

The three-judge panel's opinion in *Martinez-Cedillo* was declared non-precedential when we voted to rehear it en banc, 918 F.3d 601 (9th Cir. 2019), and the opinion was then vacated after the petitioner died. 923 F.3d 1162 (9th Cir. 2019). But both *Alvarez-Cerriteno* and *Menendez* remain ***1143** good law. We have cited *Alvarez-Cerriteno* as supporting deference to the BIA's interpretation, *Cortes-Maldonado v. Barr*, 978 F.3d 643, 648 (9th Cir. 2020), as has the Fifth Circuit, *Garcia v. Barr*, 969 F.3d 129, 132, 134 (5th Cir. 2020) (citing *Alvarez-Cerriteno* as deferring to the BIA's interpretation of "crime of child abuse" and ultimately joining "the Second, Third, Ninth, and Eleventh Circuits in holding that the Board's interpretation is entitled to *Chevron* deference").

The majority nonetheless holds that *Alvarez-Cerriteno* and *Menendez*, do not establish "binding circuit precedent" because the opinions simply follow *Martinez-Cedillo* "without engaging in any independent analysis of the deference issue," and because "both decisions were effectively insulated from en banc review on the legal issue decided in *Martinez-Cedillo*." Maj. at 1130.

The majority cites no authority for its approach which is

contrary to our established case law on precedent. In *Gonzalez v. Barr*, 955 F.3d 762, 765 (9th Cir. 2020), we reiterated that a three-judge panel is "bound by the prior decision of another three-judge panel" and "gives way when, but only when, the earlier decision is clearly irreconcilable with the holding or reasoning of intervening authority from our court sitting en banc or the Supreme Court." *See also* *Miller v. Gammie*, 335 F.3d 889, 893, 899–90 (9th Cir. 2003). Moreover, the "clearly irreconcilable" requirement is a "high standard," and when "we can apply our precedent consistently with that of the higher authority, we *must* do so." *Id.* (quoting *FTC v. Consumer Def., LLC*, 926 F.3d 1208, 1213 (9th Cir. 2019)) (emphasis added). Here, there is no intervening irreconcilable decision by the Supreme Court or the Ninth Circuit. Indeed, if we are going to adopt a new exception to our approach to precedent, such a departure should itself be made by an en banc panel.[2]

2 The majority's argument that *Alvarez-Cerriteno* and *Menendez* "are in fact irreconcilable with a subsequent decision of the court sitting en banc" (Maj. at 1130) mischaracterizes the en banc court orders in *Martinez-Cedillo*. The first order, 918 F.3d 601, noted that the case would be reheard en banc and stated that the three-judge disposition "shall not be cited as precedent." The second order, 923 F.3d 1162, reiterated that the three-judge disposition, which had been designated as non-precedential was vacated and the appeal dismissed. The en banc panel never reached the merits of the *Martinez-Cedillo* opinion. Certainly, the opinion relied upon by *Alverez-Cerriteno* and *Menendez* was vacated but their continued deference to *Soram* is not "irreconcilable" to any Ninth Circuit en banc opinion or order.

Relatedly, the majority's approach is contrary to the principle of stare decisis. *See In re NCAA Athletic Grant in Aid Cap Antitrust Litigation*, 958 F.3d 1239, 1253 (9th Cir. 2020) (reiterating that stare decisis binds today's court to yesterday's decision). In *S & H Packing & Sales v. Tanimura Dist. Inc.*, 850 F.3d 446, 450 (9th Cir. 2017), vacated and reheard en banc 883 F.3d 797 (9th Cir. 2018), we cited *United States v. Lucas*, 963 F.2d 243, 247 (9th Cir. 1992), as "noting that subsequent panels are bound by prior panel decisions and only the en banc court may overrule panel precedent." We explained:

> In some cases, an earlier panel's election not to discuss an argument may prevent future panels from concluding the earlier panel implicitly accepted or rejected an argument. After all, "under the doctrine of stare decisis a case is important only for what it decides—for the 'what,' not for the 'why,' and not for the 'how.' " *In re Osborne*, 76 F.3d 306, 309 (9th Cir. 1996) ("[T]he doctrine of stare decisis concerns the holdings of previous cases, not the rationales[.]").

850 F.3d at 450. The majority, without any supporting authority, ignores "what" ***1144** *Alvarez-Cerriteno* and *Menendez* decided because it does not agree with the "why" of those opinions. Again, even if this were a sound approach, it is a decision reserved for an en banc panel.

Moreover, the proposal is not sound as a practical matter. How is one to determine whether the holding in *Alvarez-Cerriteno* that the Ninth Circuit defers to the BIA's reasonable interpretation of "crime of child abuse" is not precedential? The opinion remains extant and has even been cited by the Ninth Circuit as supporting deference to the BIA's interpretation. *See Cortes-Maldonado*, 978 F.3d at 648.[3] Nor can the deference be dismissed as dictum because deference to the BIA's decision is central to the panel's explanation for why the Nevada statute there at issue does not come within the BIA's definition of "crime of child abuse." The majority presumably requires that an attorney look to see if the authority cited in *Alvarez-Cerriteno* (here *Martinez-Cedillo*) remains good law. But this research would disclose only that *Martinez-Cedillo* was vacated. It would not disclose a contrary Ninth Circuit opinion, because there is no such opinion.

3 Because *Cortes-Maldonado* was decided well after *Martinez-Cedillo* was dismissed, it rebuts the majority's suggestion that *Alvarez-Cerriteno*'s precedential value is undercut because it was decided while en banc proceedings were pending in *Martinez-Cedillo*.

The majority's holding that *Alvarez-Cerriteno* and *Menendez* may be dismissed as precedent because *Martinez-Cedillo*, which *Alvarez-Cerriteno* and *Menendez* cite as authority, was vacated, is contrary to the Ninth Circuit's position on precedent, beyond the authority of a three-judge panel, and wrong.[4]

4 The majority's cure seems more viral than the

disease. If *Alvarez-Cerriteno* and *Menendez* need to be overruled, the majority could seek to have this appeal heard en banc. Such an approach is consistent with our approach to precedent. Nor is this a situation that is likely to reoccur as it arises out of a relatively unusual situation in which an appeal becomes moot between the time that we vote to grant rehearing en banc and when we hear the case en banc.

III.

The majority recognizes the two-step framework set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), *see* Maj. at 1128–29, and purports to disapprove of the BIA's definition of "crime of child abuse" under the first *Chevron* prong. Its analysis of "crime of child abuse" starts with a discussion of *Esquivel-Quintana v. Sessions*, ––– U.S. ––––, 137 S. Ct. 1562, 198 L.Ed.2d 22 (2017). There the Court held that a "state statute criminalizing consensual sexual intercourse between a 21-year-old and a 17-year-old" does not qualify "as sexual abuse of a minor under the INA." *Id.* at 1567. The Court concluded that "the statute, read in context, unambiguously forecloses the Board's interpretation." *Id.* at 1572. Contrary to the majority's reading, it is not clear whether the Supreme Court held the federal statute to be unambiguous (the first prong) or that the Board's interpretation of an ambiguous statute was unreasonable (the second prong).

The majority insists that its analysis proceeds under the first prong of *Chevron*. First, the majority states that *Soram* is not entitled to deference because "[i]n our view, as to that specific question, 'Congress has supplied a clear and unambiguous answer' precluding deference under *Chevron* step one." Maj. at 1132 (quoting *Pereira v. Sessions*, ––– U.S. ––––, 138 S. Ct. 2105, 2113, 201 L.Ed.2d 433 (2018)). Second, it asserts that in *Esquivel-Quintana*, 137 S. Ct. at 1567, the Supreme Court ***1145** rejected the BIA's interpretation "under *Chevron* step one." Maj. at 1132. Third, the majority dismisses contrary decisions by our sister circuits as not having "engaged in any meaningful analysis of the text of § 1227(a)(2)(E)(i) at step one of the *Chevron* analysis." Maj. at 1136.

To the extent that the majority asserts that § 1227(a)(2)(E)(i) is unambiguous, it is wrong. Furthermore, its failure to recognize the differences between the approaches mandated by the first and second prongs of *Chevron* contributes to its failure to appreciate our duty to defer to an agency's reasonable interpretation of an ambiguous statute.

Initially, it should be noted that the majority's opinion is the first suggestion that the statute is unambiguous. In *Martinez-Cedillo*, 896 F.3d at 987, we agreed with "[e]very circuit court to have considered it" that § 1227(a)(2)(E)(i) is ambiguous. Indeed, Judge Wardlaw in her dissent commented "the majority correctly notes that all of the circuits to examine the issue agree that the phrase 'crime of child abuse, child neglect, or child abandonment' " in § 1227(a)(2)(E)(i) is ambiguous." *Id.* at 998. Similarly, in *Alvarez-Cerriteno*, 899 F.3d 774, both the majority and the dissenting opinions agreed that the statute was ambiguous.[5] Thus, despite the majority's contrary assumption, our decision to rehear *Martinez-Cedillo* en banc did not undermine the determination that the statute was ambiguous.

5 *Menendez*, 908 F.3d 467, seems to accept that 8 U.S.C. § 1182(a)(2)(A)(i) is ambiguous in concluding that California Penal Code § 288(c)(1) "is broader than the generic definition of a 'crime of child abuse' in two ways." *Id.* at 474.

Our sister circuits uniformly agree that the statute is ambiguous. The Fifth Circuit in *Garcia v. Barr*, 969 F.3d 129, 133 (5th Cir. 2020), opined that "Congress left the term 'crime of child abuse' undefined, and the legislative history doesn't plainly express its meaning," that there is not "any widely accepted definition of that term," and that "the statute doesn't speak unambiguously to the question at issue." *Id.* The Third Circuit in *Mondragon-Gonzalez v. Attorney General*, 884 F.3d 155, 158–59 (3d Cir. 2018), held that "[t]he crime of child abuse is not defined in the INA. Moreover, the meaning of the phrase, 'crime of child abuse,' as used in § 1227(a)(2)(E)(i) is not plain and unambiguous." The Eleventh Circuit in *Pierre v. U.S. Attorney General*,

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879 F.3d 1241, 1249 (11th Cir. 2018), stated that "[t]he INA does not define 'child abuse' " and thus, "[b]ecause the statute is silent on the issue, we may defer to the BIA's interpretation of the INA, so long as that interpretation is reasonable and consistent with the statute." The Second Circuit in *Florez v. Holder*, 779 F.3d 207, 211 (2d Cir. 2015), had "little trouble concluding that the statutory provision is ambiguous." It noted that "the statute does not define the term 'crime of child abuse,' " "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," and "it is difficult to know precisely which sort of convictions Congress had in mind when it used the phrase 'a crime of child abuse.' " *Id.*

Even the Tenth Circuit in *Ibarra v. Holder*, 736 F.3d 903 (10th Cir. 2013), the only case that agrees with the majority's bottom line, implicitly recognized the statute's ambiguity. *Id.* at 910 ("We apply *Chevron* deference to precedential BIA interpretations of ambiguous federal immigration statutes so long as the Board's interpretation does not contravene Congressional intent.").

To the extent that the majority asserts that § 1227(a)(2)(E)(i) is unambiguous, the ***1146** conclusion is contrary to our prior opinions and creates a split with all of our sister circuits that have considered the issue.

IV

Nor is the majority opinion persuasive when viewed through *Chevron*'s second prong. It ignores the reasoning in the majority opinion in *Martinez-Cedillo*, as well as the reasoning of our sister circuits, and seeks to limit the agency's discretion to the majority's reading of dictionary definitions and its supposition of what Congress might have thought. Furthermore, the majority's approach is violative of our limited review of an agency decision.

In *Chevron*, 467 U.S. at 843–44, 104 S.Ct. 2778, the Supreme Court held that where "Congress has not directly addressed the precise question at issue," then the agency's regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." The Court commented that where "a reasonable accommodation of conflicting policies ... [are] committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.* at 845, 104 S.Ct. 2778 (quoting *United States v. Shimer*, 367 U.S. 374, 382–83, 81 S.Ct. 1554, 6 L.Ed.2d 908 (1961)). We have adhered to this standard. In *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1087 (9th Cir. 2013) (en banc), we held that "the BIA's construction of ambiguous statutory terms in the INA ... is entitled to deference under *Chevron*" and "[i]f the BIA's construction is reasonable, we must accept that construction under *Chevron*, even if we believe the agency's reading is not the best statutory interpretation."

Although the opinion was vacated, Judge Bybee's reasoning in *Martinez-Cedillo* offers substantial guidance. His majority opinion moved quickly to *Chevron* step two because "[t]here are no federal crimes of child abuse, neglect, or abandonment to provide analogous definitions, and unlike certain common-law crimes like burglary or assault, there are no widely accepted definitions of child abuse, neglect, or abandonment." 896 F.3d at 987. The majority agreed with the Second Circuit's opinion in *Florez v. Holde*r, 779 F.3d 207 (2d Cir. 2015), reasoning:

> Similar to the instant case, Nilfor Yosel Florez had been convicted of child endangerment under New York law for driving under the influence with children in his car and had been ordered removed under § 1227(a)(2)(E)(i). *Id.* at 208. The Second Circuit reasoned that, as of 1996 when Congress passed IIRIRA, "at least nine states had crimes called 'child abuse' (or something similar) for which injury was not a required element." *Id.* at 212. Although "even more states used a definition that did require injury," courts must not "look [ ] for the best interpretation, or the majority interpretation—only a reasonable one." *Id.* The Second Circuit concluded that the BIA acted reasonably in adopting a definition of child abuse "consistent with the definitions used by the legislatures of Colorado, Kentucky, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, and Virginia." *Id.* Moreover, Black's Law Dictionary offered a definition of "child abuse" that did not require injury. *Id.*

896 F.3d at 987–88.

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The majority found the Tenth Circuit's contrary conclusion flawed. First, it commented that "there is no inherent problem in the BIA relying partly on civil statutes to understand the phrase 'a crime of child abuse, child neglect, or child abandonment,' " in part because "the BIA used civil definitions to inform its understanding ***1147** of which convictions are crimes of child abuse, neglect, or abandonment, and that is not unreasonable." *Id.* at 988–89. "Second, there is no requirement that the BIA interpret a generic offense in the INA to conform to how the majority of states might have interpreted that term at the time of amendment. That is one reasonable aid to interpreting statutes, but it is not the only reasonable method for doing so." *Id.* at 989. Third, the majority found that the Tenth Circuit's fifty-state survey was problematic and misconstrued some state laws.[6] *Id.* at 991.

6 For example, the majority thought that the Tenth Circuit had misunderstood the mens rea required by California Penal Code § 273a. *Martinez-Cedillo*, 896 F.3d at 991.

Most recently the Fifth Circuit, in *Garcia v. Barr*, 969 F.3d 129 (5th Cir. 2020), considered and deferred to the BIA's interpretation of "crime of child abuse." It first agreed with its sister circuits that the statute was ambiguous. *Id.* at 133. The Fifth Circuit declined to follow *Ibarra*, 736 F.3d 903, noting that the "Tenth Circuit's reading of a 'crime of child abuse' may be reasonable; it might even be more reasonable than the Board's. But the question isn't whether the Board's interpretation is the best—only whether it is reasonable." *Id.* at 134. The Fifth Circuit also rejected the petitioner's argument that the Board should reconsider its definition of "crime of child abuse" in light of *Esquivel-Quintana v. Sessions*, ––– U.S. ––––, 137 S. Ct. 1562, 198 L.Ed.2d 22. It reasoned:

> *Esquivel-Quintana* has no application here. The Court's narrow holding didn't relate to the child-abuse provision in § 1227(a)(2)(E)(i), mandate a particular approach to statutory interpretation, or cast doubt on the Board's definition of a crime of child abuse. *See Matthews v. Barr*, 927 F.3d 606, 614–16 (2d Cir. 2019). And because the statutory text there was unambiguous—unlike the child-abuse provision here—that case doesn't affect our *Chevron* analysis.

969 F.3d at 134.

Similarly, in *Mondragon-Gonzalez*, 884 F.3d 155, the Third Circuit found that the BIA's interpretation of "crime of child abuse" was reasonable. It noted that the BIA had explained that the statute "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." *Id.* at 159 (quoting *Velasquez-Herrera*, 24 I. & N. Dec. at 508–09). The court concluded that "[g]iven Congress' evident intent to make crimes that harm children deportable offenses, we do not find the BIA's interpretation in this regard to be 'arbitrary, capricious, or manifestly contrary to the statute.' " *Id.* (quoting *Chen v. Ashcroft*, 381 F.3d 221, 224 (3d Cir. 2004)); *see also* *Pierre v. U.S. Attorney General*, 879 F.3d 1241, 1249–50 (11th Cir. 2018).

The Second Circuit in *Florez v. Holder*, 779 F.3d 207 (2d Cir. 2015), also found the BIA's definition of "crime of child abuse" to be a permissible construction of the statute. *Id.* at 211. The court commented that the definition—broad as it is—is at least grounded in reason. "When Congress amended the INA in 1996 to make child abuse a removable offense, at least nine states had crimes called "child abuse" (or something similar) for which injury was not a required element." *Id.* at 212.

Of course, as *Martinez-Cedillo* has been vacated, it is not binding on us, nor are our sister circuits' opinions, but the majority's failure to address the reasoning in these cases undermines its analysis. The majority does not consider the legislative history of § 1227(a)(2)(E)(i), or Congress' intent in ***1148** enacting the statute, or whether there are multiple reasonable interpretations of "crime of child abuse." Instead, citing *Esquivel-Quintana*, ––– U.S. ––––, 137 S. Ct. 1562, 198 L.Ed.2d 22 (2017), it seeks to find a single compelling definition of the generic federal offense. Maj. at 1130–31. But this is leading with

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the wrong foot. Under *Chevron* we are not tasked with defining the elements of the generic federal offense but in determining whether the agency's definition of the generic federal offense is reasonable.

The majority proceeds down the wrong path in arguing that *Esquivel-Quintana*, which it admits "has no direct bearing on the issue before us," is highly instructive. Maj. at 1132. It reasons that in *Esquivel-Quintana* when the Court observed that Congress had not defined the critical term, the Court "did not throw up its hands and declare the statute ambiguous," but instead "relied on 'the normal tools of statutory interpretation' to determine whether the statute provided a clear answer." Maj. at 1132 (quoting *Esquivel-Quintana*, 137 S. Ct. at 1569). It then concludes that "three of the four sources of statutory meaning the Court consulted in *Esquivel-Quintana*—contemporary legal dictionaries, statutory structure, and contemporary state criminal codes—support the conclusion that § 1277(a)(2)(E)(i) unambiguously forecloses the BIA's interpretation of the statute in *Soram*."[7] Maj. at 1132.

7 It may be reasonable to use "the normal tools of statutory interpretation" under step one to determine the parameters of Congress' delegation to the agency, but these tools are less compelling when employed to determine whether the agency's interpretation of an ambiguous statute is permissible or reasonable.

In addition to being the wrong question based on an inapplicable case (as the Fifth Circuit noted in *Garcia*, 969 F.3d at 134), the majority's analyses of legal dictionaries, statutory structure, and state criminal codes is less than persuasive.

The majority purports to hunt for the "common meaning in 1996" of "child abuse," "child neglect," and "child abandonment." Maj. at 1132–34. But this presumes that the BIA's definition of crime of child abuse is limited to a "common meaning." Among the dictionary definitions the majority cites for "child neglect" (perhaps the most relevant of the three terms) is "[t]he failure of a person responsible for a minor to care for the minor's emotional or physical needs." Maj. at 1133. The majority then concludes that such a definition "excludes child endangerment offenses ... that punish one-time negligent acts or omissions exposing a child to the risk of harm." Maj. at 1133. But this conclusion is hardly compelled. Why isn't it "child neglect" to with at least "criminal negligence," subject a child to the risk of serious physical or emotional harm? After all, Diaz-Rodriquez's conviction of felony child endangerment required a finding of criminal willfulness. *See* CPC § 273a(a).

The majority's section on "statutory structure" is likewise less than compelling. The majority suggests that Congress omitted "child endangerment from the list of crimes specified in § 1227(a)(2)(E)(i)" because "Congress *could have viewed* this less-serious form of misconduct ["negligent child endangerment" rather that child neglect] as an unacceptable basis under the immigration laws for separating parents from their children." Maj. at 1134 (emphasis added). While this may be a noble sentiment, reasonable minds may differ as to whether any child should be left with a criminally negligent parent and there is certainly nothing to suggest that what "Congress could have viewed" was what Congress did view or was compelled to view. In other words, the majority's approach to "statutory structure" is, at best, ***1149** one reasonable perspective that does not foreclose the existence of other reasonable perspectives.

The majority's discussion of state criminal codes also does not support its assertion of a single compelling interpretation of the statute. The majority, having done its own research, states that in 1996 "only a handful of States criminalized conduct that would constitute child endangerment under states proscribing 'abuse,' 'neglect' or 'abandonment;' " "only 14 States criminalized child endangerment committed with a mens rea of criminal negligence," and "36 States did not criminalize such conduct." Maj. at 1135. According to the majority, this "general consensus ... unambiguously forecloses the BIA's interpretation of the statute in *Soram*." Maj. at 1135. This is so, the majority reasons, because in *Esquivel-Quintana,* "the Supreme Court held that the consensus view of 31 States and the District of Columbia supported the conclusion that Congress unambiguously foreclosed the BIA's attempt to define the generic offense of sexual abuse of a minor to include an age of consent of 18." Maj. at 1135.

This line of reasoning is far from compelling. As noted, our task is not to determine the best interpretation of "crime of child abuse," but whether the BIA's interpretation is reasonable. Indeed, the majority's own research disclosed that in 1996 "14 States criminalized child endangerment committed with a mens rea of criminal negligence." Maj. at 1135. The majority does not explain why these states' definitions are unreasonable or why the BIA's interpretation of child abuse must conform to that of the majority of the states in 1996. The majority has strayed far from our task of determining whether the

agency's position is reasonable, "even if we believe the agency's reading is not the best statutory interpretation." *Henriquez-Rivas*, 707 F.3d at 1087.

Basically, the ultimate question is whether the BIA could reasonably interpret "crime of child abuse, child neglect, or child abandonment" to encompass a child endangerment offense committed with a mens rea of at least criminal negligence. The majority does not appear to be arguing that the statute did not require a sufficient mens rea and high risk of harm to the child, as were the issues in *Alverez-Cerriteno*[8] and *Menendez*, but that the statute cannot be construed to include "negligent child endangerment." Maj. at 1135–36. This conclusion is not sound: it strays from our limited task of reviewing the reasonableness of the BIA's determination and is contrary to the opinions of most of our sister circuits. The BIA's determination in *Soram* that the crime of child abuse encompassed the crime of child endangerment committed with a mens rea of criminal negligence was the product of over a decade of efforts by the agency and the courts to interpret the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. *See* *Martinez-Cedillo*, 896 F.3d at 982–87; *Garcia*, 969 F.3d at 132–133. In *Martinez-Cedillo* we held that the BIA's determination was a reasonable interpretation of an ambiguous statute, we ***1150** reiterated that position in *Alvarez-Cerriteno*, 899 F.3d at 781, and *Menendez*, 908 F.3d at 474, and we referred to the deference noted in *Alvarez-Cerriteno* in *Cortes-Maldonado*, 978 F.3d. at 648. Although our opinion in *Martinez-Cedillo* was withdrawn, *Alvarez-Cerriteno* and *Menendez* remain extant. The majority's determination that it can ignore these opinions as precedent is unprecedented, contrary to Ninth Circuit case law on precedent, contrary to the principle of stare decisis, and impractical. I would hold that as a three-judge panel we are bound by the holdings in *Alvarez-Cerriteno* and *Menendez* that the BIA reasonably concluded that § 1227(a)(2)(E)(i) encompasses child endangerment. Accordingly, I dissent.

But even if we were not bound by our prior opinions, I would still dissent because I agree with our sister circuits that the statute is ambiguous, and that the BIA's interpretation of the statute is reasonable. In concluding otherwise, the majority confuses the first and second prongs of *Chevron* and seeks to impose its definitive interpretation of the statute on us and the agency. I cannot agree. The majority presumes that the definition of crime of child abuse is limited to *the common meaning* in 1996 of child abuse, child neglect, and child abandonment. But its own research reveals that in 1996 the states had different criminal codes and that 14 states criminalized child endangerment committed with a mens rea of criminal negligence. The majority's review of selected dictionary definitions cannot obscure the fact that in 1996, indeed even today, there is no singular definition of "crime of child abuse." I agree with the Second, Third, Fifth, and Eleventh Circuits that the BIA's interpretation of 8 U.S.C. § 1227(a)(2)(E)(i) as encompassing the crime of child endangerment committed with the mens rea of criminal negligence is a reasonable interpretation of an ambiguous statute. For this reason, as well, I respectfully dissent.

[8] Diaz was convicted under CPC § 273a(a) which covers "[a]ny person who, under circumstances *likely to produce great bodily harm or death*." (Emphasis added). The panel in *Alvarez-Cerriteno*, in holding that the Nevada statute there at issue did "not require a sufficiently high risk of harm to a child to meet the definition of child abuse, neglect, or abandonment," 899 F.3d at 783, misinterpreted the BIA's decision in *Matter of Mendoza Osorio*, 26 I. & N. Dec. 703 (BIA 2016) as referring to § 273a(a). In fact, *Mendoza Osorio* concerned CPC § 273a(b) which applies to "[a]ny person who, under circumstance or conditions *other than those likely to produce great bodily harm or death*." (Emphasis added).

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No. 13-73719

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAFAEL DIAZ-RODRIGUEZ,

Petitioner,

v.

MERRICK B. GARLAND, United States Attorney General,

Respondent.

On Petition For Review of a Decision of the Board of Immigration Appeals
Agency No. A093-193-920

RESPONSE TO PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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INTRODUCTION

The panel's decision was a straightforward and correct application of recent Supreme Court precedent instructing the courts of appeals, in no uncertain terms, to apply all traditional interpretive tools before deeming a statute ambiguous and deferring to an agency such as the Board of Immigration Appeals ("Board"). *E.g.*, *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017). The panel applied the same interpretive tools the Supreme Court identified to conclude that the statutory phrase "crime of child abuse, child neglect, or child abandonment" in 8 U.S.C. § 1227(a)(2)(E)(i) unambiguously excludes California's crime of child "endangerment"—a distinct, lesser offense than those Congress identified in the statute that criminalizes one-off, negligent mistakes involving children that do not result in *any* actual harm.

The government offers little substantive response to the panel's statutory interpretation. The government cannot identify a single contemporary dictionary that defined the statutory terms in a way that encompasses an isolated incident of negligent endangerment. It does not dispute that its position conflicts with the vast majority of state criminal laws in effect when Congress enacted the statute. And its statutory-structure argument depends on using a heading to rewrite the statute's text to add in the endangerment offenses that Congress left out.

Unable to meaningfully dispute the merits of the panel's decision, the

government invokes the specter of intra- and extra-circuit conflict as to whether the statutory phrase "crime of child abuse, child neglect, or child abandonment" is "ambiguous." But the government's arguments all depend on approaching ambiguity at an improperly high level. The question here is not whether the statute has *any* ambiguity. The question is whether the statute is ambiguous as to the specific interpretive question at issue: whether the phrase "crime of child abuse, child neglect, or child abandonment" encompasses the distinct, lesser offense of negligent child endangerment. *See, e.g.*, *Esquivel-Quintana*, 137 S. Ct. at 1568 (asking not whether a statutory phrase is ambiguous *at all*, but whether it unambiguously forecloses the relevant Board interpretation). No precedential decision in this circuit or any other holds that the child-abuse provision is sufficiently ambiguous to permit an interpretation that sweeps in negligent endangerment. Indeed, the only other circuit to address that question reached the same conclusion as the panel here. *Ibarra v. Holder*, 736 F.3d 903, 910 (10th Cir. 2013).

The government's claim that the panel's decision conflicts with *Fregozo v. Holder*, 576 F.3d 1030 (9th Cir. 2009), is particularly off-base. In *Fregozo*, this Court considered an earlier Board interpretation of the child-abuse provision that, as this Court read it, *excluded* offenses that do not "requir[e] some actual injury to the child." *Id.* at 1038. Applying that interpretation, this Court held that the noncitizen's endangerment conviction was *not* a child-abuse offense because it did *not* require

"actual injury." *Id.* Because the noncitizen prevailed under then-governing Board precedent, this Court did not consider whether the statute is ambiguous in any relevant sense.

The government's assertion that the panel's decision conflicts with other circuits rests on similar errors. Most of the cases the government cites do not involve endangerment, and the few that do involve offenses with different mens rea. The Tenth Circuit has addressed a negligent endangerment offense, and it *agreed* with the panel that the statute's "plain language," read using "traditional tools of statutory construction," precludes the Board's conclusion that negligent endangerment is a child-abuse offense. *Ibarra*, 736 F.3d at 910.

The only potential conflict is with the Second Circuit's decision in *Florez v. Holder*, 779 F.3d 207 (2d Cir. 2015), which deferred to the Board in the context of a New York endangerment statute with a different mens rea. But if there is a conflict, it was the Second Circuit that created it by rejecting the Tenth Circuit's decision in *Ibarra*. *Id.* at 212. This Court cannot resolve that conflict, it can only choose a side.

The panel chose the correct side, as recent Supreme Court precedent makes clear. The Second Circuit in *Florez* thought it was "unlikely" the statute actually sweeps in endangerment offenses, but nevertheless deferred to the Board because the court concluded, after one cursory paragraph of analysis, that the statute is "ambiguous." *Id.* at 212, 214. Post-*Florez* Supreme Court cases have emphatically

rejected such "cursory analysis," requiring instead that the federal courts "engage[] in … meaningful analysis of the [statute's] text" before deferring to an agency. *Diaz-Rodriguez v. Garland*, 12 F.4th 1126, 1132, 1136 (9th Cir. 2021) (quotation marks omitted). The panel correctly followed the Supreme Court's instructions rather than importing the Second Circuit's outdated and "reflexive" approach to agency deference. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019).

This Court should deny rehearing.

ARGUMENT

I. The panel correctly applied Supreme Court precedent and held that negligent child endangerment is not a categorical crime of child "abuse," "neglect," or "abandonment."

In 1996, Congress amended the Immigration and Nationality Act to make noncitizens removable, and ineligible for many forms of relief, if convicted of one of three specific "crime[s]" against children: "child abuse, child neglect, or child abandonment." 8 U.S.C. § 1227(a)(2)(E)(i). The question here is whether that provision encompasses a fourth type of crime against children: child "endangerment." Specifically, the question is whether the statute encompasses an endangerment provision with a mens rea of criminal negligence.

The California endangerment provision at issue covers any criminally negligent act by someone with "care or custody" of a child that "causes or permits that child to be placed in a situation in which his or her person or health is

endangered" under "circumstances or conditions likely to produce great bodily harm or death." Cal. Pen. Code § 273a(a). Though the government repeatedly describes this provision as a "felony," that is wrong: Consistent with the broad scope of conduct it criminalizes, section 273a(a) is a "wobbler" that can be charged as either a felony or a misdemeanor. *People v. Mincey*, 2 Cal. 4th 408, 453 (1992). Mr. Diaz-Rodriguez was charged with a misdemeanor, *not* a felony. A.R. 265-66, 394. That misdemeanor was based on his driving with a child in the car with a blood alcohol level of 0.08 or higher. A.R. 393-94, 417. No one was injured.

The Board, in *Matter of Soram*, 25 I. & N. Dec. 378 (BIA 2010), interpreted the child-abuse provision to encompass most state endangerment offenses. But the Supreme Court has emphasized that the courts of appeals should not uncritically accept an agency's interpretation of a statute. As Justice Gorsuch recently explained, "[t]he people who come before us are entitled … to have independent judges exhaust all the textual and structural clues bearing on [a statute's] meaning." *Niz-Chavez*, 141 S. Ct. at 1480 (quotation marks and citations omitted). If "exhausting those clues enables us to resolve the interpretive question put to us, our sole function is to apply the law as we find it, not defer to some conflicting reading the government might advance." *Id.* In *Kisor*, too, the Court emphasized that courts cannot "wave the ambiguity flag" after a "first read" of a statute or regulation; "hard interpretive conundrums … can often be solved" using "the 'traditional tools' of construction."

139 S. Ct. at 2415; *see also, e.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2019) (Kennedy, J., concurring) (criticizing the courts of appeals for their "reflexive deference" to agencies based on "cursory analysis" of statutory text).

As the panel recognized, the Supreme Court's decision in *Esquivel-Quintana* is particularly instructive. *Diaz-Rodriguez*, 12 F.4th at 1132. The Court there considered the age at which a person can consent to sexual activity such that it does not constitute "sexual abuse of a minor." That question is structurally analogous to the one here. Congress added both the child-abuse and "sexual abuse of a minor" removability grounds in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Congress provided no definition for either statutory provision. *Id.* And relevant state laws varied somewhat as to both the age of consent and the definition of "crimes" of child "abuse," "neglect," and "abandonment." *Id.* at 1135.

Nevertheless, the Court in *Esquivel-Quintana* "did not throw up its hands and declare the statute ambiguous as to the specific question" at issue. *Id.* at 1132. Instead, Justice Thomas, writing for a unanimous Court, applied traditional interpretive tools—including dictionary definitions, the majority approach from contemporary criminal statutes, and statutory structure—to conclude that the statute "unambiguously forecloses the Board's interpretation" and requires that the age of consent be sixteen. *Esquivel-Quintana*, 137 S. Ct. at 1572.

The panel here followed *Esquivel-Quintana* to a T: It considered the same interpretive tools, which similarly demonstrated that the statute precludes the Board's approach. The government tries to distinguish *Esquivel-Quintana* (at 16) on the ground that child "abuse," "neglect," and "abandonment" were not "universally" or "consistent[ly]" defined. But the same was true in *Esquivel-Quintana*: The age of consent varied across states and the dictionaries stated that the age of consent is "usually"—not universally—sixteen. 137 S. Ct. at 1569, 1571-72. Indeed, as discussed below, traditional interpretive tools provide a clearer answer here than they did in *Esquivel-Quintana*.

Dictionary definitions. Legal dictionaries show that, in 1996, the terms "child abuse, child neglect, and child abandonment were well-understood concepts" that exclude endangerment, especially negligent endangerment. *Diaz-Rodriguez*, 12 F.4th at 1133. As the panel explained, "abuse" required "the infliction of some injury upon the child"; "neglect" required "a sustained failure by a child's caregiver to provide for the child's basic needs"; and "abandonment" required "the forsaking of one's parental duties." *Id.* at 1133-34. Not one of these concepts encompasses an "endangerment" provision that criminalizes a one-off negligent act that does not harm the child.

The government's assertion (at 16) that the dictionaries are "inconclusive" ignores what those dictionaries actually say. Citing a snippet from one of the many

dictionaries on which the panel relied, the government claims that "neglect" encompasses any act that "endanger[s]" a child. But the actual definition makes clear that, to constitute neglect, endangerment must be caused by a "parent or custodian" exercising "improper care or control." *Id.* at 1133 (quoting Black's Sixth Edition 1032). The definition does not encompass *every* "one-time negligent act[] or omission[] exposing a child to the risk of harm." *Id.* And it certainly does not sweep in such acts when they are committed not by a "parent or custodian," as the dictionary requires, but by a "babysitter" or anyone else "entrusted with the care of a child" even for "a relatively short period of time," as California's endangerment statute permits. *People v. Perez*, 164 Cal. App. 4th 1462, 1469 (2008).

The government also claims (at 16) that, because the dictionaries define "abuse" to include injury to "moral or mental well-being," it must also include "negligently endangering a child's life." That makes little sense. There are numerous situations in which negligently *endangering* a child does not cause any "moral or mental" *injury*—for instance, leaving a young child unattended at a swimming pool. The government invokes dicta from *Fregozo* concerning a 2004 definition of "child abuse" that required "imminent" harm. 576 F.3d at 1038. That says nothing about whether Congress, in 1996, intended to sweep in one-off negligent acts that create the *non*-imminent potential for harm.

State criminal codes. State criminal codes confirm that these dictionary

definitions reflect common usage. *Diaz-Rodriguez*, 12 F.4th at 1135. In 1996, "only a handful of States criminalized conduct that would constitute child endangerment under statutes proscribing 'abuse,' 'neglect,' or 'abandonment.'" *Id.* Indeed, only fourteen states treated negligent endangerment as a "crime" *at all*, "irrespective of the label used." *Id.* State criminal laws are thus *more* conclusive than in *Esquivel-Quintana*, where the Court concluded that the statute unambiguously precluded an interpretation adopted in *sixteen* states. *Id.*

The government does not dispute that the vast majority of states in 1996 did not make negligent endangerment a "crime" *at all*—let alone classify it as a crime of child "abuse," "neglect," or "abandonment." Regardless whether a state survey is "required" or independently "conclusive," Pet. 18, such a survey is indisputably an important interpretive tool on which the Supreme Court has repeatedly relied, including in *Esquivel-Quintana*.

Statutory structure. The harsh immigration consequences of a child-abuse conviction also suggest that Congress was targeting conduct far more serious than negligent endangerment. Removal for a conviction of child "abuse," "neglect," or "abandonment" will often lead to "the forced separation of parent and child," which makes little sense when the parents' conduct amounted to "a single lapse in parental judgment." *Diaz-Rodriguez*, 12 F.4th at 1134 (citing *Ibarra*, 736 F.3d at 905 & n.3). Moreover, an "abuse," "neglect," or "abandonment" conviction makes a non-

permanent resident ineligible for cancellation of removal, which generally allows a non-permanent resident to remain if her removal would cause "exceptional and extremely unusual hardship" to her child. *Id.* (citing 8 U.S.C. § 1229b(b)(1)(D)). It makes no sense to render a non-citizen convicted of a single lapse in parental judgment "categorically ineligible for cancellation of removal even if she can prove that separation would cause 'exceptional and extremely unusual hardship' to that same child." *Id.* (quotation marks omitted); *see also, e.g.*, *Ibarra*, 736 F.3d at 905-06 (Board's interpretation made a single mother ineligible for cancellation because she left her children briefly alone while at work); *Martinez v. Att'y Gen.*, 413 Fed. Appx. 163, 168-69 (11th Cir. 2011) (Board's interpretation led to the "heartbreaking" and "profoundly unfair, inequitable, and harsh" result of separating a "caring parent" from her children by making her ineligible for cancellation).

The government's only response is to assert (at 18) that the California statute requires "life-threatening circumstances." The California statute's limitations (which do not actually require life-threatening circumstances) do not alleviate the structural tension the panel identified. A parent who, on one occasion, negligently leaves an unsupervised young child exposed to one of many serious yet pervasive dangers—swimming pools, lakes, toxic household products, unmounted furniture, motor vehicles, bathtubs, etc.—almost certainly creates "conditions likely to produce great bodily harm or death." Cal. Pen. Code § 273a(a). Yet it would harm,

not protect, that child to be separated from her parent based on such a one-off mistake. Indeed, petitioner's daughter Paula—the child he was convicted of endangering (but not harming)—submitted a passionate plea to the immigration judge to allow her father to remain in the country, writing that "I … can't sleep without him and every day I cry myself to sleep" and that "I miss my dad and love him so much." A.R. 335, 394.

The government advances a different structural argument, asserting (at 16-18) that the shorthand phrase "crimes against children" in the statutory heading means that the operative text must denote a "unitary concept" that sweeps in "a wide variety of offenses against children." But the "title of a statute cannot limit the plain meaning of the text." *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (alterations omitted). Congress did not make *any* "crime[] against children" a basis for removal; it identified three specific child-related crimes. Regardless whether those crimes are viewed as a "unitary concept" or as distinct offenses, the Board cannot sweep in any child-related offense it does not like if that offense does not fall within the ordinary meaning of child "abuse," "neglect," or "abandonment."

The government also claims (at 17) that the lack of statutory definition means that Congress "left a void for the agency to fill." But *Esquivel-Quintana* found no relevant "void" in a similarly undefined term. P. 6, *supra*.

Finally, the government faults the panel for not considering federal *civil* laws.

Pet. 18. But the statute is limited to "crime[s]." Civil definitions are broader than criminal ones because they serve difference purposes: "determin[ing] when social services may intervene" versus "determin[ing] when an abuser is criminally culpable." *Ibarra*, 736 F.3d at 911. Moreover, the government is tellingly silent as to which civil statutes even support classifying negligent endangerment as child "abuse," "neglect," or "abandonment." Though it vaguely invokes (at 18) statutes the Board cited in *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503 (BIA 2008), it is far from clear those civil definitions encompass negligent endangerment.

II. The panel's decision is consistent with this Court's precedent.

The panel's decision does not conflict with this Court's precedent. As the panel explained, and the government does not dispute, the panel was not bound by *Martinez-Cedillo v. Sessions*, 896 F.3d 979 (9th Cir. 2018), because this Court designated that decision non-precedential when it granted rehearing en banc and then vacated it when the case became moot. *Diaz-Rodriguez*, 12 F.4th at 1129. Nor does the government appear to dispute the panel's detailed explanation of why it was not bound by two decisions that cited *Martinez-Cedillo* before this Court decided to rehear *Martinez-Cedillo* en banc. *Id.* at 1129-31. That is for good reason. Neither case turned on *Martinez-Cedillo*, as the petitioner won in each case. *Id.* And, regardless, it would make little sense for the precedential value of a depublished, vacated opinion to depend on the happenstance of whether that opinion was cited

before being depublished and vacated.

The government's assertion of intra-circuit conflict thus turns on its claim (at 8-11) that the panel's decision conflicts with *Fregozo*. The government mischaracterizes *Fregozo*. The issue in *Fregozo* was whether a different California endangerment provision—Cal. Pen. Code § 273a(b)—was a categorical crime of child "abuse," "neglect," or "abandonment." At that time, the Board had not decided *Soram*, which classified most endangerment provisions as removable offenses. Instead, the governing Board precedent was *Velazquez-Herrera*, which interpreted the child-abuse provision to encompass an "act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being." 24 I. & N. Dec. at 512. In *Fregozo*, this Court read the Board to have "held that … the perpetrator's actions … must actually inflict *some* form of injury on a child." 576 F.3d at 1037. Under that reading of *Velazquez-Herrera*, child endangerment is not a child-abuse offense because it "reaches conduct that creates only potential harm to a child; no actual injury to a child is required." *Id.*

Fregozo is perfectly consistent with the panel's decision here. Given that *Fregozo* held that child endangerment is *not* a removable offense even under then-governing Board precedent, this Court had no occasion to independently interpret the statute or consider *Velazquez-Herrera*'s validity. Indeed, contrary to the government's repeated assertions, *e.g.*, Pet. 9, this Court did not *once* describe the

statute as ambiguous as to whether it encompasses negligent endangerment. Moreover, even if this Court had found the statute sufficiently ambiguous to permit a Board interpretation that *excluded* endangerment offenses, that would say nothing about whether the statute was sufficiently ambiguous to permit the Board's later conclusion that the statute *includes* endangerment provisions.

For these reasons, the government is simply wrong when it claims (at 9) that *Fregozo* "squarely" held that the statute is "ambiguous" as to whether it "includes negligent endangerment." This Court did not consider whether the statute could be read to sweep in negligent endangerment because it thought the Board had read the statute *not* to reach that far. The government fares no better in asserting (at 9-10) that "*Fregozo* deferred to the Board's interpretation that child abuse includes criminally negligent acts or omissions that constitute maltreatment." This Court did not defer to the Board's interpretation; it held that the petitioner won even if the Board was correct. And, even if *Fregozo* had accepted that negligent *maltreatment* constitutes child abuse, that does not mean that negligent *endangerment* constitutes child abuse because this Court interpreted maltreatment to require "actual injury."[1]

[1] The government cites (at 11) dicta in *Fregozo* explaining that section 273a(b) endangerment (at issue in *Fregozo*) is broader than section 273a(a) endangerment (at issue here). But *Fregozo* never decided whether the Board could classify section 273a(a) as a child-abuse offense. Indeed, *Fregozo*'s author has concluded that the Board *cannot* permissibly classify section 273a(a) as such an offense. *Alvarez-Cerriteno v. Sessions*, 899 F.3d 774, 785 (9th Cir. 2018) (Berzon, J., concurring).

576 F.3d at 1037.

In sum, *Fregozo* applied a prior Board interpretation that excluded endangerment offenses; the panel here rejected a subsequent Board interpretation that included endangerment offenses. Those decisions are perfectly aligned.

III. The potential conflict with the Second Circuit does not warrant rehearing.

A. The only potential conflict is with the Second Circuit, and this Court cannot resolve that conflict.

The government's attempt (at 12-13) to cast the panel's decision as an outlier rests largely on cases that found the statute ambiguous as to whether it encompassed state crimes *other than* endangerment. *Pierre v. Attorney General*, 879 F.3d 1241, 1250 (11th Cir. 2018) (throwing "blood, seminal fluid, or urine or feces" at a child); *Mondragon-Gonazalez v. Attorney General*, 884 F.3d 155, 158 (3d Cir. 2018) (contacting a minor for purposes relating to sexual abuse); *Garcia v. Barr*, 969 F.3d 129, 133 (5th Cir. 2020) (sexual assault of a child). The child-abuse provision may be ambiguous as to whether it encompasses *those* offenses while still unambiguously excluding negligent endangerment—just as a statute regulating "vehicles" may be ambiguous as to whether it governs bicycles while unambiguously excluding roller skates. *See Esquivel-Quintana*, 137 S. Ct. at 1568 (asking not whether "sexual abuse of a minor" is ambiguous *at all*, but whether it unambiguously forecloses the relevant Board interpretation).

The panel's decision, in fact, *agrees* with the only other circuit to address whether negligent endangerment falls within the child-abuse provision. In *Ibarra*, the Tenth Circuit held that the statute's text precludes the Board's conclusion that "criminally negligent non-injurious conduct" is a form of child "abuse," "neglect," or "abandonment." *Ibarra*, 736 F.3d at 917-18. The government claims (at 14) that subsequent Tenth Circuit precedent characterizes *Ibarra* as a *Chevron* step two, not step one, decision. Pet. 14 (citing *Zarate-Alvarez v. Garland*, 994 F.3d 1158, 1164 (10th Cir. 2021)). But, labels aside, the panel's reasoning in *Ibarra* closely aligns with the panel's reasoning in this case: *Ibarra* held that the "plain language of the statute," read using "traditional tools of statutory construction," does not "grant the BIA the sweeping interpretive license it has taken" in classifying "criminally negligent non-injurious conduct" as "abuse," "neglect," or "abandonment." *Ibarra*, 736 F.3d at 910, 917-18.

The only potential conflict is with the Second Circuit, which deferred to the Board in the context of a New York endangerment statute with a different mens rea. *Florez*, 779 F.3d at 213-14. The Second Circuit described its decision as creating a "direct conflict" with the Tenth Circuit's decision in *Ibarra* without acknowledging the different mens rea. *Id.* at 212. The panel here found the New York statute "distinguishable" because the California statute has a lower mens rea. *Diaz-Rodriguez*, 12 F.4th at 1136. The government argues (at 14) that the panel's decision

"exacerbates" the conflict the Second Circuit identified. But, even if there is a conflict despite the different mens rea, the panel had no choice but to "exacerbate" that conflict by aligning with either the Second or Tenth Circuit. The existence of a conflict would thus provide no independent basis for rehearing.

B. The Second Circuit's decision rests on precisely the "reflexive" deference that intervening Supreme Court precedent has rejected.

The Second Circuit's decision in *Florez* is also wrong on the merits, as its approach to agency deference is irreconcilable with subsequent Supreme Court precedent. The Second Circuit thought it "unlikely" that the statutory child-abuse provision actually encompasses child endangerment. 779 F.3d at 214. But the court thought its judicial construction of the statute was "irrelevant" because the statute contains some "ambiguity," making the agency's interpretation "authoritative." *Id.* at 211, 214. As explained, pp. 5-6, *supra*, however, post-*Florez* Supreme Court cases make clear that federal courts cannot "wave the ambiguity flag" without first exhausting all "the 'traditional tools' of construction." *Kisor*, 139 S. Ct. at 2415. If applying those tools "resolve[s] the interpretive question put to us, our sole function is to apply the law as we find it, not defer to some conflicting reading the government might advance." *Niz-Chavez*, 141 S. Ct. at 1480 (quotation marks and citation omitted).

The Second Circuit in *Florez* did exactly what the Supreme Court has forbidden. Far from "exhaust[ing]" its "legal toolkit," *Kisor*, 139 S. Ct. at 2415, the

Second Circuit declared the statute ambiguous after one cursory paragraph of analysis, noting only that the statute "does not define the term 'crime of child abuse'" and that state and federal statutes offered "varied" definitions. *Florez*, 779 F.3d at 211. That is not enough: *Esquivel-Quintana* held that the statute precluded the Board's interpretation of "sexual abuse of a minor" *even though* the statute does not define that term and state and federal laws varied. 137 S. Ct. at 1569. Indeed, the Second Circuit's one-paragraph effort at statutory interpretation in *Florez* is strikingly similar to its cursory analyses in *Guaman-Yuqui v. Lynch*, 786 F.3d 235, 238-39 (2d Cir. 2015), and *Mugalli v. Ashcroft*, 258 F.3d 52, 56 (2d Cir. 2001), which the Supreme Court abrogated in *Pereira* and *Esquivel-Quintana*, respectively.

The panel correctly followed the Supreme Court's instructions rather than allow the Second Circuit's outdated and flawed decision to infect this Court's approach to agency deference.

CONCLUSION

The Court should deny rehearing.

Respectfully submitted,

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January 27, 2022

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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 27th day of January, 2022. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

January 27, 2022

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