No. 24-

IN THE

Supreme Court of the United States

ELDEN DON BRANNAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The National Firearms Act criminalizes the unregistered possession of a narrow subset of inherently dangerous "firearms," including a "destructive device." 26 U.S.C. § 5861(d). Under the Act, "destructive device" is defined by reference to two categories of military-style ordinance and artillery—like bombs, grenades, mines, and large-projectile launchers—plus combinations of parts designed or intended to be converted into such weapons. *Id.* § 5845(f)(1)–(3). The same definitional provision clarifies, however, that "[t]he term 'destructive device' shall not include any device which is neither designed nor redesigned for use as a weapon." *Id.* § 5845(f).

The circuits openly disagree over the meaning and significance of this limiting language in the context of a § 5861(d) prosecution. On one view, applied by the Fifth Circuit below, the language creates an affirmative defense to liability. The opposing view, in contrast, holds that the language identifies design (or redesign) for use as a weapon as an essential characteristic of a covered destructive device, and thus an element of the crime.

The question presented is:

Whether the Act's instruction that the term destructive device "shall not include any device which is neither designed nor redesigned for use as a weapon" describes an essential feature that the government must prove in order to obtain a conviction under 26 U.S.C. § 5861(d), or instead sets forth an affirmative defense.

RULE 14.1(b)(iii) STATEMENT

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

United States of America v. *Brannan*, No. 2:22-cr-00184 (S.D. Tex.);

United States of America v. *Brannan*, No. 23-40098 (5th Cir.).

No other proceedings in state or federal trial or appellate courts, or in this Court, directly relate to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Elden Don Brannan petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS AND ORDERS BELOW

The Fifth Circuit's opinion is reported at 98 F.4th 636 and reproduced at App. 1a–8a.

STATEMENT OF JURISDICTION

The Fifth Circuit entered judgment on April 12, 2024, and denied petitioner's timely petition for rehearing *en banc* on August 15, 2024. App. 1a, 9a. On November 6, 2024, Justice Alito extended the deadline to file this petition to December 13, 2024. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

26 U.S.C. § 5845, in pertinent part, provides (with line breaks added):

> For purposes of this chapter—
>
> **(a) Firearm.**—The term "firearm" means . . . (8) a destructive device.
>
> * * *
>
> **(f) Destructive Device.**—The term "destructive device" means
>
> (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellent charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device;

> (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes; and
>
> (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled.
>
> The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 7684(2), 7685, or 7686 of title 10, United States Code; or any other device which the Secretary finds is not likely to be used as a weapon, or is an antique or is a rifle which the owner intends to use solely for sporting purposes.

26 U.S.C. § 5861 provides, as relevant:

> It shall be unlawful for any person—
>
> * * *
>
> **(d)** to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record[.]

INTRODUCTION

This case presents the Court with the opportunity to resolve an acknowledged and entrenched circuit conflict over the meaning and elemental significance of the National Firearms Act's instruction that "[t]he term 'destructive device' shall not include any device which is neither designed nor redesigned for use as a weapon," 26 U.S.C. § 5845(f), in the context of a prosecution, under the Act, for the alleged unlawful possession of such a device.

The National Firearms Act, 26 U.S.C. § 5801, *et seq.*, imposes strict registration and other regulatory restraints on a subset of statutorily defined "firearms." The Act makes it a felony, punishable by up to 10 years in prison, *id.* § 5871, for anyone "to receive or possess a firearm which is not registered to him" in a national database. *Id.* § 5861(d). Because the line between proscribed and lawful weapons is blurry and often technical, and because the penalty for misperceiving that line is so steep, § 5861(d) requires proof of scienter—a guilty mind. *Staples* v. *United States*, 511 U.S. 600, 604–19 (1994). To obtain a § 5861(d) conviction, then, the government must prove not only that an alleged "firearm" had all the features necessary to "br[ing] it within the statutory definition," *id.* at 602, but also that the accused knew the weapon had each essential feature. *Id.* at 619–20.

At issue here are the features that define the class of registrable "destructive devices." Section 5845(f) of the Act exhaustively defines what can be considered a "destructive device"—and what cannot. Covered devices fall into three categories consisting of military-type ordinance and artillery (e.g., "explosive" "bombs," "grenades," and "missiles"), *id.* § 5845(f)(1), "weapon[s] by whatever name" that "expel" large-bore "projectile[s]," *id.* § 5845(f)(2), and "combination[s] of parts designed

or intended" to convert "any device" into a weapon in the first two categories. *Id.* § 5845(f)(3). But the same provision also takes care to identify devices that are not covered. In particular, a "'destructive device' shall not include any device which is neither designed nor redesigned for use as a weapon." *Id.* § 5845(f).

The circuits are openly split on whether, as incorporated into § 5861(d), "th[is] limiting language constitutes an element of the offense or an affirmative defense." *United States* v. *Neil*, 138 F. App'x 418, 420–21 n.3 (3d Cir. 2005); App. 6a n.4 (noting "diverge[nt]" circuit decisions). The Eleventh Circuit reads § 5845(f)'s instruction *not* to include devices "neither designed nor redesigned for use as a weapon" as "exclud[ing]" such devices from the "statutory framework." *United States* v. *Hammond*, 371 F.3d 776, 780 (11th Cir. 2004). On this view, a device "is a 'destructive device' within the meaning of the statute if, and only if, it was designed for use as a weapon." *Ibid.* The government thus bears the burden of proving that feature "beyond reasonable doubt" to secure a § 5861(d) conviction. See *id.* at 780–82.

In the decision below, the Fifth Circuit reaffirmed its commitment to the contrary view that it and six other circuits share. App. 6a n.4 (collecting cases). These courts interpret § 5845(f)'s "neither designed nor redesigned" language to create an "affirmative defense" to § 5861(d) liability, "not an element of the crime." App. 1a. The government thus has no duty to "affirmatively prove" that a "device *was* designed as a weapon." *Id.* at 5a (original emphasis). Instead, the burden rests on the individual accused of violating § 5861(d) to assert and establish that his device was not so designed.

This square conflict clearly implicates this Court's paramount interest in rectifying the uneven application of the federal criminal law. The "distinction between the elements of an offense and an affirmative defense is well-known and important." *Ruan* v. *United States*, 597 U.S. 450, 468 (2022) (Alito, J., concurring). An incorrect answer both shifts to the accused the burden of disproving a fact that Due Process makes essential to his guilt, and denies his Sixth Amendment right to "a 'complete verdict'" from a jury properly instructed "on every element of the [charged] offense." *Neder* v. *United States*, 527 U.S. 1, 12 (1999). And in the context of a § 5861(d) prosecution, those consequences follow not only as to the burden to prove the defendant possessed a "firearm," but as to the *mens rea* requirement identified in *Staples*, 511 U.S. at 619. If design as a weapon is an elemental fact the jury must find beyond reasonable doubt, then, under *Staples*, so too is the accused's knowledge of that characteristic.

The decision below also warrants review because the Fifth Circuit's approach is wrong. Text, structure, and context all compel the conclusion that § 5845(f)'s definition of "destructive device" reaches only those devices that have been designed, or redesigned, for use as one of the weapons the statute enumerates. And that interpretation has clear import as to the elements in a § 5861(d) prosecution. An alleged destructive device's character as "*designed* for use as a *weapon*" is a fact the government must prove to establish its status as a statutory "firearm." *Hammond*, 371 F.3d at 780 (original emphasis). Just as a rifle is a registrable "machinegun" only if it is capable of firing more than one round automatically upon a single function of the trigger, see *Garland* v. *Cargill*, 602 U.S. 406, 415–16 (2024); *Staples*, 511 U.S. at 602, the makeshift device Elden Brannan filled with a small amount of firework

powder was an "explosive *bomb*" only if it was designed to function as that type of weapon.

In short: this case meets all the criteria for review. The stakes of the question presented are high. There are no roadblocks on the Court's path to reaching that question. And the court of appeals itself acknowledged that its answer squarely conflicts with that of another circuit. The petition should be granted.

STATEMENT OF THE CASE

1. Elden Brannan has been "fascinate[d]" with fireworks "since he was a kid" and still uses any occasion as an excuse to set them off, particularly as a means to entertain his sister and her three children. Indeed, at the Corpus Christi, Texas, home he shares with his sister and the kids, Mr. Brannan's firework displays are "definitely a family activity." C.A. ROA.446, 453–54.

In February of 2022, Mr. Brannan got into an altercation with his sister's then-boyfriend, and the police were called to intervene. App. 2a. Sill upset over the incident, Mr. Brannan's sister told the responding officers about a device in her brother's bedroom closet that she said might be a "pipe bomb"—a description she based on portrayals of such devices on television. She knew about the device because she had seen Mr. Brannan working on it at the kitchen table, openly, several weeks prior, and had since noticed it in the closet, which her brother kept unlocked, while borrowing a shirt. C.A. ROA.442, 444–45, 448–49.

Inside the closet, next to Mr. Brannan's collection of arial-shell fireworks leftover from New Year's, the officers found a slender metal pipe, about six inches in length. App. 2a. One end, covered by some tape but "not fully enclosed," had a hobby fuse protruding from the opening, with holed pieces of cardboard and clay

below. *Ibid.*; C.A. ROA.490, 500, 545. The other end consisted of a plastic soda-bottle cap, above five dimes and a piece of wax. App. 2a. The middle contained 39.7 grams of pyrotechnic composition (the mixture of black powder and stars that produces colors) taken from one of the nearby fireworks. *Ibid.*; C.A. ROA.546.

The government subsequently charged Mr. Brannan with possessing an unregistered "destructive device," specifically, an "explosive bomb," contrary to 26 U.S.C. § 5861(d). Maintaining his innocence, Mr. Brannan insisted on a trial.

2. At Mr. Brannan's trial, there was no dispute that he made the makeshift firework device and hadn't registered it. The case thus turned on (1) whether the device was in fact a "destructive device," in that it had all the essential features of an "explosive bomb," and (2) whether Mr. Brannan knew the device had those features. As to the two contested elements, the government's evidence consisted entirely of testimony from the ATF agents who examined the device and deemed it registrable. App. 2a.

That testimony revealed that, apart from confirming the identity of the firework powder, and that samples of both the powder and fuse burned when exposed to flame, the agents performed no other analysis or tests. The agents explained that most of the device's component parts, like hobby fuse, low-explosive powder, clay, and a metal tube, are often seen in improvised bombs. But they agreed that each of those commonplace items, except the metal tube, is regularly present in commercial and hobbyist fireworks. C.A. ROA.492–94, 498–500, 527–30, 535–37, 541–46, 558–60.

The agents also conceded that Mr. Brannan's device lacked any additional components typically associated with bombs and other explosive weaponry, such as

shrapnel, high-explosive powders, and metal end caps. C.A. ROA.497–98, 507, 547. And, aside from the device's composition, the agents were aware of no direct or circumstantial evidence suggesting Mr. Brannan intended to make a bomb. Nevertheless, the ATF's explosives expert testified that the device qualified as a "bomb," and thus a "destructive device" under the National Firearms Act, because he believed the device "could" explode as constructed, and would be capable of causing some degree of harm if it did. C.A. ROA.538–39, 548–49, 565, 568–69.

In defense, Mr. Brannan presented his own explosives expert, a former Air Force bomb technician. App. 2a. Based on the device's composition—particularly, the absence of components guaranteed to ensure the tube would confine enough gas to fragment (e.g., metal end caps), or that would, if present, objectively signal an intent to harm (e.g., shrapnel)—the expert opined that the device was most consistent with a makeshift roman-candle or fountain firework, i.e., a device that was designed to emit a colorful pyrotechnic display out of one end, but not to explode. C.A. ROA.588–92, 603–04, 609–11; App. 2a. The expert thus concluded that the device lacked the essential qualities of a "destructive device" within the meaning of the Act. App. 2a–3a.

Emphasizing the apparent ambiguity as to whether he designed the device to explode at all, let alone as a bomb, Mr. Brannan moved for judgment of acquittal at each stage of the trial. App. 3a. In support, he argued that, by instructing that "[t]he term 'destructive device' shall not include any device which is neither designed nor redesigned for use as a weapon," 26 U.S.C. § 5845(f), the Act required the government to prove he designed his device to function as the charged weapon. App. 3a. In the case of an explosive *bomb*, he further argued, this meant proof that the device was designed

both to explode, and to do so as a means of inflicting harm. C.A. ROA.227–35, 239. He also urged the district court to instruct the jury consistent with his interpretation of the Act. App. 3a.

The district court denied those requests. It reasoned that the government had no duty to prove Mr. Brannan designed his device as an explosive bomb because, under Fifth Circuit precedent, *United States* v. *Beason*, 690 F.2d 439 (5th Cir. 1982), an alleged destructive device's design as a weapon "was not an element of the offense but an affirmative defense." App. 3a. Mr. Brannan declined to assert that defense, maintaining that doing so would impermissibly shift to him the government's burden as to the two key contested elements. *Ibid.* As to those elements, the jury was instructed to find that "this destructive device was an explosive bomb," and that Mr. Brannan "knew the characteristics of the destructive device, an explosive bomb." App. 3a. Yet, over Mr. Brannan's objection, the only guidance the court jury received as to what those terms meant was, "In this case, the term destructive device means any explosive bomb." C.A. ROA.116.

So instructed, the jury voted to convict. App. 4a. Mr. Brannan was later sentenced to 24 months' imprisonment, and three years of supervised release. *Ibid.*

3. On appeal, Mr. Brannan pressed the same construction of the Act, renewing his insufficiency claim, and alleging that the district court reversibly erred by declining to instruct the jury consistent with his reading. App. 4a–5a. He further asserted that a more recent Fifth Circuit decision indicated that *Beason* did not foreclose his interpretation. *Id.* at 7a–8a. Alternatively, he argued that, in any event, *Beason* lacked binding force because it conflicted with an earlier Fifth Circuit decision, *id.* at 6a–7a, as well as this Court's

intervening decision in *Staples*, 511 U.S. at 600. See Def. C.A. Br. 25–26 (ECF No. 35).

4. The Fifth Circuit affirmed. App 1a–8a. The panel held that Mr. Brannan's reading of the Act was indeed "foreclose[d]" by its prior decision in *Beason*. App. 5a. As the panel explained, *Beason* interpreted § 5845(f)'s neither-designed-nor-redesigned language as creating an "exception" to liability under § 5861(d), and accordingly an affirmative defense the accused must invoke. This was so, in *Beason*'s view, because § 5861(d)'s "destructive device" element "can be defined accurately" by reference to the term "explosive bomb" alone, and thus "without reference" to an allegedly proscribed device's quality as designed (or redesigned) as a weapon. App. 5a–6a (citing *Beason*, 690 F.2d at 445).

"Because" it was "bound by *Beason*," the panel "reject[ed] [the] contention that the Government must affirmatively prove § 5845(f)'s 'not designed as a weapon' exception as an element of the crime," App. 6a, and held that the district court did not err by failing to so instruct the jury. App. 8a. And the panel concluded that, under *Beason*'s construction of the Act, the government provided "ample evidence" to convict in light of the ATF expert's opinion that Mr. Brannan's device "would explode and produce dangerous metal shrapnel" if it did. *Id.* at 7a–8a. In so holding, the panel noted that the circuits that have addressed the issue "mostly agree" with *Beason*'s affirmative-defense reading, but acknowledged that the Eleventh Circuit has "diverged" from this view. *Id.* at 6a n.4.

5. Mr. Brannan timely petitioned for rehearing *en banc*, urging the Fifth Circuit to revisit *Beason* and embrace the Eleventh Circuit's interpretation in *Hammond*. The court denied the petition. App. 9a.

REASONS FOR GRANTING THE PETITION

I. The circuits are openly split on the elements necessary to establish guilt for the knowing possession of a registrable "destructive device" under 26 U.S.C. § 5861(d).

First and foremost, the Fifth Circuit's decision warrants review because it cleanly presents an important question of statutory interpretation that has split the circuits. The National Firearms Act provides that the term "'destructive device' shall not include any device which is neither designed nor redesigned for use as a weapon." 26 U.S.C. § 5845(f). That language begs the question: in order to obtain a § 5861(d) conviction for the alleged possession of an unregistered "destructive device," should the government have to prove the device was designed, or redesigned, for use as a weapon?

As the circuits have long acknowledged, the answer depends on geography. The majority of circuits, including the Fifth, say "no." The key language is read as merely creating an affirmative defense that, if satisfied, operates to justify the possession of an otherwise covered device. In at least the Eleventh Circuit, in contrast, the answer is "yes." The same language is understood as identifying a feature that is essential to coverage, and thus a fact the government must prove on pain of judgment of acquittal. This square circuit conflict is open, longstanding, and firmly entrenched. The Court should resolve the dispute, as only it can.

1. In the decision below, the Fifth Circuit reaffirmed its commitment to the majority view that, as the court observed, App. 6a n.4, it shares with six other circuits. That view interprets § 5845(f) not as excluding "any device which is neither designed nor redesigned for use as a weapon" from the class of registrable "destructive devices," but as creating an exception (or exemption)

that the accused must assert and support as an affirmative defense to § 5861(d) liability.

a. The Fifth Circuit's decisions in *Beason*, and now, Mr. Brannan's case, exemplify the majority approach. In *Beason*, the defendant challenged his conviction under § 5861(d) for having possessed five "homemade hand grenades," 690 F.2d 439, 441 (5th Cir. 1982), on the ground that the government failed to present evidence that the grenades were "designed for use as a weapon." *Id.* at 445. The government contended that it had no such duty because, in its view, that language sets forth an "exception" that "the defendant must raise." *Ibid.* Adopting that view, the Fifth Circuit held that "the exceptions contained in the definition of destructive device should be treated as affirmative defenses rather than as part of the elements of the offense." *Ibid.*

The Fifth Circuit gave two reasons for this conclusion. *First*, the court noted that "[e]xceptions to statutory definitions are generally matters for affirmative defenses, especially where the elements constituting the offense may be defined accurately without any reference to the exceptions." 690 F.2d at 445. "Since 'firearm' is defined as including destructive devices, such as explosive grenades," the court reasoned, "the elements of the offense may be defined accurately without reference to the exceptions, which therefore should be treated as affirmative defenses." *Ibid. Second*, the court cited "the legislative history of Section 5845," which it took to "suggest[ ] that Congress intended the exceptions to operate as affirmative defenses." *Id.* at 445 & n.8 (citing S. Rep. No. 90-1501 at 47 (1968)).

In affirming Mr. Brannan's conviction, the panel below removed any basis to doubt that *Beason* is the law of the Fifth Circuit: "Under our binding precedent, this exception to § 5861(d) is an affirmative defense, not an

element of the crime." App. 1a, 5a–7a. As the court expressly held, under that rule, the government is not obliged to "affirmatively prove," *id.* at 5a, 6a, and the jury need not be instructed to find, *id.* at 8a, that an alleged explosive bomb was designed for use as that weapon. Indeed, the Fifth Circuit confirmed that, under its approach, the district court did not err in declining Mr. Brannan's request to at least apprise the jury of the bare fact that the statutory definition of "destructive device" says that term "shall not include" any device neither designed nor redesigned as a weapon. See *id.* at 3a–4a.

b. Six other circuits have reached the same conclusion. Notably, however, none of those circuits has engaged in any meaningful analysis, instead simply treating *Beason*, or the legislative history, as dispositive. See *United States* v. *Musso,* 914 F.3d 26, 28 (1st Cir. 2019) (citing *Beason* to hold that the "exclusions present affirmative defenses; they do not define elements of the substantive offense"); *United States* v. *Posnjak*, 457 F.2d 1110, 1116 (2d Cir. 1972) ("The Committee Report stated that this exception was an affirmative defense; a device which otherwise appeared to fall within the statute would be exempted from its requirements if it could be shown that it was not designed as a weapon."); *United States* v. *Dalpiaz*, 527 F.2d 548, 552 (6th Cir. 1975) ("The legislative history of the section reveals that the exception is a matter of affirmative defense."); *United States* v. *Johnson*, 152 F.3d 618, 623 (7th Cir. 1998) ("[T]he subsection contains an affirmative defense: The term destructive device does not include any device that is not designed for use as a weapon."); *United States* v. *Oba*, 448 F.2d 892, 894 (9th Cir. 1971) ("[W]e point out that the exception created by Congress . . . in substance constitutes an affirmative defense . . . ."); *United States* v. *La*

Cock, 366 F.3d 883, 889 (10th Cir. 2004) ("Along with several other circuits, we have previously held that the determination as to whether a device was 'designed [or] redesigned for use as a weapon' is an affirmative defense, not an element of" § 5861(d)).

The precise contours of the affirmative defense vary slightly across these circuits. But the bottom line is the same: in a § 5861(d) prosecution, the government has no duty to "affirmatively prove the [defendant's] device *was* designed as a weapon." App. 5a (original emphasis).

2. The exact opposite is true in the Eleventh Circuit. In that circuit, if the government's evidence is "insufficient to permit the jury to find beyond reasonable doubt that [a] device was designed as a weapon," then the § 5861(d) defendant is entitled to "judgment of acquittal." *Hammond*, 371 F.3d at 782. And while the Fourth Circuit has not had occasion to directly address the issue, that court's precedent suggests that it would almost certainly agree.

a. In *Hammond*, the Eleventh Circuit affirmed a district court's grant of judgment of acquittal to a defendant alleged to have violated § 5861(d) based on his possession of a homemade "firecracker" device much like the device at issue here. See 371 F.3d at 777–78, 780–82. The alleged "explosive bomb" was a fused, 13-inch tube "made of ten layers of industrial grade cardboard" that "was 'as hard as wood,'" and that the defendant had filled with nine ounces (252 grams) of low-explosive powder mixture (significantly more than the 39.7 grams in Mr. Brannan's device). *Id.* at 778. And there, as here, the government's case rested on the testimony of an ATF expert who opined that the device fell within the Act because it "would explode," and anyone nearby "could sustain serious injury or death" if it did. *Id.* at 780.

The Eleventh Circuit held that this testimony "[wa]s not enough to bring the device within the statutory framework." *Hammond*, 371 F.3d at 780. And that conclusion followed from a straightforward reading of § 5845(f)'s text: "Although the statute does define a 'destructive device' to include explosive devices, . . . it also explicitly excludes from coverage any explosive device not *designed* for use as a *weapon*." *Ibid.* (original emphasis). By force of logic, then, a device "is a 'destructive device' within the meaning of the statute if, and only if, it was designed for use as a weapon." *Ibid.* In the context of an alleged explosive bomb, for instance, "[s]tatutory coverage depends upon proof that a device is an explosive *plus* proof that it was designed as a weapon." *Ibid.* (original emphasis). The government's failure to prove that essential characteristic accordingly mandated judgment of acquittal. See *id.* at 780–82.

b. Fourth Circuit precedent strongly suggests the same rule. In *United States* v. *Morningstar*, a defendant was charged under § 5861(d) for possessing several sticks of "commercial explosives" he "fastened together with electrical tape and several unattached blasting caps"—on the theory that those items constituted "a combination of parts intended for use as a bomb and from which a bomb may be readily assembled." 456 F.2d 278, 279–80 (4th Cir. 1972); see § 5845(f)(3). The Fourth Circuit joined every other circuit in holding that, although not encompassed by § 5845(f)(1), commercial explosives (like dynamite and fireworks) may form one of a "combination of parts" as contemplated in § 5845(f)(3). *Morningstar*, 456 F.2d at 280–81. It thus reversed the district court's dismissal of the indictment premised on contrary reasoning.

But, in so holding, the Fourth Circuit emphasized that a qualifying combination of parts must be either

"designed," or "intended," to be converted into a device listed in paragraph (f)(1) or (f)(2), *and* that the devices in those categories are subject to the express limitation that they be designed or redesigned as weapons. See *Morningstar*, 456 F.2d at 280–81. The statutory text and legislative history confirmed as much. See *ibid.* And those sources revealed that the "designed or redesigned" language, like the "designed or intended for use" language, serve to restrict the statute's scope. The Fourth Circuit thus held that the latter language in § 5845(f)(3) does not "simply creat[e] an affirmative defense." *Id.* at 281. And it instructed that, at trial, "the burden will be on the government to prove," among other things, that "the commercial materials mentioned in the indictment . . . could have been readily assembled into a bomb," and that "Morningstar intended to convert the sticks and caps into a bomb." *Id.* at 281–82.

To be sure, *Morningstar* did not specifically register a view as to the whether the language excluding devices "neither designed nor redesigned for use as a weapon" is also an element. But its reasoning as to § 5845(f)(3)'s "designed or intended" element leaves little doubt that, in the Fourth Circuit, Mr. Brannan's case would have turned out differently. That reasoning was necessary to its holding about the statute's scope, and applies equally to the "designed or redesigned" language. See *id.* at 281 (quoting H.R. Rep. No. 90-1577, at 12 (1968), *reprinted in* 3 U.S.C.C.A.N. 4410, 4418 (1968)).

3. This circuit conflict clearly implicates the Court's paramount interest in ensuring uniform application of federal criminal statutes. As Mr. Brannan's case illustrates, the predictable result of these divergent interpretations is different standards of proof that result in disparate treatment of similarly situated defendants.

Had Mr. Brannan's case arisen in Florida, he would have been entitled to have the jury informed that the firework-filled device he tinkered with openly and kept unsecured in his bedroom closet was not a "destructive device" within the meaning of the Act "merely because it explodes," and that his guilt thus "depend[ed] upon proof that [the] device [wa]s an explosive *plus* proof that it was designed as a weapon." *Hammond*, 371 F.3d at 780 (original emphasis). But Mr. Brannan lives in Texas, where Fifth Circuit precedent "foreclose[d]" his request for just such an instruction. App. 5a.

Moreover, under the Eleventh Circuit's interpretation, an ATF expert's testimony that a makeshift "firecracker" device "would explode" and cause "serious injury or death" to those nearby is "clearly insufficient proof" to secure a § 5861(d) conviction. *Hammond*, 371 F.3d at 780. But under the Fifth Circuit's approach, an agent's opinion that Mr. Brannan's device "would explode and produce dangerous metal shrapnel" qualified as "ample evidence" of his guilt. App. 7a–8a.

That is precisely the sort of geographic incongruity that warrants this Court's intervention.

4. It is also clear that this split will not resolve itself.

Mr. Brannan urged his panel to adopt the Eleventh Circuit's reading, arguing that a recent Fifth Circuit decision had moved in that direction, and away from *Beason*. But the panel rejected that contention, cementing *Beason*, and its affirmative-defense rule, as binding Fifth Circuit law. App. 5a–7a. The Seventh Circuit also recently reaffirmed that it "ha[s] never adopted [the Eleventh Circuit's] analysis" under "the *Hammond* test." *United States* v. *Creek*, 95 F.4th 484, 490 (7th Cir. 2024). Meanwhile, the Eleventh Circuit continues to consistently apply *Hammond*. See *United States* v. *Spoerke*, 568 F.3d 1236, 1246–47 (11th Cir.

2009) (so applying but rejecting insufficiency claim on the case's particular facts); *United States* v. *Pisa*, 701 F. App'x 781, 782–83 (11th Cir. 2017) (same). This conflict is entrenched, and ripe for the resolution only this Court can offer.

II. The question presented is important, and this case is an ideal vehicle.

The Court's interest in ensuring uniform application of federal law is reason enough to grant the petition. But the question presented is also important in its own right. And Mr. Brannan's case presents an excellent vehicle for reaching and resolving that question.

1. Whether the Act is best interpreted as making an alleged destructive device's character as having been "designed [ ]or redesigned for use as a weapon" an affirmative defense, or an indispensable feature to the device's coverage, is important in numerous respects.

a. "In criminal law, the distinction between the elements of an offense and an affirmative defense is well-known and important." *Ruan*, 597 U.S. at 468 (Alito, J., concurring). That is because an incorrect answer shifts to the accused the burden of disproving a fact that Due Process makes essential to his guilt. Just as importantly, failing to properly instruct the jury "on every element of the offense" denies the accused his Sixth Amendment right to "a 'complete verdict.'" *Neder*, 527 U.S. at 12.

And in the context of a § 5861(d) prosecution, those consequences follow not only as to the burden to prove the defendant possessed a "firearm," but as to the *mens rea* requirement identified in *Staples*, 511 U.S. at 619. If design as a weapon is an elemental fact the jury must find beyond reasonable doubt, then, under *Staples*, so too is the accused's knowledge of that characteristic. As this Court's enduring interest illustrates,

clarifying the mental state that distinguishes "entirely innocent" acts from culpable ones is an issue of surpassing importance. See *Staples*, 511 U.S. at 614–15; see also, e.g., *Ruan*, 597 U.S. at 468; *Rehaif* v. *United States*, 588 U.S. 225, 232, 237 (2019); *Elonis* v. *United States*, 575 U.S. 723, 740, 743–44 (2015).

b. The answer to the question presented also has implications throughout the National Firearms Act's regulatory apparatus. Section 5845 defines the scope of all "firearms" subject to the Act, and its corresponding registration and other regulatory requirements. Subsection (f), in turn, governs which devices are, and are not, subject to those requirements. Thus, proper construction of § 5845's various provisions is crucial to providing citizens with notice of the characteristics that trigger the duty to seek advance government approval to make, possess, or carry a covered "firearm." See *Hammond*, 371 F.3d at 782 ("Whether Congress should require registration, tax, and permission for one to make or possess" a device like Mr. Hammond's "we cannot say; it has not, however, required it yet.").

2. Mr. Brannan's case is an excellent vehicle for resolving the conflict over this important question.

a. First, this case cleanly and squarely presents that question. Mr. Brannan implored the trial court to weigh the sufficiency of the evidence, and instruct the jury, consistent with his preferred interpretation. App. 3a. He pressed that insufficiency claim, and alleged instructional error, for the same reasons on appeal. *Id.* at 4a. And, after rejecting both claims on the merits, *id.* at 4a–8a, the Fifth Circuit declined to revisit its position en banc. *Id.* at 9a.

b. The question presented is also dispositive. To be sure, Mr. Brannan preserved his view that his conviction rests on insufficient evidence, and he would no

doubt renew that contention on remand if he were to prevail in this Court.

For present purposes, however, the more important point is that a favorable answer to the question presented would be outcome determinative of Mr. Brannan's claim of reversible instructional error. Had his case arisen in the Eleventh Circuit, the court of appeals would have held that the district court erred by failing to instruct the jury that the government needed to prove beyond a reasonable doubt that his device was designed for use as a weapon. And there is no way this constitutional instructional error could be deemed harmless beyond a reasonable doubt. See *Neder*, 527 U.S. at 11. Given that the parties hotly contested the device's design and function, a reasonable jury could easily have found that the government failed to carry its burden under the correct reading of the statute. Indeed, the Fifth Circuit recently held that failing to instruct the jury that a defendant "knew that he 'was acting in an unauthorized manner' as required by *Ruan*"—a case similarly concerning an element formerly thought to be an affirmative defense—was not harmless error. *United States* v. *Qureshi*, 121 F.4th 1095, 1100–03, 1105–08 (5th Cir. 2024). So too here.

III. The decision below is wrong.

The Fifth Circuit's decision also warrants review because it is incorrect on the merits. The statutory text, read in context and in light of this Court's precedents, confirms that whether a device was "designed [ ]or redesigned for use as a weapon" goes to the statute's coverage. This language thus imposes a burden on the government; it does not merely create an affirmative defense that a defendant can invoke.

1. The Act prohibits any person from receiving or possessing an unregistered "firearm." 26 U.S.C.

§ 5861(d). A covered "firearm" includes "a destructive device," *id.* § 5845(a)(8), which in turn has a three-prong definition, *id.* § 5845(f).

The first two prongs essentially cover military-style weapons whose sole function is combat. The first category includes ordinance like explosive, incendiary, or poison gas bombs, grenades, rockets, missiles, and mines. *Id.* § 5845(f)(1). Similarly, the second category reaches large-bore projectile weapons. *Id.* § 5845(f)(2). These two categories thus cover devices that, by their design and nature, have no non-weapon purpose. See *Morningstar*, 456 F.2d at 280–81.

The definition's third prong reaches "any combination of parts either designed or intended for use in converting any device into a destructive device as defined in" the first two prongs "and from which a destructive device may be readily assembled." *Id.* § 5845(f)(3). "The third section does not broaden the group of devices which are covered; it merely precludes evasion through possession of the unassembled components instead of the assembled item." *Posnjak*, 457 F.2d at 1116.

Finally, the definition includes the key limitation at issue: A "destructive device" "shall not include any device which is neither designed nor redesigned for use as a weapon."

In two ways, these provisions show that the "neither designed nor redesigned" language goes to statutory coverage, not an affirmative defense. First, none of these provisions regulates primary conduct or governs litigation burdens or procedures. They are all part of the *definition* of a statutory term that forms part of the offense itself. So when Congress instructed that a "destructive device" "shall not include" certain devices, it was saying those devices are not covered by the statute

to begin with. As a matter of plain text, a device "is a 'destructive device' within the meaning of the statute if, and only if, it was designed for use as a weapon." *Hammond*, 371 F.3d at 780.

Second, all three prongs of the definition focus on devices purposely made or converted to function as weapons—the first two directly, by listing objects that have no other function, and the third by reference to the first two. It thus makes perfect sense that the scope of the entire definition would be limited to devices "designed [ ]or redesigned for use as a weapon." A device that is not so designed does not share the unifying characteristic of the examples listed in the adjacent provisions.

2. This reading also tracks this Court's approach to distinguishing elements from affirmative defenses, as set out in *United States* v. *Cook,* 84 U.S. 168 (1872). *Cook* explained that a statutory exception is an essential element of the offense when it "is so incorporated with the language defining the offence that the ingredients of the offence cannot be accurately and clearly described if the exception is omitted." *Id*. at 173. An exception is an affirmative defense when "the language of the section defining the offence is so entirely separable from the exception that the ingredients constituting the offence may be accurately and clearly defined without any reference to the exception." *Id*. at 173–74. Thus, the core question "is whether the exception is so incorporated with the substance of the clause defining the offence as to constitute a material part of the description of the acts, omission, or other ingredients which constitute the offence." *Id*. at 176.

Here, the "neither designed nor redesigned" language is fully "incorporated with the language defining the offence." Without this language, at least some aspects of the remaining definition cannot sensibly be

applied. In many cases, whether a device is a firework or an "explosive . . . bomb," see 26 U.S.C. 5845(f)(1)(A), boils down to whether it is designed as a weapon. Both explode, and both are potentially harmful, but only the latter is covered by the statute. Likewise, how a device is "designed or intended" to be used is the core focus of the § 5845(f)(3) component-parts clause. Thus, treating the rest of subsection (f) as a complete offense arbitrarily severs part of the statutory definition from the rest. And the "designed or intended" exclusion looks nothing like an ordinary affirmative defense, which is "a justification or excuse which is a bar to the imposition of criminal liability on conduct that satisfies the elements of an offense." *Ruan*, 597 U.S. at 472 (Alito, J., concurring) (cleaned up).

3. The Fifth Circuit's approach also risks criminalizing large swaths of innocent commercial and personal conduct, contrary to this Court's guidance in *Staples*. There, the Court ruled that § 5861(d) requires the government to prove not only that the alleged "firearm" had each characteristic necessary to bring it within the Act's relevant definition, but also that the defendant knew it had each such characteristic. 511 U.S. at 624–25. In so holding, the Court emphasized "the particular care we have taken to avoid construing a statute to dispense with *mens rea* where doing so would 'criminalize a broad range of apparently innocent conduct.'" *Id.* at 610.

The same reasoning applies here. Just as "all guns [cannot] be compared to hand grenades," *id.*, the three-prong definition in § 5845(f) reflects that not all explosives are dangerous weapons—some have "a useful social [or] commercial purpose." *Hammond*, 371 F.3d at 782. That is true even if they "are potentially harmful devices": "Even dangerous items can, in some cases, be so commonplace and generally available that we would

not consider them to alert individuals to the likelihood of strict regulation." *Staples*, 511 U.S. at 611. Firecrackers and other fireworks fall into that category, as do commercial explosives used for blasting or construction. *Cf. Posnjak*, 457 F.2d at 1112, 1119 (government conceded, and court held, that commercial dynamite, *simpliciter*, falls outside the statute's ambit).

In such situations, this Court will not impute to Congress the intent to "subject such law-abiding, well-intentioned citizens to a possible ten-year term of imprisonment" without proof that they possessed a culpable mental state. *Staples*, 511 U.S. at 615. In turn, "the background rule of the common law favoring *mens rea* should govern interpretation of § 5861(d) in this case." *Id.* at 619. And that background rule dovetails with the plain text, requiring the government to show that the device was designed or redesigned for use as a weapon, and that the defendant knew of the features establishing that fact.

4. Below, the Fifth Circuit relied on *Beason*, which held that because "'firearm' is defined as including destructive devices, such as explosive grenades, the elements of the offense may be defined accurately without reference to the exceptions, which therefore should be treated as affirmative defenses." 690 F.2d at 445; see App. 5a–6a. If the statute referred solely to grenades, *Beason*'s reasoning might make sense. Congress would have little reason to require the government to prove specifically that an explosive grenade was designed as a weapon, since that purpose is inherent in the concept of a grenade.

But *Beason*'s reasoning ignores the statute's other terms. Again, the key difference between a "bomb," App. 3a, and some commercial explosives or fireworks is the device's design as a weapon. In turn, the "neither

designed nor redesigned" language is necessary to coherently define the full offense. Reading the statute as a whole thus shows that the Fifth Circuit's approach is unsound.

Beason's reliance on legislative history was also misplaced. As *Morningstar* explained, "the legislative history also suggests that the exclusion of devices made of commercial explosives"—meaning devices beyond the statute's first two prongs—"depends on their intended use." 456 F.2d at 281. The House Report notes that the statute "excludes . . . from the definition of 'destructive device'" those devices "not *designed or redesigned* or used or intended for use as a weapon." H.R. Rep. No. 90-1577, 1968 U.S.C.C.A.N. at 4418 (emphasis added). Unlike the Senate Report, the House Report says nothing about any affirmative defense; it refers to limits on the very concept of "destructive device." Compare *ibid.*, with S. Rep. No. 90-1501 at 47. At best, then, the legislative history is inconsistent. And this Court "won't allow ambiguous legislative history to muddy clear statutory language." *Azar* v. *Allina Health Servs.*, 587 U.S. 566, 579 (2019) (cleaned up).

* * *

CONCLUSION

The petition should be granted.

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