No. 22-23

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government agrees that the deep and intractable circuit split over the meaning of the INA's obstruction-of-justice aggravated-felony provision warrants the Court's review and that the petition here should be granted. That acknowledgement is correct. While the government does not concede the existence of an additional circuit split over whether to afford *Chevron* deference to the BIA's interpretation, its request for review does not suggest that the grant of certiorari be limited—and indeed, the issue is a logical threshold question to the government's own reliance on *Chevron*. *See* BIO 13-15. The government suggests that the Third Circuit agrees with other courts of appeals on the *Chevron* issue, but unlike its sister circuits, the Third Circuit does not apply *Chevron* in this context. And the need for this Court's review of the *Chevron* issue is confirmed by the Court's previous grant of certiorari to address it and by the amicus briefs filed in support of the petition.

This case is an ideal vehicle to resolve these issues. The government urges the Court to grant both this petition and its petition in *Garland v. Cordero-Garcia*, No. 22-331 (filed Oct. 7, 2022), to address different aspects of the scope of the INA's obstruction-of-justice provision. But at the very least, the Court should grant this petition. The procedural obstacles in *Cordero-Garcia* that may counsel against review in that case are not present here. Here, the core interpretive question that has divided the circuits—whether interference with an ongoing or pending proceeding is required to qualify an offense under the INA's obstruction-of-justice provision—is outcome

determinative. Accordingly, regardless of how this Court disposes of *Cordero-Garcia*, it should grant this petition. And review is all the more warranted because the government's defense of the Fourth Circuit majority's flawed reasoning fails, for all the reasons explained in the petition.

A. The Parties Agree This Court Should Grant Certiorari

1. The government agrees that this Court should grant certiorari to resolve the circuit conflict over whether a state accessory-after-fact offense that does not require interference with an ongoing or pending proceeding or investigation qualifies as one "relating to obstruction of justice" under the INA. BIO 6, 16-17; *see* 8 U.S.C. § 1101(a)(43)(S). That concession is well-founded. The Third and Ninth Circuits hold that the statute unambiguously requires an ongoing or pending proceeding, and thus that accessory-after-the-fact offenses are not categorically aggravated felonies under the INA. *See Valenzuela Gallardo v. Barr*, 968 F.3d 1053, 1069 (9th Cir. 2020); *Flores v. Attorney General*, 856 F.3d 280, 292-95 (3d Cir. 2017). The Fourth Circuit defers to the BIA's interpretation of the statute, which holds that an accessory-after-the-fact offense qualifies because it involves interference with a proceeding or investigation that is "reasonably foreseeable." Pet. App. 13a-14a, 34a. And the First Circuit holds that the INA unambiguously does *not* require interference with a pending proceeding and in the alternative would defer to the BIA's interpretation. *See Silva v. Garland*, 27

F.4th 95, 98 (1st Cir. 2022).* Only this Court can resolve this clear and acknowledged conflict among the courts of appeals.

2. The government disputes that this case implicates a separate conflict between the circuits on whether the *Chevron* framework applies to the BIA's interpretation of "offense relating to obstruction of justice," but nevertheless requests the petition be granted without limitation. BIO 17, 19. The government maintains that in *Denis v. Attorney General*, 633 F.3d 201 (3d Cir. 2011), the Third Circuit did not defer to the BIA's interpretation of the phrase because it concluded that the phrase was not ambiguous. BIO 17. That interpretation is mistaken.

The Third Circuit did not apply *Chevron* in *Denis*, expressly stating that it was splitting from other circuits in declining to do so. 633 F.3d. at 209 n.11 (explaining that it would not apply *Chevron* to the BIA's interpretation of the obstruction provision, unlike the Ninth and Fifth Circuits); *see also Flores*, 856 F.3d at 287 n.23 ("In contrast to other circuits, we do not defer to the BIA's interpretation of the Obstruction Provision[.]" (citing cases that engage in *Chevron* analysis and defer to the BIA's interpretation of the obstruction provision)). Thus, the Third Circuit does not apply the *Chevron*

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* A petition for certiorari has recently been filed in *Silva v. Garland*, No. 22-369 (filed Oct. 17, 2022). That petition, like the instant petition, challenges whether an accessory-after-the-fact offense qualifies under the INA's obstruction-of-justice provision. The petition in *Silva* does not separately address the applicability of *Chevron* to the BIA's interpretation of this provision.

framework to the obstruction-of-justice aggravated-felony provision, while other circuits do apply *Chevron*, but reach varying results. *See* Pet. 17-20 (collecting cases in First, Fourth, Fifth, Seventh, and Ninth Circuits). Indeed, the courts of appeals have expressly acknowledged this conflicting legal landscape. *See, e.g.*, *Higgins v. Holder*, 677 F.3d 97, 103 (2d Cir. 2012) ("There is a circuit split on the question of whether deference is owed to the BIA's reasoning" when interpreting the obstruction provision.); *Armenta-Lagunas v. Holder*, 724 F.3d 1019, 1022 (8th Cir. 2013) (same).

This important and recurring issue merits review. The Court previously granted certiorari in *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017), in part to determine whether the BIA's interpretation of another INA aggravated-felony definition was entitled to *Chevron* deference, but did not do so after concluding that definition was unambiguous. *Id.* at 1572. As this petition demonstrates, the issue is certain to recur. The INA contains 20 enumerated "aggravated felony" definitions, most containing multiple sub-definitions (as here). *See* 8 U.S.C. § 1101(a)(43). Until this Court steps in, the courts of appeals will continue to apply inconsistent approaches to the appropriate scope of deference to the BIA's interpretation and will reach conflicting results.

In his dissent below, Chief Judge Gregory noted the "growing acceptance" that *Chevron* does not apply in cases with criminal consequences (like this one), underscoring the need for clarity from this Court. Pet. Ap. 40a (Gregory, C.J., dissenting). And adding

to the chorus, two amici have filed briefs urging the Court to grant certiorari in this case to address the *Chevron* issue and its interplay with immigration statutes. *See* Pacific Legal Found. Amicus Br. 4-22; West Virginia *et al.* Amici Br. 5-21. Only this Court can answer this extremely important question of administrative law, and the time is ripe to do so.

B. This Case Is An Ideal Vehicle For Resolving The Splits At Issue

1. As the government agrees, this case is an ideal vehicle for addressing the statutory construction question that has divided the circuits. BIO 15-17. The proper interpretation of "offense relating to obstruction of justice" is outcome determinative. If petitioner prevails on his argument that this statutory phrase requires an ongoing investigation or proceeding, his accessory-after-the-fact conviction would not qualify as an aggravated felony.

Likewise, the decision below squarely raises the *Chevron* issue. Petitioner argued that *Chevron* should not apply. The Fourth Circuit rejected that argument, deferred to the BIA's interpretation, and held that under that interpretation, petitioner's accessory-after-the-fact offense is an aggravated felony. Pet. 25.

2. The government contends that its petition in *Garland v. Cordero-Garcia*, No. 22-331 (filed Oct. 7, 2022), is also a "suitable vehicle[] for deciding whether an offense relating to obstruction of justice must involve a pending proceeding or investigation." BIO 18. It further contends that *Cordero-Garcia* unlike this case, presents a "distinct" circuit conflict

on whether a crime analogous to the witness tampering offense in Chapter 73 of the federal criminal code is an "offense relating to obstruction of justice" even if a pending proceeding or investigation is otherwise required. BIO 18. For that reason, the government contends, "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 … is an offense relating to obstruction of justice." *Id.*; *see also Cordero-Garcia* Pet. 9, 20-21.

The petition in this case is independently sufficient to resolve the conflict over whether an offense relating to obstruction of justice must involve an ongoing or pending proceeding or investigation. And it is free from a feature of *Cordero-Garcia* that may make that case an unsuitable vehicle for review on the theory that it presents a separate issue relating to witness-tampering offenses. That is because the government's *Cordero-Garcia* petition relies on alternative reasoning that the BIA did not adopt in that case.

In *Cordero-Garcia*, the government argued to the Ninth Circuit, in the alternative, that Cordero-Garcia's conviction under California's witness-tampering statute is "an offense relating to obstruction of justice" because it is a categorical match to a Chapter 73 offense, namely, 18 U.S.C. § 1512. *See Cordero-Garcia* Pet. 18-19. According to that argument, it does not matter whether the witness-tampering offense has "a nexus to an ongoing or pending proceeding or investigation," because the assertedly relevant federal analogue, § 1512, contains

no pending-proceeding limitation. *Cordero-Garcia v. Garland*, 44 F.4th 1181, 1190-91 (9th Cir. 2022).

The court of appeals noted, however, that "[t]he BIA did not find that [Cordero-Garcia's California offense] was an 'offense[] covered by chapter 73.'" *Id.* at 1190 n.4. The court thus held that it could "[]not deny the petition on these grounds," because, as the government recognized, "the BIA did not analyze whether Cordero-Garcia's [witness-tampering] conviction was a categorical match with 18 U.S.C. § 1512." *Id.* at 1191 (citing, *inter alia*, *Santiago-Rodriquez v. Holder*, 657 F.3d 820, 829 (9th Cir. 2011)); *see also SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). It also stated that "in any event," Cordero-Garcia's offense under California law "is not a categorical match with 18 U.S.C. § 1512." *Cordero-Garcia*, 44 F.4th at 1191. Based on a detailed analysis of state law, the court concluded that the California offense "is broader than 18 U.S.C. § 1512(b)(3) because the former lacks the requirement that an individual 'uses intimidation, threatens, or corruptly persuades another person,' or 'engages in misleading conduct toward another person.'" *Id.* at 1192.

This history presents two obstacles to this Court's review of the distinct issue that prompted the government's petition. First, because the BIA did not consider whether Cordero-Garcia's offense qualified as an aggravated felony on the theory that it is a match to a Chapter 73 witness-tampering offense, *Chenery* principles would prevent this Court from considering that issue. As this Court recently remarked in the context of review of a BIA decision, "[o]f course, reviewing courts remain bound by

traditional administrative law principles, including the rule that judges generally must assess the lawfulness of an agency's action in light of the explanations the agency offered for it rather than any *ex post* rationales a court can devise." *Garland v. Ming Dai*, 141 S. Ct. 1669, 1679 (2021) (citing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943)).

Second, even if the Court reached that legal issue and agreed an offense that matches a Chapter 73 witness-tampering offense qualifies as an offense related to obstruction even absent a pending proceeding or investigation, that would not justify vacating the judgment in that case. That is because the Ninth Circuit found that Cordero-Garcia's California offense is *not* a categorical match. And that alternative basis for the decision would not merit this Court review. The Ninth Circuit's construction of California's witness-tampering statute is not the subject of disagreement among the circuits. Nor does the government suggest that the state-law-specific issue of whether California Penal Code § 136.1(b)(1) is a categorical match for Section 1512 would otherwise merit this Court's review. Unsurprisingly, then, the government did not petition for review on this independent basis. *See Cordero-Garcia* Pet. 9-17 ("Comparing [the California statute] with Section 1512(b)(3) thus *reinforces* that petitioner was convicted of an offense relating to obstruction of justice." (emphasis added)).

The petition in this case is free from those procedural complications. And because the relevant federal accessory-after-the-fact offense, 18 U.S.C. § 3, falls outside Chapter 73, the government cannot

contend that petitioner's offense is a categorical match for a Chapter 73 offense. Accordingly, however the Court disposes of the government's *Cordero-Garcia* petition, *this* case is an ideal vehicle for resolving the issue dividing the courts of appeals: whether a state offense like petitioner's accessory-after-the-fact offense that does not involve interference with an existing official proceeding or investigation may constitute an "offense relating to obstruction of justice."

C. The Decision Below Is Incorrect

1. The government defends various aspects of the Fourth Circuit majority's reasoning, including the majority's reliance on an ambiguous dictionary definition, BIO 7 (citing Bryan A. Garner, *A Dictionary of Modern Legal Usage* 611 (2d ed. 1995)), and its application of *Chevron* deference to resolve what that court believed to be statutory ambiguity, *id.* 12-15. The government offers no defense of its other conclusions, including the majority's holding that the statutory language is in fact ambiguous. *Id.* 12. For the reasons explained in the petition, the Fourth Circuit was wrong on all of these issues (and others). Pet. 25-36. But the time to fully address these arguments will be on the merits, if and when this Court grants review.

2. If the Court holds that an existing proceeding or investigation is required for an offense to be one relating to obstruction of justice, the judgment below must be reversed. The government contends that "petitioner does not dispute that his conviction as an accessory after the fact constitutes a conviction for an aggravated felony under the Board's" latest definition

of "an offense relating to obstruction of justice," BIO at 13-14 n.5, which includes the requirement that an investigation or proceeding must be "reasonably foreseeable." BIO at 13-14 n.5 (quoting *In re Valenzuela Gallardo*, 27 I. & N. Dec. 449, 460 (B.I.A. 2018)). But petitioner did question that equivalence below, and—contrary to the government's suggestion—the Fourth Circuit never said otherwise. All the court below observed is that petitioner "did not exhaust" the contention that Virginia law "does not necessarily require a specific intent to reduce the likelihood of a criminal punishment resulting from an ongoing or reasonably foreseeable proceeding." Pet. App. 33a n.18. It therefore did not consider *that* argument in determining that the Virginia accessory-after-the-fact offense is an aggravated felony. If this Court grants review and clarifies that the appropriate test includes some appropriately defined nexus requirement other than to an existing proceeding, the appropriate disposition would be to vacate for further consideration of this issue. The BIA's "[un]helpful" foreseeability requirement, *Valenzuela Gallardo*, 968 F.3d at 1067, provides no appropriate basis for finding an offense to be an aggravated felony.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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