

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

JEAN FRANCOIS PUGIN,)
)
 Petitioner,)
)
 v.) No. 22-23
)
MERRICK B. GARLAND,)
)
 ATTORNEY GENERAL,)
)
 Respondent.)

MERRICK B. GARLAND,)
)
 ATTORNEY GENERAL,)
)
 Petitioner,)
)
 v.) No. 22-331
)
FERNANDO CORDERO-GARCIA, AKA)
)
 FERNANDO CORDERO,)
)
 Respondent.)

Pages: 1 through 118
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Date: April 17, 2023

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15 FERNANDO CORDERO,)

16 Respondent.)

17 - - - - -

18 Washington, D.C.

19 Monday, April 17, 2023

20

21 The above-entitled matter came on for
22 oral argument before the Supreme Court of the
23 United States at 10:03 a.m.

24

25

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8 behalf of Fernando Cordero-Garcia.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 22-23, Pugin versus Garland, and the consolidated case.

Mr. Gannon.

ORAL ARGUMENT OF CURTIS E. GANNON

ON BEHALF OF MERRICK B. GARLAND, ATTORNEY GENERAL

MR. GANNON: Mr. Chief Justice, and may it please the Court:

In 1996, Congress made an offense relating to obstruction of justice an aggravated felony for purposes of the Immigration and Nationality Act. At the time it did so, the phrase "obstruction of justice" was understood to include crimes that occurred when a proceeding or investigation was not currently pending.

The wheels of justice can be obstructed even before they begin to move. Indeed, one of the best ways to obstruct an investigation or a proceeding is to ensure that it never starts in the first place.

My friends on the other side say that only 14 states plus D.C. even punished

1 obstruction of justice in 1996 and that Congress
2 meant to limit obstruction of justice to a
3 catch-all offense in the federal Criminal Code
4 that includes a pending proceeding requirement.

5 But, by 1996, Congress had added other
6 obstruction-of-justice offenses without any such
7 limitation, and it had expressly disavowed such
8 a limit in 1982 when creating the principal
9 federal witness and evidence tampering statute,
10 18 U.S.C. 1512.

11 Also by 1996, case law, dictionaries,
12 leading commentators, and the Model Penal Code
13 had all recognized that the kinds of offenses at
14 issue in these two cases -- accessory after the
15 fact and witness tampering -- involved
16 obstruction of justice even when the elements of
17 the offense did not require there to be a
18 pending investigation or proceeding at the time
19 of the offense conduct.

20 This Court should hold that the Ninth
21 Circuit erred in concluding otherwise.

22 I welcome the Court's questions.

23 JUSTICE THOMAS: Mr. Gannon, could you
24 give us a straightforward definition of
25 "obstruction of justice"?

1 MR. GANNON: We agree with the
2 definitions on page 23 of our brief from legal
3 dictionaries that obstruction of justice
4 involves willfully interfering with the process
5 of justice. And the Board here said that the
6 offenses at issue are the category that have an
7 affirmative act that includes a specific intent
8 to interfere with the process of justice and
9 law.

10 JUSTICE THOMAS: So you give a wide
11 range of -- of evidence. You talk about
12 Blackstone, as well as Chapter 73. Do you think
13 all of the crimes listed there are
14 obstruction-of-justice crimes?

15 MR. GANNON: We think that they're
16 obstruction-of-justice crimes if they have the
17 specific intent to interfere with an
18 investigation. Now we don't think that the
19 investigation has to have already come into
20 existence. It can be a future investigation.
21 In a retaliation case, it can be a past
22 investigation.

23 But we think that it -- it does -- in
24 -- in most circumstances, is going to require
25 there to be a nexus -- in all circumstances,

1 there'll need to be a nexus to a particular
2 investigation or proceeding that could come
3 about, but that comes through the specific
4 intent to interfere with the process of justice
5 and law. It doesn't need to already be in -- in
6 existence at the time the conduct occurs.

7 CHIEF JUSTICE ROBERTS: Counsel, one
8 of the things that troubles me about both sides'
9 position is the "relating to" language. It
10 seems to me that to the extent you have a broad
11 definition of "obstruction of justice," it
12 becomes even broader when you say "relating to."
13 And, of course, on the other side, the narrow
14 definition -- I don't know that it takes
15 adequate account of that.

16 So I understand the formulation in
17 your brief, but could you flesh out a little bit
18 more about how "relating to" works, particularly
19 against your fairly broad definition of
20 obstruction?

21 MR. GANNON: Well, I think,
22 ultimately, we agree that "relating to" does
23 broaden beyond just what would be core
24 obstruction of justice, but the Board here has
25 recognized that the offenses that we're talking

1 about are those that have the specific intent to
2 interfere with proceedings of -- of law and
3 justice.

4 And so that, we think, is the --
5 ultimately the limiter here. Even though it
6 would need to relate to obstruction of justice,
7 we think, to the extent that there is a specific
8 intent to interfere, that's a sufficiently close
9 nexus that you don't need to be concerned about
10 sweeping in a lot of other offenses.

11 And the Board in 1999 drew the line
12 between accessory after the fact and misprision
13 of felony in the federal Criminal Code, between
14 Section 3 and Section 4. It said accessory
15 after the fact, a crime that looks almost
16 exactly like Mr. Pugin's crime here under any
17 law.

18 CHIEF JUSTICE ROBERTS: Well, but, I
19 mean, if you -- if you -- we're dealing with a
20 criminal statute here, and if you didn't have
21 the Board's construction, would your -- what
22 would your answer?

23 MR. GANNON: My answer would -- would
24 be that obstruction of justice in the dictionary
25 definitions still requires willfully interfering

1 with the process of justice and law. I think
2 "relating to" does get us a little bit beyond
3 that at the margins. I'm not exactly sure what
4 those offenses are going to be. It does need to
5 be categorical.

6 And so we think that in this context,
7 though, the Board, looking for that specific
8 intent, should give the Court reassurance that
9 we're not sweeping in a lot of other offenses.

10 And to the extent that the other side
11 is concerned about -- and some of the amici are
12 concerned about defining offense conduct
13 broadly, this case isn't about what actually
14 violates any of the underlying offenses. We
15 take those as given.

16 The question is just whether, as a
17 category, as a family of offenses,
18 obstruction-of-justice offenses need to have a
19 pending proceeding. And we think the answer to
20 that is clearly not.

21 JUSTICE KAGAN: When -- when you say
22 that there needs to be some sort of nexus to a
23 proceeding or an investigation, are you
24 suggesting that there needs to be a kind of
25 reasonable foreseeability in the way that I

1 think that the Board has indicated previously?

2 MR. GANNON: Well, we think -- we
3 acknowledge that that effectively comes in, but
4 it does, though, as part of the specific intent
5 inquiry. It can't be a stand-alone element. If
6 it were a stand-alone element, then,
7 essentially, no state statute would come in
8 because no state statute echoes the Arthur
9 Andersen opinion that this Court issued in 2005
10 --

11 JUSTICE SOTOMAYOR: Mr. --

12 MR. GANNON: -- to construe 1512.

13 JUSTICE BARRETT: I think Justice
14 Sotomayor -- I'll go after.

15 JUSTICE SOTOMAYOR: Mr. Gannon, let me
16 start with, what other aggravated felony is
17 defined merely by dictionary -- by the
18 dictionary? Because that seems to be what
19 you're doing. Tell me what other identified
20 aggravated felony do we approach that way.

21 MR. GANNON: Well, you approach the
22 sexual-abuse-of-a-minor offense in
23 Esquivel-Quintana that way. You used other
24 sources, and we too are using the same sources
25 that you used in Esquivel-Quintana --

1 JUSTICE SOTOMAYOR: But we --

2 MR. GANNON: -- to say that --

3 JUSTICE SOTOMAYOR: -- we were just
4 defining -- in that case, we were using the
5 categorical approach and looking at common law
6 elements and figuring out what they meant.

7 Now, assuming that the -- I think the
8 other side has a point that we have to find what
9 the definition is of "obstruction of justice" or
10 "relating to obstruction of justice," all I can
11 find is that in 1831, leading commentators,
12 Blackstone and Kent, understood it to require a
13 pending petition.

14 In 19 -- in 1893, the Court in
15 Pettibone held that obstruction of justice
16 requires a pending petition.

17 Congress reenacted the offense in
18 1948, explaining that it made no substantive
19 change to the -- to the petition at the -- at
20 the time of Pettibone.

21 Then, in 1995, just one year before
22 obstruction of justice was added to the INA list
23 of aggravated felonies, the Court of -- the
24 Court in Aguilar again required interference
25 with a pending proceeding.

1 Now you say some states in 1996 had
2 expanded it not -- expanded the definition of
3 "obstruction of justice" not to need a pending
4 proceeding. But the majority of them still
5 defined it that way.

6 I look at how Congress used it, and in
7 all of the federal Criminal Code, the phrase
8 "relating" -- phrase "relating to obstruction of
9 justice" appears in just one other place, RICO
10 Section 1961, and it specifically refers to
11 1503.

12 That same provision refers to Section
13 1512 as relating to tampering with a witness.
14 So Congress itself is now saying we think of
15 obstruction of justice as something different
16 than the other provisions. And if we read
17 things the way you're saying, there's a lot
18 that's superfluous in this statute.

19 Why would Congress have made it
20 necessary to point to perjury or to false
21 statements or to other provisions that it did?

22 I -- I'm a little bit confused. I
23 would think that we would go to what the common
24 law understanding was at the time in 1996 --

25 MR. GANNON: Well --

1 JUSTICE SOTOMAYOR: -- and in 1996,
2 every use of "relating to obstruction of
3 justice" required a pending proceeding.

4 MR. GANNON: -- Justice Sotomayor, we
5 do not disagree that 1503 is an
6 obstruction-of-justice offense. We disagree
7 about the idea that that's the only
8 obstruction-of-justice offense in federal
9 criminal law, and --

10 JUSTICE SOTOMAYOR: No, you're --
11 you're missing the point.

12 MR. GANNON: Well --

13 JUSTICE SOTOMAYOR: The point is what
14 are the elements of an obstruction of justice,
15 and if it required a pending proceeding --

16 MR. GANNON: Yes, and --

17 JUSTICE SOTOMAYOR: -- how do we read
18 it out?

19 MR. GANNON: Because we think that you
20 have to look at more offenses than 1503 in order
21 to determine --

22 JUSTICE SOTOMAYOR: But, when Congress
23 did that --

24 MR. GANNON: But the only instance --

25 JUSTICE SOTOMAYOR: -- like in when it

1 referred to 1512, it said relating to tampering
2 with a witness, not relating to the obstruction
3 of justice, as it did in RICO.

4 MR. GANNON: The -- RICO is the only
5 place where it does that, and the two parallel
6 cross-references --

7 JUSTICE SOTOMAYOR: And then --

8 MR. GANNON: -- that you're --

9 JUSTICE SOTOMAYOR: -- why bother --

10 MR. GANNON: -- talking about --

11 JUSTICE SOTOMAYOR: -- why bother with
12 all the other definitions, perjury, all the
13 other crimes? They all relate to obstruction of
14 justice according to you with or without a
15 proceeding.

16 MR. GANNON: I think the aggravated
17 felony definition is replete with potential
18 overlap. Congress clearly wanted this
19 definition to be broad. It returned to it
20 several times in the 1990s in order to make it
21 broader, in order to reduce the punishment
22 thresholds. It reduced the punishment threshold
23 here from five years to one year.

24 And there are other things that
25 clearly overlap in the aggravated felony

1 definition. Murder --

2 JUSTICE SOTOMAYOR: There are many
3 states that make it a crime not to -- not to
4 report a crime, even if the person hasn't aided
5 or abetted or participated in any way in the
6 crime or helped the criminal.

7 Is that an obstruction-of-justice
8 offense?

9 MR. GANNON: Only if it has the
10 specific intent requirement to interfere with an
11 investigation.

12 JUSTICE SOTOMAYOR: But it seems to
13 me --

14 MR. GANNON: And what we are saying is
15 that --

16 JUSTICE SOTOMAYOR: -- you're reading
17 that intent in -- into everything.

18 MR. GANNON: We --

19 JUSTICE SOTOMAYOR: So is the BIA.
20 You're saying that just because an investigation
21 might follow, you're responsible.

22 MR. GANNON: We read that intent
23 requirement by looking at the dictionary
24 definitions, the commentators, the Model Penal
25 Code, lots of other things that had happened in

1 the law after Blackstone in 1831.

2 CHIEF JUSTICE ROBERTS: Counsel --

3 JUSTICE BARRETT: Mr. --

4 MR. GANNON: We take Pettibone and --

5 CHIEF JUSTICE ROBERTS: Okay. Why
6 don't you finish your answer to Justice
7 Sotomayor, and then I have a question.

8 MR. GANNON: We -- we take Pettibone
9 and this Court's decision in Aguilar in 1995 as
10 saying that 1503 did have the pending proceeding
11 requirement, but we think it's clear that
12 Congress considered a larger range of offenses,
13 including those that are in Chapter 73, as also
14 being obstruction-of-justice offenses, and,
15 indeed, Section 3, the accessory-after-the-fact
16 provision, which federal courts of appeals since
17 the late 1960s and early 1970s had repeatedly
18 characterized as saying the gist of an
19 accessory-after-the-fact offense under Section 3
20 is obstruction of justice. We think that is
21 part of the context against which Congress
22 enacted this definition in 1996.

23 CHIEF JUSTICE ROBERTS: Counsel,
24 looking at your reasonable foreseeability point,
25 exactly what -- at what point do you -- do you

1 decide -- let's say there is a 50 percent chance
2 based on historic -- historical evidence that
3 the government would prosecute a particular
4 crime, would investigate it to the point of
5 prosecution.

6 Is that enough to say that the
7 investigation is reasonably foreseeable?

8 MR. GANNON: Well, I -- I'm not
9 exactly sure how this Court would apply the
10 Arthur Andersen test or how courts of appeals
11 have applied that in cases about when that needs
12 to be an element of the offense.

13 We think here that it's not a strict
14 element of the offense, but it does come in
15 through the mens rea. So we think that if the
16 -- if the investigation is really unthinkable,
17 it's the sort of thing that nobody's going to
18 get investigated or prosecuted for --

19 CHIEF JUSTICE ROBERTS: Right. I
20 understand the --

21 MR. GANNON: -- then there's not going
22 to be --

23 CHIEF JUSTICE ROBERTS: -- I -- I
24 understand the easy case and the hard case. I'm
25 trying to figure out exactly where you would

1 draw the line.

2 MR. GANNON: I mean, I think, here,
3 the -- the main place we're going to draw the
4 line is about whether you have a specific intent
5 to interfere with the process of justice.

6 And so, if it's the type of offense
7 that nobody is going to be prosecuted or
8 investigated for, that prosecution isn't going
9 to get brought -- they aren't going to get
10 convicted.

11 We're not going to have a conviction
12 for accessory after the fact, which had, in
13 Virginia, for instance, the mens rea of
14 intending to influence -- intending to enable
15 the felon to elude punishment.

16 If you're intending to enable him to
17 elude punishment for something that he was never
18 going to be come after for, then it's going to
19 be very difficult for the prosecution to prove
20 that offense.

21 JUSTICE KAGAN: So --

22 JUSTICE BARRETT: Mr. --

23 JUSTICE KAGAN: -- putting aside
24 the -- the -- the question of how exactly you
25 draw the line, when you say that you don't want

1 it to be an element of the offense and it's
2 supposed to only come through the mens rea
3 requirement, why are you arguing that, and
4 what's the effect of that?

5 MR. GANNON: I -- I mean, the -- the
6 practical effect and the why that we're arguing
7 it is that there are essentially no statutes,
8 not even the text of 1512, that include the
9 1512 -- I mean, that include the Court's gloss
10 in Arthur Andersen to require there to be a
11 reasonably foreseeable investigation. We don't
12 deny that that's part of 1512 since the Court
13 construed the statute in 2005.

14 But the -- all of the state
15 obstruction-of-justice offenses, accessory after
16 the fact, a lot of these other crimes, they
17 weren't drafted in a post-Arthur Andersen age --

18 JUSTICE KAGAN: Yeah, but it does seem
19 --

20 MR. GANNON: -- and nevertheless --

21 JUSTICE KAGAN: -- right, that Arthur
22 Andersen and then Marinello, where it says is it
23 in the offing --

24 MR. GANNON: It does, but I --

25 JUSTICE KAGAN: -- you know, would --

1 would suggest that when we think of prototypical
2 cases of obstruction, we're thinking of cases in
3 which there is a proceeding or at least an
4 investigation, as Marinello said, in the offing.

5 MR. GANNON: Yes, there needs to be a
6 particular, in Marinello, tax proceeding that is
7 in the offing. It's not just day-to-day work of
8 the IRS agents there. But I would stress that
9 Marinello relied on the phrase "due
10 administration of this title" as echoing 1503,
11 and that's -- that's language from the statute
12 that was construed in Pettibone and Aguilar as
13 needing a pending proceeding requirement.

14 And even though the Title 26 provision
15 had that similar language that is not in the
16 INA, the Court still didn't require there to be
17 an already pending investigation at the IRS in
18 order for the Title 26 provision to apply.

19 JUSTICE BARRETT: Mr. --

20 MR. GANNON: It said in the offing was
21 good enough.

22 And so, here, we think that an intent
23 to interfere with something that really is
24 conceivable essentially gets at the same point.

25 JUSTICE ALITO: I mean, this

1 distinction matters, doesn't it, only in the
2 case where the person who specifically intends
3 to obstruct a future investigation is
4 unreasonable in thinking that there will be a
5 future investigation, right? That's the only
6 instance in which it would -- it makes a
7 difference whether this is a stand-alone element
8 or whether it's subsumed by the intent
9 requirement.

10 MR. GANNON: That's right that that's
11 the only cases in which it's going to make a
12 difference, but if you say that it needs to be
13 an element of the offense --

14 JUSTICE ALITO: No, I understand that.

15 MR. GANNON: -- then -- then it would
16 be harder for us to satisfy in a -- in a lot of
17 cases where I think we would say the intent is
18 going to sweep that in virtually all the time.

19 JUSTICE ALITO: Yeah, I understand
20 that.

21 Let me ask you a question about
22 Pettibone. Do you interpret that as a decision
23 that interpreted a specific statutory provision
24 and the language of that specific statutory
25 provision, or was the Court saying that

1 obstruction of justice, like burglary or murder,
2 is a common law offense and it has
3 well-recognized elements, and so we are going to
4 read this statute in accordance with a common
5 law offense?

6 MR. GANNON: We -- we think it's
7 clearly the former. In Pettibone and in Aguilar
8 and again in Marinello, the Court recognized
9 that the phrases that mattered in 1503 were the
10 reference to the "due administration of justice"
11 and "in any court."

12 And so that's language that Congress
13 included in the catch-all clause in 1503 that
14 was construed originally in Pettibone in the
15 1890s and was carried through into the 1995
16 decision that Justice Sotomayor mentioned. But
17 that's still only the 1503 statute. And we
18 think it's quite clear that when Congress added
19 1512 in 1982, it also considered 1512 to be an
20 obstruction-of-justice offense.

21 JUSTICE BARRETT: Mr. Gannon, can I
22 ask you a question about this link between the
23 two? Does it have to be linked to a particular
24 proceeding? Because, at the time when a
25 proceeding -- an investigation might be in the

1 offing, I mean, I think some of our prior cases
2 have required that link to be between a
3 particular investigation.

4 So you could threaten a witness and
5 say, don't report this to the authorities. But
6 that could be state authorities. It could be
7 federal authorities. There could be overlapping
8 jurisdictional authority.

9 So do you think it has to be close
10 enough to an investigation for the defendant to
11 suspect that state authorities might bring a
12 particular investigation as opposed to the feds?

13 MR. GANNON: I -- I think it wouldn't
14 matter which type of offense it would be. If
15 you were specifically trying to prevent a
16 witness from going to either state or federal
17 authorities about your --

18 JUSTICE BARRETT: Justice from
19 anywhere?

20 MR. GANNON: -- criminal conduct, that
21 that is still a conceivable -- you're still
22 interfering with the wheels of justice even
23 though you don't know whether they're state or
24 federal at that point.

25 JUSTICE BARRETT: Okay. Let me ask

1 you a different question then. This goes back
2 to Justice Sotomayor's point about you using
3 obstruction of justice in a dictionary
4 definition rather than looking at the elements
5 of an offense.

6 For perjury and bribery of a witness,
7 I assume that you would agree, under the
8 categorical approach, we would be looking to
9 generic definitions of perjury and generic
10 definitions of bribery of a witness.

11 MR. GANNON: I -- I think you could
12 also look to the federal statutes that
13 criminalize those crimes. You would look to
14 state statutes as well. In a case like
15 Esquivel-Quintana and -- where the Court was
16 looking at sexual abuse of a minor, it
17 recognized that this may be a family of
18 offenses, and it said that statutory rape is
19 just one part of the category that's covered by
20 sexual abuse of a minor.

21 Here, we think it's clear that --

22 JUSTICE BARRETT: But you
23 wouldn't necessarily start -- I guess what I'm
24 getting at is it seems like there are clusters
25 here. You have obstruction of justice, you have

1 perjury, subornation of perjury, bribery of a
2 witness, and it feels a little bit odd to be
3 relying primarily on the dictionary definition,
4 which is up at the highest level of generality
5 for the first one but using kind of a more
6 traditional approach for the others in the
7 statute.

8 MR. GANNON: We're not running away
9 from the statutes. We think that they support
10 us. Our main contention about the statutes is
11 that 1503 isn't the only obstruction-of-justice
12 offense at the federal level.

13 JUSTICE JACKSON: And do you draw --

14 MR. GANNON: We think it's clear that
15 Congress --

16 JUSTICE BARRETT: Okay. Last -- last
17 question then. What does "relating to" do?
18 What is an offense "relating to" bribery of a
19 witness or "relating to" perjury?

20 MR. GANNON: In -- it -- we think
21 there it also expands the category a little bit.
22 The Ninth Circuit in the Yim case held that
23 "relating to perjury" extends a little bit
24 further maybe than the elements of the offense.
25 It held --

1 JUSTICE BARRETT: What do you mean?

2 MR. GANNON: It -- it held there that
3 a federal perjury provision didn't necessarily
4 -- the short answer is yes, we think that
5 "relating to" adds to both obstruction of
6 justice and the clauses that follow.

7 JUSTICE JACKSON: But why? If -- if
8 obstruction of justice is itself a family, as
9 you say, and I accept that, there's not a
10 particular obstruction-of-justice offense that
11 we call that or that Congress considered to be
12 that, why isn't "relating to obstruction of
13 justice" just describing the family?

14 What I don't understand is why you
15 have a group or a class called "obstruction of
16 justice," and then you interpret "relating to"
17 to get you beyond that, as opposed to
18 interpreting the entire phrase, "relating to
19 obstruction of justice," to say, refer to all of
20 the offenses listed in 73. I -- I don't know
21 why -- I guess I'm just confused --

22 MR. GANNON: Yeah.

23 JUSTICE JACKSON: -- as to why
24 "relating to" is adding to --

25 MR. GANNON: Yeah.

1 JUSTICE JACKSON: -- the
2 classification that you say exists.

3 MR. GANNON: I -- I think, if you
4 agree with us about the mens rea as being
5 necessary to establish a sufficient connection
6 in order to come in here even when it's relating
7 to, then there isn't going to be any --

8 JUSTICE JACKSON: But why do I need to
9 --

10 MR. GANNON: -- practical difference
11 between those two --

12 JUSTICE JACKSON: -- can -- can we set
13 the -- setting the mens rea aside --

14 MR. GANNON: Yeah.

15 JUSTICE JACKSON: -- just trying to
16 understand what you believe "obstruction of
17 justice" in subparagraph (S) to be referring to.
18 I've heard you say several times that it's a
19 family, a classification.

20 If I accept that and agree with you,
21 then why isn't "relating to obstruction of
22 justice" just describing that category? That
23 would seem to be to me a way to limit because we
24 don't have to worry about "relating to" as being
25 beyond the class.

1 And, second point, why isn't the class
2 what Congress has listed in Chapter 73 and
3 grouped together under the heading "obstruction
4 of justice"? I don't know why you're going
5 beyond a Chapter 73-type offense in your
6 argument.

7 MR. GANNON: Well, I -- I think
8 that -- with respect to the first question, I
9 understand your point about "relating to." We
10 think that the phrase generally is used by
11 Congress to broaden things. In this particular
12 definition, when it's used in parentheticals,
13 it's just a reference, a cross-reference, but we
14 think, generally, it would be broader.

15 But even taking your point about a
16 family of offenses that's defined, as we think,
17 by this common mens rea and various different
18 potential actus reuses, that --

19 JUSTICE JACKSON: All of which runs
20 through Chapter 73, right?

21 MR. GANNON: Yes, but it's not just
22 limited to Chapter 73. We think --

23 JUSTICE JACKSON: Why?

24 MR. GANNON: Because we think that
25 other offenses are obstruction of justice. And

1 as I said already --

2 JUSTICE JACKSON: But isn't the -- but
3 I'm saying, isn't the question what Congress
4 intended?

5 MR. GANNON: Absolutely. It is.

6 JUSTICE JACKSON: And so, if Congress
7 says an offense relating to obstruction of
8 justice, and then, in Chapter 73, they list a
9 number of offenses under the heading
10 "obstruction of justice," I guess I don't
11 understand why we are being directed to some
12 sort of a generic categorical approach about a
13 particular offense called obstruction of justice
14 when that's really not a thing. It seems like
15 it's a class. And here's a list of all of the
16 things, some of which require a proceeding, some
17 of which don't.

18 Why isn't this the universe of -- of
19 offenses plus the state law analogues to them?
20 Why isn't that what Congress intended
21 "obstruction of justice" to mean?

22 MR. GANNON: I agree with everything
23 there except to say that Chapter 73 defines the
24 extent of the universe of parallel --

25 JUSTICE JACKSON: Why?

1 MR. GANNON: -- offenses here. And
2 that's because it was clear by 1996 that
3 accessory after the fact, for instance, the gist
4 of that offense was obstruction of justice. And
5 the mere fact that --

6 JUSTICE JACKSON: Clear to whom and
7 where? In the dictionary? Clear to -- to whom?

8 MR. GANNON: Clear in -- in
9 most circuit courts of the United -- of the
10 federal circuit courts had said that about
11 Section 3, and -- and many state courts had said
12 that about their obstruction -- their
13 accessory-after-the-fact offenses.
14 Commentators, the LaFave treatise, the Model
15 Penal Code commentary, all of these sources
16 talked about offenses outside of Chapter 73 as
17 also being paradigmatic obstruction-of-justice
18 offenses.

19 And so that's why we think that just
20 looking to Chapter 73 isn't enough. We think
21 Chapter 73 provides good guidance. There are
22 clearly more than one obstruction-of-justice
23 offense in Chapter 73, and, therefore, my
24 friends' attempt to limit this to 1503 is too
25 narrow. But I -- we also think it's clear that

1 Congress thought that there were
2 obstruction-of-justice offenses outside Chapter
3 73, including, I would say --

4 JUSTICE JACKSON: But Congress didn't
5 put --

6 MR. GANNON: -- the Title 26
7 provision.

8 JUSTICE JACKSON: -- but Congress did
9 not put accessory after the fact in Chapter 73.
10 So the -- the --

11 MR. GANNON: That's right, but
12 Congress also --

13 JUSTICE JACKSON: -- those who
14 believed it was broader, what was the basis --
15 the mens rea that runs to those other crimes?

16 MR. GANNON: It -- it -- it still --
17 the -- Section 3 still requires the intent to
18 hinder and prevent the -- the prosecution of the
19 felon. And --

20 JUSTICE JACKSON: I'm sorry. I'm just
21 talking about accessory after the fact --

22 MR. GANNON: Yes.

23 JUSTICE JACKSON: -- is not in the
24 list of crimes that Congress has put together
25 under obstruction of justice in Chapter 73.

1 MR. GANNON: That --

2 JUSTICE JACKSON: You say it's still
3 covered. And I guess I'm just trying to
4 understand why is it -- because it has the same
5 mens rea as these offenses?

6 MR. GANNON: Yes. Because it still
7 requires that the act be taken to hinder or
8 prevent the apprehension, trial, or punishment
9 of the -- of the known felon, and that's why
10 everybody considered it to be the gist of that
11 offense was obstruction of justice, is what the
12 D.C. Circuit said in 1972 and various
13 commentators did.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Thomas, anything further?

17 Justice Alito?

18 JUSTICE ALITO: The question on which
19 we granted review is, to qualify as an offense
20 relating to obstruction of justice, must a
21 predicate offense require a nexus with a pending
22 or ongoing investigation or proceeding? And you
23 say that that is not required.

24 And we might or might not agree with
25 you, but if we do agree with you on that, do we

1 need to go any further and decide whether the
2 offenses in the two cases qualify as obstruction
3 -- offenses relating to the obstruction of
4 justice?

5 MR. GANNON: Well, you would not need
6 to in order to answer the question on which you
7 granted cert. The question that we offered in
8 our petition was broader and would have included
9 that question in the case of Mr. Cordero-Garcia.

10 We think -- we have submitted that the
11 other side in both cases hasn't preserved any
12 other arguments, but we don't think you would
13 need to decide that question. If you wanted to
14 remand and let the courts of appeals apply your
15 definition or your answer to the question that
16 there does not need to be a pending proceeding,
17 then my friends on the other side would be able
18 to raise any other arguments that they happen to
19 have preserved.

20 JUSTICE ALITO: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor?

23 Justice Kagan?

24 JUSTICE KAGAN: What -- what seems
25 unusual to me, Mr. Gannon, about your argument

1 is that you -- in most cases, when we ask about
2 a generic offense, we're asking about a
3 prototypical offense, we're asking about sort of
4 the core offense, and we realize that there are
5 things that fall outside that core, and when a
6 state statute includes them, it's going to flunk
7 the categorical test.

8 But the -- but the -- we are asking
9 about the core. And it seems to me that your
10 answer to this question is really not asking
11 about the core. It's asking, like, what's the
12 outer bounds of the offense and what is anything
13 that anybody has said is included in the
14 offense, and then we're going to include all
15 that in our definition of what a generic offense
16 is.

17 But I guess I would think that that's
18 pretty inconsistent with how we've taken the
19 generic offense question to go generally.

20 MR. GANNON: Yeah. And I don't think
21 it is if you recognize that this is a family of
22 offenses, as Justice Jackson was saying, and I
23 think as the Court was -- was essentially also
24 saying in *Esquivel-Quintana* when the Court
25 looked at the phrase "sexual abuse of a minor."

1 It didn't say, oh, there's one generic
2 sexual-abuse-of-a-minor offense. It said one
3 category there is -- one example of this
4 category of crimes is the phrase the Court used
5 with statutory rape laws.

6 JUSTICE KAGAN: Well, I -- I take the
7 point that you're --

8 MR. GANNON: And so -- and so --

9 JUSTICE KAGAN: Go ahead.

10 MR. GANNON: -- and -- and I would say
11 that there are other -- there are other
12 categorical approach cases where the Court has
13 recognized that there is an irreducible minimum
14 that defines this as being part of the category
15 of -- of cases at issue, of offenses at issue,
16 but that doesn't mean that there can't be other
17 things that also apply.

18 So, in Nijhawan, in Kawashima, the
19 Court was talking about offenses involving fraud
20 or deceit, and it recognized that fraud can be
21 mail fraud, it can be wire fraud, it can be
22 conspiracy to defraud, it can be lots of other
23 types of fraud.

24 But the actus reus is -- can be a
25 bunch of different things, but what it has to

1 include is an intent to defraud. Same with
2 sexual abuse of a minor. Statutory rape was as
3 an example.

4 Here, we think all of the offenses are
5 going to require the willful interference with
6 the process of justice and law, and -- but the
7 --

8 JUSTICE KAGAN: I -- I mean --

9 MR. GANNON: -- actus reus can be
10 different. It could be you're threatening a
11 witness, it could be you're destroying a
12 document, it could be --

13 JUSTICE KAGAN: Yeah, but take the
14 accessory after the fact, which you want to put
15 in. I mean, you can look at that accessory
16 after the fact. It's just like aiding and
17 abetting, or it's like being a member of a
18 conspiracy or something like that. I mean,
19 nobody truly thinks of that as a core
20 obstruction-of-justice offense.

21 MR. GANNON: With respect, Justice
22 Kagan, look at the 1972 decision from the
23 D.C. Circuit. It said that obstruction of
24 justice is the gist of that offense.

25 And many circuits that we cite in our

1 brief on page 22 and 23 repeat that definition.
2 So did commentators. So does the Model Penal
3 Code. Everybody recognized that just -- even
4 though it's not in Chapter 73 --

5 JUSTICE KAGAN: I mean, it's sort of
6 --

7 MR. GANNON: -- because Congress has
8 told us --

9 JUSTICE KAGAN: -- obstruction of
10 justice taking over the world --

11 MR. GANNON: No. It -- it says --

12 JUSTICE KAGAN: -- and doing so --
13 excuse me, Mr. Gannon -- and doing so by means
14 of trying to define a generic offense which, in
15 everything we've ever said about that project,
16 is defining the prototypical crime.

17 MR. GANNON: And the reason why we
18 think that one is prototypical is because it
19 requires the comfort and assistance given the
20 known felon there to be done in order to hinder
21 or prevent his apprehension, trial, or
22 punishment.

23 That's what Section 3 at the federal
24 level says. The Virginia statute at issue in
25 Pugin is essentially the same as it's -- as it's

1 applied under Virginia case law, and the -- the
2 model jury instructions that require there to be
3 a specific intent to help escape or delay,
4 capture prosecution or punishment. And that is
5 what it means to obstruct justice, we think, if
6 you look at the dictionary definitions and the
7 commentators.

8 CHIEF JUSTICE ROBERTS: Justice
9 Gorsuch?

10 JUSTICE GORSUCH: Well, you're not
11 going to like this any more.

12 Just to follow up on Justice Kagan's
13 thought, I wonder whether we're essentially
14 asked to -- between these two choices, I just
15 wonder if you think this is a fair summary of --
16 of our choices in defining what constitutes
17 categorically obstruction of justice.

18 One option would be to look to the
19 common law and to this Court's decisions in
20 Pettibone and Aguilar and say, well, that
21 usually meant at common law traditionally that
22 there was an ongoing proceeding, obstruction of
23 justice was contempt of court, things like that.

24 The other is to look at dictionaries
25 and say, well, there's some linguistic gift in

1 this concept, and when we speak casually, the
2 gist of any kind of thing that impedes an
3 investigation -- failure to report a crime,
4 accessory after the fact, witness tampering --
5 they -- they sound sort of like obstruction of
6 justice, and they would fall within a
7 contemporary dictionary definition. So that
8 should be the choice we make.

9 Is that a fair summary of our two
10 choices here?

11 MR. GANNON: Well, I -- I would
12 quibble with both halves briefly to say that
13 with respect to the first part, Pettibone and
14 Aguilar were not talking about the common law.

15 JUSTICE GORSUCH: I understand.

16 MR. GANNON: They were talking about a
17 specific statute.

18 JUSTICE GORSUCH: I -- I understand
19 that. But, if we look at the common law, it's
20 consistent with Pettibone and Aguilar, I
21 think -- I think we'd find. So I -- I take your
22 quibble, but --

23 MR. GANNON: And -- and with respect
24 to the second half, I would say that we're not
25 just resting on dictionaries. We're resting on

1 a lot of other federal and state criminal
2 offenses. We think that 1512 is an
3 obstruction-of-justice offense. We think
4 Section 3 is an obstruction-of-justice offense.

5 JUSTICE GORSUCH: Let's take 1512. I
6 mean, that may be your best one, and you rely on
7 it a lot in your brief, and that has to do with
8 witness tampering, of course.

9 But Congress there specifically said,
10 in this instance, you don't need to have a
11 pending proceeding. And I -- I take the point
12 that that in some ways might be seen to -- might
13 seem to help you, but might it also hurt you in
14 another way in the sense that there Congress
15 exhibited an understanding that normally
16 obstruction of justice, as understood at common
17 law, the soil that came with 1503, requires an
18 ongoing offense, but not in this case, Congress
19 said.

20 So doesn't that kind of -- isn't it
21 the exception that proves the rule?

22 MR. GANNON: We don't think it is
23 because we think that Congress was clearly
24 distinguishing the new provision from 1503, but
25 that doesn't mean that Congress didn't think

1 that 1512 was also an obstruction-of-justice
2 offense. And, indeed, it was understood that it
3 was going to take on a lot of the cases that had
4 previously proceeded under 1503.

5 JUSTICE GORSUCH: And -- and then this
6 linguistic grift concept of obstruction of
7 justice is -- as from the dictionary definitions
8 is impeding a process of justice, I think, is
9 how you use.

10 What does that mean? Is that defined
11 in law anywhere?

12 MR. GANNON: There's not a separate
13 definition of that.

14 JUSTICE GORSUCH: Yeah.

15 MR. GANNON: But we do think that you
16 can impede or inter- --

17 JUSTICE GORSUCH: I'm not aware of
18 one, and I didn't see one in your brief.

19 MR. GANNON: I mean, I think that
20 the -- the ordinary meaning of the phrase
21 "impede or interfere" is to prevent from being
22 effectuated in -- in its -- in its full way.
23 And we think that you can impede an
24 investigation by keeping it from getting off the
25 ground.

1 JUSTICE GORSUCH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Kavanaugh?

4 JUSTICE KAVANAUGH: Just on -- a
5 follow-up on these questions.

6 I think you're saying that the core of
7 this has to be defined by the mens rea, willful
8 interference with the process of law, and that
9 that unites all of these disparate crimes.

10 MR. GANNON: We agree with that. We
11 think that that -- that's common across the
12 federal and state statutes that we cite and that
13 we think Congress was aware of.

14 JUSTICE KAVANAUGH: And if a crime
15 didn't have that mens rea requirement, it
16 wouldn't work?

17 MR. GANNON: Yes. I think that the
18 retaliation offenses come in a little bit
19 differently with respect to whether there's a --
20 you know, a -- a -- a pending proceeding and --
21 and how you're interfering with that.

22 We think that the retaliation against
23 a witness, a juror, a judge, other participants
24 in the trial process, those would also still
25 come in because we think that that's an attempt

1 to interfere with the machinery of justice even
2 though it comes after the conclusion of an
3 individual proceeding, but -- but, yes, I take
4 your point that -- that we -- we do think that
5 that is what is common. That is our point, that
6 that is what is common across this family of
7 offenses.

8 JUSTICE KAVANAUGH: And then defining
9 it, Justice Gorsuch's question, I thought it was
10 usually examples: shredding documents, killing
11 a witness, killing the judge, paying off a
12 witness, bribing a juror. I mean, there's a
13 family of offenses. I didn't think it was that
14 complicated, but I don't know what you think
15 that the -- the definition of process of law
16 was.

17 MR. GANNON: Well, I -- I -- we do
18 think that all of those are going to come in.
19 We think that the fact that those are all, you
20 know, different acts demonstrates why this is a
21 family of offenses, and -- but we -- but they
22 are still united --

23 JUSTICE KAVANAUGH: Your temporal
24 point -- killing the judge during the case is --
25 is the same as killing the judge after the case?

1 MR. GANNON: Yes. Or --

2 JUSTICE KAVANAUGH: They're both
3 obstruction?

4 MR. GANNON: And also, you know,
5 preventing a witness from showing up during the
6 trial is the same as preventing the witness from
7 reporting a crime to the police in the first
8 instance.

9 JUSTICE KAVANAUGH: Okay.

10 MR. GANNON: And, indeed, in
11 California, as we point out, they punish the
12 preventing the report of the crime even more
13 harshly than preventing a witness from
14 testifying at trial.

15 JUSTICE KAVANAUGH: Okay. A slightly
16 different tack. "Relating to," I think there is
17 ambiguity about what that means, and I wouldn't
18 want it to just stretch forever, like some of my
19 colleagues said. But, to the extent there's
20 ambiguity about whether it's the core 1503 or
21 includes before and after, I would think
22 "relating to" is -- is a helpful textual
23 indicator there.

24 MR. GANNON: I -- I agree with that.
25 And I -- I would also agree with Justice

1 Jackson. If you took this as a family of
2 offenses and this relates to the entire family
3 of offenses, that would -- that would capture
4 the bulk of what we're concerned about here.

5 JUSTICE KAVANAUGH: Okay. And then
6 last question, again, on a different tack.

7 The immigrant in these cases is still
8 eligible -- correct me if I'm wrong -- for
9 statutory withholding of removal and for CAT,
10 Convention Against Torture, as well. Is that
11 accurate? I saw that in a footnote.

12 MR. GANNON: I believe -- that's --
13 that's in Footnote 3 on page 3 of our brief.

14 JUSTICE KAVANAUGH: Accurate footnote?

15 MR. GANNON: I sure hope so.

16 JUSTICE KAVANAUGH: Okay. Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett?

19 JUSTICE BARRETT: Mr. Gannon, in your
20 interchange with Justice Jackson, she was asking
21 you about Chapter 73. I just wanted to clarify.

22 That is a title that was put in by the
23 codifiers, not Congress, correct?

24 MR. GANNON: To the extent that
25 Congress codified Title 18 as positive law in

1 1948, then Congress adopted it, but they did so
2 along with a provision that said: Don't
3 consider where this particular offense is
4 classified when you're construing this offense
5 for purposes of -- of construing Title 18. And
6 so --

7 JUSTICE BARRETT: Right.

8 MR. GANNON: -- the answer to your
9 question is -- is "yes, but."

10 JUSTICE BARRETT: Well, but we've --

11 MR. GANNON: It ends up in the same
12 place.

13 JUSTICE BARRETT: -- said you can't
14 put too much weight on that --

15 MR. GANNON: That --

16 JUSTICE BARRETT: -- the fact that it
17 appears under Chapter 73, the title "obstruction
18 of justice."

19 I'm just wondering how far you would
20 take that. Do you -- are there any offenses in
21 Chapter 73 that you think wouldn't qualify, or
22 is the fact that they fall under the title
23 "obstruction of justice" as organized by the
24 codifiers enough?

25 MR. GANNON: If they don't have the

1 specific intent, then I don't think that they
2 would qualify. The -- the 1520 offense about
3 keeping audit papers may or may not include that
4 specific intent. I'm not sure. The civil --

5 JUSTICE BARRETT: Well, there's one
6 about a sound truck outside of a courthouse too.

7 MR. GANNON: -- the -- the -- the
8 civil actions in, you know, 1514 and 1514A
9 aren't criminal offenses. So something can be
10 there without being an obstruction-of-justice
11 offense. But we -- we -- we think that the fact
12 that Congress put them all together is evidence
13 consistent with a common meaning and a common
14 understanding and what we think the term means
15 --

16 JUSTICE BARRETT: Okay. Thank you.

17 MR. GANNON: -- without making the
18 title dispositive.

19 CHIEF JUSTICE ROBERTS: Justice
20 Jackson?

21 JUSTICE JACKSON: Yes. So I think
22 that was helpful because, what is your view?
23 Your view is that in order to be in the family
24 of offenses, you have to do what? I'm sorry.

25 MR. GANNON: You -- you have to take

1 some affirmative act --

2 JUSTICE JACKSON: Okay.

3 MR. GANNON: -- with a specific
4 intent --

5 JUSTICE JACKSON: Okay.

6 MR. GANNON: -- to interfere with the
7 process of justice and law.

8 JUSTICE JACKSON: And, conceivably, we
9 can read all of the listed offenses that
10 Congress has grouped together, whether it's the
11 codifiers or not, as giving rise to those
12 elements, correct?

13 MR. GANNON: Yes.

14 JUSTICE JACKSON: I mean, there's
15 nothing in here that you look at and say that's
16 not conceivable, the -- the elements that you
17 have identified?

18 MR. GANNON: As -- as I just suggested
19 to Justice Barrett, I -- there may be an
20 argument that aspects of 1520 would not come in
21 because that's just to -- a requirement to
22 preserve audit papers and leave that --

23 JUSTICE JACKSON: Destruction of
24 corporate audit records is -- is 1520?

25 MR. GANNON: Yeah. To the extent that

1 that -- that that is -- that would look more
2 like the offense in Marinello, that -- that
3 might be a limit. But I -- I -- we haven't
4 taken a position on that. But my -- my real
5 point is that we think that Chapter 73 includes
6 lots of illustrative offenses, that some of them
7 have pending proceeding requirements, some of
8 them implicitly do not, and the 1512 ones
9 explicitly do not. And that's why we think that
10 the pending proceeding requirement isn't common
11 to the family.

12 JUSTICE JACKSON: Okay. And if I --
13 if I agree with you about that, help me just one
14 more time with aiding and abetting or accessory
15 after the fact.

16 MR. GANNON: Accessory after the fact.

17 JUSTICE JACKSON: Because what I'm --
18 what I'm worried about is that it doesn't look
19 anything like any of these insofar as these are
20 all, whether it's a pending proceeding or not --
21 and by "these," I mean the ones in Chapter 73.

22 Whether it's a pending proceeding or
23 not, there is a circumstance in which, as you
24 say, the wheels of justice are turning in some
25 way, there's an investigation, there's an actual

1 pending proceeding, there are things that are
2 happening that are the administration of
3 justice, and the actus reus in these various
4 offenses go toward interference with that
5 process.

6 I guess I'm just still a little
7 worried about accessory after the fact.

8 MR. GANNON: And -- and I would say
9 that even in Chapter 73, those offenses, the
10 wheels don't have to have started turning. It
11 -- it could just be that there's a potential
12 investigation there.

13 And I think that in accessory after
14 the fact, it talks about the intention to
15 prevent apprehension, trial, or punishment. All
16 of those things -- apprehension, trial, or
17 punishment -- are things that happen during the
18 anticipated proceeding. That's what the
19 investigation or proceeding would be. You are
20 trying to hinder it right there in the element
21 of the offense. And that's why we agree with
22 all those courts that said the gist of that
23 offense is obstruction of justice.

24 JUSTICE JACKSON: Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Ms. Hutton.

3 ORAL ARGUMENT OF MARTHA HUTTON

4 ON BEHALF OF JEAN FRANCOIS PUGIN

5 MS. HUTTON: Mr. Chief Justice, and
6 may it please the Court:

7 In 1996, when Congress chose to put
8 the words "offense relating to obstruction of
9 justice" into subsection (43)(S), it was
10 choosing a term of art that meant interference
11 with a pending proceeding.

12 Just one year earlier, this Court had
13 reaffirmed its century-old holding from
14 Pettibone: obstruction can only arise when
15 justice is being administered. And it had
16 further explained that any interference must
17 have a close nexus to that pending proceeding.

18 An offense that might or might not
19 affect a proceeding is not obstruction. No
20 persuasive authority supports abandoning this
21 well-settled, well-bounded definition for
22 something looser, like a purpose to interfere
23 with the process of justice.

24 And doing so would be contrary to the
25 notice and administrability concerns of the

1 categorical approach itself. It would leave
2 courts, lawyers, and noncitizens to guess
3 whether a predicate offense might at some point
4 interfere with some possible process of justice
5 and thus be an aggravated felony.

6 Mr. Pugin's case demonstrates the
7 overreach of this looser approach. Accessory
8 after the fact is a distinct offense. It's
9 being a party to another person's crime, not an
10 esoteric variant of obstruction. It is not, so
11 to speak, in the family.

12 It is recognized in the common law, in
13 every state, and in the federal Criminal Code as
14 something different, and so it is too big a leap
15 to decide Congress meant to list it as an
16 aggravated felony when it chose words that are
17 the name of a different crime. That kind of
18 leap is the opposite of the interpretive
19 restraint this Court uses in construing statutes
20 with significant immigration and criminal
21 consequences.

22 The Court should instead stay on solid
23 ground and confirm that an offense relating to
24 obstruction of justice under (43)(S) requires a
25 close nexus to a pending proceeding.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: And what do you mean
3 by "pending proceeding"? Are you referring --
4 you seem to focus mostly on judicial
5 proceedings.

6 MS. HUTTON: Yes, Your Honor. Our
7 point in explaining the core as the judicial
8 proceedings that are protected by 1503, I think,
9 is not to object to potentially including other
10 official proceedings in that generic definition.
11 It -- it certainly wouldn't matter for
12 Mr. Pugin. There's no proceeding involved in
13 his -- his offense.

14 But what I think it would illustrate
15 is that already words like "relating to" or an
16 expansive interpretation that might be
17 underscored by using the categorical approach
18 here is already doing some work because
19 including an agency proceeding that might be
20 from 1505, for example, would be expansive, but
21 it would -- it would still be consistent with
22 that core meaning.

23 JUSTICE THOMAS: So how would you
24 confine that, though? What -- what about an
25 investigation?

1 MS. HUTTON: I think, again, an
2 investigation is a step further out from the
3 core definition and so should be viewed with
4 some caution, but I don't think we would object
5 necessarily to it being used here. Accessory
6 after the fact doesn't require an investigation.
7 No one -- no one makes that contention.

8 And, in 1503, grand jury
9 investigations, for example, are included, and
10 so it would be consistent with that core as well
11 to include investigations.

12 JUSTICE THOMAS: I think the problem
13 that we're having is that the government wants
14 to broaden the definition. It's like we're
15 navigating between Scylla and Charybdis, and no
16 one is giving us a way to get between the two
17 extremes.

18 And you're saying you would like to
19 restrict it to a pending proceeding, but yet you
20 admit that as you drift away from the core, that
21 is, judicial proceedings, we have no way --
22 you're not giving us a way to navigate how far
23 out do we go from that core proceeding.

24 MS. HUTTON: Your Honor, I think the
25 mast that -- that is -- that we're tied to here

1 --

2 JUSTICE THOMAS: Mm-hmm.

3 MS. HUTTON: -- so to speak, is the
4 proceeding requirement itself. It is the core,
5 it's the object, kind of grammatically, what are
6 you protecting. And there's nothing strange
7 about saying, once justice has taken its most
8 official form, that's something special to
9 protect in a specific, discrete statute.

10 And so we think the proceeding is what
11 can't move. I think my friend thinks the intent
12 is what can't move. If -- if -- if the issue is
13 the beginning -- whether that proceeding has
14 begun, the -- the Court has in other cases taken
15 a little bit of an envelope around an existing
16 proceeding and said, well, if it's in the
17 offing, for example.

18 I don't understand my friend to be
19 proposing something like that, and that might be
20 hard to administer in the categorical approach.
21 But, again, with accessory after the fact, there
22 needs -- nothing needs to be on the horizon.

23 JUSTICE KAVANAUGH: But your -- your
24 -- your position is not just accessory after the
25 fact; it's anything afterwards, after the

1 proceeding, correct?

2 MS. HUTTON: Your Honor, it -- it
3 wouldn't matter for us. We could certainly
4 accept that. And I think, if you were to say
5 punishment relating -- because of a concluded
6 proceeding, a proceeding that has been pending,
7 here's how it would be consistent, if I may, is
8 -- is -- the pending proceeding, when it is
9 occurring, part of what protects that is
10 knowledge that afterwards a witness is not going
11 to get killed without the law having some
12 negative and deterrent effect towards that.

13 And so you're still protecting the
14 actual functioning process of justice, the
15 wheels, when they are turning, in a way that
16 would be, again, still consistent with the focus
17 on the proceeding.

18 JUSTICE KAVANAUGH: So retaliation
19 after the proceeding has concluded, retaliation
20 crimes, which I think Congress filled that gap
21 in the '40s, are those obstruction of justice or
22 not?

23 MS. HUTTON: Your Honor, I think they
24 could be. They're in 1503, and there has been a
25 proceeding pending and that's going to have a --

1 both historically purpose-wise and also I think
2 prudentially in terms of is this an admin- -- a
3 -- a standard that would make sense, all of
4 those could include a -- a --

5 JUSTICE KAVANAUGH: So -- so you're
6 not arguing for a temporal nexus alone then?

7 MS. HUTTON: I think my friend is --
8 in their briefs gave the name temporal
9 necklace -- excuse me, nexus -- it is the
10 existence of the proceeding at some point. I
11 think we've used the word "extant proceeding."
12 I guess former proceeding would be fine too.

13 JUSTICE KAVANAUGH: And accessory
14 after the fact if there was a proceeding? I --
15 I guess I'm not understanding the distinction
16 between retaliation and accessory after the fact
17 that you're drawing. Maybe I'm not following.

18 MS. HUTTON: Your -- Your Honor, I
19 think, if I may try to clarify, what -- what we
20 would see as being consistent and involving a
21 concluded proceeding would be something like
22 interference related to a proceeding that has
23 been pending. So there has been a process and
24 then a retaliatory offense like in 1503 where
25 it's captured. It is relating to that process.

1 And, of course, there is the word "relating," so
2 maybe that's some use for it there.

3 Accessory after the fact doesn't
4 require that any authority of any kind ever have
5 known or suspected that the -- that the
6 principal's offense took place.

7 If I lend Bob a shovel to go bury the
8 gun he used, I may have some intent to help Bob
9 avoid punishment, but we don't need to know that
10 the sheriff is coming down the street or that
11 the grand jury has issued an indictment. There
12 is no relationship -- the wheels are not yet
13 turning, no accessory offense, prior to that.

14 JUSTICE KAVANAUGH: But -- but the
15 wheels would turn, so going to the temporal
16 point beforehand, the wheels would turn if -- if
17 you didn't take this act with the intent to
18 frustrate the process of justice.

19 So what about that? The most
20 effective form of obstruction of justice is to
21 convince the witness, kill the witness ahead of
22 time, prevent the witness ahead of time, hide
23 the witness.

24 MS. HUTTON: Your Honor, I think --

25 JUSTICE KAVANAUGH: What about that?

1 MS. HUTTON: -- I think that would be
2 a bad act. It would be criminal. It would be
3 --

4 JUSTICE KAVANAUGH: It's not
5 obstruction of justice?

6 MS. HUTTON: It -- it is not because
7 what you have there is -- is a -- the wheels
8 might or might not turn. And Aguilar tells us
9 might or might not is not enough. And -- and I
10 --

11 JUSTICE BARRETT: I'm -- oh, sorry.

12 JUSTICE ALITO: What if it's well --
13 what if it's pretty clear that the wheels are
14 going to start turning pretty soon? Let's say
15 that a new district attorney is elected in a
16 county and the district attorney says, I'm going
17 to crack down on organized crime in this -- in
18 this place, and it's known that the detectives
19 in the DA's office have -- are questioning a
20 particular person, and it's also known that a
21 grand jury is going to begin to sit on Monday.

22 So, if someone who fears that he or
23 she's going to be indicted by that grand jury
24 approaches this witness on Sunday and says,
25 here's \$10,000 and a ticket to a place where

1 there's no extradition treaty, be on that flight
2 and stay there until we let you know or we're
3 going to wipe out your family. So that's not
4 obstruction of justice as you see it.

5 But, if the person waits until
6 Tuesday, it's too late, right?

7 MS. HUTTON: Your Honor, I think that
8 is a -- a -- a harder question and that might be
9 if there were some kind of foreseeability
10 analysis maybe where it would work the day
11 before.

12 But I think what that does include,
13 Your Honor's example, is a particularity
14 requirement. And Justice Barrett inquired about
15 this earlier. It's in every case. If a -- a
16 particular -- where there is a foreseeability
17 requirement, there is a particular proceeding
18 that must be in process.

19 JUSTICE ALITO: I -- I thought your
20 argument was that there has to be a pending
21 proceeding.

22 MS. HUTTON: That -- that is our
23 argument. And if -- if the --

24 JUSTICE ALITO: So there's no pending
25 proceeding in this case. The grand jury isn't

1 going to start to sit until Monday.

2 MS. HUTTON: That's right, Your Honor.
3 And I think, if there were a -- a -- a desire to
4 bridge that gap, A, there are plenty of ways for
5 that to be a criminal act that are not
6 obstruction of justice.

7 B, that would imply a particularity
8 requirement that I think does exist in the law.
9 It's certainly not -- does not exist in my
10 friend's standard here. It's something that the
11 BIA failed to apply and the Fourth Circuit in
12 this case.

13 And that -- that is another way that
14 we are in a -- kind of a -- a --

15 JUSTICE KAVANAUGH: Well, I thought --

16 CHIEF JUSTICE ROBERTS: Or C --

17 JUSTICE KAVANAUGH: -- I thought that
18 meant --

19 JUSTICE BARRETT: But it sounds to me
20 like you've --

21 CHIEF JUSTICE ROBERTS: I'm getting
22 both sides here. Or C, you could have a broader
23 understanding of what "relating to" means.

24 It seems to me that if this is all
25 taking place on Sunday in anticipation of what's

1 going to happen on Monday, I -- I would think a
2 very narrow definition, we would say, well,
3 that's certainly relating to that proceeding.

4 But you seem to have a much stricter
5 understanding.

6 MS. HUTTON: I -- I think that's
7 right, Your Honor, and I think there might be a
8 witness tampering kind of charge or an
9 intimidation charge. I'm not sure it would be
10 obstruction of justice, which has a different
11 and more bounded meaning.

12 And I -- I -- to make sense --

13 CHIEF JUSTICE ROBERTS: No, I -- I
14 guess I -- no, maybe it couldn't be obstruction
15 of justice, but it certainly could be relating
16 to obstruction of justice if it's something, if
17 you wait 10 hours or whatever and do it, it
18 would be obstruction of justice.

19 MS. HUTTON: Your Honor, I think,
20 again, that the word "particularity" might have
21 some work to do there that is absent from my
22 friend's definition. So I think we don't -- we
23 don't get to this example. For the
24 particularity, we would say what is -- what is
25 it that you're interfering with. And so it's

1 limiting that -- that mens rea.

2 JUSTICE KAVANAUGH: But that --
3 that --

4 JUSTICE BARRETT: But that's a --

5 JUSTICE KAVANAUGH: -- that --

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett?

8 JUSTICE BARRETT: I was just going to
9 say but it seems to me now, I mean, I thought
10 one of the virtues of the administrability of
11 your approach was that it required an extant
12 proceeding, putting aside investigation, which I
13 thought might have been a difference between you
14 and your friend on the same side.

15 But it sounds to me like what you're
16 saying now is that your position is essentially
17 the same as the government's with a tightened
18 mens rea standard.

19 MS. HUTTON: Your Honor, I -- I don't
20 mean to convey that. I think our position is,
21 as you articulated at -- at the first point, I
22 am trying to explain, if there was a discomfort
23 with that, ways that would bridge it that would
24 still be more definite than my -- than my
25 friend's approach.

1 JUSTICE BARRETT: So that it could be
2 relating to a proceeding, but "relating to"
3 narrows the mens rea requirement to a particular
4 proceeding --

5 MS. HUTTON: Yes.

6 JUSTICE BARRETT: -- so that it might
7 capture Justice Alito's example of the Sunday
8 versus the Tuesday?

9 MS. HUTTON: And it would exclude this
10 general idea that anytime anyone does something
11 that might or might not lever the possibility of
12 prosecution a little bit is not included with
13 accessory after the fact.

14 JUSTICE BARRETT: And "proceeding,"
15 what's your definition of "proceeding"? Would
16 it, you know, include a magistrate and -- you
17 know, to get a search warrant? Is that an
18 investigation, or is that a proceeding?

19 MS. HUTTON: It would -- it could be
20 either. I think, under the state law, for the
21 categorical approach, it would probably define
22 that. I don't think we would oppose the
23 inclusion of either in the generic offense.
24 Neither is anywhere close to what's required for
25 accessory after the fact.

1 JUSTICE BARRETT: Thank you.

2 JUSTICE KAVANAUGH: Well, I thought
3 the mens rea that Mr. Gannon articulated was
4 designed to solve the problem that you were
5 identifying; in other words, to be convicted of
6 the state offense, the prosecutors in the state
7 offense are going to have to show you
8 specifically intended to interfere with a -- the
9 process of law, a proceeding. So it'll be
10 focused in that way. And the mens rea does what
11 you're asking.

12 MS. HUTTON: Your -- Your Honor, I --
13 I don't think that's quite right an accessory
14 after the fact is the example there, where the
15 prosecutor doesn't have to show that you
16 intended anything towards a proceeding. It just
17 says you've done something that has moved the
18 dial in some way.

19 And so you're not affecting justice in
20 -- in any embodied form there. The government
21 hasn't entered the picture. It's not being
22 obstructed or impeded, anything like that.

23 You're just making punishment or law
24 enforcement maybe a little bit easier or more
25 difficult. And so we're still, I think, in --

1 in quite a gap from accessory after the fact
2 and -- and that definition.

3 JUSTICE KAVANAUGH: Well, if it's
4 something that is preventing the person from
5 being arrested, is that good enough?

6 MS. HUTTON: If there is an ongoing
7 investigation --

8 JUSTICE KAVANAUGH: No. No, there
9 would -- no.

10 MS. HUTTON: No. Then -- then, no,
11 it's not.

12 JUSTICE KAVANAUGH: Okay.

13 JUSTICE JACKSON: Do you --

14 JUSTICE SOTOMAYOR: Counsel, I've
15 struggled a bit with the reasonably foreseeable
16 aspect of this discussion and something that
17 Justice Barrett's question put on. As I looked
18 at 1512, it actually is dealing with this
19 complication. It says, "an official proceeding
20 need not be pending or about to be instituted at
21 the time of the offense."

22 And as I thought about it, the problem
23 with your -- your answer to these questions is
24 that you want a pending proceeding, and one
25 that's imminently going to start or the witness

1 knows it's going to start doesn't count.

2 MS. HUTTON: Mm-hmm.

3 JUSTICE SOTOMAYOR: Assuming I were to
4 disagree with that, that I think that there is a
5 difference between the situation like yours, an
6 accessory after the fact where there's nothing
7 pending or about to be pending, how do I
8 articulate that? Give me a version of how to
9 read this in a way that deals with that
10 difference.

11 MS. HUTTON: I think one way might
12 be -- and, again, our -- our position is not
13 that 1512 would be definitional here, so I'm --
14 but I'm -- I --

15 JUSTICE SOTOMAYOR: No, no, no. But
16 you understand --

17 MS. HUTTON: I understand your point.

18 JUSTICE SOTOMAYOR: -- I think it
19 captures some of the discomfort that's being
20 addressed.

21 MS. HUTTON: So -- so the way this
22 Court captured similar discomfort in Marinello
23 was again that reasonably foreseeable particular
24 proceeding in the offing. So that was many
25 different constraints on a general idea that

1 doing something bad with your taxes would
2 interfere with the administration of -- of the
3 Tax Code. So that would maybe be a kind of --
4 of -- of standard.

5 But, to the BIA, the Fourth Circuit,
6 they did not apply all pieces of that standard.
7 They just said, oh, it's reasonably foreseeable
8 someone might guess. That's not what reasonable
9 foreseeability has meant. This Court has never
10 accepted that kind of vague standard in an
11 obstruction-type case and shouldn't do so here.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Justice Thomas?

15 Justice Alito?

16 JUSTICE ALITO: Back to Justice
17 Barrett's questions about what constitutes a
18 proceeding. So you said a search warrant
19 application would be -- that would be a
20 proceeding?

21 MS. HUTTON: Especially if
22 investigations were included, yes.

23 JUSTICE ALITO: How about if one
24 person is arrested for conspiring to commit an
25 offense and other members of the conspiracy

1 might subsequently be arrested? Would that
2 arrest be -- constitute a proceeding?

3 MS. HUTTON: It might indicate that
4 there was an investigation into a conspiracy,
5 and since you need more than one conspirator, I
6 think probably that indicates there's an
7 investigation into other conspirators. You've
8 got something definite, and I think that's what
9 we're really searching for, is that starting
10 point. Is the machinery on, or is it not?
11 Because it can't be on all the time. That's, I
12 think, our basic premise.

13 JUSTICE ALITO: But your -- you don't
14 think an investigation in and of itself is a
15 proceeding, right?

16 MS. HUTTON: I don't think it's the
17 same as a proceeding. I think the -- the -- it
18 could be, kind of colloquially, a formal action
19 taken by law enforcement to try to investigate
20 or solve or remedy a crime.

21 And so I think the language in the
22 question presented was investigation or
23 proceeding. That treats them differently. So
24 we're happy to do that as well.

25 JUSTICE ALITO: So -- and what about

1 states that don't have grand juries? So, if
2 they're investigating, that -- that's
3 sufficient?

4 MS. HUTTON: I think that would be
5 fair, especially because, if we're saying 1503
6 is really our heartland here, that grand jury
7 investigations are included there. The state
8 doesn't use that. They're still probably doing
9 something perhaps similarly formal even to
10 investigate crimes. That could be included
11 because we want to give some effect to the idea
12 this is a categorical approach case. We're not
13 trying to rule out an effective statute here.

14 JUSTICE ALITO: If I go back to my
15 earlier hypothetical, so we know the grand jury
16 is sitting on Monday, but maybe that's not --
17 this -- that crime is not the one that they're
18 going to take up on Monday. Maybe they're not
19 going to take that up for another week or two.
20 Would that matter?

21 MS. HUTTON: I think you would at
22 least have a particular grand jury proceeding in
23 mind, and if it had not quite started and the
24 Court wanted to include that as the generic,
25 which I don't think is the best -- the best

1 reading, that would still require particularity.
2 It might require reasonable foreseeability. And
3 I think it would also bring in the nexus
4 requirement, which is separate and we haven't
5 talked much about here today. But the Court
6 gave it a lot of effect in Aguilar, where, of
7 course, there was a proceeding ongoing already,
8 but the actions were not close enough.

9 And so the -- the time effect
10 causation-type analysis might also give some
11 work to get us out of this anywhere, anytime,
12 all possible justice standard that my friend
13 proposes and to something that's more coherent
14 and with -- aligned with the historic core.

15 JUSTICE ALITO: All right. One last
16 question. Suppose that Congress enacts a
17 statute that prohibits threatening a witness
18 with a specific intent to obstruct a future
19 investigation or proceeding. Would that be an
20 offense relating to the obstruction of justice?

21 MS. HUTTON: I think not under
22 (43)(S), no.

23 JUSTICE ALITO: Even though it refers
24 specifically to obstruction of justice in the
25 text of the statute, that would not relate to

1 the obstruction -- to obstruction of justice?

2 MS. HUTTON: Well, it might kind of
3 colloquially, maybe under the Sentencing
4 Guidelines, but I think, when you're looking at
5 a statute that was written in 1996 and trying to
6 understand what state offenses fit within that
7 based on what Congress understood those words to
8 mean in 1996, this later affected, more broad
9 statute might not do that, no.

10 JUSTICE ALITO: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Sotomayor?

13 Justice Kagan?

14 Justice Kavanaugh?

15 JUSTICE KAVANAUGH: So, on the
16 accessory after the fact, I think your answers
17 have said, if the police are already
18 investigating and you engage in activities that
19 assist the perpetrator in some way with the
20 proper intent, that that could be covered, is
21 that right?

22 MS. HUTTON: I -- I think that's right
23 in a kind of conceptual way. I want to be
24 clear, under a categorical approach analysis,
25 the question would be: Do the elements of the

1 -- the state crime fit the elements of the
2 generic crime? And so it would just depend what
3 is someone actually being convicted of in that
4 state scenario.

5 I think the accessory-after-the-fact
6 element sometimes wouldn't get into that kind of
7 analysis. So you're really asking, what's the
8 minimum conduct in accessory after the fact?
9 There is no investigating officer going around
10 in that minimum conduct. It is simply entirely
11 prospective and possible.

12 JUSTICE KAVANAUGH: And meanwhile,
13 though, if there's a dead body, but the police
14 don't know about it yet and there -- so there's
15 no investigation ongoing, but you provide
16 assistance in that same scenario in the same way
17 with the same intent, in that case, that's
18 definitely out under your theory, right, because
19 the police don't know about it yet and haven't
20 started?

21 MS. HUTTON: If that was prosecuted as
22 accessory after the fact where the minimum
23 conduct is much different than that, yes, that
24 would still be out.

25 JUSTICE KAVANAUGH: And the other

1 could be in?

2 MS. HUTTON: I -- my memory is -- is
3 fading a little bit on -- on the other, but --

4 JUSTICE KAVANAUGH: The other being
5 the police have already started to investigate.

6 MS. HUTTON: Yeah, especially if a
7 state offense, for example, discussed you have
8 -- you have interfered with an ongoing law
9 enforcement investigation, there could be a
10 state crime that criminalized that, yes, you
11 have the elements right there. And when you
12 compare that to a federal offense like what
13 we're proposing, it's clearly in.

14 But, of course, we just can't lose
15 sight in these hypotheticals that we're looking
16 at the elements of the state offense in most
17 cases and the generic federal offense.

18 JUSTICE KAVANAUGH: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Barrett?

21 JUSTICE BARRETT: My questions are
22 just to distill exactly what your position is to
23 make sure I understand it.

24 Coming into argument, I thought a
25 distinction between Mr. Pugin and

1 Mr. Cordero-Garcia was that you thought it was
2 just a proceeding, whereas he said it could be
3 an investigation or proceeding. But I hear you
4 during argument saying that you think it could
5 be an investigation or a proceeding. Am I
6 understanding that correctly?

7 MS. HUTTON: Yes, Your Honor.

8 JUSTICE BARRETT: Okay. So you've
9 shifted gears slightly?

10 MS. HUTTON: Yes, and if I can just
11 explain briefly. I think our focus was to try
12 to answer the question that the Court presented:
13 What is -- what is obstruction of justice? It's
14 a -- interference with a judicial proceeding.
15 And if it is expanded beyond that, and there are
16 some principled ways to do that that we've
17 discussed here, maybe that's giving effect to
18 the categorical approach; maybe that's giving
19 effect to "relating to." That might be --
20 include these other investigations, proceedings.

21 We don't necessarily take issue with
22 that. It doesn't make a difference for
23 Mr. Pugin. And I think it might also be good to
24 look at that in another case where the type of
25 proceeding did matter.

1 JUSTICE BARRETT: Mm-hmm.

2 MS. HUTTON: But it's not going to be
3 definitional for accessory after the fact either
4 way, so we're not fighting that.

5 JUSTICE BARRETT: So your primary
6 concern would be an Arthur Andersen-type concern
7 of tying the conduct, the obstructive, impair,
8 impede conduct, to a specific investigation or a
9 specific proceeding that's reasonably
10 foreseeable?

11 MS. HUTTON: I think that's right.

12 JUSTICE BARRETT: So it turns more on
13 mens rea -- this goes back, I guess, to the
14 question that I asked before. It turns more on
15 mens rea than on your definition of obstruction
16 of justice of proceeding or investigation
17 because that's what's doing your narrowing work,
18 right?

19 MS. HUTTON: Well, I -- I think that
20 it's both, where the intent does need to
21 contemplate something particular and that
22 something needs to exist or be in the offing,
23 you know -- and, again, that's not our primary
24 position, but if we're stepping away from
25 existence, you can't go into the ether. There

1 has to at least be some tie to reality or -- or
2 a strong possibility. Fifty-fifty from Aguilar,
3 not enough.

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

6 JUSTICE JACKSON: Do you agree or
7 disagree with the government's view that
8 obstruction of justice is a family or category
9 or classification?

10 MS. HUTTON: It's not our primary
11 position. We think it has a defined common law
12 meaning of -- of protecting those judicial
13 proceedings. Courts have said Chapter 73 is a
14 group that defines this. The Third Circuit, for
15 example. I think the most important thing about
16 that for our purposes is accessory after the
17 fact is nowhere near there.

18 JUSTICE JACKSON: Okay. I wanted to
19 get --

20 MS. HUTTON: Yeah.

21 JUSTICE JACKSON: -- to that, but --
22 but you -- you -- do you accept the Third
23 Circuit and now I think the government's view
24 that there is more than one
25 obstruction-of-justice offense, that it's not a

1 particular thing, like burglary; it is a group
2 of -- of offenses?

3 MS. HUTTON: I think our position is
4 different than that. We do think there is a
5 generic meaning. I think the BIA might have
6 gotten close to it in the Espinoza case with the
7 specific intent to interfere with an existing
8 proceeding-type analysis, which it then backed
9 away from.

10 But that type of definition, which
11 would work with the categorical approach, would
12 be possible here from that singular approach.

13 JUSTICE JACKSON: No, I understand,
14 but I guess I also heard you to say that you
15 thought that what we're trying to do here is
16 figure out what Congress intended when it wrote
17 subparagraph (S) and referred to offenses
18 related to obstruction of justice.

19 So I'm just trying to home in on
20 whether your view is that when Congress said
21 offenses related to obstruction of justice, they
22 were talking about a single
23 obstruction-of-justice offense to start and then
24 offenses that were somehow related to that --
25 that -- that single offense.

1 MS. HUTTON: Yes, Your Honor, we do
2 think it was -- it was thinking more singularly
3 from Aguilar just one year before. That's what
4 obstruction of justice is. If it's going to be
5 a family, perhaps Chapter 73 is a way to look at
6 that.

7 JUSTICE JACKSON: And where in the
8 statute -- so you say 1503 is the only -- is --
9 is the one?

10 MS. HUTTON: We think that's been the
11 archetypal obstruction-of-justice heartland
12 crime in -- for over a century, yes.

13 JUSTICE JACKSON: All right. So, if
14 -- if I disagree and if I'm looking at the
15 entire chapter of 73, with all the various ones
16 that say obstruction or that use "obstruct" in
17 their language, which is a number of them, why
18 is it that you say that your client doesn't fit
19 any of those -- any of those offenses?

20 MS. HUTTON: So two reasons. First is
21 that if you look through all of those statutes,
22 there is a strong current of a pending
23 proceeding requirement. So we believe that does
24 --

25 JUSTICE JACKSON: What about 18, 1518?

1 It doesn't --

2 MS. HUTTON: Well, that was passed
3 after (43)(S). We don't think it's particularly
4 informative. And -- and -- and I don't want to
5 take the position that every single statute
6 there has a pending proceeding requirement.
7 1512 clearly doesn't.

8 But we think there's that strong trend
9 there that if you're going to define a generic
10 crime using interpretive restraint, which is the
11 approach this Court has adopted, then -- then
12 you need that pending proceeding requirement.

13 But, of course, the main point for
14 Mr. Pugin's case, accessory after the fact is in
15 there. It's not a match to a Chapter 73
16 offense. No court that has looked at this
17 problem through that lens has found that it is,
18 and I don't -- I don't think anyone is saying
19 it's a close match for one of those offenses.

20 JUSTICE JACKSON: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Mr. Fleming.

24

25

1 ORAL ARGUMENT OF MARK C. FLEMING
2 ON BEHALF OF FERNANDO CORDERO-GARCIA
3 MR. FLEMING: Mr. Chief Justice, and
4 may it please the Court:

5 The categorical approach doesn't turn
6 on whether an offense seems like or has the gist
7 or feels like it has the effect of obstructing
8 justice. It turns, Justice Jackson, to your
9 question, on the elements of the generic crime
10 of obstruction of justice as traditionally
11 understood.

12 The government's argument today would
13 sweep in convictions for failure to report a
14 crime or for simply urging someone to deal with
15 a traffic accident informally rather than
16 calling the police, and that is an offense under
17 the California statute at issue in
18 Mr. Cordero-Garcia's case.

19 Had Congress meant to treat
20 convictions like that as aggravated felonies, it
21 would not have used the phrase "obstruction of
22 justice," which, through longstanding usage, has
23 required interference with a pending
24 investigation or proceeding. That's because
25 it's only then that the defendant is

1 intentionally interfering with a legal process.

2 Now the generic definition that we
3 propose still captures numerous convictions,
4 like corruptly influencing jurors, threatening
5 prosecutors, or lying to investigating officers,
6 and broader offenses like California's that do
7 not require a pending investigation may still be
8 deportable, but they are not aggravated felony
9 obstruction of justice.

10 I want to make sure that I get to
11 "relating to" and that I try to help the Court
12 between Scylla and Charybdis, but at this point,
13 I welcome the Court's questions.

14 JUSTICE THOMAS: What exactly is the
15 generic crime of obstruction of justice?

16 MR. FLEMING: Our proposed definition,
17 Justice Thomas, is the BIA's definition simply
18 requiring a pending investigation or proceeding.
19 So, specifically, an affirmative and intentional
20 attempt motivated by specific intent to
21 interfere with an investigation or proceeding
22 that is ongoing or pending.

23 JUSTICE THOMAS: So where do you get
24 that?

25 MR. FLEMING: Well, we get it -- we

1 get it from the BIA, we get it from the ordinary
2 meaning, and we get it from state and federal
3 crimes of obstruction of justice, which --

4 JUSTICE THOMAS: So, when you talk
5 about the states and you went through them in
6 your brief --

7 MR. FLEMING: Yes, Your Honor.

8 JUSTICE THOMAS: -- which of the state
9 laws should we choose as a comparator? And
10 on -- in your analysis, what was the basis of
11 your choices?

12 MR. FLEMING: So we look at the state
13 -- so, at the first step of the categorical
14 approach, which is the statutory interpretation
15 step, we look to how states have defined the
16 crime of obstruction of justice.

17 And this is why we think the
18 government engages in the wrong exercise,
19 because it looks at state crimes or even whole
20 portions of state codes that use different
21 labels, like offenses against public
22 administration or governmental administration.
23 That tells us nothing about what Congress meant
24 when it said obstruction of justice.

25 There are 15 states that in 1996

1 defined crimes of obstruction of justice, and
2 more than half required a pending proceeding.
3 We counted eight, and then the government
4 rightly pointed out in their reply in Footnote 8
5 that we undercounted because we have the right
6 to claim Virginia.

7 So there are nine out of 15 that do
8 require a pending proceeding. Two are
9 ambiguous. One requires a reasonably
10 foreseeable proceeding. Only three of 15
11 support the government's position.

12 I -- the -- I do want to address the
13 response that Mr. Gannon previewed in his
14 opening, which is, well, it can't be that only
15 15 jurisdictions criminalize obstruction of
16 justice.

17 The point is, when states criminalize
18 this kind of behavior, sometimes they use
19 different names for their offenses, and at the
20 first step of the categorical approach, that's
21 not relevant to the statutory interpretation
22 exercise. We're looking at what Congress
23 defined the generic obstruction-of-justice
24 offense to be in 1996.

25 However, at the second step, when the

1 time comes to compare state convictions to the
2 federal generic, there are plenty of other
3 offenses that are going to qualify as generic
4 obstruction of justice.

5 We cite some of them in Footnote 18 of
6 our brief: California Penal Code 95, corrupt
7 influencing of jurors; Colorado 18-8-608,
8 intimidating of a juror; 609, jury tampering;
9 New York Penal Law 2-15-13. I can go on. There
10 are many of them that are going to qualify.

11 But, when you are trying to determine
12 what the -- the elements of the federal generic
13 crime of obstruction of justice is --

14 JUSTICE KAVANAUGH: Well, many --

15 MR. FLEMING: -- you look at --

16 JUSTICE KAVANAUGH: -- many before and
17 after the proceeding, many of those crimes,
18 although not with the label, are before or after
19 the proceeding, correct?

20 MR. FLEMING: So -- so some of the
21 retaliation crimes can be charged if the
22 proceeding has concluded.

23 And on that point, Justice Kavanaugh,
24 I'd agree with Ms. Hutton that I think -- well,
25 first of all, it -- it doesn't affect the

1 outcome in either of these cases. So, if the
2 Court were to include retaliation after the
3 proceeding is concluded, that would still
4 require --

5 JUSTICE KAVANAUGH: Then the temporal
6 point's lost then.

7 On -- on the before point, I guess I'm
8 not sure why Congress in 1996 wouldn't have been
9 looking at the body of federal law of
10 obstruction crimes, and those included a variety
11 of crimes where the proceeding did not yet have
12 to be pending, and to your point about the
13 generic offense, I don't understand why,
14 therefore, to follow up on Justice Thomas, it's
15 not defined as acts taken with the willful
16 intent to obstruct the legal process.

17 MR. FLEMING: Well, so -- so, to -- to
18 take the federal Chapter 73 first, the -- the
19 overwhelming majority of provisions in Chapter
20 73 in 1996 did require a pending proceeding,
21 fully 12 out of 16.

22 JUSTICE KAVANAUGH: Right. But you --
23 you're aware, right, that Congress specifically
24 in '45 and '67 broadened past the core that had
25 been in 1893 of just having a pending

1 proceeding, and they did it in both directions:
2 the retaliation afterwards and some of the
3 offenses that could be considered obstruction
4 beforehand.

5 Do you agree with that history?

6 MR. FLEMING: Well, certainly,
7 Your Honor. And I'm not --

8 JUSTICE KAVANAUGH: Okay.

9 MR. FLEMING: -- I'm not here to -- I
10 apologize.

11 JUSTICE KAVANAUGH: So, if that -- if
12 -- if we have that history, Congress itself,
13 you've been relying and your friend on the other
14 side -- on this side have been relying on, well,
15 there's this core from back in the 1800s.
16 Congress had changed that quite dramatically by
17 the time 1996 came around, correct?

18 MR. FLEMING: Our position on that,
19 Justice Kavanaugh, is that those are nongeneric
20 offenses just like how in Taylor this Court
21 recognized that there were states that had
22 defined "burglary" more broadly than the generic
23 breaking into a --

24 JUSTICE KAVANAUGH: That -- okay.

25 MR. FLEMING: -- into a building.

1 JUSTICE KAVANAUGH. And that gets us
2 to whether we should define the generic offense
3 willful interference with the process of law or
4 willful interference with a pending proceeding,
5 right? You think that's the question?

6 MR. FLEMING: We would say
7 investigation or proceeding, yes, Your Honor.

8 JUSTICE KAVANAUGH: Investigation or
9 proceeding. And why shouldn't it be willful
10 interference with the process of law if the
11 federal statutes, if the Model Penal Code, if
12 the state statutes -- some -- had developed in
13 the way that they developed, perhaps most
14 relevant being the federal statutes?

15 MR. FLEMING: Well -- well, let me --
16 let me start. The Model Penal Code did not have
17 an obstruction of justice. They didn't have an
18 offense called obstruction of justice, right?
19 They have witness tampering, they have tampering
20 with physical evidence. None of that tells you
21 what Congress meant when it used the specific
22 generic offense phrase, "obstruction of
23 justice."

24 The states, the vast majority that did
25 use that phrase did require a pending

1 proceeding. The government's pointed to only
2 three of them that didn't.

3 Now, when we get to Chapter 73, again,
4 you have a situation where --

5 JUSTICE KAVANAUGH: I guess that seems
6 artificial because we know those are
7 obstruction-of-justice offenses. They're using
8 a more specific name within the family of
9 obstruction of justice, like the Sentencing
10 Commission describes all these, Chapter 73
11 describes all these.

12 You agree witness tampering is a form
13 of obstruction of justice, don't you?

14 MR. FLEMING: Well, it depends on the
15 elements. If there's a pending proceeding or
16 investigation, then it will be generic
17 obstruction of justice.

18 Congress is free and this Court can
19 use the phrase in other ways, but those are
20 nongeneric usages of the term, just like
21 breaking into a car can be called burglary. It
22 has the gist of burglary, it sounds like
23 burglary, but it isn't generic burglary as this
24 Court has consistently recognized it.

25 Unlawful sexual intercourse with

1 someone who is 17 years old sounds like sexual
2 abuse of a minor. Some states call that sexual
3 abuse of a minor, but it's not generic sexual
4 abuse of a minor, as this Court expressly said
5 in Esquivel-Quintana. So that's how I would
6 account for the minority of offenses within
7 Chapter 73, where Congress in 1512 expressly has
8 said we are not requiring a pending
9 investigation or a pending proceeding here
10 precisely because the generic form of the
11 offense did require it.

12 When they wanted to create offenses
13 that were not generic, they said so, or they
14 created a specialized idiosyncratic provision to
15 address, for instance, healthcare offenses in
16 1518.

17 Those are crimes. It's perfectly fine
18 to call them crimes. It's perfectly fine to
19 even call them obstruction of justice. But they
20 are not generic obstruction of justice any more
21 than breaking into a car or a boat is generic
22 burglary.

23 I would like to talk about "relating
24 to" because I do think that --

25 JUSTICE ALITO: Well, before you get

1 to that --

2 MR. FLEMING: Yes.

3 JUSTICE ALITO: -- there -- there's a
4 difference between burglary and obstruction of
5 justice. Burglary was what was involved in
6 Taylor, which gave rise to this categorical
7 approach. It's a common law offense. And the
8 elements of that common law offense were well
9 known, so that was the basis for saying that
10 these are the elements of generic burglary.

11 But obstruction of justice is not the
12 same. It wasn't a common law offense. It is a
13 concept that developed over the years. Isn't
14 that true?

15 MR. FLEMING: I -- I mean, Blackstone
16 does talk about impediments to justice and
17 summarizes what -- what offenses he believes
18 qualify, and they are all interference --

19 JUSTICE ALITO: A variety of offenses
20 --

21 MR. FLEMING: -- with court
22 proceedings --

23 JUSTICE ALITO: -- a variety of
24 offenses qualify.

25 MR. FLEMING: -- which share the

1 element of interference with a -- and impeding a
2 court proceeding. And that's what the Black's
3 Law Dictionary in 1996 required.

4 I'll note sexual abuse of a minor
5 wasn't a common law offense either by that name.
6 But this Court had no problem applying the
7 categorical approach and coming up with a
8 generic definition of that offense.

9 JUSTICE ALITO: But there are many
10 authorities going back to the 19th Century that
11 describe witness tampering as obstruction of
12 justice without drawing a distinction between
13 tampering with a witness in a proceeding that's
14 pending or in a future proceeding, isn't that
15 true?

16 MR. FLEMING: I'm having trouble
17 bringing one to mind. Blackstone
18 certainly talked --

19 JUSTICE ALITO: Well, it's described
20 as an obstruction of justice over and over
21 again. And when it's so described, it isn't --
22 they -- they -- those authorities don't say, but
23 only if there's a pending proceeding.

24 MR. FLEMING: I think, when Blackstone
25 talks about a witness giving evidence, he's

1 talking about giving evidence in court. Going
2 and giving a -- calling up a police officer and
3 saying, I think I -- I just saw a crime being
4 committed is not giving evidence, and I don't
5 know of a 19th Century authority that said that
6 was the offense of obstruction of justice, but I
7 might be misremembering.

8 JUSTICE ALITO: How important is
9 Pettibone to your argument?

10 MR. FLEMING: I think Pettibone is --
11 is -- is important because it -- 1503 is the
12 generic, general, very broad
13 obstruction-of-justice offense, so to the extent
14 the Court is looking to federal practice and
15 usage of that term, the fact that Congress
16 legislated on the background of Pettibone
17 indicates that it understood obstruction of
18 justice the way the majority of states that have
19 an obstruction-of-justice offense understand it,
20 which is to require a pending investigation or
21 proceeding.

22 JUSTICE ALITO: Well, wasn't Pettibone
23 the interpretation of a particular statutory
24 provision with particular language?

25 MR. FLEMING: Yes, of course, it was,

1 Your Honor, and that is the generic, general
2 federal obstruction-of-justice statute at the
3 time. It was carried forward into 1503, which
4 the Court interpreted in Aguilar and carried
5 forward the interpretation of it from Pettibone.

6 JUSTICE KAVANAUGH: You've
7 acknowledged, I think, that things like witness
8 tampering, in response to Justice Alito, come
9 within the umbrella of what we think about as
10 obstruction of justice as a concept, right?

11 MR. FLEMING: I mean, I suppose in --
12 in a very loose sense, sure, but we are not
13 engaged in identifying loose senses --

14 JUSTICE KAVANAUGH: Well, maybe we are
15 when Congress -- when they put this in,
16 obstruction of justice, in 1996, doesn't just
17 put in obstruction of justice but puts in
18 "relating to," and maybe it's because, if we
19 assume they're thinking this through, they
20 recognize that obstruction of justice as a
21 single term may be different because it includes
22 witness tampering, document destruction, lots of
23 offenses, murder of a witness, intimidation of a
24 judge, that are going to not necessarily be
25 labeled obstruction of justice. So Congress

1 puts in "relating to obstruction of justice."

2 And I know you were going to turn to
3 that, but I'd be interested in your answer why
4 that doesn't solve the problem here.

5 MR. FLEMING: I'd be delighted to
6 answer it, Justice Kavanaugh. So I think that
7 is exactly how Congress used it. Now recall
8 "relating to" is used 24 times in the aggravated
9 felony provision. It is -- 20 out of 24, it's
10 definitional purely. It's just that it's
11 followed by a cross-reference to a particular
12 federal statute.

13 In the other situations in which it's
14 used, it is used in exactly the way Your Honor
15 described, which is to say, look, these may not
16 be called bribery, it may not be called perjury;
17 it might be called obstruction of justice. So
18 we want to make sure you don't get hung up on
19 the -- on the title of the offense. But that
20 doesn't change the elements of the generic
21 offense of obstruction of justice any more than
22 it does for bribery or perjury.

23 So we don't think it has an expansive
24 effect --

25 JUSTICE KAVANAUGH: But -- but --

1 MR. FLEMING: -- if this -- I'm sorry,
2 Your Honor.

3 JUSTICE KAVANAUGH: I'm sorry, I
4 shouldn't -- but you -- you just said we
5 shouldn't get hung up on the title of the
6 offense, but when you were going through all the
7 state offenses, I think you were telling me to
8 -- to be hung up on the title of the offense.

9 MR. FLEMING: When -- no, when you're
10 interpreting obstruction of justice.
11 Obstruction of justice is a generic offense that
12 has elements, just like perjury, just like
13 bribery.

14 Now we think all "relating to" is
15 doing is directing you to the fact that once
16 you're at the second stage of the categorical
17 approach and you're comparing a state conviction
18 to the elements of obstruction of justice, don't
19 get hung up on the fact that it's not called
20 obstruction of justice. It might be called
21 tampering with a juror. That's fine.

22 If the Court disagrees with me on
23 that, I do think there could be some expansive
24 work that "relating to" would do, but it does
25 not get the government as far as they want to

1 get. I think, for instance, it could have to --
2 it could expand -- there are a lot of states,
3 for instance, that criminalize a bribe -- a
4 bribe receiving by a witness or a juror. So not
5 just bribing a witness, but the witness -- if
6 the witness solicits a bribe and says, I'll
7 change my testimony if you give me a thousand
8 dollars, that is a criminal offense on the part
9 of the witness or on the part of the juror.
10 New York Penal Law 215.05, Nevada 199.250.
11 There are lots of others.

12 That could relate to obstruction
13 because it's not itself obstruction. The
14 witness doesn't have to change the testimony in
15 order to be guilty of that offense, and they
16 don't need specific intent necessarily to
17 obstruct the proceeding. They just want the
18 money. So -- so that might be relating to
19 obstruction.

20 Solicitation of obstruction of
21 justice: I really wish you'd lie to the grand
22 jury in their investigation for me.

23 Subsection (U) of the aggravated
24 felony provision includes attempt and
25 conspiracy, but it doesn't mention solicitation.

1 JUSTICE KAVANAUGH: What --

2 MR. FLEMING: So that might be an
3 option and the retaliation offenses that we've
4 mentioned.

5 JUSTICE KAVANAUGH: I think the
6 government has a common-sense point they start
7 with, which you can deal with, which is the best
8 way to obstruct an investigation is to make sure
9 it never gets started by interfering with a
10 witness or destroying documents or what have
11 you.

12 And I think you've acknowledged some
13 of the titles of offenses that might not be
14 called obstruction would get at that kind of
15 offense even before a proceeding has started.
16 Certainly, some of the federal offenses would
17 and state offenses as well.

18 So why isn't that -- why doesn't that
19 help us inform what "relating to" means here?

20 MR. FLEMING: May I respond, Mr. Chief
21 Justice?

22 CHIEF JUSTICE ROBERTS: Yes.

23 MR. FLEMING: So I think the -- the --
24 the difficulty with -- with this is that before
25 any kind of investigation or proceeding has

1 started, there is -- we are -- we're at a
2 different moment where the defendant does not
3 know that there's any proceeding that's
4 necessary going to begin, hasn't made the
5 determination that they want to throw sand in
6 the gears of something that's actually going
7 forward.

8 JUSTICE KAVANAUGH: That -- but the --
9 well -- I'll --

10 MR. FLEMING: No, no, no.

11 JUSTICE KAVANAUGH: No, I'm done.

12 MR. FLEMING: Okay.

13 JUSTICE KAVANAUGH: He'll cut me off.

14 MR. FLEMING: I apologize.

15 (Laughter.)

16 MR. FLEMING: Just trying to be
17 helpful here, Mr. Chief Justice.

18 CHIEF JUSTICE ROBERTS: Justice
19 Thomas?

20 Justice Alito?

21 JUSTICE ALITO: There may be reason to
22 be concerned about the breadth of this concept
23 in the Immigration and Naturalization Act, but a
24 lot of the problems are not going to be solved
25 -- if there are problems, they're not going to

1 be solved by adopting your limitation. Take
2 perjury, for example. There's going to be a
3 pending proceeding, right?

4 MR. FLEMING: Not invariably. You --
5 you can perjure yourself by signing a document
6 under the pains and penalties of perjury. There
7 might not be a proceeding then.

8 But -- but I think -- I think our
9 position does solve all the workability problems
10 that -- that I believe Your Honor is adverting
11 to with -- with the government's interpretation,
12 because it's easy to tell when an investigation
13 or a proceeding are pending. But the government
14 hasn't given the Court any way to tell what
15 interference with the process of justice is
16 going to look like when there isn't even an
17 investigation that is proceeding.

18 JUSTICE ALITO: How is it easy to
19 determine whether an investigation is in
20 progress?

21 MR. FLEMING: Well, if the -- if the
22 police have opened a case file and they're
23 asking questions and they're interviewing
24 witness -- potential witnesses and they're
25 trying to figure out, you know, whether a crime

1 has been committed, that's an investigation. If
2 the grand jury's going to meet on Monday,
3 there's been an investigation to -- to -- to
4 prep them and get them going.

5 I think that's much easier to identify
6 than what the government has -- has put forward,
7 which is completely amorphous.

8 CHIEF JUSTICE ROBERTS: Justice
9 Sotomayor?

10 JUSTICE SOTOMAYOR: I do note that
11 under -- I do note that under 1101, it's not
12 just an offense relating to obstruction of
13 justice but perjury or subornation of perjury.
14 So your lying on a document would qualify.

15 MR. FLEMING: I believe, yes. A
16 federal --

17 JUSTICE SOTOMAYOR: Yes. So -- so
18 that takes care -- and I think it supports you
19 --

20 MR. FLEMING: I think that's true.

21 JUSTICE SOTOMAYOR: -- that
22 obstruction of justice was being viewed
23 differently --

24 MR. FLEMING: Yes. I think that's
25 right. And -- and --

1 JUSTICE SOTOMAYOR: -- than perjury or
2 subornation of perjury, which could occur
3 anywhere.

4 MR. FLEMING: That -- that's
5 definitely right, and I think that is another
6 flaw of the government's position, is that it
7 would subsume not only perjury and bribery of a
8 witness but also other provisions in
9 1101(a)(43), like altering a passport. There --
10 there are all kinds of -- all kinds of other
11 provisions where the government would say you're
12 interfering with the process of justice. And if
13 it were as broad as -- as -- as the government
14 is saying, why did Congress need to specify
15 those other provisions?

16 CHIEF JUSTICE ROBERTS: Justice Kagan?

17 JUSTICE KAGAN: Mr. Fleming, in our
18 decisions, we've talked a good deal about this
19 reasonable foreseeability concept, so Arthur
20 Andersen and then Marinello, in the offing, and
21 do we just get rid of that under -- under your
22 way of thinking about these questions?

23 MR. FLEMING: I don't think you need
24 to get rid of it, Justice Kagan, but it does not
25 apply in this case. I'll note Mr. Gannon, you

1 know, quite surprisingly to me at least,
2 completely disavowed that, even though that was
3 part of the BIA's adopted definition in this
4 case based on Marinello.

5 JUSTICE KAGAN: I take it he doesn't
6 quite disavow it. He disavows it as a separate
7 element but doesn't disavow it as an
8 understanding of what intent is required.

9 MR. FLEMING: Which is very different
10 from what the BIA did. The BIA treated it as
11 part of the actus reus.

12 I think what Marinello and Arthur
13 Andersen were doing, I mean, Arthur Andersen
14 expressly because it was a 1512 case, was
15 talking about, you know, what is required
16 notwithstanding the fact that 1512 says no
17 proceeding is required, the -- the Court said,
18 but it still has to be -- it still has to be
19 close, and then Marinello picked that up for the
20 provision of the Internal Revenue Code that was
21 at issue there.

22 Neither of them was construing generic
23 obstruction of justice. And our position would
24 be, and it has been throughout, I think it's
25 clear that 1512, whether we call it as --

1 something that has the gist of obstruction of
2 justice, it is not generic. It is a nongeneric
3 obstruction offense, just like --

4 JUSTICE KAGAN: I think the "in the
5 offing" idea is meant to deal with the sort of
6 Sunday/Tuesday hypothetical, and that was
7 something that we recognized the law really is
8 not distinguishing between.

9 MR. FLEMING: I think that that may be
10 right, and that's because we're talking about a
11 proceeding specifically under the Ninth
12 Circuit's view and -- and our view. If you have
13 an investigation, I don't think that comes up.

14 I will say that if the Court were to
15 go towards a reasonably foreseeable requirement
16 for the actus reus, then we would absolutely
17 need a remand in this case because, of course,
18 when we filed our opening brief in the Ninth
19 Circuit, the Ninth Circuit had already said no
20 proceed -- that a -- an ongoing proceeding or
21 investigation is required, so we had no cause to
22 argue whether the California offense in this
23 case required a California prosecutor to prove
24 beyond a reasonable doubt that a proceeding was
25 reasonably foreseeable.

1 I can preview for the Court it does
2 not. A California prosecutor does not need to
3 prove that at all, and so it would not be a
4 categorical match for the BIA's definition even
5 were the Court to adopt it.

6 We don't think it's justified just
7 because the -- the reasonably foreseeable for
8 Marinello and Arthur Andersen comes out of 1512,
9 which we don't think is a generic version of
10 obstruction of justice.

11 CHIEF JUSTICE ROBERTS: Justice
12 Gorsuch?

13 JUSTICE GORSUCH: You said at the
14 beginning that you had two things you hoped to
15 get to, and I'm not sure -- I think you got to
16 one of them with Justice Kavanaugh, though I'm
17 not entirely sure. I just want to make sure you
18 get a chance to spit out whatever else you want
19 to say.

20 MR. FLEMING: Thank you very much,
21 Justice Gorsuch.

22 We did talk about "relating to" a
23 little bit and its -- and its definitional --
24 its definitional role and the -- the sense that
25 the government's approach would render other

1 language in 15 -- in subsection (S) completely
2 superfluous.

3 I talked about falsely making or
4 altering a passport, which does sound an awful
5 like the process of justice if it's used as
6 broadly as the government says.

7 Subsection (M)(2) pertaining to tax
8 evasion, that also sounds like something that
9 presumably would -- would hinder the process of
10 justice under the government's view. There's no
11 limiting principle in the government's view
12 for -- for how to exclude that.

13 I -- I'd also say that there's a
14 significant administrability problem with what
15 the government is trying to do here. It would
16 basically include almost everything, including
17 failure to report a crime, failure to assist a
18 police officer. There are all kinds of state
19 law offenses here that the government would
20 sweep in that intuitively do not sound like
21 aggravated felonies, and I think it would
22 require a lot more clarity to think that that's
23 what Congress meant to treat as an aggravated
24 felony.

25 Congress could change this tomorrow.

1 It could add in -- it could take the language
2 from 1512 and put it into subparagraph (S) and
3 say you don't need an ongoing or pending --
4 obstruction of justice without need for an
5 ongoing or pending investigation or proceeding.
6 It could do that if it wished to change it. It
7 could get rid of the categorical approach
8 entirely.

9 But, when we look at the words that
10 Congress has used using the generic offense of
11 obstruction of justice as it was understood at
12 the time, I think it's very clear that there was
13 a -- and remains to this day -- a requirement of
14 an ongoing investigation or proceeding.

15 I talked a little bit about Scylla and
16 Charybdis. I believe I answered that. I hope I
17 did anyway with respect to Justice Thomas's
18 question about how we would define the generic
19 offense.

20 Thank you, Your Honor.

21 CHIEF JUSTICE ROBERTS: Justice
22 Kavanaugh?

23 JUSTICE KAVANAUGH: Yeah, I thought we
24 spent the whole argument talking about your two
25 points, but maybe -- maybe I'm wrong about that.

1 (Laughter.)

2 MR. FLEMING: I -- I -- I hope I
3 haven't worn out my welcome, Your Honor.

4 (Laughter.)

5 JUSTICE KAVANAUGH: Yeah. No, you've
6 been very helpful. I just want to make sure I
7 understand what you said to Justice Kagan.

8 Does the generic offense include
9 reasonable foreseeability or not?

10 MR. FLEMING: We don't think so,
11 Your Honor. We -- we -- we argue that --

12 JUSTICE KAVANAUGH: So no? Even the
13 Sunday/Tuesday hypothetical --

14 MR. FLEMING: Oh, that is dealt with
15 by the fact that a -- an investigation is
16 pending during that time. Maybe the grand jury
17 hasn't met, but the prosecutor's office and the
18 police are investigating.

19 JUSTICE KAVANAUGH: It deals with
20 right before the investigation is about to
21 start.

22 MR. FLEMING: The grand jury
23 investigation but not the investigation of the
24 executive branch. The -- the DA's office is
25 investigating before they convene the grand

1 jury.

2 JUSTICE KAVANAUGH: So when does it
3 start under your approach? What's the
4 bright-line start for a typical criminal
5 offense?

6 MR. FLEMING: When -- when a -- when a
7 criminal investigator begins inquiring about the
8 commission of an offense.

9 JUSTICE KAVANAUGH: Begins inquiring?

10 MR. FLEMING: I think so. I think, if
11 you know the police are -- if -- if the offense
12 says you have to know that the -- that the
13 police are investigating and you intentionally
14 with specific intent interfere with the police's
15 investigation --

16 JUSTICE KAVANAUGH: Does it start when
17 it's reported to the police?

18 MR. FLEMING: I think when it is --
19 once it is reported to -- I mean, I suppose, if
20 the police immediately say, I'm not interested
21 in that, that's a frivolous or abusive
22 complaint, I'm not going to look into it, then,
23 no, there's no investigation.

24 But, if the police say, thank you for
25 bringing this to my attention, I'm going to ask

1 about it and start talking to eyewitnesses and
2 figure out whether a crime's been committed and
3 then someone -- and then someone says, I'm going
4 to interfere with that, and -- and that is an
5 element of the state crime of conviction, then I
6 think that would -- that would qualify.

7 JUSTICE KAVANAUGH: Then you started
8 with a couple what you called trivial -- you
9 didn't call them -- but seemed trivial offenses
10 that you say shouldn't qualify as aggravated
11 felonies.

12 I thought Congress tried to deal with
13 that originally by having a five-year limit and
14 then changed it to a one-year limit so that it
15 would not capture some of the more kinds of
16 offenses you're describing that shouldn't be
17 called aggravated felonies.

18 Now there still may be a lot that are,
19 and that might be your response.

20 MR. FLEMING: Can we talk about the
21 offense at issue in this case, Your Honor?

22 JUSTICE KAVANAUGH: Sure.

23 MR. FLEMING: California's offense
24 sweeps very broadly. If you look at page 19A of
25 the petition appendix in Mr. Cordero-Garcia's

1 case, the Ninth Circuit block quotes a passage
2 from the California Court of Appeal decision
3 People versus Wahidi, where they quote the
4 assembly report that accompanied the -- the
5 legislation saying it criminalizes attempts to
6 settle misdemeanor violations, certain traffic
7 accidents, et cetera, among the parties without
8 reporting them to the police. Likewise, a
9 person arrested by a civilian, e.g., a
10 shopkeeper, may face criminal charges by trying
11 to talk the shopkeeper into not calling the
12 police.

13 Mr. Wahidi himself didn't threaten
14 anybody. He had gotten into an altercation with
15 someone outside a mosque, and then he went and
16 said, you know, we're both Muslims, we should
17 try to have our families settle this rather than
18 informing the authorities.

19 He didn't threaten the person. He
20 didn't say, I'm going to do anything to you if
21 you call the police. All he wanted to do was
22 settle it. He was convicted. His conviction
23 was affirmed. This is an extremely broad
24 provision.

25 There is no reason to think that

1 Congress meant this to be an aggravated felony
2 obstruction of justice any more than the fact
3 that some states in Taylor had broader burglary
4 statutes. California has a very broad witness
5 dissuasion, not witness tampering, witness
6 dissuasion statute that --

7 JUSTICE KAVANAUGH: Thank you.

8 MR. FLEMING: Thank you, Your Honor.

9 CHIEF JUSTICE ROBERTS: Justice
10 Barrett?

11 JUSTICE BARRETT: Just -- just a quick
12 question. So, in figuring out how to draw the
13 line, give me your definition for when an
14 investigation begins.

15 MR. FLEMING: When the authorities are
16 inquiring into or investigating -- I guess I
17 can't say investigating -- inquiring into the
18 commission of the crime and criminal
19 responsibility for it.

20 JUSTICE BARRETT: Okay. What about
21 something like Yates? You know, the officer is
22 going to come and check to see what size the
23 fish are on board, turns away, they throw the
24 fish overboard that are undersized.

25 MR. FLEMING: I think, at that point,

1 the officer is onboard and -- and trying -- and
2 inquiring into whether the -- the -- the
3 fish meet the limitation -- the -- the
4 limitation.

5 JUSTICE BARRETT: Whether there has
6 been a crime committed?

7 MR. FLEMING: Yeah, yeah.

8 JUSTICE BARRETT: Okay.

9 MR. FLEMING: Whether there has been a
10 -- yes, investigating whether there has been a
11 crime committed would also qualify.

12 JUSTICE BARRETT: Okay. So as soon as
13 a police officer or some member of the executive
14 branch is asking questions?

15 MR. FLEMING: Yeah, because I think
16 that is a legal process, and -- and Congress
17 could justifiably and has drawn a line saying,
18 once you know that there is a legal process that
19 is ongoing, if you knowingly impede or interfere
20 with that, that is something we want to treat as
21 an aggravated felony.

22 Whereas, before that begins, it is
23 quite reasonable -- now California may well have
24 made a different policy judgment and it's
25 entitled to do that, but when Congress uses

1 obstruction of justice --

2 JUSTICE BARRETT: Okay. I just --

3 MR. FLEMING: Okay.

4 JUSTICE BARRETT: That -- that was all
5 I wanted to know about.

6 MR. FLEMING: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Jackson?

9 JUSTICE JACKSON: So page 15 of your
10 brief seems to at least acknowledge the
11 relevance of Chapter 73, and I know you're
12 looking at it to find the generic elements of an
13 obstruction-of-justice offense.

14 But suppose we think that the right
15 inquiry is not to look for a generic
16 obstruction-of-justice offense but to ask
17 whether your client had committed one of the
18 offenses listed in Chapter 73 or a state law
19 offense that was a categorical match for one of
20 those offenses.

21 What is your best argument that
22 California's statute, the one under which your
23 client was convicted, is not a match for
24 something like witness tampering in Chapter 73?

25 MR. FLEMING: So this is the issue

1 that divided the majority and the dissent in the
2 court of appeals. They didn't actually reach a
3 holding on it because the BIA hadn't considered
4 it. So everyone recognized that the Court
5 couldn't deny our petition for review on that
6 basis.

7 But, as the majority indicated, 1512
8 requires a corrupt intent. And as I was
9 discussing in responding to Justice Kavanaugh's
10 last question, California's offense does not
11 require that, and the --

12 JUSTICE JACKSON: And 1512 is the only
13 one you see in here that would be close to what
14 it is that you're requiring?

15 MR. FLEMING: I believe it's the only
16 that --

17 JUSTICE JACKSON: It's the only one.

18 MR. FLEMING: -- it's the only one
19 that I think was suggested. And, again, because
20 this was all dicta in the court of appeals --

21 JUSTICE JACKSON: Yeah.

22 MR. FLEMING: -- the issue hasn't
23 really been joined. I don't know that the
24 government has suggested that the California
25 offense would match any other provision in

1 Chapter 73. And -- and we don't think it
2 matches any of them for the reasons explained by
3 the panel majority, but that's an issue for
4 remand if Your Honor goes that way. I -- I
5 recognize it was a hypothetical. We don't think
6 the Court should go that way. But, if it does,
7 the answer is to send it back.

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 MR. FLEMING: Thank you, Your Honor.

12 CHIEF JUSTICE ROBERTS: Rebuttal,
13 Mr. Gannon?

14 REBUTTAL ARGUMENT OF CURTIS E. GANNON
15 ON BEHALF OF MERRICK B. GARLAND, ATTORNEY GENERAL

16 MR. GANNON: Just a few quick points.

17 I would say that both of my friends have
18 conceded that there may be an investigation and
19 that it starts at a certain point, and -- and
20 they would concede that that works.

21 But that doesn't concede that any
22 other statutes come in because, under the
23 categorical approach, if they want that to be an
24 element of the offense, that's going to be a
25 vanishingly small category, as they've

1 acknowledged today.

2 They've said that only 14 states plus
3 D.C. are the denominator for trying to analyze
4 this because you only look at
5 obstruction-of-justice offenses, and we don't
6 think that that gets the categorical approach
7 analysis correct. But I would say we return to
8 what the BIA was saying.

9 And, Justice Kagan, you asked about
10 reasonable foreseeability. That is in the
11 Board's definition as part of the mens rea.
12 This is at page 460 of the Valenzuela Gallardo
13 III decision, where the Board states this, and
14 it specifically says that -- that it's an
15 affirmative and -- and intentional attempt that
16 is motivated by a specific intent to interfere
17 either in an investigation or proceeding that is
18 ongoing, pending, or reasonably foreseeable.

19 So it's in the part of the definition
20 that it's about a specific intent to interfere
21 with that. That's consistent with what we're
22 arguing today about how that comes in.

23 But, if you look at the California
24 offense that Mr. Fleming was just talking about,
25 it comes in because it has the specific intent

1 to influence a potential witness's or victim's
2 testimony or acts. That's quoted in our brief
3 at page 6. And, in this instance, it's a
4 serious offense, we know, because he was -- by
5 Congress's lights, because he was sentenced to a
6 year in prison for each of the two counts.

7 And so, here, we think it's clear that
8 the family of offenses in federal law includes
9 not just 1503 but also 1512 and Section 3,
10 accessory of -- accessory-after-the-fact
11 offenses. And Congress did not mean to draw a
12 line between those on the basis of whether there
13 was a pending proceeding when some of them
14 clearly have it and some of them do not.

15 The Court -- the case on which the --
16 the question on which the Court granted cert is
17 just about whether the entire category of
18 offenses always requires a pending proceeding or
19 investigation, and we submit that it does not.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel. The case is submitted.

22 (Whereupon, at 11:43 a.m., the case
23 was submitted.)

24
25

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