UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18-70936
Agency No. 023-897-181

PHONESAVANH NAKHOKKONG,[1]
Petitioner,
v.

WILLIAM P. BARR, US ATTORNEY GENERAL,
Respondent.

On Petition for Review Of An Order Of The Board Of Immigration Appeals

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BRIEF OF *AMICI CURIAE* IMMIGRATION LAW PROFESSORS, EXPERTS, AND CLINICIANS IN SUPPORT OF PETITIONER'S REQUEST FOR REVIEW

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INTEREST OF *AMICI CURIAE*

Proposed *amici curi*ae include law professors, experts, and clinicians with expertise in immigration law and experience defending noncitizens in immigration proceedings. *Amici* have an interest in ensuring that federal immigration laws are properly interpreted. *Amici* also represent clients who are in removal proceedings because of the crime-based grounds of removal, including the crime of child abuse, neglect, or child abandonment removal ground. This Court's resolution of issues presented in this case have the potential to significantly affect the proper functioning and fairness of the criminal justice and immigration systems in this Circuit and throughout the United States.

RULE 29(a)(4)(E) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* state that (1) no party's counsel authored this brief in whole or in part, (2) no party or party's counsel contributed money for the preparing or filing of this brief, and (3) no person, other than undersigned counsel, contributed funding to prepare or file this brief. Petitioner's counsel and undersigned counsel co-authored and filed a similar *amici curiae* brief in support of a motion for rehearing in *Martinez-Cedillo v. Sessions*, 896 F.3d 979 (9th Cir. 2018), *vacated sub nom. Martinez-Cedillo v. Barr*, No. 14-71742, 2019 WL2136113 (9th Cir. May 16, 2019), but the portions of that brief authored by Petitioner's counsel have not been replicated in this brief.

INTRODUCTION

This Court should not grant deference to the Board of Immigration Appeals' ("BIA" or "Board") impermissibly broad interpretation of the "crime of child abuse, child neglect, or child abandonment" removal ground in *Matter of Soram*, 25 I. & N. Dec. 378 (BIA 2010).[2] Congress intended the crime of child abuse removal ground to be interpreted narrowly; requiring a criminal conviction for an offense that necessarily involved injury to a child. In *Matter of Soram*, the BIA interpreted the "crime of child abuse" to only require a *risk* of injury to a child, thus contradicting the plain-meaning of the removal provision's text and congressional intent.

Amici, therefore, request that this Court reject the BIA's expansive interpretation of the crime of child abuse removal ground, which has strayed far from the statute's text and congressional intent. The Court should instead adopt a definition of the crime of child abuse removal ground that requires a predicate offense to necessarily involve injury to a child. Such an interpretation would be consistent with the plain-meaning of the statute's text and its intent.

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[2] This brief uses the phrase "crime of child abuse" to refer to the "crime of child abuse, child neglect, or child abandonment" removal ground.

ARGUMENT

The BIA's interpretation of the crime of child abuse removal ground in *Matter of Soram* to include criminal offenses that do not necessarily involve injury to a child should not be accorded deference by this Court. In *Matter of Soram*, "the Board strayed far from congressional intent . . . and ignored the context, language, and purpose of the statute." *Martinez-Cedillo*, 896 F.3d at 996 (Wardlaw, J., dissenting); *see also Alvarez-Cerriteno v. Sessions*, 899 F.3d 774, 785 (9th. Cir. 2018) (noting that although the Court was bound by Martinez-Cedillo, the BIA's decision in Matter of Soram does not warrant deference) (Berzon, J., concurring)); *Ibarra v. Holder*, 736 F.3d 903, 907 (10th Cir. 2013) (holding that the BIA's expansive interpretation of the "crime of child abuse" removal ground in *Matter of Soram* was "an impermissible interpretation of the federal statute").

This Court should reject *Matter of Soram's* expansive definition of a "crime of child abuse" and give effect to the statute's language and congressional intent. Continued deference to the BIA's interpretation would impose severe immigration consequences on individuals whom Congress did not intend to encompass within the "crime of child abuse" removal ground.

I. CONGRESS DID NOT INTEND THE "CRIME OF CHILD ABUSE" REMOVAL GROUND TO INCLUDE CRIMES THAT DO NOT RESULT IN INJURY TO A CHILD.

In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, § 350, 110 Stat. 3009-546, 3009-640 (Sept. 30, 1996) introduced several new crime-based grounds of removal, including a removal ground for individuals "convicted of . . . a crime of child abuse, child neglect, or child abandonment." 8 U.S.C. § 1227(a)(2)(E)(i). Some Courts have relied on Congress's concerted effort to expand the crime-based grounds of removal to interpret the "crime of child abuse" provision to include "'infliction on a child of physical harm, even if slight and mental or emotional harm, including acts injurious to morals.'" *Fregozo v. Holder*, 576 F.3d 1030, 1037 (9th Cir. 2009) (quoting *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503, 509 (BIA 2008)) (internal modifications omitted).

But Congress did not intend the provision to be stretched so broadly as to encompass crimes that do not require any injury whatsoever to a child. As the BIA has previously noted, "[b]y enacting section 237(a)(2)(E)(i) . . . Congress clearly intended to single out those who have been convicted of *maltreating or preying upon children*." *Velazquez-Herrera*, 24 I. & N. Dec. at 509 (emphasis added). Indeed, this Court previously determined that Congress enacted the provision to "'facilitat[e] the removal of child abusers.'" *Fregozo*, 576 F.3d at 1036–38 (quoting *Velazquez-Herrera*, 24 I. & N. Dec. at 509). Legislative history elucidates that purpose.

The BIA in *Matter of Soram* departed from the "crime of child abuse" by stretching the provision to include criminal offenses that do not require injury to a child. 25 I. & N. Dec. at 384. As set forth below, this expansive definition is contrary to legislative history and renders the BIA's interpretation contrary to the plain-meaning of the statutory text and congressional intent. *See Martinez-Cedillo*, 896 F.3d at 1002 (Wardlaw, J., dissenting); *see also Ibarra*, 736 F.3d at 912 n.12 (noting that the BIA's expansive interpretation of the "crime of child abuse" removal ground is unsupported by the provision's legislative history).

A. The Senate Amendment Creating The "Crime of Child Abuse" Provision Was Narrowly Worded To Encompass Only Individuals Who Act Against A Child.

In April 1996, the House bill that was later enacted as IRIRA was amended by the Senate to include the "crime of child abuse" removal ground. 104 H.R. 2202 Engrossed Amendment Senate, § 218 (May 2, 1996) (enacted). Section 218 of the Senate amendment authored by Senators Paul Coverdell and Robert Dole was entitled "Exclusion Grounds for Offenses of Domestic Violence, Stalking, Crimes *Against* Children, and Crimes of Sexual Violence." *Id.* (emphasis added).

The term "against" is defined by Merriam-Webster as "in opposition or hostility to." *Merriam-Webster*, merriam-webster.com, https://www.merriam-webster.com/dictionary/against (last visited May 28, 2019). The term "crimes against children" must therefore be interpreted to require some criminal conduct in opposition to or hostility toward a child. *Cf. Leocal v. Ashcroft*, 543 U.S. 1, 11, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004) (holding that driving under the influence and causing serious bodily harm was not a "crime of violence" because it does not require either active employment of force against another).

Criminal conduct that is in opposition to or hostile toward a child necessarily results in physical, mental, or emotional harm to the targeted child. Conversely, an offense that may hypothetically result in a child's harm, but does not actually require a child to be injured, cannot logically be considered an offense *against* a child. *See Fregozo*, 576 F.3d at 1037 (holding that misdemeanor child endangerment pursuant to California law is not a "crime of child abuse" because the "statutory language clearly reaches conduct that creates only *potential* harm to a child; no actual injury to a child is required for conviction.") (emphasis added)).

B. Senators Who Drafted The "Crime Of Child Abuse" Removal Ground Stated That Its Purpose Is To Remove Those Who Inflict Actual Injury On A Child.

Senate floor remarks from Senators Paul Coverdell and Robert Dole, co-sponsors of the Coverdell-Dole Amendment that created the "crime of child abuse" provision, underscore the provision's goal to facilitate the removal of individuals who have been convicted of crimes involving injury to a child. The senators' carefully chosen words demonstrate that the provision's purpose is to protect children by deporting individuals who have been convicted of crimes resulting in physical, emotional, or mental harm to a child.

In support of his amendment, Senator Coverdell stated on the Senate floor that the "crime of child abuse" removal ground and its accompanying removal provisions concerning crimes of domestic violence and stalking was necessary to "protect women and children." 104 Cong. Rec. S4059 (daily ed. Apr. 24, 1996) (statement of Sen. Coverdell). He explained that "[i]nvestigations by State child protective service agencies in 48 States determined that 1.12 million children were victims of child abuse and negligence in 1994." *Id.* The figure represented a 27 percent increase since 1990 in the number of children "found to be victims of maltreatment" according to Senator Coverdell. *Id.* He further explained that "[a]mong the children . . . for whom maltreatment was substantiated or indicated in 1994, 53 percent suffered negligence, 26 percent physical abuse, 14 percent sexual abuse, 5 percent emotional abuse, and 3 percent medical negligence." *Id.*

Senator Robert Dole, then-Senate Majority Leader, echoed his co-sponsor's comments while further elaborating on the purpose of the Coverdell-Dole Amendment:

> The amendment offered by Senator Coverdell and myself seeks to . . . mak[e] clear that our society will not tolerate crimes against women and children. The criminal law should be a reflection of the best of our values, and it is important that we not only send a message that we

> will protect our citizens against these assaults, but that we back it up as well. . . . When someone is an alien and has already shown a predisposition toward violence against women and children, we should get rid of them the first time.

104 Cong. Rec. S4059 (daily ed. Apr. 24, 1996) (statement of Sen. Dole). After the amendment passed, Senator Dole praised his colleagues for adopting the legislation that he considered critical to "stop[ping] the *vicious acts* of stalking, child abuse, and sexual abuse." 142 Cong. Rec. 10,067 (daily ed. May, 2, 1996) (statement of Sen. Dole) (emphasis added).

The remarks of Senators Coverdell and Dole do not support the BIA's interpretation of the "crime of child abuse" removal ground as one that includes criminal acts that do not necessarily require injury to a child. *Martinez-Cedillo*, 896 F.3d at 1002 (Wardlaw, J., dissenting) ("[S]ection 1227(a)(2)(E)(i)'s limited legislative history and purpose support the government's position that a crime of child abuse, child neglect, or child abandonment should include convictions that do not result in injury to the child."). Conduct that does not result in any harm to a child can hardly be described as a "vicious act" or an "assault." Furthermore, the Tenth Circuit's review of state statutes in effect in 1996 demonstrates that a majority of states "did not criminalize endangering children or exposing them to a risk of harm *absent injury* if there was only a culpable mental state of criminal negligence." *Ibarra*, 736 F.3d at 915 (emphasis added). It is clear that the "crime of child abuse" removal ground was intended to encompass only harmful acts against children that necessarily result in injury.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court grant the petition for review and hold that the "crime of child abuse" removal ground must be limited to criminal offenses in which injury to a child is a required element.

Dated: May 28, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that: Pursuant to Fed. R. App. P., Rule 32(a)(7)(B) and (C), Rule (a)(5) and (6), and Ninth Circuit Rules 32-1 and 32-4, the attached brief is proportionally spaced, has a typeface of 14 points or more, and contains approximately 1,903 words, exclusive of the table of contents, table of authorities, certificates of counsel, list of *amici curiae*, and signature block, which does not exceed the 4,200 word-limit for an amicus brief. The word count includes the FRAP RULE 29 Statement.

CERTIFICATE OF SERVICE

I, Philip L. Torrey, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: May 28, 2019 Respectfully submitted,

/s Philip L. Torrey
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