No. 07-455

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

AHMED RESSAM,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENT

THOMAS W. HILLIER, II
Counsel of Record
LAURA E. MATE
LISSA WOLFENDALE SHOOK

FEDERAL PUBLIC DEFENDER
1601 Fifth Avenue
Suite 700
Seattle, WA 98101
(206) 553-1100

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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" federal felony, and "explosive" is defined in Section 844(j) to include many common and legal substances, like gasoline and gunpowder, so long as they "may cause an explosion." The question presented is whether Section 844(h)(2) applies to a person who "carries" such an "explosive" during the commission of a felony to which the "explosive" is completely unrelated.

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STATEMENT

Respondent, Ahmed Ressam, entered the United States on December 14, 1999, by car ferry at Port Angeles, Washington, where he was contacted by customs inspectors. Respondent provided false information regarding his identity and citizenship. His demeanor aroused suspicion and he was referred for secondary inspection. His car was searched and discovered hidden in its trunk were the components of a bomb, including explosives, detonators, timing devices, and other items. Pet. App. 4a. Respondent was arrested and the government initiated an intensive investigation. That investigation bore significant fruit and Respondent was ultimately charged on February 14, 2001, in a nine-count Second Superseding Indictment. J.A. 18-23.

The centerpiece of the Indictment was Count 1, which alleged conspiracy to commit an act of terrorism in violation of 18 U.S.C. § 2332b(a)(1)(B). Five counts alleged the violation of laws related to explosives: placing an explosive in proximity to a terminal (Count 2); smuggling explosives (Count 6); transporting explosives without a permit (Count 7); possession of an unregistered destructive device (Count 8); and carrying an explosive during the commission of a federal felony (Count 9). The three remaining counts centered on Respondent's attempt to enter the United States under false pretenses: possession of false identification (Count 3); use of a fictitious name (Count 4); and making a false statement to a customs

official (Count 5). The government chose Count 5 as the felony underlying the charge brought in Count 9.

Respondent was tried before a jury in Los Angeles during March and April 2001. At trial, Respondent moved for a judgment of acquittal on Count 9, arguing that the government presented no evidence that would support a finding that the carrying of the explosives facilitated the false statement charge in Count 5. J.A. 62-63. The district court denied the motion for a judgment of acquittal. J.A. 67.

The jury convicted Respondent on all counts, but sentencing was delayed as a result of his decision to cooperate. His cooperation was "extensive," Pet. App. 6a, but ultimately stopped, and on July 27, 2005, the district court sentenced Respondent to a total of 22 years imprisonment. J.A. 74. The government appealed the sentence and Respondent cross-appealed, challenging the sufficiency of the evidence on Count 9.

The court of appeals did not address the sentencing question, both because it agreed with Respondent that the conviction on Count 9 could not stand, and because it felt the district court should, on remand, have the opportunity to take into account sentencing law emerging from *United States v. Booker*, 543 U.S. 220 (2005). Pet. App. 13a-14a.

In vacating the conviction on Count 9, the court of appeals observed that "the government offered no evidence that Ressam's carrying the explosives in any way facilitated his falsifying the customs declaration

form." Pet. App. 7a. Noting that absence of proof, the court of appeals went on to hold that "[i]t is not enough for the government to prove that Ressam lied *because* he was smuggling explosives in the trunk of his car. Rather, the government must demonstrate that the explosives aided the commission of the underlying felony in some way." Pet. App. 13a (emphasis in original).

Certiorari was sought and granted on the question of whether Title 18 U.S.C. § 844(h)(2) requires a relation or connection between the underlying felony and the carried explosives.

SUMMARY OF ARGUMENT

Section 844(h)(2) mandates a ten-year sentence 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 statute must be read to require that the explosives carried bear a relationship to the underlying felony. This conclusion flows from the text of Section 844(h)(2) itself, the statutory scheme of which it is a part, the history and purpose of the statute, and from long-standing principles of statutory construction.

Without the imposition of a relational requirement, Section 844(h)(2) would inflexibly mandate a ten-year sentence for the legal, commonplace, safe possession of explosives during the commission of unrelated and comparatively non-serious offenses.

Because the statute employs the terms "explosive," "any [federal] felony," and "carries," all of which are remarkably broad, the need for a relational requirement is of more than academic interest. Contrary to the government's claim that an explosive is a relatively unusual item, the innocent carrying of which is more unusual yet, Govt. Br. at 30, the definition of "explosive" includes a host of common items lawfully possessed by many people in many situations, substances like gasoline and fertilizer. Equally expansive is the range of conduct covered by federal felony statutes, and the term "carries" extends to items conveyed in the locked trunk of a vehicle. In the face of the statute's broad sweep, the government's contention that no relationship between the explosives and the felony need exist to trigger the statute's mandatory penalty offends common sense and should not be accepted when, as here, the words can readily be construed in a far more sensible way.

The statutory scheme of Section 844 reinforces the necessity of a causal relationship between the carried explosives and the underlying felony. Section 844 was adopted to penalize the misuse of explosives. Its subsections proscribe using explosives to kill, injure, intimidate, damage property, and make threats, under circumstances that implicate federal jurisdiction. It is wholly inconsistent with the full text of Section 844 that Section 844(h)(2)'s mandatory penalties would apply to the lawful possession of explosives simply because they were carried during the commission of an incidental felony.

The historical development of Section 844 further demonstrates that its purpose is to punish only the misuse of explosives. Section 844(h)(2) first appeared as part of the Organized Crime Control Act of 1970, a bill that was enacted, in part, for the purpose of strengthening and expanding criminal penalties for "the intentional misuse of explosives." Congress took care to differentiate between the use and misuse of explosives, crafting regulations concerning their lawful transportation and storage, while enhancing punishments where carried or used for illegal purposes. The relationship between the explosives and the underlying felony in Section 844(h)(2) is consistent with this scheme, while the government's view that the statute's penalties reach the lawful carrying of explosives during an incidental felony is not.

The government presses a literal reading of Section 844(h)(2), one which would require no relationship between the carried explosive and the underlying felony and one it concedes risks "overly expansive use" if adopted. That risk is not readily apparent in this case where Respondent carried explosives and planned an act of terrorism. But the government's unusual charging decision, linking Section 844(h)(2) to the completely unrelated felony of making a false declaration to a customs official, does not disguise the government's unreasonable construction of the statute's reach. Without a nexus between the explosive and the underlying felony, there is no logical limit to its application. In the government's view, its harsh penalties could apply even where the

explosives were carried lawfully, safely, and to no relevant effect as to the underlying felony.

The government's position that no relationship at all need exist between carrying the explosives and the predicate felony under Section 844(h)(2) ignores the definition and meaning of key terms used in Section 844(h)(2) and even suggests this Court should treat as surplusage words that do not fit with its theory. And at no point does the government attempt to harmonize its expansive interpretation of Section 844(h)(2) with the full text and structure of the explosives statutes. The government's approach is inconsistent with rulings of this Court which regularly caution against attempts to interpret statutes by construing words and phrases in isolation; requiring instead consideration of the whole statutory text, the statute's structure, its purpose, and consideration of other authorities that might inform the analysis. Utilizing this well-established holistic approach to the question presented leads inescapably to the conclusion that Section 844(h)(2) requires that the explosives be carried in relation to the underlying felony.

ARGUMENT

I. Section 844, Read as a Whole, and In Light of Its Purpose and History, Requires a Relationship Between the Carrying of Explosives and the Predicate Felony.

Applying the well-established principle that "[s]tatutory construction is a 'holistic endeavor,'" *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (quoting *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)), the text, its context, purpose, and history all support the conclusion that implicit in 18 U.S.C. § 844(h)(2) is the element that there be a relationship between the explosives and the underlying felony.

A. The Text of Section 844(h)(2) Requires That the Carrying of Explosives Be Related to the Underlying Felony.

Statutory interpretation "begins with the language of the statute." *Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004) (citing *Bailey v. United States*, 516 U.S. 137, 144 (1995)). This Court "consider[s] not only the bare meaning of the word, but also its placement and purpose in the statutory scheme." *Bailey*, 516 U.S. at 145. An examination of 18 U.S.C. § 844(h)(2)'s text and surrounding provisions clarifies that its heavy mandatory minimum penalty only attaches to situations where there is a connection between the explosives and the underlying felony.

1. The key terms of Section 844(h)(2) – "explosive," "carries," and "[federal] felony" – are so broad independently that when read together they "most naturally suggest[ ]," *Leocal,* 543 U.S. at 9, there must be a relationship between them.

For one, the term "explosive" as defined for purposes of Section 844(h)(2) is not limited to "unusual item[s]," Govt. Br. 30, but instead encompasses common materials that people use in their daily lives and professions:

> gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, other explosive or incendiary devices within the meaning of paragraph (5) of section 232 of this title, and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.

18 U.S.C. § 844(j) (reproduced at Resp. App. 6a).[1]

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[1] The cross reference to 18 U.S.C. § 232 provides the following definition of "explosive or incendiary device":

> (A) dynamite and all other forms of high explosives,
> (B) any explosive bomb, grenade, missile, or similar

(Continued on following page)

Courts have recognized, and other statutory provisions confirm, that this definition includes within its reach everyday items such as gasoline, ammunition, fertilizer, natural gas, and fireworks. *See, e.g., United States v. Ramsey,* 726 F.2d 601, 603 (10th Cir. 1984) (holding that gasoline constitutes an explosive under Section 844(j)); *United States v. Davis*, 202 F.3d 212, 218-19 (4th Cir. 2000) (finding gunpowder in ammunition to be "gunpowder" and thus falling within Section 844(j)'s definition of "explosive")[2]; 18 U.S.C. § 844(g)(2)(A) (specifically exempting ammunition in certain circumstances from explosives that cannot be possessed in airports);

> device, and (C) any incendiary bomb or grenade, fire bomb, or similar device, including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and (ii) can be carried or thrown by one individual acting alone.

18 U.S.C. § 232.

[2] While the government correctly points out that the defendant in *Davis* had not been charged with violating Section 844, Govt. Br. 31 n.4, the Court did interpret Section 844(j) to include ammunition. 202 F.3d at 219. Because the Guidelines section at issue, U.S.S.G. § 2K1.4, did not define "explosives," the Fourth Circuit, noting that U.S.S.G. § 2K1.3 specifically incorporated Section 844(j) to define "explosives," looked to Section 844(j). *Id.* The court reasoned that ammunition in a loaded gun is an explosive because it contains "gunpowder," something specifically identified in Section 844(j), and also because " 'shooting' requires an explosion to expel a projectile from a firearm." *Id*.

18 U.S.C. § 845(a)(4) (which generally excepts the title from application to "small arms ammunition" but specifically does not except it from subsections 844(d) through (i)); *United States v. Nettles,* 476 F.3d 508 (7th Cir. 2007) (assuming without deciding that ammonium nitrate, a fertilizer, is an explosive under Section 844); *United States v. Hepp*, 656 F.2d 350, 352 (8th Cir. 1981) (holding random mixture of air and methane gas constitutes an explosive under Section 844); *United States v. Shearer*, 479 F.3d 478, 482 (7th Cir. 2007) (holding that fireworks are explosives for purposes of U.S.S.G. § 2K1.3, which adopts the definition of explosives found in Section 844(j)).

The predicate offense under Section 844(h)(2) – "any felony which may be prosecuted in a court of the United States" – is also remarkably broad. In general, a felony includes any offense punishable by more than one year. *See* 18 U.S.C. § 3559(a). Federal felonies range from possessing a counterfeit twenty-dollar bill, 18 U.S.C. § 472, and making a false statement, 18 U.S.C. § 1001, to murder, 18 U.S.C. § 1111, and terrorism, 18 U.S.C. § 2332b.

Another potentially expansive statutory term is "carries." In the context of carrying firearms under Section 924(c), Title 18, an offense punished by a mandatory minimum of not less than five years imprisonment, this Court has interpreted "carries" to apply not only where the firearms are carried on the person, but also where "a person who knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car,

which the person accompanies." *Muscarello v. United States*, 524 U.S. 125, 126-27 (1998).[3]

The breadth of these three terms read in isolation raises a question of how they are most appropriately understood in relation to each other when they are read together in the phrase "carries an explosive during the commission of any [federal] felony." This Court has "often wisely applied" the rule that "[a] word is known by the company it keeps" in instances "where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Dolan v. United States*, 546 U.S. 481, 486 (2006) (internal quotation marks omitted). Here, absent a nexus between the terms and any limitation that the explosives be carried unlawfully, *see infra,* Sec. I.B., the statute punishes what would otherwise be innocent conduct. *Cf. Arthur Andersen LLP v.*

[3] Because this Court relied on the required relationship between the firearms and predicate felony when interpreting "carries" in Section 924(c), the government's reading of Section 844 would compel the conclusion that "carries" has a more narrow meaning in Section 844(h)(2) than it does in Section 924(c). *See Muscarello*, 524 U.S. at 137 ("Once one takes account of the words 'during' and 'in relation to,' it no longer seems beyond Congress' likely intent, or otherwise unfair, to interpret the statute as we have done."). The better common sense reading of Section 844(h)(2) as requiring a relationship between the explosives and the felony, allows "carries" to mean the same thing in both sections. Indeed, it is unlikely Congress intended two different meanings for the word "carries" and far more likely that Congress intended a nexus requirement exist in both provisions.

United States, 544 U.S. 696, 703 (2005) (exercising restraint in assessing the reach of a federal statute "where the act underlying the conviction . . . is by itself innocuous").

The practical consequence of reading the statute without a relationship is that individuals lawfully carrying explosives in connection to their work or hobbies, who happen simultaneously to commit unrelated possession and status offenses, are subject to the same mandatory minimum ten-year sentence enhancement as those who carry explosives to aid the commission of a felony. For example, under the government's reading, the statute applies to someone employed by a commercial demolition company, or with an avalanche control team in the mountain passes, or with an explosives manufacturer, or as a farmer or law enforcement officer, who carries explosives as part of his everyday work, and who simultaneously possesses a counterfeit twenty-dollar bill, an unauthorized money order, or unauthorized food stamps, in violation of 18 U.S.C. § 472, 18 U.S.C. § 500, and 7 U.S.C. § 2024, respectively. And, as the government stated at oral argument in the Ninth Circuit, its interpretation would apply to a licensed dynamite practitioner carrying dynamite who, while crossing the Canadian border into Washington, lied about carrying diamonds. *See* Br. in Opp. 14. Similarly, an employee or employer who willfully failed to pay child support (18 U.S.C. § 228), evaded taxes (26 U.S.C. § 7201), or knowingly employed illegal aliens

(8 U.S.C. § 1324(a)(3)) is also within the statute's ambit as interpreted by the government.

Indeed, if no relationship is required, the statute applies to a person who in her car carries a can of gasoline to a stranded friend, while at the same time committing one of the possessory or status offenses described above. And it applies to the farmer who, while committing a possessory or status offense, also happens to carry home from the feed store some ammonium nitrate, commonly used as a fertilizer. These few examples illustrate why common sense compels the conclusion that these three broad terms when read together "most naturally suggest[ ]," *Leocal,* 543 U.S. at 9, that there must be a relationship between them. "[T]here is no canon against using common sense in construing laws as saying what they obviously mean." *Roschen v. Ward*, 279 U.S. 337, 339 (1929).

2. The last sentence of Section 844(h) further supports the necessity of a relational element: "nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the felony *in which* the explosive was used or carried." Section 844(h) (reproduced at Resp. App. 5a-6a) (emphasis added). Notably, the text does not say "during which." Instead, it explicitly requires a relationship – and more than a coincidental one – between the felony and the explosives.

3. While the text of Section 844(h)(2) establishes that a relational element is necessary, the context similarly supports the requirement of a nexus. *See, e.g.*, *Owasso Indep. Sch. Distr. v. Falvo*, 534 U.S. 426, 434 (2002) (looking at other statutory sections in interpreting statute and citing *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.")).

Reading the two subsections of Section 844(h) together shows that they form a coherent whole by punishing both the actual and the intended misuse of explosives during the commission of a felony. Section 844(h)(1) imposes a mandatory ten-year term of imprisonment on anyone who actually "uses . . . an explosive to commit any felony which may be prosecuted in a court of the United States." 18 U.S.C. § 844(h)(1). Section 844(h)(2) then repeats the verb "commit" to ensure that those who intended to use explosives "during the commission of" a felony, but were interrupted or otherwise dissuaded, also receive an enhanced punishment. That is, read naturally in light of Section 844(h)(1), this provision seeks to punish those who are carrying explosives for a purpose related to the federal crime being committed but do not actually use them. The clear objective of both provisions is to punish the *misuse* of explosives. Had Congress intended Section 844(h)(2) to accomplish the radically different goal of punishing the coincidental

carrying of explosives while committing any unrelated felony, it would be surprising at best to see it intertwined with Section 844(h)(1)'s identical ten-year penalty for using an explosive during a felony.

That it is the *misuse* of explosives that is the common subject of the crimes addressed in other provisions of Section 844 provides additional textual support that Section 844(h)(2) requires a relationship between the explosives carried and the underlying felony.[4] For example, Section 844(d) proscribes actual or attempted transporting or receiving of "any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property." Resp. App. 2a-3a. Section 844(e) prohibits bomb threats. Resp. App. 3a. Section 844(f) punishes someone who "maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive." Resp. App. 3a-4a. Section 844(i) does the same for those damaging, or attempting to damage, "any building, vehicle or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." Resp. App. 6a.

[4] The sole exception is Section 844(g), which addresses special concerns about the possession of explosives on federal property. Resp. App. 4a-5a.

Read together, the many subsections of Section 844 penalize the misuse of explosives, further demonstrating that Section 844(h)(2) requires a nexus between the explosives and the underlying felony.

B. Section 844(h)(2)'s History and Purpose Accord With the Text and Confirm There Must Be a Relationship Between the Explosives and the Felony.

Any remaining doubt that the statute's scope was intended to enclose only the related carrying of explosives is dispelled by the statutory history and purpose.

1. Two amendments to the original Section 844 support the conclusion that there must be a relationship between the explosives and the underlying felony. First, in 1988, Congress deleted the term "unlawfully" that had previously limited Section 844(h)(2) to sanctioning those who "carrie[d] an explosive *unlawfully* during the commission of any [federal] felony." Pet. App. 33a; *see* Anti-Drug Abuse Amendments Act of 1988, Pub. L. No. 100-690, Tit. VI, § 6474(b)(1), 102 Stat. 4379-4380. In doing so, Congress must have understood the statute to include some other limitation on the scope of conduct covered by the otherwise broad terms. Absent such an understanding, the amendment would have been quite radical – sweeping within its purview entirely innocent conduct. If Congress had made such a dramatic change, one would expect more debate at the time as

well as more explicit language in the statute. *See Koons*, 543 U.S. at 63 (citing *Church of Scientology of Cal. v. IRS*, 484 U.S. 9, 17-18 (1987) ("All in all, we think this is a case where common sense suggests, by analogy to Sir Arthur Conan Doyle's 'dog that didn't bark,' that an amendment having the effect petitioner ascribes to it would have been differently described by its sponsor, and not nearly as readily accepted by the floor manager of the bill.")).

Subsequently, in 1994, Congress amended Section 844 to add Section 844(m), which expressly prohibits conspiring to violate Section 844(h): "[a] person who conspires to commit an offense under subsection (h) shall be imprisoned for any term of years not exceeding 20." *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110518(b), 108 Stat. 2020. There is little question that one can conspire to carry explosives to be used in a felony. *Cf. United States v. McAuliffe*, 490 F.3d 526 (6th Cir. 2007) (upholding convictions for using fire to commit mail fraud in violation of Section 844(h)(1) and conspiring to use fire to commit mail fraud in violation of Section 844(m)). In contrast, it is not a criminal conspiracy to agree to do something that is lawful. If Section 844(h)(2) is read as the government suggests, however, the latter is precisely what Section 844(m) sanctions.

2. Respondent's reading of the statute "also enjoys the virtue of serving the evident Congressional purpose." *Johnson v. United States*, 529 U.S. 694, 708 (2000). The purpose of the Organized Crime Control

Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, of which Section 844(h)(2) was a part, was to punish only the misuse of explosives and not the coincidental carrying of explosives:

> The Congress hereby declares that the purpose of this title [Title XI] is to protect interstate and foreign commerce against interference and interruption by reducing the hazard to persons and property arising from misuse and unsafe or insecure storage of explosive materials. *It is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, storage, or use of explosive materials for industrial, mining, agricultural, or other lawful purposes,* or to provide for the imposition by Federal regulations of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title.

Pub. L. No. 91-452, § 1101, 84 Stat. 952 (emphasis added).

As the purpose indicates, Title XI of the Act, the explosives title, was enacted both to regulate explosives and impose criminal sanctions on the misuse of explosives. To this end, Congress enacted two different definitions of "explosive": one to govern the regulatory aspect of the title, Section 841(d), and another to address the malicious use of explosives, Section 844(j). The regulatory definition is limited to "any chemical compound mixture, or device, *the primary or*

common purpose of which is to function by explosion." 18 U.S.C. § 841(d) (emphasis added). This definition was specifically crafted to exclude "commonly used mixtures, such as gasoline and ammonium nitrate, a fertilizer, from interstate *regulation* as explosives." *United States v. Lorence*, 706 F.2d 512, 515 (5th Cir. 1983) (emphasis in original).

In contrast with the narrow regulatory definition, Congress enacted a much broader definition of explosives to "deal with the malicious use of explosives" set forth in Sections 844(d) through (i). *Lorence*, 706 F.2d at 515; *supra*, Sec. I.A. These different definitions demonstrate Congress did not want to interfere with the legal use of explosives such as use or carrying by commercial demolition workers or avalanche control crews. The only interpretation of Section 844(h)(2) that avoids such interference is one limited in application to related contemporaneous carrying.

II. The Legislative History of Section 844(h)(2) Is Consistent With Interpreting the Statute to Sanction the Carrying of Explosives Only When Related to an Underlying Felony.

What little legislative history there is accords with the conclusion compelled by the statutory terms, history, and purpose that Section 844(h)(2) requires explosives to be more than coincidentally related to the predicate felony.

Section 844(h) and the rest of Title XI of the Organized Crime Control Act of 1970 (codified as 18 U.S.C. §§ 841-48) were a "respon[se] to a widespread national concern that existing Federal and State sanctions and prohibitions over the use, possession, and transportation of explosives [were] inadequate" in light of "[b]ombings and the threat of bombings [that] ha[d] become an ugly, recurrent incident of life in the cities and on campuses throughout our Nation." H.R. Rep. No. 91-1549 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4007, 4013. Congress "combine[d] the regulatory approach to the distribution and storage of explosives with strengthened and expanded criminal prohibitions that apply to the *intentional misuse* of explosives." *Id.* (emphasis added). The role of Section 844 was specifically to "set[ ] the penalties for violation of the regulatory provisions of this chapter and create[d] certain offenses pertaining to the *unlawful use* of explosives." *Id.* at 4045 (emphasis added).

As discussed above, while Congress wanted to sanction the misuse of explosives, it sought to do so in a way that did not interfere with the lawful use of explosives. *See supra,* Sec. I.E. Nothing in the statute indicates Congress intended to punish the coincidental carrying of explosives while simultaneously committing an unrelated felony, let alone do so with a harsh and inflexible mandatory minimum sentence.

As the Ninth Circuit recognized in its decision below, in furtherance of its broad effort to regulate and sanction the misuse of explosives, Congress

modeled Section 844(h) on Section 924(c), which had been enacted as part of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1224. Pet. App. 9a; Govt. Br. 19. When enacted the only difference between Section 844(h) and Section 924(c) was that the former addressed "explosive" and the latter "firearm." Pet. App. 33a; Resp. App. 9a.

While the legislative history of Section 924(c), like that for Section 844(h), is thin, as the Ninth Circuit correctly concluded in *United States v. Stewart*, 779 F.2d 538 (9th Cir. 1985), it supports the conclusion that when enacting Section 924(c), Congress intended the carrying of firearms to be related to the predicate felony. Specifically noting the sparse legislative history from Section 924(c)'s enactment, the Ninth Circuit looked to the legislative history at the time it was amended. *Id*. at 539-40. The court concluded that the legislative history "strongly implies that the 'in relation to' language did not alter the scope of the statute, explaining that 'the [original] section was directed at persons who chose to carry a firearm as an offensive weapon for a specific criminal act.'" *Id.* at 539 (citing S. Rep. No. 225, 98th Cong., 1st Sess. at 314 n.10 (1983), *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3490-92). From the conclusion that Congress believed the original version of Section 924(c) required a relationship between the carrying of firearms and the predicate felony, it is not a long leap to the conclusion that two years later, when Congress modeled its explosives statute on 924(c), it intended a similar relational element.

III. The Government's Contention That Section 844(h)(2) Does Not Require a Relationship Between the Carrying of Explosives and the Predicate Felony Does Not Comport With a Common Sense Reading of the Statute.

1. The government concedes that under its interpretation the statute is subject to "overly expansive use." Govt. Br. 31. The government surmises that Congress intended to rely on prosecutorial discretion to protect against improper overreaching. *Id.* But "[i]t is no answer to say that the statute would not be applied in such a case." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 599 (1967). *See also Baggett v. Bullitt*, 377 U.S. 360, 373 (1964) ("It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful . . . prosecution for some of the activities seemingly embraced within the sweeping statutory definitions."); *United States v. Wells*, 519 U.S. 482, 512, n.15 (1997) (Stevens, J., dissenting) ("[T]he liberty of our citizens cannot rest at the whim of an individual who could have a grudge or, perhaps, just exercise bad judgment."). Reliance on prosecutorial discretion is of particular concern here where the penalty – a mandatory minimum ten-year term – removes the

judiciary's ability to mitigate prosecutorial overreaching.[5]

It makes far more sense that Congress safeguarded individuals against the overly expansive use of this provision by limiting its application to situations where there is a relationship between the carrying of explosives and the underlying felony. This better interpretation of the statute does not leave the government without tools to sanction those who misuse explosives. In Respondent's case, for example, the government could have chosen to charge the Section 844(h)(2) violation in connection with the conspiracy to commit terrorism count (Count 1) rather than the false statement count (Count 5). *See* Br. in Opp. 5-6. If it had done so, this Court would have no issue to resolve because the parties do not dispute that the evidence was sufficient to prove a relationship between the carrying of explosives and

[5] Indeed, the mandatory minimum sentence makes this statute an effective tool in plea negotiations even if it is not seen in actual counts of conviction. *See, e.g.,* Ronald F. Wright*, Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 153 (2005) (noting that "[m]andatory minimum sentence laws exert a powerful pull on plea negotiations, because a prosecutor's promise not to file (or to dismiss) charges that carry a mandatory minimum penalty can create enormous incentives to plead guilty"); Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 202 (1993) (noting that "[m]andator[y] [minimum sentences] then become little more than a bargaining chip, a 'hammer' which the prosecutor can invoke at her option, to obtain more guilty pleas under more favorable terms").

the terrorism charge. *See id*. And in other cases, ample avenues remain to punish the misuse, or attempted misuse, of explosives. *See, e.g.,* Section 844(d)-(f), (i), as discussed, *supra*.

2. The government's struggle to conform its interpretation of Section 844(h)(2) with the text is apparent in its alternative suggestions regarding the words "during the commission of." The government's first suggestion, that the words are roughly synonymous with "during any felony" and that the surplusage should be tolerated, Govt. Br. 15, is inconsistent with this Court's admonition that "[j]udges should hesitate to treat statutory terms in any setting as surplusage, particularly when the words describe an element of a crime." *Jones v. United States,* 529 U.S. 848, 857 (2000) (citing *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994)). It is also a strained reading of the statute. It is not any more "normal" to say "during the commission of any felony" than to say "during any felony." *See* Govt. Br. 15-16. Instead, "during the commission of any felony" is best read as an effort to repeat the verb "commit" from Section 844(h)(1) and, like (h)(1), sanction the misuse of explosives.

The government's next suggestion for these words indicates it believes the statute does contain an implicit nexus requirement, just a different one than what Respondent identifies. Specifically the government posits the words "during the commission of" "confirm that it is the defendant – rather than some other individual – who must commit the underlying

felony 'during' which the explosive is carried." Govt. Br. 16. These words, however, do not accomplish this task. What they do confirm is that this provision punishes the misuse of explosives.

3. Finally, the government's reliance on amendments to Section 924(c) and Congressional inaction on Section 844(h)(2) is not sufficient to undermine the clear textual indications that Section 844(h)(2) requires a relationship between the carrying of explosives and the predicate felony.

To be sure, Section 924(c) now explicitly limits its application to those who carry firearms "during and in relation to" the predicate offense. Pet. App. 34a. But the mere fact that Section 924(c) contains these words and Section 844(h)(2) does not shows only that "Congress sometimes uses different words in different statutes even though it intends those words to have the same meaning." Govt. Br. 20 in *United States v. Santos*, No. 06-1005 (citing *Limtiaco v. Camacho*, 127 S. Ct. 1413, 1419 (2007) (holding that "tax valuation" in 48 U.S.C. 1423a means "assessed valuation" even though Congress used "assessed valuation" in another statute)); *Deal v. United States*, 508 U.S. 129, 134 (1993) ("No one can disagree . . . that 'Congress sometimes uses slightly different language to convey the same message.'")). *See also Lawrence v. Florida*, ___ U.S. ___, 127 S. Ct. 1079, 1084 (2007) (holding that although 28 U.S.C. § 2263 and 28 U.S.C. § 2244 use different words, "it is clear that the language used in both sections provides that tolling hinges on the pendency of state review").

Similarly, that Congress amended Section 924(c) to make this relationship explicit, but has not similarly altered Section 844(h)(2), reflects only that there is little to be learned from Congressional inaction. *See*, *e.g.*, *Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983) (noting that "non-action by Congress is not often a useful guide").

That amendments made to Section 924(c) but not to Section 844(h)(2) provide little guidance on how to interpret Section 844(h)(2) is supported by the government's position that Section 844(h)(2) applies only to the defendant who both carries the explosive and commits the predicate felony. Govt. Br. 16. When first enacted in 1968, Section 924(c) stated: "Whoever . . . carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States. . . ." Resp. App. 9a. In 1971, Section 924(c) was amended to read: "Whoever . . . carries a firearm unlawfully during the commission of any felony *for which he* may be prosecuted in a court of the United States." *See* Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, Tit. II, § 13, 84 Stat. 1889-1890 (emphasis added). No such amendment has been made to Section 844(h), yet the government does not suggest that this inaction – this failure to make explicit that which was implicit – is of any significance.

IV. The Rule of Lenity Should Apply to Resolve Any Ambiguity in the Scope of Section 844(h)(2).

1. Contrary to the government's assertion that the rule of lenity does not apply in this case, Govt. Br. 33, "where text, structure, and history fail to establish that the Government's position is *unambiguously correct*, [this Court] appl[ies] the rule of lenity and resolve[s] the ambiguity in [the defendant's] favor." *United States v. Granderson*, 511 U.S. 39, 54 (1994) (emphasis added). As consulting those sources here shows, Congress has not "spoken in language that is clear and definite" enough to justify choosing the harsher alternative as to "what conduct Congress has made a crime" under Section 844(h)(2). *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (internal quotation marks omitted); *United States v. Bass*, 404 U.S. 336, 347 (1971).[6] Consequently, doubt regarding the scope of the statute should be resolved in favor of lenity and thereby in favor of Respondent. *See Bass*, 404 U.S. at 347-48.

The "fundamental principles of due process," *Dunn v. United States*, 442 U.S. 100, 112 (1979), in which this "venerable rule," *United States v. R.L.C.*, 503 U.S. 291, 305 (1992), is rooted weigh in favor of

[6] *See also Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.").

applying it here.[7] This Court has "traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress, and out of concern that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *See Arthur Andersen*, 544 U.S. at 703 (quoting *United States v. Aguilar*, 515 U.S. 593, 600 (1995)) (internal citations and quotation marks omitted).[8]

Such restraint is particularly appropriate here, where the exceptionally broad statutory definition of "explosive" for purposes of Section 844(h)(2) embraces many commonplace items and the lack of requirement that such items be carried "unlawfully" results in the statute clearly implicating conduct that may "by itself [be] innocuous." *Arthur Andersen*, 544 U.S. at 703. As a result, construing the ambiguity here to

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[7] The origins of the rule of lenity have been fully explored in Petitioner's Brief in *Burgess v. United States*, No. 06-11429, pp. 27-30, currently pending before the Court.

[8] For example, this Court has narrowly construed statutes where defendant's conduct fell within the broader possible interpretation. *See, e.g., Aguilar*, 515 U.S. at 599-600 (reading statute narrowly to require a nexus between defendant's obstructing or impeding "the due administration of justice" and a judicial proceeding, even though evidence established that defendant had uttered false statements to an investigating agent); *McBoyle v. United States*, 283 U.S. 25, 26-27 (1931) (applying rule of lenity even though the petitioner's conduct of transporting an airplane he knew to be stolen fell within the literal letter of the statute at issue).

extend the statute's reach to purely incidental carrying creates an intolerable risk that a defendant will "languish[ ] in prison" for ten years longer than Congress "has clearly said" he or she should. *Bass*, 404 U.S. at 348. *See also Castillo v. United States*, 530 U.S. 120, 131 (2000) (taking account of "the length and severity of an added mandatory sentence" as weighing in favor of rule of lenity). In contrast, a narrow construction "assur[es] that the society, through its representatives, has genuinely called for the punishment to be meted out." *R.L.C.*, 503 U.S. at 309 (Scalia, J., concurring).

2. Applying the rule of lenity also enables the Court to sidestep the "grave doubts" about the statute's constitutionality that would otherwise arise under the government's interpretation. *See Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998). As this Court has often instructed, in deciding which statutory interpretation to adopt, "a court must consider the necessary consequences of its choice." *Clark v. Martinez*, 543 U.S. 371, 380 (2005). "If one of them would raise a multitude of constitutional problems, the other should prevail – whether or not those constitutional problems pertain to the particular litigant before the Court." *Id.* at 380-81.

For example, under the government's interpretation of the statute, a defendant who happened to be lawfully carrying a can of gasoline or ammonium nitrate fertilizer when she knowingly used $150 worth of unauthorized food stamps would be subject to a mandatory ten-year sentence, whereas her

neighbor, who committed the same felony without the unrelated and legal item, could receive no more than a five-year sentence for the same underlying unlawful conduct. *See* 7 U.S.C. § 2024(b)(1). Such a prospect would offend equal protection principles. *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972) ("The Equal Protection Clause . . . den[ies] to State the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'") (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

In addition, construing Section 844(h)(2) as not requiring proof that the explosives were carried both during *and* in relation to a federal felony would render the statute void for vagueness. Reasonable people are unlikely to understand that mere and lawful carrying of an item such as a can of gasoline or fertilizer at the same time they commit a wholly unrelated felony itself is a forbidden act that carries a ten-year mandatory minimum sentence. *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983). And the need to rely upon prosecutorial discretion to rein in the scope of Section 844(h)(2), *see* Govt. Br. 31, makes clear that a broad construction of the statute poses an unacceptable risk of arbitrary or unlawful enforcement.

See Kolender, 461 U.S. at 357; *cf. Baggett*, 377 U.S. at 373-74 ("Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law.").[9]

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the court of appeals.

Respectfully submitted,

THOMAS W. HILLIER, II
Counsel of Record
LAURA E. MATE
LISSA WOLFENDALE SHOOK

FEDERAL PUBLIC DEFENDER
1601 Fifth Avenue
Suite 700
Seattle, WA 98101
(206) 553-1100

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[9] These constitutional concerns are especially acute here, because Section 844(h)(2) does not require any *mens rea* with regard to carrying the explosives, beyond simply having them. *See Colautti v. Franklin,* 439 U.S. 379, 395 (1979) ("This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*.").

APPENDIX A

18 U.S.C. § 844 (2000)

Penalties

(a) Any person who –

(1) violates any of subsections (a) through (i) or (l) through (o) of section 842 shall be fined under this title, imprisoned for not more than 10 years, or both; and

(2) violates subsection (p)(2) of section 842, shall be fined under this title, imprisoned not more than 20 years, or both.

(b) Any person who violates any other provision of section 842 of this chapter shall be fined under this title or imprisoned not more than one year, or both.

(c)(1) Any explosive materials involved or used or intended to be used in any violation of the provisions of this chapter or any other rule or regulation promulgated thereunder or any violation of any criminal law of the United States shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.

(2) Notwithstanding paragraph (1), in the case of the seizure of any explosive materials for any offense for which the materials would be subject to forfeiture

in which it would be impracticable or unsafe to remove the materials to a place of storage or would be unsafe to store them, the seizing officer may destroy the explosive materials forthwith. Any destruction under this paragraph shall be in the presence of at least 1 credible witness. The seizing officer shall make a report of the seizure and take samples as the Secretary may by regulation prescribe.

(3) Within 60 days after any destruction made pursuant to paragraph (2), the owner of (including any person having an interest in) the property so destroyed may make application to the Secretary for reimbursement of the value of the property. If the claimant establishes to the satisfaction of the Secretary that –

(A) the property has not been used or involved in a violation of law; or

(B) any unlawful involvement or use of the property was without the claimant's knowledge, consent, or willful blindness,

the Secretary shall make an allowance to the claimant not exceeding the value of the property destroyed.

(d) Whoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property, shall be imprisoned for not more than ten years, or

fined under this title, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not more than twenty years or fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

(e) Whoever, through the use of the mail, telephone, telegraph, or other instrument of interstate or foreign commerce, or in or affecting interstate or foreign commerce, willfully makes any threat, or maliciously conveys false information knowing the same to be false, concerning an attempt or alleged attempt being made, or to be made, to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property by means of fire or an explosive shall be imprisoned for not more than 10 years or fined under this title, or both.

(f)(1) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other personal or real property in whole or in part owned or possessed by, or leased to, the United States, or any department or agency thereof, shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both.

(2) Whoever engages in conduct prohibited by this subsection, and as a result of such conduct, directly or proximately causes personal injury or creates a substantial risk of injury to any person, including any public safety officer performing duties, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both.

(3) Whoever engages in conduct prohibited by this subsection, and as a result of such conduct directly or proximately causes the death of any person, including any public safety officer performing duties, shall be subject to the death penalty, or imprisoned for not less than 20 years or for life, fined under this title, or both.

(g)(1) Except as provided in paragraph (2), whoever possesses an explosive in an airport that is subject to the regulatory authority of the Federal Aviation Administration, or in any building in whole or in part owned, possessed, or used by, or leased to, the United States or any department or agency thereof, except with the written consent of the agency, department, or other person responsible for the management of such building or airport, shall be imprisoned for not more than five years, or fined under this title, or both.

(2) The provisions of this subsection shall not be applicable to –

(A) the possession of ammunition (as that term is defined in regulations issued pursuant to this chapter) in an airport that is subject to the regulatory

authority of the Federal Aviation Administration if such ammunition is either in checked baggage or in a closed container; or

(B) the possession of an explosive in an airport if the packaging and transportation of such explosive is exempt from, or subject to and in accordance with, regulations of the Research and Special Projects Administration for the handling of hazardous materials pursuant to chapter 51 of title 49.

(h) Whoever –

(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,

including a felony which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years. In the case of a second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for 20 years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that

imposed for the felony in which the explosive was used or carried.

(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

(j) For the purposes of subsections (d), (e), (f), (g), (h), and (i) of this section and section 842(p), the term "explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, other explosive or incendiary devices within the meaning of paragraph (5) of section 232 of this title, and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such

proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.

(k) A person who steals any explosives materials which are moving as, or are a part of, or which have moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(l) A person who steals any explosive material from a licensed importer, licensed manufacturer, or licensed dealer, or from any permittee shall be fined under this title, imprisoned not more than 10 years, or both.

(m) A person who conspires to commit an offense under subsection (h) shall be imprisoned for any term of years not exceeding 20, fined under this title, or both.

(n) Except as otherwise provided in this section, a person who conspires to commit any offense defined in this chapter shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense the commission of which was the object of the conspiracy.

(o) Whoever knowingly transfers any explosive materials, knowing or having reasonable cause to believe that such explosive materials will be used to commit a crime of violence (as defined in section 924(c)(3)) or drug trafficking crime (as defined in

section 924(c)(2)) shall be subject to the same penalties as may be imposed under subsection (h) for a first conviction for the use or carrying of an explosive material.

APPENDIX B

18 U.S.C. § 924(c) (eff. 1968)

Whoever –

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

shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than five years nor more than 25 years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of such person or give him a probationary sentence.