

IN THE SUPREME COURT OF THE UNITED STATES

---

No. 22-23

JEAN FRANCOIS PUGIN, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

---

No. 22-331

MERRICK B. GARLAND, ATTORNEY GENERAL

v.

FERNANDO CORDERO-GARCIA

---

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

---

JOINT MOTION OF PETITIONER PUGIN AND RESPONDENT CORDERO-GARCIA  
FOR DIVIDED ARGUMENT

---

Pursuant to Rules 28.4 and 28.7 of the Rules of this Court, petitioner Jean Francois Pugin and respondent Fernando Cordero-Garcia respectfully move for divided argument in this case. The Court granted certiorari in each of these cases, consolidated them, and allotted one hour for argument. The Court then realigned the parties for merits briefing, and the government has filed its

consolidated brief addressing the distinct factual and legal contexts of the two cases. Pugin and Cordero-Garcia have each filed separate briefs in response to the government's brief addressing their individual cases. Dividing the argument will ensure that counsel for both noncitizens can adequately present their distinct arguments in the different contexts of their cases and that this Court can adequately consider them. Because this motion requests that fifteen minutes be allocated to Pugin and fifteen minutes to Cordero-Garcia, division of the argument would not require an enlargement of time. The United States does not oppose this motion.

1. These cases involve the meaning of "an offense relating to obstruction of justice," 8 U.S.C. § 1101(a)(43)(S), which constitutes an aggravated felony under the immigration laws. A conviction for an offense that categorically matches a generic aggravated felony exposes a noncitizen to removal and prevents the noncitizen from seeking discretionary relief on a variety of grounds, including cancellation of removal, asylum, and voluntary departure. Pugin was convicted of a Virginia offense of accessory after the fact to a felony. Cordero-Garcia was convicted of a California offense of dissuading a witness from reporting a crime. The Board of Immigration Appeals concluded that the state crime in each case qualified as a generic "offense relating to obstruction of justice," even though neither state crime required as an element

that the defendant's conduct interfered with a pending or ongoing investigation or proceeding. On review, the Fourth Circuit upheld the Board's determination in Pugin's case, deferring to the Board's interpretation of the obstruction-based aggravated felony. In contrast, the Ninth Circuit rejected the Board's determination in Cordero-Garcia's case and, applying circuit precedent, concluded that the Board's decision conflicted with the clear meaning of the obstruction-based aggravated felony: that the generic offense requires a nexus to an ongoing or pending proceeding or investigation.

2. Pugin filed a petition for a writ of certiorari seeking review of the Fourth Circuit's holding. The government acquiesced in the granting of Pugin's petition, noting that this Court's review was warranted to resolve a circuit conflict over whether a pending proceeding is required to satisfy the generic meaning of "an offense relating to obstruction of justice" in 8 U.S.C. § 1101(a)(43)(S). The government separately filed a petition for a writ of certiorari seeking review of the Ninth Circuit's judgment in Cordero-Garcia's case. The government asserted that granting both petitions was warranted "[t]o allow this Court to address the meaning of ['an offense relating to obstruction of justice'] in full view of the issues raised by both accessory-after-the-fact and witness-tampering crimes -- two recurring kinds of crimes that have each precipitated disagreements among the courts of

appeals.” 22-23 U.S. Br. 6 (filed Oct. 2022); 22-331 U.S. Pet. 9 (filed Oct. 2022) (same). The government explained that granting certiorari in both cases would be appropriate because “a decision in one of the two cases would not necessarily resolve all of the issues raised by the other case.” 22-23 U.S. Br. 18 (filed Oct. 2022); 22-331 U.S. Pet. 20 (filed Oct. 2022) (same). On January 13, 2023, this Court granted both petitions, consolidated the cases, and limited the grant of certiorari to the following question: “To qualify as an ‘offense relating to obstruction of justice,’ 8 U.S.C. § 1101(a)(43)(S), must a predicate offense require a nexus with a pending or ongoing investigation or judicial proceeding.”

3. Division of the argument is warranted in this case. Pugin and Cordero-Garcia agree on the answer to the question presented: the generic meaning of “an offense relating to obstruction of justice” requires a nexus with a pending or ongoing proceeding or investigation and, accordingly, offenses that lack that element do not qualify as aggravated felonies under 8 U.S.C. 1101(a)(43)(S). But they approach that question in light of the different state crimes involved in their cases and emphasize different legal arguments. Pugin contends that the phrase “obstruction of justice” draws its meaning from its term-of-art usage in this Court’s case law; that this core meaning requires a pending proceeding; and that the government’s reliance on scattered dictionaries, state

laws, the Model Penal Code, and other federal laws to derive a more expansive definition does not establish that the generic crime covers offenses that do not involve a pending proceeding. Cordero-Garcia contends that the meaning of "an offense relating to obstruction of justice" turns on the phrase's ordinary meaning and how it is commonly understood; based on that approach, Cordero-Garcia argues that federal and state criminal law, dictionaries, treatises, and this Court's cases confirm that a pending investigation or proceeding is required to establish the generic offense. While Pugin and Cordero-Garcia agree that the methodology presented in each brief leads to the same conclusion, they provide different factual and legal frameworks for the Court's consideration of how to identify the meaning of this generic offense.

Each case also involves a distinct predicate offense -- accessory after the fact in Pugin versus dissuading a witness in Cordero-Garcia. Those offenses have distinct histories and relationships to traditional obstruction crimes. They also raise distinct issues under the Board of Immigration Appeals' approach, as the government recognized in recommending that the Court grant both petitions. 22-23 U.S. Br. 18 (filed Oct. 2022); 22-331 U.S. Pet. 20 (filed Oct. 2022). Accordingly, separate presentations would permit each of the noncitizens whose liberty is at stake to fully present their arguments to the Court. Divided argument will

also afford the Court the opportunity to explore the full range of issues raised by the separate petitions involving separate types of predicate crimes.

4. This Court has frequently granted divided argument in comparable situations: i.e., where the Court has granted review in companion cases involving different parties; the parties present related but distinct arguments; and the Court consolidated the cases for argument. See, e.g., Ruan v. United States, No. 20-1410, and Kahn v. United States, No. 21-5261, \_\_\_ S. Ct. \_\_\_ (Feb. 18, 2022) (granting divided argument in related criminal cases presenting distinct arguments on the same set of related issues); Rosen v. Ming Dai and Rosen v. Alcaraz-Enriquez, 141 S. Ct. 1234 (2021) (mem.) (granting divided argument in related immigration cases after consolidating two related petitions for argument raising parallel issues). Furthermore, this Court often grants divided argument when separate parties with separate counsel each file briefs emphasizing different arguments in support of the same basic legal proposition. See, e.g., Fulton v. City of Philadelphia, 141 S. Ct. 230 (2020) (mem.); Kelly v. United States, 140 S. Ct. 661 (2019) (mem.); Rucho v. Common Cause, 139 S. Ct. 1316 (2019) (mem.); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 951 (2019) (mem.); McDonald v. City of Chicago, 559 U.S. 902 (2010) (mem.).

Given that the Court granted each of these petitions after the government represented that “concurrent review in both [cases] would allow this Court to address the meaning of [‘an offense relating to obstruction of justice’] in full view of the issues raised by both types of crimes” involved in the two cases, 22-23 U.S. Br. 19 (Oct. 2022), it is appropriate for the argument to be divided equally between Pugin and Cordero-Garcia, with each party allocated fifteen minutes of argument time.

Respectfully submitted.

Mark C. Fleming  
Counsel of Record for  
Fernando Cordero-Garcia

WILMER CUTLER PICKERING HALE  
AND DORR LLP  
60 State St.  
Boston, MA 02109  
(617) 526-6909  
mark.fleming@wilmerhale.com

Michael R. Dreeben  
Counsel of Record for  
Jean Francois Pugin

O’MELVENY & MYERS LLP  
1625 Eye St., N.W.  
Washington, DC 20006  
(202) 383-5300  
mdreeben@omm.com