No. 19-72903

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MCKENZY ALII ALFRED,

Petitioner,

v.

WILLIAM BARR, Attorney General,

Respondent.

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

PETITIONER'S SUPPLEMENTAL REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

STATE CASES

STATE STATUTES

OTHER AUTHORITIES

INTRODUCTION

Respondent's answering brief effectively abandons the central argument that he asked this Court to review en banc: that courts should not consider an argument that accomplice liability renders a statute overbroad. Instead, for the first time, Respondent asserts that the Supreme Court's decision in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), should be understood to require an additional or "threshold" step in the categorical analysis. Supp. Ans. Br. 10. This "threshold limitation" would require a party to cite "at least one case" to demonstrate overbreadth. *Id.*; *see also id.* at 1, 17, 21–22. Not only has Respondent failed to previously raise this issue, but it stands in direct tension with Respondent's prior arguments that asserted accomplice liability is simply "irrelevant" to this case. Ans. Br. 19, 24; Pet. Reh'g 10. *Duenas-Alvarez* makes clear that an adjudicator must examine whether Washington's accomplice liability scheme renders Mr. Alfred's crimes overbroad.

Respondent's argument for a "threshold" realistic probability showing is really a new claim about *what* is required to demonstrate overbreadth in the categorical approach, and asserts that a mismatch in elements is not enough. *See* Supp. Ans. Br. 1, 32–33. Supreme Court case law resoundingly refutes this argument. Indeed, just this term, the Supreme Court explained that a party does not need to "to identify a single case" where "there is no overlap to begin with"

between the statute of conviction and the federal or generic offense. *United States v. Taylor*, 142 S. Ct. 2015, 2024–25 (2022). In doing so, the Court distinguished *Duenas-Alvarez* as a case where "the elements of the relevant state and federal offenses clearly overlapped," thus requiring the Court to look at state law to determine "how a state court would interpret its own . . . laws." *Id.* at 2025. Notably, in several cases, the Supreme Court has relied on the mismatch in elements *alone* to conclude state laws are overbroad. En banc precedent from this Court also establishes that a criminal statute is overbroad where its elements encompass more conduct than the generic or federal offense, refuting Respondent's argument that such a mismatch is not enough.

In this case Mr. Alfred's robbery and attempted robbery convictions are overbroad, as Washington accomplice liability requires only knowledge, while generic theft (and the generic accomplice liability that forms part of it) requires specific intent. Notably, Respondent does not meaningfully contest Mr. Alfred's extensive survey of state case law, which shows that the overwhelming majority of states require specific intent—just like federal law does. Thus, the sources this Court must look to in order to define generic accomplice liability confirm that generic accomplice liability requires specific intent. The resulting mismatch between Washington's accomplice liability scheme and generic accomplice liability demonstrate Washington robbery is overbroad compared to generic theft.

State case law only underscores this point. Respondent ignores many cases that Mr. Alfred cited in his opening brief showing the clear mismatch between state and federal accomplice liability. To do so, Respondent argues these cases may be distinguished on the basis that they do not involve second degree robbery convictions. But that is a distinction without any importance. Indeed, in *Duenas-Alvarez* the Supreme Court looked to cases from many different crimes to help determine whether California accomplice liability was overbroad, demonstrating that the same is appropriate here. In any event, even the limited cases Respondent does choose to address reflect the overbreadth of Washington's accomplice liability. Accordingly, the Court should grant this petition for review and vacate Mr. Alfred's removal order.

ARGUMENT

I. *Duenas-Alvarez* Requires the Court to Consider a Properly Raised Argument That Accomplice Liability Renders a Conviction Overbroad.

In *Duenas-Alvarez*, the Supreme Court held that "the generic sense in which the term theft is now used . . . covers . . . aiders and abettors as well as principals." *Duenas-Alvarez*, 549 U.S. at 190 (internal quotation marks omitted). In its decision, the Court also addressed a question the government asked the Court to answer at oral argument. Specifically, the government suggested that the Court should address "whether [the holding that generic theft includes accomplice liability] means that there is some general Federal immigration law definition of

aiding and abetting with which the law of aiding and abetting in the jurisdiction of conviction would have to be compared in every single removal case." Transcript of Oral Argument at 8:4–8, *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) (No. 05-1629). The government urged the Court to answer that question in a way that guaranteed that no court would need to consider whether accomplice liability renders a statute overbroad. *Id*. 8:9–14.

The Supreme Court resoundingly rejected the invitation to answer the question the government posed in such a sweeping fashion. Instead, it held that "the criminal activities of the[] aiders and abettors of a generic theft must themselves fall within the scope of the term 'theft' in the federal statute." 549 U.S. at 190. The Court then went on to demonstrate this point, analyzing whether California's version of the natural and probable consequences doctrine was broader than the doctrine as applied in other states. *Id.* at 190–93.

Faced with the government's prior position before the Supreme Court, Supp. Op. Br. 8–12, Respondent no longer argues that accomplice liability is simply "irrelevant," Ans. Br. 19; Pet. Reh'g 10. Nor does Respondent assert (as he did before) that because Washington has a single accomplice liability statute, courts should not consider whether accomplice liability renders a state conviction overboard. Ans. Br. 19; Pet. Reh'g 7. Similarly, Respondent has stopped

contending that because Mr. Alfred was not convicted as an accomplice, the Court may not consider accomplice liability. Pet. Reh'g 1, 3, 8–10.

Instead, in his supplemental answering brief, Respondent raises a novel argument. Specifically, he asserts that "any consideration of an overbreadth claim . . . is conditioned on the citation of actual cases showing that the accomplice liability doctrines of the convicting jurisdiction" are overbroad. Supp. Ans. Br. 18. Respondent's argument thus effectively concedes that courts must consider properly raised arguments that accomplice liability renders a conviction overbroad. Indeed, by demanding a "threshold 'reasonable possibility' showing," Supp. Ans. Br. 22, Respondents admit that an adjudicator must consider an argument that accomplice liability renders a statute overbroad.

In support of his novel argument for a "threshold 'reasonable possibility' showing," Supp. Ans. Br. 22, Respondent notes several Supreme Court cases that either cite *Duenas-Alvarez* or decide a categorical approach question. *See* Supp. Ans. Br. 23–27. According to Respondent, the cited cases show that "nothing in *Duenas-Alvarez* is fairly read as requiring routine consideration of the prospect of accomplice liability in all cases." Supp. Ans. Br. 23.

The cases Respondent cites do not address accomplice liability simply because that was not the argument upon which a party argued a conviction was overbroad. It is a basic rule that courts "do not, or should not, sally forth each day

looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (alterations in original) (citation omitted). This rule of "party presentation . . . . rel[ies] on the parties to frame the issues for decision and assign[s] to courts the role of neutral arbiter of matters the parties present." *Id.* (internal quotation marks omitted). Moreover, when a party does not raise an issue in one case, new parties in a different case can raise that issue. Indeed, just like the rule of party presentation, it is well-established that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925); *see also, e.g.*, *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (similar).

Ignoring these "principle[s]" and "general rule[s]," *Sineneng-Smith*, 140 S. Ct. at 1579, Respondent urges this Court read into the *absence* of any accomplice liability discussion a principle that a court may ignore accomplice liability even where the issue is raised by a party. Supp. Ans. Br. 23. However, no party raised accomplice liability in those cases—a fact confirmed by the questions presented in

each case.[1] As a result, the cases Respondent cites provide no support for his position.

Notably, in the one, recent instance in which the Supreme Court *did* address *Duenas-Alvarez* and accomplice liability, the Court described the case exactly as Mr. Alfred has. In *United States v. Taylor*, the Court explained that *Duenas-Alvarez* confronted the question of whether the California statue at issue "reach[ed] aiding and abetting conduct that fell 'beyond generic theft.'" 142 S. Ct. at 2024. As the Court then noted, to answer the question, it "looked to state decisional law and

[1] *See Taylor*, 142 S. Ct. at 2019–20 (noting that the question was whether attempted Hobbs robbery qualifies as a crime of violence); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1567–68 (2017) (addressing whether California statutory rape offense categorically criminalizes conduct that falls within the generic crime of "sexual abuse of a minor"); *Torres v. Lynch*, 578 U.S. 452, 454 (2016) ("[W]e must decide if a state crime counts as an aggravated felony when it corresponds to a specified federal offense in all ways but one—namely, the state crime lacks the interstate commerce element used in the federal statute to establish legislative jurisdiction . . . ."); *Moncrieffe v. Holder*, 569 U.S. 184, 189–90 (2013) (explaining that the question was "whether a conviction under a statute that criminalizes conduct described by both [21 U.S.C.] § 841's felony provision and its misdemeanor provision, such as a statute that punishes all marijuana distribution without regard to the amount or remuneration, is a conviction for an offense that 'proscribes conduct punishable as a felony under' the [Controlled Substances Act]"); *Kawashima v. Holder*, 565 U.S. 478, 482 (2012) (stating that the question was whether the federal convictions at issue qualified as aggravated felonies as defined by 8 U.S.C. § 1101(a)(43)(M) because the convictions allegedly did not involve fraud or deceit); *James v. United States*, 550 U.S. 192, 195 (2007) (noting that question presented was "whether attempted burglary, as defined by Florida law, is a 'violent felony' under [the Armed Career Criminal Act]"), *overruled on other grounds by Johnson v. United States*, 576 U.S. 591 (2015).

asked whether a 'realistic probability' existed that the State would 'apply its statute to conduct that falls outside' the federal generic definition." *Id.* at 2024–25 (quoting *Duenas-Alvarez*, 549 U.S. at 193). *Taylor* thus confirms that *Duenas-Alvarez* must be read to require courts to examine whether accomplice liability renders a state offense overbroad (when such an argument is presented).

In the end, by focusing on this "threshold 'reasonable possibility' showing" Supp. Ans. Br. 22, Respondent has effectively abandoned the main question it asked this Court to review en banc.[2]

II. The Realistic Probability Test Is Satisfied By a Mismatch in Elements or By a Case Showing Overbroad Application.

The government also raises a second issue that it never argued at any previous stage in this litigation: whether a mismatch in elements is sufficient to render a statute overbroad, or whether a noncitizen must in addition cite to cases demonstrating the overbreadth. Respondent erroneously asserts that Mr. Alfred

[2] Respondent also repeatedly asserts that Mr. Alfred has the "burden" in this case to show a realistic probability. *See, e.g.*, Supp. Ans. Br. 10, 19, 31. Notably, Respondent cites no authority for this proposition. Nor can he. This petition for a review concerns the removal proceeding of a noncitizen lawfully admitted to the United States, whom the government claims is removable. *See* AR 260 (Notice to Appear acknowledging Mr. Alfred was lawfully admitted and charging him as removable under 8 U.S.C. § 1227(a)(2)(A)(iii)). In such proceedings, it is the *government* who bears the burden of proof to prove removability by clear and convincing evidence. 8 U.S.C. § 1229a(c)(3)(A); AR 44 (immigration judge acknowledging DHS bore the burden of proof).

must demonstrate a "realistic probability" by citation to cases involving that specific offense. First, numerous cases do in fact demonstrate Washington accomplice liability is overbroad. *See* Supp. Op. Br. 32–35, 38. But it is equally true that the facial mismatch in elements between generic accomplice liability and Washington accomplice liability, without more, is sufficient to demonstrate that Mr. Alfred's conviction is not categorically a theft aggravated felony.

Supreme Court and en banc circuit precedent make clear that a noncitizen may demonstrate overbreadth either by showing (1) a mismatch in elements or (2) non-generic application through a case. First, the Supreme Court explained just this term that *Duenas-Alvarez*'s realistic probability test applies only in some instances. As the Court noted, *Duenas-Alvarez* looked to state case law—rather than just the elements of the generic and state crimes at issue—because "the elements of the relevant state and federal offenses clearly overlapped and the only question the Court faced was whether state courts *also* 'appl[ied] the statute in [a] special (nongeneric) manner.'" *Taylor*, 142 S. Ct. at 2025 (alterations in original). Notably, other circuits have observed the same point. For example, in *Singh v. Attorney General*, the Third Circuit pointed out that *Duenas Alvarez* involved a statute where "the relevant elements were identical," and that as a result, "the 'realistic probability' language is simply not meant to apply" where "the elements

of conviction are not the same as the elements of the generic federal offense." 839 F.3d 273, 286 n.10 (3d Cir. 2016).

This Court—and many others—have further elaborated on this rationale. As the en banc Court explained in *United States v. Grisel*, the realistic probability test is not applicable where a statute is facially overbroad because such cases require "no 'legal imagination.'" 488 F.3d 844, 850 (9th Cir. 2007) (en banc) (quoting *Duenas-Alvarez*, 549 U.S. at 193), *abrogated on other grounds by United States v. Stitt*, 139 S. Ct. 399 (2018). "Put simply, the [mismatch in] elements leave nothing to the 'legal imagination,' because they show that one statute captures conduct outside of the other." *Zhi Fei Liao v. Att'y Gen.*, 910 F.3d 714, 724 (3d Cir. 2018) (citation omitted). Notably, at least eight circuits have adopted the rule that a mismatch in elements is sufficient to demonstrate that a statute of conviction is overbroad compared to a federal offense or generic crime. *See Swaby v. Yates*, 847 F.3d 62, 66 (1st Cir. 2017); *Hylton v. Sessions*, 897 F.3d 57, 63 (2d Cir. 2018); *Zhi Fei Liao*, 910 F.3d at 724; *United States v. Aparicio-Soria*, 740 F.3d 152, 158 (4th Cir. 2014) (en banc); *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1147 (9th Cir. 2020) (affirming "[t]here are two ways to show 'a realistic probability' that a state statute exceeds the generic definition"); *Gonzalez v. Wilkinson*, 990 F.3d 654, 656 (8th Cir. 2021); *United States v. Cantu*, 964 F.3d 924, 934 (10th Cir. 2020); *Aspilaire v. U.S. Att'y Gen.*, 992 F.3d 1248, 1255 (11th Cir. 2021); *see also United States v. De*

La Torre, 940 F.3d 938, 952 (7th Cir. 2019) (finding "the plain language chosen by the Indiana legislature dictates that the Indiana statute is categorically broader than the federal definition"); *United States v. Ruth*, 966 F.3d 642, 648 (7th Cir. 2020) (similar).

This approach is also consistent with how the Supreme Court has explained and employed the categorical approach. In cases that involve a match between the elements of the statute of conviction and the federal or generic offense, an individual must resort to case law to demonstrate application beyond the generic or federal statutory definition. *Duenas-Alvarez*, 549 U.S. at 193; *see also Taylor*, 142 S. Ct. at 2025. But otherwise, the Supreme Court has instructed courts to "adher[e] to an elements-only inquiry." *Mathis v. United States*, 579 U.S. 500, 510 (2016). Indeed, pursuant to this inquiry, the Court in *Mathis* held that the Iowa burglary conviction at issue was overbroad solely because "the elements of Mathis's crime of conviction (Iowa burglary) cover a greater swath of conduct than the elements of the relevant [Armed Career Criminal Act (ACCA)] offense (generic burglary)." *Id.* at 509.[3]

[3] While *Mathis* and the following case cited, *Descamps*, involved the Armed Career Criminal Act (ACCA), the categorical approach principles explained in those cases apply equally to offenses listed in the INA. *See, e.g.*, *Mathis*, 579 U.S. at 510 n.2 (explaining that the categorical approach used in ACCA cases "appl[ies] . . . outside the ACCA context—most prominently, in immigration cases").

Other Supreme Court cases follow a similar pattern. For example, in *Descamps v. United States*, the Supreme Court confronted the question of whether a defendant's California burglary conviction criminalized more conduct than generic burglary. 570 U.S. 254, 258–59 (2013). After holding that the statute at issue was not "divisible," *id.* at 260–64, the Court compared the *elements* of the California offense at issue to the *elements* of generic burglary, *id.* at 265. And because generic burglary requires "breaking and entering" while California's burglary statute did not, the Court concluded that California "define[s] burglary more broadly than the generic offense." *Id.* (alteration in original) (internal quotation marks omitted).[4]

Finally, in *Mellouli v. Lynch*—an immigration case—the Supreme Court concluded that a Kansas drug statute for possession of drug paraphernalia was not a controlled substances offense under 8 U.S.C. § 1227(a)(2)(B)(i) because that subsection "limits the 'controlled substance,' for removal purposes, to the substances controlled under [21 U.S.C.] § 802." 575 U.S. 798, 813 (2015). Accordingly, the Court concluded that the Kansas statute before it was overbroad because "[a]t the time of Mellouli's conviction, Kansas' schedules included at least

[4] In *Descamps*, the Supreme Court also cited a single California case to underscore this point, but its analysis ultimately depended upon "a simple discrepancy between generic burglary and the crime established in [the California statute]." *Descamps*, 570 U.S. at 264.

nine substances not included in the federal lists." *Id.* at 802. Notably, to conclude the statute was overbroad, the Court simply compared the relevant statutes defining the drug schedules, *id.*, without ever citing to a single Kansas case. *Id.* at 800–13.[5]

In sum, Supreme Court precedent resoundingly rejects Respondent's position and affirms that the first step in the categorical approach is to examine whether the elements of the statute of conviction match the elements of the federal generic crime. Here, that requires comparing accomplice liability for Washington robbery to accomplice liability for generic theft (i.e., generic accomplice liability).

In resisting this conclusion, Respondent makes two arguments. First, he asserts that this Court's line of case law that analyzes a mismatch in elements does not apply here because "*Duenas-Alvarez* is directly on point and controlling." Suppl. Ans. Br. 33. But Respondent ignores that the Supreme Court has repeatedly engaged in the categorical approach by first comparing the elements of the statute of conviction with the elements of the federal generic or statutory crime, and has instructed lower courts to do the same. *Supra* pp. 9–13. Moreover, Respondent also ignores that *Grisel* and many other circuit cases—both in and out of the Ninth

[5] Other circuits have repeatedly relied on these Supreme Court cases to conclude that an individual need not cite examples from a case where the state statute is explicitly overbroad. *See, e.g.*, *Gonzalez*, 990 F.3d at 660 (citing both *Mellouli* and *Mathis* as examples of Supreme Court opinions that conducted the categorical approach without looking to state case law); *Hylton*, 897 F.3d at 65 (same); *Gordon v. Barr*, 965 F.3d 252, 259–60 (4th Cir. 2020) (similar, relying on *Mathis*).

Circuit—have rejected the government's rationale. In those cases, courts have explained that *Duenas-Alvarez* does not apply because, as noted, the cases did not present situations where "'legal imagination' is required to hold that a realistic probability exists." *Grisel*, 488 F.3d at 850; *see also Singh*, 839 F.3d at 286 n.10 (rejecting need for an actual case for same reason as *Grisel*); *Swaby*, 847 F.3d at 66 (similar). This is because the "state statute's greater breadth is evident from its text." *Grisel*, 488 F.3d at 850. Indeed, the Supreme Court itself made the same point just this term, rejecting application of *Duenas-Alvarez*'s "actual case" requirement. The Court did so because in the case before it, there was a clear mismatch in elements, *Taylor*, 142 S. Ct. at 2020–21, 2025, while in *Duenas-Alvarez*, "the elements of the relevant state and federal offenses clearly overlapped," *id*. at 2025.

Second, the government claims that *Taylor* "supports the Government here." Supp. Ans. Br. 25. To make this argument, Respondent points to language in the opinion regarding how *Duenas-Alvarez* looked to state law in part to accord "the respect due state courts as the final arbiters of state law in our federal system." *Taylor*, 142 S. Ct. at 2025. But *Taylor* provides the government no such support. Just like here, the government asserted that *Duenas-Alvarez* required the defendant to "identify a . . . case" where the government prosecuted conduct that was overbroad. *Id.* at 2024. The Court unambiguously rejected this argument for two

independent reasons. First, it noted *Duenas-Alvarez* looked to state case law because doing so was necessary "to consult how a state court would interpret its own State's laws." *Id.* at 2025. And second, the Court explained that "in *Duenas-Alvarez* the elements of the relevant state and federal offenses clearly overlapped," while in the case before the Supreme Court, "there [was] no overlap to begin with" between the two statutes at issue. *Id.* Indeed, it was only necessary to "consult" state law *in Duenas-Alvarez* precisely because of this overlap. *Id.* Thus, the Court explicitly affirmed, rather than rejected, the rationale that this Court and others have applied when assessing whether a party must cite a case to demonstrate overbreadth.

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

A. Generic Accomplice Liability Requires Specific Intent.

Respondent never meaningfully contests that generic accomplice liability requires specific intent. Indeed, he never challenges Mr. Alfred's survey of state law, effectively conceding that it supports Mr. Alfred's claim regarding the elements of generic accomplice liability. Respondent also acknowledges that the government itself previously represented to the Supreme Court that generic accomplice liability requires intent. *See* Supp. Ans. Br. 42 n.13.

Moreover, Respondent offers no alternative to define the requisite mens rea for generic accomplice liability. Respondent is incorrect that the law is unclear

regarding what mens rea is required for generic accomplice liability.[6] As Mr. Alfred explained in his opening brief, nearly all states require specific intent or the intent of the principal (which for generic theft, would be specific intent) to convict an accomplice. *See* Supp. Op. Br. 24–25 nn. 8–9. Respondent never contests this survey of state law. Instead, he merely asserts that the differences between the possible mentes reae are "rather subtle," Supp. Ans. Br. 42, citing the same treatise he asks the Court to disregard in a separate footnote, Supp. Ans. Br. 42 n.13. But the differences are not subtle. The cited sources—which come almost exclusively from state statutes or the highest court of each state—provide clear standards for what is required to convict an accomplice. And among the states, only an exceedingly small minority—less than five—make it easier to convict accomplices through a knowledge scienter requirement. *See* Supp. Op. Br. 24–26 nn. 8–11.[7]

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[6] Instead, Respondent only seeks to sow confusion, claiming that Mr. Alfred's argument is at a "high[] level of generality" and "there is considerable variation in [state law] specifying the requisite mental state for accomplice liability." Supp. Ans. Br. 41 (internal quotation marks omitted).

[7] Moreover, the treatise the government cites in order to claim that only "subtle" differences exist does not provide the comprehensive survey of state case law that Mr. Alfred does. *See* 2 Wayne La Fave, Subst. Crim. L. § 13.2(b) (3d ed. 2021). In addition, immediately after making this point, the treatise declares that "[g]enerally, it may be said that accomplice liability exists when the accomplice *intentionally* encourages or assists, in the sense that *his purpose* is to encourage or assist another in the commission of a crime as to which the accomplice has the requisite mental state." *Id.* (emphasis added). Thus, the treatise only underscores that generic accomplice liability requires specific intent.

Significantly, the *Duenas-Alvarez* court itself used surveys of state case law to help define whether generic theft includes accomplice liability and to define a doctrine within accomplice liability—the natural and probable consequences doctrine. *See* 549 U.S. at 190–93 & App. A–C.[8] Indeed, Respondent repeatedly acknowledges that "it is undisputed . . . that the accomplice law of the States . . . must be considered when adjudicating a claim of overbreadth based on the prospect of accomplice liability." Supp. Ans. Br. 41; *see also* Supp. Ans. Br. 30–31. But despite acknowledging that, he never offers an account of what that law requires—while Mr. Alfred does.

Federal law also requires specific intent, as *Rosemond v. United States* makes clear. 572 U.S. 65 (2014). As the Federal Defenders' amicus brief explains, and as Mr. Alfred also notes in his opening brief, in *Rosemond*, the Supreme Court reiterated that "a person is liable under [18 U.S.C.] § 2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) *with the intent* of facilitating the offense's commission." *Id.* at 71 (emphasis

[8] The natural and probable consequences doctrine is not relevant to this case. The doctrine is about foreseeability and asks whether a defendant can be held liable for *other* crimes that the principal commits if the state first demonstrates that the accomplice had the mens rea for the principal crime. *See, e.g.*, *Sales v. Sessions*, 868 F.3d 779, 783 (9th Cir. 2017) (explaining that the doctrine as one involving a "target" offense, the intent for which can extend criminal liability to the "the natural and probable consequence of the target offenses"); Paul H. Robinson, Imputed Criminal Liability, 93 Yale L.J. 609, 617 (1984) (similar).

added); *see also* Fed. Defenders' Amicus Br., ECF No. 68 at 4–12; Supp. Op. Br. 28, 37–38. The Court then went on to answer the question of "when does [the defendant] *intend* to facilitate [the] commission [of the crime at issue in *Rosemond*]?" 572 U.S. at 71 (emphasis added). To answer that question, the Court explained that the government may prove *intent* where the defendant had "full knowledge of the circumstances constituting the charged offense." 572 U.S. at 77. In *Rosemond*, this meant that the defendant charged as an accomplice "has the intent needed to aid and abet a[n] [18 U.S.C.] § 924(c) violation when he knows that one of his confederates will carry a gun." *Id.* Accordingly, *Rosemond* further underscores that generic accomplice liability requires intent—not knowledge.

B. Washington's Accomplice Liability Is Overbroad Compared to Generic Accomplice Liability.

While generic accomplice liability requires specific intent, Washington state requires only the lower mens rea of knowledge to convict accomplices. As such, Washington accomplice liability renders Mr. Alfred's robbery offense overbroad. This is first true due to the simple mismatch in elements: generic accomplice liability requires specific intent (or the intent of the principal), while Washington requires only knowledge. As explained above, *supra* Sec. II, this mismatch is sufficient to demonstrate overbreadth.

But even if it were not enough, Washington's case law underscores this point. Respondent dodges many of the cases cited by Mr. Alfred by noting that

they are not second-degree robbery cases. *See* Supp. Ans. Br. 40 n.12, 46. Yet Respondent cites no authority for the bizarre proposition that Mr. Alfred may cite only to second-degree robbery cases to define the contours of the accomplice liability doctrine in Washington—a doctrine that applies to *all* offenses. Indeed, *Duenas-Alvarez* again directly contravenes Respondent's position. In *Duenas-Alvarez*, the Court analyzed whether California's version of the natural and probable consequences doctrine covered conduct other states did not. 549 U.S. at 190–93. In doing so, the Court examined how California courts employ the doctrine, citing to cases involving convictions for murder, sexual assault, kidnapping, robbery, and attempted murder. *Id.* After reviewing those cases, the Court concluded that the "concepts as used in . . . these cases [do not] extend significantly beyond the concept as set forth in the cases of other States." 549 U.S. at 193. Notably, the Supreme Court relied on those cases even though, like this case, the actual offense at issue was a theft-related offense. *Id.* at 187.[9]

[9] Respondent asserts that this Court can only look to second-degree robbery cases because the Supreme Court observed in *Duenas-Alvarez* that a noncitizen "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; Supp. Ans. Br. 20. That reading of *Duenas-Alvarez* is simply not tenable. The Court's lengthy analysis of California state case law on the accomplice liability doctrine at issue demonstrates that in reviewing those cases, it was considering whether "the California Vehicle Code provision . . . reaches beyond generic theft to cover certain nongeneric crimes." 549 U.S. at 190.

As a result, the Supreme Court made clear that courts should look to a state's general law on accomplice liability to determine whether its accomplice liability doctrine is overbroad. That makes sense, since accomplice liability is a doctrine that does not apply just to a specific offense, but rather to all offenses. This is especially so with Washington state, which provides a uniform statutory definition of accomplice liability. *See* RCW 9A.08.020 (explaining that accomplices are liable for any "crime," provided they satisfy the requirements of RCW 9A.08.020).

With this in mind, Respondent has failed to contest several critical cases that demonstrate Washington's accomplice liability does not match generic accomplice liability. Notably, an obvious mismatch exists between Washington robbery cases and *Rosemond*. Respondent does not contest that in Washington, an accomplice need not have "advance knowledge" that a defendant possesses a gun (or for that matter, any weapon) to be convicted as an accomplice for certain robberies, while *Rosemond* explicitly requires just that. *See Rosemond*, 572 U.S. at 77–78; *State v. Davis*, 682 P.2d 883, 884 (Wash. 1984); *see also* Fed. Defenders' Amicus Br., ECF No. 68 at 12–15 (describing *Davis* and other cases as examples of the overbreadth of Washington accomplice liability). And this does not apply just to robberies. It is a principle that runs throughout Washington case law, applying in contexts like burglary, *State v. Randle*, 734 P.2d 51, 54 (Wash. App. 1987), and assault, *State v. McChristian*, 241 P.3d 468, 472 (Wash. App. 2010); *Sarausad v.*

State, 39 P.3d 308, 315 (Wash. App. 2001). Notably, Washington case law additionally holds that "an accomplice need not have specific knowledge of every element of the crime committed by the principal, provided he has general knowledge of the specific crime." *State v. Roberts*, 14 P.3d 713, 736 (Wash. 2000) (emphasis omitted). This directly contrasts with federal accomplice liability, which requires "full knowledge of the circumstances constituting the charged offense," or "advance knowledge" to hold an individual liable. *Rosemond*, 572 U.S. at 77–78.

Respondent fails to address these cases and does not even attempt to contest that they demonstrate a mismatch between federal and Washington accomplice liability. Supp. Ans. Br. 45–46. As explained above, *Duenas-Alvarez* makes Respondent's position untenable. Supreme Court case law demonstrates that when considering the overbreadth of accomplice liability, courts should consider how that doctrine is employed across state case law, since it is not confined to any one type of offense.

Respondent also errs in asserting that the other cases Mr. Alfred cites do not show "something special" about Washington accomplice liability. 549 U.S. at 191 (emphasis omitted). For one thing, Respondent fails to address several additional cases Mr. Alfred cites beyond the robbery, assault, and burglary cases cited above simply because they do not involve second degree robbery. *See* Supp. Ans. Br. 40

n.12. Again, *Duenas-Alvarez* unequivocally rejects Respondent's attempt to disregard them.

Finally, even the robbery cases Respondent does address demonstrate the overbreadth of Washington accomplice liability. Tellingly, Respondent has no meaningful response to either *State v. A.L.Y.*, 135 Wash. App. 1002, 2006 WL 2723983 (2006) or *State v. K.P.*, 149 Wash. App. 1009, 2009 WL 513738 (2009). Instead, Respondent resorts to asserting that "knowledge implies purpose," citing only a Model Penal Code commentary. Supp. Ans. Br. 37–38. But this does not mean that intent and knowledge are the same. Indeed, the commentary Respondent cites "explains that a higher scienter than knowledge is required for accomplice liability." Supp. Ans. Br. 38. This is unsurprising, as the Model Penal Code itself requires intent—and not knowledge—for accomplice liability. Model Penal Code § 2.06(3). But as Mr. Alfred has explained, Washington chose *not* to adopt the MPC's recommended mens rea for accomplice liability, and instead imposed a lower mens rea. Supp. Op. Br. 30–31.

That difference is determinative in this case. *See* RCW 9A.08.010(1)(a), (1)(b) (defining intent and knowledge separately). Intent requires a showing regarding "the actor's objective or purpose," while knowledge does not. *State v. Caliguri*, 664 P.2d 466, 469 (Wash. 1983) (citation omitted); *see also State v. Hall*, 706 P.2d 1074, 1078 (Wash. 1985) ("Willful is equated with 'a purposeful act'

while knowledge is characterized as a 'lack of mental intent requirement.'" (citation omitted)). By asserting otherwise, Defendant disregards what it urges this Court to do elsewhere in its brief: respect principles of federalism. Supp. Ans. Br. 24. That principle would require Respondent to acknowledge that Washington has deliberately chosen a lower requisite mens rea for accomplice liability to make it easier to convict accomplices in instances where federal law and other states would not. *See* Supp. Op. Br. 24–35, 38.

In any event, *A.L.Y.* and *K.P.* are definite instances of Washington convicting individuals for robbery under an accomplice liability theory based only on the mens rea of knowledge. In *A.L.Y.* the Washington Court of Appeals noted this explicitly, observing that "A.L.Y. did not need to have the intent to steal, just knowledge that his actions were facilitating the crime." 2006 WL 2723983, at *3. In fact, the court said that accomplice liability could be imposed "[r]egardless of whether A.L.Y. demanded the money." *Id.* at *4. All he needed to do was "accept[] and retain[] the money," *id.*, even though his accomplice "had suggested they 'mess'" with the victims, the accomplice "instigated the confrontation," and after the fact, A.L.Y. told the accomplice "he felt uncomfortable and wanted to return the money," *id.* at *1. Despite this, Respondent asserts "there is no reason to think . . . A.L.Y would have been acquitted of robbery if specific intent rather than knowledge were required." Supp. Ans. Br. 40. But that ignores the appellate

court's explicit rationale, and more importantly, the lack of any showing that A.L.Y. set out with the "objective or purpose" of committing robbery. *Caliguri*, 664 P.2d at 469.

K.P. is similar. In *K.P.*, the defendant was not even present at the robbery—he was alleged as having simply given another youth "permission to 'jump" the victim, as well as the victim's cell phone number. 2009 WL 513738, at *1. But just like in *A.L.Y.*, the appellate court relied on the mens rea of knowledge to affirm the conviction. *Id.* at *2. Thus, like *A.L.Y.*, the case provides a clear example of how the lower mens rea in Washington sweeps in conduct that a specific intent requirement would not.

As to the *Oeung* and *Barrington* cases, Respondent's arguments do nothing to fix the overbreadth problem these other cases demonstrate. With respect to *Oeung*, Respondent conflates legal principles. Supp. Ans. Br. 36–37. He notes that the jury instruction for *conspiracy* in the case required intent. *Id.* But this says nothing about the mens rea for accomplice liability. Indeed, with respect to accomplice liability on the robbery and unlawful imprisonment charges, the state appellate court relied on the lower mens rea of knowledge to uphold the convictions. *State v. Oeung*, 196 Wash. App. 1011, 2016 WL 7217270, at *23–24 (2016). Similarly, in *Barrington*, it is true (as Respondent notes, *see* Supp. Ans. Br. 35–36) that the state court stated that the evidence was sufficient even to prove

intent. *State v. Barrington*, 6 Wash. App. 2d 1015, 2018 WL 5977920, at *6 (2018). But that just shows what is *sufficient* for a conviction, not what constitutes the "least of th[e] acts" criminalized" under Washington accomplice liability. *Moncrieffe*, 569 U.S. at 191 (alteration in original) (citation omitted). Indeed, the *Barrington* court rejected the defendant's claims that the state needed to show intent, since "for accomplice liability a person just needs [g]eneral knowledge of the crime." 2018 WL 5977920, at *6 (alteration in original) (citation omitted).

In sum, caselaw further confirms the mismatch between how Washington defines accomplice liability and how it is defined under generic accomplice liability. Accordingly, Mr. Alfred's robbery convictions do not constitute aggravated felonies.

IV. The Court Should Not Overrule *Valdivia-Flores*.

Respondent last asserts this Court should overrule *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017). As an initial matter, the Court need not address this issue. As. Mr. Alfred explained before, *Valdivia-Flores* required comparing a federal drug-trafficking offense with a state drug offense, while this case requires comparing a generic offense with a state offense. *See* Supp. Op. Br. 35–37. This distinction matters, because the definition of generic accomplice liability looks to more than just federal accomplice liability under 18 U.S.C. § 2.

As a result, a ruling in Mr. Alfred's favor here does not apply directly to situations like that in *Valdivia-Flores*.

To support overturning *Valdivia-Flores*, Respondent first asserts that *Valdivia-Flores* failed to "extend the logic of *Duenas-Alvarez*." Supp. Ans. Br. 48. This argument assumes that courts need not consider accomplice liability or that a mismatch in elements is insufficient. Relatedly, Respondent next claims that *Duenas-Alvarez* states an "actual case" requirement that *Valdivia-Flores* failed to apply. Supp. Ans. Br. 49. But as explained above, *Duenas-Alvarez* does not impose any such requirement. To the contrary, *Valdivia-Flores* faithfully applies Supreme Court precedent. *Supra* Sec. I–II.

Finally, Respondent merely repeats the argument that Washington's "knowledge" requirement is no different from intent. Supp. Ans. Br. 49–50. Here too, Respondent falls short for all the reasons stated above, namely, the facial mismatch in elements and the voluminous case law Mr. Alfred has cited. These authorities demonstrate Washington accomplice liability is broader than both federal accomplice liability and generic accomplice liability, as there is indeed a difference between knowledge and specific intent. *Supra* Sec. III.

CONCLUSION

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

Date: August 15, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Aaron Korthuis, counsel for the petitioner and a member of the Bar of the Court, certify, pursuant to Federal Rule of Appellate Procedure 32(g) and Ninth Circuit Rule 32-1(b), that the foregoing Supplemental Opening Brief of the Petitioner is proportionately spaced, has a typeface of 14 points or more, and contains 6,499 words according to the word count feature of Microsoft Word, exclusive of tables of contents and authorities and certificates of counsel.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 15, 2022.

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

Signature: s/ Aaron Korthuis Date: August 15, 2022

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