Nos. 22-23 and 22-331

IN THE
Supreme Court of the United States

JEAN FRANCOIS PUGIN,
Petitioner,
v.
MERRICK B. GARLAND,
Attorney General.

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

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

BRIEF OF AMICI CURIAE CRIMINAL LAW SCHOLARS IN SUPPORT OF PETITIONER PUGIN AND RESPONDENT CORDERO-GARCIA

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INTEREST OF AMICI CURIAE[1]

Amici are law professors with expertise and interest in ensuring that development of United States criminal law is consistent with due process guarantees and sound, established traditions of criminal responsibility. Amici share the concern that expansive interpretations of federal obstruction statutes can threaten these guarantees and traditions.

Amicus Julie R. O'Sullivan is the Agnes Williams Sesquicentennial Professor at the Georgetown Law Center. Professor O'Sullivan's research and teaching focuses on white collar criminal law, the federal sentencing guidelines, and cross-border criminality and law enforcement. Professor O'Sullivan authored *Federal White Collar Crime: Cases and Materials* (8th ed. 2022) and is co-author of David Luban, Julie R. O'Sullivan, David P. Stewart & Neha Jain, *International and Transnational Criminal Law* (3d ed. 2019). Professor O'Sullivan has written extensively on federal criminal law, most notably for these purposes, Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. Crim. L. & Criminology 643 (2006).

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[1] Pursuant to Rule 37.6, counsel for amici curiae state that no counsel for a party authored this brief in whole or in part, and no person or entity other than amici or their counsel has made a monetary contribution to the preparation or submission of this brief.

of Law. Professor Buell's research and teaching focuses on criminal law, corporations, and the regulatory state. Professor Buell is the author of *Capital Offenses: Business Crime and Punishment in America's Corporate Age* (2016) and the textbook, *Corporate Crime: An Introduction to the Law and Its Enforcement* (2d ed. 2022). For additional publications, see, for example, Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. Rev. 1491 (2008); Samuel W. Buell, *Good Faith and Law Evasion*, 58 UCLA L. Rev. 611 (2011); Samuel W. Buell, *Culpability and Modern Crime*, 103 Geo. L.J. 547 (2015); Samuel W. Buell, *"White Collar" Crimes*, *in The Oxford Handbook of Criminal Law* 837 (Markus D. Dubber & Tatjana Hörnle eds., 2014).

SUMMARY OF ARGUMENT

For more than a century, the archetypal offense of obstructing justice has included a close nexus limiting a statute's reach to obstruction of a *pending* legal proceeding. This pending proceeding requirement honors the due process principle that criminal law must be clear, provide fair notice, and prevent arbitrary enforcement of law. Knowledge of a proceeding best ensures adequate notice to a potential defendant.

Honoring the longstanding pending proceeding requirement is especially important in the context of the Immigration and Nationality Act (INA). Under the INA, a conviction for an "aggravated felony" carries serious civil and criminal consequences. This is true even for underlying obstruction of justice

offenses that are misdemeanors in the convicting jurisdiction. Other mechanisms that have cabined obstruction statutes—an elevated mens rea requirement that the predicate act be performed "corruptly," or an actus reus requirement limited to inherently wrongful or criminal behaviors—are not necessarily present in the various federal or state offenses incorporated into the INA through the categorical approach. To ensure adequate notice and to uphold due process guarantees, this Court should honor its longstanding pending proceeding requirement in interpreting obstruction of justice statutes.

ARGUMENT

A nexus between an accused's conduct and a pending legal proceeding lies at the core of the various forms of obstruction of justice offenses under federal law. When interpreting the INA's provision incorporating offenses relating to obstruction, the Court should adhere to that core principle and safeguard due process values.

I. Requiring a nexus between a prohibited act and a pending proceeding avoids due process perils

In a line of cases spanning more than a century, this Court has construed archetypal obstruction statutes to require a nexus between the defendant's action and a pending proceeding. Without this nexus to a pending proceeding, criminal obstruction statutes

risk overexpansive application and threaten to deny due process guarantees.

A. This Court has repeatedly imposed a pending proceeding requirement for obstruction of justice

The violation set forth in the "omnibus clause" of 18 U.S.C. § 1503 has long been the archetype for the crime of obstruction of justice. This statute sweeps within the offense of obstruction any conduct that "corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice." 18 U.S.C. § 1503(a). For more than a century, this Court has held that a pending proceeding requirement is central to that archetypal obstruction offense.

In *Pettibone* v. *United States*, 148 U.S. 197 (1893), this Court held that the crime of obstruction of justice requires a nexus to an ongoing judicial proceeding of which the defendant is aware. "The obstruction of the due administration of justice in any court of the United States, corruptly or by threats or force, is indeed made criminal," this Court explained, "but such *obstruction can only arise when justice is being administered*." *Id.* at 207 (emphasis added). *Pettibone* concluded that without "knowledge or notice" of the fact of a pending judicial proceeding, "evil intent is lacking." *Id.*

In *United States* v. *Aguilar*, 515 U.S. 593, 599–600 (1995), this Court again required proof of a connection

with a pending proceeding for conviction under Section 1503's omnibus clause.[2] Expounding on its decision in *Pettibone*, this Court explained that "a person lacking knowledge of a pending proceeding necessarily lacked the evil intent to obstruct." *Id.* at 599. In addition to requiring knowledge of a pending proceeding, this Court in *Aguilar* also clarified the "nexus" requirement imposed in *Pettibone*: "the act must have a relationship in *time, causation, or logic* with the judicial proceedings" and "the endeavor must have the natural and probable effect of interfering with the due administration of justice." *Id.* (internal quotation marks and citation omitted) (emphasis added). Explaining its application of these principles, this Court remarked that it "traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress" and "out of concern that 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'" *Id.* at 600 (citation omitted); see also Norman Abrams, Sara Beale & Susan Klein, *Federal Criminal Law and Its Enforcement* 1203 (6th ed. 2015) (discussing 18 U.S.C. §§ 1501–1512). Although the defendant in *Aguilar* had knowledge of a pending grand jury proceeding,

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[2] *Aguilar* agreed with a long series of lower court decisions that imposed similar constraints on the same provision. *Aguilar*, 515 U.S. at 599 (citing *United States* v. *Wood*, 6 F.3d 692, 696 (10th Cir. 1993), *abrogated by Hubbard* v. *United States*, 514 U.S. 695 (1995); *United States* v. *Walasek*, 527 F.2d 676, 679 & n.12 (3d Cir. 1975); *United States* v. *Brown*, 688 F.2d 596, 598 (9th Cir. 1982)).

this Court nonetheless held that the possibility that his false statements to an investigative agent would affect that proceeding was too "speculative" to have the "'natural and probable effect' of interfering with the due administration of justice," and thus was not obstruction. *Id.* at 601.[3]

B. Overly broad obstruction statutes risk depriving citizens of due process guarantees

This Court's pending proceeding requirement for obstruction offenses reflects foundational due process values enshrined in the Constitution. Reading obstruction statutes too broadly undermines these values.

[3] Thereafter, in *Arthur Andersen LLP* v. *United States*, 544 U.S. 696 (2005), this Court interpreted a different federal statute that prohibited "corruptly persuad[ing]" a person to withhold testimony or destroy records to be used in official proceedings. *Id.* at 706. This Court held that the statute required proof of a nexus between the corrupt persuasion and a "particular proceeding." *Id.* at 707–08. That statute's text notably departed from the § 1503 obstruction of justice archetype at issue in both *Pettibone* and *Aguilar* in that the statute at issue in *Arthur Andersen* specifically provided that the proceeding "need not be pending or about to be instituted at the time of the offense." See *id.* at 705–08 (quotation marks omitted). Similarly, in *Marinello v. United States*, 138 S. Ct. 1101, 1104–05 (2018), the Court examined another specialized branch of the obstruction tree, this time in the tax code. In that particularized context, the Court applied a somewhat looser "reasonably foreseeable" nexus requirement, but still limited the statute's reach because a "broad interpretation" would risk a "lack of fair warning." *Id.* at 1108–10.

1. The Fifth Amendment's guarantee that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law" requires courts to construe criminal statutes to avoid arbitrary enforcement. *Johnson* v. *United States*, 576 U.S. 591, 595 (2015) ("[T]he Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement."). The requirement that criminal statutes provide fair notice is "well-recognized," "consonant alike with ordinary notions of fair play and the settled rules of law." *Connally* v. *Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). An indeterminate criminal statute "violates the first essential of due process." *Id.*

The importance of avoiding vague or overly expansive interpretations of statutes is at its zenith in the criminal context because individual liberty interests are at stake. Indeed, "[w]ith criminal prohibitions, not only might an overbroad law create worries about sunk costs in the form of wasteful overdeterrence, needless enforcement expenses, and the opportunity for discrimination and caprice by state actors, but" worse yet, "it can also produce unjust treatment of individuals who are not blameworthy or have not had notice that a course of conduct might lead to deprivation of liberty." Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. Rev. 1491, 1492 (2008); see also *id*. at 1502 ("Because of the importance of liberty interests at stake with criminal law, there is less tolerance at the margin for

open texture than with rules of, for example, private law.").

These requirements ensure that Congress speaks clearly—and with restraint—when proscribing conduct, so that police, prosecutors, judges, and juries are not impermissibly delegated lawmaking authority supplied "on an ad hoc and subjective basis." See *Grayned* v. *City of Rockford*, 408 U.S. 104, 108–09 (1972). Limiting criminal law in this manner ensures that penal statutes have "sufficient definiteness that ordinary people can understand what conduct is prohibited," *Skilling* v. *United States*, 561 U.S. 358, 402 (2010) (citation omitted), and avoids the "standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections," *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983) (citation omitted).

Absent limiting interpretive principles, expansive obstruction statutes pose two serious due process risks. *First*, on their face, unconstrained criminal obstruction statutes open individuals to criminal liability without fair notice. Indeed, this Court has "traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress, and out of concern that 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'" *Aguilar*, 515 U.S. at 600 (quoting *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931)).

This danger looms especially large in our adversarial legal system. Broad obstruction liability "poses a significant hazard for everyone involved in our system of justice, because so much of what the adversary process calls for could be construed as obstruction." *United States* v. *Bonds*, 784 F.3d 582, 584 (9th Cir. 2015) (Kozinski, J., concurring). "Lawyers face the most pervasive threat under such a regime." *Id.*

It is undeniable that a lawyer's role in the adversarial system runs in some tension with truth-seeking aims. "[T]he role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means." Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. Pa. L. Rev. 1267, 1288 (1975). See also Kenneth Mann, *Defending White Collar Crime* 5 (1985) ("[T]his is the central theme of the white-collar crime defense function, the defense attorney works to keep potential evidence out of government reach by controlling access to information."); Julie R. O'Sullivan, *Federal White Collar Crime* 12 (2001) ("[T]he challenges facing defense counsel are . . . limiting, consistent with ethical and legal constraints, government access to incriminating evidence . . ."). "Making everyone who participates in our justice system a potential criminal defendant for conduct that is nothing more than the ordinary tug and pull of litigation risks chilling zealous advocacy." *Bonds*, 784 F.3d at 584 (Kozinski, J., concurring).

Consider the case of attorney Lauren Stevens, who was prosecuted under Section 1519 of Title 18 for

actions taken in her capacity as Associate General Counsel for the pharmaceutical company GlaxoSmithKline. See Reuters Staff, *Former Glaxo Lawyer Indicted Again Over Drug Probe*, Reuters (Apr. 14, 2011), http://bit.ly/40gAU2E. Stevens was indicted twice on charges of obstructing a probe into the company's drug marketing practices for allegedly failing to produce some corporate documents that the Government argued fell within the scope of an FDA request. In prosecuting Stevens, the Government took the position that Section 1519 required proof of "general intent" only, and therefore that Stevens' contention that she relied in "good faith on the advice of [outside] counsel" about which documents to produce was irrelevant. *United States* v. *Stevens*, 771 F. Supp. 2d 556, 559 (D. Md. 2011). The court rejected that contention. Relying on this Court's decision in *Arthur Andersen*, the district judge held that Section 1519 requires evidence of an "individual's intent to do that which is wrongful." *Id*. at 561. In rejecting the second prosecution, the court further noted the "enormous potential for abuse in allowing prosecution of an attorney for the giving of legal advice." Transcript of Oral Argument at 10:2 – 10:4, *United States* v. *Stevens*, 771 F. Supp. 2d 556 (D. Md. 2011) (Case No. 10-cr-694), ECF No. 190.

The prosecution of Stevens illustrates the dangers of excessively broad interpretations of criminal obstruction statutes: "[O]verdeterrence of legitimate lawyering," and "prosecutorial overreach." Greta Fails, Note, *The Boundary Between Zealous Advocacy and Obstruction of Justice after Sarbanes-Oxley*, 68 N.Y.U. Ann. Surv. Am. L. 397, 420–21 (2012). In the

absence of limiting principles such as a requirement of specific intent to do wrong, restriction of a statute to inherently wrongful conduct such as bribing a witness or threatening a juror, or the requirement of a nexus between the defendant's conduct and a pending legal proceeding, criminal obstruction statutes loom over a myriad of behaviors that are neither blameworthy nor unwelcome: routine decisions to discard unnecessary documents in business affairs; practices of avoiding the creation of writings or other records that might later be used in legal disputes; advice to clients, relatives, friends, or others not to trust or speak to government officials; and even the actual or threatened filing of legal claims in hopes of forcing resolution of disputes. See also Charles J. Ogletree, *The Future of Defense Advocacy*, 136 U. Pa. L. Rev. 1903, 1911 (1988) ("[A] strict [obstruction] model is necessary to protect the adversarial system and the attorney-client relationship.").

Second, expansive criminal obstruction laws create a risk of criminal liability that is too "speculative" in nature. *Aguilar*, 515 U.S. at 601. Such laws threaten to subject individuals to criminal liability for activity so temporally and logically removed from any relevant legal process that liability serves no legitimate criminal-law purpose. This Court recognized that problem in *Aguilar* when it held that, even with knowledge of a pending grand jury proceeding, "false testimony given to an investigating agent who has not been subpoenaed or otherwise directed to appear before the grand jury" cannot give rise to criminal

liability because "it cannot be said to have the 'natural and probable effect' of interfering with the due administration of justice." *Id.* The broad and speculative reach of criminal law expands even farther where no pending proceeding exists for a defendant to have knowledge of.

Expansive readings of obstruction statutes can threaten lawyers' roles in an adversarial system. It risks sweeping in an attorney who advises her corporate client to adopt a routine document retention policy that calls for the destruction of all nonessential documents after two years. If the corporate client is later under criminal investigation for its financial practices, and relevant documents more than two years old have been destroyed pursuant to that policy, the document retention policy—and the attorney's advice in establishing it—may have impeded the administration of justice. An expansive criminal obstruction statute without a pending proceeding requirement could expose the attorney to criminal liability despite the lengthy temporal gap between her legal advice and the material judicial proceeding.

2. Some obstruction statutes, unlike those that are most central and longstanding in the federal criminal code, have protected due process interests through different means from a pending proceeding requirement. Such outlier statutes have avoided due process concerns in one of two ways: (1) an enhanced mens rea requirement that the act be done "corruptly," or (2) an inherently wrongful or criminal actus reus. An offense with a corrupt intent or criminal actus reus component may contain no

pending proceeding requirement because the statute is otherwise narrowed by the culpable intent of the actor, or the obvious wrongfulness of their actions.

When the conduct touched by a statute is particularly broad, a heightened mens rea requirement ensures that the law only sweeps in culpable actors rather than everyone who engages in that action. See Buell, *supra*, *The Upside of Overbreadth*, at 1557 ("Mens rea inquiry is a natural response to the problem of preventing broadly framed conduct rules from violating legality-related commitments by surprising unaware or blameless persons with sanctions."); *id.* at 1558 ("The broader a rule is (as measured by the range of conduct to which it applies), the stricter its mens rea requirement (as measured by the depth of inquiry into an actor's cognition at the time of her conduct) should be."); W. Robert Thomas, *Corporate Criminal Law Is Too Broad—Worse, It's Too Narrow*, 53 Ariz. St. L.J. 199, 206 (2021) ("[H]eightened *mens rea* standards . . . operate to constrain the risks attendant to a doctrine that, standing alone, would otherwise criminalize too much conduct."). An obstruction statute that concerns inherently wrongful behavior, like homicide, may not have a corrupt intent or nexus requirement because all are plainly on notice that such action may subject them to criminal punishment.

In the absence of a pending proceeding requirement, a corrupt intent or inherently wrongful behavior requirement ensures that lawful conduct within an adversarial system of justice is not swept into the reach of obstruction statutes. For example, a

lawyer who counsels their guilty client not to testify may be acting with the intent to make it more difficult for the government to convict their client and in so doing may in fact influence the administration of justice. However, given that the client is constitutionally entitled to refuse to testify, the lawyer seeks no unlawful advantage in advising the client. The lawyer, therefore, is not guilty of obstruction of justice under a statute requiring an inherently wrong actus reus or a corrupt intent. See 18 U.S.C. § 1503.

The Government points to several offenses under 18 U.S.C. § 1512 as examples of obstruction with no pending proceeding requirement. Gov't Br. 26–27. These offenses, however, require force, the threat of force, or alternatively corrupt intent for conviction.[4] Thus, Section 1512 operates exactly as it should: Where the conduct at issue can be innocent, such as "persuad[ing] another person" in Section 1512(b), the "corruptly" mens rea requirement is appended; where the conduct is inherently wrongful or unlawful, such as killing or threatening someone with physical force, the actus reus cabins obstruction offenses to culpable actors. The other criminal statutes without mens rea requirements that the Government references as having no nexus requirement similarly concern what

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[4] See 18 U.S.C. § 1512(a) (requiring killing another person, threats of physical force, or actual force); *id.* § 1512(b) (requiring that the defendant "knowingly uses intimidation, threatens, or corruptly persuades another person"); *id.* § 1512(c) (requiring the crime be committed "corruptly"); *id.* § 1512(d) (forbidding intentional "harass[ment]").

is already wrongful or unlawful conduct.[5]

Statutes with an enhanced mens rea or an inherently wrongful actus reus in lieu of a pending proceeding requirement are exceptional, generally having been enacted to respond to discrete concerns. See, e.g., 18 U.S.C. § 1519; *Yates* v. *United States*, 574 U.S. 528, 535–36 (2015) (explaining that the "Sarbanes-Oxley Act [including § 1519] . . . was prompted by the exposure of Enron's massive accounting fraud" and revelations that its auditor "had systematically destroyed potentially incriminating documents."). By contrast, generally applicable "omnibus" anti-obstruction provisions—the longstanding archetype being Section 1503—have been limited consistently by the pending proceeding requirement. See John F. Decker, *The Varying Parameters of Obstruction of Justice in American Criminal Law*, 65 La. L. Rev. 49, 53–54 (2004) ("[T]he majority of federal prosecutions for obstruction of justice are based on [section 1503 of Title 18]."). In *Pettibone* and in *Aguilar*, this Court held that the archetypal crime of obstruction of justice under Section 1503 required a nexus to an ongoing judicial proceeding of which the defendant was aware notwithstanding the statute's corrupt mens rea or wrongful actus reus requirements. *Pettibone*, 148 U.S. at 207; *Aguilar*, 515 U.S. at 600. As *Aguilar*

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[5] See Gov't Br. 28 (citing 18 U.S.C. § 1510(a) (concerning bribery); *id.* § 1511 (concerning "illegal gambling"); *id.* § 1513(a) (concerning killing or attempting to kill); *id.* § 1513(b) (concerning inflicting bodily injury or threatening to do so); *id.* § 1513(e) (concerning taking "any action harmful to any person" as retaliation for giving information to law enforcement)).

made clear, Section 1503's nexus-to-a-pending-proceeding requirement is central to the archetypal obstruction offense. 515 U.S. at 599–600.

II. A nexus to a pending proceeding requirement is necessary under 8 U.S.C. § 1101(a)(43)(S)

Conviction of an "aggravated felony" under the Immigration and Nationality Act (INA) carries serious civil and criminal consequences. This holds true even for some underlying offenses that are misdemeanors in the convicting jurisdiction, as Mr. Pugin's offense was. The concerns animating the requirement for a pending proceeding nexus in criminal statutes apply with similar force to the INA. And because the INA includes neither a corrupt mens rea requirement nor a necessarily wrongful actus reus component, the pending proceeding requirement is necessary to cabin the INA's reach and comport with due process. See 8 U.S.C. § 1101(a)(43)(S).

1. The serious civil penalties and criminal applications of the INA heighten the need to construe the statute to comport with the due process requirement of notice. Noncitizens falling under the ambit of Section 1101(a)(43)(S) are deportable, and are ineligible for many forms of discretionary relief, including cancellation of removal, asylum, and voluntary departure. See 8 U.S.C. § 1227(a)(2)(A)(iii) (deportation); *id.* § 1229b(a)(3), (b)(1)(C) (cancellation of removal); *id.* § 1158(b)(2)(A)(ii), (B)(i) (asylum); *id.* § 1229c(b)(1)(C) (voluntary departure). Though technically a civil penalty, this Court recognized, "[d]eportation is always a particularly severe penalty"

and "may be more important to [a] client than any potential jail sentence." *Lee* v. *United States*, 137 S. Ct. 1958, 1968 (2017) (internal quotation marks and citations omitted).

Moreover, Section 1101(a)(43)(S) can result in enhanced criminal penalties because an aggravated-felony conviction can serve as a predicate for federal criminal prosecutions and sentencing enhancement. When a removed noncitizen is later convicted of unlawful reentry, a previous conviction for an aggravated felony increases the possible term of imprisonment from up to two years to as long as twenty years. See 8 U.S.C. § 1326(a), (b)(2). Suppose, for example, that Mr. Pugin is deported under an expansive interpretation of Section 1101(a)(43)(S). Should Mr. Pugin ever subsequently unlawfully reenter the United States and be prosecuted for that reentry, he could face up to *twenty years*' imprisonment rather than up to two years. Section 1101(a)(43)(S) has clear and severe consequences for criminal liability.

Where, as here, a statute "has both criminal and noncriminal applications," whether courts "encounter its application in a criminal or noncriminal context, the rule of lenity applies." *Leocal* v. *Ashcroft*, 543 U.S. 1, 11–12, 11 n.8 (2004). This rule is founded on both the idea that "'fair warning should be given to the world . . . of what the law intends to do if a certain line is passed'" and on separation of powers principles—that "legislatures and not courts should define criminal activity." *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (quoting *McBoyle* v. *United States*, 283

U.S. 25, 27 (1931)). These concepts apply as equally in the context of INA Section 1101(a)(43)(S) as they do in connection with any other statute with criminal repercussions.

2. An overly expansive reading of the INA could reach beyond conduct criminalized by analog federal statutes and risks sweeping a wider range of acts that may not put a defendant on adequate notice of possible civil and criminal immigration consequences. And, because under the INA, penalties apply based on underlying offenses spelled out in other federal and state laws, other potential limiting factors like mens rea, "corrupt" intent, or a wrongful actus reus do not uniformly exist. The statutes in this case are perfect examples of the problem.

Mr. Cordero-Garcia's conviction under California Penal Code Section 136.1(b)(1) required no proof of corrupt intent, mens rea, or wrongful actus reus. See *Cordero-Garcia* v. *Garland*, 44 F.4th 1181, 1191–93 (9th Cir. 2022). Instead, the underlying criminal statute required proof only that: "(1) the defendant has attempted to prevent or dissuade a person (2) who is a victim or witness to a crime (3) from making any report of his or her victimization to any peace officer or other designated officials." *Id.* at 1191 (citing *People* v. *Upsher*, 155 Cal. App. 4th 1311, 1320 (2007)). The statute's "overbreadth is evident from its text" because it criminalizes "innocent persuasion." *Id.* at 1193. The federal analog, by contrast, requires that the defendant "*knowingly* uses intimidation, threatens, or *corruptly persuades* another person, or attempts to do so, or engages in misleading conduct

toward another person" and has a specific intent to prevent communication to law enforcement. See 18 U.S.C. § 1512(b), (b)(3) (emphasis added).

Similarly, Mr. Pugin's offense in Virginia requires no proof of corrupt intent and arguably sweeps in potentially lawful behavior. Accessory-after-the-fact is a misdemeanor under state law; it requires no corrupt mens rea, and involves no force or threats. See *Commonwealth* v. *Dalton*, 259 Va. 249, 254–55 (2000). And the actus reus for a federal accessory-after-the-fact conviction could be simply providing comfort to another. See 18 U.S.C. § 3 (defining the actus reus as "receiv[ing], reliev[ing], comfort[ing] or assist[ing] [an] offender").

Without a nexus to a pending proceeding, the convictions here and others like them—convictions that require no proof of mens rea, a "corrupt" intent, or an inherently wrongful actus reus—could subject individuals to severe civil and potentially criminal penalties under the INA. The INA's means of imposing liability based on the substantive laws of the federal government and all the separate states, makes the INA ripe for overbreadth problems. A nexus to a pending proceeding requirement provides a backstop to ensure that a defendant is given adequate notice and prevents other due process concerns. In a statute like INA Section 1101(a)(43)(S), where traditional narrowing constraints are absent, the pending proceeding requirement must take on a maximal role.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals in *Pugin* v. *Garland*, No. 22-23, and affirm the judgment of the court of appeals in *Garland* v. *Cordero-Garcia*, No. 22-331.

Respectfully submitted,

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