No. 22-369

In the Supreme Court of the United States

CARLOS MONTEIRO SILVA, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the crime of being an accessory after the fact, in violation of Massachusetts law, is "an offense relating to obstruction of justice," 8 U.S.C. 1101(a)(43)(S).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-72a) is reported at 27 F.4th 95. The decisions of the Board of Immigration Appeals (Pet. App. 73a-80a) and the immigration judge (Pet. App. 81a-102a, 103a-114a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 2022. A petition for rehearing was denied on August 3, 2022 (Pet. App. 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, renders deportable any noncitizen "who is convicted of an aggravated felony at any time after admission" to the United States. 8 U.S.C.

1227(a)(2)(A)(iii).* Under the INA, "an offense relating to obstruction of justice * * * for which the term of imprisonment is at least one year" constitutes an aggravated felony, regardless of whether the offense is committed "in violation of Federal or State law." 8 U.S.C. 1101(a)(43)(S).

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

2. Petitioner is a native and citizen of Cape Verde. Pet. App. 5a. In 1989, he was admitted to the United States as a lawful permanent resident. *Ibid.* In 2017, following a guilty plea in Massachusetts state court, petitioner was convicted of being an accessory after the fact, in violation of Mass. Gen. Laws ch. 274, § 4 (2003), and sentenced to four to five years of imprisonment. Pet. App. 5a-6a. That provision provides that "[w]hoever, after the commission of a felony, harbors, conceals, maintains or assists the principal felon * * * or gives such offender any other aid, knowing that he has committed a felony * * * , with intent that he shall avoid or escape detention, arrest, trial or punishment, shall be an accessory after the fact." Mass. Gen. Laws ch. 274, § 4 (2003). In petitioner's case, he drove the getaway

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

car for three people who had beaten a man to death. Pet. App. 93a-94a.

In 2018, the Department of Homeland Security (DHS) served petitioner with a notice to appear before an immigration judge (IJ) for removal proceedings. Administrative Record (A.R.) 986-988. The notice to appear charged that petitioner was subject to removal under 8 U.S.C. 1227(a)(2)(A)(iii) because his conviction for an accessory-after-the-fact offense was a conviction for an aggravated felony. A.R. 986. At the time, DHS alleged that petitioner's offense qualified as an aggravated felony because it was a "crime of violence." *Ibid.*; see 8 U.S.C. 1101(a)(43)(F).

An IJ granted petitioner's motion to terminate his removal proceedings on the ground that the notice to appear had not specified the date and time of his initial removal hearing. A.R. 941-943. The Board of Immigration Appeals (Board) later reinstated petitioner's removal proceedings and remanded them to the IJ. A.R. 893. The Board explained that, "because [petitioner] was subsequently served with a [notice of hearing], specifying the date and time of the initial removal hearing, the [notice to appear] was not defective and jurisdiction vested with the [IJ]." *Ibid.*

In March 2019, DHS amended the charges against petitioner. A.R. 849. DHS still charged that petitioner was subject to removal under Section 1227(a)(2)(A)(iii) because his conviction for an accessory-after-the-fact offense was a conviction for an aggravated felony. *Ibid.* But DHS withdrew its original charge that petitioner's offense was a "crime of violence." *Ibid.* Instead, DHS charged that petitioner's offense was an aggravated felony because it was an "offense relating to obstruction of justice." *Ibid.*; see 8 U.S.C. 1101(a)(43)(S). DHS addi-

tionally charged that petitioner was subject to removal under 8 U.S.C. 1227(a)(2)(A)(ii) because he had been convicted of two crimes involving moral turpitude: (1) being an accessory after the fact, and (2) receiving stolen property, in violation of Mass. Gen. Laws ch. 266, § 60 (2002). A.R. 849.

In May 2019, an IJ denied petitioner's motion to dismiss. Pet. App. 103a-114a. The IJ rejected petitioner's contention that his accessory-after-the-fact offense did not qualify as an offense relating to obstruction of justice. *Id.* at 108a-110a. The IJ observed that in *In re Valenzuela Gallardo*, 27 I. & N. Dec. 449 (B.I.A. 2018), vacated by *Valenzuela Gallardo* v. *Barr*, 968 F.3d 1053 (9th Cir. 2020), the Board had interpreted "an 'offense relating to obstruction of justice' to include crimes involving (1) an affirmative and intentional attempt; (2) that is motivated by a specific intent; (3) to interfere with an investigation or proceeding that is ongoing, pending, or reasonably foreseeable by the defendant." Pet. App. 108a (citing *Valenzuela Gallardo*, 27 I. & N. Dec. at 456). The IJ found that petitioner's accessory-after-the-fact offense satisfied that "generic definition." *Ibid.*; see *id.* at 92a & n.4, 108a-110a.

In December 2019, an IJ denied petitioner's applications for asylum, withholding of removal, and protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. Pet. App. 81a-102a. The IJ held that petitioner's accessory-after-the-fact offense is an "aggravated felony" that renders him ineligible for asylum and is a "particularly serious crime[]" that renders him ineligible for withholding of removal. *Id.* at 92a; see *id.* at 92a-95a. The IJ also determined

that petitioner had not demonstrated that he is entitled to protection under the CAT. *Id.* at 97a-101a. The IJ therefore ordered petitioner's removal to Cape Verde. *Id.* at 102a.

In May 2020, the Board dismissed petitioner's appeal. Pet. App. 73a-80a. The Board affirmed the IJ's determination that being an accessory after the fact under Massachusetts law is categorically an offense relating to obstruction of justice under the Board's interpretation in *Valenzuela Gallardo*. *Id.* at 76a. The Board observed that the Massachusetts statute "contemplates at least an affirmative and intentional attempt that is motivated by a specific intent." *Ibid.* And the Board explained that there "'would be little reason'" for a defendant to commit such an offense "unless an investigation or proceeding[] was reasonably foreseeable." *Ibid.* (quoting *In re Cordero-Garcia*, 27 I. & N. Dec. 652, 654 (B.I.A. 2019)). The Board thus found that petitioner is "removable as an alien convicted of an aggravated felony" and declined to address whether he is removable on the separate charge under Section 1227(a)(2)(A)(ii). *Id.* at 76a-77a. The Board also affirmed the IJ's denial of petitioner's applications for relief and protection. *Id.* at 77a-79a.

3. A divided panel of the court of appeals denied petitioner's petition for review. Pet. App. 3a-72a.

The court of appeals upheld the Board's determination that petitioner's "Massachusetts conviction for accessory after the fact is categorically an offense relating to obstruction of justice and so rendered him removable as an aggravated felon." Pet. App. 5a. After considering "the text, the structure of the statute and closely related federal statutes, the consensus of state criminal statutes, and definitions from other sources, like the

Model Penal Code," *id.* at 11a, the court determined that "the generic federal definition of 'an offense relating to obstruction of justice' unambiguously does not require a nexus to a pending or ongoing investigation or judicial proceeding." *Id.* at 5a; see *id.* at 10a-26a. The court therefore rejected petitioner's contention that "some nexus" is required. *Id.* at 4a.

In the alternative, the court of appeals held that, "[t]o the extent the statute is ambiguous," the interpretation adopted by the Board in *Valenzuela Gallardo*—which construed "the statute to mean that an offender must 'interfere with an investigation or proceeding that is ongoing, pending or 'reasonably foreseeable,'" Pet. App. 26a n.17 (quoting *Valenzuela Gallarado*, 27 I. & N. Dec. at 456)—is reasonable and entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 26a n.17, 33a-36a. The court rejected petitioner's contention that *Chevron* deference does not apply "to the [Board's] interpretation of a statute with criminal implications." *Id.* at 34a. And the court determined that the crime of being an accessory after the fact under Massachusetts law satisfies the "nexus requirement" that the Board had articulated. *Id.* at 26a n.17; see *id.* at 26a-32a.

Judge Barron dissented. Pet. App. 38a-72a. In his view, "even if the generic, federal offense requires no more of a nexus between the defendant's obstructive conduct and an investigation or proceeding than the [Board] has determined that offense to require," the elements of being an accessory after the fact under Massachusetts law are "not a categorical match" with "the elements of the generic, federal" offense referred to in

Section 1101(a)(43)(S) "as described by the [Board]." *Id.* at 64a.

4. The court of appeals denied rehearing en banc. Pet. App. 1a-2a.

DISCUSSION

1. The court of appeals in this case held that the crime of being an accessory after the fact, in violation of Massachusetts law, is "an offense relating to obstruction of justice," 8 U.S.C. 1101(a)(43)(S). Pet. App. 5a. As petitioner acknowledges (Pet. 1), the First Circuit's decision implicates issues similar to those presented in two other pending petitions for writs of certiorari, in *Pugin* v. *Garland*, No. 22-23 (filed July 5, 2022), and *Garland* v. *Cordero-Garcia*, No. 22-331 (filed Oct. 7, 2022).

Like this case, *Pugin* involves the question whether an accessory-after-the-fact offense qualifies as an offense relating to obstruction of justice. The Fourth Circuit in *Pugin* held that the crime of being an accessory after the fact to a felony, in violation of Virginia law, does qualify as such an offense. *Pugin* v. *Garland*, 19 F.4th 437, 439 (2021), petition for cert. pending, No. 22-23 (filed July 5, 2022). The government has filed a response to the petition for a writ of certiorari in *Pugin*, taking the position that although the Fourth Circuit's decision is correct, its decision conflicts with the decisions of other courts of appeals, and this Court's review is warranted. *Pugin* Gov't Cert. Resp. at 6. For the reasons stated in that response, the First Circuit's decision in this case is likewise correct and conflicts with the decisions of other courts of appeals. *Id.* at 6-17.

Cordero-Garcia involves a witness-tampering offense, not an accessory-after-the-fact offense. The Ninth Circuit in that case held that that dissuading a witness from

reporting a crime, in violation of California law, is not an offense relating to obstruction of justice for purposes of Section 1101(a)(43)(S) because the California offense "is missing the element of a nexus to an ongoing or pending proceeding or investigation." *Cordero-Garcia* v. *Garland*, 44 F.4th 1181, 1188 (2022), petition for cert. pending, No. 22-331 (filed Oct. 7, 2022). The government has filed a petition for a writ of certiorari urging review of the Ninth Circuit's decision. See *Cordero-Garcia* Pet. at 9-21.

As the government has explained, *Cordero-Garcia* and *Pugin* implicate distinct circuit conflicts on whether witness-tampering crimes and accessory-after-the-fact crimes, respectively, are offenses relating to obstruction of justice. *Cordero-Garcia* Pet. at 20-21; *Pugin* Gov't Cert. Resp. at 17-19. The government has further explained that granting concurrent review in both *Cordero-Garcia* and *Pugin* would allow this Court to address the meaning of "an offense relating to obstruction of justice" in full view of the issues raised by both types of crimes. See *Cordero-Garcia* Pet. at 20-21; *Pugin* Gov't Cert. Resp. at 18-19.

2. Although petitioner in this case agrees (Pet. 11) that this Court should grant certiorari in both *Cordero-Garcia* and *Pugin*, he contends (Pet. 11, 16-17) that the Court should also grant review in his case and consolidate it with the other two. Granting certiorari in all three cases, however, would be unnecessary.

Petitioner contends (Pet. 16) that granting review in his case alongside the other two would put before this Court the "third side" of a "three-way split" on whether an offense must involve a pending proceeding or investigation in order to qualify as "an offense relating to obstruction of justice." But this Court need not grant cer-

tiorari in a third case in order to consider the First Circuit's view that Section 1101(a)(43)(S) "unambiguously does not require a nexus to a pending or ongoing investigation or judicial proceeding." Pet. App. 5a. The question whether an offense must involve a pending proceeding or investigation is squarely presented in both *Cordero-Garcia* and *Pugin*. And in both of those cases, the government has taken the position that "an offense relating to obstruction of justice" unambiguously does not require an already-pending proceeding or investigation. *Cordero-Garcia* Pet. at 16; *Pugin* Gov't Cert. Resp. at 12. The First Circuit's interpretation of the statute is thus already before this Court in *Cordero-Garcia* and *Pugin*, and the Court need not grant certiorari in a third case to consider it.

Petitioner also contends (Pet. 16-17) that the Court should "grant review in this case because, if the Court ultimately reads the statute to require a reasonably foreseeable investigation (like the Fourth Circuit and [the Board]), only this case will allow the Court to resolve the scope of that reasonable-foreseeability rule, especially as applied to accessory statutes." Petitioner is correct that the application of the reasonable-foreseeability rule is not at issue in either *Cordero-Garcia* or *Pugin*. See *Cordero-Garcia* Pet. at 18 n.5 (noting that, in the Ninth Circuit, the respondent in *Cordero-Garcia* did not challenge the Board's application of the reasonable-foreseeability rule); *Pugin* Gov't Cert. Resp. at 14 n.5 (noting that the petitioner in *Pugin* did not dispute in his petition for a writ of certiorari that "his conviction as an accessory after the fact constitutes a conviction for an aggravated felony under the Board's decisions"). But the application of the reasonable-foreseeability rule implicates no circuit conflict, and it is not otherwise

worthy of this Court's review. Accordingly, the Court should not grant certiorari to consider the application of that rule.

3. Rather than grant certiorari in all three cases, this Court should grant certiorari in two of them: *Cordero-Garcia* and either of the other two. While *Cordero-Garcia* is the only one of the three cases that involves a witness-tampering crime, both *Pugin* and this case involve accessory-after-the-fact crimes. In the government's view, either *Pugin* or this case would be a suitable vehicle for review of the distinct issues implicated by such crimes. But unless petitioner in this case waives the 14-day waiting period for distribution of his petition for a writ of certiorari, see Sup. Ct. R. 15.5, his petition would not be conferenced in time for the Court to grant review and hear his case during the current Term without significant expedition of the merits briefing. Thus, absent petitioner's waiver of the 14-day period in this case, the Court should grant certiorari in both *Cordero-Garcia* and *Pugin*, and then hold the petition for a writ of certiorari in this case pending the Court's decisions in those cases.

CONCLUSION

The petition for a writ of certiorari should be granted or should be held pending this Court's consideration of the petitions for writs of certiorari in *Pugin* v. *Garland*, No. 22-23 (filed July 5, 2022), and *Garland* v. *Cordero-Garcia*, No. 22-331 (filed Oct. 7, 2022), and then disposed of as appropriate in light of the Court's disposition of those cases.

Respectfully submitted.

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