No. 22-23

In The Supreme Court of the United States

JEAN FRANCOIS PUGIN,

Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondent.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

To qualify as "an offense relating to obstruction of justice," 8 U.S.C. § 1101(a)(43)(S), must a predicate offense require a nexus with a pending or ongoing investigation or judicial proceeding?

PARTIES TO THE PROCEEDING

Petitioner in this Court and in the court below is Jean Francois Pugin.

Respondent in this Court and in the court below is Merrick B. Garland, Attorney General.

In Case No. 22-331, with which this case has been consolidated, the Petitioner is Merrick B. Garland, Attorney General, and the Respondent is Fernando Cordero-Garcia.

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BRIEF FOR PETITIONER

INTRODUCTION

"[D]eportation is a drastic measure and at times the equivalent of banishment or exile." *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). To safeguard against imposing these harsh consequences unless clearly required, this Court has long refused to "assume that Congress meant to trench on [a noncitizen's] freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Id.*

In this case, the government seeks to stretch a generic ground for removal far beyond its well-settled legal meaning. It does this in service of removing petitioner, who has lived in this country since 1985, based on a state misdemeanor accessory-after-the-fact

conviction for which he served three months in prison eight years ago.

The government argues that petitioner's accessory-after-the-fact conviction is a categorical match to the generic federal aggravated felony of "an offense relating to obstruction of justice." That is incorrect. The statutory phrase means interference with a pending or ongoing proceeding to administer justice. That is the meaning this Court has twice given to the central federal obstruction of justice offense—first in 1893, then again in 1995, just one year before Congress enacted the obstruction statute at issue in this case. *Pettibone v. United States*, 148 U.S. 197, 207 (1893); *United States v. Aguilar*, 515 U.S. 593, 599 (1995).

The government would discard the longstanding requirement of a connection to a pending or ongoing proceeding, in favor of a broader meaning of crimes with any purpose to obstruct justice. It derives this newly invented test—which corresponds to no actual crime in the U.S. Code and encompasses an exceedingly broad swath of conduct—based on a survey of scattered state laws, dictionary definitions, and special-purpose provisions in federal law that depart from the heartland obstruction offense involving pending proceedings.

The government's approach is wrong. An "offense relating to obstruction of justice" under the immigration laws requires interference with a pending proceeding. Only that test ensures that the offense in question constitutes an *aggravated* felony—not just any crime that assists in avoiding some hypothetical proceeding that may commence sometime in the

indefinite future. Only that test provides the certainty and administrability necessary to apply the immigration laws across a range of disparate state laws. And only that test is consistent with this Court's approach of "err[ing] on the side of underinclusiveness" when construing a generic offense—rather than adopting a maximally severe approach or deferring to the government's interpretations of statutes that have criminal as well as removal consequences. *Moncrieffe v. Holder*, 569 U.S. 184, 205 (2013).

Petitioner's case illustrates how far the government's unbounded test extends. The government asserts that petitioner's state misdemeanor accessory-after-the-fact offense "relat[es] to obstruction of justice" because it has as an element the intent to help another "elude punishment." GB11 (quotations omitted). But the government suggests no limit to how attenuated such intent may be from any *actual* future proceeding or investigation that could yield punishment. Vague approaches like this invite boundless applications. And trying to fit accessory-after-the-fact offenses into an obstruction framework overlooks the distinct pedigree and purpose of accessory offenses, which have no historical link to obstruction of justice.

The Board of Immigration Appeals ("BIA") has struggled for years with changing and amorphous definitions of obstruction of justice—and the government defends none of them. Instead, the government offers only a negative: in its view, a pending proceeding is *not* required. But the government does not say what *is* required to define the

generic offense. This open-ended and non-specific approach guarantees confusion and overreach.

A better and more straightforward reading of the statute exists. For more than a century, a pending-proceeding requirement has prevailed in the Court's interpretation of the foundational obstruction offense. Congress can be presumed to have had that element in mind when describing this generic aggravated felony. Accordingly, this Court should hold that an offense relating to obstruction of justice requires interference with a pending or ongoing proceeding. Under that definition, petitioner's accessory-after-the-fact offense, which undisputedly does not require a nexus to a pending proceeding, is not an aggravated felony.

OPINIONS BELOW

The court of appeals' opinion is reported at 19 F.4th 437 and reprinted at Pet. App. 1a-70a. The BIA's opinion, *id.* 71a-75a, is unreported. The Immigration Judge's decision, *id.* 76a-82a, is unreported.

JURISDICTION

The court of appeals entered its judgment on November 30, 2021, Pet. App. 1a, and denied rehearing on March 7, 2022, *id.* 83a. On April 19, 2022, the Chief Justice extended the time within which to file a petition for a writ of certiorari until July 6, 2022. The petition was filed on July 5, 2022, and granted on January 13, 2023, limited to the question presented *supra* at i, and consolidated with *Garland v. Cordero-Garcia*, No. 22-331. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App. 1a-5a.

STATEMENT

A. Legal Background

1. The INA "renders deportable any [noncitizen] convicted of an 'aggravated felony' after entering the United States." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1210 (2018); *see* 8 U.S.C. § 1227(a)(2)(A)(iii). Such a noncitizen becomes ineligible for essentially every form of discretionary relief. *See* 8 U.S.C. § 1158(b)(2) (asylum), § 1182(h) (waiver), § 1229b(a)(3) (cancellation of removal), § 1229c(a)(1) (voluntary departure). Once an aggravated felon is removed, he is permanently ineligible for readmission. § 1182(a)(9)(A). If a removed noncitizen is later convicted of unlawful reentry, the extent of his criminal liability depends on whether he has a previous aggravated felony conviction: if so, he faces a maximum twenty-year sentence; if not, he faces a maximum two-year sentence. *See id.* §§ 1326(a), (b)(2). An "aggravated felony" can enhance the advisory sentencing range, *see* U.S.S.G. § 2L1.1 (U.S. Sent'g Comm'n 2021), and an individual's prior "aggravated felony" conviction is an element of the federal crime of assisting certain individuals to enter the country, *see* 8 U.S.C. § 1327.

2. The INA lists many aggravated felonies. 8 U.S.C. § 1101(a)(43). One such offense—at issue here—is "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." § 1101(a)(43)(S).

A state conviction must qualify as an aggravated felony under the "categorical approach." *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 389 (2017). This approach turns on the elements of the "generic" definition of the aggravated felony. *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013). If the elements of the state statute of conviction "cover[] any more conduct than the generic offense," a conviction under that statute is not an aggravated felony. *Mathis v. United States*, 579 U.S. 500, 504 (2016). By "err[ing] on the side of underinclusiveness," *Moncrieffe*, 569 U.S. at 205, the categorical approach "promote[s] efficiency, fairness, and predictability in the administration of immigration law," *Mellouli v. Lynch*, 575 U.S. 798, 806 (2015).

3. Over time, the BIA has offered various definitions of the generic obstruction offense. In *In re Batista-Hernandez*, 21 I. & N. Dec. 955 (B.I.A. 1997) (en banc), the BIA held that the federal accessory-after-the-fact provision, 18 U.S.C. § 3, was an "offense relating to obstruction of justice." *Id.* at 961-62. But in 1999, the BIA held that "obstruction of justice" is a "term of art" that excludes offenses, like misprision of a felony, that "do[] not require as an element either active interference with proceedings of a tribunal or investigation, or action or threat of action against those who would cooperate in the process of justice." *In re Espinoza-Gonzalez*, 22 I. & N. Dec. 889, 893 (B.I.A. 1999) (en banc).

In 2012, however, the BIA revised its interpretation to explain that "obstruction offenses"

need not "involve interference with an *ongoing* investigation or proceeding," but rather require only interference "with the process of justice." *In re Valenzuela Gallardo*, 25 I. & N. Dec. 838, 840-842 (B.I.A. 2012). The BIA therefore concluded that a California accessory-after-the-fact conviction "is an offense 'relating to obstruction of justice.'" *Id.* (quotations omitted).

The Ninth Circuit rejected this interpretation, holding that "the BIA has not given an indication of what it … include[s] in 'the process of justice,' or where that process begins and ends." *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 819 (9th Cir. 2016) ("*Valenzuela Gallardo II*"). "[T]his new interpretation," the Ninth Circuit held, "raises grave doubts about whether INA § 101(a)(43)(S) is unconstitutionally vague," *id.*, and thus did not merit *Chevron* deference, *id.* at 818-24.

In response, the BIA "clarif[ied]" its view "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'" and stated it was sufficient if the proceeding is "ongoing, pending, *or reasonably foreseeable* by the defendant." *In re Valenzuela Gallardo*, 27 I. & N. Dec. 449, 456, 460 (B.I.A. 2018) ("*Valenzuela Gallardo III*") (emphasis added). The BIA determined again that a California accessory-after-the-fact conviction is an "offense relating to obstruction of justice." *Id.* at 461. The Ninth Circuit rejected this formulation in *Valenzuela Gallardo v. Barr*, 968 F.3d 1053 (9th Cir. 2020) ("*Valenzuela Gallardo IV*"), holding that "the BIA's new construction is inconsistent with the unambiguous meaning of the term 'offense relating to

obstruction of justice'" by expanding the phrase beyond "a nexus to an ongoing criminal proceeding or investigation." *Id.* at 1056.

B. The Current Controversy

1. Petitioner Jean Francois Pugin, a native and citizen of Mauritius, has been a lawful permanent resident of the United States since 1985. Pet. App. 3a.

In 2014, petitioner pleaded guilty to the Virginia misdemeanor of being an accessory after the fact to a non-homicide felony. *Id.* 3a-4a. That crime has "three elements." *Commonwealth v. Dalton*, 259 Va. 249, 253 (2000). "First, the felony must be complete. Second, the accused must know that the felon is guilty. Third, the accused must receive, relieve, comfort, or assist the felon." *Id.* Some Virginia authorities also state that the accused must act "with the view of enabling his principal to elude punishment." *Wren v. Commonwealth*, 67 Va. 952, 957 (1875). Petitioner was sentenced to 12 months' imprisonment, with nine months suspended. Pet. App. 3a.

In 2015, the Department of Homeland Security sought to remove petitioner on the theory that he was convicted of an aggravated felony—specifically, "an offense relating to obstruction of justice …, for which the term of imprisonment is at least one year." § 1101(a)(43)(S).

2. The immigration judge ("IJ") denied petitioner's motion to terminate proceedings. Pet. App. 82a. The IJ concluded that because Virginia's accessory-after-the-fact offense "requires [defendants to] act with the specific purpose of hindering the process of justice," it

"is categorically an aggravated felony relating to obstruction of justice." *Id.* 80a-81a.

The BIA dismissed petitioner's appeal. *Id.* 75a. Citing its 2018 *Valenzuela Gallardo III* decision, the BIA concluded that Virginia's accessory-after-the-fact offense "categorically falls within the federal generic definition" of "offense relating to obstruction of justice" because it requires an intent to "hinder a felon's apprehension, conviction, or punishment." *Id.* 74a.

3. A divided panel upheld removal, deferring under *Chevron* to the BIA's interpretation of § 1101(a)(43)(S). *Id.* 3a-4a.

The majority acknowledged "that no Supreme Court case has afforded *Chevron* deference" to the BIA's determination that a state offense qualifies as an aggravated felony. *Id.* 11a. Yet the majority held that Fourth Circuit precedent required *Chevron*'s application because the INA "is a civil statute, and any collateral criminal consequences are too attenuated to change our analysis." *Id.* 8a-10a.

The majority next held that, under *Chevron*, the statutory text was "ambiguous" about "whether an ongoing proceeding or reasonably foreseeable proceeding must be obstructed," *id.* 13a, and deferred to "the Board's generic definition of obstruction of justice"—*i.e.*, its most recent 2018 view that interference in a "*reasonably foreseeable* proceeding" suffices, *id.* 24a. The majority then held that "Virginia accessory after the fact … is a categorical match with the Board's generic definition," *id.* 26a-27a, because (in its view) Virginia law "require[s] intent to help a known felon escape capture or punishment," *id.* 29a.

Chief Judge Gregory dissented, concluding that the phrase "relating to obstruction of justice" unambiguously requires interference with "an ongoing or pending proceeding or investigation." *Id.* 42a.

SUMMARY OF ARGUMENT

An "offense relating to obstruction of justice" under the INA requires interference with a pending proceeding—it does not authorize mandatory removal based on offenses that involve, at most, efforts to "elude" possible "punishment" through some process that might or might not actually take place.

I. When Congress in 1996 made an "offense relating to obstruction of justice" an "aggravated felony" under the INA, *see* 8 U.S.C. § 1101(a)(43)(S), "obstruction of justice" had a well-established term-of-art meaning: interference with a pending legal proceeding. Since 1831, in the original obstruction of justice statute, federal law has protected the federal judicial process against obstruction. *See* Act of Mar. 2, 1831, ch. 99, 4 Stat. 487 (1831). In 1893, this Court explained that protection applies to pending proceedings, because "obstruction can only arise when justice is being administered." *Pettibone v. United States*, 148 U.S. 197, 207 (1893). In 1995, more than a hundred years later—but just one year before Congress enacted § 1101(a)(43)(S)—this Court again confirmed the pending proceeding requirement in *United States v. Aguilar*, 515 U.S. 593 (1995). In *Aguilar*, the Court held the contemporary central obstruction statute, 18 U.S.C. § 1503, does not criminalize obstructive acts absent knowledge of a pending proceeding. Congress enacted the relevant

INA provision against that century-old generic backdrop.

II. The government seeks to expand generic "obstruction of justice" by pointing to disparate statutes in the U.S. Code, state laws, the Model Penal Code, ambiguous dictionary definitions, and the Sentencing Guidelines. None of these sources can overshadow the paradigmatic meaning articulated in this Court's cases: interference with a pending proceeding. In particular, provisions like 18 U.S.C. § 1512 are specific exceptions made necessary by the heartland obstruction-of-justice provision's requirement of a pending proceeding. No cases from this Court support deriving a generic offense from an amorphous set of laws that the government circularly groups together based on its premise that anything with a purpose to impair a process of justice, even when no proceeding or investigation is underway, is generic obstruction of justice. Congress is presumed to have the general obstruction rule in mind, rather than a non-existent offense that the government invents by drawing inferences from various exceptions.

III. Alternatively, the government argues that the words "relating to" in "relating to obstruction of justice" expand the generic offense. GB44-46. But "relating to," if not cabined, has an endlessly broad and indeterminate reach, sweeping in crimes such as perjury and money laundering that have long been understood to constitute distinct generic crimes. The structure of the aggravated-felony list in the INA, which separately identifies specific crimes, cuts against capturing disparate offenses under the

"relating to" umbrella. So does this Court's decision in *Mellouli v. Lynch*, 575 U.S. 798 (2015), as well as fair-notice principles and the rule against expansive construction of offenses with criminal and immigration consequences.

IV. In an additional alternative argument, the government asks for *Chevron* deference to the BIA's interpretation of § 1101(a)(43)(S). GB46-52. *Chevron* deference has no role here. Even if § 1101(a)(43)(S) were ambiguous about its pending-proceeding element, which it is not, construing an aggravated felony provision means construing the scope of criminal liability, so it is a job for the courts—not for an executive agency. *See Abramski v. United States*, 573 U.S. 169, 191 (2014). And to the extent any doubts exist about the generic meaning of "obstruction of justice," settled principles against construing immigration provisions broadly and the rule of lenity—not *Chevron* deference—would resolve those doubts in favor of the pending-proceeding requirement.

V. Finally, if the Court holds that the generic offense does not include a pending-proceeding requirement, it should remand for consideration of whether petitioner's accessory-after-the-fact misdemeanor nevertheless is a categorical match to the generic offense. The imprecise and shifting versions of the BIA's approach cannot support treatment of petitioner's offense as an aggravated felony; a more concrete definition of the appropriate nexus is required, and the lower court should apply that formulation in the first instance.

ARGUMENT

"AN OFFENSE RELATING TO OBSTRUCTION OF JUSTICE" REQUIRES A PENDING PROCEEDING

Straightforward principles of statutory construction establish that "an offense relating to obstruction of justice" has a core, historic element: interference with a pending proceeding. This Court's cases, statutory context, and history support that conclusion. The government's contrary arguments are unpersuasive.

I. THE PHRASE "OBSTRUCTION OF JUSTICE" UNAMBIGUOUSLY INCLUDES THE HISTORICAL REQUIREMENT OF A PENDING PROCEEDING

In 1996, Congress added "an offense relating to obstruction of justice" to its long list of aggravated felonies. By then, "obstruction of justice" was a term of art that had long been understood to require a pending proceeding as an essential element. This requirement was therefore part of "the generic sense in which [obstruction of justice was] used," and so is an element of "generic" obstruction of justice under the categorical approach. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007) (internal quotation marks omitted).

A. "Obstruction Of Justice" Is A Term Of Art That Historically Required Interference With A Pending Proceeding

Because Congress did not expressly define "relating to obstruction of justice" as used in 8 U.S.C. § 1101(a)(43)(S), this Court "interpret[s] that phrase using the normal tools of statutory interpretation," beginning with "the language of the statute." *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 391

(2017) (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004)). Many words take their meaning from dictionary definitions or ordinary speech. *See id.* But here, the relevant tool of interpretation is the longstanding principle that specialized "terms of art" are afforded their "technical," "specialized meaning[s]." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 73 (2012); *see, e.g.*, 2A Norman Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction* § 47:30 (7th ed. 2022) ("Legal terms in a statute have their legal meaning, absent legislative intent to the contrary, or other evidence of a different meaning, such as context or a statutory definition."). "Where Congress employs a term of art 'obviously transplanted from another legal source,' it 'brings the old soil with it.'" *George v. McDonough*, 142 S. Ct. 1953, 1959 (2022) (quoting *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019)). Here, "obstruction of justice" was an established legal term of art when Congress "transplanted" that phrase into § 1101(a)(43)(S), and it comes with the "old soil" requirement of interference with a *pending* proceeding firmly attached.[1]

1. The pending-proceeding requirement has deep roots in the legal term of art "obstruction of justice"

The "generic obstruction of justice statute," now codified at 18 U.S.C. § 1503, traces its roots to the Act of March 2, 1831. Ellen S. Podgor, *Obstruction of Justice: Redesigning the Shortcut*, 46 B.Y.U. L. Rev.

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[1] Alternatively, the same result follows from the ordinary understanding of the statutory language. *See* Cordero-Garcia Br. 13-24.

657, 664-65, 670 (2021). At that time, the "administration of justice"—and, by logical extension, its obstruction—was understood as taking place in the context of ongoing court proceedings. Blackstone defined a "court" as "a place wherein justice is judicially administered" and emphasized that the creation of "a prodigious variety of courts" was necessary for the "more speedy, universal, and impartial administration of justice." 3 William Blackstone, *Commentaries on the Laws of England* 23-24 (1768). James Kent's commentaries reflect the same view, stating that "the judiciary power is intrusted with the administration of justice." 1 James Kent, *Commentaries on American Law* 356 (14th ed. 1896).

Founding era writings confirm the prevailing understanding of the administration of justice. The Declaration of Independence charged King George III with "obstruct[ing] the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers," thus linking the idea of obstruction of justice to the administration of justice in courts. The Declaration of Independence para. 10 (U.S. 1776). And George Washington "considered the first arrangement of the Judicial department as essential to the happiness of our Country" based on his conviction that "the due administration of justice is the firmest pillar of good Government." Letter from President George Washington to Attorney Gen. Edmund Randolph (Sept. 28, 1789) (on file with the Library of Congress).

Against that backdrop, the Act of March 2, 1831—the foundational federal obstruction-of-justice statute—focused on interference with the

administration of *particular* judicial proceedings. The Act's purpose was to "bifurcate[] the contempt power" of federal courts in response to perceived judicial abuse of the power to summarily punish for contempt. Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 Geo. L.J. 1435, 1473 (2009). The Act first limited summary proceedings to failures to comply with court orders or contemptuous acts committed in the presence or geographical proximity of the court. *Id.* The Act's second section—"which was to lay the foundation for the modern statutory incarnation of the offense of obstruction of justice"—was equally intertwined with pending judicial proceedings: it criminalized certain *indirect* contempts of court, thereby ensuring that full procedural safeguards would attach to the punishment of such conduct. *Id.* Specifically, Section 2 prohibited "any person or persons" from "corruptly, or by threats of force, endeavor[ing]" either "to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty" or "to obstruct or impede, the due administration of justice therein." Act. of Mar. 2, 1831, ch. 99, 4 Stat. 487 (1831). That provision became Section 5399 of the Revised Statutes, the formative obstruction provision in federal law. Murphy, *supra,* at 1473; *see* Rev. Stat., tit. LXX, ch.4, § 5399 (1875).

In *Pettibone v. United States*, 148 U.S. 197 (1893), this Court construed Section 5399 to require a pending proceeding. The Court recognized that "[t]he obstruction of the due administration of justice in any court of the United States … is indeed made criminal, but such obstruction *can only arise when justice is being administered*." *Id.* at 207 (emphasis added).

"Unless that fact exists the statutory offense cannot be committed." *Id.* The "pendency of proceedings" in a particular "United States court, or the progress of the administration of justice therein" thus became a critical element of the historical core meaning of "obstruction of justice" in federal criminal law. *Id.* at 205.

The government downplays *Pettibone* because it "construed a statute that is no longer in effect." GB32. But that overlooks that in 1948, Congress incorporated Section 5399 into the modern omnibus obstruction provision, 18 U.S.C. § 1503, explaining that it made no substantive changes to the counterpart provision that existed at the time of *Pettibone*. *See* H.R. Rep. No. 80-304, at A107 (1947).[2] The government has previously conceded as much before this Court, acknowledging that the relevant portion of § 1503 is substantively identical to Section 5399 and that, accordingly, "the requirement of a known, pending judicial proceeding that existed under Rev. Stat. § 5399 and *Pettibone* was carried through to Section 1503(a)." GB28-29, *Marinello v. United States*, No. 16-1144 (Oct. 2017) (hereinafter "*Marinello* GB"); *see also* GB16, *United States v. Aguilar,* No. 94-270 (Jan. 1995) (acknowledging pending-proceeding requirement in § 1503).

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[2] Its modest changes to the statutory text—including the omission of the word "therein," meaning "in the court"—were instead intended as "[m]inor changes … in phraseology," *id*., and presumptively "worked [no] change in the underlying substantive law," *Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9, 20 (2006).

Thus, the original legal concept of obstruction of justice in federal statutory law demanded an obstruction of *pending* proceedings. And so deeply rooted and pervasive was this background understanding that when Congress codified the basic obstruction provision § 1503 in 1948, it placed that provision alongside five other offenses to form Chapter 73 of title 18, captioned "Obstruction of Justice." *See* Act of June 25, 1948, ch. 645, §§ 1501-1506, 62 Stat. 769, 769-70 (1948). None of these six offenses permitted conviction before any proceeding had commenced.[3] This constellation of statutes thus formed the general, generic rule in federal law: a pending proceeding is required for obstruction of justice.

2. This Court's decision in Aguilar *reaffirmed the pending-proceeding requirement*

In 1995, just one year before the enactment of § 1101(a)(43)(S), this Court reaffirmed the longstanding understanding of generic obstruction of justice as interference with a *pending* proceeding under the basic federal obstruction provision, § 1503.

a. In *United States v. Aguilar*, 515 U.S. 593 (1995), the Court interpreted the omnibus clause of § 1503 to require interference with a pending proceeding. Citing

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[3] In addition to § 1503, the five other original Chapter 73 offenses were § 1501 ("Assault on process server"); § 1502 ("Resistance to extradition agent"); § 1504 ("Influencing juror by writing"); § 1505 ("Influencing or injuring witness before agencies and committees"); and § 1506 ("Theft or alteration of record or process; false bail"). To the extent § 1503 embraced retaliation offenses, no prosecution was possible without a concrete proceeding having been commenced. *See infra* at 25-26.

Pettibone's established rule that "justice … being administered in … court" is a prerequisite to liability for "obstructing or impeding the due administration of justice in a court," *id.* at 599 (quoting *Pettibone*, 148 U.S. at 206-07), the Court held that this required a defendant to know of a "pending proceeding" in order to have "the evil intent to obstruct," *id.* The Court reinforced the fundamental character of this requirement by citing approvingly to lower court decisions that embraced it. *See, e.g.*, *id.* (citing *United States v. Brown*, 688 F.2d 596, 598 (9th Cir. 1982)). *Aguilar* thus cemented *Pettibone*'s pending-proceeding requirement as critical to the core generic meaning of obstruction of justice. Justice Scalia's partial concurrence underscored the same point: "an endeavor to obstruct proceedings that did not exist would not violate the statute" because "[o]bstruction can only arise when justice is being administered," meaning that "a pending judicial proceeding" is a "core element[]" of § 1503. *See id.* at 610 n.1 (Scalia, J., concurring in part and dissenting in part) (first quoting *Pettibone*, 148 U.S. at 207; then quoting *United States v. Williams*, 874 F.2d 968, 977 (5th Cir. 1989)).

b. The government tries to elude *Aguilar*'s pending-proceeding requirement by focusing on a separate requirement: that of a "nexus" between the defendant's act and "the judicial proceedings." 515 U.S. at 599. The government suggests that the Court's description of the "nexus" as requiring a relationship in "time, causation or logic" between act and proceeding erases the *pending*-proceeding requirement. GB20, 32. But the two aspects of *Aguilar* are distinct and entirely consistent.

Beyond requiring that a proceeding be pending, the Court embraced *another* objective limitation to ensure that the defendant's conduct would have "the natural and probable effect" of obstructing justice. *Aguilar*, 515 U.S. at 599 (internal quotation marks omitted). The nexus test—requiring a "relationship in time, causation or logic with the judicial proceedings"—*narrowed* the reach of the statute; it did not eliminate the pending proceeding requirement.[4] The Court did so out of deference to Congress's prerogatives to define criminal law and to ensure "fair warning" of what the law required. *Id.* at 600 (internal quotation marks omitted). The government's reading would turn *Aguilar* on its head; it would dispense with the Court's threshold demand for a *pending* proceeding—a requirement drawn from history and the century-old precedent in *Pettibone*—and substitute a free-floating nexus test. The government's past briefs have not so read *Aguilar*. *See Marinello* GB26 (citing *Aguilar* for the proposition that "Section 1503(a) has been interpreted to require knowledge of a pending judicial proceeding"); *id.* at 29 (same).

The government cites *Marinello v. United States*, 138 S. Ct. 1101 (2018), to support its reinterpretation of *Aguilar*, but that reliance is misplaced. In

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[4] Both court of appeals decisions *Aguilar* cited as correctly construing the "nexus" requirement also recognized the additional requirement of a pending proceeding. *See* 515 U.S. at 599 (citing *United States v. Wood*, 6 F.3d 692, 695 (10th Cir. 1993) (listing "a pending judicial proceeding" as a "core element[]"), *abrogated on other grounds by Hubbard v. United States*, 514 U.S. 695 (1995); *United States v. Walasek*, 527 F.2d 676, 678 (3d Cir. 1975) (similar)).

interpreting a specific obstruction provision of the Internal Revenue Code, the Court adopted *Aguilar*'s "time, causation, or logic" nexus element to define the necessary *relationship* between the defendant's conduct and a tax proceeding for purposes of that provision. *Id.* at 1109-10. But the Court separately analyzed what type of tax proceeding counted, noting that "[i]n addition to satisfying this nexus requirement," the government must show a pending, or at least reasonably foreseeable proceeding. *Id.* at 1110.

The government does not embrace *Marinello*'s objective, "reasonably foreseeable" proceeding requirement, instead going straight to the nexus test, where the government relies on an amorphous *mens rea* element to define the offense. GB16 (arguing that "objective to obstruct justice"—a purpose test—is a sufficient nexus); *id.* at 22 (a purpose to obstruct provides a "causal or logical nexus"). But *Marinello* did not allow bad intentions alone to do service for the objective proceeding requirement. And while *Marinello* required only a "reasonably foreseeable" proceeding, the proceeding had to be at least "in the offing." 138 S. Ct. at 1110. The Court rejected the proposition that a proceeding was "reasonably foreseeable" simply because an offender believes the government "may catch on to his unlawful scheme eventually." *Id.* The government would dispense with any objective limitation. But for the generic obstruction offense, from *Pettibone* through *Aguilar*, concrete particular proceedings are essential.

Marinello in fact confirms that a pending proceeding is the rule, and foreseeability a limited

exception. *Marinello* relaxed the established pending-proceeding requirement for specialized reasons that make it an inapt model for defining the generic obstruction offense. *Marinello* relied on *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), "a case about Chapter 73's unusual witness tampering provision, § 1512," which expressly disclaims a pending proceeding requirement, *Valenzuela Gallardo IV*, 968 F.3d 1053, 1067 (9th Cir. 2020); *see infra* at 24-25. Accordingly, that aspect of *Marinello* "sheds little light on the meaning of § 1503" or on the generic meaning of "obstruction of justice" in federal law. *Valenzuela Gallardo IV*, 968 F.3d at 1067.

B. Congress Can Be Presumed To Have Relied On This Court's Understanding Of Obstruction Of Justice In Describing The Generic Offense

This Court can presume that Congress is aware of this Court's decisions when it uses specialized and historical terms of art that this Court has interpreted, and that Congress legislates against that backdrop. *See Ryan v. Gonzales*, 568 U.S. 57, 66 (2013) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent." (internal quotation marks omitted)). Indeed, Congress has elsewhere confirmed its awareness of the specialized meaning of this term of art: in the only other place in the U.S. Code that uses the phrase "relating to obstruction of justice," Congress treated that language as describing § 1503, including its historically rooted omnibus clause. *See* 18 U.S.C. § 1961(1) (describing § 1503 in the list of RICO predicates as "relating to obstruction of justice").

Presuming that Congress intended to adhere to a term of art's historical core is especially appropriate in defining a traditional offense's generic elements. Congress is always free to supply a broader definition for an aggravated felony, or to cross-reference a wider set of laws. But in defining a generic aggravated felony, the Court should look to the core, established meaning—the tree's trunk, as it were, not later branches and offshoots. For more than a century, the paradigmatic obstruction offense had a pending-proceeding requirement, first articulated in *Pettibone* and reaffirmed in *Aguilar*. Congress must be understood to have looked to that well-established requirement when referring to the generic obstruction offense, rather than imagining a lowest common denominator, existing nowhere in federal law, that the government would derive from a variety of disparate or specifically tailored provisions.

II. THE GOVERNMENT'S EXPANSIVE APPROACH TO OBSTRUCTION IS UNFOUNDED

The government's arguments for dispensing with a pending-proceeding requirement turn primarily on immaterial subsequent developments in the federal criminal code and inapposite secondary sources. They do nothing to overcome the long-established meaning of the term of art at the center of this case.

A. Chapter 73 Offenses

After codifying obstruction offenses in 1948, Congress continued to add criminal offenses to Chapter 73, many of which hew to the traditional definition of obstruction of justice by applying only in the context of a pending proceeding or investigation. *See, e.g.*, 18 U.S.C. § 1507 (picketing or parading near

courts or certain buildings "with the intent of interfering with, obstructing, or impeding the administration of justice, or … influencing any judge, juror, witness, or court officer, in the discharge of his duty"); § 1508 (recording or observing jury proceedings); § 1510(b), (d) (disclosures regarding subpoenas); § 1516 (obstruction of a federal auditor "in the performance of official duties"); § 1517 (obstruction of the examination of a financial institution). Certain of the newer additions to Chapter 73 either depart from or are ambiguous about the traditional requirement of a pending proceeding or investigation, but none casts doubt on the primacy of that requirement within the core historical meaning of "obstruction of justice." Indeed, Congress itself, in defining RICO predicates, has noted the distinction between § 1503 and other discrete Chapter 73 offenses, labeling only § 1503 as "relating to obstruction of justice" while categorizing §§ 1510, 1511, 1512, and 1513 with other descriptors indicating their particularized purposes. *See* 18 U.S.C. § 1961(1); *see also United States v. Davis*, 139 S. Ct. 2319, 2329 (2019) (the Court "normally presume[s] that the same language in related statutes carries a consistent meaning"). And additional reasons exist to discount each of the government's arguments.

1. Section 1512, addressing witness tampering, represents an express departure from the root concept; it provides that "*[f]or the purposes of this section*," an "official proceeding need not be pending or about to be instituted at the time of the offense." 18 U.S.C. § 1512(f)(1) (emphasis added). This carveout would be unnecessary if not for the background principle that the heartland of "obstruction of justice" requires

interference with a pending proceeding. The Ninth Circuit thus correctly characterized § 1512 as an "exception that proves the rule" of a pending-proceeding requirement. *Valenzuela Gallardo IV*, 968 F.3d at 1066.

2. The other Chapter 73 provisions on which the government relies are no more relevant to the core historical meaning of the term of art "obstruction of justice." One category cited by the government consists of offenses closely intertwined with particular court proceedings that are either pending or concluded. Section 1509, for example, prohibits obstruction "by threats or force" of "any order, judgment, or decree of a court of the United States." 18 U.S.C. § 1509. Echoing § 1503's roots in the law of contempt, *see supra* at 15-16, § 1509 is thus concerned with conduct that interferes with a particular court's authority in the context of a specific, actualized proceeding. Two statutes involving retaliation against witnesses, victims, or informants, *see* § 1513, and against jurors or court officers, § 1503(a) (retaliation clause), are likewise impossible to violate in the absence of a particular proceeding or investigation that has at least commenced.[5] To the extent this category of statutes departs from the traditional

[5] This clause within § 1503 covers harming a juror "on account of any verdict or indictment assented to by him" or a court officer "on account of the performance of his official duties." 18 U.S.C. § 1503(a). Although this provision, unlike the omnibus clause construed in *Aguilar*, could be read to encompass conduct that takes place after a particular proceeding concludes, it concerns conduct that necessarily requires that there have been an actual proceeding.

understanding of "obstruction of justice," then, it does so on narrow grounds by requiring a connection to a *past or present* proceeding or investigation. That modest expansion offers no basis to redefine the essential, generic "obstruction of justice" offense to encompass *future*, hypothetical proceedings or investigations, as contemplated by the government's shapeless reconceptualization.

3. The government contends that § 1510(a) (obstruction of criminal investigations), § 1511 (conspiracy relating to illegal gambling), § 1518 (obstruction of health care investigations), and § 1519 (destroying or altering records) all lack a pending proceeding or investigation requirement and therefore support erasing that requirement from the generic definition of "an offense relating to obstruction of justice." Its argument does not withstand scrutiny.

As an initial matter, even accepting the government's characterization of these offenses as lacking a pending proceeding or investigation requirement, they have no bearing on the generic meaning of "obstruction of justice" because each is a specialized evolution of Chapter 73 to address conduct outside obstruction's historical core. *See Yates v. United States*, 574 U.S. 528, 540 (2015) (plurality opinion) (explaining that Chapter 73 contains certain "specialized provisions" applicable to "specific contexts," such as those "expressly aimed at corporate fraud and financial audits"). That Congress departed from the settled historical meaning of "obstruction of justice" in order to address a particularized problem does not alter the generic meaning of "obstruction of

justice" here. Beyond that, the government overstates its case.

§ 1510. While, as the government notes, § 1510 was originally enacted "to close a loophole in former laws which protected witnesses only during the pendency of a *[judicial] proceeding*," *United States v. San Martin*, 515 F.2d 317, 320 (5th Cir. 1975) (emphasis added), many cases hold that a pending *investigation* is nevertheless required, *see, e.g.*, *United States v. Carzoli*, 447 F.2d 774, 779 (7th Cir. 1971) ("An element of the offense charged is an actual, existing investigation of possible violation of a criminal statute."); *United States v. Zolli*, 51 F.R.D. 522, 530 (E.D.N.Y. 1970) (§ 1510(a) required a showing of "a pending investigation"); *Construction and Application of 18 U.S.C.A § 1510*, 18 A.L.R. Fed. 875 (1974) (at the time of publication, "[a]ll of the decided cases ha[d] recognized that as [an] element[] of the offense the government must show that at the time of the conduct … there was a pending federal investigation of a violation of federal criminal law").[6] Further undermining § 1510(a)'s import is the fact that,

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[6] The government quotes dictum from *United States v. Leisure*, 844 F.2d 1347 (8th Cir. 1988), which first observed that "[f]ederal and state authorities had been investigating the [defendants'] activities" at the time of the offending conduct before later suggesting that a pending proceeding was not an element of the statute. *Id.* at 1353, 1364. That demonstrates at most a lack of judicial consensus on the question. *See, e.g.*, *United States v. Van Engel*, 15 F.3d 623, 627 (7th Cir. 1993) (deeming it "unclear" whether § 1510 was "applicable if there is no criminal investigation known to be in progress"); *United States v. Daly*, 842 F.2d 1380, 1391 (2d Cir. 1988) (finding it "unnecessary to decide whether § 1510 requires an ongoing criminal investigation").

following amendments in 1982, § 1510(a)'s ambit has been sharply reduced to cover only bribery offenses. *See* Pub. L. No. 97-291, 96 Stat. 1248, 1253 (1982).

§ 1511. This provision prohibits a *conspiracy* "to obstruct the enforcement of the criminal laws of a State or a political subdivision thereof, with the intent to facilitate an illegal gambling business." 18 U.S.C. § 1511. That no proceeding need have been pending under § 1511 is a function of the nature of conspiracy as "an *agreement* to commit an unlawful act," *United States v. Shabani*, 513 U.S. 10, 16 (1994) (emphasis added) (internal quotation marks omitted), not the nature of obstruction of justice. Nothing in that logic suggests that actual "obstruct[ion] of the enforcement of the criminal laws of a State" under § 1511 could be accomplished in the absence of a pending proceeding or investigation. On the contrary, because the statute "contains language that is similar to" the "catchall provision" in § 1503, which requires a pending proceeding, and "[i]n light of the way in which [§ 1511] was used" to target "efforts by organized crime organizations to bribe local officials to investigate gambling operations run by their competitors," "Congress likely understood" that language in § 1511 as "contemplating a nexus to ongoing or pending investigations or proceedings." *Valenzuela Gallardo IV*, 968 F.3d at 1064 n.9.

§§ 1518 and 1519. Both § 1518 and § 1519 are highly particularized to specific contexts, with § 1518 addressed to the unique realm of health care fraud and § 1519 responding to the Enron scandal, *see Yates*, 574 U.S. at 532 (plurality opinion). Further, § 1518 contains language similar to that used in § 1510(a),

making it at least ambiguous about the requirement of a pending investigation. Finally, both provisions *postdate* the enactment of § 1101(a)(43)(S). The government thus cannot rely on these provisions as having altered the long-established meaning of "obstruction of justice" as used in that provision.

* * *

The government's reliance on Chapter 73 to broaden the traditional generic meaning of "obstruction of justice" thus fails. The government does not rely on the obstruction-of-justice *heading* of Chapter 73 to illuminate § 1101(a)(43)(S)'s scope. *See* GB24. Instead, it would distill from these disparate provisions a rule that has no definable core *except* the government's position that no pending proceeding is required in the generic obstruction offense. The government cites no decision of this Court that has engaged in such a freewheeling approach. Chapter 73 has evolved over time to encompass various additional offenses beyond the "older generic statute" that reflects the core of obstruction of justice. Podgor, *supra*, at 671. But the government offers no basis to conclude that this evolution also expanded the historical term of art "obstruction of justice" beyond the established meaning of more than 130 years. *See supra* at 13-19.

B. State Law

A "multijurisdictional analysis … is not required by the categorical approach." *Esquivel-Quintana*, 581 U.S. at 396 n.3. But even if the Court looked to state law, it would not help the government. The government does not rely on offenses named "obstruction of justice," and any such reliance would be

unavailing. *See* Cordero-Garcia Br. 24-28. Instead, the government supports its approach by widening the lens to include state witness-tampering and accessory-after-the-fact offenses. But that gets the categorical approach backwards, picking out disparate crimes to inform the analysis without first identifying what the generic offense is. *Cf. Esquivel-Quintana*, 581 U.S. at 393 (looking to offenses of conviction first "turns the categorical approach on its head"). In any event, the effort fails.

According to the government, a majority of states in 1996 either titled or categorized witness-tampering and accessory offenses (which did not require a pending proceeding) in ways that identify them as species of obstruction of justice. GB37-43. That approach is circular and misguided: it assumes what the government seeks to prove, *i.e.*, that the generic obstruction-of-justice crime embraces these offenses. The correct focus is on crimes identified as "obstruction of justice," and by that metric, the government swings and misses when it relies on these non-obstruction offenses to define the generic offense.

Witness tampering. The government counts two states that codified that offense under sections named "Obstructing Governmental Administration" and "Obstruction of the Administration of Government," and 30 states that codified it in sections named "'offenses against public administration' or something similar." GB37 & nn.9-10. None of these sections is called "obstruction of justice," or even includes the words "obstruction" and "justice" together. Two of the 32 states gave that title to *other* sections of their criminal codes. *See Valenzuela Gallardo III*, 27 I. & N.

Dec. 449, 452 n.4 (B.I.A. 2018) (citing Tenn. Code Ann. §§ 39-16-601-609 (1996); Iowa Code §§ 719.1-.8 (1996)). And nearly all of the states codified offenses in these sections that bear little to no resemblance to any notion of obstruction—even the broad view advanced by the government. *See* Appendix B, App. 6a-26a; *e.g.,* Ga. Code Ann. § 16-10-9 (1996) ("offense against public administration" to hold office in more than one branch of government); Mont. Code Ann. § 45-7-501 (1996) (employer's failure to provide workers' compensation coverage). Whatever several states in 1996 understood "offense against public administration" to mean, it offers no rational blueprint for understanding the meaning of "obstruction of justice," nor could it possibly alter the settled historical understanding of that term in federal law. *See* John F. Decker, *The Varying Parameters of Obstruction of Justice in American Criminal Law*, 65 La. L. Rev. 49, 121-23 (2004) (concluding that "it is difficult to derive any sweeping conclusions about these laws").

Accessory after the fact. The government makes even less headway here: it admits that only three of 50 states in 1996 characterized that offense as "obstructing justice," while 20 states classified it as an "accessory" offense. GB41-42 & nn.21, 24. That is consistent with the federal scheme, which locates the accessory-after-the-fact offense outside of Chapter 73. *See* 18 U.S.C. § 3. Indeed, in codifying accessory after the fact outside of Chapter 73, Congress drew on the distinct, deeply rooted lineage of that offense as part of the underlying crime, not part of an effort to obstruct future proceedings. *See Skelly v. United States*, 76 F.2d 483, 487 (10th Cir. 1935) (describing traditional offense as part of "one continuous criminal

transaction"); *see also* U.S. Code Supplement IV, at 791 (1946 ed.) (noting that Congress drafted statute "based upon authority of *Skelly v. United States*").

As to the remaining 27 states, the government says they described accessory after the fact using terms like "hindering prosecution" or "harboring or aiding a felon." GB41-42 & nn.22-23. Again, none of these phrases is "obstruction of justice." And many of these offenses were located in sections of the states' criminal codes *not* concerning obstruction. *See* Appendix C, App. 27a-28a.

The disconnect from generic obstruction is highlighted by the fact that describing the accessory offense as "aiding" or "harboring" a criminal is consistent with how the offense was historically understood. At common law, an accessory after the fact's culpability arose not from the tendency of his assistance to the principal to interfere with the investigation or prosecution of the principal's crime, but instead upon the theory that his "aid" to or "harboring" of the principal made him party to the crime. *See, e.g.*, 1 Matthew Hale, *The History of the Pleas of the Crown* 618 (Robert H. Small ed., 1847) ("This kind of accessary after the fact is where a person … receives, relieves, comforts, or assists the felon."); 2 Joel Prentiss Bishop, *Criminal Procedure*, book XII, ch. I, § 8 (3d ed. 1880) (indictment "must aver that the accessory 'did receive, harbor, and maintain,' &c., the principal"). In that context, "the accessory's liability derive[d] from that of his principal." Model Penal Code ("MPC") Art. 242, introductory note at 199 (1980). It was thus distinct from liability for traditional contempt, which derived from its tendency

to obstruct the administration of justice in court. *See supra* at 15-16.

The government cannot bolster its position by noting Blackstone's use of the words "impediment[]" or "hindrance of public justice" to describe witness tampering and accessory offenses. GB15, 20-21. Blackstone thought many offenses were contrary to "public justice"—including, for example, receipt of stolen goods (an "affront to public justice"), perjury (an "offence against public justice"), and extortion by a public official ("an abuse of public justice"). 4 William Blackstone, *Commentaries on the Laws of England* 132, 136, 141 (1769). But federal criminal law does not classify these offenses as "obstruction of justice," *see* 18 U.S.C. § 662 (receiving stolen property); § 872 ("Extortion by officers or employees of the United States"); § 1621 (perjury)—and the government does not contend that they fall within the generic meaning of that term.

In sum, a "multijurisdictional analysis" of state obstruction law does not support the government's argument—and the government's misplaced reliance on witness tampering and accessory law only reinforces that conclusion.

C. The Model Penal Code

The government's reliance on the MPC does not assist it either. *See* GB33-36. In *Esquivel-Quintana*, this Court cited the MPC only in passing, solely to observe that, at least with respect to the aggravated felony there at issue—"sexual abuse of a minor"—the MPC confirmed the view endorsed by a majority of states. 581 U.S. at 395-96. Here, however, "no discernible" agreement exists among states on the

meaning of "obstruction of justice." *Valenzuela Gallardo III*, 27 I. & N. Dec. at 461.

The MPC, moreover, was a "law reform project[]" meant to shape, rather than reflect or restate, the criminal law. Gerard E. Lynch, *Revising the Model Penal Code: Keeping It Real*, 1 Ohio St. J. of Crim L. 219, 220 (2003). Consistent with that aim, the MPC adopted a radical view of the law of obstruction. It recognized that "[t]he concept of 'obstruction' has a long history in the context of interference with the judicial system." MPC § 242.1, cmt. 1, at 201. But it consciously broke with that history. Thus, it departed from "[p]rior laws against tampering with evidence" that required "that an official proceeding or investigation actually be pending or in fact be under consideration by public authorities." *Id.* § 241.7, cmt. 2, at 178. And it "br[oke] decisively" from the common-law understanding of accessory-after-the-fact offenses. *Id.* § 242.3, cmt. 1, at 224. Because no evidence existed that, as of 1996, the federal government or a majority of states followed the MPC's decisive departure from historical understandings, the MPC is of no help in interpreting "obstruction of justice" here.

D. Dictionary Definitions

Legal dictionaries in print at the time of § 1101(a)(43)(S)'s enactment in 1996 were consistent with the understanding of "obstruction of justice" embraced by federal law, and in any event do not form any contrary consensus that could override the term of art's longstanding legal meaning.

Several legal dictionaries defined "obstruction of justice" or "obstructing justice" with reference to pending or ongoing proceedings. *Black's Law*

Dictionary, for example, opens its definition with "Impeding or obstructing those who seek justice *in a court*, or those who have duties or powers of administering justice *therein*," and goes on to include "[a]ny act, conduct, or directing agency pertaining to *pending proceedings*" that "deflect[s] and deter[s] [a] *court* from performance of its duty." *Black's Law Dictionary* 1077 (6th ed. 1990) (emphases added). The government emphasizes the portion of the definition that includes "obstructing the administration of justice in any way," but the historical and contemporary meaning of "administration of justice" is closely tied to pending judicial proceedings. *See supra* at 13-19; *see also Black's Law Dictionary* 53 (10th ed. 2014) (defining "due administration of justice" as "[t]he proper functioning and integrity of a court or other tribunal and the proceedings before it in accordance with the rights guaranteed to the parties").

Other dictionaries are in accord. *See, e.g.*, Steven H. Gifis, *Barron's Law Dictionary* 347 (4th ed. 1996) ("[T]he impeding or obstructing [of] those who seek justice *in a court*, or those who have duties or powers of administering justice *therein*," including "attempting to influence, intimidate or impede any juror, witness or officer in any court regarding the discharge of his duty." (emphases added)); *Gilbert Law Summaries Dictionary* 177 (1994) ("To hinder, impede, or prevent the efforts of those who seek to exercise their legal rights in court or those whose duties involve the administration of justice, *e.g.,* to seek to prevent a person from testifying at a trial.").

The dictionaries on which the government relies cast no doubt on the continued viability of the

longstanding "pending proceeding" requirement. *Merriam-Webster's Dictionary of Law*, for example, refers generally to "interfering with the process of justice and law" or "otherwise impeding an investigation or legal process," and its proffered examples in large part apply only in the context of a pending proceeding. *See Merriam-Webster's Dictionary of Law* 337 (1996) (listing "influencing, threatening, harming, or impeding a witness, potential witness, juror, or judicial or legal officer or by furnishing false information in … an investigation or legal process" as examples of obstruction of justice). The government relies on a single example—conduct targeted at a "potential witness"—to support a theory that this definition dispenses with a pending proceeding requirement. GB24. That is wrong: "potential witnesses" can describe those waiting in the wings while proceedings are ongoing, *see* Fed. R. Evid. 615; *Aguilar*, 515 U.S. at 616 (Scalia, J., concurring in part and dissenting in part) (referring to "potential grand jury witnesses" in a pending proceeding), and witnesses are commonly "potential" in the context of an ongoing investigation. Thus, nothing in *Merriam-Webster*'s definition undermines the pending proceeding requirement encompassed by the technical federal law term of art.

The same is true of the *Dictionary of Modern Legal Usage* definition. GB23. That definition includes "every willful act of corruption, intimidation, or force that tends somehow to impair the machinery of the civil or criminal law"—an imprecise construction that may well refer to "machinery" that is already in motion. Bryan A. Garner, *A Dictionary of Modern Legal Usage* 611 (2d ed. 1995). *See* Pet. App. 45a

(Gregory, C.J., dissenting) ("[A] plain reading of this definition leads to the conclusion that obstruction occurs once the 'machinery' learns of the crime, i.e., there are pending proceedings."). At bottom, the contemporaneous legal dictionaries do nothing to call into question the well-established requirement of a pending proceeding inherent in the term of art "obstruction of justice" as used in the context of federal criminal law.

E. Sentencing Guidelines

The Sentencing Guidelines are likewise unhelpful. The government points out that the Guideline entitled "Obstruction of Justice" was applicable to most Chapter 73 offenses. GB43-44 (citing U.S.S.G. § 2J1.2 (U.S. Sent'g Comm'n 1995)). But the Guideline's taking its cue from a set of statutes collected under the title "obstruction of justice" does not alter the core historical requirement reaffirmed in this Court's cases that there be a pending proceeding, any more than does the presence of some exceptions to that rule in Chapter 73 itself. *See supra* at 23-29.

The government also overreads those portions of the Guidelines that it says "suggested an equivalence" between obstruction and accessory after the fact. GB44. The commentary to the "obstruction" enhancement refers to a range of non-traditional offenses, such as perjury and failure to appear, that do not receive the enhancement unless there is "further obstruction." U.S.S.G. § 3C1.1, cmt. n.6 (1995). The Guidelines may cast a broad net over various offenses for sentencing purposes. But equating crimes such as "perjury" to obstruction would be inconsistent with the structure of § 1101(a)(43)(S). The words "perjury" and

"bribery" appear alongside "obstruction of justice" in the statute, and each should be given independent meaning. *See*, *e.g.*, *Leocal*, 543 U.S. at 12. Accordingly, the broader approach of the Guidelines cannot inform the meaning of generic "obstruction of justice" in § 1101(a)(43)(S).

The obstruction Guideline's cross-reference to the accessory-after-the-fact Guideline is similarly unilluminating. The obstruction Guideline directs application of the accessory-after-the-fact Guideline where it would result in a higher offense level, and where "the offense involved obstructing the investigation or prosecution of a criminal offense." U.S.S.G. § 2J1.2(c)(1) (1995). This hardly suggests an "equivalence" between generic "obstruction of justice" and accessorial liability, as the government contends. GB44. To the contrary, the commentary to the obstruction Guideline recognizes that the conduct covered by "obstruction of justice" "is frequently part of"—thus, not the same as—"an effort to avoid punishment for an offense or to assist another person to escape punishment for an offense." U.S.S.G. § 2J1.2, cmt. (1995). If anything, the accessory-after-the-fact Guideline, which keys an accessory's sentence to a certain lesser amount than the principal's offense, underscores the historical notion that accessorial culpability is derivative of the principal's culpability—not based on any propensity to interfere with an investigation or proceeding. *See id.* § 2X3.1; *supra* at 32-33.

III. THE PHRASE "RELATING TO" IN § 1101(A)(43)(S) DOES NOT EXPAND GENERIC "OBSTRUCTION OF JUSTICE" BEYOND ITS CORE PENDING-PROCEEDING REQUIREMENT

The government alternatively argues that even if a pending-proceeding requirement is part of the generic offense, the words "relating to" expand the generic offense to encompass any offense that "share[s] the same 'objective to obstruct justice.'" GB45. But that amorphous and limitless interpretation lacks merit. Understood in context, "relating to" cannot override the core meaning of "obstruction of justice" as requiring a pending proceeding.

A. An "Offense Relating To Obstruction Of Justice" Retains The Pending Proceeding Requirement

Section 1101(a)(43)(S)'s inclusion of the phrase "relating to" does not stretch the statute beyond the core pending-proceeding requirement. This Court has recognized that "in connection with"—a synonym for "relating to"—is "broad" and "indeterminate." *Maracich v. Spears*, 570 U.S. 48, 59 (2013). Extended "to the furthest stretch of its indeterminacy," it would impose virtually no limit on the words it modifies, because "[r]eally, universally, relations stop nowhere." *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (internal quotation marks omitted). Although such breadth can sometimes be appropriate, in other cases, "context" and "historical background" may "tug … in favor of a narrower reading." *Mellouli v. Lynch*, 575 U.S. 798, 811-12 (2015) (quotations omitted).

In *Mellouli*, the Court construed a provision of the INA (enacted only six years before § 1101(a)(43)(S))

that makes noncitizens deportable on the basis of "a violation of … any law or regulation … relating to a controlled substance (as defined in section 802 of Title 21)." 8 U.S.C. § 1227(a)(2)(B)(i). The government argued that laws or regulations "relating to" federally controlled substances included state laws based on "drug schedules that have a 'substantial overlap' with the federal schedules." *Mellouli*, 575 U.S. at 812. The Court rejected this construction because it offered no principled limit: a "statute with *any* overlap would seem to be *related to* federally controlled drugs," as would, perhaps, "offenses related to drug activity more generally, such as gun possession." *Id.* (emphasis in original). Without deciding precisely what "relating to" means, the Court concluded that it cannot transgress the statute's core textual limitation to federally controlled substances. *Id.* at 811-13; *cf. Prus v. Holder*, 660 F.3d 144, 148 (2d Cir. 2011) (employing similar reasoning in declining to construe "relates to" in § 1101(a)(43)(K)(i) to "bring within the provision's sweep the management of conduct that is like, but is *not*, prostitution"). Thus, because the state offense in question could occur without a federally controlled substance, it was not a categorical match. *Mellouli*, 575 U.S. at 811-13.

The same analysis applies here. An offense "relating to obstruction of justice" should retain the core element of obstruction as it has long been understood: interference with a pending proceeding. It should not sweep in offenses that have at most "some general relation" to "obstruction of justice." *Id.* at 812.

B. The Government's Approach Is Boundless

The government's reading of "relating to" has no meaningful limit. It argues that the phrase expands the statute to encompass "offenses that share the same 'objective to obstruct justice.'" GB45 (quoting MPC § 242.3, cmt. 2, at 226). It is not at all clear what this means. The government's source material, the MPC, adds no clarity. It describes the inquiry as "whether the defendant has manifested an objective to obstruct justice *to a sufficient degree*." MPC §242.3, cmt. 2, at 226 (emphasis added). If anything, that makes the government's test more vague. In the context of the MPC, the test is apparently satisfied for every offense listed in Articles 240 to 242, ranging from "Gifts to Public Servants by Persons Subject to Their Jurisdiction" to "Bail Jumping" and "Escape." MPC §§ 240.5, 242.6.

The government's test is also at odds with the structure of § 1101(a)(43), because it would sweep in separately defined aggravated felonies, thus failing to "give effect to every word" of the statute. *Leocal*, 543 U.S. at 12. Perjury is again a salient example, because, in a broad sense, "[a]ll perjured relevant testimony is at war with justice." *In re Michael*, 326 U.S. 224, 227 (1945). So is federal money laundering. *See* 8 U.S.C. § 1101(a)(43)(D). A person commits a federal money laundering offense where they engage in a financial transaction "knowing that the transaction is designed in whole or in part – (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of the specified unlawful activity." 18 U.S.C. § 1956(a)(1)(B)(i). This *mens rea* element is naturally

read to refer to concealment *from* "law enforcement," thus likely satisfying the government's "same objective" test. *Cf. Regalado Cuellar v. United States*, 553 U.S. 550, 565 (2008). Yet money laundering is not codified in Chapter 73 and not historically considered a form of obstruction. It is a relatively new offense, rooted in Congress's efforts to combat organized crime's use of illicit proceeds "to finance further crimes and to infiltrate legitimate business." H.R. Rep. No. 99-855, at 8 (1986); *see also* Steven Mark Levy, *Federal Money Laundering Regulation* § 1.02 (2022).

The government's construction of "offenses relating to obstruction of justice" thus has no principled stopping point. To the extent it has a discernible meaning, it would make other parts of the INA's aggravated felony definition superfluous. And it would apply to a variety of offenses that radically depart from the traditional understanding of obstruction of justice, or that are only "related to [obstruction of justice] more generally." *Mellouli*, 575 U.S. at 812-13.

The government's test also implicates serious vagueness and fair notice concerns. The prohibition on vague statutes "is an 'essential' of due process" that "guards against arbitrary or discriminatory law enforcement." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212-13 (2018) (describing the "exacting vagueness standard" applicable in "removal cases"). Applying this Court's precedents, the Ninth Circuit found unconstitutionally vague the BIA's previous definition of obstruction of justice as an "affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice." *Valenzuela*

Gallardo II, 818 F.3d 808, 819-21 (9th Cir. 2016) (internal quotation marks omitted). It is difficult to find daylight between this definition and "manifest[ing] an objective to obstruct justice." MPC § 242.3, cmt. 2, at 226; GB45. If anything, the government's test appears vaguer because it lacks a clear specific intent element. "Absent some indication of the contours" of the government's definition, "an unpredictable variety of … crimes could fall within it," inviting arbitrary enforcement of the INA. *Valenzuela Gallardo II*, 818 F.3d at 820. As the foregoing analysis demonstrates, an unpredictable variety of crimes could indeed appear to fit within that definition—forcing noncitizens facing similar charges, and their defense counsel, to guess about the immigration consequences of a potential conviction.

Context thus tugs "in favor of a narrower reading." *Mellouli*, 575 U.S. at 812-13. An "offense relating to obstruction of justice" must, at a minimum, retain the foundational pending-proceeding requirement. The government's all-encompassing alternative construction should be rejected.

IV. ANY AMBIGUITY SHOULD BE RESOLVED IN FAVOR OF NONCITIZENS, NOT BY DEFERRING TO THE BIA

Because the statute's text "unambiguously forecloses the [BIA's] interpretation," this Court's analysis can stop there. *Esquivel-Quintana*, 581 U.S. at 398. To the extent any ambiguity remains, deference to the BIA's interpretation is impermissible. Instead, the Court should resolve ambiguities against the harsher interpretation based on principles of separation of powers, due process, and lenity.

A. *Chevron* Deference Does Not Apply

The government premises its argument for deference on the INA's instruction that "[t]he determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. § 1103(a)(1); *see* GB51-52. But this Court has never read that language to outsource to the Attorney General this Court's paramount role of determining what the law is, under ordinary principles of statutory interpretation. On the contrary, this Court has repeatedly interpreted this provision to mean at most that the "principles of *Chevron* deference are applicable" to the BIA's interpretation of the INA. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999); *accord, e.g.*, *Negusie v. Holder*, 555 U.S. 511, 516 (2009).

Chief among those principles is that, before a court deems a statute ambiguous and defers to an agency interpretation, it first must exhaust all the "traditional tools" of statutory construction. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984); *see, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) ("[T]here is, for *Chevron* purposes, no ambiguity in [the] statute for an agency to resolve" when a traditional presumption dictates a particular reading of seemingly "ambiguous" text.).

B. Traditional Tools Of Interpretation Do Apply

Here, two traditional presumptions independently resolve any remaining ambiguity; accordingly, "*Chevron* leaves the stage." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (internal quotation marks omitted).

First, "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]" applies. *St. Cyr*, 533 U.S. at 320; *see Kawashima v. Holder*, 565 U.S. 478, 489 (2012) (noting the Court has long "construed ambiguities in deportation statutes in the [noncitizen]'s favor"). In recognition that "deportation is a drastic measure and at times the equivalent of banishment or exile," this principle prevents courts from "assum[ing] that Congress meant to trench on [a noncitizen's] freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948); *see Padilla v. Kentucky*, 559 U.S. 356, 373-74 (2010). This presumption also helps ensure noncitizens understand when guilty pleas or other criminal convictions might subject them to removal. *See Padilla*, 559 U.S. at 370 (recognizing that it is of "great importance" that noncitizens know when criminal convictions might trigger "exile from this country and separation from their families"). Thus, if § 1101(a)(43)(S) were ambiguous, this Court would be "constrained" to resolve the uncertainty in favor of noncitizens like petitioner. *Costello v. INS*, 376 U.S. 120, 128 (1964).

Second, any ambiguity would also trigger the rule of lenity—another "time-honored interpretive guideline"—because the meaning of the obstruction category of aggravated felonies determines criminal liability as well as immigration consequences. *Crandon v. United States*, 494 U.S. 152, 158 (1990) (internal quotation marks omitted). This canon reflects values of "due process and the separation of powers." *Wooden v. United States*, 142 S. Ct. 1063, 1082 (2022) (Gorsuch, J., concurring). It applies here

because "aggravated felony" convictions serve as predicates for federal criminal prosecutions and sentencing enhancements. Noncitizens convicted of illegally reentering the country may generally receive two-year prison sentences, but those previously convicted of an "aggravated felony" who reenter illegally are subject to 20-year sentences. Noncitizens convicted of "aggravated felonies" are also subject to heightened criminal sanctions if they disobey orders of removal, *see* 8 U.S.C. § 1253(a)(1), as are individuals who help "aggravated felon[s]" illegally enter the country, 8 U.S.C. § 1327.

The government dismisses these criminal law ramifications because this case "concern[s] the meaning of a phrase in the INA." GB52. But the "rule of lenity … favors a strict construction" of a civil statute that, like this one, "has criminal as well as civil ramifications." *Bittner v. United States*, 143 S. Ct. 713, 725 (2023) (opinion of Gorsuch, J., joined by Jackson, J.) (collecting cases). Because statutes are not "chameleon[s]," the meaning of a statute cannot "change" depending on context. *Clark v. Martinez*, 543 U.S. 371, 382 (2005); *see United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality opinion); *FCC v. ABC*, 347 U.S. 284, 296 (1954); *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1028 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part) (the "one-interpretation rule means that," with respect to the "aggravated felony" provision, the "criminal-law construction of the statute (with the rule of lenity) prevails"), *rev'd sub nom. Esquivel-Quintana v. Sessions*, 581 U.S. 385.

Separation of powers and due process principles require that result. Affording *Chevron* deference to agency interpretations of ambiguous laws with criminal applications would violate the principle that "criminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 573 U.S. 169, 191 (2014); *cf.* GB52 (conceding that "the Attorney General has no delegated authority to speak 'with the force of law' when interpreting state law or the federal criminal code" (citation omitted)). It would also empower agencies to "create (and uncreate) new crimes at will, so long as they do not roam beyond ambiguities that the laws contain." *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J., joined by Thomas, J., respecting the denial of certiorari). Yet "only the *legislature* may define crimes and fix punishments," and "Congress cannot, through ambiguity, effectively leave that function to the courts—much less to the administrative bureaucracy." *Id.* at 354; *see* Thomas W. Merrill, *The* Chevron *Doctrine* 179 (2022) (because the rule of lenity serves "principles of due process and separation of powers, … [it] should enter into the determination of how much freedom the agency has to interpret").

C. This Court's Cases Support The Application Of The Rule Of Lenity Over *Chevron*

While the government has sometimes asked this Court to defer to the BIA's interpretations of generic crimes, the Court has never done so. *See, e.g.*, *Esquivel-Quintana*, 581 U.S. at 397-98; *Torres v. Lynch*, 578 U.S. 452, 473 (2016); *Nijhawan v. Holder*, 557 U.S. 29, 41 (2009). That pattern reflects that, while the "principles of *Chevron*" may sometimes permit deference to BIA interpretations of the INA

when those interpretations do *not* have criminal-law consequences, *Aguirre-Aguirre*, 526 U.S. at 424; *see*, *e.g.*, *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 57 (2014) (plurality opinion); *Holder v. Martinez Gutierrez*, 566 U.S. 583, 591 (2012), deference is never appropriate when they do have criminal consequences—as with the BIA's interpretation of a generic aggravated felony offense.

Leocal v. Ashcroft confirms as much. There, the Court stated that "[a]lthough here we deal with [the crime-of-violence definition] in the deportation context, [it] is a criminal statute, and it has both criminal and noncriminal applications" and so "the rule of lenity applies." 543 U.S. at 11 n.8. The Court never mentioned *Chevron*. The government would distinguish *Leocal* because the statute the Court considered there appears in the criminal code, GB52 n.29, but that suggestion cannot be squared with the Court's clear instruction to apply "consistent[]" interpretations to statutes with dual criminal and civil applications, 543 U.S. at 11 n.8.[7]

Nor does a footnote in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S.

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[7] The Fourth Circuit incorrectly reasoned that lenity does not apply because a civil agency determination precedes any related criminal sanction. *See* Pet. App. 12a. In fact, at least some criminal consequences for committing an aggravated felony have no relitigation bar, *see, e.g.*, § 1253(a)(1) (criminal liability for aggravated felons who disobey removal orders), or can be imposed by a federal court without any underlying agency designation at all, *see, e.g.*, § 1327 (criminal liability for individuals who help an individual "convicted" of aggravated felony unlawfully reenter the country).

687 (1995), give *Chevron* primacy over lenity in this case. While that footnote rejected the argument that "the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement," *id.* at 704 n.18, that language has no application here, *see, e.g.*, *Esquivel-Quintana*, 810 F.3d at 1024. This case does not involve a facial challenge to an agency-promulgated regulation. And because the regulation in *Babbitt* gave ample prospective notice of its reach, this Court stressed that affording *Chevron* deference to it did not raise any "fair warning" concern. 515 U.S. at 704 n.18. Here, by contrast, the agency's view of the statute at issue stems from evolving case-by-case adjudication, with the specific decision here dating back to just 2018. Given that a broad reading of *Babbitt* would "contradict[] the many cases before and since holding that, if a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings," *Whitman*, 135 S. Ct. at 353-54 (Scalia, J., joined by Thomas, J., respecting the denial of certiorari), it should not be expanded to permit *Chevron* deference here.

V. SHOULD THE COURT DECIDE THAT § 1101(A)(43)(S) DOES NOT REQUIRE A PENDING PROCEEDING, IT SHOULD REMAND FOR APPLICATION OF THE NEXUS REQUIREMENT

If the Court concludes that the generic obstruction of justice aggravated felony does not require a pending proceeding, it should vacate and remand petitioner's case to the court of appeals for application of a valid nexus test. The BIA here invented a subjective-intent definition that has no grounding in settled and

discernible principles. If, as the government argues, the governing nexus test requires *only* that there be a connection in "time, causation or logic" between the defendant's act and some proceedings, whether or not pending, GB20, then the Court must still put boundaries on that test to ensure that it has intelligible limits. Specifically, that test would require (at the very minimum) an objective foreseeability of *particular* future proceedings—not a subjective test of imagined possible proceedings that is infinitely malleable and that this Court has twice rejected. *See Aguilar*, 515 U.S. at 599 (reversing conviction because of only speculative possibility that grand jury might hear false evidence); *Marinello*, 138 S. Ct. at 1109-10 (requiring at least foreseeable proceedings "in the offing"); *see also Arthur Andersen*, 544 U.S. at 706-07 (requiring a nexus to "particular" proceedings under 18 U.S.C. § 1512(b)). In concluding that petitioner's Virginia accessory offense was a categorical obstruction offense, the BIA and the court of appeals failed to consider this requirement.[8]

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[8] This issue is fairly included within the question presented, which specifically addresses the "nexus" requirement. The issue is also preserved. *See* Pet'r C.A. Br. 11, 31-32 & n.17; Reply Br. 15-18. Petitioner also exhausted the issue before the BIA by challenging application of the BIA's obstruction definition in "general" terms. *Ramirez v. Sessions*, 887 F.3d 693, 700 (4th Cir. 2018) (holding that the INA's exhaustion provision "only prohibits 'the consideration … of general issues that were not raised below, but not of specific, subsidiary legal arguments, or arguments by extension, that were not made below'" (citation omitted)); *see* CAR 52-53 & n.1. The Fourth Circuit's conclusion that petitioner did not exhaust an argument concerning construction of *Virginia* law is irrelevant. *See* Cert. Reply Br. 9-10.

That both *Arthur Andersen* and *Marinello* departed from the pending-proceeding requirement but retained the nexus requirement underscores its critical importance in cabining broadly worded obstruction offenses. In both cases, the Court allowed that liability could be premised on proof of a reasonably foreseeable proceeding. But it emphasized that it must be a "*particular* official proceeding" that is foreseen. *Arthur Andersen*, 544 U.S. at 708 (emphasis added); *Marinello*, 138 S. Ct. at 1110. "It is not enough for the Government to claim that the defendant knew the [authorities] may catch on to his unlawful scheme eventually. To use a maritime analogy, the proceeding must at least be in the offing." *Marinello*, 138 S. Ct. at 1110.

Were the nexus requirement any less stringent, the offenses that require only reasonable foreseeability would take on remarkable breadth. Without a nexus to a particular proceeding, all the government must show is foreseeable possible operation of some nonspecific governmental function. That requirement could presumably be satisfied in almost any case involving criminal activity. "After all, proof of the existence of the predicate unlawful [activity], in and of itself, would necessarily constitute proof that at least" an eventual proceeding or investigation was "possible." *Silva v. Garland*, 27 F.4th 95, 117 (2022) (Barron, J., dissenting); *see also* Pet. App. 61a-62a (Gregory, C.J., dissenting).

The court of appeals failed to appreciate that "obstruction of justice" retains its stringent nexus requirement even if it encompasses interference with proceedings that are not yet pending. In concluding

that the Virginia accessory-after-the-fact offense of which petitioner was convicted is an aggravated felony, the court of appeals evidently interpreted the *mens rea* element of the BIA's definition—"a specific intent [] to interfere with an investigation or proceeding that is … reasonably foreseeable by the defendant"—as synonymous with intent to interfere with "the process of justice." Pet. App. 6a, 33a. But that is precisely the sort of vague interpretation precluded by the requirement that there be a connection "in time, causation, or logic" between the defendant's conduct and a particular proceeding. *Aguilar*, 515 U.S. at 599. All investigations, including whatever investigation may have been foreseen by petitioner, are "at least in some broad sense, a part of the administration of justice." *Marinello*, 138 S. Ct. at 1110. But "[j]ust because" an offender knows that law enforcement will investigate criminal activity "does not transform every" crime "into an obstruction charge." *Id.*

Virginia's accessory-after-the-fact crime lacks any analogue to a properly limited nexus requirement. At most, all it requires is that the defendant act "with the view of enabling his principal to elude punishment." *Wren v. Commonwealth*, 67 Va. 952, 956 (1875); *see also* Pet. App. 29a (defining element as "the intent of helping [the principal] escape or delay capture, prosecution or punishment" (citing Virginia Pattern Jury Instructions No. 3.300)). It does not have as an element a particular foreseeable proceeding or investigation. Pet. App. 27a-29a. If anything, it affirmatively endorses the view that a general "objective to obstruct" suffices to establish liability. *See id.* (summarizing Virginia cases requiring no more

than proof of the defendant's aim to help another evade punishment). That is not sufficient to satisfy the elements of a generic offense relating to obstruction of justice.

Accordingly, if this Court agrees with the court of appeals that the generic definition of "obstruction of justice" does not incorporate a pending proceeding requirement, it should still vacate and remand petitioner's case so that court can consider, in view of this Court's nexus requirement precedents, whether Virginia's accessory-after-the-fact crime matches the elements of generic obstruction.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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