No. _____

IN THE

Supreme Court of the United States

ELDEN DON BRANNAN,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(7), Elden Don Brannan seeks leave to file the accompanying Application for Extension of Time to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs, and to proceed in forma pauperis. Mr. Brannan was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(b) and (c), both in the United States District Court for the Southern District of Texas and on appeal to the United States Court of Appeals for the Fifth Circuit.

Date:
October 31, 2024

Respectfully submitted,

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Application for Extension of Time to File a Petition for a fWrit of Certiorari to the U.S. Court of Appeals for the Fifth Circuit

APPLICATION TO THE HONORABLE JUSTICE SAMUEL A. ALITO AS CIRCUIT JUSTICE

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October 31, 2024

APPLICATION FOR EXTENSION OF TIME

Under this Court's Rule 13.5, Applicant Elden Don Brannan respectfully requests a 30-day extension of time, to and including December 13, 2024, to file a petition for a writ of certiorari.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is *United States* v. *Brannan*, 98 F.4th 636 (5th Cir. 2024) (attached as Exhibit 1), *reh'g denied*, No. 23-40098 (5th Cir. Aug. 15, 2024) (attached as Exhibit 2).

JURISDICTION

This Court will have jurisdiction over any timely petition under 28 U.S.C. § 1254(1). The Fifth Circuit issued its judgment on April 12, 2024, and denied Applicant's timely petition for rehearing en banc on August 15, 2024. The petition is currently due on November 13, 2024. This application has been filed more than ten days before that date.

REASONS JUSTIFYING AN EXTENSION OF TIME

1. This case concerns the elements necessary to sustain a conviction under the National Firearms Act for the unlawful possession of a registrable "firearm," 26 U.S.C. § 5861(d), in the form of a "destructive device" as defined in § 5845(f) of the Act. Section 5845(f) defines destructive device to mean any of several enumerated military-style weapons, including "explosive, incendiary, or poison gas . . . bomb[s]" and large-bore projectile launchers, § 5845(f)(1)-(2), as well as "combination[s] of parts" from which any such weapon "may be readily assembled." § 5845(f)(3). At issue is Section 5845(f)'s further instruction that "[t]he term 'destructive device' shall not

include any device which is neither designed nor redesigned for use as a weapon." The question presented asks whether that language is properly construed as identifying an essential feature of a covered "destructive device," and thus element of a charged § 5861(d) offense, or instead as setting out an affirmative defense to § 5861(d) liability.

That question makes this case a serious candidate for review. Applicant is a life-long fireworks enthusiast with extensive experience handling and creating fireworks displays to celebrate holidays and entertain family members. He was charged under § 5861(d) with possessing an unregistered "destructive device," specifically, an "explosive bomb," after officers responding to an unrelated family dispute learned of a homemade device that applicant had made and stored in his bedroom closet—next to his sizeable collection of commercial fireworks. The device consisted of a slender, six-inch metal pipe, with a hobby fuse running through a clay plug on one end, and a plastic bottle cap reinforced by wax and five dimes on the other end, and was filled with a small amount of low-explosive firework composition—pyrotechnic stars and black powder—taken from one of the nearby commercial fireworks.

At applicant's trial, the ATF agents who examined the device testified that they performed no tests on the device apart from identifying the chemical composition of the powder, and confirming that samples of the powder and fuse burned when exposed to flame. The agents admitted that the device was made entirely of commercially available parts, and that it lacked additional components typically associated with weaponized explosives, such as blasting caps, shrapnel, high-explosive powder,

and metal caps. And the agents agreed that they were aware of no other direct or circumstantial evidence suggesting that applicant intended to construct a bomb. The ATF's expert nevertheless opined that the device qualified as an explosive "pipe" bomb, and thus a § 5845(f) "destructive device," because he believed it could explode as constructed, and would likely cause some degree of harm if it did in light of the metal exterior. Applicant's own explosives expert testified that the device's composition, particularly the absence of metal or bronze end-caps, was consistent with an amateur, if not poorly-executed, fountain firework designed to emit a colorful pyrotechnic display out of one end, but not to explode. The ATF expert disagreed, but could not rule out the possibility that the device would function in that way.

Applicant moved for judgment of acquittal on the basis that the government was required to prove that he purposely designed the homemade device for use an as an explosive weapon, and that the evidence was insufficient to support such a finding. He also urged the district court to instruct the jury that the government had to make that showing beyond a reasonable doubt. The court denied both requests, relying on the Fifth Circuit's decision in *United States v. Beason*, 690 F.2d 439, 445 (5th Cir. 1982), which held that § 5845(f)'s exclusion of "any device neither designed nor redesigned for use as a weapon" from the definition of "destructive device" sets forth an affirmative defense, as opposed to an elemental fact. Applicant was subsequently convicted and sentenced to 24 months' imprisonment.

The Fifth Circuit affirmed, holding that *Beason* "foreclose[d]" applicant's contention that the government was required to prove that his device was designed for

use as a weapon and that the district court accordingly had not erred in failing to instruct the jury to so find. *See United States v. Brannan*, 98 F.4th 636, 638-41 (5th Cir. 2024). And it subsequently declined applicant's petition to revisit *Beason* en banc.

As the panel below acknowledged, see *id.* at 639 n.4, the Fifth Circuit's construction of § 5845(f), as incorporated into the "firearm" and mental-state elements of § 5861(d), conflicts with precedent from other circuits. See also *United States v. Neil*, 138 F. App'x 418, 420-21 n.3 (3d Cir. 2005) (acknowledging circuit conflict). As the Eleventh Circuit rightly holds, "[s]tatutory coverage depends on proof that a device is an explosive *plus* proof that it was designed as a weapon." *United States v. Hammond*, 371 F.3d 776, 780 (11th Cir. 2004). A "device that explodes is not covered by the statute merely because it explodes"; rather, the government must prove—so the defendant need not disprove—that the device was designed or redesigned for use as a weapon. See *ibid.*; *cf. United States* v. *Morningstar*, 456 F.2d 278, 281 (4th Cir. 1972) (declining to read § 5845(f)(3)'s reference to combinations of parts "designed or intended for use in converting any device into a destructive device as defined in" (f)(1) or (f)(2) as setting forth affirmative defense).

2. Good cause supports a 30-day extension. Applicant intends to file a petition raising the circuit split the Fifth Circuit acknowledged and further entrenched in the decision below, and has asked the Carter G. Phillips/Sidley Austin LLP Supreme Court Clinic at Northwestern Pritzker School of Law to help prepare that petition. A

30-day extension will allow time for the Clinic's students to draft a cogent and well-researched petition without conflicting with their academic schedules.

An extension is also warranted because of the press of counsels' other client business. The Clinic is responsible for forthcoming petitions in *Kovac* v. *Wray*, No. 24A335, *Chisesi* v. *Hunady*, No. 24A311, and *Tucker* v. *United States*, No. 23-1781 (7th Cir.), and replies in support of the petitions in *Aquart* v. *United States*, No. 24-5754, and *Fields* v. *Colorado*, No. 24-5460. Mr. Howze is solely responsible for forthcoming briefs in *United States v. Barrios*, 5th Cir. No. 24-20262, *United States v. Long*, 5th Cir. No. 24-20348, *United States v. Day*, 5th Cir. No. 24-20298, *United States v. Judd*, 5th Cir. No. 24-40389, *United States v. Inguanzo*, 5th Cir. No. 24-40135, and *United States v. Gietzen*, D.C. Cir. No. 24-3075. And Mr. Loss-Eaton is presenting oral argument in *Wisconsin Central Ltd.* v. *STB*, No. 24-1484 (7th Cir.), on November 15.

*   *   *

CONCLUSION

For these reasons, Applicant respectfully requests an extension of the time to file a petition for a writ of certiorari by 30 days, to and including December 13, 2024.

Respectfully submitted,

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