No. 22-331

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

REPLY BRIEF FOR THE PETITIONER

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Witness tampering is a paradigmatic obstruction of justice. Yet the decision below held that dissuading a witness from reporting a crime, in violation of Cal. Penal Code § 136.1(b)(1) (West 2007), is not "an offense relating to obstruction of justice," 8 U.S.C. 1101(a)(43)(S), because that offense does not require a nexus to an already-pending proceeding or investigation. That decision cannot be squared with the ordinary meaning of "obstruction of justice" or with the decisions of other circuits. Respondent's attempts to minimize the circuit conflicts and raise vehicle concerns are unavailing. This Court should grant certiorari in this case and in one of two other cases about whether certain accessory-after-the-fact crimes are offenses "relating to obstruction of justice"—*Pugin* v. *Garland*, No. 22-23 (filed July 5, 2022), or *Silva* v. *Garland*, No. 22-369 (filed Oct. 17, 2022).

A. The Court Of Appeals' Decision Is Wrong

Like the court of appeals, respondent attempts (Br. in Opp. 25-28) to derive a pending-proceeding requirement from (1) the ordinary meaning of "obstruction of justice," and (2) the offenses described in Chapter 73 of the federal criminal code. But those sources actually demonstrate that no such requirement exists.

1. Respondent contends (Br. in Opp. 25) that when Section 1101(a)(43)(S) was enacted in 1996, the "ordinary meaning of 'obstruction of justice'" excluded witness tampering and other crimes that lacked a pending-proceeding requirement. But the dictionary on which he relies—*Merriam-Webster's Dictionary of Law* (1996) (*Merriam-Webster's*)—suggests the opposite. See Pet. 12-13. *Merriam-Webster's* defines obstruction of justice as "willfully interfering with the process of justice and law," without mentioning any *pending* proceeding. *Merriam-Webster's* 337. Moreover, *Merriam-Webster's* specifically references witness tampering as an example of obstruction of justice. *Ibid.* Respondent simply elides that reference when quoting the *Merriam-Webster's* definition. See Br. in Opp. 25-26.

Respondent also suggests (Br. in Opp. 26) that this Court's decisions support his ordinary-meaning argument. But in interpreting other statutory provisions, this Court has recognized a nexus requirement that more closely resembles the one adopted by the Board of Immigration Appeals (Board), which has construed Section 1101(a)(43)(S) to require "interfere[nce] with an investigation or proceeding that is ongoing, pending, *or* 'reasonably foreseeable by the defendant.'" *In re Valenzuela Gallardo*, 27 I. & N. Dec. 449, 456 (2018) (quoting *Marinello* v. *United States*, 138 S. Ct. 1101, 1110 (2018)), vacated by *Valenzuela Gallardo* v. *Barr*, 968 F.3d 1053

(9th Cir. 2020). See, *e.g.*, *Marinello*, 138 S. Ct. at 1110 (adopting similar foreseeability requirement in interpreting the Internal Revenue Code); *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 707-708 (2005) (adopting similar foreseeability requirement in interpreting particular provisions of the federal witness-tampering statute). Thus, this Court's decisions support the Board's determination that respondent's offense qualifies as an offense relating to obstruction of justice. Pet. App. 57a-59a. Indeed, respondent does not dispute that his offense satisfies the nexus requirement articulated by the Board. Pet. 18 n.5.

2. Respondent also argues (Br. in Opp. 26) that the offenses described in Chapter 73 of the federal criminal code "provide some context for the appropriate federal generic definition of obstruction of justice." But witness tampering *is* a Chapter 73 offense—and, as codified there, it does not require a nexus to a pending proceeding. See 18 U.S.C. 1512(f)(1). Thus, Chapter 73 supports neither the injection of a pending-proceeding requirement into Section 1101(a)(43)(S) nor the exclusion of witness tampering from the category of offenses "relating to obstruction of justice" under that provision.

Respondent offers two responses. First, he characterizes (Br. in Opp. 27) witness tampering as "an outlier" to the "generic" obstruction-of-justice offenses "with which it shares a statutory chapter." But as the government's petition explains (at 14), witness tampering is just one among many Chapter 73 offenses that can be committed before a proceeding has begun. Respondent does not address those other offenses.

Second, respondent contends (Br. in Opp. 29) that his offense is not a "categorical match" to any particular witness-tampering offense described in Chapter 73.

But that is beside the point. Section 1101(a)(43)(S) does not require that an offense be a categorical match to a Chapter 73 offense. Rather, Section 1101(a)(43)(S) requires only that an offense be one "*relating to* obstruction of justice." 8 U.S.C. 1101(a)(43)(S) (emphasis added). Witness tampering is a paradigmatic obstruction-of-justice offense. See *Merriam-Webster's* 337. And the fact that Cal. Penal Code § 136.1(b)(1) (West 2007) prohibits conduct similar to witness tampering under 18 U.S.C. 1512(b)(3) reinforces that respondent has committed "an offense relating to obstruction of justice" for purposes of Section 1101(a)(43)(S). See *People* v. *Navarro*, 212 Cal. App. 4th 1336, 1352 (2013); Pet. 11.

B. Respondent's Efforts To Minimize The Circuit Conflicts Lack Merit

Respondent acknowledges (Br. in Opp. 16) that the decision below implicates a "division of authority" on "whether an offense can relate to obstruction of justice even when it requires no interference with an ongoing or pending investigation or proceeding." But he contends (*id.* at 10, 16) that the decision below does not implicate any conflicts specific to witness-tampering crimes. That is incorrect.

1. As the government's petition explains (at 18), the decision below conflicts with decisions of the Second and Eighth Circuits holding that certain witness-tampering crimes constitute offenses relating to obstruction of justice for purposes of Section 1101(a)(43)(S). *Higgins* v. *Holder*, 677 F.3d 97 (2d Cir. 2012) (per curiam), and *Armenta-Lagunas* v. *Holder*, 724 F.3d 1019 (8th Cir. 2013), involved state statutes that made it a crime for a person, "believing that an official proceeding * * * is pending *or about to be instituted*," to tamper with a witness. *Id.* at 1023 (emphasis added) (quoting Neb. Rev.

Stat. § 28-919(1)); see *Higgins*, 677 F.3d at 104 (quoting Conn. Gen. Stat. § 53a-151(a)). Yet the Second and Eighth Circuits in those cases did not conclude, as the court of appeals did here, that the state offense lacked the required nexus to a "pending" proceeding. Pet. App. 2a.

Respondent attempts (Br. in Opp. 10) to distinguish *Higgins* and *Armenta-Lagunas* on the ground that they involved "materially different state offense[s]." But the state statutes in those cases, like the California statute here, did not categorically require a nexus to an already-pending proceeding. Respondent also contends (*id.* at 13) that the court of appeals in this case "did not apply any different rule or reasoning from the Second Circuit in *Higgins* or the Eighth Circuit in *Armenta-Lagunas*." In particular, respondent contends (*id.* at 14) that "all" three circuits "took the same approach as the [Board] had taken in" *In re Espinoza-Gonzalez*, 22 I. & N. Dec. 889 (1999) (en banc). But neither the Second Circuit nor the Eighth Circuit read *Espinoza-Gonzalez* to require a nexus to a pending proceeding. See *Armenta-Lagunas*, 724 F.3d at 1022-1023; *Higgins*, 677 F.3d at 105. Only the Ninth Circuit has done so, see *Trung Thanh Hoang* v. *Holder*, 641 F.3d 1157, 1164 (2011)—underscoring that its approach conflicts with that of the other circuits.

2. As the government's petition explains (at 18-19), the decision below implicates a conflict on whether the federal witness-tampering statute, 18 U.S.C. 1512, is an "appropriate comparator" for determining whether an offense relates to obstruction of justice. Pet. App. 15a. Whereas the court of appeals in this case held that it is not, *ibid.*, the Second, Third, and Eighth Circuits have determined that it is, see *Higgins*, 677 F.3d at 105;

Denis v. *Attorney Gen.*, 633 F.3d 201, 213 (3d Cir. 2011); *Armenta-Lagunas*, 724 F.3d at 1023-1024.

Respondent asserts (Br. in Opp. 14-15) that none of those other decisions relied solely on a comparison with Section 1512. But that misses the point. By treating Section 1512 as a guide, each of those other circuits understood Section 1512 to be an example of an obstruction-of-justice offense—an offense that would itself satisfy Section 1101(a)(43)(S). The court of appeals here, in contrast, held that Section 1512 is "not an appropriate comparator" because "it does not contain the required element of a nexus to an ongoing or pending proceeding or investigation." Pet. App. 15a. Thus, unlike in those other circuits, a Section 1512 offense itself would not satisfy Section 1101(a)(43)(S) in the Ninth Circuit.

C. Respondent's Vehicle Concerns Are Misplaced

Respondent raises (Br. in Opp. 16-25) various concerns regarding this case as a vehicle for this Court's review. But two of his concerns rest on a mistaken understanding of the government's arguments before this Court, and the remaining three would not affect this Court's consideration of the arguments the government seeks to raise.

1. Respondent contends (Br. in Opp. 18-20) that this case would be an inappropriate vehicle for considering whether dissuading a witness under Section 136.1(b)(1) is a categorical match to an offense described in Section 1512. Specifically, he expresses (*ibid.*) two concerns: that the Board did not consider the issue and that, though the court of appeals did, it found no categorical match.

In this Court, however, the government has not taken the position that respondent's offense is "an offense relating to obstruction of justice" because it is a

categorical match to an offense described in Section 1512. Instead, the government contends (Pet. 10-11) that respondent's offense is "an offense relating to obstruction of justice" as a matter of that phrase's ordinary meaning. The government's purpose in comparing respondent's offense with Section 1512 is simply to reinforce that ordinary-meaning argument. See Pet. 11; pp. 3-4, *supra*.

Because the government is not asking this Court to determine whether respondent's offense is a categorical match to Section 1512, it does not matter that the Board did not conduct such an analysis. See Br. in Opp. 18-19. Nor does it matter whether the court of appeals was correct to conclude that "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." *Id.* at 3; see *id.* at 19. None of the arguments raised in the government's petition depends on the scope of Section 136.1(b)(1)'s intent element.

2. Respondent's remaining three vehicle arguments relate to whether this Court's review would affect the outcome of his removal proceedings. None furnishes a reason to deny review.

a. Respondent contends (Br. in Opp. 20-22) that, even if this Court were to hold that an offense relating to obstruction of justice does not require a nexus to a pending proceeding, dissuading a witness under Section 136.1(b)(1) would still not qualify as such an offense. As respondent observes, the Board has construed an offense relating to obstruction of justice to require a "specific intent" to "interfere either in an investigation or proceeding." *Id.* at 21 (citation omitted). Respondent argues (*id.* at 20-21) that Section 136.1(b)(1) does not

require such an intent and thus "sweeps far more broadly" than the Board's "generic definition."

The Board in this case, however, rejected that argument. Pet. App. 58a-59a. The Board observed that California appellate-court decisions have construed Section 136.1(b)(1) to require the prosecution to "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 59a (brackets and citations omitted). One decision cited by the Board expressly stated that "section 136.1 is a specific intent crime." *Navarro*, 212 Cal. App. 4th at 1347 (citation omitted). In light of that "California case law," the Board determined that "section 136.1(b)(1) requires a specific intent to interfere in an investigation or proceeding." Pet. App. 59a. Respondent did not challenge that determination in the court of appeals. See Resp. C.A. Br. 12-17. Accordingly, he has forfeited any argument (Br. in Opp. 20) that Section 136.1(b)(1)'s "mens rea element" sweeps too broadly.

b. Respondent next contends (Br. in Opp. 22-24) that it would raise retroactivity concerns in his case to apply a "new" agency interpretation of the statutory phrase "an offense relating to obstruction of justice" that does not include a pending-proceeding requirement. But the Board held that such an interpretation "may be applied retroactively" to respondent's case, Pet. App. 73a, and the court of appeals did not reach the issue, *id.* at 22a n.7. The issue thus does not stand in the way of this Court's review.

In any event, the premise of respondent's retroactivity argument is mistaken. Respondent contends (Br. in Opp. 23) that, "[a]t the time of [his] conviction in 2009, the [Board] 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." That is incorrect. As the government's petition explains (at 16-17), since first addressing the issue in 1997, the Board has consistently interpreted "an offense relating to obstruction of justice" 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, is an offense relating to obstruction of justice); *In re Espinoza-Gonzalez*, 22 I. & N. Dec. at 894-895 (en banc decision reaffirming the holding of *Batista-Hernandez* in 1999). Respondent's efforts to dissuade two of his former patients from reporting his sexual activities with them occurred the day after his November 2007 arrest for rape by threat of use of public authority. See Pet. 3; Pet. App. 113a-114a. Thus, even assuming arguendo that changes in the Board's interpretation of the INA could present retroactivity concerns, the application of the Board's previously established interpretation to respondent's 2007 conduct and 2009 conviction would not.

c. Respondent also argues (Br. in Opp. 25) that even if his conviction under Section 136.1(b)(1) does not qualify as an aggravated felony, he "could be held removable on remand on alternative grounds." It is true that, in 2012, the Board determined that respondent was removable on the separate charge that he had been convicted of two crimes involving moral turpitude. Pet. App. 101a-104a. But after respondent filed a petition for review in the court of appeals, the government filed an unopposed motion to remand the case to the Board in light of intervening Ninth Circuit precedent relevant

to whether his conviction under Section 136.1(b)(1) qualifies as a crime involving moral turpitude. See Administrative Record 139 (citing *Escobar* v. *Lynch*, 846 F.3d 1019 (9th Cir. 2017), which held that a neighboring provision, Cal. Penal Code § 136.1(a) (West 2007), is not a crime involving moral turpitude). On remand, the Board declined to address whether respondent still has two convictions for crimes involving moral turpitude, Pet. App. 56a n.1, and respondent provides no basis for thinking that the Board would conclude that he does if it were to address the issue today.

D. This Court Should Grant Review In Both This Case And Either *Pugin* Or *Silva*

Respondent contends (Br. in Opp. 1) that, if the Court wishes to resolve whether Section 1101(a)(43)(S) "requires a nexus to an ongoing or pending proceeding or investigation," it "should grant the petition in *Pugin*," and that "[n]o purpose would be served by additionally granting review in this case." But as the government's petition explains (at 20-21), this case and *Pugin* implicate distinct issues and circuit conflicts regarding whether two recurring categories—witness-tampering crimes and accessory-after-the-fact crimes—are offenses relating to obstruction of justice.

Indeed, the courts and the parties in this case and *Pugin* have taken differing positions on the relationship between Section 1103(a)(43)(S) and Chapter 73. For example, whereas the petitioner in *Pugin* has argued that "the phrase 'obstruction of justice' is a term of art used narrowly in the INA to refer to the offenses enumerated in * * * Chapter 73," Pet. Br. at 12, *Pugin* v. *Garland*, 19 F.4th 437 (4th Cir. 2021) (No. 20-1363), the court of appeals in this case held that the federal witness-tampering statute, though appearing in Chapter 73, "is

not an appropriate comparator" for determining whether an offense satisfies Section 1103(a)(43)(S), Pet. App. 15a. Likewise, whereas the petitioner in *Pugin* has emphasized that "the relevant federal accessory-after-the-fact offense, 18 U.S.C. § 3, falls outside Chapter 73," Cert. Reply at 8-9, *Pugin*, *supra* (No. 22-23), the respondent in this case has expressed the view that "no individual provision," even within Chapter 73, "can be isolated as a meaningful comparator," Br. in Opp. 27.

After the government filed its certiorari petition in this case, a certiorari petition was filed by the noncitizen in *Silva*, *supra*, a case, like *Pugin*, involving whether an accessory-after-the-fact crime is an offense relating to obstruction of justice. As the government explains in its response to that petition, either *Pugin* or *Silva* would be a suitable vehicle for review of the distinct issues implicated by accessory-after-the-fact crimes. Gov't Cert. Resp. at 10, *Silva*, *supra* (No. 22-369). Accordingly, the Court should grant certiorari in this case (the only one of the three that involves a witness-tampering crime) and in either of the other two cases, and consolidate them for argument.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

ELIZABETH B. PRELOGAR
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