No. 18-936

IN THE
Supreme Court of the United States

JEREMY KETTLER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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STATEMENT

This case was tried together in district court with co-defendant Shane Cox. Each defendant separately appealed, but both cases were decided by a single Tenth Circuit opinion. Petitions for Certiorari were filed for both cases on the same day, and Mr. Cox's petition was docketed as No. 18-7451.

REPLY BRIEF FOR PETITIONER

1. The government suggests several reasons why this Court should find it unnecessary to reconsider the continuing validity of Sonzinsky v. United States, 300 U.S. 506 (1937). None is persuasive.

First, the government notes this "Court has denied previous petitions inviting reconsideration of *Sonzinsky*," and argues that the Court "should follow the same course here." Brief for the United States in Opposition ("Opp.") at 7. However, those earlier petitions occurred over 15 years ago, while one of Petitioner's most compelling arguments involves ATF's 2003 transfer from the Treasury Department to the Justice Department. Petition for Certiorari ("Pet.") at 8. Moreover, the government never alleges that the same challenges brought here were made in any of those earlier petitions. Petitioner's theory is that the National Firearms Act of 1934 ("NFA") still lives, despite having suffered a death by a thousand cuts — as numerous developments over the years have transformed the NFA from a limited taxing statute into a bloated and unabashed gun control scheme. Today, much of the NFA is entirely unrelated to the collection of revenue, and entirely unsupportable under Congress's power to lay and collect taxes.

Reconsideration of earlier decisions is hardly a novel concept. To the contrary, there are numerous instances where the passage of time and change of circumstances have led this Court to again review — and then declare invalid — a law that it previously upheld. For example, considering Section V of the Voting Rights Act, this Court recently noted that "[t]here is no denying ... that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.... 'current burdens ... must be justified by current needs.'" Shelby County v. Holder, 570 U.S. 529, 535-36 (2013). Indeed, just as this Court explained that "history did not end in 1965" (*id.* at 552), neither did it end in 1937 with this Court's Sonzinsky decision. Petitioner has pointed to numerous and significant changes to both law and fact that today undermine the justification for the Sonzinsky opinion, few of which were addressed by the government. Pet. at 5-7.

A recent book co-authored by two members of this Court discusses a "school of thought [where] the oldest decisions should be subject to more searching reconsideration because facts change, times change, and the country should not be saddled with rules of law whose relevance disappeared decades if not centuries ago." B. Garner, *et al.*, The Law of Judicial Precedent (Thomson Reuters: 2016). This principle has direct application to the NFA. Not only is the NFA no longer justifiable under Congress's power to tax, but also the days of gangster bootleggers hanging off the side rails of a Ford Deuce with Tommy Guns are long past. These days, the ubiquitous semi-automatic

handgun — "the quintessential self-defense weapon"[1] — is also the firearm chosen overwhelmingly by the criminal element in this country.[2] In other words, today the NFA is a (constitutionally flawed) solution in search of a problem.

Second, the government notes the court of appeals' conclusion that Petitioner did not provide sufficient reasons to "'justify departing from *Sonzinsky*'s conclusion.'" Opp. at 7 (citing Petition Appendix ("App.") at 22a). The government then claims that "'[o]ther circuits uniformly agree,'" making it appear as if other courts of appeals have also considered and rejected Petitioner's arguments. However, the court of appeals only noted that other circuits have concluded "the NFA falls within Congress's power to tax." App. 22a. In fact, none of the decisions cited considered the arguments Petitioner makes here, instead addressing three arguments that Petitioner is not making:

1) an argument (rehashed from Sonzinsky) that the NFA was always meant to be a regulation, not a tax;

2) an argument in the aftermath of the Tenth Circuit's opinion in United States v. Dalton, 960 F.2d 121, 124 (10th Cir. 1992), that Congress's criminalization of possession (28 U.S.C. § 5861(d)) does not aid in raising revenue; or

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[1] D.C. v. Heller, 554 U.S. 570, 629 (2008).

[2] *See, e.g.*, S. Kollmorgen, "Chicago Criminals' Favorite Gunmakers: A Visual Ranking," The Trace (Jan. 6, 2016).

3) a Dalton-based argument that the NFA is unconstitutional — as applied — because it was impossible to register an illegal device which had been manufactured and transferred without registration.

Contrary to the impression the government seeks to leave, the Tenth Circuit never claimed that Petitioner's arguments have been rejected by other courts.

Third, taking issue with Petitioner's position that changed circumstances since Sonzinsky require its reconsideration, the government simply restates generic holdings from taxing power cases. First, that "'every tax is in some measure regulatory,'" even if it "'deter[s] or even suppress[es] the taxed activity.'" Opp. at 8. And second, that "'the essential feature of any tax' is that it 'produces at least some revenue....'" *Id.* But the government never confronts how Petitioner's theories that conflict with those principles.

On the contrary, Petitioner simply notes that there must be some link between a regulatory effect and the taxing purpose. Pet. at 11. In other words, the NFA's incidental regulation (however onerous) must assist in achieving the purpose of the statute — the collection of taxes for the government. That is not merely Petitioner's interpretive gloss, but represents this Court's repeated holding. In Sonzinsky, the Court upheld "registration provisions, which are obviously supportable as **in aid of** a revenue purpose." Sonzinsky at 513 (emphasis added). By contrast, in Hill v. Wallace, 259 U.S. 44 (1922), the Court struck

down a law where "[t]he manifest purpose of the tax is to compel ... compl[iance] with regulations, many of which can have **no relevancy to the collection** of the tax at all." Hill at 66 (emphasis added).

As Petitioner noted, many parts of the current regulatory scheme are not "in aid of a revenue purpose" — in fact many actually impede — collection of NFA taxes.[3] Pet. at 13. The government makes no attempt to rebut this reality or explain how the regulations have "relevancy to" raising revenue.

As to the NFA's revenue-raising effect, Petitioner acknowledges this Court's holdings that taxes need not raise substantial revenue for the government — but the NFA does not even clear that low hurdle. Rather, over the last eight decades, inflation has effectively reduced the NFA's $200 "tax" by 95 percent, and as Congress and bureaucrats have piled restriction upon regulation, the cost of administering the bloated NFA now greatly exceeds any revenue — possibly several times over. Pet. at 9, 17-18. The government fails to address the high cost of enforcing the NFA in relation to the pittance generated in "revenue." Rather, the government's position seems to be that it should be permitted to expend **any** amount on enforcing a vast

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[3] The government rebrands the same argument later in its opposition, arguing that "[t]he Constitution ... grants Congress broad authority to enact laws that are 'necessary and proper for carrying into Execution' its enumerated powers, including the power to tax." Opp. at 10. Yet much of the current regulatory scheme is neither necessary nor proper to aid the taxing power on which the NFA was enacted and is being defended. *See* Pet. at 13.

regulatory regime, so long as it associates with it a few dollars in fees called a "tax" that generates **any** revenue at all. This Court's precedents should not be stretched so far, as such a principle would allow Congress to circumvent constitutional limits on the scope of its power.

Fourth, the government does not appear to challenge Petitioner's argument that the NFA looks far less like a tax since ATF was moved from the Treasury Department to the Justice Department. Rather, the government adopts the Tenth Circuit's conclusion that the transfer alone does not matter. Opp. at 9. The government claims that "Petitioner does not explain why the transfer ... transforms a tax ... into something other than a tax." *Id.* On the contrary, Petitioner **did** explain why this change is important — because this Court has repeatedly said so. Pet. at 7-8. As Petitioner noted, this Court has **struck down** a challenged law in part because it **was not** administered solely by the Treasury Department, and has **upheld** a challenged law in part because it **was** administered solely by Treasury. *Id.* Contrary to the government's assertion, it **does** matter who administers a so-called "tax," and this case is less defensible than either of those referenced above, because here the Treasury Department is involved neither in the collection of NFA taxes nor enforcement of its regulations.

2. Petitioner has argued that the circuit court erred in ruling that suppressors are not protected by the Second Amendment because they are "firearm accessories," not "bearable arms." Pet. at 21-22. In

response, the government asserts that the Second Amendment protects only "'weapons of offence, or armour of defence,'" and that suppressors are neither. Opp. at 10 (quoting Heller at 581). Then, only two pages later, the government's brief adopts the polar opposite position, that suppressors are outside the protection of the Second Amendment because they are "'dangerous and unusual weapons.'" Opp. at 12. The government even asserts that suppressors are so dangerous that they are part of "the arsenal of *** the 'gangster.'" *Id.* (citing as authority a Michigan case decided during the era of John Dillinger and Bonnie and Clyde). The government is wrong on both counts.

Suppressors clearly are "firearm accessories." Briefing by Appellants below explained to the court their function, and the circuit court adopted that analysis. App. at 28a. Just one of the common uses of suppressors is to protect hearing, which is particularly important for Petitioner, a disabled veteran, as suppressors help to avoid further impairment of hearing. Pet. at 23, 27-28.[4] Neither the Tenth Circuit nor the government dispute any of these assertions, but the court below simply asserted that "because silencers are not 'bearable arms,' they fall outside the Second Amendment's guarantee." App. at 29a. That view so badly misconstrues the Heller decision and is so extreme that it even forced a concurring judge to issue a separate opinion to disclaim that the panel's

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[4] Rather than address arguments made by Petitioner, the government invokes a statement by Kettler's co-defendant, Shane Cox, that suppressors make shooting "more enjoyable," seeking to leave the impression that this is all they do. Opp. at 11.

opinion had determined items such as ammunition to be outside the Second Amendment's protection. App. at 51a.

The government's Brief in Opposition was careful never to embrace the Tenth Circuit panel's extreme position, but rather created an atextual "necessary" standard for protected "firearm accessories," asserting that ammunition is "necessary to make firearms usable for self-defense" but silencers are not. Opp. at 11-12. By defining the scope of the right to keep and bear arms as limited to only what is "necessary," the government would have this Court reject Heller's holding that handguns are protected arms because they are "overwhelmingly chosen by American society" for self-defense (Heller at 628), even if not "necessary" for it. *Id*. at 629. *See also* Brief of *Amici Curiae* Kansas, *et al*., at 4-5.

Suppressors are clearly not "dangerous and unusual" weapons, and they are in "common use." The government's opposition failed to mention many key facts. First, the court below declined to categorize suppressors as "dangerous and unusual," noting "we needn't decide the issue." App. at 29a n.13. Second, states have increasingly recognized that suppressors are not dangerous, and it is reported that 42 states now allow purchases and possession of suppressors.[5] Far from being standard issue for gangsters, as the

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[5] *See* https://americansuppressorassociation.com/wp-content/uploads/2017/10/162261_HANDOUT_UPDATE.pdf.

government implies, suppressors are almost never used in crime.[6]

The government admits that "few courts" have addressed whether the Second Amendment protects suppressors, but claims that the courts which had addressed the issue have concluded they are not so protected. Opp. at 11. The cases cited often address the issue in *dicta* and are weak reeds upon which to rely. For the proposition that "[s]ilencers" "are even more dangerous and unusual than machine guns...." the government cites United States v. McCartney, 357 Fed. Appx. 73, 76 (9th Cir. 2009). Opp. at 12. While those words do appear in this loosely written opinion, the Ninth Circuit was contrasting the machineguns possessed by defendant in that case with "[t]he other weapons involved in this case," which included "[s]ilencers, grenades, and directional mines." Certainly the Ninth Circuit was not addressing the dangerousness of suppressors standing alone, and the government's assertion that a suppressor — a hollow metal tube with no moving parts — is more dangerous than a machinegun is simply absurd. Other authorities cited which found suppressors to be

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[6] Being highly regulated, there are perhaps more data available regarding the use of suppressors in crimes than for other firearm accessories, and that data shows that, far from being "part of 'the arsenal of ... the "gangster"'" (Opp. at 12), suppressors are not dangerous, unusual, or uncommon, and are rarely used in the commission of a crime. Pet. at 27. *See also* Brief *Amici Curiae* of Kansas, *et al.*, at 9. The conclusion of the court below that only bearable arms are protected by the Second Amendment, to the exclusion of accessories such as suppressors, should not be allowed to stand.

"unusual" failed to recognize the rapidly increasing number of lawfully registered suppressors, now approximately 1.3 million. *See* Pet. at 27. *See also* Brief *Amici Curiae* of Kansas, *et al.*, at 6.

3. The government disputes that this case provides a good vehicle for this Court to determine whether a tax targeting the exercise of Second Amendment rights violates the principles of Cox v. New Hampshire, 312 U.S. 569 (1941) and Murdock v. Pennsylvania, 319 U.S. 105 (1943). Notably, however, the government never disputes Petitioner's contention that the rule of those two cases should apply to protect the Second Amendment right to keep and bear arms against taxes targeting the exercise of that right.

First, the government argues that "the court of appeals held that petitioner was *not* exercising his Second Amendment rights when he bought and possessed an unregistered" suppressor. Opp. at 12. It was for that reason that Petitioner presented his second question for review — "[w]hether the Second Amendment protects firearm accessories such as sound suppressors." If firearm accessories are protected arms, then the government's first argument against this Court deciding the Murdock/Cox issue vanishes.

Second, the government argues that "the court of appeals expressly declined to consider the limits of the government's authority to tax the exercise of Second Amendment rights." Opp. at 13. It is true that the court of appeals did conclude that, because suppressors were not protected under the Second Amendment, the

NFA tax on their possession did not need to be subjected to the Murdock/Cox analysis. App. at 32a. However, this does not mean, as the government argues, that the issue was "not addressed by the Court of Appeals." Opp. at 13 (citation omitted). After reporting that "neither [the Tenth Circuit] nor the Supreme Court [had previously] applied *Murdock* or *Cox* [to] the Second Amendment," the court of appeals refused to apply that line of cases, preferring a more familiar approach: "[t]o analyze Second Amendment challenges to federal statutes, we have used *Reese*'s two-step test, borrowed from the Third Circuit, which **does not incorporate the Court's fee jurisprudence**." App. at 32a (emphasis added). Regardless of its reason to reach its decision, the court of appeals clearly considered this Court's Murdock/Cox "fee jurisprudence" and refused to apply it to the NFA tax imposed on suppressors.

Third, the government claims that the petition should be denied because Petitioner did not specifically argue Murdock/Cox in the district court, that the district court's failure to apply this Court's fee jurisprudence should be subject to plain-error review, and that its failure to do so was not clear error under current law. Opp. at 13. Yet as Petitioner argued below, this Court has held that "[o]nce a federal **claim** is properly presented, a party can make any **argument** in support of that claim...." Yee v. City of Escondido, 503 U.S. 519, 534 (1992) (emphasis added). *See* Appellant's Reply Brief at 16-17. Indeed, the court of appeals acknowledged that the trial counsel had "raised the Second Amendment in the district-court proceedings" (App. at 31a) but ruled that "the district

court didn't err (plainly or otherwise) in not applying the framework of *Murdock* and *Cox*." *Id*., App. at 31a. Having asserted the Second Amendment claim in district court, Petitioner was free to make an argument based on Murdock/Cox on appeal. As this Court recently explained: "a court would be remiss in performing its duties were it to accept an unsound principle merely to avoid the necessity of making a broader ruling." Citizens United v. FEC, 558 U.S. 310, 329 (2010).

Lastly, the government's assertion that this issue "is not 'clear under current law'" is incorrect. Opp. at 13. It is clear under existing law that a revenue-raising tax targeting the exercise of "constitutionally protected conduct" is impermissible *per se*. *See* Brief *Amici Curiae* of Downsize DC Foundation, *et al*., at 5. It is also clear that, since 2008, the Second Amendment has been recognized as protecting an individual right to keep and bear arms. *See* Heller at 592. It is a small step to apply those principles together to conclude that Murdock/Cox principles prevent the targeted taxation of the exercise of Second Amendment rights.

Respectfully submitted,

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