Nos. 22-23, 22-331

In The Supreme Court of the United States

JEAN FRANCOIS PUGIN,
Petitioner,
v.
MERRICK B. GARLAND, ATTORNEY GENERAL,
Respondent.

MERRICK B. GARLAND, ATTORNEY GENERAL,
Petitioner,
v.
FERNANDO CORDERO-GARCIA, AKA FERNANDO CORDERO,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fourth and Ninth Circuits

BRIEF OF *AMICUS CURIAE* THE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF THE ATTORNEY GENERAL

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INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute[1] ("IRLI") is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed amicus curiae briefs in many immigration-related cases before federal courts (including this Court) and administrative bodies, including *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 579 U.S. 547 (2016); *City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018); *Arizona Dream Act Coal. v. Brewer*, 855 F.3d 957 (9th Cir. 2017); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 942 F.3d 504 (D.C. Cir. 2019); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

SUMMARY OF THE ARGUMENT

Congress has provided that any alien convicted of "an offense relating to obstruction of justice" be deemed to have been convicted of an aggravated felony. An aggravated felony conviction renders an alien both deportable and ineligible for naturalization

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[1] Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity—other than *amicus*, its members, or its counsel—contributed monetarily to preparing or submitting this brief.

and most forms of relief from removal. Congress has further entrusted the Attorney General, and his delegate, the Board of Immigration Appeals ("the Board") with the primary authority to interpret the meaning of the Immigration and Nationality Act ("INA").

The government has amply demonstrated that that there is no temporal nexus requirement with respect to a proceeding under the generic obstruction of justice offense. If the Court agrees, that is the end of the matter. If the Court disagrees, however, it should defer to the Board's reasonable interpretation of "an offense relating to obstruction of justice."

In interpreting the meaning of "an offense relating to obstruction of justice," the Board employed the categorical approach and determined that the least culpable conduct under the generic offense required that an investigation or proceeding be reasonably foreseeable to the defendant when the crime is committed. Everyone agrees that a pending investigation or proceeding is sufficient to meet the requirements for the generic offense. Absent an historical or contextual clue that necessitates a narrower reading, the Board's requirement that an investigation or proceeding be reasonably foreseeable is in such close proximity to a "pending" proceeding that it is an eminently reasonable interpretation of "an offense relating to obstruction of justice" and is entitled to deference.

Finally, the rule of lenity has no application here. The aggravated felony definition at issue is not a criminal statute to which the rule of lenity would

apply but is instead a judgment by Congress of which *types* of crimes should render an alien both removable and ineligible for certain forms of relief. Inasmuch as Congress has charged the Attorney General with the primary authority to interpret any ambiguities in the INA, the Board's permissible construction of which crimes are sufficiently akin to the generic obstruction of justice offense to be considered an aggravated felony is entitle to deference. Lenity, moreover, is already built into the categorical approach adopted by the Board. The Board looked at the least culpable conduct under both the generic offense and the state offenses and determined that the state offenses were "relating to obstruction of justice" only if the least culpable conduct under state law necessarily fell within the bounds of the generic offense. Under this approach, the Board has already afforded aliens every benefit of the doubt. Because Congress has explicitly charged the Attorney General with the duty to interpret the INA, to the extent that the Court finds any ambiguity in the phrase "an offense relating to obstruction of justice," it should defer to the Board's permissible interpretation and not reach the rule of lenity.

ARGUMENT

I. The Court should defer to the Board's interpretation of offenses relating to obstruction of justice.

It has long been recognized that the power "to forbid the entrance of foreigners … or to admit them only in such cases and upon such conditions as it may see fit to prescribe" is an inherent sovereign prerogative. *Nishimura Ekiu v. United States*, 142

U.S. 651, 659 (1892); *see also United States v. Valenzuela-Bernal*, 458 U.S. 858, 864 (1982) (describing the power to regulate immigration as "essential to the preservation of any nation"). Under our Constitution, this sovereign prerogative is entrusted exclusively to Congress. *See Galvan v. Press*, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress . . . .").

Congress has exercised this plenary power by establishing a comprehensive and uniform immigration system governing who may enter and remain in the United States. For example, Congress has specified numerous classes of aliens who are either inadmissible or deportable from the United States. *See generally* 8 U.S.C. §§ 1182(a) (describing inadmissible aliens); 1227(a) (describing deportable aliens). One such class of deportable aliens is defined as those aliens who have been convicted of an aggravated felony. *See* 8 U.S.C. § 1227(a)(2)(A)(iii). Congress defined "aggravated felony" to include numerous serious offenses,[2] including, as relevant

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[2] The seriousness of aggravated felony offenses is reflected in the fact that Congress has rendered aliens convicted of such offenses to be ineligible for most forms of relief under the INA. For example, an aggravated felon is ineligible for asylum and cancellation of removal. *See* 8 U.S.C. §§ 1158(b)(2)(A)(ii), (B)(i), 1229b(a)(3), (b)(1)(C). An aggravated felon is also permanently barred from naturalization because such an alien cannot demonstrate the requisite good moral character. *See* 8 U.S.C. §§ 1101(f)(8) (preventing "one who at any time has been convicted of an aggravated felony" from demonstrating good moral character), 1427(a)(3) (requiring naturalization applicants to maintain good moral character during specified periods).

here, an "offense relating to obstruction of justice." 8 U.S.C. § 1101(a)(43)(S).

Because an aggravated felon is deportable based upon the fact of conviction alone and not upon specific conduct, courts generally "employ a 'categorical approach' to determine" whether a state offense of conviction "is comparable to an offense listed in the INA." *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). Under this approach, courts "look not to the facts of the particular prior case, but instead to whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding aggravated felony." *Id.* (internal quotations omitted). Courts "presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Id.* at 190-91 (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)).

The Board followed this approach in defining an offense relating to obstruction of justice. *Matter of Valenzuela Gallardo*, 27 I. & N. Dec. 449, 453-460 (BIA 2018). There, the Board analyzed various federal offenses involving obstruction of justice and determined 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.'" *Id.* at 456; *id.* at 454-55 (discussing the least elements of an offense under 18 U.S.C. § 1512). The Board observed that at the time section 1101(a)(43)(S) was enacted, the federal statute prohibiting witness tampering explicitly provided that "'an official proceeding need not be pending or about

to be instituted at the time of th[e] offense.'" *Id.* at 455 (quoting 18 U.S.C. § 1512(e)(1)). The Board further observed that established precedent at that time only required the prosecution to establish that a defendant acted "with the intent to frustrate an investigation or proceeding that he or she believed *might* be instituted." *Id.* (citing *United States v. Stansfield*, 101 F.3d 909, 918 (3d Cir. 1996)).

Because subsequent precedent interpreting offenses under chapter 73 of the federal criminal code concluded that interference in a reasonably foreseeable investigation or proceeding was sufficient to incur criminal culpability, *see id.* at 455,[3] the Board defined the generic offense relating to obstruction of justice as encompassing

> offenses covered by chapter 73 of the Federal criminal code[, 18 U.S.C. §§ 1501-1521,] 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,

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[3] Citing, *inter alia*, *Arthur Andersen LLP v. United States*, 544 U.S. 696, 707-08 (2005) (requiring the government to prove that a proceeding was "foreseen" to convict a defendant of persuading others to shred documents under § 1512); *Marinello v. United States*, 138 S. Ct. 1101, 1110 (2018) (synthesizing the Court's prior precedents interpreting offenses under chapter 73 and concluding that the government must establish that the proceeding was, at least, "reasonably foreseeable by the defendant" at the time of the obstructive conduct").

> or in another's punishment resulting from a completed proceeding.

Matter of Valenzuela Gallardo, 27 I. & N. Dec. 449, 460 (BIA 2018) (emphasis added); *see also Matter of Cordero-Garcia*, 27 I. & N. Dec. 652, 654 (BIA 2019) (applying the categorical test set forth in *Valenzuela Gallardo*).

The government has amply demonstrated that the generic obstruction of justice offense does not encompass a temporal nexus requirement. *See generally* Brief for the Attorney General ("Gov't Br.") at 17-44. Insofar as the Court agrees, that is the end of the matter. If, however, the Court were to conclude that the generic obstruction of justice offense includes a temporal nexus requirement, it should defer to the Board's interpretation of "offense *relating to* obstruction of justice" under 8 U.S.C. § 1101(a)(43)(S) for two reasons. First, Congress has conferred upon the Attorney General primary authority to decide all questions of law under the INA. *See* 8 U.S.C. § 1103(a)(1) (providing that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling"). Thus, Congress has expressly delegated authority to the Attorney General fill any statutory gap in reasonable fashion. The Board, a body delegated by the Attorney General under the INA, *see* 8 C.F.R. § 1003.1(a)(1),[4] has

[4] *See also* 8 C.F.R. § 1003.1(d)(1) ("[T]he Board, through precedent decisions, shall provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the [INA] and its implementing regulations.").

exercised that authority in interpreting the meaning of "offense relating to obstruction of justice" in a precedential decision, *Valenzuela Gallardo*. Accordingly, the Board's interpretation is entitled to *Chevron* deference.

Second, there is no question that Congress left an ambiguity in the phrase "offense *relating to* obstruction of justice." 8 U.S.C. § 1101(a)(43)(S) (emphasis added). This Court has described the ordinary meaning of the phrase "relating to" as "a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.'" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting *Black's Law Dictionary* 1158 (5th ed. 1979)). This Court has also described the words "relating to" as "broad" and "indeterminate." *Mellouli v. Lynch*, 575 U.S. 798, 811 (2015) (quoting *Maracich v. Spears*, 570 U. S. 48, 59 (2013)) (internal quotation marks and brackets omitted).

In *Mellouli*, the Court was interpreting a provision in the INA that renders an alien removable if he or she has been convicted of a crime "relating to a controlled substance (as defined in section 802 of Title 21)," 8 U.S.C. § 1227(a)(2)(B)(i). *See* 575 U.S. at 801. In that case, the Board held that § 1227(a)(2)(B)(i) encompassed Mellouli's drug paraphernalia offense because it "relates to any and all controlled substances, whether or not federally listed" and that "there is no need to show that the type of controlled substance involved in a paraphernalia conviction is one defined in §802." *Id.* at 809 (internal quotation marks omitted).

The *Mellouli* Court rejected this interpretation because it did not give effect to the text limiting the offense to those substances controlled under section 802 of Title 21. *Id.* at 812-13. The Court acknowledged that the words "relating to" are broad, and "[i]f § 1227(a)(2)(B)(i) stopped with the words 'relating to a controlled substance,'" it "would make sense" to interpret the state offense as falling within the purview of § 1227(a)(2)(B)(i). *Id.* at 808 n.9. But when analyzing the reach of an offense "relating to" a generic crime, *Mellouli* requires a court to consider the statutory history and context to determine if they "tug in favor of a narrower reading." *Id.* at 812 (alterations and internal quotation marks omitted). The *Mellouli* Court determined that the parenthetical language limiting the scope of controlled substances to those "defined in section 802 of Title 21" rendered the Board's broader reading impermissible in that case.

Here, there is no such statutory history or context that would limit the Board's interpretation of an "offense relating to obstruction of justice." Instead, Congress expanded the definition of "aggravated felony" when it added this offense to the list of aggravated felonies and required that the conviction only be related to an obstruction of justice offense. As the body charged with the duty to provide interpretive guidance of the INA, the Board's interpretation of § 1101(a)(43)(S) cannot be said to be beyond the "bounds of reasonable interpretation." *Arlington v. FCC*, 569 U.S. 290, 296 (2013). Indeed, the Board's determination that an investigation or proceeding must be "reasonably foreseeable" at the time of the offense in order to be related to obstruction of justice

bears a close relation to a "pending" investigation or proceeding that everyone agrees is sufficient to meet the generic definition. Accordingly, the Board's interpretation of "an offense relating to obstruction of justice" is eminently reasonable and entitled to deference.

II. The Rule of Lenity does not apply in these circumstances.

The "rule of lenity" is "the familiar rule that, 'where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.'" *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 285 (1978) (quoting *United States v. Bass*, 404 U.S. 336, 348 (1971)). In adding "an offense relating to obstruction of justice" to the definition of aggravated felony, Congress did not establish a new criminal statute, but instead sought to preclude aliens who have already been convicted of crimes *relating to* obstruction of justice from remaining in the United States. Not only does an aggravated felony conviction render an alien deportable, 8 U.S.C. § 1227(a)(2)(A)(iii), it also renders one ineligible for most forms of relief from removal and naturalization. *See* note 2, *supra*. In other words, Congress has determined that such aliens are undesirable and should be removed from the country. Further, Congress has explicitly charged the Attorney General, and his delegate the Board, with interpreting the meaning of the INA.

Instead of limiting its definition of aggravated felony to an offense "described" in a specific federal statute, as it did in 8 U.S.C. § 1101(a)(43)(H)-(J),

(K)(ii)-(iii), or (L), Congress sought to cast a wider net, encompassing offenses "relating to" obstruction of justice. 8 U.S.C. § 1101(a)(43)(S); *see also id.* (Q)-(R), (T) (each defining aggravated felonies "relating to" other generic offenses). By utilizing this "relating to" text, Congress entrusted the Attorney General and the Board with determining how close the relationship must be between the state crime of conviction and the generic federal offense in order for the conviction to fall within the bounds of the aggravated felony definition. Here, the Board determined that the least of the acts criminalized under federal obstruction of justice statutes require at a minimum that an investigation or proceeding be reasonably foreseeable by the defendant in order to fall within the definition at § 1101(a)(43)(S). *Valenzuela Gallardo*, 27 I. & N. Dec. at 460. Even if the Court were to decide that a pending proceeding is necessary under the generic obstruction of justice offense, the Board's interpretation requiring a reasonably foreseeable proceeding is such a close cousin to a pending proceeding that it is therefore an eminently reasonable interpretation of "an offense relating to obstruction of justice."[5]

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[5] As suggested above, the Board employed the categorical approach to determine the least culpable conduct under the federal obstruction of justice provisions in formulating its interpretation of section 1101(a)(43)(S). *Id.* at 454-60. To the extent the Court disagrees with the Board's categorical analysis, the question would then arise of whether the United States Court of Appeals for the Third Circuit was correct to reject the categorical approach as the sole basis for determining whether certain convictions "relate to" generic federal offenses, and thus to hold that the Board's interpretation is a reasonable reading of

Finally, the rule of lenity is inappropriate here because lenity is built into the categorical analysis employed by the Board. Again, the Board did not look to the acts committed by the aliens convicted of state crimes to determine whether they had been convicted of an offense "relating to" obstruction of justice. Instead, it looked at the least culpable conduct under the federal definition of obstruction of justice and compared that conduct to the acts criminalized under state law. The Board concluded that an alien has been convicted of an aggravated felony only if the least culpable conduct criminalized by state law necessarily falls within the conduct criminalized under the federal generic crime. By employing this categorical approach, the Board has already afforded aliens every benefit of the doubt.

CONCLUSION

The judgment of the court of appeals in *Pugin v. Garland*, No. 22-23, should be affirmed. The judgment of the court of appeals in *Garland v. Cordero-Garcia*, No. 22-331, should be reversed.

Congress's "relating to" language. *See Denis v. AG of the United States*, 633 F.3d 201, 211 (3d Cir. 2011) ("To give effect to Congress's choice of language, a categorical matching of the elements of the offense of conviction with the elements of a federal law cannot be the sole test for determining whether a crime of conviction 'relates to' a generic federal offense."); *Drakes v. Zimski*, 240 F.3d 246, 249 (3d Cir. 2001) ("Unless the words 'relating to' have no effect, the enumerated crime . . . must not be strictly confined to its narrowest meaning.").

Respectfully submitted.

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