No. 19-72903

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MCKENZY ALII ALFRED,

Petitioner,

v.

WILLIAM BARR, Attorney General,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER
OF THE BOARD OF IMMIGRATION APPEALS
(AGENCY NO. A215-565-401)

PETITIONER'S SUPPLEMENTAL OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

STATE CASES

STATE LAWS

SESSION LAWS

OTHER AUTHORITIES

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), the Supreme Court explained that when analyzing whether a crime is overbroad under the categorical approach, lower courts must consider a properly raised argument that accomplice liability renders the offense overbroad. Because accomplice liability is necessarily a means of committing the underlying offense under the categorical approach, Petitioner McKenzy Alfred's Washington conviction for second degree robbery is not an aggravated felony, as the Department of Homeland Security (DHS) alleged in the proceedings below. That is because in Washington, accomplice liability requires only a mens rea of knowledge, while generic accomplice liability and generic theft under 8 U.S.C. § 1101(a)(43)(G) require specific intent.

The overbreadth of Mr. Alfred's offense is compelled by *Duenas-Alvarez* and subsequent Supreme Court decisions applying the categorical approach. Just like this case, *Duenas-Alvarez* concerned whether a state theft offense was rendered overbroad by accomplice liability. In answering that question, the Supreme Court observed that "the criminal activities of . . . aiders and abettors of a generic theft must . . . fall within the scope of the term 'theft' in the federal statute" when conducting a categorical analysis. *Duenas-Alvarez*, 549 U.S. at 190. The Court then went on to examine whether California's accomplice liability matched that of other states. *Id.* at 190–93.

Mr. Alfred asks that the Court do the same here. Respondent claims that the Court need not do so, and that accomplice liability is not relevant. Pet. Reh'g 7–10. *Duenas-Alvarez* forecloses that argument. Indeed, in *Duenas-Alvarez* itself, the Court considered questions of accomplice liability even though the state conviction at issue was not committed as an accomplice.

Moreover, Washington criminal law—just like the laws of other states—always treats accomplice liability as a means of committing the principal offense. Accomplice liability is not an element of the crime, it is not charged separately, and a jury need not be unanimous as to whether an individual was the principal or an accomplice. Thus, as *Duenas-Alvarez* instructs, it must be considered when examining whether a Washington conviction categorically constitutes a removable offense.

In undertaking that inquiry here, the Court must consider whether Washington accomplice liability matches the "generic" definition of accomplice liability, because 8 U.S.C. § 1101(a)(43)(G) refers to a generic offense, not a specific statutory offense. Notably, the parties agree on this point: Respondent acknowledged in his petition for rehearing that if accomplice liability is relevant, then this approach best conforms to the Supreme Court's analysis in *Duenas-Alvarez*. Pet. Reh'g 15–16. Mr. Alfred agrees. The laws of nearly all states—one of the most important factors the Supreme Court and this Court look to in defining a

generic crime—define accomplice liability to require specific intent or the intent of the principle (which in this case is also specific intent). As a result, generic accomplice liability must be defined in this way too. By contrast, Washington accomplice liability requires only knowledge, rendering the offense overbroad.

This approach is unaffected by the mens rea analysis presented by *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017). Unlike this case, *Valdivia-Flores* concerned whether a Washington conviction was a drug trafficking aggravated felony, the elements of which are defined by statute. *See* 8 U.S.C. § 1101(a)(43)(B). Thus, this Court compared federal *statutory* accomplice liability under 18 U.S.C. § 2 with Washington accomplice liability. In conducting that inquiry, *Valdivia-Flores* overlooked *Rosemond v. United States*, 572 U.S. 65 (2014), which articulated the mens rea standard for federal statutory accomplice liability under 18 U.S.C. § 2. That oversight, however, does not affect the outcome of this case, because the issue at hand calls for a different approach. As *Duenas-Alvarez* demonstrates, this Court must compare Washington accomplice liability to the mens rea required for *generic* accomplice liability, rather than the requisite mens rea for federal accomplice liability under 18 U.S.C. § 2.

Finally, and notably, by employing the correct analysis here, this Court will avoid the other dangers that Respondent raised in his petition for rehearing. Granting Mr. Alfred's petition will not cause a circuit split, because this case

requires the Court to compare Washington accomplice liability to *generic* accomplice liability or *generic* theft, rather than to federal statutory accomplice liability, as in *Valdivia Flores* and the Eleventh Circuit decision in *Bourtzakis v. U.S. Attorney General*, 940 F.3d 616 (11th Cir. 2019). Moreover, employing the proper approach to the questions presented here demonstrates that granting the petition for review will impact only a limited number of Washington offenses.

For all these reasons, and as explained further below, Mr. Alfred respectfully requests that the Court grant his petition for review.

STATEMENT OF ISSUE PRESENTED

Whether the agency erred in finding that Mr. Alfred's Washington robbery conviction is an aggravated felony as defined in 8 U.S.C. § 1101(a)(43)(G).

STATEMENT OF FACTS[1]

Mr. Alfred is a citizen of the Republic of Palau who entered the United States as a non-immigrant under the Compact of Free Association in December 2011. AR 262. Per this compact, citizens of Palau are authorized to enter, work, and establish residence in the United States without visas. Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986); *see also* Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, 117

[1] Mr. Alfred incorporates by reference the statement of facts in his opening brief, Op. Br. 3–6, and briefly summarizes the critical facts.

Stat. 2720; 8 C.F.R. § 212.1(d). Palauans present in the United States remain subject to the grounds of removability that apply to other noncitizens. *See* Pub. L. No. 108-188 § 141(f), 117 Stat. at 2762.

On September 26, 2018, Mr. Alfred pleaded guilty to second degree and attempted robbery in the second degree in violation of subsections 9A.56.210, 9A.56.190, and 9A.28.020 of the Revised Code of Washington (RCW). AR 174–88, 262. On January 9, 2019, the Department of Homeland Security (DHS) filed a Notice to Appear (NTA) charging Mr. Alfred as removable under 8 U.S.C. § 1227(a)(2)(A)(iii) for having been convicted of an aggravated felony as defined in 8 U.S.C. § 1101(a)(43)(G). AR 260. DHS later added additional charges, and the IJ concluded that Mr. Alfred was removable for conviction of an aggravated felony under 8 U.S.C. § 1227(a)(2)(A)(iii) and § 1101(a)(43)(G) and (U), and of a criminal involving moral turpitude (CIMT) under § 1227(a)(2)(A)(ii). AR 137. The BIA later affirmed the aggravated felony removal grounds under 8 U.S.C. § 1101, without addressing the separate CIMT ground. AR 3–4. This petition for review followed.

STANDARD OF REVIEW

This Court reviews questions of law de novo. *Ai Jun Zhi v. Holder*, 751 F.3d 1088, 1091 (9th Cir. 2014). "Whether an offense is an aggravated felony for removal

purposes is a question of law." *Chuen Piu Kwong v. Holder*, 671 F.3d 872, 876 (9th Cir. 2011) (brackets and citation omitted).

ARGUMENT

I. The Categorical Approach

Where DHS "alleges that a state conviction qualifies as an 'aggravated felony,'" courts must "employ a 'categorical approach' to determine whether the state offense is comparable to an offense listed in the [Immigration and Nationality Act (INA)]." *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). To undertake that inquiry, a court "compare[s] the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime" to determine whether the offense is an aggravated felony. *Descamps v. United States*, 570 U.S. 254, 257 (2013). If a statute reaches conduct that falls outside the generic definition—in other words, if the elements of the state conviction are broader than the elements of the generic crime—then the state conviction is not an aggravated felony. *See, e.g.*, *Mellouli v. Lynch*, 575 U.S. 798, 805 (2015); *Descamps*, 570 U.S. at 257; *Ramirez v. Lynch*, 810 F.3d 1127, 1130–31 (9th Cir. 2016).

If a state statute is divisible, courts may proceed to a second step of the categorical approach called the "modified categorical approach." *Descamps*, 570 U.S. at 257. A statute is divisible if it is comprised of multiple versions—in essence, "several different crimes"—of an offense defined by alternative elements.

Id. at 261–65; *Ramirez*, 810 F.3d at 1131. Elements are facts that must be found by a unanimous jury in order to sustain a conviction. *See Padilla-Martinez v. Holder*, 770 F.3d 825, 831 n.3 (9th Cir. 2014) ("A statute is divisible if it contains multiple, alternative elements of functionally separate crimes, and as to each alternative element, the jury must then find that element, unanimously and beyond a reasonable doubt." (internal quotation marks omitted)). By contrast, if "a statute does not list alternative elements, but merely encompasses different *means* of committing an offense, the statute is indivisible," and the inquiry is at its end. *Lopez-Valencia v. Lynch*, 798 F.3d 863, 868 (9th Cir. 2015) (emphasis added).

II. Supreme Court Precedent Requires This Court to Consider Accomplice Liability When Applying the Categorical Approach.

A. *Duenas Alvarez* Requires this Court to Consider Accomplice Liability and Instructs How To Do So.

In his petition for rehearing en banc, Respondent asserted that the panel opinion erred in considering accomplice liability when analyzing whether Mr. Alfred's Washington robbery offense was broader than a generic theft offense. *See* Pet. Reh'g 7 ("*Valdivia-Flores* incorrectly assumed that the categorical approach should consider accomplice liability."); *see also id.* at 7–10. The Supreme Court's decision in *Duenas-Alvarez* squarely forecloses this argument. Indeed, *Duenas-Alvarez* explicitly requires this Court to consider accomplice liability, and also instructs how to do so.

The backdrop to *Duenas-Alvarez* helps demonstrate why this Court must consider accomplice liability. Prior to the Supreme Court decision in that case, this Court had held California theft did "not facially qualif[y] as an aggravated felony under 8 U.S.C. § 1101(a)(43)(G)," in part because a "defendant can be convicted of the substantive offense . . . for aiding and abetting a theft." *United States v. Corona-Sanchez*, 291 F.3d 1201, 1207–08 (9th Cir. 2002) (en banc). The Court reasoned that this fact rendered the statute overbroad in comparison to the relevant "federal sentencing definition" of generic theft at issue in the case. *Id.* at 1208. Later decisions from this Court involving similar California crimes applied the same rationale. *See, e.g.*, *Penuliar v. Gonzales*, 435 F.3d 961 (9th Cir. 2006).

The government then petitioned for a writ of certiorari in a subsequent case—*Duenas-Alvarez*—asking the Court to decide "[w]hether a 'theft offense,' which is an 'aggravated felony' under the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(G), includes aiding and abetting." Brief of Petitioner in Support of Petition for Writ of Certiorari at (I), *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) (No. 05-1629). The government argued that the Ninth Circuit erred, and that instead accomplice liability must be considered a form of committing a generic offense. To advance this argument, the government took exactly the opposite position of the one it takes now. In both its petition for a writ of certiorari and later on at the merits stage, the government repeatedly asserted

that "[i]n every jurisdiction," accomplice liability is a way of committing a principal offense and thus must be considered in applying the categorical approach. *See, e.g.*, Brief of Petitioner at 11, *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) (No. 05-1629); *see also id.* at 7; ("[A]iding and abetting is included in the definition of 'theft offense.'"); *id.* at 11 ("In every jurisdiction, aiding and abetting is not separate and distinct from the underlying offense."); *id.* at 20 ("The text of 8 U.S.C. 1101(a)(43) confirms that the term 'aggravated felony' includes aiding and abetting the specified offense."); *see also* Brief of Petitioner in Support of Petition for Writ of Certiorari at 7 ("In the criminal codes of *all* States, as well as in the criminal title of the United States Code, the definition of 'theft offense'—and, indeed, of every substantive criminal offense—includes aiding and abetting . . . ."); *id.* at 13–14 ("A fundamental theory of American criminal law is that there is no offense of aiding and abetting or accomplice liability as such. Instead, accomplice liability is merely a means of determining which persons were closely enough related to the underlying offense to be prosecuted and convicted of that offense." (quoting *United States v. Baca-Valenzuela*, 118 F.3d 1223, 1232 (8th Cir. 1997)). The government's motivation for this was plain: if the definition of a generic offense did not encompass accomplice liability, the Ninth Circuit's ruling threatened to make "only a small fraction of those convicted of violating a theft

statute [persons who] would be deemed to have been convicted of a 'theft offense.'" Brief of Petitioner at 22.

The Supreme Court granted the petition for a writ of certiorari and agreed with the government. In its decision, the Court explained that it had "granted the Government's petition for certiorari in order to consider the legal validity of the Ninth Circuit's holding . . . that 'aiding and abetting' a theft is not itself a crime that falls within the generic definition of theft." *Duenas-Alvarez*, 549 U.S. at 188–89. That holding, said the Court, was error. *Id.* at 189. To reach that conclusion, the Court affirmed that "the generic sense in which the term theft is now used . . . covers . . . aiders and abettors as well as principals." *Id.* at 190 (internal quotation marks omitted).

In reversing the Ninth Circuit, the Court also explained the logical consequence of that rule, which governs this case. On the one hand, the rule adopted in *Duenas-Alvarez* expanded the scope of who may be removable or inadmissible—which is what the government sought in *Duenas-Alvarez*. But "[t]he Government cannot have it both ways." *Moncrieffe*, 569 U.S. at 200. As the Supreme Court explained, its holding in *Duenas-Alvarez* also means that criminal liability for accomplices must itself "fall within the scope of the term 'theft'" (or other specified crimes) under the INA. 549 U.S. at 190. Notably, the government asked the Court to decide this second point at the oral argument in *Duenas-*

Alvarez. Specifically, the government asserted that "simply hold[ing] contrary to the Ninth Circuit's holding that aiding and abetting is included in an aggravated felony[] . . . will leave open a very important question which we think the Court should provide guidance to the lower courts on." Transcript of Oral Argument at 7:25–8:3, *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) (No. 05-1629).[2] That question, explained the government, was "whether that [holding] means that there is some general Federal immigration law definition of aiding and abetting with which the law of aiding and abetting in the jurisdiction of conviction would have to be compared in every single removal case." Tr. 8:4–8.

The Supreme Court answered that question for the government, as it requested. But it explicitly rejected the government's view that *any* form of accomplice liability could render a person's conviction one that qualifies as a generic theft offense. Tr. 8:9–14. Instead, the Court held that accomplice liability itself must fall within the generic definition of the crime at issue. *Duenas-Alvarez*, 549 U.S. at 190.[3]

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[2] All additional citations to the oral argument in *Duenas-Alvarez* are cited as "Tr."

[3] The government even conceded that accomplice liability must be considered and that the modified categorical approach would not apply in its briefing before the Court. Specifically, the government noted that "because the law generally—and California law specifically—does not distinguish between aiding and abetting and the offense of the principal, the 'modified categorical' approach will generally not permit reviewing courts to exclude the possibility that the defendant was convicted as an aider or abettor." Brief of Petitioner at 32. That same logic compels the

The *Duenas-Alvarez* decision underscores this point with the analysis that followed this statement of law. After explaining that accomplice liability must be considered, the Court went on to address an argument that California's accomplice liability was broader than the "generic" form of such liability. Specifically, the Court answered the question of whether California's aiding and abetting liability was unusual because it extends to "any crime that 'naturally and probably' results from [the] intended crime." *Id.* The Supreme Court explained that for this argument "[t]o succeed, Duenas-Alvarez must show something *special* about California's version of the doctrine—for example, that California in applying it criminalizes conduct that most other States would not consider 'theft.'" *Id.* at 191; *see also, e.g.*, Tr. 12:11–16:15 (discussion of the issue at oral argument). The Court concluded that Duenas-Alvarez had not made that showing. 549 U.S at 191–94. But regardless of what California requires, what is notable is that the Court undertook this inquiry—comparing a particular state's "version of the [natural and probable consequences] doctrine" with that applied by other states. *Id.* at 191.

Notably, the Court reaffirmed this reading of *Duenas-Alvarez* just this term. In *United States v. Taylor*, the Court explained that *Duenas-Alvarez* confronted the question of whether the California statue at issue "reach[ed] aiding and abetting

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conclusion that accomplice liability must also be factored as a way that potentially renders an offense overbroad, since it is simply a form of committing the principal offense. *Duenas-Alvarez*, 549 U.S. at 190.

conduct that fell 'beyond generic theft.'" 142 S. Ct. 2015, 2024 (2022). As the Court then noted, to answer the question, it "looked to state decisional law and asked whether a 'realistic probability' existed that the State would 'apply its statute to conduct that falls outside' the federal generic definition." *Id.* at 2024–25.

Duenas-Alvarez thus resoundingly answers the primary question that Respondent asked this Court to review en banc. Indeed, the government is asking this Court to relitigate a question that the government itself already asked the Supreme Court to decide, and which the Supreme Court did. Accordingly, this Court must consider whether Washington accomplice liability has "something special" that renders it overbroad when compared to generic accomplice liability. 549 U.S. at 191 (emphasis omitted); *accord Amaya v. Garland*, 15 F.4th 976, 982–83 (9th Cir. 2021) (noting that the "form of [the petitioner's] argument [was] proper" where he argued that the Court should consider accomplice liability when assessing whether a crime is overbroad, but rejecting the specific overbreadth argument in that case).

B. The Rationale of *Duenas-Alvarez* Applies to Washington State's Accomplice Liability Statute.

Neither the structure of Washington's accomplice liability statute nor the fact that Mr. Alfred was not himself an accomplice alters this analysis. *See* Pet. Reh'g 7–10. First, Respondent claimed in his petition that Mr. Alfred's crime is unlike the California crime at issue in *Duenas-Alvarez* because "the possibility of

[accomplice] liability arises from a statute other than the state statute of conviction." *Id.* at 7. Once again, Respondent seeks to relitigate *Duenas-Alvarez*. As described at length above, *supra* Sec. II.A, Respondent argued precisely the opposite in *Duenas-Alvarez*—and prevailed. Specifically, the government explained to the Supreme Court that "[i]n the criminal codes of *all* States, as well as in the criminal title of the United States Code, the definition of 'theft offense'—and, indeed, of *every substantive criminal offense*—includes aiding and abetting," Brief of Petitioner in Support of Petition for Writ of Certiorari at 7 (second emphasis added), and the Court agreed, *Duenas-Alvarez*, 549 U.S. at 189–90.

This does not change simply because of how Washington's accomplice liability statute is structured. In Washington, "[a] person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable." RCW 9A.08.020(1). Just like all states, this applies to all principal crimes in Washington. *See Duenas-Alvarez*, 549 U.S. at 189–90. Indeed, the Supreme Court cited Washington as part of Appendix A to its opinion, which was a compilation of state laws showing that "the generic sense in which the term theft is now used in the criminal codes of most States covers . . . aiders and abettors." *Id.* at 190 (internal quotation marks and citation omitted); *see also id.* App'x A (citing RCW 9A.08.020). Thus, the Supreme Court itself has already recognized that Washington is just like other states, where accomplice liability is a way to commit

a generic theft offense, and thus where "the criminal activities of these aiders and abettors of a generic theft must themselves fall within the scope of the term 'theft' in the federal statute." *Id.* at 190.

State case law confirms this point. In Washington, "[t]here is no separate crime of being an accomplice; accomplice liability is principal liability." *State v. Toomey*, 690 P.2d 1175, 1181 (Wash. App. 1984); *see also State v. Jackson*, 944 P.2d 403, 413 (Wash. App. 1997) ("[A]ccomplice liability is not a separate crime: it is predicated on aid to another in the commission of a crime, and is, in essence, liability for that crime."), *aff'd*, 976 P.2d 1229 (Wash. 1999). Further, "[a]n information need not include 'accomplice' language [in Washington] in order for the jury to be instructed on accomplice liability." Pamela Loginsky, Washington Ass'n of Prosecuting Attorneys, Charging Manual 25 (2004). That is because "[t]he complicity rule in Washington is that any person who participates in the commission of the crime is guilty of the crime and is charged as a principal." *State v. Silva-Baltazar*, 886 P.2d 138, 143 (Wash. 1994); *see also State v. Carothers*, 525 P.2d 731, 734 (Wash. 1974) (observing that "a verdict may be sustained upon evidence that the defendant participated . . . as an aider or abettor, even though he was not expressly accused of aiding and abetting and even though he was the only person charged in the information"), *overruled in part on other grounds by State v. Harris*, 685 P.2d 584, 587 (Wash. 1984); *State v. Lynch*, 970 P.2d 769, 772 (Wash.

App. 1999) ("[A]n information that charges an accused as a principal adequately apprises him of his potential liability as an accomplice."); *State v. Rodriguez*, 898 P.2d 871, 873–74 (Wash. App. 1995) (similar); *State v. Shaw*, 167 Wash. App. 1041, 2012 WL 1380216, at *1 (2012) (upholding conviction for burglary where the defendant was convicted "as either an accomplice or a principal").

In light of these principles, in Washington, "[a] robbery conviction may be based on accomplice liability." *State v. Truong*, 277 P.3d 74, 79 (Wash. App. 2012). These statements of law simply reflect what the Supreme Court confirmed in *Duenas-Alvarez*—that all states' criminal laws now treat accomplice liability uniformly with principal liability. *See* 549 U.S. at 189–90. There is simply no merit to Respondent's argument that because Washington has a single statute that defines accomplice liability for all offenses, this Court should ignore accomplice liability when conducting a categorical analysis.

How Washington State juries treat principal and accomplice liability further underscores the lack of distinction between accomplice and principal liability when engaging in the categorical approach. As the Washington Supreme Court has explained, a jury "need not reach unanimity on whether a defendant acted as a principal or an accomplice." *State v. Teal*, 96 P.3d 974, 977 (Wash. 2004); *see also State v. McDonald*, 138 P.2d 680, 688 (Wash. 1999) (similar); *State v. Holcomb*, 321 P.3d 1288, 1291 (Wash. App. 2014) (noting that the Washington Supreme

Court has clearly held that no jury unanimity is required as to whether an individual is accomplice or principal). "[N]or is accomplice liability an element of . . . committing a crime." *Teal*, 96 P.3d at 977; *see also Carothers*, 525 P.2d at 736 ("The elements of the crime remain the same" irrespective of "the degree or nature of [the individual's] participation."); *cf. Young v. United States*, 22 F.4th 1115, 1122 (9th Cir. 2022) (observing as to federal law that "[a]iding and abetting is not a separate offense; it is simply one means of committing the underlying crime" (citation omitted)). Instead, accomplice liability is just one way that an individual can be convicted of the principal offense.

This is critical because under the categorical approach courts must consider whether any means of committing the single crime of Washington second-degree robbery extends beyond the "generic" crime of theft. As the Supreme Court has admonished, "[w]e have often held, and in no uncertain terms, that a state crime cannot qualify as [a conviction that carries immigration consequences] if its *elements* are broader than those of a listed generic offense." *Mathis v. United States*, 579 U.S. 500, 509 (2016) (emphasis added)[4]; *see also Moncrieffe*, 569 U.S.

[4] *Mathis* involved whether a state offense qualified as a predicate offense for purposes of the Armed Career Criminal Act (ACCA). However, the categorical approach and its principles apply equally both in the ACCA and INA contexts. *Mathis*, 579 U.S. at 510 n.2 (explaining that the categorical approach used in ACCA cases "appl[ies] . . . outside the ACCA context—most prominently, in immigration cases"); *see also, e.g.*, *Medina-Rodriguez v. Barr*, 979 F.3d 738, 744

at 190 (explaining that "a state offense is a categorical match with a generic federal offense only if a conviction of the state offense necessarily involved . . . facts equating to [the] generic [federal offense]." (alterations in original) (internal quotation marks omitted)); *see also, e.g.*, *Rendon v. Holder*, 764 F.3d 1077, 1085–86 (9th Cir. 2014). And for the reasons stated above, that inquiry must involve accomplice liability where such an argument is properly raised, as accomplice liability is (1) a form of committing the principal offense, (2) it is not an element, (3) it need not be charged, and indeed, (4) juries need not be unanimous about it.

These same principles compel the conclusion that Washington robbery is not "divisible" as to whether an individual was convicted as an accomplice or not. *See Descamps*, 570 U.S. at 257.[5] As a result, the record of conviction is not relevant to the categorical analysis in this case.[6]

(9th Cir. 2020) (observing that both the ACCA and INA aggravated felony definition call for the categorical approach).

[5] Notably, Respondent never argued in this case—either before the agency or before this Court—that the statute is divisible so as to allow a court to investigate whether an individual was convicted as an accomplice. *See* AR 3–4 (BIA Decision), 27–29 (DHS Motion for Summary Affirmance), 42–50 (IJ Decision), 230–39 (DHS Opposition to the Motion to Terminate); Resp't Ans. Br. at 17–34. Because Respondent has never asserted the statute is divisible, he has waived this issue. *See Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1149 (9th Cir. 2020) (government waived issue of whether statute was divisible by not arguing it).

[6] Moreover, undertaking an inquiry into the record of conviction would often be futile because Washington prosecutors need not charge accomplice liability and

Second, Respondent suggested in his petition for rehearing en banc that because Mr. Alfred was not convicted as an accomplice, this Court need not consider accomplice liability. Pet. Reh'g 1, 3, 8–10. As an initial matter, all the reasons cited above apply with equal force here. Because accomplice liability is not an element of the crime, but just a way to be liable for the principal offense, *Teal*, 96 P.3d at 977, "[w]hether the noncitizen's actual conduct" was as an accomplice "is quite irrelevant," *Moncrieffe*, 569 U.S. at 190 (citation omitted). Indeed, Washington prosecutors do not need to charge accomplice liability, *Carothers*, 525 P.2d at 734, and a jury might not even agree whether a defendant was a principal or an accomplice, *Teal*, 96 P.3d at 977.

Just as importantly, *Duenas-Alvarez* directly refutes this point. As explained above, in that case, the Supreme Court already held that courts must consider properly raised arguments that accomplice liability renders a conviction overbroad. Notably, the Court did so even though the respondent in the case was *not* convicted as an accomplice. *See, e.g.*, Brief of Petitioner in Support of Petition for Writ of Certiorari at 4 (describing the respondent's convictions and the underlying conduct); Brief of Petitioner at 4 (same); Tr. 14:23 ("[The Respondent] was charged as a principal."). Despite this fact, the Court analyzed whether California's

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juries need not be unanimous about whether someone was a principal or an accomplice.

aiding and abetting liability rendered the respondent's conviction overbroad. *See supra* p. 12. Accordingly, the Court must do the same here.

This approach is also consistent with the purpose of the categorical approach. At its foundation, the categorical approach rests on the text of the INA, because the law "ask[s] what the noncitizen was 'convicted of,' not what he did, and [thus] the inquiry in immigration proceedings is limited accordingly." *Moncrieffe*, 569 U.S. at 200; *see also Descamps*, 570 U.S. at 267–68 (similar as to Armed Career Criminal Act). While the result is that federal courts must often ask whether a crime is overbroad, the alternative is "the relitigation of past convictions in minitrials conducted long after the fact." *Moncrieffe*, 569 U.S. at 200–01. The categorical approach therefore serves the "practical purpose[]" of promoting "judicial and administrative efficiency" by absolving immigration courts of the need to relitigate the facts of prior convictions. *Id*. at 200 (internal quotation marks omitted). Notably, this approach avoids saddling "our Nation's overburdened immigration courts [from having to] entertain and weigh testimony" in each case involving the effects of a noncitizen's prior crimes. *Id.* at 201; *see also* Transactional Records Access Clearinghouse, Immigration Court Backlog—Pending Cases (last accessed July 8, 2022) (showing that immigration courts have a nationwide backlog of over 1.8 million cases).

In sum, *Duenas-Alvarez* instructs that the Court must consider accomplice liability to determine whether Mr. Alfred's conviction necessarily encompasses the requisite elements of the generic offense. The Court should reject Respondent's argument to the contrary.

III. Washington Robbery Is Overbroad Compared to Generic Theft Because Washington Accomplice Liability Renders the Offense Overbroad.

The "generic" offense that DHS alleges Mr. Alfred has been convicted of is that of "theft." *See* AR 260, 8 U.S.C. § 1101(a)(43)(G). The Supreme Court has defined generic theft offense as a "taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Duenas-Alvarez*, 549 U.S. at 189 (citation omitted). To determine whether Mr. Alfred is removable based on his Washington conviction for second-degree robbery, this Court must determine whether accomplice liability for Washington robbery offenses categorically matches the accomplice liability for generic theft. *Supra* Sec. II.

A. Washington Robbery is Overbroad Because Generic Accomplice Liability Requires Specific Intent or the Intent of The Principal.

To conduct this inquiry, the Court must determine whether Washington accomplice liability matches "generic accomplice liability" as defined through case law. This approach conforms to the Supreme Court's analysis in *Duenas-Alvarez*

and subsequent case law related to generic offenses. As explained above, in *Duenas-Alvarez*, after the Supreme Court explained that accomplice liability must itself match generic theft, 549 U.S. at 190, it employed this very inquiry, *see id.* at 190–93. Specifically, the Court asked whether California's version of accomplice liability allowed accomplices to be convicted of certain crimes that resulted during the commission of a crime, but which the accomplice may not have intended. *Id.*

To answer this question, the Court first ascertained the definition of generic accomplice liability (as relevant in that case), employing the tools that courts regularly rely on to define a generic crime. The Court attached two appendices to its decisions, which showed that most other states allowed accomplices to be convicted of acts similar to those committed by accomplices in California. *Id.* at 190–91. The Court then reviewed the California case law that the Respondent submitted to demonstrate how California convicted accomplices of acts that other states did not. *Id.* at 191–93. After doing so, the Court concluded that "we cannot say that those concepts as used in any of these cases extend significantly beyond the concept as set forth in the cases of other States," and cited to its appendix of state case law in support. *Id.* at 193; *see also* Op. Br. 10–12 (discussing the Court's analysis in further detail).

The Supreme Court's inquiry in *Duenas-Alvarez* dictates how the Court should proceed here to determine whether Washington's accomplice liability is

overbroad. Specifically, this Court must compare accomplice liability under Washington law to its generic counterpart—"*i.e.*, the offense as commonly understood." *Descamps*, 570 U.S. at 257; *see also Moncrieffe*, 569 U.S. at 190 (explaining how the categorical approach proceeds with generic crimes). Accordingly, "[a] court applying categorical analysis ordinarily surveys a number of sources—including state statutes, the Model Penal Code, federal law, and criminal law treatises—to establish the federal generic definition of a crime." *United States v. Garcia-Jimenez*, 807 F.3d 1079, 1084 (9th Cir. 2015). This approach is grounded in Supreme Court case law, which has for decades relied primarily on state laws, as well as other sources of law, to define generic offenses. *See, e.g.*, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1570 (2017) (relying in part on "evidence from state criminal codes" to define generic "sexual abuse of a minor"); *Duenas-Alvarez*, 549 U.S. at 189–90 (looking to state laws to define generic crime of theft to include aiding and abetting liability); *id.* at 190–93 (looking to state laws to conduct categorical inquiry regarding California's version of accomplice liability); *Taylor v. United States*, 495 U.S. 575, 598 (1990) (explaining that "Congress meant by 'burglary' [under 18 U.S.C. § 924(e)(2)(B)(ii)] the generic sense in which the term is now used in the criminal codes of most States"); *cf.* Pet. Reh'g 15–17 (Respondent acknowledging that this Court must ultimately compare Washington law to the generic definition of aiding

and abetting derived from the approaches employed by state and federal jurisdictions).

Applying that approach to define the mens rea for generic accomplice liability demonstrates that Washington accomplice liability is overbroad. The definitions of accomplice liability across state laws—the most instructive source for defining a generic crime—resoundingly require either specific intent or the intent of the principal (which for generic theft, is specific intent to deprive).[7] In fact, well over half of the states require specific intent for an accomplice to be convicted of the principal crime. Footnote 8 contains a list of those states.[8] Another

[7] *See Duenas-Alvarez*, 549 U.S. at 189; *United States v. Martinez-Hernandez*, 932 F.3d 1198, 1206 (9th Cir. 2019); *United States v. Alvarado-Pineda*, 774 F.3d 1198, 1202 (9th Cir. 2014).

[8] These thirty states include: **Alabama** (Ala. Code § 13A-2-23); **Alaska** (Alaska Stat. § 11.16.110); **Arizona** (Ariz. Rev. Stat. Ann. § 13-301); **Arkansas** (Ark. Code Ann. § 5-2-403); **California** (*People v. Beeman*, 674 P.2d 1318, 1323–25 (Cal. 1984) ("[W]e conclude that the weight of authority and sound law require proof that an aider and abettor act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.")); **Colorado** (Colo. Rev. Stat. § 18-1-603); **Delaware** (Del. Code Ann. tit. 11 § 271); **Florida** (*Brown v. Crosby*, 249 F. Supp. 2d 1285, 1318 (S.D. Fla. 2003) (citing *Ryals v. State*, 150 So. 132 (Fla. 1933)); *Staten v. State*, 519 So. 2d 622, 624 (Fla. 1988) ("In order to be guilty as a principal for a crime physically committed by another, one must intend that the crime be committed . . . .")); **Georgia** (Ga. Code Ann.§ 16-2-20); **Hawaii** (Haw. Rev. Stat. § 702-222); **Illinois** (720 Ill. Comp. Stat. Ann. 5/5-2); **Kentucky** (Ky. Rev. Stat. Ann. § 502.020); **Maine** (17-A Me. Rev. Stat. Ann. § 57); **Maryland** (*Bellamy v. State*, 941 A.2d 1107, 1122 (Md. 2008) (noting that it was a "correct statement of law" where lower court instructed the jury that "[a] person aids and abets the commission of a crime by knowingly associating with the criminal

fourteen states employ some form of a doctrine that requires the accomplice's intent to match the principal's intent.[9] Even among the remaining small number of

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venture with the intent to help commit the crime"); *Davis v. State*, 52 A.3d 148, 160 (Md. Ct. Spec. App. 2012) (citing Maryland's Criminal Pattern Jury Instructions)); **Minnesota** (Minn. Stat. § 609.05); **Mississippi** (*Pointer v. State*, 202 So. 3d 210, 214 (Miss. 2016) (noting that defendant must have the "intention of giving assistance" to be accomplice)); **Missouri** (Mo. Rev. Stat. § 562.041); **Montana** (Mont. Code Ann. § 45-2-302); **New Hampshire** (N.H. Rev. Stat. Ann. § 626:8), **New Jersey** (N.J. Stat. Ann. § 2C:2-6), **North Dakota** (N.D. Cent. Code § 12.1-03-01); **Oklahoma** (*Littlejohn v. State*, 181 P.3d 736, 740 (Ok. Crim. App. 2008) ("[A]ll persons who either commit acts constituting a crime, or who knowingly, and with criminal intent, aid and abet in the commission of the crime, are equally guilty as principals."); *see also* Oklahoma Uniform Jury Instructions – Criminal, 9-26 (2d ed.) ("An 'accomplice' is one who, with criminal intent, is involved with others in the commission of a crime.") **Oregon** (Or. Rev. Stat. § 161.155); **Pennsylvania** (18 Pa. Cons. Stat. § 306(c)(1)); **South Dakota** (S.D. Codified Laws § 22-3-3); **Tennessee** (Tenn. Code Ann. § 39-11-402); **Texas** (Tex. Penal Code Ann. § 7.02); **Utah** (Utah Code § 76-2-202; *State v. Briggs*, 197 P.3d 628, 631–32 (Utah 2008) ("To show that a defendant is guilty under accomplice liability, the State must show that an individual acted with both the intent that the underlying offense be committed and the intent to aid the principal actor in the offense.")); **Wisconsin** (Wis. Stat. § 939.05(2)(b)); **Wyoming** (*Vlahos v. State*, 75 P.3d 628, 636 (Wyo. 2003) ("To fall within this definition of accomplice, a person must actively participate in or encourage the crime and have the intent to accomplish the same criminal end as the principal.")).

[9] For example, at least six states—**Connecticut**, **Kansas**, **Louisiana**, **New York**, **Ohio**, and **Vermont**—require that the accomplice's mens rea match the minimum culpability required for the principal offender. *See* Conn. Gen. Stat. § 53a-8(a); Kan. Stat. Ann. § 21-5210(a); *State v. Hebert*, 688 So. 2d 612, 617 (La. Ct. App. 1997); N.Y. Penal Law § 20.00; Ohio Rev. Code Ann. § 2923.03(A); *State v. Bacon*, 658 A.2d 54, 61 (Vt. 1995). Similarly, at least six other States—**Idaho**, **New Mexico**, **Rhode Island**, **South Carolina**, **Virginia**, and **West Virginia**—require that the accomplice have a "shared" or "common" criminal intent with the perpetrator. *See State v. Mitchell*, 195 P.3d 737, 742 (Idaho Ct. App. 2008) (shared criminal intent); *State v. Carrasco*, 946 P.2d 1075, 1079 (N.M. 1997) (shared criminal intent); *State v. Long*, 61 A.3d 439, 447 (R.I. 2013) (shared criminal

states, accomplice liability based on mere knowledge is rare. At least two of those states require the accomplice to have knowledge *and* to intend that another person commit the crime.[10] And in Indiana, where the accomplice liability statute encompasses an individual who "knowingly or intentionally aids" a crime, state case law demonstrates that certain crimes nevertheless require specific intent for an accomplice.[11] Accordingly, as this Court has observed before, there are "*at most*

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intent); *State v. Reid*, 758 S.E.2d 904, 910 (S.C. 2014) (an accomplice must act "intentionally, or through a common design [with the perpetrator]"); *Jones v. Commonwealth*, 157 S.E.2d 907, 909 (Va. 1967) ("To constitute one an aider and abettor, it is essential that he share the criminal intent of the principal or party who committed the offense." (citation omitted)); *State v. Fortner*, 387 S.E.2d 812, 823 (W. Va. 1989) (shared criminal intent). Similarly, **Nebraska** requires either that the accomplice's intent match the principal's, or that the accomplice have knowledge of the principal's intent. *See State v. Sims*, 603 N.W.2d 431, 443 (Neb. 1999). **Michigan** requires that the accomplice have either specific intent or knowledge of the principal's intent. *People v. Robinson*, 715 N.W.2d 44, 48 (Mich. 2006).

[10] **Massachusetts** (*Commonwealth v. Britt*, 987 N.E.2d 558, 569 (Mass. 2013) ("It is enough that the Commonwealth, proceeding against a defendant on a joint venture theory, prove beyond a reasonable doubt that the defendant knowingly participated in the commission of the crime charged, and that the defendant had or shared the required criminal intent.") (internal quotation marks omitted)); **Nevada** (*Sharma v. State*, 56 P.3d 868, 872 (Nev. 2002) ("[I]n order for a person to be held accountable for the specific intent crime of another under an aiding or abetting theory of principal liability, the aider or abettor must have knowingly aided the other person with the intent that the other person commit the charged crime.")).

[11] **Indiana** (Ind. Code Ann. § 35-41-2-4; *Rosales v. State*, 23 N.E.3d 8 (Ind. 2015) ("Consistent with our case law, this instruction informs the jury of the State's burden to prove beyond a reasonable doubt all the elements of attempted murder under an accomplice liability theory—especially the defendant's specific intent to kill—in order to convict the defendant.") (emphasis omitted)).

five jurisdictions that require only a mens rea of knowledge for accomplice liability." *United States v. Franklin*, 904 F.3d 793, 799 (9th Cir. 2018) (emphasis added), *abrogated on other grounds by Shular v. United States*, 140 S. Ct. 779 (2020).[12]

The Model Penal Code (MPC) further affirms that generic accomplice liability requires something more than knowledge. *See Taylor*, 495 U.S. at 598 & n.8 (looking to the MPC to help define generic burglary). Notably, much of Washington's criminal code, and its accomplice liability statute in particular, is based on the MPC. But Washington deliberately departed from the MPC in defining accomplice liability by *lowering* the requisite mens rea. *Compare* MPC § 2.06(3) ("A person is an accomplice of another person in the commission of an offense if (a) with the *purpose* of promoting or facilitating the commission of the offense . . . ." (emphasis added)) *with* RCW 9A.08.020(3) ("A person is an accomplice of another person in the commission of a crime if: (a) *With knowledge* . . . ." (emphasis added)).

[12] In *Shular v. United States*, the Supreme Court abrogated a portion of this Court's holding in *Franklin* regarding how to define a "serious drug offense" under the ACCA. 140 S. Ct. at 784. However, *Shular* did not abrogate this Court's holding that Washington accomplice liability is overbroad compared to accomplice liability under federal law and most state definitions, as other portions of *Franklin* addressed. *See Franklin*, 904 F.3d at 798–99.

As the Supreme Court explained in *Rosemond v. United States*, federal accomplice liability also requires intent. 572 U.S. at 76 ("[A] person aids and abets a crime when (in addition to taking the requisite act) he intends to facilitate that offense's commission."); *see also id.* ("[T]he canonical formulation of that needed state of mind . . . is Judge Learned Hand's: To aid and abet a crime, a defendant must not just 'in some sort associate himself with the venture,' but also 'participate in it as in something that he wishes to bring about' and 'seek by his action to make it succeed.'" (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949))). Accordingly, *intent* to commit the crime is required under 18 U.S.C. § 2, the federal accomplice liability statue.

Federal prosecutors may demonstrate that intent by showing that "a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense." *Id.* at 77. In *Rosemond*, that meant that the defendant needed "advance knowledge" that his co-participants were carrying a gun. *Id.* at 78. Such advance knowledge, the Court explained, "shows [the defendant's] intent to aid an armed offense." *Id.* (emphasis omitted). In short, the requirement that a defendant intend the crime can be accomplished by proving that a defendant had knowledge about every key aspect of the crime. But significantly, federal law still requires intent—not knowledge—to hold an accomplice liable.

These sources highlight that Washington is almost unique among jurisdictions in the United States in defining accomplice liability convictions to solely require general knowledge. Indeed, the state's decision to depart from the MPC language underscores the exceptional nature of its accomplice liability. And the vast majority of states and the federal government also require something more. Washington therefore has the "something special" that *Duenas-Alvarez* explained was required to render a state offense overbroad in comparison to a federal generic definition. 549 U.S. at 191 (emphasis omitted).

Notably, the government has again switched positions on this issue. In *Duenas-Alvarez*, the government explained to the Court that the "basic elements of generic aiding and abetting are (1) assisting in the commission of a crime (2) *with the intent* to promote or facilitate its commission." Reply Brief of Petitioner at 3, *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) (No. 05-1629) (emphasis added) (internal quotation marks omitted). That fact that the government previously regarded this point as uncontroversial only further highlights the resounding agreement that exists regarding the appropriate mens rea for generic accomplice liability. This Court should thus define generic accomplice liability as requiring specific intent (or at least the intent of the principal), and hold that Mr. Alfred's offense is overbroad because Washington accomplice liability requires only knowledge. *See* RCW 9A.08.020(3)(a); *see also infra* Sec. III.C.

B. Washington Robbery Is Overbroad Because Generic Theft Requires Specific Intent.

While the analysis in the prior section best follows the Supreme Court's instructions in *Duenas-Alvarez*, an alternative approach would be to compare whether Washington accomplice liability for robbery matches the intent for generic theft. This approach to answering the question follows from the Supreme Court's statement that "the criminal activities of these aiders and abettors of a generic theft must themselves fall within the scope of the term 'theft' in the federal statute." 549 U.S. at 190.

The result of that approach is straightforward. Washington accomplice liability requires only knowledge, *see* RCW 9A.08.020(3)(a), while generic theft requires "criminal" or "specific" intent. *See* 549 U.S. at 189; *Martinez-Hernandez*, 932 F.3d at 1206; *Alvarado-Pineda*, 774 F.3d at 1202. Because courts must consider accomplice liability when deciding whether an offense is overbroad, *supra* Sec. II, this necessarily dictates that Mr. Alfred's robbery offenses do not constitute aggravated felonies under 8 U.S.C. § 1101(a)(43)(G).

C. Washington Accomplice Liability Requires Only Knowledge.

Washington courts and juries regularly rely on the lower mens rea of knowledge for accomplices to hold individuals criminally liable. As an initial matter, Washington deliberately chose to part ways with the MPC and employ a lower mens rea than the one that the MPC's drafters suggested. Both the state

statute and case law confirm that this distinction is meaningful. *See* RCW 9A.08.010(1)(a), (1)(b) (defining intent and knowledge separately); *State v. Caliguri*, 664 P.2d 466, 469 (Wash. 1983); *State v. Loos*, 473 P.3d 1229, 1236 (Wash. App. 2020) ("The mens rea [for fourth degree assault] is . . . intent under RCW 9A.08.010(1)(a). Proof of a higher mental state necessarily proves a lower mental state. RCW 9A.08.010(2). However, the converse is not true."). This mismatch in elements demonstrates that Washington accomplice liability is overbroad as compared to the generic version.

Moreover, the same mismatch is sufficient to show there is a "realistic probability" that defendants in Washington are convicted as an accomplice based on a mens rea of knowledge, a lower mens rea than what generic accomplice liability requires. When an offense is explicitly overbroad through a comparison of elements, "no 'legal imagination' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime." *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1009–10 (9th Cir. 2015) (quoting *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc)); *see also United States v. Vidal*, 504 F.3d 1072, 1082 (9th Cir. 2007) (en banc) (same); *Descamps*, 570 U.S. at 257 ("The prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense.").

Even if this were not the case, Washington case law demonstrates that state courts regularly rely on the lower mens rea of knowledge to sustain convictions, including in second-degree robbery cases. For example, in *State v. A.L.Y.*, the Washington Court of Appeals upheld a juvenile's conviction for robbery as an accomplice. 135 Wash. App. 1002, 2006 WL 2723983 (2006). In that case, A.L.Y. was walking with an adult when they approached four boys. *Id.* at *1. The adult companion suggested to A.L.Y. that they "mess" with the boys, and after approaching them, the adult companion pushed one of them and acted threateningly. *Id.* When the boys responded that they did not want trouble, either A.L.Y. or his adult companion said they could resolve the situation with $20. *Id.* The boys gave the money to A.L.Y., who then gave it to the adult, and the two walked away. *Id.* Afterwards, A.L.Y. told police he felt uncomfortable and wanted to return the money to the boys. *Id.* The trial court relied on accomplice liability to convict A.L.Y. of two counts of second-degree robbery, as two of the boys had given the pair a total of $20. *Id.*

On appeal, A.L.Y. argued that the state presented insufficient evidence of intent to deprive the victims of their property. *Id.* at *3. The Court of Appeals rejected that argument, relying on the lower mens rea requirement for accomplice liability:

> Th[e] [accomplice liability] statute predicates criminal liability on general knowledge of the crime. An accomplice "need not participate

> in or have specific knowledge of every element of the crime nor share the same mental state as the principal." Thus, A.L.Y. did not need to have the intent to steal, just knowledge that his actions were facilitating the crime.

Id. at *3 (citations omitted). Accordingly, the Washington Court of Appeals found that even if A.L.Y. did not threaten the boys or tell them to hand over money, which was a contested issue on appeal, the fact that he accepted their money with knowledge that his companion had intimidated them was "enough to satisfy the requirements for second degree robbery based on an accomplice theory." *Id.* at *4.

The Washington Court of Appeals came to the same conclusion in a different case in 2018. *State v. Barrington*, 6 Wash. App. 2d 1015, 2018 WL 5977920 (2018). There, the court rejected Barrington's argument that he could not be convicted of robbery without intent to deprive:

> Second, Barrington also argues that intent is a necessary element of robbery and that the testimony shows that Barrington did not have the requisite intent. The crime of robbery "includes the nonstatutory element of specific intent to steal, which . . . is the equivalent to specific intent to deprive the victim of his or her property permanently." However, for accomplice liability a person just needs "[g]eneral knowledge of 'the crime'" and does not need "knowledge of each element of the principal's crime." Based on the circumstantial evidence that the State presented at trial as summarized above, Barrington aided the two others with knowledge that his actions facilitated the crime of robbery . . . .
>
> . . . . Therefore, Barrington's claim that insufficient evidence supports his first degree robbery conviction fails.

Id. at *6–7 (first and second alteration in original) (citations omitted).

These cases are not outliers. Washington courts have consistently upheld convictions of accomplices to robbery and other specific intent crimes where the state proved only that the accomplice had knowledge of the crime. *See, e.g.*, *State v. Oeung*, 196 Wash. App. 1011, 2016 WL 7217270, at *23–24 (2016) (upholding convictions for first-degree robbery for an accomplice where there was sufficient circumstantial evidence that she knew the principals would commit a robbery); *State v. K.P.*, 149 Wash. App. 1009, 2009 WL 513738, at *2 (2009) (upholding a juvenile's first-degree robbery conviction where she was an accomplice, as "she had the general knowledge that she was aiding in the crime of robbery"); *State v. Kemmling*, 101 Wash. App. 1074, 2000 WL 1146857, at *1 (2000) (upholding conviction for malicious mischief, which requires intent of malice, because defendant was an accomplice and therefore his knowledge that friend would drive and damage grass field was sufficient for conviction); *State v. Sweet*, 980 P.2d 1223, 1230 (Wash. 1999) (upholding convictions for first-degree burglary and assault because the "accomplice liability instruction allowed the jury to convict [defendant] as a principal" based on "general knowledge of a crime"); *State v. Ronquillo*, 89 Wash. App. 1037, 1998 WL 87641, at *9 (1998) ("Sarausad misstates the law in Washington when he asserts that to be convicted as an accomplice, the State must prove that the accomplice had the mental state required for commission of the charged offense.").

Moreover, these cases only scratch the surface, as the Supreme Court recently recognized. Given that the criminal justice system is a "world where most cases end in plea agreements," many, if not most, cases do not "make their way into easily accessible commercial databases." *Taylor*, 142 S. Ct. at 2024. This fact further underscores that Washington convicts people as a matter of course in circumstances that other states do not.

Because RCW 9A.08.020(3)(a) expressly defines the requisite mens rea for accomplice liability as knowledge, Mr. Alfred has established a realistic probability that Washington's robbery offense exceeds the generic definition.

IV. The Proper Analysis Negates the Concerns that Respondent Raised in His Petition for Rehearing En Banc.

Duenas-Alvarez and other Supreme Court case law demonstrate that this Court must (1) consider accomplice liability to assess whether Mr. Alfred's offense is overbroad, and (2) conduct that inquiry by comparing Washington accomplice to generic accomplice liability. *Supra* Sec. II–III.

This analysis addresses Respondent's concerns with respect to *Valdivia-Flores*. Respondent argued in his petition for rehearing en banc that the panel "erroneous[ly] utiliz[ed] . . . 18 U.S.C. § 2, rather than the generic definition of aiding and abetting." Pet. Reh'g 15. Mr. Alfred agrees that *Duenas-Alvarez* instructs the inquiry must proceed differently, as outlined above. *See* Sec. II–III.

But ultimately, the result is the same, as Washington accomplice liability is broader than the generic definition of aiding and abetting.

In his petition for rehearing, Respondent also contended that in *Valdivia-Flores* the Court should have compared federal accomplice liability under 18 U.S.C. § 2 (as defined by *Rosemond*) with Washington accomplice liability. Pet. Reh'g 10–15. Ultimately, *Valdivia-Flores* presents a different question than this case does. The issue in *Valdivia-Flores* called for comparing federal accomplice liability under 18 U.S.C. § 2 with Washington accomplice liability, because the Washington drug offense at issue was being compared to the aggravated felony grounds at 8 U.S.C. § 1101(a)(43)(B), which in turn, incorporates offenses defined by federal statute. *Valdivia-Flores*, 876 F.3d at 1206–07; *see also* Answering Brief for the United States at 5, *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017) (No. 15-50384). That provision asks whether a state offense is one of "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. § 1101(a)(43)(B). In other words, the Court was called upon not to compare the Washington conviction at issue to a generic offense—such as generic theft—but instead to a specific criminal provision defined by federal statute. *See, e.g.*, *Moncrieffe*, 569 U.S. at 192 (explaining that the state offense at issue must "necessarily proscribe" conduct criminalized by the Controlled Substances Act

(CSA) in a case involving 8 U.S.C. § 1101(a)(43)(B), which cross-references the CSA (internal quotation marks omitted)).

Thus, even if Respondent is correct that in cases like *Valdivia-Flores* the relevant definition of accomplice liability is that defined by 18 U.S.C. § 2, rather than generic accomplice liability, the instant case presents no occasion to address that argument. As a result, Respondent's request to abrogate *Valdivia-Flores* would be better addressed in a future case. Indeed, Mr. Alfred and Respondent are not in a truly adversarial posture as to whether *Valdivia-Flores* sufficiently considered *Rosemond*. Accordingly, the Court need not—and should not—decide this issue. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579–82 (2020) (vacating Ninth Circuit judgment where case lacked adversarial presentation of the statutory question before this Court).[13]

However, even if this Court does proceed to decide this question, Washington case law shows that its accomplice liability statute is broader than 18 U.S.C. § 2. As noted above, *Rosemond* explains that federal law requires the government to show specific intent, and prosecutors can do so by showing

[13] Mr. Alfred's submits this Court should reserve decision on whether to overrule *Valdivia-Flores* until a separate case properly presents the issue. However, even if the Court were to overrule *Valdivia-Flores* on the basis that it overlooked *Rosemond*, it should not answer the subsequent question of whether Washington accomplice liability is overbroad compared to 18 U.S.C. § 2, because this case simply does not present that question.

"advance knowledge," 572 U.S. at 78, or "full knowledge of the circumstances constituting the charged offense," *id.* at 77. In *Rosemond*, the Court then stated that to convict an individual as an accomplice under 18 U.S.C. § 924(c) and 18 U.S.C. § 2, these principles meant that the alleged accomplice needed "full awareness . . . that the plan calls not just for a drug sale, but for an *armed* one." *Id.* at 77–78 (emphasis added).

In Washington, by contrast, courts have repeatedly observed that "an accomplice need not have specific knowledge of every element of the crime committed by the principal, provided he has general knowledge of the specific crime." *State v. Roberts*, 14 P.3d 713, 736 (Wash. 2000) (emphasis omitted). As a result, the Washington Supreme Court has held "the State is not required to prove that the accomplice had knowledge that the principal was armed," even in cases where being armed is an element of the offense (like first-degree robbery with a deadly weapon). *State v. Davis*, 682 P.2d 883, 884 (Wash. 1984); *see also, e.g.*, *State v. McChristian*, 241 P.3d 468, 472 (Wash. App. 2010) (holding that "the State was not required to prove that [the defendant] had knowledge that the principal intended to assault Williams with a deadly weapon" where defendant was accused of being an accomplice to a first-degree assault); *Sweet*, 980 P.2d at 1230 ("It is not necessary for an accomplice to have specific knowledge of every element of the principal's crime."). These cases underscore that a meaningful

difference exists between Washington's knowledge requirement for accomplice liability and the requisite mens rea for federal accomplice liability under 18 U.S.C. § 2.[14] Accordingly, Washington accomplice liability is overbroad even when compared to federal statutory accomplice liability and the case law defining it, including *Rosemond*.

V. Granting the Petition for Review Will Not Create a Circuit Split. To the Contrary, Holding that this Court Cannot Consider Accomplice Liability in Conducting a Categorical Analysis Will.

Respondent's petition for rehearing en banc represented that this case conflicts with the Eleventh Circuit's decision in *Bourtzakis*. That is incorrect. To the contrary, adopting Respondent's position will create a circuit split.

First, a holding that Washington robbery is overbroad compared to the generic definition of theft will not conflict with *Bourtzakis*. *Bourtzakis*, like *Valdivia-Flores*, focused on whether a Washington conviction constitutes a drug trafficking aggravated felony. 940 F.3d at 619. As a result, the case required the Eleventh Circuit to compare Washington accomplice liability to federal *statutory* accomplice liability under 18 U.S.C. § 2 and as defined in *Rosemond*. *Id.* at 621–25. By contrast, this case requires the Court to compare the mens rea of Washington accomplice liability to generic accomplice liability or the mens rea of

[14] The Eleventh Circuit never addressed this line of case law in *Bourtzakis*, even though it provides a stark contrast to federal accomplice liability as explained by *Rosemond*.

generic theft. *Supra* Sec. III. Thus, the inquiry is fundamentally different, and granting the instant petition for review would not create a conflict with *Bourtzakis*. Moreover, as explained above, holding in Mr. Alfred's favor does not preclude the Court from reconsidering *Valdivia-Flores* in a separate case, where this Court could then directly confront the question that *Bourtzakis* poses.[15]

On the contrary, adopting Respondent's argument that federal courts should not consider accomplice liability *would* create a conflict with *Bourtzakis*. In *Bourtzakis*, the Eleventh Circuit recognized that "accomplice liability is implicit in every charge under Washington law." *Id.* at 621 (agreeing that in Washington, "a person may be charged and convicted as an accomplice even if the charging documents and judgment of conviction make no mention of the accomplice statute"); *see also id.* (citing Washington cases and noting, inter alia, that "Washington courts have consistently upheld convictions under Washington's Uniform Controlled Substances Act on an accomplice theory of liability even where the defendant was charged as a principal"). The *Bourtzakis* court then went on to analyze whether Washington's accomplice liability matched federal accomplice liability under 18 U.S.C. § 2, citing *Duenas Alvarez*. *Id.* at 622.

[15] While *Bourtzakis* was correct to consider accomplice liability when employing the categorical approach, it overlooked many relevant Washington state court decisions. As a result, it incorrectly held that Washington accomplice liability is not overbroad as compared to 18 U.S.C. § 2. *See supra* pp. 37–39 & n.14.

Accordingly, a holding that it is inappropriate to consider Washington accomplice liability in conducting the categorical approach will directly conflict with the Eleventh Circuit's decision and create a circuit split.

VI. Granting the Petition for Review Will Not Dramatically Affect DHS's Ability to Charge Washington Offenses in Removal Proceedings.

Finally, in urging en banc review, Respondent claimed the decisions in *Valdivia-Flores* and the panel opinion were "truly sweeping." Pet. Reh'g 14. Yet the Supreme Court has already anticipated that in certain unique circumstances, state convictions may criminalize conduct—including conduct as an accomplice—that falls outside of the generic definition. Moreover, this Court's decisions applying *Valdivia-Flores* reject Respondent's claim that *Valdivia-Flores* and the panel opinion are "sweeping" in scope.

First, Supreme Court case law is what compels this Court to consider accomplice liability. *Supra* Sec. II. This Court's decision to consider such accomplice liability in decisions like *Valdivia-Flores*, *Amaya*, and the panel opinion in this case faithfully implement *Duenas-Alvarez*. And as explained above, other circuits have done the same. *See, e.g.*, *Bourtzakis*, 940 F.3d at 621–25. Moreover, the rationale provided here results in a categorical mismatch only where a noncitizen can show "something *special*" in a state's accomplice liability scheme. *Duenas-Alvarez*, 549 U.S. at 191. As far as Petitioner is aware, Washington is the only state in this circuit whose accomplice liability requires a

lower mens rea than generic accomplice liability. *Supra* Sec. II; *see also supra* pp. 24–25 & nn. 8–9 (listing nearly all other states in this circuit among those that require specific intent or the intent of the principal to establish accomplice liability). As a result, the decision in this case will likely apply only to Washington convictions.

Second, this particular case concerns only generic offenses that require comparing Washington accomplice liability to generic accomplice liability. But many, if not most, offenses listed in the INA require comparison to specific federal statutory crimes. *See, e.g.*, 8 U.S.C. § 1101(a)(43) (defining aggravated felony in large part by reference to several different, specific federal crimes). This limits the scope of those crimes affected by a decision granting Mr. Alfred's petition.

Third, this Court's case law underscores that the outcome in this case and in *Valdivia-Flores* have limited impact. The two published decisions applying the *Valdivia-Flores* opinion's reasoning with respect to Washington accomplice liability illustrate this point. In both cases, this Court *rejected* claims that *Valdivia-Flores* renders other Washington offenses overbroad. *See Amaya*, 15 F.4th at 985 (noting that this Court has "rejected [the] proposition" that "no Washington state conviction can serve as an aggravated felony at all" (citation omitted)).

The first, *United States v. Door*, 917 F.3d 1146 (9th Cir. 2019), explains that for whole categories of offenses, the logic of *Valdivia-Flores* does not apply.

Specifically, *Valdivia-Flores* and the analysis Mr. Alfred explained above may apply when federal law enumerates state offenses that carry federal penalties (e.g., a sentencing enhancement or an immigration consequence). By contrast, they do not apply where Congress creates penalties for convictions with certain types of characteristics. For example, in *Door*, this Court explained that *Valdivia-Flores*'s logic does not apply to an assertion that an offense is a crime of violence under the "force" or "elements" clause, *see* 18 U.S.C. § 16(a); U.S.S.G. § 4B1.2(a)(1), because such offenses need only have certain characteristics. *See* 917 F.3d at 1153 (holding that a Washington felony harassment conviction qualifies as a crime of violence). So long as the state conviction is for an offense that has "as an element the use, attempted use, or threatened use of physical force," 18 U.S.C. § 16(a), the state conviction carries the penalties Congress provided.

In a second case, *Amaya*, this Court again declined to extend *Valdivia-Flores* as well as the panel decision in this case. In *Amaya*, the petitioner argued in relevant part that his Washington first-degree assault conviction was not a "crime of violence" aggravated felony because (1) Washington accomplice liability means that an individual could be convicted as accomplice to an assault with only knowledge, and (2) the mens rea of knowledge is not sufficient for a crime of violence. 15 F.4th at 982–84. The Court rejected this argument, explaining that the mens rea for Washington accomplice liability—knowledge or "general intent"—is

sufficient to satisfy the requisite mens rea for the crime of violence definition. *Id.* at 983. As such, this Court's precedent reaffirms the narrow impact of the analyses in *Duenas-Alvarez* and *Valdivia-Flores*.[16]

Finally, DHS may bring alternative charges of removability where the theft offense does not constitute an aggravated felony. Even in this case, the record illustrates that DHS also charged Mr. Alfred's robbery convictions as crimes of moral turpitude, and the IJ sustained those charges. AR 48–49. On appeal, the BIA declined to address this question, and ruled only on whether Mr. Alfred's crime was a theft aggravated felony. AR 4.

As a result, the Court should reject Respondent's attempt to overstate the impact of this case. Granting the petition for review will affect only a small subset of Washington crimes and only certain aggravated felonies and removable offenses that are "generic" offenses. And even in those cases, DHS may often bring alternative charges. No matter how the Court decides, DHS will continue to have many tools at its disposal to charge Washington offenses as removable offenses. But ultimately, this Court should reject Respondent's efforts to argue for an expanded definition of the removable offense, as it did in *Duenas Alvarez*, and then

[16] A petition for rehearing en banc is pending before this Court in *Amaya*. *See* Petitioner's Petition for Panel Rehearing and Rehearing En Banc, *Amaya v. Garland*, 15 F.4th 976 (9th Cir. 2021) (No. 18-70060), ECF No. 66. The panel has held that petition in abeyance pending a decision by the en banc court in this case. *See* Order, *Amaya* (No. 18-70060), ECF No. 67.

turn around and argue the opposite to avoid the necessary consequences of that expanded definition in cases like this one.

CONCLUSION

For the foregoing reasons, Mr. Alfred is not removable as charged. Accordingly, he respectfully asks the Court to vacate the agency's decision.

Date: July 11, 2022

Respectfully submitted,

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s/ Matt Adams
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STATEMENT OF RELATED CASES

Pursuant to Federal Rule of Appellate Procedure 28-2.6, Petitioner states that he is aware of the following related cases pending before this Court:

Amaya v. Garland, No. 18-70060

Manzo-Gutierrez v. Garland, No. 20-70592

Eugenio v. Garland, No. 21-357

STATEMENT OF DETENTION STATUS

Pursuant to Circuit Rule 28-2.4(b), Petitioner advises that he was deported to Palau and is no longer detained by the Department of Homeland Security. There is no motion to reopen or motion for reconsideration pending before the BIA.

CERTIFICATE OF COMPLIANCE

I, Aaron Korthuis, counsel for the petitioner and a member of the Bar of the Court, certify, pursuant to Federal Rule of Appellate Procedure 32(g) and Ninth Circuit Rule 32-1(a), that the foregoing Supplemental Opening Brief of the Petitioner is proportionately spaced, has a typeface of 14 points or more, and contains 11,213 words according to the word count feature of Microsoft Word, exclusive of tables of contents and authorities and certificates of counsel.

Signature: s/ Aaron Korthuis Date: July 11, 2022

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 11, 2022.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature: s/ Aaron Korthuis Date: July 11, 2022

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