

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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JEAN FRANCOIS PUGIN, )  
 )  
 Petitioner, )  
 )  
 v. ) No. 22-23  
 )  
MERRICK B. GARLAND, )  
 )  
 ATTORNEY GENERAL, )  
 )  
 Respondent. )  
-----

MERRICK B. GARLAND, )  
 )  
 ATTORNEY GENERAL, )  
 )  
 Petitioner, )  
 )  
 v. ) No. 22-331  
 )  
FERNANDO CORDERO-GARCIA, AKA )  
 )  
 FERNANDO CORDERO, )  
 )  
 Respondent. )  
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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 22-23, Pugin versus Garland, and the consolidated case.

Mr. Gannon.

ORAL ARGUMENT OF CURTIS E. GANNON

ON BEHALF OF MERRICK B. GARLAND, ATTORNEY GENERAL

MR. GANNON: Mr. Chief Justice, and may it please the Court:

In 1996, Congress made an offense relating to obstruction of justice an aggravated felony for purposes of the Immigration and Nationality Act. At the time it did so, the phrase "obstruction of justice" was understood to include crimes that occurred when a proceeding or investigation was not currently pending.

The wheels of justice can be obstructed even before they begin to move. Indeed, one of the best ways to obstruct an investigation or a proceeding is to ensure that it never starts in the first place.

My friends on the other side say that only 14 states plus D.C. even punished

1 obstruction of justice in 1996 and that Congress  
2 meant to limit obstruction of justice to a  
3 catch-all offense in the federal Criminal Code  
4 that includes a pending proceeding requirement.

5 But, by 1996, Congress had added other  
6 obstruction-of-justice offenses without any such  
7 limitation, and it had expressly disavowed such  
8 a limit in 1982 when creating the principal  
9 federal witness and evidence tampering statute,  
10 18 U.S.C. 1512.

11 Also by 1996, case law, dictionaries,  
12 leading commentators, and the Model Penal Code  
13 had all recognized that the kinds of offenses at  
14 issue in these two cases -- accessory after the  
15 fact and witness tampering -- involved  
16 obstruction of justice even when the elements of  
17 the offense did not require there to be a  
18 pending investigation or proceeding at the time  
19 of the offense conduct.

20 This Court should hold that the Ninth  
21 Circuit erred in concluding otherwise.

22 I welcome the Court's questions.

23 JUSTICE THOMAS: Mr. Gannon, could you  
24 give us a straightforward definition of  
25 "obstruction of justice"?

1                   MR. GANNON: We agree with the  
2 definitions on page 23 of our brief from legal  
3 dictionaries that obstruction of justice  
4 involves willfully interfering with the process  
5 of justice. And the Board here said that the  
6 offenses at issue are the category that have an  
7 affirmative act that includes a specific intent  
8 to interfere with the process of justice and  
9 law.

10                   JUSTICE THOMAS: So you give a wide  
11 range of -- of evidence. You talk about  
12 Blackstone, as well as Chapter 73. Do you think  
13 all of the crimes listed there are  
14 obstruction-of-justice crimes?

15                   MR. GANNON: We think that they're  
16 obstruction-of-justice crimes if they have the  
17 specific intent to interfere with an  
18 investigation. Now we don't think that the  
19 investigation has to have already come into  
20 existence. It can be a future investigation.  
21 In a retaliation case, it can be a past  
22 investigation.

23                   But we think that it -- it does -- in  
24 -- in most circumstances, is going to require  
25 there to be a nexus -- in all circumstances,

1 there'll need to be a nexus to a particular  
2 investigation or proceeding that could come  
3 about, but that comes through the specific  
4 intent to interfere with the process of justice  
5 and law. It doesn't need to already be in  
6 existence at the time the conduct occurs.

7 CHIEF JUSTICE ROBERTS: Counsel, one  
8 thing that troubles me about both sides'  
9 position is the "relating to" language. It  
10 seems to me that to the extent you have a broad  
11 definition of "obstruction of justice," it  
12 becomes even broader when you say "relating to."  
13 And, of course, on the other side, the narrow  
14 definition -- I don't know that it takes  
15 adequate account of that.

16 So I understand the formulation in  
17 your brief, but could you flesh out a little bit  
18 more about how "relating to" works, particularly  
19 against your fairly broad definition of  
20 obstruction?

21 MR. GANNON: Well, I think,  
22 ultimately, we agree that "relating to" does  
23 broaden beyond just what would be core  
24 obstruction of justice, but the Board here has  
25 recognized that the offenses that we're talking



1 about are those that have the specific intent to  
2 interfere with proceedings of -- of law and  
3 justice.

4 And so that, we think, is ultimately  
5 the limiter here. Even though it would need to  
6 relate to obstruction of justice, we think, to  
7 the extent that there is a specific intent to  
8 interfere, that's a sufficiently close nexus  
9 that you don't need to be concerned about  
10 sweeping in a lot of other offenses.

11 And the Board in 1999 drew the line  
12 between accessory after the fact and misprision  
13 of felony in the federal Criminal Code, between  
14 Section 3 and Section 4. It said accessory  
15 after the fact, a crime that looks almost  
16 exactly like Mr. Pugin's crime here under any  
17 law.

18 CHIEF JUSTICE ROBERTS: Well, but, I  
19 mean, if you -- if you -- we're dealing with a  
20 criminal statute here, and if you didn't have  
21 the Board's construction, would your -- what  
22 would your answer?

23 MR. GANNON: My answer would -- would  
24 be that obstruction of justice in the dictionary  
25 definitions still requires willfully interfering

1 with the process of justice and law. I think  
2 "relating to" does get us a little bit beyond  
3 that at the margins. I'm not exactly sure what  
4 those offenses are going to be. It does need to  
5 be categorical.

6 And so we think that in this context,  
7 though, the Board, looking for that specific  
8 intent, should give the Court reassurance that  
9 we're not sweeping in a lot of other offenses.

10 And to the extent that the other side  
11 is concerned about -- and some of the amici are  
12 concerned about defining offense conduct  
13 broadly, this case isn't about what actually  
14 violates any of the underlying offenses. We  
15 take those as given.

16 The question is just whether, as a  
17 category, as a family of offenses,  
18 obstruction-of-justice offenses need to have a  
19 pending proceeding. And we think the answer to  
20 that is clearly not.

21 JUSTICE KAGAN: When -- when you say  
22 that there needs to be some sort of nexus to a  
23 proceeding or an investigation, are you  
24 suggesting that there needs to be a kind of  
25 reasonable foreseeability in the way that I

1 think that the Board has indicated previously?

2 MR. GANNON: Well, we think -- we  
3 acknowledge that that effectively comes in, but  
4 it does, though, as part of the specific intent  
5 inquiry. It can't be a stand-alone element. If  
6 it were a stand-alone element, then,  
7 essentially, no state statute would come in  
8 because no state statute echoes the Arthur  
9 Andersen opinion that this Court issued in 2005  
10 --

11 JUSTICE SOTOMAYOR: Mr. --

12 MR. GANNON: -- to construe 1512.

13 JUSTICE BARRETT: I think Justice  
14 Sotomayor -- I'll go after.

15 JUSTICE SOTOMAYOR: Mr. Gannon, let me  
16 start with, what other aggravated felony is  
17 defined merely by dictionary -- by the  
18 dictionary? Because that seems to be what  
19 you're doing. Tell me what other identified  
20 aggravated felony do we approach that way.

21 MR. GANNON: Well, you approach the  
22 sexual-abuse-of-a-minor offense in  
23 Esquivel-Quintana that way. You used other  
24 sources, and we too are using the same sources  
25 that you used in Esquivel-Quintana --

1 JUSTICE SOTOMAYOR: But we --

2 MR. GANNON: -- to say that --

3 JUSTICE SOTOMAYOR: -- we were just  
4 defining -- in that case, we were using the  
5 categorical approach and looking at common law  
6 elements and figuring out what they meant.

7 Now, assuming that the -- I think the  
8 other side has a point that we have to find what  
9 the definition is of "obstruction of justice" or  
10 "relating to obstruction of justice," all I can  
11 find is that in 1831, leading commentators,  
12 Blackstone and Kent, understood it to require a  
13 pending petition.

14 In 19 -- in 1893, the Court in  
15 Pettibone held that obstruction of justice  
16 requires a pending petition.

17 Congress reenacted the offense in  
18 1948, explaining that it made no substantive  
19 change to the -- to the petition at the -- at  
20 the time of Pettibone.

21 Then, in 1995, just one year before  
22 obstruction of justice was added to the INA list  
23 of aggravated felonies, the Court of -- the  
24 Court in Aguilar again required interference  
25 with a pending proceeding.

1           Now you say some states in 1996 had  
2 expanded it not -- expanded the definition of  
3 "obstruction of justice" not to need a pending  
4 proceeding. But the majority of them still  
5 defined it that way.

6           I look at how Congress used it, and in  
7 all of the federal Criminal Code, the phrase  
8 "relating" -- phrase "relating to obstruction of  
9 justice" appears in just one other place, RICO  
10 Section 1961, and it specifically refers to  
11 1503.

12           That same provision refers to Section  
13 1512 as relating to tampering with a witness.  
14 So Congress itself is now saying we think of  
15 obstruction of justice as something different  
16 than the other provisions. And if we read  
17 things the way you're saying, there's a lot  
18 that's superfluous in this statute.

19           Why would Congress have made it  
20 necessary to point to perjury or to false  
21 statements or to other provisions that it did?

22           I -- I'm a little bit confused. I  
23 would think that we would go to what the common  
24 law understanding was at the time in 1996 --

25           MR. GANNON: Well --

1 JUSTICE SOTOMAYOR: -- and in 1996,  
2 every use of "relating to obstruction of  
3 justice" required a pending proceeding.

4 MR. GANNON: -- Justice Sotomayor, we  
5 do not disagree that 1503 is an  
6 obstruction-of-justice offense. We disagree  
7 about the idea that that's the only  
8 obstruction-of-justice offense in federal  
9 criminal law, and --

10 JUSTICE SOTOMAYOR: No, you're --  
11 you're missing the point.

12 MR. GANNON: Well --

13 JUSTICE SOTOMAYOR: The point is what  
14 are the elements of an obstruction of justice,  
15 and if it required a pending proceeding --

16 MR. GANNON: Yes, and --

17 JUSTICE SOTOMAYOR: -- how do we read  
18 it out?

19 MR. GANNON: Because we think that you  
20 have to look at more offenses than 1503 in order  
21 to determine --

22 JUSTICE SOTOMAYOR: But, when Congress  
23 did that --

24 MR. GANNON: But the only instance --

25 JUSTICE SOTOMAYOR: -- like in when it

1 referred to 1512, it said relating to tampering  
2 with a witness, not relating to the obstruction  
3 of justice, as it did in RICO.

4 MR. GANNON: RICO is the only place  
5 where it does that, and the two parallel  
6 cross-references --

7 JUSTICE SOTOMAYOR: And then --

8 MR. GANNON: -- that you're --

9 JUSTICE SOTOMAYOR: -- why bother --

10 MR. GANNON: -- talking about --

11 JUSTICE SOTOMAYOR: -- why bother with  
12 all the other definitions, perjury, all the  
13 other crimes? They all relate to obstruction of  
14 justice according to you with or without a  
15 proceeding.

16 MR. GANNON: I think the aggravated  
17 felony definition is replete with potential  
18 overlap. Congress clearly wanted this  
19 definition to be broad. It returned to it  
20 several times in the 1990s in order to make it  
21 broader, in order to reduce the punishment  
22 threshold. It reduced the punishment threshold  
23 here from five years to one year.

24 And there are other things that  
25 clearly overlap in the aggravated felony

1 definition. Murder --

2 JUSTICE SOTOMAYOR: There are many  
3 states that make it a crime not to -- not to  
4 report a crime, even if the person hasn't aided  
5 or abetted or participated in any way in the  
6 crime or helped the criminal.

7 Is that an obstruction-of-justice  
8 offense?

9 MR. GANNON: Only if it has the  
10 specific intent requirement to interfere with an  
11 investigation.

12 JUSTICE SOTOMAYOR: But it seems to  
13 me --

14 MR. GANNON: And what we are saying is  
15 that --

16 JUSTICE SOTOMAYOR: -- you're reading  
17 that intent in -- into everything.

18 MR. GANNON: We --

19 JUSTICE SOTOMAYOR: So is the BIA.  
20 You're saying that just because an investigation  
21 might follow, you're responsible.

22 MR. GANNON: We read that intent  
23 requirement by looking at the dictionary  
24 definitions, the commentators, the Model Penal  
25 Code, lots of other things that had happened in



1 the law after Blackstone in 1831.

2 CHIEF JUSTICE ROBERTS: Counsel --

3 JUSTICE BARRETT: Mr. --

4 MR. GANNON: We take Pettibone and --

5 CHIEF JUSTICE ROBERTS: Okay. Why  
6 don't you finish your answer to Justice  
7 Sotomayor, and then I have a question.

8 MR. GANNON: We -- we take Pettibone  
9 and this Court's decision in Aguilar in 1995 as  
10 saying that 1503 did have the pending proceeding  
11 requirement, but we think it's clear that  
12 Congress considered a larger range of offenses,  
13 including those that are in Chapter 73, as also  
14 being obstruction-of-justice offenses, and,  
15 indeed, Section 3, the accessory-after-the-fact  
16 provision, which federal courts of appeals since  
17 the late 1960s and early 1970s had repeatedly  
18 characterized as saying the gist of an  
19 accessory-after-the-fact offense under Section 3  
20 is obstruction of justice. We think that is  
21 part of the context against which Congress  
22 enacted this definition in 1996.

23 CHIEF JUSTICE ROBERTS: Counsel,  
24 looking at your reasonable foreseeability point,  
25 exactly what -- at what point do you -- do you

1 decide -- let's say there is a 50 percent chance  
2 based on historic -- historical evidence that  
3 the government would prosecute a particular  
4 crime, would investigate it to the point of  
5 prosecution.

6 Is that enough to say that the  
7 investigation is reasonably foreseeable?

8 MR. GANNON: Well, I -- I'm not  
9 exactly sure how this Court would apply the  
10 Arthur Andersen test or how courts of appeals  
11 have applied that in cases about when that needs  
12 to be an element of the offense.

13 We think here that it's not a strict  
14 element of the offense, but it does come in  
15 through the mens rea. So we think that if the  
16 -- if the investigation is really unthinkable,  
17 it's the sort of thing that nobody's going to  
18 get investigated or prosecuted for --

19 CHIEF JUSTICE ROBERTS: Right. I  
20 understand the --

21 MR. GANNON: -- then there's not going  
22 to be --

23 CHIEF JUSTICE ROBERTS: -- I -- I  
24 understand the easy case and the hard case. I'm  
25 trying to figure out exactly where you would

1 draw the line.

2 MR. GANNON: I mean, I think, here,  
3 the -- the main place we're going to draw the  
4 line is about whether you have a specific intent  
5 to interfere with the process of justice.

6 And so, if it's the type of offense  
7 that nobody is going to be prosecuted or  
8 investigated for, that prosecution isn't going  
9 to get brought -- they aren't going to get  
10 convicted.

11 We're not going to have a conviction  
12 for accessory after the fact, which had, in  
13 Virginia, for instance, the mens rea of  
14 intending to influence -- intending to enable  
15 the felon to elude punishment.

16 If you're intending to enable him to  
17 elude punishment for something that he was never  
18 going to be come after for, then it's going to  
19 be very difficult for the prosecution to prove  
20 that offense.

21 JUSTICE KAGAN: So --

22 JUSTICE BARRETT: Mr. --

23 JUSTICE KAGAN: -- putting aside  
24 the -- the -- the question of how exactly you  
25 draw the line, when you say that you don't want

1 it to be an element of the offense and it's  
2 supposed to only come through the mens rea  
3 requirement, why are you arguing that, and  
4 what's the effect of that?

5 MR. GANNON: I -- I mean, the -- the  
6 practical effect and the why that we're arguing  
7 it is that there are essentially no statutes,  
8 not even the text of 1512, that include the  
9 1512 -- I mean, that include the Court's gloss  
10 in Arthur Andersen to require there to be a  
11 reasonably foreseeable investigation. We don't  
12 deny that that's part of 1512 since the Court  
13 construed the statute in 2005.

14 But the -- all of the state  
15 obstruction-of-justice offenses, accessory after  
16 the fact, a lot of these other crimes, they  
17 weren't drafted in a post-Arthur Andersen age --

18 JUSTICE KAGAN: Yeah, but it does seem  
19 --

20 MR. GANNON: -- and nevertheless --

21 JUSTICE KAGAN: -- right, that Arthur  
22 Andersen and then Marinello, where it says is it  
23 in the offing --

24 MR. GANNON: It does, but I --

25 JUSTICE KAGAN: -- you know, would --

1 would suggest that when we think of prototypical  
2 cases of obstruction, we're thinking of cases in  
3 which there is a proceeding or at least an  
4 investigation, as Marinello said, in the offing.

5 MR. GANNON: Yes, there needs to be a  
6 particular, in Marinello, tax proceeding that is  
7 in the offing. It's not just day-to-day work of  
8 the IRS agents there. But I would stress that  
9 Marinello relied on the phrase "due  
10 administration of this title" as echoing 1503,  
11 and that's -- that's language from the statute  
12 that was construed in Pettibone and Aguilar as  
13 needing a pending proceeding requirement.

14 And even though the Title 26 provision  
15 had that similar language that is not in the  
16 INA, the Court still didn't require there to be  
17 an already pending investigation at the IRS in  
18 order for the Title 26 provision to apply.

19 JUSTICE BARRETT: Mr. --

20 MR. GANNON: It said in the offing was  
21 good enough.

22 And so, here, we think that an intent  
23 to interfere with something that really is  
24 conceivable essentially gets at the same point.

25 JUSTICE ALITO: I mean, this

1 distinction matters, doesn't it, only in the  
2 case where the person who specifically intends  
3 to obstruct a future investigation is  
4 unreasonable in thinking that there will be a  
5 future investigation, right? That's the only  
6 instance in which it would -- it makes a  
7 difference whether this is a stand-alone element  
8 or whether it's subsumed by the intent  
9 requirement.

10 MR. GANNON: That's right that that's  
11 the only cases in which it's going to make a  
12 difference, but if you say that it needs to be  
13 an element of the offense --

14 JUSTICE ALITO: No, I understand that.

15 MR. GANNON: -- then -- then it would  
16 be harder for us to satisfy in a -- in a lot of  
17 cases where I think we would say the intent is  
18 going to sweep that in virtually all the time.

19 JUSTICE ALITO: Yeah, I understand  
20 that.

21 Let me ask you a question about  
22 Pettibone. Do you interpret that as a decision  
23 that interpreted a specific statutory provision  
24 and the language of that specific statutory  
25 provision, or was the Court saying that

1 obstruction of justice, like burglary or murder,  
2 is a common law offense and it has  
3 well-recognized elements, and so we are going to  
4 read this statute in accordance with a common  
5 law offense?

6 MR. GANNON: We -- we think it's  
7 clearly the former. In Pettibone and in Aguilar  
8 and again in Marinello, the Court recognized  
9 that the phrases that mattered in 1503 were the  
10 reference to the "due administration of justice"  
11 and "in any court."

12 And so that's language that Congress  
13 included in the catch-all clause in 1503 that  
14 was construed originally in Pettibone in the  
15 1890s and was carried through into the 1995  
16 decision that Justice Sotomayor mentioned. But  
17 that's still only the 1503 statute. And we  
18 think it's quite clear that when Congress added  
19 1512 in 1982, it also considered 1512 to be an  
20 obstruction-of-justice offense.

21 JUSTICE BARRETT: Mr. Gannon, can I  
22 ask you a question about this link between the  
23 two? Does it have to be linked to a particular  
24 proceeding? Because, at the time when a  
25 proceeding -- an investigation might be in the

1     offing, I mean, I think some of our prior cases  
2     have required that link to be between a  
3     particular investigation.

4             So you could threaten a witness and  
5     say, don't report this to the authorities. But  
6     that could be state authorities. It could be  
7     federal authorities. There could be overlapping  
8     jurisdictional authority.

9             So do you think it has to be close  
10    enough to an investigation for the defendant to  
11    suspect that state authorities might bring a  
12    particular investigation as opposed to the feds?

13            MR. GANNON: I think it wouldn't  
14    matter which type of offense it would be. If  
15    you were specifically trying to prevent a  
16    witness from going to either state or federal  
17    authorities about your --

18            JUSTICE BARRETT: Justice from  
19    anywhere?

20            MR. GANNON: -- criminal conduct, that  
21    that is still a conceivable -- you're still  
22    interfering with the wheels of justice even  
23    though you don't know whether they're state or  
24    federal at that point.

25            JUSTICE BARRETT: Okay. Let me ask



1 you a different question then. This goes back  
2 to Justice Sotomayor's point about you using  
3 obstruction of justice in a dictionary  
4 definition rather than looking at the elements  
5 of an offense.

6 For perjury and bribery of a witness,  
7 I assume that you would agree, under the  
8 categorical approach, we would be looking to  
9 generic definitions of perjury and generic  
10 definitions of bribery of a witness.

11 MR. GANNON: I think you could also  
12 look to the federal statutes that criminalize  
13 those crimes. You would look to state statutes  
14 as well. In a case like Esquivel-Quintana and  
15 -- where the Court was looking at sexual abuse  
16 of a minor, it recognized that this may be a  
17 family of offenses, and it said that statutory  
18 rape is just one part of the category that's  
19 covered by sexual abuse of a minor.

20 Here, we think it's clear that --

21 JUSTICE BARRETT: But you  
22 wouldn't necessarily start -- I guess what I'm  
23 getting at is it seems like there are clusters  
24 here. You have obstruction of justice, you have  
25 perjury, subornation of perjury, bribery of a

1 witness, and it feels a little bit odd to be  
2 relying primarily on the dictionary definition,  
3 which is up at the highest level of generality  
4 for the first one but using kind of a more  
5 traditional approach for the others in the  
6 statute.

7 MR. GANNON: We're not running away  
8 from the statutes. We think that they support  
9 us. Our main contention about the statutes is  
10 that 1503 isn't the only obstruction-of-justice  
11 offense at the federal level.

12 JUSTICE JACKSON: And do you draw --

13 MR. GANNON: We think it's clear that  
14 Congress --

15 JUSTICE BARRETT: Okay. Last -- last  
16 question then. What does "relating to" do?  
17 What is an offense relating to bribery of a  
18 witness or relating to perjury?

19 MR. GANNON: In -- we think there it  
20 also expands the category a little bit. The  
21 Ninth Circuit in the Yim case held that  
22 "relating to perjury" extends a little bit  
23 further maybe than the elements of the offense.  
24 It held --

25 JUSTICE BARRETT: What do you mean?

1           MR. GANNON: It -- it held there that  
2 a federal perjury provision didn't necessarily  
3 -- the short answer is yes, we think that  
4 "relating to" adds to both obstruction of  
5 justice and the clauses that follow.

6           JUSTICE JACKSON: But why? If -- if  
7 obstruction of justice is itself a family, as  
8 you say, and I accept that, there's not a  
9 particular obstruction-of-justice offense that  
10 we call that or that Congress considered to be  
11 that, why isn't "relating to obstruction of  
12 justice" just describing the family?

13           What I don't understand is why you  
14 have a group or a class called obstruction of  
15 justice, and then you interpret "relating to" to  
16 get you beyond that, as opposed to interpreting  
17 the entire phrase, "relating to obstruction of  
18 justice," to say, refer to all of the offenses  
19 listed in 73. I don't know why -- I guess I'm  
20 just confused --

21           MR. GANNON: Yeah.

22           JUSTICE JACKSON: -- as to why  
23 "relating to" is adding to --

24           MR. GANNON: Yeah.

25           JUSTICE JACKSON: -- the

1 classification that you say exists.

2 MR. GANNON: I think, if you agree  
3 with us about the mens rea as being necessary to  
4 establish a sufficient connection in order to  
5 come in here even when it's relating to, then  
6 there isn't going to be any --

7 JUSTICE JACKSON: But why do I need to  
8 --

9 MR. GANNON: -- practical difference  
10 between those two --

11 JUSTICE JACKSON: -- can -- can we set  
12 the -- setting the mens rea aside --

13 MR. GANNON: Yeah.

14 JUSTICE JACKSON: -- just trying to  
15 understand what you believe "obstruction of  
16 justice" in subparagraph (S) to be referring to.  
17 I've heard you say several times that it's a  
18 family, a classification.

19 If I accept that and agree with you,  
20 then why isn't "relating to obstruction of  
21 justice" just describing that category? That  
22 would seem to be to me a way to limit because we  
23 don't have to worry about "relating to" as being  
24 beyond the class.

25 And, second point, why isn't the class

1 what Congress has listed in Chapter 73 and  
2 grouped together under the heading "obstruction  
3 of justice"? I don't know why you're going  
4 beyond a Chapter 73-type offense in your  
5 argument.

6 MR. GANNON: Well, I -- I think  
7 that -- with respect to the first question, I  
8 understand your point about "relating to." We  
9 think that the phrase generally is used by  
10 Congress to broaden things. In this particular  
11 definition, when it's used in parentheticals,  
12 it's just a reference, a cross-reference, but we  
13 think, generally, it would be broader.

14 But even taking your point about a  
15 family of offenses that's defined, as we think,  
16 by this common mens rea and various different  
17 potential actus reuses, that --

18 JUSTICE JACKSON: All of which runs  
19 through Chapter 73, right?

20 MR. GANNON: Yes, but it's not just  
21 limited to Chapter 73. We think --

22 JUSTICE JACKSON: Why?

23 MR. GANNON: Because we think that  
24 other offenses are obstruction of justice. And  
25 as I said already --

1 JUSTICE JACKSON: But isn't the -- but  
2 I'm saying, isn't the question what Congress  
3 intended?

4 MR. GANNON: Absolutely. It is.

5 JUSTICE JACKSON: And so, if Congress  
6 says an offense relating to obstruction of  
7 justice, and then, in Chapter 73, they list a  
8 number of offenses under the heading  
9 "obstruction of justice," I guess I don't  
10 understand why we are being directed to some  
11 sort of a generic categorical approach about a  
12 particular offense called obstruction of justice  
13 when that's really not a thing. It seems like  
14 it's a class. And here's a list of all of the  
15 things, some of which require a proceeding, some  
16 of which don't.

17 Why isn't this the universe of -- of  
18 offenses plus the state law analogues to them?  
19 Why isn't that what Congress intended  
20 "obstruction of justice" to mean?

21 MR. GANNON: I agree with everything  
22 there except to say that Chapter 73 defines the  
23 extent of the universe of parallel --

24 JUSTICE JACKSON: Why?

25 MR. GANNON: -- offenses here. And

1 that's because it was clear by 1996 that  
2 accessory after the fact, for instance, the gist  
3 of that offense was obstruction of justice. And  
4 the mere fact that --

5 JUSTICE JACKSON: Clear to whom and  
6 where? In the dictionary? Clear to -- to whom?

7 MR. GANNON: Clear in -- in  
8 most circuit courts of the United -- of the  
9 federal circuit courts had said that about  
10 Section 3, and -- and many state courts had said  
11 that about their obstruction -- their  
12 accessory-after-the-fact offenses.

13 Commentators, the LaFave treatise, the Model  
14 Penal Code commentary, all of these sources  
15 talked about offenses outside of Chapter 73 as  
16 also being paradigmatic obstruction-of-justice  
17 offenses.

18 And so that's why we think that just  
19 looking to Chapter 73 isn't enough. We think  
20 Chapter 73 provides good guidance. There are  
21 clearly more than one obstruction-of-justice  
22 offense in Chapter 73, and, therefore, my  
23 friends' attempt to limit this to 1503 is too  
24 narrow. But we also think it's clear that  
25 Congress thought that there were

1 obstruction-of-justice offenses outside Chapter  
2 73, including, I would say --

3 JUSTICE JACKSON: But Congress didn't  
4 put --

5 MR. GANNON: -- the Title 26  
6 provision.

7 JUSTICE JACKSON: -- but Congress did  
8 not put accessory after the fact in Chapter 73.  
9 So the -- the --

10 MR. GANNON: That's right, but  
11 Congress also --

12 JUSTICE JACKSON: -- those who  
13 believed it was broader, what was the basis --  
14 the mens rea that runs to those other crimes?

15 MR. GANNON: It -- it -- it still --  
16 the -- Section 3 still requires the intent to  
17 hinder and prevent the -- the prosecution of the  
18 felon. And --

19 JUSTICE JACKSON: I'm sorry. I'm just  
20 talking about accessory after the fact --

21 MR. GANNON: Yes.

22 JUSTICE JACKSON: -- is not in the  
23 list of crimes that Congress has put together  
24 under obstruction of justice in Chapter 73.

25 MR. GANNON: That --



1                   JUSTICE JACKSON: You say it's still  
2 covered. And I guess I'm just trying to  
3 understand why is it -- because it has the same  
4 mens rea as these offenses?

5                   MR. GANNON: Yes. Because it still  
6 requires that the act be taken to hinder or  
7 prevent the apprehension, trial, or punishment  
8 of the -- of the known felon, and that's why  
9 everybody considered it to be the gist of that  
10 offense was obstruction of justice, is what the  
11 D.C. Circuit said in 1972 and various  
12 commentators did.

13                   CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15                   Justice Thomas, anything further?

16                   Justice Alito?

17                   JUSTICE ALITO: The question on which  
18 we granted review is, to qualify as an offense  
19 relating to obstruction of justice, must a  
20 predicate offense require a nexus with a pending  
21 or ongoing investigation or proceeding? And you  
22 say that that is not required.

23                   And we might or might not agree with  
24 you, but if we do agree with you on that, do we  
25 need to go any further and decide whether the

1 offenses in the two cases qualify as obstruction  
2 -- offenses relating to the obstruction of  
3 justice?

4 MR. GANNON: Well, you would not need  
5 to in order to answer the question on which you  
6 granted cert. The question that we offered in  
7 our petition was broader and would have included  
8 that question in the case of Mr. Cordero-Garcia.

9 We think -- we have submitted that the  
10 other side in both cases hasn't preserved any  
11 other arguments, but we don't think you would  
12 need to decide that question. If you wanted to  
13 remand and let the courts of appeals apply your  
14 definition or your answer to the question that  
15 there does not need to be a pending proceeding,  
16 then my friends on the other side would be able  
17 to raise any other arguments that they happen to  
18 have preserved.

19 JUSTICE ALITO: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Sotomayor?

22 Justice Kagan?

23 JUSTICE KAGAN: What -- what seems  
24 unusual to me, Mr. Gannon, about your argument  
25 is that you -- in most cases, when we ask about

1 a generic offense, we're asking about a  
2 prototypical offense, we're asking about sort of  
3 the core offense, and we realize that there are  
4 things that fall outside that core, and when a  
5 state statute includes them, it's going to flunk  
6 the categorical test.

7 But the -- but the -- we are asking  
8 about the core. And it seems to me that your  
9 answer to this question is really not asking  
10 about the core. It's asking, like, what's the  
11 outer bounds of the offense and what is anything  
12 that anybody has said is included in the  
13 offense, and then we're going to include all  
14 that in our definition of what a generic offense  
15 is.

16 But I guess I would think that that's  
17 pretty inconsistent with how we've taken the  
18 generic offense question to go generally.

19 MR. GANNON: Yeah. And I don't think  
20 it is if you recognize that this is a family of  
21 offenses, as Justice Jackson was saying, and I  
22 think as the Court was -- was essentially also  
23 saying in *Esquivel-Quintana* when the Court  
24 looked at the phrase "sexual abuse of a minor."

25 It didn't say, oh, there's one generic

1 sexual-abuse-of-a-minor offense. It said one  
2 category there is -- one example of this  
3 category of crimes is the phrase the Court used  
4 with statutory rape laws.

5 JUSTICE KAGAN: Well, I take the point  
6 that you're --

7 MR. GANNON: And so -- and so --

8 JUSTICE KAGAN: Go ahead.

9 MR. GANNON: -- and -- and I would say  
10 that there are other -- there are other  
11 categorical approach cases where the Court has  
12 recognized that there is an irreducible minimum  
13 that defines this as being part of the category  
14 of -- of cases at issue, of offenses at issue,  
15 but that doesn't mean that there can't be other  
16 things that also apply.

17 So, in Nijhawan, in Kawashima, the  
18 Court was talking about offenses involving fraud  
19 or deceit, and it recognized that fraud can be  
20 mail fraud, it can be wire fraud, it can be  
21 conspiracy to defraud, it can be lots of other  
22 types of fraud.

23 But the actus reus is -- can be a  
24 bunch of different things, but what it has to  
25 include is an intent to defraud. Same with

1 sexual abuse of a minor. Statutory rape was as  
2 an example.

3 Here, we think all of the offenses are  
4 going to require the willful interference with  
5 the process of justice and law, and -- but the  
6 --

7 JUSTICE KAGAN: I -- I mean --

8 MR. GANNON: -- actus reus can be  
9 different. It could be you're threatening a  
10 witness, it could be you're destroying a  
11 document, it could be --

12 JUSTICE KAGAN: Yeah, but take the  
13 accessory after the fact, which you want to put  
14 in. I mean, you can look at that accessory  
15 after the fact. It's just like aiding and  
16 abetting, or it's like being a member of a  
17 conspiracy or something like that. I mean,  
18 nobody truly thinks of that as a core  
19 obstruction-of-justice offense.

20 MR. GANNON: With respect, Justice  
21 Kagan, look at the 1972 decision from the  
22 D.C. Circuit. It said that obstruction of  
23 justice is the gist of that offense.

24 And many circuits that we cite in our  
25 brief on page 22 and 23 repeat that definition.

1 So did commentators. So does the Model Penal  
2 Code. Everybody recognized that just -- even  
3 though it's not in Chapter 73 --

4 JUSTICE KAGAN: I mean, it's sort of  
5 --

6 MR. GANNON: -- because Congress has  
7 told us --

8 JUSTICE KAGAN: -- obstruction of  
9 justice taking over the world --

10 MR. GANNON: No. It -- it says --

11 JUSTICE KAGAN: -- and doing so --  
12 excuse me, Mr. Gannon -- and doing so by means  
13 of trying to define a generic offense which, in  
14 everything we've ever said about that project,  
15 is defining the prototypical crime.

16 MR. GANNON: And the reason why we  
17 think that one is prototypical is because it  
18 requires the comfort and assistance given the  
19 known felon there to be done in order to hinder  
20 or prevent his apprehension, trial, or  
21 punishment.

22 That's what Section 3 at the federal  
23 level says. The Virginia statute at issue in  
24 Pugin is essentially the same as it's -- as it's  
25 applied under Virginia case law, and the -- the

1 model jury instructions that require there to be  
2 a specific intent to help escape or delay,  
3 capture prosecution or punishment. And that is  
4 what it means to obstruct justice, we think, if  
5 you look at the dictionary definitions and the  
6 commentators.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Gorsuch?

9 JUSTICE GORSUCH: Well, you're not  
10 going to like this any more.

11 Just to follow up on Justice Kagan's  
12 thought, I wonder whether we're essentially  
13 asked to -- between these two choices, I just  
14 wonder if you think this is a fair summary of --  
15 of our choices in defining what constitutes  
16 categorically obstruction of justice.

17 One option would be to look to the  
18 common law and to this Court's decisions in  
19 Pettibone and Aguilar and say, well, that  
20 usually meant at common law traditionally that  
21 there was an ongoing proceeding, obstruction of  
22 justice was contempt of court, things like that.

23 The other is to look at dictionaries  
24 and say, well, there's some linguistic gift in  
25 this concept, and when we speak casually, the

1     gist of any kind of thing that impedes an  
2     investigation -- failure to report a crime,  
3     accessory after the fact, witness tampering --  
4     they -- they sound sort of like obstruction of  
5     justice, and they would fall within a  
6     contemporary dictionary definition. So that  
7     should be the choice we make.

8                     Is that a fair summary of our two  
9     choices here?

10                    MR. GANNON: Well, I -- I would  
11     quibble with both halves briefly to say that  
12     with respect to the first part, Pettibone and  
13     Aguilar were not talking about the common law.

14                    JUSTICE GORSUCH: I understand.

15                    MR. GANNON: They were talking about a  
16     specific statute.

17                    JUSTICE GORSUCH: I understand that.  
18     But, if we look at the common law, it's  
19     consistent with Pettibone and Aguilar, I  
20     think -- I think we'd find. So I -- I take your  
21     quibble, but --

22                    MR. GANNON: And -- and with respect  
23     to the second half, I would say that we're not  
24     just resting on dictionaries. We're resting on  
25     a lot of other federal and state criminal



1 offenses. We think that 1512 is an  
2 obstruction-of-justice offense. We think  
3 Section 3 is an obstruction-of-justice offense.

4 JUSTICE GORSUCH: Let's take 1512. I  
5 mean, that may be your best one, and you rely on  
6 it a lot in your brief, and that has to do with  
7 witness tampering, of course.

8 But Congress there specifically said,  
9 in this instance, you don't need to have a  
10 pending proceeding. And I -- I take the point  
11 that that in some ways might be seen to -- might  
12 seem to help you, but might it also hurt you in  
13 another way in the sense that there Congress  
14 exhibited an understanding that normally  
15 obstruction of justice, as understood at common  
16 law, the soil that came with 1503, requires an  
17 ongoing offense, but not in this case, Congress  
18 said.

19 So doesn't that kind of -- isn't it  
20 the exception that proves the rule?

21 MR. GANNON: We don't think it is  
22 because we think that Congress was clearly  
23 distinguishing the new provision from 1503, but  
24 that doesn't mean that Congress didn't think  
25 that 1512 was also an obstruction-of-justice

1 offense. And, indeed, it was understood that it  
2 was going to take on a lot of the cases that had  
3 previously proceeded under 1503.

4 JUSTICE GORSUCH: And -- and then this  
5 linguistic grift concept of obstruction of  
6 justice is -- as from the dictionary definitions  
7 is impeding a process of justice, I think, is  
8 how you use.

9 What does that mean? Is that defined  
10 in law anywhere?

11 MR. GANNON: There's not a separate  
12 definition of that.

13 JUSTICE GORSUCH: Yeah.

14 MR. GANNON: But we do think that you  
15 can impede or inter- --

16 JUSTICE GORSUCH: I'm not aware of  
17 one, and I didn't see one in your brief.

18 MR. GANNON: I mean, I think that  
19 the -- the ordinary meaning of the phrase  
20 "impede or interfere" is to prevent from being  
21 effectuated in -- in its -- in its full way.  
22 And we think that you can impede an  
23 investigation by keeping it from getting off the  
24 ground.

25 JUSTICE GORSUCH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Kavanaugh?

3 JUSTICE KAVANAUGH: Just on -- a  
4 follow-up on these questions.

5 I think you're saying that the core of  
6 this has to be defined by the mens rea, willful  
7 interference with the process of law, and that  
8 that unites all of these disparate crimes.

9 MR. GANNON: We agree with that. We  
10 think that that -- that's common across the  
11 federal and state statutes that we cite and that  
12 we think Congress was aware of.

13 JUSTICE KAVANAUGH: And if a crime  
14 didn't have that mens rea requirement, it  
15 wouldn't work?

16 MR. GANNON: Yes. I think that the  
17 retaliation offenses come in a little bit  
18 differently with respect to whether there's a --  
19 you know, a -- a -- a pending proceeding and --  
20 and how you're interfering with that.

21 We think that the retaliation against  
22 a witness, a juror, a judge, other participants  
23 in the trial process, those would also still  
24 come in because we think that that's an attempt  
25 to interfere with the machinery of justice even

1     though it comes after the conclusion of an  
2     individual proceeding, but -- but, yes, I take  
3     your point that -- that we do think that that is  
4     what is common. That is our point, that that is  
5     what is common across this family of offenses.

6             JUSTICE KAVANAUGH: And then defining  
7     it, Justice Gorsuch's question, I thought it was  
8     usually examples: shredding documents, killing  
9     a witness, killing the judge, paying off a  
10    witness, bribing a juror. I mean, there's a  
11    family of offenses. I didn't think it was that  
12    complicated, but I don't know what you think  
13    that the definition of process of law was.

14            MR. GANNON: Well, I -- I -- we do  
15    think that all of those are going to come in.  
16    We think that the fact that those are all, you  
17    know, different acts demonstrates why this is a  
18    family of offenses, and -- but we -- but they  
19    are temporal points --

20            JUSTICE KAVANAUGH: So killing the  
21    judge during the case is -- is the same as  
22    killing the judge after the case?

23            MR. GANNON: Yes. Or --

24            JUSTICE KAVANAUGH: They're both  
25    obstruction?

1                   MR. GANNON: And also, you know,  
2 preventing a witness from showing up during the  
3 trial is the same as preventing a witness from  
4 reporting a crime to the police in the first  
5 instance.

6                   JUSTICE KAVANAUGH: Okay.

7                   MR. GANNON: And, indeed, in  
8 California, as we point out, they punish the  
9 preventing the report of the crime even more  
10 harshly than preventing a witness from  
11 testifying at trial.

12                   JUSTICE KAVANAUGH: Okay. A slightly  
13 different tack. "Relating to," I think there is  
14 ambiguity about what that means, and I wouldn't  
15 want it to just stretch forever, like some of my  
16 colleagues said. But, to the extent there's  
17 ambiguity about whether it's the core 1503 or  
18 includes before and after, I would think  
19 "relating to" is -- is a helpful textual  
20 indicator there.

21                   MR. GANNON: I -- I agree with that.  
22 And I -- I would also agree with Justice  
23 Jackson. If you took this as a family of  
24 offenses and this relates to the entire family  
25 of offenses, that would -- that would capture

1 the bulk of what we're concerned about here.

2 JUSTICE KAVANAUGH: Okay. And then  
3 last question, again, on a different tack.

4 The immigrant in these cases is still  
5 eligible -- correct me if I'm wrong -- for  
6 statutory withholding of removal and for CAT,  
7 Convention Against Torture, as well. Is that  
8 accurate? I saw that in a footnote.

9 MR. GANNON: That's -- that's in  
10 Footnote 3 on page 3 of our brief.

11 JUSTICE KAVANAUGH: Accurate footnote?

12 MR. GANNON: I sure hope so.

13 JUSTICE KAVANAUGH: Okay. Thank you.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Barrett?

16 JUSTICE BARRETT: Mr. Gannon, in your  
17 interchange with Justice Jackson, she was asking  
18 you about Chapter 73. I just wanted to clarify.

19 That is a title that was put in by the  
20 codifiers, not Congress, correct?

21 MR. GANNON: To the extent that  
22 Congress codified Title 18 as positive law in  
23 1948, then Congress adopted it, but they did so  
24 along with a provision that said: Don't  
25 consider where this particular offense is

1 classified when you're construing this offense  
2 for purposes of -- of construing Title 18. And  
3 so --

4 JUSTICE BARRETT: Right.

5 MR. GANNON: -- the answer to your  
6 question is -- is "yes, but."

7 JUSTICE BARRETT: Well, but we've --

8 MR. GANNON: It ends up in the same  
9 place.

10 JUSTICE BARRETT: -- said you can't  
11 put too much weight on that --

12 MR. GANNON: That --

13 JUSTICE BARRETT: -- the fact that it  
14 appears under Chapter 73, the title "obstruction  
15 of justice."

16 I'm just wondering how far you would  
17 take that. Do you -- are there any offenses in  
18 Chapter 73 that you think wouldn't qualify, or  
19 is the fact that they fall under the title  
20 "obstruction of justice" as organized by the  
21 codifiers enough?

22 MR. GANNON: If they don't have the  
23 specific intent, then I don't think that they  
24 would qualify. The 1520 offense about keeping  
25 audit papers may or may not include that

1 specific intent. I'm not sure. The civil --

2 JUSTICE BARRETT: Well, there's one  
3 about a sound truck outside of a courthouse too.

4 MR. GANNON: -- the -- the -- the  
5 civil actions in, you know, 1514 and 1514A  
6 aren't criminal offenses. So something can be  
7 there without being an obstruction-of-justice  
8 offense. But we -- we -- we think that the fact  
9 that Congress put them all together is evidence  
10 consistent with a common meaning and a common  
11 understanding and what we think the term means  
12 --

13 JUSTICE BARRETT: Okay. Thank you.

14 MR. GANNON: -- without making the  
15 title dispositive.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Jackson?

18 JUSTICE JACKSON: Yes. So I think  
19 that was helpful because, what is your view?  
20 Your view is that in order to be in the family  
21 of offenses, you have to do what? I'm sorry.

22 MR. GANNON: You -- you have to take  
23 some affirmative act --

24 JUSTICE JACKSON: Okay.

25 MR. GANNON: -- with a specific



1 intent --

2 JUSTICE JACKSON: Okay.

3 MR. GANNON: -- to interfere with the  
4 process of justice and law.

5 JUSTICE JACKSON: And, conceivably, we  
6 can read all of the listed offenses that  
7 Congress has grouped together, whether it's the  
8 codifiers or not, as giving rise to those  
9 elements, correct?

10 MR. GANNON: Yes.

11 JUSTICE JACKSON: I mean, there's  
12 nothing in here that you look at and say that's  
13 not conceivable, the elements that you have  
14 identified?

15 MR. GANNON: As -- as I just suggested  
16 to Justice Barrett, there may be an argument  
17 that aspects of 1520 would not come in because  
18 that's just to -- a requirement to preserve  
19 audit papers and leave that --

20 JUSTICE JACKSON: Destruction of  
21 corporate audit records is 1520?

22 MR. GANNON: Yeah. To the extent that  
23 that -- that that is -- that would look more  
24 like the offense in Marinello, that -- that  
25 might be a limit. But I -- I -- we haven't

1 taken a position on that. But my -- my real  
2 point is that we think that Chapter 73 includes  
3 lots of illustrative offenses, that some of them  
4 have pending proceeding requirements, some of  
5 them implicitly do not, and the 1512 ones  
6 explicitly do not. And that's why we think that  
7 the pending proceeding requirement isn't common  
8 to the family.

9 JUSTICE JACKSON: Okay. And if I --  
10 if I agree with you about that, help me just one  
11 more time with aiding and abetting or accessory  
12 after the fact.

13 MR. GANNON: Accessory after the fact.

14 JUSTICE JACKSON: Because what I'm --  
15 what I'm worried about is that it doesn't look  
16 anything like any of these insofar as these are  
17 all, whether it's a pending proceeding or not --  
18 and by "these," I mean the ones in Chapter 73.

19 Whether it's a pending proceeding or  
20 not, there is a circumstance in which, as you  
21 say, the wheels of justice are turning in some  
22 way, there's an investigation, there's an actual  
23 pending proceeding, there are things that are  
24 happening that are the administration of  
25 justice, and the actus reus in these various

1 offenses go toward interference with that  
2 process.

3 I guess I'm just still a little  
4 worried about accessory after the fact.

5 MR. GANNON: And I would say that even  
6 in Chapter 73, those offenses, the wheels don't  
7 have to have started turning. It could just be  
8 that there's a potential investigation there.

9 And I think that in accessory after  
10 the fact, it talks about the intention to  
11 prevent apprehension, trial, or punishment. All  
12 of those things -- apprehension, trial, or  
13 punishment -- are things that happen during the  
14 anticipated proceeding. That's what the  
15 investigation or proceeding would be. You are  
16 trying to hinder it right there in the element  
17 of the offense. And that's why we agree with  
18 all those courts that said the gist of that  
19 offense is obstruction of justice.

20 JUSTICE JACKSON: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 Ms. Hutton.  
24  
25

1 ORAL ARGUMENT OF MARTHA HUTTON  
2 ON BEHALF OF JEAN FRANCOIS PUGIN  
3 MS. HUTTON: Mr. Chief Justice, and  
4 may it please the Court:

5 In 1996, when Congress chose to put  
6 the words "offense relating to obstruction of  
7 justice" into subsection (43)(S), it was  
8 choosing a term of art that meant interference  
9 with a pending proceeding.

10 Just one year earlier, this Court had  
11 reaffirmed its century-old holding from  
12 Pettibone: obstruction can only arise when  
13 justice is being administered. And it had  
14 further explained that any interference must  
15 have a close nexus to that pending proceeding.

16 An offense that might or might not  
17 affect a proceeding is not obstruction. No  
18 persuasive authority supports abandoning this  
19 well-settled, well-bounded definition for  
20 something looser, like a purpose to interfere  
21 with the process of justice.

22 And doing so would be contrary to the  
23 notice and administrability concerns of the  
24 categorical approach itself. It would leave  
25 courts, lawyers, and noncitizens to guess

1 whether a predicate offense might at some point  
2 interfere with some possible process of justice  
3 and thus be an aggravated felony.

4 Mr. Pugin's case demonstrates the  
5 overreach of this looser approach. Accessory  
6 after the fact is a distinct offense. It's  
7 being a party to another person's crime, not an  
8 esoteric variant of obstruction. It is not, so  
9 to speak, in the family.

10 It is recognized in the common law, in  
11 every state, and in the federal Criminal Code as  
12 something different, and so it is too big a leap  
13 to decide Congress meant to list it as an  
14 aggravated felony when it chose words that are  
15 the name of a different crime. That kind of  
16 leap is the opposite of the interpretive  
17 restraint this Court uses in construing statutes  
18 with significant immigration and criminal  
19 consequences.

20 The Court should instead stay on solid  
21 ground and confirm that an offense relating to  
22 obstruction of justice under (43)(S) requires a  
23 close nexus to a pending proceeding.

24 I welcome the Court's questions.

25 JUSTICE THOMAS: And what do you mean

1 by "pending proceeding"? Are you referring --  
2 you seem to focus mostly on judicial  
3 proceedings.

4 MS. HUTTON: Yes, Your Honor. Our  
5 point in explaining the core as the judicial  
6 proceedings that are protected by 1503, I think,  
7 is not to object to potentially including other  
8 official proceedings in that generic definition.  
9 It certainly wouldn't matter for Mr. Pugin.  
10 There's no proceeding involved in his -- his  
11 offense.

12 But what I think it would illustrate  
13 is that already words like "relating to" or an  
14 expansive interpretation that might be  
15 underscored by using the categorical approach  
16 here is already doing some work because  
17 including an agency proceeding that might be  
18 from 1505, for example, would be expansive, but  
19 it would -- it would still be consistent with  
20 that core meaning.

21 JUSTICE THOMAS: So how would you  
22 confine that, though? What about an  
23 investigation?

24 MS. HUTTON: I think, again, an  
25 investigation is a step further out from the

1 core definition and so should be viewed with  
2 some caution, but I don't think we would object  
3 necessarily to it being used here. Accessory  
4 after the fact doesn't require an investigation.  
5 No one -- no one makes that contention.

6 And, in 1503, grand jury  
7 investigations, for example, are included, and  
8 so it would be consistent with that core as well  
9 to include investigations.

10 JUSTICE THOMAS: I think the problem  
11 that we're having is that the government wants  
12 to broaden the definition. It's like we're  
13 navigating between Scylla and Charybdis, and no  
14 one is giving us a way to get between the two  
15 extremes.

16 And you're saying you would like to  
17 restrict it to a pending proceeding, but yet you  
18 admit that as you drift away from the core, that  
19 is, judicial proceedings, we have no way --  
20 you're not giving us a way to navigate how far  
21 out do we go from that core proceeding.

22 MS. HUTTON: Your Honor, I think the  
23 mast that -- that is -- that we're tied to here  
24 --

25 JUSTICE THOMAS: Mm-hmm.

1 MS. HUTTON: -- so to speak, is the  
2 proceeding requirement itself. It is the core,  
3 it's the object, kind of grammatically, what are  
4 you protecting. And there's nothing strange  
5 about saying, once justice has taken its most  
6 official form, that's something special to  
7 protect in a specific, discrete statute.

8 And so we think the proceeding is what  
9 can't move. I think my friend thinks the intent  
10 is what can't move. If -- if -- if the issue is  
11 the beginning -- whether that proceeding has  
12 begun, the Court has in other cases taken a  
13 little bit of an envelope around an existing  
14 proceeding and said, well, if it's in the  
15 offing, for example.

16 I don't understand my friend to be  
17 proposing something like that, and that might be  
18 hard to administer in the categorical approach.  
19 But, again, with accessory after the fact, there  
20 needs -- nothing needs to be on the horizon.

21 JUSTICE KAVANAUGH: But your -- your  
22 -- your position is not just accessory after the  
23 fact; it's anything afterwards, after the  
24 proceeding, correct?

25 MS. HUTTON: Your Honor, it wouldn't



1 matter for us. We could certainly accept that.  
2 And I think, if you were to say punishment  
3 relating -- because of a concluded proceeding, a  
4 proceeding that has been pending, here's how it  
5 would be consistent, if I may, is -- is -- the  
6 pending proceeding, when it is occurring, part  
7 of what protects that is knowledge that  
8 afterwards a witness is not going to get killed  
9 without the law having some negative and  
10 deterrent effect towards that.

11 And so you're still protecting the  
12 actual functioning process of justice, the  
13 wheels, when they are turning, in a way that  
14 would be, again, still consistent with the focus  
15 on the proceeding.

16 JUSTICE KAVANAUGH: So retaliation  
17 after the proceeding has concluded, retaliation  
18 crimes, which I think Congress filled that gap  
19 in the '40s, are those obstruction of justice or  
20 not?

21 MS. HUTTON: Your Honor, I think they  
22 could be. They're in 1503, and there has been a  
23 proceeding pending and that's going to have a --  
24 both historically purpose-wise and also I think  
25 prudentially in terms of is this an admin- -- a

1 -- a standard that would make sense, all of  
2 those could include a -- a --

3 JUSTICE KAVANAUGH: So -- so you're  
4 not arguing for a temporal nexus alone then?

5 MS. HUTTON: I think my friend is --  
6 in their briefs gave the name temporal  
7 necklace -- excuse me, nexus -- it is the  
8 existence of the proceeding at some point. I  
9 think we used the word "extant proceeding." I  
10 guess former proceeding would be fine too.

11 JUSTICE KAVANAUGH: And accessory  
12 after the fact if there was a proceeding? I --  
13 I guess I'm not understanding the distinction  
14 between retaliation and accessory after the fact  
15 that you're drawing. Maybe I'm not following.

16 MS. HUTTON: Your -- Your Honor, I  
17 think, if I may try to clarify, what -- what we  
18 would see as being consistent and involving a  
19 concluded proceeding would be something like  
20 interference related to a proceeding that has  
21 been pending. So there has been a process and  
22 then a retaliatory offense like in 1503 where  
23 it's captured. It is relating to that process.  
24 And, of course, there is the word "relating," so  
25 maybe that's some use for it there.

1           Accessory after the fact doesn't  
2     require that any authority of any kind ever have  
3     known or suspected that the -- that the  
4     principal's offense took place.

5           If I lend Bob a shovel to go bury the  
6     gun he used, I may have some intent to help Bob  
7     avoid punishment, but we don't need to know that  
8     the sheriff is coming down the street or that  
9     the grand jury has issued an indictment. There  
10    is no relationship -- the wheels are not yet  
11    turning, no accessory offense, prior to that.

12           JUSTICE KAVANAUGH: But -- but the  
13    wheels would turn, so going to the temporal  
14    point beforehand, the wheels would turn if -- if  
15    you didn't take this act with the intent to  
16    frustrate the process of justice.

17           So what about that? The most  
18    effective form of obstruction of justice is to  
19    convince the witness, kill the witness ahead of  
20    time, prevent the witness ahead of time, hide  
21    the witness.

22           MS. HUTTON: Your Honor, I think --

23           JUSTICE KAVANAUGH: What about that?

24           MS. HUTTON: -- I think that would be  
25    a bad act. It would be criminal. It would be

1 --

2 JUSTICE KAVANAUGH: It's not  
3 obstruction of justice?

4 MS. HUTTON: It -- it is not because  
5 what you have there is -- is a -- the wheels  
6 might or might not turn. And Aguilar tells us  
7 might or might not is not enough. And -- and I  
8 --

9 JUSTICE BARRETT: I --

10 JUSTICE ALITO: What if it's well --  
11 what if it's pretty clear that the wheels are  
12 going to start turning pretty soon? Let's say  
13 that a new district attorney is elected in a  
14 county and the district attorney says, I'm going  
15 to crack down on organized crime in this -- in  
16 this place, and it's known that the detectives  
17 in the DA's office are questioning a particular  
18 person, and it's also known that a grand jury is  
19 going to begin to sit on Monday.

20 So, if someone who fears that he or  
21 she's going to be indicted by that grand jury  
22 approaches this witness on Sunday and says,  
23 here's \$10,000 and a ticket to a place where  
24 there's no extradition treaty, be on that flight  
25 and stay there until we let you know or we're

1 going to wipe out your family. So that's not  
2 obstruction of justice as you see it.

3 But, if the person waits until  
4 Tuesday, it's too late, right?

5 MS. HUTTON: Your Honor, I think that  
6 is a -- a -- a harder question and that might be  
7 if there were some kind of foreseeability  
8 analysis maybe where it would work the day  
9 before.

10 But I think what that does include,  
11 Your Honor's example, is a particularity  
12 requirement. And Justice Barrett inquired about  
13 this earlier. It's in every case. If a -- a  
14 particular -- where there is a foreseeability  
15 requirement, there is a particular proceeding  
16 that must be in process.

17 JUSTICE ALITO: I -- I thought your  
18 argument was that there has to be a pending  
19 proceeding.

20 MS. HUTTON: That is our argument.  
21 And if -- if the --

22 JUSTICE ALITO: So there's no pending  
23 proceeding in this case. The grand jury isn't  
24 going to start to sit until Monday.

25 MS. HUTTON: That's right, Your Honor.

1 And I think, if there were a -- a -- a desire to  
2 bridge that gap, A, there are plenty of ways for  
3 that to be a criminal act that are not  
4 obstruction of justice.

5 B, that would imply a particularity  
6 requirement that I think does exist in the law.  
7 It's certainly not -- does not exist in my  
8 friend's standard here. It's something that the  
9 BIA failed to apply and the Fourth Circuit in  
10 this case.

11 And that -- that is another way that  
12 we are in a -- kind of a -- a --

13 JUSTICE KAVANAUGH: Well, I thought --

14 CHIEF JUSTICE ROBERTS: Or C --

15 JUSTICE KAVANAUGH: -- I thought that  
16 --

17 JUSTICE BARRETT: But it sounds to me  
18 like you've --

19 CHIEF JUSTICE ROBERTS: I'm getting  
20 both sides here. Or C, you could have a broader  
21 understanding of what "relating to" means.

22 It seems to me that if this is all  
23 taking place on Sunday in anticipation of what's  
24 going to happen on Monday, I -- I would think a  
25 very narrow definition, we would say, well,

1 that's certainly relating to that proceeding.

2 But you seem to have a much stricter  
3 understanding.

4 MS. HUTTON: I -- I think that's  
5 right, Your Honor, and I think there might be a  
6 witness tampering kind of charge or an  
7 intimidation charge. I'm not sure it would be  
8 obstruction of justice, which has a different  
9 and more bounded meaning.

10 And I -- I -- to make sense --

11 CHIEF JUSTICE ROBERTS: Well, I -- I  
12 guess I -- no, maybe it couldn't be obstruction  
13 of justice, but it certainly could be relating  
14 to obstruction of justice if it's something, if  
15 you wait 10 hours or whatever and do it, it  
16 would be obstruction of justice.

17 MS. HUTTON: Your Honor, I think,  
18 again, that the word "particularity" might have  
19 some work to do there that is absent from my  
20 friend's definition. So I think we don't -- we  
21 don't get to this example. For the  
22 particularity, we would say what is -- what is  
23 it that you're interfering with. And so it's  
24 limiting that -- that mens rea.

25 JUSTICE KAVANAUGH: But that --

1 that --

2 JUSTICE BARRETT: But that's a --

3 JUSTICE KAVANAUGH: -- that --

4 CHIEF JUSTICE ROBERTS: Justice  
5 Barrett?

6 JUSTICE BARRETT: I was just going to  
7 say but it seems to me now, I mean, I thought  
8 one of the virtues of the administrability of  
9 your approach was that it required an extant  
10 proceeding, putting aside investigation, which I  
11 thought might have been a difference between you  
12 and your friend on the same side.

13 But it sounds to me like what you're  
14 saying now is that your position is essentially  
15 the same as the government's with a tightened  
16 mens rea standard.

17 MS. HUTTON: Your Honor, I -- I don't  
18 mean to convey that. I think our position is,  
19 as you articulated at the first point, I am  
20 trying to explain, if there was a discomfort  
21 with that, ways that would bridge it that would  
22 still be more definite than my -- than my  
23 friend's approach.

24 JUSTICE BARRETT: So that it could be  
25 relating to a proceeding, but "relating to"



1 narrows the mens rea requirement to a particular  
2 proceeding --

3 MS. HUTTON: Yes.

4 JUSTICE BARRETT: -- so that it might  
5 capture Justice Alito's example of the Sunday  
6 versus the Tuesday?

7 MS. HUTTON: And it would exclude this  
8 general idea that anytime anyone does something  
9 that might or might not lever the possibility of  
10 prosecution a little bit is not included with  
11 like offenses on that side.

12 JUSTICE BARRETT: And "proceeding,"  
13 what's your definition of "proceeding"? Would  
14 it, you know, include a magistrate and -- you  
15 know, to get a search warrant? Is that an  
16 investigation, or is that a proceeding?

17 MS. HUTTON: It would -- it could be  
18 either. I think, under the state law, for the  
19 categorical approach, it would probably define  
20 that. I don't think we would oppose the  
21 inclusion of either in the generic offense.  
22 Neither is anywhere close to what's required for  
23 accessory after the fact.

24 JUSTICE BARRETT: Thank you.

25 JUSTICE KAVANAUGH: Well, I thought

1 the mens rea that Mr. Gannon articulated was  
2 designed to solve the problem that you were  
3 identifying; in other words, to be convicted of  
4 the state offense, the prosecutors in the state  
5 offense are going to have to show you  
6 specifically intended to interfere with a -- the  
7 process of law, a proceeding. So it'll be  
8 focused in that way. And the mens rea does what  
9 you're asking.

10 MS. HUTTON: Your -- Your Honor, I --  
11 I don't think that's quite right an accessory  
12 after the fact is the example there, where the  
13 prosecutor doesn't have to show that you  
14 intended anything towards a proceeding. It just  
15 says you've done something that has moved the  
16 dial in some way.

17 And so you're not affecting justice in  
18 any embodied form there. The government hasn't  
19 entered the picture. It's not being obstructed  
20 or impeded, anything like that.

21 You're just making punishment or law  
22 enforcement maybe a little bit easier or more  
23 difficult. And so we're still, I think, in --  
24 in quite a gap from accessory after the fact  
25 and -- and that definition.

1 JUSTICE KAVANAUGH: Well, if it's  
2 something that is preventing the person from  
3 being arrested, is that good enough?

4 MS. HUTTON: If there is an ongoing  
5 investigation --

6 JUSTICE KAVANAUGH: No. No, there  
7 would -- no.

8 MS. HUTTON: Then -- then, no, it's  
9 not.

10 JUSTICE KAVANAUGH: Okay.

11 JUSTICE JACKSON: Do you --

12 JUSTICE SOTOMAYOR: Counsel, I've  
13 struggled a bit with the reasonably foreseeable  
14 aspect of this discussion and something that  
15 Justice Barrett's question put on. As I looked  
16 at 1512, it actually is dealing with this  
17 complication. It says, "an official proceeding  
18 need not be pending or about to be instituted at  
19 the time of the offense."

20 And as I thought about it, the problem  
21 with your -- your answer to these questions is  
22 that you want a pending proceeding, and one  
23 that's imminently going to start or the witness  
24 knows it's going to start doesn't count.

25 MS. HUTTON: Mm-hmm.

1 JUSTICE SOTOMAYOR: Assuming I were to  
2 disagree with that, that I think that there is a  
3 difference between the situation like yours, an  
4 accessory after the fact where there's nothing  
5 pending or about to be pending, how do I  
6 articulate that? Give me a version of how to  
7 read this in a way that deals with that  
8 difference.

9 MS. HUTTON: I think one way might  
10 be -- and, again, our -- our position is not  
11 that 1512 would be definitional here, so I'm --  
12 but I'm -- I --

13 JUSTICE SOTOMAYOR: No, no, no. But  
14 you understand --

15 MS. HUTTON: I understand your point.

16 JUSTICE SOTOMAYOR: -- I think it  
17 captures some of the discomfort that's being  
18 addressed.

19 MS. HUTTON: So -- so the way this  
20 Court captured similar discomfort in Marinello  
21 was again that reasonably foreseeable particular  
22 proceeding in the offing. So that was many  
23 different constraints on a general idea that  
24 doing something bad with your taxes would  
25 interfere with the administration of the Tax

1 Code. So that would maybe be a kind of -- of --  
2 of standard.

3 But, to the BIA, the Fourth Circuit,  
4 they did not apply all pieces of that standard.  
5 They just said, oh, it's reasonably foreseeable  
6 someone might guess. That's not what reasonable  
7 foreseeability has meant. This Court has never  
8 accepted that kind of vague standard in an  
9 obstruction-type case and shouldn't do so here.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

12 Justice Thomas?

13 Justice Alito?

14 JUSTICE ALITO: Back to Justice  
15 Barrett's questions about what constitutes a  
16 proceeding. So you said a search warrant  
17 application would be -- that would be a  
18 proceeding?

19 MS. HUTTON: Especially if  
20 investigations were included, yes.

21 JUSTICE ALITO: How about if one  
22 person is arrested for conspiring to commit an  
23 offense and other members of the conspiracy  
24 might subsequently be arrested? Would that  
25 arrest be -- constitute a proceeding?

1                   MS. HUTTON: It might indicate that  
2                   there was an investigation into a conspiracy,  
3                   and since you need more than one conspirator, I  
4                   think probably that indicates there's an  
5                   investigation into other conspirators. You've  
6                   got something definite, and I think that's what  
7                   we're really searching for, is that starting  
8                   point. Is the machinery on, or is it not?  
9                   Because it can't be on all the time. That's, I  
10                  think, our basic premise.

11                  JUSTICE ALITO: But your -- you don't  
12                  think an investigation in and of itself is a  
13                  proceeding, right?

14                  MS. HUTTON: I don't think it's the  
15                  same as a proceeding. I think the -- it could  
16                  be, kind of colloquially, a formal action taken  
17                  by law enforcement to try to investigate or  
18                  solve or remedy a crime.

19                  And so I think the language in the  
20                  question presented was investigation or  
21                  proceeding. That treats them differently. So  
22                  we're happy to do that as well.

23                  JUSTICE ALITO: So -- and what about  
24                  states that don't have grand juries? So, if  
25                  they're investigating, that -- that's

1 sufficient?

2 MS. HUTTON: I think that would be  
3 fair, especially because, if we're saying 1503  
4 is really our heartland here, that grand jury  
5 investigations are included there. The state  
6 doesn't use that. They're still probably doing  
7 something perhaps similarly formal even to  
8 investigate crimes. That could be included  
9 because we want to give some effect to the idea  
10 this is a categorical approach case. We're not  
11 trying to rule out an effective statute here.

12 JUSTICE ALITO: If I go back to my  
13 earlier hypothetical, so we know the grand jury  
14 is sitting on Monday, but maybe that's not --  
15 this -- that crime is not the one that they're  
16 going to take up on Monday. Maybe they're not  
17 going to take that up for another week or two.  
18 Would that matter?

19 MS. HUTTON: I think you would at  
20 least have a particular grand jury proceeding in  
21 mind, and if it had not quite started and the  
22 Court wanted to include that as the generic,  
23 which I don't think is the best -- the best  
24 reading, that would still require particularity.  
25 It might require reasonable foreseeability. And

1 I think it would also bring in the nexus  
2 requirement, which is separate and we haven't  
3 talked much about here today. But the Court  
4 gave it a lot of effect in Aguilar, where, of  
5 course, there was a proceeding ongoing already,  
6 but the actions were not close enough.

7 And so the -- the time effect  
8 causation-type analysis might also give some  
9 work to get us out of this anywhere, anytime,  
10 all possible justice standard that my friend  
11 proposes and to something that's more coherent  
12 and with -- aligned with the historic core.

13 JUSTICE ALITO: One last question.  
14 Suppose that Congress enacts a statute that  
15 prohibits threatening a witness with a specific  
16 intent to obstruct a future investigation or  
17 proceeding. Would that be an offense relating  
18 to the obstruction of justice?

19 MS. HUTTON: I think not under  
20 (43)(S), no.

21 JUSTICE ALITO: Even though it refers  
22 specifically to obstruction of justice in the  
23 text of the statute, that would not relate to  
24 the obstruction -- to obstruction of justice?

25 MS. HUTTON: Well, it might kind of



1 colloquially, maybe under the Sentencing  
2 Guidelines, but I think, when you're looking at  
3 a statute that was written in 1996 and trying to  
4 understand what state offenses fit within that  
5 based on what Congress understood those words to  
6 mean in 1996, this later affected, more broad  
7 statute might not do that, no.

8 JUSTICE ALITO: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Sotomayor?

11 Justice Kagan?

12 Justice Kavanaugh?

13 JUSTICE KAVANAUGH: So, on the  
14 accessory after the fact, I think your answers  
15 have said, if the police are already  
16 investigating and you engage in activities that  
17 assist the perpetrator in some way with the  
18 proper intent, that that could be covered, is  
19 that right?

20 MS. HUTTON: I -- I think that's right  
21 in a kind of conceptual way. I want to be  
22 clear, under a categorical approach analysis,  
23 the question would be: Do the elements of the  
24 state crime fit the elements of the generic  
25 crime? And so it would just depend what is

1 someone actually being convicted of in that  
2 state scenario.

3 I think the accessory-after-the-fact  
4 element sometimes wouldn't get into that kind of  
5 analysis. So you're really asking, what's the  
6 minimum conduct in accessory after the fact?  
7 There is no investigating officer going around  
8 in that minimum conduct. It is simply entirely  
9 prospective and possible.

10 JUSTICE KAVANAUGH: And meanwhile,  
11 though, if there's a dead body, but the police  
12 don't know about it yet and there -- so there's  
13 no investigation ongoing, but you provide  
14 assistance in that same scenario in the same way  
15 with the same intent, in that case, that's  
16 definitely out under your theory, right, because  
17 the police don't know about it yet and haven't  
18 started?

19 MS. HUTTON: If that was prosecuted as  
20 accessory after the fact where the minimum  
21 conduct is much different than that, yes, that  
22 would still be out.

23 JUSTICE KAVANAUGH: And the other  
24 could be in?

25 MS. HUTTON: I -- my memory is -- is

1 fading a little bit on -- on the other, but --

2 JUSTICE KAVANAUGH: The other being  
3 the police have already started to investigate.

4 MS. HUTTON: Yeah, especially if a  
5 state offense, for example, discussed you have  
6 -- you have interfered with an ongoing law  
7 enforcement investigation, there could be a  
8 state crime that criminalized that, yes, you  
9 have the elements right there. And when you  
10 compare that to a federal offense like what  
11 we're proposing, it's clearly in.

12 But, of course, we just can't lose  
13 sight in these hypotheticals that we're looking  
14 at the elements of the state offense in most  
15 cases and the generic federal offense.

16 JUSTICE KAVANAUGH: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice  
18 Barrett?

19 JUSTICE BARRETT: My questions are  
20 just to distill exactly what your position is to  
21 make sure I understand it.

22 Coming into argument, I thought a  
23 distinction between Mr. Pugin and  
24 Mr. Cordero-Garcia was that you thought it was  
25 just a proceeding, whereas he said it could be

1 an investigation or proceeding. But I hear you  
2 during argument saying that you think it could  
3 be an investigation or a proceeding. Am I  
4 understanding that correctly?

5 MS. HUTTON: Yes, Your Honor.

6 JUSTICE BARRETT: Okay. So you've  
7 shifted gears slightly?

8 MS. HUTTON: Yes, and if I can just  
9 explain briefly. I think our focus was to try  
10 to answer the question that the Court presented:  
11 What is -- what is obstruction of justice? It's  
12 a -- interference with a judicial proceeding.  
13 And if it is expanded beyond that, and there are  
14 some principled ways to do that that we've  
15 discussed here, maybe that's giving effect to  
16 the categorical approach; maybe that's giving  
17 effect to "relating to." That might be --  
18 include these other investigations, proceedings.

19 We don't necessarily take issue with  
20 that. It doesn't make a difference for  
21 Mr. Pugin. And I think it might also be good to  
22 look at that in another case where the type of  
23 proceeding did matter.

24 JUSTICE BARRETT: Mm-hmm.

25 MS. HUTTON: But it's not going to be

1       definitional for accessory after the fact either  
2       way, so we're not fighting that.

3                   JUSTICE BARRETT:    So your primary  
4       concern would be an Arthur Andersen-type concern  
5       of tying the conduct, the obstructive, impair,  
6       impede conduct, to a specific investigation or a  
7       specific proceeding that's reasonably  
8       foreseeable?

9                   MS. HUTTON:    I think that's right.

10                  JUSTICE BARRETT:    So it turns more on  
11       mens rea -- this goes back, I guess, to the  
12       question that I asked before.  It turns more on  
13       mens rea than on your definition of obstruction  
14       of justice of proceeding or investigation  
15       because that's what's doing your narrowing work,  
16       right?

17                  MS. HUTTON:    Well, I think that it's  
18       both, where the intent does need to contemplate  
19       something particular and that something needs to  
20       exist or be in the offing, you know -- and,  
21       again, that's not our primary position, but if  
22       we're stepping away from existence, you can't go  
23       into the ether.  There has to at least be some  
24       tie to reality or -- or a strong possibility.  
25       Fifty-fifty from Aguilar, not enough.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Jackson?

3 JUSTICE JACKSON: Do you agree or  
4 disagree with the government's view that  
5 obstruction of justice is a family or category  
6 or classification?

7 MS. HUTTON: It's not our primary  
8 position. We think it has a defined common law  
9 meaning of -- of protecting those judicial  
10 proceedings. Courts have said Chapter 73 is a  
11 group that defines this. The Third Circuit, for  
12 example. I think the most important thing about  
13 that for our purposes is accessory after the  
14 fact is nowhere near there.

15 JUSTICE JACKSON: Okay. I wanted to  
16 get --

17 MS. HUTTON: Yeah.

18 JUSTICE JACKSON: -- to that, but --  
19 but you -- you -- do you accept the Third  
20 Circuit and now I think the government's view  
21 that there is more than one  
22 obstruction-of-justice offense, that it's not a  
23 particular thing, like burglary; it is a group  
24 of -- of offenses?

25 MS. HUTTON: I think our position is

1 different than that. We do think there is a  
2 generic meaning. I think the BIA might have  
3 gotten close to it in the Espinoza case with the  
4 specific intent to interfere with an existing  
5 proceeding-type analysis, which it then backed  
6 away from.

7 But that type of definition, which  
8 would work with the categorical approach, would  
9 be possible here from that singular perspective.

10 JUSTICE JACKSON: No, I understand,  
11 but I guess I also heard you to say that you  
12 thought that what we're trying to do here is  
13 figure out what Congress intended when it wrote  
14 subparagraph (S) and referred to offenses  
15 related to obstruction of justice.

16 So I'm just trying to home in on  
17 whether your view is that when Congress said  
18 offenses related to obstruction of justice, they  
19 were talking about a single  
20 obstruction-of-justice offense to start and then  
21 offenses that were somehow related to that --  
22 that single offense.

23 MS. HUTTON: Yes, Your Honor, we do  
24 think it was -- it was thinking more singularly  
25 from Aguilar just one year before. That's what

1 obstruction of justice is. If it's going to be  
2 a family, perhaps Chapter 73 is a way to look at  
3 that.

4 JUSTICE JACKSON: And where in the  
5 statute -- so you say 1503 is the only -- is --  
6 is the one?

7 MS. HUTTON: We think that's been the  
8 archetypal obstruction-of-justice heartland  
9 crime in -- for over a century, yes.

10 JUSTICE JACKSON: All right. So, if  
11 -- if I disagree and if I'm looking at the  
12 entire chapter of 73, with all the various ones  
13 that say obstruction or that use "obstruct" in  
14 their language, which is a number of them, why  
15 is it that you say that your client doesn't fit  
16 any of those -- any of those offenses?

17 MS. HUTTON: So two reasons. First is  
18 that if you look through all of those statutes,  
19 there is a strong current of a pending  
20 proceeding requirement. So we believe that does  
21 --

22 JUSTICE JACKSON: What about 18, 1518?  
23 It doesn't --

24 MS. HUTTON: Well, that was passed  
25 after (43)(S). We don't think it's particularly



1 informative. And -- and -- and I don't want to  
2 take the position that every single statute  
3 there has a pending proceeding requirement.  
4 1512 clearly doesn't.

5 But we think there's that strong trend  
6 there that if you're going to define a generic  
7 crime using interpretive restraint, which is the  
8 approach this Court has adopted, then -- then  
9 you need that pending proceeding requirement.

10 But, of course, the main point for  
11 Mr. Pugin's case, accessory after the fact is in  
12 there. It's not a match to a Chapter 73  
13 offense. No court that has looked at this  
14 problem through that lens has found that it is,  
15 and I don't -- I don't think anyone is saying  
16 it's a close match for one of those offenses.

17 JUSTICE JACKSON: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Mr. Fleming.

21 ORAL ARGUMENT OF MARK C. FLEMING  
22 ON BEHALF OF FERNANDO CORDERO-GARCIA

23 MR. FLEMING: Mr. Chief Justice, and  
24 may it please the Court:

25 The categorical approach doesn't turn

1 on whether an offense seems like or has the gist  
2 or feels like it has the effect of obstructing  
3 justice. It turns, Justice Jackson, to your  
4 question, on the elements of the generic crime  
5 of obstruction of justice as traditionally  
6 understood.

7           The government's argument today would  
8 sweep in convictions for failure to report a  
9 crime or for simply urging someone to deal with  
10 a traffic accident informally rather than  
11 calling the police, and that is an offense under  
12 the California statute at issue in  
13 Mr. Cordero-Garcia's case.

14           Had Congress meant to treat  
15 convictions like that as aggravated felonies, it  
16 would not have used the phrase "obstruction of  
17 justice," which, through longstanding usage, has  
18 required interference with a pending  
19 investigation or proceeding. That's because  
20 it's only then that the defendant is  
21 intentionally interfering with a legal process.

22           Now the generic definition that we  
23 propose still captures numerous convictions,  
24 like corruptly influencing jurors, threatening  
25 prosecutors, or lying to investigating officers,

1 and broader offenses like California's that do  
2 not require a pending investigation may still be  
3 deportable, but they are not aggravated felony  
4 obstruction of justice.

5 I want to make sure that I get to  
6 "relating to" and that I try to help the Court  
7 between Scylla and Charybdis, but at this point,  
8 I welcome the Court's questions.

9 JUSTICE THOMAS: What exactly is the  
10 generic crime of obstruction of justice?

11 MR. FLEMING: Our proposed definition,  
12 Justice Thomas, is the BIA's definition simply  
13 requiring a pending investigation or proceeding.  
14 So, specifically, an affirmative and intentional  
15 attempt motivated by specific intent to  
16 interfere with an investigation or proceeding  
17 that is ongoing or pending.

18 JUSTICE THOMAS: So where do you get  
19 that?

20 MR. FLEMING: Well, we get it -- we  
21 get it from the BIA, we get it from the ordinary  
22 meaning, and we get it from state and federal  
23 crimes of obstruction of justice, which --

24 JUSTICE THOMAS: So, when you talk  
25 about the states and you went through them in

1 your brief --

2 MR. FLEMING: Yes, Your Honor.

3 JUSTICE THOMAS: -- which of the state  
4 laws should we choose as a comparator? And  
5 on -- in your analysis, what was the basis of  
6 your choices?

7 MR. FLEMING: So we look at the state  
8 -- so, at the first step of the categorical  
9 approach, which is the statutory interpretation  
10 step, we look to how states have defined the  
11 crime of obstruction of justice.

12 And this is why we think the  
13 government engages in the wrong exercise,  
14 because it looks at state crimes or even whole  
15 portions of state codes that use different  
16 labels, like offenses against public  
17 administration or governmental administration.  
18 That tells us nothing about what Congress meant  
19 when it said obstruction of justice.

20 There are 15 states that in 1996  
21 defined crimes of obstruction of justice, and  
22 more than half required a pending proceeding.  
23 We counted eight, and then the government  
24 rightly pointed out in their reply in Footnote 8  
25 that we undercounted because we have the right

1 to claim Virginia.

2 So there are nine out of 15 that do  
3 require a pending proceeding. Two are  
4 ambiguous. One requires a reasonably  
5 foreseeable proceeding. Only three of 15  
6 support the government's position.

7 I -- I do want to address the response  
8 that Mr. Gannon previewed in his opening, which  
9 is, well, it can't be that only 15 jurisdictions  
10 criminalize obstruction of justice.

11 The point is, when states criminalize  
12 this kind of behavior, sometimes they use  
13 different names for their offenses, and at the  
14 first step of the categorical approach, that's  
15 not relevant to the statutory interpretation  
16 exercise. We're looking at what Congress  
17 defined the generic obstruction-of-justice  
18 offense to be in 1996.

19 However, at the second step, when the  
20 time comes to compare state convictions to the  
21 federal generic, there are plenty of other  
22 offenses that are going to qualify as generic  
23 obstruction of justice.

24 We cite some of them in Footnote 18 of  
25 our brief: California Penal Code 95, corrupt

1 influencing of jurors; Colorado 18-8-608,  
2 intimidating of a juror; 609, jury tampering;  
3 New York Penal Law 2-15-13. I can go on. There  
4 are many of them that are going to qualify.

5 But, when you are trying to determine  
6 what the elements of the federal generic crime  
7 of obstruction of justice is --

8 JUSTICE KAVANAUGH: Well, many --

9 MR. FLEMING: -- you look at --

10 JUSTICE KAVANAUGH: -- many before and  
11 after the proceeding, many of those crimes,  
12 although not with the label, are before or after  
13 the proceeding, correct?

14 MR. FLEMING: So -- so some of the  
15 retaliation crimes can be charged if the  
16 proceeding has concluded.

17 And on that point, Justice Kavanaugh,  
18 I'd agree with Ms. Hutton that I think -- well,  
19 first of all, it -- it doesn't affect the  
20 outcome in either of these cases. So, if the  
21 Court were to include retaliation after the  
22 proceeding is concluded, that would still  
23 require --

24 JUSTICE KAVANAUGH: Then the temporal  
25 point's lost then.

1                   On the before point, I guess I'm not  
2                   sure why Congress in 1996 wouldn't have been  
3                   looking at the body of federal law of  
4                   obstruction crimes, and those included a variety  
5                   of crimes where the proceeding did not yet have  
6                   to be pending, and to your point about the  
7                   generic offense, I don't understand why,  
8                   therefore, to follow up on Justice Thomas, it's  
9                   not defined as acts taken with the willful  
10                  intent to obstruct the legal process.

11                  MR. FLEMING: Well, so -- so, to -- to  
12                  take the federal Chapter 73 first, the -- the  
13                  overwhelming majority of provisions in Chapter  
14                  73 in 1996 did require a pending proceeding,  
15                  fully 12 out of 16.

16                  JUSTICE KAVANAUGH: Right. But you --  
17                  you're aware, right, that Congress specifically  
18                  in '45 and '67 broadened past the core that had  
19                  been in 1893 of just having a pending  
20                  proceeding, and they did it in both directions:  
21                  the retaliation afterwards and some of the  
22                  offenses that could be considered obstruction  
23                  beforehand.

24                  Do you agree with that history?

25                  MR. FLEMING: Well, certainly,

1 Your Honor. And I'm not --

2 JUSTICE KAVANAUGH: Okay.

3 MR. FLEMING: -- I'm not here to -- I  
4 apologize.

5 JUSTICE KAVANAUGH: So, if that -- if  
6 we have that history, Congress itself, you've  
7 been relying and your friend on the other side  
8 -- on this side have been relying on, well,  
9 there's this core from back in the 1800s.  
10 Congress had changed that quite dramatically by  
11 the time 1996 came around, correct?

12 MR. FLEMING: Our position on that,  
13 Justice Kavanaugh, is that those are nongeneric  
14 offenses just like how in Taylor this Court  
15 recognized that there were states that had  
16 defined "burglary" more broadly than the generic  
17 breaking into a --

18 JUSTICE KAVANAUGH: That -- okay.

19 MR. FLEMING: -- into a building.

20 JUSTICE KAVANAUGH. And that gets us  
21 to whether we should define the generic offense  
22 willful interference with the process of law or  
23 willful interference with a pending proceeding,  
24 right? You think that's the question?

25 MR. FLEMING: We would say



1 investigation or proceeding, yes, Your Honor.

2 JUSTICE KAVANAUGH: Investigation or  
3 proceeding. And why shouldn't it be willful  
4 interference with the process of law if the  
5 federal statutes, if the Model Penal Code, if  
6 the state statutes -- some -- had developed in  
7 the way that they developed, perhaps most  
8 relevant being the federal statutes?

9 MR. FLEMING: Well -- well, let me --  
10 let me start. The Model Penal Code did not have  
11 an obstruction of justice. They didn't have an  
12 offense called obstruction of justice, right?  
13 They have witness tampering, they have tampering  
14 with physical evidence. None of that tells you  
15 what Congress meant when it used the specific  
16 generic offense phrase, "obstruction of  
17 justice."

18 The states, the vast majority that did  
19 use that phrase did require a pending  
20 proceeding. The government's pointed to only  
21 three of them that didn't.

22 Now, when we get to Chapter 73, again,  
23 you have a situation where --

24 JUSTICE KAVANAUGH: I guess that seems  
25 artificial because we know those are

1 obstruction-of-justice offenses. They're using  
2 a more specific name within the family of  
3 obstruction of justice, like the Sentencing  
4 Commission describes all these, Chapter 73  
5 describes all these.

6           You agree witness tampering is a form  
7 of obstruction of justice, don't you?

8           MR. FLEMING: Well, it depends on the  
9 elements. If there's a pending proceeding or  
10 investigation, then it will be generic  
11 obstruction of justice.

12           Congress is free and this Court can  
13 use the phrase in other ways, but those are  
14 nongeneric usages of the term, just like  
15 breaking into a car can be called burglary. It  
16 has the gist of burglary, it sounds like  
17 burglary, but it isn't generic burglary as this  
18 Court has consistently recognized it.

19           Unlawful sexual intercourse with  
20 someone who is 17 years old sounds like sexual  
21 abuse of a minor. Some states call that sexual  
22 abuse of a minor, but it's not generic sexual  
23 abuse of a minor, as this Court expressly said  
24 in *Esquivel-Quintana*. So that's how I would  
25 account for the minority of offenses within

1 Chapter 73, where Congress in 1512 expressly has  
2 said we are not requiring a pending  
3 investigation or a pending proceeding here  
4 precisely because the generic form of the  
5 offense did require it.

6 When they wanted to create offenses  
7 that were not generic, they said so, or they  
8 created a specialized idiosyncratic provision to  
9 address, for instance, healthcare offenses in  
10 1518.

11 Those are crimes. It's perfectly fine  
12 to call them crimes. It's perfectly fine to  
13 even call them obstruction of justice. But they  
14 are not generic obstruction of justice any more  
15 than breaking into a car or a boat is generic  
16 burglary.

17 I would like to talk about "relating  
18 to" because I do think that --

19 JUSTICE ALITO: Well, before you get  
20 to that --

21 MR. FLEMING: Yes.

22 JUSTICE ALITO: -- there -- there's a  
23 difference between burglary and obstruction of  
24 justice. Burglary was what was involved in  
25 Taylor, which gave rise to this categorical

1 approach. It's a common law offense. And the  
2 elements of that common law offense were well  
3 known, so that was the basis for saying that  
4 these are the elements of generic burglary.

5 But obstruction of justice is not the  
6 same. It wasn't a common law offense. It is a  
7 concept that developed over the years. Isn't  
8 that true?

9 MR. FLEMING: I -- I mean, Blackstone  
10 does talk about impediments to justice and  
11 summarizes what -- what offenses he believes  
12 qualify, and they are all interference --

13 JUSTICE ALITO: A variety of offenses  
14 --

15 MR. FLEMING: -- with court  
16 proceedings --

17 JUSTICE ALITO: -- a variety of  
18 offenses qualify.

19 MR. FLEMING: -- which share the  
20 element of interference with a -- and impeding a  
21 court proceeding. And that's what the Black's  
22 Law Dictionary in 1996 required.

23 I'll note sexual abuse of a minor  
24 wasn't a common law offense either by that name.  
25 But this Court had no problem applying the

1 categorical approach and coming up with a  
2 generic definition of that offense.

3 JUSTICE ALITO: But there are many  
4 authorities going back to the 19th Century that  
5 describe witness tampering as obstruction of  
6 justice without drawing a distinction between  
7 tampering with a witness in a proceeding that's  
8 pending or in a future proceeding, isn't that  
9 true?

10 MR. FLEMING: I'm having trouble  
11 bringing one to mind. Blackstone  
12 certainly talked --

13 JUSTICE ALITO: Well, it's described  
14 as an obstruction of justice over and over  
15 again. And when it's so described, it isn't --  
16 they -- they -- those authorities don't say, but  
17 only if there's a pending proceeding.

18 MR. FLEMING: I think, when Blackstone  
19 talks about a witness giving evidence, he's  
20 talking about giving evidence in court. Going  
21 and giving a -- calling up a police officer and  
22 saying, I think I -- I just saw a crime being  
23 committed is not giving evidence, and I don't  
24 know of a 19th Century authority that said that  
25 was the offense of obstruction of justice, but I

1 might be misremembering.

2 JUSTICE ALITO: How important is  
3 Pettibone to your argument?

4 MR. FLEMING: I think Pettibone is --  
5 is -- is important because it -- 1503 is the  
6 generic, general, very broad  
7 obstruction-of-justice offense, so to the extent  
8 the Court is looking to federal practice and  
9 usage of that term, the fact that Congress  
10 legislated on the background of Pettibone  
11 indicates that it understood obstruction of  
12 justice the way the majority of states that have  
13 an obstruction-of-justice offense understand it,  
14 which is to require a pending investigation or  
15 proceeding.

16 JUSTICE ALITO: Well, wasn't Pettibone  
17 the interpretation of a particular statutory  
18 provision with particular language?

19 MR. FLEMING: Yes, of course, it was,  
20 Your Honor, and that is the generic, general  
21 federal obstruction-of-justice statute at the  
22 time. It was carried forward into 1503, which  
23 the Court interpreted in Aguilar and carried  
24 forward the interpretation of it from Pettibone.

25 JUSTICE KAVANAUGH: You've

1 acknowledged, I think, that things like witness  
2 tampering, in response to Justice Alito, come  
3 within the umbrella of what we think about as  
4 obstruction of justice as a concept, right?

5 MR. FLEMING: I mean, I suppose in a  
6 very loose sense, sure, but we are not engaged  
7 in identifying loose senses --

8 JUSTICE KAVANAUGH: Well, maybe we are  
9 when Congress -- when they put this in,  
10 obstruction of justice, in 1996, doesn't just  
11 put in obstruction of justice but puts in  
12 "relating to," and maybe it's because, if we  
13 assume they're thinking this through, they  
14 recognize that obstruction of justice as a  
15 single term may be different because it includes  
16 witness tampering, document destruction, lots of  
17 offenses, murder of a witness, intimidation of a  
18 judge, that are going to not necessarily be  
19 labeled obstruction of justice. So Congress  
20 puts in "relating to obstruction of justice."

21 And I know you were going to turn to  
22 that, but I'd be interested in your answer why  
23 that doesn't solve the problem here.

24 MR. FLEMING: I'd be delighted to  
25 answer it, Justice Kavanaugh. So I think that

1 is exactly how Congress used it. Now recall  
2 "relating to" is used 24 times in the aggravated  
3 felony provision. It is -- 20 out of 24, it's  
4 definitional purely. It's just that it's  
5 followed by a cross-reference to a particular  
6 federal statute.

7 In the other situations in which it's  
8 used, it is used in exactly the way Your Honor  
9 described, which is to say, look, this may not  
10 be called bribery, it may not be called perjury;  
11 it might be called obstruction of justice. So  
12 we want to make sure you don't get hung up on  
13 the -- on the title of the offense. But that  
14 doesn't change the elements of the generic  
15 offense of obstruction of justice any more than  
16 it does for bribery or perjury.

17 So we don't think it has an expansive  
18 effect --

19 JUSTICE KAVANAUGH: But -- but --

20 MR. FLEMING: -- if this -- I'm sorry,  
21 Your Honor.

22 JUSTICE KAVANAUGH: I'm sorry, I  
23 shouldn't -- but you -- you just said we  
24 shouldn't get hung up on the title of the  
25 offense, but when you were going through all the



1 state offenses, I think you were telling me to  
2 -- to be hung up on the title of the offense.

3 MR. FLEMING: When -- no, when you're  
4 interpreting obstruction of justice.  
5 Obstruction of justice is a generic offense that  
6 has elements, just like perjury, just like  
7 bribery.

8 Now we think all "relating to" is  
9 doing is directing you to the fact that once  
10 you're at the second stage of the categorical  
11 approach and you're comparing a state conviction  
12 to the elements of obstruction of justice, don't  
13 get hung up on the fact that it's not called  
14 obstruction of justice. It might be called  
15 tampering with a juror. That's fine.

16 If the Court disagrees with me on  
17 that, I do think there could be some expansive  
18 work that "relating to" would do, but it does  
19 not get the government as far as they want to  
20 get. I think, for instance, it could have -- it  
21 could expand -- there are a lot of states, for  
22 instance, that criminalize a bribe -- a bribe  
23 receiving by a witness or a juror. So not just  
24 bribing a witness, but the witness -- if the  
25 witness solicits a bribe and says, I'll change

1 my testimony if you give me a thousand dollars,  
2 that is a criminal offense on the part of the  
3 witness or on the part of the juror. New York  
4 Penal Law 215.05, Nevada 199.250. There are  
5 lots of others.

6 That could relate to obstruction  
7 because it's not itself obstruction. The  
8 witness doesn't have to change the testimony in  
9 order to be guilty of that offense, and they  
10 don't need specific intent necessarily to  
11 obstruct the proceeding. They just want the  
12 money. That might be relating to obstruction.

13 Solicitation of obstruction of  
14 justice: I really wish you'd lie to the grand  
15 jury in their investigation for me.

16 Subsection (U) of the aggravated  
17 felony provision includes attempt and  
18 conspiracy, but it doesn't mention solicitation.

19 JUSTICE KAVANAUGH: What --

20 MR. FLEMING: So that might be an  
21 option and the retaliation offenses that we've  
22 mentioned.

23 JUSTICE KAVANAUGH: I think the  
24 government has a common-sense point they start  
25 with, which you can deal with, which is the best

1 way to obstruct an investigation is to make sure  
2 it never gets started by interfering with a  
3 witness or destroying documents or what have  
4 you.

5 And I think you've acknowledged some  
6 of the titles of offenses that might not be  
7 called obstruction would get at that kind of  
8 offense even before a proceeding has started.  
9 Certainly, some of the federal offenses would  
10 and state offenses as well.

11 So why isn't that -- why doesn't that  
12 help us inform what "relating to" means here?

13 MR. FLEMING: May I respond, Mr. Chief  
14 Justice?

15 CHIEF JUSTICE ROBERTS: Yes.

16 MR. FLEMING: So I think the -- the --  
17 the difficulty with -- with this is that before  
18 any kind of investigation or proceeding has  
19 started, there is -- we are -- we're at a  
20 different moment where the defendant does not  
21 know that there's any proceeding that's  
22 necessary going to begin, hasn't made the  
23 determination that they want to throw sand in  
24 the gears of something that's actually going  
25 forward.

1 JUSTICE KAVANAUGH: But the -- well --

2 MR. FLEMING: No, no, no.

3 JUSTICE KAVANAUGH: No, I'm done.

4 MR. FLEMING: Okay.

5 JUSTICE KAVANAUGH: He'll cut me off.

6 MR. FLEMING: I apologize.

7 (Laughter.)

8 MR. FLEMING: Just trying to be  
9 helpful here, Mr. Chief Justice.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Thomas?

12 Justice Alito?

13 JUSTICE ALITO: There may be reason to  
14 be concerned about the breadth of this concept  
15 in the Immigration and Naturalization Act, but a  
16 lot of the problems are not going to be solved  
17 -- if there are problems, they're not going to  
18 be solved by adopting your limitation. Take  
19 perjury, for example. There's going to be a  
20 pending proceeding, right?

21 MR. FLEMING: Not invariably. You --  
22 you can perjure yourself by signing a document  
23 under the pains and penalties of perjury. There  
24 might not be a proceeding then.

25 But I think -- I think our position

1 does solve all the workability problems that --  
2 that I believe Your Honor is adverting to with  
3 -- with the government's interpretation, because  
4 it's easy to tell when an investigation or a  
5 proceeding are pending. But the government  
6 hasn't given the Court any way to tell what  
7 interference with the process of justice is  
8 going to look like when there isn't even an  
9 investigation that is proceeding.

10 JUSTICE ALITO: How is it easy to  
11 determine whether an investigation is in  
12 progress?

13 MR. FLEMING: Well, if the -- if the  
14 police have opened a case file and they're  
15 asking questions and they're interviewing  
16 witness -- potential witnesses and they're  
17 trying to figure out, you know, whether a crime  
18 has been committed, that's an investigation. If  
19 the grand jury's going to meet on Monday,  
20 there's been an investigation to -- to prep them  
21 and get them going.

22 I think that's much easier to identify  
23 than what the government has -- has put forward,  
24 which is completely amorphous.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 JUSTICE SOTOMAYOR: I do note that  
3 under -- I do note that under 1101, it's not  
4 just an offense relating to obstruction of  
5 justice but perjury or subornation of perjury.  
6 So your lying on a document would qualify.

7 MR. FLEMING: I believe, yes. A  
8 federal --

9 JUSTICE SOTOMAYOR: Yes. So -- so  
10 that takes care -- and I think it supports you  
11 --

12 MR. FLEMING: I think that's true.

13 JUSTICE SOTOMAYOR: -- that  
14 obstruction of justice was being viewed  
15 differently --

16 MR. FLEMING: Yes. I think that's  
17 right. And -- and --

18 JUSTICE SOTOMAYOR: -- than perjury or  
19 subornation of perjury, which could occur  
20 anywhere.

21 MR. FLEMING: That -- that's  
22 definitely right, and I think that is another  
23 flaw of the government's position, is that it  
24 would subsume not only perjury and bribery of a  
25 witness but also other provisions in

1 1101(a)(43), like altering a passport. There --  
2 there are all kinds of -- all kinds of other  
3 provisions where the government would say you're  
4 interfering with the process of justice. And if  
5 it were as broad as -- as -- as the government  
6 is saying, why did Congress need to specify  
7 those other provisions?

8 CHIEF JUSTICE ROBERTS: Justice Kagan?

9 JUSTICE KAGAN: Mr. Fleming, in our  
10 decisions, we've talked a good deal about this  
11 reasonable foreseeability concept, so Arthur  
12 Andersen and then Marinello, in the offing, and  
13 do we just get rid of that under -- under your  
14 way of thinking about these questions?

15 MR. FLEMING: I don't think you need  
16 to get rid of it, Justice Kagan, but it does not  
17 apply in this case. I'll note Mr. Gannon, you  
18 know, quite surprisingly to me at least,  
19 completely disavowed that, even though that was  
20 part of the BIA's adopted definition in this  
21 case based on Marinello.

22 JUSTICE KAGAN: I take it he doesn't  
23 quite disavow it. He disavows it as a separate  
24 element but doesn't disavow it as an  
25 understanding of what intent is required.

1                   MR. FLEMING: Which is very different  
2 from what the BIA did. The BIA treated it as  
3 part of the actus reus.

4                   I think what Marinello and Arthur  
5 Andersen were doing, I mean, Arthur Andersen  
6 expressly because it was a 1512 case, was  
7 talking about, you know, what is required  
8 notwithstanding the fact that 1512 says no  
9 proceeding is required, the Court said, but it  
10 still has to be -- it still has to be close, and  
11 then Marinello picked that up for the provision  
12 of the Internal Revenue Code that was at issue  
13 there.

14                   Neither of them was construing generic  
15 obstruction of justice. And our position would  
16 be, and it has been throughout, I think it's  
17 clear that 1512, whether we call it as --  
18 something that has the gist of obstruction of  
19 justice, it is not generic. It is a nongeneric  
20 obstruction offense, just like --

21                   JUSTICE KAGAN: I think the "in the  
22 offing" idea is meant to deal with the sort of  
23 Sunday/Tuesday hypothetical, and that was  
24 something that we recognized the law really is  
25 not distinguishing between.



1           MR. FLEMING: I think that that may be  
2 right, and that's because we're talking about a  
3 proceeding specifically under the Ninth  
4 Circuit's view and our view. If you have an  
5 investigation, I don't think that comes up.

6           I will say that if the Court were to  
7 go towards a reasonably foreseeable requirement  
8 for the actus reus, then we would absolutely  
9 need a remand in this case because, of course,  
10 when we filed our opening brief in the Ninth  
11 Circuit, the Ninth Circuit had already said no  
12 proceed -- that a -- an ongoing proceeding or  
13 investigation is required, so we had no cause to  
14 argue whether the California offense in this  
15 case required a California prosecutor to prove  
16 beyond a reasonable doubt that a proceeding was  
17 reasonably foreseeable.

18           I can preview for the Court it does  
19 not. A California prosecutor does not need to  
20 prove that at all, and so it would not be a  
21 categorical match for the BIA's definition even  
22 were the Court to adopt it.

23           We don't think it's justified just  
24 because the reasonably foreseeable for Marinello  
25 and Arthur Andersen comes out of 1512, which we

1 don't think is a generic version of obstruction  
2 of justice.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Gorsuch?

5 JUSTICE GORSUCH: You said at the  
6 beginning that you had two things you hoped to  
7 get to, and I'm not sure -- I think you got to  
8 one of them with Justice Kavanaugh, though I'm  
9 not entirely sure. I just want to make sure you  
10 get a chance to spit out whatever else you want  
11 to say.

12 MR. FLEMING: Thank you very much,  
13 Justice Gorsuch.

14 We did talk about "relating to" a  
15 little bit and its -- and its definitional --  
16 its definitional role and the -- the sense that  
17 the government's approach would render other  
18 language in 15 -- in subsection (S) completely  
19 superfluous.

20 I talked about falsely making or  
21 altering a passport, which does sound an awful  
22 like the process of justice if it's used as  
23 broadly as the government says.

24 Subsection (M)(2) pertaining to tax  
25 evasion, that also sounds like something that

1 presumably would -- would hinder the process of  
2 justice under the government's view. There's no  
3 limiting principle in the government's view  
4 for -- for how to exclude that.

5 I -- I'd also say that there's a  
6 significant administrability problem with what  
7 the government is trying to do here. It would  
8 basically include almost everything, including  
9 failure to report a crime, failure to assist a  
10 police officer. There are all kinds of state  
11 law offenses here that the government would  
12 sweep in that intuitively do not sound like  
13 aggravated felonies, and I think it would  
14 require a lot more clarity to think that that's  
15 what Congress meant to treat as an aggravated  
16 felony.

17 Congress could change this tomorrow.  
18 It could add in -- it could take the language  
19 from 1512 and put it into subparagraph (S) and  
20 say you don't need an ongoing or pending --  
21 obstruction of justice without need for an  
22 ongoing or pending investigation or proceeding.  
23 It could do that if it wished to change it. It  
24 could get rid of the categorical approach  
25 entirely.

1                   But, when we look at the words that  
2 Congress has used using the generic offense of  
3 obstruction of justice as it was understood at  
4 the time, I think it's very clear that there was  
5 a and remains to this day a requirement of an  
6 ongoing investigation or proceeding.

7                   I talked a little bit about Scylla and  
8 Charybdis. I believe I answered that. I hope I  
9 did anyway with respect to Justice Thomas's  
10 question about how we would define the generic  
11 offense.

12                   Thank you, Your Honor.

13                   CHIEF JUSTICE ROBERTS: Justice  
14 Kavanaugh?

15                   JUSTICE KAVANAUGH: Yeah, I thought we  
16 spent the whole argument talking about your two  
17 points, but maybe -- maybe I'm wrong about that.

18                   (Laughter.)

19                   MR. FLEMING: I -- I -- I hope I  
20 haven't worn out my welcome, Your Honor.

21                   (Laughter.)

22                   JUSTICE KAVANAUGH: Yeah. No, you've  
23 been very helpful. I just want to make sure I  
24 understand what you said to Justice Kagan.

25                   Does the generic offense include

1 reasonable foreseeability or not?

2 MR. FLEMING: We don't think so,  
3 Your Honor. We -- we -- we argue that --

4 JUSTICE KAVANAUGH: So no? Even the  
5 Sunday/Tuesday hypothetical --

6 MR. FLEMING: Oh, that is dealt with  
7 by the fact that a -- an investigation is  
8 pending during that time. Maybe the grand jury  
9 hasn't met, but the prosecutor's office and the  
10 police are investigating.

11 JUSTICE KAVANAUGH: It deals with  
12 right before the investigation is about to  
13 start.

14 MR. FLEMING: The grand jury  
15 investigation but not the investigation of the  
16 executive branch. The -- the DA's office is  
17 investigating before they convene the grand  
18 jury.

19 JUSTICE KAVANAUGH: So when does it  
20 start under your approach? What's the  
21 bright-line start for a typical criminal  
22 offense?

23 MR. FLEMING: When -- when a -- when a  
24 criminal investigator begins inquiring about the  
25 commission of an offense.

1 JUSTICE KAVANAUGH: Begins inquiring?

2 MR. FLEMING: I think so. I think, if  
3 you know the police -- or if the offense says  
4 you have to know that the -- that the police are  
5 investigating and you intentionally with  
6 specific intent interfere with the police's  
7 investigation --

8 JUSTICE KAVANAUGH: Does it start when  
9 it's reported to the police?

10 MR. FLEMING: I think when it is --  
11 once it is reported to -- I mean, I suppose, if  
12 the police immediately say, I'm not interested  
13 in that, that's a frivolous or abusive  
14 complaint, I'm not going to look into it, then,  
15 no, there's no investigation.

16 But, if the police say, thank you for  
17 bringing this to my attention, I'm going to ask  
18 about it and start talking to eyewitnesses and  
19 figure out whether a crime's been committed and  
20 then someone -- and then someone says, I'm going  
21 to interfere with that, and -- and that is an  
22 element of the state crime of conviction, then I  
23 think that would -- that would qualify.

24 JUSTICE KAVANAUGH: Then you started  
25 with a couple what you called trivial -- you

1 didn't call them -- but seemed trivial offenses  
2 that you say shouldn't qualify as aggravated  
3 felonies.

4 I thought Congress tried to deal with  
5 that originally by having a five-year limit and  
6 then changed it to a one-year limit so that it  
7 would not capture some of the more kinds of  
8 offenses you're describing that shouldn't be  
9 called aggravated felonies.

10 Now there still may be a lot that are,  
11 and that might be your response.

12 MR. FLEMING: Can we talk about the  
13 offense at issue in this case, Your Honor?

14 JUSTICE KAVANAUGH: Sure.

15 MR. FLEMING: California's offense  
16 sweeps very broadly. If you look at page 19A of  
17 the petition appendix in Mr. Cordero-Garcia's  
18 case, the Ninth Circuit block quotes a passage  
19 from the California Court of Appeal decision  
20 People versus Wahidi, where they quote the  
21 assembly report that accompanied the legislation  
22 saying it criminalizes attempts to settle  
23 misdemeanor violations, certain traffic  
24 accidents, et cetera, among the parties without  
25 reporting them to the police. Likewise, a

1 person arrested by a civilian, e.g., a  
2 shopkeeper, may face criminal charges by trying  
3 to talk the shopkeeper into not calling the  
4 police.

5 Mr. Wahidi himself didn't threaten  
6 anybody. He had gotten into an altercation with  
7 someone outside a mosque, and then he went and  
8 said, you know, we're both Muslims, we should  
9 try to have our families settle this rather than  
10 informing the authorities.

11 He didn't threaten the person. He  
12 didn't say, I'm going to do anything to you if  
13 you call the police. All he wanted to do was  
14 settle it. He was convicted. His conviction  
15 was affirmed. This is an extremely broad  
16 provision.

17 There is no reason to think that  
18 Congress meant this to be an aggravated felony  
19 obstruction of justice any more than the fact  
20 that some states in Taylor had broader burglary  
21 statutes. California has a very broad witness  
22 dissuasion, not witness tampering, witness  
23 dissuasion statute that --

24 JUSTICE KAVANAUGH: Thank you.

25 MR. FLEMING: Thank you, Your Honor.



1 CHIEF JUSTICE ROBERTS: Justice  
2 Barrett?

3 JUSTICE BARRETT: Just a quick  
4 question. So, in figuring out how to draw the  
5 line, give me your definition for when an  
6 investigation begins.

7 MR. FLEMING: When the authorities are  
8 inquiring into or investigating -- I guess I  
9 can't say investigating -- inquiring into the  
10 commission of the crime and criminal  
11 responsibility for it.

12 JUSTICE BARRETT: Okay. What about  
13 something like Yates? You know, the officer is  
14 going to come and check to see what size the  
15 fish are on board, turns away, they throw the  
16 fish overboard that are undersized.

17 MR. FLEMING: I think, at that point,  
18 the officer is onboard and -- and trying -- and  
19 inquiring into whether the -- the fish meet the  
20 limitation -- the -- the limitation.

21 JUSTICE BARRETT: Whether there has  
22 been a crime committed?

23 MR. FLEMING: Yeah, yeah.

24 JUSTICE BARRETT: Okay.

25 MR. FLEMING: Whether there has been a

1 -- yes, investigating whether there has been a  
2 crime committed would also qualify.

3 JUSTICE BARRETT: Okay. So as soon as  
4 a police officer or some member of the executive  
5 branch is asking questions?

6 MR. FLEMING: Yeah, because I think  
7 that is a legal process, and -- and Congress  
8 could justifiably and has drawn a line saying,  
9 once you know that there is a legal process that  
10 is ongoing, if you knowingly impede or interfere  
11 with that, that is something we want to treat as  
12 an aggravated felony.

13 Whereas, before that begins, it is  
14 quite reasonable -- now California may well have  
15 made a different policy judgment and it's  
16 entitled to do that, but when Congress uses  
17 obstruction of justice --

18 JUSTICE BARRETT: Okay. I just --

19 MR. FLEMING: Okay.

20 JUSTICE BARRETT: That -- that was all  
21 I wanted to know about.

22 MR. FLEMING: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Jackson?

25 JUSTICE JACKSON: So page 15 of your

1 brief seems to at least acknowledge the  
2 relevance of Chapter 73, and I know you're  
3 looking at it to find the generic elements of an  
4 obstruction-of-justice offense.

5 But suppose we think that the right  
6 inquiry is not to look for a generic  
7 obstruction-of-justice offense but to ask  
8 whether your client had committed one of the  
9 offenses listed in Chapter 73 or a state law  
10 offense that was a categorical match for one of  
11 those offenses.

12 What is your best argument that  
13 California's statute, the one under which your  
14 client was convicted, is not a match for  
15 something like witness tampering in Chapter 73?

16 MR. FLEMING: So this is the issue  
17 that divided the majority and the dissent in the  
18 court of appeals. They didn't actually reach a  
19 holding on it because the BIA hadn't considered  
20 it. So everyone recognized that the Court  
21 couldn't deny our petition for review on that  
22 basis.

23 But, as the majority indicated, 1512  
24 requires a corrupt intent. And as I was  
25 discussing in responding to Justice Kavanaugh's

1 last question, California's offense does not  
2 require that, and the --

3 JUSTICE JACKSON: And 1512 is the only  
4 one you see in here that would be close to what  
5 it is that you're requiring?

6 MR. FLEMING: I believe it's the only  
7 that --

8 JUSTICE JACKSON: It's the only one.

9 MR. FLEMING: -- it's the only one  
10 that I think was suggested. And, again, because  
11 this was all dicta in the court of appeals --

12 JUSTICE JACKSON: Yeah.

13 MR. FLEMING: -- the issue hasn't  
14 really been joined. I don't know that the  
15 government has suggested that the California  
16 offense would match any other provision in  
17 Chapter 73. And -- and we don't think it  
18 matches any of them for the reasons explained by  
19 the panel majority, but that's an issue for  
20 remand if Your Honor goes that way. I recognize  
21 it was a hypothetical. We don't think the Court  
22 should go that way. But, if it does, the answer  
23 is to send it back.

24 JUSTICE JACKSON: Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 MR. FLEMING: Thank you, Your Honor.

3 CHIEF JUSTICE ROBERTS: Rebuttal,

4 Mr. Gannon?

5 REBUTTAL ARGUMENT OF CURTIS E. GANNON

6 ON BEHALF OF MERRICK B. GARLAND, ATTORNEY GENERAL

7 MR. GANNON: Just a few quick points.

8 I would say that both of my friends have  
9 conceded that there may be an investigation and  
10 that it starts at a certain point, and -- and  
11 they would concede that that works.

12 But that doesn't concede that any  
13 other statutes come in because, under the  
14 categorical approach, if they want that to be an  
15 element of the offense, that's going to be a  
16 vanishingly small category, as they've  
17 acknowledged today.

18 They've said that only 14 states plus  
19 D.C. are the denominator for trying to analyze  
20 this because you only look at  
21 obstruction-of-justice offenses, and we don't  
22 think that that gets the categorical approach  
23 analysis correct. But I would say we return to  
24 what the BIA was saying.

25 And, Justice Kagan, you asked about

1 reasonable foreseeability. That is in the  
2 Board's definition as part of the mens rea.  
3 This is at page 460 of the Valenzuela Gallardo  
4 III decision, where the Board states this, and  
5 it specifically says that -- that it's an  
6 affirmative and -- and intentional attempt that  
7 is motivated by a specific intent to interfere  
8 either in an investigation or proceeding that is  
9 ongoing, pending, or reasonably foreseeable.

10 So it's in the part of the definition  
11 that it's about a specific intent to interfere  
12 with that. That's consistent with what we're  
13 arguing today about how that comes in.

14 But, if you look at the California  
15 offense that Mr. Fleming was just talking about,  
16 it comes in because it has the specific intent  
17 to influence a potential witness's or victim's  
18 testimony or acts. That's quoted in our brief  
19 at page 6. And, in this instance, it's a  
20 serious offense, we know, because he was -- by  
21 Congress's lights, because he was sentenced to a  
22 year in prison for each of the two counts.

23 And so, here, we think it's clear that  
24 the family of offenses in federal law includes  
25 not just 1503 but also 1512 and Section 3,

1 accessory of -- accessory-after-the-fact  
2 offenses. And Congress did not mean to draw a  
3 line between those on the basis of whether there  
4 was a pending proceeding when some of them  
5 clearly have it and some of them do not.

6 The Court -- the case on which the --  
7 the question on which the Court granted cert is  
8 just about whether the entire category of  
9 offenses always requires a pending proceeding or  
10 investigation, and we submit that it does not.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel. The case is submitted.

13 (Whereupon, at 11:43 a.m., the case  
14 was submitted.)

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