No. 22-331

IN THE

Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL,
Petitioner,

v.

FERNANDO CORDERO-GARCIA,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the offense defined by Cal. Penal Code § 136.1(b)(1) is categorically an "obstruction of justice" aggravated felony under 8 U.S.C. § 1101(a)(43)(S).

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INTRODUCTION

The courts of appeals are divided as to whether "an offense relating to obstruction of justice" under the Immigration and Nationality Act (INA) requires a nexus to an ongoing or pending proceeding or investigation. If the Court wishes to resolve that question, it should grant the petition for certiorari in *Pugin* v. *Garland*, No. 22-23, which cleanly presents the issue, and which the government agrees should be granted.

No purpose would be served by additionally granting review in this case. Doing so would do nothing to enhance the Court's consideration of whether obstruction requires a pending proceeding. And this case is a far poorer vehicle than *Pugin* for resolving that issue.

Unlike *Pugin*, addressing that issue in this case would raise a significant retroactivity problem, because the Board of Immigration Appeals (BIA) adopted its interpretation of the federal generic obstruction-of-justice offense after Mr. Cordero-Garcia's 2009 conviction. Also unlike *Pugin*, the California statute of conviction in this case fails to categorically match the federal obstruction-of-justice offense for other reasons unrelated to the pendency of an ongoing proceeding or investigation. And further unlike *Pugin*, this case comes to the Court in an interlocutory posture, such that Mr. Cordero-Garcia could well be held removable on remand to the BIA regardless of the Court's resolution of the question presented.

The government nonetheless seeks certiorari in both cases, but its primary argument for review here—that this case implicates two additional circuit splits unique to the witness-tampering context and not raised by *Pugin*—is demonstrably wrong. The Second and Eighth Circuit decisions the government invokes applied a generic definition of "an offense relating to obstruction of justice" that required a nexus to an ongoing or pending proceeding or investigation, just as the court of appeals did in this case. While those courts reached differing results, that was because the state statutes at issue had different elements: the Connecticut and Nebraska predicate offenses required an ongoing or pending proceeding or investigation, whereas the California offense at issue here does not. And contrary to the government's argument, no circuit has based its decision on a finding that a state statute of conviction categorically matches one of the individual offenses in chapter 73 of Title 18, let alone the witness-tampering provision at 18 U.S.C. § 1512, which the government proposes for comparison in this case.

Moreover, even if these two additional asserted splits were worthy of review, this case does not present them. First, the BIA here did not rely on any analogy to the federal witness-tampering statute. The Court cannot deny relief to Mr. Cordero-Garcia on a ground the BIA did not rely on. Second, as the court of appeals concluded, the California statute of conviction omits any requirement of malicious intent and is therefore broader than—and not a categorical match to—the federal witness-tampering statute. This case accordingly provides no opportunity to consider whether a state offense analogous to federal witness tampering constitutes an offense relating to obstruction of justice.

At most, the petition in this case should be held pending disposition of *Pugin*. But given the numerous vehicle problems that would needlessly complicate any further review in this case, the better course is to deny it.

STATEMENT

A. Statutory Background

Under the INA, a noncitizen is removable if he or she is "convicted of an aggravated felony at any time after admission" to the United States. 8 U.S.C. § 1227(a)(2)(A)(iii); *see also Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1210 (2018).

The INA lists categories of aggravated felonies. 8 U.S.C. § 1101(a)(43). The aggravated felony category at issue here is "an offense relating to obstruction of justice … for which the term of imprisonment is at least one year." *Id.* § 1101(a)(43)(S).

To determine whether a state-law statute of conviction qualifies as an aggravated felony under the

INA, this Court applies the "categorical approach" to compare the elements of the statute of conviction to the elements of the generic federal crime identified in the INA. *See Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1568 (2017) (internal quotation marks omitted); *Moncrieffe* v. *Holder*, 569 U.S. 184, 190-91 (2013). The "facts underlying the case" are irrelevant. *Moncrieffe*, 569 U.S. at 190-191. If the elements of the state statute of conviction "cover[] any more conduct than the generic offense," any conviction under that statute is categorically not an aggravated felony. *Mathis* v. *United States*, 579 U.S. 500, 504 (2016).

B. Factual Background

Respondent Fernando Cordero-Garcia, who is over eighty years old, is a Mexican national who was lawfully admitted to the United States almost sixty years ago to attend college. A.R. 358-359. He became a lawful permanent resident on July 2, 1965. A.R. 252. Mr. Cordero-Garcia has been married to Angela Caballero de Cordero, a U.S. citizen, for approximately 45 years. A.R. 368-369. They have five adult children, all of whom are U.S. citizens. A.R. 371-372.

In 2009, Mr. Cordero-Garcia was convicted of violating Cal. Penal Code § 136.1(b)(1), among other charges. A.R. 532-533, 842. California Penal Code § 136.1(b)(1) provides, in relevant part: "every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is a 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" is guilty of a crime punishable by imprisonment up to a year.

C. Procedural History

The government began removal proceedings against Mr. Cordero-Garcia, based in part on his conviction under Cal. Penal Code § 136.1(b)(1). The government charged him as removable as an aggravated felon, *see* 8 U.S.C. § 1227(a)(2)(A)(iii), contending that Cal. Penal Code § 136.1(b)(1) qualified as a crime relating to obstruction of justice under 8 U.S.C. § 1101(a)(43)(S). *See* A.R. 252-253. Separate and apart from the aggravated felony charge—and unaffected by the issues raised in the government's petition for certiorari—the government also charged Mr. Cordero-Garcia as removable under 8 U.S.C. § 1227(a)(2)(A)(ii) for having been convicted of two crimes involving moral turpitude. A.R. 253. An immigration judge found Mr. Cordero-Garcia removable on both charges—*i.e.*, both as an aggravated felon and as having two convictions involving moral turpitude. *See* A.R. 252-267.

The Board of Immigration Appeals ("BIA") dismissed Mr. Cordero-Garcia's appeal. Pet. App. 98a-104a. The BIA held that Cal. Penal Code § 136.1(b)(1) is a categorical match for the federal generic definition of a crime "relating to obstruction of justice" under § 1101(a)(43)(S). A.R. 192. In reaching this determination, the BIA relied on its decision in *Matter of Valenzuela Gallardo*, 25 I&N Dec. 838 (BIA 2012) ("*Valenzuela Gallardo I*"), decided after Mr. Cordero-Garcia's conviction. In *Valenzuela Gallardo I*, the BIA held that "a crime may relate to obstruction of justice … irrespective of the existence of an ongoing criminal investigation or proceeding." Pet. App. 100a.

Valenzuela Gallardo I represented a significant departure from the BIA's prior definition of obstruction of justice, which had been in place for more than a dec-

ade. *See Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889, 893 (BIA 1999) (holding that offenses that do not require a nexus to an ongoing proceeding or investigation do not qualify as obstruction-of-justice offenses). Nonetheless, the BIA applied *Valenzuela Gallardo I*'s new reasoning retroactively to Mr. Cordero-Garcia's conviction under Cal. Penal Code § 136.1(b)(1).

The BIA also affirmed the immigration judge's determination that Mr. Cordero-Garcia was removable for having two convictions for crimes involving moral turpitude. Pet. App. 101a-104a. In December 2012, the government deported Mr. Cordero-Garcia to Mexico, *see* A.R. 178, where he remains to this day.

Mr. Cordero-Garcia petitioned for review of the BIA's decision, arguing, among other things, that his conviction under § 136.1(b)(1) was not an aggravated felony—because it did not require an ongoing investigation or proceeding—and that neither § 136.1(b)(1) nor his other convictions were crimes involving moral turpitude.

While Mr. Cordero-Garcia's petition was pending, the Ninth Circuit decided *Valenzuela Gallardo* v. *Lynch*, 818 F.3d 808 (9th Cir. 2016) ("*Valenzuela Gallardo II*"), vacating the BIA's ruling in *Valenzuela Gallardo I*. *Id.* at 819. Also while Mr. Cordero-Garcia's petition was pending, the Ninth Circuit decided *Escobar* v. *Lynch*, 846 F.3d 1019 (9th Cir. 2017) which held that Cal. Penal Code § 136.1(a), which is adjacent to § 136.1(b)(1), is not categorically a crime of moral turpitude. The Ninth Circuit accordingly remanded Mr. Cordero-Garcia's case to the BIA for further consideration consistent with *Valenzuela Gallardo II* and *Escobar*. A.R. 136, *see also* A.R. 138-140.

While Mr. Cordero-Garcia's case was pending on remand, the BIA issued its remand decision in *Matter of Valenzuela Gallardo*, 27 I&N Dec. 449 (BIA 2018) ("*Valenzuela Gallardo III*"). The BIA reinterpreted "obstruction of justice" under § 1101(a)(43)(S) 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." *Id.* at 460.

The BIA then issued its remand decision in this case, again dismissing Mr. Cordero-Garcia's appeal. *See* Pet. App. 55a-74a. The BIA first held that Cal. Penal Code § 136.1(b)(1) is categorically an aggravated felony under the new generic definition articulated in *Valenzuela Gallardo III*, based on its determination that § 136.1(b)(1) requires interference with either an extant or a "reasonably foreseeable" investigation or proceeding. *See* Pet. App. 59a. Importantly, the BIA neither addressed nor relied on the portion of *Valenzuela Gallardo III* purporting to include all "offenses covered by chapter 73 of the Federal criminal code" in the generic definition of obstruction of justice.

Applying the multi-factor retroactivity test outlined in *Montgomery Ward & Co.* v. *FTC*, 691 F.2d 1322 (9th Cir. 1982), the BIA then determined that *Valenzuela Gallardo III* could be applied retroactively to Mr. Cordero-Garcia's case. And, having found Mr. Cordero-Garcia removable as an aggravated felon, the BIA declined to reach the removability charge based on crimes of moral turpitude. Pet. App. 56a n.1.

Mr. Cordero-Garcia again petitioned for review. In 2020, while that petition was pending, the Ninth Circuit vacated the new interpretation of obstruction of justice that the BIA adopted in *Valenzuela Gallardo III*, holding that obstruction of justice "unambiguously requires a nexus to ongoing or pending proceedings." *Valenzuela Gallardo* v. *Barr*, 968 F.3d 1053, 1069 (9th Cir. 2020) ("*Valenzuela Gallardo IV*"). The government petitioned for rehearing en banc in that case, which was denied without dissent. The government did not petition for certiorari in *Valenzuela Gallardo IV*.

Applying *Valenzuela Gallardo IV* to Mr. Cordero-Garcia's case, the Ninth Circuit held that Cal. Penal Code § 136.1(b)(1) is not a categorical match to § 1101(a)(43)(S) because § 136.1(b)(1) "is missing the element of a nexus to an ongoing or pending proceeding or investigation." Pet. App. 8a.

The court of appeals separately rejected the government's argument that, under the BIA's decision in *Valenzuela Gallardo III*, any state offense "covered by chapter 73" qualifies as an offense relating to obstruction of justice, regardless of whether it requires an ongoing proceeding or investigation, and that Cal. Penal Code § 136.1(b)(1) is a categorical match with such a chapter 73 offense—namely, the federal witness-tampering statute, 18 U.S.C. § 1512. Pet. App. 12a-15a. The court of appeals noted that, because the BIA had not addressed this argument in Mr. Cordero-Garcia's case, the court could not deny Mr. Cordero-Garcia's petition on that ground. Pet. App. 16a (citing *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.")). The court of appeals further concluded that Cal. Penal Code § 136.1(b)(1) is not a categorical match with the federal

witness-tampering statute. Pet. App. 16a. Analyzing California law, the court explained that Cal. Penal Code § 136.1(b)(1) is broader than 18 U.S.C. § 1512 and found a reasonable probability that Cal. Penal Code § 136.1(b)(1) would be applied to conduct falling outside of the federal offense. Pet. App. 15a-22a. The court of appeals therefore granted Mr. Cordero-Garcia's petition. Pet. App. 22a.

Judge VanDyke dissented, contending that § 136.1(b)(1) was a categorical match to § 1512, Pet. App. 46a-54a—*i.e.*, an issue the BIA did not decide in this case.

REASONS FOR DENYING THE PETITION

As the court of appeals acknowledged, the circuits are divided as to whether an "offense relating to obstruction of justice" requires interference with a pending or ongoing proceeding or investigation. Pet. App. 15a. The petition for certiorari in *Pugin* v. *Garland*, No. 22-23 (July 5, 2022), in which the government has acquiesced, squarely presents that question. Should the Court wish to decide it, the petition in *Pugin* presents a sufficient vehicle for doing so.

No useful purpose would be served by additionally granting certiorari in this case. On the contrary, doing so would inject a number of unnecessary complications. Although the government contends that this case implicates two additional circuit splits, those alleged splits are illusory. And Mr. Cordero-Garcia's case comes with several complexities that make it a poor vehicle for considering the question presented or any of the additional issues the government offers up. At most, the Court should hold this petition pending review on the

merits in *Pugin*; in light of the vehicle issues, however, the more prudent disposition is to deny it.

I. THIS CASE DOES NOT IMPLICATE ANY GENUINE DIVISION OF AUTHORITY BEYOND THE SPLIT PRESENTED IN *PUGIN*

The government contends that the decision below implicates three different circuit splits warranting this Court's review. Pet. 18-20. Two of the asserted "splits," however, prove illusory, and the sole remaining split is squarely and more cleanly presented by the petition in *Pugin*, in which the government has acquiesced. Because this case implicates no additional circuit split, the Court should deny the government's petition or, at the very most, hold it pending disposition of *Pugin*.

1. The government first contends that the decision below "creates a conflict on whether certain witness-tampering crimes constitute 'an offense relating to obstruction of justice[.]'" Pet. 18. That is specious at best. The government points to decade-old cases from the Second and Eighth Circuits, but they were decided under a legal standard the Ninth Circuit *approved*, and involved state offenses that—unlike Cal. Penal Code § 136.1(b)(1)—each required a close nexus to an official proceeding. The decision below thus does not conflict with those decisions; it applied a consistent standard and reached a different result only because this case involves a materially different state offense.

The Second Circuit in *Higgins* v. *Holder*, 677 F.3d 97 (2d Cir. 2012) (per curiam), considered whether a Connecticut witness-tampering offense related to obstruction of justice under Section 1101(a)(43)(S). *Id.* at 99. The Connecticut offense provided that a "person is

guilty of tampering with a witness if, *believing that an official proceeding is pending or about to be instituted*, he induces or attempts to induce a witness to testify falsely, withhold testimony, elude legal process summoning him to testify or absent himself from any official proceeding." *Id.* at 104 (emphasis added) (quoting Conn. Gen. Stat. § 53a-151(a)); *see also* Conn. Gen. Stat. § 53a-146 (defining "official proceeding" as a proceeding "before any legislative, judicial, administrative or other agency or official authorized to take evidence under oath"). In the leading case on the issue prior to the Second Circuit's decision, the Connecticut Supreme Court explained that the state witness-tampering offense "penalizes only verbal acts relating to a specific pending [or imminent] prosecution." *State* v. *Cavallo*, 513 A.2d 646, 649, 651 (Conn. 1986); *accord State* v. *Ortiz*, 93 A.3d 1128, 1140 (Conn. 2014) ("[T]he omission of 'investigation' [from § 53a-151(a)] was intended to exclude from the scope of the statute situations in which the defendant believes that only an investigation, but not an official proceeding, is likely to occur."). Accordingly, the Connecticut statute does not criminalize witness dissuasion where the defendant did not believe that an actual official proceeding was pending or about to begin. *Ortiz*, 93 A.3d at 1140.

Against that state-law backdrop, the Second Circuit in *Higgins* held that Connecticut's narrow witness-tampering offense does match the elements of generic obstruction of justice under the BIA's earlier decision in *Espinoza-Gonzalez*, 22 I&N Dec. 889 (BIA 1999). As discussed above (*supra* p. 6), the BIA in *Espinoza-Gonzalez* defined offenses relating to obstruction of justice as those that have "as an element either active interference with proceedings of a tribunal or investigation, or action or threat of action against those who

would cooperate in the process of justice." *Id.* at 895. That definition, as the Ninth Circuit later explained approvingly, requires "interfere[nce] with an ongoing proceeding or investigation." *Trung Thanh Hoang* v. *Holder*, 641 F.3d 1157, 1163-1164 (9th Cir. 2011).

The Second Circuit reasoned that the Connecticut offense, which the state courts had construed narrowly to require a nexus to an "official proceeding," categorically matches the elements of generic federal obstruction of justice because it requires "active interference with proceedings of a tribunal or investigation" and a "belie[f] that an official proceeding is pending or about to be instituted." *Higgins*, 677 F.3d at 104-105. Thus, though the Second Circuit held that the Connecticut offense is a categorical match, it did so because the state offense has as an element the very kind of close nexus to a pending proceeding or investigation that the Ninth Circuit correctly held lacking in Cal. Penal Code § 136.1(b)(1).

The Eighth Circuit applied similar reasoning to a similar state-law offense in *Armenta-Lagunas* v. *Holder*, 724 F.3d 1019 (8th Cir. 2013). The Eighth Circuit considered a Nebraska statute criminalizing, in relevant part, "'attempts to induce or otherwise cause a witness or informant to: … (c) Elude legal process summoning him or her to testify or supply evidence; or (d) absent himself or herself from any proceeding or investigation to which he or she has been legally summoned.'" *Id.* at 1023 (quoting Neb. Stat. § 28-919(1)). The Eighth Circuit held that the Nebraska statute matches the generic offense because it "undoubtedly requires an 'active interference with proceedings of a tribunal or investigations'" and Nebraska courts had construed it narrowly to require intent to interfere with such proceedings or investigation. *Id.* at 1023-

1025. As is particularly relevant here, the Nebraska statute requires interference with a witness who has been legally summoned to testify or otherwise appear in a "proceeding or investigation," thus necessarily requiring the existence of an ongoing legal proceeding or investigation.

The Ninth Circuit's decision in this case did not apply any different rule or reasoning from the Second Circuit in *Higgins* or the Eighth Circuit in *Armenta-Lagunas*; it merely considered a very different state statute. Unlike the Connecticut and Nebraska statutes at issue in *Higgins* and *Armenta-Lagunas*, Cal. Penal Code § 136.1(b)(1) requires no nexus to any ongoing or pending proceeding or investigation. As discussed, the California statute criminalizes "attempts to prevent or dissuade" a victim or witness from "[m]aking any report" to law enforcement. Pet. App. 10a. Thus, while the Connecticut and Nebraska statutes have as elements interference with an ongoing investigation or imminent official proceeding, the California statute criminalizes conduct well before an investigation has even begun, specifically criminalizing "'*pre-arrest* efforts to prevent a crime from being reported.'" Pet. App. 11a (emphasis added) (quoting *People* v. *Fernandez*, 106 Cal. App. 4th 943, 948-950 (2003)). Indeed, California expressly distinguishes between pre-arrest interference, criminalized by the statute at issue here, and "'effort[s] to prevent a witness from giving testimony after a criminal proceeding has been commenced,'" as criminalized by the statutes at issue in *Higgins* and *Armenta-Lagunas*. *See id.* (recognizing that under California law the two are "not … equivalent" (quoting *Fernandez*, 106 Cal. App. 4th at 948-950)).

Thus, there is no circuit split regarding how to determine whether "witness-tampering crimes constitute an 'offense relating to obstruction of justice,'" Pet. 18. Rather, the Second, Eighth, and Ninth Circuits all took the same approach as the BIA had taken in *Espinoza-Gonzalez*, asking whether the offense requires as an element interference with a pending investigation or proceeding. Connecticut's and Nebraska's statutes have such an element, but California's does not. That is not a circuit split; it is an appropriate application of the categorical approach to disparate state crimes.

2. The government next argues that the decision below "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." Pet. 18 (quotation marks and citation omitted). That too is wrong. In fact, no circuit has held that a state crime categorically qualifies as an obstruction-of-justice offense within the meaning of § 1101(a)(43)(S) based merely on a comparison to § 1512.

The government points again to *Higgins* and *Armenta-Lagunas*, as well as the Third Circuit's decision in *Denis* v. *Attorney General*, 633 F.3d 201 (3d Cir. 2011), but none rests on a comparison to 18 U.S.C. § 1512. As discussed above, *Higgins* and *Armenta-Lagunas* compared the state offenses there at issue to the generic obstruction offense as defined by the BIA in *Espinoza-Gonzalez*. *See Higgins*, 677 F.3d at 107 ("Because CGS § 53a-151 fulfills the elements of the generic offense of 'obstruction of justice,' we conclude that a conviction under CGS 53a-151 is categorically 'an offense relating to obstruction of justice' under 8 U.S.C. § 1101(a)(43)."); *Armenta-Lagunas*, 724 F.3d at 1024-

1025 ("[T]he Nebraska state statute on witness tampering meets the generic definition of obstruction of justice."). As the Eighth Circuit explained, § 1512 was "a helpful guide," but the dispositive issue was whether the state offense "includes th[e] element[s]" of the generic offense as defined by the BIA. 724 F.3d at 1024. Similarly, the Second Circuit looked to § 1512 only after concluding that the Connecticut statute categorically matches the BIA's definition of an offense relating to obstruction of justice. *See* 677 F.3d at 104-105.

The Third Circuit's consideration of § 1512 in *Denis* was similarly immaterial. The Third Circuit saw the federal code as a loose guide, looking only for a "logical or causal connection," not a "precise degree of similarity" between the state crime and any federal obstruction offense. 633 F.3d at 212. And when looking for a federal comparator, the Third Circuit focused primarily not on 18 U.S.C. § 1512, but on § 1503. *Id.* The court's consideration of § 1512 was confined to just four short sentences, stating that § 1512 "reinforce[d]" the court's conclusion that the offense at issue related to obstruction of justice. *Id.* at 213. Indeed, the Third Circuit was clear that it "d[id] not actually rely upon 1512(c) to find that Denis's crime of conviction categorically matched the elements" of the generic obstruction-of-justice offense. *Id.* at 213 n.17.

Thus, there is no division of authority regarding whether § 1512 is an appropriate comparator for determining whether a state offense relates to obstruction of justice, because no court has actually relied on § 1512 in that way. Indeed, as discussed below (*infra* pp. 18, 29-30), even the Ninth Circuit did not do so here, because the BIA had not either.

3. The government's only remaining asserted split does not justify granting review in this case. Although there is a division of authority regarding whether an offense can relate to obstruction of justice even when it requires no interference with an ongoing or pending investigation or proceeding, that question is squarely and more cleanly presented by the petition in *Pugin* v. *Garland*, No. 22-23, in which the government has acquiesced. In *Pugin*, the Fourth Circuit considered the offenses included in Chapter 73 of Title 18, including § 1512, and deferred to the interpretation of an offense "relating to obstruction of justice" that the BIA adopted in *Valenzuela Gallardo III*. *See Pugin* v. *Garland*, 19 F.4th 437, 444-450 (4th Cir. 2021). Should the Court wish to consider the soundness of that approach, it may do so by granting certiorari in *Pugin*. Delineating the category of offenses "relating to obstruction of justice" within the meaning of the INA does not turn on any particulars of the state offense or factual context, so nothing would be added by granting review in a second case. On the contrary, as discussed below, Mr. Cordero-Garcia's case would bring with it a number of vehicle problems that would needlessly complicate the Court's review. Because this case does not implicate any actual division of authority of its own, and the one division it does implicate is fully presented in *Pugin*, the government has shown no reason for this Court to muddy the waters.

II. THIS CASE IS A POOR VEHICLE

Apart from the government's debunked circuit splits relating to witness tampering, the government's principal argument for seeking review here in addition to *Pugin* is that granting review in *Pugin* alone "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." Pet. 20. But this case is an exceptionally poor vehicle for resolving that question. First, the BIA did not rely on any analogy to § 1512, so Mr. Cordero-Garcia's petition for review cannot be denied on that basis. And second, as the court of appeals found, the government's assumption that Cal. Penal Code § 136.1(b)(1) is "analogous" to the federal witness-tampering statute is wrong as a matter of California law. The government has not asked the Court to consider either of those threshold issues, and they would not be worthy of this Court's review in any event.

Moreover, this case is also a poor vehicle for considering whether an "offense relating to obstruction of justice" requires interference with a pending or ongoing proceeding or investigation. Quite apart from whether obstruction requires a pending proceeding, the California statute here cannot categorically be an "offense relating to obstruction of justice" because its mens rea element sweeps more broadly than that of the generic federal offense. Mr. Cordero-Garcia's case also poses a significant retroactivity issue given the BIA's change in position. And finally, the court of appeals' decision here is interlocutory; the court remanded the case to the BIA to determine whether Mr. Cordero-Garcia is removable on other grounds. Accordingly, this Court's review might well not affect the outcome—further confirming that no purpose would be served by a duplicative grant of review in this case.

A. This Case Is An Inappropriate Vehicle For Deciding Whether A Crime Analogous To Federal Witness Tampering Is An Offense Relating To Obstruction Of Justice

The Court cannot decide here whether an offense analogous to federal witness tampering under 18 U.S.C. § 1512 constitutes an aggravated felony, any more than it could do so in *Pugin*. The BIA did not rely on that ground in ruling against Mr. Cordero-Garcia, and the California statute here is not analogous to federal witness tampering in any event.

1. The BIA did not rely on any analogy to federal witness tampering

As the government conceded below, the BIA "did not analyze whether [Mr.] Cordero-Garcia's CPC § 136.1(b)(1) conviction was a categorical match with 18 U.S.C. § 1512." Pet. App. 16a. The court of appeals accordingly held that it could not affirm the BIA's decision on that basis. *Id.*

The government has not asked this Court to review the court of appeals' conclusion in that regard, which was undoubtedly correct. As this Court recently reaffirmed, "reviewing courts remain bound by traditional administrative law principles, including the rule that judges generally must assess the lawfulness of an agency's action in light of the explanations the agency offered for it rather than any *ex post* rationales a court can devise." *Garland* v. *Ming Dai*, 141 S. Ct. 1669, 1679 (2021) (citing *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943)). If the Court wishes to consider whether Cal. Penal Code § 136.1(b)(1) categorically matches 18 U.S.C. § 1512 (or any other part of Chapter 73), it

should await a case where the BIA has actually taken a position on that issue.

2. Cal. Penal Code § 136.1(b)(1) is not "analogous" to federal witness tampering

In touting this case as an opportunity to decide whether state offenses "analogous" to federal witness tampering constitute "offenses relating to obstruction of justice," the government disregards the Ninth Circuit's conclusion that no such "analogy" holds in this case. As the Ninth Circuit concluded, Cal. Penal Code § 136.1(b)(1) does not require malicious intent—an essential element under 18 U.S.C. § 1512—and thus is not a categorical match for federal witness tampering. Pet. App. 16a-22a.

The federal witness-tampering statute requires that an individual "uses intimidation, threatens, or corruptly persuades another person," or "engages in misleading conduct toward another person." 18 U.S.C. § 1512(b). California Penal Code § 136.1(b)(1), by contrast, "does not require that the defendant act knowingly and maliciously." *People* v. *Cook*, 59 Cal. App. 5th 586, 590 (2021); *see also People* v. *Brackins*, 37 Cal. App. 5th 56, 67 (2019) ("The Legislature could have reasonably concluded that the limited scope of subdivision (b) did not need to be further narrowed by a malice requirement[.]"). Notably, Cal. Penal Code § 136.1(b)(1) differs in this regard from neighboring provisions, which do require malicious intent. Moreover, although the textual overbreadth of Cal. Penal Code § 136.1(b)(1) alone defeats the government's asserted analogy, the court of appeals below found a "realistic probability" based on California case law that Cal. Penal Code § 136.1(b)(1) would be applied to con-

duct falling outside the scope of federal witness tampering. Pet. App. 20a; *see* Pet. App. 20a-22a.

The government does not dispute the court of appeals' analysis of California law, nor does it offer any reason to think that analysis is worthy of this Court's review. This case accordingly does not present the question whether a state offense that categorically matches the federal witness-tampering statute is an "offense relating to obstruction of justice," and there is nothing to be gained by granting the government's petition.

B. This Case Is A Poor Vehicle For Deciding Whether Generic Obstruction Of Justice Requires An Ongoing Proceeding Or Investigation

This case is also a poor vehicle for deciding whether generic obstruction of justice requires a pending proceeding. That issue is complicated here by questions of state law and retroactivity and by the case's interlocutory posture. To the extent the Court wishes to decide that issue, it may do so in *Pugin*, which is not in an interlocutory posture and does not implicate extraneous state-law or retroactivity concerns.

1. Regardless of whether a pending proceeding is required, Cal. Penal Code § 136.1(b)(1) would not be a categorical match anyway

Regardless of whether an obstruction offense requires interference with a pending or ongoing proceeding or investigation, Cal. Penal Code § 136.1(b)(1) would not be a categorical match anyway because its mens rea element sweeps far more broadly than the BIA's

broadest generic definition of federal obstruction to date.

In *Valenzuela Gallardo III*—the decision the BIA most recently applied to find Mr. Cordero-Garcia removable—the BIA held that generic obstruction of justice covered offenses "motivated by a specific intent … to interfere either in an investigation or proceeding that is ongoing, pending, or reasonably foreseeable by the defendant[.]" Pet. 6 (quotation marks omitted). The federal witness-tampering statute in chapter 73—which the government invokes as evidence that Mr. Cordero-Garcia was convicted of "an offense relating to obstruction of justice" (Pet. 11)—requires only "knowingly … corruptly persuad[ing] another person … , with intent to … 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." 18 U.S.C. § 1512(b)(3) (emphasis added); *see United States* v. *Tyler*, 956 F.3d 116, 124-125 (3d Cir. 2020) (upholding § 1512(b)(3) conviction where evidence "support[ed] an inference that [defendant] acted with intent to prevent [the victim's] communication with law enforcement").

Although Cal. Penal Code § 136.1(b)(1) requires that a defendant interfere with a report to the authorities, the statute—unlike the BIA's articulation of generic obstruction of justice—does not require that the defendant *intend* to interfere with a report that is going to the authorities, or at the very least is not clear on the point. California Penal Code § 136.1(b)(1) requires that a defendant "'knew he was preventing or discouraging [another] from reporting [his or her] victimization and intended to do so.'" *People* v. *Serrano*, 77 Cal. App. 5th 902, 910 (2022). The statute does not state as an element that the defendant intend to interfere spe-

cifically with a report to the authorities, as opposed to someone else, nor have California courts clearly developed such a requirement.

Thus, in one of the cases that was consolidated with Mr. Cordero-Garcia's for oral argument, a noncitizen defendant was charged with violating Cal. Penal Code § 136.1(b)(1) where, after a physical struggle, the defendant swatted a phone from his girlfriend's hand when she threatened to "have [him] killed" and began to make a call. Only later did the defendant learn that she was calling the police, as opposed to calling someone who would carry out her threat to "have [him] killed." The information alleged that the defendant "unlawfully attempt[ed] to prevent and dissuade [his girlfriend], a victim and witness of a crime from making a report of such victimization" to the authorities. Pet. Br. 14, 38, *Flores* v. *Garland*, No. 19-73089 (9th Cir. June 8, 2020), ECF No. 15 (quotation marks omitted). But the information did not charge that the defendant knew his girlfriend was calling the police and intended to interfere with a call to the police, because California law does not appear to require any such allegation. *See id.* The Ninth Circuit did not address this issue. Thus, even if this Court determined that "an offense relating to obstruction of justice" does not require a nexus to an ongoing or pending proceeding or investigation, the breadth of the mens rea requirement in the California statute appears to exceed even the BIA's broadest formulation of the generic federal offense.

2. This case raises retroactivity concerns not present in *Pugin*

This case is further complicated by the question whether a new interpretation of "an offense relating to obstruction of justice" may lawfully be applied retroac-

tively in Mr. Cordero-Garcia's case—an issue the BIA addressed (Pet. App. 63a-74a) but the court of appeals did not (Pet. App. 22a n.7).

At the time of Mr. Cordero-Garcia's conviction in 2009, the BIA had long applied a consistent interpretation of "an offense relating to obstruction of justice" under § 1101(a)(43)(S) that required a nexus to an ongoing investigation or proceeding. *See Valenzuela Gallardo* v. *Lynch*, 818 F.3d 808, 824 (9th Cir 2016) ("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."). Under that established interpretation, Cal. Penal Code § 136.1(b)(1) was not categorically an offense "relating to obstruction of justice" because it does not require a nexus to an ongoing investigation or proceeding. *See Salazar-Luviano* v. *Mukasey*, 551 F.3d 857, 863 (9th Cir. 2008) ("Salazar-Luviano could not have known of, and his conduct could not have had the natural and probable effect of interfering with, a judicial proceeding that did not exist.").

Because § 136.1(b)(1) was not a removable offense under the established interpretation of § 1101(a)(43)(S) at the time of Mr. Cordero-Garcia's 2009 conviction, a new interpretation that renders a § 136.1(b)(1) conviction an aggravated felony would retroactively impose a new consequence on that conviction. The Board's decision in *Espinoza-Gonzalez* was well-established as the generic interpretation of an offense "relating to obstruction of justice" at the time of Mr. Cordero-Garcia's conviction, and the Ninth Circuit had explicitly addressed and approved of it. *See Acosta-Olivarria* v. *Lynch*, 799 F.3d 1271, 1276 (9th Cir. 2015) ("People within the Ninth Circuit should be able to rely on our opinions in making decisions.") Retroactively imposing

a new consequence on Mr. Cordero-Garcia's conviction would result in severe prejudice to Mr. Cordero-Garcia, as "deportation alone is a substantial burden that weighs against retroactive application of an agency adjudication." *Miguel-Miguel* v. *Gonzales*, 500 F.3d 941, 952 (9th Cir. 2007); *see also Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1148 (10th Cir. 2016) (Gorsuch, J.) ("agencies exercising delegated legislative power" may be able to "effectively overrule judicial precedents … [b]ut that does not necessarily mean their decisions must or should presumptively apply retroactively to conduct completed before they take legal effect. If anything, … the opposite presumption should apply.").

The government's position that generic obstruction does not require a pending proceeding thus could not be applied in Mr. Cordero-Garcia's case without resolving a thorny retroactivity question. In contrast, the petitioner in *Pugin*—a case arising from a 2014 conviction—has not raised a retroactivity challenge.

3. This case's interlocutory posture may render further review unnecessary

Finally, this case is in an interlocutory posture: the court of appeals remanded to the BIA to determine whether Mr. Cordero-Garcia was removable on other grounds not at issue in the government's petition. Because he may well be removable on other grounds, further proceedings may render the question presented moot in this case. There is no reason for this Court to review a decision in an interlocutory posture where the Court's decision may make no difference at all. *See, e.g.*, Shapiro, et al., *Supreme Court Practice* 249 (10th ed. 2013) ("If the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied.").

The BIA found Mr. Cordero-Garcia removable not only as a noncitizen convicted of an aggravated felony, but also as a noncitizen "convicted of more than one crime involving moral turpitude." Pet. App. 56a n.1; *see also* A.R. 282-284 (decision of the Immigration Judge finding Mr. Cordero-Garcia "has been convicted of at least two crimes of moral turpitude" and is thus removable under 8 U.S.C. § 1227(a)(2)(A)(ii) of the INA). In its most recent decision, however, the BIA upheld the order of removability solely on the aggravated-felony ground and did not reach the other charge of removability. *See* Pet. App. 56a n.1. As a result, further review in this case may be unnecessary because Mr. Cordero-Garcia could be held removable on remand on alternative grounds. This Court should not grant review where its decision might have no bearing on the outcome.

III. The Court Of Appeals Correctly Resolved The Question It Decided

Although the foregoing provides ample reason to deny, or at most hold, the government's petition in this case, a further reason is that the court of appeals correctly concluded that Cal. Penal Code § 136.1(b)(1) is not categorically "an offense relating to obstruction of justice" under 8 U.S.C. § 1101(a)(43)(S). *See* Pet. App. 22a.

As the government recognizes, defining the federal generic offense of "obstruction of justice" begins with the ordinary meaning of the phrase. *See* Pet. 10 (citing *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1569 (2017)). When § 1101(a)(43)(S) was enacted in 1996, the ordinary meaning of "obstruction of justice" required a nexus to an existing proceeding. *See*, *e.g.*, *Merriam-Webster's Dictionary of Law* 337 (1996) (defining ob-

struction of justice as "the crime or act of willfully *interfering with the process of justice* … or otherwise impeding *an investigation or legal process*" (emphasis added)). Thus, as this Court recognized over a century ago, and as remained true in 1996, "such obstruction can only arise *when justice is being administered*," and "[u]nless that fact exists the statutory offense cannot be committed." *Pettibone* v. *United States*, 148 U.S. 197, 207 (1893) (emphasis added); *see also United States* v. *Aguilar*, 515 U.S. 593, 599 (1995) (obstruction of justice "[contains] a 'nexus' requirement—that the act must have a relationship in time, causation, or logic with … judicial proceedings"); *see also id.* (obstruction of justice "must be [committed] with an intent to influence judicial or grand jury proceedings" which "courts have phrased … as a 'nexus' requirement"); *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 707 (2005) (holding that obstruction of justice requires proof of "nexus" between persuasion to destroy documents and "any *particular* proceeding" (emphasis added)).

Accordingly, as the court of appeals correctly recognized in *Valenzuela Gallardo IV*, "[b]ecause in 1996 the contemporaneous understanding of 'obstruction of justice' required a nexus to an *extant* investigation or proceeding, it is unlikely that Congress intended to stretch the term 'obstruction of justice' under § 1101(a)(43)(S) … to include interference with proceedings or investigations that" did not yet exist. 968 F.3d at 1063, cited at Pet. App. 13a-14a.

The court of appeals also correctly looked to Chapter 73 of Title 18, which is entitled "Obstruction of Justice," as a whole, to provide some context for the appropriate federal generic definition of obstruction of justice. *See Valenzuela Gallardo IV*, 968 F.3d at 1063-

1064 (citing *United States* v. *Calvert*, 511 F.3d 1237, 1243 (9th Cir. 2008)); *see also Flores* v. *Attorney General*, 856 F.3d 280, 288-289 (3d Cir. 2017) (holding that Chapter 73 provides the relevant statutory context for defining "obstruction of justice"). While, as discussed below (*infra* pp. 30-31), no individual provision within the statute can be isolated as a meaningful comparator, a holistic examination of Chapter 73 unambiguously reinforces the conclusion that in order to obstruct justice, there must be an ongoing proceeding to obstruct.

When Chapter 73 was codified in 1946, all six offenses that Congress originally put under the "Obstruction of Justice" umbrella required as an element interference with a pending proceeding or investigation. *See* 18 U.S.C. §§ 1501-1506. When Congress added the federal witness-tampering statute, 18 U.S.C. § 1512, it explicitly identified it as an exception to the generic obstruction-of-justice rule: that "for purposes of *this* section, an official proceeding need not be pending or about to be instituted at the time of the offense." 18 U.S.C. § 1512(f)(1) (emphasis added). Congress would not have thought it necessary to clarify the absence of a pending-proceeding requirement for purposes of § 1512 if obstruction-of-justice crimes did not generically require such an element. *See*, *e.g.*, *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) ("We are … 'reluctant to treat statutory terms as surplusage' in any setting." (quoting *Babbitt* v. *Sweet Home Chapter*, *Communities for Great Or.*, 515 U.S. 687, 698 (1995))). Congress's decision deliberately to announce that § 1512 does not require a nexus to an ongoing proceeding proves that it is an outlier to the generic obstruction-of justice-offenses with which it shares a statutory chapter—it is, as the Ninth Circuit accurately described, the "exception that

proves the rule." *Valenzuela Gallardo IV*, 968 F.3d at 1066.

"It is a cardinal rule of statutory construction that, when Congress employs a term of art … it presumably knows and adopts the cluster of ideas that were attached to [that term] in the body of learning from which it is taken." *Air Wis. Airlines Corp.* v. *Hoeper*, 571 U.S. 237, 248 (2014); *see also Palisades Collections LLC* v. *Shorts*, 552 F.3d 327, 335 (4th Cir. 2008) ("[W]e presume that Congress legislated consistently with existing law and with the knowledge of the interpretation that courts have given to the existing statute."). When Congress enacted § 1101(a)(43)(S), "obstruction of justice" carried with it a federal-law meaning that required an ongoing proceeding. *See Aguilar*, 515 U.S. at 599; *see also United States* v. *Brown*, 688 F.2d 596, 598 (9th Cir. 1982) ("No case interpreting [obstruction of justice] extended it to conduct which was not aimed at interfering with a pending judicial proceeding."). "[T]he common understanding from the time of enactment, statutory context, and judicial precedent pre-1996 all point to one conclusion: 'obstruction of justice' requires a nexus to an ongoing proceeding." *Valenzuela Gallardo IV*, 968 F.3d at 1068. Because "the generic sense in which" the phrase "obstruction of justice" was used in 1996 contemplated an ongoing proceeding, the court of appeals was correct in holding that this requirement is an element of the generic definition of "obstruction of justice" for purposes of applying the categorical approach. *Gonzalez* v. *Duenas-Alvarez*, 549 U.S. 183, 186 (2007) (emphasis omitted).

To the extent the government argues in the alternative that Cal. Penal Code § 136.1(b)(1) is categorically an "offense relating to obstruction of justice" because § 136.1(b)(1) is "covered by chapter 73" insofar as it is a

categorical match to § 1512, that argument also lacks merit. As an initial matter, the BIA did not rely on this ground, and the Court cannot rely on an argument the BIA did not address. *Supra* p. 18. Moreover, as explained above, the court of appeals also correctly determined that Cal. Penal Code § 136.1(b)(1) is not a categorical match to federal witness tampering, because its mens rea element is broader than § 1512, which requires "corrupt persuasion," or malice, *see Arthur Andersen*, 544 U.S. at 705 (describing § 1512's corrupt persuasion requirement), whereas Cal. Penal Code § 136.1(b)(1) does not. *See supra* p. 19. Because § 136.1(b)(1) lacks an element that § 1512 requires, it is not a categorical match. *See, e.g.*, *Descamps* v. *United States*, 570 U.S. 254, 276 (2013) ("Whether the statute of conviction has an overbroad or missing element, the problem is the same: Because of the mismatch in elements, a person convicted under that statute is never convicted of the generic crime.").

More broadly, the government's attempt to transform the entirety of Chapter 73 into a grab bag of multiple generic definitions for "obstruction of justice" would turn the categorical approach on its head. Where, like the INA here, a "statute refers generally to an offense without specifying its elements," the categorical approach "requires the court to come up with a 'generic' version of a crime—that is, the elements of the offense as commonly understood." *Shular* v. *United States*, 140 S. Ct. 779, 783 (2020) (citations and quotation marks omitted); *see also Moncrieffe* v. *Holder*, 569 U.S. 184, 190 (2013) (describing purpose of categorical approach as "to determine whether the state offense is comparable to *an offense listed in the INA*" (emphasis added)). Here, the aggravated-felony offense "listed in the INA," *Moncrieffe*, 569 U.S. at 190, is "obstruction of

justice"—not witness tampering or any of the other individual crimes contained within Chapter 73. The offenses enumerated in Chapter 73 may provide relevant context for identifying the elements of the federal generic offense, *see Flores*, 856 F.3d at 288-289, but they do not constitute 19 different definitions of the generic offense. *See*, *e.g.*, *Trung Thanh Hoang*, 641 F.3d at 1160 ("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[.]"). The application of the categorical approach requires the articulation of a single generic definition of "obstruction of justice," not a menu of possibilities as the government proposes here.

CONCLUSION

The petition for a writ of certiorari should be denied or, at the very most, held pending disposition of *Pugin* v. *Garland*, No. 22-23.

Respectfully submitted.

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