NOS. 22-23, 22-331

In the Supreme Court of the United States

JEAN FRANCOIS PUGIN,
Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,
Respondent.

MERRICK B. GARLAND, ATTORNEY GENERAL,
Petitioner,

v.

FERNANDO CORDERO-GARCIA,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth Circuit and Ninth Circuit

BRIEF OF AMICI CURIAE IMMIGRANT DEFENSE PROJECT, AMERICAN IMMIGRATION COUNCIL, AND AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PUGIN AND CORDERO-GARCIA

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INTEREST OF AMICI CURIAE[1]

Amici are organizations of immigration law practitioners and experts who utilize the immigration laws in daily practice and are committed to the fair and just administration of immigration laws. For that reason, Amici monitor the Board of Immigration Appeals' decision-making and, where necessary, challenge the agency's erroneous construction of immigration statutes. With expertise on the intersection of criminal and immigration law, Amici are regularly called on by immigration and criminal system stakeholders—in particular, criminal defense counsel, judges, prosecutors, and noncitizens accused of crimes—to provide accurate, reliable advice and information on the intersection of immigration and criminal law. Amici have a particular interest in clear, fair, and consistent rules for defining deportable conduct.

IMMIGRANT DEFENSE PROJECT (IDP) is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants having contact with the criminal and immigration systems. IDP provides defense attorneys, immigration attorneys, immigrants, and judges with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law.

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[1] Pursuant to Supreme Court Rule 37, counsel for amici curiae states that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than the amici curiae, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

IDP seeks to improve the quality of justice for immigrants accused of crimes and therefore has a keen interest in ensuring that immigration law is correctly interpreted to give noncitizens the full benefit of their constitutional and statutory rights. IDP has submitted amicus curiae briefs in many key cases before the U.S. Supreme Court and Courts of Appeals involving the interplay between criminal and immigration law and the rights of immigrants in the criminal legal and immigration systems.

The AMERICAN IMMIGRATION COUNCIL is a nonprofit 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.

The AMERICAN IMMIGRATION LAWYERS ASSOCIATION (AILA), founded in 1946, is a national, non-partisan, non-profit association with more than 16,000 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 promote justice, advocate for fair and reasonable immigration law and policy, and advance the quality of immigration and nationality law and practice. 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 Appeals and the U.S. Supreme Court.

SUMMARY OF THE ARGUMENT

Amici agree with Mr. Pugin and Mr. Cordero-Garcia that the obstruction of justice aggravated felony unambiguously requires a nexus to a pending proceeding or investigation. However, should this Court find the statute ambiguous on this question, the well-established and long-standing criminal rule of lenity comes into play. This Court has made plain that where a statute with both criminal and noncriminal application is susceptible to multiple interpretations, "lenity applies." *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004). As such, this Court has repeatedly instructed adjudicators that ambiguous aggravated felony provisions—provisions with serious criminal consequences—must be construed to narrow their punitive reach. And the rule of lenity is not only a tool for the courts. It is a traditional tool of statutory construction that agencies, including the Board of Immigration Appeals (BIA), must employ when interpreting ambiguous dual-application statutes.

Though the BIA has acknowledged the applicability of the criminal rule of lenity in interpreting the aggravated felony statute, *see Matter of Deang*, 27 I. & N. Dec. 57, 63 (BIA 2017), it has only applied the canon once. Contrary to this Court's guidance, the BIA has repeatedly failed to apply lenity when construing aggravated felony provisions susceptible to narrower alternative constructions—narrower constructions that were ultimately adopted by this Court and circuit courts on review. The agency's persistent refusal to apply the criminal rule of lenity comes at a cost to the judiciary, which must intervene to course-correct,

and to noncitizens, who wrongly face mandatory deportation and significantly enhanced federal prison sentences.

The consequences of the BIA's failure to apply the criminal rule of lenity where it is clearly called for are in stark relief in the instant cases. Over the course of two decades and five published decisions, the BIA has changed and expanded the generic definition of "an offense relating to obstruction of justice." Notably, the BIA had previously adopted the nexus requirement endorsed by Mr. Pugin and Mr. Cordero-Garcia, only to later abandon it. Yet not once has the BIA considered, let alone applied, lenity, even though the BIA itself has found the aggravated felony provision "susceptible to varying interpretations." *Matter of Valenzuela Gallardo*, 27 I. & N. Dec. 449, 452 (BIA 2018). Per this Court's precedents, the BIA should have applied the recognized legal principle that criminal consequences should not be imposed unless expressly authorized by Congress. This Court must correct the BIA's error by once again making clear that ambiguous aggravated felony provisions must be construed to narrow their reach, as required by the criminal rule of lenity.

ARGUMENT

As explained by Mr. Pugin and Mr. Cordero-Garcia, "an offense relating to obstruction of justice" unambiguously requires a nexus to an ongoing proceeding or investigation. *See* Pugin Br. at 13-23; Cordero-Garcia Br. at 13-24. Indeed, for over a decade the BIA itself interpreted the aggravated felony provision in this way. *See infra* Part B. However, beginning in 2012, the BIA reversed course and found the statutory language ambiguous on this question, *see Matter of Valenzuela-Gallardo I*, 25 I. & N. Dec. 838, 839 (BIA 2012) [hereinafter *Valenzuela Gallardo I*], and "susceptible to varying interpretations," *Matter of Valenzuela Gallardo*, 27 I. & N. Dec. 449, 452 (BIA 2018) [hereinafter *Valenzuela Gallardo III*].

When statutory text with criminal applications—such as the "obstruction of justice" aggravated felony provision—is ambiguous, there is a long-standing principle of statutory construction that must be applied to identify the statute's meaning: the criminal rule of lenity. *See infra* Part A. This is true even where the statute is encountered in a civil context; this Court has so instructed numerous times over the years. *See infra* Part A.1. Nevertheless, the BIA has repeatedly ignored this Court's guidance. *See infra* Part A.2. The BIA's inconsistent decision-making on the question presented in these cases highlights the importance of applying the rule of lenity where an immigration statute has criminal consequences. *See infra* Part B.

Thus, should the Court decide that the statutory text at issue here is ambiguous as to the question

presented, Amici submit that the Court must apply the criminal rule of lenity to conclude that the obstruction of justice aggravated felony provision is restricted to offenses that have, as an element, a nexus to an ongoing proceeding or investigation. Amici further submit that this Court should provide guidance to the BIA that, henceforth, the agency too must apply the criminal rule of lenity when it interprets aggravated felony provisions it finds ambiguous.

A. THE BIA HAS IGNORED THIS COURT'S REPEATED INSTRUCTION TO CONSIDER AND APPLY THE RULE OF LENITY WHEN INTERPRETING AMBIGUOUS IMMIGRATION STATUTES WITH CRIMINAL APPLICATIONS.

1. The Criminal Rule of Lenity Is a Long-Standing Legal Principle That the Court Has Repeatedly Referenced When Interpreting Ambiguous Statutes with Criminal Applications Such as the Dual Application Immigration Statute at Issue Here.

The criminal rule of lenity has "long been part of [the American legal] tradition." *United States v. Bass*, 404 U.S. 336, 348 (1971); *accord United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion) (rule of lenity embodied in "a long line of our decisions"). This principle "is founded on 'the tenderness of the law for the rights of individuals' to fair notice of the law 'and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.'" *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) (quoting *United States v. Wiltberger*,

18 U.S. (5 Wheat.) 76, 95, 5 L. Ed. 37 (1820) (Marshall, C.J.)).

The two values underlying lenity—of providing "fair warning" and requiring a "clear statement" from the legislature before condemning individuals to prison—are relevant whenever a statute carries criminal consequences. *Bass*, 404 U.S. at 347-49 (internal citations omitted). Thus, this Court has long required that ambiguities in criminal laws be construed in favor of the accused. *See Davis*, 139 S. Ct. at 2333 (rule of lenity is "'perhaps not much less old than' the task of statutory 'construction itself'") (quoting *Wiltberger*, 18 U.S. at 95). A tool consistently and frequently applied by this Court, the criminal rule of lenity is a "time-honored" principle of statutory interpretation. *Crandon v. United States*, 494 U.S. 152, 158 (1990). It is also one that, as discussed below, applies not only to statutes that are themselves criminal, but also to civil statutes that have criminal application.

i. This Court Has Repeatedly Provided Guidance That Agencies Must Apply Lenity When Construing Dual-Application Statutes with Criminal as Well as Civil Law Applications Such as the Aggravated Felony Provision at Issue Here.

As this Court has recognized in case after case, lenity applies whenever a statute "has both criminal and noncriminal applications." *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *see also United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992) (plurality opinion) (applying lenity in construing

"a tax statute [] in a civil setting" because the statute "has criminal applications"). Thus, as this Court has explained, the criminal rule of lenity must resolve ambiguity "when a statute with criminal sanctions is applied in a noncriminal context." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 16 (2011) (citing *Leocal*, 543 U.S. at 11 n.8). This Court has found lenity to be an appropriate tool in a variety of civil cases, including where private litigants sought damages and injunctive relief under the Hobbs Act, *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 408-09 (2003); and where the government sought recovery of private severance payments, *Crandon*, 494 U.S. at 158 (applying lenity in civil case in which "governing standard" came from criminal statute). Contrary to the government's assertion in these cases, Gov't Br. at 52-53 & n.29, lenity's application is not limited to statutes that directly incorporate the federal criminal code, *Thompson/Center Arms*, 504 U.S. at 517-18 (plurality opinion) (applying lenity where tax liability was at issue and criminal liability only a hypothetical possibility); *id.* at 519 (Scalia, J., concurring); *see also Bittner v. United States*, 143 S. Ct. 713, 724-25 (2023) (opinion of Gorsuch, J., joined by Jackson, J.) (discussing applicability of lenity where government's interpretation of a provision of the Bank Secrecy Act that levies only a civil penalty would give rise to additional criminal liability under a related provision).

Therefore, where a statute—such as the aggravated felony provisions of the Immigration and Nationality Act (INA)—has such dual applications, it must be "consistently" interpreted, regardless of whether an adjudicator encounters it in "a criminal or non-

criminal context." *Leocal*, 543 U.S. at 11 n.8. The BIA is therefore required to apply lenity whenever an aggravated felony provision is ambiguous. Removal cases that hinge on an aggravated felony provision, like the obstruction of justice provision at issue here, exemplify the necessity of lenity when construing dual-application statutes. This is so because provisions like 8 U.S.C. § 1101(a)(43)(S) have "both criminal and non-criminal applications." *Leocal*, 543 U.S. at 11 n.8; *accord Whitman v. United States*, 135 S. Ct. 352, 353-54 (2014) (Scalia, J. concurring with denial of certiorari). An aggravated felony determination carries severe sentencing enhancements as well as criminal liability. *See* 8 U.S.C. §§ 1326(b)(2) (authorizing 20-year sentence for federal conviction for "illegal reentry"); 1327 (criminalizing as a felony aiding or assisting a noncitizen who "has been convicted of an aggravated felony" to enter the United States).

Thus, it is unsurprising that over the past two decades this Court has time and again made clear that the criminal rule of lenity is an interpretive principle that should be applied where aggravated felony provisions contain ambiguities. The Court first articulated such guidance in *Leocal*, which held a driving under the influence of alcohol conviction was not a crime of violence aggravated felony. 543 U.S. at 11-12. Chief Justice Rehnquist, writing for a unanimous court, recognized that any ambiguity in the statute had to be interpreted in the noncitizen's favor: "Although here we deal with § 16 in the deportation context, § 16 is a criminal statute, and it has both criminal and non-criminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule

of lenity applies." *Id.* at 11 n.8. For support, the Court cited *Thompson/Center Arms*, which applied lenity to a tax statute that carried potential future criminal liability, *id.*—exactly as the aggravated felony statute does. *See* 8 U.S.C. §§ 1326(b)(2), 1327.

A few years later, the Court again addressed the relevance of lenity and found that it weighed against reading the "illicit trafficking" aggravated felony provision to include subsequent simple possession offenses. *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 581 (2010). Echoing the guidance in *Leocal*, the Court held that "ambiguities in criminal statutes referenced in immigration laws should be construed in the noncitizen's favor." *Id.* In *Moncrieffe v. Holder*, this Court repeated that admonition, erring "on the side of underinclusiveness" to find that the noncitizen's conviction for marijuana possession did not qualify as an illicit trafficking aggravated felony. 569 U.S. 184, 205 (2013). Even in cases where the Court has found the statute unambiguous, it has emphasized that lenity could have applied had the aggravated felony provision at issue been ambiguous. *See Kawashima v. Holder*, 565 U.S. 478, 489 (2012) (acknowledging that "we have, in the past, construed ambiguities in deportation statutes in the alien's favor" but finding that the fraud aggravated felony clearly encompassed tax crimes that involved fraudulent conduct); *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 397-98 (2017) (holding that proper reading of sexual abuse of a minor aggravated felony provision "unambiguously forecloses the Board's interpretation" such that there was "no need to resolve whether the rule of lenity or *Chevron* deference receives priority").

This Court requires application of the criminal rule of lenity when construing ambiguous dual application statutes because it ensures uniformity in statutory meaning across both contexts. *See FCC v. ABC*, 347 U.S. 284, 296 (1954) (explaining that "[t]here cannot be one construction for" the civil context "and another for the" criminal context). As this Court has made clear, "[t]he lowest common denominator"—the least liberty-infringing interpretation of the statute—"must govern" when a statute has both criminal and civil applications. *Clark v. Martinez*, 543 U.S. 371, 380 (2005); *Bass*, 404 U.S. at 347-48. Because courts routinely construe the aggravated felony statute in both criminal and immigration proceedings,[2] without this uniform-meaning principle, the aggravated felony statute turns into a "chameleon, its meaning subject to change" depending on the circumstances. *Clark*, 543 at 382.

ii. The BIA Must Consider and Apply All Relevant Tools of Statutory Construction, Including Canons Like the Rule of Lenity, When Interpreting Aggravated Felony Provisions.

When determining the meaning of a statute, adjudicatory agencies as well as courts must employ all "traditional tools of statutory construction." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S.

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[2] *See, e.g.*, *United States v. Rodriguez-Flores*, 25 F.4th 385, 387–90 (5th Cir. 2022) (determining whether state offense was an aggravated felony to support enhanced criminal sentence under 8 U.S.C. § 1326(b)(2)); *United States v. Quinones-Chavez*, 641 F. App'x 722, 726–27 (9th Cir. 2016) (determining whether state offense constituted an aggravated felony to support a conviction under 8 U.S.C. § 1327).

837, 842-43 & n.9 (1984). "[T]raditional canons" are considered "traditional tool[s] of statutory construction." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018). Lenity is among the "traditional canons" the agency must employ when construing a statute. *Epic Sys. Corp.*, 138 S. Ct. 1612 at 1630. Its provenance goes back to the "Republic's early years," when it became "a widely recognized rule of statutory construction" that encapsulated the uncontroversial idea that "penal laws should be construed strictly." *Wooden v. United States*, 142 S. Ct. 1063, 1082 (2022) (Gorsuch, J., concurring) (quoting *The Adventure*, 1 F. Cas. 202 (C.C. Va. 1812) (No. 93)); *see also United States v. Lanier*, 520 U.S. 259, 266 (1997) (describing values supporting "the canon of strict construction of criminal statutes, or rule of lenity"). As discussed above in Part A.1.i., precedent establishes that lenity must be considered when determining the meaning of ambiguous statutes with criminal applications. *See Burrage v. United States*, 134 S. Ct. 881, 891 (2014) (rule of lenity constrains interpretation of criminal statutes). Consequently, the BIA must resolve any ambiguity in the aggravated felony provisions by applying the lenity doctrine and adopting the less-punitive construction. *See Leocal*, 543 U.S. at 11 n.8; *Carachuri-Rosendo*, 560 U.S. at 581; *Moncrieffe*, 569 U.S. at 205; *see also INS v. St. Cyr*, 533 U.S. 289, 320 & n.45 (2001) (finding a canon rendered a statute unambiguous).

Applying the criminal rule of lenity is entirely consistent with the BIA's role as the agency that must apply the statutory provisions that give rise to the sanction of deportation and criminal liability.[3]

[3] This stands in contrast to voiding a statute as unconstitutionally vague, which has "generally been thought beyond the juris-

By regulation, the BIA is obligated to "provide clear and uniform guidance . . . on the proper interpretation and administration of the" INA. 8 C.F.R. § 1003.1(d)(1). For ambiguous dual application statutes, a fair and predictable construction must involve consideration of the rule of lenity. Absent lenity, the BIA is free to change between permissible interpretations of ambiguous text, *see infra* Part B, altering criminal consequences as it goes. In cases like Mr. Pugin's and Mr. Cordero-Garcia's, where the BIA's determination of the scope of an aggravated felony provision has life-altering consequences for noncitizens, reasoned and consistent decision-making requires the BIA to apply the rule of lenity.[4]

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diction of administrative agencies." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (quoting *Johnson v. Robison*, 415 U.S. 361, 368 (1974)). Instead, agencies charged with statutory interpretation of dual application statutes employ the criminal rule of lenity or the doctrine of constitutional avoidance to interpret statutes in a manner that does not raise constitutional problems. *See Wooden*, 142 S. Ct. at 1086 (Gorsuch, J., concurring) (describing as "protect[ing] fair notice and the separation of powers"); *Lanier*, 520 U.S. at 266 (describing lenity's role in protecting the "fair warning requirement" for statutes with criminal penalties); *cf. Borden v. United States*, 141 S. Ct. 1817, 1836 (2021) (Thomas, J., dissenting) ("When faced with a criminal statute too vague for the case at hand, the right answer likely is to apply the rule of lenity . . . .").

[4] Even if the aggravated felony statute had no criminal application, the BIA should have followed this Court's longstanding instruction to construe "any lingering ambiguities in deportation statutes" in favor of the noncitizen. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *see St. Cyr*, 533 U.S. at 320; *INS v. Errico*, 385 U.S. 214, 225 (1966); *Costello v. INS,* 376 U.S. 120, 128-29 (1964); *Bonetti v. Rogers*, 356 U.S. 691, 699 (1958); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 9-10 (1948). In fact, there is a longstanding practice of applying lenity to any statute imposing

2. Despite the Court's Guidance, the BIA Consistently Fails to Apply the Criminal Rule of Lenity to Dual Application Immigration Statutes Susceptible to Varying Interpretations .

Contrary to the Attorney General's arguments before this Court, Gov't Br. at 51-53, the BIA has recently acknowledged that when interpreting an ambiguous aggravated felony provision, it is "obligate[d]" under the criminal rule of lenity "to construe any ambiguity in favor of the respondent"—regardless of whether the statute cross-references a provision in Title 18. *Matter of Deang*, 27 I. & N. Dec. 57, 63-64 (BIA 2017) (holding that were the aggravated felony receipt of stolen property offense at 8 U.S.C. § 1101(a)(43)(G) ambiguous, lenity would apply under *Leocal*, 543 U.S. at 11 n.8). Despite recognizing its obligation to consider lenity, the agency has applied the canon in only one of its forty-one published decisions interpreting the aggravated felony statute since *Leocal*.[5] In fact, the agency has only once applied the

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penalties, whether or not criminal. *See Bittner*, 143 S. Ct. at 724 (opinion of Gorsuch, J.) ("Under the rule of lenity, this Court has long held, statutes imposing penalties are to be 'construed strictly' against the government and in favor of individuals.") (quoting *Comm'r v. Acker*, 361 U.S. 87, 91 (1959)).

[5] *See Matter of C. Morgan*, 28 I. & N. Dec. 508 (BIA 2022); *Matter of A. Valenzuela*, 28 I. & N. Dec. 418 (BIA 2021); *Matter of Cordero-Garcia*, 27 I. & N. Dec. 652 (BIA 2019); *Matter of A. Vasquez*, 27 I. & N. Dec. 503 (BIA 2019); *Matter of Valenzuela Gallardo*, 27 I. & N. Dec. 449 (BIA 2018); *Matter of Ding*, 27 I. & N. Dec. 295 (BIA 2018); *Matter of Cervantes Nunez*, 27 I. & N. Dec. 238 (BIA 2018); *Matter of Rosa*, 27 I. & N. Dec. 228 (BIA 2018); *Matter of Jasso Arangure*, 27 I. & N. Dec. 178 (BIA 2017); *Matter of Delgado*, 27 I. & N. Dec. 100 (BIA 2017); *Deang*, 27 I. & N. Dec. 57; *Matter of Alday-Dominguez*, 27 I. & N. Dec. 48

long-standing principle in its entire history. The BIA's refusal to apply lenity has led it to reach incorrect decisions: it has repeatedly failed to apply lenity when construing aggravated felony provisions susceptible to narrower alternative constructions that were ultimately adopted by this Court and circuit courts on review.

An early example of the agency's failure to consider lenity despite its relevance is *Lopez v. Gonzales*, 549 U.S. 47 (2006). At issue in *Lopez* was the scope of the illicit trafficking in a controlled substance aggravated felony provision, which includes "a drug

(BIA 2017); *Matter of Ibarra*, 26 I. & N. Dec. 809 (BIA 2016); *Matter of Guzman-Polanco*, 26 I. & N. Dec. 806 (BIA 2016); *Matter of Garza-Olivares*, 26 I. & N. Dec. 736 (BIA 2016); *Matter of Adeniye*, 26 I. & N. Dec. 726 (BIA 2016); *Matter of Guzman-Polanco*, 26 I. & N. Dec. 713 (BIA 2016); *Matter of Francisco-Alonzo*, 26 I. & N. Dec. 594 (BIA 2015); *Matter of Esquivel-Quintana*, 26 I. & N. Dec. 469 (BIA 2015); *Matter of L-G-H-*, 26 I. & N. Dec. 365 (BIA 2014); *Matter of Sierra*, 26 I. & N. Dec. 288 (BIA 2014); *Matter of Oppedisano*, 26 I. & N. Dec. 202 (BIA 2013); *Matter of Flores*, 26 I. & N. Dec. 155 (BIA 2013); *Matter of Cuellar*, 25 I. & N. Dec. 850 (BIA 2012); *Matter of Valenzuela Gallardo*, 25 I. & N. Dec. 838 (BIA 2012); *Matter of M-W-*, 25 I. & N. Dec. 748 (BIA 2012); *Matter of Castro Rodriguez*, 25 I. & N. Dec. 698 (BIA 2012); *Matter of U. Singh*, 25 I. & N. Dec. 670 (BIA 2012); *Matter of Guerrero*, 25 I. & N. Dec. 631 (BIA 2011); *Matter of Bautista*, 25 I. & N. Dec. 616 (BIA 2011); *Matter of Gruenangerl*, 25 I. & N. Dec. 351 (BIA 2010); *Matter of Sanchez-Cornejo*, 25 I. & N. Dec. 273 (BIA 2010); *Matter of Richardson*, 25 I. & N. Dec. 226 (BIA 2010); *Matter of Cardiel*, 25 I. & N. Dec. 12 (BIA 2009); *Matter of Aruna*, 24 I. & N. Dec. 452 (BIA 2008); *Matter of Garcia-Madruga*, 24 I. & N. Dec. 436 (BIA 2008); *Matter of Thomas*, 24 I. & N. Dec. 416 (BIA 2007); *Matter of Carachuri-Rosendo*, 24 I. & N. Dec. 382 (BIA 2007); *Matter of S-I-K-*, 24 I. & N. Dec. 324 (BIA 2007); *Matter of Babaisakov*, 24 I. & N. Dec. 306 (BIA 2007); *Matter of Gertsenshteyn*, 24 I. & N. Dec. 111 (BIA 2007); *Matter of Brieva*, 23 I. & N. Dec. 766 (BIA 2005).

trafficking crime," defined as "any felony punishable under the Controlled Substances Act." 549 U.S. at 50 (quoting 8 U.S.C. § 1101(a)(43)(B), 18 U.S.C. § 924 (c)(2)). The question before this Court was whether a South Dakota statute of conviction that the state labeled a "felony" necessarily fell within this aggravated felony ground. *Id.* at 52. The agency's precedential decision giving rise to the BIA's ruling in Mr. Lopez's case demonstrates the harms and inconsistency that result from the agency's failure to apply the stabilizing principle of lenity. In 1999, the BIA in *Matter of K-V-D-* held that a controlled substance offense must be punishable as a federal felony to be an aggravated felony. 22 I. & N. Dec. 1163, 1174 (BIA 1999). Subsequently, in *Matter of Yanez-Garcia*, the BIA withdrew from *K-V-D-*, reinterpreting the illicit trafficking aggravated felony to hold that a state felony drug offense no longer needed to be punishable as a federal felony to constitute illicit trafficking. 23 I. & N. Dec. 390, 396 (BIA 2002). Thus, as in the cases at bar, *see infra* Part B, the BIA flip-flopped and did the opposite of applying lenity in construing the statute, requiring this Court's correction. *See Lopez*, 549 U.S. at 60 (holding that offenses which do not constitute federal felonies cannot be drug trafficking crimes).

A few years later, the Court again had to step in and correct the BIA's interpretation of the illicit trafficking aggravated felony provision. *Moncrieffe*, 569 U.S. at 196-99. The BIA, relying on its published decision in *Matter of Aruna*, 24 I. & N. Dec. 452 (BIA 2008), held that Mr. Moncrieffe's Georgia conviction for possession of marijuana with intent to distribute was analogous to the similarly named federal offense, despite the fact that he only actually distributed a small

amount of marijuana and that his conviction did not require a showing of remuneration. *In re: Adrian Phillip Moncrieffe*, 2010 WL 8751124 at *1-2 (BIA Sept. 20, 2010). While the BIA acknowledged a Fifth Circuit decision interpreting the statute more narrowly, the agency refused to follow its reasoning. *Id.* at *2. Likewise, in *Aruna*, the BIA recognized but rejected the Third Circuit's narrower construction of the same provision, opting to read it broadly. 24 I&N Dec. at 457-58 & n.4. No consideration or even mention of lenity appears in either agency decision, despite obvious alternative constructions—including the narrower construction that this Court ultimately embraced. *See Moncrieffe*, 569 U.S. at 206 (holding that a state offense that punishes distribution of a small amount of marijuana for no renumeration cannot be an aggravated felony). Although the BIA evidently struggled over the course of a decade with how to interpret 8 U.S.C. § 1101(a)(43)(B), it failed to achieve the predictability and consistency that could have resulted from applying the rule of lenity.

More recently, the BIA's refusal to consider lenity when construing the sexual abuse of a minor aggravated felony provision required this Court's intervention in *Esquivel-Quintana*, 581 U.S. at 388-89. The agency decision, *Matter of Esquivel-Quintana*, purported to decipher congressional intent but did not employ traditional tools of statutory construction and improperly concluded that the sexual abuse of a minor aggravated felony provision included within its scope consensual sexual contact with sixteen- and seventeen-year-olds. *See* 26 I. & N. Dec. 469, 474 (BIA 2015). Instead of using traditional construction tools such as lenity, the BIA sought justification for its broad

reading of the statute by citing case law on the risk of exploitation when adults solicit minors for sexual activity and a social science article about teenage women's lack of "negotiation skills." *Id.* Had the BIA at least acknowledged some ambiguity in the sexual abuse of a minor provision—apparent from conflicting circuit court decisions on its scope, *id.* at 472-73—and embraced lenity as a tool, it would have ended up with the less-punitive construction of the statute later adopted by this Court. *See Esquivel-Quintana*, 581 U.S. at 397-398.

The courts of appeals have similarly reversed the BIA after it failed to apply lenity. In *Matter of Rosa*, the BIA again interpreted the definition of the "drug trafficking" aggravated felony provision. 27 I. & N. Dec. at 232. The BIA held that when deciding whether a state controlled substance offense is punishable as a federal felony, the adjudicator need not look solely to the provision of the Controlled Substances Act that is most similar to the state statute of conviction. *Id.* In so holding, the BIA did not acknowledge any ambiguity in the statute even though the Department of Justice argued on petition for review that the term "any" in the definition of "drug trafficking crime" was "ambiguous." *Rosa v. Att'y Gen.*, 950 F.3d 67, 79 (3d Cir. 2020). But the Third Circuit declined to defer to the BIA's interpretation of a criminal statute, holding that the statute was beyond the agency's "sphere of special competence." *Id.* at 79 (quoting *Singh v. Ashcroft*, 383 F.3d 144, 151 (3d Cir. 2004)). The court of appeals rejected the BIA's construction, finding it contrary to "longstanding practice in federal court," which "limits that comparison to only the most similar federal analog." *Id.* at 76. Had the agency

followed this Court's guidance in *Leocal* and applied the lenity framework, it would have adopted the narrower construction of the statute ultimately embraced by the Third Circuit.

And, in *Matter of Richardson*, the BIA concluded that the term "conspiracy" at 8 U.S.C. § 1101(a)(43)(U) does not require an overt act in furtherance of the conspiracy. 25 I. & N. Dec. 226, 230 (BIA 2010). Two courts of appeals have subsequently rejected the BIA's broad reading of the statute—one in the context of a criminal prosecution for illegal reentry—finding the statute unambiguously necessitates the narrower construction with an overt act requirement. *Quinteros v. Attorney General*, 945 F.3d 772, 783-85 (3d Cir. 2019); *United States v. Garcia-Santana*, 774 F.3d 528, 537-40, 542-43 (9th Cir. 2014). Had the BIA acknowledged the evident alternative construction, *see Quinteros*, 945 F.3d at 784 (noting the "large majority of states" and the Model Penal Code all require an overt act for conspiracy), and properly applied lenity, Mr. Garcia-Santana would not have faced a criminal prosecution with enhanced criminal penalties based on the BIA's erroneous and expansive construction of the aggravated felony statute.

B. THE BIA'S INCONSISTENT DECISION-MAKING WITH RESPECT TO THE QUESTION PRESENTED HERE HIGHLIGHTS THE IMPORTANCE OF TAKING THE LENITY PRINCIPLE INTO ACCOUNT.

Despite the BIA's recognition that the phrase "an offense relating to obstruction of justice" is "susceptible to varying interpretations," *Valenzuela Gallardo III*, 27 I. & N. Dec. at 452, not one of the BIA's five published decisions interpreting the phrase mentions lenity or acknowledges the criminal implica-

tions of its interpretations. Rather, with each decision, the agency has changed course with the goal not to resolve any ambiguity "in favor of liberty," *Wooden*, 142 S. Ct. at 1081 (Gorsuch, J., concurring), but instead to include ever more offenses within a fluctuating, and ultimately expanding, generic definition. The BIA's flip-flop decision-making on the question presented here—which carries significant criminal consequences—illustrates the importance of the consistent and predictable application of lenity as a method of statutory construction.

The BIA first confronted the obstruction of justice aggravated felony provision over two decades ago. In *Matter of Batista-Hernandez*, 21 I. & N. Dec. 955 (BIA 1997), the agency considered whether a conviction under 18 U.S.C. § 3, accessory after the fact, fell within the aggravated felony definition. *Id.* at 956. While the immigration judge had based the removal order on the illicit trafficking aggravated felony at 8 U.S.C. § 1101(a)(43)(B), the BIA, without explanation and *sua sponte*, went in search of a different ground. *See id.* It landed on obstruction of justice, which had been newly added to the aggravated felony definition while Mr. Batista-Hernandez' case was pending.[6] *Id.*

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[6] Congress added obstruction of justice to the aggravated felony definition in 1996, with a sentence of at least five years required to fit within the definition. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, § 440(e)(8), 110 Stat. 1214, 1278. Congress almost immediately shortened the required sentence to one year, while clarifying the retroactive application of the aggravated felony definition. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, div. C, § 321(a)(11), (b), 110 Stat. 3009, 3009-628; *see* 8 U.S.C. § 1101(a)(43) ("[T]he term [aggravated felony] applies regardless

at 962. Consequently, the provision was neither listed on his immigration charging document nor addressed by the parties. *Id.* at 966-69 (Rosenberg, Board Member, concurring in part and dissenting in part).

Without the benefit of any briefing, the BIA devoted a total of four sentences to concluding that "18 U.S.C. § 3 clearly relates to obstruction of justice," with no statutory analysis and without employing traditional construction tools, such as lenity. *Id.* at 962. According to the agency, the "hinder or prevent" provision of § 3, and dicta from a case interpreting accessory after the fact provided the necessary support for this conclusion. *Id.* (citing *United States v. Barlow*, 470 F.2d 1245, 1252–53 (D.C. Cir. 1972)). The BIA did not, however, attempt to define "obstruction of justice," nor did it consider the federal crimes within the "obstruction of justice" chapter of the U.S. Code—ignoring the suggestion of the dissent. *See id.* at 971 (dissent noting that "the term 'obstruction of justice' is a term of art used in the federal statute to refer to a series of specific offenses").

Two years later, the en banc BIA again considered the meaning of obstruction of justice. *Matter of Espinoza-Gonzalez*, 22 I. & N. Dec. 889 (BIA 1999). The criminal offense at issue was 18 U.S.C. § 4, misprision of a felony. *Id.* at 889. This time, the agency endeavored to define "obstruction of justice." *Id.* at 891-96. The BIA rejected a definition that would include "every offense that, by its nature, would tend to 'obstruct justice,'" noting that Congress "chose instead a term of art utilized in the United States code." *Id.*

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of whether the conviction was entered before, on, or after the date of enactment of this paragraph.").

at 893-94. Relying primarily on the offenses listed under "obstruction of justice" in chapter 73 of the U.S. Code, and Black's Law Dictionary, *id.* at 891-93, the BIA explained that obstruction of justice constituted "an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice." *Id.* at 894. The BIA made clear that "process of justice" required an ongoing proceeding or investigation. *See id.* at 893 n.3 (elaborating on "process of justice" in a footnote by pointing to § 1505, explaining that it requires knowledge of "a pending proceeding"); *id.* at 891 (citing Black's Law Dictionary defining obstruction of justice as impeding "justice in a court" or "the execution of lawful process"); *id.* at 892 ("In general, the obstruction of justice offenses listed in 18 U.S.C. §§ 1501-1518 have as an element interference with the proceedings of a tribunal or require an intent to harm or retaliate against others who cooperate in the process of justice or might otherwise so cooperate."); *id.* at 892-93 (citing *United States v. Aguilar*, 515 U.S. 593, 598-99 (1995) for discussion of nexus requirement for the "catchall" obstruction of justice offense in 18 U.S.C. § 1503); *id.* at 893 (noting that Congress "employed that term ["obstruction of justice"] in conjunction with other crimes (e.g., perjury and bribery) that also are clearly associated with the affirmative obstruction of a proceeding or investigation"); *see also Trung Thanh Hoang v. Holder*, 641 F.3d 1157, 1164 (9th Cir. 2011) (explaining that *Espinoza-Gonzalez* defined obstruction of justice to require a pending proceeding or investigation).

Thus, the BIA agreed with the interpretation of the obstruction of justice provision proposed by Mr. Pugin and Mr. Cordero-Garcia, *i.e.*, the BIA conclu-

ded that the statute requires interference with an existing proceeding or investigation. The BIA further concluded that the phrase "relating to" cannot bring within the aggravated felony definition offenses that lack this "critical element." *Espinoza-Gonzalez*, 22 I. & N. Dec. at 894. It therefore held that misprision of a felony could not be obstruction of justice because it "does not require as an element 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." *Id.* at 893.

Despite having narrowly defined the obstruction of justice aggravated felony, the BIA did not revisit *Batista-Hernandez*, choosing instead to distinguish misprision of a felony from accessory after the fact in a manner that suggested, but did not expressly hold, that the latter offense requires a pending proceeding or investigation. *See id.* at 894-95. Misprision of a felony, according to the BIA, is a "lesser offense" as compared to accessory after the fact, because "there is no investigation or proceeding, or even an intent to hinder the process of justice, and where the defendant need not be involved in the commission of the crime." *Id.* at 895. Thus, even after a more fulsome analysis of obstruction of justice, with little discussion the BIA held on to its unreasoned earlier decision, over the persuasive objection of the dissent. *Id.* at 900–05 (Rosenberg, Board Member, concurring in part and dissenting in part).

For over a decade, the agency applied the *Espinoza* generic definition more or less consistently.[7] But

[7] *See, e.g.*, *In re: Cesar Duran-Morales*, 2008 WL 1924674, at *3 (BIA Apr. 10, 2008) (finding Arizona escape conviction not categorically obstruction of justice because "where proceedings have

then in 2012, the BIA reversed course, once again considering obstruction of justice and an accessory after the fact offense, this time accessory to a felony under the California Penal Code. *Valenzuela Gallardo I*, 25 I. & N. Dec. 838. Faced with the tension between the conclusory *Batista-Hernandez* opinion, which suggested that all accessory after the fact offenses fall within obstruction of justice, and the reasoned generic definition adopted in *Espinoza*, the agency back-tracked. After explicitly asserting for the first time that the provision is "ambiguous," the BIA invoked *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). *Valenzuela Gallardo I*, 25 I. & N. Dec. at 839-40. Acknowledging that the Ninth Circuit's reading of *Espinoza* to require a nexus to an extant proceeding or investigation was "understandable," the BIA switched positions and declared, "[i]nterference with the 'process of justice' does not require the existence of an ongoing proceeding or

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been completed . . . escaping from custody does not represent an offense related to the obstruction of justice"); *In re: Wei Ly Bokel*, 2007 WL 4707380, at *2 (BIA Dec. 14, 2007) (holding that parental kidnapping under 18 U.S.C. § 1204 was not obstruction of justice because some states grant parental rights without any legal proceeding, such that the offense "does not necessarily [require that a defendant] intend to thereby disregard or frustrate the execution of any legal order or process"); *In re: Maria Jesus Rivera De Alvarado*, 2006 WL 2008342, at *1 (BIA May 31, 2006) (obstruction of justice depends on "whether the elements of the offense reflect an affirmative and intentional attempt to interfere with the process of justice, particularly with the proceedings of a tribunal or investigation"); *but see In re: Raul Capi-Esquivel*, 2011 WL 1792600, at *3 (BIA Apr. 13, 2011) (finding California accessory after the fact to be obstruction of justice, even though there need not be "ongoing judicial proceedings").

investigation." *Id.* at 842. In contrast to the thorough discussion in *Espinoza*, in *Valenzuela Gallardo I* the BIA provided just two reasons to dispense with the nexus requirement. *Id.* at 842-43. First, the BIA pointed to one offense in chapter 73, 18 U.S.C. § 1512, that does not require a nexus. *Id.* at 842. Second, the BIA maintained that the phrase "relating to" called for a broader generic definition, *id.* at 843, abandoning *Espinoza*'s holding that this phrase could not erase a "critical element" of the generic offense, *Espinoza*, 22 I. & N. Dec. at 896. Having dispensed with the defining feature of the "process of justice," the agency did not proffer a new definition. *See Valenzuela Gallardo I*, 25 I. & N. Dec. at 842-44.

The BIA was not done with its re-imagining of the obstruction provision. On petition for review, the Ninth Circuit held that the "new interpretation" in *Valenzuela Gallardo I* raised "serious constitutional concerns about whether the statute is unconstitutionally vague." *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 811 (9th Cir. 2016) [hereinafter *Valenzuela Gallardo II*]. The court of appeals explained that "though the BIA has said that not every crime that tends to obstruct justice qualifies as an obstruction of justice crime, and the critical factor is the interference with the process of justice—which does not require an ongoing investigation or proceeding—the BIA has not given an indication of what it does include in 'the process of justice,' or where that process begins and ends." *Id.* at 819.

On remand, the BIA came up with yet another generic definition—<u>any</u> offense included in chapter 73 of the U.S. Code <u>and</u> any offense "that involves (1) an affirmative and intentional attempt (2) that is

motivated by a specific intent (3) to interfere either in an investigation or proceeding that is ongoing, pending, or reasonably foreseeable by the defendant, or in another's punishment resulting from a completed proceeding"—that is the focus of the parties' dispute before this Court. *Valenzuela Gallardo III*, 27 I. & N. Dec. at 460; *see Matter of Cordero-Garcia*, 27 I. & N. Dec. 652, 654-55 (BIA 2019) (applying new definition to hold dissuading a witness under Cal. Penal Code § 136.1(b)(1) is obstruction of justice aggravated felony). Though decided just one year after the BIA acknowledged that the rule of lenity required construing ambiguous aggravated felony provisions in favor of the noncitizen, *Deang*, 27 I. & N. Dec. at 63, *Valenzuela Gallardo III* makes no mention of the canon—despite the BIA's own seeming inability to figure out what the statute means.[8]

The BIA's trouble interpreting "a term of art utilized in the United States Code to designate a specific list of crimes" is unsurprising. *Espinoza-Gonzalez*, 22 I. & N. Dec. at 893. It was operating in a field where it lacks any special expertise. *See Cupete v. Garland*, 29 F.4th 53, 57 (2d Cir. 2022) ("[T]he BIA has no particular expertise in construing federal and state criminal statutes."); *Rosa*, 950 F.3d at 79–80 (same); *Valenzuela Gallardo II*, 818 F.3d at 823 n.9 (same); *Da Silva Neto v. Holder*, 680 F.3d 25, 28 n.3 (1st Cir. 2012) (same); *Al-Najar v. Mukasey*, 515 F.3d 708, 714 (6th Cir. 2008) (same); *Garcia v. Gonzales*, 455

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[8] In departing from agency precedent without explanation, the BIA's failure to apply lenity was also arbitrary and capricious. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.").

F.3d 465, 467 (4th Cir. 2006) (same). But the consequences of this waffling are severe—not only from an immigration perspective but also based on potential criminal liability. As the agency expanded the obstruction of justice aggravated felony to include more crimes, it likewise exposed more people to enhanced criminal penalties for having an aggravated felony conviction. *See* 8 U.S.C. §§ 1326(b)(2); 1327. Yet not once in its obstruction of justice interpretive journey did the BIA follow this Court's guidance in *Leocal, Carachuri-Rosendo*, and *Moncrieffe*, or acknowledge the reminder from a dissenting member, *Espinoza*, 22 I. & N. Dec. at 899–900, to consider lenity. This is particularly striking because, the BIA previously adopted a narrower construction of the provision, but subsequently pursued the "harsher alternative"—the anti-lenity approach. *Bass*, 404 U.S. at 347.

Thus, should the Court disagree with Mr. Cordero-Garcia and Mr. Pugin and find the obstruction of justice aggravated felony ambiguous with respect to nexus, this case presents an opportunity to correct the BIA's error and re-instruct the agency that it must apply lenity when interpreting such dual-application statutes. Proper application of the canon would have resolved this statutory construction controversy long before this Court was called on to intervene.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Fourth Circuit should be reversed, and the judgment of the U.S. Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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