No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JAMESON LAFOREST,
ROBERT WESLEY JOHNSON,
KEITH MARVEL WALTON,

Petitioners,

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. May a defendant be found guilty of a substantive offense based on *Pinkerton* liability where that offense was not an object of the alleged conspiracy?
2. Should this Court limit to its facts or overrule *Pinkerton v. United States*, 328 U.S. 640 (1946), as judge-made federal criminal law in derogation of *United States v. Hudson*, 11 U.S. 32 (1812)?

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The Ninth Circuit's decision can be found at *United States v. Walton*, 2021 WL 3615426 (9th Cir. 2020).

JURISDICTION

The court of appeals filed its decision on August 16, 2021, and denied rehearing and rehearing *en banc* on October 21, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioners appealed the judgments arising from their alleged participation in robberies targeting luxury watch retailers in the Southern California area. A panel of the Ninth Circuit affirmed in a memorandum disposition. *See* Pet. Appx. 1.

In so doing, the panel turned aside petitioners' challenge to the applicability of *Pinkerton v. United States*, 328 U.S. 640 (1946), to section 924(c) charges, a

claim arising principally from *United States v. Hudson*, 11 U.S. 32 (1812), *United States v. Davis*, 139 S. Ct. 2319 (2019), *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), and *Rosemond v. United States*, 572 U.S. 65 (2014); the panel did so by relying on *United States v. Henry*, 984 F.3d 1343, 1354-56 (9th Cir. 2021), which presented the same claim and was decided during the pendency of Petitioners' direct appeals. *See* Pet. Appx. 4.

In his separate opinion, Judge Watford recognized the merits of petitioners' claims, the "flawed" nature of *Pinkerton*'s application to section 924(c) offenses, and its irreconcilability with this Court's recent decision in *Rosemond v. United States*, 572 U.S. 65 (2014). Pet. Appx 12. Petitioners continue to contend that (1) a defendant may not be found guilty of a substantive offense based on *Pinkerton* liability where that offense was not an object of the alleged conspiracy, and (2) this Court should limit *Pinkerton* to its circumstance—conspiracy cases requiring an overt act, and requiring the substantive charge at issue to be an object of the conspiracy—especially because *Pinkerton* constitutes judge-made federal criminal law created in derogation of *United States v. Hudson*, 11 U.S. 32 (1812). The Court should grant this petition because settled Ninth Circuit law (*Henry*) conflicts with decisions of this Court, and consideration of the lower courts' extended scope of *Pinkerton* is necessary to maintain uniformity this Court's decisions.

Nor is further percolation of the issue necessary. As *Henry*, 984 F.3d at 1356, observed:

> Since *Davis*, the First, Third, Sixth, Tenth, and Eleventh Circuits have all held that aiding and abetting Hobbs Act robbery—the conviction that was vacated in *Davis* when based on the residual clause—is a crime of violence under § 924(c)(3)(A). *See United States v. Richardson*, 948 F.3d 733, 742 (6th Cir. 2020) (collecting cases).

See also infra, at 17 (collecting cases reflecting that the majority of the circuit courts have adopted the same expansive rule as the Ninth, and impose *Pinkerton* liability for substantive offenses that are *not* objects of the charged conspiracy). The Court should address this oft-repeated issue already adopted by a majority of circuits.

ARGUMENT

A. The lower courts violated Petitioners' Fifth Amendment due process rights by giving a *Pinkerton* instruction for an 18 U.S.C. section 924(c) substantive offense— Count 12—that was not an object of the charged Hobbs Act conspiracy.

As Judge Watford recognized in his separate opinion, application of *Pinkerton* to section 924(c) offenses is "flawed." Pet. Appx. 12. And he perceived these flaws to be multi-faceted:

> The [*Pinkerton*] rule is unsound for many reasons, among them that no statute enacted by Congress authorizes this form of vicarious liability, *see Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 994–95 (1959), and that the rule permits conviction based on a *mens rea* of negligence when the substantive offense

> frequently requires a more culpable mental state, *see* American Law Institute, Model Penal Code and Commentaries § 2.06, Comment, p. 312 & n.42 (1985). The drafters of the Model Penal Code were right in concluding that liability for substantive offenses committed by co-conspirators "should be controlled by the same limits that are otherwise the measure of liability for complicity." *Id.* at 310. As they observed, and contrary to *Pinkerton*'s fundamental premise, "conspiracy does not present a special case for broadened liability." *Id.* at 310 n.35.

Pet. Appx. 11.

Judge Watford correctly credited petitioners' argument that application of *Pinkerton* to section 924(c) offenses conflicts with this Court's recent opinion, *Rosemond v. United States*, 572 U.S. 65 (2014). Pet. Appx 12. "There, the Court held that, to be convicted under § 924(c) as an aider or abettor, a defendant must have participated in the predicate offense with 'advance knowledge that a confederate would use or carry a gun during the crime's commission.'" *Id.* (quoting 572 U.S. at 67); *see also* Consolidated Opening Brief (Docket Entry 24) 39-54; Consolidated Reply Brief (Docket Entry 71) 13-19. More directly, "[t]hat use of a gun during the crime was reasonably foreseeable is not enough to sustain a conviction." Pet. Appx. 12. As a result, Judge Watford acknowledged that "[n]o principled basis exists for permitting vicarious liability for § 924(c) offenses under a less rigorous rule merely because a conspiracy is involved." *Id.*

Despite these flaws, Judge Watford believed that the Ninth Circuit could not limit *Pinkerton* as urged by petitioners, and only this Court can do so. *See* Pet. Appx. 12. The Court should answer Judge Watford's call and grant this Petition so it may address the important question about the limits of *Pinkerton* liability.

1. The lower court should not have permitted conviction of the section 924(c) charges based on *Pinkerton.*

The district court gave a *Pinkerton* instruction for Count 12 charging a violation of section 924(c).[1] That instruction directed the jury to convict petitioners of that offense if it was committed by a co-conspirator and "could reasonably have been foreseen [by petitioners] to be a necessary and natural consequence of the unlawful agreement." *Id*. While petitioners argued that the instruction was erroneous under, *inter alia*, the Fifth Amendment, the court of appeals determined that this use of *Pinkerton* is wholly proper under settled circuit precedent. Pet. Appx. 4 (citing *Henry*). *Henry* was incorrectly decided, and this Court should hear this case to address this oft-prosecuted theory of guilt. *See infra*, at 17 (collecting cases reflecting that the majority of the circuit courts have adopted the same expansive rule as the Ninth, and impose *Pinkerton* liability for substantive offenses that are *not* objects of the charged conspiracy).

[1] The district court's *Pinkerton* instruction also applied to the section 924(c) charges alleged in Counts 3, 5, 7 and 10. The jury acquitted on those counts, and Petitioners thus do not address them further.

In *Pinkerton*, 328 U.S. at 641-42, the defendants were charged with one conspiratorial and several substantive tax fraud counts. The Court held that, even though 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 to commit that substantive offense. As the Court explained: "The unlawful agreement contemplated precisely what was done." *Id.* at 647. But the Court 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.

Petitioners contend that the district court violated their Fifth Amendment due process rights by giving a *Pinkerton* instruction for a substantive offense—the use of a gun—that was not an object of the charged conspiracy.

For this reason alone, the Court should grant this petition to instruct the lower courts on the strict limits of *Pinkerton* liability.

B. The Court should grant this Petition to reconsider the correctness of the lower courts' expansion of *Pinkerton*.

Although the so-called *Pinkerton* doctrine has survived in federal common law, many states (and the Model Penal Code) have rejected it. *See, e.g.*, Model Penal Code § 2.06, Comment; *State v. Nevarez*, 130 P.3d 1154, 1157-59 (Idaho Ct.

App. 2005). Given the unfairness noted by the jurisdictions rejecting *Pinkerton*, and given the potential constitutional problems discussed below, this Court should reconsider its expansion of this doctrine in derogation of its other teachings.

Specifically, as described above, the defendant in *Pinkerton* was convicted of conspiring to commit a tax fraud offense, and he was also held liable for the substantive tax fraud offenses that were the *object* of the conspiracy. Under these facts, *Pinkerton* liability is not as controversial because it is well-established that "'the requisite intent necessary to commit the underlying substantive offense,' is an essential element of any conspiracy." *United States v. Kim*, 65 F.3d 123, 126 (9th Cir. 1995) (citations omitted); *see, e.g.*, *Ingram v. United States*, 360 U.S. 672, 678 (1959). Thus, limited to this context, the Government will have proved that *the defendant* had the requisite *intent* to commit the substantive offense, and therefore he is only held accountable for the overt *acts* of his coconspirators. *See Pinkerton*, 328 U.S. at 647. As mentioned, *Pinkerton* was based on the premise that "[t]he unlawful agreement contemplated *precisely* what was done." *Id.* (emphasis added).

It is an entirely different matter for a defendant to be convicted of conspiracy to commit a particular offense, and then, as here, to be held liable for a different substantive offense that was *not* the object of the conspiracy and for which the defendant did *not* have the necessary *mens rea*. Such an expansion of *Pinkerton*

liability allows the Government to convict a defendant without proving *he had* the requisite *mens rea* for the substantive offense.

The lower courts' answer—that a co-defendant had the requisite *mens rea*—does not excuse the need to establish the defendant's culpable *mens rea* before imposing severe criminal liability. Count 12 required the Government to prove a particular *mens rea* to support conviction. Petitioners, however, were not charged with conspiring to violate section 924(c). Nor did the sole conspiracy count—conspiracy to interfere with commerce by robbery (Count One)—require the jury to find that any petitioner had any knowledge or intent that a firearm would be possessed or used.

But under the *Pinkerton* instruction given, the Government was only required to prove that Petitioner could reasonably foresee the use and possession of a firearm during the robbery conspiracy. In other words, petitioners did not have to know or intend firearm possession, much less use it, during any robbery. The *Pinkerton* instruction thus reduced significantly the requisite scienter established by Congress to sustain section 924(c) convictions.

The scope of *Pinkerton* liability should also be reevaluated in light of the Court's recent decision in *Rosemond*, which addressed the scope of accessorial liability in the context of section 924(c). The question in *Rosemond* concerned the *mens rea* necessary to sustain a section 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 drug] crime's commission." *Id.* at 1243 (emphasis added). In doing so, the Court explained the well-established rule that, for accessorial liability, the requisite "intent must go to the specific and entire crime charged[.]" *Id.* at 1248. 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 allowing conviction under a *Pinkerton* theory without the requisite *mens rea* for the substantive offense. Judge Watford's separate opinion confirms this reading of *Rosemond*, and its conflict with this Court's expansive application of *Pinkerton*. *See* Pet. Appx. 11-12.

Additionally, the Court's other recent precedent further demonstrates that *Pinkerton* liability does not apply to section 924(c) at all. In *Honeycutt*, the Court recently rejected the proposition that Congress enacts criminal statutes based on a presumption of *Pinkerton* liability. *See Honeycutt*, 137 S. Ct. at 1634. To the contrary, it is much more likely that when Congress enacted section 924(c) in 1968, it was relying on the treatment of conspiracy law in the Model Penal Code, published in 1962, which, as mentioned, rejected *Pinkerton* liability. *See 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); *see also Rosemond v.*

United States, 572 U.S. 65, 76 (2014) (relying on Model Penal Code when determining accessorial liability under section 924(c)). Not only did the Model Penal Code reject *Pinkerton* liability, *see* Model Penal Code § 2.06, Comment, but the new federal criminal code proposed at about the same time in 1970 also rejected it. *See* 2 Wayne R. LaFave, Substantive Criminal Law § 13.3(a), at 359 (2003).

The statutory language confirms that section 924(c) does not include *Pinkerton* liability. In *Honeycutt*, the Court determined that the statute did not incorporate *Pinkerton* liability and noted that its language made it applicable to "any person" that had been convicted of certain serious offenses. *Honeycutt*, 137 S. Ct. at 1632. Likewise, section 924(c) applies to "any person" who commits a crime of violence or drug trafficking claim "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 does not permit conspiratorial liability.

Honeycutt also determined 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 section 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, the statute requires the defendant to actually know about and agree to firearm use, and Congress intended *no* consecutive mandatory minimum sentence for such a violation. It therefore makes little sense to think that Congress would have intended for a coconspirator to receive the harsher mandatory consecutive sentences for the substantive section 924(c) offense if he could merely foresee that a firearm would be used. *Cf. United States v. Luong*, 627 F.3d 1306, 1310-11 (9th Cir. 2010) (declining to decide the issue).

For all these reasons, this Court should conclude that section 924(c) does not include *Pinkerton* liability at all.

At bottom, the lower courts' application of *Pinkerton* in this case and cases like it violates the Constitution by extending vicarious liability to substantive offenses that were not the objects of the charged conspiracy. Because it has long been established that the federal courts have no common law authority to create offenses, *United States v. Hudson*, 11 U.S. 32, 34 (1812), this Court starts from the basic premise that 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); *see*

Liparota v. United States, 471 U.S. 419, 424 (1985). Typically, the *mens rea* element is one of the most critical, if not *the* most critical, element of a criminal offense. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 362 (1997); *Staples*, 511 U.S. at 605-06.

If *Pinkerton* liability may be expanded, like the lower courts permit, to include substantive offenses that were not an object of the conspiracy charged, then the doctrine constitutes a judicial rewriting of the elements required by Congress to sustain a conviction for a particular offense. Such an expansive application of *Pinkerton* liability allows a defendant to be convicted of a substantive offense that may require a knowing or even willful scienter based on a mere reasonable foreseeability standard. Not only does such a judicial rewriting of the statutory requirements for a criminal offense violate the constitutional framework of our federal criminal justice system, it also violates the Fifth Amendment. *Cf. Bouie v. City of Columbia*, 378 U.S. 347 (1964). In other words, while *Pinkerton* liability may be well-established and constitutional for substantive offenses that are the objects of the charged conspiracy, that decision did not constitutionally authorize such liability for additional substantive offenses without a jury finding that the defendant possessed the requisite *mens rea* for those additional offenses.

C. This case presents a worthy vehicle to answer the questions presented.

This case presents a worthy vehicle for further review because the inclusion of *Pinkerton* liability was prejudicial. Although the district court instructed on both aiding and abetting and *Pinkerton* liability as to the § 924(c) counts, the jury returned a general verdict, which automatically requires reversal because the jury was instructed on a legally invalid theory. *See, e.g.*, *Griffin v. United States*, 502 U.S. 46, 58-59 (1991).

Count 12 required that Defendant "*knowingly* used and carried a firearm during and in relation to, and possessed that firearm *in furtherance of,* a crime of violence. ER 348 (emphasis added). Although the indictment alleged Defendant's knowing and intentional use of a firearm to further the robbery, the district court instructed that the jury did not need to find the requisite *mens rea*. Under the *Pinkerton* instruction, the jury needed only to find that a co-conspirator's possession of the firearm was "in furtherance of the conspiracy," and "could reasonably have been foreseen to be a necessary or natural consequence of the unlawful agreement." The jury returned a guilty verdict on the section 924(c) count alleged in Count 12.

As argued *supra*, *mens rea* is one of the most critical, if not *the* most critical, element of a criminal offense. *See, e.g.*, *Hendricks*, 521 U.S. at 362; *Staples*, 511 U.S. at 605-06. The *Pinkerton* instruction removed the most critical element of the

offense and thus substantially altered the 924(c) count charged in the indictment. Defendants object to the prejudice occasioned by the lesser standard of proof, because the grand jury's charge required the finding of a higher *mens rea* beyond a reasonable doubt, but then the petit jury was not required to make such a finding a requirement of liability.

And the *Pinkerton* instruction mattered here. For one, the aiding and abetting charge for Count 12, the Government needed to prove that Appellants (1) "aided, counseled, commanded, induced or procured" Evan Scott to brandish a firearm, *see* ER 534; *see also* ER 1126 (Order addressing aiding and abetting elements), with "advance knowledge" that the crime—brandishing a gun—was planned. *United States v. Goldtooth*, 754 F.3d 763, 768–69 (9th Cir. 2014) quoting *Rosemond*, 134 S.Ct. at 1249-50. But the Government made no such showing as to LaForest or Walton.

The Government cannot dispute the first point was not satisfied, as its entire theory about the gun in Count 12 arose from government cooperator Walter Elima's testimony that Johnson told him he was giving a gun to Scott to be the gunman and it would provide an element of surprise. *See* CR 1126 at 3:5-4:7 (Order setting forth facts regarding Del Amo robbery); *see also* CR 1201. Those facts do not come close to showing that LaForest or Walton "aided, counseled,

commanded, induced or procured" Scott to brandish a firearm, and neither were alleged to have entered the store.

And as the district court found, the Government's evidence of "advance knowledge" was thin and conflicted. Cooperating witness Cornell Stephen testified that he did *not* know it was going to be an armed robbery prior to Scott pulling out the firearm." CR 1126 (Order citing Transcript 8/29/17 Vol. I at 117-18). Likewise, cooperator and mastermind Darrell Dent testified similarly: he could *not* conjure "any discussion about a gun being used in the Del Amo robbery." CR 1201 (Order denying LaForest Rule 29 motion) (citing Transcript 8/31/17 Vol. II at 41:20-23). In other words, two of the three Government cooperators disputed Elima's implication of Johnson, and exonerated LaForest and Walton from having advance knowledge of any jury issue.

In sharp contrast, to obtain the Count 12 convictions under *Pinkerton*, the Government didn't need to prove either of those prongs. Instead, it prevailed upon a showing that Scott's brandishing of a gun was "reasonably foreseeable and committed in furtherance of the conspiracy." CR 1121 (Order denying LaForest Rule 29 motion). It is that ridiculously watered-down, errant standard that prejudiced defendants.

And there can be no genuine question that the Government prevailed on its shift to *Pinkerton*, not aiding and abetting, as charged by the grand jury. In

summation, the Government spent less than a single transcript page arguing aiding and abetting, with the following being its total of eight lines of argument on the point:

> For the robbery counts, a classic example is a getaway car driver. A getaway car driver such as Defendant Jeremy Tillett aids in the robbery even though he doesn't go inside the store. Another example would be Defendant Walton and Defendant Johnson who counseled, induced, and commanded others, but never themselves went inside the stores.
>
> Aiding and abetting also applies to the gun count. You have Defendant Johnson who provided the gun but never actually pointed it at any jewelry store employees.

CR 1055 at 18:14-22. In sharp contrast, the Government then pivoted to its *Pinkerton* theory, and devoted more than four pages to it. *Id*. at 18:23-22:21. Likewise, the district court denied LaForest's Rule 29 on Count 12 by relying on the Government's *Pinkerton* theory, and could not sustain it on an aiding and abetting theory, finding the aiding-and-abetting evidence on Count 12 "not sufficient." CR 1201 at 17 n.7. The same is true for Walton. CR 1167 at 21 n.8.

In sum, the Government obtained convictions pursuant to the lesser *Pinkerton* standard. The evidence on this point was razor thin, and this theory prejudiced Petitioners.

Nor is further percolation needed: the majority of the circuit courts have adopted the same expansive rule as the Ninth, and impose *Pinkerton* liability for

substantive offenses that are *not* objects of the charged conspiracy. *See e.g.*, *United States v. Christian*, 942 F.2d 363, 367-68 (6th Cir. 1991); *United States v. Troop*, 890 F.2d 1393, 1397 (7th Cir.1989); *United States v. Pierce*, 479 F.3d 546, 549-51 (8th Cir. 2007); *United States v. Chorman*, 910 F.2d 102, 110-12 (4th Cir. 1990); *United States v. Alvarez*, 755 F.2d 830, 847-52 (11th Cir. 1985); *United State v. Sanjar*, 876 F.3d 725, 742-44 (5th Cir. 2017); *see also United States v. Shabani*, 513 U.S. 10, 16 (1994).[2]

Because this Court has never decided whether *Pinkerton* liability is limited to the facts of *Pinkerton*, and therefore is only applicable to a substantive offense that stands as the object of the conspiracy count, it should take the opportunity to do so now and rein in the lower courts' unconstitutional expansion of the doctrine, if not overrule it outright.

[2] *Shabani* held that section 846—the conspiracy statute at issue in Count One—does not contain an overt act requirement. This Court focused on the overt act requirement in reaching its conclusion in *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"). Thus, Petitioners also contend that *Pinkerton* liability should not apply to conspiracies that do not require overt acts.

CONCLUSION

For these reasons, the Court should grant the petition and consider this case.

Respectfully submitted,

DATED: January 18, 2022

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