No. 07-455

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

AHMED RESSAM

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 844(h)(2) of Title 18, United States Code, prescribes a mandatory ten-year term of imprisonment for any person who "carries an explosive during the commission of any felony which may be prosecuted in a court of the United States." The question presented is whether Section 844(h)(2) requires that the explosive be carried "in relation to" the underlying felony.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 474 F.3d 597.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 2007. A petition for rehearing was denied on June 6, 2007 (Pet. App. 24a-31a). On August 22, 2007, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including October 4, 2007, and the petition was filed on that date. The petition for a writ of certiorari was granted on December 7, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to the petition for a writ of certiorari. Pet. App. 32a-36a.

STATEMENT

Respondent was indicted on nine counts resulting from his attempt to smuggle explosives and timing devices into the United States with the intent to detonate an explosive at Los Angeles International Airport (LAX) around the time of the millennium. Pet. App. 1a. Following a jury trial in the United States District Court for the Western District of Washington, respondent was convicted of conspiring to commit an act of terrorism transcending a national boundary, in violation of 18 U.S.C. 2332b(a)(1)(B) (Count 1); placing explosives in proximity to a terminal, in violation of 18 U.S.C. 33 (Count 2); possessing false identification documents with intent to defraud the United States, in violation of 18 U.S.C. 1028(a)(4) (Count 3); entering the United States using a fictitious name, in violation of 18 U.S.C. 1546 (Count 4); making a false statement to a United States customs official, in violation of 18 U.S.C. 1001 (Count 5); smuggling explosives into the United States, in violation of 18 U.S.C. 545 (Count 6); transporting explosives without a permit, in violation of 18 U.S.C. 842(a)(3)(A) (Count 7); possessing an unregistered destructive device, in violation of 26 U.S.C. 5845(a) and 5861(d) (Count 8); and carrying an explosive during the commission of a felony (the false statement offense charged in Count 5), in violation of 18 U.S.C. 844(h)(2) (Count 9). J.A. 13, 18-23. He was sentenced to 22 years of imprisonment. J.A. 74. A divided panel of the court of appeals reversed respondent's conviction on the Section 844(h)(2) count,

holding that the government had been required to establish that the explosives were carried "in relation to" the underlying false statement offense charged in Count 5. Pet. App. 1a-23a.

1. Section 844(h) prescribes a mandatory ten-year term of imprisonment for any person who

> (1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or
>
> (2) carries an explosive during the commission of any felony which may be prosecuted in a court of the United States.

18 U.S.C. 844(h); see *ibid.* (mandating twenty years of imprisonment in the case of a "second or subsequent conviction"); 18 U.S.C. 844(j) (definition of "explosive").

2. Respondent is an Algerian citizen. Pet. App. 3a. In 1998, he was recruited by an al Qaeda operative while living in Canada. *Ibid.* After using a forged baptismal certificate to obtain a Canadian passport in the name Benni Antoine Noris, respondent traveled to Afghanistan, where he received advanced training in the manufacture and use of explosives. *Id.* at 3a-4a. During that period, respondent and others conceived a plot to target a United States airport to coincide with the millennium. *Id.* at 4a.

On November 17, 1999, respondent and another al Qaeda operative traveled to Vancouver, British Columbia, where they rented a Chrysler 300M and checked into a motel. Pet. App. 4a. On December 14, 1999, the pair drove to Tsawwassen, British Columbia, where they took a car ferry to Victoria on Vancouver Island. *Ibid.*; J.A. 20, 41-42. Hidden in the Chrysler's spare tire well were the components of a bomb, including explosives,

timing devices, detonators, fertilizer, and aluminum sulfate. Pet. App. 4a. Following their arrival in Victoria, respondent's accomplice returned to Vancouver via public transportation, and respondent boarded the day's only car ferry from Victoria to Port Angeles, Washington. *Ibid.*; J.A. 27.

When the ferry arrived at Port Angeles, respondent's vehicle was the last to off-load, and respondent became agitated when questioned by a United States customs inspector. Pet. App. 5a; J.A. 29-30. The customs inspector instructed respondent to complete a customs declaration form, on which respondent claimed to be a Canadian citizen and signed his name as Benni Noris. Pet. App. 5a; J.A. 30-31. The customs inspector then directed respondent to turn off his car, open the trunk, and get out of the vehicle so that a secondary inspection could be performed. J.A. 32-33. The car was searched, and the explosives and other items were discovered. Pet. App. 5a; J.A. 36-39. An expert later determined that a bomb made from the components found in respondent's vehicle could have killed or injured hundreds of people if detonated during the holiday travel rush at LAX. Pet. App. 5a.

3. On February 14, 2001, a grand jury returned a nine-count Second Superseding Indictment. J.A. 18-23. Count 9 charged a violation of 18 U.S.C. 844(h)(2). It read:

> On or about December 14, 1999, * * * [respondent] knowingly carried an explosive during the commission of a felony prosecutable in a court of the United States, that is making a false statement to a U.S. Customs Inspector as charged in Count 5.

J.A. 22.

At trial, respondent filed a motion for a judgment of acquittal on Count 9, arguing that the act of carrying explosives had played no role in the false statement offense charged in Count 5. J.A. 62-63. The district court denied that motion. J.A. 67. Respondent also unsuccessfully objected to the district court's jury instructions on Count 9 because they did not contain a relational requirement. J.A. 68-70; see J.A. 61 (respondent's proposed jury instruction on Count 9). The district court charged the jury that, in order to return a verdict of guilty on Count 9, it was required to find:

> First, the defendant knowingly carried explosive materials; and
>
> Second, the defendant committed the felony of making a false statement to a U S Customs Inspector (as charged in Count 5 of the Indictment) while he was carrying those explosive materials.

J.A. 65.

The jury found respondent guilty on all counts. Pet. App. 6a; J.A. 13. The district court sentenced him to a total of 22 years of imprisonment. J.A. 74.

4. The government appealed the sentence as unreasonable, and respondent filed a cross-appeal challenging the sufficiency of the evidence on Count 9. A divided panel of the court of appeals reversed respondent's conviction on Count 9 and remanded for resentencing without reaching the government's arguments. Pet. App. 1a-23a.

a. The majority viewed itself as "constrained" by the court of appeals' earlier decision in *United States* v. *Stewart*, 779 F.2d 538 (9th Cir. 1985) (Kennedy, J.). Pet. App. 2a. *Stewart* involved 18 U.S.C. 924(c), which at the time of the defendant's conduct in that case had pro-

scribed "carr[ying] a firearm unlawfully during the commission of any felony." 18 U.S.C. 924(c)(2) (1982). Shortly before the Ninth Circuit's decision in *Stewart*, Congress had amended Section 924(c) by deleting the word "unlawfully" and adding "and in relation to" after "during." See Comprehensive Crime Control Act of 1984 (1984 Firearms Amendment), Pub. L. No. 98-473, Tit. II, § 1005(a), 98 Stat. 2138. The legislative history of that subsequent amendment, *Stewart* concluded, "reveal[ed] an understanding on the part of the amending Congress that the earlier Congress intended to require a relation between the firearm and the underlying crime." 779 F.2d at 540; see *id.* at 539 (citing S. Rep. No. 225, 98th Cong., 1st Sess. 312-314 (1983) (*1983 Senate Report*)). Based on that subsequent history, as well as the "sparse" legislative history of the original statute, *Stewart* interpreted the pre-amendment version of Section 924(c)(2) "as if it contained the requirement that the firearm be possessed 'during and in relation to' the underlying offense." *Id.* at 540.

In this case, the court of appeals reasoned that *Stewart's* construction of former Section 924(c)(2) required the conclusion that "§ 844(h)(2) necessarily always had a relational element as well." Pet. App. 11a. Section 844(h), the court of appeals emphasized, was patterned after Section 924(c), and the original version of the explosives statute "was identical to the original firearms counterpart that we considered in *Stewart*." *Id.* at 9a-10a. The court of appeals acknowledged that Congress had, post-*Stewart*, amended Section 844(h)(2) by striking the word "unlawfully" without at the same time adding "and in relation to" as it had done with Section 924(c). *Id.* at 10a-11a. But the court of appeals stated that the legislative history of that amendment "does not

specifically say why" Section 844(h)(2) was amended in that manner, and it reasoned that "[b]ecause in *Stewart* we did not think addition of the phrase 'and in relation to' changed the scope of original § 924(c), we are hard-pressed now to say that its absence changes the scope of § 844(h)(2)." *Id.* at 11a.

Having interpreted Section 844(h)(2) as including an implicit relational element, the court of appeals stated that there was "no real dispute that [respondent's] conviction on Count 9 cannot stand." Pet. App. 12a. Although respondent had conceded that the government introduced "ample evidence" that he made a false statement on his customs form and that "he carried explosives in the trunk of his car," the court stated that there was "no evidence" that the explosives "facilitated" or "aided the commission of" the underlying false statement offense. *Id.* at 12a-13a (quoting *Stewart*, 779 F.2d at 540).

b. Judge Alarcón dissented from the court of appeals' decision to reverse respondent's conviction on Count 9. Pet. App. 14a-23a. In his view, the statutory text plainly and unambiguously demonstrates that Section 844(h)(2) contains no relational requirement, and the court "lack[ed] the constitutional authority to add an element to a criminal statute." *Id.* at 19a.

5. The court of appeals denied the government's petition for rehearing en banc. Pet. App. 24a-31a. Judge O'Scannlain, joined by five other active circuit judges, dissented from that decision. *Id.* at 25a-31a. Congress's failure to add the words "and in relation to" when it amended the explosives statute in 1988, Judge O'Scannlain argued, meant that the court was "not 'constrained' by *Stewart*'s reasoning in deciding the proper interpretation of § 844(h)(2)." *Id.* at 28a. In addition,

Judge O'Scannlain stated that it was "reasonable to question the validity of *Stewart's* reasoning," because that decision had relied "upon the legislative history of an amendment to determine the scope of the pre-amendment statute," and because "other courts have not read the legislative history relied upon by *Stewart* to be so clear." *Id.* at 30a-31a n.3 (citing *United States* v. *Rosenberg*, 806 F.2d 1169, 1178 (3d Cir. 1986), cert. denied, 481 U.S. 1070 (1987)).

SUMMARY OF ARGUMENT

A. Section 844(h)(2) proscribes "carr[ying] an explosive during the commission of any felony which may be prosecuted in a court of the United States." 18 U.S.C. 844(h)(2). The statute does not say the explosive must have been carried "in relation to" the underlying felony, nor does it contain any language that can bear that construction. "[D]uring" suggests only a temporal connection; it means "at the same time as," not "at the same time and in connection with." That straightforward reading is reinforced by the fact that the adjacent prohibition in Section 844(h)(1), which applies when a person "uses fire or an explosive to commit" another felony, clearly requires a connection beyond a mere temporal relationship between a defendant's possession of an explosive and the perpetration of the underlying felony.

B. Congress has expressly included the very words that the Ninth Circuit read into Section 844(h)(2) in a closely related provision. Section 924(c)(1) of Title 18, United States Code, prohibits carrying a firearm "during and in relation to" certain specified offenses. Because it is undisputed that Section 844(h) was patterned on Section 924(c), the lack of similar language in Section

844(h)(2) is best viewed as reflecting a deliberate congressional choice.

C. Because the text of Section 844(h)(2) is clear and unambiguous, there is no need to resort to legislative history. Nonetheless, the statute's history confirms the plain meaning of the text. As originally drafted, both Section 924(c) and Section 844(h)(2) proscribed "carrying [an item] unlawfully during the commission of" certain specified offenses. In 1984, Congress amended Section 924(c), the firearms statute, by deleting the word "unlawfully" and adding the words "and in relation to" after "during." In 1988, Congress amended Section 844(h)(2), the explosives statute, by deleting the word "unlawfully," but Congress conspicuously failed to add the words "and in relation to." A committee report prepared in connection with the 1984 amendments to the firearms statute expressly recognized that, absent the words "unlawfully" or "and in relation to," the statute would apply when a defendant's carrying of the firearm "played no part in" the underlying offense. In addition, the Department of Justice advised Congress in 1985 that the elimination of the word "unlawfully" from Section 844(h)(2) would result in the statute being expanded to cover "all cases in which explosives are carried during the commission of a federal felony."

D. The Ninth Circuit's own previous decision in *United States* v. *Stewart*, 779 F.2d 538 (9th Cir. 1985) (Kennedy, J.), does not support reading into Section 844(h)(2) a relational element that appears nowhere in the statutory text. *Stewart* construed a different statute that was amended at a different time and in different ways, and did not purport to interpret Section 844(h).

E. The canon against reading general language in a statute to produce absurd results has no application

here. Given the inherent dangerousness of explosives, as well the relative infrequency of situations in which a person will have a legitimate reason for carrying one, there is nothing irrational or absurd about mandating enhanced punishment for any person who carries an explosive while committing a federal felony. Respondent relies on a few hypothetical scenarios to which Section 844(h)(2) might potentially extend, but a party who invokes the absurd results canon to create an exception to otherwise clear statutory language must, at minimum, demonstrate that a straightforward reading of the text produces an absurd result in his own case. Respondent has not attempted to do so. In any event, it is unclear whether the examples respondent posits would be truly absurd.

F. The rule of lenity is inapplicable. The statutory text is clear and unambiguous, and supplying an element that Congress itself omitted goes well beyond the rule's limited role.

ARGUMENT

IN A PROSECUTION BROUGHT UNDER 18 U.S.C. 844(h)(2), THE GOVERNMENT IS NOT REQUIRED TO PROVE THAT THE EXPLOSIVE WAS CARRIED "IN RELATION TO" THE UNDERLYING FELONY

Section 844(h)(2) mandates a ten-year term of imprisonment for any person who "carries an explosive during the commission of any felony which may be prosecuted in a court of the United States." 18 U.S.C. 844(h)(2). For purposes of these proceedings, respondent does not deny that he gave a false name to a United States customs inspector, or that his conduct constituted a "felony which may be prosecuted in a court of the United States." *Ibid.*; see Pet. App. 12a. Nor does re-

spondent deny that, at the time he committed that offense—*i.e.*, "during" it, he was "carr[ying]" the items found concealed in the trunk of his car, or that those items constituted "an explosive" within the meaning of Section 844(h)(2). *Ibid.* The Ninth Circuit nevertheless concluded that respondent is entitled to a judgment of acquittal on Count 9 because the government did not prove that his act of carrying the explosives "facilitated" or "aided the commission of" the underlying false statement offense charged in Count 5. *Id.* at 12a-13a (quoting *United States* v. *Stewart*, 779 F.2d 538, 540 (9th Cir. 1985) (Kennedy, J.)).

The court of appeals' decision is wrong. It conflicts with the statutory text and basic principles of statutory construction. Nothing in Section 844(h)'s text even remotely suggests that the explosive must have been carried "in relation to" the underlying felony. Rather, the only textual requirement is that the explosive be carried "during the commission of" the felony. "During" simply does not mean "during and in relation to." This Court has repeatedly emphasized that courts should not "read * * * absent word[s] into [a] statute." *Lamie* v. *United States Trustee*, 540 U.S. 526, 538 (2004). No basis exists for departing from that principle here.

A. The Text Of 18 U.S.C. 844(h) Makes Clear That Section 844(h)(2) Does Not Require Proof That The Explosive Was Carried "In Relation To" The Underlying Felony

1. This Court often has emphasized that "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Staples* v. *United States*, 511 U.S. 600, 604 (1994) (quoting *Liparota* v. *United States*, 471 U.S. 419, 424 (1985)).

Thus, "in determining what facts must be proved beyond a reasonable doubt, the * * * legislature's definition of the elements of the offense is usually dispositive." *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986); see *Clark* v. *Arizona*, 126 S. Ct. 2709, 2719 (2006) (noting this Court's "traditional recognition of a State's capacity to define crimes and defenses"); *Almendarez-Torres* v. *United States*, 523 U.S. 224, 228 (1998) (stating that, subject to constitutional limitations, "the question of which factors are [elements of a criminal offense] is normally a matter for Congress").

The primary and generally exclusive source for identifying the elements of a criminal offense is the statutory text, and this Court has often declined to add elements that have no basis in that text. In *Bates* v. *United States*, 522 U.S. 23 (1997), the Court unanimously held that a specific intent to injure or defraud is not an element of the crime of knowingly and willfully misapplying federally insured student loan funds under 20 U.S.C. 1097(a). The Court observed that "[t]he text of § 1097(a) does not include an 'intent to defraud' state of mind requirement" and stated that it "ordinarily resist[s] reading words or elements into a statute that do not appear on [the statute's] face." *Bates*, 522 U.S. at 29. Similarly, in *United States* v. *Wells*, 519 U.S. 482 (1997), the Court held that materiality is not an element of the crime of knowingly making a false statement to a federally insured bank under 18 U.S.C. 1014, noting that "[n]owhere does [the statutory text] say that a material fact must be the subject of the false statement or so much as mention materiality." 519 U.S. at 490; see *National Org. for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 256-257 (1994) (rejecting argument that 18 U.S.C. 1962(c) requires proof of economic motive; "[n]owhere in [the statute] is

there any indication that an economic motive is required"); *United States* v. *Culbert*, 435 U.S. 371, 373, 380 (1978) (rejecting claim that, to establish a violation of the Hobbs Act, 18 U.S.C. 1951, it must be shown that a defendant engaged in "racketeering" activities, and stating that "the absence [in the statute] of any reference to 'racketeering' * * * is strong evidence that Congress did not intend to make 'racketeering' an element of a Hobbs Act violation").

2. The principle that Congress's definition of the elements of a criminal offense is controlling absent constitutional constraints mandates the conclusion that, in a prosecution brought under 18 U.S.C. 844(h)(2), the government is not required to prove that the explosive was carried "in relation to" the underlying felony. Those words do not appear in the text of Section 844(h)(2), which simply makes it unlawful to "carr[y] an explosive during the commission of any felony which may be prosecuted in a court of the United States." 18 U.S.C. 844(h)(2). See Pet. App. 29a (O'Scannlain, J., dissenting from denial of rehearing en banc) (stating that "the plain language of § 844(h)(2) says nothing about a relational element").

Nor is a relational requirement implicit in the phrase "during the commission of." 18 U.S.C. 844(h)(2). Because those words are undefined in the statute, their meaning "has to turn on the language as we normally speak it." *Watson* v. *United States*, 128 S. Ct. 579, 583 (2007); accord *Logan* v. *United States*, 128 S. Ct. 475, 482 (2007) (discussing "[t]he ordinary meaning" of the undefined statutory term "restored"); *Smith* v. *United States*, 508 U.S. 223, 228 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."). "The plain ev-

eryday meaning of 'during' is 'at the same time' or 'at a point in the course of.' It does not normally mean 'at the same time and in connection with.'" *United States* v. *Rosenberg*, 806 F.2d 1169, 1178-1179 (3d Cir. 1986) (citation omitted), cert. denied, 481 U.S. 1070 (1987); accord *Black's Law Dictionary* 456 (6th ed. 1990) (defining "during" as "[t]hroughout the course of; throughout the continuance of; in the time of; after the commencement and before the expiration of"); *The American Heritage Dictionary of the English Language* 572 (3d ed. 1992) ("[t]hroughout the course or duration of" or "[a]t some time in"); *The Random House Dictionary of the English Language* 608 (2d ed. 1987) ("throughout the duration, continuance, or existence of" or "at some time or point in the course of"); *Webster's Third New International Dictionary of the English Language* 703 (1993) (when used as a preposition, "during" means "throughout the continuance or course of" or "at some point in the course of"). According to a plain and ordinary reading of Section 844(h)(2), therefore, the only requirements are that the defendant must have been carrying an explosive *at the same time as* "the commission of" the underlying felony.

The contrast in language between Section 844(h)(1) and (2) confirms that the latter does not mandate proof that the explosive was carried in relation to the underlying felony. Whereas Section 844(h)(1) requires that fire or an explosive have been "use[d] * * * to commit" the underlying felony, Section 844(h)(2) provides that the explosive must only have been "carrie[d] * * * during the commission of" it. Because subsection (h)(1) clearly requires proof that the fire or explosive "aided the commission of the underlying felony in some way," Pet. App. 13a, Subsection (h)(2)'s omission of any similar formula-

tion underscores that the only connection mandated by that provision is a temporal one.

A dissenting judge in a different case argued that Section 844(h)(2) must contain an implicit relational element in order for the words "the commission of" to retain "some independent meaning." *Rosenberg*, 806 F.2d at 1181 n.2 (Higginbotham, J., dissenting) (quoting 18 U.S.C. 844(h)(2) (1982)). But the phrase "during the commission of any felony" is roughly synonymous with "during any felony," such that the additional words need not be interpreted as playing an independent role in the statute. Furthermore, "[s]urplusage does not always produce ambiguity," *Lamie*, 540 U.S. at 536, and "[i]t is appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction," *United States* v. *Atlantic Research Corp.*, 127 S. Ct. 2331, 2337 (2007); see *Lamie*, 540 U.S. at 536 (stating that "[w]here there are two ways to read" a statute's text, one of which generates surplusage but renders the statutory meaning plain and one of which avoids surplusage but introduces ambiguity, "the rule against surplusage is, absent other indications, inappropriate"). Judge Higginbotham did not explain how the words "the commission of" can be reasonably understood as "connecting the possession of illegal explosives to the *perpetration* of some other felonious act," *Rosenberg*, 806 F.2d at 1180-1181, and, as already explained, see pp. 14-15, *supra*, the contrast between Section 844(h)(1) and (2) confirms that the latter requires no such connection.

At any rate, the words "the commission of" in Section 844(h)(2) are not "mere surplusage." *BP Am. Prod. Co.* v. *Burton*, 127 S. Ct. 638, 648 (2006). For one thing, they conform the provision to normal usage, because it would be at least somewhat unusual to refer to a person doing

something "during any felony," which is how the statute would read in the absence of "the commission of." 18 U.S.C. 844(h)(2). In addition, those words confirm that it is the defendant—rather than some other individual—who must commit the underlying felony "during" which the explosive is carried, and that the possession of explosives during only the planning stage of a felony would not suffice. See *Scheidler* v. *National Org. for Women, Inc.*, 547 U.S. 9, 22 (2006) (stating that the presumption against surplusage is inapplicable so long as the words in question have even "a small amount of additional work * * * to do").

Examination of all parts of Section 844(h)(2) yields the same conclusion: There is simply no textual basis for concluding that, under Section 844(h)(2), the government must prove that the explosive was carried "in relation to" the underlying felony. "Thus, under the first criterion in the interpretive hierarchy, a natural reading of the full text, a [relational requirement] would not be an element of [Section 844(h)(2)]." *Wells*, 519 U.S. at 490 (citation omitted).

B. The Presence Of An Express Relational Element In 18 U.S.C. 924(c)(1) Confirms That Section 844(h)(2) Does Not Contain An Implicit One

The fact that "during" simply does not mean "during and in relation to" is sufficient to decide this case. But if further evidence were needed that the words "and in relation to" have independent meaning and are necessary to introduce a relational requirement, it is provided by the text of 18 U.S.C. 924(c)(1)(A). The Ninth Circuit's conclusion that Section 844(h)(2) contains an entirely unstated relational requirement is undermined by

the fact that such a requirement is set forth expressly in that closely related provision.

1. This Court has stated that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted); see *Bates*, 522 U.S. at 29-30. The Court has applied a similar analysis when a relevant comparison of different statutes suggests that the presence of certain language in one indicates that the absence of such language reflects a deliberate congressional choice. In *United States* v. *Shabani*, 513 U.S. 10 (1994), for example, the Court unanimously rejected the argument that courts should read into the drug conspiracy statute, 21 U.S.C. 846, a requirement that a conspirator have committed an overt act in furtherance of the conspiracy. In so holding, the Court cited the fact that, unlike the general conspiracy statute, 18 U.S.C. 371, the text of Section 846 does not contain an overt act requirement. *Shabani*, 513 U.S. at 14; see *Whitfield* v. *United States*, 543 U.S. 209, 214 (2005) (stating that, in *Shabani*, the Court "found instructive the distinction between [the drug conspiracy] statute and the general conspiracy statute").

2. As the Ninth Circuit and other courts of appeals have recognized, Section 844(h)(2) was modeled on the predecessor of 18 U.S.C. 924(c)(1)(A). See Pet. App. 9a-10a, *Rosenberg*, 806 F.2d at 1178; accord H.R. Rep. No. 1549, 91st Cong., 2d Sess. 69 (1970) (*1970 House Report*). In its current form, Section 924(c)(1)(A) expressly prohibits the use or carrying of a firearm "during *and*

in relation to" the underlying offense. 18 U.S.C. 924(c)(1)(A) (emphasis added).

Given the close connection between the two provisions, the presence of "this additional element in [Section 924(c)(1)(A)]," and its complete absence in Section 844(h)(2), "speaks volumes." *Shabani*, 513 U.S. at 14. Indeed, "the question here is not whether identical or similar words should be read *in pari materia* to mean the same thing. Rather, the question is whether Congress intended its different words to make a legal difference." *Burlington N. & Santa Fe Ry.* v. *White*, 126 S. Ct. 2405, 2412 (2006) (citations omitted). The most natural inference from a side-by-side comparison of the two provisions is that Congress deliberately omitted the "and in relation to" language from Section 844(h)(2) because it intended there to be no such requirement.

C. The Statute's History Confirms That The Absence Of A Relational Element In Section 844(h)(2) Reflects A Deliberate Congressional Choice

1. As the previous sections explained, an examination of Section 844(h)(2)'s full text makes clear that it contains no implicit relational element, and that conclusion is confirmed by the contrast between Section 844(h)(2) and Section 924(c)(1)(A). There is thus neither need nor warrant to consider legislative history in resolving this case. See *Whitfield*, 543 U.S. at 215 (no need to consider legislative history where "the meaning of [the statutory] text is plain and unambiguous"); *Lamie*, 540 U.S. at 536 ("We should prefer the plain meaning since that approach respects the words of Congress" and "avoid[s] the pitfalls that plague too quick a turn to the more controversial realm of legislative history."); *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148

(1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear.").

2. Even if this Court were to consider legislative history in the face of an unambiguous statute, Section 844(h)(2)'s legislative history further refutes the court of appeals' conclusion that Congress meant to adopt an "in relation to" element that exists nowhere in the statutory text. To the contrary, the manner in which the two statutes have evolved confirms that the presence of an express relational element in Section 924(c)(1)(A), and the absence of one in Section 844(h)(2), reflects a deliberate congressional choice.

a. Section 924(c), the firearms statute, was originally enacted as part of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213. In its initial form, the statute mandated at least one and no more than ten years of imprisonment for any person who

> carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States.

§ 102, 82 Stat. 1224 (18 U.S.C. 924(c)(2) (Supp. IV 1968)).

Section 844(h)(2), the explosives statute, was first enacted two years later, as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922. With the exception of the substitution of the words "an explosive" for "a firearm," its language was identical to that of the original Section 924(c)(2). See § 1102, 84 Stat. 957 (18 U.S.C. 844(h)(2) (1970)). A committee report accompanying the 1970 legislation confirms that the parallel language was intentional, stating that "Section 844(h) carries over to the explosives area the stringent provisions of the Gun Control Act of 1968 relating to the use of firearms and the unlawful carrying of firearms to

commit, or during the commission of, a Federal felony." *1970 House Report* 69.

In 1984, Congress redrafted the firearms statute, and made three changes to Section 924(c) that are pertinent here. First, Congress deleted the word "unlawfully" and added "and in relation to" after "during." 1984 Firearms Amendment § 1005(a), 98 Stat. 2138. Second, Congress limited Section 924(c) to cases involving a "crime of violence." *Ibid.*[1] Third, Congress mandated a five-year term of imprisonment for a first offense under Section 924(c), and it specified that the term of imprisonment may not "run concurrently with any other term of imprisonment including that imposed for the crime of violence in which the firearm was used or carried." § 1005(a), 98 Stat. 2138-2139.

A committee report prepared in connection with the 1984 Firearms Amendment contains a detailed discussion of the deletion of "unlawfully" and the addition of "and in relation to." See *1983 Senate Report* 314 n.10. In the view of the 1983 report's authors, the word "unlawfully" had been added to the original 1968 firearms statute "because of Congressional concerns that without it policemen and persons licensed to carry firearms who committed Federal felonies would be subject to additional penalties, even where the weapon played no part in the crime." *Ibid.* But, the report states, "persons who are licensed to carry firearms and abuse that privilege by committing a crime with the weapon, as in the extremely rare case of the armed police officer who commits a crime, are as deserving of punishment as [those] whose possession of the gun" was itself unlawful. *Ibid.*

[1] In 1986, Congress expanded Section 924(c)'s coverage to encompass cases involving a "drug trafficking crime." Firearms Owners' Protection Act, Pub. L. No. 99-308 § 104(a)(2)(C), 100 Stat. 457.

In addition, the Senate Report notes that the new language requiring that the firearm be used or carried "'in relation to' the [underlying] crime would preclude [the firearms statute's] application in a situation where [the firearm's] presence played no part in the crime, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight." *Ibid.*

In 1985, the Department of Justice (Department) proposed a package of "minor or technical amendments" to the statute in which Section 844(h)(2) originally had been enacted. See 131 Cong. Rec. 14,166 (1985) (statement of Sen. Thurmond introducing S. 1236, 99th Cong., 1st Sess. (1985)). Section 83 of the proposed legislation would have modified Section 844(h) to require a mandatory and consecutive five-year term of imprisonment for any person who "uses fire or an explosive to commit, or carries an explosive during the commission of, any felony which may be prosecuted in a court of the United States." 131 Cong. Rec. at 14,173. In a section-by-section bill analysis that was placed in the *Congressional Record*, see *ibid.*, the Department explained that, under the proposed amendment,

> the carrying offense in Section 844(h) would be expanded to include all cases in which explosives are carried during the commission of a federal felony, not only those in which the carrying was "unlawful."

Id. at 14,183.

In 1988, Congress amended Section 844(h) in a manner that closely paralleled the Department's 1985 proposal. See Anti-Drug Abuse Amendments Act of 1988 (1988 Explosives Amendment), Pub. L. No. 100-690, Tit. VI, § 6474(b), 102 Stat. 4379. As the Department had

proposed, see 131 Cong. Rec. at 14,173, the 1988 Explosives Amendment deleted the word "unlawfully" without at the same time adding the words "and in relation to." § 6474(b)(1), 102 Stat. 4380. In addition, as the Department had proposed during the previous Congress, see 131 Cong. Rec. at 14,173, and as it had already done with the firearms statute, see 1984 Firearms Amendment § 1005(a), 98 Stat. 2138, Congress imposed a mandatory five-year term of imprisonment for a first offense under Section 844(h)(2), and directed that the term of imprisonment may not "run concurrently with any other term of imprisonment including that imposed for the felony in which the explosive was used or carried." 1988 Explosives Amendment § 6474(b)(2), 102 Stat. 4380.

No committee reports were prepared in connection with the 1988 Explosives Amendment. See 102 Stat. 4545. Senator Biden, however, the then-Chairman of the Judiciary Committee, drafted a section-by-section analysis of the Title that included the amendments to Section 844(h) "as a detailed statement in the *Record* of Congress' intent in enacting these provisions." 134 Cong. Rec. 32,692 (1988).[2] Addressing the proposed amendments to Section 844(h), Senator Biden stated that they

> would strengthen the offense * * * of using or carrying an explosive during the commission of a federal felony, so as to bring it in line with similar amendments adopted by the Comprehensive Crime Control Act of 1984 and the Firearms Owners' Protection Act of 1986 with respect to the parallel offenses of using or carrying a firearm during the commission of federal offenses. Presently, as a result of the above-ref-

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[2] Senator Biden's bill analysis is "the Senate Report" to which the court of appeals referred in its opinion. See Pet. App. 11a.

> erenced amendments to 18 U.S.C. 924(c), a person who uses a firearm to commit a bank robbery would be subject to harsher penalties than a person who committed the same offense using an explosive. There is no justification for this disparity.

134 Cong. Rec. at 32,700.[3]

b. The sequence and manner in which the two statutes were enacted and amended confirm that the absence of a relational element in Section 844(h)(2) reflects a deliberate congressional choice. Aside from the substitution of "an explosive" for "a firearm," Section 924(c)(2) and Section 844(h)(2) began with identical language. The 1988 Explosives Amendment tracked the 1984 Firearms Amendment in a number of respects, including the deletion of the word "unlawfully," the imposition of a mandatory five-year term of imprisonment for a first offense, and the requirement that the sentence for the use or carrying offense be served consecutively to all other sentences. But the most salient point here is that when it amended the explosives statute in 1988, Congress did *not* add the words "and in relation to" that it had added to the firearms statute just four years earlier. Pet. App. 28a (O'Scannlain, J., dissenting from denial of rehearing en banc).

The legislative record only confirms the significance of the current differences in wording between the two

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[3] In 1996, Congress enacted the current mandatory ten-year term of imprisonment for a first offense under Section 844(h). See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 708(a)(3)(A), 110 Stat. 1296. Section 924(c) has been amended a number of times since 1984. See 18 U.S.C. 924 note (2000 & Supp. V 2005). In 1998, Congress redrafted Section 924(c)(1) and enacted the present graduated penalty structure. See Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469.

statutes. The Senate Report prepared in connection with the 1984 Firearms Amendment reveals an understanding that, in the absence of an "unlawfully" or "in relation to" requirement, the statute could be applicable in situations where the weapon "played no part in the crime." *1983 Senate Report* 314 n.10; see *Muscarello* v. *United States*, 524 U.S. 125, 137 (1998) (stating that "Congress added the[] words ['and in relation to'] in part to prevent prosecution where guns 'played' no part in the crime."). The Department expressed a similar understanding in its 1985 bill analysis, noting that, absent the word "unlawfully," Section 844(h)(2) would apply to "*all cases* in which explosives are carried during the commission of a federal felony." 131 Cong. Rec. at 14,183 (emphasis added). The limited legislative history of the 1988 Explosives Amendment "does not specifically say why 'unlawfully' was struck, or why 'and in relation to' was not added," Pet. App. 11a, but what evidence there is from Senator Biden's statement affords no basis for discounting the significance of the omission of the "and in relation to" language. Senator Biden did not say that Congress's intent was to add an entirely unstated relational element, and, when read in context, his statement that the purpose of the amendments was "to bring [Section 844(h)(2)] in line with" the recent amendments to Section 924(c) was clearly a reference to the then-existing disparity in penalty rather than an expression of intent for the two statutes to be identical in every respect. 134 Cong. Rec. at 32,700.

D. The Court Of Appeals' Own Previous Decision In *Stewart* Does Not Warrant A Different Result

The Ninth Circuit made no attempt to identify a source in the statutory language for its holding that Sec-

tion 844(h)(2) contains an implicit relational element. Instead, it relied on *Stewart*, *supra*, a decision that construed an earlier version of the firearms statute, and extrapolated from *Stewart* that the current version of Section 844(h)(2) must contain a requirement that the statutory text omits. Pet. App. 8a-11a.

The court of appeals' analysis is flawed at every step. First, "[t]he starting point in discerning congressional intent is the existing statutory text, and not the predecessor statutes," *Lamie*, 540 U.S. at 534 (citation omitted), much less a predecessor version of a different statute. "And where," as here, "the statutory language provides a clear answer," the analysis "ends there as well." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999). All of those principles apply *a fortiori* in this Court, where *Stewart* has no special claim as circuit precedent.

Second, to the extent *Stewart* is relevant at all, it is equally plausible to view *Stewart,* and the congressional actions that followed it, as undermining the court of appeals' decision here. *Stewart* construed a different statute that was amended at a different time and in different ways, see pp. 19-23, *supra*, and did not purport to interpret Section 844(h). And if Congress's subsequent addition of the words "and in relation to" can shed light on the meaning of the pre-1984 version of the firearms statute, as the *Stewart* court determined that it can, see 779 F.2d at 540, then surely Congress's failure to add those very same words when it amended the explosives statute in 1988 suggests something about the meaning of current Section 844(h)(2). See *Rosenberg*, 806 F.2d at 1178 (stating that "Congress has not seen fit to modify [Section] 844(h) in the same manner" that it had modified

Section 924(c) by the time of the Ninth Circuit's decision in *Stewart*).

In fact, Congress's failure to add the words "and in relation to" when it amended Section 844(h) in 1988 is all the more telling in light of *Stewart* and *Rosenberg*. In 1985, *Stewart* held that in light of the 1984 amendments, the pre-1984 version of Section 924(c)(2)—which contained the word "unlawfully" but not the words "and in relation to," see 18 U.S.C. 924(c)(2) (1982)—was best understood as containing an implicit relational element. In 1986, the Third Circuit held that the pre-1988 version of Section 844(h)(2)—which also contained the word "unlawfully" but not the words "and in relation to," see 18 U.S.C. 844(h)(2) (1982)—"has no relational element." *Rosenberg*, 806 F.2d at 1179. And, faced with these "divergent decisions," Congress chose to delete from Section 844(h)(2) the word "unlawfully" *without* at the same time adding the words "and in relation to" that it had added to Section 924(c) only four years earlier. Pet. App. 28a (O'Scannlain, J., dissenting from denial of rehearing en banc). That contrast suggests that, whatever the merits of *Stewart*'s interpretation of Section 924(c), Congress thereafter had good reason to be explicit if it had wanted an "in relation to" requirement in Section 844(h)(2), and it declined to take that step.

Third, the method of analysis employed in *Stewart* is inconsistent with this Court's more recent precedents regarding statutory interpretation. The Ninth Circuit's decision in that case made no attempt to explain how its holding was consistent with the text of the governing statute. See, *e.g.*, *Lamie*, 540 U.S. at 534 ("The starting point in discerning congressional intent is the existing statutory text."); *Wells*, 519 U.S. at 490 (describing "a natural reading of the full text" as "the first criterion in

the interpretive hierarchy"); *United States* v. *Alvarez-Sanchez*, 511 U.S. 350, 356 (1994) ("When interpreting a statute, we look first and foremost to its text.") Moreover, subsequent opinions have reaffirmed that *Stewart*'s heavy reliance "upon the legislative history of an amendment to determine the scope of the pre-amendment statute [was] questionable." Pet. App. 31a n.3 (O'Scannlain, J., dissenting from denial of rehearing en banc). See, *e.g.*, *Jones* v. *United States*, 526 U.S. 227, 238 (1999) ("[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress.") (internal quotation marks and citation omitted); *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185 (1994) ("[W]e have observed on more than one occasion that the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute.") (citation omitted). Even if such evidence may properly be considered, *Stewart* acknowledged that the legislative history of the 1984 Firearms Amendment is "not entirely free of ambiguity," 779 F.2d at 540, and *Stewart*'s interpretation of that history is debatable. See *Rosenberg*, 806 F.2d at 1178 (disagreeing with *Stewart*'s conclusion that "the legislative history of the 1984 amendment 'strongly implie[d]' that the 'in relation to' phrase did not affect the scope of the statute as originally written" (quoting *Stewart*, 779 F.2d at 539-540)); see also pp. 20-21, *supra* (discussing the committee report upon which *Stewart* relied). Finally, even assuming that *Stewart* was correct that the firearms statute's "evident purpose * * * necessarily implies some relation or connection between the underlying criminal act and the use or possession of the firearm," 779 F.2d at 540, "the fact that a statute can be 'ap-

plied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998) (quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 499 (1985)).

For all of these reasons, *Stewart*'s interpretation of a long-superseded version of a different statute is entitled to little, if any, weight in assessing the meaning of current Section 844(h)(2). It most certainly cannot bear the case-dispositive significance the Ninth Circuit ascribed to it here. Pet. App. 11a-12a.

E. The Canon Against Absurdities Does Not Apply

Respondent relies (Br. in Opp. 13-15) on the canon against absurdities, which applies when a statute's text would lead to "patently absurd consequences." *United States* v. *Brown*, 333 U.S. 18, 27 (1948), such that "the absurdity and injustice of applying the provision to the case would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application." *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122, 203 (1819) (Marshall, C.J.). That canon has no application here.

1. This Court has applied the canon against absurdities in interpreting ambiguous statutes that are susceptible to two or more interpretations because it is likely that Congress intended the non-absurd interpretation. See, *e.g.*, *Clinton* v. *City of New York*, 524 U.S. 417, 428-429 (1998); *United States* v. *Granderson*, 511 U.S. 39, 56 (1994). This Court has also read broad or general terms narrowly, or even on occasion recognized unstated exceptions, because it is unlikely that Congress foresaw an absurd application of general language, such as where a sheriff was prosecuted for obstructing the mails even

though he was executing a warrant to arrest the mail carrier for murder, or where a medieval law against drawing blood on the streets was to be applied against a physician who had come to the aid of a man who had fallen down in a fit. *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 460-461 (1892) (citing cases); see *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 455 (1989).

2. Section 844(h)(2), it bears repeating, does not come into play until a person commits a "felony which may be prosecuted in a court of the United States." 18 U.S.C. 844(h)(2). The question, therefore, is whether it is "quite impossible [to believe] that Congress could have intended" to require an additional ten years of punishment for any person who commits a federal felony while simultaneously carrying an explosive, and that the "absurdity [of doing so] is so clear as to be obvious to most anyone." *Public Citizen*, 491 U.S. at 471 (Kennedy, J., concurring in the judgment).

To ask such a question is to answer it. There is nothing absurd about mandating severe punishment for any person who carries an explosive while committing another crime, and, at any rate, harshness of punishment alone is insufficient to render a statute's clear meaning absurd or ambiguous. *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 483-484 (1992); see *Lamie*, 540 U.S. at 538 ("Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding."). Explosives are inherently dangerous, and "[t]he carrying of [one] during the commission of a crime greatly increases the risk of injury or death to others," especially given the high risk that explosives "may go off accidentally." Pet. App. 28a n.1 (O'Scannlain, J., dissenting from denial of

rehearing en banc); see Organized Crime Control Act of 1970, § 1101, 84 Stat. 952 (recognizing the "hazard to persons and property" posed by the "misuse and unsafe or insecure storage of explosive materials" in the statute that first enacted Section 844); *1970 House Report* 24 (same).

In addition, an explosive is a relatively unusual item for an individual to be carrying, and the number of situations in which there is a fully innocent explanation for doing so is smaller still. Congress could therefore reasonably have concluded that a defendant's act of carrying an explosive while simultaneously committing a felony is sufficiently likely to be connected to that felony to warrant dispensing with any requirement for the government to provide case-specific proof of a relationship between the two. Nor was it unforeseeable that the amended statute could be applicable to situations in which the explosive did not facilitate the commission of the underlying felony: The Department advised Congress in 1985 that the deletion of the word "unlawfully" would result in "the carrying offense in section 844(h) [being] expanded to include all cases in which explosives are carried during the commission of a federal felony." 131 Cong. Rec. at 14,183. Cf. *1983 Senate Report* 314 n.10 (recognizing that, absent an "unlawfully" or "in relation to" requirement, the firearms statute could be applicable in situations where the weapon "played no part in the crime").

Respondent does not appear to contend that there is anything "patently absurd" (*Brown*, 333 U.S. at 27) about requiring him to serve an additional period of imprisonment based on the fact that he was carrying the explosives found in the trunk of his car at the time he committed the underlying crime of lying about his name

to a United States customs inspector. Instead, respondent asserts that interpreting Section 844(h)(2) in accordance with its plain terms could authorize other, hypothetical, prosecutions that Congress may not have anticipated, such as a police officer being prosecuted for accepting a bribe while carrying his loaded service revolver, or a licensed explosives dealer being prosecuted for possessing explosives during an entirely unrelated customs offense. Br. in Opp. 13-15.

That argument fails for several different reasons. First, it is entirely plausible that Congress's primary purpose in amending Section 844(h)(2) in 1988 was to ensure that the statute would be broad enough to cover all situations in which its enhanced penalty is warranted, and that Congress was content to rely on the exercise of sound prosecutorial discretion to guard against the statute's overly expansive use. It is telling in this regard that respondent is unable to identify any actual prosecutions that resemble the hypothetical ones he posits.[4]

[4] *United States* v. *Davis*, 202 F.3d 212 (4th Cir.) (Br. in Opp. 23), cert. denied, 530 U.S. 1236 (2000), did not involve a prosecution under Section 844(h)(2). Rather, that case involved the calculation of the proper base offense level under the Sentencing Guidelines for a defendant who had been convicted, *inter alia*, of maliciously damaging a dwelling within the special maritime or territorial jurisdiction of the United States. See *id*. at 214, 218-219; 18 U.S.C. 1363. Although the Fourth Circuit referred to the definition of "explosive" contained in 18 U.S.C. 844(j), it did so only because the Guidelines themselves contained no definition of that term. *Davis*, 202 F.3d at 218. Judge Michael dissented in *Davis*. In his view, "[e]xplosives blow things apart through the violent expansion of internal energy," and this fact precludes the term's application to the gunpowder contained inside a bullet. *Id.* at 221-223; but see 18 U.S.C. 844(j) (defining "explosive" for purposes of a number of provisions, including Section 844(h), as including "gunpowders"); 18 U.S.C. 845(a)(4) (generally exempting "small arms ammunition and components thereof" from coverage under

Second, this Court's decisions have stated that the absurd consequences canon is properly invoked to narrow broad statutory language in situations "where the words [of the statute] 'could not conceivably have been intended to apply' *to the case at hand*," not to other, hypothetical, ones. *Logan*, 128 S. Ct. at 484 (emphasis added) (quoting *Cabell* v. *Markham*, 148 F.2d 737, 739 (2d Cir.) (L. Hand, J.), aff'd, 326 U.S. 404 (1945)); accord *Sturges*, 17 U.S. (4 Wheat.) at 203 (stating that the canon applies in situations where "applying the provision to *the case* would be * * * monstrous") (emphasis added). There is no overbreadth doctrine that gives defendants whose own prosecution is far from absurd license to attack the statute based on absurd hypotheticals. Finally, given the inherently dangerous nature of explosives, Congress's decision to eliminate the word "unlawfully," 1988 Explosives Amendment § 6474(b)(1), 102 Stat. 4380, and the broad definition of explosives it chose for this particular statute, see note 4, *supra*, it is far from clear that even the two hypothetical applications of Section 844(h)(2) that respondent posits "would be, in a genuine sense, absurd," such that "it is quite impossible to imagine that Congress could have intended the result." *Public Citizen*, 491 U.S. at 470-471 (Kennedy, J., concurring in the judgment).

Although he does not directly assert that such a regime is absurd, respondent also suggests that it "makes no sense" for Congress to have "impose[d] an identically harsh penalty for the coincidental carrying of an explosive" as "for the *use* of explosives to commit a felony." Br. in Opp. 13 (citing 18 U.S.C. 844(h)(1)). But it is Con-

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Chapter 40 of Title 18, United States Code, 18 U.S.C. 841 *et seq.*, but providing that this carve-out "shall not apply to" certain specified provisions, including Section 844(h)).

gress that "has primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme," and courts "do not sit as a 'superlegislature' to second-guess these policy choices." *Ewing* v. *California*, 538 U.S. 11, 28 (2003) (opinion of O'Connor, J.); see *Gore* v. *United States*, 357 U.S. 386, 393 (1958) ("Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, these are peculiarly questions of legislative policy.") (citation omitted). Congress's decision to omit a relational element in Section 844(h)(2) may reflect only a desire not to saddle the government with an additional element of proof once it has shown the carrying of an explosive in temporal proximity with the commission of a federal felony. Nor is it clear that the punishments for use and carrying offenses will invariably be the same. While a first offense under Section 844(h)(2) for carrying an explosive requires a ten-year sentence, a person who uses or attempts to use an explosive to "damage[] or destroy[]" federal property, 18 U.S.C. 844(f)(1) (Supp. V 2005), or any real or personal property "used in * * * any activity affecting interstate or foreign commerce," 18 U.S.C. 844(i), is subject to at least five and up to 20 years of imprisonment, with the ranges being increased to seven to 40 years of imprisonment if a person is injured, and to 20 years to life imprisonment or the death penalty if a person is killed.

F. The Rule Of Lenity Does Not Apply

Contrary to respondent's assertion (Br. in Opp. 15), the rule of lenity does not apply in this case. That "maxim of statutory construction," *Taylor* v. *United States*, 495 U.S. 575, 596 (1990), is reserved for cases involving a "grievous ambiguity" in the statutory text

such that, "after seizing everything from which aid can be derived, . . . [the Court] can make no more than a guess as to what Congress intended." *Muscarello*, 524 U.S. at 138-139 (internal quotation marks and citations omitted). Rule of lenity concerns are also attenuated where, as here, the provision in question does not demarcate a line between legally innocent and criminally culpable conduct, but instead involves an offense that requires, as an element, the commission of a different felony. Cf. *Arthur Anderson LLP* v. *United States*, 544 U.S. 696, 703-704 (2005) (discussing situation where "the act underlying the conviction * * * is by itself innocuous" and "not inherently malign").

Respondent has not identified any language in Section 844(h)(2) that he claims is ambiguous. Rather, he asserts that it would be "rational to interpret the statute as requiring the government prove a relationship between the carrying of the explosives and the charged [felony]." Br. in Opp. 15. While Congress might have rationally adopted such a requirement, it is not rational to read such a requirement into a statute that contains no textual or other basis for such an interpretation. And "[t]he mere possibility of articulating a narrower construction * * * does not by itself make the rule of lenity applicable," *Smith*, 508 U.S. at 239, because "[t]he rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 410 (1991) (quoting *Callanan* v. *United States*, 364 U.S. 587, 596 (1961)). Section 844(h)(2) is clear and unambiguous, and supplying an element that Congress itself omitted goes well beyond the rule's limited role.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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