No. 19-72903

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MCKENZY ALII ALFRED,

Petitioner-Appellant,

v.

MERRICK B. GARLAND,
UNITED STATES ATTORNEY GENERAL,

Respondent-Appellee.

Appeal from the
Board of Immigration Appeals

Brief of Amici Curiae Ninth Circuit Federal Public and Community Defenders in Support of the Petitioner-Appellant During Pendency of Rehearing En Banc

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KARA HARTZLER
VINCENT BRUNKOW
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, CA 92101
(619) 234-8467
Kara_Hartzler@fd.org
Vince_Brunkow@fd.org

Attorneys for *Amici Curiae*

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STATEMENT OF INTEREST OF AMICI AND DISCLOSURE STATEMENT

The Ninth Circuit Federal Public and Community Defenders ("Amici") represent indigent defendants before this Court. As institutional defenders, these organizations have an interest in all federal criminal law issues, including what mens rea applies to federal accomplice liability under 18 U.S.C. § 2. Amici believe this case's outcome may impact not only how courts interpret § 2, but also how courts use the generic definition of "aiding and abetting" liability to determine whether prior state convictions may trigger a federal sentencing enhancements under the categorical approach set forth in *Taylor v. United States*, 495 U.S. 575 (1990).

Amici affirm the following: 1) that no publicly held corporation owns stock in them; 2) that counsel for neither party authored this brief (in whole or in part); and 3) that no party, party's counsel, person, or other entity contributed money to preparing this brief.

All parties consented to Amici filing this brief.

SUMMARY OF ARGUMENT

In *United States v. Valdivia-Flores*, this Court held that Washington state accomplice liability is broader than federal accomplice liability because "federal law requires a mens rea of specific intent for conviction for aiding and abetting, whereas Washington requires merely knowledge." 876 F.3d 1201, 1207 (9th Cir. 2017). In a footnote, however, a later three-judge panel questioned the correctness of *Valdivia-Flores*'s holding, stating it was "unclear" how this statement "comports with the analysis set forth in *Rosemond v. United States*, 572 U.S. 65 (2014), a case not addressed by the *Valdivia-Flores* majority." *Alfred v. Garland*, 13 F.4th 980, 987 n.8 (9th Cir. 2021) (citations omitted).

The government echoed this sentiment in its petition for rehearing in *Alfred*, arguing that *Rosemond* "rejected the argument that 18 U.S.C. § 2 requires specific intent." Government Petition for Rehearing at 11. Instead, the government contends that *Rosemond* adopted a mens rea of mere "knowledge" for § 2, which matches the mens rea of Washington's accomplice liability. *Id.* This Court granted the government's petition for rehearing in *Alfred*, placing at issue the scope of accomplice liability under federal and Washington law.

As federal criminal practitioners who regularly defend individuals charged with accomplice liability, Amici disagree with the government's contention (and the *Alfred* panel's suggestion) that *Rosemond* somehow lowered the mens rea of federal accomplice liability from intent to mere knowledge. Rather, *Rosemond*, this Court's jury instructions, and post-*Rosemond* case law all make plain that an accomplice must have "the *intent* of facilitating the offense's commission." 572 U.S. at 71 (emphasis added). To find this intent, a person must not only possess "advance knowledge" of every aspect of the scheme, they must also choose to "actively participate[ ]" in the scheme, instead of altering or withdrawing from it. *Rosemond*, 572 U.S. at 77, 78, 81.

Washington accomplice liability sweeps more broadly. It holds that a person need *not* have advance knowledge of all elements of the principal's crime to be convicted as an accomplice. This expansive view of accomplice liability contradicts *Rosemond*, which held that a conviction under § 2 requires advance knowledge of the principal's criminal act. Because Washington accomplice liability permits a conviction for the very conduct *Rosemond* excluded, Washington's law is overbroad.

The Eleventh Circuit, which held to the contrary, misinterpreted *Rosemond* in three critical ways. First, it misapplied the categorical approach by looking beyond the plain text of the Washington accomplice statute and holding that it does not "significantly" differ from 18 U.S.C. § 2. *Bourtzakis v. United States Att'y Gen.*, 940 F.3d 616, 623, 624 (11th Cir. 2019). Second, *Bourtzakis* never mentioned that *Rosemond* required "advance" knowledge of the use of a firearm. Third, *Bourtzakis* relied on a single Washington case while ignoring others that do not require an accomplice to know the principal was armed. Given these misinterpretations, the Court should decline to follow the Eleventh Circuit's flawed holding.

For these reasons, Amici urge this en banc Court to affirm its earlier holding that Washington aiding and abetting liability is broader than federal accomplice liability.

ARGUMENT

I. *Rosemond* defined accomplice liability under 18 U.S.C. § 2 to require a mens rea of intent, not mere knowledge.

Both the three-judge panel in this case and the government's petition for rehearing maintained that *Valdivia-Flores*'s categorical comparison of accomplice liability under federal and Washington state

law misinterpreted 18 U.S.C. § 2.[1] *See Alfred*, 13 F.4th at 987 n.8; Gov. Pet. at 11. Specifically, both assert that *Valdivia-Flores* incorrectly read the Supreme Court's decision in *Rosemond* to require a mens rea of intent (rather than general knowledge). *See id.* Amici disagree. The three-judge panel in *Valdivia-Flores* correctly characterized § 2 and *Rosemond* as requiring an intentional mens rea.

Rosemond involved a drug deal gone wrong. Everyone agreed that Mr. Rosemond and two others arranged to sell a pound of marijuana to a prospective buyer. 572 U.S. at 67. And everyone agreed that when the buyer attempted to flee with the drugs, one of the sellers fired several shots at him. *See id.* But the parties disagreed on whether the jury could convict Mr. Rosemond as an accomplice to using or carrying a firearm to further a drug trafficking offense under § 2 if he was not the one who pulled the trigger. *See id.* at 68.

[1] Mr. Alfred contends that a survey of state law and the Model Penal Code under *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), rather than 18 U.S.C. § 2, provides the controlling definition of federal accomplice liability for purposes of the generic "theft offense" definition under 8 U.S.C. § 1101(a)(43)(G). *See* Petitioner's Supplemental Opening Brief at 35–37. Amici agree but offer these arguments in the event this Court holds to the contrary or believes these definitions are identical.

The district court instructed the jury it could convict. *Id.* at 69. Specifically, the court told the jury that it could find Mr. Rosemond guilty if he 1) "knew his cohort used a firearm in the drug trafficking crime" and 2) "knowingly and actively participated in the drug trafficking crime." *Id.* at 69 (quotations omitted). This meant that the prosecutor need not show Mr. Rosemond knew his conspirator had a gun ahead of time—only that he knew his conspirator had a gun when the shots were fired.

The Supreme Court disagreed. Under common law and § 2, *Rosemond* explained, a person aids and abets a crime if they commit an affirmative act to further the offense "with the intent of facilitating the offense's commission." *Id.* at 71. The Supreme Court then considered the conduct necessary to demonstrate that a person "intend[ed] to facilitate its commission." *Id.*

Rosemond explained that "an aiding and abetting conviction requires not just an act facilitating one or another element, but also a state of mind extending to the *entire crime*." *Id.* at 75–76 (emphasis added). Under this rule, a person may be convicted of aiding and abetting the use of a firearm to further drug trafficking "only if his

intent reaches beyond a simple drug sale, to an armed one." *Id.* at 76. *Rosemond* stressed that "[a]n intent to advance some different or lesser offense" is generally insufficient. *Id.* "Instead, the intent must go to the *specific and entire crime charged*—so here, to the *full scope* (predicate crime plus gun use) of § 924(c)." *Id.* (emphases added).

The Supreme Court then cited a series of cases showing that the "intent requirement" for accomplice liability is met when a person "actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense." *Id* at 77. So participation in a scheme was not enough—rather, participation must be accompanied by knowledge of the "extent and character" of the scheme to show that the person "intends that scheme's commission." *Id.* Thus, a person has the "intent needed to aid and abet a § 924(c) violation" when "he has chosen … to align himself with the illegal scheme in its entirety—including its use of a firearm." *Id.* at 78.

Rosemond then reiterated that "[f]or all that to be true," the defendant must have "advance knowledge" of the existence of a firearm. *Id.* Such advance knowledge "shows his intent to aid an *armed* offense," since he could otherwise "attempt to alter that plan or, if unsuccessful,

withdraw from the enterprise." *Id.* (emphasis in original). This holding is "grounded in the distinctive intent standard for aiding and abetting" described by Judge Hand: that a defendant must not only "associate himself" with the scheme, but also "participate in it as in something that he wishes to bring about" and "seek by his action to make it succeed." *Id.* at 81 n.10. Thus, "a defendant's prior knowledge is *part of the intent* required to aid and abet a § 924(c)." *Id.* (emphasis added).

In other words, *Rosemond* did not hold that accomplice liability requires a mere "knowledge" scienter. Rather, it held that accomplice liability requires an "intent" to "align [one]self with the illegal scheme *in its entirety*." *Id.* at 78 (emphasis added). That intent is shown when a person has "advance knowledge" of every aspect of the scheme and yet chooses to "actively participate[ ]" in it, rather than alter it or withdraw altogether. *Id.* at 77, 78, 81. So while 'knowledge' is one *ingredient* of the intentional mens rea, it is not the mens rea itself.

This Court's post-*Rosemond* jury instructions confirm as much. At the outset, the instruction for § 2(a) states that "[t]o 'aid and abet' means *intentionally* to help someone else commit a crime." Manual of Model Criminal Jury Instructions for the District Courts of the Ninth

Circuit § 4.1 (2010 ed., updated Mar. 2022) (emphasis added). The third element then states that the government must prove the defendant "acted with the *intent* to facilitate [*specify crime charged*]." *Id.* (first emphasis added). After listing the elements, the instruction then explains that this "intent to facilitate" is shown when a person "actively participates in a criminal venture with advance knowledge of the crime." *Id.*

So, like *Rosemond*, the Ninth Circuit jury instruction for § 2 shows that knowledge is not *the* mens rea; rather, knowledge is one *component* of the mens rea. Only if that knowledge was acquired beforehand, and only if the defendant nevertheless decided to go through with the plan, may the factfinder conclude that these factors together satisfy the "intent requirement" necessary to be convicted of accomplice liability. *Rosemond*, 572 U.S. at 76.

This Court's post-*Rosemond* case law holds the same. In *United States v. Goldtooth*, the Court overturned a federal robbery conviction where three men approached the victim, but only one "snatched" several dollars' worth of tobacco from him. 754 F.3d 763, 766 (9th Cir. 2014). All three men then left. *Id.* Although the government could not prove which

man "snatched" the tobacco, it relied on an aiding and abetting theory under § 2 to convict two of the men. *Id.* at 768.

Citing *Rosemond*, however, the Court held that accomplices must have "foreknowledge that the robbery was to occur." *Id.* But none of the evidence in *Goldtooth* "indicate[d] foreknowledge." *Id.* at 769. And an after-the-fact awareness of the taking "cannot satisfy the government's burden" because "mere presence at the scene of the crime and knowledge that the crime is being committed is not enough to sustain an aiding and abetting conviction." *Id.* (quotations omitted). Accordingly, this Court overturned the accomplices' convictions because the spontaneous taking could not have been "known in advance or intended by another." *Id.*; *see also United States v. Morales*, 680 F. App'x 548, 551 (9th Cir. 2017) (stating that an aiding and abetting instruction conveyed "the required *intent* element") (emphasis added).

This intent requirement is also consistent with this Court's pre-*Rosemond* aiding and abetting law. Decades before *Rosemond*, this Court held that "[o]ur circuit law is clear that aiding and abetting contains an additional element of specific intent, beyond the mental state required by the principal crime." *United States v. Sayetsitty*, 107

F.3d 1405, 1412 (9th Cir. 1997). The Court explained that good reason exists for this elevated mens rea, as aiding and abetting involves a "degree of uncertainty" about the accomplice's motive that is "not present in the case of a principal who actually commits the crime." *Id.* Because of this uncertainty, it is "reasonable to require proof of a specific intent that would not be required of one who completed the crime." *Id.* Thus, *Rosemond* did not change the law—it confirmed this Court's holding that an accomplice must know the principal "had and intended to use a dangerous weapon during the robbery, and that the defendant intended to aid in that endeavor." *United States v. Dinkane*, 17 F.3d 1192, 1195 (9th Cir. 1994). *See also United States v. Short*, 493 F.2d 1170, 1172 (9th Cir. 1974) ("[T]he jury must be told that it must find that [the defendant] knew that [the principal] was armed and intended to use the weapon, and intended to aid him in that respect."); *United States v. Jones*, 592 F.2d 1038, 1042 (9th Cir. 1979) (same).

As these sources demonstrate, *Rosemond*, this Court's jury instructions, and the Court's pre- and post-*Rosemond* case law all confirm that mere "knowledge that the crime is being committed" is "not enough to sustain an aiding and abetting conviction." *Goldtooth*,

754 F.3d at 769. As Amici next explains, this substantially differs from Washington's aiding and abetting liability.

II. Washington aiding and abetting liability requires only general knowledge of a crime, rather than an intent to commit every element of it.

Even a brief survey of Washington accomplice law reveals that it sweeps more broadly—and encompasses more conduct—than § 2. At least four Washington cases demonstrate this.

Nearly four decades ago, the Washington Supreme Court considered facts that were materially identical to *Rosemond*, but reached the opposite conclusion. In *State v. Davis*, the court considered an issue of "first impression": whether aiding and abetting first degree robbery required the state to "prove that the accomplice knew the principal was armed." 682 P.2d 883, 884 (1984). The court found that this required it to decide whether accomplices must have "general knowledge of a crime or specific knowledge of the elements of the participant's crime, *i.e.*, possession of a gun." *Id.* at 885. The court held it required only "general knowledge" because "an accomplice, having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality." *Id.* at 886.

Thus, "the State is not required to prove that the accomplice had knowledge that the principal was armed." *Id.* at 884.

In 2000, the Washington Supreme Court clarified that this decision "does not impose strict liability on accomplices for any and all crimes." *State v. Roberts*, 14 P.3d 713, 736 (2000). Instead, it "merely reaffirms our long-standing rule that an accomplice need not have specific knowledge of *every element* of the crime committed by the principal, provided he has general knowledge of that specific crime." *Id.* (emphasis in original). *See also State v. Cronin*, 14 P.3d 752, 758 (2000) ("adher[ing] to" *Roberts*).

The Washington Supreme Court's take on accomplice liability sweeps more broadly than § 2 and *Rosemond*. For instance, the year after *Roberts*, several petitioners sought post-conviction relief on the basis that *Roberts* had changed the law of accomplice liability. *See Sarausad v. State*, 109 Wash. App. 824, 833 (2001). Although the court of appeals agreed that *Roberts* required it to "take another look" at the issue, the court ultimately denied the petitions. *Id.* at 834. It did so because "only general knowledge is required" for aiding and abetting, so accomplices must still know "the general nature of the crime" the

principal would commit "regardless of degree." *Id.* at 835–36.

For example, "an accused who is charged with assault in the first or second degree as an accomplice must have known generally that he was facilitating an assault, even if only a simple, misdemeanor-level assault." *Id.* at 836. So while a person could not aid and abet a *murder* if they believed the principal would only commit *assault*, a person could aid and abet an *armed assault* if they believed the principal would only commit a *simple assault*. *See id.* Thus, even after *Roberts*, a person "need not have known that the principal was going to use deadly force or that the principal was armed" to be convicted as an accomplice—the opposite conclusion of *Rosemond*. *Id.*

Washington courts continue to apply this expanded accomplice definition. In *State v. McChristian*, the court of appeals relied on *Roberts* to reiterate that "an accomplice need not have knowledge of each element of the principal's crime to be convicted" of aiding and abetting because "general knowledge of 'the crime' is sufficient." 158 Wash. App. 392, 400–01 (2010). Thus, in a first-degree assault case, the state did not need to prove that an accomplice knew the principal had a knife—it "needed to prove only that [the accomplice] knew that the

principal intended to commit an assault generally." *Id.* at 401. By "facilitating the assault," the accomplice "ran the risk" that the principal would "elevate the assault to a first degree offense." *Id.*

These cases confirm that Washington accomplice liability sweeps more broadly than § 2. *Rosemond* requires "advance knowledge" of a weapon, 572 U.S. at 67, 78, 79, 81, 82, 83, while Washington holds that the state is "not required to prove that the accomplice had knowledge that the principal was armed," *Davis*, 682 P.2d at 884. *Id.* at 884. *Rosemond* requires that the accomplice's mens rea "extend[ ] to the entire crime," 572 U.S. at 76, while in Washington, an accomplice "need not have specific knowledge of every element of the crime committed by the principal," *Roberts*, 14 P.3d at 736. As a result, *Rosemond* excludes from accomplice liability those whose intent does not reach "beyond a simple drug sale, to an armed one," 572 U.S. at 76, while Washington says that a person who intended to commit "only a simple, misdemeanor-level assault" may be convicted as an accomplice to first-degree assault, *Sarausad*, 109 Wash. App. at 836. Because Washington permits an aiding and abetting conviction for the *exact* mens rea that *Rosemond* and § 2 exclude, their definitions do not categorically match.

III. The Eleventh Circuit's decision misinterprets *Rosemond*.

Although Washington accomplice liability sweeps more broadly than § 2, the Eleventh Circuit held otherwise in *Bourtzakis v. United States Att'y Gen.*, 940 F.3d 616 (11th Cir. 2019). But *Bourtzakis* made three critical errors that infected its analysis and led to an incorrect result.[2]

First, *Bourtzakis* did not properly apply the categorical approach when comparing § 2 and the Washington accomplice statute. At the outset, it acknowledged a "difference in language" between the federal and state definitions because *Rosemond* requires "intent," while Washington requires only "knowledge." 940 F.3d at 622. But *Bourtzakis* dismissed this difference, claiming that Washington's statutory language "does not create a realistic probability that accomplice liability in Washington is broader than under federal law." *Id.* at 624. This directly contradicts this Court's longstanding principle that when "a state statute explicitly defines a crime more broadly than the generic

[2] Amici agree, however, with *Bourtzakis*'s recognition that "accomplice liability is implicit in every charge under Washington law" and thus must be considered when employing the categorical approach. 940 F.3d at 621.

definition," a "realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime" because its "greater breadth is evident from its text." *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc), *abrogated on other grounds by United States v. Stitt*, 139 S. Ct. 399 (2018).

Bourtzakis also departed from the very heart of the categorical approach by stating that Washington accomplice liability "does not extend *significantly* beyond" and does not "diverge to any *significant* degree" from § 2. 940 F.3d at 623, 624 (emphases added). The Supreme Court has rejected this close-enough approach to federal and state comparisons that would find a categorical match when state and federal definitions "substantially overlap." *Mellouli v. Lynch*, 575 U.S. 798, 811 (2015). Indeed, *Mellouli* held that such a "sweeping interpretation departs so sharply from the statute's text and history that it cannot be considered a permissible reading" of the ground of removability. *Id.* at 813. *See also United States v. Taylor*, 142 S. Ct. 2015, 2024, 2025 n.3 (2022) (rejecting a "some-is-good-enough" approach to statutory comparison because a focus on whether a federal definition is "sometimes or even usually associated" with the state crime "defies this

Court's precedents") (emphasis in original). So, from the start, the Eleventh Circuit did not ground its analysis in the core principles of the categorical approach.

Second, *Bourtzakis* never acknowledged the heart of *Rosemond*'s holding: that § 2 required *advance* knowledge of the principal's acts. In *Rosemond*, the trial court had erroneously instructed the jury that it need only find the defendant "knew his cohort used a firearm in the drug trafficking crime"—i.e., that he knew it "when shots are fired." 572 U.S. at 69. *Rosemond* soundly rejected this instruction, explaining that by "telling the jury to consider merely whether Rosemond 'knew his cohort used a firearm,' the court did not direct the jury to determine *when* [R]osemond obtained the requisite knowledge." *Id.* at 82 (emphasis in original). Thus, the jury could have improperly convicted "even if Rosemond first learned of the gun when it was fired and he took no further action to advance the crime." *Id.* Accordingly, the trial court "erred in instructing the jury, because it did not explain that Rosemond needed advance knowledge of a firearm's presence." *Id.* at 81.

But while *Rosemond* stated no fewer than seven times that a

defendant must have "advance" knowledge of the firearm, *Bourtzakis* never used this word (or even this concept) once. *Compare Rosemond,* 572 U.S. at 67, 78, 79, 81, 82, 83; *Bourtzakis*, 940 F.3d at 618–26. Instead, *Bourtzakis* said that *Rosemond* held only that the defendant "knew the nature of the crime"—not that he knew it in advance. *Bourtzakis*, 940 F.3d at 624; *see also id*. at 623 (stating that, under federal law, a person is liable as an accomplice if he "knows the nature of the crime he is facilitating"). With no mention or recognition of *Rosemond*'s critical "advance knowledge" requirement, the Eleventh Circuit erroneously concluded that § 2 requires "the same proof of mens rea that Washington requires for accomplice liability." *Id*. at 624–25.

Third, *Bourtzakis* misread Washington case law. The only Washington case *Bourtzakis* relied on was *State v. Cronin*, 14 P.3d 752, 757 (2000). *Bourtzakis*, 940 F.3d at 623. *Bourtzakis* read *Cronin* as requiring that an accomplice "'have acted with knowledge that he or she was promoting or facilitating *the* crime for which that individual was eventually charged'—not just '*any* crime.'" *Id*. (quoting *Cronin*, 14 P. 3d at 757–58) (emphasis in *Bourtzakis*). Thus, *Bourtzakis* accepted that Washington juries could not convict accomplices "without proof that the

defendants knew they were specifically facilitating the respective crimes of assault and murder, and not some lesser crime." *Id.*

But *Cronin* was decided the same year as *Roberts* and "adhere[d] to" that decision. *Cronin*, 14 P.3d at 758. As previously explained, *Roberts* held only that an accomplice must possess "general knowledge" that he was aiding and abetting a particular *type* of crime—such as "assault" or "murder." *Roberts*, 14 P.3d at 736. And soon after *Cronin* and *Roberts*, Washington courts quickly clarified that this "general knowledge" did not apply to the "degree" of that assault or murder. *Sarausad*, 109 Wash. App. at 835–36. So a person who only intends to facilitate simple assault "need not have known that … the principal was armed" to be convicted as an accomplice to first-degree assault with a firearm. *Id.* at 836.[3]

This contradicts the *precise* holding of *Rosemond*, which

[3] *See also In re Domingo,* 155 Wash. 2d 356, 364, 119 P.3d 816, 820 (2005) (reaffirming *Davis*'s holding that a person may be convicted of first-degree robbery "even if he did not know the principal was armed" because he had "general knowledge that he was aiding in the crime of robbery"); *McChristian*, 158 Wash. App. at 401 (holding that a person may be convicted of aiding and abetting first-degree assault if they did not know the principal had a knife but knew "the principal intended to commit an assault generally").

repeatedly stated that a person must have "advance" knowledge of the principal's weapon to be convicted as an accomplice. 572 U.S. at 67, 78, 79, 81, 82, 83. Thus, Washington's distinction between the "type" of crime and the "degree" of that crime continues to render it broader than § 2. Because *Bourtzakis* misapplied the categorical approach, ignored *Rosemond*'s requirement of "advance knowledge," and misread Washington law, this Court should decline to follow it.

CONCLUSION

For these reasons, Amici urge this en banc Court to affirm that Washington aiding and abetting liability is broader than federal accomplice liability under 18 U.S.C. § 2.

DATED: July 18, 2022

Respectfully submitted,

s/ Kara Hartzler

Kara Hartzler
Vincent J. Brunkow
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101

CERTIFICATE OF COMPLIANCE

9th Cir. Case Number(s) 17-50195

I am the attorney or self-represented party.

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