No. 25-2

In the
Supreme Court of the United States

DEON REESE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

For nearly 80 years, *Pinkerton v. United States*, 328 U.S. 640 (1946), has empowered the government to deprive individuals of their liberty for crimes they did not commit—or even facilitate—under a dubious theory of vicarious criminal liability. Yet *Pinkerton* has no foothold in the common law or any criminal statute that Congress enacted then or since. And it impermissibly blurs the critical distinction, embodied in the common law and the U.S. Code, between aiding-and-abetting liability and the crime of conspiracy, while eliminating key liberty-protecting features of both. Though *Pinkerton* purported to rely on conspiracy principles to craft this history-defying rule, it mistakenly assumed that the overt-act *element* of the crime of conspiracy could trigger liability as a principal for all crimes committed by a co-conspirator, rather than satisfying a single element of the lesser crime of conspiracy. That category error spawned immediate reproach, from both commentators and Justice Jackson on his return from Nuremberg—reproach that, as the amici here confirm, has never abated. In a word, the decision is an anathema, and should be rejected as such.

The government steadfastly defends this unconstitutional innovation. But it does so only by invoking the same misunderstanding of the overt-act requirement that led the *Pinkerton* majority astray. That the government's principal justification for *Pinkerton* requires doubling down on its fundamental flaw only accentuates the case's shallow reasoning. And while the government claims that overruling this atextual judicial invention would upset congressional

expectations regarding background principles of criminal law, that fear rings hollow. The government never grapples with the fact that *Pinkerton*'s imposition of substantive liability for a defendant's mere joinder in a conspiracy expressly conflicts to this day with how Congress defined secondary liability in 18 U.S.C. §2.

In reality, perpetuating *Pinkerton*'s errors plainly works the greater harm, as it permits the judiciary to amend every criminal statute to include an unenacted strain of vicarious criminal liability, even when Congress has expressly provided otherwise, and even though this Court swore off the separation-of-powers-defying practice of inventing common-law crimes more than two centuries ago. *See United States v. Hudson*, 11 U.S. (7 Cranch) 32, 32-34 (1812). The *stare decisis* factors therefore overwhelmingly favor retiring this judge-made theory. And the government does not even try to deny that this is an excellent vehicle to do so. The time is thus ripe for this Court to relegate *Pinkerton* to the ash heap of history.

I. This Court Should Overrule *Pinkerton*.

A. *Pinkerton* Is Egregiously Wrong.

Text, structure, and historical tradition all confirm that *Pinkerton* is fatally flawed. The upshot of the decision is that any defendant who joins a conspiracy faces substantive criminal liability for his co-conspirator's unlawful acts regardless of whether there is any proof that he actively and consciously participated in those crimes. Congress itself did not embrace that ahistorical rule, and the miscarriage of justice that it works demands a course correction.

From the Nation's founding, it has been a bedrock principle of criminal law that federal courts lack common-law authority to construct new crimes. *See Hudson*, 11 U.S. (7 Cranch) at 32. That power is reserved exclusively for the legislature, which is directly accountable to the electorate. *See United States v. Davis*, 588 U.S. 445, 451 (2019). Congress has wielded that authority with respect to secondary criminal liability. And in its considered judgment, a full-fledged criminal accomplice should face drastically different consequences for his criminal acts than a mere co-conspirator. *See* Pet.16-18. The former is liable as if he had committed the crime himself. *See* 18 U.S.C. §2. After all, by aiding and abetting the commission of the crime, an accomplice assumes responsibility for the principal's acts. A conspirator, by contrast, is liable only for the conspiracy itself—*viz.*, the agreement to engage in illicit conduct. *See* 18 U.S.C. §371.

Pinkerton disregarded that dividing line when it created a chimera that imposes accomplice liability on a conspirator for merely joining a conspiracy. *See* Pet.6-8. That atextual result was plainly "[h]eedless" of Congress's handiwork. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 398 (2024). And *Pinkerton*'s common-law approach to shaping criminal liability is premised on "a power [this Court] long ago abjured: the power to define new federal crimes." *Skilling v. United States*, 561 U.S. 358, 415 (2010) (Scalia, J., concurring in part and concurring in judgment). *Pinkerton* thus has nothing textually or historically, let alone constitutionally, to recommend it.

Inexplicably, the government defends *Pinkerton* as "a decision of statutory construction." BIO.8. But *Pinkerton* did not involve any real (let alone feigned) attempt to interpret the relevant criminal statutes. Indeed, the majority had no qualms about admitting that it used what it viewed as the "principle[s]" undergirding other crimes to devise its new-fangled conspiracy doctrine. *Pinkerton*, 328 U.S. at 647-48. That freewheeling approach to crafting a new strand of criminal liability is reminiscent of the now-discarded methodology that common-law courts used to construct new causes of action. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 726 (2004). The government's assertion that *Pinkerton*'s transparently atextual approach was simply a matter of statutory construction blinks reality.[1]

Indeed, had the *Pinkerton* majority endeavored to construe the relevant secondary-liability statutes (cited only in passing, *see* Pet.17-18), it could not possibly have reached the outcome it did. After all, before *Pinkerton*, *see* 328 U.S. at 649 & nn.2-3 (Rutledge, J., dissenting) (discussing the materially similar predecessors of 18 U.S.C. §§2, 371), Congress had already made clear that conspiracy is a standalone crime, 18 U.S.C. §371, as mere conspirators are not "punishable as a principal," *id.* §2. *See* Pet.16-17 & n.5. And Congress tried to disavow *Pinkerton* by reiterating that view two years later, *see* Pub. L. No. 80-772, ch. 645, §§2, 371, 62 Stat. 684, 701 (1948)—to no avail. The government cannot

[1] Even if *Pinkerton* were a statutory-construction case, moreover, its opaque interpretation of the scope of a conspiracy cannot be squared with due process. *See* Pet.22-24.

plausibly claim congressional acquiescence given that history. *Contra* BIO.8-9, 12-13.[2] *Pinkerton* is instead the brainchild of a judiciary that assumed the power of a legislator without the accountability. The Constitution does not abide such a glaring separation-of-powers violation.

Shifting gears, the government claims that *Pinkerton* applied "settled" common-law principles. *See* BIO.6-8. But it simply parrots *Pinkerton*'s mistaken analysis, claiming that because *evidence of an overt act* can be supplied by a co-conspirator, a defendant can be held *substantively liable* for a co-conspirator's offenses. BIO.6-7. That misguided leap has no common-law grounding. "Historically, vicarious criminal liability was imposed only on those who aided and abetted a crime" or "were accessories before the fact." *Developments in the Law: Criminal Conspiracy*, 72 Harv. L. Rev. 922, 993 (1959) ("*Developments*"); *accord Commonwealth v. Knapp*, 26 Mass. (9 Pick.) 496, 527-28 (Mass. 1830). Indeed, this Court recognized as much more than 50 years before *Pinkerton* when it observed that a conspiracy "offense

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[2] The statutes at play also undermine the government's claim that there is no friction between *Pinkerton* and Congress' other enactments. *Contra* BIO.8-9. That the substantive Hobbs Act offense is listed separately from the conspiracy offense, 18 U.S.C. §1951(a), underscores that Congress does not consider them one and the same. *See FCC v. Pacifica Found.*, 438 U.S. 726, 739-40 (1978). Yet *Pinkerton*'s application to Reese's case allowed them to be treated as just that. And while someone like Reese, who did not "use[]," "carr[y]," or "possess[]" a firearm, *see* Pet.11-12, cannot violate §924(c) unless he fits into one of 18 U.S.C. §2's categories, *Pinkerton* allowed the jury to convict him based on a category of criminals (conspirators) not found in §2.

does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone." *United States v. Britton*, 108 U.S. 199, 204 (1883).

The smattering of 19th century sources that the government cites do not state otherwise. *See* BIO.6-7. They instead note "that an individual is responsible for acts of fellow conspirators in furtherance of the conspiracy" only to explain "the rule that the act of any coconspirator satisfies the common statutory requirement of an overt act." *Developments*, *supra*, at 993; *see* 3 J. Chitty, *A Practical Treatise on the Criminal Law* 1143a (5th ed. 1847) (discussing only the evidence needed to satisfy the overt-act requirement); J.W. May, *The Law of Crimes* §§87-89 (1881) (similar); *Collins v. Commonwealth*, 1817 WL 1796 (Pa. 1817) (discussing the overt-act element in a conspiracy-only prosecution); *cf. United States v. Gooding*, 25 U.S. (12 Wheat.) 460 (1827) (analyzing the principal-agent relationship and mentioning conspiracy only in dicta). *Pinkerton*'s extension of liability historically reserved for aiders and abettors to conspirators accordingly improperly conflated distinct offenses to fashion an entirely new one that was unknown at common law. *Contra* BIO.10.

Perhaps realizing more is needed, the government tries to justify *Pinkerton*'s leap from the overt-act element to substantive liability by citing *civil agency* principles. BIO.6, 10. But the conspirators-as-partners view of criminal conspiracies that it invokes is not a common-law concept; this Court first gave voice to it in 1910. Daniel Harris, *How Justice Holmes Turned Conspirators Into Partners*, 16 Wm. & Mary

Bus. L. Rev. 541, 545-46 (2025) (discussing *United States v. Kissel*, 218 U.S. 601 (1910)). A civil-law theory adopted only 25 years before *Pinkerton* is hardly proof that conspirators were historically held criminally liable for each other's offenses. And the better reading of history demonstrates that the common law long rejected attempts to import civil principles into the criminal law. *See* Pet.20-21.

In the end, the government cannot defend *Pinkerton* without repeating its mistakes. That just underscores the case's shaky foundation.

B. This Court's *Stare Decisis* Factors Support Overruling *Pinkerton*.

Unsurprisingly, the government falls back on *stare decisis* to try to justify leaving *Pinkerton* in place. But *stare decisis* is "not an inexorable command," and it provides no justification for giving the government adverse possession of its citizens' liberty. BIO.8. All *stare decisis* factors thus favor overruling this indefensible judicial expansion of criminal liability; in fact, it is not a close call. *See* Pet.21-27.

Pinkerton's unwarranted departure from the common law and bedrock due-process and separation-of-powers principles demonstrates that it is not only wrong, but egregiously wrong. *See* Pet.15-24. Indeed, *Pinkerton* continues to face substantial opprobrium from all corners even today, as amici ably illustrate. *See* Pet.24-25; DPI.Br.1-4; NACDL.Br.1-5.

Moreover, whatever purchase *Pinkerton*'s extra-statutory approach to defining criminal liability may have had at the time, it has plainly been eviscerated in the several decades since. *See* Pet.22-24. The government resists that conclusion, noting that there

is no "uncertainty over the scope of co-conspirator liability." BIO.12. But *Pinkerton* is not problematic because courts are confused about its sweeping everyone-is-liable holding. It is problematic because they understand, are bound by, and still apply its liberty-destroying holding *despite* its affront to our constitutional structure. And while the government dismisses Reese's due-process cases as "unrelated," BIO.12, they throw *Pinkerton*'s "flawed nature … into stark relief." *United States v. Walton*, 2021 WL 3615426, at *4 (9th Cir. Aug. 16, 2021) (Watford, J., concurring). In case after case, this Court has scrutinized criminal statutes to ensure that they give adequate notice of what is proscribed. By empowering the government to disregard textual limitations that would otherwise prevent a conviction, *Pinkerton* flouts that bedrock due-process principle. *See* Pet.22-24.

In short, *Pinkerton* is an anachronism of a "'bygone era' characterized by a more freewheeling approach to statutory construction." *Wooden v. United States*, 595 U.S. 360, 394 (2022) (Gorsuch, J., concurring in the judgment). That this Court has steadfastly refused to employ that type of analysis over the past few decades underscores that recent developments have eroded its underpinnings. *See* Pet.25-26.[3]

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[3] The government's concern about "destabilizing effects" gets matters backwards. BIO.12. Several judges have raised concerns that cases applying *Pinkerton*'s ahistorical holding to the Confrontation Clause likely violates the Court's admonition that *common-law* principles should inform the scope of the right. *E.g.*, *United States v. Brown*, 973 F.3d 667, 700-01 (7th Cir. 2020). That *Pinkerton* and this Court's more recent jurisprudence are in

The government's efforts to prove *Pinkerton* workable fare no better. That this Court has occasionally repeated *Pinkerton*'s holding is not proof that it is workable. *Contra* BIO.10-11. The relevant metric for workability is how courts have handled applying the case to an actual set of facts—and they have consistently struggled. *See* Pet.26-27. *Nye & Nissen v. United States*, 336 U.S. 613 (1949), is illustrative. There, the lower court viewed *Pinkerton* as an alternate legal theory that could be inserted into a case after a conviction—much as *Pinkerton* itself did when it first announced its newly minted conspiracy principes. *See Nye & Nissen v. United States*, 168 F.2d 846, 854-55 (9th Cir. 1948). That this Court had to arrest *Pinkerton*'s expansion even in its earliest days because it threatened to distort other aspects of criminal law is a clear signal the doctrine was not workable from the first. *See Nye & Nissen*, 336 U.S. at 618. *Contra* BIO.10. And this Court's unanimous rejection of an effort to use *Pinkerton* to atextually expand Congress's asset-forfeiture regime in *Honeycutt v. United States*, 581 U.S. 443, 453 (2017), only emphasizes the problem with using *Pinkerton*'s atextual approach to deprive individuals of their liberty. *Contra* BIO.11. If personal property has more protection than individual liberty, then the law has not struck a workable or sensible balance.

That lower courts have felt compelled to limit *Pinkerton* via a *de minimis* exception solidifies the point. The government questions whether even that much is necessary. *See* BIO.11-12. But judges' felt

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tension even in other areas of law is a mark in favor of revisiting *Pinkerton*, not uncritically preserving it.

need to cabin *Pinkerton* is itself evidence that *Pinkerton*'s divergence from statutory constraints and common-law principles has proven untenable. *See* Pet.26-27. Indeed, the irony seems to be lost on the government when it describes the *ad hoc* assessment of a "defendant's involvement in the conspiracy" under *Pinkerton* as a "familiar judicial enterprise." BIO.11-12. As that inquiry is untethered from any statutory text, it "undermine[s] the Constitution's separation of powers" by "hand[ing] responsibility for defining crimes to relatively unaccountable … judges." *Davis*, 588 U.S. at 451. *Pinkerton* is accordingly anything but a "familiar judicial enterprise."

The government is thus left insisting that overruling *Pinkerton* would upset substantial reliance interests. But the government (rightly) does not dispute that it lacks any interest in enforcing an unconstitutional doctrine. Pet.27. It instead claims that *Congress* has come to rely on *Pinkerton* when enacting criminal statutes. *See* BIO.12-13. That effort to spin a separation-of-powers violation into a feature rather than a flaw falls flat. In *Pinkerton*, this Court arrogated to itself the power to create a new theory of criminal liability *at the expense of Congress*. Placing the onus on Congress to expressly disavow that power grab serves only to entrench it further still. In reality, it is Congress' job as the people's representative to enact laws and this Court's to apply them—not the reverse. There is no constitutionally valid justification to disregard that principle here.

Indeed, even if some in Congress are content for this Court to usurp their legislating function, that is no excuse for perpetuating a separation-of-powers

violation. This Court abandoned the *ancien regime* not because inferring crimes was unpopular with Congress, but because it was fundamentally wrong. The best path forward in handling this "judicial invention … is for [*this Court*] to leave [*Pinkerton*] behind." *Loper Bright*, 603 U.S. at 411-12.

II. This Case Is An Ideal Vehicle To Address This Exceptionally Important Question.

The government does not deny that the question presented is of exceptional importance. Nor could it. *See* Pet.28. "The doctrine of personal guilt is one of the most fundamental principles of our jurisprudence," *Bridges v. Wixon*, 326 U.S. 135, 163 (1945) (Murphy, J., concurring)—on par with the equally foundational principle that "[i]t is the legislature, not the Court, which is to define a crime, and ordain its punishment," *United States v. Wiltberger*, 18 U.S. (5 Wheat) 76, 95 (1820) (Marshall, C.J.). Yet, as petitioner explained, and the briefs from the criminal-defense bar and Due Process Institute confirm, *Pinkerton*'s distortion of conspiracy law runs roughshod over both principles and violates multiple constitutional provisions to boot. *See* NACDL.Br.3-20; DPI.Br.4-9. Whether to overturn this judge-made doctrine is enormously important to our constitutional order and plainly warrants this Court's attention.

The government also does not dispute that this is an ideal vehicle for this Court to revisit *Pinkerton*.[4]

[4] Notably, that was not the case in the other petitions that the government notes (at 4-5) this Court recently denied. *See* Br. in Opposition 20, *Gomez v. United States,* No. 23-7415 (U.S. filed July 29, 2024) (urging Court to deny petition filed by successive habeas petitioner because it did not address *stare decisis*); Br. in

There is little wonder why: This case is on direct appeal, the issue was plainly preserved, Pet.App.5.n.2, and the proceedings, evidence, and verdict make clear that the government's reliance on *Pinkerton* proved dispositive in the jury's verdict, Pet.App.25; CA3.Appx.510-11, 635-36, 1068. *See* Pet.28-30. There is thus no denying that the petition squarely presents the question for review. And there is no reason to put off review of this issue of surpassing importance any longer. The Court should grant the petition, overrule *Pinkerton*, and return once and for all to "the people[] [the] ability to oversee the creation of the laws they are expected to abide." *Davis*, 588 U.S. at 451.

Opposition 8-9, *LaForest v. United States*, No. 21-7093 (U.S. filed May 25, 2022) (urging Court to deny petition as untimely and because *Pinkerton* issue was not preserved).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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