No.

In the Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL,
PETITIONER

v.

FERNANDO CORDERO-GARCIA,
AKA FERNANDO CORDERO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether dissuading a witness from reporting a crime, in violation of California law, is "an offense relating to obstruction of justice," 8 U.S.C. 1101(a)(43)(S).

RELATED PROCEEDINGS

United States Court of Appeals (9th Cir.):

Cordero-Garcia v. *Sessions*, No. 12-74130 (July 10, 2017)

Cordero-Garcia v. *Garland*, No. 19-72779 (Aug. 15, 2022)

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-54a) is reported at 44 F.4th 1181. A prior order of the court of appeals (App., *infra*, 94a) is unreported. The most recent decision of the Board of Immigration Appeals (App., *infra*, 55a-74a) is reported at 27 I. & N. Dec. 652. The other decisions of the Board of Immigration Appeals (App., *infra*, 75a-93a, 95a-97a, 98a-104a) and the decisions of the immigration judge (App., *infra*, 105a-135a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in an appendix to this petition. App., *infra*, 137a-146a.

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, renders deportable any noncitizen "who is convicted of an aggravated felony at any time after admission" to the United States. 8 U.S.C. 1227(a)(2)(A)(iii).[1] Under the INA, "an offense relating to obstruction of justice * * * for which the term of imprisonment is at least one year" constitutes an aggravated felony, regardless of whether the offense is committed "in violation of Federal or State law." 8 U.S.C. 1101(a)(43)(S).

Whether a noncitizen has been convicted of an offense relating to obstruction of justice depends on application of "a categorical approach" that "look[s] to the statute ... of conviction, rather than to the specific facts underlying the crime." *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1568 (2017) (citation omitted). Under that approach, the question is whether the "elements" of the offense establish that the conviction was for an offense relating to obstruction of justice. *Kawashima* v. *Holder*, 565 U.S. 478, 483 (2012).

2. Petitioner is a native and citizen of Mexico. App., *infra*, 2a. In 1965, he was admitted to the United States

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[1] This brief uses "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

as a lawful permanent resident. *Ibid.* In 1990, he began working for Santa Barbara County as a psychologist. *Id.* at 110a; Administrative Record (A.R.) 867. His patients included individuals "referred to him for treatment through the criminal justice system." App., *infra*, 103a.

Over the course of many years, petitioner sexually abused and assaulted numerous patients. A.R. 533-535, 869. Many of the assaults occurred in petitioner's offices —including an office in the county courthouse—where his victims sought treatment for depression and other mental-health issues. App., *infra*, 112a; A.R. 533-534. Invoking his reputation as a "trusted" psychologist, petitioner threatened his victims with various consequences if they did not submit to his abuse. A.R. 871; see A.R. 533-535. For example, he "threatened to put [one patient] in jail or a mental hospital if she did not have sex with him." A.R. 533. And he "reminded [another patient] that she could lose her children if she did not see him"—insisting that "he could do anything and get away with it because judges respected him." A.R. 534.

In 2007, petitioner was "arrested for rape by threat of use of public authority" and "released on bail." A.R. 534. The day after he was arrested, petitioner met with two of his victims and attempted to persuade them not to report his conduct to authorities. App., *infra*, 113a-114a; A.R. 535.

In 2009, petitioner was convicted of sexual battery without restraint and sexual exploitation by a psychotherapist, both in violation of California law. A.R. 532-533. He was also convicted on two counts of dissuading a witness from reporting a crime, in violation of Cal. Penal Code § 136.1(b)(1), for which he was sentenced to

two years of imprisonment. A.R. 535-536, 663-664, 842, 848-849, 855, 860, 875. "To prove a violation of section 136.1, subdivision (b)(1), the prosecution must show '(1) the defendant has attempted to prevent or dissuade a person (2) who is a victim or witness to a crime (3) from making a report . . . to any peace officer or other designated officials.'" *People* v. *Navarro*, 212 Cal. App. 4th 1336, 1347 (2013) (brackets and citation omitted). "The prosecution must also establish that 'the defendant's acts or statements were intended to affect or influence a potential witness's or victim's testimony or acts.'" *Ibid.* (brackets and citation omitted). Thus, "section 136.1 is a specific intent crime." *Ibid.* (citation omitted).

3. In 2011, the Department of Homeland Security (DHS) charged that petitioner was subject to removal under 8 U.S.C. 1227(a)(2)(A)(iii) because his convictions for dissuading a witness were convictions for an aggravated felony—specifically, for an offense relating to obstruction of justice. A.R. 993. DHS later charged that petitioner was subject to removal on the additional ground that he had been convicted of "two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct." A.R. 886; see 8 U.S.C. 1227(a)(2)(A)(ii). The immigration judge (IJ) sustained both charges of removability, denied cancellation of removal, and ordered petitioner's removal to Mexico. App., *infra*, 105a-136a.

In 2012, the Board of Immigration Appeals (Board) dismissed petitioner's appeal. App., *infra*, 98a-104a. The Board rejected petitioner's contention that dissuading a witness under Section 136.1(b)(1) "is not categorically an offense relating to obstruction of justice because it require[s] no interference with ongoing crim-

inal proceedings." A.R. 205; see App., *infra*, 100a. The Board explained that it had held in *In re Valenzuela Gallardo*, 25 I. & N. Dec. 838 (2012) (*Valenzuela Gallardo I*), that "a crime may relate to obstruction of justice within the meaning of [the INA] irrespective of the existence of an ongoing criminal investigation or proceeding." App., *infra*, 100a. The Board also determined that petitioner had been convicted of two crimes involving moral turpitude and upheld the IJ's denial of cancellation of removal. *Id.* at 101a-104a.

Petitioner sought review in the court of appeals. While his case was pending, another panel of the Ninth Circuit decided *Valenzuela Gallardo* v. *Lynch*, 818 F.3d 808 (2016) (*Valenzuela Gallardo II*), in the course of which it rejected the interpretation of an offense relating to obstruction of justice that the Board had adopted in *Valenzuela Gallardo I*. *Id.* at 823-824. The court understood the Board in that case to have held that "the 'critical element' of obstruction of justice crimes" is "the 'affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice,' regardless of the existence of an ongoing investigation or proceeding." *Id.* at 819 (quoting *Valenzuela Gallardo I*, 25 I. & N. Dec. at 842). In the court's view, that interpretation left "grave uncertainty about the plethora of steps before and after an 'ongoing criminal investigation or trial' that comprise 'the process of justice,'" *id.* at 820, and thus "raise[d] grave doubts about whether [Section 1101(a)(43)(S)] is unconstitutionally vague," *id.* at 819.

The government filed an unopposed motion to remand petitioner's case to the Board for further proceedings in light of both *Valenzuela Gallardo II* and intervening circuit precedent relevant to the Board's deter-

mination that petitioner had been convicted of two crimes involving moral turpitude. A.R. 137-141. The court granted the motion and remanded the case. App., *infra*, 94a.

While petitioner's case was pending on remand, the Board issued its decision in *In re Valenzuela Gallardo*, 27 I. & N. Dec. 449 (2018) (*Valenzuela Gallardo III*). In *Valenzuela Gallardo III*, the Board reiterated its view that "Congress did not intend interference in an ongoing or pending investigation or proceeding to be a necessary element of an 'offense relating to obstruction of justice' under the [INA]." *Id.* at 456. In light of the court of appeals' vagueness concerns, however, the Board took "the opportunity to clarify" its interpretation of Section 1101(a)(43)(S), *id.* at 451, explaining that "an offense relating to obstruction of justice" encompasses "offenses covered by chapter 73 of the Federal criminal code or any other Federal or State offense that involves (1) an affirmative and intentional attempt (2) that is motivated by a specific intent (3) to interfere either in an investigation or proceeding that is ongoing, pending, or reasonably foreseeable by the defendant, or in another's punishment resulting from a completed proceeding," *id.* at 460.

In light of *Valenzuela Gallardo III*, the Board issued a decision dismissing petitioner's appeal. App., *infra*, 55a-74a (published version); see *id.* at 75a-93a (unpublished version).[2] The Board explained that dissuad-

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[2] The record contains two versions of the Board's decision, which are materially identical in substance. One is an unpublished version, issued to the parties, App., *infra*, 75a-93a; the other is a published version, issued to the parties and released to the public, *id.* at 55a-74a. The published decision constitutes "precedent that binds the Board, the immigration courts, and DHS." Exec. Office for Immi-

ing a witness under Section 136.1(b)(1) "requires a specific intent to interfere in an investigation or proceeding." *Id.* at 59a. And the Board held that such intent "necessarily" means that an investigation or proceeding was "ongoing, pending, or reasonably foreseeable." *Ibid.* In the Board's view, "there would be little reason for a person to try to prevent or dissuade a victim or witness from reporting the crime to appropriate authorities unless there was an investigation in progress or one was reasonably foreseeable." *Ibid.* The Board therefore concluded that dissuading a witness under Section 136.1(b)(1) is categorically an offense relating to obstruction of justice under "the criteria * * * outlined in" *Valenzuela Gallardo III*. *Ibid.* Because petitioner's conviction for that offense rendered him removable and ineligible for cancellation of removal, *id.* at 74a, the Board found it unnecessary to reach the issue of whether petitioner had been convicted of two crimes involving moral turpitude, *id.* at 56a n.1.

Petitioner again petitioned for review in the court of appeals. While his petition was pending, the court in *Valenzuela Gallardo* v. *Barr*, 968 F.3d 1053 (9th Cir. 2020) (*Valenzuela Gallardo IV*), held that "'obstruction of justice' under § 1101(a)(43)(S) unambiguously requires a nexus to ongoing or pending proceedings." *Id.* at 1069. The court therefore rejected the contrary interpretation that the Board had adopted in *Valenzuela Gallardo III*. *Id.* at 1062-1068. The government petitioned for rehearing en banc in *Valenzuela Gallardo IV*, but the petition was denied without any noted dissent. See *Valenzuela Gallardo* v. *Barr*, No. 18-72593 (9th Cir. Nov. 17, 2020).

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gration Review, *Board of Immigration Appeals Practice Manual* ch. 1.4(d)(1), at 11 (updated Aug. 26, 2022).

4. A divided panel of the court of appeals granted petitioner's petition for review and remanded for further proceedings. App., *infra*, 1a-54a. The court "recognize[d] that a circuit split has emerged" about whether Section 1101(a)(43)(S) "unambiguously requires a nexus to an ongoing or pending proceeding or investigation." *Id.* at 15a. But the court noted that it was "bound to apply" its prior decision in *Valenzuela Gallardo IV*. *Ibid.* Accordingly, the court held that the offense of dissuading a witness under Section 136.1(b)(1) is "not a categorical match" to an offense relating to obstruction of justice under the INA because the California offense "is missing the element of a nexus to an ongoing or pending proceeding or investigation." *Id.* at 8a. The court further held that because the federal witness-tampering statute, 18 U.S.C. 1512, also "does not contain the required element of a nexus to an ongoing or pending proceeding or investigation," "it is not an appropriate comparator * * * for purposes of a categorical approach analysis." App., *infra*, 15a. The court concluded, in any event, that dissuading a witness under Section 136.1(b)(1) is "not a categorical match with 18 U.S.C. § 1512." *Id.* at 16a.

Judge VanDyke dissented. App., *infra*, 23a-54a. In his view, the court of appeals' prior decisions in *Valenzuela Gallardo II* and *Valenzuela Gallardo IV* were wrongly decided but did not foreclose the argument that an offense relates to obstruction of justice if it is "covered by [C]hapter 73 of the Federal criminal code." *Id.* at 45a (quoting *Valenzuela Gallardo III*, 27 I. & N. Dec. at 460) (brackets in original); see *id.* at 33a-45a. Judge VanDyke concluded that because dissuading a witness under Section 136.1(b)(1) "is a categorical match" to an offense covered by Chapter 73—namely, witness tam-

pering under 18 U.S.C. 1512(b)(3)—petitioner was convicted of an aggravated felony. App., *infra*, 54a.

REASONS FOR GRANTING THE PETITION

The court of appeals in this case held that petitioner's conviction for dissuading a witness from reporting a crime under California law does not qualify as an offense relating to obstruction of justice for purposes of the INA's aggravated-felony definition, 8 U.S.C. 1101(a)(43)(S), on the theory that obstruction of justice categorically requires "a nexus to an ongoing or pending proceeding or investigation." App., *infra*, 8a. The court of appeals' decision is incorrect, and it conflicts with the decisions of other courts of appeals. This Court's review is warranted.

Concurrently with the filing of this petition for a writ of certiorari, the government is filing a response to the petition for a writ of certiorari in *Pugin* v. *Garland*, No. 22-23 (filed July 5, 2022), a case involving the closely related question whether an accessory-after-the-fact crime qualifies as "an offense relating to obstruction of justice" for purposes of Section 1101(a)(43)(S). To allow this Court to address the meaning of that phrase in full view of the issues raised by both witness-tampering and accessory-after-the-fact crimes—two recurring kinds of crimes that have each precipitated disagreements among the courts of appeals—the government requests that certiorari be granted in this case and *Pugin* and that the cases be consolidated for argument.

A. The Court Of Appeals' Decision Is Wrong

The court of appeals in this case held that dissuading a witness from reporting a crime, in violation of Cal. Penal Code § 136.1(b)(1), is not "an offense relating to ob-

struction of justice," 8 U.S.C. 1101(a)(43)(S). That holding is incorrect.

1. Because the INA does not expressly define "an offense relating to obstruction of justice," 8 U.S.C. 1101(a)(43)(S), that phrase should be given its "ordinary meaning," *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1569 (2017). In *Esquivel-Quintana*, this Court determined the "ordinary meaning" of a different part of the INA's definition of an aggravated felony—the one referring to "sexual abuse of a minor," 8 U.S.C. 1101(a)(43)(A)—by consulting *Merriam-Webster's Dictionary of Law* (1996) (*Merriam-Webster's*). *Esquivel-Quintana*, 137 S. Ct. at 1569. That same dictionary defines "obstruction of justice" as follows:

> 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 ⟨the defendant's *obstruction of justice* led to a more severe sentence⟩.

Merriam-Webster's 337; see Bryan A. Garner, *A Dictionary of Modern Legal Usage* 611 (2d ed. 1995) ("obstruction of justice (= interference with the orderly administration of law) is a broad phrase that captures every willful act of corruption, intimidation, or force that tends somehow to impair the machinery of the civil or criminal law").[3]

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[3] Congress added Section 1101(a)(43)(S) to the INA's definition of an aggravated felony in April 1996. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e)(8), 110 Stat. 1278.

Here, petitioner was convicted of dissuading a witness from reporting a crime under Section 136.1(b)(1). Reporting a crime is part of the process of bringing a criminal to justice, and one who "intentionally 'prevent[s] or dissuade[s]' a victim or witness from reporting a crime" necessarily interferes with that process. *People* v. *Navarro*, 212 Cal. App. 4th 1336, 1351 (2013) (citation omitted). Indeed, *Merriam-Webster's* specifically identifies "influencing, threatening, harming, or impeding a witness" or "potential witness" as an example of "obstruction of justice." *Merriam-Webster's* 337. The elements of an offense under Section 136.1(b)(1) thus establish that petitioner was convicted of an offense relating to obstruction of justice.

That conclusion finds further support in the federal witness-tampering statute, 18 U.S.C. 1512(b)(3), which prohibits anyone from "knowingly * * * corruptly persuad[ing] another person * * * , with intent to * * * prevent the communication * * * of information" to the authorities "relating to the commission or possible commission of a Federal offense." *Ibid.* An offense under Section 1512(b)(3) is regarded as one involving obstruction of justice, see *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 703 (2005), and Section 136.1(b)(1) prohibits the same type of "culpable conduct," *Navarro*, 212 Cal. App. 4th at 1351—*i.e.*, "statements specifically intended to induce a witness or victim to withhold evidence of a crime from law enforcement officials," *id.* at 1352. Comparing Section 136.1(b)(1) with Section 1512(b)(3) thus reinforces that petitioner was convicted of an offense relating to obstruction of justice.

2. Relying on its prior decision in *Valenzuela Gallardo* v. *Barr*, 968 F.3d 1053 (9th Cir. 2020) (*Valenzuela Gallardo IV*), the court of appeals in the decision below

nevertheless concluded that dissuading a witness from reporting a crime, in violation of Section 136.1(b)(1), is not an offense relating to obstruction of justice because it "is missing the element of a nexus to an ongoing or pending proceeding or investigation." App., *infra*, 8a. The court in *Valenzuela Gallardo IV* derived that "temporal nexus requirement" primarily from two sources: (1) the *Merriam-Webster's* definition, and (2) the offenses described in Chapter 73 of the federal criminal code. 968 F.3d at 1063 (citation omitted); see *id.* at 1063-1065. But those sources do not support such a requirement; to the contrary, they make clear that an offense need not involve a pending proceeding or investigation in order to qualify as an offense relating to obstruction of justice.

a. The court of appeals in *Valenzuela Gallardo IV* believed that the *Merriam-Webster's* definition of obstruction of justice supported the court's interpretation of Section 1101(a)(43)(S) because that definition refers to "an investigation or legal process." 968 F.3d at 1063 (citation and emphasis omitted). But the definition refers to "an investigation or legal process" only in describing one example of obstruction of justice. *Merriam-Webster's* 337. And even then, it does not require that the "investigation or legal process" be pending; a defendant can "imped[e] an investigation or legal process," *ibid.*, that has not yet begun. See, *e.g.*, *Arthur Andersen*, 544 U.S. at 703, 707-708 (noting that, even if a proceeding was not pending or about to be instituted at the time of the offense, it could "be foreseen" and thus could support a conviction for persuading others to shred documents to prevent their "'use in an official proceeding'" in violation of 18 U.S.C. 1512(b)(2)(A) or

(B)); see also *Marinello* v. *United States*, 138 S. Ct. 1101, 1110 (2018) (similar).

Indeed, the rest of the *Merriam-Webster's* definition of obstruction of justice makes clear that no pending proceeding or investigation is required. The main clause of the definition—"the crime or act of willfully interfering with the process of justice and law"—makes no mention of a pending proceeding or investigation. *Merriam-Webster's* 337. And "influencing, threatening, harming, or impeding a witness" or "*potential* witness" —which, as noted, the definition provides as an example of obstruction of justice—plainly need not involve an already-pending proceeding or investigation. *Ibid.* (emphasis added); see, *e.g.*, 18 U.S.C. 1512(f)(1) (providing that, in order to be convicted of witness tampering, "an official proceeding need not be pending or about to be instituted at the time of the offense").

b. The court of appeals in *Valenzuela Gallardo IV* also inferred a pending-proceeding requirement from the offenses described in Chapter 73 of Title 18 of the U.S. Code, which are understood to be obstruction-of-justice offenses. 968 F.3d at 1063-1065.[4] To be sure, some Chapter 73 offenses explicitly depend on the ex-

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[4] The court of appeals relied on Congress's placement of certain offenses in Chapter 73 under the heading "Obstruction of Justice." *Valenzuela Gallardo IV*, 968 F.3d at 1063-1064. Congress has specifically instructed that "[n]o inference of a legislative construction is to be drawn by reason of the chapter in Title 18, Crimes and Criminal Procedure, * * * in which any particular section is placed, nor by reason of the catchlines used in such title." Act of June 25, 1948, ch. 645, § 19, 62 Stat. 862. Even apart from their placement in Chapter 73 and the heading of that Chapter, however, the offenses described in Chapter 73 are understood to be offenses "relating to obstruction of justice" as a matter of ordinary meaning. See *Arthur Anderson*, 544 U.S. at 703.

istence of a pending proceeding. See, *e.g.*, 18 U.S.C. 1504 (influencing a juror "upon any issue or matter pending before such juror" by writing); 18 U.S.C. 1505 (obstructing the "due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States"); 18 U.S.C. 1508 (recording, listening to, or observing "the proceedings" of a jury "while such jury is deliberating or voting").

But many Chapter 73 offenses can be committed before any proceeding has begun. See, *e.g.*, 18 U.S.C. 1510(a) (endeavoring by means of bribery to obstruct "the communication of information * * * to a criminal investigator"); 18 U.S.C. 1511 (obstructing "the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business"); 18 U.S.C. 1512 (tampering with a witness, victim, or informant); 18 U.S.C. 1513(a)(1)(B) (retaliating against a person for providing information to a law-enforcement officer); 18 U.S.C. 1518 (obstructing "the communication of information or records relating to a violation of a Federal health care offense to a criminal investigator"); 18 U.S.C. 1519 (destroying "any record, document, or tangible object" to influence a federal investigation). And various other Chapter 73 offenses can be committed after a proceeding has ended. See, *e.g.*, 18 U.S.C. 1503(a) (injuring a juror on account of his "having been such juror"); 18 U.S.C. 1509 (obstructing "the due exercise of rights" under the "judgment" of a federal court); 18 U.S.C. 1513(a)(1)(A) (retaliating against a person for attending an official proceeding). Thus, far from supporting a pending-proceeding requirement, the offenses described in Chapter 73

make clear that obstruction of justice can occur before, during, or after a proceeding.

While acknowledging that witness tampering under Section 1512 does not require a nexus to a pending proceeding or investigation, the court of appeals in *Valenzuela Gallardo IV* viewed Section 1512 as "the exception that proves the rule." 968 F.3d at 1066; see *id.* at 1065-1066. But witness tampering is a paradigmatic obstruction-of-justice offense, see *Merriam-Webster's* 337, and many other offenses described in Chapter 73 likewise lack a pending-proceeding requirement, even without the specific disclaimer included in Section 1512(f)(1), see p. 14, *supra*. Those offenses are not exceptions to such a requirement; rather, they show that no such requirement exists in the first place. The court of appeals' contrary view—which would exclude those offenses from the category of "offense[s] relating to obstruction of justice," 8 U.S.C. 1101(a)(43)(S)—cannot be squared with the ordinary meaning of that phrase. See App., *infra*, 15a (holding that Section 1512 "is not an appropriate comparator" for what qualifies as "an offense relating to obstruction of justice").

The court of appeals in *Valenzuela Gallardo IV* also regarded the offenses described in Section 1519 as "not relevant to [the] analysis here" because Congress's enactment of Section 1519 post-dated its addition of "an offense relating to obstruction of justice" to the INA's definition of an aggravated felony in 1996. 968 F.3d at 1065 n.9; see note 3, *supra*. But the ordinary meaning of obstruction of justice did not change in the short period between 1996 and the enactment of Section 1519 in 2002. See Corporate and Criminal Fraud Accountability Act of 2002, Pub. L. No. 107-204, § 802(a), 116 Stat. 800. And "courts do not interpret statutes in isolation,

but in the context of the *corpus juris* of which they are a part, including later-enacted statutes." *Branch* v. *Smith*, 538 U.S. 254, 281 (2003) (plurality opinion); see *United States* v. *Fausto*, 484 U.S. 439, 453 (1988) ("[C]ourts frequently * * * interpret a statutory text in the light of surrounding texts that happen to have been subsequently enacted.").

c. Because "an offense relating to obstruction of justice" unambiguously does not require an already-pending proceeding or investigation, that should be the end of the matter. See *Esquivel-Quintana*, 137 S. Ct. at 1572. Given the lack of ambiguity as to whether a proceeding or investigation must be pending, "neither the rule of lenity nor *Chevron* applies." *Ibid.*; see *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

In any event, any ambiguity about whether a proceeding or investigation must be pending should be resolved by deferring to the Board's rejection of a pending-proceeding requirement. Ever since the Board first addressed the issue in 1997—the year after Congress added "an offense relating to obstruction of justice" to the INA's definition of an aggravated felony, see note 3, *supra*—the Board has consistently interpreted the phrase to encompass offenses that do not require a pending proceeding or investigation. See *In re Batista-Hernandez*, 21 I. & N. Dec. 955, 962 (1997) (en banc) (holding that accessory after the fact under 18 U.S.C. 3, which requires no pending proceeding or investigation, constitutes an offense relating to obstruction of justice); *In re Espinoza-Gonzalez*, 22 I. & N. Dec. 889, 894-895 (1999) (en banc) (reaffirming the holding of *Batista-Hernandez*); *In re Valenzuela Gallardo*, 25 I. & N. Dec. 838, 841 (2012) (*Valenzuela Gallardo I*) (reiterating

that "interference with an ongoing criminal investigation or trial" is "not an essential element of 'an offense relating to obstruction of justice'"); *In re Valenzuela Gallardo*, 27 I. & N. Dec. 449, 456 (2018) (*Valenzuela Gallardo III*) (reiterating that "Congress did not intend interference in an ongoing or pending investigation or proceeding to be a necessary element of an 'offense relating to obstruction of justice'"); App., *infra*, 57a-59a (holding that dissuading a witness under California law, which requires no pending proceeding or investigation, constitutes an offense relating to obstruction of justice). At a minimum, that interpretation is a reasonable one that would be entitled to *Chevron* deference. See pp. 9-16, *supra*; see also 8 U.S.C. 1103(a)(1) (provision of INA directing that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling"); *Negusie* v. *Holder*, 555 U.S. 511, 516 (2009) ("It is well settled that 'principles of *Chevron* deference are applicable to this statutory scheme.'") (citation omitted).[5]

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[5] In *Espinoza-Gonzalez* and *Valenzuela Gallardo I*, the Board adopted an interpretation of "obstruction of justice" that tracked the *Merriam-Webster's* definition: "an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice." *Espinoza-Gonzalez*, 22 I. & N. Dec. at 896; *Valenzuela Gallardo I*, 25 I. & N. Dec. at 841. After the court of appeals incorrectly rejected that interpretation, see *Valenzuela Gallardo* v. *Lynch*, 818 F.3d 808, 823-824 (9th Cir. 2016) (*Valenzuela Gallardo II*), the Board clarified that "an offense relating to obstruction of justice" encompasses "offenses covered by chapter 73 of the Federal criminal code or any other Federal or State offense that involves (1) an affirmative and intentional attempt (2) that is motivated by a specific intent (3) to interfere either in an investigation or proceeding that is ongoing, pending, or reasonably foreseeable by the defendant, or in another's punishment resulting from a completed proceeding," *Valenzuela Gallardo III*, 27 I. & N. Dec. at 460. The

B. The Court Of Appeals' Decision Conflicts With The Decisions Of Other Circuits

The decision below implicates multiple conflicts in the courts of appeals that warrant this Court's review. First, the court of appeals' decision creates a conflict on whether certain witness-tampering crimes constitute "an offense relating to obstruction of justice" for purposes of Section 1101(a)(43)(S). The court of appeals in this case held that dissuading a witness from reporting a crime does not qualify as "an offense relating to obstruction of justice." App., *infra*, 8a. In contrast, the Second and Eighth Circuits have held that similar witness-tampering crimes do qualify as such an offense. See *Higgins* v. *Holder*, 677 F.3d 97, 107 (2d Cir. 2012) (per curiam) (holding that Connecticut witness tampering "is categorically 'an offense relating to obstruction of justice'"); *Armenta-Lagunas* v. *Holder*, 724 F.3d 1019, 1025 (8th Cir. 2013) (holding that Nebraska witness tampering "meets the generic definition of obstruction of justice").

Relatedly, the court of appeals' decision conflicts with decisions of other courts of appeals on the question whether 18 U.S.C. 1512—the federal witness-tampering statute—is an "appropriate comparator" for determining whether an offense relates to obstruction of justice.

Board in this case reasoned that an offense under Section 136.1(b)(1) qualifies as an offense relating to obstruction of justice under *Valenzuela Gallardo III* because Section 136.1(b)(1) requires "a specific intent to interfere in an investigation or proceeding," which "necessarily" means that an investigation or proceeding was "ongoing, pending, or reasonably foreseeable." App., *infra*, 59a. Before the court of appeals, petitioner did not challenge that reasoning; rather, he argued only that *Valenzuela Gallardo III* had been "overruled" by the court's intervening decision in *Valenzuela Gallardo IV*. Pet. C.A. Br. 10.

App., *infra*, 15a. The court of appeals in this case held that Section 1512 "is not an appropriate comparator" for that purpose. *Ibid.* In contrast, the Second, Third, and Eighth Circuits have used Section 1512 as a comparator and found analogous state offenses to be offenses relating to obstruction justice. See *Higgins*, 677 F.3d at 105 (holding that Connecticut witness tampering is an offense relating to obstruction of justice based on a comparison with Section 1512); *Denis* v. *Attorney Gen.*, 633 F.3d 201, 213 (3d Cir. 2011) (holding that New York tampering with physical evidence is an offense relating to obstruction of justice based on a comparison with Section 1512); *Armenta-Lagunas*, 724 F.3d at 1023-1024 (holding that Nebraska witness tampering is an offense relating to obstruction of justice based on a comparison with Section 1512).

And the court of appeals' decision in this case implicates a pre-existing conflict about whether an offense must involve a pending proceeding or investigation in order to qualify as "an offense relating to obstruction of justice." The court of appeals in this case reaffirmed Ninth Circuit precedent holding that "a nexus to an ongoing or pending proceeding or investigation" is required. App., *infra*, 8a; see *Valenzuela Gallardo IV*, 968 F.3d at 1069 (holding that "'obstruction of justice' under § 1101(a)(43)(S) unambiguously requires a nexus to ongoing or pending proceedings"). In doing so, the court "recognize[d] that a circuit split has emerged" about that question. App., *infra*, 15a. As it noted, the First and Fourth Circuits have reached the contrary conclusion that no such nexus is required. See *Silva* v. *Garland*, 27 F.4th 95, 98 (1st Cir. 2022) (holding that "'an offense relating to obstruction of justice' unambiguously does not require a nexus to a pending or ongoing

investigation or judicial proceeding"); *Pugin* v. *Garland*, 19 F.4th 437, 450 (4th Cir. 2021) (deferring to the Board's view that an offense relating to obstruction of justice does "not require an ongoing proceeding"), petition for cert. pending, No. 22-23 (filed July 5, 2022).

C. This Court's Review Is Warranted In Both This Case And *Pugin*

Concurrently with the filing of this petition for a writ of certiorari, the government is filing a response to the certiorari petition in *Pugin*, *supra* (No. 22-23). The Fourth Circuit in *Pugin* held that being an accessory after the fact to a felony, in violation of Virginia law, is an offense relating to obstruction of justice. *Pugin*, 19 F.4th at 439. In so holding, the Fourth Circuit deferred to the Board's view that an offense relating to obstruction of justice does "not require an ongoing proceeding." *Id.* at 450.

This Court's review is warranted in both this case and *Pugin*. Although both cases are suitable vehicles for deciding whether an offense relating to obstruction of justice must involve a pending proceeding or investigation, this case and *Pugin* implicate distinct circuit conflicts on whether witness-tampering crimes and accessory-after-the-fact crimes, respectively, are offenses relating to obstruction of justice. Compare pp. 18-20, *supra*, with Gov't Br. at 15-17, *Pugin*, *supra* (No. 22-23). As a result, a decision in one of the two cases would not necessarily resolve all of the issues raised by the other case. For example, a decision in *Pugin* regarding an accessory-after-the-fact crime would not necessarily resolve whether a crime analogous to witness tampering under 18 U.S.C. 1512, which appears in Chapter 73 of the federal criminal code, is an offense relating to obstruction of justice. See Pet. at 29, *Pugin*, *supra*, No.

22-23 (arguing that "Congress understood obstruction of justice by reference to Chapter 73"); Pet. Br. at 12, *Pugin* v. *Garland*, 19 F.4th 437 (4th Cir. 2021) (No. 20-1363) (arguing that "the phrase 'obstruction of justice' is a term of art used narrowly in the INA to refer to the offenses enumerated in the title of the same name in the United States Code, 18 U.S.C. Chapter 73"). Conversely, a decision in this case would not necessarily resolve whether a crime analogous to accessory after the fact under 18 U.S.C. 3, which does not appear in Chapter 73, is an offense relating to obstruction of justice.

Disputes over the meaning of "an offense relating to obstruction of justice" in Section 1101(a)(43)(S) have frequently involved witness-tampering or accessory-after-the-fact crimes, and granting concurrent review in both this case and *Pugin* would allow this Court to address the meaning of that phrase in full view of the issues raised by both types of crimes. The government therefore requests that certiorari be granted in both this case and *Pugin* and that the cases be consolidated for argument.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-72779
Agency No. A014-690-577

FERNANDO CORDERO-GARCIA,
AKA FERNANDO CORDERO, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,
RESPONDENT

Argued and Submitted: Feb. 11, 2022
San Francisco, California
Filed: Aug. 15, 2022

On Petition for Review of an Order
of the Board of Immigration Appeals

OPINION

Before: ANDREW D. HURWITZ and LAWRENCE VANDYKE, Circuit Judges, and BARRY TED MOSKOWITZ,* District Judge.

Opinion by Judge MOSKOWITZ

Dissent by Judge VANDYKE

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* The Honorable Barry Ted Moskowitz, United States District Judge for the Southern District of California, sitting by designation.

MOSKOWITZ, District Judge:

This petition for review presents the following question: is dissuading or attempting to dissuade a witness from reporting a crime, in violation of California Penal Code ("CPC") § 136.1(b)(1), "an offense relating to obstruction of justice" under 8 U.S.C. § 1101(a)(43)(S), and thus an "aggravated felony" for purposes of the Immigration and Nationality Act ("INA")? Applying the categorical approach, we conclude that CPC § 136.1(b)(1) is not a categorical match to "an offense relating to obstruction of justice" under § 1101(a)(43)(S), which requires a nexus to an ongoing or pending proceeding or investigation, or to the federal witness tampering statute, 18 U.S.C. § 1512(b)(3), which requires the use of intimidation, threats or corrupt persuasion. Accordingly, we grant the petition for review and remand.

I.

Fernando Cordero-Garcia, a native and citizen of Mexico, was admitted to the United States as a lawful permanent resident on July 2, 1965. On April 24, 2009, Cordero-Garcia was convicted of two counts of CPC § 136.1(b)(1) and sentenced to two years of imprisonment. Cordero-Garcia was also convicted of one count of sexual battery without restraint in violation of CPC § 243.4(e)(1), and one count of sexual exploitation by a psychotherapist or drug abuse counselor in violation of California Business and Professions Code ("CBPC") § 729(a).

On November 29, 2011, the Department of Homeland Security ("DHS") served Cordero-Garcia with a Notice to Appear, alleging that he had "been convicted of an

aggravated felony as defined in [§ 1101(a)(43)(S)], an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year." On December 21, 2011, DHS served Cordero-Garcia with additional charges of deportability, alleging that he had also "been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct."

Cordero-Garcia moved to terminate his removal proceedings on the ground that he was not removable, or in the alternative, moved for cancellation of removal. On June 27, 2012, the immigration judge ("IJ") sustained the charges of removability against Cordero-Garcia, denied his application for cancellation of removal, and ordered him removed. The IJ held that Cordero-Garcia's CPC § 136.1(b)(1) convictions were offenses relating to obstruction of justice, and that his CPC § 243.4(e)(1) and CPC § 136.1(b)(1) convictions were crimes of moral turpitude. The IJ declined to reach the issue of whether Cordero-Garcia's CBPC § 729(a) conviction was also a crime of moral turpitude. On November 27, 2012, the Board of Immigration Appeals ("BIA") dismissed Cordero-Garcia's appeal. Upholding the IJ's determination that Cordero Garcia's CPC § 136.1(b)(1) convictions were offenses relating to obstruction of justice, the BIA held that "a crime may relate to obstruction of justice within the meaning of [§ 1101(a)(43)(S)] irrespective of the existence of an ongoing criminal investigation or proceeding."

On March 31, 2016, we decided *Valenzuela Gallardo v. Lynch* ("*Valenzuela Gallardo I*"), 818 F.3d 808 (9th Cir. 2016), which considered the BIA's new definition of

"an offense relating to obstruction of justice" under § 1101(a)(43)(S) as the "the affirmative and intentional attempt, with specific intent, to interfere with the process of justice." *Id.* at 811. We held that the BIA's new definition raised "grave constitutional concerns" because it used "an amorphous phrase—'process of justice'—without telling us what that phrase means." *Id.* at 822. We remanded to the BIA to either offer a new construction of § 101(a)(43)(S) or apply its prior interpretation from *In Re Espinoza-Gonzalez*, 22 I. & N. Dec. 889 (BIA 1999).[1] *Id.* at 824.

In light of *Valenzuela Gallardo I*, and after Cordero-Garcia filed a petition for review with this court, on July 10, 2017, we granted an unopposed motion to remand the case to the BIA. Meanwhile, on September 11, 2018, in *Matter of Valenzuela Gallardo*, the BIA had modified its definition of "an offense relating to obstruction of justice" to include:

> offenses covered by chapter 73 of the Federal criminal code or any other Federal or State offense that involves (1) an affirmative and intentional attempt (2) that is motivated by a specific intent (3) to interfere either in an investigation or proceeding that is ongoing, pending, or reasonably foreseeable by the defendant, or in another's punishment resulting from a completed proceeding.

27 I. & N. Dec. 449, 460 (BIA 2018).

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[1] "For over a decade, we upheld the interpretation that the BIA announced in *Espinoza-Gonzalez*—requiring a nexus to an ongoing proceeding—as a plausible construction." *Valenzuela Gallardo I*, 818 F.3d at 824.

On October 18, 2019, on remand, the BIA dismissed Cordero-Garcia's appeal. *Matter of Cordero-Garcia*, 27 I. & N. Dec. 652, 663 (BIA 2019). The BIA "conclude[d] that dissuading a witness in violation of [CPC § 136.1(b)(1)] is categorically an aggravated felony offense relating to obstruction of justice under [§ 1101(a)(43)(S)] pursuant to the criteria that [the BIA] outlined in [*Matter of Valenzuela Gallardo*]." *Id.* at 654-55. The BIA also determined that it was appropriate to apply its modified definition from *Matter of Valenzuela Gallardo* retroactively and concluded that Cordero-Garcia was removable and ineligible for cancellation of removal. *Id.* at 663. On November 1, 2019, Cordero-Garcia timely petitioned for review.

On August 6, 2020, we decided *Valenzuela Gallardo v. Barr* ("*Valenzuela Gallardo II*"), "hold[ing] that the BIA's new construction is inconsistent with the unambiguous meaning of the term 'offense relating to obstruction of justice' in [§ 1101(a)(43)(S)] as enacted by Congress and, therefore, is an unreasonable construction of the statute." 968 F.3d 1053, 1056 (9th Cir. 2020). We held that "'obstruction of justice' under § 1101(a)(43)(S) unambiguously requires a nexus to ongoing or pending proceedings." *Id.* at 1069.

II.

We have jurisdiction over Cordero-Garcia's petition for review pursuant to 8 U.S.C. § 1252(a)(2)(D). "We review constitutional and other questions of law de novo." *Bojnoordi v. Holder*, 757 F.3d 1075, 1077 (9th Cir. 2014) (internal quotation marks omitted). "Whether an offense is an aggravated felony for removal purposes is a question of law." *Chuen Piu Kwong v. Holder*, 671 F.3d 872, 876 (9th Cir. 2011) (brackets omitted). "We

do not defer to the BIA's interpretations of state law or provisions of the federal criminal code, and instead must review de novo whether the specific crime of conviction meets the INA's definition of an aggravated felony." *Salazar-Luviano v. Mukasey*, 551 F.3d 857, 860-61 (9th Cir. 2008) (internal citations and quotation marks omitted).

III.

"Under the INA, any noncitizen who is convicted of an aggravated felony suffers several consequences, such as becoming deportable, inadmissible, and ineligible for cancellation of removal." *Cortes-Maldonado v. Barr*, 978 F.3d 643, 647 (9th Cir. 2020) (footnotes omitted). Under § 1101(a)(43)(S), an "aggravated felony" includes "an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year." 8 U.S.C. § 1101(a)(43)(S).

"Courts employ the categorical approach to determine whether a state criminal conviction is an aggravated felony for the purposes of the INA." *Medina-Rodriguez v. Barr*, 979 F.3d 738, 744 (9th Cir. 2020). "The categorical approach prescribes a three-step process for determining whether an offense is an 'aggravated felony.'" *Ho Sang Yim v. Barr*, 972 F.3d 1069, 1077 (9th Cir. 2020). "First, we must identify the elements of the generic federal offense." *Id.* "Second, we must identify the elements of the specific crime of conviction." *Id.* "Third, we compare the statute of conviction to the generic federal offense to determine whether the specific crime of conviction meets the . . . definition of an aggravated felony." *Id.* (internal quo-

tation marks omitted). "Under the categorical approach, we ignore the actual facts of the particular prior conviction and instead compare the elements of the state statute of conviction to the federal generic crime to determine whether the conduct proscribed by the state statute is broader than the generic federal definition." *Cortes-Maldonado*, 978 F.3d at 647 (internal quotation marks omitted). "There is a categorical match only if the statute's elements are the same as, or narrower than, those of the generic offense." *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1147 (9th Cir. 2020) (citation and quotation marks omitted).

"A state offense qualifies as a generic offense—and therefore . . . an aggravated felony—only if the full range of conduct covered by the state statute falls within the meaning of the generic offense." *Id.* (brackets omitted). "[T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). "It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Id.* "There are two ways to show a realistic probability that a state statute exceeds the generic definition. First, there is not a categorical match if a state statute expressly defines a crime more broadly than the generic offense." *Lopez-Aguilar*, 948 F.3d at 1147 (internal quotation marks omitted). When "a state statute explicitly defines a crime more broadly than the generic definition, no legal imagination is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the

crime and a statute's overbreadth is evident from its text." *United States v. Rodriguez-Gamboa*, 972 F.3d 1148, 1152 (9th Cir. 2020) (citing *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc), *abrogated on other grounds by United States v. Stitt*, 139 S. Ct. 399 (2018)) (internal quotation marks omitted). "Second, a petitioner can show that a state statute exceeds the generic definition if the petitioner can point to at least one case in which the state courts applied the statute in a situation that does not fit under the generic definition." *Lopez-Aguilar*, 948 F.3d at 1147 (internal quotation marks omitted); *Duenas-Alvarez*, 549 U.S. at 193 ("To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.").

IV.

Applying the categorical approach here,[2] we find that CPC § 136.1(b)(1) is not a categorical match to "an offense relating to obstruction of justice" under § 1101(a)(43)(S), because the California statute is missing the element of a nexus to an ongoing or pending proceeding or investigation. Thus, it is not an "aggravated felony" for purposes of the INA.

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[2] The parties do not argue that CPC § 136.1(b)(1) is divisible or that the modified categorical approach is applicable here. *See Lopez-Aguilar*, 948 F.3d at 1147 ("If the statute of conviction is broader than the generic offense, we next determine whether the statute is divisible or indivisible.").

We do not write on a clean slate. In *Valenzuela Gallardo II* we held that "the statute is unambiguous in requiring an ongoing or pending criminal proceeding, and the Board's most recent interpretation [in *Matter of Valenzuela Gallardo*] is at odds with that unambiguous meaning."[3] 968 F.3d at 1062. In short, "an offense relating to obstruction of justice" under § 1101(a)(43)(S)

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[3] This holding was expressly reiterated at least four more times in *Valenzuela Gallardo II*:

> The precise question at issue in this case is whether an offense relating to obstruction of justice under § 1101(a)(43)(S) requires a nexus to an ongoing or pending proceeding or investigation. We conclude that Congress has clearly answered this question in the affirmative.

968 F.3d at 1062.

> Because § 1101(a)(43)(S) unambiguously does not extend to cover intentional interference with "reasonably foreseeable" proceedings or investigations, we conclude our analysis here and do not proceed to *Chevron* Step Two to determine whether the agency's interpretation is a reasonable choice within a gap left open by Congress.

Id. at 1068.

> We would reach the same conclusion even if we were not applying the *Chevron* framework: In 1996, when Congress enacted § 1101(a)(43)(S) into law, an offense relating to obstruction of justice unambiguously required a nexus to an ongoing or pending proceeding or investigation.

Id.

> Because "obstruction of justice" under § 1101(a)(43)(S) unambiguously requires a nexus to ongoing or pending proceedings, and California Penal Code § 32 does not, [petitioner's] state criminal conviction is not a categorical match with the aggravated felony offense charged in his Notice to Appear.

Id. at 1069.

requires the element of a nexus to an ongoing or pending proceeding or investigation.

Both parties agree that CPC § 136.1(b)(1) does not require a nexus to an ongoing or pending proceeding or investigation. We concur. In relevant part, the statute states:

> [E]very person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison: (1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge.

The text does not require a nexus to an ongoing or pending proceeding or investigation. Nor have California courts read such a requirement into the statute. *See People v. Cook*, 59 Cal. App. 5th 586, 590 (2021) ("[T]o prove a violation of [CPC § 136.1(b)(1)], the prosecution must show (1) the defendant has attempted to prevent or dissuade a person (2) who is a victim or witness to a crime (3) from making any report of their victimization to any peace officer or other designated officials.") (internal quotation marks omitted). Moreover, the California courts' decisions involving CPC § 136.1(b)(1) demonstrate that convictions under the statute do not require the existence of ongoing or pending proceedings or investigations. *See, e.g.*, *Cook*, 59 Cal. App. 5th at 588-89 (defendant attacked a family member at home, and while another family member was calling 911 to report the attack, defendant broke the phone); *People v.*

Galvez, 195 Cal. App. 4th 1253, 1257-58 (2011) (while a witness to an assault outside of a restaurant was calling 911 on his cellphone, the defendant assaulted the witness causing the cell phone to fall to the ground); *People v. McElroy*, 126 Cal. App. 4th 874, 881 (2005) ("When [defendant's partner] dialed 911, she specifically told defendant she was calling the police. Defendant responded by taking the telephone away and hanging it up, thereby preventing her from contacting the police."). Indeed, California courts have characterized CPC § 136.1(b)(1) as designed to address conduct that occurs *prior to* the initiation of a proceeding or investigation. *See People v. Fernandez*, 106 Cal. App. 4th 943, 948-50 (2003) ("[CPC § 136.1(b)(1)] is not a catch-all provision designed to punish efforts to improperly influence a witness" but rather "punishes a defendant's pre-arrest efforts to prevent a crime from being reported to the authorities. Under the current statutory scheme, such conduct is not the equivalent of an effort to prevent a witness from giving testimony after a criminal proceeding has been commenced.").

Because CPC § 136.1(b)(1)'s lack of the element of a nexus to an ongoing or pending proceeding or investigation is evident from its text and practical application, there is a realistic probability that the statute covers offenses that fall outside the definition of "an offense relating to obstruction of justice" under § 1101(a)(43)(S). CPC § 136.1(b)(1) is therefore not a categorical match to the generic definition of obstruction of justice. *See Valenzuela Gallardo II*, 968 F.3d at 1069 (finding that California's accessory to a felon offense, CPC § 32, "is not a categorical match with obstruction of justice under

§ 1101(a)(43)(S) because California's statute encompasses interference with proceedings or investigations that are not pending or ongoing").

V.

In *Valenzuela Gallardo II*, we expressly took issue with the second prong of the BIA's definition of "an offense relating to obstruction of justice" under § 1101(a)(43)(S), specifically its language regarding "reasonably foreseeable" investigations or proceedings. *See* 968 F.3d at 1068 (holding that "§ 1101(a)(43)(S) unambiguously does not extend to cover intentional interference with reasonably foreseeable proceedings or investigations") (internal quotation marks omitted). The government now for the first time argues that *Valenzuela Gallardo II* left untouched the first prong of the BIA's definition—"offenses covered by chapter 73 of the Federal criminal code."[4] Under the government's view, an offense "covered by chapter 73" qualifies as "an offense relating to obstruction of justice" under § 1101(a)(43)(S), with or without a nexus to an ongoing or pending proceeding or investigation. The government then argues that CPC § 136.1(b)(1) is a categorical match to 18 U.S.C. § 1512—tampering with a witness, victim, or an informant—a Chapter 73 offense that does not require a nexus to an ongoing or pending proceeding or investigation. *See* 18 U.S.C. § 1512(f)(1) ("an official proceeding need not be pending or about to be instituted at the time of the offense").

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[4] The BIA did not find that CPC § 136.1(b)(1) was an "offense[] covered by chapter 73."

The government's new position, however, is flatly inconsistent with *Valenzuela Gallardo II*, in which we stated:

> The precise question at issue in this case is whether an offense relating to obstruction of justice under § 1101(a)(43)(S) requires a nexus to an ongoing or pending proceeding or investigation. We conclude that Congress has clearly answered this question in the affirmative.

968 F.3d at 1062. We noted that § 1101(a)(43)(S) "does not expressly define 'an offense relating to obstruction of justice.'"[5] *Id.* at 1063; *see also Trung Thanh Hoang v. Holder*, 641 F.3d 1157, 1160 (9th Cir. 2011) ("Though the United States criminal code includes a chapter entitled 'Obstruction of Justice,' 18 U.S.C. §§ 1501-1521, it does not clearly set forth the elements of a generic federal obstruction of justice crime; nor does § 1101(a)(43)(S) provide a generic definition.") (footnote omitted). And, we observed that the ordinary meaning of the term "obstruction of justice" indicated that "an offense relating to obstruction of justice" under § 1101(a)(43)(S) requires a nexus to an ongoing or pending proceeding or investigation. *Valenzuela Gallardo II*, 968 F.3d at 1063.

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[5] The term "aggravated felony" in § 1101(a)(43) encompasses twenty-one subsections identifying qualifying offenses. Fourteen of those subsections explicitly cross-reference other statutes to define the relevant qualifying offenses. *See* 8 U.S.C. § 1101(a)(43)(B), (C), (D), (E), (F), (H), (I), (J), (K), (L), (M), (N), (O), and (P). In contrast, § 1101(a)(43)(S) does not contain such a cross-reference to Chapter 73 of the federal criminal code for the term "obstruction of justice." *See Victoria-Faustino v. Sessions*, 865 F.3d 869, 874 (7th Cir. 2017) (as amended) ("Unlike other crimes enumerated as aggravated felonies, [§ 1101(a)(43)(S)] does not equate a crime relating to the obstruction of justice to a particular federal crime.").

Moreover, we noted that when the Antiterrorism and Effective Death Penalty Act of 1996 was enacted, "the contemporaneous understanding of 'obstruction of justice' required a nexus to an *extant* investigation or proceeding." *Id.* We also found that the relevant statutory context, specifically Chapter 73 of the federal criminal code, supported our holding. *Id.* at 1064. We explained that "[o]f the substantive provisions in Chapter 73 that existed when § 1101(a)(43)(S) was enacted, almost all of them required a nexus to an ongoing or pending proceeding or investigation." *Id.* "Therefore, the norm in Chapter 73 is that an offense relating to obstruction of justice requires a nexus to an ongoing or pending proceeding or investigation." *Id.* at 1065.

Indeed, we specifically discussed 18 U.S.C. § 1512, explaining that

> Congress's explicit instruction that § 1512 reach proceedings that are not pending at the time of commission of the act only underscores that the common understanding at the time § 1101(a)(43)(S) was enacted into law was that an obstruction offense referred only to offenses committed while proceedings were ongoing or pending. If that were not the case, it would not have been necessary for Congress to make clear that § 1512 operates differently than the other provisions in Chapter 73. Thus, contrary to the BIA's conclusion, § 1512 is the exception that proves the rule: "an offense relating to obstruction of justice" requires a nexus to an ongoing or pending proceeding.

Id. at 1065-66.

We recognize that a circuit split has emerged regarding whether "an offense relating to obstruction of justice" under § 1101(a)(43)(S) unambiguously requires a nexus to an ongoing or pending proceeding or investigation. *Compare Valenzuela Gallardo II*, 968 F.3d at 1062 ("the statute is unambiguous in requiring an ongoing or pending criminal proceeding"), *with Pugin v. Garland*, 19 F.4th 437, 449 (4th Cir. 2021) ("Considering federal and state laws, the Model Penal Code, and dictionary definitions, it is at least ambiguous as to whether the phrase 'relating to obstruction of justice' requires the obstruction of an ongoing proceeding."), *and Silva v. Garland*, 27 F.4th 95, 108 (1st Cir. 2022) ("That the vast majority of jurisdictions with obstruction of justice offenses did not limit that concept to only offenses with a nexus to a pending or ongoing investigation or judicial proceeding further confirms our reading of the generic federal definition."). In our Circuit, however, *Valenzuela Gallardo II* is controlling precedent that we are bound to apply. *See United States v. Shelby*, 939 F.3d 975, 978 (9th Cir. 2019). And *Valenzuela Gallardo II* mandates the conclusion that 18 U.S.C. § 1512 cannot serve as the generic obstruction of justice definition because it does not contain the required element of a nexus to an ongoing or pending proceeding or investigation. Accordingly, it is not an appropriate comparator to CPC § 136.1(b)(1) for purposes of a categorical approach analysis.

VI.

The government's argument—that because "offenses covered by chapter 73 of the Federal criminal code" are "offense[s] related to the obstruction of justice" under

§ 1101(a)(43)(S), CPC § 136.1(b)(1) qualifies as a categorical match to a chapter 73 offense—also fails. The government concedes that the BIA did not analyze whether Cordero-Garcia's CPC § 136.1(b)(1) conviction was a categorical match with 18 U.S.C. § 1512, the federal analogue identified by the government, so we cannot deny the petition on these grounds. *See Santiago-Rodriguez v. Holder*, 657 F.3d 820, 829 (9th Cir. 2011) ("In reviewing the decision of the BIA, we consider only the grounds relied upon by that agency.") (quotation marks and citation omitted); *see also Andia v. Ashcroft*, 359 F.3d 1181, 1184 (9th Cir. 2004) (citing *INS v. Ventura*, 537 U.S. 12, 16-17 (2002) ("If we conclude that the BIA's decision cannot be sustained upon its reasoning, we must remand to allow the agency to decide any issues remaining in the case."). In any event, CPC § 136.1(b)(1) is not a categorical match with 18 U.S.C. § 1512.

The elements of § 136.1(b)(1) are "(1) the defendant has attempted to prevent or dissuade a person (2) who is a victim or witness to a crime (3) from making any report of his or her victimization to any peace officer or other designated officials." *People v. Upsher*, 155 Cal. App. 4th 1311, 1320 (2007). "[S]ection 136.1 is a specific intent crime." *People v. Navarro*, 212 Cal. App. 4th 1336, 1347 (2013).

In comparison, the elements of 18 U.S.C. § 1512(b)(3) are that the defendant (1) "knowingly uses intimidation, threatens, or corruptly persuades another person or attempts to do so, or engages in misleading conduct toward another person"; (2) "with the intent to hinder, delay, or prevent the communication to a law enforcement

officer or judge of the United States"; (3) "of information relating to the commission or possible commission of a Federal offense." *Id.*

CPC § 136.1(b)(1) is broader than 18 U.S.C. § 1512(b)(3) because the former lacks the requirement that an individual "uses intimidation, threatens, or corruptly persuades another person," or "engages in misleading conduct toward another person." While CPC § 136.1(a) and (c) expressly require proof of malice, CPC § 136.1(b)(1) does not.[6] *See Cook*, 59 Cal App. 5th at 590 ("[CPC § 136.1(b)(1)] does not require that the defendant act knowingly and maliciously.") (internal quotation marks omitted). The California Court of Appeal has explained the omission of a malice requirement from CPC § 136.1(b)(1) as follows:

> The Legislature could have reasonably concluded that a person who prevents or attempts to prevent a victim or witness from *attending or testifying at a trial or other proceeding* commits a crime only if the person did so with malice. For instance, the Legislature may have been concerned about potentially criminalizing the conduct of an employer who intentionally prevented an employee from testifying at a proceeding if the employer was motivated by the desire to keep the employee at work rather than by a

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[6] CPC § 136.1(a) punishes any person who, "knowingly and maliciously prevents or dissuades" or "attempts to prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law." Cal. Penal Code §§ 136.1(a)(1)-(2). CPC § 136.1(c) punishes "[e]very person doing any of the acts described in subdivision (a) or (b) knowingly and maliciously under [certain aggravating circumstances]." *Id.* §§ 136.1(c)(1)-(4).

> malicious desire to thwart the administration of justice or to vex or annoy the employee. As a result, the Legislature may have wished to limit section 136.1, subdivision (a) offenses to those involving malice. No such concern arises with regard to a section 136.1, subdivision (b) offense since, even without a malice element, a subdivision (b) offense requires the perpetrator to intend to prevent a crime from even being reported by a victim or witness. The Legislature could have reasonably concluded that the limited scope of subdivision (b) did not need to be further narrowed by a malice requirement, particularly in light of the importance of encouraging reports to law enforcement.
>
> . . . Furthermore, the Legislature could have reasonably concluded that it would be reasonable for a family member to try to protect a victim or witness from the trauma of attending a proceeding, but unreasonable for a family member to try to prevent a victim or witness from reporting a crime.

People v. Brackins, 37 Cal. App. 5th 56, 67 (2019).

Likewise, with respect to the scope of conduct covered by the malice requirements in CPC § 136.1(a) and (c), the California Court of Appeal has explained:

> [T]he model statute, on which California's statute was based, was designed to apply to persons who attempt to dissuade witnesses from testifying, other than persons such as family members and individuals who make offhand comments about not becoming involved. The statute provided that the prosecution could show malice in either of two ways: proving the traditional meaning of malice (to vex, annoy,

> harm, or injure) or proving the meaning of malice that is unique to the statute (to thwart or interfere in any manner with the orderly administration of justice). By including the latter definition of malice, the [California] Legislature envisioned a relatively broad application of the term. The Assembly Committee on Criminal Justice bill analysis noted: "This new misdemeanor may make criminal attempts to settle misdemeanor violations, certain traffic accidents, etc., among the parties without reporting them to the police. Likewise, a person arrested by a civilian (i.e., a shopkeeper) may face criminal charges by trying to talk the shopkeeper into not calling the police."

People v. Wahidi, 222 Cal. App. 4th 802, 809 (2013) (footnote omitted).

Because CPC § 136.1(b)(1) only requires the defendant specifically intend to "prevent or dissuade a person" from reporting a crime, without any requirement of malice, it is broader than 18 U.S.C. § 1512(b)(3), which requires use of intimidation, threats, misleading conduct, or corrupt persuasion. "Corrupt persuasion" is distinct from "innocent persuasion." *See United States v. Doss*, 630 F.3d 1181, 1190 (9th Cir. 2011) (as amended) (explaining that "[the defendant's conduct], without more, was insufficient to establish 'corrupt' as opposed to innocent persuasion"); *see also Arthur Andersen LLP v. United States*, 544 U.S. 696, 705 (2005) ("'Corrupt' and 'corruptly' are normally associated with wrongful, immoral, depraved, or evil."); *United States v. Farrell*, 126 F.3d 484, 489 (3d Cir. 1997) ("We read the inclusion of 'corruptly' in § 1512(b) as necessarily implying that an

individual can 'persuade' another not to disclose information to a law enforcement official with the intent of hindering an investigation without violating the statute, i.e., without doing so 'corruptly.'"); *United States v. Weiss*, 630 F.3d 1263, 1273 (10th Cir. 2010) ("The 'corruptly persuades' element of the witness tampering statute requires the government to prove a defendant's action was done voluntarily and intentionally to bring about false or misleading testimony or to prevent testimony with the hope or expectation of some benefit to the defendant or another person.") (internal quotation marks omitted); *United States v. Edlind*, 887 F.3d 166, 173 (4th Cir. 2018) ("To convict [the defendant] under § 1512, the Government had to prove not only that she used persuasion toward [another person], but that the persuasion was corrupt, because the word 'corruptly' is what serves to separate criminal and innocent acts of influence.") (internal quotation marks omitted).

Because CPC § 136.1(b)(1)'s overbreadth is evident from its text, we need not identify a case in which the state courts did in fact apply the statute in a non-generic manner. *See United States v. Taylor*, 142 S. Ct. 2015, 2025 (2022) (explaining that "in *Duenas-Alvarez* the elements of the relevant state and federal offenses clearly overlapped," and finding it unnecessary to determine whether state courts applied a statute in a special nongeneric manner where "there [was] no overlap to begin with"); *Lopez-Aguilar*, 948 F.3d at 1147. Nonetheless, California caselaw demonstrates a realistic probability that CPC § 136.1(b)(1) would be applied to conduct that falls outside the definition of 18 U.S.C. § 1512(b)(3). In *People v. Wahidi*, the defendant was convicted under CPC § 136.1(a)—dissuading a witness from giving testimony with malice. 222 Cal. App. 4th

at 805. The defendant was involved in a physical altercation with other individuals in a parking lot, during which the defendant punched one of the individuals and broke another individual's car windows with a baseball bat. *Id.* at 804. The day before the preliminary hearing related to the altercation, the defendant approached one of the individuals at his mosque, apologized, and said: "We're both Muslims. That if we could just settle this outside the court in a more Muslim manner family to family, have our families meet and settle this out of court and not take this to court." *Id.* at 804-05 (brackets omitted). "[The individual] understood [the defendant] wanted the case to be resolved informally and did not want [the individual] to testify at the preliminary hearing. [The individual] responded sympathetically to [the defendant] and accepted his apology." *Id.* at 805. "[The defendant] never demanded that [the individual] refrain from testifying or threatened [the individual] with harm if he were to come to court." *Id.* "The [trial] court . . . found [the defendant] had attempted to dissuade [the individual] from testifying, but not by using force or threat of force, and declared the offense a misdemeanor." *Id.* The California Court of Appeal affirmed the trial court's judgment, explaining that:

> Section 136 defines "malice" for purposes of section 136.1: "'Malice' means an intent to vex, annoy, harm, or injure in any way another person, or to thwart or interfere in any manner with the orderly administration of justice." There is no substantial evidence that [the defendant] intended to "vex, annoy, harm, or injure" [the individual] when [the defendant] approached [the individual] in the mosque.

> But the evidence does show that [the defendant] intended to "thwart or interfere in any manner with the orderly administration of justice" by convincing [the individual] not to testify at the preliminary hearing the next day. Under the definition of malice in section 136, [the defendant] maliciously attempted to dissuade [the individual] from testifying.

Id. at 807. Plainly, the defendant's "malicious" conduct in *Wahidi* was not the kind of intimidation, threat, corrupt persuasion, or misleading conduct that would give rise to liability under 18 U.S.C. § 1512(b). And because CPC § 136.1(b) *lacks* a malice requirement and is broader than CPC § 136.1(a), *Wahidi* demonstrates that California would apply CPC § 136.1(b) to conduct outside the definition of U.S.C. § 1512(b).[7]

VII.

For the reasons above, we hold that Cordero-Garcia's conviction under CPC § 136.1(b)(1) is not "an offense relating to obstruction of justice" under 8 U.S.C. § 1101(a)(43)(S), and that he is not removable on that basis. We grant the petition for review and remand to the BIA for further proceedings consistent with this opinion.

PETITION GRANTED and **REMANDED**.

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[7] Because we conclude that CPC § 136.1(b)(1) is not a categorical match to "an offense relating to obstruction of justice" under § 1101(a)(43)(S), we do not proceed with a *Montgomery Ward & Co. v. F.T.C.*, 691 F.2d 1322 (9th Cir. 1982) retroactivity analysis.

VANDYKE, Circuit Judge, dissenting.

I haven't been shy in my criticism of our court's "abysmal and indefensible immigration precedents,"[1] and this case well illustrates why. The majority emphasizes that in reaching its result, "[w]e do not write on a clean slate." Quite true. Since 2011, our court has been whipsawing the Board of Immigration Appeals ("BIA"), doing everything in our power (and much not) to upset the BIA's consistent and reasonable interpretation of what constitutes "an offense related to obstruction of justice." To understand just how dirty our court has played to prevent the deportation of immigrants who have willingly interfered with our justice system requires another depressing walk down memory lane, where successive panels of our court—often over a dissent—have misrepresented the BIA, misrepresented the law, and even completely reversed key positions taken in our own decisions issued only a few years earlier. All for only one discernable reason: to entrench an indefensible legal conclusion that was clearly wrong when first made over a decade ago and, despite our wrongheaded efforts to defend it at every turn, has made us an embarrassing outlier with our sister circuits.

While I appreciate, as the majority does, that we are bound by precedent, that does not mean that we are bound to perpetuate the irrationality of our immigration

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[1] *Reyes v. Garland*, 11 F.4th 985, 998 (9th Cir. 2021) (VanDyke, J., dissenting); *see also Molina v. Garland*, 37 F.4th 626, 641 (9th Cir. 2022) (VanDyke, J., dissenting); *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 696 (9th Cir. 2021) (VanDyke, J., dissenting); *Sanchez Rosales v. Barr*, 980 F.3d 716, 721-23 (9th Cir. 2020) (VanDyke, J., concurring dubitante).

jurisprudence by projecting it headlong into the future. I must regrettably dissent.

* * *

One more thing before we start our journey. I have been critical of what I see as results-oriented judging by our court, particularly (although not exclusively) in immigration cases. I want to be clear: generally, it is not the result in any individual case that has led me to that conclusion. Only God knows whether erroneous judging in any individual case is a result of bad motives, mere human foibles, or something else (or a combination, I suppose). And that is no doubt true of *this* case.

But there is also the jurisprudential equivalent of the law of large numbers. While any single erroneous decision can usually be explained as a mere well-intentioned mistake, the ongoing and indefensible jurisprudential trainwreck that is our court's immigration jurisprudence writ large—which I've chronicled not only below, but also sadly in a now long list of decisions—doesn't just happen by accident. To paraphrase the Bard, something is rotten in our court's immigration jurisprudence, and it's not by chance.

My colleagues in the majority should be embarrassed. Perhaps not for their wrong decision today—to err is human, after all, even for those in robes. But they should be troubled by our court's jaw-dropping, always-increasing, epic collection of immigration gaffes. The fact that they are not, but rather charge on heedlessly in this case, is itself perhaps a clue as to why the trainwreck continues.

I. DISCUSSION

A. Factual Background

Before I recount the history of how we got to this point in our jurisprudence, it is important to know the facts of this case. Not because the facts are relevant to application of the "categorical approach"—they aren't, a point that my colleague felt compelled to reiterate during oral argument, explaining that facts are "nice" but "we don't care what the facts of [Cordero-Garcia's] crime were . . . ." But the facts of this case are important nonetheless because they show how far we've strayed from Congress's purpose in defining deportable crimes. *See* H.R. Rep. No. 104-22, at 6-7 (1995) (explaining Congress's purpose in defining "aggravated felony" was to "strengthen the government's ability to efficiently deport aliens who are convicted of serious crimes" to address the fact that "many aliens who commit[] serious crimes [a]re released into American society after they [a]re released from incarceration, where they then continue to pose a threat to those around them"). The majority largely ignores the facts, and you can't blame them. The Department of Justice attorney arguing this case described Cordero-Garcia's crimes as "some of the most horrendous . . . in all of [her] time in the government." It's difficult to hear the depravity in detail, but easy to see why Congress acted to prevent criminal aliens like Cordero-Garcia from being released back into American society.

* * *

Cordero-Garcia, a native and citizen of Mexico, worked as a staff psychologist for the County of Santa

Barbara Alcohol, Drug and Mental Health Service Department since 1990. Following a report of sexual abuse by a female patient, police began investigating him in September 2007. As a result of this investigation, Cordero-Garcia "was arrested for rape by threat of use of public authority" and released on bail in November 2007. Prosecutors alleged that for years Cordero-Garcia abused his position by sexually assaulting, raping, and sodomizing his patients. While Cordero-Garcia denied the accusations against him, he admitted to having continuous, repeated sexual relationships with his patients. Cordero-Garcia was ultimately convicted of: (1) sexual battery without restraint under California Penal Code ("CPC") § 243.4(e)(1); (2) sexual exploitation by a psychotherapist under CPC § 729(a); and (3) two counts of dissuading a victim or witness from reporting a crime under CPC § 136.1(b)(1).

The first of Cordero-Garcia's patients to come forward recalled being "sexually abused . . . for more than three years." She claimed that Cordero-Garcia repeatedly raped and sodomized her, threatening her with time "in jail or a mental hospital" if she refused. She later recounted for authorities that Cordero-Garcia filmed the assaults and would sometimes use a "dildo" to penetrate her vaginally and anally. While executing a search warrant, police officers found video of Cordero-Garcia having sex with the patient and also located a "dildo" with "mixed DNA on it" matching that of Cordero-Garcia and the patient.

Numerous other patients explained how Cordero-Garcia victimized them, including one he was supposed to be treating for "depression and suicidal tendencies." She described that Cordero-Garcia would hug and kiss

her and touch her breasts during therapy sessions. Another patient said Cordero-Garcia threatened to take her children away, warning that "he could do anything and get away with it because judges respected him." She described that over the course of numerous sessions, he "fondled and photographed her breasts, exposed his erect penis," forced his hand down her pants and digitally penetrated her, and finally, "shoved [her] face down on a desk and raped her."

Another patient said Cordero-Garcia threatened to put her schizophrenic brother "in a mental hospital where he would be tied down and not fed," so she "submitted" to oral, vaginal, and anal sex with Cordero-Garcia. The patient recalled being "victimized . . . for years" as Cordero-Garcia "raped her mind and body." She described Cordero-Garcia as a "monster" and explained that "he would touch his penis during most of their sessions and masturbate . . . while she was forced to watch. He would always talk about 'how hard' he was and reminded her of the power he had over her." While released on bail, Cordero-Garcia "begged" this woman "not to testify against him." He confessed to her that the accusations against him "were true," admitting that there were even "more girls."

Ultimately, seven women, six of whom were patients of Cordero-Garcia, came forward. In a civil suit against Cordero-Garcia and the County of Santa Barbara, these women accused Cordero-Garcia of being "a sexual predator" and "intentionally seeking out socio-economic disadvantaged female mental health patients whom he could systematically re-victimize." The county agreed to confidential monetary settlements with each of the women "as a result of the serious mental

and physical harm" inflicted on them by Cordero-Garcia.

Given the facts in cases like this, one might wonder why our court has worked so hard to prevent the deportation of individuals like Cordero-Garcia, even to the point, as the majority acknowledges, of creating a lopsided circuit-split. Of course, much of the damage that I recount below is now our court's binding precedent, which can be fixed only by our court en banc or the Supreme Court. But precedent does not mandate today's result. If it did, there would be no need for the majority to publish its lengthy decision. Instead, the majority today drives the train even farther off the tracks. It did not need to do so. And to understand why it should have tried to avoid doing so, we start at the beginning.

B. Legal Background

Our tale starts on a less depressing note, with *In re Batista-Hernandez*, 21 I. & N. Dec. 955 (BIA 1997). The respondent Juan Batista-Hernandez was convicted of being an accessory after the fact in violation of 18 U.S.C. § 3. *Id.* at 956.[2] Following his conviction, the Immigration and Naturalization Service ("INS") charged that he was deportable for committing "an offense relating to obstruction of justice" under 8 U.S.C. § 1101(a)(43)(S). *Id.* at 961; *see also* 8 U.S.C. §§ 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any

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[2] Section 3 provided that "[w]hoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact." 18 U.S.C. § 3.

time after admission is deportable."); 1101(a)(43)(S) (defining "aggravated felony" to include "an offense relating to obstruction of justice . . . for which the term of imprisonment is at least one year"). An en banc panel of the BIA considered whether Batista-Hernandez's accessory after the fact conviction was an "obstruction of justice" under the statute. *Batista-Hernandez*, 21 I. & N. Dec. at 961. The BIA concluded that it "clearly" was. *Id.* Specifically, "the wording of . . . § 3 itself indicates its relation to obstruction of justice, for the statute criminalizes actions knowingly taken to 'hinder or prevent (another's) apprehension, trial or punishment.'" *Id.*

Two years later, in *In Re Espinoza-Gonzalez*, 22 I. & N. Dec. 889 (BIA 1999), the BIA again addressed the definition of "obstruction of justice." This time, the respondent Rafael Espinoza-Gonzalez was convicted of misprision of a felony in violation of 18 U.S.C. § 4. *Id.* at 890.[3] The BIA explained that "[t]he United States Code does not define the term 'obstruction of justice' or 'obstructing justice.' Instead, [C]hapter 73 of title 18[, specifically, 18 U.S.C. §§ 1501-1518,] lists a series of offenses collectively entitled 'Obstruction of Justice.'" *Id.* at 891. And "the obstruction of justice offenses listed in [Chapter 73] have as an element interference with the proceedings of a tribunal or require an intent to harm or retaliate against others who cooperate in the process of justice or might otherwise so cooperate."

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[3] Section 4 provided 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 . . . , shall be fined . . . or imprisoned . . . , or both." 18 U.S.C. § 4.

Id. at 892. "[A]nd although misprision of a felony bears some resemblance to these offenses, it lacks *the critical element of an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice*." *Id.* at 894 (emphasis added). Thus, the BIA concluded that Espinoza-Gonzalez's misprision of a felony conviction was not an "obstruction of justice." *Id.* at 897.

In distinguishing *Batista-Hernandez*, the BIA explained that unlike the crime of accessory after the fact, which "requires an affirmative action knowingly undertaken 'in order to hinder or prevent (another's) apprehension, trial or punishment,'" *id.* at 894 (quoting 18 U.S.C. § 3), the crime of misprision of a felony does not require a "specific purpose for which the concealment must be undertaken," *id.* In other words, "[t]he *specific purpose of hindering the process of justice* brings the federal 'accessory after the fact' crime within the general ambit of offenses that fall under the 'obstruction of justice' designation." *Id.* at 894-95 (emphasis added). But *nowhere* did the BIA suggest—explicitly or implicitly—that "an ongoing proceeding or investigation" was a requirement.

Nearly a decade later in *Renteria-Morales v. Mukasey*, 551 F.3d 1076 (9th Cir. 2008), our court considered "whether a conviction for failure to appear in court in violation of 18 U.S.C. § 3146 meets the definition of an aggravated felony in . . . § 1101(a)(43)(S)." *Id.* at 1079.[4] Because "§ 1101(a)(43)(S) does not clearly set

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[4] Section 3146 provided that "[w]hoever, having been released under this chapter knowingly (1) fails to appear before a court as required by the conditions of release; or (2) fails to surrender for

forth the elements of the generic federal crime," we looked to *Espinoza-Gonzalez* as "binding agency precedent . . . interpret[ing] the elements of a generic obstruction-of-justice offense under § 1101(a)(43)(S)." *Id.* at 1086 (cleaned up). We observed that, in *Espinoza-Gonzalez*,

> the BIA articulated both an actus reus and mens rea element of the generic definition of such crimes for purposes of § 1101(a)(43)(S). First, the BIA held that obstruction of justice crimes include "either active interference with proceedings of a tribunal or investigation, or action or threat of action against those who would cooperate in the process of justice." Second, the BIA held that such crimes include an intent element, defined as a "specific intent to interfere with the process of justice."

Id. (cleaned up) (quoting *Espinoza-Gonzalez*, 22 I. & N. Dec. at 892-93). We determined that the BIA had "acted reasonably in deriving the definition of 'obstruction of justice' for purposes of § 1101(a)(43)(S) from the body of federal statutes imposing criminal penalties on obstruction-of-justice offenses." *Id.* We concluded that § 3146 "clearly includes the requisite actus reus . . . [and] mens rea," *id.* at 1087, and thus, "a conviction under § 3146 is categorically 'an offense relating to obstruction of justice' under § 1101(a)(43)(S)," *id.* at 1089.

The following year, in *In re Trung Thanh Hoang* ("*Hoang I*"), No. A074 465 074, 2009 WL 2981785 (BIA

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service of sentence pursuant to a court order; shall be punished . . . ." 18 U.S.C. § 3146.

Aug. 31, 2009), the BIA considered whether a Washington state conviction "for the offense of rendering criminal assistance . . . qualified as an aggravated felony pursuant to [§1101(a)(43)(S)]." *Id.* at *1.[5] The respondent Trung Thanh Hoang argued that *Batista-Hernandez* had been overruled by *Espinoza-Gonzalez* "and that his offense [did] not . . . correspond to the definition provided in *Espinoza-Gonzalez*." *Id.* The BIA disagreed. In *Espinoza-Gonzalez*, the BIA had "concluded . . . that obstruction-of-justice crimes include (1) 'either active interference with proceedings of a tribunal or investigation, or action or threat of action against those who would cooperate in the process of justice,' and (2) an intent element defined as a 'specific intent to interfere with the process of justice.'" *Id.* at *2 (quoting *Espinoza-Gonzalez*, 22 I. & N. Dec. at 893).[6] *Espinoza-Gonzalez*, the BIA explained, "*reaffirmed rather than overruled* our holding in . . . *Batista-Hernandez*, . . . that a conviction . . . for being an accessory after the fact constitutes an obstruction-of-justice offense." *Id.* (emphasis added) (citing *Espinoza-Gonzalez*, 22 I. & N. Dec. at 894-95). The BIA determined that the elements of the federal crime of accessory after the fact

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[5] The relevant Washington state statute provided that a "person is guilty of rendering criminal assistance in the second degree if he or she renders criminal assistance to a person who has committed or is being sought for a class B or class C felony or an equivalent juvenile offense or to someone being sought for violation of parole, probation, or community supervision." Wash. Rev. Code § 9A.76.080(1).

[6] Notably, the BIA cited *Renteria-Morales*, agreeing with our court's summary therein of the BIA's "articulation of both an actus reus and mens rea element of the generic definition of obstruction-of-justice crimes." *Hoang I*, 2009 WL 2981785, at *2 (citing *Renteria-Morales*, 551 F.3d at 1086).

were "*substantially the same*" as those for the state crime of rendering criminal assistance. *Id.* (emphasis added). As a result, the BIA concluded that the respondent's conviction of rendering criminal assistance was "an obstruction-of-justice" because it, like the federal crime of accessory after the fact, "require[d] that the defendant (1) have knowledge that the principal has committed an offense; and (2) take actions to assist the principal with the intent that the principal avoid arrest, trial, or punishment." *Id.*

Hoang petitioned our court for review of the BIA's decision in his case. And that's when the train first jumped the tracks.

In *Trung Thanh Hoang v. Holder* ("*Hoang II*"), 641 F.3d 1157 (9th Cir. 2011), our court considered, as the BIA had below, whether a state "conviction for rendering criminal assistance is a crime related to obstruction of justice." *Id.* at 1158. The panel majority noted, as we had in *Renteria-Morales*, that Chapter 73 "does not clearly set forth the elements of a generic federal obstruction of justice crime; nor does § 1101(a)(43)(S) provide a generic definition." *Id.* at 1160 (citing *Renteria-Morales*, 551 F.3d at 1086). "Consequently," the majority explained, "we must determine whether [the BIA] has defined the term. We defer to the BIA's reasonable interpretations of ambiguous terms." *Id.* (citing *Renteria-Morales*, 551 F.3d at 1086). This proved to be lip service.

While the majority acknowledged that *Espinoza-Gonzalez* "did not overrule *Batista-Hernandez*," it refused to "defer to *Batista-Hernandez*." *Id.* at 1164. Per the majority, *Batista-Hernandez* "merely conclude[d] that [the crime of accessory after the fact] is

obstruction of justice without defining the ambiguous term, identifying the elements of the statute of conviction, or applying a definition of obstruction of justice to the statute." *Id.* Thus, although *Batista-Hernandez* was *clearly* more factually relevant—concerning a crime the BIA viewed to be "substantially the same," *Hoang I*, 2009 WL 2981785, at *2—the majority looked instead to *Espinoza-Gonzalez* "to supply the definition of the generic federal obstruction of justice offense," *Hoang II*, 641 F.3d at 1161. The majority's motivation for doing so quickly became apparent.

While purporting to defer to the BIA's "reasonable interpretation" of "obstruction of justice," the majority cherry-picked portions of the *Espinoza-Gonzalez* decision without context to conclude that "[t]he language used [in *Espinoza-Gonzalez*] indicates that the BIA now concludes that accessory after the fact is an obstruction of justice crime *when it interferes with an ongoing proceeding or investigation.*" *Id.* at 1164 (emphasis added). But the BIA never made any such conclusion. Nevertheless, with this definition securely divined, the majority determined that a "conviction for a misdemeanor by rendering criminal assistance . . . lacks the necessary actus reus and is not categorically obstruction of justice according to the definition provided in *Espinoza-Gonzalez*." *Id.* at 1165. Our court accordingly granted Hoang's petition for review. *Id.*

Judge Bybee dissented. As he correctly pointed out, the majority's claim that the BIA had not defined the ambiguous term "obstruction of justice" in *Batista-Hernandez* was flatly inconsistent with our court's earlier decision in *Renteria-Morales*. There, our court "[i]n no uncertain terms, . . . held that 'in determining

whether [a] specific crime of conviction is an obstruction-of-justice . . . , we rely on the BIA's definition.'" *Id.* at 1166 (Bybee, J., dissenting) (quoting *Renteria-Morales*, 551 F.3d at 1086-87). "Here, the BIA has indeed crafted such a definition, and it contradicts the one asserted by the majority." *Id.* As Judge Bybee explained, *Batista-Hernandez* "cannot be ignored" despite the majority's obvious preference to do so. *Id.* at 1167. And although the majority claimed to defer to the BIA's definition in *Espinoza-Gonzalez*, it "remarkably, applie[d] its own interpretation of the standard articulated *by the BIA* in *Espinoza-Gonzalez*." *Id.* "The weakness in the majority's position," Judge Bybee observed, is "highlighted by its acknowledgment that 'the BIA was correct that *Espinoza-Gonzalez* . . . did not overrule *Batista-Hernandez*.' Nonetheless, it maintains that 'the BIA now concludes that accessory after the fact is an obstruction of justice crime when it interferes with an ongoing proceeding or investigation.'" *Id.* In short, "not only has the majority conceded that *Espinoza-Gonzalez* did not overrule *Batista-Hernandez*, but it has also fashioned a definition that, *to its own satisfaction*, fuses the two together." *Id.* at 1168 (emphasis added).

Hoang II, as badly decided as it was, is just the opening chapter in our sad story. As our court has repeatedly (if begrudgingly) recognized, it is the BIA—not our court—that has the final word in how ambiguous provisions in the immigration statutes are interpreted. *Id.* at 1160 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). And since the majority in *Hoang II* acknowledged that "a crime relating to obstruction of justice" is ambiguous, there was hope that the BIA might fix our bungled mess.

Which the BIA quickly attempted. Following our decision in *Hoang II*, the BIA sua sponte reopened removal proceedings in a different case: *In re Valenzuela Gallardo* ("*Valenzuela Gallardo I*"), 25 I. & N. Dec. 838 (BIA 2012). It did so expressly to address whether the respondent Agustin Valenzuela Gallardo's "felony accessory offense qualifies as 'an offense relating to obstruction of justice,'" *id.* at 839,[7] and "to clarify [its] prior precedents" since our court seemed to be having trouble comprehending them, *id.* at 840. Discussing *Batista-Hernandez* and *Espinoza-Gonzalez*, the BIA reiterated that the "critical element"—"the affirmative and intentional attempt, with specific intent, to interfere with the process of justice—*demarcates the category of crimes constituting obstruction of justice*." *Id.* at 841 (emphasis added). And "[w]hile many crimes fitting this definition will involve interference with an ongoing criminal investigation or trial, we now clarify that *the existence of such proceedings is not an essential element* of 'an offense relating to obstruction of justice.'" *Id.* (emphasis added). Applying this definition to Valenzuela Gallardo's conviction, the BIA concluded that the state crime of felony accessory "is properly classified as an offense 'relating to obstruction of justice.'" *Id.* As the BIA explained, the elements of felony accessory are "closely analogous, if not functionally

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[7] Valenzuela Gallardo was convicted of the crime of accessory to a felony under CPC § 32, which provided that "[e]very person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony." Cal. Penal Code. § 32.

identical, to those [of the crime of accessory after the fact at issue in *Batista-Hernandez*]. Critically, both [crimes] include the element of an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice." *Id.*

No doubt recognizing that our court is sometimes oddly obtuse when it comes to reading the BIA's decisions, the BIA directly addressed our holding in *Hoang II*, explaining that the BIA had never held "that obstruction offenses must involve interference with an ongoing investigation or proceeding. Rather, the standard we set forth was that an obstruction offense must include 'the critical element of an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice.'" *Id.* at 842 (quoting *Espinoza-Gonzalez*, 22 I & N Dec. at 894). And again, "[i]nterference with the 'process of justice' does not require the existence of an ongoing investigation or proceeding." *Id.* As the BIA explained, Chapter 73 defines criminal offenses "as within the category of offenses described as 'Obstruction of Justice' [that] clearly involve conduct that significantly precedes the onset of any official proceeding, even of an investigative nature." *Id.* at 842-43. The BIA therefore concluded Valenzuela Gallardo was removable as charged. *Id.* at 844.

Given the clarity with which the BIA rebuffed our holding in *Hoang II*, our court would need to get creative on appeal to achieve its preferred result. We didn't disappoint. First, we erroneously read *Valenzuela Gallardo I* as establishing a "new" definition of "obstruction of justice" that was inconsistent with the BIA's "prior construction" because its "new" definition "re-

quire[d] no nexus to an ongoing investigation or proceeding." *Valenzuela Gallardo v. Lynch* ("*Valenzuela Gallardo II*"), 818 F.3d 808, 811 (9th Cir. 2016). But the BIA had *never* required any such nexus. Rather, it was our court in *Hoang II* that introduced this requirement. 641 F.3d at 1164. Judge Seabright, sitting by designation, vehemently dissented, making this exact point. *See Valenzuela Gallardo II*, 818 F.3d at 825 (Seabright, J., dissenting) (explaining that *Valenzuela Gallardo I* "did not announce a new . . . interpretation that removed a required nexus between an obstructive act and an existing proceeding"). As he observed,

> the majority . . . relies on a mistaken premise that [*Espinoza-Gonzalez*] previously required a nexus to an ongoing investigation or proceeding for a crime of conviction to be "an offense relating to obstruction of justice" for purposes of . . . § 1101(a)(43)(S). In fact, *Espinoza-Gonzalez* did not (and [*Valenzuela Gallardo I*] explains why). [*Valenzuela Gallardo I*] is not a change from BIA precedent—it is a change from *this Circuit's interpretation of BIA precedent*.

Id. (emphasis added); *see also id.* at 829 ("*Espinoza-Gonzalez* never required a crime of conviction to have as an element only 'active interference with proceedings of a tribunal;' it always required 'either active interference with proceedings of a tribunal or investigation, or action or threat of action against those who would cooperate in the process of justice.'" (quoting *Espinoza-Gonzalez*, 22 I. & N. Dec. at 893)).

The majority downplayed Judge Seabright's concern, suggesting that it didn't matter whether it characterized the BIA's definition as "new, newly clarified, or merely

'a change from this Circuit's interpretation of BIA precedent.'" *Id.* at 814 n.2. But the majority's treatment of the BIA's definition as "new" went well beyond mere unnecessary "characterization." *Id.* In fact, it controlled its analysis. The majority acknowledged that our court had previously "deferred to the BIA's interpretation of 'obstruction of justice' in at least three cases," but was able to elide the obvious inconsistent treatment only by pretending the BIA's earlier definition was consistent with the one first announced by our court in *Hoang II*, and thus "was reasonable" and merited our prior deference. *Id.* at 815. But according to the majority, the BIA's supposedly "new" definition "raise[d] grave constitutional concerns." *Id.* at 818. Framing the BIA's definition as "new" thus allowed the majority to attack the BIA's definition unshackled by the weight of our court's own precedent.

Continuing, the majority explained that because the BIA's "new" definition didn't give "an indication of what it does include in 'the process of justice,' or where that process begins and ends," it was "unconstitutionally vague." *Id.* at 819; *see also id.* at 818-22. Specifically, "[t]he BIA's new construction leaves grave uncertainty about the plethora of steps before and after an 'ongoing criminal investigation or trial' that comprise 'the process of justice,' and, hence, uncertainty about which crimes constitute 'obstruction of justice.'" *Id.* at 820; *see also id.* at 822. The majority thus remanded the case to the BIA, so that it could "either offer a new construction of [obstruction of justice] or, in the alternative, apply *Espinoza-Gonzalez*'s interpretation to the instant case." *Id.* at 824. In doing so, the majority all but invited the BIA to modify its definition of "an offense relating to obstruction of justice" to require at least a

nexus "to 'a foreseeable or contemplated proceeding.'" *Id.* at 822 n.7 (noting that if "the BIA intends interference with the 'process of justice' to mean interference with an ongoing *or foreseeable or contemplated* investigation or proceeding, it can clarify this on remand").

On remand, the BIA tried—yet again—"to clarify [its] prior precedents regarding the contours of the generic definition of an aggravated felony offense relating to obstruction of justice." *In re Valenzuela Gallardo* ("*Valenzuela Gallardo III*"), 27 I. & N. Dec. 449, 451 (BIA 2018). The BIA first observed that "[t]he Ninth Circuit has recognized that the language of [§ 1101(a)(43)(S)] is ambiguous because it does not clearly answer whether an offense relating to obstruction of justice must involve interference in an ongoing investigation or proceeding." *Id.* at 452. After analyzing the crimes proscribed under Chapter 73, the BIA "conclude[d] that Congress did not intend interference in an ongoing or pending investigation or proceeding to be a necessary element of an 'offense relating to obstruction of justice.'" *Id.* at 456. Nor did Congress intend "to limit the phrase 'obstruction of justice' to the crimes listed in [C]hapter 73." *Id.* at 460. Thus, "an offense relating to obstruction of justice" consists of: first, "offenses covered by [C]hapter 73 of the Federal criminal code"; or second, "any other Federal or State offense that involves (1) an affirmative and intentional attempt (2) that is motivated by a specific intent (3) to interfere either in an investigation or proceeding that is ongoing, pending, or reasonably foreseeable by the defendant, or in another's punishment resulting from a completed proceeding." *Id.* Notably, the BIA (again) explained that its definition was not new: "This definition is consistent with our prior holdings regarding the

limited contours of the phrase 'obstruction of justice.'" *Id.* Based on this definition, the BIA once again "conclude[d] that [Valenzuela Gallardo's] conviction is categorically one . . . relating to obstruction of justice that renders him removable." *Id.* at 461.

In short, in *Valenzuela Gallardo III* the BIA effectively reiterated the same definition that it had consistently held since at least its 1997 *Batista-Hernandez* decision—with one small tweak. Dutifully attempting to be responsive to our court's *Valenzuela Gallardo II* decision, the BIA added the requirement that obstruction of justice be an attempt to interfere with an "investigation or proceeding that is ongoing, pending, *or reasonably foreseeable*." *Id.* at 460 (emphasis added). The avid and informed court-watcher would be atremble with eager anticipation: how would the Ninth Circuit get around this one? It seemed like the BIA had gone the extra mile this time.

Pass the popcorn.

On appeal, our court began by purporting to describe the BIA's history defining "obstruction of justice." But the panels' view—like that of its predecessor in *Valenzuela Gallardo II*—was distorted and detached from reality, painting our court as a beacon of consistency and the BIA as fickler than Tom Brady in retirement:

> In an en banc precedential decision issued over two decades ago, the [BIA] held that "an offense relating to obstruction of justice" is defined by the federal obstruction of justice offenses listed under that title in 18 U.S.C. §§ 1501-18, almost all of which require a

> nexus to an ongoing criminal proceeding or investigation. *Matter of Espinoza-Gonzalez*, 22 I. & N. Dec. 889, 892-94 (BIA 1999) (en banc). Our court approved that definition as applied to a state misdemeanor conviction for rendering criminal assistance. *Hoang v. Holder*, 641 F.3d 1157, 1164-65 (9th Cir. 2011).
>
> Since then, in this very case, the BIA has twice changed that settled definition, each time expanding it in different ways to encompass the crime for which Agustin Valenzuela Gallardo was convicted: accessory to a felony in violation of [CPC] § 32.

Valenzuela Gallardo v. Barr ("*Valenzuela Gallardo IV*"), 968 F.3d 1053, 1056 (9th Cir. 2020).

Clearly our court was laying the foundation for something drastic. After all, the basis for our decision in *Valenzuela Gallardo II*—unconstitutional vagueness—was no longer on the table. *See id.* at 1067 ("We agree that [*Marinello v. United States*, 138 S. Ct. 1101 (2018)] settles any concern that defining obstruction of justice to include interference with a 'reasonably foreseeable' proceeding is unconstitutionally vague."). But desperate times call for desperate measures, and our court was desperate. The BIA had proven a resilient foe, apparently missing our not-so-subtle insistence that *we* really, really like *our* crabbed interpretation of "relating to obstruction of justice" over the BIA's—*Chevron* be damned. With the rationales from all our cases in shambles, it was obvious that if we continued to pretend deference to the agency, we would never get our way. So we just stopped pretending.

Despite having previously determined at least three times that § 1101(a)(43)(S) is *ambiguous* about the definition of "an offense relating to obstruction of justice," *Renteria-Morales*, 551 F.3d at 1086; *Salazar-Luviano v. Mukasey*, 551 F.3d 857, 860 (9th Cir. 2008); *Hoang II*, 641 F.3d at 1160, 1160 n.3; *see also Valenzuela Gallardo II*, 818 F.3d at 815, our court—tapping into a deep reservoir of creativity—now discerned that the statute is in fact "*unambiguous* in requiring an ongoing or pending criminal proceeding, and the [BIA's] most recent interpretation is at odds with that unambiguous meaning," *Valenzuela Gallardo IV*, 968 F.3d at 1062 (emphasis added).[8] Fully aware that this might seem inconsistent, our court doubled down on our historical revisionism:

> We did not previously have occasion to opine on this point because, prior to its first precedential opinion below, *see Valenzuela Gallardo*, 25 I. & N. Dec. 838,

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[8] To my knowledge, no other circuit agrees with our court's volteface. The First Circuit recently held that "the generic federal definition of 'an offense relating to obstruction of justice' unambiguously does *not* require a nexus to a pending or ongoing investigation or judicial proceeding." *Silva v. Garland*, 27 F.4th 95, 98 (1st Cir. 2022) (emphasis added). And even "assuming § 1101(a)(43)(S) is ambiguous," the First Circuit concluded the BIA's definition in *Valenzuela Gallardo III* was "reasonable." *Id.* at 113. The Third Circuit has likewise determined that an offense "relating to obstruction of justice" is unambiguous—but in exactly the opposite way our court says. *Denis v. Att'y Gen.*, 633 F.3d 201, 209 (3d Cir. 2011). The Fourth Circuit determined that § 1101(a)(43)(S) "is at least ambiguous as to whether the phrase 'relating to obstruction of justice' requires the obstruction of an ongoing proceeding." *Pugin v. Garland*, 19 F.4th 437, 449 (4th Cir. 2021). And like the Third Circuit, it concluded that the BIA's definition in *Valenzuela Gallardo III* was "reasonable." *Id.* at 449.

> the BIA consistently construed obstruction of justice offenses as requiring a nexus to an ongoing proceeding.

Id. at 1062-63.

Based on a fanciful determination that "an offense relating to obstruction of justice unambiguously required a nexus to an ongoing or pending proceeding or investigation," our court held that the second prong of the BIA's definition "cannot stand." *Id.* at 1068. And because CPC § 32 "encompasses interference with proceedings or investigations that are not pending or ongoing," it "is not a categorical match with obstruction of justice under § 1101(a)(43)(S)." *Id.* at 1069. So we granted Valenzuela Gallardo's petition for review. *Id.*

* * *

Our court's series of illogical and inconsistent maneuvers are intentionally hard to follow, so to briefly recap: In *Hoang II*, our court interjected a brand-new nexus requirement—interference with an ongoing proceeding or investigation—into the BIA's definition of "obstruction of justice." 641 F.3d at 1164. No other court has insisted on such a requirement. And after the BIA *explicitly* rejected that new nexus requirement, *see Valenzuela Gallardo I*, 25 I. & N. Dec. at 841, our court tried a different tact: treating the BIA's old definition as "new" so that we could hold it unconstitutionally vague without appearing to be inconsistent with our prior precedents, *see Valenzuela Gallardo II*, 818 F.3d at 819-20. On remand, the BIA tried once more to appease us, "clarifying" its definition but again rejecting our nexus requirement. *See Valenzuela Gallardo III*, 27 I. & N. Dec. at 460. With our prior rationale—unconstitutional

vagueness—no longer an option, our court was forced to employ a different type of inconsistency. In *Valenzuela Gallardo IV*, we suddenly decided that § 1101(a)(43)(S) was unambiguous—despite previously repeatedly holding that it was ambiguous—and that the BIA's definition was inconsistent with the statute's newly unambiguous meaning. *See* 968 F.3d at 1062. All the while our court gaslit the BIA and pretended it was the agency that was changing its mind, when in fact, it was our court that at each step replaced our old rationale with something new—each time more farfetched than the last, and often inconsistent with aspects of our prior rationales. And in doing so we created and then continually deepened a circuit split.

C. This Case

That brings us to this case, where unfortunately the majority's decision continues the ugly trajectory set by prior panels. Notably, the majority does not attempt to defend our indefensible precedents. But while maintaining a healthy degree of separation from the faulty rationales underlying those precedents, the majority nonetheless wraps itself in them as dictating the result in this case.

Somewhat surprisingly, given the tortured history recounted above, the government still had one argument left to it in this case. In *Valenzuela Gallardo III*, the BIA provided a two-part definition with two different ways that a crime might constitute "an offense relating to obstruction of justice": first, "offenses covered by [C]hapter 73 of the Federal criminal code"; and second, "any other Federal or State offense that involves (1) an affirmative and intentional attempt (2) that is motivated

by a specific intent (3) to interfere either in an investigation or proceeding that is ongoing, pending, or reasonably foreseeable by the defendant, or in another's punishment resulting from a completed proceeding." 27 I. & N. Dec. at 460. As the majority acknowledges, *Valenzuela Gallardo IV* addressed only the second prong, foreclosing any argument for the government under that definition. But here we are free to consider and apply the first prong of the BIA's definition—that is, whether CPC § 136.1(b)(1) is "covered by" Chapter 73, namely, 18 U.S.C. § 1512(b)(3).

The Government has squarely raised this issue before our court. The majority claims that because "the BIA did not analyze" the issue, we cannot address it.[9] But "[w]e do not remand a case to the BIA where only legal questions remain and these questions do not invoke the [BIA's] expertise and where all relevant evidence regarding the conviction [has] been presented to the BIA in earlier proceedings." *See Diaz-Quirazco v. Barr*, 931 F.3d 830, 846 (9th Cir. 2019) (cleaned up). This is such a case. Indeed, by devoting more than six pages of its opinion to this exact issue, the majority demonstrates that it is willing to ignore any purported inability to consider whether CPC § 136.1(b)(1) is a categorical match with § 1512(b)(3)—so long as the analysis

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[9] The majority avoids addressing whether the first prong of the BIA's definition—"offenses covered by [C]hapter 73 of the Federal criminal code"—is a reasonable interpretation of "an offense relating to obstruction of justice" under § 1101(a)(43)(S). I would decide this issue. And I would conclude—like other circuits—that it is a "reasonable" interpretation of the statute. *See Silva*, 27 F.4th at 98; *Pugin*, 19 F.4th at 449.

reaches a preferred result. But in doing so, we continue our court's history of distorting caselaw—this time, California's—to reach that result.

"The categorical approach prescribes a three-step process for determining whether an offense is an 'aggravated felony.'" *Ho Sang Yim v. Barr*, 972 F.3d 1069, 1077 (9th Cir. 2020). "First, we must identify the elements of the generic federal offense." *Id.* "Second, we must identify the elements of the specific crime of conviction." *Id.* "Third, we compare the statute of conviction to the generic federal offense to determine whether the specific crime of conviction meets the . . . definition of an aggravated felony." *Id.* (cleaned up). "There is a categorical match only if the statute's elements are the same as, or narrower than, those of the generic offense." *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1147 (9th Cir. 2020) (cleaned up).

The majority starts out by correctly noting that CPC § 136.1(b)(1) requires that "(1) the defendant has attempted to prevent or dissuade a person (2) who is a victim or witness to a crime (3) from making any report of his or her victimization to any peace officer or other designated officials." *People v. Upsher*, 155 Cal. App. 4th 1311, 1320 (2007). By comparison, § 1512(b)(3) requires that the defendant (1) "knowingly use[d] intimidation, threaten[ed], or corruptly persuade[d] another person . . . or engage[d] in misleading conduct toward another person" (2) "with the intent to hinder, delay, or prevent the communication to a law enforcement officer" (3) "of information relating to the commission or possible commission of a Federal offense." 18 U.S.C. § 1512(b)(3).

The majority finds a mismatch with only the first of § 1512(b)(3)'s elements: "Because CPC § 136.1(b)(1) only requires the defendant specifically intend to 'prevent or dissuade a person' from reporting a crime, without any requirement of malice, it is broader than . . . § 1512(b)(3), which requires use of intimidation, threats, misleading conduct, or corrupt persuasion." According to the majority, because CPC § 136.1(b)(1) has no malice requirement, an individual could be convicted under CPC § 136.1(b)(1) for *innocently* preventing or dissuading another person from reporting a crime, without satisfying the "corruptly persuades" requirement of § 1512(b)(3). Thus, the majority concludes, the two are not a categorical match.

While I agree with the majority that § 1512(b)(3) does not proscribe "innocent persuasion," where the majority gets it wrong is in concluding that CPC § 136.1(b)(1) reaches innocent persuasion, when California precedent explicitly says it does not. As multiple California courts have observed, CPC § 136.1(b)(1) proscribes only "culpable conduct."

"There are two ways to show a realistic probability that a state statute exceeds the generic definition." *See Lopez-Aguilar*, 948 F.3d at 1147 (cleaned up). The majority attempts both. "First, there is not a categorical match if a state statute expressly defines a crime more broadly than the generic offense." *Id.* "In identifying the elements of the statute of conviction, 'we consider not only the language of the state statute, *but also the interpretation of that language in judicial opinions.*'" *Rodriguez-Castellon v. Holder*, 733 F.3d 847, 853 (9th Cir. 2013) (emphasis added) (quoting *Covarrubias Teposte v. Holder*, 632 F.3d 1049, 1054 (9th Cir.

2010)). It is the latter that the majority largely ignores.

In *People v. Navarro*, 212 Cal. App. 4th 1336 (2013), for example, the defendant David Navarro argued that CPC § 136.1(b)(1) "violate[d] the state and federal constitutions by impermissibly inhibiting free speech" and "also suggest[ed] the statute [was] 'fatally uncertain' or vague." *Id.* at 1347. The California Court of Appeal disagreed. As it explained, CPC § 136.1(b)(1) "has been limited in its application to persons who intentionally 'prevent or dissuade' a victim or witness from reporting a crime." *Id.* at 1351 (cleaned up) (citing *People v. McDaniel*, 22 Cal. App. 4th 278, 284 (1994)). "This focus on the mental state of the perpetrator and his or her intent to affect or influence a potential witness's or victim's report *limits the statute's reach by distinguishing culpable conduct from innocent conversation* and restrains use of its provisions to inhibit protected speech." *Id.* (emphasis added). The court rejected Navarro's attempt to support his argument with a "number of hypotheticals" that "involve[d] innocent behavior." *Id.* at 1352.[10] Specifically, the court explained that

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[10] Navarro argued that CPC § 136.1(b)(1)

> would preclude an attorney from "advising a client to file a civil lawsuit for damages in response to a crime"; prohibit a store manager from "directing employees to call the parents of first-time shoplifters under the age of [eighteen] instead of reporting such incidents to the police"; and prevent citizens from "expressing their opinion about which crimes warrant government intervention, and which do not," "attempting to prevent a friend from reporting a small theft to the police by expressing the opinion that it will be more trouble and paperwork than it's worth," or "suggesting that

> [t]here is no reason to believe persons engaged in conduct of the type [Navarro] posits are in substantial danger of prosecution under the statute. The statute prohibits statements specifically intended to induce a witness or victim to withhold evidence of a crime from law enforcement officials. Ordinary citizens discussing the criminal justice system and the pros and cons of becoming involved in a police investigation *would not run afoul of the law.*

Id. (emphasis added).

This same point was recently reaffirmed in *People v. Brackins*, 37 Cal. App. 5th 56 (2019), where the state court again observed that there is "[n]o . . . concern" that CPC § 136.1(b) criminalizes innocent behavior. *Id.* at 67.

Thus, California courts have made it clear enough that CPC § 136.1(b)(1) does not proscribe "innocent persuasion" as the majority imagines. Rather, CPC § 136.1(b)(1) criminalizes only "culpable conduct." *Navarro*, 212 Cal. App. 4th at 1351. This is consistent with § 1512(b)(3)'s requirement of "corrupt persuasion," which we have interpreted to require only a "consciousness of wrongdoing." *United States v. Doss*, 630 F.3d 1181, 1189 (9th Cir. 2011), *as amended on reh'g in part* (Mar. 15, 2011). Consequently, CPC § 136.1(b)(1) and § 1512(b)(3) are a categorical match. *See Yim*, 972 F.3d at 1083.

The second way to "show a realistic probability that a state statute exceeds the generic definition" is by

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> the problem of criminal activity be handled privately with an apology, with amends being made, or some other way."

Navarro, 212 Cal. App. 4th at 1352 (cleaned up).

"point[ing] to at least one case in which the state courts applied the statute in a situation that does not fit under the generic definition." *See Lopez-Aguilar*, 948 F.3d at 1147 (cleaned up). Not surprisingly, the majority fails to point to a *single* case in which CPC § 136.1(b)(1) has been applied to "innocent persuasion." To the contrary, as just explained, California courts have made clear that CPC § 136.1(b)(1) would not apply to such conduct.

Recognizing that its preferred interpretation of California law flounders under the California cases *directly* addressing CPC § 136.1(b)(1), the majority resorts to a strangely *indirect* approach—relying on a California case construing a related yet altogether different offense: *People v. Wahidi*, 222 Cal. App. 4th 802 (2013). *Wahidi* concerns CPC § 136.1(a)(2), not subsection (b)(1). Despite this critical distinction, the majority nonetheless unconvincingly tries to extrapolate a rule supporting its view with respect to CPC § 136.1(b)(1). But even putting aside that there are directly on-point California cases squarely blocking the majority's preferred interpretation of subsection (b)(1), its reliance on *Wahidi* is also based on clearly wrong reasoning. To understand why requires an accurate comparison of subsections (a)(2) and (b)(1).

CPC § 136.1(a)(2) proscribes "[k]nowingly and maliciously" attempting to prevent or dissuade "any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law." Thus, subsection (a)(2) requires a showing of "malice" (which, as the majority emphasizes, subsection (b)(1) does not). But in this context, the California legislature has provided a "unique" definition of "malice," much broader

than the term's "traditional meaning." *Wahidi*, 222 Cal. App. 4th at 809; *see also* CPC § 136 (defining "malice" as "an intent to vex, annoy, harm, or injure in any way another person, *or to thwart or interfere in any manner with the orderly administration of justice*" (emphasis added)). In fact, California defines "malice" so broadly in this context that it arguably renders the term effectively meaningless. *See Wahidi*, 222 Cal. App. 4th at 807 (explaining that the provision's unique "definition of malice in [§] 136 appears to write the word 'maliciously' out of [§] 136.1"). It is precisely because of this extremely broad definition of malice that CPC § 136.1(a)(2) criminalizes conduct that the majority refers to as "innocent persuasion," and that admittedly falls outside the reach of § 1512(b)(3). *See id.* at 809. Thus, the majority's attempt to paint subsection (b)(1) as "broader than CPC § 136.1(a)" because it "*lacks* a malice requirement" has it exactly backwards—it is subsection (a)(2)'s uniquely broad malice element that allows it to criminalize "innocent persuasion," so attempting to transpose subsection (a)(2)'s overbreadth to (b)(1), which lacks the very element that causes (a)(2)'s overbreadth, is just faulty analysis.

In contrast to CPC § 136.1(a)(2), subsection (b)(1) proscribes "attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from . . . [m]aking any report of that victimization." Unlike CPC § 136.1(a)(2), subsection (b)(1) does not include a malice requirement. But this doesn't mean that subsection (b)(1) is necessarily broader than subsection (a)(2). Quite the opposite. CPC § 136.1(b)(1) "is a specific intent crime," which California courts have explained means that subsection (b)(1) proscribes only "culpable conduct." *Navarro*, 212 Cal.

App. 4th at 1347, 1351; *see also Brackins*, 37 Cal. App. 5th at 66-67. Thus, in this respect—which is the only one that matters in this case—California courts have uniformly interpreted subsection (b)(1) to be *narrower* than subsection (a)(2). *See Brackins*, 37 Cal. App. 5th at 67 (explaining that unlike CPC § 136.1(a)(2), subsection (b)(1) "already described a sufficiently narrow offense that did not require further restriction by means of a malice requirement").

So the majority is doubly wrong. First, it just refuses to defer to the California courts, which have held that: (1) subsection (b)(1) is *narrower* than subsection (a)(2), *see id.* at 66-67; and (2) subsection (b)(1) does *not* criminalize innocent conduct, *see Navarro*, 212 Cal. App. 4th at 1353; *Brackins*, 37 Cal. App. 5th at 66-67. Second, it relies on its own twisted and flawed logic that, while perhaps not as audacious as our court's past machinations, is no less fallacious. The majority reasons that (1) because CPC § 136.1(b)(1) "*lacks* a malice requirement" it is necessarily "broader than" CPC § 136.1(a)(2) (which, as shown, is false); so (2) because CPC § 136.1(a)(2) criminalizes innocent conduct like that at issue in *Wahidi*, CPC § 136.1(b)(1) necessarily criminalizes innocent conduct as well. But Subsection (b)(1) is not "broader" than subsection (a)(2), at least insofar as the criminalization of "innocent persuasion" is concerned.

When you remove the majority's flawed reliance on *Wahidi*, the majority is left with only its "legal imagination." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). That is not enough. The Supreme Court has made clear that a categorical mismatch "requires a realistic probability, not a theoretical possibility, that the

State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case." *Id.* The majority does not try to make this showing, presumably because of the heinous nature of Cordero-Garcia's conduct. As a result, the majority "must at least point to . . . other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Id.* It cannot.

Cordero-Garcia's conviction under CPC § 136.1(b)(1) is a categorical match for § 1512(b)(3), and the BIA did not error in concluding that Cordero-Garcia is removable under 8 U.S.C. § 1227(a)(2)(A)(iii).

II. CONCLUSION

I would deny Cordero-Garcia's petition for review, and thus respectfully dissent.

APPENDIX B

Matter of Fernando CORDERO-GARCIA, Respondent

Decided Oct. 18, 2019

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

(1) The crime of 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 under section 101(a)(43)(S) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(S) (2012). *Matter of Valenzuela Gallardo*, 27 I&N Dec. 449 (BIA 2018), followed.

(2) The holding in *Matter of Valenzuela Gallardo*, 27 I&N Dec. 449 (BIA 2018), may be applied retroactively.

FOR RESPONDENT: Michael K. Mehr, Esquire, Santa Cruz, California

FOR THE DEPARTMENT OF HOMELAND SECURITY: Jennifer L. Castro, Assistant Chief Counsel

BEFORE: Board Panel: WENDTLAND, GREER, and O'CONNOR, Board Members.

WENDTLAND, Board Member:

In a decision dated June 27, 2012, an Immigration Judge found the respondent removable under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii) (2012), as an alien convicted of an aggravated felony, denied his application for cancellation of removal under section 240A(a) of the Act, 8

U.S.C. § 1229b(a) (2012), and ordered him removed from the United States.[1] We dismissed the respondent's appeal on November 27, 2012, affirming the Immigration Judge's conclusion that the respondent was convicted of an aggravated felony because dissuading a witness in violation of section 136.1(b)(1) of the California Penal Code is an offense relating to obstruction of justice under section 101(a)(43)(S) of the Act, 8 U.S.C. § 1101(a)(43)(S) (2012).[2] In addition, we agreed with the Immigration Judge that the respondent did not meet his burden of showing that he merits a grant of cancel-

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[1] The Immigration Judge also found that the respondent was removable under section 237(a)(2)(A)(ii) of the Act, as an alien convicted of more than one crime involving moral turpitude. In light of our conclusion that the respondent is removable under section 237(a)(2)(A)(iii) based on our retroactive application of *Matter of Valenzuela Gallardo*, 27 I&N Dec. 449 (BIA 2018), we need not address the other charge of removability. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach."). However, for purposes of our retroactivity analysis, we will assume that the respondent is *not* deportable under section 237(a)(2)(A)(ii) of the Act and that his removability turns solely on whether he is convicted of an aggravated felony.

[2] At all relevant times, section 136.1(b)(1) of the California Penal Code has provided in pertinent part:

> Except as provided in subdivision (c), every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison:
>
> (1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge.

lation of removal in the exercise of discretion. We subsequently denied a motion filed by the Department of Homeland Security ("DHS") to reopen these removal proceedings.

Pursuant to a motion by the Government, the United States Court of Appeals for the Ninth Circuit has remanded this case for us to address whether the crime of dissuading a witness in violation of section 136.1(b)(1) of the California Penal Code is an aggravated felony offense relating to obstruction of justice in light of its decision in *Valenzuela Gallardo v. Lynch*, 818 F.3d 808 (9th Cir. 2016). This question will determine the respondent's removability under section 237(a)(2)(A)(iii) of the Act and his eligibility for cancellation of removal under section 240A(a)(3). The respondent's appeal will again be dismissed.

I. AGGRAVATED FELONY

Section 101(a)(43)(S) of the Act defines an aggravated felony as "an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year." To establish whether the respondent's conviction is for such an offense, we apply the categorical approach by focusing on whether the elements of section 136.1(b)(1) of the California Penal Code proscribe conduct that categorically falls within the Federal generic definition of an offense relating to obstruction of justice. *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016).

We outlined the generic definition of an offense relating to obstruction of justice in *Matter of Valenzuela Gallardo* ("*Valenzuela Gallardo I*"), 25 I&N Dec. 838 (BIA

2012). The Ninth Circuit declined to defer to our definition, concluding that it was impermissibly vague. *Valenzuela Gallardo*, 818 F.3d at 812-13, 823-24. While this appeal was pending, we clarified the generic definition of an aggravated felony under section 101(a)(43)(S) of the Act, stating that an offense relating to obstruction of justice

> consists of offenses covered by chapter 73 of the Federal criminal code[, 18 U.S.C. §§ 1501-1521 (2012),] or any other Federal or State offense that involves (1) an affirmative and intentional attempt (2) that is motivated by a specific intent (3) to interfere either in an investigation or proceeding that is ongoing, pending, or reasonably foreseeable by the defendant, or in another's punishment resulting from a completed proceeding.

Matter of Valenzuela Gallardo ("*Valenzuela Gallardo II*"), 27 I&N Dec. 449, 460 (BIA 2018).

We further held that the crime of accessory to a felony under section 32 of the California Penal Code is an aggravated felony offense relating to obstruction of justice. *Id.* at 461. The California accessory statute required "a violator to aid the principal, with knowledge that the principal has committed a crime, and with the specific intent to interfere in the principal's arrest, trial, conviction, or punishment." *Id.* (citing *People v. Nuckles*, 298 P.3d 867, 870 (Cal. 2013)).

To obtain a conviction under section 136.1(b)(1) of the California Penal Code, the State must prove that "(1) the defendant has attempted to prevent or dissuade a person (2) who is a victim or witness to a crime (3) from making [a] report . . . to any peace officer or other

designated officials." *People v. Navarro*, 152 Cal. Rptr. 3d 109, 117-18 (Cal. Ct. App. 2013) (alteration in original) (quoting *People v. Upsher*, 66 Cal. Rptr. 3d 481, 488 (Cal. Ct. App. 2007)). "The prosecution must also establish that 'the defendant's acts or statements [were] intended to affect or influence a potential witness's or victim's testimony or acts.'" *Id.* at 118 (alteration in original) (quoting *People v. McDaniel*, 27 Cal. Rptr. 2d 306, 309 (Cal. Ct. App. 1994)).

According to this California case law, section 136.1(b)(1) requires a specific intent to interfere in an investigation or proceeding. Where an individual attempts to prevent or dissuade a victim or witness from making a report of a crime to a peace officer or other designated official, an investigation or proceeding would necessarily be either ongoing, pending, or reasonably foreseeable. In other words, there would be little reason for a person to try to prevent or dissuade a victim or witness from reporting the crime to appropriate authorities unless there was an investigation in progress or one was reasonably foreseeable. We therefore conclude 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 under section 101(a)(43)(S) of the Act pursuant to the criteria that we outlined in *Matter of Valenzuela Gallardo II*, 27 I&N Dec. at 460.[3]

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[3] The Immigration Judge found that a violation of section 136.1(b)(1) of the California Penal Code was not a categorical aggravated felony offense relating to obstruction of justice, but he applied the modified categorical approach to determine that the respondent's conviction was for an aggravated felony. In light of our holding that dissuading a witness under California law is categorically an

II. RETROACTIVITY

The respondent argues that the standard for obstruction of justice we set forth in *Valenzuela Gallardo II* may not be applied retroactively to his conviction, which occurred before our decisions in *Valenzuela Gallardo I* and *II* were issued. Therefore, we must also determine whether the standard for obstruction of justice we set forth in *Matter of Valenzuela Gallardo II* can be retroactively applied to the respondent's conviction. In this regard, we recognize the well-established principle that agencies may adjudicate new rules and apply them retroactively.

> [T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.
>
> . . . That [an agency] action might have a retroactive effect [i]s not necessarily fatal to its validity. Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency. But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.

SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) (citation omitted).

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aggravated felony, we will not address the Immigration Judge's finding in this regard.

We acknowledge, however, that "[a]s a general rule, '[r]etroactivity is not favored in the law.'" *Velasquez-Garcia v. Holder*, 760 F.3d 571, 579 (7th Cir. 2014) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). In this regard, at least one circuit has indicated that agency "rules . . . should be presumed prospective in operation *unless Congress has clearly authorized retroactive application*." *De Niz Robles v. Lynch*, 803 F.3d 1165, 1172 (10th Cir. 2015) (emphasis added); *see also Betansos v. Barr*, 928 F.3d 1133, 1143-46 (9th Cir. 2019) (noting that a retroactivity analysis "should be conducted with 'the presumption of prospectivity'" where the court has given deference to our decision pursuant to *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), but deciding to apply the decision retroactively (quoting *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1144 (10th Cir. 2016))).

However, Congress has "indicate[d] unambiguously its intention to apply [the aggravated felony provisions] retroactively." *INS v. St. Cyr*, 533 U.S. 289, 318-19 & n.43 (2001) (stating that the aggravated felony definition itself clearly provides that it applies retroactively). In enacting section 101(a)(43) of the Act, Congress expressly stated its intent that "the term [aggravated felony] applies regardless of whether the conviction was entered before, on, or after the date of enactment." Accordingly, in our informed discretion, we conclude that we may apply our decisions retroactively after proper consideration of the relevant factors, consistent with *SEC v. Chenery Corp.*, 332 U.S. at 209 (upholding the agency's determination, despite its retroactive effect, and recognizing it as "the product of administrative

experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts").

A. Change in Law

Before we decide whether to apply *Matter of Valenzuela Gallardo II* retroactively, we must consider whether our holding in that case is a change in law, which the Ninth Circuit has stated is required before a retroactivity analysis is necessary. *See Olivas-Motta v. Whitaker*, 910 F.3d 1271, 1276 (9th Cir. 2018). A "retroactivity analysis is only applicable when 'an agency consciously overrules or otherwise alters its own rule or regulation,' or 'expressly considers and openly departs from a circuit court decision.'" *Id.* at 1277 (quoting *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 518-19 (9th Cir. 2012) (en banc)). The Ninth Circuit remanded *Valenzuela Gallardo I* for "consideration of a *new* construction or application of the interpretation" of obstruction of justice that we had outlined in *Matter of Espinoza*, 22 I&N Dec. 889 (BIA 1999), to which the court previously deferred in *Trung Thanh Hoang v. Holder*, 641 F.3d 1157 (9th Cir. 2011). *Valenzuela Gallardo*, 818 F.3d at 812-13 (emphasis added).

Not all Board precedents clarifying prior decisions are necessarily changes in the law. The Ninth Circuit has rejected as "contrary to settled law" the assertion that "the mere existence of a new published decision on an issue would always trigger retroactivity analysis." *Olivas-Motta*, 910 F.3d at 1276. Moreover, a new Board precedent that resolves prior, potentially inconsistent unpublished decisions is not a change in the law, because "[u]npublished decisions are not precedential and 'do not bind future parties.'" *Id.* at 1278 (quoting

Marmolejo-Campos v. Holder, 558 F.3d 903, 909 (9th Cir. 2009) (en banc)).

As we will discuss in greater detail below, our decision in *Valenzuela Gallardo II* openly departed from the generic definition that the Ninth Circuit previously approved. Our decision also clarified *Valenzuela Gallardo I*, but the standard in *Valenzuela Gallardo II* differs in some respects from our prior definition. We therefore conclude that a retroactivity analysis is appropriate in this case.

B. Test for Retroactivity

Next, we must determine the appropriate test for ascertaining whether *Matter of Valenzuela Gallardo II* may be applied retroactively. The Ninth Circuit applies the factors outlined in *Montgomery Ward & Co. v. FTC* ("*Montgomery Ward*"), 691 F.2d 1322 (9th Cir. 1982). *Garfias-Rodriguez*, 702 F.3d at 514-23 (applying these factors in favor of retroactive applicability). This test was first set forth in *Retail, Wholesale & Dep't Store Union v. NLRB* ("*Retail Union*"), 466 F.2d 380, 390 (D.C. Cir. 1972) (involving a labor dispute before the National Labor Relations Board ("NLRB") between a company and union workers).

The Second, Third, Fourth, Sixth, Seventh, and Tenth Circuits also apply this test. *See Microcomputer Tech. Inst. v. Riley*, 139 F.3d 1044, 1050 n.4 (5th Cir. 1998) (collecting cases); *see also De Niz Robles*, 803 F.3d 1177-80 (following the "balancing" test the Tenth Circuit set forth in *Stewart Capital Corp. v. Andrus*, 701 F.2d 846, 848 (10th Cir. 1983)). The Eighth Circuit applies a similar test. *Ryan Heating Co. v. NLRB*, 942 F2d 1287, 1289 (8th Cir. 1991). By contrast, the Fifth Circuit

weighs "the disadvantages of retroactivity—frustration of parties' expectations—against the detrimental effect of prospectivity—partial frustration of what we have now determined is the proper statutory interpretation." *Microcomputer Tech. Inst.*, 139 F.3d at 1051.

In light of the courts' overwhelming adoption of the test outlined in *Retail Union* (known as the *Montgomery Ward* test in the Ninth Circuit), we will employ that test, not only in cases arising in the Ninth Circuit, where we are bound to use it, but throughout the country. *See Matter of J-H-J-*, 26 I&N Dec. 563, 564 (BIA 2015) (acceding to the majority view of the circuits).[4] In addition to considering the desirability of applying the immigration laws with nationwide uniformity, we must also recognize that the circuit courts use this test in reviewing decisions from numerous other agencies. In our opinion, it would therefore be incongruous for us to employ a different test.

C. Application

The test for retroactivity requires us to consider the following factors:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a

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[4] To the extent that a court of appeals applies a different test, however, Immigration Judges and the Board should follow the law of that circuit. *See Matter of Anselmo*, 20 I&N Dec. 25, 31 (BIA 1989).

> party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Montgomery Ward, 691 F.2d at 1333 (quoting *Retail Union*, 466 F.2d at 390).

The Ninth Circuit has recognized that the first factor may not be well suited to the context of proceedings to remove an alien because *Retail Union* involved litigation between private parties in labor disputes before the NLRB. *See Garfias-Rodriguez*, 702 F.3d at 520-21 (noting that the first factor often does not favor either side in removal proceedings, where the Government is always a party); *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 951 (9th Cir. 2007) ("[T]he first factor is directed towards maintaining an incentive for litigants to raise novel claims by allowing a litigant who successfully argues for a new rule to get the benefit of that rule."). However, the court has recognized that this factor favors the alien where the agency has "confronted the problem before, *ha[s] established an explicit standard of conduct*, and now attempts to punish conformity to that standard under a new standard subsequently adopted." *Miguel-Miguel*, 500 F.3d at 951 (alteration in original) (emphasis added) (quoting *Retail Union*, 466 F.2d at 391).

Those circumstances were not present in *Valenzuela Gallardo II*, which was issued after decades of rulings by the Board and the Ninth Circuit interpreting the aggravated felony ground of removal relating to obstruction of justice. Moreover, the Ninth Circuit has noted in regard to the first factor that "any question of unfairness in applying a new rule . . . , such as surprise or detrimental reliance, is fully captured in the second and

third *Montgomery Ward* factors." *Garfias-Rodriguez*, 702 F.3d at 521. Based on the circumstances of this case, we agree.

As the Ninth Circuit has stated regarding the question of unsettled law,

> The second and the third factors are closely intertwined. If a new rule "represents an abrupt departure from well established practice," a party's reliance on the prior rule is likely to be reasonable, whereas if the rule "merely attempts to fill a void in an unsettled area of law," reliance is less likely to be reasonable. . . . [T]hese two factors will favor retroactivity if a party could reasonably have anticipated the change in the law such that the new "requirement would not be a complete surprise."

Id. (citations omitted).

The Ninth Circuit has acknowledged that Congress did not clearly define the generic elements of an aggravated felony offense relating to obstruction of justice. *Renteria-Morales v. Mukasey*, 551 F.3d 1076, 1086 (9th Cir. 2008). Since 1997, both the Ninth Circuit and the Board have issued decisions defining the outer limits of offenses relating to obstruction of justice. *See, e.g.*, *Valenzuela Gallardo*, 818 F.3d 808; *Trung Thanh Hoang*, 641 F.3d 1157; *Matter of Espinoza*, 22 I&N Dec. 889; *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997). Recently, the Ninth Circuit emphasized that "an ongoing conversation or a back-and-forth between this Court and the [Board] about the proper interpretation" is an important consideration in a retroactivity analysis. *Betansos*, 928 F.3d at 1144. A brief

review of these decisions reflects that the discussion between the Board and the Ninth Circuit regarding this aggravated felony ground has been ongoing, and the process of defining it has been unsettled, for several decades.

In *Matter of Batista-Hernandez*, 21 I&N Dec. at 961, we concluded that the offense of accessory after the fact in violation of 18 U.S.C. § 3 (Supp. V 1993) "clearly relates to obstruction of justice," notwithstanding the fact that the statute lacked an element of an ongoing investigation or proceeding. Two years later, in *Matter of Espinoza*, we held that misprision of felony in violation of 18 U.S.C. § 4 (1994) was not an offense relating to obstruction of justice. The Ninth Circuit has repeatedly deferred to a generic definition that it drew from *Matter of Espinoza*, which, according to the court, required interference with an ongoing proceeding or investigation, although the decision did not itself articulate such a requirement and *Batista-Hernandez* clearly did not apply one.[5] *See Trung Thanh Hoang*, 641 F.3d at 1164; *Renteria-Morales*, 551 F.3d at 1086-87; *Salazar-Luviano v. Mukasey*, 551 F.3d 857, 861-63 (9th Cir. 2008).[6]

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[5] We did note the absence of an ongoing criminal investigation or trial in *Matter of Espinoza*. However, we made the more general observation that misprision of felony does not constitute "obstruction of justice" because "it lacks the critical element of an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice." *Matter of Espinoza*, 22 I&N Dec. at 896. In identifying the critical element of specific intent, we did not state that an ongoing criminal investigation or trial was always required, but we subsequently clarified the matter in *Valenzuela Gallardo I*, 25 I&N Dec. at 841-42.

[6] If we were to assess the generic definition of an aggravated felony offense relating to obstruction of justice when the respondent

However, one judge in *Trung Thanh Hoang* dissented from the majority's use of that definition, contending that the court was not limited to applying the definition that it had derived from *Matter of Espinoza* and should, instead, have followed *Matter of Bastista-Hernandez*. *Trung Thanh Hoang*, 641 F.3d at 1165-68 (Bybee, J., dissenting).

We subsequently clarified our prior precedents interpreting section 101(a)(43)(S) of the Act and held that an offense relating to obstruction of justice must have as an element "the affirmative and intentional attempt, with specific intent, to interfere with the *process of justice*. . . . [T]he existence of [an ongoing criminal investigation or trial] is not an essential element of 'an offense relating to obstruction of justice.'" *Valenzuela Gallardo I*, 25 I&N Dec. at 841 (emphasis added). Concerned that this definition might be impermissibly vague, a divided panel of the Ninth Circuit applied the doctrine of constitutional avoidance and remanded for us to consider a new construction of section 101(a)(43)(S) of the Act or to apply our previous interpretation in *Matter of Espinoza*. *See Valenzuela Gallardo*, 818 F.3d at 811, 813-24. We clarified our definition again in *Valenzuela Gallardo II*.

The unsettled nature of defining the term "relating to obstruction of justice" in section 101(a)(43)(S) of the Act is evidenced by the continuing discussion in these

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entered his guilty plea in 2009, we would still conclude that the law was unsettled at that time. The Ninth Circuit precedent had not yet analyzed our 1997 decision in *Matter of Batista-Hernandez*, so a respondent who potentially faced this aggravated felony charge in 2009 would have had to address *Matter of Batista-Hernandez* and could not merely rely on *Renteria-Morales* and *Salazar-Luviano*.

administrative and judicial decisions for more than 20 years. That the question has been unsettled becomes more apparent in light of the reasoning underpinning the Ninth Circuit's opinion in *Valenzuela Gallardo*, where the court had serious constitutional doubts about the vagueness of the definition we set forth in *Valenzuela Gallardo I*. As the court noted, "Absent 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 under [section 101(a)(43)(S)] and what crimes do not." *Valenzuela Gallardo*, 818 F.3d at 820. It would be questionable to conclude that an area of law is settled when a court has expressed such concerns about the vagueness of an agency's interpretation of the relevant statute.

Moreover, a construction that requires interference with an ongoing proceeding or investigation brings its own uncertainty. Some of the obstruction of justice crimes that Congress placed in Chapter 73 of the Federal criminal code do not require interference with an ongoing tribunal or investigation. *See Valenzuela Gallardo*, 818 F.3d at 821 (citing 18 U.S.C. § 1512(b)(3) (2012) ("prohibition on tampering with a witness with the intent to hinder or prevent 'communication to a law enforcement officer' regarding a Federal offense"); § 1512(d)(2) ("prohibition on harassing someone with the intent to prevent that person from 'reporting [a federal crime] to a law enforcement officer or judge'"); and § 1519 (2012) ("prohibition on falsifying or destroying a record 'with the intent to impede, obstruct, or influence the investigation or proper administration of any matter' within the jurisdiction of the United States")). An Immigration Judge, practicing attorney, or alien could

reasonably question whether these offenses—placed by Congress in a chapter expressly dedicated to obstruction of justice—would qualify as an aggravated felony offense relating to obstruction of justice under the definition previously applied by the Ninth Circuit. Although case-by-case adjudication would likely resolve this issue over time, it is further evidence of unsettled law.

We also look beyond the interplay between Board precedent and Ninth Circuit decisions to determine whether the definition of the term "relating to obstruction of justice" is unsettled. The Ninth Circuit's inquiry has been whether and to what extent it would defer to the Board's definition under step two of the analysis in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (stating that deference to an agency's decision depends on whether its statutory interpretation is "based on a permissible construction of the statute"). A court can only reach this second step if the statute is "silent or ambiguous." *Id.* at 843. Finding that the Act did not define the phrase "offense relating to obstruction of justice," the Ninth Circuit has thus addressed this statutory term in the context of *Chevron*'s step two.[7] *See Renteria-Morales*, 551 F.3d at 1086.

By contrast, the Third Circuit has concluded that the phrase "relating to obstruction of justice" is unambiguous. *See Denis v. Att'y Gen. of U.S.*, 633 F.3d 201, 209

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[7] In *Valenzuela Gallardo*, 818 F.3d at 815-18, the Ninth Circuit applied the constitutional avoidance doctrine at *Chevron*'s step one. However, the court also noted that section 101(a)(43)(S) was an "ambiguous statute." *Id.* at 824.

(3d Cir. 2011). Applying de novo review, the Third Circuit found our definition of the phrase in *Espinoza* to be unnecessarily restrictive, and it adopted a broader definition. *Id.* at 211-13; *see also Matter of Valenzuela Gallardo I*, 25 I&N Dec. at 843. Judicial disagreement over whether a phrase is plain or ambiguous further demonstrates how unsettled the issue of defining "relating to obstruction of justice" has been.

Additionally, we consider significant the contrast between the circuit courts' assessment of our decisions defining an offense relating to obstruction of justice and those addressing the circumstances under which a theft offense is a crime involving moral turpitude. In *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016), we revisited the standard by which we assessed whether a theft offense is turpitudinous. Previously, from our "earliest days," we had held that "a theft categorically involves moral turpitude if—and only if—it is committed with the intent to *permanently* deprive an owner of property." *Id.* at 849. Finding it appropriate to "update our existing jurisprudence," we determined that "a theft offense is a crime involving moral turpitude if it involves an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded." *Id.* at 853. Recently, the Fifth Circuit joined the Second, Ninth, and Tenth Circuits in declining to apply our decision retroactively, concluding that our new definition "drastically chang[ed] the landscape." *Monteon-Camargo v. Barr*, 918 F.3d 423, 431 (5th Cir. 2019); *see also Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1296 (9th Cir. 2018); *Obeya v. Sessions*, 884 F.3d 442, 449 (2d Cir. 2018); *Lucio-Rayos v. Sessions*, 875 F.3d 573, 578 (10th Cir. 2017). We discern no comparable "departure

from well established practice" in the context of interpreting the ambiguous phrase "relating to obstruction of justice" in section 101(a)(43)(S) of the Act. *Montgomery Ward*, 691 F.2d at 1333 (citation omitted).

The Immigration Courts and the Board routinely encounter a diverse range of criminal statutes containing distinct elements that might relate to obstruction of justice. We must therefore determine whether these State and Federal offenses categorically relate to obstruction of justice. Our prior determinations, such as our holding in *Matter of Espinoza* that misprision of felony under 18 U.S.C. § 4 does not relate to obstruction of justice, are relevant but not dispositive when examining these other statutes. It was in this context that we made our conclusions in *Valenzuela Gallardo I* and *II* that accessory to a felony in violation of section 32 of the California Penal Code is categorically an obstruction of justice offense under section 101(a)(43)(S) of the Act.

Applying the second factor of the *Montgomery Ward* test, we conclude that these decisions were merely attempts to fill a void in an unsettled area of law and do not represent an abrupt departure from well-established practice. *See, e.g., Valenzuela Gallardo I*, 25 I&N Dec. at 842 (noting that our prior precedent had not gone "so far as to hold that obstruction offenses must involve interference with an *ongoing* investigation or proceeding"); *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (holding that "accessory after the fact" under 18 U.S.C. § 3 qualifies as an offense relating to obstruction of justice, without requiring a pending or ongoing proceeding). Likewise, we cannot discern a settled "former rule" on which the respondent may reasonably have relied under the third factor of the *Montgomery Ward* test.

We will assume that *Montgomery Ward*'s fourth factor "strongly favors" the respondent. *Garfias-Rodriguez*, 702 F.3d at 523. Removal of an alien from the United States is a "substantial burden that weighs against retroactive application of an agency adjudication." *Id.* (citation omitted). We do not diminish this factor or the hardship that might result from an alien's removal.

"The fifth factor—the statutory interest in applying a new rule—points in favor of the government because non-retroactivity impairs the uniformity of a statutory scheme, and the importance of uniformity in immigration law is well established." *Id.* "[T]he Federal immigration laws are intended to have uniform nationwide application and to implement a unitary Federal policy." *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 508 (BIA 2008) (citing *Kahn v. INS*, 36 F.3d 1412, 1414 (9th Cir. 1994)). As noted, Congress expressly indicated its intention that the aggravated felony definitions in section 101(a)(43) of the Act should apply retroactively. *See St. Cyr*, 533 U.S. at 318-19. This congressional action further cuts in favor of retroactive application here, although it is not dispositive.

Having weighed the factors in the *Montgomery Ward* test in their totality, we conclude that *Valenzuela Gallardo II* may be applied retroactively. Our decision has filled a void in what was an unsettled area of law, and while we acknowledge the hardship that retroactive application might cause to the respondent, the national uniformity of our immigration laws is a strong countervailing interest. We reach this conclusion based on the circumstances of this case and the provision of the Act at issue. We do not decide whether or how to apply decisions retroactively in other contexts, including those

involving other grounds for removal and discretionary or mandatory relief.

III. CONCLUSION

In sum, the respondent was convicted of dissuading a witness in violation of section 136.1(b)(1) of the California Penal Code, an offense that is categorically an aggravated felony offense relating to the obstruction of justice. We reject his argument that the standard we set forth for defining obstruction of justice in *Valenzuela Gallardo II* may not be applied retroactively to his conviction, and we conclude that he is removable under section 237(a)(2)(A)(iii) of the Act. Consequently, he is also ineligible for cancellation of removal under section 240A(a)(3) of the Act.[8] Accordingly, the respondent's appeal will be dismissed.

ORDER: The appeal is dismissed.

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[8] The respondent summarily argues that both we and the Immigration Judge erred by denying his application for cancellation of removal. This claim, which addresses no new arguments on remand, does not merit any further consideration.

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA, 22041

File Number: A014-690-577

IN RE: FERNANDO CORDERO-GARCIA
A.K.A. FERNANDO CORDERO

Date: [Oct. 18, 2019]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Michael K. Mehr, Esquire

ON BEHALF OF DHS:

Jennifer L. Castro
Assistant Chief Counsel

APPLICATION:

Termination; cancellation of removal under section 240A(a) of the Act

I. FACTUAL AND PROCEDURAL HISTORY

On November 27, 2012, we dismissed the respondent's appeal from the Immigration Judge's June 27,

2012, decision finding him removable as charged and denying his application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). On July 1, 2014, we denied the Department of Homeland Security's motion for sua sponte reopening. This case is presently before us pursuant to a July 10, 2017, order of the United States Court of Appeals for the Ninth Circuit granting the Government's motion to remand. The parties have filed briefs on remand. The appeal will be dismissed.

We review findings of fact, including credibility findings, for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and all other issues de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

This appeal requires us to address the immigration consequences of the respondent's 2009 conviction of dissuading a witness from reporting a crime, in violation of California Penal Code (Cal. Penal Code) § 136.1(b)(1). The Government sought remand from the Ninth Circuit for the Board to address whether the respondent's conviction of dissuading a witness in violation of Cal. Penal Code § 136.1(b)(1) constitutes an aggravated felony relating to obstruction of justice as defined in section 101(a)(43)(S) of the Act, 8 U.S.C. § 1101(a)(43)(S). *See Valenzuela Gallardo v. Lynch*, 818 F.3d 808 (9th Cir. 2016).[1] This question is relevant to the respondent's removability as an alien convicted of an aggravated felony

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[1] In *Valenzuela Gallardo v. Lynch*, the Ninth Circuit did not defer to our definition of offenses relating to obstruction of justice set forth in *Matter of Valenzuela Gallardo*, 25 I&N Dec. 838 (BIA 2012)

and his eligibility for cancellation of removal. *See* section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii); section 240A(a)(3) of the Act.[2]

II. ANALYSIS

A. STATUS AS AGGRAVATED FELONY RELATING TO OBSTRUCTION OF JUSTICE

California Penal Code§ 136.1(b)(1) provides in relevant part:

> (b) Except as provided in subdivision (c), every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison: (1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge.

Cal. Penal Code § 136.1(b)(1).

During the pendency of this appeal, we clarified the generic definition of an aggravated felony relating to obstruction of justice. *See Matter of Valenzuela Gallardo,* 27 I&N Dec. 449 (BIA 2018) (*Valenzuela Gallardo II*). We defined such an offense as involving

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(Valenzuela Gallardo I), which the court found to be impermissibly vague.

[2] The Government further noted intervening Ninth Circuit case law relevant to whether Cal Penal Code§ 136.1(b)(1) defines a crime involving moral turpitude, which would impact whether the respondent is removable under section 237(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(ii). *See Escobar v. Lynch,* 846 F.3d 1019 (9th Cir. 2017).

"(1) an affirmative and intentional attempt (2) that is motivated by a specific intent (3) to interfere either in an investigation or proceeding that is ongoing, pending, or reasonably foreseeable by the defendant, or in another's punishment resulting from a completed proceeding." *Id.* at 460.

We further held that a conviction of being accessory to a felony under section 32 of the California Penal Code that results in a term of imprisonment of at least 1 year is a conviction for an aggravated felony offense relating to obstruction of justice. *Id.* at 460-61. The California accessory statute required "a violator to aid the principal, with knowledge that the principal has committed a crime, and with the specific intent to interfere in the principal's arrest, trial, conviction, or punishment." *Id.* at 461 (citing *People v. Nuckles*, 298 P.3d 867, 870 (Cal. 2013)) (footnote omitted).

For a conviction under Cal. Penal Code § 136.1(b)(I), the prosecutor must show "'(1) the defendant has attempted to prevent or dissuade a person (2) who is a victim or witness to a crime (3) from making [a] report . . . to any peace officer or other designated officials.'" *See People v. Navarro*, 212 Cal. App. 4th 1336, 1347 (Cal. App. 2013) (quoting *People v. Upsher*, 155 Cal. App. 4th 1311, 1320 (Cal. App. 2007)). "The prosecution must also establish that 'the defendant's acts or statements [were] intended to affect or influence a potential witness's or victim's testimony or acts.'" *See id.* (quoting *People v. McDaniel*, 22 Cal. App. 4th 278, 284 (Cal. App. 1994)) (alterations by the court).

Thus, dissuading a witness under California law requires a specific intent. We further conclude that an investigation or proceeding would be ongoing, pending,

or reasonably foreseeable, where an accused is trying 'to prevent or dissuade a victim or witness from making a report to a peace officer or other designated official. Put another way, an investigation is reasonably foreseeable when one tries to prevent a victim or witness from reporting to appropriate authorities. Otherwise, there is little reason to prevent or dissuade such a report.[3] Therefore, we conclude that a violation of Cal. Penal Code§ 136.1(b)(1) meets our criteria under *Valenzuala Gallardo II* for an aggravated felony relating to obstruction of justice under section 101(a)(43)(S) of the Act.

B. RETROACTIVITY

We also reject the respondent's argument that our standard for obstruction of justice may not be applied retroactively to his conviction, which occurred before the issuance of both of our decisions in *Valenzuela Gallardo* (Respondent's Br. at 11). At the outset, we note the well-established principle that agencies may adjudicate new rules and apply those new rules retroactively. "[T]he choice made between proceeding by general rule

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[3] In determining that the respondent's conviction under Cal. Penal Code § 136.1(b)(1) was an aggravated felony relating to obstruction of justice, the Immigration Judge applied a version of the modified categorical approach then utilized by the Ninth Circuit (IJ at 10-11). The Immigration Judge specifically cited the modified categorical approach used in *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc) (IJ at 10). The Supreme Court rejected that version of the modified categorical approach in *Descamps v. United States*, 570 U.S. 254 (2013). The Immigration Judge found that Cal. Penal Code § 136.1(b)(1) was not a categorical aggravated felony under *Trung Thanh Hoang v. Holder*, 641 F.3d 1157 (9th Cir. 2011) (IJ at 9-10). Applying our decision in *Valenzuela Gallardo II*, we conclude that this offense is categorically an aggravated felony relating to obstruction of justice.

or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (citation omitted).

> That such action might have a retroactive effect was not necessarily fatal to its validity. Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency. But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.

Id. (citation omitted).

1. Change in Law

Before we decide whether or not to apply *Matter of Valenzuela Gallardo* retroactively, we must decide whether that decision constituted a change in law. The Ninth Circuit recently held that a change in the law is required before a retroactivity analysis is required. *See Olivas-Motta v. Whitaker*, 910 F.3d 1271, 1276 (9th Cir. 2018). A retroactivity analysis is applicable when "'an agency consciously overrules or otherwise alters its own rule or regulation,'" or "'expressly considers and openly departs from a circuit court decision.'" *Id.* at 1277 (quoting *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 518-19 (9th Cir. 2012) (en banc)). The Ninth Circuit remanded *Valenzuela Gallardo* to the Board for "consideration of a *new* construction or application of the interpretation" previously deferred to by the court.

Valenzuela Gallardo v. Lynch, 818 F.3d at 812-13 (emphasis added).

Not all Board precedents clarifying prior decisions are necessarily changes in the law. The Ninth Circuit rejected as "contrary to settled law" the conclusion that "the mere existence of a new published decision on an issue would always trigger retroactivity analysis." *Olivas-Motta v. Whitaker,* 910 F.3d at 1276. Moreover, a new Board precedent that resolves prior, potentially inconsistent unpublished decisions is not a change in the law, as "[u]npublished decisions are not precedential and 'do not bind future parties.'" *Olivas-Motta v. Whitaker,* 910 F.3d at 1278 (quoting *Marmolejo-Campos v. Holder,* 558 F.3d 903, 909 (9th Cir. 2009)).

As discussed in greater detail below, our decision in *Valenzuela Gallardo II* openly departed from the generic definition as previously used by the Ninth Circuit. *Valenzuela Gallardo II* also clarified *Valenzuela Gallardo I,* but the standard in *Valenzuela Gallardo II* differs in some respects from the definition in *Valenzuela Gallardo I.* We conclude that a retroactivity analysis is therefore appropriate in this case.

2. *Montgomery Ward* Test

We must then determine the appropriate test for ascertaining whether *Valenzuela Gallardo II* may be applied retroactively. The Ninth Circuit applies the factors set forth in *Montgomery Ward & Co. v. FTC,* 691 F.2d 1322, 1328 (9th Cir. 1982). *See Garfias-Rodriguez v. Holder,* 702 F.3d at 514-23 (applying these factors in favor of retroactive applicability). This test was first applied in *Retail, Wholesale & Dep't Store Union v. NLRB,* 466 F.2d 380,390 (D.C. Cir. 1972). The Fifth

Circuit has surveyed the circuit courts and found that the Second, Third, Fourth, Sixth, and Seventh Circuits also apply this test. *Microcomputer Tech. Inst. v. Riley,* 139 F.3d 1044, 1050 n.4 (5th Cir. 1998) (collecting cases). The Eighth Circuit applies a similar test. *Id.* The Tenth Circuit has adopted this test as well. *Stewart Capital Corp. v. Andrus,* 701 F.2d 846, 848 (10th Cir. 1983). The Fifth Circuit, by contrast, weighs "the disadvantages of retroactivity—frustration of parties' expectations—against the detrimental effect of prospectivity—partial frustration of what we have now determined is the proper statutory interpretation." *Microcomputer Tech. Inst. v. Riley,* 139 F.3d at 1051.

The Tenth Circuit has also clarified that agency "rules . . . should be presumed prospective in operation unless *Congress* has clearly authorized retroactive application." *De Diz Robles v. Lynch,* 803 F.3d 1165, 1172 (10th Cir. 2015) (emphasis added). The Ninth Circuit has also applied a presumption of prospective application. *See Betansos v. Barr,* No. 15-72347, 2019 WL 2896367, at *9 (9th Cir. July 5, 2019).

Congress has expressly stated that the aggravated felony definitions shall apply retroactively. *See* section 101(a)(43) of the Act; *see also INS v. St. Cyr,* 533 U.S. 289, 318-19 (2001) (stating that the definitions of aggravated felonies clearly apply retroactively). Upon consideration of our informed discretion, we may apply decisions retroactively consistent with *SEC v. Chenery.*

In light of the courts' overwhelming use of the *Retail, Wholesale & Dep't Store Union v. NLRB* test (known as the *Montgomery Ward* test within the Ninth Circuit), we will use that test, not only in cases arising in the

Ninth Circuit, where we are bound to use it, but throughout the country. *See Matter of J-H.J-*, 26 I&N Dec. 563, 564 (BIA 2015) (acceding to the clear majority view of nine circuit courts).[4] We must not only consider the desirability of the uniform application of the immigration laws nationwide. We also must consider that the circuit courts use this test in reviewing decisions from numerous other agencies. It would be incongruous to use a different test under those circumstances.

3. Application of *Montgomery Ward*

The applicable test requires us to apply the following factors:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Montgomery Ward & Co. v. FTC, 691 F.2d at 1333. The first factor may not be well-suited to the context of removal proceedings and often does not favor either side. *See Garfias-Rodriguez v. Holder*, 702 F.3d at 521

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[4] However, to the extent that a court of appeals applies a different test, an Immigration Judge and the Board should follow the law of that circuit. *See Matter of Anselmo*, 20 I&N Dec. 25, 31 (BIA 1989) (citations omitted).

(distinguishing between removal proceedings and litigation between private parties in the context of the NLRB).

"[T]he first factor is directed towards maintaining an incentive for litigants to raise novel claims by allowing a litigant who successfully argues for a new rule to get the benefit of that rule." *Miguel-Miguel v. Gonzales,* 500 F.3d 941, 951 (9th Cir. 2007) (citation omitted). In subsequent cases, however, this factor favors the alien when the agency has "confronted the problem before, had established an explicit standard of conduct, and now attempts to punish conformity to that standard under a new standard subsequently adopted." *Retail, Wholesale & Dep't Store Union, AFL-C/O v. NLRB,* 466 F.2d at 391. As explained in greater detail below, *Valenzuela Gallardo II* did not arise under these circumstances, but rather arose after decades of Board and Ninth Circuit decisions interpreting the aggravated felony relating to obstruction of justice. In analyzing the first factor, the Ninth Circuit has noted that "any question of unfairness in applying a new rule . . . , such as surprise or detrimental reliance, is fully captured in the second and third *Montgomery Ward* factors. *Garfias-Rodriguez v. Holder,* 702 F.3d at 521. We agree based on the circumstances of this case.

"The second and the third factors are closely intertwined. If a new rule represents an abrupt departure from well established practice, a party's reliance on the prior rule is likely to be reasonable, whereas if the rule merely attempts to fill a void in an unsettled area of law, reliance is less likely to be reasonable." *Id.* (internal quotation marks and citation removed). "[T]hese two

factors will favor retroactivity if a party could reasonably have anticipated the change in the law such that the new 'requirement would not be a complete surprise.'" *Id.* (quoting *Montgomery Ward*, 691 F.2d at 1333-34).

The Ninth Circuit has stated that Congress did not clearly define the generic elements of the aggravated felony relating to obstruction of justice. *Renteria-Morales v. Mukasey*, 551 F.3d 1076, 1086 (9th Cir. 2008). This Board and the Ninth Circuit have issued numerous decisions since 1997 about defining the outer limits of offenses relating to obstruction of justice. *See, e.g., Valenzuela Gallardo v. Lynch*, 818 F.3d 808; *Trung Thanh Hoangv. Holder*, 641 F.3d 1157 (9th Cir. 2011); *Matter of Espinoza*, 22 I&N Dec. 889 (BIA 1999) (en banc); *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997) (en banc). Recently, the Ninth Circuit, in a retroactivity analysis, emphasized that "an ongoing conversation or a back-and-forth between this Court and the BIA about the proper interpretation" is an important consideration. *Betansos v. Barr*, 2019 WL 2896367, at*10. A brief review of these decisions reflects a lengthy ongoing conversation between the Board and the Ninth Circuit and the unsettled nature of defining an aggravated felony relating to obstruction of justice.

In *Matter of Batista*, we concluded that a conviction under the federal accessory-after-the-fact statute, 18 U.S.C. § 3, "clearly relates to obstruction of justice," notwithstanding the lack of an element of an ongoing investigation or proceeding. 21 I&N Dec. at 96 1. Two years later, in *Matter of Espinoza*, we held that the federal misprision of a felony statute, 18 U.S.C. § 4, was not an offense relating to obstruction of justice. The Ninth

Circuit has repeatedly deferred to a generic definition that it drew from *Matter of Espinoza,* requiring interference with an ongoing proceeding or investigation, although *Espinoza* did not itself articulate such a requirement and *Batista* clearly did not apply such a requirement. *See Trung Thanh Hoang v. Holder,* 641 F.3d at 1164; *Renteria-Morales v. Mukasey, 551* F.3d 1076, 1086-87 (9th Cir. 2008); *Salazar-Luviano v. Mukasey, 551* F.3d 857, 860 (9th Cir. 2008).[5] However, one judge dissented from the court's use of that definition in *Trung Thanh Hoang v. Holder,* contending that the court should have followed *Matter of Bastista* and was not limited to following the definition that the court had derived from *Matter of Espinoza.*[6] 641 F.3d at 1165-68 (Bybee, J., dissenting).

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[5] If we were to measure the generic definition of the relating to obstruction of justice aggravated felony in 2009 when the respondent pleaded guilty, we would still conclude that the law was unsettled. The Ninth Circuit precedent at the time had not yet analyzed our en banc decision in *Matter of Batista.* A respondent potentially facing this aggravated felony would have had to address *Matter of Batista* in 2009 and could not merely rely on *Renteria-Morales v. Mukasey* and *Salazar-Luviano v. Mukasey.*

[6] We did note in *Matter of Espinoza* the absence of an ongoing criminal investigation or trial. However, we made the more general observation that misprision does not constitute "obstruction of justice" because "it lacks the critical element of an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice." *Matter of Espinoza,* 22 I&N Dec. at 896. In identifying the critical element of specific intent, we did not state that an ongoing criminal investigation or trial was always required. Subsequently, in *Valenzuela Gallardo I,* we clarified that an ongoing investigation or proceeding is not necessary for an interference with the "process of justice" to occur. 25 I&N Dec. at 842.

The Board subsequently clarified our prior precedents interpreting section 101(a)(43)(S) of the Act and held that an offense relating to obstruction of justice must have as an element "the affirmative and intentional attempt, with specific intent, to interfere with the *process of justice*. . . . [T]he existence of [an ongoing criminal investigation or trial] is not an essential element of 'an offense relating to obstruction of justice.'" *Valenzuela Gallardo I,* 25 I&N Dec. at 841 (emphasis added). Concerned that this definition might be impermissibly vague, a divided court applied the doctrine of constitutional avoidance and remanded for this Board to consider a new construction or application of the interpretation that the court had previously derived from *Matter of Espinoza* and to which the court had deferred in *Trung Thanh Hoang v. Holder. See Valenzuela Gallardo v. Lynch,* 818 F.3d at 813-25. We clarified our definition again in *Valenzuela Gallardo II.* These administrative and judicial decisions show that the issue of the requirements for an aggravated felony relating to obstruction of justice under section 101(a)(43)(S) of the Act has been unsettled for several decades.

The unsettled nature of defining the term "relating to obstruction of justice" becomes more apparent in light of the reasoning underpinning *Valenzuela Gallardo v. Lynch.* The Ninth Circuit had serious constitutional doubts about the vagueness of the Board's definition set forth in *Valenzuela Gallardo I.* The court noted 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 under [section 101(a)(43)(S) of the Act] and what crimes do not." *Valenzuela Gallardo v. Lynch,* 818 F.3d at

820. It is difficult to conclude that an area of law is settled when a court expresses such concerns about the vagueness of an agency's interpretation of the relevant statute.

Moreover, a construction requiring interference with an ongoing proceeding or investigation brings its own unsettled uncertainty. As noted in *Valenzuela Gallardo v. Lynch,* Congress placed obstruction of justice crimes in Title 18, Chapter 73. 818 F.3d at 821. Some of these crimes do not require interference with an ongoing tribunal or investigation. *Id.* (citing 18 U.S.C. § 1512(b)(3) (prohibition on tampering with a witness with the intent to hinder or prevent "communication to a law enforcement officer" regarding a federal offense); 18 U.S.C. § 1512(d)(2) (prohibition on harassing someone with the intent to prevent that person from "reporting [a federal crime] to a law enforcement officer or judge"); 18 U.S.C. § 1519 (prohibition on falsifying or destroying a record "with the intent to impede, obstruct, or influence the investigation or proper administration of any matter" within the jurisdiction of the United States)). An Immigration Judge, practicing attorney, or alien would reasonably question whether these offenses—placed by Congress in a chapter expressly dedicated to obstruction of justice—would relate to obstruction of justice under the definition previously applied by the Ninth Circuit. Although case-by-case adjudication might likely resolve this issue over time, it is further evidence of unsettled law.

Additionally, we contrast defining the aggravated felony relating to obstruction of justice with defining the circumstances under which theft is a crime involving moral turpitude. The Fifth Circuit recently declined to

apply retroactively our decision in *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016). *See Monteon-Camargo v. Barr*, 918 F.3d 423 (5th Cir. 2019). In *Matter of Diaz-Lizarraga*, we held that "a theft offense is a crime involving moral turpitude if it involves an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded." 26 I&N Dec. at 853. Previously, from our "earliest days," we had held that theft only categorically encompassed moral turpitude "if—and only if—it is committed with the intent to *permanently* deprive an owner of property." *Id* at 849. The Fifth Circuit, joining the Ninth Circuit and two others,[7] concluded that our new definition drastically changed the landscape. *Monteon-Camargo v. Barr*, 918 F.3d at 431. We discern no comparable established practice in the context of interpreting the ambiguous phrase "relating to obstruction of justice."

We also look beyond the interplay between Board precedent and Ninth Circuit decisions to determine whether the definition of the term "relating to obstruction of justice" is unsettled. The Ninth Circuit's inquiry has been whether and to what extent it would defer under *Chevron's* step two to the Board's definition of section 101(a)(43)(S) of the Act. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). A court can only reach this second step if the statute is silent or ambiguous. After finding that the Act did not define the the phrase "offense relating to ob-

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[7] *See Garcia-Martinez v. Sessions*, 886 F.3d 1291 (9th Cir. 2018); *Obeya v. Sessions*, 884 F.3d 442 (2d Cir. 2018); *Lucio-Rayos v. Sessions*, 875 F.3d 573 (10th Cir. 2017).

struction of justice," the Ninth Circuit has thus addressed this statutory term in the context of *Chevron* step two.[8] *See Renteria-Morales v. Mukasey*, 551 F.3d at 1086.

The Third Circuit, by contrast, has concluded that the phrase "relating to obstruction of justice" is unambiguous. *See Denis v. U.S. Atty Gen.*, 633 F.3d 201, 209 (3d Cir. 2011). Applying de novo review, the Third Circuit found our definition of the phrase in *Espinoza* to be unnecessarily restrictive and adopted a broader definition. *Id.* at 211-13; *see also Matter of Valenzuela Gallardo I*, 25 I&N Dec. at 843. Judicial disagreement over whether a phrase is ambiguous or plain further demonstrates how unsettled the issue of defining "relating to obstruction of justice" has been.

This Board and Immigration Courts routinely encounter a diverse range of criminal statutes containing distinct elements that might relate to obstruction of justice. We thus must determine whether or not these state and Federal offenses categorically relate to obstruction of justice. Our prior determinations, such as our conclusion that misprision of a felony under 18 U.S.C. § 4 does not relate to obstruction of justice, *see Matter of Espinoza*, are relevant but not dispositive when examining these other statutes. Our conclusions in *Valenzuela Gallardo I* and *Valenzuela Gallardo II* that section 32 of the California Penal Code is categorically an obstruction of justice offense under section

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[8] The court in *Valenzuela Gallardo v. Lynch* applied the constitutional avoidance doctrine at *Chevron*'s step one. 818 F.3d at 815-18. However, the court also noted that section 101(a)(43)(S) was an "ambiguous statute." *Id.* at 824.

101(a)(43)(S) of the Act were made in this context. Applying the second factor of the *Montgomery Ward* test, we conclude that these decisions were merely attempts to fill a void in an unsettled area of law and do not represent an abrupt departure from well-established practice. *See, e.g., Valenzuela Gallardo I,* 25 I&N Dec. at 842 (noting that our prior precedent had not gone "so far as to hold that obstruction offenses must involve interference with an ongoing investigation or proceeding"); *Matter of Batista-Hernandez,* 21 I&N Dec. 955 (holding that "accessory after the fact" under 18 U.S.C. § 3 qualifies as an offense relating to obstruction of justice, without requiring a pending or ongoing proceeding). Likewise, we cannot discern a settled "former rule" on which the respondent may reasonably have relied, under the third factor of the *Montgomery Ward* test.

We will assume that *Montgomery Ward's* fourth factor "strongly favors" the respondent. *Garfias-Rodriguez v. Holder,* 702 F.3d at 523. Deportation is a "substantial burden" weighing against retroactive application. *Id.* We do not diminish this factor or the hardship that might result from removal.

"The fifth factor—the statutory interest in applying a new rule—points in favor of the government because non-retroactivity impairs the uniformity of a statutory scheme, and the importance of uniformity in immigration law is well established." *Garfias-Rodriguez v. Holder,* 702 F.3d at 523 (citation omitted). "[T]he Federal immigration laws are intended to have uniform nationwide application and to implement a unitary Federal policy." *Matter of Velazquez-Herrera,* 24 I&N Dec. 503, 508 (BIA 2008) (citing *Kahn v. INS,* 36 F.3d 1412, 1414 (9th Cir. 1994)) (additional citation omitted). As

noted, Congress has expressly stated that the aggravated felony definitions shall apply retroactively. *See* section 101(a)(43) of the Act; *see also INS v. St. Cyr*, 533 U.S. 289, 318-19 (2001) (stating that the definitions of aggravated felonies clearly apply retroactively). This Congressional action further cuts in favor of retroactive application here, although it is not dispositive.

Having weighed the factors in their totality, we conclude that *Valenzuela Gallardo II* may be applied retroactively. We acknowledge the hardship that retroactive application might cause to the respondent. However, *Valenzuela Gallardo II* filled a void in an unsettled area of law, and the national uniformity of our immigration laws is a strong countervailing interest.[9]

We reach this conclusion based on the circumstances of this case and the statute at issue. We do not decide whether or how to apply decisions retroactively in other contexts, including other grounds of removal and discretionary or non-discretionary relief from removal.

III. CONCLUSION

In sum, the respondent is convicted of an offense that categorically relates to obstruction of justice. As the respondent is convicted of an aggravated felony, he is removable under section 237(a)(2)(A)(iii) of the Act and

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[9] Since we will apply *Valenzuela Gallardo II* retroactively, we will not reach the issue of whether the respondent is removable under the crime involving moral turpitude provision at section 237(a)(2)(A)(ii) of the Act. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach.").

is not eligible for cancellation of removal. *See* section 240A(a)(3) of the Act.

The respondent summarily argues that the Immigration Judge and this Board erred by denying cancellation of removal (Respondent's Br. at 16). This claim, which does not include any new arguments on remand, does not warrant relief.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

/s/ [LSW]
FOR THE BOARD

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-74130
Agency No. A014-690-577

FERNANDO CORDERO-GARCIA,
AKA FERNANDO CORDERO, PETITIONER

v.

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL,
RESPONDENT

[Filed: July 10, 2017]

ORDER

Respondent's Unopposed Motion for Remand and to Remove Case from the Oral Argument Calendar, filed with this court on July 5, 2017, is GRANTED. The copy of this order shall act as and for the mandate of this court.

PETITION REMANDED.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Allison Fung
Deputy Clerk
Ninth Circuit Rule 27-7

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA, 20530

File Number: A014 690-577—San Francisco, Ca.

IN RE: FERNANDO CORDERO-GARCIA
A.K.A. FERNANDO CORDERO

Date: [July 1, 2014]

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:

Pre se[1]

ON BEHALF OF DHS:

Margaret R. Curry
Deputy Chief Counsel

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[1] The respondent's "Opposition to the Department of Homeland Security's Motion to Reopen Removal Proceedings Sua Sponte" was filed on the respondent's behalf by Attorney Michael K. Mehr. The Board, however, does not recognize Michael K. Mehr as the attorney of record for the respondent as he has not submitted the required Form EOIR-27 (Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals). Because of this, we will send a courtesy copy of the decision to Michael K. Mehr, Esquire.

APPLICATION:

Reopening

This case was last before the Board on November 27, 2012, when the Board dismissed the respondent's appeal from the Immigration Judge's June 27, 2012, decision finding the respondent removable as charged and denying his application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). The Board agreed with the Immigration Judge and concluded that the respondent's 2009 convictions for dissuading a witness from reporting a crime in violation of Cal. Penal Code section 136.1(b)(1), categorically constitute an aggravated felony offense thereby rendering the respondent removable as charged as an aggravated felon. The Board also determined, in the alternative, that such conviction qualifies as an aggravated felony under the modified categorical approach. The Board further concluded that the respondent's convictions for dissuading a witness from reporting a crime in violation of Cal. Penal Code section 136.1(b)(1), and his conviction for sexual battery without restraint in violation Cal. Penal Code section 243.4(e)(1), categorically constitute crimes involving moral turpitude thereby rendering the respondent removable as charged as an alien who has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. Finally, the Board agreed with the Immigration Judge and concluded that the respondent does not warrant cancellation of removal in the exercise of discretion.

On May 23, 2014, the Department of Homeland Security ("DHS"), filed the present untimely request for sua sponte reopening. The motion will be denied.

The pending motion neither contains nor identifies any evidence, legal or otherwise, that affects the Board's November 27, 2012, decision. Thus, on this record, we would not reopen these proceedings based on the DHS's apparent "fundamental change of law" argument. Further, given the entirety of the record before us, we are not persuaded that reopening of these proceedings in the exercise of discretion is warranted. *See Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999); *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). Accordingly, we will enter the following order.

ORDER: The motion is denied.

/s/ [ILLEGIBLE]
FOR THE BOARD

APPENDIX F

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA, 22041

File Number: A014 690 577—San Francisco, Ca.

IN RE: FERNANDO CORDERO-GARCIA
A.K.A. FERNANDO CORDERO

Date: [Nov. 27, 2012]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Michael K. Mehr, Esquire

ON BEHALF OF DHS:

Jennifer L. Castro
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)]—Convicted of aggravated felony as defined in section 101(a)(43)(S) of the Act.

Lodged: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)]—Convicted of two or more crimes involving moral turpitude

APPLICATION:

Termination; cancellation of removal 240A(a)

The respondent, a native and citizen of Mexico, appeals from the decision of the Immigration Judge dated June 27, 2012, finding him removable as charged and denying his application for cancellation of removal pursuant to section 240A(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1229b(a). The appeal will be dismissed. The request for oral argument is denied. *See* 8 C.F.R. § 1003.1(e)(7).

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1 (d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge found that the respondent was removable pursuant to section 237(a)(2)(A)(iii) of the Act based on the respondent's record of conviction (Exhs. 1, 1B, 9). The Immigration Judge specifically found that the respondent's 2009 convictions for dissuading a witness from reporting a crime under California Penal Code section 136.1(b)(1)[1] constituted an aggravated felony offense, as defined under section

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[1] California Penal Code section 136.1(b)(1) provides as follows:

(b) Except as provided in subdivision (c), every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison:

101(a)(43)(S) of the Act, 8 U.S.C. §§ 1101(a)(43)(S) (an offense relating to obstruction of justice, perjury, or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year).

The respondent argues that his convictions are not offenses relating to obstruction of justice because there is no requirement under California Penal Code section 136.1(b)(1) that an offense actively interfere with the proceedings of a tribunal or an investigation or action or threat of action against those who would cooperate with the process of justice. However, we held in *Matter of Valenzuela Gallardo,* 25 I&N Dec. 838 (BIA 2012), that a crime may relate to obstruction of justice within the meaning of section I01(a)(43)(S) of the Act irrespective of the existence of an ongoing criminal investigation or proceeding. In addition, California Penal Code section 136.1 (b)(1) requires the specific intent to dissuade the victim from reporting the crime or victimization. *See People v. Young,* 34 Cal. 4th 1149, 1210 (2005); *see also* Exh. 6, at tab E pp. 2085-2086 (requiring the jury to find that the defendant maliciously tried to prevent or discourage the victims from making a report, which requires intent).

In the alternative, even if it were determined that interference with proceedings or an investigation were required, we agree with the Immigration Judge's determination that, under the modified categorical approach, the record of conviction establishes that the respondent's crime did in fact interfere with a proceeding or in-

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(1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge.

vestigation, as the jury specifically found that the respondent "was released from custody on bail or on his own recognizance in Case Number 1279489" at the time that he committed the offense of dissuading a witness under California Penal Code section 136.1(b)(1). *See* Exh.3; *see also Hoang v. Holder*, 641 F.3d 1157 (9th Cir. 2011) (interpreting the Board's definition of an offense relating to obstruction of justice prior to our holding in *Matter of Valenzuela Gallardo, supra*). This establishes that at the time he committed the offense, the respondent was the subject of an ongoing criminal investigation and proceeding. Thus, the respondent's convictions under California Penal Code section 136.1(b)(1) relate to obstruction of justice within the meaning of section 101(a)(43)(S) of the Act. *See Matter of Valenzuela Gallardo, supra.*

The Immigration Judge further determined that the respondent's 2009 California convictions for dissuading a witness from reporting a crime, under California Penal Code section 136.1(b)(1), and his conviction for sexual battery without restraint, under California Penal Code section 243.4(e)(1),[2] were crimes involving moral turpitude and he concluded that the respondent was removable pursuant to section 237(a)(2)(A)(ii) of the Act. We affirm that determination. We agree that the respond-

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[2] California Penal Code section 243.4(e)(1) provides:

(e)(1) Any person who touches an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of misdemeanor sexual battery, punishable by a fine not exceeding two thousand dollars ($2,000), or by imprisonment in a county jail not exceeding six months, or by both that fine and imprisonment.

ent's conviction for sexual battery without restraint under California Penal Code section 243.4(e)(1) qualifies as a crime involving moral turpitude and renders the respondent removable as charged. *See generally Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001) (moral turpitude refers to conduct that is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general). This crime includes the aggravating factors that the victim is subjected to physical touching of an intimate part of the body without consent and for the specific purpose of sexual arousal, sexual gratification, or sexual abuse. *See* California Penal Code section 243.4(e)(1); *see also Matter of Sanudo*, 23 I&N Dec. 968, 971-72 (BIA 2006) (assault and battery offenses may appropriately be classified as crimes of moral turpitude if they necessarily involved aggravating factors); *see generally People v. Chavez*, 100 Cal. Rptr. 2d 680 (2000) (holding that sexual battery pursuant to California Penal Code section 243.4 was a crime involving moral turpitude because the degrading use of another, against her will, for one's own sexual arousal is deserving of moral condemnation).

We additionally conclude that the respondent's convictions for dissuading a witness from reporting a crime, under California Penal Code section 136.1(b)(1), also constitute crimes involving moral turpitude, as a conviction under that section requires specific intent to dissuade a victim from reporting their victimization which interferes with the process of justice. *See People v. Young, supra; see also* Exh.6, at tab E pp. 2085-2086 (requiring the jury to find that the defendant maliciously tried to prevent or discourage the victims from making a report, which requires intent).

We review de novo the discretionary denial of cancellation of removal under section 240A(a) of the Act. We recognize the respondent's significant positive equities including his age and length of lawful residence in the United States since 1965. The respondent is married to a United States citizen and has 5 children who are also citizens of this country. We recognize that the respondent's wife and oldest son testified concerning the emotional hardship that they would suffer upon the respondent's removal, and we have considered the respondent's discussion of this in his appellate brief and his assertions regarding emotional hardship and the stigma associated with deportation. We have considered the respondent's career and the supportive letters from family, friends, and colleagues. We also consider all of the respondent's arguments and contentions on appeal, including his assertion that he has some health struggles including high blood pressure and other "aches and pains."

We have also considered the opinions of two psychologists, indicating that the respondent's actions were fueled by a failure of judgement and impulse control, and Dr. Burdick's opinion and the respondent's contention that the risk of re-offending is very low and that the respondent has a strong interest in maintaining his family.

However, given the nature and the recency of the respondent's criminal offenses, his continuous and repeated sexual relationships with women, without their consent, who were referred to him for treatment through the criminal justice system and whom he also attempted to dissuade from reporting his crimes and their victimization while he was out on bail, we are not persuaded

that the respondent's equities outweigh the adverse factors presented in this case nor that the respondent has met his burden of demonstrating that he merits a favorable exercise of discretion. In exercising our judgment, we follow our obligation to safeguard the interests of the United States. After balancing the positive factors against the negative factors in this case, we are unable to conclude that a grant in the exercise of discretion would be in the best interests of the United States.

Accordingly, the following order will be entered.

ORDER: The respondent's appeal is dismissed.

/s/ [ILLEGIBLE]
FOR THE BOARD

APPENDIX G

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN FRANCISCO, CALIFORNIA

File Number: A014-689-577

MATTER OF FERNANDO CORDERO GARCIA,
RESPONDENT

Date: June 27, 2012

IN REMOVAL PROCEEDINGS

Charge:

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended, as an alien who, at any time after admission, has been convicted of an aggravated felony as defined in section 101(a)(43)(S) of the Act, an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year

Lodged Charge:

Section 237(a)(2)(A)(ii) of the Act, as an alien who, at any time after admission, has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct

Application:

Cancellation of Removal for Certain Permanent Residents

On Behalf of the Respondent:

Michael K. Mehr
Law Offices of Michael K. Mehr
100 Doyle Street, Suite A
Santa Cruz, California 95062

On Behalf of the DHS:

Jennifer L. Castro
Office of the Chief Counsel
120 Montgomery Street, Suite 200
San Francisco, California 94104

DECISION OF THE IMMIGRATION JUDGE

I. Background

The Department of Homeland Security ("DHS") initiated these removal proceedings against the respondent, Fernando Cordero Garcia, by filing a Notice to Appear ("NTA") with the San Francisco, California, Immigration Court on November 30, 2011. Exh. 1. The NTA alleged that the respondent is a native and citizen of Mexico and was admitted to the United States at Los Angeles, California, on or about July 2, 1965, as a lawful permanent resident. *Id.* The NTA further alleged that that the respondent was convicted in the Superior Court of California for the County of Santa Barbara on April 24, 2009, of two counts of dissuading a witness from reporting a crime, in violation of California Penal Code ("CPC") § 136.1(b)(1), and was sentenced to two

years' imprisonment. *Id.* The DHS charged the respondent with removability under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA" or "Act"), as amended, as an alien who, at any time after admission, has been convicted of an aggravated felony as defined in section 101(a)(43)(S) of the Act (an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year). *Id.* The DHS later filed a Form 1-261, Additional Charges of Inadmissibility/ Deportability, alleging that on April 24, 2009, the respondent was also convicted in the Superior Court of California for the County of Santa Barbara of sexual battery without restraint, in violation of CPC § 243.4(e)(1), and sexual exploitation by a psychotherapist or drug abuse counselor, in violation of California Business and Professions Code ("CBPC") § 729(a). On the basis of these convictions, the DHS charged the respondent with removability under section 237(a)(2)(A)(ii) of the Act, as an alien who, at any time after admission, has been convicted of two crimes involving moral turpitude ("CIMTs") not arising out of a single scheme of criminal misconduct.

At a hearing before the Court on April 25, 2012, the respondent admitted all of the factual allegations against him but denied both charges of removability. The respondent has moved to terminate the proceedings on the ground that he is not removable under either section 237(a)(2)(A)(ii) or 237(a)(2)(A)(iii) of the Act. In the alternative, he seeks cancellation of removal for certain permanent residents.

II. Facts

The evidence in this case consists of testimony from the respondent, his witnesses, and the following exhibits:

Exhibit 1: Notice to Appear;

Exhibit 2: Form 1-261, Additional Charges of Inadmissibility/Deportability;

Exhibit 3: Documents related to the respondent's criminal convictions;

Exhibit 4: Form EOIR-42A, Application for Cancellation of Removal for Certain Permanent Residents;

Exhibit 5: Documents in support of the respondent's Form EOIR-42A;

Exhibit 6: Additional documents related to the respondent's criminal convictions;

Exhibit 7: Letter regarding civil lawsuit against the respondent.[1]

A. DHS's Evidentiary Submissions

The DHS submitted extensive evidence regarding the respondent's criminal convictions. Exhs. 3, 5. In a third amended Information filed by the Santa Barbara County District Attorney on February 11, 2009, the respondent was charged with 13 crimes, including 11 sex crimes arising from alleged sexual encounters or attempted sexual encounters with 6 victims and 2 counts of dissuading a witness from reporting a crime. Exh 3. The respondent was tried by a jury, which found him

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[1] The Court hereby enters the letter into the record as Exhibit 7.

guilty on April 24, 2009, of one count of sexual battery without restraint against R.S., in violation of CPC § 243.4(e)(1), a misdemeanor, and two felony counts of dissuading or attempting to dissuade a witness from reporting a crime, against R.S. and M.E.P., in violation of CPC § 136.1(b)(1). *Id.* The jury further found that the respondent was released from custody on bail at the time he committed both violations of CPC § 136.1(b)(1). *Id.* The respondent was also charged with sexual exploitation by a psychotherapist or drug-abuse counselor, against M.E.P. and S.L., in violation of CBPC § 729(a), but the jury deadlocked as to whether he had committed the crime against S.L. *Id.* On May 20, 2009, the respondent pleaded guilty to an amended count of violating CBPC § 729(a); in the amended count, he was accused of sexually exploiting M.E.P. and a different woman, M.E.F. Exh. 6C. The DHS also submitted police reports from November 2007, excerpts from the transcript of the respondent's criminal trial and sentencing, and a decision of the California Court of Appeal upholding the respondent's conviction and sentence. Exh. 6.

Finally, the DHS submitted a letter from counsel for the seven plaintiffs in a civil lawsuit against the respondent and the county of Santa Barbara based on the same events giving rise to the criminal charges. Exh. 7. Six of the seven plaintiffs were the respondent's patients when he was employed as a psychologist for the county of Santa Barbara. *Id.* According to their attorney, the women essentially alleged in their complaint that the respondent "was a sexual predator, intentionally seeking out socio-economic[ally] disadvantaged female mental health patients who he could systematically re-vic-

timize." *Id.* They also alleged that the county was vicariously liable for the respondent's acts and had negligently supervised him. *Id.* Each woman entered into a confidential monetary settlement with the county. *Id.*

B. Testimony of the Respondent

The respondent was born in Mexico City, Mexico, in 1942 and is nearly 70 years old. He first entered the United States with a student visa in 1963, and he became a lawful permanent resident two years later. The respondent has been married to Angela Caballero de Cordero, a United States citizen, for approximately 35 years. They have five adult children who are all United States citizens. The respondent has degrees in psychology at the bachelor's and master's levels, as well as a Ph.D. in social and clinical psychology. He has worked in various capacities in the field of psychology since 1972.

At the time of his arrest in 2007, the respondent was employed as a staff psychologist for the Santa Barbara County Department of Drug and Alcohol and Mental-Health Services and as a teacher at Allan Hancock Community College in Santa Maria, California. Although the respondent had been employed by the county as a psychologist since 1990, he took on a new role in February 2007 and began working as a liaison for the Santa Maria Superior Court. In that capacity, he worked out of an office at the county courthouse and facilitated the intersection between the mental-health department and the criminal justice system. While he transitioned into this new position, he maintained an office at the county mental-health clinic, as well as a private office.

Testimony Regarding the Respondent's Alleged Sexual Encounters with Patients

The respondent was charged with a number of crimes related to his sexual relationship with his patient, M.E.F., including sodomy, rape, sexual penetration by a foreign object, and oral copulation, all by use of force and duress and under color of law. He was not convicted of any of these crimes, however, and he maintained during his testimony that he did not commit them. Although he admitted to having sex with M.E.F. more times than he could remember, he maintained that all of their sexual encounters were consensual. He denied that he ever used forced or threats against her, or that he told her that she was required to have sex with him because he was her therapist.

The respondent testified that he met M.E.F. in approximately 2004, when she was referred to the county mental-health clinic. He could not recall what M.E.F.'s particular mental-health diagnosis was, although he remembered that she had been referred to the clinic as a result of her numerous arrests for shoplifting. The respondent testified that M.E.F. was the first patient with whom he ever had a sexual relationship, although he had admitted that he had previously been unfaithful to his wife by "embracing" with one of his students a few years earlier. The respondent and M.E.F. had sex for the first time at M.E.F.'s home. She had recently been placed on electronic ankle monitoring, and the respondent offered to go to her home to assist her with setting up the necessary technology. Before this occasion, he and M.E.F. had only "caressed" and "embraced" in his office, but, according to the respondent, "it was clear" that they both wanted to do more. After assisting her

with the ankle-monitor technology that day, he and M.E.F. had sex.

The respondent testified that he had an anxiety attack following this encounter. Nevertheless, instead of stopping himself from repeating this behavior, he let "lust" take over from that point forward. He continued his relationship with M.E.F., ultimately having sex with her many times over a three-year period, including at the courthouse, the clinic, and in his private office. He watched pornography with M.E.F. and videotaped them having sex in 2007. They had sex many times, sometimes as often as once a month. The respondent testified that, during the course of their three-year affair, M.E.F. wrote many notes to him telling him how much she loved him and wanted to be with him. The respondent's wife was unaware of the affair until he was arrested in 2007.

The respondent also testified regarding another patient, R.S. R.S., who has been diagnosed with borderline personality disorder, was the respondent's patient for approximately 12 years and attempted suicide more than 15 times during that period. As noted above, the respondent was convicted of sexual battery without restraint in violation of CPC § 243.4(e)(1) against R.S. He testified that the conviction arose from an encounter that he had with her in his office in the county courthouse. After kissing and fondling each other in the office, R.S. was preparing to leave so that the respondent could attend to his other patients. Before she left, the respondent "touched the area of her vagina" with his hand. He then walked her to her car. The respondent testified before this Court that he believes he touched R.S.'s vaginal area over her pants, but he stated

that the District Attorney alleged that it was under her pants. In any event, he testified in this Court that, in his opinion, the touching was consensual and was a part of "sexual foreplay." R.S., however, testified against him at the criminal trial and said that the touching was not consensual.

As noted above, the respondent was also convicted of dissuading or attempting to dissuade R.S. from reporting him to the authorities. He recalled that he had been arrested on a Friday in November 2007, and he met with R.S. in a parking Jot the following day. Although he did not tell her the details of why he was arrested, he told her that he was going to lose his house and his family. He told her that he would not be able to continue seeing her but that she needed to continue mental-health treatment. According to the respondent, he arranged this meeting because he was worried for R.S.'s safety; he feared that once he could no longer treat her, she might attempt suicide again. He testified that he did not recall telling her not to report their sexual relationship to the authorities. Rather, he recalled only asking her not to tell anyone about their meeting. The respondent admitted, however, that he may have "unconsciously" wanted her not to tell anyone about their "caressing" at his office.

The respondent testified that he learned that R.S. tried to commit suicide after his arrest. He stated that R.S. testified at his trial that they had sex and that he abused her for many years, but he denies those allegations. He admitted, however, that he and R.S. once "tried to have sex" in his office at the courthouse, but he stated that they were unable to do so because of "physical mechanics."

As noted above, the respondent was convicted of sexually exploitation another patient, M.E.P. He testified that he never had intercourse with M.E.P. but that they "fondled each other's sexual parts" at her home in 2005 or 2006 after he accompanied her to a Social Security hearing. According to the respondent, he and M.E.P. had previously "embraced," and they had mutually agreed they would engage in mutual masturbation after the Social Security hearing. He insisted their activities entirely consensual and that M.E.P. had dictated the details of the encounter.

The respondent was also convicted of dissuading M.E.P. from reporting him to the authorities. He testified that, as with R.S., he met M.E.P. the day after he was arrested. Although M.E.P. was no longer his patient at the time, he had agreed to attend another Social Security hearing with her the following week. He testified that he wanted to meet with her to let her know he would be unable to attend the hearing. He admitted, however, that he told her not to tell anyone about their sexual activities.

Although the respondent was only convicted of crimes stemming from encounters with M.E.F., R.S., and M.E.P., he was charged with crimes resulting from encounters with other alleged victims. First, he was charged with attempted sexual exploitation by a psychotherapist with respect to S.D.G. He testified that she was a former client who moved to Los Angeles but later returned to the Santa Barbara area. She returned to the clinic to be evaluated for services, but the respondent told her that she did not qualify because she did not have a severe mental disorder. The respondent recalled that

S.D.G. was dissatisfied with his assessment. Nevertheless, he tried to embrace her on her way out, but she refused and left. The respondent denies that he kissed her on the mouth, as she testified. His defense against the sexual exploitation charge was that S.D.G. was not his patient.

The respondent also testified regarding a fifth woman, A.R., against whom he was charged with attempted sexual exploitation by a psychotherapist. He recalled that she too had borderline personality disorder. He treated her for several years without incident, although she often made sexually explicit comments during their sessions. The respondent insisted that he never had a sexual encounter with A.R.

Additional Testimony

When the respondent's counsel asked him to explain how he came to find himself in these sexual encounters with his patients, he testified that he had lost all sense of ethics, moral judgment, and self-control. The respondent posited a theory as to the origin of this lapse in judgment and control. He explained that in 2003, he began teaching a course in Human Sexuality at Hancock College. When the class was first offered to him, he did not know much about the subject. However, he accepted it because he saw it as a challenge and an opportunity for learning. He immersed himself in the topic and began reading books and watching videos with explicit sexual content.

As he recalled, he became "completely surrounded by sex" overnight. He believes that he developed an obsession with sex and eventually was overcome by lust. He testified that lust took over his life, and he began to

view his female patients as sexual objects and no longer as patients. He did this even though he had been trained extensively in graduate school regarding the inappropriateness of having sex with one's clients and had been taught strategies for how to avoid such acts. He testified that he was not thinking rationally when he engaged in sexual relations with his patients. The respondent recalled that the sexual encounters began either by a patient flirting with him or vice versa. He stated that when patients flirted with him, he acted against his better judgment and training and encouraged it.

The respondent testified that, although he did not force any of his patients to have sex with him, his years of incarceration had caused him to reflect on whether the encounters had in fact been consensual. He acknowledged that there was a significant power imbalance between him and his patients by virtue of the therapeutic relationship, and he testified that he now believes the patients were not acting of their own free will. He acknowledged that he worked with a vulnerable population and had manipulated his patients to satisfy his own needs. The respondent also testified that it is "very clear" to him that he victimized his patients and that they did not have the "ability to counter the superiority" he had over them. He stated that his behavior was grossly unethical and that after 2004, he was no longer "functioning as a productive psychologist."

The respondent was sentencing to seven years' imprisonment but ultimately served only three years and eleven months. While in custody, he worked in the prison law library and assisted with GED-instruction classes. He has two "strikes" under California's "Three Strikes" sentencing laws, and he is subject to

mandatory reporting requirements for sex offenders. The respondent testified that his license to practice psychology was suspended at some point in the course of his criminal proceedings but that he has since surrendered it voluntarily. He submitted proof of this in the form of a Stipulated Surrender of License and Order submitted to the Board of Psychology of the California Department of Consumer Affairs on March 8, 2012. Exh. 5 at 52-54. He testified that he does not intend ever to apply for such a license again because he wants to avoid being in any situation where there is a "power differential" between him and other people. Consequently, he does not intend to work once he is released from custody.

When asked why he wants to remain in the United States instead of accepting an order of removal, the respondent testified that he wants an opportunity to mend later terminated the separation. He and his wife remain legally married, and she has told him that she will reunite with him upon his release from detention. The respondent testified that he also maintains relationships with each of his five children, although the relationships remain complicated. He recognized that his actions had significantly affected each of his children. For example, his oldest son, Carlos, was so affected that he failed all of his college classes the semester the respondent was arrested. Another of his sons, Sebastian, told the respondent that he would "never forgive" him for what he had done.

If the respondent remains in the United States, he plans to support himself through social security benefits and his personal retirement fund. The respondent testified that he has high blood pressure but is in otherwise

good health for his age. He testified that he has many interests he would like to pursue if he remains in the United States, such as astronomy, archaeology, and classical guitar. He also plans to seek a psychotherapist in either the United States or Mexico to explore why he committed the acts that he committed. The respondent testified that he does not have any family in Mexico other than two stepbrothers with whom he is not close. He testified that if he is ordered removed, he will likely move to Mexico City, but he fears that he will quickly be identified as an American and will be targeted for extortion. He stated with certainty that his wife and children would not accompany him to Mexico if he is removed. His only assets in Mexico are a small house that his mother left him in Sonora.

C. Testimony of the Respondent's Wife and Son

In addition to submitting letters of support, Exh. 5 at 64, 66, the respondent's wife and oldest son testified on his behalf on April 25, 2012. The respondent's wife, Angela Caballero de Cordero, is a United States citizen. Exh. 5 at 18. She holds a Ph.D. in education and currently serves as the dean of counseling and matriculation at De Anza College in Cupertino, California. *Id.* at 27-28. She and the respondent have been married for over 30 years and have 5 children together. *Id.* at 19-26. Mrs. Cordero testified that the respondent has been her best friend, confidant, and biggest supporter throughout their marriage. She further stated that, notwithstanding his behavior, she believes he is a good husband and father. Mrs. Cordero pleaded with the Court to grant her husband cancellation of removal, opining that he "has already paid this society for his mistakes" and that removal would not be in the interest of

justice in light of the devastating effect it would have on her and her family. *Id.* at 64.

Carlos Cordero-Caballero is the respondent's oldest son. Mr. Cordero-Caballero spoke highly of the respondent and reported that the respondent had been a positive influence throughout his life. He stated that he has visited his father regularly throughout his incarceration and believes that being incarcerated has enabled bis father to understand what he did wrong. Mr. Cordero-Caballero opines that his father will never again break the law because of the impact his crimes have had on his family. Like Mrs. Cordero, he pleaded with the Court to permit the respondent to remain in the United States. Finally, he noted that he and his siblings would not be able to move to Mexico with the respondent because they are pursuing educational and career opportunities in the United States.

The respondent submitted letters of support from his remaining four children, as well as other family members, friends, and colleagues. Exh. 5 at 64-124. Although the Court will not summarize all of these letters, it has read and considered each one.

D. Psychological Reports

The respondent submitted psychological evaluations from two forensic psychologists. Exh. 5 at 6-17. The first, by Dr. John W. Lewis, was performed at the request of the respondent's criminal defense attorney in 2009. *Id.* at 6. Dr. Lewis interviewed the respondent for a total of eight hours and conducted two tests, the Personality Assessment Inventory ("PAI") and the Psychopathy Checklist-Revised ("PCL-R"). *Id.* at 6, 10. He also briefly interviewed the respondent's wife and

reviewed police reports and related court documents provided by the respondent's defense attorney. *Id.* at 6-7. According to Dr. Lewis's report, the respondent's version of events during their interviews essentially mirrored his testimony before this Court: he reported that when he began teaching a course in human sexuality in 2003, he became overly preoccupied with sex and began having sex with patients the following year. *Id.* at 9. The respondent denied ever forcing any of the victims to have sex with him, and he told Dr. Lewis that some of the victims had actually been the ones to initiate sex. *Id.* He also told Dr. Lewis that although he was a "nervous wreck" after the first sexual encounter with a patient, he became less concerned with the consequences as time went by. *Id.*

Dr. Lewis concluded that the respondent does not possess either antisocial or psychopathic personality traits, and the doctor did not identify any mental disorder as the cause of the respondent's sexual activities with his patients. Exh. 5 at 9-10. He noted that the respondent appeared to have had trouble resolving the sexual feelings resulting from his human-sexuality class and that he experienced and suffered a "gross lapse in judgment and impulse control" regarding those feelings. *Id.*

The second psychological report was conducted by Dr. Mark Burdick, who also testified before the Court on April 25, 2012. At the request of the respondent's immigration attorney, Dr. Burdick interviewed the respondent in detention. He also reviewed Dr. Lewis's report as well as police reports and related court documents. Dr. Burdick assessed the respondent using

clinical interview techniques and a standardized assessment measure known as the Inventory of Offender Risks, Needs, and Strengths ("IORNS"). According to Dr. Burdick, the respondent does not meet the criteria for antisocial disorder or for profiling as a sexual predator. Exh. 5 at 14. The doctor also opined that the respondent has a very low ranking on the "overall risk" index, meaning he does not show a high correlation with aggression or criminal behavior. *Id.* On the basis of these assessments, the doctor concluded that the respondent's risk of re-offending is "significantly low." *Id.* at 15.

III. Analysis

A. Removability Under Section 237(a)(2)(A)(iii)

As a result of his conviction for two counts of dissuading a witness in violation of CPC § 136.1(b)(1), the DHS has charged the respondent with removability under section 237(a)(2)(A)(iii) of the Act, as an alien convicted of an offense relating to obstruction of justice for which the term of imprisonment is at least one year. *See* INA § 101(a)(43)(S). To determine whether the respondent's conviction under CPC § 136.1(b)(1) constitutes an aggravated felony under § 101(a)(43)(S) of the Act, the Court first applies the categorical approach set forth in *Taylor v. United States,* 495 U.S. 575 (1990). *See, e.g., Hoang v. Holder,* 641 F.3d 1157, 1159 (9th Cir. 2011). Under the categorical approach, the Court compares the elements of the statute of conviction with the federal definition of the crime to determine whether conduct proscribed by the state statute is broader than the generic federal definition. *Id.*

In *Matter of Espinoza-Gonzalez,* 22 I&N Dec. 889 (BIA 1999), the Board supplied the elements of a generic obstruction-of-justice offense under§ 101(a)(43)(S), and the Ninth Circuit has repeatedly deferred to the Board's definition. *See, e.g., Hoang v. Holder,* 641 F.3d 1157, 1161 (9th Cir. 2011); *Renteria-Morales* v. *Mukasey,* 551 F.3d 1076, 1086 (9th Cir. 2008). As interpreted by the Ninth Circuit, the Board's definition of an offense relating to obstruction of justice for purposes of § 101(a)(43)(S) includes two elements: (1) an actus reus of either active interference with proceedings of a tribunal or investigation, or action or threat of action against those who would cooperate with the process of justice and (2) a mens rea of specific intent to interfere with the process of justice. *Hoang,* 641 F.3d at 1161; *Espinoza-Gonzalez,* 22 I&N at 892-93. As the Board has explained, not every offense that "by its nature, would tend to 'obstruct justice' is an offense that should properly be classified as 'obstruction of justice.'" *Espinoza-Gonzalez,* 22 I&N Dec. at 893. Rather, there must be an "affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice." *Id.*

For this reason, the Board has held that misprision of a felony is not categorically a crime relating to obstruction of justice because it does not require either active interference with a pending proceeding or investigation, nor does it require proof that the defendant acted with a motive, or even knowledge, of a pending proceeding or investigation. *Id.* Likewise, the Ninth Circuit has held that a Washington state statute that proscribes rendering criminal assistance is not a crime relating to obstruction of justice because it applies to one who assists another person he knows has committed

a crime *or* is being sought by law enforcement officials for the commission of a crime; it does not require a pending proceeding or investigation. *Hoang,* 641 F.3d at 1161-62.

The respondent's statute of conviction, CPC § 136.1(b)(1), is violated by any person "who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from . . . [m]aking any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge." On its face, § 136.1(b)(1) does not require that the defendant acted with the specific intent to influence a pending judicial proceeding or investigation. Indeed, it requires only that the object of dissuasion have been a victim or witness to a crime; it does not require the existence of a pending proceeding or investigation, let alone a specific intent to influence such a proceeding. For example, it is possible to violate the statute when acting with an intent to protect the victim or witness rather than to impede the administration of justice. *Cf.* CPC § 136.1(a) (criminalizing the act of knowingly and maliciously preventing or dissuading a witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law, but creating an exception when the defendant was a family member who interceded in an effort to protect the witness or victim). Because CPC § 136.1(b)(1) does not on its face require either the necessary actus reus or mens rea, the Court finds that it is not categorically an offense relating to obstruction of justice.

Nevertheless, the Court must also employ the modified categorical approach to determine whether the respondent's conviction under § 136.1(b)(1) qualifies as an offense relating to obstruction of justice. *See United States v. Aguila-Montes de Oca,* 655 F.3d 915, 936-38. Under the standard recently clarified by the Ninth Circuit, "the modified categorical approach asks what facts the conviction 'necessarily rested' on in light of the [prosecutorial] theory of the case as revealed in the relevant judicially noticeable] documents, and whether these facts satisfy the elements of the generic offense." *Robles-Urrea v. Holder,* 2012 U.S. App. LEXIS 8101, at *21 (9th Cir. Apr. 23, 2012) (quoting *Aguila-Montes de Oca,* 655 F.3d at 937). Judicially noticeable documents include the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings. *See, e.g., Tokatly v. Ashcroft,* 371 F.3d 613, 620 (9th Cir. 2004).

The record of conviction in the respondent's case reveals that in Counts 9 and 13 of the information, the respondent was charged with violating § 136.1(b)(1) by attempting to prevent and dissuade R.S. and M.E.P., respectively, from reporting their victimization to a law enforcement official. Exh. 3. It was further alleged in each count that the respondent was "released from custody on bail or his own recognizance in Case Number 1279489" at the time he committed the offense. *Id.* Case Number 1279489 is the same case number for the case in which the respondent was ultimately charged of 13 crimes and convicted of 4. *See id.* The jury found the respondent guilty of both Counts 9 and 13, including the allegation that he committed the crimes while out on bail. *Id.*

First, with regard to the necessary actus reus, the Court finds that the judicially noticeable documents establish that the respondent's conviction necessarily rested on a factual finding that he actively interfered with a pending proceeding or investigation. *See Hoang,* 641 F.3d at 1161. As noted above, the jury found that the respondent violated§ 136.1(b)(1) while released on bail in the very same case in which he was ultimately convicted. Accordingly, the jury necessarily found that there was an investigation pending against the respondent when he committed the crime.

Second, with respect to the requisite mens rea, the Court finds that the jury necessarily found that the respondent had the specific intent to interfere with the process of justice. *See id.* Although§ 136.1(b)(1) does not explicitly require a finding of any particular intent on the part of the defendant, the jury in the respondent's case explicitly was instructed that it could only convict the respondent under§ 136.1(b)(1) if it found that "he *maliciously* tried to prevent or discourage R.S. or M.E.P. from making a report that she was a victim of a crime to the police" and that he "knew he was trying to prevent or discourage R.S. or M.E.P. from making a report that she was a victim of a crime to the police and intended to do so." Exh. 6E at 2085 (emphasis added). These instructions are consistent with California's standard jury instructions, which state that, when § 136.1 is read as a whole, it includes a malice requirement for all of its subsections; the jury instructions thus recommend that the jury be instructed that is required to find malice for a conviction under § 136.1(b)(1). *See* CALCRIM No. 2622.

Because the jury in the respondent's case received this instruction and convicted him of violating § 136.1(b)(1), the Court can conclude that his conviction necessarily rested on a factual finding that he maliciously tried to prevent or dissuade R.S. and M.E.P. from reporting their victimization to the police, and thus that he had a specific intent to interfere with the process of justice. *See Hoang,* 641 F.3d at 1161.

In short, the Court finds that, as demonstrated by the judicially noticeable documents in the record, the respondent's conviction necessarily rested on findings that (1) he committed acts amounting to active interference with proceedings of a tribunal or investigation, or action or threat of action against those who would cooperate with the process of justice and (2) he acted with a mens rea of specific intent to interfere with the process of justice. *See Hoang,* 641 F.3d at 1161; *Espinoza-Gonzalez,* 22 J&N at 892-93. Accordingly, the respondent's convictions under CPC § 136.1(b)(1) are offenses relating to obstruction of justice, and he is thereby removable as charged under section 23 7(a)(2)(A)(iii) of the Act.

B. Removability Under Section 237(a)(2)(A)(ii)

The DHS has also charged the respondent with removability under section 237(a)(2)(A)(ii) of the Act, as alien who has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. The DHS alleges that the respondent's convictions for sexual battery, dissuading a witness, and sexual exploitation by a psychotherapist each qualify as a crime involving moral turpitude.

To determine whether an offense constitutes a crime involving moral turpitude, the Court must employ the framework set forth by the Attorney General in *Matter of Silva-Trevino,* 24 I&N Dec 687 (AG 2008). *See, e.g, Matter of Alfaro,* 25 I&N Dec. 417,420 (BIA 2011). Under the first step of the framework, the Court employs the categorical approach, meaning it examines the criminal statute at issue to determine whether moral turpitude is intrinsic to all offenses that have a "realistic probability" of being prosecuted under the statute. *Id* at 689-90, 696-98. Next, if the issue cannot be resolved under the categorical approach, the Court uses a modified categorical approach, which requires inspection of the respondent's record of conviction to discern the nature of the underlying conviction. *Id* at 690, 698-99. Finally, if the record of conviction is inconclusive, the Court may consider evidence beyond the record of conviction in evaluating whether the respondent's offense constitutes a crime involving moral turpitude. *Id* at 690, 699-701.

The Board has long held that moral turpitude refers generally to conduct that is inherently base, vile; or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. *See, e.g., Matter of Ruiz-Lopez,* 25 I&N Dec. 551, 553 (BIA 2011); *Matter a/Solon,* 24 I&N Dec. 239,240 (BIA 2007); *Matter a/Torres-Varela,* 23 J&N Dec. 78, 83 (BIA 2001). Moral turpitude is conduct that is per se morally reprehensible and intrinsically wrong or malum in se. *See Matter of Fualaau,* 21 I&N Dec. at 477; *Matter of Franklin,* 20 I.&N. Dec. 867 (BIA 1994), *aff'd,* 72 F.3d 571 (8th Cir. 1995); *Matter of Serna,* 20 I&N Dec. 579, 582 (BIA 1992). Where knowing or

intentional conduct is an element of a morally reprehensible offense, the Board has found moral turpitude to be present. *Ruiz-Lopez*, 25 I&N Dec. at 553.

CPC § 243.4(e)(I): Sexual Battery

As noted above, the jury convicted the respondent of sexual battery in violation of CPC § 243.4(e)(1). A conviction under § 243.4(e)(1) requires finding that the defendant (1) touched an intimate part of another person, (2) the touching was against the will of the person touched, and (3) the touching was for the specific purpose of sexual arousal, sexual gratification, or sexual abuse.

Although simple battery is generally not considered to involve moral turpitude, this general rule does not apply when a battery necessarily involves some additional element of moral depravity. *See Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465, 466 (BIA 2011). Sexual battery far exceeds simple battery in terms of depravity because it necessarily involves unwilling intimate contact with another with the specific intent to cause sexual arousal, gratification, or abuse. *See, e.g., People v. King*, 183 Cal. App. 4th 1281, 1319 (Cal. Ct. App. 2010); *People v. Chavez*, 84 Cal. App. 4th 25, 29 (Cal. Ct. App. 2000); *see also* CALJIC No. 16.145. Although this Court is unaware of a published decision of the Board of Immigration Appeals or the Ninth Circuit explicitly finding that a violation of CPC § 243.4(e)(1) is categorically a crime involving moral turpitude, the weight of authority supports such a finding.

First, the Board has held that indecent assault, a crime similar to § 243.4(e)(1), involves moral turpitude. *See Matter of Z-*, 7 I&N Dec. 253, 254-55 (BIA 1956);

Mater of S-, 5 I&N Dec. 686, 687-88 (BIA 1954). Additionally, California courts have held that§ 243.4(e)(1) is a crime involving moral turpitude for purposes of impeachment under state laws of evidence. *Chavez,* 84 Cal. App. 4th at 24-30. As the California Court of Appeal has explained, "the degrading use of another, against her will, for one's own sexual arousal is deserving of moral condemnation." *Id* at 30; *see also In re Shannon.T.,* 144 Cal. App. 4th 618, 623 (Cal. Ct. App. 2006) ("[I]n a civilized society, mature people ordinarily do not touch the intimate parts of other people without consent.").

Most persuasive, however, is an unpublished decision in which the Board held that § 243.4(e) is categorically a CIMT. Jose Gonzalez Cervantes, A078 468 051 (BIA Sept. 7, 2010). In that case, the Board was specifically instructed by the Ninth Circuit to determine whether there is a "realistic probability, not a theoretical possibility," that California would apply § 243.4(e) to conduct that falls outside of the generic definition of moral turpitude. *See Nunez v. Holder,* 594 F.3d 1124, 1229 (9th Cir. 2010). After reviewing California cases involving § 243.4(e), the Board concluded that there is not a "realistic probability" that the statute would be applied to conduct that is not morally turpitudinous.

This Court's own review of California cases causes it to reach the same conclusion. *See, e.g, Shannon T.,* 144 Cal. App. 4th at 623 (upholding defendant's conviction under§ 243.4(e) where he slapped the victim on the face, grabbed her arm, and purposely squeezed her breast, resulting in bruising); *People v. Dayan,* 34 Cal. App. 4th 707 (Cal. Ct. App. 1995) (upholding conviction under § 243.4(e) (then § 243.4(d)) of dentist who kissed and

rubbed against the breasts of multiple patients without their consent). Accordingly, the Court finds that the respondent's conviction under § 243.4(e) is categorically a crime involving moral turpitude.

Alternatively, the Court notes that, even if sexual battery under § 243.4(e) were not a crime involving moral turpitude in all cases, it would qualify as such after applying the third step of the *Silva-Trevino* framework to the respondent's case. The respondent testified before this Court that the prosecution's theory of the charge under § 243.4(e) was that the respondent fondled R.S.'s vagina inside of her pants as she was leaving his office at the Santa Barbara county courthouse. In light of the fact that the conviction required the jury to find that the respondent committed this highly invasive act against R.S.'s will, the Court finds that, were it to reach step three of the *Silva-Trevino* framework, it would conclude that the specific facts of the respondent's conviction necessarily involved moral turpitude.

CPC § 136.1(b)(1): Dissuading a Witness

Finally, the Court considers whether the respondent's final conviction, for dissuading a witness in violation of CPC § 136.1(b)(1) is a crime involving moral turpitude. As explained above, § 136.1(b)(1) is violated by any person "who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from . . . [m]aking any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge."

The Court need not reach the issue of whether a violation of § 136.1(b)(1) is categorically a crime involving

moral turpitude because under the modified categorical approach the judicially noticeable documents show that this respondent was convicted of such a crime. The record of conviction reveals that in Counts 9 and 13 of the information, the respondent was charged with violating § 136.1(b)(1) by attempting to prevent and dissuade R.S. and M.E.P., respectively, from making a report of their victimization to a law-enforcement official, all while he was released on bail in the same case in which he ultimately was charged with a variety of sex offenses. Exh. 3. As explained above, although § 136.1(b)(1) does not on its face require a showing of malice, the jury in the respondent's case explicitly was instructed that such a finding was necessary to convict him of the crime.

Because the jury received this instruction, the Court can conclude that his conviction necessarily rested on a factual finding that he maliciously tried to prevent or discourage both victims from reporting him to the police, and thus that he had a specific intent to interfere with the process of justice or conceal evidence, which traditionally qualifies as turpitudinous. Because the jury necessarily found this element, the Court finds that the respondent's convictions under § 136.1(b)(1) involve moral turpitude.

Based on the foregoing the Court finds that respondent has been convicted of at least two crimes of moral turpitude and is removable under Section 237(a)(2)(A)(ii) of the Act. In light of the foregoing the Court does not need to reach the issue of whether a violation of CBPC § 729(a) is a crime of moral turpitude.

B. Cancellation of Removal

A lawful permanent resident is statutorily eligible for cancellation of removal under INA § 240A(a) of the Act if he (1) has been lawfully admitted for permanent residence for not less than five years; (2) has resided in the United States continuously for seven years after having been admitted in any status; and (3) has not been convicted of an aggravated felony. INA § 240A(a)(1)-(3). Although the Court has found that the respondent was convicted of an aggravated felony, because the law of obstruction of justice is in flux, the Court decided it was it prudent to hear the evidence on the merits of respondent's cancellation application and make alternative findings.

In addition to demonstrating statutory eligibility for cancellation of removal, the respondent must demonstrate that he merits a favorable exercise of discretion. *Matter of C-V-T-*, 22 I&N Dec. 7 (BIA 1998). This analysis requires the Court to balance the adverse factors evidencing the respondent's undesirability as a permanent resident with the social and humane considerations presented on his behalf. The immigration judge "must balance the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of . . . relief appears in the best interest of this country." *Id.* at 11; *Matter of Marin*, 16 I&N Dec. 581,584 (BIA 1978)).

Positive factors include family ties with the United States, particularly the existence of United States citizen minor children. *Matter of Arreguin*, 21 I&N Dec. 38 (BIA 1995); *C-V-T-*, 22 I&N Dec. at 11. Other positive factors include residency of long duration in the

United States (particularly from a young age); evidence of hardship to the respondent and his family if removal occurs; service in the United States armed forces; history of employment; existence of property or business ties; existence of value or service in the community; proof of genuine rehabilitation if a criminal record exists; and other evidence attesting to the respondent's good moral character. *C-V-T-*, 22 I&N Dec. at 11. Negative factors include the nature and underlying circumstances of the grounds of removal; additional significant immigration violations; existence of a criminal record; and other evidence of bad character or undesirability. *C-V-T-*, 22 I&N Dec. at 11. "As the negative factors grow more serious, it becomes incumbent upon the alien to introduce additional offsetting favorable evidence, which in some cases may have to involve unusual or outstanding equities." *Id.* at 11-12.

Weighing in the respondent's favor are his long residence and his family ties to the United States. The respondent was admitted to the United States as an LPR in 1965, when he was 23 years old, and he has lived here ever since. He is married to a United States citizen, with whom he has five adult children who are also citizens. His wife and oldest son testified on his behalf and spoke about the emotional hardship they would suffer if he is removed. In spite of the devastation the respondent's actions have caused them, the respondent's wife and son pleaded with the Court to permit him to the remain in the United States. He presented several letters of support from friends, family, and colleagues. Additionally, the respondent had a successful career for many years. Exh. 5 at 32-55.

Two psychologists opined that the respondent's actions were fueled more by a failure of judgment and impulse control than by an antisocial personality disorder. Dr. Burdick specifically opined that the respondent's risk of re-offending was very low. The respondent testified that he too believes his risk of re-offending is low because he does not intend to practice psychology in the future or to place himself in a position of power relative to women, whether as a therapist, teacher, or consultant.

Although respondent does have positive equities, the negative factors are extremely serious. By the respondent's own admission, he engaged in an extra-marital sexual relationship for more than three years with M.E.F., a mentally disturbed woman who was referred to him for treatment through the criminal-justice system. He had sex with her more times than he could remember, including in a county courthouse and a county clinic. He also had sexual relations with M.E.P. at her home after accompanying her to a Social Security hearing in his professional capacity. The respondent was also convicted of sexual battery without restraint against R.S., which he testified resulted from fondling her vagina inside of his office at the county courthouse. The respondent admitted that these acts were morally reprehensible and that he exploited a vulnerable population of women whom he had been entrusted to protect. His only explanation for his misdeeds is that he became obsessed with sex after teaching a course in human sexuality, a defense that causes the Court to question whether he has truly accepted responsibility for his actions.

In light of the recency and seriousness of the respondent's criminal history, he was required to introduce significant offsetting favorable evidence. *See C-V-T-*, 22 I&N Dec. at 11-12. On this record, the Court is unable to find favorable qualities substantial enough to outweigh the negative. First, there is little evidence that the respondent's family will suffer substantial hardship upon his removal. His wife is employed as a college dean, and his five adult children are pursuing academic and professional pursuits. The respondent is in good health for his age, and there is no evidence that he would be unable to support himself in Mexico with the help of his family.

On balance, the negative factors in this case, especially the repetitive and depraved character of respondent's criminal acts, compounded by the fact that they were committed against vulnerable victims in a relationship of special trust with the respondent, militate against the granting of relief. The evidence in this case does not show that the best interests of this country would be advanced by allowing the respondent to remain here. The respondent's application for cancellation of removal is accordingly also denied as a matter of discretion.

The respondent is ineligible for voluntary departure because he has been convicted of an aggravated felony, *see* Section 240B(b)(1)(C), and because he cannot, based on his criminal conviction, show he has had the requisite good moral character for the preceding five years. *See* Section 240B(b)(1)(C). In light of the foregoing, the following orders shall enter:

ORDERS

IT IS HEREBY ORDERED that the charges of removability under sections 237(a)(2)(A)(ii) and 237(a)(2)(A)(iii) of the Act are **SUSTAINED.**

IT IS FURTHER ORDERED that the respondent's application for cancellation of removal for certain permanent residents is **DENIED.**

IT IS FURTHER ORDERED that the respondent be removed to **MEXICO.**

APPENDIX H

1. 8 U.S.C. 1101 provides in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(43) The term "aggravated felony" means—

* * * * *

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

* * * * *

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

* * * * *

2. 8 U.S.C. 1227 provides in pertinent part:

Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * * * *

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.

(ii) Multiple criminal convictions

Any alien who is convicted of two or more crimes in a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted on an aggravated felony at any time after admission is deportable.

* * * * *

3. 18 U.S.C. 1512 provides:

Tampering with a witness, victim, or an Informant

(a)(1) Whoever kills or attempts to kill another person, with intent to—

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to—

(A) influence, delay, or prevent the testimony of any person in an official proceeding;

(B) cause or induce any person to—

(i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;

(iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(iv) be absent from an official proceeding to which that person has been summoned by legal process; or

(C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(3) The punishment for an offense under this subsection is—

(A) in the case of a killing, the punishment provided in sections 1111 and 1112;

(B) in the case of—

(i) an attempt to murder; or

(ii) the use or attempted use of physical force against any person; imprisonment for not more than 30 years; and

(C) in the case of the threat of use of physical force against any person, imprisonment for not more than 20 years.

(b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or

possible commission of a Federal offense or a violation of conditions of probation[1] supervised release,,[1] parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than 20 years, or both.

(c) Whoever corruptly—

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.

(d) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation[1] supervised release,,[1] parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

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[1] So in original.

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined under this title or imprisoned not more than 3 years, or both.

(e) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(f) For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(g) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or

employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(h) There is extraterritorial Federal jurisdiction over an offense under this section.

(i) A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.

(j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(k) Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

4. Cal. Penal. Code § 136.1 provides:

Intimidation of witnesses and victims; offenses; penalties; enhancement; aggravation

(a) Except as provided in subdivision (c), any person who does any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison:

(1) Knowingly and maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.

(2) Knowingly and maliciously attempts to prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.

(3) For purposes of this section, evidence that the defendant was a family member who interceded in an effort to protect the witness or victim shall create a presumption that the act was without malice.

(b) Except as provided in subdivision (c), every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison:

(1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge.

(2) Causing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof.

(3) Arresting or causing or seeking the arrest of any person in connection with that victimization.

(c) Every person doing any of the acts described in subdivision (a) or (b) knowingly and maliciously under any one or more of the following circumstances, is guilty

of a felony punishable by imprisonment in the state prison for two, three, or four years under any of the following circumstances:

(1) Where the act is accompanied by force or by an express or implied threat of force or violence, upon a witness or victim or any third person or the property of any victim, witness, or any third person.

(2) Where the act is in furtherance of a conspiracy.

(3) Where the act is committed by any person who has been convicted of any violation of this section, any predecessor law hereto or any federal statute or statute of any other state which, if the act prosecuted was committed in this state, would be a violation of this section.

(4) Where the act is committed by any person for pecuniary gain or for any other consideration acting upon the request of any other person. All parties to such a transaction are guilty of a felony.

(d) Every person attempting the commission of any act described in subdivisions (a), (b), and (c) is guilty of the offense attempted without regard to success or failure of the attempt. The fact that no person was injured physically, or in fact intimidated, shall be no defense against any prosecution under this section.

(e) Nothing in this section precludes the imposition of an enhancement for great bodily injury where the injury inflicted is significant or substantial.

(f) The use of force during the commission of any offense described in subdivision (c) shall be considered a circumstance in aggravation of the crime in imposing a term of imprisonment under subdivision (b) of Section 1170.