No. _____

IN THE

Supreme Court of the United States

_____

BERNANDINO GAWALA BOLATETE,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

Petitioner was convicted under 26 U.S.C. §§ 5861(d) and 5871, sections of the National Firearms Act that impose criminal penalties of up to 10 years' imprisonment for receiving or possessing a firearm suppressor not registered by the transferor of the suppressor. As the transferee, Petitioner was not responsible for paying the $200 required to register the suppressor. The constitutional foundation justifying the federal criminalization of Petitioner's conduct is Congress's power to tax under Article I, section 8, of the Constitution. The important federal question presented is:

Whether federal criminal punishment of the receipt and possession of unregistered suppressors under 26 U.S.C. §§ 5861(d) and 5871 exceeds Congress's power to tax under Article I, section 8, of the Constitution and violates the Tenth Amendment.

PROCEEDINGS IN FEDERAL TRIAL AND APPELLATE COURTS DIRECTLY RELATED TO THIS CASE

United States District Court (M.D. Fla.):

United States v. Bolatete, No. 3:17-cr-00240-HES-JBT-1 (September 17, 2018)

United States Court of Appeals (11th Cir.):

United States v. Bolatete, No. 18-14184 (September 29, 2020)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bernandino Bolatete respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion, 977 F.3d 1022 (11th Cir. 2020), is provided in the petition appendix (Pet. App.) at 1a-22a.

JURISDICTION

The Eleventh Circuit issued its decision on September 29, 2020. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. Mr. Bolatete has timely filed this petition pursuant to this Court's Order Regarding Filing Deadlines (Mar. 19, 2020) (extending deadlines due to COVID-19) and Rules 29.2 and 30.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 1 of the U.S. Constitution provides:

> The Congress shall have 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; but all Duties, Imposts and Excises shall be uniform throughout the United States.

The Tenth Amendment to the U.S. Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Section 921 of Title 18 of the United States Code provides in relevant part:

> Definitions
>
> (a) As used in this chapter—
>
> . . .

(3) The term "firearm" means . . . (C) any firearm muffler or firearm silencer . . .

(24) The terms "firearm silencer" and "firearm muffler" mean any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication. . . .

Section 5811 of Title 26 of the United States Code provides:

(a) Rate.--There shall be levied, collected, and paid on firearms transferred a tax at the rate of $200 for each firearm transferred, except, the transfer tax on any firearm classified as any other weapon under section 5845(e) shall be at the rate of $5 for each such firearm transferred.

(b) By whom paid.--The tax imposed by subsection (a) of this section shall be paid by the transferor.

(c) Payment.--The tax imposed by subsection (a) of this section shall be payable by the appropriate stamps prescribed for payment by the Secretary.

Section 5841 of Title 26 of the United States Code provides:

(a) Central registry.--The Secretary shall maintain a central registry of all firearms in the United States which are not in the possession or under the control of the United States. This registry shall be known as the National Firearms Registration and Transfer Record. The registry shall include—

(1) identification of the firearm;
(2) date of registration; and
(3) identification and address of person entitled to possession of the firearm.

(b) By whom registered.--Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transferee by the transferor.

(c) How registered.--Each manufacturer shall notify the Secretary of the manufacture of a firearm in such manner as may by regulations be prescribed and such notification shall effect the registration of the firearm required by this section. Each importer, maker, and transferor of a firearm shall, prior to importing, making, or transferring a firearm, obtain authorization in such manner as required by this chapter or regulations

issued thereunder to import, make, or transfer the firearm, and such authorization shall effect the registration of the firearm required by this section.

(d) Firearms registered on effective date of this Act.--A person shown as possessing a firearm by the records maintained by the Secretary pursuant to the National Firearms Act in force on the day immediately prior to the effective date of the National Firearms Act of 1968 shall be considered to have registered under this section the firearms in his possession which are disclosed by that record as being in his possession.

(e) Proof of registration.--A person possessing a firearm registered as required by this section shall retain proof of registration which shall be made available to the Secretary upon request.

Section 5845 of Title 26 of the United States Code provides, in relevant part:

For the purpose of this chapter—

(a) Firearm.—The term "firearm" means . . . (7) any silencer (as defined in section 921 of title 18, United States Code) . . . .

Section 5861 of Title 26 of the United States Code provides, in relevant part:

It shall be unlawful for any person–

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

Section 5871 of Title 26 of the United States Code provides:

Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than $10,000, or be imprisoned not more than ten years, or both.

STATEMENT OF THE CASE

1. Mr. Bolatete was charged by indictment in the United States District Court for the Middle District of Florida for having knowingly received and possessed a device for silencing, muffling, and diminishing the report of a portable firearm as defined in 18 U.S.C. § 921(a)(24), specifically, a Knights Armament firearm silencer, not registered to the defendant in the National Firearms Registration and Transfer Record as required by 26 U.S.C. § 5841, in violation of 26 U.S.C. §§ 5861(d) and 5871. *See* Doc. 14.[1]

Mr. Bolatete moved to dismiss the indictment because 26 U.S.C. §§ 5861(d) and 5871 are an unconstitutional extension of Congressional taxing powers. Doc. 42. He asserted that 26 U.S.C. § 5861 and its penalty provision exceeded Congress's power to enact legislation under the Taxation Clause and violated the Tenth Amendment's limitation on the federal government's authority to invade the police powers granted to the States. *Id*. The district court denied the motion, finding that Mr. Bolatete's arguments were squarely foreclosed by Eleventh Circuit precedent. Doc. 54.

Mr. Bolatete proceeded to trial, and a jury found him guilty. Doc. 63. The district court later adjudicated Mr. Bolatete guilty and imposed a sentence of 60 months' imprisonment followed by a two-year term of supervised release. Doc. 82. Mr. Bolatete appealed his conviction and sentence. Doc. 84.

2. The Eleventh Circuit affirmed Mr. Bolatete's conviction. Pet. App. 1a-22a. One of several constitutional claims Mr. Bolatete maintained on appeal was that Congress exceeded its taxing powers and violated the Tenth Amendment when it enacted and enforced a criminal penalty

[1] Mr. Bolatete cites docket entries from the district court proceedings, Case No. 3:17-cr-00240-HES-JBT-1 (M.D. Fla), as "Doc."

on the mere possession of unregistered weapons. Pet. App. 14a-15a. He argued that the Eleventh Circuit's prior precedent in *United States v. Spoerke*, 568 F.3d 1236, 1245 (11th Cir. 2009), which upheld the criminal penalty for violating the National Firearms Act as a valid exercise of Congressional taxing power, was wrongly decided. Pet. App. 16a. The Eleventh Circuit disagreed, finding that Mr. Bolatete's arguments were "clearly foreclosed by *Spoerke*." *Id*. Relying on *Spoerke*, the Eleventh Circuit thus held that "§ 5861(d) aids a revenue-raising purpose even though it punishes possessors and transferees who have no obligation or opportunity to pay the transfer tax themselves." Pet. App. 16a-17a.

REASONS FOR GRANTING THE WRIT

Petitioner Bolatete was a lawful owner of firearms who frequently practiced his shooting at a firearms range. Pet. App. at 8a. He purchased an unregistered firearm suppressor from an undercover law enforcement officer.[2] Pet. App. at 7a, 11a. As the purchaser, or transferee, of the suppressor, Petitioner was neither responsible for nor capable of paying the $200 required to register the firearm. He was charged with and convicted of an offense, 28 U.S.C. § 5861(d), created by Congress under its enumerated power to tax. Specifically, he was convicted of receiving or possessing a device for silencing, muffling, and diminishing the report of a portable firearm as defined in 18 U.S.C. § 921(a)(24), specifically, a Knights Armament firearm silencer, not registered to him in the National Firearms Registration and Transfer Record as required by 26 U.S.C. § 5841. He was sentenced to five years' in prison under 26 U.S.C. § 5871. He is currently incarcerated.

I. The Important Federal Question About the Extent of Congress's Enumerated Power to Tax Warrants Review

This case presents an important question about federalism and the extent of Congress's enumerated power to tax. The Eleventh Circuit held that binding circuit precedent precluded relief, but that precedent predated this Court's articulation of the functional approach to identifying a tax in *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 565 (2012) (*NFIB*). This Court should examine the constitutional foundation for 26 U.S.C. §§ 5861(d) and 5871 in light of *NFIB*.

In addition, resolution of the issue has serious consequences for Mr. Bolatete, who was sentenced to five years' imprisonment, as well as all other defendants convicted and sentenced under §§ 5861(d) and 5871 for receipt or possession of an unregistered silencer or other firearm

[2] The terms "suppressor" and "silencer" refer to the same item and are used interchangeably.

covered by the National Firearms Act. In particular, Mr. Bolatete was a downstream possessor of the suppressor with no responsibility to pay the required $200 or register the suppressor.

A. The Federal Government possesses the enumerated power to tax; the States retain the police power.

"In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *Bond v. United States*, 572 U.S. 844, 854 (2014); *see also United States v. Butler*, 297 U.S. 1, 63 (1936). By creating a Federal Government of enumerated powers, the Constitution limits the authority of the Federal Government to the exercise of only the powers granted to it by the Constitution. *Bond*, 572 U.S. at 854 (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 405 (1819)); *see also United States v. Lopez*, 514 U.S. 549, 552 (1995) (citing U.S. Const. Art. I, § 8) ("The Constitution creates a Federal Government of enumerated powers."). The Tenth Amendment also reflects this concept of federalism and provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amend. X.

Under this federalist system, "[t]he States have broad authority to enact legislation for the public good—what [this Court] has often called a "police power"." *Bond*, 572 U.S at 854. Indeed, punishment of local criminal activity is perhaps the clearest example of traditional state authority. *Id*. at 858 (citing *United States v. Morrison*, 529 U.S. 598, 618 (2000)); *see also NFIB*, 567 U.S. at 535-36 (punishment of street crime is an example of a general power of governing possessed by the States but not by the Federal Government, often referred to as the "police power"); *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) ("States possess primary authority for defining and enforcing the criminal law."). In contrast, Congress lacks a "police power" and "cannot punish felonies generally." *Cohens v. Virginia*, 6 Wheat. 264, 428, 5 L.Ed. 257 (1821); *see also Bond*, 572 U.S. at 854 (explaining that it has been clear for nearly two centuries that

Congress lacks a "police power" and cannot punish felonies generally). Accordingly, every criminal offense Congress enacts must have "some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States." *Id.* (quoting *United States v. Fox*, 95 U.S. 670, 672 (1878)).

Congress may not pass laws to accomplish objectives not entrusted to the Federal Government under a pretext of executing its enumerated powers. *McCulloch,* 4 Wheat. at 423*, quoted in Bailey v. Drexel Furniture*, 259 U.S. 20, 40 (1922) (*Drexel Furniture*). As Chief Justice Marshall explained:

> Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was no the law of the land.

McCulloch, 4 Wheat. at 423. Thus, "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *Morrison*, 529 U.S. at 607; *see also Marbury v. Madison*, 1 Cranch 137, 176, 2 L.Ed. 60 (1803) (Marshall, C.J.) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."). Congress's enumerated powers include the power to lay and collect taxes. U.S. Const., Art. I, § 8, cl.1.

B. The $200 exaction imposed upon transfer of a silencer under the National Firearms Act functions not as a tax, but as a pretext to coerce conduct reserved to the police power of the States.

Invoking its taxing authority, Congress in 1934 enacted the National Firearms Act ("NFA"), which this Court later described as "a regulatory measure in the interest of public safety." *United States v. Freed*, 401 U.S. 601 (1971); *see also Staples v. United States*, 511 U.S. 600, 627

(1994) (Stevens, J., dissenting) (the NFA "is primarily a regulatory measure"). Regarding the NFA, Justice Stevens explained:

> Congress fashioned a legislative scheme to regulate the commerce and possession of certain types of dangerous devices, including specific kinds of weapons, to protect the health and welfare of the citizenry. To enforce this scheme, Congress created criminal penalties for certain acts and omissions.

Staples, 511 U.S. at 630 (1994) (Stevens, J., dissenting); *see also* National Firearms Act: Hearings Before the House Committee on Ways and Means, 73rd Cong., 2d Sess., 8 (1934); Rept. No. 1780, Committee on Ways and Means, U.S. House of Representatives, 73rd Cong., 2d Sess. 2 (1934); Rept. No. 1444, Committee on Finance, U.S. Senate, 73rd Cong., 2d Sess. 1 (1934). This regulatory scheme with criminal penalties evolved, and in 1958, Congress added a criminal offense to the NFA prohibiting the receipt or possession of an unregistered firearm. 26 U.S.C. § 5861(d).[3]

Section 5861(d) makes it unlawful for any person to receive or possess certain firearms that are not registered to him in the National Firearms Registration and Transfer Record. 26 U.S.C. § 5861(d). The penalty for a violation of or failure to comply with § 5861(d) is found in § 5871, which provides for a fine of not more than $10,000 or imprisonment of not more than ten years, or both. 26 U.S.C. § 5871. Mr. Bolatete was convicted of that offense and sentenced to 5 years' imprisonment.

[3] Prior to the addition of the provision now found at § 5861(d), this Court upheld the constitutionality of a different tax and provision of the National Firearms Act in *United States v. Sonzinsky*, 300 U.S. 506, 511, 514 (1937) (holding that an annual excise tax on firearms dealers in section 2 of the NFA was constitutional). While *Sonzinsky* addressed the annual dealer tax in section 2, the $200 transfer tax, which serves as the precursor to 26 U.S.C. §§ 5811 and 5821, was found within section 3. *Id.* at 511. Here, the Eleventh Circuit found that *Sonzinsky* did not decide the issues in Petitioner's case because it did not involve the transfer tax and because the NFA was markedly different in 1937 than it is today. Pet. App. at 15a (n.7).

To be sure, Congress does not necessarily exceed its constitutional authority when it levies taxes in an effort to influence conduct. *See NFIB*, 567 U.S. at 567 ("taxes that seek to influence conduct are nothing new"); *see also Drexel Furniture*, 259 U.S. at 40-43 (discussing cases); *cf. Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767 (1994) ("We have cautioned against invalidating a tax simply because its enforcement might be oppressive or because the legislature's motive was somehow suspect."). Taxes imposed "on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous . . . do not lose their character as taxes because of the incidental motive." *Drexel Furniture*, 259 U.S. at 38.

Yet "Congress's ability to use its taxing power to influence conduct is not without limits." *NFIB*, 567 U.S. at 572; *see, e.g., Butler*, 297 U.S. at 61 (concluding that the Agricultural Adjustment Act of 1933 regulated agricultural production and that the tax was a mere incident of such regulation); *Linder v. United States*, 268 U.S. 5 (1925) (stating that Congress may not justify the regulation of the practice of the medical profession under the pretext of raising revenue); *Drexel Furniture*, 259 U.S. at 39-40 (invalidating the "so-called tax" as a "penalty to coerce people of a state to act as Congress wishes them to act in respect of a matter completely the business of the state government under the federal Constitution").[4] Congress may not use its enumerated powers as a pretext to the exercise of power reserved to the States. *See Drexel Furniture*, 259 U.S. at 40 (quoting *McCulloch*, 4 Wheat. at 423). In particular, Congress may not usurp the police

[4] Pending before this Court is *California v. Texas*, No. 19-840. One of the questions presented is whether reducing the amount of the tax specified in 26 U.S.C. § 5000A to zero renders the minimum coverage provision of the Patient Protection and Affordable Care Act unconstitutional. *California v. Texas*, No. 19-840, *pet. for cert.* at i. This Court's decision may shed additional light on the limits of Congress's ability to use its taxing power to influence conduct.

powers of the States under the guise of a taxing act. *See United States v. Constantine*, 296 U.S. 287 (1935).

Furthermore, courts must read the Constitution's grant of the power to tax and other powers "carefully to avoid creating a general federal authority akin to the police power." *NFIB*, 567 U.S. at 536. Nearly a century ago, this Court warned of the potential dangers of allowing laws to stand that pretextually used the taxing authority to legislate on matters of public interest reserved to the States.

> Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a socalled tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states.

Drexel Furniture, 259 U.S. at 38.

"Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more." *NFIB*, 567 U.S. at 574. As such, the taxing power does not give Congress the same degree of control over individual behavior as the current understanding of Congress's power to regulate commerce. *Id.* at 573. Critically, "the provisions of the so-called taxing act must be naturally and reasonably adapted to the collection of the tax and not solely to the achievement of some other purpose plainly within state power." *Drexel Furniture*, 259 U.S. at 43.

1. A functional approach is used to identify a tax.

To identify a tax, this Court has applied a "functional approach" and focused on the "practical characteristics of the so-called tax." *NFIB*, 567 U.S. at 565. This functional approach

disregards the label given to the tax in favor of viewing the "substance and application" of the exaction. *Id.* at 565 (quoting *Constantine*, 296 U.S. at 294). Also, this Court has observed that "[a] tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the government." *Butler*, 297 U.S. at 61. Moreover, "taxes . . . are usually motivated by revenue-raising, rather than punitive, purposes." *Kurth Ranch*, 511 U.S. at 780-81.

In *NFIB*, under the functional approach, this Court noted that the exaction imposed by the Patient Protection and Affordable Care Act "look[ed] like a tax in many respects." 567 U.S. at 563, 565. Taxpayers paid the sum into the Treasury Department when they filed their income tax returns, and the amount was determined by familiar factors such as taxable income, number of dependents, and joint filing status. *Id.* at 563-64. The requirement to pay was found in the Internal Revenue Code and enforced by the Internal Revenue Service. *Id.* The payment was expected to raise about $4 billion per year, satisfying the essential feature of a tax, which is producing revenue for the government. *Id.* (citing *United States v. Kahriger*, 345 U.S. 22, 28, n.4 (1953)). The exaction in *NFIB* was not excessive, did not require scienter, and was collected "solely by the IRS through the normal means of taxation – except that the [Internal Revenue] Service [was] *not* allowed to use those means most suggestive of a punitive sanction, such as criminal prosecution." *Id.* at 566 (emphasis in original). In addition, under the "functional" analysis, the statutory context of the exaction and its practical operation matter to the determination of whether the exaction is a tax. *See NFIB*, 567 U.S. at 565; *see id.* at 563-70.

2. The $ 200 transfer fee does not function as a tax.

The NFA imposes a $200 "tax" for each firearm made or transferred. *See* 26 U.S.C. §§ 5811, 5821. The maker or transferor of the firearm is responsible for paying the tax and registering the firearm. *See* 26 U.S.C. § 5841.

Applying the same functional approach and practical analysis here demonstrates that the $200 transfer fee underlying the NFA does not "look like" a tax. Instead, it serves as a pretext for criminalizing the receipt or possession of a silencer, which should be a matter for the States rather than the Federal Government. As this Court has noted repeatedly, "[t]here comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment."[5] *NFIB*, 567 U.S. at 573 (internal quotations omitted) (citing *Kurth Ranch*, 511 U.S. at 779, and *Drexel Furniture ,* 259 U.S. at 38).

Several practical characteristics of the $200 payment and its enforcement strongly suggest that it does not function as a tax. First, the amount of the $200 payment has not changed for inflation since 1934. Congress's decision by omission not to adjust the amount for inflation strongly suggests that Congress does not seek with the $200 payment to produce revenue for the government, which is the essential feature of a tax. *See NFIB*, 567 U.S. at 563-64.

In addition, since 2003, responsibility for the enforcement of the NFA no longer lies with the Treasury Department and its Internal Revenue Service (IRS), but rather with the Justice

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[5] In *Drexel Furniture*, this Court asked:

> Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty?

259 U.S. at 36.

Department and the Bureau of Alcohol, Tobacco, and Firearms (ATF).[6] The decision to transfer ATF from the Treasury Department to the Justice Department reflects the domination of the criminal enforcement provision of the statute over revenue collection.[7] Also, enforcement by the Justice Department suggests that the $200 payment does not function as a tax. *See Drexel Furniture*, 259 U.S. at 36-37 (finding that the so-called tax was a penalty in part because it was enforced by the Department of Labor, an agency responsible for punishing violations of labor laws); *see also NFIB*, 567 U.S. at 563-64 (finding that the payment was a tax in part because it was enforced by the IRS, an agency responsible for collecting revenue).

In addition, unlike the tax in *NFIB*, the ATF and Justice Department may enforce the payments required by the NFA using "those means most suggestive of a punitive sanction, such as criminal prosecution." *NFIB*, 567 U.S. at 563-64. Indeed, the criminal penalties drive the NFA, not the collection of revenue. Yet the penalty provisions are not "naturally and reasonably adapted to the collection of the tax" but rather to "the achievement of some other purpose plainly within state power." *Drexel Furniture*, 259 U.S. at 43.

Indeed, the NFA criminal penalty is far more severe than other criminal penalties for failing to pay taxes. Failure to obtain a $200 tax stamp on a silencer carries a maximum penalty of $10,000 and 10 years imprisonment. 26 U.S.C. § 5871. But the maximum penalty for violations of the Internal Revenue Code is only five years imprisonment (26 U.S.C. § 7201), with other

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[6] *See* ATF History Timeline, Bureau of Alcohol, Tobacco, Firearms and Explosives, https://www.atf.gov/our-history/atf-history-timeline; *see also* Pub. L. No. 107-296, §§ 1111, 1112(k), 116 Stat. 2135, (2002) (creating the Department of Homeland Security); *see also* 6 U.S.C. § 531.

[7] The Homeland Security act split the missions and functions of ATF into two agencies: the ATF and the Alcohol and Tobacco Tax transferred to the Justice Department, and the Trade Bureau remained with the Treasury Department. *See* ATF History Timeline, Bureau of Alcohol, Tobacco, Firearms and Explosives, https://www.atf.gov/our-history/atf-history-timeline; *see also* 26 U.S.C. § 7801(a)(2).

violations carrying three-year (26 U.S.C. § 7206) or one-year (26 U.S.C. § 7203) terms.

Furthermore, the penalties provided by § 5871, including up to ten years' imprisonment, are disproportionately severe compared to the $200 transfer fee that the government never received. A useful contrast is the national median loss amounts and average sentences for various white collar offenses as recently reported by the United States Sentencing Commission[8]:

White Collar Crime	Median Loss Amount	Average Prison Sentence
Counterfeiting	$6,600	15 months
Bribery	$41,390	25 months
Government benefits	$48,006	10 months
Credit cards	$77,000	31 months
Theft & property destruction	$137,500	23 months
Money laundering	$208,000	70 months
Copyright and trademarks	$236,600	12 months
Taxes	$296,000	16 months
Healthcare	$1,188,178	34 months
Mortgages	$1,372,368	23 months
Securities and investments	$2,000,000	50 months

By comparison, the downstream recipient of a firearm who is held criminally responsible for the failure of the transferor to pay the $200 transfer fee is scored under U.S.S.G. § 2K2.1, which leads to an average prison sentence of **64 months**—by far the lowest monetary harm to the government with nearly the highest penalty.[9]

Moreover, it is important to note that the downstream recipient, such as Petitioner, of the firearm has no obligation to pay the $ 200 fee and register the firearm; that burden falls on the transferor. 26 U.S.C. §§ 5811(b), 5841(b); *see also Freed*, 401 U.S. at 603-04 ("[O]nly possessors who lawfully make, manufacture[ ], or import firearms can and must register them; the transferee does not and cannot register."); *id.* at 605. The offense also "requires no specific intent

[8] U.S. Sentencing Commission, Quick Facts, Economic Crimes, April-November 2020, available at https://www.ussc.gov/research/quick-facts (last accessed on February 16, 2021).

[9] U.S. Sentencing Commission, Quick Facts, Firearms, May 2020, available at https://www.ussc.gov/research/quick-facts (last accessed on February 16, 2021).

or knowledge that the [firearm was] unregistered." *Id.* at 607. As such, § 5861(d) harshly punishes a downstream firearm recipient without a requirement that the government prove any specific intent about the $ 200 transfer tax.

Under the "functional" analysis, the statutory context of the exaction is also relevant. Here, Congress intended to ban certain firearms, not raise revenue, when it enacted the National Firearms Act. *See* National Firearms Act: Hearings Before the House Committee on Ways and Means, 73rd Cong., 2d Sess., 8 (1934); Rept. No. 1780, Committee on Ways and Means, U.S. House of Representatives, 73rd Cong., 2d Sess. 2 (1934); Rept. No. 1444, Committee on Finance, U.S. Senate, 73rd Cong., 2d Sess. 1 (1934). In addition, the provisions of the NFA are not naturally and reasonably adapted to the collection of the tax; rather, they are solely designed to achieve a purpose related to the police power, which is plainly within state power. In sum, the practical operation of § 5861(d) and the statutory context suggest that the $ 200 registration requirement does not function as a tax.

II. Petitioner's Case Presents an Appropriate Vehicle to Answer this Question

Petitioner presented the issue of the constitutionality of §§ 5861(d) and 5871 to both the district court and the appellate court, thus preserving the issue for review by this Court. The Eleventh Circuit held that it was bound by its circuit precedent of *United States v. Spoerke*, 568 F.3d 1236, 1245 (11th Cir. 2009), and *United States v. Ross*, 458 F.2d 1144, 1145 (5th Cir. 1972), to deny Petitioner's facial and as-applied challenges to the statute.[10] Pet. App. at 13a-16a. However, *Spoerke* and *Ross* pre-date this Court's decision in *NFIB* and the functional approach to identifying a tax that focuses on practical characteristics.

[10] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit issued before October 1, 1981.

In *Ross*, the court of appeals rejected a constitutional challenge to §5861(d), reasoning that the statute was "part of the web of regulation aiding enforcement of the transfer tax provision in § 5811." 458 F.2d at 1145. The court observed: "Having required payment of a transfer tax and registration as an aid in collection of that tax, Congress under the taxing power may reasonably impose a penalty on possession of unregistered weapons." *Id.* The court held that the penalty imposed by § 5861(d) was a valid exercise of Congress's taxing power because that penalty "ultimately discourages the transferor on whom the tax is levied from transferring a firearm without paying the tax." *Id.*

In *Spoerke*, the Eleventh Circuit relied on *Ross* and held that the NFA "is facially constitutional" and that "Congress under the taxing power may reasonably impose a penalty on possession of unregistered weapons." 568 F.3d at 1245 (citing *Ross*, 458 F.2d at 1145) (internal quotation marks omitted). The Eleventh Circuit also noted that "[t]he unlawfulness of an activity does not prevent its taxation" (*id*. (citing *Kurth Ranch*, 511 U.S. at 778) (internal quotations omitted)), and neither does it "cease to be a valid tax measure because it deters the activity taxed" (*id*. (citing *Minor v. United States*, 396 U.S. 87, 98 n.13 (1969)) (internal quotations omitted)). The Eleventh Circuit further found that "Spoerke . . . could have registered and paid taxes" on his firearms, or "Spoerke could have declined to manufacture and possess" the firearms, and therefore the NFA was also constitutional as applied to him. *Id*. at 1246.

Spoerke does not stand alone in its holding. *See*, *e.g.*, *United States v. Lim*, 444 F.3d 910, 913 (7th Cir. 2006) (holding that § 5861(d) "reasonably may be construed as part of the web of regulation aiding enforcement of the transfer tax provision in § 5811" (internal citation omitted)); *United States v. Grier*, 354 F.3d 210, 215 (3d Cir. 2003) (holding that "the NFA remains a proper exercise of the congressional taxing power under the Constitution"); *United States v. Hall*, 171

F.3d 1133, 1142 (8th Cir. 1999) ("We therefore hold that Congress had the authority under the taxing clause to define as a crime the possession of an unregistered silencer."); *United States v. Gresham*, 118 F.3d 258, 262 (5th Cir. 1997) ("Having required payment of a transfer tax and registration as an aid in collection of that tax, Congress under the taxing power may reasonably impose a penalty on possession of unregistered weapons.") (internal citation omitted); *United States v. Birmley*, 529 F.2d 103, 106 (6th Cir. 1976) ("The taxing power of Congress provides the authority to validate the provisions of 26 U.S.C. 5861(d)."); *United States v. Tous*, 461 F.2d 656, 657 (9th Cir. 1972) (holding that § 5861(d) "is a valid exercise of the power of Congress to tax"). Indeed, these cases find that the NFA legitimately targets downstream recipients and possessors of firearms as a deterrent for nonpayment of the transfer tax. *See Lim*, 444 F.3d at 913. But these cases also acknowledge, as they must, that the transferee is not responsible for registering the firearm (and cannot do so). *Id*.

Spoerke foreclosed Petitioner's argument below that the NFA is a facially invalid extension of Congressional taxing power (Pet. App. 16a), just as defendants nationwide are foreclosed from raising this claim. Petitioner maintains that *Spoerke* was wrongly decided in light of *NFIB* and that this is an issue of great federal importance only this Court can resolve. Petitioner asks this Court to consider is whether the taxing powers of Congress extend so far as to allow it to impose a $200 transfer fee that serves as a pretext to punish criminally individuals who have neither obligation nor opportunity to pay the transfer tax and may not even know the firearm is not registered.

Petitioner submits, as he did below, that because § 5861(d) relies not on a tax, but on a pretext, it does not further Congressional revenue-raising purposes or even deter similar conduct. As such it is unconstitutional as an improper exercise of federal police powers and extension of

Congress's enumerated power to tax. As it currently exists, § 5861(d) cannot withstand constitutional scrutiny.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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