

No. _____

In The
Supreme Court of the United States

— ♦ —
DARREN KYLE STEPP-ZAFFT

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

— ♦ —
On Petition For Writ Of Certiorari
To The United States Court of Appeals
For the Eighth Circuit

— ♦ —
PETITION FOR WRIT OF CERTIORARI

RICK RAMSTAD
Counsel of Record
CREW & CREW, P.C.
141 N. Main Ave.
Sioux Falls, SD 57104
(605) 335-5561
rick@crewandcrew.com

Counsel for Petitioner

QUESTION PRESENTED

The prohibition against individual possession of unregistered NFA firearms and their component parts by otherwise law-abiding citizens exceeds the scope of Congress's power under the commerce clause. Moreover, because the penalty for possessing an unregistered NFA firearm or its component parts is potentially punished by up to 10 years in prison and a \$10,000 fine, its enactment was beyond the scope of Congress's power to tax. Thus, the question presented is:

Is 26 U.S.C. § 5861(d) a valid exercise of Congress's power to tax?

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

RULE 29.6 STATEMENT

None of the petitioners is a nongovernmental corporation. None of the petitioners has a parent corporation or shares held by a publicly traded company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDING	ii
RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT.....	4
This Court Should Grant Certiorari to determine whether 26 U.S.C. § 5861 (d) is a permissible exercise of Congress's power to impose a tax burdening the individual right under the Second Amendment to the United States Constitution to possess firearms which are "in common use" and "typically possessed by law-abiding citizens for lawful purposes."	4
A. This Court should Grant Certiorari Because Firearms in Common Use and Typically Possessed by Law Abiding Citizens are Protected Under the United States Constitution Second Amendment's Right to Keep and Bear Arms.....	4
B. This Court Should Grant Certiorari Because 26 U.S.C. § 5861(d) is an Invalid Exercise of Congress Power to Tax as Applied to Individuals.....	5
CONCLUSION.....	10

APPENDIX

	Page
Opinion, United States Court of Appeals for the Eighth Circuit, July 31, 2017	App. 1
Judgment in a Criminal Case, March 7, 2017.....	App. 5

TABLE OF AUTHORITIES

	Page
CASES	
<i>Child Labor Tax Case</i> , 259 U.S. 20 (1922)	7
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008).....	4, 5
<i>Heller v. District of Columbia</i> , 670 F.3d 1244 (2011).....	4
<i>Murdock v. Pennsylvania</i> , 319 U.S. 105 (1943).....	5, 6
<i>Nat'l Fed'n of Indep. Bus. v. Sebelius</i> , 567 U.S. 519 (2012).....	8,9,10
<i>New York State Rifle & Pistol Ass'n, Inc. v. Cuomo</i> , 804 F.3d 242 (2d Cir. 2015).....	4
<i>Sonzinsky v. United States</i> 300 U.S. 506 (1937).....	5,6,7
<i>Staples v. United States</i> , 511 U.S. 600 (1994)	10
<i>United States v. Hall</i> , 171 F.3d 1133, 1142 (8th Cir. 1999).....	3, 9
<i>United States v. Kahriger</i> 345 U.S. 22 (1953).....	7
<i>United States v. Thompson/Center Arms Co.</i> , 504 U.S. 505 (1992).....	9
STATUTES	
26 U.S.C. § 5811	9
26 U.S.C. § 5841	9
26 U.S.C. § 5845(a).....	3
26 U.S.C. § 5861(d).....	2-10
26 U.S.C. § 7201	9
26 U.S.C. § 7801(a)(2)	7

Darren Kyle Stepp-Zafft respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 2018 U.S. App. LEXIS 12341 and is found at Appendix 1.

JURISDICTION

Petitioner seeks review of the decision of the United States Court of Appeals for the Eighth Circuit entered on May 11, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

26 U.S.C. § 5861(d)

It shall be unlawful for any person—

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record

_____ ♦ _____

STATEMENT OF THE CASE

On December 6, 2015, police in Sioux Falls, South Dakota, were dispatched to an apartment after a tenant found a bullet hole in his wall. Police obtained a warrant to search the adjacent apartment, leased to Darren Kyle Stepp-Zafft (“Zafft”) and his former girlfriend. Zafft was an avid gun collector and gun-range frequenter.

In Zafft’s apartment, police discovered numerous firearms, black powder, novelty grenades, grenade fuses, hobby fuses, and empty CO₂ pellet gun cylinders. Police also discovered a silencer and the requisite registration papers and tax stamp, as well as two automotive filters with threaded adapters attached, alleged to be homemade silencers. Five of the firearms were configured in a manner alleged to require registration under 26 U.S.C. § 5861(d) due to the addition of aftermarket barrel and/or military style buttocks. The Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) was alerted for further investigation.

At trial, Zafft testified that he used the automotive filters as solvent traps for cleaning firearms. The government contended that the devices would also function effectively as silencers in violation of 26 U.S.C. § 5861(d).¹ The government also purported that the combination of black powder materials that Zafft attributed to his muzzle-loading hobby and the novelty grenade bodies he used as signaling devices in playing war games constituted a combination of parts either designed or intended for use in converting any device into a destructive device, also in violation of 26 U.S.C. § 5861(d).

Following a jury trial, Zafft was convicted of three counts of a Superseding Indictment charging him with possession of unregistered firearms under 26 U.S.C. § 5861(d). Zafft faced a maximum term of imprisonment of ten years for each of the three counts, a maximum fine of \$250,000, and a guideline range of 78-97 months imprisonment. The district court sentenced him to thirty-seven months imprisonment and three years of supervised release.

In an opinion filed on May 11, 2018, the United States Court of Appeals for the Eighth Circuit affirmed Zafft’s conviction, holding that any error in failure to dismiss the charges was not a plain error. The Appellate Court found that 26 U.S.C. § 5861(d) was properly enacted by Congress under the taxing power, concluding that the statute is “in aid of a revenue purpose” as determined by *United States v. Hall*, 171 F.3d 1133, 1141 (8th Cir. 1999).

¹ The NFA categorizes certain firearm accessories, such as suppressors and silencers, as “firearms,” even though they are not firearms per se. See 26 U.S.C. § 5845(a). (H.R. 367, the “Hearing Protection Act of 2017,” removing suppressors from the NFA, is now pending).

REASONS FOR GRANTING THE WRIT

This Court Should Grant Certiorari to determine whether 26 U.S.C. § 5861(d) is a permissible exercise of Congress's power to impose a tax burdening the individual right under the Second Amendment to possess firearms which are "in common use" and "typically possessed by law-abiding citizens for lawful purposes."

A. Firearms in Common Use and Typically Possessed by Law Abiding Citizens are Protected Under the United States Constitution Second Amendment's Right to Keep and Bear Arms

In the landmark decision of *District of Columbia v. Heller*, the Supreme Court held in a 5–4 decision that the Second Amendment protects an individual's right to possess firearms, unconnected with service in a militia, for traditionally lawful purposes such as self-defense within the home and hunting. 554 U.S. 570, 573 (2008). The *Heller* Court specifically held that Washington D.C.'s handgun ban and requirement that lawfully-owned rifles and shotguns be kept "unloaded and disassembled or bound by a trigger lock" violated this guarantee. *Id.* at 628.

In *Heller*, this Court explained that the Second Amendment "codified a pre-existing" individual right to keep and bear arms, which was important to Americans not only to maintain the militia, but also for self-defense and hunting. *Id.* at 592, 599. This Court noted that "[a]lthough self-defense had little to do with the right's codification[,] it was the central component of the right itself." *Id.* at 599. Ultimately, *Heller* resolved the centuries old dispute as to whether the Second Amendment protects an individual's right to keep and bear arms for self-defense.

In *Heller v. District of Columbia (Heller II)*, the D.C. Court of Appeals found that assault style rifles and magazines with capacities exceeding ten rounds were in "common use" as defined by *Heller*. 670 F.3d 1244, 1261 (2011). In *Heller II*, the court noted that nothing in *Heller* limited its holding to handguns. *Id.* at 1268–69. Rather, it found that this Court had emphasized that "the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms," not just to handguns. *Heller*, 554 U.S. at 582.

Relevant to this case is the fact that short-barreled rifles (SBR) and silencers are in common use for self-defense, hunting, and other lawful purposes. While it might be argued that SBRs are more easily concealed for use in gun crimes, as opposed to other lawful pursuits, the same could be said for the more readily concealed handguns in *Heller*. "Though handguns comprise only about one-third of the nation's firearms, by some estimates they account for 71 percent to 83 percent of the firearms used in murders and 84 percent to 90 percent of the firearms used in other violent crimes." *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 256 (2d Cir. 2015). *See also Heller*, 554 U.S. at 698 (Breyer, J., dissenting) (discussing similar statistics suggesting that handguns "appear to be a very popular weapon among criminals").

Evidence of disproportionate criminal use did not prevent this Court from holding that handguns merited constitutional protection. Under *Heller*, that a weapon may have a higher association with crime does not justify a denial of Second Amendment protection. Rather, *Heller* looks to whether the weapon is “dangerous and unusual” in the hands of law-abiding citizens. *Heller*, 554 U.S. at 572. As discussed below, SBRs and silencers are neither dangerous nor unusual.

The fact that a short-barreled rifle might be more easily concealed somehow makes it “dangerous” finds no support in *Heller*, particularly in light of this Court’s recognition that the attributes of handguns which make them most desirable for self-defense also render them easily concealed:

It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police.

Id. at 629.

With respect to silencers, according to the ATF, registered suppressors in the ATF National Firearms Registry and Transfer Record system have increased from 285,087 in December 2010 to 762,282 in February 2015, an increase of 167.3%. See *Fact Sheet – Federal Firearms and Explosives Licenses by Types*, ATF (May 2018), <https://www.atf.gov/resource-center/fact-sheet/fact-sheet-federal-firearms-and-explosives-licenses-types>.

This Court’s emphasis that the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms resolves the question that SBRs and silencers “typically possessed by law-abiding citizens for lawful purposes” are protected under the Second Amendment. *Heller*, 554 U.S. at 625.

B. This Court Should Grant Certiorari Because 26 U.S.C. § 5861(d) is an Invalid Exercise of Congress Power to Tax as Applied to Individuals

The Constitution vests Congress with the power to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States.” U.S. Const., Art. I, § 8, cl. 1.

In *Sonzinsky v. United States*, this Court upheld regulatory measures on firearms dealers selling sawed-off shotguns. 300 U.S. 506 (1937). The *Sonzinsky* Court noted that “[e]very tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed.” *Id.* at 513. On the other hand, this Court has consistently 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). The

Court in *Murdock* 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. *Id.* at 113-14.

Sonzinsky questioned whether Section 2 of the National Firearms Act of 1934 (26 U.S.C., §§ 1132-1132q) which imposed a \$200 annual license tax on firearm dealers was a constitutional exercise of the legislative power of Congress. The *Sonzinsky* Court upheld the tax as an appropriate use of taxing power:

In the exercise of its constitutional power to lay taxes, Congress may select the subjects of taxation, choosing some and omitting others. Its power extends to the imposition of excise taxes upon the doing of business.

The case is not one where the statute contains regulatory provisions related to a purported tax in such a way as has enabled this Court to say in other cases that the latter is a penalty resorted to as a means of enforcing the regulations. Nor is the subject of the tax described or treated as criminal by the taxing statute.

Id. at 512-513 (internal citations omitted).

In concluding that Congress had the authority under the taxing clause to make it a crime to possess an unregistered “firearm,” courts have reasoned that that even when applied to individuals, § 5861(d) is “in aid of a revenue purpose,” *Id.* at 513, by virtue of the fact that § 5861(d) helps the government to learn “the chain of possession of a firearm” and thus to identify the maker liable for the tax. *Hunter v. United States*, 73 F.3d 260, 262 (9th Cir. 1996) (per curiam). *See also United States v. Dodge*, 61 F.3d 142, 146 (2d Cir. 1995), cert. denied, 516 U.S. 969, 1000, 116 S.Ct. 428, 542, 133 L.Ed.2d 343, 446 (1995); *United States v. Jones*, 976 F.2d 176, 184 (4th Cir. 1992), cert. denied, 508 U.S. 914, 113 S.Ct. 2351, 124 L.Ed.2d 260 (1993). While raising little in the way of revenue, the tax’s true purpose is to “discourage or eliminate transactions in these firearms.”

The ATF itself explains:

While the NFA was enacted by Congress as an exercise of its authority to tax, 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 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.

See *National Firearms Act*, ATF (April 26, 2018), <https://www.atf.gov/rules-and-regulations/national-firearms-act>.

Relying on *Sonzinsky*, the court below upheld Zafft's conviction under 26 U.S.C. § 5861(d). But this Court's rationale in *Sonzinsky* is not applicable here. Unlike the statute in question in *Sonzinsky*, Section 5861(d) does not tax merchants; it taxes possessors. Moreover, Section 5861(d) as an exercise of Congress's power to tax is further suspect in that a violation of the statute imposes highly punitive criminal sanctions. Because the 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.

In the *Child Labor Tax Case*, this Court struck down the Child Labor Tax Law in part 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[.]" 259 U.S. 20, 37 (1922). This Court noted, "[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.*

In this case, ATF's jurisdiction over the NFA is not concurrent with the 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. See 26 U.S.C. § 7801(a)(2). As this Court held in the *Child Labor Tax Case*, a court "must be blind not to see" that the sole purpose of § 5861(d) is regulation, not taxation. What may have been a legitimate exercise of Congress' taxing power in *Sonzinsky* bears no resemblance to a measure designed to collect revenue. Moreover, enforcement of Section 5861(d) is not administered by the Department of the Treasury or the IRS — the only federal agencies responsible for taxation.

As Justice Frankfurter opined in his dissent in *United States v. Kahriger*, "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." 345 U.S. 22, 37 (1953). He further noted:

[W]hen 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. As in *Kahriger*, the NFA here is "enforced through a detailed scheme of administration beyond the obvious fiscal needs[.]" *Id.* at 39.

Most recently, this Court reviewed its focus on the distinction between legitimate revenue measures and pure penalties. In distinguishing penalties from taxes, this Court has explained that "if the concept of penalty means anything, it

means punishment for an unlawful act or omission." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 567 (2012) (citing *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996)).

Distinguishing between the regulatory authority vested in the Commerce Clause and the limitations to control behavior via taxation, this Court stated:

[A]lthough the breadth of Congress's power to tax is greater than its power to regulate commerce, the taxing power does not give Congress the same degree of control over individual behavior. Once we recognize that Congress may regulate a particular decision under the Commerce Clause, the Federal Government can bring its full weight to bear. Congress may simply command individuals to do as it directs. An individual who disobeys may be subjected to criminal sanctions. Those sanctions can include not only fines and imprisonment, but all the attendant consequences of being branded a criminal: deprivation of otherwise protected civil rights, such as the right to bear arms or vote in elections; loss of employment opportunities; social stigma; and severe disabilities in other controversies, such as custody or immigration disputes.

By contrast, Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more. If a tax is properly paid, the Government has no power to compel or punish individuals subject to it. We do not make light of the severe burden that taxation — especially taxation motivated by a regulatory purpose — can impose. But imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice.

Id. at 573. While the Court noted that "individuals do not have a lawful choice not to pay a tax due, and may sometimes face prosecution for failing to do so" Section 5861(d) imposes no tax. *Id.* at 574, n. 11.

This Court has previously recognized that the purpose of Section 5861(d) is purely regulatory:

It is of course clear from the face of the Act that the NFA's object was to regulate certain weapons likely to be used for criminal purposes, just as the regulation of short-barreled rifles, for example, addresses a concealable weapon likely to be so used.

The adoption of the original definition of rifle was intended to preclude coverage of antique guns held by collectors, "in pursuance of the clearly indicated congressional intent to cover under the National Firearms Act only such modern and lethal weapons, except pistols and revolvers, as could be used readily and efficiently by criminals or gangsters.

United States v. Thompson/Center Arms Co., 504 U.S. 505, 516-17 (1992) (quoting H. R. Rep. No. 1337, 83d Cong., 2d Sess., A395 (1954)).

While this Court has not had occasion to consider the impact of its Second Amendment jurisprudence as applied to the taxation of individual gun owners under Section 5861(d), *Sebelius* clearly establishes that the power to tax is subject to limitations much greater than its powers to regulate under the Commerce Clause:

Congress's ability to use its taxing power to influence conduct is not without limits. A few of our cases policed these limits aggressively, invalidating punitive exactions obviously designed to regulate behavior otherwise regarded at the time as beyond federal authority. *See, e.g.*, *United States v. Butler*, 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477 (1936); *Drexel Furniture*, 259 U.S. 20, 42 S.Ct. 449, 66 L.Ed. 817. More often and more recently we have declined to closely examine the regulatory motive or effect of revenue-raising measures. *See Kahriger*, 345 U.S., at 27-31, 73 S.Ct. 510 (collecting cases). We have nonetheless maintained that "'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.'" *Kurth Ranch*, 511 U.S., at 779, 114 S.Ct. (quoting *Drexel Furniture, supra*, at 38, 42 S.Ct. 449).

Sebelius, 567 U.S. at 572-53. This Court further noted, "It remains true, however, that the power to tax is not the power to destroy while this Court sits." *Id.* at 573 (citations omitted).

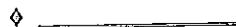
Following *Sebelius*, justification that Section 5861(d) is a statute "in aid of a revenue purpose" must fail. The firearms Zafft possessed were assembled from component parts, so his mere possession in no way serves to "help[] the government learn 'the chain of possession of a firearm' and thus identify the maker liable for the tax." *United States v. Hall*, 171 F.3d 1133, 1142 (8th Cir. 1999). Rather, the punitive nature of the statute demonstrates a purely regulatory purpose, as previously recognized by this Court, and well beyond Congress's power of taxation. Zafft is not charged with failing to pay a registration tax for the NFA firearms. 26 U.S.C. § 5841 (requiring payment of a \$200.00 tax). He is not charged with failing to pay a transfer or maker's tax under 26 U.S.C. § 5811. Zafft is not a dealer or a transferor. Nor did the Government did not claim that he failed to pay any tax. Rather, the sole purpose for any prosecution under Section 5861(d) is retribution.

Because Zafft faced no tax burden, there can be no tax purpose. Yet a conviction under Section 5861(d) for possessing an NFA firearm carries a penalty of up to ten years in prison and a ten thousand dollar fine. Zafft faced a sentencing guideline range of 78-97 months for an offense which would have netted no revenue to the treasury because there is no provision of law even allowing a possessor, such as Zafft, to register his weapons under the act. By way of contrast, the penalty for tax evasion is a maximum of five years in prison. 26 U.S.C. § 7201. A tax evader with

the same criminal history would be subject to a guideline range of six to twelve months and a five thousand dollar fine. U.S.S.G § 2T1.1.

Section 5861(d) is further suspect in that it imposes its burden only on those who knowingly receive or possesses an unregistered firearm. *See Staples v. United States*, 511 U.S. 600, 620 (1994) (noting that the statute was silent with respect to a mens rea requirement and reasoning that because firearms are widely accepted as lawful possessions, in light of the potential severity of the sentence, a conviction under it requires a showing of mens rea and not simply strict liability). This Court has noted, "Such scienter requirements are typical of punitive statutes, because Congress often wishes to punish only those who intentionally break the law." *Sebelius*, 567 U.S. at 566.

While nondiscriminatory taxes on the sale of firearms, such as a state sales tax, are permissible, the legislative history of the NFA is clear that its true purpose is to discourage and prohibit individual possession of NFA firearms. The burden it places on the rights of individual owners of such weapons is an unconstitutional tax on the exercise of a right protected by the Second Amendment.



CONCLUSION

For these reasons, this Court should grant the petition.

Respectfully submitted,

A handwritten signature of Rick L. Ramstad in black ink.

RICK L. RAMSTAD
Counsel of Record
CREW & CREW, P.C.
141 N. Main Ave.
Sioux Falls, SD 57104
(605) 335-5561
rick@crewandcrew.com

Counsel for Petitioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17-1558.
July 31, 2017.

Docket No. 4:16CR40015-1

UNITED STATES OF AMERICA, Plaintiff – Appellee,

v.

DARREN KYLE STEPP-ZAFFT, Defendant – Appellant.

Appeal from the United States District Court
for the District of South Dakota, Southern Division

Before COLLOTON, SHEPHERD, and STRAS, Circuit Judges

PER CURIAM.

Darren Kyle Stepp-Zafft was convicted at trial on three counts of possession of unregistered firearms, in violation of 26 U.S.C. §§ 5861(d) and 5871. The district court¹ sentenced him to a total of thirty-seven months' imprisonment. Stepp-Zafft appeals his convictions, arguing for the first time on appeal that the registration requirements are unconstitutional. We conclude that there is no plain error warranting relief, and we therefore affirm.

The prosecution arose from the execution of a search warrant at Stepp-Zafft's apartment in Sioux Falls, South Dakota. Law enforcement officers discovered numerous firearms, grenade bodies, fuses, black powder, empty carbon dioxide pellet gun cylinders, and what appeared to be two homemade silencers fashioned out of oil and fuel filters. A search of the National Firearms Registration and Transfer Record revealed that some of these items were not registered to Stepp-Zafft, as required by 26 U.S.C. § 5861(d). A grand jury charged Stepp-Zafft with three counts of possession of unregistered firearms—namely, five short-barreled rifles, nine destructive devices, and two silencers.

At trial, agents described the items seized from Stepp-Zafft's apartment. All five of the unregistered short-barreled rifles had been modified from their original design. Two had been modified with barrels shorter than sixteen inches. The other three were originally designed and sold as pistols, but they had been converted into short-barreled rifles with the addition of a shoulder stock. Stepp-Zafft testified that the firearms belonged to his mother and that she had modified them. He also claimed that the objects charged as unregistered silencers were merely homemade "solvent traps" used for cleaning guns. The jury found Stepp-Zafft guilty on all three counts.

On appeal, Stepp-Zafft contends that the registration requirement unconstitutionally infringes on a Second Amendment right to possess the short-barreled rifles and homemade silencers found in his apartment. He also argues that Congress lacked authority to enact the registration statute. Stepp-Zafft did not raise these arguments in a pretrial motion to dismiss the indictment, *see Fed. R. Crim. P. 12(b)(3)(B)*, or at any other time in the district court. We have said that a party must show "good cause" to raise an alleged defect in the indictment for the first time on appeal, *see United States v. Anderson*, 783 F.3d 727, 741 (8th Cir. 2015), but the government does not raise that point and concedes instead that we should review for plain error. Under that rubric, Stepp-Zafft must show an error that is "clear or obvious, rather than subject to reasonable dispute," *Puckett v. United States*, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009), and must demonstrate that the error affected his substantial rights and seriously affected the fairness, integrity, or reputation of the judicial proceedings. *See United States v. Olano*, 507 U.S. 725, 734-36, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993).

¹ The Honorable Karen E. Schreier, United States District Judge for the District of South Dakota, imposed sentence. The Honorable Lawrence L. Piersol presided over Stepp-Zafft's trial.

Stepp-Zafft first argues that 26 U.S.C. § 5861(d) unconstitutionally burdens a Second Amendment right to possess short-barreled rifles and silencers. In *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), the Court explained that the Second Amendment right to keep and bear arms extends to weapons that are in "common use" and "typically possessed by law-abiding citizens for lawful purposes" like self-defense. *Id.* at 624-25. Stepp-Zafft claims that short-barreled rifles are in common use for lawful purposes, but he cites no authority in support of that view. *Heller* said that there is no Second Amendment right to possess a short-barreled shotgun, 554 U.S. at 624; *see also United States v. Miller*, 307 U.S. 174, 178, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373 (1939), and a plurality of the Court previously observed in a different context that a short-barreled rifle is a "concealable weapon" that is "likely to be used for criminal purposes." *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517, 112 S. Ct. 2102, 119 L. Ed. 2d 308 (1992) (plurality opinion). Other courts have seen no constitutional distinction between short-barreled shotguns and rifles in the wake of *Heller*. *See, e.g., United States v. Gilbert*, 286 F. App'x 383, 386 (9th Cir. 2008); *United States v. Cox*, 235 F. Supp. 3d 1221, 1227 (D. Kan. 2017); *United States v. Gonzales*, No. 2:10-cr-00967, 2011 U.S. Dist. LEXIS 127121, 2011 WL 5288727, at *6 (D. Utah Nov. 2, 2011). The question is not presented for *de novo* review in this case, so we need not agree or disagree with these decisions of other courts, but Stepp-Zafft's constitutional claim is at least subject to reasonable dispute. The district court did not make an obvious error by failing to dismiss the charge *sua sponte*.

Stepp-Zafft also contends that the Second Amendment guarantees a right to possess unregistered silencers. He cites no supporting authority, however, and some courts after *Heller* have rejected his position on the ground that silencers are not typically possessed by law-abiding citizens for lawful purposes. *See United States v. McCartney*, 357 F. App'x 73, 76 (9th Cir. 2009); *Cox*, 235 F. Supp. 3d at 1227; *United States v. Perkins*, No. 4:08CR3064, 2008 U.S. Dist. LEXIS 83236, 2008 WL 4372821, at *4 (D. Neb. Sept. 23, 2008). Stepp-Zafft argues on appeal that silencers are used lawfully for target practice and for collection as exotic weapons. He reasons that the large number of registered silencers shows that most people use them for harmless activities. But because he did not raise this challenge in the district court, the parties did not present evidence on the purposes and common uses of silencers. Again, the constitutional question is not presented for *de novo* review here, but the claim is at least subject to reasonable dispute in light of existing authorities and the undeveloped record in this case. The district court did not commit a plain error by declining to dismiss the charge on its own motion.

Stepp-Zafft next asserts that Congress lacked authority to enact the registration statute under either the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, or the Taxing Clause, U.S. Const. art. I, § 8, cl. 1. We have held, however, that Congress properly enacted the statute under the taxing power. *United States v. Hall*, 171 F.3d 1133, 1142 (8th Cir. 1999). Stepp-Zafft complains that the registration statute serves no legitimate revenue-raising purpose, and is thus beyond the taxing power, because the statute does not permit a "mere possessor" to register a firearm

and pay the requisite tax. But *Hall* rejected this precise argument, concluding that the statute is "in aid of a revenue purpose," *id.* (quoting *Sonzinsky v. United States*, 300 U.S. 506, 513, 57 S. Ct. 554, 81 L. Ed. 772, 1937-1 C.B. 351 (1937)), because it helps the government to identify the maker liable for the tax, and encourages makers of firearms to register them and to pay the relevant tax so that potential purchasers can lawfully accept them. Stepp-Zafft also suggests that *NFIB v. Sebelius*, 567 U.S. 519, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012), narrowed Congress's taxing power and superseded *Hall*. But *NFIB* upheld an Act of Congress based on the taxing power, *id.* at 574, and nothing in that decision obviously undermines our relevant precedent. The district court therefore committed no plain error.

The judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
District Of South Dakota, Southern Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

Darren Kyle Stepp-Zafft

Case Number: 4:16CR40015-1
USM Number: 16201-273Rick L. Ramstad
Defendant's Attorney

THE DEFENDANT:

FILED

pleaded guilty to count(s) MAR 07 2017

pleaded nolo contendere to count(s) /s/ CLERK
Which was accepted by the Court

was found guilty on count (s) 1, 2, and 3 of the Superseding Indictment.
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
26 U.S.C. §§ 5861(d) and 5871	Possession of Unregistered Firearms	12/01/2015	1s
26 U.S.C. §§ 5861(d) and 5871	Possession of Unregistered Firearms	12/01/2015	2s
26 U.S.C. §§ 5861(d) and 5871	Possession of Unregistered Firearms	12/01/2015	3s

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) _____ is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by the Judgment are fully paid. If ordered to pay restitution, the defendant must notify the Court and United States attorney of material changes in economic circumstances.

03/06/2017

Date of Imposition of Judgment

/s/ Karen E. Schreier

Karen E. Schreier, United States District Judge

March 7, 2017

DEFENDANT: Darren Kyle Stepp-Zafft
CASE NUMBER: 4:16CR40015-1

IMPRISONMENT

- The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 37 months on each of Counts 1 through 3, such terms to run concurrent.
- The Court makes the following recommendations to the Bureau of Prisons:
- The defendant is remanded to the custody of the United States Marshal.
- The defendant shall surrender to the United States Marshal for this district:
 - at _____ a.m. p.m. on _____
 - as notified by the United States Marshal.
- The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
 - before 2 p.m. on _____
 - as notified by the United States Marshal.
 - as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment.

United States Marshall

By

Deputy United States Marshal

DEFENDANT: Darren Kyle Stepp-Zafft
CASE NUMBER: 4:16CR40015-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of 3 years on each of Counts 1-3, such terms shall run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse.
4. You must cooperate in the collection of DNA as directed by the probation officer.
5. You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense.
6. You must participate in an approved program for domestic violence.

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Darren Kyle Stepp-Zafft
CASE NUMBER: 4:16CR40015-1

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your contact and condition.

1. You must report to the probation office in the federal district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at reasonable times, at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not

possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or information without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: Darren Kyle Stepp-Zafft
CASE NUMBER: 4:16CR40015-1

SPECIAL CONDITIONS OF SUPERVISION

1. You must participate in and complete a cognitive behavioral training program as directed by the probation office.
2. You must submit to a warrantless search of your person, residence, place of business, or vehicle, at the discretion of the probation office.

DEFENDANT: Darren Kyle Stepp-Zafft
 CASE NUMBER: 4:16CR40015-1

CRIMINAL MONETARY PENALTIES

You must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

<u>Assessment</u>	<u>JVTA Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS \$300.00	Not Applicable	Waived	Not Applicable

- The determination of restitution is deferred until An *Amended Judgment in a Criminal Case* will be entered after such determination.
- You must make restitution (including community restitution) to the following payees in the amount listed below.

If you make a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss</u>	<u>Restitution Ordered</u>	<u>Priority or %</u>
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TOTALS	\$_____	\$_____
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- Restitution amount ordered pursuant to Plea Agreement \$_____
- You must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the Judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The Court determined that you do not have the ability to pay interest and it is ordered that:
 - The interest is waived for the fine restitution.
 - The interest requirement for the fine restitution is modified as follows:

DEFENDANT: Darren Kyle Stepp-Zafft
CASE NUMBER: 4:16CR40015-1

SCHEDULE OF PAYMENTS

Having assessed your ability to pay, payment of the total criminal monetary penalties is due as follows:

A Lump sum payment of \$300 due immediately.

Unless the Court has expressly ordered otherwise, if this Judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

You shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several
Defendant and Co-Defendant Names and Case Numbers, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- You shall pay the cost of prosecution.
- You shall pay the following court cost(s):
- You shall forfeit your interest in the following property to the United States:

See page 8

DEFENDANT: Darren Kyle Stepp-Zafft
CASE NUMBER: 4:16CR40015-1

ADDITIONAL FORFEITED PROPERTY

1. German Sports Guns, model GSG-5, .22 caliber semi-automatic rifle, serial number A288940;
2. Group Industries model HR4332S, 9mm semi-automatic pistol, serial number 490-25801;
3. Ruger model .22 Charger, .22 caliber semi-automatic pistol, serial number 490-25801;
4. German Sports Guns, model GSG-5, .22 caliber semi-automatic rifle, serial number A280529;
5. Masterpiece Arms 9mm semi-automatic rifle, serial number B7670;
6. All property seized from the defendant's residence located at Sioux Falls, SD, during the execution of a Search Warrant on December 10, 2015, that are "destructive devices" or are parts either designed or intended for use in converting any device into a "destructive device," or from which a "destructive device" may be readily assembled, including all carbon dioxide cylinders, all metal grenade bodies, all explosive power, all grenade fuses, and all pyrotechnic fuses; and
7. Two silencers.