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 Courts Of Appeals For The Fourth And Ninth Circuits

BRIEF OF *AMICI CURIAE* NATIONAL IMMIGRANT JUSTICE CENTER, NATIONAL IMMIGRATION PROJECT, AND CAPITAL AREA IMMIGRANTS' RIGHTS COALITION IN SUPPORT OF PETITIONER PUGIN AND RESPONDENT CORDERO-GARCIA

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INTEREST OF *AMICI CURIAE*[1]

Amici National Immigrant Justice Center, National Immigration Project, and Capital Area Immigrants' Rights Coalition are immigration-focused organizations with substantial interest in the Court's resolution of this case.

Amicus National Immigrant Justice Center ("NIJC") is a program of the Heartland Alliance for Human Needs and Human Rights, a non-profit corporation headquartered in Chicago, Illinois. NIJC is dedicated to ensuring human rights protections and access to justice for all immigrants, refugees, and asylum seekers. By partnering with more than 2,000 attorneys from the Nation's leading law firms, NIJC provides direct legal services to approximately 10,000 individuals annually. This experience informs NIJC's advocacy, litigation, and educational initiatives, as it promotes human rights on a local, regional, national, and international stage.

Amicus National Immigration Project ("NIPNLG") is a non-profit membership organization of immigration attorneys, legal workers, jailhouse lawyers, grassroots advocates, and others working to defend immigrants' rights and secure fair administration of the immigration and nationality laws. NIPNLG provides technical assistance to immigration attorneys, litigates on behalf of noncitizens, hosts continuing legal education seminars

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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 counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief.

on the rights of noncitizens with criminal convictions, and is the author of numerous practice advisories, as well as Immigration Law and Crimes and three other treatises published by ThomsonWest. NIPNLG has a direct interest in ensuring that the rules governing classification of criminal convictions for immigration purposes are fair and predictable.

Amicus Capital Area Immigrants' Rights ("CAIR") Coalition is a nonprofit legal services organization that provides legal services to indigent noncitizens detained by the U.S. Department of Homeland Security ("DHS"). CAIR Coalition provides legal rights presentations, conducts pro se workshops, secures pro bono legal counsel, and offers in-house pro bono legal advice and representation to detained individuals in removal proceedings. CAIR Coalition has an interest in the outcome of this case because it directly bears upon CAIR Coalition's mission to advance the rights and dignity of all immigrants, particularly those who are at risk of immigration detention and removal. CAIR Coalition's years of experience may assist the Court in its analysis of the "aggravated felony" definition and the resulting impacts on people's lives. This Court's ruling will impact how CAIR Coalition counsels detained noncitizens, their families, and their attorneys on the risks of deportation and the potential immigration consequences of certain offenses.

As preeminent organizations in the immigration litigation field, *amici* share a significant interest in ensuring the fair, uniform, and predictable administration of federal immigration laws. As explained below, the government's position in this case would impose drastic immigration consequences for many minor offenses that are not obstruction of

justice—and would place impossible and impractical burdens on individuals in immigration proceedings.

INTRODUCTION AND SUMMARY OF ARGUMENT

Many criminal offenses, including many minor state-law offenses, include some element of concealment, evasion, or deception. And as a result, many criminal offenses necessarily include conduct that in some sense interferes with the process of law and justice as an element. It cannot be the case that all such criminal offenses rise to the level of "obstruction of justice" offenses, however. As this Court repeatedly has recognized, the term "obstruction of justice" must have meaningful limitations, lest it leave the government free to characterize virtually all crimes involving concealment, evasion, or deception as "obstruction of justice." *See, e.g.*, *United States v. Aguilar*, 515 U.S. 593, 600 (1995) (holding that both "deference to the prerogatives of Congress" and the need to give "fair warning" warranted reading the federal obstruction of justice statute more narrowly (citation omitted)); *Pettibone v. United States*, 148 U.S. 197, 206-07 (1893) (concluding, when interpreting predecessor statute to the current federal obstruction of justice statute, that a defendant lacked "the evil intent" to obstruct a proceeding when he was unaware of a pending proceeding); *see also Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018) (holding that broad interpretation of obstruction provision in federal tax code would "risk the lack of fair warning" and "related kinds of unfairness").

As a result, the offense of "obstruction of justice" has long been understood to require a nexus to a pending

investigation or proceeding. For example, this Court has twice held that the federal obstruction of justice offense requires interference with a pending or ongoing proceeding to administer justice. *See Aguilar*, 515 U.S. at 599; *Pettibone*, 148 U.S. at 207. And this Court has made clear that the federal obstruction of justice offense does not extend to *other* conduct that could theoretically hinder law enforcement or government efforts. *Aguilar*, 515 U.S. at 600 (providing false statement to law enforcement agents). This interpretation of the term "obstruction of justice" is consistent with both the plain meaning of the term and its historical context. *See* Pugin Br. at 13-23; Cordero-Garcia Br. at 13-24.

The government in this case nevertheless advocates for an expansive reading of the term "obstruction of justice" in 8 U.S.C. § 1101(a)(43)(S). That provision defines the term "aggravated felony" for purposes of the Immigration and Nationality Act to include an "offense relating to obstruction of justice … for which the term of imprisonment is at least one year." *Id.* The government argues that the term does not require any nexus to any pending investigation or proceeding—and appears to assert that it instead extends to an offense undertaken in a way to avoid investigation or prosecution in the future. *See, e.g.*, Gov't Br. at 45.

The government's reading of this provision is far too broad. It would expand this category of "aggravated felonies" to include conduct that is not obstruction of justice, not aggravated, and not a felony. And it would sweep in a broad range of criminal offenses, merely because they require some element of concealment, evasion, or deception.

Practical problems with the government's approach abound. It creates the very vagueness and overbreadth problems that have caused this Court to reject similarly broad readings of other obstruction statutes. *See, e.g.*, *Marinello*, 138 S. Ct. at 1108; *Aguilar*, 515 U.S. at 599; *Pettibone*, 148 U.S. at 206-07. It leaves noncitizens and their lawyers to guess which state law offenses could potentially be deemed to be aggravated felonies under this provision. And it does so in a context with dire consequences, as noncitizens deemed to have committed aggravated felonies face deportation, ineligibility for forms of discretionary relief, and ineligibility for readmission. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (deportation), *id.* § 1158(b)(2) (asylum), *id.* § 1182(h) (waiver), *id.* § 1229b(a)(3) (cancellation of removal), *id.* § 1229c(a)(1) (voluntary departure), *id.* § 1182(a)(9)(A) (ineligibility for readmission).

Congress drafted immigration law to permit the effective policing of our Nation's borders, while still avoiding overly harsh results. To achieve these goals, Congress provided immigration judges with discretion to make judgment calls in light of the facts and circumstances of a case. But an "aggravated felony" conviction removes that discretion, generally mandating removal regardless of how compelling the countervailing equities may be. The government's broad reading of § 1101(a)(43)(S) would upset the statutory scheme because it would divest immigration judges of discretion in a wide range of cases where exercise of discretion is most warranted. This is not a result that Congress could have intended.

ARGUMENT

I. The government's expansive reading of § 1101(a)(43)(S) is wrong.

Congress defined "aggravated felony" for purposes of the INA to include "an offense relating to obstruction of justice …. for which the term of imprisonment is at least one year." 8 U.S.C. § 1101(a)(43)(S). The plain meaning of the term "obstruction of justice" and the Court's long-established understanding of obstruction both necessitate the conclusion that "an offense relating to obstruction of justice" for purposes of § 1101(a)(43)(S) must have a nexus to a pending investigation or proceeding.

While the phrase "obstruction of justice" is not defined in § 1101(a)(43)(S), the phrase was clearly understood at the time of enactment to require a connection to a pending proceeding or investigation. *See, e.g.*, obstructing justice, *Black's Law Dictionary* 1077 (6th ed. 1990) ("Any act, conduct, or directing agency *pertaining to pending proceedings*, intended to play on human frailty and to deflect and deter court from performance of its duty . . . constitutes an obstruction to administration of justice." (emphasis added)). This Court's jurisprudence concerning obstruction of justice was also well established at the time of the statute's adoption: obstruction of justice requires not only "knowledge of a pending proceeding," but also has "a 'nexus' requirement—that the act must have a relationship in time, causation, or logic with the judicial proceedings." *Aguilar*, 515 U.S. at 599. And this was not a new or unexpected legal interpretation. Rather, it was a continuation of the century-old understanding that "obstruction [of justice] can only arise when justice is

being administered." *Pettibone*, 148 U.S. at 207. Even more, the Court in *Aguilar* disagreed with the idea that criminal liability could attach to "*any* act, done with the intent to 'obstruct . . . the due administration of justice.'" *Aguilar*, 515 U.S. at 602 (concluding that such a broad reading would create scenarios where "culpability is a good deal less clear from the statute than we usually require in order to impose criminal liability").

The government nevertheless argues in this case for a broad and sweeping reading of the term "obstruction of justice" in § 1101(a)(43)(S). It argues that "obstruction of justice" for purposes of § 1101(a)(43)(S) need not have any nexus to any pending investigation or proceeding. The government does not accept other meaningful limitations, either. It does not, for example, appear to endorse the Board of Immigration Appeal's ("BIA") more limited definition of "obstruction of justice" under § 1101(a)(43)(S). And it further argues that the Third Circuit is wrong to limit "obstruction of justice" under § 1101(a)(43)(S) to those crimes enumerated in Section 73 of the federal Criminal Code. *See, e.g.*, Gov't Br. at 25 n.5.

The government instead relies on broad and sweeping definitions of the term "obstruction of justice"—for example, invoking one dictionary definition according to which "obstruction of justice" encompasses any conduct that "interfer[es] with the process of justice and law." *See* Gov't Br. at 18 (quoting *Merriam Webster's Dictionary of Law* 337 (1996)). The government further argues that § 1101(a)(43)(S) can be construed even more expansively because the term "obstruction of justice" is preceded by the phrase "relating to." *See, e.g.*, Gov't Br. at 45 ("The ordinary meaning of the phrase 'relating to' 'is a broad one—to stand in some relation; to have bearing or concern; to

pertain; refer; to bring into association with or connection with.…' 'Congress characteristically employs the phrase to reach any subject that has "a connection with, or reference to," the topics the statute enumerates.'" (citation omitted)). The government thus argues that "relating to" expands the offense to encompass any offense that "share[s] the same 'objective to obstruct justice.'" *Id.* And while the government does not explicitly adopt any single definition of the generic crime of "obstruction of justice" for purposes of § 1101(a)(43)(S), it appears to read this provision to cover *any* offense involving intent to avoid investigation or prosecution down the road.

The government's approach in this case is problematic for several reasons. First, the government's assertion that "relating to obstruction of justice" need not be connected to a pending criminal proceeding is wrong as a matter of law. So too is the government's suggestion that the phrase should refer to actions that prevent the administration of justice "in any way," Gov't Br. at 23. As Mr. Pugin and Mr. Cordero-Garcia establish in their briefs, this reading of § 1101(a)(43)(S) is inconsistent with the plain language of the statute, the history of the statute, and this Court's precedent. *See* Pugin Br. at 13-23; Cordero-Garcia Br. at 13-24.

Second, the government's approach in this case cannot be squared with this Court's "categorical approach." Under the categorical approach, a court determines whether a conviction is an "offense relating to obstruction of justice" by examining the statutory definition of the crime to determine whether the state statute of conviction "necessarily" renders a noncitizen removable under the INA. *See Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). When applying the categorical

approach, courts must determine the "elements of [the] generic [offense]." *Mathis v. United States*, 579 U.S. 500, 504 (2016) (explaining that categorical approach requires comparing the "elements of the crime of conviction" to the "elements of [the] generic [offense]"). But the government fails to set forth the specific "elements" of the generic offense of obstruction, instead relying on numerous broad and sweeping definitions of obstruction. As a result, the government's approach deprives litigants of the predictability and consistency in the law that this Court's precedents and the categorical approach require.

Finally, as discussed below, the government's approach in this case is problematic for its serious practical consequences. The government's reading of the term "relating to obstruction of justice" is potentially boundless. It turns a wide range of minor offenses into "aggravated felonies." This greatly expands § 1101(a)(43)(S) beyond its plain language and the intent of Congress. And it does so in a context with devastating consequences, as a noncitizen convicted of an "aggravated felony" is deportable and is generally ineligible for discretionary forms of relief such as cancellation of removal or asylum. *See, e.g.*, 8 U.S.C. § 1227(a)(2)(A)(iii); *id.* § 1158(b)(2)(A)(ii), (B)(i); *id.* § 1229b(a)(3), (b)(1)(C). Thus, as discussed below, the government's broad and sweeping reading of this provision would result in the deportation of individuals for predicate offenses that are far afield from being either "obstruction of justice" or "aggravated felonies."

II. The government's expansive reading of § 1101(a)(43)(S) turns many low-level and non-obstruction offenses into aggravated felony offenses.

This Court has cautioned against interpreting the INA's "aggravated felony" provision to encompass offenses that may be neither aggravated nor felonies—a result that "the English language tells us not to expect." *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 575 (2010) (citation omitted). The government's approach in this case ignores that warning. By jettisoning the well-established requirement of a pending investigation or proceeding—and replacing it with a requirement of mere intent to avoid an investigation or a proceeding in the future—the government creates an aggravated felony provision with no meaningful limit. Indeed, the government's reading would extend to low-level state-law offenses that criminalize hindering law enforcement or government work in some way. It also would extend to many other state-law offenses that require some element of concealment, evasion, or deception. The government's approach thus turns a wide range of low-level and non-obstruction crimes into aggravated felonies.

This raises the very vagueness and overbreadth problems that have led this Court to reject sweeping readings of other obstruction statutes. *See Aguilar*, 515 U.S. at 601 ("We think the transcript citation relied upon by the Government would not enable a rational trier of fact to conclude that respondent knew that his false statement would be provided to the grand jury, and that the evidence goes no further than showing that respondent testified falsely to an investigating agent…. We think it cannot be said to have the 'natural and

probable effect' of interfering with the due administration of justice."); *see also Marinello*, 138 S. Ct. at 1108 ("A broad interpretation [of a federal statute that prohibits obstructing or impeding the administration of the federal Tax Code] would …. risk the lack of fair warning and related kinds of unfairness that led this Court in *Aguilar* to 'exercise' interpretive 'restraint.'" (citation omitted)).

The government's boundless reading of this provision also extends to many state law offenses that are neither "aggravated" nor in many cases even felonies. While § 1101(a)(43)(S) applies to offenses for which the "term of imprisonment is at least one year," this includes misdemeanor offenses in a majority of states. *See* National Conference of State Legislators, *Misdemeanor Sentencing Trends* (updated Jan. 29, 2019), https://www.ncsl.org/civil-and-criminal-justice/misdemeanor-sentencing-trends (explaining that in a majority of states, a state misdemeanor can be punishable by a term of imprisonment of at least one year). As illustrated below, the government's interpretation of "relating to obstruction of justice" would reach many low-level state offenses—from offenses of hindering government operations, to failing to report a crime, to presenting false identification—that may be punishable by a term of imprisonment of "at least one year" in one state, but not another. This disparate and arbitrary result undermines the very uniformity on which the categorical approach is based. And it further underscores that these offenses are a far cry from the sorts of *aggravated felonies* that Congress sought to enumerate in § 1101(a)(43).

In contrast, interpreting § 1101(a)(43)(S) to require a nexus to a pending proceeding—consistent with its plain

language, its history, and this Court's precedent—ensures that noncitizens' immigration status will not depend on variations in state laws and that the deportation provision is applied in a way that comports with the United States Constitution, the purpose of the INA, and the categorical approach. *See, e.g.*, *Moncrieffe*, 569 U.S. at 205 n.11 (reiterating that the categorical approach is designed to "ensure[ ] that all defendants whose convictions establish the same facts will be treated consistently, and thus predictably, under federal law"); *Bustamante-Barrera v. Gonzales*, 447 F.3d 388, 399 (5th Cir. 2006) (citing "overarching constitutional interest in uniformity of federal immigration and naturalization laws"); *Gerbier v. Holmes*, 280 F.3d 297, 311 (3d Cir. 2002) (stating that "the policy favoring uniformity in the immigration context is rooted in the Constitution"); *Nemetz v. INS*, 647 F.2d 432, 435-36 (4th Cir. 1981) (noting that where homosexual sodomy was not criminalized in nine states, the "use of state law defeats the uniformity requirement").

A. The government's approach would turn many low-level offenses of hindering law enforcement or government work into aggravated felonies.

As the government's brief illustrates, states have enacted a wide range of statutes that criminalize obstructing, interfering with, or hindering government work. *See* Gov't Br. at 36-43. To be sure, some of these provisions require that a defendant obstruct a pending investigation or proceeding. But many do not. Instead, in many states, it is a state criminal offense merely to hinder the work of law enforcement, government, or public administration in some way. And while these typically are low-level state offenses, they nevertheless remain capable of giving rise to a term of imprisonment

of "at least one year" (as required by § 1101(a)(43)(S)) in some states. The government's expansive reading of "relating to obstruction of justice" is problematic because it allows the government to turn such state law offenses into aggravated felonies, merely by arguing that their commission interferes with the process of law or justice in some way.

1. Interfering with Law Enforcement or Government.

As the government notes, when § 1101(a)(43)(S) was enacted in 1996, the majority of State codes included generalized portions "entitled 'offenses against public administration' or something similar." Gov't Br. at 37 (citing 30 state statutes). This remains the case today.[2] Many of the offenses defined in these portions are classified by their states as merely misdemeanors, although they are punishable by a year of imprisonment.

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[2] *See* Ala. Code §§ 13A-10-1 to -210; Alaska Stat. §§11.56.100 to .900; Ariz. Rev. Stat. §§ 13-2401 to 2413; Ark. Code Ann. §§ 5-51-201 to 55-602; Cal. Penal Code §§ 92 to 183; Colo. Rev. Stat. §§ 18-8-101 to -117; Del. Code Ann. tit. 11, §§ 1201 to 1274; Ga. Code Ann. §§ 16-10-1 to -98; Haw. Rev. Stat. §§ 710-1000 to -1078; Ind. Code §§ 35-44.1-1-1 to .1-5-7; Ky. Rev. Stat. Ann. §§ 519.010 to .070; Mass. Gen. Laws ch. 268, §§ 1 to 40; Me. Rev. Stat. tit. 17-A, §§ 751 to 760; Minn. Stat. §§ 609.48 to .5151; Mo. Rev. Stat. §§ 575.010 to .353; Mont. Code Ann. §§ 45-7-101 to 601; Neb. Rev. Stat. §§ 28-901 to -936; Nev. Rev. Stat. §§ 199.010 to .540; N.H. Rev. Stat. Ann. §§ 642:1 to :10; N.J. Stat. § 2C:29-1 to 2C:30-8; N.Y. Penal Law §§ 195.00 to 251.80; N.C. Gen. Stat. §§ 14-209 to -268; Ohio Rev. Code Ann. §§ 2921.01 to .52; Or. Rev. Stat. §§ 162.225 to .400; 18 Pa. Cons. Stat. §§ 4501 to 5303; S.C. Code Ann. §§ 16-9-10 to -460; S.D. Codified Laws §§ 22-11-1 to -38; Tenn. Code Ann. §§ 39-16-101 to -707; Tex. Penal Code Ann. §§ 36.01 to 39.07; Utah Code Ann. §§ 76-8-101 to -1403; Va. Code Ann. §§ 18.2-434 to -480.1; Vt. Stat. Ann. tit. 13, §§ 3001 to 3019; Wis. Stat. §§ 946.01 to .93.

See, e.g., Ala. Code § 13A-10-2(c) ("Obstructing governmental operations is a Class A misdemeanor"); Ala Code § 13A-5-7(a) (class A misdemeanor punishable by one year); Haw. Rev. Stat. § 710-1010 ("Obstruction of government operations is a misdemeanor"); Haw. Rev. Stat. § 706-663(3) (misdemeanor punishable by one year) Neb. Rev. Stat. § 28-901 ("Obstructing government operations" is a Class I misdemeanor); Neb. Rev. Stat. § 28-106(1) (Class I misdemeanor punishable by one year).

The government's reading of "relating to obstruction of justice" would turn many of these general state statutes into aggravated felonies, because they criminalize hindering or interfering with law enforcement or government in some way. In many cases, these general state statutes do not require any nexus to any ongoing investigation or proceeding: the broad language of these provisions goes much further. *See, e.g.*, Ala. Code § 13A-10-2 (offense of "obstructing governmental operations" criminalizing conduct that "[i]ntentionally obstructs, impairs or hinders the administration of law or other governmental function" or "[i]ntentionally prevents a public servant from performing a governmental function"); Cal Penal Code § 148(a)(1) (offense of "resisting, delaying or obstructing officer" criminalizing conduct that "willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician … in the discharge or attempt to discharge any duty of his or her office or employment…."); Vt. Stat. Ann. tit. 13, § 3001 (offense of "impeding public officers" criminalizing conduct that "hinders an executive, judicial, law enforcement, civil, or military officer acting under the authority of this State or any subdivision thereof…").

And, as a practical matter, states have criminalized a wide range of conduct that is a far cry from "obstruction of justice" under these state statutes. *See generally*, *e.g.*, *Scarpone v. Commonwealth*, 596 A.2d 892, 895-96 (Pa. Commw. Ct. 1991), *aff'd*, 634 A.2d 1109 (Pa. 1993) (affirming conviction of Pennsylvania offense of "obstructing a government function" for "capping a monitoring pipe and diverting uncontaminated water into the pipe"); *State v. Russell*, 414 P.3d 200, 2018 WL 1022722, at *4-5 (Haw. Ct. App. 2018) (unpublished table decision) (affirming a conviction under Hawaii's "Obstructing Government Operations" statute for an unhoused person who refused to leave her tent when asked to by city employees who were enforcing an ordinance prohibiting the storage of personal property on public property); *Skuljan v. Commonwealth*, No. 2014-CA-000261-MR 2016 Ky. App. Unpub. LEXIS 201 (Ky. Ct. App Mar. 11, 2016) (affirming conviction under Kentucky's "obstructing governmental operations" statute for making off-color and seemingly threatening remarks during a planned active shooter exercise on a community college campus); *Moore v. State*, 143 S.W.3d 305, 310-11, 318-22 (Tex. App. 2004) (affirming conviction for Texas offense of "Obstruction or Retaliation" for threatening a school superintendent because he was withholding the defendant's wife's paycheck).

Moreover, many of these state statutes also criminalize specific conduct that the government could argue interferes with the work of law enforcement or government. Some states, for example, criminalize refusing to aid a peace officer. *See*, *e.g.*, Ala. Code § 13A-10-5 (criminalizing "refusing to aid a peace officer" within the offense of "Obstruction of Justice"); Conn. Gen. Stat. § 53a-167b (criminalizing failure to assist a

peace officer or firefighter within the offense of "Bribery, Offenses Against the Administration of Justice and Other Related Offenses"). Others, for example, include the crime of common barratry, defined as exciting groundless judicial proceedings. *See, e.g.*, Okla. Stat. tit. 21, § 550 (criminalizing barratry in a provision titled "Other Crimes Against Public Justice"); Cal. Penal Code § 158 (same). Thus, under the government's approach, any conviction of such a general multifarious state law that provides for a sentence of a year may be an aggravated felony, even if the crimes are far afield from "obstruction of justice" as that term has been understood historically and in this Court's decisions.

Moreover, the different state law treatments of these offenses underscore that they are not "aggravated felonies." States treat low-level offenses of hindering law enforcement and government work differently—both in defining the elements of the offenses, and in setting the maximum sentences. As just one example, Ala. Code § 13A-10-5 carries a maximum three-month sentence for refusing to aid a peace officer. Ala. Code § 13A-5-7. Conn. Gen. Stat. § 53a-167b, in contrast, carries a maximum one-year sentence for the similar crime of failure to assist a peace officer or firefighter. Conn. Gen. Stat. § 53a-36. Thus, while both are similar offenses, and both are classified by their states as misdemeanors, only one of them could trigger § 1101(a)(43)(S)'s requirement of a sentence of at least one year. *See also* Okla. Stat. tit. 21, § 10 (maximum sentence for offense of barratry not to exceed one year); Cal. Penal Code § 158 (maximum sentence for offense of barratry is six months).

2. Failing to Report a Crime.

The government's reading of § 1101(a)(43)(S) also would extend to other low-level state law offenses involving conduct that makes it more difficult for the government to discover crimes. By taking the view that obstruction merely requires intent to avoid some hypothetical investigation or prosecution that could arise at some point in the future, *see* Gov't Br. at 45, the government's approach would turn minor offenses like failing to report a crime or leaving the scene of an accident into aggravated felonies resulting in deportation for noncitizens.

The facts of *Flores v. Attorney General United States*, 856 F.3d 280 (3d Cir. 2017), illustrate how this can happen. Flores pleaded guilty to a state-law accessory-after-the-fact offense for failing to report a murder that she witnessed. *Id.* at 284. The record did "not reflect that Flores covered up the homicide, lied to police or prosecutors, or assisted the shooter in any way." *Id.* Rather, she testified that she did not immediately report the murder to police because the shooter had threatened to kill her and her three-year-old child if she did so. *Id.*

The BIA found that Flores' guilty plea made her ineligible for withholding of removal because her offense was one "relating to obstruction of justice" for purposes of § 1101(a)(43)(S). *Id.* at 285. The Third Circuit reversed, finding that the statutory text, legislative history, and categorical approach did not support categorizing this offense as one "relating to obstruction of justice." *Id.* at 296. As the Third Circuit explained, "adopting a construction of the Obstruction Provision that reaches unknowable offenses based on 'broad notion[s] of 'obstruction of justice" causes confusion for

courts, puzzlement for practitioners, and incomprehension for immigrants." *Id.* at 290.

But that is just what the government's broad reading of § 1101(a)(43)(S) would do. Since "failure to report" offenses could make it more difficult for law enforcement to uncover and investigate and prosecute a criminal offense, these offenses seemingly would become obstruction-related aggravated felonies under the government's reading. Deportation is therefore a very real consequence for someone whose only wrongdoing was not reporting a crime they did not commit, potentially due to fear of retaliation.

The wide differences in "failure to report" offenses further underscore that they are not aggravated felonies. Some states and the federal government still have stand-alone offenses that make failure to report a crime a felony in some circumstances. *See, e.g.*, Ariz. Rev. Stat. § 13-2405 (Arizona offense of "compounding," which can include not reporting all relevant information about a crime to law enforcement in exchange for money); 18 U.S.C. § 4 (federal offense of misprision, stating that "[w]hoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States"); *see also In re Espinoza-Gonzalez*, 22 I. & N. Dec. 889, 897 (B.I.A. 1999) (holding, under previous BIA definition of "relating to obstruction of justice," that federal misprision of felony is not an aggravated felony under § 1101(a)(43)(S)). In other cases, failure to report a crime is prosecuted under other state statutes, such as accessory-after-the-fact statutes. *See, e.g., Flores*, 856 F.3d at 284.

So too for offenses of leaving the scene of a crime. Many states, for example, have laws criminalizing failure to stay on the scene of a car accident. These statutes range from imposing felony sentences when the accident resulted in death or serious injury, to imposing felony sentences when the accident resulted in *any* injury, to imposing felony sentences when the accident caused mere property damage. N.J. Stat. § 2C:11-5.1 (felony to leave scene of accident causing death); N.C. Gen. Stat. § 20-166(a), (a1) (felony to leave scene of accident causing injury or death); Mass. Gen. Laws ch. 90, § 24(2) (potential sentence of more than one year for leaving scene of accident causing "injury to any other vehicle or property," bodily injury, or death); Fla. Stat. § 316.027 (felony to leave scene of an accident causing injury or death). Under the government's broad reading of "obstruction of justice," someone convicted of leaving the scene of an accident causing only minor injury or property damage could be deportable for having committed "obstruction of justice" for purposes of § 1101(a)(43)(S) in some states, but not in many other states.

The government's broad reading of "relating to obstruction of justice" threatens to turn all offenses of not reporting a crime or leaving the scene of a crime into "obstruction of justice," since those offenses might make it more difficult for law enforcement to uncover or investigate or prosecute crimes. This interpretation results in deportation for actions that would not be considered obstruction of justice under any of the usual definitions of that term.

3. Presenting False Identification or Information.

The government's broad reading of "obstruction of justice" also would sweep a wide range of state false identification offenses, many of which are minor crimes that do not require a nexus to a pending investigation or proceeding, into the scope of § 1101(a)(43)(S). Thus, under the government's approach in this case, a conviction for even a low-level state law offense of providing a false name or identification to an officer, wholly outside any pending investigation or proceeding, could result in deportation.

Under the laws of several states, individuals who present false identification to law enforcement are guilty of offenses punishable by at least one year. Some of these statutes extend to any circumstance in which a person gives a false identification to a law enforcement officer who is acting in an official capacity.[3] Other state statutes,

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[3] *See, e.g.*, Ga. Code Ann. § 16-10-25 ("A person who gives a false name, address, or date of birth to a law enforcement officer in the lawful discharge of his official duties with the intent of misleading the officer as to his identity or birthdate is guilty of a misdemeanor."); Ga. Code Ann. § 17-10-3 (potential one-year sentence); Miss. Code Ann. § 97-9-79 ("Any person who shall make or cause to be made any false statement or representation as to his or another person's identity … to a law enforcement officer in the course of the officer's duties with the intent to mislead the officer shall be guilty of a misdemeanor and … imprisoned for a term not to exceed one (1) year."); N.H. Rev. Stat. Ann. § 265:4 ("No person, while driving or in charge of a vehicle, shall: … Give a false name, date of birth, address, name and address of the owner of such vehicle … to a law enforcement officer that would hinder the law enforcement officer from properly identifying the person in charge of such motor vehicle."); N.H. Rev. Stat. Ann. § 625:9(IV)(a)

in contrast, criminalize presenting a false identification when the individual is being detained, issued a citation, or the like.[4] And in still other states, the same conduct would *not* be punishable by a sentence of at least one year. *See, e.g.*, Ky. Rev. Stat. Ann. §§ 523.110, 532.090 (Kentucky false identification offense punishable by sentence of up to 90 days).

* * *

(potential one-year sentence); Okla. Stat. tit. 21, § 1550.41(C) ("It is a felony for any person: … To display or present an identification document … which bears altered, false or fictitious information for the purpose of … misleading a peace officer in the performance of duties," and this is punishable by imprisonment "not to exceed seven (7) years."); S.D. Codified Laws § 22-40-1 ("No person may impersonate any other person, which includes offering a fictitious name or false date of birth, with intent to deceive a law enforcement officer."); S.D. Codified Laws 22-6-2 (potential one-year sentence); Va. Code Ann. § 19.2-82.1 ("Any person who falsely identifies himself to a law-enforcement officer with the intent to deceive the law-enforcement officer as to his real identity … is guilty of a Class 1 misdemeanor."); Va. Code Ann. § 18.2-11 (potential one-year sentence).

[4] *See, e.g.*, Alaska Stat. § 11.56.800 ("A person commits the crime of false information or report if the person knowingly … gives false information to a peace officer … concerning the person's identity while the person is … being served with an arrest warrant or being issued a citation."); Alaska Stat. § 12.55.135 (potential one-year sentence); Fla. Stat. § 901.36 ("It is unlawful for a person who has been arrested or lawfully detained by a law enforcement officer to give a false name, or otherwise falsely identify himself or herself in any way."); Fla. Stat. § 775.082 (potential one-year sentence); Mass. Gen. Laws ch. 268, § 34A ("Whoever knowingly and willfully furnishes a false name … or other information as may be requested for the purposes of establishing the person's identity, to a law enforcement officer … following an arrest shall be punished … by imprisonment in a house of correction for not more than 1 year.").

As these examples illustrate, the government's reading of "relating to obstruction of justice" is far-reaching. It allows the government to sweep a wide range of low-level state law offenses into § 1101(a)(43)(S), merely because these offenses might hinder the work of law enforcement in some way. And it allows the government to do so even though these offenses are not obstruction of justice, are not aggravated, and in many cases are not even felonies.

And as these examples also illustrate, states treat these low-level offenses differently—in some cases as punishable by at least one year imprisonment, and in some cases not. This further underscores that these offenses are a far cry from typical aggravated felonies. Moreover, the differential state treatment of identical crimes, coupled with the government's sweeping reading of the phrase "relating to obstruction of justice," would mean that stark immigration consequences could turn on a mere "accident of geography." *Nemetz*, 647 F.2d at 435. This is exactly the result Congress sought to avoid in adopting the categorical approach.

B. The government's approach would turn many crimes of concealment, evasion, or deception into aggravated felonies.

The problems do not stop there. A broad reading of "obstruction of justice" as any offense with an intent to avoid investigation or prosecution in the future, *see* Gov't Br. at 45, is nearly boundless. Many criminal offenses require an intent to avoid detection—from crimes that involve concealing one's identity, to crimes that involve deceit, to crimes that involve withholding information, to crimes that otherwise involve evading discovery. And still other offenses require an intent to

take something of value in a way that is hard to trace or detect.

A broad reading of "obstruction of justice" as any offense interfering with the process of justice or law thus could have an exceptionally far reach, to crimes that no one thinks of as obstruction. Some of these offenses stretch the concept of "obstruction of justice" very far past its breaking point. Take, for example, a 20-year-old using a fake ID to purchase beer or enter a bar. *See, e.g.*, 15 ILCS 335/14B (Illinois state law making it a felony to "knowingly possess, display, or cause to be displayed any fraudulent identification card"). Or an individual paying her employees under the table, or taking similar steps, to avoid paying taxes. *See, e.g.*, *Marinello*, 138 S. Ct. at 1108 (noting that an expansive reading of obstruction of the tax code could include "a person who pays a babysitter $41 per week in cash without withholding taxes, leaves a large cash tip in a restaurant, fails to keep donation receipts from every charity to which he or she contributes, or fails to provide every record to an accountant" (internal citation omitted)). Or an individual committing a multitude of other offenses—from falsifying a document, to making a material misstatement to investors, to concealing the proceeds of illegal activity. *See, e.g.*, 720 ILCS 5/17-3 (Illinois offense of forgery); N.Y. Gen. Bus. Law § 352-c (New York securities-related offenses); 18 U.S.C. § 1956 (federal offense of money laundering).

These offenses do not require that an individual have any interaction with law enforcement or obstruct any ongoing process of law. Rather, these offenses are merely crimes that themselves are undertaken with some general intent to deceive. But they nevertheless could be swept up into the government's broad reading

of "relating to obstruction of justice," since they entail efforts to deceive or to withhold information from those administering the law.

A broad reading of "obstruction of justice" also would lead to results Congress could not have intended. Congress included in § 1101(a)(43)(S) the separate offenses of "obstruction of justice, perjury or subornation of perjury, or bribery of a witness." It is hard to imagine an offense of perjury, subornation of perjury, or bribery of a witness that would *not* fall within the government's sweeping interpretation of "relating to obstruction of justice." The government's approach in this case thus renders the other offenses listed in § 1101(a)(43)(S) superfluous—a result Congress could not have intended. *See, e.g.*, *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004).

Moreover, Congress already included certain crimes of concealment, deceit, and evasion on its list of "aggravated felonies" enumerated in § 1101(a)(43). As one example, Congress included the crimes of fraud and tax evasion as "aggravated felonies" under § 1101(a)(43)(M)—but only in cases where the loss to the victim or the government exceeds $10,000. *See* § 1101(a)(43)(M)(i) (offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000"); *id.* (M)(ii) (offense "relating to tax evasion" "in which the revenue loss to the Government exceeds $10,000"). It strains credulity that Congress would have intended to sweep *other* instances of fraud and tax evasion into the meaning of "relating to obstruction of justice," merely because the offenses were ones of concealment, deceit, or evasion. So too for the multitude of other offenses of concealment, deceit, and evasion that Congress omitted from the list of enumerated offenses

in § 1101(a)(43). Yet that is just what the government's broad reading of "relating to obstruction of justice" could accomplish.

The government's approach in this case thus is unbounded. It would turn *any* offense undertaken in a way to avoid investigation and prosecution into a removable aggravated felony. It would encompass an exceedingly broad swath of conduct—and could sweep up large portions of the federal criminal code and the criminal codes of the states into the scope of § 1101(a)(43)(S). It would raise serious constitutional problems of vagueness and overbreadth. *See, e.g.*, *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 819-21 (9th Cir. 2016) (explaining that "[a]bsent some indication of the contours of 'process of justice,' an unpredictable variety of specific intent crimes could fall within it, leaving us unable to determine what crimes make a criminal defendant deportable"). And it would stretch the terms "relating to obstruction of justice" and "aggravated felony" far beyond their breaking points.

III. The government's expansive reading of §1101(a)(43)(S) is especially problematic given the serious consequences of an aggravated felony determination.

An "aggravated felony" determination imposes devastating consequences on lawful permanent residents, lawful nonpermanent residents, and asylum seekers alike. A person convicted of an "aggravated felony" is "deportable" under 8 U.S.C. § 1227(a)(2)(A)(iii). And the immigration consequences of the government's position here extend far beyond deportability. When deportation proceedings are instituted based on an aggravated felony, discretion not

to order removal is generally unavailable; and the noncitizen cannot seek discretionary relief such as asylum or cancellation of removal. *See id.* § 1158(b)(2)(A)(ii), (B)(i); *id.* § 1229b(a)(3), (b)(1)(C). Once an aggravated felon is deported, he is permanently ineligible for readmission. § 1182(a)(9)(A); *see also id.* § 1326(a), (b)(2) (maximum criminal sentence of twenty years for removed citizen later convicted of unlawful reentry). The government's expansive reading of § 1101(a)(43)(S) thus will leave many noncitizens ineligible to seek relief from removal—and permanently banished from home and family—for committing low-level offenses that are far afield from obstruction of justice.

An individual convicted of an aggravated felony may not seek "[c]ancellation of removal." 8 U.S.C. § 1229b(a). Cancellation of removal is a form of discretionary relief through which lawful permanent residents who have lived in the United States continuously for at least seven years following their admission, and who have been lawful permanent residents for at least five years, may request an order allowing them to stay in the United States. *Id.* Equitable factors relevant to an immigration judge's exercise of discretion under this provision include "family ties within the United States," residency of long duration, "evidence of hardship to the respondent" and respondent's family if deportation occurs, service in the Armed Forces, "history of employment," "existence of property or business ties," "evidence of value and service to the community," "proof of genuine rehabilitation if a criminal record exists," and other evidence of respondent's good moral character. *See, e.g.*, *Matter of C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998); *Matter of Wadud*, 19 I. & N. Dec. 182, 186-87 (B.I.A. 1984); *Matter of Marin*, 16 I. & N. Dec. 581, 584-

85 (B.I.A. 1978), *receded from Matter of Edwards*, 20 I. & N. Dec. (B.I.A. 1990).

For a lawful permanent resident who has lived in this country for his entire adult life, deportation is among the most extreme punishments possible. It amounts to permanent exile from the only home he has ever known. As Learned Hand once observed:

> [W]e think it not improper to say that deportation under the circumstances would be deplorable. Whether the relator came here in arms or at the age of ten, he is as much our product as though his mother had borne him on American soil. He knows no other language, no other people, no other habits, than ours; he will be as much a stranger in [his country of origin] as any one born of ancestors who immigrated in the seventeenth century. However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples.

United States ex rel. Klonis v. Davis, 13 F.2d 630, 630 (2d Cir. 1926); *accord Jordan v. De George*, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting) (removal means "a life sentence of exile from what has become home, of separation from his established means of livelihood for himself and his family of American citizens").

Under the government's approach, individuals convicted of low-level crimes it deems "relating to obstruction of justice" would be statutorily barred from seeking cancellation of removal. *See* 8 U.S.C. § 1229b(a)(3). Such a noncitizen would have no opportunity to argue that, as a matter of equity, he should be allowed to remain in this country. Nor would

he have the opportunity to present evidence of family ties, history of employment, proof of rehabilitation, and good moral character. He would, instead, face automatic deportation—no matter how long he had lived in the United States, no matter how minimal and remote his connections to his country of origin, and no matter how many people in the United States depend on him for support. The government's approach further strips immigration judges of the leeway to consider these factors and to grant relief when warranted.

A finding of an aggravated felony has dire consequences in other circumstances, as well. It is a total bar to cancellation of removal for nonpermanent residents, eliminating an important safety valve for humanitarian situations. *See* 8 U.S.C. § 1229b(b)(1). That safety valve ordinarily gives immigration judges discretion to cancel the removal of certain longtime nonpermanent residents, in circumstances where the removal would "result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. § 1229b(b)(1)(D). But an aggravated felony finding makes the nonpermanent resident categorially ineligible for this relief, regardless of the humanitarian need. 8 U.S.C. §§ 1129b(b)(1)(C), 1227(a)(2)(A)(iii).

A finding of an aggravated felony also permanently blocks a noncitizen from seeking asylum in the United States, even if the noncitizen has a well-founded fear that he or she will face persecution or death if returned to his or her country of origin. *See, e.g.*, 8 U.S.C. § 1158. Under these provisions, any person convicted of an "aggravated felony" is statutorily barred from seeking asylum, regardless of the severity of the threat faced

upon return to the country of origin, and regardless of the circumstances surrounding the offense. This statutory bar can result in the deportation of noncitizens to countries where they face imminent harm.

The structure of the INA reflects Congress's judgment that, in most cases, the exercise of discretion is the best way to assess the gravity of an offense. The government's broad interpretation of "aggravated felony" would undermine this structure by mandating removal in cases where the circumstances may indicate removal is inappropriate. By contrast, interpreting "aggravated felony" consistent with its text and this Court's precedents, as advocated by Mr. Pugin and Mr. Cordero-Garcia, would instead preserve the discretion of the immigration judges and the BIA to make individualized assessments of whether removal is appropriate. With respect to crimes for which Congress has not clearly mandated removal, the latter result is more consistent with the statutory scheme and the ends of justice, as discretionary relief may still be granted or denied, depending upon the circumstances.

Nothing in the INA suggests that Congress intended the "aggravated felony" category to apply to low-level offenders who are deemed merely to have hindered hypothetical law enforcement or government work somehow. Nor does the INA suggest that Congress intended the "aggravated felony" distinction to reach other low-level offenders whose offenses involve concealment, deceit, or evasion. The conduct that would be covered by § 1101(a)(43)(S) under the government's reading is, in many cases, nothing resembling an "aggravated felony." The categorical denial of discretion to accommodate such cases is inconsistent with the statutory scheme.

If Congress wishes to extend the devastating consequences of an aggravated felony conviction to such minor state law offenses, it is free to do so. But it is simply wrong to say that it already has.

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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