No. 18-72593

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Agustin VALENZUELA GALLARDO,
Petitioner,

v.

William BARR, Attorney General of the United States,
Respondent.

On Review from the Board of Immigration Appeals
Agency No. A056-010-094

BRIEF OF *AMICI CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION, THE U.C. DAVIS SCHOOL OF LAW IMMIGRATION LAW CLINIC, AND ASIAN AMERICANS ADVANCING JUSTICE – ASIAN LAW CAUCUS IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT UNDER FRAP 26.1

I, Amalia Wille, certify that none of the *amici curiae* has a parent corporation. No publicly held corporation owns 10 percent or more of any stake or stock in *amici curiae*.

February 26, 2019

s/ Amalia Wille
Amalia Wille

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STATEMENT OF *AMICI CURIAE*[1]

The American Immigration Lawyers Association ("AILA") is a national association with more than 15,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security, immigration courts, and the Board of Immigration Appeals, as well as before the federal courts.

The U.C. Davis School of Law Immigration Law Clinic ("The Clinic") is an academic institution dedicated to defending the rights of detained noncitizens in the United States. The Clinic provides direct representation to detained immigrants who are placed in removal proceedings—oftentimes these individuals have criminal convictions. In addition, the Clinic advises public defenders on the immigration consequences of criminal convictions. Thus, the Clinic has an interest

[1] Pursuant to Fed. R. App. P. 29(a)(2), counsel for *amici curiae* states that all parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

in seeking judicial resolution on whether certain California criminal statutes have immigration consequences so the Clinic can accurately advise public defenders. The Clinic also has an interest in seeing that the immigration statutes are applied in a constitutional, consistent, predictable, and just manner.

Asian Americans Advancing Justice - Asian Law Caucus ("Advancing Justice - ALC"), founded in 1972, is the nation's first legal and civil rights organization serving low-income Asian Pacific Islander communities. Advancing Justice - ALC employs a broad strategy which integrates the provision of legal services, educational programs, community organizing initiatives and advocacy. The intersection of criminal justice and immigration enforcement is of particular concern to Southeast Asian and Pacific Islander communities who are disproportionately impacted by detention and deportation due to criminal convictions.

INTRODUCTION

This case concerns the meaning of the statutory term "obstruction of justice," an aggravated felony under the Immigration and Nationality Act ("INA"). 8 U.S.C. § 1101(a)(43)(S). For over a decade, the Board of Immigration Appeals ("BIA" or "Board") construed obstruction of justice narrowly, to require a nexus to an ongoing proceeding or investigation. *Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889, 893-94 (BIA 1999) (en banc). Guided by federal statutes and Supreme Court precedent interpreting the crime of obstruction of justice, the BIA reasoned

that, in the immigration context, the meaning of the term must be constrained: "[w]e do not believe that every offense that, by its nature, would tend to 'obstruct justice' is an offense that should properly be classified as 'obstruction of justice.'" *Id.*

In 2012, however, the Board made an about-face in Petitioner's case, and abandoned the *Espinoza-Gonzalez* definition of obstruction of justice in favor of a broad definition, untethered to any ongoing investigation of proceeding. *See Matter of Valenzuela Gallardo*, 25 I&N Dec. 838 (BIA 2012) ("*Valenzuela Gallardo I*"). On review, this court vacated *Valenzuela Gallardo I*, noting that "after *Valenzuela Gallardo[I]*, arguably everything that happens after someone commits a crime could be considered to be part of the 'process of justice'" and held that the BIA's new generic definition raised "serious constitutional concerns about whether the statute is unconstitutionally vague." *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 820, 811 (9th Cir. 2016) ("*Valenzuela Gallardo II*"). The court remanded to the BIA with instructions to either apply *Espinoza-Gonzalez*, or offer a permissible construction of 8 U.S.C. § 1101(a)(43)(S). *Id.* On remand, the BIA has once again construed the obstruction of justice aggravated felony in an overly-broad manner. *Matter of Valenzuela Gallardo*, 27 I&N Dec. 449 (BIA 2018) ("*Valenzuela Gallardo III*"). This court is now called to review that decision.

Amici urge the court to apply the ordinary tools of statutory construction and hold that the term "obstruction of justice" within 8 U.S.C. § 1101(a)(43)(S) unambiguously requires three elements: (1) an affirmative act of interference with a pending proceeding; (2) undertaken with knowledge or notice of the pending proceedings; and (3) with the specific intent to obstruct that proceeding. Such a definition is consistent with over a century of Supreme Court precedent interpreting, and limiting, the federal criminal offense of obstruction of justice. *See Pettibone v. United States*, 148 U.S. 197, 205-07 (1893); *United States v. Aguilar*, 515 U.S. 593, 598-601 (1995). As the Supreme Court has long held, "obstruction can only arise when justice is being administered." *Pettibone*, 148 U.S. at 207. This court should conclude that, when Congress enacted the obstruction of justice aggravated felony in 1996, it adopted the well-settled meaning of obstruction of justice, which requires interference with an ongoing proceeding.

The court should not apply the framework of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984) to the BIA's decision below. However, should the court determine that *Valenzuela Gallardo III* is eligible for *Chevron* deference, the court should not grant it deference because it is not a reasonable construction of the statute.

ARGUMENT

I. The BIA's Definition of Obstruction of Justice is Not Eligible for *Chevron* Deference

A. The Court Should Apply the Normal Tools of Statutory Construction Rather Than *Chevron* Deference Because "Aggravated Felonies" Have Extensive Criminal Application

The *Chevron* framework should not apply where, as here, a court is tasked with discerning the generic meaning of the statutory term "aggravated felony." The court may, at times, defer to the BIA's reasonable interpretation of ambiguous provisions of the INA pursuant to *Chevron*, because the BIA is charged with administering the INA in civil removal proceedings. However, the court should not so defer when interpreting 8 U.S.C. § 1101(a)(43), which defines the term "aggravated felony," because that term not only applies in the civil removal context, but it has extensive criminal application as well. Instead, when defining the term "obstruction of justice" at 8 U.S.C. § 1101(a)(43)(S), this court should apply the normal tools of statutory construction, including the rule of lenity.

Several federal crimes incorporate the INA's term, "aggravated felony." For example, it is a felony to aid or assist an inadmissible noncitizen who has been convicted of an aggravated felony. 8 U.S.C. § 1327. It is also a felony for a noncitizen with an aggravated felony conviction to remain in this country following a removal order. 8 U.S.C. §§ 1253(a)(1), 1227(a)(2)(A)(iii). A prior

conviction for an aggravated felony also substantially increases the sentencing exposure of those convicted of certain criminal offenses. *See, e.g.,* 8 U.S.C. § 1326(b)(2) (providing for lengthier sentencing for an illegal reentry conviction if the defendant has previously been convicted of an aggravated felony); 8 U.S.C. §§ 1253(a)(1), 1227(a)(2)(A)(iii) (providing for an increased sentence for failure to depart if previously convicted of an aggravated felony).[2]

It is well-settled that this court affords no deference to the BIA's interpretations of criminal law. *Sandoval v. Sessions*, 866 F.3d 986, 988 (9th Cir. 2017). "The BIA has no special expertise by virtue of its statutory responsibilities in construing state or federal criminal statutes." *Marmolejo-Campos v. Holder*, 558 F.3d 903, 907 (9th Cir. 2009) (en banc). "[C]riminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 573 U.S. 169, 191 (2014). When interpreting criminal statutes, federal courts apply the normal rules of statutory construction. Under the longstanding rule of lenity, criminal statutes are to be construed narrowly, and "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *United States v. Bass*, 404 U.S. 336, 348 (1971). *See also United States v. LeCoe*, 936 F.2d 398, 402 (9th Cir. 1991)

[2] The criminal law consequences of § 1101(a)(43) are far-reaching. The illegal reentry statute is the second-most prosecuted felony (after illegal entry) in the federal courts. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, TRAC REPORTS, Immigration Prosecutions for 2018, *available from* https://tracfed.syr.edu/results/9x205bcfa46428.html (accessed Feb. 25, 2019).

(noting that the "lenity doctrine has been extended beyond interpretations of the substantive ambit of criminal prohibitions; the doctrine also encompasses the penalties imposed by criminal statutes").

Courts "must interpret [a] statute consistently, whether we encounter its application in a criminal or noncriminal context." *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004). The meaning of a statutory phrase—here, "aggravated felony," which is defined to include "obstruction of justice"—cannot be subject to change depending on the context in which it is applied. *See Clark v. Martinez*, 543 U.S. 371, 382 (2005) (noting that statutes are not "chameleon[s]").

Amici contend that the statute at issue here is unambiguous and that the court should not proceed to the second step of *Chevron* in any event. *See infra*, Section II. However, the possibility of the court applying *Chevron* step two to the definition of "obstruction of justice" illustrates why the *Chevron* framework is untenable when the court is interpreting the meaning of the phrase "aggravated felony." The BIA cannot be granted *Chevron* deference to determine what crimes constitute the obstruction of justice aggravated felony because the BIA is not empowered to determine whether an individual is guilty of a federal crime, or whether a sentence enhancement should be imposed upon a criminal defendant. *See, e.g., United States v. Apel*, 571 U.S. 359, 369 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference.").

Yet, this would be the result if the court applies the *Chevron* framework and finds the statute at issue ambiguous. For in that case, if an "agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). Significant criminal consequences cannot flow from the BIA's interpretation of an ambiguous statute that this court has let stand merely because it is not "unreasonable." In fact, when penal consequences are at issue, the rule of lenity mandates that courts apply the opposite presumption.

The court must apply a single, uniform definition of the term "aggravated felony," including the obstruction of justice ground, across the civil and criminal context. Because of the criminal application of the INA's term, "aggravated felony," this court should decipher the meaning of "obstruction of justice." To the extent that it finds ambiguities in the statute, pursuant to the rule of lenity, any ambiguities in the phrase should be resolved in favor of the noncitizen, and no deference should be afforded to the BIA's interpretation of the term "obstruction of justice." *See Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1028 (6th Cir. 2016) (Sutton, J., dissenting), *rev'd sub nom. Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017) ("Time, time, and time again, the [Supreme] Court has confirmed that

the one-interpretation rule means that the criminal-law construction of the statute (with the rule of lenity) prevails over the civil-law construction of it (without the rule of lenity). When a single statute has twin applications, the search for the least common denominator leads to the least liberty-infringing interpretation.").

B. The Court's Deference to the BIA's Prior Construction of "Obstruction of Justice" Does Not Preclude the Court From Determining the Plain Meaning of the Statutory Term

Amici recognize that this court has previously deferred to the BIA's generic definition of the term "obstruction of justice" as set forth in *Espinoza–Gonzalez,* 22 I&N Dec. 889, at *Chevron* step two. *See Renteria–Morales v. Mukasey*, 551 F.3d 1076, 1086 (9th Cir. 2008); *Salazar–Luviano v. Mukasey,* 551 F.3d 857, 861–62 (9th Cir. 2008); *Hoang v. Holder*, 641 F.3d 1157, 1161 (9th Cir. 2011). However, the court is not bound by those decisions to move directly to *Chevron* step two in this case.

A court is not required to consider whether an agency's interpretation is a permissible one until it has determined that Congress left statutory gaps for the agency to fill. *See Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (stating that deference "is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent."). None of the three decisions that accorded deference to *Espinoza–Gonzalez* held that the statute at 8 U.S.C. § 1101(a)(43)(S) was ambiguous after

employing the ordinary tools of statutory construction. Rather, in *Renteria–Morales*, the court determined only that the INA does not define "obstruction of justice," and then sidestepped the complete *Chevron* step one analysis by deciding that *Espinoza–Gonzalez*'s construction of the statute was permissible. 551 F.3d at 1086-87. *Cf. Edelman v. Lynchburg Coll.*, 535 U.S. 106, 114 (2002) (declining to resolve what kind of deference, or how much, was owed because the court "so clearly agree[d]" with the agency's interpretation). In *Salazar–Luviano* and *Hoang*, the court merely repeated the holding of *Renteria–Morales*. Notably, in *Renteria–Morales*, the court found the *Espinoza–Gonzalez* definition to be reasonable because there, the BIA had defined obstruction of justice to require interference with an ongoing proceeding, based on the BIA's consideration of the obstruction of justice federal criminal statute and the Supreme Court's guidance in *Aguilar*, 515 U.S. at 598-601. *See* 551 F.3d at 1086-87. This is the interpretation of "obstruction of justice" that *amici* urges the court to adopt as the statute's unambiguous meaning. *See infra* Section II.

This court's decision in *Valenzuela Gallardo II* further confirms that the court is not required to skip to *Chevron* step two. When the BIA abandoned *Espinoza–Gonzalez* and this court was called to review the new definition of obstruction of justice set forth in *Matter of Valenzuela Gallardo I*, 25 I&N Dec. 838, the court did not skip directly to *Chevron* step two, despite the decisions in

Renteria–Morales, *Salazar–Luviano* and *Hoang*. *See Valenzuela Gallardo II*, 818 F.3d at 816-24. Instead, the court conducted a *Chevron* step one analysis, focusing on the statutory interpretation doctrine of constitutional narrowing. *Id.*

Here, as it did previously in *Valenzuela Gallardo II*, the court should begin its review of the BIA's decision below by applying the normal rules of statutory construction to interpret 8 U.S.C. § 1101(a)(43)(S), rather than moving directly to *Chevron* step two.

II. "Obstruction of Justice" Within the Meaning of 8 U.S.C. § 1101(a)(43)(S) Unambiguously Requires Intentional Interference With an Ongoing Proceeding

The statutory phrase "obstruction of justice" is an unambiguous term that has been consistently defined by the Supreme Court for over a century. Obstruction of justice requires interference with an ongoing proceeding, as "obstruction can only arise when justice is being administered." *Pettibone*, 148 U.S. at 207. In accordance with Supreme Court precedent in place at the time obstruction of justice was added to the INA, this court should hold that obstruction of justice under 8 U.S.C. § 1101(a)(43)(S) requires three elements: (1) an affirmative act of interference with a pending proceeding; (2) undertaken with knowledge or notice of the pending proceedings; and (3) with the specific intent to obstruct that proceeding. *See Pettibone*, 148 U.S. at 205; *Aguilar*, 515 U.S. at 598-601. *See also*

United States v. Wood, 6 F.3d 692, 695 (10th Cir. 1993); *United States v. Rasheed*, 663 F.2d 843, 851-52 (9th Cir. 1981).

Because 8 U.S.C. § 1101(a)(43)(S) does not expressly define "obstruction of justice," the court should begin its interpretation of the phrase "using the normal tools of statutory construction." *See Esquivel-Quintana*, 137 S. Ct. at 1569. To decipher the generic meaning of the aggravated felony ground, the court should look to closely related federal statutes in place at the time the phrase was added to the INA and the everyday understanding of the term. *See id.*; *Lopez v. Gonzales,* 549 U.S. 47, 53 (2006). *Castro-Baez v. Reno*, 217 F.3d 1057, 1059 (9th Cir. 2000); *Morales-Alegria v. Gonzales*, 449 F.3d 1051, 1054 (9th Cir. 2006). When determining the meaning Congress intended for a statutory term, courts also consider pre-existing judicial interpretations of that term. When Congress "codifies a judicially defined concept, . . . absent an express statement to the contrary, . . . Congress intended to adopt the interpretation placed on that concept by the courts." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 813 (1989). "[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (quoting *Standard Oil v. United States*, 221 U.S. 1, 59 (1911)). The court should also apply other relevant canons of statutory

interpretation, including examination of the structure of the statute, the rule of lenity, and the canon of constitutional narrowing. *See Esquivel-Quintana*, 137 S. Ct. at 1570; *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *Valenzuela-Gallardo II*, 818 F.3d at 816.

By using these statutory construction tools, the court can directly discern the generic definition of an aggravated felony without affording deference to the BIA's interpretation of the statutory phrase. *Esquivel-Quintana*, 137 S. Ct. at 1572 (holding that the rule of *Chevron* did not apply when determining the generic definition of sexual abuse of a minor "because the statute, read in context, unambiguously forecloses the Board's interpretation").

A. Federal Court Precedent in 1996 Defined Obstruction of Justice to Require an Ongoing Proceeding

Here, the court's analysis of the phrase "obstruction of justice" in 8 U.S.C. § 1101(a)(43)(S) must look to the meaning of the statutory phrase in 1996, when Congress added obstruction of justice to the INA. *See* Section 440(e)(8), Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1276-78. Just a year before Congress made obstruction of justice a removable offense, the Supreme Court reaffirmed its long-standing precedent that the general criminal offense of obstruction of justice must be construed narrowly to require a nexus between an obstructive act and an existing judicial or quasi-judicial

proceeding. *Aguilar*, 515 U.S. at 598-99 (interpreting 18 U.S.C. § 1503). As this court has already held, "[j]udicial interpretations of § 1503 are particularly relevant" when discerning the meaning of § 1101(a)(43)(S) because the BIA has always—and continues to—look to the federal criminal code to inform its understanding of the term "obstruction of justice." *Valenzuela Gallardo II*, 818 F.3d at 823 n.9. *See also Valenzuela Gallardo III*, 27 I&N Dec. at 453-54 (continuing to cite to § 1503).[3]

In *Aguilar*, the Supreme Court interpreted the portion of 18 U.S.C. § 1503 which makes it a crime to "corruptly . . . influence[], obstruct[] or impede[] . . . the due administration of justice." The Court referred to this provision as "the

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[3] The BIA recently relied on the federal criminal code as interpreted by the Supreme Court when determining the generic definition of the perjury aggravated felony, which is also codified at 8 U.S.C. § 1101(a)(43)(S). In *Matter of Alvarado*, 26 I&N Dec. 895 (BIA 2016), the BIA explained:

> Because "removal proceedings are a function of Federal law," we also rely to a "significant degree" on 18 U.S.C. § 1621—the Federal perjury statute at the time that section 101(a)(43)(S) was enacted—to discern the elements of generic perjury. *Matter of M-W-*, 25 I&N Dec. at 752 n.5 (quoting *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991, 994–95 (BIA 1999)). The roots of § 1621 date back to at least the Perjury Statute of 1563, and the statute has "remained unchanged in its material respects for over a century." *United States v. Dunnigan*, 507 U.S. 87, 94 (1993). We therefore presume that Congress was familiar with 18 U.S.C. § 1621 when it enacted section 101(a)(43)(S) of the Act. . .

Id. at 900.

Omnibus Clause," which it described as "a catchall" for the federal criminal code chapter entitled "Obstruction of Justice." *Aguilar*, 515 U.S. at 598; *see* 18 U.S.C. Pt. I, Ch. 73. While acknowledging that the statutory language of the Omnibus Clause is "far more general in scope" than other clauses in the statute, the Court held that to be guilty of obstructing justice, the "action taken by the accused must be with an intent to influence judicial or grand jury proceedings; it is not enough that there be an intent to influence some ancillary proceeding, such as an investigation independent of the Court's or grand jury's authority." *Aguilar*, 515 U.S. at 599.

Aguilar reaffirmed the Supreme Court's 1893 decision, *Pettibone*, which was the first case construing the predecessor statute to § 1503. In *Pettibone*, the Court held that "a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court." 148 U.S. at 206. The Court reasoned that without the fact of a pending proceeding, obstruction of justice cannot be committed, and without knowledge of a pending proceeding, one necessarily lacks the evil intent to obstruct. *Id.* at 207. In *Aguilar*, the Supreme Court confirmed that to be convicted of the "general," "catchall" obstruction of justice criminal statute, "as in *Pettibone*, if the defendant lacks knowledge that his

actions are likely to affect the *judicial proceeding*, he lacks the requisite intent to obstruct." *Aguilar*, 515 U.S. at 599 (emphasis added).

The *Aguilar* Court underscored that obstructing an investigation that is untethered from a proceeding is insufficient to constitute obstruction of justice: "The action taken by the accused must be with an intent to influence judicial or grand jury proceedings; it is not enough that there be an intent to influence some ancillary proceeding, such as an investigation independent of the court's or grand jury's authority . . . We do not believe that uttering false statements to an investigating agent . . . who might or might not testify before a grand jury is sufficient to make out a violation of the catchall provision of § 1503." *Id.* at 599-600. This circuit has also long held that Congress's broad statutory language prohibiting obstruction of justice must be limited to existing proceedings, explaining that "it might be said that many matters other than proceedings pending in court have to do with the administration of justice," but the phrase "due administration of justice" is properly interpreted to exclude investigations that precede the initiation of proceedings, or activities that obstruct punishment following completed proceedings. *Haili v. United States*, 260 F.2d 744, 745-46 (9th Cir. 1958).[4]

[4] Following the guidance of *Aguilar*, this court has continued to "conclude that a criminal investigation is not an 'official proceeding' under the obstruction of justice statute." *See, e.g., United States v. Ermoian*, 752 F.3d 1165, 1172 (9th Cir.

By 1996, dozens of circuit court opinions had consistently "place[d] metes and bounds on the very broad language of the catchall provision" at 18 U.S.C. § 1503 and had concluded that obstruction of justice requires the actus reus to "have a relationship in time, causation, or logic with the judicial proceedings." *Aguilar*, 515 U.S. at 599. This court, for example, has long held that "interference with the 'due administration of justice' cannot be construed to proscribe conduct which takes place wholly outside the context of an ongoing judicial or quasi-judicial proceeding." *United States v. Brown*, 688 F.2d 596, 598 (9th Cir. 1982). Indeed, prior to *Aguilar*, every circuit court to have considered the issue had narrowed the broad language of the omnibus criminal obstruction of justice provision to require a nexus to an ongoing proceeding. *See Brown*, 688 F.2d at 598 (collecting cases and noting that "no case interpreting § 1503 has extended it to conduct which was not aimed at interfering with a pending judicial proceeding").[5]

2013), as amended (Aug. 28, 2013) (interpreting 18 U.S.C. § 1512 and explaining: "We do not think that the obstruction of justice statute was intended to reach so far back as to cover conduct that occurred even pre-criminal-investigation. Indeed, such a construction would be in tension with Supreme Court precedent requiring a nexus between the obstructive act and criminal proceedings in court.").

Amici note, however, that consistent with *Aguilar,* 515 U.S. at 599-600, in limited circumstances, interference with an ongoing investigation may constitute obstruction of justice, so long as there is a sufficient nexus to a proceeding.

[5] *See also United States v. Fayer,* 573 F.2d 741, 745 (2d Cir. 1978), *cert. denied*, 439 U.S. 831 (1978)*; United States v. Shoup*, 608 F.2d 950, 961 (3d Cir. 1979); *United States v. Johnson*, 605 F.2d 729, 730 (4th Cir. 1979); *United States v. Williams*, 874 F.2d 968, 977 (5th Cir. 1989); *United States v. Bashaw*, 982 F.2d

That obstruction of justice was understood in 1996 to require interference with ongoing proceedings was also reflected in the then-operative federal sentencing guidelines, which provided for a sentencing enhancement for obstruction of justice. U.S.S.G. § 3C1.1 (1996). The commentary to the sentencing guidelines provided that a variety of conduct undertaken while proceedings are ongoing warrants application of the enhancement, but that avoiding or fleeing arrest does not. *See United States v. Madera-Gallegos*, 945 F.2d 264, 268 (9th Cir. 1991). By 1996, the Ninth Circuit had interpreted U.S.S.G. § 3C1.1 to require that "the defendant must have been submitted, willfully or otherwise, to the due process of law before the obstruction adjustment can obtain." *United States v. Draper*, 996 F.2d 982, 986 (9th Cir. 1993). It was with awareness of this uniform and entrenched understanding of the concept of obstruction of justice that Congress made it a deportable offense to obstruct justice. *See Davis* 489 U.S. at 813; *Lorillard*, 434 U.S. at 580.

Like the omnibus clause for the federal crime of obstruction of justice, the INA's aggravated felony ground describes a generic category of offense. As this

168, 170 (6th Cir. 1992); *United States v. Guzzino*, 810 F.2d 687, 696 (7th Cir. 1987); *United States v. Risken*, 788 F.2d 1361, 1369 (8th Cir. 1986); *United States v. Wood,* 6 F.3d 692, 695 (10th Cir. 1993); *United States v. Thomas*, 916 F.2d 647, 651 (11th Cir. 1990). In 1996, the First Circuit stated that *Aguilar* had "reaffirmed" the pending proceeding requirement from *Pettibone*. *United States v. Frankhauser*, 80 F.3d 641, 650 (1st Cir. 1996).

court held in *Valenzuela Gallardo II*, 18 U.S.C. § 1503 is a useful guidepost for deciphering the uniform, categorical definition of obstruction of justice within the immigration context. 818 F.3d at 823 n.9.

B. Additional Statutory Construction Tools Confirm that Congress Intended Obstruction of Justice to Require an Ongoing Proceeding

The doctrine of constitutional narrowing further confirms that the immigration definition of obstruction of justice must be constrained and apply only where there is interference with ongoing proceedings. Amorphous terms "without statutory definitions, narrowing context, or settled legal meanings" raise the potential for unconstitutional vagueness. *United States v. Williams*, 553 U.S. 285, 306 (2008). *See also Sessions v. Dimaya*, 138 S. Ct. 1204, 1210 (2018) (holding that the residual clause of the "crime of violence" aggravated felony is impermissibly vague in violation of due process). In *Aguilar*, the Supreme Court justified the imposition of a nexus requirement to judicial proceedings "out of concern that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." 515 U.S. at 600 (internal quotation marks and citation omitted). In *Valenzuela Gallardo II*, this court held that the BIA's failure to apply a sufficiently limiting principle to what it meant to interfere with the "process of justice" meant that "an unpredictable variety of specific intent crimes could fall within it, leaving

us unable to determine what crimes make a criminal defendant deportable under INA § 101(a)(43)(S) and what crimes do not." 818 F.3d at 820. Construing the term obstruction of justice within the INA consistently with the limitations imposed by the Supreme Court in the criminal context serves to allay the concerns this court has already expressed regarding the potential for § 1101(a)(43)(S) to be unconstitutionally vague.

In addition, the structure and surrounding provisions in the INA indicate that Congress intended obstruction of justice to require interference with ongoing proceedings. *See Esquivel-Quintana*, 137 S. Ct. at 1570 ("Surrounding provisions of the INA guide our interpretation of sexual abuse of a minor."). The INA lists obstruction of justice in the same subparagraph as the aggravated felonies of "perjury or subornation of perjury" and "bribery of a witness." 8 U.S.C. § 1101(a)(43)(S). This court has already held that "[p]erjury and bribery of a witness are clearly tied to proceedings," and that this should inform the court's "understanding of Congress's intended interpretation of 'obstruction of justice.'" *Valenzuela Gallardo II*, 818 F.3d at 821. *Cf. Matter of Alvarado*, 26 I&N Dec. at 899-900 (noting, when providing the generic definition of the perjury aggravated felony, that in 1996, "the majority of States, the Model Penal Code, and the Federal statute required that the witness take [an] oath in an official proceeding, or in a proceeding where an oath was either required or authorized by law") (internal

quotation marks omitted). Thus, the statutory structure further indicates that the obstruction of justice aggravated felony unambiguously requires a nexus to an ongoing proceeding. *See Brown v. Gardner*, 513 U.S. 115, 118 (1994) (recognizing that "ambiguity is a creature not of definitional possibilities but of statutory context").

Finally, the common understanding of obstruction of justice also supports that the phrase requires interference with an ongoing proceeding. The term "obstruction of justice" in 1996 was understood to mean "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).[6] The word "justice," in turn, has been defined as "the legal system by which people and their causes are judged, esp[ecially] the system used to punish people who have committed crimes." Black's Law Dictionary (10th ed. 2014).

For these reasons, the court should conclude that obstruction of justice in the INA unambiguously requires interference with an ongoing proceeding.[7]

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[6] As noted above, interference with an investigation may sometimes constitute obstruction of justice if it is sufficiently moored to a proceeding.

[7] If the court were to disagree with *amici*'s position regarding the unambiguous meaning of "obstruction of justice," a potentially viable alternative definition is that Congress intended 8 U.S.C. § 1101(a)(43)(S) to correspond to Chapter 73 of

* * *

Amici underscore that where offenses would be excluded by the proposed generic definition of obstruction of justice, they may still constitute removable offenses under another provision of the INA. For example, some obstruction-like offenses may be crimes involving moral turpitude, aggravated felonies for crimes of violence, or aggravated felonies for failure to appear. *See* 8 U.S.C. §§ 1227(a)(2)(A)(i), 1101(a)(43)(F), 1101(a)(43)(Q), 1101(a)(43)(T).

Similarly, *amici* note that while adopting a construction of "obstruction of justice" that requires interference with an ongoing proceeding would exclude certain criminal offenses from the aggravated felony ground at 8 U.S.C. § 1101(a)(43)(S), it would not change that interference with law enforcement remains subject to penalty under criminal laws. Interference with a potential or reasonably foreseeable government investigation, or preventing another's apprehension or punishment, may indeed be a crime (like, for example, Cal. Pen. Code § 32); however, that alone does not qualify it as a crime of "obstruction of justice." *See, e.g., Flores v. Att'y Gen.*, 856 F.3d 280, 293 n.66 (3d Cir. 2017) (noting that "one does not obstruct the 'administration of justice' merely by making it more difficult for authorities to move forward with their investigation");

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the federal criminal code. While this is not *amici*'s position, this statutory reading has been adopted by the Third Circuit Court of Appeals. *See Denis v. Att'y Gen.*, 633 F.3d 201, 209 (3d Cir. 2011).

Renteria–Morales, 551 F.3d at 1088 (concluding that while fleeing arrest "may obstruct justice in a general sense," it does not "interfere with judicial process" and thus is "different in kind than generic obstruction-of-justice offenses"); *Ermoian*, 752 F.3d at 1172 (noting, "[w]e do not think that the obstruction of justice statute was intended to reach so far back as to cover conduct that occurred even pre-criminal-investigation").

III. In the Alternative, Even if There Were Ambiguity Triggering *Chevron*, the Board's Definition of "Obstruction of Justice" Does Not Warrant Deference Because It Is Unreasonable.

To the extent the court determines that the statutory phrase "obstruction of justice" is ambiguous, and proceeds to step two of *Chevron*, the BIA's construction of the statute does not warrant deference because it is not "a reasonable construction." *Chevron*, 467 U.S. at 840. This is so for the same reason stated *infra*: a generic definition of "obstruction of justice" that does not require knowing interference in an ongoing proceeding is unmoored from the Supreme Court's settled interpretation of that term. "For over a decade, [this court] upheld the interpretation that the BIA announced in *Espinoza-Gonzalez*—requiring a nexus to an ongoing proceeding—as a plausible construction" of the statutory term

obstruction of justice." *Valenzuela Gallardo II*, 818 F.3d at 824.[8] Now that the BIA has removed the key element of an ongoing proceeding from the definition of obstruction of justice, the court should hold that *Valenzuela Gallardo III*, 27 I&N Dec. 449, is not a plausible statutory construction.

Moreover, the Board's new definition of obstruction of justice is unreasonably broad because it reaches beyond the already expansive set of crimes set forth in Title 18, Chapter 73 of the United States criminal code. As the Board itself has previously noted, "[t]he United States delineates a circumscribed set of offenses that constitutes 'obstruction of justice.'" *Espinoza-Gonzalez*, 22 I&N Dec. at 89. This court previously held that *Espinoza-Gonzalez*'s generic definition was reasonable precisely because the BIA "deriv[ed] the definition of 'obstruction of justice' for purposes of § 1101(a)(43)(S) from the body of federal statutes imposing criminal penalties on obstruction of justice offenses" as set forth in Chapter 73. *Renteria–Morales,* 551 F.3d at 1086; *see also Salazar-Luviano*, 551 F.3d at 861 (noting, when deferring to *Espinoza-Gonzalez*, that the question of

[8] Although the BIA has issued two other published opinions addressing the "obstruction of justice" aggravated felony ground, this court has only ever deferred to the generic definition set forth in *Espinoza-Gonzalez*. *See Hoang*, 641 F.3d at 1164 (stating that, because *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997) did not provide a definition of the phrase "obstruction of justice," "we do not defer to *Batista-Hernandez*"); *Valenzuela Gallardo II*, 818 F.3d at 823 (declining to afford deference to the Board's generic definition articulated in *Valenzuela Gallardo I*, because of serious constitutional concerns about whether it renders the statute unconstitutionally vague).

whether a specific offense counts as an obstruction of justice aggravated felony under *Espinoza-Gonzalez* "depends exclusively on whether the elements of the offense . . . constitute the crime of obstruction of justice as that term is defined in the federal criminal law, U.S. Code Title 18, Chapter 73 (18 U.S.C. § 1501-1521)") (internal quotation marks and citation omitted).

With its newest decision in Petitioner's case, the BIA unreasonably abandoned its longstanding focus on the "circumscribed set of offenses" identified in Chapter 73—which already encompasses over a dozen discrete criminal offenses—in order to cast an even wider net of obstruction of justice offenses that includes accessory after the fact offenses, like Petitioner's conviction.[9]

The federal accessory after the fact offense, 18 U.S.C. § 3, is codified in Chapter 1, entitled "General Provisions," completely apart from the offenses in 18 U.S.C. § 1501 *et seq.*, which appear under Chapter 73's title, "Obstruction of

[9] The BIA also acted unreasonably by relying on post-1996 amendments to Chapter 73 to support its conclusion that "Congress did not intend interference in an ongoing or pending investigation or proceeding to be a necessary element of an "offense relating to obstruction of justice" under the INA. *See Valenzuela Gallardo III*, 27 I&N Dec. 456. The Board cites to Congress's decision in 2002 to expand Chapter 73 by adding § 1519 as "indicat[ion] that Congress did not intend interference in an ongoing or pending investigation or proceeding to be a necessary element of 'obstruction of justice' when it enacted section [1101](a)(43)(S)." *Id.* at n.8. Congress's 2002 statutory amendment does not shed light on Congress's intent in 1996, when it enacted § 1101(a)(43)(S). *See United States v. Price*, 361 U.S. 304, 313 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.").

Justice." As the Third Circuit has noted, "Congress codified its own accessory-after-the-fact statute *outside* the provision related to obstruction of justice. If Congress considered § 3 an obstruction-of-justice offense, it presumably would have placed the statute in Chapter 73, entitled 'Obstruction of Justice,' or referenced § 3 in the Obstruction Provision. It did neither," *Flores,* 856 F.3d at 289 (emphasis in original).

The BIA's seemingly results-oriented approach cannot be squared with the Board's longstanding assertion—central to this court's holdings that the BIA's narrow definition of obstruction of justice in *Espinoza-Gonzalez* was a plausible construction—that "[w]e do not believe that every offense that, by its nature, would tend to 'obstruct justice' is an offense that should properly be classified as 'obstruction of justice'" within the meaning of the aggravated felony ground. *Espinoza-Gonzalez*, 22 I&N Dec. at 893-94. As the Third Circuit pointed out when concluding that an accessory after the fact conviction does not fall under the obstruction of justice aggravated felony ground, "adopting a construction of the Obstruction Provision that reaches unknowable offenses based on broad notions of obstruction of justice causes confusion for courts, puzzlement for practitioners, and incomprehension for immigrants." *Flores*, 856 F.3d at 290 (internal quotations omitted). *See also Hoang*, 641 F.3d at 1162 (holding that a conviction under Washington's accessory after the fact statute is not an aggravated felony as

obstruction of justice because it does not require an active interference with a pending proceeding of a tribunal or investigation). The BIA's newly expanded and overly broad definition of obstruction of justice cannot be reconciled with the principle that matters of doubt should be resolved in favor of the noncitizen in deportation proceedings. *See Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948); *Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007).

The court should find the BIA's new definition unreasonable and not entitled to deference.

CONCLUSION

This court should conclude that the obstruction of justice aggravated felony requires interference with an ongoing proceeding. Accordingly, it should grant the petition for review and vacate the Board's decision below.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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