No. 22-23

In the Supreme Court of the United States

JEAN FRANCOIS PUGIN, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the crime of being an accessory after the fact to a felony, in violation of Virginia law, is "an offense relating to obstruction of justice," 8 U.S.C. 1101(a)(43)(S).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-70a) is reported at 19 F.4th 437. The decisions of the Board of Immigration Appeals (Pet. App. 71a-75a) and the immigration judge (Pet. App. 76a-82a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 2021. A petition for rehearing was denied on March 7, 2022 (Pet. App. 83a-92a). On April 19, 2022, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 6, 2022, and the petition was filed on July 5, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, renders deportable any noncitizen "who is convicted of an aggravated felony at any time after admission" to the United States. 8 U.S.C. 1227(a)(2)(A)(iii).[1] Under the INA, "an offense relating to obstruction of justice * * * for which the term of imprisonment is at least one year" constitutes an aggravated felony, regardless of whether the offense is committed "in violation of Federal or State law." 8 U.S.C. 1101(a)(43)(S).

Whether a noncitizen has been convicted of an offense relating to obstruction of justice depends on application of "a categorical approach" that "look[s] to the statute . . . of conviction, rather than to the specific facts underlying the crime." *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1568 (2017) (citation omitted). Under that approach, the question is whether the "elements" of the offense establish that the conviction was for an offense relating to obstruction of justice. *Kawashima* v. *Holder*, 565 U.S. 478, 483 (2012).

2. Petitioner is a native and citizen of Mauritius. Pet. App. 77a. In 1985, he was admitted to the United States as a lawful permanent resident. *Ibid.* In 2014, following a guilty plea in Virginia state court, petitioner was convicted of being an accessory after the fact to a felony, in violation of Va. Code Ann. § 18.2-19(ii), and sentenced to 12 months of imprisonment. Administrative Record (A.R.) 179-185. Section 18.2-19 incorporates "the common-law definition of what constitutes an accessory after the fact." *Suter* v. *Commonwealth*, 796

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[1] This brief uses "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

S.E.2d 416, 420 (Va. Ct. App. 2017). Under Virginia law, the offense has the following elements: (1) a "felony must be completed" by someone other than the defendant; (2) the defendant "must know that the felon is guilty"; and (3) the defendant "must receive, relieve, comfort or assist" the felon, "with the view of enabling [the felon] to elude punishment." *Wren* v. *Commonwealth*, 67 Va. 952, 956-957 (1875); see *Suter*, 796 S.E.2d at 420 (explaining that "the aid must have been given to the felon personally for the purpose of hindering the felon's apprehension, conviction, or punishment"); Va. Model Crim. Jury Instr. No. 3.300(4) (Sept. 2019) (explaining that the "Commonwealth must prove" that "the defendant comforted, relieved, hid, or in any other way assisted the person who committed the [felony] with the intent of helping that person escape or delay capture, prosecution or punishment").

In 2015, the Department of Homeland Security charged that petitioner was subject to removal under 8 U.S.C. 1227(a)(2)(A)(iii) because his conviction for an accessory-after-the-fact offense was a conviction for an aggravated felony—specifically, for an offense relating to obstruction of justice. A.R. 206, 208. In 2018, petitioner filed a motion to terminate his removal proceedings, arguing that his accessory-after-the-fact offense under Virginia law is not an "offense relating to obstruction of justice * * * because it does not include 'the critical element of an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice.'" A.R. 170 (quoting *In re Valenzuela Gallardo*, 25 I. & N. Dec. 838, 841 (B.I.A. 2012) (*Valenzuela Gallardo I*)).

In 2019, the immigration judge (IJ) denied petitioner's motion. Pet. App. 76a-82a. The IJ observed that

in *In re Espinoza-Gonzalez*, 22 I. & N. Dec. 889 (1999) (en banc), the Board of Immigration Appeals (Board) reaffirmed that "a federal conviction for accessory after the fact under 18 U.S.C. § 3 is a crime relating to obstruction of justice" because the federal offense has as an element the "'specific purpose of hindering the process of justice.'" Pet. App. 80a (citation omitted). The IJ determined that "specific intent to hinder the process of justice" is likewise an element of being an accessory after the fact under Virginia law because the prosecution must prove that the defendant acted "'with the view of enabling [the felon] to elude punishment.'" *Id.* at 81a (citation omitted). The IJ therefore concluded that "Virginia Code § 18.2-19(ii) is categorically an aggravated felony relating to obstruction of justice," *ibid.*, and ordered petitioner's removal to Mauritius, A.R. 70-71.

The Board dismissed petitioner's appeal. Pet. App. 71a-75a. Like the IJ, the Board rejected petitioner's contention that a conviction under Va. Code Ann. § 18.2-19(ii) does not require a showing of "specific intent to interfere with the process of justice." A.R. 54; see Pet. App. 74a. The Board agreed with the IJ that, "[t]o establish that a defendant is guilty of accessory after the fact under" Virginia law, the prosecution must prove that the defendant aided the felon "for the purpose of hindering the felon's apprehension, conviction, or punishment." Pet. App. 74a. The Board therefore affirmed the IJ's determination that petitioner's "conviction constitutes an aggravated felony offense relating to obstruction of justice." *Id.* at 72a.

3. A divided panel of the court of appeals upheld the Board's decision. Pet. App. 1a-70a. The court rejected petitioner's argument that an offense relating to obstruction of justice "requires a connection to an ongoing

or pending proceeding or investigation." *Id.* at 6a. After "[c]onsidering federal and state laws, the Model Penal Code, and dictionary definitions," the court determined that "the phrase 'relating to obstruction of justice'" is "at least ambiguous" as to whether it "requires the obstruction of an ongoing proceeding." *Id.* at 24a; see *id.* at 13a-24a. The court then deferred under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the Board's "reasonable" interpretation of the phrase as encompassing "interference in an ongoing *or reasonably foreseeable* proceeding." Pet. App. 24a; see *In re Valenzuela Gallardo*, 27 I. & N. Dec. 449, 460 (B.I.A. 2018) (*Valenzuela Gallardo III*). The court rejected petitioner's contention that "the rule of lenity should apply rather than *Chevron* because the definition of obstruction of justice is used in criminal actions." Pet. App. 6a; see *id.* at 7a-13a.

The court of appeals further held that "the Virginia offense of accessory after the fact categorically matches the Board's definition" of an offense relating to obstruction of justice. Pet. App. 3a. Like the IJ and the Board, the court rejected petitioner's contention that Virginia law does not require "specific intent." *Id.* at 26a; see *id.* at 26a-33a. And the court held that it "lack[ed] jurisdiction to address" petitioner's alternative argument that, "[e]ven if Virginia law requires specific intent," "it does not necessarily require a specific intent to reduce the likelihood of a criminal punishment resulting from an ongoing or reasonably foreseeable proceeding." *Id.* at 33a n.18. The court explained that petitioner had failed to "exhaust that argument in the proceedings before the [IJ] or the Board." *Ibid.* (citing A.R. 28-33, 168-170).

Judge Gregory dissented. Pet. App. 35a-70a. In his view, the phrase "obstruction of justice" unambiguously

requires a "nexus" to a "pending or ongoing proceeding," *id.* at 59a, and the Board therefore "erred in concluding that [p]etitioner's state conviction is an 'aggravated felony,'" *id.* at 70a.

4. The court of appeals denied rehearing en banc over Judge Gregory's dissent. Pet. App. 83a-92a.

DISCUSSION

Petitioner contends (Pet. 4) that his conviction under Virginia law for being an accessory after the fact does not qualify as an offense relating to obstruction of justice for purposes of the INA's aggravated-felony definition, 8 U.S.C. 1101(a)(43)(S), on the theory that obstruction of justice categorically requires "interference with a pending proceeding or investigation." Although the court of appeals correctly rejected that contention, the decision below conflicts with the decisions of other courts of appeals, and this Court's review is warranted.

Concurrently with the filing of this response, the government is filing a petition for a writ of certiorari seeking review of the Ninth Circuit's decision in *Cordero-Garcia* v. *Garland*, 44 F.4th 1181 (2022), a case involving the closely related question whether a witness-tampering crime qualifies as "an offense relating to obstruction of justice" for purposes of Section 1101(a)(43)(S). To allow this Court to address the meaning of that phrase in full view of the issues raised by both accessory-after-the-fact and witness-tampering crimes—two recurring kinds of crimes that have each precipitated disagreements among the courts of appeals—the government requests that certiorari be granted in this case and *Cordero-Garcia* and that the cases be consolidated for argument.

1. The court of appeals correctly held that the crime of being an accessory after the fact to a felony, in viola-

tion of Va. Code Ann. § 18.2-19(ii), is "an offense relating to obstruction of justice," 8 U.S.C. 1101(a)(43)(S).

a. Because the INA does not expressly define "an offense relating to obstruction of justice," 8 U.S.C. 1101(a)(43)(S), that phrase should be given its "ordinary meaning," *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1569 (2017). In *Esquivel-Quintana*, this Court determined the "ordinary meaning" of a different part of the INA's definition of an aggravated felony—the one referring to "sexual abuse of a minor," 8 U.S.C. 1101(a)(43)(A)—by consulting *Merriam-Webster's Dictionary of Law* (1996) (*Merriam-Webster's*). *Esquivel-Quintana*, 137 S. Ct. at 1569. That same dictionary defines "obstruction of justice" as follows:

> the crime or act of willfully interfering with the process of justice and law esp. by influencing, threatening, harming, or impeding a witness, potential witness, juror, or judicial or legal officer or by furnishing false information in or otherwise impeding an investigation or legal process ⟨the defendant's *obstruction of justice* led to a more severe sentence⟩.

Merriam-Webster's 337; see Bryan A. Garner, *A Dictionary of Modern Legal Usage* 611 (2d ed. 1995) ("obstruction of justice (= interference with the orderly administration of law) is a broad phrase that captures every willful act of corruption, intimidation, or force that tends somehow to impair the machinery of the civil or criminal law").[2]

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[2] Congress added Section 1101(a)(43)(S) to the INA's definition of an aggravated felony in April 1996. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e)(8), 110 Stat. 1278.

Here, petitioner was convicted of being an accessory after the fact to a felony. Under Virginia law, that offense involves assisting a known felon "with the view of enabling [the felon] to elude punishment." *Wren* v. *Commonwealth*, 67 Va. 952, 956-957 (1875); see p. 3, *supra*.[3] Punishment is a stage in the process of justice. *Silva* v. *Garland*, 27 F.4th 95, 104 (1st Cir. 2022). And one who purposefully aids a felon's evasion of punishment necessarily interferes with that process. The elements of the accessory-after-the-fact offense under Virginia law thus establish that petitioner was convicted of an offense relating to obstruction of justice.

b. Petitioner nevertheless contends (Pet. 4) that an accessory-after-the-fact conviction under Virginia law is not for an offense relating to obstruction of justice because it lacks the "element" of "interference with a pending proceeding or investigation." Petitioner derives that "temporal nexus requirement" primarily from two sources: (1) the *Merriam-Webster's* definition, and (2) the offenses described in Chapter 73 of the federal criminal code. *Valenzuela Gallardo* v. *Barr*, 968 F.3d 1053, 1063 (9th Cir. 2020) (*Valenzuela Gallardo IV*) (citation omitted); see Pet. 25-29, 31. But those sources do not support such a requirement; to the contrary, they make clear that an offense need not involve a pending proceeding or investigation in order to qualify as an offense relating to obstruction of justice.

i. Petitioner asserts that the *Merriam-Webster's* definition of obstruction of justice "plainly support[s]" his interpretation of Section 1101(a)(43)(S) because that

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[3] Before this Court, petitioner does not dispute that acting "with the view of enabling [the felon] to elude punishment" is an element of his accessory-after-the-fact offense under Virginia law. Pet. 9 (citation omitted).

definition refers to "'an investigation or legal process.'" Pet. 31 (citation and emphasis omitted). But the definition refers to "an investigation or legal process" only in describing one example of obstruction of justice. *Merriam-Webster's* 337. And even then, it does not require that the "investigation or legal process" be pending; a defendant can "imped[e] an investigation or legal process," *ibid.*, that has not yet begun. See, *e.g.*, *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 703, 707-708 (2005) (noting that, even if a proceeding was not pending or about to be instituted at the time of the offense, it could "be foreseen" and thus could support a conviction for persuading others to shred documents to prevent their "'use in an official proceeding'" in violation of 18 U.S.C. 1512(b)(2)(A) or (B)); see also *Marinello* v. *United States*, 138 S. Ct. 1101, 1110 (2018) (similar).

Indeed, the rest of the *Merriam-Webster's* definition of obstruction of justice makes clear that no pending proceeding or investigation is required. The main clause of the definition—"the crime or act of willfully interfering with the process of justice and law"—makes no mention of a pending proceeding or investigation. *Merriam-Webster's* 337. And "influencing, threatening, harming, or impeding a witness" or "*potential* witness"—which the definition provides as an example of obstruction of justice—plainly need not involve an already-pending proceeding or investigation. *Ibid.* (emphasis added); see, *e.g.*, 18 U.S.C. 1512(f)(1) (providing that, in order to be convicted of witness tampering, "an official proceeding need not be pending or about to be instituted at the time of the offense").

ii. Petitioner also attempts (Pet. 26) to infer a pending-proceeding requirement from the offenses described in Chapter 73 of Title 18 of the U.S. Code, which are un-

derstood to be obstruction-of-justice offenses.[4] To be sure, some Chapter 73 offenses explicitly depend on the existence of a pending proceeding. See, *e.g.*, 18 U.S.C. 1504 (influencing a juror "upon any issue or matter pending before such juror" by writing); 18 U.S.C. 1505 (obstructing the "due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States"); 18 U.S.C. 1508 (recording, listening to, or observing "the proceedings" of a jury "while such jury is deliberating or voting").

But many Chapter 73 offenses can be committed before any proceeding has begun. See, *e.g.*, 18 U.S.C. 1510(a) (endeavoring by means of bribery to obstruct "the communication of information * * * to a criminal investigator"); 18 U.S.C. 1511 (obstructing "the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business"); 18 U.S.C. 1512 (tampering with a witness, victim, or informant); 18 U.S.C. 1513(a)(1)(B)

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[4] Petitioner relies on Congress's placement of certain offenses in Chapter 73 under the heading "Obstruction of Justice." Pet. 26; see Pet. 29 (relying on the fact that Congress "put the accessory-after-the-fact statute," 18 U.S.C. 3, "in a chapter other than Chapter 73") (brackets and citation omitted). But Congress has specifically instructed that "[n]o inference of a legislative construction is to be drawn by reason of the chapter in Title 18, Crimes and Criminal Procedure, * * * in which any particular section is placed, nor by reason of the catchlines used in such title." Act of June 25, 1948, ch. 645, § 19, 62 Stat. 862. Even apart from their placement in Chapter 73 and the heading of that Chapter, however, the offenses described in Chapter 73 are understood to be offenses "relating to obstruction of justice" as a matter of ordinary meaning. See *Arthur Anderson*, 544 U.S. at 703. Similarly, "courts have long considered" an accessory-after-the-fact offense "to be an obstruction of justice as a matter of plain meaning." Pet. App. 19a (citing cases).

(retaliating against a person for providing information to a law-enforcement officer); 18 U.S.C. 1518 (obstructing "the communication of information or records relating to a violation of a Federal health care offense to a criminal investigator"); 18 U.S.C. 1519 (destroying "any record, document, or tangible object" to influence a federal investigation). And various other Chapter 73 offenses can be committed after a proceeding has ended. See, *e.g.*, 18 U.S.C. 1503(a) (injuring a juror on account of his "having been such juror"); 18 U.S.C. 1509 (obstructing "the due exercise of rights" under the "judgment" of a federal court); 18 U.S.C. 1513(a)(1)(A) (retaliating against a person for attending an official proceeding). Thus, far from supporting a pending-proceeding requirement, the offenses described in Chapter 73 make clear that obstruction of justice can occur before, during, or after a proceeding.

Petitioner does not dispute (Pet. 27) that witness tampering under Section 1512 does "not require interference with an existing official proceeding." Rather, he asserts that Section 1512 is "the 'exception that proves the rule.'" *Ibid.* (citation omitted). But witness tampering is a paradigmatic obstruction-of-justice offense, see *Merriam-Webster's* 337, and many other offenses described in Chapter 73 likewise lack a pending-proceeding requirement, even without the specific disclaimer included in Section 1512(f)(1), see pp. 10-11, *supra*. Contrary to petitioner's contention, those offenses are not exceptions to such a requirement; rather, they show that no such requirement exists in the first place.

Petitioner further contends (Pet. 29 n.4) that the offenses described in Sections 1518 and 1519 are "irrelevant to the inquiry here" because Congress's enactment of those Sections post-dated its addition of "an offense

relating to obstruction of justice" to the INA's definition of an aggravated felony in April 1996. See note 2, *supra*. But the ordinary meaning of obstruction of justice did not change in the short period between April 1996 and the enactment of Sections 1518 and 1519 in August 1996 and July 2002, respectively. See Corporate and Criminal Fraud Accountability Act of 2002, Pub. L. No. 107-204, § 802(a), 116 Stat. 800 (enacting Section 1519); Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 245(a), 110 Stat. 2017-2018 (enacting Section 1518). And "courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes." *Branch* v. *Smith*, 538 U.S. 254, 281 (2003) (plurality opinion); see *United States* v. *Fausto*, 484 U.S. 439, 453 (1988) ("[C]ourts frequently * * * interpret a statutory text in the light of surrounding texts that happen to have been subsequently enacted.").

c. Because "an offense relating to obstruction of justice" unambiguously does not require an already-pending proceeding or investigation, that should be the end of the matter. See *Esquivel-Quintana*, 137 S. Ct. at 1572. Given the lack of ambiguity as to whether a proceeding or investigation must be pending, "neither the rule of lenity nor *Chevron* applies." *Ibid.*; see *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

In any event, any ambiguity about whether a proceeding or investigation must be pending should be resolved by deferring to the Board's rejection of a pending-proceeding requirement. Ever since the Board first addressed the issue in 1997—the year after Congress added "an offense relating to obstruction of justice" to the INA's definition of an aggravated felony, see

note 2, *supra*—the Board has consistently interpreted the phrase to encompass offenses that do not require a pending proceeding or investigation. See *In re Batista-Hernandez*, 21 I. & N. Dec. 955, 962 (1997) (en banc) (holding that accessory after the fact under 18 U.S.C. 3, which requires no pending proceeding or investigation, constitutes an offense relating to obstruction of justice); *In re Espinoza-Gonzalez*, 22 I. & N. Dec. 889, 894-895 (1999) (en banc) (reaffirming the holding of *Batista-Hernandez*); *In re Valenzuela Gallardo*, 25 I. & N. Dec. 838, 841 (2012) (*Valenzuela Gallardo I*) (reiterating that "interference with an ongoing criminal investigation or trial" is "not an essential element of 'an offense relating to obstruction of justice'"); *In re Valenzuela Gallardo*, 27 I. & N. Dec. 449, 456 (2018) (*Valenzuela Gallardo III*) (reiterating that "Congress did not intend interference in an ongoing or pending investigation or proceeding to be a necessary element of an 'offense relating to obstruction of justice'"); *In re Cordero-Garcia*, 27 I. & N. Dec. 652, 654-655 (2019) (holding that dissuading a witness under California law, which requires no pending proceeding or investigation, constitutes an offense relating to obstruction of justice). At a minimum, that interpretation is a reasonable one that would be entitled to *Chevron* deference. See pp. 7-12, *supra*.[5]

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[5] In *Espinoza-Gonzalez* and *Valenzuela Gallardo I*, the Board adopted an interpretation of "obstruction of justice" that tracked the *Merriam-Webster's* definition: "an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice." *Espinoza-Gonzalez*, 22 I. & N. Dec. at 896; *Valenzuela Gallardo I*, 25 I. & N. Dec. at 841. After the Ninth Circuit incorrectly rejected that interpretation, see *Valenzuela Gallardo* v. *Lynch*, 818 F.3d 808, 823-824 (2016) (*Valenzuela Gallardo II*), the Board clarified that "an offense relating to obstruction of justice" encompasses "offenses covered by chapter 73 of the Federal crimi-

Petitioner contends that any ambiguity should be resolved not by applying *Chevron*, but rather by applying either one of two lenity-based canons—the canon that ambiguities in "deportation statutes" should be construed in favor of the noncitizen, Pet. 33 (citation omitted), or the canon that ambiguities in "criminal statutes" should be construed in favor of the defendant, Pet. 33-34. But the question whether *Chevron* (or some other canon) should apply is a matter of "congressional intent." *City of Arlington* v. *FCC*, 569 U.S. 290, 296 (2013). Here, "Congress has charged the Attorney General with administering the INA," *Negusie* v. *Holder*, 555 U.S. 511, 516-517 (2009), and instructed that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling," 8 U.S.C. 1103(a)(1). Congress has thus made clear that any ambiguity in the INA should be resolved, "first and foremost," by the Attorney General, not by principles of lenity. *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996). And because the Attorney General, in turn,

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nal code 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," *Valenzuela Gallardo III*, 27 I. & N. Dec. at 460. The Board further clarified that "a specific intent to interfere in an investigation or proceeding" "necessarily" means that an investigation or proceeding was "ongoing, pending, or reasonably foreseeable." *Cordero-Garcia*, 27 I. & N. Dec. at 654. Before this Court, petitioner does not dispute that his conviction as an accessory after the fact constitutes a conviction for an aggravated felony under the Board's decisions in *Valenzuela Gallardo III* and *Cordero-Garcia*. See Pet. App. 33a n.18 (holding that petitioner "did not exhaust" any argument that a Virginia accessory-after-the-fact conviction does not require that a proceeding be at least "reasonably foreseeable").

has lawfully vested his interpretive authority in the Board, see *Negusie*, 555 U.S. at 517, this Court has repeatedly held that principles of *Chevron* deference apply when the Board interprets the INA. See, *e.g.*, *Scialabba* v. *de Osorio*, 573 U.S. 41, 57 (2014) (plurality opinion); *id.* at 79 (Roberts, C.J., concurring in the judgment); *Holder* v. *Martinez Gutierrez*, 566 U.S. 583, 591-598 (2012); *Negusie*, 555 U.S. at 517; *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999).

Of course, the Attorney General has no delegated authority to speak "with the force of law" when interpreting Virginia law or the federal criminal code. *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001). But this case concerns the meaning of a phrase that Congress added to the INA, 8 U.S.C. 1101(a)(43)(S); Congress has authorized the Attorney General to speak with the force of law when interpreting the INA, 8 U.S.C. 1103(a)(1); and the Board exercised that authority in holding that Section 1101(a)(43)(S) does not impose a pending-proceeding requirement, see pp. 12-13, *supra*. In these circumstances, Congress has decided that *Chevron* should apply—a decision that makes particular sense given the "'especially sensitive political functions'" that "executive officials" exercise "in the immigration context." *Negusie*, 555 U.S. at 517 (citation omitted).

2. Although the court of appeals' decision in this case is correct, this Court's review is warranted because the court of appeals' decision conflicts with the decisions of other courts of appeals.

a. The court of appeals' decision in this case implicates two conflicts warranting this Court's review. First, the court of appeals' decision deepens a conflict on whether an accessory-after-the-fact offense constitutes "an offense relating to obstruction of justice" for

purposes of Section 1101(a)(43)(S). Five circuits, in cases involving similar accessory-after-the-fact offenses under state law, have addressed the question. Like the court of appeals in this case, the First and Fifth Circuits have held that accessory after the fact qualifies as "an offense relating to obstruction of justice." See *Silva*, 27 F.4th at 98 (holding that a "Massachusetts conviction for accessory after the fact is categorically an offense relating to obstruction of justice"); *United States* v. *Gamboa-Garcia*, 620 F.3d 546, 550 (5th Cir. 2010) (holding that an Idaho accessory-after-the-fact conviction is for an offense relating to obstruction of justice); Pet. App. 3a (holding that a Virginia accessory-after-the-fact conviction "categorically qualif[ies] under the [INA] as one 'relating to obstruction of justice'"). In contrast, the Third and Ninth Circuits have held that accessory-after-the-fact convictions do not so qualify. See *Flores* v. *Attorney Gen.*, 856 F.3d 280, 284 (3d Cir. 2017) (holding that a "South Carolina accessory-after-the-fact conviction is not an offense 'relating to obstruction of justice'"); *Valenzuela Gallardo IV*, 968 F.3d at 1069 (holding that a California accessory-after-the-fact conviction is not for an offense relating to obstruction of justice).

Second, the court of appeals' decision in this case implicates a conflict on whether an offense must involve a pending proceeding or investigation in order to qualify as "an offense relating to obstruction of justice." Like the court of appeals in this case, the First Circuit has held that the proceeding or investigation need not be pending. See *Silva*, 27 F.4th at 98 (holding that "'an offense relating to obstruction of justice' unambiguously does not require a nexus to a pending or ongoing investigation or judicial proceeding"); Pet. App. 25a (de-

ferring to the Board's view that an offense relating to obstruction of justice does "not require an ongoing proceeding"). In contrast, the Ninth Circuit has held that "'obstruction of justice' under § 1101(a)(43)(S) unambiguously requires a nexus to ongoing or pending proceedings." *Valenzuela Gallardo IV*, 968 F.3d at 1069.

b. Petitioner asserts (Pet. 14) that the court of appeals' decision in this case implicates a further conflict on "whether the *Chevron* framework applies at all to the [Board's] interpretation of 'offense relating to obstruction of justice.'" That assertion is mistaken. Although the Third Circuit in *Denis* v. *Attorney General*, 633 F.3d 201 (2011), concluded that it "owe[d] no deference" to the Board's interpretation of that phrase, it did so on the ground that the phrase was not ambiguous. *Id.* at 209; see *ibid.* (explaining that the case did "not present an obscure ambiguity" and that "'relating to'" and "'obstruction of justice'" were "discrete phrases," "both of which are capable of definition"). Indeed, the Third Circuit recognized that "some deference" is "warranted" "to the agency's view as to what constitutes an aggravated felony" when "there is a lack of clarity, or outright ambiguity." *Id.* at 208. Thus, no court of appeals has held that, if the phrase "offense relating to obstruction of justice" is ambiguous, the *Chevron* framework does not apply at all.

3. Concurrently with the filing of this response, the government is filing a petition for a writ of certiorari seeking review of the Ninth Circuit's decision in *Cordero-Garcia*, *supra*. Relying on its prior decision in *Valenzuela Gallardo IV*, the Ninth Circuit in *Cordero-Garcia* held that dissuading a witness from reporting a crime, in violation of California law, is not an offense relating to obstruction of justice for purposes of Section

1101(a)(43)(S) because the California offense "is missing the element of a nexus to an ongoing or pending proceeding or investigation." 44 F.4th at 1188. The Ninth Circuit further held that because the federal witness-tampering statute, 18 U.S.C. 1512, also "does not contain the required element of a nexus to an ongoing or pending proceeding or investigation," "it is not an appropriate comparator * * * for purposes of a categorical approach analysis." *Cordero-Garcia*, 44 F.4th at 1191.

This Court's review is warranted in both this case and *Cordero-Garcia*. Although both cases are suitable vehicles for deciding whether an offense relating to obstruction of justice must involve a pending proceeding or investigation, this case and *Cordero-Garcia* implicate distinct circuit conflicts on whether accessory-after-the-fact crimes and witness-tampering crimes, respectively, are offenses relating to obstruction of justice. Compare pp. 15-17, *supra*, with Gov't Pet. at 18-20, *Garland* v. *Cordero-Garcia*. As a result, a decision in one of the two cases would not necessarily resolve all of the issues raised by the other case. For example, a decision in this case regarding an accessory-after-the-fact crime would not necessarily resolve whether a crime analogous to witness tampering under 18 U.S.C. 1512, which appears in Chapter 73 of the federal criminal code, is an offense relating to obstruction of justice. See Pet. 29 (arguing that "Congress understood obstruction of justice by reference to Chapter 73"); Pet. C.A. Br. 12 (arguing that "the phrase 'obstruction of justice' is a term of art used narrowly in the INA to refer to the offenses enumerated in the title of the same name in the United States Code, 18 U.S.C. Chapter 73"). Conversely, a decision in *Cordero-Garcia* would not necessarily resolve whether a crime analogous to accessory after the fact

under 18 U.S.C. 3, which does not appear in Chapter 73, is an offense relating to obstruction of justice.

Disputes over the meaning of "an offense relating to obstruction of justice" in Section 1101(a)(43)(S) have frequently involved accessory-after-the-fact or witness-tampering crimes, and granting concurrent review in both this case and *Cordero-Garcia* would allow this Court to address the meaning of that phrase in full view of the issues raised by both types of crimes. The government therefore requests that certiorari be granted in both this case and *Cordero-Garcia* and that the cases be consolidated for argument.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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