No. 21-7093

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

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JAMESON LAFOREST,
ROBERT WESLEY JOHNSON,
KEITH MARVEL WALTON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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# REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## ARGUMENT IN REPLY

Petitioners requested the issuance of a writ of certiorari for this Court to address the lower courts' consistent expansion of the so-called *Pinkerton* doctrine, a judge-made rule of law that, based on *United States v. Hudson*, 11 U.S. 32 (1812), is of questionable constitutionality itself. In so doing, Petitioners relied heavily on Judge Watford's separate opinion below, which detailed the many problems with *Pinkerton* generally,[1] as well as the doctrine's incompatibility with this Court's recent opinion in *Rosemond v. United States*, 572 U.S.65 (2014).[2]

The Government appears to have no answer to these issues. It ignores entirely Judge Watford's separate opinion and his invitation to this Court to address the important issues presented by Petitioners. The Government instead offers a series of dodges that ultimately prove unavailing. The Court should grant this Petition.

The Government—while *not* contesting this Court's jurisdiction to hear this case—first asks the Court to turn aside the petition as untimely. The Court should

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[1] These include (1) the lack of statutory authorization by Congress with respect to this form of vicarious liability, (2) *Pinkerton*'s relaxing of culpable *mens rea* to a negligence standard when the substantive offense requires a more culpable mental state, and (3) its clear rejection by the drafters of the Model Penal Code. Pet. at 3-4 quoting Pet. Appx. 11.

[2] Opining that "[n]o reasonable basis exists for permitting vicarious liability for § 924(c) offenses under a less rigorous [*Pinkerton*] rule merely because a conspiracy is involved." Pet. at 4 quoting Pet. App. 12.

decline that invitation. The Government's request, following Petitioners' timely electronic submission to this Court and timely service upon the United States by mail, is instead grounded on Petitioners' failure to also mail paper copies to this Court on time. Petitioners thus agree that this petition was filed 14 days late, but they ask the Court to exercise its discretion to overlook this non-jurisdictional issue and review the petition on its merits.

The petition for writ of certiorari in this case was due on January 19, 2022. Petitioners electronically submitted the petition to the Court on January 18, 2022 and served a copy of the petition on the Office of the Solicitor General by mail on that same day. The petition was not mailed to the Court until February 2, 2022, however, rendering it untimely pursuant to Supreme Court Rules 13-1 and 13-3.

As set forth in the declaration from counsel of record—the attorney responsible for the filing and service of all three Petitioners—the late paper filing of the Petition arose from his misunderstanding of the COVID-19 amendments to the filing rules established by the Court on April 15, 2020. He mistakenly believed that rules set forth in the April 15, 2020 order governed the filing of this petition. This was incorrect, as the Court's July 19, 2021 Order rescinded the application of the April 15, 2020 Order to this case considering the date the court of appeals denied *en banc* rehearing. Additionally, counsel mistakenly believed that, like timely electronic filings in the district and circuit courts, a timely electronic

submission would suffice to file the petition with the Court pursuant to the April 15, 2020 order. This also was incorrect, as a copy served to the Court by mail was required to file the petition with the Court.

But, and importantly so, in criminal cases, "[t]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." *Schacht v. United States*, 398 U.S. 58, 64 (1970); *see also Bowles v. Russell*, 551 U.S. 205, 212 (2007). The ends of justice strongly support the Court exercising its discretion and considering the instant Petition on its merits. As a matter of undisputed fact, Petitioners provided both the Court and the government with timely submissions of the Petition. They submitted the Petition electronically to the Court on the day prior to its due date, and the Government was properly served by mail that same day. So too, two of the Petitioners relied on their co-Petitioner's counsel to timely file the Petition, and subjecting them to the sanction the Government urges would be doubly harsh to them.

At bottom, denying Petitioners a merits review of their petition would be a harsh result considering that the Petition was completed on time, electronically filed with the Court and served on the Government on time, and it was only counsel's good faith misunderstanding of the mailing rules in place during the continuing pandemic which led to the technically late filing. *See Schacht*, 398 U.S.

at 64 (considering fact that Petitioner acted in good faith when permitting untimely filing). Petitioners respectfully ask the Court to waive this time defect and consider their Petition for a writ of certiorari on its merits.

The Government then takes a second stab at dodging the merits when it argues that the Court of Appeals didn't even address "Petitioner's primary conten[tion] that the district court erred in instructing the jury on *Pinkerton* liability for a crime—violation of Section 924(c)—that was not the object of the charged conspiracy[,]" Opp. at 9-10 (Claiming "[t]he court of appeals did not address that contention"), and the Court should deny the Petition because it is a court "of review, not of first view." *Id.* at 10 (citations omitted).

This Government's contention is untrue, and the lower court directly addressed Petitioners' *Pinkerton* challenges. It turned aside Petitioners' challenges to the *Pinkerton* instructions as follows:

> The district court did not plainly err in instructing the jury that *Pinkerton* liability applied to the 18 U.S.C. § 924(c) counts. Defendants contend that *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), dictate a contrary result, but we recently rejected those same arguments in *United States v. Henry*, 984 F.3d 1343, 1354-56 (9th Cir. 2021).

Pet. Appx 4.

*Henry*, in turn, addressed the *identical issue*: assignment of error by permitting conviction for a section 924(c) violation based on *Pinkerton* liability. 984 F.3d at 1350, 1354-56. Even further, the defendant in *Henry* relied on (and the lower court addressed) *Davis*, *Honeycutt*, and *Rosemond*, for the very same arguments Petitioners presented below, and argue anew here. *Id.* at 1354-56. Thus, by citing *Henry*'s precedential rejection of this identical claim, the panel below most certainly addressed Petitioners' challenges; the Government should not have told this Court the opposite. This is especially true because the Government urged the panel below to reject Petitioner's challenge to their section 924(c) convictions on *Pinkerton* liability based on *Henry*, in a Rule 28(j) letter filed after its Answering Brief but before Petitioners' reply came due, *see* Ninth Circuit D.E. 60, and Petitioners then agreed that *Henry* disposed of the identical claim, and thus Petitioners preserved the issue for consideration by higher authority. *Id.*, D.E. 71 at 21.[3] Indeed, the Government later relies on *Henry* to try to overcome Petitioners' direct challenge to *Pinkerton*, and their reliance on *Honeycutt.* Opp. at 17. In other words, the Government's brief itself proves that the court below

[3] Petitioners cite to the ECF-generated pagination atop the pages of filed pleadings referenced in this brief.

passed on the claims raised here, contrary to the Government's incorrect assertion otherwise.[4]

When the Government finally turns to the merits, it then talks past Petitioner's claims, which likely explains why it avoids Judge Watford's separate opinion altogether. Petitioner argued that *Pinkerton* based its holding on the fact that "[t]he unlawful agreement contemplated precisely what was done[,]" before cautioning 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[,]" *Pinkerton*, 328 U.S. at 647-48. In response, the Government never addresses how the Court's holding plainly is

[4] The Government later offers a similar dodge when claiming that Petitioners' pointed argument that this Court's decision in *Honeycutt* establishes "that *Pinkerton* liability does not apply to section 924(c) at all" does not fall within the scope of the two questions presented. Opp. at 15. Review of Question 2, which calls for the Court to either (1) expressly limit *Pinkerton* to its facts (and exclude section 924(c) offenses from its reach), or (2) overrule it (and accomplishing the same), proves the Government's error.

Similarly, while Petitioners seek the writ pursuant to Supreme Court Rule 10(c), and demonstrate that no further percolation is required because the majority of the circuits have adopted the errant rule which Petitioners challenge, the Government complains that Petitioners don't rely on Rule 10(a), which doesn't apply here. *See* Opp. at 13. That distraction provides no reason to deny issuing the writ.

limited to the scope of the unlawful agreement, *viz.*, only substantive crimes that constitute the object of the conspiracy are subject to *Pinkerton*. Opp. at 12.

The Government then quotes stray language from two of the Court's cases—*Smith v. United States*, 568 U.S. 106, 111 (2013) and *Fiswick v. United States*, 329 U.S. 211, 217 (1946), *see* Opp. at 12—that say the same thing, as Petitioners urge: *Pinkerton* liability is limited to substantive crimes that "[t]he unlawful agreement [*viz.*, the conspiracy] contemplated *precisely* what was done." 328 U.S. at 647.

In so doing, the Government fails to grapple with the fact that the section 924(c) counts at issue were not alleged to be part of the alleged conspiracy, and the jury instructions did not require—as the Government admits *Pinkerton* requires—findings that Petitioners entered an unlawful agreement to use, carry, brandish, or discharge firearms as part of the robbery conspiracy alleged. Count 12 required the government to prove *mens rea* to support the conviction: that Petitioners "*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).[5] Petitioners, however, were not charged with conspiring to violate section 924(c). Nor did the sole conspiracy count—conspiracy to commit Hobbs Act robbery (Count One)—require the jury to find that Petitioners had any knowledge or intent

[5] "ER" refers to Appellants' Excerpts of Record, filed in the court of appeals as D.E. 21-1. "CR" refers to the docket entries in the district court Clerk's Record.

that a firearm would be possessed or used. ER 510. But under the *Pinkerton* instruction, the government was only required to prove that Petitioners could reasonably foresee the use or possession of a firearm. ER 536-37. In other words, Petitioners did not have to know or intend that firearm use or possession would take place, nor did they have to specifically intend to further a crime of violence, as required by section 924(c). *See, e.g.*, *United States v. Thongsy*, 577 F.3d 1036, 1042 (9th Cir. 2009); *United States v. Lopez*, 477 F.3d 1110, 1115-16 (9th Cir. 2007). The *Pinkerton* instruction thus reduced significantly the requisite scienter established by Congress to sustain the section 924(c) convictions.

And as shown, this omission mattered, thus establishing the third and fourth prongs of *Olano*'s plain error test. 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, much less entering any agreement with respect to, the use of any firearm.

The Government's argument likewise misses the point when it contends that *Pinkerton* did not "'create' criminal offenses" different from Congress's enactments, but merely "recognized that a defendant can be held liable for a substantive offense committed by his co-conspirators in furtherance of the conspiracy." Opp. At 14. This is incorrect. Congress declared that to be convicted of a section 924(c) violation, the Government must prove that the defendant [the "person"] "*knowingly* used and carried a firearm during and in relation to, and possessed that firearm in furtherance of, a crime of violence." ER 348. But under *Pinkerton*, no such finding is required, and none was made by the jury here; worse, Petitioners were not charged with and the jury never found that any of them *agreed* to or had *advance knowledge* of any use of any firearm. Petitioners nonetheless suffered convictions for this serious crime despite this failure of proof. That circumstance certainly establishes conviction of a different crime than enacted by Congress.

As explained in the Petition, *Pinkerton* authorizes this approach for crimes that are part of the conspiracy—*viz.*, the objects of the unlawful agreement. Pet. At 6-8. But *Pinkerton* does not go as far as most of the courts of appeals have held, and permit conviction for substantive crimes *not* the objects of the charged

conspiracy, *viz.*, *not* part of the unlawful agreement presented to the jury for its consideration. Especially after *Rosemond* and *Honeycutt*, the lower court's expansion of *Pinkerton* to substantive crimes *not* within the unlawful agreement, *viz.*, not an object of the conspiracy, is plain and obvious.

The Government's treatment of *Rosemond* and *Honeycutt* is similarly unconvincing. As to the former, it offers one paragraph to state the obvious: *Rosemond* addressed aiding and abetting liability, not *Pinkerton*. Opp. at 16-17. True enough, and entirely unresponsive to Petitioners' challenge and Judge Watford's observation that "[n]o reasonable basis exists for permitting vicarious liability for § 924(c) offenses under a less rigorous [*Pinkerton*] rule merely because a conspiracy is involved." *See* Pet. Appx. 11-12. Instead, Judge Watford recognized the equally obvious: aiding and abetting and *Pinkerton* both address accessorial liability for the acts of others; *Rosemond* emphasized the well-established requirement that any responsible party must have the requisite *mens rea* for the substantive crime. 572 U.S. at 76. In contrast, *Pinkerton* liability as expanded by a majority of the courts of appeal *removes* the need for any such finding, and instead permits conviction merely on "reasonable foreseeability," a lesser standard nowhere charged by the grand jury. But *Pinkerton* does not, and properly cannot, permit conviction for a substantive crime *not* charged as part of

the unlawful agreement, and for which the jury never made a finding of guilt on the question of an agreement to commit that substantive crime.[6]

Put into the language from *Pinkerton*, it doesn't apply *unless* "[t]he unlawful agreement contemplated *precisely* what was done." 328 U.S. at 647 (emphasis added). In this case (and in far too many others in the majority of circuits), the lower courts permit *Pinkerton* liability without requiring the prosecution to allege *and* prove that the alleged agreement contemplated *precisely* the substantive offense subject to vicarious liability.

The Government likewise talks past the effect of *Honeycutt*, in which this Court rejected the proposition that Congress enacts criminal statutes based on a presumption of *Pinkerton* liability. 137 S. Ct. at 1634. The Government offers no response to Petitioners' comparison of the structure and language of section 924(c) and the forfeiture statute at issue in *Honeycutt.* It instead claims that *Honeycutt* based its decision on "the background principles . . . of forfeiture[,]" which are inapplicable here. Opp. at 17 quoting 137 S. Ct. at 1634. But the Government misreads the case.

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[6] None of the three circuit cases the Government cites with respect to *Rosemond* addressed the argument raised here: that *Rosemond* proves incorrect the lower courts' expansive use of *Pinkerton* to reach substantive crimes *not* within the scope of the alleged conspiracy. *See* Opp. at 16. As a result, none inform this Court's resolution of the Petition at all. *See, e.g.*, *United States v. Shabani*, 513 U.S. 10, 16 (1994) ("questions which merely lurk in the record are not resolved, and no resolution of them may be inferred").

*Honeycutt* turned—like most questions of statutory interpretation—upon review of the statutory text which resolved the question presented there. 137 U.S. at 1632-33 ("Section 853(a)'s limitation of forfeiture to tainted property acquired or used by the defendant, together with the plain text of § 853(a)(1), foreclose joint and several liability for coconspirators"); *see also id.*, at 1633-34 (addressing additional textual clues to confirm the limitations of the statute).

In contrast, the language the Government cobbles together to make its defense against *Honeycutt*'s teachings as applied here is the section wherein the Court rejected the Government's claim that Congress drafted the statute with *Pinkerton* liability in mind. *Id.* at 1634-35. Rather, the Court held that "[t]he plain text and structure of § 853 leave no doubt that Congress did not incorporate those background [*Pinkerton*] principles[,]" *id.*, *viz.*, precisely the argument Petitioners present with respect to section 924(c).

At bottom, *Rosemond* and *Honeycutt* demonstrate the merits of this Petition, and the Court should grant it.

## CONCLUSION

For the reasons presented, this Court should issue the requested writ. The majority of circuits have expanded *Pinkerton* far beyond its holding and reasoning, and they have rewritten section 924(c) in a manner that violates the Fifth Amendment. The error is plain and obvious under *Pinkerton*, *Smith*, *Fiswick*,

*Rosemond*, and *Honeycutt*, and the plainness of the error is determined now, at the time of appellate review. *Henderson v. United States*, 568 U.S. 266, 279 (2013). The error affected Petitioners' substantial rights, as proven by the district court's rulings. *See* Pet. at 15-16.

As a result, this case presents a worthy vehicle to rein in the lower courts, and require fidelity to the limits of *Pinkerton*, or overrule it altogether. For these reasons, the Court should grant the Petition.

Respectfully submitted,

DATED: June 7, 2022

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