No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

DAVID SCHIEFERLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

BJORN E. BRUNVAND
Brunvand & Wise Law Group
615 Turner Street
Clearwater, Florida 33756
Ph: (727) 446-7505
Email: bjorn@acquitter.com
Florida Bar No. 0831077

J. JERVIS WISE
Brunvand & Wise Law Group
615 Turner Street
Clearwater, Florida 33756
Ph: (727) 446-7505
Email: jervis@acquitter.com
Florida Bar No. 0019181

Counsel of Record for Petitioner

QUESTIONS PRESENTED

I.

Whether items such as inline fuel filters and firearms solvent traps, which might be able to function to muffle or silence the report of a firearm, can qualify as "firearms silencers" or "firearm mufflers" under the National Firearms Act when the items are not marketed as silencers and have not actually been used to silence or muffle a firearm?

II.

Whether the Second Amendment prohibits any laws that foreclose law-abiding citizens with ordinary self-defense needs from possessing items that serve as firearm mufflers or silencers?

LIST OF PARTIES

The parties to the judgment from which review is sought are the Petitioner and appellant in the lower court, David Schieferle, and the Respondent and appellee in the lower court, the United States of America.

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OPINION BELOW

The United States Court of Appeals for the Eleventh Circuit affirmed the judgment of the district court in an unpublished opinion, *United States v. Schieferle*, No. 23-11792, 2024 WL 1905326, (11th Cir. May 1, 2024), which is attached hereto as Appendix A.

GROUNDS FOR JURISDICTION

The Eleventh Circuit issued its panel opinion on May 1, 2024. Petitioner seeks the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1) through the filing of the instant petition for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. II

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

18 U.S.C. 922(l):

> (l) Except as provided in section 925(d) of this chapter, it shall be unlawful for any person knowingly to import or bring into the United States or any possession thereof any firearm or ammunition; and it shall be unlawful for any person knowingly to receive any firearm or ammunition which has been imported or brought into the United States or any possession thereof in violation of the provisions of this chapter.

18 U.S.C. § 921(a)(3):

> (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED (Cont.)

18 U.S.C. § 921(a)(25):

> The terms "firearm silencer" and "firearm muffler" mean any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication.

STATEMENT OF THE CASE

Petitioner David Schieferle was convicted of alleged offenses arising from his possession of items that purportedly qualified as "firearms silencers" under the National Firearms Act. Mr. Schieferle had no prior criminal history. He served in the United States Army Reserves and as a police officer before serving as a senior federal air marshal for the 20 years prior to his arrest. (Doc. 162 at 49.) The charges he faced arose from his online orders of inline fuel filters, some of which could also serve as firearms cleaning solvent traps, but which also purportedly could be converted to serve as firearms silencers. (Doc. 162-164.)

The pertinent facts began when Customs and Border Patrol officers at Chicago International Airport detained two packages that were flagged for inspection on or about November 24, 2020. (Doc. 162

at 12, 15-16, 33, 77.) The packages were mailed from an address in China and listed David Schieferle as the intended recipient. (Doc. 162 at 19.)

The first package contained ten items that the Government later purported to be silencers. (Doc. 162 at 16.) The packaging described the items contained therein as "003 WI X2403 solvent." (Doc. 162 at 19-20.) The items that were alleged to be silencers were described as metal cylinders with an inner chamber, O ring, and an end cap. (Doc. 162 at 21.) The end caps had a center marking that an agent purported to have been for the purposes of providing a point to drill through in order, allegedly, for a projectile to pass through. (Doc. 162 at 38.) Two of the ten items contained "monocore" or "monolithic" baffles on the interior that already bore holes in their centers. (Doc. 162 at 40.)

The second package contained two items

purported to be silencers. (Doc. 162 at 29, 39.) The package described its content as adaptors. (Doc. 162 at 46.) The items contained inside were described as barrel cylinders with an end cap and "capsules" on the inside. (Doc. 162 at 30.) The items all contained dimples on the end caps but not holes. (Doc. 162 at 79.)

On December 17, 2020, law enforcement sought a search warrant for Mr. Schieferle's home based its belief that the items contained in the two packages were firearm silencers. (Doc. 162 at 48.) The affidavit submitted in support of the requested search warrant opined "I believe the combination of parts contained in the packages that are the subject of this investigation, discussed below, were designed and intended for use in assembling or fabricating a firearm silencer as defined in 18 U.S.C. § 921(a)(24)..." (Doc. 38-1 at 7.) A Magistrate Judge went on to issue a search warrant for Mr. Schieferle's residence. (Doc. 38-1 at 19-24.)

Mr. Schieferle's residence was located on a farm in south Florida. (Doc. 162 at 78.) Present on the property were tractors, motorized equipment, and fuel storage tanks. (Doc. 162 at 79.) Mr. Schieferle's property also contained several large shipping containers that held numerous items that had no relation to the instant case. (Doc. 162 at 50-52.) The search of the property revealed that Mr. Schieferle appeared to order, receive, and store numerous random items from online retailers such as Amazon. (Doc. 162 at 77-78.)

Various legal firearms and firearms-related items were found on Mr. Schieferle's property. (Doc. 162 at 49-65, 76.) Those firearms were not seized. (Doc. 162 at 65.) The firearms were secured in safes in the home. (Doc. 162 at 80-82.) In addition to firearms, air rifles were also in the home. (Doc. 162 at 67.)

An item purported at trial to be a "firearm silencer" was collected on a dining table. (Doc. 162 at 74.) It was described as "black in color, containing a hollow tube with two end-caps, one which was internally threaded and one with a marking in the center, and it also had the internal parts such as the baffles." (Doc. 162 at 75.) The item was inside of a closed box. (Doc. 162 at 82.) On the box the item was contained in was written "solvent tube." (Doc. 162 at 97.) The item did not contain a serial number or other such identifying marking. (Doc. 162 at 97.) No firearms were present in the room where that box was found. (Doc. 162 at 100.) The box was, on the contrary, surrounded by numerous other boxes and various items unrelated to firearms. (Doc. 109-7.)

On March 8, 2022, Mr. Schieferle was indicted in the United States District Court for the Southern District of Florida on two counts of Illegal Importation

of a Firearm or Ammunition pursuant to 18 U.S.C. §§ 922(l) and 924(a)(1)(C) and one count of Possession of an Unregistered Firearm pursuant to 26 U.S.C. § 5861(d) and 18 U.S.C. § 2. (Doc. 3.)

On August 26, 2022, Mr. Schieferle filed a motion to suppress the fruits of the search of his home. (Doc. 38.) The motion set out that the items that were seized at the airport and the item that was contained in the box at Mr. Schieferle's home were oil filters and inline filters that had a legal and legitimate use in farm equipment for filtering out debris such as rust and paint chips from farm fuel storage tanks that Mr. Schieferle had on his farm. (Doc. 38 at 2.) To provide an example of the nature of the items, Mr. Schieferle cited an Amazon.com webpage. (Doc. 38 at 2.) The motion further set that Mr. Schieferle legally purchased the items at issue on internet websites. (Doc. 38 at 2.)

Mr. Schieferle asserted in the motion that the affidavit filed in support of the search warrant application failed to establish probable cause for the issuance of a warrant. (Doc. 38.) In support of that position, Mr. Schieferle argued in detail that the affidavit did not allege that something inherently illegal, such as a controlled substance, was likely to be found in the home. (Doc. 38 at 10.) On the contrary, the affidavit proposed that the home may contain an item that, in its present form, could be modified to qualify as illegal contraband if it were to be so modified without ATF approval. (Doc. 83 at 10.) The motion included an affidavit from a firearms expert who would later testify as trial and who opined that "these solvent traps cannot serve as a silencer until they are machined, cut and threaded to fit onto a firearm." (Doc. 38-2 at 4.)

The district court denied the motion to suppress. (Doc. 160 at 2.)

The case then proceeded to a jury trial beginning on December 5, 2022. (Doc. 161.)

At trial, the Government presented as an expert witness a firearms enforcement officer for the Bureau of Alcohol, Tobacco, Firearms and Explosives. (Doc. 163 at 38.) The officer described the characteristics of a silencer as having "an outer tube, does it have the caps on the end -- the end-caps that house everything in the middle -- and does it have something in the middle that helps in reducing the sound of a firearm when shot." (Doc. 163 at 42.)

The officer opined that the various items that were seized from the mailings qualified them as silencers. With respect to the two items that contained the monolithic baffles, the officer testified that he could hold the items up to light and see

through them, thereby allowing them to serve as functional silencers. (Doc. 163 at 56-57.) The remaining items contained cone style baffles that would need to be drilled through before a projectile could potentially pass through. (Doc. 162 at 38-41, 47-48.) The officer had tested one of the monolithic baffle items on a firearm and found that it reduced the noise level of the firearm by 17 decibels. (Doc. 163 at 58.)

The officer additionally testified that solvent traps are used to attach to the end of a firearm barrel to capture any solvent that leaks out during the process of cleaning the gun. (Doc. 163 at 65.) He gave the opinion that the items at issue would not make sense for use as solvent traps or fuel filters. (Doc. 163 at 66-68.) The officer testified on cross-examination, nonetheless, that it is legal to possess solvent traps and inline fuel filters. (Doc. 163 at 83.) He further testified that the items had characteristics of solvent

traps. (Doc. 163 at 85.) He believed that the items would not be effective as fuel filters because they did not contain filtering elements. (Doc. 163 at 85.) The officer additionally conceded that empty two liter bottles or PVC pipes can serve as silencers. (Doc. 163 at 88.)

Mr. Schieferle called as an expert witness a retired ATF agent who had served 14 years with the ATF, reaching the level of acting chief of the Firearms Technology Branch. (Doc. 163 at 108-09.) The expert testified that the ten cone style baffle items could not serve as functional silencers in their present form. (Doc. 164 at 4-5.) With respect to the monolithic baffles, the expert testified that they could serve as silencers but could also serve as solvent traps. (Doc. 164 at 5.) He further testified that those items could also serve as inline fuel filters with modification. (Doc. 165 at 5-6.) Those cone style baffle items, the expert

testified, are available from retailers such as Walmart and Amazon. (Doc. 165 at 9.)

The expert went on to testify that any object that can be attached to a firearm muzzle can serve as a silencer if it has a chamber or opening that allows gas to slow as it leaves the firearm barrel. (Doc. 165 at 6-7.) The expert provided as examples of objects that can serve as silencers as a lawn mower muffler, a Febreeze bottle, a lighter fluid bottle, and a PVC pipe. (Doc. 165 at 7.) He further testified that purported silencers can be attached to air rifles. (Doc. 165 at 10.) Such air powered guns would not qualify as firearms. (Doc. 165 at 10.)

At the close of the Government's case, Mr. Schieferle moved for a judgment of acquittal, asserting, among other arguments, that the Government failed to prove that the items purported

to be silencers were illegal to possess. (Doc. 163 at 100-04.) The district court denied that motion, stating:

> THE COURT: The standard at this juncture is to view the evidence in the light most favorable to the United States. I believe the record demonstrates the case must proceed at this stage to the jury.
>
> There is not only sufficient circumstantial evidence as to Mr. Schieferle's possession of an unregistered silencer but also his importation of devices; devices which Government experts have stated, despite whatever title was on a package, had no other purpose but to be a muffler. And there is also circumstantial evidence of Mr. Schieferle's intent, demonstrated by some of the search items found on his cell phone and laptop, clear evidence of his familiarity with firearms, firearm components, with matters relating to firearms and suppressors.
>
> The potato, Coke bottle argument I think is a red herring of sorts. That really does not enter into an analysis for the -- at least in this Court's opinion -- for the reason that a potato is meant to be an edible item and a Coke bottle contains a beverage.

> The testimony here is that these pieces of equipment that Mr. Schieferle had and had ordered had no other purpose than to be suppressors for firearms. So I will deny the defendant's motion for judgment of acquittal at this time; with of course the defendant's ability to raise it after he has presented his case.

(Doc. 105-06.)

On December 9, 2022, the jury returned a verdict of guilty as charged on the three counts. (Doc. 104.) On May 24, 2023, the district court sentenced Mr. Schieferle to concurrent sentences of eight months incarceration to be followed by three years of supervised release on each count. (Doc. 146.)

Mr. Schieferle thereafter took a direct appeal to the United States Court of Appeals for the Eleventh Circuit. He raised three grounds:

> I. Whether the district court erred in denying the Appellant's motion for judgments of acquittal on charges of illegal importation of firearms and possession of an unregistered firearm when the charges arose from the

> Appellant's purchase of inline fuel filters from an online retailer?
>
> II. Whether the district court erred in denying the Appellant's motion to suppress the fruits of a search of his home when the Appellant asserted that the search warrant affidavit failed to provide probable cause to be believe a crime was committed or was being committed? and
>
> III. Whether the Second Amendment protects the right of an individual to possess items that might be considered "firearm silencers"?

On May 1, 2024, the Eleventh Circuit issued a panel opinion affirming the convictions.

Concerning the sufficiency of the evidence issue, the Eleventh Circuit found, in relevant part, that the items at issue "had the features of a silencer that subjected them to registration under the NFA." App. A at 8. In reaching that holding, the court relied on the Government's expert witness testimony that the items could serve to muffle a firearm report, in their present form as to two of the items, or with

modification as to the remainder of the items. App. A at 7-8.

As to the Second Amendment issue, the Eleventh Circuit reviewed for plain error and provided that "[n]either we nor the Supreme Court have addressed whether silencers are protected by the Second Amendment." App. A at 8. The court further reasoned, "[t]o the extent Schieferle relies on *Bruen*, that case did not directly address whether silencers constitute "arms" under the Second Amendment." App. A at 9 *citing New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 8-11, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022).

This petition follows.

REASONS FOR GRANTING THE PETITION

I.

THE QUESTION OF WHETHER ITEMS SUCH AS INLINE FUEL FILTERS OR FIREARMS SOLVENT TRAPS, WHICH MAY BE ABLE TO FUNCTION AS "FIREARM SILENCERS," CAN QUALIFY AS "SILENCERS" UNDER THE NATIONAL FIREARMS ACT WHEN THE ITEMS ARE NOT MARKETED AS SILENCERS AND HAVE NOT ACTUALLY BEEN USED TO SILENCE OR MUFFLE A FIREARM?

Petitioner David Schieferle was convicted of possessing products that were marketed as inline fuel filters and firearm cleaning solvent traps. Undisputed evidence presented at trial established that he never used any of the items as firearm silencers or ever even attempted to fit any of the items on a firearm. Instead, he was convicted of the charges levied against him merely because the items were able to be used or modified to fit on a firearm to serve as a "silencer" or "muffler" and because, according to the

Government, he purportedly had intent to later use the items as such. The evidence at trial, however, established that countless other items, even such common items as plastic soft drink bottles or PVC pipes, could be used to silence or muffle a firearm just as an inline fuel filter or solvent trap could. Consequently, the proper interpretation of the definition of a "firearm silencer" or "firearm muffler" is a critical issue that has not been addressed by this Court and will likely arise in many future cases in lower courts. The instant case thereby presents the important question of whether an item can qualify as a "firearm silencer" or "firearm muffler" under the relevant provisions of the National Firearms Act [NFA] merely because it is *able* to be used to muffle or silence a firearm but has not been marketed for such a purposes nor used for such a purpose?

A. The Importance of the Question Presented

As set forth above, 18 U.S.C. § 921(a)(3) includes within the definition of a "firearm," "any firearm muffler or firearm silencer" 18 U.S.C. § 921(a)(3)(C). The statute, in turn, defines the terms "firearm silencer" and "firearm muffler" in 18 U.S.C. § 921(a)(25).[1] The plain text of the statute defines a "silencer" or "muffler" as "any device *for* silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, *and intended for* use in assembling or

[1]In addition to the 18 U.S.C. § 922(l) counts alleged in Counts One and Two of the Indictment, Mr. Schieferle was also convicted under 26 U.S.C. § 5861(d) of Possession of an Unregistered Firearm arising from the possession of the purported "silencers." Proof of that charge required proof that the defendant "knew of the features of the 'firearm' that brought it within the scope of the National Firearms Act, 26 U.S.C. §§ 5801-5872." *United States v. Moore*, 253 F.3d 607, 609 (11th Cir. 2001) *citing Staples v. United States*, 511 U.S. 600, 619, 114 S.Ct. 1793, 1804, 128 L.Ed.2d 608 (1994). All three charges alleged against Mr. Schieferle thereby required proof that the purported silencers qualified as "firearm silencers" or "firearm mufflers" under subsection 921(a)(25), which would have, in turn, qualified them as "firearms" under subsection 921(a)(3).

fabricating a firearm silencer or firearm muffler, and any part *intended only for* use in such assembly or fabrication." 18 U.S.C. § 921(a)(25) (emphasis added). The statutory definition clearly and unequivocally requires the parts or combination of parts be intended for use in or as a firearm silencer. The items at issue in the instant case were not "commercial silencers," but rather, were marketed as serving a function other than silencing a firearm. Given the plain text of the statutory definition, those items cannot thereby qualify as silencers. The inline fuel filters, which the evidence established are sold by legitimate retailers in the United States, cannot qualify as silencers on their own because they are not intended for use as a firearm silencer. Despite the testimony from the Government witnesses that manufacturers purportedly market solvent traps and inline fuel filters as a ruse, the fact remains that the items were marketed to the public,

to include Mr. Schieferle, for intended uses as solvent traps and inline filters. Consequently, without proof that the items were actually intended for use as a "firearm muffler" or "firearm silencer," or were actually used to silence or muffle a firearm, the plain text of the statutory definition should preclude items such as the inline fuel filter and solvent traps from qualifying as firearms under the NFA.

B. The ATF has Wavered in its Interpretation of What Constitutes a "Firearm Muffler" or "Firearm Silencer" and Lower Courts, in Turn, Have Endorsed an Overly Expansive Definition of the Terms

The question presented is a critical question that is likely to arise frequently in the lower courts in the future. The reason for that likelihood is that under the expansive view of the statutory definition of "firearm muffler" and "firearm silencer" that the ATF and some lower courts have taken, innocuous items that virtually every adult citizen possesses on a daily

basis can qualify as firearms. Those items can be as simple as plastic bottles or PVC pipes.

To further complicate matters, the ATF's enforcement of the NFA's regulations with respect to firearms mufflers and silencers has been markedly inconsistent. In 2017, the ATF issued Technical Bulletin 17-02, which was titled "Solvent Traps." ATF Technical Bulletin 17-02 at 1 (Apr. 20, 2017). The bulletin stated that solvent traps have a recognized purpose of catching excess fluid during firearms cleaning but can also be used as a firearm silencer. *Id.* at 1-2. The bulletin went on to advise:

> Certain commercially available items such as cleaning solvent traps, automotive oil/fuel filters, flashlights, and freeze plugs are sometimes used to assemble firearm silencers. Such items are unregulated *until* a possessor assembles, accumulates, or otherwise demonstrates these articles are to be used for making a firearm silencer. Once such an item(s) is possessed with intent to be used in assembling or fabricating a firearm silencer, it comes within the

> purview of the GCA and NFA and is properly classified as a "firearm silencer."

Id. at 2 (emphasis in original). That interpretation, of course, was consistent with the plain text of the relevant provisions of the NFA. Under that interpretation of the NFA, the ATF likely would have never begun an investigation of Mr. Schieferle for purported possession of firearm silencers.

By 2019, however, ATF had changed its view and interpretation of the NFA's classification of mufflers and silencers. In ATF Technical Bulletin 20-01, the agency acknowledged its prior position from Bulletin 17-02, but stated that it was changing course:

> Recently, FTCB [ATF Firearms Technology Criminal Branch] has observed an increased number of criminal cases involving firearm silencers manufactured from IFFs [inline fuel filters]. This increase in the use of IFFs as silencers, as well as the need for more thorough analysis of these items, prompted FTCB personnel to

> clarify the classification of inline filters purportedly used as solvent traps.

ATF Technical Bulletin 20-01 at 1 (Oct. 30, 2019). The bulletin went on to opine that some fuel filters and solvent traps were being marketed through "deceptive advertisements" that "sometime include an 'NFA Warning' or a legal disclaimer regarding the use or modification of these devices as, or in the fabrication of, firearm silencers." *Id.* at 3. Since that time, as the instant case exemplifies, the ATF has taken to arbitrary approach to deciding if an item that *could* serve to muffle a firearm report is in fact a "silencer" or "muffler" under the NFA.

To illustrate the danger inherent in failing provide the ATF and the lower courts with further guidance on what constitutes a muffler or silencer, the Eighth Circuit, in *United States v. Hay*, 46 F.4th 746 (8th Cir. 2022), recently addressed the issuance of a search warrant under circumstances similar to those

of the instant case. In *Hay*, U.S. Customs and Border Protection seized two packages in international mail that were listed as containing "Fuel Filters" and "Filters." *Id.* at 748-49. Inspections of the packages revealed them to contain items consistent with "NAPA 4003" fuel filters. *Id.* at 749. Law enforcement thereafter sought a search warrant for the address of the intended recipient of the packages. *Id.* When, however, law enforcement sought the search warrant, it relied on bulletins of the aforementioned ATF Technical Bulletin 20-01 that alleged that the items at issue qualified as "silencers" *in their present forms*. *Id.* at 748 (emphasis added).

After a search warrant was later issued and the defendant was arrested based on evidence seized under the warrant, the defendant filed a motion to suppress asserting, among other grounds, that "the warrant application did not establish probable cause

to justify the search of his residence because it relied on the confidential Bulletin, which in Hay's view represents an attempt by the ATF to improperly change the law by defining all fuel filters and solvent traps as silencers regardless of how a person intends to use them." *Id.* at 750. The Eighth Circuit reasoned that the Appellant was reading the ATF overbroadly and found that "[t]he only "fuel filters" that the Bulletin and affidavit claim qualify as 'firearm silencers' without additional evidence of intent are those with specific characteristics that render them incapable of functioning as legitimate solvent traps but capable of being used as silencers—like those marketed as 'NAPA 4003' fuel filters." *Id.* It went on to hold "[t]hus, rather than attempting to change the law, the Bulletin merely seeks to inform law enforcement officers of items that qualify as firearm silencers under the law as it already exists." *Id.* In so

finding, the Eighth Circuit arguably took an overly narrow view of the Bulletin's directive. In any event, however, the Eighth Circuit clearly recognized the significance of the ATF Bulletin to law enforcement. It, furthermore, endorsed the ATF view that an item that is marketed to an unsuspecting purchaser as something other than a silencer can still qualify as a silencer under the NFA even without any evidence that it is being used as a silencer.

While, to be sure, the ATF Bulletins were not the basis for the denial of the Rule 29 motion for judgment of acquittal in the instant case, the ATF's interpretation of the NFA was clearly the catalyst that led to Mr. Schieferle's prosecution, just as it was the catalyst that led to the *Hay* defendant's prosecution. Moreover, even in spite of this Court's recent holding in *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244, 2024 WL 3208360 (Jun. 28, 2024), which

overruled the deference standard promulgated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the ATF will continue to have a need to make its own assessments of the relevant provisions of the NFA in carrying out its duties as a law enforcement agency. The ATF's view of what constitutes a "silencer" or "muffler" will therefore clearly drive its decisions to conduct investigations and make arrests.

An additional concern inherent in the ATF's current interpretation of what constitutes a "silencer" or "muffler" is at what point otherwise innocuous items that can be used to create a "silencer" or "muffler" actually become a "silencer" or "muffler" under the NFA. The present view taken by the ATF, and seemingly by the Eight and Eleventh Circuits, is that the items can qualify as a "silencer" or "muffler"

at any point. Perhaps the greatest problem with that interpretation is that an individual may lawfully create a silencer with items such as fuel filters and solvent traps so long as he or she does so with ATF approval. *See Form 1 – Application to Make and Register a Firearm (ATF Form 5320.1)*, Bureau of Alcohol, Tobacco, Firearms and Explosives, https://www.atf.gov/firearms/docs/form/form-1-application-make-and-register-firearm-atf-form-53201/download (last revised December 2022). To illustrate the frequency by which that occurs, on March 18, 2022, 168 members of Congress signed a letter to the acting direct of the ATF expressing concern that constituents were recently being restricted from lawfully creating mufflers or silencers. *See https://biggs.house.gov/sites/evo-subsites/biggs.house.gov/files/evo-media-document/2022-03-*

18%20House%20GOP%20to%20ATF%20re%20Silencers_Final.pdf. The letter set out that:

> We have learned that the ATF has begun denying Form 1 requests from law-abiding citizens seeking to make silencers for their personal use. These individuals sought to follow the law by filing Form 1 requests, and they often did so carefully following published ATF guidance. The individuals sought approval to make silencers from individually sourced raw materials, components, or kits that included items that are manufactured for other non-firearm purposes, such as flashlight tubes or fuel filters. In denying the Form 1 requests, the ATF informed these individuals that they were in violation of the NFA because they had not received prior approval to own the materials in question, which the ATF claims to meet the legal definition of a silencer. Because of the ATF's actions, these law-abiding citizens are now concerned that they could be in violation of a law that carries punishments of up to 10 years in prison and $250,000 in fines.

Id. at 1-2. The letter thereby asserted that the "ATF attempt to expand the definition of a silencer—like the ATF's other regulatory actions—is contrary to

years of ATF precedent and beyond the scope of the agency's authority under federal law." *Id.* at 1. While the instant case is a prime example of the concern that the letter from Congress seeks to address, the letter is a further indication that, under the current ATF view, a person who obtains an item that could become a component of a silencer can be guilty of possessing a silencer despite having purely innocent intentions.

Without further guidance on what actually constitutes a "silencer" or "muffler" under the NFA, the ATF will be left to continue to arbitrarily decide what constitutes a "silencer." On one end of the spectrum would be readily-identifiable silencers that are marketed as such. On the other end of the spectrum would be plastic bottles and PVC pipes. Under the current interpretation taken by the ATF and at least two of the Circuits, items falling along the entire spectrum could qualify as silencers. Therefore,

to ensure consistency and the appropriateness of the enforcement of the NFA's regulations of firearms silencers and mufflers, it is imperative for this Court to take up the question presented herein.

C. The Lower Circuit Courts are Split in their Interpretation of the NFA's "Firearm Muffler" and "Firearm Silencer" Definition

The Eleventh Circuit's holding in the instant case is seemingly consistent with the Eighth Circuit's interpretation of the scope of the NFA's definition of a firearm muffler or silencer, but is markedly inconsistent with the reasoning of the First Circuit. The First Circuit addressed a scenario analogous that of the instant case in *United States v. Crooker*, 608 F.3d 94 (1st Cir. 2010). In that case, law enforcement intercepted a mailing that contained a "large caliber airgun" and a purported silencer that was "a cylinder made of black metal with a hole running through it, threading that allowed attachment to the muzzle of

the airgun and baffles inside." *Id.* at 95. The purported silencer was apparently homemade. *Id.* at 99 n.4. Law enforcement also later found evidence connecting the defendant to an article titled "Federal Law Definition of a Silencer," which described how an airgun silencer could function as a firearm silencer. *Id.* The defendant was thereafter charged and convicted of transporting a firearm in interstate commerce as a convicted felon based on that purported silencer. *Id.* At trial, the Government called an expert to testify "that the seized device could be used to muffle the sound of an ordinary firearm in various ways, including the holding of the device against the barrel of the firearm with one's hand so that the bullet would pass through the device." *Id.* The witness also testified that, when test firing the silencer, he, for safety purposes, had attached the silencer to the firearm "by threading an 'adapter' onto both the barrel

of an ordinary gun and the silencer to connect the two implements, because the silencer did not fit directly to the testing pistol." *Id.*

When the case reached the First Circuit, the court recognized that "[i]n the ordinary criminal case, the device charged as a silencer is one manufactured for use with a firearm and is easily connected (*e.g.,* by threading one onto the other); and the possessor knows perfectly well the intended function of the device." *Id.* at 96-97 *citing United States v. Hall*, 171 F.3d 1133, 1152 (8th Cir. 1999). It reasoned, on the other hand, that the *Crooker* case was problematic because the alleged silencer was intended for use with an airgun and required modification to be used as a firearm silencer. *Id.* at 97. The court found the "problems arise in two different dimensions: its capability for use as a silencer and, separately, the defendant's knowledge, purpose or both with respect

to the device." *Id.*

In addressing those problems, the court concluded that the statutory definition of a silencer "by its terms requires something more than a potential for adaptation and knowledge of it." *Id.* The court plainly noted that "[t]he statute does not refer either to capability or adaptation; it speaks of a device 'for' silencing or muffling." *Id.* The court then reasoned that:

> …the airgun silencer in this case required a further 'part' (the adapter), arguably making the case fall within one of the 'parts' definitions that require intent. Worse still for the government, the use of a 'capability' and 'knowledge' definition-as applied to a home-made silencer-could also extend to a soda bottle or even a potato.

Id. The court then distinguished the statutory definition of "silencers" from the statutory definition of a "machine-gun." *Id.* at 98. The court noted that the machine gun definition, in contrast to the silencer

definition, "explicitly adopts a test of objective capability: it covers any weapon "*which shoots,* is designed to shoot, *or can be readily restored to shoot*" automatically multiple shots with a single trigger pull. *Id. quoting* 26 U.S.C. § 5845(b) (emphasis in original). The court correspondingly found "the range of physical objects that *can* muffle a firearm is so large and of so many alternative uses that some filtering restriction is needed to prevent overbreadth and possibly vagueness." The court went on to reverse the defendant's conviction and remand for entry of a judgment of acquittal. *Id.* at 100. In so holding, the court provided:

> To read the statute literally, as we do, is conventional with criminal statutes in order to provide fair notice, *United States v. Lanier*, 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997), and in this instance tempers problems of overbreadth and vagueness created by the multiple legitimate objects that can be used to silence a firearm. Conversely, the fact that a possessor does have a

> purpose to use, or to pass on the device to someone to use, as a silencer for a *firearm* increases the danger of such a use and makes it precisely the threat against which the statute means to guard.
>
> Of course, this literal construction poses no barrier to prosecuting anyone who knowingly possesses a commercial silencer. In such a case, it would be suitable to charge that the jury need only find that the defendant knowingly possessed a device designed to be used as silencer for firearm. The defendant's purpose becomes a pivotal issue only for a device not so designed, but that is the case before us; or at least the government's evidence and arguments leave it in that posture.

Id. at 99

The First Circuit's holding in *Crooker* stands at odds with the Eleventh Circuit's holding in the instant case. In *Crooker*, *Hay*, and the instant case, the items at issue were not "commercial silencers," but rather, were marketed as serving a function other than silencing a firearm. Furthermore, just as in *Crooker*, in the instant case, the evidence established that any

of the alleged "silencers" at issue could have been used as airgun silencers just as readily as they could have been used as firearm silencers. The evidence likewise established that Mr. Schieferle owned and possessed at least one airgun in his home. Notwithstanding that potential application of the items as airgun silencers, under the *Crooker* reasoning, the plain text of the statutory definition of "silencers" would not encompass the purported silencers at issue in *Hay* nor in the instant case. On the other hand, under the reasoning of the Eighth and Eleventh Circuits, those items qualify as silencers despite not having been

marketed for or used for that purpose.[2]

For the reasons set forth above, the question presented herein is one of great importance that has not yet been decided by this Court and one which will likely arise frequently in lower courts in the future. SUP. CT. R. 10(c). While functionally ignoring the "intended for use" component of the statutory definition, the Government's current interpretation of the NFA would seemingly have every item that might be able to be used in fabricating a silencer qualify as

[2] While none of the items at issue can qualify as "silencers" based on the plain text of 18 U.S.C. § 921(a)(25), that conclusion is particularly true of the filers that contained the cone style baffles. The evidence clearly established that those filers could not serve as silencers in their present forms. At most, those filters could be nothing more than "any part" that could allegedly be used to assemble or fabricate a silencer. 18 U.S.C. § 921(a)(25). As such, they could only potentially qualify as a "silencer" if they were "*intended only* for use in such assembly or fabrication." *Id.* In contrast, the Government expert alleged that the two filters with the monolithic cores could be used as silencers in their present form. Nonetheless, that fact remains that those filters were marketed for a purpose other than to muffle a firearm and were capable of serving as an oil/fuel filter capable of filtering large particles, just as Mr. Schieferle intended to use it. 18 U.S.C. § 921(a)(25).

a silencer. Under that overly broad interpretation, nearly every citizen in the United States could be guilty of possessing a silencer based on their possession of some innocent item that could be found in their home, such as a lawn mower muffler, a Coca Cola bottle, or a household water pipe. The plain text of section 921(a)(25) does not, however, support such an absurd interpretation. When, as in this case, the items at issue are not marketed and sold for the purpose of muffling or silencing a firearm, and no steps have been taken to use the items for such a purpose, the items cannot be *intended for use* in assembling or fabricating a silencer simply because they might be able to function for that purpose. As a result, Petitioner Schieferle respectfully requests this Honorable Court to grant certiorari to determine whether an item can qualify as a "firearm silencer" or "firearm muffler" under the relevant provisions of the

National Firearms Act merely because the item is *able* to be used to muffle or silence a firearm but has not been marketed for such a purpose nor used for such a purpose?

II.

THE QUESTION OF WHETHER THE SECOND AMENDMENT PROHIBITS ANY LAWS THAT FORECLOSE LAW-ABIDING CITIZENS WITH ORDINARY SELF-DEFENSE NEEDS FROM POSSESSING ITEMS THAT CAN SERVE AS FIREARM MUFFLERS OR SILENCERS?

Assuming for purposes of argument that the items at issue in this case meet the definition of a "silencer," the additional question presented is whether the Second Amendment protects a law-abiding individual's right to possess such "silencers." As this Court held in the relatively recently decided and highly impactful case, *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022), the Second Amendment protects an individual's right to carry a firearm for self-defense outside of his or her home. *Id.* This Court held in *Bruen* that "[w]hen the Second Amendment's plain text covers an individual's conduct, the

Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24. "Only then may a court conclude that the individual's conduct falls outside the Second Amendment." *Id.*

In so holding, this Court dispensed with the means end scrutiny analysis that lower courts had employed since *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). In place of the means end scrutiny analysis, the Court provided that "[i]nstead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Bruen*, 597 U.S. at 19. Conducting that historical tradition review requires courts to "assess whether modern

firearms regulations are consistent with the Second Amendment's text and historical understanding." *Id.* at 26. That is because, as the Court provides, "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*." *Id.* at 34 *quoting Heller*, 554 U.S. at 634-35 (emphasis in original).

The broadly presented question in the instant case is whether the Second Amendment's plain text protects the right of an individual to possess objects that could qualify as suppressors under the National Firearms Act? The Second Amendment, of course, provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. Amend II. The inherent narrower question that will lend an answer to the broader overall question is whether a firearm suppressor is an "arm"

as contemplated in the Second Amendment? The questions at issue are questions that this Court has not yet addressed, but questions that will likely arise in many lower court cases in the future.

A. The Question Presented is Likely to Arise in Many Future Cases in the Lower Courts

The recent *Bruen* and *Rahimi* decisions indicate that the question presented herein is ripe for this Court's consideration. The Court reasoned in *Bruen*, "when it comes to interpreting the Constitution, not all history is created equal." 597 U.S. at 34. With respect to the question of what might constitute "arms," the Court noted "[w]e have already recognized in *Heller* at least one way in which the Second Amendment's historically fixed meaning applies to new circumstances: Its reference to 'arms' does not apply 'only [to] those arms in existence in the 18th century.'" *Id.* at 28 *quoting Heller*, 554 U.S. at

582. "'Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.'" *Id. quoting id* (citations omitted in original). As the Court went on to hold in *Bruen*, "even though the Second Amendment's definition of 'arms' is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense." *Id. citing Caetano v. Massachusetts*, 577 U.S. 411, 411–412, 136 S.Ct. 1027, 194 L.Ed.2d 99 (2016) (per curiam) (addressing stun guns).

This Court's even more recent decision in *United States v. Rahimi*, 602 U.S. ---, 144 S.Ct. 1889 (Jun. 21, 2024), further highlights the need for the Court to take up the question presented in the instant

case. In *Rahimi*, the Court reiterated the *Bruen* historical tradition test and provided that the inquiry must revolve around "whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." *Id.* at 1898. Again, as the Court stated in *Bruen*, the Second Amendment's protections and limitations are not restricted to the "arms" and regulations that existed at the time of the Nation's founding. The Court found in *Rahimi*, "[h]olding otherwise would be as mistaken as applying the protections of the right only to muskets and sabers." *Id.* at 1898.

Rahimi further clarified that, for a current regulation to be consistent with a regulation that would have been in effect at the time of the founding, the regulation at issue need not be a "dead ringer" or a "historical twin" to the historical regulation. *Rahimi*, 144 S.Ct. at 1898. In making the relevant

determination, a reviewing court must "ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance struck by the founding generation to modern circumstances.'" *Id. quoting Bruen*, 142 S.Ct. at 2111. Consistent with that reasoning, the Court had earlier cautioned in *Bruen* that reviewing courts must "guard against giving postenactment history more weight than it can rightly bear." *Id.* at 2136. As such, historical evidence from the late nineteenth century and the twentieth century "does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Id.* at 2154 & n.28.

In deciding *Rahimi*, the Court noted that "some courts have misunderstood the methodology of our recent Second Amendment cases." *Rahimi*, 144 S.Ct. at 1897. The Court seemingly found that those lower

courts had erroneously concluded that this Court's Second Amendment cases, to include *Heller*, *Bruen*, and *Rahimi*, were "meant to suggest a law trapped in amber." *Id.* As the Court made abundantly clear in *Rahimi*, that is not the case.

The lower court cases that have addressed the Second Amendment's impact on the regulation of firearms suppressors are a prime example of such lower court misinterpretation of this Court's recent holdings. In finding that firearm suppressors are not "arms" in the context of the Second Amendment, many lower courts have reasoned contrary to this Court's directive that "the Second Amendment is not limited only to those arms that were in existence at the founding." *Id.* at 1897 *citing Heller*, 554 U.S. at 582. To be sure, this Court made clear in *Bruen* that the question of whether an object constitutes an arm turns on its purpose in facilitating armed self-defense.

A silencer undoubtedly serves to facilitate armed self-defense. Many of the lower courts that have addressed the question of whether a firearm suppressor or silencer is an "arm" protected under the Fourth Amendment, have failed to recognize *Bruen*'s guidance on what constitutes an "arm." Those courts have instead employed an overly restrictive definition of the term "arm." In so reasoning, those lower courts are examples of the courts that *Rahimi* found to mistakenly interpret *Heller* and its progeny to trap the Second Amendment in amber. *See e.g. United States v. Cox*, 906 F.3d 1170 (10th Cir. 2018) (finding that at the time of founding and at present "the Second Amendment covers '[w]eapons of offence, or armour of defence,' or 'any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another,' but failing to conduct a principles test and consequently finding that a

silencer "is simply a firearm accessory; it's not a weapon in itself (nor is it 'armour of defence')" *id.* at 1186 *quoting Heller*, at 5534 U.S. 581); *United States v. Saleem*, --- F.Supp.3d ----, 2023 WL 2334417 (W.D. N.C. Mar. 2, 2023) (finding that a silencer is not an "arm" within the purview of the Second Amendment despite recognizing that "'arms' at the founding included not just the firearm itself, but also 'proper accoutrements that rendered that firearm useful and functional.'" *id quoting United States v. Miller*, 307 U.S. 174, 182, 59 S.Ct. 816, 83 L.Ed. 1206 (1939)); *United States v. Villalobos*, No. 3:19-cr-00040-DCN, 023 WL 3044770 (D. Idaho Apr. 21, 2023) (following *Cox*); *Cox v. United States*, No. CR11-00022RJB, 2023 WL 4203261 (D. Alaska Jun. 27, 2023) (following *Saleem*); *United States v. Cooperman*, No. 22-CR-146, 2023 WL 4762710 (N.D. Illinois Jul. 26, 2023) (finding that "the Supreme Court and the Seventh Circuit

have not specifically addressed whether silencers constitute bearable arms," but adhering to the Tenth Circuit's pre-*Bruen* decision in *Cox*); *United States v. Peterson*, No. 22-cr-231, 2023 WL 5383664 (E.D. La. Aug. 21, 2023) (following *Cox*); *United States v. Lightner*, No. 8:24-CR-21-WFJ-CPT, 2024 WL 2882237, (M.D. Fla. Jun. 7, 2024) (adhering to *Cox* and *Saleem*); *United States v. DeFelice*, No. 3:23-CR-116-OAW, 2024 WL 3028425 (D. Conn Jun. 17, 2024) (same); *compare United States v. Comeaux*, No. 6:23-CR-00183, 2024 WL 115929 (W.D. La. Jan. 10, 2024) (rejecting the argument that firearms are not "arms" but failing to conduct an adequate principles test and instead finding that the Second Amendment does not protect possession of silencers because "silencers have been regulated by Congress for the same period of time and for the same purpose as sawed-off shotguns and machineguns" and that "firearm silencers were

perceived by the American public as dangerous shortly after they were patented in 1908." *id* at *3). Indeed, rather than addressing whether firearm suppressors serve to facilitate armed self-defense, the vast majority of the above-cited lower courts have instead erroneously decided the "arms" question based on an analysis of silencers' mechanical functionality.

To further illustrate the overly restrictive view the majority of those courts have taken in defining the term "arm" as it applies to silencers, the plain text Congress chose to use in defining "firearm silencer" and "firearm muffler" clearly indicates that Congress views a silencer or muffler as an arm. As set forth in the preceding question presented, Congress included "firearm muffler" and "firearm silencer" within the actual definition of a "firearm." 18 U.S.C. § 921(a)(3). Not only does the plain text of the NFA include a

silencer within the definition of a firearm, but it also indicates that Congress likewise views silencers to serve the same purpose of facilitating self-defense that a more commonly recognized firearm would serve. Given, therefore, the lower courts' inconsistent interpretation of the question presented, coupled with Congress' apparent position on the question, the question of whether firearm mufflers and silencers are "arms" protected under the Second Amendment is a question of great importance that is likely to arise in many future cases in the lower courts.

B. The Historical Tradition of Legitimate Silencer Use and the Steadily Increasing Number of Lawful Silencers in Existence in the United States Exemplify the Need for the Court to Address the Question Presented

While firearm mufflers and silencers may not have existed in their present form at the time of the Nation's founding, they do have long history of legitimate use in the United States. The first patent

for a silencer appears to have issued in 1894. J. Stahel, *Device for Lessening the Noise of Firearms*, No. 516,236. Patented Mar. 13, 1894. Silencers then became readily available commercially by 1902. Emily Rupertus, Suppressors: The History, NRA BLOG, https://www.nrablog.com/articles/2016/10/history-of-suppressors/ (Oct. 5, 2016). The silencers were "marketed to all sportsmen and intended to enhance the shooting experience by reducing the risk of hearing damage and noise pollution." *Id.* Theodore Roosevelt was a proponent of and regular user of silencers. *Id. see also Saleem*, 2023 WL 2334417 at *10 n.7, 9 quoting *id.* When the NFA was later implemented in 1934, it included guidelines for the lawful manufacture and possession of silencers. *Id.* Those regulations remain in place today. *Id.* at *11 n. 9 *citing* 26 U.S.C. §§ 5811, 5812, 5821, 5822.

In fact, as of 2021, 2,664,774 silencers were lawfully registered in the United States. U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Firearms Commerce in the United States: Annual Statistical Update* (2021) (avail at: https://www.atf.gov/firearms/docs/report/2021-firearms-commerce-report/download). The figure has steadily and exponentially increased over the course of a decade since 2012, when 360,534 lawfully registered silencers existed in the Nation. U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Firearms Commerce in the United States: Annual Statistical Update* (2012) (avail at: https://www.atf.gov/resource-center/data-statistics).

As history and present statistics demonstrates, the silencer is a useful arm with recognized lawful purposes. Indeed, silencers perform the legitimate function of muffling the otherwise dangerous report of

a firearm for those who lawfully use firearms for sport, hunting, and self-defense. That muffling function protects the hearing of firearm users, as well as bystanders, and creates a much more comfortable environment for shooting. To be sure, the device has seemingly received a bad name in movies and other media. In reality, however, history and the widespread lawful ownership of the devices indicate that silencers are genuine modern instrumentalities to facilitate armed self-defense. Furthermore, the steadily increasing number of lawful silencers registrations and registration applications indicate that Second Amendment questions concerning the purchase, possession, and use of firearm mufflers and silencers are likely to arise frequently in the lower courts. For those many reasons, the question of whether the Second Amendment prohibits any laws that foreclose law-abiding citizens with ordinary self-

defense needs from possessing items that serve as firearm mufflers or silencers is a question of great importance that has not yet been decided by this Court and one which will arise frequently in the lower courts in the future. SUP. CT. R. 10(c).

CONCLUSION

Based on the foregoing, the Petitioner respectfully requests that this Honorable Court grant this petition for a writ of certiorari.

Respectfully Submitted on this
____ day of July 2024,

BJORN E. BRUNVAND
Brunvand and Wise Law Group
615 Turner Street
Clearwater, Florida 33756
Ph: (727) 446-7505
Email: bjorn@acquitter.com
Florida Bar No. 0831077
Counsel of Record for Petitioner