No. 18-936

IN THE

Supreme Court of the United States

JEREMY KETTLER, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

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

Brief *Amicus Curiae* of Downsize DC Foundation, DownsizeDC.org, Tennessee Firearms Association and The Heller Foundation in Support of Petitioner

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF THE *AMICI CURIAE*[1]

Downsize DC Foundation and Heller Foundation are nonprofit educational and legal organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(3). DownsizeDC.org and The Tennessee Firearms Association are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4).

Amici organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to its filing; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

A fee targeting constitutionally protected conduct is permissible only if it meets the expense incident to the administration of the regulation and to the maintenance of public order in the matter regulated. The Court below, adopting the government's argument, held that the National Firearms Act of 1934, 26 U.S.C. §§ 5801-5872 (NFA) is a revenue tax, not a cost-of-administration fee. By the government's own argument, then, the NFA is an impermissible infringement on a fundamental right guaranteed by the Bill of Rights. The NFA is thus *per se* unconstitutional.

Just as the First Amendment protects modern forms of communications and the Fourth Amendment protects 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. Sound suppressors are such instruments, and the Circuit Court incorrectly excluded them from the protection of the Second Amendment.

No contemporary prosecution resulting from a failure to pay the NFA tax can be justified under the Commerce Clause. Modern applications of the NFA tax cannot be justified under the same rationales underlying this Court's 80 year-old Miller case and this Court has never upheld the validity of the NFA tax against a Second Amendment challenge as raised by Petitioner. Notwithstanding this, application of the NFA upon Petitioner ultimately punished Petitioner

for conduct explicitly protected and authorized under valid state law.

ARGUMENT

I. This Court Should Grant Certiorari to Condemn the Imposition of a Tax on the Exercise of Fundamental, Constitutional Rights Guaranteed by the Bill of Rights.

Over three quarters of a century ago, this Court unequivocally affirmed that to allow a flat tax on a fundamental right guaranteed by the Bill of Rights "would be a complete repudiation of the philosophy of the Bill of Rights." Murdock v. Pennsylvania, 319 U.S. 105, 116 (1943). It is difficult to imagine a stronger condemnation of attempts to tax fundamental rights including those guaranteed in the Second Amendment.[2] Murdock correctly condemned the imposition of a "tax" not only on the exercise of "a privilege granted by the Bill of Rights" but even "for

[2] This Court recently reaffirmed "the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen." District of Columbia v. Heller, 554 U.S. 570, 594 (2008). Despite this, the right to bear arms continues to be under constant attack by the "mainstream" media and the political left. Indeed, it seems clear that gun control "advocates" no longer are willing to admit, if they ever were, that the right to bear arms is a fundamental right. See Peruta v. California, 137 S.Ct. 1995, 1999 (2017) (Thomas, J., dissenting from denial of certiorari).

the privilege of carrying on interstate commerce." Murdock at 113.[3]

A. Any Tax on Protected Rights Is Unconstitutional *Per Se.*

The Petitioner has ably shown that the National Firearms Act "tax" is not a "tax" in any sense of the word. But even if it is, it is an unconstitutional infringement of a fundamental right. This is a critically important issue that this Court must resolve.

In this case, the United States has argued that the NFA "tax" is not designed or collected to cover the costs of the administration of the NFA, but has asserted that it is a revenue tax. The Circuit Court accepted this argument, incorrectly concluding that "on its face, the NFA is a taxing scheme." United States v. Cox, 906 F.3d 1170, 1179 (10th Cir. 2018). The NFA, however, is not a "tax" but is an unabashed effort to engage in impermissible gun control.

In Murdock, this Court held that efforts "to control or suppress [the] enjoyment" of "fundamental rights" is

[3] "The constitutional difference between such a regulatory measure and a tax on the exercise of a federal right has long been recognized. While a state may not exact a license tax for the privilege of carrying on interstate commerce, it may, for example, exact a fee to defray the cost of purely local regulations in spite of the fact that those regulations incidentally affect commerce. 'So long as they do not impede the free flow of commerce and are not made the subject of regulation by Congress they are not forbidden.' Clyde Mallory Lines v. Alabama, 296 U.S. 261, 267, n.8 and cases cited."[other internal citations omitted].

not permitted. Murdock at 112. Of course, this prohibition does not extend to "a tax on the income of one who engages in [protected] activities or a tax on property used or employed in connection with those activities." Id. But if the Government is permitted "to tax the exercise of a privilege" it has "the power to control or suppress its enjoyment." Id. Thus, "a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the [Bill of Rights] . . . restrains in advance . . . constitutional liberties . . . and inevitably tends to suppress their exercise." Id., at 113.

As the Murdock Court explained, "[t]he power to tax the exercise of a privilege is the power to control or suppress its enjoyment." Id. at 112. Although the exercise of constitutionally protected activities may be subject to generally applicable taxes, such activities may not be singled out for special taxes, or even fees, except as narrowly permitted under this Court's fee jurisprudence established in Murdock and Cox v. New Hampshire, 312 U.S. 569, 577 (1941). A fee targeting constitutionally protected conduct is permissible only if it is "'not a revenue tax, but one to meet the expense incident to the administration of the Act and to the maintenance of public order in the matter licensed.'" Cox, at 577. But, as the government has argued, the NFA is a revenue tax, not a cost-of-administration coverage. Just as in Murdock, the government here has not argued, and the Petitioner was "not charged with, breaches of the peace." Id., at 116.

Similarly, this Court declared unconstitutional a tax on newspapers with a circulation of more than

20,000 "because it abridges the freedom of the press," while noting that was "not . . . to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press." Grosjean v. American Press Co., 297 U.S. 233, 250-251 (1936). This Court proclaimed such a tax on a fundamental right as "bad":

> It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves. [Id., at 250]

Likewise, the National Firearms Act enacted is a "tax", solely for purpose of fettering the constitutionally protected, fundamental right to keep and bear arms. This tax is "bad" because its sole purpose is to infringe and fetter the citizens' right to possess certain firearms and accessories like suppressors.

The Tenth Circuit, however, rejected the application of Murdock to Petitioner's case, incorrectly holding that suppressors are outside the protection of

the Second Amendment. In so doing, the Circuit Court rejected the plain language of the Second Amendment despite this Court's recent historical observation in District of Columbia v. Heller, 554 U.S. 570, 594 (2008). The Court below also ignored the holding in Heller that:

> Just as the First Amendment protects modern forms of communications, e.g., Reno v. American Civil Liberties Union, 521 U.S. 844, 849 (1997), and the Fourth Amendment applies to modern forms of search, e.g., Kyllo v. United States, 533 U.S. 27, 35–36 (2001), 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. [Heller, at 582]

B. The Penalties of the National Firearms Act Are Unconstitutional

Under the NFA, Petitioner was subject to imprisonment for up to 10 years and a $10,000 fine because he lawfully exercised his Second Amendment rights and the rights guaranteed to him under the Kansas statute and this, simply for the failure to pay an unconstitutional, $200 tax. Regardless of whether he incurred imprisonment, Petitioner now has been transformed into a felon, permitting the government to strip him completely from the exercise of his Second Amendment rights, as well as the right to vote guaranteed by the Fourteenth Amendment, the right

to hold certain elective offices and even the right to obtain a license in many trades and professions.

Such a severe and overreaching penalty is two to three times the comparable criminal sanction for violations of other tax laws in the United States. 26 U.S.C. §§ 7201, 7203 and 7206. The NFA's criminal penalties make crystal clear that its true purpose and effect has nothing to do with general revenue to the government and everything to do with gun control amounting to an unconstitutional infringement of a fundamental civil right guaranteed by the Bill of Rights.[4]

[4] The NFA thus imposes a cruel and unusual punishment or an excessive fine in violation of the Eighth Amendment. See Alexander v. United States, 509 U.S. 544, 558 (1993) (remanding to the Court of Appeals for its failure to consider the "excessive fine" component of the Eighth Amendment).

II. The Prosecution of Petitioner Under the National Firearms Act Violates the Interstate Commerce Clause and Upends State Legislative Efforts to Protect the Fundamental Right to Bear Arms.

Although this Court upheld the NFA tax in United States v. Miller, that case was decided 80 years ago with no Second Amendment challenge, involved no "thorough examination of the Second Amendment", Heller, at 623, and was not a case or controversy given that "The defendants made no appearance in the case, neither filing a brief nor appearing at oral argument; the Court heard from no one but the Government (reason enough, one would think, not to make that case the beginning and the end of this Court's consideration of the Second Amendment)." Id. Even if it had, "new cases expose old infirmities which apathy or absence of challenge has permitted to stand." Williams v. Illinois, 399 U.S. 235, 245 (1970).[5]

In this case, the Court below dismissed the applicability of the Ninth and Tenth Amendments to the United States Constitution, holding that Kansas' Second Amendment Protection Act, Kansas Statutes, Section 50-1201, et seq. was preempted by the NFA. Significantly, it did so even though the Kansas Act expressly limits itself to *intrastate* commerce in firearms and accessories. Tennessee and eight other States have enacted similar laws aimed at

[5] Holding that a "State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine." Id., 242.

undergirding the fundamental right to bear arms and accessories made, transferred and possessed intrastate. Tenn. Code Ann. § 4-54-101, et seq. It was never disputed that the suppressor at issue below was made, transferred and possessed solely in Kansas. Oddly, the Court also said that the Kansas Act "has never been an issue in this case." Cox, at 1188.

In addition to the obvious inapplicability of the Commerce Clause as a justification for the prosecution in this case, the Court below held that the noise suppressor for which Petitioner was prosecuted, is not protected by the Second Amendment because it is not a *bearable arm,* in defiance of this Court's definition of "bearable arm" in Heller. Cox, at 1186. The Court below held that it matters not that a *noise suppressor* – inaccurately referred to as a "silencer" by the Circuit Court and many who oppose the Second Amendment – though used solely for the lawful and desirable purpose of protecting the hearing of the user and those around him "can't be a bearable arm." Id. This unsupportable proposition underpinned the Court's affirmance of Petitioner's conviction and disregards the Kansas legislature's express finding that a suppressor is among those firearm accessories entitled to Second Amendment protection.

If for no other reason than this obvious health and safety benefit, the legislatures of Kansas and Tennessee have proclaimed that the Second Amendment protects the manufacture, transfer and possession of firearm accessories, includes "sound suppressors". The Kansas and Tennessee legislatures, among others, have proclaimed these firearm

accessories to be bearable arms, protected under the Second Amendment and further have declared that the Ninth and Tenth Amendments guarantee that citizens may exercise their Second Amendment rights without interference from the federal government. In identical language to the Tennessee Act, the Kansas Act provides as follows:

> Legislative declaration. The legislature declares that the authority for K.S.A. 2014 Supp. 50-1201 through 50-1211, and amendments thereto, is the following:
>
> (a) The tenth amendment to the constitution of the United States guarantees to the states and their people all powers not granted to the federal government elsewhere in the constitution and reserves to the state and people of Kansas certain powers as they were understood at the time that Kansas was admitted to statehood in 1861. The guaranty of those powers is a matter of contract between the state and people of Kansas and the United States as of the time that the compact with the United States was agreed upon and adopted by Kansas in 1859 and the United States in 1861.
>
> (b) The ninth amendment to the constitution of the United States guarantees to the people rights not

granted in the constitution and reserves to the people of Kansas certain rights as they were understood at the time that Kansas was admitted to statehood in 1861. The guaranty of those rights is a matter of contract between the state and people of Kansas and the United States as of the time that the compact with the United States was agreed upon and adopted by Kansas in 1859 and the United States in 1861.

(c) The second amendment to the constitution of the United States reserves to the people, individually, the right to keep and bear arms as that right was understood at the time that Kansas was admitted to statehood in 1861, and the guaranty of that right is a matter of contract between the state and people of Kansas and the United States as of the time that the compact with the United States was agreed upon and adopted by Kansas in 1859 and the United States in 1861.

(d) Section 4 of the bill of rights of the constitution of the state of Kansas clearly secures to Kansas citizens, and prohibits government interference with, the right of individual Kansas citizens to keep and bear arms. This constitutional protection is unchanged from the constitution of the state of Kansas,

> which was approved by congress and the people of Kansas, and the right exists as it was understood at the time that the compact with the United States was agreed upon and adopted by Kansas in 1859 and the United States in 1861. [Kan. Stat. § 50-1202 (emphasis added)]

Kansas, like Tennessee, rightly protects firearms accessories manufactured and owned in Kansas from "federal regulation" because they never enter into "interstate commerce." Kan. Stat. § 50-1204. Kansas defines firearms accessories to include "sound suppressors" – the item lawfully possessed by Petitioner and for which he was convicted of failing to pay the $200 tax. As noted above, Tennessee contains the identical definition. Tenn. Code Ann. § 4-54-103(1).

The Court below expressly held that the National Firearms Act, 26 U.S.C. § 5861, preemption of the Second Amendment Protection Act was not "relevant". Cox, at 1178 n.7. The Court then refused to "engage any of Kansas's arguments." Id. This Court therefore should grant certiorari to "engage" those arguments.

CONCLUSION

For the reasons stated, the *amici* respectfully urge that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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