No. 05-1630

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

NOPRING PAULINO PENULIAR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondent does not deny that, if the Court grants certiorari in *Gonzales* v. *Duenas-Alvarez*, petition for cert. pending, No. 05-1629 (filed June 22, 2006), the petition in this case should be held pending the disposition of that case and then disposed of accordingly. Instead, respondent contends (Br. in Opp. 1-3, 8-26) that the petition in *Duenas-Alvarez* should be denied—and thus that the petition in this case should be denied as well. Respondent is mistaken.

A. The Ninth Circuit's Rule Is Incorrect

1. As the *Duenas-Alvarez* petition demonstrates (at 6-10), the Ninth Circuit erred in holding that aiding and abetting is not included in the generic definition of the term "theft offense" under the "aggravated felony" provision of the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(43)(G). Respondent contends that that holding is correct, because

"[n]one of the fifty states' theft offense statutes expressly includes aiders and abettors or accessories after the fact." Br. in Opp. 24. That is irrelevant even if true, because every State criminalizes aiding and abetting and treats an aider and abettor as a principal, and thus the law in every State is that a defendant who aids and abets a theft offense is guilty of the theft offense itself. See *Duenas-Alvarez* Pet. 6-10.

Respondent also relies (Br. in Opp. 25) on the fact that the INA "contains an express provision including attempt and conspiracy to commit an aggravated felony as 'aggravated felonies' themselves" but "contains no such provision * * * regarding aiding and abetting." Br. in Opp. 25. That reasoning is equally flawed. As explained in the *Duenas-Alvarez* petition (at 22 n.13), attempt and conspiracy, unlike aiding and abetting, are distinct from the underlying offense, and thus would not constitute an aggravated felony unless Congress explicitly so provided. Respondent correctly points out (Br. in Opp. 25) that the Sentencing Guidelines do include aiding and abetting (as well as attempt and conspiracy) in their definition of "aggravated felony." See Sentencing Guidelines § 2L1.2, comment. (n.5). But it is hardly unusual for a legislature (or agency) explicitly to include in a statute (or regulation) a principle of law that would apply even if it were omitted, so as to remove any conceivable doubt. And even if it *were* unusual, the Sentencing Commission's inclusion of particular language in the Guidelines would not be evidence of what *Congress* intended when it enacted the INA—especially since aiding-and-abetting liability is *automatically* included as a form of principal liability under federal statute and the laws of all 50 States, whether or not it is expressly mentioned.

2. Respondent contends (Br. in Opp. 25-26) that, even if aiding and abetting is included in the generic definition of "theft offense," aiding and abetting under California law is

broader than generic aiding and abetting. That theory, however, was not the basis for respondent's argument or the Ninth Circuit's decision below. In any event, it is incorrect. According to respondent, while California holds a defendant responsible for any crime that is the "natural and probable consequence" of the crime he intended to aid and abet, "the majority of states and the federal government" do not. *Id.* at 25-26. As Professor LaFave explains, however, the "established rule" is in fact the one applied in California—that "accomplice liability extends to acts of the principal * * * which were a 'natural and probable consequence' of the criminal scheme the accomplice encouraged or aided." 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.3(b), at 361 (2d ed. 2003) (footnote omitted); see *id.* § 13.3(b), at 361-362 nn. 26-29 (citing treatises, state cases, and state statutes).[1]

Respondent also contends (Br. in Opp. 20-23) that, even if aiding and abetting is included in the generic definition of "theft offense," and even if aiding and abetting under California law is no broader than generic aiding and abetting, California Vehicle Code § 10851 (West 2000) imposes liability on an "accessory," which means an accessory after the fact, and an accessory after the fact is not covered by the generic definition of "theft offense" as that term is used in the INA. As explained in the *Duenas-Alvarez* reply brief (at 2-8), that theory, too, was not the basis for the decision below; the theory

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[1] The federal courts of appeals have uniformly interpreted the federal aiding-and-abetting statute, 18 U.S.C. 2, to permit conviction on that theory. See, *e.g.*, *United States* v. *Edwards*, 303 F.3d 606, 637 (5th Cir. 2002), cert. denied, 537 U.S. 1192 and 1240 (2003); *United States* v. *Walker*, 99 F.3d 439, 443 (D.C. Cir. 1996); *United States* v. *Miller*, 22 F.3d 1075, 1078-1079 (11th Cir. 1994); *United States* v. *Moore*, 936 F.2d 1508, 1527 (7th Cir.), cert. denied, 502 U.S. 991 (1991); *United States* v. *Graewe*, 774 F.2d 106, 108 n.1 (6th Cir. 1985), cert. denied, 475 U.S. 1017 (1986); *United States* v. *Barnett*, 667 F.2d 835, 841 (9th Cir. 1982).

is not correct; even if the theory were correct, it would not follow that an alien (like respondent) who was charged with violating Section 10851(a) *as a principal* has not been convicted of a "theft offense" under the "modified categorical" approach; and the Ninth Circuit has applied the rule challenged by the government to California theft statutes that do not include the term "accessory."

B. The Ninth Circuit's Rule Conflicts With The Rule Applied By Other Courts Of Appeals

As the *Duenas-Alvarez* petition demonstrates (at 10-15), the Ninth Circuit's rule that the generic definition of "theft offense" excludes aiding and abetting is inconsistent with the principle applied by the First, Second, Seventh, and Eighth Circuits in analytically indistinguishable circumstances.[2] Respondent contends that there is no such conflict, because the statutes at issue in those cases "employ different language and serve different purposes than the INA." Br. in Opp. 11. That contention is mistaken, because the decisions from the other circuits do not rely on particular language or purposes of the statutes at issue; they rely on the basic principle of the criminal law, which the Ninth Circuit ignored, that aiding and abetting and the underlying substantive crime are not distinct offenses.[3] Respondent also contends that the decision below

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[2] Since the petition was filed, the Fifth Circuit has held that aiding and abetting bank fraud is an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(i), which covers offenses that "involve[] fraud or deceit in which the loss to the victim or victims exceeds $10,000." *James* v. *Gonzales*, No. 04-60445, 2006 WL 2536614, at *2-*3 (Sept. 5, 2006).

[3] See *United States* v. *Hathaway*, 949 F.2d 609, 610-611 (2d Cir. 1991) (per curiam) ("the laws of many states today include counseling, aiding or procuring the burning within the definition of actual arson," and "[a]iding and abetting also supports a substantive conviction for arson under Federal law"), cert. denied, 502 U.S. 1119 (1992); *United States* v. *Groce*, 999 F.2d 1189, 1191 (7th Cir. 1993) ("both federal law and Wisconsin state law punish an aider and

is not inconsistent with the Eighth Circuit's decision in *United States* v. *Baca-Valenzuela*, 118 F.3d 1223 (1997), because that case "dealt with sentencing under an 'aggravated felony' provision of the federal Sentencing Guidelines," which "have been amended specifically to include aiding and abetting offenses within the definition of 'aggravated felonies.'" Br. in Opp. 12-13. That contention is likewise mistaken, because, at the time *Baca-Valenzuela* was decided, the definition of "aggravated felony" in the Guidelines was the same as that in the INA, see 118 F.3d at 1232; the fact that the Guidelines have since been amended does not mean that *Baca-Valenzuela* is no longer controlling in the Eighth Circuit on whether aiding and abetting an aggravated felony is itself an aggravated felony under the INA.

In the alternative, respondent contends (Br. in Opp. 13-14) that it would be premature for this Court to decide whether the generic definition of "theft offense" in 8 U.S.C. 1101(a)(43)(G) includes aiding and abetting, because the Ninth Circuit recently granted rehearing en banc in *United States* v. *Vidal*, 426 F.3d 1011 (2005), rehearing granted, 453 F.3d 1114 (2006). As explained in the *Duenas-Alvarez* reply brief (at 8-10), that contention is mistaken, because *Vidal* does not involve the question presented in this case.[4] Contrary to re-

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abettor as a principal"); *United States* v. *Mitchell*, 23 F.3d 1, 2 (1st Cir. 1994) (per curiam) ("aiding and abetting is not a separate offense from the underlying substantive crime") (internal quotation marks and citation omitted); *United States* v. *Baca-Valenzuela*, 118 F.3d 1223, 1232 (8th Cir. 1997) ("Whether one is convicted *as* a principal or *as* an accomplice/aider and abettor, the crime *of which* he is guilty is the same: whatever is the underlying offense."); *James*, 2006 WL 2536614, at *3 ("Significantly, the aiding and abetting statute, 18 U.S.C. § 2, does not define a separate crime, but rather provides another means of convicting someone of the underlying offense.") (internal quotation marks and footnote omitted).

[4] While the en banc petition in *Vidal* did argue that "the panel's decision conflicted with the Ninth Circuit's decision in *Penuliar*" (Br. in Opp. 14), it did

spondent's contention, the government is not seeking to "have it both ways" in arguing (1) that the decision below conflicts with *Baca-Valenzuela* and (2) that the grant of en banc review in *Vidal* does not render certiorari review in *Duenas-Alvarez* premature. Br. in Opp. 14 n.3. The decision below conflicts with *Baca-Valenzuela* because that case interpreted a prior definition of "aggravated felony" that did not explicitly include aiding and abetting; it does not conflict with *Vidal* because that case interpreted a current definition of "aggravated felony" that *does* explicitly include aiding and abetting.

C. If Left Unreviewed, The Ninth Circuit's Rule Will Have A Substantial Effect On The Administration Of The Immigration Laws

The *Duenas-Alvarez* petition points out (at 15-16) that there are approximately 8000 cases that could be affected by the Ninth Circuit's rule. Respondent contends that "[t]his overstates the impact of the court of appeals' decision," because the decision "does not prevent [the government] from showing * * * that an individual's violation of [Section 10851(a)] constitutes a theft offense under the modified categorical approach." Br. in Opp. 16. In fact, the decision does

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not argue that the decision conflicted with *Penuliar* on the question presented here. Instead, in the portion of the en banc petition cited by respondent, Vidal argued that the documents in the record were insufficient to show that he had been convicted of a "theft offense" under the "modified categorical" approach, because the charging instrument merely tracked the language of California Vehicle Code § 10851(a). See 04-50185 Pet. for Reh'g & Suggestion for Reh'g En Banc at 4-5, 16-17. There is in fact no conflict between *Vidal* and *Penuliar* on that point. The Ninth Circuit did not hold in *Penuliar* that a charging instrument is insufficient if it tracks the statutory language; it held that it is insufficient if the generic definition of an offense excludes aiding and abetting (because a defendant charged as a principal can be convicted as an aider and abettor). See Pet. App. 15a-17a. The generic definition at issue in *Vidal* explicitly includes aiding and abetting.

precisely that as a practical matter in a great number of cases. As explained in the *Duenas-Alvarez* petition (at 17-18), under the Ninth Circuit's "modified categorical" holding (see Pet. App. 15a-17a), even an alien explicitly charged as a principal will not be deemed to have been convicted of a "theft offense" on the basis of the charging instrument and corresponding judgment (because a defendant charged as a principal can be convicted as an aider and abettor), and other documents from the criminal case often will be unavailable or difficult to obtain, or will shed no light on whether the alien was convicted as what the Ninth Circuit regards as a "true principal."

The *Duenas-Alvarez* petition also explains (at 20-21) that the Ninth Circuit's rule has few obvious limits and may well be extended to other crimes that are a basis for removal under the INA. Respondent disagrees. According to him, the holding of the Ninth Circuit is merely that "a violation of Section 10851(a) of the California Vehicle Code does not * * * constitute a 'theft offense' for purposes of the INA"; the Ninth Circuit "has not extended that holding to other contexts"; and "there are logical reasons why [it] might choose not to do so." Br. in Opp. 17. In fact, the Ninth Circuit's holding that the generic definition of "theft offense" excludes aiding and abetting has already been applied to other theft crimes, see *United States* v. *Corona-Sanchez*, 291 F.3d 1201, 1207-1208 (9th Cir. 2002) (en banc) (general theft under California Penal Code § 484(a) (West 1999)); *Martinez-Perez* v. *Gonzales*, 417 F.3d 1022, 1027-1028 (9th Cir. 2005) (grand theft under California Penal Code § 487(c) (West 1999)), and the brief in opposition does not identify any "logical reasons" for not extending it to crimes such as murder, rape, and bur-

glary, see 8 U.S.C. 1101(a)(43)(A) and (G); *Duenas-Alvarez* Pet. 20-21.[5]

D. *Duenas-Alvarez* Is A Suitable Vehicle For Deciding Whether The Ninth Circuit's Rule Is Incorrect

1. Respondent contends (Br. in Opp. 17-18) that *Duenas-Alvarez* is an unsuitable vehicle for deciding the question presented, because, unlike most California theft statutes, California Vehicle Code § 10851(a) includes the term "accessory," and thus is broader than the generic definition of "theft offense" without regard to whether that generic definition includes aiding and abetting. Even if the statute's inclusion of "accessory" means that Section 10851(a) is not categorically a "theft offense," *Duenas-Alvarez* is still a suitable vehicle for deciding whether the generic definition includes aiding and abetting. As explained in the *Duenas-Alvarez* reply brief (at 5-8), whatever the significance of the term "accessory" in the statute, an alien charged with violating Section 10851(a) as a principal has been convicted of a "theft offense" under the "modified categorical" approach if "theft offense" includes aiding and abetting—and, in any event, the Ninth Circuit has already applied the rule challenged here to statutes that do not include the term "accessory."

2. Respondent contends (Br. in Opp. 19-20) that *Duenas-Alvarez* is an unsuitable vehicle for the additional reason that the Ninth Circuit remanded the case to the Board of Immigration Appeals, and thus, according to respondent, the case

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[5] Respondent also contends that "[t]here is no pressing need to resolve the issue presented" because "both houses of Congress have addressed [it] through pending legislation." Br. in Opp. 14-15. As of the date of the filing of this reply brief, however, a conference committee has not even been appointed to reconcile the two major immigration-reform bills, which differ in significant respects. As respondent acknowledges, therefore, "it is still unclear when and if these bills will become law." *Id.* at 15 n.4. For that reason, the pendency of the bills provides no basis for denying certiorari.

is in an interlocutory posture. That contention fails for a number of reasons.

In the first place, this case is not in an interlocutory posture in the sense in which that term is ordinarily understood when the decision is by a federal court of appeals, because the case has not been remanded to a federal district court, such that it remains within the Judicial Branch. A decision of a federal court that reverses an agency decision and remands the matter to the agency is *final* for purposes of further judicial review. Cf. *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990) (order of district court effectively declaring regulations invalid and remanding case to agency is "final decision" under 28 U.S.C. 1291).

Moreover, assuming that the case was remanded "to conduct [a] modified categorical review" (Br. in Opp. 20)—the court of appeals' brief memorandum opinion does not say what the purpose of the remand is—that would not be a basis for denying review on "interlocutory" grounds in *Duenas-Alvarez* even if there could be a case in which a court's remand to an agency renders the case nonfinal. Respondent was charged as a principal, see Pet. App. 16a n.8; the Ninth Circuit held that that is not a sufficient basis for a finding that he was *convicted* as a principal (because a defendant charged as a principal can be convicted as an aider and abettor), *id*. at 15a-17a; and Duenas-Alvarez was likewise charged as a principal, in language essentially identical to that in the charging instruments in this case, see *Duenas-Alvarez* Pet. App. 13a (No. 05-1629). The Ninth Circuit's "modified categorical" holding in this case and the administrative record in *Duenas-Alvarez* thus combine to make it virtually inevitable that the agency would find that Duenas-Alvarez was not convicted of a "theft offense," and the government would not be able to seek judicial review of that decision. Under these circumstances, the court of appeals' decision in *Duenas-Alvarez* is

final (rather than interlocutory) both because the "outcome of [the] further proceedings [is] preordained" and because "the governing * * * law would not permit [the government] again to present [its] * * * claim[] for review" if the agency ruled in favor of Duenas-Alvarez. *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 479, 481 (1975).

Even if the decision could be viewed as interlocutory, however, "there is no absolute bar to review of nonfinal judgments of the lower federal courts," *Mazurek* v. *Armstrong*, 520 U.S. 968, 975 (1997) (per curiam), and the considerations identified above would justify the exercise of this Court's certiorari jurisdiction. The exercise of that jurisdiction in *Duenas-Alvarez* is particularly warranted inasmuch as the Ninth Circuit's rule that "theft offense" excludes aiding and abetting is "clearly erroneous," *ibid.*; the rule conflicts with the rule applied in other circuits; a large number of immigration cases are affected by the rule, see *Duenas-Alvarez* Pet. 15-21; there is a substantial threshold jurisdictional question in this case and most of the other cases in which the Ninth Circuit has applied the rule, see *id.* at 23-24; and there is likely to come a point in the near future at which the question presented no longer reaches that court, inasmuch as the Board of Immigration Appeals is bound by the Ninth Circuit's decisions in cases arising there, see, *e.g.*, *In re Anselmo*, 20 I. & N. Dec. 25, 31-32 (B.I.A. 1989).

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be held pending this Court's disposition of *Gonzales* v. *Duenas-Alvarez*, No. 05-1629, and then disposed of accordingly.

Respectfully submitted.

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