UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1363

Jean Francois PUGIN,
Petitioner,

v.

Merrick B. GARLAND, Attorney General,
Respondent.

ON PETITION FOR REVIEW OF A DECISION OF THE BOARD OF IMMIGRATION APPEALS

BRIEF OF AMERICAN IMMIGRATION LAWYERS ASSOCIATION AND AMERICAN IMMIGRATION COUNCIL AS AMICI CURIAE IN SUPPORT OF PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT UNDER FRAP 26.1

I, Emma Winger, attorney for amici curiae certify that the American Immigration Lawyers Association and American Immigration Council are non-profit organizations that do not have any parent corporations or issue stock and, consequently, there exists no publicly held corporation which owns 10% or more of stock.

DATED: January 21, 2022

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I. INTRODUCTION AND STATEMENT OF AMICI[1]

Pursuant to Federal Rules of Appellate Procedure 29(b), and 35, amici curiae[2] urge the Court to rehear this case en banc because the panel majority in *Pugin v. Garland*, 19 F.4th 437 (4th Cir. 2021), misinterpreted the Immigration and Nationality Act's (INA) definition of the aggravated felony "obstruction of justice," 8 U.S.C. § 1101(a)(43) (S), and as a result, created a circuit split. Rigorous application of the traditional tools of statutory construction establish that the obstruction of justice aggravated felony unambiguously requires interference with an ongoing proceeding or investigation. Accordingly, the panel majority erred when it became the first federal court of appeals to grant *Chevron* deference to the Board of Immigration Appeals' (BIA) contrary conclusion in *Matter of Valenzuela Gallardo*, 27 I&N Dec. 449, 456 (BIA 2018). Amici agree with Petitioner that the panel wrongly applied the *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), framework to the dual application aggravated felony statute. Here, however, amici focus on why the Court should grant en banc review to correct the panel majority's misguided statutory analysis under *Chevron* step one.

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[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than amici curiae, its members, and its counsel contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. 29(a)(4)(E).

[2] A statement of amici is attached as Appendix A.

The panel majority split from the Ninth Circuit and the Third Circuit when it deferred to the Board's construction of "obstruction of justice." *See Valenzuela Gallardo v. Barr*, 968 F.3d 1053 (9th Cir. 2020) [hereinafter *Valenzuela Gallardo II*]; *Flores v. Att'y Gen.*, 856 F.3d 280 (3d Cir. 2017). This was error. This Court should grant en banc review and join the Ninth Circuit in holding, at *Chevron* step one, that the plain meaning of the term "obstruction of justice" requires a nexus to an ongoing or pending proceeding. *See Valenzuela Gallardo II*, 968 F.3d at 1056.

II. THE PROPER CONSTRUCTION OF THE OBSTRUCTION OF JUSTICE AGGRAVATED FELONY IS A QUESTION OF EXCEPTIONAL IMPORTANCE

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

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 v. Sessions*, 137 S. Ct. 1562, 1569 (2017); *see also Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) (explaining that resorting to step two of *Chevron* should not be "reflexive"); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (holding a statute or regulation is ambiguous "only when that legal toolkit is empty and the interpretive question still has no single right answer"). The statutory phrase "obstruction of justice" is an unambiguous term as evidenced by the term's plain

meaning in 1996 and its statutory context. For over a century the Supreme Court has consistently defined the omnibus obstruction of justice criminal offense to require interference with an ongoing proceeding, as "obstruction can only arise when justice is being administered." *Pettibone v. United States*, 148 U.S. 197, 207 (1893). This Court should grant rehearing en banc and hold that obstruction of justice under 8 U.S.C. § 1101(a)(43)(S) requires an affirmative act of interference with a pending proceeding or investigation. *Valenzuela Gallardo II*, 968 F.3d at 1056; *see Pettibone*, 148 U.S. at 205; *United States v. Aguilar*, 515 U.S. 593, 598-601 (1995).

1. *The Ordinary Understanding of the Term in 1996, as well as its Statutory Context, Make Clear that Obstruction of Justice Requires Interference with a Pending Proceeding*

To determine whether the phrase "obstruction of justice" is ambiguous, the Court's "analysis begins with the language of the statute." *Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004). To decipher the generic meaning of "obstruction of justice," the Court should look to the ordinary meaning of the term in 1996, when Congress added obstruction of justice to the INA,[3] as well as to closely related federal statutes in place at the time the phrase was added. *See Esquivel-Quintana*, 137 S. Ct. at 1569.

[3] *See* Section 440(e)(8), Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1276-78 (1996).

As Judge Gregory correctly observed in dissent, when the obstruction of justice aggravated felony was introduced in 1996, it was understood to require interference in an ongoing judicial proceeding or investigation. *See Pugin*, 19 F.4th at 459 (Gregory, C.J., dissenting). Prior to 1996, Black's Law Dictionary defined obstructing justice as "[i]mpeding or obstructing those who seek justice *in a court*, or those who have duties or powers of *administering justice therein*. The act by which one or more persons attempt to prevent, or do prevent, the execution of lawful process." Black's Law Dictionary 1077 (6th ed. 1990) (quoted in *Matter of Espinoza-Gonzalez*, 22 I&N Dec. 899, 891 (BIA 1999) (emphasis added). The ordinary meaning of the phrase in 1996 included "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). *See Esquivel-Quintana*, 137 S.Ct. at 1569 (using Merriam-Webster's 1996 dictionary to determine the "ordinary meaning" of an aggravated felony). These definitions are entirely consistent with the definition employed by A Dictionary of Modern Legal Usage (2d ed. 1995), on which the panel majority relied, which speaks of "impair[ing] the machinery of the civil or criminal law." *Pugin*, 19 F.4th at 449. As the Ninth Circuit has explained, "[b]ecause in 1996 the

contemporaneous understanding of 'obstruction of justice' required a nexus to an *extant* investigation or proceeding, it is unlikely that Congress intended to stretch the term 'obstruction of justice' under § 1101(a)(43)(S) . . . to include interference with proceedings or investigations that were merely 'reasonably foreseeable to the defendant.'" *Valenzuela Gallardo II*, 968 F.3d at 1063 (emphasis in original).

In addition, the structure and surrounding provisions of the INA indicate that the plain meaning of the term "obstruction of justice" requires interference with ongoing proceedings. *See Esquivel-Quintana*, 137 S. Ct. at 1570 (noting that the "[s]urrounding provisions of the INA guide our interpretation of" the generic definition of an aggravated felony term). The INA lists obstruction of justice in the same subparagraph as the aggravated felonies for "perjury or subornation of perjury" and "bribery of a witness." 8 U.S.C. § 1101(a)(43)(S). "Perjury and bribery of a witness are clearly tied to proceedings," and this statutory context should inform the Court's "understanding of Congress's intended interpretation of 'obstruction of justice.'" *See Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 821 (9th Cir. 2016) [hereinafter *Valenzuela Gallardo I*].[4] Thus, the INA's statutory structure

[4] The panel majority incorrectly cited *Ho Sang Yim v. Barr*, 972 F.3d 1069, 1080–82 (9th Cir. 2020) for the proposition that the perjury aggravated felony does not require a nexus to an ongoing proceeding or investigation. *Pugin*, 19 F.4th at 448. In *Yim*, the Ninth Circuit deferred to the BIA's decision in *Matter of Alvarado*, 26 I&N Dec. 895 (BIA 2016), which did not abandon this nexus. Rather, the Board merely stated that it found "no meaningful distinction between an

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").

As the Ninth and Third Circuits have recognized, Chapter 73 of Title 18, which is entitled "Obstruction of Justice," also provides relevant statutory context for determining the meaning of obstruction of justice within the INA. *See Valenzuela Gallardo II*, 968 F.3d at 1063-65; *Flores*, 856 F.3d at 288–89 (concluding that Chapter 73 provides the relevant statutory context for interpreting the aggravated felony term "obstruction of justice"). All three aggravated felony grounds contained in § 1101(a)(43)(S)—obstruction of justice, perjury, and bribery of a witness—correspond to titles of specific chapters in Title 18. *See* 18 U.S.C. Ch. 11 ("Bribery, Graft, and Conflicts of Interest"); 18 U.S.C. Ch. 79 ("Perjury"); 18 U.S.C. Ch. 73 ("Obstruction of Justice"). As the Third Circuit explained: "Given Congress's linking of the textually adjacent terms—'perjury and subornation of perjury' and 'bribery of a witness'—with their respective chapters, it seems odd that Congress would not similarly link the first term in the list,

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official proceeding and one where an oath is authorized as part of the proceeding" and further cited Supreme Court precedent discussing when a "witness . . . testifying under oath" commits perjury. *Alvarado*, 26 I&N Dec. at 900.

'obstruction of justice,' with its identically named chapter." *Flores*, 856 F.3d at 289. Indeed, the Board itself has long looked to the federal criminal code as a guidepost for defining the term "obstruction of justice." *See Matter of Espinoza-Gonzalez*, 22 I&N Dec. at 891.

All of the provisions in Chapter 73 that existed in 1996, with the exception of the witness intimidation provision, "define obstruction of justice to require a nexus to an ongoing or pending investigation or proceeding." *Valenzuela Gallardo II*, 968 F.3d at 1064 n.9.[5] The text of the witness intimidation provision, which is now codified at § 1512, specifies that "an official proceeding need not be pending or about to be instituted at the time of the offense." 18 U.S.C. § 1512(f)(1).[6] As the Ninth Circuit has recognized, "Congress's explicit instruction that § 1512 reach proceedings that are not pending at the time of commission of the act only underscores that the common understanding at the time § 1101(a)(43)(S) was enacted into law was that an obstruction offense referred only to offenses committed while proceedings were ongoing or pending." *Valenzuela Gallardo II*,

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[5] The panel majority incorrectly held otherwise, 19 F.4th at 446, by reading certain criminal provisions too broadly or, in the case of 8 U.S.C. § 1519, improperly relying on a statutory provision that postdates the passage of § 1101(a)(43)(S). *See Valenzuela Gallardo II*, 968 F.3d at 1064 n.9.

[6] The text was codified at 18 U.S.C. § 1512(e)(1) in 1996.

968 F.3d at 1065. In other words, when considering the *generic* definition of obstruction of justice, "§ 1512 is the exception that proves the rule." *Id.* at 1066.[7]

This conclusion is not undermined by the inclusion of the words "relating to" in § 1101(a)(43)(S). The phrase cannot be used to eliminate an essential element from the generic obstruction of justice offense. *Valenzuela Gallardo II*, 968 F.3d at 1068; *see Mellouli v. Lynch*, 575 U.S. 798, 811-12 (2015) (declining to construe "relate to" to eliminate the requirement that a controlled substance offense at 8 U.S.C. § 1227(a)(2)(B)(i) involve a federally controlled substance).

Accordingly, the common understanding of obstruction of justice, as well as statutory context within the INA and the federal criminal code, make clear that the phrase requires interference with an ongoing proceeding.

2. *Federal Court Precedent in 1996 Defined Obstruction of Justice to Require an Ongoing Proceeding or Investigation*

When determining the meaning of a statutory term, courts must also consider pre-existing judicial interpretations of that term. "[W]here words are employed in a statute which had at the time a well-known meaning at common law

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[7] Moreover, contrary to the panel majority's reasoning, *Pugin*, 19 F.4th at 445, the fact that few states used the term "obstruction of justice" in their criminal code in 1996 does not create ambiguity in the INA given the weight of federal authority establishing the unambiguous meaning, discussed both *infra* and *supra*. Nor does the Model Penal Code create statutory ambiguity, since it does not employ the term "obstruction of justice." *See id.*

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, 583 (1978) (quoting *Standard Oil v. United States*, 221 U.S. 1, 59 (1911)); *see Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 813 (1989).

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 proceeding. *Aguilar*, 515 U.S. at 598-600 (interpreting 18 U.S.C. § 1503). As the Ninth Circuit has held, "[j]udicial interpretations of § 1503 are particularly relevant" when discerning the meaning of § 1101(a)(43)(S). *Valenzuela Gallardo I*, 818 F.3d at 823 n.9.

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 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. 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 act must have a relationship in time, causation, or logic with the judicial proceedings." *Aguilar*, 515 U.S. at 599-600.

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, relying on *Pettibone*, that a defendant cannot be convicted of the "general," "catchall" obstruction of justice criminal statute, "if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, [because] he [therefore] lacks the requisite intent to obstruct." *Aguilar*, 515 U.S. at 599.

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

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 the

dissent observed and the Ninth Circuit held, 18 U.S.C. § 1503 is a useful guidepost for deciphering the definition of the "term of art" obstruction of justice within the immigration context and supports the conclusion that aggravated felony provision plainly requires a nexus to a proceeding or investigation. *Pugin*, 19 F.4th at 458 (Gregory, C.J., dissenting); *Valenzuela Gallardo I*, 818 F.3d at 823 n.9.

III. CONCLUSION

For these reasons, the Court should conclude that obstruction of justice in the INA unambiguously requires interference with an ongoing proceeding and should grant rehearing en banc to correct the panel majority's erroneous conclusion to the contrary.

Respectfully submitted,

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DATED: January 21, 2022

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4), because it contains 2,600 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word 2016, is proportionately spaced, and has a typeface of 14 point.

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Appendix A

STATEMENTS OF INTERESTS OF AMICI

The **American Immigration Lawyers Association** (AILA), founded in 1946, is a non-partisan, nonprofit national association of more than 15,000 attorneys and law professors who practice and teach immigration 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. AILA has participated as amicus curiae in numerous cases before the U.S. Courts of Appeal and the U.S. Supreme Court.

The **American Immigration Council** is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council regularly litigates and advocates around issues involving the intersection of criminal and immigration law.

Collectively, amici have a direct interest in ensuring that noncitizens are not ordered removed based on an erroneous classification of a conviction as an aggravated felony.

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2021, I electronically filed the foregoing amici brief of the American Immigration Lawyers Association and American Immigration Council with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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