No. 12-895

In the Supreme Court of the United States

JUSTUS C. ROSEMOND, PETITIONER,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the offense of aiding and abetting the use of a firearm during and in relation to a crime of violence or drug trafficking crime, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2, requires proof of (i) intentional facilitation or encouragement of the use of the firearm, as held by the First, Second, Third, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits, or (ii) simple knowledge that the principal used a firearm during a crime of violence or drug trafficking crime in which the defendant also participated, as held by the Sixth, Tenth, and District of Columbia Circuits.

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Bailey v. *United States*, 516 U.S. 137 (1995) ... 18, 50

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Beecham v. *United States*, 511 U.S. 368 (1994) 19-20

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Chevron U.S.A. Inc. v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 18

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Good Samaritan Hosp. v. *Shalala*, 508 U.S. 402 (1993) 18

Hammer v. *United States*, 271 U.S. 620 (1926) 24

Hedgpeth v. *Pulido*, 555 U.S. 57 (2008) (per curiam) 11

Hicks v. *United States*, 150 U.S. 442 (1893) 2, 13

McNally v. *United States*, 483 U.S. 350 (1987) 49

Cases—Continued: **Page(s)**

McNeill v. *United States*, 131 S. Ct. 2218 (2011) 18

Microsoft Corp. v. *i4i Ltd. P'ship*, 131 S. Ct. 2238 (2011) 24

Miller v. *Alabama*, 132 S. Ct. 2455 (2012) 42

Muscarello v. *United States*, 524 U.S. 125 (1998) 48

Neder v. *United States*, 527 U.S. 1 (1999) ..... *passim*

Nye & Nissen v. *United States*, 336 U.S. 613 (1949) 27, 28, 41

Parker's Case, 2 Dyer 186 a. (K.B. 1559) 21, 25

S.D. Warren Co. v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006) 19

Safeco Ins. Co. of Am. v. *Burr*, 551 U.S. 47 (2007) 24

Scheidler v. *Nat'l Org. for Women, Inc.*, 537 U.S. 383 (2003) 50

Sekhar v. *United States*, 133 S. Ct. 2720 (2013) 24, 50

Simpson v. *United States*, 435 U.S. 6 (1978) 32

Skilling v. *United States*, 130 S. Ct. 2896 (2010) 15

Standefer v. *United States*, 447 U.S. 10 (1980) 17

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Sullivan v. *Louisiana*, 508 U.S. 275 (1993) 51

Cases—Continued: **Page(s)**

United States v. *Amen*, 831 F.2d 373 (2d Cir. 1987)....38

United States v. *Anderson*, 189 F.3d 1201 (10th Cir. 1999)....29

United States v. *Andrews*, 75 F.3d 552 (9th Cir. 1996) 31

United States v. *Arrington*, 719 F.2d 701 (4th Cir. 1983)....29

United States v. *Bancalari*, 110 F.3d 1425 (9th Cir. 1997)....33

United States v. *Bowen*, 527 F.3d 1065 (10th Cir. 2008) 3, 12

United States v. *Capers*, 708 F.3d 1286 (11th Cir.), petition for cert. filed, No. 12-10635 (June 3, 2013) 3, 12, 35

United States v. *Castillo*, 530 U.S. 120 (2000) 3, 13

United States v. *Daniels*, 370 F.3d 689 (7th Cir. 2004) (per curiam)....33

United States v. *Emerson*, 501 F.3d 804 (7th Cir. 2007) 47

United States v. *Garth*, 188 F.3d 99 (3d Cir. 1999)....33

United States v. *Gaskins*, 690 F.3d 569 (D.C. Cir. 2012) 40

United States v. *Granderson*, 511 U.S. 39 (1994) 15, 49, 50

Cases—Continued: **Page(s)**

United States v. *Grey Bear*, 828 F.2d 1286 (8th Cir. 1987).....40

United States v. *Hill*, 55 F.3d 1197 (6th Cir. 1995).....14

United States v. *Huet*, 665 F.3d 588 (3d Cir. 2012).....29

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United States v. *Morrow*, 977 F.2d 222 (6th Cir. 1992) 41

United States v. *Nelson*, 137 F.3d 1094 (9th Cir. 1998) 29, 33, 34

United States v. *Ortega*, 44 F.3d 505 (7th Cir. 1995) 28

Cases—Continued: **Page(s)**

United States v. *Otero-Mendez*, 273 F.3d 46 (1st Cir. 2001) 31

United States v. *Peñaloza-Duarte*, 473 F.3d 575 (5th Cir. 2006) 38

United States v. *Peoni*, 100 F.2d 401 (2d Cir. 1938) ..... *passim*

United States v. *Pino-Perez*, 870 F.2d 1230 (7th Cir. 1989) (en banc) 37, 42

United States v. *Rodriguez*, 392 F.3d 539 (2d Cir. 2004) 31

United States v. *Rodriguez-Moreno*, 526 U.S. 275 (1999) 3, 32, 45

United States v. *Santana*, 524 F.3d 851 (8th Cir. 2008) 29

United States v. *Santos*, 553 U.S. 507 (2008) 50

United States v. *Searan*, 259 F.3d 434 (6th Cir. 2001) 29

United States v. *Short*, 493 F.2d 1170 (9th Cir. 1974) 33

United States v. *Sorrells*, 145 F.3d 744 (5th Cir. 1998) 17

United States v. *Stanchich*, 550 F.2d 1294 (2d Cir. 1977) 40

United States v. *Weaver*, 290 F.3d 1166 (9th Cir. 2002) 39

United States v. *Williams*, 504 U.S. 36 (1992) 55

Cases—Continued: **Page(s)**

United States v. *Willis*, 38 F.3d 170 (5th Cir. 1994).....31

United States v. *Wilson*, 135 F.3d 291 (4th Cir. 1998) 39, 40

United States v. *Wilson*, 160 F.3d 732 (D.C. Cir. 1998) 29

United States v. *Wiseman*, 172 F.3d 1196 (10th Cir. 1999).....35

U.S. Postal Serv. v. *Flamingo Indus. (USA) Ltd.*, 540 U.S. 736 (2004).....25

Utah v. *Evans*, 536 U.S. 452 (2002) 20

John Walker and Mary Rothwell, Proceedings of the Old Bailey 344 (Feb. 26, 1783).....22, 25

Yates v. *United States*, 354 U.S. 298 (1957) 51

Statutes:

18 U.S.C. § 2.....*passim*

18 U.S.C. § 2(a) .....*passim*

18 U.S.C. § 550 (1934) 17

18 U.S.C. § 922(g)(1) 7

18 U.S.C. § 922(g)(5)(A) 7

18 U.S.C. § 924(c).....*passim*

18 U.S.C. § 924(c)(1) 44, 45, 50

18 U.S.C. § 924(c)(1)(A) .....*passim*

18 U.S.C. § 924(c)(1)(A)(iii).....11

Statutes—Continued: **Page(s)**

18 U.S.C. § 924(c)(1)(D)(ii)....11
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21 U.S.C. § 841(a)(1)....6
21 U.S.C. § 848....37
28 U.S.C. § 1254(1)....1
Act of June 25, 1948, ch. 645, § 2(b), 62 Stat. 684....26
Act of Mar. 4, 1909, § 332, 35 Stat. 1152....17
Act of Oct. 31, 1951, ch. 655, § 17b, 65 Stat. 710, 717....26
Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469 (1998)....50

Other Authorities:

Black's Law Dictionary (1st ed. 1891)....19
Black's Law Dictionary (9th ed. 2009)....18
1 John Bouvier, *Law Dictionary* (1st ed., Philadelphia, T. & J. W. Johnson 1839)....21, 24
John Bouvier, *Law Dictionary* (Francis Rawle ed., new ed., Boston, Boston Book Co., 1897)....19
William Caxton, *Cato* (Westmystre 1483)....21

Other Authorities—Continued: **Page(s)**

Comm. on Fed. Crim. Jury Instructions for the Seventh Circuit, *Pattern Crim. Jury Instructions for the Seventh Circuit* (2012) 30

Comm. on Model Crim. Jury Instructions for the Third Circuit, *Crim. Jury Instructions* (2013) 30

Comm. on Pattern Jury Instructions Dist. Judges Ass'n, Fifth Circuit, *Pattern Jury Instructions (Crim. Cases)* (2012) 30

John Cowell, *The Interpreter, or Booke Containing the Signification of Words* (Cambridge, John Legate 1607) 21

42 Cong. Rec. 1374 (1908) 26

Crim. Pattern Jury Instructions Comm. of the U.S. Court of Appeals for the Tenth Circuit, *Crim. Pattern Jury Instructions* (2011) 31

2 Edward Hyde East, *A Treatise of the Pleas of the Crown* (Philadelphia, P. Byrne 1806) 22

3 Abraham Fleming, *Holinshed's Chronicles* (London 1587) 22

H.R. Rep. No. 60-2 (1909) 25

1 Matthew Hale, *The History of the Pleas of the Crown* (Sollom Emlyn ed., London 1736) 13, 17

Other Authorities—Continued: **Page(s)**

Judicial Comm. on Model Jury Instructions for the Eighth Circuit, *Manual of Model Crim. Jury Instructions for the District Courts of the Eighth Circuit* (2013).....30

2 Wayne R. LaFave, *Substantive Criminal Law* (2d ed. 2003) .....*passim*

Model Penal Code § 2.06 (West 2013).....29

Ninth Circuit Jury Instructions Comm., *Manual of Model Crim. Jury Instructions* (2010) 30

Oxford English Dictionary (2d ed. 1989) 21

Pattern Criminal Jury Instructions Drafting Comm., *Pattern Crim. Jury Instructions for the District Courts of the First Circuit* (D. Me. 2013) 30

S. Rep. No. 82-1020 (1951) 26

S. Rep. No. 98-225 (1984) 3

Walter A. Shumaker & George Foster Longsdorf, *The Cyclopedic Dictionary of Law* (1901 ed.) 2, 19, 46

Sixth Circuit Comm. on Pattern Crim. Jury Instructions, *Pattern Criminal Jury Instructions* (2013).....30

Henry J. Stephen, *Summary of the Criminal Law* (Philadelphia, J.S. Littell; New York, Halstead & Voorhies 1840) 22

1 Charles E. Torcia, *Wharton's Crim. Law* (15th ed. 1993).....19

Other Authorities—Continued: **Page(s)**

U.S. Dep't of Justice, U.S. Attorneys' Manual, tit. 9, *Criminal Resource Manual* (Oct. 1998).....3, 31, 38, 40

Timothy Walker, *Introduction to American Law* (Philadelphia, P. H. Nicklin & T. Johnson 1837).....22

Webster's Third New International Dictionary (2002).....18

Webster's Universal Dictionary (Thomas H. Russell, et. al., eds. 1905) 19

1 Francis Wharton, *A Treatise on Criminal Law* (10th ed., Philadelphia, Kay & Brother 1896).....2, 22

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the court of appeals, Pet. App. 1a-11a, is reported at 695 F.3d 1151.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2012. On December 4, 2012, Justice Sotomayor extended the time for filing a petition for a writ of certiorari to and including January 16, 2013, and the petition was filed on that date. The petition for a writ of certiorari was granted on May 28, 2013. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2(a) of title 18 of the United States Code provides:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

Section 924(c)(1)(A) of that title provides, in pertinent part:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition

to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

STATEMENT

For centuries, it has been settled law that to prove a person aided and abetted the commission of a crime requires proof of two facts: that the accomplice (1) "d[id] some act to render aid to the actual perpetrator thereof" or "encourage or set another on to commit a crime," Walter A. Shumaker & George Foster Longsdorf, *The Cyclopedic Dictionary of Law* 5, 41-42 (1901 ed.), and (2) did so with the "design to encourage, incite, or in some manner afford aid or consent to the particular act." 1 Francis Wharton, *A Treatise on Criminal Law* § 211, at 229 (10th ed., Philadelphia, Kay & Brother 1896). In the decade before Congress enacted the federal aiding and abetting statute, this Court reversed a criminal conviction because the "defective" jury instruction did not require proof of both of these "condition[s]" for accomplice liability. *Hicks* v. *United States*, 150 U.S. 442, 448-449 (1893). Today, these two prerequisites are so well established that even the government recognizes that accomplice liability requires proof a defendant "acted in some affirmative manner

designed to aid" a crime with the "specific intent to facilitate the commission of a crime by another." U.S. Dep't of Justice, U.S. Attorneys' Manual, tit. 9, *Criminal Resource Manual* § 2474 (Oct. 1998); *id.* § 2475.

This case involves application of these two bedrock requirements to the crime of using or carrying a firearm during and in relation to a crime of violence or drug trafficking crime, 18 U.S.C. § 924(c), which imposes mandatory "severe penalties" (*Busic* v. *United States*, 446 U.S. 398, 404 n.9 (1980)) of between five years' and life imprisonment upon proof that a defendant both (1) "committed all the acts necessary to be subject to punishment for" a violent or drug-trafficking crime, and (2) "used a firearm" "during and in relation to" that offense. *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999). Although Section 924(c) references, and requires proof of, another crime, it "sets out an offense distinct from the underlying felony and is not simply a penalty provision," *United States* v. *Castillo*, 530 U.S. 120, 125 (2000) (quoting S. Rep. 98-225, pp. 312-314 (1984)), and imposes a sentence that runs consecutive to that predicate offense.

The "vast majority" of courts of appeals have held that a defendant cannot be liable for aiding and abetting a Section 924(c) violation unless he has "'intentionally take[n] some action to facilitate or encourage the use of the firearm.'" Pet. App. 9a-10a (quoting *United States* v. *Bowen*, 527 F.3d 1065, 1079 (10th Cir. 2008)). The court of appeals below is one of a handful that do not require proof of intentional facilitation or encouragement. Instead, it requires

only that the defendant "knowingly and actively participated" in the predicate crime and "knew his cohort used a firearm"—even if the defendant learned of the gun's presence only as it was being used. Pet. App. 7a.

The judgment below must be reversed. The government must prove the defendant intentionally facilitated the use of the firearm during and in relation to the predicate drug offense; "[t]his specific crime—not the [drug offense]—is the crime that [the defendant] was charged with aiding and abetting, and it is this specific crime that [the defendant] must have consciously and affirmatively assisted." *United States* v. *Medina*, 32 F.3d 40, 45 (2d Cir. 1994). The Tenth Circuit's rule permits additional penalties—massive, consecutive, *mandatory* penalties—to be imposed on a defendant without any finding of culpable conduct or intent beyond the predicate crime that is separately punished. Thus, petitioner Justus Rosemond received a four-year prison sentence for his involvement in a drug-trafficking crime and, without *any* finding of additional acts of intentional facilitation, a mandatory ten-year consecutive sentence under Section 924(c). The Tenth Circuit's rule is tantamount to strict liability, which is fundamentally inconsistent with "general principles applicable to accomplice liability." 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.2(f) (2d ed. 2003). "Congress used no language spelling out a purpose so improbable" as imposing the extraordinary sanctions of Section 924(c) based on such attenuated involvement; it is "just too unlikely"

that Congress intended such a result. *Abuelhawa* v. *United States*, 556 U.S. 816, 824 (2009).

1. The government presented evidence at trial that cooperating witness Vashti Perez arranged the sale of one pound of marijuana in Tooele, Utah on August 26, 2007. Pet. App. 2a. According to Perez, she went to a local park with her boyfriend's nephew, Ronald Joseph, whom she had known for months, and with petitioner Justus Rosemond, an acquaintance of her boyfriend who had arrived in Tooele hours earlier; Perez met Rosemond only that evening and would not see him again. J.A. 100, 115-116.

Around 9 p.m., Perez drove Joseph and Rosemond to the meeting place in her four-door 1996 Mazda Protegé subcompact and parked in a well-lit lot. J.A. 102-103. One man sat in the front passenger seat and one in the rear driver's-side seat; an empty child's car seat occupied the rear passenger's-side seat. J.A. 92, 62-63. The two buyers, Ricardo Gonzales and Coby Painter (acquaintances of Perez, J.A. 79), arrived soon afterward. J.A. 38.

Gonzales approached Perez's car and got in the back seat from the driver's side; Painter stood a distance away. J.A. 91-92. The rear-seat passenger handed Gonzales the marijuana to inspect. J.A. 93. Throughout the transaction, both buyers observed that the front-seat passenger "did not turn around and he did not say a word to either of" the buyers. J.A. 87, 92. Gonzales then left the car briefly to confer with Painter, before returning to the rear seat. J.A. 93. Gonzales decided to steal the marijuana because he "didn't know" the men in the car and thought the theft "wouldn't come back to [him]." J.A.

93-94. Gonzales punched the rear-seat passenger in the face, and he and Painter fled on foot with the marijuana. As they did, they heard shots fired in their direction. J.A. 95-96. Perez then drove off "pretty fast" in pursuit of the buyers with Joseph and petitioner in her car. J.A. 109 ("I was trying to catch up to the other guys that took the stuff."). Perez told police that, as the shooter tried to hide the pistol, "one of the men in the car with [her], either Justus [Rosemond] or Ronald Joseph, said 'I don't want to touch the gun.'" J.A. 111, 134.

About one mile away, two police officers stopped Perez's car, "assist[ed]" by county officers who happened to be nearby. J.A. 70. Rosemond, wearing an (unnumbered) Los Angeles Dodgers jersey, was seated in the front passenger's seat. J.A. 69-70. Ronald Joseph, wearing an Indianapolis Colts Peyton Manning jersey, was seated in the rear seat behind the driver. J.A. 62, 76. Police observed Rosemond fidgeting, both while seated in the stopped car and while an officer frisked him as he leaned against the trunk. J.A. 69-70. The officers asked for permission to search the car, and Perez consented. J.A. 62-63. After a "thorough search," J.A. 53, checking and "rechecking what was in the vehicle," J.A. 74, and frisking all three occupants, J.A. 61, the officers found no weapons or drugs, J.A. 63. Of the three, only Rosemond was carrying identification documents. J.A. 59-60, 129.

2. Based on statements Perez made to police, J.A. 22-23, Rosemond was charged with: (1) possession of marijuana with intent to distribute it, in violation of 21 U.S.C. § 841(a)(1); (2) discharging a firearm, or

aiding and abetting the discharge of a firearm, during and in relation to a federal drug trafficking crime, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2; (3) two counts of unlawful ammunition possession, relating to shell casings found at the scene, in violation of 18 U.S.C. § 922(g)(1) and (g)(5)(A). J.A. 11-13. Rosemond pleaded not guilty on all counts. Pet. App. 12a.

a. At trial, Perez, Joseph, and the buyers testified under cooperation agreements with the government; several bystanders also testified. There was considerable variation among the eyewitnesses' accounts. The government introduced testimony that two eyewitnesses who "got a good view of the parking lot" (J.A. 146) told police that a lone man had gotten out of the driver's side of Perez's car, fired the shots, and gotten back into the vehicle. J.A. 39, 41-42, 48. With one notable exception, *none* of the witnesses testified that they had seen whether Joseph or Rosemond had fired the shots. Only Joseph—the main alternative suspect, who previously had been convicted of both "providing false information" and burglary in Texas, J.A. 130—testified that Rosemond had fired the gun. J.A. 84, 96, 124, 54 (Officer James May testifying, "we're not sure who the shooter was"). Only Joseph testified that Rosemond, as the shooter, had tried to hide the gun in the car after the shooting. J.A. 127-128. Although Perez had earlier told police she "possibly thought" Rosemond, rather than her boyfriend's nephew, had fired the gun and later tried to hide and dispose of it, J.A. 106, 112, she admitted at trial that she did not see who had fired because her back was turned, Pet. App. 3a; J.A. 107,

and indicated that she did not see who had hidden the gun, J.A. 111-112.

The witnesses disagreed about which man sat in the back seat of Perez's car. Ricardo Gonzales testified that "[t]he guy that was next to me was in an Indianapolis Colts jersey," and he distinctly recalled seeing Peyton Manning's "Number 18" "on the left side of his arm." J.A. 92-93, 97-98. Joseph, who had initially told police he had sat in the *front* passenger's seat, Rosemond Presentence Report 4, acknowledged at trial that he was seated in the "same place in the back seat" behind the driver both before and after the shooting.[1] J.A. 126. Although Perez testified that she thought Rosemond was in the back seat, she conceded she "wasn't looking in the back" and "trying not to listen" to the transaction. J.A. 104. Painter, who was a distance away, described the rear-seat passenger as "bald and wearing glasses" J.A. 83, and Rosemond apparently wore glasses; but *neither* man was bald. See Gov't Ex. 18.

b. The government tried the Section 924(c) count on two alternative theories. First, the government argued that Rosemond was the principal—*i.e.*, the shooter who discharged the firearm. Alternatively, it argued that Rosemond had aided and abetted Joseph's (or Perez's) discharge of the firearm. J.A. 157-158.

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[1] Joseph stated for the first time at trial that he thought that petitioner sat in the back seat with him and Gonzales, J.A. 122—but the prosecution dismissed as "high[ly] unlikely that three grown men were all sitting in that back seat," J.A. 149, given the car's small size and the presence of a child's car seat.

The government and Rosemond each submitted proposed jury instructions on the aiding and abetting theory. Rosemond proposed the following instruction:

> The defendant may be liable for aiding and abetting the use of a firearm during a drug trafficking crime, if (1) the defendant knew that another person used a firearm in the underlying drug trafficking crime, and (2) the defendant *intentionally took some action to facilitate or encourage the use of the firearm*.

J.A. 14 (emphasis added). By contrast, the government proposed an instruction that did not require a showing that the defendant intended to facilitate or encourage the use of the firearm. J.A. 16.

The court accepted the government's proposed instruction without material alteration, but acknowledged that "[i]f I'm wrong, [Rosemond's] got a great issue for appeal and it's [the government's] fault." J.A. 140. The court instructed the jury that to find Rosemond guilty of the Section 924(c) charge on an aiding and abetting theory (J.A. 196):

> [Y]ou must find that:
>
> (1) the defendant knew his cohort used a firearm in the drug trafficking crime, and
>
> (2) the defendant knowingly and actively participated in the drug trafficking crime.

During closing arguments, the government explained its theory of aiding and abetting:

> Justus Rosemond would be guilty of aiding and abetting another in the gun offense if he knew his cohort used a firearm in the drug trafficking

> crime and [he] knowingly and actively participated in the drug trafficking crime. So if Mr. Rosemond were to * * * argue that Ronald Joseph or Vashti Perez fired the gun, he's still guilty of the crime. That is what the law says based on the evidence before you.
>
> * * * [T]he evidence establishes that Justus Rosemond was involved in the drug trafficking crime. He is involved with the [drug] deal with Ricardo Gonzales. He certainly knew and actively participated in that crime.
>
> And with regards to the other element of aiding and abetting the gun crime, the fact is a person cannot be present and active at a drug deal when shots are fired and not know their cohort is using a gun. You simply can't do it.

J.A. 157-158. Consistent with the trivial showing required to establish guilt under its proffered instruction, the government did not bother arguing that Rosemond's actions before, during, or after the shooting had facilitated or encouraged the use of a firearm, much less that he had done so intentionally. When the government discussed Rosemond's actions, it did so only to support its theory that "he was the shooter." J.A. 156.

c. During deliberations, the jury sent a note asking whether the aiding and abetting theory applied to "question 3 on the verdict form," Pet. App. 40a, which asked the jury to determine whether Rosemond had "carried," "used," "brandished," or "discharged" the firearm, *id.* at 29a (internal quotation marks omitted); see also J.A. 210. The judge responded that

the jury should answer question 3 if it found Rosemond guilty under any theory. J.A. 211. Soon afterward, the jury found Rosemond guilty on all counts; the verdict form indicated it had found Rosemond engaged in each of the four kinds of firearm use listed in question 3. J.A. 202-204. But the verdict form did not require the jury to indicate whether it had found Rosemond guilty of the firearm offense as a principal or as an aider and abettor. Pet. App. 5a; see also J.A. 205 (prosecutor states, "I still don't think we know what the jury – what the basis for their verdict was.").

d. The district court sentenced Rosemond to 168 months' imprisonment, to be followed by 60 months' supervised release. Pet. App. 15a, 18a. Although the Guidelines range for the other counts of conviction was 70-87 months' imprisonment, the court imposed a substantially shorter 48-month sentence. In imposing a consecutive mandatory-minimum sentence for the Section 924(c) count, the district judge explained that he had no choice: "I have to give you 10 years consecutive." J.A. 207; see also 18 U.S.C. § 924(c)(1)(A)(iii), (c)(1)(D)(ii).

3. The court of appeals affirmed. Pet. App. 1a-11a. The court began by acknowledging that, whatever the sufficiency of the evidence supporting liability as a principal, it was necessary to resolve Rosemond's challenge to the aiding and abetting instruction "because '[a] conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one,'" *id.* at 6a (quoting *Hedgpeth* v. *Pulido*, 555 U.S. 57, 58 (2008) (per

curiam)), and the jurors had not been "required to specify under which theory they convicted" Rosemond, *id.* at 5a.

The court rejected Rosemond's argument that the aiding and abetting instruction was erroneous, relying on circuit precedent holding that a defendant need not take "some action to facilitate or encourage his cohort's use of the firearm" to be liable for aiding and abetting a Section 924(c) offense. Pet. App. 9a. Instead, the court emphasized it "'currently only require[s] that an aider and abetter (1) know a cohort used a firearm in an underlying crime of violence [or drug trafficking crime], and (2) knowingly and actively participated in that underlying crime.'" *Ibid.* (quoting *Bowen*, 527 F.3d at 1079).

SUMMARY OF ARGUMENT

In the Tenth Circuit, a defendant can be found guilty of aiding and abetting the use of a firearm during and in relation to a drug trafficking crime without a jury ever finding that he intentionally facilitated or encouraged that offense—that is, without finding that he aided or abetted it; it is enough that he participated in the *predicate offense* and learned of the firearm at the moment it was used. That rule is tantamount to strict liability for a defendant's awareness of his confederate's conduct.

The Tenth Circuit's approach is inconsistent with all available evidence regarding the meaning of Section 2. The ordinary understanding of the active verbs in Section 2, which extends liability as a principal to one who "aids, abets, counsels, commands, induces or procures [the] commission" of a crime, is

that they require proof of affirmative action to facilitate or encourage the offense, and that the defendant must intend to do so: "[a]ll of the words used—even the most colorless, 'abet'—carry an implication of purposive attitude." *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (Hand, J.). And in enacting Section 2, Congress legislated against the background of centuries of common-law use requiring proof of affirmative acts of facilitation together with proof the defendant acted "with the intention of encouraging" the crime, *Hicks*, 150 U.S. at 448. There is every indication that Congress intended to incorporate this established understanding when it adopted an aiding and abetting "formula" whose "substance * * * goes back a long way." *Peoni*, 100 F.2d at 402; see also 1 Matthew Hale, *The History of the Pleas of the Crown* 615 (Sollom Emlyn ed., London 1736) (law deems as principals those who "doth procure, counsel, command, or abet another to commit a felony").

It is thus settled law, recognized by this Court and every federal court of appeals with criminal jurisdiction, that aiding and abetting liability requires a finding that the defendant (1) affirmatively acted to facilitate or encourage commission of the offense he is accused of aiding and abetting; and that he (2) intended to facilitate or encourage the commission of that offense. Section 924(c) requires proof of a predicate crime of violence or drug-trafficking offense, but it "sets out an offense distinct from the underlying felony." *Castillo*, 530 U.S. at 125 (internal quotation marks omitted). Because "this specific crime—not the [drug trafficking crime]—is the crime that [the defendant] was charged with aiding and abetting,

* * * it is this specific crime that [the defendant] must have consciously and affirmatively assisted." *Medina*, 32 F.3d at 45. Participation in the predicate drug-trafficking crime—indeed, even intentionally facilitating that offense—is not enough to make a defendant liable for the distinct Section 924(c) crime. Cf., *e.g.*, *United States* v. *Hill*, 55 F.3d 1197, 1202 (6th Cir. 1995) (conviction for aiding and abetting gambling operation under 18 U.S.C. § 1955 requires "intent * * * to assist the gambling enterprise itself, not simply an intent to have a particular transaction with one of the principals"). The Tenth Circuit's rule would collapse two distinct offenses into one, because it would require no additional acts of intentional facilitation for the separate Section 924(c) offense. That would be tantamount to strict liability, contrary to bedrock principles of aiding and abetting law.

The Tenth Circuit's approach also severs the relationship between culpability and punishment. Under it, a defendant is liable for a mandatory sentence of five years' to life imprisonment under Section 924(c)(1)(A) merely because he "knowingly and actively participated in the drug-trafficking crime"—a crime for which he is separately liable—and "knew his cohort used a firearm" in the commission of that crime, without more. Pet. App. 7a (quoting J.A. 196). It provides the same sentence for a passive participant in a drug deal who learns of the gun's presence only when it is used, and for someone who chose to bring a gun to a drug deal and then chose to use it. There is no reason to believe Congress intended punishment to be so divorced from culpability, particularly given its efforts to graduate punishment under

Section 924(c). Because the ordinary tools of statutory interpretation "fail to establish that the Government's position is unambiguously correct," this Court must "apply the rule of lenity and resolve the ambiguity in [Rosemond's] favor." *United States* v. *Granderson*, 511 U.S. 39, 54 (1994).

Justus Rosemond's Section 924(c) conviction must be reversed. Although the prosecution also attempted to prove Rosemond's direct liability as the shooter of the firearm, the jury returned "a general verdict," which may have rested on the "legally invalid theory" of aiding and abetting. *Skilling* v. *United States*, 130 S. Ct. 2896, 2934 (2010). Because there is compelling evidence that someone else (probably Ronald Joseph) was the shooter and that Rosemond neither said nor did anything to facilitate use of the firearm—indeed, there is evidence he *refused* Joseph's request to hide it—it is impossible to "confidently say" that the Tenth Circuit's error "did not contribute to the verdict obtained." *Neder* v. *United States*, 527 U.S. 1, 16-17 (1999).

ARGUMENT

Nearly three-quarters of Justus Rosemond's 14-year sentence stems from his conviction for aiding and abetting the use of a firearm during and in relation to a drug-trafficking crime. See 18 U.S.C. §§ 924(c)(1)(A) and 2. The government was able to secure a mandatory 10-year sentence under Section 924(c) without showing any additional act to facilitate, or intent to facilitate, the use of the firearm. Rather, it was enough to prove Rosemond's participation in the predicate drug trafficking crime (which itself accounts for a separate four-year sentence) plus

just one additional fact: that Rosemond "knew his cohort used a firearm in the drug trafficking crime." Pet. App. 7a. This amounts to having to prove almost nothing at all. As the prosecutor explained to the jury: "[T]he fact is a person cannot be present and active at a drug deal when shots are fired and not know their cohort is using a gun. You simply can't do it." J.A. 158. According to the Tenth Circuit, once a participant in a drug-trafficking crime uses a gun, all of his cohorts who are present have aided and abetted the use of that firearm, whether or not they facilitated or encouraged—indeed, whether or not they *discouraged*—its use.

Such a sweeping view of accomplice liability might have made sense if Congress had chosen to depart from hundreds of years of common-law practice and hold codefendants strictly liable for the actions of principals without proof of intentional facilitation or encouragement. But there is no indication it did. Indeed, all available evidence indicates Congress incorporated long-established principles of accomplice liability when it enacted the federal aiding and abetting statute. Because there is no dispute that the jury here was never asked to determine that Rosemond intentionally facilitated the use of the firearm, his Section 924(c) conviction must be reversed.

A. Section 2 Requires Proof That The Defendant Acted Intentionally To Facilitate Or Encourage The Offense

It has "long since" been established that criminal liability extends not simply to the person who "actually commit[s] the offense," but that "all present, aiding, and abetting, are equally principal with him."

1 Hale, *supra*, at 437, 615. Thus, the common law deemed principals those who "doth yet procure, counsel, command, or abet another to commit a felony." *Id.* at 615. Aiding and abetting is not "a separate crime," but simply another theory of liability for the substantive offense. *United States* v. *Sorrells*, 145 F.3d 744, 752 (5th Cir. 1998) (internal quotation marks omitted).

Today, these basic principles are embodied in the federal aiding and abetting statute, 18 U.S.C. § 2. While that statute, first enacted in 1909, see Act of Mar. 4, 1909, ch. 14, § 332, 35 Stat. 1088, 1152, abolished the "'intricate' distinctions" and procedural accretions that had developed for various types of accessories, *Standefer* v. *United States*, 447 U.S. 10, 15 (1980), it preserved the basic principles of accomplice liability, in language that would be familiar to common-law judges, see *Peoni*, 100 F.2d at 402 (stating of the statute, "[t]he substance of [its] formula goes back a long way"[2]). Section 2 provides in relevant part that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a).

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[2] At the time of *Peoni*, the statute provided that "[w]hoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal." 18 U.S.C. § 550 (1934).

1. The Plain Language Of Section 2 Requires Proof Of Intentional Facilitation Or Encouragement

Statutory interpretation must always "start * * * with the language of the statute," giving words their "'ordinary or natural' meaning," *Bailey* v. *United States*, 516 U.S. 137, 144-145 (1995), considering "the specific context in which that language is used,'" *McNeill* v. *United States*, 131 S. Ct. 2218, 2221 (2011) (internal quotation marks omitted). Because the text of Section 2 is clear, its language is also the "'end of the matter.'" *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 409 (1993) (quoting *Chevron U.S.A. Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)).

The words "aid" and "abet" are universally understood to require that a person act affirmatively to facilitate or encourage the completion of an objective. *E.g.*, *Webster's Third New International Dictionary* 44 (2002) (defining "aid" as "to give help or support to: FURTHER, FACILITATE, ASSIST"); *id.* at 3 (defining "abet" as "to incite, encourage, instigate, or countenance" or "to assist or support in the achievement of a purpose"); *Black's Law Dictionary* 81 (9th ed. 2009) (defining "aid and abet" to mean "[t]o assist or facilitate the commission of a crime, or to promote its accomplishment"); cf. *Abuelhawa*, 556 U.S. at 821 (discussing meaning of "terms like 'aid,' 'abet,' and 'assist,'" and noting that it is "likely that Congress had comparable scope in mind when it used the term 'facilitate,' a word with equivalent meaning"). As one leading treatise explains: "To 'aid' is to assist or help another. To 'abet' means, literally, to bait or excite * * *. In its legal sense, ['aid and

abet'] means to encourage, advise, or instigate the commission of a crime." 1 Charles E. Torcia, *Wharton's Criminal Law* § 29, at 181 (15th ed. 1993). The meanings of both words have been essentially unchanged since before the predecessor of Section 2 was first enacted.[3]

In addition to requiring an affirmative act or encouragement, "aiding and abetting" connotes an *intent* to bring about the criminal objective; under the ordinary meaning of those words, one can be guilty of aiding and abetting "only if the requisite acts * * * and accompanying mental state are both present." 2 LaFave, *supra*, § 13.1(b). That understanding becomes clearer still when "aid[and] abet[]" are considered in the context of the other verbs listed in Section 2, which extend liability as a principal to one who "counsels, commands, induces or procures [the] commission" of an offense. See *S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 378 (2006) ("a word is known by the company it keeps") (internal quotation marks omitted); see also *Beecham* v. *United*

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[3] See, *e.g.*, *Black's Law Dictionary* 56 (1st ed. 1891) (defining "aid and abet" as "doing some act to render aid to the actual perpetrator of the crime"); accord Shumaker & Langsdorf, *supra*, at 41-42; *id.* at 5 (defining "abet" as "[t]o encourage or set another on to commit a crime * * * to command, procure, or counsel him to commit it"); 1 John Bouvier, *Bouvier's Law Dictionary* 125 (Francis Rawle ed., new ed., Boston, Boston Book Co. 1897) (defining "aiding and abetting" as "doing some act to render aid to the actual perpetrator"). General dictionaries from that period reflect a similar understanding. See, *e.g.*, *Webster's Universal Dictionary* A B E (Thomas H. Russell, et al., eds., 1905) (defining "abet" as "[i]n law, to encourage, counsel, incite, or assist in a criminal act").

States, 511 U.S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well."). All of those verbs require that an actor have acted intentionally to bring about the desired result. See, *e.g.*, *Webster's Third*, *supra*, at 518 (defining "counsel" as "to advise," or "to recommend"); *id.* at 455 (defining "command" as "to direct authoritatively: ORDER, ENJOIN"); *id.* at 1154 (defining "induce" as "to move and lead (as by persuasion or influence)," "prevail upon: INFLUENCE, PERSUADE"); *id.* at 1809 (defining "procure" as "to cause to happen or be done: bring about: EFFECT").

As Learned Hand recognized in his seminal analysis of the statute, "[a]ll the words used—even the most colorless, 'abet'—carry an implication of *purposive attitude*." *Peoni*, 100 F.2d at 402 (emphasis added). It is therefore not enough that the government show that the offense "follow[s] upon the accessory's conduct." *Ibid.* Rather, it is necessary that the defendant "*seek by his action* to make [the offense] succeed." *Ibid.* (emphasis added). In short, Section 2 requires proof of "intentional wrongdoing" with respect to the offense of conviction. *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 190 (1994).

2. The Historical Understanding Of Aiding And Abetting Confirms That Liability Requires Proof Of Intentional Action To Facilitate Or Encourage The Offense

The genesis of the terms "aiding and abetting," their "[c]ontemporaneous general usage," *Utah* v. *Evans*, 536 U.S. 452, 475 (2002), and their historic

use "corroborate[]" the understanding, *Golan* v. *Holder*, 132 S. Ct. 873, 885 (2012), that an aider and abettor must act intentionally to facilitate or encourage the offense of conviction. Since its origin in the Old French *aidier*, "aid" has meant "to give help to." *Oxford English Dictionary* 273 (2d ed. 1989); William Caxton, *Cato* a iij b (Westmystre 1483) ("[t]o ayde helpe and Susteyne them in theyr necessytees"); see also John Cowell, *The Interpreter, or Booke Containing the Signification of Words*, at AI (Cambridge, John Legate 1607) (defining "ayde," in relevant part, as "calling in of helpe from another," "to give strength to the party that prayeth in aide of him"). Likewise, from its origins in the Old French *abeter*, "to bait, hound on," *Oxford English Dictionary*, *supra*, at 21, "abet" has required affirmative action urging another to do something. Thus, the term has for centuries "signifieth in our common law * * * to encourage or set on," and "has generally been reserved to describe action with a nefarious purpose." Cowell, *supra*, at AB ("both verbe and noune is alway vsed ["used"] in the euill ["evil"] part"); cf. 1 John Bouvier, *Law Dictionary* 30 (1st ed., Philadelphia, T & J. W. Johnson 1839) ("[Abet] is always taken in a bad sense.").

It is no surprise, then, that when the term "abet" entered the criminal law more than four centuries ago, it denoted intentional action to encourage a crime. The term "abet" often appeared in the company of other verbs denoting intentional action that eventually found their way into Section 2, including "aid." See, *e.g.*, *Parker's Case*, 2 Dyer 186 a., 186 b. (K.B. 1559) ("maliciously and feloniously

counseled, commanded, procured, and abetted" murder); 3 Abraham Fleming, *Holinshed's Chronicles* 1579/2 (London 1587) ("The Scottish queene did not onelie advise them, but also direct, comfort, and abbet them, with persuasion, counsel, promise of reward, an dearnest obtestation."); Hale, *supra*, at 615 ("procure, counsel, command, or abet another to commit a felony"); *John Walker and Mary Rothwell,* Proceedings of the Old Bailey 344-345 (Feb. 26, 1783) ("unlawfully and feloniously, did council, aid, abet, and procure the said John Walker and Mary Rothwell to do, and commit the same").

At common law, it was thus well understood that "aiding and abetting" liability required the defendant to have performed an affirmative act to facilitate or encourage the offense. As an influential 19th Century treatise explained, "aiding and abetting must involve * * * participation" in the offense of conviction; "Mere presence without opposition will not suffice * * *." Henry J. Stephen, *Summary of the Criminal Law* ch.3, at 4 (Philadelphia, J.S. Littell; New York, Halstead & Voorhies 1840); Timothy Walker, *Introduction to American Law* 694 (Philadelphia, P. H. Nicklin & T. Johnson 1837) (defendant must have acted to "assist[]" crime). Nor is it enough that the defendant participated in the criminal venture in some general sense; rather, the prosecution must demonstrate that he had "a *design* to encourage, incite, or in some manner afford aid or consent *to the particular act*." 1 Wharton, *supra*, at 229 (emphasis added); see also 2 Edward Hyde East, *A Treatise of the Pleas of the Crown* § 17, at 889 (Philadelphia, P. Bryne 1806) (discussing liability for

"every person knowingly and wilfully aiding, abetting, or assisting any person or persons to commit any such offenses").

This Court confirmed these two essential elements of aiding and abetting liability in the decade before Congress enacted the predecessor of Section 2. In *Hicks* v. *United States*, *supra*, this Court identified the necessary "condition[s]" for the imposition of aiding and abetting liability. The first was whether the defendant "aided, abetted, or advised, or encouraged" the crime and "in some way contribute[d] * * * by some act done by him, or by some words spoken by him." 150 U.S. at 448. The Court next inquired whether the defendant was present "*for the purpose* of either aiding, abetting, advising, or encouraging" the crime. *Ibid.* (emphasis added). The Court reversed the defendant's conviction for aiding and abetting a murder in part because the trial judge had "omitted to instruct the jury that the acts or words of encouragement and abetting must have been used by the accused *with the intention of encouraging and abetting* [the principal]." *Id.* at 449 (emphasis added). It was not enough, the Court held, that the defendant committed some intentional act—"the intentional use of the words," *ibid.*; instead, to be liable for aiding and abetting, the jury needed to find he had "intention as respects the effect to be produced," *ibid., i.e.,* to facilitate the crime. The Court was unanimous in this respect; the two dissenting Justices agreed that aiding and abetting required intentional action to encourage the offense of conviction. *Id.* at 455 (Brewer, J., dissenting). To them, in fact, that was so obvious

that the instruction was not error: "What is the omission? * * * Does not the word 'abet' imply an intent that the party shall do that which he is abetted to do?" *Ibid.* (citing 1 Bouvier, *supra*, at 39).

3. Section 2 Did Not Alter The Traditional Understanding Of Aiding And Abetting

When "Congress uses a common-law term in a statute, [this Court] assume[s] the 'term * * * comes with a common law meaning, absent anything pointing another way.'" *Microsoft Corp.* v. *i4i Ltd. P'ship*, 131 S. Ct. 2238, 2245 (2011) (quoting *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 58 (2007)). Congress gave no indication, when it enacted the predecessor of Section 2, that it did not intend to "incorporate the well-settled meaning'" (*Sekhar* v. *United States*, 133 S. Ct. 2720, 2724 (2013) (quoting *Neder*, 527 U.S. 23) of "aiding and abetting." Congress enacted the federal aiding and abetting statute as part of the nationwide reform of the country's penal laws, with one overarching purpose: to "abolish[] the distinction between principals and accessories" that existed at common law. *Hammer* v. *United States*, 271 U.S. 620, 628 (1926). Doing so simplified the law, eliminating the need to distinguish between certain types of accessories (based on, for example, whether they were "present at the scene of the crime"[4]), see *Standefer*, 447 U.S. at

[4] At common law,

> In felony cases, parties to a crime were divided into four distinct categories: (1) principals in the first degree who actually perpetrated the offense; (2) principals in the second degree who were actually or constructively present at the scene of the crime and aided or abetted its commission; (3)

15, and for special procedural rules for various types of accessories (for example, involving whether an accomplice could be tried separately from the principal, or after his acquittal), *id.* at 18 (citing H.R. Rep. No. 60-2, at 13-14 (1909)).

Although Congress plainly intended to eliminate some of the procedural complexities that attended the distinction between principals and accessories (which the House Committee deemed "obstacles to justice," H.R. Rep. No. 60-2, at 14), there is no indication Congress sought to depart from the well-established understanding of "aiding and abetting" liability. To the contrary, in drafting the statute, Congress employed a well-established "formula" (*Peoni*, 100 F.2d at 402) using a series of words familiar from common-law sources. See, *e.g.*, *Parker's Case*, 2 Dyer 186 a., 186 b. ("counseled, commanded, procured, and abetted"); *John Walker and Mary Rothwell*, 344-345 ("council, aid, abet, and procure"). Indeed, that Congress did not change the historical understanding of the word at a time it made other changes to the law "implicitly ratifie[s]" the previously understood definition. *U.S. Postal Serv.* v. *Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 745 (2004); see also *ibid.* (when Congress alters the law but "[does] not change the definition * * * in the statute," that definition is "unaltered by Congress' action"). Indeed, the provision's sponsors understood that the statutory

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accessories before the fact who aided or abetted the crime, but were not present at its commission; and (4) accessories after the fact who rendered assistance after the crime was complete.

Standefer, 447 U.S. at 15.

definition "does not differ in effect" from the "definition at common law." 42 Cong. Rec. 1374 (1908) (exchange between Sen. Bacon and Sen. Heyburn); see also *State* v. *Bogue*, 34 P. 410, 412 (Kan. 1893) (saying that an analogous state statute "d[id] not in any manner enlarge or diminish the essential elements of criminality," but "merely d[id] away with a somewhat arbitrary [common-law] nomenclature").[5]

This Court and others have indicated that common law practice is centrally relevant to the scope of accomplice liability under Section 2 and its predecessor. In *Standefer*, 447 U.S. at 21, for example, this Court relied on the common-law understanding in concluding acquittal of the principal did not bar an aiding and abetting conviction. And *Peoni* reviewed common-law practice in determining the showing necessary to convict a person of aiding and abetting under an earlier version of the provision.

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[5] Although Congress has made a handful of minor changes to the provision over the years, there is no indication any of them was designed to disturb the understanding of what constitutes aiding and abetting. In 1948, Congress removed the adverb "directly" ("[w]hoever directly commits any act constituting an offense defined by any law of the United States") and recodified the provision at its present location. Act of June 25, 1948, ch. 645, § 2(b), 62 Stat. 683, 684. In 1951, Congress again amended § 2 to "make a few improvements of a minor character," S. Rep. No. 82-1020, at 7-8 (1951), replacing the phrase "is a principal" in § 2(a) and similar language in § 2(b) with the phrase, "is *punishable as* a principal," Act of Oct. 31, 1951, ch. 655, § 17b, 65 Stat. 710, 717 (emphasis added). See generally *Standefer*, 447 U.S. at 18 n.11. In the decades since, Congress has not sought to amend the statute to depart from the accepted meaning of "aiding and abetting."

100 F.2d at 402; see also *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949) (adopting *Peoni* standard); *Abuelhawa*, 556 U.S. at 821 (noting traditional understanding of "terms like 'aid,' 'abet,' and 'assist,'" in interpreting "'facilitate,' a word with equivalent meaning").

Although the government now contends that a defendant facilitates a firearm offense when he "knowingly benefit[s] from the protection afforded by the firearm," Br. in Opp. 12 (internal quotation omitted), it is impossible to square the passive receipt of some "benefit" from the use of a firearm with Section 2's active language requiring proof of intentional facilitation. Indeed, that argument has the required showing *backwards*: Instead of proving that the defendant facilitated use of the firearm, the government argues the correct inquiry is whether the firearm facilitated the defendants in committing the predicate offense.

B. Bedrock Principles Require Proof That A Section 924(c) Defendant Acted Intentionally To Facilitate Or Encourage The Use Of The Firearm

Generally recognized principles of aiding and abetting law confirm what is already plain from the text of Section 2 and historical practice. The great weight of judicial authority, both from this Court and others, establishes that aiding and abetting a Section 924(c) firearm offense requires a finding the defendant has acted intentionally to facilitate or encourage the use of the firearm.

1. The Canonical Definition Of Aiding And Abetting Requires An Intentional Act To Facilitate Or Encourage The Offense

Judge Learned Hand's opinion in *Peoni* is widely regarded as establishing the "canonical definition of aiding and abetting a federal offense." *United States* v. *Ortega*, 44 F.3d 505, 507 (7th Cir. 1995). After examining the text of the federal aiding and abetting statute in the context of common-law practice, he explained that a defendant is liable for aiding and abetting an offense if he "associate[s] himself with the venture, * * * participate[s] in it as in something that he wishes to bring about, that he *seek[s] by his action* to make it succeed." 100 F.2d at 402 (emphasis added). This Court has embraced that formulation time and again. See *Cent. Bank of Denver*, 511 U.S. at 190; *Nye & Nissen*, 336 U.S. at 619.

This test establishes that aiding and abetting consists of two essential elements: first, the defendant must have taken an affirmative act to facilitate or encourage commission of the offense he is accused of abetting; second, the defendant must have *intended* to facilitate or encourage the commission of that offense. As this Court explained, Section 2 "decrees that those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime." *Cent. Bank of Denver*, 511 U.S. at 181; see also *id.* at 190 (indicating offense requires "intentional wrongdoing"). That two-part test has been widely embraced. See 2 LaFave, *supra*, § 13.2 ("[O]ne is liable as an accomplice to the crime of another if he

(a) gave assistance or encouragement * * * (b) with the intent thereby to promote or facilitate commission of the crime."); Model Penal Code § 2.06(3) (West 2013) (requiring the person "solicit[]" or "aid[] or agree[] or attempt[] to aid such other person in planning or committing" an offense "with the purpose of promoting or facilitating the commission of the offense").

Although the Tenth Circuit has adopted a distinct, uniquely expansive conception of accessory liability in the Section 924(c) context, see pp. 35-42, *infra*, every federal court of appeals has recognized as a general matter that under Section 2, "[a]iding and abetting has two components: an act on the part of a defendant which contributes to the execution of a crime and the intent to aid in its commission." *United States* v. *Searan*, 259 F.3d 434, 444 (6th Cir. 2001).[6] Most circuits' general accomplice-liability pattern jury instructions likewise require proof of

[6] *E.g.*, *United States* v. *Loder*, 23 F.3d 586, 590-591 (1st Cir. 1994); *Medina*, 32 F.3d at 45; *United States* v. *Huet*, 665 F.3d 588, 596 (3d Cir. 2012); *United States* v. *Arrington*, 719 F.2d 701, 705 (4th Cir. 1983); *Sorrells*, 145 F.3d at 753; *United States* v. *Carter*, 695 F.3d 690, 697 (7th Cir. 2012); *United States* v. *Santana*, 524 F.3d 851, 853 (8th Cir. 2008); *United States* v. *Nelson*, 137 F.3d 1094, 1103-1104 (9th Cir. 1998); *United States* v. *Anderson*, 189 F.3d 1201, 1207 (10th Cir. 1999) (defendant must "seek to make the [criminal] venture succeed through some action of his own") (internal quotation marks omitted); *United States* v. *Capers*, 708 F.3d 1286, 1306-1307 (11th Cir.), petition for cert. filed, No. 12-10635 (June 2013); *United States* v. *Wilson*, 160 F.3d 732, 738 (D.C. Cir. 1998).

these two facts.[7] Indeed, these two basic elements are so widely accepted that the Department of

[7] See, *e.g.*, Pattern Crim. Jury Instructions Drafting Comm., *Pattern Crim. Jury Instructions for the Dist. Courts of the First Circuit* § 4.18.02(a) & cmt. (D. Me. 2013) (government must show defendant "participated in [the crime]" and "intended to help [the principal]"); Comm. on Model Crim. Jury Instructions for the Third Circuit, *Crim. Jury Instructions* § 7.02 (2013) (must show defendant "did some act for the purpose of [aiding] [assisting] [soliciting] [facilitating] [encouraging]" principal "in committing the specific offense(s) charged and with the intent" that the principal "commit that [those] specific offense(s)," and that the defendant's "acts did, in some way, [aid,] [assist,] [facilitate,] [encourage,]" the principal "to commit the offense(s)") (brackets in original); Comm. on Pattern Jury Instructions Dist. Judges Ass'n, Fifth Circuit, *Pattern Jury Instructions (Crim. Cases)* § 2.06 (2012) (must show "the defendant shared the criminal intent of the principal" and "engaged in some affirmative conduct designed to aid the venture or assist the principal"); Sixth Circuit Comm. on Pattern Crim. Jury Instructions, *Pattern Crim. Jury Instructions* § 4.01 (2013) (government must prove "that the defendant helped to commit the crime [or encouraged someone else to commit the crime]" and "intended" to do so) (brackets in original); Comm. on Fed. Crim. Jury Instructions for the Seventh Circuit, *Pattern Crim. Jury Instructions for the Seventh Circuit* § 5.06 (2012) (requiring proof that the defendant "knowingly [aids; counsels; commands; induces; or procures] the commission of an offense" and "tr[ies] to make [the offense] succeed") (first brackets in original); Judicial Comm. on Model Jury Instructions for the Eighth Circuit, *Manual of Model Crim. Jury Instructions for the District Courts of the Eighth Circuit* § 5.01 (2013) (defendant must "have knowingly acted" "for the purpose of [causing] [encouraging] [aiding]" the offense) (brackets in original); Ninth Circuit Jury Instructions Comm., *Manual of Model Crim. Jury Instructions* § 5.1 (2010) (government must prove "the defendant knowingly and intentionally aided, counseled, commanded, induced or procured [the principal] to commit each element of" the offense with

Justice's *Criminal Resource Manual*, which serves as guidance to U.S. Attorneys, unequivocally states that "[t]he elements necessary to convict under [an] aiding and abetting theory" include "[t]hat the accused had specific intent to facilitate the commission of a crime by another" and "the accused assisted or participated in the commission of the underlying substantive offense," meaning they "acted in some affirmative manner designed to aid" it. *Criminal Resource Manual* § 2474; *id.* §§ 2475, 2478 (requires showing "the defendant engaged in some affirmative conduct designed to aid" the offense; "[a]ll courts seem to agree that aiding and abetting requires specific intent, also described as 'purposive attitude'").[8]

2. Aiding And Abetting A Section 924(c) Offense Requires An Intentional Act To Facilitate Or Encourage The Use Of The Firearm

As the "vast majority" of courts of appeals have concluded, Pet. App. 10a, applying these accepted principles of accomplice liability to Section 924(c) requires the government to prove that (1) the

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"intention of helping that person commit" the offense); Crim. Pattern Jury Instruction Comm. of the U.S. Court of Appeals for the Tenth Circuit, *Crim. Pattern Jury Instructions* § 2.06 (2011) (requiring that the defendant "intentionally participated in" the crime and "intended to help [principal]").

[8] Accord *United States* v. *Rodriguez*, 392 F.3d 539, 545 (2d Cir. 2004); *United States* v. *Otero-Mendez*, 273 F.3d 46, 52 (1st Cir. 2001); *United States* v. *Irorere*, 228 F.3d 816, 823 (7th Cir. 2000); *United States* v. *Andrews*, 75 F.3d 552, 555 (9th Cir. 1996); *United States* v. *Willis*, 38 F.3d 170, 177 n.7 (5th Cir. 1994).

defendant acted to facilitate or encourage the use of a firearm in the predicate drug trafficking crime; and (2) the defendant intended to facilitate or encourage the commission of that offense. The Tenth Circuit's (and the government's) rule fails to require either an act of facilitation or an intent to facilitate the use of the firearm. Accordingly, it is invalid.

Section 924(c)(1)(A) provides, in relevant part:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm * * *, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime [receive a specified mandatory minimum penalty] * * *.

Section 924(c) establishes a separate, freestanding offense that is "distinct from the underlying federal felony," *Simpson* v. *United States*, 435 U.S. 6, 10 (1978), and does not merely create an enhanced penalty for the underlying crime, *Castillo*, 530 U.S. at 125. A Section 924(c) offense "contain[s] two distinct conduct elements"—"the 'using and carrying' of a gun and the commission of [the violent or drug-trafficking crime]." *Rodriguez-Moreno*, 526 U.S. at 280. Thus, to convict a person of this offense as a principal, the prosecution must prove that (1) the defendant "committed all the acts necessary to be subject to punishment for * * * a crime of violence [or drug trafficking crime] in a court of the United States";

and (2) he "used a firearm" and did so "'during and in relation to' [the drug trafficking crime]." *Ibid.*

When a defendant is charged with aiding and abetting a firearm offense under Section 924(c), the intentional act of facilitation or encouragement required by Section 2 must be directed at the use of the firearm during and in relation to the drug-trafficking crime—*not* merely to facilitating or encouraging the predicate drug offense—because "[i]t is the firearm crime that [the defendant] is charged with aiding and abetting, not the [drug trafficking] crime." *United States* v. *Bancalari*, 110 F.3d 1425, 1430 (9th Cir. 1997). Because an aider and abettor "is punished as a principal for 'using' a firearm . . . therefore [he] must facilitate in *the 'use' of the firearm rather than simply assist in the crime underlying the § 924(c)[] violation*." *United States* v. *Lopez-Urbina*, 434 F.3d 750, 758 (quoting *Sorrells*, 145 F.3d at 754) (alterations in *Lopez-Urbina*); accord *United States* v. *Daniels,* 370 F.3d 689, 691 (7th Cir. 2004) (per curiam); *United States* v. *Garth*, 188 F.3d 99, 113 (3d Cir. 1999); *Bazemore* v. *United States*, 138 F.3d 947, 949-950 (11th Cir. 1998); *Nelson*, 137 F.3d at 1103-1104; *United States* v. *Luciano-Mosquera*, 63 F.3d 1142, 1150 (1st Cir. 1995); *Medina*, 32 F.3d at 45. And because "[i]t is the aider and abettor's state of mind, rather than the state of mind of the principal, that determines the former's liability," the jury may only convict if it "find[s] that [the alleged accomplice] knew that [the principal] was armed and intended to use the weapon, and intended to aid him in that respect." *United States* v. *Short*, 493 F.2d 1170, 1172 (9th Cir. 1974) (discussing 18 U.S.C. § 2113(a) of-

fense). Thus, it is the use of the firearm during the violent or drug trafficking crime, rather than the predicate offense simpliciter, that the defendant must have "participate[d] in" and "[sought] by his action to make * * * succeed." *Peoni*, 100 F.2d at 402.

Applying this reasoning, the Second Circuit overturned a Section 924(c) conviction where the defendant "learned that [the principal] intended to carry a gun" during an armed robbery, but the government presented no evidence that the defendant "prompted or induced him to do so." *Medina*, 32 F.3d at 45. Judge Jacobs, writing for the court, reasoned that the principal was charged with "using or carrying a firearm during and in relation to a crime of violence," and that because "[t]his specific crime—not the robbery—is the crime that [the defendant] was charged with aiding and abetting * * * it is this specific crime that [the defendant] must have consciously and affirmatively assisted." *Ibid.* The court rejected the contention that the defendant could be convicted as an aider and abettor "merely because he knew that a firearm would be used or carried and, with that knowledge, performed an act to facilitate or encourage the robbery itself," explaining that "the language of the statute requires proof that he performed some act that directly facilitated or encouraged *the use or carrying of a firearm*." *Ibid.* (emphasis added).

Similarly, the Ninth Circuit reversed the conviction of a defendant who "participated in [a] robbery *knowing a gun would be used*" because there was "no evidence that [the defendant] directly facilitated or encouraged the use of the firearm." *Nelson*, 137 F.3d

at 1104 (emphasis added). Writing for the court, Judge Hall reasoned that "[t]he prosecution must still prove a specific intent to aid the firearms crime, and some act that facilitates or encourages that crime." *Id.* at 1103 (citation omitted).

3. The Tenth Circuit's Rule Violates Fundamental Principles Of Aiding And Abetting Liability

The Tenth Circuit's rule requires no showing that the defendant "took some action to facilitate or encourage his cohort's use of the firearm," much less that he did so "intentionally." Pet. App. 9a. Instead, that court "'only require[s] that an aider and abetter (1) know a cohort used a firearm in an underlying crime of violence [or drug trafficking crime], and (2) knowingly and actively participated in that underlying crime.'" *Ibid.* (quoting *Bowen*, 527 F.3d at 1079). So relaxed is this standard that it imposes Section 924(c) liability for "using" a firearm based on simple awareness of it; as the government argued at trial, "a person cannot be present and active at a drug deal when shots are fired and not know their cohort is using a gun. You simply can't do it." J.A. 158. In effect, the Tenth Circuit's rule collapses any distinction between the defendant's role in the predicate offense and his role in aiding and abetting the use of a firearm during and in relation to that offense. The Tenth Circuit adopted this faulty standard virtually without analysis in *United States* v. *Wiseman*, 172 F.3d 1196, 1217 (10th Cir. 1999), and has never undertaken to explain why it is unnecessary to show proof the defendant intentionally facilitated the crime of conviction. See Pet. App. 7a-8a (reviewing development of case law).

a. The Tenth Circuit's Rule Fails To Require Proof Of The Two Essential Elements Of Aiding And Abetting

The government contends that the instruction given below was correct. See Br. in Opp. 8. A Section 924(c) offense, it argues, requires proof of two elements: (1) use or carrying of a firearm; and (2) that "the use or carrying was 'during and in relation to' a 'crime of violence or drug trafficking crime.'" *Ibid.* (internal quotation marks omitted). The government's position relies critically on the proposition that "[w]hen a person actively participates in the predicate crime of violence or drug trafficking offense, he facilitates the principal's completion of the second element of the Section 924(c) offense." *Ibid.* That is nonsense. Participation in the predicate offense may establish a condition necessary for the penalties of Section 924(c) to apply, but in no sense does bare participation in that crime "aid" or "encourage" "'the use or carrying' [of the firearm] * * * 'during and in relation to' * * * [that] crime." *Ibid.*

The government next contends that when a defendant participates in the predicate crime of violence or drug trafficking crime "with the knowledge of the principal's use or carrying of a firearm during the commission of the crime, he has plainly 'participate[d] in [the Section 924(c) offense] as in something that he wishe[d] to bring about." Br. in Opp. 8-9 (quoting *Cent. Bank of Denver*, 511 U.S. at 190). But simply because a defendant has intentionally participated in the predicate violent or drug-trafficking offense does not mean he has had the requisite involvement in the "distinct" crime

(*Castillo*, 530 U.S. at 125) of using a firearm during and in relation to that offense. Proof of a predicate violent or drug-trafficking offense is a necessary part of establishing Section 924(c) liability; that does not mean that intentional participation in that predicate offense necessarily constitutes intentional facilitation of the separately defined Section 924(c) crime. Cf., *e.g.*, *United States* v. *Hill*, 55 F.3d 1197, 1202 (6th Cir. 1995) (conviction for aiding and abetting gambling operation under 18 U.S.C. § 1955 requires "intent * * * to assist the gambling enterprise itself, not simply an intent to have a particular transaction with one of the principals").

The government's theory would expand criminal liability dramatically. For example, because a drug sale can be part of a "continuing criminal enterprise," 21 U.S.C. § 848, the government's theory would permit imposition of draconian "drug kingpin" liability on someone who participated in a single predicate act knowing that others had engaged in additional predicate transactions, but who himself never intended (or acted) to facilitate the larger "enterprise." But see *United States* v. *Pino-Perez*, 870 F.2d 1230, 1231 (en banc) ("The venture in a kingpin case is, of course, the continuing criminal enterprise. It is *that* enterprise which [a defendant] would have to be found to have associated with, participated in, and sought by his action to make succeed, in order to be punishable as an aider and abettor."); Sharon C. Lynch, Comment, *Drug Kingpins and Their Helpers: Accomplice Liability under 21 USC Section 848*, 58 U. Chi. L. Rev. 391, 414 (1991) ("The intentional aid sufficient to impose accomplice liability must be

assistance intended to aid the [continuing criminal enterprise] itself, not simply an intent to have particular transactions with the CCE succeed."); cf. also *United States* v. *Amen*, 831 F.2d 373, 382 (2d Cir. 1987) (holding accomplice liability is not available under kingpin statute). Nothing in the text or history of Section 2 suggests that Congress intended accomplice liability to sweep so far.

b. The Tenth Circuit's Rule Conflates Two Distinct Offenses

Accepting the Tenth Circuit's (and the government's) rule would collapse two distinct offenses into one—there would be no difference between the intent and action necessary to establish the separate offenses of aiding and abetting the use of a firearm during and in relation to a drug-trafficking crime, and simply aiding and abetting the drug crime. That rule requires no finding of any act of intentional facilitation of the distinct firearm offense. Rather, both the act of facilitation and the intent to facilitate would be inferred from a defendant's "knowing[] and active[] participat[ion] in the drug trafficking crime." Pet. App. 7a. But that at most shows intentional facilitation of *the drug offense*, which is separately defined and punished, see, *e.g.*, 21 U.S.C. § 841. See generally *United States* v. *Peñaloza-Duarte*, 473 F.3d 575, 579 (5th Cir. 2006) ("'Participation' means that the defendant engaged in some affirmative conduct designed *** to assist the perpetrator of the crime."); *Criminal Resource Manual* § 2478 (same). The rule requires proof of only *one fact* apart from that required to establish the predicate crime, one fact to trigger a consecutive mandatory sentence of between

five years' imprisonment and life imprisonment without parole: that the defendant "knew" (from his presence at the scene) of a confederate's firearm use "in th[e] underlying crime." Pet. App. 8a (internal quotation marks omitted).

Because aiding and abetting a Section 924(c) violation is a distinct offense from aiding and abetting a drug trafficking crime, it stands to reason that courts would "require discrete proof of the accomplice's intentional abetment" of the additional fact "that by itself imposes an additional criminal offense"—use of a firearm. *United States* v. *Weaver*, 290 F.3d 1166, 1174 (9th Cir. 2002) (O'Scannlain, J.); see also *Sorrells*, 145 F.3d at 753-754 (holding that the defendant must "perform[] some affirmative act *relating to the firearm*" and "share in the criminal intent *to use the firearm*") (emphasis added) (internal quotation marks omitted). It is the use of the firearm for which the defendant is punished, *Sorrells*, 145 F.3d at 754; thus, it is the use of the firearm that the defendant must have "participate[d] in" and "[sought] by his action to make * * * succeed." *Peoni*, 100 F.2d at 402.[9]

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[9] The government contends that action or intent to facilitate use of a firearm is unnecessary because "'[t]o be convicted of aiding and abetting, participation *in every stage of an illegal venture* is not required, only participation at some stage accompanied by knowledge of the result and intent to bring about that result.'" Br. in Opp. 8 (quoting *United States* v. *Wilson*, 135 F.3d 291, 305 (4th Cir. 1998) (internal quotation marks omitted). But saying that a defendant need not "participate in every stage" is not the same as saying that a defendant need not facilitate the offense of conviction so long as he facilitates some other offense. *Wilson* is not to the contrary.

c. The Tenth Circuit's Rule Is Tantamount To Strict Liability

As the government itself has acknowledged, "mere presence at the crime scene and guilty knowledge of the crime are generally not enough for aiding and abetting." *Criminal Resource Manual* § 2478; see also *ibid.* ("More is needed than simply knowledge that the crime was to be committed. Awareness of the crime is insufficient to establish aiding and abetting.") (citations omitted); see also *United States* v. *Gaskins*, 690 F.3d 569, 579 n.4 (D.C. Cir. 2012) ("'mere negative acquiescence . . . in the criminal conduct of others, even with guilty knowledge, is not sufficient to establish aiding and abetting'") (quoting *United States* v. *Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)). "Aiding and abetting * * * requires conduct of an affirmative nature." *United States* v. *Grey Bear*, 828 F.2d 1286, 1293 (8th Cir. 1987). While the Tenth Circuit rule requires proof of involvement in the predicate violent or drug-trafficking crime, "mere presence at the crime scene" and knowledge of the firearm suffices to trigger liability for the distinct crime of Section 924(c). The Tenth Circuit's rule contravenes basic principles of accomplice liability. "Under the general principles

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There, the court of appeals found it unnecessary that a defendant himself beat the victim to "aid and abet" the beating, noting that he had helped the principals gain access to the victim and had stated in the presence of the principals that the victim deserved to be beaten. 135 F.3d at 305. From that the court easily concluded that the defendant had acted and "had the requisite intent to 'bring about' the pistol whipping of [the victim]." *Ibid.*

applicable to accomplice liability, *there is no such thing as liability without fault*. Thus, it is not enough that the alleged accomplice's acts in fact assisted or encouraged the person who committed the crime"—the defendant must have intended to do so. 2 LaFave, *supra*, § 13.2(f) (emphasis added); accord *Hicks*, 150 U.S. at 449.

In the Tenth Circuit, the defendant is liable *even if* he did not intend for the firearm to be used and did nothing to facilitate or encourage it—indeed, the defendant would be liable even if he discouraged or sought to prevent its use. That is a far cry from requiring that the defendant "'wishe[d] to bring about'" the firearm offense and "'[sought] by his action to make [the offense] succeed.'" *Nye & Nissen*, 336 U.S. at 619 (quoting *Peoni*, 100 F.2d at 402). Rather, it is tantamount to "strict liability." *United States* v. *Morrow*, 977 F.2d 222, 233-234 (6th Cir. 1992) (Martin, J., dissenting).

The government seeks to apply acts of facilitation and intent directed at a drug trafficking offense—an offense of which Rosemond was separately convicted as a principal and sentenced—to a *distinct* firearm offense carrying a separate (and severe) penalty. But there is no precedent for allowing a person to be convicted of aiding and abetting one offense based on proof he intentionally facilitated *a different* offense. General principles of criminal liability prohibit using intent to aid in the commission of *one* offense as a substitute for intent to aid in the commission of a *separate* offense. Cf. *Hill*, 55 F.3d at 1202 (conviction for aiding and abetting gambling operation under Section 1955 requires "intent * * * to assist the

gambling enterprise itself, not simply an intent to have a particular transaction with one of the principals"); *Pino-Perez*, 870 F.2d at 1231 (defendant must have "sought by his action to make" the *continuing criminal enterprise* succeed, not simply the predicate acts); see also *United States* v. *Martiarena*, 955 F.2d 363, 367 (5th Cir. 1992) (evidence of intent to aid avoiding the filing of currency and money instrument report not sufficient to prove intent to aid avoidance of separate currency transaction report).

C. The Tenth Circuit's Rule Severs The Required Connection Between Culpability And Punishment

It is a "basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." *Miller* v. *Alabama*, 132 S. Ct. 2455, 2463 (2012) (internal quotation marks omitted). The Tenth Circuit's rule violates that basic precept because it permits the draconian penalties of Section 924(c) to be imposed on defendants significantly less culpable than the principal; it is also contrary to Congress's evident purpose in enacting that statute, which imposes severe, but *graduated*, penalties based on the specific conduct of each defendant. See *Castillo*, 530 U.S. at 121.

When Congress enacted the federal aiding and abetting statute in 1909, it abolished common law distinctions between principals and accessories. *Standefer*, 447 U.S. at 18-19. But implicit in that decision was the understanding that those who would be sentenced as aiders and abettors would be equally

deserving of punishment as those who actually "'commit'" the offense. *Id.* at 18 (quoting Section 2). Because the Tenth Circuit's rule does not require that the defendant acted intentionally to facilitate or encourage the use of a firearm, it subjects defendants to Section 924(c) liability without a showing of the sort of "direct participation" in the offense of conviction that would be necessary to be liable as a principal. The government can trigger Section 924(c) liability by proving just one fact beyond those necessary to establish the predicate drug offense: that the defendant "knew his cohort" used a firearm—even if the defendant first became aware of the gun only at the moment it was discharged.[10] See p. 35, *supra*. Indeed, the defendant would be liable

[10] The government concedes that in the Tenth Circuit, "*advance* knowledge" that the principal has a firearm is not necessary to support an aiding and abetting conviction, Br. in Opp. 9, but argues that "[a] defendant cannot be convicted under the court of appeals' rule unless he had knowledge of the firearm before the underlying crime was *completed*." *Id.* at 9-10. While it is hornbook law that one cannot aid and abet a completed offense, 2 LaFave, *supra*, § 13.2(a), at 341 n.36, nothing in the Tenth Circuit's statement of its rule, see Pet. App. 7a-8a, or its cases implementing it imposes such an explicit requirement. The government contends that "it is clear that petitioner continued to participate in the drug trafficking offense after the discharge of the firearm through his subsequent pursuit of Gonzales." Br. in Opp. 10 n.2; see also *id.* at 15. But that is not an argument the government ever submitted to the jury, much less one the jury necessarily accepted. It also turns on the government's characterization as "pursuit" a passenger's failure to jump out of a car after its driver "took off at a high rate of speed." J.A. 42, 49.

based on his knowledge alone even if he discouraged or sought to prevent its use. See p. 41, *supra*.

As the government emphasized in this case, the requisite knowledge can routinely be inferred because, when a person is "present at a drug deal when shots are fired," he "simply can't" lack awareness of that single enhancing fact under such circumstances. J.A. 158. But that is too slender a reed on which to base such a significant sentencing increase. As the Fifth Circuit reasoned,

> [A] defendant's knowledge * * * that a gun will be used in the commission of the underlying offense is not sufficient to sustain a conviction; there must be evidence that the defendant took some action to facilitate or encourage the use or carrying of a firearm. 'The link to the firearm is necessary because the defendant is punished as a principal for 'using' a firearm . . . and therefore must facilitate in the 'use' of the firearm rather than simply assist in the crime underlying the § 924(c)(1) violation.'

Lopez-Urbina, 434 F.3d at 758 (quoting *Sorrells*, 145 F.3d at 754). "To ensure that the accomplice and the principal possess the same moral culpability, it is only just to require the accomplice to have the mens rea to aid" the *offense of conviction* rather than a predicate offense. *Hill*, 55 F.3d at 1202. Without that crucial link, the government can obtain Section 924(c) liability for the distinct firearm offense based on culpability for the predicate offense—which would never suffice to establish Section 924(c) liability as a principal.

This case vividly illustrates how the Tenth Circuit's rule divorces culpability from punishment. The Section 924(c) conviction increased Rosemond's sentence from four years of imprisonment to *fourteen*, simply because he "knew his cohort" used a firearm, see Pet. App. 7a-9a, although there was no jury finding of any actual act to facilitate or encourage the gun's use—indeed, the evidence is consistent with simple passivity throughout the drug sale and the shooting, and a desire *not* to facilitate its use, see p. 53, *infra*. The Tenth Circuit's rule therefore imposes the same punishment on a person who passively sits through a transaction as it does on the person who affirmatively chooses to fire a deadly weapon at others: It permits a supposed accessory to be punished for conduct substantially less culpable than that of the principal.

Nothing in Section 2 or Section 924(c) evinces Congress's intent to establish that novel—and wildly expansive—concept of accomplice liability. As the government has acknowledged, "Section 924(c)(1) punishes only one who chooses to commit a serious crime *and* chooses to use or carry a gun during and in relation to that crime." Reply Br. for the United States at 5, *United States* v. *Rodriguez-Moreno* (No. 97-1139). "Congress used no language spelling out a purpose so improbable" as imposing severe Section 924(c) sentences on defendants with such an attenuated relationship to the offense, "but legislated against a background usage of terms such as 'aid,' 'abet,' and 'assist' that points in the opposite direction." *Abuelhawa*, 556 U.S. at 824. "[I]t is impossible to believe that Congress intended" such an

weak connection to the use of a firearm "to cause [a] quantum leap in punishment." *Id.* at 822-823.

The government contends that "those who actively participate in drug deals, robberies, or other violent crimes with the knowledge that an accomplice has brought along a firearm" are "equally deserving of punishment as principals under Section 924(c)." Br. in Opp. 9 (internal quotation marks omitted). There are two possible explanations for that statement, and both are bad. The first is that the government, while wanting to avoid any *jury finding* that the defendant intentionally facilitated the firearm's use, wants courts *simply to assume* that the defendant intended to facilitate use of the firearm and "[did] some act to render aid." Shumaker & Langsdorf, *supra*, at 41-42. But "courts have the responsibility" in applying principles of accomplice liability "to make sure that mere speculation is not permitted to substitute for proof." *United States* v. *Kelton*, 446 F.2d 669, 671 (8th Cir. 1971) (internal quotation marks omitted).

The other possible explanation is no better. It is that, lacking any compelling *legal* arguments for why a defendant should be punished as a principal for aiding and abetting an offense he neither intended to facilitate nor did facilitate, the government is simply appealing to a sense of rough justice: people who commit crimes at which a gun is present, like the people who actually choose to use guns to facilitate their crimes, or intentionally facilitate the use of guns in a crime, should not be heard to object to the "severe penalties of § 924(c)." *Busic*, 446 U.S. at 404

n.9.[11] But those who do not intentionally act to facilitate the use of a firearm at a crime are "clearly less culpable than those directly participating in the crime." 2 LaFave, *supra*, § 13.2(d). That understanding is borne out by the Sentencing Guidelines, which, for example, provide a relatively modest 2-level increase for defendants who participate in drug offenses knowing their codefendants will be armed (or when that is foreseeable).[12] Application of that enhancement here would have increased Rosemond's advisory sentencing range a maximum of 18 months (from 70-87 to 84-105 months; the district judge sentenced Rosemond well below the Guidelines), a far cry from the consecutive mandatory minimum *120-month* sentence prescribed here by Section 924(c)—more than a six-fold increase.

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[11] An alternatively explanation is that this statement embodies the idea that "a person cannot knowingly benefit from the protection afforded by the firearm carried by his companion and then subsequently evade criminal liability for its presence." Br. in Opp. 12 (internal quotation marks omitted). But, without more, simply "benefit[ting]" from the use of a firearm does not involve intentional facilitation of the principal's use of the weapon, see p. 27, *supra*, and is adequately punished by a sentencing enhancement to the predicate violent or drug-trafficking crime.

[12] *E.g.*, *United States* v. *Miles*, 346 F. App'x 993, 994 (5th Cir. 2009) (per curiam) (enhancement appropriate where "there is evidence that Miles's coconspirator possessed a firearm during the course of the [drug] conspiracy and that Miles saw and heard about the coconspirator's gun"); *United States* v. *Emerson*, 501 F.3d 804, 815 (7th Cir. 2007) (enhancement appropriate where recording indicated coconspirator discussed his gun with defendant while planning crime).

The government's description of the deterrent effect the Tenth Circuit's rule purportedly serves makes plain that it does not really address aiding and abetting Section 924(c) so much as it does the predicate drug trafficking crime. As the government notes, "the chief legislative objective of * * * Section 924(c) is 'to persuade the man who is tempted to commit a Federal felony to leave his gun at home.'" Br. in Opp. 9 (quoting *Muscarello* v. *United States*, 524 U.S. 125, 132 (1998)). But because the Tenth Circuit's rule sweeps in those who have no involvement in encouraging or facilitating the use of a firearm, that incentive has no application here. Instead, the rule encourages the defendant "to leave hi[mself] at home." *Ibid.* As the government puts it, the Tenth Circuit's rule "deter[s]" people "from *participating in the criminal enterprise* when they know of their confederate's use * * * of a firearm." *Ibid.* (emphasis added). While the government's use of the vague term "criminal enterprise" obscures the effect of the Tenth Circuit's rule, the "criminal enterprise" refers to the predicate drug trafficking offense, the only "criminal enterprise" the defendant has been found to "participate[] in." Pet. App. 7a. But deterring *that* offense is the work of 21 U.S.C. § 841 and the associated Guidelines' firearms enhancement, not Section 924(c), which is a "distinct" crime and "not simply a penalty provision." See *Castillo*, 530 U.S. at 125. It is no justification for an unprecedented, expansive interpretation of aiding and abetting liability.

D. The Rule Of Lenity Mandates Requiring Proof That A Section 924(c) Defendant Intentionally Facilitated Or Encouraged The Firearm's Use

If the plain language of Section 2, the centuries-old common-law understanding of the requirements for "aiding and abetting" liability, and the circumstances surrounding the passage of the provision and its legislative history "fail to establish that the Government's position is unambiguously correct," *Granderson*, 511 U.S. at 54, then this Court must "apply the rule of lenity and resolve the ambiguity in [Rosemond's] favor." *Ibid.* It is well established that, "when there are two rational readings of a criminal statute, one harsher than the other," this Court will "choose the harsher only when Congress has spoken in clear and definite language." *McNally* v. *United States*, 483 U.S. 350, 359-360 (1987). In light of the language of Section 2, the established common-law understanding, and rejection by the "vast majority" (Pet. App. 10a) of circuits, it is plain that, at a minimum, the government's view is not "unambiguously correct."

As discussed above, see pp. 36-38, *supra*, the Tenth Circuit's conception of aiding and abetting liability relieved the government from proving that Rosemond took *any* affirmative act to facilitate the criminal activity he allegedly aided and abetted—the use of a firearm during and in relation to a drug-trafficking offense. That rule relies on a novel conception of aiding and abetting liability; "if the rule of lenity * * * means anything, it means that the familiar meaning of [a statute's] word[s] * * * should

be preferred to the vague and obscure." *Scheidler* v. *Nat'l Org. for Women, Inc.*, 537 U.S. 393, 403 n.8 (2003). To accept the government's reading would require a novel application of "aiding and abetting," "subject[ing] [defendants] to punishment that is not clearly prescribed" by the statute. *United States* v. *Santos*, 553 U.S. 507, 514 (2008). If Congress had meant to take such an expansive view of aiding and abetting liability, "it would have spoken more clearly"; absent that, "the rule of lenity * * * counsel[s] in favor of an interpretation of the statute that does not reach so broadly." *Sekhar*, 133 S. Ct. at 2730 (Alito, J., concurring).

Aside from the unfairness of punishing someone for conduct that is not clearly proscribed, there is another good reason why this Court construes a criminal statute in favor of the defendant when the government's reading fails to be "unambiguously correct," *Granderson*, 511 U.S. at 54: Doing so "keeps courts from making criminal law in Congress's stead" and "places the weight of inertia upon the party that can best induce Congress to speak more clearly." *Santos*, 553 U.S. at 514. Congress has shown itself more than capable of taking action when it concludes Section 924(c) has been interpreted too narrowly. See, *e.g.*, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469, 3469 (1998) (amending 18 U.S.C. § 924(c)(1) to abrogate the holding of *Bailey*, *supra*, by expanding the scope of Section 924(c)). Absent stronger indication that Congress meant to apply aiding and abetting liability so broadly, the statute should be interpreted to require proof the defendant

intentionally facilitated or encouraged the use of a firearm.

E. Rosemond's Section 924(c) Conviction Must Be Reversed

It is well settled that a verdict is constitutionally infirm where a jury is instructed on alternative theories of guilt and returns "a general verdict that may rest on a legally invalid theory." *Skilling*, 130 S. Ct. at 2934 (citing *Yates* v. *United States*, 354 U.S. 298 (1957)). Reversal is therefore required unless the government proves the error was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18, 24 (1967). To determine whether the government has met that "strict" standard, *California* v. *Roy*, 519 U.S. 2, 5 (1996) (per curiam), the inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered." *Sullivan* v. *Louisiana*, 508 U.S. 275, 279 (1993). Rather, it involves whether "the guilty verdict actually rendered in this trial was *surely unattributable* to the error." *Ibid.* (emphasis added).

Error may be harmless, for example, when a jury is not asked to find an element "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence." *Neder*, 527 U.S. at 17. Because Rosemond's involvement in the Section 924(c) offense was hotly contested, and "the record contains evidence that could rationally lead to a * * * finding" that Rosemond *did not* intentionally facilitate or encourage use of the firearm, *id.* at 19, it is impossible to "confidently say" that the Tenth Circuit's error "did not contribute to the verdict

obtained," *id.* at 16, 17 (internal quotation marks omitted). Rosemond's Section 924(c) conviction cannot stand.

To begin with, there is no serious question that the jury could rationally conclude that Rosemond was not the shooter. The *only* eyewitnesses who saw the firearm discharged, who concededly "got a good view of the parking lot" (J.A. 146), said that a single man stepped from the *driver's* side of the car to fire the pistol, J.A. 39, 41-42, 48. That is the position that both buyer Ricardo Gonzales and confederate Ronald Joseph testified *Joseph* occupied during the transaction, J.A. 92-93, 98, 126, see also J.A. 123 (Joseph testifies petitioner shot from *passenger's* side of vehicle), and it was the rear-seat passenger Gonzales punched before fleeing out the driver's side door, J.A. 95-96. Although Perez initially told police that Rosemond—a stranger to her, J.A. 100—committed the shooting rather than her boyfriend's nephew Joseph (whom she had known for months, J.A. 115-116), she recanted that testimony at trial, after her relationship with his uncle had ended, see J.A. 112-113, 119. There is a reason the jury sought clarification of the standards for aiding and abetting liability, see J.A. 210; it concluded Rosemond was *not* the shooter, cf. J.A. 205 (government attorney concedes, "I still don't think we know what * * * the basis for the[] verdict was").

There is no serious question that the evidence amply supported the conclusion that Rosemond did not intentionally facilitate or encourage use of a firearm. It is undisputed that Rosemond had just met Perez and Joseph, see J.A. 100, 118; there is no

evidence of a prior relationship that would lead Rosemond to believe either would be armed for the sale of a "measly" amount of poor-quality marijuana, J.A. 207, 93. Indeed, Perez, who arranged the drug transaction and knew Joseph far better than Rosemond did, testified that she was unaware there was a gun present and was "very much in shock" when one was used, J.A. 111, 113, indicating no gun was discussed or displayed beforehand; Gonzales likewise saw nothing to make him aware of any gun, J.A. 96. The evidence suggested the front-seat passenger was quite passive throughout the transaction; both buyers testified that the front-seat passenger "did not turn around and he did not say a word to either of" them. J.A. 87, 92. Perez told police that, after the use of the firearm was complete and the shooter was trying to hide the firearm, "either Justus [Rosemond] or Ronald Joseph[] said, ['I don't want to touch the gun,']" J.A. 111, 134—compelling evidence of an intent *not* to "facilitate" or "encourage" use of the weapon. Although Perez told police that Rosemond, the stranger who had since returned to Texas, and not her boyfriend's nephew, had both hidden the pistol and later removed it from her car, she recanted at trial, saying she "d[id]n't remember saying that" and "d[id]n't know" whether Rosemond had handled the gun. J.A. 112-113, 115.[13]

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[13] The government contends that Rosemond somehow "facilitated" use of the firearm by "pursu[ing] Gonzales in the vehicle" after the shooting was completed. Br. in Opp. 15; *id.* at 10 n.2. Even if that conduct could facilitate the already-complete firearm use, the evidence indicates that the front-seat passenger was passive and took no steps to "pursue" Gonzales

There is therefore no serious question that "the record contains evidence that could rationally lead to a * * * finding" that Rosemond did not intentionally facilitate or encourage use of the firearm, *Neder*, 527 U.S. at 19. The jury convicted Rosemond of aiding and abetting solely because the district court required only a negligible showing—participation in the drug offense together with knowledge a confederate had a gun, even if Rosemond only learned of the gun's use at the moment "when shots [we]re fired." J.A. 158; U.S. C.A. Br. 12 ("there was sufficient evidence of this knowledge" that "[Rosemond's] cohort used a firearm in the underlying crime" based on testimony that when "Rosemond was in the immediate vicinity, one of Rosemond's cohorts fired several gunshots"). That standard required so little that the government's closing argument did not identify a *single act* of Rosemond's that facilitated or encouraged the firearm's use—other than *listening*. The district judge's comment that this was a "great issue for

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and Painter. The sole disinterested eyewitnesses indicated that the front-seat passenger never exited (and thus did not reenter) the car, J.A. 39-40, 41-42, 48, and the fact that Perez immediately "took off at a high rate of speed" after the shooting, J.A. 42, 49, suggests Rosemond had no opportunity to step out of the car and end his involvement with Perez and Joseph, if he even would have dared to try after Joseph fired his pistol. Perez testified to no actions by petitioner to suggest he was participating in any pursuit, and recalled nothing he said to suggest participation, J.A. 110; indeed, Perez testified that "*I* was trying to catch up to the other guys that took the stuff," J.A. 109 (emphasis added).

appeal" (J.A. 140) certainly suggests he believed it had the potential to affect the verdict.

In its brief in opposition, the government for the first time argued that the error here was harmless, contending that because the jury convicted Rosemond under Counts 3 and 4 of possessing the shell casings found at the scene, and the jury was not explicitly instructed on aiding and abetting liability for those counts, the jury *necessarily* concluded that Rosemond possessed the firearm that had held them. Br. in Opp. 14. But in granting review notwithstanding that argument, this Court "necessarily considered and rejected that contention" as a basis to avoid deciding the question presented. *United States* v. *Williams*, 504 U.S. 36, 40 (1992). This Court's "normal practice where the court below has not yet passed on [harmlessness]" is to leave it "to the Court of Appeals * * * to consider [the argument] in the first instance." *Neder*, 527 U.S. at 25. But in any event, the argument is meritless; the far likelier conclusion is that the legally flawed "aiding and abetting" instruction permitted Rosemond to be convicted of "possessing" ammunition inside a confederate's firearm.

The district court instructed the jury that possession of a firearm is an element of a Section 924(c) violation, and that the "possession involved carrying, using, brandishing or discharging the firearm." J.A. 191-192. The court also explicitly instructed the jury that "[a]iding and abetting is simply another way of committing the offense[]," J.A. 195, making clear that those who aided and abetted a Section 924(c) were liable for "possession." It

reinforced that conclusion by emphasizing that "[p]ossession may be sole or joint," "actual [or] constructive," and that the term applied to any exercise of "authority, dominion, or control over" the firearm, J.A. 200; see also J.A. 187 (stating that "a person need not have actual physical custody of an object in order to be in legal possession of it"); J.A. 198. After the judge explicitly instructed the jury that it should "find that [Rosemond] 'used' the firearm" (J.A. 203) if it believed he "aided and abetted" the offense, J.A. 211, it is unsurprising that the jury concluded that in "us[ing]" the firearm, he "possessed" the ammunition inside the weapon—a conclusion contemplated by the instructions, which explicitly permitted possession "jointly with another," J.A. 193, specifically the person who actually brandished and discharged the firearm.

In short, this court can have no "confidence" that the error "did not contribute to the verdict obtained." *Neder*, 527 U.S. at 16, 17. Justus Rosemond's Section 924(c) conviction must be reversed.

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

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AUGUST 2013