No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ERIK QUIROZ RAZO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTIONS PRESENTED

1. Whether a defendant can be convicted of conspiring to aid and abet a crime when the underlying crime is never completed?

2. Whether, to conspire to aid and abet a crime of international flight from prosecution, a defendant needs specific knowledge that he is helping someone flee internationally, or whether it is sufficient for the defendant to know he is helping someone generally flee prosecution?

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Petitioner, Erik Quiroz Razo, respectfully prays for a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

On September 24, 2021, the Ninth Circuit affirmed Petitioner's conviction. Though the jury instructions did not require the jury to find that Petitioner had acted with advance knowledge of the full crime he was aiding and abetting, the court did not find instructional error. And it found sufficient evidence to sustain the conviction even though Petitioner's conviction—for conspiracy to aid and abet—was for an underlying crime that was never completed. *See* Appendix ("App.") at 4-5; *United States v. Quiroz*, 860 F. App'x 477 (9th Cir. Sept. 24, 2021) (unpublished). *Id.* On December 20, 2021, the Ninth Circuit denied Petitioner's request for rehearing. *See* App-7.

JURISDICTION

Petitioner was convicted of conspiracy to aid and abet another's unlawful flight to avoid prosecution, in violation of 18 U.S.C. §§ 2, 371, and 1073, in the United States District Court for the Eastern District of California. The United States Court of Appeals for the Ninth Circuit reviewed his conviction under 28 U.S.C. § 1291, and denied a petition for rehearing on December 20, 2021. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

18 U.S.C. § 2

18 U.S.C. § 371

18 U.S.C. § 1073

18 U.S.C. § 2, the federal aiding and abetting liability statute, provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

The federal conspiracy statute, **18 U.S.C. § 371**, provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

The Unlawful Flight to Avoid Prosecution ("UFAP") Statute, **18 U.S.C. § 1073**, provides:

> Whoever moves or travels in interstate or foreign commerce with intent either (1) to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees, for a crime, or an attempt to commit a crime, punishable by death or which is a felony under the laws of the place from which the fugitive flees, … shall be fined under this title or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

I. Petitioner is charged with conspiring to aid and abet a crime that is never committed.

Petitioner, along with a co-defendant, was charged with conspiring to aid and abet another's unlawful flight to avoid prosecution, in violation of 18 U.S.C. § 1073. Section 1073 prohibits moving or traveling interstate with the intent to avoid being prosecuted by the state someone is fleeing from. *See id.*

This charge stemmed from Petitioner and his co-defendant giving their co-worker, Paulo, a ride to work one morning. They picked up Paulo at his house in the early morning to carpool to their construction jobsite a couple hours north from where they lived in central California. Petitioner's co-defendant was driving his own car, and Petitioner was in the passenger seat. Though they didn't know it when they picked him up, Paulo had shot and killed a police officer in the middle of the night, after the officer had attempted to pull him over for driving under the influence.

No one discussed the murder during the drive. But after a little while, Petitioner's co-defendant received a call from his wife, who told him that she'd heard on the news that Paulo was wanted for murdering a police officer.

Paulo then changed his mind about going to work that day, and instructed Petitioner's co-defendant to take him to his uncle's farm nearby, still in in the California central valley. When they got there, in front of Petitioner and his co-defendant, Paulo told his aunt and uncle he had "shot an officer." He asked his relatives if he could stay at their house for three days so he could "figure out what he

was going to do." Paulo didn't have a plan—he just wanted to hide out and think about what to do next. His said he needed to find someone who could get him "out" or help him "leave," which his aunt and uncle believed meant help him get to Mexico, where he had other relatives.

His aunt and uncle didn't want to get in trouble and told Petitioner's co-worker that he couldn't stay with them. The group left their house, and Paulo instructed Petitioner's co-defendant to drive him to a friend's dairy, near Petitioner's house, where he could stay until he figured out his next steps. He never mentioned anything about planning to go to Mexico.

The co-defendant drove Petitioner and Paulo to Petitioner's house, and from there Petitioner drove Paulo to Paulo's friend's dairy. Their entire trip, which lasted about half a day, took place entirely within California. After Petitioner dropped Paulo off at the dairy, Petitioner never saw Paulo again.

Petitioner was arrested the day after he dropped Paulo off. Paulo, however, eluded authorities for a few days more. He was picked up from the dairy by one of his brothers, and then hid out with some of his family members, still remaining in California. During this time, he was in contact with a smuggler who arranged to take him to Mexico. Police ultimately caught him in California after a few days and charged him with the officer's murder; he later pleaded guilty.

II. At trial, the evidence established that Paulo never moved or traveled interstate, and the jury wasn't required to find that Petitioner knew Paulo intended to flee to Mexico.

When Petitioner and his co-defendant went to trial, the evidence demonstrated that the group never left California. They picked up Paulo, drove north to go to work, detoured to his relatives' house in California, then returned south to Petitioner's house and the dairy, still remaining in California. There was no interstate movement or travel.

Over Petitioner's objection, the jury was instructed that "there was an agreement between two or more persons to aid and abet Paulo Virgen Mendoza's flight to avoid prosecution" and that the "object of the conspiracy charged in Count Three of the indictment is to aid and abet Paulo Virgen Mendoza's flight to avoid prosecution." Petitioner had objected that because 18 U.S.C. § 1073 required movement or travel in interstate or foreign commerce with the intent to avoid prosecution, the instruction needed to refer to Paulo's flight as "interstate." Otherwise, it would not properly require the jury to find that Petitioner had conspired to aid and abet an interstate flight—only general flight within California, which is not what § 1073 required.

Because there was no model instruction for a § 1073 offense, nor for a "conspiracy to aid and abet," the district court wrote its own instruction for the charge. It cobbled together pieces of the Ninth Circuit's model instructions for aiding and abetting and conspiracy, as well as language from the § 1073 statute; it was

essentially a combination of the three statutes in one instruction. The full two-page instruction is set out at App-9-10.

Petitioner moved for a judgment of acquittal, under Federal Rule of Criminal Procedure 29(a), arguing that for a conviction under an aiding and abetting theory of liability, there must be an underlying crime committed by a principal. Here, because Paulo had remained entirely in California, there was no violation of § 1073, which required interstate movement or travel. And because there was no underlying § 1073 crime, Petitioner couldn't conspire to aid and abet it. The district court disagreed, and denied Petitioner's Rule 29 motion.

The jury later returned a guilty verdict on this count, and Petitioner appealed.

III. The Ninth Circuit affirmed Petitioner's conviction, finding that the instruction sufficiently stated the mens rea for the offense, and that there was sufficient evidence of a conspiracy to aid and abet a crime.

The Ninth Circuit affirmed Petitioner's conviction. Addressing the jury instruction argument, it held that the instruction "adequately stated the knowledge requirements for the charged conspiracy." *See* App-4. It parsed the instruction and concluded that the various pieces, "[t]aken together," "informed the jury that aiding and abetting requires proof that the defendant participated in the 'criminal venture with advance knowledge of the crime.'" *See* App-4. This sufficiently required the "prosecution to prove that [Petitioner] knew of Paulo's intent to travel to Mexico, satisfying the standard for § 371 conspiracy." *Id.*

Regarding the sufficiency of the evidence, the court found Petitioner's argument "unavailing," as "a conspiracy to aid and abet may be sustained even when the underlying offense never transpires." *See* App-4-5.

The Ninth Circuit later denied a Petition for Rehearing. *See* App-7.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit affirmed Petitioner's conviction for conspiring to aid and abet an unlawful flight from prosecution, imposing criminal liability even though no principal committed an underlying crime.

Petitioner was convicted of conspiring to aid and abet Paulo's violation of the federal statute prohibiting unlawful flight to avoid prosecution, 18 U.S.C. § 1073; *see also* 18 U.S.C. §§ 2, 371 (aiding and abetting and conspiracy statutes). But Paulo never violated § 1073 because moving across state lines is an essential element of the statute—section 1073 only applies to someone who "moves or travels in interstate or foreign commerce" intending to avoid prosecution. 18 U.S.C. § 1073; *see also United States v. McCord*, 695 F.2d 823, 827 (5th Cir. 1983) ("Interstate movement was an essential element of the [UFAP] offense which the Government was obliged to prove beyond a reasonable doubt.").

That means Petitioner was convicted for helping Paulo do something that wasn't itself illegal. Even though Paulo's underlying conduct wasn't illegal, the Ninth Circuit still affirmed Petitioner's conviction because a conspiracy conviction only requires an agreement to help someone commit a crime (and an overt act), even if a crime is never committed. *See* App-5.

But there are two problems with this reasoning, in terms of fundamental principles of fairness. The first is that agreeing to help do something that isn't illegal seems, in terms of culpability, like something that the law shouldn't seek to punish. The second is that analyzing Petitioner's conviction purely in terms of conspiracy law, and not in terms of the requirements for aiding and abetting liability that require a completed underlying crime, doesn't hold the government to its decision to charge a conspiracy to aid and abet; the analysis essentially lets the government off the hook and allows it to avoid proving the elements of aiding and abetting liability.

In addition to raising the question of whether it is fair to impose criminal liability on someone under these circumstances, this Petition also notes the division in the circuits on whether a principal must first commit an underlying crime before another can be punished for conspiring to aid and abet the commission of it.

A. Imposing criminal liability on someone who agrees to help do something that isn't illegal contravenes basic principles of fairness that underlay our criminal justice system.

As just stated, Petitioner was charged and convicted of conspiring to aid and abet Paulo's § 1073 flight from prosecution—but Paulo never crossed state lines, so he never violated § 1073. The upshot is that Petitioner's aid, and his agreement to aid and abet Paulo, didn't result in any crime. Yet he still suffered a criminal conviction.

This is because conspiracy and aiding and abetting liability, like other forms of accomplice liability that hold others liable for crimes a principal commits, permit

conviction for conduct that is attenuated from the underlying crime. Conspiracy allows for criminal liability for an agreement to commit a crime and an overt act done in furtherance of it—even if the overt act isn't criminal. And aiding and abetting liability allows for criminal liability if someone helps another commit a crime—even if the helpful acts one undertakes aren't themselves criminal.

Here, the prosecution charged these two theories of liability together when it charged a conspiracy to aid and abet. Charging these two inchoate offenses together, and combining them with an uncompleted § 1073 underlying crime, affected the fairness of Petitioner's criminal proceeding in two ways.

First, the nature of the charges meant that Petitioner suffered a federal conviction for conduct that never resulted in a federal crime. This seems like an overreach, and a questionable use of prosecutorial resources. The Sixth Circuit, in fact, reflected in a case similar to Petitioner's that conspiracy charges could sweep too broadly and reach those whose actions are attenuated from any culpable conduct. *See*, *e.g.*, *United States v. Superior Growers*, 982 F.2d 173, 179 (6th Cir. 1992) (cautioning against using conspiracy charge to sweep up defendants whose actions are attenuated from culpable conduct).

Second, upholding Petitioner's conviction for conspiring to aid and abet a crime that never took place meant the government didn't have to prove the full charge in the indictment. For aiding and abetting liability, a principal must first commit an underlying offense. That never occurred here, since Paulo never violated § 1073. And while aiding and abetting is a theory of liability, rather than a substantive offense,

this doesn't mean that aiding and abetting liability doesn't have any elements or proof requirements. Aiding and abetting imposes liability on a defendant as a principal—and before the government can do that, it must prove certain elements beyond a reasonable doubt. One of these elements is that a principal committed an underlying crime. *See*, *e.g.*, *United States v. Singh*, 532 F.3d 1053, 1057 (9th Cir. 2008). Without proving this element, the government proves only a conspiracy to commit a § 1073 crime—not a conspiracy to aid and abet a § 1073 crime.

The problem is that the government didn't charge and convict Petitioner with conspiracy to commit § 1073; it charged conspiracy *to aid and abet* a § 1073 violation. So leaving out the elements of aiding and abetting liability relieves the government of its burden to prove all of the elements of the offense beyond a reasonable doubt.

Again, the Sixth Circuit recognized this issue in *Superior Growers*, where the defendants were charged with conspiracy to aid and abet the manufacture of marijuana. 982 F.2d 173. The court reasoned that if the government had charged only conspiracy to manufacture marijuana, it would "only have to prove an agreement between defendants and their customers to manufacture marijuana." *Id.* at 178. But because the government chose to charge a conspiracy to aid and abet the manufacture, its required proof was different. It had to prove that a principal was actually manufacturing marijuana or intending to; otherwise, there was no underlying crime to aid or abet. *Id.* It was necessary to "deconstruct[] the charge in the indictment"—rather than ignore part of the charge—to harmonize the conspiracy and aiding and abetting charges.

Decades ago, Justice Frankfurter noted that conspiracy charges "readily lend themselves" to "grave dangers of abuse." *See Nye & Nissen v. United States*, 336 U.S. 613, 626 (1949) (Frankfurter, J., dissenting). He warned that a conspiracy charge should not be "an invitation to circumvent the safeguards in the prosecution of crime … by making it a device to establish guilt, not on the basis of personal responsibility" but upon other bases. *Id.* Upholding Petitioner's conviction for conspiring to aid and abet a crime that Paulo never committed allows the government to circumvent the safeguards our criminal justice system imposes to guarantee just punishment only for those culpable actors most deserving of it. Allowing Petitioner's conviction to stand, though there is no element of an underlying crime committed by a principal, creates a risk, as Justice Frankfurter posited, that Petitioner was convicted based on something other than his personal criminal liability. After all, the most he did was agree to help someone do something that isn't a crime. Requiring proof of a completed underlying crime, and strict compliance with the elements of aiding and abetting liability—rather than reading that liability out of the charge—guards against these risks.

B. The circuits are split on whether criminal liability can be imposed for conspiring to aid and abet an underlying crime when the underlying crime was never committed.

Beyond the problematic policy issues with a conviction for conspiring to aid and abet a crime that didn't occur, there is also a split among the circuits regarding

whether it is possible to sustain a conviction on these charges without an underlying crime.

In Petitioner's case, the Ninth Circuit affirmed Petitioner's conviction for conspiring to aid and abet a § 1073 crime, despite Paulo never committing a § 1073 crime. In its decision, the court cited existing Ninth Circuit precedent, *see United States v. Bosch*, 914 F.3d 1239, 1241 (9th Cir. 1990), and noted that "a conspiracy to aid and abet may be sustained even when the underlying offense never transpires." *See* App-5.

In *Bosch*, the defendants were charged with conspiring to aid and abet the possession of cocaine with intent to distribute; they helped an undercover IRS agent launder what the defendants believed were drug sale proceeds. *Id.* at 1240-41. Because the IRS agent never possessed or distributed cocaine, the defendants argued there was no completed distribution offense so there was insufficient evidence of aiding and abetting liability for the conspiracy count. *Id.* at 1241. The Ninth Circuit disagreed. It did not address the aiding and abetting liability in the charge, and held only that conspiracy does not require a completed crime. *Id.* Once the co-conspirators agreed to commit the offense and completed an overt act in furtherance of the agreement, the conspiracy was complete, even if no underlying crime was ever committed. *See id.*

The Sixth Circuit, in contrast, reached the opposite conclusion, in an opinion that accounted for principles of aiding and abetting liability. In *Superior Growers Supply, Inc.*, the Sixth Circuit analyzed a charge of conspiring to aid and abet the

manufacture of marijuana. 982 F.2d at 177. The defendants would sell equipment or supplies that could be used to manufacture marijuana, as well as give publications about growing marijuana to their customers, or otherwise provide advice about growing marijuana to customers. *Id.* at 175. However, there was no evidence that the manufacture of marijuana actually occurred, so the district court granted the defendants' motion to dismiss the indictment.

The Sixth Circuit reasoned, "[t]he problem here is how to logically combine the crime of conspiracy, which does not require proof of the underlying substantive offense, with an aiding and abetting offense, which doesn't exist without one." *Id.* at 178. It noted that the problem arose because of how the government chose to charge the case: including the aiding and abetting liability in the conspiracy count required more proof than just a conspiracy charge alone. *Id.* The court concluded:

> It seems to us then that in order to conspire or agree to assist "X" in the manufacture of marijuana, "Y and Z" have to know that "X" is manufacturing marijuana or planning to. Otherwise, all "Y and Z" are agreeing to do is to aid and abet a "possibility," or a "criminal wish"; which simply isn't a crime.

Id. Without any underlying crime, the court concluded, there could be no intent to further or aid and abet it. *See id.* The court reasoned that "[a]bsent an awareness that their customers are manufacturing marijuana, defendants cannot have the requisite criminal intent to conspire to aid and abet them." *Id.* Without anyone manufacturing marijuana, the defendants could not conspire to achieve the conspiracy's objective—aiding and abetting the manufacture of marijuana—because there was no crime to aid and abet, or agree to aid and abet.

The Sixth Circuit, for its part, believed that its reasoning was consistent with *Bosch*. It noted that *Bosch* was a sufficiency challenge to a conviction, rather than an indictment challenge, and reasoned that *Bosch* proved that a conspiracy to aid and abet "charge is legally and factually viable *when an underlying crime has been committed*." 982 F.2d at 180 (emphasis in original). In other words, the Sixth Circuit believed that no underlying crime took place in *Superior Growers*, whereas an underlying crime was completed in *Bosch*, which explained the different outcomes.

However, as the defendants themselves explained in *Bosch*, there could not be a completed crime since the defendants had conspired with a government agent and he never possessed or distributed cocaine. *See* 914 F.2d at 1241. Whether there was an underlying crime committed, therefore, could not account for the difference in the cases' outcomes; it was simply a question of different legal analysis.

The cases, then, reached conflicting results regarding whether a defendant can conspire to aid and abet a crime that is not accomplished. The circuits are split as to whether a principal must first commit an underlying crime before another can be charged with conspiring to aid and abet that crime. This Court should grant the petition to offer guidance to the lower courts, as well as guidance to federal prosecutors on how to charge these types of inchoate offenses.

II. Defendant was convicted without the jury finding that he had advance knowledge of Paulo's intent to flee internationally, which means the Ninth Circuit's decision conflicts with this Court's decision in *Rosemond v. United States* requiring advance knowledge of the full circumstances of the specific crime one is charged with aiding and abetting.

In *Rosemond v. United States*, 572 U.S. 65 (2014), this Court addressed the requirements for aiding and abetting liability, in the context of a 18 U.S.C. § 924(c) offense. The Court reiterated that a person aids and abets a crime only when he intends to facilitate "*that* offense's commission," and not "some different or lesser offense." *See id.* at 1248 (emphasis added). The defendant's "intent must go to the specific and entire crime charged." *See id.*

In the context of a § 924(c) charge, which punishes using a firearm during and in relation to a drug trafficking crime, a defendant has to intend to aid and abet not just a drug sale, but "an armed drug sale." *See id.* at 1249. Importantly, the defendant had to have "advance knowledge" of the firearm to satisfy the intent requirement, or else he could not aid and abet a § 924(c) violation. *See id.* And because the district court "did not explain that [the defendant] needed advance knowledge of a firearm's presence" it misstated the intent requirement for aiding and abetting liability, and the jury instruction was erroneous. *Id.* at 1251.

Similarly, in Petitioner's case, the jury instruction for the conspiracy charge did not require the jury to find that Petitioner had advance knowledge of the "specific and entire crime charged." *See id.* at 1248. Instead, the instruction allowed the jury to convict Petitioner for a "different," "lesser offense," by misstating the specific crime

charged, and thereby misstating the intent element for the aiding and abetting liability.

The instructions asked the jury to find "an agreement between two or more persons to aid and abet Paulo Virgen Mendoza's flight to avoid prosecution." *See* App-9. They also stated that the object of the conspiracy was to "aid and abet Paulo Virgin Mendoza's flight to avoid prosecution." *See* App-9. But because the "specific and entire crime charged" was conspiring to aid and abet an unlawful flight to avoid prosecution, *i.e.* a violation of 18 U.S.C. § 1073, the instructions should have defined Paulo's flight as *interstate* or *international* flight—not just general flight to avoid prosecution.

18 U.S.C. § 1073 requires interstate or international travel ("whoever moves or travels in interstate or foreign commerce with intent" to avoid prosecution). And for aiding and abetting liability a defendant must "actively participate in a criminal venture with full knowledge of the circumstances constituting the charged offense." *Rosemond*, 572 U.S. at 76. Under *Rosemond*, then, Petitioner's "specific and entire crime" is not conspiracy to aid and abet general flight from prosecution. It is conspiracy to aid and abet a § 1073 flight from prosecution, which requires interstate or international flight. This means that Petitioner needed "advance knowledge" that Paulo's plan would include interstate or international flight, and "chose[], with full knowledge, to participate in the illegal scheme." *See id.* at 1250.

The instructions' omission of interstate or international flight didn't accurately delineate the "specific and entire crime charged." *See id.* at 1248. Instead, the

instructions should have asked the jury to find that Petitioner joined the conspiracy with advance knowledge that its object was to aid and abet Paulo's interstate or international flight to avoid prosecution. This would have accurately stated the knowledge requirement for aiding and abetting liability, and ensured that the jury found the correct mens rea for the offense.

Because the instructions omitted this, and instead allowed the jury to convict Petitioner if he joined the conspiracy intending to aid and abet only Paulo's general flight from prosecution, the instructions allowed Petitioner to be convicted for a different, lesser crime than he was charged with. This violates the Court's decision in *Rosemond* regarding the required mental state for aiding and abetting liability.

III. This case presents an ideal vehicle to resolve the issues since they were preserved and resolving them would affect the outcome in Petitioner's case.

Petitioner's case presents an ideal vehicle to address the issues raised in the petition.

First, as to whether a defendant can be convicted for conspiring to aid and abet a crime when a principal has not committed an underlying offense, this issue was preserved and ruled on in district court when Petitioner made a motion for acquittal under Federal Rule of Criminal Procedure 29. Additionally, the Ninth Circuit squarely addressed the issue on appeal. *See* App-4-5.

Second, regarding the intent requirement for aiding and abetting liability and whether the instructions adequately stated the mens rea for the offense, Petitioner

similarly objected in district court to the jury instructions and preserved the issue. The Ninth Circuit also squarely addressed the issue on appeal. *See* App-4.

Moreover, if the Court grants the petition and resolves the issues, each issue would affect the outcome in Petitioner's case. If the Court determines that a defendant cannot be criminally liable for conspiring to aid and abet a crime that did not occur, remanding to the district court would require the court to vacate Petitioner's conviction for insufficient evidence. And if the Court holds that the mens rea for Petitioner's specific offense required advance knowledge of Paulo's intent to flee to Mexico, and agrees that the instructions only required a finding of general flight, the Court could remand, as it did in *Rosemond*, *see* 572 U.S. at 1252, for the Ninth Circuit to conduct a harmless error analysis in the first instance. Though the parties briefed harmless error, and Petitioner presented substantial argument and evidence pointing out why the instructional error could not be harmless in light of the evidence, the lower court never determined whether any instructional error was harmless. *See* App-4. If the Court were to remand, the Ninth Circuit could address that issue in the first instance. Given the state of the record, it would more than likely result in a different outcome for Petitioner.

CONCLUSION

This Court should grant the writ to address these important questions of federal law and ensure uniformity within the circuits.

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Respectfully submitted,

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