Nos. 22-23 and 22-331

In the Supreme Court of the United States

JEAN FRANCOIS PUGIN, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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v.

FERNANDO CORDERO-GARCIA, AKA FERNANDO CORDERO

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

REPLY BRIEF FOR THE ATTORNEY GENERAL

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The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, defines an aggravated felony as including "an offense relating to obstruction of justice." 8 U.S.C. 1101(a)(43)(S). As our opening brief explains (at 19-20), the ordinary meaning of obstruction of justice is "the crime or act of willfully interfering with the process of justice and law." *Merriam-Webster's Dictionary of Law* 337 (1996) (*Merriam-Webster's*). There must be *some* nexus between the defendant's conduct and the process

of justice and law, but the ordinary meaning does not require a temporal overlap. The wheels of justice can be obstructed even before they have begun moving. Indeed, many paradigmatic forms of obstruction of justice—such as "influencing, threatening, harming, or impeding" a "potential witness," *ibid.*—are obstructive because they prevent an investigation or proceeding from commencing in the first place. That does not keep such an offense from being an "obstruction of justice," much less an offense "relating to" obstruction of justice.

Cordero-Garcia and Pugin nevertheless construe "an offense relating to obstruction of justice" as including a temporal-nexus requirement. See Cordero-Garcia Br. 13-24; Pugin Br. 13-23. But they offer two competing views of the supposed temporal nexus. Cordero-Garcia contends that Section 1101(a)(43)(S) "requires interference with a pending or ongoing investigation or proceeding." Cordero-Garcia Br. 13 (capitalization and emphasis omitted). Urging an even stricter reading, Pugin contends (Br. 2) that Section 1101(a)(43)(S) requires "interference with a pending or ongoing proceeding to administer justice," by which he means (Br. 16-17, 35) only a pending "judicial" proceeding.

Neither of those temporal-nexus requirements can be squared with the ordinary meaning of "obstruction of justice." To the contrary, both would excise from Section 1101(a)(43)(S) a broad swath of offenses commonly understood to be offenses relating to obstruction of justice—carving out paradigmatic forms of not just witness tampering, but also retaliation and evidence tampering. No authority supports that outcome, and the sources on which Cordero-Garcia and Pugin rely—whether dictionary definitions, Chapter 73 of the federal criminal code, or state enactments—actually un-

dermine their imputation of a temporal-nexus requirement. Accordingly, this Court should hold that an offense need not require a nexus with a pending or ongoing investigation or proceeding in order to qualify as "an offense relating to obstruction of justice."

A. A Temporal-Nexus Requirement Cannot Be Squared With The Ordinary Meaning Of "Obstruction Of Justice"

The ordinary meaning of "obstruction of justice" is reflected in the same legal dictionary that this Court consulted to interpret a different part of the INA's aggravated-felony definition in *Esquivel-Quintana* v. *Sessions*, 581 U.S. 385, 391 (2017). That dictionary defines "obstruction of justice" as "the crime or act of willfully interfering with the process of justice and law esp. by influencing, threatening, harming, or impeding a witness, potential witness, juror, or judicial or legal officer or by furnishing false information in or otherwise impeding an investigation or legal process." *Merriam-Webster's* 337. Cordero-Garcia's and Pugin's competing views of "obstruction of justice" cannot be reconciled with the phrase's ordinary meaning.

1. Cordero-Garcia contends that obstruction of justice "requires interference with a pending or ongoing investigation or proceeding." Cordero-Garcia Br. 13 (capitalization and emphasis omitted). But the words "pending or ongoing" are conspicuously missing from the *Merriam-Webster's* definition. And construing Section 1101(a)(43)(S) to impose such a temporal-nexus requirement would exclude from Section 1101(a)(43)(S)'s scope a slew of offenses commonly understood to be obstruction of justice (or offenses relating thereto).

One such offense—an example of what "obstruction of justice" is "esp[ecially]" understood to include—is "influencing, threatening, harming, or impeding" a "po-

tential witness." *Merriam-Webster's* 337. When targeting such conduct in the federal witness-tampering statute, see 18 U.S.C. 1512(a), (b), and (d), and in other provisions of Chapter 73 of the federal criminal code, see 18 U.S.C. 1510(a), 1518, Congress has not required proof of an already-pending investigation or proceeding, see Gov't Br. 26-29. On Cordero-Garcia's view, however, none of those offenses qualifies as one relating to obstruction of justice. Nor would any of the evidence-tampering offenses described in neighboring provisions of Chapter 73, which also require no pending investigation or proceeding. See 18 U.S.C. 1512(c)(1), 1519; Gov't Br. 26-28.

As our opening brief explains (at 20-21), construing "an offense relating to obstruction of justice" to exclude all of those offenses makes little sense. The most effective forms of "interfering with the process of justice and law," *Merriam-Webster's* 337, are often those that prevent an investigation or proceeding from ever commencing. That is why, for instance, California law punishes dissuading a witness from reporting a crime "more severely" than dissuading a witness from testifying once judicial proceedings have begun. *People* v. *Fernandez*, 106 Cal. App. 4th 943, 950 (2003). Cordero-Garcia has no response to that commonsense point.

Another paradigmatic example of "obstruction of justice" is "harming" a "witness," "juror," or "judicial or legal officer." *Merriam-Webster's* 337. When targeting that conduct, Congress has enacted numerous provisions in Chapter 73 prohibiting retaliation against a witness, juror, or judicial officer even *after* an investigation or proceeding has ended. See 18 U.S.C. 1503(a), 1513(a), (b), and (e); Gov't Br. 29-30. Cordero-Garcia asserts (Br. 19-20) that those offenses presuppose that

an investigation or proceeding existed at some point. See Pugin Br. 25-26 (similar). But Cordero-Garcia asks this Court to hold that "obstruction of justice requires a *pending or ongoing* investigation or proceeding"—not one that existed at some point. Cordero-Garcia Br. 13 (capitalization omitted; emphasis altered). Cordero-Garcia's rule would thus exclude retaliation offenses from the scope of Section 1101(a)(43)(S) as well.

2. Pugin departs further from the ordinary meaning, contending that obstruction of justice requires "interference with a pending or ongoing proceeding to administer justice," Pugin Br. 2—*i.e.*, a pending or ongoing "judicial" proceeding, *id.* at 16-17.

The ordinary meaning of "obstruction of justice" is not limited to interference with judicial proceedings; rather, it encompasses interference with any "process of justice and law." *Merriam-Webster's* 337. That includes congressional and administrative proceedings, as reflected in 18 U.S.C. 1505, which prohibits obstruction of proceedings before departments, agencies, and committees. Congress also included interference with congressional and administrative proceedings among the offenses described in 18 U.S.C. 1512 and 1513. See 18 U.S.C. 1515(a)(1)(B) and (C) (defining "official proceeding" as used in Sections 1512 and 1513 to include congressional and administrative proceedings). Pugin, however, would exclude from Section 1101(a)(43)(S)'s scope all of those offenses.

Moreover, the ordinary meaning encompasses interference not just with proceedings, but also with "investigation[s]." *Merriam-Webster's* 337. Various provisions of Chapter 73 reach that form of obstruction of justice—by prohibiting efforts to prevent the communication of information to a "criminal investigator," 18

U.S.C. 1510(a), 1518; efforts to prevent the reporting of a "possible" federal offense to a "law enforcement officer," 18 U.S.C. 1512(a)(1)(C), (a)(2)(C), (b)(3), and (d)(2); the obstruction of a federal audit, 18 U.S.C. 1516; the obstruction of any "examination" of a financial institution by a federal agency, 18 U.S.C. 1517; and the altering, destroying, or concealing of "any record, document, or tangible object" with the intent to impede a federal "investigation," 18 U.S.C. 1519. By requiring a nexus with "ongoing court proceedings," Pugin Br. 15, Pugin would exclude all of those offenses from the scope of Section 1101(a)(43)(S) as well.

3. Recognizing that Section 1101(a)(43)(S) should be read as including offenses traditionally understood as involving obstruction of justice does not "get[] the categorical approach backwards." Cordero-Garcia Br. 12; Pugin Br. 30. The categorical approach begins with the meaning of the pertinent statutory phrase: here, "an offense relating to obstruction of justice." 8 U.S.C. 1101(a)(43)(S). The same dictionary on which the Court previously relied when construing the INA reflects the ordinary meaning of obstruction of justice. See *Esquivel-Quintana*, 581 U.S. at 391. And various offenses readily fall within that ordinary meaning, including many that Congress has included in Chapter 73 (which is entitled "Obstruction of Justice," 18 U.S.C. Ch. 73 (capitalization altered)). That Cordero-Garcia and Pugin would not consider those offenses to be offenses "relating to obstruction of justice" shows that their reading of the statute is unduly narrow—a recurring consideration under the categorical approach. See, *e.g.*, *Stokeling* v. *United States*, 139 S. Ct. 544, 551 (2019) (declining to construe the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(i), to "*exclud*[*e*]

the quintessential ACCA-predicate crime of robbery"); *Esquivel-Quintana*, 581 U.S. at 395 (declining to construe "sexual abuse of a minor" to "categorically exclude the statutory rape laws of most States"); *Nijhawan* v. *Holder*, 557 U.S. 29, 39-40, 47-51 (2009) (declining to apply the monetary threshold in the INA's aggravated-felony definition for an offense "involv[ing] fraud or deceit," 8 U.S.C. 1101(a)(43)(M)(i), on a categorical basis when that would exclude many federal- and state-law fraud offenses).

B. No Category Of Authorities Supports Interpreting "Obstruction Of Justice" To Include A Temporal-Nexus Requirement

Cordero-Garcia and Pugin purport to derive their temporal-nexus requirements from various sources. See Cordero-Garcia Br. 13-24; Pugin Br. 13-23. But even their authorities support the conclusion that "obstruction of justice" does not require a nexus with a pending or ongoing investigation or proceeding.

1. Contemporaneous dictionaries

Cordero-Garcia attempts to read the *Merriam-Webster's* definition in his favor, contending that one cannot "interfer[e] with the process of justice and law," *Merriam-Webster's* 337, unless an investigation or proceeding has "actually begun," Cordero-Garcia Br. 14. That contention is mistaken. As explained above and in our opening brief (at 19-20, 23-24), one can interfere with the process of justice and law by preventing an investigation or proceeding from ever commencing. When Congress enacted Section 1101(a)(43)(S) in 1996, that was hornbook law. A leading criminal-law treatise described being an "accessory after the fact" (*i.e.*, Pugin's offense) as "interfering with the processes of jus-

tice," even though that offense does not require a nexus with a pending investigation or proceeding. 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 6.9(a), at 170 (1986) (LaFave). And the 1980 commentary on the Model Penal Code (MPC) described "tampering with a witness" to "conceal commission of a crime" (*i.e.*, Cordero-Garcia's offense) as a form of "obstruction of justice," even though, under the MPC, that offense does not require a nexus with a pending investigation or proceeding. MPC § 242.3, comments 1 and 4, at 225, 233.[1]

The notion that there must be a pending investigation or proceeding before someone may "interfere[] with the process of justice and law" is also inconsistent with the recognition that "influencing, threatening, harming, or impeding" a "*potential* witness" is an obstruction of justice. *Merriam-Webster's* 337 (emphasis added). Pugin notes (Br. 36) that a "potential witness" could be one who is "waiting in the wings while proceedings are ongoing." That is true, but it hardly exhausts the meaning of "potential witness." The phrase is naturally read as also including "any 'person who may testify in an official proceeding,'" even if "[f]ormal proceedings" have not yet been "'initiated.'" *Ortiz* v. *State*, 93 S.W.3d 79, 86 (Tex. Crim. App. 2002) (en banc) (citations omitted) (addressing the meaning of "prospective

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[1] Cordero-Garcia also relies on definitions of "[i]nterference" and "impede," but nothing in those definitions suggests that an investigation or proceeding must be pending in order for a defendant to interfere with, or impede, the process of justice. Cordero-Garcia Br. 14 (citations omitted); see *Webster's Third New International Dictionary of the English Language* 1132 (1993) (defining "impede" as "to interfere with or get in the way of the progress of"); *id.* at 1178 (defining "interference" as "the act of meddling in or hampering an activity or process").

witness"), cert. denied, 538 U.S. 998 (2003); see Gov't Br. 39 & nn.15-16 (discussing state statutes that refer to "prospective" witnesses, or persons "likely to become a witness," without requiring a pending investigation or proceeding).

Cordero-Garcia's attempt to explain away the reference to a "potential witness" is similarly unavailing. In his view, the *Merriam-Webster's* definition "encompasses only those witness-related offenses that 'imped[e] an investigation or legal process.'" Cordero-Garcia Br. 29 (quoting *Merriam-Webster's* 337) (brackets in original). But, as already explained, one can impede an investigation or legal process by preventing it *ab initio*. See Gov't Br. 24; pp. 4, 7, *supra*. In any event, Cordero-Garcia's reading of the *Merriam-Webster's* definition mixes parts from its two different sets of examples. The witness-related examples are in the first set (which begins "by influencing"), but the phrase "or otherwise impeding an investigation or legal process" modifies only the second set (which begins "by furnishing false information"). *Merriam-Webster's* 337.

Cordero-Garcia's and Pugin's reliance on other dictionaries is also misplaced. For example, they observe (Cordero-Garcia Br. 14; Pugin Br. 35) that the 1990 edition of *Black's Law Dictionary* defined "[o]bstructing justice" in part as "[a]ny act, conduct, or directing agency pertaining to *pending* proceedings." *Black's Law Dictionary* 1077 (6th ed. 1990) (emphasis altered). Of course, no one doubts that interfering with pending proceedings is *one* form of obstructing justice. But the 1990 edition recognized, more expansively, that "[t]he term applies also to obstructing the administration of justice in any way." *Ibid.* And the next edition omitted

any reference to "pending proceedings." See *Black's Law Dictionary* 1105 (7th ed. 1999).

The 1996 edition of *Barron's Law Dictionary*, which Pugin cites (Br. 35), likewise undermines, rather than supports, a temporal-nexus requirement. That dictionary observed that obstruction of justice "is sometimes called 'obstruction of governmental administration,'" citing Article 242 of the MPC. Steven H. Gifis, *Barron's Law Dictionary* 347 (4th ed. 1996). The cited provision of the MPC, in turn, recognizes "the common-law offense of accessory after the fact" as a form of obstruction of justice, MPC § 242.3, comment 1, at 224; it also treats an "objective to obstruct," not any temporal nexus with a pending investigation or proceeding, as the defining feature of "obstruction of justice," MPC § 242.3, comment 2, at 226. See Gov't Br. 35-36.

Taking a different tack, Pugin contends (Br. 14, 22) that "obstruction of justice" should be understood as a "legal term of art" with a "specialized meaning," rather than something that takes its meaning from "ordinary speech." But *Merriam-Webster's Dictionary of Law* accounts for the legal context; it provides "ordinary English" definitions of "legal words and phrases." *Merriam-Webster's* iv. Its definition of "obstruction of justice" thus reflects the ordinary *legal* meaning of the phrase. And there is no indication that Congress intended to depart from that ordinary legal meaning here. See Antonin Scalia & Bryan A. Garner, *Reading Law* 73 (2012) ("[W]hen the law is the subject, ordinary legal meaning is to be expected.").

Reliance on *Merriam-Webster's* therefore is just as appropriate here as it was in *Esquivel-Quintana*. See 581 U.S. at 391 (relying on *Merriam-Webster's* for the ordinary legal meaning of "sexual abuse"). If Pugin were

correct (Br. 14) that "obstruction of justice" had a legal meaning in 1996 that required "interference with a *pending* proceeding," that meaning would have been reflected in the *Merriam-Webster's* definition, in all of the definitions in the 1990 and 1999 editions of *Black's Law Dictionary*, and in Bryan A. Garner's *Dictionary of Modern Legal Usage* (2d ed. 1995). But it was not, see Gov't Br. 23; pp. 5-6, 9-10, *supra,* which demonstrates that Pugin's narrow view of obstruction of justice is incorrect.

2. Chapter 73 of the federal criminal code

Cordero-Garcia and Pugin purport to derive their temporal-nexus requirements from Chapter 73 of the federal criminal code. See Cordero-Garcia Br. 15-21; Pugin Br. 13-23. They rely primarily upon the so-called "catchall provision" of 18 U.S.C. 1503, *United States* v. *Aguilar*, 515 U.S. 593, 599 (1995), which this Court construed in 1893 to impose a temporal-nexus requirement, *Pettibone* v. *United States*, 148 U.S. 197, 207 (1893). In the century after that decision, however, Congress repeatedly broadened the scope of federal obstruction-of-justice statutes. By the time it enacted Section 1101(a)(43)(S) in 1996, the concept of "obstruction of justice" was plainly understood by Congress—just as it was by many state legislatures and the American Law Institute, see pp. 17-23, *infra*—as not requiring a nexus with a pending investigation or proceeding.

a. Section 1503 has its origins in the Act of Mar. 2, 1831, ch. 99, 4 Stat. 487. That act, entitled "[a]n Act declaratory of the law concerning contempts of court," had two Sections: one that addressed the power of "courts of the United States" to "inflict summary punishments for contempts of court," and another that addressed con-

tempts to be prosecuted "by indictment." §§ 1-2, 4 Stat. 487-488 (emphasis omitted). The latter provided:

> if any person or persons shall, corruptly, or by threats or force, endeavour to influence, intimidate, or impede any juror, witness, or officer, *in any court of the United States*, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or impede, or endeavour to obstruct or impede, *the due administration of justice therein*, every person or persons, so offending, shall be liable to prosecution therefor, by indictment.

§ 2, 4 Stat. 488 (emphases added).

Congress later codified that provision as Rev. Stat. § 5399 (2d ed. 1878). Then, in 1893, this Court construed Section 5399 in *Pettibone*. 148 U.S. at 202. Focusing on the second clause of that Section, the Court held that although "[t]he obstruction of the due administration of justice in any court of the United States, corruptly or by threats or force, is indeed made criminal," "such obstruction can only arise when justice is being administered." *Id.* at 207. That clause, now codified in Section 1503 and known as that section's catchall provision, is still understood to require an already-pending judicial proceeding. See *Aguilar*, 515 U.S. at 599.

Pugin contends that the INA's reference to "an offense relating to obstruction of justice" should be limited to the scope of Section 1503's catchall provision and be construed to require a pending judicial proceeding. Pugin Br. 2; see *id.* at 13-23. But the relevant timeframe for assessing the meaning of "an offense relating to obstruction of justice" is 1996, not 1893. See *Niz-Chavez* v. *Garland*, 141 S. Ct. 1474, 1480 (2021) ("When called on to resolve a dispute over a statute's meaning, this Court normally seeks to afford the law's terms their

ordinary meaning at the time Congress adopted them."). By then, Congress had repeatedly extended the reach of federal obstruction-of-justice statutes beyond the ambit of Section 1503's catchall provision under *Pettibone*—making clear that, by 1996, the concept of obstruction of justice was not understood to require a pending judicial proceeding.

In 1945, for example, Congress amended Section 1503's predecessor to "eliminate[]" a "gap" left by *Pettibone*—namely, that "existing law" did not include the "substantive offense" of injuring a party, witness, juror, or court officer "after the termination of the proceedings." S. Rep. No. 225, 79th Cong., 1st Sess. 1-2 (1945) (citation omitted); see *United States* v. *McLeod*, 119 F. 416, 418 (N.D. Ala. 1902) (holding that Section 1503's predecessor did not prohibit assaulting a United States Commissioner after the termination of proceedings). Congress eliminated that gap by prohibiting retaliation against a party, witness, juror, or court officer, with no pending-proceeding requirement. Act of June 8, 1945, ch. 178, § 1, 59 Stat. 234; see Gov't Br. 30.

In 1967, Congress addressed another "loophole" left by *Pettibone*—namely, that under existing law, it was "not a Federal crime to harass, intimidate, or assault a witness who may communicate information to Federal investigators prior to a case reaching the court." H.R. Rep. No. 658, 90th Cong., 1st Sess. 2 (1967) (1967 House Report). To "remedy that deficiency," *id.* at 1, Congress added 18 U.S.C. 1510 to Chapter 73, thereby prohibiting efforts to prevent the communication of information to a "criminal investigator," but requiring no pending investigation or proceeding. Act of Nov. 3, 1967, Pub. L. No. 90-123, § 1(a), 81 Stat. 362; see Gov't Br. 28; 1967 House Report 4 (explaining that Section

1510 would apply "at any time from the commission of a criminal violation"). Congress thus "extend[ed] to informants and potential witnesses the protections" that existing law had "afforded witnesses and jurors in judicial, administrative, and congressional proceedings." 1967 House Report 1; see *id.* at 2 ("The fundamental danger to an informant or a witness arises from the fact as to whether or not he has supplied the Government with information. It is not whether a case is pending.").

In 1982, Congress again strengthened protections for informants and victims by enacting the Victim and Witness Protection Act (VWPA), Pub. L. No. 97-291, 96 Stat. 1248. Among other things, the VWPA added two more provisions to Chapter 73, 18 U.S.C. 1512 and 1513, targeting witness tampering and witness retaliation, respectively. VWPA § 4(a), 96 Stat. 1249-1250. Those provisions do not require a pending investigation or proceeding. See Gov't Br. 26-27, 29-30. In its statutory findings, Congress emphasized that "[w]ithout the cooperation of victims and witnesses, the criminal justice system would cease to function." VWPA § 2(a)(1), 96 Stat. 1248. And Congress "declare[d] that the purposes of" the VWPA included "protect[ing] the necessary role of crime victims and witnesses in the criminal justice process" and "provid[ing] a model for legislation for State and local governments." VWPA § 2(b)(1) and (3), 96 Stat. 1248-1249.

Those post-1893 enactments doom Pugin's claim that the meaning of Section 1101(a)(43)(S) was "obviously transplanted" only from the narrow context of Section 1503's catchall provision. Pugin Br. 14 (citation omitted). To be sure, when Congress enacted Section 1101(a)(43)(S), a violation of Section 1503's catchall provision remained one form of obstruction of justice. But

by 1996, Congress had expanded the coverage of Chapter 73 by closing various gaps and loopholes left by *Pettibone*, demonstrating its view that Section 1503's catchall provision covered only a subset of offenses relating to obstruction of justice. There is no indication that Congress incorporated all those earlier gaps and loopholes when it enacted Section 1101(a)(43)(S). To the contrary, Section 1101(a)(43)(S) refers broadly to offenses "*relating to* obstruction of justice." 8 U.S.C. 1101(a)(43)(S) (emphasis added). It does not cross-reference Section 1503 alone, nor even echo the language of Section 1503's catchall provision by, for example, referring to "the due administration of justice" or using the phrase "in * * * any court." 18 U.S.C. 1503(a).

Pugin observes that 18 U.S.C. 1961, "in defining RICO predicates," parenthetically refers to Section 1503 as "relating to obstruction of justice" while using different language for other Chapter 73 provisions. Pugin Br. 24. But no one denies that a violation of Section 1503 is an offense relating to obstruction of justice. When cross-referencing other Chapter 73 provisions by their actual citations, Section 1961 simply added parenthetical references to those provisions' headings. See 18 U.S.C. 1961(1)(B) (describing Section 1512, for example, as "relating to tampering with a witness, victim, or an informant"). Section 1961's use of those particularized headings as parallel, parenthetical shorthand has no bearing on whether those provisions are also more generally understood as relating to obstruction of justice.

b. While acknowledging that 18 U.S.C. 1512 requires no temporal nexus to a pending investigation or proceeding, Cordero-Garcia and Pugin characterize Section 1512 as the "exception that proves [their pre-

ferred] rule[s]." Cordero-Garcia Br. 21 (citation omitted); Pugin Br. 25 (citation omitted). But the post-1893 history belies that characterization. Section 1512 was one of several provisions that Congress enacted to extend the reach of federal obstruction-of-justice laws. See pp. 13-15, *supra*. And Congress's intent in enacting those provisions was not to create an "exception," but to eliminate gaps in existing law by expanding federal protections against obstructions of justice.

Observing that Section 1512 expressly disclaims any temporal-nexus requirement, see 18 U.S.C. 1512(f)(1), Cordero-Garcia and Pugin contend that such an express disclaimer was made necessary by "the background principle" that "'obstruction of justice' requires interference with a pending proceeding." Pugin Br. 24-25; see Cordero-Garcia Br. 20-21. But no such background principle exists. Section 1503's catchall provision is understood to impose a temporal-nexus requirement not because of a background principle, but because of the specific text and history of that provision. See pp. 11-12, *supra*. And since 1893, Congress has enacted many provisions that—even without an express disclaimer—have been logically and correctly construed as lacking any temporal-nexus requirement. Gov't Br. 27-31. Section 1101(a)(43)(S) must be read against the backdrop of all of those provisions, not just Section 1503.

c. Cordero-Garcia and Pugin also attempt to dismiss the relevance of several provisions—18 U.S.C. 1510, 1511, 1518, and 1519—by characterizing them as "specialized and narrow extensions of general obstruction concepts to particular, limited settings." Cordero-Garcia Br. 38; see Pugin Br. 26-27. But while each of those provisions addresses a different aspect of the problem, they all address the same problem: obstruction of justice.

See, *e.g.*, *Yates* v. *United States*, 574 U.S. 528, 540 (2015) (plurality opinion) (describing various provisions of Chapter 73 as "prohibiting obstructive acts in specific contexts"). Those provisions accordingly inform what "obstruction of justice" meant when Congress enacted Section 1101(a)(43)(S).

Cordero-Garcia's and Pugin's other attempts to dismiss the relevance of those provisions lack merit. They contend that Section 1510 requires at least a pending investigation, see Cordero-Garcia Br. 19; Pugin Br. 27, but the text of Section 1510 contains no such requirement, see Gov't Br. 28; pp. 13-14, *supra*. They note that Section 1511 is a conspiracy offense, see Cordero-Garcia Br. 20; Pugin Br. 28, but nothing in Section 1511 requires that the conspiracy be one to obstruct a pending investigation or proceeding; the conspiracy may instead be one to prevent law enforcement from commencing an investigation in the first place, see Gov't Br. 28-29. Finally, Cordero-Garcia and Pugin emphasize that Sections 1518 and 1519 postdate the April 1996 enactment of Section 1101(a)(43)(S). See Cordero-Garcia Br. 38; Pugin Br. 29. But there is no reason to believe that the ordinary meaning of obstruction of justice changed so markedly in the short period between April 1996 and the enactment of Sections 1518 and 1519 in August 1996 and July 2002, respectively. See Gov't Br. 32.

3. The Model Penal Code and state criminal codes

Adopted in 1962, the Model Penal Code demonstrably treats witness tampering and being an accessory after the fact as forms of obstruction of justice, while generally dispensing with any temporal-nexus requirement for obstruction-of-justice offenses. See Gov't Br. 33-36. Cordero-Garcia and Pugin attempt to dismiss the MPC as a "'law reform project' meant to shape, rather than

reflect or restate, the criminal law," asserting that there is "no evidence" that, "as of 1996," a "majority of states followed" the MPC's approach. Pugin Br. 34 (brackets and citation omitted); see Cordero-Garcia Br. 29-30. But Congress added the obstruction-of-justice provision to the INA after many state criminal codes already bore the imprint of the MPC and its commentary.

a. The MPC's main witness-tampering offense is found in Section 241.6(1). In 1980, the American Law Institute published updated and expanded commentary on the MPC, which noted that 29 States had "enacted or proposed laws based on Section 241.6(1)." MPC § 241.6, comment 1, at 164 & n.8. And by 1996, 29 of the 35 jurisdictions with statutes whose meaning on the issue can be discerned had dispensed with a temporal-nexus requirement for witness-tampering and witness-intimidation offenses in certain contexts. Gov't Br. 40.

Cordero-Garcia disputes (Br. 37) that most States treated witness tampering as a form of "obstruction of justice." But even though the text of Section 241.6(1) of the MPC does not use that phrase, no one doubts that its drafters viewed witness tampering as "obstruction of justice." MPC § 241.6, comment 2, at 167 ("What is important is not that the actor believe that an official proceeding or investigation will begin within a certain span of time but rather that he recognize that his conduct threatens obstruction of justice."). Section 241.6(1) appears under the broad heading of "offenses against public administration," MPC Pt. 2, at XV (capitalization and emphasis omitted), and many jurisdictions in 1996 used those or similar words to refer to witness tampering, see Gov't Br. 37 n.10. Cordero-Garcia makes much of the fact (Br. 27) that one State—Iowa—placed witness tampering in a chapter entitled "Interference with Ju-

dicial Process" rather than "Obstructing Justice." See Iowa Code § 720.4 (1996). But "Interference with Judicial Process" is a perfectly normal way of describing a form of obstruction of justice.

Cordero-Garcia thus errs in counting (Br. 28) only 11 jurisdictions as treating witness tampering as obstruction of justice in 1996. In any event, he is wrong that 8 of those jurisdictions "required an ongoing or pending investigation or proceeding." *Ibid.* Of the 11 jurisdictions he identifies, 3 imposed such a requirement,[2] 3 did not do so in certain contexts,[3] and the remaining 5 had statutes whose meaning on this issue is not apparent.[4]

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[2] See Md. Code Ann. art. 27, § 26 (1996) (as discussed in *State* v. *Pagano*, 669 A.2d 1339, 1341 (Md. 1996)); Miss. Code Ann. § 97-9-55 (1996); W. Va. Code § 61-5-27 (1996).

[3] See D.C. Code § 22-722(a)(3)(B) (1996) (prohibiting preventing a person from reporting a crime to the authorities in the first place); La. Rev. Stat. Ann. § 14:130.1(A)(2)(e) (1996) (same); Vt. Stat. Ann. tit. 13, § 3015 (1996) (protecting witnesses in connection with matters "already heard, presently being heard or to be heard"). Cordero-Garcia counts (Br. 28 n.15) Vermont as requiring a pending investigation or proceeding, but the state supreme court expressly held that "a pending judicial proceeding is not a required element" for a charge of "obstruction of justice under" Section 3015. *State* v. *O'Neill*, 682 A.2d 943, 943 (Vt. 1996).

[4] See Ind. Code Ann. § 35-44-3-4 (1996); Nev. Rev. Stat. Ann. §§ 199.230 and 199.240 (Westlaw 1996); N.C. Gen. Stat. § 14-226 (1996); R.I. Gen. Laws § 11-32-5 (1996); Va. Code Ann. § 18.2-460 (1996). Cordero-Garcia counts (Br. 28 n.15) Indiana, Nevada, North Carolina, and Rhode Island as requiring a pending investigation or proceeding, but the text of those States' statutes is ambiguous on the issue. See Gov't Br. 40 n.19. Cordero-Garcia errs in suggesting (Br. 31) that the North Carolina and Rhode Island statutes are clear. The North Carolina Court of Appeals has upheld the application of the North Carolina statute to a defendant who "threatened a prospective witness in an attempt to prevent her from testifying in court," despite the defendant's objection that "there was no court

b. The MPC's version of an accessory-after-the-fact offense is known as "hindering apprehension or prosecution of another." MPC art. 242, intro. note, at 199. The MPC's version "br[oke] decisively" from the traditional conception, *ibid.*, by dispensing with the necessity of showing that the person being assisted "actually committed a crime" and that "the person rendering assistance was aware of that fact," MPC § 242.3, comment 3, at 229. In doing away with those elements of the common-law offense, the MPC "laid" the "basis" for "treating [the offense] for what it is—obstruction of justice." MPC § 242.3, comment 1, at 225.

Cordero-Garcia and Pugin attempt to dismiss the "MPC's treatment of accessory after the fact" as "anomalous." Cordero-Garcia Br. 30; see Pugin Br. 31-32. But the American Law Institute's 1980 commentary noted that a "majority of recent codification efforts ha[d] agreed with the Model Code position that this offense should be recharacterized as an obstruction of justice and accordingly ha[d] dispensed with" the former elements. MPC § 242.3, comment 3, at 229. And by 1996, 29 States had adopted provisions with attributes of the MPC's version.[5]

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date or 'court pending' at the time [he] threatened [the victim]." *State* v. *Hairston*, 227 N.C. App. 226, 2013 WL 1905152, at *7-*8 (May 7, 2013) (Tbl.). The Rhode Island statute prohibits intimidating "a victim of a crime * * * with respect to that person's participation in any criminal proceeding," but does not specify whether the proceeding must be pending as opposed to, say, reasonably foreseeable. R.I. Gen. Laws § 11-32-5 (1996).

[5] See Ala. Code §§ 13A-10-42 to 13A-10-44 (1996); Alaska Stat. § 11.56.770 (1996); Ariz. Rev. Stat. §§ 13-2510 to 13-2512 (1996); Ark. Code Ann. § 5-54-105 (1995); Colo. Rev. Stat. § 18-8-105 (1996); Conn. Gen. Stat. § 53a-165 (1996); Del. Code Ann. tit. 11, § 1244 (1996); Ga. Code Ann. § 16-10-50 (1996); Haw. Rev. Stat. §§ 710-1028

Even in the 22 jurisdictions that adhered to a more traditional conception of accessory after the fact, it was understood that the essential character of the offense was that of "interfering with the processes of justice," 2 LaFave § 6.9(a), at 170, because the prosecution had to prove that the defendant rendered aid "for the purpose of hindering the felon's apprehension, conviction or punishment," *id.* § 6.9(a), at 168. That the prosecution may also have had to prove the commission of an underlying offense and the defendant's knowledge of that offense did not detract from the offense's "true character." *Id.* § 6.9(a), at 171. The "gist of being an accessory after the fact" has thus always been "obstructing justice," *United States* v. *Brown*, 33 F.3d 1002, 1004 (8th Cir. 1994) (quoting a prior case's discus-

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to 710-1030 (1996); 720 Ill. Comp. Stat. 5/31-4 (1996); Ky. Rev. Stat. Ann. §§ 520.110 to 520.130 (1996); Me. Rev. Stat. tit. 17-A, § 753 (1996); Minn. Stat. § 609.495, subd. 3 (1996); Mo. Rev. Stat. § 575.030 (1996); Mont. Code Ann. § 45-7-303 (Westlaw 1996); Neb. Rev. Stat. § 28-204 (1996); N.H. Rev. Stat. Ann. § 642:3 (1996); N.J. Rev. Stat. § 2C:29-3 (1996); N.Y. Penal Law §§ 205.50 to 205.65 (1996); N.D. Cent. Code § 12.1-08-03 (1995); Ohio Rev. Code Ann. § 2921.32 (Westlaw 1996); Or. Rev. Stat. § 162.325 (Westlaw 1996); 18 Pa. Cons. Stat. § 5105 (1996); S.D. Codified Laws § 22-3-5 (1996); Tenn. Code Ann. § 39-11-411 (1996); Tex. Penal Code Ann. § 38.05 (Westlaw 1996); Utah Code Ann. § 76-8-306 (1996); Wash. Rev. Code § 9A.76.050 (1996); Wyo. Stat. Ann. § 6-5-202 (1996). Among these 29 States, 5 States (Colorado, Nebraska, South Dakota, Tennessee, and Wyoming) continued to call the offense an "accessory" offense.

In counting 30 States that described their accessory-after-the-fact-type offenses as a form of obstruction of justice, our opening brief relies (at 41-42) on the titles of the relevant state provisions. Although Cordero-Garcia and Pugin criticize that approach, looking beyond those titles gets them nowhere. Comparing, as we do here, the operative text of the state provisions with that of the MPC's hindering-apprehension-or-prosecution provision results in a similar tally of 29 States.

sion of 18 U.S.C. 3); see Gov't Br. 22-23, 43 n.27 (citing cases), and Pugin errs in suggesting (Br. 31-33) otherwise.

c. Cordero-Garcia and Pugin contend that the "correct focus is on crimes identified as 'obstruction of justice,'" Pugin Br. 30, and they count 15 jurisdictions in 1996 with crimes "defined or described" as such, Cordero-Garcia Br. 22-23 & n.7.[6] But it is inconceivable that "obstruction of justice" was criminalized in only 14 States and the District of Columbia. That number alone suggests that considering only offenses labeled "obstruction" of or "obstructing" "justice" excludes many offenses that were understood as relating to obstruction of justice. Indeed, two of the provisions that Cordero-Garcia identifies as qualifying are so narrow that they could not plausibly have been the only offenses relating to obstruction of justice even in those States.[7]

In any event, Cordero-Garcia is wrong in concluding (Br. 22) that 8 of the 15 offenses he identifies required a nexus to a pending investigation or proceeding. In fact, only 6 of those required such a temporal nexus,[8]

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[6] Pugin complains (Br. 30) that the government's total count does not satisfy his "metric" of "crimes identified as 'obstruction of justice,'" but he advances no count of his own.

[7] See Haw. Rev. Stat. § 710-1072.5 (1996) (prohibiting a witness from refusing to testify after "having been granted immunity"); Wis. Stat. Ann. § 946.65 (1996) (prohibiting "giv[ing] false information" to a court officer).

[8] See Haw. Rev. Stat. § 710-1072.5 (1996); Md. Code Ann. art. 27, § 26 (1996); Miss. Code Ann. § 97-9-55 (1996); Va. Code Ann. § 18.2-460 (1996); W. Va. Code § 61-5-27 (1996); Wis. Stat. Ann. § 946.65 (1996).

and 7 did not do so.[9] The other 2 were ambiguous on this issue.[10]

4. The federal sentencing guidelines

Cordero-Garcia and Pugin assert that the federal sentencing guidelines at the time of Section 1101(a)(43)(S)'s enactment "add nothing to the government's position." Cordero-Garcia Br. 41; see Pugin Br. 37. But as our opening brief explains (at 43-44), the guidelines' use of the phrase "Obstruction of Justice" to describe most Chapter 73 offenses, including many that lack a temporal-nexus requirement, reinforces that those offenses were commonly understood to be offenses relating to obstruction of justice. Sentencing Guidelines § 2J1.2 (1995).

Our opening brief also observes (at 44) that the "Obstruction of Justice" guideline specified that the "Accessory After the Fact" guideline should be applied to certain Chapter 73 offenses that "involved obstructing the investigation or prosecution of a criminal offense"—suggesting that being an accessory after the fact was understood to be a form of such "obstructi[on]." Sentencing Guidelines § 2J1.2(c)(1) (1995). Pugin makes much of a sentence in the accompanying commentary,

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[9] See D.C. Code § 22-722 (1996); 720 Ill. Comp. Stat. 5/31-4 (1996); La. Rev. Stat. Ann. § 14:130.1 (1996); Mont. Code Ann. § 45-7-303 (Westlaw 1996); Ohio Rev. Code Ann. § 2921.32 (Westlaw 1996); Utah Code Ann. § 76-8-306 (1996); Vt. Stat. Ann. tit. 13, § 3015 (1996). The Illinois, Montana, Ohio, and Utah statutes bore attributes of the MPC's hindering-apprehension-or-prosecution provision. The Vermont Supreme Court has found "no evidence that the Legislature intended the [Vermont] provision to apply only where a judicial proceeding was pending." *O'Neill*, 682 A.2d at 946.

[10] See Ind. Code Ann. § 35-44-3-4 (1996); Nev. Rev. Stat. Ann. § 199.230 (Westlaw 1996).

which explained that the conduct covered by the "Obstruction of Justice" guideline was "*frequently* part of an effort to avoid punishment for an offense that the defendant has committed or to assist another person to escape punishment for an offense." *Id.* § 2J1.2, comment. (backg'd) (emphasis added); see Pugin Br. 38. But there is nothing noteworthy about the commentary's use of the word "frequently," as opposed to something more categorical, given that the "Obstruction of Justice" guideline also covered interference with noncriminal processes. See, *e.g.*, 18 U.S.C. 1505 (prohibiting obstruction of proceedings before departments, agencies, and committees); *United States* v. *Hopper*, 177 F.3d 824, 832 (9th Cir. 1999) ("According to the [Sentencing Guidelines'] Statutory Index, defendants convicted of violating § 1505 should normally be sentenced under § 2J1.2."), cert. denied, 528 U.S. 1163 (2000), and cert. dismissed, 529 U.S. 1063 (2000).

Pugin further contends (Br. 38) that by "key[ing] an accessory's sentence to a certain lesser amount than the principal's offense," the guidelines did not actually view being an accessory after the fact as a form of obstruction of justice. See Sentencing Guidelines § 2X3.1 (1995) (specifying a base offense level for being an accessory after the fact of "6 levels lower than the offense level for the underlying offense") (emphasis omitted). But even the MPC—which undisputedly treats being an accessory after the fact as a form of obstruction of justice, see Gov't Br. 35-36; p. 20, *supra*—recognizes that "the gravity of the principal offense is not unrelated to the appropriate grading for the offense of one who hinders the apprehension or trial of another": "The more serious the underlying crime involved, the greater the importance to the community of successful pursuit of the

putative offender." MPC § 242.3, comment 6, at 239. The inference that Pugin attempts to draw from the guidelines' calculation of an accessory's sentence is thus mistaken.

C. At A Minimum, An Offense "Relating To" Obstruction Of Justice Need Not Involve A Temporal Nexus

As our opening brief explains (at 44-46), the category of offenses "relating to" obstruction of justice is necessarily broader than the category of obstruction of justice itself. 8 U.S.C. 1103(a)(43)(S). Thus, even if an offense that lacks a temporal-nexus requirement does not qualify as "obstruction of justice," it should still be considered an offense "relating to" obstruction of justice if it involves the same mens rea: an "objective to obstruct justice." MPC § 242.3, comment 2, at 226.

Cordero-Garcia contends (Br. 34) that "relating to" should not be read to "expand" the category of covered offenses beyond obstruction of justice itself. But as Cordero-Garcia acknowledges (Br. 33), the INA's aggravated-felony definition elsewhere refers to offenses by using "a single generic label," without "relating to." For example, 8 U.S.C. 1101(a)(43)(A) refers to "murder, rape, or sexual abuse of a minor"; 8 U.S.C. 1101(a)(43)(B) and (C) refer to "illicit trafficking"; and 8 U.S.C. 1101(a)(43)(G) refers to "a theft offense" and "a burglary offense." Congress could have likewise omitted "relating to" in Section 1101(a)(43)(S) and referred simply to "obstruction of justice" or "an obstruction of justice offense." But Congress used the phrase "an offense relating to" in Section 1101(a)(43)(S), just as it did in neighboring provisions. See 8 U.S.C. 1101(a)(43)(Q), (R), and (T) ("an offense relating to"); see also 8 U.S.C. 1101(a)(43)(K)(i) ("an offense that * * * relates to"). In doing so, Congress presumably intended to expand the

category of covered offenses beyond obstruction of justice itself. See Gov't Br. 45-46.

This Court's decision in *Mellouli* v. *Lynch*, 575 U.S. 798 (2015), does not suggest otherwise. The INA provision in that case authorized the removal of a noncitizen "convicted of a violation of * * * any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21)." 8 U.S.C. 1227(a)(2)(B)(i). While reaffirming that the words "relating to" are "broad," *Mellouli*, 575 U.S. at 811 (citations omitted), the Court emphasized that Congress "qualified 'relating to a controlled substance' by adding the limitation 'as defined in [§ 802],'" *id.* at 808 n.9 (brackets in original). The Court then declined to read Section 1227(a)(2)(B)(i) as "reaching state-court convictions * * * in which '[no] controlled substance (as defined in [§ 802])' figures as an element of the offense." *Id.* at 811 (brackets in original). Because no similar qualifying language appears in Section 1101(a)(43)(S), Pugin's reliance (Br. 39-40) on *Mellouli* is misplaced.

Cordero-Garcia and Pugin likewise err in asserting that giving "relating to" its ordinary meaning would render the provision boundless and vague. See Cordero-Garcia Br. 34-35; Pugin Br. 41-43. As noted above, an offense would relate to obstruction of justice insofar as it shares the same "objective to obstruct justice." MPC § 242.3, comment 2, at 226. That interpretation would rule out offenses such as misprision of felony under 18 U.S.C. 4 and perjury under 18 U.S.C. 1623—neither of which has as an element a purpose to hinder the process of justice. See *In re Espinoza-Gonzalez*, 22 I. & N. Dec. 889, 894 (B.I.A. 1999) (en banc) ("Although misprision of a felony has as an element the affirmative conceal-

ment of the felony, there is, unlike [18 U.S.C. 3], nothing in [18 U.S.C. 4] that references the specific purpose for which the concealment must be undertaken."); *United States* v. *Fornaro*, 894 F.2d 508, 512 (2d Cir. 1990) (per curiam) (explaining that "willfulness is not an element" of perjury under 18 U.S.C. 1623); cf. *United States* v. *Dunnigan*, 507 U.S. 87, 92-94 (1993) (holding that the phrase "impede or obstruct the administration of justice" in Sentencing Guidelines § 3C1.1 (1989) includes perjury under 18 U.S.C. 1621).[11] But because the offenses that Cordero-Garcia and Pugin committed did require such a purpose, they qualify as offenses relating to obstruction of justice. See Gov't Br. 45-46.

D. In Any Event, The Board's Reasonable Rejection Of A Temporal-Nexus Requirement Is Entitled To Deference

Because "an offense relating to obstruction of justice" clearly does not require a nexus to a pending investigation or proceeding, the Court need not reach the question whether the Board of Immigration Appeals' rejection of such a requirement is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources De-*

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[11] For similar reasons, Cordero-Garcia's and Pugin's concern that the government's interpretation would render superfluous other provisions of Section 1101(a)(43) is unfounded. See Cordero-Garcia Br. 34; Pugin Br. 42. In any event, some overlap between provisions of Section 1101(a)(43) is inevitable. Compare, *e.g.*, 8 U.S.C. 1101(a)(43)(A) ("murder, rape, or sexual abuse of a minor"), with 8 U.S.C. 1101(a)(43)(F) ("crime of violence"); see *Hubbard* v. *United States*, 514 U.S. 695, 714 & n.14 (1995) (plurality opinion) (noting the "extensive array of statutes" that "penalize false statements within the Judicial Branch," including statutes prohibiting "perjury" and "obstruction of justice," and observing that "Congress may, and often does, enact separate criminal statutes that may, in practice, cover some of the same conduct"). And Section 1101(a)(43)(S) expressly includes "an offense relating to * * * perjury."

fense Council, Inc., 467 U.S. 837 (1984). But to the extent that any ambiguity exists, deference is warranted. See Gov't Br. 46-53. Cordero-Garcia and Pugin err in contending that any ambiguity should be resolved by applying one of two lenity canons instead.

1. As our opening brief explains (at 51-52), the applicability of *Chevron* deference is a matter of congressional intent, and here, Congress has made its intent clear by instructing that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. 1103(a)(1).

Cordero-Garcia contends (Br. 45) that Section 1103 "simply allocates interpretive authority among Executive Branch officials." But Section 1103 does more than that: It also demonstrates Congress's intent that the Attorney General will "be able to speak with the force of law when [he] addresses ambiguity in the statute or fills a space in the enacted law." *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001). As this Court has long recognized, it is that intent which renders "principles of *Chevron* deference * * * applicable to this statutory scheme." *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999); see Gov't Br. 52 (citing additional cases).

2. Cordero-Garcia and Pugin nevertheless contend that the Attorney General's authority to resolve ambiguities in the INA should give way either to the immigration-lenity canon or to the criminal-lenity canon. In their view, the immigration-lenity canon—that ambiguities in immigration statutes should be construed in favor of noncitizens—is a traditional tool of statutory construction that the Court must exhaust before deferring to the Attorney General. Pugin Br. 45; Cordero-Garcia Br. 44. But the "traditional tools of statutory construction" that apply at *Chevron*'s first

step are tools like text, structure, and history—tools for "ascertain[ing] [whether] Congress had an intention on the precise question at issue." *Chevron*, 467 U.S. at 843 n.9. The immigration-lenity canon is not such a tool; rather, it is used to resolve "ambiguities" when Congress's intent is unclear. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). And because Congress clearly stated its intent that the Attorney General shall have the authority to resolve ambiguities in the INA in the first instance, see 8 U.S.C. 1103(a)(1), the immigration-lenity canon has no role to play when, as here, the Attorney General has exercised that authority through his delegees. See *Negusie* v. *Holder*, 555 U.S. 511, 518 (2009) (finding that "the rule of lenity" did "not demonstrate that the statute [wa]s unambiguous" such that deference was unwarranted). If courts were required to resolve any and all ambiguities in the INA in noncitizens' favor, that would usurp the Attorney General's interpretive authority.

The criminal-lenity canon, also known as the rule of lenity, is inapplicable for similar reasons. The rule of lenity is not a tool for ascertaining Congress's intent; rather, it is a rule for resolving "grievous ambiguity" in Congress's intent. *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (citation omitted); see *Shular* v. *United States*, 140 S. Ct. 779, 787 (2020) (explaining that a court may invoke the rule of lenity only "after consulting traditional canons of statutory construction") (citation omitted). Thus, even assuming that the rule of lenity would otherwise apply to a provision like Section 1101(a)(43)(S), it would not trump Congress's intent that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. 1103(a)(1).

3. Cordero-Garcia contends (Br. 43) that the Board's "categorical analysis of obstruction of justice" does not actually represent an interpretation of "the language and context of the INA itself." That contention is mistaken. In reaffirming its rejection of a temporal-nexus requirement in *In re Valenzuela Gallardo*, 27 I. & N. Dec. 449 (2018), the Board invoked *Chevron*, agreed with the Ninth Circuit that "the language of section [1101(a)(43)(S)] is ambiguous," and recognized its "duty" to "'fill the statutory gap in reasonable fashion.'" *Id.* at 452 (citation omitted); see *id.* at 451-452. The Board's rejection of a temporal-nexus requirement thus reflects an exercise of the Attorney General's interpretive authority under Section 1103. Cf. *Holder* v. *Martinez Gutierrez*, 566 U.S. 583, 597 (2012) (according *Chevron* deference even where the Board "did not highlight the statute's gaps or ambiguity").

Pugin's reliance (Br. 48) on *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), is accordingly misplaced. The issue in that case was whether a noncitizen's conviction was for "a crime of violence under 18 U.S.C. § 16." *Id.* at 4. Section 1103 did not grant the Attorney General interpretive authority over such a "criminal statute," *id.* at 11 n.8, so no issue of *Chevron* deference arose. The issue here, in contrast, is the meaning of "an offense relating to obstruction of justice" in Section 1101(a)(43)(S). Section 1103 *does* grant the Attorney General interpretive authority over that INA provision. So even though a determination about the scope of Section 1101(a)(43)(S) may have ramifications in a criminal proceeding in light of further, wrongful conduct in addition to the aggravated felony itself, Congress has instructed that any ambiguities in Section 1101(a)(43)(S) be resolved, "first and foremost," by the Attorney General. *Smiley* v. *Citi-*

bank (S.D.), N.A., 517 U.S. 735, 741 (1996); see, *e.g.*, *United States* v. *O'Hagan*, 521 U.S. 642, 673 (1997) (affording "controlling weight" to an agency rule in upholding criminal convictions) (quoting *Chevron*, 467 U.S. at 844); *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 704 n.18 (1995) (rejecting the contention that "the rule of lenity should foreclose deference" to an agency interpretation of a statute that "includes criminal penalties").[12]

4. The only remaining question is whether the Board's rejection of a temporal-nexus requirement is a reasonable interpretation of Section 1101(a)(43)(S). For the reasons above, the answer is yes. See pp. 3-27, *supra*. Cordero-Garcia questions the reasonableness of other aspects of the Board's definition of "an offense relating to obstruction of justice," see Cordero-Garcia Br. 45-46, but those other aspects are not at issue here.[13]

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[12] Cordero-Garcia and Pugin claim that being designated an aggravated felon may "carr[y] criminal-law consequences," Cordero-Garcia Br. 44, or have "at least some criminal consequences," Pugin Br. 48 n.7. But their examples all require additional conduct beyond having an aggravated-felony conviction, such as disobeying a removal order, 8 U.S.C. 1253(a)(1); reentering the United States without permission after being removed, 8 U.S.C. 1326(b)(2); or assisting in unlawful entry, 8 U.S.C. 1327. The potential ramifications are accordingly quite different from the "criminal and noncriminal applications" at issue in *Leocal*, 543 U.S. at 12 n.8, or even the criminal penalties that could attach to violations of the statutes and regulations in *O'Hagan* and *Sweet Home*.

[13] Cordero-Garcia and Pugin suggest that the Board has changed positions over time. Pugin Br. 3, 6-7; Cordero-Garcia Br. 7-9 & n.1. Although the Board has clarified its definition of "an offense relating to obstruction of justice" in response to multiple erroneous Ninth Circuit decisions, it has, since 1997, consistently interpreted the phrase to encompass offenses that do not require a nexus to a pending investigation or proceeding. See Gov't Br. 46-50.

E. Cordero-Garcia And Pugin Have Not Preserved The Issues That They Propose Raising On Remand

Cordero-Garcia and Pugin argue that even if this Court holds that "an offense relating to obstruction of justice" does not require a nexus with a pending investigation or proceeding, they would still be entitled on remand to challenge whether their offenses categorically match the generic definition of "an offense relating to obstruction of justice." See Cordero-Garcia Br. 46 n.21; Pugin Br. 49-53. That is incorrect.

In Cordero-Garcia's case, the Board determined that "dissuading a witness in violation of section 136.1(b)(1) of the California Penal Code is categorically an aggravated felony offense relating to obstruction of justice." *Cordero-Garcia* Pet. App. 59a. Cordero-Garcia argued that the Board erred in not applying a temporal-nexus requirement, see Cordero-Garcia C.A. Br. 12-15, and the Ninth Circuit agreed, see *Cordero-Garcia* Pet. App. 8a. Contrary to Cordero-Garcia's suggestion (Br. 46 n.21), he has not preserved any additional argument that his offense does not "categorically match[]" the generic definition of an offense relating to obstruction of justice. See Gov't Br. 51 n.28 (noting that Cordero-Garcia did not dispute below that his offense satisfies the Board's definition).

In Pugin's case, the Fourth Circuit determined that "the phrase 'relating to obstruction of justice'" is "at least ambiguous" as to whether it requires "an ongoing proceeding," and deferred to the Board's "reasonable conclusion" that the phrase encompasses "interference in an ongoing *or reasonably foreseeable* proceeding." *Pugin* Pet. App. 24a. The Fourth Circuit then held that "the Virginia offense of accessory after the fact categorically matches the Board's definition" of an offense re-

lating to obstruction of justice. *Id.* at 3a. Pugin petitioned for this Court's review, challenging only the Fourth Circuit's analysis of the temporal-nexus issue, including its deference to the Board. *Pugin* Pet. i. Thus, if this Court rejects Pugin's position on that issue, it should simply affirm the Fourth Circuit's judgment. That is particularly so given that the Fourth Circuit found that Pugin "did not exhaust" the foreseeability-related arguments that he now suggests would be available to him on remand. *Pugin* Pet. App. 33a n.18; see Gov't Br. 50 n.28.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals in *Pugin* v. *Garland*, No. 22-23, should be affirmed, and the judgment of the court of appeals in *Garland* v. *Cordero-Garcia*, No. 22-331, should be reversed.

Respectfully submitted.

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Solicitor General

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