No. 17-3035

In The United States Court of Appeals for the Tenth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JEREMY KETTLER,
Defendant-Appellant.

Appeal from the United States District Court for the District of Kansas District Court No. 6:15-cr-10150-JTM-01 J. Thomas Marten, United States District Judge

Appellant's Opening Brief

Oral Argument Is Requested

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STATEMENT OF RELATED APPEALS

Appellant Kettler was tried in the court below with Shane Cox. Cox has separately filed a notice of appeal to this Court, which is pending as Docket # 17-3034.

JURISDICTIONAL STATEMENT

Appellant Jeremy Kettler seeks review of the district court's May 10, 2016 and January 31, 2017 orders denying motions to dismiss. Appellant was convicted of violating 26 U.S.C. § 5861(d). The district court had jurisdiction pursuant to 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. Appellant Kettler filed his notice of appeal timely on February 16, 2017. II App. 342.[1]

STATEMENT OF THE ISSUES

1. Has the National Firearms Act morphed into an unconstitutional exercise of a nonexistent federal police power, ceasing to constitute a proper exercise of the taxing power?

2. Even if the National Firearms Act would otherwise be a proper exercise of Congress's power to tax, does it impermissibly tax a constitutionally protected right?

3. Should Mr. Kettler suffer penal consequences for what is effectively a constitutional dispute between two independent but interrelated civil sovereigns?

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[1] Citations to "App." refer to the Appellant's Appendix, which is filed concurrently with this brief. The Appendix is in two volumes and is paginated consecutively. The Roman numeral refers to the volume in which the page citation appears.

4. In disallowing any defense based upon the Kansas Second Amendment Protection Act, did the trial court apply the proper *mens rea* requirement for 26 U.S.C. § 5861?

STATEMENT OF THE CASE

Defendant-Appellant Jeremy Kettler, an honorably discharged, decorated combat veteran, grew up in rural Kansas, the eldest of 10 children, and still resides in Humboldt, Kansas. I App. 62. Until his recent felony conviction below, Mr. Ketter had no serious criminal history. *Id.*

Mr. Kettler met Co-Defendant Shane Cox sometime in 2014, while shopping in his military surplus store in a nearby town of Chanute, Kansas. II App. 367-69. While there, he saw a sound suppressor on the shelf and next to it, a copy of Kansas' Second Amendment Protection Act ("the Act"). II App. 369, 399. The Act stated that "a firearm accessory ... manufactured commercially or privately and owned in Kansas and that remains within the borders of Kansas is not subject to any federal law." K.S.A. § 50-1204(a). It further provided that the term "firearm accessory" was inclusive of "sound suppressors." K.S.A. § 50-1203(b). On the basis of the Act, Mr. Kettler believed that his acquisition, possession, and use of such a suppressor was entirely lawful. I App. 64-65.

From his military training, Mr. Kettler, being medically retired, recognized that using a suppressor as an accessory to his firearm would reduce the sound level while shooting and help preserve his hearing, already damaged from his combat service. I App. 63, II App. 369. He acquired the suppressor from Mr. Cox and produced a video showing him firing his firearm with it. I App. 63, II App. 423-24. Mr. Kettler then posted that video on Facebook along with his comments. I App. 63, 93, II App. 367, 369. Agents from the Bureau of Alcohol, Tobacco and Firearms ("ATF") eventually heard about Mr. Cox's business, did an Internet search regarding it, and discovered Mr. Kettler's Facebook posts. II App. 367. Mr. Kettler was then interviewed by an ATF agent. I App. 63, II App. 473. Thinking he had "done nothing wrong," II App. 425, Mr. Kettler readily admitted to his possession of a suppressor, and reported he fired approximately 700 rounds with it attached to his firearm before it failed and he threw it away, months before. I App. 63, II App. 404-06. After he mentioned to the ATF agent that, "you know, there is a Kansas law that says this is completely legal [and that] what [you a]re doing [i]s illegal," the "conversation ... wasn't productive after that point." II App. 425.

The United States then sought an indictment against Mr. Kettler for: (i) making false statements during a federal investigation in violation of 18

U.S.C. § 1001, I App. 20-21; and (ii) conspiring with Mr. Cox in violation of 18 U.S.C. § 371 to make, receive and transfer a firearm in violation of 26 U.S.C. § 5861. I App. 22-23. The grand jury returned a true bill of indictment against Mr. Kettler on October 6, 2015. I App. 27. A few months later, the Government sought its first and only Superseding Indictment against Mr. Kettler, including not only the first two original charges (making false statements, I App. 28-29, and conspiracy, I App. 30-31), but also adding a new third charge against him of possessing an unregistered firearm in violation of 26 U.S.C. § 5861(d).[2] I App. 34-35. The grand jury returned a true bill on this First Superseding Indictment on March 9, 2016.[3] I App. 35.

Co-Defendant Cox moved to dismiss the First Superseding Indictment, arguing: (i) that the National Firearms Act of 1934 ("NFA"), 26 U.S.C. Chapter 53, was an unconstitutional exercise of Congress's taxing power, I App. 39; (ii) that 26 U.S.C. § 5861(d) is not valid under the Commerce Clause, I App. 48, and (iii) that Congress's enumerated powers under the Commerce

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[2] Many other individuals in Mr. Kettler's and Mr. Cox's communities also acquired suppressors from Mr. Cox's store. II App. 372-73. However, none of these individuals — including a police lieutenant — were ever charged by the federal government. *Id.*

[3] Eleven counts in the First Superseding Indictment were returned against Mr. Cox. I App. 28-35.

Clause should not extend to purely intrastate activity. I App. 57. Mr. Kettler joined this Motion. I App. 70.

In a separate Motion entitled "Motion to Dismiss for Entrapment by Estoppel," Mr. Kettler also moved to dismiss the First Superseding Indictment. I App. 62. The gravamen of his argument was that, because the Kansas Second Amendment Protection Act unambiguously declared his possession of a suppressor lawful — as federal law did not apply — he did not possess the requisite *mens rea* to be convicted of 26 U.S.C. § 5861(d). I App. 65-68.

The trial court denied all of Defendants' Motions, I App. 94-104, and the matter proceeded to move toward jury trial. A little over a month before trial was scheduled to begin, the Government filed a Motion in Limine seeking an order that "any defense based on Kansas' enactment of the Second Amendment Protection Act ... is not a valid legal defense." I App. 105; *see also* II App. 347-48. The Government later broadened its limiting request in its Reply Memorandum, I App. 114; *see also* II App. 348-49, to Mr. Kettler's Opposition, I App. 112, asking the trial judge to ban even the mere mention of "the law [and Defendants'] reliance on it...." I App. 116; *see also* II App. 348 ("we are moving for a prohibition of any mention of [the Act]"). Although the court granted the Motion in Limine, I App. 118, it subsequently modified its

order, allowing testimony regarding the Kansas Second Amendment Protection Act to provide the jury with context of Defendants' actions.[4] II App. 361. However, the judge repeatedly provided corrective instructions to the jury that the Act provided no defense to, or excuse for, Defendants' actions. II App. 362, 364-65.

After the Government rested, the trial judge dismissed not only the false statement charge against Mr. Kettler, but also the conspiracy charge against both Mr. Cox and Mr. Kettler. II App. 423. This left a single count pending against Mr. Kettler — possession of an unregistered firearm in violation of 26 U.S.C. § 5861(d). The following trial day, Mr. Kettler chose to testify on his own behalf and evidence closed. That afternoon, the court instructed the jury as to its duties and the elements of the charged crimes. It also provided this instruction:

> You heard some evidence about a Kansas law known as the "Second Amendment Protection Act." That Act states in part that "a firearm accessory that is manufactured ... and owned in Kansas and that remains within the borders of Kansas is not subject to any federal law ... including any federal firearm ... registration program, under the authority of congress to regulate interstate commerce."
>
> There is also a Kansas statute that prohibits the "possessing of any device or attachment of any kind designed, used or intended for use in suppressing the report of any firearm," unless that person is in compliance with the National Firearms Act.

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[4] The trial court refused to allow a copy of the Act to go before the jury. II App. 399-401.

> Section 5861 of the National Firearms Act, the federal law the defendants are charged with violating, was passed by Congress under its authority to levy taxes. As you will see in the instructions, one of the elements of an offense under Section 5861 is that a defendant must have known of the characteristics of the firearm that made it registrable. The Government is not required to prove, however, that a defendant knew that the National Firearms Act required a firearm with those characteristics to be registered. For that reason, it is not a defense to a charge under Section 5861 that a defendant may have believed, based on Kansas law, that the National Firearms Act did not require registration of a firearm. [II App. 461-62.]

After closing arguments, the jury retired to deliberate, returning its verdicts a little over three hours later. Mr. Kettler was convicted of the single remaining count against him in the First Superseding Indictment — possession of an unregistered firearm in violation of 26 U.S.C. § 5861(d), a class C felony. II App. 336. Mr. Kettler was sentenced less than three months later to standard conditions of probation for one year. II App. 337. The instant appeal followed.

SUMMARY OF ARGUMENT

The district court erred in ruling that the National Firearms Act ("NFA") constituted a valid exercise of Congress's power to tax. Although prior cases have upheld the NFA as enacted under the taxing power — those cases were decided well before circumstances surrounding the NFA changed dramatically. For example, the NFA is now an outlier, as a tax law not administered by the Treasury Department, as its enforcement was

transferred to the Justice Department in 2002. Additionally, since the transfer fee has not been increased in 83 years, and the ATF makes every effort to minimize the number of persons who pay that tax, it becomes clear that the constitutional predicate for the NFA needs to be re-examined, as courts have done with other taxing measures.

Even if the NFA were a proper exercise of Congress's taxing power, the district court erred in giving effect to the NFA as it impermissibly imposes a tax on the exercise of a constitutional right — the possession of firearm accessories, guaranteed under the Second Amendment. The Supreme Court has ruled consistently that governments may not so burden the enjoyment of rights granted under the Constitution. Since the NFA tax is not tied to and designed to defray the expenses of administering the Act, it is an unconstitutional tax on the exercise of a constitutional right.

The district court allowed Mr. Kettler to suffer penal consequences for being, in effect, a third party to a constitutional dispute between two independent but interrelated civil sovereigns. His prosecution was an outgrowth of "a plainly political dispute between the then-Attorney General of the United States and the Governor of the State of Kansas."

This unique prosecution of Mr. Kettler and Mr. Cox proceeded without the government being required to demonstrate any true criminal intent, in that

these men acted in reliance on a presumptively valid law enacted by their state sovereign. This is quite different from cases involving misinterpretation or misapprehension of law. Moreover, the conduct prohibited by 26 U.S.C. § 5861 is *malum prohibitum*, not *malum in se*, and required that Mr. Kettler be allowed to assert a defense for reliance on the Kansas Second Amendment Protection Act, which was denied by the trial court.

ARGUMENT

I. STANDARD OF REVIEW

Sections II through IV address the constitutionality of the law under which Appellant was convicted. This Court's review of the determination of the constitutionality of a federal statute is *de novo*. United States v. Jones, 390 F.3d 1291, 1292 (10th Cir. 2004).

Section V addresses the legality of jury instructions. This Court's review for timely challenges to a jury instruction is *de novo* and the Court reviews the instructions "to determine whether, considering the instructions as a whole, the jury was misled." United States v. Winchell, 129 F.3d 1093, 1096 (10th Cir. 1997).

II. THE NATIONAL FIREARMS ACT IS NOT A MEASURE TO RAISE REVENUE.

At his trial ending on November 10, 2016, Appellant Jeremy Kettler was charged and convicted of one count of knowingly receiving a firearm

suppressor[5] that was not registered to him pursuant to the National Firearms Act of 1934, 48 STAT. 1236. In pretrial and post-trial Motions to Dismiss (joined by Mr. Kettler, *see* Motion of Kettler to Join in All Motions of Cox, I App. 70), defendants challenged 26 U.S.C. §§ 5841 and 5861 of the NFA as an unconstitutional exercise of Congress' taxing power. I App. 39, 200. As defendants argued below, the NFA has "nothing whatsoever to do with collecting revenue, or taxing...." I App. 39-40. Rather, defendants argued that the NFA has "everything to do with the regulation of the possession of the weapon: to decide who can or cannot possess the weapon," especially since "the federal government may deny permission!" *Id.* at 42-43. Defendants argued that even if the NFA once was a taxing provision, it has "lo[st its] character as a taxing provision, and [has] become merely regulatory punishment...." *Id.* at 200.

The NFA was enacted, and upheld by the district court below, based on Congress' Article I, Section 8, Clause 1 power to lay and collect taxes. *See*

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[5] The NFA categorizes certain firearm accessories, such as suppressors, as "firearms," even though they are not firearms in common parlance. *See* 26 U.S.C. § 5845(a). (H.R. 367, the "Hearing Protection Act of 2017," which removes suppressors from the NFA, is now pending.) This brief uses the term "suppressor" as opposed to the more colloquial term "silencer" because, while such a device will "suppress" the noise of a gunshot to below a level that would cause hearing damage. *See* OSHA Technical Manual, Sec. III, Ch. 5, App. A. "Suppressors" come nowhere close to "silencing" the sound of a gunshot, as is depicted in television and movies.

Memorandum and Order, I App. 99.[6] Relying on Sonzinsky v. United States, 300 U.S. 506 (1937), and decisions from numerous courts which over the years have upheld the NFA as a taxing scheme, the district court below rejected defendants' claim that the taxing clause cannot be used to justify the NFA. *See* I App. 97; *see also* II App. 327-28; *see, e.g.*, United States v. Roots, 124 F.3d 218 (10th Cir. 1997). According to the district court, "*Sonzinsky* has never been reversed, vacated or modified [and thus] it is 'the supreme Law of the Land' on this issue." II App. 327.

Yet, as the district court noted, it was "long ago" that the Supreme Court upheld the NFA under the power to tax. I App. 98. Indeed, this Court noted that the NFA is valid "**precisely because the National Firearms Act was a revenue measure only** and did not purport to exercise any general criminal power not delegated to Congress by the Constitution." United States v. Dalton, 960 F.2d 121, 124 (10th Cir. 1992) (emphasis added) (citing United States v. Rock Island Armory, Inc., 773 F. Supp. 117 (C.D. Ill. 1991)). However, since these cases were decided, there have been material changes in the nature of the NFA. What may have been a legitimate exercise of Congress' taxing power in 1934 has morphed, over more than eight decades,

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[6] *See also* ATF, "National Firearms Act," Dec. 1, 2016, https://www.atf.gov/rules-and- regulations/national-firearms-act. Hereinafter "NFA Description."

to the point that the current NFA registration system bears virtually no resemblance to a measure designed to collect revenue and, therefore, is no longer defensible under the Constitution as a taxing measure, requiring reexamination of its constitutional basis by this Court.[7]

A. Today, the NFA Is an Exercise of Federal Law Enforcement Power, Not Revenue Collection.

In 1862, Congress created the Office of Internal Revenue under the Department of the Treasury, and tasked it with collecting taxes on liquor and tobacco, eventually hiring three "detectives" to investigate tax evasion cases.[8] Except for a brief stint during the prohibition era, the offices that would become ATF have always been within the Department of the Treasury. That was true at the time the NFA was passed in 1934, and remained true when ATF became a separate bureau with the Treasury Department in 1972. *Id.* *See also* II App. 377. In 2003, however, "[a]fter more than two centuries of history with the Treasury Department, the Bureau of Alcohol, Tobacco and Firearms ... will report to a new boss: the Justice Department."[9] As the

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[7] *See generally* D. T. Hardy, "The Firearms Owners' Protection Act: A Historical and Legal Perspective," 17 CUMB. L. REV. 585-682 (1986).

[8] "ATF History Timeline," https://www.atf.gov/our-history/atf-history-timeline.

[9] D. Eggen, "Move to Justice Dept. Brings ATF New Focus," *Washington Post*, Jan. 23, 2003, http://goo.gl/N9UG3U.

Washington Post explained of the reorganization, the ATF will "no longer be responsible for collecting taxes and fees on tobacco and spirits. Instead, it will be **devoting itself full time to investigating firearms violations**, explosives thefts, cigarette smuggling and other crimes."[10] *Id.* At trial, the prosecutor noted that "ATF ... generally is involved in the **enforcement of gun control**." II App. 366 (emphasis added).

Unlike in Sonzinsky, the search into the legislation here is not a forbidden one into "hidden motives." *See id.*, 300 U.S. 506, 513-14. Rather, the separation of the ATF's law enforcement functions from its previous tax and administrative role was made as part of Congress' creation of an entirely new department of the federal government — the Department of Homeland Security — tasked with the "primary mission" to "prevent terrorist attacks within the United States." Homeland Security Act of 2002, 116 STAT. 2142, § 111(b) (Nov. 25, 2002). The ATF is now an integral part of the Department of Justice, no longer answerable to the Secretary of the Treasury.

An ATF publication explains that, today, "[t]he [entire] Internal Revenue Code, **with the exception of the NFA**, is administered and enforced by the

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[10] Even though ATF was placed under the Justice Department, the NFA remained part of the Internal Revenue Code in Title 26, but merely for convenience's sake. *See* ATF's Federal Firearms Regulations Reference Guide (2005) at 75 ("ATF Reference Guide").

Secretary of the Treasury." ATF Reference Guide, *supra*, at 74 (emphasis added). That is a significant "exception." The NFA's status as the sole outlier from the Treasury Department's authority over federal taxes should give any court pause while considering if the NFA truly remains a taxing measure. Indeed, in the Child Labor Tax Case, 259 U.S. 20 (1922), the Supreme Court struck down the Child Labor Tax Law in part for this very reason — because it was enforced "not only by the taxing officers of the Treasury, the Department normally charged with the collection of taxes, but also by the Secretary of Labor and his subordinates...." *Id.* at 37. As such, the Court noted that "a court **must be blind** not to see that the **so-called** tax is imposed to [have a] **prohibitory and regulatory effect** and purpose...." *Id.* (emphasis added). This case is even more clear than that faced by the High Court in 1922 — because ATF's jurisdiction over the NFA is not concurrent with Treasury, as was true with the Child Labor Tax Law. Rather, Congress by statute has explicitly removed all of the Treasury's authority over the NFA. 26 U.S.C. § 7801(a)(2). To paraphrase the Child Labor Tax Case, today a court "must be blind not to see" that the sole purpose of the NFA is regulation, not taxation.

By moving the ATF (and its enforcement over the NFA) from the Department of the Treasury to the Justice Department, Congress made clear

that, no matter what it once may have been, the NFA is no longer a law enacted to raise revenue. Although in 1934, the NFA may have been a revenue measure with some incidental regulation, since 2003 the NFA has been purely a regulatory measure, imposing some incidental fees still labeled as "taxes." Since the NFA appears to be the only "tax" that is not administered by the Department of the Treasury or the IRS — the only federal agencies responsible for taxation — it has lost its revenue nature and stands entirely as a criminal and regulatory statute, administered by a law enforcement agency outside of Congress' taxing power.[11] Today, the NFA's sole purpose is to regulate (and restrict) access to certain firearms and firearm accessories like the one possessed by Mr. Kettler.

B. True Taxing Provisions Are Crafted to Ensure People Pay the Tax, whereas the NFA's Regulatory Scheme Is Now Designed to Prevent Payment of the Tax in as Many Instances as Possible.

If the NFA was designed to raise revenue, it would not be structured to discourage payment of the tax. Real taxes do not operate in this fashion. The IRS has never prohibited a convicted felon from filing a federal income tax return and paying income tax. The State of Kansas has never stopped an

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[11] Nomenclature does not govern whether the federal tax power is invoked, as terminology can be manipulated. For example, to become a dealer of GCA firearms, ATF charges a "fee," (https://www.atf.gov/firearms/apply-license) but to become a dealer of NFA firearms, ATF charges a "tax." (https://www.atf.gov/qa-category/national-firearms-act-nfa).

illegal drug user from paying sales tax on his groceries. And Allen County, Kansas has never told a homeowner subject to a restraining order not to bother mailing in his property tax check. Yet, as Defendant explained below, the ATF's administration of the NFA thwarts the payment of tax by many persons who desire to register certain NFA-regulated firearms. *See* I App. 43-44.

In 1937, the Supreme Court concluded that "§2 [of the NFA] contains no regulation other than the mere registration provisions." Sonzinsky, *supra*, at 513. However, today the NFA is nothing but regulation piled on top of regulation.[12] Currently, a person wishing to purchase an NFA weapon has to wait in an ATF queue for approximately eight months just for the privilege of receiving permission to pay his $200 tax. *See* II App. 379. An 2017 internal ATF document notes that the current delay "is unlikely to diminish unless [suppressors] are removed from the NFA."[13]

In 1934 when the National Firearms Act was enacted, registration and payment of the tax was fairly straightforward. An individual submitted an application, along with his fingerprints and photograph, and paid $200 for a

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[12] *See* II App. 380 (government witness claiming that the "Form 4 transfer ... is ten different forms.").

[13] R. Turk, "Options to Reduce or Modify Firearms Regulations," ATF, Jan. 20, 2017, p. 6, http://goo.gl/y8Qef5.

tax stamp. 48 STAT. 1236, §§ 3(a) and 4(a). And, at the time the NFA was enacted, well before enactment of the Gun Control Act of 1968 and even before enactment of the Federal Firearms Act of 1938, no federal prohibitions on the possession of firearms existed, and there was no background check required for an NFA transfer.

Since then, however, amendments to the NFA have required ATF to deny a transfer application "if the transfer, receipt, or possession of the firearm would place the transferee in violation of law." 26 U.S.C. § 5812; *see also* § 5822. ATF apparently interprets this text as **implicitly** permitting it to run a background check on every person who applies to transfer an NFA firearm — despite **explicit** statutory language in the GCA making clear that such checks were not to be conducted. The Gun Control Act defines a "firearm" to include a "silencer" (18 U.S.C. § 921(a)(3)), but **specifically exempts from the background check requirement** "a firearm transfer between a licensee and another person if ... the Attorney General has approved the transfer under section 5812...." 18 U.S.C. § 922(t)(3)(B). In spite of that express GCA exemption, ATF continues to conduct background checks on those who apply for transfers of suppressors — some during the application process, and some at the time of transfer with the involvement of

a federal firearms licensee after the application for transfer has been approved. *See* ATF Final Rule 41F.[14]

In conducting its NFA background checks, if an applicant falls into any of the several categories of persons listed in 18 U.S.C. § 922(d)(1)-(9), ATF will deny the application. This means that literally tens of millions of Americans are deemed ineligible to pay the NFA tax.[15] *See* I App. 43. The district court attempted to minimize this truth, conceding only that "the government retains **some authority** to deny an application for registration of a firearm...." I App. 100 (emphasis added). But can the NFA system be properly viewed as a "tax," when perhaps as many as one in ten Americans is prohibited from paying it?

Additionally, not only are various **persons** prohibited from registering NFA weapons, but there are also some NFA **weapons** that today are

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[14] ATF guidance actually contradicts the plain language of the statute. Whereas 18 U.S.C. § 922(t)(3)(B) says that **no background check should be required** if the Attorney General approves the transfer under the NFA, ATF asserts that "**[a] NICS background must be conducted** if an NFA firearm has been approved for transfer to a trust or legal entity, such as a corporation, and no background check was conducted as part of the application process on the individual who will receive the firearm." ATF General 41F Question & Answers, http://goo.gl/2HikRm (emphasis added).

[15] In attempting to measure the magnitude of persons falling within just two of the nine banned categories, it is estimated that approximately 25 million persons have used illicit drugs in the past month, and 20 million Americans have felony records. http://goo.gl/ipa4ti; http://goo.gl/1hSQZj.

completely banned from registration. For example, under the misnamed Firearm Owner Protection Act of 1986, 100 STAT. 449, Congress banned the manufacture, sale, and transfer to civilians of machineguns that were manufactured after the effective date of the Act. *See* 18 U.S.C. § 922(o). That means that, even if an applicant sends off his $200 check seeking to register or manufacture a post-1986 machinegun, ATF will refuse to accept it.[16] Contrast this approach with other circumstances where Congress has never had any problem taxing even unlawful conduct. *See, e.g.,* United States v. Sullivan, 274 U.S. 259 (1927).

Further evidencing NFA's differences from revenue measures, NFA exempts state and local government and law enforcement from the requirement of paying the transfer fee, but still requires their registration of the NFA weapons. 26 U.S.C. § 5853.

If the modern NFA truly had a revenue generating purpose, it would not have been structured to avoid generating revenue in as many instances as possible.

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[16] Some years ago, this Court rejected the federal government's absurd attempt to charge a defendant for failure to register an illegal NFA machinegun which the government refused to register. United States v. Dalton, *supra*. *See also* Hollis v. Lynch, 827 F.3d 436 (5th Cir. 2016) and United States v. One Palmetto State Armory PA-15 Machinegun Receiver/Fame, 822 F.3d 136 (3rd Cir. 2016) for illustrations of the federal government refusing to register post-1986 machineguns.

C. Fees of $5 and $200 No Longer Justify the NFA as a Taxing Provision.

Continuously since its inception in 1934, the NFA "tax" on transfers of suppressors, short-barreled rifles, short-barreled shotguns, and machineguns has been $200, while the "tax" for an "any other weapon" has been $5. 26 U.S.C. §§ 5811, 5852(e), and 5845(h); 27 C.F.R. §§ 479.11, 479.82, and 479.91. In 1934, $200 was a significant sum of money,[17] and its effect was that only

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[17] At a hearing by the House Ways and Means Committee, the following exchange took place:

> Mr. COOPER. In that connection, would you be prepared to give us some information as to the average cost of one of these machine guns?
>
> Attorney General CUMMINGS. The cost now is about $200 —
>
> Mr. COOPER. That is, delivered to the purchaser?
>
> Attorney General CUMMINGS. Yes, sir.
>
> Mr. COOPER. **Then the proposed tax of $200.**
>
> **Attorney General CUMMINGS. Would be about a 100-percent tax**.
>
> Mr. COOPER. About a 100-percent tax?
>
> Attorney General CUMMINGS. Yes, sir.
>
> [National Firearms Act, Hearings before the Committee on Ways and Means, U.S. House of Representatives, H.R. 9066, Apr. & May 1934, http://goo.gl/X1LChZ (emphasis added).]

the well-to-do could afford to possess NFA firearms. As the ATF itself frankly explains:

> While the **NFA** was enacted by Congress as an exercise of its authority to tax,[18] the NFA had an underlying **purpose unrelated to revenue collection**. As the legislative history of the law discloses, **its underlying purpose was to curtail, if not prohibit**, transactions in NFA firearms. Congress found these firearms to pose a significant crime problem[19] because of their frequent use in crime, particularly the gangland crimes of that era such as the St. Valentine's Day Massacre. The **$200 making and transfer taxes on most NFA firearms were considered quite severe and adequate to carry out Congress' purpose** to **discourage or eliminate** transactions in these firearms. [NFA Description (emphasis added).]

No doubt, Congress often has used its taxing power as a means to discourage conduct. *See, e.g.,* NFIB v. Sebelius, 567 U.S. 519 (2012). Indeed, as the Supreme Court held in Sonzinsky, all taxes on conduct discourage that conduct to some extent, and "a tax is not any the less a tax because it has a regulatory effect." *Id.* at 513. Yet as ATF admits, "The $200 tax has not changed since 1934."[20] Over the last 83 years, Congress has never raised the transfer fee — not even to keep up with inflation, yet at the same time it has acted to raise the taxes for importers, manufacturers, and dealers. *See, e.g.,*

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[18] *See* Cummings testimony, *supra*, at 19.

[19] Interestingly enough, in spite of Congressional "findings," after 83 years ATF was forced to admit "the lack of criminality associated with silencers...." Turk, *supra*, at 6.

[20] *See* NFA Description, *supra*.

Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203; 53 *Fed. Reg.* 17538. Just accounting for inflation, the $200 tax of 1934 would be a whopping $3,650[21] today — and yet it remains at a modest $200, meaning that many NFA weapons today are accessible to a far greater percentage of law-abiding Americans than they were in 1934.[22] Today, the $200 "tax" is little more than an annoyance for anyone financially able to buy an NFA weapon, so that it no longer even serves its initial purpose to "discourage or eliminate transactions in these firearms."

Additionally, although the NFA in 1934 actually may have produced meaningful revenue, the NFA in 2017 certainly does not. The Court in Sonzinsky upheld the NFA precisely because "the annual tax of $200 is **productive of some revenue**." *Id.* at 514 (emphasis added). Today, however, it could be said that the annual tax of $200 is **productive of no net revenue**. Indeed, in March 2014, ATF estimated that there were 3,656,649 total weapons registered under NFA.[23] Yet, even with the popularity of NFA firearms, ATF reported its total revenues related to NFA

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[21] *See* http://www.usinflationcalculator.com/.

[22] If a firearm suppressor costs, say, $500, an additional $200 may not dissuade most purchasers. But an additional $3,650 would price many, if not most, suppressor owners out of the market.

[23] *See* ATF, "Firearms Commerce in the United States: Annual Statistical Update" at 15 (2014) https://www.atf.gov/file/3336/download.

activities at just over $22 million in 2013, which are paid to the Department of the Treasury. *Id.* at 11; ATF Final Rule RIN 1140-AA43 at 203 (Jan. 4, 2016).[24] Also in 2013, ATF processed nearly 1.1 million NFA applications of one sort or another. *Id.* at 12. Thus it appears that ATF's average gross revenue was about $20 per processed application.[25] Contrast that meager sum with ATF's cost of processing an NFA application, running a background check on the applicant, maintaining a perpetual registration database related to all NFA weapons, and investigating and prosecuting alleged NFA violations such as Mr. Kettler's. Clearly, **the NFA system generates no net revenue** and, indeed, administering the NFA imposes a significant **net drain on federal resources**.[26] In fact, ATF's FY 2017 budget request sought an additional $5.7 million (including funding for 22 additional employees) in order to "continue to reduce processing delays and backlog and

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[24] https://www.atf.gov/file/100896/download.

[25] A large percentage of NFA transfers generate no revenue: transfers between licensed dealers, manufacturers, importers, state and local governments, police agencies, and lawful heirs. *See* ATF Form 3 and Form 5.

[26] As ATF explains it, despite over a billion dollars annually in Congressional funding, "we are still unable to meet performance targets due to the shear [sic] workload...." ATF, FY 2016 Congressional Budget Submission at 25 (Feb. 2015), http://goo.gl/oMt1dR.

improve performance for processing NFA applications and licensing activities."[27]

D. The NFA Is No Longer a Tax but a Penalty.

This Circuit noted in its 1992 Dalton decision, discussed *supra*, **times change**, and sometimes the constitutional basis for upholding a statute must be reexamined:[28]

> a provision which is passed as an exercise of the **taxing power no longer has that constitutional basis** when Congress decrees that the subject of that provision can no longer be taxed. [*Id.*, 960 F.2d at 125 (emphasis added).]

The district court below declined to find Dalton controlling in this case (I App. 99), but even so, an important principle from Dalton applies here: the taxing power can no longer be the constitutional basis for the NFA when the $5 and $200 NFA fees no longer raise net revenue. Indeed, how can a statute be justified under Congress' power to **raise revenue**, when its net effect is to

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[27] *See* ATF, FY 2017 Congressional Budget Submission at 51 (Feb. 2016), https://www.justice.gov/jmd/file/821361/download.

[28] The Supreme Court in NFIB v. Sebelius, *supra*, noted that **times can change**: "there comes a time in the extension of the penalizing features of the **so-called tax** when it **loses its character** as such and becomes a mere penalty with the characteristics of regulation and punishment." *Id.* at 573 (citing Dep't of Revenue v. Kurth Ranch, 511 U.S. 767 (1994) (emphasis added)). The district court below declined to apply Sebelius to this case in its Order of January 31, 2017. I App. 99.

impose millions (if not tens of millions) of dollars in costs on taxpayers annually? That would be the sort of logic that appeals only to lawyers.

Whereas in 1937 in Sonzinsky, the amount of the tax had a "deterrent effect on the activities taxed [to the extent the tax] imposes an economic impediment," today it is not the $200 — but rather ATF's pervasive regulatory scheme — that deters many Americans from owning NFA weapons. To continue to treat the NFA as a revenue-raising measure is to perpetuate an unconstitutional charade.

For many years, NFA arguably was justifiable as a legitimate exercise of Congress' constitutional power to tax. However, over time, NFA has lost any logical connection to taxation. Since NFA was enacted, there has been:

- continual and significant inflation of the U.S. money supply;[29]
- the 1968 GCA ban on prohibited persons possessing firearms;[30]
- the 1986 FOPA requirement for background checks which ATF applied to the NFA;[31]
- the 1986 FOPA machine gun ban;[32] and
- the Supreme Court's decisions in District of Columbia v. Heller, 554 U.S. 570 (2008) and McDonald v. Chicago, 561 U.S. 742 (2010).

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[29] *See* T. McMahon, "Historical Inflation Rate," InflationData.com, http://goo.gl/C3817e.

[30] *See* 18 U.S.C. § 922(g)(1)-(9).

[31] *See* 18 U.S.C. § 922(s) and (t); *see also* ATF Final Rule 41F.

[32] *See* 18 U.S.C. § 922(o).

As Justice Frankfurter (typically a fan of federal authority) wrote in his dissent in United States v. Kahringer, 345 U.S. 22 (1953), "Constitutional issues are likely to arise whenever Congress draws on the taxing power **not to raise revenue** but to regulate conduct. This is so, of course, because of the distribution of legislative power between the Congress and the State legislatures in the regulation of conduct." *Id.* at 37 (emphasis added). Justice Frankfurter noted that:

> when oblique use is made of the taxing power as to matters which substantively are not within the powers delegated to Congress, the Court cannot shut its eyes to what is obviously, because designedly, an attempt to control conduct which the Constitution left to the responsibility of the States, **merely because Congress wrapped the legislation in the verbal cellophane of a revenue measure**. [*Id.* at 38 (emphasis added).]

As in Kahringer, the NFA here is "enforced through a detailed scheme of administration beyond the obvious fiscal needs...." *Id.* at 39. Its reliance on the taxing power no longer can be justified, for the NFA now intrudes on the authority of States (such as Kansas) to regulate conduct. The time is now to reconsider whether the NFA remains constitutional as an exercise of the taxing power.

III. ASSUMING *ARGUENDO* THE NFA IS AN EXERCISE OF CONGRESS'S POWER TO TAX, THEN IT IS AN UNCONSTITUTIONAL TAX ON THE EXERCISE OF A CONSTITUTIONALLY PROTECTED RIGHT.

A. The NFA Tax Violates the Constitutional Principle Established in Cox v. New Hampshire and Murdock v. Pennsylvania.

Citing the U.S. Supreme Court's 1937 decision in Sonzinsky v. United States, and cases decided between 1995 and 2006, the district court below declared that the NFA tax on suppressors is a "valid exercise of Congress' taxing authority." I App. 97-98, 101. In Section II, *supra*, Appellant Kettler challenges the continuing validity of this line of cases. However, even if the NFA tax constitutes an exercise of Congress's enumerated power to tax, it is unconstitutional for an entirely different reason: it imposes a tax on the exercise of a constitutional right.[33]

For over 80 years,[34] the Supreme Court consistently has ruled that governments "may not impose a charge for the enjoyment of a right granted by the Federal Constitution." Murdock v. Pennsylvania, 319 U.S. 105, 113 (1943). In Murdock, the Supreme Court struck down a license and tax

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[33] Below, Intervenor State of Kansas addressed how "the Second Amendment itself limits the exercise of an otherwise valid federal power (such as the Taxing power or Commerce power) if the effect of exercising that power is to impermissibly infringe upon the constitutional right to keep and bear arms." Brief of Kansas in Response to Defendant Cox's Motion to Dismiss (11/15/2016), I App. 245. *See also* Defendant Cox's Response to Brief of State of Kansas (11/23/2016), I App. 277 ("Competing with this personal 'right of the people to keep and bear Arms' is the taxing power of Congress found at Article I, Section 8, Clause 1....").

[34] *See* Grosjean v. American Press Co., 297 U.S. 233 (1936) (striking down a Louisiana tax on newspapers).

requirement imposed by a city in Pennsylvania upon Jehovah's Witnesses who were selling and delivering books and pamphlets. The Court ruled that such a fee on the exercise of a constitutional right is permissible only if: (i) it is **not a general revenue-generating tax**; and (ii) it is **tied directly** to defraying administrative **expenses** incurred in the operation of a program in which there is a legitimate governmental interest.[35] *Id*. at 113-14.

The Murdock court explained the nature of the tax it struck down:

> the **license tax** is fixed in amount and **unrelated** to the scope of the activities of petitioners or to their realized revenues. It is **not** a **nominal** fee imposed as a regulatory measure to **defray the expenses of policing** the activities in question. It is in no way apportioned. It is a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment. Accordingly, it **restrains** in advance those **constitutional liberties** of press and religion and inevitably tends to **suppress their exercise**. That is almost uniformly recognized as the inherent vice and evil of this flat license tax. [*Id*. at 113-14 (emphasis added).]

Even the dissent in Murdock agreed that "an occupation tax [cannot be] used as a cover for discrimination against a constitutionally protected right or as an unjustifiable burden upon it." *Id*. at 139 (Frankfurter, J., dissenting).

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[35] Even before Murdock, the Supreme Court barred taxes designed to raise revenue when it upheld criminal convictions for violation of a New Hampshire statute which prohibited a parade or procession on a public street without obtaining a special license requiring a $300 license fee. The Supreme Court **upheld** the fee because it was "'**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 v. New Hampshire, 312 U.S. 569, 577 (1941) (emphasis added) (quoting the New Hampshire Supreme Court).

Just last year, this Court applied the principle of Murdock to New Mexico's court e-filing fee structure, stating that: "'The lesson to be gleaned ... is that an ordinance requiring a person to pay a license or permit fee before he can engage in a constitutionally protected activity does not violate the Constitution so long as the purpose of charging the fee is limited to defraying expenses incurred in furtherance of a legitimate state interest.'" Whittington v. Maes, 655 Fed. Appx. 691, 699 (10th Cir. 2016) (unpublished) (quoting Ne. Ohio Coal. for the Homeless v. City of Cleveland, 105 F.3d 1107, 1109-10 (6th Cir. 1997).)

Although Murdoch involved the First Amendment, the principles applied there apply equally to the Second Amendment. In District of Columbia v. Heller, 554 U.S. 570 (2008), the Supreme Court held that "the Second Amendment conferred an individual right to keep and bear arms." Heller at 595. Ninth Circuit Judge Alex Kozinski recently "ruminat[ed]" that "[t]he time has come to treat the Second Amendment as a real constitutional right. It's here to stay."[36] Thus, the question here is whether levying a tax on an NFA firearm purchase impairs the exercise of a "right of the People to keep and bear arms."

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[36] Fisher v. Kealoha, 855 F.3d 1067, 1072 (9th Cir., 2017) (Kozinski, J., concurring).

Two circuits since Heller have recognized that the principles of Murdock apply to the exercise of a Second Amendment right, even while upholding the fees being challenged. The Second Circuit rejected a challenge to New York City's $340 residential handgun licensing fee under the Supreme Court's "fee jurisprudence." Contrasting it with Murdock's holding relating to taxes, the Second Circuit ruled that "[t]he undisputed evidence ... demonstrates that the $340 licensing fee is designed to defray (and does not exceed) the administrative costs associated with the licensing scheme." Kwong v. Bloomberg, 723 F.3d 160, 166 (2nd Cir. 2013).

Similarly, earlier this year, the Ninth Circuit upheld California's allocation of $5 out of a $19 firearms transfer fee set aside to a law enforcement fund. Bauer v. Becerra, 2017 U.S. App. LEXIS 9658, *13 (9th Cir. 2017). The "fee was originally limited to background checks [but] was later expanded to allow the fee to be used for 'the costs associated with funding Department of Justice firearms-related regulatory and enforcement activities related to the sale, purchase, loan, or transfer of firearms,'" among other related costs. *Id*. at *3-4. Emphasizing Cox's holding that "a tax on a constitutional right may not be used to raise general revenue" (Bauer at *19), the Ninth Circuit found that the government programs funded by the fees "can fairly be considered an 'expense[] of policing the activities in question,' ...

or an 'expense incident to ... the maintenance of public order in the matter licensed.'" *Id*. (quoting Murdock and Cox, respectively).

In contrast to the schemes in Kwong and Bauer, the NFA tax violates the Murdoch principle. It is a general revenue-raising measure unrelated to the cost of administering the program targeted at an activity — manufacturing, buying, and selling arms and accessories —but rather is expressly designed to suppress exercise of the right to keep and bear arms protected by the Second Amendment.

The NFA tax is not a fee that is directly tied to defraying administrative expenses of the ATF, and no one has ever claimed that it is either so predicated or so used.[37] The $200 tax goes into the general U.S. Treasury Fund and is spent as part of general Congressional appropriations. Moreover, it would be frivolous to argue that the $200 tax is used for defraying the cost of the program, when it is lost in the pool of the general U.S. Treasury Fund. The $200 tax has never changed since it was enacted over 80 years ago, despite significant inflation. *See* pp. 13-14, *supra*.

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[37] *See* U.S. Department of Justice Annual Financial Report, FY 2015 at II-67 ("As ATF is unable to use these collections in its operations, ATF also has the authority to transfer these collections to the Treasury General Fund.").

Nondiscriminatory taxes on the sale of firearms, such as a state sales tax,[38] may be permissible, but the $200 NFA tax is imposed not to generate a significant source of revenue for the federal government, but to discourage purchases of NFA firearms. ATF admits the purpose: "As the legislative history of the law discloses, its underlying purpose was to curtail, if not prohibit, transactions in NFA firearms."[39] Therefore, it is an unconstitutional tax on the exercise of a right protected by the Second Amendment.

B. Suppressors Are Protected Firearms under the Second Amendment.

The district court erroneously concluded that suppressors "are outside the scope of Second Amendment protection." II App. 332-33. However, suppressors are a firearm accessory[40] and, as such, are protected by the Second Amendment. This principle was confirmed by the Supreme Court in

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[38] *See*, *e.g.*, Grosjean, *supra.* at 250.

[39] ATF, "National Firearms Act," (Dec. 1, 2016).

[40] The NFA defines a "firearm" as including "any silencer." 26 U.S.C. § 5845(a)(7). Likewise, 18 U.S.C. § 921(a)(3)(C) defines a "firearm" as including "any firearm muffler or firearm silencer."

United States v. Miller, 307 U.S. 174 (1939),[41] as Second Amendment scholar Stephen Halbrook explained:

> It is noteworthy that the [Miller] Court recognized that "**arms**" included not only firearms, but also the related items and **accessories** that made them usable, including ammunition, bayonets, and accouterments. While **noise suppressors** of the Maxim type had not been invented at the time of the founding, they might have readily fit into the same model had the NFA not intervened. [S. Halbrook, "Firearm Sound Moderators: Issues of Criminalization and the Second Amendment," 46 CUMB. L. REV. 33, 54 (2016) (emphasis added).]

The district court below conducted only a cursory analysis before concluding that the only test is whether "a type of arm [is] 'in common use'" and that suppressors are not "'typically possessed by law-abiding citizens for lawful purposes.'" Memorandum and Order denying Motion to Dismiss (Jan. 31, 2017) at 10. II App. 332.

The district court relies on Heller's reference to arms "in common use" being protected by the Second Amendment and cites cases where other courts have decided that machineguns are not currently in common use. *Id.* at 331-32. The court apparently believed that Heller resolved the issue. The court assumed the "common use" language in Heller created a new test to identify a

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[41] Miller quoted a 1785 Virginia law requiring most males to possess both a firearm ("'a good, clean musket carrying an ounce ball, and three feet eight inches long in the barrel'") as well as firearm accessories ("'a good bayonet and iron ramrod well fitted thereto, a cartridge box properly made, to contain and secure twenty cartridges fitted to his musket.'") Miller at 181.

protected "arm." This could not have been what Justice Scalia meant, as handguns protected by Heller were decidedly **not** in "common use" in the District of Columbia and were **not** "typically possessed by law-abiding citizens for lawful purposes" when Heller decided that handguns were protected by the Second Amendment.

Moreover, according to the logic of the district court decision, constitutional rights would evaporate if the government violates them for a period. But a long period of unconstitutional infringement of a Second Amendment right cannot transform a protected firearm into an unprotected one. Moreover, suppressors **are** in common use. Neither the court below nor the authorities it cited make any mention of the nearly **1.3 million suppressors** that have been registered pursuant to the NFA — demonstrating that they are in fact very much and increasingly in common use. Certainly, suppressors are more common today than handguns were in Washington, D.C. in 2008.[42] As for the supposed "lawful purpose" test, the use of a suppressor in the commission of a crime is very rare[43] — except on television and in the movies.

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[42] S. Gutowski, "ATF: 1.3 Million Silencers in U.S. Rarely Used in Crimes," *Washington Free Beacon* (Feb. 17, 2017).

[43] *See* Halbrook, *supra*, at 63-67.

Thus, for both of these reasons, the district court was wrong in concluding that the Second Amendment and Heller provide no protection for suppressors. In fact, Heller found it was "bordering on the frivolous" that the Second Amendment would not protect modern arms and accessories, of which the suppressor clearly is one. Heller at 582. Rather, the court noted that "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*.

Last year, a unanimous Supreme Court granted review and reversed without argument a Massachusetts opinion upholding that state's law banning stun guns.[44] *See* Caetano v. Massachusetts, 136 S.Ct. 1027 (2016). The U.S. Supreme Court rejected the Massachusetts Supreme Court's strained reading of Heller in describing a stun gun ban as a "dangerous and unusual weapon[]." Concurring, Justice Alito astutely noted that "[u]nder the decision below, however, virtually every covered arm would qualify as 'dangerous.'" *Id*. at 1031. However, "the pertinent Second Amendment inquiry is whether [a type of arm is] commonly possessed by law-abiding citizens for lawful purposes *today*." *Id*. at 1032. Justice Alito found that stun

[44] *See also* Maloney v. Rice, 561 U.S. 1040 (2010) (summarily reversing and remanding an appellate court decision, requiring it to apply Heller to a law banning possession of nunchakas).

guns were common because "'[h]undreds of thousands of Tasers and stun guns have been sold to private citizens.'" *Id*. And how much more common are suppressors, of which there are over 1 million lawfully in circulation?

For all these reasons, even if, as the district court claims, the NFA tax is a general revenue-raising tax, then this Court still must reverse and remand because it is a tax designed to suppress the exercise of a constitutionally protected right.

IV. MR. KETTLER HAS BEEN SNARED IN A CONSTITUTIONAL DISPUTE BETWEEN TWO INDEPENDENT BUT INTERRELATED CIVIL SOVEREIGNS.

The prosecution in this case was part of a contentious dispute between the United States and the State of Kansas over the important jurisdictional line between federal and state power, as drawn by the United States Constitution. Rather than resolve its jurisdictional dispute directly with Kansas, the federal government chose instead to demonstrate its superior power, indicting and putting on trial two Kansas citizens — Mr. Kettler and Mr. Cox.

A. The Kansas Second Amendment Protection Act.

A proper understanding of the legal and constitutional significance of Mr. Kettler's purchase of a firearm suppressor begins with consideration of the April 2013 enactment of the Kansas Second Amendment Protection Act, codified at K.S.A. §§ 50-1201 through 50-1211. Containing 11 sections and

over 1,400 words, the Act recites its constitutional foundation, rooted in the Second, Ninth, and Tenth Amendments to the U.S. Constitution, as well as Section 4 of the Bill of Rights of the Constitution of the State of Kansas. Each guarantee, in turn, rests upon the original "contract between the state and people of Kansas and the United States," as understood at the time that the State of Kansas entered the union in 1861. K.S.A. § 50-1202.

The Act contains two major operative declarations as to the invalidity of certain federal laws and actions.

First, the Act "declared" that the Commerce Clause does not authorize the federal government to regulate certain types of firearms, accessories, and ammunition manufactured in Kansas and remaining in Kansas:

> A personal firearm, a **firearm accessory** or ammunition that is manufactured commercially or privately and owned **in Kansas** and that remains within the borders of Kansas is **not subject to any federal law**, treaty, federal regulation, or federal executive action, including any federal firearm or ammunition registration program, under the authority of congress to regulate interstate commerce. It is **declared** by the legislature that those items have **not** traveled in **interstate commerce**. [K.S.A. § 50-1204(a) (emphasis added).]

Second, the Act declared federal laws in violation of the Second Amendment to be void and unenforceable by Kansas authorities:

> Any act, law, treaty, order, rule or regulation of the government of the United States which **violates the second amendment** to the constitution of the United States is null, void and unenforceable in the state of Kansas. [K.S.A. § 50-1206(a) (emphasis added).]

That same section prohibits Kansas officials from enforcing such invalid federal laws:

> No official, agent or employee of the state of Kansas, or any political subdivision thereof, shall enforce or attempt to enforce any act, law, treaty, order, rule or regulation of the government of the United States regarding any personal firearm, firearm accessory or ammunition that is manufactured commercially or privately and owned in the state of Kansas and that remains within the borders of Kansas. [K.S.A. § 50-1206(b).]

Next, the Act prohibits enforcement of such unconstitutional laws by federal officials, such as happened in this case:

> It is unlawful for any official, agent or employee of the government of the United States ... to enforce or attempt to enforce any act, law, treaty, order, rule or regulation of the government of the United States regarding a firearm [manufactured and remaining in] Kansas [as a level 10 nonperson felony]. [K.S.A. § 50-1207.]

The array of legal and constitutional issues raised by the Act is broad and deep. Yet these did not receive thoughtful consideration by the federal government. Shortly after the Act was enacted, Attorney General Eric Holder wrote a curt letter to the Governor of Kansas, in which he described the Kansas Act as an attempt to "nullify certain federal firearms requirements." Attorney General Holder continued:

> In purporting to override federal law and to criminalize the official acts of federal officers, S.B. 102 directly conflicts with federal law and is therefore unconstitutional.... [u]nder the Supremacy Clause of the United States Constitution, Kansas may not prevent federal employees and officials from carrying out their official responsibilities.... Because S.B. 102 conflicts with federal firearms laws and regulations, federal

> law supersedes this new statute; all provisions of federal laws and their implementing regulations therefore continue to apply. [Letter from Attorney General Eric Holder to Kansas Governor Sam Brownback (Apr. 26, 2013).]

Having chosen this hardline response, Attorney General Holder made no effort to address the substantive constitutional concerns of Kansas officials. Instead, he threatened to enforce all "firearms laws and regulations," irrespective of the constitutional objections being raised.

In the prosecution of Mr. Kettler (and Mr. Cox), the Department of Justice took the action it threatened against two citizens of the State of Kansas, despite the sensitive and complicated question of whether the Supreme Court's preemption doctrine bars a state from declaring conduct banned by the federal government to be legal.[45] Few lawyers could offer a reasoned view on this momentous constitutional issue, although no doubt most would conclude that, regardless of the merits of the legal claims, the federal government would resist any such assertion of authority by a state.

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[45] *See generally*, R.A. Mikos, "On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime," 62 VAND. L. REV. 1421 (Oct. 2009). Professor Mikos contends that there can be no federal preemption of state law allowing a person to engage in a behavior proscribed by the federal government due to the "anti-commandeering rule." *See, e.g.,* Printz v. United States, 521 U.S. 898 (1997). That is not to say that the state may interfere in the federal government's enforcement of a valid federal law, but states are allowed to decline to also sanction federally prohibited behavior, and to refuse to participate in the enforcement of a federal criminal law.

Nonetheless, on close examination, Mr. Kettler's belief that the State of Kansas had properly drawn that jurisdictional line is fully understandable.

B. This Prosecution Reflects a Jurisdictional Dispute between Two Sovereigns.

Mr. Kettler is a citizen of the United States, and a citizen of the State of Kansas, owing allegiance to both sovereign governments.[46] Since, in our Constitutional Republic, the United States Government is one of enumerated[47] powers, having primacy only as to matters of legitimate federal authority,[48] the State of Kansas has primacy on all matters not delegated to the United States. *See* U.S. Constitution, Article I, Section 8, Clause 1; Article VI; and Tenth Amendment.

As the Kansas Attorney General has explained, the Kansas Second Amendment Protection Act was "plainly intended to assert state primacy in the regulation of firearms that are made and kept **solely** within the borders

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[46] As the Supreme Court observed in the Slaughter-House Cases, "there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual." *Id.*, 83 U.S. 36, 74 (1873).

[47] *See, e.g.,* Gibbons v. Ogden, 22 U.S. 1, 195 (1824) ("The enumeration presupposes something not enumerated....").

[48] *See* United States v. Lopez, 514 U.S. 549, 566 (1995) ("The Constitution ... withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation.")

of Kansas."[49] Like many other citizens of Kansas, Mr. Kettler had understood the Kansas Second Amendment Protection Act to have brought clarity to the scope of federal firearms law, explaining to residents of Kansas that a noise suppressor made in Kansas, and that stayed in Kansas, was not subject to being regulated under any enumerated power of the federal government. However, for openly acting on that reasonable belief — shared by many Kansans based on the actions of the Kansas State Legislature, the Kansas Governor, and the Kansas Attorney General — Mr. Kettler stands guilty of committing a federal crime.

As Kansas Attorney General Derek Schmidt asserted in his letter to the then-Attorney General Designee Jeff Sessions:

> It appears the United States went out of its way to prosecute this case that ordinarily would not have warranted federal attention. If so, it is truly unfortunate these **individual defendants have been caught up in what has every appearance of a political dispute** between the prior leadership at the U.S. Department of Justice and the Governor and Legislature of the State of Kansas.... [T]he United States should not express its displeasure with state law by prosecuting individual **defendants who relied on it in good faith**. [*Id.* at 3 (emphasis added).]

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[49] Letter from Kansas Attorney General Schmidt to United States Attorney General Sessions at 1 (Jan. 31, 2017) (emphasis added), http://ag.ks.gov/docs/default-source/documents/letter-to-ag-nominee-sessions-and- acting-ag-boente.pdf?sfvrsn=8.

The prosecution of a citizen of a state contesting a federal action is not the dispute resolution strategy that should be followed by the federal government to resolve a political dispute between two sovereigns. This "crime" of which Mr. Kettler was convicted had none of the classic attributes of criminal behavior — there was no violence or threatened violence, no endangerment, and no risk of harm to the community. Mr. Kettler did not act on the basis of a criminal mind or heart. *See* Section IV, *infra*. To the contrary, he posted a video about his purchase on Facebook as a claim of right, not as a wrongful act.[50] Indeed, the suppressor in question would not be considered to be an unusually dangerous "firearm," or even a firearm at all, as ordinarily understood. Therefore, even if a Kansas citizen understood that the federal government had authority over firearm sales, that same person could easily have believed that the Kansas government had correctly stated the constitutional principles — that a suppressor made in Kansas could be purchased in Kansas without federal paperwork.

It certainly was not unreasonable for a citizen of the State of Kansas to view the Kansas Second Amendment Protection Act to be an effort by Kansas to protect its citizens from an "incursion" by the federal government into a matter left by the U.S. Constitution to the states. It certainly was not

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[50] *See* I App. 63, 93; II App. 367, 369.

unreasonable for a citizen of the State of Kansas to believe that his state sovereign was exercising its powers lawfully.

Although there is regular tension between the federal and state governments over spending, regulations, immigration, refugees, etc., those conflicts generally do not put any individual citizen in the cross-hairs of the dispute, as they did in this case. Indeed, one strains to identify any other federal-state controversy that has trapped a private citizen into making a choice whether to believe his sovereign federal government or his sovereign state government.

In truth, Mr. Kettler stands convicted of a crime solely because he trusted and put his confidence in an official Act of the State of Kansas. *See* Section IV, *infra*. Truly, in the words of the Kansas Attorney General, the charges against Mr. Kettler were the outgrowth of "a plainly political dispute between the then-Attorney General of the United States and the Governor of the State of Kansas...." *Id.* at 2. This conviction must not be allowed to stand.

C. States Have a Duty as Lower Civil Magistrates to Protect their Citizens from the Unconstitutional Exercise of Powers Not Delegated to the Federal Government.

As Justice Anthony Kennedy explained in U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995):

> Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens

> would have two political capacities, one state and one federal, **each protected from incursion by the other**. [*Id.* at 838 (Kennedy, J., concurring) (emphasis added).]

State resistance to federal overreach is not unheard of in America. Indeed, it was anticipated by the Framers of the Constitution that, if the federal government was deemed to have exceeded its constitutionally-enumerated powers, the States and their peoples would be expected — indeed, counted on — to "push back" against such acts of federal usurpation. Again, as Justice Kennedy stated in Term Limits:

> The resulting Constitution created a legal system unprecedented in form and design, establishing **two orders of government**, each with its own direct relationship, its own privity, **its own set of mutual rights and obligations** to the people who sustain it and are governed by it. [U.S. Term Limits, Inc. at 838 (emphasis added).]

Justice Kennedy's acknowledgment that we live under two distinctly independent sovereigns, each with the duty to protect the people from the lawless activities of the other, is the constitutional foundation principle upon which the American republic was built. As the Declaration of Independence makes clear, it is to secure our God-given rights that civil governments are instituted among men deriving their just powers from the consent of the governed. Whenever any government becomes destructive of those rights, it

is the duty of the people — through their lower civil magistrates[51]— to resist the misuse of power even to the point of taking up arms against tyranny as America's founders did in 1776. In 1776, those lower civil magistrates were the colonial assemblies; today, the states serve that important function. Indeed, it was for the very purpose of warding off the prospect of another tyrant like George III and the English Parliament that America's founders constituted not a unitary United States of America, but rather a federation of independent, but interrelated, states which were empowered to interpose on behalf of their own people, should the national government exceed its constitutionally prescribed powers or violate the limits imposed upon it.

It did not take long for that federal structure to be put to the test. In 1798, the federal government enacted the Alien and Sedition Act, in response to which both the Kentucky and the Virginia legislatures adopted Resolutions to resist the Act as exceeding the powers delegated. These Resolutions were in the tradition of Alexander Hamilton's Federalist No. 28:

> It may safely be received as an axiom in our political system, that the **state** governments will ... afford complete **security against invasions** of the public liberty **by the national authority**.... [Federalist No. 28, *The Federalist* (G. Carey & J. McClellan, eds., Liberty Fund: 2001) (emphasis added). *See also* Federalist No. 46.]

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[51] *See generally* M. Trewhella, Doctrine of the Lesser Magistrate (CreateSpace: 2013).

While Jefferson's views largely prevailed in the Kentucky and Virginia Resolutions, today the States have, individually and collectively, dwindled in both stature and power.[52]

On the day that the Kansas Governor signed the Second Amendment Protection Act, the accolades poured in from gun rights activists in a number of other states.[53] But the optimism turned quickly in the light of the weakening of Kansas' resolve. That was not the original hope of James Madison, who expected that in a robust contest of power between the federal government and the states: "[S]tate governments will have the advantage with regard to the predilection and support of the people." Federalist No. 46; *see also* Federalist No. 51.

In a deferential, not confrontational, letter dated February 28, 2017, the Kansas Attorney General asked the newly confirmed Attorney General of the

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[52] *See e.g.,* W.J. Watkins, Jr., "The Kentucky and Virginia Resolutions," Constitution.org ("Though much has changed since Jefferson and Madison penned the Kentucky and Virginia resolutions, the nature of power remains the same — power can be checked only by power. The Resolves point to the states as the natural depository of the power to check the national government.")

[53] *See* J. Celock, "Kansas Governor Signs 'Strictest Second Amendment Protection Law' In Nation," Huffington Post http://www.huffingtonpost.com/2013/04/17/ kansas-gun-bill_n_3103488.html (Apr. 17, 2013).

United States to personally review this prosecution, and to take action to end it:

> It is within your power as Attorney General, even at this stage of the proceedings, to direct that in the interest of justice DOJ stop defending these convictions and instead ask that the case be returned to the district court and the indictments be dismissed [citations omitted]. In the alternative, I would encourage your support for a presidential pardon in this matter. [Letter from Kansas Attorney General to United States Attorney General, Feb. 28, 2017, at 1.]

Mr. Kettler deserves more than clemency from the President of the United States. He deserves the protection of the republican form of government established in Kansas at the time of its admission to the union so that he is not punished for being caught between the two sovereigns to which he oversees allegiance.[54]

V. THIS EXTRAORDINARY, UNPRECEDENTED CASE REQUIRES THAT THIS COURT REEXAMINE THE *MENS REA* REQUIREMENT OF 26 U.S.C. § 5861.

The factual record in this case is undisputed, demonstrating that Mr. Kettler believed possession of a Kansas-made suppressor in Kansas constituted no violation of any law. Before ever taking possession of the suppressor in question, Mr. Kettler read the Kansas Second Amendment Protection Act, a copy of which was placed prominently next to the suppressor

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[54] *See* 1787 Northwest Ordinance, Article V, reprinted in Sources of Our Liberties (R. Perry & J. Cooper, eds., Rev. Edition, ABA Foundation: 1978) at 387-89, 397.

in Mr. Cox's store. Section 50-1204 of that Act stated unequivocally that "a firearm accessory [defined as including a sound suppressor] ... manufactured commercially or privately and owned in Kansas and that remains within the borders of Kansas is not subject to any federal law." K.S.A. §§ 50-1203(b), 50-1204(a). Based upon Mr. Cox's description of the suppressor and the foregoing Kansas statutes, Mr. Kettler was confident that his purchase and possession of the suppressor was perfectly lawful.

It is equally uncontested that Mr. Kettler knew that the device he possessed was designed "for silencing, muffling, or diminishing the report of a portable firearm." *See* 26 U.S.C. § 5845(a)(7) and 18 U.S.C. § 921(a)(24). Ordinarily, as the trial judge found, this might end the question of whether Mr. Kettler possessed sufficient *mens rea* to be convicted under 26 U.S.C. § 5861, notwithstanding his understanding that his possession of the suppressor was perfectly legal. *See* Staples v. United States, 511 U.S. 600, 622 n.3 (1994) (Ginsburg, J., concurring) ("[t]he *mens rea* presumption requires knowledge only of the facts that make the defendant's conduct illegal..."). But this is **no ordinary case**.

The trial court recognized the case's uniqueness, describing it as unusually "interesting" due to the "the Second Amendment Protection Act and what it purports to do, and what it actually does...." II App. 438. Yet, after noting

that Mr. Kettler and Mr. Cox "really thought that what they were doing was fine" (*id.*), and that "nobody has challenged the constitutionality of the Second Amendment Protection Act," the trial court relied on its understanding of the law: informed by the Staples decision. *Id.* at 439. Therefore, although "sympathetic to [the] defense" of "ignorance of law and even confusion over what the law is," the court held that "you act at your risk in terms of potential prosecution," despite such ignorance or confusion. *Id.* at 440. The trial court concluded that the "Act, for all that it purports to do, has done more harm to people like Mr. Cox, and Mr. Kettler, than it has done in protecting persons..." *Id.*

The trial court's description of these unique circumstances was spot-on: this was truly an extraordinary case. The sovereign State of Kansas, relying on its constitutional right of primacy on all matters not specifically delegated to the Government of the United States, enacted the Second Amendment Protection Act, setting forth affirmative protections for the possession of certain firearms and accessories. In this case, therefore, Mr. Kettler did not inexcusably rely on any state or local agent's misrepresentation of the federal law he was charged with violating. Rather, he expressly relied on the unambiguous language of the state law, passed by the sovereign State of Kansas' legislature, signed by its governor, and undisturbed by its courts. In

other words, this was not Mr. Kettler's mistake of law based upon some faulty representation of a state official; this was at its core an unresolved jurisdictional dispute between sovereigns where the citizen of both was caught in the middle. And it is this unique context of this case that demands a more thoughtful analysis of the *mens rea* element of 26 U.S.C. § 5861 than given by the court below.

Yet the district court's instructions set out and discussed in the Statement, *supra*, required only that the jury believe Mr. Kettler know "the characteristics of the silencer that made it registrable." II App. 461. Those instructions failed to allow the jury to consider Mr. Kettler's reliance on the Kansas law, a failure which constituted error for the following reasons.

A proper starting point for understanding the application of *mens rea* in this case requires a review of its historical development. Near the beginning of the Republic's jurisprudence, the authoritative Blackstone Commentaries contended that defenses to crimes should be reduced to a single consideration: "the want or defect of *will*.... So that to constitute a crime against human laws, there must be, first, a vitious will; and, secondly, an unlawful act consequent upon such vitious will."[55] But this traditional view has not held,

[55] 4 Blackstone's Comm. 20-21 (1st Am. ed. 1772).

as Herbert Packer explained in his treatise, The Limits of the Criminal Sanction (Stanford University Press: 1968) at 122-123:

> Traditional criminal law has fallen into the deliberate, and on occasion inadvertent, use of strict liability or liability without fault. For our purposes strict liability can be defined as the refusal to pay attention to a claim of mistake.

Packer asserts this erosion of *mens rea* has occurred as much through "inadvertence as through design." *Id.* at 123.

One oft-cited case, United States v. Dotterweich, 320 U.S. 277 (1943), imposed strict liability in place of *mens rea*, explaining that the law in question imposed:

> penalties [which] serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct — awareness of some wrongdoing. In the interest of the larger good [strict liability] puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. [*Id.* at 280-81 (citation omitted).]

In other words, public safety considerations today may trump lack of wrongful intent, justifying strict liability for certain crimes.[56] The Kansas Act here, however, is not regulatory in design, but one that purports to secure a constitutional right with the imprimatur of the Kansas government upon it.

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[56] Packer clarifies that there is actually "no such thing as a 'strict liability' offense except as a partial rather than a complete discarding of *mens rea*, for there is always some element of any offense with respect to which a mental element is attached." *Id.* at 126.

This is exactly the argument put forth by the Government in Staples to justify its position that, since no *mens rea* was expressly stated in the statute, "Congress did not intend to require proof of *mens rea* to establish an offense." Staples at 606. Justice Thomas and six of his colleagues rejected that proposition in light of the "nature of the statute and the particular character of the items regulated to determine whether congressional silence concerning the mental element of the offense should be interpreted as dispensing with conventional *mens rea* requirements." *Id.* at 607. But what of *ignorantia legis*? Justice Ginsburg in Staples recites "the ... presumption, 'deeply rooted in the American legal system,' that, ordinarily, 'ignorance of the law or a mistake of law is no defense to criminal prosecution.'"[57] This rule makes sense only with respect to laws that are *malum in se,* **not** *malum prohibitum*. In the former case, everyone knows the laws of the Creator, as they are written in the created order and imprinted by the Creator on every man. *See Romans* 1:18-20. One need not be religious to accept this fundamental truth. As Professor Packer has pointed out, there is a direct connection "between the immorality of a category of conduct and the appropriate use of the criminal sanction[.]" Packer at 262. Thus, if an act is intrinsically immoral, then there is no excuse for one not to know that if he commits that act he is

[57] 511 U.S. at 622 n.3.

criminally liable. This is not so as to actions that are morally indifferent. To prove his point, Packer addresses the *mens rea* rule as applied to the selling of oleomargarine:

> If he knows that the law forbids him to sell oleomargarine, he is culpable if he sells it, regardless of whether – the law apart – the sale of oleomargarine is considered to be morally good, bad or indifferent. He is culpable because he has knowingly violated a legal prohibition. In this kind of situation ... the actor's knowledge of the legal prohibition is crucial, which is why we view criminal punishment as inappropriate unless he has been warned that what he is doing is illegal. If he has been warned, punishment is justifiable, quite apart from the moral quality of the forbidden act. [Packer at 261-62.]

There is no doubt that the firearms law which Mr. Kettler was convicted of violating, is, like the laws applying to the sale of oleomargarine, *malum prohibitum,* not *malum in se*. *See generally* Staples at 608-15. So the ordinary rule of *ignorantia legis* would not apply.

Rather the *mens rea* element would be subject to the mistake of law rule as fashioned by the drafters of the **Model Penal Code** ("MPC"). Subsection 2.04(3) of the MPC supplies an aggressive defense for mistake of law: "[a] belief that conduct does not legally constitute an offense is a **defense** to a prosecution for that offense based upon such conduct when (b) [one] acts in **reasonable reliance upon an official statement of the law**, afterward determined to be invalid or erroneous, **contained in (i) a statute** or other enactment." (Emphasis added.) This defense is separate and distinct from

that contained in MPC 2.04(3)(b)(iv), requiring that any public official who wrongly describes controlling law actually be legally responsible for the interpretation, administration, or enforcement of the law defining the offense. Moreover, this defense does not require the enabling "statute or other enactment" to arise from the same sovereign. In other words, it appears that MPC 2.04(3)(b)(i) supplies a defense directly supporting Mr. Kettler's case.

Although this Court, as well as the U.S. Supreme Court, has determined that the *mens rea* requirement for NFA crimes ordinarily protects only mistakes of fact as opposed to mistakes of law, such a rule was developed and applied to cases which do not mirror the appeal at bar. A sensible distinction can be made in federal cases such as Mr. Kettler's where the defendant reasonably relied on the express language of a state statute enacted by his state sovereign.

CONCLUSION

For the foregoing reasons, appellant requests that the conviction be vacated and the district court's orders denying the motions to dismiss be reversed.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant requests oral argument to address any concerns of the panel not adequately addressed in the briefs.

Respectfully submitted,

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July 21, 2017

BRIEF FORMAT CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(a), I certify that this brief is proportionately spaced, has a typeface of 13 points or more, and contains 12,972 words.

I relied on my word processor to obtain the count. My word processor software is WordPerfect X8.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after reasonable inquiry.

DATED this 21st day of July, 2017.

CERTIFICATE OF SERVICE AND DIGITAL SUBMISSION

I HEREBY CERTIFY that the foregoing Appellant's Opening Brief was filed with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit through the CM/ECF system on this 21st day of July, 2017. I ALSO CERTIFY that all participants are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system. I ALSO CERTIFY that any required privacy redactions have been made, and that the hard copies being submitted to the clerk's office are exact copies of the electronic version. I FURTHER CERTIFY that the digital submission of this document has been scanned for viruses with scanning program Symantec

Endpoint Protection, version 14.0.2415.0220, most recently updated on July 20, 2017, and according to the program, the file is free from viruses.

/s/
JOSEPH W. MILLER
Attorney for Jeremy Kettler

ATTACHMENT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

v. 6:15-cr-10150-JTM-01,02

SHANE COX, and
JEREMY KETTLER,

Defendants.

MEMORANDUM AND ORDER

This matter is before the court on a motion to dismiss the indictment by defendant Shane Cox (Dkt. 29), and a motion to dismiss counts 5 and 13 by defendant Jeremy Kettler (Dkt. 32). For the reasons set forth herein, the court finds that the motions should be denied.

I. Summary

A first superseding indictment filed March 9, 2016, contains thirteen counts. Dkt. 27. Shane Cox, who is named in all but two counts, is charged with three counts of unlawful possession of an unregistered firearm (26 U.S.C. § 5861(d)), one count of conspiracy (18 U.S.C. § 371), five counts of unlawful transfer of an unregistered firearm (26 U.S.C. § 5861(e)), one count of unlawfully making a firearm in violation of the National Firearms Act (26 U.S.C. § 5861(f)), and one count of unlawfully engaging in business as a dealer and manufacturer of firearms (26 U.S.C. § 5861(a)). Jeremy Kettler is charged in three counts: one count each of making false statements on a matter within

the jurisdiction of the executive branch of the U.S. Government (18 U.S.C. § 1001), conspiracy (18 U.S.C. § 371), and unlawful possession of an unregistered firearm (26 U.S.C. § 5861(d)).

The "firearms" identified in the foregoing counts include silencers, destructive devices, and a short-barreled rifle. *See* 26 U.S.C. § 5845(a) (defining "firearm" under the National Firearms Act (NFA) to include the foregoing devices). The NFA generally requires individuals who make or transfer these types of firearms to register them and to pay a special tax. *See Johnson v. United States*, 135 S.Ct. 2551 (2015). Section 5861 of the Act makes it unlawful to possess, make, receive, or transfer a firearm covered by the Act without having registered or paid the tax required by the Act.

In his motion to dismiss, defendant Cox argues that 26 U.S.C. § 5861 is unconstitutional because it is an invalid exercise of Congress' power to tax: "Congress has used the power to tax as a subterfuge to regulate the possession of certain weapons, and to punish severely the possession of those weapons not brought within the federal regulation scheme, thus the statute is unconstitutional." Dkt. 29 at 5. Defendant claims that "[o]n its face, and as applied, the statute … is much more than a taxing measure," because the NFA "gives the government the discretion to decide who can register a firearm, prohibits the registration of weapons the government determines may not be legally made, transferred, or possessed, and then criminally punishes the failure to register the weapon." *Id.* at 11. Defendant claims this is unconstitutional "because it goes beyond the power to tax." *Id.*

Cox additionally argues that 26 U.S.C. § 5861(d) is not valid under Congress' power to regulate interstate commerce. Dkt. 29 at 13. Defendant argues that criminalizing the intrastate possession of a firearm does not implicate any of the three areas of interstate commerce that Congress may properly regulate – i.e., the channels of interstate commerce; the instrumentalities of interstate commerce (including persons and things in interstate commerce); and activities that substantially affect interstate commerce. *Id*. at 15-18 (*citing, inter alia, United States v. Lopez*, 514 U.S. 549 (1995) (prohibition on possession of a firearm in a school zone exceeded Congress' authority to regulate interstate commerce)).[1]

Defendant Jeremy Kettler moves to dismiss Counts 5 and 13 on grounds of entrapment by estoppel. Kettler contends that he relied in good faith on the Kansas Second Amendment Protection Act, which declares in part that any firearm or "firearm accessory," including a silencer, which is made in Kansas and which remains in Kansas, "is not subject to any federal law … under the authority of congress to regulate interstate commerce." *See* K.S.A. § 50-1204. Kettler argues that 26 U.S.C. § 5861 "require[s] knowledge that someone is possessing a 'firearm' in violation of the federal prohibition in order to be found guilty," and that he "could not have known that any attribute of the 'firearm' brought it within federal regulation because the Kansas

[1] Cox opened and closed his brief with assertions that he did not intend to violate the law. *See* Dkt. 29 at 2 ("Cox relied on his State of Kansas representatives and did not believe he was violating the law") and at 25 ("defendant had reason to believe in and rely on the law of Kansas"). These assertions about Cox's subjective intent are not otherwise argued in the briefs. To the extent Cox is arguing that he did not have the intent necessary to commit the offense, that is a question for the jury to decide based upon the evidence and the instructions given at trial. To the extent Cox is raising a defense of entrapment by estoppel, that argument is rejected for the same reasons set forth herein pertaining to defendant Kettler.

legislature … explicitly told the citizens of the State of Kansas that a sound suppressor did not fall within federal regulation." Dkt. 32 at 4. Kettler argues that this amounts to a defense of entrapment by estoppel, which can arise from a person's reasonable reliance upon the misleading representations of a government agent. *Id*. at 4 (*citing United States v. Hardridge*, 379 F.3d 1188 (10th Cir. 2004)).

II. Discussion

A. Whether 26 U.S.C. § 5861 is a valid exercise of Congress' taxing authority. The National Firearms Act imposes strict regulatory requirements on certain statutorily defined "firearms." *Staples v. United States*, 511 U.S. 600, 602 (1994). Under the Act, the term "firearm" includes, among other things, a rifle having a barrel of less than 16 inches in length, a silencer, and a destructive device. 26 U.S.C. § 5845(a). Under the Act, all such firearms must be registered in the National Firearms Registration and Transfer Record maintained by the Secretary of the Treasury. § 5841. Section 5861(d) makes it a federal crime, punishable by up to 10 years in prison, for any person to possess a firearm that is not properly registered. *Staples*, 511 U.S. at 602-03.

Among other things, the Act imposes a tax upon dealers in these firearms (§ 5801); requires registration of dealers (§ 5802); imposes a tax of $200 per firearm on the maker of the firearm (§ 5821); imposes a $200 tax on each firearm transferred, with the tax to be paid by the transferor (§ 5811); and prohibits transfers unless a number of conditions are met, including that the transferor must file an application with the Secretary, the transferor must pay the required tax and identify the transferee and the firearm, and the Secretary must approve the transfer (§ 5812).

As Cox concedes, the Supreme Court long ago rejected the argument that the Act was not a valid exercise of Congress' authority to levy taxes because it was allegedly designed as a penalty to suppress trafficking in certain firearms. *See Sonzinsky v. United States*, 300 U.S. 506, 512-14 (1937) ("a tax is not any the less a tax because it has a regulatory effect"). Since then, the Tenth Circuit, like all other circuits to address the issue, has found that § 5861 represents a valid exercise of Congress' taxing authority. *See United States v. Houston*, 103 F. Appx. 346, 349-50, 2004 WL 1465776 (10th Cir. 2004) ("Mr. Houston fails to establish 26 U.S.C. § 5861(d) and its parent act are beyond Congress' enumerated power to either regulate commerce through firearms registration requirements, or impose a tax thereon."); *United States v. Roots*, 124 F.3d 218 (Table), 1997 WL 465199 (10th Cir. 1997) ("*Lopez* does not undermine the constitutionality of § 5861(d) because that provision was promulgated pursuant to Congress's power to tax"). *See also United States v. Village Center*, 452 F.3d 949, 950 (8th Cir. 2006) ("irrespective of whether § 5861(c) is a valid exercise of Congress's commerce clause authority … it is a valid exercise of Congress's taxing authority"); *United States v. Lim*, 444 F.3d 910, 914 (7th Cir. 2006) ("Section 5861(d), as applied to Lim's possession of the sawed-off shotgun, is a valid use of Congress's taxing power"); *United States v. Pellicano*, 135 F. Appx. 44, 2005 WL 1368077 (9th Cir. 2005) (valid exercise of taxing power); *United States v. Oliver*, 208 F.2d 211 Table), 2000 WL 263954 (4th Cir. 2000) (the weapon need not have traveled in interstate commerce because § 5861 "has been held to be a valid exercise of the power of Congress to tax"); *United States v. Gresham*, 118 F.3d 258, 261-62 (5th Cir. 1997) ("Gresham charges that Congress has used the taxing power as a pretext

to prohibit the possession of certain disfavored weapons, without any rational relationship to the revenue-raising purposes of the Internal Revenue Code. … To the contrary, it is well-settled that § 5861(d) is constitutional because it is 'part of the web of regulation aiding enforcement of the transfer tax provision in § 5811.'"); *United States v. Dodge*, 61 F.3d 142, 145 (2nd Cir. 1995) (the registration requirement "bears a sufficient nexus to the overall taxing scheme of the NFA and, therefore, assists the government in collecting revenues.").

Defendant tries to get around these cases by relying on *United States v. Dalton*, 960 F.2d 121 (10th Cir. 1992). In that case the Tenth Circuit held it was unconstitutional to convict a defendant for possessing an unregistered machine gun when there was a separate criminal ban on possession of machine guns. The ban made registration of such weapons a legal impossibility. In that circumstance, the Tenth Circuit found, the § 5861 could not reasonably be viewed as an aid to the collection of tax revenue. *See Dalton*, 960 F.2d at 125 ("a provision which is passed as an exercise of the taxing power no longer has that constitutional basis when Congress decrees that the subject of that provision can no longer be taxed."). But the Tenth Circuit soon made clear that *Dalton* applied only if there was a statutory ban on possession of the particular firearm. Thus, § 5861 was constitutionally applied to possession of a sawed-off shotgun, a weapon as to which there was no separate ban. *United States v. McCollom*, 12 F.3d 968 (10th Cir. 1993). *See also United States v. Berres*, 777 F.3d 1083 (10th Cir. 2015) (rejecting due process challenge to conviction for possession of unregistered flash-bang device). The *McCollom* rule applies equally to the firearms identified in the indictment in this case – silencers,

short-barreled rifles, and destructive devices – because it was legally possible to register and pay the required tax on such items. *Berres*, 777 F.3d at 1088; *McCollom*, 12 F.3d at 971 ("[d]ifferent from *Dalton*, the registration of this weapon was not a legal impossibility."); *United States v. Eaton*, 260 F.3d 1232, 1236 (10th Cir. 2001) (defendant's conviction for possessing unregistered pipe bombs did not violate due process; there was no statute criminalizing possession of pipe bombs and defendant was not precluded by law from registering them).

Finally, Cox contends that because the government retains some authority to deny an application for registration of a firearm, that fact somehow renders the Act unconstitutional. Dkt. 29 at 8-9. As an initial matter, the court notes defendant has not alleged that an application for registration of these particular firearms was in fact denied. Moreover, the Tenth Circuit has made clear that it is only when registration is a legal impossibility that application of § 5861 constitutes a due process violation. *See McCollom,* 12 F.3d at 971 ("Even if it is unlikely that the firearm would have been accepted for registration, the defendant has cited no statute which makes the possession of short-barreled shotguns illegal."); *Eaton*, 260 F.3d at 1236 ("[w]hether the ATF would have accepted the pipe bomb for registration does not bear on the issue of legal impossibility."). *See also United States v. Shepardson*, 167 F.3d 120, 123 (2nd Cir. 1999) (same); *United States v. Aiken*, 974 F.2d 446, 449 (4th Cir. 1992) ("The fact that not everyone might be able to obtain a short-barreled shotgun, since the BATF must first approve the reasonable necessity and public safety declarations, does not invalidate the NFA as a taxing statute."). *See also Dist. of Columbia v. Heller*, 554 U.S. 570, 624 (2008)

("the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.").

Defendant has not alleged or made any showing that registration of the firearms identified in the indictment was a legal impossibility. Under these circumstances, Tenth Circuit law compels a finding that application of § 5861(d) rationally furthers the NFA scheme for collecting taxes and constitutes a valid exercise of Congress' taxing authority. *McCollom, supra. See also* U.S. CONST. art. I, § 8 ("The Congress shall have Power To lay and collect Taxes"); *Sonzinsky*, 300 U.S. at 514 ("an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed."). Accordingly, defendant Cox's motion to dismiss the indictment must be denied. In view of this finding, the court need not address Cox's additional argument that § 5861 exceeds Congress' power to regulate interstate commerce.

B. Entrapment by estoppel. "The defense of entrapment by estoppel is implicated where an agent of the government affirmatively misleads a party as to the state of the law and that party proceeds to act on the misrepresentation so that criminal prosecution of the actor implicates due process concerns under the Fifth and Fourteenth Amendments." *United States v. Bradley*, 589 F. App'x 891, 896 (10th Cir. 2014) (*quoting United States v. Nichols,* 21 F.3d 1016, 1018 (10th Cir. 1994), *cert. denied*, 135 S. Ct. 1511, 191 L. Ed. 2d 445 (2015)).

To establish the defense, a defendant must show: (1) an active misleading by a government agent who is responsible for interpreting, administering, or enforcing the

law defining the offense; and (2) actual reliance by the defendant, which is reasonable in light of the identity of the agent, the point of law misrepresented, and the substance of the misrepresentation. *Bradley*, 589 F. Appx. at 896 (*citing United States v. Rampton*, 762 F.3d 1152, 1156 (10th Cir. 2014)).

Defendant Kettler's assertion of this defense fails to satisfy the first element. He contends he was misled by the State of Kansas (or its legislature), because it represented through adoption of K.S.A. § 50-1204 that possession of a silencer that was made in and remained in Kansas was not subject to any federal law.[2] But Kansas officials and representatives are not responsible for interpreting or enforcing the law defining this offense - 26 U.S.C. § 5861 - which is a federal statute adopted by Congress, interpreted by the courts of the United States, and enforced by the executive branch of the United States. Kansas officials have authority to declare the laws of Kansas, but they have no responsibility for construing or enforcing federal laws such as this. The defense of entrapment by estoppel is not available to defendant in these circumstances. *See Gutierrez-Gonzales*, 184 F.3d 1160, 1167 (10th Cir. 1999) ("the 'government agent' must be a government official or agency responsible for enforcing the law defining the offense"); *United States v. Stults*, 137 F. Appx. 179, 184, 2005 WL 1525266, *5 (10th Cir. 2005) (advice given by state probation and state judge was not the advice of a federal official and did not give rise to entrapment by estoppel); *United States v. Hardridge*, 379 F.3d 1188, 1195 (10th Cir. 2004) (Kansas City Police Department was not responsible for interpretation

[2] K.S.A. § 50-1204 declares that a firearm accessory which is made in Kansas and which remains in Kansas "is not subject to any federal law, … *under the authority of congress to regulate interstate commerce.*" [emphasis added]. The provision does not mention Congress' power to levy taxes.

or enforcement of federal firearms law). *See also United States v. Miles*, 748 F.3d 485, 489 (2nd Cir. 2014) (citing "unanimous" rule that state and local officials cannot bind the federal government to an erroneous interpretation of federal law).

Kettler nonetheless argues that the representation in this instance came from "a governing body of such character [as] to render reliance reasonable." Dkt. 32 at 6. But the above cases demonstrate that it is not reasonable to rely upon representations about the validity of federal law from officials who have no authority over federal law.

Kettler contends the *mens rea* for an offense under § 5861 could not possibly have been present. Dkt. 32 at 4. In so arguing, he mistakenly asserts that § 5861 requires proof that he knew possession of an unregistered silencer was a violation of the federal law. *Id*. But in *Staples v. United States*, 511 U.S. 600 (1994), where the defendant was charged with possession of an unregistered machine gun, the Court held only that the government must prove the defendant knew *of the characteristics of his weapon* that made it a firearm under the NFA, not that he knew the NFA required its registration. *See Staples*, 511 U.S. at 622, n.3 (Ginsburg, J., concurring) ("The *mens rea* presumption requires knowledge only of the facts that make the defendant's conduct illegal, lest it conflict with the related presumption, 'deeply rooted in the American system,' that, ordinarily, 'ignorance of the law or a mistake of law is no defense to criminal prosecution.'"); *United States v. Michel*, 446 F.3d 1122, 1130 (10th Cir. 2006) ("Although the government was required to prove Mr. Michel knew the gun was a sawed-off shotgun, it was not required to further prove he knew it was supposed to be registered or that it lacked a serial number.").

As such, under § 5861 the government must prove the defendant knew that the device in question was "for silencing, muffling, or diminishing the report of a portable firearm," not that he knew possession of such an unregistered item violated the NFA. *See* 26 U.S.C. § 5845(a)(7) and 18 U.S.C. § 921(a)(24). Whether or not defendant had the requisite knowledge for commission of that offense is a question for the jury to determine from the evidence.

IT IS THEREFORE ORDERED this 10th day of May, 2016, that the defendants' motions to dismiss the indictment (Dkts. 29 and 32) are DENIED. Defendants' motions to join in each other's motions (Dkts. 30 and 31) are GRANTED.

s/ J. Thomas Marten
J. THOMAS MARTEN, JUDGE

ATTACHMENT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 15-10150-01,02-JTM

SHANE COX and
JEREMY KETTLER,

Defendants.

MEMORANDUM AND ORDER

This matter is before the court on defendant Shane Cox's motion to dismiss (Dkt. 63). Defendant Jeremy Kettler joins in the motion. The motion argues that the National Firearms Act (NFA) is unconstitutional because it amounts to "regulatory punishment" rather than imposition and enforcement of a valid federal tax. Defendants further argue that the NFA violates the Second and Tenth Amendments to the U.S. Constitution. Dkts. 63, 78.

This case has generated significant interest within the District of Kansas and beyond. Many concerned persons have written emails or called the court's chambers to express their views. Judges are not allowed to publicly comment on pending cases, but I believe it is important to give a clear explanation of the court's decision and the reasons behind it to all who are interested. In order to do that, I begin with a summary of the court's obligations, the relevant law, and how the law applies to the facts of the case.

Before assuming office, every justice or judge of the United States courts must take the following oath:

> I [name], do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as [a judge] under the Constitution and laws of the United States. So help me God.

28 U.S.C. § 453.

This oath requires a judge to uphold the Constitution and laws of the United States, as interpreted by the United States Supreme Court and the Tenth Circuit Court of Appeals. Where there is a decision on any point of law from the Supreme Court or the Tenth Circuit, or both, I am bound to follow those decisions. This is true whether the decision is absolutely identical, or whether it sets out a principle of law that applies equally to different facts. As a district court judge, I am not empowered to do what I think is most fair – I am bound to follow the law.

The U.S. Constitution provides in part that the Constitution and laws of the United States "shall be the supreme Law of the Land," binding all judges in every state, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." In other words, United States District Courts are bound by federal law, even if a state law says something to the contrary.

The National Firearms Act (26 U.S.C. § 5861 et seq.) is a federal law that imposes a tax and licensing requirement on firearms dealers. It includes silencers among the items subject to registration and taxation. Eighty years ago, the Supreme Court upheld the NFA as a valid exercise of Congressional taxing power. *Sonzinsky v. United States*,

300 U.S. 506 (1937). The Supreme Court reaffirmed this point in *Nat'l. Fed'n of Indep. Bus. Women v. Sebelius*, 132 S.Ct. 2566 (2012). Further, the Supreme Court has held that if Congress has exercised a valid power, such as its taxing power, then the Tenth Amendment "expressly disclaims any reservation of that power to the States." *New York v. United States*, 505 U.S. 144, 156 (1992).

This leaves the Second Amendment. The Supreme Court, while recently recognizing that individuals have a right to "keep and bear Arms," also said that the Second Amendment is not absolute, and that nothing in its decision should be interpreted "to cast doubt on … laws imposing conditions and qualifications on the commercial sale of arms." *Dist. of Columbia v. Heller*, 128 S.Ct. 2783, 2816-17. The National Firearms Act is such a law.

As is more fully set out below, the Constitution and Supreme Court decisions discussed in this opinion compel the result this court reaches in upholding the constitutionality of the National Firearms Act and in denying the defendants' motion to dismiss.

I. Supremacy Clause.

The Constitution of the United States provides in part that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof …shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI. This necessarily makes the question presented by defendant's motion one of federal law. If the NFA is otherwise consistent with the U.S. Constitution and is a

valid exercise of Congress's power to tax spelled out in the Constitution, then it is "the supreme Law of the Land," notwithstanding "any Thing in the … Laws of any State to the Contrary."

The defendants argue that Kansas's adoption of the Second Amendment Protection Act (SAPA), K.S.A. § 50-1204, somehow rendered the National Firearms Act unconstitutional. Dkt. 63 at 6. This court has no authority to construe SAPA or to determine what it means; that is a task reserved to the Kansas courts. But the Constitution could not be clearer on one point: if the National Firearms Act is a valid exercise of Congressional taxing power, and if it does not infringe on rights granted in the U.S. Constitution, then it is the "supreme Law of the Land," regardless of what SAPA says.

II. Is the NFA a valid exercise of Congress's taxing authority?

The Constitution gives the Congress certain enumerated powers. Among those is the authority to impose and collect taxes, and to enact laws for carrying out the taxing regimen. *See* U.S. Const., art. I, § 8 (The Congress shall have Power to lay and collect Taxes,… to pay the Debts and provide for the common Defence and general welfare of the United States" [and] "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers").

In 1937, the Supreme Court of the United States addressed "whether section 2 of the National Firearms Act …, which imposes a $200 annual license tax on dealers in firearms, is a constitutional exercise of the legislative power of Congress." *Sonzinsky v. United States*, 300 U.S. 506, 511 (1937). The case involved the criminal conviction of a

man charged with unlawfully carrying on a business as a dealer in firearms without having registered or paid the tax required by the NFA. The defendant argued "that the present levy is not a true tax, but a penalty imposed for the purpose of suppressing traffic in a certain noxious type of firearms, the local regulation of which is reserved to the state because [it is] not granted to the national government." *Id*. at 512. He argued that the cumulative effect of imposing taxes on the manufacturer, dealer, and buyer of a covered firearm was "prohibitive in effect and … disclose[s] unmistakably the legislative purpose to regulate rather than to tax." *Id*. at 512-13. The Supreme Court flatly rejected the argument, finding that because the NFA "is not attended by an offensive regulation, and since it operates as a tax, it is within the national taxing power." *Id*. at 513.

Sonzinsky has never been reversed, vacated or modified by the Supreme Court. Only recently, in *Nat'l Fed'n Of Indep. Bus. Women v. Sebelius*, 132 S.Ct. 2566 (2012), where the Supreme Court upheld the Affordable Care Act's "individual mandate" as a valid exercise of Congress's taxing power, the Court cited *Sonzinsky* for the proposition that a tax is not invalid merely because it seeks to influence behavior, noting "we have upheld such obviously regulatory measures as taxes on selling … sawed-off shotguns," and observing that "[e]very tax is in some measure regulatory" because it "interposes an economic impediment to the activity…." *Nat'l Fed'n of Indep. Bus. Women*, 132 S.Ct. at 2596 (citing *Sonzinsky*, 300 U.S. at 506, 513)). Because *Sonzinsky* remains a valid Supreme Court decision, it is "the supreme Law of the Land" on this issue.

Defendant urges the court to find the NFA invalid based on the observation in *Nat'l Fed'n of Indep. Bus. Women* that "there comes a time in the extension of the penalizing features of [a] so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment." *Id.*, 132 S.Ct. at 2599-2600. That argument, however, is precisely the one rejected by the Supreme Court in *Sonzinsky*. Unless or until the Supreme Court decides otherwise, this court is bound by *Sonzinky's* conclusion that the NFA represents a valid exercise of Congress's constitutional power to levy taxes. *See also United States v. Houston*, 103 Fed.Appx. 346, 349–50 (10th Cir. 2004) ("Mr. Houston fails to establish 26 U.S.C. § 5861(d) and its parent act are beyond Congress's enumerated power to either regulate commerce through firearms registration requirements, or impose a tax thereon."); *United States v. Roots*, 124 F.3d 218 (Table), 1997 WL 465199 (10th Cir. 1997) ("*Lopez* does not undermine the constitutionality of § 5861(d) because that provision was promulgated pursuant to Congress's power to tax"). The same conclusion has been reached by every federal court of appeals to have addressed the issue since adoption of the NFA.[1]

[1] *See United States v. Village Center*, 452 F.3d 949, 950 (8th Cir. 2006) ("irrespective of whether § 5861(c) is a valid exercise of Congress's commerce clause authority … it is a valid exercise of Congress's taxing authority"); *United States v. Lim*, 444 F.3d 910, 914 (7th Cir. 2006) ("Section 5861(d), as applied to Lim's possession of the sawed-off shotgun, is a valid use of Congress's taxing power"); *United States v. Pellicano*, 135 F. Appx. 44, 2005 WL 1368077 (9th Cir. 2005) (valid exercise of taxing power); *United States v. Oliver*, 208 F.2d 211 Table), 2000 WL 263954 (4th Cir. 2000) (the weapon need not have traveled in interstate commerce because § 5861 "has been held to be a valid exercise of the power of Congress to tax"); *United States v. Gresham*, 118 F.3d 258, 261-62 (5th Cir. 1997) ("Gresham charges that Congress has used the taxing power as a pretext to prohibit the possession of certain disfavored weapons, without any rational relationship to the revenue-raising purposes of the Internal Revenue Code. … To the contrary, it is well-settled that § 5861(d) is constitutional because it is 'part of the web of regulation aiding enforcement of the transfer tax provision in § 5811.'"); *United States v. Dodge*, 61 F.3d 142, 145 (2nd Cir. 1995) (the registration requirement "bears a sufficient nexus to the overall taxing scheme of the NFA and, therefore, assists the government in collecting revenues.").

Defendant cites the Tenth Amendment and argues that the NFA is invalid because it has "invaded an area of law that has traditionally been reserved to the States." Dkt. 63 at 6. But if the NFA is otherwise consistent with the Constitution and constitutes a valid exercise of Congress's taxing power – as the Supreme Court said it did in *Sonzinsky* – then it does not run afoul of the Tenth Amendment. *See New York v. United States,* 505 U.S. 144, 156 (1992) ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States."). Again, the Supreme Court in *Sonzinsky* specifically rejected the defendant's claim that the NFA was invalid because it regulated on a matter that was reserved to the states. *Sonzinsky*, 300 U.S. at 512.

III. Is the NFA consistent with the Second Amendment?

Defendant's original motion to dismiss did not argue that the NFA violates the Second Amendment. *See* Dkt. 63. His response to the State of Kansas's brief, however, relies almost exclusively on the Second Amendment. Dkt. 78. Be that as it may, a review of case law shows that defendant's Second Amendment argument is also foreclosed by Supreme Court precedent.

The Second Amendment provides that "the right of the people to keep and bear Arms … shall not be infringed." U.S. Const. amend II. In striking down a District of Columbia statute that essentially prohibited the possession of useable handguns in the home, the Supreme Court held that the Second Amendment "confer[s] an individual

right to keep and bear arms." *Dist. of Columbia v. Heller*, 128 S.Ct. 2783 (2008). This amendment protects the right of law-abiding citizens to keep and bear arms that are in common use for traditionally lawful purposes, such as self-defense. *See also McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767 (2010) ("in *Heller*, we held that individual self-defense is 'the *central component*' of the Second Amendment right.") (citing *Heller*, emphasis in original).

"Like most rights, the right secured by the Second Amendment is not unlimited." *Id*. at 2816. *Heller* noted the amendment did not confer a right to keep and carry *any* weapon for *any purpose* whatsoever. For example, the Court observed that prohibitions on carrying concealed weapons had long been upheld under the Second Amendment and under similar state laws. *Id*. Without defining the precise scope of the right to keep and bear arms, the Supreme Court pointed out that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, *or laws imposing conditions and qualifications on the commercial sale of arms*." *Id*. at 2816-17 (emphasis added).

In *United States v. Miller*, 307 U.S. 174 (1939), two defendants were criminally charged with violating the NFA by transporting a short-barreled shotgun in interstate commerce without paying the tax and obtaining the approval required by the NFA. A U.S. District Court dismissed the charge, finding that it violated the Second Amendment. But the Supreme Court reversed that ruling because "we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." *Id*.

at 178.[2] In *Heller*, the Supreme Court reviewed *Miller* and indicated that it remains good law, stating: "We therefore read *Miller* to say … that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with the historical understanding of the scope" of the Second Amendment right. *Heller*, 128 S.Ct. at 2815-16. So, as *Miller* holds, the Second Amendment protects the sorts of weapons "in common use" but does not extend to "the carrying of 'dangerous and unusual weapons.'" *Heller*, 128 S.Ct. at 2817.

Defendant Cox was convicted of three different types of NFA violations. The first (Count 3) was for possessing a short-barreled rifle without registering it and paying the tax required by the NFA. Such a weapon is clearly comparable to the short-barreled shotgun at issue in *Miller*. No suggestion or showing is made that short-barreled rifles have been in common use by law-abiding citizens for lawful purposes. The court must therefore conclude under *Miller* that they fall outside the scope of the Second Amendment. *See Heller*, 128 S.Ct. at 2814 ("*Miller* stands … for the proposition that the Second Amendment right … extends only to certain types of weapons."); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517 (1992) ("It is clear … that the [NFA's] object was to regulate certain weapons likely to be used for criminal purposes, just as

[2] At the time of the *Miller* decision, the firearms covered by the NFA included "a muffler or silencer for any firearm…." *See Miller*, 307 U.S. at 175, n.1 (quoting Act of June 26, 1934, c. 757, 48 Stat. 1236-1240, 26 U.S.C.A. § 1132 *et seq.*). The NFA at that time also provided that "[a]ny person who violates or fails to comply with any of the requirements of [this Act] shall, upon conviction, be fined not more than $2,000 or be imprisoned for not more than five years, or both, in the discretion of the court." *Id*. *Miller* also rejected an argument that the NFA was not a valid revenue measure, stating that "[c]onsidering *Sonzinsky v. United States*, [supra, and other cases] the objection that the Act usurps police power reserved to the States is plainly untenable." 307 U.S. at 177-78.

the regulation of short-barreled rifles, for example, addresses a concealable weapon likely to be so used"); *United States v. Gonzales*, 2011 WL 5288727 (D. Utah Nov. 2, 2011) (short-barreled rifle was not a constitutionally protected arm under *Heller*); *United States v. Barbeau*, 2016 WL 1046093, *4 (W.D. Wash. Mar. 16, 2016) (defendant's possession of a short-barreled rifle was not protected by the Second Amendment); *United States v. Gilbert*, 286 F.App'x 383, 386, 2008 WL 2740453 (9th Cir. 2008) ("Under *Heller*, individuals still do not have a right to possess [machine guns] or short-barreled rifles").

The second type of violation at issue here was making, possessing, or transferring silencers without registering or paying the tax required by the NFA. While it is certainly possible to possess silencers for lawful purposes, no showing is made that they are a type of arm "in common use" covered by the Second Amendment. *See United States v. McCartney*, 357 F.App'x 73, 77, 2009 WL 4884336, *3 (9th Cir. 2009) ("Silencers, grenades, and directional mines are not 'typically possessed by law-abiding citizens for lawful purposes' … and are less common than either short-barreled shotguns or machine guns."); *United States v. Perkins*, 2008 WL 4372821, *4 (D. Neb. Sept. 23, 2008) ("silencers/suppressors 'are not in common use by law abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use'"); *United States v. Garnett*, 2008 WL 2796098, *4 (E.D. Mich. July 18, 2008) ("Nothing in [*Heller*] … casts doubt on the constitutionality of federal regulations over [machine guns] and silencers at issue in this case."). Because the foregoing arms are outside the scope of Second Amendment

protection, the application of the NFA to persons possessing, transferring or making such items does not infringe on Second Amendment rights.

Finally, defendant Cox's third type of conviction was for engaging in business as a dealer or manufacturer of silencers without paying the appropriate federal tax and registering. Defendant's motion does not address this charge specifically, but it is clearly one of the federal "laws imposing conditions and qualifications on the commercial sale of arms" that *Heller* said were permissible under the Second Amendment. Regardless of the level of scrutiny applied, a long-standing NFA regulation requiring a commercial firearms dealer to obtain a federal license and pay the federal tax required by the NFA before engaging in the firearms business would clearly pass muster under the Second Amendment. *See United States v. Hosford*, 843 F.3d 161, 166 (4th Cir. 2016) ("the prohibition against unlicensed firearm dealing is a longstanding condition or qualification on the commercial sale of arms and is thus facially constitutional"). In sum, binding Supreme Court precedent – i.e., *Sonzinsky, Miller, and Heller* - shows that the NFA, both on its face and as applied, is a valid and constitutional exercise of Congress's authority to levy taxes.[3]

[3] It bears pointing out how different the NFA is from the statute struck down in *Heller*. *Heller* involved a law *banning* an "entire class of 'arms' that [was] overwhelmingly chosen by American society" for the lawful purpose of self-defense, and it extended the ban "to the home, where the need for defense of self, family, and property is most acute." *Heller*, 128 S.Ct. at 2817. By contrast, the NFA deals with weapons or accessories not in common use, and it does not ban possession of those items, but only requires that a person register and pay a federal tax before possessing them.

IV. Congress's authority to regulate interstate commerce.

The U.S. Constitution also gives Congress the power "To regulate Commerce … among the several States…." U.S. Const., art. I, § 8. The Supreme Court has held that this clause does not permit Congress to regulate purely local activities. *See United States v. Lopez*, 514 U.S. 549 (1995). But Supreme Court case law also "firmly establishes Congress's power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). Thus, "[w]hen Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class." *Id*. [4]

The court's conclusion that the NFA is a valid exercise of Congress's taxing power makes it unnecessary to decide whether the NFA is also a valid exercise of Congress's power to regulate interstate commerce. *Cf. Montana Shooting Sports Ass'n. v. Holder*, 727 F.3d 975, 982 (9th Cir. 2013), *cert. denied*, 134 S.Ct. 955 (Jan. 13, 2014) (finding that under *Raich*, Congress can exercise its commerce power to validly regulate manufacture of firearms made within the State of Montana, notwithstanding Montana

[4] In *Raich*, the question was whether Congress could regulate a person's possession of medical marijuana in California when the marijuana was entirely locally grown and locally possessed, and was lawful to possess under California law. The Supreme Court found that "[g]iven the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, … and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the [Controlled Substances Act]." *Raich*, 545 U.S. at 22. Thus, Congress "was acting well within its authority to 'make all Laws which shall be necessary and proper' [to] 'regulate Commerce … among the several States.'" *Id*. *See also id*. at 35 (Scalia, J., concurring) ("Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.").

Firearms Freedom Act declaring otherwise). Accordingly, the court does not address that issue.

V. Conclusion.

The Supreme Court cases cited above establish that the NFA provisions under which defendants were convicted are valid and constitutional acts adopted by Congress pursuant to its authority to levy and enforce the collection of taxes. As such, they constitute the "the supreme Law of the Land," notwithstanding "any Thing in the … Laws of any State to the Contrary." U.S. Const., art. VI.

IT IS THEREFORE ORDERED this 31st day of January, 2017, that the defendants' motion to dismiss (Dkt. 63) is DENIED.

s/ J. Thomas Marten
J. THOMAS MARTEN, JUDGE