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IN THE SUPREME COURT OF THE UNITED STATES

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ALBERTO R. GONZALES, :  
ATTORNEY GENERAL, :  
Petitioner :

v. : No. 05-1629

LUIS ALEXANDER DUENAS-ALVAREZ. :

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Washington, D.C.

Tuesday, December 5, 2006

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:06 a.m.

APPEARANCES:

DAN HIMMELFARB, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.; on  
behalf of the Petitioner.

CHRISTOPHER J. MEADE, ESQ., New York, N.Y.; on behalf of  
the Respondent

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P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in case 05-1629 Gonzales versus Duenas-Alvarez.

Mr. Himelfarb.

ORAL ARGUMENT OF DAN HIMMELFARB

ON BEHALF OF PETITIONER

MR. HIMMELFARB: Mr. Chief Justice, and may it please the Court.

The Ninth Circuit held that the term theft offense, an aggravated felony under the Immigration and Nationality Act, does not include aiding and abetting. That holding is incorrect. Indeed, it is so clearly incorrect that even respondent does not defend it. Respondent's aiding and abetting argument is that his violation of the California vehicle theft statute is not a theft offense under the INA, not because the California statute covers aiding and abetting and the theft offense does not, as the Ninth Circuit held, but because the California statute covers a certain kind of aiding and abetting, so-called natural and probable consequences rule, and a theft offense does not.

That theory is slightly narrower than the Ninth Circuit's but it is mistaken for many of the same

1 reasons. One of the reasons that the Ninth Circuit's  
2 holding is mistaken is that it would drastically limit  
3 the number of aliens who could be treated as aggravated  
4 felons based on a conviction obtained in any  
5 jurisdiction, because no jurisdiction distinguishes  
6 between principals and aiders and abettors and it is  
7 ordinarily not possible to prove that an alien in a  
8 particular case was not convicted as an aider and  
9 abettor. Respondent's theory would have the same effect  
10 when a conviction was obtained in any jurisdiction that  
11 obtains the natural and probable consequences rule.

12 JUSTICE SOUTER: Will you help me out on one  
13 mechanical point? As you probably know from your brief,  
14 I don't come from a jurisdiction that uses this rule and  
15 I'm just not used to it. I had thought -- and I guess  
16 I'm wrong -- that if the natural and probable  
17 consequences theory were used to prove, let's say,  
18 ultimately the offense of assault, in what started out  
19 as a theft case, that there would have to be a separate  
20 charge of assault but that the theory of proof would be  
21 the natural and consequences extension of aiding and  
22 abetting so that there would at least be on the record a  
23 charge of assault.

24 And I take it that's not the case.

25 MR. HIMMELFARB: I -- I don't think it is.

1 I --

2 JUSTICE SOUTER: Otherwise, you wouldn't  
3 have this problem.

4 MR. HIMMELFARB: Well, it is the case that  
5 the aider and abettor has to intend to aid and abet what  
6 is sometimes called the target crime. It also has to be  
7 the case that the principal has to then go on to commit  
8 some other crime, a subsequent crime. The issue then  
9 arises whether the aider and abettor who intended to  
10 assist the target crime is held liable for the  
11 subsequent crime.

12 JUSTICE SOUTER: But in any case in my  
13 example of -- of theft, and the further offense under  
14 natural and probable consequences being assault, the  
15 only charge against the defendant who aided and abetted  
16 would be a charge of theft; is that correct?

17 MR. HIMMELFARB: It could be. It could be.  
18 But in the course of proving the aider and abettor  
19 guilty of the subsequent crime on this natural and  
20 probable consequences theory, there would have to be  
21 proof that bore upon the target crime to show what his  
22 intent was with respect to the target crime and also  
23 whether the subsequent crime was a foreseeable  
24 consequence of the initial crime.

25 JUSTICE SCALIA: I don't understand it. How

1 can he be convicted of -- of the consequential crime if  
2 he is never charged with the consequential crime? You  
3 charge him with the -- with the theft and convict him of  
4 assault?

5 MR. HIMMELFARB: No, Justice Scalia. He  
6 would have to be charged with the subsequent crime.

7 JUSTICE SCALIA: Okay, well I thought you --  
8 I thought you answered --

9 JUSTICE SOUTER: Me too.

10 MR. HIMMELFARB: I didn't mean to say that.  
11 I meant to say he didn't have to be charged with the  
12 initial crime. In fact, even the principal wouldn't  
13 have to be charged with the initial crime or for that  
14 matter, any crime. The aider and abettor could be  
15 charged only with a consequent crime but in the course  
16 of proving that under the natural and probable  
17 consequences rule, there would have to be proof with  
18 respect to the target crime, because the elements of the  
19 natural and probable consequences rule depend upon what  
20 happened.

21 JUSTICE SCALIA: The theory being that  
22 anybody who intended to aid and abet a crime which  
23 naturally leads to another crime intended the other  
24 crime as well.

25 MR. HIMMELFARB: That's the basic principle.

1 JUSTICE GINSBURG: Mr. Himmelfarb, does the  
2 government urge that we consider the point that you're  
3 now arguing and the other points? You started out by  
4 saying everyone agrees that the rationale of the Ninth  
5 Circuit won't wash, but if we go beyond that, then we  
6 are deciding the question as a matter of first view  
7 instead of review.

8 Does the government urge that we dispose of  
9 those issues anyway, even though they were not disposed  
10 of by the Ninth Circuit?

11 MR. HIMMELFARB: We think that the aiding  
12 and betting argument that respondent raises is fairly  
13 included within the question presented and that it  
14 should be resolved. We don't think the other two issues  
15 are fairly included within the question presented.

16 We think that this issue is fairly presented  
17 within the -- fairly included within the question  
18 presented and should resolve --

19 JUSTICE GINSBURG: But it wasn't discussed  
20 by the Ninth Circuit, was it?

21 MR. HIMMELFARB: It wasn't,  
22 Justice Ginsburg, but it bears upon the question of what  
23 it means to say that an aggravated felony encompasses  
24 aiding and abetting. If the Court simply holds contrary  
25 to the Ninth Circuit's holding that aiding and abetting

1 is included in an aggravated felony, it will leave open  
2 a very important question which we think the Court  
3 should provide guidance to the lower courts on. It  
4 would leave open the question of whether that means that  
5 there is some general Federal immigration law definition  
6 of aiding and abetting with which the law of aiding and  
7 abetting in the jurisdiction of conviction would have to  
8 be compared in every single removal case, at least  
9 potentially, or rather as we would submit, that Congress  
10 intended to cover the entire range of aiding and  
11 abetting under whatever formulation was used in any  
12 jurisdiction at the time the aiding and abetting  
13 provision was added to the Immigration and Nationality  
14 Act.

15 JUSTICE SCALIA: And what about the  
16 remaining questions that were not decided by the Ninth  
17 Circuit?

18 MR. HIMMELFARB: Well, certainly the --

19 JUSTICE SCALIA: Do we remand for those or  
20 what?

21 MR. HIMMELFARB: Yes. It's open to -- it  
22 would be open to the Ninth Circuit. Assuming the Ninth  
23 Circuit were of the view that they were fairly raised in  
24 the Ninth Circuit, and also that they were fairly raised  
25 in the agency, it would be open to the Ninth Circuit to



1 resolve those questions in the first instance. Let me  
2 just add that --

3 JUSTICE GINSBURG: Why would it have to be  
4 raised in the Ninth Circuit? I thought this case was  
5 controlled by a prior decision of the Ninth Circuit.  
6 Therefore, there was nothing more that was needed to  
7 take care of this case.

8 MR. HIMMELFARB: That's true. The Ninth  
9 Circuit didn't pass upon any issue except the question  
10 whether aiding and abetting as a general matter is  
11 included in a theft offense. Relying on a prior  
12 decision, it held that it wasn't, and sent the case back  
13 to the Board of Immigration Appeals. But there, I think  
14 it would still be fair for the government to argue that  
15 a particular theory that may be raised here in defense  
16 of the judgment wasn't properly raised either in the  
17 Ninth Circuit by respondent, or before the agency, such  
18 that that claim was not properly exhausted.

19 JUSTICE SCALIA: Mr. Himelfarb, you point  
20 out these last two issues are not, and probably  
21 correctly, that they are not fairly included within the  
22 question presented. Well, that would be disabling if  
23 indeed it was the petitioner that is seeking to raise  
24 those two additional issues. But here it is the  
25 respondent; and we can certainly reach those issues if

1 we want to.

2 MR. HIMMELFARB: Of course. Of course.

3 JUSTICE SCALIA: The respondent can seek to  
4 uphold the judgment below on whatever grounds he wishes.

5 MR. HIMMELFARB: Of course.

6 JUSTICE SCALIA: So we can reach those other  
7 issues if we wish.

8 MR. HIMMELFARB: It's ultimately a matter of  
9 the Court's discretion. Our submission is that the  
10 wiser exercise of the Court's discretion would not --  
11 would be not to address the issue, particularly the last  
12 issue raised in respondent's brief.

13 CHIEF JUSTICE ROBERTS: Well, the only thing  
14 that the Ninth Circuit held was that the definition of a  
15 theft offense in California is broader than the generic  
16 definition of theft. All of these arguments that are  
17 being discussed are ways in which that particular ruling  
18 is supported. I don't know why they wouldn't be  
19 considered subsumed under the Ninth Circuit's decision.

20 MR. HIMMELFARB: Well, Mr. Chief Justice, we  
21 don't read the Ninth Circuit's order that way. We think  
22 the Ninth Circuit simply reversed on the strength of its  
23 prior decision in Penuliar. And in Penuliar, the Ninth  
24 Circuit clearly held the reason this California statute  
25 was not a theft offense was that conviction under it is

1 possible under an aiding and betting liability theory.  
2 So insofar as the order relied on Penuliar, it was  
3 saying nothing more and nothing less than that  
4 respondent's conviction was not a theft offense because  
5 it is theoretically possible he was convicted as an  
6 aider and abettor and the definition of theft offense  
7 under the INA does not include aiding and abetting.

8           Now as I was saying, I think it's important  
9 for the Court to make clear what it means to say, that  
10 aiding and abetting is included in the aggravated felony  
11 definition. And this -- the type of argument that  
12 respondent raises here, I think is important to keep in  
13 mind, is not limited to the particular aspect of aiding  
14 and abetting law on which he relies.

15           There are a great many different  
16 formulations of the basic requirements of aiding and  
17 betting. Not only that they -- they vary not only from  
18 jurisdiction to jurisdiction but even within  
19 jurisdictions. So in the next case, you could imagine  
20 an alien or removal case arguing that because some other  
21 requirement of aiding and abetting law in the  
22 jurisdiction in which he was convicted is broader than  
23 the more typical formulation, that even though he was  
24 clearly convicted of, for example, murder, and even  
25 though the elements of murder in that jurisdiction

1 perfectly match up with the federal definition of murder  
2 in the immigration statute --

3 CHIEF JUSTICE ROBERTS: Counsel, you're  
4 ahead of me, and I'm still back on the last question,  
5 but I take it your rationale for not reaching these  
6 other grounds would also apply to your argument that  
7 whatever the categorical definition, that this defendant  
8 was convicted of an actual theft offense, looking at the  
9 charging documents. That wasn't a basis for the Ninth  
10 Circuit's decision either.

11 MR. HIMMELFARB: That's true, Mr. Chief  
12 Justice. Our main submission is that the Ninth Circuit  
13 relied on an issue of aiding and abetting. We  
14 petitioned on that question and the Court granted  
15 certiorari on that question.

16 The three grounds on which respondent relies  
17 on defense of the judgment, even though they all vary in  
18 some sense from the Ninth Circuit's ground, two of them  
19 simply have nothing to do with aiding and abetting. The  
20 first ground is an aiding and abetting argument. It's  
21 slightly different from the one, slightly narrower than  
22 the one on which the Ninth Circuit relied, but we think  
23 it's fairly included and we think the Court should  
24 address it. We think the Court should reject it for the  
25 reasons I am attempting to articulate now.

1           If you have a jurisdiction with a law of  
2   aiding and abetting that is broader, it can be  
3   characterized as broader in some sense than what might  
4   be thought to be the general notion of aiding and  
5   abetting, under the premise of respondent's theory, you  
6   could conceivably have this kind of argument in any  
7   removal case --

8           JUSTICE ALITO:  What if a particular  
9   jurisdiction has an entirely novel and fundamentally  
10  different theory of aiding and abetting?  Is it simply  
11  sufficient that it is labeled aiding and abetting?

12          MR. HIMMELFARB:  Well, Justice Alito, we  
13  think it would be perfectly appropriate for the Court to  
14  leave open the question that if at some point in the  
15  future, some entirely novel radical far-reaching theory  
16  of aiding and abetting were adopted, that would not be  
17  sufficient.  I don't think as the law currently stands  
18  there is any such theory in any jurisdiction; and I  
19  think that Congress should be presumed when it enacted  
20  the aggravated felony provision, to be covering the  
21  field of possibilities.  But if at some point in the  
22  future some jurisdiction decided that, you know,  
23  somebody could be strictly liable --

24          JUSTICE STEVENS:  Mr. Himmelfarb, what about  
25  accessory after the fact, do your comments apply to that

1 argument as well?

2 MR. HIMMELFARB: Well, we think that that's  
3 not fairly included within the question presented. We  
4 think that's just a -- accessory after the fact is a  
5 separate crime

6 JUSTICE STEVENS: Well, it may not be fairly  
7 included but as you've acknowledged, it is an argument  
8 asserted to defend the judgment.

9 MR. HIMMELFARB: That's right. We think  
10 that the Court could resolve that issue along the lines  
11 we've suggested in our reply brief. Respondent's basic  
12 submission on that point is that the term -- the phrase  
13 in the California statute, any person who is a party or  
14 an accessory to or an accomplice in the driving or  
15 unauthorized taking or stealing, that in that phrase the  
16 term accessory means accessory after the fact. An  
17 accessory after the fact is not included in the  
18 definition of the theft offense. Therefore, the  
19 California statute is broader than a theft offense.  
20 It's our submission that the Court can assume that he's  
21 right about that but still rule for the government on  
22 the accessory after the fact issue, because whatever the  
23 statute might say, he was charged as a principal. And  
24 the law is clear that somebody charged as a principal --  
25 JUSTICE GINSBURG: How do we know that? I

1 was looking at, what is it, 13-A? How do we know that  
2 that charge is as a principal? In the appendix to the  
3 petition.

4 MR. HIMMELFARB: Well, Justice Ginsburg, it  
5 tracks the language of the statute up to the point where  
6 the statute uses the phrase I just read.

7 So it's principal language. It's  
8 theoretically possible that he was convicted as an aider  
9 and abettor because the law in California, as it is  
10 elsewhere, is that somebody charged as a principal can  
11 be convicted as an aider and abettor; but the law in  
12 California, as it is elsewhere, is that somebody charged  
13 as a principal cannot be convicted as an accessory after  
14 the fact. There is no language in the charging  
15 instrument to suggest that respondent was charged as an  
16 accessory after the fact.

17 JUSTICE SOUTER: But to accept your answer,  
18 we've got to look into a question of California pleading  
19 law which hasn't been passed on below.

20 MR. HIMMELFARB: Well, that's right.  
21 Respondent raises a number of arguments in response  
22 essentially to the argument I just made. We think  
23 they're all entirely insubstantial and could be rejected  
24 quite easily. But it may well be that the Court would  
25 think that the better course is not to address the

1 accessory after the fact issue.

2 JUSTICE SCALIA: Why wouldn't the better  
3 course be also not to decide the principal question you  
4 want us to decide on the broad ground that you want us  
5 to take, which is that if there are minor differences  
6 between what you might call the general law of aiding  
7 and abetting, it doesn't matter. Why wouldn't it be  
8 wiser to decide this on the simple ground that this kind  
9 of consequential liability is part of the general law of  
10 aiding and abetting, which you argue in your brief?

11 So that would be the narrower ground.

12 MR. HIMMELFARB: That would be narrower  
13 ground. That is certainly our fallback position and we  
14 would not be at all unhappy if the case were resolved on  
15 that ground.

16 JUSTICE GINSBURG: Even though that position  
17 has been widely criticized, I think. Is it the  
18 ALI Model Penal Code, which thinks it's a bad rule?

19 MR. HIMMELFARB: There has been some  
20 criticism of the rule, Justice Ginsburg, but it is  
21 applied in criminal cases in Federal courts; and  
22 whatever criticism there might be in the academic  
23 literature, even in some state decisions, we think it is  
24 just inconceivable that Congress would have intended  
25 that somebody could be convicted under this theory under



1 the Federal criminal law and be subject to the same  
2 criminal penalties as a principal, and yet under the  
3 federal immigration law could not be subject to the same  
4 immigration consequences as a principal. So whatever  
5 grounds there are for criticizing it, it is the law in  
6 most places. And most importantly, we think, it is the  
7 law in Federal courts.

8           Taking account of minor variations in  
9 formulation of aiding and abetting standards among  
10 jurisdictions would not only have the consequence of  
11 drastically limiting the number of aliens who could be  
12 found to be aggravated felons, because of the difficulty  
13 of establishing that someone was convicted as a  
14 principal rather than an aider and abettor. It would  
15 also complicate removal cases enormously, as I  
16 mentioned.

17           The premise of respondent's aiding and  
18 abetting theory would suggest that in any case, it would  
19 be necessary for the immigration judge, board of  
20 immigration appeals and the reviewing court, to engage  
21 not only in an analysis of whether the principal offense  
22 of conviction matches some Federal definition, which  
23 itself can be a quite complex enterprise, but having  
24 done that, it would then have to go on and compare the  
25 aiding and abetting law of the state of conviction with

1 some Federal aiding and abetting law.

2 JUSTICE SCALIA: In that former question as  
3 to whether California theft is general theft, do you  
4 propose the same rule? That even if California has some  
5 minor variations -- not just in aiding and abetting but  
6 in what constitutes theft -- minor variations from what  
7 the general national rule is, they should be  
8 disregarded? And if not, why not?

9 MR. HIMMELFARB: Well, we think that -- we  
10 don't, first of all.

11 And I think no court would say that and we  
12 certainly wouldn't. But there's a very important  
13 difference insofar as that type of comparison was  
14 concerned between on the one hand a principal offense  
15 and on the other hand aiding and abetting. The two  
16 important differences are if you have a general  
17 definition of the principal offense, whether it's a  
18 theft offense or burglary, any reasonable framework  
19 would contemplate that in a great many cases you would  
20 be able to tell whether the alien before the court was  
21 convicted of that offense, of the Federal definition of  
22 that offense, simply by looking at the State statute of  
23 conviction; and if it matches it, that's the end of the  
24 analysis. If it's broader, in most cases you'd be able  
25 to look at the charging instrument and see whether that

1 person was charged with something narrower than the  
2 whole range of conduct that's covered by the statute.

3 Under respondent's theory, if you were  
4 to apply that same approach to aiding and abetting you  
5 would never be able to look at the statute to see  
6 whether somebody was convicted under an aiding and  
7 abetting theory that matches the Federal definition  
8 because every statute includes aiding and abetting, so  
9 it's impossible to tell from the statute whether  
10 somebody was convicted as a principal or an aider and  
11 abettor.

12 Then if you look at the charging  
13 instrument, that won't suffice either because the law  
14 everywhere as far as I'm aware is that somebody charged  
15 as a principal can be convicted as an aider and abettor.  
16 So the only cases in which you'd be able to establish  
17 that somebody was not convicted as an aider and abettor  
18 are the unusual cases where there happens to be  
19 something in the files of the criminal case that will  
20 explain in some admissible fashion whether the defendant  
21 was convicted as a principal or an aider and abettor.  
22 That's the first important distinction. The second --

23 JUSTICE SCALIA: So you would limit your  
24 rule just to aiding and abetting and not to other minor  
25 variations, just minor variations in the aiding and

1 abetting definition?

2 MR. HIMMELFARB: That's right. I mean, our  
3 submission is that Congress's intent in enacting an  
4 aggravated felony provision that captures aiders and  
5 abettors was that minor variations in formulation  
6 wouldn't matter for the reasons I'm giving. So it's  
7 ultimately a matter of Congressional intent.

8 The second reason why this is important is  
9 because if you were to apply that rule to aiding and  
10 abetting you would be saying, in effect, that in any  
11 jurisdiction that applies a broader rule of aiding and  
12 abetting every single crime in the criminal code would  
13 not qualify for aggravated felony status, because an  
14 aiding and abetting statute runs with the entirety of the  
15 criminal code and is a potential theory of liability for  
16 every substantive criminal offense. So that would mean  
17 that in those, those broader aiding and abetting  
18 jurisdictions, nothing could ever be an aggravated  
19 felony unless the government could somehow search  
20 through the criminal files and find something to prove  
21 that in fact the defendant was not convicted under an  
22 aiding and abetting theory.

23 JUSTICE GINSBURG: Mr. Himmelfarb, before  
24 your time runs out, there's something curious about this  
25 California statute. This one is in the Motor Vehicle

1 Code, and there's this offense in the Penal Code called  
2 car theft. Do you know what the difference between  
3 those two and what would move a prosecutor to charge  
4 under the Penal Code as opposed to the Vehicle Code?

5 MR. HIMMELFARB: Well, the theft offense  
6 that covers cars under than this one in California that  
7 I'm aware of, Justice Ginsburg, is just a grand theft  
8 statute, which is just general theft as applied to  
9 particular circumstances, one of which is the theft of a  
10 car.

11 JUSTICE GINSBURG: That's mentioned in what,  
12 487(d)?

13 MR. HIMMELFARB: That's right. That's  
14 right. And as I understand it, that is essentially a  
15 larceny statute, which encompasses a common law larceny  
16 rule, which is that there has to be an intent to steal  
17 or, stated differently, that there has to be an intent  
18 to deprive the owner of the car, of the car permanently,  
19 whereas the California vehicle theft statute at issue  
20 here is a broader statute in that it doesn't require any  
21 intent to steal. It doesn't even require a taking. A  
22 driving is sufficient. So it would capture the receipt  
23 of stolen property. And it doesn't require an intent to  
24 deprive the owner of the car permanently. It would be  
25 sufficient if there was an intent to deprive the owner

1 of the car temporarily.

2 JUSTICE GINSBURG: It covers joyriding?

3 MR. HIMMELFARB: Well, it would cover -- it  
4 would cover what is colloquially known as joyriding if  
5 it fell within the terms of the statute. That is, if  
6 there was an intent to deprive the owner of the  
7 property. And on the subject of joyriding, let me --

8 JUSTICE GINSBURG: Temporarily.

9 MR. HIMMELFARB: At least temporarily.

10 Respondent makes much of the fact that on  
11 our reading of the statute, on our understanding, that a  
12 theft offense would cover the California vehicle theft  
13 statute here. That would mean that joyriding would be  
14 included. But I think it's critical to keep in mind  
15 that there are two very important limitations in the  
16 Federal definition of theft offense. The first is that,  
17 as interpreted by the Board of Immigration Appeals, it  
18 does require an intent to deprive the owner of property,  
19 and a great many unauthorized use of vehicle statutes in  
20 the State don't have that element. That's one important  
21 limitation.

22 The other is that many of these statutes are  
23 misdemeanor statutes, so somebody convicted of it would  
24 not be sentenced to more than a year in prison. By the  
25 terms of the theft offense provision of the aggravated

1 felony provision in the INA you have to be sentenced to  
2 at least a year in prison in order to be treated as an  
3 aggravated felon. So we think the vast majority of what  
4 is colloquially known as joyriding cases would not fall  
5 within this particular aggravated felony.

6 JUSTICE GINSBURG: But in California they  
7 would? Or is there a separate joyriding --

8 MR. HIMMELFARB: No. Joyriding in  
9 California would be prosecuted under this statute. But  
10 unless there was an intent to deprive, there could be no  
11 conviction, and unless the sentence was at least a year  
12 it would not be treated as an aggravated felony.

13 JUSTICE SCALIA: Is it the sentence given or  
14 the sentence prescribed for the crime?

15 MR. HIMMELFARB: The sentence given, Justice  
16 Scalia.

17 JUSTICE SCALIA: Given.

18 MR. HIMMELFARB: I'd like to reserve the  
19 remainder of my time.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 Mr. Himmelfarb.

22 Mr. Meade.

23 ORAL ARGUMENT OF CHRISTOPHER J. MEADE

24 ON BEHALF OF RESPONDENT

25 MR. MEADE: Mr. Chief Justice, and may it

1 please the Court:

2 I would like to pick up on the point made by  
3 Justice Ginsburg. This case does not involve a  
4 conviction under California's car theft statute, which  
5 is Penal Code 487(d), which requires an intent to steal.  
6 Rather, it involves a conviction under California's  
7 Vehicle Code, which covers varied and less serious  
8 conduct including liability with or without the intent  
9 to steal and also expressly reaching accessories after  
10 the fact, which the Government concedes would make it  
11 broader than the generic definition of theft.

12 The question is whether a conviction under  
13 this statute is a theft offense and therefore an  
14 aggravated felony triggering the extremely serious  
15 consequences of automatic deportation from the United  
16 States, a permanent bar from the United States, and in  
17 the sentencing context a sentencing enhancement from 2  
18 to 20 years for illegal reentry.

19 CHIEF JUSTICE ROBERTS: Your friend began  
20 his argument by saying you don't defend the decision of  
21 the Ninth Circuit below on aiding and abetting. Is that  
22 correct?

23 MR. MEADE: We do defend the judgment of the  
24 Ninth Circuit.

25 CHIEF JUSTICE ROBERTS: I know the judgment,



1 but you focused at least primarily on other grounds than  
2 the one on which the Ninth Circuit relied.

3 Is he correct that you concede that merely  
4 because the statute extends to aiders and abettors that  
5 is not sufficient to take it out of the categorical  
6 treatment?

7 MR. MEADE: As an abstract general matter  
8 divorced from the facts of this case and divorced from  
9 California law, we agree that aiding and abetting  
10 liability is part of a generic definition of any crime,  
11 including the theft offense here.

12 However, that's not what the Ninth Circuit  
13 stated in either this case or in Penuliar. In Penuliar  
14 the Ninth Circuit stressed the extremely broad nature of  
15 California's aiding and abetting liability. It cited a  
16 case, People v. Beeman, which refers to the specific  
17 natural and probable consequences doctrine under  
18 California law.

19 So the Ninth Circuit was talking about the  
20 broad sweep of aiding and abetting liability under  
21 California law.

22 JUSTICE SCALIA: Could I ask a factual  
23 question? I'm just curious. If the Government's  
24 statement of the facts here is correct, your client, a  
25 Peruvian, was convicted of burglary in 1992 and

1 convicted of possession of a firearm by a felon in 1994,  
2 and nonetheless was made a lawful permanent resident in  
3 1998. How does that happen? Is that a mistake or --  
4 how do we decide who's admitted as a lawful permanent  
5 resident?

6 MR. MEADE: I don't know the answer to the  
7 question except to state that those two, those  
8 convictions did happen in the years that you state and  
9 he did become a lawful permanent resident in 1998.

10 I believe it was through a waiver provision  
11 under the INA that that's how he became a lawful  
12 permanent resident.

13 JUSTICE SCALIA: He's not a joyrider anyway.

14 MR. MEADE: I would disagree with that. All  
15 we know in this case from the record is that he was not  
16 charged with 487(d) car theft, which requires an intent  
17 to steal. He was rather charged under a conviction  
18 which covers joyriding.

19 In my reading of the Government's brief, the  
20 Government doesn't contest that joyriding would put a  
21 statute outside the generic definition of theft offense.  
22 Even in the Government's presentation today, the  
23 Government suggested that in most States joyriding would  
24 be outside the generic definition of --

25 JUSTICE BREYER: So then the Ninth Circuit

1 was wrong in your opinion when it defined generic theft  
2 as the taking or exercising control over property  
3 without consent, with the intent to deprive the owner of  
4 rights and benefits, even if it is less than permanent  
5 or total? They're wrong in your opinion?

6 MR. MEADE: No, I don't think they're wrong.

7 JUSTICE BREYER: Well then, I don't see  
8 how you make --

9 MR. MEADE: Sure. I'd be happy to --

10 JUSTICE BREYER: Isn't that  
11 inconsistent with what you just said?

12 MR. MEADE: No.

13 JUSTICE BREYER: Why not?

14 MR. MEADE: No, it's not inconsistent. We  
15 don't take the position that a permanent deprivation is  
16 required, is required. A less than permanent  
17 is sufficient, as the Ninth Circuit stated in  
18 Corona-Sanchez. The Ninth Circuit has subsequently held  
19 that a joyriding offense is outside that definition  
20 because it includes a brief taking with an intent to  
21 return, and the last footnote of the Government's brief,  
22 note 8, cites that Ninth Circuit case.

23 JUSTICE BREYER: I don't understand how that  
24 could be right, though. I mean, when you joyride it's  
25 less than personal. In other words, their definition is

1 if you take somebody else's property for an hour that  
2 that isn't theft, but if you take it for a day it is?

3 MR. MEADE: The question has to do with how  
4 long of the taking. And at common law --

5 JUSTICE BREYER: They're trying to -- is  
6 there a common law, because they're trying to report --  
7 is under the common law there a rule or any generic rule  
8 that says if you take somebody else's property for a  
9 couple of hours it is not theft, but if you take it for  
10 several hours or several days it is theft?

11 MR. MEADE: There is a generic rule on this,  
12 and there is a consensus among the vast majority of  
13 States. I point to both Professor LeFave as well as the  
14 Model Penal Code. And what these rules say -- and this  
15 is true in the vast majority of States, 42 States by our  
16 count -- is that if you take either permanently or for  
17 an unreasonable amount of time such that it would  
18 deprive the owner of the significant portion of the  
19 economic value, then that constitute a theft offense.

20 JUSTICE SCALIA: You shouldn't steal it for  
21 an unreasonable amount of time, just for a reasonable  
22 amount of time?

23 MR. MEADE: Excuse me.

24 JUSTICE SCALIA: I don't understand the  
25 concept of stealing something for a reasonable amount of

1 time.

2 MR. MEADE: Well, I mean, that goes to the  
3 exact point, Justice Scalia, because we're not -- the  
4 question is what is stealing. The question --

5 JUSTICE BREYER: You're saying that the rule  
6 is something is theft only if you take it long enough to  
7 deprive an owner of a significant portion of its value?

8 MR. MEADE: Or a reasonable time, or to  
9 place --

10 JUSTICE BREYER: No, no, no. Wait. I want  
11 to know where that comes from, because I would think I  
12 have a Volvo. It lasts for about 30 years, apparently.  
13 So I guess if you took my car for a year, that that then  
14 would not be a theft, or maybe it would be. Where is  
15 the source of the rule you just cited?

16 MR. MEADE: The source is the generic  
17 definition as applied in all of the States.

18 JUSTICE BREYER: No, no. I want a book. I  
19 want a book that will tell me that if they take my car  
20 for a month it isn't theft, but if they take it for a  
21 year it is. What book, or where do I look to verify  
22 that this is common law? I'm not denying what you're  
23 saying. I just want to know where to look.

24 MR. MEADE: Sure. Two sources. One would  
25 be Professor LeFave in his discussion of what the intent

1 required for the different theft offenses; and the  
2 second source would be the Model Penal Code when it sets  
3 forth the requisite mens rea for theft offenses.

4 CHIEF JUSTICE ROBERTS: That was the third  
5 reference to the Model Penal Code, so I have to ask. No  
6 one's enacted the Model Penal Code, have they?

7 MR. MEADE: No. But in Taylor and in  
8 Seidler this Court used the Model Penal Code as a  
9 shorthand for the generic definition of a certain crime.  
10 But we don't rely on the Model Penal Code.

11 CHIEF JUSTICE ROBERTS: Would you describe  
12 the Model Penal Code as closer to restatement or  
13 aspirational in terms of its reflection of the existence  
14 of general law?

15 MR. MEADE: I would say that the Model Penal  
16 Code is consistent with the majority view. On this  
17 question of intent to steal, as we set forth in our  
18 brief, 42 States hold what we say the law is, that an  
19 intent to steal -- a theft offense requires a mens rea  
20 more than taking with an intent to give back.

21 JUSTICE SCALIA: You assert, you assert it's  
22 consistent with the majority view on this issue, not on  
23 everything. What does it say about the death penalty?

24 MR. MEADE: I'm not sure what it says about  
25 the death penalty. On this issue.

1 CHIEF JUSTICE ROBERTS: Is that what  
2 joyriding is? That when you're done with your joy ride,  
3 you return the car where you picked it up? I thought  
4 they just abandoned it wherever you happen to be.

5 MR. MEADE: If you abandon the car wherever  
6 you happen to be that's not joy riding. That's covered  
7 by traditional larceny principles. In the, the case of  
8 State v. Davis from 1875 involves that exact principle.  
9 That is larceny in that case. But however, if someone  
10 takes a car, a teenager, a neighbor takes a car, drives  
11 it around the block, brings it back to the same place,  
12 that is joyriding. That is covered by 108.51.

13 CHIEF JUSTICE ROBERTS: What's the joy in  
14 that?

15 (Laughter.)

16 JUSTICE SCALIA: The joy apparently is you  
17 don't get convicted of theft.

18 (Laughter.)

19 MR. MEADE: But what we have here is statute  
20 that criminalized conduct less serious than car theft.  
21 This is -- 108.51 is the only statute in California that  
22 covers joyriding. There's a whole different provision  
23 that deals with car theft. In cases where that's the  
24 appropriate charge, prosecutors will charge the person  
25 with car theft and meet the burden of proof. Here we're

1 dealing with a less serious crime, a less serious  
2 statute and the question is whether this statute that  
3 require a very minimal mens rea, with or without intent  
4 to steal, is sufficient to lead to the very serious  
5 consequences of being an aggravated felony.

6 CHIEF JUSTICE ROBERTS: Do you understand  
7 that point to be what the Ninth Circuit relied on?

8 MR. MEADE: No. Absolutely not. The Ninth  
9 Circuit didn't rely on that. It was presented to the  
10 Ninth Circuit but the Ninth Circuit did not rely on  
11 that.

12 CHIEF JUSTICE ROBERTS: So if we decided on  
13 the question, the aiding and abetting question, they did  
14 decide this would be available to you to argue on remand?

15 MR. MEADE: Uh, yes.

16 CHIEF JUSTICE ROBERTS: Because you  
17 presented it to the Ninth Circuit below.

18 MR. MEADE: Yes, it would.

19 I would like to also to address the question  
20 of accessory liability under California law.

21 108.51 expressly covers accessories. The  
22 Government concedes that if that term means accessory  
23 after the fact, then this statute is outside the generic  
24 definition of a theft offense. Under California law,  
25 accessory has only one meaning, and that one meaning is



1 accessory after the fact. On that ground alone, this  
2 statute is broader than a generic definition of theft  
3 offense and would provide a -- an alternate ground of  
4 affirmance in this case.

5 JUSTICE GINSBURG: Mr. Meade, the Government  
6 says that definition holds for penal code offenses, but  
7 it's not altogether clear that a definition in the penal  
8 code would carry over to the vehicle code.

9 MR. MEADE: I have two responses,  
10 Justice Ginsburg. First, there's a similar provision to  
11 108.51 covering the taking or operating of an airplane.  
12 It is in the penal code. It is 499(b). It exactly  
13 mirrors the language of 108.51. So presumably the  
14 Government would agree that the definition of accessory  
15 under California law in the penal code would cover  
16 499(b) for the same reasons it would cover under 108.51.  
17 Moreover, accessory under California law only has one  
18 meaning. In 1872 the California legislature passed the  
19 provision at issue, Section 32 and said accessory is  
20 defined to be accessory after the fact. At the same  
21 time, the legislature passed other provisions which also  
22 used accessory in that consistent way.

23 The California Supreme Court as early as  
24 1898 stated that accessory means accessory after the  
25 fact and relatedly, accessory before the fact, the only

1 other plausible meaning of the term, has no meaning  
2 under California law.

3 So with all due respect to the Government,  
4 accessory in 108.51 means accessory after the fact and  
5 that alone makes a broad and generic definition of theft  
6 offense.

7 JUSTICE ALITO: So wouldn't it odd for this  
8 Court to decide that issue of California law?

9 MR. MEADE: I wouldn't think it would be  
10 odd, Justice Alito, because it is so clear. It has to  
11 do with a statutory term. It has to do with a statutory  
12 term that's defined under the California statute.  
13 Moreover, under a Taylor inquiry, Federal courts are  
14 often required to look at state law to figure out  
15 whether a particular provision is within or outside a  
16 generic definition of a crime.

17 JUSTICE SCALIA: Of course if you're right  
18 about this it would mean the statute is broader, but it  
19 would still be available to find out whether your client  
20 was in fact convicted as an accessory or as a principal.

21 MR. MEADE: That's correct, Your Honor.

22 JUSTICE SCALIA: Now is that -- is it  
23 possible? Or is that out of the question in this case?

24 MR. MEADE: I'm sorry. Is what possible?

25 JUSTICE SCALIA: Is it possible from

1 pleading documents, from the charge, to determine  
2 whether he was convicted as an accessory or not? And if  
3 it's clear that he wasn't, then we're just wasting our  
4 sometime in arguing this point, aren't we?

5 MR. MEADE: I disagree. Because as an  
6 initial matter, this case in our view is about the  
7 categorical approach. But as to your question about  
8 what these documents show, no, the documents in this  
9 case do show that he was an accessory after the fact or  
10 a principal, but the Government has failed to meet its  
11 burden one way or the other.

12 CHIEF JUSTICE ROBERTS: Well, they say you  
13 cannot be convicted as an accessory unless you are  
14 charged as such, and that the documents show he was  
15 charged as a principal.

16 MR. MEADE: We disagree with that  
17 characterization of the Government as we set forth in  
18 our brief. California law does not require someone to  
19 be charged with that specific -- level of specificity.  
20 And that's something we set forth in our brief.  
21 Moreover --

22 JUSTICE GINSBURG: Well how about how -- how  
23 the defendant was charged in this very case?  
24 Mr. Himelfarb thought that it was plain from that  
25 charge, that's on 13(a), that he was charged as a

1 principal. And you must take the view that this charge,  
2 this information was inadequate to identify him as  
3 principal.

4 MR. MEADE: This charge is ambiguous as to  
5 whether he was charged as a driver and taker, as the  
6 principal, or as an accessory after the fact.

7 JUSTICE SCALIA: No, no, no. It says, "who  
8 at the time and place last aforesaid did willfully and  
9 unlawfully drive or take a vehicle." I mean, he is --  
10 he's charged with being the person who took the vehicle,  
11 not, not some subsequent accessory.

12 MR. MEADE: Well, this is a question of  
13 California law.

14 JUSTICE SCALIA: It is not a question of Cal  
15 -- it is a question of English.

16 MR. MEADE: No, I disagree, Your Honor. I  
17 mean, it's a question of California law what needs to be  
18 charged in a California charging document.

19 JUSTICE SCALIA: We're not saying about what  
20 needs to be charged. We're talking about what was  
21 charged. And it seems to me there's no question what  
22 was charged is that he did willfully and unlawfully  
23 drive or take a vehicle. There is no way you can  
24 consider that an accessory.

25 MR. MEADE: Well, I disagree. Because under

1 California law you need to charge generally under the  
2 statute, and the statute says drive or take. That's how  
3 he was charged. Moreover, though, under California law,  
4 the charging document does not necessarily control the  
5 conviction.

6 JUSTICE SOUTER: No, but you're -- you're  
7 saying then despite the fact that the, the indictment in  
8 this case said he willfully et cetera did this, it would  
9 be open to California to prove that in fact he didn't do  
10 any of those things, but was merely an accessory after  
11 the fact? That -- that's your position? That's what  
12 California pleading law allows?

13 MR. MEADE: Yes.

14 JUSTICE SOUTER: Okay.

15 JUSTICE STEVENS? Do you have any case on  
16 that?

17 MR. MEADE: Yes. People v West and People v  
18 Toro.

19 JUSTICE STEVENS: Both West and Toro.

20 MR. MEADE: Yes. W-e-s-t, and People v  
21 Toro. There's also the case of Sandoval which is also  
22 cited in our brief.

23 JUSTICE STEVENS: Does any of those cases  
24 squarely hold that he could be convicted of being an  
25 accessory after the fact on a general indictment like

1 this?

2 MR. MEADE: No, none of them do. They talk  
3 about the general principle under California law, about  
4 that a charging document does not necessarily control  
5 the ultimate conviction and sets forth the test that  
6 needs to be applied. But on this question --

7 CHIEF JUSTICE ROBERTS: Well, the Government  
8 -- it is not only that. The Government has authority  
9 going the other way. People versus Prado, "in the  
10 absence of a statute, an accessory after the fact must  
11 be indicted and convicted as such." If you look at this  
12 information, it's clear that he's not being indicted as  
13 an accessory after the fact.

14 MR. MEADE: Well, we think People v Prado  
15 supports our view which is a statute specifically that  
16 allows for accessory liability on its face. So,  
17 therefore, a person need not be charged under the  
18 different accessory statute.

19 However, to the extent this Court finds the  
20 charging documents or ultimate conviction ambiguous,  
21 which it sounds like some members of the Court may  
22 believe it is, this is a question of California law, as  
23 a first point; but moreover, the question here is  
24 whether the Government has met its burden under Taylor  
25 and Shepard. And under Taylor and Shepard the inquiry

1 is whether it can necessarily be shown that someone was  
2 convicted of a generic definition; and here, given the  
3 ambiguity under California law, it can't be said that --

4 JUSTICE BREYER: But what do we do about  
5 that? No, you have no interest in answering my  
6 question, but the question, it seems to me under the  
7 law, here is what I do -- and I'm a good deference  
8 lawyer, as you are. I simply look at the statute. And  
9 I imagine some very weird case that the statute could  
10 cover where the person wouldn't have the right intent or  
11 it wouldn't be theft or it would be some odd thing.  
12 There's no possibility in the world that applied to my  
13 client. But most charges are simply stated in the  
14 wording of the statute. And most judgments simply say  
15 guilty.

16 So I say "see, you see, it is theoretically  
17 possible." And now when you decide what really  
18 happened, Court, you're supposed to look only to the  
19 charging documents in the judgment; and you can't say it  
20 didn't. So the whole congressional scheme is basically  
21 put to the side.

22 Now what's the answer to that problem,  
23 insofar as you want to answer it?

24 MR. MEADE: Of course, I'd be happy to. I  
25 don't think it puts the whole scheme aside. Remember,

1 the Government gets two bites at the apple here. They  
2 get a first bite on the categorical approach where all  
3 they need to show is that all the elements are within  
4 the generic definition of the crime. We'd be dealing  
5 with a different case if the person was charged under  
6 the penal code which doesn't require -- which requires  
7 intent to steal and which does not cover accessories  
8 after the fact. So the Government gets a free pass on  
9 round one.

10 On round two, on the modified categorical  
11 approach as we're discussing here, the Government gets a  
12 second chance to -- based on actual documents in the  
13 record to establish whether there's enough there.

14 Here the Government relies on the charging  
15 document in an abstractive judgment, but the Government  
16 does not put in a plea colloquy, it does not put in plea  
17 allocution, it does not put in any other documents that  
18 would establish under Shepard that someone was  
19 necessarily convicted of the crime. So what -- the  
20 Government here is asking to be relieved of its burden  
21 of proof which it has in this case. I would like to  
22 note that on the --

23 JUSTICE SCALIA: But the charging document  
24 you acknowledge would suffice if it indeed is California  
25 law that in order to convict as an accessory you have to



1 charge as an accessory? You would acknowledge this?

2 MR. MEADE: Yes. I would acknowledge the  
3 charging document unto itself, but not taking into  
4 account the fact that the charging document and the  
5 conviction not match.

6 I would note, though, that the Court need  
7 not go to the modified categorical approach, and I would  
8 say should not. This is something that the board -- the  
9 agency has been able to deal with for 60 years or so,  
10 dealing with the actual documents, trying to figure out  
11 a whether particular charging document is or is not  
12 enough. In Shepard itself, which actually dealt with  
13 the question of which documents could or could not be  
14 considered, the Court did not go further and look at the  
15 next step and decide whether those particular documents  
16 did or did not meet the definition in that case.

17 I'd also like to note to the extent that  
18 this Court finds California charging law ambiguous or  
19 hard to understand, under the principle of Jett v Dallas  
20 Independent School District, the circuit courts are in a  
21 better position to consider a matter of California State  
22 law in the first instance.

23 So our accessory argument is that the Court  
24 should decide the categorical approach alone on the  
25 accessory after the fact ground and remand to the agency

1 for consideration under the modified approach.

2 I'd like to also stress that if the Court  
3 were to affirm on that ground it would be a very narrow  
4 holding. There's only two other statutes in California  
5 that expressly include accessories after the fact.  
6 California's car theft statute does not include  
7 accessories after the fact.

8 JUSTICE ALITO: In order to agree with you  
9 on the accessory point, though, don't we have to decide  
10 two disputed issues of California law? Whether  
11 accessory here in this statute means accessory after the  
12 fact, and whether if somebody is charged under that  
13 statute as an accessory, that has to be alleged  
14 specifically in the indictment, or whether it is just  
15 sufficient to charge the person with the offense.

16 MR. MEADE: The Court would only need to  
17 decide that first question, not the second question.  
18 The first question is what is the meaning of accessory  
19 under California law. That is sufficiently clear in our  
20 view that the Court need not send it back to the Court  
21 of Appeals. The second question under the modified  
22 approach is outside the core of what this case is about,  
23 and we suggest that that should be remanded to the Ninth  
24 Circuit or the agency.

25 CHIEF JUSTICE ROBERTS: Has anyone ever been

1 prosecuted as an accessory after the fact to joyriding?

2 MR. MEADE: I do not know one way or the  
3 other, Your Honor. But I also note that we don't know  
4 whether anyone has been prosecuted under 108.51 on that  
5 ground, we also do not know whether someone has been  
6 prosecuted under Section 32, which is the accessory  
7 after the fact provision, or more generally on that  
8 ground.

9 CHIEF JUSTICE ROBERTS: But if no one has  
10 ever been prosecuted as an accessory after the fact for  
11 joyriding, we'd really have to go out on a limb to  
12 construe this charging document which charges him as a  
13 principal as actually meaning to charge him as an  
14 accessory after the fact, wouldn't we?

15 MR. MEADE: Not necessarily, because what we  
16 have is a statutory provision that clearly covers  
17 accessories after the fact. We do not have an example  
18 of someone who was charged under 108.51, but there are  
19 many reasons why that may not show up, partly because  
20 the charging documents don't need to so provide, in our  
21 view. So figuring out who was and who was not an  
22 accessory after the fact or a principal under 108.51 is  
23 not so easy to distill.

24 JUSTICE BREYER: Have you been able to think  
25 of any examples where a person could have been,

1 convicted of this statute, under the statute would he  
2 actually have been some kind of accessory to another  
3 person committing another crime, and the natural and  
4 probable consequence was that that other person would  
5 violate this statute?

6 MR. MEADE: So --

7 JUSTICE BREYER: Have you been able to think  
8 of one?

9 MR. MEADE: Sure. So you're switching to  
10 the natural and probable consequences?

11 JUSTICE BREYER: Yes, I am.

12 MR. MEADE: Yes, and I thank you for that  
13 question. Someone who, say, could aid and abet, or have  
14 the intent to aid and abet purchasing alcohol for a  
15 minor, a natural and probable consequence of that could  
16 be joyriding.

17 I would also like to -- turning to the  
18 question of the natural and probable consequences  
19 doctrine, the government is incorrect when it states  
20 that the majority view accepts the natural and probable  
21 consequences.

22 JUSTICE ALITO: Are there cases that hold  
23 that the natural and probably consequences of purchasing  
24 alcohol for a minor could be joyriding?

25 MR. MEADE: We have not found a case on

1 that. However --

2 JUSTICE ALITO: Or anything else that  
3 somebody might do after getting intoxicated?

4 JUSTICE SCALIA: Partying maybe I would  
5 understand. I don't know about joyriding.

6 MR. MEADE: The natural and probable  
7 consequences theory cuts across a wide variety of  
8 crimes, as the government points out. So it would also  
9 cover the different provisions under the INA such as  
10 burglary, theft, and other provisions as well. The  
11 government, though, is incorrect in stating that the  
12 natural and probable consequences is a majority view.  
13 Even in its brief, the government only sets forth 22  
14 states that it says apply that analysis.

15 Those 22 states that the government cites,  
16 many of them do not support the proposition that it is a  
17 majority view or even applied in those states. For  
18 example, just to give a couple of examples, the  
19 government cites Missouri as a state that applies the  
20 natural and probable consequences doctrine. However in  
21 Missouri, in the very case cited by the government,  
22 *People v. Evans*, the court rejects the use of the  
23 natural and probable consequences doctrine and says,  
24 "The use of the natural and probable consequences  
25 doctrine was error as a matter of law."

1           The same is true -- and that's on the same  
2 page the government cites. The same is true with  
3 respect to Maryland, where the same footnote that the  
4 government cites rejects the natural and probable  
5 consequences doctrine in favor of a narrower theory.  
6 It's also true in Idaho, Louisiana, Georgia and Texas,  
7 also do not apply the natural and probable consequences  
8 doctrine.

9           So what, the government here is seeking to  
10 hold someone guilty of a theft offense as an aggravated  
11 felony without the requisite mens rea, and something  
12 that's a minority view of the states.

13           Just to put this into context, under the  
14 natural and probable consequences doctrine, it's as if  
15 California passed a statute saying that in some cases  
16 someone can be guilty of burglary without the mens rea  
17 of burglary, or saying that one can be guilty of theft  
18 without the mens rea of theft.

19           CHIEF JUSTICE ROBERTS: Your argument isn't  
20 limited to theft offenses, correct? That would cut  
21 across all of these areas in which the federal law  
22 refers, in which a Taylor analysis would apply?

23           MR. MEADE: Yes, it would. So it would not  
24 necessarily apply to the non-Taylor provisions such as  
25 the one --

1 CHIEF JUSTICE ROBERTS: It would mean we  
2 could not rely on the categorical approach in almost any  
3 of those cases?

4 MR. MEADE: As -- on the first step, yes.

5 CHIEF JUSTICE ROBERTS: Yeah, the  
6 categorical approach.

7 MR. MEADE: It does mean that, Your Honor.

8 JUSTICE BREYER: Well then, what's an  
9 example of where you're held guilty on the ground that  
10 you aided and abetted natural and probable -- somebody  
11 did X and the natural and probable consequence was  
12 Y. Because after all, you are properly held guilty when  
13 you do an act and a known consequence is Y. So what's an  
14 example of that?

15 MR. MEADE: Sure. I'd be happy to give a  
16 number of examples.

17 JUSTICE BREYER: One would be good enough.  
18 The best one.

19 MR. MEADE: If you intend to aid and abet  
20 robbery, you intend to aid and abet robbery, you can be  
21 held liable for an unintended rape of another. If you  
22 aid and abet --

23 JUSTICE BREYER: That's a known and probable  
24 consequence? That's a probable consequence?

25 MR. MEADE: Yes.

1 JUSTICE BREYER: Well then, maybe the  
2 problem is that they don't define natural and probable  
3 consequence properly.

4 MR. MEADE: Well, this is how it's applied  
5 under California law. To give another example --

6 JUSTICE SCALIA: Wait a minute. That's a  
7 real case?

8 MR. MEADE: That's a real case, and I'll  
9 give you the cite. People v. Banks, 2002 Westlaw 192,  
10 720. There's another case cited in our brief, aid and  
11 abet robbery, natural probable consequence, sex  
12 offenses, that's the People v. Nguyen case. Another  
13 example, a person who has the intention to aid and abet  
14 battery, beating someone up, can be held guilty for an  
15 unintended robbery.

16 And to show how stark this is, this is in  
17 California, it's broader than even the common law.

18 JUSTICE SCALIA: It sounds like the doctrine  
19 of unnatural improbable consequences.

20 (Laughter.)

21 JUSTICE BREYER: You're asking us to say  
22 that not only do the states have to have the same rule,  
23 but they have to interpret the rule the same way. This  
24 would make the application of the categorical approach  
25 impossible. You'd have to look not only to the



1 expression of the rule of law by the state courts, but  
2 to its application by the state courts in every  
3 jurisdiction. I mean, that just makes the whole  
4 enterprise infeasible, it seems to me.

5 MR. MEADE: What the Taylor analysis looks  
6 to is what's in the heartland of a certain crime, and  
7 here what's in the heartland of aiding and abetting.  
8 And what we have here is an aberrant doctrine of  
9 California law that is outside the mainstream.

10 JUSTICE SCALIA: Let me tell you, what's  
11 aberrant is the California interpretation of the  
12 standard doctrine that is used in many states, which is  
13 you intend the natural and probable consequences of what  
14 you do. And if California has, some California courts  
15 have come up with weird notions of that, I don't know  
16 that that destroys the uniformity among the states.

17 MR. MEADE: Just to briefly respond?

18 CHIEF JUSTICE ROBERTS: Yes, sir.

19 MR. MEADE: The rule that you state is that  
20 one intends the natural and probable consequences of  
21 one's own acts. We do not dispute this rule. The  
22 question is as applied to aiding and abetting liability,  
23 and California is one of a handful of states that  
24 applies the natural and probable consequences doctrine  
25 to aiding and abetting liability, which has the novel

1 and aberrant consequences of holding people liable even  
2 if they don't have the requisite mens rea for the  
3 offense.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 Mr. Meade.

6 Mr. Himelfarb, you have four minutes  
7 remaining.

8 REBUTTAL ARGUMENT OF DAN HIMMELFARB  
9 ON BEHALF OF PETITIONER

10 JUSTICE KENNEDY: Would it be completely  
11 inconsistent with Taylor versus United States for us to  
12 say that when there is a novel or an unusual theory of  
13 potential liability such as proposed by the respondent,  
14 which would exonerate him from application of this  
15 statute, that he has the burden to show that that's what  
16 happened?

17 MR. HIMMELFARB: Well, we think --

18 JUSTICE KENNEDY: Would Taylor allow us to  
19 do that sort of burden shifting?

20 MR. HIMMELFARB: Well ultimately,  
21 Justice Kennedy, we don't think that Taylor controls on  
22 the question of what Congress's intent was under the  
23 INA. Ultimately Taylor was a question about Congress's  
24 intent in enacting the Armed Career Criminal Act, and  
25 every aspect of that decision was tied in some way to

1 Congress's intent there.

2           We think Congress's intent in enacting the  
3 aggravated felony provision of the INA has to be that it  
4 didn't intend that you would have these highly arcane  
5 comparisons of some general definition of aiding and  
6 abetting, which either would or wouldn't include the  
7 infinite variety of formulations of aiding and abetting.

8           JUSTICE KENNEDY: And so your general rule  
9 to accomplish your objective would be?

10           MR. HIMMELFARB: It's the one I suggested  
11 when I was up here earlier, which is a holding by this  
12 Court that Congress intended to include aiding and  
13 abetting liability in the aggravated felony provision,  
14 and intended to cover whatever formulations were extant  
15 in 1988 when the provision was enacted. The Court can  
16 leave open the possibility that if in some future case,  
17 some jurisdiction were to enact an extraordinarily far  
18 reaching theretofore unheard of formulation, for  
19 example, anybody who intentionally insists -- assists --  
20 without regard to whether the person even knew about the  
21 principles of criminal conduct, could be held liable as  
22 an aider and abettor. In that circumstance, it might  
23 well be the case that a state, by adopting such a far  
24 reaching theory of aiding and abetting, would in effect  
25 forfeit the right to have any of the subsequent

1 provisions in its criminal code treated as aggravated  
2 felonies unless the government in the immigration case  
3 could somehow prove that the alien wasn't convicted as  
4 an aider and abettor.

5 JUSTICE SOUTER: I think that, the problem I  
6 guess that I have with your argument, is that the theory  
7 of Taylor and as carried forward in Shepard was that  
8 there was a concept of a generic offense. And when  
9 aiding and abetting liability is extended in the natural  
10 and probable consequences theory, we face the fact that  
11 regardless of what the actual count is, even on your  
12 count, there isn't even a majority of states that do it.  
13 And I have difficulty seeing how that can, therefore,  
14 form an element of a generic offense when it is -- or a  
15 generic concept of the offense -- when it is a minority  
16 view.

17 MR. HIMMELFARB: Well, even under our  
18 fallback position, Justice Souter, under which you would  
19 have to come up with some general definition of aiding  
20 and abetting and then make a comparison with the law of  
21 aiding and abetting in the jurisdiction of conviction.  
22 And even if it's, you know, 20-20 or 18-18 among the  
23 states on this particular wrinkle in the law of aiding  
24 and abetting, we think it is frankly dispositive in this  
25 case, that it is the Federal rule, and my friend

1 Mr. Meade has not disputed that.

2 We think it's just inconceivable that  
3 Congress would have intended that in a Federal criminal  
4 case if you're charged with murder, you can be convicted  
5 under a natural and probable consequences theory such  
6 that you could conceivably spend life in prison the same  
7 way a principal would, and yet you would not be subject  
8 to the same immigration consequences as somebody  
9 convicted of the principal offense of murder, and  
10 indeed, that you wouldn't even be able -- the government  
11 wouldn't be able to --

12 JUSTICE SOUTER: Why didn't we simply take  
13 the closest Federal definition as being the touchstone?

14 MR. HIMMELFARB: Well, I -- in Taylor?

15 JUSTICE SOUTER: Yes.

16 MR. HIMMELFARB: I think that one of the  
17 problems in Taylor was that there really is no Federal  
18 definition of burglary. That's part of it. The other  
19 part of it is to some extent, the Court did rely on the  
20 Federal definition in Taylor. The original version, the  
21 original version of the office statute defined burglary,  
22 and it defined it in a generic way which was broader  
23 than the common law rule.

24 JUSTICE SOUTER: Was Taylor an immigration  
25 case?

1                   MR. HIMMELFARB: No, it wasn't. It was a  
2 criminal case.

3                   JUSTICE SOUTER: So you are in effect, you  
4 would say that the rule should be, or the modified  
5 Taylor rule for application here should be that it's  
6 either got to fall within the concept of the Federal  
7 offense, or in default of there being a comparable  
8 Federal offense, a generic offense defined by reference  
9 to state practice?

10                  MR. HIMMELFARB: May I answer the question?

11                  CHIEF JUSTICE ROBERTS: Certainly.

12                  MR. HIMMELFARB: Our primary submission is  
13 that in the context of aiding and abetting, there  
14 shouldn't be any generic definition beyond what the  
15 states apply, whatever the formulation. Our fallback  
16 position is essentially what you just described, and we  
17 think we should prevail under it because we think we  
18 have the Federal rule. We think we have the majority  
19 rule in the states. And we have the common law rule as  
20 well.

21                  CHIEF JUSTICE ROBERTS: Thank you,  
22 Mr. Himmelfarb. The case is submitted.

23                  (Whereupon, at 11:08 a.m., the case in the  
24 above-entitled matter was submitted.)

25

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