No. 22-_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____◆_____

JORDAN HUFF,
MARCUS MAJOR

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 WRIT OF CERTIORARI

_____◆_____

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QUESTIONS PRESENTED

1. Where 18 U.S.C. § 924(c) is a double-barreled crime that, at least in the context of aiding and abetting, requires proof both of a defendant's active participation and his prior knowledge that someone would use a firearm during the commission of the predicate offense, does *Pinkerton* liability, which requires neither active participation nor prior knowledge, have any role to play in securing the heightened penalties under § 924(c)(3)(A), which looks at whether the defendant elected to use force knowing the harm his conduct would cause another?

2. Where in *Taylor* and *Borden* this Court looked to a defendant's election to use force against another, as opposed to simply engaging in conduct that creates a risk that force would be deployed against another, when the government elects to secure a conviction on the basis of aiding and abetting liability for what would otherwise be a predicate offense, can the government use the defendant's conviction as the basis for securing the enhanced penalties under § 924(c)(3)(A)?

3. Where a conviction for Hobbs Act robbery can be secured on the basis of placing someone in fear of injury to property, has an individual convicted of Hobbs Act robbery necessarily used, attempted to use or threatened to use violent physical force as required to qualify as a predicate under 18 U.S.C. § 924(c)(3)(A)?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

LIST OF RELATED PROCEEDINGS

United States v. Jordan Huff, No. 17-16763 (9th Cir.)

United States v. Marcus Major, No. 17-16764 (9th Cir.)

United States v. Jordan Huff, No. 1:07-cr-00156 LJO (E.D. Cal.)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Jordan Huff and Marcus Major respectfully petition this Court for a writ of certiorari to review the decisions by the United States Court of Appeals for the Ninth Circuit affirming the district court's denial of their 28 U.S.C. § 2255 motions to vacate and correct their sentences premised on *Johnson v. United States*, 135 S. Ct. 2551 (2015), and subsequently *United States v. Davis*, 139 S. Ct. 2319 (2019), and informed by *Borden v. United States*, 141 S. Ct. 1817 (2021) and *United States v. Taylor*, 142 S. Ct. 2015 (2022), which collectively seem to establish that they are serving life sentences premised on conduct—the act of agreeing to possible future criminal events—that does not support the heightened penalties under 18 U.S.C. § 924(c)(3)(A).

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OPINIONS BELOW

On August 21, 2017, the district court denied Huff and Major's 28 U.S.C. § 2255 motions to vacate and correct their sentences on the merits. The district court's decisions are unpublished and reproduced in the appendix at E1-E12 and F1-F12, respectively. On October 28, 2020, the United States Court of Appeals for the Ninth Circuit granted Petitioners' request for a certificate of appealability with respect to whether their convictions and sentences for violating 18 U.S.C. § 924(c) must be vacated because neither conspiracy to commit Hobbs Act robbery, nor Hobbs Act robbery based on a *Pinkerton* or aiding and abetting theory of liability, qualify as predicates under § 924(c)(3)(A). Petitioners also briefed the uncertified

issue of whether substantive Hobbs Act robbery constitutes a predicate offense under § 924(c)(3)(A).

On May 23, 2022 and May 27, 2022, the United States Court of Appeals for the Ninth Circuit affirmed the district court's denial of Huff and Major's 28 U.S.C. § 2255 motions to vacate and correct their sentences. The decisions by the Ninth Circuit were unpublished, and are reproduced in the appendix to this petition at C1-C4 and D1-D4. Petitioners filed timely petitions for rehearing en banc, which the Ninth Circuit denied on September 7, 2022 in the orders reproduced in the appendix at A1 and B1.

While Petitioners were originally sentenced on March 25, 2010, following remand from a direct appeal to the Ninth Circuit, on May 15, 2012, the district court re-sentenced Huff and Major to 8,905 and 8,919 months respectively. The Amended Judgments are reproduced in the appendix at G1-G7 and H1-H7.

JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit denying Huff and Major's request for rehearing en banc was filed on September 7, 2022. Appx. A1 and B1. This Court therefore has jurisdiction over this timely petition pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 13.3.

PROVISIONS OF LAW INVOLVED

The **Fifth Amendment** to the United States Constitution provides in relevant part:

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

Pursuant to **18 U.S.C. § 924(c)(1)** any person who used or carried, brandished or discharged a firearm "during and in relation to any crime of violence or drug trafficking crime" "shall, in addition to the punishment provided for such crime of violence or drug trafficking crime," receive a heightened penalty of five, seven or ten years respectively.

Section 924(c)(3) defines a "crime of violence" as "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*.]—Struck down by *United States v. Davis*, 139 S. Ct. 2319 (2019)

Pursuant to **18 U.S.C. § 924(o)** "A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both. . ."

Hobbs Act robbery, **18 U.S.C. § 1951**, states, in relevant part:

"(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

Petitioners request certiorari because urgent action is needed by this Court where the circuit courts are permitting the imposition of the heightened penalties under § 924(c)(3)(A) premised merely on a defendant's act of engaging in conduct that, at best, creates a substantial risk that someone else will use force against another, which in this case deprived Petitioners of their liberty for life.

The government charged Jordan Huff and Marcus Major with one count of conspiring with others to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951, which listed thirty different robberies as overt acts, and also charged them with thirty counts of Hobbs Act robbery premised on each of the robberies listed as overt acts of the conspiracy. The robberies spanned a seven-month period, and the median amount taken at each robbery was $550.

At the outset of its closing argument the government informed the jury that this case was "a whodunit," and because it was a whodunit, the government elected to hedge its bet by requesting instructions for both *Pinkerton* and aiding and abetting liability on all thirty Hobbs Act robbery counts, which in turn served as the predicate for thirty separate counts of violating § 924(c).

The jury convicted Petitioners on all of the aforementioned counts as well as a single count of conspiring to violate § 924(c) in violation of 18 U.S.C. § 924(o).

Petitioners each received sentences over 740 years, with 732 years premised on what were at the time the heightened penalties associated with 18 U.S.C. § 924(c).[1]

Because the government requested a *Pinkerton* instruction, the only conduct the government necessarily established was committed by the Petitioners is the act of agreeing with others to a plan that anticipated someone would commit a robbery in the future. While the Petitioners' act of agreeing evinces a degree of callousness towards risk, the government did not establish an election by the Petitioners to use force against another knowing within a practical certainty that their decision to use force in that moment would result in harm to another. Rather, simply on the basis of their act of agreeing with others concerning possible events in the future, 20-year old Marcus Major and a 21-year old Jordan Huff, both of whom had no prior felony convictions at the time of the offense conduct, received life sentences many times over.

At its core, 18 U.S.C. § 924(c) is a sentencing enhancement that "authorizes heightened criminal penalties" for conducting a predicate crime in a specific manner, namely by "using or carrying a firearm during and in relation to" the commission of the predicate crime. *United States v. Davis*, 139 S. Ct. 2319, 2324

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[1] If this case had occurred after 2018, and the government again elected to bring thirty individual counts of violating 18 U.S.C. § 924(c) against two young black men with no prior felony convictions, Congress has clarified that the mandatory sentence for the thirty § 924(c) convictions would have be 228 years, not 732 years. The First Step Act, P.L. 115-391, 132 Stat. 5194, § 403(a) (Dec. 21, 2018) (clarifying that when Congress said that an individual should be sentenced to 25 years for a "second or subsequent conviction" under § 924(c), it meant that a defendant only qualified for consecutive 25 year sentences if the defendant's prior § 924(c) conviction had become final).

(2019) (internal quotations omitted). In fact § 924(c) does more than authorize heightened penalties; it mandates them. Judges are stripped of their sentencing discretion, resulting in sentences that are irreconcilable with Congress' mandate under 18 U.S.C. § 3553(a) that courts impose sentences that are sufficient but no greater than necessary to accomplish the penological goals of sentencing, which in this case deprived two young men just emerging from adolescence of their liberty for life.

While § 924(c) reads, and acts, like a mandatory sentencing enhancement premised on an individual's decision to use a firearm during a crime of violence, it has the unique characteristic that it can function as a stand-alone offense. This anomaly has prompted this Court to refer to § 924(c) as a "double-barreled crime." *Rosemond v. United States*, 572 U.S. 65, 71 (2014).

Given its unique status as a stand-alone crime functioning as a sentencing enhancement premised on how a predicate crime was committed, it is hardly surprising that this Court in *Rosemond* signaled § 924(c) out for special attention in the context of accomplice liability. Specifically, in *Rosemond*, this Court looked at exactly what *actus reus* and *mens rea* the government needs to establish beyond a reasonable doubt in order to sustain a § 924(c) sentencing enhancement for someone who aids and abets a violation of § 924(c)(2). *Rosemond*, 572 U.S. at 71.

Rosemond addressed the situation of the individual who actively participates in the commission of a predicate drug trafficking offense where a gun was used, but because it was unclear who actually used the gun during the commission of the

offense, the government sought the enhanced penalties under § 924(c) by invoking aiding and abetting liability. *Id.* at 68. The defendant "actively participated" in the predicate drug trafficking offense, and because he chose to actively participate in the predicate offense, if the government could establish that the defendant had "prior knowledge of the gun's involvement" in the offense, it was of no moment whether the defendant or someone else was the one who actually used the gun in carrying out the predicate offense. *Id.* at 67, 69, 81-82.

Several questions left unanswered by *Rosemond* are presented here. First, is the government able to do an end run around *Rosemond* by simply requesting a *Pinkerton* instruction thereby dispensing with any requirement to prove a defendant's active participation in the commission of the predicate offense as well as a defendant's advance knowledge that a firearm would be used in its commission? Second, does *Rosemond*'s requirement of mere "active participation" established in the context of reviewing a predicate offense under § 924(c)(2) make sense in the context of § 924(c)(3)(A), which is premised on the commission of a specific element rather than on the commission of a drug trafficking offense?

The Ninth Circuit's decision upholding the Petitioners' sentences in this case is premised on its published decision in *United States v. Henry*, 984 F.3d 1343 (9th Cir. 2021), which profoundly expanded the reach of § 924(c)(3)(A)—the Elements Clause—to individuals convicted of predicate offenses on the basis of *Pinkerton* liability so long as it was reasonably foreseeable that someone might use a firearm when committing the predicate offense, even though the commission of the

predicate offense was not necessarily known to the defendant, so long as its commission was also reasonably foreseeable. In other words, in the Ninth Circuit the "double-barreled crime" that is 18 U.S.C. § 924(c) can now be premised on a double-layer of reasonable foreseeability derivative of a defendant's sole act of agreeing about possible future events.

Of course, unlike *Pinkerton* liability, liability as an aider and abettor has "nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct," but rather demands the defendant's active participation in the commission of the offense as not only "something that he wishes to bring about [but] that he seek by his action to make it succeed." *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). Not only does *Pinkerton* liability dispense with *Rosemond*'s affirmative act require, in sharp contrast to *Rosemond*, there is no requirement that the defendant have advance knowledge that an individual committing the predicate had a gun; indeed the defendant need not know the individual even committed the predicate offense so long as it was reasonably foreseeable that he would. *Id.* at 1955-56.

After first observing that "*Rosemond* raises some question about whether advance knowledge should be required for *Pinkerton* liability as well as for aiding-and-abetting liability," *Henry*, 984 F.3d. at 1356, the Ninth Circuit proceeded to do an end run around *Rosemond*, treating *Pinkerton*'s "reasonable foreseeability" and *Rosemond*'s "knowledge" requirement as interchangeable. *Id.* The Ninth Circuit reasoned that because a defendant convicted of a predicate offense under either

Pinkerton or an aiding and abetting theory of liability are deemed principals, the conviction for the predicate offense renders them liable for the heightened penalties under § 924(c)(3)(A) based on the conduct of others, regardless of whether the defendant actively participated in the commission of the predicate offense or had advance knowledge that someone would use a firearm in the commission of the predicate offense. *Id.* at 1356.

Relying on its decision in *Henry*, it would seem the Ninth Circuit here did exactly what *Taylor* and *Borden* said not to do—it looked simply at whether the predicate offense has "violence as an element," regardless of whether the government necessarily established beyond a reasonable that the defendant used, threatened to use or attempted to use force against another. *Henry*, 984 F.3d at 1355-56. Ignoring the distinction between what is sufficient to establish liability under *Pinkerton* as opposed to liability as an aider and abettor, the Ninth Circuit rendered, as a practical matter, every defendant *strictly liable* for the enhanced penalties under § 924(c)(3)(A) based on the conduct of others so long as someone committed an offense that has "violence as element," and it was reasonably foreseeable that someone might do so.

By treating liability for a substantive offense secured under *Pinkerton* as interchangeable for purposes of § 924(c) as liability for the substantive offense secured under 18 U.S.C. § 2, the Ninth Circuit effectively eviscerated both the act and the knowledge requirement that this Court established in *Rosemond*. Not surprisingly, the Ninth Circuit's broad reading of the Elements Clause, extending it

to individuals simply on the basis of their act of agreeing to participate in a conspiracy that anticipated the future election by someone to use or threaten force against another, is seemingly at odds with this Court's decisions in *Taylor* and *Borden*, which looked at whether the government necessarily established that the defendant used, attempted to use, or threatened to use force with the intent of harming another, in contrast to those who simply engaged in conduct that created a risk of said harm. *Taylor*, 142 S. Ct. at 2022; *Borden*, 141 S. Ct. at 1829 n.6.

The Ninth Circuit is not alone. *See, e.g.*, *United States v. Hernández-Román*, 981 F.3d 138, 144-45 (1st Cir. 2020) (holding that pursuant to *Pinkerton*, the defendant was liable for the substantive robbery even if he was not physically involved, which in turn also made him liable for the decision of others to carry a gun while committing the robbery); *Sessa v. United States*, No. 20-2691, 2022 U.S. App. LEXIS 10792, at *5-6 (2d Cir. 2022) (holding that even if the defendant was vicariously liable under *Pinkerton* for the actual murder, the fact that someone, even if it was not the defendant, necessarily used force against another, that was sufficient to impose heightened penalties under § 924(c)); *United States v. Gillespie*, 27 F.4th 934, 942 (4th Cir. 2022) (opining that even if the defendant had not been actively involved in the commission of the underlying offense, and even if "the defendant was not present at the robbery and never touched a gun," he would still be liable for the heightened penalties under § 924(c) premised on someone else's election to use force against another while carrying a firearm because such conduct by another was a foreseeable consequence of the defendant's agreement); and

Edmond v. United States, No. 20-1929, 2022 U.S. App. LEXIS 23650, at *2-3, 13-16 (6th Cir. 2022) (building on its earlier decision in *United States v. Woods*, 14 F.4th 544, 553 (2021) in which it had opined that so long as someone committed an offense satisfying the elements of § 924(c)(3)(A) it did not matter if the defendant was not involved in the commission of the predicate offense, the Sixth Circuit held that it did not matter if the defendant did not have advance knowledge a firearm would be used during the commission of predicate offenses with which he was indisputably not involved, because the commission of the offenses were foreseeably within the scope of the agreement in which the defendant had entered).[2]

In light of these decisions, why would the government ever secure § 924(c)'s heightened penalties under an aiding and abetting theory, which, at minimum, requires it to prove both that the defendant knew a gun would be involved in the offense and that the defendant actively participated in the predicate offense, when it can dispense with proof of both active participation and knowledge by simply

[2] Tellingly, in support of its decision that "a defendant need not have committed the predicate substantive crime as a principal to be convicted under § 924(c), the Sixth Circuit relied on *United States v. Richardson*, 948 F.3d 733 (6th Cir. 2020), which was a case in which the defendant was convicted of the predicate on the basis of aiding and abetting, not *Pinkerton*. *Edmond*, 2022 U.S. App. LEXIS 23650, at *15. Of course, the critical distinction being that to be liable for aiding and abetting § 924(c), the government must prove beyond a reasonable doubt that the defendant had advance knowledge prior to the commission of the actual offense such that he had opportunity to withdraw before the commission of the predicate—something that would be impossible to do for the defendant convicted of a predicate offense under *Pinkerton* that was merely foreseeable but about which he had no specific knowledge. *Rosemond*, 572 U.S. at 81.

alleging the defendant conspired with others and then invoke *Pinkerton*, effectively eviscerating any notion of a "double-barreled crime"?

Based on this Court's jurisprudence, however, it seems that *Pinkerton* should have no role to play when it comes to applying the draconian heightened penalties under § 924(c)(3)(A). For example, when an individual actively commits the predicate offense as a principal there seems to be no legitimate application of *Pinkerton* when it comes to securing the heightened penalty under § 924(c). Such an individual will have satisfied the *actus reus* established by *Rosemond* by actively participating in the predicate offense, and he will be liable so long as he had prior knowledge that someone would use a gun during the course of committing the predicate offense. The only function of invoking *Pinkerton* liability in this context would be to effect a blatant end run around *Rosemond* by dispensing with the knowledge requirement this Court established as a precursor to § 924(c) liability. *See, e.g.*, *United States v. Roberson*, 474 F.3d 432, 433 (7th Cir. 2007) (holding that it was "irrelevant" whether the defendant was carrying the gun [or even knew about the gun] because it was reasonably foreseeable that someone would carry a gun and that is sufficient under *Pinkerton*).

When an individual commits the predicate offense as an aider and abettor, following *Davis* which struck down the residual clause of § 924(c) and *Taylor* and *Borden*, which looked at whether an individual necessarily elected to use, attempted to use or threatened to use force against another (as opposed to engaging in conduct that simply increased the risk that such force would be used), it is not clear that

aiding and abetting a predicate offense is in and of itself sufficient to satisfy the *actus reus* of the double-barreled crime when that double-barreled crime is predicated on a crime of violence as opposed to a drug trafficking offense. Resolution of that question provides an additional basis for granting Petitioners' petition. That said, if aiding and abetting the commission of the predicate offense alone does not render one liable for the heightened penalties under § 924(c)(3)(A), it seems that, following *Rosemond*, active participation in the predicate offense plus active participation in the use of the firearm (including providing another with said firearm for use in the commission of the predicate) would satisfy the *actus reus* and the *mens rea* of the double-barreled crime. Once again, it would seem that invoking *Pinkerton* in this context would have no role to play other than to work an end run around the elements necessary to satisfy this double-barreled crime as established in *Rosemond*. *See e.g., United States v. Serrano-Delgado*, 29 F.4th 16, (1st Cir. 2022) (holding that the government could be relieved of its burden under *Rosemond* to prove that the defendant had advance knowledge that his co-defendant was armed because the government was permitted to proceed under *Pinkerton* which merely requires reasonable foreseeability).

That brings us to the final scenario. When an individual is convicted of the predicate offense on the basis of *Pinkerton* liability, it would again seem that an additional *Pinkerton* overlay has no role to play in securing the enhanced penalties under § 924(c). By definition, if an individual is convicted of violating the predicate offense on the basis of *Pinkerton* liability, it cannot be said that the individual

actively participated in the predicate offense. Indeed, the individual might not even have been aware of the commission of the specific offense at issue so long as it was reasonably foreseeable based on the individual's act of entering an agreement that anticipated some unlawful conduct. In other words, where the predicate offense is secured on the basis of *Pinkerton* liability, it cannot be said that the individual committed either the *actus reaus* or the *mens rea* of the double-barreled crime, let alone used, threatened to use or attempted to use, force against another or their property as is required by 18 U.S.C. § 924(c)(3)(A).

In light of *Taylor* and *Borden*, which are both premised on a defendant's use of force against another, and which both rejected the government's argument that engaging in conduct that simply creates a risk of harm to another is sufficient to sustain the heightened penalties under 18 U.S.C. § 924(c)(3)(A), the time is ripe for this Court to address this gaping hole in its jurisprudence that the circuit courts are currently exploiting to dispense with any requirement that the government establish the defendant engaged in any conduct beyond entering an agreement that simply created a risk of future harm to another. As this Court has recognized, § 924(c) is uniquely double barreled, and layering *Pinkerton* liability on top of *Pinkerton* liability is incongruous with the basic principles of retributivism that provide the moral justification for draconian sentencing enhancements such as those codified at § 924(c), and, not surprisingly, is in serious tension with this Court's jurisprudence concerning § 924(c)(3)(A). The stakes could not be higher for Petitioners who, just as they were entering adulthood, lost their liberty for life

based on their act of agreeing to commit one or more convenience store robberies at some future date, without proof beyond a reasonable doubt that they elected to use, threatened to use or attempted to use, force against another, or were even active participants in one, let alone thirty, of the robberies for which they received 732 years of "heightened penalties" on top of their sentences for the substantive robberies. Urgent action is needed by this Court to ensure that individuals, such as Petitioners, are not "languishing in prison" on the basis of heightened penalties absent clear direction from Congress that they should. *United States v. Bass*, 404 U.S. 336, 348-49 (1971).

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REASONS FOR GRANTING THE WRIT

A. In Reliance on *Pinkerton v. United States*, the Circuit Courts Are Currently Performing an End Run Around *Rosemond v. United States*, as well as the Plain Language of the Statute Enacted by Congress, Resulting in Individuals Being Stripped of their Liberty for Life Under 18 U.S.C. § 924(c)(3)(A) Merely on the Basis of a Double Layer of Reasonable Foreseeability.

As this Court has steadfastly held for over two hundred years, 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." *Liparota v. United States*, 471 U.S. 419, 424 (1985) (citing *United States v. Hudson*, 11 U.S. 32 (1812)). Indeed, as early as 1798, this Court made clear that it is only Congress that can establish "crimes and punishments." *United States v. Worrall*, 2 U.S. 384, 391 (1798). In other words, it is Congress who "must first make *an act* a crime, *affix a*

punishment to it, and declare the Court shall have jurisdiction of the offence." *Hudson*, 11 U.S. at 34 (emphasis added).

Notably, Congress has made the act of agreeing to use firearms to commit future crimes of violence a crime, and it has affixed a punishment. That crime is codified at 18 U.S.C. § 924(o) and it carries a penalty up to twenty years.[3] Planning something in the future is very different from making an election in the moment to actually harm another. Congress recognized that distinction when it codified § 924(o), which punishes someone who conspires with others to use a firearm in the commission of a future crime of violence, as opposed to § 924(c)(3)(A) which imposes substantial mandatory sentences on an individual who actually elects in the moment to use violent force against another or their property, knowing within a practical certainty the harm their intentional conduct will cause another.

What Congress has unambiguously not done is create a crime holding individuals strictly liable for heightened penalties based on the decision by others to elect to use force against another, and who in so doing use a firearm, so long as the actions by others was a foreseeable risk arising from an individual's act of entering into an agreement concerning future criminal conduct.

Indeed, Congress has created "three classes of crime. . . (1) completed substantive offenses; (2) aiding, abetting or counseling another to commit them; and (3) conspiracy to commit them." *Pinkerton v. United States*, 328 U.S. 640, 649,

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[3] If the firearm contemplated as part of the agreement was a machine gun or a destructive device, or is equipped with a silencer or muffler, then the punishment is up to life. 18 U.S.C. § 924(o).

(Rutledge, J., dissenting in part). Missing from that list is a fourth class of crime whereby one who engages in the act of agreeing about future events also becomes liable for the unknown, yet foreseeable conduct of others. Likewise, as is relevant here, Congress has not established a statutory scheme whereby those individuals liable for the unknown but foreseeable conduct of others are *additionally liable* for heightened punishment depending upon how others elect to commit that unknown but foreseeable crime.

That Congress has not done so is hardly surprising. Historically crime has been viewed "as a compound concept" that "generally constituted only from the convergence of an evil-meaning mind with an evil-doing hand." *Morissette v. United States*, 342 U.S. 246, 251 (1952). This notion that individuals should be stripped of their liberty only on the basis of their commission of a specific act done with a specific intent is "congenial to an intense individualism and took deep and early root in American soil." *Id.* at 251-52.

This same "spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes." *Morissette*, 342 U.S. at 249-50. In other words, it should not matter that *Pinkerton* is a theory of liability as opposed to a stand-alone crime. The end result is the same. Based on satisfying the elements of *Pinkerton* liability the government is able to strip individuals of their liberty—in this case for life. It is of no solace to any individual who has been stripped of their liberty for life that it was

done pursuant to a theory of liability created by this Court rather than a statute enacted by Congress.

Because of the "serious criminal penalties" attached to a violation of § 924(c)(3)(A) "legislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971). Indeed, it is a "plain principle that the power of punishment is vested in the legislative, not in the judicial department." *Davis*, 139 S. Ct. at 2333 (internal quotations omitted). At its core, this " policy embodies the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *Bass*, 404 U.S. at 348 (internal quotations omitted). Yet, languishing in prison for life absent a clear statement from Congress that they should, is exactly what Petitioners are doing.

This "Court has emphasized that 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" *Williams v. United States*, 458 U.S. 279, 290 (1982) (internal quotations omitted). Here Congress has made the act of agreeing to use firearms in anticipated future conduct a crime, and Petitioners were convicted of said crime. What Congress has never done, however, is subject individuals to the heightened penalties under § 924(c)(3)(A) for someone else's decision to actually perpetuate a crime in which the person not only elected to use force against another or their property but elected to do so using a firearm.

Notably, *Pinkerton* involved only an "unlawful agreement [that] contemplated precisely what was done. It was formed for the purpose." *Pinkerton*, 328 U.S. at 647. The *Pinkerton* court, however, substantially broadened the reach of the newfound liability it created beyond the narrow factual scenario presented when it suggested that liability extended not just to agreements that contemplated precisely what was done but to any future conduct by others that could "be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." *Id.* at 647-48. Of course once an event occurs, its reasonable foreseeability as a natural consequence of an agreement is not difficult to ascertain. Where the standard is inherently subjective and informed by the passage of time, it is of questionable utility in terms of providing meaningful due process limits on criminal liability.

While this Court's decision in *Pinkerton* "represented the exercise of raw judicial power" that rests on an unworkable standard and is ripe for review, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2243, 2265 (2022), the issue here is not *Pinkerton* liability generally, but whether it should be extended to 18 U.S.C. 924(c)(3)(A).

This Court has "repeatedly warned" that it "will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." *Grunewald v. United States*, 353 U.S. 391, 404 (1957). If there was ever a place to reign in the reach of *Pinkerton* liability it would be in the context of *Pinkerton* liability layered on top of *Pinkerton* liability, particularly in the context

of § 924(c)(3)(A) which, as discussed below, is premised on a defendant's election to use force against another rather than conduct that simply creates a risk that force will be used against another. *See United States v. Hamm*, 952 F.3d 728, 747 (6th Cir. 2020) (refusing to extend *Pinkerton* liability to 21 U.S.C. § 841(b)(1)(C), which provides for a heightened penalty if a person causes death or serious bodily injury resulting from drugs trafficking—just like § 924(c) provides for heightened penalties if a person uses a firearm in the commission of a predicate offense—without proof that the defendants were actually involved in the proscribed conduct). *Cf.* *Honeycutt v. United States*, 137 S. Ct. 1626, 1634 (2017) (refusing to extend the government's authority to forfeit the assets of co-conspirators not directly involved, reasoning that doing so "would allow the Government to circumvent Congress' carefully constructed statutory scheme").

Congress has carefully constructed a statutory scheme in the context of 18 U.S.C. § 924(c), which separately recognizes the dangers of individuals conspiring with others about the future use of firearms to commit future crimes of violence versus the dangers of individuals actually electing to use force against another while actually using a firearm, and proscribed distinctly different penalties for the distinctly different conduct. In other words, extending *Pinkerton* liability to § 924(c)(3)(A) not only effectively eviscerates the "advanced knowledge" requirement of *Rosemond*, it undermines the very statutory scheme Congress established.

B. Clarity is Needed from this Court that the Heightened Penalties under 18 U.S.C. § 924(c)(3)(A) Cannot Be Premised on a Defendant's Engagement in Conduct that Merely Creates a Foreseeable Risk of Harm to Another.

"In our jurisprudence guilt is personal," *Scales v. United States*, 367 U.S. 203, 224-25 (1961), and "[g]uilt with us remains individual and personal, even as respect conspiracies." *Kotteakos v. United States*, 328 U.S. 750, 772 (1946); *see, e.g.*, Francis Sayre, *Criminal Responsibility for the Acts of Another*, 43 Harv. L. Rev. 689, 702 (1930) (observing that the "intensely personal basis of criminal liability" is part of "the most deep-rooted traditions of criminal law"). The personal nature of guilt means that when it comes to "the imposition of punishment" the relationship between an individual's actual conduct and the conduct being punished "must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment." *Scales*, 367 U.S. at 224-25. And, the concern with punishment being tied to personal conduct is at its zenith when what is at issue are heightened penalties above and beyond the penalties for engaging in the substantive offense based on a defendant's decision to engage in even more egregious conduct than was contemplated by the bare elements of the substantive offense. Sentencing enhancements above and beyond the offense of conviction that can deprive an individual of his liberty for life should not be premised on "atmospheric emanations of guilt," but on what the defendant actually did. *Nye & Nissen v. United States*, 336 U.S. 613, 620 (1949) (Frankfurter, J., dissenting). And, when it comes to interpreting 18 U.S.C. § 924(c) that is what this Court has always done.

In *Bailey v. United States* this Court was tasked with "clarify[ing] the meaning of 'use' under § 924(c)(1)." 516 U.S. 137, 142 (1995). Given "the statute and the sentencing scheme" as well as the context, the "use" in § 924(c)(1) means "active employment," not passive conduct. *Id.* at 143-44. As this Court explained, "'using a firearm' should not have a 'different meaning in § 924(c)(1) than it does in § 924(d).'" *Id.* at 146. Notably, in § 924(d), "Congress recognized a distinction between firearms 'used' in commission of a crime and those 'intended to be used,'" whereas under § 924(c)(1) "liability attaches only to cases of actual use, not intended use." *Id.* As this Court observed, that clearly shows that if Congress had meant to broaden application of § 924(c) beyond "use" to include "intended use," it "could and would have so specified." *Id.*

Section § 924(c)(3)(A) also relies on use, and attempted use and threatened use, but not intended use. If Congress wanted § 924(c) liability to extend to individuals who merely intend to use force as oppose to those who actually did use (threaten or attempt to use) force against another or their property, it presumably could and would have so specified. Indeed, in a separate provision, § 924(c)(3)(B), Congress did specify its intent to reach individuals who engage in conduct that simply creates a substantial risk of harm to another, but that is the provision this Court struck down in *Davis*, and "[d]ue process and the separation of powers suggests a court may not, in order to save Congress the trouble of having to write a new law, construe a criminal statute to penalize conduct it does not clearly proscribe." *Davis*, 139 S. Ct. at 2333.

To be sure the simple act of agreeing to commit Hobbs Act robberies may create a situation where it is reasonably foreseeable that the use of violent physical force may be used against another and that a firearm may be involved. After *Davis*, however, that is no longer the inquiry. As the *Davis* court explained, *Johnson* and *Dimaya* "teach [us] that the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case,'" such as the hypothesized dangers flowing from a defendant's agreement that at some point in the future someone should engage in a Hobbs Act robbery. *Id.* at 2326. In other words, liability for reasonable foreseeability in the context of § 924(c)(3) was exactly what this Court struck down in *Davis*. *Davis*, 139 S. Ct. at 2334 (explaining that "the residual clause. . . sweeps more broadly than the elements clause—potentially reaching offenses. . . that do not have violence as an element but that arguably create a substantial risk of violence") (internal quotations omitted); *accord Davis*, 139 S. Ct. at 2339 (Kavanaugh, J., dissenting) (describing § 924(c)(3)(B) as "the substantial-risk prong" that reaches convictions "that are not necessarily violent by definition under the elements prong").

So, following *Davis*, we know that liability under § 924(c)(3) requires the use (or attempted or threatened use) of force against another. The issue presented here is whether an individual can be subjected to the heightened penalties under § 924(c) that can strip him of liberty for life absent proof beyond a reasonable doubt that it was the individual, as opposed to someone else, who actually used force against another knowing the harm it would cause the person or his property. This Court's

jurisprudence following *Davis*, not to mention the draconian nature of the heightened penalties themselves as well as our deeply entrenched belief that individuals should not be stripped of their liberty absent the convergence of an evil mind with the evil act being punished, strongly suggests it does matter who made the actual election to use the requisite force against another.

Specifically, while under either an aiding and abetting or a *Pinkerton* theory of liability it does not matter who commits the elements of the predicate offense for purposes of securing a conviction for the predicate offense, following *United States v. Taylor*, 142 S. Ct. 2015 (2022) and *Borden v. United States*, 141 S. Ct. 1817 (2021), to satisfy the elements of the heightened penalties provided for under § 924(c)(3)(A), it seemingly does matter whether the specific defendant not only used, attempted to use or threatened to use violent physical force, but when he made the election to do so, he was aware within a practical certainty that his conduct would result in harm to another or their property. Just because two people are convicted of the same offense does not mean that the government secured the two convictions by proving the same elements; following this Court's reasoning in *Taylor* and *Borden*, what matters under § 924(c)(3)(A) are not theories of liability, but rather whether the government necessarily established beyond a reasonable doubt that the defendant—not someone else—used, attempted or threatened to use violent physical force against a person or their property.

In *Taylor*, this Court held that a defendant's intent to commit a predicate offense coupled with some act that would make the commission of said offense more

likely cannot support a conviction under § 924(c)(3)(A) because neither "require the government to prove that *the defendant* used, attempted to use, or even threatened to use force against another person or his property." *Taylor*, 142 S. Ct. at 2020 (emphasis added). *Taylor* explained, the "elements clause. . . asks whether the defendant *did* commit a crime of violence—and it proceeds to define a crime of violence as a felony that includes as an element the use, attempted use, or threatened use of force." *Id.* at 2022 (underlying added). As this Court observed, if Congress had wanted the Elements Clause to apply to those individuals who simply display a callousness towards others by engaging in conduct that makes it more likely a predicate offense would transpire in the future, Congress "could have easily said so." *Id.* And, of course, Congress did exactly that in the residual clause codified at 18 U.S.C, § 924(c)(3)(B) that was struck down in *Davis*.

In sharp contrast to the residual clause, the Elements Clause looks at the actual election to use force, and what the defendant understood regarding the possibility of harming another or their property because of his election to use force in that moment. In *Borden* a plurality of this Court held that the Elements Clause "covers purposeful and knowing acts, but excludes reckless conduct," and by that it clarified the Clause reaches only those convictions where the government necessarily established a defendant intended, or knew within a "practical certainty," the harm he would cause another as a result of his willful decision to use violent force. *Id.* at 1823-25, 1848. While Justice Thomas disagreed with the plurality as to where in the text of the Elements Clause the *mens rea* of

recklessness was grounded, he joined the plurality in holding that the Elements Clause demands more that "mere recklessness." *Id.* at 1835 (Thomas, J., concurring in the judgment) (citing his dissent in *United States v. Voisine*, 579 U.S. 686, 700 (2016) in which he explained the use of force requires not only that the decision to use force was intentional, but that the "act [was] done for the purpose of causing certain consequences or at least with knowledge that those consequences will ensue").

In other words, five justices of this Court held that the aggravated assault statute at issue did not satisfy the Elements Clause for exactly the same substantive reason: a prior conviction that merely requires proof that a defendant consciously disregarded a substantial risk that his intentional decision to use violent physical force would harm another does not satisfy the elements of § 924(c)(3)(A). That holding is hardly remarkable. A sentencing enhancement "invariably turns on mental state as well as harm," and thus "an act done recklessly [let alone one done negligently] often should not receive as harsh a punishment as the same act done purposefully or knowingly, even when the two cause the same harm." *Borden*, 141 S. Ct. 1857 n.8.

Borden, therefore, drew the line between those convictions requiring proof beyond a reasonable doubt that when the defendant acted he did so with a practical certainty that his conduct will harm another, and those convictions, such as those secured under *Pinkerton*, that merely require proof that when the defendant acted he "consciously disregard[ed] a substantial and unjustifiable risk" that his conduct

would harm another "in gross deviation from accepted standards." *Id.* at 1824 (internal quotations omitted). The former satisfies the elements of § 924(c)(3)(A), the latter does not.

Taylor followed *Borden*'s lead, focusing on what the individual defendant necessarily did, and, specifically, whether the defendant necessarily used, threatened to use or attempted to use force against another or their property. *Taylor* acknowledged that sometimes, if not most times, an individual convicted of attempted Hobbs Act robbery has engaged in the use, attempted use or threatened use of force—just like someone who is convicted of a predicate offense on the basis of *Pinkerton* liability—but "*some* cases are not *all* case," and the dispositive fact rendering an individual liable for the heightened penalties under § 924(c)(3)(A) is whether securing the conviction "require[d] the government to prove beyond a reasonable doubt that *the defendant* used, attempted to use, or even threatened to use force." *Id.* (emphasis added). Where the "statute speaks of the 'use' or 'attempted use' of 'physical force against the person or property of another'. . . [p]lainly, this language requires the government to prove that *the defendant* took specific actions against specific persons or their property." *Id.* at 2023 (emphasis added). Because "no element of attempted Hobbs Act robbery requires proof that *the defendant* used, attempted to use, or threatened to use force," a conviction for attempting to commit Hobbs Act robbery does not render a defendant liable for the heightened penalties under § 924(c). *Id.* at 2021 (emphasis added).

When a defendant is convicted of a substantive offense on the basis of *Pinkerton* it cannot be said that he has knowingly engaged in any conduct beyond agreeing to participate in a conspiracy. Ninth Circuit Model Jury Instruction 8.25, Conspiracy—Liability for Substantive Offense Committed by Co-Conspirator (*Pinkerton* Charge). In other words, it cannot be said that the defendant used, attempted to use, or threatened to use force against a person or their property any more than it can be said the defendant convicted of attempted Hobbs Act robbery did. The only act it can be said the defendant convicted of a substantive offense under *Pinkerton* committed is the act of agreeing to the desirability of a future crime. At the time the defendant acts, that future crime is no more than a foreseeable risk. To be sure, it could be said that the act of agreeing to anticipated future robberies involves "a substantial risk that physical force against the person or property of another may be used," § 924(c)(3)(B), but without something more that is all that can be said. Without additional conduct by the defendant in which he necessarily makes the election to use force against another knowing the harm it will cause another or their property, he has not engaged in the conduct required by the § 924(c)(3)(A), and thus does not qualify for the heighted penalties under § 924(c).

Notably, the least act criminalized in both a conspiracy to commit Hobbs Act robbery and substantive liability on the basis of *Pinkerton*, is an agreement—which in the case of substantive conspiracy at least requires the government to prove that the defendant had an intent to achieve a particular objective, as opposed to

Pinkerton liability that captures conduct that was not necessarily anticipated by the defendant so long as it was reasonably foreseeable to a jury with the benefit of hindsight. *United States v. Jauregui*, 918 F.3d 1050, 1060-61 (9th Cir. 2019) (Berzon, J., concurring). Indeed, under a *Pinkerton* theory of liability defendants are vicariously liable for the offenses of others "whether they were aware of [each offense] or not," so long as the offenses were "reasonably foreseeable overt acts committed by others in furtherance of the conspiracy." *United States v. Grasso*, 724 F.3d 1077, 1089 (9th Cir. 2013).

When it comes, therefore, to culpable conduct justifying a sentencing enhancement, a conspiracy conviction versus a conviction for the substantive offense premised on *Pinkerton* liability "rests on a distinction without a conceptual difference." *Hamm*, 952 F.3d at 747. An individual who is guilty of conspiracy may be faulted for "pay[ing] insufficient attention to the potential application of force" in the future, as well as demonstrating a "degree of callousness toward risk," but the fact that someone else in the future elected to engage in violent conduct against another, does not alter the non-violent nature of the defendant's conduct that evinces a "mere indifference to risk" rather than "a deliberate choice [to] wreak[] harm on another." *Borden*, 141 S. Ct. at 1827-30; *Taylor*, 142 S. Ct. at 2022.

Without establishing beyond a reasonable doubt that Petitioners did anything beyond agreeing to future conduct, let alone actually electing to use violent force knowing the harm it would cause another, they each received a 732-year heightened penalty under § 924(c)(3)(A) beyond their sentences for the

substantive robberies and beyond the sentences they received for violating 18 U.S.C. § 924(o)—the statute Congress enacted to address the dangers associated with conspiring to use firearms in the commission of future crimes of violence. In other words, Petitioners lost their liberty for life based on the conduct of others that they did not necessarily know about, but which was merely a foreseeable consequence of an agreement in which they had previously entered. That seems to be in serious tension with *Taylor* and *Borden*, and with the fundamental principle that the deprivation of liberty should be premised on individual guilt, particularly in the context of heightened penalties capable of stripping individuals of their liberty for life.

C. Clarity is Needed from this Court that the Heightened Penalties under 18 U.S.C. § 924(c)(3)(A) Cannot Be Premised on a Defendant's Engagement in Conduct that Merely Creates a Substantial Risk that Someone Else Will Elect to Use Force Against Another or their Property.

In *Rosemond*, the predicate offense was drug trafficking, and thus this Court reviewed the affirmative act requirement in the context of 18 U.S.C. § 924(c)(2), which unlike § 924(c)(3)(A) is not premised on the commission of a specific act. 18 U.S.C. § 924(c)(3)(A). When the issue is liability under § 924(c)(2), the defendant's "active participation in a drug sale is sufficient. . . so long as the defendant had prior knowledge of the gun's involvement." *Rosemond*, 572 U.S. at 82. Following *Borden* and *Taylor*, the question is what is sufficient "active participation" to satisfy the narrower element inquiry that defines a crime of violence under § 924(c)(3)(A)?

Just like in *Taylor*, a defendant can be convicted of aiding and abetting a predicate offense without committing a single element of the predicate offense let

alone engage in conduct that constitutes the use, threatened use or attempted use of violent physical force against a person or property of another. Rather, "[i]n proscribing aiding and abetting, Congress used language that comprehends all assistance rendered by words, acts, encouragement, support, or presence. . . — even if that aid relates to only one (or some) of a crime's phases or elements." *Rosemond*, 572 U.S. at 71 (internal quotations omitted). All that matter is that the defendant "facilitated one component" of the offense, and that "one component" need not be an element of the offense. *Id.* at 74-75. Likewise, "one may become an accomplice without actually rendering physical aid to the endeavor." Wayne R. LaFave, *Substantive Criminal Law*, 2 Subst. Crim. L. § 13.2(a) (3d ed. 2022). In other words, "federal accomplice liability requires a defendant to *do something* to aid the substantive crime," but not something specifically. *United States v. Delgado*, 972 F.3d 63, 77 n.10 (2d Cir. 2020) (cleaned up) (emphasis in original).

The problem is that proof that a defendant *did something* to advance the commission of the substantive offense is exactly what this Court held in *Taylor* was not sufficient to subject an individual to the heightened penalties under § 924(c)(3)(A). Whether or not the offense actually comes to fruition based on the actions of others seemingly should not matter when what is at stake are heightened penalties that presumably are dependent on what a defendant did, and it cannot be said that a defendant convicted of aiding and abetting an offense with an element requiring the use, attempted use or threatened use of force against another or their property has engaged in any different conduct with any different intent than the

defendant convicted of *attempting* such an offense. In both cases the defendant acts with the desire that the underlying offense occur, but it cannot be categorically established beyond a reasonable doubt that the defendant necessarily used, attempted to use, or threatened to use physical force against a person or their property.

Nevertheless, when it comes to applying the heightened penalties under § 924(c)(3)(A), the Ninth Circuit, and every other circuit to consider the issue, has dispensed with any inquiry into what elements the government necessarily established a specific defendant committed as the aider and abettor of an offense. Instead, the lower courts are holding that so long as somebody used force (or threatened to use or attempted to do so) against another during the commission of an offense that the defendant aided and abetted, the defendant "is deemed to have committed a crime of violence under § 924(c)'s elements clause." *Young v. United States*, 22 F.4th 1115, 1122-23 (9th Cir. 2022). *See, e.g.*, *United States v. Ali*, 991 F.3d 561, 574 (4th Cir. 2021); *United States v. Richardson*, 948 F.3d 733, 742 (6th Cir. 2020); *United States v. García-Ortiz*, 904 F.3d 102, 109 (1st Cir. 2018); *United States v. Deiter*, 890 F.3d 1203, 1214-16 (10th Cir. 2018); *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016); *see also United States v. McKelvey*, 773 F. App'x 74, 75 (3d Cir. 2019); *United States v. Grissom*, 760 F. App'x 448, 454 (7th Cir. 2019).

It is this very notion of "deeming" someone to have satisfied the elements of § 924(c)(3)(A) that *Borden* and *Taylor* seemingly rejected with their focus on what the government necessarily established with respect to whether the specific

defendant elected to use or threaten to use force, and, if he did so elect, whether he did so knowing within a practical certainty that his conduct would result in harm to another. *Taylor*, 142 S. Ct. at 2022; *Borden*, 141 S. Ct. at 1823, 1857 n.6.

In the decisions below the Ninth Circuit held that its decision in *Young* foreclosed Petitioners' argument that following this Court's decisions in *Borden* and *Taylor* what renders a defendant liable for the heightened penalties under § 924(c)(3)(A) is the defendant's actual election to use force in the moment aware of the harm his conduct would cause another, and thus a conviction for aiding and abetting, which by definition does not establish that the defendant made the election to use force against another knowing the harm it would cause, cannot subject a defendant to heightened penalties under § 924(c)(3)(A). Indeed, it is precisely because the government cannot establish the defendant used the requisite force against another, that the government elected to secure a conviction under a theory of aiding and abetting liability. *See Rosemond*, 572 U.S. at 68 (describing the government's election to seek and aiding and abetting instruction as its "back-up argument" when it is concerned about its ability to prove who actually committed each element of the charged offense).

As evinced by the decisions below, notwithstanding the guidance this Court provided in *Taylor* and *Borden*, absent clear direction from this Court, the circuit courts will not revisit their jurisprudence deeming individuals liable for the heightened penalties under § 924(c)(3)(A) regardless of whether their conviction for the predicate offense necessarily required the government to prove beyond a

reasonable doubt that they elected to use force against another knowing the harm their conduct would cause another, and individuals like Petitioners will continue to languish in prison for life based on the conduct of others.

D. Because a Conviction for Hobbs Act Robbery Can Be Secured on the Basis of a Defendant Placing Another in Fear of Injury to Property, Contrary to the Position Taken by the Circuit Courts, It Would Seem to Follow that a Defendant Convicted of Violating 18 U.S.C. § 1951 Has Not Necessarily Used, Attempted to Use or Threatened to Use, Violent Physical Force as Required to Qualify as a Predicate Under 18 U.S.C. § 924(c)(3)(A).

In *Taylor* this Court left open the question of whether Hobbs Act robbery necessarily satisfies the elements of § 924(c)(3)(A), *Taylor*, 142 S. Ct. at 2020, and, at the same time, eviscerated the reasoning on which the Ninth Circuit in *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020), relied upon by the court below, held that it was. Specifically, in *Taylor* this Court explained that when a federal court is interpreting a federal statute it looks to the plain language of the statute, and if the plain language reaches the conduct at issue, the statute proscribes said conduct regardless of whether the court is aware of the government exercising its authority to prosecute said conduct. *Taylor*, 142 S. Ct. at 2024 (observing the unfairness as well as the "oddity of placing a burden on the defendant to present empirical evidence about the government's own prosecutorial habits").

Under the plain language of the statute, Hobbs Act robbery can be effected through the use of "force" or "violence" or instilling a "fear of injury" to the property of another. 18 U.S.C. § 1951(b)(1). The statute does not place any limitation on the type of property a defendant can harm, moreover, Congress' decision to include "fear of injury" as a separate means of violating the statute in addition to the use of force

or violence suggests it means something different than force or violence. *See, e.g.*, *Yates v. United States*, 574 U.S. 528, 543 (2015) (observing that the "canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme") (internal quotations omitted). Indeed, "fear of injury" makes sense as a separate means of committing Hobbs Act robbery precisely because robberies can be effected by threatening harm to property.

Accordingly, under the plain language of the statute Hobbs Act robbery can be committed by placing someone in fear of harm to intangible property interests, which means it can, by definition, be effected without the use, threatened use or attempted use of violent physical force that § 924(c)(3)(A) requires. *See, e.g.*, *Stokeling v. United States*, 139 S. Ct. 544, 555 (2019). Notably, in the case below the jury was instructed that it could find Petitioners guilty of Hobbs Act robbery on the basis of someone instilling a fear of injury to property, including "money and other tangible and *intangible things of value*." *United States v. Major et al.*, No. 1:07-cr-156 (E.D. Cal.), Jury Instruction 37, Dkt. Entry 318 (filed Dec. 23, 2009) (emphasis added). The jury instruction here was anything but an outlier. At least the Third, Tenth, and Eleventh Circuits use pattern Hobbs Act jury instructions explicitly defining Hobbs Act robbery to include fear of future injury to intangible property. *See* Third Circuit Model Criminal Jury Instructions, 6.18.1951-4 and 6.18.1951-5 (Oct. 2017); Tenth Circuit Criminal Pattern Jury Instructions, 2.70 (April 2, 2021); Eleventh Circuit, Pattern Jury Instructions (Criminal Cases), O70.3 (March 10, 2022).

The Ninth Circuit nevertheless refuses to look at the plain language of § 1951(b)(1) based on its misreading of this Court's decision in *Gonzales v. Duenas-Alvarez*, 549 U. S. 183 (2007) for the proposition that the defendant bears the burden of showing the government has exercised the authority it has under the statute to prosecute individuals who steal by placing someone in fear of injury to their intangible property. *Dominguez*, 954 F.3d at 1260 (citing *Duenas-Alvarez* for the proposition that the burden is on the defendant "to point to any realistic scenario in which a robber could commit Hobbs Act robbery by placing his victim in fear of injury to an intangible economic interest"). Petitioners explained to the Ninth Circuit that based on *Taylor* it was misreading *Duenas-Alvarez*, and it should instead look to the plain language of the statute. The Ninth Circuit did not correct course. Indeed, upon remand from this Court following *Taylor*, the *Dominguez* court refused to even accept briefing on the issue, and summarily affirmed its previous decision premised on its misreading of *Duenas-Alvarez*. *United States v. Dominguez*, No. 14-10268, 2022 U.S. App. LEXIS 23598, at *1 (9th Cir. Aug. 23, 2022).

Once again, the Ninth Circuit is not alone. *See, e.g.*, *United States v. García-Ortiz*, 904 F.3d 102, 107 (1st Cir. 2018) ("García points to no actual convictions for Hobbs Act robbery matching or approximating his theorized scenario. And the Supreme Court has counseled that we need not consider a theorized scenario unless there is a 'realistic probability' that courts would apply the law to find an offense in such a scenario."); *United States v. Gooch*, 850 F.3d 285, 292 (6th Cir. 2017)

("[H]ypothetical nonviolent violation of the statute, without evidence of actual application of the statute to such conduct, is insufficient to show a 'realistic probability' that Hobbs Act robbery could encompass nonviolent conduct."); *United States v. Hill*, 890 F.3d 51, 57 n.9 (2d Cir. 2016) ("[W]e need not explicate the statute's outer limits . . . as Hill has failed to show any realistic probability that a perpetrator could effect such a robbery in the manner he posits without employing or threatening physical force").

E. This Case Provides An Excellent Vehicle for this Court to Expeditiously Address the Pressing and Significant Issue of Vicarious Liability in the Context of § 924(c)(3)(A).

The issue presented here goes to the core of the fairness, credibility and integrity of our criminal justice system, and this case presents an ideal vehicle for providing much needed clarity regarding the application of the heightened penalties under § 924(c)(3)(A) to individuals who the government cannot prove used, threatened to use, or attempted to use physical force against another or the property, but rather merely engaged in some conduct that created a risk that somebody else would use, threaten to use or attempt to use force against another or their property. Because the jury was instructed on both *Pinkerton* liability as well as aiding and abetting liability and a general verdict was returned, both forms of vicarious liability are before the Court, thereby providing this Court with a vehicle to dispose of both issues at once in a coherent manner. Given the draconian penalties under § 924(c), this issue is not going away, and it is difficult to conceive of a case in which those heightened penalties are more pronounced than this one.

The issue has percolated in nearly every circuit, and it seems the circuit courts are getting the matter wrong with devastating consequences, which here has deprived Petitioners of their liberty for life. Clarity is desperately needed from this Court. Moreover, if Petitioners' are successful, they would be entitled to a new trial where the jury is not instructed on invalid theories of liability. *Griffin v. United States*, 502 U.S. 46, 59 (1991). Additionally, there are no issues of fact, only pure questions of law. Petitioners' case does not pose any danger of mootness as they have both received life sentences many times over.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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