No. 09-_____

IN THE
Supreme Court of the United States

DAVID R. OLOFSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner was tried and convicted for a violation of 18 U.S.C. sections 922(o) and 924(a)(2), which make it a felony punishable by a fine and up to 10 years imprisonment to knowingly transfer a machinegun as defined in 26 U.S.C. section 5845(b). According to the government's theory of the case, permitted by the trial court, any firearm which fires more than one round per pull of the trigger is a machinegun, "no matter what the cause." The central issue at trial and on appeal concerned the meaning of the term "shoots ... automatically," as applied to a malfunctioning semiautomatic rifle. The questions presented are:

1. Whether the sufficiency of the evidence of the Petitioner's knowledge of the firing characteristics of his semiautomatic rifle was improperly assessed in the courts below by a definition of "automatically" in conflict with the one adopted and applied in Staples v. United States, 511 U.S. 600 (1994)?

2. Whether Petitioner was denied a fair trial by the trial court's refusal to include in its jury instructions the definition of "automatically" set forth in Staples?

3. Whether Petitioner's conviction was obtained at trial and affirmed on appeal based on an inaccurate statement of the law governing the meaning of "automatically" as prescribed in 26 U.S.C. section 5845(b), and incorporated by 18 U.S.C. section 921(a)(23) into 18 U.S.C. section 922(o)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

MISCELLANEOUS

PETITION FOR WRIT OF CERTIORARI

Petitioner David Roland Olofson ("Olofson") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming Olofson's conviction of violating 18 U.S.C. sections 922(o) and 924(a)(2), which prohibit the knowing transfer of a machine gun.

OPINIONS BELOW

On January 8, 2008, at the close of the case, the district court denied Olofson's request that the jury instructions include the definition of "automatic," as stated in Staples v. United States, 511 U.S. 600, 602 n.1 (1994). Record ("R.") 69; Appendix ("App.") 32a-33a. On January 8, 2008, a jury verdict of guilty was entered. R. 70. On May 15, 2008, the district court denied Olofson's motion for acquittal for insufficiency of the evidence. *See* R. 95; Sentencing Transcript ("Sent. Tr.") 21, ll. 10-14. On the same date, the district court entered judgment against Olofson, and imposed a sentence of 30 months imprisonment. R. 95; App. 24a-28a. All of the above actions are unreported.

On May 18, 2008, Olofson filed a timely notice of appeal. R. 99. On May 1, 2009 (after oral argument on January 22, 2009), the court of appeals entered its judgment affirming Olofson's conviction. App. 1a-21a. The decision is reported at 563 F.3d 652 (7th Cir. 2009).

JURISDICTION

The decision of the court of appeals was entered on May 1, 2009. On May 14, 2009, Olofson filed a timely

Petition for Rehearing *En Banc,* which was denied on June 1, 2009. App. 22a-23a. This Court has jurisdiction under 28 U.S.C. section 1254(1), this petition having been timely filed under Rule 13 of the Rules of the U.S. Supreme Court.

STATUTORY PROVISIONS INVOLVED

This case involves 18 U.S.C. section 922(o), which reads, in pertinent part, "it shall be unlawful for any person to transfer ... a machinegun," and 18 U.S.C. section 924(a)(2), which reads, in pertinent part, "[w]hoever knowingly violates subsection ... (o) of section 922 shall be ... imprisoned not more than 10 years ...." App. 29a. This case also involves 18 U.S.C. section 921(a)(23), which reads "[t]he term 'machinegun' has the meaning given such term in section 5845(b) of the National Firearms Act," which, in turn and in pertinent part, reads that "[t]he term 'machinegun' means any weapon which shoots ... automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b); App. 30a.

STATEMENT OF THE CASE

This petition concerns the meaning of "automatically," as applied to a malfunctioning semiautomatic rifle, in a prosecution for the knowing transfer of a machinegun (as defined in 26 U.S.C. section 5845(b)) in alleged violation of 18 U.S.C. sections 922(o) and 924(a)(2).

On December 5, 2006, a grand jury returned a one-count indictment charging Olofson of having, on July 13, 2006, knowingly transferred a machinegun — an Olympic Arms, .223 caliber SGW rifle, model CAR-AR ("hereinafter AR-15") — in violation of 18 U.S.C. sections 922(o) and 924(a)(2). App. 29a. On January 8, 2008, after a plea of not guilty and a two-day trial, a jury found Olofson guilty as charged. App. 24a-26a. On May 13, 2008, the district court imposed judgment, sentencing Olofson to 30 months' imprisonment. App. 27a-28a.

A. Olofson's AR-15: A Malfunctioning Semiautomatic Rifle.

Olofson was a member of the U.S. Army Reserves. Tr. 85, ll. 18-19. On July 13, 2006, Olofson loaned to Robert Kiernicki ("Kiernicki"), without charge, Olofson's AR-15 semiautomatic rifle and a supply of ammunition for use at a nearby shooting range. Tr. 37, l. 8 – 38, l. 13.

Already familiar with the function of the safety of the AR-15 when placed in the "safety" and "fire" positions (Tr. 35, ll. 21-22; 36, ll. 9-22), Kiernicki asked Olofson what would happen if the selector switch were moved to what he called an "unmarked" position. Tr. 46, ll. 11-15. Olofson told Kiernicki not to put the AR-15 in such an unmarked position, because it would "malfunction." Tr. 46, ll. 7-21.

Nonetheless, at the shooting range, Kiernicki "at least twice" moved the safety into the unmarked position, pulled the trigger and — without releasing

the trigger or exhausting the ammunition in the magazine — the AR-15 fired three shots and then jammed. Tr. 46, l. 16 – 47, l. 8.

In response to a telephone complaint concerning "automatic fire," the local police arrived, identified Kiernicki as "the one doing that," and took down the serial numbers of three guns, including Olofson's AR-15. Tr. 40, ll. 3-22. Later the same day, the local police came to Kiernicki's home and confiscated Olofson's rifle. Tr. 41, ll. 8-10. On July 16, 2006, the federal Bureau of Alcohol, Tobacco and Firearms ("ATF") executed a search warrant at Olofson's home. Tr. 62, ll. 4-9. After an extensive search, the ATF agents found neither automatic weapons nor automatic weapon parts. Tr. 68, ll. 17-21. During the search, ATF special agent Jody Keeku ("Keeku") "told Olofson that [his AR-15] had fired automatically," to which Olofson replied "if that happened then it was a malfunction." Tr. 68, ll. 1-16.

B. The First ATF Firearm Test: Olofson's AR-15 Determined Not to Be a Machinegun.

On October 11, 2006, an ATF firearms enforcement officer, Max Kingery (hereinafter "Kingery"), conducted an inspection of Olofson's AR-15. Tr. 100, ll. 23-25 – 101, ll. 1-13; Tr. 122, ll. 8-10. Kingery found that Olofson's AR-15 had been assembled with four M-16 parts — "the trigger, the hammer, the disconnector, and the selector switch" Tr. 102, ll. 1-6. Kingery acknowledged that an instruction manual entitled, "AR-15 to M-16 Conversion" — Government Exhibit 9 — stated that a semiautomatic firearm like Olofson's

AR-15 required a fifth M-16 part to function as a machinegun. Tr. 102, l. 20 – 103, l. 19. Nevertheless, Kingery — in **reliance** on his "training and experience," and **before** conducting any test of the firearm itself — concluded that the "effect of having those four components" would be to make Olofson's AR-15 "fire automatically." Tr. 103, l. 22 – 104, l. 11.

Upon testing the rifle, however, it did not fire more than one round. *See* Tr. 107, ll. 4-7. Instead, after testing the AR-15 in the "safety" and "fire" positions — each of which tested as Kingery expected (Tr. 105, ll. 2-24) — Kingery placed the safety into the unmarked position and, after "squeez[ing] the trigger[,] the weapon fired one round, ejected that round, loaded another, and then the hammer followed that round forward but failed to fire, [being] caught in the semiauto position [and] not allowed to continue forward." Tr. 106, ll. 6-8, 17-18. As Kingery acknowledged, Olofson's AR-15 experienced "a malfunction they call hammer follow or follow through" Tr. 122, ll. 19-25 – 123, ll. 1-2. Thus, on the basis of the October 2006 test, Kingery concluded that Olofson's malfunctioning AR-15 was **not a machine gun**. Tr. 124, ll. 21-25 – 125, l. 1.

Kingery's initial opinion thus was consistent with that of Olofson's firearms expert witness Savage, who concluded that "in the unmarked position" the firearm exhibits a malfunction called a "hammer follow" (Tr. 167, ll. 8-9 and 170, ll. 1-24), and "you're not supposed to put it" in that position. Tr. 167, ll. 7-11.

C. A Second and Third ATF Firearms "Test": Olofson's AR-15 Said to Be a Machine gun.

One month later, in November 2006, Keeku requested that Kingery conduct a second test. Tr. 125, ll. 14-17. This time, Kingery, after checking the AR-15 in the "safety" position, skipped the "semiauto position" and went directly to the unmarked position "and squeezed the trigger." Tr. 108, ll. 18-21. Then, with the AR-15 in that position, Kingery testified that he "held the trigger down and it emptied all 20 rounds [in the magazine] without any stoppage." Tr. 109, ll. 8-19. Further, Kingery averred that he tested the weapon by pulling and releasing the trigger, causing the weapon to "fire[] in five to 10 round bursts by [himself] functioning the trigger in five to 10 round bursts." Tr. 109, ll. 20-25.

When asked why the AR-15 fired differently in the two tests, Kingery explained that it was "due to the ammunition [he] was using":

> Even though it was commercially available ammunition [in the first test], it was a military grade ammunition which has much harder primer than standard civilian ammunition. [Tr. 107, ll. 16-19.]

According to Kingery, the "harder primer" ammunition was designed to ensure that a firearm's "firing pin" would not "strik[e] the primer," and "accidentally" cause the firearm to "go off." Tr. 108, ll. 1-9. However, when pressed on cross-examination whether the utilization of a "softer primer" ammunition grade

would increase the likelihood of "multiple firings," Kingery denied that the "softer" civilian grade of ammunition would have had any such effect. Tr. 126, l. 12 – 127, l. 19.

When pressed further on cross, Kingery was asked why during the second test he had failed to test the AR-15 in the semiautomatic position. Tr. 127, ll. 20-25. Kingery replied, "because I already knew that it would function." Tr. 128, ll. 1-2. Yet, Kingery admitted that, by utilizing a different ammunition, it was "possible" that, even in the semi-automatic position, Olofson's AR-15 could have malfunctioned, either by "hammer follow" or by misfiring more than one shot at the single pull of a trigger. Tr. 128, l. 3 – 129, l. 3.

After Olofson was indicted, a third videotaped test was ordered without requiring the presence of Olofson or his counsel, the videotape to be made available to Olofson afterwards for his examination. R. 29 (Court minutes dated February 13, 2007). Like the second "test," the third "test" was limited to firing the AR-15 in the unmarked position only, using the same kind of soft-primered ammunition. Consequently, the results were said to be the same. *See* Tr. 110, l. 16 – 112, l. 6.

D. Prosecution's Definition of "Machine gun" as a Weapon that — No Matter What the Cause — Shoots More than One Shot at the Single Pull of the Trigger.

At the pretrial conference, Olofson postulated that, like the AR-15 at issue in Staples v. United States,[1] his AR-15 shot more than one shot only as a result of a "malfunction." Pretrial Transcript ("Pretr. Tr.") at 25, l. 11 – 26, l. 2; App. 34a-35a. Thus, Olofson sought a jury instruction incorporating the "definition of fully automatic ... from footnote 1" in Staples. Pretr. Tr. 34, ll. 15-19; App. 36a-37a. In response, the prosecution advanced an argument, one that it consistently made throughout the trial, that: "[A] machine gun is any weapon that shoots more than one shot without manual reloading by a single function of the trigger." Pretr. Tr. 35, ll. 7-8; App. 37a. As the prosecution explained later in the trial, whether Olofson's AR-15 shot more than one shot at the single pull of the trigger as a result of a "hammer follow" malfunction "makes [no] difference under the statute [:] If you pull the trigger [of a firearm] once and it fires more than one round, **no matter what the cause**, it's a machine gun." Tr. 151, ll. 9-15 (emphasis added).

Thus, in his opening statement, the prosecution stated that "if a firearm expels more than one round with a single pull of the trigger, that firearm is a machine gun." Tr. 12, ll. 7-9. Three times during the course of government expert Kingery's testimony, the

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[1] 511 U.S. 600 (1994).

prosecutor elicited the same unqualified answer — that, in Kingery's expert opinion, Olofson's AR-15 was a machinegun because it could fire or did fire more than one shot at the single pull of the trigger without manual reloading. Tr. 102, ll. 7-19; Tr. 110, ll. 1-8; Tr. 112, ll. 8-18.

In closing argument, the prosecution continued in the same vein, contending before the jury that, "if you have a gun, you pull the trigger once and more than one shot is fired, that firearm is a machine gun." Tr. 189, ll. 1-2.

Thus, the prosecution insisted that, whether the jury considered the testimony of Kiernicki that Olofson's AR-15 fired three shots and then jammed, or that of Kingery with respect to the second and third tests of that AR-15, the jury should find that Olofson's AR-15 was a machine gun because "when you pull the trigger once on that firearm more than one round is fired." Tr. 190, ll. 21-25 – 191, ll. 1-4.

E. The Trial Court's Jury Instructions Omitted Any Guidance as to the Meaning of "Automatically" as Applied to Olofson's AR-15.

At the final pretrial conference, Olofson requested the trial court include the definition of "automatically" set forth in Staples v. United States 511 U.S. 600, 602 n.1 (1994). *See* Pretr. Tr. 34, ll. 15-19.

Refusing Olofson's request, the trial court omitted the Staples definition, instructing the jury in the

language of the statute that "[a] machine gun is any weapon that shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single pull of the trigger." Tr. 219, l. 25 – 220, l. 3, App. 33a. Accordingly, the trial court instructed the jury that it must find only "that the defendant knew, or was aware of, the essential characteristics of the firearm that made it a machine gun," without spelling out to the jury what those essential characteristics were. Tr. 220, ll. 5-9, App. 33a.

F. In its Review of Olofson's Motion for Acquittal, the District Court Applied the Prosecution's Definition of "Automatically."

On May 13, 2009, at Olofson's sentencing hearing, the district court denied Olofson's motion for acquittal on the grounds of insufficiency of the evidence. *See* Sent. Tr. 21, ll. 10-14. In its assessment of the testimony of Kiernicki, the court commented:

> Olofson had informed [Kiernicki] that he knew that it was an automatic function. Olofson mentioned to [Kiernicki] that he had fired the weapon in the three-round burst position and the weapon had jammed on him. There Olofson is stating that he not only operated this rifle in the automatic mode, but he had done so prior to turning it over to [Kiernicki] for firing. [Sent. Tr., 15, ll. 10-16.]

Thus, in reliance on this view of "automatic," the court concluded "that Mr. Olofson knew the weapon at issue here could fire automatically." *See* Sent. Tr., 20, ll. 19-22.

G. The Court of Appeals Rejected the Staples Definition of "Automatic."

Even though Olofson's request for a jury instruction on the meaning of "automatic" tracked *verbatim* the definition of that term in Staples — "that once the trigger is depressed the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted" — the court of appeals ruled that the trial court "properly rejected it" because "Olofson's proffered instruction was **not** an accurate statement of the law." United States v. Olofson, 563 F.3d at 659, App. 11a (emphasis added).

Instead, the court of appeals determined that the true meaning of the statutory term was fixed by the definition of "automatically" as that term "was commonly used and understood in 1934, the year in which the definition of 'machine gun' became law." *Id.* at 658, App. 9a-10a. Stating that such 1934 meaning "comports with its ordinary modern meaning ... that is readily accessible to laypersons and is in no sense confusing," the court of appeals concluded that "the district court was not required to define that term for the jury." *Id* at 659, App. 11a.

Further, the court of appeals dismissed Olofson's contention that the trial court had applied an erroneous standard of "automatically" to Olofson's

motion for acquittal on the grounds of the insufficiency of the evidence. *Id*. at 659, App. 11a-12a. As was the case with the trial court, the court of appeals relied solely upon the evidence of what Olofson knew about his AR-15 before Kiernicki borrowed it — that "the three-round burst wouldn't work and that it would jam up":

> That testimony was sufficient for a reasonable jury to find beyond a reasonable doubt that the defendant knew that the AR-15, with a single pull of the trigger and without manual reloading, could shoot more than one round as the result of a self-acting mechanism. [*Id*. at 659, App. 12a.]

REASONS FOR GRANTING THE WRIT

Petitioner, a U.S. Army Reservist, is now serving a 30-month prison sentence for a felony conviction for the knowing transfer of a machinegun, despite the absence of any evidence that he knew that his malfunctioning, semi-automatic rifle would "shoot ... automatically," under 26 U.S.C. section 5845(b), as defined and applied in Staples v. United States, 511 U.S. 600 (1994).

Not only did the courts below disregard Staples in their review of the sufficiency of the evidence, but they rejected Petitioner's requested jury instruction on the meaning of "automatically," even though it was a **verbatim** recital of the Staples definition. Indeed, the court of appeals "went rogue" in further ruling the Staples definition was "an inaccurate statement of the

law." The court of appeals affirmance of Petitioner's conviction is not only in irreconcilable conflict with Staples, and the application of the Staples mens rea rule by the First and Eighth Circuits, but also incompatible with relevant legislative history, prior ATF rulings and practices, and usage in the firearms industry.

Only by reaffirming the definition of "automatically" in Staples will law-abiding owners of semiautomatic rifles and handguns be protected from prosecutions that would make them "felons-by-chance," in derogation of their right to keep and bear arms.

I. The Court of Appeals' Affirmance of Olofson's Conviction Creates an Irreconcilable Conflict with Staples v. United States and with the U.S. Courts of Appeals for the First and Eighth Circuits.

Both the court of appeals and the district court failed to comply with this Court's decision in Staples v. United States, 511 U.S. 600 (1994). The Staples Court determined that Congress did not intend to create a strict liability crime of unlawful possession of a machinegun, but required the government to prove that the defendant knew that his semiautomatic rifle would actually shoot "fully automatically," as defined in footnote 1 of its opinion: "That ...once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted." *Id.*, 511 U.S. at 602 n.1. There is no

evidence that Olofson had any such knowledge at the time of the alleged illegal transfer.

There are important similarities between the instant case and Staples. Both cases involved an AR-15 rifle manufactured by Olympic Arms, Inc. of Olympia, Washington.[2] (An AR-15 is the civilian variant of the military's fully automatic M-16 rifle, but specifically designed to fire only in a semiautomatic mode.)[3] Both the Staples and Olofson rifles contained certain M-16 parts[4], and, indeed, many such AR-15's were manufactured with certain M-16 parts.[5] Importantly, neither rifle contained an M-16 "auto-sear," which is considered to be the critical part which could transform an AR-15 rifle into a machinegun, nor an M-16 bolt carrier.[6] In both cases the government argued that the rifle was a machinegun, not because it was designed or modified to shoot automatically, but only that arguably it could so shoot.[7] And, in both cases the defendant contended that, if the AR-15 fired more than one shot at the single pull of a trigger, it

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[2] *See* Staples, 511 U.S. at 603 and App. 32a.

[3] *See* Staples, 511 U.S. at 603.

[4] *See* Staples, 511 U.S. at 603 and page 4, *supra.*

[5] *See* Staples, Brief of Petitioner *8, 1992 U.S. Briefs 1441 (1993).

[6] *See* Staples, Brief of Petitioner *8 and Tr. 119, ll. 1-3 and 121, ll. 4-6.

[7] *See* Staples, Brief for the United States, 1992 U.S. Briefs 1441 at *10-11 and pages 7-9, *supra.*

would be the result of a malfunction, and that a malfunctioning semiautomatic rifle is not a machinegun.[8] Indeed, the first test of the Olofson rifle by the government determined that Olofson's rifle was a malfunctioning semiautomatic rifle, not a machinegun.[9]

In Staples, the defendant had "requested the district court to instruct the jury that, to establish a violation ..., the Government must prove beyond a reasonable doubt that the defendant 'knew that the gun would fire **fully automatically**."[10] The Staples Court found the denial of defendant's request to be reversible error, and "remanded [the case] for further proceedings consistent with [its] opinion."[11]

As in Staples, there was no evidence at trial that Olofson knew — at the time that the alleged criminal act took place — that the weapon fired "fully automatically" under the Staples definition.[12] Indeed, the only record evidence as to Olofson's knowledge was that he knew his rifle could malfunction and sometimes fire more than one round and then jam, without the release of the trigger or the exhaustion of the ammunition, the ATF tests of Olofson's AR-15

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[8] *See* Staples, Brief of Petitioner *12 and pages 7-8, *supra*.

[9] *See* pages 4-5, *supra*.

[10] Staples, 511 U.S. at 603-04 (emphasis added).

[11] Staples, 511 U.S. at 620.

[12] *See* Staples, 511 U.S. at 602 n.1.

having been conducted months after the July 2006 transfer.[13] Yet, the district court refused to apply the Staples definition in its review of the sufficiency of the evidence, and refused to include that definition in its jury instructions.

A. The Rulings of the Courts Below on the Sufficiency of the Evidence Conflict with Staples and the Opinions of Two Other Federal Circuits.

1. The Courts Below Refused to Apply the Staples Definition.

According to Staples, the government would have had to prove beyond a reasonable doubt that Olofson knew at the time of the transfer of his AR-15 semiautomatic that the firearm could shoot automatically, that is, "once its trigger is depressed, the weapon will automatically continue to fire until the trigger is released or the ammunition is exhausted." *Id.* At the time that Kiernicki borrowed Olofson's AR-15, the evidence — construed most favorably for the prosecution — showed only that Olofson knew that the AR-15 could malfunction, firing three or four shots at the single pull of the trigger without manual reloading and then jam.

According to the prosecution's expansive view of "automatically," however, a malfunctioning rifle which jammed after shooting more than one shot at the

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[13] *See* pages 3-7, *supra*.

single pull of the trigger is a machinegun, regardless of whether it stopped shooting before either the trigger was released or the ammunition was exhausted. Embracing the prosecution's promiscuous definition of "automatically" — that at the single pull of the trigger a firearm shoots more than one shot, "no matter what the cause"[14] — the trial court improperly ruled that the evidence was sufficient to establish that Olofson knew that his malfunctioning semiautomatic was a machinegun. *See* Sent. Tr. 15, ll. 10-16.

Although the court of appeals affirmed, it did so only after rejecting Staples and applying its own definition of "automatically," thereby enabling it to find that evidence showing that Olofson knew, at the time of the transfer, that the AR-15 had previously fired more than one shot and jammed "was sufficient for a reasonable jury to find beyond a reasonable doubt that the defendant knew that the AR-15, with a single pull of the trigger and without manual reloading, could shoot more than one round **as the result of a self-acting mechanism.**" Olofson, 563 F.3d at 659; App. 12a (emphasis added). Had either court below applied the Staples definition, it could not have justified its finding.

2. The Staples Definition of "Automatic" Was Material to its Mens Rea Holding.

According to the court of appeals, the Staples definition did not apply to the Olofson transfer because

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[14] Tr. 151, ll. 9-15.

"[t]he precise definition of 'automatically' was not at issue [in Staples]; therefore the Court's discussion of the terms 'automatic' and 'fully automatic' was immaterial to its holding." Olofson, 563 F.3d at 657; App. 7a-8a. The court of appeals was mistaken.

The mens rea rule laid down in Staples is "that to be criminally liable a defendant must know that his weapon possessed **automatic firing capability so as to make it a machinegun as defined by the National Firearms Act."** United States v. X-Citement Video, Inc., 513 U.S. 64, 71 (1994) (emphasis added). In X-Citement Video, this Court explained that Staples held that such specific knowledge of "the features of a gun as **technically** described by the firearm registration Act" was necessary in order that "otherwise innocent conduct" would **not** be "criminalized." *Id.*, 513 U.S. at 72 (emphasis added).

In an effort to give further direction to the application of the Staples holding — that "the mens rea element ... requires the Government to prove the defendant knew that **the item** he possessed had the **characteristics** that brought it within the statutory definition of a firearm"[15] — this Court, in an opinion written by two justices in the Staples majority and two in dissent, said:

> [P]etitioner was charged with the unlawful possession of a machine-gun in violation of 18 U.S.C. §922(o). His conviction on that count was

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[15] Rogers v. United States, 522 U.S. 252, 254 (1998) (emphasis added).

> reversed on appeal after the Government conceded that the evidence did **not** establish that petitioner **knew** that the **gun** had been **modified** to act as a **fully automatic** weapon.... **Reversal was therefore required under Staples**.... [Rogers v. United States, 522 U.S. 252, 254 n.1 (1998) (emphasis added).]

3. The Ruling of the Court of Appeals Conflicts with Decisions of the U.S. Courts of Appeals for the First and Eighth Circuits.

In United States v. Nieves-Castano, 480 F.3d 597 (1st Cir. 2007), the First Circuit implemented the mens rea rule in Staples by applying the definitional distinction between a machinegun and a semiautomatic firearm as set forth in footnote 1 of Staples. *Id.*, 480 F.3d at 600. The court concluded that, even though there was sufficient evidence to establish that the AK-47 semiautomatic weapon at issue was "**capable** of **fully automatic** fire," the evidence was **insufficient** to establish beyond a reasonable doubt that the defendant knew "that the rifle possessed the characteristics of an **automatic** weapon." *Id.*, 480 F.3d at 600 (emphasis added).

Similarly, in United States v. Backer, 362 F.3d 504 (8th Cir. 2004), the Eighth Circuit used the Staples terminology of "fully-automatic" in its effort to apply the Staples "mens rea standard" to the sufficiency of the evidence in its review of whether a defendant knew that his originally-designed semiautomatic firearm "operated as a machine gun." *Id.*, 362 F.3d at 507. In

its analysis of the evidence, the Backer court referred to pages 603 through 606 of the Staples opinion[16] where: (a) the term, "semiautomatic," appears in juxtaposition to "automatic" and "fully automatic," reflecting the distinction between the meaning of the terms, as set forth in Staples footnote 1, and (b) the mens rea issue is framed in relation to the "automatic" and "fully automatic" firing capability of the weapon at issue. *See* Staples, 511 U.S. at 603-05. Additionally, the Backer court cited to pages 614-15 of the Staples decision[17] where the Supreme Court wrapped up its discussion of its mens rea rule, reiterating the rule's distinction between a "semiautomatic" and "fully automatic" weapon, and the importance of ensuring that no one "who has purchased what he believes to be a semiautomatic rifle or handgun ... can be subject to imprisonment, despite absolute ignorance of the gun's firing capabilities, if the gun turns out to be an automatic." *See* Staples, 511 U.S. at 615.

In sum, the courts of appeals for both the First and Eighth Circuits found that the definition of "automatic" or "fully automatic" was material to the Staples mens rea holding, and decided accordingly.

4. The Ruling of the Court of Appeals Conflicts with Staples.

Unlike the First and Eighth Circuits, the court of appeals below dismissed Staples footnote 1 as no more

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[16] Backer, 362 F.3d at 507.

[17] Backer, 362 F.3d at 507.

than "a glossary for terms frequently appearing in the opinion," and thus ruled that the definitions of "'automatic' and 'fully automatic'" were not to be understood as terms of statutory interpretation. Olofson, 563 F.3d at 657; App. 8a. To the contrary, however, the Staples Court expressly adopted the term "fully automatic" to identify those firearms that are "within the meaning of" 26 U.S.C. section 5845(b) as it applies to "'any weapon which **shoots** ... automatically more than one shot, without manual reloading, by a single function of the trigger." *Id.,* 511 U.S. at 602 (emphasis added). Indeed, after setting forth its definition of "automatic" or "fully automatic" in the footnote, the Staples Court stated that "[s]uch weapons are 'machineguns' within the meaning of the Act." Staples, 511 U.S. at 602 n.1.

The court of appeals insisted, however, that the "preface[]" to footnote 1 — "as used here" — limited the footnote's application to the opinion. Olofson, 563 F.3d at 657, App. 8a. But the footnote applied to "the Act," not to "the opinion." *See* Staples, 511 U.S. at 602. Further, the word, "here," means "at this point in space," or "in this location," not "in what follows." Webster's Third New International Dictionary 1058 (1964). Had the Court meant its definitions in footnote 1 as a guide to the reader of its opinion, and not as an interpretation of the Act itself, the Court would have used the prefatory phrase, "as used hereinafter," *i.e.,* "in the following part of this opinion." *See id.* at 1059.

B. Staples Requires a Jury Instruction Specifying the Meaning of "Automatically" in a Prosecution under 18 U.S.C. Section 922(o).

Because the court of appeals below dismissed Staples footnote 1 as a "glossary [of] terms," rather than an authoritatively binding interpretation of the meaning of "automatically," it concluded that Staples "did not establish a requirement for district courts to instruct juries on the meaning of 'automatically' from § 5845(b)." Olofson, 563 F.3d at 657; App. 8a. The court was not only mistaken; its conclusion put it in direct conflict with Staples.

In Rogers v. United States, 522 U.S. 252 (1998), a Court plurality expressed its understanding that, under Staples, prosecution for possession of any section 5845(b) "firearm" — including a silencer — would "require[] the Government to prove that the defendant knew that the item he possessed had the characteristics that brought it within the statutory definition of a firearm." *Id.*, 522 U.S. at 254. Although the Court found the particular mens rea instruction in Rogers to have been sufficient to apprise the jury that the government must prove beyond a reasonable doubt that the defendant knew the silencer to be a silencer, the Rogers plurality noted its assumption "that the trial judge would have been **more explicit in explaining the mens rea element of these offenses if Staples had been decided prior to submitting the case to the jury**." *Id.*, 522 U.S. at 258 (emphasis added). Furthermore, the plurality observed that "[i]t would be wise for trial courts to

explain the Staples requirement more carefully than the instruction used in this case to foreclose any possibility that jurors might [mistakenly] interpret the instruction" not to require that the defendant knew "that he possessed a device having **all the characteristics** of a silencer." *Id.*, 522 U.S. at 258 n.7 (emphasis added). *See also id.*, 522 U.S. at 259 (O'Connor, J., concurring).

Without doubt, then, this Court expected that the mens rea requirement in Staples would have a direct impact upon the requisite jury instructions, mandating that the instructions be sufficiently **explicit** so as to ensure that the defendant knew that the weapon at issue had **every** characteristic of a forbidden firearm, lest the defendant be subject to a substantial fine and prison sentence for engaging in "otherwise innocent activity." *See* United States v. X-Citement Video, Inc., 513 U.S. at 72. Accordingly, the "scienter requirement" laid down in Staples was expected to "apply to each of the statutory elements," one of which was "the **features** of a gun as **technically** described by the firearm registration Act...." *Id.* (emphasis added).

One of the features of the definition in 26 U.S.C. section 5845(b) is that a weapon "shoot[] ... automatically." Thus, Olofson requested the trial court to instruct the jury that it must find that, at the time of the transfer of his AR-15, Olofson knew that his AR-15 would "shoot[] ... automatically," that is, "once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition exhausted." Staples, 511

U.S. at 602 n.1. But the trial court refused, instructing the jury merely that the evidence must show beyond a reasonable doubt that Olofson "knew of the **features** of the gun that made it a machine gun as defined by federal law when he transferred the gun." (App. 33a (emphasis added)) or "that the defendant knew, or was aware of, the **essential characteristics** of the firearm which made it a machine gun." App. 33a (emphasis added).

By failing to articulate the specific "features" or "characteristics" of a weapon that "shoots ... automatically" are, neither instruction served as an adequate guide to the jury, especially in light of the prosecution's persistently mistaken advocacy before the jury that Olofson's AR-15 was a machinegun because it shot more than one shot at the single pull of a trigger, even though it stopped shooting because it jammed.[18] *See* United States v. Smith, 217 F.3d 746, 751 (9th Cir. 2000) (conviction for violation of 18 U.S.C. section 922(o) reversed for failure to give specific instruction on knowledge necessitated by the government's misstatements of law to the jury).

According to the court of appeals below, however, "the *Staples* footnote ... merely 'offer[ed] commonsense explanations' of the words 'automatic' and 'semiautomatic.'" Olofson, 562 F.3d at 658; App. 9a. Yet, it rejected those "explanations" as inaccurate statements of the law in favor of a different meaning of "automatically" and inexplicably concluded that its

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[18] *E.g.*, Tr. 204, ll. 8-18.

definition was "readily accessible to lay persons and ... in no sense confusing." *Id.* at 659; App. 11a.

Staples, however, mandates that the jury be specifically instructed on those "features ... technically described" by 26 U.S.C. section 5845(b) as an element of the offense. *See* X-Citement Video, 513 U.S. at 72.

While the Staples footnote 1 definition of "automatically" does not cite to any source, the definition conforms to the technical meaning of "automatically," as applied to weapons,[19] not to its general, ordinary meaning. Further, the Staples record in the trial court featured a battle of the experts over whether the AR-15 firearm in that case could be fired in a "fully automatic mode" or whether its "automatic firing capability ... was the result of a malfunction." *See* Staples, Brief of the United States at *8-*12. Similarly, the trial of Olofson uncovered differing technical opinions as to whether Olofson's malfunctioning semiautomatic rifle shoot automatically as a machinegun. *Compare, e.g.*, Tr. 101, l. 14 – 102, l. 19 *with* Tr. 166, l. 19 – 168, l. 11. The court of appeals, however, ruled that "the district court correctly used § 5845(b) to instruct the jury" (Olofson, 563 F.3d at 659; App. 11a), erroneously presuming that the bare language of section 5845(b) would offer sufficient guidance to the jury.

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[19] *See* pages 35-36, *infra*.

C. The Court of Appeals Presumptuously and Incorrectly Denounced the Staples Definition of "Automatic" as "Not an Accurate Statement of the Law."

After liberating itself from the Staples footnote — as immaterial to the holding of the case, and irrelevant to any jury instruction on "automatically" — the court of appeals went one step further, denouncing the Staples definition of "automatically" as "not an accurate statement of law." Olofson, 562 F.3d at 659; App. 11a.

In order to reach such a conclusion, the three-judge panel was first compelled to address whether the Seventh Circuit opinion in United States v. Fleischli, 305 F.3d 643 (7th Cir. 2002), had foreclosed this option, since Fleischli had applied *verbatim* the Staples footnote definition of "automatic" in a ruling that a triggerless minigun was a machine gun. *Id.*, 305 F.3d at 654-55.

According to the panel below, Fleischli had just "borrow[ed] terminology from *Staples* in order to stamp out the appellant's 'disingenuous argument'" that his minigun was a semiautomatic firearm. Olofson, 563 F.3d at 658; App. 8a. Relying on Fleischli's characterization of the Staples footnote as having "offered common sense explanations of the terms 'automatic' and 'semiautomatic,'" the panel below concluded that Fleischli had not "consider[ed] [Staples] to be precedentially binding." Olofson, 562 F.3d at 658; App. 9a. In short, the panel concluded

that Fleischli was not binding because the Staples footnote was not binding.

Once free from having to conform to Staples and Fleischli as a matter of precedent, the Olofson panel was still encumbered with the duty to define "automatically." Relying on the general rule that "'the most relevant time for determining a statutory term's meaning' is the year of the provision's enactment," the panel chose a dictionary definition of "automatic" that "was commonly used and understood in 1934, the year in which the definition of 'machinegun' became law with the passage of the National Firearms Act." Olofson, 362 F.3d at 658; App. 9a-10a. But it offered no explanation why it chose the "common" meaning of "automatically"[20] when the very same 1934 dictionary contained a definition of "automatic gun"[21] that conformed to the Staples definition.[22] Yet, without any discussion of the merits of the Staples definition, the panel summarily concluded that "[i]n light of [its] interpretation ... Olofson's proffered instruction was

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[20] "Having a self-acting or self-regulating mechanism that performs a required act at a predetermined point in an operation."

[21] "A firearm which, after the first round is exploded, by gas pressure or force of recoil automatically extracts and ejects the empty case, loads another round into the chamber, fires, and repeats the above cycle, **until the ammunition in the feeding mechanism is exhausted or the trigger is released.**" (Emphasis added.)

[22] This oversight is discussed more specifically at pages 31-32, *infra.*

not an accurate statement of the law." Olofson, 362 F.3d at 659; App. 11a.

Because Olofson had requested an instruction incorporating *verbatim* the meaning of automatic in Staples footnote 1, and that instruction was found to be incompatible with the panel's definition of "automatically," then the panel opinion, in effect, purports to overrule the Staples definition of "automatic." And, insofar as Fleischli rests upon the Staples definition, the panel effectively overruled Fleischli.

On May 15, 2009, Olofson filed a timely Petition for Rehearing *En Banc,* calling the full court's attention to the panel's conflict within the Seventh Circuit — and more importantly the conflict between the panel decision and Staples. Nevertheless, on June 1, 2009, Olofson's rehearing petition was denied without a single judge in active service requesting a vote, even though Olofson called the full court's attention to "the rule that Supreme Court precedents are binding on lower federal courts." *See* Olofson Petition For Rehearing, p. 15.

As demonstrated above, the Staples footnote-one definition of "automatic" or "fully automatic" has direct application to this case. Indeed, even the facts in Staples are remarkably similar. Both cases involved an AR-15 semiautomatic rifle that could shoot more than one shot at the single pull of the trigger. And both cases posed the same question: Whether the multiple shots were the consequence of a malfunction, and, if not, whether the defendant knew or was aware

of the automatic firing capability of the AR-15. To resolve these issues, the Staples court employed its footnote-one definitions distinguishing between a machinegun and a semiautomatic rifle. At trial and on appeal, Olofson attempted to employ those same definitions, only to be rebuffed by the trial court, and then to be told by the court of appeals, effectively, that the Supreme Court did not know what it was talking about when it laid down the definition of "automatically" in Staples.

Appellate courts have been instructed to follow the Supreme Court, leaving to that Court "the prerogative of overruling its own decisions." Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989). This is that rare case where a court of appeals "has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power." *See* Rule 10(a), Rules of the U.S. Supreme Court.

II. The Court of Appeals' Affirmance Based on an Erroneous Definition of "Automatic" Presents an Important Question of Federal Law that Should Be Settled by this Court.

A. The Trial Court Adopted the Prosecution's Erroneous Understanding of What Constitutes "Automatic" Fire.

In support of his request for the Staples jury instruction, Olofson argued that a malfunctioning semiautomatic rifle that could exhibit some multiple round fire and then jam "did not fire until the trigger

was released or until it emptied the magazine," and therefore would not be a machinegun. *See* Pretr. Tr. 26, l. 24 – 27, l. 1; 34, ll. 15-19; App. 35a-37a.

The prosecutor asserted that the Staples definition "seems to be inconsistent with the statutory definition which provides that a machine gun is any weapon that shoots more than one shot without manual reloading by a single function of the trigger." *Id.*, 35, ll. 5-10. Conspicuously absent from the prosecutor's understanding of the "statutory definition" of a machinegun was the word "automatically." *See* 26 U.S.C. § 5845(b). That the omission was not inadvertent became clear later in the trial when the prosecutor objected as follows to Olofson's proffer that his expert witness would testify that Olofson's AR-15 fired more than one shot because of a **malfunction**, namely, a "hammer follow condition"[23]:

> [**T]here's no indication that it makes any difference** under the statute. If you pull the trigger once and it fires more than one round, **no matter what the cause**, it's a machine gun. [Tr. 151, ll. 9-15 (emphasis added).]

In response, Olofson contended that "[t]he Staples case, footnote one" would be necessary, to guide the jury to properly consider the defense's "issue about the hammer follow and what happened with the three rounds and then stopping." Tr. 151, ll. 16-22. Although the trial court allowed Olofson's expert

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[23] Tr. 150, l. 22 – 151, l.1.

witness to testify about the malfunction (Tr. 166, l. 19 – 167, l. 14), it denied Olofson's corresponding jury instruction request.

The court of appeals affirmed, ruling that "the district court was not required to define [automatically] for the jury," its "meaning [being] readily accessible to laypersons." Olofson, 562 F.3d at 659; App. 11a. As the court of appeals assumed:

> Under [its] interpretation ... a defendant can still argue that the *reason a gun fired more than one round* (with a single pull of the trigger without manual reloading) was due to a malfunction — i.e., the additional rounds fired resulted from a mishap rather than from a **regular self-acting mechanism**. [*Id.* at 658-59; App. 11a (italics original) (bold added).]

The court of appeals failed to recognize that, without express guidance, a jury would not know that a malfunction would negate a finding of "automatically." But the court of appeals' own definition of automatically did not distinguish between an irregular "self-acting mechanism" and a "regular" one and, thus, fell far short of the Staples definition.

B. The Court of Appeals' 1934 Definition of "Automatically" Is Demonstrably Erroneous.

The court of appeals placed its reliance on a definition drawn from a 1934 dictionary, to learn how "automatically" "was commonly used and understood

in 1934, the year in which the definition of 'machinegun' became law with the passage of the National Firearms Act." 563 F.3d at 658; App. 9a-10a. Thus, relying on that dictionary, the court concluded that "**automatic**" meant "[h]aving a self-acting or self-regulating mechanism which performs a required act at a predetermined point in an operation." *Id.*

However, on the same page of the same dictionary appears a definition of "automatic gun" similar to that in Staples, but which was ignored by the court:

> A firearm which, after the first round is exploded, by gas pressure or force of recoil automatically extracts and ejects the empty case, loads another round into the chamber, fires, and repeats the above cycle, **until the ammunition** in the feeding mechanism is **exhausted or pressure on the trigger is released**. [Webster's New International Dictionary 187 (2d ed 1934) (emphasis added).]

The court of appeals offered no explanation why it chose "the ordinary meaning" of "automatic" over this more contextual one. Nor did the court explore the legislative history of the Federal Firearms Act of 1934 for clues as to the meaning of this critical term.

As initially enacted in the Federal Firearms Act of 1934, a "machinegun" was defined as follows:

> The term "machine gun" means any weapon which shoots, or is designed to shoot, **automatically or semiautomatically**, more

> than one shot, without manual reloading, by a single function of the trigger. [48 Stat. 1236 (73d Cong., 2d Sess., June 26, 1934) (emphasis added).]

As originally proposed, the Act would have defined a "'machine gun' [as] any weapon designed to shoot **automatically or semiautomatically twelve or more** shots without reloading." *See* H.R. 9066, 73d Cong., 2d Sess. (emphasis added).

In testimony presented to the House of Representatives, Committee on Ways and Means, Karl T. Frederick, President of the National Rifle Association, stated that this proposed definition was "wholly inadequate and unsatisfactory." Hearing, House of Representatives, Committee on Ways and Means, p. 39 (Apr. 16, 1934). In response to a request from a committee member for a more adequate definition, Mr. Frederick submitted that the definition be revised so as to read:

> A machine gun ... as used in this act means any firearm ... which **shoots automatically more than one shot without manual reloading, by a single function of the trigger**. [*Id.,* p. 40 (emphasis added).]

Mr. Frederick explained his proposal as follows: "The distinguishing feature of a machine gun is that by a single pull of the trigger the gun continues to fire **as long as there is any ammunition in the belt or in the magazine.**" *Id.* (emphasis added).

While Congress did not adopt Mr. Frederick's language in 1934, it did so in the Gun Control Act of 1968 and struck "semiautomatically" so that the definition would read:

> The term "machinegun" means any weapon which **shoots**, is designed to shoot, or can be readily be restored to shoot, **automatically more than one shot, without manual reloading, by a single function of the trigger**. [*See* Gun Control Act of 1968, Pub. L. 90-618, § 201, 82 Stat. 1213, 1231 (1968) (emphasis added).]

By this 1968 revision, Congress clearly required that to be a machinegun, a semiautomatic rifle had to be proven to fire "automatically." According to the Staples Court, this meant that the rifle must be shown to "shoot ... automatically," that is, fire and keep on firing, until the trigger was released or the ammunition was exhausted, consistent with the 1934 testimony of Mr. Frederick. Apparently unaware of this legislative history, including the 1968 amendment to the definition of machinegun, the court of appeals made no effort to ascertain the meaning of "automatically" in 1968. Had the court of appeals done so, it would have found that the Staples definition fits squarely within the meaning of "automatic" as applied to a firearm in the 1964 edition of Webster's Third International Dictionary, which reads:

> marked by use of either gas pressure or force of recoil and mechanical spring action for **ejecting** the empty cartridge case after the first shot,

> **loading** the next cartridge from the magazine, **firing, ejecting** the spent case, and **repeating** the above cycle **as long as the pressure on the trigger is maintained and there is ammunition in the magazine or other loading device**. [*Id.* 148 (emphasis added).]

The court of appeals also overlooked the fact that "[t]he word 'firearm' is used as a **term of art** in the NFA" and even ordinary words that appear in the definition — such as "make" — take on a meaning tailored to the purpose of the Act. *See* United States v. Thompson/Center Arms, 504 U.S. 505, 506-509 (1992) (emphasis added). Furthermore, the court of appeals appears to have ignored the Supreme Court's observation that "the statutory elements [of section 5845(b)] that criminalize otherwise innocent conduct [concern] features of a gun as **technically** described by the firearm registration Act." X-Citement, 513 U.S. at 72 (emphasis added).

C. The Staples Definition Is Supported by Numerous Authorities, Including the ATF Itself.

Olofson called the court of appeals' attention not only to the 1964 dictionary definition of "automatic,"[24] but also to numerous other authoritative definitions

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[24] *See* United States v. Olofson, Docket No. 08-2294 (7th Cir.), Brief of Appellant, p. 36.

that reinforce the accuracy of the Staples/Fleischli definition.[25]

In prosecuting Olofson, the government even violated its own official definitions of "automatic" in ATF Rul. 2004-5 (Aug. 18, 2004) and in ATF's Guide to Investigating Illegal Firearms Trafficking (Oct. 1997). Designed, *inter alia*, "to promote uniformity in the ... meanings of [illegal firearms trafficking] terminology" (*id*. at 9), the ATF Guide defines "automatic" or "fully automatic" as:

> An Autoloading action that will fire a succession of cartridges, so long as the trigger is depressed, or **until the ammunition supply is exhausted**. Automatic weapons are machineguns subject to the provisions of the National Firearms Act (NFA). [*Id*. at 100 (emphasis added).]

Indeed, ATF — the administrative agency commissioned to administer the federal firearms laws — formally adopted the Staples definition in support of its finding that a particular device, when added to a semiautomatic rifle, constitutes a machinegun because "when activated by a single pull of the trigger, [it] initiates an automatic firing cycle that continues **until** either the finger is released or **the ammunition supply is exhausted**." ATF Rul. 2006-2, 2-3 (Dec. 13, 2006) (emphasis added).

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[25] *See* United States v. Olofson, Docket No. 08-2294 (7th Cir.), Brief of Appellant, pp. 19, 36-37.

In his Firearms Deskbook (2008 Edition), author Stephen Halbrook quotes the definition of "automatic" that appears in the Glossary of the Association of Firearm and Toolmark Examiners (1985):

> A firearm design that feeds cartridges, fires and ejects cartridge cases **as long as the trigger is fully depressed and there are cartridges available in the feed system.** [*Id.* 2 as quoted in S. Halbrook, Firearms Law Deskbook, § 6.6, 440 (2008 ed.) (emphasis added).]

The court of appeals, however, chose to ignore ATF's official definition of "automatic," as well as other legal and firearms authorities. Clearly, the Staples definition is an accurate statement of the law, and the definition of the court of appeals below is not.

III. The Precise and Detailed Staples Definition of "Automatically" Is Necessary to Protect Second Amendment Rights.

In Staples, the government took the position that it need only prove that a defendant knew that a firearm was "dangerous" to obtain a conviction for violation of a federal law prohibiting possession of a machinegun. *Id.*, 511 U.S. at 608. This Court wisely rejected that argument on the ground that it would "'criminalize a broad range of apparently innocent conduct.'" *Id.* at 610. Instead, Staples crafted a mens rea rule that requires the government to prove, beyond a reasonable doubt, that a defendant must know the "facts that make his conduct illegal." *Id.* at 610, 619. In the case of a semi-automatic rifle that the government claims

to be a machinegun because it "shoot[s] ... automatically," Staples requires the government to prove that the weapon **actually does shoot automatically** — defined to be "more than one shot at the single pull of the trigger without manual reloading unless the trigger was released or the ammunition exhausted." *Id*. at 602 n.1.

Had the government adhered to the Staples precise and detailed description of what constitutes a machinegun, Olofson would never have been put in jeopardy of a felony conviction with up to 10 years' imprisonment. But the government chose not to adhere to Staples and, thus far, has successfully persuaded the courts that there is no need for precision and detail in defining the essential characteristics of a machinegun. Not only has that choice put Olofson in prison for conduct that, under Staples would be innocent, Olofson's conviction — if left standing — threatens countless other law-abiding citizens with becoming "felons-by-chance" should their semiautomatic weapons malfunction while exercising their right to keep and bear arms secured by the Second Amendment.

Olofson was convicted in early January 2008, just five months before this Court decided District of Columbia v. Heller, 554 U.S. ___, 128 S.Ct. 2783 (2008), settling the question whether the Second Amendment secured an individual right. Heller ruled that the federal government may not prohibit a person from possessing a handgun in his own home for self-defense. Like Staples' and Olofson's semiautomatic rifles, semi-automatic handguns are complex machines

and can malfunction, causing the weapon to fire more than one shot at the single pull of the trigger. But malfunctions alone do not create machineguns out of lawful-to-own semiautomatic firearms. Only the precision and detail of a Staples-like definition of "automatically" can protect the constitutional right to own a semi-automatic handgun against arbitrary government classification, leading to seizure, prosecution, incarceration, and lifetime ban on firearm ownership. Under the long-standing rule, it is "incumbent upon [this Court] to read [a] statute to eliminate [serious constitutional] doubts so long as such a reading is not plainly contrary to the intent of Congress." *See* X-Citement Video, 513 U.S. at 78.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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