No. 22-____

IN THE

Supreme Court of the United States

JEAN FRANCOIS PUGIN,

Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Michael R. Dreeben
Counsel of Record
Brian D. Boyle
Martha Hutton
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300
mdreeben@omm.com

QUESTION PRESENTED

Under the Immigration and Nationality Act (INA), a noncitizen who is convicted of an "aggravated felony" is subject to mandatory removal and faces enhanced criminal liability in certain circumstances. One aggravated felony is "an offense relating to obstruction of justice." 8 U.S.C. § 1101(a)(43)(S). The questions presented are:

1. Whether a state offense—like petitioner's accessory-after-the-fact offense here—that does not involve interference with an existing official proceeding or investigation may constitute an "offense relating to obstruction of justice."

2. Whether, assuming that the phrase "offense relating to obstruction of justice" is deemed ambiguous, courts should afford *Chevron* deference to the Board of Immigration Appeals' interpretation of that phrase.

PARTIES TO THE PROCEEDING

Petitioner in this Court and in the court below is Jean Francois Pugin.

Respondent in this Court and in the court below is Merrick B. Garland, Attorney General.

DIRECTLY RELATED PROCEEDINGS

Jean Francois Pugin v. Merrick B. Garland, Attorney General, No. 20-1363 (4th Cir.) (agency action affirmed and opinion issued November 30, 2021; rehearing en banc denied March 7, 2022; mandate issued March 25, 2022).

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

APPENDIX

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

STATUTES

TABLE OF AUTHORITIES

Page(s)

ADMINISTRATIVE DECISIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

IN THE

Supreme Court of the United States

No. 22-___

JEAN FRANCOIS PUGIN,

Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Petitioner Jean Francois Pugin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 19 F.4th 437 and reprinted in the Appendix to the Petition at Pet. App., *infra,* 1a-70a. The opinion of the Board of Immigration Appeals, Pet. App. 71a-75a, is unreported. The decision of the Immigration Judge, Pet. App. 76a-82a, is unreported.

JURISDICTION

The court of appeals entered its judgment on November 30, 2021, Pet. App. 1a, and denied rehearing

on March 7, 2022, *id.* at 83a. On April 19, 2022, the Chief Justice extended the time to file a petition for a writ of certiorari through July 6, 2022. No. 21A608. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 101(a)(43) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43), provides in relevant part: "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."

Other relevant provisions of the U.S. Code—specifically, 8 U.S.C. §§ 1253, 1326, 1327 and 18 U.S.C. § 3—are reproduced at Pet. App. 93a-101a.

INTRODUCTION

The immigration laws impose harsh consequences on a noncitizen convicted of an aggravated felony. Such an individual faces both mandatory removal and increased criminal punishment for certain immigration offenses. Recognizing that these consequences implicate significant liberty interests, courts have routinely rejected sweeping executive claims about the scope of what constitutes an aggravated felony. This case presents a paradigmatic overbroad interpretation of one type of aggravated felony under the Immigration and Nationality Act (INA): an offense "relating to obstruction of justice." 8 U.S.C. § 1101(a)(43)(S). Decades of decisions have viewed obstruction of justice as involving interference with a *pending* proceeding. Despite this interpretation, im-

migration authorities have asserted that offenses relating to obstruction of justice include crimes committed *before* any proceeding exists. That erroneous and expansive interpretation has predictably produced a circuit split.

Some courts of appeals—the Third and Ninth Circuits—have correctly held that an "offense relating to obstruction of justice" has a clear legal meaning requiring interference with an *existing* official proceeding or investigation. The Fourth Circuit, by contrast, has deemed the INA ambiguous about the scope of an "offense relating to obstruction of justice"; it then applied *Chevron, U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to defer to the Board of Immigration Appeals' (BIA) interpretation. In so doing, the Fourth Circuit has accepted the BIA's view that the INA extends to crimes that punish interference with a *future* proceeding, as long as that proceeding was "reasonably foreseeable." And on the other end of the spectrum, the First Circuit has held that "offense relating to obstruction of justice" is unambiguous—and that the phrase does *not* require a nexus to a pending investigation or proceeding.

The conflict is sharp and entrenched in the context of the state offense involved in this case: a conviction for being an accessory after the fact. The Fourth Circuit held that the offense is covered by deferring to the BIA; the First Circuit views the statute as clearly covering it without resort to *Chevron*; and the Third and Ninth Circuits hold that it clearly is *not* covered. Only this Court can resolve this three-way disagreement over the meaning of a federal statute—as well as the interrelated question, which is the subject of its

own circuit conflict, whether *Chevron* deference would be appropriate if the statute is deemed ambiguous.

The questions presented are critically important. A noncitizen with an aggravated-felony conviction is removable from this country, no matter how long he has lived here. Petitioner, for instance, has lived in the United States for 37 years, but now faces permanent exile based on the BIA interpretation to which the Fourth Circuit deferred. If petitioner's case had arisen in the Third or Ninth Circuits, however, he would face no such consequence. The penalty of deportation should not turn on the vagaries of where a noncitizen's immigration proceedings are initiated. Nor should the extensive criminal liability that can also flow from an aggravated-felony conviction. And the fact that both deportation and criminal liability directly infringe individual liberty makes it all the more important that a *court*—not an executive agency like the BIA—independently decide whether such consequences are authorized. The Fourth Circuit here surrendered its independent role by deferring to the BIA.

The Fourth Circuit's decision is also wrong. For more than a century, federal law has defined "obstruction of justice" to require interference with a pending proceeding or investigation. Accessory-after-the-fact offenses, however, lack that element. They typically cover conduct long before any proceeding is on the horizon. Reflecting that distinction, the federal accessory-after-the-fact prohibition appears outside the U.S. Code chapter entitled "Obstruction of Justice." Congress enacted the INA's coverage of "an offense re-

lating to obstruction of justice" against that background and thus incorporated the established federal-law meaning of that phrase. But even if the statute were deemed ambiguous, *Chevron* deference would have no role to play. Courts, not agencies, should apply the usual tools of statutory construction to define what is an aggravated felony. And both the immigration and criminal rules of lenity would require construing the category of aggravated felony narrowly, not to the greatest imaginable breadth that executive immigration authorities might envision.

To resolve the circuit conflicts over the provision at issue here, to settle the proper legal framework for addressing recurring questions about the role of *Chevron* in this context, and to reaffirm the limited scope of obstruction of justice in federal law, the petition for certiorari should be granted.

STATEMENT

A. Legal Background

1. The INA "renders deportable any [noncitizen] convicted of an 'aggravated felony' after entering the United States." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1210 (2018); *see* 8 U.S.C. § 1227(a)(2)(A)(iii). Such a noncitizen is also ineligible for essentially every form of discretionary relief from removal. *See id.* §§ 1158(b)(2) (no asylum), 1182(h) (no waiver), 1229b(a)(3) (no cancellation of removal), 1229c(a)(1) (no voluntary departure). And once an aggravated felon is removed from the United States, he is permanently ineligible for readmission or naturalization. *Id.* § 1182(a)(9)(A). If a removed noncitizen is later

convicted of unlawful reentry, the extent of his criminal liability depends on whether he has previously been convicted of an aggravated felony: if so, he faces a twenty-year sentence; if not, he faces a two-year sentence. *See id.* §§ 1326(a), (b)(2).

2. The INA contains a list of criminal offenses that constitute aggravated felonies. *Id.* § 1101(a)(43). One such offense—at issue here—is "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." *Id.* § 1101(a)(43)(S).

To determine whether a state conviction qualifies as a listed aggravated felony, this Court applies the "categorical approach." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017). Under that approach, the "facts underlying the case" at issue are immaterial. *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013). Rather, the Court determines the elements of the aggravated felony's "generic" definition of the crime. *Id.* (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007)). And if the elements of the state statute of conviction "are the same as, or narrower than, those of the generic offense," then the conviction constitutes an aggravated felony. *Mathis v. United States*, 579 U.S. 500, 504 (2016). But if the elements of the state statute of conviction "cover[] any more conduct than the generic offense," then a conviction under that statute is not an aggravated felony. *Id.* By "err[ing] on the side of underinclusiveness," *Moncrieffe*, 569 U.S. at 205, the categorical approach "promote[s] efficiency, fairness, and predictability in the administration of immigration law," *Mellouli v. Lynch*, 575 U.S. 798, 806 (2015).

3. Over the past two decades, the BIA has taken different approaches to the interpretive question presented here. In *In re Batista-Hernandez*, 21 I. & N. Dec. 955 (1997), the BIA held that the federal accessory-after-the-fact provision, 18 U.S.C. § 3, was an "offense relating to obstruction of justice." *Id.* at 962. But in 1999, the BIA held that "obstruction of justice" is a "term of art" that excludes offenses, like misprision of a felony, that "do[] not require as an element either active interference with proceedings of a tribunal or investigation, or action or threat of action against those who would cooperate in the process of justice." *In re Espinoza-Gonzalez*, 22 I. & N. Dec. 889, 893 (1999). In light of that analysis, the Ninth Circuit held that "the BIA now concludes that accessory after the fact is an obstruction of justice crime *when* it interferes with an ongoing proceeding or investigation," and it rejected the view that a state misdemeanor of rendering criminal assistance in the absence of an ongoing proceeding qualified under that test. *Trung Thanh Hoang v. Holder*, 641 F.3d 1157, 1164 (9th Cir. 2011).

In 2012, however, the BIA "invoke[d] the authority" under *Chevron* and *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), to offer a new interpretation of the statutory phrase. *In re Valenzuela Gallardo*, 25 I. & N. Dec. 838, 840 (2012). There, the BIA concluded that "obstruction offenses" need not "involve interference with an *ongoing* investigation or proceeding," but rather require only interference "with the process of justice." *Id.* at 842. The BIA therefore concluded that a state accessory-after-the-fact conviction "is an

offense 'relating to obstruction of justice.'" *Id.*

The Ninth Circuit rejected this new interpretation, holding that "the BIA has not given an indication of what it … include[s] in 'the process of justice,' or where that process begins and ends." *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 819 (9th Cir. 2016). "[T]his new interpretation," the Ninth Circuit held, "raises grave doubts about whether INA § 101(a)(43)(S) is unconstitutionally vague," *id.*, and thus did not merit *Chevron* deference, *id.* at 818-24. The court then remanded to the agency for either a new construction of the statute or a return to *Espinoza-Gonzalez*. *Id.* at 824.

After the Ninth Circuit's ruling, the BIA announced a new formulation. *See In re Valenzuela Gallardo*, 27 I. & N. Dec. 449, 451-52 (2018). Again invoking *Chevron* and *Brand X*, the BIA "clarif[ied]" its interpretation by first reiterating 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'" and then stating that it was sufficient if the proceeding is "ongoing, pending, *or reasonably foreseeable* by the defendant." *Id.* at 456, 460 (emphasis added). Applying this new definition, the BIA determined again that a state accessory-after-the-fact conviction is an "offense relating to obstruction of justice." *Id.* at 461.[1]

---

[1] The Ninth Circuit rejected this formulation as well. *See Valenzuela Gallardo v. Barr*, 968 F.3d 1053, 1056 (9th Cir. 2020) (holding that "the BIA's new construction is inconsistent with

B. Factual and Procedural Background

1. Petitioner Jean Francois Pugin, a native and citizen of Mauritius, was admitted to the United States in 1985 as a lawful permanent resident and has lived here ever since. Pet. App. 3a.

In 2014, Pugin pleaded guilty in Virginia to being an accessory after the fact to a non-homicide felony. *Id.* at 3a-4a. Under Virginia law, that crime is a misdemeanor, *id.* at 4a n.1, and consists of "three elements," *Commonwealth v. Dalton*, 524 S.E.2d 860, 862 (Va. 2000). "First, the felony must be complete. Second, the accused must know that the felon is guilty. Third, the accused must receive, relieve, comfort, or assist the felon." *Id.* Some Virginia cases also hold that the accused must act "with the view of enabling his principal to elude punishment." *Wren v. Commonwealth*, 67 Va. 952, 957 (1875). Pugin was sentenced to twelve months of imprisonment with nine months suspended. Pet. App. 3a.

In 2015, the Department of Homeland Security issued Pugin a notice to appear charging him with removability because the agency believed he had been convicted an aggravated felony—specifically, "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). Pugin moved to terminate proceedings before the immigration judge (IJ), arguing that he was not removable because his conviction

---

the unambiguous meaning of the term 'offense relating to obstruction of justice'" by expanding the phrase beyond "a nexus to an *ongoing* criminal proceeding or investigation") (emphasis added)).

did not qualify as an aggravated felony. Pet. App. 4a.

2. The IJ denied Pugin's motion to terminate. *Id.* at 82a. Applying the BIA's 2012 interpretation, the IJ concluded that because Virginia's accessory-after-the-fact statute "requires [defendants to] act with the specific purpose of hindering the process of justice," it "is categorically an aggravated felony relating to obstruction of justice, which renders [Pugin] removable." *Id.* at 80a-81a.

The BIA affirmed the IJ's decision and dismissed Pugin's appeal. *Id.* at 75a. Citing the 2018 decision in *In re Valenzuela Gallardo*, the BIA held that to be an "offense relating to obstruction of justice," a state conviction need only involve interference in an investigation or proceeding that is "reasonably foreseeable." *Id.* at 73a. Applying that definition, the BIA concluded that Virginia's accessory-after-the-fact offense "categorically falls within the federal generic definition" of "offense relating to obstruction of justice." *Id.*

3. Pugin sought judicial review, and a divided Fourth Circuit panel deferred to the BIA's interpretation under *Chevron*.

The majority first considered whether the *Chevron* framework applied at all to the BIA's interpretation of "offense relating to obstruction of justice." *Id.* at 7a-8a. The majority acknowledged "that no Supreme Court case has afforded *Chevron* deference" to the BIA's determination that a state offense qualifies as an aggravated felony. *Id.* at 11a. It recognized that such a determination "might indirectly impact future criminal liability" if a noncitizen were later convicted

of unlawfully reentering the United States. *Id.* at 9a. And it noted the "thoughtful and ongoing debate about whether *Chevron* can apply to interpretations of criminal law." *Id.* at 8a. Yet the majority held that Fourth Circuit "precedent suggests that we must apply *Chevron*" because the INA "is a civil statute, and any collateral criminal consequences are too attenuated to change our analysis." *Id.*

Having determined that the *Chevron* framework applies, the majority next held that the phrase "'relating to obstruction of justice' is ambiguous" about "whether an ongoing proceeding or reasonably foreseeable proceeding must be obstructed." *Id.* at 13a. In turn, at "*Chevron* Step Two," the majority held that "the Board's generic definition of obstruction of justice"—*i.e.*, that interference in a "*reasonably foreseeable* proceeding" suffices—is permissible. *Id.* at 24a. In support, the majority observed that some state obstruction-of-justice laws "do not require a connection to an ongoing proceeding" and that the Model Penal Code "criminalizes the act of concealing a crime without a pending proceeding." *Id.* at 16a. And the majority reasoned that the words "relating to" in the phrase "relating to obstruction of justice" effectively "broaden[] th[e] understanding" of "obstruction of justice." *Id.* at 21a.

The majority rejected Pugin's argument—adopted by the Third and Ninth Circuits—that "obstruction of justice" is a "term of art referencing Chapter 73 of Title 18 of the U.S. Code, which is titled 'Obstruction of Justice.'" *Id.* at 14a (citing *Valenzuela Gallardo*, 968 F.3d at 1064; *Flores v. Attorney General*, 856 F.3d 280, 294 (3d Cir. 2017)). And the majority also rejected

Pugin's argument that Congress's placement of the federal accessory-after-the-fact offense outside of Chapter 73 shows that Congress understood accessory-after-the-fact offenses not to qualify as obstruction. *Id.* at 19a-21a.

The majority then held that "Virginia accessory-after the fact … is a categorical match with the Board's generic definition," *id.* at 27a, because (in its view) Virginia law "require[s] intent to help a known felon escape capture or punishment," *id.* at 29a. "So," the majority concluded, "Pugin is removable." *Id.* at 27a.

Chief Judge Gregory dissented. As a threshold matter, the dissent accepted that the *Chevron* framework applied despite "reservations and growing acceptance of the contrary view." *Id.* at 40a (Gregory, C.J., dissenting). At *Chevron* step one, the dissent concluded that the phrase "relating to obstruction of justice" unambiguously requires interference with "an ongoing or pending proceeding or investigation." *Id.* at 42a. The dissent explained that "[t]he term 'obstruction of justice' is a term dating back to the 19th century that federal courts have consistently interpreted for over one-hundred years as requiring a specific intent to impede a pending or ongoing proceeding," and courts "presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts." *Id.* at 43a. The dissent also emphasized that "Congress clearly spoke by placing [the federal accessory-after-the-fact offense] outside of Chapter 73 and, thus, instructed courts that it was different from 'obstruction of justice.'" *Id.* at 58a (citing *Flores*, 856 F.3d at 289 & n.38). And the dissent noted

that "sister courts" have agreed that "a nexus element to an ongoing formal proceeding or investigation" is "requir[ed]." *Id.* at 48a.

4. The court of appeals denied Pugin's petition for rehearing en banc. *Id.* at 83a-84a. Chief Judge Gregory and Judges King and Wynn voted to grant the petition. *Id.* In dissenting from the denial of rehearing, Chief Judge Gregory noted that the panel decision conflicts with decisions from "our sister circuits," and argued that the panel decision "will have far-reaching implications" because it "expands the list of possible state crimes that could trigger immigration deportation consequences for many persons." *Id.* at 90a, 92a.

REASONS FOR GRANTING THE PETITION

This case involves two issues of fundamental importance to the administration of the immigration laws on which the courts of appeals are divided. The immediate issue concerns the meaning of "offense relating to obstruction of justice." On that question, courts have broken three ways in a sharp, well-developed, and intractable conflict. The broader background issue is whether the *Chevron* framework applies at all to the BIA's interpretation of the scope of an aggravated felony. There as well, courts disagree. Both conflicts merit this Court's intervention. Indeed, the Court has previously granted certiorari in part to address the *Chevron* issue but was unable to do so in the context of that case. Resolving these conflicts is critically important to noncitizens like Pugin and to the immigration and criminal justice systems more broadly. And this Court's review is especially warranted because the decision below is incorrect—both as a matter of statutory interpretation and on the

court of appeals' approach to reconciling the roles of courts and agencies in interpreting immigration laws with criminal consequences. This case is the ideal vehicle for addressing these longstanding issues. The petition should therefore be granted.

A. This Case Implicates Two Interrelated Issues On Which The Circuits Are Divided

The Fourth Circuit's decision presents two circuit conflicts that justify this Court's review. First, the circuits are divided over whether the phrase "offense relating to obstruction of justice" in the INA's aggravated-felony provision has a clear legal meaning extending only to offenses involving interference with an existing proceeding or investigation. Second, the circuits are divided over whether the *Chevron* framework applies at all to the BIA's interpretation of "offense relating to obstruction of justice."

1. *The meaning of obstruction of justice.* The Ninth and Third Circuits have held that the phrase "offense relating to obstruction of justice" unambiguously requires the presence of an actual proceeding or investigation, and thus excludes accessory-after-the-fact offenses because accessory conduct may occur before criminal enforcement authorities have even been alerted to the principal's offense. In contrast, the Fourth Circuit held in this case that the statutory phrase is ambiguous, deferred to the BIA's interpretation that only a "reasonably foreseeable" proceeding or investigation is required, and thus concluded that an accessory-after-the-fact offense qualifies as an aggravated felony. And deepening the disagreement, the First Circuit has held that the statutory phrase unambiguously does *not* require an actual proceeding

or investigation, and thus includes accessory-after-the-fact offenses. These three divergent approaches underscore the need for this Court's intervention.

a. In *Valenzuela Gallardo v. Barr*, 968 F.3d 1053 (9th Cir. 2020), the Ninth Circuit canvassed the same interpretive arguments presented here and held that "when Congress enacted § 1101(a)(43)(S) into law, an offense relating to obstruction of justice unambiguously required a nexus to an ongoing or pending proceeding or investigation." *Id.* at 1068. It therefore rejected the BIA's broader interpretation of that phrase "to cover intentional interference with 'reasonably foreseeable' proceedings or investigations." *Id.* And it concluded that California's accessory-after-the-fact statute "is not a categorical match with obstruction of justice under § 1101(a)(43)(S) because California's statute encompasses interference with proceedings or investigations that are not pending or ongoing." *Id.* at 1069.

To similar effect is *Flores v. Attorney General*, 856 F.3d 280 (3d Cir. 2017). There, the Third Circuit held that § 1101(a)(43)(S) only "reach[es] conduct" that "impedes a judicial [or other official] proceeding" and "does not reach conduct unmoored from [such] proceedings." *Id.* at 295; *see id.* at 292-94. It reasoned that § 1101(a)(43)(S) "reference[s] Chapter 73," *id.* at 288—which is entitled "Obstruction of Justice"—and offenses in that chapter have a "nexus" to an "official proceeding," *id.* at 294. Accordingly, the Third Circuit concluded that South Carolina's accessory-after-the-fact offense "is *not* 'relat[ed] to obstruction of justice.'" *Id.* at 292; *id.* at 293 (emphasizing that the South Carolina offense "focus[es] not on a defendant's intent

and actions regarding a particular judicial proceeding, but on the principal of a crime"). Had Congress considered accessory after the fact to be "an obstruction-of-justice offense," the court explained, "it presumably would have placed [the federal accessory-after-the-fact provision] in Chapter 73." *Id.* at 289.

b. In contrast, the Fourth Circuit held that "[t]he phrase 'relating to obstruction of justice' is ambiguous," Pet. App. 13a, and deferred to the BIA's interpretation that the phrase encompasses interference with "reasonably foreseeable" as well as "ongoing" investigations or proceedings, *id.* at 13a-14a, 24a. The court thus accepted the BIA's conclusion that Pugin's accessory-after-the-fact conviction constitutes an aggravated felony. *Id.* at 34a. In so holding, the Fourth Circuit expressly "disagree[d]" with the holdings of the Ninth and Third Circuits. *Id.* at 14a.

c. Breaking with both of those approaches, a divided panel of the First Circuit "h[e]ld the generic federal definition of 'an offense relating to obstruction of justice' unambiguously does not require a nexus to a pending or ongoing investigation or judicial proceeding." *Silva v. Garland*, 27 F.4th 95, 98 (1st Cir. 2022). The First Circuit explicitly rejected the Ninth Circuit's decision in *Valenzuela Gallardo* and the Third Circuit's decision in *Flores*. *Id.* at 106 n.16. It disagreed with those courts' derivation of a pending-proceeding requirement from the general character of the obstruction crimes found in Chapter 73 and Congress's placement of federal accessory after the fact outside of that chapter. *Id.* at 105-06; *see also id.* at 114 (Barron, J., dissenting) (noting that the majority "reject[ed] the reasoning of the Third Circuit in *Flores*

… and the Ninth Circuit in *Valenzuela Gallardo*"). Further cementing the conflict, the First Circuit also held that "[a]ssuming, arguendo, that the statute is ambiguous and thus subject to *Chevron* deference, we must defer to the BIA's interpretation." *Id.* at 111-12 (majority opinion). The court thus found it "clear that [the petitioner's] Massachusetts accessory-after-the-fact conviction is an aggravated felony under § 1101(a)(43)(S) because it is categorically 'an offense relating to obstruction of justice.'" *Id.* at 110.

2. *Application of* Chevron *deference*. This case also implicates a deeper question of administrative law that is intertwined with the meaning of the obstruction-of-justice aggravated-felony provision: whether the *Chevron* framework applies to the BIA's interpretations of that phrase. The Third Circuit has held that *Chevron* has no role to play in interpreting this provision. The Fourth, Fifth, Seventh, and Ninth Circuits have applied *Chevron* while reaching varying results. And the First Circuit has declared it unclear whether *Chevron* applies, but has nevertheless proceeded to apply *Chevron* in the alternative. Multiple courts have acknowledged this circuit split. *See Higgins v. Holder*, 677 F.3d 97, 103 (2d Cir. 2012) ("There is a circuit split on the question of whether deference is owed to the BIA's reasoning" when interpreting § 1101(a)(43)(S)); *see also Armenta-Lagunas v. Holder*, 724 F.3d 1019, 1022 (8th Cir. 2013) (same).

a. In *Denis v. Attorney General*, 633 F.3d 201 (3d Cir. 2011), the Third Circuit held that its review of whether a state conviction constitutes an "offense relating to obstruction of justice" is "*de novo* and [it]

owe[s] no deference to the BIA's reasoning or definition." *Id.* at 209. The court reasoned that these interpretive questions did "not present an obscure ambiguity or a matter committed to agency discretion." *Id.* Rather, because "Title 18 of the U.S. Code contains a listing of crimes entitled 'obstruction of justice,'" the court could "easily determine the types of conduct Congress intended the phrase to encompass." *Id.* The court also explained that "the phrase 'relating to obstruction of justice'" does not "pertain[] to the Executive Branch's exercise of especially sensitive political functions that implicate questions of foreign relations." *Id.* at 209 n.11. And it disagreed with decisions from the Ninth and Fifth Circuits deferring to the BIA's interpretation. *Id.*

More recently, in *Flores*, the Third Circuit followed *Denis* and reviewed *de novo* whether a state accessory-after-the-fact conviction was an "offense relating to obstruction of justice." 856 F.3d at 285 n.6. "In contrast to other circuits," *Flores* explained, "we do not defer to the BIA's interpretation." *Id.* at 287 n.23.

b. Several circuits, however, have held that the *Chevron* framework does apply to the BIA's interpretation of "offense relating to obstruction of justice."

Applying prior circuit rulings, the Fourth Circuit held in this case that, at "[s]tep [z]ero," "*Chevron* applies." Pet. App. 8a. The court rejected Pugin's argument that *Chevron* deference is unwarranted where, as here, a statutory provision has both civil and criminal applications. *Id.* at 8a-13a. For its part, in *Valenzuela Gallardo*, the Ninth Circuit recognized the force of the arguments against deferring "to the BIA's construction of a statute with criminal applications," 968

F.3d at 1059; *see id.* at 1059-1062, but concluded that it was "not free to take a fresh look at the *Chevron* Step Zero question" in light of circuit precedent holding that *Chevron* applies, *id.* at 1062.

The Fifth and Seventh Circuits have also held that the *Chevron* framework applies to the BIA's interpretation of "offense relating to obstruction of justice." In *Victoria-Faustino v. Sessions*, 865 F.3d 869 (7th Cir. 2017), which construed "offense relating to obstruction of justice," the Seventh Circuit stated that "[i]t is our practice to give deference to the Board's reasonable interpretation of what constitutes an aggravated felony under the INA." *Id.* at 875. And in *Alwan v. Ashcroft*, 388 F.3d 507 (5th Cir. 2004), the Fifth Circuit "conclude[d] that the BIA's determination that [the petitioner's] offense [of contempt of court] was one 'relating to obstruction of justice'" was "based on a permissible interpretation" of the statute. *Id.* at 515 (quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (applying *Chevron* deference to the BIA's "permissible" interpretation of the "serious nonpolitical crime" exception to withholding of deportation)).

c. The depth of the circuits' disarray on this issue is epitomized by the First Circuit's decision in *Silva*. The court conceded that "[i]n light of [this Court's decision in *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017)], it is not clear" whether the BIA's interpretation of "offense relating to obstruction of justice" is "subject to *Chevron* deference." 27 F.4th at 111-12 & n.22. The court thus approached the question *de novo*—holding that the statute unambiguously reaches beyond pending-proceeding crimes—and went on to apply *Chevron* in the alternative, *id.* at

112. In that alternative holding, the court rejected the "contention that we cannot defer to the BIA's interpretation of a statute with criminal implications" as "misguided" and "inconsistent with" a Supreme Court decision involving a facial challenge to an environmental regulation. *Id.* at 112-13 (citing *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 702-04 & 704 n.18 (1995)).

B. The Issues Presented Are Critically Important, And This Case Is An Ideal Vehicle For Resolving Them

These interlinked conflicts call out for this Court's review. Disagreement over the meaning of a frequently invoked immigration provision is intolerable. There is no justification for giving noncitizens in San Francisco and Philadelphia relief while denying it to similarly situated noncitizens in Boston and Richmond. And few issues are more fundamental than whether courts or agencies determine the meaning of a federal law with criminal consequences. The conflicts are sufficiently deep, persistent, and entrenched as to leave no path to uniform outcomes but this Court's review.

1. This Court has frequently granted certiorari to clarify the scope of generic offenses enumerated as INA aggravated felonies. *See, e.g.*, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017); *Torres v. Lynch*, 578 U.S. 452 (2016); *Moncrieffe v. Holder*, 569 U.S. 184 (2013); *Kawashima v. Holder*, 565 U.S. 478 (2012); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Nijhawan v. Holder*, 557 U.S. 29 (2009); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004). Resolving the conflict over the meaning

of "offense relating to obstruction of justice" is equally worthy of review.

a. The decision below has "a sizeable impact for many people in our country" because it "expands the list of possible state crimes that could trigger immigration deportation consequences for many persons who may not have been otherwise subject to deportation." Pet. App. 92a (Gregory, C.J., dissenting from denial of rehearing en banc). For lawful permanent residents like Pugin, whether an offense constitutes an aggravated felony carries life-altering consequences. "[R]emoval is a virtual certainty for a[] [noncitizen] found to have an aggravated felony conviction, no matter how long he has previously resided here." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1211 (2018). And this Court has long recognized "the grave nature of deportation" as "a drastic measure" that is "at times the equivalent of banishment or exile." *Jordan v. De George*, 341 U.S. 223, 231 (1951) (internal quotation marks omitted); *see also Lee v. United States*, 137 S. Ct. 1958, 1968 (2017) ("Deportation is always a particularly severe penalty" and "may be more important to [a] client than any potential jail sentence" (internal quotation marks omitted)). The consequences of deportation are particularly grave for long-time residents like Pugin, who arrived here 37 years ago and now faces permanent expulsion from the country where he built his life.

b. The question presented is also vital to prosecutors, defense attorneys, and the criminal justice system more broadly.

i. Resolving whether accessory-after-the-fact con-

victions (and other similar convictions) are "aggravated felonies" would allow prosecutors to make charging and plea-bargaining decisions with full knowledge of the immigration consequences. Some states explicitly require prosecutors to consider the immigration consequences of potential plea agreements. *See, e.g.*, Cal. Penal Code § 1016.3(b); Va. State Bar Legal Ethics, Formal Op. 1876 (2015). Prosecutors cannot do so effectively given the current state of the law.

ii. The interest of defense attorneys for an accurate understanding of the law may be even greater. The categorical approach normally "enables [noncitizens] to anticipate the immigration consequences of guilty pleas in criminal court, and to enter safe harbor guilty pleas that do not expose the [noncitizen] to the risk of immigration sanctions." *Mellouli v. Lynch*, 575 U.S. 798, 806 (2015) (internal quotation marks and alterations omitted). And defense attorneys have a duty to advise clients about which crimes are aggravated felonies that render them removable, and which are not. *See Padilla v. Kentucky*, 559 U.S. 356, 367 (2010). But defense lawyers cannot provide that advice effectively when the circuits are divided over whether particular offenses constitute aggravated felonies.

iii. Finally, the question presented is significant for the criminal justice system more broadly. Aggravated-felony convictions serve as predicates for federal criminal prosecutions and sentencing enhancements. Beyond the previously noted ten-fold increase in potential prison time reserved for aggravated felons convicted of unlawful reentry, 8 U.S.C. §§ 1326(a),

(b)(2), aggravated felons are subject to criminal sanctions if they disobey removal orders, *see id.* § 1253(a)(1), as are individuals who help aggravated felons unlawfully reenter the country, *id.* § 1327.

These criminal consequences arise frequently. Unlawful reentry is one of the most commonly charged offenses in the federal system. *See* United States Courts, *Criminal Statistical Tables for the Federal Judiciary 2021*, https://www.uscourts.gov/statistics/table/d-3/statistical-tables-federal-judiciary/2021/12/31. In 2021, the government charged 13,337 defendants with unlawful reentry, accounting for approximately 18.5% of all federal criminal cases filed during that period. *Id.* And in 2020, 19,654 defendants were *convicted* of unlawful reentry. *See* United States Sentencing Commission, *Illegal Reentry Offenses* (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY20.pdf. Research from the Sentencing Commission suggests that approximately 40% of those convicted of unlawful reentry have a prior aggravated-felony conviction and thus face an enhanced twenty-year sentence. *See* United States Sentencing Commission, *Illegal Reentry Offenses*, at 9 (Apr. 2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf. Just as prosecutors must know when they may charge these cases and seek an enhanced sentence, courts must know when such a case has been lawfully charged.

2. The *Chevron* issue presented here—whether

courts may defer to BIA interpretations of an immigration provision with criminal applications—is independently worthy of review. The Court has previously recognized this issue's certworthiness. In *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017), the Court granted certiorari in a case involving a similar question about whether *Chevron* deference may apply to the BIA's interpretation of an offense within the aggravated-felony provision. But the Court found it unnecessary then to resolve the *Chevron* issue. *Id.* at 1572. Granting certiorari here would allow the Court to answer the question left open in *Esquivel-Quintana*.

Whether *Chevron* applies to dual-application laws has significant implications for the separation of powers and individual liberty. One position empowers the Executive Branch to both make and apply law that gravely affects individual liberty; the other assigns to courts their traditional role of interpreting laws written by Congress. Few questions have greater doctrinal and practical importance for the administration of justice. This case squarely presents this *Chevron* question because an interpretation of an offense within the INA's aggravated-felony provision carries not only the most serious possible civil consequence (deportation), but criminal consequences as well. *See supra* at 22-23. Nonetheless, the Fourth Circuit deferred to the BIA's interpretation of such an offense here. The Court should grant certiorari to address the serious separation-of-powers and individual-liberty concerns raised by the Fourth Circuit's decision.

3. This case is an ideal vehicle in which to resolve the issues presented.

First, the case cleanly presents the statutory issue, *viz.,* the proper interpretation of "offense relating to obstruction of justice." The Fourth Circuit issued a published opinion with a lengthy dissent. And the question presented is outcome determinative for Pugin: if he prevails, his accessory-after-the-fact conviction would not qualify as an aggravated felony, and he would no longer be subject to removal.

Second, the case squarely presents the *Chevron* issue. Pugin argued below that *Chevron* should not apply. Br. of Pet., Dkt. 31, No. 20-1363, at 22-25 (4th Cir.). And the Fourth Circuit's decision rests exclusively on *Chevron*: the court held that the *Chevron* framework applies at "step zero," held the provision ambiguous at "step one," and held the BIA's interpretation reasonable at "step two."

C. The Decision Below Is Incorrect

Finally, the case for review is particularly pressing because the Fourth Circuit's decision is incorrect on both the statutory-interpretation issue and the *Chevron* issue.

1. Contrary to the Fourth Circuit's decision, the generic definition of "offense relating to obstruction of justice" unambiguously requires interference with a pending proceeding or investigation and excludes accessory-after-the-fact offenses like Pugin's here. *See Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013) (categorical approach turns on "the 'generic' federal definition of a corresponding aggravated felony").

a. "Obstruction of justice" is a term of art with an established generic meaning under federal criminal law. Nearly 130 years ago, this Court interpreted an

early version of the federal obstruction-of-justice statute to include a pending-proceeding element. "The obstruction of the due administration of justice in any court of the United States … is indeed made criminal," the Court explained, "but such obstruction can only arise *when justice is being administered*." *Pettibone v. United States*, 148 U.S. 197, 207 (1893) (emphasis added). "Unless that fact exists the statutory offense cannot be committed." *Id.*

In 1946, Congress codified this understanding in 18 U.S.C. Chapter 73, entitled "Obstruction of Justice." The six offenses that Congress originally placed within this chapter all involved interference with pending official proceedings. *See* 18 U.S.C. §§ 1501-1506 (1946); *id.* §§ 1501 (assault on process server), 1502 (resistance to extradition agent), 1503 (influencing or injuring officer, juror or witness), 1504 (influencing juror by writing), 1505 (influencing or injuring witness before agencies and committees), 1506 (theft or alteration of record or process "in any court of the United States"). To be sure, Section 1503 included (and still includes) an "Omnibus Clause," prohibiting the obstruction of "the due administration of justice." But this Court—relying on *Pettibone*—has held that this "very broad language" contains "a 'nexus' requirement—that the act must have a relationship in time, causation, or logic with … judicial proceedings." *United States v. Aguilar*, 515 U.S. 593, 599 (1995); *see id.* ("The action taken by the accused must be with an intent to influence judicial or grand jury proceedings"). And even before *Aguilar*, "[n]o case interpreting [this provision] ha[d] extended it to conduct which was not aimed at interfering with a *pending* judicial

proceeding." *United States v. Brown*, 688 F.2d 596, 598 (9th Cir. 1982) (emphasis added).

In 1982, Congress added an offense to Chapter 73—witness tampering—that did not require interference with an existing official proceeding. *See* 18 U.S.C. § 1512. But in so doing, Congress used express language: "For purposes of this section, an official proceeding need not be pending or about to be instituted at the time of the offense." *Id.* § 1512(f)(1). Such express language was necessary, Congress recognized, because the default federal-law understanding of obstruction of justice required interference with a pending official investigation or proceeding. Section 1512 is therefore the "exception that proves the rule." *Valenzuela Gallardo v. Barr*, 968 F.3d 1053, 1065-66 (9th Cir. 2020).[2]

---

[2] In 1967, Congress passed 18 U.S.C. § 1510(a), which prohibits obstruction of the communication of information "to a criminal investigator" without explicitly requiring an investigation to be pending. One court has observed, however, that this provision "was designed to deter the coercion of potential witnesses by the *subjects of federal criminal investigations*," *United States v. Cameron*, 460 F.2d 1394, 1401 (5th Cir. 1972) (emphasis added), *overruled on other grounds by United States v. Howard*, 483 F.2d 229 (5th Cir. 1973)—implying the need for a live criminal probe. *See* H. Rep. No. 658, at 1761-62 (1967). While other courts have articulated a broader interpretation, *see United States v. Leisure*, 844 F.2d 1347, 1364 (8th Cir. 1988); *United States v. Lippman*, 492 F.2d 314, 317 (6th Cir. 1974), investigations had commenced at the time of the offenses in those cases, so the issue was not squarely presented, *see Leisure*, 844 F.2d at 1353 (noting that "[f]ederal and state authorities" had begun investigating); *Lippman*, 492 F.2d at 316 ("[c]learly, an investigation was being made into the possible criminal activity"). Petitioner has not identified any case in which a court has affirmed

Thus, in 1996, when Congress wrote the term "obstruction of justice" into § 1101(a)(43)(S), that term carried a general federal-law meaning that required interference with an ongoing investigation or proceeding. This requirement was therefore part of "the generic sense in which [obstruction of justice was] used," and so is an element of "generic" obstruction of justice under the categorical approach. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007) (internal quotation marks omitted). Nothing in § 1101(a)(43)(S) suggests that Congress deviated from that generic definition in favor of a novel definition that could sweep in all manner of activity that might conceivably make a future proceeding less likely. After all, "[i]t is a cardinal rule of statutory construction that, when Congress employs a term of art [like obstruction of justice,] it presumably knows and adopts the cluster of ideas that were attached to [the term] in the body of learning from which it is taken." *Air Wis. Airlines Corp. v. Hoeper*, 571 U.S. 237, 248 (2014).[3]

Section 1101(a)(43)(S)'s structure confirms that Congress sought to codify the generic federal-law meaning of "obstruction of justice." In full,

---

a defendant's § 1510(a) conviction where no investigation was underway. *Cf. United States v. Siegel*, 717 F.2d 9, 21 (2d Cir. 1983) (reversing conviction where "no federal criminal investigation was being conducted" but declining to address whether § 1510(a) always requires a pending investigation).

[3] *See also Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992) (Congress "know[s] the interpretation federal courts had given the words," so when "[i]t used the same words, … we can only assume it intended them to have the same meaning that courts had already given them").

§ 1101(a)(43)(S) covers "offense[s] relating to" (i) "obstruction of justice"; (ii) "perjury or subornation of perjury"; or (iii) "bribery of a witness." 8 U.S.C. § 1101(a)(43)(S). Each of these three enumerated offenses "reference[s] [a] specific chapter[] of Title 18." *Flores v. Attorney General*, 856 F.3d 280, 295 (3d Cir. 2017); *see* 18 U.S.C. Chapter 73 ("Obstruction of Justice"); 18 U.S.C. Chapter 79 ("Perjury"); 18 U.S.C. Chapter 11 ("Bribery …"). This symmetry suggests that Congress understood these offenses as they were captured in 1996 by their corresponding Title 18 chapters. And that means Congress understood obstruction of justice by reference to Chapter 73, which as a general rule requires interference with actual proceedings or investigations. *See Valenzuela Gallardo*, 968 F.3d at 1064 n.9 (listing Chapter 73's provisions).[4]

By the same token, that means Congress did *not* understand generic obstruction of justice to include accessory-after-the-fact offenses. Congress "saw fit to put th[e] accessory-after-the-fact statute [18 U.S.C. § 3] in a chapter other than Chapter 73, which is the only chapter on which Congress chose to bestow the title, 'Obstruction of Justice.'" *Silva v. Garland*, 27 F.4th 95, 122 n.29 (1st Cir. 2022) (Barron, J., dissenting).

---

[4] The majority (Pet. App. 16a-19a) cited 18 U.S.C. §§ 1518 and 1519 in support of its ambiguity holding, but Congress added those provisions to Chapter 73 *after* it passed § 1101(a)(43)(S), so they are irrelevant to the inquiry here. *See Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1569 (2017) (looking to relevant term's meaning "[a]t th[e] time" "Congress added [it] to the INA in 1996").

b. The Fourth Circuit majority rejected the foregoing analysis and instead found the phrase "relating to obstruction of justice" ambiguous. Its reasoning is unsound.

The majority first stated that § 1101(a)(43)(S) does not reference Chapter 73 because it does not include a *statutory citation* to Chapter 73. Pet. App. 14a. But Congress did not need to use a statutory citation, because it cross-referenced Chapter 73 in a different way: by invoking that chapter's *title* ("Obstruction of Justice"), just as it did with its parallel references to other Title 18 chapters ("Perjury" and "Bribery").

The majority then moved from federal to state law, observing that some state obstruction-of-justice offenses "do not require a connection to an ongoing proceeding." *Id.* at 15a. But "this sort of multijurisdictional analysis" is "not required by the categorical approach" and is only "useful insofar as it helps shed light on the common understanding and meaning of the federal provision." *Esquivel-Quintana*, 137 S. Ct. at 1571 n.3 (internal quotation marks omitted). Here, a "common understanding" of obstruction of justice exists under *federal law*, so a state survey lacks utility. That is especially true because when Congress passed § 1101(a)(43)(S), "only seventeen states used the phrase 'obstruction of justice' or 'obstructing justice' in their criminal codes" at all. Pet. App. 15a. Indeed, even the BIA decision to which the Fourth Circuit deferred recognized that "[s]tate law is of limited benefit to our analysis because there is no discernible pattern in how the States treated the concept of obstruction of justice in their criminal statutes in 1996." *In re Valenzuela Gallardo*, 27 I. & N. Dec. 449, 452

n.4 (2018). In contrast, this Court's "multijurisdictional analysis" in *Esquivel-Quintana* was significantly more probative because every state had a provision prohibiting the relevant crime of statutory rape. *See* 137 S. Ct. at 1571-72 & n.3.[5]

Next, the majority relied on "legal dictionaries," which it thought "somewhat favor Pugin's position, but not clearly." Pet. App. 23a. As the majority acknowledged, two of its cited dictionaries plainly support Pugin's reading. The 1996 version of Merriam Webster's Dictionary, for instance, defines "obstruction of justice" as "the crime or act of willfully interfering with the process of justice and law es[pecially] 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) (emphasis added); *see Obstructing Justice*, Black's Law Dictionary 1077 (6th ed. 1990) (similar). But the majority found ambiguity based on another dictionary that defines "obstruction of justice" as "a broad phrase that captures every willful act of corruption, intimi-

---

[5] The majority's reliance on the Model Penal Code (Pet. App. 15a-16a) is even further afield. "[T]he Model Penal Code did not even contain an offense labeled 'obstruction of justice' at the time that § 1101(a)(43)(S) was enacted," and "the Model Penal Code itself acknowledges that, under the 'traditional concept' of 'common law … accessory after the fact,' a crime of that type was not 'an independent offense of obstruction of justice.'" *Silva*, 27 F.4th at 122 n.29 (Barron, J., dissenting) (citing Model Penal Code § 242.1 explanatory note).

dation, or force that tends somehow to impair the machinery of the civil or criminal law." B. Garner, A Dictionary of Modern Legal Usage 611 (2d ed. 1995). That definition is itself ambiguous, however, since "machinery of the … law" could refer to machinery that is already in motion. *See* Pet. App. 45a (Gregory, C.J., dissenting). And one ambiguous dictionary definition cannot create an ambiguous statute—particularly where two other dictionaries (and federal law) unambiguously point in the other direction.

Finally, the majority reasoned that "even if the term 'obstruction of justice' standing alone required an ongoing proceeding, the 'relating to' clause would broaden that understanding." *Id.* at 21a. But while "relating to" are "words of inclusion," they cannot "bring within the scope of [§ 1101(a)(43)(S)] an offense that is not itself an 'obstruction of justice' offense at all." *Silva*, 27 F.4th at 115 (Barron, J., dissenting). In any event, this Court has held that "[c]ontext" may "tug in favor of a narrower reading" of "relating to," *Mellouli v. Lynch*, 575 U.S. 798, 812 (2015)—and context does so here, "because the common understanding from the time of enactment, statutory context, and judicial precedent pre-1996 all point to one conclusion: 'obstruction of justice' requires a nexus to an ongoing proceeding," *Valenzuela Gallardo*, 968 F.3d at 1068.

2. a. Even assuming that the Fourth Circuit correctly found § 1101(a)(43)(S) ambiguous, it erred by applying *Chevron* deference to the BIA's interpretation.

As explained, an interpretation of an offense listed in the aggravated-felony provision implicates both the

serious civil penalty of deportation and criminal sanctions. And in this context, two tiebreaking canons of statutory construction take precedence over *Chevron* and foreclose the BIA's interpretation of "offense relating to obstruction of justice." *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (directing courts to "employ[] traditional tools of statutory construction" before deferring to an agency interpretation); *INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) (once interpretive canon applied, "there [remains], for *Chevron* purposes, no ambiguity … for an agency to resolve"); *see also Am. Hosp. Ass'n*, 142 S. Ct. 1896, at *8 (2022) (not referencing *Chevron* and disagreeing with agency "after employing the traditional tools of statutory interpretation").

First, because deportation follows from deeming a conviction to be an "offense relating to obstruction of justice," "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien" applies. *St. Cyr*, 533 U.S. at 320. This principle prevents courts from "assum[ing] that Congress meant to trench on [a noncitizen's] freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

Second, because the meaning of "offense relating to obstruction of justice" determines criminal liability as well as immigration consequences, the rule of lenity applies. Statutes are not "chameleon[s]"; the meaning of a statute with both civil and criminal applications cannot be "subject to change" depending on the context in which it is applied. *Clark v. Martinez*,

543 U.S. 371, 382 (2005). And because the rule of lenity instructs that ambiguous criminal statutes are construed against the government, that criminal construction—as the "lowest common denominator"—"must govern." *Id.* at 380; *see United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality opinion). As Judge Sutton has reasoned, "the one-interpretation rule means that," with the "aggravated felony provision," the "criminal-law construction of the statute (with the rule of lenity) prevails over [any alternative BIA] construction of it (without the rule of lenity)." *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1028 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part), *rev'd sub nom Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017).

This Court's cases support application of the rule of lenity over *Chevron* here. In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), for instance, the Court considered the BIA's construction of the term "crime of violence" in determining whether a noncitizen's state DUI conviction was an aggravated felony. *Id.* at 3-5. The Court explained that "[a]lthough here we deal with [the crime-of-violence definition] in the deportation context, [it] is a criminal statute, and it has both criminal and noncriminal applications." *Id.* at 11 n.8. And "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context," the Court reasoned, "the rule of lenity applies." *Id.* The Court never mentioned *Chevron*. *See also Torres v. Lynch*, 578 U.S. 452 (2016) (determining whether a state offense was an aggravated felony without referencing *Chevron*, even though the

government sought *Chevron* deference).[6]

b. While admitting that "no Supreme Court case has afforded *Chevron* deference in this situation," Pet. App. 11a, the Fourth Circuit majority relied on circuit precedent holding that *Chevron* applied "because the [INA] is a civil statute, and any collateral criminal consequences are too attenuated," *id.* at 8a. This reasoning is flawed.

To begin with, the majority's conclusion allows an agency's interpretation to govern the scope of criminal liability in certain cases—giving rise to separation-of-powers and individual-liberty concerns. Suppose, for instance, that a noncitizen is removed because a court defers to the BIA's interpretation of "offense relating to obstruction of justice." Then suppose that the noncitizen unlawfully reenters the country and is prosecuted. Because of the BIA's earlier interpretation to which a court deferred, that noncitizen faces twenty years' imprisonment rather than two. *See* 8

---

[6] In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), the Court in a footnote rejected the argument that "the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." *Id.* at 704 n.18. But this "drive-by" footnote "deserves little weight" and "contradicts the many cases before and since holding that, if a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings" and precludes *Chevron* deference. *Whitman v. United States*, 574 U.S. 1003, 1003 (2014) (Scalia, J., statement respecting the denial of certiorari). In any event, the *Babbitt* footnote is expressly limited to a discrete context—facial challenges to regulations—far removed from the BIA adjudication at issue here.

U.S.C. §§ 1326(a), (b)(2). Thus, the BIA's interpretation of a supposedly ambiguous statute has led to the imposition of enhanced criminal punishment. That is why the Sixth Circuit in *Esquivel-Quintana* determined that offenses within the aggravated-felony provision "ha[ve] both civil and criminal applications." 810 F.3d at 1023 (majority opinion); *see id.* at 1028 (Sutton, J., concurring in part and dissenting in part).

The Fourth Circuit majority's response is that the BIA's "interpretation occurs only at the civil stage," and "[c]riminal sanctions can only potentially come later in a separate criminal proceeding where the [INA] is not interpreted anew." Pet. App. 12a. Yet the majority's premise—that that there is no potential for re-interpretation of the aggravated-felony definition when it is applied criminally—is incorrect. While defendants in unlawful-reentry proceedings normally may not relitigate the validity of the underlying removal order, *see* 8 U.S.C. § 1326(d), an aggravated-felony determination can produce criminal penalties in other contexts where there is no similar relitigation bar, *see id.* § 1253(a)(1) (criminal liability for aggravated felons who disobey removal orders); *id.* § 1327 (criminal liability for individuals who help aggravated felons unlawfully reenter the country). In any event, it is immaterial whether criminal sanctions arise in the same proceeding or a separate one: either way, the BIA's interpretation leads directly to those sanctions. While the Fourth Circuit majority believed the connection was "too attenuated," Pet. App. 8a, it never explained how it drew that line.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

Michael R. Dreeben
Counsel of Record
Brian D. Boyle
Martha Hutton
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300
mdreeben@omm.com

JULY 2022