UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 20-1593

Carlos Monteiro SILVA,
Petitioner,

v.

William P. BARR, Attorney General,
Respondent.

ON PETITION FOR REVIEW OF A DECISION OF THE BOARD OF IMMIGRATION APPEALS
Agency No. A41-958-826

CONSENTED TO BRIEF OF COMMITTEE FOR PUBLIC COUNSEL SERVICES, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AND AMERICAN IMMIGRATION COUNCIL AS AMICI CURIAE IN SUPPORT OF PETITIONER

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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, American Immigration Council, and Committee for Public Counsel Services 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.

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STATEMENT OF PARTY CONSENT TO AMICUS BRIEF FILING

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), I, Emma Winger, attorney for amici curiae, state that I informed counsel for Petitioner, Kerry Doyle, and counsel for Respondent, Evan P. Schultz, of the instant amicus brief and that both Ms. Doyle and Mr. Schultz consented to the filing of this amicus brief.

DATED: December 2, 2020 */s/ Emma Winger*

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I. INTRODUCTION AND STATEMENT OF AMICI[1]

This case concerns the meaning of "obstruction of justice," an aggravated felony under the Immigration and Nationality Act (INA). 8 U.S.C. § 1101(a)(43)(S). Twenty years ago, the Board of Immigration Appeals (Board or BIA) construed the term narrowly, requiring a nexus to an ongoing judicial proceeding or investigation. *Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889 (BIA 1999) (en banc). However, since 2012, the Board has twice changed the definition, each time finding new reasons to expand obstruction of justice to include an offense untethered to any ongoing judicial proceedings or grand jury investigation. Initially the Board introduced a broad and nebulous definition that encompassed any attempt to interfere with the "process of justice." *Matter of Valenzuela Gallardo*, 25 I&N Dec. 838, 842 (BIA 2012) [hereinafter, *Matter of Valenzuela Gallardo I*]. The Ninth Circuit rejected this definition because it raised "serious constitutional concerns about whether the statute is unconstitutionally vague." *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 811, 824 (9th Cir. 2016) [hereinafter, *Valenzuela Gallardo I*]. On remand, the Board offered yet another definition. The Board now maintained that obstruction of justice covers offenses "involving (1) an

[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).

affirmative and intentional attempt (2) that is motivated by a specific intent (3) to interfere with an investigation or proceeding that is ongoing, pending, or *reasonably foreseeable* by the defendant." *Matter of Valenzuela Gallardo*, 27 I&N Dec. 449, 456 (BIA 2018) [hereinafter *Matter of Valenzuela Gallardo II*] (emphasis added). The Ninth Circuit again rejected this definition because it is contrary to the plain meaning of the term "obstruction of justice," which requires a nexus to an ongoing judicial proceeding or grand jury investigation. *Valenzuela Gallardo v. Barr*, 968 F.3d 1053 (9th Cir. 2020) [hereinafter, *Valenzuela Gallardo II*]. Because the Board relied on *Matter of Valenzuela Gallardo II*'s faulty definition in Petitioner's case, the Court is called upon to review it now.

No federal court of appeals has granted *Chevron* deference to the Board's recent pronouncements that the obstruction of justice aggravated felony does not require interference in an ongoing judicial proceeding or grand jury investigation. Rather, every circuit court to have reviewed the BIA's decisions in *Matter of Valenzuela Gallardo* has rejected its generic definitions of the term. *See Valenzuela Gallardo I*, 818 F.3d at 822; *Valenzuela Gallardo II*, 968 F.3d at 1062; *Flores v. Att'y Gen.*, 856 F.3d 280, 288–89 (3d Cir. 2017); *see also Victoria-Faustino v. Sessions*, 865 F.3d 869, 876 (7th Cir. 2017) (declining to defer to the BIA's 2012 definition on the basis that it was vacated by the Ninth Circuit). This Court has never addressed the scope of this aggravated felony provision. Amici

urge the Court to reject the Board's newest definition and find that the plain meaning of the obstruction of justice aggravated felony provision requires interference in an ongoing judicial proceeding or grand jury investigation. Because the elements of accessory after the fact under Mass. Gen. Laws ch. 274 § 4 do not match the proper generic federal definition of obstruction of justice, this Court should hold that Mr. Silva's conviction does not constitute an aggravated felony.

The Committee for Public Counsel Services (CPCS) is the state public defender agency for Massachusetts, overseeing the provision of legal representation to indigent persons in criminal and civil cases and administrative proceedings in which there is a right to counsel. The CPCS Immigration Impact Unit provides training and case-specific consultation regarding the immigration consequences of Massachusetts criminal conduct to all defense attorneys representing indigent persons in Massachusetts so that counsel comply with their obligations under *Padilla v. Kentucky*, 559 U.S. 356 (2010).

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.

II. ARGUMENT

A. *Chevron* Is Not Applicable to the Dual-Application Obstruction of Justice Aggravated Felony Definition

Because the Court is tasked with interpreting a provision of the aggravated felony statute—a statute that carries severe immigration *and* criminal consequences—it should not resort to the deference framework outlined in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

The familiar two-part *Chevron* test is a significant exception to the general principle that it is for the courts, and not the executive, to determine "what the law is." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). But the *Chevron* framework simply does not apply to criminal statutes. *See United States v. Apel*, 571 U.S. 359, 368–69 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference."). Rather, "criminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 573 U.S. 169, 191 (2014). This refusal to defer to the executive on the construction of criminal laws is deeply grounded in Anglo Saxon common law, due process, and separation of powers principles. *See Whitman v. United States*, 574 U.S. 1003, 135 S. Ct. 352, 353 (Mem.) (2014) (Scalia, J., statement respecting denial of certiorari) ("With deference to agency interpretations of statutory provisions to which criminal prohibitions are attached, federal administrators can in effect create (and uncreate) new crimes at will, so long as they do not roam beyond ambiguities that the laws contain."); *see also Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (Mem.) (2020) (Gorsuch, J., statement respecting denial of certiorari) ("Before courts may send people to prison, we owe them an independent determination that the law actually forbids their conduct.").

The aggravated felony statute at 8 U.S.C. § 1101(a)(43) is both an

immigration and a criminal statute, i.e. a dual-application statute. Deferring to the Board's broad definition of the obstruction of justice aggravated felony, rather than the narrow construction that follows from applying the traditional rules of statutory construction, would expand the number of individuals subject to felony prosecution for aiding or assisting a noncitizen who has been convicted of an aggravated felony. *See* 8 U.S.C. § 1327. It would similarly expose more individuals to a ten-fold increase in penalty for illegal reentry—from a baseline two-year maximum prison sentence to a twenty-year maximum sentence. *See* 8 U.S.C. § 1326(b)(2); *see also United States v. Cordoza-Estrada*, 385 F.3d 56, 57–59 (1st Cir. 2004) (determining that defendant's prior conviction constituted an aggravated felony and therefore affirming an enhanced sentence under § 1326(b)(2)).

Because the statute at issue is also a criminal statute, the traditional rules of statutory construction that courts apply to criminal statutes, including the rule of lenity, should apply here. Courts "must interpret [a] statute consistently, whether [courts] encounter its application in a criminal or noncriminal context." *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *see also Clark v. Martinez*, 543 U.S. 371, 380 (2005) (rejecting argument that the same statute be construed differently when applied in different contexts). It is therefore inappropriate to apply *Chevron* to this dual-application statute. *See Whitman*, 135 S. Ct. at 353-54 (discussing why

Chevron should not apply to "an executive agency's interpretation of a law that contemplates both criminal and administrative enforcement"); *see generally Valenzuela Gallardo II*, 968 F.3d at 1059-61 (discussing Supreme Court precedent suggesting *Chevron* does not apply to dual-application provisions of the INA).

Consistent with this approach, the Supreme Court has never deferred to the agency on the scope of dual application aggravated felony grounds of removal, even when the government has requested such deference. *See Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017) (declining to give deference to agency interpretation of an aggravated felony provision); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010) (rejecting Board's generic aggravated felony definition without citing *Chevron*); *Torres v. Lynch,* 136 S. Ct. 1619 (2016) (determining the generic definition of an aggravated felony without mention of *Chevron*); *Lopez v. Gonzales*, 549 U.S. 47 (2006) (same); *see also Valenzuela Gallardo II*, 968 F.3d at 1061 (discussing Supreme Court's pattern of refusing to apply *Chevron* when interpreting the aggravated felony statute).

Amici recognize that this Court has previously granted *Chevron* deference to the Board's construction of certain other provisions of the aggravated felony statute. *See, e.g., Lecky v. Holder*, 723 F.3d 1, 5 (1st Cir. 2013); *Soto-Hernandez v. Holder*, 729 F.3d 1, 3–5 (1st Cir. 2013). In those cases, however, it does not appear that any party raised, and the Court certainly did not discuss, the question of

whether *Chevron* should apply given the criminal applications of the statute. Thus, this Court has never decided the question and is not precluded from doing so here. *See Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").[2]

This case illustrates the consequences of applying *Chevron* to a dual-application statute. As discussed below, amici contend that the statute at issue is unambiguous and thus deference is unwarranted even under *Chevron*. *See* 467 U.S. at 842-43. However, if this Court were to find the statute ambiguous and defer to

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[2] In one case, the Court recognized that it should not defer to the Board's interpretation of criminal statutes but erroneously assumed, without citation, that an aggravated felony provision "does not impose a criminal penalty." *Emile v. Immigration & Naturalization Serv.*, 244 F.3d 183, 185 (1st Cir. 2001). In *Emile*, the Court granted deference to the Board's definition of the aggravated felony for sexual abuse of a minor without answering the threshold question of whether the statute at issue was ambiguous nor expressly invoking *Chevron*. *Id.* (stating only that the statute did not "explicitly" define the term). Notably, the Supreme Court subsequently declined to defer to the Board's construction of the same provision, holding that, at least in the context of statutory rape convictions, the statute unambiguously foreclosed the Board's interpretation. *Esquivel-Quintana*, 137 S. Ct. at 1572. If the Court believes it is precluded from considering this argument, in the alternative, amici suggest that the Court grant initial hearing en banc *sua sponte* because the issue of whether the *Chevron* framework applies to dual application statutes is exceptionally important. *See*, *e.g.*, *United States v. Tavares*, 1993 U.S. App. LEXIS 33320 (1st Cir. 1993) (reporting that the full court had ordered hearing en banc *sua sponte* at suggestion of panel). *See also* Fed. R. App. P. 35 Advisory Committee's Note (noting "the power of a court of appeals to initiate en banc hearings *sua sponte*").

the agency's definition under *Chevron* merely because the construction question arose in an immigration case, that same deferred-to definition would apply to individuals facing a dramatic increase in their prison sentence under 8 U.S.C. § 1326(b)(2) and a felony prosecution under 8 U.S.C. § 1327. Those individuals would be denied their right to have a court interpret the criminal law and the protection of the well-established rule of lenity. *See United States v. Bass*, 404 U.S. 336, 348 (1971) (noting that under the rule of lenity, unlike *Chevron*, "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant"); *Leocal*, 543 U.S. at 11 n.8 (applying rule of lenity to dual-application statute); *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1028 (6th Cir. 2016), *rev'd sub nom. Esquivel-Quintana*, 137 S. Ct. 1562 (Sutton, J., concurring in part and dissenting in part) ("Time, time, and time again, the 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."). *Chevron* has no place in this case.

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

Even if this Court determines that *Chevron* deference may sometimes be appropriate when construing a provision of the aggravated felony statute, it is not appropriate here. Resorting to step two of *Chevron* should not be "reflexive." *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring). Instead, a court applying *Chevron* must first independently and rigorously exhaust all the traditional tools of statutory interpretation to determine statutory meaning. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (citing *Chevron*, 467 U.S. at 843 n.9). This Court should join the Ninth Circuit and hold, 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. The "BIA's new construction [of § 1101(a)(43)(S)] is inconsistent with the unambiguous meaning of the term 'offense relating to obstruction of justice.'" *Id.*

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. The statutory phrase "obstruction of justice" is an unambiguous term that, as evidenced by the term's plain meaning in 1996 and its statutory context, requires interference with a pending proceeding. 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). 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 judicial proceeding or grand jury investigation; (2) undertaken with knowledge or notice of the pending proceedings or grand jury investigation; and (3) with the specific intent to obstruct that proceeding or grand jury investigation. *See Pettibone*, 148 U.S. at 205; *United States v. Aguilar*, 515 U.S. 593, 598-601 (1995); *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).

As set forth below, by employing the ordinary statutory construction tools, the Court should directly discern the generic definition of obstruction of justice, and should not afford deference to the BIA's interpretation of the statutory phrase. *See Esquivel-Quintana*, 137 S. Ct. at 1572.

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*, 543 U.S. at 8;

see also Lopez, 549 U.S. at 53 ("The everyday understanding of [a term used in § 1101(a)(43)] should count for a lot here, for the statutes in play do not define the term, and so remit us to regular usage to see what Congress probably meant."). 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.

When the obstruction of justice aggravated felony was introduced in 1996, it was understood to require interference in an ongoing judicial proceeding or grand jury investigation. 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. at 891) (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

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

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 the aggravated felony for "sexual abuse of a minor"). 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), as the BIA has now stretched it, 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 the aggravated felony term "sexual abuse of a minor"). 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 I*, 818 F.3d at 821. Thus, the INA's statutory structure further indicates that the obstruction of justice aggravated felony unambiguously requires a nexus to an ongoing judicial 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 1063-64; *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"); *Denis v. Att'y Gen.*, 633 F.3d 201, 209 (3d Cir. 2011) (determining that § 1101(a)(43)(S) is unambiguous in part because the phrase "obstruction of justice" is wholly defined by Title 18). 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, 'obstruction of justice,' with its identically named chapter." *Flores*, 856 F.3d at 289. This Court should follow its sister circuits' conclusion that Congress would not have "engaged in such tortuous drafting." *Id.*; *see also Valenzuela Gallardo II*, 968 F.3d at 1064. 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. 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).[4] 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*,

[4] 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.

That obstruction of justice was understood in 1996 to require interference with an ongoing judicial proceeding or grand jury investigation is further underscored by 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 from arrest does not. *See United States v. Bell*, 953 F.2d 6, 8 (1st Cir. 1992) (holding that the district court erred by applying an upward adjustment when an individual attempted to avoid arrest, noting that "[s]uch conduct, while reprehensible, does not warrant an obstruction adjustment"). By 1996, federal courts of appeals 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); *see also United States v. Sanchez,* 928 F.2d 1450, 1459 (6th Cir. 1991), *abrogated on other grounds by United States v. Jackson-Randolph*, 282 F.3d 369 (6th Cir. 2002). It was with awareness of this uniform and entrenched understanding of obstruction of justice that Congress made

obstructing justice a removable offense. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 813 (1989); *Lorillard v. Pons*, 434 U.S. 575, 583 (1978).

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 Grand Jury Investigation*

When determining the meaning of a statutory term, courts must 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* 489 U.S. at 813. "[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*, 434 U.S. at 583 (quoting *Standard Oil v. United States*, 221 U.S. 1, 59 (1911)).

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 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 "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, 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 (emphasis added).

The *Aguilar* Court underscored that obstructing an investigation that is untethered from a judicial 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.

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. 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 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").[5] In April 1996, this Court noted that *Aguilar* had "reaffirmed" *Pettibone*'s pending proceeding requirement. *United States v. Frankhauser*, 80 F.3d 641, 650 (1st Cir. 1996).

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

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[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 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).

3. *Additional Statutory Construction Tools Confirm that Obstruction of Justice Requires 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. *See 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 I*, the Ninth Circuit 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 regarding the potential for § 1101(a)(43)(S) to be unconstitutionally vague.

For these reasons, the Court should conclude that obstruction of justice in the INA unambiguously requires interference with an ongoing proceeding.[6]

C. The Board's Generic Definition of Obstruction of Justice Does Not Merit Deference Because It Has Been Vacated by the Ninth Circuit

Even if this Court were to determine that this case cannot be resolved at *Chevron* step one, there is yet another reason this Court should not defer to the Board's decision in *Matter of Valenzuela Gallardo II*. Because the Ninth Circuit has vacated the decision, *see Valenzuela Gallardo II*, 968 F.3d at 1069, it no longer carries precedential weight. *See Lovelace v. Se. Mass. Univ.*, 793 F.2d 419, 422 (1st Cir. 1986) (noting a decision that has been vacated and remanded has "no precedential value"); *In re Bernard L. Madoff Inv. Sec. LLC.*, 721 F.3d 54, 68 (2d Cir. 2013) ("[V]acatur dissipates precedential force."). It would be inappropriate for this Court to defer to this now-vacated decision. *See Victoria-Faustino*, 865 F.3d at 876 (declining to defer to *Matter of Valenzuela Gallardo I* "[i]n light of the Ninth Circuit's decision to remand the petition to the Board for further

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[6] This conclusion is not altered by the inclusion of the words "relating to" in § 101(a)(43)(S). As the Ninth Circuit recently explained, "although the phrase 'relating to' may be broad, the context of the statute 'may tug . . . in favor of a narrower reading' of the phrase" and does so here "because the common understanding from the time of enactment, statutory context, and judicial precedent pre-1996 all point to one conclusion: 'obstruction of justice' requires a nexus to an ongoing proceeding." *Valenzuela Gallardo II*, 968 F.3d at 1068 (quoting *Mellouli v. Lynch*, 575 U.S. 798 (2015)).

proceedings"); *see also Quinchia v. Att'y Gen.*, 552 F.3d 1255, 1258 (11th Cir. 2008) (stating that an unpublished BIA decision that does not rely on BIA or Court of Appeals precedent does not receive *Chevron* deference); *Rotimi v. Gonzales*, 473 F.3d 55, 57–58 (2d Cir. 2007) (holding that an unpublished BIA decision that does not rely on precedent for its definition of a contested term does not receive *Chevron* deference, because it is not "promulgated under [the agency's] authority to make rules carrying the force of law") (internal quotation marks omitted). Accordingly, the Court should not defer to *Matter of Valenzuela Gallardo II*.

D. Mass. Gen. Laws ch. 274 § 4 Is Not a Categorical Match to the Obstruction of Justice Aggravated Felony

Having determined the proper generic federal definition of obstruction of justice, *supra* at Section II.B, this Court must next answer the question of whether a Massachusetts conviction for accessory after the fact under Mass. Gen. Laws ch. 274 § 4 meets that federal generic definition. Because the elements of accessory after the fact do not match the proper generic federal definition of obstruction of justice, this Court should find that Mr. Silva's conviction does not constitute an aggravated felony.

When determining whether a particular state offense qualifies as an aggravated felony, courts apply the categorical approach. *Nijhawan v. Holder*, 557 U.S. 29, 34-35 (2009); *see also Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). Under this approach, "a state offense is a categorical match with a generic

federal offense only if a conviction of the state offense 'necessarily involved facts equating to the generic federal offense.'" *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013) (quoting *Shepard v. United States*, 544 U.S. 13, 24 (2005)). Where the state statute punishes conduct that does not satisfy the generic federal definition, the analysis ends and the offense may never qualify as the generic removal ground. *See Descamps v. United States* 570 U.S. 254, 257 (2013); *Swaby v. Yates*, 847 F.3d 62 (1st Cir. 2017). Unless a statute is divisible, meaning the statute "sets out one or more elements of the offense in the alternative," *Descamps*, 570 U.S. at 257, the categorical approach requires only a determination that the minimum conduct criminalized by the statute satisfies the federal generic definition. *Moncrieffe*, 569 U.S. at 190-91.

The Massachusetts offense of accessory after the fact is not a categorical match for the generic federal obstruction of justice definition. To be convicted of accessory after the fact, the Commonwealth must prove that the defendant (1) harbored, concealed, maintained, assisted or aided the principal felon, (2) knowing that he has committed a felony, (3) with intent that he shall avoid or escape detention, arrest, trial or punishment. Mass. Gen. Laws. Ch. 274 § 4; *see also Commonwealth v. Rivera*, 121 N.E.3d 1121 (Mass. 2019). The Commonwealth is not required to prove that an individual intended to interfere with an ongoing judicial proceeding or grand jury investigation. *See id.* In fact, the Commonwealth

need not show that any proceeding has or will result *at all*. *See Rivera*, 121 N.E.3d at 1126-1127 ("[W]e continue to uphold convictions of accessory after the fact where, for instance, the defendants aided the principals in fleeing the scene of the crime, where they hid or destroyed evidence, or where they assisted in the disposal of stolen goods.").

The Massachusetts crime of accessory after the fact derives its meaning from common law. *See Commonwealth v. Perez*, 770 N.E.2d 428, 431 (Mass. 2002) ("The statute's definition of accessory after the fact is in the common law form and obviously has roots in the common law tradition.") (internal citation and quotation omitted). The statutory definition in use today remains connected to the common law definition. *Id*. at 433 ("[T]he Legislature has not amended the statute to transform the crime of being an accessory after the fact into the more modern articulation of the crime as an obstruction of justice.").

At common law, and today, the offense of accessory after the fact is not focused on "the defendant's conduct in obstructing justice or impeding law enforcement." *Id*. at 433. Rather, the statute focuses on the aid rendered to the principle. *Id*.; *see also Rivera*, 121 N.E.3d at 1127-8 ("Under the common law, the accessory was defined by his direct, personal assistance as one who receives and comforts, or conceals the principal felon.") (internal citation and quotation omitted). The aid or assistance provided to the principle felon could include

"furnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force and violence to rescue or protect him." *See Commonwealth v. Devlin*, 314 N.E.2d 897, 900 (Mass. 1974) (citing *4 Blackstone, Commentaries*, 37—38 (1769)).

Under this common law definition, it is evident that the Massachusetts offense of accessory after the fact does not require that the aid provided to the principle be undertaken to interfere with an ongoing judicial proceeding or grand jury investigation. In fact, in its most common form, Massachusetts accessory after the fact is entirely removed from any judicial proceeding. *See Rivera*, 121 N.E.3d at 1126; *Commonwealth v. Simpkins*, 22 N.E.3d 944 (Mass. 2015) (holding that assisting shooters in their escape was properly charged as accessory after the fact); *Heang v. Commonwealth*, 908 N.E.2d 373 (Mass. 2011) (noting defendant was charged with accessory after the fact for helping dispose of the firearm and clothing worn by the principle); *Commonwealth v. Valleca*, 263 N.E.2d 468 (Mass. 1970) (holding that attempted sale of stolen coins back to gallery from which they were stolen sufficient to support conviction as accessory after fact to breaking and entering). Therefore, regardless of whether the three elements of accessory after the fact are further divisible (e.g., between harboring, concealing, or assisting), because there is no circumstance in which a jury must decide whether or not the defendant obstructed a judicial proceeding or investigation in order to convict, the

offense is not divisible with respect to that critical element. *Descamps*, 570 U.S. at 272; *see Mathis*, 136 S. Ct. at 2249 (explaining an offense is only divisible when it includes separate crimes defined by different elements). Without any element requiring interference with an ongoing judicial proceeding, the Massachusetts accessory after the fact statute cannot be a categorical match for the aggravated felony definition of obstruction of justice.

III. CONCLUSION

For the foregoing reasons, this Court should grant the petition for review and vacate the Board's decision below.

Respectfully submitted,

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DATED: December 2, 2020

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) and 29(a)(5), because it contains 6,492 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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CERTIFCATE OF SERVICE

I hereby certify that on December 2, 2020, I electronically filed the foregoing consented to 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 First 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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