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 UNITED STATES

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QUESTION PRESENTED

Whether a defendant may be convicted of aiding and abetting the use or carriage 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) and 2, if the defendant actively participated in a crime of violence or drug-trafficking crime and knew that an accomplice used or carried a firearm in the commission of that offense.

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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 within which to file a petition for a writ of certiorari to and including January 16, 2013. The petition was filed on that date, and was granted on May 28, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in the appendix to this brief. App., *infra*, at 1a-14a.

STATEMENT

Following a jury trial in the United States District Court for the District of Utah, petitioner was convicted on one count of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Count 1); one count of using, carrying, brandishing, and discharging a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c) and 2 (Count 2); one count of possession of ammunition by a felon, in violation of 18 U.S.C. 922(g)(1) (Count 3); and one count of possession of ammunition by an illegal alien, in violation of 18 U.S.C. 922(g)(5)(A) (Count 4). Pet. App. 28a-30a; J.A. 11-13. He was sentenced to concurrent sentences of 48 months of imprisonment on Counts 1, 3, and 4, and a consecutive sentence of 120 months of imprisonment on Count 2, to be followed by five years of supervised release. Pet. App. 15a, 18a. The court of appeals affirmed. *Id.* at 1a-11a.

1. On August 26, 2007, Vashti Perez brokered a deal for the sale of one pound of marijuana to Ricardo Gonzales and Coby Painter, which was to take place in a park in Tooele, Utah. Pet. App. 2a. She told Gonzales and Painter that the marijuana belonged to two men looking to dispose of it before returning home to Texas. See J.A. 79-80.

That evening, Perez drove to the park in a blue Mazda Protegé to conduct the transaction. J.A. 102. With her in the car were two men. *Ibid.* The first was petitioner, a Texan visiting town with his brother, a friend of Perez's boyfriend. J.A. 100, 118-120. The second was Ronald Joseph, the nephew of Perez's boyfriend. J.A. 115, 118. At least one man sat in the

backseat, but witnesses later had different recollections about which man sat where.

Gonzales and Painter arrived at the park around 9:00 p.m. J.A. 80. While Painter waited outside, Gonzales entered Perez's car through a backdoor. J.A. 91-92. A man sitting in the backseat of the vehicle then allowed Gonzales to examine the marijuana. J.A. 122. Instead of paying for it, however, Gonzales punched that man in the face and fled with the marijuana. Pet. App. 2a; J.A. 95, 122. As Gonzales and Painter ran away, one of the two male occupants of the car fired several shots from a 9-millimeter semiautomatic handgun. Pet. App. 2a; J.A. 124. Because the deal had occurred near a residential community, multiple witnesses heard the shots, and one bullet landed on the sidewalk adjacent to a senior citizen's home. See J.A. 30-31, 39-40, 166; 12/13/2010 Trial Tr. 78-79, 86-87 (testimony of David Hammond).

Petitioner, Joseph, and Perez then set out after Gonzales in the car. J.A. 109, 125. They were stopped by a state trooper a short time later, however, after a police dispatcher announced that shots had been fired in the park and that a blue vehicle carrying three passengers had driven away from the scene of the shooting. Pet. App. 2a-3a; J.A. 44, 56-57. As the trooper walked up to Perez's stopped car, petitioner, who was sitting in the front passenger seat, was recorded by the trooper's video camera turning around and making movements. J.A. 58. After obtaining Perez's consent, a second trooper searched the car but did not find a firearm. Pet. App. 3a; J.A. 57, 62-63. The troopers therefore did not make an arrest at that time.

In the weeks immediately after the shooting, the police conducted a further investigation. They discovered seven 9-millimeter shell casings in the park near the scene of the shooting. J.A. 45-47. Officers interviewed Perez, who identified petitioner as the shooter and explained that he had concealed the gun in the car during the traffic stop and retrieved it later. J.A. 105-108, 111-114. The police also ultimately learned that petitioner was a convicted felon and an alien in the country illegally. See J.A. 199.

2. a. Petitioner was indicted in the United States District Court for the District of Utah on one count of possessing marijuana with intent to distribute it and aiding and abetting that offense, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Count 1); one count of using, carrying, brandishing, and discharging a firearm during and in relation to a drug-trafficking crime and aiding and abetting that offense, in violation of 18 U.S.C. 924(c) and 2 (Count 2); one count of possession of ammunition by a felon, in violation of 18 U.S.C. 922(g)(1) (Count 3); and one count of possession of ammunition by an illegal alien, in violation of 18 U.S.C. 922(g)(5)(A) (Count 4). J.A. 11-13. He pleaded not guilty, and the case proceeded to a jury trial.

The government argued that petitioner had been the man sitting in the backseat of Perez's car, and that, after Gonzales absconded with his marijuana, petitioner had discharged the semiautomatic handgun. At trial, Perez and Joseph both testified that the marijuana had belonged to petitioner and that he was the man Gonzales had punched. J.A. 99-100, 104-105, 117, 122. Joseph testified that petitioner had fired the shots at Gonzales. Pet. App. 3a; J.A. 123-124. Perez,

who had signed a declaration immediately after the incident stating that petitioner "did the shooting," testified that she did not directly "see [petitioner] fire the gun but in my mind that's what I thought happened," likely because the drugs belonged to him. J.A. 105-108. Both said that everyone had exited the vehicle when the firing started and then had reentered the vehicle to pursue Gonzales, with petitioner at that point sitting in the front seat. J.A. 109, 124. Painter testified that a man most closely matching petitioner's description ("bald and wearing glasses") had been the person Gonzales punched. J.A. 61, 83. Gonzales, however, testified that the man matching Joseph's appearance ("in an Indianapolis Colts jersey") had been the person in the backseat, J.A. 92-95, while Joseph said that he thought that both he and petitioner had been sitting in the backseat, J.A. 122.

Joseph also testified that the state trooper had not found the firearm during the search of the vehicle because petitioner had concealed it under the backseat. J.A. 128. Perez claimed not to remember petitioner's concealment of the firearm and subsequent retrieval of it. J.A. 111-112. Consistent with the video recording, which was introduced into evidence, the trooper who had stopped Perez's car testified that, at the time of the stop, petitioner was the only occupant who was "moving around a lot inside the vehicle." J.A. 57-59, 68-69.

b. Count 2 charged petitioner with violating 18 U.S.C. 924(c). The "use or carry" prong of that provision subjects to a mandatory-minimum sentence of five years "any person who, during and in relation to any crime of violence or drug trafficking crime[,] * * * uses or carries a firearm," with seven- and

ten-year minimums, respectively, if a firearm is brandished or discharged. 18 U.S.C. 924(c)(1)(A). That sentence must run consecutively to any sentence imposed for the crime of violence or drug-trafficking crime. 18 U.S.C. 924(c)(1)(D)(ii). In this case, the underlying drug-trafficking crime was the charge of possession of marijuana with intent to distribute it set forth in Count 1.

Consistent with the indictment, the government sought aiding-and-abetting instructions for Counts 1 and 2. The district court accordingly instructed the jury that "you may find a defendant guilty of the offense charged if you find beyond a reasonable doubt that the government has proved that another person actually committed the offense with which the defendant is charged, and that the defendant aided or abetted that person in the commission of the offense." J.A. 195. "In order to aid or abet another to commit a crime," the court continued, "it is necessary that the defendant willfully and knowingly associated himself in some way with the crime, and that he willfully and knowingly seeks by some act to help make the crime succeed." J.A. 196 (paraphrasing *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949)). Petitioner did not object to that instruction.

Petitioner and the government, however, proposed different jury instructions with respect to how that general standard applies to a Section 924(c) offense. Petitioner requested a two-pronged instruction stating that "[t]he 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. 14-15. The government proposed an instruction that was materially identical on the first prong, but that for the second prong stated that "the defendant knowingly and actively participated in the drug trafficking crime." J.A. 16. Although petitioner acknowledged that the government's instruction was consistent with circuit precedent, he objected to it on the ground that the relevant Tenth Circuit decisions each involved crimes of violence, not drug-trafficking crimes. J.A. 138-140.

The district court called petitioner's proffered distinction a "great issue for appeal" but ultimately rejected it. J.A. 140. The court accordingly instructed the jury that to find petitioner guilty of aiding and abetting the Section 924(c) offense, it "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." J.A. 195-196.

The government did not seek an aiding-and-abetting instruction on the two ammunition-possession counts (Counts 3 and 4). See J.A. 194-195. The court therefore told the jury that to convict petitioner on those counts, it was required to find that petitioner "knowingly possessed the ammunition." J.A. 198, 199.

c. In its summation, the government argued that "the evidence establishes beyond a reasonable doubt that it was [petitioner] who fired at least seven rounds from a 9 millimeter semi-automatic handgun" in order to protect the marijuana that petitioner "had brought to the park to sell." Pet. App. 32a; J.A. 141-142. The government also advanced the "alternative legal theo-

ry" that the jury could convict petitioner for aiding and abetting the Section 924(c) offense. J.A. 157-158. Under that theory, the government explained, if one of petitioner's accomplices had "fired the gun, [petitioner is] still guilty of the crime * * * based on the evidence before you." *Ibid.* Petitioner "certainly knew and actively participated" in the drug-trafficking crime, the government argued, and "a person cannot be present and active at a drug deal when shots are fired and not know their cohort is using a gun." J.A. 158. With respect to the ammunition-possession counts, the government argued that because the evidence established that petitioner had possessed the firearm, "he had to have also possessed the cartridge cases that were inside the 9 millimeter [gun]." J.A. 159.

Defense counsel suggested to the jury that Joseph, Gonzales, or Painter could have been the shooter and that the marijuana might have belonged to Perez and Joseph. J.A. 163, 171, 173. He made no argument that petitioner could have possessed the ammunition without possessing the gun.

d. During deliberations, the jury sent a note to the trial judge asking whether "aiding and abetting appl[ied] to Question Three" on the verdict form. J.A. 210 (capitalization altered). Question 3 asked the jury to determine, if it found petitioner guilty on Count 2, whether petitioner had "used," "carried," "brandished," or "discharged" a firearm. J.A. 203. The court instructed the jury to answer Question 3 if the jury found petitioner guilty of Count 2 under any theory. J.A. 211.

The jury found petitioner guilty on all four counts and checked all four options in Question 3. J.A. 202-

204. The verdict form did not require the jury to indicate whether it found petitioner guilty on the first two counts because he committed the offense or because he aided and abetted another's commission of it. Pet. App. 28a-30a. The district court sentenced petitioner to concurrent terms of 48 months of imprisonment on Counts 1, 3, and 4 and a consecutive 120-month sentence on Count 2, to be followed by five years of supervised release. See J.A. 207-208.

3. On appeal, petitioner argued that the district court's instruction on aiding and abetting a Section 924(c) offense was erroneous insofar as it stated that the government was required to prove that "the defendant knowingly and actively participated in the drug trafficking crime." Pet. C.A. Br. 18-19. He argued, consistent with his objection at trial, that the government was required to prove that he "intentionally [took] some action to facilitate or encourage the use of a firearm." *Ibid.*

The court of appeals rejected that argument and affirmed petitioner's conviction. Pet App. 5a-10a. The court held that, whether the underlying crime is a crime of violence or a drug-trafficking crime, a person is guilty as an aider and abettor when he "(1) kn[e]w a cohort used a firearm in an underlying crime of violence, and (2) knowingly and actively participated in that underlying crime." *Id.* at 7a-8a (citation omitted).

SUMMARY OF ARGUMENT

I. The district court correctly instructed the jury on aiding and abetting a Section 924(c) violation.

A. The parties agree 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." Pet. Br. 13 (emphases added). Petitioner contends that to aid and abet a violation of Section 924(c), an individual must "intentionally facilitate or encourage the use of a firearm." Pet. i. That issue focuses on the affirmative-act requirement of aiding and abetting: must the defendant take action directed specifically at facilitating the firearm's use or carriage? In accordance with a long and unbroken understanding of the law of aiding and abetting, a defendant need not assist in every aspect of the criminal venture or directly aid the principal's completion of every element of the offense, so long as the defendant facilitated *some* aspect of the crime and intended that the charged criminal venture succeed. Under that test, petitioner's claim fails.

1. Since long before Congress codified the doctrine of accomplice liability in Section 2(a), it has been understood that "[a] defendant can be convicted as an aider and abettor without proof that he participated in each and every element of the offense." *United States* v. *Sigalow*, 812 F.2d 783, 785 (2d Cir. 1987). As the very sources petitioner cites explain, "[*a*]*ny participation* in a general felonious plan, provided such participation be concerted * * * is enough to make a man an [accomplice] as to any crime committed in execution of the plan." 1 Francis Wharton, *A Treatise on Criminal Law* § 213, at 231 (10th ed., Phil., Kay & Brother 1896) (Wharton) (emphasis added). Applying that blackletter principle, this Court has concluded that the fact that an accomplice does not participate in every element of an offense is no barrier to conviction. See *Pereira* v. *United States*, 347 U.S. 1, 8-10 (1954).

2. That rule defeats petitioner's claim. To secure a conviction of a person for violating Section 924(c), the government must prove "[i] that [the defendant] used [or carried] a firearm, [ii] that he 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 [iii] that he used [or carried] the gun 'during and in relation to'" that crime. *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999). This Court has made clear that Section 924(c) "proscribe[s] both the use of the firearm *and* the commission of acts that constitute a violent crime" or drug-trafficking crime. *Id.* at 281. When a defendant furnishes aid or encouragement with respect to either of those "essential conduct elements," *id.* at 280, he satisfies the affirmative-act requirement. And when he does so with the intent to help a person complete the Section 924(c) offense, he is guilty as an accomplice.

Petitioner argues that the government's position "conflates two distinct offenses" by making the requirements for aiding and abetting the crime of violence or drug-trafficking crime coextensive with the requirement of aiding and abetting the Section 924(c) violation. Pet. Br. 38 (capitalization altered). But all agree that it is not enough for conviction that a person intentionally aid the commission of a crime of violence or drug-trafficking crime. Rather, to aid and abet a Section 924(c) violation, the person must intend that his assistance will help another person commit the crime of violence or drug-trafficking crime with a firearm. That *intent* can exist (and be proved) even if the manner in which the defendant facilitates the Section 924(c) offense is to aid in the predicate crime.

3. No sound reason exists to depart from the settled understanding of accomplice liability in the Section 924(c) context. The basic legislative objective of Section 924(c)—to prevent the dangerous combination of guns with violence or drugs—would be ill-served by petitioner's narrow view of accomplice liability. That view would also produce substantial disparities in sentences imposed on different offenders without any defensible justification. Petitioner's approach would further generate a host of imponderable questions for juries and courts based on the need to draw fine lines over what conduct directly facilitates firearm use. And although petitioner observes that eight of the eleven circuits to consider the issue have technically adopted his position, the majority of those circuits have held that a defendant can be liable as an accomplice if he merely "benefits" from his confederate's use or carriage of the firearm—a rule indistinguishable in practical application from the government's approach.

B. 1. Throughout his brief petitioner also appears to challenge whether the instructions below adequately described the intent requirement for accomplice liability. But that is not the question on which this Court granted certiorari, and petitioner did not object to the intent instructions below. The Tenth Circuit has long held that the defendant must have "acted with the intention of causing the [Section 924(c) offense] to be committed" by the principal, *United States* v. *Bindley*, 157 F.3d 1235, 1238 (1998), cert. denied, 525 U.S. 1167 (1999), and petitioner's case-specific, untimely claim of instructional error does not warrant this Court's review. At minimum, the claim should be reviewed for plain error.

2. The district court's intent instructions were correct in any event. The court instructed the jury that it had to find that petitioner "willfully and knowingly" sought "to help make the crime succeed" by intentionally participating in the drug-trafficking offense knowing that his confederate would commit it with a firearm. J.A. 196. That instruction was correct because "it has always been enough [for aiding and abetting] that the defendant, knowing what the principal was trying to do, rendered assistance that he believed would * * * make the principal's success more likely." *United States* v. *Ortega*, 44 F.3d 505, 508 (7th Cir. 1995) (Posner, J.).

II. If this Court finds instructional error, it should either hold that the error was harmless or remand to the court of appeals for a harmless-error analysis. The jury convicted petitioner of two counts of possessing ammunition without receiving an aiding-and-abetting instruction on those counts. The government's only theory on those counts was that petitioner had fired the gun. At minimum, petitioner's possession of the very ammunition that a confederate used in discharging a firearm would satisfy the requirements for accomplice liability under any conceivable standard.

ARGUMENT

I. THE DISTRICT COURT'S AIDING-AND-ABETTING INSTRUCTIONS WERE CORRECT

A. Active Participation In A Crime Of Violence Or Drug-Trafficking Crime Satisfies The Affirmative-Act Requirement For Accomplice Liability

Under Section 2(a) of Title 18, "[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). The parties agree that accomplice liability under Section 2(a) has two requirements: "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." Pet. Br. 13 (emphases added). Those two requirements—an affirmative act of assistance or encouragement and the intent to help the principal commit the offense—follow from this Court's teaching that "it is necessary that a defendant 'in some sort associate himself with the [criminal] venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed.'" *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949) (quoting *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (Hand, J.)); see *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994) ("[Section 2(a)] decrees that those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime.").

The question on which this Court granted certiorari concerns the first, affirmative-act requirement:

"[w]hether the offense of aiding and abetting the [Section 924(c) offense] requires proof of * * * intentional facilitation or encouragement of the use of the firearm." Pet. i. The answer to that question is no. This Court has held that the "use or carry" prong of Section 924(c) has two "essential conduct elements": the carriage or use of a gun *and* the commission of a crime of violence or drug-trafficking crime. See *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999). It has long been settled that any aid or encouragement relating to the criminal venture satisfies the affirmative-act requirement for aiding and abetting; the defendant need not participate in *every* aspect of the venture. Accordingly, proof that a defendant assisted or encouraged either conduct element of the Section 924(c) offense, with the intent to help the principal complete the offense, establishes accomplice liability. Petitioner has identified no compelling reason in history or practical policy to depart from the principle that "[a] defendant can be convicted as an aider and abettor without proof that he participated in each and every element of the offense." *United States* v. *Sigalow*, 812 F.2d 783, 785 (2d Cir. 1987).

1. An accomplice need not directly facilitate or encourage each element of the offense

The federal aiding-and-abetting statute was enacted in 1909 against a well-settled common-law backdrop of accomplice liability. See *Standefer* v. *United States*, 447 U.S. 10, 18-19 (1980); Act of Mar. 4, 1909, ch. 321, § 332, Pub. L. No. 60-350, 35 Stat. 1088, 1152. Although the enactment abolished certain procedural distinctions between different classes of accessories, it did not modify the longstanding principle that "the government need not prove assistance related to eve-

ry element of the underlying offense." *United States* v. *Woods*, 148 F.3d 843, 850 (7th Cir. 1998).

a. Section 2(a) subjects to punishment as a principal two categories of common-law accomplices: second-degree principals and accessories before the fact. See *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 189 (2007); *Hammer* v. *United States*, 271 U.S. 620, 628 (1926); S. Rep. No. 10, 60th Cong., 1st Sess. Pt. 1, at 13-14 (1908). A second-degree principal was "one who shares the guilty purpose and, while not taking part in the actual commission of the crime, is present, encouraging, assisting, or abetting its commission, or is so near, as to be of material service to the criminal at the very time of the commission, and is there for that purpose." John G. Hawley & Malcolm McGregor, *The Criminal Law* 81 (5th ed., Detroit, Sprague Publishing Co. 1908) (Hawley & McGregor). An accessory before the fact was even further removed from the ultimate criminal acts: "one who procures, advises, commands, or solicits a crime to be committed by a guilty agent, or, furnishes aid in advance towards its commission, but is not present when the crime is committed, and does not, at that time, aid or abet its commission." *Id.* at 82; see also William L. Clark & William L. Marshall, *A Treatise on the Law of Crimes* § 176, at 245 (2d ed., St. Paul, Keefe-Davidson Co. 1905) (Clark & Marshall). The verbs that Congress employed in Section 2(a)—"aids, abets, counsels, commands, induces, or procures"—capture those two types of accomplices. See Wayne R. LaFave, *Criminal Law* 666 (4th ed. 2003) (LaFave).

At common law, conviction as a second-degree principal or an accessory before the fact required only minimal participation in the offense—as the very

sources petitioner cites make clear. As explained by the 1896 edition of the Wharton treatise (then, as now, a "leading treatise," Pet. Br. 18-19), "[*a*]*ny participation* in a general felonious plan, provided such participation be concerted, and there be constructive presence, [was] enough to make a man principal in the second degree." 1 Wharton § 213, at 231. If a defendant was "present abetting while *any act* necessary to constitute the offence [was] being performed through another, though *not the whole thing necessary* * * * he [was] a principal." 1 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 649, at 360 (6th ed. rev. 1877) (emphases added) (footnote omitted). And "[w]here several acts constitute[d] together one crime, if each [was] separately performed by a different individual in the absence of all the rest, all [were] principals as to the whole." *Id.* § 650, at 360. "Thus," Wharton explained by way of example, "if several act in concert to steal a man's goods, and he is induced by fraud to trust one of them, in the presence of the others, with the possession of the goods, and then another of the party entice the owner away so that he who has the goods may carry them off, all are guilty as principals." Wharton, § 213, at 231; see, *e.g.*, *Mitchell* v. *Commonwealth*, 74 Va. (33 Gratt.) 845, 868-869 (1880).

Courts did not require that a defendant perform any particular act to be liable as an accomplice. Indeed, it was "enough to make one a principal in the second degree if he [was] present in concert with the actual perpetrator of the offense, for the purpose of assisting if necessary, or of watching and preventing interference or detection, or for the purpose of encouragement." Clark & Marshall § 174, at 244; see,

e.g., *Hicks* v. *United States*, 150 U.S. 442, 450 (1893) (explaining that presence of accomplice is sufficient for liability so long as parties had previously agreed that he would be present for the purpose of assistance). For example, defendants who did not themselves directly assist in breaking into a building during a burglary, but who were "ready and near enough to render * * * assistance" with knowledge of the first-degree principals' actions, were considered second-degree principals. *Doan* v. *State*, 26 Ind. 495, 495 (1866). Matthew Hale similarly explained in the context of murder that "[i]f many be present, and only one gives the stroke, whereof the party dies, they are all principal, if they came for that purpose." 1 Matthew Hale, *The History of the Pleas of the Crown* 440 (1736).

What was vital was not assistance or encouragement in every aspect of the criminal enterprise, but assistance or encouragement with the intent to help or encourage the principal to commit the offense. It was sufficient for liability that the defendant "do or say something showing consent to the felonious purpose, and * * * contribute something to its execution," but "[t]he quantity [was] immaterial." Robert Desty, *A Compendium of American Criminal Law* § 37a, at 106 (S.F., Sumner Whitney & Co. 1882).

b. Section 2(a) incorporates that established principle. As petitioner explains, "Congress gave no indication, when it enacted the predecessor of Section 2, that it did not intend to incorporate the well-settled meaning of 'aiding and abetting.'" Pet. Br. 24 (internal quotation marks and citation omitted). That term of art "comprehends *all* assistance rendered by words, acts, encouragement, support, or presence." *Reves* v.

Ernst & Young, 507 U.S. 170, 178 (1993) (quoting *Black's Law Dictionary* 68 (6th ed. 1990)) (emphasis added). Congress employed "a term of breadth," *ibid.*, that includes any acts providing support for the crime, even if the acts do not facilitate the principal's completion of every element of the offense. And when Congress amended the statute in 1951 to provide that an accomplice "is punishable as a principal" (rather than "is a principal"), it did so to dispel any doubt that a person could be liable even if she could not satisfy a personal-status element of a particular offense (*e.g.*, solicitation of a bribe by a public official, 18 U.S.C. 201(a)(2)). See S. Rep. No. 1020, 82d Cong., 1st Sess. 7-8 (1951). Congress thus understood that accomplice liability does not require the defendant to take part in a direct way in every element of the offense.

This Court has applied this basic tenet of accomplice liability. In *Pereira* v. *United States*, 347 U.S. 1 (1954), the defendant was charged with aiding and abetting mail fraud, 18 U.S.C. 1341, the elements of which comprise a scheme to defraud and the use of the mail for the purpose of executing the scheme. See 347 U.S. at 8-9. The accomplice had knowingly participated in the fraudulent scheme—a "confidence game" in which the principal married a woman on false pretences to induce her to lend money to him—"from beginning to end," thus facilitating the first element of mail fraud. *Id.* at 6, 10. But the evidence showed that it was the principal actor who alone had "caused" the charged mailing. See *id.* at 8, 9; see also *id.* at 15 (Minton, J., concurring in part and dissenting in part) ("Concededly, [the accomplice] did not participate directly in the use of the mails.").

Notwithstanding the defendant's nonparticipation in that element of the offense, the Court held that the "jury could conclude that [he] aided, abetted, or counseled [the principal] in the commission of the specific acts charged," 347 U.S. at 10-11, on the theory that he "shared [the principal's] knowledge" that the mails would be used for "the realization of their common goal," *id.* at 12-13 (affirming conspiracy count based on "what we have said with regard to the substantive offenses"). On that point, the three dissenting Justices agreed with the majority that the accomplice could be convicted even though he played no role in causing the mailing, so long as he "could reasonably have expected" the mail to be used by the principal. See *id.* at 14 (Minton, J., concurring in part and dissenting in part); see also *United States* v. *Johnson*, 319 U.S. 503, 515, 518 (1943) (explaining with respect to defendants convicted of aiding and abetting tax-evasion scheme that "all who shared in [the scheme's] execution have equal responsibility before the law, whatever may have been the different roles of leadership and subordination among themselves"). And this rule parallels the same principle in conspiracy law. As this Court has explained, a defendant can be liable for RICO conspiracy even if he "does not himself commit or agree to commit the two or more predicate acts requisite to the underlying offense"; he is liable under traditional principles "by agreeing to facilitate only some of the acts leading to the substantive offense," so long as he "adopt[s] the goal of furthering or facilitating the criminal endeavor." *Salinas* v. *United States*, 522 U.S. 52, 61-66 (1997).

In harmony with this Court's analysis in *Pereira*, courts of appeals applying Section 2(a) have regularly

held that "[a] defendant can be convicted as an aider and abettor without proof that he participated in each and every element of the offense." *Sigalow*, 812 F.2d at 785; see, *e.g.*, *Woods*, 148 F.3d at 850 ("[T]he government need not prove assistance related to every element of the underlying offense."); *United States* v. *Arias-Izquierdo*, 449 F.3d 1168, 1176 (11th Cir. 2006) ("The government was not required to prove that [the defendant] participated in each element of the substantive offense in order to hold him liable as an aider and abettor."), cert. denied, 547 U.S. 1006 (2006), and 549 U.S. 1140 (2007).[1] As the D.C. Circuit has ex-

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[1] See also, *e.g.*, *United States* v. *Ali*, 718 F.3d 929, 939 (D.C. Cir. 2013) ("[P]roving a defendant guilty of aiding and abetting does not ordinarily require the government to establish participation in each substantive and jurisdictional element of the underlying offense.") (internal quotation marks and citation omitted); *United States* v. *Hathaway*, 534 F.2d 386, 399 (1st Cir.) ("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."), cert. denied, 429 U.S. 819 (1976); *United States* v. *Arrington*, 719 F.2d 701, 705 (4th Cir. 1983) (same), cert. denied, 465 U.S. 1028 (1984); *United States* v. *Milby*, 400 F.2d 702, 706 (6th Cir. 1968) ("We think it unnecessary that each defendant be shown either to have committed the offenses charged in the indictment or to have physically assisted in every detail of their perpetration."). Only the Ninth Circuit has expressly held otherwise. See *United States* v. *Dinkane*, 17 F.3d 1192, 1196-1198 (1994). The Fifth Circuit's standard, which requires a defendant to "aid and abet, rather than commit, each element of the crime," *United States* v. *Cauble*, 706 F.2d 1322, 1339 (1983), cert. denied, 465 U.S. 1005 (1984), begs the question of what it means to "aid and abet." So does a sentence from the United States' *Criminal Resource Manual* cited by petitioner at the certiorari stage (Cert. Reply Br. 6-7). See U.S. Dep't of Justice, *Criminal Resource Manual* § 2474 (1998). That discussion, moreover, goes on to explain that a defendant's "level of participa-

plained, the notion that "participation in each element of the substantive offense" is required for accomplice liability "ignores the breadth of the aiding and abetting statute." *United States* v. *Garrett*, 720 F.2d 705, 713 n.4 (1983), cert. denied, 465 U.S. 1037 (1984). Rather, participation of even "relatively slight moment" is sufficient. *United States* v. *Garguilo*, 310 F.2d 249, 253 (2d Cir. 1962) (Friendly, J.). State courts interpreting their own accomplice-liability provisions, which grew out of the same common-law tradition, have likewise concluded that "it is not necessary that the evidence show the accomplice personally participated in the commission of each element of the offense." *Fox* v. *State*, 497 N.E.2d 221, 227 (Ind. 1986).[2]

Accordingly, the affirmative-act requirement for accomplice liability can be met by a wide variety of conduct only tangentially related to any particular element of the offense, such as "act[ing] as a lookout," "man[ning] the getaway car," "signal[ing] the approach of the victim," and even "standing by at the scene of the crime ready to give some aid if needed." LaFave 672-673. The "assistance given," furthermore, "need not contribute to the criminal result in the sense that but for it the result would not have ensued." *Id.* at 674 (quoting *State* v. *Tally*, 15 So. 722, 738 (Ala. 1894)). And "[t]he *quantity* of aid rendered

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tion may be of relatively slight moment" and that "it does not take much evidence to satisfy the facilitation element once the defendant's knowledge of the unlawful purpose is established." *Ibid.*

[2] See *Meadows* v. *State*, 386 S.W.3d 470, 475 (Ark. 2012); *Krueger* v. *State*, 267 N.W.2d 602, 609 (Wis.), cert. denied, 439 U.S. 874 (1978); *People* v. *Hall*, 231 N.E.2d 416, 421 (Ill. 1967); *State* v. *Gatlin*, 241 P.3d 443, 446 (Wash. App. 2010).

is of no consequence." Wharton § 234, at 252. As long as the defendant acts "with the intent to facilitate the crime," *Central Bank of Denver*, 511 U.S. at 181, his assistance or encouragement need not relate to every aspect of the offense.

Any other rule would be untenable. Consider kidnapping. Under one definition, that crime "contains three requirements: (1) knowing removal or confinement, (2) substantial interference with the victim's liberty, and (3) force, threat, or fraud." *United States* v. *Cervantes-Blanco*, 504 F.3d 576, 580 (5th Cir. 2007). Suppose a principal sets out to kidnap someone by fraudulently inducing him to get into a car. One accomplice might make a phone call giving the victim a fraudulent reason to enter the vehicle. *E.g.*, *United States* v. *Jenkins*, No. 12-13-GFVT, 2013 WL 3158210, at *24 (E.D. Ky. June 20, 2013) (accomplice "helped [principal] lure [victim] into a truck"). Another accomplice might drive the car. *E.g.*, *Wallace* v. *Lockhart*, 701 F.2d 719, 728 (8th Cir. 1983) (defendant "was an accomplice to the kidnapping based upon his participation in driving [the victim] to [an] apartment and then later driving [him] to the river"), cert. denied, 464 U.S. 934 (1983). A third accomplice might allow the principal to use her house to hold the victim captive. *E.g.*, *State* v. *Corean*, 791 N.W.2d 44, 61-62 (S.D. 2010) (defendant "aided and abetted [principal] by allowing her house to be used as a sanctuary to facilitate the kidnapping"). And a fourth accomplice might merely wait outside the victim's house to assist with force if necessary. See Clark & Marshall § 174, at 244; cf. *Garguilo*, 310 F.2d at 253 (giving as example of aiding and abetting "the attendance of a 250-pound bruiser at a shakedown as a companion to the extor-

tionist"). So long as all four confederates have the intent to help the principal complete the kidnapping, each is subject to accomplice liability, even though none of them participates in every element of the offense.

c. Petitioner spends a great deal of his brief discussing the basic, undisputed requirements for accomplice liability—some affirmative act of assistance or encouragement and the intent to help the principal's offense succeed. Pet. Br. 16-31. But he asserts only summarily the legal proposition that is central to his case: that it is not "enough that the defendant participated in the criminal venture in some general sense." *Id.* at 22. As discussed above, that assertion has no support in the common-law principles that Section 2(a) codified. Indeed, the very sentence that petitioner cites from the Wharton treatise as support for his position explains that "presence alone" is sufficient where the accomplice "knows that his presence will be regarded by the perpetrator as an encouragement and protection." Wharton § 211a, at 229. And two pages later, Wharton makes clear that "[*a*]*ny participation* in a general felonious plan, provided such participation be concerted * * * is enough." *Id.* § 213, at 231 (emphasis added). The only other source that petitioner cites for the point merely quotes verbatim an 18th Century British anti-forgery statute. See Pet. Br. 22 (citing 2 Edward Hyde East, *A Treatise of the Pleas of the Crown* § 17, at 889 (Phil., P. Bryne 1806)). It is unclear what relevance petitioner ascribes to that law.

2. Because commission of a crime of violence or drug-trafficking crime is an essential conduct element of Section 924(c), active participation in such a crime satisfies the affirmative-act requirement

a. Under the foregoing principles of accomplice liability, active participation in a crime of violence or drug-trafficking crime satisfies the affirmative-act requirement for aiding and abetting a Section 924(c) violation. The "use or carry" prong of Section 924(c) subjects to criminal punishment "any person who, during and in relation to any crime of violence or drug trafficking crime[,] * * * uses or carries a firearm." 18 U.S.C. 924(c)(1)(A). To prove that a defendant committed that violation, the government must establish three elements: "[i] that [the defendant] used [or carried] a firearm, [ii] that he 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 [iii] that he used [or carried] the gun 'during and in relation to'" that crime. *Rodriguez-Moreno*, 526 U.S. at 280; see also *Smith* v. *United States*, 508 U.S. 223, 228 (1993) (grouping requirements into two elements).

In light of the longstanding principles set forth above, a defendant's aid or encouragement with respect to either active element of the crime satisfies the affirmative-act requirement for accomplice liability. A defendant who participates in a crime of violence or drug-trafficking crime with his armed confederate therefore meets the affirmative-act requirement. (He also must meet the separate intent requirement, discussed below.) While such participation does not necessarily facilitate or encourage the use of the firearm in a specific way, it facilitates the gun's use *dur-*

ing and in relation to a crime of violence or drug-trafficking crime. The primary offender, despite his use or carriage of the firearm, could not commit the Section 924(c) offense without the commission of a crime of violence or drug-trafficking crime. Here, for example, had petitioner "not been dealing drugs," the shooter (assuming it was someone else) may not "have [had] use for his gun." *United States* v. *Rattigan*, 151 F.3d 551, 558 (6th Cir.), cert. denied, 525 U.S. 1031 (1998).

Petitioner's contrary view appears to rest on the assumption that the only significant element in a Section 924(c) offense is the use or carriage of the firearm, not the commission of the crime of violence or drug-trafficking crime. See Br. 33-34. Borrowing the Ninth Circuit's reasoning, petitioner argues that "[i]t is the firearm crime that [the defendant] is charged with aiding and abetting, not the [drug trafficking] crime." *Id.* at 33 (quoting *United States* v. *Bancalari*, 110 F.3d 1425, 1430 (9th Cir. 1997)) (brackets in original). Therefore, the argument goes, "the intentional act of facilitation or encouragement required by Section 2 must be directed at the use of the firearm." *Ibid.*

Petitioner's premise is mistaken. This Court has unanimously rejected the view that the use or carriage of a firearm is the only significant element of a Section 924(c) offense. In *Rodriguez-Moreno*, a multi-state drug transaction had culminated with the defendant pointing a gun at a victim at a location in Maryland. See 526 U.S. at 276-277. The Third Circuit held that the defendant's trial in New Jersey federal court violated Article III of the Constitution and the Sixth Amendment because the Section 924(c) offense had

occurred in Maryland, the only State where the defendant was alleged to have used a firearm. See *United States* v. *Palma-Ruedas*, 121 F.3d 841, 847-851 (1997), cert. denied, 522 U.S. 1062, 522 U.S. 1096, 522 U.S. 1142, 523 U.S. 1033, and 524 U.S. 915 (1998); U.S. Const. Art. III, § 2, Cl. 3; Amend. VI.

This Court concluded that the Third Circuit had "overlooked an essential conduct element of the Section 924(c)(1) offense": that the defendant committed a crime of violence. 526 U.S. at 280. By "criminaliz[ing] a defendant's use of a firearm 'during and in relation to' a crime of violence," the Court explained, "Congress proscribed *both* the use of the firearm *and* the commission of acts that constitute a violent crime." *Id.* at 281 (first emphasis added). Accordingly, a prosecution for a Section 924(c) offense "is proper in any district where the crime of violence [or drug-trafficking crime] was committed, even if the firearm was used or carried only in a single district." *Id.* at 276. The two dissenting Justices in *Rodriguez-Moreno* likewise rejected the view "that using the firearm is 'the entire essence of the offense,'" finding, like the majority, that "[t]he predicate offense is assuredly an element of the crime." *Id.* at 285 (Scalia, J., dissenting) (quoting U.S. Reply Br., at 9 (No. 97-1139)).[3]

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[3] The dissent believed that due to the "during and in relation to" element of the Section 924(c) offense, its commission can occur only in a district in which both of the active elements occurred. See 526 U.S. at 283. That view would not support petitioner's approach, because, as explained above, accomplice liability has never required an accomplice to assist in every element of an offense.

As the Court explained in *Rodriguez-Moreno*, the view that only the firearm element is important in defining the Section 924(c) offense erroneously attaches significance to the fact that "the crime of violence element of the statute is embedded in a prepositional phrase and not expressed in verbs." 526 U.S. at 280. Congress could have, without altering the substance of the offense at all, written the statute to read: "Whoever ~~during and in relation to~~ **commits** any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States **and during and in relation to that crime** uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years." *Palma-Ruedas*, 121 F.3d at 860 (Alito, J., concurring in part and dissenting in part) (alterations in original). In that case, a person who actively participates in the crime of violence or drug-trafficking crime would unquestionably satisfy the affirmative-act requirement for aiding and abetting. The same is true for the statute as written: The commission of the underlying crime is an element that is just as significant as the use or carriage of the firearm, and thus facilitating that crime satisfies the affirmative-act requirement.

While it is true that "Section 924(c) establishes a separate, freestanding offense that is 'distinct from the underlying federal felony,'" Pet. Br. 32 (quoting *Simpson* v. *United States*, 435 U.S. 6, 10 (1978)), it is equally true that Section 924(c) establishes an offense that is distinct from any penalty that might be imposed for the use or carriage of a firearm—such as penalties for firing a gun seven times in a public park. Section 924(c) punishes the temporal and relational

conjunction of those two separate acts. No logical reason exists to subject a person to accomplice liability for aiding one of those acts but not for aiding the other. Indeed, active participation in a crime of violence or drug-trafficking crime presents a far more direct instance of accomplice liability than the examples of aiding and abetting that populate criminal-law treatises. At common law, an accomplice could be liable as a second-degree principal merely for being present at the scene of an offense with the understanding that he would offer aid if necessary—*i.e.*, even if he did not directly facilitate *any* element of the offense. See pp. 17-18, *supra*. Given that historical baseline, when a defendant actively and intentionally participates in one element of the offense, he readily meets the affirmative-act requirement.

b. Petitioner does not dispute that the commission of a crime of violence or a drug-trafficking crime is an element of the Section 924(c) offense, and he does not expressly argue that accomplice liability requires an affirmative act related to each element of an offense. But he objects to the application of that principle here on the ground that it assertedly would allow conviction based on nothing more than what is necessary to prove aiding and abetting the underlying crime of violence or drug-trafficking crime and that it therefore "conflates two distinct offenses." Pet. Br. 38 (capitalization altered).

That is incorrect. Aiding and abetting liability requires both an affirmative act of facilitation—which may consist of participating in the underlying crime of violence or drug-trafficking crime or some other conduct—*and* the intent that the act help the principal complete the Section 924(c) offense (as well as the

principal's actual completion of the Section 924(c) offense). A defendant who does not know that his confederate intends to bring along a firearm to a violent crime or drug transaction when he completes his intentional act of facilitation or encouragement is not guilty of aiding and abetting a Section 924(c) offense, though he is guilty of aiding and abetting the underlying crime. See pp. 48-49, *infra*.

Criminal law often punishes criminal conduct more harshly when the offender intends to facilitate a further crime by a confederate, even if the offender's overt actions constitute the commission of a more basic crime.[4] For example, Section 2113(a) of Title 18 generally prohibits bank robbery, and Subsection (d) establishes an aggravated form of that offense, with greater penalties, for armed bank robbery. A person who drives the getaway car for a bank robbery, which is independently unlawful under Subsection (a), is liable for aiding and abetting armed bank robbery under Subsection (d) if he knows that the plan calls for his confederates to use weapons. See *United States* v. *Spinney*, 65 F.3d 231, 236 (1st Cir. 1995) ("A participant in the holdup of a bank will be found to be an aider and abettor of an *armed* robbery only if the

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[4] Indeed, under co-conspirator liability principles, it is not always necessary that the confederate's further crime be intended. See *Pinkerton* v. *United States*, 328 U.S. 640, 646-647 (1946). An alternative way to convict an accomplice under Section 924(c)(1) is to give the jury a "*Pinkerton*" instruction: *i.e.*, that the accomplice is liable for the Section 924(c)(1) offense because it was a reasonably foreseeable result of a conspiracy to which she was a part. See, *e.g.*, *United States* v. *Casiano*, 113 F.3d 420, 427 (3d Cir. 1996), cert. denied, 522 U.S. 887 (1997). Because no *Pinkerton* instruction was given in this case, that basis for liability is not at issue here. Cf. *Pereira*, 347 U.S. at 10 n.*.

government can provide * * * proof that the accomplice knew a dangerous weapon would be used [in the robbery] or at least . . . was on notice of the likelihood of its use.") (internal quotation marks and citation omitted) (brackets in original); see also, *e.g.*, *United States* v. *Wallace*, 212 F.3d 1000, 1003-1004 (7th Cir. 2000); but see *United States* v. *Dinkane*, 17 F.3d 1192, 1195-1198 (9th Cir. 1994) (suggesting that act of assistance related directly to the gun is required under Section 2113(d)). Likewise, a defendant can be guilty of aiding and abetting a confederate's distribution of illegal drugs, 21 U.S.C. 841(a)(1), if he takes possession of the drugs in order to facilitate the confederate's distribution scheme, even though possession is independently unlawful, 21 U.S.C. 844(a).

Nor is accomplice liability for independently unlawful acts that intentionally facilitate a separate offense inherently unfair. In most cases, an accomplice's affirmative act of assistance or encouragement—driving a vehicle, say, or depositing money in a bank account—would be completely innocuous but for being paired with the knowledge of what the principal plans to do when he arrives at the location or collects the funds. When a legislature penalizes that conduct, it does not punish driving or banking, but rather the role that the conduct played in aiding another's offense. So too here: petitioner's Section 924(c) conviction punishes him not merely for actively participating in a drug deal, but for doing so with the intent to help an accomplice complete that offense with a firearm. That his conduct would have been unlawful even if a firearm was not involved does not confer on him a special immunity from accomplice liability.

Petitioner relatedly suggests (Br. 40) that the government's position would impose accomplice liability for "mere presence" at the scene of the offense. That is also incorrect. The offender must intentionally participate in, facilitate, or encourage the crime of violence or drug-trafficking crime with the knowledge that his confederate will complete that offense with a firearm. Those who, side-by-side with armed confederates, perpetrate bank robberies, *e.g.*, *United States* v. *Price*, 76 F.3d 526, 529-530 (3d Cir. 1996), kidnap people, *e.g.*, *United States* v. *Obregon*, 371 Fed. Appx. 556, 559 (5th Cir. 2010) (unpublished), commit gang rapes, *e.g.*, *United States* v. *Ayala*, 601 F.3d 256, 263 (4th Cir.), cert. denied, 131 S. Ct. 262 (2010), and traffic in illegal drugs, *e.g.*, J.A. 191, 202, are not passive observers. They are active participants.

c. Petitioner invokes (Pet. Br. 49-51) the rule of lenity. But that tie-breaking rule of statutory construction applies only where the Court finds "grievous ambiguity or uncertainty in the statute." *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (internal quotation marks and citation omitted). The application of settled principles of accomplice liability does not call for the Court to resolve any textual ambiguity.[5] The canon, moreover, is designed to ensure fair notice to citizens of what the criminal laws require. *United States* v. *Kozminski*, 487 U.S. 931, 952 (1988). A person who knowingly assists an armed confederate in robbing a bank, committing a sexual assault, or

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[5] This case does not implicate the view that "the rule of lenity [has] special force in the context of mandatory minimum provisions," *Dean* v. *United States*, 556 U.S. 568, 585 (2009) (Breyer, J., dissenting), because petitioner's position is that he should not be liable under Section 924(c) at all.

selling drugs should understand that he may be held to account for aiding and abetting the use of a firearm during and in relation to that crime.

3. No justification exists to exempt from Section 924(c) those who intentionally join armed confederates in violent crimes or serious drug offenses

Nothing in the text or purpose of Section 924(c) indicates that Congress intended to establish a narrower, Section 924(c)-specific concept of aiding and abetting. To the contrary, four considerations particular to Section 924(c) fortify the conclusion that Congress intended Section 924(c)'s penalties to apply to persons who intentionally participate in violent crimes or drug trafficking, with the full knowledge that confederates will bring along firearms.

a. The core objectives of the original enactment of Section 924(c) and its expansion by successive Congresses would be ill-served by exempting those who intentionally perpetrate serious, dangerous crimes with the knowledge that their confederates will be armed. As this Court has explained, the "statute's basic purpose" is "to combat the 'dangerous combination' of 'drugs and guns'" (and violent crimes and guns). *Muscarello*, 524 U.S. at 132 (quoting *Smith*, 508 U.S. at 240). When Section 924(c) was originally enacted in 1968, the bill's sponsor explained that the provision sought "to persuade the man who is tempted to commit a Federal felony to leave his gun at home." *Ibid.* (quoting 114 Cong. Rec. 22,231 (1968)).

That concern applies with no less force to a person who makes a concerted choice to participate in a sexual assault or a narcotics sale with an armed confederate, ignoring the tremendous increase in the potential for injury or death produced by the presence of a

firearm. Congress had no sensible reason to exclude such offenders from Section 924's compass. Many of the offenses covered by Section 924(c), such as robberies and drug deals, are often committed by groups of offenders acting in concert—as this case illustrates. Congress's effort to keep such situations gun-free would be thwarted if gangs and other violent groups knew that most participants could avoid the tough penalties of Section 924(c).

Indeed, in a statute that seeks to persuade violent criminals to commit their crimes in a less dangerous manner, it makes little sense to subject to special punishment only those unarmed individuals who happen to take some direct action with respect to the firearm. Petitioner has identified no plausible reason why Congress would have deemed a person who lends an associate a firearm to use in a drug deal more culpable than the person who arranges and actively participates in the deal knowing that his accomplice will employ a firearm.

Petitioner contends (Br. 48) that the government's position would expand the statute's deterrent effect to encompass participation in any violent crime or drug-trafficking crime, not only those that involve firearms. That does not follow. Application of Section 924(c) to those who knowingly participate in offenses intending to aid armed confederates would give potential wrongdoers a strong incentive to avoid committing a felony *involving firearms,* either by persuading their cohorts to leave their guns at home or by declining to provide aid to an offense when they know that a firearm will be involved. Petitioner's approach, by contrast, would undermine the statute's effectiveness by assuring criminal gangs and other joint offenders that

heightened penalties will apply only to the individuals carrying the firearms or those who facilitate the carriage in a direct way.

That would be misguided in a statute designed not to deter gun use per se, but rather to discourage the commission of serious crimes in a particularly dangerous way. As one Senator put it, "Section 924(c) comes with a message: 'If you mix guns and drugs, or guns and violence, we're going to come after you—and the price will be high.'" 144 Cong. Rec. 26,597 (1998) (statement of Sen. DeWine); see *Palma-Ruedas*, 121 F.3d at 863 (Alito, J., concurring in part and dissenting in part) (explaining that the statute's legislative history "confirms the critical importance of the element requiring proof that the defendant committed a crime of violence or drug trafficking offense."). That objective would be undercut if serious offenders could "mix guns and violence" with impunity as long as a confederate assumes the role of the triggerman.

Congress, moreover, was well aware when it expanded the breadth of Section 924(c) in 1998 that a defendant's facilitation or encouragement of a violent crime or drug-trafficking crime by an armed confederate would expose him to liability. See An Act to Throttle Criminal Use of Guns, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469-3470 (1998). The 1998 amendment revised the statute to impose liability where a defendant possesses a firearm without actively employing it, responding to this Court's narrower construction of the "use or carry" prong in *Bailey* v. *United States*, 516 U.S. 137 (1995); see also *Abbott* v. *United States*, 131 S. Ct. 18, 25 (2010). At a hearing concerning a legislative response to *Bailey*, the Senate Judiciary Committee received written testimony

from a former Assistant U.S. Attorney arguing against a "mere possession" standard. See *Violent & Drug Trafficking Crimes: The Bailey Decision's Effect on Prosecutions Under 924(c): Hearing Before the S. Comm. on the Judiciary*, 104th Cong., 2d Sess. 31-32 (1996) (1996 Hearing). He was concerned that imposing liability for possession "during and relation to" the underlying crime could allow conviction for "simply having a gun and drugs in a home during the period of an offense." *Id.* at 32. Of particular relevance here, he explained that under pre-*Bailey* case law, "a girlfriend can be convicted of 924(c) for the mere possession of an unloaded gun by her boyfriend during the offense if at any time during the length of the conspiracy or the offense, she *aided and abetted his activities in even a minor way*." *Ibid.* (emphasis added).[6] The witness told the Committee that "these cases are routinely brought by prosecutors." *Ibid.*

Congress ultimately addressed the witness's practical concern by imposing a "slightly higher" nexus requirement ("in furtherance of") for the possession prong of Section 924(c). H.R. Rep. No. 344, 105th Cong., 1st Sess. 11 (1997). But Congress was clearly aware in 1998 that defendants could be liable as accomplices where they provided even "minor" aid in the underlying unlawful activities. Yet it chose to expand the coverage of the provision.

b. In addition to frustrating the basic objectives of the statute, petitioner's approach would produce substantial disparities in sentences imposed on similarly

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[6] Although the witness referred to "the reach of conspiracy laws," it is clear from his example that he also was adverting to "aiding and abetting" liability for actions in support of "the offense" rather than "the conspiracy." 1996 Hearing 32.

situated offenders without any discernible justification in their real conduct. Under petitioner's view, accomplices can jointly execute a violent crime with the shared understanding that one of them will brandish a firearm in order to subdue the victim, yet the unarmed assailant will escape punishment under Section 924(c) unless he physically provided another person with the gun or otherwise "facilitated" its use. That would reflect an entirely arbitrary scheme of criminal punishment. Indeed, the rationale for common-law accomplice liability was that those who participate in a criminal venture in even a small way share equal moral culpability with the primary offender. See Hawley & McGregor 80.

Petitioner's own examples illustrate the incompatibility of his approach with that bedrock principle. In a decision that petitioner offers as an exemplar of his approach (Br. 34-35), the Ninth Circuit reversed the conviction of a defendant who helped *plan* a jewelry-store robbery knowing that the plan called for confederates to brandish firearms to make the victims fear for their lives and then participated in the robbery. See *United States* v. *Nelson*, 137 F.3d 1094, 1100, 1103-1104, cert. denied, 525 U.S. 901 (1998); see also *United States* v. *Medina*, 32 F.3d 40, 42-43, 46 (2d Cir. 1994) (rejecting view "that a defendant aids and abets a violation of § 924(c) by planning a crime of violence with the knowledge that a firearm will be used"). It is inconceivable that Congress intended that a defendant who orchestrates an armed rape or robbery, and then actively participates in the commission of the offense, would be immune from liability for Section 924(c) because others were responsible for bringing the firearms.

Petitioner argues (Br. 42-49) that the government's position "severs the required connection between culpability and punishment" because "it permits the draconian penalties of Section 924(c) to be imposed on defendants significantly less culpable than the principal." *Id.* at 42 (capitalization altered). But his argument rests on a fallacy: that the government's position would allow conviction even "if the defendant first became aware of the gun only at the moment it was discharged" and after he completed his active participation in the predicate crime. *Id.* at 14, 43. To establish accomplice liability, the government must prove that the defendant "acted with the intention of causing the [Section 924(c) offense] to be committed" by another. *United States* v. *Bindley*, 157 F.3d 1235, 1238 (10th Cir. 1998), cert. denied, 525 U.S. 1167 (1999). That requirement will not be met if the aider and abettor's participation ends when the gun appears.

Indeed, nowhere in petitioner's brief does he identify a circumstance in which it would be even arguably inequitable to subject a person who commits a violent crime or drug-trafficking crime with the foreknowledge that his confederate will commit the offense with a firearm to the same punishment as the confederate. Although the penalties for violating Section 924(c) are stiff, particularly when shots are fired, that is because the use of a firearm during robberies, rapes, assaults, and drug deals puts people's lives in danger.[7] Here, for example, regardless of

[7] Nor is there anything inequitable about the fact that a defendant may not necessarily know before the crime that his cohort will discharge the weapon. This Court held in *Dean*, *supra*, that even an *accidental* discharge warrants the higher penalty. 556 U.S. at 578. The "fact that the actual discharge of a gun" may not have

whether petitioner or Joseph discharged the semiautomatic handgun, any number of innocent people could have been shot, including an elderly man who found a bullet near his porch; "[b]y pure luck, no one was killed or wounded." *Dean* v. *United States*, 556 U.S. 568, 577 (2009). Had the police not intercepted Perez's car, moreover, Gonzales himself might have been gunned down. Nothing inequitable results from punishing petitioner as if he had wielded the firearm himself.[8]

Petitioner relatedly argues (Br. 47) that the government's position does not accord with the Sentencing Guidelines, which "provide a relatively modest 2-level increase for defendants who participate in drug offenses knowing their confederates will be armed." That argument is misdirected. The Guidelines provision to which petitioner refers (without citing it) recommends a two-level increase in an offender's base offense level "[i]f a dangerous weapon (including a firearm) was possessed"—by the principal *or* a coconspirator. Sentencing Guidelines § 2D1.1(b)(1); see *id.* § 1B1.3(a)(1)(B) (imposing co-conspirator liability). Yet it could not be maintained that the provision suggests any impropriety in convicting the primary offender under Section 924(c) for possession of a firearm, even though absent the Section 924(c) conviction

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been anticipated by the defendant "does not mean that the defendant is blameless." *Id.* at 576.

[8] Petitioner argues (Br. 45) that the trial evidence is "consistent" with petitioner's "simple passivity throughout the drug sale." That claim—irrelevant to the question of instructional error—cannot be reconciled with the jury's verdict on Count 1 that petitioner, at minimum, aided and abetted the possession of the marijuana with intent to distribute. J.A. 202.

he could receive only a two-point increase for the firearm. The same holds true for an accomplice. Unlike Section 924(c), the Guidelines address possession without the same connection requirement (and of course do not require proof beyond a reasonable doubt), which explains why Section 2D1.1(b)(1)'s increase in offense level is less than the minimum sentences set forth in Section 924(c). And the Guidelines provision does not apply at all if the defendant is convicted under the higher standards of Section 924(c). See Sentencing Guidelines § 2K2.4, comment (n.4).

c. A requirement that an accomplice participating in a violent crime or drug offense directly facilitate the use or carriage of the firearm would generate a host of unanswerable questions for juries and courts. Although sometimes a defendant's conduct obviously facilitates the use or carriage of a firearm in a direct way, such as where he purchases the gun, that is often not true. When a person is already actively participating in a crime in which he knows that a firearm will be used to complete the offense, what conduct constitutes "facilitation" or "encouragement" of the use or carriage of the firearm will be exceedingly difficult to say with precision. Indeed, petitioner never offers anything close to an administrable definition of direct facilitation or encouragement of the use or carriage of a firearm.

If a person, for example, collects payment during a narcotics sale while his confederate displays a firearm to the buyer, has he facilitated the confederate's use of the firearm during and in relation to the drug-trafficking crime? *E.g.*, *United States* v. *Daniels*, 370 F.3d 689, 691-692 (7th Cir. 2004). It might, after all, be more difficult for the confederate to complete the

Section 924(c) "use" offense if he is required simultaneously to hold the firearm and to conduct the exchange; without the accomplice, he might be forced to keep the gun tucked into his waistband. See, *e.g.*, *Price*, 76 F.3d at 530 (holding facilitation requirement satisfied where confederate "pointed the gun while [the defendant] gathered the money"). And does the accomplice's implicit approval of the confederate's brandishing the firearm constitute "encouragement"? Asking juries to resolve these imponderables will produce irreconcilable verdicts and will inevitably reduce the public's confidence in the fairness of the justice system.

d. Finally, although petitioner emphasizes that the majority of courts of appeals have imposed a requirement that an accomplice facilitate the use or carriage of the firearm (Br. 31-32), most of those courts hold that an accomplice can be convicted upon proof that he merely "benefitted" from the weapon in some way. See *Daniels*, 370 F.3d at 691; see also *Medina*, 32 F.3d at 46 (permitting liability for benefitting from the weapon under a constructive-possession theory). Though not grounded in traditional aiding-and-abetting princples, that understanding—which petitioner evidently rejects (Br. 27, 47 n.11)—does not appear to differ in any practical way from the government's view that a defendant is liable if he actively participates in the offense with knowledge of the use or carriage of the firearm by a confederate. See Br. in Opp. 13. Under the approach of those courts, for example, "inspect[ing] the marijuana * * * under the watchful eye of [an] armed coconspirator" qualifies as facilitating the use of the gun. *Bazemore* v. *United States*, 138 F.3d 947, 950 (11th Cir. 1998).

And as petitioner has explained (Pet. 11-13), three courts of appeals have adopted the government's position outright. See *United States* v. *Gardner*, 488 F.3d 700, 712 (6th Cir. 2007); *United States* v. *Harrington*, 108 F.3d 1460, 1471 (D.C. Cir. 1997).

It appears, in fact, that every circuit other than the Ninth has, on some legal theory, upheld convictions of defendants who actively participated in a crime of violence or drug-trafficking crime with knowledge that an accomplice had a gun.[9] Judges who regularly examine the diverse array of dangerous encounters Congress intended to target with Section 924(c) have thus by and large concluded that the statute was intended to reach those who assist others in completing armed offenses.

B. Petitioner's Argument That The District Court Erroneously Instructed The Jury On The Intent Requirement For Accomplice Liability Was Forfeited And Lacks Merit In Any Event

For the reasons set forth above, accomplice liability under Section 924(c) does not require a defendant to directly facilitate or encourage the use of the firearm. Rather, the affirmative-act requirement for accomplice liability is met if a defendant actively participates in the crime of violence or drug-trafficking

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[9] See, *e.g.*, *United States* v. *Ramirez-Ferrer*, 82 F.3d 1149, 1154 (1st Cir.), cert. denied, 519 U.S. 973 (1996); *United States* v. *Gomez*, 580 F.3d 94, 103 (2d Cir. 2009); *Price*, 76 F.3d at 529-530 (3d Cir.); *United States* v. *Wilson*, 135 F.3d 291, 305 (4th Cir.), cert. denied, 523 U.S. 1143 (1998); *United States* v. *Kelley*, 441 Fed. Appx. 255, 256 (5th Cir. 2011); *United States* v. *Moore*, 572 F.3d 334, 341-342 (7th Cir. 2009); *United States* v. *Rolon-Ramos*, 502 F.3d 750, 758 (8th Cir. 2007).

crime. That conclusion resolves the question presented.

The parties do not dispute what must be proved for the second, intent requirement: that the defendant's assistance was furnished with the intent to facilitate or encourage another's commission of the Section 924(c) offense. See Pet. Br. 13. As the Tenth Circuit has long held, the government must prove that the defendant "acted with the intention of causing the [Section 924(c) offense] to be committed." *Bindley*, 157 F.3d at 1238. Throughout his brief, however, petitioner appears to raise a claim that the particular jury instructions in this case did not adequately describe the intent requirement. See Pet. Br. 19-20, 27, 32, 33, 35, 38-39 & n.9, 41. He forfeited that objection by failing to raise it below, and it lacks merit in any event.

1. The district court instructed the jury on the intent requirement for accomplice liability in two ways. First, the court described to the jury the general intent requirement applicable to both the drug-possession count and the Section 924(c) count. Hewing closely to this Court's formulation, the court instructed the jury that "[i]n order to aid or abet another to commit a crime, it is necessary that the defendant *willfully and knowingly* associated himself in some way with the crime, and that he *willfully and knowingly* seeks by some act to *help make the crime succeed*." J.A. 196 (emphases added). The judge had previously defined the term "knowingly" to mean "that an act was done voluntarily and intentionally, not because of mistake or accident." J.A. 194.

The judge then explained how that general requirement applied to the Section 924(c) offense specif-

ically. He instructed the jury that to convict petitioner, it had to find that "(1) [petitioner] knew his cohort used a firearm in the drug trafficking crime, and (2) [petitioner] knowingly and actively participated in the drug trafficking crime." J.A. 196. The judge also instructed the jury that it could reach the Section 924(c) offense only if it convicted petitioner on the drug-possession count. J.A. 191. Accordingly, the jury, to convict petitioner under Section 924(c), was required to find that he had either committed the drug offense or intentionally assisted the armed confederate in that offense.

Petitioner did not argue in the district court that if the government was correct that active participation in the drug-trafficking crime satisfies the affirmative-act requirement, the instructions were independently deficient in their description of the intent requirement. In his written objection to the government's Section 924(c)-specific accomplice-liability instructions, in fact, he agreed with the government as to the first prong: "that the defendant knew his cohort used a firearm in the drug trafficking crime." J.A. 16-17. Although petitioner's proposed instruction on the second prong used the word "intentionally," that concerned only the volitional nature of the act of assisting the use of the firearm, not whether petitioner had the intent to help another person succeed in the overall Section 924(c) offense.

Nor did he raise any such argument on appeal, which argued in favor of the same instruction he proffered to the district court. See Pet. C.A. Br. 13-14. The court of appeals did not understand him to be challenging the intent aspect of the instructions. See Pet. App. 9a ("[Petitioner] argues that most other

circuits require jurors to find, additionally, that the defendant took some action to facilitate or encourage his cohort's use of the firearm."). He challenged the sufficiency of the evidence as to whether he "knew that a firearm was used in the underlying crime until after completion of its use," but he did not frame that as a claim of instructional error. Pet. C.A. Br. 17.

In his counseled certiorari petition, petitioner repeatedly characterized the issue as "whether aiding and abetting liability under 18 U.S.C. § 924(c) requires proof that the defendant facilitated or encouraged the principal's use of a firearm." Pet. 9; see also Pet. 14-17, 20, 24. Although the petition adverted to the alleged insufficiency of the evidence that petitioner knew about the firearm before it was fired, see Pet. 11-12, 25, it did not identify that factbound issue as an additional question warranting this Court's review. The petition did claim that the instruction failed to satisfy the intent requirement in addition to the affirmative-act requirement, but only insofar as the instruction did not require that petitioner "intentionally take some action to facilitate or encourage the use of the firearm." Pet. 22. Petitioner did not make the separate argument that, even if the government were correct that active participation satisfied the affirmative-act requirement, the instructions in this case allowed conviction without a determination that petitioner intended by that participation to help another person complete the Section 924(c) offense.

This Court should not address an issue that is neither squarely encompassed within the question presented nor necessary to an intelligent resolution of that question. See Sup. Ct. R. 15.2; *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325,

1336 (2011). At minimum, because petitioner did not object to the intent component of the instructions below, the claim should be reviewed for plain error. See Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461, 465-470 (1997).

2. a. In any event, the district court's intent instructions sufficiently conveyed to the jury that it could convict petitioner only if he "intended to facilitate or encourage the commission of [the Section 924(c)] offense." Pet. Br. 13. The general instruction stated that petitioner could be convicted if he intentionally sought "to help make the crime succeed." J.A. 196. And the specific instructions, particularly in conjunction with the instructions on the drug-possession count, made clear that petitioner had to have intended to assist the completion of the drug-trafficking crime and to have known that his confederate used a gun to commit that crime.

That adequately reflected the intent requirement for accomplice liability. When a defendant intentionally helps a confederate commit a crime of violence or drug-trafficking crime with the knowledge that the confederate is using a firearm to commit it, the intent requirement is met because the defendant intends by his assistance to help make the Section 924(c) offense succeed. That the defendant might have been personally indifferent to whether the confederate used a firearm to commit the crime does not absolve him of accomplice liability if he knew that the crime would be committed in that manner and nevertheless proceeded to furnish assistance. "[I]t has always been enough [for aiding and abetting] that the defendant, knowing what the principal was trying to do, rendered assistance that he believed would (whether or not he cared

that it would) make the principal's success more likely." *United States* v. *Ortega*, 44 F.3d 505, 508 (7th Cir. 1995) (Posner, J.); see *Bozza* v. *United States*, 330 U.S. 160, 164-165 (1947) (holding that a defendant aids and abets the crime of carrying on a distillery business with intent willfully to defraud the United States of taxes where he "actively helps to operate a secret distillery" and "*knows* that he is helping to violate Government revenue laws") (emphasis added); see also *Hanauer* v. *Doane*, 79 U.S. (12 Wall.) 342, 347 (1870) ("Can a man furnish another with the means of committing murder, or any abominable crime, knowing that the purchaser procures them, and intends to use them, for that purpose, and then pretend that he is not a perpetrator in the guilt? * * * No one can hesitate to say that such a man voluntarily aids in the perpetration of the offense."); see also *Pereira*, 347 U.S. at 12-13.[10]

Any other rule would be unsound. Even under petitioner's narrow view of the affirmative-act require-

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[10] See generally 1 Francis Wharton, *A Treatise on the Criminal Law of the United States* § 120, at 95 (6th rev. ed., Phil., Kay & Brother 1868) ("If A. is charged with the offence, and B. is charged with aiding and abetting him, it is essential to make out the charge as to B., that B. should have been aware of A.'s intention to commit murder."); *Tanner* v. *State*, 9 So. 613, 615 (Ala. 1891) ("[W]hen intent is one of the required constituent elements, the co-conspirator or accomplice, to authorize his conviction, must himself have entertained the intent, or must have known that the actor whom he was encouraging, aiding, or abetting entertained it."); cf. Clark & Marshall 245 ("When a specific intent is necessary to constitute a particular crime, one cannot be a principal in the second degree to that particular offense unless he entertains such an intent, or knows that the party actually doing the act entertains such intent.").

ment, for example, a defendant who lends a firearm to another person to use in a rape is surely guilty of aiding and abetting the Section 924(c) offense if he has knowledge of the planned use of the gun, even if he does not care whether the other person commits the armed rape. Such a defendant intentionally furnishes assistance for a crime he knows another person intends to commit, which is all that is required for aiding and abetting.

At minimum, whatever theoretical difference exists between, on the one hand, intending that a confederate use a firearm to commit an offense and, on the other hand, intending that a confederate commit an offense knowing that he will use a firearm to do it would not establish that the district court here committed plain error.

b. Petitioner essentially lodges two objections relating to the intent component of the district court's instructions: (i) that a defendant could be convicted if he "learned of the gun's presence only as it was being used" (Pet. Br. 4); and (ii) that a "defendant would be liable even if he discouraged or sought to prevent [the firearm's] use" by the principal (*id.* at 41). Neither has merit.

a. With respect to the first argument, the government does not contend that a person could be convicted of aiding and abetting a Section 924(c) offense if he completed his assistance before learning that a confederate had a firearm. But petitioner does not contest that if petitioner *continued* his intentional facilitation or encouragement after learning of the use of the gun in the drug-trafficking crime, that suffices for accomplice liability. For example, if a bank robber learns of a confederate's use of a gun mid-robbery and

continues to intentionally participate in what he now knows to be an armed offense, he is guilty of aiding and abetting the confederate's Section 924(c) violation. *E.g.*, *Price*, 76 F.3d at 527-530.

Here, the district court's instructions did not suggest that petitioner could be convicted if he learned of the gun only after his affirmative act of facilitation or encouragement was completed. The court's knowledge instruction ("the defendant knew his cohort used a firearm in the drug trafficking crime," J.A. 196) would not lead a reasonable jury to believe that a defendant could be convicted if he "knew" of the use only after his role in the criminal venture was completed, although it would have been clearer had the court said "would use" rather than "used." This Court does not evaluate jury instructions "in isolation but in the context of the entire charge," *Jones* v. *United States*, 527 U.S. 373, 391 (1999), which here includes the umbrella instruction requiring petitioner to have "*willfully and knowingly* [sought] by some act to help make the crime succeed." J.A. 196 (emphasis added). The district court's conjugation choice certainly does not rise to the level of plain error. Indeed, petitioner's own proposed knowledge instruction was worded the same way, J.A. 14, yet he surely did not believe that it would encompass knowledge of the drug-trafficking crime gained only after completion of his facilitation or encouragement of the use of the firearm. Petitioner's newly minted complaint that the knowledge instruction was not sufficiently "explicit" on the point (Br. 43 n.10) was therefore waived through his "affirmative approval," precluding even plain-error review. *United States* v. *Natale*, 719 F.3d 719, 729 (7th Cir. 2013).

Petitioner points to the prosecutor's remark in summation that "a person cannot be present and active at a drug deal when shots are fired and not know their cohort is using a gun." J.A. 158. That unobjected-to comment, which petitioner did not cite before the court of appeals, may have simply reflected the fact that both of petitioner's accomplices testified at trial that when Gonzales fled the vehicle and the shooting began, all three occupants exited the vehicle, J.A. 109, 125, and then, "[a]fter the shooting stopped, * * * everybody jumped back in the car" and took off "trying to catch up to the other guys that took the stuff," J.A. 109; see also J.A. 126-127. Even if he was not the shooter, petitioner's intentional participation in the drug-trafficking crime continued when he reentered the vehicle to "chas[e]" the men who had stolen his marijuana. J.A. 109.[11] In any event, a prosecutor's unchallenged statement in summation could not taint a proper instruction by the district court.

b. Petitioner's claim that the government's position would permit a defendant's conviction "even if he discouraged or sought to prevent [the firearm's] use" (Pet. Br. 41) is true but incomplete. What is required for conviction is that, with full knowledge that the principal intends to use a firearm during and in relation to the offense, the defendant proceeds intentionally to assist the principal complete the offense, despite any reservations about the firearm. See *Central Bank of Denver*, 511 U.S. at 181 (explaining that Section 2(a) punishes "those who provide knowing aid to

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[11] The possession of a controlled substance with intent to distribute it is a continuing offense. See, *e.g., United States* v. *Zidell*, 323 F.3d 412, 422 (6th Cir. 2003), cert. denied, 540 U.S. 824 (2004).

persons committing federal crimes, with the intent to facilitate the crime"). A defendant's intentional participation in another's armed crime of violence or drug-trafficking crime is not exempt from Section 924(c) because he verbally urges the other person not to use a gun. A getaway driver, for example, could not avoid accomplice liability because he urged his confederates not to rob the bank as he drove them to its front door.

Any other view would not comport with Congress's objectives in enacting Section 924(c) or a rational system of criminal punishment. Petitioner appears to believe that if, for example, a defendant admitted to orchestrating and perpetrating a sexual assault of a child, see 18 U.S.C. 2241(c) (Supp. V 2011), with the full knowledge that a confederate would use a firearm to subdue the victim, he would not be subject to accomplice liability under Section 924(c) if he discouraged—or even secretly disapproved of—the accomplice's use of the firearm. Petitioner cites no decision of this Court construing an intent requirement in that way, and Congress could not have meant to exclude such offenders from the Section 924(c) penalty. Rather, as discussed above, when a defendant intentionally joins in a crime of violence or drug-trafficking crime with the knowledge that a confederate will use a firearm during and in relation to that crime, he has "participate[d] in [the Section 924(c) offense] as in something that he wishes to bring about." *Nye & Nissen*, 336 U.S. at 619 (citation omitted).

II. ANY INSTRUCTIONAL ERROR WAS HARMLESS

Even if the district court erred in failing to instruct the jury that it had to find that petitioner had facilitated the principal's use of the firearm, the error would be harmless beyond a reasonable doubt. See *Skilling* v. *United States*, 130 S. Ct. 2896, 2934 & n.46 (2010); *Neder* v. *United States*, 527 U.S. 1, 15 (1999). Accordingly, this Court should either exercise its discretion to hold that the error was harmless or remand to the court of appeals for a determination of harmlessness in the first instance. See, *e.g.*, *Skilling*, 130 S. Ct. at 2935.[12]

The jury found petitioner guilty on Count 3 of possession of ammunition by a previously convicted felon and on Count 4 of possession of ammunition by an illegal alien. Each of those counts was based on his possession of shell casings matching the gun that was fired at Gonzales. See Pet. App. 29a-30a; J.A. 12-13. The jury was not charged on aiding and abetting for either count. And the government's only argument to the jury on those counts was that, because the evidence established petitioner's "possession of the 9 millimeter firearm," it necessarily "establishe[d] beyond a reasonable doubt that he had to have also possessed the cartridge cases that were inside the 9 millimeter that he possessed." J.A. 159; see also *ibid.* ("So based on the government's evidence regarding the defendant's possession of the firearm and, there-

[12] Given the clarity of Tenth Circuit precedent, the government did not raise a harmless-error argument below. But because the government raised the issue in its brief in opposition, and for the reasons set forth below, the government respectfully urges the Court to exercise its discretion to reach the issue if it finds an instructional error or remand to the court of appeals.

fore, his necessary possession of the cartridge cases, * * * I would ask you also to return a verdict of guilty on Counts Three and Four.").

The jury's guilty verdict on those counts thus demonstrates beyond a reasonable doubt that the jury found that petitioner was the shooter. The jury's conclusion was amply justified by the trial evidence, including Joseph's testimony that petitioner had discharged the handgun. Pet. App. 3a; J.A. 123-124.

But even if evidence had been presented that petitioner possessed ammunition fired by someone else, that conduct would readily qualify as facilitation of the use of the firearm under any conceivable standard. Under even the narrowest view of facilitation, the provision of ammunition to the principal would be aiding and abetting. The jury's guilty verdict on Counts 3 and 4 therefore demonstrates that the asserted instructional error was harmless beyond a reasonable doubt because the jury "necessarily found the element as to which the jury had been mischarged." *United States* v. *Green*, 254 F.3d 167, 170 (D.C. Cir. 2001).

Petitioner contends (Br. 55-56) that the district court's aiding-and-abetting instruction on Counts 1 and 2 could have prompted the jury to mistakenly convict him on Counts 3 and 4 for a confederate's possession of the ammunition in the gun. That argument is flawed. This Court "presum[es] that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case." *United States* v. *Olano*, 507 U.S. 725, 740-741 (1993). The instructions never suggested that a finding of liability on the Section 924(c) offense under an aiding-and-abetting theory would require a

finding that petitioner possessed ammunition. See J.A. 196-200. To the contrary, the court told the jurors that conviction for aiding and abetting requires a finding that "that *another person* actually committed the offense with which the defendant is charged"—*i.e.*, that another person used or carried the firearm. J.A. 195 (emphasis added). The instructions could not reasonably be read to provide that because petitioner aided and abetted *another's* use or carriage of a firearm during and in relation to a drug transaction through his participation in that transaction, he must have possessed the ammunition inside the firearm *himself*. Nor did petitioner object in the district court that the aiding-and-abetting instructions had the potential to confuse the jurors on the ammunition-possession counts.

In short, the jury's conclusion that petitioner possessed the very ammunition loaded into the gun that was fired during the drug transaction demonstrates beyond a reasonable doubt that any instructional error on aiding and abetting was harmless.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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STATUTORY APPENDIX

1. 18 U.S.C. 2 provides:

Principals

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

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

2. 18 U.S.C. 924 provides:

Penalties

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever—

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (*o*) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly—

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if—

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)—

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any 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.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any 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 armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided

for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Pro-*

vided, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsec-

tion, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are—

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(*l*), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by im-

prisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which—

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46,

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to

acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(k) A person who, with intent to engage in or to promote conduct that—

(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(*l*) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(*o*) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more

than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

(p) PENALTIES RELATING TO SECURE GUN STORAGE OR SAFETY DEVICE.—

(1) IN GENERAL.—

(A) SUSPENSION OR REVOCATION OF LICENSE; CIVIL PENALTIES.—With respect to each violation of section 922(z)(1) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing—

(i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or

(ii) subject the licensee to a civil penalty in an amount equal to not more than $2,500.

(B) REVIEW.—An action of the Secretary under this paragraph may be reviewed only as provided under section 923(f).

(2) ADMINISTRATIVE REMEDIES.—The suspension or revocation of a license or the imposition of a civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary.