No. 19-72903

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MCKENZY ALII ALFRED,
(Removed)

Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondent.

PETITION FOR REVIEW OF ORDER OF
THE BOARD OF IMMIGRATION APPEALS
Agency No. A215-565-401

SUPPLEMENTAL BRIEF FOR RESPONDENT

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SUPPLEMENTAL BRIEF FOR RESPONDENT

INTRODUCTION

The elements of Washington State's second-degree robbery offense qualify it as a "theft offense" under 8 U.S.C. § 1101(a)(43)(G). Petitioner Alfred's claim that the prospect of a conviction for that offense on an accomplice theory (*i.e.*, for aiding or abetting the commission of a robbery) leads to a different result lacks merit because:

- Under *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), adjudicators do not have to decide whether the prospect of a conviction on an accomplice theory makes a state crime overbroad as an integral aspect of the categorical analysis, and petitioner Alfred errs in reading the decision to impose that obligation;

- Rather, before a such a claim of overbreadth can be considered, the claimant must cite at least one actual case evidencing that a court in the convicting jurisdiction applied the criminal statute at issue in the manner that he alleges; that obligation is not affected by this Court's "facial overbreadth" precedents such as *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc); and Alfred has failed to meet that obligation;

- But even if accomplice liability is considered, Petitioner Alfred has failed to make a showing that his claim of overbreadth has merit because the "generic" aiding and abetting concept under *Duenas-Alvarez* must be at least as broad as

federal criminal aiding and abetting law and Washington's accomplice liability standard is not meaningfully broader than federal criminal law; and

- To the extent they hold otherwise, *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017), and other opinions of this Court should be abrogated.[1]

STATEMENT OF JURISDICTION

Subject Matter Jurisdiction: The Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq*., specifies classes of noncitizens who are removable from the United States, and provides (with exceptions not relevant here) that a proceeding before an immigration judge is the exclusive procedure for determining whether a noncitizen is to be removed from the United States. *See* 8 U.S.C. §§ 1227 & 1229a(a).[2] Jurisdiction "in a purely colloquial sense" was vested in the immigration court by the filing of a charge that petitioner Alfred is removable. *See* Certified Administrative Record (R) 260-62; *United States v. Bastide-Hernandez*, 39 F.4th 1187, 1191 (9th Cir. 2022) (en banc). The Board of Immigration Appeals had appellate jurisdiction over the decision of the immigration judge under 8 C.F.R. §§ 1003.1(b)(3) & (d).

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[1] This brief supersedes the Brief for Respondent filed in this matter in June 2020.

[2] This brief uses "noncitizen" as equivalent to the statutory term "alien," *i.e.*, "a person not a citizen or national of the United States." *See Barton v. Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. § 1101(a)(3)); *Torres v. Barr*, 976 F.3d 918, 922 n.6 (9th Cir. 2020) (citing *Barton* and 8 U.S.C. § 1101(a)(3)).

Appellate Jurisdiction: The Board's October 21, 2019 decision is a final order of removal. *See* R 1-4; 8 U.S.C. § 1101(a)(47). This Court's jurisdiction rests on 8 U.S.C. § 1252(a).

Timeliness: The petition for review was filed on November 15, 2019, within the time prescribed in 8 U.S.C. § 1252(b)(1).

STATEMENT OF THE ISSUES

1. Whether robbery in the second degree under Washington law is a categorical "theft offense";

2. Whether petitioner Alfred has met his burden of proving a "realistic probability" under *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), that Washington State's accomplice liability law is applied to convict persons of robbery when those persons would be acquitted in jurisdictions that require a specific intent scienter for accomplice liability; and, if so,

3. Whether the prospect of a conviction for robbery in the second degree under Washington law on an accomplice theory renders that offense not a categorical "theft offense."

STATEMENT OF THE CASE

Based on petitioner Alfred's September 2018 conviction for robbery in the second degree in violation of Washington state law, the Department of Homeland Security (DHS) charged him with being removable from the United States. Relying

on Alfred's admissions and evidence submitted by DHS, an immigration judge found Alfred removable as charged. Alfred then obtained an attorney and filed a motion to terminate the removal proceeding based on *Valdivia-Flores*. Following full briefing, the immigration judge denied that motion and ordered removal. The Board of Immigration Appeals upheld that decision and dismissed Alfred's appeal.

1. Among the classes of noncitizens subject to removal from the United States are those "convicted of an aggravated felony at any time after admission." 8 U.S.C. § 1227(a)(2)(A)(iii). The term "aggravated felony" is defined "by way of a long list of offenses," in "21 subparagraphs" of 8 U.S.C. § 1101(a)(43) "that enumerate some 80 different crimes." *Luna Torres v. Lynch*, 578 U.S. 452, 455 (2016). The term "aggravated felony" "applies to an offense" classified as such "whether in violation of Federal or State law." 8 U.S.C. § 1101(a)(43) (penultimate sentence). Among those crimes is a "theft offense . . . for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(G). An "attempt . . . to commit" an aggravated felony is itself an aggravated felony. 8 U.S.C. § 1101(a)(43)(U). In addition to rendering a noncitizen subject to removal, an aggravated felony conviction bars discretionary relief from removal. *Moncrieffe v. Holder*, 569 U.S. 184, 187 (2013). And when the noncitizen is not a permanent resident, an aggravated felony conviction can be a basis of an expedited form of removal proceeding. *See* 8 U.S.C. § 1228(b).

The "categorical approach" is used "to determine whether the state offense is comparable to an offense listed in the" aggravated felony definition. *Moncrieffe*, 569 U.S. at 190. Under that approach, a conviction for a state crime triggers the specified federal consequences based upon the elements required for that conviction, regardless of how the offense may be "labeled" "by the laws of the State of conviction." *See Taylor v. United States*, 495 U.S. 575, 588-89 (1990). To determine whether a conviction is an aggravated felony, the adjudicator disregards the underlying facts of the violation and is to "presume that the conviction 'rested upon nothing more than the least of the acts' criminalized, and then determine whether even those acts" satisfy the relevant criteria under the federal law. *Moncrieffe*, 569 U.S. at 190-91 (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)) (cleaned up). Under this method, "a prior crime would qualify as a predicate offense in all cases or in none." *See Descamps v. United States*, 570 U.S. 254, 268 (2013).

2. In the afternoon of February 20, 2018, Alfred, a noncitizen admitted to the United States as a nonimmigrant, committed a series of crimes resulting in the convictions underlying his order of removal. He attempted to rob a credit union, then robbed a nearby coffee stand, and was finally apprehended shortly after attempting a carjacking. *See* R 191-92; *see also* R 187. According to the Certificate for a Determination of Probable Cause executed under penalty of perjury by a

police detective, in the credit union, Alfred approached a teller, held a backpack over the counter with his hand in it and told the teller he would shoot her unless she gave him money. R 191. Alfred fled before the teller returned from the back room, where she had gone to retrieve money. *Id.* When Alfred reached the coffee stand, he robbed the barista. *Id.* Initially, he tried to get her car keys, "ask[ing] her something to the effect of, 'Do you wanna die? Do you wanna die? Then give me your keys." *Id.* When the barista said she didn't have a car, Alfred demanded money and the barista allowed Alfred to take money from the till. *Id.* The barista stated that Alfred pulled a gun from his backpack and pointed it at her chest. *Id.* Then Alfred approached a car stopped at a nearby intersection, opened the driver's door, yelled "This is a robbery," and reached across the driver to grab the keys before abandoning the effort and exiting the car. R 192. He was walking away when he was stopped by police. *Id.* According to the certificate, Alfred stated, after receiving *Miranda* warnings, that he "had committed these crimes so he could go to jail"; "had researched how to get deported and got the idea of robbing the bank"; and "wanted to go to jail and/or get deported." R 191-92.

In connection with this conduct, Alfred pleaded guilty to an amended information charging him with one count of robbery in the second degree and two

counts of attempted robbery in the second degree. R 186, 189-90.[3] The statement of offense he provided read that, "with intent to commit theft," he "unlawfully" "attempted to take US currency from the person of" the credit union teller "by use or threatened use of force"; took "cash" "belonging to" the barista "by threatening the use of force"; and, finally, "attempted to take property" – a car – "belonging to" his third victim "by threatened use of force." R 187. For each count, Alfred was sentenced to a 15-month term of imprisonment, to be served concurrently. R 168.

3. DHS filed charges in immigration court alleging that the conviction for the completed robbery offense is a "theft offense" aggravated felony rendering Alfred removable. R 260, 262. DHS later filed additional charges of removability, alleging that Alfred's attempted robbery convictions render him removable for having been convicted of both an attempt to commit an aggravated felony and multiple crimes involving moral turpitude, and further alleging that he is removable for having been convicted of a "crime of violence" aggravated felony. R 243. The immigration judge ordered Alfred's removal on all charges except the last. R 64. The Board dismissed Alfred's appeal. R 3-4.

[3] Washington law divides robberies into two degrees: robbery in the first degree includes robberies committed within financial institutions and robberies involving a firearm or other deadly weapon or the infliction of bodily injury and is a class A felony; all other robberies are robbery in the second degree, a class B felony. *See* Wash. Rev. Code §§ 9A.56.200 & 9A.56.210.

As the three-judge panel in this case noted, there is "no evidence that [Alfred] acted as an accomplice to someone else, or was charged as an accomplice," *see Alfred v. Garland*, 13 F.4th 980, 983 (9th Cir. 2021), *vacated upon grant of reh'g*, 35 F.4d 1218 (2022) (published order). Yet Alfred's defense to removal rested entirely on the prospect that his conviction could have been predicated on accomplice liability and that such conduct triggered no immigration consequences. *See* R 12-13 (appellate brief to Board). Concluding that Alfred had been convicted of a "theft offense" aggravated felony, the Board stated that it agreed with the immigration judge's reasons for rejecting Alfred's arguments. R 3-4. The immigration judge had declared that the "determinative issue" is what offense Alfred was convicted of – "actual or attempted second-degree robbery," and stated that the fact that Washington State's accomplice liability statute "requires only knowledge" is "not significant." R 61. As support, the immigration judge cited *Ortiz-Magana v. Mukasey*, 542 F.3d 653 (9th Cir. 2008), where this Court observed that "there is no material distinction between an aider and abettor and principals in any jurisdiction of the United States including California and federal courts." R 61; see 542 F.3d at 659. In a footnote, the immigration judge also observed that federal criminal law "has extremely narrow 'robbery' and 'theft' statutes that reflect the federal government's limited role in prosecuting criminal cases," and remarked that "it would make scant sense to define the generic

definition of ‘'theft’ to exclude states that define aiding-and-abetting liability more broadly than the federal government, which is why that reasoning was rejected” in *Duenas-Alvarez.* R 60 n.2. “Restated,” the immigration judge observed, Alfred had “failed to show ‘a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct’” not constituting a “theft offense.” R 61-62 (quoting *Duenas-Alvarez*, 549 U.S. at 193).

Separately, the Board also concluded that Alfred’s criminal attempt convictions constituted “attempt” aggravated felonies. R 4. Given those rulings, the Board declined to address whether Alfred is removable for having been convicted of multiple crimes involving moral turpitude. *Id.*

STATEMENT OF THE STANDARD OF REVIEW

Whether a state criminal offense is a categorical “theft offense” aggravated felony is a legal question reviewed *de novo*. *United States v. Vidal*, 504 F.3d 1072, 1076 (9th Cir. 2007) (en banc). In addition to reviewing the Board’s decision, the Court should review the reasoning of the immigration judge that is incorporated into the Board’s decision as its own reasoning. *See*, *e.g.*, *Szonyi v. Barr*, 942 F.3d 874, 897 (9th Cir. 2019) (amended opinion).

SUMMARY OF ARGUMENT

I. Petitioner Alfred is removable as a noncitizen convicted of a “theft offense” aggravated felony. Under categorical analysis principles, the elements of

a robbery offense under Washington law are encompassed within the "theft offense" classification. *United States v. Alvarado-Pineda*, 774 F.3d 1198, 1203 (9th Cir. 2014), resolves the issue, and should be followed here.

II. The prospect of a conviction for robbery as an accomplice does not lead to a different result. Petitioner Alfred is correct that the disposition in this case should flow from *Gonzales v. Duenas-Alvarez*. But his argument that he is not removable is based on a misreading of that decision. *Duenas-Alvarez* imposes a significant threshold limitation on the circumstances in which a federal court can declare a state criminal statute overbroad based on the state's accomplice liability theories: a claimant has a burden to prove, through the citation of at least one case, that the statute is actually applied in the way that is claimed to make it overbroad. This Court's recognition and application of that burden of proof is sufficient to decide this case, because Alfred has failed to show that Washington's robbery statute has been applied in the manner he suggests. To show that the scienter requirement of Washington's accomplice liability law actually leads to convictions for robbery in circumstances where other states do not convict, he must cite at least one Washington case in which the evidence demonstrated that the defendant had only *knowledge* that a robbery was afoot, and *not* an *intent* that the robbery be carried out.

But there is more. As Alfred himself recognizes, *Duenas-Alvarez* also requires reviewing courts to consider more than just federal criminal aiding-and-abetting law when reviewing a claim of overbreadth based on the prospect of accomplice liability. But consideration of the federal criminal aiding and abetting law is dispositive in favor of the Government because Washington's accomplice liability law is no broader than the federal accomplice liability standard as reflected by *Rosemond v. United States*, 572 U.S. 65 (2014), and Alfred is mistaken in urging otherwise.

III. In deciding this case, the Court should also recognize that the application of *Duenas-Alvarez* and *Rosemond* require that the Court abrogate its precedent finding that the prospect of a conviction for accomplice liability means that Washington state offenses are not categorical aggravated felonies or other federal predicates, including *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017), and similar decisions. That precedent is incorrect insofar as it suggests that an overbreadth claim based on accomplice liability can be decided absent a threshold showing that the state criminal statute is actually applied in the way that is claimed to make it overbroad, and insofar as it treats a comparison of the state's accomplice liability law with federal criminal aiding and abetting law as dispositive of the overbreadth inquiry.

ARGUMENT

BECAUSE WASHINGTON STATE ROBBERY IS A "THEFT OFFENSE," ALFRED'S CONVICTIONS ARE AGGRAVATED FELONIES RENDERING HIM REMOVABLE.

I. Robbery Under Washington Law Is A Categorical "Theft Offense" Aggravated Felony.

The elements of robbery under Washington state law qualify as a "theft offense" under 8 U.S.C. § 1101(a)(43)(G), as this Court correctly held in *Alvarado-Pineda*, 774 F.3d at 1203. *See* R 3-4. When, as here, a federal statute "refers generally to an offense without specifying its elements," the offense must be "define[d]" "so that" the adjudicator "can compare elements, not labels." *Shular v. United States*, 140 S. Ct. 779, 783 (2020). Here, "theft offense" has already been defined to include offenses consisting of 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." *See Duenas-Alvarez*, 549 U.S. at 189.

Given that definition, there can be no serious dispute that the elements of any robbery under Washington state law qualify it as a "theft offense." Regardless of "the least of the acts" criminalized as robbery in the second degree under Washington law, the offense elements include the unlawful taking of another's property against the will of the other person (*i.e.*, without consent) and with intent to steal. Robbery's elements include (1) "*unlawfully tak[ing] personal property*"

(2) "from the person of another or in his or her presence" (3) "*against his or her will*." *See* Wash. Rev. Code § 9A.56.190 (emphasis added). Underscoring that the taking of property must necessarily be without consent, robbery also includes as an additional offense element that the "taking" must be "by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone," where the "force or fear" is "used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking." *Id.* Additionally, "the intent to steal[] is an essential element of the crime of robbery." *State v. Hicks*, 683 P.2d 186, 188 (Wash. 1984) (citing *State v. Steele*, 273 P. 742 (Wash. 1929)). Those elements establish that second-degree robbery is a categorical "theft offense," as explained in *Alvarado-Pineda*, 774 F.3d at 1203. And because each of Alfred's three convictions for robbery and attempted robbery resulted in a sentence of 15 months' imprisonment, R 168, there is no dispute that his convictions satisfy the "term of imprisonment [of] at least one year" aggravated felony criterion. 8 U.S.C. § 1101(a)(43)(G). Accordingly, Alfred is removable as a noncitizen convicted of an aggravated felony.

II. The Prospect Of A Conviction For Robbery On An Accomplice Theory Does Not Defeat The Classification Of Washington's Robbery Offense As A "Theft Offense" Aggravated Felony.

Alfred's defense to aggravated felony removability rests on the prospect that he could have been convicted of robbery on an accomplice theory of liability.

Because of that prospect, he maintains, his conviction does not necessarily mean he was convicted of committing the elements of a "theft offense" under 8 U.S.C. § 1101(a)(43)(G). His defense rests on the scienter criterion of accomplice liability under Washington state law. Under that law, a person is "guilty" of a crime "committed by the conduct of another person" if the person is an accomplice. Wash. Rev. Code § 9A.08.020(1) & (2)(c). A person is an accomplice in the commission of a crime if he or she "[a]ids or agrees to aid such other person in planning or committing" the crime "*[w]ith knowledge* that" such aid or agreement "*will promote or facilitate* the commission of *the* crime." *See* Wash. Rev. Code § 9A.08.020(3)(a)(iii) (emphasis added). "Knowledge" means actual knowledge, and a trier of fact "must find" that the defendant "had subjective knowledge" to convict on an accomplice theory. *See State v. Shipp*, 610 P.2d 1322, 1326 (Wash. 1980).[4]

[4] Under Washington law, a person "knows or acts knowingly or with knowledge when:

> (i) He or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or
> (ii) He or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.

Wash. Rev. Code § 9A.08.010(b). But subparagraph (ii) "only permit[s], rather than direct[s], the jury to find that the defendant had knowledge if it finds that the ordinary person would have had knowledge under the circumstances," and allows the jury "to conclude that [the defendant] was less attentive or intelligent than the ordinary person." *Shipp*, 610 P.2d at 1326.

The Board correctly rejected Alfred's defense. To begin, the Court should hold that, ordinarily, there is no need to consider the prospect of accomplice liability when deciding whether a conviction is an aggravated felony as a categorical matter. The prospect of accomplice liability is generally irrelevant to, and thus need not be considered as a part of, the categorical analysis of a state court conviction. The Supreme Court directly addressed a claim of overbreadth based on accomplice liability in *Duenas-Alvarez*. As that decision makes clear, such claims generally "cannot" succeed, 549 U.S. at 193 – and thus need not be considered – absent a showing that Alfred has failed to make here that the Washington State law is actually applied in the way he claims.

Further, when it is necessary to consider such a claim, the relevant point of comparison when gauging whether a state law conviction is overbroad is not exclusively federal criminal law – as Alfred himself acknowledges. Rather, the criminal law of the many states must also be considered.

Finally, the Court should recognize, in line with *Duenas-Alvarez*, that any finding of overbreadth based on the prospect of accomplice liability is necessarily limited to the state offense at issue. *See* 549 U.S. at 193. That conclusion has two implications for this en banc Court. First, this Court's precedent decision in *Valdivia-Flores* is wrong because of its sweeping general rule, and it should be abrogated for that reason, independent of the reasons described later in the brief.

Second, regarding the removal order in Alfred's case, the Court need only consider whether convictions for robbery based on accomplice liability have occurred under Washington law.

A. Duenas-Alvarez Guides An Adjudicator's Consideration Of Any Claim Of Overbreadth Based On The Prospect Of Accomplice Liability.

At the threshold, Respondent agrees with Alfred that *Gonzales v. Duenas-Alvarez* "[a]pplies to" and governs the resolution of his claim of overbreadth. *See* Pet'r Supp. Opening Br. (July 11, 2022) ("Br.") at 13. But in urging that a ruling in his favor "is *compelled* by" *Duenas-Alvarez* (Br. at 1), Alfred overlooks or misapprehends critical aspects of the Supreme Court's decision. After ruling that a "theft offense" under 8 U.S.C. § 1101(a)(43)(G) includes aiding and abetting a "theft offense," *see* 549 U.S. at 189-90, the Court dealt with Duenas-Alvarez's argument that the California car theft statute at issue there was nevertheless not a categorical aggravated felony because it "reaches beyond generic theft to cover certain non-generic crimes." *Id.* at 190. As Alfred points out, the Government did indeed urge the Court to address that argument: the Government contended that the Court's disposition of the argument not only "bears upon the question of what it means to say that an aggravated felony encompasses aiding and abetting," but that addressing it would also "provide guidance to the lower courts" in considering such claims. *See* Transcript of Oral Argument, *Gonzales v. Duenas-Alvarez*, No. 05-1629 (Dec. 5, 2006) ("Tr."), 2006 WL 3498431, at *7-*8. That part of the

Court's opinion thus provides valuable, direct guidance regarding the adjudication of claims of overbreadth based on the prospect of accomplice liability. Alfred is correct that the Supreme Court in *Duenas-Alvarez* did not expressly adopt the Government's litigating position.[5] But the guidance that the Court provided to address the significant practicalities of claims of overbreadth based on accomplice liability is quite different from Alfred's take on it. Far from supporting Alfred, that guidance requires that his claim be rejected.

1. Under *Duenas-Alvarez*, Courts Generally Need Not Consider Whether The Prospect Of A Conviction On An Accomplice Theory Renders A State Statute Overbroad.

First, to present a claim of overbreadth, *Duenas-Alvarez* establishes that a claimant must cite at least one case "in which the state courts in fact did apply the

[5] Alfred errs in asserting (Br. at 11) that the Government's position was "that any form of accomplice liability could render a person's conviction one that qualifies as a generic theft offense." Rather, the Government argued that "Congress should be presumed when it enacted the aggravated felony provision, to be covering the field of possibilities," Tr. at *13, and urged the Court to conclude "that Congress intended to cover the entire range of aiding and abetting under whatever formulation was used in any jurisdiction" at the time of enactment. Tr. at *8. The Government said that the Court could reserve the question whether, "if at some point in the future, some entirely novel radical far-reaching theory of aiding and abetting were adopted, that would not be sufficient" to be an aggravated felony. Tr. at *13. Somewhat in line with that argument, the *Duenas-Alvarez* opinion effectively leaves open the possibility that state courts could apply a particular criminal statute in a way that renders it overbroad, but requires as a prerequisite to considering such a claim a showing that the statute was so applied by "pointing to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." 549 U.S. at 193.

statute in the special (nongeneric) manner for which he argues." 549 U.S. at 193. Lacking such a showing, the Court stated, an adjudicator "*cannot* find that California's statute, through the California courts' application of a 'natural and probable consequences' doctrine, creates a subspecies of the [California car theft] crime that falls outside the generic definition of 'theft.'" 549 U.S. at 193-94. This aspect of the opinion, holding that any consideration of an overbreadth claim of this sort is conditioned on the citation of actual cases showing that the accomplice liability doctrines of the convicting jurisdiction do lead to convictions in the manner urged, also makes clear that an adjudicator need not ordinarily consider the prospect of accomplice liability. When no overbreadth finding may be made in the absence of that showing, it necessarily follows that an adjudicator has no need to consider the prospect of accomplice liability in the absence such a showing.

This requirement of specifying an actual case evidencing application of the statute in the manner urged is a critical aspect of *Duenas-Alvarez*'s guidance. Through it, the Court resolved a problem Justice Breyer raised at argument regarding claims of overbreadth based on accomplice liability: a defense attorney could "imagine some very weird case that the statute could cover where the person wouldn't have the right intent or it wouldn't be theft or it would be some odd thing," and even though "[t]here's no possibility in the world that applied to my client," the attorney would say "'[S]ee, you see, it is theoretically possible.'" Tr. at

*38-*39. And because a Court is to look "only to the charging documents in the judgment, and you can't say it didn't happen," Justice Breyer worried, "the whole congressional scheme is basically put to the side." *Id.* at *39. The Court's opinion addresses that concern by concluding that "more than the application of legal imagination to a state statute's language" is needed "to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute" – specifically ruling that a "realistic probability that the state would apply its statute to conduct that falls outside the generic definition of a crime" is needed. 549 U.S. at 193. In line with Justice Kennedy's question at argument whether the Court could "say that when there is a novel or an unusual theory of potential liability . . . which would exonerate [a defendant] from application of this statute, that he has the burden to show that that's what happened," Tr. at *50, the Court ruled that "[t]o show that realistic probability," the claimant "must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." 549 U.S. at 193.

Importantly, to carry that burden, the cases must reflect the application of the criminal statute at issue. Duenas-Alvarez's claim was that, through California's accomplice liability doctrine that an aider and abettor "is criminally responsible . . . for any crime that 'naturally and probably' results from his intended crime," an aider and abettor is "criminally liable for conduct that the defendant did not intend,

not even as a known or almost certain byproduct of the defendant's intentional acts." 549 U.S. at 191; *see also id.* at 193. The cases he cited to support his claim dealt with crimes other than a violation of the car theft statute at issue – aiding and abetting a sexual assault, aiding and abetting a kidnapping, and aiding and abetting a murder, *see id.* at 191-93. That is important context for the Supreme Court's statement that, to "show that realistic probability," the cases must show "that the state courts in fact did apply *the statute* in the special (nongeneric) manner for which he argues." *Id*. at 193. Evidence that the criminal statute at issue *has* been applied in the requisite manner in an actual case necessarily establishes a "realistic probability" of its application in that manner. *See*, *e.g.*, *Moncrieffe*, 569 U.S. at 194 (concluding that a conviction for possession with intent to distribute marijuana could have been for social sharing of a small amount, citing authority showing convictions for possessing "only a small amount of marijuana" and that "'distribution' does not require remuneration").

Alfred errs in contending that "*Duenas-Alvarez instructs*" that "accomplice liability must be considered when examining whether a Washington conviction categorically constitutes a removable offense," and that this Court "must consider accomplice liability to determine whether" his robbery "conviction necessarily encompasses the requisite elements of the generic offense." Br. at 2, 21 (emphasis added). In fact, a footnote to his argument reveals that, far from being expressly

required by *Duenas-Alvarez*, a "conclusion that accomplice liability must be factored [in] as a way that potentially renders an offense overbroad" is "compel[led]" by "logic." *See* Br. at 12-13 n.3. Alfred explains that accomplice liability "is simply a form of committing the principal offense," and an adjudicator conducting a categorical analysis of a conviction generally will not be able to exclude the prospect that the noncitizen may have been convicted as an accomplice. *See* Br. at 12-13 n.3; *see also id.* at 14-15, 18. But that "logic" fails to account for the Supreme Court's resolution of the special problem posed by these claims of overbreadth: its holding that an adjudicator *cannot* find overbreadth based on such a claim when the claimant has not cited at least one case reflecting that the statute is, in fact, applied "in the special (nongeneric) manner for which he argues." *Duenas-Alvarez*, 549 U.S. at 193.[6]

[6] Additionally, Alfred points – as he did in his initial opening brief – to the sentence in *Duenas-Alvarez* stating 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, as a source of this obligation. *See* Br. at 10; *see also* Pet'r Opening Br. at 10. But as explained below, that sentence simply states the federal-law consequence of the Court's conclusion in the preceding sentence that "the generic sense in which the term 'theft' is now used in the criminal codes of most states covers such aiders and abettors as well as principals." 549 U.S. at 190 (internal marks and citation omitted). Indeed, the Court's use of "And" at the outset of the very phrase quoted in part by Alfred further signals the relationship between that sentence and the one preceding it. *See id.* Alfred therefore errs in reading that sentence as a source of any limitation on the sorts of "criminal activities" of aiders and abettors that constitute a generic "theft offense." (*continued*)

Thus, in view of *Duenas-Alvarez*, as Judge Rawlinson has explained, to determine whether a noncitizen has been convicted of an aggravated felony, this Court generally needs only to "compare the state statute of conviction to the generic federal definition." *Valdivia-Flores*, 876 F.3d at 1212 (Rawlinson, J. dissenting); *see also Bourtzakis v. United States Att'y Gen.*, 940 F.3d 616, 627 (11th Cir. 2019) (Robreno, J., concurring) ("the focus of the categorical analysis should not be on the theory of liability, but upon the elements of the crime as described in the statute of conviction").[7] In the absence of the threshold "reasonable possibility" showing demanded by *Duenas-Alvarez*, any "[r]eliance on *Duenas-Alvarez* as authority to support focusing our categorical analysis on Washington's aiding and abetting statute is misplaced." *Valdivia-Flores*, 876 F.3d at 1212 (Rawlinson, J. dissenting).

(*continued from previous page*)
Rather, the next part of the opinion (Part III-A, 549 U.S. at 190-94) provides guidance regarding those limits.

[7] In *Valdivia-Flores*, as explained in more detail below, this Court sustained a claim of overbreadth based on the prospect of accomplice liability for a Washington illegal drug crime. The decision did not address whether *Duenas-Alvarez* required the defendant to cite an actual case showing the application of the illegal drug statute in the manner claimed – apparently because the Government's principal submission in this Court was that Washington's accomplice liability statute does not extend significantly beyond aiding and abetting liability under federal criminal law. *See* Ans. Br. for the United States, No. 15-50384, at 8-9, 22-31 (May 27, 2016), *available at* 2016 WL 3097907.

Finally, Alfred is wrong to assert (Br. at 1) that "subsequent Supreme Court decisions applying the categorical approach" support his position. Only in *Duenas-Alvarez* itself has the Supreme Court addressed the prospect that a state's accomplice liability law renders a state offense overbroad. And nothing in *Duenas-Alvarez* is fairly read as requiring routine consideration of the prospect of accomplice liability in all cases. The Supreme Court certainly has not read that decision as having that effect. Not one of the six majority opinions of the Supreme Court that cite *Duenas-Alvarez* even hints at the reading urged by Alfred. *See United States v. Taylor*, 142 S. Ct. 2015, 2024-25 (2022); *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 718 (2020); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1567 (2017); *Moncrieffe*, 569 U.S. at 190; *Kawashima v. Holder*, 565 U.S. 478, 483 (2012); *James v. United States*, 550 U.S. 192, 208 (2007), *overruled on other grounds by Johnson v. United States*, 576 U.S. 591 (2015).

The Supreme Court has cited *Duenas-Alvarez* most frequently for the basic proposition that categorical analysis principles apply when determining whether a crime is an aggravated felony. *See Esquivel-Quintana*, 137 S. Ct. at 1567; *Moncrieffe*, 569 U.S. at 190; *Kawashima*, 565 U.S. at 483. It has also cited *Duenas-Alvarez* twice for the proposition that a court may not use its "legal imagination" when determining the least conduct as a part of the categorical analysis of an offense. *See Moncrieffe*, 569 U.S. at 191; *see also id.* at 205 (citing

this point of *Duenas-Alvarez* in addressing the Government's concern "that a conviction under any state firearms law that lacks such an exception will be deemed to fail the categorical inquiry); *see also James*, 550 U.S. at 208. *Esquivel-Quintana* also cited and quoted *Duenas-Alvarez*'s "something special" language in announcing that a state statutory rape offense with an age of consent of 18, rather than 16, is not a categorical "sexual abuse of a minor" aggravated felony. *See* 137 S. Ct. at 1572 (quoting *Duenas-Alvarez*, 549 U.S. at 191).

Most recently, in *Taylor*, the Supreme Court ruled that attempted Hobbs Act robbery is not a crime of violence because the elements of that offense did not satisfy the relevant criteria. 142 S. Ct. at 2024. The Court explained that it was unnecessary to have a showing that the federal criminal statute had been applied to convict a defendant when the underlying conduct did not include communicated threats and that reasoning is not inconsistent with *Duenas-Alvarez*. *Id.* at 2025. The Court distinguished *Duenas-Alvarez* as concerning a state offense, in which the "federalism concern" of "respect" owed by federal courts to state courts' interpretation of state law required a showing that the state statute was actually applied in the way that was claimed to be at odds with the generic crime. *Ibid.*

Alfred argues that *Taylor* "reaffirmed" that categorical approach analysis requires courts to undertake a comparison of the "particular state's [criminal law doctrine] with that applied by other states," Br. at 12, and so this Court must now

consider "whether Washington accomplice liability has 'something special' that renders it overbroad when compared to generic accomplice liability," Br. at 13. Alfred is again mistaken. *Taylor* did repeat that *Duenas-Alvarez* held that the categorical analysis requires courts to undertake a comparison of the particular state's decisional-law application of the statute of conviction with other states' applications of their comparable statutes. 142 S. Ct. at 2024-25. But that supports the Government here, not Alfred. The Government's argument in *Taylor* was that there had been no showing that the federal statute had ever been applied in a way that is inconsistent with the crime of violence definition, as described in *Duenas-Alvarez*. *Taylor*, 142 S. Ct. at 2024. The Supreme Court rejected that argument because examination of the actual state court application of the state criminal law in *Duenas-Alvarez* was appropriate due to federalism principles. But, the Court observed, those principles are inapplicable when a federal court considers the meaning of a federal law. *Id.* at 2025. Nothing in *Taylor* supports Alfred's claim that a court must consider whether some doctrine in state law might be applied in a manner contrary to the comparable doctrines of other states regardless of any proof that it actually has been applied in the particular manner urged to make the crime at issue overbroad. The parties here agree that *Taylor* reinforces that this Court must follow *Duenas-Alvarez*. But contrary to Alfred's contention, what *Taylor* reaffirms is that the categorical analysis of a state offense cannot succeed absent a showing

that, as actually applied, there is "something special" about the state offense that makes it overbroad.[8]

Meanwhile, since *Duenas-Alvarez*, the Supreme Court *has* applied the categorical approach numerous times to compare state statutes to a generic crime or federal analogue, and in none of those cases did the Court consider the contours of accomplice liability under the relevant state statute or suggest that such an analysis may be required. *See*, *e.g.*, *Luna Torres*, 136 S. Ct. at 1623-1634; *Quarles v. United States*, 139 S. Ct. 1872 (2019). *Moncrieffe* is especially instructive because its exposition of categorical approach principles well shows how *Duenas-Alvarez* fits within the categorical analysis. As that opinion explains, the adjudicator considers "whether *the state statute defining the crime of conviction* categorically fits within the generic federal definition of a corresponding aggravated felony." 569 U.S. at 190 (cleaned up) (emphasis added). *Duenas-Alvarez* imposed a "qualification" that applies when the adjudicator is ascertaining "the least of the acts criminalized" under that state statute for purposes of determining whether there is a categorical fit. 591 U.S. at 191 (cleaned up). At that

[8] *Rodriguez*, the remaining Supreme Court opinion that cites *Duenas-Alvarez*, did not concern the categorization of a prior conviction for any federal law purposes, but rather included a citation to *Duenas-Alvarez* in a string cite as an example of the Supreme Court's practice of leaving issues open for consideration by courts of appeals on remand from that Court. 140 S. Ct. at 718.

step, the opinion explains, "the adjudicator may not "apply 'legal imagination' to the state offense"; rather, "there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.'" *Id.* (quoting *Duenas-Alvarez*, 549 U.S. at 193). *Duenas-Alvarez* did not otherwise alter the basics of the categorical analysis.[9]

Here, then, absent a showing by Alfred of the "realistic probability" demanded by *Duenas-Alvarez*, the Court should confine its analysis to the elements set forth in the statute of conviction at issue – Washington Revised Code § 9A.56.210, which uses the definition of robbery in Section 9A.56.190 – and rule that the Board correctly followed *Alvarado-Pineda* in upholding Alfred's order of removal.

[9] It may also have been relevant to the Supreme Court's consideration of Duenas-Alvarez's claim of overbreadth that the statute setting forth the criminal offense at issue expressly provided for accomplice liability. *See* 549 U.S. at 187-188 (addressing a state statute that expressly covered "any person who is a party or an accessory to or an accomplice in [the prohibited conduct]") (citation and emphasis omitted). Alfred cites no post-*Duenas-Alvarez* decision of this Court (and the Government is aware of none) before *Valdivia-Flores* was decided in 2017 that analyzed a state criminal statute that does not address accomplice liability on its face in which the Court considered the contours of accomplice liability under the relevant state law or even suggested that such an analysis may be required. That fact is telling given the longstanding requirement that an adjudicator must evaluate whether "the least of the acts' criminalized" satisfy the relevant criteria under the federal law. *See Moncrieffe*, 569 U.S. at 190-91 (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)) (cleaned up).

2. Under *Duenas-Alvarez*, More Than Federal Accomplice Law Is Germane To Resolving A Properly Supported Claim Of Overbreadth Based On An Accomplice Theory Of Liability.

Although, as explained in Part II-B *infra*, Alfred has failed to make the "realistic probability" showing demanded by *Duenas-Alvarez*, and that point is sufficient to decide this case, the Court should also rule that, when evaluating a claim of overbreadth based on the prospect of accomplice liability, *Duenas-Alvarez* requires an adjudicator to consider more than just federal accomplice law as a point of comparison. Specifically, an overbreadth claim must be tested against the backdrop of both state and federal case law. *See* 549 U.S. at 191-93.

On this point, it appears the parties agree. Alfred initially argued in immigration court that he is not removable because "Washington's statutory scheme defines accomplice liability more broadly than does federal law." *See* R 251-52; *see also* R 216. But before the Board, Alfred refined his argument, asserting that the contours of accomplice liability under federal criminal law should have "*particular importance* in analyzing what accomplice mens rea would be required for a state conviction to constitute an aggravated felony," but also cited "the federal definition, the Model Penal Code, and a majority of States" as "defin[ing] the minimum mens rea for accomplices." R 16-18 (emphasis added). And Alfred's opening brief to the en banc Court is even more explicit on this point, "agree[ing] that *Duenas-Alvarez* instructs [that] the inquiry must proceed

differently" from the panel's prior analysis in this case, which used federal criminal law regarding accomplice liability to conduct the comparison. Br. at 35; *see Alfred*, 13 F.4th at 986 (quoting *Valdivia-Flores*, 876 F.3d at 1207).

Given the lack of a significant dispute between the parties, we summarize only briefly *Duenas-Alvarez*'s guidance on this question. In assessing the overbreadth claim there, the Court looked to more than just federal criminal law when determining the scope of the aggravated felony provisions. The Court rejected, as insufficient to show overbreadth, the fact that the state law at issue made an accomplice liable "not only for the crime he intends" but also crimes "that 'naturally and probably result[]' from his intended crime." 549 U.S. at 190 (citation omitted). In doing so, it pointed to both federal and state criminal law as germane to the issue, explaining that "many States and the Federal Government apply some form or variation of that doctrine," while "relatively few jurisdictions . . . have expressly rejected" it. 549 U.S. at 190-91; *see also* Appendix C (collecting cases from a majority of states and several federal circuit courts), 549 U.S. at 196-98. And when the Court rejected the state court precedents Duenas-Alvarez had cited as insufficient to substantiate the claim of overbreadth, it stated that "we cannot say those concepts" – by which the Court was apparently referring to the concepts of "motive" or "intent" reflected in those cases – "extend significantly beyond the concept as set forth in the cases of other states," and cited

Appendix C to support its determination. *See* 549 U.S. at 193. These aspects of *Duenas-Alvarez* make clear that the accomplice law of the states, as well as federal accomplice law, must be considered when adjudicating a claim of overbreadth based on the prospect of accomplice liability.

Additionally, the question of what law is relevant is implicit in the *Duenas-Alvarez* Court's resolution of the question whether "theft offense" also includes aiding and abetting a theft offense. *See* 549 U.S. at 189-90. The Court reasoned that, although a distinction existed at common law between principals in the commission of a crime on the one hand, and accomplices who either were "present at the scene of the crime" or "helped the principal before the basic criminal event took place," that distinction had been eliminated over "the course of the 20th century." *Id.* By the middle of the twentieth century, the Supreme Court had declared it "well engrained in the law" that one who aids and abets the commission of an offense "is as responsible for that act as if he committed it directly." *Nye & Nissen v. United States*, 336 U.S. 613, 618 (1949) (quoting jury instructions). The *Duenas-Alvarez* Court expressly confirmed that "*the law of all states and federal jurisdictions*" "treat similarly principals and aiders and abettors" of a crime. 549 U.S. at 189-90 (emphasis added). It then concluded 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." *Id.* at 190. By referring to both federal *and*

state law in this part of the opinion, the Court signaled that more than the federal law of accomplice liability is relevant to the application of the "theft offense" aggravated felony classification.

B. Duenas-Alvarez Requires This Court To Reject Alfred's Claim Of Overbreadth Based On The Prospect Of Accomplice Liability.

Given *Duenas-Alvarez*'s guidance on consideration of claims of overbreadth based on the prospect of accomplice liability, the Court should reject Alfred's claim that Washington State's robbery offense is not a categorical "theft offense" aggravated felony based on the prospect of accomplice liability. First, Alfred has not carried his threshold burden of showing a "realistic probability" that Washington's robbery statute is applied in the manner urged. Second, and separately, Washington's law of accomplice liability is not meaningfully broader than the federal criminal law of accomplice liability.

1. Alfred Has Failed To Demonstrate A "Realistic Probability" That The Washington Robbery Statute Is Applied In The Manner That He Claims.

To begin, Alfred has failed to show that he has presented a claim of overbreadth that warrants consideration by the Court. Alfred attempts to meet his burden under *Duenas-Alvarez* to show a "realistic probability" that the law is applied in the manner he urges in two ways. First, he cites this Court's line of precedent holding that, in some circumstances, the showing may be made by pointing to the language of the state statute. Br. at 31. Second, he cites several

Washington cases that, he claims, establish the required "realistic probability" that the law is applied in a manner that makes it overbroad. Br. at 32-34. Neither argument carries Alfred's burden under *Duenas-Alvarez*.

At the threshold, the Court should reject Alfred's one-paragraph claim (Br. at 31) that the bare fact that the Washington statute specifies that a person is an accomplice if he or she "[a]ids or agrees to aid such other person in planning or committing" the crime "*[w]ith knowledge* that" such aid or agreement "*will promote or facilitate* the commission of *the* crime," Wash. Rev. Code § 9A.08.020(3)(a)(iii) (emphasis added), establishes that he is not removable. Alfred cites this Court's line of precedent that a criminal statute may be found overbroad on its face, without regard for whether cases reflect the application of the statute in a way that makes it overbroad, when the "text of the statute expressly includes in its definition that which the Supreme Court expressly excluded from the generic, federal definition." *See 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). The *Grisel* Court explained that when "a state statute explicitly defines a crime more broadly than the generic definition, 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." *Id.* (quoting *Duenas-Alvarez*, 549 U.S. at 193) (citation omitted). The burglary statute at issue

in *Grisel* expressly defined "building" to include any "vehicle, boat, aircraft or other structure adapted for overnight accommodation of persons or for carrying on business therein," and the Court held that fact sufficient, without more, to establish overbreadth, pointing out that "[t]he state statute's greater breadth is evident from its text," and the "state courts have not narrowed this expansive definition." *Id.* at 850-51. In subsequent cases, as Alfred points out (Br. at 31), this Court has held other state crimes overbroad as a categorical matter based on the terms of the state statutes at issue, *see*, *e.g.*, *Lorenzo v. Sessions*, 902 F.3d 930, 936 (9th Cir. 2018) (holding illegal drug conviction under California state law not a categorical removable offense because state definition of methamphetamine includes geometric isomers of methamphetamine but federal definition does not), *withdrawn on denial of reh'g*, 913 F.3d 930 (2019); *but see United States v. Rodriguez-Gamboa*, 972 F.3d 1148, 1152 (9th Cir. 2020) (rejecting that claim of overbreadth given trial court finding that no geometric isomers of methamphetamine exist).

Applying that line of precedent here would be inappropriate, however, because *Duenas-Alvarez* is directly on-point and controlling. It holds that a court "cannot find" that the prospect of accomplice liability renders a state crime not a categorical "theft offense" when the claimant has not "at least point[ed] to his own case or other cases in which the state courts in fact did apply the statute in the

special (nongeneric) manner for which he argues." 549 U.S. at 193. When, as here, there is on-point controlling authority, this Court must follow it. *See*, *e.g.*, *Tenet v. Doe*, 544 U.S. 1, 8-10 (2005); *see also In re Twelve Grand Jury Subpoenas*, 908 F.3d 525, 529 (9th Cir. 2018); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

Alfred's fallback assertion that Washington state cases show that the law is applied in a way that renders it overbroad as claimed (Br. at 32-35) also lacks merit. Alfred asserts that "Washington courts have consistently upheld convictions of accomplices to robbery . . . where the state proved *only* that the accomplice had knowledge of the crime," and that "Washington convicts people as a matter of course in circumstances that other states do not." Br. at 34 (emphasis added); *id.* at 35.[10] Given that claim, the Court should hold that, under *Duenas-Alvarez*, Alfred must cite cases showing robbery convictions based on accomplice liability where the application of a specific intent scienter requirement would result in an acquittal. In other words, if Alfred had cases showing convictions for robbery on an accomplice theory where the evidence only showed a knowing scienter and did not

[10] Alfred also claims that "state courts regularly rely on the lower mens rea of knowledge to sustain convictions," (Br. at 32) but that only proves that the state courts apply the accomplice liability statute as it is written and does not carry his burden under *Duenas-Alvarez*.

establish a scienter of intent, that showing *could* carry his burden under *Duenas-Alvarez*.

None of his cases provide that showing. Although a defendant can "show that the statute was applied" in the manner rendering it overbroad "in his own case," *see* 549 U.S. at 193, Alfred candidly acknowledges (Br. at 13) that he "was not himself an accomplice." Rather, he cites four unpublished appellate court decisions upholding robbery convictions on an accomplice theory, *State v. Barrington*, 6 Wash. App. 2d 1015, 2018 WL 5977920 (2018); *State v. Oeung*, 196 Wash. App. 1011, 2016 WL 7217270 (2016); *State v. K.P.*, 149 Wash. App. 1009, 2009 WL 513738 (2009); and *State v. A.L.Y.*, 135 Wash. App. 1002, 2006 WL 2723983 (2006). *See* Br. at 32-34. Those decisions do not carry his burden of proof.

The inadequacy of these citations is clearest from *Barrington* and *Oeung*. Each opinion confirms that the evidence supporting the robbery convictions also supported findings of specific intent. In *Barrington*, the Court ruled that the evidence was sufficient to convict the defendant of robbery as a principal *as well as* an accomplice, stating – within the portion of the opinion quoted at length in Alfred's brief, but omitted from that quotation by ellipses, *see* Br. at 33 – that "[a] reasonable trier of fact could also infer from the evidence that Barrington acted as a principal and threatened [the victim] by pointing his gun at [him] *with the intent*

to deprive Acosta of his property," and thus "could have found that Barrington was either an accomplice *or principal*" in the robbery. *See* 2018 WL 5977920, at *6-*7 (emphasis added). The opinion thus makes clear that the same evidence established the defendant's knowledge that others intended to deprive the victim of his property *and* his own specific intent to deprive the victim of his property.

Similarly, in *Oeung*, which Alfred describes as a case in which "there was sufficient circumstantial evidence that she knew the principals would commit a robbery," Br. at 34, the decision shows that the evidence established both the defendant's specific intent as well as her knowledge regarding the commission of robberies, and that the jury actually found both intent and knowledge.[11] The defendant had been convicted of conspiracy to commit a robbery and of the completed robbery on an accomplice theory, and the decision rejected the defendant's challenge to the sufficiency of the evidence (apart from the defendant's own self-incriminating statement to police) underlying the conspiracy conviction. *See Oeung*, 2016 WL 7217270, at *21-*23. To convict the defendant

[11] It appears that the portion of the opinion cited by Alfred addressed only knowledge because the issue concerned the extent of the defendant's knowledge regarding the crimes that were being committed – specifically whether the defendant only knew that the perpetrators of a home invasion robbery had intended to commit a burglary or also knew that they intended to commit a robbery. *See Oeung*, 2016 WL 7217270, at *23. Because the defendant's intent was immaterial to the resolution of that issue, the state did not respond regarding the defendant's intent, and the court did not address her intent.

of conspiracy, the jury was charged that it must find that she "agreed with one or more persons to engage in or cause the performance of conduct constituting the crime of robbery" and "made the agreement *with the intent that such conduct be performed*." *Id.* at *22 (emphasis added). The state appellate court found circumstantial evidence "to support that Oeung knew that the others were going to commit a robbery and she conspired with them to help," and held both that the prosecution carried its burden of establishing that the defendant's statement could be admitted into evidence and that the evidence was sufficient to convict her of conspiracy to commit robbery. *Id.* at *23.

Nor does either of the juvenile delinquency cases cited by Alfred – *State v. K.P.*, or *State v. A.L.Y.* – meet his burden under *Duenas-Alvarez*. Neither case evidences a conviction for robbery as an accomplice where only a knowing scienter could be proved. Alfred nowhere even attempts to specify the type of case that *could* prove that the statute is applied to convict where only a knowing scienter can be proved, let alone to show how those cases are of that type.

But the American Law Institute, in its commentary on the Model Penal Code, has provided a useful discussion. The commentary explains that "often, if not usually, aid rendered with guilty knowledge implies purpose since it has no other motivation." *See* American Law Inst., *Model Penal Code and Commentaries*, § 2.06, Cmt. (c), at 316 (1985). The use of a knowing scienter may lead to a

conviction when the conduct that aids and abets the commission of a crime is motivated by some purpose unrelated to the commission of the crime, such as an intention to complete an otherwise lawful business transaction or perform a duty of some sort – for example, when:

> A lessor rents with knowledge that the premises will be used to establish a bordello. A vendor sells with knowledge that the subject of the sale will be used in the commission of a crime. A doctor counsels against abortion during the third trimester but, at the patient's insistence, refers her to a competent abortionist. A utility provides telephone or telegraph service, knowing it is used for bookmaking. An employee puts through a shipment in the course of his employment though he knows the shipment is illegal. A farm boy clears the ground for setting up a still knowing that the venture is illicit.

Id. Or, put differently, a knowledge scienter allows a conviction where the actor "is lending assistance or encouragement to a criminal scheme toward which he is indifferent." 2 Wayne R. LaFave, *Substantive Crim. Law* § 13.2(d) at 475 (3d ed. 2018). Quoting a leading opinion by Judge Learned Hand, the Model Penal Code commentary explains that a higher scienter than knowledge is required for accomplice liability because the actor's "attitude towards the forbidden undertaking must be more positive" to warrant punishment for the substantive offense. *Model Penal Code and Commentaries*, § 2.06, Cmt. (c), at 317 (quoting *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir. 1940)). Specifically, the actor "must in some sense *promote* the[] venture himself, make it his own, have a stake in its outcome." *Id.*(emphasis added). "It is *not enough* that" the actor "*does not*

forego a normal lawful activity, of the fruits of which he knows that others will make an unlawful use." *Id.* (emphasis added)

In neither *K.P.* nor *A.L.Y.* was the conduct that aided and abetted the commission of the robberies motivated by some purpose unrelated to the commission of the robbery. In *K.P.*, the defendant was asked for permission to "jump" the victim after informing another person that the victim (also a juvenile) had a large sum of money and alcoholic beverages. *See* 2009 WL 513738 at *1. In addition to granting that permission, the defendant provided the victim's cellular telephone number to the perpetrator, who used the number to call the victim and arrange "for them to meet up," at which time the victim was knocked unconscious and robbed. *Id.* The defendant's providing the means to contact the victim after agreeing to the commission of the robbery had no obvious purpose other than facilitating the robbery by providing the means for the perpetrator to lure the victim to the place where the robbery occurred.

In *A.L.Y.*, four juveniles were robbed following a confrontation with A.L.Y.'s and his companion. After A.L.Y.'s companion "forcefully pushed" one of the juveniles, "causing him to fall back into the street," and "then began removing his coat and watch as if preparing for a fight," the juveniles "worried the situation might escalate into further violence with someone getting beaten or hurt." 2006 WL 2723983 at *2. A.L.Y. told the juveniles "that the only way to settle the

situation was with money," and two juveniles then gave money to A.L.Y., who gave the money to his companion, and the pair walked away. *Id.* at *2-*3. A.L.Y. both communicated a demand for money, received it directly from the victims, and delivered it to the person who represented the threat, acts of direct participation in the unlawful taking and retention of the money.

There is no reason to think that either K.P. or A.L.Y. would have been acquitted of robbery if specific intent rather than knowledge were required to convict them on an accomplice theory. Neither of these cases establishes that Washington applies its robbery statute to convict defendants when it can prove only knowledge and not intent. The Court should hold that none of these cases carries Alfred's burden under *Duenas-Alvarez* and dismiss his claim of overbreadth without further consideration.[12]

2. Alfred Has Failed To Show That Washington's Accomplice Liability Law Is Materially Broader Than Generic Accomplice Liability Law.

Regardless of whether Alfred has carried his initial burden of showing that the Washington robbery law sweeps as broadly as he claims it does through the application of the state accomplice liability doctrines, Alfred's claim of

[12] To support his claim of overbreadth, Alfred also cites (Br. at 34) *State v. Sweet*, 980 P.2d 1223 (Wash. 1999), plus two unpublished appellate court decisions, *State v. Kemmling*, 101 Wash. App. 1074, 2000 WL 1146857 (2000), and *State v. Ronquillo*, 89 Wash. App. 1037, 1998 WL 87641 (1998). Those cases involve convictions for offenses other than robbery and are inapposite for that reason.

overbreadth fails on the merits. He has failed to establish a significant difference between accomplice liability doctrine as applied by Washington state courts and the scope of accomplice liability that qualifies as a "theft offense" under *Duenas-Alvarez*.

To recap, it is undisputed in this Court that the accomplice law of the States, as well as federal accomplice law, must be considered when adjudicating a claim of overbreadth based on the prospect of accomplice liability. To show "something special" about the law of the convicting jurisdiction, Alfred could show that Washington, in applying its robbery statute, "criminalizes conduct that most other states would not consider 'theft.'" *See* 549 U.S. at 191. But he has not attempted such a showing. Rather, he argues at length (Br. at 24-26) and at a higher level of generality that some states "require specific intent for an accomplice to be convicted of the principal crime," while others "employ some form of a doctrine that requires the accomplice's intent to match the principal's intent," and still others require a knowledge scienter. Even if arguments at this level of generality could establish "something special" about the Washington law, Alfred's submissions fail to do that. To be sure, there is "considerable variation in the language used by courts and legislatures" in specifying the requisite mental state for accomplice liability. 2 LaFave § 13.2(b) at 466 (3d ed. 2018). As that treatise explains, the accomplice liability statutes that specify a mental state "may require

that one 'intentionally' or 'knowingly' assist or encourage a crime, that one assist or encourage a crime 'with the intent to promote or facilitate such commission,' or that the aid and encouragement be given by one 'acting with the mental state required for commission of an offense.'" *Id.* at 466-67 (footnotes omitted). And decisional law "speak[s] in terms of the accomplice's knowledge or reason to know of the principal's mental state," "the accomplice's sharing the criminal intent of the actor," and "the accomplice's intent to aid or encourage." *Id.* at 466. Those formulations "to some extent" "may represent different ways of stating the same mental state requirement; "it is undoubtedly true that some *rather subtle* differences exist between them." *Id.* at 467 (emphasis added). Those "rather subtle differences," without more, are insufficient to establish that Washington's robbery offense is overbroad.[13] Indeed, a bare focus on the mens rea requirement of accomplice liability, as Alfred urges, leads to an incomplete analysis because it disregards related aspects of accomplice liability, such as the degree to which the actor actually contributed to the success of the crim. *See Model Penal Code and*

[13] Citing the briefing in *Duenas-Alvarez*, Alfred points out that the Government previously stated 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." Br. at 29 (quoting Reply Brief of Petitioner at 3, Gonzales v. Duenas-Alvarez (No. 05-1629) (Nov. 27, 2006) (internal quotation marks omitted)). But read in context, that statement does not bear the weight Alfred urges. No issue in that case was presented regarding the scienter element, and that statement, made in passing, cited only a treatise as supporting authority. *See* Reply Br. at 3 (citing 2 LaFave § 13.2 (2d ed. 2003)).

Commentaries, § 2.06, Cmt. (c), at 315 (pointing out that initial draft of the Model Penal Code's accomplice liability provision included a knowing scienter and "conduct requirements [that] were more rigorously drafted to require . . . that the facilitation be 'substantial' or that the actor have provided the means or opportunity for the commission of the crime"). After all, as *Duenas-Alvarez* itself reflects, a "person *intends* that which he *knows* 'is practically certain to follow from his conduct." 549 U.S. at 191 (quoting 1 Wayne R. LaFave, *Substantive Crim. Law* § 5.2(a) at 341 (2d ed. 2003)). In this respect, the Washington accomplice liability statute requires knowledge that the aid or agreement to aid in planning or in committing the offense "*will* promote or facilitate" – not "may promote or facilitate" or "could promote or facilitate" – the commission of the crime. *See* Wash. Rev. Code § 9A.08.020(3)(a)(iii) (emphasis added).

Regardless of the precise contours of generic accomplice liability, however, Alfred's argument fails because Washington's accomplice liability law is not meaningfully different from federal accomplice liability under 18 U.S.C. § 2. The generic accomplice liability under *Duenas-Alvarez* must be *at least* as broad as federal accomplice liability. Construing generic aiding and abetting under 8 U.S.C. § 1101(a)(43) as not encompassing federal accomplice liability would lead to the unlikely and anomalous result that a noncitizen could be convicted and subjected to criminal sanction for committing a federal crime that otherwise meets

aggravated felony criteria but escape the immigration consequences of that offense. And because federal accomplice liability is as broad as Washington's accomplice liability, the Court should reject Alfred's claim of overbreadth.

The federal accomplice liability statute, 18 U.S.C. § 2, provides in relevant part that a person who ""aids, abets, counsels, commands, induces or procures" the commission of an offense is punishable as a principal. In *Rosemond*, 572 U.S. at 71, the Supreme Court provided a further explanation of its precedent construing this statute and in doing so, indicated even more clearly that the scienter element of 18 U.S.C. § 2 is consistent with knowledge. The Court explained it had previously held that the "the intent of facilitating the offense's commission" component of federal accomplice liability was satisfied "when a person actively participates in a criminal venture *with full knowledge of the circumstances constituting the charged offense*." *Id.* at 77 (emphasis added). Under those circumstances, the Court explained, the actor "has chosen . . . to align himself with the illegal scheme in its entirety" and "has determined . . . to do what he can to 'make that scheme succeed.'" *Id.* at 78 (quoting *Nye & Nissen*, 336 U.S. at 619) (alteration marks omitted). Put differently, the Court explained, "[w]hat matters for purposes of gauging intent is that the defendant *has chosen*, *with full knowledge*, to participate in the illegal scheme." *Id.* (emphasis added). Thus, the *Rosemond* Court expressly rejected the submission that a participant in the crime at issue "intends to assist" in

the offense "only if he affirmatively desires one of his confederates to use a gun," observing that "[t]he law does not, nor should it, care whether he participates with a happy heart or a sense of foreboding. Either way, he has the same culpability, because either way he has knowingly elected to aid in the commission of a peculiarly risky form of offense." *Id.* at 79-80.

Given *Rosemond*, the Court should hold that Washington's accomplice liability is no broader than the federal accomplice liability standard and uphold the order of removal. Indeed, in *Bourtzakis*, 940 F.3d at 623, the Eleventh Circuit considered the issue and, in a well-reasoned opinion, ruled that the scienter requirement under Washington's accomplice liability law "does not extend significantly beyond the federal requirement." The Eleventh Circuit explained that the scienter requirement under federal law, as reflected by *Rosemond*, and the corresponding requirement under Washington law, as reflected by *State v. Cronin*, 14 P.3d 752 (Wash. 2000) "mirror one another." 940 F.3d at 623. *Cronin*, the *Bourtzakis* Court explained, ruled that the defendant must have acted with knowledge that he or she was promoting or facilitating "the crime for which that individual was eventually charged" to be convicted as an accomplice. *Id.* (quoting 14 P.3d at 757-58).

Alfred's attempt to show otherwise is unavailing. His principal submission is based on Washington state court authority that a person can be convicted of

armed robbery (*i.e.*, robbery in the first degree) knowing only that the crime to be committed is robbery (and not necessarily armed robbery). *See* Br. at 38-39 (citing, *inter alia*, *State v. Davis*, 682 P.2d 883 (Wash. 1984)). That point is immaterial here because Alfred's offense (robbery in the second degree) has no element relating to a firearm. Although it is true, under Washington law, that an accomplice "need not have specific knowledge of *every* element of the crime committed by the principal," he must have "*general* knowledge of th[e] *specific crime*" that he is charged with committing. *See State v. Roberts*, 14 P.3d 713, 736 (Wash. 2000) (amended on denial of reconsideration). That requirement ensures that a conviction for committing robbery in the second degree on an accomplice liability theory is necessarily based on a finding that the defendant aided or agreed to aid in planning or in committing a robbery, knowing that the aid will promote or facilitate the commission of a robbery. *See In re Domingo*, 119 P.3d 816, 820-21 (Wash. 2005). Washington's accomplice liability law is not meaningfully broader than accomplice liability under federal criminal law, and Alfred is removable.

III. The Court Should Abrogate Its Precedent Holding State Offenses Overbroad Based On The Prospect Of A Conviction On An Accomplice Liability Theory.

In addition to upholding the removal order before the Court, the en banc panel should make clear that its ruling in this case necessarily abrogates circuit precedent holding state criminal statutes overbroad in relation to a federal

classification because of the prospect of accomplice liability. That precedent – which includes *Valdivia-Flores* – rests on several discrete errors. At a minimum, the Court should declare that the reasoning and result of that precedent unsound for at least the following three reasons.

First, the Court erred in *Valdivia-Flores* when it held a state statute overbroad based only on comparing Washington State's accomplice liability law to federal criminal law without considering the accomplice liability law of other states. *See* 876 F.3d at 1207-08. Although, as just explained, at a high level of generality, Washington's accomplice liability standard is no broader than the federal accomplice liability standard, the comparison with federal accomplice liability is not necessarily determinative of the overbreadth analysis. Rather, even if a state's accomplice liability standard is broader than the federal standard, the Court must also analyze whether the state "in applying" the statute "criminalizes conduct that *most other States* would not consider 'theft.'" *Duenas-Alvarez,* 549 U.S. at 191 (emphasis added).

Seeking to limit the breadth of an en banc decision, Alfred suggests (Br. at 42) that this case "concerns only generic offenses that require comparing" a state statute "to generic accomplice liability," and he argues that "many, if not most" of the aggravated felony classifications "require comparison to specific federal statutory crimes." He also urges the Court (Br. at 37 & n.13) to "reserve decision

on whether" *Valdivia-Flores* is abrogated or should be overruled "until a separate case properly presents the issue." But the reason for *Duenas-Alvarez*'s ruling that 8 U.S.C. § 1101(a)(43)(G)'s "theft offense" classification includes aiding and abetting a "theft offense" – the fact that the distinction between principals and accomplices has been abrogated in all jurisdictions in the United States – applies equally to *every* aggravated felony classification. As a result, the suggestion that a distinction can be drawn between aggravated felony classifications that "require comparing a state statute with its federal counterpart," on the one hand versus classifications defined in some other way, such as by reference to whether the offense has, as an element, "the use, attempted use, or threatened use of physical force," *see Amaya v. Garland*, 15 F.4th 976, 985 (9th Cir. 2021), is unavailing.

In particular, that reasoning applies to the aggravated felony classification at issue in *Valdivia-Flores*. That case concerned the application of the aggravated felony classification for "illicit trafficking in a controlled substance . . . including a drug trafficking crime" as defined elsewhere in federal law. *See* 8 U.S.C. § 1101(a)(43)(B); *Valdivia-Flores*, 876 F.3d at 1211 (O'Scannlain, J., specially concurring); *see also id.* at 1212 (Rawlinson, J. dissenting). The bare fact that the "drug trafficking crime" component of that classification entails comparison of the elements of the state illegal drug crime to the universe of federal drug felonies is not a basis for refusing to extend the logic of *Duenas-Alvarez*'s ruling regarding

accomplice liability principles into that context. The *Valdivia-Flores* Court thus erred when it concluded that a comparison between Washington state's accomplice liability standards and federal criminal liability standards is decisive.

Second, the *Valdivia-Flores* Court erred in addressing the claim of overbreadth without any showing that the illegal drug statute at issue was applied to lead to convictions based on aiding and abetting liability theories where a specific intent scienter would lead to an acquittal. The decision did not examine whether the defendant had cited an actual case showing the application of the illegal drug statute in the manner claimed. There, the Government did not argue that *Duenas-Alvarez* required the defendant to do so, but rather argued principally that Washington's accomplice liability statute does not extend significantly beyond aiding and abetting liability under federal criminal law. *See* Ans. Br. for the United States, No. 15-50384, at 8-9, 22-31. But as explained above, under *Duenas-Alvarez*, such a showing is a prerequisite to the Court's consideration of a claim of overbreadth based on the prospect of accomplice liability. A holding to that effect would abrogate *Valdivia-Flores* because the opinion does not address that threshold question. *See*, *e.g.*, *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (court may address an issue when not "squarely addressed" by prior precedent).

Third, and in any event, the *Valdivia-Flores* Court erred in concluding that Washington State's accomplice liability law is broader than federal criminal

accomplice liability under Ninth Circuit precedent.[14] The Court based that determination on the "formal distinction" between the scienter of intent as defined by its federal criminal precedents and knowledge as set forth in Washington state law, 876 F.3d at 1208. But as explained above, that distinction is one *merely* of form – and as *Rosemond* makes clear, the standards are substantially no different from one another. Accordingly, a ruling on this point will likewise abrogate *Valdivia-Flores*.

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[14] Alfred incorrectly claims (Br. at 39-41) that the Court can rule in his favor based on the prospect that he was convicted on an accomplice theory of liability without precipitating a circuit split with *Bourtzakis*. He argues (Br. at 39) that his case is different because it "requires the Court to compare the mens rea of Washington accomplice liability to generic accomplice liability or the mens rea of generic theft" under *Duenas-Alvarez*. And he claims (Br. at 40-41) that comparison is different from comparing Washington accomplice liability to federal criminal accomplice liability under 18 U.S.C. § 2. But he does not dispute that generic accomplice liability under *Duenas-Alvarez* must encompass (at a minimum) federal criminal accomplice liability under 18 U.S.C. § 2. A holding that Washington accomplice liability is meaningfully broader than federal criminal accomplice liability would therefore conflict with *Bourtzakis*.

CONCLUSION

For the foregoing reasons, the petition for review should be denied. If the Court does not uphold the removal order, it should grant the petition and remand the case for further agency consideration of the remaining charges of removability.

Respectfully submitted.

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