No. 24-6158

IN THE SUPREME COURT OF THE UNITED STATES

ELDEN DON BRANNAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

D. JOHN SAUER
Solicitor General
Counsel of Record

MATTHEW R. GALEOTTI
JENNY C. ELLICKSON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court permissibly understood the exception of a "device which is neither designed nor redesigned for use as a weapon" from the definition of a "destructive device," 26 U.S.C. 5845(f), to set forth an affirmative defense in a prosecution for possessing an unregistered destructive device, in violation of 26 U.S.C. 5861(d) and 5871.

IN THE SUPREME COURT OF THE UNITED STATES

No. 24-6158

ELDEN DON BRANNAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 98 F.4th 636.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 2024. A petition for rehearing was denied on August 15, 2024 (Pet. App. 9a). On November 6, 2024, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including December 13, 2024, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possessing a destructive device not registered in the National Firearms Registration and Transfer Record, in violation of 26 U.S.C. 5841, 5861(d), and 5871. Judgment 1. The district court sentenced petitioner to 24 months of imprisonment, to be followed by 3 years of supervised release. Judgment at 2-3. The court of appeals affirmed. Pet. App. 1a-8a.

1. In 2022, petitioner's sister called 911 to report that petitioner had assaulted her boyfriend and was threatening suicide. Pet. App. 2a. When the police arrived at the home that petitioner shared with his sister, his sister told them that petitioner had a "pipe bomb" in his bedroom closet. Ibid.

The device was a metal pipe wrapped in tape, six inches long and one inch in diameter, with a fuse cord sticking out of one end. Pet. App. 2a. The top of the pipe was sealed with a cardboard-and-clay plug, and the bottom was sealed with a waxy material, five dimes, and a plastic bottle cap. Ibid. The pipe had another clay plug, "along with powder containing pyrotechnic stars harvested from fireworks, a common feature of pipe bombs." Ibid. And petitioner's sister told investigators that petitioner had, in fact, built the device at their kitchen table using

repurposed fireworks. Ibid.; Presentence Investigation Report ¶ 15.

As constructed, once the device's fuse was lit, the powder would burn, generate gas, and eventually explode, with metal pieces and the dimes flying out as shrapnel. Pet. App. 2a. And given those characteristics, an agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) determined that the device was "an explosive or improvised explosive bomb." Ibid.

2. The National Firearms Act, 26 U.S.C. 5801 et seq., prohibits the possession of certain types of "firearm[s]" unless properly registered in the National Firearms Registration and Transfer Record. 26 U.S.C. 5861(d). For purposes of that statute, the term "firearm" includes "a destructive device." 26 U.S.C. 5845(a).

Under Section 5845(f), three categories of devices qualify as "destructive device[s]." 26 U.S.C. 5845(f). The first category, set forth in Section 5845(f)(1), includes "any explosive [or] incendiary * * * bomb," as well as certain grenades, rockets, missiles, mines, and "similar device[s]." 26 U.S.C. 5845(f)(1). The second category, set forth in Section 5845(f)(2), consists of any weapon with a "bore of more than one-half inch in diameter" that will, or may be readily converted to, expel a projectile by the action of an explosive or other propellant, except that this category does not include "a shotgun or shotgun shell which the

Secretary finds is generally recognized as particularly suitable for sporting purposes." 26 U.S.C. 5845(f)(2).* The third category, set forth in Section 5845(f)(3), covers "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." 26 U.S.C. 5845(f)(3). The last sentence of Section 5845(f) states:

> 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. 5845(f).

3. A federal grand jury in the Southern District of Texas returned an indictment charging petitioner with one count of possessing a destructive device that was not registered in the National Firearms Registration and Transfer Record, in violation of 26 U.S.C. 5841, 5861(d), and 5871. C.A. ROA 30.

---

* Section 5845(f) refers to the Secretary of the Treasury, but Congress has transferred the relevant enforcement authority to the Attorney General. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 1111(c)(1), 116 Stat. 2275. The Attorney General has, in turn, delegated to the Director of ATF the authority to "administer * * * the laws related to * * * firearms." 28 C.F.R. 0.130(a).

Petitioner proceeded to trial. See Pet. App. 2a. The government's evidence that the pipe was a "destructive device[]" included testimony from an ATF agent "explain[ing] how the pipe's sealed ends would confine the expanding gas and cause the pipe to explode," producing "dangerous metal shrapnel." Id. at 8a & n.5. "He also noted that the placement of the fuse and lift charge in [petitioner]'s device differed from those in fireworks." Id. at 8a n.5. "And [petitioner]'s sister testified that [petitioner] had never previously constructed fireworks." Ibid.

Petitioner nonetheless maintained that the device was a "makeshift roman-candle or fountain firework" that was designed "to 'emit a pyrotechnic display' from one end." Pet. App. 2a, 7a. In support of that defense, petitioner presented an expert witness who opined that the device would not have exploded because its non-metallic plugs could not have contained expanding gas. Id. at 2a-3a. That expert witness admitted, however, that the device's metal structure was "not typical" of improvised fireworks and that he did not know what purpose the dimes served in the device. Id. at 3a.

The district court denied petitioner's motions for a judgment of acquittal based on the theory that the evidence was insufficient to show that he had designed the device as a weapon. Pet. App. 3a. During the charge conference, petitioner asked the district court to include a verbatim recitation of the concluding sentence

of Section 5845(f) -- which provides that the definition of "destructive device" does not include, inter alia, devices "neither designed nor redesigned for use as a weapon"; surplus ordnance; and devices that the ATF "finds [are] not likely to be used as a weapon" -- as an element of the offense. C.A. ROA 76. Relying on circuit precedent, the district court understood that sentence not to set forth exceptions whose inapplicability the government must plead and prove beyond a reasonable doubt, but instead to provide an affirmative defense to liability. Pet. App. 3a.

Petitioner opted not to present such an affirmative defense. Pet. App. 3a; see C.A. ROA 240. In its final instructions, the district court instructed the jury that it could find petitioner guilty only if the government proved beyond a reasonable doubt that the device in this case was "an explosive bomb" and that petitioner "knew the characteristics of the destructive device, an explosive bomb." C.A. ROA 115-116.

The jury found petitioner guilty. Pet. App. 4a. The district court sentenced him to 24 months of imprisonment, to be followed by three years of supervised release. Ibid.

4. The court of appeals affirmed. Pet. App. 1a-8a. The court explained that, in United States v. Beason, 690 F.2d 439 (5th Cir. 1982), cert. denied, 459 U.S. 1177 (1983), it had determined that "§ 5845(f)'s exceptions are affirmative defenses,

not offense elements," Pet. App. 5a, and it found "unavailing" petitioner's attempts "get around" Beason by invoking other circuit decisions, id. at 6a.

ARGUMENT

Petitioner contends (Pet. 11-25) that the district court reversibly erred in declining to instruct the jury that it could find him guilty of possessing an unregistered destructive device, in violation of Sections 5861(d) and 5871, only if the government proved beyond a reasonable doubt that he designed the device for use as a weapon. The court of appeals correctly rejected that contention, and no court of appeals to have addressed the issue would have reached a different result in these circumstances. In any event, this case would be a poor vehicle in which to address the question presented because any error in the jury instructions was harmless.

1. The district court correctly declined to instruct the jury that it could find petitioner guilty of possessing an unregistered destructive device, in violation of 26 U.S.C. 5861(d) and 5871, only if the government proved that he intentionally designed the device for use as a weapon.

a. Section 5845(f) defines a "destructive device" to include three categories of devices. 26 U.S.C. 5845(f). The first category, set forth in Section 5845(f)(1), includes "any explosive [or] incendiary * * * bomb," as well as certain grenades,

rockets, missiles, mines, and "similar device[s]." The second category, set forth in Section 5845(f)(2), consists of any weapon with a "bore of more than one-half inch in diameter" that will, or may be readily converted to, expel a projectile by the action of an explosive or other propellant, with the exception of "a shotgun or shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes." The third category, set forth in Section 5845(f)(3), covers "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."

After setting forth those three categories of destructive devices, Section 5845(f) states:

> 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. 5845(f). Consistent with established principles of statutory construction, the statutory exceptions in the final sentence are affirmative defenses, not elements of the offense.

This Court has long recognized the "settled rule * * * that an indictment or other pleading * * * need not negative the matter of an exception made by a proviso or other distinct clause * * * and that it is incumbent on one who relies on such an exception to set it up and establish it." McKelvey v. United States, 260 U.S. 353, 357 (1922); accord United States v. Cook, 84 U.S. (17 Wall.) 168, 173-174 (1872). More recently, in Dixon v. United States, 548 U.S. 1 (2006), the Court reaffirmed that, under the common law, the burden of proving "'affirmative defenses * * * rested on the defendant,'" even where Congress had "enacted an affirmative defense in the proviso of a statute." Id. at 8, 13 (quoting Patterson v. New York, 432 U.S. 197, 202 (1977)).

That rule applies with full force here. As petitioner himself recognizes (Pet. 22), "all three prongs of the definition focus on devices purposely made or converted to function as weapons." Thus, the government's proof in every case will necessarily encompass that feature of a device. If the defendant believes that, despite such proof, his device was nonetheless "neither designed nor redesigned for use as a weapon," 26 U.S.C. 5845(f), he may plead and prove that exceptional fact as an affirmative defense. Indeed, petitioner does not directly dispute that the other exceptions that appear in the same statutory sentence would be affirmative defenses. But particularly given that they -- like the one on which petitioner focuses -- are phrased in the negative, requiring

affirmative proof of all of those negatives in every case would be an implausible construction of the statute.

The legislative history confirms that Congress did not intend such a construction. See United States v. Dalpiaz, 527 F.2d 548, 552 (6th Cir. 1975); United States v. Posnjak, 457 F.2d 1110, 1116 (2d. Cir. 1972). The Senate Report states expressly that the "exceptions to the definitions of the term 'destructive device'" within Section 5845(f) are "affirmative defense[s]," such that the defendant must "establish[]" that a given "exception is applicable." S. Rep. No. 1501, 90th Cong., 2d Sess. 47 (1968). And petitioner's reliance (Pet. 25) on the House Report, H.R. Rep. No. 1577, 90th Cong., 2d Sess. 12 (1968), which does not address the issue, creates no ambiguity in either the text or the Senate Report's explication of it.

b. Petitioner's reliance (Pet. 22-23) on United States v. Cook, is likewise misplaced. In Cook, this Court observed that when a statutory exception "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," that indictment must allege that a defendant does not fall within the exception (i.e., as an element). 84 U.S. (17 Wall.) at 173. The Court, however, "has applied the Cook rule narrowly, such as when an exception to a criminal offense is contained within the same sentence of the provision defining the offense." Cunningham

v. Cornell University, No. 23-1007 (April 17, 2025), slip op. 13. And the Court in Cook recognized that "if [the exception] is not so incorporated with the clause defining the offence as to become a material part of the definition of the offence, then it is [a] matter of defence" -- even if the exception appears "in the same section or even in the succeeding sentence" to the elements of the offense. Cook, 84 U.S. (17 Wall.) at 176.

Thus, far from undermining the court of appeals' understanding of Section 5845(f), Cook supports it. As noted above, a "destructive device" -- here, for example, an "explosive * * * bomb" -- can be adequately described without reference to the exceptions. 26 U.S.C. 5845(f)(1)(A). Indeed, Section 5845(f) includes exceptions that will have no application to many cases. That includes exceptions for obsolete field artillery, like a bronze cannon, given to a public park pursuant to 10 U.S.C. 7684; obsolete military supplies given to a public museum pursuant 10 U.S.C. 7685; and rifles that an owner intends to use for sporting purposes. See 26 U.S.C. 5845(f). None of those exceptions are "a material part of the definition of the offense." Cook, 84 U.S (17 Wall.) at 176. And petitioner offers no reason why Congress would have intended to impose on the government the unusual and onerous requirement of proving in every prosecution the inapplicability of Section 5845(f)'s numerous exceptions. Cf. Cunningham, slip op. 11 ("When statutory exceptions 'are numerous,' 'fairness usually

requires that the adversary give notice of the particular exception upon which it relies and therefore that it bear the burden of pleading'") (citation omitted).

Petitioner further errs in asserting (Pet. 22-23) that the first exception in Section 5845(f)'s final sentence -- the exception for "any device which is neither designed nor redesigned for use as a weapon," 26 U.S.C. 5845(f) -- must be treated as an "element[]" to avoid the risk of "criminalizing large swaths of innocent commercial and personal conduct." Because Section 5845(f)(1) already requires that the "government provide[] sufficient evidence to prove a particular explosive-containing device was a 'destructive device,'" United States v. Harbarger, 46 F.4th 287, 289 (5th Cir. 2022), a valid conviction requires proof of a device's "destructive potential," Pet. App. 7a. Here, for example, the government proved that petitioner's pipe "would explode and produce dangerous metal shrapnel," rather than, as petitioner had urged, merely "emit a pyrotechnic display." Id. at 7a-8a.

There is nothing inherently "innocent" (Pet. 23) about knowingly possessing an unregistered destructive device that "produce[s] dangerous metal shrapnel, Pet. App. 8a -- particularly when the government must also prove (as it did here) that the defendant knew of the device's destructive properties. In Staples v. United States, 511 U.S. 600 (1994), this Court held that a

defendant must know that "the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun" under 26 U.S.C. 5845(b). 511 U.S. at 602. Accordingly, the district court specifically instructed the jury in this case that "the term destructive device means any explosive bomb," and that the government had to prove that petitioner "knew the characteristics of the destructive device, an explosive bomb." C.A. ROA 116. A defendant who knows that he possesses an explosive bomb "know[s] the facts that make his conduct illegal" under the statute. Staples, 511 U.S. at 619.

2. Petitioner acknowledges (Pet. 11-14) that the decision below accords with the decisions of six other courts of appeals. See United States v. Musso, 914 F.3d 26, 28, 30 (1st Cir. 2019); Posnjak, 457 F.2d at 1113-1121 (2d Cir.); Dalpiaz, 527 F.2d at 552 (6th Cir.); United States v. Johnson, 152 F.3d 618, 623-627 (7th Cir. 1998); United States v. Oba, 448 F.2d 892, 894 (9th Cir. 1971), cert. denied, 405 U.S. 935 (1972); United States v. La Cock, 366 F.3d 883, 889 (10th Cir.), cert. denied, 543 U.S. 937 (2004). Petitioner claims (Pet. 14-17), however, that the outcome of his case would have been different in the Fourth and Eleventh Circuits. The decisions on which he relies do not support that claim.

Contrary to petitioner's contention (Pet. 15-16), the Fourth Circuit's half-century-old decision in United States v. Morningstar, 456 F.2d 278, cert. denied 409 U.S. 896 (1972), does

not show that it would disagree with the decision below. Morningstar concluded that materials qualify as a "destructive device" under Section 5845(f)(3) only if the government proves that those items "could have been readily assembled into a bomb" and that the defendant "intended" to convert them into the bomb. Id. at 281. But Section 5845(f)(3) -- which defines a "destructive device" to include "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," 26 U.S.C. 5845(f)(3) (emphasis added) -- is not at issue in petitioner's case, as the district court instructed the jury that "the term destructive device means any explosive bomb" within the scope of Section 5845(f)(1). C.A. ROA Vol. 116.

The Fourth Circuit's conclusion about what proof Section 5845(f)(3) entails does not address the separate issue of whether the exceptions that appear later in Section 5845(f) are elements or affirmative defenses. Petitioner stresses (Pet. 16) that the Fourth Circuit in Morningstar observed that the definition of destructive device "exclude[s]" devices that are not designed or redesigned as a weapon. 456 F.2d at 280 (quoting H.R. Rep. No. 1577, 90th Cong., 2d Sess. 12 (1968)). But the court below has likewise recognized this "crucial limitation" in the statute -- which the decision below reiterates. Pet. App. 6a

(quoting United States v. Ross, 458 F.2d 1144, 1145 (5th Cir. 1972)). Recognizing that limitation, however, says nothing about whether that exception is an element, rather than affirmative defense. See id. at 6a-7a. Indeed, in Morningstar, the Fourth Circuit suggested that on remand, the government would need to prove only that the device could be "assembled into a bomb" that the defendant intended to assemble -- not that it fell outside the statutory exclusions. 456 F.2d at 281.

Petitioner also errs in asserting (Pet. 14-15) that the decision below conflicts with the Eleventh Circuit's decision United States v. Hammond, 371 F.3d 776 (2004). In Hammond, the Eleventh Circuit stated that an explosive device constitutes a "'destructive device'" within the meaning of Section 5845(f) only if the government presents "proof that it was designed as a weapon." Id. at 780 (citation omitted). But the court also specifically noted that the government could satisfy that requirement through evidence that an explosive device was "made of metal, steel or cast iron pipe, with caps threaded at each end," and thus would "propel[]" fragments "like shrapnel against the bodies of those in the vicinity" when "the pipe ruptured." Ibid. And it noted that the government might additionally prove that an explosive device was designed as a weapon if the device was "designed to include tacks, nails, or other small pieces." Id. at 780-781.

Petitioner accordingly cannot show that the outcome of his case would have differed in the Eleventh Circuit. In petitioner's case, the government presented evidence that the device at issue was a metal pipe containing five dimes, and when it exploded, metal and dimes would have flown out as shrapnel -- exactly the type of evidence that would satisfy the requirements articulated in Hammond. See Pet. App. 2a; Hammond, 371 F.3d at 780-781. There was no dispute that his device had all of the features identified above -- metal pipes, threaded caps, and a design that would spread fragments, see Pet. App. 2a-- and he cannot establish that he would have been acquitted of the charge even if the jury instructions had specifically tracked Hammond.

As noted, the district court instructed the jury that it could find petitioner guilty only if the government proved beyond a reasonable doubt that the device in this case was "an explosive bomb." C.A. ROA 115-116. Because the jury found petitioner guilty, the jury necessarily found that the government carried that burden. And the government's expert testified that he considered the device an "explosive bomb," rather than a "commercial pyrotechnic," precisely because it had no "legitimate social or industrial value" and was "not designed as a weapon." C.A. ROA 284, 288-290. The jury's verdict shows that it agreed with that assessment and rejected petitioner's claim that the

device was "a makeshift roman-candle or fountain firework." Pet. App. 2a.

3. Indeed, the evidence in this case makes it an overall poor vehicle for review of the question presented, because it renders any error harmless. See Fed. R. Crim. P. 52(a); see also Gov't C.A. Br. 25-27 (raising this argument). Even had the court accepted petitioner's suggestion for an additional jury instruction, the outcome would have been the same. Because the record therefore indicates that the government proved that the device in this case was "designed * * * for use as a weapon," 26 U.S.C. 5845(f), any error in the jury instructions was harmless, and petitioner would not be entitled to relief even if this Court adopted his view of the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

D. JOHN SAUER
Solicitor General
Counsel of Record

MATTHEW R. GALEOTTI
JENNY C. ELLICKSON
Attorneys

APRIL 2025