No. 07-455

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

AHMED RESSAM

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

PETITION FOR A WRIT OF CERTIORARI

PAUL D. CLEMENT
Solicitor General
Counsel of Record
KENNETH L. WAINSTEIN
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
TOBY J. HEYTENS
Assistant to the Solicitor General
JOHN F. DE PUE
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and guidelines:

Statutes and guidelines—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 07-455

UNITED STATES OF AMERICA, PETITIONER

v.

AHMED RESSAM

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

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

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

JURISDICTION

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

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this petition. App., *infra*, 32a-36a.

STATEMENT

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

"in relation to" the underlying false statement offense charged in Count 5. App., *infra*, 1a-23a.

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

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

18 U.S.C. 844(h). The statute further states that a district 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 * * * run concurrently with any other term of imprisonment including that imposed for the felony in which the explosive was used or carried." *Ibid.*

2. Respondent is an Algerian citizen. In 1998, he was recruited by an al Qaeda operative while living in Canada. After using a forged baptismal certificate to obtain a Canadian passport in the name Benni Antoine Noris, respondent traveled to Afghanistan, where he received advanced training in the manufacture and use of explosives. During that period, respondent and others conceived a plot to target a U.S. airport to coincide with the millennium. App., *infra*, 4a; C.A. E.R. 496. Respondent eventually selected LAX as his target. App., *infra*, 1a, 4a.

On December 14, 1999, respondent and another al Qaeda operative loaded explosives, electronic timing devices, detonators, fertilizer, and aluminum sulfite into the spare tire compartment of a rental car. Respondent then traveled to the United States by a circuitous route,

ultimately boarding the day's last car ferry from Tswassen, British Columbia to Port Angeles, Washington. App., *infra*, 4a.

Upon arrival in the United States, respondent became agitated when questioned by a customs inspector. The customs inspector instructed respondent to complete a customs declaration form, on which respondent claimed to be a Canadian citizen and signed his name as Benni Noris. App., *infra*, 5a; C.A. E.R. 630-631. The customs inspector directed respondent to a secondary inspection station, where respondent's vehicle was searched and the explosives and other items were discovered. An expert later determined that a bomb made from the materials found in respondent's car could have killed or injured hundreds of people if detonated during the holiday travel rush at LAX. App., *infra*, 5a.

3. On February 14, 2001, a grand jury returned a nine-count Second Superseding Indictment. App., *infra*, 5a. Count 9 charged a violation of 18 U.S.C. 844(h)(2). It read:

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

App., *infra*, 14a.

At trial, respondent filed a motion for a judgment of acquittal on Count 9, arguing that the act of carrying explosives had played no role in the false statement offense charged in Count 5. The district court denied that motion. Respondent also unsuccessfully objected to the district court's jury instructions on Count 9 because

they did not contain a relational requirement. The jury found respondent guilty on all counts. App., *infra*, 6a.

Shortly after the jury's verdict, respondent entered into a cooperation agreement with the government. Respondent provided extensive assistance, but later "stopped cooperating." App., *infra*, 6a. "[A]t the court's instigation" and in the hope of encouraging additional cooperation, the government moved under Guidelines § 5K1.1 for a downward departure based on respondent's testimony at one trial. *Ibid.*; C.A. E.R. 100. "Still, [respondent] did not resume cooperation." App., *infra*, 6a. As a result, the government was forced to dismiss pending indictments against two confederates who had been charged based on information provided by respondent. Gov't C.A. E.R. 116-142.

As calculated by the probation officer, respondent's convictions carried a Guidelines range of 65 years to life imprisonment. C.A. E.R. Under Seal 296. The district court sentenced respondent to 22 years of imprisonment and instructed the government "to allocate that [term of imprisonment] according to the statutory minimums among the counts in consecutive and concurrent as necessary to arrive at a total of 22 years." App., *infra*, 6a-7a. The district court "expressed no view on an appropriate Guidelines range, including the effect of the factors bearing on substantial assistance to authorities in § 5K1.1, and offered no explanation for imposition of the particular sentence in consideration of the factors in 18 U.S.C. § 3553(a)." *Id.* at 7a.

4. The government appealed the sentence as unreasonable, and respondent filed a cross-appeal challenging the sufficiency of the evidence on Count 9. A divided panel of the court of appeals reversed respondent's conviction on Count 9 and remanded for resentencing with-

out reaching the government's arguments. App., *infra*, 1a-23a.

a. The court of appeals acknowledged that "the Third and Fifth Circuits have declined to interpret § 844(h)(2) as requiring that the explosives be carried in relation to the underlying felony." App., *infra*, 7a (citing *United States* v. *Rosenberg*, 806 F.2d 1169, 1179 (3d Cir. 1986), cert. denied, 481 U.S. 1070 (1987), and *United States* v. *Ivy*, 929 F.2d 147, 151 (5th Cir.), cert. denied, 502 U.S. 883 (1991)). But it held that its earlier decision in *United States* v. *Stewart*, 779 F.2d 538 (9th Cir. 1985) (Kennedy, J.), mandated a different result. App., *infra*, 8a-12a. *Stewart* involved 18 U.S.C. 924(c), which at the time of the defendant's conduct in that case had proscribed "carr[ying] a firearm unlawfully during the commission of any felony." 18 U.S.C. 924(c)(2) (1982). Shortly before the Ninth Circuit's decision in *Stewart*, Congress amended Section 924(c) by deleting the word "unlawfully" and adding "and in relation to" after "during." See Act of Oct. 12, 1984, Pub. L. No. 98-473, § 1005, 98 Stat. 2138. The legislative history of that amendment, *Stewart* concluded, "reveal[ed] an understanding on the part of the amending Congress that the earlier Congress intended to require a relation between the firearm and the underlying crime." 779 F.2d at 540. Based on that subsequent history, as well as the "sparse" legislative history of the original statute, *Stewart* interpreted the pre-amended Section 924(c)(2) "as if it contained the requirement that the firearm be possessed 'during and in relation to' the underlying offense." *Ibid.*

Here, the court of appeals reasoned that *Stewart*'s construction of former Section 924(c)(2) mandated the conclusion that "§ 844(h)(2) necessarily always had a

relational element as well." App., *infra*, 11a. Section 844(h), it emphasized, had been patterned after Section 924(c), and the original version of the explosives statute "was identical to the original firearms counterpart that we considered in *Stewart*." *Id.* at 9a-10a. The court of appeals acknowledged that Congress had, post-*Stewart*, amended Section 844(h)(2) by striking the word "unlawfully" without at the same time adding "and in relation to." *Id.* at 10a-11a. But the court of appeals stated that the legislative history of that amendment "does not specifically say why" Section 844(h)(2) was amended in that manner, and it reasoned that "[b]ecause in *Stewart* we did not think addition of the phrase 'and in relation to' changed the scope of original § 924(c), we are hard-pressed now to say that its absence changes the scope of § 844(h)(2)." *Id.* at 11a.

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

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

Alarcón also observed that "Congress has not amended § 844(h)(2) to add a relational element" in response to the Third Circuit's twenty-year-old holding in *Rosenberg*, *id.* at 20a, and he argued that *Stewart* did not limit the court's ability to follow "the words expressly and unambiguously set forth by Congress in a separate statute," *id.* at 21a.

5. The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 24a-25a. Judge O'Scannlain filed a dissent from the denial of rehearing that was joined by Judges Kleinfeld, Gould, Bybee, Callahan, and Bea. *Id.* at 25a-31a. Congress's failure to add the words "and in relation to" when it amended the explosives statute in 1988, Judge O'Scannlain argued, meant that the court was "not 'constrained' by *Stewart*'s reasoning in deciding the proper interpretation of § 844(h)(2)." *Id.* at 28a. He also explained that the panel's decision was "in conflict with every other circuit which has had occasion to consider the question." *Id.* at 29a (citing *Rosenberg*, *supra*; *Ivy*, *supra*; and *United States* v. *Jenkins*, 229 Fed. Appx. 362 (6th Cir. 2005), cert. denied, 126 S. Ct. 2022 (2006)). Finally, Judge O'Scannlain stated that it was "reasonable to question the validity of *Stewart*'s reasoning," because that decision had relied "upon the legislative history of an amendment to determine the scope of the pre-amendment statute" and because "other courts have not read the legislative history relied upon by *Stewart* to be so clear." *Id.* at 30a n.3 (citing *Rosenberg*, 806 F.2d at 1178).

REASONS FOR GRANTING THE PETITION

The court of appeals has misconstrued 18 U.S.C. 844(h)(2) in a way that conflicts with the decisions of other courts of appeals and could significantly diminish the statute's usefulness as a tool for combating terrorism-related offenses. Nothing in the text of Section 844(h)(2) indicates that the explosives must have been carried "in relation to" the underlying felony, and this Court has repeatedly emphasized that courts should not "read * * * absent word[s] into [a] statute." *Lamie* v. *United States Trustee*, 540 U.S. 526, 538 (2004). That conclusion is bolstered by Congress's express inclusion of the very words the Ninth Circuit read into Section 844(h)(2), "in relation to," in the current version of Section 924(c), whose predecessor provided the model for Section 844(h)(2). The contrast between the two statutes confirms that the absence of comparable language in Section 844(h)(2) reflects a deliberate choice.

The court of appeals' erroneous holding warrants review. The panel majority acknowledged a square conflict between its decision here and the decisions of two other courts of appeals, App., *infra*, 7a-9a, and it stated that the proper resolution of that conflict "matters in this case," *id.* at 7a. Section 844(h)(2) applies to respondent's conduct, if no relational element must be established, because he clearly carried an explosive during his felony of making a false statement to a customs inspector. But under the court of appeals' holding, it does not, even though his possession of an explosive raised a significant danger to others. The proper scope of Section 844(h)(2) is a matter of increasing importance in light of the provision's application to certain terrorist plots. Indeed, this case provides an apt illustration of why the

court of appeals' holding will make it more difficult to obtain appropriate punishment in situations where the government foils an act of terrorism before the plan is put into action. Accordingly, this Court's review is warranted.

A. The Decision Of The Court Of Appeals Conflicts With Decisions Of Other Courts Of Appeals

Section 844(h)(2) provides a mandatory ten-year term of imprisonment for any person who "carries an explosive during the commission of any felony which may be prosecuted in a court of the United States." 18 U.S.C. 844(h)(2). The court of appeals held that this provision requires proof that the explosives were carried "in relation to" the specified felony, App., *infra*, 2a, 11a, and it reversed respondent's conviction on Count 9 because it concluded that no such relationship had been established in this case, *id.* at 12a-13a. As the panel majority acknowledged, *id.* at 7a-9a, that decision directly conflicts with the published decisions of two other courts of appeals.

1. In *United States* v. *Rosenberg*, 806 F.2d 1169 (1986), cert. denied, 481 U.S. 1070 (1987), the Third Circuit squarely held that Section "844(h)(2) has no relational element," *id.* at 1179, and it affirmed a conviction under that provision even though "no specific connection was shown between the carrying of the explosives and the [underlying] felony," *id.* at 1177.

The version of Section 844(h)(2) in effect at the time of *Rosenberg* was identical to the current statute except for its inclusion of the word "unlawfully" between "explosive" and "during." See 18 U.S.C. 844(h)(2) (1982) (mandating enhanced punishment for any person who "carries an explosive unlawfully during the commission

of any felony which may be prosecuted in a court of the United States"). Because no colorable argument exists that Congress's elimination of the word "unlawfully" somehow added a relational element mentioned nowhere in the text of either version of Section 844(h)(2), the conflict between the court of appeals' decision here and *Rosenberg* is a square one. See App., *infra*, 7a-9a (acknowledging conflict with *Rosenberg*); *id.* at 19a-21a (Alarcón, J., dissenting); *id.* at 29a (O'Scannlain, J., dissenting from denial of rehearing en banc).

2. In *United States* v. *Ivy*, 929 F.2d 147, cert. denied, 502 U.S. 883 (1991), the Fifth Circuit endorsed the Third Circuit's decision in *Rosenberg*, stated that "[w]e, too, refuse to judicially append the relation element to § 844(h)(2)," and rejected the defendant's argument that the district court had erred in refusing to instruct the jury that it could not convict unless "the defendant carried the explosives 'during and in relation to' the kidnapping." *Id.* at 151.

The Fifth Circuit's rejection of a relational element in *Ivy* was not "an alternative holding," App., *infra*, 7a, or "best regarded as dicta," Resp. C.A. Reh'g Br. 17 n.4. The defendant in *Ivy* raised two distinct claims: (1) that the evidence was insufficient to demonstrate he carried the explosives during the felony; and (2) that the judge erred in refusing to instruct the jury that he must have carried the explosive "during and in relation to" the felony. *Ivy*, 929 F.2d at 151. The court considered the sufficiency of the evidence of "carrying" first.[1] *Ibid.* The principal thrust of the sufficiency argument was that the explosive device was in the trunk of the defendant's car,

[1] Respondent here has conceded that he "carried" the explosives found in the trunk of his car. See App., *infra*, 12a.

which remained at the site of the original abduction while the defendant and the estranged wife embarked on a multi-state tour in her car. *Id.* at 149, 151. The court of appeals, however, emphasized that the explosive device facilitated the original abduction, and thus was carried during the offense. *Id.* at 151. In reaching that conclusion, the court pointed to evidence that might have satisfied an "in relation to" element, "[t]he evidence was sufficient to support the jury's conclusion that the bomb facilitated the kidnapping and established an offense under § 844," but only in the context of finding ample evidence of carrying. *Ibid.* Cf. *Muscarello* v. *United States*, 524 U.S. 125, 127 (1998) (holding that a defendant "carries a firearm" within the meaning of 18 U.S.C. 924(c)(1) in situations where the firearm is contained "in the locked glove compartment or trunk of a car[] which the person accompanies").

The court then went on to address the argument that the judge erred in failing to instruct the jury concerning the "and in relation to" element. *Ivy*, 929 F.2d at 151. *Ivy*'s rejection of a relational element under Section 844(h)(2) was independent of its sufficiency holding and necessary to support the court's judgment. Although a trial court's failure to instruct a jury on an element of a criminal offense may be harmless error, see *Neder* v. *United States*, 527 U.S. 1 (1999), the Fifth Circuit's opinion contains no harmlessness analysis and to the contrary the court expressly held that no instructional error occurred. See *Ivy*, 929 F.2d at 151. Accordingly, *Ivy*'s conclusion that "Section 844(h)(2) * * * does not include the relation element Ivy urges," *ibid.*, was essential to the result in that case.

This 2-1 conflict among published court of appeals decisions merits this Court's review.[2] Although the issue has not generated a volume of published opinions, it is increasingly important in terrorism prosecutions. Moreover, the government's ability to obtain an appropriate sentence for an attempted act of international terrorism should not depend on whether the defendant attempted to enter the United States through Washington State rather than New Jersey, Pennsylvania, or Texas.

B. The Court Of Appeals' Decision Incorrectly Constricts The Scope Of 18 U.S.C. 844(h)(2)

The decision of the court of appeals not only conflicts with the decisions of other courts of appeals, it is incorrect as well. Nothing in Section 844(h)(2)'s text indicates that the government must establish that the explosives were carried in relation to the underlying felony. The contrast between the text of Section 844(h)(1) and (2) as well as the presence of an express relational requirement in current Section 924(c)(1)(A), the provision whose predecessor provided the model for Section 844(h)(2), confirm that the omission of such an element from Section 844(h)(2) reflects a deliberate choice. Nor does the court of appeals' own decision in *United States*

---

[2] As Judge O'Scannlain observed (App., *infra*, 29a), the court of appeals' decision also conflicts with the Sixth Circuit's unpublished decision in *United States* v. *Jenkins*, 229 Fed. Appx. 362 (2005), cert. denied, 126 S. Ct. 2022 (2006). In *Jenkins*, the court of appeals stated that *Rosenberg* "correctly interpret[s] the statute," and it rejected the defendant's assertion that the government had been required to "show that the explosives were used to *further* the commission of the underlying crime." *Id.* at 365, 367; see *ibid.* ("[T]he plain language of [Section 844(h)(2)] does not require a relational element.").

v. *Stewart*, 779 F.2d 538 (9th Cir. 1985), which construed a different statute with different language and a different legislative history, warrant interpreting Section 844(h)(2) to contain an unstated relational element.

1. The starting point for statutory construction is "the language of the statute." *Bailey* v. *United States*, 516 U.S. 137, 144 (1995). "And where the statutory language provides a clear answer," the analysis "ends there as well." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999).

Section 844(h)(2) mandates enhanced punishment for any person who "carries an explosive during the commission of any felony which may be prosecuted in a court of the United States." As the Third Circuit has observed, "[t]he plain everyday meaning of 'during' is 'at the same time' or 'at a point in the course of.' It does not normally mean 'at the same time and in connection with.'" *Rosenberg*, 806 F.2d at 1178-1179 (citation omitted). "Thus, under the first criterion in the interpretative hierarchy, a natural reading of the full text, [a relational nexus] would not be an element of [Section 844(h)(2)]." *United States* v. *Wells*, 519 U.S. 482, 490 (1997) (citation omitted); see App., *infra*, 29a (O'Scannlain, J., dissenting from denial of rehearing en banc) (stating that "the plain language of § 844(h)(2) says nothing about a relational element").

The contrast between Section 844(h)(1) and (2) confirms that the latter does not mandate proof that the explosives were carried in relation to the underlying felony. Whereas Section 844(h)(1) requires that the fire or explosives have been "use[d] * * * to commit" that felony, Section 844(h)(2) provides that the explosives must only have been "carrie[d] * * * during the commission of" it. Because subsection (h)(1) clearly requires

proof that the fire or explosives "aided the commission of the underlying felony in some way," App., *infra*, 13a, subsection (h)(2)'s use of the passive voice underscores that the only connection mandated by that provision is a temporal one.

A dissenting judge in *Rosenberg* argued that Section 844(h)(2) must contain an implicit relational element in order for the words "'the commission of'" to retain "some independent meaning." 806 F.2d at 1181 n.2 (Higginbotham, J., dissenting) (quoting 18 U.S.C. 844(h)(2) (1982)). But Judge Higginbotham did not explain how the words "the commission of" can be understood as "connecting the possession of illegal explosives to the *perpetration* of some other felonious act," *id.* at 1180-1181, and, as we have already explained, see pp. 14-15, *supra*, the contrast between the language of Sections 844(h)(1) and (h)(2) confirms that (h)(2) requires no such connection. Nor does such an interpretation result in surplusage, because the words "the commission of" confirm that it is the defendant—rather than some other individual—who must commit the underlying felony "during" which the explosives are carried.

The panel majority made no attempt to identify a source in the statutory language for its holding that Section 844(h)(2) contains a relational element. Instead, it relied on circuit precedent construing another statute (former 18 U.S.C. 924(c)(2) (1982)), the relationship between that statute and Section 844(h)(2), and the manner in which Section 844(h)(2) has evolved over time. App., *infra*, 8a-11a. But "[t]he starting point is discerning congressional intent is the existing statutory text, and not the predecessor statutes." *Lamie*, 540 U.S. at 534 (citation omitted). And "when the statute's language is plain, the sole function of the courts—at least where

the disposition required by the text is not absurd—is to enforce it according to its terms." *Ibid.* (citation omitted).

There is nothing absurd about severely punishing any person who carries an explosive while committing another felony. As Judge O'Scannlain observed, "[t]he carrying of an explosive * * * greatly increases the risk of injury or death to others," especially given the high risk that explosives "may go off accidentally." App., *infra*, 28a n.1. Although the mandatory consecutive ten-year sentence provided by Section 844(h)(2) might plausibly be characterized as harsh in some cases—though certainly not in this one—harshness of punishment alone is insufficient to render a statute's clear meaning absurd or ambiguous. See *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 483-484 (1992); see also *Lamie*, 540 U.S. at 538 ("Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding."). Nor is the rule of lenity at issue in this case. Because the rule is a "maxim of statutory construction," it "cannot dictate an implausible interpretation of a statute, nor one at odds with the generally accepted contemporary meaning of a term." *Taylor* v. *United States*, 495 U.S. 575, 596 (1990).

Because the power to make laws resides with the legislature, it is improper for courts to "read * * * absent word[s] into [a] statute." *Lamie*, 540 U.S. at 538. The court of appeals' decision in this case does precisely that by "add[ing] an element to § 844(h)(2) that does not appear in the statute enacted by Congress." App., *infra*, 18a (Alarcón, J., dissenting); see *Rosenberg*, 806 F.2d at 1179 ("It is not fitting for this court to declare that the

crime defined by § 844(h)(2) has more elements than those enumerated on the face of the statute.").

2. The court of appeals' conclusion that Section 844(h)(2) contains an unstated relational requirement also affords insufficient weight to the fact that such a requirement is set forth expressly in a closely related provision. The manner in which the two statutes have evolved, moreover, confirms the significance of that distinction.

As the panel recognized, see App., *infra*, 9a-10a, Section 844(h)(2) was modeled after the predecessor of 18 U.S.C. 924(c)(1)(A), which prohibits the use or carrying of a firearm during certain specified offenses. See H.R. Rep. No. 1549, 91st Cong., 2d Sess. 69 (1970) ("Section 844(h) carries over to the explosives area the stringent provisions of the Gun Control Act of 1968 relating to the use of firearms and the unlawful carrying of firearms to commit, or during the commission of a Federal felony."). In its current form, Section 924(c)(1)(A) provides that the firearm must have been used or carried "during *and in relation to*" an underlying "crime of violence or drug trafficking crime." 18 U.S.C. 924(c)(1)(A) (emphasis added). Given the close connection between the two provisions, the omission of comparable language from Section 844(h)(2) would appear to reflect an "intentional[] and purpose[ful]" choice. *Russello* v. *United States*, 464 U.S. 16, 23 (1983). Indeed, "the question here is not whether identical or similar words should be read *in pari materia* to mean the same thing. Rather, the question is whether Congress intended its different words to make a legal difference." *Burlington N. & Sante Fe Ry.* v. *White*, 126 S. Ct. 2405, 2412 (2006) (citations omitted).

The manner in which Section 844(h)(2) has evolved confirms that Congress's failure to include a relational

element in that statute was deliberate. When Section 844(h)(2) was originally enacted in 1970, both it and Section 924(c)(2) prohibited "carr[ying] [a firearm or an explosive] unlawfully during the commission of any felony which may be prosecuted in a court of the United States." See 18 U.S.C. 844(h)(2) (1982) (App., *infra*, 33a); 18 U.S.C. 924(c)(2) (1982) (App., *infra*, 36a). In 1984, Congress amended the firearms statute to remove the word "unlawfully" and add "and in relation to" after "during." See Pub. L. No. 98-473, § 1005, 98 Stat. 2138 In 1985, the Ninth Circuit concluded that the pre-1984 firearms statute had contained an implicit relational element. See *Stewart*, 779 F.2d at 540. In 1986, the Third Circuit held that the explosives statute "has no relational element." *Rosenberg*, 806 F.2d at 1179. And in 1988, Congress amended Section 844(h)(2) by eliminating the word "unlawfully" without at the same time adding "and in relation to." See Act of Nov. 18, 1988, Pub. L. No. 100-690, § 6474(b), 102 Stat. 4379. Although the legislative history of the 1988 amendment to Section 844(h)(2) "does not specifically say why 'unlawfully' was struck, or why 'and in relation to' was not added," App., *infra*, 11a,[3] the best explanation is that Congress, faced

[3] The "Senate Report" to which the court of appeals referred (App., *infra*, 11a) is a section-by-section bill analysis drafted and placed in the Congressional Record by Senator Biden, the then-Chairman of the Judiciary Committee. See 134 Cong. Rec. 32,692 (1988). The two sentences that follow the one partially quoted by the court of appeals make clear that the need "to bring [Section 844(h)(2)] in line with" Congress's then-recent amendments to Section 924(c) involved a disparity in penalty rather than a general intent for the two statutes to be identical in every respect. See *id.* at 32,700 ("Presently, as a result of the above-referenced amendments to 18 U.S.C. 924(c), a person who uses a firearm to commit a bank robbery would be subject to harsher penalties

with the "divergent decisions" in *Stewart* and *Rosenberg*, chose not to incorporate into Section 844(h)(2) the relational element that it had recently added to Section 924(c)(1)(A). App., *infra*, 28a (O'Scannlain, J., dissenting from denial of rehearing en banc).

3. The court of appeals' earlier decision in *United States* v. *Stewart*, 779 F.2d 538 (9th Cir. 1985), does not support reading into Section 844(h)(2) a relational element that appears nowhere in the statutory text. *Stewart* construed a different statute that was amended at a different time and in different ways. See pp. 17-18, *supra*. And if Congress's subsequent addition of the words "and in relation to" can shed light on the meaning of pre-amendment Section 924(c)(2), see *Stewart*, 779 F.2d at 540, surely Congress's failure to add those same words suggests something about the meaning of current Section 844(h)(2).

Stewart itself, moreover, did not attempt to explain how its holding was consistent with the governing statutory text of Section 924(c), let alone make any claim about Section 844(h). Moreover, subsequent opinions of this Court render the opinion's heavy reliance "upon the legislative history of an amendment to determine the scope of the pre-amendment statute * * * questionable." App., *infra*, 31a n.3 (O'Scannlain, J., dissenting from denial of rehearing en banc). See, *e.g.*, *Jones* v. *United States*, 526 U.S. 227, 238 (1999) ("[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress.") (internal quotation marks and citations omitted)); *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S.

---

than a person who committed the same offense using an explosive. There is no justification for this disparity.").

164, 185 (1994) ("[W]e have observed on more than one occasion that the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute.") (quoting *Public Employees Ret. Sys.* v. *Betts*, 492 U.S. 158, 168 (1989). Even if such evidence may properly be considered, *Stewart* acknowledged that the legislative history of the 1984 amendment to Section 924(c) was "not entirely free of ambiguity," 779 F.2d at 540, and *Stewart*'s interpretation of that history is debatable. See *Rosenberg*, 806 F.2d at 1178 (concluding that the Senate Report relied upon by the *Stewart* court "[a]t most * * * fails to explain why the 'in relation to' phrase was added to the [firearms] statute"). Finally, although *Stewart* concluded that firearms statute's "evident purpose * * * necessarily implies some relation or connection between the underlying criminal act and the use or possession of the firearm," 779 F.2d at 540, "the fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998) (quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 499 (1985) (citation omitted)).

C. The Question Presented Is Of Substantial Importance

Review is also warranted because the question presented is important. As the relatively small number of reported decisions suggest, Section 844(h)(2) is not a frequently used provision. And it may be that in many cases the government will be able to establish that the carrying of explosives "facilitated or played a role in" (App., *infra*, 12a (citation omitted)) the underlying offense.

But that will not always be the case. Unlike the firearms statute, which applies only when the weapon is used or carried in connection with "a crime of violence or drug trafficking crime," 18 U.S.C. 924(c)(1)(A), Section 844(h)(2) is applicable whenever an explosive is "carrie[d] * * * during the commission of any felony." Many federal felonies—such as the false statement offense charged as the underlying felony in this case—may not ordinarily lend themselves to proof that the explosives "aided the commission of the underlying felony" (App., *infra*, 13a), even though the explosives' mere presence "greatly increases the risk of injury or death to others." *Id.* at 28a n.1 (O'Scannlain, J., dissenting from denial of rehearing en banc).

The court of appeals0.' holding is likely to be particularly significant in terrorism cases where a defendant ultimately intends to employ the explosives but is apprehended before the plan is put into action. A distinct federal offense whose commission would be facilitated by the carrying of explosives may not yet have evolved sufficiently to permit its proof beyond a reasonable doubt. Or the evidence necessary to establish such an offense may be unavailable for use at trial, either because of national security concerns or because the evidence is in the custody of foreign governments. In such circumstances, the Ninth Circuit's decision could substantially diminish Section 844(h)(2)'s usefulness as a tool for combating terrorist-related activity and thus make it more difficult to obtain appropriate punishment in such cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

KENNETH L. WAINSTEIN
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

TOBY J. HEYTENS
Assistant to the Solicitor General

JOHN F. DE PUE
Attorney

OCTOBER 2007

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 05-30422, 05-30441

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

AHMED RESSAM, ALSO KNOWN AS
BENNI ANTOINE NORIS, DEFENDANT-APPELLEE

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

AHMED RESSAM, ALSO KNOWN AS
BENNI ANTOINE NORIS, DEFENDANT-APPELLANT

Filed: Jan. 16, 2007

Before: ALARCÓN, RYMER, and BERZON, Circuit Judges.

RYMER, Circuit Judge:

Ahmed Ressam trained with members of al Qaeda in Afghanistan and hatched a plot to detonate explosives at Los Angeles International Airport (LAX) in the days before the new Millennium. He was charged with, and convicted of, nine counts of criminal activity connected to this plot. Ressam challenges his conviction on one of

these counts, Count 9, for carrying an explosive during the commission of a felony—making false statements on a customs declaration—in violation of 18 U.S.C. § 844(h)(2). The issue is whether § 844(h)(2) must be read to include a relational element such that the crime is carrying an explosive during *and in relation to* commission of a felony. We previously construed the statute upon which § 844(h)(2) was modeled, 18 U.S.C. § 924(c), to require this relational element, *United States v. Stewart,* 779 F.2d 538, 539-40 (9th Cir. 1985), even though it, too, lacked the phrase "and in relation to." We are constrained to follow *Stewart's* analysis here and conclude that § 844(h)(2) requires a relationship between the underlying crime and the act of carrying an explosive. As the jury was neither instructed that such a relationship was a required element of the offense, nor did the government offer evidence that Ressam's explosives were used to facilitate his false customs declaration, his conviction on Count 9 must be reversed.

Ressam was exposed to a sentence of some 65 years, but after trial entered into a cooperation agreement with the United States according to which he would not seek, and the government would not recommend, a sentence of less than 27 years. Although he provided testimony and participated in numerous debriefings, Ressam ultimately stopped cooperating. As a result, the government recommended a sentence of 35 years. Ressam argued for a sentence of 120 months, and the district court imposed a sentence of 22 years. The government appeals this sentence as unreasonable in light of Ressam's failure to continue to assist the government and the district court's lack of explanation for what the government believes is an extreme departure. Given reversal of the conviction on Count 9 and its corresponding mandatory

minimum sentence of 10 years, we vacate the entire sentence so that the district court can resentence in light of this decision and developments in the law of sentencing in the meantime.

I

Ressam is an Algerian citizen. He left Algeria in 1992 for France, where he was arrested on an immigration-related violation. Ressam then obtained a genuine French passport under the name of Anjer Tahar Medjadi and fled for Montreal in February of 1994. Using his true name, Ressam sought asylum in Canada, claiming that he had been falsely accused by the Algerian government of aiding Islamist insurgents and had served 15 months in prison. His petition was denied, but Ressam was allowed to stay in Canada because of a moratorium on deportations to Algeria.

Ressam met an al Qaeda operative in Montreal named Abderraouf Hannachi sometime in 1998. Hannachi recruited individuals to train in al Qaeda camps in Afghanistan and to participate in jihadist activities. Using a forged Catholic baptismal certificate, Ressam obtained a Canadian passport in the name of Benni Antoine Noris in order to travel to Afghanistan. In March of 1998, Ressam—traveling as Benni Noris—left Montreal for Karachi, Pakistan.

Once in Pakistan, Ressam met Abu Zubaydah, who arranged Ressam's travel to the Khalden training camp in Afghanistan. Ressam stayed with an Algerian terror group at Khalden for six months. During that time, he received firearms training and learned how to fire a rocket-propelled grenade launcher. Al Qaeda operatives at the camp taught Ressam to make explosive charges and showed him how to detonate particular types of

plastic explosives. Ressam also learned how to destroy infrastructure targets, such as power plants, military installations, railroads, and airports. He later went to a second camp near Jalalabad where he received further training in explosives. It was during this time that Ressam and others hatched the plot to target a U.S. airport to coincide with the Millennium.

Ressam returned to Canada via LAX in February of 1999. He carried bomb-making notes, two chemicals used to manufacture explosives, and $12,000 in cash. Ressam resettled in Montreal where he continued to plan the LAX attack. On November 17, 1999, Ressam and Abdelmajid Dahoumane, another member of the Montreal al Qaeda cell, traveled to Vancouver, British Columbia. Ressam and Dahoumane rented a Chrysler 300M and checked into a motel. On December 14, 1999, Ressam and Dahoumane loaded the trunk of the rental car with explosives, electronic timing devices, detonators, fertilizer, and aluminum sulfate. They drove to the ferry terminal at Tswassen, British Columbia. Dahoumane returned by bus to Vancouver while Ressam, using his Benni Noris passport, boarded the MV Coho, a ferry bound for Port Angeles, Washington. U.S. Customs inspectors[1] searched the trunk of Ressam's car as part of a pre-screening process prior to departure. They did not discover the explosives which were hidden in the trunk's spare tire well.

---

[1] The Homeland Security Act of 2002, Pub. L. No. 107-296, § 403, 116 Stat. 2135, transferred the U.S. Customs Service from the Treasury Department to the Department of Homeland Security. The agency is now known as U.S. Customs and Border Protection. We refer to the agency as the Customs Service because Ressam was apprehended prior to the reorganization.

The MV Coho docked at Port Angeles about 6:00 p.m. Customs Inspector Diana Dean was finishing her day shift when Ressam drove his vehicle off the ferry. He steered the car into the middle lane where Dean stopped him for inspection. Dean asked Ressam about his travel plans. His answers indicated that he was nervous and agitated. Dean asked Ressam to complete a customs declaration—which he signed as Benni Noris. Dean directed Ressam to a secondary inspection station where Customs inspectors searched the vehicle. The inspectors discovered what were later identified as the bomb's component parts. At the time, they believed Ressam was attempting to smuggle narcotics into the country.

The substances were inventoried and tested. Agents found two primary explosives (hexamethylene triperoxide diamine (HMTB) and cyclotrimethylene trinitramine (RDX)) in a Tylenol pill bottle and zinc lozenge case, a secondary explosive (ethylene glycol dinitrate (EGDN)) poured into two olive oil jars, fertilizer which can provide fuel for an explosion, and aluminum sulfate. Agents also found Ressam's fingerprints on four plastic boxes that contained timing devices. EGDN is a powerful explosive that packs twice the punch of the equivalent amount of TNT. The detonation of the bombs during the holiday travel rush at LAX would likely have killed and injured hundreds of people.

On February 14, 2001, the grand jury returned a nine-count Second Superceding Indictment against Ressam.[2] It charged Ressam with an act of terrorism transcending a national boundary, placing explosives in

[2] Dahoumane, who was a fugitive at the time, was also charged in four of the counts. Algerian security services arrested Dahoumane in March 2001.

proximity to the ferry terminal, possessing false identification, using a fictitious name, falsely identifying himself on a customs declaration form, the smuggling of and transportation of explosives, the illegal possession of a destructive device, and carrying an explosive during the commission of a felony, namely, signing the customs form as Benni Noris. The district court ordered the trial moved from Seattle to Los Angeles due to pre-trial publicity.

Ressam filed a Federal Rule of Criminal Procedure 29 motion on Count 9, arguing that the act of carrying explosives had not played a role in the false statement made on the customs form. The district court denied the motion. Ressam also objected to the government's proposed jury instruction on Count 9 because it lacked a relational requirement, which the district court overruled. On April 6, 2001, the jury convicted Ressam on all counts.

Ressam's sentencing was delayed until July 27, 2005. Ressam provided extensive cooperation until early 2003, when he basically stopped cooperating. In February of that year Ressam asked the court to proceed with sentencing, but at the court's instigation, the government filed a motion under U.S.S.G. § 5K1.1 to allow a downward departure from the Guidelines range for substantial assistance. Still, Ressam did not resume cooperation. The court set a hearing for April 27, 2005, but decided on its own to give Ressam three more months in order to be able to give him as much credit as possible for cooperation. No additional cooperation was forthcoming before the reconvened hearing in July. The district court imposed a sentence of 22 years in custody and instructed the government "to allocate that according to

the statutory minimums among the counts in consecutive and concurrent as necessary to arrive at a total of 22 years." It expressed no view on an appropriate Guidelines range, including the effect of the factors bearing on substantial assistance to authorities in § 5K1.1, and offered no explanation for imposition of the particular sentence in consideration of the factors in 18 U.S.C. § 3553(a).

The United States appeals the sentence, and Ressam cross-appeals his conviction on Count 9.

II

Ressam's cross-appeal boils down to what 18 U.S.C. § 844(h)(2) means when it punishes one who "carries an explosive during the commission of any felony which may be prosecuted in a court of the United States," with a mandatory term of imprisonment of 10 years. Does it criminalize carrying an explosive during the commission of another felony, or does it criminalize carrying an explosive during and *in relation to* that other felony? The answer matters in this case because the government offered no evidence that Ressam's carrying the explosives in any way facilitated his falsifying the customs declaration form.

This is an issue of first impression for us, although the Third and Fifth Circuits have declined to interpret § 844(h)(2) as requiring that the explosives be carried in relation to the underlying felony. *See United States v. Rosenberg,* 806 F.2d 1169, 1179 (3d Cir. 1986); *United States v. Ivy,* 929 F.2d 147, 151 (5th Cir. 1991) (following *Rosenberg* in an alternative holding). As these courts see it, "the plain everyday meaning of 'during' is 'at the same time' or 'at a point in the course of.' It does not normally mean 'at the same time and in connection with.

. . .' It is not fitting for this court to declare that the crime defined by § 844(h)(2) has more elements than those enumerated on the face of the statute." *Rosenberg,* 806 F.2d at 1178-79 (internal citation omitted); *Ivy,* 929 F.2d at 151 (citing *Rosenberg,* 806 F.2d at 1177). *But see Rosenberg,* 806 F.2d at 1180-1183 (Higginbotham, J., dissenting).

Unlike our colleagues in other circuits, we do not write on a clean slate. We interpreted a similar provision in the firearms statute, 18 U.S.C. § 924(c), in *United States v. Stewart,* 779 F.2d 538, 539-540 (9th Cir. 1985), *overruled in part on other grounds by United States v. Hernandez,* 80 F.3d 1253, 1257 (9th Cir. 1996). Section 924(c) as written when Stewart committed his offense provided that it was a crime to "carr[y] a firearm unlawfully during the commission of any felony. . . ." 18 U.S.C. § 924(c)(2) (1982). Later, in 1984, it was amended to substitute for the word "during" the phrase "during *and in relation to.*" 18 U.S.C. § 924(c) (1985) (emphasis added). The word "unlawfully" was also deleted. Our review of the legislative history indicated that the new "in relation to" language was not intended to create an element of the crime that did not previously exist, but rather was intended to make explicit what had been implicit before—that a relation between the firearm and the underlying felony was required. *Stewart,* 779 F.2d at 539-40. The legislative history also indicated that when "unlawfully" was eliminated, the "in relation to" language was added to allay concern that a person could be prosecuted for committing an entirely unrelated crime while in possession of a firearm, but the "in relation to" language did not alter the scope of the statute. *Id.* As then-Judge Kennedy explained, "the evident purpose of the [original] statute was to impose more

severe sanctions where firearms facilitated, or had the potential of facilitating, the commission of a felony." *Id.* at 540. "That purpose necessarily implies some relation or connection between the underlying criminal act and the use or possession of the firearm." *Id.* Consequently, we interpreted the statute that applied to Stewart as if it contained the requirement that the firearm be possessed "during and in relation to" the underlying crime. Put differently, the relational requirement "has always been an implicit element of the crime even before Congress amended § 924 to include the specific 'in relation to' language." *United States v. Mendoza,* 11 F.3d 126, 129 (9th Cir. 1993) (describing *Stewart's* holding).

While *Rosenberg* and *Ivy* were free to (and did) reject *Stewart's* analysis of § 924(c), we cannot. Therefore, we must decide whether a relational requirement has always been an implicit element of § 844(h)(2), as well. The two sections have much in common, and we are mindful of the canon *in pari materia* which provides that similar statutes are to be interpreted in a similar manner unless legislative history or purpose suggests material differences. *See, e.g., Fogerty v. Fantasy, Inc.,* 510 U.S. 517, 523-24, 114 S. Ct. 1023, 127 L. Ed .2d 455 (1994); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank,* 510 U.S. 86, 104-106, 114 S. Ct. 517, 126 L. Ed. 2d 524 (1993); *U.S. West Comm., Inc. v. Hamilton,* 224 F.3d 1049, 1053 (9th Cir. 2000).

Section 844 was enacted as part of Title XI of the Organized Crime Control Act of 1970. Pub. L. No. 91-452, 84 Stat. 922, 956. Its purpose was to align explosives with the firearms provisions in § 924(c), and it was modeled after § 924(c). *United States v. Mueller,* 463 F.3d 887, 891 (9th Cir. 2006). The House Report ex-

plains that "Section 844(h) carries over to the explosives area the stringent provisions of the Gun Control Act of 1968 [codified at 18 U.S.C. § 924(c)] relating to the use of firearms and the unlawful carrying of firearms to commit, or during the commission of a federal felony." H.R. Rep. 91-1549, *reprinted in* 1970 U.S.C.C.A.N. 4007, 4046. Its original text was identical to the original firearms counterpart that we considered in *Stewart*. Thus, the original version of § 924(c) provided:

> 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 . . .

And the original version of § 844(h) provided:

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

Congress amended § 844(h)(2) in 1988 by striking "unlawfully" in paragraph (2), as the 1984 revisions to § 924(c) had done. Pub. L. No. 100-690, § 6474(b).[3] By

---

[3] The current version of § 844(h) provides, in pertinent part:

> (h) Whoever—
>
> (1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or

contrast with the 1984 amendment to § 924(c), however, the word "during" was not replaced with "during and in relation to." The legislative history does not specifically say why "unlawfully" was struck, or why "and in relation to" was not added. The Senate Report simply indicates that the new version strengthened the penalty provisions of § 844(h) for "using or carrying an explosive during the commission of a federal felony, so as to bring it in line with similar amendments adopted in the Comprehensive Crime Control Act of 1984. . . ." S. Rep. at 17367.

Because in *Stewart* we did not think addition of the phrase "and in relation to" changed the scope of original § 924(c), we are hard-pressed now to say that its absence changes the scope of § 844(h)(2). In other words, accepting that § 924(c) always had a relational element, as we must, § 844(h)(2) necessarily always had a relational element, too. For this reason, we cannot accord the same weight as the government, and the Third Circuit, give to the fact that § 844(h)(2) was not altered as § 924(c) was to add "and in relation to" language.[4]

---

(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.

[4] The government's brief argued that, unlike § 924(c), § 844(h)(2) never contained a requirement that the explosive be carried "*unlawfully* during commission of any felony." However, this assertion is incorrect, as the government has subsequently acknowledged.

Judge Alarcón contends that *Stewart* has been undercut by intervening authority. Yet neither *Stewart's* holding, nor the "theory or reasoning" underlying the decision, has been called into question by this court sitting en banc or by the United States Supreme Court. The dissent's citation to *Lamie v. United States Trustee,* 540 U.S. 526, 538, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004)—a case interpreting a bankruptcy statute—as supervening authority is inapposite. *Lamie* did not articulate a new rule of statutory interpretation; it did not construe § 844(h)(2) or § 924(c); and there was no prior construction of a similar statute to contend with. Nothing about its holding, reasoning, or mode of analysis is irreconcilable with *Stewart's* determination that a relational element was always implicit in the phrase "carries a firearm . . . during." Accordingly, we are obliged to follow *Stewart's* construction of § 924(c), which served as the template for § 844(h). *See Mueller,* 463 F.3d at 891.

Given this interpretation, there is no real dispute that Ressam's conviction on Count 9 cannot stand. The government introduced ample evidence that Ressam falsely signed the customs form as Benni Noris and that he carried explosives in the trunk of his car. Ressam so concedes. However, the evidence adduced at trial does not show that the explosives "facilitated or played a role in the crime" of lying on the customs declaration. *See* Ninth Cir. Model Crim. Jury Instr. No. 8.65; *Stewart,* 779 F.2d at 540 (contrasting Stewart's case with circumstances showing a violation of § 924(c) as interpreted, such as "the firearm facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others, whether or not such

display or discharge in fact occurred"). It 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. There is no evidence that the explosives emboldened Ressam to lie or that he used them to "protect himself or intimidate others." *Id*. Accordingly, we vacate Ressam's conviction as to Count 9 only.

III

The government believes that Ressam's sentence is unreasonable and seeks to have it vacated because the district court failed to balance the cooperation that Ressam provided against the magnitude of his crimes and his continued aid to terrorists by his failure to complete his promised assistance. We decline to address the merits of the government's position for two reasons. First, Ressam's conviction on Count 9 having been reversed, his sentence on that count necessarily falls as well. The district court articulated no basis upon which we could infer whether its sentence would be the same, or different, without a conviction on this count. We prefer to leave it to the district court in the first instance to arrive at an appropriate sentence on the remaining counts of conviction. Even more significantly, the law applicable to sentencing is in flux. We are rehearing two cases en banc, *United States v. Carty,* 453 F.3d 1214 (9th Cir. 2006) *reh'g en banc granted,* 462 F.3d 1066 (9th Cir. 2006), and *United States v. Zavala,* 443 F.3d 1165 (9th Cir. 2006) *reh'g en banc granted,* 462 F.3d 1066 (9th Cir. 2006), and the United States Supreme Court has granted writs of certiorari in *Claiborne v. United States,* 75 U.S.L.W. 3243, 3246 (U.S. Nov. 3, 2006) (No.

06-5618), and *Rita v. United States*, 75 U.S.L.W. 3243, 3246 (U.S. Nov. 3, 2006) (No. 06-5754), which will have a good deal to say about the sentencing process in the wake of *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). As the district court should have the initial opportunity to impose a sentence consistent with evolving law, we leave it to that court's discretion to defer resentencing until the Supreme Court has decided *Claiborne* and *Rita*, or we have decided *Carty* and *Zavala*.

REVERSED IN PART; VACATED IN PART and REMANDED.

ALARCÓN, Circuit Judge, concurring in part and dissenting in part:

I respectfully dissent from the majority's decision to reverse Count 9 of the Second Superceding Indictment. I also concur in the majority's decision to vacate the sentence but on different grounds. I agree with the Government that the sentence imposed by the District Court was unreasonable and an extreme departure from the advisory Sentencing Guidelines.

I

Count 9 reads as follows:

> On or about December 14, 1999, at Port Angeles, within the Western District of Washington, AHMED RESSAM knowingly carried an explosive during the commission of a felony prosecutable in a court of the United States, that is making a false statement to a U.S. Customs Inspector as charged in Count 5

> herein. All in Violation of Title 18, United States Code, Section 844(h)(2)

Section 844(h)(2) provides as follows:

> Whoever—. . . (2) carries an explosive during the commission of any felony which may be prosecuted in a court of the United States, . . . shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years.

In Count 5 of the indictment, Mr. Ressam was charged as follows:

> On or about December 14, 1999, at Port Angeles, within the Western District of Washington, in a matter within the jurisdiction of the United States Custom Service, an agency of the United States, AHMED RESSAM did knowingly and willfully make a false, fraudulent, and fictitious material statement and representation; in that the defendant presented to the U.S. Customs inspectors a Customs Declarations Form # 6059B identifying himself as Benni Noris, whereas in truth and fact, as he then well knew, this statement was false in that his true name is AHMED RESSAM. All in violation of Title 18, United States Code, Section 1001.

The district court gave the following instruction to the jury concerning the elements that the Government was required to prove to demonstrate a violation of § 844(h)(2).

> The defendant is charged in Count 9 of the indictment with carrying an explosive during the commission of a felony in violation of Section 844(h)(2) of Title 18 of the United States Code. In order for the

> defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt.
>
> First, the defendant knowingly carried explosive materials; and
>
> Second, the defendant committed the felony of making a false statement to a U.S. Customs Inspector (as charged in Count 5 of the Indictment) while he was carrying those explosive materials.

In his opening brief, Mr. Ressam concedes that "[t]he government did present evidence that Mr. Ressam was carrying explosives in the trunk of the car he was driving at the time he completed and presented the customs form, and that Mr. Ressam falsely identified himself on the form." Opening Brief of Appellant at 18. Mr. Ressam does not argue that the words used by Congress in § 844(h)(2) are ambiguous or lack plain meaning.

The Supreme Court instructed in *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978) that: "When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning." *Id.* at 184, 98 S. Ct. 2279 n.29. In *United States v. Missouri Pac. R. Co.*, 278 U.S. 269, 49 S. Ct. 133, 73 L. Ed. 322 (1929), the Court stated: "where the language of an enactment is clear, and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended." *Id.* at 278, 49 S. Ct. 133.

More recently, in *Lamie v. United States Trustee,* 540 U.S. 526, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004), Justice Kennedy, writing for the majority, stated:

> The starting point in discerning congressional intent is the existing statutory text, and not the predecessor statutes. It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms. (internal citations and quotation marks omitted).

Id. at 534, 124 S.Ct. 1023.

Mr. Ressam argues that we must read the words "in relation to" into the text of § 844(h)(2). He contends that we must reverse because the court refused an instruction he submitted that states as follows:

> The defendant is charged in Count 9 of the Indictment with knowingly carrying an explosive during and in relation to a felony prosecutable in a court of the United States in violation of Section 844(h)(2) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt.
>
> First, the defendant committed the crime of making a false statement to a United States customs inspector as charged in Count 5 of the Indictment;
>
> Second, the defendant knowingly carried an explosive; and

> Third, the defendant carried the explosive *during and in relation to the false statement crime* alleged in Count 5 of the Indictment.
>
> A defendant takes such action *in relation to the crime* if the explosive facilitated or played a role in the false statements charge alleged in Count 5.

(emphasis added).

Mr. Ressam's proposed instruction would have required the District Court to add an element to § 844(h)(2) that does not appear in the statute enacted by Congress. Justice Kennedy, in his opinion in *Lamie,* rejected a similar notion:

> Petitioner's argument stumbles on still harder ground in the face of another canon of interpretation. His interpretation of the Act—reading the word "attorney" in § 330(a)(1)(A) to refer to "debtors' attorneys" in § 330(a)(1)—would have us read an absent word into the statute. That is, his argument would result "not [in] a construction of [the] statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope." *Iselin v. United States,* 270 U.S. 245, 251, 46 S. Ct. 248, 70 L. Ed. 566 (1926). With a plain, non-absurd meaning in view, we need not proceed in this way. "*There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted*." *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 625, 98 S. Ct. 2010, 56 L. Ed. 2d 581 (1978).

> Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding. It results from "deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill." *United States v. Locke,* 471 U.S. 84, 95, 105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985) (citing *Richards v. United States,* 369 U.S. 1, 9, 82 S. Ct. 585, 7 L. Ed. 2d 492 (1962)).

540 U.S. at 538, 124 S. Ct. 1023. (emphasis added).

We lack the constitutional authority to add an element to a criminal statute. That is Congress' function. Our role is merely to interpret what Congress has enacted.

II

This Court has not previously addressed the question whether a trial court must instruct a jury that, to convict under § 844(h)(2), the Government must prove beyond a reasonable doubt that the defendant carried explosives *during and in relation to* the commission of a felony which may be prosecuted in a court of the United States. The Third and Fifth Circuits have expressly rejected this contention.

In *United States v. Rosenberg,* 806 F.2d 1169 (3rd Cir. 1986), the Third Circuit affirmed a judgment of conviction for a violation of § 844(h)(2), wherein the trial court rejected the defendants' argument that the Government was required to present evidence of a specific connection between the carrying of explosives and the alleged felony. The Third Circuit reasoned as follows:

> Section 844(h)(2) by its terms only requires that the government show that the defendant unlawfully carried an explosive "during the commission of any felony." The plain everyday meaning of "during" is "at the same time" or "at a point in the course of." *See,* Webster's Third New International Dictionary 703 (1961). It does not normally mean "at the same time and in connection with. . . ." It is not fitting for this court to declare that the crime defined by § 844(h)(2) has more elements than those enumerated on the face of the statute. If Congress sees fit to add a relational element to § 844(h)(2), it is certainly free to do so, in the same manner that it added a relational element to § 924(c). Until such time, we will hold that § 844(h)(2) has no relational element, and accordingly, we now hold that the district court correctly denied the defendants' motion to dismiss Count 5.

Id. at 1178-79.

The Third Circuit's determination in *Rosenberg* that a federal court cannot read absent words into a statute is faithfully consistent with Justice Kennedy's statement in *Lamie* that federal courts cannot "rewrit[e] rules that Congress has affirmatively and specifically enacted." *Lamie,* 540 U.S. at 538, 124 S. Ct. 1023 (quoting *Mobil Oil,* 436 U.S. at 625, 98 S. Ct. 2010). In *United States v. Ivy,* 929 F.2d 147 (5th Cir. 1991) the Fifth Circuit, citing the Third Circuit's opinion in *Rosenberg,* "refuse[d] to judicially append the relation element to § 844(h)(2)." *Id*. at 151.

The *Rosenberg* decision was written twenty years ago. Since then, Congress has not amended § 844(h)(2) to add a relational element. Under our constitutional

doctrine of the separation of powers, we cannot usurp Congress' authority.

III

The majority has refused to follow the Third Circuit's decision in *Rosenberg,* and the Fifth Circuit's opinion in *Ivy,* that we lack the authority to add an "in relation to" element to § 844(h)(2). Instead, the majority asserts that it is "constrained" to apply this Court's opinion in *United States v. Stewart,* 779 F.2d 538 (9th Cir. 1985), *overruled in part on other grounds by United States v. Hernandez,* 80 F.3d 1253, 1257 (9th Cir. 1996), which read a relational element into 18 U.S.C. § 924(c). The term "constrain" is defined as "to force by stricture, restriction, or limitation imposed by nature, oneself, or circumstances and exigencies." Webster's Third New International Dictionary 489 (1976). I do not agree with my colleagues that we are forced, by the law of this Circuit, to follow *Stewart* in construing the words expressly and unambiguously set forth by Congress in a separate statute.

> [A] three-judge panel may not overrule a prior decision of the court. That proposition is unassailable so far as it goes, but it does not take into account the possibility that our prior decision may have been undercut by higher authority to such an extent that it has been effectively overruled by such higher authority and hence is no longer binding on district judges and three-judge panels of this court. . . . We hold that the issues decided by the higher court need not be identical in order to be controlling. Rather, the relevant court of last resort must have undercut the theory or reasoning underlying the

> prior circuit precedent in such a way that the cases are clearly irreconcilable.

Miller v. Gammie, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc).

More recently, in *Ortega-Mendez v. Gonzales,* 450 F.3d 1010 (9th Cir. 2006), Judge Berzon pointed out that "[w]e are 'bound not only by the holdings of [such intervening] decisions but also by their mode of analysis.'" *Id.* at 1019. (quoting *Gill v. Stern (In re Stern),* 345 F.3d 1036, 1043 (9th Cir. 2003)). (internal quotations omitted).

In *Stewart,* a three-judge panel of this Court determined that it had the authority to add an element to a criminal statute that was unambiguous by referring to legislative history. We stated: "We interpret [§ 924(c)] as if it contained the requirement that the firearm be possessed 'during and in relation to' the underlying offense." 779 F.2d at 540. The Supreme Court's subsequent holding in *Lamie* that, where the language is plain, we cannot "read an absent word into the statute," 540 U.S. at 538, 124 S. Ct. 1023, undercuts our conclusion in *Stewart* that we had the authority to add a relational element to § 924(c). Accordingly, we are constrained to apply the holding and mode of analysis set forth in *Lamie* and enforce § 844(h)(2) "according to its terms" and not to "rewrit[e] rules that Congress has affirmatively and specifically enacted." *Lamie,* 540 U.S. at 538, 124 S. Ct. 1023.

I would affirm the District Court's judgment of conviction with respect to Count 9 by employing the following logical syllogism.

Section 844(h)(2) provides that "[whoever . . . carries an explosive during the commission of any felony which may be prosecuted in a court of the United States . . . shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years."

It is undisputed that Mr. Ressam was carrying explosives in the trunk of his car when he falsely stated in a Customs Declaration Form # 6059B that his name was Benni Noris in violation of 18 U.S.C. § 1001.

Therefore, Mr. Ressam is subject to the enhanced punishment prescribed in § 844(h)(2) because he was carrying an explosive during the commission of the crime set forth in § 1001.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Western District of Washington, Seattle

Nos. 05-30422, 05-30441
D.C. No. CR-99-00666-001-JCC

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT-CROSS-APPELLEE

v.

AHMED RESSAM, ALSO KNOWN AS
BENNI ANTOINE NORIS, DEFENDANT-APPELLEE-
CROSS-APPELLANT

Filed: June 6, 2007

ORDER

Before: ARTHUR L. ALARCÓN, PAMELA ANN RYMER, and MARSHA S. BERZON, Circuit Judges.

Order;

Dissent by Judge O'SCANNLAIN

A majority of the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Alarcón would grant the peti-

tion for rehearing and accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc. A judge of the court requested a vote on whether to rehear the matter en banc. However, the matter failed to receive a majority of votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is **DENIED** and the suggestion for rehearing en banc is **REJECTED**.

O'SCANNLAIN, Circuit Judge, dissenting from the denial of rehearing en banc, joined by KLEINFELD, GOULD, BYBEE, CALLAHAN and BEA, Circuit Judges:

With all due respect to my colleagues, this high-profile case, involving an individual trained in Afghanistan by al-Qaeda and convicted of conspiring to detonate explosives at Los Angeles International Airport as part of a terrorist attack, is an ideal candidate for rehearing en banc. In *United States v. Ressam,* 474 F.3d 597 (9th Cir. 2007), a panel majority concluded that a conviction under 18 U.S.C. § 844(h)(2) requires that explosives be carried not only *during* a felony, as the statute says, but also *in relation to* that felony, which the statute does not say. The panel thus reversed one count of conviction of "Millenium Bomber" Ahmed Ressam. I dissent from the denial of rehearing en banc because *United States v. Stewart,* 779 F.2d 538, 539-40 (9th Cir. 1985), the two-decade old decision of our court upon which the panel relied, does not compel the result reached, and, further, by extending *Stewart* and reading the "in relation to" language into § 844(h)(2), we have not only usurped the congressional function, but have also created a split of authority with every other United States

Court of Appeals that has addressed this question. *See* Fed. R. App. P. 35(b)(1)(B).

I

The facts and circumstances surrounding al-Qaeda trainee Ahmed Ressam's plot to detonate explosives at Los Angeles International Airport and his capture as he entered the United States are well-detailed in the panel opinion. *Ressam*, 474 F.3d at 599-601. In brief, Ressam and an associate loaded the trunk of a rental car with explosives, electronic timing devices, detonators, fertilizer, and aluminum sulfate, and drove to a ferry terminal at Twassen, British Columbia. *Id*. at 600. Ressam drove the rental car aboard the ferry, which later that day docked in Port Angeles, Washington. When Ressam attempted to drive his car off, a customs inspector stopped him for inspection. *Id*. After the customs officer became suspicious and subjected Ressam's vehicle to a more intrusive search, inspectors discovered some of the bomb's component parts. Once the car and all its contents were inventoried and tested, authorities realized that Ressam had all the materials for a full scale terrorist attack. *Id.* Ressam was indicted and convicted on nine counts, including one count of carrying an explosive during the commission of a felony, in violation of 18 U.S.C. § 844(h)(2). *Id*. at 600-01.

II

The critical legal issue in this appeal is whether Ressam's conviction for carrying an explosive during the commission of a felony must be reversed because the government did not also prove that Ressam was carrying the explosives *in relation to* the underlying felony (the "relational element"), which in this case the government designated as making a false statement in a

customs declaration. *See* 18 U.S.C. § 844(h) ("Whoever . . . carries an explosive during the commission of any felony which may be prosecuted in a court of the United States . . . shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years.").

The panel reasoned that our decision in *Stewart,* 779 F.2d at 539-40 compelled it to conclude that 18 U.S.C. § 844(h)(2) contains a relational element. I respectfully disagree. Then-Judge Kennedy's majority opinion in *Stewart* construed 18 U.S.C. § 924(c), which made unlawful the carrying of a firearm during the commission of a felony. At the time of Mr. Stewart's conviction, § 924(c) did not include an explicit relational element. *See Stewart,* 779 F.2d at 539. But by the time his case reached our court on appeal, "Congress [had] revised section 924(c), combining former subsections 924(c)(1) and 924(c)(2). The 1984 amendment substituted for the word 'during' the phrase 'during and in relation to.'" *Id.*

In determining whether the jury was properly instructed at Mr. Stewart's trial, our court focused almost entirely upon the legislative history of the 1984 amendment. The court's reading of the legislative history "indicate[d] the 'in relation to' language was not intended to create an element of the crime that did not previously exist, but rather was intended to make clear a condition already implicit in the statute." *Id*. Thus, it concluded, because the relational element existed at the time of Stewart's trial, his jury instruction was in error.

But critically, there is no similar legislative history as to § 844(h)(2) because Congress never amended that

statute to include the language that it added to § 924(c).[1] As the Third Circuit reasoned in reaching a conflicting conclusion than that of our *Ressam* panel, "even if the *Stewart* court was correct in its analysis of why Congress amended § 924(c), Congress has not seen fit to modify § 844(h) in the same manner." *United States v. Rosenberg,* 806 F.2d 1169, 1178 (3d Cir. 1986).

Indeed, it is telling that when Congress did amend § 844(h)(2) in 1988, it did *not* add the relational language. At that time, Congress had before it our circuit's decision in *Stewart,* 779 F.2d at 539-40, and the Third Circuit's decision in *Rosenberg,* 806 F.2d at 1179. *Rosenberg* had rejected *Stewart's* general reasoning and its reasoning as specifically applied to § 844(h)(2), instead relying upon the plain, unambiguous language of that section. With these divergent decisions before it, Congress chose in 1988 not to add the "in relation to" language to § 844(h)(2). As the Supreme Court has explained, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States,* 464 U.S. 16, 23 (1983). This presumption of a knowing and intentional Congress in my view compels us to recognize that we are not "constrained" by *Stewart*'s reasoning in deciding the proper interpretation of § 844(h)(2).

---

[1] It should go without saying that this may have been a deliberate omission. The carrying of an explosive during the commission of a crime greatly increases the risk of injury or death to others, more so than even a firearm. Plus, it is more likely in the case of explosives than firearms that the "weapon" may go off accidentally. In short, as a policy matter, Congress may have had good reasons for not amending § 844(h)(2) as it amended the firearms statute.

III

But even were the panel constrained by *Stewart,* I think it appropriate to rehear this case en banc because our holding that § 844(h)(2) includes a relational element is in conflict with every other circuit which has had occasion to consider the question. *See Rosenberg,* 806 F.2d at 1178; *United States v. Ivy,* 929 F.2d 147 (5th Cir. 1991); *United States v. Jenkins,* 2005 WL 3440416, **3-5 (6th Cir. 2005) (unpublished).[2]

The main thrust of our sister circuits' decisions is that the plain language of § 844(h)(2) says nothing about a relational element, but only requires carrying the explosives *during* the commission of a felony. As *Rosenberg* stated:

> Section 844(h)(2) by its terms only requires that the government show that the defendant unlawfully carried an explosive "during the commission of any felony." The plain everyday meaning of "during" is "at the same time" or "at a point in the course of." *See,* Webster's Third New International Dictionary 703 (1961). It does not normally mean "at the same time and in connection with. . . ." It is not fitting for this court to declare that the crime defined by § 844(h)(2) has more elements than those enumerated on the face of the statute. If Congress sees fit to add a relational element to § 844(h)(2), it is certainly free to

[2] The government also contends that the Eighth Circuit's decision in *United States v. King,* 230 F.3d 1364 (8th Cir. 2000) (unpublished), conflicts with *Ressam,* but I think *King*'s reasoning too difficult to follow and too conclusory to give it much weight.

> do so, in the same manner that it added a relational element to § 924(c).

806 F.2d at 1178-79.

Further, as the Supreme Court more recently explained, when interpreting a statute "[w]ith a plain, nonabsurd meaning in view," we should not undertake to add missing words or elements, or to soften the impact of Congress' enactments. *Lamie v. United States Trustee,* 540 U.S. 526, 538 (2004). According to the Court, "[o]ur unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding. It results from 'deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill.'" *Id.* (quoting *United States v. Locke,* 471 U.S. 84, 95 (1985) (internal citations omitted)). As Judge Alarcón stated in his dissent, "Mr. Ressam's proposed instruction would have required the District Court to add an element to § 844(h)(2) that does not appear in the statute enacted by Congress." *Ressam,* 474 F.3d at 606 (Alarcón, J., dissenting in part). It remains to be seen how, in practice, this additional requirement will impact the ability of prosecutors in this circuit to obtain convictions in explosives and terrorism cases. But in my view, *Lamie* confirms that the wisdom of such additions are firmly left to the determination of the legislative branch.

The reasoning and restraint of *Lamie* and of our sister circuits' decisions stand in stark contrast to *Stewart* and the panel decision in *Ressam*.[3] The great ad

---

[3] I think it is reasonable to question the validity of *Stewart*' s reasoning even though the statute has been amended to include the rela-

vantage of rehearing this appeal before our en banc court is that we could decide the proper interpretation of § 844(h)(2) and overrule *Stewart,* even if it is true that decision has left our circuit with something less than a "clean slate." *Ressam,* 474 F.3d at 602.

IV

Regardless of whether *Stewart* was correctly decided, I would quite simply not allow that decision to control the outcome of this case without en banc review. Because the panel's decision to vacate "Millennium Bomber" Ahmed Ressam's conviction under 18 U.S.C. § 844(h)(2) is in square conflict with the reasoning of our sister circuits and with the cautionary pronouncements of the Supreme Court, we should have reheard this case en banc. I respectfully dissent from the court's decision otherwise.

---

tional element. The reliance in that opinion upon the legislative history of an amendment to determine the scope of the pre-amendment statute is questionable. *See United States v. Price,* 361 U.S. 304, 313, 80 S. Ct. 326, 4 L. Ed. 2d 334 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."). And other courts have not read the legislative history relied upon by *Stewart* to be so clear. *See Rosenberg,* 806 F.2d at 1178 ("[W]e do not find that the legislative history to the 1984 amendment 'strongly implied' that the 'in relation to' language did not affect the scope of the statute as originally drafted. At most, we find that the legislative history fails to explain why the 'in relation to' phrase was added to the statute."); *see also Stewart,* 779 F.2d at 540 (noting that the legislative history upon which it relied was "sparse" and "not entirely free of ambiguity").

APPENDIX C

1. 18 U.S.C. 844(h) and (j) (2000) provides:

Penalties

(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.

* * * * *

(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.

* * * * *

2. 18 U.S.C. 844(h) (1982) provides:

Penalties

* * * * *

(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 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 ten years. In the case of the 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 twenty-five years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of such person or give him a probationary sentence.

* * * * *

3. 18 U.S.C. 924(c)(1) (2000) provides:

Penalties

(C)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler,

the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other terms of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

* * * * *

4. 18 U.S.C. 924(c) (1982) provides:

Penalties

* * * * *

(c) Whoever—

(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States,

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten 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 two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

* * * * *