22-369

IN THE

Supreme Court of the United States

CARLOS MONTEIRO SILVA,

Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

GERARD J. CEDRONE
Counsel of Record
DAVID J. ZIMMER
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
gcedrone@goodwinlaw.com
(617) 570-1849

October 17, 2022

Counsel for Petitioner

QUESTION PRESENTED

Federal immigration law makes noncitizens who have been convicted of an "offense relating to obstruction of justice" within the meaning of 8 U.S.C. §1101(a)(43)(S) removable and ineligible for various forms relief from removal. The question presented is:

Whether, and under what circumstances, an individual's conviction as an accessory after the fact is categorically "an offense relating to obstruction of justice" if the statute of conviction does not require the individual to interfere with a pending or ongoing criminal investigation or proceeding.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

U.S. Court of Appeals for the First Circuit:

Silva v. *Garland*, No. 20-1593 (judgment entered Feb. 28, 2022; reh'g denied Aug. 3, 2022)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Federal Statutes:

Federal Regulations:

State Statutes:

Carlos Monteiro Silva respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

INTRODUCTION

The courts of appeals are intractably split over what constitutes "an offense relating to obstruction of justice" under 8 U.S.C. §1101(a)(43)(S). The Third and Ninth Circuits have held that the term is limited to crimes in which the defendant frustrates an *existing* criminal investigation or proceeding. *See Flores* v. *Attorney General*, 856 F.3d 280, 287-296 (3d Cir. 2017); *Cordero-Garcia* v. *Garland*, 44 F.4th 1181, 1185 (9th Cir. 2022). The Fourth Circuit, deferring to the Board of Immigration Appeals, has held that the term can encompass offenses in which the defendant impedes a *foreseeable* criminal investigation or proceeding. *See Pugin* v. *Garland*, 19 F.4th 437 (2021). In this case, meanwhile, a divided panel of the First Circuit held that the statute does not require a nexus to any criminal investigation or proceeding *at all*—not even one that is merely in the offing. *See* Pet. App. 3a-72a.

That three-way split warrants this Court's review. The Solicitor General recently asked the Court to grant certiorari in cases arising out of the Fourth and Ninth Circuits. *See* Gov't Cert. Br., *Pugin* v. *Garland*, No. 22-23 (Oct. 7, 2022); Pet., *Garland* v. *Cordero-Garcia*, No. 22-331 (Oct. 7, 2022). The Court should do just that—and should grant certiorari in this case, too. As just explained, the First Circuit adopted a reading of §1101(a)(43)(S) not shared by any other court—indeed, the panel majority held that the statute *compels* its novel construction. Granting review in this case (and consolidating it with *Pugin* and *Cordero-Garcia*)

will allow the Court to effectively review the full scope of this three-way split.

The need for the Court to resolve this entrenched conflict is underscored by the importance of the question presented. Every "offense relating to obstruction of justice" is an "aggravated felony" for purposes of federal immigration law. §1101(a)(43)(S). And conviction of an aggravated felony renders a noncitizen removable and categorically ineligible for asylum—an important form of relief that protects noncitizens against deportation to countries in which they are likely to face persecution on the basis of race, religion, or other protected characteristics. *See* 8 U.S.C. §§1158(b)(2)(A)(ii), (B)(i), 1227(a)(2)(A)(iii). An aggravated felony conviction can also make a noncitizen ineligible for "withholding" of removal, which prevents the government from deporting noncitizens to certain countries in which their safety would be at risk. *See* 8 U.S.C. §1231(b)(3)(B)(ii); 8 C.F.R. §1208.16(d)(2). Thus, many noncitizens' ability to remain in this country—and to remain free from serious bodily harm or even death—currently depends on the happenstance of the circuit in which their removal proceedings arise. Without this Court's review, that unwarranted disparity will persist.

Certiorari is particularly warranted in this case because the First Circuit's decision is wrong on the merits. Applying the ordinary tools of statutory construction makes clear that a generic "obstruction of justice" offense requires interference with an *extant* judicial proceeding or investigation. The statute's structure and context is particularly telling. As both the Third and Ninth Circuits have explained, "obstruction" in §1101(a)(43)(S) is best read in light of

Chapter 73 of the federal criminal code—the chapter that contains every substantive federal "obstruction" offense. *See Valenzuela Gallardo*, 968 F.3d at 1063-1065; *Flores*, 856 F.3d at 287-296. All but one of those offenses require a defendant to obstruct an *actual* proceeding or investigation—not a prospective one. The remaining provision extends to hypothetical future proceedings only because its text expressly says so—thus *confirming* that the generic offense does not sweep so broadly. Accordingly, a state-law accessory offense that cares only about a defendant's intent to assist the principal—without requiring proof of any ongoing investigation or proceeding—is not a categorical match for the generic federal offense. And that means the panel below erred in deeming Massachusetts' accessory offense an "offense relating to obstruction of justice" under §1101(a)(43)(S).

For these reasons, the Court should grant certiorari and reverse.[1]

OPINIONS BELOW

The First Circuit's opinion (Pet. App. 3a-72a) is reported at 27 F.4th 95. The order denying rehearing en banc (Pet. App. 1a-2a) and the opinions of the Board of Immigration Appeals (Pet. App. 73a-80a) and the immigration judge (Pet. App. 81a-114a) are unreported, but are reproduced in the appendix.

---

[1] At the very least, if the Court grants certiorari in *Pugin* or *Cordero-Garcia*, it should hold this petition pending the outcome of those cases.

JURISDICTION

The court of appeals entered judgment on February 28, 2022, and denied a timely petition for rehearing en banc on August 3, 2022. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 101 of the Immigration and Nationality Act, as codified at 8 U.S.C. §1101, provides in relevant part:

§1101. Definitions

(a) As used in this chapter—

* * *

(43) The term "aggravated felony" means—

* * *

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year * * * .

Chapter 274, §4, of the Massachusetts General Laws provides in relevant part:

Section 4: Accessories after fact; punishment; relationship as defence; cross-examination; impeachment

Whoever, after the commission of a felony, harbors, conceals, maintains or assists the principal felon or accessory before the fact, or gives such offender any other aid, knowing that he has committed a felony or has been accessory thereto before the fact, with intent that he shall avoid or escape

detention, arrest, trial or punishment, shall be an accessory after the fact. * * *

Other relevant statutory and regulatory provisions are reproduced in the appendix (at 115a-119a).

STATEMENT

A. Statutory Background.

1. The government may generally remove from the country any noncitizen who has been convicted of an "aggravated felony"—a term that is defined to include any "offense relating to obstruction of justice." 8 U.S.C. §§1101(a)(43)(S), 1227(a)(2)(A)(iii). Conviction of an aggravated felony also affects a noncitizen's ability to seek important forms of relief from removal.

First, a noncitizen who has been convicted of an aggravated felony is categorically ineligible for asylum. Under 8 U.S.C. §1158, a noncitizen may be entitled to asylum if he or she can show "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion" in his or her country of nationality or habitual residence. §1101(a)(42)(A); *see* §1158(b)(1)(A). But the government may not grant asylum to a noncitizen that has been "convicted by a final judgment of a particularly serious crime." §§1158(b)(2)(A)(ii). For purposes of this asylum bar, a "particularly serious crime" includes any "aggravated felony." §1158(b)(2)(B)(i).

Second, many noncitizens who have been convicted of aggravated felonies are ineligible for withholding of removal. Under 8 U.S.C. §1231(b)(3), the government "may not remove an alien to a country if [it] decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or

political opinion." §1231(b)(3)(A). And under the Convention Against Torture, the government may not remove a noncitizen if he or she can "establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. §208.16(c)(2); *see also* 8 U.S.C. §1231, note. But, as with asylum, the government may not withhold removal if a noncitizen has been "convicted by a final judgment of a particularly serious crime." 1231(b)(3)(B)(ii); 8 C.F.R. §1208.16(d)(2). For purposes of this withholding bar, a "particularly serious crime" includes any "aggravated felony" for which the noncitizen was sentenced to at least five years in prison, or any other "aggravated felony" that the Attorney General deems particularly serious. §1231(b)(3)(B).

"[T]o determine whether an alien's conviction qualifies as an aggravated felony under [the INA], [courts and the agency must] employ a categorical approach by looking to the statute of conviction, rather than to the specific facts underlying the crime." *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1567-1568 (2017) (punctuation omitted). In other words, they ask "whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding aggravated felony." *Id.* at 1568 (quotation marks omitted).

2. Over the years, the BIA has taken inconsistent stances on whether an accessory offense is an "offense relating to obstruction of justice"—and, thus, an "aggravated felony." Initially, the Board concluded that, as used in §1101(a)(43)(S), "obstruction of justice" is a "term of art" whose meaning is cabined by Chapter 73 of the federal criminal code—the chapter entitled "Obstruction of Justice." *Matter of Espinoza-Gonzalez*, 22

I. & N. Dec. 889, 893 (1999) (en banc). So cabined, the Board held, the term does not encompass an offense that "does not require as an element either active interference with proceedings of a tribunal or investigation, or action or threat of action against those who would cooperate in the process of justice." *Id.*

More recently, however, the Board changed its mind. In *Matter of Valenzuela Gallardo*, 27 I. & N. Dec. 449 (BIA 2018), the Board declared that §1101(a)(43)(S) "encompasses offenses covered by chapter 73 of the Federal criminal code *or any other Federal or State 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." *Id.* at 449 (emphasis added) (citation omitted).

B. Factual and Procedural Background.

1. Mr. Silva, a citizen of Cape Verde, was admitted to the United States as a lawful permanent resident in 1989 when he was six years old. Pet. App. 5a; Certified Administrative Record (A.R.) 523 (¶3). His family settled in Boston, and he has lived in the United States ever since, returning to Cape Verde just once in 1990 to visit his grandparents. A.R. 523-524 (¶¶3, 7, 9). All of his family members are U.S. citizens. A.R. 523 (¶3).

In 2017, Mr. Silva pleaded guilty to being an accessory after the fact under Chapter 274, §4, of the Massachusetts General Laws. Pet. App. 5a. As relevant here, the statute imposes criminal liability as an "accessory after the fact" on any person who, "after the

commission of a felony, harbors, conceals, maintains or assists the principal felon or accessory before the fact, or gives such offender any other aid, knowing that he has committed a felony or has been accessory thereto before the fact, with intent that he shall avoid or escape detention, arrest, trial or punishment." §4. Mr. Silva was sentenced to four to five years in prison. Pet. App. 6a.

2. In 2018, the Department of Homeland Security initiated removal proceedings against Mr. Silva, alleging that his accessory conviction under §4 constituted an aggravated felony rendering him removable. Pet. App. 6a-7a. The immigration judge agreed. Applying the categorical approach, and relying on the BIA's decision in *Valenzuela Gallardo*, the immigration judge held that §4 establishes an "offense relating to obstruction of justice," §1101(a)(43)(S), and that Mr. Silva was therefore removable as an "alien . . . convicted of an aggravated felony," §1227(a)(2)(A)(iii). Pet. App. 7a-8a, 103a-114a.

Mr. Silva then applied for withholding of removal under the INA, withholding of removal under the Convention Against Torture, and asylum. Pet. App. 8a. His application demonstrated that he is likely to face serious or even fatal danger in Cape Verde for a number of reasons, including his cooperation with Massachusetts police in connection with a gang-related prosecution. A.R. 529-530 (¶¶42-52). But the immigration judge denied his requests for relief. Pet. App. 8a, 81a-102a. The judge explained that, as an aggravated felony conviction, Mr. Silva's §4 offense rendered him ineligible for asylum. Pet. App. 8a-9a, 92a; *see* 8 U.S.C. §1158(b)(2)(A)(ii), (B)(i). The immigration judge also concluded that Mr. Silva's accessory offense qualified

as a "particularly serious crime" for withholding purposes, thus barring his applications for withholding. Pet. App. 8a-9a, 92a-95a; *see* 8 U.S.C. §1231(b)(3)(B)(ii).

3. Mr. Silva appealed, but the BIA denied relief in an opinion that "adopt[ed] and "affirm[ed] the Immigration Judge's decision." Pet. App. 74a; *see* Pet. App. 9a. According to the Board, "[t]he Massachusetts accessory-after-the-fact elements categorically fit within the definition set forth in *Valenzuela Gallardo*." Pet. App. 76a (hyphenation added). Thus, the Board concluded, Mr. Silva was "removable as charged" and barred from applying for asylum. Pet. App. 74a, 76a. The Board also affirmed the immigration judge's denial of withholding on the basis that Mr. Silva's accessory offense constituted a "particularly serious crime." Pet. App. 9a.

4. Mr. Silva filed a timely petition for review in the First Circuit, which upheld the BIA's judgment in a split decision. Writing for the court, Judge Lynch, joined by Chief Judge Howard, concluded that Mr. Silva's §4 conviction was categorically "an offense relating to obstruction of justice" on two independent grounds. First, breaking from every other circuit to consider the question, the majority held that the phrase "offense relating to obstruction of justice" does not require *any* nexus to *any* criminal proceeding or investigation. Pet. App. 10a-26a; *see also* Pet. App. 22a n. 16 (acknowledging two other circuits' contrary decisions but "find[ing] neither persuasive"). Indeed, the majority thought that the text and context of §1101(a)(43)(S) make that interpretation unambiguous. *See* Pet. App. 5a, 26a n. 17. Second, and in the alternative, the majority held that it would defer to

the BIA's view that only a nexus to a *foreseeable* proceeding was required, and that the Massachusetts statute under which Mr. Silva was convicted categorically entails such a nexus. Pet. App. 33a-37a.

Judge Barron dissented. As he explained, two other circuits have held that the term "an offense relating to obstruction of justice" unambiguously requires some connection to an existing criminal investigation or proceeding. Pet. App. 38a-39a (citing *Flores* v. *Attorney General*, 856 F.3d 280 (3d Cir. 2017); *Valenzuela Gallardo* v. *Barr*, 968 F.3d 1053 (9th Cir. 2020). Ultimately, however, Judge Barron would have resolved the case on narrower grounds. The Massachusetts accessory statute, he reasoned, does not require proof of even a foreseeable investigation or proceeding—and so is not a removable offense even under the BIA's interpretation of §1101(a)(43)(S). Pet. App. 57a-65a.

5. Mr. Silva filed a timely petition for rehearing. The Court denied panel rehearing and rehearing en banc. Pet. App. 1a-2a.

REASONS FOR GRANTING THE WRIT

The courts of appeals are fundamentally at odds on what constitutes an "offense relating to obstruction of justice" under 8 U.S.C. §1101(a)(43)(S). The answer to that question has profound implications for long-time residents hoping to remain at home in this country—or flee persecution in others. In light of the entrenched and consequential nature of the split, there is, unsurprisingly, widespread agreement that this Court should address and resolve the conflict.

This case presents an ideal vehicle for it to do so. The immigration courts ordered Mr. Silva's removal

and denied his request for asylum—and the First Circuit upheld those determinations—based solely on the view that an accessory offense need not impede an existing investigation to count as an "offense relating to obstruction of justice." This case thus squarely implicates the question presented.

Indeed, even if the Court is inclined to grant review in *Pugin* and *Cordero-Garcia* (as it should), it should also grant review in this case to bring before it each side of the three-way split. The majority opinion below adopted a position not taken by any other circuit: in the First Circuit's view, §1101(a)(43)(S) does not require *any* nexus to *any* investigation or proceeding—even one that is merely foreseeable. The majority and dissent also parted ways on a subsidiary question not raised in the other pending cases: whether a criminal statute that requires proof of the defendant's specific intent to help someone avoid detection or punishment (as most accessory statutes do) categorically provides a sufficient nexus to a foreseeable investigation or proceeding. Granting and consolidating all three cases will allow the Court to thoroughly consider the full range of viewpoints on this issue.

And on review, the Court should hold that §1101(a)(43)(S) requires a nexus to a real, existing criminal investigation or proceeding. The statutory text, structure, and purpose all point to that construction. In this case, therefore, the Court should grant certiorari and reverse.

I. The question presented warrants this Court's prompt attention.

A. There is an entrenched split on the meaning of §1101(a)(43)(S).

There is profound—and widely acknowledged—disagreement among the courts of appeals over the interpretive question presented in this case. *See, e.g.*, Gov't Cert. Br. at 16, *Pugin*, *supra*, No. 22-23 (conceding that the circuits are split "on whether an offense must involve a pending proceeding or investigation in order to qualify as 'an offense relating to obstruction of justice.'")

As discussed, two circuits have held that §1101(a)(43)(S) requires a nexus to an existing criminal proceeding. In *Flores*, a panel of the Third Circuit held, over the dissent of Judge Shwartz, that a noncitizen's conviction as an accessory after the fact under South Carolina law did not qualify as an aggravated felony under §1101(a)(43)(S). Like Massachusetts' accessory statute, the South Carolina statute required the defendant to harbor or assist someone known to have committed a felony for the purpose of enabling the principal to escape detection or arrest. 856 F.3d at 287-288 n. 30. As the Third Circuit explained, this was not a categorical match for the generic offense. Section 1101(a)(43)(S) is clarified by Chapter 73 of the federal criminal code, the court held, and unlike the "obstruction of justice" offenses in Chapter 73—which focus on the defendant's intent and actions vis-à-vis a judicial proceeding—the South Carolina statute focuses on the defendant's intent and actions vis-à-vis the principal. *Id.* at 287-296.

A unanimous panel of the Ninth Circuit reached a similar conclusion in addressing a conviction under California's accessory statute. Like those in Massachusetts and South Carolina, California's penal code makes it a felony to harbor or assist someone who has committed a felony with the intent that the principal avoid or escape arrest, trial, conviction, or punishment. *Valenzuela Gallardo*, 968 F.3d at 1057. As the Ninth Circuit explained: "The precise question at issue in this case is whether an offense relating to obstruction of justice under §1101(a)(43)(S) requires a nexus to an ongoing or pending proceeding or investigation. We conclude that Congress has clearly answered this question in the affirmative." *Id.* at 1062. Like the Third Circuit, the Ninth Circuit concluded that "Chapter 73 of Title 18, entitled 'Obstruction of Justice,' provides the relevant statutory context" in construing §1101(a)(43)(S). *Id.* at 1063-1064.[2]

Reaching a different conclusion, a split panel of the Fourth Circuit held that the phrase "relating to obstruction of justice" in §1101(a)(43)(S) is ambiguous and deferred to the BIA's construction in *Valenzuela Gallardo*, which requires a nexus to a "reasonably foreseeable" proceeding or investigation. *Pugin*, 19 F.4th at 444-450. Applying that rule, the majority held that Virginia's accessory-after-the-fact statute is a categorical match for the generic offense in §1101(a)(43)(S). Judge Gregory dissented; in his view, the Third and Ninth Circuits had correctly determined that §1101(a)(43)(S) unambiguously requires a

---

[2] The Ninth Circuit recently reaffirmed *Valenzuela Gallardo* in *Cordero-Garcia*. *See* 44 F.4th at 1186, 1189.

nexus to a pending or ongoing proceeding or investigation. *Id.* at 458-466 (Gregory, J., dissenting).

As explained, the First Circuit has now taken a third approach. According to the panel majority, the text and structure §1101(a)(43)(S) do not require any nexus at all to an investigation or proceeding—even a foreseeable future one. Pet. App. 10a-26a. In the alternative, the court joined *Pugin* in deferring to the BIA's reading. Pet. App. 33a-36a.

As these cases make clear, not only is there a split with respect to the broader interpretive question, but there is also a split as to the specific type of criminal offense at issue here: accessory offenses. *See* Gov't Cert. Br. at 15-16, *Pugin*, *supra*, No. 22-23 (acknowledging this split). The First, Fourth, and Fifth Circuits have held that an accessory conviction is an offense relating to obstruction of justice. Pet. App. 10a-26a; *Pugin*, 19 F.4th at 444-450; *United States* v. *Gamboa-Garcia*, 620 F.3d 546, 550 (5th Cir. 2010). The Third and Ninth Circuits have held that it is not. *Flores*, 856 F.3d at 287-296; *Valenzuela Gallardo*, 968 F.3d at 1062-1064.

B. The question presented is important.

The Court's review is especially appropriate given the importance of the question presented to numerous noncitizens.

As described above, conviction of an "aggravated felony" subjects an otherwise lawful resident to removal from the United States. *See supra*, p. 5. That is a significant penalty: "The Court has stated that deportation is a drastic measure and at times the equivalent of banishment or exile[.]" *Jordan* v. *De George*, 341 U.S. 223, 231 (1951) (quotation marks omitted).

That is certainly true in Mr. Silva's case: removal means leaving the only country he has called home since he was six years old. *See supra*, p. 7.

An aggravated felony conviction also completely bars a noncitizen from seeking asylum and bars many noncitizens from seeking withholding of removal. *See supra*, pp. 5-6. Those, too, are significant penalties. Withholding and asylum provide a fundamental backstop in the machinery of removal: the United States has committed not to remove individuals to places in which they will face persecution or torture. *See supra*, pp. 5-6. As one court has explained, these guarantees are not just a domestic commitment, but a fulfillment of the United States' international treaty obligations. *See Garcia* v. *Sessions*, 856 F.3d 27, 30 (1st Cir. 2017) (explaining that the withholding and asylum statutes trace their roots to the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees). Under the law of several circuits, those important forms of relief are now unavailable to certain noncitizens—even if they can *prove* that their "life or freedom would be threatened" in a proposed country of removal. 8 U.S.C. §1231(b)(3)(A).

If Mr. Silva's case had arisen in one of the fifteen states and territories that make up the Third and Ninth Circuits, he would not have been found removable and would be entitled to apply for asylum. But because his case arose in the First Circuit, those doors are now closed to him. This Court should consider whether the statute mandates that result.

II. The Court should grant certiorari in this case and consolidate it with *Pugin* and *Cordero-Garcia*.

This case is an ideal vehicle for the Court to address the meaning of "offense relating to obstruction of justice" under §1101(a)(43)(S). Mr. Silva was ordered removed, and his application for asylum was denied, solely on the ground that he had committed an "offense relating to obstruction of justice." *See* Pet. App. 7a n. 4. And the BIA and First Circuit concluded that Mr. Silva's predicate conviction—his accessory offense under §4—was an "offense relating to obstruction of justice" entirely because they thought §1101(a)(43)(S) does not require a nexus to a pending criminal investigation or proceeding. The relevant split is thus squarely presented and outcome determinative, and the Court should grant this petition.

That is so even if the Court is also inclined to grant review in both *Cordero-Garcia* and *Pugin*, as the Solicitor General has suggested. As discussed above, there is a three-way split on the meaning of §1101(a)(43)(S). *Cordero-Garcia* and *Pugin* reflect two sides of that split: the view that §1101(a)(43)(S) requires a nexus to an *extant* investigation or proceeding (*Cordero-Garcia*) or a *foreseeable* investigation or proceeding (*Pugin*). The decision below reflects the third side: the view that §1101(a)(43)(S) requires no nexus to an investigation or proceeding, foreseeable or otherwise. The Court should grant certiorari and consolidate all three cases to bring before it each side of this entrenched three-way split.

The Court should also grant review in this case because, if the Court ultimately reads the statute to require a reasonably foreseeable investigation (like the

Fourth Circuit and BIA), only this case will allow the Court to resolve the scope of that reasonable-foreseeability rule, especially as applied to accessory statutes. The panel below split on exactly that question. Echoing the BIA, the majority thought that §4's requirement that "the accessory . . . act with specific intent to enable a felon to 'avoid or escape detention, arrest, trial, or punishment'" provides a sufficient link to a foreseeable investigation or proceeding. Pet. App. 27a (quoting Mass. G.L. c. 274, §4). Judge Barron, for his part, strenuously disagreed. Pet. App. 57a-72a. That dispute extends far beyond this case, because the elements of the Massachusetts accessory statue mirror the elements of those in many other states. *Cf., e.g.*, Cal. Penal Code §32 (requiring a defendant to act "with the intent that [the] principal may avoid or escape from arrest, trial, conviction or punishment"). This issue, which divided the panel here, is not raised in either of the other pending petitions. Granting certiorari in this case would thus allow this Court to consider the full range of disputes about the meaning of the federal statute at issue. *See infra*, pp. 21-22 (explaining why Judge Barron's view is correct).

For these reasons, the Court should grant certiorari in this case and consolidate it with *Pugin* and *Cordero-Garcia*.[3]

III. The First Circuit's interpretation is wrong.

A. The Court's review is particularly warranted in this case because the First Circuit's decision is wrong on the merits. In the majority's view, the ordinary tools

---

[3] As noted, *see supra*, n. 1, at a minimum the Court should hold this petition pending a final decision in *Pugin* or *Cordero-Garcia* if it grants certiorari in either of those cases.

of statutory construction show that §1101(a)(43)(S) requires no nexus to a criminal process at all—let alone a nexus to a *pending* investigation proceeding. Pet. App. 10a-26a. That is incorrect.

1. Start with the operative term itself: "obstruction of justice." Citing contemporary dictionary definitions, the majority below reasoned that the term does not necessarily connote efforts to obstruct an *existing* proceeding. Pet. App. 12a-15a. But as Judge Gregory explained in *Pugin*, the dictionary evidence cuts in the opposite direction: each of the relevant contemporary definitions refers to—or at the very least presupposes—an existing criminal investigation or process. 19 F.4th at 459 (dissenting opinion); *accord Valenzuela Gallardo*, 968 F.3d at 1063; *cf.* Pet. App. 54a n. 29 (Barron, J., dissenting) (explaining that, at the very least, the dictionary definitions do not support the majority's no-nexus interpretation).

And what the dictionaries suggest, the surrounding statutory context makes plain. As both the Third and Ninth Circuits explained:

> Section 1101(a)(43)(S) refers to three offenses: "obstruction of justice," "perjury or subornation of perjury," and "bribery of a witness." Both "perjury or subornation of perjury" and "bribery of a witness" correspond to the 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"). So, too, does "obstruction of justice": it corresponds to the title of Chapter 73 ("Obstruction of Justice").

Valenzuela Gallardo, 968 F.3d at 1064; *see Flores*, 856 F.3d at 288 & n. 36. In light of this parallel structure, Chapter 73 "provides the relevant statutory context"

to understanding §1101(a)(43)(S). *Valenzuela Gallardo*, 968 F.3d at 1063-1064. Indeed, even the BIA once agreed: before its recent change of heart, the Board's en banc decision in *Espinoza-Gonzalez* had held that, as used in §1101(a)(43)(S), "obstruction of justice" is a "term of art" whose meaning was cabined by Chapter 73. 22 I. & N. Dec. at 893.

This link to Chapter 73 defeats the government's efforts to label Mr. Silva's accessory offense an "offense relating to obstruction of justice." "Of the substantive provisions in Chapter 73 that existed when §1101(a)(43)(S) was enacted, almost all of them required a nexus to an ongoing or pending proceeding or investigation." *Valenzuela Gallardo*, 968 F.3d at 1064; *see also Flores*, 856 F.3d at 292-294 (comparing the South Carolina accessory offense to the offenses in Chapter 73). In other words, as illuminated by Chapter 73, the generic "obstruction of justice" offense does not categorically encompass the broader set of conduct penalized in Massachusetts' accessory statute.

2. The First Circuit made several additional points in defense of its interpretation, but each of point fails to overcome the plain meaning of §1101(a)(43)(S).

First, the majority observed that the statute does not just cover "obstruction of justice," but "an offense *relating to* obstruction of justice." Pet. App. 21a-22a. But that phrase—"relating to"—simply accounts for variation among the state laws that may be a categorical match for the elements of the generic offense; it does not transform §1101(a)(43)(S) into a freewheeling generic offense with whatever elements the Board sees fit to add or remove in a given case. *Flores*, 856 F.3d at 291; *Valenzuela Gallardo*, 968 F.3d at 1068; *Pugin*, 19 F.4th at 459-460 (Gregory, J., dissenting).

Second, the majority suggested that even if Chapter 73 informs the meaning of §1101(a)(43)(S), some offenses in Chapter 73 do not require a nexus to an ongoing proceeding. Pet. App. 19a-20a. But the majority identified just two provisions: 18 U.S.C. §§1511 and 1512. As to the first, there is good evidence that "Congress likely understood §1511 as contemplating a nexus to ongoing or pending investigations or proceedings." *Valenzuela Gallardo*, 968 F.3d at 1065 n. 9. And as to the second, §1512 expressly states that it applies to more than just proceedings that are "pending or about to be instituted"—a proviso that would be unnecessary if the generic offense were *already* as broad as the majority says. *See id.* at 1065; *cf.* Pet. App. 54a n. 29 (Barron, J., dissenting) (explaining that, at the very least, Chapter 73 does not support the majority's no-nexus interpretation).

Third, the majority reasoned that the federal accessory offense, 18 U.S.C. §3, sheds light on the meaning of "an offense relating to obstruction of justice." Pet. App. 17a-19a. But its principal support for that contention was the entirely circular argument that "the federal accessory-after-the-fact statute relates to 'obstruction of justice.'" Pet. App. 17a. The majority also noted that several cases have suggested that the "gist of being an accessory after the fact lies essentially in obstructing justice." Pet. App. 18a (emphasis omitted). But the majority offered no reason to believe that those offhand statements—colloquial uses of the term "obstructing justice" in passing dicta—shed light on the technical meaning of "an offense relating to obstruction of justice" in §1101(a)(43)(S).

Finally, the majority reasoned that state statutes, the Model Penal Code, and the U.S. Sentencing

Guidelines support its reading of the statute. Pet. App. 23a-26a. But the majority's tally of state statutes cannot bear the weight the majority placed on it: the majority identified only seventeen states with crimes labeled "obstruction of justice," and only thirteen that allowed prosecution with something less than a nexus to an ongoing or pending proceeding. *See* Pet. App. 23a-24a. A single explanatory note in the Model Penal Code also cannot overcome the evidence of the statute's meaning discussed above. *See* Pet. App. 25a. And the majority misread the Sentencing Guidelines note on which it relied: that note shows only that accessory and obstruction offenses are related and often overlap—not that an accessory offense is *always* an obstruction offense, even if there is no proceeding to obstruct. *See* Pet. App. 25a-26a.

B. The panel majority's alternative holding—that a typical accessory statute like the one at issue in this case provides a sufficient nexus to a "foreseeable" investigation or proceeding (Pet. App. 26a-30a)—is equally flawed. Both the panel majority and the BIA determined that Massachusetts' accessory statute satisfies the reasonable-foreseeability test because it requires someone to act "with intent that [the principal] shall avoid or escape detention, arrest, trial or punishment." Mass. G.L. c. 274, §4. As Judge Barron explained, however, that language does not "require proof . . . that an investigation was in fact in the offing (or, for that matter, was even reasonably foreseeable under any understanding of that constraint)." Pet. App. 61a-62a. That is, the fact that the defendant intended to help the principal avoid an investigation *if one were to occur* says nothing about how likely or foreseeable it would be that an investigation would, in fact, take place. For this reason, too, the majority's

understanding of a generic "offense relating to obstruction of justice" swept too broadly.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

GERARD J. CEDRONE
Counsel of Record
DAVID J. ZIMMER
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
gcedrone@goodwinlaw.com
(617) 570-1849

October 17, 2022

Counsel for Petitioner