No. _____

IN THE

Supreme Court of the United States

SHANE COX,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Shane Cox owned an army surplus store in Chanute, Kansas. The store sold the usual stock (duffle bags, peppery spray, stun guns, knives), but not firearms, as Mr. Cox did not have a federal firearms license. In 2013, however, the Kansas legislature passed, and the governor signed, the Kansas Second Amendment Protection Act (codified at KSA § 50-1201 et seq.). The Act generally exempts all firearms or firearm accessories within Kansas from any federal law or regulation, including any federal registration program. With this law on the books, Mr. Cox made a short-barreled rifle for himself. He also made silencers and sold them in his store in a glass case alongside a copy of the Kansas Act. But the federal government prosecuted him anyway under the National Firearms Act, 26 U.S.C. § 5801 et seq., and a jury convicted him of possessing the unregistered short-barreled rifle and an unregistered silencer, as well as transferring unregistered silencers. The jury did so only after the district court instructed it that Mr. Cox's reliance on the Kansas Act was not an affirmative defense. The Tenth Circuit affirmed, and also held that the Second Amendment does not protect silencers or short-barreled rifles. The questions presented are:

I. Did the district court deny Mr. Cox his due process right to present a defense when it precluded Mr. Cox from arguing to the jury that his reliance on the Kansas Second Amendment Protection Act could be considered an affirmative defense.

II. Are short-barreled rifles and silencers protected by the Second Amendment.

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES CITED

PAGE

Cases

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner Shane Cox respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's decision is published at 906 F.3d 1170 and is included as Appendix A. The district court's order refusing to instruct the jury on Mr. Cox's affirmative defense is published at 187 F.Supp.3d 1282 and is included as Appendix B. The portions of the trial transcript where the district court orally refused to instruct the jury on this defense, as well as the relevant instructions given, are included as Appendix C. The district court's order rejecting Mr. Cox's Second Amendment challenge is published at 235 F.Supp.3d 1221 and is included as Appendix D.

JURISDICTION

The Tenth Circuit's judgment was entered on October 16, 2018. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

The Fifth Amendment to the United States Constitution provides, *inter alia*: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The relevant provisions of the Kansas Second Amendment Protection Act, KSA § 50-1201 to 50-1211, are included as Appendix E.

STATEMENT OF THE CASE

Constitutional principles of due process require that "criminal defendants be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). This Court has consistently held that a criminal defendant who is misled by the government (via a statute, regulation, agency, or official) into committing a crime may assert the government's incorrect advice as a defense. *United States v. Cardiff*, 344 U.S. 174 (1952) (improper to convict under inconsistent statute); *Raley v. Ohio*, 360 U.S. 423 (1959) (reversing contempt convictions for refusing to testify where a state legislative commission advised the defendants that they had the right not to testify); *Cox v. Louisiana*, 379 U.S. 559 (1965) (reversing picketing convictions because police officers gave the defendants permission to picket); *United States v. Pennsylvania Industries*, 411 U.S. 655 (1973) (district court erred when it refused to permit corporation to claim as a defense reliance on Army Corp of Engineers regulations).[1]

The lower courts have not faithfully applied this line of precedent. They generally hold that a defendant has no affirmative defense when the government that advises differs from the government that prosecutes (as in this case). But there are opposing views. This Court should grant review to consider this critically important issue on its own.

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[1] The lower courts refer to this defense as "entrapment by estoppel." Pet. App. 36a. But this phrase is a misnomer. *See United States v. Brady*, 710 F.Supp. 290, 295-296 (D. Col. 1989) (Matsch, J.). This Court has never adopted it. *Id.* at 295. "The doctrine stems from the due process clause, not from the common law of contract, equity or agency. Of course, it is settled that estoppel is not available against the United States on the same terms as it is against an ordinary litigant." *Id.* at 295-296. Thus, we do not use the phrase, but instead generally refer to the defense as a good-faith defense.

This case also raises an important and recurring Second Amendment question over whether short-barreled rifles and silencers receive any constitutional protection whatsoever. The Tenth Circuit's holding – excluding these things from protection – treats the Second Amendment as a disfavored right. Review is necessary.

A. Statutory Background

Kansas's Second Amendment Protection Act provides that firearms and firearm accessories that are made and owned in Kansas and that remain within Kansas are "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." KSA § 50-1204(a). The Act also prohibits Kansas officials from enforcing "any [federal] act, law, treaty, order, rule or regulation" against a firearm or firearm accessory made, owned, and kept in Kansas. KSA § 50-1206(b). Similarly, the Act makes it a felony for any federal official to enforce "any" such federal law. KSA § 50-1207.

The latter two provisions are not limited to federal laws regulating interstate commerce. Indeed, the Act was publicly touted as declaring all locally made and owned firearms and accessories beyond the reach of any federal regulation or law, period. *See*, *e.g.*, Legislative Summary, SB 102 (Kan. Legis. Research Dept. 2013) ("The bill provides that for as long as any such personal firearm, firearm accessory, or ammunition [made and owned in Kansas] remains with the borders of Kansas, it is not subject to any federal law, regulation, or authority"). Thus, as written, if a firearm or firearm accessory has never left Kansas, federal gun control laws cannot

be enforced with respect to that firearm or firearm accessory.

The National Firearms Act, however, requires individuals to register certain firearms and firearm accessories, including short-barreled rifles and silencers. 26 U.S.C. § 5861. By its plain terms, then, the Kansas Second Amendment Protection Act purports to prohibit the enforcement of the National Firearms Act with respect to firearms made, owned, and kept in Kansas.

B. Factual Background

Shane Cox is, in his own words, "just a shy guy," who lives "off in the sticks" of Petrolia, Kansas. R3.109 at 115. As a boy, Mr. Cox liked military weapons and was voted "most likely to go in the Army" by his classmates. *Id.* at 116-117. But his dream of joining the military ended in high school when he was rejected by the Marines because of a hearing loss he had suffered as a child. *Id.* And so he stayed put in rural Kansas, raised two children, worked locally as a hay cutter and a welder, and learned his way around a machine shop. *Id.* at 115-120.

When the opportunity arose, Mr. Cox and his daughter (now a Marine herself) opened up an army surplus store in Chanute, Kansas. *Id.* at 120-121. The store did not sell firearms, however. Mr. Cox did not have a federal firearms license – he wasn't interested in dealing on that level "because of the red tape, the money involved" – so he only stocked gun parts and other items that he could legally sell without a license. *Id.* at 122-123.

After Kansas passed the Second Amendment Protection Act, however, Mr. Cox began to hear talk in the store about the Act from customers who had started to make

"Kansas legal suppressors." *Id.* at 128. Intrigued, Mr. Cox asked local law enforcement whether the law was valid. *Id.* at 129. They said yes: "There was no issues, Kansas law, you know constitutionally valid and everything, it's a legal – it's a good law." *Id.* Satisfied that he was within his rights, Mr. Cox made a short-barreled rifle for himself and stamped it "Made in Kansas," as is required by the Act. *Id.* at 129, 132-133, 135. And he taught himself how to build an effective silencer. *Id.* at 131-132. He knew silencers would sell in the store. *Id.* at 143. They not only protect hearing; they enhance sport shooting pleasure. *Id.*

But despite silencers' marketability, Mr. Cox would never had made or sold them had he not believed that it was legal to do so under the Kansas Act. "Because of the red tape involved and in all of the – and I just wasn't as interested, you know. It – it hadn't occurred to me to – to pursue making suppressors, you know. I had never made one before this – this law." *Id.* at 131. He displayed the silencers in a glass case alongside a copy of the Kansas Act. Pet. App. 4a. He advertised them as "legal suppressors" on the store's Facebook page, where he also discussed the Kansas Act: "After SB102 was passed you can make your own firearm in Kansas without any background checks, permits, et cetera." R3.108 at 79.

Word spread – in part through an enthusiastic online review by customer (and later codefendant) Jeremy Kettler – and orders began to roll in, including one from a local law enforcement officer. R3.108 at 86-87.[2] When customer Jason Gardner

[2] This officer threw the silencer Mr. Cox made for him into a river when he learned of the federal investigation. R3.108 at 86-87. But he was never charged either for possessing the silencer or for obstructing justice. *Id.*

(actually an undercover federal agent) talked with Mr. Cox about the silencers, he found Mr. Cox "very open" and unconcerned in his discussion. R3.109 at 55-57, 64, 81. Mr. Cox showed Mr. Garner a copy of the Kansas Act, and it was clear to Mr. Gardner that "Mr. Cox thought that what he was doing was protected by state law." *Id.* at 65, 77. All told, Mr. Cox sold around seven silencers. *Id.* at 142.

C. Proceedings Below

1. In March 2016, a federal grand jury returned a thirteen-count indictment against Mr. Cox and codefendant Kettler. Pet. App. 5a-6a. A jury eventually convicted Mr. Cox of the following eight crimes:

- possessing an unregistered short-barreled rifle, 26 U.S.C. § 5861(d);
- five counts of transferring an unregistered silencer, 26 U.S.C. § 5861(e);
- making an unregistered silencer, 26 U.S.C. § 5861(f); and
- manufacturing silencers without tax or registration, 26 U.S.C. § 5861(a).

Pet. App. 8a-9a.

2. Before trial, Mr. Cox (and Kettler) moved to dismiss the indictment, asserting, *inter alia*, that their reasonable reliance on the Kansas Second Amendment Protection Act rendered the federal prosecution unjust. Pet. App. 6a. The district court disagreed, reasoning that because state officials lack the power to construe or enforce federal law, it wasn't reasonable for the defendants to rely on the Kansas Act's representations about the reach of federal law. Pet. App. 7a, 57a-58a. Thus, although the district court allowed the defendants to mention the Kansas Act at trial as part of the *res gestae* of the offenses, the district court precluded the defendants

from using their reliance on the Act as an affirmative defense. Pet. Ap. 33a.

The district court further refused to instruct the jury on this good-faith defense, and instead instructed the jury (some six different times throughout trial) that any reliance on the Kansas Act was not an affirmative defense, Pet. App. 60a-61a; R3.107 at 83-84; R3.109 at 93; R3.109 at 134; R3.109 at 135; R3.109 at 150; R3.110 at 88; R1.74 at 23. The district court so instructed even though it was "personally sympathetic to allowing that as a defense" because it believed that Mr. Cox "did believe that this statute gave him cover or he wouldn't have been making these things." R3.110 at 48-49; *see also* R3.112 at 10 ("I am satisfied that you both had a good faith belief that you were protected by this statute.").

3. The defendants also moved to dismiss the indictment on Second Amendment grounds. Pet. App. 9a. The district court rejected this claim as well, concluding that short-barreled rifles and silencers "fall outside the scope of the Second Amendment." Pet. App. 9a-10a, 70a-72a. After the jury returned a guilty verdict, the district court sentenced Mr. Cox to two years' probation. Pet. App. 10a. Mr. Cox appealed.[3]

4. The Tenth Circuit affirmed in a published decision. Pet. App. 1a-47a. In the Tenth Circuit, a defendant is entitled to a good-faith defense in this situation only if he can prove four things:

> (1) that a government agent actively misled him about the state of the law defining the offense; (2) that the government agent was responsible for interpreting, administering, or enforcing the law defining the offense; (3) that the defendant actually relied on the agent's misleading pronouncement in

[3] Prior to trial, the State of Kansas intervened to defend the Kansas Act's constitutionality. Pet. App. 8a. The state also participated in the appeal. But neither the district court nor the Tenth Circuit addressed the state's arguments or ruled on the Kansas Act's constitutionality. Pet. App. 11a n.7.

> committing the offense; and (4) that the defendant's reliance was reasonable in light of the identity of the agent, the point of law misrepresented, and the substance of the misrepresentation.

Pet. App. 36a-37a (quotations omitted).

The Tenth Circuit held that Mr. Cox could not meet the second prong of this test because the Kansas legislature is not responsible for interpreting, administering, or enforcing the National Firearms Act. Pet. App. 37a. The Tenth Circuit further held that Mr. Cox could not meet the fourth prong of this test because the Kansas Act purports to exempt only those federal laws "*to regulate interstate commerce*," and the National Firearms Act was enacted pursuant to Congress's authority *to tax*. Pet. App. 37a-38a. The Tenth Circuit acknowledged that some provisions of the Kansas Act were not expressly limited to laws regulating commerce, but interpreted those provisions in this manner because they referred solely to firearms within Kansas. *Id.* 38a.

The Tenth Circuit refused to create a "new" defense "to fit situations in which 'the accused's conduct is subject to facially conflicting state and federal laws' and the accused acts in good-faith reliance on the state law." Pet. App. 39a. "[A]llowing state legislatures to estop the federal government from prosecuting its laws would upset the balance of powers between states and the federal government and contravene the Supremacy Clause." Pet. App. 40a. The Tenth Circuit also rejected the argument that a provision of the Model Penal Code supported such a defense. Pet. App. 41a-42a. Finally, the Tenth Circuit refused to broaden the defense to include statutes (like the ones at issue here) that are *malum prohibitum*, or wrong only because of a statutory

prescription. Pet. App. 43a. The Tenth Circuit reasoned that, had Congress wanted to include a defense in such cases, it would have done so via a heightened *mens rea* requirement (such as willfulness) in the National Firearms Act. Pet. App. 44a.

The Tenth Circuit also held that the Second Amendment does not protect short-barreled rifles or silencers. Pet. App. 22a-31a. The Tenth Circuit held that short-barreled rifles are not protected because short-barreled shotguns are not protected. Pet. App. 25a-26a. The Tenth Circuit held that the Second Amendment does not protect silencers because they are not "bearable arms." Pet. App. 27a-28a. "A silencer is a firearm accessory; it's not a weapon in itself." Pet. App. 27a.

This timely petition follows.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit erred when it denied Mr. Cox the right to present his good-faith defense.

Mr. Cox sincerely believed that his possession, transfer, and manufacture of the rifle and silencers within Kansas was lawful in light of Kansas's Second Amendment Protection Act. But he was convicted at trial without an opportunity to present this defense to the jury. This Court should grant this petition to address and clarify this critically important area of the law, and to correct the Tenth Circuit's erroneous decision. This is an ideal vehicle to do so.

Start with this Court's precedent. This Court has consistently reversed convictions in analogous situations where the government (via a statute, regulation, or official) misadvised the defendant, then prosecuted the defendant after he followed that advice. *Cardiff*, 344 U.S. at 176; *Raley*, 360 U.S. at 438-439; *Cox*, 379 U.S. at 571;

Pennsylvania Industries, 411 U.S. at 673-674. *Cardiff* involved a contradictory federal statute that made inspection of a covered factory dependent on the owner's consent, but it also made refusal to allow inspection a crime. 344 U.S. at 176. This was "not fair warning." *Id.* "We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold." *Id.* at 176-177.

In *Raley*, a state legislative "Un-American Activities Commission" summoned three witnesses and advised them that they had a right to rely on their privilege against self-incrimination. This advice was incorrect – state law deprived them of the privilege by immunizing their testimony. The state thereafter prosecuted the witnesses for contempt. On review, this Court found "no suggestion that the Commission had any intent to deceive the appellants," but held nonetheless that affirming the convictions "after the Commission had acted as it did would be to sanction the most indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State clearly had told him was available to him." 360 U.S. at 438. Pointing out that the witnesses had been subjected to "active misleading" by "the voice of the State most presently speaking" to them, this Court concluded that "[w]e cannot hold that the Due process clause permits convictions to be obtained under such circumstances." *Id.* at 439.

In *Cox*, "the highest police officials of the city, in the presence of the Sheriff and Mayor," advised demonstrators that they could hold a demonstration across the street from a courthouse. 379 U.S. at 571. Defendant Cox was thereafter arrested,

prosecuted, and convicted for violating a state anti-picketing statute. This Court reversed the conviction. "The Due Process Clause does not permit convictions to be obtained under such circumstances." *Id.*

In *Pennsylvania Industries*, the government charged a manufacturing corporation with pollution under the Rivers and Harbors Act. 411 U.S. at 658-59. The district court refused to permit the corporation to present evidence at trial that it had relied on longstanding Army Corps of Engineers regulations, and "that it was affirmatively misled . . . into believing that the law did not apply in this situation." *Id.* at 673-74. The Third Circuit reversed, and the Supreme Court affirmed: "to the extent that the regulations deprived PICCO of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution." *Id.* at 674.

The circumstances leading to Mr. Cox's conviction bear similar marks of unfairness. His highest state officials led him to believe that his conduct was legal by adopting a statutory scheme that on its face apparently gave him the right to make, possess, and transfer firearms within the State of Kansas, free from federal regulation or prosecution. He should have been allowed to present his reliance as an affirmative defense at trial. It should not matter, as the Tenth Circuit held, that the Kansas legislature is not responsible for interpreting, administering, or enforcing federal law. Pet. App. 37a. And the jury, not the court, should have decided whether

Mr. Cox's reliance was reasonable. This is particularly true here, as the registration offenses are *malum prohibitum*.

It is true that most federal courts have held, consistent with the Tenth Circuit's decision here, that any good-faith "defense is not applicable where the state incorrectly advises the person and, then, the federal government prosecutes the person." *United States v. Funches*, 135 F.3d 1405, 1407 (11th Cir. 1998); *see also* Pet. App. 37a. But some have questioned this rationale. For instance, the Second Circuit "wonders whether such a limitation makes sense in light of the fact that the motivating principle underlying the doctrine is 'the unfairness of prosecuting one who has been led by the conduct of government agents to believe his acts were authorized.'" *United States v. Giffen*, 473 F.3d 30, 42 (2d Cir. 2006*); see also United States v. Hedges*, 912 F.2d 1397, 1405 (11th Cir. 1990) ("There has never been a suggestion that Lehman could waive or authorize a violation of the statute. On the contrary, the only issue before us, clearly, is whether Hedges acted on advice that he was not violating the statute.").

A federal district court judge in Colorado has expressed similar views. "The better view is that the defense is not based on the government being bound by the conduct of its agents, but rather, the fundamental unfairness of punishing a defendant for conforming his conduct to an erroneous interpretation of the law." *United States v. Brady*, 710 F.Supp. 290, 296 (D. Col. 1989) (Matsch, J.). After all, "the United States has given the state and federal courts a joint role in applying the Constitution and laws of the United States." *Id.*

And a federal district court judge in Pennsylvania has expressly declined to adopt such a rule. *United States v. Conley*, 859 F.Supp. 909, 931 (W.D. Pa. 1994) (Lee, J.). "The focus of the Due Process inquiry into fundamental fairness and substantial justice [] should not be arbitrarily constrained by concepts taken from other contexts such as estoppel, actual authority or deterrence." *Id.* at 932. "A per se rule in a federal criminal prosecution predicating the availability of the Due Process defense on federal action saps the notion of fundamental fairness of its flexibility and leaves the door open for fundamentally unfair prosecutions to be upheld." *Id.* As an example:

> If a defendant who intended to maintain gambling devices relied on advice from an appropriate state or local official that the conduct was legal, without complicity or corruption on the part of the government official, the Due Process clause would render a state prosecution a nullity. The Court fails to see how a prosecution founded on the same conduct and the same state law would be rendered fundamentally fair because it was instituted by federal authorities.

Id. at 932-933.

People v. Studifin, 504 N.Y.S.2d 608 (N.Y. Sup. Ct. 1986), is the inverse of this case. There, the trial court found the defendant not guilty of *state* gun crimes because of the defendant's good-faith reliance on *federal* law. *Id.* at 611-612. "[T]he plain words of the Regional Regulatory Administrator of the ATF misled defendant into believing that he needed a local license only to sell guns, that he did not need a local license to possess them." *Id.* at 611.

> The defendant apparently is an otherwise law-abiding man who became ensnared in a rat's nest of local, state and federal regulations. His misfortune, perhaps, was that he read the rules and regulations too carefully and reasonably relied on their literal meaning. His reasonable reliance on those official statements of law provide him with a legally cognizable excuse for what would otherwise be criminal conduct.

Id. at 612. The defendant "was misled into violating a state statute by a federal official," and it was "altogether understandable that even a well-intentioned, conscientious layman could get mixed up and confuse the two." *Id.* "Studifin did everything reasonable to avoid running afoul of the law; he is a good man fallen victim to confusing laws and bad and misleading advice." *Id.*[4]

This line of precedent is in direct conflict with the Tenth Circuit's decision in this case. Pet. App. 37a. It is also the better reading of this Court's precedent. This Court has never held that any particular advisor identity is necessary for a due-process defense such as Mr. Cox's defense. Similar to the statute in *Cardiff*, 344 U.S. at 176, the Kansas Act is "not fair warning" to Kansas residents. Just the opposite (as this case demonstrates). As in *Raley*, Mr. Cox was subjected to "active misleading" by "the voice of the State most presently speaking." 360 U.S. at 438. He was "affirmatively misled . . . into believing that the law did not apply in this situation." *Pennsylvania Industries*, 411 U.S. at 673-674. He was convicted "for exercising a privilege which the State had clearly told him was available to him." *Cox*, 379 U.S. at 571. Under this Court's precedent, he should have been allowed to present his good-faith defense.

[4] A provision of the Model Penal Code also provides for a defense where an individual "acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in a statute or other enactment." MPC § 2.04(3)(b)(i). The Tenth Circuit dismissed this provision's relevance in light of the word "official." "A state legislature's statement about the reach of federal law is hardly an 'official' statement of federal law, and to rely on such a statement is not reasonable." Pet. App. 42a. But this analysis is atextual. Another subsection of this provision provides a defense for a defendant who relies upon "an *official* interpretation of the public officer or body *charged by law with responsibility for the interpretation, administration or enforcement of the law defining* the offense." MPC § 2.04(3)(b)(iv) (emphasis added). If the Code's use of the word "official" was meant to limit the former provision to statutes interpreting, administering, or enforcing the law defining the offense, then the latter provision's "charged by law" phrase is entirely superfluous.

In holding otherwise, the Tenth Circuit found the regulatory nature of the statute irrelevant. Pet. App. 43a. It did so because Congress did not include a heightened mens rea in the National Firearms Act. Pet. App. 44a. But other courts have explained that this particular good-faith defense exists apart from any mens rea requirement within the statute. *See*, *e.g.*, *United States v. Thompson*, 25 F.3d 1558, 1564 (11th Cir. 1994) ("the defense of entrapment by estoppel focuses on the conduct of the government officials, not on the state of mind of the defendant"); *United States v. Tallmadge*, 829 F.3d 767, 773 (9th Cir. 1987) (same); *Studifin*, 504 N.Y.S.2d at 610-611 (same); *Miller v. Com.*, 492 S.E.2d 482, 485 (Va. Ct. App. 1997) (same). And they have done so by citing this Court's above-mentioned precedent. *Id.* The Tenth Circuit has created an ill-advised conflict within the Circuits on this point, further warranting this Court's review.

The Tenth Circuit also removed the issue of reasonable reliance from the jury, finding, as a matter of law, that Mr. Cox's reliance was unreasonable. Pet. App. 37a-38a. But almost all courts treat the defense as one of fact for the jury in cases where there is a basis to find reasonable reliance. Mark S. Cohen, 53 AMJUR POD 3d 249, Proof of Defense of Entrapment by Estoppel (Nov. 2018 update); *United States v. Ramos*, 961 F.2d 1003, 1006 (1st Cir. 1992), *overruled on other grounds by United States v. Caron*, 77 F.3d 1 (1st Cir. 1996) ("The issue of reasonable reliance normally requires factual development at trial."); *Thompson*, 25 F.3d at 1565 ("Even if Thompson's testimony regarding the alleged immunity agreement was not credible, as the government asserts and the district court found, it is the jury's, not the district

court's, function to determine questions of credibility and assess Thompson's testimony.").

The Tenth Circuit held that Mr. Cox's reliance on the Kansas Act was unreasonable because the Act purports to exempt only federal laws regulating interstate commerce. Pet. App. 38a. But this is an untenable reading of the Kansas Act. While one provision provides that firearms and firearm accessories that are made and owned in Kansas and that remain within Kansas are "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," KSA § 50-1204(a), two other provisions refer to "any" law, without specifying those regulating interstate commerce. KSA § 50-1206(b); KSA § 50-1207. And, as mentioned above, the Act was publicly touted as declaring all locally made and owned firearms and accessories beyond the reach of any federal regulation or law, period. *See*, *e.g.*, Legislative Summary, SB 102 (Kan. Legis. Research Dept. 2013). Thus, as written, if a firearm or firearm accessory has never left Kansas, federal gun control laws cannot be enforced with respect to that firearm or firearm accessory.

The Tenth Circuit erred when it rejected this straightforward reading of the statute. According to the Tenth Circuit, these latter two provisions are also limited to laws regulating interstate commerce because they emphasize "the local nature of the firearms' (and accessories') manufacture and ownership." Pet. App. 38a. They do so by including the phrase "in the state of Kansas and that remains within the borders

of Kansas." Pet. App. 38a. From this phrase, the Tenth Circuit concluded that the provision "protects only homegrown, local firearms, so the Kansas legislature didn't need to utter the magic words, 'Commerce Clause.'" Pet. App. 38a.

But § 50-1204(a) includes this identical phrase:

> 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.

KSA § 50-1204(a). If this phrase in itself limits the applicable federal laws to those regulating interstate commerce, then there would have been no reason to include the phrase "under the authority of congress to regulate interstate commerce." KSA § 50-1204(a). The Tenth Circuit's decision thus violates "the cardinal principle of statutory interpretation that courts must give effect, if possible, to every clause and word of a statute." *Loughrin v. United States*, 134 S.Ct. 2384, 2390 (2014) (cleaned up).

More to the point, the Tenth Circuit's strained reading of the Kansas Act does not demonstrate that a lay person like Mr. Cox could not reasonably rely on it to possess unregistered firearms and firearm accessories. As the district court stressed, the "cockamamie" Kansas Act "was not a well thought out statute." R3.110 at 47. "[T]he Second Amendment Protection 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.* at 49. The provisions pretty plainly authorize exactly what Mr. Cox did here – possess Kansas-made unregistered firearms within the State of Kansas. KSA § 50-1204-1207.

The district court should have submitted Mr. Cox's good-faith defense to the jury. Review is necessary.

II. The Tenth Circuit erred when it held that silencers and short-barreled rifles are not protected by the Second Amendment.

The Second Amendment confers an individual right to keep and bear arms. *D.C. v. Heller*, 554 U.S. 570, 595-596 (2008). *Heller* held unconstitutional a statute prohibiting the possession of handguns in the home. *Id.* at 628-629. But *Heller* also recognized that the Second Amendment has limits. *Id.* at 595, 626-627. *Heller* refused "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 626-627. And, importantly for purposes of this case, *Heller* held that "the historical tradition of prohibiting the carrying of dangerous and unusual weapons" limited the Second Amendment's reach to weapons "in common use at the time" of ratification. *Id.* at 627. "[T]hose weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns," are not protected by the Second Amendment. *Id.* at 625.

1. In light of this latter qualification on short-barreled shotguns, the Tenth Circuit held that short-barreled rifles are not protected by the Second Amendment. Pet. App. 25a-26a. This Court should review this issue for three reasons.

First, the question whether short-barreled shotguns are protected by the Second Amendment was not before this Court in *Heller*. Thus, any discussion of the point was dicta, which this Court need not follow. *Central Va. Community College v. Katz*,

546 U.S. 356, 363 (2006) ("we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated"); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013) (refusing to follow dicta where "more complete argument demonstrate[s] that the dicta is not correct").

Second, when *Heller* stated that short-barreled shotguns were not protected by the Second Amendment, it was merely reporting what this Court had earlier held nearly eight decades ago in *United States v. Miller*, 307 U.S. 174 (1939). *Heller*, 554 U.S. at 625. But, as *Heller* itself acknowledges, *Miller* "did not even purport to be a thorough examination of the Second Amendment." *Id.* at 623. "The defendants made no appearance in the case, neither filing a brief nor appearing at oral argument; the Court heard from no one but the Government (reason enough, one would think, not to make that case the beginning and the end of this Court's consideration of the Second Amendment)." *Id.* The government's brief in *Miller*

> provided scant discussion of the history of the Second Amendment—and the Court was presented with no counterdiscussion. As for the text of the Court's opinion itself, that discusses *none* of the history of the Second Amendment. It assumes from the prologue that the Amendment was designed to preserve the militia (which we do not dispute), and then reviews some historical materials dealing with the nature of the militia, and in particular with the nature of the arms their members were expected to possess. Not a word (*not* a word) about the history of the Second Amendment.

Id. at 623-624. *Heller* then criticized the dissent's reliance on *Miller*. *Id.* at 624.

Third, *Miller* was decided in 1939. Whether short-barreled shotguns were typically possessed by law-abiding citizens for lawful purposes in 1939 does not inform the question *today*. *See*, *e.g.*, *Caetano v. Massachusetts*, 136 S.Ct. 1027, 1032

(2016) (Alito, J., concurring). Today, short-barreled rifles *are* typically possessed by law-abiding citizens. ATF statistics reflect 213,594 short-barreled rifles and 140,474 short-barreled shotguns registered in the United States as of February 2016. FIREARMS COMMERCE IN THE UNITED STATES 2016 at 15 (US DOJ BATFE 2016). Legal uses of short-barreled firearms include collecting, hunting, and home defense. *See*, *e.g.*, *United States v. Buffalo*, 10 F.3d 575, 576 (8th Cir. 1993) (defendant used short-barreled rifle to "shoot skunks, weasels, and raccoons that killed his chickens"); *United States v. Hammond*, 1991 WL 103450 at *1 (9th Cir. 1991) (unpublished) (defendant purchased short-barreled shotgun "for hunting and had used it to kill a number of grouse for eating").

Short-barreled firearms "have no discernable operational differences from firearms excluded from the [NFA]." James A. D'Cruz, *Half-Cocked: The Regulatory Framework of Short-Barrel Firearms*, 40 Harv. J.L. & Pub. Pol'y 493, 496 (2017). And they are no more dangerous than they are unusual. *Id.* at 508-09; *see also Johnson v. United States*, 135 S.Ct. 2551, 2565 (2015) (Thomas, J., concurring) ("Reported convictions support the conclusion that mere possession of a short-barreled shotgun does not, in the ordinary case, pose a serious risk of injury to others."). In 2013, for instance, out of 8,454 firearms-related homicides, only 285 "were committed with rifles of any type, including short-barrel rifles." *Half-Cocked*, 40 Harv. J.L. & Pub. Pol'y at 512 & n.108. Indeed, constitutionally protected "non-restricted pistols are far more commonly used in firearm-related crime." *Id.* at 518 & n.161.

For these reasons, review is necessary. "Because the right to keep and bear arms

is enumerated in the Constitution, courts cannot subject laws that burden it to mere rational-basis review." *Silvester v. Becerra*, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from the denial of cert.). Here, the Tenth Circuit went further and held that laws regulating short-barreled rifles are not subject to *any* review. Pet. App. 25a-26a. The Tenth Circuit's decision "is symptomatic of the lower courts' general failure to afford the Second Amendment the respect due an enumerated constitutional right." *Silvester*, 138 S.Ct. at 945 (Thomas, J., dissenting from the denial of cert.). "This Court has not definitively resolved the standard for evaluating Second Amendment claims." *Id.* at 947. At least with respect to short-barreled rifles, it should use this case to do just that.

2. The Tenth Circuit further held that silencers are not protected by the Second Amendment. Pet. App. 27a-28a. But it did so for a different, and novel, reason: silencers are not "arms" under the Second Amendment. Pet. App. 27a. This Court should review this decision for five reasons.

First, although other courts have held that silencers are not protected by the Second Amendment, none have held so because silencers are not "arms." Instead, courts have held that silencers are not the type of "arms" typically possessed by law-abiding citizens. *United States v. Stepp-Zafft*, 733 Fed. Appx. 327, 329 (8th Cir. 2018); *United States v. McCartney*, 357 Fed. Appx. 73, 76 (9th Cir. 2009); *United States v. Perkins*, 2008 WL 4372821, at *4 (D. Neb. Sept. 23, 2008); *State v. Dor*, 75 A.3d 1125, 1130 (N.H. 2013); *see also State v. Christian*, 274 P.3d 262, 276 (Or. Ct. App. 2011) (Edmonds, C.J., dissenting) (referring to silencers as "constitutionally unprotected

arms"); *United States v. McGill*, 618 F.3d 1273, 1277-1278 (11th Cir. 2010) (referring to silencers as "weapons" that "have no appropriate sporting use or use for personal protection"). Additionally, the Fifth Circuit has held that a statute taxing the making of silencers was not unconstitutional because it did "not substantially burden a core Second Amendment right," not because silencers receive no Second Amendment protection. *Bezet v. United States*, 714 Fed. Appx. 336, 341 (5th Cir. 2017). This Court should grant review to resolve this disagreement among the lower courts on the definition of "arms" in the Second Amendment.

Second, any definition of "arms" that excludes silencers is in tension with this Court's decision in *Miller*. *Miller*'s discussion of "arms" is broader than just firearms. 307 U.S. at 179-182. As one scholar notes, *Miller* "recognized that 'arms' included not only firearms, but also the related items and accessories that made them usable, including ammunition, bayonets, and accouterments. Stephen P. Halbrook, *Firearm Sound Moderators: Issues of Criminalization and the Second Amendmen*t, 46 Cumb. L. Rev. 33, 54 (2016). Silencers readily fit within *Miller*'s conception of "arms." *Id.*

Third, although *Heller* provided some guidance on this issue, more is needed. Citing Eighteenth Century dictionaries, *Heller* defines "arms" as "weapons of offence, or armour of defence," and "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." 554 U.S. at 581. But rather than explain specifically what constitutes "arms," *Heller* merely holds that "arms" can include "weapons that were not specifically designed for military use and were not employed in a military capacity." *Id.* Silencers meet that definition. The Tenth

Circuit was wrong to rely on *Heller* for the proposition that silencers are not "arms" under the Second Amendment.

Fourth, as an empirical matter, silencers deserve Second Amendment protection. Over one million silencers have been registered under the National Firearms Act, which demonstrates that silencers, as "arms," are in fact typically used today. S. Gutowski, *ATF: 1.3 Million Silencers in U.S. Rarely Used in Crimes*, Washington Free Beacon (Feb. 17, 2017). And the use of silencers to commit crimes is exceedingly rare. *Id.* (only .003 percent of silencers are used in crimes each year); Halbrook, 46 Cumb. La. Rev. at 63-67 ("use of silenced firearms in crime is a rare occurrence, and is a minor problem"); *State v. Langlois*, 2 N.E.3d 936, 957 (Ohio Ct. App. 2013) ("the use of suppressors in gun crimes generally and in homicides specifically is extremely infrequent, and the criminal use of a registered suppressor is virtually nil relative to their widespread ownership").

Silencers do not aid crime as much as do other firearms not subject to the National Firearms Act. According to one news source, "[d]ata from the ATF show that silencers are seldom used in crime. From 2012-15, 390 silencers were recovered from crime scenes where an ATF trace was requested. During that same period, more than 600,000 pistols were recovered." Nathan Rott, *Debate Over Silencers: Hearing Protection or Public Safety Threat?*, ALL THINGS CONSIDERED (NPR Mar. 21, 2017). Another study of silencer-related prosecutions reported in Westlaw and Lexis from 1995 to 2005 found only 153 cases "in which the evidence suggests a silencer was used for a criminal purpose." Paul A. Clark, *Criminal Use of Firearm Silencers*, 8 WESTERN

CRIMINOLOGY REV. 44, 49-51 (2007). More than 80% of those cases involved non-violent victimless crimes. *Id.* Only two reported federal cases in the 10-year study involved a silencer used in a murder. *Id.* at 52. In contrast, "ordinary firearms are far more likely to be actively employed, as well as used to injure a victim." *Id.*

Silencers also serve lawful purposes. The hearing-protection benefits of silencers extends beyond mere hunting and sport-shooting. Silencers improve accuracy by reducing muzzle flinch and the disorientation that can follow a loud shot. *See* A.J. Peterman, *Second Amendment Decision Rules, Non-Lethal Weapons, and Self-Defense*, 97 MARQ. L. REV. 853, 892 n.221 (2014) (quoting firearms instructor's warning: "[I]f you fire that shotgun it's going to be extremely loud, and you will probably lose your hearing for a few minutes. Those few minutes can be vital, because the intruder now knows where you are and you're unable to be as alert as you normally would."); Halbrook, 46 CUMB. L. REV. at 69 ("Legitimate advantages could also be listed for a suppressor, whether used for sporting purposes or for self-defense—reduction of noise, recoil, and muzzle rise immediately come to mind."). Silencers are thus valuable for home-defense—the "core lawful purpose" of firearms ownership recognized by *Heller*. 554 U.S. at 629-630. The person who reaches for a firearm to protect against an intruder (animal or human) does not want to pause and don earmuffs or earplugs to prevent the health and safety fallout of unsuppressed gunfire, and certainly does not want to muffle the sounds of the surrounding environment in order to protect his or her hearing.

Finally, review is necessary because this issue is both recurring and important.

With over one million silencers in this country, the great majority used for lawful purposes, it is critically important that we know whether such silencers fall within the scope of the Second Amendment. And this is particularly so here, where the Tenth Circuit's narrow definition of "arms" in the Second Amendment makes it even more of a "disfavored right." *Silvester*, 138 S.Ct. at 945 (Thomas, J., dissenting from the denial of cert.).[5]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[5] Mr. Cox's codefendant, Jeremy Kettler, has raised additional issues in a separate petition. Mr. Cox preserved those issues in the lower courts, but, in order to avoid unnecessary repetition and to conserve judicial resources, we do not separately brief those issues here. If this Court grants certiorari on any of those issues, we respectfully request that this Court hold this petition in abeyance pending disposition of the Kettler petition. And if this Court ultimately grants Mr. Kettler relief, we ask for the same relief.

FILED
United States Court of Appeals
Tenth Circuit

October 16, 2018

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SHANE COX,

Defendant - Appellant.

STATE OF KANSAS,

Intervenor - Appellant.

No. 17-3034

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JEREMY KETTLER,

Defendant - Appellant.

STATE OF KANSAS,

Intervenor - Appellant.

No. 17-3035

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 6:15-CR-10150-JTM)

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Joseph W. Miller of Law Offices of Joseph Miller, LLC, Fairbanks, Alaska (Robert J. Olson, William J. Olson, Jeremiah L. Morgan, Herbert W. Titus of William J. Olson, P.C., Vienna, Virginia, with him on the briefs) for Defendant–Appellant Jeremy Kettler.

Derek Schmidt, Attorney General of Kansas, Jeffrey A. Chanay, Chief Deputy Attorney General, Toby Crouse, Solicitor General of Kansas, Dwight R. Carswell and Bryan C. Clark, Assistant Solicitors General, Topeka, Kansas, for Intervenor–Appellant.

Elizabeth H. Danello, Attorney, Appellate Section, Criminal Division, Department of Justice, Washington, D.C. (Stephen R. McAllister, United States Attorney, District of Kansas, Jared S. Maag, Assistant United States Attorney, District of Kansas, Kenneth A. Blanco, Acting Assistant Attorney General, and Trevor N. McFadden, Deputy Assistant Attorney General, Department of Justice, Washington, D.C., with her on the brief) for Plaintiff–Appellee.

Before **HARTZ**, **SEYMOUR**, and **PHILLIPS**, Circuit Judges.

PHILLIPS, Circuit Judge.

This is a tale of two laws: the National Firearms Act (NFA), 26 U.S.C. §§ 5801–5872, which requires the registration of statutorily defined firearms, and Kansas's Second Amendment Protection Act (SAPA), ch. 100, 2013 Kan. Sess. Laws vol. 1 500–03 (codified at Kan. Stat. Ann. §§ 50-1201 to -1211 (2014)), which purports to exempt any personal firearm, firearm accessory, or ammunition manufactured, owned, and remaining within Kansas's borders from "any federal law, . . . including any federal firearm or ammunition registration program, under the

authority of congress to regulate interstate commerce." Kan. Stat. Ann. § 50-1204(a). In 2014, these two laws intersected when the government prosecuted two Kansas men, Shane Cox and Jeremy Kettler, for violating the NFA by manufacturing (in Kansas), transferring (in Kansas), and possessing (in Kansas) several unregistered firearms. A jury found them guilty of most (though not all) of the charges.

Now, Cox and Kettler appeal their convictions, though they don't dispute that their actions ran afoul of the NFA.[1] First, they challenge the NFA's constitutionality, alleging that the statute is an invalid exercise of congressional power and an invasion of the Second Amendment right to bear arms. Second, they challenge the district court's ruling that their reliance on the SAPA, which they understood to shield Kansas-made and -owned firearms from federal regulation, provided no defense to charges that they violated the NFA. Kettler further asks us to see his prosecution as the product of a dispute between Kansas and the federal government over the SAPA, a dispute that unjustly swept him up (along with Cox, though Cox hasn't joined this argument). We also granted Kansas's request to participate in these appeals as needed to defend the SAPA from a Supremacy Clause challenge.

[1] Cox and Kettler each appealed individually (in cases nos. 17-3034 and 17-3035, respectively), but because their appeals raise overlapping issues, we granted the government leave to file a single response brief. We consider Cox's and Kettler's appeals companioned cases (though we never formally consolidated them), separately submitted to the same panel for oral argument and decision.

We reject Cox's and Kettler's challenges to their convictions (without addressing the SAPA's constitutionality). Exercising jurisdiction under 28 U.S.C. § 1291, we therefore affirm the district court's judgments.

BACKGROUND

In 2014, Shane Cox ran Tough Guys, an army-surplus store in Chanute, Kansas. Inside the store, near a glass display case filled with homemade silencers, Cox had posted a copy of the SAPA (which the Kansas legislature passed a year earlier) for his customers to read. *See* Kan. Stat. Ann. §§ 50-1201 to -1211. Drawing on the Second, Ninth, and Tenth Amendments to the U.S. Constitution, as well as the Kansas Constitution's bill of rights, the SAPA purports to protect from federal interference the availability of all firearms, firearm accessories (including silencers[2]), and ammunition made, sold, and kept "within the borders of Kansas." Kan. Stat. Ann. §§ 50-1202, 50-1203(b), 50-1204(a), 50-1206 to -1208; *see also* Kan. Const. Bill of Rights § 4 (guaranteeing an individual right to bear arms).

The display caught the attention of Jeremy Kettler, an army veteran from neighboring Humboldt who'd walked into Tough Guys to look around. Cox was in

[2] The Kansas law uses the term "sound suppressors" instead of "silencers." *See, e.g.*, Kan. Stat. Ann. § 50-1203(b). Kettler, too, prefers "suppressor" to "the more colloquial term 'silencer,'" explaining that "while such a device will 'suppress' the noise of a gunshot to below a level that would cause hearing damage," it "come[s] nowhere close to 'silencing' the sound of a gunshot, as is depicted in television and movies." Kettler's Opening Br. at 10 n.5. But the NFA uses "silencer," as does Cox. 26 U.S.C. § 5845(a)(7); *see also, e.g.*, Cox's Opening Br. at 2. So for consistency's sake (and without expressing an opinion on either term's accuracy), we adopt "silencer" throughout this opinion.

the store, so Kettler asked him about the law and the silencers. Neither Cox nor Tough Guys held a federal firearms license, but Cox believed that as a result of the SAPA, he could avoid the "red tape" of federal firearms regulations as long as the silencers never left Kansas. Cox R. vol. 3 at 292:9–11. Kettler bought one of Cox's silencers and later praised it (and Tough Guys) in a Facebook post.

In December 2014, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) learned that Tough Guys was selling unregistered silencers and started an investigation. Within a year, federal prosecutors secured a grand jury indictment against Cox and Kettler, charging them with thirteen crimes linked to Cox's firearms-manufacturing venture, Kettler's patronage of it, and the ensuing investigation. Count 1 alleged that Kettler had knowingly and willfully made false statements "[d]uring a [f]ederal [i]nvestigation," in violation of 18 U.S.C. § 1001. Cox R. vol. 1 at 28. Counts 2, 3, and 4 each charged Cox with possessing an unregistered firearm—a destructive device, a short-barreled rifle, and another destructive device,[3] respectively—in violation of 26 U.S.C. § 5861(d). Count 5 accused both Cox and Kettler of conspiring, under 18 U.S.C. § 371, to violate the NFA by building and selling an unregistered silencer. Counts 6, 7, 8, 9, and 11 charged Cox with five violations of 26 U.S.C. § 5861(e) for transferring five silencers—four to recipients

[3] The NFA defines a destructive device as "any explosive, incendiary, or poison" gas, bomb, grenade, rocket, mine, or similar device, as well as "any combination of parts either designed or intended" to be converted into such a device. 26 U.S.C. § 5845(f). Prosecutors alleged that Cox had kept some "grenade husks," accelerant, and other components in his workshop. Cox R. vol. 3 at 221:14.

identified by their initials plus a fifth to "an undercover law enforcement officer." Cox R. vol. 1 at 34. Count 10 accused Cox of making a silencer in violation of 26 U.S.C. § 5861(f). Count 12 alleged that between June 20, 2014, and February 4, 2015, Cox had "engaged in the business of manufacturing and dealing in" silencers in violation of 26 U.S.C. § 5861(a). Cox R. vol. 1 at 34. And count 13 charged Kettler with possessing a silencer in violation of 26 U.S.C. § 5861(d).

Cox and Kettler each pleaded not guilty and moved to dismiss the NFA-based charges,[4] claiming—for slightly different reasons—that the SAPA shielded them from criminal liability for running afoul of federal firearms regulations.[5] Cox argued that because of the SAPA, enforcing the NFA against him would exceed the federal government's constitutional authority and usurp "powers reserved to the States" in violation of the Tenth Amendment. Cox R. vol. 1 at 39. Kettler, in turn, asserted entrapment by estoppel. By enacting the SAPA, argued Kettler, the Kansas legislature had "specifically" told him that federal laws didn't apply to his Kansas-made and -owned suppressor, and his reasonable reliance on Kansas's promise rendered the federal prosecution unjust. *Id.* at 69.

The district court rejected both arguments in one written order. *See United States v. Cox* (*Cox I*), 187 F. Supp. 3d 1282, 1285–88 (D. Kan. 2016). First it ruled,

[4] Kettler didn't contest count 1, the false-statement charge.

[5] Cox and Kettler also each moved "to join in any and all motions and memoranda" filed by the other. Cox R. vol. 1 at 62; Kettler R. vol. 1 at 65. The district court granted their motions.

based on Supreme Court and circuit precedent, that the NFA was a valid exercise of Congress's taxing power. *Id.* at 1285–87. Next the court threw out Kettler's entrapment-by-estoppel defense, reasoning that because state officials lack the power to construe or enforce federal law, it wasn't reasonable for Kettler to rely on the Kansas legislature's representations about the reach of federal law. *Id.* at 1287–88. The court therefore denied the motions to dismiss the indictment. *Id.* at 1288.

A few months later, the government submitted a pre-trial motion asking the court to "find that any defense based on Kansas' enactment of the [SAPA] is not a valid legal defense." Cox R. vol. 1 at 106. And to keep the Kansas statute from confusing matters for the jury, the government sought "a prohibition on any mention" of the SAPA. *Id.* vol. 3 at 16:21–22. The court initially granted the government's request, but then tempered that ruling in response to Kettler's offer of proof, which convinced the court that "references to [the] SAPA [we]re interwoven with the evidence of the alleged offenses."[6] *Id.* vol. 1 at 194. The court maintained that the SAPA "provide[d] no defense" to the charged offenses, *id.* at 193, but it declined to "excise" the SAPA from the evidence and predicted that some mention of the law would be admissible to contextualize the charged offenses, *id.* at 194. And if (as the

[6] Kettler's proffer of SAPA-related evidence included: (1) that Cox handed out copies of the SAPA to customers, including Kettler, who bought silencers; (2) that Kettler knew about the SAPA and relied on it; (3) that an ATF agent who'd talked to Kettler on the phone learned that Kettler "was confused as to the investigation into Cox and his silencers because of the existence of the State law"; and (4) that Cox had informed Kettler of the SAPA when the two discussed silencers. Cox R. vol. 1 at 133.

court assumed) the SAPA surfaced at trial, the court promised to instruct jurors on how to consider the law.

The state of Kansas, meanwhile, moved to intervene. Federal law gives a state the right to intervene "[i]n any action, suit, or proceeding in a court of the United States . . . wherein the constitutionality of any statute of that State affecting the public interest is drawn in question." 28 U.S.C. § 2403(b). So far in this case, the district court had neither ruled nor been asked to rule on the SAPA's constitutionality. Yet considering the breadth of the words "drawn into question," the court decided to grant Kansas's motion to intervene. Cox R. vol. 1 at 197 (quoting 28 U.S.C. § 2403(b)). Kansas couldn't present evidence or directly participate in the trial, but the court's order allowed the state "to be heard on any subsequent rulings that implicate[d] the constitutionality of [the] SAPA." *Id.*

The cases proceeded to a joint trial in November 2016. After Cox rested on the third day, and again after Kettler rested on the fourth, both moved for judgments of acquittal. The court ultimately dismissed the conspiracy charge against both defendants, having seen "no evidence . . . of a conspiracy between Mr. Cox and Mr. Kettler," and the false-statement charge against Kettler. Cox R. vol. 3 at 565. Yet it found that the government had presented sufficient evidence to send the remaining counts to the jury.

The jury began deliberating on the fourth day, and it returned a verdict later the same day, finding Cox not guilty of the destructive-device-possession counts (2 and 4) but guilty of the remaining eight counts: unlawfully possessing a short-

barreled rifle in count 3; unlawfully transferring silencers in counts 6, 7, 8, 9, and 11; unlawfully making a silencer in count 10; and unlawfully engaging in business as a dealer or manufacturer of silencers in count 12. The jury also found Kettler guilty of the remaining count against him, unlawfully possessing a silencer in count 13.

The day before the court submitted the case to the jury, Kettler (joined by Cox) filed a motion "to dismiss the present prosecution." Cox R. vol. 1 at 218. They argued that because the NFA provisions at issue—26 U.S.C. §§ 5861 and 5871, which lay out prohibitions and penalties—had "become merely regulatory punishment," the provisions exceeded Congress's power to tax and, in fact, usurped power that the Tenth Amendment reserved to the states. *Id.* at 220. The motion doesn't mention the Second Amendment, but after Kansas submitted a response defending the SAPA on Second Amendment grounds, Kettler filed a reply relying almost exclusively on that amendment and urging the court to find that the NFA unconstitutionally infringed the right to bear arms.

The district court addressed both arguments in a January 2017 written order. *United States v. Cox* (*Cox II*), 235 F. Supp. 3d 1221, 1222–23 (D. Kan. 2017). The court reiterated its conclusion, based on Supreme Court precedent, that the NFA is a valid exercise of Congress's taxing power. *Id.* at 1225; *accord Cox I*, 187 F. Supp. 3d at 1285, 1287. And "if the NFA is otherwise consistent with the Constitution and constitutes a valid exercise of Congress's taxing power," the court reasoned, "then it does not run afoul of the Tenth Amendment." *Cox II*, 235 F. Supp. 3d at 1225. Next, the court concluded that none of the NFA provisions that applied to Cox and Kettler

infringed their Second Amendment rights. *Id.* at 1227–28. The court therefore denied the motion to dismiss. *Id.* at 1229.

The following month, the district court held a sentencing hearing. At that hearing, the court took into account Cox's and Kettler's reliance on the SAPA and gave them the benefit of that reliance. In lieu of prison time, the court sentenced Cox to two years' probation and Kettler to one year's.

Cox and Kettler appealed their convictions, and Kansas "move[d] to participate as a party" in Cox's appeal, citing 28 U.S.C. § 2403(b) and Fed. R. App. P. 44(b). State of Kan.'s Mot. to Participate as Party at 1–2, *United States v. Cox*, No. 17-3034 (10th Cir. May 9, 2017). The SAPA "ha[d] played a prominent role in [Cox's] case," Kansas noted, and the federal government had "argued at every turn that the [SAPA] is 'clearly preempted by federal law' and 'invalid.'" *Id.* at 2 (quoting Cox R. vol. 1 at 87, 108). Kansas therefore asked to submit briefs, on the same schedule as Cox, defending the SAPA's constitutionality. No one opposed the motion, so we granted it, and Kansas filed two briefs.

DISCUSSION

Though Cox and Kettler challenge their convictions, neither denies that he failed to abide by the NFA's rules: Kettler possessed an unregistered silencer; Cox possessed an unregistered short-barreled rifle and dealt in unregistered silencers. They strike instead at the NFA itself, arguing that the Act exceeds the constitutional bounds of Congress's power and violates their Second Amendment rights. In the alternative, even if the NFA passes constitutional muster, they contend that their

reliance on the SAPA mitigates their culpability for violating the NFA—a defense that, they claim, the district court erroneously kept from the jury.[7] We address the NFA's constitutionality first; then we turn to the SAPA and how (if at all) it affected Cox's and Kettler's culpability.

A. The Constitutionality of the National Firearms Act

Cox and Kettler claim that the NFA—at least as applied to their conduct[8]—suffers two constitutional infirmities, both fatal. We review each challenge de novo.

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[7] Kansas, in turn, briefed these issues:

1. Does the National Firearms Act, specifically 26 U.S.C. § 5861, preempt the Second Amendment Protection Act?
2. Did the District Court err in holding that the Second Amendment does not protect possession of silencers?

Br. of Intervenor State of Kan. at 1 (Br. of Kan.). As for the first issue, though, preemption isn't relevant here, and we needn't address the SAPA's constitutionality. And as for the second issue, it's not clear how the Second Amendment's protection of silencers would advance the SAPA's constitutionality. As a result, we don't directly engage any of Kansas's arguments.

[8] Kettler isn't clear about whether he's mounting a facial or an as-applied challenge to the NFA, while Cox specifically claims that the NFA "as applied" exceeds Congress's powers and violates the Second Amendment. Cox's Opening Br. at 36, 52. It's harder to prevail on a facial challenge—unlike an as-applied challenge, a facial challenge fails if "at least some" constitutional applications of the challenged statute exist. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 457 (2008) (quoting *Schall v. Martin*, 467 U.S. 253, 264 (1984)). And Kettler focuses on the NFA's transfer provisions, such as 26 U.S.C. § 5811, rather than take on the statute as a whole. So, in the absence of an indication that we should do otherwise, we treat both Cox's and Kettler's constitutional challenges as challenges to the NFA as it applied to them. (We also note that the failure of an as-applied challenge shows that the statute has "at least some" constitutional applications, spelling the end of any facial challenge.)

United States v. Reese, 627 F.3d 792, 799 (10th Cir. 2010) (quoting *United States v. Dorris*, 236 F.3d 582, 584 (10th Cir. 2000)).

1. Is the National Firearms Act a Valid Exercise of Congressional Power?

Cox and Kettler argue that the NFA exceeds Congress's power. We agree with the government, though: the NFA is a valid exercise of Congress's taxing power, as well as its authority to enact any laws "necessary and proper" to carry out that power. U.S. Const. art. I, § 8, cls. 1, 18.

Among other enumerated powers, Article I of the Constitution gives Congress the "Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States," *id.* cl. 1, and "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Power[]," *id.* cl. 18.

And on its face, the NFA is a taxing scheme. The statute collects occupational and excise taxes from businesses and transactions involving listed firearms—which include short-barreled rifles, silencers, and destructive devices. *See* 26 U.S.C. § 5845(a) (defining "firearm"). Importers, manufacturers, and dealers of these firearms must pay a yearly tax of $500 to $1,000. *Id.* § 5801. And each time one of these firearms is made or transferred, the statute levies a $200 tax. *Id.* § 5811 ("Transfer tax"); *id.* § 5821 ("Making tax"). But the NFA does more than lay taxes. To carry out the taxing scheme, it also mandates the registration of every importer, manufacturer, and dealer, *see id.* § 5802, and of every firearm made, *see id.* § 5822, or transferred, *see id.* § 5812. And to ensure compliance, the statute has teeth: the

failure to abide by any of its rules is a crime punishable by up to ten years in prison (or a fine, or both). *Id.* §§ 5861 ("Prohibited acts"), 5871 ("Penalties").

The Supreme Court addressed Congress's taxing-clause authority to enact the NFA eighty-one years ago, when a firearms dealer indicted for failing to pay the (then $200) annual dealer tax challenged the statute's constitutional basis with an argument similar to Cox and Kettler's. *See United States v. Sonzinsky*, 300 U.S. 506, 511 (1937). The dealer conceded that the taxing power allowed Congress to tax firearms dealers, yet he "insist[ed]" that the tax at issue was "not a true tax, but a penalty imposed for the purpose of suppressing traffic in a certain noxious type of firearms." *Id.* at 512. But the Constitution, according to the dealer, had reserved regulation of these firearms to the states, not to the federal government. *Id.* He concluded that the NFA revealed its "penal and prohibitive character" by cumulatively taxing importers, manufacturers, dealers, and transferors. *Id.*

The Supreme Court rejected the dealer's challenge, refusing to conclude that the NFA—on its face a taxing measure—exceeded congressional power "by virtue of its deterrent effect on the activities taxed." *Id.* at 513–14. "Every tax is in some measure regulatory," explained the Court, and "a tax is not any the less a tax because it has a regulatory effect." *Id.* at 513. Unlike the child-labor tax struck down in the *Child Labor Tax Case*, the NFA tax wasn't "a penalty resorted to as a means of enforcing [other] regulations." *Id.* (citing *Bailey v. Drexel Furniture Co.* (*The Child Labor Tax Case*), 259 U.S. 20, 35 (1922)). Rather, though the NFA contained registration provisions, those provisions were "obviously supportable as in aid of a

revenue purpose." *Id.* And because the $200-per-year dealer tax produced "some revenue," the Court refused to ponder Congress's motives in imposing it or to estimate its regulatory effect. *Id.* at 514. In sum, since "it [wa]s not attended by an offensive regulation, and since it operate[d] as a tax," the Court concluded that the NFA's taxing scheme was "within the national taxing power." *Id.*

Cox and Kettler urge us to limit *Sonzinsky*'s holding to the NFA of 1937, a statute that they claim no longer exists, and to reconsider the constitutional premise for today's NFA. According to Cox and Kettler, the statute that *Sonzinsky* upheld "has morphed, over more than eight decades, to the point that the current NFA registration system bears virtually no resemblance to a measure designed to collect revenue." Kettler's Opening Br. at 11–12.

Today, Cox and Kettler contend, the NFA is "far more of a gun-*control* measure than a gun-*tax* measure." Cox's Opening Br. at 53. They point out that since 2003, the ATF has administered the NFA from the Justice Department instead of the Treasury Department, where the ATF and its predecessor agencies spent the preceding 200 years. They note that as a result, the NFA—alone in the Internal Revenue Code—now falls outside the purview of the Treasury Secretary. And with this shift in oversight, they argue, today's NFA resembles the regulatory scheme struck down in the *Child Labor Tax Case*, which subjected employers "to inspection at any time 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, whose normal function is the advancement and protection of the

welfare of the workers." 259 U.S. at 37. Cox and Kettler thus conclude that the NFA, like that "so-called tax" on child labor, is really a penalty, outside Congress's taxing power. *The Child Labor Tax Case*, 259 U.S. at 37.

Which agency or agencies administer a tax, however, is but one indicator among several in the "functional approach" to whether that tax is really—for constitutional purposes—a tax. *See Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 565 (2012). And on that score, the child-labor "tax" in the *Child Labor Tax Case* had two more strikes against it: first, the tax imposed "a heavy exaction" on violators, equal to one tenth of a business's yearly net income; and second, the law included a scienter requirement, meaning that only knowing violators had to pay the tax. *The Child Labor Tax Case*, 259 U.S. at 36; *see also Sebelius*, 567 U.S. at 565–66. The sum of all three characteristics made "palpable" the law's "prohibitory and regulatory effect" and convinced the Court that the so-called tax was really a penalty, meant to stop child labor, and fell outside Congress's taxing-clause authority. *The Child Labor Tax Case*, 259 U.S. at 37, 39.

Yet Cox and Kettler don't contend that today's NFA exhibits either of the other penalty-like features of the child-labor "tax" in the *Child Labor Tax Case*. Nor need we assess which way those features point in this case, for we aren't starting from a blank slate in determining whether the NFA is a constitutional tax; we're starting from *Sonzinsky*. In upholding the NFA, *Sonzinsky* expressly distinguished the *Child Labor Tax Case* and similar decisions, in which "the [challenged] statute contain[ed] regulatory provisions related to a purported tax in such a way . . . that the

latter [wa]s a penalty resorted to as a means of enforcing the regulations." *Sonzinsky*, 300 U.S. at 513. The NFA, according to *Sonzinsky*, regulates only "in aid of a revenue purpose." *Id.*

Only six years ago, *Sebelius* reaffirmed the NFA's constitutional legitimacy, touting the statute's "obviously regulatory" tax on sawed-off shotguns as proof that "taxes that seek to influence conduct are nothing new" and remain valid exercises of the taxing power. 567 U.S. at 567 (citing *Sonzinsky*, 300 U.S. at 513); *see also id.* (explaining that even though the Affordable Care Act's individual mandate "seeks to shape decisions about whether to buy health insurance," it's still a valid exercise of the taxing power). And by itself, moving the NFA's administration from the Treasury Department to the Justice Department didn't so alter the balance between the statute's taxes and its regulatory provisions as to unmoor today's NFA from the statute deemed constitutional in *Sonzinsky* and cited with approval in *Sebelius*.

But Cox and Kettler's taxing-power argument has another angle. Noting that *Sonzinsky* upheld the NFA's dealer tax in large part because the tax produced "some revenue," they dispute that the administration of today's NFA raises *any* net revenue. *See* 300 U.S. at 514. Citing our decision in *United States v. Dalton*, 960 F.2d 121 (10th Cir. 1992), they claim that a statute that doesn't raise net revenue can't "be justified under Congress' power to **raise revenue**." Kettler's Opening Br. at 24.

The current registration process, they argue, is "structured to avoid generating revenue in as many instances as possible." *Id.* at 19. They claim that increasingly complex registration applications, background checks, and swelling (now months-

long) delays likely discourage many from even trying to register and pay NFA taxes. As for those willing to run that gantlet, Cox and Kettler note that the ATF denies the applications of would-be registrants whom federal law prohibits from buying firearms, meaning that "literally tens of millions of Americans are deemed ineligible to pay the NFA tax." Kettler's Opening Br. at 18 (citing 18 U.S.C. § 922(d), which makes it unlawful "for any person to sell or otherwise dispose of any firearm" to someone who falls into any of nine categories, including felons, *see id.* § 922(d)(1), and fugitives from justice, *see id.* § 922(d)(2)). And what's more, Congress hasn't raised the $200 transfer fee for silencers and short-barreled rifles since 1934—not even to keep pace with inflation[9]—so, argue Cox and Kettler, "it could be said that" the NFA's taxes are now "**productive of no net revenue**." *Id.* at 22.

But *Dalton* doesn't stand for the proposition that Cox and Kettler attribute to it: that "the taxing power can no longer be the constitutional basis for the NFA when the $5[10] and $200 NFA fees no longer raise net revenue." Kettler's Opening Br. at 24.

[9] Cox and Kettler recognize that Congress has raised the occupational taxes that importers, manufacturers, and dealers must pay.

[10] The NFA imposes a transfer tax of $5 "on any firearm classified as any other weapon under [26 U.S.C.] section 5845(e)." 26 U.S.C. § 5811(a). But the weapons listed in Cox's and Kettler's indictment—silencers, a short-barreled rifle, destructive devices—don't fall under § 5845(e)'s definition of "any other weapon." 26 U.S.C. § 5845. They are "firearms" taxed at $200 per transfer, *see* § 5811(a), so the $5 rate is irrelevant to Cox's and Kettler's as-applied challenges to the NFA.

That case addressed whether due process permitted Dalton's convictions for violating the NFA by possessing (26 U.S.C. § 5861(d)) and transferring (§ 5861(e)) an unregistered machinegun, when a separate law, 18 U.S.C. § 922(*o*), banned the possession and transfer of machineguns. *Dalton*, 960 F.2d at 122. To avoid running afoul of 26 U.S.C. § 5861(d) and (e), the NFA's transfer provision (§ 5812) required the transferor to pay a tax and apply to register the machinegun. *Dalton*, 960 F.2d at 122. But the transfer provision also required that applications to register illegal weapons be denied. *Id.* at 123. Section 922(*o*) thus made compliance with § 5861(d) and (e)'s registration requirements impossible, and we agreed with Dalton "that it violate[d] fundamental fairness to convict him for failing to do an act which everyone agree[d] he could not perform." *Dalton*, 960 F.2d at 123. Weakening the premise for Dalton's convictions still further, we reasoned that § 922(*o*) had "undercut the constitutional basis" of the NFA's machinegun-registration requirement. *Id.* at 124–25 (quoting *United States v. Rock Island Armory, Inc.*, 773 F. Supp. 117, 125 (C.D. Ill. 1991), *rejected by United States v. Ross*, 9 F.3d 1182, 1194 (7th Cir. 1993), *vacated*, 511 U.S. 1124 (1994)).[11] We noted that *Sonzinsky* had upheld the NFA's registration requirements as "solely in aid of collecting the tax," so when § 922(*o*)

[11] The Supreme Court returned *Ross* to the Seventh Circuit for reconsideration in light of the Court's intervening decision in *Staples v. United States*, 511 U.S. 600, 602 (1994), which interpreted 26 U.S.C. § 5861(d) to require a defendant to know that the weapon that he possessed exhibited features making it a "firearm" for NFA purposes. *Ross v. United States*, 511 U.S. 1124 (1994); *see also United States v. Ross*, 40 F.3d 144, 145 (7th Cir. 1994) (concluding, on remand, that failing to instruct the jury on this knowledge requirement warranted a new trial).

ended the registration and taxation of machineguns, it also removed "the constitutional base for those requirements—*i.e.,* the power to tax." *Id.* at 124. Dalton's convictions for possessing and transferring an unregistered machinegun in violation of § 5861(d) and (e), we concluded, were therefore "constitutionally infirm." *Id.* at 126.

As later decisions have made clear, the constitutional infirmity in Dalton's convictions resulted from 18 U.S.C. § 922(*o*)'s prohibition of the firearm at issue, which removed 26 U.S.C. § 5861's constitutional footing by making registration "a literal and legal impossibility." *United States v. McCollom*, 12 F.3d 968, 971 (10th Cir. 1993). Unless a separate statute criminalizes possession of a firearm, though, a due-process or taxing-power challenge to a § 5861(d) conviction is doomed to fail. *See id.* at 970–71 (concluding that, because no statute bans the registration of short-barreled shotguns, due process didn't bar McCollum's § 5861(d) conviction for possessing an unregistered sawed-off shotgun). That's so regardless of the practical difficulty or unlikelihood of registering the firearm—and regardless of how little revenue the tax generates. *See, e.g.*, *United States v. Berres*, 777 F.3d 1083, 1088 (10th Cir. 2015) (reasoning that the registration of flash bangs isn't a legal impossibility, and so rejecting a due-process challenge to Berres's § 5861(d) conviction for possessing one); *United States v. Eaton*, 260 F.3d 1232, 1236 (10th Cir. 2001) (reaching the same conclusion regarding Eaton's possession of a pipe bomb). And because Cox and Kettler point to no federal statutory ban on the

possession or transfer of the firearms at issue—silencers and short-barreled rifles—*Dalton* doesn't control this case.

Nevertheless, Cox and Kettler urge us to extend *Dalton* to this case by treating a lack of net revenue from NFA taxes on a weapon like a statutory ban on that weapon. As net revenue falls to zero, they argue, the NFA's taxing purpose disappears, leaving only its regulatory effect, and the statute's constitutional legitimacy crumbles.

They're correct that revenue mattered in *Dalton*, which reasoned that because of § 922(*o*)'s machinegun ban, the government collected none from the possession or transfer of machineguns. 960 F.2d at 125. Revenue also mattered in *Sonzinsky*, 300 U.S. at 514, which upheld the NFA because its dealer tax was "productive of some revenue," and in *Sebelius*, 567 U.S. at 564, which noted that the ACA's shared-responsibility payment bore "the essential feature of any tax: It produce[d] at least some revenue for the Government."

But in each case, the constitutional question hinged on *gross* revenue, and it set the bar low—"some" gross revenue. *See Minor v. United States*, 396 U.S. 87, 98 n.13 (1969) ("A statute does not cease to be a valid tax measure . . . because the revenue obtained is negligible . . . ."). Cox and Kettler direct us to no authority where a tax's *net* revenue (i.e., what's left after deducting expenses) affects its constitutional validity. Plus, as the government pragmatically puts it, "If the focus were on net revenue, then the Executive Branch could negate the constitutionality of a tax imposed by Congress simply through spendthrift enforcement." Br. for the

United States at 21. While Cox and Kettler contend that the $200 transfer tax on silencers "no longer raise[s] net revenue," they do not dispute that it raises *some* revenue. Kettler's Opening Br. at 24. That's all that *Sonzinsky* and *Sebelius* require (and what we deemed impossible in *Dalton*).

Accordingly, though times may have changed since the Court decided *Sonzinsky* in 1937, Cox and Kettler point to no differences, either in the NFA or in courts' understanding of the national taxing power, that justify departing from *Sonzinsky*'s conclusion that the NFA is a valid exercise of Congress's power. *See Citizens United v. FEC*, 530 F. Supp. 2d 274, 278 (D.D.C. 2008) ("Only the Supreme Court may overrule its decisions."); *see also Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (explaining that courts of appeals should follow Supreme Court precedent that "has direct application in a case" even if that precedent "appears to rest on reasons rejected in some other line of decisions" and should "leav[e] to th[e] Court the prerogative of overruling its own decisions"). We therefore conclude that the NFA falls within Congress's power to tax.[12]

[12] Other circuits uniformly agree. *See, e.g.*, *United States v. Spoerke*, 568 F.3d 1236, 1245–46 (11th Cir. 2009); *United States v. Vill. Ctr.*, 452 F.3d 949, 950 (8th Cir. 2006); *United States v. Lim*, 444 F.3d 910, 913–14 (7th Cir. 2006); *United States v. Thompson*, 361 F.3d 918, 921 (6th Cir. 2004); *United States v. Grier*, 354 F.3d 210, 215 (3d Cir. 2003); *United States v. Gresham*, 118 F.3d 258, 261–62 (5th Cir. 1997); *United States v. Dodge*, 61 F.3d 142, 145–46 (2d Cir. 1995); *United States v. Aiken*, 974 F.2d 446, 449–50 (4th Cir. 1992); *United States v. Giannini*, 455 F.2d 147, 148 (9th Cir. 1972).

2. Does the National Firearms Act Comport with the Second Amendment?

Cox and Kettler next challenge the NFA on the ground that it violates the Second Amendment. Both contend that their NFA convictions stem from activities that the Second Amendment protects—possessing short-barreled rifles and making, selling, transferring, and possessing silencers—yet their challenges then diverge. While Cox urges us to follow *District of Columbia v. Heller*, 554 U.S. 570, 595, 626 (2008), and to apply means–end scrutiny to the NFA, Kettler argues that under *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941), and *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943), the NFA impermissibly taxes the exercise of his constitutional right to bear arms.

We begin, as Cox suggests, with *Heller*, tracing the scope of the Second Amendment and asking whether it permits the NFA regulations at issue. Then we turn to Kettler's argument and consider the impact of the *Cox–Murdock* rule on our analysis.

a. The Scope of the Second Amendment under *Heller*

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. This amendment confers an individual right to keep and carry arms, but that doesn't mean that it gives everyone the absolute right to carry any weapon, in any manner, for any purpose. *Heller*, 554 U.S. at 595, 626.

The right to keep and carry arms, like other constitutional guarantees, has limits, and in *Heller*, the Court identified two venerable ones. *See id.* at 595, 626–27. First, since the nineteenth century, the Second Amendment has coexisted with a range of firearms regulations. *Id.* at 627 & n.26. *Heller* refused "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 626–27. Second, the Court reasoned that "the historical tradition of prohibiting the carrying of dangerous and unusual weapons" supported limiting the Second Amendment's protection to weapons "in common use at the time" of ratification. *Id.* at 627 (internal quotation marks and citations omitted) (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)). That means, according to *Heller*, that "those weapons not typically possessed by law-abiding citizens for lawful purposes"—short-barreled shotguns, for instance—fall outside the scope of the amendment. *Id.* at 625; *see also Miller*, 307 U.S. at 178 ("[W]e cannot say that the Second Amendment guarantees the right to keep and bear [a short-barreled shotgun].").

Yet within these limits, the Second Amendment takes some firearm regulations "off the [constitutional] table." *Heller*, 554 U.S. at 636. The law at issue in *Heller*, the District of Columbia's total ban on handgun possession in the home, represents the archetype of an unconstitutional firearm regulation. *See id.* at 628–29. The law not only prohibited "an entire class of 'arms'" that Americans "overwhelmingly"

choose to keep and to use for "the core lawful purpose of self-defense," but it extended that prohibition "to the home, where the need for defense of self, family, and property is most acute." *Id.* at 628, 630. Such a ban, *Heller* concluded, "would fail constitutional muster" no matter what level of scrutiny the Court applied. *Id.* at 628–29 & 628 n.27. *Heller* thus highlighted some traits of an unconstitutional regulation, but it left open how future courts should sort the constitutional from the unconstitutional.

As Cox points out though, our decision in *United States v. Reese* interpreted *Heller* to "'suggest[] a two-pronged approach to Second Amendment challenges' to federal statutes." 627 F.3d 792, 800 (10th Cir. 2010) (quoting *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010), and citing *United States v. Skoien*, 614 F.3d 638, 641–42 (7th Cir. 2010) (en banc)). Under the two-pronged approach, the reviewing court first asks: Does the challenged law burden conduct within the scope of the Second Amendment's guarantee? *Id.* (quoting *Marzzarella*, 614 F.3d at 89). If not, then the inquiry ends there. *Id.* at 800–01 (quoting *Marzzarella*, 614 F.3d at 89). But if the law burdens protected conduct, then "[the court] must evaluate the law under some form of means-end scrutiny." *Id.* at 801 (alteration in original) (quoting *Marzzarella*, 614 F.3d at 89). The law is constitutional only if it survives that scrutiny. *Id.* (quoting *Marzzarella*, 614 F.3d at 89).

We agree with Cox that *Reese*'s two-pronged approach provides a workable means of evaluating his Second Amendment challenges to the NFA's regulation of (1) short-barreled rifles, (2) silencers, and (3) the making and selling of firearms. We

thus begin by asking whether each regulated activity falls within the scope of the Second Amendment's guarantee. *See Reese*, 627 F.3d at 800–01. (If we answer "yes," then we will address whether the NFA's regulation of that activity survives means–end scrutiny. *Id.* at 801.)

i. Short-barreled rifles

Cox argues that because short-barreled rifles are neither unusual nor especially dangerous, possessing them falls within the Second Amendment's ambit. He asserts that legal uses of short-barreled rifles include "collecting, hunting, and home defense." Cox's Opening Br. at 48. And when it comes to the risk of violence, Cox claims that compared to *all* rifles (short- or long-barreled), "non-restricted pistols are far more commonly used in firearm-related crime." *Id.* at 49 (quoting James A. D'Cruz, *Half-Cocked: The Regulatory Framework of Short-Barrel Firearms*, 40 Harv. J.L. & Pub. Pol'y 493, 518 & n.161 (May 2017)).

That handguns may bear a higher correlation to crime than rifles do, however, implies nothing about whether short-barreled rifles, in particular, are dangerous and unusual. More telling is *Heller*'s conclusion that short-barreled shotguns—close analogues to short-barreled rifles—belong in that category of weapons not typically possessed by law-abiding citizens for lawful purposes and, therefore, not protected by the Second Amendment. 554 U.S. at 624–25 (discussing *Miller*, 307 U.S. at 178); *accord United States v. Artez*, 290 F. App'x 203, 208 (10th Cir. 2008) (noting that *Heller* expressly foreclosed Artez's argument that the Second Amendment protected his possession of a sawed-off shotgun). And since *Heller*, many courts have

explained that a long gun with a shortened barrel is both dangerous, because "its concealability fosters its use in illicit activity," and unusual, "because of its heightened capability to cause damage." *Marzzarella*, 614 F.3d at 95; *see also, e.g.*, *United States v. Amos*, 501 F.3d 524, 531 (6th Cir. 2007) (McKeague, J., dissenting) ("[A] sawed-off shotgun can be concealed under a large shirt or coat. . . . [T]he combination of low, somewhat indiscriminate accuracy, large destructive power, and the ability to conceal . . . makes a sawed-off shotgun useful for only violence against another person, rather than, for example, against sport game.").

Though these cases dealt with short-barreled shotguns, rather than short-barreled rifles, Cox has offered no meaningful distinction between the two. We need not opine on whether a sufficient factual record could be developed to distinguish short-barreled rifles from short-barreled shotguns. On the record and argument before us, we take our cue from *Heller* and conclude that the possession of short-barreled rifles falls outside the Second Amendment's guarantee.

ii. Silencers

Next, we turn to silencers, which both Cox and Kettler contend merit Second Amendment protection. They argue that silencers are in common use (more common, says Kettler, than handguns were in the District of Columbia when the Court decided *Heller*) and that they're very rarely used to commit crimes—"except on television and in the movies." Kettler's Opening Br. at 34. Further, they claim that silencers protect the shooter's (and bystanders') hearing and, "by reducing muzzle flinch and the disorientation that can follow a loud shot," can improve accuracy. Cox's Opening

Br. at 45. And because the alternative—donning earmuffs—takes up precious time and suppresses surrounding sounds, they argue that these hearing-protection and accuracy benefits make silencers particularly valuable for "the core lawful purpose of home defense." *See Heller*, 554 U.S. at 630.

But a more basic question remains: Even if silencers are commonly used by law-abiding citizens for lawful purposes, are they a type of instrument protected by the Second Amendment? According to *Heller*, "the Second Amendment extends, prima facie, to all instruments that constitute *bearable arms*." 554 U.S. at 582 (emphasis added). An instrument need not have existed at the time of the founding to fall within the amendment's ambit, but it must fit the founding-era definition of an "Arm[]." *Id.* at 581 (citing two dictionaries from the eighteenth, and one from the nineteenth, century). Then and now, that means, the Second Amendment covers "[w]eapons of offence, or armour of defence," or "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." *Id.* at 581 (alteration in original) (citations omitted). A silencer is a firearm accessory; it's not a weapon in itself (nor is it "armour of defence"). Accordingly, it can't be a "bearable arm" protected by the Second Amendment.[13]

[13] Though we needn't decide the issue, we note that the government cites authority concluding that silencers are dangerous and unusual, the type of "arm" traditionally excluded from the Second Amendment's protection. *See, e.g.*, *United States v. McCartney*, 357 F. App'x 73, 76 (9th Cir. 2009) (finding silencers even more dangerous than machineguns, for "[s]ilencers . . . are not 'typically possessed by law-abiding citizens for lawful purposes,' and are less common than either short-barreled shotguns or machine guns" (quoting *Heller*, 554 U.S. at 625)); *United States*

Thus, because silencers are not "bearable arms," they fall outside the Second Amendment's guarantee.

iii. Making and selling firearms

Finally, Cox argues that the Second Amendment protects the making and selling of silencers. For two reasons, however, we disagree.

As a threshold matter, *Heller* endorsed "laws imposing conditions and qualifications on the commercial sale of arms" as one of the limitations on the right to bear arms. 554 U.S. at 626–27. The NFA's requirements that firearms dealers and manufacturers register and pay taxes annually fit neatly into that category of "presumptively lawful regulatory measures." *Id.* at 627 n.26; *see* 26 U.S.C. §§ 5801 (imposing an annual tax of $500 to $1,000 on "every importer, manufacturer, and dealer in firearms"), 5802 (requiring "each importer, manufacturer, and dealer in firearms" to register every year with the Secretary of the Treasury). Those requirements, therefore, don't infringe the right to bear arms.

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v. Garnett, 2008 WL 2796098, at *4 (E.D. Mich. 2008) (concluding that "nothing in [*Heller*] . . . casts doubt on the constitutionality of" the NFA's regulation of silencers); *see also* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1489 & n.187 (2009) ("Bans on silencers . . . would . . . likely be constitutional because they don't materially burden self-defense." (citing *People v. Brown*, 235 N.W. 245, 246–47 (Mich. 1933) (upholding a ban on silencers, among other weapons, because the ban focused on "a partial inventory of the arsenal of the 'public enemy,' the 'gangster'"; it didn't include "weapons usually relied upon by good citizens for defense or pleasure")).

More importantly, though, the indictment charged Cox with, and the jury found him guilty of, engaging in business as a dealer or manufacturer of *silencers* in violation of the NFA. And as we've already concluded, the right to bear arms doesn't extend to silencers. Even if the Second Amendment covers the right to buy and sell arms in the abstract, it can't in practice protect the right to buy and sell instruments, such as silencers, that fall outside its ambit. Thus, as they apply to Cox in particular, the NFA's taxation and registration requirements for firearms manufacturers and dealers don't burden protected conduct.

* * *

In sum, the Second Amendment protects neither (1) short-barreled rifles, nor (2) silencers, nor (3) the business of manufacturing and dealing in silencers, so the NFA's regulation of these activities doesn't burden protected conduct. Our analysis thus ends at its first step, and we needn't test the challenged regulations under any form of means–end scrutiny. *See Reese*, 627 F.3d at 800–01.

b. Applying the Rule of *Cox v. New Hampshire* and *Murdock v. Pennsylvania* to Second Amendment Rights

For the first time on appeal, Cox and Kettler urge us to find that NFA taxes violate the Second Amendment by "impos[ing] a charge for the enjoyment of a right granted by the federal constitution." *Murdock*, 319 U.S. at 113. Under *Murdock* and *Cox*, seminal cases in the Court's "fee jurisprudence," the government may collect a fee to defray administrative and maintenance costs associated with the exercise of a constitutional (usually First Amendment) right, but it can't impose a general revenue

tax on the exercise of such a right. *Compare Murdock*, 319 U.S. at 113 (striking down a license tax on the exercise of the First Amendment right to free speech), *with Cox*, 312 U.S. at 576–77 (upholding a parade-licensing fee that the state charged "to meet the expense incident to the administration of [the parade] and to the maintenance of the public order").

When they raised the Second Amendment in the district-court proceedings, neither Cox nor Kettler cited the Court's fee jurisprudence, so the government urges us to review this argument for plain error. But it doesn't matter whether we review for plain error or not, because the district court didn't err (plainly or otherwise) in not applying the framework of *Murdock* and *Cox*.

As the government notes, neither this court nor the Supreme Court has applied *Murdock* or *Cox* in the Second Amendment context. To analyze Second Amendment challenges to federal statutes, we have used *Reese*'s two-step test, borrowed from the Third Circuit, which does not incorporate the Court's fee jurisprudence. *See Reese*, 627 F.3d at 800–01 (concluding that *Heller* "suggests a two-pronged approach to Second Amendment challenges," which asks whether the challenged law burdens protected conduct and, if so, whether it passes muster "under some form of means-end scrutiny" (quoting *Marzzarella*, 614 F.3d at 89)).

We recognize that other circuits have imported fee-jurisprudence principles to their Second Amendment analyses. *See, e.g.*, *Bauer v. Becerra*, 858 F.3d 1216, 1225 (9th Cir. 2017) (applying the fee-jurisprudence framework and concluding that fees supporting an extended background-check program "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'" (alterations in original) (quoting *Murdock*, 319 U.S. at 113–14, and *Cox*, 312 U.S. at 577)); *Kwong v. Bloomberg*, 723 F.3d 160, 165 (2d Cir. 2013) (deciding that "the Supreme Court's First Amendment fee jurisprudence provides the appropriate foundation for addressing" the plaintiffs' challenge to a handgun-licensing fee). But this appeal isn't the right vehicle to test that approach in our circuit, given our conclusion that the Second Amendment covers neither silencers nor short-barreled rifles. NFA taxes on the possession, transfer, and manufacture of these items do not constitute "charge[s] for the enjoyment of a right granted by the federal constitution," so they need not be measured against administrative costs or the expense of maintaining public order. *Murdock*, 319 U.S. at 113.

* * *

For these reasons, we conclude that the NFA comports with Cox's and Kettler's Second Amendment right to bear arms.

B. Kansas's Second Amendment Protection Act

The validity of the Second Amendment Protection Act has never been at issue in this case, yet the statute has played an outsized role since the case began. Now on appeal, Cox and Kettler both contend—albeit through differing theories—that the district court reversibly erred in ruling that they couldn't use their reliance on the SAPA as a defense to breaking federal firearms laws. Separately and additionally,

Kettler claims that the SAPA caused a clash between the Governor of Kansas and the U.S. Attorney General, which led, unjustly, to his prosecution.

The availability and scope of any defense based on the SAPA present legal questions that we review de novo. *Cf. United States v. Hernandez-Urista*, 9 F.3d 82, 83, 84 (10th Cir. 1993) (reviewing de novo whether a good-faith defense required that the defendant's good-faith belief be reasonable). We start our analysis with an overview of the SAPA, and then turn to Cox's and Kettler's arguments.

The SAPA spans about three pages of the *Kansas Register*, but its most oft-quoted section in this appeal is § 4(a), which states,

> 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. This section applies to a firearm, a firearm accessory or ammunition that is manufactured commercially or privately and owned in the state of Kansas.

Second Amendment Protection Act § 4(a) (codified at Kan. Stat. Ann. § 50-1204(a)).

The SAPA also:

- declares "[a]ny act, law, treaty, order, rule or regulation of the government of the United States" that violates the Second Amendment "null, void and unenforceable in the state of Kansas," Kan. Stat. Ann. § 50-1206(a);
- prohibits Kansas officials from enforcing, or attempting 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," Kan. Stat. Ann. § 50-1206(b); and,

- subjects any federal official who enforces, or tries to enforce, "any act, law, treaty, order, rule or regulation of the government of the United States regarding a firearm, a 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" to prosecution for "a severity level 10 nonperson felony," Kan. Stat. Ann. § 50-1207.

1. Is Reliance on the Second Amendment Protection Act a Defense?

Cox and Kettler both claim (and the government doesn't dispute) that they understood the SAPA to insulate from federal regulation the making, possession, and transfer of firearms within Kansas's borders. That was a mistake—the NFA's taxes and registration requirements apply to all statutorily defined firearms—yet Cox and Kettler argue that their reliance on the SAPA still provided a defense to the charges that they violated the NFA.

The district court permitted mention of the SAPA during trial "as part of the *res gestae* of the offenses," but it didn't let Cox and Kettler claim reliance on the SAPA as a defense. Cox R. vol. 1 at 194–95.[14] In doing so, it relied on settled law.

[14] Cox specifically notes that the court: (1) denied his request to introduce a copy of the SAPA displayed in his store; (2) refused to instruct the jury that he was raising, "as a complete defense[,] . . . that he acted in 'good faith' in his belief he was following State law [the SAPA] that superseded application of the federal law" charged in the indictment, Cox R. vol. 1 at 207; (3) instructed the jury, over his and Kettler's objections, that to establish the offenses of possession (26 U.S.C. § 5861(d)) or transfer (§ 5861(e)) of an unregistered firearm, "[t]he government [wa]s not required to prove that the defendant knew that the firearm was not registered or had to be registered," Cox R. vol. 1 at 287, 290; and (4) instructed the jury, over Cox's and Kettler's objections, that because the government needn't prove

The NFA's list of "[p]rohibited acts" in 26 U.S.C. § 5861 is silent regarding violators' mental state; the statute just makes it "unlawful for any person" to be a firearms dealer; or to make, receive, possess, or transfer a firearm in violation of the NFA's registration or other provisions. Silence, though, doesn't necessarily mean "that Congress intended to dispense with a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal." *Staples v. United States*, 511 U.S. 600, 605 (1994) (citing *United States v. Balint*, 258 U.S. 250, 251 (1922)). In the context of § 5861(d) in particular, which makes it unlawful "to receive or possess" an unregistered firearm, the government must prove that a defendant knew the features of the firearm that made it a "firearm" under the NFA. *Id.* at 619. A defendant need not, however, know that the firearm was unregistered. *Id.* at 609 (citing *United States v. Freed*, 401 U.S. 601, 607–09 (1971)). "Knowledge of whether the gun was registered is so closely related to knowledge of the registration requirement that requiring the Government to prove the former would in effect require it to prove knowledge of the law." *Id.* at 622 n.3 (Ginsburg, J., concurring). And as a general rule, ignorance of the law or a mistake of law is no defense to criminal prosecution. *Cheek v. United States*, 498 U.S. 192, 199 (1991);

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a defendant's knowledge of the NFA's registration requirements, "it [wa]s not a defense to a charge under [26 U.S.C.] § 5861 that a defendant may have believed, based on Kansas law, that the National Firearms Act did not require registration of a firearm," Cox R. vol. 1 at 295.

accord Staples, 511 U.S. at 622 n.3 (Ginsburg, J., concurring) (citing *Freed*, 401 U.S. at 612–14 (Brennan, J., concurring)).

That general mistake-of-law rule forecloses Cox and Kettler's proposed defense—that they wrongly believed, in reliance on the SAPA, that federal firearms regulations didn't reach their Kansas-centric activities. To be criminally liable, Cox and Kettler didn't need to know that their acts were "illegal, wrong, or blameworthy." *Freed*, 401 U.S. at 612 (Brennan, J., concurring). But Cox and Kettler urge us not to apply the general rule here. Something about the SAPA, they claim, changes things. Their arguments differ enough that we address them separately.

a. Cox's Argument: A Due Process Problem

Cox grounds his argument in the due-process principle that a defendant deserves "a meaningful opportunity to present a complete defense." Cox's Opening Br. at 23–24 (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). He argues for a limited exception, in cases like his, to the rule that ignorance of the law isn't a defense. If (1) "the accused's conduct is subject to facially conflicting state and federal laws," and if (2) "the state law has not (yet) been held inapplicable, inferior, or illegitimate by any court," then, he claims, "the accused's good-faith reliance on the state law is a complete defense to criminal charges brought under the federal law." *Id.* at 24.

Cox asserts that in prior cases, the Supreme Court has endorsed similar defenses based on notions of due process, notice, and fairness. In an appeal brought by a different Mr. Cox, for example, the Court concluded that the Due Process Clause

prevented the government from "convicting a citizen for exercising a privilege which the [government] had clearly told him was available to him." *Cox v. Louisiana*, 379 U.S. 559, 571 (1965) (quoting *Raley v. Ohio*, 360 U.S. 423, 426 (1959)). In *Cox*, "the highest police officials of the city, in the presence of the Sheriff and Mayor," had told demonstrators, including Mr. Cox, that they could meet at a spot about 101 feet from the courthouse steps, but after the demonstration (at that spot), the state prosecuted Cox for violating a statute banning picketing "in or near" a courthouse. *Id.* at 560, 571. Based on the public officials' actions, the Court struck Cox's conviction, reasoning that to sustain it "would be to sanction an indefensible sort of entrapment by the State." *Id.* at 571 (quoting *Raley*, 360 U.S. at 426); *see also United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655, 657, 673–74 (1973) (allowing a corporation to assert, as a defense to a charge of polluting a river in violation of the Rivers and Harbors Act, that it had relied on the Army Corps of Engineers'—the administrative agency responsible for interpreting the Act—"longstanding administrative construction of [the Act] as limited to water deposits that impede or obstruct navigation").

In this circuit, courts treat such due-process challenges as claims of entrapment by estoppel. *See United States v. Hardridge*, 379 F.3d 1188, 1192 (10th Cir. 2004) (citing *Raley*, 360 U.S. at 426, and *Cox*, 379 U.S. at 571). To win an entrapment-by-estoppel claim, a defendant criminally prosecuted for an offense must prove (1) that a government agent actively misled him about the state of the law defining the offense; (2) that the government agent was "responsible for interpreting, administering, or

enforcing the law defining the offense"; (3) that the defendant actually relied on the agent's misleading pronouncement in committing the offense; and (4) that the defendant's reliance was "reasonable in light of the identity of the agent, the point of law misrepresented, and the substance of the misrepresentation." *Id.* (quoting *United States v. Gutierrez-Gonzalez*, 184 F.3d 1160, 1167 (10th Cir. 1999), and *United States v. Nichols*, 21 F.3d 1016, 1018 (10th Cir. 1994)).

Here, Cox wouldn't be able to prove either (1) that the misleading government agent (the Kansas legislature) was responsible for interpreting, administering, or enforcing the law defining the offense (the NFA) or (2) that his reliance on the misleading pronouncement (the SAPA) was reasonable in light of the circumstances. First, unlike the police in *Cox*, who enforced the anti-picketing law, or the Army Corps of Engineers in *Pennsylvania Industrial Chemical*, which administered the Rivers and Harbors Act, the Kansas legislature (which wrote the SAPA) isn't responsible for administering or enforcing the NFA (or any other federal law). Second, irrespective of the government agent's identity, the substance of the SAPA's misrepresentation made Cox's reliance on it unreasonable. Section 4(a) of the SAPA expressly states that certain firearms and accessories, if kept in Kansas, aren't "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*." Kan. Stat. Ann.

§ 50-1204(a) (emphases added). But the SAPA says nothing about laws, such as the NFA, passed under Congress's authority *to tax*.

Cox counters that this reading of the SAPA "ignores provisions in the Act that prohibit both state and federal actors from enforcing 'any' federal firearms laws or regulations with respect to local firearms." Cox's Reply Br. at 2–3 (citing Kan. Stat. Ann. §§ 50-1206(b), 1207). But Cox is wrong that "[n]o Commerce Clause limit appears" in these provisions, which prohibit state officials from, and subject federal officials to prosecution for, enforcing or attempting to enforce federal laws against any 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*." Cox's Reply Br. at 3; Kan. Stat. Ann. §§ 50-1206(b), 1207 (emphases added). These provisions protect only homegrown, local firearms, so the Kansas legislature didn't need to utter the magic words, "Commerce Clause," to make clear its intent to preserve constitutional limits on the federal government's power over intrastate activity. Kansas wasn't considering, and didn't purport to limit, Congress's taxing-clause authority. Any other interpretation ignores the SAPA's emphasis on the local nature of the firearms' (and accessories') manufacture and ownership.

Cox, therefore, can't use the SAPA to establish an entrapment-by-estoppel defense in this case. *Cf. Hardridge*, 379 F.3d at 1192–96 (rejecting representations about the application of federal firearms laws made (1) by the Kansas City Police Department, (2) by the defendant's state-court sentencing judge, and (3) by a licensed federal firearms dealer as bases for an entrapment-by-estoppel defense); *Gutierrez-*

Gonzalez, 184 F.3d at 1168–69 (denying an entrapment-by-estoppel defense based on alleged misrepresentations made (1) by a private entity that assisted deported, indigent aliens, because the entity wasn't a government agency and because the defendant's reliance on its misrepresentations wasn't reasonable given the defendant's admission that he was in the country illegally, and (2) by an immigration official, because the defendant couldn't reasonably form the belief that he was in the U.S. legally merely from the official's failure to arrest him "on the spot").

Nor do notions of due process warrant expanding entrapment by estoppel and creating a new, estoppel-like defense to fit situations in which "the accused's conduct is subject to facially conflicting state and federal laws" and the accused acts in good-faith reliance on the state law. Cox's Opening Br. at 24. Nothing about a statute makes reliance on its pronouncements more consequential than reliance on a government agent's non-statutory statements.[15] And before we apply the doctrine of

[15] According to Cox, "[t]he collective judgment of an entire state legislature, regardless of jurisdiction, is surely more trustworthy than the advice of an extra-jurisdictional individual official." Cox's Opening Br. at 30. But the superiority of collective judgments is beside the point. State legislatures have no special expertise in, and aren't charged with enforcing, federal law. State legislators are more likely to consider their duty to promote their constituents' policy preferences than to expound on the reach of federal law.

Nor is Cox's analogy to the Fourth Amendment context persuasive. There, the Court has often deemed it reasonable for law-enforcement officers to rely on legislative pronouncements in forming probable cause. *See, e.g.*, *Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979) ("The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality—with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws."). But whether an officer's belief was reasonable for probable-cause purposes is a very different question, with very

estoppel against the government, due process requires us to weigh the needs of society against the "natural sympathy" that we may feel toward defendants like Cox and Kettler, who have been prosecuted for conduct that, based on a state statute's assurances, they believed was lawful. *Hardridge*, 379 F.3d at 1194. Application of the estoppel doctrine is justified only if it doesn't "interfere with underlying government policies or unduly undermine the correct enforcement of a particular law or regulation." *United States v. Browning*, 630 F.2d 694, 702 (10th Cir. 1980) (citing 27 A.L.R. Fed. 702 (1976)). Here, though, allowing state legislatures to estop the federal government from prosecuting its laws would upset the balance of powers between states and the federal government and contravene the Supremacy Clause. *See* U.S. Const. art. VI. We can't countenance that result, so we decline to adopt Cox's proposed defense.

Accordingly, we reject Cox's argument that due process required that he be able to present his reliance on the SAPA as a defense.

b. Kettler's Argument: Mens Rea and the Model Penal Code's Approach

Kettler, in turn, focuses on the mens rea element of possessing an unregistered firearm (in his case, a silencer) in violation of 26 U.S.C. § 5861(d). He claims that the "jurisdictional dispute between sovereigns" over the SAPA "demands a more

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different consequences, than whether a defendant's reliance was reasonable for estoppel purposes. So different, in fact, that answering the former doesn't help answer the latter.

thoughtful analysis of the *mens rea* element of 26 U.S.C. § 5861 than given by the court below." Kettler's Opening Br. at 50. Because possession of an unregistered silencer is a "morally indifferent" act ("*malum prohibitum*, not *malum in se*"), he contends, the mens rea element should yield to a mistake-of-law defense premised on the Model Penal Code's approach. *Id.* at 53.[16]

Section 2.04(3) of the Model Penal Code, titled "Ignorance or Mistake," provides,

> 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) [the actor] 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*; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.

Model Penal Code § 2.04(3) (Am. Law Inst. 2017) (emphasis added).

According to the explanatory note, this subsection "establishes a limited exception to the principle . . . that culpability is not generally required as to the illegality of the actor's conduct." *Id.* § 2.04 Explanatory Note. But the drafters delineated this exception "narrowly . . . so as to induce fair results without undue risk

[16] Cox also mentions the Model Penal Code, claiming that it's consistent with his proposed good-faith defense. And Cox, too, argues that NFA offenses aren't inherently immoral, a trait that, he claims, "weighs in favor of recognizing his [good-faith] defense." Cox's Opening Br. at 34. To avoid duplicating any analysis, we address both points only once, here.

of spurious litigation." *Id.* Thus, for instance, § 2.04(3)(b)(iv) permits reliance on an "official statement of the law" contained in an "official interpretation of the public officer or body" only if the interpreting officer or body is "charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense."

Yet unlike paragraph (b)(iv) of § 2.04(3), paragraph (b)(i) does not expressly limit the "statute[s] or other enactment[s]" on whose pronouncements a defendant may "act in reasonable reliance." Model Penal Code § 2.04(3)(b)(i). So, Kettler contends, paragraph (b)(i) permits reliance on a statute (like the SAPA) regardless of the enacting legislature's jurisdiction, "suppl[ying] a defense directly supporting [his] case." Kettler's Opening Br. at 54.

We disagree. The drafters of the Model Penal Code's ignorance-or-mistake-of-law defense intended only a narrow exception in the interest of fair results. *See* Model Penal Code § 2.04(3) Introductory Note. Thus, the code's failure to restrict reliance on statutes to those passed under the same authority as the law defining the offense probably reflects that the drafters weren't considering our circumstance, not that they intended to allow state governments to estop the federal government from enforcing its laws. After all, the plain language of the code requires "*reasonable* reliance upon an *official* statement of the law." *Id.* § 2.04(3)(b) (emphases added). A state legislature's statement about the reach of federal law is hardly an "official" statement of federal law, and to rely on such a statement is not reasonable.

Ultimately, however, the Model Penal Code isn't the law in this circuit. Like Cox's, Kettler's claim sounds in this circuit's doctrine of entrapment by estoppel. *See Gutierrez-Gonzalez*, 184 F.3d at 1166–68. And we've already concluded, in resolving Cox's claim, that reliance on the SAPA can't sustain an entrapment-by-estoppel defense in these cases. *See supra* Section B.1.a. It's fatal to their proposed defense that "in light of the identity of the agent, the point of law misrepresented, and the substance of the misrepresentation," Cox's and Kettler's reliance on the SAPA was not reasonable. *Nichols*, 21 F.3d at 1018.

Nor does Kettler's characterization of an NFA offense as "*malum prohibitum*," or wrong only because of a statutory proscription, justify broadening the entrapment-by-estoppel doctrine's (or the Model Penal Code's) exception to the rule that a mistake of law generally provides no defense to a criminal prosecution. Kettler's Opening Br. at 52. Kettler claims that "everyone knows the laws of the Creator, as they are written in the created order and imprinted by the Creator on every man" and that, as a result, the general mistake-of-law rule applies only to offenses that are mala in se (inherently wrong), not mala prohibita. *Id.* (citing *Romans* 1:18–20). But he cites no legal precedent carving out such an exception.

In *Cheek*, the Court explained the general mistake-of-law rule's provenance: "[b]ased on the notion that the law is definite and knowable, the common law presumed that every person knew the law." 498 U.S. at 199. That presumption might not always hold true anymore given the "proliferation of statutes and regulations," especially in the tax context, so Congress has "softened" its impact "by making

specific intent to violate the law an element of certain federal criminal tax offenses." *Id.* at 199–200 (citing *United States v. Murdock*, 290 U.S. 389 (1933)). Accordingly, *Cheek* recognized that since the 1930's, the Court has interpreted the term "willfully" in federal criminal tax statutes "as carving out an exception to the traditional rule." *Id.* at 200. "Willfulness," *Cheek* explained, means "the 'voluntary, intentional violation of a known legal duty.'" *Id.* at 201 (quoting *United States v. Pomponio*, 429 U.S. 10, 12 (1976)). *Cheek*, however, didn't suggest that the general mistake-of-law rule disappears whenever an offense may be categorized as malum prohibitum.

Moreover, Congress didn't put a "willfulness" requirement in the NFA. *See* 26 U.S.C. § 5861. As explained above, the NFA is silent about mens rea. The Court filled the gap, based on the presumption that criminal liability should attach only when a defendant knows the facts that make his conduct illegal, by requiring that the defendant know the characteristics of a firearm that bring it within the NFA's ambit. *Staples*, 511 U.S. at 619. The Court took the mens-rea presumption no further, however, "lest it conflict with the related 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.'" *Id.* at 622 n.3 (Ginsburg, J., concurring) (quoting *Cheek*, 498 U.S. at 199). Under *Staples*, then, certain factual mistakes (e.g., that a firearm isn't a "firearm" for NFA purposes) may provide a defense to a charge of violating the NFA, but legal mistakes (e.g., that the NFA doesn't apply to locally made firearms) do not.

Accordingly, we reject Kettler's argument that the mens rea element of 26 U.S.C. § 5861 should be subject to a mistake-of-law defense like the Model Penal Code's.

* * *

Finally, we note that Cox's and Kettler's reliance on the SAPA did, in the end, mitigate their sentences, if not their guilt. At the sentencing hearing, the court reasoned that even though the SAPA wasn't available as a defense at trial, the court could "take [it] into account" in deciding to impose probationary, instead of prison, sentences. Cox R. vol. 3 at 716:14–15. Speaking to Cox and Kettler, the court said, "I believe that you both honestly felt that you were protected by [the SAPA] and I believe that to be so[.]" *Id.* at 716:15–17. Thus, the court continued, "I am giving you what benefit I can of that statute here at sentencing." *Id.* at 717:12–13. That benefit turned out to be two years' probation for Kettler and one year's for Cox. (The NFA allows for a penalty of up to ten years in prison, a fine of up to $10,000, or both for violating any of its provisions. 26 U.S.C. § 5871.)

For all these reasons, we conclude that the district court was correct to prohibit Cox and Kettler from introducing their reliance on the SAPA as a defense to their NFA charges. Cox and Kettler received a fair trial and, at sentencing, the benefit of their good-faith reliance on the SAPA, so we see no reason—be it grounded in notions of due process or premised on presumptions about mens rea—either to create a new defense out of whole cloth (as Cox suggests) or to borrow one from the Model Penal Code (as Kettler suggests).

2. Was Kettler "Snared in a Constitutional Dispute Between Two Independent but Interrelated Civil Sovereigns"?

In a related argument, Kettler contends that the political rumpus following the SAPA's enactment "snared [him] in a constitutional dispute between two independent but interrelated civil sovereigns." Kettler's Opening Br. at 36. Citing the Declaration of Independence and its protection of unalienable rights, he argues that "[w]henever any government becomes destructive of those rights, it is the duty of the people—through their lower civil magistrates—to resist the misuse of power even to the point of taking up arms against tyranny as America's founders did in 1776." *Id.* at 44–45 (footnote omitted). Contrary to the founders' federalist ideals, Kettler claims that after passing the SAPA, Kansas's resolve weakened. "In a deferential, not confrontational, letter," he notes, the Kansas Attorney General asked the U.S. Attorney General either to order the dismissal of the indictment or to support a presidential pardon. *Id.* at 46. But Kettler claims that he deserves more than clemency or a pardon—"[h]e 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." *Id.* at 47.

We're unable to give Kettler either as an appellate remedy. The Constitution created the "judicial Power" to resolve cases and controversies, U.S. Const. art. III, § 2, cl. 1, and to do so, we have jurisdiction "of appeals from all final decisions of the district courts," 28 U.S.C. § 1291. As Chief Justice Marshall wrote, "the essential

criterion of appellate jurisdiction" is "that it revises and corrects the proceedings in a cause already instituted, and does not create that cause." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803). Yet in making his argument, Kettler points to no error in the district-court proceedings. Without such a claim, we can't simply order the executive branch to grant Kettler clemency or demand that Kansas grant him the protection of a republican form of government. Stated otherwise, to fulfill the judiciary's duty "to say what the law is," we need a legal question. *Id.* at 177.

Accordingly, we decline to grant Kettler relief for being "snared in a constitutional dispute" between Kansas and the federal government. Kettler's Opening Br. at 36.

CONCLUSION

For these reasons, we affirm the judgments of the district court.

17-3034, *United States v. Cox*
17-3035, *United States v. Kettler*

HARTZ, Circuit Judge, concurrence

I join Judge Phillips's opinion in full. I add this comment solely to caution against overreading our holding regarding silencers. In determining that silencers are not protected by the Second Amendment, we explain that they are not "bearable arms." We had no occasion to consider whether items that are not themselves bearable arms but are necessary to the operation of a firearm (think ammunition) are also protected.

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

will be at 1:00 o'clock when we do the instructions and then the closing arguments.

All right. We're in recess.

(Brief recess taken. Proceedings then continue in the conference room with both defendants present:)

THE COURT: All right. Well, the first thing, and of course this is on the record for the moment, is I am not going to give the proposed instructions that the defendants had proffered with respect to good faith. And I think that I've already stated the reasons for that on two or three occasions, but your record is preserved by having filed them. And as well as your motion and your supporting memorandum.

MR. HENRY: Your Honor.

THE COURT: And I don't think I need to hear anything else but, Tim, if you really feel compelled, go right ahead.

MR. HENRY: Well, actually, there's a -- getting into this further, the -- it is our belief, and in fact I think there's some, having reread Staples, which the Court wanted us to look at, what I find interesting is, is that the issue there, the defense that was raised in Staples was the person didn't even know that the gun that had been transferred to him had

wants to have their cake and eat it, too, no offense to Rich, of course, but it just seems that they're inconsistent and if that defense is available in Cheek, I think it should be available to us in this type of a case.

But that's all I have, Your Honor.

THE COURT: Thank you. Ian, there anything you want to add?

MR. CLARK: Your Honor, I had all sorts of clever things prepared for you but since those two counts got dismissed I would just, I guess, echo and adopt on the record the argument made by counsel for Mr. Cox, and then I'll just file a motion to that effect here shortly. So in case that doesn't get done until after we get to work, you know --

THE COURT: We've got you on the record here joining in, and that's fine.

MR. CLARK: Okay. Thank you, Judge.

THE COURT: You bet.

Rich?

MR. HATHAWAY: Judge, we don't have anything really additionally. We believe that the instructions correctly state the law of the case and we have no suggestions or additions.

THE COURT: Well, you know, this is one of

Instruction No. 19

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 "possessing 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.

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 § 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 § 5861 that a defendant may have believed, based on a Kansas law, that the National Firearms Act did not require registration of a firearm.

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

West's Kansas Statutes Annotated
Chapter 50. Unfair Trade and Consumer Protection
Article 12. Manufacturers of Firearms, Firearms Accessories, Ammunition

K.S.A. 50-1201

50-1201. Second amendment protection act

Currentness

K.S.A. 50-1201 through 50-1211, and amendments thereto, may be cited as the second amendment protection act.

Credits
Laws 2013, ch. 100, § 1, eff. April 25, 2013.

Notes of Decisions (3)

K. S. A. 50-1201, KS ST 50-1201
Statutes are current through laws effective on or before July 1, 2017, enacted during the 2017 Regular Session of the Kansas Legislature.

End of Document

West's Kansas Statutes Annotated
Chapter 50. Unfair Trade and Consumer Protection
Article 12. Manufacturers of Firearms, Firearms Accessories, Ammunition

K.S.A. 50-1202

50-1202. Legislative declaration

Currentness

The legislature declares that the authority for K.S.A. 50-1201 through 50-1211, and amendments thereto, is the following:

(a) The tenth amendment to the constitution of the United States guarantees to the states and their people all powers not granted to the federal government elsewhere in the constitution and reserves to the state and people of Kansas certain powers as they were understood at the time that Kansas was admitted to statehood in 1861. The guaranty of those powers is a matter of contract between the state and people of Kansas and the United States as of the time that the compact with the United States was agreed upon and adopted by Kansas in 1859 and the United States in 1861.

(b) The ninth amendment to the constitution of the United States guarantees to the people rights not granted in the constitution and reserves to the people of Kansas certain rights as they were understood at the time that Kansas was admitted to statehood in 1861. The guaranty of those rights is a matter of contract between the state and people of Kansas and the United States as of the time that the compact with the United States was agreed upon and adopted by Kansas in 1859 and the United States in 1861.

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

(d) Section 4 of the bill of rights of the constitution of the state of Kansas clearly secures to Kansas citizens, and prohibits government interference with, the right of individual Kansas citizens to keep and bear arms. This constitutional protection is unchanged from the constitution of the state of Kansas, which was approved by congress and the people of Kansas, and the right exists as it was understood at the time that the compact with the United States was agreed upon and adopted by Kansas in 1859 and the United States in 1861.

Credits
Laws 2013, ch. 100, § 2, eff. April 25, 2013.

Notes of Decisions (3)

K. S. A. 50-1202, KS ST 50-1202

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End of Document

West's Kansas Statutes Annotated
Chapter 50. Unfair Trade and Consumer Protection
Article 12. Manufacturers of Firearms, Firearms Accessories, Ammunition

K.S.A. 50-1203

50-1203. Definitions

Currentness

As used in K.S.A. 50-1201 through 50-1211, and amendments thereto, the following definitions apply:

(a) "Borders of Kansas" means the boundaries of Kansas described in the act for admission of Kansas into the union, 12 stat. 126, ch. 20, § 1.

(b) "Firearms accessories" means items that are used in conjunction with or mounted upon a firearm but are not essential to the basic function of a firearm, including, but not limited to, telescopic or laser sights, magazines, flash or sound suppressors, collapsible or adjustable stocks and grips, pistol grips, thumbhole stocks, speedloaders, ammunition carriers and lights for target illumination.

(c) "Manufacture" means to assemble using multiple components to create a more useful finished product.

Credits
Laws 2013, ch. 100, § 3, eff. April 25, 2013.

K. S. A. 50-1203, KS ST 50-1203
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End of Document

West's Kansas Statutes Annotated
Chapter 50. Unfair Trade and Consumer Protection
Article 12. Manufacturers of Firearms, Firearms Accessories, Ammunition

K.S.A. 50-1204

50-1204. Personal firearms, accessories and ammunition manufactured in Kansas; exempt, interstate commerce

Currentness

(a) 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. This section applies to a firearm, a firearm accessory or ammunition that is manufactured commercially or privately and owned in the state of Kansas.

(b) Component parts are not firearms, firearms accessories or ammunition, and their importation into Kansas and incorporation into a firearm, a firearm accessory or ammunition manufactured and owned in Kansas does not subject the firearm, firearm accessory or ammunition to federal regulation. It is declared by the legislature that such component parts are not firearms, firearms accessories or ammunition and are not subject to congressional authority to regulate firearms, firearms accessories and ammunition under interstate commerce as if they were actually firearms, firearms accessories or ammunition.

(c) Firearms accessories that are imported into Kansas from another state and that are subject to federal regulation as being in interstate commerce do not subject a firearm to federal regulation under interstate commerce because they are attached to or used in conjunction with a firearm in Kansas.

Credits
Laws 2013, ch. 100, § 4, eff. April 25, 2013.

Notes of Decisions (6)

K. S. A. 50-1204, KS ST 50-1204
Statutes are current through laws effective on or before July 1, 2017, enacted during the 2017 Regular Session of the Kansas Legislature.

End of Document

West's Kansas Statutes Annotated
Chapter 50. Unfair Trade and Consumer Protection
Article 12. Manufacturers of Firearms, Firearms Accessories, Ammunition

K.S.A. 50-1205

50-1205. Firearms manufactured in Kansas; stamped requirement

Currentness

A firearm manufactured in Kansas within the meaning of K.S.A. 50-1201 through 50-1211, and amendments thereto, must have the words "Made in Kansas" clearly stamped on a central metallic part, such as the receiver or frame.

Credits
Laws 2013, ch. 100, § 5, eff. April 25, 2013.

Notes of Decisions (3)

K. S. A. 50-1205, KS ST 50-1205
Statutes are current through laws effective on or before July 1, 2017, enacted during the 2017 Regular Session of the Kansas Legislature.

End of Document

West's Kansas Statutes Annotated
Chapter 50. Unfair Trade and Consumer Protection
Article 12. Manufacturers of Firearms, Firearms Accessories, Ammunition

K.S.A. 50-1206

50-1206. Certain federal laws made inapplicable; prohibition against enforcement

Currentness

(a) 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.

(b) 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.

Credits
Laws 2013, ch. 100, § 6, eff. April 25, 2013.

Notes of Decisions (3)

K. S. A. 50-1206, KS ST 50-1206
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End of Document

West's Kansas Statutes Annotated
Chapter 50. Unfair Trade and Consumer Protection
Article 12. Manufacturers of Firearms, Firearms Accessories, Ammunition

K.S.A. 50-1207

50-1207. Criminal penalty; certain actions of federal officials

Currentness

It is unlawful for any official, agent or employee of the government of the United States, or employee of a corporation providing services to 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, a 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. Violation of this section is a severity level 10 nonperson felony. Any criminal prosecution for a violation of this section shall be commenced by service of complaint and summons upon such official, agent or employee. Such official, agent or employee shall not be arrested or otherwise detained prior to, or during the pendency of, any trial for a violation of this section.

Credits
Laws 2013, ch. 100, § 7, eff. April 25, 2013.

K. S. A. 50-1207, KS ST 50-1207
Statutes are current through laws effective on or before July 1, 2017, enacted during the 2017 Regular Session of the Kansas Legislature.

End of Document

West's Kansas Statutes Annotated
Chapter 50. Unfair Trade and Consumer Protection
Article 12. Manufacturers of Firearms, Firearms Accessories, Ammunition

K.S.A. 50-1208

50-1208. Kansas prosecutors; injunctive relief

Currentness

A county or district attorney, or the attorney general, may seek injunctive relief in any court of competent jurisdiction to enjoin any official, agent or employee of the government of the United States or employee of a corporation providing services to the government of the United States from enforcing any act, law, treaty, order, rule or regulation of the government of the United States regarding a firearm, a 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.

Credits
Laws 2013, ch. 100, § 8, eff. April 25, 2013.

K. S. A. 50-1208, KS ST 50-1208
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End of Document

West's Kansas Statutes Annotated
Chapter 50. Unfair Trade and Consumer Protection
Article 12. Manufacturers of Firearms, Firearms Accessories, Ammunition

K.S.A. 50-1209

50-1209. Firearms; exclusions

Currentness

K.S.A. 50-1201 through 50-1211, and amendments thereto, do not apply to:

(a) A firearm that cannot be carried and used by one person;

(b) ammunition with a projectile that explodes using an explosion of chemical energy after the projectile leaves the firearm; or

(c) other than shotguns, a firearm that discharges two or more projectiles with one activation of the trigger or other firing device.

Credits
Laws 2013, ch. 100, § 9, eff. April 25, 2013.

K. S. A. 50-1209, KS ST 50-1209
Statutes are current through laws effective on or before July 1, 2017, enacted during the 2017 Regular Session of the Kansas Legislature.

End of Document

West's Kansas Statutes Annotated
Chapter 50. Unfair Trade and Consumer Protection
Article 12. Manufacturers of Firearms, Firearms Accessories, Ammunition

K.S.A. 50-1210

50-1210. Application of act

Currentness

K.S.A. 50-1201 through 50-1211, and amendments thereto, apply to firearms, firearms accessories and ammunition that are manufactured, as defined in K.S.A. 50-1203, and amendments thereto, owned and remain within the borders of Kansas on and after October 1, 2009.

Credits
Laws 2013, ch. 100, § 10, eff. April 25, 2013.

K. S. A. 50-1210, KS ST 50-1210
Statutes are current through laws effective on or before July 1, 2017, enacted during the 2017 Regular Session of the Kansas Legislature.

End of Document

West's Kansas Statutes Annotated
Chapter 50. Unfair Trade and Consumer Protection
Article 12. Manufacturers of Firearms, Firearms Accessories, Ammunition

K.S.A. 50-1211

50-1211. Severability

Currentness

If any provision of K.S.A. 50-1201 through 50-1210, and amendments thereto, or the application to any persons or circumstances is held to be invalid, such invalidity shall not affect the other provisions or application of K.S.A. 50-1201 through 50-1210, and amendments thereto, and to this end the provisions of K.S.A. 50-1201 through 50-1210, and amendments thereto, are declared to be severable.

Credits
Laws 2013, ch. 100, § 11, eff. April 25, 2013.

Notes of Decisions (3)

K. S. A. 50-1211, KS ST 50-1211
Statutes are current through laws effective on or before July 1, 2017, enacted during the 2017 Regular Session of the Kansas Legislature.

End of Document