No. 24- 6158

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

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

Reply brief 1

I. The circuits are openly split on the question presented. 2

II. This case is an ideal vehicle. 5

III. The decision below is wrong 8

Conclusion 11

TABLE OF AUTHORITIES

Page

Cases:

Cunningham v. *Cornell Univ.*, 145 S. Ct. 1020 (2025) 9
Lab. Corp. of Am. v. *Davis*, No. 24-304 (Apr. 29, 2025) 6
Neder v. *United States*, 527 U.S. 1 (1999) 6, 7
Ruan v. *United States*, 597 U.S. 450 (2022) 6
United States v. *Creek*, 95 F.4th 484 (7th Cir. 2024) 3
United States v. *Hammond*, 371 F.3d 777 (11th Cir. 2004) 2, 3, 7, 8, 9, 10
United States v. *Morningstar*, 456 F.2d 278 (4th Cir. 1972) 3, 4
United States v. *Neil*, 138 F. App'x 418 (3d Cir. 2005) 3

Statutes:

26 U.S.C. § 5845(f) 1, 8, 9
26 U.S.C. § 5845(f)(1) 4
26 U.S.C. § 5845(f)(2) 4
26 U.S.C. § 5845(f)(3) 3, 4
26 U.S.C. § 5861(d) 1, 2, 3, 8, 9

REPLY BRIEF

This case calls on the Court to resolve a circuit split over the elements necessary to obtain a conviction, under 26 U.S.C. § 5861(d) of the National Firearms Act, for the possession of a registrable "destructive device." As the Fifth Circuit highlighted in the decision below, Pet. App. 6a n.4, the conflict derives from a disagreement over the best way to interpret the Act's definition of that term—specifically, its 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). The Eleventh Circuit reads that language as identifying an elemental quality of each enumerated device, and so a fact the government must prove beyond reasonable doubt. But the Fifth Circuit, like six others, views the same language as creating an affirmative defense.

The government's opposition avoids but never denies the split, and tacitly confirms the conflict in any event in arguing (BIO 7–13) that the disputed language refers to an affirmative defense, and not an element. Of course, the government's belief that the Fifth Circuit's view is right, and the Eleventh Circuit's is wrong, is no reason to leave the law unsettled.

In the end, the government's position boils down to this: "Because Section 5845(f)(1) already requires that [it] provide sufficient evidence to prove a particular explosives-containing device was a 'destructive device,' a valid conviction" under § 5861(d) only "requires proof of a device's 'destructive potential.'" BIO 12 (cleaned up). But that begs the very question: what is it the law requires for something to be a "destructive device" in the first place? Aside from ignoring the text, the core oversight in this "destructive potential" theory is that whether an item was "designed []or redesigned for use as a weapon" is often the *only* thing that separates a

proscribed device carrying a hefty prison sentence from an innocent one. That is exactly why the Eleventh Circuit held that design-as-a-weapon is an element, not an affirmative defense.

The government tellingly never disputes the significance of the question presented. Rightly so: the circuits are openly at odds over the meaning of a federal statute that at once informs the reach of the National Firearms Act's broad regulatory regime, and the scope of the elements of the Act's criminal provisions that punish noncompliance by up to a decade in prison. And the consequence of the circuits' divergent interpretations is that the evidentiary threshold for triggering those harsh penalties is lower, or higher, for no other reason than geography. Pet. 16–17. As the government eventually concedes, it can obtain a § 5861(d) conviction in the Eleventh Circuit "only if [it] presents 'proof that [an alleged destructive device] was designed as a weapon.'" BIO 15 (quoting *United States* v. *Hammond*, 371 F.3d 777, 780 (11th Cir. 2004)). But in much of the country, including in the Fifth Circuit, the government has no duty to "affirmatively prove" a device that it contends is a "bomb" was in fact a weapon by design. Pet. App. 5a, 6a.

That degree of incongruity is intolerable when years in prison hang in the balance. The petition should be granted.

I. The circuits are openly split on the question presented.

1. The government nowhere disputes that the Fifth Circuit's interpretation of §§ 5845(f) and 5861(d) that "foreclose[d]" Mr. Brannan's insufficiency and instructional-error claims, Pet. App. 5a, is directly contrary to the Eleventh Circuit's reading of the same statutes in *Hammond*, 371 F.3d at 780–81. Nor could it, given the

number of circuits—including the Fifth Circuit in this case—that have flagged the "conflict." Pet. App. 6a n.4; see, *e.g.*, *United States* v. *Creek*, 95 F.4th 484, 490 (7th Cir. 2024); *United States* v. *Neil*, 138 F. App'x 418, 420–21 n.3 (3d Cir. 2005).

The panel below correctly perceived that its decision "diverged" with *Hammond* on the question presented. The Eleventh Circuit's answer: Yes—§ 5845(f) is best read as "exclud[ing] from coverage any explosive device not *designed* for use as a *weapon*," such that a § 5861(d) defendant's guilt "depends upon proof that a device is an explosive *plus* proof that it was designed as a weapon." *Hammond*, 371 F.3d at 780 (original emphasis). The Fifth Circuit's answer: No—§ 5845(f) is best read as carving out an "exception to § 5861(d)" for devices that, though covered, are not designed (or redesigned) to be used as weapons, making that characteristic "an affirmative defense, not an element of the crime." Pet. App. 1a. The upshot: the government had no duty to "affirmatively prove [Mr. Brannan's] device *was* designed as a weapon" in the Fifth Circuit, Pet. App. 5a (original emphasis), while the exact opposite is true in the Eleventh Circuit—where the government's failure to prove "beyond reasonable doubt that [a] device *was* designed as a weapon" entitles the accused to "judgment of acquittal." *Hammond*, 371 F.3d at 782 (emphasis added). The split over this purely legal question is as clear as they come.

2. The government takes issue (BIO 13–15) with Mr. Brannan's contention that the Fourth Circuit's reasoning in *United States* v. *Morningstar*, 456 F.2d 278 (4th Cir. 1972), indicates it would side with the Eleventh Circuit. But the government's observations (BIO 13–14) that *Morningstar* involved § 5845(f)(3)'s combination-of-parts provision, and that the Fourth Circuit's "conclusion about what proof [that paragraph] entails

does not address" the question presented, are unavailing—the petition expressly acknowledged (Pet. 15–16) as much.

The salient point, which the government does not answer, is that the court construed § 5845(f)(3)'s reference to unassembled parts "designed or intended for use in converting any device into a destructive device as defined in [ ]paragraphs (1) and (2)" in light of its understanding that the devices in those first two paragraphs are limited to fully assembled devices that—by virtue of plain meaning, and the exclusionary language at issue here—are designed, or redesigned, for use as weapons. *Morningstar*, 456 F.2d at 280–81. And the Fourth Circuit took care to note that any covered combination of parts must be, whether by "design[] or inten[t]," meant to be assembled into a device enumerated in paragraph (f)(1) or (2). *Ibid.*

Thus, while the Fourth Circuit's remand order instructed that "the government would need to prove only that the [parts] could be 'assembled into a bomb' that the defendant intended to assemble," BIO 15 (quoting *Morningstar*, 456 F.2d at 281), that instruction fully embraced the court's professed understanding that, in order meet that burden, the government necessarily had to demonstrate intent to convert the parts into a device designed to be used as a weapon (there, as here, a bomb) listed in § 5845(f)(1)–(2). The Fourth Circuit's interpretive analysis is consistent with *Hammond*'s view that, by excluding devices "neither designed nor redesigned for use as a weapon," the Act makes that quality a defining, elemental feature of a covered "destructive device," rather than "simply creating an affirmative defense." *Morningstar*, 456 F.2d at 281. There accordingly remains good reason to think the Fourth Circuit would answer the question presented differently from the Fifth Circuit.

Regardless, as the Fifth Circuit itself observed below, Pet. App. 6a n.4, the Eleventh Circuit *has* decided the question presented differently. That the government elects not to mention that inconvenient fact does not make it any less true.

II. This case is an ideal vehicle.

1. The court of appeals explicitly held that an alleged destructive device's character as designed as a weapon "is an affirmative defense, not an element of the crime. We therefore affirm Brannan's conviction." Pet. App. 1a; accord Pet. App. 5a–6a, 8a. That is the legal rule Mr. Brannan challenged in both lower courts, Pet. App. 3a–4a, and now presents for this Court's review. Pet. i. The panel declined the government's invitation to decide, instead or alternatively, that any error was harmless. See BIO 17; Gov't C.A. Br. 25–27. And it did not so much as hint that the result might be the same under the Eleventh Circuit's contrary rule. Mr. Brannan's case thus comes to this Court in an ideal posture: the court of appeals disposed of both his insufficiency and instructional-error claims based solely on its answer to the question presented.

2. The government nevertheless claims that the case is a "poor vehicle" because, in its view, Mr. Brannan "cannot show that the outcome of his case would have differed in the Eleventh Circuit," making "any error harmless." BIO 16–17. This claim fails for several reasons.

a. First, the relevant "outcome" for purposes of this Court's review is the Fifth Circuit's case-dispositive answer to the question presented. As the government recently and accurately noted, "this Court frequently corrects errors of law in what the court[s] of appeals say without analyzing whether the prevailing party below could nevertheless still prevail under the new

rule. It does that all the time . . . ." Arg. Tr. 108–09, *Lab. Corp. of Am.* v. *Davis*, No. 24-304 (Apr. 29, 2025). Indeed, this Court's "normal practice" when faced with claims of harmless error is to resolve the legal question before it and then "remand" for the court below "to consider in the first instance whether the [particular] error was harmless." *Neder* v. *United States*, 527 U.S. 1, 25, (1999); see, *e.g.*, *Ruan* v. *United States*, 597 U.S. 450, 467 (2022).

b. In any event, there is no colorable harmless-error claim here. The government, rightly, does not argue that the threadbare instructions in this case, see Pet. 9, actually conveyed to the jury that it had to find beyond reasonable doubt that Mr. Brannan's device was designed to be used as a weapon in order to find that it was an "explosive bomb," and thus, a "firearm." Under *Neder*, that misdescription or omission of an element is harmless only if the government can show "beyond a reasonable doubt that the jury verdict would have been the same absent the error." 527 U.S. at 19. And the government cannot make that showing, "for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding." *Id.* at 16, 19. The government does not mention, let alone attempt to carry, its actual burden.

Nor could it. Whether Mr. Brannan's device was in fact an explosive bomb, and whether he knew the facts that made it so, were the *only* two contested issues at his trial. See Pet. 7. And any suggestion that the case on that score was overwhelming—even under *the government's* preferred "destructive potential" standard—would fly in the face of the trial court's characterization of the evidence as "minimally" sufficient to survive directed acquittal, C.A. ROA.577–78, and its observation, after a spirited charge conference, that "we've got

two very good experts on either side and the jury could go either way." C.A. ROA.239. The government thus cannot seriously claim that properly alerting the jury to the need to find that Mr. Brannan designed his device to be an explosive weapon "could [not] rationally lead to a contrary finding with respect to that omitted element." *Neder*, 527 U.S. at 19.

c. Finally, although the government's harm analysis is cursory, Mr. Brannan is constrained to note that it misstates the trial evidence it does discuss. The government claims that "[t]here was no dispute" at trial that Mr. Brannan's device "had all of the features identified" in *Hammond* as potential signs of weaponized design: "metal pipe[], threaded caps, and a design that would spread fragments." BIO 16.

In fact, the government's own evidence established that the device did *not* have threaded caps—it had pieces of clay and wax, reinforced by tape, that enclosed only one end.[1] As *Hammond* noted, that matters—sealed caps cause a device to "build up pressure until the container bursts, resulting in an explosion." 371 F.3d at 778. Mr. Brannan's device lacked this telltale feature. Moreover, two of the government's explosives experts testified that Mr. Brannan's device contained none of the objects they commonly see used to create shrapnel in true improvised bombs: "bbs," "metal pellets," "nails," "screws," "needles," etc. C.A. ROA.507, 547. These errors serve to reinforce the trial judge's observation that the government's case was far more equivocal than it lets on, and further underscore that the fact-intensive task of assessing the entire trial record for harm is best left to the court of appeals.

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[1] See C.A. ROA.555 (Defense counsel: "And we've said that on neither end was there a metal end cap screwed on?" ATF Agent: "That's correct.").

But this is all distraction. The Fifth Circuit affirmed because it believed the same language the Eleventh Circuit interprets as describing an element in fact describes an affirmative defense. That disagreement on the law is the only issue Mr. Brannan asks this Court to settle.

III. The decision below is wrong.

If anything, the government's merits preview only underscores the need for review.

1. Like each of the circuits that adhere to the affirmative-defense rule, see Pet. 12–14, the government asserts that, "[c]onsistent with established principles of statutory construction, the statutory *exceptions* in [§ 5845(f)'s] final sentence are affirmative defenses, not elements of the offense." BIO 8 (added emphasis). But this simply assumes the answer to the threshold interpretive question—i.e., that § 5845(f) *excepts* devices "neither designed nor redesigned for use as a weapon" from § 5861 liability, rather than *excluding* them from the Act's coverage altogether. In line with the circuits on this side of the split, the government makes this move without undertaking any, let alone meaningful, examination of the statutory text, context, structure, and purpose. See BIO 7–10. And, like those circuits, the government musters only legislative history as justification for that unexamined assumption. BIO 10.

That analysis is misguided. The interpretive inquiry begins with the text, and ends there if the ordinary tools yield a best answer. As the Eleventh Circuit recognized in *Hammond*, the text here clearly points in the opposite direction: § 5845(f) is best read as "explicitly exclud[ing] from [the Act's] coverage any explosive device not *designed* for use as a *weapon*," thereby rendering that quality an essential feature of any covered

destructive device. 371 F.3d at 780 (original emphasis). And, as *Hammond* rightly holds, that makes a device's character as designed (or redesigned) for use as a weapon a fact the government must prove, and the jury must be instructed to find, in order to obtain a § 5861(d) conviction. *Id.* at 780–81. That the Fifth Circuit reached its contrary rule by bypassing the plain meaning of the text in favor of ambiguous statements in a single Senate Report, see Pet. 25, is at a minimum enough to raise grave doubts as to the propriety of its affirmative-defense construction.

2. The government similarly errs in focusing on the rule "that an indictment or other pleading . . . need not negative the matter of an exception made by a proviso or other distinct clause[.]" BIO 9. Neither Mr. Brannan nor *Hammond* purport to add any extra pleading requirements. The government's pleading obligation is satisfied by charging possession of a particular type of "destructive device," or combination of parts, that it believes was registrable. Under the correct reading, alleging possession of an unregistered "explosive bomb" is to allege possession of a device designed (or redesigned) to explode and to be used as a weapon, in the same way that alleging possession of a "machinegun" is to allege possession of a rifle capable of firing more than one round, automatically, upon a single function of the trigger.

The government's reliance (BIO 10–11) on *Cunningham* v. *Cornell Univ.*, 145 S. Ct. 1020 (2025), is misplaced for the same reason. The defendants in that case claimed that statutory "exemptions"—set out as such—operated so as to "impose additional pleading requirements to make out" a claim under the relevant statute. *Id.* at 1027. Mr. Brannan makes no such claim here. And, unlike exemptions and exceptions traditionally understood as affirmative defenses, § 5845(f)'s

direction not to include any devices "neither designed nor redesigned for use as [] weapon[s]" does not purport to exempt or excuse conduct that would otherwise be proscribed. See Pet. 23.

3. As noted above, the government's contention that proof of an item's "destructive potential" is all the Act requires, BIO 12, is impermissibly overinclusive. What separates commercial and recreational explosive devices—like dynamite and fireworks—from registrable "explosive . . . bombs" (or "grenades," etc.), is the purpose for which the respective devices are designed to function. Sticks of dynamite and aerial fireworks, for instance, are designed to explode; and both are capable of causing great harm. Yet despite the "destructive potential" each carries if put to malicious use, neither is registrable. What matters is whether a device was "designed for its pyrotechnic [or other] qualities," or " rather was designed as a weapon." *Hammond*, 371 F.3d at 782.

4. Nor does the fact that the statutory definition also excludes other categories of items based on traits "that will have no application to many cases," BIO 11, help the government's cause. The primary difference is that none of the other categories describes a trait that is inherent in the ordinary meaning of each of the devices enumerated in paragraphs (f)(1)–(2), Pet. 22, and that is necessary to distinguish large swaths of devices that everyone agrees are not subject to registration from those that are.

Regardless, the tools of statutory interpretation are just as readily applied to the other categories. And even if the inquiry would come out differently as to those categories, it would not follow that the exclusion of devices not designed for use as weapons lacks the elemental significance that the Eleventh Circuit correctly understands it to possess.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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