No. 05-1629

IN THE

Supreme Court of the United States

ALBERTO GONZALES, ATTORNEY GENERAL,
Petitioner,

v.

LUIS ALEXANDER DUENAS-ALVAREZ,
Respondent.

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

BRIEF FOR THE RESPONDENT

CHRISTOPHER J. MEADE
Counsel of Record
ANNE K. SMALL
JANET R. CARTER
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

QUESTION PRESENTED

Whether a "theft offense," which is an "aggravated felony" under the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(G), includes aiding and abetting the commission of the offense.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES & RULES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

LEGISLATIVE HISTORY

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

IN THE

Supreme Court of the United States

No. 05-1629

ALBERTO GONZALES, ATTORNEY GENERAL,
Petitioner,

v.

LUIS ALEXANDER DUENAS-ALVAREZ,
Respondent.

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

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported. The decisions of the Board of Immigration Appeals (Pet. App. 3a) and the Immigration Judge (Pet. App. 4a-10a) are also unreported.

STATUTORY PROVISIONS INVOLVED

1. California Vehicle Code § 10851 provides in relevant part:

> Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a

> party or accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense and, upon conviction thereof, shall be punished by imprisonment in a county jail for not more than one year or in the state prison or by a fine of not more than five thousand dollars ($5,000), or by both the fine and imprisonment.

Cal. Veh. Code § 10851(a).

2. The Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(43)(G), defines "aggravated felony" to include "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year."

STATEMENT

1. An alien deemed to be convicted of an "aggravated felony," 8 U.S.C. § 1101(a)(43), is subject to severe and wide-ranging consequences. Such an alien is subject to, *inter alia*, mandatory removal, *id.* §§ 1227(a)(2), 1229b(a) (barring discretionary relief from removal), and is permanently barred from returning to the United States, *id.* § 1182(a)(9)(A)(i). Among the offenses that qualify as aggravated felonies are "theft offense[s] (including receipt of stolen property) . . . ." *Id.* § 1101(a)(43)(G).

Taylor v. *United States*, 495 U.S. 575, 599-602 (1990) sets forth the two-part test that courts apply to determine whether a conviction under a particular statute qualifies as a conviction for the relevant offense under the INA. The first step—the "categorical" approach—asks whether all conduct covered by the statute of conviction falls within the "generic" definition of the relevant offense (*i.e.*, "the generic sense in which the term is now used in the criminal codes of most States," *id.* at 598). If it does, then the conviction qualifies categorically as an aggravated felony. If the statute of conviction is broader, however, then the court moves on to the second step—the "modified categorical" approach. Under this step, the court reviews certain documents in the record to determine whether the particular offense of which

the defendant was convicted falls within the scope of the generic definition. *Id.* at 602.

2. Luis Duenas-Alvarez, a native and citizen of Peru, became a lawful permanent resident of the United States in 1998. In 2004, the Department of Homeland Security initiated removal proceedings charging Duenas-Alvarez with removability based, *inter alia*, on his conviction for an alleged aggravated felony, namely a "theft offense." At issue was Duenas-Alvarez's 2002 conviction, pursuant to a guilty plea, under California Vehicle Code § 10851.

3. California Vehicle Code § 10851(a) outlaws the taking or driving of a vehicle "without the consent of the owner" and "with intent either to permanently or temporarily deprive the owner thereof of . . . title to or possession of the vehicle, whether with or without intent to steal." The inclusion of temporary takings and liability without the intent to steal means that § 10851 covers what is typically referred to as "joyriding." It also explicitly includes liability for an "accessory," which is defined under California law to be an accessory after the fact. Cal. Penal Code § 32. Section 10851 has been interpreted as proscribing a variety of conduct. *See generally People* v. *Garza*, 111 P.3d 310, 315 (Cal. 2005).

The scope and application of California Vehicle Code § 10851 is aptly demonstrated when it is placed in the context of the California Penal Code's theft statutes—the general theft statute, Cal. Penal Code § 484(a), and the grand theft statute, § 487(d). Section 484(a) states that any person who, *inter alia*, "feloniously steal[s], take[s], . . . lead[s], or drive[s] away the personal property of another . . . is guilty of theft." Section 487(d) in turn provides that the taking of an automobile, of whatever value, constitutes "grand theft." A joyrider could not be convicted under these statutes, as he would lack the requisite intent. *See, e.g.*, *People* v. *Davis*, 965 P.2d 1165, 1167-1168 (Cal. 1998). And, unlike § 10851, these statutes do not include liability for accessories after the fact.

4. The Immigration Judge in Duenas-Alvarez's removal proceeding determined that California Vehicle Code § 10851 was a categorical theft offense under the first step of the *Taylor* analysis. Pet. App. 9a. The Board of Immigration Appeals affirmed. *Id.* at 3a. Duenas-Alvarez petitioned for review in the Ninth Circuit.

5. While the petition was pending, the Ninth Circuit decided *Penuliar* v. *Ashcroft*, 395 F.3d 1037 (2005), *amended*, 435 F.3d 961 (9th. Cir.), *petition for cert. filed*, 75 U.S.L.W. 3001 (June 22, 2006) (No. 05-1630). In that case, the Ninth Circuit concluded that California Vehicle Code § 10851 was not a categorical "theft offense" under *Taylor* because it imposed broader liability than a generic "theft offense." 395 F.3d at 1044-1045. Specifically, the court noted that the statute expressly includes liability for accessories. *Id.* at 1044.

6. In light of its decision in *Penuliar*, the Ninth Circuit granted Duenas-Alvarez's petition: "As the government notes, we recently held that a violation of section 10851(a) does not categorically qualify as a theft offense because that section is broader than the generic definition of a theft offense" under the INA. Pet. App. 2a. As requested by the Government, the court remanded Duenas-Alvarez's case to the BIA for further proceedings. *Id.*

SUMMARY OF ARGUMENT

Initially, the Government asked the Court to decide a phantom question. It urged the Court to reject language used in the Ninth Circuit's *Penuliar* opinion that could possibly—but should not—be read contrary to the Government's view of the question presented. But "this Court reviews judgments, not opinions." *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Bowen* v. *American Hosp. Ass'n*, 476 U.S. 610, 625-626 n.11 (1986); *see also Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 823 (1985) (Stevens, J., concurring in part and dissenting in part) ("Our job, however, is to review judgments, not to edit opinions."). Because this Court "is not bound to en-

counter phantoms," the proper question is "was the judgment correct." *McClung* v. *Silliman*, 19 U.S. (6 Wheat.) 598, 603 (1821) (emphasis omitted).

In recognition of these principles, the Government's brief acknowledges the actual dispute between the parties: whether California Vehicle Code § 10851 is categorically a "theft offense" under the INA. *See* Gov't Br. III, 9, 27-30.

Under *Taylor* v. *United States*, 495 U.S. 575, 598-602 (1990), the answer is clearly no. Pursuant to *Taylor*'s "categorical" approach, the question is whether all conduct covered by the statute of conviction falls within the "generic" definition of the relevant offense, *i.e.*, "the generic sense in which the term is now used in the criminal codes of most States." *Id.* at 598. California Vehicle Code § 10851 is broader than the generic definition of "theft offense" for multiple reasons, any one of which suffices as a ground for affirmance.

First, California Vehicle Code § 10851 is not a categorical "theft offense" because it includes liability for accessories after the fact (those who assist the principal *after* the completion of the crime). In its brief, the Government concedes that accessory after the fact liability is beyond the scope of the generic definition of "theft offense" and, therefore, that if § 10851 reaches accessories after the fact, then it is not a categorical theft offense. The only dispute, then, concerns whether this particular statute—§ 10851—reaches accessories after the fact. The Government's feeble protestations notwithstanding, the statute plainly does so. The statute itself explicitly includes liability for an "accessory," and California statutes and case law make plain that "accessory" means "accessory after the fact."

Second, California Vehicle Code § 10851 is not a categorical "theft offense" due to the broad sweep of aiding and abetting liability in California. While Respondent does not dispute that, as a general matter, aiding and abetting liability is included in the generic definition of a crime, that does not resolve this case, which involves *California* aiding and abetting liability. California takes an especially broad ap-

proach to aiding and abetting liability; it is one of a minority of states that apply the disfavored "natural and probable consequences" doctrine. Pursuant to this doctrine, one guilty as an aider and abettor of one crime may be held liable for a *second* crime so long as the second crime is the natural and probable consequence of the original crime that he aided and abetted. Because California's expansive aiding and abetting liability is broader than the approach in the majority of states, § 10851 covers conduct beyond the generic definition of "theft offense" for this reason as well.

Third, California Vehicle Code § 10851 is not a categorical "theft offense" because it does not require the prosecutor to prove the mens rea necessary for theft. In fact, the statute specifically negates the intent commonly associated with larceny—an intent to steal—as it states that one is liable under § 10851 "with or without intent to steal." Section 10851 draws within its broad scope the offense commonly known as "joyriding," and permits conviction of an individual who took a vehicle intending only to use it for a brief time and return it. At common law and today, a more culpable mens rea is required to constitute a theft offense. Thus, the minimal showing of intent required by § 10851 also warrants the conclusion that the provision is not a categorical "theft offense."

Although the Court is in a position to address any arguments regarding the first step of *Taylor*—whether § 10851 is a categorical "theft offense"—the Court should not reach beyond that analysis to the second step of *Taylor*, the modified categorical approach. The Ninth Circuit addressed the categorical question alone and remanded to the BIA for additional consideration under the modified approach. This Court should take the same approach and remand the case to the agency for consideration of the modified approach in the first instance. Regardless, however, the modified categorical inquiry does not support the Government's view; the documents the Government relies on fail to demonstrate that Respondent was in fact convicted of a "theft offense" as generically defined.

ARGUMENT

I. CALIFORNIA VEHICLE CODE § 10851 COVERS ACCESSORIES AFTER THE FACT AND, THEREFORE, EXCEEDS THE GENERIC DEFINITION OF "THEFT OFFENSE"

The Government concedes, as it must, that "[i]f Section 10851(a) reaches accessories after the fact, . . . a violation of the statute is not a theft offense as a 'categorical' matter." Gov't Br. 29 (footnote omitted); *see also id.* at 9. The only question, then, is whether California Vehicle Code § 10851 reaches accessories after the fact. Because it clearly does so, § 10851 is not a categorical "theft offense" under the INA.

A. Accessories After the Fact Are Beyond The Scope Of The Generic Definition Of A Theft Offense

At common law, there were four main parties to a crime: (1) "principal in the first degree"; (2) "principal in the second degree," also known as an aider and abettor present; (3) "accessory before the fact," also known as an aider and abettor not present; and (4) "accessory after the fact." 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.1 (2d ed. 2003); *see also* 4 William Blackstone, *Commentaries*, at 34-40. In brief, the principal in the first degree is the actor who engages in the criminal act (2 LaFave § 13.1(a)); principals in the second degree are present at the crime and "aid, counsel, command, or encourage the principal in the first degree in the commission of that offense" (*id.* § 13.1(b)); the accessory before the fact is not present at the crime but "orders, counsels, encourages, or otherwise aids and abets another to commit a felony" (*id.* § 13.1(c)); and the accessory after the fact offers assistance to the principal after the crime is complete (*id.* § 13.1).

Modern penal codes have done away with the distinctions among the first three categories. Principals and aiders and abettors (present and not present) "have all played a part in the commission of the crime and are quite appropriately held accountable for its commission." 2 LaFave § 13.6(a).

By contrast, the category of accessory after the fact has not been collapsed with the others. *See* 2 LaFave § 13.6(a); *see also* Gov't Br. 11-12 & n.3. An accessory after the fact "had no part in causing the crime" and is "not deemed a participant in the felony." 2 LaFave §§ 13.6(a), 13.1. Instead, the offense of the accessory after the fact is considered to be "that of interfering with the processes of justice and is best dealt with in those terms." *Id.* § 13.6(a).

In fact, in all fifty states and the District of Columbia, an accessory after the fact is not liable for an offense as a principal. Br. in Opp. 17-24. Thus, and as the Government concedes, it is clear that a statute that reaches accessories after the fact is beyond the generic definition of a "theft offense." *See* Gov't Br. 9, 29; *see also Taylor*, 495 U.S. at 598.[1]

B. Section 10851 Reaches Accessories After The Fact

The only question, then, is whether California Vehicle Code § 10851 covers accessories after the fact. The plain language of the statute explicitly reaches the conduct of an "accessory." And under California law, that term refers to an accessory after the fact.

Provisions in the California Penal Code dating back to 1872 establish that the term "accessory" means accessory

---

[1] Respondent raised this argument below. Starting with the IJ, Respondent argued, *inter alia*, that because § 10851 includes liability for "a party, accessory or accomplice" in the "driving or . . . taking" of a vehicle, it exceeds the scope of the generic definition of "theft offense." Pet. App. 29a-30a. Respondent further confirmed that his argument was based in part on the inclusion of liability for accessories by arguing that his conviction was not for a "theft offense" under the modified approach because "Respondent may have been convicted as 'a party, accessory or accomplice.'" *Id.* at 30a. Later, proceeding pro se before the Ninth Circuit, Respondent again stressed the point that § 10851 includes liability for accessories. *See* Pet.-Appellant's Substitute Opening Br., No. 04-74471, at 14. Moreover, the Ninth Circuit understood the accessory argument to be properly before it—as explained in Part I.B. *infra*, California Vehicle Code § 10851's liability for accessories formed the basis for the court's decision.

after the fact as a matter of California law. Section 30, entitled "Classification of Parties to Crime," breaks the parties to a crime down into two categories: "The parties to crimes are classified as: (1) Principals; and, (2) Accessories." Cal. Penal Code § 30. The sections that follow—§ 31 and § 32—pertain to these two classifications respectively. Most notably for present purposes, § 32, which is entitled "Accessories defined," establishes that an "accessory" is one who assists a principal *after* a crime has been committed.[2] The conduct covered by § 32 is that of an accessory after the fact. *See generally* 2 LaFave § 13.6(a); *see also* Gov't Br. 28 ("As used in Section 32 of the Penal Code, . . . an 'accessory' is an accessory after the fact."). The section of the Penal Code immediately following sets forth the relevant punishment for "accessories," *i.e.*, accessories after the fact. Cal. Penal Code § 33.[3]

Significantly, contemporaneous with the enactment of §§ 30-33 of the Penal Code, California abrogated the distinction between principals in the first and second degree and accessories before the fact. *See* Cal. Penal Code § 971 ("The distinction between an accessory before the fact and a principal, and between principals in the first and second degree is abrogated . . . .").

Thus, the term "accessory *before* the fact" has not been a relevant category under California law since 1872. *See People* v. *Collum*, 54 P. 589, 590 (Cal. 1898) ("[I]n this state an access[o]ry before the fact is not recognized."); *see also infra* n.7. As a result, common law "accessories after the

---

[2] California Penal Code § 32 provides:

> Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony.

[3] Section 31 sets forth those liable as principals, a group that includes aiders and abettors.

fact" became known simply as "accessories." *See, e.g.*, *Collum*, 54 P. at 590 (using the term "accessory" to reference an accessory after the fact); *Ex parte Goldman*, 88 P. 819, 820-821 (Cal. Dist. Ct. App. 1906) (same). By 1923, when the precursor to California Vehicle Code § 10851 first included liability for an "accessory,"[4] the term "accessory" had an established meaning under California law.[5]

Notwithstanding the unambiguous state of the law, the Government makes a handful of assertions aimed at undermining the conclusion that California Vehicle Code § 10851 includes liability for accessories after the fact. Gov't Br. 29. None of these arguments is availing.

The Government's main contention is that California Penal Code § 32 does not "provide a definition of a term" but, rather, merely "describes an offense." Gov't Br. 29. This assertion is curious in light of the title of § 32: "Accessories defined." Moreover, the legislature and the courts have long understood § 32 as defining the term "accessory." *See, e.g.*, 1935 Cal. Stat. 1484 (passing "An act to amend section 32 of the Penal Code, *relating to the definition of an accessory*" (emphasis added)).[6]

---

[4] The predecessor to § 10851 was first passed in 1913. That provision stated: "Any person who shall drive or operate, or cause to be driven or operated . . . any motor vehicle not his own, with or without intent to steal the same, in the absence of the owner thereof, and without such owner's consent shall be guilty of a felony . . . ." 1913 Cal. Stat. 651. In 1923 that provision was amended to include liability for an "accessory." 1923 Cal. Stat. 564. It provided in relevant part that "[a]ny person who assists in, or is a party or accessory to or an accomplice in, any such stealing or unauthorized taking or driving, shall also be deemed guilty of a felony." *Id.*

[5] Case law in the ensuing years confirms this point. *See, e.g., People* v. *Mitten*, 112 Cal. Rptr. 713, 715 (Cal. Ct. App. 1974) ("[O]ne who would formerly have been an 'accessory after the fact' is now guilty as an accessory."); *People* v. *Celis*, 46 Cal. Rptr. 3d 139, 142-144 (Cal. Ct. App. 2006) (observing that "[s]ection 32 defines 'accessory' as . . . ." and using the term "accessory" to refer to an accessory after the fact).

[6] The term "accessory" appears in a handful of California statutes, and all of these provisions are consistent with "accessory" having the meaning of "accessory after the fact." As noted, the term "accessory"

Significantly, although the Government argues that "accessory" in California Vehicle Code § 10851 should not be read to mean "accessory after the fact," it has failed to suggest *any* meaning of the term. As a general matter, there can be only three possible meanings of "accessory": (1) that it refers to an accessory *before* the fact; (2) that it refers to an accessory *after* the fact; or (3) that it refers to *both* accessories before the fact and after the fact. *See, e.g.*, 4 Blackstone at 34-40. Under options (2) and (3) Respondent prevails; for as the Government concedes, if the statute reaches accessories after the fact, it is broader than the generic definition of "theft offense." Gov't Br. 9, 29. Thus, for the Government to prevail, "accessory" in § 10851 must refer *only* to an accessory *before* the fact. In light of the fact that "an access[o]ry before the fact is not recognized" under California law, *Collum*, 54 P. at 590,[7] that argument is untenable.

---

appears in Cal. Penal Code §§ 30-33, 971 in a manner consistent with its definition as accessory after the fact. Other than those statutes and California Vehicle Code § 10851, the term is used in only five statutory provisions: Cal. Penal Code § 499d, Cal. Veh. Code § 10851.5, Cal. Penal Code § 791, Cal. Penal Code § 972, and Cal. Health & Safety Code § 12607. Section 499d, entitled "Aircraft; taking without owner's consent," and § 10851.5, pertaining to theft of binder chains, are both drafted comparably to § 10851, including establishing liability for "any person who is a party or accessory to or an accomplice in . . . ." Cal. Penal Code § 499d, Cal. Veh. Code § 10851.5. Section 791 is entitled "Accessory" and describes the court with jurisdiction over the "accessory" "as defined in § 32." Section 972 provides for the prosecution of the "accessory" without regard to the prosecution of the principal, and directly follows § 971. Section 12607 provides that the State Fire Marshal may deny a license to anyone "who has been convicted as a principal or accessory in a crime against property involving arson." In both of these provisions the use of "principal" and "accessory" demonstrates that "accessory" must mean accessory after the fact rather than aider or abettor because, under California Penal Code § 971, the distinctions between aiders and abettors and principals are abolished.

[7] *See also, e.g.*, *People* v. *Magee*, 31 Cal. Rptr. 658, 681 (Cal. Dist. Ct. App. 1963) ("[T]here are no accessories before the fact . . . in California." (citation omitted)); *People* v. *Wallace*, 178 P.2d 771, 784 (Cal. Dist. Ct. App. 1947) ("[T]he offense at common law known as 'accessory before the fact' is not known to the law of California."); *People* v. *King*, 85 P.2d 928,

The Government is left to argue that the term "accessory" in California Vehicle Code § 10851 has no meaning whatsoever. It proposes reading the language "an accessory to or an accomplice in" in § 10851 as merely "shorthand for aider and abettor." Gov't Br. 29. This argument violates basic principles of statutory interpretation. In California, the term "accomplice" is a defined term, and encompasses principals and aiders and abettors. *See* Cal. Penal Code § 1111; *see also* 1 Witkin & Epstein, Introduction to Crimes § 77.[8] Because the plain language of § 10851 establishes liability for an "accomplice" *or* an "accessory," these terms should be given independent meaning. *See*, *e.g.*, *Houge* v. *Ford*, 285 P.2d 257, 260 (Cal. 1955).[9] According the two terms different meanings is also consistent with the basic rule of statutory interpretation that "[i]nterpretive constructions which render some words surplusage . . . are to be avoided." *California Mfrs. Ass'n* v. *Public Util. Comm'n*, 598 P.2d 836, 840 (Cal. 1979).[10] Because "accomplice" already includes principals and aiders and abettors, the term "accessory" must pertain to something else.[11] And the authority

---

939 (Cal. Dist. Ct. App. 1938) ("One who would have been an accessory before the fact at common law is triable and punishable as a principal under our statutes, . . . there now being no such offense as accessory before the fact."); 1 B.E. Witkin & Norman L. Epstein, *California Criminal Law*, Introduction to Crimes § 77 (3d ed. 2000) (Witkin & Epstein) ("[T]here are neither accessories before the fact nor second degree principals in California.").

[8] In more general usage, the term "accomplice" refers to aiders and abettors. *See*, *e.g.*, 2 LaFave § 13.2.

[9] *Cf. Garcia* v. *United States*, 469 U.S. 70, 73 (1984) ("Canons of construction indicate that terms connected in the disjunctive in this manner [*i.e.*, separated by "or"] be given separate meanings.").

[10] *Cf. Freytag* v. *Commissioner*, 501 U.S. 868, 877 (1991) (statutory interpretations that "render superfluous other provisions in the same enactment" are strongly disfavored (citation omitted)).

[11] Indeed, California cases have long recognized this distinction. *Collum*, 54 P. at 590 (distinguishing "accomplice" from "accessory"); *cf. People* v. *Felton*, 18 Cal. Rptr. 3d 626, 632 (Cal. Ct. App. 2004) (distin-

the Government cites to support reading the entire statutory phrase as "shorthand" for aiding and abetting is inapposite: *People* v. *Clark*, 60 Cal. Rptr. 58 (Cal. Ct. App. 1967), an intermediate appellate case, in no way purported to define "accessory" or the requirements for liability as an "accessory" under § 10851; rather, as the facts reveal, the case only involved whether the defendant could be held liable under an *accomplice* theory. *See id.* at 62.[12]

Where, as here, there is no ambiguity in the meaning of "accessory," California Vehicle Code § 10851 must be interpreted to provide liability for accessories after the fact. *People* v. *Coronado*, 906 P.2d 1232, 1234 (Cal. 1995) ("If there is no ambiguity in the language of the statute, then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs . . . courts will not interpret away clear language in favor of an ambiguity that does not exist." (citations omitted)).[13]

---

guishing accomplices, *i.e.*, those liable as principal, from accessories after the fact).

[12] *Clark* addressed whether evidence that an individual was found riding in the passenger seat of a stolen car was sufficient to convict him under California Vehicle Code § 10851. The court held that there was no evidence that he was anything but an "innocent passenger" and, therefore, that there could be no liability. *Clark*, 60 Cal. Rptr. at 62. There is no suggestion that the Court considered whether the passenger might have been an accessory after the fact. Indeed, the facts of the case—a passenger found riding in a stolen car—are necessarily inconsistent with accessory after the fact liability; the circumstances entailed an ongoing crime under § 10851, which criminalizes not only "taking" but also "driving." *People* v. *Garza*, 111 P.3d 310, 315 (Cal. 2005) (observing that § 10851 criminalizes both the "taking" of a vehicle and the "posttheft driving" of a vehicle). Accessories after the fact become involved only after a felony is complete. *See* Cal. Penal Code § 32; *People* v. *Montoya*, 874 P.2d 903, 909 (Cal. 1994); *Collum*, 54 P. at 590.

[13] The Government also cites "legislative history" in support of its view that "accessory" under § 10851 does not mean accessory after the fact. Gov't Br. 30 n.17. But the source that the Government relies upon is, curiously, the legislative history of a *different* statute, namely § 499b(b) of the California Penal Code, which pertains to joyriding of "vessels." *See* S. Comm. on Public Safety, B. Analysis of Assemb. B. 928 (2003-2004 Reg.

In such circumstances—and as the Government concedes—California Vehicle Code § 10851 exceeds the scope of the generic definition of "theft offense."[14] As a result, a con-

---

Sess.), July 8, 2003 at B-C & n.1. And the statement itself is merely a tentative opinion on the meaning of a case in the intermediate California appellate court, *Clark*, 60 Cal. Rptr. 58. *See supra* n.12.

As an initial matter, the relevant discussion in the legislative history is a footnote "hung" off the word "accomplice" (*not* "accessory")—again supporting the notion that *Clark* only pertains to "accomplice" liability. And the discussion is tentative on its face, stating only that appellate cases "appear to require" an aiding and abetting standard for accomplice liability under the statute.

More importantly, this legislative history is weak support indeed. This Court has "recogn[ized] that only the most extraordinary showing of contrary intentions from [legislative history] would justify a limitation on the 'plain meaning' of statutory language." *Garcia*, 469 U.S. at 75. Here, the meaning of "accessory" under § 10851 is made clear by statute. A statement in the legislative history of a different statute, that merely interprets case law, and coming some eighty years after the term "accessory" was first used in the precursor to § 10851 is hardly sufficient to disturb the plain meaning of "accessory" within § 10851.

[14] In fact, the judgment in *Penuliar* appears to have rested on the fact that California Vehicle Code § 10851 expressly includes liability for accessories after the fact. Section 10851, as the court noted, includes liability for "'a *party or an accessory to or an accomplice* in the driving or unauthorized taking or stealing.'" *Penuliar*, 435 F.3d at 970 (quoting Cal. Veh. Code § 10851 (emphasis in original)). The court then repeated, "[a]s the statute makes plain, California Vehicle Code § 10851(a) includes accessory or accomplice liability." *Id.* Thus, the court concluded that § 10851 "does not categorically qualify as a 'theft offense' within the meaning of 8 U.S.C. § 1101(a)(43)(G)." *Id.* The repeated references to § 10851's inclusion of liability for accessories and the fact that the term is clearly defined under California law suggest that accessory liability was the basis of the decision. Furthermore, at least one of the judges on the *Penuliar* panel has subsequently explained that *Penuliar*'s holding pertains to accessory liability. *See United States* v. *Vidal*, 426 F.3d 1011, 1018-1019 (2005) (Browning, J., concurring in part and dissenting in part), *reh'g en banc granted*, 453 F.3d 1114 (9th Cir. 2006) (explaining that "accessory" means accessory after the fact under California law, observing the inclusion of accessory after the fact liability under § 10851, and indicating this was the basis for the *Penuliar* holding). The fact that *Penuliar* is properly read as resting on accessory after the fact liability provides another indication

viction under § 10851 is not categorically a "theft offense." *See Taylor*, 495 U.S. at 598-600.[15]

II. CALIFORNIA AIDING AND ABETTING LIABILITY IS BEYOND THE SCOPE OF THE GENERIC DEFINITION OF "THEFT OFFENSE" BECAUSE IT INCLUDES THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE

The Government argues that aiding and abetting liability is included within the generic definition of "theft offense" because all states hold aiders and abettors liable for the underlying crime. This assertion, however, does not resolve the categorical inquiry into whether the scope of liability under California Vehicle Code § 10851 is broader than the generic definition of "theft offense." The answer to this question necessarily depends on the scope of *California* aiding and abetting liability. Because California aiding and abetting liability includes the "natural and probable consequences doctrine," liability under § 10851 reaches conduct beyond that covered by the aiding and abetting principles in the Model Penal Code and the majority of states. As such, § 10851 exceeds the scope of the generic definition of "theft offense." *See Scheidler* v. *National Org. for Women, Inc.*, 537 U.S. 393, 410 (2003) (examining "the Model Penal Code and a majority of States" to determine generic offense).[16]

---

that the Government's question presented seeks a purely advisory opinion.

[15] An affirmance on this ground would have little practical impact. Ordinarily, accessories after the fact are not liable for the underlying crime. A determination that § 10851 exceeds the scope of the generic definition of "theft offense" because it includes liability for accessories after the fact will be relevant only to the exceptional statute, such as § 10851, that explicitly includes liability for accessories after the fact. *Cf.* Gov't Br. 29 n.16 (recognizing the narrowness of a holding on this ground).

[16] This argument plainly falls within the scope of the question presented. The Government sought review on whether aiding and abetting liability is within the scope of the generic definition of "theft offense." As the Brief in Opposition (at 16) observed, the only aiding and abetting liability that is relevant to the disposition of this case is California aiding and abetting liability; thus any consideration of whether aiding and abet-

A. The Requirements of Aiding And Abetting Liability

As a general matter, there are two basic elements of aiding and abetting liability—an act (some effort at facilitation or encouragement), and an intent to aid in the commission of the crime. *See*, *e.g.*, 2 LaFave § 13.2; *Hicks* v. *United States*, 150 U.S. 442, 449 (1893).

The act requirement demands that an aider and abettor provide assistance or encouragement for the criminal act. *See generally* 2 LaFave § 13.2(a). The aider and abettor is not required to commit the act that produces the criminal result. *See*, *e.g.*, *Nye & Nissen* v. *United States*, 336 U.S. 613, 618-619 (1949) (aider and abettor "is as responsible for that act as if he committed it directly"). Moreover, the promotion or facilitation of the criminal act need not be substantial.[17] Indeed, the de minimis nature of the act requirement has led some commentators to observe that "the mental state is really what defines the aider and abettor." Baruch Weiss, *What Were They Thinking?: The Mental States of The Aider And Abettor And the Causer Under Federal Law*, 70 Fordham L. Rev. 1341, 1347-1348 (2002).

With respect to the intent required of an aider and abettor, the prevailing view stems from Judge Learned Hand's decision in *United States* v. *Peoni*, 100 F.2d 401 (2d Cir. 1938). Judge Hand held that the aider and abettor must "in some sort associate himself with the venture, . . . participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." *Id.* at 402. In other words, the aider and abettor must have a "purposive attitude towards" the crime. *Id.* This Court approved of this approach in *Nye & Nissen*, 336 U.S. at 619. *See also* Weiss,

---

ting liability is included in the generic definition of "theft offense" must be tethered to California's aiding and abetting liability.

[17] *See*, *e.g.*, *United States* v. *Whitney*, 229 F.3d 1296, 1303 (10th Cir. 2000) ("[T]he level of participation may be of relatively slight moment." (quotation omitted)); *United States* v. *Taylor*, 226 F.3d 593, 597 (7th Cir. 2000) (finding that it "does not take much to satisfy" the facilitation requirement (quotation omitted)).

70 Fordham L. Rev. at 1350-1351 & nn.27-40 (noting the acceptance of the *Peoni* rule and speculating that the number of court decisions adopting the rule must be in excess of one thousand).[18]

B. California's Natural And Probable Consequences Doctrine Liability Reflects A Minority View Of Aiding And Abetting Liability

California takes a particularly broad view of aiding and abetting liability by incorporating the "natural and probable consequences doctrine." Under this doctrine, an aider and abettor may be held liable not only for the target crime but also for a *second* crime so long as the second crime is the natural and probable consequence of the original crime that he aided and abetted. *See generally* 1 Witkin & Epstein, Introduction to Crimes § 82. This doctrine is applied in a minority of states and, in fact, faces growing opposition in light of the fact that it is inconsistent with basic criminal justice principles. California's use of aiding and abetting liability pursuant to the natural and probable consequences doctrine thus means that California Vehicle Code § 10851 criminalizes

---

[18] A variation on this view is reflected in the Model Penal Code, which states that an accomplice must have "the purpose of promoting or facilitating the commission of the offense." MPC § 2.06(3)(a). The Model Penal Code also provides that:

> [W]hen causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.

MPC § 2.06(4). The Commentaries explain that "[t]his formulation combines the policy that accomplices are equally accountable within the range of their complicity with the policies underlying those crimes defined according to results." Model Penal Code and Commentaries (Official Draft and Revised Comments) (MPC Commentaries) Pt. I, vol. 1, at 321 (1985).

There are some distinctions among the states as to the precise contours of the intent requirement for an aider and abettor, but all impose some requirement of intent that is directed at the particular target crime. *See generally* 2 LaFave § 13.2.

conduct that is beyond the scope of "theft offense" as generically defined. As such, a conviction under § 10851 is not categorically a theft offense. *See Taylor*, 495 U.S. at 598-600.[19]

1. California's Natural And Probable Consequences Doctrine

Under California's natural and probable consequences doctrine, an aider and abettor is liable not only for the offense that is aided and abetted—the target offense—but also for the "natural and probable consequences" of the offense that he "knowingly and intentionally aids and encourages." *People* v. *Beeman*, 674 P.2d 1318, 1326 (Cal. 1984); *see also People* v. *Prettyman*, 926 P.2d 1013, 1020-1021 (Cal. 1996). In other words, pursuant to the natural and probable consequences doctrine, liability does not stop with the crime that was actually aided and abetted.

This has serious consequences for mens rea requirements—which are the crux of aiding and abetting liability. *See supra* Part II.A. As the California Supreme Court observed in *People* v. *Croy*, 710 P.2d 392, 398 n.5 (Cal. 1985) (en

---

[19] There is a strong argument that, to the extent that the Ninth Circuit's holding in *Penuliar* concerned aiding and abetting liability, it related to the particular scope of aiding and abetting liability *under California law*. *Penuliar* observed that in *United States* v. *Corona-Sanchez*, 291 F.3d 1201, 1208 (9th Cir. 2002) (en banc), *superseded by statute as stated in United States* v. *Vidal*, 426 F.3d 1011, 1018-1019 (2005), *reh'g en banc granted*, 453 F.3d 1114 (9th Cir. 2006), which determined that California's general theft statute was not a categorical "theft offense," the court "relied in part on the broad nature of aiding and abetting liability under California law." 435 F.3d at 969. *Penuliar* then cited *People* v. *Beeman*, 674 P.2d 1318, 1325-1326 (Cal. 1984), a case also cited by *Corona-Sanchez*. The pages of *Beeman* referenced in these opinions address the broad scope of aiding and abetting liability in light of, *inter alia*, the natural and probable consequences doctrine. *See Beeman*, 674 P.2d at 1325-1326 (stating that "the liability of an aider and abettor extends" to the natural and probable consequences of the target crime). Moreover, the judgment is well supported on this ground. Accordingly, to the extent that *Penuliar* concerns aiding and abetting liability, it relates to the particularly broad scope of aiding and abetting liability under California law.

banc), *disapproved of on other grounds by People* v. *Dyer*, 753 P.2d 1 (Cal. 1988), the natural and probable consequences doctrine permits liability for *unintended* crimes: "a defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator." *See also People* v. *McCoy*, 24 P.3d 1210, 1214 (Cal. 2001) (observing that the natural and probable consequences doctrine is an exception to the rule that the aider and abettor must be as culpable as the actual perpetrator).

California applies the natural and probable consequences doctrine extremely broadly. For example, in *People* v. *Nguyen*, 26 Cal. Rptr. 2d 323 (Cal. Ct. App. 1993), one who aided and abetted a robbery was convicted for sex offenses—not withstanding that his only intent was to aid the robbery—based on the natural and probable consequence doctrine. In *People* v. *Simpson*, 152 P.2d 339, 344 (Cal. Ct. App. 1944), the court found that one who intended to aid and abet a robbery could be held liable for unplanned kidnapping as a natural and probable consequence of robbery. And *People* v. *Montes*, 88 Cal. Rptr. 2d 482 (Cal. Ct. App. 1999), held that the defendant was guilty of attempted murder as the natural and probable consequence of simple assault or breach of the peace.

As these cases demonstrate, the natural and probable consequences doctrine can be relied upon to create expansive liability that is unhinged from traditional mens rea requirements. It is not limited to circumstances in which the principal also lacks an intent element with regard to the particular criminal result—such as felony murder, transferred intent, or crimes based on negligence or recklessness. Nor is it limited to conspiracy cases. Indeed, it is not even limited to crimes that are necessary to carry out the predicate crime or to circumstances where the predicate crime is a felony.

2. California's Natural And Probable Consequences Doctrine Is Not Within The Generic Definition Of "Theft Offense"

In order for liability under California Vehicle Code § 10851 to qualify as a categorical "theft offense," California's natural and probable consequences doctrine of aiding and abetting liability must fall within the scope of the generic definition. California's sweeping approach to aiding and abetting liability under the natural and probable consequences doctrine, however, does not qualify under this standard: It has been rejected by the Model Penal Code and it is not applied by a majority of states. *See Scheidler*, 537 U.S. at 410 (examining "the Model Penal Code and a majority of States" to determine generic offense); *Taylor*, 495 U.S. at 598-599 & n.8.[20]

---

[20] The Government argued in the Reply to the Brief in Opposition to its Petition for Writ of Certiorari in *Gonzales* v. *Penuliar*, No. 05-1630, that LaFave stated that the natural and probable consequences doctrine was an "established rule." *Penuliar* Reply Br. 3. The Government apparently relied on this proposition to rebut the argument that the natural and probable consequences rule is the minority view. This argument fails for several reasons. First, LaFave's description of the rule as "established" does not mean it is the *predominant* view; Respondent does not dispute that the rule exists (though it is on the wane). Further, the quote in context is far more easily read as setting forth the established rule of natural and probable consequences—how the rule has come to be understood—rather than suggesting it is the prevailing view. Indeed, LaFave's other analysis indicates that the majority view does not embrace natural and probable consequences liability for aiders and abettors, requiring a closer connection to the crime both in terms of conduct and intent. *See*, *e.g.*, 2 LaFave § 13.2(c) ("The prevailing view is that the accomplice must also have the mental state required for the crime of which he is to be convicted on an accomplice theory."); *id.* § 13.2(b) ("Generally, it may be said that accomplice liability exists when the accomplice intentionally encourages or assists, in the sense that his purpose is to encourage or assist another in the commission of a crime as to which the accomplice has the requisite mental state."); *id.* (noting that "one may become an accomplice by giving encouragement or assistance with knowledge that it will promote or facilitate a crime" but observing that "liability has seldom been imposed on this basis"). Moreover, even if LaFave is read as the Government proposes, actual analysis of the state laws demonstrates that the natural and prob-

The Model Penal Code provisions regarding aiding and abetting liability are inconsistent with the doctrine of natural and probable consequences. *See supra* n.18. The Commentaries make explicit that the rule of accomplice liability, MPC § 2.06, does not include the natural and probable consequences doctrine, which it labels "incongruous and unjust." MPC Commentaries Pt. I, vol. 1, at 312 & n.42 ("[T]he liability of an accomplice ought not to be extended beyond the purposes that he shares.").

The states do not support inclusion of the natural and probable consequences doctrine within the generic definition either. Indeed, only a handful of states appear to apply a natural and probable consequences doctrine to aiding and abetting liability—and, even among these states, it appears the doctrine is applied in a more limited manner.[21]

There is no clear majority of states that applies the natural and probable consequences doctrine.[22] Ten jurisdic-

---

able consequences doctrine of aiding and abetting liability is *not* the prevailing view.

[21] For example, the Rhode Island Supreme Court has clearly held that the aider and abettor must share the principal's intent. *State* v. *Diaz*, 654 A.2d 1195, 1202 (R.I. 1995). It also has allowed jury instructions for aiders and abettors that permit liability based on the natural and probable consequences of one's *acts*, as opposed to the natural and probable consequences of the target crime. *State* v. *Medeiros*, 599 A.2d 723, 726 (R.I. 1991). This rule is plainly not the rule applied by California, although it utilizes similar language; the rule that one intends the natural and probable consequences of one's own acts is more closely connected to the actor than is a rule looking at the natural and probable consequences of someone else's conduct (*i.e.*, the crime). *See also* Me. Rev. Stat. Ann. tit. 17-A, § 57; *State* v. *Berry*, 711 A.2d 142, 145-146 (Me. 1998).

[22] This discussion and the supporting citations concern general aiding and abetting liability; they do not, of course, pertain to separate doctrines such as felony murder or conspiracy. Nor do they concern circumstances in which the intent requirement is not in play such as transferred intent or recklessness- or negligence-based crimes. Furthermore, all of these citations are intended to reflect the current state of the law, not prior views based on, *inter alia*, predecessor state statutes or the common law.

tions (nine states and the District of Columbia) expressly reject the doctrine.[23] At least sixteen more states impose intent requirements by statute and/or controlling case law that are inconsistent with the doctrine and, in any event, do not apply the doctrine to general aiding and abetting liability.[24] For at least four states, the most that can be said of

---

[23] *See* Alaska Stat. § 11.16.110; *Riley* v. *State*, 60 P.3d 204, 214, 219-221 (Alaska Ct. App. 2002); *Tarnef* v. *State*, 512 P.2d 923, 928 (Alaska 1973); *State* v. *Phillips*, 46 P.3d 1048, 1056-1058 (Ariz. 2002); *State* v. *Wall*, 126 P.3d 148, 151-152 (Ariz. 2006) (en banc); Colo. Rev. Stat. § 18-1-603; *People* v. *Bogdanov*, 941 P.2d 247, 250-252 & n.8 (en banc), *as amended by* 955 P.2d 997 (Colo. 1997) (en banc), *disapproved of on other grounds by Griego* v. *People*, 19 P.3d 1, 7-8 (Colo. 2001) (en banc); *Wilson-Bey* v. *United States*, 903 A.2d 818, 821-822 (D.C. 2006) (en banc); *Kitt* v. *United States*, 904 A.2d 348, 354-356 (D.C. 2006); *Commonwealth* v. *Richards*, 293 N.E.2d 854, 859-860 (Mass. 1973); *Commonwealth* v. *Daughtry*, 627 N.E.2d 928, 930-931 (Mass. 1994); Mont. Code Ann. § 45-2-302; *State ex rel. Keyes* v. *Montana Thirteenth Jud. Dist. Ct.*, 955 P.2d 639, 642-643 (Mont. 1998); *Sharma* v. *State*, 56 P.3d 868, 871-873 (Nev. 2002); *cf. Bolden* v. *State*, 124 P.3d 191, 200 (Nev. 2005); *State* v. *Carrasco*, 946 P.2d 1075, 1079-1080 (N.M. 1997); *State* v. *Bacon*, 658 A.2d 54, 60-63 (Vt. 1995); *State* v. *Pitts*, 800 A.2d 481, 483-485 (Vt. 2002). Maryland has also expressly rejected this doctrine; liability for unintended crimes extends only to those crimes necessary to the accomplishment of the target crime or the escape therefrom. *Sheppard* v. *State*, 538 A.2d 773, 775 & n.3 (Md. Ct. App. 1988), *disapproved of on other grounds by State* v. *Hawkins*, 604 A.2d 489, 496-497 (Md. 1992); *State* v. *Raines*, 606 A.2d 265, 272-273 (Md. Ct. App. 1992); *Owens* v. *State*, 867 A.2d 334, 342-343 (Md. Ct. Spec. App. 2005).

[24] *See, e.g.*, N.H. Rev. Stat. Ann. § 626:8; *State* v. *Anthony*, 861 A.2d 773, 774-776 (N.H. 2004); N.J. Stat. Ann. § 2C:2-6; *State* v. *Torres*, 874 A.2d 1084, 1092 (N.J. 2005); *State* v. *Weeks*, 526 A.2d 1077, 1080-1082 (N.J. 1987); N.D. Cent. Code § 12.1-03-01; *State* v. *Lind*, 322 N.W.2d 826, 841-842 (N.D. 1982); 18 Pa. Cons. Stat. Ann. § 306; *Commonwealth* v. *Flanagan*, 854 A.2d 489, 493-494 (Pa. 2004); Utah Code Ann. § 76-2-202; *State* v. *Alvarez*, 872 P.2d 450, 461 (Utah 1994); *State* v. *Crick*, 675 P.2d 527, 534 (Utah 1983); *In re Domingo*, 119 P.3d 816, 820 (Wash. 2005); *State* v. *Evans*, 114 P.3d 627, 636-637 (Wash. 2005); *Jahnke* v. *State*, 692 P.2d 911, 921-922 (Wyo. 1984); *Fales* v. *State*, 908 P.2d 404, 408 (Wyo. 1995). Some states, which squarely fall in the category of states that do not apply the doctrine, nonetheless have case law that uses similar phraseology but in plainly distinguishable circumstances or in dicta. *See, e.g.*, *State* v. *Floyd*, 756 A.2d 799, 810 (Conn. 2000); *State* v. *Diaz*, 679 A.2d 902, 914

the natural and probable consequences doctrine for aiding and abetting liability is that it is occasionally referenced, or even applied by lower courts, although it is contrary to statute and apparently controlling case law.[25]

In such circumstances, it cannot fairly be said that the generic definition of "theft offense" includes liability for aiders and abettors under California's natural and probable consequences doctrine. *Taylor*, 495 U.S. at 598; *see also Scheidler*, 537 U.S. at 410. Accordingly, California Vehicle Code § 10851 necessarily creates liability beyond the scope of the generic definition of "theft offense."

3. The Natural And Probable Consequences Doctrine Is Inconsistent With Basic Criminal Justice Principles

The natural and probable consequences doctrine has been the subject of ample and growing criticism. *See, e.g.*, 2

(Conn. 1996); Haw. Rev. Stat. §§ 702-222, 702-223; *State* v. *Soares*, 815 P.2d 428, 430 (Haw. 1991); Ky. Rev. Stat. Ann. § 502.020; *Tharp* v. *Commonwealth*, 40 S.W.3d 356, 364-366 (Ky. 2000); *Commonwealth* v. *Nourse*, 177 S.W.3d 691, 699-700 (Ky. 2005); *Welch* v. *State*, 566 So. 2d 680, 684-685 (Miss. 1990); *State* v. *Roberts*, 709 S.W.2d 857, 863 & n.6 (Mo. 1986); *State* v. *Ferguson*, 20 S.W.3d 485, 497 (Mo. 2000); *State* v. *Logan*, 645 S.W.2d 60, 64-65 (Mo. Ct. App. 1982); N.Y. Penal Law § 20.00; *People* v. *Kaplan*, 556 N.E.2d 415, 417-418 (N.Y. 1990); *People* v. *Bello*, 705 N.E.2d 1209, 1211 (N.Y. 1998); Or. Rev. Stat. § 161.155; *State* v. *Pine*, 82 P.3d 130, 135, 137 & n.6 (Or. 2003); *State* v. *Anlauf*, 995 P.2d 547, 548-549 & n.1 (Or. Ct. App. 2000); S.D. Codified Laws § 22-3-3; *State* v. *Tofani*, 719 N.W.2d 391, 400 (S.D. 2006). In Idaho, one unexplained, outdated reference to the doctrine is easily overcome by more recent precedent that is flatly inconsistent and the absence of cases applying the doctrine. *Compare State* v. *Scroggins*, 716 P.2d 1152, 1158 (Idaho 1985) *and State* v. *Nevarez*, 130 P.3d 1154, 1158-1159 (Idaho Ct. App. 2005) *with State* v. *Ehrmantrout*, 595 P.2d 1097 (Idaho 1979) (per curiam).

[25] Ga. Code Ann. § 16-2-20; *Jackson* v. *State*, 599 S.E.2d 129, 131-132 (Ga. 2004); *Jordan* v. *State*, 530 S.E.2d 192, 193-194 (Ga. 2000); *State* v. *Meyers*, 683 So. 2d 1378, 1382 (La. Ct. App. 1996); *State* v. *Holmes*, 388 So. 2d 722, 725-727 (La. 1980); Ohio Rev. Code Ann. § 2923.03; *State* v. *Johnson*, 754 N.E.2d 796, 799-801 (Ohio 2001); *State* v. *Herring*, 762 N.E.2d 940, 947-948 (Ohio 2002); Tex. Penal Code Ann. § 7.02; *Ex parte Thompson*, 179 S.W.3d 549, 552 (Tex. Crim. App. 2005).

LaFave § 13.3. While these critiques are not directly relevant to the *Taylor* analysis, the context helps explain why the states have increasingly rejected the doctrine.

As Professor LaFave has noted, the natural and probable consequences doctrine is "inconsistent with more fundamental principles of our system of criminal law." 2 LaFave § 13.3(b).[26] Significantly, as several other commentators have observed, "[i]t would permit liability to be predicated upon negligence even when the crime involved requires a different state of mind. Such is not possible as to one who has personally committed a crime, and should likewise not be the case as to those who have given aid or counsel." *Id.* (footnote omitted).

The Model Penal Code Commentaries similarly explain:

> To say that the accomplice is liable if the offense committed is "reasonably foreseeable" or the "probable consequence" of another crime is to make him liable for negligence, even though more is required in order to convict the principal actor. This is both incongruous and unjust; if anything the culpability level for the accomplice should be higher than that of the principal actor, because there is generally more ambiguity in the overt conduct engaged in by the accomplice, and thus a higher risk of convicting the innocent.

MPC Commentaries Pt. I, vol. 1, at 312 & n.42 (1985). Courts have expressed similar views. *See*, *e.g.*, *State* v. *Phillips*, 46 P.3d 1048, 1056-1057 (Ariz. 2002) (rejecting the "ab-

---

[26] *See also*, *e.g.*, Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 Hastings L.J. 91, 98-99 n.36 (1985) (doctrine "[o]ne of the most troubling and frequently criticized aspects of accomplice liability"); Sanford H. Kadish, *Complicity, Cause, and Blame: A Study in the Interpretation of Doctrine*, 73 Cal. L. Rev. 323, 351-352 (1985) (criticizing doctrine's lack of intent requirement); Paul H. Robinson, *Imputed Criminal Liability*, 93 Yale L.J. 609, 638-639 (1984) (criticizing doctrine's weak causal requirements).

surd result" of the natural and probable consequences doctrine that "would allow a defendant who did *not* intend to aid in an offense to be an accomplice *in that offense*" (emphasis in original)).

The doctrine is also inconsistent with the goals of the modern project to abandon the common law distinctions between principals and aiders and abettors. These distinctions at common law gave rise to a host of procedural complications; there were restrictions on where aiders and abettors could be charged, stringent requirements for consistency between the charge against the individual and the proof at trial, and the conviction of the principal was a prerequisite to the trial of an accomplice. *See generally* 2 LaFave § 13.1(d). The modern approach abandons these distinctions and treats principals and aiders and abettors the same, holding all liable for the underlying offense and thus overcoming the procedural hurdles; now, *inter alia*, indictments need not specify whether the individual was an aider or abettor or principal, juries need not decide the question, the principal's conviction is not a prerequisite for the conviction of the aider and abettor, and rules of evidence previously applicable to principals only apply to all.[27]

The natural and probable consequences doctrine reintroduces distinctions. Under the doctrine, it is unnecessary to prove that an aider and abettor intended a given crime so long as it is the natural and probable consequence of a crime that was intended. A principal, of course, except in limited circumstances such as felony murder (*see infra* n.31), will need to possess the requisite intent for the crime. The practical consequence is that the jury will need to determine whether the defendant is an aider and abettor or principal and then apply the relevant intent requirement. *Cf.* Weiss, 70 Fordham L. Rev. at 1365.

---

[27] *See generally* 2 LaFave § 13.1(e) (describing and collecting statutes removing procedural obstacles); *see also Standefer* v. *United States*, 447 U.S. 10 (1980); Weiss, 70 Fordham L. Rev. at 1362-1363.

In addition, the criminal law permits an individual to be liable for the unintended secondary acts of another only in rare circumstances. The *Pinkerton* rule of conspiracy liability,[28] for example, which has some superficial similarity to the natural and probable consequences doctrine, has justifications and limits that are not available for the natural and probable consequences doctrine.

First, a criminal conspiracy is an offense "of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime." *Pinkerton*, 328 U.S. at 644. It "involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices." *Id.*; *see also United States* v. *Jimenez Recio*, 537 U.S. 270, 274-275 (2003) (labeling conspiratorial agreement "a distinct evil" (citation omitted)).

Second, for a conspiracy charge, prosecutors are required to show the existence of an unlawful agreement. This element requires prosecutors to establish that the policy concerns just mentioned are in play.[29] Perhaps even more importantly, the unlawful agreement serves to satisfy the intent requirement for subsequent acts. *Pinkerton*, 328 U.S. at 647 (liability for the acts of co-conspirators permitted in part because the "[t]he criminal intent to do the act is established by the formation of the conspiracy").[30]

---

[28] Under *Pinkerton* v. *United States*, 328 U.S. 640, 645 (1946), one co-conspirator is liable for the offenses of another co-conspirator so long as the offense was committed "in furtherance of [an] unlawful agreement or conspiracy."

[29] *Iannelli* v. *United States*, 420 U.S. 770, 777-778 & n.10 (1975) (noting that the "agreement remains the essential element of the crime, and serves to distinguish conspiracy from aiding and abetting which, although often based on agreement, does not require proof of that fact").

[30] *See also* 2 LaFave § 12.2(a) ("The agreement is all-important in conspiracy, for one must look to the nature of the agreement to decide several critical issues, such as whether the requisite mental state is also present . . . .").

No such justifications and limitations exist for the natural and probable consequences doctrine. Although extensive liability may be warranted in the conspiracy context because of the special evils it fosters, there is no basis to extend it to complicity absent conspiracy. Furthermore, because there is no agreement requirement in ordinary aiding and abetting liability, liability may be much more expansive. Also, the intent requirement is left unsatisfied. Thus, the natural and probable consequences doctrine is distinguishable from, and broader than, the limited *Pinkerton* rule.[31]

* * *

Yet, at bottom, whether the natural and probable consequences doctrine is a good or bad doctrine is of no moment. As demonstrated above, it is rejected by the Model Penal Code and is not the prevailing view in the majority of states. As a result, in light of California's extremely broad aiding and abetting liability, California Vehicle Code § 10851 sweeps more broadly than a generic "theft offense" and, therefore, is not a categorical "theft offense" under the INA. *See Taylor*, 544 U.S. at 598-600.

III. CALIFORNIA VEHICLE CODE § 10851 INCLUDES LIABILITY WITHOUT THE REQUISITE INTENT OF A "THEFT OFFENSE"

California Vehicle Code § 10851 has a minimal mens rea requirement. Specifically, it permits conviction "*with or without intent to steal*." Cal. Veh. Code § 10851(a) (emphasis added). It permits conviction of one who drives or takes a

[31] The felony murder doctrine also shares superficial features with the natural and probable consequences doctrine. The felony murder rule derives from the common law rule that one who brings about an unintended death in the process of committing a felony is guilty of murder. *See, e.g.*, 2 LaFave § 14.5. As the name implies, it has a limited scope, whereas the natural and probable consequences doctrine applies broadly in California. Moreover, the felony murder doctrine is itself subject to increasing criticism. *See, e.g., id.* Several states have abolished it entirely. *See, e.g.*, Haw. Rev. Stat. § 707-701; Ky. Rev. Stat. Ann. § 507.020; *People* v. *Aaron*, 299 N.W.2d 304, 312-316 (Mich. 1980).

vehicle intending to deprive the owner of possession for any period of time, no matter how short—even if only a brief or momentary deprivation is intended. *See People* v. *Score*, 120 P.2d 62, 64 (Cal. Dist. Ct. App. 1941) ("When a person temporarily deprives the owner of a vehicle of temporary possession even without intent to steal, he is guilty of a felony. . . . Temporary possession may be for a day and it may be for less than a minute.").[32] In other words, § 10851 reaches conduct commonly known as "joyriding." *See, e.g.*, *People* v. *Allen*, 984 P.2d 486, 490 (Cal. 1999) ("Vehicle Code section 10851 can be violated either by taking a vehicle with the intent to steal it or by driving it with the intent only to temporarily deprive its owner of possession (*i.e.*, joyriding).").

The mens rea required under California Vehicle Code § 10851 stands in stark contrast to the California statutes that cover car theft. Section 487(d) of the California Penal Code specifies that the taking of an automobile (regardless of value) is "[g]rand theft," *see* 2 Witkin & Epstein, Crimes Against Property § 6, and, as the Supreme Court of California has noted, a conviction for grand theft auto "*necessarily* requires a finding that the accused intended to steal." *People* v. *Jaramillo*, 548 P.2d 706, 709 (Cal. 1976); *see also* Cal. Penal Code § 484(a) (general theft).

In light of its minimal mens rea element, there can be little doubt that California Vehicle Code § 10851 sweeps more broadly than the generic definition of theft. *Compare, e.g.*, 3 LaFave § 19.5 ("[f]or larceny there must be an intent to steal") *with* Cal. Veh. Code § 10851(a) (liability for driving or taking "with or without intent to steal"). Indeed, given the minimal mens rea required for joyriding, it is hard to

---

[32] Thus, in crafting the new jury instructions in 2006, the Judicial Council of California set no lower temporal bound on the intent required for a conviction under § 10851, permitting conviction if the defendant "intended to deprive the owner of possession or ownership of the vehicle *for any period of time*." Judicial Council of Cal. Crim. Jury Instns. (2006) CALCRIM No. 1820 (emphasis added).

imagine that Congress intended to deem a joyrider an "aggravated felon," thereby leading to mandatory deportation and a permanent bar from the United States. *See* 8 U.S.C. §§ 1182(a)(9)(A)(i), 1227(a)(2), 1229b(a).

While this Court need not decide the precise contours of the mens rea required for a theft offense, the mens rea requirement must be more robust than that which is sufficient for a conviction under § 10851.[33]

A. Evolution Of Theft Crimes

Larceny was the original, common-law theft crime; indeed, "theft" was sometimes used as a synonym for the crime of larceny. *See* 4 Blackstone at 229 (describing crime of "[l]arciny, or theft"); *Black's Law Dictionary* 1477 (6th ed. 1990) (first entry for "theft": "A popular name for larceny.").[34] Larceny required a trespassory taking and carry-

---

[33] This Court may affirm the judgment of the Court of Appeals on any ground properly raised below. *E.g.*, *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 38-39 (1989). Respondent presented both to the BIA (Pet. App. 18a-19a) and to the Ninth Circuit (Pet.-Appellant's Substitute Opening Br., No. 04-74471, at 7-9, 12) the argument that § 10851 is not a "theft offense" because the required mens rea is less than is required for "theft."

The Government, moreover, has put these questions directly at issue both by arguing that "the offense of which respondent was convicted satisfies the generic definition of 'theft offense'" (Gov't Br. 27 (capitalization altered)), and by asking that the court of appeals' judgment be reversed rather than vacated (*id.* at 33). If this Court finds the arguments in Section B of the Government's brief to be "fairly included" within the question presented, S. Ct. R. 14.1(a), then it must also consider Respondents' arguments herein. That is particularly so given that the intent to steal argument pertains to *Taylor*'s first step (the categorical approach), and is thus logically prior to the arguments in Section B of the Government's brief, which pertain to *Taylor*'s second step. *Cf. Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 75 n.13 (1996) (questions "'predicate to an intelligent resolution' of the question presented" are 'fairly included' within the question presented" (citation omitted)).

[34] *See also Black's Law Dictionary* 1516 (8th ed. 2004) (first entry for "theft": "The felonious taking and removing of another's personal property with the intent of depriving the true owner of it; larceny.").

ing away of the personal property of another with intent to steal. 3 LaFave § 19.2. The intent to steal—traditionally expressed as the requirement that the taking be "felonious; that is, done animo furandi," 4 Blackstone at 232 (emphasis omitted)—served to distinguish felons from "mere trespassers, and other petty offenders," *id.* The typical articulation required the wrongdoer to act with intent "to deprive the owner of his property permanently." 3 James Fitzjames Stephen, *A History of the Criminal Law of England* 132 (1883); *see also Van Vechten* v. *American Eagle Fire Ins. Co.*, 146 N.E. 432, 432 (N.Y. 1925) (Cardozo, J.) (in general, there is no larceny unless actor intended "to appropriate another's property permanently and wholly" (citing cases)).

A corollary of the requirement of intent to steal is the principle that, where an individual takes property intending only to use it briefly and to return it, there is no larceny. *See, e.g.*, *Regina* v. *Trebilcock*, 7 Cox Crim. Cas. 408, 411 (1858) ("If at the time of the asportation his intention is to make a mere temporary use of the chattels taken, so that the *dominus* should again have the use of them afterwards, that is a trespass, but not a felony."). As Blackstone states, "if a neighbour takes another's plough, that is left in the field, and uses it upon his own land, and then returns it," then there can be no larceny because the requisite intent—the animus furandi—is lacking. 4 Blackstone at 232.

Larceny's requirement of a trespassory taking, however, proved in certain circumstances to be a hurdle to the conviction of culpable individuals. Where the individual appropriated property already lawfully in her possession (such as a bank clerk who pocketed cash just handed to her by a customer, instead of putting it in the cash draw), or who deceived a victim into willingly transferring title to his property by telling him lies, a trespass was difficult to find. In the late 18th century, Parliament filled these voids with the statutory offenses of embezzlement and false pretenses. *See Bell* v. *United States*, 462 U.S. 356, 359 (1983). The lacunae that prompted these changes, however, had to do only with

the wrongdoer's external acts, not the wrongdoer's intent with respect to the property appropriated.

B. The Minimum Mens Rea vFor A Theft Offense

Today, the term "theft" is generally thought to include larceny, embezzlement, and false pretenses.[35] Not surprisingly, the core mens rea principles of the common law have carried into the modern definition of "theft." *See generally Black's Law Dictionary* 1477 (6th ed. 1990) ("Theft is any of the following acts done with intent to deprive the owner permanently of the possession, use or benefit of his property: (a) Obtaining or exerting unauthorized control over property; or (b) Obtaining by deception control over property; or (c) Obtaining by threat control over property; or (d) Obtaining control over stolen property knowing the property to have been stolen by another.").[36] Simply stated, the brief taking of property with the intent to return it does not satisfy the mens rea requirement for a theft offense. *See generally* Brief for Amici Curiae Professors of Criminal Law.

Larceny. First, with respect to larceny offenses, Professor LaFave states: "For larceny there must be an intent to steal." 3 LaFave § 19.5; *compare with* Cal. Veh. Code § 10851

---

[35] The leading treatise, for example, divides its "Theft" chapter into discussions of larceny, embezzlement, and false pretenses. 3 LaFave ch. 19; *see also id.* at § 19.8 (historically, "the wrongful appropriation of another's property was covered by three related but separate, non-overlapping crimes—larceny, embezzlement and false pretenses" (footnote omitted)); *Black's Law Dictionary* 1477 (6th ed. 1990) ("[T]heft is a wider term than larceny and . . . includes swindling and embezzlement."); *United States* v. *Turley*, 352 U.S. 407, 412 n.8, 415-417 (1957) (holding that "stolen" in National Motor Vehicle Theft Act is not limited to taking by larceny, but also includes embezzlement).

[36] The "most relevant time for determining a statutory term's meaning" is the year of enactment. *MCI Telecomms. Corp.* v. *AT&T Co.*, 512 U.S. 218, 228 (1994) (discussing dictionary definitions). The sixth edition of *Black's Law Dictionary* was current in 1994, when "theft offense" was added to § 1101(a)(43)(G). *See* Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222.

(covering individuals acting "without intent to steal"). It is quite clear that use of property for a reasonable time with an intent to return is not sufficient for a larceny offense. As Professor LaFave states, "[o]ne who takes another's property intending at the time he takes it to use it temporarily and then to return it unconditionally within a reasonable time—and having a substantial ability to do so—lacks the intent to steal required for larceny." *Id.* at § 19.5(b).

In the great majority of states—at least forty-two—an individual who takes property intending to use it briefly and return it is not guilty of larceny-type theft.[37] In only two

[37] Nineteen states prohibit unauthorized taking with intent to "deprive"; sixteen of those states define "deprive" in such a way as to exclude from the statute's reach deprivations with intent merely to use for a brief time and return, and the remaining three employ a broader definition of "deprive" but narrow it through case law to yield the same result. For the substantive prohibitions, *see* Ala. Code § 13A-8-2; Ariz. Rev. Stat. Ann. § 13-1802(A)(1); Ark. Code Ann. § 5-36-103(a)(1); Haw. Rev. Stat. § 708-830(1); Ky. Rev. Stat. Ann. § 514.030; Me. Rev. Stat. Ann. tit. 17-A, § 353; Md. Code Ann., Crim. Law § 7-104(a); Mo. Rev. Stat. § 570.030; Neb. Rev. Stat. § 28-511; Nev. Rev. Stat. § 205.0832(1)(a); N.H. Rev. Stat. Ann. § 637:3; N.J. Stat. Ann. § 2C:20-3; N.D. Cent. Code § 12.1-23-02(1); 18 Pa. Cons. Stat. Ann. § 3921; Tenn. Code Ann. § 39-14-103; Tex. Penal Code Ann. § 31.03; Utah Code Ann. § 76-6-404; Wash. Rev. Code § 9A.56.020; Wyo. Stat. Ann. § 6-3-402(a). For definitions of "deprive," *see* Ariz. Rev. Stat. Ann. § 13-1801(A)(4); Ark. Code Ann. § 5-36-101(4); Haw. Rev. Stat. § 708-800; Ky. Rev. Stat. Ann. § 514.010(1); Me. Rev. Stat. Ann. tit. 17-A, § 352(3); Mo. Rev. Stat. § 570.010(8); Neb. Rev. Stat. § 28-509(1); Nev. Rev. Stat. § 205.0824; N.H. Rev. Stat. Ann. § 637:2(III); N.J. Stat. Ann. § 2C:20-1(a); N.D. Cent. Code § 12.1-23-10(3); 18 Pa. Cons. Stat. Ann. § 3901; Tenn. Code Ann. § 39-11-106(a)(8); Tex. Penal Code Ann. § 31.01(2); Utah Code Ann. § 76-6-401(3); Wyo. Stat. Ann. § 6-3-401(a)(ii). For the broader definitions of "deprive" and case law constraining the definition, *see* Ala. Code § 13A-8-1(2); Md. Code Ann., Crim. Law § 7-101; Wash. Rev. Code § 9A.56.010(6); *Strickland* v. *State*, 771 So. 2d 1123, 1124, 1126-1129 (Ala. Crim. App. 1999); *In re Lakeysha P.*, 665 A.2d 264, 276 (Md. Ct. Spec. App. 1995); *State* v. *Walker*, 879 P.2d 957, 959-960 (Wash. Ct. App. 1994).

Eighteen states require through their statutes or by case law an intent to (or a knowing use that will) deprive "permanently." Colo Rev. Stat. § 18-4-401; 720 Ill. Comp. Stat. 5/16-1, 5/15-3 (defining "permanently deprive" in a way materially similar to the Model Penal Code's definition

states and the District of Columbia would such intent clearly be sufficient for theft.[38] (The situation is ambiguous in the remaining six states.[39])

The Model Penal Code similarly provides that an individual who took property intending to use it briefly and return it is not guilty of larceny-type theft.[40] The model code compels this result by requiring that the wrongdoer act with

---

of "deprive"); Kan. Stat. Ann. §§ 21-3701, 21-3110(6) (same); La. Rev. Stat. Ann. § 14:67(A); Wis. Stat. § 943.20(1)(a); *People* v. *Davis*, 965 P.2d 1165, 1167-1168 (Cal. 1998); *State* v. *Schminkey*, 597 N.W.2d 785, 788-789 (Iowa 1999); *Commonwealth* v. *Cheromcka*, 850 N.E.2d 1088, 1100 (Mass. App. Ct. 2006); *People* v. *Goodchild*, 242 N.W.2d 465, 468 (Mich. Ct. App. 1976); *Crouse* v. *State*, 89 So. 2d 919, 922-923 (Miss. 1956); *State* v. *Rhea*, 523 P.2d 26, 28 (N.M. Ct. App. 1974); *State* v. *Barbour*, 570 S.E.2d 126, 127 (N.C. Ct. App. 2002); *Tate* v. *State*, 706 P.2d 169, 171 (Okla. Crim. App. 1985); *In re Timothy*, 442 A.2d 887, 890 (R.I. 1982); *Kerrigan* v. *State*, 406 S.E.2d 160, 161 (S.C. 1991); *State* v. *Hanson*, 446 A.2d 372, 374-375 (Vt. 1982); *Bright* v. *Commonwealth*, 356 S.E.2d 443, 444 (Va. Ct. App. 1987); *State* v. *Casto*, 480 S.E.2d 525 527-28 (W. Va. 1996).

Four states require an intent to "deprive" or to "appropriate," and the definitions of both terms, as construed in case law, exclude deprivations with intent to use briefly and return. For the substantive prohibition, *see* Alaska Stat. § 11.46.100(1); Del. Code Ann. tit. 11, § 841(a); N.Y. Penal Law § 155.05; Or. Rev. Stat. § 164.015(1). For the definitions of "deprive" and "appropriate," *see* Alaska Stat. § 11.46.990(2), (8); Del. Code Ann. tit. 11, § 857(1), (2); N.Y. Penal Law § 155.00(3), (4); Or. Rev. Stat. § 164.005(1), (2). For cases interpreting these provisions, *see Champion* v. *State*, 908 P.2d 454, 464-467 (Alaska Ct. App. 1995); *State* v. *Willis*, 673 A.2d 1233, 1240 & n.9 (Del. Super. Ct. 1995); *People* v. *Jennings*, 504 N.E.2d 1079, 1086-1087 (N.Y. 1986); *State* v. *Christine*, 93 P.3d 82, 87 (Or. Ct. App. 2004). Finally, one state requires intent either to deprive permanently or to effect a temporary deprivation with qualifications that exclude intent to use for a brief time and return. Minn. Stat. § 609.52 subdiv. 2(1), 2(5).

[38] Fla. Stat. § 812.014; Ga. Code Ann. § 16-8-2; D.C. Code § 22-3211.

[39] Conn. Gen. Stat. § 53a-119; Idaho Code § 18-2403; Ind. Code § 35-43-4-2; Mont. Code Ann. § 45-6-301; Ohio Rev. Code Ann. § 2913.02; S.D. Codified Laws § 22-30A-1.

[40] In the "modern statutes dealing with theft[,] [b]y far the most common approach is to follow the Model Penal Code . . . ." 3 LaFave § 19.5.

"purpose to deprive" the owner of the property taken, MPC § 223.2(1), and defining "deprive" to mean:

> (a) to withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value, or with intent to restore only upon payment of reward or other compensation; or (b) to dispose of the property so as to make it unlikely that the owner will recover it.

MPC § 223.0(1). Under this definition, an individual who takes property intending to use it for a few moments (or even a few hours) and then return it will not "deprive" the owner of the property.

Embezzlement. With respect to embezzlement, Professor LaFave similarly explains that a person who takes with an intent to return is not guilty of embezzlement: "One who, with another's property in his rightful possession, converts it, intending, however, to return the specific property (and having a substantial ability to return it) in its original condition, after a period of time, is not guilty of embezzlement, for he lacks the fraudulent intent which embezzlement requires." 3 LaFave § 19.6(f)(2) (footnote omitted). And, in fact, the embezzlement prohibitions of the majority of states likewise require an intent more robust than the intent to use property temporarily and return it.[41] Only five states and

[41] This is true in at least 29 states. Nineteen states require intent to "deprive," or to "deprive" or "appropriate," and use the same definition of those terms as applied in larceny cases. Ala. Code § 13A-8-2(1); Alaska Stat. § 11.46.100(1); Ark. Code Ann. § 5-36-103(a)(1); Del. Code Ann. tit. 11, § 841(a); Haw. Rev. Stat. § 708-830(1); Ky. Rev. Stat. Ann. § 514.030; Me. Rev. Stat. Ann. tit. 17-A, § 353; Mo. Rev. Stat. § 570.030; Neb. Rev. Stat. § 28-511; N.H. Rev. Stat. Ann. § 637:3; N.J. Stat. Ann. § 2C:20-3; N.Y. Penal Law § 155.05; N.D. Cent. Code § 12.1-23-02(1); Or. Rev. Stat. § 164.015(1); 18 Pa. Cons. Stat. Ann. § 3921; Tenn. Code Ann. § 39-14-103; Tex. Penal Code Ann. § 31.03; Utah Code Ann. § 76-6-404; Wyo. Stat. Ann. § 6-3-402(b). For the definitions of "deprive" and "appropriate," *see supra* n.37.

In a further ten states, either statutes or case law makes clear that an intent to use briefly and return will not be sufficient for embezzlement. An intent to deprive "permanently" is required by statute in four states,

the District of Columbia unequivocally reject this position.[42] In addition, the embezzlement provision of the Model Penal

---

Colo. Rev. Stat. § 18-4-401; 720 Ill. Comp. Stat. 5/16-1; Kan. Stat. Ann. § 21-3701; La. Rev. Stat. Ann. § 14:67(A); *see also supra* n.37 (citing definitions of deprive "permanently" in Illinois and Kansas), and by case law in two states, *Commonwealth* v. *Oliver*, 805 N.E.2d 1019, 1021 (Mass. Ct. App. 2004); *State* v. *Oliveira*, 432 A.2d 664, 666 (R.I. 1981). Cases in three states make clear that the only difference between larceny and embezzlement is the timing of the intent relative to gaining possession, *Ennis* v. *State*, 167 P. 229, 233 (Okla. Crim. App. 1917); *State* v. *Butler*, 1884 WL 4584 (S.C. July 1, 1884); *State* v. *Moyer*, 52 S.E. 30, 32 (W. Va. 1905), and thus that an intent approximating larceny's intent permanently to deprive is required for embezzlement, *Butler*, 1884 WL 4584, at *2 ("with the intent to make it his own, and to destroy the title of the true owner"), or conversely that intent to deprive temporarily and return is insufficient, *see Chapman* v. *State*, 212 P.2d 485, 488 (Okla. Crim. App. 1949); *Moyer*, 52 S.E. at 32. Finally, one state defines the theft offense in such a way as to exclude conversion with intent to use briefly and return. Minn. Stat. § 609.52 subdiv. 2(1), 2(5).

[42] D.C. Code § 22-3211; Fla. Stat. § 812.014; Ga. Code Ann. § 16-8-2; Iowa Code § 714.1(2); N.M. Stat. § 30-16-8; S.D. Codified Laws §§ 22-30A-1, 22-30A-10. The rule is ambiguous in the remaining sixteen states. Ariz. Rev. Stat. Ann. § 13-1802; Cal. Penal Code §§ 484(a), 503-515; Conn. Gen. Stat. § 53a-119; Idaho Code § 18-2403; Ind. Code § 35-43-4-2; Md. Code Ann., Crim. Law §§ 7-104(a), 7-113; Mich. Comp. Laws §§ 750.174, 750.362; Miss. Code Ann. §§ 97-11-25, 97-23-19; Mont. Code Ann. § 45-6-301(1), (7); Nev. Rev. Stat. § 205.0832(1)(b); N.C. Gen. Stat. §§ 14-90 to 14-99; Ohio Rev. Code Ann. § 2913.02; Vt. Stat. Ann. tit. 13, §§ 2531-2538; Va. Code Ann. § 18.2-111; Wash. Rev. Code § 9A.56.020; Wis. Stat. § 943.20(1)(a), (b).

Determining whether a state rejects the majority position is made difficult by the fact that there exist two generally accepted principles that are entirely distinct analytically but rather similar in articulation to such a rejection. First, it is "uniformly held" that intent to return *equivalent* property is no defense to embezzlement. 3 LaFave § 19.6(f)(3). For the defense to be available, the intent must be to restore the very property taken. *Id.* § 19.6(f)(2). Second, there is a similarly well-established rule that if the initial act of taking or conversion is done with the necessary intent, then a later-formed intent to return the property is no defense. *See, e.g.*, 3 Charles E. Torcia, *Wharton's Criminal Law* § 385 (15th ed. 1995) ("To constitute embezzlement, the property must be appropriated or converted with the intent permanently to deprive. . . . Given a fraudulent appropriation or conversion, an embezzlement is committed even if the defendant intends at some subsequent time to return the property or to

Code requires intent to "deprive," and uses the same definition of "deprive" as applied to larceny.[43]

False Pretenses. False pretenses differs from larceny and embezzlement in that title to the property must pass from the victim to the wrongdoer for the crime to be complete. *Bell*, 462 U.S. at 359-360 ("The theoretical distinction between false pretenses and larceny by trick may be stated simply. If a thief, through his trickery, acquired *title* to the property from the owner, he has obtained property by false pretenses; but if he merely acquired *possession* from the owner, he has committed larceny by trick.").[44] Rarely, if ever, will an individual trick an owner into parting with title to property when the individual's only intent is to use the property for a brief time and return it. If, as is far more likely, an individual tricks the owner into parting only with possession, the crime is not false pretenses, but larceny,[45] *see Bell*, 462 U.S. at 359-360, and the intent requirement for lar-

---

make restitution to the owner."). Statements in case law frequently are equivocal between stating one of these two principles and rejecting the majority position. Furthermore, in some states the statute is unclear and the only relevant declaration found regarding intent in the case law is that an intent permanently to deprive is not required for embezzlement, thus not settling conclusively the question whether an intent to deprive for a brief time and return would be sufficient.

[43] The model code in fact criminalizes larceny and embezzlement in a single section, providing that a person is guilty of theft "if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof." MPC § 223.2(1). Several states take the same approach. *E.g.*, Ky. Rev. Stat. Ann. § 514.030; N.J. Stat. Ann. § 2C:20-3.

[44] *See also* MPC §§ 223.3, 223.0(5)(a) ("Theft by Deception") (a person is guilty of theft by deception if he "bring[s] about a transfer . . . of a legal interest in the property" through deception); *see also* MPC Commentaries Pt. II, vol. 2, at 182-183 (1980) (theft by deception "is not an offense designed to safeguard possession").

[45] Although "[t]he expression 'larceny by trick' is often used to identify this type of larceny, . . . it is the crime of larceny and not a separate crime." 3 LaFave § 19.1(a)(3) & n.7 (describing leading larceny by trick case of *Rex* v. *Pear*, 168 Eng. Rep. 208 (1779)).

ceny[46] will apply. False pretenses therefore has little relevance to takings with intent to use briefly and return. *See* MPC Commentaries Pt. II, vol. 2, at 182 (1980) ("Theft by deception . . . is not an offense designed to safeguard possession, nor does it protect against the use of deception to gain temporary possession or control of property or to continue a possession or control that was lawfully acquired.").[47]

Yet even with respect to false pretenses, there is no liability if one takes with an intent to return. As Professor LaFave states:

> To be guilty of false pretenses (under the typical statute) it is not enough that the wrongdoer tells what he knows or believes to be false . . .; in addition, he must have an intent to defraud. . . . As with the analogous theft crimes, larceny and embezzlement, one who tells intentional lies nevertheless is not guilty of false pretenses, because he lacks the intent to defraud, if . . . he intends to restore the very property taken, unconditionally and within a reasonable time, and has a substantial ability to do so. . . .

---

[46] *See supra* nn.37-40 and accompanying text.

[47] Moreover, serious doubt exists as to whether a conviction under California Vehicle Code § 10851 could ever amount to false pretenses, because the statute requires that the taking be "without the consent of the owner," and in false pretenses the owner's consent is always obtained, albeit fraudulently. *People* v. *Cook*, 39 Cal. Rptr. 802, 804-805 (Cal. Dist. Ct. App. 1964) ("[F]raud in the inducement . . . does not vitiate consent. . . . [S]ection 10851 of the Vehicle Code makes no reference to fraud, false pretense or trick and device but is specifically based upon the taking without consent. . . . Consent having been given, there was no violation of section 10851 . . . ." (emphasis omitted)); CALCRIM No. 1820 (in "Related Issues" section under jury instruction applicable to § 10851, stating "*Consent Not Vitiated By Fraud.* The fact that an owner's consent was obtained by fraud or misrepresentation does not supply the element of nonconsent." (citing *Cook*)). *But cf. People* v. *Burford*, No. B156883, 2003 WL 1984547, at *3-4 (Cal. Ct. App. Apr. 30, 2003) (unpublished).

3 LaFave § 19.7(f)(2).[48]

* * *

As a generic matter, then, it is clear that an individual who exerts unauthorized control over property but intends only to use it briefly and then return it lacks the intent required for theft.[49] Because § 10851 creates liability in such a

---

[48] In addition, the language of § 1101(a)(43)(G) makes clear that Congress intended the phrase to reach another, historically separate theft crime: receipt of stolen property. Again, however, that intent defeats the intent required for the offense. As Professor LaFave states, "one who receives what he knows to be stolen property with the intent to restore it unconditionally to its owner does not have the requisite intent for the crime." 3 LaFave § 20.2(e); *see also* MPC § 223.6 (carving out from reach of receiving stolen property provision the circumstance where "the [stolen] property is received . . . with purpose to restore it to the owner"); MPC Commentaries Pt. II, vol. 2, at 237 (1980) (stating that "a purpose to restore defeats conviction" of receipt of stolen property).

[49] The Model Penal Code provides further indication that "joyriding" is not a theft crime. The drafters created a misdemeanor offense to cover joyriding—in MPC § 223.9—called "Unauthorized Use of Automobiles and Other Vehicles." The Commentary makes clear that the drafters saw this offense as distinct from those offenses properly labeled as theft crimes. In the "Introductory Note" to Article 223, the drafters explain that the "consolidation of traditional acquisitive offenses into the single offense called 'theft'" is accomplished by the consolidating section "and by the separate definition of different forms of the offense *in Sections 223.2 through 223.8*. . . . The offenses heretofore known as larceny, embezzlement, false pretense, extortion, blackmail, fraudulent conversion, receiving stolen property, and the like, . . . are thereby replaced with a unitary offense." MPC Commentaries Pt. II, vol. 2, at 122 (1980) (emphasis added). The joyriding offense in MPC § 223.9, by contrast, is discussed separately in the Note, and is described as "relat[ing] to the lesser included conduct of unauthorized use of property." MPC Commentaries Pt. II, vol. 2, at 123 (1980).

Indeed, the BIA itself has suggested that joyriding is not a theft offense. In *Matter of V-Z-S-*, the BIA considered whether California Vehicle Code § 10851 was a "theft" offense. The Board interpreted the statutory scheme before it was clear that joyriding was covered by § 10851. The Board stressed—on two separate occasions—that, in its view, § 10851 did not cover joyriding. 22 I. & N. Dec. 1338, 1348 (BIA 2000) ("a person . . . guilty of joyriding, or temporarily operating another's vehicle, without an intent to deprive the owner of such vehicle, . . . could not be [convicted] under section 10851(a)"); *id.* at 1349 ("The respondent's 1995 conviction

circumstance, this Court should hold that § 10851 is not categorically a "theft offense."[50]

IV. THE MODIFIED CATEGORICAL APPROACH IS NOT PROPERLY BEFORE THE COURT AND, REGARDLESS, SUPPORTS RESPONDENT

The Government argues that even if Respondent is correct that California Vehicle Code § 10851 includes liability for accessories after the fact—and thus exceeds the generic definition of "theft offense"—the judgment below should be

---

was not under section 499b . . . which at the time was the California 'joyriding' statute."). The BIA also stressed that "'a glorified borrowing' of property is not a theft offense." *Id.* at 1346.

And regardless of whether the Board's interpretation of California law in *V-Z-S-* was correct, it is now clear that joyriding is punishable—and only punishable—under § 10851. Previously, California Penal Code § 499b had covered such conduct, but a 1997 amendment to that statute removed "automobile" from the statute's reach. The declared legislative intent in making this change was "'to clarify and streamline existing law by deleting provisions in Section 499b of the Penal Code that are generally duplicative of provisions in subdivision (a) of Section 10851 of the Vehicle Code.'" *People* v. *Moon*, 117 P.3d 591, 607 n.3 (Cal. 2005), *cert. denied*, 126 S. Ct. 1146 (2006) (quoting Stats. 1996, ch. 660, § 3, Assembly Bill No. 3170 (additional citation omitted)).

[50] The Government generally accepts the Ninth Circuit's generic definition of theft. Gov't Br. 11 n.2 (quoting *Penuliar*, 435 F.3d at 969 ("[A] taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." (citations omitted))). If this definition would apply to an individual who acts with intent to use property briefly and then return it, then this definition is inconsistent with the mens rea requirement in a majority of States and the Model Penal Code. *See supra*. If, however, the definition covers intent to effect certain non-permanent deprivations—*i.e.*, those that appropriate a major portion of the economic value of the property taken—but excludes brief or momentary deprivations with an intent to return, then it would be consistent with general mens rea principles. *See* MPC § 223.0(1) ("deprive" defined as, inter alia, "to withhold property of another permanently or for so extended a period to appropriate a major portion of its economic value."); *cf.* 3 LaFave § 19.5 ("for larceny, one must intend to deprive the owner of the possession of his property either permanently or for an unreasonable length of time.").

reversed under the "modified categorical" approach; in the Government's view, "the charging instrument and corresponding judgment show that [Respondent] was not convicted as an accessory after the fact." Gov't Br. 30. The Court should decline the Government's invitation to engage in this fact-intensive inquiry and, instead, should remand for further proceedings before the agency. If, however, the Court decides to resolve this factual question, it should nonetheless hold for Respondent.

A. The Court Should Remand So The BIA May Consider The Fact-Intensive Modified Categorical Analysis In The First Instance

It is a "simple but fundamental rule of administrative law" that a reviewing court "must judge the propriety of [agency] action solely by the grounds invoked by the agency." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). In this case, the BIA's brief order adopting the decision of the IJ indicated that it was based on the categorical inquiry alone. Pet. App. 3a (citing *Matter of V-Z-S-*, 22 I. & N. Dec. 1338 (BIA 2000) (determining that California Vehicle Code § 10851 was a categorical "theft offense")).[51] The Court should therefore remand to the agency for consideration under the modified approach. *Cf. Gonzales* v. *Thomas*, 126 S. Ct. 1613, 1614-1615 (2006) (per curiam).

The Government's approach to the case up to this point has been consistent with this principle. In its brief in the Ninth Circuit, the Government acknowledged that the categorical inquiry was controlled by the Ninth Circuit's prior

[51] Even if the scope of the BIA decision were ambiguous, however, remand would be warranted. "It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive." *Chenery*, 332 U.S. at 196-197. The basis on which the agency decided "must be set forth with such clarity as to be understandable," because the Court "must know what a decision means before the duty becomes [the Court's] to say whether it is right or wrong." *Id.* (citation omitted).

decision in *Penuliar*. Resp. Br. 5 (*Penuliar* v. *Ashcroft*). And it asked the Ninth Circuit—on four separate occasions in its six-page brief—to remand Respondent's case to the BIA for further proceedings under the modified categorical approach. *Id.* at 4, 5, 6.

In seeking certiorari, the Government took a similar tack, presenting a question that concerned only the categorical inquiry. Now it asks the Court to engage in a highly fact-bound inquiry with little or no significance outside this case.

Even in *Shepard* v. *United States*, 544 U.S. 13 (2005), in which the question presented at least pertained to the modified categorical inquiry, the Court did not conduct such an inquiry; after determining which documents could be considered in the analysis to determine whether the defendant had been convicted of "burglary," the Court remanded for application of its rule to the case at hand. *Id.* at 26.

B. Even If This Court Reaches The Modified Categorical Analysis, It Should Hold For Respondent

As this Court has made clear, the modified categorical approach is a narrow inquiry.[52] Thus, a court may "go beyond the mere of fact of conviction"—*i.e.*, rule on the modified approach—"in a narrow range of cases" in which certain documents establish that the defendant was "necessarily" convicted of a generic offense. *Taylor*, 495 U.S. at 602; *see also Shepard*, 544 U.S. at 17.[53] This case does not fall within this narrow range.

---

[52] *Cf. Taylor*, 495 U.S. at 601 ("[T]he practical difficulties and potential unfairness of a factual approach are daunting.").

[53] To the extent that *Shepard* and *Taylor* were based in part on the fact that those cases involved a sentencing enhancement, those considerations are equally present here. A prior conviction for an "aggravated felony" serves as a sentencing enhancement, increasing the maximum sentence for illegal reentry from 2 to 20 years, *see* 8 U.S.C. § 1326. In fact, this is the provision that was at issue in *Almendarez-Torres* v. *United States*, 523 U.S. 224, 228-229 (1998).

The Government argues that the documents in the record (specifically, the charging document)[54] purportedly establish that Respondent was not convicted as an accessory to the fact to the driving or taking of a vehicle under California Vehicle Code § 10851. The Government's sole argument on this score is that the charging document did not specifically charge Respondent as an accessory after the fact. Gov't Br. 30-32.

The Government's reasoning errs in two respects. First, it is simply not true that, in order to charge one as an accessory under California Vehicle Code § 10851, the charging document would need to so specify. The starting point for this modified categorical analysis, after all, is that § 10851 is a rare statute in that *it makes an accessory after the fact liable as a principal for the underlying offense*. This special feature of the statute means that the charging document in the present case is entirely consistent with a charge for an accessory after the fact. Second, even assuming arguendo that the information charged Respondent as a principal (*i.e.*, as driving or taking a vehicle), that does not demonstrate that he was convicted as such. California law makes clear that a California charging document does not control the basis for the ultimate conviction. Thus, even if Respondent were charged as a principal, he could have been convicted for the conduct of an accessory after the fact. Accordingly, the Government has failed to establish that Respondent was not convicted as an accessory after the fact.

---

[54] The charging document is at Pet. App. 13a-15a. The only other document the Government references is the Abstract of Judgment. *Id.* at 11a-12a. The Government does not rely on this document, and with good reason: under California law, an "abstract of judgment" is not the actual judgment. *People* v. *Mitchell*, 26 P.3d 1040, 1042 (Cal. 2001) ("An abstract of judgment is not the judgment of conviction"; it is "merely a form prepared and signed by the clerk of the court" (internal quotations omitted)); *People* v. *Mesa*, 535 P.2d 337, 340 (Cal. 1975) (abstract of judgment not "controlling").

1. The Charging Documents Are Consistent With A Charge Under California Vehicle Code § 10851 As An Accessory After The Fact

The Government is incorrect that, under California law, a charging document would need to reference accessory liability in order to charge an individual as an accessory after the fact under California Vehicle Code § 10851.

As a general matter, California does not require prosecutors to allege criminal wrongdoing with any great specificity. *See, e.g.*, *People* v. *Britton*, 56 P.2d 494, 496 (Cal. 1936). It is sufficient for the charging document simply to mimic the language of the statute. Section 952 of the California Penal Code expressly provides that the charge "may be in the words of the enactment describing the offense or declaring the matter to be a public offense." *See also* 4 Witkin & Epstein, Pretrial Proceedings § 179 (noting that this "appears to be the most common . . . method of pleading").

In particular, no special allegations are required when other parties to a crime (such as aiders or abettors) are held liable under the substantive statute. As the Government acknowledges (Br. 31-32), because California law has abrogated the distinction between aiders and abettors and principals, *see* Cal. Penal Code § 971, the charging documents need not identify whether the individual is being charged as an aider and abettor or principal. In fact, the California Penal Code expressly provides that "no other facts need be alleged in any accusatory pleading against any [aider and abettor] than are required in an accusatory pleading against a principal." *Id.*; *see also People* v. *Kennedy*, 253 P.2d 522, 523-524 (Cal. Ct. App. 1953); *cf. People* v. *Steelik*, 187 Cal. 361, 368 (Cal. 1921) (charging one as principal and aider and abettor "would be duplicative" since both are liable for the offense).

The Government argues that, in contrast, accessories after the fact must be identified accordingly in the charging documents. Gov't Br. 31. In the ordinary case, the Government is correct; the law generally distinguishes principals

and aiders and abettors on the one hand, from accessories after the fact on the other.[55]

But the Government ignores the special feature of California Vehicle Code § 10851 that triggered this analysis in the first place: Section 10851 expressly reaches accessories after the fact, thereby eviscerating the distinction between accessories after the fact and principals. This express statutory provision—making the accessory liable for the substantive crime—alters the general rule with respect to charging accessories. Indeed, this exception to the general rule is noted in one of the very cases cited by the Government: the Government quotes *People* v. *Prado*, 136 Cal. Rptr. 521, 523 (Cal. Ct. App. 1977), for the proposition that "a person charged in an indictment as a principal cannot be convicted on evidence showing him to be only an accessory after the fact" (Br. 31 n.18), but omits the language immediately preceding this quotation (and in the same sentence), which makes clear that the general rule only holds "*in the absence of statute*." *Prado*, 136 Cal. Rptr. at 523 (emphasis added).[56]

Put another way, aiders and abettors and accessories after the fact are on equal footing with respect to liability under § 10851—both are liable for the substantive crime on the same terms as the principal. Notably, neither need actually "take" or "drive" the vehicle and yet both are deemed liable under this statute. Their comparable status has logical im-

---

[55] Indeed, the accessory after the fact is not only identified as such in a charging document, he is charged with a "separate and independent offense." *Montoya*, 874 P.2d at 909 (citation omitted); *see also* Cal. Penal Code § 32.

[56] The two other sources the Government cites for the proposition that the accessory after the fact must be charged differently from the principal are irrelevant. Gov't Br. 31 n.18 (citing *People* v. *Baker*, 330 P.2d 240 (Cal. Ct. App. 1958); 17 Cal. Jur. 3d Criminal Law: Core Aspects § 124, at 192 (2002)). Neither of these sources concerns statutes that include liability for an accessory after the fact. Thus, they merely stand for the ordinary rule that an accessory after the fact is guilty of a distinct crime from the underlying offense and must, therefore, be charged as such.

plications for the charging document. In this case, for example, the charging document merely repeated the statutory language, charging Respondent with "driv[ing] or tak[ing]" the vehicle. Pet. App. 13a.[57] Because this language in a charging document suffices to charge aiders and abettors—and the Government concedes it does—then, for the same reasons, such a charge is sufficient for accessories after the fact under this particular statute, which holds them liable for the underlying crime as well.

Nor do notice requirements demand a different result. Ordinarily, as the Government suggests, accessories after the fact—who are charged with a separate crime from the underlying felony—must be charged as such in order to provide notice of the charges. But, again, because accessories after the fact under California Vehicle Code § 10851 are directly liable under this statute as principals, recitation of the statutory language places a defendant on notice of the charges against him.[58]

In light of California's pleading requirements and the particular statute here at issue, it is clear that the charging document did not limit the theories of liability under California Vehicle Code § 10851 to the exclusion of accessory after the fact liability.

---

[57] Indeed, contrary to the Government's suggestion (Gov't Br. 31), the charging document did not identify Respondent as a principal; it was silent as to his status.

[58] Moreover, the Government mistakenly assumes that the charging document is the only opportunity for notice. In California, however, "[u]nder modern pleading procedures, notice of the particular circumstances of an alleged crime is provided by the evidence presented to the committing magistrate at the preliminary examination, not by a factually detailed information." *People* v. *Jennings*, 807 P.2d 1009, 1023 (Cal. 1991) (citing *People* v. *Thomas*, 43 Cal. 3d 818, 829 (Cal. 1987)). *See also People* v. *Diaz*, 834 P.2d 1171, 1202-1203 (Cal. 1992) (en banc) ("[A]n accusatory pleading charging a defendant with murder need not specify the theory of murder on which the prosecution intends to rely" because "generally the accused will receive adequate notice of the prosecution's theory of the case from the testimony presented at the preliminary hearing.").

2. Even If The Charging Documents Are Read To Specify A Charge As Principal, California Law Demonstrates That Respondent Was Not Necessarily Convicted On That Theory

In addition, under California law, a guilty plea is not necessarily tied to the specifics of the formal charging document. California courts have long permitted informal, oral amendment of accusatory pleadings. As *People* v. *Sandoval*, 43 Cal. Rptr. 3d 911 (Cal. Ct. App. 2006), explains: "California law does not attach any talismanic significance to the existence of a written information," and thus allows, under the "informal amendment doctrine," for "a defendant's conduct [to] effect an informal amendment of an information without the People having formally filed a written amendment to the information." *Id.* at 926 (citing *People* v. *Rasher*, 83 Cal. Rptr. 724, 725, 727-728 (Cal. Ct. App. 1970); *People* v. *Hensel*, 43 Cal. Rptr. 865, 868 (Cal. Ct. App. 1965)).[59] Therefore, even if the written information is reflective of the prosecutor's theory at the time of charging, it may not be reflective of the actual information in place at the time of the plea.

Furthermore, the California Supreme Court has expressly recognized that a defendant may plead guilty to a crime that is different from that described in the written information without amending the information. In *People* v. *West*, 477 P.2d 409 (Cal. 1970), the Supreme Court of California stated that a "court, in accepting a knowing and voluntary plea of guilty or nolo contendere, is not limited in its jurisdiction to the offenses charged or necessarily included in those charged." *Id.* at 420 (citations omitted).[60] The

---

[59] *See also* 4 Witkin & Epstein, Pretrial Proceedings § 213 ("The proceedings in the trial court may constitute an informal amendment of the accusatory pleading, when the defendant's conduct or circumstances created by him amount to an implied consent to the amendment.").

[60] The California Supreme Court explained, 477 P.2d at 420 (citations omitted):

> A defendant who knowingly and voluntarily pleads guilty or nolo contendere can hardly claim that he is unaware that he

"court may accept a bargained plea of guilty or nolo contendere to any lesser offense reasonably related to the offense charged in the accusatory pleading." *Id.* at 419. A "reasonable relationship between the charged offense and the plea obtains when (1) the defendant pleads to the same type of offense as that charged (. . . a 'categoric similarity'), or (2) when he pleads to an offense which he may have committed during the course of conduct which led to the charge." *Id.* at 420.[61]

A guilty plea as an accessory after the fact under California Vehicle Code § 10851 is plainly "reasonably related" to being a principal or aider and abettor under that same statute; there is a "categoric similarity" and the offense "may have been committed during the course of conduct that led to the original charge." Thus, one charged as a principal may, in fact, have pleaded guilty as an accessory after the fact.

In short—even reading the information as the Government suggests—the charging document in the present case does not establish that Respondent was "necessarily" convicted of a "theft offense"; under California law, based on these record documents there is no way to determine

---

> might be convicted of the offense to which he pleads; his plea demonstrates that he not only knows of the violation but is also prepared to admit each of its elements. Although we could speak of defendant's plea as an 'implied' amendment of the information to add the charge to which defendant pleads, we see no need to fashion such a fiction . . . .

[61] *See also People* v. *Toro*, 766 P.2d 577, 580-581 (Cal. 1989) (en banc), *overruled on other grounds by People* v. *Guiuan*, 957 P.2d 928 (Cal. 1998) (establishing an exception to the rule that the defendant may not be convicted of uncharged offenses "in cases where a defendant expressly or impliedly consents to have the trier of fact consider a nonincluded offense"); *West*, 477 P.2d at 420 (citing the "practice of reduction to a count that bears some categoric similarity to the original charge" and noting that homicide might be reduced from murder to manslaughter or perhaps to assault, but "grossly inconsistent offenses, such as larceny or possession of narcotics are never arbitrarily used in place of murder unless these offenses were part of the actual conduct involved." (citation omitted)).

whether Respondent was convicted as an accessory after the fact. *See Shepard*, 544 U.S. at 17 (citing *Taylor*, 495 U.S. at 602).[62]

3. The Modified Categorical Analysis Pursuant To The Alternate Grounds For Affirmance Likewise Favors Respondent

Finally, if the Court were to inquire into the modified categorical approach regarding the other two alternate grounds for affirmance, *see* Parts II and III, Respondent would also prevail.

If this Court concludes that California aiding and abetting liability exceeds that which is included in the generic definition, the modified analysis favors Respondent. The Government concedes (Br. 31-32) that the charging document in this case applies equally to principals and aiders and abettors. Thus, the charging document does not reveal whether Respondent was convicted as principal or as aider and abettor pursuant to California's natural and probable consequences doctrine. Accordingly, it cannot be said that Respondent was necessarily convicted of a "theft offense" under the INA.

Similarly, if the Court agrees with Respondent that California Vehicle Code § 10851 permits convictions without the requisite mens rea for a "theft offense," the Court should hold for Respondent under the modified approach. Indeed, in this particular analysis, the charging document is singu-

---

[62] This Court's statement in *Shepard* that a charging document may reveal whether a conviction falls within a generic definition, 544 U.S. at 20-21, does not suggest otherwise. While charging documents may be *considered* as part of a modified categorical inquiry, they by no means necessarily *resolve* whether a particular conviction was within the generic definition in any particular case. *See Taylor*, 495 U.S. at 602 (modified approach resolves inquiry "in a narrow range of cases" in which certain documents establish that the defendant was "necessarily" convicted of the generic offense); *cf. id.* (jury instruction can resolve an inquiry in a conviction-by-jury case only if the instructions "actually required the jury to find all of the elements" of the generic offense).

larly unhelpful to the Government. It expressly notes that the alleged offense was committed "with the intent to permanently or temporarily deprive" the owner of title or possession and "*with or without intent to steal* the vehicle." Pet. App. 13a (emphasis added). Thus, the modified categorical inquiry is manifestly inconclusive—it cannot be said that Respondent was "necessarily" convicted of a "theft offense" under the INA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

CHRISTOPHER J. MEADE
Counsel of Record
ANNE K. SMALL
JANET R. CARTER
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

NOVEMBER 2006