No. 22-331

IN THE

Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL,
Petitioner,

v.

FERNANDO CORDERO-GARCIA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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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 judicial proceeding?

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BRIEF FOR RESPONDENT

INTRODUCTION

Under 8 U.S.C. § 1101(a)(43)(S), a noncitizen convicted of "an offense relating to obstruction of justice" is deemed an "aggravated felon" and subject to severe immigration consequences, including mandatory removal. To determine whether a conviction is "an offense relating to obstruction of justice," courts apply the well-settled "categorical approach," which compares the elements of the statute of conviction to the generic federal offense. If the elements of the statute of conviction are broader than the those of the generic federal offense, the conviction categorically is not an aggravated felony for purposes of immigration law.

Plain language, this Court's decisions, and federal and state criminal law reveal that the generic obstruction-of-justice offense does not encompass any and all activities that could conceivably undermine governmental

goals, but rather requires interference with a pending investigation or proceeding. From Blackstone's observation that "impediments of justice" involve ongoing processes like grand jury or court proceedings, *see* 4 Blackstone, *Commentaries on the Laws of England* 124-126 (1769), to this Court's 1893 recognition that obstruction of justice "can only arise when justice is being administered," *Pettibone* v. *United States*, 148 U.S. 197, 207 (1893), to modern obstruction-of-justice offenses, including the core, omnibus federal obstruction-of-justice offense, 18 U.S.C. § 1503, the overwhelming weight of authority shows that generic obstruction of justice requires interference with an ongoing investigation or proceeding.

Of course, Congress and state legislatures may enact criminal laws that prohibit broader swaths of conduct that arise before an investigation or proceeding exists. Convictions under such statutes may well render a noncitizen removable for other reasons, such as if they qualify as crimes involving moral turpitude. But they do not categorically qualify as obstruction-of-justice aggravated felonies, because their elements are broader than the elements of *generic* obstruction of justice.

One example of a criminal offense whose elements sweep more broadly than generic obstruction of justice is California's witness-dissuasion statute, Cal. Penal Code § 136.1(b)(1), which requires that "(1) the defendant has attempted to prevent or dissuade a person (2) who is a victim [of] or witness to a crime (3) from making any report of his or her victimization to any peace officer or other designated officials." Pet. App. 16a. A California prosecutor is not required to prove beyond a reasonable doubt that the defendant interfered with a pending investigation or proceeding. This permissible criminal law reflects California's public policy, but because it sweeps

beyond the elements of the generic obstruction-of-justice offense, Congress has not chosen to treat it as an aggravated felony for immigration purposes.

The government's contrary arguments rest primarily on assuming its own desired conclusion and misapplying the categorical approach. The government does not even purport to identify a generic definition of "obstruction of justice." Rather, the government argues that because offenses like witness tampering are, in its view, "paradigmatic 'obstruction of justice'" yet require no pending proceeding, generic obstruction of justice must not require a proceeding either. *See* Br. 16, 31. But Congress did not identify "witness tampering" as an aggravated felony in Section 1101(a)(43). When the analysis is focused where it should be—on the elements of generic obstruction of justice—the government's arguments are revealed as circular and unpersuasive.

The Court should affirm the court of appeals' judgment.

STATEMENT

A. The Categorical Approach

The Immigration and Nationality Act ("INA") defines certain categories of offenses as "aggravated felon[ies]." 8 U.S.C. § 1101(a)(43). For a noncitizen, conviction of an aggravated felony triggers "the harshest deportation consequences." *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 566 (2010). A noncitizen aggravated felon "shall … be removed," 8 U.S.C. § 1227(a), and is ineligible for readmission, naturalization, and virtually all forms of discretionary relief, *see* 8 U.S.C. §§ 1158(b)(2), 1182(a)(9)(A), 1182(h), 1227(a)(2)(A)(iii), 1229b(a)(3), 1229c(a)(1). These consequences apply even to lawful permanent residents, regardless of "how long

[they] ha[ve] previously resided" in this country. *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1211 (2018).

For decades, this Court has applied the well-settled "categorical approach" to determine whether state criminal statutes fall within the INA's aggravated-felony categories. *See, e.g.*, *Moncrieffe* v. *Holder*, 569 U.S. 184, 190-191 (2013) (citing cases). That approach derives from *Taylor* v. *United States*, 495 U.S. 575, 599-600 (1990), which considered how a court should evaluate whether a prior conviction triggered sentencing enhancements under the Armed Career Criminal Act ("ACCA"). The Court concluded that ACCA requires "a formal categorical approach" that looks only to the statutes of conviction, not to the facts of an individual defendant's case. *Id.*

Under the categorical approach, the courts compare "the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime—*i.e.*, the offense as commonly understood." *Descamps* v. *United States*, 570 U.S. 254, 257 (2013). The first step is to define the elements of the generic federal offense. Where the contours of the federal generic offense are "not readily apparent" from the statute, they are determined from the "prevailing view" at the time the statute was enacted. *Taylor*, 495 U.S. at 580, 598. Though "the exact formulations [may] vary," the task is to identify how the offense is most often understood and applied. *Id.* at 598.

Not every conceivable example of conduct that might qualify as a version of the offense will satisfy the categorical approach. In *Taylor*, for example, the Court identified generic "burglary" as any crime "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to

commit a crime." 495 U.S. at 599. Although some States defined "burglary" more broadly to cover entry into "automobiles and vending machines, other than buildings," *id.*, the Court did not view this as license to expand the generic burglary offense beyond unlawful entry into "a building or structure." *Id.* at 599-600. The Court instead recognized that some States had simply chosen to enact "nongeneric-burglary statute[s]" that do not categorically match the federal generic offense. *Id.*

Once a court has identified the elements of the generic federal offense, it compares them to the elements of the state statute of conviction. *See Descamps*, 570 U.S. at 257. If the elements of the state crime "cover[] any more conduct than the generic offense," convictions under that statute are categorically not aggravated felonies. *Mathis* v. *United States*, 579 U.S. 500, 504 (2016); *see also Mellouli* v. *Lynch*, 575 U.S. 798, 808 (2015) (state statute criminalizing possession of controlled substances covered broader range of substances than the federal generic and therefore was not categorically an aggravated felony). This is true "even if the defendant actually committed the offense in its generic form." *Descamps*, 570 U.S. at 261.

Application of the categorical approach in immigration cases is firmly rooted in statutory text. By its terms, the INA "makes aliens removable based on the nature of their convictions, not based on their actual conduct." *Esquivel-Quintana* v. *Sessions*, 581 U.S. 385, 389 (2017); *see* 8 U.S.C. § 1227(a)(2)(A)(iii) (making removable a noncitizen who is "convicted" of an aggravated felony); *see also, e.g.*, *id.* § 1158(b)(2)(B)(i) (imposing immigration consequence for noncitizen "convicted" of an aggravated felony); *id.* § 1182(a)(9)(A) (same); *id.* § 1182(h)(same); *id.* § 1229b(a)(3) (same). "[C]onviction," not conduct, is "the relevant statutory hook."

Carachuri-Rosendo, 560 U.S. at 580; *see also Pereida* v. *Wilkinson*, 141 S. Ct. 754, 762 (2021) (INA does not "task courts with examining whether an individual's *actions* meet a federal standard … but only whether the individual has been convicted of an *offense* that does so" (quotation marks omitted)). Indeed, "[a]s early as 1913, courts examining the federal immigration statute concluded that Congress, by tying immigration penalties to *convictions*, intended to limit the immigration adjudicator's assessment of a past criminal conviction to a legal analysis of the statutory offense, and to disallow [examination] of the facts underlying the crime." *Mellouli*, 575 U.S. at 805-806 (citations and quotation marks omitted; second alteration in original).

It was against this backdrop that Congress, in 1996, amended the INA's list of aggravated felonies to include "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).

B. Procedural History

Respondent Fernando Cordero-Garcia is an 80-year-old Mexican national who was lawfully admitted to the United States almost sixty years ago. A.R. 252. He has been a lawful permanent resident since 1965. *Id.* Mr. Cordero-Garcia's wife of 45 years and their five adult children are all U.S. citizens. A.R. 368-372.

In 2009, Mr. Cordero-Garcia was convicted under California's witness-dissuasion statute, Cal. Penal Code § 136.1(b)(1), among other offenses. A.R. 532-533, 842. That statute provides, in relevant part: "every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is a witness to a crime from … [m]aking 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" is punishable by imprisonment up to a year. Cal. Penal Code § 136.1(b)(1).

The elements of the crime defined by Cal. Penal Code § 136.1(b)(1) are: "'(1) the defendant has attempted to prevent or dissuade a person (2) who is a victim [of] or witness to a crime (3) from making any report of his or her victimization to any peace officer or other designated officials.'" Pet. App. 16a (quoting *People* v. *Upsher*, 155 Cal. App. 4th 1311, 1320 (2007)). To convict under this provision, a California prosecutor does not need to prove beyond a reasonable doubt that any investigation or judicial proceeding was pending or ongoing.

In 2011, the government charged Mr. Cordero-Garcia with removability as an aggravated felon, *see* 8 U.S.C. § 1227(a)(2)(A)(iii), contending that Cal. Penal Code § 136.1(b)(1) defines a crime "relating to obstruction of justice" under 8 U.S.C. § 1101(a)(43)(S). A.R. 252-253. The government also charged Mr. Cordero-Garcia as removable under 8 U.S.C. § 1227(a)(2)(A)(ii) for having been convicted of two crimes involving moral turpitude not arising out of a single scheme of misconduct—an independent ground of removability not implicated by the question presented. *See id.* An immigration judge found Mr. Cordero-Garcia removable on both grounds. A.R. 252-267.

At the time of Mr. Cordero-Garcia's conviction, the Board of Immigration Appeals ("BIA") had maintained for over a decade that an offense relating to obstruction of justice required "action taken by the accused … with an intent to influence judicial or grand jury proceedings." *In re Espinoza-Gonzalez*, 22 I&N Dec. 889, 892 (BIA 1999) (en banc); *see also Hoang* v. *Holder*, 641 F.3d

1157, 1162 (9th Cir. 2011) (explaining that *Espinoza-Gonzalez* required a pending proceeding). After Mr. Cordero-Garcia's conviction, the BIA changed course, holding in *Matter of Valenzuela Gallardo*, 25 I&N Dec. 838 (BIA 2012) ("*Valenzuela Gallardo I*"), that generic obstruction of justice consisted of "the affirmative and intentional attempt, with specific intent, to interfere with the process of justice." *Id.* at 841. The BIA stated that, while "many crimes fitting this definition will involve interference with an ongoing criminal investigation or trial ... the existence of such proceedings is not an essential element of 'an offense relating to obstruction of justice.'" *Id.*

Relying on *Valenzuela Gallardo I*, the BIA dismissed Mr. Cordero-Garcia's appeal. Pet. App. 98a-104a. The BIA held that Cal. Penal Code § 136.1(b)(1) is a categorical match for the federal generic definition of a crime "relating to obstruction of justice" under Section 1101(a)(43)(S). Pet. App. 100a-101a.

In December 2012, the government removed Mr. Cordero-Garcia to Mexico, A.R. 178, where he remains.

Mr. Cordero-Garcia petitioned for review, arguing, among other things, that Cal. Penal Code § 136.1(b)(1) is not categorically an obstruction-of-justice aggravated felony because it does not require interference with a pending or ongoing investigation or proceeding. In the meantime, the Ninth Circuit decided *Valenzuela Gallardo* v. *Lynch*, 818 F.3d 808 (9th Cir. 2016) ("*Valenzuela Gallardo II*"), which ruled that the BIA's "new interpretation" of obstruction of justice raised "grave doubts" as to whether Section 1101(a)(43)(S) was unconstitutionally vague. *Id.* at 819. At the government's request, the Ninth Circuit remanded Mr. Cordero-Garcia's case for further consideration. Pet. App. 94a.

While Mr. Cordero-Garcia's case was pending on remand, the BIA issued *Matter of Valenzuela Gallardo*, 27 I&N Dec. 449 (BIA 2018) ("*Valenzuela Gallardo III*"). The BIA, again purporting to apply the categorical approach, stated that generic obstruction of justice covers two categories of offenses. First, the BIA asserted that generic obstruction of justice includes "offenses covered by chapter 73 of the Federal criminal code." *Id.* at 460. Second, the BIA stated that generic obstruction of justice includes "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.* (emphasis added).[1]

The BIA again dismissed Mr. Cordero-Garcia's appeal. Pet. App. 55a-74a. The BIA did not address whether Cal. Penal Code § 136.1(b)(1) was an "offense[] covered by chapter 73 of the Federal criminal code" for purposes of its first definition. And the BIA did not cite any California authority indicating that a California prosecutor must prove beyond a reasonable doubt, as an

[1] The government suggests (Br. 46-53) that the BIA's decisions in *Valenzuela Gallardo I* and *Valenzuela Gallardo III* made no change in law. But the BIA recognized in this very case that it had changed positions, which is why it performed a retroactivity analysis to determine whether its new interpretation could fairly be applied to Mr. Cordero-Garcia. Pet. App. 62a-74a. The BIA acknowledged that a retroactivity analysis was "appropriate" because its decision in *Valenzuela Gallardo III* had "openly departed from the generic definition" the BIA had previously articulated in *Espinoza-Gonzalez* and that the Ninth Circuit approved in *Hoang*, and "differ[ed] in some respects from the BIA's prior decision in *Valenzuela Gallardo I*. Pet. App. 63a.

element of Cal. Penal Code § 136.1(b)(1), that an investigation or proceeding was "reasonably foreseeable by the defendant." Instead, the BIA merely asserted that "there would be little reason" for a defendant to "try to prevent or dissuade a witness from reporting the crime to appropriate authorities unless there was an investigation in progress or one was reasonably foreseeable." Pet. App. 59a.[2]

Mr. Cordero-Garcia again petitioned for review. Meanwhile, the Ninth Circuit vacated *Valenzuela Gallardo III* and held that the federal generic obstruction-of-justice offense "requires a nexus to ongoing or pending proceedings." *Valenzuela Gallardo* v. *Barr*, 968 F.3d 1053, 1069 (9th Cir. 2020) ("*Valenzuela Gallardo IV*").

Applying *Valenzuela Gallardo IV* to Mr. Cordero-Garcia's case, the Ninth Circuit held that Cal. Penal Code § 136.1(b)(1) is not a categorical match for Section 1101(a)(43)(S) because Section 136.1(b)(1) "is missing the element of a nexus to an ongoing or pending proceeding or investigation." Pet. App. 8a; *accord* Pet. App. 9a-10a.

The panel divided on an issue not presented here, namely whether Cal. Penal Code § 136.1(b)(1) could be considered an "offense[] covered by chapter 73 of the Federal criminal code" for purposes of the BIA's first definition. As the panel majority noted, the BIA had not

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[2] The BIA also held, over Mr. Cordero-Garcia's objection, that *Valenzuela Gallardo III* could be applied retroactively to Mr. Cordero-Garcia's case. Pet. App. 60a-74a. Because the court of appeals did not reach the retroactivity question—and because of the limited question presented in this Court's grant of certiorari—Mr. Cordero-Garcia preserves his retroactivity argument for any remand but does not brief it here.

relied on that ground, such that Mr. Cordero-Garcia's petition could not be denied on that basis. Pet. App. 16a. The panel majority separately stated that Cal. Penal Code § 136.1(b)(1) was not a categorical match for the federal witness-tampering statute (18 U.S.C. § 1512) in any event, because—unlike the federal provision—the California offense does not require "use of intimidation, threats, misleading conduct, or corrupt persuasion." Pet. App. 19a. Judge VanDyke dissented from the panel majority's understanding of California law. Pet. App. 47a, 54a. The government's brief in this Court does not adopt Judge VanDyke's interpretation of Cal. Penal Code § 136.1(b)(1), his view that it categorically matches 18 U.S.C. § 1512(b)(3), or his view that such a match, by itself, would suffice to render the California offense an obstruction-of-justice aggravated felony.

SUMMARY OF ARGUMENT

The first step under the categorical approach is to identify the elements of "the generic crime … as commonly understood." *Descamps* v. *United States*, 570 U.S. 254, 257 (2013). The ordinary meaning of "obstruction of justice," federal criminal law, and state criminal law all point in one direction: at the time of Section 1101(a)(43)(S)'s enactment, the generic offense of obstruction of justice was commonly understood to require an existing legal process.

Contemporary dictionaries and treatises defined "obstruction of justice" as interference with an ongoing legal process. The majority of federal offenses codified in the 1996 version of Title 18, Chapter 73 (titled "Obstruction of Justice") also required a nexus to a pending investigation or legal proceeding. And most state obstruction of justice offenses as of 1996 likewise required interference with a pending investigation or proceeding.

While States may of course decide to criminalize a broader range of behavior—as California has—those are examples of nongeneric crimes and are thus not aggravated felonies under the categorical approach.

The government nowhere actually offers its own generic definition of obstruction of justice. It tellingly does not defend the BIA's twofold definition, indeed implicitly criticizing one half of it in a footnote. Br. 25 n.5. And even as to the second half, the government offers scant support for the BIA's view that generic obstruction of justice can be satisfied by a "reasonably foreseeable" investigation or proceeding. Rather, the government gets the categorical approach backwards, asserting first that "witness tampering" is sometimes thought of as a type of obstruction-of-justice offense, and that many witness-tampering statutes—most of which do not even use the phrase "obstruction of justice"—do not require an ongoing proceeding. But that has no bearing on the elements of *generic* obstruction of justice, any more than the fact that some state burglary statutes criminalize breaking into a car or a boat as well as a building bears on generic burglary. The government's approach "turns the categorical approach on its head by defining the federal offense … as whatever is illegal under the particular law of the State where the defendant was convicted. Under the Government's preferred approach, there is no 'generic' definition at all." *Esquivel-Quintana* v. *Sessions*, 581 U.S. 385, 393 (2017).

The INA's reference to offenses "relating to" obstruction of justice does not help the government either, and certainly does not effect the virtually limitless expansion of Section 1101(a)(43)(S) that the government urges. Rather, the statutory context of the rest of the INA, which repeatedly uses the phrase "relating to" descriptively, not expansively, counsels "in favor of a

narrower reading" of those two words. *Mellouli* v. *Lynch*, 575 U.S. 798, 812 (2015).

This Court owes the BIA's contrary conclusion no deference. The elements of generic obstruction of justice are unambiguous. Moreover, the BIA's interpretation would have consequences for criminal law, as to which it has no expertise. Indeed, the government itself undermines the reasonableness of the BIA's interpretation by implicitly criticizing the first half of it and assuming but barely defending the correctness of its second half. And the government's cursory effort to write the longstanding rule of lenity out of the immigration law has no basis.

The Court should affirm the Ninth Circuit's judgment.

ARGUMENT

I. GENERIC OBSTRUCTION OF JUSTICE REQUIRES A PENDING OR ONGOING INVESTIGATION OR PROCEEDING

A. The Ordinary Meaning Of "Obstruction Of Justice" Requires Interference With A Pending Or Ongoing Investigation Or Proceeding

Because Section 1101(a)(43)(S) does not expressly define "obstruction of justice," "normal tools of statutory construction" apply. *Esquivel-Quintana* v. *Sessions*, 581 U.S. 385, 391 (2017). Statutory interpretation begins with the "language of the statute" and its "ordinary meaning." *Id.*

Because Congress added "obstruction of justice" to the INA's aggravated-felony list in 1996, *see* Pub. L. No. 104-132, 110 Stat. 1278 (1996), dictionaries available "[a]t that time" provide proper context. *Esquivel-Quintana*, 581 U.S. at 391. "[O]bstruction of justice" was then

defined as "the crime or act of willfully interfering with the process of justice and law esp[ecially] 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." *Merriam-Webster's Dictionary of Law* 337 (1996). "Interference" meant the "act of meddling in or hampering an activity or process." *Webster's Third New Int'l Dictionary* 1178 (1993). Similarly, "impede" meant "to interfere with or get in the way of the progress of" some ongoing process or force. *Id.* at 1132. These definitions all require the existence of something to get in the way of or meddle with; in other words, they require a *process*—as relevant here, an investigation or proceeding—to exist.

Black's Law Dictionary likewise reflected the understanding that a legal process must have actually begun in order to be obstructed. It defined "[o]bstructing justice" as the act "by which one or more persons attempt to prevent, or do prevent, the execution of lawful process" or "[a]ny act [or] conduct … pertaining to *pending proceedings*, intended to play on human frailty and to deflect and deter [a] court from performance of its duty." *Black's Law Dictionary* 1077 (6th ed. 1990) (emphasis added).

These definitions align with the common-law understanding of the offense of obstruction of justice. Blackstone defined "[c]ontempts against the king's palaces or courts of justice" as including "endeavour[ing] to dissuade a witness from *giving evidence*; to disclose an *examination before the privy council*; or, to advise a prisoner to *stand mute*"—"all of which [we]re impediments of justice[.]" 4 Blackstone, *Commentaries on the Laws of England* 124-126 (1769) (emphases added). The context of Blackstone's discussion, which the government

ignores, reveals that all the examples given of "impediments of justice" involve pending or ongoing proceedings, such as an "examination before the privy council" or a prisoner "stand[ing] mute" when questioned. *Id.* Blackstone's reference to "a witness … giving evidence" therefore refers to testimony given in a *court* proceeding; otherwise it would not be a "contempt[] of the king's *courts*." *Id.* at 126 (emphasis added). *Id.* Thus, at common law as now, one could not "imped[e] … justice," *id.* at 126, without an ongoing proceeding to obstruct.[3]

B. Federal Criminal Law Codified At Chapter 73 Likewise Shows That Generic Obstruction Of Justice Requires A Pending Or Ongoing Proceeding

Chapter 73 of Title 18 also provides relevant context for defining the generic obstruction-of-justice offense. Section 1101(a)(43)(S)'s text points directly to Title 18. The three generic offenses enumerated in Section 1101(a)(43)(S)—"'obstruction of justice,' 'perjury or subornation of perjury,' and 'bribery of a witness,'"—each "correspond to the titles of specific chapters in Title 18." *Valenzuela Gallardo IV*, 968 F.3d at 1064; *see also* 18 U.S.C. ch. 73 ("Obstruction of Justice"); 18 U.S.C. ch. 11 ("Bribery, Graft, and Conflicts of Interest"); 18 U.S.C. ch. 79 ("Perjury"). It therefore stands to reason that Title 18 provides guidance in identifying the relevant generic elements. *See Flores* v. *Attorney Gen.*, 856 F.3d 280, 289 (3d Cir. 2017); *see also Valenzuela Gallardo IV*, 968 F.3d at 1064.

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[3] Indeed, these traditional understandings show that, by the time Congress enacted Section 1101(a)(43)(S) in 1996, "obstruction of justice" had become a term of art that carried with it a requirement of a pending proceeding. *See* Pugin Br. 13-19.

When Congress added "obstruction of justice" to the INA in 1996, the clear trend among Chapter 73 offenses was to "define obstruction of justice to require a nexus to an ongoing or pending investigation or proceeding." *Valenzuela Gallardo IV*, 968 F.3d at 1064 n.9. The BIA shared this view for over a decade. *See In re Espinoza-Gonzalez*, 22 I&N Dec. 889, 892 (BIA 1999) (en banc) ("In general, the obstruction of justice offenses listed in 18 U.S.C. §§ 1501-1518 have as an element interference with the proceedings of a tribunal or require an intent to harm or retaliate against others who cooperate in the process of justice or might otherwise so cooperate.").

Analysis of Chapter 73 should begin with "the generic obstruction of justice statute" codified at 18 U.S.C. § 1503. Podgor, *Obstruction of Justice: Redesigning the Shortcut*, 46 B.Y.U. L. Rev. 657, 670 (2021). Within Section 1503, the so-called "catchall" or "Omnibus Clause" sets forth "the general obstruction of justice provision." Taylor, *The Obstruction of Justice Nexus Requirement After* Arthur Andersen *and Sarbanes-Oxley*, 93 Cornell L. Rev. 401, 402 (2008). Section 1503 prohibits "persons from endeavoring to influence, obstruct, or impede the due administration of justice." *United States* v. *Aguilar*, 515 U.S. 593, 598 (1995); *accord United States* v. *Fassnacht*, 332 F.3d 440, 444 (7th Cir. 2003) (noting omnibus clause's "broad" reach); *United States* v. *Griffin*, 589 F.2d 200, 206 (5th Cir. 1979) ("The omnibus clause of the statute clearly states that it punishes all endeavors to obstruct the due administration of justice."). Section 1503 was intended to encompass the full breadth of obstruction-of-justice offenses, "ensur[ing] that criminals could not circumvent the law's purpose by devising novel and creative schemes that would interfere with the administration of justice but would nonetheless fall outside the scope of" Section 1503's more specific

prohibitions. *United States* v. *Tackett*, 113 F.3d 603, 607 (6th Cir. 1997); *accord Griffin*, 589 F.2d at 206-207 (Section 1503 "was drafted with an eye to 'the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined'" (quoting *Anderson* v. *United States*, 215 F.2d 84, 88 (6th Cir. 1954))). Indeed, because Section 1503's omnibus clause is "broad enough to cover any act committed corruptly, in an endeavor to impede or obstruct justice," *United States* v. *Brenson*, 104 F.3d 1267, 1275 (11th Cir. 1997) (quotation marks omitted), it is often "used to prosecute both crimes that clearly f[a]ll within § 1503's more specific provisions and also conduct that those provisions could not reach," *Tackett*, 113 F.3d at 607.

Section 1503 unquestionably requires a pending proceeding. The government's own guidance to federal prosecutors states that "a pending judicial proceeding is a prerequisite to prosecution under 18 U.S.C. § 1503." U.S. Department of Justice, *Criminal Resource Manual* § 1722 (updated Jan. 23, 2020). That is consistent with this Court's decision over a century ago in *Pettibone* v. *United States*, which held that obstruction of justice under the predecessor to Section 1503 could "only arise when justice is being administered." 148 U.S. 197, 207 (1893). And as this Court reaffirmed, just one year before Congress added obstruction of justice to the INA's aggravated-felony list, a person cannot be convicted of obstructing justice under Section 1503 if he or she "lack[s] knowledge of a pending proceeding." *Aguilar*, 515 U.S. at 599. That holding reflected decades of consistent precedent interpreting Section 1503 to require interference with a pending proceeding. *See United States* v. *Brown*, 688 F.2d 596, 598 (9th Cir. 1982) ("No case interpreting § 1503 has extended it to conduct

which was not aimed at interfering with a pending judicial proceeding."); *United States* v. *Simmons*, 591 F.2d 206, 208 (3d Cir. 1979) ("A prerequisite for conviction [under Section 1503] is the pendency at the time of the alleged obstruction of some sort of judicial proceeding that qualifies as an 'administration of justice.'" (citing *Pettibone*, 148 U.S. at 197)). Indeed, "[m]ost courts agree that" Section 1503 dictates that any "charge of obstruction of justice" requires "a judicial proceeding pending" that the defendant both "ha[d] knowledge of" and "corruptly endeavored to influence, obstruct, or impede." Decker, *The Varying Parameters of Obstruction of Justice in American Criminal Law*, 65 La. L. Rev. 49, 54 (2004).

Congress was no doubt aware of this "settled judicial … interpretation" of Section 1503 when it added obstruction of justice to the INA's list of aggravated felonies. *Commissioner* v. *Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993); *accord Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062, 1072 (2020) (this Court presumes that "Congress is aware of relevant judicial precedent" (quotation marks omitted)).

With few exceptions, the other substantive provisions of Chapter 73 in place as of 1996 also require interference with an ongoing investigation or proceeding.[4]

Sections 1501, 1504, 1505, and 1506 expressly reference ongoing legal processes. *See* 18 U.S.C. § 1501 (interfering with the "serving, or attempting to serve or execute, any legal or judicial writ or process of any court of the United States"); *id.* § 1504 (influencing a "grand or

[4] Sections 1514 and 1515 "are either definitional or otherwise do not describe substantive offenses." *Valenzuela Gallardo IV*, 968 F.3d at 1064 n.9.

petit juror of any court of the United States" regarding a matter "pending before such juror" or "pertaining to his duties"); *id.* § 1505 (interfering with "any civil investigative demand" or other "pending proceeding[s] … before any department or agency of the United States"); *id.* § 1506 (interfering or attempting to interfere with "any record, writ, process, or other proceeding, in any court of the United States" and the procurement of false bail). Sections 1502, 1507, and 1508, in turn, reach conduct that could arise only during an ongoing legal proceeding. *See* 18 U.S.C. § 1502 (interfering with "an extradition agent of the United States in the execution of his duties"); *id.* § 1507 ("picket[ing] or parad[ing]" with the intent to interfere with "the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty"); *id.* § 1508 (listening to or recording jury "deliberat[ions] or voting"). Sections 1510, 1516, and 1517, properly construed, reach only interference with ongoing investigations. *See* 18 U.S.C. § 1510 (interference with reports of information "to a criminal investigator" during an ongoing investigation, including by notifying an individual of the issuance of a subpoena);[5] *id.* § 1516 (interference with a "Federal auditor in the performance of official duties"); *id.* § 1517 (interference with an ongoing "examination of a financial institution by an agency of the United States"). And although Sections 1509 and 1513 can reach conduct after a judicial proceeding has concluded, they nonetheless require a close nexus to an investigation or

[5] *See also United States* v. *Carzoli*, 447 F.2d 774, 779 (7th Cir. 1971) ("An element of the offense charged is an actual, existing investigation of possible violation of a criminal statute."); H.R. Rep. No. 90-658, at 3 (1967) (noting that Section 1510 was added to reach interference with witnesses "*during the investigative stage*" (emphasis added)).

proceeding that was actually brought into existence, not a merely hypothetical one. *Id.* § 1509 (interfering with the "due exercise of rights" under, or the execution of "any order, judgment, or decree of a court of the United States"); *id.* § 1513 (retaliating against a witness for participating in "an official proceeding" or investigation).

Finally, Section 1511 concerns "obstruction of State or local law enforcement"—prohibiting conspiracies to obstruct "the enforcement of the criminal laws of a State … with the intent to facilitate an illegal gambling business"—and therefore has little relevance to defining generic "obstruction of justice." 18 U.S.C. § 1511. This provision aimed to thwart the ability of organized crime to profit off syndicated gambling by "mak[ing] it unlawful to engage in a conspiracy to obstruct the enforcement of state law to facilitate an 'illegal gambling business.'" H.R. Rep. No. 91-1549, at 34 (1970). Given that focus on "illegal gambling activities of major proportions," *id.* at 53, the elements of Section 1511 do not speak to generic obstruction of justice but instead define a narrow, specialized offense requiring a conspiracy to facilitate illegal gambling involving "at least one government official and at least one person involved in an illegal gambling business." *United States* v. *Crockett*, 514 F.2d 64, 74 (5th Cir. 1975).

Notably, when Congress added an offense to Chapter 73 that did not require a nexus to an ongoing investigation or proceeding, it said so expressly. Section 1512 was added by the Victim and Witness Protection Act of 1982, Pub. L. 97-291 § 2, 96 Stat. 1248, which "dealt with protecting witnesses and victims from harassment and injury, rather than with obstruction of justice." *Tackett*, 113 F.3d at 610. Section 1512 is entitled "[t]ampering with a witness, victim, or an informant," and expressly provides that "[f]or the purposes of this section … 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). If generic obstruction of justice did not require a pending proceeding, Congress would have had no need to include that express carve-out. This Court should "resist a reading [of a provision of Chapter 73] that would render superfluous" this language that Congress deliberately included in Chapter 73. *Yates* v. *United States*, 574 U.S. 528, 543 (2015) (plurality opinion) (rejecting the government's argument that the words "tangible object" in 18 U.S.C. § 1519 include all physical objects, because that reading would render 18 U.S.C. § 1512(c)(1) superfluous).

The substantial weight of Chapter 73 as it existed in 1996 thus shows that generic obstruction of justice requires a nexus to a pending or ongoing investigation or proceeding. Section 1512 is an exception only because Congress specifically and expressly removed that requirement—an action that reinforces its role as the nongeneric "exception that proves the rule." *Valenzuela Gallardo IV*, 968 F.3d at 1066.

C. State Law Further Confirms That Obstruction Of Justice Requires A Pending Or Ongoing Investigation Or Proceeding

"[L]ook[ing] to state criminal codes for additional evidence about the generic meaning" of obstruction of justice further confirms the requirement of a nexus to a pending or ongoing investigation or proceeding. *Esquivel-Quintana*, 581 U.S. at 395.[6]

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[6] Although "this sort of multijurisdictional analysis" is "not required by the categorical approach," it "can be useful insofar as it helps shed light on the 'common understanding and meaning' of the federal provision being interpreted." *Esquivel-Quintana*, 581 U.S.

When Section 1101(a)(43)(S) was enacted, 14 States and the District of Columbia had a specific crime that they defined or described as "obstruction" of or "obstructing" "justice."[7] Eight of those crimes (*i.e.*, more than half) expressly required a nexus to a pending or ongoing investigation or proceeding or could apply only where such a proceeding existed.[8] Two were ambiguous

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at 396 n.3. Here, federal law clearly indicates the "common understanding" of obstruction of justice, *see supra* pp. 15-21, and thus a survey of state law is unnecessary. Even so, most States with a specific offense defining or describing "obstruction of justice," or a close variation, required a nexus to an ongoing investigation or proceeding.

[7] *See* D.C. Code § 22-722 (1996); Haw. Rev. Stat. § 710-1072.5 (1996); 720 Ill. Comp. Stat. 5/31-4 (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); Mont. Code Ann. § 45-7-303 (1996); Nev. Rev. Stat. Ann. § 199.230 (1996); Ohio Rev. Code Ann. § 2921.32 (1996); Utah Code Ann. § 76-8-306 (1996); Vt. Stat. Ann. tit. 13, § 3015 (1996); Va. Code Ann. § 18.2-460 (1996); W. Va. Code § 61-5-27 (1996); Wis. Stat. Ann. § 946.65 (1996).

[8] Haw. Rev. Stat. § 710-1072.5 (1996) (prohibiting a witness, who has been granted immunity, from "intentionally … refus[ing] to testify or be qualified as a witness when duly directed to testify or be qualified as a witness"); Ind. Code Ann. § 35-44-3-4(a)(1) (1996) (prohibiting "[k]nowingly or intentionally induc[ing] … a witness or informant in an official proceeding or investigation" to undertake certain conduct); Md. Code Ann. art. 27, § 26 (1996) (prohibiting conduct that seeks to "influence, intimidate, or impede any juror, witness, or court officer of any court of this State in the discharge of his duty"); Miss. Code Ann. § 97-9-55 (1996) (prohibiting conduct that seeks to "obstruct or impede the administration of justice in any court"); Nev. Rev. Stat. Ann. § 199.230 (1996) (prohibiting conduct that "prevents or attempts to prevent another person from appearing before any court ... as a witness in any action, investigation or other official proceeding"); Vt. Stat. Ann. tit. 13, § 3015 (1996) (prohibiting conduct that "intimidates or impedes any witness, grand or petit juror, or officer in or of any court … in connection with a matter already heard, presently being heard or to be heard before any

on this issue.[9] One required a foreseeable investigation or proceeding.[10] Only four omitted any nexus at all.[11] Thus, contrary to the government's position, a survey of relevant criminal statutes demonstrates that the majority of States commonly understood obstruction of justice to require a pending investigation or proceeding.

In sum, the prevailing dictionary definitions, federal law, and state law all point to the same conclusion: When "obstruction of justice" was added to the INA's list of aggravated felonies, the phrase, as commonly used, required interference with a pending or ongoing investigation or proceeding. Accordingly, the federal generic offense necessarily requires that a process of justice—whether an investigation or proceeding—have been

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court of the state of Vermont"); W. Va. Code § 61-5-27 (1996) (prohibiting conduct that "obstruct[s]," "impede[s]," or "influence[s]," actors and evidence in "an official proceeding"); Wis. Stat. Ann. § 946.65 (1996) (prohibiting "knowingly giv[ing] false information to any officer of any court with intent to influence the officer in the performance of official functions").

[9] Ohio Rev. Code Ann. § 2921.32 (1996) (prohibiting conduct with the "purpose to hinder the discovery, apprehension, prosecution, conviction, or punishment of another for crime"); Utah Code Ann. § 76-8-306 (1996) (prohibiting conduct that intends "to hinder, prevent, or delay the discovery, apprehension, prosecution, conviction, or punishment of another for the commission of a crime"). Notably, in 2001, Utah replaced the word "discovery" with "investigation," suggesting that the 1996 statute likely required a nexus to at least an ongoing investigation. 2001 Utah Laws 307 (H.B. 250).

[10] La. Rev. Stat. Ann. § 14 :130.1 (1996) (prohibiting conduct as "obstruction of justice … when committed with the knowledge that such act has, reasonably may, or will affect an actual or potential present, past, or future criminal proceeding").

[11] D.C. Code § 22-722 (1996); 720 Ill. Comp. Stat. 5/31-4 (1996); Mont. Code Ann. § 45-7-303 (1996); Va. Code Ann. § 18.2-460 (1996).

brought into existence; until that happens, there is nothing to interfere with, impede, or "obstruct."

II. THE GOVERNMENT'S COUNTERARGUMENTS ARE UNPERSUASIVE

The government's attempts to broaden the generic offense by eliminating the well-settled element of a nexus to a pending or ongoing investigation or proceeding are unpersuasive and, in many instances, distort both the text of relevant criminal provisions and the categorical approach itself.

A. The Government Errs In Defining Generic Obstruction Of Justice By Reference To Witness-Tampering Offenses

The government's primary error lies in seeking to define generic obstruction of justice by reference to criminal offenses other than obstruction of justice. The government first assumes its desired conclusion, namely that "witness tampering"—however defined and regardless of its elements—is a "paradigmatic" obstruction-of-justice offense. Br. 15-16. The government then observes that some States have enacted witness-tampering offenses that do not have as an element a nexus to a pending or ongoing investigation or proceeding. Br. 37-39. Much of the government's argument is thus based on how some States and the Model Penal Code have defined not "obstruction of justice," but witness tampering (and accessory after the fact). That approach is doubly wrong.

1. The government improperly focuses on witness-tampering offenses rather than obstruction-of-justice offenses

The government's approach is wrong in principle, because it gets the categorical approach exactly backwards. The categorical approach requires a court to determine if the "state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding aggravated felony." *Moncrieffe* v. *Holder*, 569 U.S. 184, 190 (2013) (quotation marks omitted). The first step in this inquiry is to define the generic federal offense—*i.e.*, "the offense[] [as] viewed in the abstract," not by reference to the state statute of conviction. *Id.* The generic definition of an offense is intended to cut through variations in "the exact formulations" of that offense and focus instead on its common core—those shared elements that are "generally" or "typically" required. *Taylor* v. *United States*, 495 U.S. 575, 598 (1990).

The government's approach "turns the categorical approach on its head," *Esquivel-Quintana*, 581 U.S. at 393, by focusing not on the common elements of obstruction-of-justice offenses, but on the elements of Mr. Cordero-Garcia's (and Mr. Pugin's) state crimes of conviction and other distinct, and broader, offenses that the government believes could or should be referred to as a form of obstruction of justice. Br. 20-21, 37-40. That approach is akin to defining generic burglary by reference to state shoplifting offenses, simply because some state burglary statutes prohibit entering a "shop … with intent to commit grand or petit larceny," Cal. Penal Code § 459, or by reference to burglary statutes that prohibit breaking into "automobiles and vending machines," simply because some States call that burglary as well, *Taylor*, 495 U.S. at 599-600. Just as generic burglary is

not defined by the broader offenses that some States have placed under that label, the definition of generic obstruction of justice is not altered by some States' choice to categorize witness tampering as a form of obstruction of justice. Rather, the categorical approach requires identifying the elements of a single generic definition of "obstruction of justice," not a menu of possibilities encompassing every state witness-tampering offense.

There is, moreover, no sound basis for the government's shift from obstruction of justice to witness tampering. The government contends that "most jurisdictions … treated witness tampering or intimidation as a form of obstruction of justice" based on the title of the "part of the code" in which they appeared. Br. 37. But the government does not explain why the titles of *state* criminal-code "part[s]" under which state witness-tampering offenses appeared have any bearing on the generic *federal* definition of the offense of obstruction of justice. Moreover, most States did not categorize witness tampering as a form of "obstruction of justice." By the government's own admission, 32 witness-tampering offenses were categorized not as obstruction of justice, but as "offenses against public administration," "[o]bstructing [g]overnmental [a]dministration," or "something similar." Br. 37 & nn.9-10.[12] Remarkably,

[12] *See* Ala. Code § 13A-10-124 (1996) (categorized under "Offenses Against Public Administration"); Alaska Stat. § 11.56.540 (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 (1996) (same); N.Y. Penal Law § 215.17 (1996) (same); 18 Pa. Cons. Stat. § 4952 (1996) (same); Tex. Penal Code Ann. § 36.05 (1996) (same); Wyo. Stat. Ann. § 6-5-305 (1996) (same); Ark. Code Ann. § 5-53-110 (1995) (categorized under "Offenses Against the Administration of Government"); Utah Code Ann. § 76-8-508 (1996) (same); Tenn. Code Ann. § 39-16-507 (1996) (categorized under "Offenses Against Administration of

the government contends (Br. 37-38 & n.10) that Iowa's witness-tampering offense was "treated … as a form of obstruction of justice" even though Iowa's witness-tampering offense falls within a chapter entitled "Interference with Judicial Process," and not in the separate chapter with the more relevant title of "Obstructing Justice." *Compare* Iowa Code ch. 720, § 720.4 (1996), *with id.* ch. 719. Seven more state witness-tampering offenses were categorized as, for example, "crimes against life and bodily security," "bribery," or "tampering and

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Government"); Colo. Rev. Stat. § 18-8-707 (1996) (categorized under "Offenses—Governmental Operations"); 720 Ill. Comp. Stat. 5/32-4a (1996) (categorized under "Offenses Affecting Governmental Functions"); Kan. Stat. Ann. § 21-3832 (1996) (categorized under "Crimes Affecting Governmental Functions"); Neb. Rev. Stat. § 28-919 (1996) (categorized under "Offenses Involving Integrity and Effectiveness of Government Operation"); N.J. Rev. Stat. § 2C:28-5 (1996) (categorized under "Offenses Involving Public Administration Officials"); Cal. Penal Code § 136.1 (1996) (categorized under "Crimes Against Public Justice"); Mass. Ann. Laws ch. 268 § 13B (1996) (same); Okla. Stat. tit. 21 § 455 (1996) (same); Ariz. Rev. Stat. § 13-2804 (1996) (categorized under "Interference with Judicial and Other Proceedings"); Conn. Gen. Stat. § 53a-151 (1996) (categorized under "Bribery, Offenses Against the Administration of Justice and Other Related Offenses"); Iowa Code § 720.4 (1996) (categorized under "Interference with Judicial Process"); Ky. Rev. Stat. Ann. § 524.040 (1996) (categorized under "Interference with Judicial Administration"); Minn. Stat. § 609.498 (1996) (categorized under "Crimes Against the Administration of Justice"); Mo. Rev. Stat. § 575.270 (1996) (categorized under "Offenses Against the Administration of Justice"); Ohio Rev. Code Ann. §§ 2921.03 & .04 (1996) (categorized under "Offenses Against Justice and Public Administration"); Or. Rev. Stat. § 162.285 (Westlaw 1996) (categorized under "Obstructing Governmental Administration"); S.C. Code Ann. § 16-9-340 (1996) (categorized under "Offenses Against Public Justice"); S.D. Codified Laws § 22-11-19 (1996) (categorized under "Obstruction of the Administration of Government"); Wash. Rev. Code § 9A.72.120 (1996) (categorized under "Perjury and Interference with Official Proceedings").

unlawful influence," which are even further afield from "obstruction of justice."[13]

In stark contrast to these 39 jurisdictions, witness-tampering offenses appeared in specific provisions prohibiting "obstructing" or the "obstruction" of "justice" or were categorized in a part of a criminal code titled "Obstructing Justice" in only eleven jurisdictions. Br. 37 & nn.8-9.[14] And at least eight of those required an ongoing or pending investigation or proceeding. *See infra* pp. 30-31; *supra* p. 22 & n.8; Br. 40 & n.18. [15]

Nor do dictionary definitions support the government's attempt to shoehorn all witness-tampering offenses into generic obstruction of justice. The fact that *Merriam-Webster* lists "threatening, harming, or

[13] *See* Fla. Stat. § 914.22(3)(a) (1996) (categorized under "Witnesses; Criminal Proceedings"); Idaho Code Ann. § 18-2604 (1996) (categorized under "Evidence Falsified or Concealed and Witnesses Intimidated or Bribed"); Me. Rev. Stat. tit. 17-A, § 454(1) (1996) (categorized under "Falsification in Official Matters"); N.H. Rev. Stat. Ann. § 641:5 (1996) (same); N.M. Stat. Ann § 30-24-3 (1996) (categorized under "Bribery"); N.D. Cent. Code § 12.1-09-01(3)(c) (1995) (categorized under "Tampering and Unlawful Influence"); Wis. Stat. Ann. §§ 940.41(3), 940.42-.43 (1996) (categorized under "Crimes Against Life and Bodily Security").

[14] *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 (1996); Vt. Stat. Ann. tit. 13, § 3015 (1996); Va. Code Ann. § 18.2-460 (1996); W. Va. Code § 61-5-27 (1996); N.C. Gen. Stat. § 14-266 (1996) (categorized under "Obstructing Justice"); R.I. Gen. Laws § 11-32-5 (1996) (same).

[15] *See* Ind. Code Ann. § 35-44-3-4 (1996); Md. Code Ann. art. 27, § 26 (1996); Miss. Code Ann. § 97-9-55 (1996); Nev. Rev. Stat. Ann. § 199.230 (1996); N.C. Gen. Stat. § 14-266 (1996); R.I. Gen. Laws § 11-32-5 (1996); Vt. Stat. Ann. tit. 13, § 3015 (1996); W. Va. Code § 61-5-27 (1996).

impeding a witness [or] potential witness" as an example of obstruction of justice does not mean that all witness-tampering offenses constitute generic obstruction of justice. To the contrary, the *Merriam-Webster* definition expressly encompasses only those witness-related offenses that "imped[e] an investigation or legal process." *Merriam-Webster's Dictionary of Law* 337 (1996). As discussed (*supra* p. 14), the word "impede" is synonymous with "interfere," which requires an ongoing investigation or proceeding; otherwise, there is nothing to impede or interfere with. Though the government attempts (Br. 23-24) to minimize that requirement as but one of several examples of obstruction of justice, it is not. Rather, "'[u]nder conventional rules of grammar,'" the "impeding" clause—appearing at the end of a list of similar examples—"'applies to the entire series.'" *Facebook, Inc.* v. *Duguid*, 141 S. Ct. 1163, 1169 (2021) (quoting Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012)). Indeed, the final "impeding" clause in the *Merriam-Webster* definition mirrors the primary definition of "interfering with the process of justice and law," further supporting that the "impeding" clause "is applicable as much to the first and other words as to the last," and thus that "the natural construction of the language demands that the clause be read as applicable to all." *Porto Rico Ry., Light & Power Co.* v. *Mor*, 253 U.S. 345, 348 (1920). Thus, obstruction of justice encompasses impeding a witness or potential witness only in the context of a pending investigation or proceeding.

The government's reliance on the Model Penal Code ("MPC") likewise underscores the distance between the government's position and the elements of the generic obstruction-of-justice offense. Whereas defining a generic offense requires identifying commonalities, the MPC is the product of a legal "reform movement[],"

intended to revise and expand the law, *United States* v. *Bailey*, 444 U.S. 394, 403 (1980)—not to restate the generic meaning of "obstruction of justice" as it was commonly understood. Indeed, with respect to the vague nexus requirement in the MPC's witness-tampering offense—that the defendant acts "believing that an official proceeding or investigation is pending or about to be instituted"—the MPC intentionally departed from "laws requiring that a proceeding or investigation actually be pending." MPC § 241.6 cmt. 2, at 166. And many of the States that revised their witness-tampering offenses after publication of the MPC rejected the MPC's expansion. About half of the States that revised their codes rejected the MPC's extension to informants as compared to just witnesses, and a majority of States declined to expand their codes to reach retaliation after the fact. MPC § 241.6 cmt. 1, at 164-165. The MPC's treatment of accessory after the fact is similarly anomalous. The MPC "breaks decisively" with the traditional view that "one who helps an offender avoid justice becomes in some sense an accomplice in the original crime." MPC § 242.3 cmt. 1, at 224-225. The MPC thus does not support the government's attempt to expand the bounds of *generic* obstruction of justice. Rather, like many of the state statutes the government relies on—including Cal. Penal Code § 136.1(b)(1)—the MPC reflects a modern willingness to criminalize *nongeneric* conduct.

2. The government additionally mischaracterizes witness-tampering offenses on which it relies

Even if it were proper to look to state witness-tampering statutes to identify the elements of the federal generic obstruction-of-justice offense, the government misinterprets those statutes. It claims that it is "not

apparent" whether certain state witness-tampering statutes required a nexus to a pending proceeding or investigation. Br. 40 & n.19. But some of these statutes in fact did require such a nexus. For example, North Carolina's witness-tampering statute criminalized intimidating persons who are "summoned or acting as [] witness[es] in any of the courts of this State," N.C. Gen. Stat. § 14-226 (1996), which necessarily requires an ongoing proceeding. Similarly, Rhode Island's witness-tampering statute criminalized intimidating "a victim of a crime or a witness in any criminal proceeding with respect to that person's participation in any criminal proceeding." R.I. Gen. Laws § 11-32-5(a), (b) (1996). That provision expressly limits "criminal proceeding(s)" to ongoing proceedings and investigations—namely, "the filing of a criminal complaint, any grand jury proceedings, any trial or hearing conducted in any court relating to a criminal matter, any proceeding before the parole board or any official inquiry into an alleged criminal violation." *Id.* § 11-32-5(c).

Moreover, as the government acknowledges, North Carolina and Rhode Island specifically categorize their witness-tampering offenses—with their requirement of a pending proceeding—in a portion of the criminal code entitled "Obstructing Justice." Br. 37 n.9. Therefore, to the extent state witness-tampering offenses tell us anything about the generic federal obstruction-of-justice offense, witness-tampering offenses like Rhode Island's and North Carolina's further support the conclusion that generic obstruction of justice requires a pending proceeding or investigation.[16]

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[16] The government's analysis of accessory-after-the-fact provisions is likewise unavailing. *See* Pugin Br. 31-33.

B. The Statute's Use Of "Relating To" Does Not Expand The Scope Of Generic Obstruction Of Justice

The fact that Section 1101(a)(43)(S) refers to offenses "relating to" obstruction of justice does not change the analysis. Though the phrase "relating to" sometimes implies breadth, context can "'tu[g] … in favor of a narrower reading.'" *Mellouli*, 575 U.S. at 812 (quoting *Yates*, 574 U.S. at 539) (alteration and ellipsis in original). The government's reliance (Br. 45) on *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992), and *Coventry Health Care of Missouri, Inc.* v. *Nevils*, 581 U.S. 87 (2017), is thus misplaced. Those cases concerned preemption, and in that context this Court has "'repeatedly recognized' that the phrase 'relate to' in a preemption clause 'express[es] a broad pre-emptive purpose.'" *Coventry Health Care*, 581 U.S. at 95-96 (quoting *Morales*, 504 U.S. at 383). Here, by contrast, the statutory context demonstrates that the phrase "relating to" is used descriptively, not expansively.

The INA's aggravated-felony provision at issue here uses the phrase "relating to" 24 times. *See generally* 8 U.S.C. § 1101(a)(43).[17] In 20 of these 24 subparagraphs, "Congress specified the crimes by citing particular federal statutes," followed by a descriptive parenthetical identifying what category of crime the statute "relate[s] to." *Torres* v. *Lynch*, 578 U.S. 452, 455 (2016). For example, Section 1101(a)(43)(J) defines as an aggravated felony "an offense described in section 1962 of title 18 (relating to racketeer influenced corrupt organizations)." Also included are "offense[s] described in[]

[17] *See* 8 U.S.C. § 1101(a)(43)(D), (E)(i)-(iii), (H)-(J), (K)(ii)-(iii), (L)(i)-(iii), (M)-(N), (P)-(T).

[S]ection 842(h) or (i) … (relating to explosive materials offenses)," 8 U.S.C. § 1101(a)(43)(E)(i); "offense[s] described in[] [S]ection 793 (relating to gathering or transmitting national defense information)," *id.* § 1101(a)(43)(L)(i); and offenses "described in [S]ection 1546(a) [of title 18] (relating to document fraud)," *id.* § 1101(a)(43)(P). In one instance, the statute uses "relating to" to narrow the relevant conduct covered by a cited criminal provision, specifying that Section 1101(a)(43)(L)(ii) encompasses violations of "[S]ection 3121 of title 50" that "relat[e] to protecting the identity of undercover intelligence agents," while Section 1101(a)(43)(L)(iii) encompasses violations of "[S]ection 3121 of title 50" that "relat[e] to protecting the identity of undercover agents" more generally. The INA thus presents a pattern of using the phrase "relating to" to describe the relevant offense category, not to expand the category beyond its generic definition.

That pattern continues with respect to offenses defined without express reference to Title 18, where Congress instead identified "crimes by their generic labels." *Torres*, 578 U.S. at 455. Where a single generic label was readily available—for example, "murder," "rape," or "burglary"—Congress used it. *See* 8 U.S.C. § 1101(a)(43)(A), (G). But where no such single, consistently used label was available, Congress used the familiar "relating to" phrase to identify the relevant offense category. For example, Congress included offenses "relat[ing] to the owning, controlling, managing, or supervision of a prostitution business," *id.* § 1101(a)(43)(K); offenses "relating to … trafficking in vehicles the identification numbers of which have been altered," *id.* § 1101(a)(43)(R); offenses "relating to a failure to appear before a court pursuant to a court order," *id.* § 1101(a)(43)(T); and, of course, offenses "relating to

obstruction of justice," *id.* § 1101(a)(43)(S). While these subparagraphs do not refer to particular sections of Title 18, the meaning of the oft-repeated phrase "relating to" is the same. "One ordinarily assumes that identical words used in different parts of the same act are intended to have the same meaning." *Utility Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 319 (2014) (quotation marks omitted). A phrase repeatedly used simply to describe or even narrow the categories of offenses in Section 1101(a)(43) cannot plausibly be read to expand one category of offenses in the same subsection.

The government's contrary argument improperly fails "to give effect … to every word of [the] statute" and renders other material in Section 1101(a)(43)(S) surplusage. *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (quotation marks omitted). For example, Section 1101(a)(43)(S)'s list of aggravated felonies includes not only "an offense relating to obstruction of justice" but also "an offense relating to … perjury or subornation of perjury." But under the government's reading of "relating to," perjury and subornation of perjury would "relat[e] to" obstruction of justice, in that they are offenses that are "in association with or connection with" obstruction of justice. Br. 45 (quotation marks omitted). Thus, reading the phrase "relating to" to sweep in any offense bearing some relation to obstruction of justice would impermissibly render other language in the subparagraph surplusage.

The government's interpretation of "relating to" would also leave courts and individuals with no guidance regarding what constitutes an aggravated felony. "Relating to" cannot be "taken to extend to the furthest stretch of its indeterminacy," because "relations stop nowhere." *New York State Conf. of Blue Cross & Blue*

Shield Plans v. *Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (quotation marks omitted). If, as the government would have it (Br. 44-46), "relating to" as used in Section 1101(a)(43) required only some relation to obstruction of justice, the scope of "aggravated felonies" would potentially have no end. There is no reason to believe that Congress meant the phrase "relating to" to produce such results or to create such uncertainty as to the scope of a term as consequential as "aggravated felony."

Finally, rejecting the government's broad reading of "relating to" does not read it out of the statute. To the contrary, Congress's use of "relating to" to identify rather than expand the relevant category of offenses makes sense because, as discussed (*supra* p. 22 & n.7), state criminal codes only sometimes include obstruction of justice as a discrete offense. Instead, States often criminalize a list of more specific offenses, such as intimidating jurors, that do fall within the generic meaning of obstruction of justice because they require interference with a pending or ongoing investigation or proceeding and yet are called something different.[18] Congress's use of "relating to" in Section 1101(a)(43)(S) is thus best read to reach those offenses that share the elements of generic obstruction of justice but that may bear distinct,

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[18] *See, e.g.*, Haw. Rev. Stat. § 710-1074 (1996) ("Intimidating a juror," which criminalizes the use of force of threat "to influence a juror's vote, opinion, decision, or other action as a juror"); Mo. Rev. Stat. § 575.100 (1996); *State* v. *Bullock*, 826 S.W.2d 83, 85 (Mo. Ct. App. 1992) ("Tampering with physical evidence," construed to require that an "official proceeding [or investigation is] pending at the time defendant undertook to destroy the evidence"); Tenn. Code Ann. § 39-16-503 (1996) ("Tampering with or fabricating evidence," which criminalizes tampering with of fabricating evidence "knowing that an investigation or official proceeding is pending or in progress").

more specific names—not to expand the bounds of the aggravated felony far beyond the generic offense.

C. Chapter 73 Does Not Support The Government's Position

Finally, the government's reliance on cherry-picked offenses within Chapter 73 that it argues do not require a pending proceeding does nothing to alter the definition of the generic offense. In fact, when viewed as a whole, these offenses confirm that generic obstruction of justice does require the existence of a pending or ongoing investigation or proceeding.

First, the government's reliance (*see* Br. 20, 32) on this Court's statement that Section 1503 required "a relationship in time, causation, or logic with the judicial proceeding," *Aguilar*, 515 U.S. at 599, is unconvincing. *Aguilar* interpreted Section 1503, which, as noted above, indisputably requires a pending proceeding. *See supra* pp. 16-18. The Court's reference to "a relationship in time, causation or logic" did not eliminate the judicial proceeding requirement; it recognized a separate limitation on Section 1503's reach. To be convicted, *Aguilar* explained, a defendant must both have "knowledge of a pending proceeding" and have engaged in conduct with "the natural and probable effect" of obstructing that proceeding—that is, the conduct "must have a relationship in time, causation, or logic" to the "pending proceeding." 515 U.S. at 599.[19] The language the government relies

[19] *Marinello* v. *United States*, 138 S. Ct. 1101 (2018), does not change this analysis. Unlike *Aguilar*, which involved Section 1503, *Marinello* involved an unrelated provision of the Internal Revenue Code and has no bearing on whether Section 1503 (or any other Chapter 73 provision) requires an ongoing proceeding or investigation.

on referred only to the latter requirement, making clear that the "nexus" requirement exists to ensure that a defendant's actions have the "the natural and probable effect of interfering with the due administration of justice." *Id.* (quotation marks and citation omitted). Thus, *Aguilar* held that a judge's false statements to FBI agents operating pursuant to a grand jury investigation did not "have the 'natural and probable effect' of interfering with the due administration of justice" and therefore did not satisfy Section 1503's nexus requirement. *Id.* at 601. At no point did the Court even suggest, much less hold, that the "nexus" requirement could be satisfied where there was no grand jury or other proceeding at all.[20]

Tellingly, the government's reading of the "nexus" requirement set forth in *Aguilar* has also been rejected by Congress. In adding Section 1519 to Chapter 73 six years after it added "obstruction of justice" to the INA in 1996, Congress explained that this specialized "anti[-]shredding provision" was enacted to address the "patchwork" of "provisions governing the destruction or fabrication of evidence." S. Rep. No. 107-146, at 14 (2002). As Congress further explained, some of these provisions, "such as 18 U.S.C. Sec. 1503, have been narrowly interpreted by courts, including the Supreme

[20] This Court's holding further demonstrates the government's flawed portrayal of the "nexus" requirement set forth in *Aguilar*. False statements made to investigating federal agents while a grand jury was convened would, under the government's argument, presumably feature a relationship in "causation" or "logic" to this ongoing grand jury proceeding. Yet the Court ruled for the defendant because it "d[id] not believe that uttering false statements to an investigating agent … who might or might not testify before a grand jury [was] sufficient to make out a violation of the catchall provision of § 1503." 515 U.S. at 600.

Court in [*Aguilar*] to apply only to situations where the obstruction of justice can be closely tied to a pending judicial proceeding." *Id.* In the outlier case of Section 1519, Congress thus sought to expressly identify an exception to the requirement of a pending proceeding. If Congress believed that *Aguilar*'s nexus requirement could be satisfied by a "causal" or "logical" relationship to a judicial proceeding that had not yet begun, it would not have had this concern.

Next, the government contends that a small number of offenses in Chapter 73—those described in sections 1510(a), 1511, 1512, 1518, and 1519—can be committed before an investigation or proceeding is pending or ongoing. *See* Br. 26-29. But as already discussed, Sections 1510 and 1513 do require a nexus to a pending or completed investigation or proceeding. *See supra* pp. 19-20. And Sections 1518 and 1519 were codified after Congress added "obstruction of justice" to the INA's list of aggravated felonies. *See* Pub. L. No. 104-191 § 245(a), 110 Stat. 2017 (1996) (adding § 1518); Pub. L. No. 107-204 § 802(a), 116 Stat. 800 (2002) (adding § 1519). Accordingly, they are of limited use in discerning Congress's understanding of generic obstruction of justice when that offense was added to the INA's "aggravated felony" definition.

Furthermore, Sections 1511, 1518 and 1519 are of limited use in defining the generic obstruction-of-justice offense for another reason: they are specialized and narrow extensions of general obstruction concepts to particular, limited settings. This Court acknowledged the specialized nature of Sections 1518 and 1519 in rejecting the government's overbroad reading of Section 1519. *See Yates*, 574 U.S. at 540-542 (rejecting the government's reading of Section 1519 "as a general ban on the spoliation of evidence" in part because Section 1519 was placed

"at the end of the chapter, following immediately after the pre-existing § 1516, § 1517, and § 1518, each of them prohibiting obstructive acts in specific contexts"). Section 1518, prohibiting "[o]bstruction of criminal investigations of health care offenses," likewise applies to "obstruction in certain limited types of cases." *Id.* at 540 (citation and quotation marks omitted). Section 1519, a product of the Sarbanes-Oxley Act "intended to prohibit, in particular, corporate document-shredding to hide evidence of financial wrongdoing," is no different. *Id.* at 536. And as previously explained, *see supra* p. 20, Section 1511—intended to address the scourge of syndicated gambling and prescribe criminal penalties for "conspirac[ies] to obstruct the enforcement of state law to facilitate an 'illegal gambling business'"—likewise has little relevance, because the focus of this statute is a conspiracy offense. *See* H.R. Rep. No. 91-1549, at 34. These specialized provisions say nothing about the *generic* obstruction-of-justice offense.

Moreover, the government's narrow focus on statutory outliers again "turns the categorical approach on its head." *Esquivel-Quintana*, 581 U.S. at 393. Because a generic offense is "the offense as commonly understood," *Descamps*, 570 U.S. at 257, it is not expanded by the presence of isolated additional provisions that sweep more broadly or address idiosyncratic circumstances. The majority of offenses codified within Chapter 73 as of 1996, most notably including the "catchall provision of [Section] 1503," do require a pending investigation or proceeding. *Aguilar*, 515 U.S. at 600; *see supra* pp. 16-20. In setting the uniform definition of the generic offense, it is to that common understanding that courts must look. *See Shular* v. *United States*, 140 S. Ct. 779, 783 (2020) (categorical approach "requir[es] the court to come up with a 'generic' version of a crime—that is, the

elements of the 'offense as commonly understood'"); *see also Rosa* v. *Attorney Gen.*, 950 F.3d 67, 76 (3d Cir. 2020) (rejecting the government's contention that multiple federal analogs can exist under the categorical approach). The fact that a small number of offenses within Chapter 73 can reach conduct prior to a pending investigation or proceeding does not mean that obstruction of justice as "commonly understood" can be so defined; it simply means that Chapter 73 contains some offenses that reach beyond generic obstruction. *Cf. Taylor*, 495 U.S. at 591, 599.

Furthermore, if interpreted the government's way, the resulting expansive definition would again render other parts of Section 1101(a)(43) superfluous. The government argues that 18 U.S.C. § 1510(a), which prohibits interfering with "the communication of information … to a criminal investigator" "by means of bribery," supports the conclusion that the generic obstruction-of-justice crime does not require a pending investigation or proceeding. Setting aside that both the legislative history of Section 1510(a) and the courts of appeals have construed it to require such a nexus, *see supra* p. 19 & n.5, the government ignores that Section 1101(a)(43)(S) separately defines an offense "relating to … bribery of a witness" as an aggravated felony. 8 U.S.C. § 1101(a)(43)(S). The government's attempt to expand obstruction of justice thus impermissibly renders Section 1101(a)(43)(S)'s reference to bribery "inoperative or superfluous, void or insignificant." *Corley* v. *United States*, 556 U.S. 303, 314 (2009); *see also Inhabitants of Montclair Twp.* v. *Ramsdell*, 107 U.S. 147, 152 (1883) (courts should "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed").

The government also asserts that certain Chapter 73 offenses—Sections 1503, 1509, and 1513—can be committed after an investigation or proceeding has ended. Br. 29-30. Yet that says nothing about the issue presented here—namely, whether generic obstruction of justice can occur before any investigation or proceeding has started. Each of the government's identified provisions inherently requires at a minimum that an investigation or proceeding *exist*, even if it ended before the relevant criminal act. Section 1513 prohibits retaliating against a witness in an official proceeding or an individual for providing information to law enforcement. 18 U.S.C. § 1513(a), (b). Section 1503(a) prohibits retaliating against a juror or court officer for performance of their duties. *Id.* § 1503(a). And 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." *Id.* § 1509. None can occur without an investigation or proceeding taking place or having taken place. Thus, whether or not such offenses could fall within the definition of generic obstruction of justice, they do not support the government's position that generic obstruction of justice may occur even before any investigation or proceeding has begun.

Finally, the federal sentencing guidelines add nothing to the government's position. The government posits that because "the guideline provision applicable to most Chapter 73 offenses—including many that lack a temporal-nexus requirement"—was titled "Obstruction of Justice," that means "those offenses were each a form of obstruction of justice." Br. 43-44. But the fact that the Sentencing Guidelines simply track Chapter 73's structure conveys nothing beyond what is already clear from Chapter 73: as of 1996, the majority of its offenses

required a pending investigation or proceeding, and when Congress meant to provide otherwise, it needed to say so expressly. *See supra* pp. 15-21.

In short, the government seeks to substitute definitions of witness tampering, the crime for which Mr. Cordero-Garcia was convicted, in place of the definition of "obstruction of justice," the offense Congress chose to designate an "aggravated felony." Many of the crimes the government seeks to shoehorn into "obstruction of justice" are no doubt serious offenses, some of which may render noncitizens deportable for other reasons (*e.g.* as crimes involving moral turpitude). But neither the fact that some (not all or even most) States categorize witness tampering as obstruction of justice nor the fact that some (not all or even most) States have witness-tampering provisions that lack a pending proceeding requirement has any bearing whatsoever on the question presented: whether federal generic obstruction of justice requires such a proceeding. A faithful application of the categorical approach demonstrates that it does.

III. THE COURT SHOULD NOT DEFER TO THE BIA'S INTERPRETATION OF "OBSTRUCTION OF JUSTICE"

Even if the Court deems the statute ambiguous, it is the rule of lenity—not *Chevron* deference—that controls. And in any event, the BIA's interpretation is unreasonable and should be rejected.

The BIA's interpretation of "obstruction of justice" is not entitled to deference because, as the government concedes (Br. 52), that the Attorney General has no delegated authority to speak "with the force of law" when interpreting state or federal criminal law. *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001). With one notable exception discussed below, the BIA derived its

definition of generic obstruction of justice from state and federal criminal statutes and authorities, not the INA. *See In re Batista-Hernandez*, 21 I&N Dec. 955, 961 (BIA 1997) (en banc); *Valenzuela Gallardo I*, 25 I&N Dec. at 839-844; *Valenzuela Gallardo III*, 27 I&N Dec. at 451-460. Because the BIA's categorical analysis of obstruction of justice comprises interpretations of criminal law and related authorities, rather than the language and context of the INA itself, it is not entitled to *Chevron* deference. *See, e.g.*, *Torres* v. *Lynch*, 578 U.S. 452, 460-466 (2016) (determining whether a state offense was an aggravated felony without *Chevron* deference, despite the government's contention that *Chevron* deference should apply).

The one situation in which the BIA did rely on an interpretation of the INA to interpret Section 1101(a)(43)(S) was *In re Espinoza-Gonzalez*, in which the BIA concluded that offenses "relating to obstruction of justice"—like the three other crimes of "perjury," "subornation of perjury," and "bribery of a witness" listed in Section 1101(a)(43)(S)—are "clearly associated with the affirmative obstruction of a proceeding or investigation." 22 I&N Dec. at 893.

Rather than deference, if "obstruction of justice" in Section 1101(a)(43)(S) is viewed as ambiguous, both the rule of lenity and longstanding principles of immigration law require resolving any ambiguity in the noncitizens' favor. First, the rule of lenity applies because the question whether the federal generic obstruction-of-justice offense requires a nexus to a pending or ongoing investigation or proceeding "has both criminal and noncriminal applications." *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 n.8 (2004). Though the Court now confronts obstruction of justice "in the deportation context," to the extent the contours of that phrase are defined by reference to

federal or state criminal statutes, the Court "must interpret th[ose] statute[s] consistently, whether [it] encounter[s] [their] application in a criminal or noncriminal context." *Id.* Moreover, whether a particular state offense is an "aggravated felony" under Section 1101(a)(43)(S) also carries criminal-law consequences: a removed aggravated felon who seeks to reenter the United States without permission faces up to 20 years in prison, rather than the two years for other deportees. 8 U.S.C. § 1326(a), (b)(2). Noncitizens convicted of "aggravated felonies" are similarly subject to heightened criminal sanctions if they disobey orders of removal, *see* 8 U.S.C. § 1253(a)(1), as are individuals who help "aggravated felon[s]" illegally enter the country, *see id.* § 1327. Thus, lenity applies to the same extent as if the Court were directly construing the aggravated-felony provision in the context of a criminal case.

Second, there is independently a "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). This Court "resolve[s] [any] doubts in favor of" noncitizens "because deportation is a drastic measure." *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948). "[S]ince the stakes are considerable for the individual, [this Court] will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Id.* Thus, any ambiguity regarding whether "obstruction of justice" as used in Section 1101(a)(43)(S) requires a nexus to an actual or ongoing investigation or proceeding must be resolved in the noncitizens' favor. Because these principles of lenity resolve any ambiguity in the statute, *Chevron* deference has no role.

The government's reliance on 8 U.S.C. § 1103(a)(1) is misplaced. That provision, found in a subsection entitled "Secretary of Homeland Security," allocates responsibility among various cabinet officers and Executive Branch officials, concluding with a proviso that any "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." But that language, originally enacted in 1952, simply allocates interpretive authority among Executive Branch officials. It does not purport to abrogate the established role of lenity in judicial construction of removal statutes with criminal consequences or the background principle, already well established by 1952, in favor of construing deportation statutes in the "narrowest" way possible and "resolv[ing] [any] doubts in favor of" noncitizens. *Fong Haw Tan*, 333 U.S. at 10; *see also* Pub. L. No. 82-414, § 103, 66 Stat. 163, 173 (1952).

Finally, even if *Chevron* applied, the BIA's unreasonable interpretation of "offenses relating to obstruction of justice" merits no deference. The BIA adopted a two-part definition of "an offense relating to obstruction of justice": "[1] offenses covered by chapter 73 of the Federal criminal code or [2] any other Federal or State offense" involving an "attempt … motivated by a specific intent … to interfere" in an "ongoing, pending, or reasonably foreseeable" investigation or proceeding. *Valenzuela Gallardo III*, 27 I&N Dec. at 460. Neither the BIA's decisions nor the government's brief here has cited any categorical-approach case that gives a single federal offense two (or, apparently, more) sets of generic elements. And the government's brief here implicitly criticizes the first half of the BIA's definition (Br. 25 n.5), while doing nothing to defend the BIA's arbitrary "foreseeability" element. The government is in no position to demand deference to an agency interpretation that it has

not affirmatively defended and, indeed, has actually undermined.[21]

CONCLUSION

The judgment of the court of appeals should be affirmed.

[21] Contrary to the government's assertion (Br. 50 n.28), even the Court's resolution of the question presented in the government's favor would not determine whether the elements of Cal. Penal Code § 136.1(b)(1) sweep more broadly than the elements of the BIA's proposed generic definition of "obstruction of justice," a point that the court of appeals did not decide. Pet. App. 8a-15a. As Mr. Cordero-Garcia argued below, § 130.1(b)(1) reaches pre-arrest efforts to dissuade a person from reporting a crime, Pet.'s Opening Br. 14, *Cordero-Garcia* v. *Garland*, 44 F.4th 1181 (9th Cir. 2022) (No. 19-72779), not efforts to dissuade a witness from testifying in some foreseeable proceeding. Whether Cal. Penal Code § 136.1(b)(1) categorically matches the government's proposed generic definition would thus remain to be resolved on remand.

Respectfully submitted.

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