Nos. 22-23 and 22-331

In the Supreme Court of the United States

JEAN FRANCOIS PUGIN, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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v.

FERNANDO CORDERO-GARCIA, AKA FERNANDO CORDERO

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

BRIEF FOR THE ATTORNEY GENERAL

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QUESTION PRESENTED

To qualify as "an offense relating to obstruction of justice," 8 U.S.C. 1101(a)(43)(S), must a predicate offense require a nexus with a pending or ongoing investigation or proceeding?

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OPINIONS BELOW

In *Garland* v. *Cordero-Garcia*, the opinion of the court of appeals (*Cordero-Garcia* Pet. App. 1a-54a) is reported at 44 F.4th 1181. A prior order of the court of appeals (*Cordero-Garcia* Pet. App. 94a) is unreported. The most recent decision of the Board of Immigration Appeals (*Cordero-Garcia* Pet. App. 55a-74a) is reported at 27 I. & N. Dec. 652. The other decisions of the Board of Immigration Appeals (*Cordero-Garcia* Pet. App. 75a-

93a, 95a-97a, 98a-104a) and the decisions of the immigration judge (*Cordero-Garcia* Pet. App. 105a-135a) are unreported.

In *Pugin* v. *Garland*, the opinion of the court of appeals (*Pugin* Pet. App. 1a-70a) is reported at 19 F.4th 437. The decisions of the Board of Immigration Appeals (*Pugin* Pet. App. 71a-75a) and the immigration judge (*Pugin* Pet. App. 76a-82a) are unreported.

JURISDICTION

In *Cordero-Garcia*, the judgment of the court of appeals was entered on August 15, 2022. The petition for a writ of certiorari was filed on October 7, 2022.

In *Pugin*, the judgment of the court of appeals was entered on November 30, 2021. A petition for rehearing was denied on March 7, 2022 (*Pugin* Pet. App. 83a-92a). On April 19, 2022, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 6, 2022, and the petition was filed on July 5, 2022.

The petitions for writs of certiorari were granted on January 13, 2023, limited to the following question: To qualify as "an offense relating to obstruction of justice," 8 U.S.C. 1101(a)(43)(S), must a predicate offense require a nexus with a pending or ongoing investigation or proceeding?[1] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

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[1] The Court's order granting review referred to a nexus with a pending "judicial proceeding." 143 S. Ct. 645. There is no dispute, however, that an offense relating to obstruction of justice may relate to a non-judicial proceeding, such as a legislative or administrative proceeding. See, *e.g.*, 18 U.S.C. 1505 (prohibiting obstruction of proceedings before departments, agencies, and committees); 18 U.S.C. 1515(a)(1)(B) and (C) (defining "official proceeding" as used in 18 U.S.C. 1512 and 1513 to include proceedings before Congress and

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-11a.

STATEMENT

A. Statutory Background

In 1988, Congress first provided that a noncitizen who "is convicted of an aggravated felony" is deportable. 8 U.S.C. 1251(a)(4)(B) (1988).[2] That provision of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, is now codified at 8 U.S.C. 1227(a)(2)(A)(iii). In addition to being deportable, a noncitizen with an aggravated-felony conviction is ineligible for many forms of discretionary relief, including cancellation of removal, 8 U.S.C. 1229b(a)(3) and (b)(1)(C); asylum, 8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i); and voluntary departure, 8 U.S.C. 1229c(b)(1)(C).[3]

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federal agencies). The dispute is whether such a proceeding (or investigation) must be pending at the time of the defendant's offense.

[2] 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)).

[3] An aggravated-felony conviction, however, does not disqualify a noncitizen from withholding of removal under the statute or under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19 (1988), 1465 U.N.T.S. 85, unless the conviction is deemed to be for "a particularly serious crime." 8 U.S.C. 1231(b)(3)(B)(ii); 8 C.F.R. 1208.16(d)(2). A noncitizen with an aggravated-felony conviction also may obtain deferral of removal under the CAT. See 8 C.F.R. 1208.16(d)(2). Furthermore, a noncitizen convicted of an aggravated felony is generally barred from seeking readmission for 20 years following removal, 8 U.S.C. 1182(a)(9)(A)(i)-(ii), but that bar is subject to waiver, 8 U.S.C. 1182(a)(9)(A)(iii).

Between 1988 and 1996, Congress repeatedly expanded the INA's definition of "aggravated felony," and the specific provision at issue in these cases is the product of two 1996 statutes. Congress initially added "an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which a sentence of 5 years' imprisonment or more may be imposed." Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e)(8), 110 Stat. 1278 (adding 8 U.S.C. 1101(a)(43)(S)). A few months later, Congress reduced the term-of-imprisonment threshold from five years to one year. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 321(a)(11), 110 Stat. 3009-628.

Thus, as relevant here, "[t]he term 'aggravated felony' means * * * an offense relating to obstruction of justice * * * for which the term of imprisonment is at least one year," 8 U.S.C. 1101(a)(43)(S), regardless of whether the offense is "in violation of Federal or State law," 8 U.S.C. 1101(a)(43).

In applying that provision, this Court has previously explained that 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*, 581 U.S. 385, 395 (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).

B. *Cordero-Garcia*

1. Fernando Cordero-Garcia is a native and citizen of Mexico. *Cordero-Garcia* Pet. App. 2a. In 1965, he

was admitted to the United States as a lawful permanent resident. *Ibid.* In 1990, he began working for Santa Barbara County as a psychologist. *Id.* at 110a; *Cordero-Garcia* Administrative Record (*Cordero-Garcia* A.R.) 867. His patients included individuals "referred to him for treatment through the criminal justice system." *Cordero-Garcia* Pet. App. 103a.

Over the course of many years, Cordero-Garcia sexually abused and assaulted numerous patients of his. *Cordero-Garcia* A.R. 533-535, 869. Many of the assaults occurred in Cordero-Garcia's offices—including an office in the county courthouse—where his victims had sought treatment for depression and other mental-health issues. *Cordero-Garcia* Pet. App. 112a; *Cordero-Garcia* A.R. 533-534. Invoking his reputation as a "trusted" psychologist, Cordero-Garcia threatened his victims with various consequences if they did not submit to his abuse. *Cordero-Garcia* A.R. 871; see *id.* at 533-535. For example, he "threatened to put [one patient] in jail or a mental hospital if she did not have sex with him." *Id.* at 533. And he "reminded [another patient] that she could lose her children if she did not see him"—insisting that "he could do anything and get away with it because judges respected him." *Id.* at 534.

In 2007, Cordero-Garcia was "arrested for rape by threat of use of public authority" and "released on bail." *Cordero-Garcia* A.R. 534. The day after he was arrested, Cordero-Garcia met with two of his victims and attempted to persuade them not to report his conduct to authorities. *Cordero-Garcia* Pet. App. 113a-114a; *Cordero-Garcia* A.R. 535.

In 2009, Cordero-Garcia was convicted of sexual battery without restraint and sexual exploitation by a psychotherapist, both in violation of California law.

Cordero-Garcia A.R. 532-533. He was also convicted on two counts of dissuading a witness from reporting a crime, in violation of Cal. Penal Code § 136.1(b)(1), for which he was sentenced to two years of imprisonment. *Cordero-Garcia* A.R. 535-536, 663-664, 842, 848-849, 855, 860, 875. To prove a violation of Section 136.1(b)(1), "the prosecution must show '(1) the defendant has attempted to prevent or dissuade a person (2) who is a victim or witness to a crime (3) from making a report . . . to any peace officer or other designated officials.'" *People* v. *Navarro*, 212 Cal. App. 4th 1336, 1347 (2013) (brackets and citation omitted). "The prosecution must also establish that 'the defendant's acts or statements were intended to affect or influence a potential witness's or victim's testimony or acts.'" *Ibid.* (brackets and citation omitted). Thus, "section 136.1 is a specific intent crime." *Ibid.* (citation omitted).

2. In 2011, the Department of Homeland Security (DHS) charged that Cordero-Garcia was subject to removal under 8 U.S.C. 1227(a)(2)(A)(iii) because his convictions for dissuading a witness were convictions for an aggravated felony—specifically, for an offense relating to obstruction of justice. *Cordero-Garcia* A.R. 993. DHS later charged that Cordero-Garcia was subject to removal on the additional ground that he had been convicted of "two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct." *Id.* at 886; see 8 U.S.C. 1227(a)(2)(A)(ii). An immigration judge (IJ) sustained both charges of removability, denied cancellation of removal, and ordered Cordero-Garcia's removal to Mexico. *Cordero-Garcia* Pet. App. 105a-136a.

In 2012, the Board of Immigration Appeals (Board) dismissed Cordero-Garcia's appeal. *Cordero-Garcia* Pet.

App. 98a-104a. The Board rejected Cordero-Garcia's contention that dissuading a witness under Section 136.1(b)(1) "is not categorically an offense relating to obstruction of justice because it require[s] no interference with ongoing criminal proceedings." *Cordero-Garcia* A.R. 205; see *Cordero-Garcia* Pet. App. 100a. The Board explained that it had held in *In re Valenzuela Gallardo*, 25 I. & N. Dec. 838 (2012) (*Valenzuela Gallardo I*), that "a crime may relate to obstruction of justice within the meaning of [Section 1101(a)(43)(S)] irrespective of the existence of an ongoing criminal investigation or proceeding." *Cordero-Garcia* Pet. App. 100a. The Board also determined that Cordero-Garcia had been convicted of two crimes involving moral turpitude and upheld the IJ's denial of cancellation of removal. *Id.* at 101a-104a.

Cordero-Garcia sought review in the Ninth Circuit. While his case was pending, a panel of the Ninth Circuit decided *Valenzuela Gallardo* v. *Lynch*, 818 F.3d 808 (2016) (*Valenzuela Gallardo II*), in the course of which it rejected the interpretation of an offense relating to obstruction of justice that the Board had adopted in *Valenzuela Gallardo I*. *Id.* at 823-824. The court understood the Board in that case to have held that "the 'critical element' of obstruction of justice crimes" is "the 'affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice,' regardless of the existence of an ongoing investigation or proceeding." *Id.* at 819 (quoting *Valenzuela Gallardo I*, 25 I. & N. Dec. at 842). In the court's view, that interpretation left "grave uncertainty about the plethora of steps before and after an 'ongoing criminal investigation or trial' that comprise 'the process of justice,'" *id.* at 820, and thus "raise[d] grave doubts about whether

[Section 1101(a)(43)(S)] is unconstitutionally vague," *id.* at 819.

The government filed an unopposed motion to remand Cordero-Garcia's case to the Board for further proceedings in light of both *Valenzuela Gallardo II* and intervening circuit precedent relevant to the Board's determination that Cordero-Garcia had been convicted of two crimes involving moral turpitude. *Cordero-Garcia* A.R. 137-141. The Ninth Circuit granted the motion and remanded the case. *Cordero-Garcia* Pet. App. 94a.

While Cordero-Garcia's case was pending on remand, the Board issued its decision in *In re Valenzuela Gallardo*, 27 I. & N. Dec. 449 (2018) (*Valenzuela Gallardo III*). In *Valenzuela Gallardo III*, the Board reiterated its view that "Congress did not intend interference in an ongoing or pending investigation or proceeding to be a necessary element of an 'offense relating to obstruction of justice' under the [INA]." *Id.* at 456. In light of the Ninth Circuit's vagueness concerns, however, the Board took "the opportunity to clarify" its interpretation of Section 1101(a)(43)(S). *Id.* at 451. After reviewing Chapter 73 of the federal criminal code (encompassing 18 U.S.C. 1501-1521), the Model Penal Code, the federal Sentencing Guidelines, and other authorities, the Board explained that "an offense relating to obstruction of justice" refers to "offenses covered by chapter 73 of the Federal criminal code or any other Federal or State offense that involves (1) an affirmative and intentional attempt (2) that is motivated by a specific intent (3) to interfere either in an investigation or proceeding that is ongoing, pending, or reasonably foreseeable by the defendant, or in another's punishment resulting from a completed proceeding." *Id.* at 460; see *id.* at 453-460.

In light of *Valenzuela Gallardo III*, the Board issued a decision dismissing Cordero-Garcia's appeal. *Cordero-Garcia* Pet. App. 55a-74a (published version); see *id.* at 75a-93a (unpublished version).[4] The Board explained that dissuading a witness under Section 136.1(b)(1) "requires a specific intent to interfere in an investigation or proceeding." *Id.* at 59a. And the Board held that such intent "necessarily" means that an investigation or proceeding was "ongoing, pending, or reasonably foreseeable." *Ibid.* In the Board's view, "there would be little reason for a person to try to prevent or dissuade a victim or witness from reporting the crime to appropriate authorities unless there was an investigation in progress or one was reasonably foreseeable." *Ibid.* The Board therefore concluded that dissuading a witness under Section 136.1(b)(1) is categorically an offense relating to obstruction of justice under "the criteria * * * outlined in" *Valenzuela Gallardo III*. *Ibid.* Because Cordero-Garcia's conviction rendered him removable and ineligible for cancellation of removal, *id.* at 74a, the Board found it unnecessary to reach the issue of whether Cordero-Garcia had been convicted of two crimes involving moral turpitude, *id.* at 56a n.1.

Cordero-Garcia again petitioned for review in the Ninth Circuit. While his petition was pending, a panel of the Ninth Circuit in *Valenzuela Gallardo* v. *Barr*, 968

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[4] The record contains two versions of the Board's decision, which are materially identical in substance. One is an unpublished version, issued only to the parties, *Cordero-Garcia* Pet. App. 75a-93a; the other is published, *id.* at 55a-74a. The published decision constitutes "precedent that binds the Board, the immigration courts, and DHS." Exec. Office for Immigration Review, U.S. Dep't of Justice, *Board of Immigration Appeals Practice Manual* Ch. 1.4(d)(1), at 11 (updated Nov. 14, 2022).

F.3d 1053 (2020) (*Valenzuela Gallardo IV*), held that "'obstruction of justice' under § 1101(a)(43)(S) unambiguously requires a nexus to ongoing or pending proceedings." *Id.* at 1069. The court therefore rejected the contrary interpretation that the Board had adopted in *Valenzuela Gallardo III*. *Id.* at 1062-1068. The government petitioned for rehearing en banc in *Valenzuela Gallardo IV*, but the petition was denied without any noted dissent. See *Valenzuela Gallardo* v. *Barr*, No. 18-72593 (9th Cir. Nov. 17, 2020).

3. A divided panel of the Ninth Circuit granted Cordero-Garcia's petition for review and remanded for further proceedings. *Cordero-Garcia* Pet. App. 1a-54a. Relying on its prior decision in *Valenzuela Gallardo IV*, *id.* at 15a, the court held that the offense of dissuading a witness under Section 136.1(b)(1) is "not a categorical match" to an offense relating to obstruction of justice under the INA because the California offense "is missing the element of a nexus to an ongoing or pending proceeding or investigation," *id.* at 8a. The court further held that because the federal witness-tampering statute, 18 U.S.C. 1512, also "does not contain the required element of a nexus to an ongoing or pending proceeding or investigation," "it is not an appropriate comparator * * * for purposes of a categorical approach analysis." *Cordero-Garcia* Pet. App. 15a. The court concluded, in any event, that dissuading a witness under Section 136.1(b)(1) is "not a categorical match with 18 U.S.C. § 1512." *Id.* at 16a.

Judge VanDyke dissented. *Cordero-Garcia* Pet. App. 23a-54a. In his view, the Ninth Circuit's prior decisions in *Valenzuela Gallardo II* and *Valenzuela Gallardo IV* were wrongly decided but did not foreclose the argument that an offense relates to obstruction of justice if

it is "covered by Chapter 73 of the Federal criminal code." *Id.* at 45a (quoting *Valenzuela Gallardo III*, 27 I. & N. Dec. at 460) (brackets omitted); see *id.* at 33a-45a. Judge VanDyke concluded that because dissuading a witness under Section 136.1(b)(1) "is a categorical match" to an offense covered by Chapter 73—namely, witness tampering under 18 U.S.C. 1512(b)(3)—Cordero-Garcia was convicted of an aggravated felony. *Cordero-Garcia* Pet. App. 54a.

C. *Pugin*

1. Jean Francois Pugin is a native and citizen of Mauritius. *Pugin* Pet. App. 77a. In 1985, he was admitted to the United States as a lawful permanent resident. *Ibid.* In 2014, following a guilty plea in Virginia state court, he was convicted of being an accessory after the fact to a felony, in violation of Va. Code Ann. § 18.2-19(ii) (2014), and sentenced to 12 months of imprisonment. *Pugin* Administrative Record (*Pugin* A.R.) 179-185.

Section 18.2-19 incorporates "the common-law definition of what constitutes an accessory after the fact." *Suter* v. *Commonwealth*, 796 S.E.2d 416, 420 (Va. Ct. App. 2017). Under Virginia law, the offense has the following elements: (1) a "felony must be completed" by someone other than the defendant; (2) the defendant "must know that the felon is guilty"; and (3) the defendant "must receive, relieve, comfort or assist" the felon, "with the view of enabling [the felon] to elude punishment." *Wren* v. *Commonwealth*, 67 Va. 952, 956-957 (1875); see *Suter*, 796 S.E.2d at 420 (explaining that "the aid must have been given to the felon personally for the purpose of hindering the felon's apprehension, conviction, or punishment"); Va. Model Crim. Jury Instr. No. 3.300(4) (Sept. 2019) (explaining that the "Commonwealth must prove" that "the defendant comforted, relieved,

hid, or in any other way assisted the person who committed the [felony] with the intent of helping that person escape or delay capture, prosecution or punishment").

2. In 2015, DHS charged that Pugin was subject to removal because his conviction for an accessory-after-the-fact offense was a conviction for an offense relating to obstruction of justice. *Pugin* A.R. 206, 208; see 8 U.S.C. 1227(a)(2)(A)(iii). In 2018, Pugin filed a motion to terminate his removal proceedings, arguing that the Virginia offense of being an accessory after the fact is not an "offense relating to obstruction of justice * * * because it does not include 'the critical element of an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice.'" *Pugin* A.R. 170 (quoting *Valenzuela Gallardo I*, 25 I. & N. Dec. at 841).

In 2019, an IJ denied Pugin's motion. *Pugin* Pet. App. 76a-82a. The IJ observed that in *In re Espinoza-Gonzalez*, 22 I. & N. Dec. 889 (1999) (en banc), the Board had reaffirmed that "a federal conviction for accessory after the fact under 18 U.S.C. § 3 is a crime relating to obstruction of justice" because the federal offense has as an element the "'specific purpose of hindering the process of justice.'" *Pugin* Pet. App. 80a (citation omitted). The IJ determined that "specific intent to hinder the process of justice" is likewise an element of being an accessory after the fact under Virginia law because the prosecution must prove that the defendant acted "'with the view of enabling [the felon] to elude punishment.'" *Id.* at 81a (citation omitted). The IJ concluded that "Virginia Code § 18.2-19(ii) is categorically an aggravated felony relating to obstruction of justice," *ibid.*, and ordered Pugin's removal to Mauritius, *Pugin* A.R. 70-71.

The Board dismissed Pugin's appeal. *Pugin* Pet. App. 71a-75a. Like the IJ, the Board rejected Pugin's contention that a conviction under Section 18.2-19(ii) does not require a showing of "specific intent to interfere with the process of justice." *Pugin* A.R. 54; see *Pugin* Pet. App. 74a. The Board agreed with the IJ that, "[t]o establish that a defendant is guilty of accessory after the fact under" Virginia law, the prosecution must prove that the defendant aided the felon "for the purpose of hindering the felon's apprehension, conviction, or punishment." *Pugin* Pet. App. 74a. The Board therefore affirmed the IJ's determination that Pugin's "conviction constitutes an aggravated felony offense relating to obstruction of justice." *Id.* at 72a.

3. A divided panel of the Fourth Circuit upheld the Board's decision. *Pugin* Pet. App. 1a-70a. The court rejected Pugin's argument that an offense relating to obstruction of justice "requires a connection to an ongoing or pending proceeding or investigation." *Id.* at 6a. After "[c]onsidering federal and state laws, the Model Penal Code, and dictionary definitions," the court determined that "the phrase 'relating to obstruction of justice'" is "at least ambiguous" as to whether it "requires the obstruction of an ongoing proceeding." *Id.* at 24a; see *id.* at 13a-24a. The court then deferred under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the Board's "reasonable conclusion" in *Valenzuela Gallardo III* that the phrase encompasses "interference in an ongoing *or reasonably foreseeable* proceeding." *Pugin* Pet. App. 24a. The court rejected Pugin's contention that "the rule of lenity should apply rather than *Chevron* because the definition of obstruction of justice is used in criminal actions." *Id.* at 6a; see *id.* at 7a-13a.

The Fourth Circuit further held that "the Virginia offense of accessory after the fact categorically matches the Board's definition" of an offense relating to obstruction of justice. *Pugin* Pet. App. 3a. Like the IJ and the Board, the court of appeals rejected Pugin's contention that Virginia law does not require "specific intent." *Id.* at 26a; see *id.* at 26a-33a. And the court held that it "lack[ed] jurisdiction to address" Pugin's alternative argument that, "[e]ven if Virginia law requires specific intent," "it does not necessarily require a specific intent to reduce the likelihood of a criminal punishment resulting from an ongoing or reasonably foreseeable proceeding." *Id.* at 33a n.18. Pugin had failed to "exhaust that argument in the proceedings before the [IJ] or the Board." *Ibid.* (citing *Pugin* A.R. 28-33, 168-170).

Judge Gregory dissented. *Pugin* Pet. App. 35a-70a. In his view, the phrase "obstruction of justice" unambiguously requires a "nexus" to a "pending or ongoing proceeding," *id.* at 59a, and the Board therefore "erred in concluding that [Pugin's] state conviction is an 'aggravated felony,'" *id.* at 70a.

4. The Fourth Circuit denied rehearing en banc over Judge Gregory's dissent. *Pugin* Pet. App. 83a-92a.

SUMMARY OF ARGUMENT

Under the INA, an aggravated felony includes "an offense relating to obstruction of justice." 8 U.S.C. 1101(a)(43)(S). In the Ninth Circuit's view, an offense relates to obstruction of justice only if it requires that the defendant's conduct overlap in time with a pending investigation or proceeding. That temporal-nexus requirement is contrary to the ordinary meaning of the statutory text, the nature of "obstruction of justice" as commonly understood, and the Board's longstanding interpretation of Section 1101(a)(43)(S).

A. The ordinary meaning of "obstruction of justice" forecloses the Ninth Circuit's view that Section 1101(a)(43)(S) imposes a temporal-nexus requirement. When Congress added Section 1101(a)(43)(S) to the INA's aggravated-felony definition in 1996, *Merriam-Webster's Dictionary of Law* (1996) (*Merriam-Webster's*) defined "obstruction of justice" as "the crime or act of willfully interfering with the process of justice and law." *Id.* at 337. Nothing in the term's ordinary meaning required a temporal overlap between the defendant's conduct and a pending investigation or proceeding. After all, an offender could interfere with the process of justice by preventing an investigation or proceeding from commencing in the first place. The most effective forms of obstruction of justice often work in precisely that way.

The two kinds of offenses at issue in these cases illustrate the point. Cordero-Garcia's offense—dissuading a witness from reporting a crime—has long been understood to be an "impediment[] of justice." 4 William Blackstone, *Commentaries on the Laws of England* 126 (1769). And it can be a particularly serious one, for it may prevent the crime from ever being investigated or prosecuted. Pugin's offense—being an accessory after the fact—may also allow a "felon to escape the vengeance of the law," which has long been considered a "hindrance of public justice." *Id.* at 38.

B. No relevant source of authority supports interpreting "obstruction of justice" as incorporating a temporal-nexus requirement. Other dictionaries contemporaneous with the enactment of Section 1101(a)(43)(S) provide definitions similar to *Merriam-Webster's*. Many of the offenses described in Chapter 73 of the federal criminal code may be committed either before or after any investigation or proceeding; indeed, Congress has ex-

pressly disclaimed any temporal-nexus requirement for witness tampering, a paradigmatic "obstruction of justice" offense. See 18 U.S.C. 1512(f)(1). The Model Penal Code (MPC) rejected any temporal-nexus requirement for offenses such as witness tampering, evidence tampering, and being an accessory after the fact, yet treated all of those offenses as forms of obstruction of justice. And consistent with the MPC, a majority of States in 1996 treated witness tampering and being an accessory after the fact as forms of obstruction of justice, even when those offenses did not require a temporal nexus with an already-pending investigation or proceeding. That same understanding was reflected in the federal sentencing guidelines at the time. Thus, every relevant source of authority points in the same direction: that when Congress added Section 1101(a)(43)(S) to the INA's aggravated-felony definition in 1996, "obstruction of justice" was commonly understood to encompass offenses that did not overlap in time with a pending investigation or proceeding.

C. At a minimum, the INA's reference to an offense "relating to" obstruction of justice should not be construed to require such a temporal nexus. The category of offenses "relating to" obstruction of justice is necessarily broader than the category of obstruction of justice itself. Even if "obstruction of justice" were construed to reach only those efforts to interfere with the process of justice that overlap in time with a pending investigation or proceeding, the broader category of offenses "relating to" obstruction of justice should be understood to encompass at least those offenses that share the same objective to obstruct justice. Here, the offenses that Cordero-Garcia and Pugin committed required such intent, and that mens rea element is enough to

bring their offenses at least "into association with" obstruction of justice. *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (citation omitted).

D. In any event, any ambiguity about whether a temporal nexus is required should be resolved by deferring to the Board's reasonable conclusion that Section 1101(a)(43)(S) does not impose such a requirement. The Board first addressed the issue in 1997—the year after Congress added "an offense relating to obstruction of justice" to the INA's aggravated-felony definition. Ever since, the Board has consistently interpreted the phrase to encompass offenses that do not require a nexus to a pending investigation or proceeding. That interpretation is, at the very least, a reasonable one. And because Congress has made clear that any ambiguity in the INA should be resolved, first and foremost, by the Attorney General, not by principles of lenity, the Board's reasonable rejection of a temporal-nexus requirement is entitled to deference. See 8 U.S.C. 1103(a)(1); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999).

ARGUMENT

AN OFFENSE NEED NOT INVOLVE A PENDING OR ONGOING INVESTIGATION OR PROCEEDING IN ORDER TO QUALIFY AS "AN OFFENSE RELATING TO OBSTRUCTION OF JUSTICE" UNDER 8 U.S.C. 1101(a)(43)(S)

The INA provides that any noncitizen "who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. 1227(a)(2)(A)(iii). One of the crimes that constitutes an aggravated felony under the INA is "an offense relating to obstruction of justice." 8 U.S.C. 1101(a)(43)(S). This Court granted certiorari in these cases limited to the following question: To qualify as "an offense relating to obstruction of jus-

tice," *ibid.*, must a predicate offense require a nexus with a pending or ongoing investigation or proceeding?

According to the Ninth Circuit, the answer is yes. That court has held that an offense is one "relating to obstruction of justice" only when it requires a showing that the defendant's conduct occurred while an official investigation or proceeding was already "pending." *Valenzuela Gallardo* v. *Barr*, 968 F.3d 1053, 1062 (2020) (*Valenzuela Gallardo IV*). In the Ninth Circuit's view, it is not enough for the offense to require that an investigation or proceeding was "reasonably foreseeable," *ibid.*; rather, "'obstruction of justice' require[s] a nexus to an *extant* investigation or proceeding," *id.* at 1063. And under the Ninth Circuit's interpretation, it is not enough for the defendant to have *believed* that an investigation or proceeding was pending; rather, the offense must require the existence of an investigation or proceeding that was already pending *in fact*. *Id.* at 1069.

The Ninth Circuit's "temporal nexus requirement," *Valenzuela Gallardo IV*, 968 F.3d at 1063 (citation omitted), has no basis in the ordinary meaning of "an offense relating to obstruction of justice," and it finds no support in any relevant source of authority. This Court should therefore hold that an offense need not require a nexus with a pending or ongoing investigation or proceeding in order to qualify as "an offense relating to obstruction of justice."

A. The Ordinary Meaning Of "Obstruction Of Justice" Does Not Require A Temporal Overlap With The Process That Is Obstructed

Because the INA does not expressly define "an offense relating to obstruction of justice," those words should be given "their ordinary meaning at the time Congress adopted them." *Niz-Chavez* v. *Garland*,

141 S. Ct. 1474, 1480 (2021). Congress added Section 1101(a)(43)(S) to the INA's definition of "aggravated felony" in 1996. See p. 4, *supra*. The meaning of that provision therefore depends on the "common understanding and meaning" of an offense relating to obstruction of justice at that time. *Perrin* v. *United States*, 444 U.S. 37, 44-45 (1979); see *Shular* v. *United States*, 140 S. Ct. 779, 783 (2020) (explaining that "a 'generic' version of a crime" consists of "the elements of 'the offense as commonly understood'") (citation omitted).

In *Esquivel-Quintana* v. *Sessions*, 581 U.S. 385 (2017), this Court addressed a different part of the aggravated-felony definition—one referring to "sexual abuse of a minor," 8 U.S.C. 1101(a)(43)(A)—that was also added in 1996. *Esquivel-Quintana*, 581 U.S. at 391. To determine the "ordinary meaning" of "sexual abuse" at that time, the Court consulted *Merriam-Webster's Dictionary of Law* (1996) (*Merriam-Webster's*). *Esquivel-Quintana*, 581 U.S. at 391. That same dictionary defines "obstruction of justice" as follows:

> the crime or act of willfully interfering with the process of justice and law esp. by influencing, threatening, harming, or impeding a witness, potential witness, juror, or judicial or legal officer or by furnishing false information in or otherwise impeding an investigation or legal process ⟨the defendant's *obstruction of justice* led to a more severe sentence⟩.

Merriam-Webster's 337.

That definition requires that the defendant's conduct "interfer[e] with the process of justice and law." *Merriam-Webster's* 337. But such interference may occur even if an investigation or proceeding is not yet pending. Nothing in the ordinary meaning of "obstruction of justice" requires that there be "a relationship in

time" between the defendant's conduct and an investigation or proceeding. *United States* v. *Aguilar*, 515 U.S. 593, 599 (1995). Rather, as this Court has recognized, the requisite "'nexus'" may be one of "time, causation, *or* logic." *Ibid.* (emphasis added; citation omitted). In fact, the most effective ways of obstructing justice are often those that lack any temporal nexus at all because they have prevented an investigation or proceeding from commencing in the first place.

Consider, for example, Cordero-Garcia's offense of conviction: dissuading a witness from reporting a crime to the authorities. See p. 6, *supra*. As the *Merriam-Webster's* definition indicates, "influencing, threatening, harming, or impeding" a "witness" or "potential witness" is a paradigmatic example of obstruction of justice. *Merriam-Webster's* 337. That understanding is deeply rooted. Blackstone described "endeavour[ing] to dissuade a witness from giving evidence" as an "impediment[] of justice." 4 William Blackstone, *Commentaries on the Laws of England* 126 (1769) (Blackstone). The 1980 commentary on the Model Penal Code (MPC) similarly described "efforts to conceal commission of a crime" by "tampering with a witness" as a form of "obstruction of justice." MPC § 242.3, comments 1 and 4, at 225, 233. And in California—whose statute Cordero-Garcia violated—the offense appears in a title of the penal code entitled "Crimes Against Public Justice." See Cal. Penal Code § 136.1(b)(1) (capitalization altered) (located in Part 1, Title 7).

Yet the offense that Cordero-Garcia committed does not require a temporal nexus with any extant investigation or proceeding. Under California law, a person is guilty of the offense if he "intentionally" dissuades a "witness from reporting a crime," even if there is no

pending investigation or proceeding when the witness is dissuaded. *People* v. *Navarro*, 212 Cal. App. 4th 1336, 1351 (2013). The absence of a temporal-nexus requirement, however, does not keep the offense from being a form of obstruction of justice. To the contrary, "pre-arrest efforts to prevent a crime from being reported to the authorities" may present a particularly serious threat to the process of justice because, when such efforts succeed, "there may not even be a case." *People* v. *Fernandez*, 106 Cal. App. 4th 943, 950-951 (2003). California law thus "distinguish[es] the various methods of influencing a witness" and punishes efforts to dissuade a witness from reporting a crime "more severely" than efforts "to influence the contents of a witness's testimony" in court. *Id.* at 950; see *id.* at 951 (explaining that, "generally speaking, the Legislature views an attempt to alter what a witness says in court as less culpable than an attempt to prevent a witness from appearing at all or from taking steps that are predicate to the prosecution's filing of an action").

Consider also Pugin's offense of conviction: being an accessory after the fact to a felony. See pp. 11-12, *supra*. That offense likewise does not require a nexus to an extant investigation or proceeding. Yet, as early as Blackstone's day, the gravamen of the offense consisted in the accessory's "hindrance of public justice, by assisting the felon to escape the vengeance of the law." 4 Blackstone 38; see *id.* at 40 (noting that the "species of guilt" associated with being an accessory after the fact arises from "tending to evade the public justice"). That view was, if anything, even more widely shared by 1996. See MPC § 242.3, comments 1 and 3, at 224-225, 229. As the commentary on the MPC had summarized in 1980, "[a] person who aids another to elude apprehension or trial is

interfering with the processes of government." *Id.* at 225. Or, in the words of a leading criminal-law treatise, the offense committed by "[t]he accessory after the fact" is "that of interfering with the processes of justice." 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 6.9(a), at 170 (1986) (LaFave). The MPC, as well as the laws of a majority of States, thus "treat[] this kind of behavior for what it is—obstruction of justice." MPC § 242.3, comment 1, at 225; see pp. 41-43, *infra* (discussing state criminal codes).

None of that is to say that the offense of being an accessory after the fact requires no nexus to the process of justice. To the contrary, the MPC's accessory-after-the-fact provision is "[c]onsistent[] with the obstruction-of-justice theory on which [that] provision is based," in that it still "requires that the actor have a 'purpose to hinder the apprehension, prosecution, conviction or punishment of another for crime.'" MPC § 242.3, comment 3, at 228-229. And Pugin's own offense under Virginia law included a similar requirement. See pp. 11-12, *supra*. Such a mens rea element is sufficient to establish the requisite causal or logical nexus with the process of justice. That the nexus need not be a temporal one does not make being an accessory after the fact any less an obstruction of justice. See, *e.g.*, *United States* v. *Brown*, 33 F.3d 1002, 1004 (8th Cir. 1994) (explaining that "[t]he gist of being an accessory after the fact lies essentially in obstructing justice by rendering assistance to hinder or prevent the arrest of the offender after he or she has committed the crime") (brackets and citation omitted); *United States* v. *Willis*, 559 F.2d 443, 444 (5th Cir. 1977) (per curiam) (same); *United States* v. *Barlow*, 470 F.2d 1245, 1252-1253 (D.C. Cir. 1972) (same); *Virgin Islands* v. *Aquino*, 378 F.2d 540, 553 (3d Cir. 1967) ("An acces-

sory after the fact is one who, knowing that a crime has been committed, obstructs justice by giving comfort or assistance to the offender in order to hinder or prevent his apprehension or punishment.").

B. No Relevant Source Supports Interpreting "Obstruction Of Justice" To Include A Temporal-Nexus Requirement

The Ninth Circuit's temporal-nexus requirement lacks support in any relevant source of authority. In fact, every relevant source points in the other direction: that when Congress enacted Section 1101(a)(43)(S), "an offense relating to obstruction of justice" was not understood to require a nexus with an ongoing or pending investigation or proceeding.

1. Contemporaneous dictionaries

As noted above, *Merriam-Webster's* defines "obstruction of justice" as "the crime or act of willfully interfering with the process of justice and law." *Merriam-Webster's* 337. Similar definitions appear in other dictionaries contemporaneous with the enactment of Section 1101(a)(43)(S). See Bryan A. Garner, *A Dictionary of Modern Legal Usage* 611 (2d ed. 1995) ("obstruction of justice (= interference with the orderly administration of law) is a broad phrase that captures every willful act of corruption, intimidation, or force that tends somehow to impair the machinery of the civil or criminal law"); *Black's Law Dictionary* 1077 (6th ed. 1990) ("[o]bstructing justice" encompasses "obstructing the administration of justice in any way") (emphasis omitted).

The Ninth Circuit believed that *Merriam-Webster's* supported a temporal-nexus requirement because its definition goes on to refer to "impeding an investigation or legal process." *Valenzuela Gallardo IV*, 968 F.3d at 1063 (citation and emphasis omitted). But the definition

refers to "impeding an investigation or legal process" only as one example of obstruction of justice. *Merriam-Webster's* 337. And even then, it does not suggest that "an investigation or legal process" must be pending at the time of the defendant's conduct; after all, a defendant can "imped[e] an investigation or legal process" by, for instance, dissuading a witness from reporting the crime in the first place. *Ibid.*; see pp. 20-21, *supra*. Another example provided in the *Merriam-Webster's* definition is "influencing, threatening, harming, or impeding" a "*potential* witness"—a form of obstruction that can occur before any investigation or proceeding has commenced. *Merriam-Webster's* 337 (emphasis added).

2. Chapter 73 of the federal criminal code

Various offenses appear in Chapter 73 of Title 18 of the United States Code under the heading "Obstruction of Justice." Act of June 25, 1948 (1948 Act), ch. 645, § 1, 62 Stat. 769 (capitalization altered). Congress has specifically instructed that "[n]o inference of a legislative construction is to be drawn by reason of the chapter in Title 18 * * * in which any particular section is placed, nor by reason of the catchlines used in such title." 1948 Act § 19, 62 Stat. 862. But even apart from their placement in Chapter 73 and the heading of that Chapter, the offenses in Chapter 73 are understood to be "obstruction of justice" offenses as a matter of ordinary meaning. Thus, in 2005, this Court stated that "Chapter 73 * * * provides criminal sanctions for those who obstruct justice." *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 703 (2005); see *Yates* v. *United States*, 574 U.S. 528, 540 (2015) (plurality opinion) (describing multiple

provisions of Chapter 73 as "prohibiting obstructive acts in specific contexts").[5]

a. The offenses described in Chapter 73 make clear that an offense need not involve a pending investigation or proceeding in order to qualify as an "obstruction of justice" offense. Cf. *Esquivel-Quintana*, 581 U.S. at 394 (finding "further evidence" of the "generic federal definition of sexual abuse of a minor" in other federal statutes). To be sure, some Chapter 73 offenses explicitly depend on the existence of a pending proceeding. See, *e.g.*, 18 U.S.C. 1504 (influencing a juror by writing "upon any issue or matter pending before such juror"); 18 U.S.C. 1505 (obstructing the "due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States"); 18 U.S.C. 1508 (recording, listening to,

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[5] According to the Third Circuit, the phrase "obstruction of justice" in Section 1101(a)(43)(S) should be read as a "reference" to Chapter 73. *Flores* v. *Attorney Gen.*, 856 F.3d 280, 288 (2017). The Third Circuit thus believes that whether a predicate offense relates to obstruction of justice should depend entirely on a comparison between the predicate offense and "a relevant Chapter 73 offense." *Id.* at 291. But while Congress included cross-references to other federal statutes in many other parts of the aggravated-felony definition, see, *e.g.*, 8 U.S.C. 1101(a)(43)(B)-(F), Congress omitted any such cross-reference in Section 1101(a)(43)(S). The Third Circuit therefore errs in effectively converting "obstruction of justice" into such a cross-reference. The Third Circuit likewise errs in asserting that if Congress regarded being an accessory after the fact under 18 U.S.C. 3 as "an obstruction-of-justice offense," Congress "presumably would have placed that statute in Chapter 73." *Flores*, 856 F.3d at 289. That assertion contradicts Congress's instruction that "[n]o inference of a legislative construction is to be drawn by reason of the chapter in Title 18 * * * in which any particular section is placed." 1948 Act § 19, 62 Stat. 862.

or observing "the proceedings" of a jury "while such jury is deliberating or voting").

But many other Chapter 73 offenses can be committed before any investigation or proceeding has begun. In one section, describing several offenses, Congress has made that explicit. Section 1512 prohibits various efforts to obstruct "an official proceeding," including tampering with witnesses or evidence. 18 U.S.C. 1512(a)(1)(A)-(B), (a)(2)(A)-(B), (b)(1)-(2), (c), and (d)(1)-(2). That section also prohibits engaging in various acts with the intent to prevent the "communication" of "information" relating to the "commission or possible commission of a Federal offense" to a federal "law enforcement officer or judge." 18 U.S.C. 1512(a)(1)(C); see *ibid.* (prohibiting killing another person with such intent); 18 U.S.C. 1512(a)(2)(C) (prohibiting using physical force or the threat of physical force against another person with such intent); 18 U.S.C. 1512(b)(3) (prohibiting intimidating, threatening, or corruptly persuading another person, or engaging in misleading conduct toward such person, with such intent). And it prohibits harassing another person and thereby preventing that person from reporting the "commission or possible commission of a Federal offense" to a federal "law enforcement officer or judge." 18 U.S.C. 1512(d)(2).

Congress has specified that "[f]or the purposes of [Section 1512]," "an official proceeding need not be pending or about to be instituted at the time of the offense." 18 U.S.C. 1512(f)(1). Of course, when addressing one of the provisions in Section 1512 that expressly refers to an "official proceeding," the Court observed that just because "a proceeding 'need not be pending or about to be instituted'" does not mean that "a proceeding need not even be foreseen." *Arthur Andersen*, 544

U.S. at 707-708; see *Marinello* v. *United States*, 138 S. Ct. 1101, 1110 (2018) (describing the Court's decision in *Arthur Andersen* as "requiring the Government to prove a proceeding was foreseeable in order to convict a defendant for persuading others to shred documents to prevent their 'use in an official proceeding'"). But a *foreseeable* investigation would not suffice under the Ninth Circuit's temporal-nexus requirement. And other offenses described in Section 1512 do not even need a connection with an "official proceeding," much less a foreseeable one. See, *e.g.*, *Fowler* v. *United States*, 563 U.S. 668, 672 (2011) (articulating the elements of a violation of Section 1512(a)(1)(C) without mentioning a pending investigation or proceeding); *United States* v. *Ronda*, 455 F.3d 1273, 1288 (11th Cir. 2006) (explaining that Section 1512(b)(3) "does not require that a defendant's misleading conduct relate in any way either to an 'official proceeding' or even to a particular ongoing investigation"), cert. denied, 549 U.S. 1212 (2007).

Although other offenses within Chapter 73 lack an explicit provision about the pendency of an investigation or proceeding, many of them have logically and correctly been construed as applying before an investigation or proceeding begins. For example, 18 U.S.C. 1519 prohibits altering, destroying, or concealing "any record, document, or tangible object" with the intent to impede a federal "investigation." But such an investigation need not be pending at the time of the defendant's conduct. See, *e.g.*, *Yates*, 574 U.S. at 547 (plurality opinion) (observing that Section 1519 "covers conduct intended to impede any federal investigation or proceeding, including one not even on the verge of commencement"); *United States* v. *Gray*, 642 F.3d 371, 379 (2d Cir. 2011) (explaining that Section 1519 "does not re-

quire the existence or likelihood of a federal investigation"); *United States* v. *Yielding*, 657 F.3d 688, 711 (8th Cir. 2011) (interpreting Section 1519 to extend to "situations in which the accused does not act directly with respect to a pending matter, but acts either in contemplation of a future matter or in relation to a pending matter"), cert. denied, 565 U.S. 1262 (2012). And there are additional examples:

- Section 1510(a) prohibits endeavoring by means of bribery to prevent the "communication of information" relating to a federal crime to a "criminal investigator." 18 U.S.C. 1510(a). An investigation or proceeding need not be pending at the time of the bribery. See, *e.g.*, *United States* v. *Leisure*, 844 F.2d 1347, 1364 (8th Cir.) (rejecting the contention that a prior version of Section 1510(a), which was in effect until 1982 and which prohibited various means of interference in addition to bribery, required "evidence to show that a federal investigation was underway at the time" of the defendant's conduct), cert. denied, 488 U.S. 932 (1988); *United States* v. *San Martin*, 515 F.2d 317, 320 (5th Cir. 1975) (explaining that Congress in 1967 enacted Section 1510 "to close a loophole in former laws which protected witnesses only during the pendency of a proceeding").
- Section 1511 prohibits conspiring to "obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business." 18 U.S.C. 1511(a). An investigation or proceeding need not be pending at the time of the conspiracy. See, *e.g.*, *United States* v. *Welch*, 656 F.2d 1039, 1055 (5th Cir. Unit A Sept. 1981) (articulating what the prosecution must prove

without mentioning any pending investigation or proceeding), cert. denied, 456 U.S. 915 (1982).

- Section 1518 prohibits obstructing the "communication of information or records relating to a violation of a Federal health care offense to a criminal investigator." 18 U.S.C. 1518. An investigation or proceeding need not be pending at the time of the obstruction. See, *e.g.*, 11th Cir. Pattern Jury Instruction (Crim. Cases) O53.2 (revised Mar. 2022) (articulating the elements of the offense without mentioning any pending investigation or proceeding).[6]

The lack of a temporal-nexus requirement is also manifested once an investigation or proceeding has already ended. At that point, several other Chapter 73 offenses can still be committed. For example, Section 1513(a)(1)(A) and (b)(1) prohibit retaliating against a witness for attendance at, or testimony given in, an official proceeding. See 18 U.S.C. 1513(a)(1)(A) (prohibiting killing a witness in retaliation); 18 U.S.C. 1513(b)(1) (prohibiting causing bodily injury to, or damaging tangible property of, a witness in retaliation). Section 1513(a)(1)(B), (b)(2), and (e) also prohibit retaliating against a person for providing information relating to the "commission or possible commission of a Federal offense" to a "law enforcement officer." 18 U.S.C. 1513(a)(1)(B); see 18 U.S.C. 1513(b)(2) and (e). None of those offenses requires that an investigation or proceeding be pending when the retaliation occurs. See, *e.g.*, *United States* v. *Henderson*, 626 F.3d 326, 331, 341 (6th Cir. 2010) (upholding convictions under Section 1513(a)(1)(A) and (B) of a defendant who, after serving

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[6] https://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstructionsRevisedMAR2022.pdf.

15 years in prison on a federal bank robbery conviction, "kill[ed] two witnesses in retaliation for providing information and testifying against him in the federal bank robbery prosecution"); *United States* v. *Draper*, 553 F.3d 174, 180 (2d Cir. 2009) (Sotomayor, J.) (articulating the elements of a "witness retaliation charge" under Section 1513(b)(2) without mentioning any pending proceeding). And there are additional examples in Chapter 73:

- Section 1503(a) prohibits retaliating against any juror "on account of any verdict or indictment assented to by him, or on account of his being or having been such juror." 18 U.S.C. 1503(a). Section 1503(a) also prohibits retaliating against particular court officers and magistrate judges "on account of the performance of [their] official duties." *Ibid.* Proceedings need not be pending at the time of the retaliation. See *William J. Bauer Pattern Criminal Jury Instructions of the Seventh Circuit* 693 (updated 2022) (articulating the elements of retaliating against a juror without mentioning any pending proceeding).[7]
- Section 1509 prohibits interfering with "the due exercise of rights or the performance of duties under any order, judgment, or decree of a court of the United States." 18 U.S.C. 1509. The proceedings that led to the order, judgment, or decree need not still be pending at the time of the interference. See *United States* v. *Cooley*, 1 F.3d 985, 996 (10th Cir. 1993) (articulating the elements of the offense without mentioning any pending proceeding).

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[7] https://www.ca7.uscourts.gov/pattern-jury-instructions/Bauer_pattern_criminal_jury_instructions_2022updates.pdf.

The various offenses described in Chapter 73 thus demonstrate that obstruction of justice can occur even when there is no currently pending investigation or proceeding. For many "obstruction of justice" offenses, there is no temporal-nexus requirement. Rather, the defendant's obstructive conduct may occur before any investigation or proceeding has begun, or after any investigation or proceeding has ended.

b. The Ninth Circuit drew a different conclusion from Chapter 73. While acknowledging that Section 1512(f)(1) expressly disclaims the need to show "a nexus to an ongoing or pending investigation or proceeding," *Valenzuela Gallardo IV*, 968 F.3d at 1065 & n.9, the Ninth Circuit viewed Section 1512 as "the exception that proves the rule," *id.* at 1066. But the offenses described in Section 1512 are hardly unique. Many other offenses throughout Chapter 73 also lack any temporal-nexus requirement, even without an explicit disclaimer. See pp. 27-31, *supra*. The offenses described in Section 1512, moreover, are paradigmatic "obstruction of justice" offenses—offenses, like "influencing" a "witness" or "potential witness," that the *Merriam-Webster's* definition provides as examples of what "obstruction of justice" "esp[ecially]" includes. *Merriam-Webster's* 337. Contrary to the Ninth Circuit's view, those offenses reflect the ordinary meaning of "obstruction of justice," and not unusual or non-illustrative exceptions.

The Ninth Circuit also dismissed as irrelevant any parts of Chapter 73, such as Sections 1518 and 1519, that post-dated the addition of "an offense relating to obstruction of justice" to the INA's aggravated-felony definition in April 1996. See *Valenzuela Gallardo IV*, 968 F.3d at 1065 & n.9. But statutes should not be read "in isolation"; rather, they should be understood "in the

context of the *corpus juris* of which they are a part, including later-enacted statutes." *Branch* v. *Smith*, 538 U.S. 254, 281 (2003) (plurality opinion); see *United States* v. *Fausto*, 484 U.S. 439, 453 (1988) ("[C]ourts frequently * * * interpret a statutory text in the light of surrounding texts that happen to have been subsequently enacted."). That canon applies with particular force here, given the lack of any indication that the ordinary meaning of obstruction of justice changed in the short period between April 1996 and the enactment of Sections 1518 and 1519 in August 1996 and July 2002, respectively. See Corporate and Criminal Fraud Accountability Act of 2002, Pub. L. No. 107-204, § 802(a), 116 Stat. 800 (enacting Section 1519); Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 245(a), 110 Stat. 2017-2018 (enacting Section 1518).

The Ninth Circuit additionally relied on this Court's decisions in *Pettibone* v. *United States*, 148 U.S. 197 (1893), and *Aguilar*, *supra*. See *Valenzuela Gallardo IV*, 968 F.3d at 1066. But this Court in *Pettibone* construed a statute that is no longer in effect. See *Marinello*, 138 S. Ct. at 1109. And when this Court construed its successor in *Aguilar*—the so-called "catchall provision" that appears today in Section 1503(a)—the Court held that it required a "'nexus'" in "time, causation, *or* logic" between the defendant's conduct and "judicial proceedings." 515 U.S. at 599-600 (emphasis added). As the Court has subsequently made clear, such a nexus need not be a temporal one. See *Marinello*, 138 S. Ct. at 1110 (construing a prohibition against obstructing the "due administration" of the Internal Revenue Code, 26 U.S.C. 7212(a), in light of *Aguilar* to require showing that an administrative proceeding "was pending at the time the

defendant engaged in the obstructive conduct or, at the least, was then *reasonably foreseeable* by the defendant") (emphasis added). This Court's decisions in *Pettibone* and *Aguilar* thus do not support construing Section 1101(a)(43)(S) as imposing any temporal-nexus requirement here.

3. The Model Penal Code

The American Law Institute adopted its influential MPC in 1962 and, as relevant here, the MPC's provisions about specific offenses—including witness tampering and accessory after the fact—were published with updated and expanded commentary in 1980. See 1 LaFave § 1.1(b), at 4 & n.9. The MPC and its commentary provide additional evidence about the meaning of obstruction of justice when Congress enacted Section 1101(a)(43)(S). Cf. *Taylor* v. *United States*, 495 U.S. 575, 598 n.8 (1990) (noting that the generic definition of burglary adopted by the Court "approximate[d]" the one "adopted by the drafters of the Model Penal Code"). That evidence points to the same conclusion as dictionaries and Chapter 73: that to qualify as obstruction of justice, an offense need not involve a pending investigation or proceeding.

a. Articles 240 through 243 of the MPC are devoted to what the MPC calls "offenses against public administration." MPC art. 242, intro. note, at 198. Those offenses include various forms of "obstruction of justice," several of which require a nexus with official proceedings. MPC § 241.6, comment. 1, at 163; MPC § 241.7, comment 1, at 175. For those offenses, the MPC defines "official proceeding" as "a proceeding heard *or which may be heard* before any legislative, judicial, administrative or other governmental agency or official authorized to take evidence under oath." MPC § 240.0(4), at 3

(emphasis added). Accordingly, such a proceeding must have the *potential* of coming into being, but it need not already be pending for the requisite nexus to be present.

The MPC's treatment of particular offenses confirms the lack of any temporal-nexus requirement. Section 241.6 of the MPC, for example, "deals with various forms of obstruction of justice involving witnesses and informants." MPC § 241.6, comment 1, at 163. It provides that "[a] person commits an offense if, believing that an official proceeding or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a witness or informant" to "testify or inform falsely" or "withhold any testimony, information, document or thing." MPC § 241.6(1), at 162-163.

The MPC's witness-tampering offense thus does not require that an official proceeding or investigation be "in fact pending." MPC § 241.6, comment 2, at 167. Rather, the offense requires only that "the defendant held the specified belief" that an official proceeding or investigation was "about to be instituted." *Ibid.* The accompanying commentary explains, moreover, that "[i]n assessing such belief," "the word 'about' * * * should be construed more in the sense of probability than of temporal relation." *Ibid.* "What is important is not that the actor believe that an official proceeding or investigation will begin within a certain span of time but rather that he recognize that his conduct threatens obstruction of justice." *Ibid.* As the commentary explains, the MPC dispensed with any temporal-nexus requirement in order "to eliminate the purposeless quibbling invited by laws requiring that a proceeding or investigation actually be pending or in fact be contemplated by authorities." MPC § 241.6, comment 2, at 166. "In this man-

ner," the commentary states, the MPC "focuses on the individual actor's culpability and not on external factors that may be irrelevant to the actor's aim of subverting the administration of justice." *Ibid.*

The MPC adopts the same approach to another "form of obstruction of justice": "tampering with or fabricating physical evidence." MPC § 241.7, comment 1, at 175. Section 241.7 of the MPC "applies to one who undertakes to impair the verity or availability of evidence in an official proceeding or investigation or who fabricates false evidence in order to mislead a public servant engaged in such proceeding or investigation." *Ibid.* As in the case of witness tampering, "[t]he prosecution must establish that the actor believed that an official proceeding or investigation was pending or about to be instituted but need not prove that such was in fact the case." MPC § 241.7, comment 2, at 178. As the commentary explains, that requirement ensures "a close relation between the proscribed conduct and the ultimate harm of obstruction of justice," without making the "liability of the actor turn on external factors wholly unrelated to his purpose of subverting the administration of justice." *Ibid.*; see *ibid.* ("It is important that the actor recognize that his conduct threatens obstruction of justice, but it is not critical that he believe that a proceeding or investigation will commence within a certain time.").

b. The MPC likewise recognizes "the common-law offense of accessory after the fact" as a form of obstruction of justice, even though that offense also requires no nexus with a pending investigation or proceeding. MPC § 242.3, comment 1, at 224. Under Section 242.3 of the MPC, being an accessory after the fact is subsumed within the offense of "hindering apprehension or prose-

cution of another," which is among the "offenses against public administration" that appear in Article 242 of the MPC "under the rubric of obstructing governmental operations." MPC art. 242, intro. note, at 198-199.

The commentary explains that although the MPC's hindering-apprehension-or-prosecution offense does "cover[] the common-law category of accessory after the fact," it "breaks decisively with the traditional concept that the accessory's liability derives from that of his principal." MPC art. 242, intro. note, at 199. "Thus," under Section 242.3, "one who harbors a murderer is not made a party to the original homicide but is convicted, as he should be, for an independent offense of obstruction of justice." *Ibid.* And in accordance with "the obstruction-of-justice theory on which the provision is based, Section 242.3 requires that the actor have a 'purpose to hinder the apprehension, prosecution, conviction or punishment of another for crime.'" MPC § 242.3, comment 3, at 228-229. It is that "objective to obstruct"—not any temporal nexus with an investigation or proceeding—that makes the offense an "obstruction of justice" in the view of the MPC. MPC § 242.3, comment 3, at 226.

4. State criminal codes

Although a "multijurisdictional analysis" of "state criminal codes" is "not required by the categorical approach," such analysis can provide "useful context." *Esquivel-Quintana*, 581 U.S. at 396 n.3. Here, evidence from state criminal codes confirms that when Congress added "an offense relating to obstruction of justice" to the INA's aggravated-felony definition in 1996, "obstruction of justice" was commonly understood to encompass offenses that did not involve a nexus with a pending investigation or proceeding.

a. In 1996, most jurisdictions, consistent with the MPC, treated witness tampering or intimidation as a form of obstruction of justice. Thus, in 8 States and the District of Columbia, witness tampering or intimidation appeared in a provision prohibiting the "obstruction" or "obstructing" of "justice" or "the course of justice."[8] In 4 other States, witness tampering or intimidation appeared in a part of the criminal code with "Obstruction" or "Obstructing" in the title.[9] And in 30 more States, witness tampering or intimidation appeared in a part of the code entitled "offenses against public administration" or something similar.[10]

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[8] See D.C. Code § 22-722 (1996); Ind. Code Ann. § 35-44-3-4 (1996); La. Rev. Stat. Ann. § 14:130.1 (1996); Md. Code Ann. art. 27, § 26 (1996); Miss. Code Ann. § 97-9-55 (1996); Nev. Rev. Stat. Ann. § 199.230 (Westlaw 1996); Vt. Stat. Ann. tit. 13, § 3015 (1996); Va. Code Ann. § 18.2-460 (1996); W. Va. Code § 61-5-27 (1996).

This brief's references to versions of state criminal codes in effect in 1996 are to the versions that are available on Lexis, unless otherwise noted.

[9] See N.C. Gen. Stat. § 14-226 (1996) ("Obstructing Justice"); R.I. Gen. Laws § 11-32-5 (1996) (same); Or. Rev. Stat. § 162.285 (Westlaw 1996) ("Obstructing Governmental Administration"); S.D. Codified Laws § 22-11-19 (1996) ("Obstruction of the Administration of Government").

[10] See Ala. Code § 13A-10-124 (1996) ("Offenses Against Public Administration"); Alaska Stat. § 11.56.540, .900(1), and .900(6) (1996) (same); Del. Code Ann. tit. 11, § 1263 (1996) (same); Ga. Code Ann. § 16-10-93 (1996) (same); Haw. Rev. Stat. § 710-1072 (1996) (same); Mont. Code Ann. § 45-7-206 (Westlaw 1996) (same); N.Y. Penal Law § 215.17 (1996) (same); 18 Pa. Cons. Stat. § 4952 (1996) (same); Tex. Penal Code Ann. § 36.05 (Westlaw 1996) (same); Wyo. Stat. Ann. § 6-5-305 (1996); Ohio Rev. Code Ann. §§ 2921.03 and .04 (Westlaw 1996) ("Offenses Against Justice and Public Administration"); Mo. Rev. Stat. § 575.270 (1996) ("Offenses Against the Administration of Justice"); Minn. Stat. § 609.498 (1996) ("Crimes Against the Admin-

Moreover, 28 States and the District of Columbia prohibited witness tampering or intimidation in at least some circumstances where there was no pending investigation or proceeding. In 6 States, the relevant statute specified that a proceeding need not be pending.[11] In 10

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istration of Justice"); Cal. Penal Code § 136.1 (1996) ("Crimes Against Public Justice"); Mass. Ann. Laws ch. 268, § 13B (1996) (same); Okla. Stat. tit. 21, § 455 (1996) (same); S.C. Code Ann. § 16-9-340 (1996) ("Offenses Against Public Justice"); Ark. Code Ann. § 5-53-110 (1995) ("Offenses Against the Administration of Government"); Utah Code Ann. § 76-8-508 (1996) (same); Ky. Rev. Stat. Ann. § 524.040 (1996) ("Interference with Judicial Administration"); Colo. Rev. Stat. § 18-8-707 (1996) ("Offenses—Governmental Operations"); Tenn. Code Ann. § 39-16-507 (1996) ("Interference with Government Operations"); Neb. Rev. Stat. § 28-919 (1996) ("Offenses Involving Integrity and Effectiveness of Government Operation"); Ariz. Rev. Stat. § 13-2804 (1996) ("Interference with Judicial and Other Proceedings"); Iowa Code § 720.4 (1996) ("Interference with Judicial Process"); Conn. Gen. Stat. § 53a-151 (1996) ("Bribery, Offenses Against the Administration of Justice and Other Related Offenses"); Wash. Rev. Code § 9A.72.120 (1996) ("Perjury and Interference with Official Proceedings"); 720 Ill. Comp. Stat. 5/32-4a (1996) ("Offenses Affecting Governmental Functions"); Kan. Stat. Ann. § 21-3832 (1996) ("Crimes Affecting Governmental Functions"); N.J. Rev. Stat. § 2C:28-5 (1996) ("Offenses Involving Public Administration Officials").

[11] See Alaska Stat. §§ 11.56.540 and .900(6)(B) (1996) (defining "witness" to include "a person who the defendant believes may be called as a witness in an official proceeding, present or future"); Fla. Stat. § 914.22(3)(a) (1996) (providing that an "official proceeding need not be pending or about to be instituted at the time of the offense"); Ky. Rev. Stat. Ann. § 524.040(2)(a) (1996) (same); N.D. Cent. Code § 12.1-09-01(3)(c) (1995) (similar); Vt. Stat. Ann. tit. 13, § 3015 (1996) (protecting witnesses in connection with matters "already heard, presently being heard or to be heard"); Wis. Stat. §§ 940.41(3), .42, and .43 (1996) (protecting persons "likely to be called as a witness, whether or not any action or proceeding has as yet been commenced").

States, the offense required only a belief that an official proceeding or investigation was pending or about to be instituted,[12] a belief that an official proceeding or investigation was pending or will be instituted,[13] or a belief that a witness may or will be called.[14] In 3 States, the relevant statute applied to "prospective" witnesses[15] or persons "likely to become a witness";[16] and in 1 of those States, 9 others, and the District of Columbia, the relevant statute prohibited preventing a person from reporting a crime to the authorities in the first place (*i.e.*, when there often is not any investigation).[17]

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[12] See Conn. Gen. Stat. § 53a-151 (1996); Mont. Code Ann. § 45-7-206 (Westlaw 1996); Neb. Rev. Stat. § 28-919 (1996); N.H. Rev. Stat. Ann. § 641:5 (1996); N.J. Rev. Stat. § 2C:28-5 (1996); Utah Code Ann. § 76-8-508 (1996).

[13] See Me. Rev. Stat. tit. 17-A, § 454(1) (1996).

[14] See Colo. Rev. Stat. § 18-8-707 (1996) (as discussed in *People* v. *Lancaster*, 519 P.3d 1053, 1060 (Colo. App. 2022)); Iowa Code § 720.4 (1996) (as discussed in *State* v. *Welborn*, 443 N.W.2d 72, 74 (Iowa Ct. App. 1989)); Or. Rev. Stat. § 162.285 (Westlaw 1996) (as discussed in *State* v. *Bailey*, 213 P.3d 1240, 1247 (Or. 2009)).

[15] See Tenn. Code Ann. § 39-16-507 (1996) (as discussed in *State* v. *Bikrev*, No. M2001-2513-CCA-R3-CD, 2003 WL 1733580, at *6 (Tenn. Crim. App. Apr. 2, 2003)); Tex. Penal Code Ann. § 36.05 (Westlaw 1996); *Ortiz* v. *State*, 93 S.W.3d 79, 86 (Tex. Crim. App. 2002) (interpreting "prospective witness" in similarly phrased witness-retaliation statute).

[16] See N.M. Stat. Ann. § 30-24-3(A)(1) and (2) (1996) (as discussed in *State* v. *Clements*, 215 P.3d 54, 58 (N.M. Ct. App. 2009)).

[17] See Cal. Penal Code § 136.1(b)(1) (1996); D.C. Code § 22-722(a)(3)(B) (1996); Kan. Stat. Ann. § 21-3832(a)(2)(A) (1996); La. Rev. Stat. Ann. § 14:130.1(A)(2)(e) (1996); Minn. Stat. § 609.498(1)(d) and (2)(c) (1996); Mo. Rev. Stat. § 575.270(2) (1996); N.M. Stat. Ann. § 30-24-3(A)(3) (1996); N.Y. Penal Law § 215.17 (1996); Ohio Rev. Code Ann. § 2921.04(A) and (B) (Westlaw 1996); 18 Pa. Cons. Stat. § 4952(A)(1) (1996); Wash. Rev. Code § 9A.72.120(1)(c) (1996). Some

By contrast, there was a pending-proceeding or -investigation requirement in only 6 States.[18] Of the remaining 16 States, one (Michigan) had no relevant statute at all, and the other 15 had statutes whose meaning on this issue is not apparent.[19]

All told, 29 of the 35 jurisdictions with statutes whose meaning on this issue can be discerned did not impose a temporal-nexus requirement for witness-tampering and -intimidation offenses in certain contexts. Thus, state law reinforces what federal criminal law and the MPC demonstrate about the generic meaning of an "obstruction of justice" offense.

b. In 1996, the laws of all 50 States and the District of Columbia made it a crime to commit an accessory-after-the-fact-type offense.[20] Consistent with the common-

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of these States required a pending proceeding in other contexts. See, *e.g.*, Mo. Rev. Stat. § 575.270(1) (1996); N.Y. Penal Law § 215.13 (1996); Ohio Rev. Code Ann. § 2921.04(A) and (B) (Westlaw 1996) (distinguishing witnesses from victims).

[18] See Ga. Code Ann. § 16-10-93 (1996); 720 Ill. Comp. Stat. 5/32-4a (1996); Md. Code Ann. art. 27, § 26 (1996) (as discussed in *State* v. *Pagano*, 669 A.2d 1339, 1341 (Md. 1996)); Miss. Code Ann. § 97-9-55 (1996); S.C. Code Ann. § 16-9-340 (1996) (as discussed in *Taghivand* v. *Rite Aid Corp.*, 768 S.E.2d 385, 387 (S.C. 2015)); W. Va. Code § 61-5-27 (1996).

[19] See Ala. Code § 13A-10-124 (1996); Ariz. Rev. Stat. § 13-2804 (1996); Ark. Code Ann. § 5-53-110 (1995); Del. Code Ann. tit. 11, §§ 1263 and 3532 (1996); Haw. Rev. Stat. § 710-1072 (1996); Idaho Code Ann. § 18-2604 (1996); Ind. Code Ann. § 35-44-3-4 (1996); Mass. Ann. Laws ch. 268, § 13B (1996); Nev. Rev. Stat. Ann. § 199.230 and .240 (Westlaw 1996); N.C. Gen. Stat. § 14-226 (1996); Okla. Stat. tit. 21, § 455 (1996); R.I. Gen. Laws § 11-32-5 (1996); S.D. Codified Laws § 22-11-19 (1996); Va. Code Ann. § 18.2-460 (1996); Wyo. Stat. Ann. § 6-5-305 (1996).

[20] See Ala. Code § 13A-10-42 to -44 (1996); Alaska Stat. § 11.56.770 (1996); Ariz. Rev. Stat. § 13-2510 to -2512 (1996); Ark.

law conception of the crime, no jurisdiction's definition of the offense required a nexus to a pending investigation or proceeding.

Nevertheless, in a "great majority" of States, the offense was still "described to reflect its true character as a crime involving interference with the process of government." 2 LaFave § 6.9(a), at 171. Thus, 3 States called the offense "obstructing justice."[21] Like the MPC,

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Code Ann. § 5-54-105 (1995); Cal. Penal Code § 32 (1996); Colo. Rev. Stat. § 18-8-105 (1996); Conn. Gen. Stat. § 53a-165 (1996); Del. Code Ann. tit. 11, § 1244 (1996); D.C. Code § 22-106 (1996); Fla. Stat. § 777.03 (1996); Ga. Code Ann. § 16-10-50 (1996); Haw. Rev. Stat. §§ 710-1028 to -1030 (1996); Idaho Code Ann. § 18-205 (1996); 720 Ill. Comp. Stat. 5/31-5 (1996); Ind. Code Ann. § 35-44-3-2 (1996); Iowa Code § 703.3 (1996); Kan. Stat. Ann. § 21-3812 (1996); Ky. Rev. Stat. Ann. §§ 520.110 to .130 (1996); La. Rev. Stat. Ann. § 14:25 (1996); Me. Rev. Stat. tit. 17-A, § 753 (1996); Mass. Ann. Laws ch. 274, § 4 (1996); Minn. Stat. § 609.495 (1996); Miss. Code Ann. § 97-1-5 (1996); Mo. Rev. Stat. § 575.030 (1996); Mont. Code Ann. § 45-7-303 (Westlaw 1996); Neb. Rev. Stat. § 28-204 (1996); Nev. Rev. Stat. Ann. § 195.030 (Westlaw 1996); N.H. Rev. Stat. Ann. § 642:3 (1996); N.J. Rev. Stat. § 2C:29-3 (1996); N.M. Stat. Ann. § 30-22-4 (1996); N.Y. Penal Law §§ 205.50 to .65 (1996); N.C. Gen. Stat. § 14-7 (1996); N.D. Cent. Code § 12.1-08-03 (1995); Ohio Rev. Code Ann. § 2921.32 (Westlaw 1996); Okla. Stat. tit. 21, § 440 (1996); Or. Rev. Stat. § 162.325 (Westlaw 1996); 18 Pa. Cons. Stat. § 5105 (1996); R.I. Gen. Laws § 11-1-4 (1996); S.C. Code Ann. § 16-1-55 (1996); S.D. Codified Laws § 22-3-5 (1996); Tenn. Code Ann. § 39-11-411 (1996); Tex. Penal Code Ann. § 38.05 (Westlaw 1996); Utah Code Ann. § 76-8-306 (1996); Vt. Stat. Ann. tit. 13, § 5 (1996); Va. Code Ann. § 18.2-19 (1996); Wash. Rev. Code § 9A.76.050 (1996); W. Va. Code § 61-11-6 (1996); Wis. Stat. § 946.47 (1996); Wyo. Stat. Ann. § 6-5-202 (1996). In 2 States, being an accessory after the fact was a common-law offense that did not appear in the code. See *State* v. *Hawkins*, 604 A.2d 489, 496 (Md. 1992); *People* v. *Perry*, 594 N.W.2d 477, 481 (Mich. 1999).

[21] See Mont. Code Ann. § 45-7-303 (Westlaw 1996); Ohio Rev. Code Ann. § 2921.32 (Westlaw 1996); Utah Code Ann. § 76-8-306 (1996).

18 States referred to the offense as "hindering" one or more of the following: "prosecution," "apprehension," "punishment," or "law enforcement."[22] And 9 States described the offense as a form of "harboring," "aiding," or "assisting" a criminal.[23]

The remaining 20 States and the District of Columbia simply referred to the offense as an "accessory" offense.[24] But that traditional title did not disguise the

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[22] See Ala. Code § 13A-10-43 and -44 (1996) ("hindering prosecution"); Alaska Stat. § 11.56.770 (1996) (same); Ariz. Rev. Stat. § 13-2511 and -2512 (1996) (same); Conn. Gen. Stat. § 53a-165 (1996) (same); Del. Code Ann. tit. 11, § 1244 (1996) (same); Haw. Rev. Stat. §§ 710-1028 to -1030 (1996) (same); Mo. Rev. Stat. § 575.030 (1996) (same); N.Y. Penal Law §§ 205.50 to .65 (1996) (same); Or. Rev. Stat. § 162.325 (Westlaw 1996) (same); Ark. Code Ann. § 5-54-105 (1995) ("hindering apprehension or prosecution"); Me. Rev. Stat. tit. 17-A, § 753 (1996) (same); N.H. Rev. Stat. Ann. § 642:3 (1996) (same); N.J. Rev. Stat. § 2C:29-3 (1996) (same); 18 Pa. Cons. Stat. § 5105 (1996) (same); Tex. Penal Code Ann. § 38.05 (Westlaw 1996) (same); Ky. Rev. Stat. Ann. §§ 520.120 and .130 (1996) ("hindering prosecution or apprehension"); Ga. Code Ann. § 16-10-50 (1996) ("hindering apprehension or punishment"); N.D. Cent. Code § 12.1-08-03 (1995) ("hindering law enforcement").

[23] See N.M. Stat. Ann. § 30-22-4 (1996) ("harboring or aiding a felon"); Okla. Stat. tit. 21, § 440 (1996) ("harboring criminals and fugitives"); R.I. Gen. Laws § 11-1-4 (1996) ("harboring criminal"); Wis. Stat. § 946.47 (1996) ("harboring or aiding felons"); 720 Ill. Comp. Stat. 5/31-5 (1996) ("concealing or aiding a fugitive"); Ind. Code Ann. § 35-44-3-2 (1996) ("assisting a criminal"); Wash. Rev. Code § 9A.76.050 (1996) ("rendering criminal assistance"); Kan. Stat. Ann. § 21-3812 (1996) ("aiding a felon or person charged with a felony"); Minn. Stat. § 609.495 (1996) ("aiding an offender").

[24] See Cal. Penal Code § 32 (1996); Colo. Rev. Stat. § 18-8-105 (1996); D.C. Code § 22-106 (1996); Fla. Stat. § 777.03 (1996); Idaho Code Ann. § 18-205 (1996); Iowa Code § 703.3 (1996); La. Rev. Stat. Ann. § 14:25 (1996); Mass. Ann. Laws ch. 274, § 4 (1996); Miss. Code Ann. § 97-1-5 (1996); Neb. Rev. Stat. § 28-204 (1996); Nev. Rev. Stat.

essential nature of the offense as the "hindrance of public justice." 4 Blackstone 38. And even among those jurisdictions, one State placed the offense in a part of the code entitled "Obstruction of Public Justice,"[25] another placed it in an article of the code entitled "Hindering Government Operations,"[26] and some courts expressly characterized the offense in terms of "obstruct[ion]" of "justice."[27]

5. The federal sentencing guidelines

The federal sentencing guidelines at the time of Section 1101(a)(43)(S)'s enactment likewise reflected the understanding that an offense need not involve a pending investigation or proceeding in order to qualify as a form of obstruction of justice. At that time, the guideline provision applicable to most Chapter 73 offenses—including many that lack a temporal-nexus requirement, such as Sections 1510(a), 1512(c), and 1513, see

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Ann. § 195.030 (Westlaw 1996); N.C. Gen. Stat. § 14-7 (1996); S.C. Code Ann. § 16-1-55 (1996); S.D. Codified Laws § 22-3-5 (1996); Tenn. Code Ann. § 39-11-411 (1996); Vt. Stat. Ann. tit. 13, § 5 (1996); Va. Code Ann. § 18.2-19 (1996); W. Va. Code § 61-11-6 (1996); Wyo. Stat. Ann. § 6-5-202 (1996); *Hawkins*, 604 A.2d at 496 (Md.); *Perry*, 594 N.W.2d at 481 (Mich.).

[25] See Colo. Rev. Stat. § 18-8-105 (1996).

[26] See Wyo. Stat. Ann. § 6-5-202 (1996).

[27] See, *e.g.*, *Stevenson* v. *United States*, 522 A.2d 1280, 1282-1283 (D.C. 1987) ("The gist of being an accessory after the fact essentially lies in obstructing justice."); *Staten* v. *State*, 519 So. 2d 622, 626 (Fla. 1988) ("The accessory after the fact is no longer treated as a party to the crime but has come to be recognized as the actor in a separate and independent crime, obstruction of justice."); *State* v. *Petry*, 273 S.E.2d 346, 349 (W. Va. 1980) ("[T]he accessory after the fact, by virtue of his involvement after the completion of the felony, is not treated as a participant in the felony but rather as one who obstructed justice.").

pp. 26-31, *supra*—was Sentencing Guidelines § 2J1.2 (1995). That provision was entitled "Obstruction of Justice," *ibid.* (emphasis omitted), reflecting the understanding that those offenses were each a form of obstruction of justice, even if they did not require a nexus to a pending investigation or proceeding.

The sentencing guidelines likewise treated being an accessory after the fact under 18 U.S.C. 3—an offense that undisputedly does not include a temporal-nexus requirement—as a form of obstruction of justice. For example, in addressing when an enhancement for "further obstruction" would be appropriate, the sentencing guidelines referred to being an accessory after the fact as an "obstruction offense." Sentencing Guidelines § 3C1.1, comment. (n.6) (1995). In addition, they specified that Sentencing Guidelines § 2X3.1 (1995)—the "Accessory After the Fact" guideline—should be applied not only to offenses under 18 U.S.C. 3, but also to certain Chapter 73 offenses that "involved obstructing the investigation or prosecution of a criminal offense." Sentencing Guidelines § 2J1.2(c)(1) (1995); see *id.* § 2X3.1, comment. The guidelines thus suggested an equivalence between such obstruction and being an accessory after the fact—providing further evidence that obstruction of justice was not understood to require a nexus to a pending investigation or proceeding.

C. At A Minimum, An Offense "Relating To" Obstruction Of Justice Need Not Involve A Temporal Nexus

For the reasons above, the phrase "obstruction of justice" unambiguously encompasses offenses that lack a temporal-nexus requirement. Indeed, the offenses that Cordero-Garcia and Pugin committed—dissuading a witness from reporting a crime and being an accessory after the fact—fall within the heartland of what the

phrase "obstruction of justice" was commonly understood to mean in 1996.

Section 1101(a)(43)(S), however, encompasses more than just "obstruction of justice" itself. 8 U.S.C. 1101(a)(43)(S). Section 1101(a)(43)(S) reaches any "offense *relating to* obstruction of justice." *Ibid.* (emphasis added). The ordinary meaning of the phrase "relating to" "is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.'" *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting *Black's Law Dictionary* 1158 (5th ed. 1979)); see *Black's Law Dictionary* 1288 (6th ed. 1990) (providing the same definition of "relate"). "Congress characteristically employs the phrase to reach any subject that has 'a connection with, or reference to,' the topics the statute enumerates." *Coventry Health Care of Mo., Inc.* v. *Nevils*, 581 U.S. 87, 96 (2017) (quoting *Morales*, 504 U.S. at 384).

Even if "obstruction of justice" were construed to reach only those efforts to interfere with the process of justice that overlap in time with a pending investigation or proceeding, the broader category of offenses "relating to" obstruction of justice should be understood to encompass at least those offenses that share the same "objective to obstruct justice." MPC § 242.3, comment 2, at 226. Here, although the offenses that Cordero-Garcia and Pugin committed did not categorically require a temporal overlap with a pending investigation or proceeding, they did require that "the actor have a 'purpose to hinder the apprehension, prosecution, conviction or punishment of another for crime.'" MPC § 242.3, comment 3, at 229; see pp. 6, 11-12, *supra*. That mens rea element should be enough to bring their of-

fenses at least "into association with" obstruction of justice. *Morales* 504 U.S. at 383 (citation omitted).

D. In Any Event, The Board's Reasonable Rejection Of A Temporal-Nexus Requirement Is Entitled To Deference

The foregoing establishes that "an offense relating to obstruction of justice" unambiguously does not require a nexus to a pending investigation or proceeding. That should be the end of the matter. See *Esquivel-Quintana*, 581 U.S. at 397-398. In any event, any ambiguity about whether a temporal nexus is required should be resolved by deferring to the Board's reasonable conclusion that Section 1101(a)(43)(S) does not impose such a requirement. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

1. Ever since the Board first addressed the issue in 1997—the year after Congress added "an offense relating to obstruction of justice" to the INA's aggravated-felony definition, see p. 4, *supra*—the Board has consistently interpreted the phrase to encompass offenses that do not require a nexus to a pending investigation or proceeding.

In re Batista-Hernandez, 21 I. & N. Dec. 955 (1997) (en banc), was the Board's first precedent on the issue. The noncitizen in that case had a conviction under 18 U.S.C. 3, which provides: "Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact." *Ibid.*; see *Batista-Hernandez*, 21 I. & N. at 956. The Board found "that the wording of 18 U.S.C. § 3 itself indicates its relation to obstruction of justice, for the statute criminalizes actions knowingly taken to 'hinder or prevent [another's] apprehension, trial or punishment.'" 21 I. & N.

at 962 (brackets in original) (quoting 18 U.S.C. 3). The Board also noted the D.C. Circuit's recognition in *Barlow* that "the nature of being an accessory after the fact lies essentially in obstructing justice and preventing the arrest of the offender." *Ibid.* Thus, even though being an accessory after the fact need not involve any pending investigation or proceeding, the Board held that the offense is one relating to obstruction of justice under Section 1101(a)(43)(S). *Ibid.*

In *In re Espinoza-Gonzalez*, 22 I. & N. Dec. 889 (1999) (en banc), the Board reaffirmed the holding of *Batista-Hernandez*. *Id.* at 894-895. The noncitizen in *Espinoza-Gonzalez* had a conviction under 18 U.S.C. 4, which provides that "[w]hoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be" guilty of misprision of felony. *Ibid.*; see *Espinoza-Gonzalez*, 22 I. & N. Dec. at 890. The Board in *Espinoza-Gonzalez* adopted an interpretation of "obstruction of justice" that tracked the *Merriam-Webster's* definition: "an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice." 22 I. & N. Dec. at 896. The Board then held that, unlike being an accessory after the fact, the offense of misprision of felony lacks that "critical element": "Although misprision of a felony has as an element the affirmative concealment of the felony, there is, unlike § 3, nothing in § 4 that references the specific purpose for which the concealment must be undertaken." *Id.* at 894. The Board emphasized that it is "[t]he specific purpose of hindering the process of justice" that "brings the federal 'accessory after the fact' crime within the general ambit of

offenses that fall under the 'obstruction of justice' designation." *Id.* at 894-895. Without that "critical element," the Board concluded, misprision was not an offense relating to obstruction of justice. *Id.* at 896.

In *In re Valenzuela Gallardo*, 25 I. & N. Dec. 838 (2012) (*Valenzuela Gallardo I*), the Board reiterated its view that the "element" of an "affirmative and intentional attempt, with specific intent, to interfere with the process of justice" is what "demarcates the category of crimes constituting obstruction of justice." *Id.* at 841. The noncitizen in that case had been convicted of being an accessory after the fact, in violation of Cal. Penal Code § 32. *Valenzuela Gallardo I*, 25 I. & N. Dec. at 839. The Board noted that the "provisions of [that California] statute are closely analogous, if not functionally identical, to those in 18 U.S.C. § 3." *Id.* at 841. "Critically," the Board observed, "both statutes include the element of an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice." *Ibid.* The Board therefore concluded that "the California accessory offense of which the [noncitizen] was convicted, like the Federal accessory after the fact crime addressed in *Matter of Batista-Hernandez*, is an offense 'relating to obstruction of justice.'" *Id.* at 842 (citation omitted).

In expressly "reaffirm[ing]" its decision in *Batista-Hernandez*, the Board rejected what it regarded as a misreading of its decision in *Espinoza-Gonzalez* by the Ninth Circuit. *Valenzuela Gallardo I*, 25 I. & N. Dec. at 844; see *id.* at 842. The Board noted that in *Trung Thanh Hoang* v. *Holder*, 641 F.3d 1157 (2011), the Ninth Circuit had read the Board's decision in *Espinoza-Gonzalez* to "indicate[] that the [Board] now concludes that accessory after the fact is an obstruction of justice

crime *when* it interferes with an ongoing proceeding or investigation." *Valenzuela Gallardo I*, 25 I. & N. Dec. at 842 (second set of brackets in original) (quoting *Trung Thanh Hoang*, 641 F.3d at 1164). The Board in *Valenzuela Gallardo I* clarified, however, that its decision in *Espinoza-Gonzalez* had "not" held that "obstruction offenses must involve interference with an *ongoing* investigation or proceeding." *Ibid.* "Rather," the Board explained, the standard "was that an obstruction offense must include 'the critical element of an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice.'" *Ibid.* (quoting *Espinoza-Gonzalez*, 22 I. & N. Dec. at 894).

After the Ninth Circuit incorrectly rejected that standard as raising "grave doubts about whether [Section 1101(a)(43)(S)] is unconstitutionally vague," *Valenzuela Gallardo* v. *Lynch*, 818 F.3d 808, 819 (2016) (*Valenzuela Gallardo II*), the Board took "the opportunity to clarify" its interpretation of an offense relating to obstruction of justice in *In re Valenzuela Gallardo*, 27 I. & N. Dec. 449, 451 (2018) (*Valenzuela Gallardo III*). After reviewing the offenses described in Chapter 73 of the federal criminal code, the Board adhered to its view that "Congress did not intend interference in an ongoing or pending investigation or proceeding to be a necessary element of an 'offense relating to obstruction of justice.'" *Id.* at 456. The Board then clarified that "an offense relating to obstruction of justice" encompasses "offenses covered by chapter 73 of the Federal criminal code or any other Federal or State offense that involves (1) an affirmative and intentional attempt (2) that is motivated by a specific intent (3) to interfere either in an investigation or proceeding that is ongoing, pending, or reasonably foreseeable by the defendant, or in an-

other's punishment resulting from a completed proceeding." *Id.* at 460.

In so doing, the Board once again "reaffirm[ed] [its] holding in *Batista-Hernandez*." *Valenzuela Gallardo III*, 27 I. & N. Dec. at 461 n.17. The Board explained that "when [Section 1101(a)(43)(S)] was enacted, there was a consensus among the Federal courts, and the drafters of the Federal Sentencing Guidelines and the Model Penal Code, that accessory after the fact under § 3 was a form of obstruction of justice." *Id.* at 458. The Board further explained that the offense of being an accessory after the fact "requires a violator to aid the principal, with knowledge that the principal has committed a crime, and with the specific intent to interfere in the principal's arrest, trial, conviction, or punishment." *Id.* at 461. "In other words," the Board stated, "a violator must have the specific intent to interfere either in an ongoing, pending, or reasonably foreseeable investigation or proceeding, or in another's punishment resulting from a completed proceeding." *Ibid.* The Board therefore held that being an accessory after the fact "satisfie[d] the elements of [its] clarified definition" of an offense relating to obstruction of justice. *Id.* at 461 n.17.

Thus, in the decades since Congress added "an offense relating to obstruction of justice" to the INA's aggravated-felony definition, the Board has consistently interpreted the phrase to encompasses offenses that lack a temporal-nexus requirement. At a minimum, that interpretation is a reasonable one that would be entitled to *Chevron* deference. See pp. 18-46, *supra*.[28]

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[28] In this Court, Pugin does not dispute that being an accessory after the fact under Virginia law satisfies the Board's "clarified definition" of an offense relating to obstruction of justice articulated in *Valenzuela Gallardo III*, 27 I. & N. Dec. at 461 n.17. See *Pugin*

2. In his petition for a writ of certiorari, Pugin contended that any ambiguity should be resolved not by applying *Chevron*, but rather by applying one of two lenity-based canons—the canon that ambiguities in "deportation statutes" should be construed in favor of the noncitizen, *Pugin* Pet. 33 (citation omitted), or the canon that ambiguities in "criminal statutes" should be construed in favor of the defendant, *id.* at 33-34. Pugin asked this Court to grant review of the question "[w]hether, assuming that the phrase 'offense relating to obstruction of justice' is deemed ambiguous, courts should afford *Chevron* deference to the [Board's] interpretation of that phrase." *Id.* at i. But instead of granting certiorari on the questions presented in Pugin's petition, the Court granted certiorari limited to the question that the Court formulated. 143 S. Ct. 645; see Gov't Cert. Resp. Br. in *Pugin* 17 (noting the absence of a circuit split on whether, "if the phrase 'offense relating to obstruction of justice' is ambiguous, the *Chevron* framework does not apply at all").

In any event, the question whether *Chevron* (or some other canon affecting statutory interpretation) should apply is a matter of "congressional intent." *City of Arlington* v. *FCC*, 569 U.S. 290, 296 (2013). Here, "Congress has charged the Attorney General with administering the INA," *Negusie* v. *Holder*, 555 U.S. 511, 516-517 (2009), and instructed that the "determination and

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Pet. App. 33a n.18 (holding that Pugin "did not exhaust" any argument that Virginia law "does not necessarily require a specific intent to reduce the likelihood of a criminal punishment resulting from an ongoing or reasonably foreseeable proceeding"). Nor does Cordero-Garcia dispute that dissuading a witness under California law satisfies the Board's definition. See Cordero-Garcia C.A. Br. 10 (contending only that *Valenzuela Gallardo III* had been "overruled" by the Ninth Circuit's intervening decision in *Valenzuela Gallardo IV*).

ruling by the Attorney General with respect to all questions of law shall be controlling," 8 U.S.C. 1103(a)(1). Congress has thus made clear that any ambiguity in the INA should be resolved, "first and foremost," by the Attorney General, not by principles of lenity. *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996). And because the Attorney General, in turn, has vested his interpretive authority in the Board, see *Negusie*, 555 U.S. at 517, this Court has repeatedly held that principles of *Chevron* deference apply when the Board interprets the INA. See, *e.g.*, *Scialabba* v. *Cuellar de Osorio*, 573 U.S. 41, 57 (2014) (plurality opinion); *id.* at 79 (Roberts, C.J., concurring in the judgment); *Holder* v. *Martinez Gutierrez*, 566 U.S. 583, 591-598 (2012); *Negusie*, 555 U.S. at 517; *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999). Indeed, "[j]udicial deference in the immigration context is of special importance, for executive officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" *Negusie*, 555 U.S. at 517 (citation omitted).

Of course, the Attorney General has no delegated authority to speak "with the force of law" when interpreting state law or the federal criminal code. *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001). But these cases concern the meaning of a phrase in the INA, 8 U.S.C. 1101(a)(43)(S), not any other law; Congress has authorized the Attorney General to speak with the force of law when interpreting the INA, 8 U.S.C. 1103(a)(1); and the Board exercised that authority in holding that Section 1101(a)(43)(S) does not impose a temporal-nexus requirement, see pp. 46-50, *supra*.[29] Accordingly,

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[29] That distinguishes this case from *Leocal* v. *Ashcroft*, 543 U.S. 1, (2004), which concerned the federal criminal code's definition of "crime of violence," 18 U.S.C. 16(b), which is incorporated into the

the Board's consistent interpretation of the obstruction-of-justice component of the aggravated-felony definition is one of the interpretative tools that must be applied *before* determining whether a provision is so grievously ambiguous as to trigger any principle of lenity. See *Shular* v. *United States*, 140 S. Ct. 779, 787-789 (2020) (Kavanaugh, J., concurring).

CONCLUSION

The judgment of the court of appeals in *Pugin* v. *Garland*, No. 22-23, should be affirmed. The judgment of the court of appeals in *Garland* v. *Cordero-Garcia*, No. 22-331, should be reversed.

Respectfully submitted.

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INA's aggravated-felony definition, 8 U.S.C. 1101(a)(43)(F). See *Leocal*, 543 U.S. at 11-12 n.8 (emphasizing that "§ 16 is a criminal statute").

APPENDIX

TABLE OF CONTENTS

1. 8 U.S.C. 1101 provides in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(43) The term "aggravated felony" means—

* * * * *

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

* * * * *

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

* * * * *

2. 8 U.S.C. 1227 provides in pertinent part:

Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * * * *

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.

(ii) Multiple criminal convictions

Any alien who is convicted of two or more crimes in a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted on an aggravated felony at any time after admission is deportable.

* * * * *

3. 18 U.S.C. 1512 provides:

Tampering with a witness, victim, or an Informant

(a)(1) Whoever kills or attempts to kill another person, with intent to—

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to—

(A) influence, delay, or prevent the testimony of any person in an official proceeding;

(B) cause or induce any person to—

(i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;

(iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(iv) be absent from an official proceeding to which that person has been summoned by legal process; or

(C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(3) The punishment for an offense under this subsection is—

(A) in the case of a killing, the punishment provided in sections 1111 and 1112;

(B) in the case of—

(i) an attempt to murder; or

(ii) the use or attempted use of physical force against any person; imprisonment for not more than 30 years; and

(C) in the case of the threat of use of physical force against any person, imprisonment for not more than 20 years.

(b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a viola-

tion of conditions of probation[1] supervised release,,[1] parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than 20 years, or both.

(c) Whoever corruptly—

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.

(d) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation[1] supervised release,,[1] parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or in-

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[1] So in original.

stituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined under this title or imprisoned not more than 3 years, or both.

(e) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(f) For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(g) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Gov-

ernment or serving the Federal Government as an adviser or consultant.

(h) There is extraterritorial Federal jurisdiction over an offense under this section.

(i) A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.

(j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(k) Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

4. Cal. Penal. Code § 136.1 provides:

Intimidation of witnesses and victims; offenses; penalties; enhancement; aggravation

(a) Except as provided in subdivision (c), any person who does any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison:

(1) Knowingly and maliciously prevents or dissuades any witness or victim from attending or giving

testimony at any trial, proceeding, or inquiry authorized by law.

(2) Knowingly and maliciously attempts to prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.

(3) For purposes of this section, evidence that the defendant was a family member who interceded in an effort to protect the witness or victim shall create a presumption that the act was without malice.

(b) Except as provided in subdivision (c), every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison:

(1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge.

(2) Causing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof.

(3) Arresting or causing or seeking the arrest of any person in connection with that victimization.

(c) Every person doing any of the acts described in subdivision (a) or (b) knowingly and maliciously under any one or more of the following circumstances, is guilty of a felony punishable by imprisonment in the state

prison for two, three, or four years under any of the following circumstances:

(1) Where the act is accompanied by force or by an express or implied threat of force or violence, upon a witness or victim or any third person or the property of any victim, witness, or any third person.

(2) Where the act is in furtherance of a conspiracy.

(3) Where the act is committed by any person who has been convicted of any violation of this section, any predecessor law hereto or any federal statute or statute of any other state which, if the act prosecuted was committed in this state, would be a violation of this section.

(4) Where the act is committed by any person for pecuniary gain or for any other consideration acting upon the request of any other person. All parties to such a transaction are guilty of a felony.

(d) Every person attempting the commission of any act described in subdivisions (a), (b), and (c) is guilty of the offense attempted without regard to success or failure of the attempt. The fact that no person was injured physically, or in fact intimidated, shall be no defense against any prosecution under this section.

(e) Nothing in this section precludes the imposition of an enhancement for great bodily injury where the injury inflicted is significant or substantial.

(f) The use of force during the commission of any offense described in subdivision (c) shall be considered a circumstance in aggravation of the crime in imposing a term of imprisonment under subdivision (b) of Section 1170.

5. Va. Code Ann. § 18.2-19 (2014) provides:

How accessories after the fact punished; certain exceptions

Every accessory after the fact is guilty of (i) a Class 6 felony in the case of a homicide offense that is punishable by death or as a Class 2 felony or (ii) a Class 1 misdemeanor in the case of any other felony. However, no person in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity, or servant to the offender, who, after the commission of a felony, shall aid or assist a principal felon or accessory before the fact to avoid or escape from prosecution or punishment, shall be deemed an accessory after the fact.