22-23

APPENDIX B

File: A028-022-476 — Arlington, VA
Date: March 6, 2020

In re: Jean Francois PUGIN a.k.a. Laval Noel Jean Francois Pugin

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Brian R. Murray, Esquire

APPLICATION: Termination

The respondent, a native and citizen of Mauritius, appeals from the Immigration Judge's September 27, 2019, decision denying his motion to terminate proceedings and sustaining the charge of removability under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii). The Department of Homeland Security (DHS) has not responded to the appeal. The appeal will be dismissed.

We review the findings of fact made by the Immigration Judge, including the determination of credibility, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including questions of judgment, discretion, and law, de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The DHS alleged that on September 25, 2014, the respondent was convicted of accessory after the fact to a felony in violation of section 18.2-19(ii) of the Virginia Code, for which he was sentenced to a term

of imprisonment of 12 months (Exh. 1; *see also* DHS's Notice of Filing, submitted on January 10, 2018 (Unmarked Exh.)). Based on this conviction, the DHS further alleged that the respondent is removable pursuant to section 237(a)(2)(A)(iii) of the Act, for having been convicted of an aggravated felony offense relating to obstruction of justice under section 101(a)(43)(S) of the Act, 8 U.S.C. § 1101(a)(43)(S) (Exh. 1). At the hearing below, the Immigration Judge sustained the charge of removability and denied the respondent's motion to terminate these proceedings (IJ at 2-3).

On appeal, the respondent argues that the Immigration Judge erred in finding that his conviction for accessory after the fact to a felony in violation of VA. CODE § 18.2-19(ii) is an aggravated felony relating to obstruction of justice (Respondent's Br. at 3-6). We disagree.

We affirm the Immigration Judge's determination that the respondent's conviction constitutes an aggravated felony offense relating to obstruction of justice under section 101(a)(43)(S) of the Act (IJ at 2-3). Section 101(a)(43)(S) of the Act defines an aggravated felony as "an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year." To establish whether the respondent's conviction is for such an offense, we apply the categorical approach by focusing on whether the elements of section 18.2-19(ii) of the Virginia Code proscribe conduct that categorically falls within the federal generic definition of an offense relating to obstruction of justice. *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). We clarified the generic definition of an aggravated felony under

section 101(a)(43)(S) of the Act in *Matter of Valenzuela Gallardo* ("*Valenzuela Gallardo II*"), 27 I&N Dec. 449, 460 (BIA 2018), in which we stated that an offense relating to obstruction of justice consists of any state offense that involves (1) an affirmative and intentional attempt, (2) that is motivated by a specific intent, (3) to interfere either in an investigation or proceeding that is ongoing, pending, or reasonably foreseeable by the defendant, or in another's punishment resulting from a completed proceeding.[1] *See also Matter of Cordero-Garcia*, 27 I&N Dec. 652 (BIA 2019) (following *Valenzuela Gallardo II* and determining that the crime of dissuading a witness in violation of section 136.1(b)(1) of the California Penal Code is categorically an aggravated felony offense relating to obstruction of justice under section 101(a)(43)(S) of the Act).

Contrary to the respondent's assertions on appeal, the conduct proscribed by section 18.2-19(ii) of the Virginia Code categorically falls within the federal generic definition of an aggravated felony under section 101(a)(43)(S) of the Act (Respondent's Br. at 3-6). Specifically, section 18.2-19 of the Virginia Code provides that "[e]very accessory after the fact is guilty of (i) a Class 6 felony in the case of a homicide offense that is punishable by death or as a Class 2 felony or

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[1] In *Valenzuela Gallardo II*, we assumed that to "establish whether the respondent's conviction is for 'an offense relating to obstruction of justice' under section 101(a)(43)(S), we apply the categorical approach by focusing on whether the elements of his State statute of conviction proscribe conduct that categorically falls within the Federal generic definition of an offense relating to obstruction of justice." *Matter of Valenzuela Gallardo*, 27 I&N Dec. at 451, *citing Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016).

(ii) a Class 1 misdemeanor in the case of any other felony." To establish that a defendant is guilty of accessory after the fact under section 18.2-19(ii) of the Virginia Code, the State must prove the following elements: (1) a completed felony must have been committed; (2) the person giving aid must have known of the perpetration of the felony by the one he aids; and (3) the aid must have been given to the felon personally for the purpose of hindering the felon's apprehension, conviction, or punishment. *See Suter v. Commonwealth*, 796 S.E.2d 416, 420 (Va. Ct. App. 2017) (setting forth common-law requirements for Virginia's crime of accessory after the fact); *see also Commonwealth v. Dalton*, 524 S.E.2d 860, 862 (Va. 2000).

On appeal, the respondent argues that VA. CODE § 18.2-19(ii) criminalizes conduct that does not require "an affirmative and intentional attempt that is motivated by a specific intent" (Respondent's Br. at 5). We disagree. Although a "specific intent" is not required by statute, we agree with the Immigration Judge's determination that under Virginia law, to hinder a felon's apprehension, conviction or punishment necessarily requires a specific intent (IJ at 3). Additionally, the respondent has not presented evidence that Virginia applied the statute to him or to other defendants under the respondent's construction, i.e. without specific intent. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) (stating that to demonstrate that a statute criminalizes unintentional conduct, the alien "must at least point to his own case or other cases in which the state courts in fact did apply the statute" to conduct falling outside the generic definition) (internal quotation marks omitted).

Thus, we conclude that the respondent has not met his burden of establishing that under current law a realistic probability exists that Virginia would apply section 18.2-19(ii), either in his case or generically, to conduct that is not motivated by a specific intent. *See Gonzales v. Duenas-Alvarez*, 549 U.S. at 193; *see also* 8 C.F.R. § 1240.8(d). In view of the foregoing, we conclude that the Immigration Judge properly determined that the respondent is removable as charged under section 237(a)(2)(A)(iii) of the Act.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

NOTICE: If the respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the DHS, or conspired to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

/s/

FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
United States Immigration Court
1901 South Bell Street, Suite 200
Arlington, VA 22202

IN THE MATTER OF:	)	**IN REMOVAL PROCEEDINGS**
PUGIN, Jean Francois,	)	File No: A 028 - 022 - 476
a.k.a. PUGIN, Laval Noel Jean Francois,	)	
Respondent	)	

CHARGES:

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA" or "Act"), as amended, in that, at any time after admission you have been convicted of an aggravated felony as defined in section 101(a)(43)(S) of the Act, an offense relating to obstruction of justice,

perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year.

APPLICATION: Motion to Terminate.

APPEARANCES

ON BEHALF OF THE RESPONDENT:
Brian Murray, Esq.
Thai Tran, Esq.
Murray Osorio, PLLC

ON BEHALF OF DHS:
Assistant Chief Counsel
4085 Chain Bridge Road, Suite 201
U.S. Department of Homeland Security
Fairfax, VA 22030
1901 South Bell Street, Suite 900
Arlington, VA 22202

DECISION OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

The Respondent is a native and citizen of Mauritius. He was admitted to the United States on or about April 24, 1985, as a lawful permanent resident ("LPR"). *See* NTA. On September 25, 2014, the Respondent was convicted in the Loudoun

County, Virginia Circuit Court for the offense of accessory after the fact to a felony in violation of Virginia Code § 18.2-19(ii), for which he received a term of imprisonment of twelve months. *See* DHS's Notice of Filing, Tab B (Jan. 10, 2018).

On February 2, 2015, the Department of Homeland Security ("DHS") issued a Notice to Appear ("NTA"),.charging the Respondent with removability: under, section 237(a)(2)(A)(iii) of the Act for having been convicted of an aggravated felony under INA § 101(a)(43)(S), an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year. *See* NTA. On July 26, 2017, the Respondent admitted allegations 1 through 3, denied allegations 5 and 6, and denied the charge of removability,

On March 19, 2018, the Respondent filed a motion to terminate removal proceedings, in which he alleged his conviction for accessory after the fact is not an aggravated felony under INA § 101(a)(43)(S), as an offense relating to obstruction of justice. *See* Motion to Terminate (Mar. 19, 2018). DHS submitted a brief in support of removability on the same day. *See* DHS Br. (Mar. 19, 2018). For the following reasons, the Court denies the Respondent's motion to terminate and sustains the charge of removability.

II. LAW, ANALYSIS, AND FINDINGS

DHS bears the burden to prove the Respondent's removability by clear and convincing evidence. INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a). Accordingly; DHS bears the burden to establish by clear and convincing evidence that the Respondent's state conviction constitutes an aggravated felony. DHS asserts the

Respondent's conviction under Virginia Code § 18.2-19(ii) for accessory after the fact constitutes an aggravated felony relating to obstruction of justice. *See* DHS Br. at 2.

To determine whether the Respondent's state conviction constitute an aggravated felony under the 1NA, the Court must determine whether the elements .of the Respondent's state conviction sufficiently match the elements of the corresponding federal offense.[1] *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). The Court determines whether the elements of the Respondent's conviction sufficiently match the elements of the generic offense by applying either the categorical or the modified categorical approach. *Id* 2248-49.

The categorical approach requires determining whether the statute of conviction fits within the generic federal definition of a corresponding removal ground. *Matter of Ferreira*, 26 I&N Dec. 415, 418-19 (BIA 2014). The Supreme Court has found that a state offense is a "categorical match" to a generic federal offense only if a conviction for the state offense necessarily involved facts equating to the generic offense. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013). A state crime categorically constitutes an offense under the INA if the "minimum conduct that has a realistic probability of being prosecuted" under the state statute is also addressed by the corresponding federal statute. *See Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 351 (BIA 2014) (citing *Moncrieffe*, 133 S. Ct. at 1684-85). Establishing that

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[1] The Court also refers to the corresponding federal offense as the "generic offense."

a state statute creates a crime outside the generic federal definition "requires more than the application of legal imagination" to the statute's language. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). Instead, it requires a showing there is "a realistic probability, not a theoretical possibility, that the State would apply the statute to conduct that falls outside the generic definition of the crimp." *See id.*

The Board of Immigration Appeals ("BIA" or "Board").has conclusively held that a federal conviction for accessory after the fact under 18 U.S.C. § 3 is a crime relating to obstruction of justice. This statute states that "whoever, knowing that an offense against the United States has been committed, receives, relieves, comfort or assists the offender in order to hinder or prevent his apprehension trial or punishment, is an accessory after the fact." 18 U.S.C. § 3. The Board reasoned that the "specific purpose of hindering the process of justice brings the federal 'accessory after the fact' crime within the general ambit of the offenses that fall under the 'obstruction of justice designation." *Matter of Espinoza*, 22 I&N Dec. 889, 894-95 (BIA 1999). Therefore, based on this Board precedent, to determine whether the Respondent's state conviction for accessory after the fact constitutes a crime relating to obstruction of justice, the Court must determine whether the Respondent's statute of conviction requires the Respondent act with the "specific purpose of hindering the process of justice."

The Court finds Virginia Code § 18.2-19(ii) is an offense relating to obstruction of justice because, like its federal counterpart, the statute requires the Respondent act with the "specific purpose of hindering the process of justice." The Respondent's

statute of conviction provides that "every accessory after the fact is guilty of (i) a Class 6 felony in the case of a homicide offense that is punishable by death or as a Class 2 felony or (ii) a Class 1 misdemeanor in the case of any other felony." Va. Code Ann. § 18.2-19.

The Supreme Court of Virginia has determined that this offense includes three elements: (1) the felony must be complete, (2) the accused must know that the felon is guilty, and (3) the accused must receive, relieve, comfort, or assist the felon. *Commonwealth v. Dalton*, 524 S.E.2d 860, 862 (Va. 2000). Furthermore, the defendant must have done more than simply fail to report a known felon or "merely suffer a principal to escape." *See Schmitt v. True*, 387 F. Supp. 2d 622, 640 (E.D. Va. 2005). Rather, to be convicted of accessory after the fact, a defendant must have committed this offense "with the view of enabling his principal to elude punishment." *See id.* (citing *Buck v. Commonwealth*, 83 S.E. 390, 393 (Va. 1914)). The Court finds that conduct meant to enable a felon to elude punishment necessarily requires the specific intent to hinder the process of justice. Furthermore, the Respondent has not provided any evidence to suggest there is a realistic probability the statute would be applied to conduct absent a showing of such specific intent. As such, Virginia Code § 18.2-19(ii) is categorically an aggravated felony relating to obstruction of justice, which renders him removable under INA § 237(a)(2)(A)(iii).

Accordingly, the Court enters the following orders:

ORDERS

It is Ordered that
The Respondent's motion to terminate be **DENIED.**

It is Further Ordered that
The charge of removability under INA § 237(a)(2)(A)(iii) be **SUSTAINED.**

9-27-19
Roxanne C. Hladylowycz

Date
Roxanne C. Hladylowycz
United States Immigration Judge

APPEAL RIGHTS: Both parties have the right to appeal the decision in this case. Any appeal is due at the Board of Immigration Appeals within thirty calendar days after the date of service of this decision.

APPENDIX D

FILED: March 7, 2022

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1363

JEAN FRANCOIS PUGIN

Petitioner

v.

MERRICK B. GARLAND, Attorney General

Respondent

AMERICAN IMMIGRATION COUNCIL; FOURTH CIRCUIT FEDERAL PUBLIC DEFENDER; AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Amici Supporting Rehearing Petition

ORDER

The court denies the petition for rehearing en banc.

A requested poll of the court failed to produce a majority of judges in regular active service and not disqualified who voted in favor of rehearing en banc. Chief Judge Gregory, Judge King, and Judge Wynn voted to grant rehearing en banc. Judge Wilkinson, Judge Niemeyer, Judge Motz, Judge Agee, Judge Diaz, Judge Thacker, Judge Harris, Judge

Richardson, Judge Quattlebaum, Judge Rushing, and Judge Heytens voted to deny rehearing en banc. Chief Judge Gregory wrote an opinion dissenting from the denial of rehearing en banc.

Entered at the direction of Judge Richardson.

For The Court

/s/ Patricia S. Connor, Clerk

GREGORY, Chief Judge, dissenting from the denial of rehearing en bane:

I respectfully dissent from this court's denial of rehearing en bane on the issue of whether to grant *Chevron* deference to the Board of Immigration's ("Board") recent interpretation of § 110l(a)(43)(S), providing that an aggravated felony under the INA is "an offense relating to the obstruction of justice, perjury or subornation of perjury, or bribery of a witness." According to the Board, to "obstruct justice" only requires a connection to the "process of justice," which the Board later redefined as circumstances where an investigation or proceeding was merely "reasonably foreseeable." *In re Valenzuela Gallardo*, 27 I. & N. Dec. 449, 460 (B.I.A. 2018).

At step one, we are instructed to employ the traditional tools of statutory interpretation. *Chevron, U.S.A., Inc. v. Nat. Res. Def Council, Inc.*, 467 U.S. 837, 843, n. 9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."). After doing so, I ascertained that the plain text, statutory scheme, and congressional history show that "obstruction of justice" is a term of art long-ago defined by Congress in Chapter 73 of Title 18 as requiring a nexus element to pending or ongoing proceedings. *See Pettibone v. United States*, 148 U.S. 197, 207 (1893) (holding that obstruction is a criminal act that "can only arise when justice is being administered"); *United States v. Aguilar*, 515 U.S. 593, 599 (1995) (stating, as to a federal obstruction of justice offense, that the conduct "must be [taken] with an intent to influence judicial or grand jury proceedings," which "[s]ome courts have

phrased . . . as a 'nexus' requirement."); *see also Pereira v. Sessions*, 138 S. Ct. 2105, 2110 (2018) ("The plain text, the statutory context, and common sense all lead inescapably and unambiguously to that conclusion.").

Indeed, the Board itself previously concluded that the term was unambiguous and that it required a nexus to a pending or ongoing proceeding. *See In re Espinoza-Gonzalez*, 22 I. & N. 889, 892-93 (B.I.A. 1999) (en bane) (holding that "obstruction of justice" is a term of art and applying Chapter 73 to define it in the INA context). Specifically, the Board reasoned that Congress employed the phrase "obstructing justice," "a term of art utilized in the United States Code to designate a specific list of crimes ... in conjunction with other crimes (e.g., perjury and bribery) that also are clearly associated with *the affirmative obstruction of a proceeding or investigation.*" *Id.* at 893–94 (emphasis added). Of course, the Board may change its interpretation, but it must be reasonable upon our review. *Nat'l Cable & Telecommunications Ass'n v. Brand X lnternet Servs.*, 545 U.S. 967, 981 (2005).

To find ambiguity at step one, the majority relied, *inter alia*, on the preceding phrase "relating to." However, this reliance is misplaced because "relating to" does not automatically render "obstruction of justice" ambiguous. *See* Dissenting Op. 41–43; *see also In re Espinoza-Gonzalez*, 22 I. & N. at 895 (rejecting the INA's argument that "relating to" rendered § 1101(a)(43)(S) too broad and tenuous). As cautioned by the Supreme Court, we need to be careful in reading "relating to" to "extend [the statute] to the furthest stretch of [its] indeterminacy, ... [and] stop nowhere." *New York State Conference of Blue*

Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995). Instead, we must use the context of the statutory scheme "in favor of a narrower reading." *Yates v. United States*, 574 U.S. 528, 539 (2015). Here, Congress included "relating to" to capture the breadth of various state "obstruction of justice" statutes that match the essential elements of the INA statute. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, at 499 (1985) (holding that the fact that a statute "has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."); *see also Mellouli v. Lynch*, 575 U.S. 798, 811 (2015) (rejecting the Government's argument that "relating to" in § 1227(a)(2)(B)(i) eliminates the requirement that a controlled substance involve a federally controlled substance).

Furthermore, the opinion pointed to §§ 1512, 1510, 1518 as sources of ambiguity. In interpretating § 1512(e)(l), the Supreme Court held that a conviction requires proof of nexus between corrupt persuasion and particular proceeding. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 707–08 (2005). The Supreme Court also distinguished between a requirement that proceedings be reasonably foreseeable and one where they "not even be foreseen," *id.*; *see also Marinello v. United States*, 138 S. Ct. 1101, 1110 (2018) (interpreting 26 U.S.C. § 7212 as requiring that the Government show that defendant engaged in "obstructive conduct or, at the least, was then reasonably foreseeable by the defendant."). As noted by our sister circuit, *Arthur Andersen* is inapplicable in our analysis because § 1512 "is an *exception* to Chapter 73's general rule that obstruction requires a nexus to an ongoing or pending

proceeding," and the Supreme Court still read a nexus requirement into § 1512 "support[ing] the notion that obstruction of justice offenses require a tight nexus to a proceeding." *Valenzuela Gallardo v. Barr*, 968 F.3d 1053, 1067 (9th Cir. 2020) (emphasis in original). Furthermore, and with respect to *Marinello*, the Supreme Court carefully noted that the "the language and history of [§ 7212] differ[ed]" from the "obstruction of justice" in Chapter 73 it had previously interpreted as requiring a nexus element. *Marinello*, 138 S. Ct. at 1109. Finally, and as I noted in my dissent, even if *Marinello* and *Arthur Andersen* are relevant in evaluating the Board's new interpretation, we must still examine the text, ordinary meaning, history, and statutory scheme of "obstruction of justice" "[a]t th[e] time" § 1101(a)(43)(S) was passed into law. *Esquivel Quintana v. Sessions*, 137 S. Ct. 1562, 1569 (2017). Accordingly, and as I explain in my dissent, *see* Dissenting Op. 44–54, a review of the history, text, and statutory analysis of §§ 1510, 1512, 1518, 1519, and similar provisions, results in finding that the phrase "obstruction of justice" is unambiguous.

Even if the phrase "obstruction of justice" is ambiguous at *Chevron* step one, and the Board is given legislative authority, the Board's interpretation must still be reasonably consistent with the legislative scheme. *Chevron*, 104 S. Ct. at 2793.

The Board long-ago inserted vagueness into a well-settled interpretation of "obstruction of justice." In 2012, the Board redefined the phrase "obstruction of justice" to include crimes that contain the "critical element of an affirmative and intentional attempt, motivated by a specific intent, to interfere *with the process of justice*, irrespective of the existence of an

ongoing criminal investigation or proceeding." *In re Valenzuela Gallardo*, 25 I. & N. Dec. 838, 838 (B.I.A. 2012) (emphasis added). The Board, thus, redefined the phrase to mean that "the existence of [an ongoing criminal investigation or trial] is *not an essential element* of 'an offense relating to obstruction of justice.'" *Id.* at 841 (emphasis added) (internal citation omitted). The Board's vague phrase "process of justice" was untenable and contradicted settled case law. *See Aguilar*, 515 U.S. at 599 (holding that to convict a defendant under § 1512(c) "it is not enough that there be an intent to influence some ancillary proceeding, such as an investigation independent of the courts or grand jury's authority."); *see also United States v. Young*, 916 F.3d 368, 386 (4th Cir. 2019) ("[a] knowingly corrupt persuader cannot be convicted 'when he does not have in contemplation any particular official proceeding in which those documents might be material.'") (quoting *Arthur Andersen*, 544 U.S. at 708.

While the majority correctly notes that previous sister circuits have granted deference to the Board's 1999 interpretation of the statute, these decisions recognized that obstruction requires a nexus to a pending proceeding. *See, e.g., Alwan v. Ashcroft*, 388 F.3d 507, 514 (5th Cir. 2004) (affirming the Board's determination that petitioner's "obstruction of justice" state crime was an "aggravated felony" because it had a nexus requirement to impede a pending proceeding as instructed by *U.S. v. Aguilar*, 515 U.S. 593 (1995)); *Trung Thanh Hoang v. Holder*, 641 F.3d 1157, 1166 (9th Cir. 2011) (adopting the Board's 1999 definition established in *In re Espinoza-Gonzalez*). *Chevron* does not give agencies cart blanche to interpret the statute as they wish. We still

play the key role of reviewing whether the agency's interpretation is reasonable. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (J. Gorsuch, concurring) (cautioning that "the fact is that *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth."). Here, the Board's new interpretation remains untenable. *See United States v. Williams*, 553 U.S. 285, 306 (2008) (explaining that amorphous terms "without statutory definitions, narrowing context, or settled legal meanings" raise vagueness concerns). Indeed, the Board's 2012 redefinition was not granted deference by our sister circuits on at least four occasions.

The Ninth Circuit was the first to reject the Board's 2012 interpretation on constitutional avoidance grounds because it raised a vagueness issue. *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 819–22 (9th Cir. 2016) (holding that the phrase "process of justice" was "amorphous" because "the BIA has not given an indication of what it does include in 'the process of justice,' or where that process begins and ends."). Soon thereafter, the Third, Fifth, and Seventh Circuits also declined to defer to the Board's 2012 interpretation on similar grounds. *See Flores v. Att'y Gen.*, 856 F.3d 280, 287, n. 23 (3d Cir. 2017) (declining to the defer to the "BIA's [1999 or 2012] interpretation[s] of the Obstruction Provision" to conduct a categorical approach); *Cruz v. Sessions*, 689 F. App'x 328, 329 (5th Cir. 2017) (per curiam) (remanding a petition for review to the Board because it had relied on the "the now-vacated Valenzuela

Gallardo decision" but reserving judgment "as to whether the Ninth Circuit's ruling was correctly decided or whether *Valenzuela Gallardo* provided an appropriate standard"); *Victoria-Faustino v. Sessions*, 865 F.3d 869, 876 (7th Cir. 2017), *as amended* (Oct. 10, 2017) (holding that it will "not defer to the *In re Valenzuela Gallardo* articulation of what constitutes a crime relating to the obstruction of justice under the INA[,] and, instead applying the definition outlined in *Matter of Espinoza* in 1999).

After its 2012 redefinition was struck down for vagueness, the Board went back to the drawing board. However, the Ninth Circuit, again, struck down the Board's 2018 interpretation. *See Valenzuela Gallardo v. Barr*, 968 F.3d at 1063–65. In 2018, the Board held that an offense "relating to obstruction of justice":

> encompasses offenses covered by chapter 73 of the Federal criminal code, 18 U.S.C. §§ 1501-1521 (2012), or any other Federal or State offense that involves (1) an affirmative and intentional attempt (2) that is motivated by a specific intent (3) to interfere either in an investigation or proceeding that is ongoing, pending, or reasonably foreseeable by the defendant, or in another's punishment resulting from a completed proceeding.

In re Valenzuela Gallardo, 27 I. & N. Dec. at 449.

As I explained in my dissent, and above, the Board's new 2018 interpretation remains untenable because the phrase "obstruction of justice" unambiguously requires a nexus to a pending or ongoing proceeding. *See* Dissenting Op. at 44–56. Namely, the BIA has not explained what it means for proceedings to be "reasonably foreseeable." At best,

the Board stated that only a "reasonably foreseeable" investigation or proceeding is required. *In re Valenzuela Gallardo*, 27 I. & N. at 460. Still, the question of whether an investigation or proceeding is "reasonably foreseeable" is subjective and indeterminant. The Ninth Circuit also concluded that "in light of this statutory interpretation analysis, the BIA's proffered reasonably foreseeable standard cannot stand." *Valenzuela Ga*llardo, 968 F.3d at 1068.

In all, as reasonable minds may differ, I understand how my friends in the majority arrived at their conclusion. Nevertheless, I highlight that this court's decision will have far-reaching implications. Namely, this decision is the first and only to uphold the Board's 2018 redefinition as reasonable—repudiating the Ninth Circuit's 2020 decision. Accordingly, by no longer requiring a nexus element, this opinion expands the list of possible state crimes that could trigger immigration deportation consequences for many persons who may not have been otherwise subject to deportation. This is a sizeable impact for many people in our country. Accordingly, for the foregoing reasons, I believe that en banc review is warranted.

APPENDIX E

STATUTORY PROVISIONS INVOLVED

Title 8, United States Code, Section 1326 provides:

(a) In general

Subject to subsection (b), any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a), in the case of any alien described in such subsection—

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien

shall be fined under title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.[1] or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

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[1] So in original. The period probably should be a semicolon.

(c) Reentry of alien deported prior to completion of term of imprisonment

Any alien deported pursuant to section 1252(h)(2) [2] of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that—

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

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[2] See References in Text note below.

Title 8, United States Code, Section 1327 provides:

Any person who knowingly aids or assists any alien inadmissible under section 1182(a)(2) (insofar as an alien inadmissible under such section has been convicted of an aggravated felony) or 1182(a)(3) (other than subparagraph (E) thereof) of this title to enter the United States, or who connives or conspires with any person or persons to allow, procure, or permit any such alien to enter the United States, shall be fined under title 18, or imprisoned not more than 10 years, or both.

Title 8, United States Code, Section 1253 provides:

(a) Penalty for failure to depart

(1) In general Any alien against whom a final order of removal is outstanding by reason of being a member of any of the classes described in section 1227(a) of this title, who-

(A) willfully fails or refuses to depart from the United States within a period of 90 days from the date of the final order of removal under administrative processes, or if judicial review is had, then from the date of the final order of the court,

(B) willfully fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure,

(C) connives or conspires, or takes any other action, designed to prevent or hamper or with the purpose of preventing or hampering the alien's departure pursuant to such, or

(D) willfully fails or refuses to present himself or herself for removal at the time and place required by the Attorney General pursuant to such order, shall be fined under title 18, or imprisoned not more than four years (or 10 years if the alien is a member of any of the classes described in paragraph (1)(E), (2), (3), or (4) of section 1227(a) of this title), or both.

(2) Exception

It is not a violation of paragraph (1) to take any proper steps for the purpose of securing cancellation of or exemption from such order of removal or for the purpose of securing the alien's release from incarceration or custody.

(3) Suspension

The court may for good cause suspend the sentence of an alien under this subsection and order the alien's release under such conditions as the court may prescribe. In determining whether good cause has been shown to justify releasing the alien, the court shall take into account such factors as-

(A) the age, health, and period of detention of the alien;

(B) the effect of the alien's release upon the national security and public peace or safety;

(C) the likelihood of the alien's resuming or following a course of conduct which made or would make the alien deportable;

(D) the character of the efforts made by such alien himself and by representatives of the country or countries to which the alien's removal is directed to expedite the alien's departure from the United States;

(E) the reason for the inability of the Government of the United States to secure passports, other travel documents, or removal facilities from the country or countries to which the alien has been ordered removed; and

(F) the eligibility of the alien for discretionary relief under the immigration laws.

(b) Willful failure to comply with terms of release under supervision

An alien who shall willfully fail to comply with regulations or requirements issued pursuant to section 1231(a)(3) of this title or knowingly give false information in response to an inquiry under such

section shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

(c) Penalties relating to vessels and aircraft

(1) Civil penalties

(A) Failure to carry out certain orders

If the Attorney General is satisfied that a person has violated subsection (d) or (e) of section 1231 of this title, the person shall pay to the Commissioner the sum of $2,000 for each violation.

(B) Failure to remove alien stowaways

If the Attorney General is satisfied that a person has failed to remove an alien stowaway as required under section 1231(d)(2) of this title, the person shall pay to the Commissioner the sum of $5,000 for each alien stowaway not removed.

(C) No compromise

The Attorney General may not compromise the amount of such penalty under this paragraph.

(2) Clearing vessels and aircraft

(A) Clearance before decision on liability

A vessel or aircraft may be granted clearance before a decision on liability is made under paragraph (1) only if a bond approved by the Attorney General or an amount sufficient to pay the civil penalty is deposited with the Commissioner.

(B) Prohibition on clearance while penalty unpaid

A vessel or aircraft may not be granted clearance if a civil penalty imposed under paragraph (1) is not paid.

(d) Discontinuing granting visas to nationals of country denying or delaying accepting alien

On being notified by the Attorney General that the government of a foreign country denies or unreasonably delays accepting an alien who is a citizen, subject, national, or resident of that country after the Attorney General asks whether the government will accept the alien under this section, the Secretary of State shall order consular officers in that foreign country to discontinue granting immigrant visas or nonimmigrant visas, or both, to citizens, subjects, nationals, and residents of that country until the Attorney General notifies the Secretary that the country has accepted the alien.

Title 18, United States Code, Section 3 provides:

Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by life imprisonment or death, the accessory shall be imprisoned not more than 15 years.

No. 22-__

IN THE

Supreme Court of the United States

JEAN FRANCOIS PUGIN,

Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondent.

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

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I, Michael R. Dreeben, a member of the bar of this Court, certify on this 5th day of July 2022, that the Petition for a Writ of Certiorari in the above-captioned case contains 8,969 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

/s/ Michael R. Dreeben
Michael R. Dreeben

22-23

APPENDIX B

File: A028-022-476 — Arlington, VA
Date: March 6, 2020

In re: Jean Francois PUGIN a.k.a. Laval Noel Jean Francois Pugin

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Brian R. Murray, Esquire

APPLICATION: Termination

The respondent, a native and citizen of Mauritius, appeals from the Immigration Judge's September 27, 2019, decision denying his motion to terminate proceedings and sustaining the charge of removability under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii). The Department of Homeland Security (DHS) has not responded to the appeal. The appeal will be dismissed.

We review the findings of fact made by the Immigration Judge, including the determination of credibility, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including questions of judgment, discretion, and law, de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The DHS alleged that on September 25, 2014, the respondent was convicted of accessory after the fact to a felony in violation of section 18.2-19(ii) of the Virginia Code, for which he was sentenced to a term

of imprisonment of 12 months (Exh. 1; *see also* DHS's Notice of Filing, submitted on January 10, 2018 (Unmarked Exh.)). Based on this conviction, the DHS further alleged that the respondent is removable pursuant to section 237(a)(2)(A)(iii) of the Act, for having been convicted of an aggravated felony offense relating to obstruction of justice under section 101(a)(43)(S) of the Act, 8 U.S.C. § 1101(a)(43)(S) (Exh. 1). At the hearing below, the Immigration Judge sustained the charge of removability and denied the respondent's motion to terminate these proceedings (IJ at 2-3).

On appeal, the respondent argues that the Immigration Judge erred in finding that his conviction for accessory after the fact to a felony in violation of VA. CODE § 18.2-19(ii) is an aggravated felony relating to obstruction of justice (Respondent's Br. at 3-6). We disagree.

We affirm the Immigration Judge's determination that the respondent's conviction constitutes an aggravated felony offense relating to obstruction of justice under section 101(a)(43)(S) of the Act (IJ at 2-3). Section 101(a)(43)(S) of the Act defines an aggravated felony as "an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year." To establish whether the respondent's conviction is for such an offense, we apply the categorical approach by focusing on whether the elements of section 18.2-19(ii) of the Virginia Code proscribe conduct that categorically falls within the federal generic definition of an offense relating to obstruction of justice. *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). We clarified the generic definition of an aggravated felony under

section 101(a)(43)(S) of the Act in *Matter of Valenzuela Gallardo* ("*Valenzuela Gallardo II*"), 27 I&N Dec. 449, 460 (BIA 2018), in which we stated that an offense relating to obstruction of justice consists of any state offense that involves (1) an affirmative and intentional attempt, (2) that is motivated by a specific intent, (3) to interfere either in an investigation or proceeding that is ongoing, pending, or reasonably foreseeable by the defendant, or in another's punishment resulting from a completed proceeding.[1] *See also Matter of Cordero-Garcia*, 27 I&N Dec. 652 (BIA 2019) (following *Valenzuela Gallardo II* and determining that the crime of dissuading a witness in violation of section 136.1(b)(1) of the California Penal Code is categorically an aggravated felony offense relating to obstruction of justice under section 101(a)(43)(S) of the Act).

Contrary to the respondent's assertions on appeal, the conduct proscribed by section 18.2-19(ii) of the Virginia Code categorically falls within the federal generic definition of an aggravated felony under section 101(a)(43)(S) of the Act (Respondent's Br. at 3-6). Specifically, section 18.2-19 of the Virginia Code provides that "[e]very accessory after the fact is guilty of (i) a Class 6 felony in the case of a homicide offense that is punishable by death or as a Class 2 felony or

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[1] In *Valenzuela Gallardo II*, we assumed that to "establish whether the respondent's conviction is for 'an offense relating to obstruction of justice' under section 101(a)(43)(S), we apply the categorical approach by focusing on whether the elements of his State statute of conviction proscribe conduct that categorically falls within the Federal generic definition of an offense relating to obstruction of justice." *Matter of Valenzuela Gallardo*, 27 I&N Dec. at 451, *citing Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016).

(ii) a Class 1 misdemeanor in the case of any other felony." To establish that a defendant is guilty of accessory after the fact under section 18.2-19(ii) of the Virginia Code, the State must prove the following elements: (1) a completed felony must have been committed; (2) the person giving aid must have known of the perpetration of the felony by the one he aids; and (3) the aid must have been given to the felon personally for the purpose of hindering the felon's apprehension, conviction, or punishment. *See Suter v. Commonwealth*, 796 S.E.2d 416, 420 (Va. Ct. App. 2017) (setting forth common-law requirements for Virginia's crime of accessory after the fact); *see also Commonwealth v. Dalton*, 524 S.E.2d 860, 862 (Va. 2000).

On appeal, the respondent argues that VA. CODE § 18.2-19(ii) criminalizes conduct that does not require "an affirmative and intentional attempt that is motivated by a specific intent" (Respondent's Br. at 5). We disagree. Although a "specific intent" is not required by statute, we agree with the Immigration Judge's determination that under Virginia law, to hinder a felon's apprehension, conviction or punishment necessarily requires a specific intent (IJ at 3). Additionally, the respondent has not presented evidence that Virginia applied the statute to him or to other defendants under the respondent's construction, i.e. without specific intent. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) (stating that to demonstrate that a statute criminalizes unintentional conduct, the alien "must at least point to his own case or other cases in which the state courts in fact did apply the statute" to conduct falling outside the generic definition) (internal quotation marks omitted).

Thus, we conclude that the respondent has not met his burden of establishing that under current law a realistic probability exists that Virginia would apply section 18.2-19(ii), either in his case or generically, to conduct that is not motivated by a specific intent. *See Gonzales v. Duenas-Alvarez*, 549 U.S. at 193; *see also* 8 C.F.R. § 1240.8(d). In view of the foregoing, we conclude that the Immigration Judge properly determined that the respondent is removable as charged under section 237(a)(2)(A)(iii) of the Act.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

NOTICE: If the respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the DHS, or conspired to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* Section 274D of the Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

/s/

FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
United States Immigration Court
1901 South Bell Street, Suite 200
Arlington, VA 22202

IN THE MATTER OF:	)	**IN REMOVAL PROCEEDINGS**
PUGIN, Jean Francois,	)	File No: A 028 - 022 - 476
a.k.a. PUGIN, Laval Noel Jean Francois,	)	
Respondent	)	

CHARGES: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA" or "Act"), as amended, in that, at any time after admission you have been convicted of an aggravated felony as defined in section 101(a)(43)(S) of the Act, an offense relating to obstruction of justice,

perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year.

APPLICATION: Motion to Terminate.

APPEARANCES

ON BEHALF OF THE RESPONDENT:
Brian Murray, Esq.
Thai Tran, Esq.
Murray Osorio, PLLC

ON BEHALF OF DHS:
Assistant Chief Counsel
4085 Chain Bridge Road, Suite 201
U.S. Department of Homeland Security
Fairfax, VA 22030
1901 South Bell Street, Suite 900
Arlington, VA 22202

DECISION OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

The Respondent is a native and citizen of Mauritius. He was admitted to the United States on or about April 24, 1985, as a lawful permanent resident ("LPR"). *See* NTA. On September 25, 2014, the Respondent was convicted in the Loudoun

County, Virginia Circuit Court for the offense of accessory after the fact to a felony in violation of Virginia Code § 18.2-19(ii), for which he received a term of imprisonment of twelve months. *See* DHS's Notice of Filing, Tab B (Jan. 10, 2018).

On February 2, 2015, the Department of Homeland Security ("DHS") issued a Notice to Appear ("NTA"),.charging the Respondent with removability: under, section 237(a)(2)(A)(iii) of the Act for having been convicted of an aggravated felony under INA § 101(a)(43)(S), an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year. *See* NTA. On July 26, 2017, the Respondent admitted allegations 1 through 3, denied allegations 5 and 6, and denied the charge of removability,

On March 19, 2018, the Respondent filed a motion to terminate removal proceedings, in which he alleged his conviction for accessory after the fact is not an aggravated felony under INA § 101(a)(43)(S), as an offense relating to obstruction of justice. *See* Motion to Terminate (Mar. 19, 2018). DHS submitted a brief in support of removability on the same day. *See* DHS Br. (Mar. 19, 2018). For the following reasons, the Court denies the Respondent's motion to terminate and sustains the charge of removability.

II. LAW, ANALYSIS, AND FINDINGS

DHS bears the burden to prove the Respondent's removability by clear and convincing evidence. INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a). Accordingly; DHS bears the burden to establish by clear and convincing evidence that the Respondent's state conviction constitutes an aggravated felony. DHS asserts the

Respondent's conviction under Virginia Code § 18.2-19(ii) for accessory after the fact constitutes an aggravated felony relating to obstruction of justice. *See* DHS Br. at 2.

To determine whether the Respondent's state conviction constitute an aggravated felony under the 1NA, the Court must determine whether the elements .of the Respondent's state conviction sufficiently match the elements of the corresponding federal offense.[1] *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). The Court determines whether the elements of the Respondent's conviction sufficiently match the elements of the generic offense by applying either the categorical or the modified categorical approach. *Id* 2248-49.

The categorical approach requires determining whether the statute of conviction fits within the generic federal definition of a corresponding removal ground. *Matter of Ferreira*, 26 I&N Dec. 415, 418-19 (BIA 2014). The Supreme Court has found that a state offense is a "categorical match" to a generic federal offense only if a conviction for the state offense necessarily involved facts equating to the generic offense. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013). A state crime categorically constitutes an offense under the INA if the "minimum conduct that has a realistic probability of being prosecuted" under the state statute is also addressed by the corresponding federal statute. *See Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 351 (BIA 2014) (citing *Moncrieffe*, 133 S. Ct. at 1684-85). Establishing that

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[1] The Court also refers to the corresponding federal offense as the "generic offense."

a state statute creates a crime outside the generic federal definition "requires more than the application of legal imagination" to the statute's language. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). Instead, it requires a showing there is "a realistic probability, not a theoretical possibility, that the State would apply the statute to conduct that falls outside the generic definition of the crimp." *See id.*

The Board of Immigration Appeals ("BIA" or "Board").has conclusively held that a federal conviction for accessory after the fact under 18 U.S.C. § 3 is a crime relating to obstruction of justice. This statute states that "whoever, knowing that an offense against the United States has been committed, receives, relieves, comfort or assists the offender in order to hinder or prevent his apprehension trial or punishment, is an accessory after the fact." 18 U.S.C. § 3. The Board reasoned that the "specific purpose of hindering the process of justice brings the federal 'accessory after the fact' crime within the general ambit of the offenses that fall under the 'obstruction of justice designation." *Matter of Espinoza*, 22 I&N Dec. 889, 894-95 (BIA 1999). Therefore, based on this Board precedent, to determine whether the Respondent's state conviction for accessory after the fact constitutes a crime relating to obstruction of justice, the Court must determine whether the Respondent's statute of conviction requires the Respondent act with the "specific purpose of hindering the process of justice."

The Court finds Virginia Code § 18.2-19(ii) is an offense relating to obstruction of justice because, like its federal counterpart, the statute requires the Respondent act with the "specific purpose of hindering the process of justice." The Respondent's

statute of conviction provides that "every accessory after the fact is guilty of (i) a Class 6 felony in the case of a homicide offense that is punishable by death or as a Class 2 felony or (ii) a Class 1 misdemeanor in the case of any other felony." Va. Code Ann. § 18.2-19.

The Supreme Court of Virginia has determined that this offense includes three elements: (1) the felony must be complete, (2) the accused must know that the felon is guilty, and (3) the accused must receive, relieve, comfort, or assist the felon. *Commonwealth v. Dalton*, 524 S.E.2d 860, 862 (Va. 2000). Furthermore, the defendant must have done more than simply fail to report a known felon or "merely suffer a principal to escape." *See Schmitt v. True*, 387 F. Supp. 2d 622, 640 (E.D. Va. 2005). Rather, to be convicted of accessory after the fact, a defendant must have committed this offense "with the view of enabling his principal to elude punishment." *See id.* (citing *Buck v. Commonwealth*, 83 S.E. 390, 393 (Va. 1914)). The Court finds that conduct meant to enable a felon to elude punishment necessarily requires the specific intent to hinder the process of justice. Furthermore, the Respondent has not provided any evidence to suggest there is a realistic probability the statute would be applied to conduct absent a showing of such specific intent. As such, Virginia Code § 18.2-19(ii) is categorically an aggravated felony relating to obstruction of justice, which renders him removable under INA § 237(a)(2)(A)(iii).

Accordingly, the Court enters the following orders:

ORDERS

It is Ordered that
The Respondent's motion to terminate be **DENIED.**

It is Further Ordered that
The charge of removability under INA § 237(a)(2)(A)(iii) be **SUSTAINED.**

9-27-19
Roxanne C. Hladylowycz

Date
Roxanne C. Hladylowycz
United States Immigration Judge

APPEAL RIGHTS: Both parties have the right to appeal the decision in this case. Any appeal is due at the Board of Immigration Appeals within thirty calendar days after the date of service of this decision.

APPENDIX D

FILED: March 7, 2022

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1363

JEAN FRANCOIS PUGIN

Petitioner

v.

MERRICK B. GARLAND, Attorney General

Respondent

AMERICAN IMMIGRATION COUNCIL; FOURTH CIRCUIT FEDERAL PUBLIC DEFENDER; AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Amici Supporting Rehearing Petition

ORDER

The court denies the petition for rehearing en banc.

A requested poll of the court failed to produce a majority of judges in regular active service and not disqualified who voted in favor of rehearing en banc. Chief Judge Gregory, Judge King, and Judge Wynn voted to grant rehearing en banc. Judge Wilkinson, Judge Niemeyer, Judge Motz, Judge Agee, Judge Diaz, Judge Thacker, Judge Harris, Judge

Richardson, Judge Quattlebaum, Judge Rushing, and Judge Heytens voted to deny rehearing en banc. Chief Judge Gregory wrote an opinion dissenting from the denial of rehearing en banc.

Entered at the direction of Judge Richardson.

For The Court

/s/ Patricia S. Connor, Clerk

GREGORY, Chief Judge, dissenting from the denial of rehearing en bane:

I respectfully dissent from this court's denial of rehearing en bane on the issue of whether to grant *Chevron* deference to the Board of Immigration's ("Board") recent interpretation of § 1101(a)(43)(S), providing that an aggravated felony under the INA is "an offense relating to the obstruction of justice, perjury or subornation of perjury, or bribery of a witness." According to the Board, to "obstruct justice" only requires a connection to the "process of justice," which the Board later redefined as circumstances where an investigation or proceeding was merely "reasonably foreseeable." *In re Valenzuela Gallardo*, 27 I. & N. Dec. 449, 460 (B.I.A. 2018).

At step one, we are instructed to employ the traditional tools of statutory interpretation. *Chevron, U.S.A., Inc. v. Nat. Res. Def Council, Inc.*, 467 U.S. 837, 843, n. 9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."). After doing so, I ascertained that the plain text, statutory scheme, and congressional history show that "obstruction of justice" is a term of art long-ago defined by Congress in Chapter 73 of Title 18 as requiring a nexus element to pending or ongoing proceedings. *See Pettibone v. United States*, 148 U.S. 197, 207 (1893) (holding that obstruction is a criminal act that "can only arise when justice is being administered"); *United States v. Aguilar*, 515 U.S. 593, 599 (1995) (stating, as to a federal obstruction of justice offense, that the conduct "must be [taken] with an intent to influence judicial or grand jury proceedings," which "[s]ome courts have

phrased . . . as a 'nexus' requirement."); *see also Pereira v. Sessions*, 138 S. Ct. 2105, 2110 (2018) ("The plain text, the statutory context, and common sense all lead inescapably and unambiguously to that conclusion.").

Indeed, the Board itself previously concluded that the term was unambiguous and that it required a nexus to a pending or ongoing proceeding. *See In re Espinoza-Gonzalez*, 22 I. & N. 889, 892-93 (B.I.A. 1999) (en bane) (holding that "obstruction of justice" is a term of art and applying Chapter 73 to define it in the INA context). Specifically, the Board reasoned that Congress employed the phrase "obstructing justice," "a term of art utilized in the United States Code to designate a specific list of crimes ... in conjunction with other crimes (e.g., perjury and bribery) that also are clearly associated with *the affirmative obstruction of a proceeding or investigation.*" *Id.* at 893–94 (emphasis added). Of course, the Board may change its interpretation, but it must be reasonable upon our review. *Nat'l Cable & Telecommunications Ass'n v. Brand X lnternet Servs.*, 545 U.S. 967, 981 (2005).

To find ambiguity at step one, the majority relied, *inter alia*, on the preceding phrase "relating to." However, this reliance is misplaced because "relating to" does not automatically render "obstruction of justice" ambiguous. *See* Dissenting Op. 41–43; *see also In re Espinoza-Gonzalez*, 22 I. & N. at 895 (rejecting the INA's argument that "relating to" rendered § 1101(a)(43)(S) too broad and tenuous). As cautioned by the Supreme Court, we need to be careful in reading "relating to" to "extend [the statute] to the furthest stretch of [its] indeterminacy, ... [and] stop nowhere." *New York State Conference of Blue*

Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995). Instead, we must use the context of the statutory scheme "in favor of a narrower reading." *Yates v. United States*, 574 U.S. 528, 539 (2015). Here, Congress included "relating to" to capture the breadth of various state "obstruction of justice" statutes that match the essential elements of the INA statute. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, at 499 (1985) (holding that the fact that a statute "has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."); *see also Mellouli v. Lynch*, 575 U.S. 798, 811 (2015) (rejecting the Government's argument that "relating to" in § 1227(a)(2)(B)(i) eliminates the requirement that a controlled substance involve a federally controlled substance).

Furthermore, the opinion pointed to §§ 1512, 1510, 1518 as sources of ambiguity. In interpretating § 1512(e)(l), the Supreme Court held that a conviction requires proof of nexus between corrupt persuasion and particular proceeding. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 707–08 (2005). The Supreme Court also distinguished between a requirement that proceedings be reasonably foreseeable and one where they "not even be foreseen," *id.*; *see also Marinello v. United States*, 138 S. Ct. 1101, 1110 (2018) (interpreting 26 U.S.C. § 7212 as requiring that the Government show that defendant engaged in "obstructive conduct or, at the least, was then reasonably foreseeable by the defendant."). As noted by our sister circuit, *Arthur Andersen* is inapplicable in our analysis because § 1512 "is an *exception* to Chapter 73's general rule that obstruction requires a nexus to an ongoing or pending

proceeding," and the Supreme Court still read a nexus requirement into § 1512 "support[ing] the notion that obstruction of justice offenses require a tight nexus to a proceeding." *Valenzuela Gallardo v. Barr*, 968 F.3d 1053, 1067 (9th Cir. 2020) (emphasis in original). Furthermore, and with respect to *Marinello*, the Supreme Court carefully noted that the "the language and history of [§ 7212] differ[ed]" from the "obstruction of justice" in Chapter 73 it had previously interpreted as requiring a nexus element. *Marinello*, 138 S. Ct. at 1109. Finally, and as I noted in my dissent, even if *Marinello* and *Arthur Andersen* are relevant in evaluating the Board's new interpretation, we must still examine the text, ordinary meaning, history, and statutory scheme of "obstruction of justice" "[a]t th[e] time" § 1101(a)(43)(S) was passed into law. *Esquivel Quintana v. Sessions*, 137 S. Ct. 1562, 1569 (2017). Accordingly, and as I explain in my dissent, *see* Dissenting Op. 44–54, a review of the history, text, and statutory analysis of §§ 1510, 1512, 1518, 1519, and similar provisions, results in finding that the phrase "obstruction of justice" is unambiguous.

Even if the phrase "obstruction of justice" is ambiguous at *Chevron* step one, and the Board is given legislative authority, the Board's interpretation must still be reasonably consistent with the legislative scheme. *Chevron*, 104 S. Ct. at 2793.

The Board long-ago inserted vagueness into a well-settled interpretation of "obstruction of justice." In 2012, the Board redefined the phrase "obstruction of justice" to include crimes that contain the "critical element of an affirmative and intentional attempt, motivated by a specific intent, to interfere *with the process of justice*, irrespective of the existence of an

ongoing criminal investigation or proceeding." *In re Valenzuela Gallardo*, 25 I. & N. Dec. 838, 838 (B.I.A. 2012) (emphasis added). The Board, thus, redefined the phrase to mean that "the existence of [an ongoing criminal investigation or trial] is *not an essential element* of 'an offense relating to obstruction of justice.'" *Id.* at 841 (emphasis added) (internal citation omitted). The Board's vague phrase "process of justice" was untenable and contradicted settled case law. *See Aguilar*, 515 U.S. at 599 (holding that to convict a defendant under § 1512(c) "it is not enough that there be an intent to influence some ancillary proceeding, such as an investigation independent of the courts or grand jury's authority."); *see also United States v. Young*, 916 F.3d 368, 386 (4th Cir. 2019) ("[a] knowingly corrupt persuader cannot be convicted 'when he does not have in contemplation any particular official proceeding in which those documents might be material.'") (quoting *Arthur Andersen*, 544 U.S. at 708.

While the majority correctly notes that previous sister circuits have granted deference to the Board's 1999 interpretation of the statute, these decisions recognized that obstruction requires a nexus to a pending proceeding. *See, e.g., Alwan v. Ashcroft*, 388 F.3d 507, 514 (5th Cir. 2004) (affirming the Board's determination that petitioner's "obstruction of justice" state crime was an "aggravated felony" because it had a nexus requirement to impede a pending proceeding as instructed by *U.S. v. Aguilar*, 515 U.S. 593 (1995)); *Trung Thanh Hoang v. Holder*, 641 F.3d 1157, 1166 (9th Cir. 2011) (adopting the Board's 1999 definition established in *In re Espinoza-Gonzalez*). *Chevron* does not give agencies cart blanche to interpret the statute as they wish. We still

play the key role of reviewing whether the agency's interpretation is reasonable. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (J. Gorsuch, concurring) (cautioning that "the fact is that *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth."). Here, the Board's new interpretation remains untenable. *See United States v. Williams*, 553 U.S. 285, 306 (2008) (explaining that amorphous terms "without statutory definitions, narrowing context, or settled legal meanings" raise vagueness concerns). Indeed, the Board's 2012 redefinition was not granted deference by our sister circuits on at least four occasions.

The Ninth Circuit was the first to reject the Board's 2012 interpretation on constitutional avoidance grounds because it raised a vagueness issue. *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 819–22 (9th Cir. 2016) (holding that the phrase "process of justice" was "amorphous" because "the BIA has not given an indication of what it does include in 'the process of justice,' or where that process begins and ends."). Soon thereafter, the Third, Fifth, and Seventh Circuits also declined to defer to the Board's 2012 interpretation on similar grounds. *See Flores v. Att'y Gen.*, 856 F.3d 280, 287, n. 23 (3d Cir. 2017) (declining to the defer to the "BIA's [1999 or 2012] interpretation[s] of the Obstruction Provision" to conduct a categorical approach); *Cruz v. Sessions*, 689 F. App'x 328, 329 (5th Cir. 2017) (per curiam) (remanding a petition for review to the Board because it had relied on the "the now-vacated Valenzuela

Gallardo decision" but reserving judgment "as to whether the Ninth Circuit's ruling was correctly decided or whether *Valenzuela Gallardo* provided an appropriate standard"); *Victoria-Faustino v. Sessions*, 865 F.3d 869, 876 (7th Cir. 2017), *as amended* (Oct. 10, 2017) (holding that it will "not defer to the *In re Valenzuela Gallardo* articulation of what constitutes a crime relating to the obstruction of justice under the INA[,] and, instead applying the definition outlined in *Matter of Espinoza* in 1999).

After its 2012 redefinition was struck down for vagueness, the Board went back to the drawing board. However, the Ninth Circuit, again, struck down the Board's 2018 interpretation. *See Valenzuela Gallardo v. Barr*, 968 F.3d at 1063–65. In 2018, the Board held that an offense "relating to obstruction of justice":

> encompasses offenses covered by chapter 73 of the Federal criminal code, 18 U.S.C. §§ 1501-1521 (2012), or any other Federal or State offense that involves (1) an affirmative and intentional attempt (2) that is motivated by a specific intent (3) to interfere either in an investigation or proceeding that is ongoing, pending, or reasonably foreseeable by the defendant, or in another's punishment resulting from a completed proceeding.

In re Valenzuela Gallardo, 27 I. & N. Dec. at 449.

As I explained in my dissent, and above, the Board's new 2018 interpretation remains untenable because the phrase "obstruction of justice" unambiguously requires a nexus to a pending or ongoing proceeding. *See* Dissenting Op. at 44–56. Namely, the BIA has not explained what it means for proceedings to be "reasonably foreseeable." At best,

the Board stated that only a "reasonably foreseeable" investigation or proceeding is required. *In re Valenzuela Gallardo*, 27 I. & N. at 460. Still, the question of whether an investigation or proceeding is "reasonably foreseeable" is subjective and indeterminant. The Ninth Circuit also concluded that "in light of this statutory interpretation analysis, the BIA's proffered reasonably foreseeable standard cannot stand." *Valenzuela Ga*llardo, 968 F.3d at 1068.

In all, as reasonable minds may differ, I understand how my friends in the majority arrived at their conclusion. Nevertheless, I highlight that this court's decision will have far-reaching implications. Namely, this decision is the first and only to uphold the Board's 2018 redefinition as reasonable—repudiating the Ninth Circuit's 2020 decision. Accordingly, by no longer requiring a nexus element, this opinion expands the list of possible state crimes that could trigger immigration deportation consequences for many persons who may not have been otherwise subject to deportation. This is a sizeable impact for many people in our country. Accordingly, for the foregoing reasons, I believe that en banc review is warranted.

APPENDIX E

STATUTORY PROVISIONS INVOLVED

Title 8, United States Code, Section 1326 provides:

(a) In general

Subject to subsection (b), any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a), in the case of any alien described in such subsection—

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien

shall be fined under title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.[1] or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

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[1] So in original. The period probably should be a semicolon.

(c) Reentry of alien deported prior to completion of term of imprisonment

Any alien deported pursuant to section 1252(h)(2) [2] of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that—

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

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[2] See References in Text note below.

Title 8, United States Code, Section 1327 provides:

Any person who knowingly aids or assists any alien inadmissible under section 1182(a)(2) (insofar as an alien inadmissible under such section has been convicted of an aggravated felony) or 1182(a)(3) (other than subparagraph (E) thereof) of this title to enter the United States, or who connives or conspires with any person or persons to allow, procure, or permit any such alien to enter the United States, shall be fined under title 18, or imprisoned not more than 10 years, or both.

Title 8, United States Code, Section 1253 provides:

(a) Penalty for failure to depart

(1) In general Any alien against whom a final order of removal is outstanding by reason of being a member of any of the classes described in section 1227(a) of this title, who-

(A) willfully fails or refuses to depart from the United States within a period of 90 days from the date of the final order of removal under administrative processes, or if judicial review is had, then from the date of the final order of the court,

(B) willfully fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure,

(C) connives or conspires, or takes any other action, designed to prevent or hamper or with the purpose of preventing or hampering the alien's departure pursuant to such, or

(D) willfully fails or refuses to present himself or herself for removal at the time and place required by the Attorney General pursuant to such order, shall be fined under title 18, or imprisoned not more than four years (or 10 years if the alien is a member of any of the classes described in paragraph (1)(E), (2), (3), or (4) of section 1227(a) of this title), or both.

(2) Exception

It is not a violation of paragraph (1) to take any proper steps for the purpose of securing cancellation of or exemption from such order of removal or for the purpose of securing the alien's release from incarceration or custody.

(3) Suspension

The court may for good cause suspend the sentence of an alien under this subsection and order the alien's release under such conditions as the court may prescribe. In determining whether good cause has been shown to justify releasing the alien, the court shall take into account such factors as-

(A) the age, health, and period of detention of the alien;

(B) the effect of the alien's release upon the national security and public peace or safety;

(C) the likelihood of the alien's resuming or following a course of conduct which made or would make the alien deportable;

(D) the character of the efforts made by such alien himself and by representatives of the country or countries to which the alien's removal is directed to expedite the alien's departure from the United States;

(E) the reason for the inability of the Government of the United States to secure passports, other travel documents, or removal facilities from the country or countries to which the alien has been ordered removed; and

(F) the eligibility of the alien for discretionary relief under the immigration laws.

(b) Willful failure to comply with terms of release under supervision

An alien who shall willfully fail to comply with regulations or requirements issued pursuant to section 1231(a)(3) of this title or knowingly give false information in response to an inquiry under such

section shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

(c) Penalties relating to vessels and aircraft

(1) Civil penalties

(A) Failure to carry out certain orders

If the Attorney General is satisfied that a person has violated subsection (d) or (e) of section 1231 of this title, the person shall pay to the Commissioner the sum of $2,000 for each violation.

(B) Failure to remove alien stowaways

If the Attorney General is satisfied that a person has failed to remove an alien stowaway as required under section 1231(d)(2) of this title, the person shall pay to the Commissioner the sum of $5,000 for each alien stowaway not removed.

(C) No compromise

The Attorney General may not compromise the amount of such penalty under this paragraph.

(2) Clearing vessels and aircraft

(A) Clearance before decision on liability

A vessel or aircraft may be granted clearance before a decision on liability is made under paragraph (1) only if a bond approved by the Attorney General or an amount sufficient to pay the civil penalty is deposited with the Commissioner.

(B) Prohibition on clearance while penalty unpaid

A vessel or aircraft may not be granted clearance if a civil penalty imposed under paragraph (1) is not paid.

(d) Discontinuing granting visas to nationals of country denying or delaying accepting alien

On being notified by the Attorney General that the government of a foreign country denies or unreasonably delays accepting an alien who is a citizen, subject, national, or resident of that country after the Attorney General asks whether the government will accept the alien under this section, the Secretary of State shall order consular officers in that foreign country to discontinue granting immigrant visas or nonimmigrant visas, or both, to citizens, subjects, nationals, and residents of that country until the Attorney General notifies the Secretary that the country has accepted the alien.

Title 18, United States Code, Section 3 provides:

Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by life imprisonment or death, the accessory shall be imprisoned not more than 15 years.

No. 22-__

IN THE

Supreme Court of the United States

JEAN FRANCOIS PUGIN,

Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondent.

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

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I, Michael R. Dreeben, a member of the bar of this Court, certify on this 5th day of July 2022, that the Petition for a Writ of Certiorari in the above-captioned case contains 8,969 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

/s/ Michael R. Dreeben
Michael R. Dreeben