No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

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ARCHIE NED WILLIAMS, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Must the "use of physical force" required to establish a predicate crime of violence under 18 U.S.C. § 924(c)(3)(A) be personal to the defendant convicted of using a firearm during that crime of violence under § 924(c), following the Court's recent decisions in *Borden v. United States,* ___ U.S. ____, 141 S. Ct. 1817 (2021), and *United States v. Davis*, ___ U.S. ____, 139 S.Ct. 2319 (2019)?

2. Does the least conduct needed to prove a co-conspirator's liability for a principal's substantive violent crime under *Pinkerton v. United States*, 328 U.S. 640 (1946), necessarily satisfy 18 U.S.C. § 924(c)(3)(A)'s requisite use of physical force; or do fundamentals of statutory construction, due process, double jeopardy, and criminal intent, prohibit obtaining § 924(c) convictions and their predicate violent felonies pursuant to *Pinkerton*?

3. Does the least-culpable conduct needed to establish an accomplice's liability for a felony, such as Hobbs Act robbery under 18 U.S.C. §§ 2 and 1951(a), categorically satisfy § 924(c)(3)(A)'s requisite use of physical force to permit such accomplices to be convicted of using a firearm in relation to that felony under § 924(c)?

RELATED PROCEEDINGS

The following proceedings are directly related to the instant case:

- *United States v. Archie Ned Williams*, No. 4:17-cr-00077-YGR, U.S. District Court for the Northern District of California, Judgment entered October 11, 2018.
- *United States v. Archie Ned Williams*, No. 18-10357, U.S. Court of Appeals for the Ninth Circuit, memorandum disposition filed on February 4, 2021.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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PETITION FOR A WRIT OF CERTIORARI

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Petitioner Archie Ned Williams respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Northern District of California, convicting Petitioner of Conspiracy to Commit Hobbs Act Robbery, Hobbs Act Robbery, and Brandishing a Firearm in Relation to a Crime of Violence. As set forth in his accompanying motion, Petitioner requests leave to proceed *in forma pauperis*, as he is indigent and counsel was appointed to represent him in each federal court below.

OPINION BELOW

The unreported memorandum disposition of the United States Court of Appeals for the Ninth Circuit, affirming the judgment, appears as Appendix A, and its Order Denying Rehearing and Rehearing *En Banc* appears as Appendix B.

JURISDICTION

The Ninth Circuit filed its memorandum dismissing Mr. Williams's appeal on February 4, 2021. App. 2-4.[1] It denied his Petition for Rehearing and Rehearing *En Banc* on May 12, 2021. App. 6. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Petition is timely pursuant to Supreme Court Rules 13 and 30.1, and the Miscellaneous Orders of March 19, 2020, and July 19, 2021.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fifth Amendment of the United States Constitution provides in pertinent part: "No person shall … be subject for the same offence to be twice put in jeopardy of life or limb; … nor be deprived of life, liberty, or property, without due process of law."

18 U.S.C. § 2(a) provides: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its

[1] "App." refers to the Appendix to the instant petition, "AOB" refers to Appellant's Opening Brief, "ARB" refers to Appellant's Reply Brief, and "PFR" refers to Appellant's Petition for Rehearing and for Rehearing *En Banc*.

commission, is punishable as a principal."

18 U.S.C. § 924 provides, in pertinent part:

> (c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by 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;
> >
> > (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
> >
> > (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.
>
> …
>
> (2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.
>
> (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 the offense.
>
> (4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

18 U.S.C. § 1951 (the Hobbs Act) provides:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section--
>
> > (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

STATEMENT OF THE CASE

I. THE PROCEEDINGS IN THE DISTRICT COURT

Archie Ned Williams was charged with conspiracy to commit Hobbs Act robbery under 18 U.S.C. § 1951(a) & (b) for Count One; two counts of Hobbs Act robbery under sections 2 and 1951(a) for Counts Two and Four; and one count of brandishing a firearm during a crime of violence under sections 2 and 924(c)(1)(A)(ii) for Count Three. 2-ER-117-18.[2]

Three change-of-plea hearings were scheduled but not completed, because Mr. Williams maintained he only learned of his companions' armed robberies after the fact. 1-ER-36-82. After further consultations with

[2] Further section references are to 18 U.S.C. unless otherwise stated. "E.R." refers to the Excerpts of Record filed in the appeal.

additional counsel, Williams pleaded guilty to each count. 1-ER-3-5, 29-30; 2-ER-100-12. The plea identifies the robbery charged in Count Two as the predicate for Count Three.[3] 1-ER-102.

In stating the factual basis for Counts One-Three, Mr. Williams admitted he and his co-conspirators agreed to rob a pizzeria. 1-ER-103. They traveled to San Francisco, where two members of the conspiracy acted as lookouts nearby, while the two others entered the pizzeria, and one pointed a gun at and took money from the cashier. 2-ER-103-04. Williams admitted "[they] agreed and [he] knew that each of the two men who entered the restaurant carried a handgun and planned to point it at the employees in order to commit armed robbery." 1-ER-103. "Therefore, it was reasonably foreseeable to [Williams] that, as a natural consequence of the conspiracy, a member of the conspiracy would brandish his firearm to further the conspiracy, in order to intimidate, injure, or kill victims in order to accomplish the robbery." 2-ER-103. Williams further agreed that after the two robbers exited the pizzeria with the cash, they entered the vehicle, "where the other co-conspirators were waiting, and the four of us drove away." 2-ER-104.

Mr. Williams was accordingly convicted of all four counts and sentenced to 100 months for each of Counts 1, 2, and 4, to run concurrently, and 84 months for Count 3. (2-ER-84.)

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[3] Count Two's misstatement of these elements as those of extortion was an additional appellate issue, dismissed by the Court of Appeals for not satisfying plain-error prejudice. 1-ER-101; AOB Part II; App. 3.

II. THE APPEAL AND DECISIONS IN THE NINTH CIRCUIT

On appeal, Mr. Williams argued Count Three was unlawful because he did not admit conduct satisfying section 924(c)(3)(A)'s crime-of-violence elements. In his Opening Brief, he argued it was unclear whether his section 924(c) conviction was premised on conspiracy to commit Hobbs Act robbery or aiding and abetting Hobbs Act robbery, and that neither conviction satisfies section 924(c)(3)(A)'s crime of violence elements, though they could have satisfied section 924(c)(3)(B)'s residual clause, which this Court found unconstitutional in *United States v. Davis*, ___ U.S. ____, 139 S.Ct. 2319, 2336 (2019). AOB 24-49. When the Government responded that Count Three was necessarily premised on substantive robbery under a *Pinkerton*[4] theory of conspiracy or aiding and abetting it, Williams explained in his Reply Brief that the least elements needed to prove *Pinkerton* conspiracy also fail to satisfy section 924(c)(3)(A)'s elements. ARB 9-20.

A year later, a panel of the Ninth Circuit filed a memorandum disposition deeming his arguments foreclosed by its recent decisions in *United States v. Dominguez,* 954 F.3d 1251 (9th Cir. 2020), *petition for cert. filed* (U.S. Jan. 26, 2021) (20-1000), and *United States v. Henry*, 984 F.3d 1343 (9th Cir. 2021), *petition for cert. filed* (U.S. Sept. 2, 2021) (21-5560). App. 4. Williams explained in his Petition for Rehearing and Rehearing *En Banc* that *Henry* and *Dominguez* were wrongly decided and inapplicable to his precise

[4] *Pinkerton v. United States*, 328 U.S. 640 (1946).

arguments, which were unaddressed therein.

Specifically, *Henry* did not apply the requisite categorical analysis of considering whether the least-serious conduct required to prove armed bank robbery as an accomplice or *Pinkerton* co-conspirator satisfied section 924(c)(3)(A)'s elements. *See Borden v. United States,* ___ U.S. ____, 141 S. Ct. 1817, 1832 (2021); *Davis*, 139 S.Ct. at 2328. Instead, it concluded armed bank robbery has "violence as an element," and "[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," and the Ninth Circuit "has repeatedly upheld § 924(c) convictions based on accomplice liability," ergo Henry's section 924(c) conviction predicated on either theory was lawful. 984 F.3d at 1355-56.

Mr. Williams explained that none of the cases *Henry* cited as upholding section 924(c) convictions answered the only currently-relevant question when the predicate is alleged to be a crime of violence: whether the least-serious conduct required to prove that predicate under *Pinkerton* or accomplice liability categorically satisfies section 924(c)(3)(A)'s elements. PFR 19-23. Specifically, in rejecting Mr. Henry's *Pinkerton* challenge, the Ninth Circuit noted "[d]efendants found guilty of armed bank robbery under … *Pinkerton* … are treated as if they committed the offense as principals," while citing inapposite cases, upholding section 924(c) convictions obtained prior to the invalidation of 924(c)(3)(b) and/or predicated on drug-trafficking crimes under

924(c)(2). *Henry*, 984 F.3d at 1355-56 (citing, e.g., *United States v. Gadson*, 763 F.3d 1189 (9th Cir. 2014); *United States v. Luong*, 627 F.3d 1306, 1308 (9th Cir. 2010); *United States v. Allen*, 425 F.3d 1231 (9th Cir. 2005); *United States v. Alvarez-Valenzuela*, 231 F.3d 1198, 1203 (9th Cir. 2000); *United States v. Fonseca-Caro*, 114 F.3d 906, 908 (9th Cir. 1997); *United States v. Winslow,* 962 F.2d 845, 853, n.2 (9th Cir. 1992); *United States v. Johnson*, 886 F.2d 1120, 1123 (9th Cir. 1989)).

To the extent any member of a conspiracy could be convicted under *Pinkerton* if a co-conspirator's carrying a weapon was *reasonably foreseeable*, a conviction so obtained could pass section 924(c)(3)(B)'s "substantial risk" test, and thus cases which pre-dated *Davis* do not resolve whether the least conduct used to obtain Williams's conviction satisfy section 924(c)(3)(A)'s elements. *See, e.g.*, *Gadson*, 763 F.3d at 1217 (jury could find reasonably foreseeable to Gadson that co-conspirator would use firearm in furtherance of drug-trafficking offenses); *Allen*, 425 F.3d at 1234 (finding actual knowledge of guns not required because "[t]he touchstone [of *Pinkerton*] is foreseeability"). Likewise, the four cited cases which had upheld *Pinkerton* in section 924(c) convictions predicated on drug-trafficking crimes do not inform the distinct crime-of-violence inquiry. *Gadson*, 763 F.3d at 1217; *Alvarez-Valenzuela*, 231 F.3d at 1203; *Fonseca-Caro*, 114 F.3d at 907-08; *Johnson*, 886 F.2d at 1123.[5]

[5] Another cited case addressed the defendant's distinct argument he should have been sentenced under section 924(o)'s separate provision for conspiracies,

The three unpublished post-*Davis* cases *Henry* cited did not address whether predicate convictions obtained under a *Pinkerton* foreseeability standard satisfy section 924(c)(3)(A)'s elements test. *See United States v. Sleugh*, 827 Fed. Appx. 645, 648-49 (9th Cir. 2020); *United States v. Jordan*, 821 Fed. Appx. 792, 793-94 (9th Cir. 2020). Indeed, *United States v. Khamnivong*, 779 Fed. Appx. 482, 483 (9th Cir. 2019), *reversed* the only section 924(c) count based on a crime of violence pursuant to the government's concession and did not have to address whether the remaining drug-trafficking counts had crime-of-violence elements under any theory. Following *Henry*, at least one unpublished case contains a dissent disagreeing with the application of *Pinkerton* to section 924(c) and expressing hope this Court addresses the issue. *United States v. Walton*, No. 18-50262, 2021 WL 3615426, at *4 (9th Cir. Aug. 16, 2021).

The Ninth Circuit additionally found Henry's alternative basis of accomplice liability for section 924(c) was viable, without any briefing on the issue, by citing other circuit decisions which had erroneously resolved the crime-of-violence inquiry by misfocusing on section 2's provision that accomplices are to be punishable as principals, rather than on the least elements an accomplice necessarily commits. 984 F.3d at 1356-57 (citing *United States v. Richardson*, 948 F.3d 733 (6th Cir. 2020) (citing other cases)).

Luong, 627 F.3d at 1308-11; and another merely noted *Pinkerton* additionally applied, without analysis, *Winslow,* 962 F.2d at 853, n.2.

Williams explained that *Richardson's* analysis is deficient for the same reasons as the other cases he had addressed in his briefs, including the first to erroneously conclude "because an aider and abettor is *responsible* for the acts of the principal as a matter of law, an aider and abettor of a Hobbs Act robbery *necessarily commits* all the elements of a principal Hobbs Act robbery." (PFR at 22-23; AOB 42-47 (discussing *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016)); *but see id.* at 1306 (Martin, J., dissenting) (recognizing accomplice could aid and abet a crime without using force, and even if did, such "use of force was not necessarily an *element* of the [section 2] crime, as is required to meet the 'elements clause' definition.") Like the erroneous cases it relied on, *Richardson* made the inferential leap that because an accomplice "is punishable" as a principal, "to sustain a conviction under § 924(c), it makes no difference whether Richardson was an aider and abettor or a principal." 948 F.3d at 742.

Whether an accomplice or co-conspirator is *punishable* as a principal could be relevant for a section 924(c) conviction premised on a drug-trafficking felony, but it has no relevance to the distinct elements-based test for a crime of violence. *Compare* section 924(c)(2) *with* 924(c)(3)(A); *see Henry*, 984 F.3d at 1357 (citing *Rosemond v. United States*, 572 U.S. 65, 67 (2014) (addressing accomplice liability for section 924(c) predicated on drug-trafficking felony)). Because *Henry* failed to apply the requisite categorical test and relied upon inapposite and/or wrongly-decided authority which likewise failed to apply it,

Henry should not have foreclosed Williams's arguments.

Williams additionally explained the divided opinion in *Dominguez*, 954 F.3d 1251, is inapposite and does not foreclose his arguments, because it considered different theories of liability. PFR 23-24.

The Petition for Rehearing and for Rehearing *En Banc* was denied on May 12, 2021.

REASONS FOR GRANTING THE PETITION

CERTIORARI IS NEEDED TO REMEDY THE RECURRING INCONSISTENT APPLICATION OF THIS COURT'S PRECEDENT, PRESENTED BY THE WIDESPREAD PRACTICE OF OBTAINING AND AFFIRMING CONVICTIONS UNDER 18 U.S.C § 924(C) THROUGH PROOF OF BROADER ELEMENTS THAN THOSE SPECIFIED IN SECTION 924(C)(3)(A)'S FORCE CLAUSE, BECAUSE THE DEFENDANTS' PREDICATE VIOLENT FELONIES WERE PROVEN VICARIOUSLY UNDER ACCOMPLICE LIABILITY OR *PINKERTON* CONSPIRACY.

A. The Questions Presented Are Important, Recurring, and Resolvable, with Widespread Federal Application and Impact.

In its recent terms, this Court has taken a close look at several federal statutes that provide enhanced sentences or immigration consequences for defendants with prior or current violent felony convictions. *See*, *e.g., Borden v. United States*, ___ U.S. ____, 141 S. Ct. 1817 (2021); *United States v. Davis*, ___ U.S. ____, 139 S.Ct. 2319 (2019); *Sessions v. Dimaya*, __ U.S. ___, 138 S. Ct. 1204 (2018). In each decision, it has found these statutes require categorically assessing the least elements needed to prove the predicate felonies and determining whether they necessarily satisfy the statute's elements. *See Davis*, 138 S. Ct. at 2325-28. Accordingly, this Court invalidated the statutes'

"residual clauses," which had provided unconstitutionally-vague standards of assessing the "nature" of a prior or current predicate conviction, rather than pure comparisons of statutory elements. *See id.* at 2325-26, 2336. The aftermath in the lower courts has been a continuous reassessment of what types of convictions provide the requisite categorical match of statutory elements, without recourse to the residual catch-all.

Mr. Williams had sought such reassessment for his section 924(c) conviction, following this Court's invalidation of its residual clause in *Davis*. Section 924(c) "threatens long prison sentences for anyone who uses a firearm in connection with" a specifically-defined drug-trafficking or violent crime. *Davis*, 139 S.Ct. at 2323. Prior to *Davis,* the predicate violent crime could be a felony "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 the offense." § 924(c)(3)(b). Now, it can only be supplied by a felony that has the specific elements contained in section 924(c)(3)(a). Thus, defendants can only stand convicted of using a firearm during a crime of violence, if the least elements required to sustain their predicate violent felonies categorically include "the use, attempted use, or threatened use of physical force against the person or property of another." § 924(c)(3)(a); *Mathis v. United States*, __ U.S. ___,136 S. Ct. 2243, 2248, 2256-57 (2016) ("Elements" "are what the defendant necessarily admits when he pleads guilty"); *Borden*, 141 S. Ct. at 1832 ("If any—even the least culpable—of the acts criminalized

do not entail that kind of force, the statute of conviction does not categorically match the federal standard, and so cannot serve as [the] predicate.")

Following *Davis*, numerous courts have found that substantive conspiracy convictions cannot supply the crime of violence, because an agreement to commit a crime does not necessarily require the use of force. *See*, *e.g., United States v. Simms*, 914 F.3d 229, 233-34 (4th Cir. 2019) (noting Government's concession); *United States v. Barrett*, 937 F.3d 126, 127 (2d Cir. 2019). Courts are divided on whether attempt crimes have the requisite force elements. *See*, *e.g.*, *United States v. Dominguez,* 954 F.3d 1251 (9th Cir. 2020), *petition for cert. filed* (U.S. Jan. 26, 2021) (20-1000); *United States v. Taylor*, 979 F.3d 203, 208 (4th Cir. 2020).

Mr. Williams was convicted of brandishing a firearm during a crime of violence under sections 924(c)(1)(A)(ii) and 2, by admitting facts establishing he entered a conspiracy wherein two unidentified co-conspirators committed Hobbs Act robbery (under § 1951(a)), while two others acted as lookouts, and he knew in advance the co-conspirators planned to point a firearm to commit robbery, and hence the brandishing was "reasonably foreseeable" as a "natural consequence of the conspiracy." 2-ER-103. Accordingly, his convictions for both Hobbs Act robbery and section 924(c) were alternatively obtained pursuant to accomplice liability, under section 2, or as a co-conspirator under *Pinkerton*, but not as the principal who personally used the firearm supplying the force.

Mr. Williams explained unsuccessfully on appeal that his section 924(c)

conviction was unlawful following *Davis* because, as with his substantive conspiracy conviction, the least elements required to obtain his Hobbs Act robbery conviction under *Pinkerton* or section 2 did not require his active employment of force, and thus it could not serve as section 924(c)'s predicate violent felony. His arguments, as well as those of inchoate-offense defendants like Mr. Dominguez, have been strengthened by this Court's recently holding section 924(e)(2)(B)(i)'s identically-worded elements clause requires the knowing or purposeful use of force; reckless conduct does not suffice. *Borden*, 141 S. Ct. at 1825-27.

This Court has not yet reached the specific questions raised here, which ask at their most fundamental level whether section 924(c)(3)(A)'s active, intentional, use of force must be *personally committed* by the defendant whose section 924(c) conviction is predicated on that violent crime. Prior decisions addressing whether accomplices or *Pinkerton* co-conspirators can be convicted under section 924(c) or similar statutes do not answer this question, because they did not categorically evaluate the least elements required to sustain those convictions in relation to section 924(c)(3)(A)'s elements clause, generally because they predated the rejection of the residual clause and/or addressed other kinds of predicates, like drug-trafficking crimes, with distinct tests.

Nevertheless, the sheer volume and longevity of these prior decisions throughout the federal courts has been leading some to disregard *Davis's* recently-narrowed categorical analysis and treat co-conspirators and

accomplices as principals, like they always have. As explained in his Petition for Rehearing and further below, the truncated analysis of the Ninth Circuit, and the others it relied upon in rejecting Williams's and Henry's arguments, conflicts with this Court's authority, while exposing some analytical holes that still need filling. A writ of certiorari is required to address the unauthorized exception to the mandated categorical approach some lower courts have made for the incalculably large percentage of cases proven under *Pinkerton* and/or accomplice liability, permitting section 924(c) convictions through proof of broader conduct than its crime-of-violence elements require.[6]

Similar reasons to those this Court found required categorical analysis in *Davis* and knowing or purposeful use in *Borden* should lead it to find the violent felony providing the predicate for a defendant's 924(c) conviction must be personally committed by that defendant, and the least conduct needed to prove that felony cannot be broader than section 924(c)(3)(A)'s elements. Absent such clarification, federal courts will continue to inconsistently apply the diverse standards for substantive, inchoate, and vicarious crimes to permit firearm convictions for some, but not all, defendants who never actively and intentionally used a firearm, as demonstrated here. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) (defendant may point to own case to

[6] Though the Government does not appear to maintain public statistics revealing the number of section 924 convictions it obtains vicariously, the widespread reach of the practice can be confirmed by every federal attorney and court, demonstrating these issues' exceptional national import.

demonstrate "realistic probability" conviction encompasses broader conduct).

Though the categorical approach governs numerous distinct statutory frameworks, its precise application always depends on the statutory terms at issue. *See Shular v. United States*, 140 S. Ct. 779, 783-87 (2020). Thus, while this Court's resolution of the questions presented here will likely have far-reaching consequences beyond section 924(c), ultimately the parameters of its reach will depend on the extent its precise textual analysis may be applied to other statutes. And though section 924(c)'s text should be found to exclude convictions where the violent predicates are obtained pursuant to *Pinkerton* or section 2, Williams presents several mechanisms below for approaching the issues in ways that preserve the statute's ability to reach the violent criminals it was meant to address, while also preserving principles of statutory construction and fundamental rights.

Thus, the questions presented are recurring and have far-reaching national import. Moreover, the diverse ways they and related issues have been treated (or avoided) by individual judges in the lower courts, before and after this Court's clarification of the inquiries in *Davis* and *Borden*, require this Court's remedial action through a grant of the requested writ.

B. This Court's Prior Textual Analysis Indicates Section 924(c)(3)(A)'s Use of Physical Force Against Another Must Be the Personal Conduct of the Defendant whose Section 924(c) Conviction Is Predicated on that Crime of Violence.

This Court has been gradually refining the meaning of "use" throughout section 924 over the course of several decisions addressing its diverse

subdivisions. First, it found Congress intended "use" in section 924(c)(1) "in the active sense of 'to avail oneself of." *Bailey v. United States*, 516 U.S. 137, 143-46, 149 (1995) (holding "§ 924(c)(1) requires evidence sufficient to show an active employment of the firearm by the defendant," which does not include storage, placement, or possession). It distinguished "use" from "carry," the latter of which did not require "active employment" or personal conveyance. *Muscarello v. United States,* 524 U.S. 125, 132, 136-37 (1998) (citing *Bailey*, 516 U.S. at 146). This past term, it found the "use of physical force against ... another" in the Armed Career Criminals Act's identically-worded elements clause required a higher level of intent than recklessness. *Borden*, 141 S. Ct. at 1825-27 (discussing § 924(e)(2)(B)(i) ("ACCA")). The logical synthesis of this Court's analysis of "use" throughout section 924 suggests it would not support leaving 924(c)(3)(A)'s requisite "use of physical force against … another" up to the whims of a co-conspirator. *See id.* at 1824-29; *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006) ("identical words used in different parts of the same statute are presumed to have the same meaning.")

This Court's examination of the key mental states in *Borden* placed them all in relation to the defendant's conduct. For example, it explained a person "acts knowingly when 'he is aware that [a] result is practically certain to follow from his conduct,' whatever his affirmative desire." *Borden*, 141 S.Ct. at 1823 (citing *United States v. Bailey*, 444 U.S. 394, 404 (1980); Model Penal Code § 2.02(2)(b)(ii)). And, a "person acts purposefully when he 'consciously

desires' a particular result," *id*., "whatever the likelihood of that result happening from his conduct," *Bailey*, 444 U.S. at 404. Additionally, "a person acts recklessly … when he 'consciously disregards a substantial and unjustifiable risk' attached to his conduct, in 'gross deviation' from accepted standards." *Borden*, 141 S.Ct. at 1824 (quoting Model Penal Code § 2.02(2)(c)).

These mental states, so defined, cannot depend on someone else's conduct. A lookout, for example, may know a co-conspirator plans to use force, but that co-conspirator's eventual "use" is divorced from the lookout's personal conduct undertaken with that knowledge. The lookout cannot make a co-conspirator use force (except, perhaps, through his own use of force or persuasion), and a lookout does not know with certainty if or against whom the co-conspirator's planned force is used until he hears about it after the fact. Thus, a vicarious use of force cannot be described as "practically certain," no matter how well co-conspirators may know each other and their plans; and it is not "directed at another" "in the targeted way that clause requires." *Borden*, 141 S.Ct. at 1823, 1827. And, while the non-violent co-conspirator or accomplice is aware of a risk that force will be used, "reckless" conduct does not constitute section 924(c)(3)(A)'s "use" of force. [7] *Id.* at 1826-27, 1832 (recognizing even if some convictions proven by conscious disregard of the risk

[7] Moreover, because the lookout's conduct does not set the force in motion, mere awareness of the risk would not qualify as "recklessness;" another's application of force is not sufficiently "attached" to the lookout's conduct. *See Borden*, 141 S.Ct. at 1823.

of injury may seem violent, "[a]n offense does not qualify as a 'violent felony' unless the *least* serious conduct it covers falls within the elements clause.")

This Court's analysis in *Davis* likewise identifies the defendant's conduct as the central target in finding the categorical approach governs section 924(c). First, *Davis* recognized the categorical approach was required even in section 924(c)'s current-conviction framework, and application of that approach focuses on the what was necessarily proven about the defendant's *conduct* to sustain his current convictions. 139 S.Ct. at 2327 (noting a "§ 924(c) prosecution focuses on the conduct with which the defendant is currently charged," and "[t]he government already has to prove to a jury that the defendant committed all the acts necessary to punish him for the underlying crime of violence").

Second, in finding section 924(c) required a categorical, rather than case-specific approach, based on the language of section 924(c) and its precedent considering similar statutes, this Court treated the crime of violence as the defendant's personal offense of conviction. Specifically, *Davis* found section 924(c)'s use of "an offense that is a felony" required categorically comparing the elements of the offense of *conviction* to section 924(c)(3)(A)'s elements, in the same manner section 16's equivalent term required comparing the statutory elements of the prior "'offense' of conviction." 139 S.Ct. at 2328 (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004).)

Davis also considered legislative history, noting that Congress's

narrowing the original section 924(c)'s application from "any felony" to a felony "crime of violence" reflects Congress's recognition that any armed felony would carry a risk of violence, and thus using a case-specific approach to consider whether the armed felony at issue carried such risk would effectively nullify the amendment's purpose. 139 S.Ct. at 2331-32. Instead of looking at the facts of the case to determine whether *someone* used force during the offense of conviction (or allowing the residual clause to consider the "nature" of the defendant's conduct on a particular occasion), the requisite inquiry is whether the elements of the defendant's conviction categorically prove a violent crime under section 924(c)(3)(A). *See id.* at 2328-32.

This analysis likewise requires finding the violent "offense that is a felony," which predicates a section 924(c) conviction, cannot be committed vicariously. The "offense" must be the same predicate conviction the government has proven in the instant proceedings, and that conviction should require proof that the *defendant's conduct* includes his personal active employment of force to qualify as a crime of violence under section 924(c)(3)(A). *See Davis*, 139 S.Ct. at 2327 ("§ 924(c) prosecution focuses on the conduct with which the defendant is currently charged"); *Borden*, 141 S.Ct. at 1832 ("offense does not qualify as a 'violent felony' unless the *least* serious conduct it covers falls within the elements clause").

Thus, *Davis* and *Borden* set the stage for this Court to solve the last piece of the "use" puzzle. This Court should grant Williams's requested writ to

clarify that section 924(c)(3)(A)'s use of force must be active, intentional, and *personal* to the defendant whose section 924(c) conviction is predicated on that use of force.[8]

C. The Least Conduct Needed to Prove Hobbs Act Robbery Pursuant to *Pinkerton* Conspiracy Does Not Include the Defendant's Personal Use of Force or Heightened *Mens Rea*. Hence, it Cannot Supply the Predicate Violent Felony for a Section 924(c) Conviction.

Several circuit courts have found substantive conspiracy, which "is merely an agreement to commit an offense," does not require proof of a defendant's use of force and, thus, cannot supply the crime of violence under section 924(c)(3)(A). *See*, *e.g.*, *United States v. Reece*, 938 F.3d 630, 636 (5th Cir. 2019); *United States v. Simms*, 914 F.3d 229, 233-34 (4th Cir. 2019); *United States v. Barrett*, 937 F.3d 126, 127-28 (2d Cir. 2019) (finding "*Davis* precludes us from concluding … Barrett's Hobbs Act robbery conspiracy crime qualifies as a § 924(c) crime of violence"). Additionally, at least one court has found *Davis* "would clearly disqualify" section 924(c) convictions predicated on substantive crimes "based on the *Pinkerton* theory of [conspiracy] liability." *United States v. Rodriguez,* No. 94 CR. 313, 2020 WL 1878112, at *14-17 (S.D.N.Y. Apr. 15, 2020) (also citing *Barrett*, 937 F.3d at 128; *United States v.*

[8] Some courts have found, with little analysis, that the ACCA's force clause in 924(e)(2)(B)(i) does not require personal use. *See United States v. Dinkins*, 928 F.3d 349, 359 (4th Cir. 2019); *United States v. Hammons*, 862 F.3d 1052, 1055 (10th Cir. 2017). Those cases predated *Borden's* analysis of that clause, as well as *Davis's* analysis of section 924(c), and Petitioner has not found any cases directly addressing whether 924(c)(3)(A) requires a personal use of force, let alone conducting the analysis proffered here and on appeal.

Biba, No. 14-2641-cr, 788 Fed. Appx. 70, 71-72 (2d Cir. 2019) (finding admissions of agreement to act as get-away driver and knowledge of planned brandishing constituted conspiracy, not attempted Hobbs Act robbery or crime of violence)).

The Ninth Circuit affirmed Mr. Williams's section 924(c) conviction and predicate violent felony as obtained pursuant to the *Pinkerton* doctrine, which "is a judicially-created rule that makes a conspirator criminally liable for the substantive offenses committed by a co-conspirator when they are reasonably foreseeable and committed in furtherance of the conspiracy." *United States v. Long*, 301 F.3d 1095, 1103 (9th Cir. 2002). The *Pinkerton* co-conspirator need not take any action at all beyond agreeing to the plan; and hence the only distinction with substantive conspiracy is the foreseeable completion of a crime by one of the members. *See Pinkerton*, 328 U.S. at 645-48.

To the extent another's reasonably-foreseeable force might have satisfied the now-defunct residual clause, it does not satisfy section 924(c)(3)(A)'s elements clause, especially since *Borden* confirmed "reckless" conduct does not suffice. Statutory crimes of violence "are best understood to involve not only a substantial degree of force, but also a purposeful or knowing mental state—a deliberate choice of wreaking harm on another, rather than mere indifference to risk." *Borden*, 141 S.Ct. at 1830.

Even prior to *Borden*, Williams explained on appeal that his admitting a co-conspirator's brandishing a gun was reasonably foreseeable to him as a

natural consequence of their planned robbery did not satisfy section 924(c)(3)(A)'s elements. However, the Ninth Circuit found his arguments foreclosed by its recent decision in *Henry*, 984 F.3d 1343, *petition for cert. filed* (U.S. Sept. 2, 2021) (21-5560). *But see Walton*, 2021 WL 3615426, at *4 (Watford, J., concurring) (criticizing *Pinkerton* and suggesting this Court should review its application to 924(c)). *Henry* failed to apply the requisite categorical analysis, while erroneously relying on cases focusing on *Pinkerton* defendants' being "treated as if they committed the offense as principals" and/or upholding their convictions obtained prior to *Davis's* invalidation of 924(c)(3)(b). *Henry*, 984 F.3d at 1355-56 (citing, e.g., *United States v. Gadson*, 763 F.3d 1189, 1217 (9th Cir. 2014); *United States v. Allen*, 425 F.3d 1231, 1234 (9th Cir. 2005); *United States v. Alvarez-Valenzuela*, 231 F.3d 1198, 1203 (9th Cir. 2000); *United States v. Fonseca-Caro*, 114 F.3d 906, 908 (9th Cir. 1997); *United States v. Johnson*, 886 F.2d 1120, 1123 (9th Cir. 1989)).

Four of these cases had upheld *Pinkerton* in section 924(c) convictions predicated on drug-trafficking crimes. *Gadson*, 763 F.3d at 1217 (jury could find reasonably foreseeable that co-conspirator would use firearm in furtherance of drug-trafficking offenses); *Alvarez-Valenzuela*, 231 F.3d at 1203; *Fonseca-Caro*, 114 F.3d 907-08; *Johnson*, 886 F.2d at 1123. Such cases are inapposite to the instant inquiry for at least two reasons: 1) they do not require proof of section 924(c)(3)(A)'s crime-of-violence elements, including the personal, intentional, active use of force; and 2) "the term 'drug trafficking

crime' means any felony *punishable*" under several broad statutory frameworks. § 924(c)(2) (emphasis added). Thus, how a *Pinkerton* co-conspirator is punished is expressly relevant to whether a drug-trafficking predicate has been established under section 924(c)(2). It is irrelevant to the only remaining inquiry for a crime of violence predicate: whether section 924(c)(3)(A)'s elements necessarily have been established.

Following *Borden*, a Hobbs Act robbery conviction obtained pursuant to *Pinkerton* cannot supply the predicate crime of violence because it may have been obtained by proof that another's "use" of force was merely reasonably foreseeable, and foreseeability does not supply the practically-certain active employment of force section 924(c)(3)(A) requires. *See* 141 S.Ct. at 1823, 1826-27. Thus, the Government should not be permitted to obtain a section 924(c) conviction predicated on a Hobbs Act robbery that is proven under *Pinkerton*.

Additionally, the requisite categorical approach should prohibit allowing predicate violent felonies to be proven via *Pinkerton*, because the doctrine would logically render all offenses categorically ineligible under section 924(c)(3)(A)'s elements test. If *Pinkerton* applies to all substantive crimes, and another's foreseeable force does not satisfy the use-of-force element, then no crime could supply the crime of violence, because the least-serious conduct needed to prove it would be a defendant's agreement to commit a crime, for which someone else's use of force was reasonably foreseeable. *See Borden*, 141 S.Ct. at 1826-27, 1832; *Simms*, 914 F.3d at 233-34.

Thus, application of this Court's recent authority should compel the conclusion that a section 924(c) conviction cannot be predicated on a violent felony obtained pursuant to *Pinkerton*, as such crimes cannot categorically satisfy section 924(c)(3)(A). Unfortunately, courts have evaded that conclusion by finding the section 924(c) conviction itself could be predicated on *Pinkerton*, regardless of who committed the violent predicate. *See*, *e.g.*, *United States v. Woods*, No. 20-1214, 2021 WL 4237166, *3-5 (6th Cir. Sept. 17, 2021) (citing § 924(c)(1)'s describing predicate crime as one for which defendant "may be prosecuted" in finding defendant need not be convicted of predicate to be convicted of § 924(c) and rejecting *Pinkerton* claim; *Henry*, 984 F.3d at 1355-57 (interchangeably discussing *Pinkerton's* application to predicate robbery and section 924(c) conviction); *United States v. Hernandez-Roman*, 981 F.3d 138, 144-45 (1st Cir. 2020) (finding *Pinkerton* applied to predicate robbery convictions and applying pre-*Davis* case finding *Pinkerton* applied to § 924(c), without addressing its impact on section 924(c)(3)(A)'s elements). Several reasons additionally demonstrate that neither the predicate nor the substantive 924(c) conviction can be proven via *Pinkerton*, as both are incompatible with principles of due process and statutory construction.

First, section 924(c)'s legislative intent and history demonstrate *Pinkerton* should not apply to it. As discussed in Part B, the underlying predicate "offense that is a felony" was meant to attach to the defendant's *conduct*, with the requisite categorical approach asking what elements the

Government necessarily had to prove to obtain the section 924(c) defendant's predicate felony and whether those elements satisfied section 924(c)(3)(A). *See Davis*, 139 S.Ct. at 2327-28. Substituting a theory of vicarious liability that does not include the defendant's conduct following his agreement that a robbery take place (and which does not supply any of section 924(c)'s elements) is incompatible with the categorical approach, section 924's text, and fundamentals of due process and the prosecution's burden of proof. U.S. Const. amend. V.[9]

This Court recently rejected reading *Pinkerton* liability into another criminal statute, using similar textual analysis which likewise applies to exclude *Pinkerton* from section 924(c). *See Honeycutt v. United States*, 137 S. Ct. 1626, 1634 (2017). Specifically, *Honeycutt* considered the entire criminal forfeiture statute at issue to determine the meaning of terms and whether other provisions nullified the broad reach sought by the Government. *Id.* at 1632-34. Relevant here, it cited the use of the term "any person," in limiting a

[9] The Sixth Circuit failed to incorporate this textual analysis from *Davis* when it cited § 924(c)(1)'s "may be prosecuted" language in finding Woods need not be convicted of the predicate crime of violence. 2021 WL 4237166 at *3-5. Had it done so, it may have recognized the impracticality and constitutional infirmities of applying such a nebulous standard. Instead, it provides no guidance for determining whether a defendant may be prosecuted in a federal court for a violent felony, such as the requisite *elements* the Government must establish to show that it *could* prosecute the predicate, if it wanted to. Would it need to demonstrate sufficient evidence of a co-conspirator's non-reckless force? Or that the prosecution would be successful? Identifying the defendant's "felony" "offense of conviction" is the only way to ensure section 924(c)(A)(3)'s elements were necessarily proven in accordance with due process.

defendant's liability to property he had personally obtained, and explained how another subdivision was designed to address the problem for which the Government had sought co-conspirator liability. *Id*.

Likewise here, section 924(c) is directed to "any person;" and other terms, like the "use of physical force against … another" for which "he may be prosecuted," further indicate the statute was designed to address personal conduct. Moreover, it has a separate subdivision specifically designed for conspiracies, with a cap on the prison time attached to it. § 924(o) ("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 . . . .") Nothing in section 924's text indicates an intent to apply its full, potentially-harsher, punitive effects to members of a conspiracy who did nothing more than agree to a plan that was pulled off by others, for which brandishing a firearm was reasonably foreseeable.

Second, *Borden's* "context and purpose" analysis supports the conclusion that section 924(c) was not meant to be judicially-expanded to include another's foreseeable force. As this Court reiterated, "'[u]ltimately, context determines meaning, … and '[h]ere we are interpreting' a phrase 'as used in defining' the term '*violent* felony,'" which in turn requires purposeful, non-negligent force. *Borden*, 141 S.Ct at 1830 (citing *Johnson v. United States*, 559 U.S. 133, 140 (2010); *Leocal*, 543 U.S. at 11). Convicting the person who purposefully committed non-negligent force supports the goals of the statute.

Expanding its reach to convicting members of the conspiracy, to whom others' force was merely foreseeable, does not.

Third, *Borden* grounded its *mens rea* analysis on the Model Penal Code, 141 S.Ct. at 1823-24; and the Model Penal Code rejected *Pinkerton* liability, which "permits conviction based on a *mens rea* of negligence." *Walton*, 2021 WL 3615426, at *4 (Watford, J., concurring) (citing Model Pen. Code, § 2.06, Comment, p. 312 & n.42 (1985)). Congress has not incorporated *Pinkerton* vicarious liability in its criminal statutes, and section 924(c)'s enactment in 1968 further suggests Congress did not intend for it to apply. *See Salinas v. United States*, 522 U.S. 52, 64-65 (1997) (relying on Model Penal Code's view of conspiracy law when interpreting RICO statute enacted in 1970); *see also Burrage v. United States*, 571 U.S. 204, 215-16 (2014) (citing Model Penal Code in rejecting government's broader interpretation of statutory language). Judge Watford cited the Model Penal Code drafters' conclusion that liability for substantive offenses should not extend beyond accomplice liability, as well as this Court's analysis narrowly construing the requisite intent to hold accomplices accountable for section 924(c) convictions predicated on drug-trafficking crimes in *Rosemond*, 572 U.S. at 67, in expressing hope this would lead this "Court to reassess application of the *Pinkerton* rule to § 924(c) offenses in the conspiracy context—and eventually to reconsider *Pinkerton* itself." *Walton*, 2021 WL 3615426, at *4.

Of course, the distinct violent-felony inquiry highlights additional flaws

with *Pinkerton* and accomplice liability not addressed in *Rosemond*, including enhanced merger issues where, as here, there is no distinction between the defendant's conduct needed to prove section 924(c), the predicate crime of violence, and conspiracy to commit either one. Indeed, the textual analysis this Court applied long ago to the merger issues triggered in section 1955's concerted-gambling statute is informative here. *Iannelli v. United States*, 420 U.S. 770 (1975). In finding separate charges could be brought for conspiracy and the substantive crime of five or more persons running a gambling business, this Court noted the statute's omission of conspiracy's elements, which were covered in a different statute. *Id.* at 789. What this Court did not suggest is that an agreement could sustain additional substantive convictions under a statute with distinct statutory elements. *See id.* at 784, 789 (optimistically indicating prosecutions could be selectively tailored for persons "whose level of culpability varies significantly").

Nevertheless, Justice Douglass raised double-jeopardy concerns in dissent, cautioning that "to permit this kind of multiple prosecution is to place in the hands of the Government an arbitrary power to increase punishment," and he "would require the prosecutor to observe the 'fundamental rule of law that out of the same facts a series of charges shall not be preferred.'" *Iannelli*, 420 U.S. at 792 (quoting *Regina v. Elrington*, 9 Cox C.C. 86, 90, 1 B & S 688, 696 (1861)); *see also id.* at 798 (Brennan, J., dissenting) (agreeing with Justice Douglass and additionally invoking rule of lenity to prevent convictions of both

substantive conspiracy and substantive § 1955); *United States v. Collazo,* 984 F.3d 1308, 1319, fn.9 (9th Cir. 2021) ("*Pinkerton* applies when the government charges a defendant with substantive offenses that were committed by other members of the conspiracy . . . , not when the government charges a defendant with the crime of conspiracy itself.")

History has proven Justice Douglass right. In the context of section 924(c), prosecutors have been routinely obtaining two additional substantive-offense convictions for a defendant's conspiracy agreement, without proving any additional conduct by that defendant or an intent beyond negligence. Concerns with double jeopardy, statutory construction, and lenity all counsel against expanding section 924(c)'s text and express elements to incorporate conspiracy liability. *See Bell v. United States*, 349 U.S. 81, 83 (1955) ("When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.")

In short, incorporating *Pinkerton* liability within the elements for establishing a section 924(c) conviction predicated on a crime of violence is contrary to the statutory text, the requisite categorical approach that text requires, and this Court's recent and long-standing analysis rejecting the reading of judicially-constructed or negligence standards into statutes which do not specifically incorporate them. *See*, *e.g., Borden*, 141 S.Ct. at 1823-28; *Honeycutt*, 137 S. Ct. at 1634; *Elonis v. United States*, 575 U.S. 723, 738 (2015) ("Having liability turn on … 'reasonable person' … reduces culpability on the

all-important element of the crime to negligence, … and we 'have long been reluctant to infer that a negligence standard was intended in criminal statutes'"); *Walton*, 2021 WL 3615426, at *4 (Watford, J., concurring). Application of *Pinkerton* to a case like Williams's, where he was charged with and convicted of two violent felonies in addition to substantive conspiracy, through admissions that those crimes' violent elements were committed by unidentified persons, reveals the doctrine's ever-deepening pitfalls its critics have noted for decades. Certiorari is required to prevent the Government from circumventing its burden to prove section 924(c)'s precise elements through application of a judicially-constructed and inconsistently-applied proxy theory premised on negligence and conduct beyond the defendants' control.[10]

D. The Least Conduct Required to Prove Aiding and Abetting Hobbs Act Robbery Does Not Include the Defendant's Personal Use of Force. Hence, it Cannot Supply the Predicate Violent Felony for a Section 924(c) Conviction.

Mr. Williams was charged as an accomplice under section 2 for both the Hobbs Act robbery alleged in Count Two and for his section 924(c) brandishing conviction in Count Three. 1-ER-118. He argued on appeal that the least facts he admitted to sustain these convictions as an accomplice do not satisfy section 924(c)(3)(A)'s use of force. AOB Part I.F; Reply I.C.2. The Ninth Circuit never entertained these arguments because it found them foreclosed by its recent

[10] Whether a section 924(c) conviction predicated on a drug-trafficking crime may be obtained pursuant to *Pinkerton* is a distinct question that several of the above arguments suggest is also unlawful, and which this Court may additionally consider resolving through this or another requested writ.

decision in *Henry*, for which the accomplice issue was *never briefed*. Indeed, Henry has not raised the issue in his pending petition for writ of certiorari. *Henry v. United States*, 21-5560 (Sept. 2, 2021). This Court should grant Williams's requested writ to apply its recent authority to this distinct issue and hold the least elements needed to prove aiding and abetting Hobbs Act robbery are broader than section 924(c)(3)(A)'s elements, and thus his conviction obtained under sections 2, 924(c), and 1951(a) must be dismissed.

Section 2 provides: "[w]hoever commits an offense against the United States or aids, abets … its commission, is punishable as a principal." This Court previously found a section 924(c) conviction could be obtained under accomplice liability, if the Government proved the defendant committed an affirmative act towards a triggering predicate felony and intended its commission, with advance knowledge a principal was armed. *Rosemond*, 572 U.S. at 74-78. However, as noted above, *Rosemond* addressed a drug-trafficking predicate, which is distinctly defined in section 924(c)(2). To the extent *Rosemond* included violent felonies in its statements of the test, such dicta should be foreclosed by this Court's subsequent analysis in *Davis* and *Borden*. *See id.* at 67.

As Williams explained on appeal, all the circuits which have upheld accomplices' section 924(c) convictions predicated on crimes of violence following *Davis* have done so by misfocusing on section 2's statement that an accomplice may be *punished* as a principal and ignoring the requisite

categorical analysis of the least-culpable conduct required to obtain an accomplice's conviction. *See* AOB 42-47; Reply 21-23. Whether an accomplice or co-conspirator is *punishable* as a principal may have been relevant for a section 924(c) conviction predicated on a drug-trafficking felony, but it has no relevance to the distinct elements-based test for a crime of violence. *Compare* section 924(c)(2) ("'drug trafficking crime' means any felony punishable under" specified statutes) *with* 924(c)(3)(A).

Nevertheless, in a remarkable example of circular reasoning unassisted by briefing on the issue, the Eleventh Circuit was the first to conclude that:

> [b]ecause an aider and abettor is *responsible* for the acts of the principal as a matter of law, an aider and abettor of a Hobbs Act robbery *necessarily commits* all the elements of a principal Hobbs Act robbery. And because the substantive offense of Hobbs Act robbery "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," … then an aider and abettor of a Hobbs Act robbery necessarily commits a crime that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

In re Colon, 826 F.3d 1301, 1305 (11th Cir. 2016). Judge Martin sounded the alarm in dissent:

> It seems plausible that a defendant could aid and abet a robbery without ever using, threatening, or attempting any force at all. For example, the aider and abettor's contribution to a crime could be as minimal as lending the principal some equipment, sharing some encouraging words, or driving the principal somewhere. And even if Mr. Colon's contribution in his case involved force, this use of force was not necessarily an *element* of the crime, as is required to meet the "elements clause" definition. The law has long been clear that a defendant charged with aiding and abetting a crime is not required to aid and abet (let alone actually commit, attempt to commit, or threaten to commit) every element of the principal's

> crime. *See Rosemond*[, 572 U.S. at 73-74] ("As almost every court of appeals has held, a defendant can be convicted as an aider and abettor *without proof that he participated in each and every element* of the offense . . . .")

Id. at 1306-07. Nevertheless, the *Colon* majority's "legal fiction" carried the day and was ultimately adopted by the First, Third, Sixth, and now Ninth Circuits.[11] *Boston v. United States,* 939 F.3d 1266, 1273 (11th Cir. 2019) (Pryor, J., concurring) (criticizing *Colon* majority for "tak[ing] a legal fiction—that one who aids and abets a robbery by, say, driving a getaway car, is deemed to have committed the robbery itself—and transform[ing] it into a reality—that a getaway car driver actually committed a crime involving the element of force"); *United States v. Velazquez-Fontanez*, 6 F.4th 205, 218-19 (1st Cir. 2021) (upholding accomplice's conviction for section 924(c), without considering personal use or distinctly-broader proof permitted for accomplice); *Henry*, 984 F.3d at 1356; *Richardson*, 948 F.3d 733, 741-42 (6th Cir. 2020); *United States v. McKelvey*, 773 F. App'x 74, 75 (3d Cir. 2019); *United States v. García-Ortiz*, 904 F.3d 102, 109 (1st Cir. 2018).

The circuit courts' arbitrarily elevating punishment over the statutory elements needed to prove accomplice liability, as if they were resolving a chicken-and-egg problem, goes against every decision by this Court addressing

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[11] *Henry,* 984 F.3d at 1356, included the Tenth Circuit in the list it obtained from *Richardson*. However, *Richardson* had cited an ACCA case, for which the accomplice-liability analysis is distinct, as discussed further below. 948 F.3d at at 742 (citing *United States v. Deiter*, 890 F.3d 1203, 1215-16 (10th Cir. 2018)). Petitioner has not found a Tenth Circuit case specifically addressing the application of accomplice liability to section 924(c)(3)(A).

categorical analysis for violent felonies. While a section 924(c) conviction attaches heightened punishment to crimes that contain certain elements; and section 2 makes defendants punishable as principals, even if they did not commit the same elements; section 924(c) is its *own substantive criminal offense*, with its own statutory elements. Thus, the additional punishment it carries should not trump the threshold elements required to sustain it.

When a defendant is charged under sections 2 and 1951(a) together as an accomplice to Hobbs Act robbery, the Government can obtain her conviction through proof of less-serious conduct on her part than that required to prove section 924(c)(3)(A)'s elements. *See Rosemond*, 572 U.S. at 73-74. Thus, offenses charged under section 2 and another statute fail the elements test under a pure comparison of their combined statutory elements, and prior decisions which had declined to compare the statutory elements, based on precedent describing how such charges are to be *punished*, are contrary to this Court's authority, section 924(c)(3)(A)'s precise language, and section 924(c)'s distinct statutory mechanism as a separate substantive offense.

When courts, including this one, *have* categorically approached claims that defendants' convictions as accomplices made them ineligible for additional statutory outcomes, the nature of the statute dictated how the accomplice elements were treated. For example, in distinct statutory frameworks matching state convictions with generic offenses contained in broadly-defined federal statutes, courts have included the federal accomplice-

liability elements within the generic offense, to allow those federal statutory consequences to attach to accomplices. *See Duenas-Alvarez*, 549 U.S. at 188-90 (so construing 8 U.S.C. § 1101(a)(43)(G), "a theft offense (including receipt of stolen property)"); *United States v. Valdivia-Flores*, 876 F.3d 1201, 1207 & 1211-12 (9th Cir. 2017) (placing federal accomplice-liability within scope of generic "aggravated felony" under 8 U.S.C. § 1101(a)(43)(B), which includes drug offenses broadly defined by multiple statutes).

Section 924(c)(3)(A) differs from these generic-offense statutes by identifying specific elements that are incompatible with accomplice liability's broader reach. *See Shular*, 140 S. Ct. 779, 783-87 (finding § 924(e)(2)(A)(ii)'s "serious drug" offense delineates specific conduct/elements, which prior conviction must share, and abrogating *United States v. Franklin*, 904 F.3d 792 (9th Cir. 2018), which had treated it as a generic-offense statute that included federal accomplice-liability elements with narrower intent than Washington's "knowledge" standard). *Shular* analogized section 924(e)(2)(A)(ii)'s elements structure to language that is identical to section 924(c)(3)(A)'s, and hence, the distinct generic-offense framework likewise does not apply here. *Id.* at 783 (citing *Stokeling v. United States*, 586 U.S. _____, 139 S.Ct. 544, 554, (2019); § 924(e)(2)(B)(i)). Section 2's elements cannot be incorporated *within* section 924(c)(3)(A), because adding them necessarily *modifies* 924(c)(3)(A)'s precisely-delineated elements.

While courts cannot logically read section 2's elements into section

924(c)(3)(A), courts can and should consider whether sections 2 and 1951(a)'s elements *together* encompass broader conduct than section 924(c)(3)(A)'s elements. One workable solution this Court might adopt is to simply determine whether multiple statutory provisions are charged and proven together, and thereby identify the least elements, i.e., the least-culpable conduct, the Government had to prove to obtain them. *See Borden*, 141 S.Ct. at 1832 (citing *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013)); *Mathis*, 136 S.Ct. at 2248; *Rodriguez*, 2020 WL 1878112, at *15 (finding "§ 924(c) conviction must be vacated unless the record (plea or trial) establishes, in addition to a conspiracy conviction, the valid [substantive] predicate of defendant's conduct that comes within the element clause"). Whether or not this would be properly classified as a "modified categorical approach" in the current-conviction context could be addressed by this Court on certiorari. *See Mathis*, 136 S.Ct. at 2249-54 (noting modified categorical approach only applies to identify prior's statutory elements and rejecting reviewing *Shepard*[12] documents to identify defendant's conduct where state statute addressed alternative means, rather than divisible elements).

This Court has paid careful attention to the specific statutory language in each case before it and has distinctly adapted the requisite categorical inquiries accordingly. *See*, *e.g.*, *Davis*, 139 S.Ct. at 2328-39; *Shular*, 140 S.Ct. at 786. Its prior discussions of the modified-categorical approach as limited to

[12] *Shepard v. United States*, 544 U.S. 13 (2005).

statutorily-divisible offenses should be contextualized with the provisions and facts considered therein, as well as its definition of "elements" as necessarily-admitted conduct. *Mathis*, 136 S.Ct. at 2248. Rather than decide whether section 1951(a) is divisible into separate accomplice and principal statutory offenses;[13] or apply a legal fiction and substitute section 2's *punishment* of accomplices as principals for the requisite determination of what elements were necessarily proven; or artificially incorporate section 2's elements within section 924(c)(3)(A)'s specified elements; or invalidate all section 924(c) convictions because all crimes *could* be obtained pursuant to accomplice liability;[14] it may simply look to the current-conviction *Shepard* documents to see how the predicate was charged and proven, and if those *combined* statutory elements are broader than section 924(c)(3)(A)'s elements, the section 924(c) conviction cannot stand.[15]

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[13] In holding the modified categorical approach only applies to divisible statutes, this Court acknowledged the dissenters' concern "that distinguishing between 'alternative elements' and 'alternative means' is difficult," but noted any ambiguity would be resolved by reviewing the *Shepard* documents, which "would reflect the crime's elements." *Descamps v. United States*, 570 U.S. 254, 264, fn.2 (2013).

[14] Because section 924(c) convictions will always be predicated on currently-charged federal offenses, for which the *Shepard* documents should reveal section 2's express application, the specifically-charged accomplice elements could be identified without needing to invalidate all possible predicates, as some circuit courts have warned with distinct prior-conviction frameworks, like the ACCA. *See United States v. Coats*, 8 F.4th 1228, 1245 (11th Cir. 2021); *United States v. Cammorto*, 859 F.3d 311, 316 (4th Cir. 2017).

[15] Examining *Shepard* documents to determine the relevant statutory elements the defendant *necessarily* admitted to sustain his convictions is

Once the precedential threads of the Court's distinct statutory analyses are carefully separated and the applicable ones knitted together, it is inescapable that section 924(c)(3)(A) requires an elements-focused inquiry, and ignoring the broader elements required to prove crimes charged under section 2 contravenes this Court's precedent and principles of statutory construction. The only remaining question is the first one asked by Petitioner: must section 924(c)(3)(A)'s use of force be personally committed by the section 924(c) defendant? For the reasons discussed in the preceding parts, this Court should find that the violent "offense that is a felony" supporting a section 924(c) conviction must be premised on that defendant's personal, practically-certain, conduct. *Davis*, 139 S.Ct. at 2327-28; *Borden*, 141 S.Ct. at 1823. Because the least-culpable conduct needed to prove a defendant aided and abetted a Hobbs Act robbery, with advance knowledge that a principal intended to brandish a firearm, does not supply this use of force, it cannot sustain that defendant's section 924(c) conviction as an accomplice or a principal. *See Rosemond* 572 U.S. at 74-78; *see Rodriguez,* 2020 WL 1878112, at *17 (expressing doubts "aiding and abetting the criminal conduct of other individuals" would satisfy section 924(c)(3)(A)).

The conduct Williams admitted to establish his conviction under sections 2 and 1951(a) is broader than section 924(c)(3)(A)'s elements, and

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permissibly distinct from the case-specific inquiry repeatedly rejected by this Court. *See Mathis*, 136 S.Ct. at 2249-54.

thus his case presents a realistic mechanism for this Court to grant certiorari, clarify the remaining ambiguities in the legal frameworks, remedy the inconsistencies in the lower courts' application of the law, and reverse Mr. Williams's unlawful conviction.

CONCLUSION

For the foregoing reasons, a writ of certiorari to the Ninth Circuit should be granted to address the questions presented or to remand for reconsideration in light of *Borden*.

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Respectfully submitted,

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