No. 18-7451

IN THE SUPREME COURT OF THE UNITED STATES

SHANE COX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CICUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was entitled to raise an entrapment-by-estoppel defense against a federal prosecution on the ground that he was misled by state officials.

2. Whether the Second Amendment guarantees a right to possess short-barreled rifles and firearm silencers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-48a) is reported at 906 F.3d 1170. The order of the district court (Pet. App. 49a-59a) is reported at 187 F. Supp. 3d 1282. A second order of the district court (Pet. App. 62a-74a) is reported at 235 F. Supp. 3d 1221.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 2018. The petition for a writ of certiorari was filed on January 14, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Kansas, petitioner was convicted on one count of possessing an unregistered short-barreled rifle, in violation of 26 U.S.C. 5841, 5861(d), and 5871; five counts of transferring an unregistered silencer, in violation of 26 U.S.C. 5812, 5841, 5861(e), and 5871; one count of making an unregistered silencer, in violation of 26 U.S.C. 5822, 5841, 5861(f), and 5871; and one count of engaging in the business of manufacturing and dealing in silencers without having registered or paid the required tax, in violation of 26 U.S.C. 5861(a) and 5871. The district court sentenced him to two years of probation. Gov't C.A. Br. 2-3. The court of appeals affirmed. Pet. App. 1a-48a.

1. The National Firearms Act (Act), 26 U.S.C. 5801 et seq., enacted in 1934, imposes a federal tax on the manufacture, sale, and transfer of "firearm[s]." The Act defines "firearm" to include, among other items, short-barreled shotguns, short-barreled rifles, machineguns, bombs, grenades, and silencers. 26 U.S.C. 5845 (2012). The Act's definition does not include commonly used weapons such as handguns, shotguns, and rifles, or commonly used accessories such as bullets. See ibid. We refer to the items included in the Act's definition as "NFA firearms."

The Act requires manufacturers, importers, and dealers of NFA firearms to register and pay an occupational tax. 26 U.S.C. 5801,

5802. The Act also requires registration with the National Firearms Registration and Transfer Record and payment of an excise tax of $200 upon the manufacture, importation, or transfer of an NFA firearm. 26 U.S.C. 5811, 5812, 5821, 5822, 5841. The Act does not, however, prohibit the manufacture, sale, or possession of properly registered and taxed NFA firearms.

It is a criminal offense, punishable by up to ten years in prison and a $10,000 fine, to violate the Act's requirements or to possess an NFA firearm that has been transferred in violation of the Act's requirements. 26 U.S.C. 5861(d), 5871.

2. In 2013, the State of Kansas enacted the Kansas Second Amendment Protection Act, Kan. Stat. Ann. §§ 50-1201 et seq. The statute provides that a firearm or firearm accessory that is "manufactured" and "owned" in Kansas and "remains within the borders of Kansas" "is not subject to any federal law," "including any federal firearm or ammunition registration program," "under the authority of [C]ongress to regulate interstate commerce." Id. § 50-1204(a) (Supp. 2017). The statute also purports to make it a felony for any federal official to enforce any federal law regarding a firearm or firearm accessory that is "manufactured" and "owned" in Kansas and "remains within the borders of Kansas." Id. § 50-1206(b).

3. Petitioner operated "Tough Guys, an army-surplus store in Chanute, Kansas." Pet. App. 4a. In 2014, petitioner began

manufacturing firearm silencers, which are firearm attachments designed to suppress the sound of the shot. Gov't C.A. Br. 9-10. Petitioner sold his homemade silencers at Tough Guys and displayed them in a glass case next to a copy of the Kansas Second Amendment Protection Act. Pet. App. 4a. Petitioner and Tough Guys neither held a federal firearms license, nor registered the silencers, as required by the National Firearms Act. Id. at 5a.

Petitioner's co-defendant, Jeremy Kettler, bought one of petitioner's silencers and later praised its performance on Facebook. Pet. App. 4a-5a. The Bureau of Alcohol, Tobacco, Firearms and Explosives received a telephone tip about petitioner's sale of silencers. Id. at 5a. During the ensuing investigation, petitioner sold an unregistered silencer to an undercover agent. Gov't C.A. Br. 10. Agents also recovered an unregistered short-barreled rifle from petitioner's home. Ibid.

4. A federal grand jury in the District of Kansas indicted petitioner and Kettler for violating the National Firearms Act. Pet. App. 5a-6a. Before trial, the government moved for a ruling that reliance on the Kansas Second Amendment Protection Act is not a valid legal defense to the National Firearms Act charges. Id. at 7a. The district court allowed petitioner to refer to the Kansas statute at trial to "contextualize the charged offenses," but agreed with the government that reliance on the state law was not a defense to the federal charges. Ibid.

The case proceeded to trial. Pet. App. 8a. During jury deliberations, petitioner moved to dismiss the indictment, arguing that the National Firearms Act exceeded Congress's taxing power, that it violated the Tenth Amendment, and (in the reply brief) that its application to short-barreled rifles and silencers violated the Second Amendment. Gov't C.A. Br. 8. The district court denied the motion. It held that the National Firearms Act was a valid exercise of Congress's taxing power, and that the Second Amendment does not guarantee a right to keep and bear short-barreled rifles and silencers because these items are not "in common use by law-abiding citizens for lawful purposes." Pet. App. 70a.

The jury found petitioner guilty on one count of possessing an unregistered short-barreled rifle, in violation of 26 U.S.C. 5841, 5861(d), 5871; five counts of transferring an unregistered silencer, in violation of 26 U.S.C. 5812, 5841, 5861(e), 5871; one count of making an unregistered silencer, in violation of 26 U.S.C. 5822, 5841, 5861(f), 5871; and one count of engaging in the business of manufacturing and dealing in silencers without having registered or paid the required tax, in violation of 26 U.S.C. 5861(a), 5871. Gov't C.A. Br. 2-3. After considering petitioner's asserted reliance on the Kansas Second Amendment Protection Act, which the district court believed mitigated the offense, the court sentenced petitioner to two years of probation. Id. at 3, 53.

5. The court of appeals affirmed. Pet. App. 1a-48a.

The court of appeals first rejected petitioner's argument that, under the Due Process Clause of the Fifth Amendment, his reliance on the Kansas Second Amendment Protection Act precluded his prosecution under the National Firearms Act. Pet. App. 33a-40a. The court explained that the Tenth Circuit "treat[s] such due-process challenges as claims of entrapment by estoppel." Id. at 36a. To establish this defense, a defendant must show that (1) "a government agent actively misled him about the state of the law defining the offense"; (2) "the government agent was 'responsible for interpreting, administering, or enforcing the law defining the offense'"; (3) "the defendant actually relied on the agent's misleading pronouncement in committing the offense"; and (4) "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. at 36a-37a (quoting United States v. Hardridge, 379 F.3d 1188, 1192 (10th Cir. 2004)). Petitioner could not establish the second element, because "the misleading government agent (the Kansas legislature)" was not "responsible for interpreting, administering, or enforcing the law defining the offense." Id. at 37a. Petitioner also could not establish the fourth element, because "his reliance on the misleading pronouncement" (the Second Amendment Protection Act) was unreasonable. Ibid. Because the state statute refers to firearms

that remain "'within the borders of Kansas,'" and because it declares that such firearms are not "'subject to any federal law * * * under the authority of [C]ongress to regulate interstate commerce,'" the court considered it clear that "Kansas wasn't considering, and didn't purport to limit, Congress's taxing-clause authority." Id. at 37a-38a (citations omitted).

The court of appeals also rejected petitioner's claims that the application of the National Firearms Act to short-barreled rifles and silencers violates the Second Amendment. Pet. App. 22a-29a. The court observed that, under United States v. Miller, 307 U.S. 174 (1939), and District of Columbia v. Heller, 554 U.S. 570 (2008), short-barreled shotguns fall outside the scope of the Second Amendment because they are "not typically possessed by law-abiding citizens for lawful purposes." Pet. App. 25a. The court determined that the same was true of short-barreled rifles, because petitioner "ha[d] offered no meaningful distinction between the two." Id. at 26a. Turning to silencers, the court explained that the Second Amendment protects "bearable arms," which include "weapons of offence, or armour of defence." Id. at 27a (quoting Heller, 554 U.S. at 581-582) (brackets omitted). The court noted that a silencer is a "firearm accessory," "not a weapon in itself (nor is it 'armour of defence')." Ibid. Because short-barreled rifles and silencers fall outside the scope of the Second Amendment, the court concluded, the National Firearms Act's

regulation of them "doesn't burden protected conduct." Id. at 29a.

Judge Hartz wrote a concurrence "to caution against overreading [the court of appeals'] holding." Pet. App. 48a. He emphasized that, although silencers are not "bearable arms," the court did not have "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." Ibid.

ARGUMENT

Petitioner maintains (Pet. 9-18) that, under the Due Process Clause of the Fifth Amendment, his reliance on the Kansas Second Amendment Protection Act was a defense to federal charges under the National Firearms Act. The court of appeals' rejection of petitioner's entrapment-by-estoppel defense was correct and does not conflict with any decision of any other court of appeals. Petitioner separately contends (Pet. 18-25) that the Second Amendment guarantees a right to possess short-barreled rifles and silencers. The court of appeals' contrary conclusions were correct and do not conflict with the decision of any other court of appeals. Further review is unwarranted.

1. A writ of certiorari is not warranted to review the court of appeals' alternative holdings rejecting petitioner's entrapment-by-estoppel defense.

a. Petitioner begins (Pet. 9-15) by seeking review of the court of appeals' first reason for rejecting the entrapment-by-estoppel defense: its determination that the Kansas Legislature was not "responsible for interpreting, administering, or enforcing" the National Firearms Act. Pet. App. 37a. This holding was correct and does not conflict with the decision of any other court of appeals. This Court has previously denied review of petitions asking whether a defendant who relies on state officials' misadvice can raise an entrapment-by-estoppel defense against federal charges, and it should follow the same course here. See, e.g., Lemons v. United States, 568 U.S. 1012 (2012) (No. 12-5735); Sariles v. United States, 566 U.S. 923 (2012) (No. 11-6568); Hardridge v. United States, 552 U.S. 1208 (2008) (No. 07-8367); Baker v. United States, 549 U.S. 840 (2006) (No. 05-11081).

The defense of entrapment by estoppel "is a narrow exception to the general principle that ignorance of the law is no defense." United States v. Etheridge, 932 F.2d 318, 321 (4th Cir.), cert. denied, 502 U.S. 917 (1991). The defense is available only where a responsible governmental official actively misleads a defendant into believing that certain conduct is legal and the defendant reasonably relies on those misleading statements. See Cox v. Louisiana, 379 U.S. 559, 571 (1965); Raley v. Ohio, 360 U.S. 423, 425-426 (1959). As this Court's decisions make clear, the person who gives the advice on which the defendant relies must be a

governmental official who is responsible for enforcing the law at issue or who is otherwise in a position to provide an authoritative interpretation of the law. See Cox, 379 U.S. at 571 ("[T]he highest police officials of the city, in the presence of the Sheriff and Mayor, in effect told the demonstrators that they could meet where they did."); Raley, 360 U.S. at 437 (chairman of the state commission "clearly appeared to be the agent of the State in a position to give * * * assurances" that the defendant could decline to answer the commission's questions); see also United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655, 674 (1973) (reliance on regulations from "the responsible administrative agency"). As the court of appeals recognized, the Kansas Legislature is not responsible for enforcing federal law, and it is not in a position to provide an authoritative interpretation of federal law. See Pet. App. 36a-37a. Indeed, the contrary view would subvert the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, because it would enable States to nullify federal law through declarations that state citizens are immune from federal prosecution.

Numerous courts of appeals have held that the entrapment-by-estoppel defense is not available when a defendant charged with a federal crime claims to have been misled by state officials. See, e.g., United States v. Caron, 64 F.3d 713, 714-717 (1st Cir. 1995), cert. denied, 518 U.S. 1027 (1996); United States v. Miles, 748

F.3d 485, 489 (2d Cir.) (per curiam), cert. denied, 135 S. Ct. 381 (2014); Etheridge, 932 F.2d at 320-321 (4th Cir.); United States v. Spires, 79 F.3d 464, 466-467 (5th Cir. 1996); United States v. Ormsby, 252 F.3d 844, 851 (6th Cir. 2001); United States v. Rector, 111 F.3d 503, 505-507 (7th Cir. 1997), overruled on other grounds by United States v. Wilson, 169 F.3d 418 (7th Cir. 1999); United States v. Brebner, 951 F.2d 1017, 1026-1027 (9th Cir. 1991); United States v. Funches, 135 F.3d 1405, 1407 (11th Cir.), cert. denied, 524 U.S. 962 (1998); see also United States v. Stewart, 185 F.3d 112, 125 n.5 (3d Cir.), cert. denied, 528 U.S. 1063 (1999); United States v. Achter, 52 F.3d 753, 755 (8th Cir. 1995).

Petitioner erroneously suggests (Pet. 12) that the decision below conflicts with the Second Circuit's decision in United States v. Giffen, 473 F.3d 30 (2006). The Second Circuit applies the same rule that the Tenth Circuit applied here: "[S]tate and local officials cannot 'bind the federal government to an erroneous interpretation of federal law.'" Miles, 748 F.3d at 489 (citation omitted). Giffen, the case on which petitioner relies, addressed a different issue. There, the Second Circuit dismissed an appeal for lack of jurisdiction, but suggested in "nonbinding" dicta that the entrapment-by-estoppel defense may be available where the misleading advice comes from a governmental official with "apparent" rather than actual authority to enforce the law at issue. 473 F.3d 38, 42 n.12. Petitioner's defense would fail

even under this broader theory, because the Kansas Legislature lacks even the "apparent" authority to enforce federal law.

Petitioner also erroneously contends (Pet. 15) that the decision below conflicts with the decisions of other courts that "have explained that this particular * * * defense exists apart from any mens rea requirement within the statute." Contrary to petitioner's suggestion, the court of appeals did not hold that the scope of the entrapment-by-estoppel defense depends on the mens rea requirement in the National Firearms Act. It was petitioner's co-defendant, Kettler, who invoked the Act's "mens rea element" to "justify broadening the entrapment by estoppel" defense in this context. Pet. App. 43a, 45a. The court of appeals "reject[ed]" that argument. Id. at 45a.

b. In all events, this case would be a poor vehicle to address the application of the entrapment-by-estoppel defense to state misadvice about federal law, because the court of appeals' decision also rested on an alternative ground: the court's determination that petitioner's reliance on state law was unreasonable. Pet. App. 37a. Petitioner independently seeks (Pet. 15-18) review of this alternative holding, but the holding was correct and does not conflict with the decision of any other court of appeals. As the court of appeals explained, the Kansas Second Amendment Protection Act, on its own terms, covers only federal legislation enacted "under the authority of [C]ongress to regulate

interstate commerce." Kan. Stat. Ann. § 50-1204(a) (Supp. 2017). The state statute does not speak to laws such as the National Firearms Act, which rests on Congress's power to tax, see Sonzinsky v. United States, 300 U.S. 506, 512 (1937). The court's factbound analysis of state law does not warrant further review, and, even if it did, this Court would normally "defer to the construction of a state statute given it by the lower federal courts," Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 499 (1985).

2. A writ of certiorari is not warranted to review the court of appeals' holding that the Second Amendment does not protect short-barreled rifles and silencers. The court's decision was correct and does not conflict with the decision of any other court of appeals.

a. Petitioner first contends (Pet. 18-21) that the Second Amendment protects short-barreled rifles. But in United States v. Miller, 307 U.S. 174 (1939), this Court held that the Second Amendment does not guarantee a right to keep and bear short-barreled shotguns. Id. at 179. And in District of Columbia v. Heller, 554 U.S. 570 (2008), the Court "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." Id. at 625. The Court explained that this limitation "accords with the historical understanding of the scope of the right," because it is "fairly supported by the

historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" Id. at 625, 627; see, e.g., 2 William Blackstone, Commentaries 149 (1916) ("The offense of riding or going armed with dangerous or unusual weapons is a crime against the public peace.").

The court of appeals correctly relied on Miller and Heller to determine that the Second Amendment also does not protect short-barreled rifles. The court correctly observed that petitioner "has offered no meaningful distinction between" short-barreled rifles and short-barreled shotguns (but added that it "need not opine on whether a sufficient factual record could be developed to distinguish" between the weapons). Pet. App. 26a. The only other court of appeals to have directly addressed the issue agrees that "individuals * * * do not have the right to possess machineguns or short-barreled rifles." United States v. Gilbert, 286 Fed. Appx. 383, 386 (9th Cir.), cert. denied, 555 U.S. 1038 (2008).

Petitioner does not contend in this Court that there is any meaningful distinction between short-barreled rifles and short-barreled shotguns. Petitioner instead suggests (Pet. 19) that the Court should overrule Miller. In Heller, however, this Court explained that Miller's holding that "the Second Amendment does not protect * * * short-barreled shotguns" "accords with the historical understanding of the scope of the right." 554 U.S. at 625.

Petitioner incorrectly argues (Pet. 19-20) that Miller's holding regarding short-barreled shotguns is out of date. Contrary to petitioner's contention, these weapons remain "dangerous and unusual" today, and are not "in common use" by law-abiding citizens for self-defense. Heller, 554 U.S. at 627 (citation omitted). Because they combine easy concealability with high destructive power, they are "likely to be used for criminal purposes." United States v. Thompson/Center Arms Co., 504 U.S. 505, 517 (1992) (plurality opinion); see, e.g., United States v. Marzzarella, 614 F.3d 85, 95 (3d Cir. 2010) ("[A] short-barreled shotgun is dangerous and unusual in that its concealability fosters its use in illicit activity * * * [and] because of its heightened capability to cause damage."), cert. denied, 562 U.S. 1158 (2011); United States v. Upton, 512 F.3d 394, 404 (7th Cir.) ("People do not shorten their shotguns to hunt or shoot skeet. Instead, the shortened barrel makes the guns easier to conceal and increases the spread of the shot when firing at close ranges -- facts that spurred Congress to require the registration of all sawed-off shotguns, along with other dangerous weapons like bazookas, mortars, pipe bombs, and machine guns."), cert. denied, 555 U.S. 830 (2008); United States v. Fortes, 141 F.3d 1, 8 n.3 (1st Cir.) ("[S]awed-off shotguns are inherently dangerous [and] lack usefulness except for violent and criminal purposes."), cert. denied, 524 U.S. 961 (1998).

b. Petitioner also contends (Pet. 21-25) that the Second Amendment protects silencers. The Second Amendment, by its terms, protects the right to keep and bear "Arms." In Heller, this Court interpreted the word "Arms" to mean "'weapons of offence, or armour of defence.'" 554 U.S. at 580 (brackets and citation omitted). As the court of appeals correctly determined, a silencer is neither a weapon nor an "'armour of defence,'" and restrictions on silencers "don't materially burden" one's ability to use a gun for "self-defense." Pet. App. 27a-28a & n.13 (citation omitted). Petitioner now attempts to argue (Pet. 24) that silencers facilitate self-defense, but, according to petitioner's own testimony at trial, the "main purpose" of a silencer is that it "just makes the shooting sport more enjoyable." Gov't C.A. Br. 34 (quoting trial transcript). And, as petitioner acknowledges (Pet. 21-22), the few courts to address the issue have agreed that the Second Amendment does not protect silencers. See United States v. McCartney, 357 Fed. Appx. 73, 76 (9th Cir. 2009), cert. denied, 559 U.S. 1021 (2010); United States v. Perkins, No. 08-cr-3064, 2008 WL 4372821, at *4 (D. Neb. Sept. 23, 2008); State v. Dor, 75 A.3d 1125, 1130 (N.H. 2013); People v. Brown, 235 N.W. 245, 246 (Mich. 1931); see also United States v. Stepp-Zafft, 733 Fed. Appx. 327, 329-330 (8th Cir.) (per curiam), cert. denied, 139 S. Ct. 279 (2018).

Petitioner argues that the court of appeals' decision "is in tension" with the principle that the Second Amendment protects "'not only firearms, but also the related items and accessories that made them usable.'" Pet. 22 (citation omitted). But the court never denied that the Second Amendment protects ammunition and other accessories that are necessary to make firearms usable for self-defense. In fact, Judge Hartz's concurring opinion expressly "caution[ed] against overreading [the] holding regarding silencers," explaining that the court "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." Pet. App. 48a. And petitioner's claim fails even under his own standard, because petitioner has failed to explain how silencers are necessary to make firearms "usable."

Petitioner also emphasizes (Pet. 21) that the court here concluded that silencers fall outside the scope of the Second Amendment because they are not arms at all, while courts in other cases have concluded that they fall outside the scope of the Second Amendment because they are dangerous and unusual. See, e.g., McCartney, 357 Fed. Appx. at 76 ("Silencers" "are even more dangerous and unusual than machine guns * * * and are less common than either short-barreled shotguns or machine guns."); Perkins, 2008 WL 4372821, at *4 ("[S]ilencers/suppressors 'are not in common use by law-abiding citizens for lawful purposes.'"); Brown, 235

N.W. at 247 (describing silencers as part of "the arsenal of * * * the 'gangster'" and contrasting them with "weapons usually relied upon by good citizens for defense or pleasure"). "This Court, however, reviews judgments, not statements in opinions." Black v. Cutter Labs., 351 U.S. 292, 297 (1956). Petitioner's observation that different courts relied on different rationales to reach the same conclusion thus does not establish a conflict warranting this Court's intervention. To the contrary, this alternative rationale provides an additional justification for the court of appeals' holding, and an additional reason to deny review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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