No.

IN THE SUPREME COURT OF THE UNITED STATES

GARY LAMAR HENRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

1. Whether *Pinkerton v. United States*, 328 U.S. 640 (1946) liability, which only requires that a conspirator reasonably foresee the substantive crimes of his co-conspirators, applies in the context of an 18 U.S.C. § 924(c) violation predicated on a crime of violence, which categorically requires more than the reckless use of force under *United States v. Davis*, 139 S. Ct. 2319 (2019) and *Borden v. United States*, 141 S. Ct. 1817 (2021).

2. Whether this Court should grant, vacate, and remand for reconsideration in light of *Borden*.

STATEMENT OF RELATED CASES

- *United States v. Gary Lamar Henry*, No. 16CR00862-RHW, U.S. District Court for the Central District of California. Judgment entered March 21, 2019.

- *United States v. Gary Lamar Henry*, No. 19-50080, U.S. Court of Appeals for the Ninth Circuit. Judgment entered January 6, 2021 and rehearing denied April 5, 2021.

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The opinion below is reported at *United States v. Henry*, 984 F.3d 1343 (9th Cir. 2021).

JURISDICTION

The Ninth Circuit filed its opinion on January 6, 2021 and denied petitioner's request for rehearing and rehearing *en banc* on April 5, 2021. App. 1, 3.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). *See* Orders, March 19, 2020 and July 19, 2021 (extending deadline for this petition to 150 days).

STATUTORY PROVISIONS

18 U.S.C. § 924 provides:

> (c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
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> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

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[1] "App." is the Appendix, "ER" is the Excerpts of Record in the Ninth Circuit, and "CR" is the Clerk's Record in the district court.

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

* * *

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and –

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing such offense.

STATEMENT OF THE CASE

In April 2017, a federal grand jury in the Central District of California returned a first superseding indictment charging petitioner and multiple codefendants in a bank robbery scheme. ER 163; CR 24. Count 1 charged a conspiracy count under 18 U.S.C. § 371. ER 163-74. Counts 3, 5-7, and 9 charged petitioner with armed bank robbery under 18 U.S.C. § 2113(a), (d). ER 176-82. Counts 4, 8, and 10 charged him with brandishing a firearm during the armed bank robberies in violation of 18 U.S.C. § 924(c). ER 177-83. Counts 11-12 charged generic bank robbery under § 2113(a). ER 184-85.

In essence, the superseding indictment alleged that petitioner along with the codefendants and others committed eight bank robberies in the Los Angeles and Bakersfield, California areas from July to October 2016. ER 165-85. The

indictment generally alleged that petitioner would coordinate with the other defendants before and after each bank robbery, but he would not enter the bank and participate in the actual robbery. *Id.* For several of the robberies, the indictment alleged that two codefendants entered the banks brandishing a firearm. *Id.* For others, a codefendant entered the bank alone and handed over a demand note. *Id.* The defendants obtained a total of approximately $45,000 from the robberies. *Id.*

At trial, the government presented bank employees and video and photographic evidence from the banks showing codefendants committing the robberies. ER 220-21. As to petitioner's involvement, a cornerstone of the government's case was cell phone data, which showed that he was in the area and had made calls to the coconspirators around the time of several of the robberies. ER 195-96, 261-62. The government also called several cooperating witnesses. One cooperation witness stated that he drove another codefendant to petitioner after one of the robberies. ER 282, 312-14, 318, 345-46. A jailhouse informant testified that he was detained with petitioner while the latter was awaiting trial and that petitioner confessed his involvement in the robberies to him. ER 352-53, 362-71. A third cooperating witness testified that he was part of the robbery crew and that petitioner had an argument with a co-conspirator when he found out that he was going into the banks with a gun, but the codefendant insisted that he would not participate unless he could go into the banks armed. ER 205-08.

The district court instructed the jury that petitioner did not go into the banks to commit the robberies, and therefore he could only be held liable on the substantive counts under an aiding and abetting or *Pinkerton* theory of liability. ER 46-55. Thus, as to the *Pinkerton* theory, the jury was instructed that it could convict petitioner on these substantive counts if they "could reasonably have been foreseen to be a necessary or natural consequence of the" generic bank robbery conspiracy. ER 53.

The jurors sent two notes during deliberations indicating that they relied on *Pinkerton* liability to convict on the armed bank robbery and § 924(c) counts. ER 14-19, 27-30. The first asked whether they had to find both aiding and abetting liability and *Pinkerton* liability to convict on the substantive counts. ER 30. After they were informed that they did not, they sent a second note asking: "If the defendant is guilty of conspiracy does that mean that he is also guilty of armed robbery and brandishing a weapon? And or by default does that make him guilty of the charges pertaining to the firearm?" ER 28-29. The district court noted that the "two questions all have to do with conspiracy" and commented that the jurors "are focusing on conspiracy." ER 19. The district court then responded to the second note by telling the jurors that "conspiracy is a means by which defendant may be found guilty of the offenses charged in the other Counts." ER 27. Shortly thereafter, the jury returned its guilty verdicts, and the verdict form for the § 924(c)

counts only specified *Pinkerton* liability. ER 4, 8, 10, 20.

The district court imposed a total sentence of 387 months, which was comprised of 135 months for the conspiracy and bank robberies and 252 months (21 years) consecutive for the three § 924(c) counts, each of which carried a mandatory minimum consecutive sentence of 7 years. ER 186. Petitioner raised multiple claims on appeal, and the Ninth Circuit affirmed.

As relevant to this petition, he contended that the district court erred by giving a *Pinkerton* instruction as to the § 924(c) counts. He argued that *Pinkerton*'s reasonable foreseeability standard is incompatible with the definition of a crime of violence in the "elements clause," which is the only remaining definition of a crime of violence after *United States v. Davis*, 139 S. Ct. 2319 (2019). He also contended that Congress did not intend for *Pinkerton* liability to apply to § 924(c).

The Ninth Circuit rejected his claims, although somewhat non-responsively. The Ninth Circuit reasoned that "[d]efendants found guilty of armed bank robbery under either a *Pinkerton* or aiding-and-abetting theory are treated as if they committed the offense as principals." *Henry*, 984 F.3d at 1356. It also stated that it had affirmed § 924(c) convictions based on *Pinkerton* liability in unpublished opinions after *Davis*. *Id.*

ARGUMENT

This year is the 75th anniversary of *Pinkerton*, a remarkable opinion in that it not only judicially created a "theory" of criminal liability, but it articulated a reasonable foreseeability standard, an atypical standard in the criminal context. In the decades since the 1946 opinion, *Pinkerton* liability has been widely criticized, and it has been rejected by the Model Penal Code and the majority of jurisdictions throughout the country. Petitioner respectfully suggests that it is time for this Court to give further guidance on the reach of *Pinkerton*, particularly in the context of a post-Model Penal Code statute like 18 U.S.C. § 924(c) that imposes consecutive mandatory minimum sentences. Indeed, *Pinkerton* liability is incompatible with this Court's recent cases construing § 924(c), and this Court's recent precedent suggests that *Pinkerton* liability does not automatically apply whenever a conspiracy is involved, as many lower federal courts have assumed. As set forth below, this Court should grant this petition to clarify this important area of federal criminal law.

A. *Pinkerton* liability does not apply to 18 U.S.C. § 924(c) convictions predicated on a crime of violence given this Court's clarification of the statute in *Davis* and *Borden*.

In *Pinkerton*, 328 U.S. at 641-42, the defendants were charged with one conspiratorial count under the precursor to 18 U.S.C. § 371, the general conspiracy

statute,[2] and several substantive tax fraud counts. This Court held that, although there was no evidence that one of the defendants participated directly in the substantive offenses, he could still be held liable for them because he had entered into the conspiracy. This Court, however, cautioned that a "different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." *Id.* at 647-48. In accordance with a so-called *Pinkerton* theory, the jury at petitioner's trial was instructed that it could convict on the § 924(c) counts if they "could reasonably have been foreseen to be a necessary or natural consequence of the" generic bank robbery conspiracy. ER 53.

Particularly given this Court's recent opinions in *United States v. Davis*, 139 S. Ct. 2319 (2019) and *Borden v. United States*, 141 S. Ct. 1817 (2021), *Pinkerton* liability is incompatible with § 924(c). In *Davis*, this Court held that the "residual clause" definition of a crime of violence, *see* 18 U.S.C. § 924(c)(3)(B), is

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[2] *See Pinkerton*, 328 U.S. at 649 n.3 (Rutledge, J., dissenting) (quoting former section 88 of Title 18: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000 or imprisoned not more than two years, or both.").

unconstitutionally vague. Thus, the only remaining definition of a crime of violence is set forth in the "elements clause," which requires that the felony offense "has as an element the use, attempted use, or threatened us of physical force against the person or property of another . . . ." 18 U.S.C. § 924(c)(3)(A). Furthermore, under *Borden*, the "elements clause" definition requires that an underlying offense have a mental state that exceeds recklessness, and therefore a reasonable foreseeability standard clearly does not suffice. *See Borden*, 141 S. Ct. at 1825-334. Thus, it is simply inconsistent to permit § 924(c) liability based on reasonable foreseeability pursuant to *Pinkerton*, when the only remaining definition of a crime of violence requires conduct with a greater mental state than recklessness.

Indeed, if *Pinkerton* liability applies in the § 924(c) context, then many (if not all) federal offenses will fail to qualify as a crime of violence under the now-limited definition set forth in the surviving "elements clause." In other words, all crime of violence predicates that incorporate *Pinkerton* liability lack the mens rea needed under *Borden* to qualify pursuant to the requisite categorical approach, *see Borden*, 141 S. Ct. at 1822, which takes into account accessorial liability. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007).

In rejecting petitioner's argument, the Ninth Circuit explained that "[d]efendants found guilty of armed bank robbery under either a *Pinkerton* or

aiding-and-abetting theory are treated as if they committed the offense as principals." *Henry*, 984 F.3d at 1356. That is precisely right – a defendant can be convicted as a principal for a federal crime of violence under a *Pinkerton* theory without proof that the defendant intended the use of force. And this means that, pursuant to the requisite categorical approach, the alleged underlying crime of violence fails to meet the *Borden* definition. In essence, the Ninth Circuit confirmed petitioner's argument but then did not explain how permitting *Pinkerton* liability in this context satisfies the categorical approach.

Petitioner suggests that there are two potential interpretations of the statutory scheme. The first is to hold that *Pinkerton* liability does not apply in the context of § 924(c), and this Court has already suggested that *Pinkerton* fails to satisfy the mens rea required for accessorial liability under the statute. *See Rosemond v. United States*, 572 U.S. 65 (2014). Alternatively, this Court should hold that all crime of violence predicates for which *Pinkerton* liability is available fail to satisfy the categorical approach under *Borden*. Under either construction, petitioner's convictions must be vacated because the jury likely convicted him on the armed bank robbery counts and the § 924(c) counts based on *Pinkerton* liability.[3]

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[3] The Ninth Circuit noted that there was sufficient evidence to convict petitioner under an aiding and abetting theory. *See Henry*, 984 F.3d at 1357. Petitioner, however, made a claim of instructional error, not sufficiency of the evidence. Because the jury likely convicted under an invalid *Pinkerton* theory, the

Finally, the Ninth Circuit issued its opinion before this Court decided *Borden*. At the very least, this Court should grant this petition, vacate, and remand for reconsideration in light of *Borden*.

B. Congress did not intend for *Pinkerton* liability to apply to § 924(c)

As Judge Watford recently commented, *Pinkerton* "has long been the subject of criticism" and its "rule is unsound for many reasons, among them that no statute enacted by Congress authorizes this form of vicarious liability [and] the rule permits conviction based on a *mens rea* of negligence when the substantive offense frequently requires a more culpable mental state." *United States v. Walton*, No. 18-50262+, 2021 WL 3615426, at *4 (9th Cir. Aug. 16, 2021) (Watford, J., concurring) (citations omitted). Indeed, the Model Penal Code rejected *Pinkerton* liability, *see* Model Penal Code § 2.06, Comment 6(a), at 307 (1985), as have most States. *See* Sanford H. Kadish & Stephen J. Schulhofer, *Criminal Law and Its Processes* 693 (7th ed. 2001) ("In accord with the Model Penal Code, most jurisdictions currently hold, either by statute or by judicial decision, that conspirators are liable for substantive crimes of their co-conspirators only when the

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instructional error requires petitioner's conviction to be vacated even if the evidence was sufficient to convict. *See McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016); *see also Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) ("The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.") (emphasis in original).

strict conditions of accomplice liability are met.").[4]

Given that § 924(c) was enacted in 1968, it is likely that Congress did not intend for *Pinkerton* liability to apply in accordance with the Model Penal Code. *See Rosemond*, 572 U.S. at 76 (relying on Model Penal Code when determining accessorial liability under § 924(c)); *Salinas v. United States*, 522 U.S. 52, 64-65 (1997) (relying on Model Penal Code's view of conspiracy law when interpreting a statute enacted in 1970); *Commonwealth v. Chambers*, 188 A.3d 400, 415-16 (Pa. 2018) (Saylor, C.J., concurring) (explaining that modern Pennsylvania statutory law rejects *Pinkerton* liability in accordance with the Model Penal Code); *see also Burrage v. United States*, 571 U.S. 204, 215 (2014).

Likewise, a new federal criminal code proposed at about the same time in 1970 explicitly rejected *Pinkerton* liability, further demonstrating that Congress did not intend for *Pinkerton* liability to be incorporated into these statutes. *See* 2 Wayne R. LaFave, Substantive Criminal Law § 13.3(a), at 359 (2003). Indeed, this Court has relied on the proposed reform of the federal criminal code in 1970 when determining what Congress intended in enacting modern federal criminal statutes. *See Dixon v. United States*, 548 U.S. 1, 15 (2006).

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[4] *See, e.g.*, *Evanchyk v. State*, 47 P.3d 1114, 1118 (Ariz. 2002); *State v. Stein*, 27 P.3d 184, 188-89 (Wash. 2001); *State v. Nevarez*, 130 P.3d 1154, 1157-59 (Idaho Ct. App. 2005); *People v. McGee*, 399 N.E. 2d 1177, 1181-82 (N.Y. 1979); *see also Bolden v. State*, 124 P.3d 191, 196-201 (Nev. 2005).

In *Honeycutt v. United States*, 137 S. Ct. 1626, 1634 (2017), this Court rejected the proposition that Congress enacts criminal statutes based on a presumption of *Pinkerton* liability. To the contrary, this Court has "long been reluctant" to infer reasonable foreseeability and other civil negligence type standards when construing criminal statutes, *see Elonis v. United States*, 575 U.S. 723, 738 (2015), and this Court does not assume that Congress intended a theory of liability based on one of its earlier opinions if the theory is not rooted in the text of the statute. *See Alexander v. Sandoval*, 532 U.S. 275 (2001).

In finding that the criminal forfeiture statute in *Honeycutt* did not incorporate *Pinkerton* liability, this Court explained that the statutory language made it applicable to "any person" that had been convicted of certain serious offenses. *Honeycutt*, 137 S. Ct. at 1632. Likewise, § 924(c) applies to "any person" who commits a crime of violence "for which *the person* may be prosecuted in a court of the United States . . . ." 18 U.S.C. § 924(c) (emphasis added). The statute is worded in a person-focused manner, demonstrating that it applies to personal culpability. *See United States v. Walls*, 225 F.3d 858, 864-66 (7th Cir. 2000) (holding that *Pinkerton* liability does not apply to another statute, 18 U.S.C. § 922(g), in Chapter 44 governing firearms). Indeed, the consecutive mandatory minimum sentencing scheme strongly indicates that Congress intended for more personal culpability than mere accessorial liability based on reasonable

foreseeability. *See United States v. Hamm*, 952 F.3d 728, 747 (6th Cir. 2020) (holding that *Pinkerton* liability did not apply to a death or injury enhancement under 21 U.S.C. § 841(b), concluding that there is "no reason to think that Congress ever meant for *Pinkerton* liability to govern the application of the death-or-injury enhancement in the first place, for either conspiracy or substantive convictions").

Honeycutt also explained that *Pinkerton* liability was inconsistent with other provisions in the statute and the "structure" of the statutory scheme. *See Honeycutt*, 137 S. Ct. at 1633-34. The same is true for § 924(c). The statute contains a specific conspiracy provision, which states: "A person who conspires to commit an offense under section 924(c) shall be imprisoned for not more than 20 years, fined under this title, or both . . . ." 18 U.S.C. § 924(o). Thus, for a conspiratorial violation, which requires the defendant to actually know about and agree to firearm use, Congress intended no consecutive mandatory minimum sentence. Congress likely did not intend for a conspirator to receive the harsher mandatory consecutive sentences for the substantive § 924(c) offense if the use of a firearm could merely be reasonably foreseen.[5]

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[5] It appears that Congress did not incorporate *Pinkerton* in § 924 because it enacted a different type of conspiracy provision that does not require an overt act, *see Whitfield v. United States*, 543 U.S. 209, 212-13 (2005), whereas *Pinkerton* focused on the overt act requirement of the general conspiracy statute in reaching its

As mentioned, this Court's opinion in *Rosemond* also suggests that *Pinkerton* liability does not apply in the context of § 924(c). The question in *Rosemond* concerned the mens rea necessary to sustain a § 924(c) conviction under aiding and abetting liability. This Court held that a defendant must have "advance *knowledge* that a confederate would use or carry a gun during the [underlying] crime's commission." *Rosemond*, 572 U.S. at 67 (emphasis added). In doing so, this Court explained the well-established rule that, for accessorial liability, the requisite "intent must go to the specific and entire crime charged . . . ." *Id.* at 76. It makes little sense to have a rule of accessorial liability prohibiting conviction under an aiding and abetting theory without the requisite intent for the substantive offense, but nonetheless allow convictions under a *Pinkerton* theory without the requisite mens rea for the substantive offense. Judge Watford has recently

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conclusion. *See Pinkerton*, 328 U.S. at 647 ("An overt act is an essential ingredient of the crime of conspiracy . . . . If that can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense."). As an aside, New York's highest court has explained the illogical nature of the overt-act rationale in *Pinkerton*: "It is not offensive to permit a conviction of conspiracy to stand on the overt act committed by another, for the act merely provides corroboration of the existence of the agreement and indicates that the agreement has reached a point where it poses a sufficient threat to society to impose sanctions. But it is repugnant to our system of jurisprudence, where guilt is generally personal to the defendant, to impose punishment, not for the socially harmful agreement to which the defendant is a party, but for substantive offenses in which he did not participate." *McGee*, 399 N.E. 2d at 1182 (citations omitted).

recognized as much, relying on *Rosemond* and observing: "No principled basis exists for permitting vicarious liability for § 924(c) offenses under a less rigorous rule merely because a conspiracy is involved." *Walton*, 2021 WL 3615426, at *4 (Watford, J., concurring).

Construing § 924(c) as not incorporating *Pinkerton* liability is also consistent with the rule of lenity and the doctrine of constitutional doubt. *See, e.g.*, *Castillo v. United States*, 530 U.S. 120, 131 (2000); *Jones v. United States*, 526 U.S. 227, 239 (1999). Indeed, there is a strong argument that *Pinkerton* liability violates the Fifth Amendment and the constitutional structure of the federal criminal justice system, issues not considered in *Pinkerton*. *See, e.g.*, *United States v. Shabani*, 513 U.S. 10, 16 (1994) ("questions which merely lurk in the record are not resolved, and no resolution of them may be inferred"). This Court can and should avoid those questions.

It has long been established that the federal courts have no common law authority to create offenses. *See United States v. Hudson*, 11 U.S. 32, 34 (1812). Instead, "the 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." *Staples v. United States*, 511 U.S. 600, 604 (1994) (quoting *Liparota v. United States*, 471 U.S. 419, 424 (1985)); *see Dixon*, 548 U.S. at 12.

Davis confirmed that under "the Constitution's separation of powers . . .

[o]nly the people's elected representatives in the legislature are authorized to 'make an act a crime.'" *Davis*, 139 S. Ct. at 2325. "[S]eparation of powers [requires] that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018). Congress cannot simply set a wide "net" and "leave it to the courts to step inside" and create purported theories of liability. *Id*. at 1212 (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 n.7 (1983)).

"Hamilton warned, while 'liberty can have nothing to fear from the judiciary alone,' it has "every thing to fear from' the union of the judicial and legislative powers." *Id.* at 1228 (Gorsuch, J., concurring) (quoting The Federalist No. 78, at 466). "These structural worries are more than just formal ones. Under the Constitution, the adoption of new laws restricting liberty is supposed to be a hard business, the product of an open and public debate among a large and diverse number of elected representatives. Allowing the legislature to hand off the job of lawmaking risks substituting this design for one where legislation is made easy, with a mere handful of unelected judges and prosecutors free to 'condemn all that they personally disapprove and for no better reason than they disapprove it.'" *Id.*

Unlike aiding and abetting and other forms of accessorial liability, *see* 18 U.S.C. §§ 2 and 3, "no statute enacted by Congress authorizes [*Pinkerton*] vicarious liability [and] the rule permits conviction based on a *mens rea* of

negligence when the substantive offense frequently requires a more culpable mental state." *Walton*, 2021 WL 3615426, at *4 (Watford, J., concurring). Thus, allowing the courts to create such a theory of accessorial liability not only violates separation of powers, but it also infringes due process and basic notice requirements. *Cf. United States v. Gaudin*, 515 U.S. 506, 509-19 (1995) (due process prohibits judges from determining elements of a criminal offense); *Bouie v. City of Columbia*, 378 U.S. 347 (1964). Particularly given the lack of a clear and consistent common law rule permitting *Pinkerton* liability, the judicial creation of such criminal liability in this context violates bedrock constitutional principles of separation of powers and due process. *See Burrage*, 571 U.S. at 217-18.

Finally, several lower courts have recognized that *Pinkerton* liability can violate due process. *See, e.g.*, *United States v. Castaneda*, 9 F.3d 761, 766 (9th Cir. 1993) ("[s]everal circuits, including this one, recognize that due process constrains the application of *Pinkerton*"). Principles of statutory construction suggest that, rather than reading a constitutionally problematic theory of liability into a statute that mentions nothing about that theory, the more prudent course is to avoid those questions and to decline to participate in the judicial creation of criminal liability by interpreting § 924(c) narrowly. *See, e.g.*, *Jones v. United States*, 529 U.S. 848, 857-58 (2000).

In sum, although the lower courts all too often make a blanket assumption

that *Pinkerton* liability applies to all offenses in the federal criminal code, "federal crimes 'are solely creatures of statute,'" and such liability must be assessed "in the context of the[] specific offense[]" at issue. *Dixon*, 548 U.S. at 12 (citation omitted). When construed in light of legal developments in the many decades since *Pinkerton*, the specific statute at issue here, § 924(c), does not permit such a controversial theory of liability. This Court should therefore grant review to consider this important question.

C. The question presented is important and timely

As mentioned, *Pinkerton* is now 75-years old. It has taken on a life of its own in the lower federal courts, even though it has been widely criticized and rejected by the majority of States. Despite longstanding criticism, this Court has not revisited the reach of the opinion in the many decades since, nor has it done so since opinions like *Rosemond* and *Honeycutt*, which call its continuing validity into question, and at least in the specific context of § 924(c).

Pinkerton also stands on unusual, if not unsound, constitutional footing. This Court has recently reinforced the separation of powers problems that arise when the federal judiciary creates criminal liability, and *Pinkerton* itself never grappled with the constitutional question. This is yet another reason why this Court's intervention is warranted.

The stakes are also quite important. For example, through the use of

Pinkerton's watered-down reasonable foreseeability standard, petitioner was subjected to a minimum 21-year consecutive sentence pursuant to § 924(c). On a more global level, the general conspiracy statute carries a 5-year maximum sentence. *See* 18 U.S.C. § 371. Through the use of the *Pinkerton* doctrine, however, the government has the power to charge offenses that carry much greater penalties, and, to make matters worse, it can seek such enhanced punishment under a watered-down mens rea. When *Pinkerton* was decided, mandatory minimum penalties (and bloated maximum penalties) were rare, if not unheard of. It is time that this Court "reassess application of the *Pinkerton* rule to § 924(c) offenses in the conspiracy context – and eventually reconsider *Pinkerton* itself." *Walton*, 2021 WL 3615426, at *4 (Watford, J., concurring).

CONCLUSION

For the foregoing reasons, the Court should grant this petition, or it should grant, vacate, and remand for reconsideration in light of *Borden*.

Dated: August 30, 2021

Respectfully submitted,

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