PRACTICE ALERT[1]
Overview of *Pugin v. Garland*

On June 22, 2023, the U.S. Supreme Court issued *Pugin v. Garland*, 143 S. Ct. 1833 (2023), an immigration decision addressing the generic definition of the obstruction of justice aggravated felony ground at 8 U.S.C. § 1101(a)(43)(S). The Court held that a conviction may be an offense "relating to obstruction of justice," even if it does not require that an investigation or proceeding be pending or reasonably foreseeable. In doing so, *Pugin* reversed favorable case law in the Ninth Circuit, *Valenzuela Gallardo v. Barr*, 968 F.3d 1053 (9th Cir. 2020). The decision may result in the Department of Homeland Security (DHS) charging a broader range of offenses under the obstruction of justice aggravated felony ground.

Pugin is a narrow and short decision that does not adopt a specific definition of obstruction of justice but implicitly rejects the Board of Immigration Appeals' ("BIA" or "Board") current definition. *Pugin* suggests, and practitioners should argue, that at a minimum, an obstruction of justice offense requires an affirmative and intentional attempt, motivated by a specific intent to interfere with the process of justice. *Pugin* is helpful in that it reaffirms the applicability of the categorical approach and underscores the importance of challenging the Board's generic definitions of aggravated felonies at U.S. Courts of Appeals by using the tools of statutory construction without resorting to *Chevron* deference.

This practice alert reviews the generic definition of obstruction of justice prior to *Pugin* (Section I); the facts, holding, and reasoning in *Pugin* (Section II); and the key implications of the decision for practitioners (Section III).

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[1] The advisory is intended for authorized legal counsel and is not a substitute for independent legal advice provided by legal counsel familiar with a client's case. Counsel should independently confirm whether the law has changed since the date of this publication. The authors of this practice alert are Khaled Alrabe, Emma Winger, Suchita Mathur, and Rebecca Scholtz. The authors would like to thank Michael Mehr and Kathy Brady for their review and comments.

I. Generic Definition of "Obstruction of Justice" Before *Pugin*

The BIA has struggled to develop a consistent generic definition of obstruction of justice under 8 U.S.C. § 1101(a)(43)(S).[2] The BIA has addressed the contours of the aggravated felony obstruction of justice ground in four published decisions.

Initially, in *Batista-Hernandez*, the Board held that accessory after the fact under 18 U.S.C. § 3 is an aggravated felony obstruction of justice offense. 21 I&N Dec. at 961. The Board's reasoning was scant – it reached its conclusion in one short paragraph that did not provide a generic definition of obstruction of justice.[3] The decision relied on the statute's requirement to "hinder or prevent apprehension, trial or punishment," 18 U.S.C. § 3, and dicta from one federal court of appeals case addressing the federal crime of accessory after the fact. *Id*.

Matter of Espinoza, 22 I&N Dec. 889 (BIA 1999) (en banc), was the Board's first meaningful consideration of the scope of the generic definition of obstruction of justice. The Board held that a conviction for misprision of a felony under 18 U.S.C. § 4, an offense punishing the failure to report a felony, is *not* an aggravated felony obstruction of justice offense because the offense "lacks the critical element of an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice."[4] The Board reached its conclusion by looking to 18 U.S.C. ch. 73 (entitled "Obstruction of Justice"), which lists a number of "obstruction of justice" offenses, and the Black's Law Dictionary definition of the term.[5] Crucially, the Board indicated that the "process of justice" required a pending proceeding or investigation.[6]

In 2012, however, after the Ninth Circuit interpreted *Matter of Espinoza* as requiring an obstruction of justice offense to include interference with an ongoing proceeding or investigation[7] the Board issued *Matter of Valenzuela Gallardo* ("*Valenzuela Gallardo I*"), 25 I&N Dec. 838 (BIA 2012), ruling that no such nexus is necessary. The Board proclaimed that "[w]hile many crimes fitting this [*Matter of Espinoza*] definition will involve interference with

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2 *See Matter of Batista-Hernandez*, 21 I&N Dec. 955, 961 (BIA 1997) (en banc). For an in-depth analysis of this history *see* Brief of Amici Curiae Immigrant Defense Project, American Immigration Council, and the American Immigration Lawyers Association in Support of Pugin and Cordero-Garcia, at 19-27, https://www.supremecourt.gov/DocketPDF/22/22-23/259726/20230323145649274_PuginAIC%20Amicus%20Document%20March%2023%202023%20EFile.pdf.

3 Notably, Mr. Batista-Hernandez was never even charged with an aggravated felony under 8 U.S.C. § 1101(a)(43)(S), although he was charged under 8 U.S.C. § 1101(a)(43)(B) for illicit trafficking in controlled substances. *Id*. at 961. The Board took up the obstruction of justice aggravated felony ground *sua sponte* and made its holding with respect to the obstruction of justice ground without benefit of briefing. *Id.* at 966-69 (Rosenberg, Board Member, concurring in part and dissenting in part).

4 *Matter of Espinoza*, 22 I&N Dec. at 894 (citation omitted and quoting 8 U.S.C. § 1101(a)(43)(S)).

5 *Id*. at 891.

6 *Id*. at 892-93 & n.3.

7 *See Trung Thanh Hoang v. Holder*, 641 F.3d 1157, 1164 (9th Cir. 2011).

an ongoing criminal investigation or trial, we now clarify that the existence of such proceedings is not an essential element of 'an offense relating to obstruction of justice.'"[8] The Board reasoned that no nexus is required because the chapter 73 obstruction crimes include offenses, such as witness tampering (18 U.S.C. § 1512), that do not require a pending proceeding.[9] Notably, *Valenzuela Gallardo I* did not overturn *Matter of Espinoza*.

The Ninth Circuit rejected *Valenzuela Gallardo I* on petition for review, in part, because it was concerned that the BIA's interpretation rendered 8 U.S.C. § 1101(a)(43)(S) unconstitutionally vague.[10] The court explained that although the Board had found that obstruction offenses required interference with the process of justice, without a nexus to an ongoing investigation or proceeding, "the BIA has not given an indication of what it does include in 'the process of justice,' or where that process begins and ends."[11]

Finally, in response to the Ninth Circuit remand, the Board issued *Matter of Valenzuela Gallardo* ("*Valenzuela Gallardo II*"), 27 I&N Dec. 449 (BIA 2018), which established yet another generic definition of obstruction of justice. The Board defined an obstruction of justice offense as either any offense included in chapter 73 of the federal criminal code or "any other Federal or State offense that involves (1) an affirmative and intentional attempt (2) that is motivated by a specific intent (3) to interfere either in an investigation or proceeding that is ongoing, pending, or reasonably foreseeable by the defendant, or in another's punishment resulting from a completed proceeding."[12] The Ninth Circuit, again, rejected this definition because it included "reasonably foreseeable" investigations and proceedings and did not strictly require a nexus to a pending or ongoing proceeding or investigation.[13]

The U.S. Courts of Appeals had been split as to the appropriate definition of obstruction of justice. While the Ninth Circuit rejected *Valenzuela Gallardo I* and *II*, the First Circuit held that the statutory unambiguously did not require any nexus to a proceeding or investigation, and the Fourth Circuit deferred to the BIA's definition in *Valenzuela Gallardo II*.[14] The Third Circuit did not defer to the BIA's definition of obstruction of justice but instead adopted a more expansive definition.[15] Prior to *Valenzuela Gallardo II*, the Seventh Circuit deferred to the BIA's definition of obstruction of justice in *Matter of Espinoza* rather than *Valenzuela Gallardo I* in light of the

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8 *Id*. at 841.

9 *Id*. at 842.

10 *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 819 (9th Cir. 2016).

11 *Id.* (quoting *Valenzuela Gallardo I*, 25 I&N Dec. at 842).

12 *Matter of Valenzuela Gallardo II*, 27 I&N Dec. at 460.

13 *Valenzuela Gallardo v. Barr*, 968 F.3d 1053, 1068 (9th Cir. 2020).

14 *See Silva v. Garland*, 27 F.4th 95, 111-13 (1st Cir. 2022) (finding a Massachusetts conviction for accessory after the fact to be an obstruction of justice aggravated felony); *Pugin v. Garland*, 19 F.4th 437, 439 (4th Cir. 2021), *aff'd*, 143 S. Ct. 1833 (2023) (holding that a Virginia conviction for accessory after the fact constitutes an obstruction of justice aggravated felony).

15 *Flores v. Att'y Gen. U.S.*, 856 F.3d 280, 287, 291 (3d Cir. 2017).

Ninth Circuit's rejection of the latter decision.[16] Other circuits have only addressed the BIA's definition of obstruction of justice prior to *Valenzuela Gallardo I* and *II*.[17]

II. The *Pugin* Decision

A. Factual Background

Pugin addresses two separate immigration proceedings involving two lawful permanent residents (LPR), Fernando Cordero-Garcia and Jean Francois Pugin.

Mr. Cordero-Garcia was admitted to the United States as an LPR in 1965. In 2009, he was convicted of dissuading or attempting to dissuade a witness from reporting a crime in violation of California Penal Code § 136.1(b)(1). Based on this conviction, he was placed in removal proceedings in 2011 and charged with removability for having been convicted of an aggravated felony obstruction of justice offense. The IJ and BIA found him deportable. The Ninth Circuit reversed, holding that the California statute is not a categorical match to obstruction of justice because it is missing the element of a nexus to an ongoing or pending proceeding or investigation.[18]

Mr. Pugin was admitted to the United States in 1985 as an LPR. After he was convicted of common-law accessory after the fact in Virginia, he was similarly placed in removal proceedings and charged with having been convicted of an aggravated felony obstruction of justice. The IJ and BIA found him removable. The Fourth Circuit affirmed, holding that his conviction was an aggravated felony obstruction offense even though it did not require a nexus to a pending investigation or proceeding.[19] In so holding, the Fourth Circuit deferred to the BIA's definition in *Valenzuela Gallardo II.*[20]

To address this split, the Supreme Court granted certiorari on the narrow question[21] of whether "an offense relating to obstruction of justice," 8 U.S.C. § 1101(a)(43)(S), requires a nexus with a pending or ongoing investigation or judicial proceeding.

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16 *Victoria-Faustino v. Sessions*, 865 F.3d 869, 876 (7th Cir. 2017).

17 *Armenta-Lagunas v. Holder*, 724 F.3d 1019, 1022 (8th Cir. 2013) (relying on the BIA's definition in *Matter of Espinoza* without deciding whether deference is required); *Higgins v. Holder*, 677 F.3d 97, 104 (2d Cir. 2012) (same); *Alwan v. Ashcroft*, 388 F.3d 507, 514 (5th Cir. 2004) (deferring to the BIA's definition in *Matter of Espinoza*).

18 *Cordero-Garcia v. Garland*, 44 F.4th 1181, 1188 (9th Cir. 2022), *rev'd and remanded sub nom. Pugin v. Garland*, 143 S. Ct. 1833 (2023).

19 *Pugin*, 19 F.4th at 439, 441.

20 *Id*. at 439, 449-50.

21 Pugin's petition for certiorari additionally sought review of whether, if the phrase "offense relating to obstruction of justice" is considered ambiguous, deference to the BIA's definition of obstruction of justice is owed under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *See Pugin v. Garland*, No. 22-23, Petition for a Writ of Certiorari at i (July 5, 2022), https://www.supremecourt.gov/DocketPDF/22/22-

B. Holding and Reasoning

In a 6-3 decision authored by Justice Kavanaugh, the Court held that an offense may be an obstruction of justice aggravated felony even if it does not require that an investigation or proceeding be pending at the time of the obstructive conduct.[22] The Court also stated that a proceeding or investigation need not be reasonably foreseeable.[23] The Court omitted any reference to the multiple published Board decisions that define obstruction of justice. The Court thus remanded the Ninth Circuit decision in Mr. Cordero-Garcia's case and affirmed the Fourth Circuit's decision with respect to Mr. Pugin.[24]

The Court took the same approach to deciding the contours of the federal generic definition as it did in *Esquivel-Quintana v. Sessions*, 581 U.S. 385 (2017), which addressed the generic definition of sexual abuse of a minor under § 1101(a)(43)(A). Applying a straightforward statutory construction analysis, the Court sought to determine the ordinary understanding of § 1101(a)(43)(S) at the time of provision's enactment in 1996. The majority looked to dictionary definitions from 1996, Chapter 73 of the federal criminal code, state penal laws as they existed in 1996, and the Model Penal Code.[25]

The majority also discussed the meaning of the statutory language "relating to." After first considering other methods of statutory interpretation, the Court used the phrase to reaffirm its conclusion and resolve doubt about the scope of the aggravated felony provision. It held that the phrase "relating to" indicated that the provision covers offenses that "have a connection with" obstruction of justice, but did not attempt to define the latter phrase.[26] Earlier in the decision, the Court provided a more specific reading of "relating to," noting that "Congress accounted for the variations" in the way states labeled their obstructive offenses by covering offenses "relating to" obstruction of justice.[27]

After conducting a markedly brief review of the above-mentioned sources of authority, with a focus on witness tampering, the Court concluded that there is no requirement that an investigation or proceeding be pending. Echoing a concern articulated in *Esquivel-Quintana*, the majority noted that it sought to avoid an interpretation of the statute that would lead to too *few* convictions qualifying as aggravated felonies.[28]

23/229589/20230203182113163_22-23%20Petition.pdf .While the Court did not take up that question, the decision has important implications on deference questions, *see* Section III.C, *infra*.

22 *Pugin v. Garland*, 143 S. Ct. 1833, 1838 (2023). Justices Roberts, Thomas, Alito, Barrett, and Jackson joined the majority opinion. Justice Jackson additionally filed a concurring opinion. Justice Sotomayor filed a dissent joined by Justices Kagan and Gorsuch.

23 *Id.* at 1841 n.2.

24 *Id.* at 1843.

25 *See id*. at 1839-41.

26 *Id.* at 1841.

27 *Id*. at 1840.

28 *Id.* at 1841; *see Esquivel-Quintana*, 581 U.S. at 395.

In addition to concluding that a pending proceeding or investigation need not be an element of the offense, the Court rejected in a footnote a reading of the aggravated felony provision that would require an investigation or proceeding to be reasonably foreseeable.[29] The Court found "no justification for engrafting a separate foreseeability requirement" onto the obstruction of justice definition.[30] In reaching this conclusion, the majority endorsed the Solicitor General's position that offenses relating to obstruction of justice have a mens rea requirement that necessitates "an intent to interfere with the legal process."[31] The Court found that this mens rea element "targets the same basic overbreadth concern as a foreseeability requirement and ensures that §1101(a)(43)(S) will not sweep in offenses that are not properly understood as offenses 'relating to obstruction of justice.'"[32]

Lastly, the Court summarily dismissed Mr. Pugin's and Mr. Cordero-Garcia's arguments regarding the relevance of 18 U.S.C. § 1503, the historical meaning of obstruction of justice, avoiding redundancy in the statute, and application of the rule of lenity.[33]

Justice Jackson wrote a concurrence suggesting that Congress may have been referencing Chapter 73, which contains several distinct offenses, when it added the obstruction of justice aggravated felony provision to the statute.[34]

Justice Sotomayor wrote a lengthy dissent arguing that the majority's analysis gets "the categorical approach backward," and ignores sources establishing that the commonly understood meaning of obstruction of justice requires a nexus to a pending proceeding.[35] Importantly, the dissent emphasizes the narrowness of the majority's holding, noting that "all the Court really holds is that generic obstruction of justice includes one offense (dissuading a witness from reporting a crime) that does not require a pending investigation or proceedings."[36]

III. *Pugin*'s Implications for Practitioners

A. *Pugin* does not provide a generic definition of obstruction of justice and implicitly rejects *Matter of Valenzuela Gallardo II*

A key feature of the Supreme Court's *Pugin* decision is that it did not establish a generic definition of an offense relating to obstruction of justice. The Court merely held that, whatever the generic definition may be, an obstruction of justice offense need not include an element requiring a pending investigation or proceeding. As the dissent notes, the majority opinion

29 *Pugin*, 143 S. Ct. at 1841 n.2.
30 *Id.*
31 *Id*.
32 *Id*.
33 *Id.* at 1841-43.
34 *Id.* at 1843-45 (Jackson, J., concurring).
35 *Id.* at 1852 (Sotomayor, J., dissenting).
36 *Id.* at 1856.

"provid[es] zero affirmative guidance as to what sorts of offenses are a match for that category" and "leaves lower courts and the Board of Immigration Appeals without direction[.]"[37]

One practical effect of the decision is that the Board's definition in *Matter of Valenzuela Gallardo II*, *see* Section I *infra*, is no longer controlling. In that case the Board set out three elements for an obstruction of justice offense: "(1) an affirmative and intentional attempt (2) that is motivated by a specific intent (3) to interfere either in an investigation or proceeding that is ongoing, pending, or reasonably foreseeable by the defendant, or in another's punishment resulting from a completed proceeding."[38] Although *Pugin* does not reference any of the Board's decisions, its central holding and footnote two, which rejects "engrafting a separate foreseeability requirement onto the broad and general language of § 1101(a)(43)(S),"[39] are in direct conflict with the third element of *Matter of Valenzuela Gallardo II.*

B. Obstruction of justice requires an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice

Practitioners should maintain that *Pugin* does not affect the Board's definition of obstruction of justice as laid out in *Matter of Espinoza* and *Matter of Valenzuela Gallardo I*, *see* Section I *infra*. Those decisions required that an obstruction offense include "the critical element of an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice."[40] In rejecting a separate foreseeability requirement, the *Pugin* majority relies on the Solicitor General's position that obstruction offenses require an "intent to interfere with the legal process."[41] Moreover, every decision by the Board that has meaningfully addressed the generic definition of obstruction of justice has included a specific intent requirement to interfere with some legal process, *see* Section I *infra.*

As the majority confirmed in *Pugin*, offenses that do not include a specific intent element are not obstruction of justice offenses.[42] In *Matter of Espinoza*, the Board helpfully emphasized that "we do not believe that every offense that, by its nature, would tend to 'obstruct justice' is an offense that should properly be classified as 'obstruction of justice.'"[43]

This is most evident in the case of 18 U.S.C. § 4, misprision of a felony, the statute before the Board in *Matter of Espinoza* and the one cited by the Solicitor General in *Pugin* as the type of offense falling outside the ambit of obstruction of justice.[44] Although misprision of a felony

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37 *Id.* at 1857.

38 *Matter of Valenzuela Gallardo II*, 27 I&N Dec. at 460.

39 *Pugin*, 143 S. Ct. at 1841 n.2.

40 *Matter of Valenzuela Gallardo I*, 25 I&N Dec. at 842 (quoting *Matter of Espinoza*, 22 I&N Dec. at 894).

41 *Pugin*, 143 S. Ct. at 1841 n.2

42 *Id*.

43 *Matter of Espinoza*, 22 I&N Dec. at 893-94.

44 Reply Brief for the Attorney General at 26, *Pugin v. Garland*, 143 S. Ct. 1833 (2023), https://www.supremecourt.gov/DocketPDF/22/22-23/263063/20230407153030507_22-23%20Garland%20Merits%20Reply%20Br.pdf.

includes an element requiring the concealment of a felony, nothing in the statute "references the specific purpose for which the concealment must be undertaken."[45]

Similarly, for example, a felony conviction for falsely representing a Social Security number under 42 U.S.C. § 408(a)(7)(B) should not be an obstruction of justice aggravated felony because the statute criminalizes an intent to deceive for several enumerated purposes or "for *any other purpose*."[46] For this reason, some U.S. Courts of Appeals have held that this offense is not a crime involving moral turpitude.[47] Under *Matter of Espinoza*, and the approach adopted by the Solicitor General's brief, this offense would not be an obstruction of justice aggravated felony.

By not squarely addressing the meaning of obstruction of justice, *Pugin* leaves open overbreadth arguments related to the indeterminate elements of the *Espinoza* and *Valenzuela Gallardo I* definition, such as the requirement of "an affirmative and intentional attempt" and the meaning of "process of justice." For example, practitioners could argue that offenses involving obstruction of the administration of law *or* governmental functions are not obstruction of justice offenses because not all governmental functions fall within the ambit of the "process of justice."[48] Similarly, offenses that criminalize failure to report a crime or other omissive conduct do not necessarily include an element of an "*affirmative* and intentional attempt" to interfere.

However, by eliminating any nexus requirement, *Pugin* may also lead DHS to charge a wider range of offenses as obstruction of justice aggravated felonies.[49] Practitioners should consider pursuing post-conviction relief to side-step these efforts.

C. *Pugin* reaffirms the value of challenging BIA generic definitions through statutory construction arguments

The *Pugin* decision is also significant because it makes no mention of agency deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).[50] *Chevron* holds that

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45 *Matter of Espinoza*, 22 I&N Dec. at 894.

46 42 U.S.C. § 408(a)(7).

47 *See Zarate v. U.S. Att'y Gen*., 26 F.4th 1196, 1207 (11th Cir. 2022); *Beltran-Tirado v. INS*, 213 F.3d 1179, 1183-85 (9th Cir. 2000); *Ahmed v. Holder*, 324 F. App'x 82, 84 (2d Cir. 2009) (unpublished). *But see Munoz-Rivera v. Wilkinson*, 986 F.3d 587, 591 (5th Cir. 2021); *Guardado-Garcia v. Holder*, 615 F.3d 900, 902 (8th Cir. 2010).

48 *See*, *e.g*. Model Penal Code § 242.1 (criminalizes the conduct of a person who "purposely obstructs, impairs or perverts the administration of law *or other governmental function*…"). While in many states this type of offense may be classified as a misdemeanor rather than a felony, such misdemeanors may still be aggravated felonies under immigration law if a sentence of 365 days is imposed in state's whose definition of a misdemeanor includes a maximum prison sentence of 1 year or 365 days.

49 Practitioners engaged in U visa practice should also evaluate how the *Pugin* case might expand the range of obstruction of justice offenses for which a U visa certification may be granted. *See* INA 101(a)(15)(U)(iii) (defining qualifying criminal activity for U visa purposes to include activity involving "obstruction of justice"). Such U visa petitions must also meet the requirements of 8 C.F.R. § 214.14(a)(14)(ii).

50 The court rejected a question presented on *Chevron* deference. *See supra* note 21.

courts should defer to an agency's reasonable interpretation of ambiguous statutes that it administers.[51] However, in recent years the Court has cautioned against reflexive deference, instructing courts to rigorously apply all tools of statutory construction before concluding a statute is ambiguous.[52]

While the Court has previously held that published BIA decisions may be entitled to *Chevron* deference,[53] the Court has rarely deferred to the BIA – and never when construing the aggravated felony statute.[54] In *Pugin*, the Court continued that trend by not invoking the *Chevron* framework. As discussed, the Court employed traditional tools of statutory construction to arrive at what it deemed the correct interpretation, without citing the multiple BIA decisions construing obstruction of justice.

In addition, while the majority did not apply the rule of lenity in this case, see Section II.B *infra*, it left lenity arguments available for future cases.[55] Lenity is often considered to be the opposite of *Chevron* deference, because it calls for ambiguous statutes to be construed in favor of the criminal defendant or noncitizen.[56]

Therefore, practitioners are encouraged to challenge the BIA's construction of criminal removal grounds before the circuit courts of appeals using all available tools of statutory construction. Practitioners can argue that courts of appeals should not defer to the agency without carefully construing the statute in the first instance. Even if the statute is ambiguous, practitioners can argue that lenity, and not *Chevron* deference, should determine the outcome under the criminal[57] or civil[58] rules of lenity.

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51 *Chevron*, 467 U.S. at 843. The Supreme Court recently granted certiorari in a case where it will consider whether *Chevron* should be overturned. *Loper Bright Enterprises, et al. v. Raimondo*, No. 22-451, 2023 WL 3158352 (U.S. May 1, 2023). As of the date of this practice alert, however, *Chevron* remains controlling authority.

52 *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (citing *Chevron*, 467 U.S. at 843 n.9); *see also Pereira v. Sessions*, 138 S. Ct. 2105, 2120–21 (2018) (Kennedy, J., concurring).

53 *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) (holding that the BIA was entitled to deference when construing "well-founded fear" on a case-by-case basis).

54 *See, e.g.*, *Esquivel-Quintana*, 581 U.S. at 397-98(declining to give deference to agency interpretation of an aggravated felony provision); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010) (rejecting the BIA's generic aggravated felony definition without citing *Chevron*); *Torres v. Lynch,* 578 U.S. 452 (2016) (determining the generic definition of an aggravated felony without mention of *Chevron*); *Lopez v. Gonzales*, 549 U.S. 47 (2006) (same).

55 *See Pugin*, 143 S. Ct. at 1843.

56 *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *Cardoza-Fonseca*, 480 U. S. at 449.

57 Under the longstanding criminal rule of lenity, ambiguous statutes with both criminal and civil applications, such as the aggravated felony provisions, should be construed in favor of the defendant or noncitizen. *See Leocal*, 543 U.S. at 11 n.8; *Carachuri-Rosendo*, 560 U.S. at 581; *Moncrieffe v. Holder*, 569 U.S. 184, 205 (2013).

58 Supreme Court jurisprudence also suggests that ambiguous deportation statutes should be construed in favor of the noncitizen. *See Pugin*, 143 S. Ct. at 1855-56 (Sotomayor, J.,

Even where the circuit court has previously deferred to the BIA's generic definition, practitioners can argue that prior court of appeals precedent failed to adequately consider whether the meaning of the statute was plain by exhausting statutory construction tools. Practitioners can argue that subsequent Supreme Court precedent, including *Kisor*, *Esquivel-Quintana*, and *Pugin*, undermine prior circuit precedent that failed to engage in this rigorous analysis.

D. *Pugin* reinforces the application of the categorical approach

The *Pugin* majority strictly adhered to the elements-based categorical approach that the Supreme Court has consistently required adjudicators to use to determine whether a state conviction triggers a removal ground. The Court limited its inquiry to the elements of the statute of conviction without any reference to the facts underlying the case as is required by *Taylor v. United States*, 495 U. S. 575, 601 (1990) and *Moncrieffe*, 569 U. S. at 190 .[59] As explained above, the Court also followed the categorical approach's road map from prior cases to ascertain the generic definition of an aggravated felony by looking at the ordinary meaning of the term in 1996, state obstruction offenses in 1996, the Model Penal Code, and traditional tools of statutory interpretation.

The majority's use of the "relating to" phrase in 8 U.S.C. § 1101(a)(43)(S) to confirm their broader reading of the scope of obstruction of justice may lead to arguments by DHS that other generic definitions of grounds of removability that use this phrase should also be read more broadly.[60] Practitioners should push back against any such attempts. The Supreme Court has recognized, as recently as the 2022-23 term, that while the phrase "relating to" is broad, it is not indeterminant and that statutory context often requires a narrow reading of the phrase.[61] Moreover, in *Pugin*, the majority looked to the "relating to" phrase only after exhausting all other tools of statutory construction and only to confirm its conclusion that an investigation or proceeding is not an element of obstruction of justice.[62]

Crucially, *Pugin* in no way endorses the proposition that the "relating to" language allows adjudicators to deviate from the strict elements-based categorical approach, and the Supreme Court has never endorsed such a position.[63]

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dissenting) (citing *Cardoza-Fonseca*, 480 U.S. at 449); *see also INS v. St. Cyr*, 533 U.S. 289, 320 (2001); *INS v. Errico*, 385 U.S. 214, 225 (1966); *Costello v. INS,* 376 U.S. 120, 128-29 (1964); *Bonetti v. Rogers*, 356 U.S. 691, 699 (1958); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 9-10 (1948).

[59] *Pugin*, 143 S. Ct. at 1839.

[60] *See* 8 U.S.C. §§ 1182 (a)(2)(A)(i)(II); 1227(a)(2)(B)(i) ("*relating to* a controlled substance (as defined in section 802 of title 21)"); 8 USC § 1101(a)(43)(K) ("*relates to* the owning … of a prostitution business"); § 1101 (a)(43)(Q) ("*relating to* a failure to appear by a defendant for service of [a criminal] sentence" punishable by a sentence of 5 years or more); § 1101(a)(43)(R) ("*relating to* commercial bribery […]").

[61] *See Mellouli v. Lynch*, 575 U.S. 798, 811–12 (2015); *Dubin v. United States*, 143 S. Ct. 1557, 1566 (2023).

[62] *Pugin*, 143 S. Ct. at 1841.

[63] In the context of obstruction of justice, the Third Circuit has taken the unusual position that the "relating to" language allows the court to deviate from a strict elements-based

E. Implications for criminal defenders

Because *Pugin* does not require obstruction of justice offenses to include an element of a pending or reasonably foreseeable proceeding, the range of offenses that might fall under obstruction of justice have broadened. Criminal defense attorneys should be particularly wary of accessory after the fact or witness tampering offenses, such as the ones at issue in *Pugin*, and offenses that involve interfering with law enforcement activities. The obstruction of justice aggravated felony can be avoided through a sentence of 364 days or less because 8 U.S.C. § 1101(a)(43)(S) requires a term of imprisonment of at least one year.[64]

comparison. *See Denis v. Att'y Gen. of U.S.*, 633 F.3d 201, 209-11 (3d Cir. 2011); *Flores v. Att'y Gen. United States*, 856 F.3d 280, 286 (3d Cir. 2017). The *Pugin* decision undermines this approach.

[64] Criminal defense attorneys must also evaluate whether an obstruction offense carrying a sentence of less than 364 days could potentially pose immigration consequences as a crime involving moral turpitude (CIMT). For more information on how to apply the categorical approach more generally and the immigration consequences of criminal convictions see Katherine Brady, *ILRC, How to Use the Categorical Approach Now* (Oct. 2021), https://www.ilrc.org/resources/how-use-categorical-approach-now-2021.