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# The Constitutionality of the Immigration and Nationality Act Called into Question Again: The Ninth Circuit Correctly Holds "Obstruction of Justice" Raises Grave Constitutional Concerns in *Valenzuela Gallardo v. Lynch*

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# THE CONSTITUTIONALITY OF THE IMMIGRATION AND NATIONALITY ACT CALLED INTO QUESTION AGAIN: THE NINTH CIRCUIT CORRECTLY HOLDS “OBSTRUCTION OF JUSTICE” RAISES GRAVE CONSTITUTIONAL CONCERNS IN *VALENZUELA GALLARDO v. LYNCH*

**Abstract:** On March 31, 2016, in *Valenzuela Gallardo v. Lynch*, the U.S. Court of Appeals for the Ninth Circuit found that the phrase “an offense relating to obstruction of justice,” used as one definition of an aggravated felony within the Immigration and Nationality Act, raised grave unconstitutional vagueness concerns because there are no limits to where the process of justice begins and ends. This issue, identified by the Ninth Circuit, was not addressed by the Second or Eighth Circuits despite these courts interpreting the same statutory provision in separate cases. This Comment argues that the Ninth Circuit was correct on two accounts. First, the phrase, obstruction of justice, does raise unconstitutional vagueness concerns. Under the Board of Immigration Appeal’s new interpretation of the phrase, nearly every specific intent crime could be considered obstruction of justice. Second, the Second and Eighth Circuits overlooking this concern does not create a circuit split. Neither court held that the phrase was without unconstitutional vagueness concerns, but rather had no reason to discuss unconstitutional vagueness in their analysis.

## INTRODUCTION

For foreign nationals in the United States, the consequences of criminal activity can go far beyond fines or imprisonment.<sup>1</sup> This is particularly

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<sup>1</sup> See generally 8 U.S.C § 1101 (2012) (outlining immigration consequences of criminal convictions); *id.* § 1227(a)(2) (providing removal as a consequence of criminal activity for noncitizens); IRA KURZBAN, IMMIGRATION LAW SOURCEBOOK 86–278, (15th ed. 2016) (listing criminal grounds for deportation). Removal is not the only consequence of an aggravated felony conviction. See RICHARD D. STEEL, STEEL ON IMMIGRATION § 13:16 (2016 ed.) (providing analysis of aggravated felony consequences). A person convicted of an aggravated felony may be subject to expedited removal or be removed without an administrative hearing. *Id.* Other consequences include detention without bond, permanent or long-term preclusion of entry into the United States, refusal to apply for or be granted asylum status, and preclusion from establishing good moral character. *Id.* “Alien” is another word for foreign national, both are defined as a person who is not a citizen of the United States. Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1965 (2013). Crimes of moral turpitude, multiple

true when a foreign national is convicted of an aggravated felony for which the consequence is removal.<sup>2</sup> Section 1227 of the Immigration and Nationality Act (“INA”) states that, if at any time after admission to the United States, a foreign national is convicted of an aggravated felony, he or she is removable.<sup>3</sup> The INA defines aggravated felony by providing a list of qualifying criminal offenses.<sup>4</sup> Because the consequences can be so severe, one would assume foreign nationals would be careful to avoid any criminal conduct that would result in an aggravated felony conviction.<sup>5</sup> This becomes difficult, however, when foreign nationals are unable to distinguish which crimes are aggravated felonies and which are not.<sup>6</sup>

The INA states that any crime with a term of imprisonment that is at least one year and relating to obstruction of justice is considered an aggravated felony.<sup>7</sup> The phrase obstruction of justice, however, is not defined in

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criminal convictions, failure to register as a sex offender, controlled substance offenses, certain firearm offenses, sex trafficking, domestic violence, stalking, protective order violations, and child abuse are all crimes that may result in removal for a foreign national. 8 U.S.C. § 1227(a)(2); KURZBAN, *supra*, at 89–119.

<sup>2</sup> See 8 U.S.C. § 1101(a)(43) (providing that conviction of an aggravated felony is grounds for removal); *id.* § 1101(a)(43)(S) (listing an offense relating to obstruction of justice as one definition of the term “aggravated felony”); *id.* § 1227(a)(2) (authorizing removal for aggravated felony convictions). Contrary to the title, aggravated felonies under the Immigration and Nationality Act (“INA”) are not always considered felonies under the state law where the foreign national was convicted. Jeff Joseph, *Immigration Consequences of Criminal Pleas and Convictions*, 35 COLO. LAW. 55, 59 (2006). In some cases, aggravated felonies include state law misdemeanors or municipal or petty offenses. *Id.*

<sup>3</sup> 8 U.S.C. § 1227(a)(2)(A)(iii) (“Any alien who is convicted of an aggravated felony at any time after admission is deportable.”).

<sup>4</sup> *Id.* § 1101(a)(43).

<sup>5</sup> See generally Rosenbloom, *supra* note 1, at 1966 (stating that foreign nationals who have any contact with law enforcement are at risk of the detention and removal process). Because the consequences are so grave, in 2010 the U.S. Supreme Court held that the Sixth Amendment requires defense counsel to inform noncitizens of immigration consequences of a conviction. *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010).

<sup>6</sup> See *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 820 (9th Cir. 2016) (reasoning that one cannot determine which crimes under the INA may cause deportation); Derrick Moore, “*Crimes Involving Moral Turpitude*”: *Why the Void-for-Vagueness Argument Is Still Available and Meritorious*, 41 CORNELL INT’L L.J. 813, 814 (2008) (arguing that Congress has not provided a detailed or workable standard for crimes that result in punishment as severe as deportation).

<sup>7</sup> 8 U.S.C. § 1101(a)(43)(S) (2012) (“The term ‘aggravated felony’ means . . . an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year.”). The INA governs the consequences of criminal activity for a foreign national. See MARY E. KRAMER, *IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY: A GUIDE TO REPRESENTING FOREIGN BORN DEFENDANTS* 38 (6th ed. 2015) (providing an overview of consequences for criminal activity). Any crime with a term of imprisonment that is at least one year and relating to obstruction of justice is one of many offenses considered an aggravated felony under the INA. See 8 U.S.C. § 1101(a)(43) (listing all offenses considered aggravated felonies, including: murder, rape, or sexual abuse of a minor; illicit trafficking of a controlled substance; illicit trafficking in firearms, destructive devices, or explosives; a

the INA.<sup>8</sup> The lack of a clear definition for the phrase caused the U.S. Court of Appeals for the Ninth Circuit in 2016, in *Valenzuela Gallardo v. Lynch*, to hold that the phrase raises grave constitutional concerns.<sup>9</sup>

This Comment argues that the Ninth Circuit correctly raised the unconstitutional vagueness question, thereby assisting foreign nationals in protecting themselves from deportation.<sup>10</sup> This Comment also argues that the Ninth Circuit's decision did not create a circuit split, as no other circuit has addressed the issue.<sup>11</sup> Part I of this Comment discusses the categorical approach, the various definitions provided for obstruction of justice in the immigration context, the unconstitutional vagueness doctrine, and the factual history of *Gallardo*.<sup>12</sup> Part II explains the Board of Immigration Appeals' ("BIA") decision in *In re Valenzuela Gallardo*, and the appeal from the BIA's decision to the Ninth Circuit in *Gallardo*.<sup>13</sup> Finally, Part III argues that the Ninth Circuit correctly raised the unconstitutional vagueness question and by doing so, did not create a circuit split.<sup>14</sup>

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crime of violence with a term of imprisonment of at least one year; a theft or burglary offense with a term of imprisonment of at least one year; prostitution; and more).

<sup>8</sup> See 8 U.S.C. § 1101(a)(43) (stating that aggravated felony means an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year); *Gallardo*, 818 F.3d at 820 (reasoning that no definition of obstruction of justice can be gleaned from the Board of Immigration Appeals' ("BIA") case law, nor is there a statutory definition or settled legal meaning). The term "obstruction of justice" is not defined in the U.S. Code, but the Code provides a list of offenses entitled "Obstruction of Justice" in Chapter 73. 18 U.S.C. §§ 1501–1521 (2012).

<sup>9</sup> *Gallardo*, 818 F.3d at 822 (holding that the BIA's new interpretation of obstruction of justice provided in *Valenzuela Gallardo*'s case raised serious constitutional concerns, and remanding the case to the BIA to apply the previous interpretation of the phrase or for a new interpretation that does not raise constitutional concerns).

<sup>10</sup> See *United States v. Williams*, 553 U.S. 285, 304 (2008) (stating that due process is violated when a person of ordinary intelligence does not have fair notice of what conduct is prohibited); *City of Chicago v. Morales*, 527 U.S. 41, 60. (1999) (reasoning that the Constitution does not permit broad provisions from the legislature which aim to catch all possible offenders, and then leave it to the enforcement agency to decide who should be detained); *Gallardo*, 818 F.3d at 822 (holding that the BIA's definition of obstruction of justice uses amorphous phrases and thus raises grave constitutional concerns).

<sup>11</sup> See *Gallardo*, 818 F.3d at 822 n.8 (arguing that the other U.S. Courts of Appeals do not address the unconstitutional vagueness issue, thus the decision did not create a circuit split); *Armenta-Lagunas v. Holder*, 724 F.3d 1019, 1022 (8th Cir. 2013) (finding it unnecessary to address the issue because the crime falls within the BIA's narrower definition requiring a nexus to an ongoing judicial proceeding); *Higgins v. Holder*, 677 F.3d 97, 104 (2d Cir. 2012) (same).

<sup>12</sup> See *infra* notes 15–50 and accompanying text.

<sup>13</sup> See *infra* notes 51–84 and accompanying text.

<sup>14</sup> See *infra* notes 85–109 and accompanying text.

## I. THE VOID FOR VAGUENESS DOCTRINE: WHY CLARITY IN THE LAW IS EVEN MORE IMPORTANT FOR VALENZUELA GALLARDO AND OTHER FOREIGN NATIONALS

Clarity in the INA is of the utmost importance to foreign nationals, who need notice of what conduct can lead to deportation.<sup>15</sup> Section A of this Part examines the categorical approach and how obstruction of justice has been defined under the INA.<sup>16</sup> Section B provides an overview of the unconstitutional vagueness doctrine.<sup>17</sup> Finally, Section C discusses the factual background of *Gallardo*.<sup>18</sup>

### A. *The Categorical Approach and the Attempted Definitions of Obstruction of Justice*

The qualifying crimes amounting to an aggravated felony are listed in generic terms, requiring courts and adjudicative bodies to determine whether a prior conviction under state law is a qualifying crime.<sup>19</sup> When making this determination, courts use the categorical approach, looking to the elements of the penal statute as opposed to the individual foreign national's conduct.<sup>20</sup> Thus, in order for the crime at issue to be considered an aggravated felony, every set of facts violating the statute at issue must satisfy the criteria of an aggravated felony.<sup>21</sup> The BIA, which is the administrative appellate body that reviews immigration decisions and determines which crimes result in removal, may not distinguish crimes by the facts underlying the individual crime.<sup>22</sup> If the past conviction includes all of the elements of

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<sup>15</sup> See *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903) (holding that procedural due process applies to deportation proceedings because entry into the United States makes a foreign national on U.S. soil subject to U.S. jurisdiction and a part of the population); Mary Holper, *Deportation for a Sin: Why Moral Turpitude Is Void for Vagueness*, 90 NEB. L. REV. 647, 667 (2012) (stating that *Yamataya v. Fisher* “unquestionably guarantees” foreign nationals within the United States the right to procedural due process in deportation proceedings).

<sup>16</sup> See *infra* notes 19–32 and accompanying text.

<sup>17</sup> See *infra* notes 33–39 and accompanying text.

<sup>18</sup> See *infra* notes 39–50 and accompanying text.

<sup>19</sup> See *Higgins*, 677 F.3d at 101 (stating that in order to determine if a crime is an obstruction of justice, the categorical approach is used).

<sup>20</sup> See *Taylor v. United States*, 495 U.S. 575, 601 (1990) (stating that a factual approach as opposed to the categorical approach would result in practical difficulties); *Higgins*, 677 F.3d at 101 (providing an explanation of the categorical approach); *Dickson v. Ashcroft*, 346 F.3d 44, 48 (2d Cir. 2003) (stating that the categorical approach focuses on the intrinsic nature of the crime, not the underlying facts).

<sup>21</sup> *Higgins*, 677 F.3d at 101.

<sup>22</sup> See *Dickson*, 346 F.3d at 48 (stating that in order for a crime to amount to a removable offense, every set of facts violating the statute at issue must satisfy the removability criteria); KURZBAN, *supra* note 1, at 18 (providing a description of the BIA and its role).

the generic crime, the past conviction qualifies as an aggravated felony, allowing removal.<sup>23</sup>

Among the generic crimes is any crime that has a term of imprisonment of at least one year and relates to the obstruction of justice, perjury, subornation of perjury, or bribery of a witness.<sup>24</sup> In 1999, in *In re Espinoza-Gonzalez*, the BIA made one of many attempts to define obstruction of justice and held two elements required for a prior offense to qualify under the categorical approach: (1) the foreign national must have either actively interfered with an ongoing judicial proceeding or must have acted against or threatened to act against someone cooperating in the process of justice; and (2) the foreign national must have had the specific intent of interfering with a judicial process.<sup>25</sup> The BIA used Chapter 73 of the U.S. Code, entitled "Obstruction of Justice," to guide its interpretation.<sup>26</sup> Chapter 73 outlines federal obstruction of justice crimes, including alteration of a record, obstruction of proceedings, obstruction of criminal investigations, and more.<sup>27</sup>

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<sup>23</sup> See *Higgins*, 677 F.3d at 107 (holding that a witness tampering statute fulfills the generic offense of obstruction of justice under 8 U.S.C. § 1101(a)(43)(S), and thus the petitioner's conviction was an aggravated felony).

<sup>24</sup> 8 U.S.C. § 1101(a)(43)(S).

<sup>25</sup> *In re Espinoza-Gonzalez*, 22 I. & N. Dec. 889, 894 (B.I.A. 1999) (en banc). Any foreign national who has been ordered removed has a right to appeal to the BIA and he or she will not be removed until the appeal is complete. KRAMER, *supra* note 7, at 18. In light of this interpretation, the board concluded that misprision of a felony does not constitute an offense relating to obstruction of justice, because misprision of a felony does not require a specific intent to interfere with the process of justice. *In re Espinoza-Gonzalez*, 22 I. & N. Dec. at 894; cf. *In re Batista-Hernandez*, 21 I. & N. Dec. 955, 961 (B.I.A. 1997) (holding that accessory after the fact was an obstruction of justice because unlike misprision of felony, accessory after the fact requires intentional action to prevent another's trial or punishment).

<sup>26</sup> 18 U.S.C. §§ 1501–1521 (2012); *In re Espinoza-Gonzalez*, 22 I. & N. Dec. at 892. The crime at issue in *In re Espinoza-Gonzalez* was misprision of a felony. *In re Espinoza-Gonzalez*, 22 I. & N. Dec. at 890–91.

<sup>27</sup> 18 U.S.C. § 1501 (assault on process server); *id.* § 1502 (resistance to extradition agent); *id.* § 1503 (influencing or injuring officer or juror generally); *id.* § 1504 (influencing juror by writing); *id.* § 1505 (obstruction of proceedings before departments, agencies and committees); *id.* § 1506 (theft or alteration of record or process, false bail); *id.* § 1507 (picketing or parading); *id.* § 1508 (recording, listening to, or observing proceedings of grand or petit juries while deliberating or voting); *id.* § 1509 (obstruction of court orders); *id.* § 1510 (obstruction of criminal investigations); *id.* § 1511 (obstruction of State or local law enforcement); *id.* § 1512 (tampering with a witness, victim or an informant); *id.* § 1513 (retaliating against a witness, victim, or an informant); *id.* § 1514 (civil action to restrain harassment of a victim or witness); *id.* § 1514A (civil action to protect against retaliation in fraud cases); *id.* § 1515 (definitions for certain provisions, general provision); *id.* § 1516 (obstruction of federal audit); *id.* § 1517 (obstructing examination of financial institution); *id.* § 1518 (obstruction of criminal investigations of health care offenses); *id.* § 1519 (destruction, alteration or falsification of records in federal investigations and bankruptcy); *id.* § 1520 (destruction of corporate audit records); *id.* § 1521 (retaliating against a federal judge or federal law enforcement officer by false claim or slander of title); *In re Espinoza-Gonzalez*, 22 I. & N. Dec. at 891.

The BIA concluded that all of the federal crimes required either interference with a judicial proceeding or the intention to interfere with a person involved in a judicial proceeding.<sup>28</sup> Under the categorical approach, in order for a crime to be an obstruction of justice, every factual scenario of violating the statute at issue must include the two elements provided by the BIA.<sup>29</sup>

In 2011, in *Trung Thanh Hoang v. Holder*, the Ninth Circuit interpreted the BIA's definition of obstruction of justice to require interference with an ongoing judicial proceeding or investigation.<sup>30</sup> The foreign national in that case had been convicted of rendering criminal assistance.<sup>31</sup> The court held that because rendering criminal assistance does not require connection to an ongoing judicial proceeding in every circumstance, it is not an obstruction of justice under the categorical approach, and it does not qualify as an aggravated felony under the INA.<sup>32</sup>

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<sup>28</sup> See 18 U.S.C. §§ 1501–1521 (outlining obstruction of justice crimes); *In re Espinoza-Gonzalez*, 22 I. & N. Dec. at 892 (stating that even the two broadest provisions—§ 1503, prohibiting persons from influencing or injuring an officer or juror generally, and § 1510, prohibiting obstructions of criminal investigations—still involve a federal proceeding or judicial proceeding).

<sup>29</sup> See *Taylor*, 495 U.S. at 601 (stating that a categorical approach as opposed to a factual approach is used when determining if a crime is an aggravated felony); *Higgins*, 677 F.3d at 101 (stating that under the categorical approach, every factual scenario of the crime at issue must satisfy the criteria of an aggravated felony); *In re Espinoza-Gonzalez*, 22 I. & N. Dec. at 892–95 (providing the two elements of an obstruction of justice crime).

<sup>30</sup> See *Trung Thanh Hoang v. Holder*, 641 F.3d 1157, 1164 (9th Cir. 2011) (interpreting the BIA's definition of obstruction of justice as requiring a nexus to an ongoing judicial proceeding); *In re Espinoza-Gonzalez*, 22 I. & N. Dec. at 893 (holding that misprision of a felony is not an offense relating to obstruction of justice because misprision of a felony does not require active interference with a judicial proceeding or investigation).

<sup>31</sup> WASH. REV. CODE § 9A.76.080 (2016); *Hoang*, 641 F.3d at 1159 (rendering criminal assistance in the second degree violated Washington Revised Code § 9A.76.080). The statute provides:

(1) A person is guilty of rendering criminal assistance in the second degree if he or she renders criminal assistance to a person who has committed or is being sought for a class B or class C felony or an equivalent juvenile offense or to someone being sought for violation of parole, probation, or community supervision. (2)(a) Except as provided in (b) of this subsection, rendering criminal assistance in the second degree is a gross misdemeanor. (b) [not here relevant].

WASH. REV. CODE § 9A.76.080. Utilizing the categorical approach and examining the Washington criminal code, the court determined rendering criminal assistance has three elements: (1) the defendant must intend to help another person evade apprehension or prosecution; (2) the defendant must be aware of the fact that the person has committed a crime or is wanted by law enforcement; and (3) the defendant must have done one of the acts enumerated in the statutes, which in this case was providing a method of transportation to the criminal. *Hoang*, 641 F.3d at 1162.

<sup>32</sup> See *Hoang*, 641 F.3d at 1162, 1165 (reasoning that a connection to an ongoing judicial proceeding or investigation is not a necessary element of the offense, because criminal assistance, such as providing the escape car, can occur before any judicial proceeding or investigation has begun); see also *Salazar-Luviano v. Mukasey*, 551 F.3d 857, 862–63 (9th Cir. 2008) (holding that escape from custody was not an obstruction of justice because the crime does not require an ongoing judicial proceeding but rather may occur after a judicial proceeding has concluded).

### B. The Unconstitutional Vagueness Doctrine

Unconstitutional vagueness is a doctrine of the U.S. Constitution's Fifth Amendment due process clause.<sup>33</sup> The due process clause requires the government to provide due process, including notice, prior to depriving an individual of life, liberty or property.<sup>34</sup> Foreign nationals are entitled to these protections.<sup>35</sup> A statute can be unconstitutionally vague if it fails to provide a person of ordinary intelligence with fair notice of the conduct prohibited or if it encourages or authorizes arbitrary or discriminatory enforcement.<sup>36</sup>

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<sup>33</sup> See U.S. CONST. amend. V (“[N]or shall any person be . . . deprived of life, liberty, or property, without due process of law . . .”); *Dimaya v. Lynch*, 803 F.3d 1110, 1112–20 (9th Cir. 2015) (describing the doctrine and holding that the federal test for a “crime of violence” is unconstitutionally vague), *cert. granted*, 137 S. Ct. 31 (Sept. 29, 2016).

<sup>34</sup> See U.S. CONST. amend. V; *infra* note 36 and accompanying text (explaining the notice requirement).

<sup>35</sup> See *Yamataya*, 189 U.S. at 101 (holding that procedural due process applies to deportation proceedings because entry into the United States makes a foreign national on U.S. soil subject to U.S. jurisdiction and a part of the population); *Holper*, *supra* note 15, at 667 (stating that *Yamataya* “unquestionably guarantees” foreign nationals within the U.S. the right to procedural due process in deportation proceedings).

<sup>36</sup> See *Williams*, 553 U.S. at 304 (stating that fair notice requires the ability of a reasonable person to understand what conduct is prohibited); *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (outlining the two independent reasons that a statute can be unconstitutionally vague); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (stating that the void-for-vagueness doctrine requires that a statute not encourage or allow arbitrary enforcement); see also *Moore*, *supra* note 6, at 827 (stating that a statute may be unconstitutionally vague for two reasons: (1) failure to provide a person of ordinary intelligence an understanding of what the law prohibits; or (2) authorizing or encouraging arbitrary enforcement). The Supreme Court has held a loitering statute unconstitutionally vague. *Morales*, 527 U.S. at 64 (citing Chicago Municipal Code § 8-4-015). The ordinance defined the term “loiter” as “remaining in any one place with no apparent purpose.” *Id.* at 47 (internal alterations omitted). The Court held that the ordinance was a catchall provision for police officers because “apparent purpose” does not have a common meaning and an ordinary person would not know whether their conduct constituted “loitering.” *Id.* at 64. More recently, the Supreme Court held that the residual clause of the Armed Career Criminal Act of 1984 is unconstitutionally vague because there was uncertainty about two phrases within the clause: what crimes qualify as a violent felony and how much risk is considered “a serious potential risk.” See *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015) (holding that the residual clause of the Armed Career Criminal Act violates the Constitution’s guarantee of due process). The Court reasoned that the residual clause did not provide fair notice to defendants and it allowed for arbitrary enforcement by judges. See *id.* Additionally, statutes must have explicit standards for those applying them to prevent discriminatory enforcement. *Moore*, *supra* note 6, at 827. The arbitrary enforcement concept was first provided by Supreme Court Justice Roberts in dissent. *Screws v. United States*, 325 U.S. 91, 149 (1945) (Roberts, J., dissenting); *Moore*, *supra* note 6, at 827. Although there was no precedent for Justice Roberts’s argument, his reasoning can be found in many subsequent Supreme Court decisions. See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (using this reasoning to hold that an anti-picketing ordinance is unconstitutionally vague); *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972) (applying this reasoning to hold that a vagrancy ordinance was void for vagueness); *Moore*, *supra* note 6, at 827 (providing the history of discriminatory enforcement as a reason for holding a statute to be unconstitutionally vague). The Roberts standard has become a part of the modern day test, and has since been considered even more im-



A court, in analyzing unconstitutional vagueness, asks whether the statute has sufficient standards that allow the public to be certain about what is prohibited and that prevent arbitrary enforcement.<sup>37</sup> If a statute that may otherwise appear vague has developed a meaning through case law, common understandings, legislative history, definitions, context, administrative agency regulations, or law enforcement agencies, it will not be invalidated.<sup>38</sup>

### C. History of Valenzuela Gallardo's Removal Proceedings

Augustin Valenzuela Gallardo, the defendant in the case at issue has been a lawful permanent resident of the United States since 2002.<sup>39</sup> In November 2007, he was arrested and pled guilty to accessory to a felony in violation of California Penal Code § 32.<sup>40</sup> Valenzuela Gallardo was initially

portant than the notice prong. See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (stating that the void-for-vagueness doctrine requires that a statute not encourage or allow arbitrary enforcement); *Smith v. Goguen*, 415 U.S. 566, 574 (1974) (explaining that the arbitrary enforcement aspect of the vagueness analysis is most important); see also Moore, *supra* note 6, at 827 (outlining discriminatory enforcement as a reason for a statute to be unconstitutionally vague).

<sup>37</sup> See *Giaccio v. Pennsylvania*, 382 U.S. 399, 402–03 (1966) (holding that a Pennsylvania statute was unconstitutional because it had no standards and gave no conditions, limitations, or contingencies to those in charge of enforcement, in this case, the jury); Holper, *supra* note 15, at 673 (arguing that a law does not provide fair notice if it is “standardless”).

<sup>38</sup> See *Ward v. Illinois*, 431 U.S. 767, 775 (1977) (holding that an Illinois obscenity statute was not unconstitutionally vague because the court incorporated guidelines into the statute); *Wainwright v. Stone*, 414 U.S. 21, 22 (1973) (stating that courts must evaluate how the statute has been interpreted by the highest court of the state when analyzing a vagueness challenge); *Grayned*, 408 U.S. at 112 (reasoning that an otherwise vague section of a statute could be given meaning by the statute’s overall purpose); *Boutilier v. INS*, 387 U.S. 118, 124 (1967) (stating that when examining a statute for the constitutional requirement of fair warning, the test is what Congress intended, which can be gleaned from the legislative history); *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 502 (1925) (reasoning that the word “kosher” within a statute was not vague because it has a well-defined meaning to those engaged in the trade of selling kosher products); Holper, *supra* note 15, at 674 (outlining ways a vague statute may develop meaning). A statute can also accumulate a common understanding if it has been in existence for a long time. Holper, *supra* note 15, at 674 n.182. Courts are also less likely to void statutes for vagueness when an administrative agency has been assigned to interpret it and make regulations. *Id.* at 675. This played a role in the Ninth Circuit decision to remand *Valenzuela Gallardo v. Lynch* to the BIA, instead of voiding the statute for vagueness. *Gallardo*, 818 F.3d at 824.

<sup>39</sup> *In re Valenzuela Gallardo*, 25 I. & N. Dec. 838, 839 (B.I.A. 2012). Valenzuela Gallardo is a citizen of Mexico. *Id.* A lawful permanent resident (“LPR”) is permitted to live and work in the United States. KRAMER, *supra* note 7, at 3. LPR status is typically obtained through employer petitions, relative petitions, or grants of asylum. *Id.* Even with LPR status, a foreign national is subject to deportation for violation of the immigration laws. *Id.*

<sup>40</sup> CAL. PENAL CODE § 32 (West 2016); *Gallardo*, 818 F.3d at 811; *In re Valenzuela Gallardo*, 25 I. & N. Dec. at 839. The statute provides:

Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has

placed on probation, but upon violating probation was sentenced to sixteen months in prison.<sup>41</sup> The Department of Homeland Security initiated removal proceedings in June 2010 because it asserted Valenzuela Gallardo's conviction was an aggravated felony under the INA.<sup>42</sup> Valenzuela Gallardo filed a motion to terminate removal proceedings in July 2010 on the grounds that his offense did not relate to obstruction of justice because the statute under which he was convicted did not require interference with a pending judicial proceeding or investigation.<sup>43</sup> The Immigration Judge denied this motion and ordered Valenzuela Gallardo removed to Mexico, stating that his conviction was an obstruction of justice for which the term of imprisonment was beyond one year and thus was an aggravated felony under the INA.<sup>44</sup>

Following the Immigration Judge's denial, Valenzuela Gallardo petitioned for review by the Ninth Circuit and requested a stay of removal.<sup>45</sup> The Ninth Circuit dismissed the petition for lack of jurisdiction.<sup>46</sup>

In light of the 2011 *Hoang* opinion, where the Ninth Circuit stated the BIA's interpretation of obstruction of justice required a nexus to an ongoing judicial proceeding, the BIA *sua sponte* reopened Valenzuela Gallardo's removal proceedings in order to clarify what the BIA thought to be a flawed

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committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony.

CAL. PENAL CODE § 32. Valenzuela Gallardo was also charged with two counts of possession of a controlled substance, one count of possessing methamphetamine while armed, and one count of failing to comply with the terms of his probation. *Gallardo*, 818 F.3d at 811. These charges were dismissed upon pleading guilty to accessory to a felony. *Id.*

<sup>41</sup> *Gallardo*, 818 F.3d at 811; *In re Valenzuela Gallardo*, 25 I. & N. Dec. at 839. Thus meeting the INA requirement of a term of imprisonment that is at least one year. 8 U.S.C. § 1101(a)(43)(S).

<sup>42</sup> *In re Valenzuela Gallardo*, 25 I. & N. Dec. at 839.

<sup>43</sup> *Gallardo*, 818 F.3d at 812. Under the categorical rule, it does not matter whether Valenzuela Gallardo's conduct related to an obstruction of justice, it matters only that the crime for which the conviction was obtained relates to an obstruction of justice. *See Taylor*, 495 U.S. at 601 (stating that a categorical approach is used when determining if a crime is an aggravated felony); *Higgins*, 677 F.3d at 101 (stating that under the categorical approach, every factual scenario of the crime at issue must satisfy the criteria of an aggravated felony).

<sup>44</sup> *In re Valenzuela Gallardo*, 25 I. & N. Dec. at 839; *see* 8 U.S.C. § 1101(a)(43)(S) (providing that obstruction of justice offenses constitute aggravated felonies). Removal proceedings take place in a formal courtroom setting, however, there are relaxed rules of evidence. KRAMER, *supra* note 7, at 22. For example, hearsay is permitted. *Id.* There is not an opinion for this initial removal proceeding. *In re Valenzuela Gallardo*, 25 I. & N. Dec. at 838. Valenzuela Gallardo later filed a motion to reconsider, which was also denied. *Id.*

<sup>45</sup> *Gallardo*, 818 F.3d at 812.

<sup>46</sup> *Id.* The Ninth Circuit did not have jurisdiction because federal courts only have jurisdiction to review appeals of the BIA if there is a violation of the law, including the Constitution, on the part of the BIA. KRAMER, *supra* note 7, at 31. Federal courts can review whether the BIA applied the law properly and can interpret due process and equal protection constitutional claims. *Id.*

interpretation of *In re Espinoza Gonzalez*.<sup>47</sup> The BIA held that *In re Espinoza Gonzalez* had not limited the scope of obstruction of justice to cases where there is a pending judicial proceeding.<sup>48</sup> Valenzuela Gallardo then filed another appeal with the Ninth Circuit challenging the BIA's most recent interpretation of obstruction of justice as unconstitutionally vague.<sup>49</sup> This time, his appeal was granted.<sup>50</sup>

## II. THE NINTH CIRCUIT'S CONTENTION THAT THERE ARE GRAVE UNCONSTITUTIONAL VAGUENESS CONCERNS AND THE CONTENTED CIRCUIT SPLIT

The INA does not define the elements of the crime of obstruction of justice.<sup>51</sup> Since 1999, the BIA has defined the crime to include two elements: (1) interference or threatened interference with a judicial proceeding; and (2) specific intent to interfere with the process of justice.<sup>52</sup> In 2011, in *Trung Thanh Hoang v. Holder*, the U.S. Court of Appeals for the Ninth Circuit understood that definition to include a requirement that the obstruction be related to an ongoing judicial proceeding.<sup>53</sup> Section A of this Part discusses the BIA's 2012 response in *In re Valenzuela Gallardo*, holding that an ongoing judicial proceeding is not a necessary element of an obstruction of justice of-

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<sup>47</sup> See *Hoang*, 641 F.3d at 1162, 1164 (holding that the BIA's definition of obstruction of justice requires a nexus to an ongoing proceeding); *In re Valenzuela Gallardo*, 25 I. & N. Dec. at 838 (stating that Valenzuela Gallardo's case was *sua sponte* reopened eight months after the immigration judge had ordered Valenzuela Gallardo removed in light of *Trung Thanh Hoang v. Holder*).

<sup>48</sup> *In re Valenzuela Gallardo*, 25 I. & N. Dec. at 842.

<sup>49</sup> *Gallardo*, 818 F.3d at 812.

<sup>50</sup> *Id.* This time the Ninth Circuit had jurisdiction under 8 U.S.C. § 1252(a)(2)(D), a provision allowing judicial review of constitutional claims or questions in removal proceedings. 8 U.S.C. § 1252(a)(2)(D).

<sup>51</sup> See 8 U.S.C. § 1101(a)(43) (2012) ("The term 'aggravated felony' means . . . an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year . . ."); 18 U.S.C. §§ 1501–1521 (2012) (listing crimes in the U.S. Code that constitute an obstruction of justice); *In re Valenzuela Gallardo*, 25 I. & N. Dec. 838, 842 (B.I.A. 2012) (holding that an offense relating to an obstruction of justice does not require a nexus to an ongoing proceeding); *In re Espinoza-Gonzalez*, 22 I. & N. Dec. 889, 894 (B.I.A. 1999) (en banc) (holding that an obstruction of justice requires an intentional attempt to interfere with the process of justice, and a specific intent to interfere with the process of justice); *In re Batista-Hernandez*, 21 I. & N. Dec. 955, 961 (B.I.A. 1997) (holding that an offense is an obstruction of justice when it "clearly relates" to obstruction of justice).

<sup>52</sup> See *In re Espinoza-Gonzalez*, 22 I. & N. Dec. at 894 (providing the two elements of an obstruction of justice crime).

<sup>53</sup> See *Trung Thanh Hoang v. Holder*, 641 F.3d 1157, 1164 (9th Cir. 2011) (interpreting the BIA's definition of obstruction of justice as requiring a nexus to an ongoing judicial proceeding).

fense.<sup>54</sup> Section B explains the 2016 decision in Valenzuela Gallardo's appeal, *Valenzuela Gallardo v. Lynch*, wherein the Ninth Circuit remanded the case to the BIA because the offense, as then defined, raised grave constitutional concerns.<sup>55</sup> Section C discusses the contended circuit split on whether the phrase, obstruction of justice, is unconstitutionally vague.<sup>56</sup>

### A. The BIA Attempts Clarification

In 2012, in *In re Valenzuela Gallardo*, the BIA sought to clarify its previous interpretation of the phrase obstruction of justice.<sup>57</sup> A three-judge panel of the BIA rejected the Ninth Circuit's application of BIA precedent, that obstruction of justice required a nexus to an ongoing judicial proceeding, and clarified prior precedent defining obstruction of justice.<sup>58</sup> The BIA held that the two elements necessary to an obstruction of justice, (1) an intentional attempt to interfere with the process of justice; and (2) a specific intent to interfere with the process of justice, do not require an ongoing judicial proceeding or investigation.<sup>59</sup> According to the BIA, although such circumstances will frequently involve an ongoing judicial proceeding, it is not a necessary element of obstruction of justice.<sup>60</sup>

The BIA stated that the reference to ongoing judicial proceedings and investigations in the elements of an obstruction of justice offense aimed to illustrate that obstruction of justice is not an open-ended term that is inclusive of any crime that may in some way obstruct justice.<sup>61</sup> The BIA then

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<sup>54</sup> *In re Valenzuela Gallardo*, 25 I. & N. Dec. at 839; see *infra* notes 57–63 and accompanying text.

<sup>55</sup> *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 820 (9th Cir. 2016); see *infra* notes 64–75 and accompanying text.

<sup>56</sup> See *infra* notes 76–84 and accompanying text.

<sup>57</sup> See *In re Valenzuela Gallardo*, 25 I. & N. Dec. at 838 (reopening *Valenzuela Gallardo*'s case *sua sponte* in light of the opinion in *Trung Thanh Hoang v. Holder*).

<sup>58</sup> See *Hoang*, 641 F.3d at 1162–64 (holding that criminal assistance does not qualify as an offense relating to obstruction of justice because it does not require connection to an ongoing judicial proceeding or investigation, but can occur before any judicial proceeding or investigation has begun); *In re Valenzuela Gallardo*, 25 I. & N. Dec. at 842 (stating that the Ninth Circuit's interpretation was reasonable, but that *In re Espinoza-Gonzalez* did not go so far as to hold an ongoing proceeding or investigation was required). Cases appealed to the BIA are typically heard by one judge. KRAMER, *supra* note 7, at 18–19. Nevertheless, if a case is of significant nature it will be heard *en banc* by a panel of three of the BIA's fifteen sitting judges. *Id.*

<sup>59</sup> *In re Valenzuela Gallardo*, 25 I. & N. Dec. at 842; *In re Espinoza-Gonzalez*, 22 I. & N. Dec. at 894.

<sup>60</sup> See *In re Valenzuela Gallardo*, 25 I. & N. Dec. at 842–43 (stating that the Ninth Circuit's interpretation was understandable, but that the intention was not to require connection to an ongoing proceeding).

<sup>61</sup> *Id.* at 842. To support this position, the BIA provided the example of preventing communication about a criminal offense to a law enforcement officer or judge. *Id.* at 842–43. Such a crime

held that Valenzuela Gallardo's conviction of accessory to a felony was an obstruction of justice.<sup>62</sup> Valenzuela Gallardo petitioned for review, challenging the BIA's most recent interpretation of obstruction of justice and raising the question of whether the statute is unconstitutionally vague.<sup>63</sup>

*B. The Ninth Circuit's Remands and Holds the Phrase Obstruction of Justice Raises Grave Constitutional Concerns*

In March of 2016, in *Valenzuela Gallardo v. Lynch*, the U.S. Court of Appeals for the Ninth Circuit, over dissent, agreed with Valenzuela Gallardo's argument that the BIA's 2012 interpretation of obstruction of justice in *In re Valenzuela Gallardo* suggests that the phrase may be unconstitutionally vague.<sup>64</sup>

Writing for the majority, Judge Christen stated the BIA's new definition of obstruction of justice blurs the boundaries of what is considered a part of the 'process of justice' and thus does not provide fair notice of what crimes constitute an obstruction of justice.<sup>65</sup> The court stated that because the statutory phrase is amorphous, without a limitation provided by the BIA, essentially any crime could be considered an obstruction of justice under the BIA's expanded definition.<sup>66</sup> The court believed that the BIA's statement that an obstruction of justice must not necessarily require a nexus to an ongoing proceeding removed the only narrowing principle that suggested a beginning and end to the process of justice.<sup>67</sup>

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does not require an ongoing judicial proceeding or investigation, but is included in the "obstruction of justice" chapter of the U.S. Code that the BIA had previously used to provide a definition for the term. 18 U.S.C. §§ 1510–1511; *In re Valenzuela Gallardo*, 25 I. & N. Dec. at 842–43.

<sup>62</sup> See *In re Valenzuela Gallardo*, 25 I. & N. Dec. at 844 (reasoning that accessory to a felony requires a specific intent to interfere with the process of justice).

<sup>63</sup> *Gallardo*, 818 F.3d at 812.

<sup>64</sup> *Id.* at 819. The Ninth Circuit had previously deferred to the BIA's definition of obstruction of justice in *In re Espinoza-Gonzalez* three times. See *Hoang*, 641 F.3d at 1165 (interpreting the BIA's definition of obstruction of justice in *In re Espinoza-Gonzalez* to require a nexus to an ongoing proceeding, and using that interpretation to hold a conviction of criminal assistance is not an obstruction of justice offense); *Renteria-Morales v. Mukasey*, 551 F.3d 1076, 1081 (9th Cir. 2008) (deferring to the BIA because the statute was part of the INA); *Salazar-Luviano v. Mukasey*, 551 F.3d 857, 860 (9th Cir. 2008) (deferring to the BIA's definition of obstruction of justice in *In re Espinoza-Gonzalez* because Congress did not provide one).

<sup>65</sup> *Gallardo*, 818 F.3d at 819.

<sup>66</sup> *Id.* at 822; see also *Gallardo v. Lynch*, THE RECORDER (Apr. 1, 2016), <http://www.the-recorder.com/id=1202753793716/Gallardo-v-Lynch> [<https://perma.cc/UJ2V-MYW9>] (arguing that under the BIA's new interpretation, everything that occurs after a crime is committed may be considered a part of the justice process).

<sup>67</sup> *Gallardo*, 818 F.3d at 820. District Judge Seabright, in dissent, argues that the majority misunderstood *In re Espinoza-Gonzalez* from the beginning: the previous interpretation never required a nexus to an ongoing judicial proceeding or investigation. *Id.* at 825 (Seabright, J., dis-

To further support its position, the Ninth Circuit looked to the surrounding related offenses in the aggravated felony section of the INA, specifically perjury or subornation of perjury, and bribery of a witness, and determined that all three relate to an ongoing judicial proceeding.<sup>68</sup> Moreover, the court looked to the “Obstruction of Justice” chapter of the U.S. Code and noted that nearly all of the offenses involved an ongoing judicial proceeding or investigation, or an intent to interfere with an act related to a judicial proceeding or investigation.<sup>69</sup> Although the government attempted to provide limits to the BIA’s obstruction of justice definition, the court rejected their arguments.<sup>70</sup>

Having determined that the phrase raises grave constitutional concerns, the court next examined whether Congress intended to have a constitutionally questionable interpretation of obstruction of justice.<sup>71</sup> The court found no indication of this.<sup>72</sup> Further, the court reasoned that all of Congress’s examples of an obstruction of justice involved an ongoing proceeding or investigation and thus aligned with the court’s understanding of *In re Espinoza-Gonzalez*.<sup>73</sup>

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senting). According to the dissent, the BIA’s interpretation in *In re Valenzuela Gallardo* was not a change from its own precedent, but rather a change only from Ninth Circuit precedent. *Id.*

<sup>68</sup> See 8 U.S.C. § 1101(a)(43)(S) (defining aggravated felony as an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness with a term of imprisonment of at least one year); *Gallardo*, 818 F.3d at 821 (reasoning that the surrounding terms, perjury and bribery of a witness, are clearly tied to proceedings, thus Congress’s intent was for obstruction of justice to also be tied to proceedings).

<sup>69</sup> 18 U.S.C. §§ 1501–1521; *Gallardo*, 818 F.3d at 821. The court used hindering communication with a law enforcement officer and harassing someone to prevent them from reporting a federal crime as examples of those offenses that do not involve a judicial proceeding but involve an intent to interfere with a proceeding or investigation. *Gallardo*, 818 F.3d at 821.

<sup>70</sup> *Gallardo*, 818 F.3d at 821–22. The Government first contended that because the BIA’s definition requires a specific intent to interfere with the process of justice, the definition is sufficiently limited. *Id.* at 821. Although the court conceded that the mens rea was defined, it took issue with the fact that the BIA did not provide a beginning or an end to the process of justice, and thus left open the question of when there is specific intent to interfere with this undefined process. *Id.* at 821–22. The second limitation contended by the Government was the one-year of imprisonment requirement enumerated in the INA, but the court noted this limitation does not provide a person of ordinary intelligence with any additional guidance as to what conduct will be an obstruction of justice. 8 U.S.C. § 1101(a)(43)(S); *Gallardo*, 818 F.3d at 822; see also *Johnson v. United States*, 135 S. Ct. 2551, 2555, 2557 (2015) (holding a residual clause to be unconstitutionally vague despite the existence of a one-year sentence requirement).

<sup>71</sup> *Gallardo*, 818 F.3d at 823. In his dissent, District Judge Seabright raised the argument that the modifier “relating to” within the INA means Congress intended for the BIA to push the constitutional boundary. *Id.* at 832 (Seabright, J., dissenting). The majority, however, rejected that any permission to ignore grave constitutional concerns could be given. *Id.* at 824 (majority opinion).

<sup>72</sup> *Id.* at 823.

<sup>73</sup> *Id.*; see 18 U.S.C. §§ 1501–1521 (outlining “obstruction of justice” crimes). Under the *Chevron* framework, the court is to defer to the agency’s statutory interpretation if it is reasonable.

The Ninth Circuit remanded the case to the BIA to either provide a new definition of the phrase, or to apply the definition previously provided in *In re Espinoza-Gonzalez*.<sup>74</sup> Although the dissent suggests that the court should provide a limiting interpretation in the face of any unconstitutional vagueness, the court stated that remand aligns with Congress's intent that the BIA take charge in administering the INA.<sup>75</sup>

### *C. The Contended Circuit Split: The Dissent Says the Opinion Created a Circuit Split, the Majority Disagrees*

A major disagreement between the dissent and majority opinions in *Gallardo* was whether the majority opinion's decision to raise an unconstitutional vagueness issue regarding the obstruction of justice definition created a circuit split.<sup>76</sup> Following *In re Valenzuela Gallardo* in 2012, two other U.S. Courts of Appeals dealt with the issue of whether a crime was an obstruction of justice, and neither of these circuits raised an unconstitutional vagueness issue.<sup>77</sup>

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*See* *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843, 844 (1984) (introducing and outlining the *Chevron* framework). Although the court applied the *Chevron* framework and understood the preference for deferring to the agency's interpretation, the grave constitutional concerns prevented them from doing so. *Gallardo*, 818 F.3d at 817. Agency interpretations are not given deference if the interpretation raises constitutional doubts and a less concerning interpretation exists. *Id.*; *see also* *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (holding that an agency's interpretation of "coercion" including the handbilling of consumers raised concerns of First Amendment issues and thus the agency was not entitled to *Chevron* deference).

<sup>74</sup> *Gallardo*, 818 F.3d at 824. This result is similar to a 1948 Supreme Court case, *Musser v. Utah*. *See* 333 U.S. 95, 98 (1948) (remanding a statute with grave constitutional concerns to the Supreme Court of Utah instead of voiding the statute for vagueness). There, the statute at issue punished any person who committed an act "injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or the due administration of laws." *Id.* at 96 (quoting Utah Code Ann. § 103-11-1(5) (1943)). The Court concluded the statute was far too general, resulting in the statute potentially including any act. *Id.* at 96–97. The Court remanded the case to the Supreme Court of Utah to determine if there was an interpretation from a state court that limited the broad reach of the statute. *Id.* at 97–98.

<sup>75</sup> *Gallardo*, 818 F.3d at 824; *id.* at 839 (Seabright, J., dissenting).

<sup>76</sup> *See id.* at 822 n.8 (majority opinion) (holding that the decision does not create a circuit split); *id.* at 839 n.6 (Seabright, J., dissenting) (arguing that the *Gallardo* opinion is inconsistent with other circuit court opinions and thus creates a circuit split).

<sup>77</sup> *See id.* at 839 n.6 (Seabright, J., dissenting) (listing the Courts of Appeals opinions inconsistent with the majority); *Armenta-Lagunas v. Holder*, 724 F.3d 1019, 1022 (8th Cir. 2013) (holding that witness tampering is an obstruction of justice, and raising no unconstitutional vagueness concerns); *Higgins v. Holder*, 677 F.3d 97, 104 (2d Cir. 2012) (holding that witness tampering is an offense relating to obstruction of justice, but not raising the unconstitutional vagueness question). The dissent also refers to a 2011 case of the U.S. Court of Appeals for the Fifth Circuit, *United States v. Gamboa-Garcia*, decided before the BIA promulgated its new definition of obstruction of justice in *In re Valenzuela Gallardo*, to support the assertion of a circuit split because the prior con-

In *Armenta-Lagunas v. Holder*, a 2013 decision of the U.S. Court of Appeals for the Eighth Circuit, the crime at issue was witness tampering, and the court held that this offense was an obstruction of justice.<sup>78</sup> Although the Eighth Circuit did not raise an unconstitutional vagueness concern, it also stated that because the state offense at issue fell within the BIA's narrower definition of obstruction of justice there was no need to address whether deference should be given to the BIA's clarification.<sup>79</sup> Similarly, in 2012 the U.S. Court of Appeals for the Second Circuit, in *Higgins v. Holder*, held that a conviction for tampering with a witness was an obstruction of justice within the BIA's more restrictive definition and did not raise the unconstitutional vagueness question.<sup>80</sup> A nexus to an ongoing judicial proceeding or investigation was plainly required for both witness tampering statutes and thus, the unconstitutional vagueness issue was not discussed in the Second or Eighth Circuits.<sup>81</sup>

Sitting on the panel by designation, district court Judge Seabright in dissent, argued that the absence of an unconstitutional vagueness issue in these two cases created a circuit split.<sup>82</sup> The majority's view, however, is that because these cases involved offenses that were plainly obstructions of

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viction did not "refer to a pending proceeding." *Gallardo*, 818 F.3d at 839 n.6 (Seabright, J., dissenting) (citing *United States v. Gamboa-Garcia*, 620 F.3d 546 (5th Cir. 2010) (holding an accessory to murder conviction was an aggravated felony)). The majority responds, however, that *Gamboa-Garcia*, decided using the modified categorical approach, relied on the facts of the noncitizen's crime, not the elements of the statute alone. *Id.* at 822 n.8 (majority opinion); *Gamboa-Garcia*, 620 F.3d at 546. In any case, *Gamboa-Garcia* was decided using the BIA's 1999 definition of "obstruction of justice," a definition no one challenges on vagueness grounds. *Gamboa-Garcia*, 620 F.3d at 546.

<sup>78</sup> *Armenta-Lagunas*, 724 F.3d at 1020, 1022. There, the court used the definition from *In re Espinoza-Gonzalez*, requiring two elements: (1) an active interference with a judicial proceeding or investigation or threat of action against someone involved in a judicial proceeding or investigation; and (2) specific intent to interfere with a crime. *Id.* at 1022; *In re Espinoza-Gonzalez*, 22 I. & N. Dec. at 894. The court determined witness tampering undoubtedly requires an active interference with an ongoing judicial proceeding or investigation. *Armenta-Lagunas*, 724 F.3d at 1023; see NEB. REV. STAT. § 28-919(1)(c), (d) (2012) (providing a person commits witness or informant tampering if: (1) he or she has a reasonable belief there is a pending proceeding or investigation; and (2) he or she attempts to cause the witness or informant to fail to show up to testify or refuse to testify).

<sup>79</sup> *Armenta-Lagunas*, 724 F.3d at 1023.

<sup>80</sup> *Higgins*, 677 F.3d at 104; see CONN. GEN. STAT. § 53a-151 (2001) (stating the elements of witness tampering are believing a proceeding is pending or about to be instituted and inducing a witness to testify falsely, withhold testimony, evade legal proceedings or refuse to testify).

<sup>81</sup> See *Gallardo*, 818 F.3d at 822 n.8 (holding that the Courts of Appeals did not have a reason to raise an unconstitutional vagueness issue and thus did not create a circuit split); *Armenta-Lagunas*, 724 F.3d at 1022 (holding that witness tampering is an obstruction of justice and raising no unconstitutional vagueness concerns); *Higgins*, 677 F.3d at 104 (same).

<sup>82</sup> See *Gallardo*, 818 F.3d at 839 n.6 (Seabright, J., dissenting) (arguing that the majority opinion is inconsistent with the Second, Fifth, and Eighth Circuits, thus creating a circuit split).



justice, the unconstitutional vagueness issue was not implicated.<sup>83</sup> The majority noted that the Second and Eighth Circuits did not deny the possibility of an unconstitutional vagueness issue, but rather did not need to consider the possibility.<sup>84</sup>

### III. THE NINTH CIRCUIT IS CORRECT THAT “OBSTRUCTION OF JUSTICE” WITHIN THE IMMIGRATION AND NATIONALITY ACT IS UNCONSTITUTIONALLY VAGUE, BUT THIS OPINION DID NOT CREATE A CIRCUIT SPLIT

Obstruction of justice is not defined in the INA.<sup>85</sup> In 1999, the BIA defined obstruction of justice to include two elements: 1) interference or threatened interference with a judicial proceeding, and 2) specific intent to interfere with the process of justice.<sup>86</sup> In 2011, in *Trung Thanh Hoang v. Holder*, the U.S. Court of Appeals for the Ninth Circuit understood this definition provided by the BIA to include a requirement that the obstruction be related to an ongoing judicial proceeding.<sup>87</sup> The BIA responded to *Hoang* in the 2012 decision *In re Valenzuela Gallardo*, holding that an ongoing judicial proceeding is not a necessary element of an obstruction of justice offense.<sup>88</sup> On appeal, the U.S. Court of Appeals for the Ninth Circuit’s 2016 decision *Valenzuela Gallardo v. Lynch* remanded the case to the BIA because the definition raised grave constitutional concerns.<sup>89</sup> The court in *Gallardo* was correct on two accounts.<sup>90</sup> First, the new interpretation of ob-

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<sup>83</sup> See *id.* at 822 n.8 (majority opinion) (arguing that the majority opinion does not create or perpetuate a circuit split).

<sup>84</sup> See *id.* (arguing that omission of the issue did not create a circuit split); see also J. Harvie Wilkinson III, *If It Ain’t Broke . . .*, 119 YALE L.J. ONLINE 67, 70 (2009), <http://www.yalelawjournal.org/forum/if-it-aint-broke-> [https://perma.cc/6SWY-33UL] (arguing that often even when a circuit split exists, the dispute can be better resolved through a democratic body or legislation).

<sup>85</sup> See 8 U.S.C. § 1101(a)(43) (2012) (stating that aggravated felony means an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year); 18 U.S.C. §§ 1501–1521 (2012) (listing crimes in the U.S. Code that constitute an obstruction of justice); *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 820 (9th Cir. 2016) (reasoning that no definition of obstruction of justice can be gleaned from the BIA’s case law, nor is there a statutory definition or settled legal meaning).

<sup>86</sup> See *In re Espinoza-Gonzalez*, 22 I. & N. Dec. 889, 894 (B.I.A. 1999) (en banc) (providing the two elements of an obstruction of justice crime).

<sup>87</sup> See *Trung Thanh Hoang v. Holder*, 641 F.3d 1157, 1164 (9th Cir. 2011) (interpreting the BIA’s definition of obstruction of justice as requiring a nexus to an ongoing judicial proceeding).

<sup>88</sup> *In re Valenzuela Gallardo*, 25 I. & N. Dec. 838, 839 (B.I.A. 2012).

<sup>89</sup> *Gallardo*, 818 F.3d at 820.

<sup>90</sup> See *United States v. Williams*, 553 U.S. 285, 304 (2008) (stating that due process is violated when a person of ordinary intelligence does not have fair notice of what conduct is prohibited); *City of Chicago v. Morales*, 527 U.S. 41, 60. (1999) (reasoning that the Constitution does not permit the legislature to cast a wide net in order to catch all possible offenders, and then leave it to

struction of justice provided by the BIA in 2012, in *In re Valenzuela Gallardo*, was more than a mere clarification and raised grave unconstitutional vagueness concerns.<sup>91</sup> Second, the decisions of sister U.S. Courts of Appeals, that the dissent argues form a circuit split with *Gallardo*, had no reason to discuss unconstitutional vagueness and thus are not in disagreement with the Ninth Circuit.<sup>92</sup>

The BIA's interpretation of obstruction of justice in *In re Valenzuela Gallardo* deprives foreign nationals of their Fifth Amendment right to due process.<sup>93</sup> Many crimes resulting in deportation are clearly defined by Congress in the INA.<sup>94</sup> It is thus evident that Congress is capable and willing to clearly define what criminal activity ought to result in deportation.<sup>95</sup> Although courts generally defer to an interpretation of a statute provided by an

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the agency in charge of enforcement to decide who should be detained); *Gallardo*, 818 F.3d at 822 (holding that the BIA's definition of obstruction of justice uses amorphous phrases and thus raises grave constitutional concerns); *Armenta-Lagunas v. Holder*, 724 F.3d 1019, 1022 (8th Cir. 2013) (holding that witness tampering plainly requires a nexus to an ongoing judicial proceeding); *Higgins v. Holder*, 677 F.3d 97, 104 (2d Cir. 2012) (same).

<sup>91</sup> See *Williams*, 553 U.S. at 304 (holding that if a person of ordinary intelligence does not have fair notice of what conduct is illegal, the Fifth Amendment right to due process is violated); *Morales*, 527 U.S. at 64 (holding a loitering ordinance was unconstitutionally vague because it gave too much discretion to police); *Gallardo*, 818 F.3d at 822 (holding that the BIA's new definition of obstruction of justice raises grave constitutional concerns); *In re Valenzuela Gallardo*, 25 I. & N. Dec. 838, 844 (B.I.A. 2012) (holding that an offense does not need to have a nexus to an ongoing proceeding in order to be an obstruction of justice offense). Obstruction of justice is not the only phrase within the INA that raises unconstitutional vagueness concerns. See Holper, *supra* note 15, at 648 (arguing "crime involving moral turpitude" within the INA should be void for vagueness).

<sup>92</sup> See *Gallardo*, 818 F.3d at 822 n.8 (stating that the Ninth Circuit had not created a circuit split); *Armenta-Lagunas*, 724 F.3d at 1022 (holding that witness tampering is an obstruction of justice and raising no vagueness concerns); *Higgins*, 677 F.3d at 104 (same).

<sup>93</sup> See U.S. CONST. amend. V ("[N]or shall any person be . . . deprived of life, liberty, or property, without due process of law . . ."); *In re Valenzuela Gallardo*, 25 I. & N. Dec. at 842 (eliminating a nexus to an ongoing judicial proceeding); Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 280 (2003) (stating that the doctrine behind holding statutes as unconstitutionally vague is among the most important guarantees of liberty under law); Note, *The Void-for-Vagueness Doctrine in the Supreme Court: A Means to an End*, 109 U. PA. L. REV. 67, 75 (1960) (arguing that the void for vagueness doctrine helps control legislative invasion of constitutional rights and insulates a "buffer zone" of added protection to the Bill of Rights).

<sup>94</sup> See Holper, *supra* note 15, at 698–99 (reasoning that convictions of crimes involving controlled substances and crimes involving firearms are grounds for deportability and have a precise definition). These crimes, involving controlled substances and firearms, reference federal statutes that provide definitions of "controlled substance" and "firearms." See 8 U.S.C. § 1227(a)(2)(B) (referencing 21 U.S.C. § 802(6) for definition of controlled substance); *id.* § 1227(a)(2)(C) (referencing 18 U.S.C. § 921(a)(3) for definitions of firearm).

<sup>95</sup> See Holper, *supra* note 15, at 698–99 (arguing it is evident that Congress is able to clearly define ways a foreign national may be deported for undesirable behavior).

agency responsible for administering the statute, deference is inappropriate when an interpretation raises grave constitutional concerns.<sup>96</sup>

In *Gallardo*, the Ninth Circuit correctly held that the BIA's interpretation of obstruction of justice provided in 2012 in *In re Valenzuela Gallardo* raised grave unconstitutional vagueness concerns.<sup>97</sup> Without the requirement of a nexus to an ongoing judicial proceeding or investigation, the BIA's definition of 'process of justice' is unbounded.<sup>98</sup> As noted by the Ninth Circuit, under the BIA's expanded definition, any specific intent crime occurring after any prior crime could be considered an obstruction of justice.<sup>99</sup> With no guidance on what is considered the process of justice, it is impossible for a person of reasonable intelligence to distinguish between ordinary specific intent crimes and crimes that constitute an obstruction of justice.<sup>100</sup>

Moreover, the BIA's interpretation allows for arbitrary enforcement by Immigration Judges and the BIA in deciding who to deport and who to allow to remain in the United States.<sup>101</sup> Because the BIA provided no limits to

<sup>96</sup> *Gallardo*, 818 F.3d at 817; see also *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (refusing to defer to an agency's interpretation of "coercion" because it raised First Amendment issues and thus raised constitutional doubts).

<sup>97</sup> See *Williams*, 553 U.S. at 304 (holding that if a person of ordinary intelligence does not have fair notice of what conduct is illegal, the Fifth Amendment right to due process is violated); *Gallardo*, 818 F.3d at 822 (holding that the BIA's new definition of obstruction of justice raises grave constitutional concerns); *In re Valenzuela Gallardo*, 25 I. & N. Dec. at 844 (holding that an offense does not need to have a nexus to an ongoing proceeding to be an obstruction of justice offense).

<sup>98</sup> *Gallardo*, 818 F.3d at 820. The Ninth Circuit stated that the BIA's definition did not have to be tied to a judicial proceeding, but must have some limiting principle. *Id.* at 822.

<sup>99</sup> *Id.* at 822. There are many steps and processes before and after an ongoing judicial proceeding, and it is not clear from the BIA's interpretation whether the commission of a crime alone could begin the process of justice, thus rendering all activity subsequent to the commission of the crime an obstruction of justice. See *id.* at 820 (arguing that there are many steps before and after an investigation or trial, and that the BIA's new interpretations raise grave constitutional concerns about which of these steps are a part of the process of justice and which are not); Gerald Seipp, *Ninth Circuit Finds Matter of Valenzuela Gallardo Unconstitutionally Vague*, 93 INTERPRETER RELEASES, no. 15, art. 5, 2016 (summarizing the court's concern about uncertainty of what crimes are covered under the phrase).

<sup>100</sup> See *Williams*, 553 U.S. at 304 (holding that it is a violation of due process if a person of ordinary intelligence does not have fair notice of what conduct is prohibited); *Gallardo*, 818 F.3d at 822 (arguing that although the statute includes the requirement of specific intent, that does little to provide fair notice of what conduct is prohibited). The lack of clarity creates an impossibility for lawyers as they cannot intelligently advise their clients of the potential immigration consequences for a conviction or plea agreement, thus making them unable to fulfill their obligation under *Padilla v. Kentucky*. See 559 U.S. 356, 374 (2010) (holding that under the Sixth Amendment, counsel must inform their clients if their convictions may result in deportation).

<sup>101</sup> *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015) (holding that the residual clause of the Armed Career Criminal Act of 1984 is unconstitutionally vague because it encourages arbitrary enforcement by judges); see *Hill v. Colorado*, 530 U.S. 703, 732–33 (2000) (holding that a statute regulating speech-related conduct near a health care facility did not encourage arbitrary

the process of justice, this interpretation of obstruction of justice allows it to be a catchall provision.<sup>102</sup> The Constitution does not allow the legislature to write broad statutes in hopes of catching every possible offender.<sup>103</sup> The lack of fair notice and encouragement of arbitrary enforcement creates an unconstitutional vagueness issue.<sup>104</sup>

Although the provision does raise grave constitutional concerns, silence on the issue in analogous cases of the U.S. Courts of Appeals for the Second and Eighth Circuits does not constitute a circuit split on the issue.<sup>105</sup> The offenses at issue in the Second and Eighth Circuits were not only identical to one another, but were straightforward examples of crimes relating to obstructions of justice.<sup>106</sup> Thus, there was no need to address a potential unconstitutional vagueness issue within the BIA's definition of obstruction of justice.<sup>107</sup> The criminal statutes at issue before the Second and Eighth Circuits plainly required a connection to ongoing judicial proceedings or investigations and thus had the nexus the Ninth Circuit understood as required by *In re Espinoza-Gonzalez*.<sup>108</sup> The absence of this issue is not a

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enforcement because the statute set out guidelines for police); *Gallardo*, 818 F.3d at 820–21 (stating that the BIA's new interpretation invites arbitrary enforcement); Moore, *supra* note 6, at 827 (stating that explicit standards for those that apply the statutes are required).

<sup>102</sup> *Gallardo*, 818 F.3d at 820 (stating that the BIA provided no limits to the process of justice).

<sup>103</sup> See *Morales*, 527 U.S. 41, 60 (arguing that it is unconstitutional for the legislature to write broad statutes in hopes of catching every possible offender); *United States v. Reese*, 92 U.S. 214, 221 (stating that allowing the legislature to write broad statutes that serve as catchall provisions would transform the legislative branch into the judicial branch).

<sup>104</sup> See *Williams*, 553 U.S. at 304 (holding that it is a violation of due process if a person of ordinary intelligence does not have fair notice of what conduct is prohibited); *Morales*, 527 U.S. at 64 (holding that a loitering ordinance was unconstitutionally vague because it encouraged arbitrary enforcement); Moore, *supra* note 6, at 827 (stating the two reasons a statute may be unconstitutionally vague).

<sup>105</sup> See *Gallardo*, 818 F.3d at 822 n.8 (stating that the Ninth Circuit has not created a circuit split); *Armenta-Lagunas*, 724 F.3d at 1022 (holding that witness tampering is an obstruction of justice and raising no vagueness concerns); *Higgins*, 677 F.3d at 104 (same).

<sup>106</sup> See *Armenta-Lagunas*, 724 F.3d at 1023 (holding that the plain language of a witness tampering statute undoubtedly requires interfering with the process of justice); *Higgins*, 677 F.3d at 98 (same).

<sup>107</sup> See *Armenta-Lagunas*, 724 F.3d at 1023 (holding that witness tampering plainly requires interfering with the process of justice); *Higgins*, 677 F.3d at 98 (same); see also Ruth A. Moyer, *Disagreement About Disagreement: The Effect of a Circuit Split or "Other Circuit" Authority on the Availability of Federal Habeas Relief for State Convicts*, 82 U. CIN. L. REV. 831, 865 (2014) (arguing that most circuit splits are not truly circuit splits but instead are illusory—to have a true or “square” circuit split would mean that the courts would actually reach different results in a case of identical facts); Wilkinson III, *supra* note 84, at 67, 69 (arguing that circuit splits are not only more apparent than real, but often are overstated).

<sup>108</sup> See *Armenta-Lagunas*, 724 F.3d at 1023 (analyzing NEB. REV. STAT. § 28-919(1) and finding that it “undoubtedly” required connection to “proceedings of a tribunal” as required by the

promulgation of a circuit split but rather is the typical behavior of how a court treats issues irrelevant to the case at hand.<sup>109</sup>

### CONCLUSION

The BIA's all-encompassing definition of an offense relating to an obstruction of justice does not answer when the process of justice begins and when it ends. Rather, the BIA's definition appears to sweep up nearly every specific intent crime. Thus, the U.S. Court of Appeals for the Ninth Circuit was correct to hold the phrase unconstitutional, because a foreign national cannot have fair notice as to what convictions will be considered an obstruction of justice. A more restricted definition, such as the one provided by the BIA in *In re Espinoza-Gonzalez*, provides better guidance and protection for foreign nationals. When one phrase determines whether a person may be deported, it is crucial that the definition of that phrase is clear and understandable. Moreover, the Ninth Circuit's decision did not create a circuit split, but rather was the first to raise a potential unconstitutional vagueness issue with this phrase of the INA.

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BIA); *Higgins*, 677 F.3d at 104–05 (analyzing CONN. GEN. STAT § 53a-151(a) and finding that it “clearly includes” connection to “proceedings of a tribunal” as required by the BIA).

<sup>109</sup> See *Gallardo*, 818 F.3d at 822 n.8 (arguing that the Ninth Circuit has not created a circuit split); Moyer, *supra* note 107, at 865 (arguing that some circuit splits are illusory); Wilkinson III, *supra* note 84, at 69 (arguing that circuit splits are often more apparent than real).