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

REPLY BRIEF FOR THE UNITED STATES

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In this case, the Ninth Circuit added to the offense of "carr[ying] an explosive during the commission of any [federal] felony," 18 U.S.C. 844(h)(2), a non-textual requirement that the government must establish that the explosive was carried "*in relation to*" the underlying felony. Pet. App. 2a. Respondent and his amicus fail to identify anything in the statutory text that even arguably supports a relational requirement. Instead, they would rewrite the statute to include that requirement on the theory that, given the breadth of various terms Congress *has* set forth in the statutory text, Section 844(h)(2) "must be read to require that the explosives carried bear a relationship to the underlying felony." Resp. Br. 3. But this Court has rejected "the broad proposition that criminal statutes do not have to be read as broadly as they are written," *Brogan* v. *United States*, 522 U.S. 398, 406 (1998), and no background interpretive

principle warrants an exception in this case to the general rule against "reading words or elements into a statute that do not appear on its face." *Bates* v. *United States*, 522 U.S. 23, 29 (1997). Section 844(h)(2) unambiguously reaches respondent's conduct, and the court of appeals erred in holding otherwise.

A. The Statutory Text Is Clear That The Explosive Need Only Be Carried "During The Commission Of" The Underlying Felony

1. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' " *Id.* at 254 (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)). That canon is sufficient here.

2. The statutory text clearly describes the required relationship between the explosive and the underlying felony: the explosive must have been "carrie[d] * * * during the commission of" that felony. 18 U.S.C. 844(h)(2). Neither respondent nor his amicus makes any attempt to refute the basic point that "[t]he plain everyday meaning of 'during' is 'at the same time' or 'at a point in the course of,'" not "'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); see U.S. Br. 13-14. To the contrary, respondent acknowledges (Resp. Br. 5) that he loses under "a literal reading of Section 844(h)(2)."[1]

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[1] Respondent's contention (Resp. Br. 11 n.3) that "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 [18 U.S.C]

Respondent contends (Resp. Br. 24-25) that a straightforward reading of Section 844(h)(2) would make the words "the commission of" superfluous. But see U.S. Br. 15-16 (explaining why that assertion is incorrect, and would not warrant reading a relational element into Section 844(h)(2) even if it were correct). Respondent undermines his own position, however, by providing another explanation (Resp. Br. 24) for why Congress may have chosen the phrase "carries during the commission of" rather than "carries during"—that is, to parallel the verb structure of Section 844(h)(1), which applies when a defendant "uses fire or an explosive to commit" the underlying felony.

More fundamentally, respondent's assertion (Resp. Br. 7) that a relational element is "implicit" in Section 844(h)(2) would, if adopted, create a far more serious surplusage problem than any it would solve, because it would mean that the words "and in relation to" in 18 U.S.C. 924(c)(1) are entirely superfluous. Respondent attempts to avoid that difficulty by noting that "Congress sometimes uses different words in different statutes even though it intends those words to have the same meaning." Resp. Br. 25 (internal quotation marks

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924(c)(1)" is both incorrect and beside the point. The express relational element in Section 924(c)(1) was simply one factor that this Court cited in support of its construction of the term "carry" in *Muscarello* v. *United States*, 524 U.S. 125 (1998). The other interpretive factors dictate the conclusion that "carries" means the same thing in both statutes. Given the inherently dangerous and unpredictable nature of explosives, it is not difficult to see a sound reason for Congress's omission of a relational requirement from Section 844(h)(2). Pet. App. 28a n.1 (O'Scannlain, J., dissenting from denial of rehearing en banc). In any event, respondent conceded below that he was carrying the explosives found in the trunk of his car (*id.* at 12a), and he did not contest the issue in his brief in opposition.

and citation omitted). That is true enough. But, when Congress so intends, it "uses * * * different language *that means the same thing*." *Deal* v. *United States*, 508 U.S. 129, 134 (1993). Respondent does not assert that "during the commission of" means the same thing as "during and in relation to," and other statutes in which Congress has used the former phrase underscore that it does not. See 18 U.S.C. 231(a)(3) (making it unlawful to obstruct the lawful actions of "any fireman or law enforcement officer * * * incident to *and* during the commission of a civil disorder") (emphasis added); 21 U.S.C. 848(e)(1)(B) (authorizing the death penalty for any person who "during the commission of, in furtherance of, *or* while attempting to avoid apprehension * * * for" certain specified felonies "intentionally kills * * * or causes the intentional killing" of a law enforcement officer) (emphasis added).

Nor is respondent's position improved by the fact that Section 844(h)(2) does not in so many words state that the defendant must be liable for the underlying felony. Resp. Br. 24-25; Amicus NACDL Br. 5. The words "during the commission of any felony," when taken in isolation, may not conclusively resolve that question. But the first word of Section 844(h) is "[w]hoever," which makes clear that the defendant must be the perpetrator of at least some of the conduct identified in Section 844(h)(2), and subsequent portions of Subsection (h) clearly presuppose that the defendant must commit the underlying felony during which the explosive is carried. See 18 U.S.C. 844(h) (stating that the mandatory ten-year term of imprisonment shall be "in addition to the punishment provided for such felony"). In contrast, nothing in Section 844(h)'s text suggests that the defendant's carrying of explosives must have "aided the com-

mission of the underlying felony in some way." Pet. App. 13a. Indeed, the contrast between Subsections (h)(1) and (h)(2) demonstrates that Subsection (h)(2) requires no such showing. See U.S. Br. 14-15.

Respondent also relies on (Resp. Br. 13) Section 844(h)'s final clause, which provides that its mandatory ten-year term of imprisonment shall not "run concurrently with any other term of imprisonment including that imposed for the felony *in which* the explosive was used or carried." Because that clause, like those that immediately precede it, addresses the nature of the sentence to be imposed on defendants convicted under *both* Subsections (h)(1) and (2), it makes sense that those clauses refrain from using a term—*i.e.*, "during"—that appears only in Subsection (h)(2). Nor does respondent explain how the words "in which" can sensibly be viewed as embodying a requirement that the explosive be carried "in relation to" the underlying felony.

Respondent cites 18 U.S.C. 844(m)—which makes it unlawful to "conspire[] to commit an offense under subsection (h)"—and suggests that, because "it is not a criminal conspiracy to agree to do something that is lawful," Section 844(h)(2) must contain an implicit relational requirement. Resp. Br. 17. That argument, however, is premised on the view that it is generally lawful to carry an explosive while committing a federal felony, and thus assumes away the very question at issue in this case.

Finally, respondent references various other subsections of Section 844 that create criminal offenses, posits that "it is the *misuse* of explosives that is the common subject" of these provisions, and asserts that, as a result, "Section 844(h)(2) requires a relationship between the explosives carried and the underlying felony." Resp. Br. 15. That argument is flawed at every step. Respon-

dent's conjecture that Section 844(h)(2) is designed only to address situations where a defendant "intended to use explosives 'during the commission of a felony,' but w[as] interrupted or otherwise dissuaded" (Resp. Br. 14) has absolutely no support in the statutory text. In addition, the very provisions respondent cites show that Congress knew perfectly well how to create attempt or intent-based offenses involving explosives. See, *e.g.*, 18 U.S.C. 844(d) ("transport[ing] or receiv[ing], or attempt[ing] to transport or receive, in interstate or foreign commerce any explosive with the knowledge or intent that it will be used" to kill or injure a person or damage or destroy property); 18 U.S.C. 844(f)(1) ("attempt[ing] to damage or destroy" federally owned property); 18 U.S.C. 844(i) ("attempt[ing] to damage or destroy" real or personal property used in any activity "affecting interstate or foreign commerce"). Furthermore, two other criminal offenses set forth in Section 844 manifestly do not require the actual, attempted, or intended use of an explosive: Section 844(g)(1), which makes it generally unlawful to "possess[] an explosive" in an airport or any federal building, and Section 844(e), which prohibits use of any instrument of interstate commerce to make genuine *or false* bomb threats. And Congress could reasonably have determined that carrying an explosive while committing a federal felony *is*—without more—"misuse" of that explosive in much the same way that bringing an otherwise lawfully possessed explosive into an airport or federal facility constitutes "misuse."[2]

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[2] Although it is likely that respondent lied to the customs inspector at least in part "*because* he was smuggling explosives in the trunk of his car," Pet. App. 13a (emphasis added), this Court has held that the "in relation to" element contained in 18 U.S.C. 924(c)(1) requires proof that the firearm "facilitat[ed], or ha[d] the potential of facilitating" the un-

B. The Breadth Of The Other Terms In Section 844(h)(2) Cannot Support Reading In A Textually Unsupported Relational Element

Respondent and his amicus never attempt to explain how the words "during the commission of" can reasonably be understood to mean "during and in relation to." Instead, their principal submission is that because various other terms in the statute—including "explosive," "any [federal] felony," and "carries"—are "remarkably broad," Section 844(h)(2) "must be read to require that the explosives carried bear a relationship to the underlying felony." Resp. Br. 3-4; see Amicus NACDL Br. 6-14. That contention lacks merit.

Respondent cites various decisions where this Court has concluded that the meaning of an otherwise ambiguous term could be clarified by reference to: (i) other, more specific, words in a series of which the ambiguous

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derlying offense. *Smith* v. *United States*, 508 U.S. 223, 238 (1993) (quoting *United States* v. *Stewart*, 779 F.2d 538, 540 (9th Cir. 1985)). Nor is the suggestion (Resp. Br. 2, 23-24; Amicus NACDL Br. 19-20) that the government could have charged this case differently relevant to the statutory construction question in this case. Even if the government could have shown a relational element to other felonies in this case, "what charge[s] to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." *United States* v. *Batchelder*, 442 U.S. 114, 124 (1979). And although it is cost-free for respondent to concede now that "the evidence was sufficient to prove a relationship between the carrying of explosives and the terrorism charge," Resp. Br. 23-24, it is quite another to require the government to establish such a relationship beyond a reasonable doubt at trial. More fundamentally, the possibility of proving a judicially imposed relational element in a particular case does not detract from the proposition that the government's burden should be limited to proving the elements specified by Congress.

general term was a part (the canon of *ejusdem generis*);[3] (ii) the broader context in which the ambiguous term was used;[4] or (iii) the manner or context in which the same term was used in other sections of the same statute.[5] But respondent fails to identify any language in Section 844(h)(2) that is even arguably ambiguous with respect to the question presented here. In addition, the statutory terms that respondent cites are neither part of a list nor share any common attribute, and nothing in the overall statutory context suggests that they serve to narrow the clear meaning of "during the commission of." See *Ali* v. *Federal Bureau of Prisons*, 128 S. Ct. 831, 839-840 (2008). This Court should reject respondent's "attempt to create ambiguity where the statute's text and structure suggest none." *Id.* at 840.

Although neither respondent nor his amicus invokes it by name, much of their argument sounds in the canon against absurdities. See, *e.g.*, Resp. Br. 12-13, 29-30 (suggesting, *inter alia*, that Section 844(h)(2) might apply to a person who delivers gasoline to a stranded friend while simultaneously possessing a counterfeit $20

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[3] See *United States* v. *Aguilar*, 515 U.S. 593, 598-599 (1995); *McBoyle* v. *United States*, 283 U.S. 25 (1931) (Holmes, J.).

[4] See *Dolan* v. *USPS*, 546 U.S. 481, 485 (2006) (applying the canon of *noscitur a sociis* in interpreting the third item in the phrase "loss, miscarriage, or negligent transmission of letters or postal matter"); *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004) (concluding that the full phrase "use of physical force against the person or property of another," 18 U.S.C. 16(a), "most naturally suggests a higher degree of intent than negligent or merely accidental conduct").

[5] See *Owasso Indep. Sch. Dist.* v. *Falvo*, 534 U.S. 426, 434-435 (2002) (examining various requirements that attach once a particular item is deemed "an educational record" within the meaning of the Family Educational Rights and Privacy Act of 1974, Pub. L. No. 93-380, 88 Stat. 571).

bill); Amicus NACDL Br. 10-13 (listing other examples). Respondent "has been unable to demonstrate" any such "history of prosecutorial excess." *Brogan*, 522 U.S. at 405.[6] And he acknowledges (Resp. Br. 5) that his own prosecution is far from absurd. There is no absurd results "overbreadth" doctrine that permits a defendant to seek a judicially created exception from otherwise clear statutory language when his own conviction under the statute is eminently reasonable, see U.S. Br. 32, and neither respondent nor his amicus contends otherwise. Overbreadth is "strong medicine," and therefore the exception, not the rule. It cannot be used to call into question a statutory application that is far from absurd.

At any rate, the concerns expressed by respondent and his amicus about the breadth of the term "explosive" as defined in 18 U.S.C. 844(j) are considerably overstated. Section 844(j) has three parts. The first enumerates seven items: "gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electric circuit breakers), detonators, and other detonating agents, [and] smokeless powders." 18 U.S.C. 844(j). The second incorporates the definition of "explosive or incendiary device" from 18 U.S.C. 232(5), which includes dynamite, grenades and grenade-like devices, and Molotov cocktails. 18 U.S.C. 844(j). The

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[6] Respondent's contention (Resp. Br. 22) that courts must simply ignore the existence of prosecutorial discretion when construing criminal statutes misses the mark. The decisions he cites—*Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967), and *Baggett* v. *Bullitt*, 377 U.S. 360 (1964)—stand for the far more limited proposition that when a law's very existence threatens to chill conduct protected by the First Amendment, the exercise of prosecutorial discretion *ex post* cannot eliminate the constitutional problem.

third and final portion of Section 844(j) defines "explosive" also to include:

> any chemical compounds, mechanical mixtures, 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).

Because no "everyday items" (Resp. Br. 9) are specifically enumerated in Section 844(j), the only way such items could constitute an "explosive" for purposes of Section 844(h)(2) is if their particular properties bring them within the final, catchall provision. That fact, in-turn, has two principal consequences. First, because respondent does not dispute that the items found hidden in the trunk of his car constituted an "explosive" under any conceivable reading of Section 844(j), this case does not require the Court to determine the outer boundaries of that term, and it is far from clear that many of the examples respondent cites would fall within it in any event.[7] Second, because respondent's jury was instruc-

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[7] Respondent (Resp. Br. 9-10) and his amicus (NACDL Br. 9) cite various lower-court decisions holding that, in certain circumstances, gasoline—and, in one instance, a mixture of methane gas and air—could constitute an "explosive" within the meaning of Section 844(j). But see *United States* v. *Gelb*, 700 F.2d 875, 878–879 (2d Cir.) (holding that Section 844(j) does not encompass "uncontained gasoline"), cert. denied, 464 U.S. 853 (1983). None of these decisions, however, involved a prosecution under Section 844(h)(2); all involved circumstances in which the gas had been used or had been intended to be used to start or spread a destructive fire; and all involved conduct predating Congress's decision to amend a number of provisions, including Section 844(h)(1)

ted that it could not convict unless it found that he "knowingly carried explosive materials" (J.A. 65), the Court need not decide whether a person could be convicted under Section 844(h)(2) of carrying a commonplace and otherwise lawful item during the commission of an unrelated federal felony without proof that the defendant "knew of the features of [the relevant item]

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but excluding Section 844(h)(2), to cover situations involving "fire" as well as "an explosive." Anti-Arson Act of 1982, Pub. L. No. 97-298, § 2, 96 Stat. 1319; see H.R. Rep. No. 678, 97th Cong., 2d Sess. 2 (1982) (noting that "[s]everal courts * * * ha[d] rejected th[e] theory" that "gasoline mixed with air" was an explosive under Section 844(j)). The "fireworks" (Resp. Br. 10; see Amicus NACDL Br. 9) at issue in *United States* v. *Shearer*, 479 F.3d 478 (7th Cir. 2007), were "display fireworks," which "are more dangerous than consumer fireworks because they contain more than 130 milligrams of flash powder per tube, meaning that they are susceptible to mass detonation." *Id.* at 481; see 18 U.S.C. 844(j) ("in such proportions, *quantities*, or packing that ignition * * * may cause an explosion") (emphasis added). The Seventh Circuit has not "assum[ed] without deciding" (Resp. Br. 10) that ammonium nitrate fertilizer, standing alone, constitutes an explosive. The underlying offenses in *United States* v. *Nettles*, 476 F.3d 508 (7th Cir. 2007), involved an attempt to destroy the Dirksen Federal Building using "a time bomb" made from "diesel fuel and ammonium nitrate," *id.* at 511, and the issues on appeal had nothing to do with the statutory definition of "explosive." See *id.* at 512-518. Finally, *United States* v. *Agrillo-Ladlad*, 675 F.2d 905, 906 (7th Cir.), cert. denied, 459 U.S. 829 (1982), does not hold (Amicus NACDL Br. 12-13) that Section 844(j)'s catchall provision encompasses cleaning fluids, commercial solvents, or ammonium nitrate. The issue in *Agrillo-Ladlad* was whether gasoline constituted an explosive under the circumstances of that case, *id.* at 906, and the footnote cited repeatedly by amicus NACDL simply quotes testimony by an Assistant Secretary of the Interior urging rejection of the proposed bill that became Section 844(j), see *id.* at 909 n.5. See also U.S. Br. 31 n.4 (discussing *United States* v. *Davis*, 202 F.3d 212 (4th Cir.), cert. denied, 530 U.S. 1236 (2000) (cited in Resp. Br. 9 & n.2)).

that brought it within the scope of [Section 844(j)]." *Staples* v. *United States*, 511 U.S. 600, 619 (1994).

In the end, respondent's and his amicus' "principal grievance" is "with Congress itself, which has decreed" the carrying of *any* explosive during the commission of *any* federal felony "to be a separate offense, and a serious one." *Brogan*, 522 U.S. at 405. But "[i]t is not" this Court's role "to revise that judgment." *Ibid.* And while respondent repeatedly complains about Section 844(h)(2)'s "harsh and inflexible mandatory minimum sentence" (Resp. Br. 20; see *id.* at 3, 5, 7, 22-23 & n.5), "the instances in which courts may ignore harsh penalties are set forth in the Constitution," *id.* at 407, and, beyond those limits, issues regarding "severity of punishment * * * are peculiarly questions of legislative policy." *Gore* v. *United States*, 357 U.S. 386, 393 (1958). Respondent's conduct clearly satisfies Section 844(h)(2), and the Court need go no further to reverse the Ninth Circuit's judgment.

C. Neither Statutory Purpose Nor Legislative History Warrants A Different Result

Respondent and his amicus make a variety of arguments based on their view of Section 844's overall purpose and their reading of the statutory and legislative history. Because the statutory text is plain and unambiguous, there is no need for any assessments about statutory purpose, nor warrant for examining legislative history. In any event, respondent's arguments on this score lack merit as well.

1. Respondent quotes (Resp. Br. 18) language from a section of the original legislation that enacted Section 844(h)(2) that describes the purpose of the relevant title as "reducing the hazard to persons and property arising

from misuse and unsafe or insecure storage of explosive materials" without "plac[ing] any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to * * * use of explosive materials for * * * lawful purposes." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1101, 84 Stat. 952. Respondent (Resp. Br. 20) and his amicus (NACDL Br. 17) also cite language from a committee report stating that "[b]ombings and the threat of bombings have become an ugly, recurrent incident of life * * * throughout our Nation," and describing the relevant title as "strengthen[ing] and expand[ing] criminal prohibitions that apply to the intentional misuse of explosives." H.R. Rep. No. 1549, 91st Cong., 2d Sess. 37-38 (1970) (*1970 House Report*).

Respondent suggests that interpreting Section 844(h)(2) in accord with its plain meaning would not further the statutory purpose, because, he claims, "the coincidental carrying of explosives" during an unrelated felony does not constitute "misuse" (Resp. Br. 18), and because criminalizing such conduct would "interfere with the lawful use of explosives" (*id.* at 20). But invocations of legislative history does not save respondent's flawed "misuse" argument. See pp. 5-6, *supra*. And "it is not and cannot be [this Court's] practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy." *Brogan*, 522 U.S. 403; see also *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (explaining that "statutory prohibitions often go beyond the principal evil" that motivated the law); *Gonzales* v. *Oregon*, 546 U.S. 243, 288 (2006) (finding "no reason to think" that a statute's "*principal* concern" is its "*exclusive* concern"). What is more, this Court's task "is not the hopeless one of ascer-

taining what the legislators who passed the law would have decided had they reconvened to consider [respondent's] particular case[]." *Beecham* v. *United States*, 511 U.S. 368, 374 (1994). Finally, a person who commits a federal felony—a prerequisite for a Section 844(h)(2) violation—is simply not a "law-abiding citizen" engaged in the sort of "entirely innocent conduct" (Resp. Br. 16) that Congress did not intend to criminalize.[8]

2. Respondent (Resp. Br. 16) and his amicus (NACDL Br. 15-16) also maintain that Section 844(h)(2) should not be read according to its terms because the legislative history of the 1988 amendment that deleted the word "unlawfully" does not speak directly to the precise question here. That inversion of the normal rules of statutory construction is seriously misplaced.

Even if the legislative history specifically addressed the question presented, it could not override the unambiguous statutory text. See, *e.g.*, *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 567-568 (2005). It follows *a fortiori* that the *absence* of such on-point history cannot do so either. See, *e.g.*, *Whitfield* v. *United States*, 543 U.S. 209, 216 (2005). Indeed, "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the

[8] Respondent also observes (Resp. Br. 20) that the *1970 House Report* described Section 844's overall purpose as "creat[ing] certain offenses pertaining to the unlawful use of explosives." *1970 House Report* 68 (emphasis omitted). Not only did that broad statement refer only generally to a wide range of offenses, but the original version of Section 844(h)(2) was expressly limited to situations where a defendant "carrie[d] an explosive *unlawfully*." 18 U.S.C. 844(h)(2) (1970) (emphasis added). That limitation is no longer part of the law, which now requires only that the explosive be "carrie[d]" (not used) "during the commission of" a federal felony. 18 U.S.C. 844(h)(2).

face of the statute." *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 592 (1980).

In any event, neither respondent nor his amicus meaningfully refute the point, see U.S. Br. 18-24, that Section 844(h)(2)'s history confirms that the absence of a relational element reflects a deliberate congressional choice. Respondent asserts (Resp. Br. 26) that Congress's failure to add the words "and in relation to" to Section 844(h)(2) "reflects only that there is little to be learned from Congressional inaction." But this case involves far more than "the failure of Congress to act on particular legislation." *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 600 (1983). In the first place, it involves Congress's failure to add four words to the statute to change its meaning. That kind of congressional inaction is always relevant. In addition, it involves a situation where Congress—faced with a published court of appeals decision holding that the pre-amended Section 844(h)(2) did not require proof that the explosive was carried in relation to the underlying felony—chose to amend Section 844(h)(2) *without* at the same time adding the words "and in relation to" that it had added to Section 924(c) just four years earlier. U.S. Br. 20-22.[9]

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[9] Respondent errs in asserting (Resp. Br. 26) that Section 13 of the Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, 84 Stat. 1890 (1970 Amendment), suggests "[t]hat amendments made to [18 U.S.C.] 924(c) but not to Section 844(h)(2) provide little guidance on how to interpret Section 844(h)(2)." The 1970 Amendment substantially modified the penalties under 18 U.S.C 924(c) (Supp. IV 1968), and it also made explicit that which was previously implicit—*i.e.*, that, even under the "carries" provision, the defendant must bear responsibility for the underlying felony. But nothing indicates that, before the 1970 Amendment, Section 924(c) would have applied in situations where the defendant was not responsible for the underlying felony.

D. Neither The Rule Of Lenity Nor The Doctrine Of Constitutional Avoidance Applies

Section 844(h)(2) provides more than "a fair warning * * * to the world in language that the common world will understand * * * what the law intends to do if a certain line is passed." *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 703 (2005) (internal quotation marks and citation omitted). The words "during the commission of any [federal] felony" are perfectly easy to understand, and they do not mean "during and in relation to." Nor does Section 844(h)(2) "clearly implicate[] conduct that may 'by itself [be] innocuous,'" Resp. Br. 28 (brackets in original) (quoting *Arthur Andersen*, 544 U.S. at 703), because the statute is not even potentially applicable until a person commits another act that Congress has deemed sufficiently culpable to warrant making that act a federal felony.[10] This is simply "not a case of guesswork reaching out for lenity," and "the rule of lenity is no help to respondent[] here." *United States* v. *Wells*, 519 U.S. 482, 499 (1997).

Respondent errs in asserting (Resp. Br. 30) that, given the breadth of the definition of "explosive" in Section 844(j), the absence of a relational element could

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[10] *Castillo* v. *United States*, 530 U.S. 120 (2000) (see Resp. Br. 29) considered the length of the additional mandatory sentence as a factor "weigh[ing] in favor of treating" a statutory requirement that a defendant receive an enhanced sentence if the firearm involved was a "machinegun" "as referring to an element" of a separate crime, because "if after considering traditional interpretive factors, we were left genuinely uncertain as to Congress' intent in this regard, we would assume a preference for traditional jury determination of so important a factual matter." *Id.* at 131. *Castillo* provides no support, however, for reading into Section 844(h)(2) a wholly new factual requirement that Congress has nowhere provided.

render Section 844(h)(2) void for vagueness. Respondent makes no assertion that the statute is even remotely ambiguous about whether the items seized from his car constituted an "explosive," and the general rule is that, outside the First Amendment context, see *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975), "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker* v. *Levy*, 417 U.S. 733, 756 (1974); accord *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). And even if the Court were to conclude that Section 844(j)'s definition of explosive might be unconstitutionally vague as applied to circumstances other than the one at issue here, the appropriate way to deal with such concerns would be through a narrowing construction of the third, catchall portion of that definition, or by construing the statute to require that the defendant "knew of the features of [the relevant item] that brought it within the scope of [Section 844(j)]." *Staples*, 511 U.S. at 619; see *Hoffman Estates*, 455 U.S. at 499 (stating that "a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice * * * that [the defendant's] conduct is prescribed"). But there is no warrant for imposing a relational element that has no basis whatsoever in the statutory text or background principles of statutory interpretation—an element that would in any event do nothing to provide additional notice about the nature of the substances covered by Section 844(h)(2) and the various other provisions that incorporate Section 844(j)'s definition of "explosive."

Respondent contends (Resp. Br. 30) that "[r]easonable people are unlikely to understand that" some of the conduct prescribed by Section 844(h)(2) is unlawful. But

that is a claim about citizens' awareness of the law, not vagueness, and this Court has repeatedly reaffirmed the bedrock principle that, outside narrowly defined circumstances not present here, "ignorance of the law is no excuse." *Bryan* v. *United States*, 524 U.S. 184, 195 (1998); see *Staples*, 511 U.S. at 622 n.3 (citing *Cheek* v. *United States*, 498 U.S. 192, 199 (1991)).

Finally, the canon of constitutional avoidance (Resp. Br. 29-30; Amicus NACDL Br. 14 n.6) has no application here. That "canon is * * * a means of giving effect to congressional intent, not of subverting it," and it is properly invoked only where a court must "choos[e] between two competing plausible interpretations of a statutory text." *Clark* v. *Martinez*, 543 U.S. 371, 380-382 (2005); see *United States* v. *Albertini*, 472 U.S. 675, 680 (1985) (stating that the constitutional avoidance canon "is not a license for the judiciary to rewrite the language enacted by the legislature"). Here, there is only one plausible interpretation of the statutory text. In addition, respondent has failed to identify any "serious constitutional doubts," *Clark*, 543 U.S. at 381, that would be raised by construing Section 844(h)(2) in accordance with its plain terms. Given the inherent danger posed by the items specified in Section 844(j), there is nothing arbitrary or irrational about Congress's decision to create a separate criminal offense applicable to those who commit federal felonies while carrying such items. See *Johnson* v. *Robinson*, 415 U.S. 361, 378 (1974) (stating that a statute survives rational basis review so long as "characteristics peculiar to only one group rationally explain the statute's different treatment of the two groups").

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For the foregoing reasons, and those stated in the government's opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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Solicitor General

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