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 of the United States,

Respondent.

ON PETITION FOR REVIEW OF A FINAL ORDER
OF THE BOARD OF IMMIGRATION APPEALS
(Agency Case No. A215-565-401)

PETITION FOR REHEARING EN BANC

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INTRODUCTION

This case presents exceptionally important recurring questions regarding the federal consequences of convictions for violating Washington state statutes. Under categorical approach principles, a court must identify the elements of the conviction; identify the relevant federal criteria; and then compare the elements of the conviction to those criteria to determine whether the offense of conviction is broader than the relevant federal offense and thus insufficient to stand as a categorical predicate for removal under the immigration laws.

Here, when the Court held that a conviction for robbery in violation of Washington law is not a "theft offense" aggravated felony, it erred at each step of the analysis. This Court erred in the first step by following the divided ruling in *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017), that the aiding and abetting law must be considered in the categorical analysis even where the conviction records provide no indication that the conviction is for aiding and abetting a robbery, and the robbery statute fails to expressly include aiding and abetting liability. Doing so is inconsistent with the Supreme Court's categorical approach decisions, which analyze the terms of the statute of conviction without addressing accomplice liability. Doing so also finds no support in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), which considered accomplice liability only

because accomplice liability was expressly included within the terms of the statute of conviction and was among the arguments raised. As a result, the Court's decision also conflicts with the Court's prior decision in *United States v. Alvarado-Pineda*, 774 F.3d 1198 (9th Cir. 2014), which, as noted by the panel, held the crime at issue in this case to be an aggravated felony without considering accomplice liability.

Even if accomplice liability is relevant, this Court erred in two ways. First, assuming that 18 U.S.C. § 2 provides the appropriate definition against which to match the state standard, this Court erroneously failed to consider *Rosemond v. United States*, 572 U.S. 65 (2014), and consequently arrived at an interpretation inconsistent with the Supreme Court's construction of 18 U.S.C. § 2. The Court also erroneously failed to consider the authoritative construction of accomplice liability under Washington law in state court decisions. This Court's decisions not only conflict with the analysis in *Rosemond*, but also with the Eleventh Circuit's decision in *Bourtzakis v. U.S. Att'y Gen.*, 940 F.3d 616, 623 (11th Cir. 2019), cert. denied sub nom. *Bourtzakis v. Barr*, 141 S. Ct. 245 (2020), which held that Washington accomplice liability sufficiently matches 18 U.S.C. § 2. Second, at least regarding theft offenses, the Court erred by looking solely to 18 U.S.C. § 2 to determine the relevant accomplice liability standard, rather than the generic accomplice liability standard described in *Duenas-Alvarez*. That error conflicts

with *Duenas-Alvarez*, which specifically addressed the accomplice liability standard applicable to the aggravated felony theft provision at issue in this case.

En banc rehearing is therefore warranted to resolve the conflicts with *Duenas-Alvarez*, *Rosemond*, *Bourtzakis*, and *Alvarado-Pineda*, and to correct the panel's errors in this case. Left uncorrected, these errors improperly prevent the application of the immigration laws to non-citizens convicted of crimes that are properly classified as aggravated felonies – an issue itself of exceptional importance.

BACKGROUND

1. Petitioner Alfred pled guilty to second-degree robbery and attempted robbery in violation of Washington state law. *Alfred v. Garland* (attached), Slip op. 6. According to his plea agreement, Alfred – by himself – attempted to take cash from a credit union teller, then took cash from a barista at a coffee kiosk, then attempted to carjack a vehicle. *Ibid.* He was sentenced to fifteen months in prison. *Ibid.*

An immigration judge found Alfred removable because his offenses constitute crimes involving moral turpitude under 8 U.S.C. § 1227(a)(2)(A)(ii) and aggravated felonies as theft offenses under 8 U.S.C. § 1101(a)(43)(G) or attempts to commit theft offenses under 8 U.S.C. § 1101(a)(43)(U). Op. 6-7 & nn. 2-4. As relevant here, the immigration judge ruled that under *Alvarado-Pineda*, a case

addressing the same Washington statute Alfred was convicted of violating, Alfred was convicted of a categorical theft offense under 8 U.S.C. § 1101(a)(43)(G). Op. 7. The immigration judge distinguished *Valdivia-Flores* as involving a different aggravated felony classification defined by reference to specific federal criminal laws. Op. 7-8. On appeal, the Board of Immigration Appeals sustained the theft offense and attempt offense aggravated felony grounds for removal, op. 8, without addressing the moral turpitude ground, op. 7 n.3.

2. Finding itself bound by *Valdivia-Flores*, the panel held that Washington robbery is not categorically a generic theft offense because the Washington state accomplice liability standard is broader than the federal accomplice liability standard under 18 U.S.C. § 2. Op. 13-14. The Court distinguished *Alvarado-Pineda* as not addressing the accomplice liability question later addressed in *Valdivia-Flores*. Op. 11 n.7. The Court observed that *Valdivia-Flores* held that "accomplice liability is an implicit and indivisible component of the conviction that must be considered under the categorical approach"; that the "accomplice liability mens rea under Washington law is broader than that required to establish accomplice liability under federal law"; and that therefore "there could be no categorical match." Op. 7-8; *see also* op. 12-13. Reasoning that a "theft offense" under 8 U.S.C. § 1101(a)(43)(G) is an "enumerated offense," like the "drug

trafficking crime" at issue in *Valdivia-Flores*, op. 14 n.10, the Court ruled that it was bound by the analysis in *Valdivia-Flores*. Op. 13-14.

Acknowledging the government's argument that the specific intent requirement for federal accomplice liability described in *Valdivia-Flores* was inconsistent with that described in *Rosemond*, 572 U.S. at 73, 77, the Court stated that because it was "bound by *Valdivia-Flores*," it would "make no attempt to reconcile these authorities here." Op. 13 n.8. The Court therefore held that petitioner's conviction was not for an aggravated felony theft offense and remanded for further proceedings. Op. 14.

District Judge England also penned a special concurrence, joined by Judge Bybee. Judge England stated that while the Court's holding was "compelled by precedent," it was not "compelled by reason," and it "demonstrate[d] the absurdity of applying the categorical approach." Op. 15 (internal quotation marks and citation omitted). Judge England further observed that under the Ninth Circuit's case law, "it is quite possible that, at least for aggravated felonies that require comparison of all elements of the state crime and an enumerated generic federal offense, no Washington state conviction can serve as an aggravated felony at all," even though "the exact same conduct may qualify as an aggravated felony in a neighboring state." *Id.* at 16 (internal quotation marks omitted).

Judge Rawlinson concurred in the result, "only because[] the decision" was "compelled" by *Valdivia-Flores*. Op. 19. She stated that "for the reasons explained in [her] dissent" in *Valdivia-Flores*, the decision made "no sense legally or factually." *Ibid.*

ARGUMENT

I. En Banc Rehearing Is Warranted Because the Consideration of Accomplice Liability Conflicts with the Supreme Court's Categorical Approach

Alfred was charged and convicted as a principal, not as an accomplice under RCW § 9A.08.020(3)(a)(i)-(ii). Op. 6. To determine whether such a conviction qualifies as an aggravated felony, this Court compares the state statute(s) of conviction to the generic definition of the relevant aggravated felony. *See Alvarado-Pineda*, 774 F.3d at 1202 (citing *Descamps v. United States*, 570 U.S. 257-58 (2013)); *Roman-Suaste v. Holder*, 766 F.3d 1035, 1038 (9th Cir. 2014) (citing *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013)). Here, as in *Valdivia-Flores*, this Court overlooked key factors in completing that task.

Alfred has not challenged the conclusion of *Alvarado-Pineda* that the elements of Washington robbery categorically match the generic definition of a theft offense, just as Valdivia-Flores did not vigorously challenge the notion that a drug trafficking offense constitutes an aggravated felony. Rather, Alfred contends

that the Court's categorical analysis should rest on Washington's aiding-and-abetting statute, relying on *Valdivia-Flores*.

But this decision and *Valdivia-Flores* are wrong for several reasons. First, citing *Duenas-Alvarez*, *Valdivia-Flores* incorrectly assumed that the categorical approach should consider accomplice liability, even if the possibility of such liability arises from a statute other than the state statute of conviction. But *Duenas-Alvarez* involved a state statute of conviction that expressly included aiding and abetting as means of violating the statute, and the non-citizen asserted that the aiding-and-abetting component of the statute made it overbroad. 549 U.S. at 188-94 (California statute expressly applied to "any person who drives or takes a vehicle not his or her own, with the consent of the owner . . . *or any person who is a party or an accessory to or an accomplice in* the driving and or unauthorized taking or stealing." (emphasis in original)). To address that claim, the Supreme Court compared the elements of the statute with the generic definition for a "theft offense" under 8 U.S.C. § 1101(a)(43)(G). *Ibid.* Nothing in *Duenas-Alvarez* requires considering of the state definition of aiding and abetting where the substantive state definition arises from a different statute. *Ibid.*; *see Valdivia-Flores*, 876 F.3d at 1212-14 (Rawlinson, J., dissenting) ("Reliance on *Duenas-Alvarez* as authority to support focusing our categorical analysis on Washington's aiding and abetting statute is misplaced.").

Significantly, Supreme Court jurisprudence since *Duenas-Alvarez* shows that the accomplice liability analysis in *Duenas-Alvarez* was particular to the circumstances of that case, analyzing accomplice liability only because the statute of conviction included it on its face. The Supreme Court has since found offenses to be categorical aggravated felonies without examining the scope of accomplice liability for the predicate statutes. *See*, *e.g.*, *Torres v. Lynch*, 578 U.S. 452, 457-73 (2016) (attempted arson in violation of New York penal law); *Nijhawan v. Holder*, 557 U.S. 29, 32-40 (2009) (federal conspiracy to commit various fraud offenses); *see also Quarles v. United States*, 139 S. Ct. 1872, 1880 (2019) (holding that home invasion under Michigan law substantially corresponds to or is narrower than generic burglary under the Armed Career Criminal Act). Thus, where, as here, the statute of conviction includes no accomplice liability in its text, a court need only compare the statute of conviction to the corresponding generic definition. Petitioner's statute of conviction, RCW § 9A.56.190, does not explicitly include aiding and abetting. Instead, accomplice liability is codified in a completely separate statute, RCW § 9A.08.020. And there is no suggestion in the record that petitioner was convicted as an accomplice. Op. 6. Under *Duenas-Alvarez*, this Court need not consider the scope of conduct reached under the accomplice theory of liability. *See Valdivia-Flores*, 876 F.3d at 1212-14 (Rawlinson, J., dissenting) (concluding "the majority has impermissibly veered away from the statute of

conviction to find overbreadth based on its analysis of a statute that was not part of the prosecution or conviction in this case.”).

Second, the defendant’s status as a principal or accomplice is not an element of the substantive offense. 876 F.3d at 1212, 1214 (Rawlinson, J. dissenting). This Court has held “[a]iding and abetting is not a separate and distinct offense from the underlying substantive crime, but is a different theory of liability for the same offense.” *United States v. Garcia*, 400 F.3d 816, 820 (9th Cir. 2005); *see also State v. Calvin*, 316 P.3d 496, 506 (Wash. 2013) (“accomplice liability [] is a distinct theory of criminal culpability”). Accordingly, it does not matter for purposes of categorical analysis in the context of aggravated felony theft under 8 U.S.C. § 1101(a)(43)(G) whether an offender is convicted as a principal or an aider and abettor, because he will be treated the same. Thus, this Court need only compare the statute of conviction with the generic definition of theft – no other analysis is required.

Third, although the state need not charge a defendant as an accomplice for a jury to convict on that theory, accomplice liability is not implicit in all convictions. In fact, a trial judge errs by giving an accomplice liability instruction where it is not supported by the evidence. *State v. Benn*, 845 P.2d 289, 303 (Wash. 1993). One critical element is “another” actor – whom the defendant aided, abetted, etc. RCW § 9A.08.020(3)(a). Where a petitioner committed his offenses by himself, as

here, op. 6, there is no basis for accomplice liability. *See*, *e.g.*, *State v. Dreyer*, No. 81326-9-I, 2021 WL 3290399 at *3 (Wash. Ct. App. Aug. 2, 2021) (acknowledging that RCW § 9A.08.020(3)(a) requires "another" – that the defendant "did not act alone"); *State v. Wilford*, No. 53912-8-II, 2021 WL 1110370 at *3 (Wash. Ct. App. Mar. 23, 2021) (similar). In sum, accomplice liability is irrelevant to the categorical analysis here involving aggravated felony theft under 8 U.S.C. § 1101(a)(43)(G).

II. En Banc Rehearing Is Warranted Because this Court's Erroneous Conclusion that State Accomplice Liability is Broader than Federal Accomplice Liability Conflicts with *Rosemond* and *Bourtzakis*

Even if accomplice liability is appropriately considered and 18 U.S.C. § 2 provides the relevant federal definition, the Washington accomplice liability standard matches the federal definition under Supreme Court and Washington state case law. The panel in this case recognized the conflicting precedent on this question, but because it was "bound by *Valdivia-Flores*," made no attempt to reconcile the conflicts. Op. 13 n.8. This Court should undertake that task en banc, reverse its decision here, and abrogate its reasoning in *Valdivia-Flores*.

For a state offense to be overbroad relative to a federal analogue, "there must be a realistic probability, not a theoretical possibility, that the State would apply its statute" to conduct that falls outside the federal offense. *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013) (citation and internal quotation marks omitted).

Here, there is no realistic probability that an individual convicted under Washington's robbery statute as an accomplice would be convicted of acting with a lesser *mens rea* than the *mens rea* under the federal statute. The federal accomplice liability statute, 18 U.S.C. § 2, provides that anyone who "aids, abets, counsels, commands, induces or procures" the commission of an offense against the United States is punishable as a principal. In *Rosemond*, the Supreme Court considered the *mens rea* required under 18 U.S.C. § 2. The Supreme Court observed that "[a]s at common law, a person is liable under § 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." *Rosemond,* 572 U.S. at 71. The "act" requirement is "minimal," and "[i]n proscribing aiding and abetting, Congress used language that 'comprehends all assistance by words, acts, encouragement, support, or presence.'" *Id.* at 73 (citation omitted).

The Supreme Court rejected the argument that 18 U.S.C. § 2 requires specific intent, and instead held that the intent requirement is met "when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense." *Rosemond,* 572 U.S. at 77 (listing Supreme Court cases supporting that conclusion); *see also Bourtzakis*, 940 F.3d at 623 (citing *Rosemond*). In contrast, this Court held in *Valdivia-Flores* and reiterated

here that "to prove liability as an aider or abettor the government must establish . . . specific intent to facilitate the commission of a crime." Op. 12. That specific intent requirement conflicts with *Rosemond* and *Bourtzakis.*

Properly read, there is no reasonable probability that the state *mens rea* can be read more broadly than the federal *mens rea*. The Washington accomplice liability statute provides that "[a] person is an accomplice . . . if . . . [w]ith knowledge that it will promote or facilitate the commission of the crime, he . . . solicits, commands, encourages, or requests such other person to commit it; or aids or agrees to aid such other person in planning or committing it." RCW § 9A.08.020(3)(a)(i)-(ii). The Washington statute requires proof that a defendant knew his actions would "promote or facilitate the commission of crime" and that the defendant either "solicit[ed], command[ed], encourage[d], or request[ed]" another person to commit the crime or "aid[ed] or agree[d] to aid such other person in planning or committing [the crime]." RCW § 9A.08.020(3)(a)(i)-(ii). It is difficult to conceive of circumstances where those elements are satisfied and a defendant did not intend that the crime occur, *see Bourtzakis*, 940 F.3d at 623, and this Court has never found a realistic probability of such a conviction.

Moreover, *Valdivia-Flores* considered only the Washington code's separate definition of "knowing" and concluded it would not satisfy "specific intent" to commit a crime. *Valdivia-Flores*, 876 F.3d at 1207. The Washington courts,

however, have reached a different conclusion. The Washington Supreme Court has held that a defendant is an accomplice only if he facilitates the commission of the crime with "the intent" to do so; for that reason, "presence alone plus knowledge of ongoing activity" is not sufficient. *In re Welfare of Wilson*, 588 P.2d 1161, 1164 (Wash. 1979). In particular, the Washington Supreme Court has held that, to satisfy the *mens rea* requirement, the perpetrator must "act[] with knowledge that his or her conduct will *promote the specific crime* charged." *Washington v. Farnsworth*, 374 P.3d 1152, 1159 (Wash. 2016) (emphasis added). And it has explained that the Washington "legislature intended the culpability of an accomplice not [to] extend beyond the crimes of which the accomplice actually has knowledge." *State v. Cronin*, 14 P.3d 752, 758 (Wash. 2000) (brackets, citation, and internal quotation marks omitted). Those holdings mirror the federal requirement that an accomplice actively participate in a criminal venture with full knowledge of the circumstances constituting the charged offense. *Bourtzakis*, 940 F.3d at 623-24; *see Rosemond*, 572 U.S. at 77.

To be sure, those holdings of Washington case law do not appear on the face of the Washington accomplice liability statute. But "state court decision[s]" interpreting statutes, just like the statutes themselves, are "authoritative sources of state law." *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016); *see also Johnson v. United States*, 559 U.S. 133, 138 (2010) (noting that the Court is

"bound by [a state] Supreme Court's interpretation of state law, including its determination of the elements" of an offense). As conclusively interpreted by the Washington Supreme Court, the state accomplice liability statute does not "extend significantly beyond" the federal definition. *See Duenas-Alvarez*, 549 U.S. at 193. Thus, the Court erred in *Valdivia-Flore*s, and committed those same errors in this case.

Correcting the Court's errors is exceptionally important. First, the constuction of 18 U.S.C. § 2 applied here and in *Valdivia-Flores* conflicts with *Rosemond*. Second, the application of that construction in *Valdivia-Flores* conflicts with *Bourtzakis*, which matched *Rosemond* to authoritative sources of state law, and noted that this Court had not. *See Bourtzakis*, 940 F.3d at 623-24.[1] Third, by extending *Valdivia-Flores* to theft offenses, this case conflicts with the correct holding in *Alvarado-Pineda* that Washington robbery is categorically a theft offense aggravated felony. And finally, the adverse impact of the errors is truly sweeping. As District Judge England observed, the *Valdivia-Flores* accomplice liability analysis " infects countless Washington criminal statutes,"

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[1] In *Bourtzakis*, the government opposed Supreme Court review based in part on the possibility that this Court would revisit its conclusion that Washington's accomplice-liability standard rendered its criminal statutes overbroad in comparison to the federal definition. Brief in Opposition, *Bourtzakis v. Barr*, 2020 WL 5659242 (U.S.) at *16. This case provides an opportunity for this Court to do so.

making it "quite possible that, at least for aggravated felonies that require comparison of all elements of the state crime and an enumerated generic federal offense, no Washington state conviction can serve as an aggravated felony at all because of the accomplice liability statute." Op. 16 (internal quotation and marks omitted); *see also Amaya v. Garland*, 15 F.4th 976, 985 (9th Cir. 2021) (finding one exception to the rule).

III. En Banc Rehearing Is Warranted Because This Court's Erroneous Employment of 18 U.S.C. § 2 Rather than the Generic Definition of Aiding and Abetting Conflicts with *Duenas-Alvarez*

Even if accomplice liability is relevant, this Court's erroneous utilization of 18 U.S.C. § 2, rather than the generic definition of aiding and abetting derived from the approaches employed by state and federal jurisdictions, conflicts with the Supreme Court's analysis in *Duenas-Alvarez*. Here (op. 14 n.10) the panel chose to employ 18 U.S.C. § 2 rather than the generic definition by reasoning that a "theft offense" under 8 U.S.C. § 1101(a)(43)(G) is listed in 8 U.S.C. § 1101(a)(43), and therefore is an "enumerated" offense as that term is used in *United States v. Door*, 917 F.3d 1146 (9th Cir. 2019). Because it was an enumerated offense, this Court applied the accomplice liability holdings of *Valdivia-Flores* and held that petitioner's Washington conviction could not match the generic definition of an aggravated felony theft offense. Op. 13-14.

But that holding directly conflicts with the Supreme Court's approach in *Duenas-Alvarez*, which also addressed generic theft offenses under 8 U.S.C.

§ 1101(a)(43)(G). This Court had held that "aiding and abetting" a theft is not itself a crime that falls within the generic definition of theft. *See* 549 U.S. at 189. The Supreme Court reversed, holding that the "criminal activities of aiders and abettors of a generic theft must themselves fall within the scope of the term 'theft' in the federal statute." *Id.* at 190 (cleaned up). The Court applied a generic definition of aiding and abetting that aggregated the approaches of the states and federal jurisdictions. *Id.* at 189-92. Finally, the Court held that California's incorporation of the "natural and probable consequences doctrine" into its accomplice liability standard was insufficient to demonstate a "realistic probability" that there could be an aiding and abetting conviction under the California law inconsistent with the approaches of the majority of jurisdictions. *Id.* at 193-94.

At least as to theft offenses under 8 U.S.C. § 1101(a)(43)(G), *Valdivia-Flores* is wrong – the relevant definition of generic aiding and abetting is provided by *Duenas-Alvarez*, not the definition of aiding and abetting in 18 U.S.C. § 2. This Court has not compared Washington accomplice liability to that generic definition, much less concluded that Alfred or Valdivia-Flores demonstrated a "realistic probability" that there could be an aiding-and-abetting conviction under Washington law inconsistent with the approaches of the majority of jurisdictions. Based on the reasoning of *Duenas-Alvarez* and the interpretations of Washington's

own courts, *supra*, pp. 12-13, Washington's standard for accomplice liability does not "extend significantly beyond" the standard indicated in *Duenas-Alvarez*.

* * *

Valdivia-Flores conflicts with the Supreme Court's construction in *Rosemond*, and directly conflicts with the Eleventh Circuit's decision in *Bourtzakis*. Its extension to theft offenses in particular conflicts with the Supreme Court's approach in *Duenas-Alvarez*, and directly conflicts with this Court's holding in *Alvarado-Pineda*. These conflicts, exacerbated by the sweeping effect of the Court's decisions, which bars the treatment of most Washington convictions as aggravated felonies in federal litigation, demonstrate the exceptional importance of correcting these errors.

The en banc Court should then abrogate the holding of *Valdivia-Flores* that the categorical approach requires an examination of accomplice liability for a match to federal aiding and abetting independent of the statute of conviction. Alternatively, if the court holds that accomplice liability must be considered, it should hold that Washington accomplice liability substantially matches the federal aiding-and-abetting definition in 18 U.S.C. § 2, or that that petitioner has not established that Washington robbery is meaningfully broader than the generic definition of an aggravated felony theft offense under *Duenas-Alvarez*.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing en banc.

Respectfully submitted,

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December 8, 2021

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rules 35-4(a) and 40-1, the attached petition for rehearing or rehearing en banc contains 3878 words, and is prepared in a format, type face, and type style that complies with Fed. R. App. Pr. 32(a)(4)-(6).

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APPENDIX

Slip Opinion, Alfred v. Garland, No. 19-72903

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

McKENZY ALII ALFRED, *Petitioner*, v. MERRICK B. GARLAND, United States Attorney General, *Respondent*.	No. 19-72903 Agency No. A215-565-401 OPINION

Petition for Review from an Order of the
Board of Immigration Appeals

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Before: Johnnie B. Rawlinson and Jay S. Bybee,
Circuit Judges, and Morrison C. England, Jr.,*
District Judge.

Opinion by Judge England;
Special Concurrence by Judge England;
Concurrence by Judge Rawlinson

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* The Honorable Morrison C. England, Jr., United States District Judge for the Eastern District of California, sitting by designation.

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SUMMARY[**]

Immigration

Granting McKenzy Alii Alfred's petition for review of a decision of the Board of Immigration Appeals, and remanding, the panel held that Petitioner's convictions for robbery in the second degree and attempted robbery in the second degree, in violation of Wash. Rev. Code §§ 9A.56.190, 9A.56.210 and 9A.28.020, do not qualify as aggravated felony theft offenses under 8 U.S.C. §§ 1101(a)(43)(G), (U).

The panel concluded it was bound by *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017), in which a divided panel determined that when considering the immigration effect of a Washington controlled substance conviction, accomplice liability is an implicit and indivisible component of the conviction that must be considered under the categorical approach. The *Valdivia-Flores* majority further concluded that the accomplice liability mens rea under Washington law (knowledge) is broader than that required under federal law (specific intent), and therefore, there could be no categorical match between the state statute of conviction and the generic federal definition of a drug trafficking crime.

Because, according to the *Valdivia-Flores* majority, it is well-established that aiding and abetting liability is implicit in every criminal charge, the panel explained that

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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accomplice liability must be considered here. Observing that the *Valdivia-Flores* majority never reached the text of the drug trafficking statute, the panel concluded that its inquiry ended with accomplice liability as well. To this effect, the panel concluded that the overbreadth of Washington's accomplice liability means there can be no categorical match to the generic federal offense in this case either, and Petitioner's second-degree robbery convictions cannot constitute aggravated felony theft offenses. Accordingly, the panel concluded that Petitioner was not removable under 8 U.S.C. § 1227(a)(2)(A)(iii).

Specially concurring, District Judge England, joined by Judge Bybee, wrote that the panel relied on a theory of liability that assumes a crime was committed by someone else when it was undisputed that Petitioner himself—alone—committed the offense. Judge England also explained that it is quite possible that, at least in similar cases, no Washington conviction can be an aggravated felony at all. In such cases, future panels will never need to turn to the actual statute of conviction, but the exact same conduct may be an aggravated felony in a neighboring state. Judge England observed that Congress could not have intended such disparities.

Judge England wrote that the approach also puts attorneys in an untenable spot where they must argue against positions they would not normally advocate; the drive to show that state crimes of conviction are overbroad in comparison to their federal counterparts results in governments and prosecutors advocating for narrow readings of state criminal codes while defense counsel instead argue for expansion. Judge England wrote that all the confusion left in the wake of the categorical approach

undermines the legitimacy of the third branch of government.

Concurring in the result, Judge Rawlinson wrote that she concurred in the result because, and only because, the result was compelled by the majority opinion in *Valdivia-Flores*. However, for the reasons explained in her dissent in *Valdivia-Flores*, Judge Rawlinson wrote that the conclusion that convictions for second degree robbery do not constitute aggravated felonies makes no sense legally or factually.

COUNSEL

Aaron Korthuis (argued), Northwest Immigrant Rights Project, Seattle, Washington; Alison Hollinz, Northwest Immigrant Rights Project, Tacoma, Washington; for Petitioner.

Jaclyn E. Shea (argued), Trial Attorney; Zoe J. Heller, Senior Litigation Counsel; Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, D.C.; for Respondent.

OPINION

ENGLAND, District Judge:

Petitioner McKenzy Alii Alfred ("Petitioner"), a native and citizen of the Republic of Palau ("Palau"), petitions for review of an order of the Board of Immigration Appeals ("BIA" or "Board") that found him removable as an alien convicted of an aggravated felony offense. Because we are bound by the decision in *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017), we conclude that Petitioner's convictions for robbery in the second degree and attempted robbery in the second degree under Washington law do not qualify as aggravated felonies under §§ 101(a)(43)(G), (U) of the Immigration and Nationalization Act ("INA"), 8 U.S.C. §§ 1101(a)(43)(G), (U). The petition must therefore be GRANTED.

I

A.

In December 2011, Petitioner entered the United States from Palau pursuant to the so-called Compact of Free Association between the United States and several Pacific Island territories, including Palau.[1] Approximately seven

[1] Under the Compact, the Republic of the Marshall Islands, the Federated States of Micronesia, and Palau entered into an agreement with the United States allowing their citizens to enter, work, and establish residence in the United States without visas. *See* Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986), amended by Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-88, 117 Stat. 2720 (2003). Individuals so entering the United States, however, remain subject to removability on the same grounds applicable to other noncitizens. *See* Pub. L. No. 108-88 § 141(f), 117 Stat. at 2762.

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years later, Petitioner pled guilty in Washington state court to one count of second-degree robbery and two counts of attempted robbery in the second degree in violation of Wash. Rev. Code §§ 9A.56.190, 9A.56.210 and 9A.28.020. According to his plea agreement, Petitioner—by himself—first tried to obtain cash from a teller at a credit union before going to a nearby coffee kiosk and taking money from the barista. He then attempted to carjack a vehicle operated by another third party. There was no evidence that anyone other than Petitioner committed these crimes, let alone any evidence that Petitioner acted as an accomplice to someone else, or was charged as an accomplice. Petitioner was eventually sentenced to fifteen-month concurrent terms of imprisonment on each count.

B.

During Petitioner's incarceration, the Department of Homeland Security ("DHS") issued a Notice to Appear ("NTA") alleging that Petitioner was removable under 8 U.S.C. § 1227(a)(2)(A)(iii) because, *inter alia*, he had been convicted of an aggravated felony as defined by 8 U.S.C. § 1101(a)(43)(G). Specifically, in this case, Petitioner had been convicted of a theft or burglary offense for which the term of imprisonment is at least one year. *See* 8 U.S.C. § 1101(a)(43)(G).[2]

Petitioner admitted the factual allegations in the NTA, but nonetheless contested removability. At a hearing before an Immigration Judge ("IJ"), the IJ agreed with the

[2] The DHS ultimately added additional charges of removability, including charges that Petitioner had been convicted of aggravated felonies involving both violence and moral turpitude. The violence charges, however, were ultimately dismissed.

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Government that Petitioner was indeed removable as having sustained theft-related aggravated felonies.[3] The IJ's findings were subsequently memorialized in writing.

According to the IJ, this circuit's decision in *United States v. Alvarado-Pineda*, 774 F.3d 1198 (9th Cir. 2014), controlled. In that case, another panel of this court held that the same state statute under which Petitioner was convicted was a categorical match to the INA's generic offense. Since Petitioner, like Alvarado-Pineda, had unquestionably been sentenced to a term of imprisonment of more than a year for each of his convictions, the IJ determined that he had been convicted of aggravated felonies.[4]

The IJ was unpersuaded by Petitioner's claim to the contrary based on the split decision of a later panel in *Valdivia-Flores*. There, the panel determined that when considering the immigration effect of a Washington conviction for possession of a controlled substance with intent to distribute, accomplice liability is an implicit and indivisible component of the conviction that must be considered under the categorical approach. *Valdivia-Flores*, 876 F.3d at 1207. The majority concluded that the accomplice liability mens rea under Washington law is broader than that required to establish accomplice liability

[3] The IJ also sustained moral turpitude aggravated felony charges, but, as discussed below, the Board based its decision solely on the theft charges. Accordingly, we also do not consider moral turpitude.

[4] In addition to finding second-degree robbery under Washington law to be an aggravated felony for INA purposes, the IJ further found that the same categorical match applied to Petitioner's two convictions for attempted robbery. Because there is no dispute that the same analysis applied in both instances, we need not separately address attempted robbery here.

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under federal law. *Id.* at 1208. This overbreadth, in the majority's view, meant there could be no categorical match between the state statute of conviction and the generic federal definition of a drug trafficking crime.[5] *Id.* at 1209. According to the IJ, *Valdivia-Flores* was nonetheless distinguishable because that case involved comparing the state offense to a federal generic offense defined by statute as opposed to an offense such as theft, which is defined with reference to federal case law.

The BIA affirmed, agreeing that the Washington statutes categorically qualified as aggravated felony theft offenses for immigration purposes, consequently rendering Petitioner removable. Petitioner then timely petitioned this court for review.

II

This court has jurisdiction under 8 U.S.C. § 1252, and we "review only the BIA's opinion, except to the extent that it expressly adopted portions of the IJ's decision." *Rayamajhi v. Whitaker*, 912 F.3d 1241, 1243 (9th Cir. 2019) (citation omitted). Where the BIA concurs with the reasoning employed by the IJ's analysis, both decisions are reviewed. *Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1293 (9th Cir. 2018). Otherwise, however, a reviewing court must "confin[e] [its] review to a judgment upon the validity of the grounds upon which the [agency] itself based its

[5] 8 U.S.C. § 1101(a)(43)(B) defines aggravated felony to include "illicit trafficking in a controlled substance (as defined in [21 U.S.C. § 802]), including a drug trafficking crime (as defined in [18 U.S.C. § 924(c)])." 18 U.S.C. § 924(c) defines "drug trafficking crime" to mean "any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), or chapter 705 of title 46."

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action." *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). This means that we "may affirm the BIA based only on 'the explanations offered by the agency.'" *Toor v. Lynch*, 789 F.3d 1055, 1064 (9th Cir. 2015) (quoting *Arrington v. Daniels*, 516 F.3d 1106, 1113 (9th Cir. 2008)).

An agency's legal determinations are generally reviewed "de novo, subject to established principles of deference." *Alanniz v. Barr*, 924 F.3d 1061, 1065 (9th Cir. 2019). Factual findings, on the other hand, are reviewed for substantial evidence. *Singh v. Holder*, 656 F.3d 1047, 1051 (9th Cir. 2011). Under the substantial evidence standard, "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B).

III

A.

An alien convicted of an "aggravated felony" at any time after entering the United States is subject to removal under the INA. *See* 8 U.S.C. § 1227(a)(2)(A)(iii). DHS bears the burden of proving removability by clear and convincing evidence. 8 U.S.C. § 1229a(c)(3)(A). The INA defines an aggravated felony offense as, among other things, "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(G). The INA additionally makes it clear that an attempt or conspiracy to commit an aggravated felony under 8 U.S.C. § 1101(a)(43) is also deemed an aggravated felony. *See* 8 U.S.C. § 1101(a)(43)(U). If any of Petitioner's three state convictions qualify as an aggravated felony for INA purposes, the BIA's removability decision was proper, and the other offenses need not be considered. *See*, *e.g.*, *INS v.*

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Bagamasbad, 429 U.S. 24, 25 (1976) ("As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach.").

In evaluating whether a state statute qualifies as an aggravated felony for removal purposes, this court must "employ a 'categorical approach' to determine whether the state offense is comparable to an offense listed in the INA." *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). The categorical approach requires comparison of "the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime" to determine whether the offense is an aggravated felony. *See Descamps v. United States*, 570 U.S. 254, 257 (2013).[6] Those statutory elements, and not the underlying facts of the particular crime involved, govern the inquiry into determining whether a categorical match is present. *See generally*, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1567–68 (2017).

The relevant generic offense here, as indicated above, is "a theft . . . or burglary offense for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(G). The Ninth Circuit has defined generic "theft" for INA purposes as "a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of the rights and benefits of ownership." *Alvarado-Pineda*, 774 F.3d at 1202 (quoting

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[6] While *Descamps* was decided in the context of the Armed Career Criminal Act ("ACCA"), both the ACCA and the INA employ the same categorial approach in analyzing whether a conviction triggers either a fifteen-year mandatory minimum sentence under ACCA, *Mathis v. United States*, 136 S. Ct. 2243, 2247–48 (2016), or removal for immigration purposes under the INA in accordance with *Moncrieffe*, respectively.

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United States v. Corona-Sanchez, 291 F.3d 1201, 1205 (9th Cir. 2002) (*en banc*)).

Accordingly, if the required comparison between this generic federal offense and the Washington statute reveals a categorical match, then immigration consequences are triggered and, thus, Petitioner is removable. *See Roman-Suaste v. Holder*, 766 F.3d 1035, 1038 (9th Cir. 2014). If we conclude, on the other hand, that the state statute reaches conduct falling outside of the generic federal definition, then the Washington statute and generic federal offense are *not* a categorical match. In other words, if the elements of the state conviction are broader than the generic federal definition, then the state conviction is not an aggravated felony, and Petitioner is not removable on those grounds. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986–88 (2015); *Descamps*, 570 U.S. at 257; *Ramirez v. Lynch*, 810 F.3d 1127, 1130–31 (9th Cir. 2016). Thus, in this case, our analysis begins and ends with *Valdivia-Flores*.[7]

B.

The Washington statute underlying Petitioner's conviction provides:

[7] The Government's reliance on *Alvarado-Pineda* is misplaced because the impact of accomplice liability on the aggravated felony analysis was not raised therein. *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions 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."); *see also Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (a court is free to address an issue on the merits, if that issue has not been "squarely addressed" by prior precedent). Given that *Valdivia-Flores* expressly addressed aiding and abetting liability, it binds us instead.

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> A person commits robbery when he or she unlawfully takes personal property from the person of another in his or her presence against his or her will 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.

Wash. Rev. Code § 9A.56.190. Because, according to the *Valdivia-Flores* majority, it is well-established that aiding and abetting liability is implicit in every criminal charge, it must also be considered. *Valdivia-Flores*, 876 F.3d at 1207. The majority there explained how accomplice liability differs under the Washington statute as opposed to the generic federal definition:

> Washington's aiding and abetting statute state[s]: "A person is an accomplice . . . in the commission of a crime if . . . *[w]ith knowledge* that it will promote or facilitate the commission of the crime, he . . . solicits, commands, encourages, or requests such other person to commit it; or aids or agrees to aid such other person in planning or committing it." Wash. Rev. Code § 9A.08.020(3)(a)(i)–(ii) (1997) (emphasis added). In contrast, under federal law, "to prove liability as an aider and abettor the government must establish beyond a reasonable doubt that the accused had the *specific intent* to facilitate the commission of a crime by someone else." *United States v. Garcia*, 400 F.3d 816, 819 (9th Cir. 2005) (emphasis added). Therefore, federal law requires a mens rea of specific intent for

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> conviction for aiding and abetting, whereas Washington requires merely knowledge.

Id.[8] The difference between these mentes reae—specific intent and knowledge—matters, said the majority, because Washington's knowledge mens rea[9] captures more conduct than the federal specific intent mens rea, rendering accomplice liability in Washington overbroad compared to its federal counterpart. *Valdivia-Flores*, 876 F.3d at 1207–08. In that case, the overbreadth meant that "Washington's drug trafficking statute [was] overbroad compared to its federal analogue, and Valdivia-Flores's conviction [could] not support an aggravated felony determination." *Id.* at 1209.

The *Valdivia-Flores* analysis binds us and requires that we consider and compare the mentes reae for accomplice liability here, albeit in reference to a different principal

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[8] It is unclear how this last statement of the law (i.e., that federal law always requires specific intent for an aiding and abetting conviction) comports with the analysis set forth in *Rosemond v. United States*, 572 U.S. 65 (2014), a case not addressed by the *Valdivia-Flores* majority. *See*, *e.g.*, *Bourtzakis v. United States Attorney General*, 940 F.3d 616, 623 (11th Cir. 2019) (concluding that based on *Rosemond* the Washington aiding and abetting mens rea is not significantly broader than the federal requirement). Because we are bound by *Valdivia-Flores*, however, we make no attempt to reconcile these authorities here.

[9] Under Washington law, "[a] person knows or acts knowingly or with knowledge when: (i) [h]e or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or (ii) [h]e 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.

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offense.[10] The *Valdivia-Flores* majority never reached the text of the drug trafficking statute in their analysis, and so our inquiry ends with accomplice liability as well. The overbreadth of Washington's accomplice liability statute means there is no categorical match to the generic federal offense in this case either, and Petitioner's second-degree robbery convictions cannot constitute aggravated felony theft offenses. Petitioner is therefore not removable under 8 U.S.C. § 1227(a)(2)(A)(iii).

IV.

We grant the petition and remand for further consideration by the agency.

PETITION FOR REVIEW GRANTED, REMANDED.

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[10] Respondent's attempt to distinguish *Valdivia-Flores* because it compared a state statute to a federal statute as opposed to what we are asked to do here—which is to compare a state statute to a generic theft offense—is unavailing. Respondent has not identified, nor have we found, any authority to suggest that this is a distinction with a difference. Both require comparisons between the state statute and an enumerated offense.

We note that in *United States v. Door*, 917 F.3d 1146 (9th Cir. 2019), another panel of this court held that *Valdivia-Flores* did not apply to a categorical "crime of violence," and distinguished between enumerated offense aggravated felonies and "crime of violence" aggravated felonies for the purposes of sentence enhancement. Because we are not faced with a "crime of violence" aggravated felony, we limit our analysis to aggravated felonies that require comparison to *enumerated offenses*, like 8 U.S.C. §§ 1101(a)(43)(B), (G).

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ENGLAND, District Judge, with whom BYBEE, Circuit Judge, joins, specially concurring:

Our holding may be compelled by precedent, but it is not compelled by reason. To the contrary, this case, as have countless others, "demonstrates the absurdity of applying the categorical approach." *Quarles v. United States*, 139 S. Ct. 1872, 1880 (2019) (Thomas, J., concurring).[1] Not only did

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[1] Indeed, we are far from the only jurists to decry our continued reliance on this broken approach. *See, e.g.*, *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1149 (9th Cir. 2020) (Graber, J., concurring) ("I write separately to add my voice to the substantial chorus of federal judges pleading for the Supreme Court or Congress to rescue us from the morass of the categorical approach. The categorical approach requires us to perform absurd legal gymnastics, and it produces absurd results." (citations omitted)); *United States v. Escalante*, 933 F.3d 395, 406–07 (5th Cir. 2019) (Elrod, J.) ("In the nearly three decades since its inception, the categorical approach has developed a reputation for crushing common sense in any area of the law in which its tentacles find an inroad. . . . Perhaps one day the Supreme Court will consider revisiting the categorical approach and setting the federal judiciary down a doctrinal path that is easier to navigate and more likely to arrive at the jurisprudential destinations that a plain reading of our criminal statutes would suggest." (footnotes omitted)); *United States v. Williams*, 898 F.3d 323, 337 (3d Cir. 2018) (Roth, J., concurring) ("I write separately because of my concern that the categorical approach . . . is pushing us into a catechism of inquiry that renders these approaches ludicrous."); *Cradler v. United States*, 891 F.3d 659, 672 (6th Cir. 2018) (Kethledge, J., concurring) ("Whatever the merits of [the categorical] approach, accuracy and judicial efficiency are not among them . . . ."); *United States v. Brown*, 879 F.3d 1043, 1051 (9th Cir. 2018) (Owens, J., concurring) ("All good things must come to an end. But apparently bad legal doctrine can last forever, despite countless judges and justices urging an end to the so-called *Taylor* categorical approach."); *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 917 (9th Cir. 2011) (en banc) (Bybee, J.) ("In the twenty years since *Taylor*, we have struggled to understand the contours of the Supreme Court's [categorical approach] framework. Indeed, over the past decade, perhaps no other

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we conduct an aggravated felony analysis without ever addressing the principal statute of conviction, but the record contains not even a hint that Petitioner might have pled guilty as an accomplice. In fact, quite the opposite, he very clearly acted alone. So what we have done today is rely on a theory of liability that assumes a crime was committed by someone else when it is undisputed that Petitioner himself—and himself *alone*—committed the offense. We are engaging in an accomplice liability analysis that in any other context would be utterly irrelevant.[2]

More distressing, of course, is the fact that our analysis, and the analysis set forth in *Valdivia-Flores*, infects countless Washington criminal statutes. Indeed, as the Government argued in that case, it is quite possible that, at least for aggravated felonies that require comparison of all elements of the state crime and an enumerated generic federal offense, "no Washington state conviction can serve as an aggravated felony at all because of [the] accomplice liability statute." *Valdivia-Flores*, 876 F.3d at 1209. Future panels, like this one, will never even need to turn to the

area of the law has demanded more of our resources."). This list is far from exhaustive. *See, e.g.*, *United States v. Scott*, 990 F.3d 94, 125–27 (2d Cir. 2021) (Park, J., concurring) (collecting cases). The author of *Valdivia-Flores* himself wrote a special concurrence criticizing the doctrine. *Valdivia-Flores*, 876 F.3d at 1210 (O'Scannlain, J., specially concurring) ("I write separately to highlight how [this case] illustrates the bizarre and arbitrary effects of the ever-spreading categorical approach for comparing state law offenses to federal criminal definitions.").

[2] All of this despite the fact that, as Judge Rawlinson observed in her dissent to *Valdivia-Flores*, the majority "[c]ited no precedent [for] skipping over the actual statute of conviction to plug a completely different statute into the [categorical] analysis." *Valdivia-Flores*, 876 F.3d at 1213.

actual statute of conviction to determine one's status as an aggravated felon. *Id.* at 1208–09. Yet the exact same conduct may qualify as an aggravated felony in a neighboring state.

Congress "could not have intended vast . . . disparities for defendants convicted of identical criminal conduct in different jurisdictions." *Mathis*, 136 S. Ct. at 2258 (Kennedy, J., concurring). The most basic logic tells us this cannot be right but, as we have seen countless times, the categorical approach is untethered from common sense. Absurd results are far from an anomaly.[3]

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[3] *See*, *e.g.*, *Quarles*, 139 S. Ct. at 1880 (Thomas, J., concurring) ("The categorical approach relies on a comparison of the crime of conviction and a judicially created ideal of burglary. But this ideal is starkly different from the reality of petitioner's actual crime: Petitioner attempted to climb through an apartment window to attack his ex-girlfriend."); *Lopez-Aguilar*, 948 F.3d at 1149–50 (Graber, J., concurring) ("As the majority opinion explains, Oregon Revised Statutes section 164.395 is not a categorical match for the generic theft offense because it incorporates consensual takings. But I can conceive of very few scenarios in which a defendant could use, or threaten the immediate use of, physical force against a third party while carrying out a taking that was consensual from the property owner's perspective."); *United States v. Battle*, 927 F.3d 160, 163 n.2 (4th Cir. 2019) (Quattlebaum, J.) ("Through the Alice in Wonderland path known as the 'categorical approach,' we must consider whether Battle's assault of a person with the intent to murder is a crime of violence. While the answer to that question might seem to be obviously yes, it is not so simple after almost 30 years of jurisprudence beginning with *Taylor*."); *United States v. Burris*, 912 F.3d 386, 407 (6th Cir. 2019) (en banc) (Thapar, J., concurring) ("A casual reader of today's decision might struggle to understand why we are even debating if ramming a vehicle into a police officer is a crime of violence. The reader's struggle would be understandable. The time has come to dispose of the long-baffling categorical approach."); *Ovalles v. United States*, 905 F.3d 1231, 1253

Our current approach also puts attorneys in an untenable spot—whether they are litigating regarding immigration or criminal consequences—where they must argue against positions they would not normally advocate. The drive to show that state crimes of conviction are overbroad in comparison to their federal counterparts results in governments and prosecutors advocating for narrow readings of state criminal codes while defense counsel instead argue for expansion. On this point, Judge Owens most aptly described this mad transposition in the context of federal sentencing:

> Here, one lawyer zealously argues that Washington law criminalizes a "conspiracy of one," while the other lawyer strenuously contends for a narrower reading. Surely, the prosecutor is the one swinging for the fences, and the defense attorney the one pushing for lenity. In state court, you would be right. But we are in federal court, so a defense attorney ethically must play the role of the aggressive prosecutor, pushing for the most expansive reading of state law possible. She succeeded: she has established that the state law is broader than the federal law, so there is no categorical match, which favors her client.

(11th Cir. 2018) (en banc) (Pryor, J., concurring) ("How did we ever reach the point where this Court, sitting en banc, must debate whether a carjacking in which an assailant struck a 13-year-old girl in the mouth with a baseball bat and a cohort fired an AK-47 at her family is a crime of violence? It's nuts. And Congress needs to act to end this ongoing judicial charade."); *United States v. Doctor*, 842 F.3d 306, 313 (4th Cir. 2016) (Wilkinson, J., concurring) ("[T]he categorical approach can serve as a protracted ruse for paradoxically finding even the worst and most violent offenses not to constitute crimes of violence.").

> But this role reversal confirms that this is a really, really bad way of doing things. Defense attorneys should not be forced to argue for expanding criminal liability to benefit their clients, but in the *Taylor* Upside Down, that is what necessarily happened here.

Brown, 879 F.3d at 1051 (Owens, J., concurring). Only in the "Upside Down" would this make any sense.

All of the confusion left in the wake of the categorical approach undermines the legitimacy of our third branch of government. We know that bad facts make bad law. But in the case of the categorical approach, bad law makes even worse law time and again. "Instead of wasting more resources and interjecting more uncertainty into our . . . decisions, either the Supreme Court or Congress should junk this entire system." *Id.*

RAWLINSON, Circuit Judge, concurring in the result:

I concur in the result reached by the majority because, and only because, the decision reached by the majority is compelled by the majority opinion in *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017). However, for the reasons explained in my dissent to the majority opinion in *Valdivia-Flores*, the conclusion that convictions for second degree robbery do not constitute aggravated felonies makes no sense legally or factually. I guess when it comes to application of the Supreme Court's contrived categorical approach, in the words of my dearly departed Mama Louise: common sense ain't all that common.

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 December 8, 2021.

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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 RESPONSE TO RESPONDENT'S PETITION FOR REHEARING EN BANC

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INTRODUCTION

Relying on circuit and Supreme Court precedent, the panel in this case correctly concluded that Petitioner McKenzy Alfred's (Mr. Alfred) Washington conviction for second-degree robbery is not an aggravated felony for purposes of the Immigration and Nationality Act (INA). As the panel explained, Washington robbery is overbroad as compared to aggravated felony theft under 8 U.S.C. § 1101(a)(43)(G) because accomplice liability under state law allows Washington robbery convictions to encompass a broader scope of conduct than does the INA's generic theft definition. Specifically, Washington accomplice liability renders a person liable for robbery based only on knowledge, while generic theft requires specific intent. Contrary to Respondent's arguments, this conclusion faithfully applies Supreme Court precedent and this Court's precedents applying the categorical approach. Accordingly, there is no reason for this Court to rehear this case en banc.

Respondent's petition for en banc review makes two main arguments. The first is that the panel opinion and this Court's decision in *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017), incorrectly considered Washington accomplice liability in its analysis. But to the contrary, these decisions employ the well-established principles of the categorical approach. The Supreme Court's instructions in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), make clear that

accomplice liability is a critical component of a categorical analysis. Indeed, in *Duenas-Alvarez*, it was the government who argued for precisely that position—and prevailed.

Respondent's second argument seeking further review is that the panel decision erred in conducting the categorical approach either by relying on the incorrect definition for federal accomplice liability, or, in the alternative, by not relying on the standard for accomplice liability in *Duenas-Alvarez*. But *Duenas-Alvarez* all but resolves this argument. As the Supreme Court explained there, "the criminal activities of . . . 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 result, the panel correctly concluded that Washington accomplice liability—which requires only knowledge—is not a match for generic theft, which requires specific intent. Notably, Respondent's assertions about conflict between the panel decision and *Rosemond v. United States*, 572 U.S. 65 (2014), fail to support en banc consideration, as they do not direct a different result in this case. Instead, the categorical approach demonstrates that a theft aggravated felony under the INA requires specific intent, while in Washington, "the accomplice liability statute predicates criminal liability on general knowledge of the crime." *State v. Hoffman*, 804 P.2d 577, 605 (Wash. 1991). As a result, Washington robbery convictions are overbroad.

Finally, Respondent's claims that *Valdivia-Flores* and the panel decision threaten to eliminate the Department of Homeland Security's (DHS) ability to charge Washington State criminal offenses as removable offenses are significantly exaggerated. Indeed, even in the short time since the panel's opinion, this Court has explained that these cases are limited in scope, *see Amaya v. Garland*, 15 F.4th 976, 985 (9th Cir. 2021), and it has previously rejected other attempted applications of *Valdivia-Flores*, *see United States v. Door*, 917 F.3d 1146 (9th Cir. 2019). Moreover, Respondent never contests that Washington is an example of what the Supreme Court referenced in *Duenas-Alvarez*: the rare outlier whose accomplice liability principles have the "something *special*" that render some state convictions overbroad. 549 U.S. at 191. That is not true for most states, whose accomplice liability matches the intent required for generic theft offenses.

Respondent's grievance ultimately stems from the limitations of the categorical approach itself—not with a flaw in the Panel's application of that analysis. But as this Court has repeatedly made clear, it lies with Congress or the Supreme Court to address those concerns. *See, e.g.*, Op. 19 (England, D.J., specially concurring). Accordingly, this Court should deny Respondent's petition for rehearing en banc.

STANDARD FOR ACCEPTING EN BANC REVIEW

Under Federal Rule of Appellate Procedure 35, en banc review is appropriate where "(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions" or "(2) the proceeding involves a question of exceptional importance."

ARGUMENT

I. The Panel Opinion Correctly Applied the Categorical Approach and Did So Consistent with Supreme Court Precedent.

a. Supreme Court Precedent Demonstrates Washington Robbery Is Overbroad Compared to the Generic Definition of Theft.

In this case, DHS alleged that the generic INA offense that Mr. Alfred committed is that of "theft." *See* AR 260; 8 U.S.C. § 1101(a)(43)(G). Generic theft is defined in part as a "taking of property . . . without consent with the criminal intent to deprive the owner of rights and benefits of ownership." *Duenas-Alvarez*, 549 U.S. at 189 (citation omitted). The Supreme Court has explained that the definition of an aggravated felony in 8 U.S.C. § 1101(a)(43)(G) includes accomplice liability. *Duenas-Alvarez*, 549 U.S. at 189–90. This is true because "all States and the Federal Government[] ha[ve] 'expressly abrogated the distinction' among principals and aiders and abettors." *Id.* (citation omitted); *see also State v. Davis*, 682 P.2d 883, 886 (Wash. 1984) (explaining in robbery case that Washington's accomplice liability statute makes an accomplice equally liable for

the substantive crime). Accordingly, an individual convicted of theft because they aided and abetted a theft has committed a theft aggravated felony if the state conviction elements match those of the generic definition.

This means that to satisfy the generic definition of theft, the mens rea required to be an accomplice under state law must at least satisfy the mens rea required by theft's generic definition. The Supreme Court explained this requirement in *Duenas-Alvarez*, stating that "the criminal activities of . . . 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. Thus, for a conviction to constitute a theft offense under § 1101(a)(43)(G), the accomplice liability for that offense must still require "the criminal intent to deprive the owner of rights and benefits of ownership." *Id.* at 189 (citation omitted).

Consistent with the Supreme Court's analysis, the panel opinion correctly concluded that Washington's robbery statute is overbroad as compared to the definition of theft. As Mr. Alfred detailed in his opening brief, under federal and most states' law, accomplice liability generally requires intent to aid and abet the offense that the principal actor commits. *See* Pet'r Op. Br. 13–15. Mr. Alfred provided supporting citations to demonstrate that in nearly all states, an accomplice must have specific intent, the intent necessary to commit the underlying offense, or share the principal's intent. Pet'r Op. Br. 14–15 nn.1–2; *see also United States v.*

Franklin, 904 F.3d 793, 799 (9th Cir. 2018) (noting that there are "at most five jurisdictions that require only a mens rea of knowledge for accomplice liability").[1] And as noted above, generic theft itself requires specific intent. *See United States v. Martinez-Hernandez*, 932 F.3d 1198, 1205 (9th Cir. 2019). Washington, by contrast, requires only that the individual had knowledge to hold that person liable as an accomplice. RCW 9A.08.020(3); *see also State v. Roberts*, 14 P.3d 713, 736 (Wash. 2000) ("General knowledge of 'the crime' is sufficient" to be convicted as an accomplice in Washington). As a result, Mr. Alfred has demonstrated that Washington's liability scheme for robbery offenses "criminalizes conduct that most other States would not consider 'theft,'" meaning it has the "something *special*" that the Supreme Court explained was necessary to cause a state conviction to fall outside the generic definition of theft. *Duenas-Alvarez*, 549 U.S. at 191.[2]

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[1] In *Shular v. United States*, the Supreme Court abrogated a portion of this Court's holding in *Franklin* regarding how to define a "serious drug offense." 140 S. Ct. 779, 782 (2020). However, the Court did not abrogate this Court's holding that Washington accomplice liability is overbroad compared to accomplice liability under federal and state law, as other portions of *Franklin* addressed.

[2] Notably, the overbreadth in this case is also based on more than just the mismatch in elements. While this Court's precedent explains that such a mismatch is enough, *see, e.g.*, *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1147 (9th Cir. 2020), Washington case law has repeatedly demonstrated how accomplices are convicted based on a lower mens rea than specific intent, as required in most states. *See, e.g.*, Op. Br. 18–20 (citing several Washington cases convicting individuals of robbery based only on their knowledge of the crime).

This conclusion does not warrant further review. As detailed below, the panel's decision faithfully applies Supreme Court precedent, does not conflict with other decisions by this Court, and will have a limited effect on DHS's ability to prosecute removals based on Washington convictions.

b. The Panel Opinion Correctly Considered Washington Accomplice Liability When Comparing Washington Robbery to Generic Theft.

Respondent first argues that the opinions in this case and *Valdivia-Flores* conflict with *Duenas-Alvarez* because they "incorrectly assumed that the categorical approach should consider accomplice liability, even if the possibility of such liability arises from a statute other than the state statute of conviction." Resp't Pet. 7. Yet the panel's decision creates no conflict with *Duenas-Alvarez*. To the contrary, it simply applies the logic of that case and the Supreme Court's decisions explaining the categorical approach. In *Duenas-Alvarez*, the Court explained that "criminal law now uniformly treats," 549 U.S. at 190, accomplices the same as principals, having "expressly abrogated the distinction among principals and aiders and abettors," *id.* at 189 (internal quotation marks omitted). This expands the scope of who may be removable or inadmissible—which is what the government sought in *Duenas-Alvarez*. But as the Supreme Court also held, this means that criminal liability for accomplices must itself "fall within the scope of the term 'theft'" (or other specified crimes) under the INA. *Id.* at 190.

Nothing in *Duenas-Alvarez* suggests that these principles differ in states defining accomplice liability by statute, rather than by case law or in each substantive offense. Nor would that make any sense, given "[t]he implicit nature of aiding and abetting liability in every criminal charge." *Valdivia-Flores*, 876 F.3d at 1207 (citing *Duenas-Alvarez*, 549 U.S. at 189); *see also* Op. 12; *Amaya*, 15 F.4th at 984. Indeed, it was the *government* who sought certiorari in *Duenas Alvarez*, arguing that accomplice liability should be considered a way to commit a generic offense under federal law. *See Duenas-Alvarez*, 549 U.S. at 188–89 ("We granted the Government's petition for certiorari in order to consider the legal validity of the Ninth Circuit's holding . . . that 'aiding and abetting' a theft is not itself a crime that falls within the generic definition of theft. We conclude that the Ninth Circuit erred."). *Duenas-Alvarez* thus leaves no doubt that the panels here and in *Valdivia-Flores* were correct to consider accomplice liability when employing the categorical approach.

In support of his request for rehearing and argument that accomplice liability must be considered separately, Respondent also notes that being an "a principal or accomplice is not an element of the substantive offense." Resp't Pet. 9. This is true, but that only underscores what the Supreme Court explained in *Duenas-Alvarez*: an individual can be convicted for the substantive offense as an accomplice. As a result, when employing the categorical approach, a court must

consider a properly raised argument that accomplice liability does not itself "fall within the scope" of the generic crime. *Duenas-Alvarez*, 549 U.S. at 190; *see also Valdivia-Flores*, 876 F.3d at 1207; Op. 12–13. *Duenas-Alvarez* thus flatly rejects Respondent's claim that "this Court need only compare the statute of conviction with the generic definition of theft," without considering accomplice liability. Resp't Pet. 9. Indeed, Respondent later contradicts his very argument, noting that that *Duenas-Alvarez* does in fact require this Court to consider accomplice liability when applying the categorical approach. Resp't Pet. 15–16.

Washington State law also makes plain that a court cannot assess a conviction for robbery under the categorical approach without considering that the state may have pursued that conviction based on an accomplice liability theory. In Washington, "[t]here is no separate crime of being an accomplice; accomplice liability is principal liability." *State v. Toomey*, 690 P.2d 1175, 1181 (Wash. App. 1984); *see also State v. Jackson*, 944 P.2d 403, 413 (Wash. App. 1997) ("[A]ccomplice liability is not a separate crime: it is predicated on aid to another in the commission of a crime, and is, in essence, liability for that crime."), *aff'd*, 976 P.2d 1229 (Wash. 1999). In light of these principles, in Washington, "[a] robbery conviction may be based on accomplice liability." *State v. Truong*, 277 P.3d 74, 79 (Wash. App. 2012). These statements of law simply reflect what the Supreme Court clarified all states' criminal laws now recognize in *Duenas-Alvarez*. *See* 549

U.S. at 189. Respondent is therefore wrong to assert that the different possible theories of conviction for a Washington robbery are a reason to take this case en banc, or that it requires a different application of the categorical approach.

How Washington State juries treat principal and accomplice liability further supports the lack of distinction between accomplice and principal liability when engaging in the categorical approach. As the Washington Supreme Court has explained, a jury "need not reach unanimity on whether a defendant acted as a principal or an accomplice." *State v. Teal*, 96 P.3d 974, 977 (Wash. 2004). "[N]or is accomplice liability an element of . . . committing a crime." *Id.*; *cf. Young v. United States*, 22 F.4th 1115, 2022 WL 152077, at *6 (9th Cir. 2022) (observing as to federal law that "[a]iding and abetting is not a separate offense; it is simply one means of committing the underlying crime" (citation omitted)). Under the categorical approach, courts must consider whether any form of committing the single crime of Washington second-degree robbery, including as accomplice, extends beyond the "generic" crime of theft. *See, e.g.*, *Rendon v. Holder*, 764 F.3d 1077, 1085–86 (9th Cir. 2014). A Washington robbery conviction necessarily encompasses accomplice liability, but because of the principles discussed above, it is not "divisible" as to whether an individual was convicted as an accomplice or not. Accordingly, the record of conviction is not relevant to the categorical analysis in this case. *See Descamps v. United States*, 570 U.S. 254, 257 (2013); *see also id.*

at 262 (a statute is not divisible, and a court may not consult the record of conviction, where the statue of conviction "comprises multiple, alternative versions of the crime"). Notably, Respondent never argued in this case—either before the agency or before this Court—that the statute is divisible so as to allow a court to investigate whether an individual was convicted as an accomplice. *See* AR 3–4 (BIA Decision), 27-29 (DHS Motion for Summary Affirmance), 42–50 (IJ Decision), 230–39 (DHS Opposition to the Motion to Terminate); Resp't Br. at 17–34.[3]

More importantly, in *Duenas-Alvarez*, the Supreme Court never held (or even suggested) that an individual must be charged or convicted of accomplice liability to show the state conviction is overbroad on that basis; instead, the Court simply rejected this Court's holding that accomplice liability rendered the statute overbroad under the categorical approach. Nor did the Court's discussion of the facts indicate that Mr. Duenas-Alvarez was convicted as an accomplice. In fact, the record in the case suggests otherwise, as it does not demonstrate that any other

[3] In his petition, Respondent repeatedly notes that "there is no suggestion in the record that petitioner was convicted as an accomplice." Resp't Pet. 8; *see also* Resp't Pet. 1, 3. Yet Respondent has never asserted the statute is divisible, and thus has waived any such argument. *Supra* p. 11; *see also*, *e.g.*, *Lopez-Aguilar*, 948 F.3d at 1149 (government waived issue of whether statute was divisible by not arguing it).

individuals were involved with the crime at issue. *See, e.g.*, Brief for Petitioner at 4, *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) (No. 05-1629).

Finally, Respondent asserts that it is inappropriate to consider accomplice liability because the Supreme Court has not always considered accomplice liability when employing the categorical approach. Resp't Pet. 8. This argument is meritless. As the panel in this case recognized, if accomplice liability is not raised in a case, it is a "[q]uestion[] [that] merely lurk[s] in the record, neither brought to the attention of the court nor ruled upon, [and is] 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); Op. 11 n.7 (citing *Webster* and *Brecht* to reject similar argument). All the Supreme Court did in the cases Respondent cites is address the arguments that were raised in the questions presented—which did not include accomplice liability.[4] Indeed, in *Duenas-Alvarez*, the Court pointedly refused to address other issues that had not been appropriately raised in the questions presented. 549 U.S. at 194.

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[4] For this same reason, as the panel recognized, the decision in this case does not conflict with *United States v. Alvarado-Pineda*, 774 F.3d 1198 (9th Cir. 2014). That case rejected a different argument regarding why Washington robbery is not a theft aggravated felony, and never addressed accomplice liability. Op. 11 n.7.

In sum, this Court's decisions in this case and *Valdivia-Flores* correctly employed the categorical approach and the Supreme Court's decision in *Duenas-Alvarez*. Accordingly, there is no need for en banc review.

II. *Valdivia-Flores* and the Panel Opinion Used the Correct Mentes Reae for Comparison When Applying the Categorical Approach

Respondent next asserts that en banc review is warranted because *Valdivia-Flores* and the panel opinion used the wrong definition of federal accomplice liability under 18 U.S.C. § 2 to determine whether the principal offense—Washington robbery—is overbroad. Resp't Pet. 10–14. But as Respondent later recognizes, this question is not one that should dictate the outcome of this case. Resp't Pet. 15–17 (explaining that the definition of a generic offense, rather than the statutory definition of federal accomplice liability, should apply when conducting the categorical analysis in this case). *Valdivia-Flores* addressed a situation where a Washington drug trafficking conviction was measured against a federal statutory drug trafficking crime to determine if it satisfied the definition of an aggravated felony. 876 F.3d at 1206–07. Unlike theft aggravated felonies, drug trafficking aggravated felonies are defined by reference to a specific federal statute, rather than by reference to a "generic" crime defined by the common law and case law. 8 U.S.C. § 1101(a)(43)(B); *see also Moncrieffe v. Holder*, 569 U.S. 184, 188 (2013). As a result, in that case, the panel was correct to compare the Washington drug trafficking offense at issue with federal statutory accomplice liability.

In this case, however, *Duenas-Alvarez* instructs how to conduct the inquiry: by comparing whether the offense of someone who may be convicted as an accomplice under state law has been convicted of the elements required for a generic theft under the INA. 549 U.S. at 190. As detailed above, that inquiry renders Washington robbery overbroad, as Washington accomplice liability requires only knowledge for a conviction, while theft requires specific intent. *Supra* pp. 5–6. But more importantly, for purposes of this petition, it means that that the conclusion in this case does not conflict with Supreme Court precedent.

Moreover, Petitioner agrees with Respondent that even if *Duenas-Alvarez* did not apply as outlined above, the next step would be to compare Washington accomplice liability against *generic* accomplice liability, as opposed to federal *statutory* accomplice liability. Resp't Pet. 15. As Mr. Alfred explained in prior briefing, generic accomplice liability also requires specific intent, because nearly all states require specific intent or the intent required for the principal to convict an accomplice. See Pet'r Op. Br. 13–15 & nn.1–2. That fact is important, as "[a] court applying categorical analysis ordinarily surveys a number of sources—including state statutes, the Model Penal Code, federal law, and criminal law treatises—to establish the federal generic definition of a crime." *United States v. Garcia-Jimenez*, 807 F.3d 1079, 1084 (9th Cir. 2015); *see also Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1570 (2017) (relying in part on "evidence from state

criminal codes" to define generic "sexual abuse of a minor"); *Duenas-Alvarez*, 549 U.S. at 189–90 (looking to federal and state jurisdictions to define generic crime). Accordingly, this inquiry would yield the same result as the panel reached in this case: Washington robbery is overbroad because accomplice liability under the state statute requires only knowledge, while generic theft and the generic accomplice liability that forms part of it require specific intent.

III. The Panel Decision Is Limited in Scope and Will Not Undermine DHS's Ability to Charge Washington Offenses in Removal Proceedings.

Finally, Respondent asserts that this case warrants review because its conclusion is "truly sweeping." Resp't Pet. 14. But Respondent is wrong to claim this case has widespread impact. To the contrary, this Court's decisions reject that assertion. Moreover, the Supreme Court has already anticipated that in certain, outlier circumstances, state convictions may fail to meet the generic definition.

First, this is not a sweeping holding warranting further review. The panel faithfully applied binding Supreme Court precedent. Neither Respondent nor the special concurrence pointed to any other states in this circuit where this holding would apply. The decision is limited to those cases that involve "something *special*," *Duenas-Alvarez*, 549 U.S. at 191, and as far as Petitioner is aware, Washington is the only state in this circuit where this argument may apply. *See* Pet'r Op. Br. 14–15 & nn. 1–2 (listing nearly all other states in this circuit among those that require specific intent or the intent of the principal to establish

accomplice liability). And even as to Washington, Respondent has not shown that *Valdivia-Flores* or the panel's decision have resulted in higher rates terminating removal proceedings than in other states. Respondent's claims regarding the widespread impact of this case are simply speculative.

Second, this Court's case law underscores that the decision here and in *Valdivia-Flores* have limited impact. The three published decisions applying the *Valdivia-Flores* opinion illustrate this point. Indeed, two of the three decisions—i.e., the other two cases besides this one that have applied *Valdivia-Flores*—*rejected* claims that *Valdivia-Flores* renders other Washington offenses overbroad. *See Amaya*, 15 F.4th at 985 (noting that this Court has "rejected [the] proposition" that "no Washington state conviction can serve as an aggravated felony at all" (citation omitted)).

The first, *United States v. Door*, explains that for whole categories of offenses, the logic of *Valdivia-Flores* does not apply. Specifically, while *Valdivia-Flores* and this case may apply when federal law enumerates state offenses that carry federal penalties, they do not apply where Congress specifies that convictions with certain types of characteristics carry federal penalties. For example, in *Door*, this Court explained that *Valdivia-Flores*'s logic does not apply to an assertion that an offense is a crime of violence under the "force" or "elements" clause, *see* 18 U.S.C. § 16(a); U.S.S.G. § 4B1.2(a)(1), because such offenses need only have

certain characteristics. *See* 917 F.3d at 1153 (holding that a Washington felony harassment conviction qualifies as a crime of violence). So long as the state conviction is pursuant to a state crime that has "as an element the use, attempted use, or threatened use of physical force," 18 U.S.C. § 16(a), the state conviction carries the penalties Congress provided.

In a second case, *Amaya*, this Court again rejected an extension of *Valdivia-Flores*. In that case, the petitioner argued in relevant part that his Washington first-degree assault conviction was overbroad because (1) Washington accomplice liability means that an individual could be convicted as accomplice to an assault with only knowledge, and (2) the mens rea of knowledge is not sufficient for a crime of violence. 15 F.4th at 982–84. The Court rejected this argument, explaining that the mens rea for Washington accomplice liability—knowledge or "general intent"—is sufficient to satisfy the crime of violence definition. *Id.* As such, this Court's precedent reaffirms the narrow impact of the analyses in *Duenas-Alvarez* and *Valdivia-Flores*.

For all these reasons, this is not a case of "exceptional importance." Fed. R. App. P. 35(a)(2). Its impact is limited to a small subset of Washington crimes and only to certain aggravated felonies and removable offenses, and DHS continues to have many tools at its disposal to charge Washington offenses as removable

offenses.[5]

CONCLUSION

For the foregoing reasons, Mr. Alfred respectfully urges the Court to deny en banc review.

Date: February 10, 2022

Respectfully submitted,

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[5] Indeed, DHS also charged Mr. Alfred's robbery offenses as crimes of moral turpitude, and the IJ sustained those charges. AR 48–49. On appeal, the BIA declined to address this question, and ruled only on whether Mr. Alfred's crime was a theft aggravated felony. AR 4.

CERTIFICATE OF COMPLIANCE

I, Aaron Korthuis, counsel for the petitioner and a member of the Bar of the Court, certify, pursuant to Circuit Rule 40-1(a) and Federal Rule of Appellate Procedure 32, that the foregoing Brief of the Petitioner is proportionately spaced, has a typeface of 14 points or more, and contains 4,116 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 February 10, 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.

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