No. 26-

IN THE

Supreme Court of the United States

DEHSHID NOURIAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000) and progeny, must the facts underlying a restitution award under the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A, be charged in a grand jury indictment, be proved to, and be found by a jury beyond a reasonable doubt?

2. Has subsequent caselaw from this Court overtaken the judicially created *Pinkerton* doctrine, undermining Mr. Nourian's convictions that the government secured by relying on this vicarious-liability theory?

3. Must sentencing courts continue to give full deference to the United States Sentencing Guidelines commentary when it would result in an enhancement, and because this issue is pending before the Court in *Beaird* v. *United States*, No. 25-5343 (argued Oct. 13, 2026), should the Court hold this petition for the decision in *Beaird*?

PARTIES TO THE PROCEEDING

There are no corporate parties involved in this case requiring disclosure under Supreme Court Rule 29.6.

Pursuant to Supreme Court Rule 14.1(b), the following is a list of all parties to the proceeding in the court below, the judgment of which is the subject of this petition:

Petitioner Dehshid ("David") Nourian was a defendant in the district court and appellant in the Court of Appeals.

Christopher Rydberg was Petitioner's co-defendant in the district court and co-appellant in the Court of Appeals.

Michael Taba was Petitioner's co-defendant in the district court.

Respondent United States of America was the plaintiff in the district court and appellant in the Court of Appeals.

RULE 14.1(B)(III) STATEMENT

This case arises from the following proceedings in the United States District Court for the Northern District of Texas and the United States Court of Appeals for the Fifth Circuit:

United States v. *Jamshid Noryian, Dehshid Nourian, Christopher Rydberg, and Michael Taba*, 3:17-CR-155-3-L (N.D. Tex.). District Judge: Hon. Sam Lindsay. Request for mistrial granted on December 19, 2022.

United States v. *Dehshid Nourian, Christopher Rydberg, and Michael Taba*, No. 3:17-CR-155-3-L (N.D. Tex.). District Judge: Hon. Sam Lindsay. Jury verdict returned on November 16, 2023. Sentencing judgment entered on February 21, 2025.

United States v. *Michael Taba*, No. 26-10199 (5th Cir.). Filed March 9, 2026. Review pending.

United States v. *Dehshid Nourian and Christopher Rydberg*, No. 25-10365 (5th Cir.). Circuit Judges: Hon. Catharina Haynes, Stephen Higginson, and James Ho. Judgment entered on June 10, 2026. Rehearing denied on July 21, 2026.

Christopher Rydberg v. *United States*, No. 26-441, United States Supreme Court. Filed September 30, 2026. Petition for a writ of certiorari pending.

No other proceedings relate directly to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Dehshid ("David") Nourian respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is available at 2026 WL 1683484 and reproduced at Pet. App. 4a–13a. The order of the Court of Appeals denying rehearing *en banc* is unreported but reproduced at Pet. App. 1a–3a.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion on June 10, 2026. Petitioner timely filed a petition for rehearing *en banc*, which the Fifth Circuit denied on July 21, 2026. On October 16, 2026, Justice Alito extended the deadline to file a petition for a writ of certiorari to November 18, 2026. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND GUIDELINE PROVISIONS INVOLVED

Amendment V

"No person shall be held to answer for a … crime, unless on a presentment or indictment of a [g]rand [j]ury … nor be deprived of life, liberty, or property, without due process of law…."

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed …."

18 U.S.C. §§ 3663A and 3664

See Pet. App. E, at 36a–46a.

U.S.S.G. § 2B1.1(b)(2)(A)(i) and Application Notes 4(E) and 1 to U.S.S.G. § 2B1.1

U.S.S.G. § 2B1.1(b)(2)(A)(i):

"If the offense – (A) (i) involved 10 or more victims …, increase [the Guideline offense level] by **2** levels[.]"

Application Note 4(E) to U.S.S.G. § 2B1.1:

"For purposes of subsection (b)(2), in a case involving means of identification 'victim' means (i) any victim as defined in Application Note 1; or (ii) any individual whose means of identification was used unlawfully or without authority."

U.S.S.G. § 2B1.1, cmt. n.4(E) (emphasis omitted).

Application Note 1 to U.S.S.G. § 2B1.1:

"'Victim' means (A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense. 'Person' includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies."

U.S.S.G. § 2B1.1, cmt. n.1.

INTRODUCTION

Petitioner Dehshid "David" Nourian's lengthy and flawed prosecution engendered three important and recurring questions of law, one of which is already before this Court this Term in *Beaird* v. *United States*, No. 25-5343 (argued Oct. 13, 2026), and concerns the degree of deference that sentencing courts should afford to commentary in the United States Sentencing Guidelines. While Mr. Nourian asks this Court to hold this petition for the Court's decision in *Beaird,* the two other questions presented deserve plenary review, notwithstanding the effect of *Beaird* on this case.

The most prominent of the questions presented is a logical follow-on from this Court's unanimous holding last Term in *Ellingburg* v. *United States*. There the Court determined that restitution under the Mandatory Victim Restitution Act is a form of criminal punishment for purposes of the Ex Post Facto Clause. Here, the question is whether the facts that underlie a similar award of restitution must be presented in an indictment and proven to a jury beyond a reasonable doubt or otherwise admitted by the defendant. This "who decides" question is starkly presented here where Mr. Nourian, a former pharmacist, is jointly and severally liable for a restitution award of more than $115 million, an astronomical and ruinous sum that bears no relation to any pecuniary losses suffered by victims. Instead, like so many other such awards every day around the country, the award rests upon perfunctory testimony of case agents and other declarations that Mr. Nourian had no opportunity to test before a jury of his peers.

Additionally, Mr. Nourian's convictions themselves rest upon a long-suspect vicarious liability mechanism created by this Court (not Congress) 80 years ago. The so-called "*Pinkerton* doctrine" makes anyone who joins

a conspiracy liable for any and all "foreseeable" criminal acts of co-conspirators, regardless of whether that person intended those acts or took any action. That the *Pinkerton* doctrine has been in long and frequent use is no excuse; it has been continually outstripped by this Court's separation of powers and due process cases, and it is a textually and constitutionally flawed anomaly that warrants this Court's attention at last.

STATEMENT OF THE CASE

1. Mr. Nourian was a licensed pharmacist. ROA.8993-8994.[1] His oldest brother, Jamshid ("James") Noryian, operated three compounding pharmacies: Ability Pharmacy, Industrial & Family Pharmacy, and Park Row Pharmacy. Mr. Nourian held ownership stakes or officer titles in each. ROA.2279–80, 3976, 3983–84, 4419, 4890, 6992, 6998–99. According to the government, the pharmacies billed the Department of Labor's Federal Employees' Compensation Act (FECA) program and Blue Cross Blue Shield of Texas (BCBS) for prescriptions induced by kickbacks to prescribers that James had recruited, including Drs. Michael Taba, Leslie Benson, and Kevin Williams, and physician assistant (PA) Nicolas Aguilar. ROA.263–76, 4202–03, 5716–17.

2. A grand jury charged Mr. Nourian with conspiracy to commit health care fraud, 18 U.S.C. § 1349. The indictment included eight substantive counts of health care fraud, each resting on a single prescription, 18 U.S.C. § 1347. The indictment also included a money laundering conspiracy and five substantive counts of concealment money laundering, 18 U.S.C. § 1956(h), (a)(1)(B)(i), and conspiracy to defraud the United

[1] The ROA is the electronic record on appeal at the Fifth Circuit.

States, 18 U.S.C. § 371. ROA.275–86. Three of the substantive fraud counts involved PA Aguilar's prescriptions billed to BCBS, and the five other counts involved Dr. Benson's and Dr. Taba's prescriptions billed to FECA. ROA.277–78.

3. The only witness who linked Mr. Nourian to the charged prescriptions was PA Aguilar, who testified that Mr. Nourian introduced him to James and gave him prescription pads. However, PA Aguilar conceded that he never saw Mr. Nourian fill out a prescription and that James, not Mr. Nourian, paid him. ROA.4537–41, 4617–29. Nothing in the record shows that Mr. Nourian had any contact with Drs. Benson, Taba, or Williams. Brief of Appellant Dehshid Nourian at 8, 26, *United States* v. *Nourian*, No. 25-10365 (5th Cir. Oct. 10, 2025) [hereinafter Pet. C.A. Br.]. On the money laundering counts, the government's financial analyst could not say that Mr. Nourian conducted any charged transaction, and he was not yet a signatory on the account when one of the concealment money laundering counts occurred. ROA.6810–11.

4. During the first trial, the district court declared a mistrial when a defense attorney's illness and holidays caused an extensive (32-day) delay in juror deliberations, which in turn raised concerns about juror memory and potential prejudice. Mr. Nourian was retried in 2023. ROA.1103–07, 8962. At the government's request, the court instructed the jury on *Pinkerton* liability for the substantive health care fraud and money laundering counts. ROA.1628, 7744. In closing, the government told the jurors that if they found a defendant guilty of Count one, they "can find the Defendant guilty of any of the counts in Counts 2 through 9 that they are charged with." ROA.7770. On the money laundering counts, the government argued

that "[E]ven if the Defendant did not specifically initiate or conduct the specific transactions in Counts 11 through 16, you can still find [Mr. Nourian and Rydberg] guilty. (...) In for a penny, in for a pound; teamwork." ROA.7800. The jury convicted Mr. Nourian on all counts. ROA.1631–34, 7979–81. He preserved in his post-trial motion the argument that *Pinkerton* was wrongly decided, and the district court denied that motion. ROA.2168 n.3, 2939–77.

5. At sentencing, district court applied a two-level enhancement for an offense involving ten or more victims. U.S.S.G. § 2B1.1(b)(2)(A)(i). In so doing, the court relied on Guidelines Application Note 4(E) to count as victims 746 patients whose means of identification had been used even though those patients suffered no pecuniary harm. Presentence Report (PSR) ¶¶ 97, 106; ROA.8985. Mr. Nourian objected, stating that Note 4(E) is inconsistent with the guideline's text and arguing that *Kisor* v. *Wilkie*, 588 U.S. 558 (2019), supplies the governing standard for a court's deference to commentary. ROA.9013–15. The district court overruled the objection and found the applicable range 292 to 365 months' imprisonment (24 years, 4 months to 30 years, 5 months). Without the enhancement, Mr. Nourian's range would have been 235 to 293 months (19 years, 7 months to 24 years, 5 months). ROA.8007, 10678; Pet. C.A. Br. 50. The district court ultimately gave him a below-Guidelines sentence of 210 months (17 years, 6 months), and stated that it would impose the same sentence even if it had miscalculated Guidelines range. ROA.8091–92.

6. The district court also ordered Mr. Nourian, jointly and severally, to pay $115,389,128.20 in restitution under the Mandatory Victims Restitution Act

(MVRA). Mr. Nourian and his co-defendants were ordered to pay $90,938,938 to the Department of Labor, $465,033.20 to BCBS, and $23,985,157 to the IRS. PSR ¶¶ 97, 167; ROA.3154, 8094–96, 9001. The government did not charge the purported victims' loss amounts in the indictment. Mr. Nourian did not admit any facts that would support the district court's findings in this regard, and no relevant facts were presented to or found by the jury. Instead, the figures came from post-trial written submissions from case agents and BCBS to the probation officer. PSR ¶ 97. Mr. Nourian objected that the award violated his Sixth Amendment right to a jury trial, but acknowledged that Fifth Circuit precedent in *United States* v. *Rosbottom*, 763 F.3d 408 (5th Cir. 2014) foreclosed his argument. ROA.9016–17. The court rejected his objection. ROA.10679.

7. On appeal, Mr. Nourian renewed his challenge to the restitution award on *Apprendi* grounds, as well as his challenge to his substantive convictions that rested on *Pinkerton*'s flawed reasoning (Pet. C.A. Br. 25–28, 34–36), and his sentence enhancement based upon the Guidelines commentary regarding the ten-or-more victims. *Id*. at 49–56, 70–72. The government defended the substantive convictions based on *Pinkerton*, arguing that even if Mr. Nourian knew nothing of the Drs. Benson and Taba fraud, "he would still be responsible for that fraud under *Pinkerton*, which does not require knowledge of the substantive acts." Appellee's Brief for the United States at 43, *United States* v. *Nourian*, No. 25-10365 (5th Cir. Jan. 23, 2026)[hereinafter Gov't C.A. Br.]. It conceded that the enhancement issue was preserved but argued that the restitution claim was "foreclosed by precedent." *Id*. at 94, 122–23.

REASONS FOR GRANTING THE PETITION

I. JUDICIAL FACTFINDING BY A PREPONDERANCE OF EVIDENCE IN SUPPORT OF RESTITUTION ORDERS IS CONTRARY TO *APPRENDI* AND ITS PROGENY

This Court's decisions in *Southern Union Co.* v. *United States*, 567 U.S. 343, 350 (2012) (*Apprendi* does not distinguish one form of punishment from another) and *Ellingburg* v. *United States*, 607 U.S. 163, 166 (2026) (restitution under the MVRA is "plainly criminal punishment" under the Ex Post Facto Clause) demonstrate that the *Apprendi* doctrine applies to restitution orders. The Fifth Circuit's decision in Mr. Nourian's case has thus "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

A. Under Apprendi, facts impacting Mandatory Victims Restitution Act awards must be submitted to a jury

The MVRA accords no role for a grand jury or petit jury in the assessment of restitution. Rather, "[a]ny dispute as to the proper amount or type of restitution shall be resolved *by the court* by the preponderance of the evidence." App. 42a; see also *id.* ("In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses *as determined by the court* and without consideration of the economic circumstances of the defendant.") (emphases added). That Congress reposed this fact-finding function in the sentencing court is understandable because Congress enacted the MVRA in 1996, and this Court did not decide *Apprendi* until 2000.

Apprendi requires that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000). In the wake of *Apprendi* the Court has extended this Sixth Amendment protection. For example, in *Alleyne*, this Court also required juries to find facts that increase mandatory minimum sentences and overruled prior caselaw as inconsistent with *Apprendi*. *Alleyne* v. *United States*, 570 U.S. 99, 107 (2013) (overruling *Harris* v. *United States*, 536 U.S. 545 (2002)). And the Court has also done so in a variety of other criminal punishment and sentencing schemes. *Ring* v. *Arizona*, 536 U.S. 584, 609 (2002) (holding a jury must find aggravating circumstances "necessary for [the] imposition of the death penalty."); *Blakely* v. *Washington*, 542 U.S. 296, 303–05 (2004) (clarifying the definition of "statutory maximum" and invalidating defendant's sentence because the sentencing-enhancing facts were not submitted to a jury); *United States* v. *Booker*, 543 U.S. 220, 244 (2005) (holding that *Apprendi* applies to the Federal Sentencing Guidelines); *Hurst* v. *Florida*, 577 U.S. 92, 103 (2016) (holding that Florida's capital sentencing scheme and procedure violates Sixth Amendment rights); *United States* v. *Haymond*, 588 U.S. 634, 646 (2019) (invalidating part of supervised-release statute that required judge to impose an enhanced sentence without submitting them to a jury); *Erlinger* v. *United States*, 602 U.S. 821, 835 (2024) (requiring a jury to find facts related to previous offenses under the Armed Career Criminal Act). Time and time again, the Court has examined punishments through the lens of *Apprendi* and found they violated a defendant's constitutional rights.

Although the above cases address *Apprendi*'s application to incarceration, *Southern Union* and *Ellingburg* address financial punishments. Specifically, in *Southern Union* the Court held that Sixth Amendment jurisprudence does not distinguish between forms of criminal punishment. *S. Union*, 567 U.S. at 350. Therefore, criminal punishments under *Apprendi* prohibit any judicial factfinding that increases statutory maximums including "criminal 'sentence[s],' 'penalties,' or 'punishment[s]'— terms that each undeniably embrace fines." *Id.* (alteration in original). Restitution was not directly addressed in *Southern Union*, but the Court was clear that criminal punishment "inflicted by the sovereign for the commission of offenses" includes consideration of the substantial nature of a fine or monetary penalty. *Id*. at 349–52.

Ellingburg picked up a related thread after *Southern Union*. There the Court examined whether restitution was punishment under the Ex Post Facto Clause and held that the "MVRA makes abundantly clear that restitution is criminal punishment." *Ellingburg*, 607 U.S. at 167. The Court noted that the MVRA labels restitution as "a penalty for a criminal offense." *Id*. at 166 (quoting 18 U.S.C. § 3663A(a)(1) (internal quotation marks omitted). The Court therefore concluded that because the MVRA is "labeled as a penalty, is codified in the criminal code, is predicated on a criminal conviction, is imposed against a criminal defendant, … is ordered at sentencing where the United States is the adverse party, and can result in resentencing when the defendant refuses to pay," the statutory text and structure demonstrate the punishment's criminal nature. *Id*. at 168. The Court's decision was unanimous.

Despite the similarities between the criminal punishment in *Southern Union* and restitution under the MVRA, courts of appeals have yet to embrace *Southern Union*'s holding in the MVRA context. Overwhelmingly,[2] the circuits point to the fact that restitution is to be ordered "in the full amount" of victim losses as found by the court under the MVRA. App. 43a. Thus, they hold that because there is no maximum amount of restitution under the MVRA, in contrast to maximum periods of imprisonment, *Apprendi* and its progeny do not apply. [3]

As a threshold matter, this entrenched "no maximum" reasoning is a non sequitur. On its face, the MVRA specifies *both* a minimum and maximum award: "In each order of restitution, the court shall order restitution to each victim in *the full amount of each victim's losses* …." App. 43a (emphasis added).

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[2] Only the Seventh Circuit continues to rest on the basis—incorrect after *Ellingburg*—that restitution is not a criminal punishment. *See United States* v. *Gustafson*, 130 F.4th 608, 619 (7th Cir. 2025).

[3] *See United States* v. *Vega-Martinez*, 949 F.3d 43, 55 (1st Cir. 2020) (restitution distinguishable from criminal fines because there is no statutory maximum); *United States* v. *Bengis,* 783 F.3d 407, 412 (2d. Cir. 2015) (restitution is not like imprisonment because it specifies no statutory maximum restitution amount); *United States* v. *Day*, 700 F.3d 713, 732 (4th Cir. 2012); *United States* v. *Caudillo*, 110 F.4th 808, 811 (5th Cir. 2024) (relying on the reasoning in *United States* v. *Rosbottom*, 763 F.3d 408, 419–20 (5th Cir. 2014)); see also *United States* v. *Churn*, 800 F.3d 768, 781–82 (6th Cir. 2015); *United States* v. *Porter*, 417 F.3d 914, 918 (8th Cir. 2005); *United States* v. *Burns*, 800 F.3d 1258, 1261 (10th Cir. 2015).

The courts of appeals' reliance upon the absence of a maximum restitution amount also misunderstands *Blakely*'s articulated "statutory maximum" definition. There, the Court clarified that the "statutory maximum" is the "maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 542 U.S. at 303. Members of this Court have observed that "the statutory maximum for restitution is usually zero, because a court can't award any restitution without finding additional facts about the victim's loss." *Hester* v. *United States*, 586 U.S. 1104, 1107 (2019) (Gorsuch, J., dissenting from denial of certiorari, joined by Sotomayor, J.); see also *Rimlawi* v. *United States*, 145 S. Ct. 518, 518–19 (2025) (Gorsuch, J., dissenting from denial of certiorari) ("I can only hope that federal and state courts will continue to consider carefully the Sixth Amendment's application to criminal restitution orders."). And at least two circuit court judges have long harbored misgivings about the integrity of restitution awards imposed without *Apprendi* guardrails. See *United States* v. *Leahy*, 438 F.3d 328, 343–44 (3d Cir. 2006) (*en banc*) (McKee, J., concurring in part and dissenting in part) ("[r]estitution in any amount greater than zero clearly increases the punishment that could otherwise be imposed."); see also *United States* v. *Carruth*, 418 F.3d 900, 905–06 (2005) (Bye, J., dissenting) ("there is no principled basis on which to distinguish punishment for Ex Post Facto Clause and Sixth Amendment purposes.").

B. The question presented should be reviewed now

The courts of appeals, even in the face of warnings from members of this Court and their own colleagues,

have not moved off their long-standing reasoning regarding the absence of a statutory maximum in the MVRA. There is no reason to assume that they will anytime soon, given that *Ellingburg*'s pronouncement that "restitution is criminal punishment," 607 U.S. at 166-69, is nearly a year old. Certainly, the Fifth Circuit has not heeded that pronouncement. Yet in the meantime, the rights of defendants to presentment, indictment, and trial by jury under a beyond-a-reasonable-doubt standard of proof are potentially violated with each new MVRA restitution order.

In 2025 alone, out of 66,662 total individual federal felony and Class A misdemeanor cases, fines and/or restitution were imposed in 12,716 cases. U.S. Sent'g Comm'n, *2025 Sourcebook of Federal Sentencing Statistics*, tbl. 16 (2026). Thus, thousands of individuals are potentially denied their Fifth and Sixth Amendment rights each year. The size of many restitution orders, along with their lingering effects and frequency of use, all counsel in favor of this Court's review.

In *Southern Union*, the Court recognized the crushing implications of criminal fines. See *S. Union*, 567 U.S. at 351. In that case, the trial court imposed a maximum fine of $38.1 million for 762 days of violations at $50,000 per day. *Id.* at 347, 352. Here, the district court unilaterally imposed restitution on Mr. Nourian at more than three times that—over $115 million. ROA.3152, 3154–55, 8094–96. Every fact upon which that restitution award depends was found by the judge, not the jury, based on figures gathered and supplied by the Probation Office after trial.

Mr. Nourian's jury was never asked to find the amount of any victim's loss. The Department of Labor's loss was submitted by a case agent. Blue Cross Blue Shield's loss was determined by "a completed declaration of victim loss" that BCBS representative submitted to the probation officer, and the IRS tax loss was confirmed by an IRS agent. PSR ¶ 97. The sentencing judge uncritically adopted the loss figures submitted by the "victims" and ordered restitution "in the full amount of each victim's loss *as determined by the Court*." ROA.5981 (emphasis added). Without observing the *Apprendi* rule, the MVRA process yielded imprecise restitution awards founded upon lower evidentiary standards. See App. 42–43a (preponderance of the evidence standard); see also *United States* v. *Rubalcava*, 160 F.4th 664, 670 (5th Cir. 2025) ("district court's restitution order is not required to be exact"); *United States* v. *Gushlak*, 728 F.3d 184, 195 (2d Cir. 2013) (holding actual loss does not require mathematical precision); *United States* v. *Gallant*, 537 F.3d 1202, 1252 (10th Cir. 2008) (citing *United States* v. *Jackson*, 155 F.3d 942, 948 (8th Cir. 1998) (noting that in cases of fraud or theft loss determination does not require precision); *United States* v. *Matos*, 611 F.3d 31, 45 (1st Cir. 2010) (affirming holdings that restitution orders do not require absolute precision and only require "a modicum of reliable evidence" (citation omitted)).

And there is more on the importance side of the scale. The MVRA allows for additional penalties even beyond the restitution amounts imposed at sentencing. An individual who misses payment under the MVRA for 90 days is deemed to have defaulted. Once delinquent the entire amount comes due immediately.

The individual is likewise exposed to a range of other consequences. See 18 U.S.C. § 3572(i); § 3612(f)(1) ("defendant shall pay interest on any fine or restitution … unless the fine is paid in full"); § 3612(g) (defendants must pay a penalty fine equal to ten percent of principal amount if delinquent or fifteen percent of any principal amount in default). What is more, an MVRA restitution order *survives Mr. Nourian's death* and a lien in favor of the United States would be placed on all property and rights to property, shackling his family to this enormous penalty as the heirs to his estate.[4]

II. *PINKERTON* V. *UNITED STATES*, 328 U.S. 640 (1946), IS NO LONGER CONSONANT WITH THIS COURT'S PRECEDENTS ON STATUTORY TEXT, SEPARATION OF POWERS, AND THE DUE PROCESS CLAUSE.

Vicarious criminal liability is an atextual and ahistorical theory that undermines the foundations of our justice system. In *Pinkerton* v. *United States*, 328 U.S. 640 (1946), five justices rewrote a criminal conspiracy statute enacted by Congress, crafting a new form of vicarious liability out of whole cloth. Justice Douglas's majority opinion permitted federal prosecutors to charge defendants with substantive offenses committed by coconspirators even if the defendants did not aid, abet, intend, or agree to the underlying criminal acts.

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[4] 18 U.S.C. § 3613 ("The liability to pay restitution shall terminate on the date that is the later of 20 years from the entry of judgment or 20 years after the release from imprisonment of the person ordered to pay restitution.").

A. *Pinkerton* has been sharply criticized by past Justices, lower courts, and legal scholars

Doctrinally, *Pinkerton* requires that the substantive offenses committed by *co-conspirators*: (1) were done in furtherance of the conspiracy; (2) fell within the scope of the unlawful project; and (3) could have been reasonably foreseen as a consequence of the unlawful agreement. *Id.* at 647–48. Practically, *Pinkerton* permits "almost unlimited" vicarious criminal liability for conspirators. *Id.* at 650 (Rutledge, J., dissenting in part, joined in large part by Frankfurter, J.). *Pinkerton* functions as a rule of *per se* substantive liability for defendants who "did no more than join the conspiracy." *Nye & Nissen* v. *United States*, 336 U.S. 613, 618 (1949).

In the many decades since the *Pinkerton* decision, most circuits have questioned the constitutionally permissible scope of the doctrine. See *United States* v. *Castañeda*, 9 F.3d 761, 766 (9th Cir. 1993) ("Several circuits, including this one, recognize that due process constrains the application of *Pinkerton* where the relationship between the defendant and the substantive offense is slight."), *superseded by statute*, 21 U.S.C. § 841.[5] Furthermore, the drafters of the Model Penal

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[5] *See also United States* v. *Collazo-Aponte*, 216 F.3d 163, 196 (1st Cir. 2000) ("We agree with appellant that due process constrains the application of *Pinkerton* where the relationship between the defendant and the substantive offense is slight." (citation omitted)), *vacated*, 532 U.S. 1036 (2001); *United States* v. *Chorman*, 910 F.2d 102, 112 (4th Cir. 1990) (The relationship between a defendant and the substantive crime cannot be "so attenuated as to

(continued . . .)

Code rejected *Pinkerton*'s theory of vicarious criminal liability. Model Penal Code § 2.06 cmt. 6(a) ("The most important point at which the Model Code formulation diverges from the language of many courts is that it does not make 'conspiracy' as such a basis for complicity in substantive offenses committed in furtherance of its aims.").[6] The most prominent Criminal Law treatise author, Wayne LaFave, has joined the chorus of opposition to *Pinkerton*. See Wayne R. Lafave, *Substantive Criminal Law* § 13.3(a) (3d ed. 2017) ("'Is one who is a member of a conspiracy of necessity a party to any crime committed in the course of the conspiracy? … Under the better view' the question '[has to] be answered in the negative.'"). See also Bruce A. Antkowiak, *The Pinkerton Problem*, 115 Penn St. L.

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run afoul of possible due process limitations on the *Pinkerton* doctrine."); *United States* v. *Moreno*, 588 F.2d 490, 493 (5th Cir. 1979) ("Several of our judges have noted their concern that vicarious guilt may have due process limitations."); *United States* v. *Christian*, 942 F.2d 363, 367 (6th Cir. 1991) ("The foreseeability concept underlying *Pinkerton* is also the main concern underlying a possible due process violation."), *abrogated by Bailey* v. *United States*, 516 U.S. 137 (1995); *United States* v. *Walls*, 225 F.3d 858, 865 (7th Cir. 2000) (Conviction reversed based on "an unwarranted, and possibly unconstitutional, expansion of the Pinkerton doctrine.") *United States* v. *Cherry*, 217 F.3d 811, 818 (10th Cir. 2000) (Holding co-conspirators in a drug conspiracy liable for first-degree murder "appears incompatible with the due process limitations inherent in *Pinkerton*."); *United States* v. *Alvarez*, 755 F.2d 830, 850 (11th Cir. 1985) ("[W]e are mindful of the potential due process limitations on the *Pinkerton* doctrine in cases involving attenuated relationships between the conspirator and the substantive crime.").

[6] *See also Model Penal Code and Commentaries*: Pt. I § 2.06, at 298 (Am. Law Inst. 1985) ("law would lose all sense of just proportion if simply because of the conspiracy itself each were held accountable for thousands of additional offenses of which he was completely unaware and which he did not influence at all").

Rev. 607, 619–20 (2011) ("As a judicially created theory of liability, Pinkerton represents a frontal assault on both principles of separation of powers and the essential equation of criminal due process.").

Justice Jackson did not participate in the *Pinkerton* decision because he was serving as the Chief United States Prosecutor at the International Military Tribunal in Nuremberg, Germany at the time. But it was not long after his return that he reminded the Court, with reference to *Pinkerton*, that it is "well and wisely settled that there can be no judge-made offenses against the United States and that every federal prosecution must be sustained by statutory authority." *Krulewitch* v. *United States*, 336 U.S. 440, 456–57 (1949) (Jackson, J., concurring). Yet that is precisely what the *Pinkerton* doctrine does, transforming the meaning of the federal criminal statutes and permitting judges and prosecutors to usurp power from Congress. See also, *e.g.*, Alex Kreit, *Vicarious Criminal Liability and the Constitutional Dimensions of Pinkerton*, 57 Am. U. L. Rev. 585, 595 (2006) ("Thus, the *Pinkerton* majority appears to have created an entirely new basis for criminal liability out of statutory thin air, arguably in violation of the prohibition against creation of federal common law crimes.").

Stare decisis should not save *Pinkerton*. "*Stare decisis* is not an inexorable command," *Payne* v. *Tennessee,* 501 U.S. 808, 828 (1991), and "when governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent." *Id.,* at 827 (cleaned up). Even in matters of statutory interpretation, "[the Court] ha[s] never applied *stare decisis* mechanically to prohibit overruling [its] earlier decisions determining the meaning of statutes." *Monell* v. *N.Y.C. Dep't of Soc. Servs.,* 436 U.S. 658, 695 (1978). As this Court has recognized, *stare decisis* should not

control "an interpretation of [a statute] that was based on a flawed method of statutory construction from its inception." *Holder* v. *Hall*, 512 U.S. 874, 945 (1994) (Thomas, J., joined by Scalia, J., concurring in the judgment).

All conditions are met here. *Pinkerton* was "badly reasoned" and "was based on a flawed method of statutory construction from its inception." *Payne*, 501 U.S. at 809; *Holder*, 512 U.S. at 945 (Thomas, J., concurring). Its octogenarian status does not change the result. The government cannot plausibly assert a reliance interest in pressing unconstitutional theories of liability, no matter how long ago that mistaken theory was announced. "Wisdom too often never comes, and so one ought not to reject it merely because it comes too late." *Henslee* v. *Union Planters Nat'l Bank & Tr. Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting) (conceding that he should have decided a previous case differently). Accordingly, the Court can, and should, grant review and reconsider *Pinkerton.*

B. This case is an excellent vehicle to reconsider *Pinkerton*

Mr. Nourian's case exemplifies the Separation of Powers and Due Process Clause concerns. At the government's request, the district court instructed the jury on *Pinkerton* liability. ROA.1628, 7744. In closing argument, the government urged the jury to use that instruction as a shortcut. As noted above, the prosecutor told the jury that "if you find a defendant guilty of Count 1 here … you can find the Defendant guilty of any of the counts in Counts 2 through 9 that they are charged with." ROA.7770. "The law," the prosecutor said, "is that the Defendants are guilty of all foreseeable actions that furthered the conspiracy." ROA.7771. The prosecutor made the same pitch on the money laundering counts: "You can still find them guilty. In

for a penny, in for a pound; teamwork," because the charged transactions "were obviously foreseeable consequences of that conspiracy." ROA.7800–01.

The government's reliance on *Pinkerton* was no accident. On several of the substantive counts, the record contains no evidence that Mr. Nourian committed the offense himself, and little or none that he aided it. Counts Five through Nine charged claims based on prescriptions written by Dr. Benson and Dr. Taba. ROA.277–78; Pet. C.A. Br. 10–11, 21 & n.7. Mr. Nourian had no role in billing those claims to the Department of Labor or anyone else, and the record does not show he had any contact with those two doctors. *Id.* at 8, 26.

The money laundering counts are similar. The evidence showed at most that Mr. Nourian was a signatory on some of the accounts from which the charged transfers were made. For two of those counts (Counts Twelve and Sixteen), the record does not show even that. *Id.* at 35.

What remains is *Pinkerton*. Here, the government's dependence on the *Pinkerton* doctrine lays bare its defining feature—punishing a defendant for crimes he neither committed nor aided and abetted. This case presents the *Pinkerton* question more starkly than others because many conspiracy cases involve alternative theories. But here, *Pinkerton* was the government's principal strategy and main route of conviction for a large number of the substantive counts. Mr. Nourian preserved his challenge to *Pinkerton* itself,[7]

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[7] Although Mr. Nourian did not object to the giving of a *Pinkerton* instruction at the charge conference, he did, in his motion for

(continued . . .)

so there is no alternative ground or harmless-error obstacle standing between the Court and the question presented. ROA.2168 n.3; Pet. C.A. Br. 26 & n.11.

III. MR. NOURIAN'S CASE ALSO PRESENTS THE SAME QUESTION THIS COURT IS CONSIDERING ON THE MERITS IN *BEAIRD* V. *UNITED STATES,* AND THE COURT SHOULD HOLD THIS PETITION PENDING A DECISION IN *BEAIRD*.

In *Beaird*, this Court granted review to resolve a circuit split on the amount and type of deference that sentencing courts should give to Sentencing Guideline commentary that conflicts with the text of the accompanying Guideline. See *Beaird* v. *United States*, No. 25-5342 (U.S.) (cert. granted Apr. 20, 2026, argued Oct. 13, 2026). This Court is poised to resolve the question, and Mr. Nourian's sentence implicates the question as well.

Guidelines Section 2B1.1(b)(2)(A)(i) adds two levels if the offense involved 10 or more "victims." U.S.S.G. § 2B1.1(b)(2)(A)(i) (2023); ROA.8985.

Mr. Nourian's presentence report acknowledged that the governmental entities were not "victims." PSR ¶ 97. It reached the threshold only by relying on the Guideline's Application Note 4(E), which defines "victim" as including "any individual whose means of identification was used unlawfully or without authority." *Id.* The people whose identifying information was used

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judgment of acquittal, raise a challenge to the use of *Pinkerton* to sustain his convictions. As this Court has explained, the sufficiency of the evidence is evaluated under a *correct* description of the offense and its elements, and it does not include any elements upon which the jury was erroneously instructed, notwithstanding the lack of any objection to such instruction. *See Musacchio* v. *United States*, 577 U.S. 237, 243–44 (2016).

suffered no loss of their own; they often were pharmacy employees who had prescriptions signed in their names without a doctor evaluation. *Id.*

Mr. Nourian objected, arguing that Note 4(E) conflicts with the Guideline text and thus should not be followed as authoritative. The district court overruled the objection as foreclosed by Fifth Circuit precedent. See *United States* v. *Barson*, 845 F.3d 159 (5th Cir. 2016).

On appeal, Mr. Nourian again argued that Note 4(E) impermissibly conflicted with the Guideline text, even under the standard set forth in *Stinson* v. *United States*, 508 U.S. 36 (1993), and further suggested that *Stinson* no longer sets forth the correct standard to evaluate the question. Pet. C.A. Br. at 50–53; (arguing the *Stinson* question is "*res nova*, and not foreclosed"); Pet. C.A. Br. 51 (preserving the "contention that challenges of this sort should be governed by *Kisor*, not *Stinson*," while acknowledging "that that point is foreclosed"); D. Ct. Dkt. 829, at 10.

The Fifth Circuit affirmed, following prior precedent interpreting *Stinson*. *United States* v. *Nourian*, No. 25-10365, 2026 WL 1683484 (5th Cir. June 10, 2026). The enhancement made a significant difference; Mr. Nourian's Guideline range was 292–365 months but without the enhancement, it would have been 235–293 months.

If the Court, in *Beaird*, establishes that *Stinson* no longer sets forth the applicable standard for evaluating a putative conflict between Guideline text and commentary, this Court should follow its usual practice and grant this petition, vacate the Fifth Circuit's

judgment, and remand to the court of appeals for it to apply *Beaird* in the first instance.[8]

IV. THIS COURT'S REVIEW IS WARRANTED

Mr. Nourian preserved each issue at every stage. He objected in the district court that the failure to submit the restitution issue to the jury violated the Sixth Amendment and renewed that claim in the court of appeals. ROA.9016–17; Pet. C.A. Br. 70–72; Pet. C.A. Reply Br. 37. He preserved his contention that *Pinkerton* was wrongly decided in his post-trial motion and again on appeal. ROA.2168 n.3; Pet. C.A. Br. 26 & n.11. Finally, he objected to the more-than-ten-victims enhancement commentary under *Stinson* in the district court and pressed that objection on appeal; the government conceded that he had preserved it. ROA.9013–15; Pet. C.A. Br. 49–56; Gov't C.A. Br. 94. As the following sections explain, each question is also outcome-determinative.

With respect to the MVRA question, every component of the $115,389,128.20 award rests entirely on judicial factfinding. There is no jury finding that could arguably supply the facts on which the award depends, which makes this a clean *Apprendi* vehicle. And the stakes are also unusually high here. Because restitution under the MVRA is mandatory, the court was required to impose a $115,389,128.20 award "without consideration of the economic circumstances of the defendant." App 28a.

The fraud and money laundering counts that lead to Mr. Nourian's long sentence of over 17 years (he was

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[8] There are innumerable examples of this practice. *Cf., e.g., Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view ….")

62 when sentenced), rested upon the "super-crime" interpretation of the conspiracy provided by *Pinkerton*. *Pinkerton* obligated the jury to find guilt so long as the government could exceed the matchbox-height bar of showing that bad acts were reasonably foreseeable, even if it could not show that Mr. Nourian even intended them or had actual, personal knowledge of them.

CONCLUSION

For the foregoing reasons, petitioner David Nourian respectfully requests that the Court grant his petition.

Respectfully submitted,

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