No. _____

IN THE
**SUPREME COURT OF THE UNITED STATES**

PAUL ASHBY,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

**On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals**

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

As both the United States and the District of Columbia Court of Appeals recognized in this case, the *Pinkerton* doctrine of co-conspirator liability is not authorized by any statute in the District of Columbia and did not exist in the common law that Congress adopted for the District of Columbia in the 1901 Code. The question presented is whether the District of Columbia Court of Appeals unlawfully usurped the role of the legislature in violation of the separation-of-powers principles that Congress incorporated into the District of Columbia Charter when it held that it had the "inherent power" to adopt *Pinkerton* liability without authorization by the legislature.

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## PETITION FOR A WRIT OF CERTIORARI

Paul Ashby respectfully petitions this Court for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

## DECISIONS BELOW

The opinion of the District of Columbia Court of Appeals appears at App'x 1a and is reported at *Ashby v. United States*, 199 A.3d 634 (D.C. 2019). The relevant oral ruling of the District of Columbia Superior Court is unreported and appears at App'x 23a. The order denying rehearing en banc appears at App'x 30a.

## JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on January 10, 2019. The District of Columbia Court of Appeals denied rehearing en banc on January 27, 2021. This Court has jurisdiction under 28 U.S.C. § 1257.

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

D.C. Code § 1-204.04, the D.C. Charter, provides:

> [T]he legislative power granted to the District by this chapter is vested in and shall be exercised by the [D.C.] Council in accordance with this chapter.

D.C. Code § 1-204.31(a), the D.C. Charter, provides:

> The judicial power of the District is vested in the District of Columbia Court of Appeals and the Superior Court of the District of Columbia.

D.C. Code § 45-401, the 1901 Code, provides:

> (a) The common law, all British statutes in force in Maryland on February 27, 1801, the principles of equity and admiralty, all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force in the District of Columbia on March 3, 1901, shall remain in force except insofar as the same are inconsistent with, or are replaced by, some provision of the 1901 Code.
>
> (b) The repeal of a criminal statute in the District of Columbia that is declaratory of or in abrogation of a common law crime shall not reinstate the common law crime.

## STATEMENT OF THE CASE

### I. Introduction

This case is about the structural limitations on judicial power in the District of Columbia. The District of Columbia Charter, like the United States Constitution, creates a tripartite government in which the power to define and punish criminal conduct lies solely with the legislature, and not the judiciary. Neither Congress nor the District of Columbia Council has ever enacted a statute that punishes members of a conspiracy for all reasonably foreseeable crimes committed by co-conspirators in furtherance of the conspiracy—a doctrine of vicarious criminal liability that applies in the federal courts under *Pinkerton v. United States*, 328 U.S. 640 (1946). Nor did such co-conspirator liability exist in the common law that Congress adopted for the District of Columbia in the 1901 Code. Nevertheless, the trial court in this case instructed the jury, over defense objection, that it could find Mr. Ashby guilty of premeditated murder and other substantive crimes without finding that he participated in those crimes or intended to commit them, so long as it found that he joined a criminal conspiracy and that the charged crimes were reasonably

foreseeable and committed by a co-conspirator in furtherance of the conspiracy. The District of Columbia Court of Appeals affirmed. It held that, although *Pinkerton* co-conspirator liability has never been "authorized by statute" and did not exist in the common law that Congress adopted in the 1901 Code, it is nevertheless a valid "part of D.C. law" because it has been "adopted" by the D.C. Court of Appeals pursuant to its "inherent power to alter or amend the common law." *Ashby v. United States*, 199 A.3d 634, 664–65 (D.C. 2019). In claiming "inherent power" to adopt a theory of criminal liability not authorized by the legislature, the D.C. Court of Appeals unlawfully exceeded the structural limitations on its own judicial power that Congress incorporated into the D.C. Charter and that this Court recognized in *Whalen v. United States*, 445 U.S. 684, 689–90 & n.4 (1980) (holding that, under "the basic principle" that "the power to define criminal offenses . . . resides wholly with the Congress," D.C. courts, "no less than other federal courts," may punish criminal conduct "only to the extent authorized by Congress"). This Court should grant certiorari because the question whether a D.C. court may expand criminal liability beyond that authorized by the legislature is an important and recurring federal question that implicates the fundamental structure of democratic governance in the District of Columbia and Mr. Ashby's due process right not to be deprived of his liberty for conduct that the legislature did not choose to punish. This case is an ideal vehicle for deciding the issue because Mr. Ashby squarely presented the issue at every stage of this case, and the D.C. Court of Appeals expressly decided it in a published opinion.

## II. Factual Background and the Proceedings Below

On December 30, 2009, Carnell Bolden and his girlfriend Danielle Daniels drove to Keith Logan's house at 70 W Street in Northwest D.C., where Mr. Bolden and Mr. Logan both sold drugs. *Ashby*, 199 A.3d at 640. Mr. Bolden went inside the house while Ms. Daniels waited outside in the car. *Id.* Around 7:00 p.m., a "dark figure" approached the car and shot Ms. Daniels, who survived the shooting but could not identify her assailant. *Id.* at 641. Later that evening, gunshots were heard in the 3000 block of Park Drive in Southeast D.C., where Mr. Bolden's dead body, bound with duct tape and electrical cords, was found the next day. *Id.*

Petitioner Paul Ashby and his codefendants, Keith Logan and Merle Watson, were each charged with multiple counts related to these crimes, including conspiracy to kidnap or rob; kidnapping and robbery; premeditated murder and felony murder; and assault with intent to kill. *Id.* at 642. The government's theory was that Mr. Logan had arranged a drug deal with Mr. Bolden at 70 W Street with the plan to rob him there, but when he learned that Mr. Bolden had no cash and that Ms. Daniels was waiting outside in the car, he decided to kill them both. *Id.* at 663–64. Police found Mr. Bolden's blood, along with duct tape and electrical cords consistent with those found on Mr. Bolden's dead body, in Mr. Logan's basement and car, and Mr. Logan's cell phone records showed that he had called Mr. Bolden twice on the day of the murder. *Id.* at 641, 663. Mr. Logan's friend John Carrington testified that, a month before the murder, Mr. Logan had tried to recruit him to rob and kill Mr. Bolden. *Id.* at 642.

No eyewitness testimony or physical evidence linked Mr. Ashby or Mr. Watson to the crimes. Although both men were friends with Mr. Logan and had been seen inside his house six days before the murder, there was no evidence that either man knew Mr. Bolden or was involved in the drug dealing at 70 W Street. *Id.* at 641–42. To connect Mr. Ashby and Mr. Watson to the crimes, the government relied primarily on the testimony of Mr. Logan's best friend Melvin Thomas, who himself sold drugs at 70 W Street and had also been seen inside Mr. Logan's house six days before the murder. *Id.* at 642, 662. Shortly after Mr. Logan and Mr. Ashby were arrested, Mr. Thomas—who was on lifetime parole for a murder conviction and had been convicted of multiple drug and gun offenses—volunteered to the police that Mr. Ashby had implicated both himself and Mr. Logan in the shootings of Mr. Bolden and Ms. Daniels. *Id.* at 662; App'x at 43a–44a. According to Mr. Thomas, Mr. Ashby approached him in a CVS parking lot and told him that Mr. Logan had come up with the idea to kill Mr. Bolden and Ms. Daniels, that Mr. Ashby choked or beat Mr. Bolden in Mr. Logan's basement and shot Ms. Daniels in Mr. Bolden's car, and that Mr. Ashby and Mr. Watson transported Mr. Bolden to Southeast D.C. *Ashby*, 199 A.3d at 642, 652–53. Although the government introduced cell phone records showing that the defendants called each other multiple times on the day of the murder and that Mr. Ashby's cell phone was used in the general vicinity of the crime scenes that day, *id.* at 642, the cell phone evidence also contradicted Mr. Thomas's account of what Mr. Ashby and Mr. Watson did that night, placing Mr. Ashby in Southeast D.C. when Ms. Daniels was shot outside Mr. Logan's house in

Northwest D.C., and placing Mr. Ashby and Mr. Watson in Northwest D.C. when a witness in Southeast D.C. heard the gunshots that allegedly killed Mr. Bolden. *See* App'x at 35a–36a, 51a. The government urged the jury to ignore these problems and to convict all three defendants on a theory of co-conspirator liability, which did not require the jury to receive reliable evidence of who did what, so long as it found that the defendants had agreed to rob or kidnap Bolden. *Ashby*, 199 A.3d at 642; *see also* App'x at 55a–56a (quoting prosecutor's argument to the jury that "the most significant charge is the conspiracy charge" because "if there is a conspiracy . . . it doesn't matter where these defendants were on any particular occasion, who might not have been there when the shootings took place").

In support of its prosecution theory, the government asked the trial court to instruct the jury that it could find Mr. Ashby guilty of premeditated murder and the other charged crimes based on his membership in a conspiracy to kidnap or rob Mr. Bolden, even if he did not participate in or intend to commit those crimes. App'x at 53a. Counsel for Mr. Ashby filed a written opposition, arguing that the *Pinkerton* instruction unlawfully expands criminal liability beyond that authorized by the legislature, in violation of "basic separation of powers principles." *Id*. In response, the United States did not dispute that *Pinkerton* liability has never been approved by the legislature and argued only that the D.C. Court of Appeals "has upheld convictions on a *Pinkerton* theory of liability in numerous cases." *Id.* The trial court granted the government's request for a *Pinkerton* instruction based on the existing law, but predicted that "it is a train wreck waiting to happen." *Id.*

The jury found Mr. Ashby guilty of all charges related to Mr. Bolden, including premeditated murder. *Ashby*, 199 A.3d at 643.[1] The trial court sentenced Mr. Ashby to ninety years in prison. *Id.*

Mr. Ashby renewed his challenge to the *Pinkerton* instruction on appeal. App'x at 58a–71a. He explained that no statute in the D.C. Code punishes members of a conspiracy for all reasonably foreseeable crimes committed by co-conspirators in furtherance of the conspiracy. The accomplice liability statute, D.C. Code § 22-1805, is limited to "aiding and abetting"—a common-law doctrine of vicarious liability "distinct" from *Pinkerton* liability that requires the defendant to "knowingly aid" or "participate in [the charged crime] as something that he wishes to bring about." App'x at 61a–62a (quoting *Wilson-Bey v. United States*, 903 A.2d 818, 831, 839–40 (D.C. 2006) (en banc)).[2] And the conspiracy statute, D.C. Code § 22-1805a, punishes only the act of conspiratorial agreement (with a maximum sentence of five years' imprisonment) and does not hold members of a conspiracy vicariously liable for crimes committed in furtherance of the conspiracy. App'x at 61a.

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[1] Mr. Ashby was acquitted of all charges related to Ms. Daniels. *Id.* He does not challenge his conviction for conspiracy in this petition.

[2] Under the *Pinkerton* doctrine, by contrast, the government is "not required to establish that the co-conspirator actually aided the perpetrator in the commission of the substantive crime, but only that the crime was committed in furtherance of the conspiracy." *Wilson-Bey*, 903 A.2d at 840; *see also Erskines v. United States*, 696 A.2d 1077, 1080-81 & n.5 (D.C. 1997) (explaining that, whereas aiding-and-abetting liability requires "[s]ome affirmative conduct by [the defendant] to help in planning or carrying out the crime," the "*Pinkerton* doctrine allows conviction for substantive offenses without satisfaction of either the actus reus or mens rea element of the substantive offense").

Nor did *Pinkerton* liability exist in the common law that Congress adopted for the District of Columbia. In 1901, Congress passed "An Act to Establish a Code of Law for the District of Columbia," 31 Stat. 1189 (Mar. 3, 1901) ("1901 Code"), which not only prescribed punishments for various common-law crimes such as murder, kidnapping, and robbery, but also adopted "[t]he common law . . . in force" in 1801, when Maryland ceded to the United States what is now the District of Columbia.[3] Under that common law, a person could be punished for a crime only as a principal or as an accessory, neither of which encompassed vicarious liability for crimes committed by a co-conspirator in furtherance of the conspiracy. App'x at 63a–64a.

Mr. Ashby contended that, because *Pinkerton* liability has never been adopted by the legislature, and because only the legislature has the power to define criminal conduct in the District of Columbia, the *Pinkerton* doctrine is not a valid part of D.C. law, and the trial court erred in instructing the jury on that judicially created theory of criminal liability. *Id.* at 65a–66a (citing, e.g., *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820); *Whalen v. United States*, 445 U.S. 684

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[3] *Id.* ch. 854, § 1 (codified at D.C. Code § 45-401) ("The common law [and] all British statutes in force in Maryland on February 27, 1801 . . . shall remain in force except insofar as the same are inconsistent with, or are replaced by, some provision of the 1901 Code."); *see also O'Connor v. United States*, 399 A.2d 21, 25 (D.C. 1979) (1901 Code "provides that all consistent common law in force in Maryland at the time of the cession of the District of Columbia [in 1801] remains in force as part of the law of the District unless repealed or modified by statute"); *Perkins v. United States*, 446 A.2d 19, 23 (D.C. 1982) ("[T]he common law of the District of Columbia as defined by [the 1901 Code] . . . consists of the common law of Maryland and all British statutes in force in Maryland in 1801, unless inconsistent with provisions of the District of Columbia Code.").

(1980)). In support of that argument, Mr. Ashby cited numerous state court decisions rejecting the *Pinkerton* doctrine on the ground that only the state legislature has the power to define criminal liability. *Id.* at 68a–70a (collecting cases).

The United States did not dispute that the *Pinkerton* doctrine is a purely judicial creation that did not exist at common law when Congress enacted the 1901 Code. Rather, it argued only that the D.C. Court of Appeals has since adopted the *Pinkerton* doctrine as part of "the common law for the District of Columbia," which is not "frozen in time" by the 1901 Code but rather "unwritten and dynamic," to be continually expanded and developed "at the hands of judges." App'x at 77a–78a.

The D.C. Court of Appeals affirmed Mr. Ashby's convictions, holding that the trial court did not err in instructing the jury on *Pinkerton* liability. It agreed with the United States that, although *Pinkerton* liability has never been authorized by the legislature, it is nonetheless "settled law" in the District of Columbia because it has been "accepted" and "adopted" by the court pursuant to its "inherent power to alter or amend" the "'dynamic' common law." *Ashby*, 199 A.3d at 664–65 (citations omitted). Mr. Ashby challenged this holding in a timely petition for rehearing en banc, and the D.C. Court of Appeals summarily denied the petition two years later, on January 27, 2021. App'x at 31a. This timely petition followed.

## REASONS FOR GRANTING THE WRIT

This Court should grant certiorari in this case because, in holding that it had the "inherent power" to adopt the *Pinkerton* doctrine of co-conspirator liability without authorization by the legislature, *Ashby*, 199 A.3d at 665, the District of Columbia Court of Appeals incorrectly decided an "important federal question" about the scope of its own power "in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). As this Court has long held, it is fundamental to the American system of divided government that only legislatures, not courts, have the power to define criminal liability and ordain its punishment. In enacting the D.C. Charter, Congress applied that fundamental separation-of-powers principle to D.C. courts in the same way that the principle applies to federal courts. Accordingly, as this Court has previously held, D.C. courts, "no less than other federal courts," may punish criminal conduct "only to the extent authorized by Congress," *Whalen*, 445 U.S. at 689 n.4, 690—an important structural limitation on the power of unelected judges that safeguards both democratic governance and individual liberty. Indeed, this principle is so fundamental to American democracy that every state court to have addressed the question has correctly concluded that only the legislature, and not the judiciary, has the power to adopt *Pinkerton* co-conspirator liability. By reaching a contrary conclusion, and by claiming authority to adopt a new theory of criminal liability as part of its "inherent power to alter or amend the common law," *Ashby*, 199 A.3d at 665, the D.C. Court of Appeals both exceeded the scope of its judicial power under the D.C. Charter and violated Mr. Ashby's right under the Due

Process Clause of the Fifth Amendment not to be deprived of his liberty for conduct that the legislature did not choose to punish. This Court should grant certiorari to correct this egregious error of constitutional dimension because the question whether D.C. courts have the "inherent power" to adopt new theories of criminal liability arises frequently, and only this Court can enforce the limitations on judicial power that Congress established for the District of Columbia. This case is an ideal vehicle for deciding this important federal question because Mr. Ashby squarely presented the issue at every stage of this case, and the D.C. Court of Appeals expressly decided it in a published opinion.

## I. The D.C. Court of Appeals Incorrectly Decided an Important and Recurring Federal Question About the Structural and Constitutional Limitations on Judicial Power in the District of Columbia.

Pursuant to its Article I power to exercise plenary control over the District of Columbia,[4] Congress set up a tripartite structure of government for the District of Columbia that is bound by the same separation-of-powers principles that govern the federal government. The D.C. Charter, which Congress enacted in 1973 as part of the District of Columbia Self-Government and Government Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774, commonly known as the Home Rule Act, *see, e.g.*,

[4] *See* U.S. CONST. art. I, § 8, cl. 17 (granting Congress power "[t]o exercise exclusive Legislation in all Cases whatsoever" in the District of Columbia); *Palmore v. United States*, 411 U.S. 389, 397 (1973) (describing Congress's "plenary" power over the District of Columbia); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 619 (1838) ("Congress has the entire control over the [District of Columbia] for every purpose of government.").

*Jackson v. Dist. of Columbia Bd. of Elections & Ethics*, 999 A.2d 89, 94 (D.C. 2010), vests "the legislative power" in the D.C. Council, D.C. Code § 1-204.04(a), the "judicial power" in the D.C. Court of Appeals and the D.C. Superior Court, *id.* § 1-204.31(a), and the "executive power" in the Mayor, *id.* § 1-204.22.[5] Implicit in this "familiar tripartite structure," modeled after the constitutional structure of the federal government, is Congress's intent that "the same general principles" of separation of powers "should govern the exercise of such power in the District Charter as are applicable to the three branches of government at the federal level." *Wilson v. Kelly*, 615 A.2d 229, 231 (D.C. 1992); *cf. Springer v. Philippine Islands*, 277 U.S. 189, 201 (1928) (holding that the separation of powers is "implicit" in the Organic Act of the Philippine Islands because "following the rule established by the American Constitutions, both state and federal," it "divides the government into three separate departments—the legislative, executive, and judicial").[6]

Among the most fundamental of these separation-of-powers principles is the long-held recognition that "[i]t is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.); *see also United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) (holding that federal courts have no "implied powers" to

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[5] Legislation enacted by the D.C. Council and approved by the D.C. Mayor must be transmitted to Congress and becomes effective thirty days later—or sixty days later for criminal legislation—unless Congress disapproves by joint resolution. *Jackson*, 999 A.2d at 95; D.C. Code § 1-206.02(c)(1), (2).

[6] *See also* D.C. Code § 1-301.44(b) ("recogniz[ing] the principle of separation of powers in the structure of the District of Columbia government").

exercise "criminal jurisdiction in common law cases"); *Krulewitch v. United States*, 336 U.S. 440, 456–57 (1949) (Jackson, J., concurring) ("[I]t is well and wisely settled that there can be no judge-made offenses against the United States and that every federal prosecution must be sustained by statutory authority"); *Whalen v. United States*, 445 U.S. 684, 689 (1980) (explicating "the basic principle that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress"); *Missouri v. Hunter*, 459 U.S. 359, 368 (1983) ("Legislatures, not courts, prescribe the scope of punishments."); *Jones v. Thomas*, 491 U.S. 376, 381 (1989) ("the substantive power to define crimes and prescribe punishments" lies with "the legislative branch of government" (citing *Ohio v. Johnson*, 467 U.S. 493, 499 (1984)); *Staples v. United States*, 511 U.S. 600, 604 (1994) ("'[T]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.'" (quoting *Liparota v. United States*, 471 U.S. 419, 424 (1985)); *Screws v. United States*, 325 U.S. 91, 152 (1945) (Roberts, J., dissenting) ("It cannot be too often emphasized that as basic a difference as any between our notions of law and those of legal systems not founded on Anglo-American conceptions of liberty is that crimes must be defined by the legislature.").

Indeed, "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community," it has "long been part of our tradition" that only the "democratically

elected Legislature," and not a panel of elected judges, is entrusted with the power to "define criminal activity" and "expand criminal prosecutions." *United States v. Bass*, 404 U.S. 336, 348 (1971); *Arizona v. Manypenny*, 451 U.S. 232, 247 (1981); *see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1227–28 (2018) (Gorsuch, J., concurring) (explaining that the "adoption of new laws restricting liberty" is a fearsome power that may be exercised only by "the people, through their elected representatives," after "open and public debate," and not by "a mere handful of unelected judges" acting in the "comparatively obscure confines of cases and controversies" (citing THE FEDERALIST NO. 78 (A. Hamilton))).

This structural limitation on judicial power to make criminal law protects not only democratic values but also individual liberty. *See Bond v. United States*, 564 U.S. 211, 222 (2011) ("The structural principles secured by the separation of powers protect the individual."); THE FEDERALIST NO. 78 (A. Hamilton) ("There is no liberty, if the power of judging be not separated from the legislative and executive powers."). Indeed, there is "considerable historical evidence" that "due process of law" originated as a "separation-of-powers concept" designed to protect individual liberty from "deprivations not authorized by legislation or common law." *Johnson v. United States*, 576 U.S. 591, 623 (2015) (Thomas, J., concurring in the judgment); *see also Hurtado v. California*, 110 U.S. 516, 527 (1884) (explaining that the Due Process Clause was intended, since the time of the Magna Carta, "to protect the citizen against all mere acts of power" and "to secure the individual from the arbitrary exercise of the powers of government" (citations omitted)). In its most

fundamental form, then, due process "secur[es] the rule of law" by prohibiting the government from arbitrarily depriving a person of life, liberty, or property "except as provided by common law or statute." Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1807 (2012).

This Court has previously applied these basic separation-of-powers and due-process principles to D.C. courts. In *Whalen v. United States*, 445 U.S. 684 (1980), this Court held that D.C. courts could not lawfully impose consecutive sentences for felony murder and the underlying felony when such punishment was not authorized by Congress. *Id.* at 690. In explaining that decision, the Court first invoked "the basic principle that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress." *Id.* at 689 (citing *Wiltberger*, 18 U.S. (5 Wheat.) at 95). The Court explained that "[i]f a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy, but also *the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty*." *Id.* (emphasis added). The Court then went on to hold that, although "the courts of the District of Columbia were created by Congress pursuant to its plenary Art. I power to legislate for the District, and are not affected by the salary and tenure provisions of Art. III, *those courts, no less than other federal courts, may constitutionally impose only such punishments as Congress has seen fit to authorize*." *Id.* at 689 n.4 (emphasis added

and citations omitted). The Court further noted that, although "the doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States," "[t]he Due Process Clause of the Fourteenth Amendment . . . would presumably prohibit state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law." *Id.* Finally, the Court held that, by imposing consecutive sentences that were not intended by the legislature, the D.C. Court of Appeals "denied the petitioner his constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress." *Id.* at 690.

The structural limitations on judicial power that this Court has recognized for federal and D.C. courts are so fundamental to American democracy that every state constitution has "adopted some version of separation of powers," Chapman & McConnell, *supra*, at 1730, and every state court to have considered the question has held that only the legislature, not the judiciary, has the power to adopt *Pinkerton* liability. *See State ex rel. Woods v. Cohen*, 844 P.2d 1147, 1151 (Ariz. 1992) (in banc) (holding that "*Pinkerton* liability is not the law of Arizona" because the accomplice liability statute "defines the universe of vicarious liability," and "*Pinkerton* liability is not within the statutory universe"); *State v. Nevarez*, 130 P.3d 1154, 1158 (Idaho Ct. App. 2005) (declining to adopt the *Pinkerton* doctrine because "[i]t is the province of the Idaho legislature, not the courts, to define the elements of a crime"); *Bolden v. State*, 124 P.3d 191, 200 (Nev. 2005) ("The power to define crimes and penalties lies exclusively within the power and authority of the

Legislature. No statutory underpinning for the *Pinkerton* rule exists in Nevada. In the absence of statutory authority providing otherwise, we conclude that a defendant may not be held criminally liable for the specific intent crime committed by a coconspirator simply because that crime was a natural and probable consequence of the object of the conspiracy." (footnote omitted)); *People v. McGee*, 399 N.E.2d 1177, 1181–82 (N.Y. 1979) (holding that the New York accomplice liability statute does not encompass co-conspirator liability, and that judicial adoption of such liability would unlawfully "expand the basis of accomplice liability beyond the legislative design"); *State v. Small*, 272 S.E.2d 128, 135 (N.C. 1980) ("It is for the legislature to define a crime and prescribe its punishment, not the courts or the district attorney. Accordingly, we join the ranks of those who reject the rule in *Pinkerton*." (citations omitted)); *State v. Stein*, 27 P.3d 184, 188 (Wash. 2001) (en banc) (rejecting co-conspirator liability as not authorized by the conspiracy statute or the accomplice liability statute).

In reaching the opposite conclusion, the D.C. Court of Appeals unlawfully exceeded the structural limitations on judicial power that Congress adopted for the District of Columbia and that are essential to American democracy and individual liberty. As the D.C. Court of Appeals itself recognized, and as the United States did not dispute below, the *Pinkerton* doctrine is a purely judicial invention that expands criminal liability beyond that authorized by the legislature. And as the relevant decisions of both this Court and the D.C. Court of Appeals make clear, the power to define and punish criminal conduct is a quintessentially "legislative power" that

Congress vested exclusively in the D.C. Council. D.C. Code § 1-204.04. By holding that its "inherent power to alter or amend the common law" includes the authority to adopt new theories of criminal liability by judicial fiat, *Ashby*, 199 A.3d at 665, the D.C. Court of Appeals unlawfully usurped legislative power in a way that "conflicts with relevant decisions of this Court," Sup. Ct. R. 10(c), deprived Mr. Ashby of his constitutional right to be punished for a crime only to the extent authorized by the legislature, and violated the very structure of democratic government in the District of Columbia. Thus, notwithstanding this Court's "customary deference" to the D.C. Court of Appeals in interpreting or applying "Acts of Congress" that are "of exclusively local concern," *Whalen*, 445 U.S. at 687–88,[7] certiorari is warranted in this case to correct an "egregious error" on an important matter "affected by constitutional limitations." *Griffin v. United States*, 336 U.S. 704, 717–18 (1949); *see also Whalen*, 445 U.S. at 688 (reviewing D.C. Court of Appeals' interpretation of D.C. law where such interpretation "cannot be separated entirely" from constitutional questions). Indeed, the very policy underlying this Court's customary deference to the D.C. courts—to respect "Home Rule" and local self-governance—is turned on its head here, where a panel of three unelected judges unlawfully usurped the power of the people, through their elected representatives,

[7] As this Court explained in *Whalen*, this deference is "a matter of judicial policy, not a matter of judicial power" because "Acts of Congress affecting only the District, like other federal laws, certainly come within this Court's Art. III jurisdiction." 445 U.S. at 687; *see also* 28 U.S.C. § 1257(a), (b) (authorizing this Court's review of final judgments of the D.C. Court of Appeals, where any "right, privilege, or immunity" is "claimed under the Constitution" or the "statutes of . . . the United States").

to decide what conduct is worthy of criminal punishment.

Certiorari is also warranted because the question whether D.C. courts may adopt new theories of criminal liability as part of their "inherent power to amend or alter the common law" arises frequently, and with conflicting results. Although the D.C. Court of Appeals has frequently recognized its own lack of authority to expand criminal liability beyond that recognized in the common law that Congress adopted in the 1901 Code,[8] it has also frequently asserted, as it did in this case, that the common law is not "frozen in time" and can be judicially expanded to include new theories of criminal liability.[9] Such inconsistency in the D.C. Court of Appeals'

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[8] *See, e.g.*, *Little v. United States*, 709 A.2d 708, 714 (D.C. 1998) (refusing to expand accessory-after-the-fact liability beyond that recognized at common law in 1901, when Congress enacted the accessory-after-the-fact statute, "lest we intrude upon the prerogatives of the legislative branch and the liberties of the citizen"); *Comber v. United States*, 584 A.2d 26, 44 (D.C. 1990) (en banc) (refusing to adopt "an expanded definition of voluntary manslaughter at odds with the generally recognized common law understanding of that offense"); *O'Connor*, 399 A.2d at 25 (holding that the common-law doctrine of transferred intent was "available for the government to use in its theory of prosecution" only if the doctrine had been recognized in the common law that Congress adopted in the 1901 Code); *United States v. Heinlein*, 490 F.2d 725, 736 (D.C. Cir. 1973) (refusing to expand the felony murder doctrine beyond that recognized at common law when Congress enacted the murder statute in 1901, noting that "action by Congress would be necessary to that end").

[9] *See, e.g.*, *Fleming v. United States*, 224 A.3d 213, 227–30 (D.C. 2020) (en banc) (holding that it was "well within this court's authority," and not "better left to the legislature," to adopt a theory of proximate causation for second-degree murder that did not exist at common law when Congress enacted the murder statute in 1901 because the definition of common-law murder was not "frozen in 1901," but rather left for the courts to develop using their "common-law authority"); *id.* at 238–39 (Easterly, J., concurring in the judgment) (criticizing the majority's expansion of proximate causation "beyond its settled common law understanding" as defying "basic principles of separation of powers," and noting that "[w]hen it codified the common law crime of murder, Congress did not delegate to this court the authority to reshape and expand this crime to our liking"); *Tann v. United States*, 127 A.3d

understanding of the limitations on its own power underscores the importance of this Court's review to the fair and consistent administration of justice in the District of Columbia. *See* Sup. Ct. R. 10(c) (explaining that certiorari is warranted where a court "has decided an important question of federal law that has not been, *but should be*, settled by this Court" (emphasis added)).

## II. This Case is an Ideal Vehicle Because the Issue was Squarely Presented and Decided.

This case is an ideal vehicle for addressing the question presented because Mr. Ashby squarely challenged the authority of the D.C. Court of Appeals to adopt the *Pinkerton* doctrine of co-conspirator liability at every stage in this case, and the D.C. Court of Appeals expressly decided the issue in a published opinion. At trial and on appeal, the United States did not dispute that *Pinkerton* liability is not authorized by statute and did not exist in the common law that Congress adopted in the 1901 Code; instead, it argued only that the *Pinkerton* doctrine has been adopted by the D.C. Court of Appeals pursuant to its power to expand the "unwritten and dynamic" common law. App'x at 75a–80a. In upholding the *Pinkerton* instruction in this case, the D.C. Court of Appeals likewise acknowledged that the *Pinkerton* doctrine has never been approved by the legislature but held that it is nevertheless

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400, 441–45, 449 (D.C. 2015) (adopting a "community of purpose" theory of accomplice liability that was not recognized at common law when Congress enacted the accomplice liability statute in 1901, and holding that the court was "authorized" to adopt such a theory "as an incremental development of the common law"); *id.* at 498, 504–05 (Glickman, J., concurring in part) (criticizing the majority's expansion of accomplice liability as a "novel theory of [its] own devising" and an unauthorized "exercise in judicial creativity").

a valid "part of D.C. law" because it has been "adopted" by the court pursuant to its "inherent power to alter or amend the common law." *Ashby*, 199 A.3d at 664–65. Accordingly, this case cleanly presents the single question whether the D.C. courts can punish Mr. Ashby for conduct the legislature never criminalized, making it an ideal vehicle for review.

## CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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