No. 24-120

In the Supreme Court of the United States

DAVID SCHIEFERLE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly rejected petitioner's challenge to the sufficiency of the evidence supporting his convictions for knowingly importing firearm silencers without authorization, in violation of 18 U.S.C. 922(*l*) and 924(a)(1)(C), and knowingly possessing an unregistered firearm silencer, in violation of 26 U.S.C. 5861(d).

2. Whether petitioner is entitled to plain-error relief on his claim that his convictions for importing silencers without authorization and for possessing an unregistered silencer violate the Second Amendment.

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. *Schieferle*, No. 22-cr-20083 (May 24, 2023)

United States Court of Appeals (11th Cir.):

United States v. *Schieferle*, No. 23-11792 (May 1, 2024)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-12) is not published in the Federal Reporter but is available at 2024 WL 1905326.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2024. The petition for a writ of certiorari was filed on July 29, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of two counts of knowingly importing a firearm without authorization, in violation of 18 U.S.C. 922(*l*) and 924(a)(1)(C), and one count of knowingly possessing an unregistered firearm, in violation of 26 U.S.C.

5861(d). Judgment 1; see Indictment 1-2. He was sentenced to eight months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-12.

1. In 2020, petitioner ordered more than a dozen firearm silencers from a Chinese e-commerce platform after searching the internet for information on how silencers work and how to obtain them cheaply. Gov't C.A. Br. 7-9.

Under federal law, a firearm silencer may be imported into the United States only by a federal firearms licensee and only if, among other things, the device is registered with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and marked with a serial number. See 18 U.S.C. 922(*l*); 26 U.S.C. 5841, 5842(a), 5844. Federal law also prohibits possessing a silencer unless the device is properly registered to the possessor in the National Firearms Registration and Transfer Record and is serialized. 26 U.S.C. 5861(d) and (i). A "firearm silencer" is defined for those purposes 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 fabricating a firearm silencer * * * and any part intended only for use in such assembly or fabrication." 18 U.S.C. 921(a)(25); see 26 U.S.C. 5845(a)(7) (incorporating that definition).*

Petitioner was not a federal firearms licensee, nor did he comply with any of the requirements for lawfully

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* At the time of petitioner's offense, the relevant definition was found at 18 U.S.C. 921(a)(24) (2018). In 2022, the definition was redesignated as Section 921(a)(25), without any other change. See Bipartisan Safer Communities Act, Pub. L. No. 117-159, Div. A, Tit. II, § 12002(2), 136 Stat. 1325.

importing or possessing a silencer. Gov't C.A. Br. 5. He came to the attention of law enforcement in December 2020, when customs officials intercepted a package that had been shipped from China to petitioner at his home in Miami, Florida. *Id.* at 2-3; see Presentence Investigation Report (PSR) ¶ 8. The package was labeled as "solvent" but contained no solvents. Gov't C.A. Br. 3. Instead, the package contained ten devices that officials suspected to be firearm silencers. *Id.* at 3-4. The officials who intercepted the package were aware that silencers may be labeled as "solvent traps" to evade detection, and they seized the devices for further analysis. *Ibid.* (brackets omitted). Later testing confirmed that all ten devices were firearm silencers. *Id.* at 5; see PSR ¶ 14.

Later in December, customs officials intercepted a second package shipped from China, also addressed to petitioner at his home in Miami. Gov't C.A. Br. 4; see PSR ¶ 9. The second package was labeled as containing "adapters." Gov't C.A. Br. 4. Inside, officials found two more devices that proved upon further testing to be firearm silencers. *Id.* at 4-5; see PSR ¶ 14. Postal records showed that petitioner had received at least 18 other shipments from China since May 2020, including two that were declared as "adapters." PSR ¶ 11.

Law enforcement officers obtained a warrant to search petitioner's home at the address to which the intercepted packages had been shipped. PSR ¶¶ 11-12. Officers recovered one additional unregistered and unserialized firearm silencer from a box on petitioner's dining room table labeled "Solvent Tube." PSR ¶¶ 12, 14. Officers also seized petitioner's laptop and cellphone. PSR ¶ 12. A forensic analysis of those devices showed that petitioner had searched the internet for information on silencers,

including how to assemble them and where to obtain the cheapest ones; that he had ordered at least one of the intercepted shipments from the Chinese e-commerce platform Ali Express, after searching for "solvent traps"; and that he had accessed an electronic manual with instructions for making and using silencers. Gov't C.A. Br. 7-9.

2. A federal grand jury in the Southern District of Florida returned an indictment charging petitioner with two counts of knowingly importing firearm silencers into the United States without authorization, in violation of 18 U.S.C. 922(*l*) and 924(a)(1)(C), and one count of knowingly possessing an unregistered silencer, in violation of 26 U.S.C. 5861(d). Indictment 1-2.

The case proceeded to trial, where petitioner argued that the seized devices were fuel filters or solvent traps. See, *e.g.*, 12/8/22 Trial Tr. 67 (closing argument). A solvent trap is a "device that can be attached to the muzzle of the firearm so that when cleaning the firearm it can catch and capture the cleaning solvent." Gov't C.A. Br. 10 (brackets and citation omitted). The government called an ATF expert who explained, however, that the devices at issue here had characteristics consistent with a firearm silencer and several features that no fuel filter or solvent trap would have. *Ibid.* For example, two of the devices consisted of hollow tubes with holes at both ends—an impractical design for trapping liquid solvent. *Ibid.* Those two devices were functional firearm silencers when assembled. *Ibid.* The other devices needed additional holes to be drilled in them, but the spots to be drilled were pre-marked in a manner that would serve no purpose for solvent traps. See 12/6/22 Trial Tr. 38-39; 12/7/22 Trial Tr. 53-54. The ATF expert also explained that the devices would not work in their present

form as fuel filters because they were threaded to fit onto gun barrels, not engine parts. Gov't C.A. Br. 10. And the devices contained parts, such as interior baffles, that were useful in muffling sound but not in trapping solvent. *Ibid.* The government also presented evidence from petitioner's laptop and cellphone confirming his interest in silencers. See pp. 3-4, *supra*.

The district court instructed the jury that it could not find petitioner guilty unless the government proved beyond a reasonable doubt that he knowingly imported or possessed a "firearm silencer." Jury Instr. 8-9. The court also instructed the jury on the statutory definition of a "firearm silencer." *Ibid.* And, with respect to Section 5861(d), the court instructed the jury that it could find petitioner guilty only if the government proved that he "knew about the specific characteristics or features of the firearm that made it subject to registration, namely that the object was a 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." *Id.* at 9-10.

The jury found petitioner guilty on all counts. Judgment 1. The district court sentenced him to eight months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

3. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1-12. As relevant here, petitioner contended that the evidence was insufficient to show that the devices at issue were silencers or that he had knowledge of the features that would make them "qualify * * * as such." Pet. C.A. Br. 29. The court rejected those contentions. It explained that the jury was free to credit the ATF expert's testimony that two

of the devices were functional silencers "when assembled," without the need for any further modification, thus satisfying the statutory definition. Pet. App. 9. The court further explained that, although the other devices required the user to drill "additional hole[s]," the jury was nonetheless entitled to conclude that the devices "constitute[d] silencers" under the portion of the statutory definition encompassing "'any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer.'" *Id.* at 9-10 (quoting 18 U.S.C. 921(a)(25)). And the court found that "[t]he evidence, reasonably construed in the light most favorable to the government, supports the conclusion that [petitioner] knew that the devices he possessed had the features of a silencer that subjected them to registration." *Id.* at 10.

Petitioner also contended that firearm silencers are "arm[s]" within the meaning of the Second Amendment, and that the federal prohibitions on knowingly importing silencers without authorization or knowingly possessing unregistered silencers are "unconstitutional as applied" to him. Pet. C.A. Br. 52; see *id.* at 48-52. Petitioner had not previously raised any Second Amendment challenge to his prosecution. The court of appeals therefore reviewed his argument only for plain error and found no such error. Pet. App. 10-12.

ARGUMENT

Petitioner renews his contention (Pet. 19-23) that the jury lacked sufficient evidence to convict him of knowingly importing or knowingly possessing firearm silencers. The court of appeals correctly rejected that argument, and its factbound and nonprecedential decision does not conflict with any decision of this Court or another court of appeals. Petitioner also renews his

alternative contention (Pet. 44-60) that his importation and possession of the silencers was protected by the Second Amendment. Again, the court of appeals correctly rejected that argument and its unpublished decision does not implicate any conflict of authority. In addition, the plain-error standard of review would make this case an unsuitable vehicle for addressing the application of the Second Amendment to silencers even if that question otherwise warranted this Court's review. The petition should be denied.

1. The court of appeals correctly rejected petitioner's case-specific challenge to the sufficiency of the evidence supporting the jury's conclusion that the particular devices at issue here were "firearm silencer[s]" under 18 U.S.C. 921(a)(25).

a. For petitioner's two Section 922(*l*) violations, the government was required to prove that he knowingly imported a "firearm" without the requisite authorization, 18 U.S.C. 922(*l*), 924(a)(1)(C), where the term "firearm" is defined to include a "firearm silencer," 18 U.S.C. 921(a)(3)(C). For petitioner's Section 5861(d) violation, the government was required to prove that he knowingly possessed a "firearm," where that term again is defined to include a "silencer"; that the device was not properly registered to him; and that he knew the characteristics of the device that made it subject to registration. 26 U.S.C. 5845(a)(7), 5861(d); see Jury Instr. 9; cf. *Staples* v. *United States*, 511 U.S. 600, 602 (1994) (discussing the analogous knowledge requirement for machineguns). Both sets of offenses incorporate the same definition of a "firearm silencer," which means "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." 18 U.S.C. 921(a)(25); see 26 U.S.C. 5845(a)(7).

As the court of appeals recognized, the evidence was more than sufficient to support the jury's conclusion that the devices at issue here were "firearm silencer[s]." 18 U.S.C. 921(a)(25); see Pet. App. 6-10. The jury heard and was entitled to credit testimony that the devices were submitted to ATF for testing and that they functioned as silencers—*i.e.*, that they "diminish[ed] the report of a portable firearm." 18 U.S.C. 921(a)(25); see Pet. App. 9 (observing that ATF's expert "tested one of the devices and it reduced the sound of a firearm 'by over 17 decibels'").

Petitioner argues (Pet. 19, 22) that the devices he imported from China were not "marketed" as silencers, and he suggests (Pet. 20) that sustaining his conviction would call into question the lawful possession of everyday items like "plastic soft drink bottles or PVC pipes" that can in some circumstances be converted into devices capable of muffling the sound of gunfire. But on this record, the jury was entitled to conclude that the statements identifying the devices as solvent traps were merely pretextual. Two of the devices were designed to and did muffle gunfire right out of the box, without the need for any further modifications. Gov't C.A. Br. 6, 15. When assembled, those devices consisted of hollow tubes with holes at both ends; as the ATF expert explained, it would make no practical sense for a solvent trap to have holes at *both* ends, since the whole point of the device is to trap liquid solvent as it runs out of a gun barrel. *Id.* at 10. The remaining devices required minor modification in the form of drilling additional holes, but

the jury was entitled to conclude that those devices were also silencers because they constituted "combination[s] of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer." 18 U.S.C. 921(a)(25). Other specific features of the devices—such as the markings identifying where to drill the holes, the sound-dampening baffles, and the threading on the end caps to connect the devices to a gun barrel—confirmed that they were designed and intended for use as silencers rather than as fuel filters or solvent traps. Pet. App. 9-10; see pp. 4-5, *supra*.

To the extent that petitioner contends (Pet. 22) that devices marketed as fuel filters or solvent traps are excluded from the "plain text of the statutory definition," that contention is incorrect. The statutory definition of a "silencer" does not turn on how a Chinese e-commerce platform chooses to market the device. The question, instead, is whether the device is a combination of parts "designed" and "intended for use" in dampening the report of a portable firearm, 18 U.S.C. 921(a)(25), and the evidence presented in this case was sufficient to allow a jury to find beyond a reasonable doubt that these devices were so designed and intended. And to the extent that petitioner continues to dispute the evidence of his own knowledge or intent, see, *e.g.*, Pet. 20, 23, the court of appeals correctly rejected that sufficiency challenge, explaining that "[t]he evidence * * * supports the conclusion that [petitioner] knew that the devices he possessed had the features of a silencer that subjected them to registration," Pet. App. 10. Indeed, the government presented extensive evidence from petitioner's laptop and cellphone showing that he sought out information on how to make silencers, where to obtain them, and how to assemble them. See Gov't C.A. Br. 19-23.

b. In any event, the factbound and unpublished decision below does not warrant further review. This Court does not ordinarily grant certiorari "to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); see *Kyles* v. *Whitley*, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) ("[U]nder what we have called the 'two-court rule,' the policy [in *Johnston*] has been applied with particular rigor when district court and court of appeals are in agreement as to what conclusion the record requires.") (citing *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)). Petitioner does not identify any sound basis for departing from that practice here.

Petitioner asserts (Pet. 34) that the Eleventh Circuit's decision in this case is "inconsistent with the reasoning of the First Circuit" in *United States* v. *Crooker*, 608 F.3d 94 (2010) (per curiam). See Pet. 34-43. In that case, the First Circuit reversed the defendant's conviction for transporting a firearm silencer in interstate commerce after being convicted of a felony, in violation of 18 U.S.C. 922(g)(1) (2006). See *Crooker*, 608 F.3d at 95, 100. The defendant maintained that the device at issue was "designed to muffle the sound of an airgun," which is not itself a "firearm" under federal law, but the evidence at trial showed that the device could also be used to muffle the sound of a firearm using an adapter. *Id.* at 96. The First Circuit expressed concern that the definition of a "firearm silencer" could be read to reach household items like "a soda bottle" in the possession of a defendant aware that those items "have some capacity to muffle the sound of a [gun] shot," even though the defendant did not intend to use them for that purpose. *Id.* at 97, 99. Therefore, at least with respect to "homemade or adaptable devices," the First Circuit interpreted

the definition to require evidence that the defendant "had a purpose to have the device function as [a] firearm silencer," and the court viewed the particular record in that case as insufficient to support an inference of intent. *Id.* at 99-100.

Petitioner's reliance on *Crooker* is misplaced, as the district court recognized when denying his motion for a judgment of acquittal. See Sent. Tr. 4 (describing *Crooker* as "wholly distinguishable"). Here, unlike in *Crooker*, there was more than sufficient evidence that petitioner's devices were designed and intended to diminish the report of a firearm, not for some other use. Petitioner's case is thus "the ordinary criminal case" described by the First Circuit in *Crooker*, where "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)." 608 F.3d at 96-97. The First Circuit made clear in *Crooker* that its construction of the statute would "pose[] no barrier" to treating such a device as a silencer. *Id.* at 99. Petitioner therefore fails to show that the First Circuit would have reached a different conclusion in this case. Nor does he identify any other purported division in the courts of appeal.

c. Petitioner is likewise mistaken to rely (Pet. 23-34) on technical bulletins that ATF has issued regarding devices marketed as solvent traps or fuel filters. This case does not present any occasion to address those bulletins. The district court's instructions required the jury to find that the devices in question satisfied the definition of a "firearm silencer" set forth in the statute, see Jury Instr. 8-9, not any agency bulletin or other guidance document. The court of appeals likewise rejected petitioner's sufficiency challenge based on the record evidence establishing that the devices satisfied

the statutory definition of a "firearm silencer." Pet. App. 7 (citation omitted).

In any event, the ATF documents that petitioner invokes do not suggest any reason to grant further review. Those documents were not published and were instead intended to provide guidance to law enforcement personnel in applying the statutory definition of "firearm silencer." See *United States* v. *Hay*, 46 F.4th 746, 748, 750 (8th Cir. 2022) (discussing one of the bulletins and explaining that it "merely seeks to inform law enforcement officers of items that qualify as firearm silencers under the law as it already exists").

In 2023, after the events at issue in this case, ATF released an open letter to provide public guidance about the agency's approach to "devices commonly marketed as 'solvent traps.'" Open Letter from Matthew Varisco, Assistant Director, Enforcement Programs and Services, ATF, to All Federal Firearms Licensees 1 (Nov. 20, 2023), perma.cc/XS5C-XVUS. ATF's letter explains that "[t]he test for whether an item is a silencer is not the label a manufacturer or retailer applies" to the device, but rather whether the device satisfies "the statute written by Congress." *Ibid.* And the letter goes on to identify some recurring features of devices that can satisfy the statutory definition despite being marketed as solvent traps—for example, because the devices contain pre-drilled holes that would "serve[] no purpose in collecting solvent," or because the devices "include baffles" or other features that "increas[e] the effectiveness of a firearm silencer" but "offer no advantages in collecting or filtering cleaning solvent." *Id.* at 1-2.

ATF's guidance thus simply makes clear that the relevant question is whether a device satisfies the statutory definition of a firearm silencer. The jury was

properly instructed on that definition here, and it was entitled to conclude that petitioner's devices satisfied it.

2. Petitioner's belated Second Amendment challenge (Pet. 44-60) likewise lacks merit, does not implicate any conflict of authority, and does not otherwise warrant this Court's review.

The Second Amendment, by its terms, protects the right to keep and bear "Arms." U.S. Const. Amend. II. In *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), this Court interpreted the word "Arms" to bear its original meaning of "'weapons of offence, or armour of defence.'" *Id.* at 581 (quoting 1 Samuel Johnson, *Dictionary of the English Language* 106 (4th ed. 1773)) (brackets omitted). A silencer is neither a weapon nor "armour of defence." Petitioner asserts (Pet. 52) that a silencer "serves to facilitate armed self-defense." But he offers no additional textual argument for treating a silencer as falling among the "Arms" contemplated by the Second Amendment, nor does he attempt to explain how a silencer, which by definition simply makes a firearm quieter, is necessary for armed self-defense. See 18 U.S.C. 921(a)(25) (defining "silencer" by reference to its capacity "for silencing, muffling, or diminishing the report of a portable firearm").

Petitioner criticizes (Pet. 55) some lower courts for what he perceives as an unduly narrow focus on "silencers' mechanical functionality." But the decisions he invokes (Pet. 52-55) only underscore why the Second Amendment does not confer any right to keep and bear silencers. Restrictions on firearm silencers do not "materially burden" one's ability to keep and bear a gun for "self-defense." *United States* v. *Cox*, 906 F.3d 1170, 1186 n.13 (10th Cir. 2018) (citation omitted), cert. denied, 139 S. Ct. 2690, and 139 S. Ct. 2691 (2019). Petitioner is also

wrong to assert (Pet. 55-56) that the inclusion of "silencer" in the statutory definition of "firearm," 18 U.S.C. 921(a)(3)(C), supports his argument. The statute does not define the term "Arms" and in any event does not control the meaning of that term in the Second Amendment.

Petitioner does not identify any court of appeals that has adopted his view that silencers are "Arms" within the meaning of the Second Amendment, and many lower courts have rejected that argument. See Pet. 54-55 (collecting cases). Moreover, this Court explained in *Heller* that the Second Amendment allows the prohibition of "dangerous and unusual weapons," 554 U.S. at 627, and other courts have upheld federal restrictions on silencers on the alternative ground that silencers are dangerous and unusual. Rather than "trap the Second Amendment in amber" (Pet. 52), those decisions have focused on the acute dangers of silencers and their relatively uncommon use by law-abiding gun owners. See, *e.g.*, *United States* v. *McCartney*, 357 Fed. Appx. 73, 76 (9th Cir. 2009) (recognizing that silencers are "not 'typically possessed by law-abiding citizens for lawful purposes'") (quoting *Heller*, 554 U.S. at 625), cert. denied, 559 U.S. 1021 (2010); *United States* v. *Perkins*, No. 08-cr-3064, 2008 WL 4372821, at *4 (D. Neb. Sept. 23, 2008) (similar).

Finally, as the court of appeals observed, petitioner "raised his Second Amendment argument for the first time on appeal." Pet. App. 11. His claim is therefore reviewable only for plain error. See Fed. R. Crim. P. 52(b). To establish reversible plain error, a defendant must show "(1) 'error,' (2) that is 'plain,' and (3) that 'affects substantial rights.'" *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (quoting *United States* v. *Olano*, 507

U.S. 725, 732 (1993)) (brackets omitted). If those first three prerequisites are satisfied, the reviewing court has discretion to correct the error based on its assessment of whether "(4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Ibid.* (quoting *United States* v. *Young*, 470 U.S. 1, 15 (1985)) (brackets and internal quotation marks omitted). Here, at a minimum, petitioner cannot establish any error that was "plain," *i.e.*, "clear" or "'obvious.'" *Olano*, 507 U.S. at 734. And the plain-error posture of this case would make it an unsuitable vehicle for addressing the Second Amendment's application to silencers as a general matter.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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