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

Aaron Korthuis
Matt Adams
Leila Kang

Northwest Immigrant Rights Project
615 2nd Ave Ste 400
Seattle, WA 98104
Phone: (206) 816-3872
aaron@nwirp.org
matt@nwirp.org
leila@nwirip.org

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

STATE CASES

STATE STATUTES

OTHER AUTHORITIES

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]

[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.

[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,

s/ Aaron Korthuis
Aaron Korthuis

s/ Matt Adams
Matt Adams

s/ Leila Kang
Leila Kang

Northwest Immigrant Rights Project
615 2nd Ave Ste 400
Seattle, WA 98104
Telephone: (206) 816-3872

[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.

Signature: s/ Aaron Korthuis Date: February 10, 2022

Aaron Korthuis
Northwest Immigrant Rights Project
615 2nd Ave Ste. 400
Seattle, WA 98104
(206) 816-3872
aaron@nwirp.org

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.

Signature: s/ Aaron Korthuis Date: February 10, 2022

Aaron Korthuis
Northwest Immigrant Rights Project
615 2nd Ave Ste. 400
Seattle, WA 98104
(206) 816-3872
aaron@nwirp.org