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No. 21-8103

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In the

# **Supreme Court of the United States**

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**ERNEST ARMANDO ANDUJO**, Petitioner

v.

**UNITED STATES OF AMERICA**, Respondent

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

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## **Reply in Support of Petition for Writ of Certiorari**

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### **Introduction**

The petition presents an important question about the scope of a often-prosecuted federal statute, the statute that criminalizes the possession of unregistered or unmarked firearms, including silencers. Unique among federal firearm definitions, a silencer is defined by its ability to dampen sound and thus applies to common household items like potatoes and pillows. Mens rea, then, plays an important role in separating conduct that is innocent from conduct that is indictable.

This case highlights that problem. Petitioner was a prop man in Hollywood. He regularly provided firearms and firearm accessories to low-budget independent films, a role in which he worked to ensure verisimilitude. The defense didn't ask for a "Hollywood exception" to the firearm rules, as the government suggests in its brief. Rather, he argued that the silencer definition,

read to require only *capacity* to muffle sound, would sweep far more broadly than Congress could have intended. As such, he argued, the definition's use of "for"—a device *for* silencing—required proof that the defendant intended to use the purported silencer as a silencer.

The government offers three reasons why certiorari should be denied: First, it denies the existence of a conflict of authority. Second, it argues that this case does not present a suitable vehicle for review of the question. And third, it argues that the definition of silencer does not have an intrinsic mens rea requirement. None of these are correct. The Court should grant the petition.

## **Argument**

### **I. A split of authority exists as to whether the definition of a silencer depends solely on a device's objective characteristics or an individual's intent to use the device to silence, muffle, or diminish the sound of a gunshot.**

As set out in the Petition, there is a split of authority in the courts of appeals, with three courts saying that the definition of silencer incorporates some notion of purpose, and two courts (including the Ninth Circuit in this case) saying that a silencer is defined by its objective characteristics, nothing more. The government argues that no such split exists, but its arguments are not persuasive.

a. Take *Crooker*. In that case, the First Circuit considered a

defendant charged with possessing a silencer. *United States v. Crooker*, 608 F.3d 94, 95 (2010). The silencer at issue was designed to muffle the sound of an air rifle, but was capable of silencing a traditional firearm with only a minor hardware adjustment. *Id.* at 95-96. There was no evidence that the defendant planned to undertake such a conversion, or that the manufacturer of the air-rifle silencer intended such a conversion to occur—though it appeared likely the defendant knew that such a thing was possible. *Id.* at 97. The First Circuit said that the statute did not cover the defendant’s conduct. “The ordinary connotation of ‘for’ is one of purpose.” *Id.* at 97. Had Congress intended only a test of capability, it would have used words similar to that used in the machinegun provision—a gun “*which shoots*” multiple rounds automatically. *Id.* at 98 (quoting 26 U.S.C. § 5845(b)). The difference in language is easy to explain: “The range of physical objects that can muffle a firearm is so large and of so many alternative uses that some filtering restriction is needed to prevent overbreadth and possibly vagueness.” *Id.* Having reviewed both the text and the purpose of the statute, the court of appeals concluded that “intent or purpose is an element of the initial silencer definition.” *Id.*

That holding is in direct conflict with the holding of the Ninth Circuit’s conclusion here, a case in which the jury was instructed that a silencer was an item that would silence the sound report of a firearm, and in which the Ninth Circuit said there was no proof of error in the expert’s description of the law

governing silencers—testimony by the expert, recall, saying that she could determine that the item was a silencer by its objective characteristics.

b. The Sixth and Seventh Circuits have similar holdings. *United States v. Carter*, 465 F.3d 658, 667 (6th Cir. 2006) (“The language of the statute focuses on the intended application of a silencer, not its actual demonstrated operation. . . . The word choice indicates a concern for the purpose of the mechanism, and the parts thereof, not the function.”); *United States v. Syverson*, 90 F.3d 227, 232 (7th Cir. 1996) (“Under *Staples*, the government had to prove that the cylinder was made for the purpose of silencing a firearm, not that this purpose was realized”) (citing *Staples v. United States*, 511 U.S. 600 (1994)). Notably, in both of those cases, it was the *government* who wanted the silencer definition to encompass the item’s intended purpose, and not its capability to function as a silencer. That was because, in those cases, the silencers did not work. They didn’t have the capability to function. The rule should not be one way when the government wants a purpose-based definition, and another where the defense wants it.

The government’s attempts to minimize the conflict in the circuit authority are misguided. The split of authority warrants this Court’s review.

## **II. This case is an excellent vehicle for resolving the question presented.**

Moreover, despite the government’s arguments to the contrary,

Petitioner's case presents a good opportunity to address this question. The government doesn't dispute that, under the purpose-based standard he proposes, Petitioner would have had a strong defense at trial. And its argument that Petitioner did not preserve his claim misconstrues the record below. Petitioner's appellate argument about the scope of proper expert testimony is not divorced from the claim he makes here—it was grounded in the argument that an expert cannot testify about mens rea and that the silencer definition has an intrinsic mens rea requirement. The Ninth Circuit thus passed on the question presented here when it rejected Petitioner's argument about the scope of proper expert testimony. Any suggestion that the claim was not presented because it was not raised in the context of a *jury* instruction should be rejected. If the issue is properly raised, then it matters little whether it was raised as a jury instruction question, or as a matter of sufficiency of the evidence, or, as here, whether the expert's testimony was proper.

In short, no vehicle problem prevents this Court from granting review.

### **III. The Ninth Circuit's decision is wrong.**

Finally, the Ninth Circuit's decision is wrong. The plain language of the silencer definition embeds an intent requirement, as the Petitioner explained in his brief. The government's contrary arguments are meritless.

First, the government argues that it would be strange for Congress to have smuggled an extra mens rea element into the definitional provision of a

silencer, but it no other firearm definition. Not at all. Silencers is unique among the firearms provisions because the plain meaning of the definition sweeps in common household items. A mens rea requirement is necessary: “[T]he range of physical objects that *can* muffle a firearm is so large and of so many alternative uses that some filtering restriction is needed.” *Crooker*, 608 F.3d at 98.

Nor, contrary to the government’s view, does *Staples* provide an adequate buttress against prosecution of innocent individuals. *Staples* requires that a defendant know the characteristic that brings the item within the relevant definition—here, that the item is one that could muffle sound. But it hardly takes specialized knowledge to understand that items like pillows would, if placed over the end of a firearm, decrease sound—the “pillow as silencer” trope has made an appearance on everything from *Murder, She Wrote* to *Sons of Anarchy*.<sup>1</sup> Knowledge that an item, a pillow, is one that would muffle sound is knowledge of the characteristic that brings the item within the definition, which is all that *Staples* requires. Thus *Staples* provides no protection for an individual who had no intention of using their pillow for

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<sup>1</sup> See TV Tropes, “Pillow Silencer,” at <https://tvtropes.org/pmwiki/pmwiki.php/Main/PillowSilencer> (last visited Oct. 25, 2022).

muffling the sound of firepower, but knew that the pillow had the capacity to do so.

But more importantly, setting aside whether this is a prudent choice, it is the choice called for by Congress's choice of language. Section 921(a)(24) defines "silencer" not in terms of objective capability—as a device *that* silences, muffles, or diminishes the sound of a gunshot—but as "any device *for* silencing, muffling, or diminishing the report of a portable firearm." 18 U.S.C. § 921(a)(24) (emphasis added). The Ninth Circuit's failure to apply the ordinary meaning of the silencer definition justifies this Court's review.

## Conclusion

For the foregoing reasons, Mr. Andujo respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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DATED: October 28, 2022

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