No. ______________________________

IN THE
SUPREME COURT OF THE UNITED STATES

MALCOLM J. BEZET – PETITIONER

V.

UNITED STATES OF AMERICA – RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERITIORARI

Malcolm J. Bezet
4534 Schmaltz Dr.
New Orleans, LA 70129
504-255-9192
Pro Se

QUESTIONS PRESENTED

Malcolm J. Bezet challenged, under the Tenth Amendment, Necessary and Proper Clause, and the Second Amendment, provisions of the Gun Control Act (GCA) of 1968 (Title 18 U.S.C. Chapter 44) and the National Firearms Act (NFA) (Title 26 U.S.C. Chapter 53) that prevent or hinder his ability to obtain effective weapons that are part of the ordinary military equipment and whose use could contribute to the common defense of the State of Louisiana and which are the most effective for defending his person, home, and family.

The Fifth Circuit Court of Appeals found no violation of the Tenth Amendment and Necessary and Proper Clause, holding that the Congress' power to tax enables it to enact regulatory schemes within the several states to accomplish objects wholly unrelated to the collection of revenue and that the Congress' power to regulate interstate commerce allows it to criminalize wholly intrastate, wholly non-commercial behavior, mere possession, for a purpose unrelated to the regulation of interstate commerce.

The Fifth Circuit Court of Appeals found no violation of the Second Amendment, holding that the effectiveness of a weapon in the service of a militia or in defending an individual citizen's home and person is irrelevant to determining whether the possession of that weapon is protected because the Second Amendment only protects weapons that are in common use, and that the Federal Government can criminalize or regulate the possession of uncommon

LIST OF PARTIES

The Petitioner, Malcolm J. Bezet, is a natural person and a citizen of the United States of America and of the State of Louisiana and a resident of New Orleans, Louisiana. Bezet is an able-bodied person between the ages of 17 and 64 who is not exempted from militia service under the laws of the United States or of the State of Louisiana and is therefore a member of the unorganized militia of the State of Louisiana and subject to military duty pursuant to Louisiana Revised Statute 29:3.

The Respondent is the United States.

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DECISIONS BELOW

The Fifth Circuit Court of Appeals decision is reported at Bezet v. United States, No. 17-30303, 2017 WL 4876311 (5th Cir. October 27, 2017) and reprinted at App. 1-12a.

The District Court's decision is reported at Bezet v. United States, No. 2:16-CV-2545 (E.D.L.A. October 27, 2017) and reprinted at App. 14-102a.

JURISDICTION

The Fifth Circuit Court of Appeals entered its judgment on October 27, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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. am. 2.

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. am. 10.

(The Congress shall have Power) To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the

Government of the United States, or in any Department or Officer thereof. U.S. Const. art. I, § 8, cl. 18.

The relevant statutory provisions of the Gun Control Act of 1968, Title 18 U.S.C. §§ 922(l), 922(d), 922(r) and 922(o), and the National Firearms Act, Title 26 U.S.C. §§ 5845, 5811, 5812, 5821, and 5822 are set forth at App. 86-90a.

STATEMENT OF THE CASE

A. Factual Background

Malcolm J. Bezet is a citizen of the United States and of the State of Louisiana. Because Bezet is an able-bodied person between the ages of 17 and 64 who is not exempt from militia service under the laws of the United States or of the State of Louisiana, he is therefore a member of the unorganized militia of the State of Louisiana and subject to military duty pursuant to Louisiana Revised Statute 29:3. Bezet seeks to obtain a silenced, short-barreled, select fire rifle (machinegun) for use in home defense because it is the most effective small arm available for doing so, and in addition, a silenced, short-barreled, select fire rifle would best enable Bezet to defend his person and contribute to the common defense of the State of Louisiana should he be called upon to do so. A short-barreled, silenced machinegun is the most effective small arm for home defense because the short-barrel makes the weapon maneuverable in the confined spaces of the home, the full auto capability makes

the rifle effective in close quarters combat, and the silencer protects the shooter from suffering permanent hearing loss should the rifle be fired indoors where the sound is reflected back to the shooter. Short-barreled rifles are effective in militia service for the same reasons, and because of this, the M4 short-barreled assault rifle is the standard issue arm of US military forces.

Like most Americans having access to the internet and basic tools, Bezet could have easily purchased a semiautomatic rifle and converted it to a short barreled silenced machinegun if he were a criminal. However, because Bezet is a law abiding citizen, he has thus far been unable to *legally* acquire a short barreled silenced machinegun because the United States has enacted legislation for the specific purpose of hindering, discouraging, and preventing law-abiding American citizens from obtaining, converting, or building short-barreled rifles, silencers, and machineguns.

Title 18 U.S.C. § 922(l) of the Gun Control Act makes it unlawful for Bezet to import or bring into the United States any firearm or any ammunition subject to certain exceptions found in Title 18 U.S.C. § 925(d). § 925(d) specifically excludes machineguns and surplus military firearms from importation, and Title 18 U.S.C. § 922(r) forbids Bezet from assembling machineguns and surplus military firearms from imported parts. Title 18 U.S.C. § 922(o) makes it unlawful for Bezet to possess a machinegun made after May 19, 1986. Title 26 U.S.C. § 5822 requires Bezet to obtain permission

from the Federal Government prior to making a short-barreled rifle, silencer, or machinegun, and § 5821 levies a $200.00 tax on each. Title 26 U.S.C. § 5812 requires Bezet to obtain permission from the Federal Government prior to obtaining a short-barreled rifle, silencer, or machinegun from a third party, and § 5811 levies a $200.00 tax on each. A failure by the Plaintiff to comply with any provision of the National Firearms Act or the Gun Control Act subjects him, upon conviction, to imprisonment for up to ten years and substantial fines.

Bezet challenged the Federal provisions hindering, discouraging, and preventing him from obtaining, converting, or building a silenced, short-barreled machinegun under the Necessary and Proper Clause, the Second Amendment, and the Tenth Amendment. The district court where Bezet initially filed suit had original subject matter jurisdiction of this action pursuant to Title 28 U.S.C. §1346(a)(2) in that it was a civil action or claim against the United States founded upon the Constitution, Acts of Congress, and regulations of an executive department.

B. Procedural Background

The district court concluded that Bezet lacked standing to challenge 26 U.S.C. §§ 5811 and 5812, and he failed to state a claim upon which relief could be granted as to 18 U.S.C. § 922(l), (o), and (r), and 26 U.S.C. §§ 5821 and 5822, and the Fifth Circuit Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

According to the plain language of the U.S. Constitution and Supreme Court cases interpreting it, the Federal Government is limited to exercising only the powers delegated to it by the Tenth Amendment, the Second Amendment forbids the Federal Government from using its delegated powers to infringe the right of the people to keep and bear arms, and the Necessary and Proper clause prevents the Federal Government from using its delegated powers as a pretext to enact laws unnecessary for carrying into effect its delegated powers or for reasons unrelated to the purposes for which its powers were delegated.

A review of the Constitution reveals, and the Supreme Court has determined, that the Federal Government was not delegated a gun control power or a general police power, but the Congress enacted the NFA under the pretext of exercising its power to tax to "pay the Debts and provide for the common Defence and general Welfare of the United States," and enacted the GCA under the pretext of exercising its power to "regulate Commerce with foreign Nations, and among the several States." Based on the literal language of the U.S. Constitution and unambiguous holdings of the Supreme Court, the Federal Government is using its constitutionally delegated powers as a pretext to pass unnecessary laws for improper purposes, in violation of the Necessary and Proper clause, in order to exercise gun control powers the Constitution did not delegate, in violation of the Tenth Amendment, and using

these gun control powers to infringe the right of the people to keep and bear arms, in violation of the Second Amendment.

Relying on the literal language of the U.S. Constitution and the Supreme Court cases interpreting it, Bezet filed suit seeking a permanent injunction against select provisions of the NFA and GCA. Having read the same text of the U.S. Constitution and precedent of the Supreme Court that Bezet understood to resolve the issues overwhelmingly in his favor, the Fifth Circuit dismissed his complaint.

The Supreme Court should grant the writ of certiorari because the holding of the Fifth Circuit dismissing Bezet's claims is in direct conflict with the literal language of the U.S. Constitution and the unambiguous holdings of the Supreme Court interpreting it.

The Supreme Court held in *McCulloch v. Maryland* that the Federal Government is acknowledged by all to be one of enumerated powers and acknowledged in *District of Columbia v. Heller* and *McDonald v. Chicago* that a gun control power or general police power is not among them.

The Tenth Amendment states, "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." The Supreme Court held in *McCulloch v. Maryland,*

17 U.S. 316, 405 (1819), that "The [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted."

The Supreme Court recognized in *District of Columbia v. Heller,* 554 U.S. 570, 599 (2008), that "Congress was given no power to abridge the ancient right of individuals to keep and bear arms" by the Constitution's drafters, the Federalists. The Supreme Court recognized in *McDonald v. Chicago*, 561 U.S. 742, 769 (2010), that the Federalists believed the right to keep and bear arms was "protected by the Constitution's assignment of only limited powers to the Federal Government."

The Supreme Court held in *McCulloch v. Maryland* that it is the duty of the Court to strike down pretext laws passed by Congress for the accomplishment of objects prohibited by the Constitution or not intrusted to the Federal Government.

U.S. Const. art. I, § 8, cl. 18 states (The Congress shall have Power) "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." The Supreme Court held in *McCulloch v. Maryland* that "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 not the law of the land." *McCulloch v. Maryland,* 17 U.S. at 423.

In *Sonzinsky v. United States, Hill v. Wallace*, and *Bailey v. Drexel Furniture Co.*, the Supreme Court held that the Federal Government can not use its power to tax as a pretext to enact regulatory schemes because allowing it to do so would break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states.

In upholding the provisions of the National Firearms Act challenged by Bezet, the Fifth Circuit claimed "the Supreme Court upheld similar provisions of the NFA under the taxing power in Sonzinsky v. United States, 300 U.S. 506, 514 (1937)" and "[b]ecause Bezet offers no other way to distinguish the provisions upheld in Sonzinsky ... his challenge to §§ 5821 and 5822 fails." App. 11a.

Contrary to the Fifth Circuit's claim that the *Sonzinski* Court upheld "similar provisions (plural) of the NFA under the taxing power," the *only* question at issue in *Sonzinski* was the "$200 annual license tax on *dealers* in firearms," a provision the *Sonzinski* Court noted *"contain[ed] no regulation other than ... mere registration provisions." Id.* at

513. Mr. Bezet is not a firearms dealer, and he is not petitioning the government to engage in the business of dealing firearms without paying a tax or registering. Mr. Bezet's challenges are based on the *regulatory* provisions of the NFA that treat the subject of the tax as criminal and require him to obtain the approval of the Federal Government to keep and bear particular arms, and his objection to the payment of the required tax is based on his Second Amendment right to keep and bear arms. Despite the fact that *none* of the regulatory or taxing provisions challenged by Mr. Bezet were before the court in *Sonzinsky,* the Fifth Circuit found "[t]he fact that the defendant in Sonzinsky was a firearms dealer does nothing to distinguish the case ... [a] *the fact that § 5822 imposes some regulations in addition to the taxes levied by § 5821 cannot help Bezet,* given that we have repeatedly upheld similar regulatory provisions as ancillary to the taxing power. See Gresham, 118 F.3d at 262." (emphasis added) (App. 11a-12a, n. 4)

While the Fifth Circuit found the admitted fact that Congress enacted regulatory provisions under the pretext of exercising its power to tax did "nothing to distinguish the case" of Mr. Bezet from the case of *Sonzinski*, in contrast the Supreme Court in *Sonzinki* distinguished regulatory provisions passed under the pretext of taxation that it had previously *struck down* from the provision it upheld *because the challenged provision "contain[ed] no regulation other than ... mere registration provisions,* which are obviously supportable as in aid of a revenue purpose.*" Id.* at 513.

The Supreme Court held in *Hill v. Wallace*, 259 U.S. 44, 66 (1922), a case distinguished by the *Sonzinki* court, that regulatory schemes passed by Congress under the pretext of exercising its U.S. Const., Art. I, §8, cl. 1 power to tax violate the Tenth Amendment. In striking down the Future Trading Act, the Court found, "It is impossible to escape the conviction, from a full reading of this law, that it was enacted for the purpose of regulating ... conduct ... through supervision of the Secretary of Agriculture and the use of an administrative tribunal consisting of that Secretary, the Secretary of Commerce, and the Attorney General ... the title of the act recites that one of its purposes is the regulation of Boards of Trade .... the imposition of ... the tax is most burdensome ... The manifest purpose of the tax is to compel Boards of Trade to comply with regulations, many of which can have no relevancy to the collection of the tax at all..."

The NFA has *all* of the characteristics of an unconstitutional regulatory scheme that led the *Hill* Court to declare, "It is impossible to escape the conviction ... that [the Future Trading Act] ... was enacted for the purpose of regulating ... conduct." The NFA establishes supervision of the possession of the arms Americans can keep and bear in the several states through the Bureau of Alcohol, Tobacco, & Firearms and the Attorney General, and the NFA recites its purpose to regulate firearms in its name. The amount of the tax was prohibitive being equivalent to more than $10,000 when adjusted for inflation in 1934 for a single silenced short barreled machinegun. Many of the regulations imposed under

the act have no relevancy to the collection of the tax at all, and the act sets forth detailed regulation of a concern or business wholly within the police power of the state, with a heavy exaction to promote the efficacy of such regulation.

The Government admitted in its filings that the "Congress enacted the National Firearms Act of 1934 to target 'lethal weapons . . . [that] could be used readily and efficiently by criminals or gangsters'" and "[t]he National Firearms Act sets out a regulatory scheme for making and transferring these defined firearms." D. Br. 2-3.

The District Court recognized in its order dismissing the Plaintiff's claims that "...the challenged statutes ... establish a regulatory application and taxation scheme to oversee the lawful transfer of firearms between individuals," App. 51a-52a, "[t]he legislative history reveals that Congress was centrally concerned with buttressing the states' individual efforts to curb 'crime, delinquency, and violence' and 'keep firearms out of the hands of those not legally entitled to possess them' through a uniform firearm regulatory scheme at the federal level," App. 76a, "[t]he requirements on making a firearm were passed as part of a broader regulatory scheme to control the flow of firearms needed to restrict certain dangerous or irresponsible individuals from obtaining those firearms," and "[t]he challenged provisions, whether considered alone or in conjunction with the broader scheme established by the NFA ... are part of a broader regulatory scheme passed to control the flow of

certain firearms." App. 86a-87a.

The Fifth Circuit acknowledged "§ 5822 imposes ... regulations in addition to the taxes levied by § 5821..." App. 11a-12a, n. 4.

In striking down the Future Trading Act, the Supreme Court held "[w]hen this purpose is declared in the title to the bill, and is so clear from the effect of the provisions of the bill itself, it leaves no ground upon which the provisions ... can be sustained as a valid exercise of the taxing power." Based on the title of the act, the effect of the provisions of the act, the admissions of the Government, and the findings of the district court and the Fifth Circuit, the National Firearm Act was enacted for the purpose of regulating firearms, and there is "no ground upon which the provisions ... can be sustained as a valid exercise of the taxing power." *Id.* at 66-67.

The Supreme Court held in *Hill* that regulatory schemes passed under the pretext of taxing violate the Tenth Amendment and declared "[t]o 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:"

> 'Out of a proper respect for the acts of a coordinate branch of the government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax, it was intended to destroy its subject. But in the act

before us the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. 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 so-called 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.' *Id.* at 67-68. *Hill* Court quoting *Bailey v. Drexel Furniture Co.*, 259 U. S. 20 (1922).

This has complete application to the act before us, and requires us to hold that the provisions of the act we have been discussing cannot be sustained as an exercise of the taxing power of Congress conferred by section 8, article 1. *Id.* at 68.

The Supreme Court held in *Bailey v. Drexel Furniture Co.*, 259 U. S. 20 (1922), another case in which the Supreme Court invalidated a regulatory scheme passed by Congress under the pretext of exercising its power to tax, that it is the high duty and function of the Court to decline to recognize or enforce even the laws of Congress "designed to

promote the highest good" that deal with "subjects not intrusted to Congress, but left or committed by the supreme law of the land to the control of the states:"

> In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?
>
> It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not intrusted to Congress, but left or committed by the supreme law of the land to the control of the states. We cannot avoid the duty, even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature, because it leads citizens and legislators of good purpose to promote it, without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards. In the maintenance of local self-government, on the one hand, and the national power, on the other, our country has been able to endure and

prosper for near a century and a half. *Id.* at 37.

As the Supreme Court noted "[t]he good sought in unconstitutional legislation is an insidious feature, because it leads citizens and legislators of good purpose to promote it, without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards." The Supreme Court has repeatedly held that the Government does not have a gun control power or a general police power like the one retained by the states and to allow it to regulate the firearms ownership of American citizens under the pretext of taxing "would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states."

In *U.S. v. Lopez*, the Supreme Court held that the Constitution does not allow the Federal Government to use its power to regulate interstate and foreign commerce as a pretext to regulate non-commercial, intrastate behavior for a non-commercial purpose because allowing it to do so would convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.

Bezet challenged the constitutionality of §922(o) of the GCA relying on the Supreme Court case of *U.S. v. Lopez,* 514 U.S. at 549 (1995). In *Lopez,* the Supreme Court struck down §922(q) of the

GCA under the Tenth Amendment because the challenged provision was passed by the Congress under the pretext of exercising its power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Section 922(q) criminalized mere possession by making it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." Like the possessory restriction of §922(q), §922(o) made it a crime to merely possess a machine gun made after May 19, 1986, in all places and whether knowing or not:

> Title 18 U.S.C. § 922(o):
>
> (o)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.
> (2) This subsection does not apply with respect to -
> (A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

Citing the plain text of the Interstate Commerce Clause, the Lopez Court recognized that the federal regulation of commerce is "restricted to that commerce which concerns more states than

one:"

> The *Gibbons* Court, however, acknowledged that limitations on the commerce power are inherent in the very language of the Commerce Clause.
>
> "It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.
>
> "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State." *Id.* at 553.

The Court struck down 922(q) holding "[t]he Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress '[t]o regulate Commerce . . . among the several States.'" *Id.* at 551. Exactly like 922(q), 922(o) neither regulates a commercial activity nor contains a requirement that the possession of a machinegun

be connected in any way to interstate commerce.

In striking down § 922(q), the Court noted that 922(q) contained no requirement that the possession of the firearm have any concrete tie to interstate commerce:

> The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce. *Id.* at 567.

Exactly like 922(q), §922(o) lacks any requirement that the possession of a machinegun have any concrete tie to interstate commerce.

In striking down 922(q), the Court held that because the provision was a "criminal statute that, by its terms, [had] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms," and "was not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated," it could not, "therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects

interstate commerce:"

> Section 922(q) is a criminal statute that, by its terms, has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce. *Id.* at 561.

Exactly like 922(q), §922(o) is a criminal statute that, by its terms, has "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms," and it is not "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."

The Court distinguished the criminal provision it struck down in *Lopez* from the Agricultural Adjustment Act (AAA) upheld in *Wickard v. Filburn, 317 U.S. 111 (1942)* because a "primary purpose" of the AAA was the regulation of interstate commerce, the national market price of wheat, and it could "hardly be denied" that the behavior regulated had "a substantial influence on price and market conditions:"

> One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. *Id.* at 560. *Lopez* Court quoting Wickard v. Filburn, 317 U. S., at 128 (1942).

Exactly like §922(q), §922(o) lacks a commercial purpose. Section 922(o) is not designed or intended to regulate interstate and foreign commerce, and its primary purpose is not to affect the market; it is instead a "criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." It is not an essential part of a larger regulation of economic activity in which the regulatory scheme could be undercut unless the *intrastate activity* were regulated, and *it neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce.* §922(o) is unconstitutional for *all* the same, exact reasons that the Supreme Court found that §922(q) was, and Bezet relied on this case as his basis for arguing that §922(o) should be struck down as a violation of the Tenth Amendment.

In striking down §922(q), the *Lopez* Court declared, "To uphold the Government's contentions

here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567. To uphold § 922(o), the Court would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.

Apparently unable to distinguish Bezet's constitutional challenges based on *Lopez*, the Fifth Circuit simply ignored the Supreme Court's controlling precedent and ruled against Bezet because he failed to distinguish the Fifth Circuit's case of *United States v. Knutson*, 113 F.3d 27, 28 (5th Cir. 1997):

> ... § 922(o) is a permissible exercise of the commerce power. *United States v. Knutson*, 113 F.3d 27, 28 (5th Cir. 1997). The vast majority of machinegun possessions involve the channels or instrumentalities of interstate commerce, and the remainder have a substantial effect on interstate commerce. Id. at 29–30. Insofar as Bezet fails to distinguish *Knutson*, his challenge to § 922(o) as exceeding the scope of the Commerce Clause fails. App. 10a.

In *U.S. v. Miller* and *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment was codified in the Constitution to prevent the Federal

Government from destroying the citizens' militia by taking away their arms because it was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down.

U.S. Const. am. 2 states "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."

Bezet relied on the plain language of the Second Amendment and the plain holdings of *Miller* and *Heller* in filing his suit, but the Fifth Circuit dismissed Bezet's challenges to §§ 922(o), 922(l) and 922(r) brought under the Second Amendment citing *Hollis v. Lynch*, 827 F.3d 436:

> Bezet has failed to show that § 922(o) violates the Second Amendment. Indeed, we upheld that very provision in Hollis, 827 F.3d at 451, as regulating only firearms that fall outside the scope of the Second Amendment—i.e., machineguns. Because Bezet provides no reason to distinguish his case from Hollis, he cannot show that § 922(o) violates the Second Amendment...For similar reasons, Bezet has failed to show that § 922(l) and (r) violate the Second Amendment. App. 7a.

Claiming to be following *Heller*, the Fifth Circuit held "*Heller* rejected a functionalist interpretation of

the Second Amendment premised on the effectiveness of militia service," *id.* at 446, and "[w]hile the Second Amendment was no doubt concerned with the effectiveness of militias," *id.* at 444, "because 'the Second Amendment protects an individual right to possess a firearm unconnected with service in a militia,' whether a weapon is effective in a militia is not the relevant inquiry for determining whether that weapon is protected under the Second Amendment. *Id.* at 577." *Id.* at 446.

The Fifth Circuit's "interpretation" of *Heller* is inconsistent with the Supreme Court's actual opinion to the point of appearing defiant. The Supreme Court in Heller held the second amendment was "codified in a written Constitution" to counter the *"threat that the new Federal Government would destroy the citizens' militia by taking away their arms"* because "[i]t was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down:"

> "It was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down ... the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution." Heller, 554

U.S. at 599

The Supreme Court held in *U.S. v. Miller,* 307 U.S. 107, 178 (1939), that the Second Amendment protects the right of the people to keep and bear arms of the type having a "reasonable relationship to the preservation or efficiency of a well regulated militia," used as "ordinary military equipment," or of the type that "could contribute to the common defense:"

> In the absence of any evidence tending to show that possession or use of a [weapon] ... has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.

Short-barreled, silenced machineguns have a "reasonable relationship to the preservation or efficiency of a well regulated militia" and "could contribute to the common defense," and short-barreled machineguns are in common use as the standard issue arms of U.S. military forces and therefore they are the very definition of "ordinary military equipment."

In its opinion, the *Miller* Court held that it was "obvious" that the Second Amendment must be

interpreted and applied in a way that assures the continuation and renders possible the "effectiveness" of the citizens' militia:

> With obvious purpose to assure the continuation and render possible the effectiveness of such [militia] forces, the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view. *Id.* at 178.

The Heller Court explicitly upheld the Miller Court's central opinion stating, "As for the [Miller] Court's opinion ... [i]t assumes from the prologue that the Amendment was designed to preserve the militia, 307 U. S., at 178 (which we do not dispute)," *Heller*, 554 U.S. at 624, and the *Heller* Court noted, "it is ... entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia." *Id.* at 599

After reaffirming *Miller*'s central holding, the *Heller* Court expanded the definition of arms legally protected by the Second Amendment in *Miller* from "only those useful in warfare" to also include arms "'in common use at the time' for lawful purposes like self-defense" because "[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves." *Id.* at 624.

The Supreme Court in Heller observed that "history showed that the way tyrants had eliminated

a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents:"

> We reach the question, then: Does the preface fit with an operative clause that creates an individual right to keep and bear arms? It fits perfectly, once one knows the history that the founding generation knew and that we have described above. That history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents. This is what had occurred in England that prompted codification of the right to have arms in the English Bill of Rights.
>
> The debate with respect to the right to keep and bear arms, as with other guarantees in the Bill of Rights, was not over whether it was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution. During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric. *Heller*, 554 U.S. at 598.

Bezet relied on the plain holdings of *Miller* and *Heller* in filing his suit. By denying law-abiding

citizens arms composing standard issue, and therefore ordinary, military equipment, such as machineguns, the United States is destroying the effectiveness of the citizen's militia, and doing exactly what the Second Amendment was codified to prevent. The Fifth Circuit's holding that it attributes to *Heller* that "whether a weapon is effective in a militia is not the relevant inquiry for determining whether that weapon is protected under the Second Amendment" is at war with the "obvious purpose" of the Second Amendment and the plain holdings of *Miller* and *Heller* and should be overturned.

In *District of Columbia v. Heller* and *Caetano v. Massachusetts*, the Supreme Court held that the Second Amendment extends, prima facie, to all instruments that constitute bearable arms.

When it dismissed Bezet's claims brought under the Second Amendment, the Fifth Circuit claimed the Supreme Court held in Heller that "The Second Amendment protects the ownership ***only*** of weapons that are 'in common use at the time.'" (emphasis added) App. 6a. Contrary to the Fifth Circuit's claim, the Supreme Court actually held in *Heller* that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding," *Heller*, 554 U.S., at 582.

A review of the citation that the Fifth Circuit attributed to the *Heller* Court reveals that the Fifth Circuit added the limiting word "only" to the

language of the Court's opinion. By adding language to the Supreme Court's *Heller* opinion, the Fifth Circuit created the limitation on the Second Amendment that it attributed to the Supreme Court. What the *Heller* Court actually said was "'[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time'... The traditional militia was formed from a pool of men bringing arms 'in common use at the time' for lawful purposes like self-defense," and "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." *Id.* at 624-625.

Silencers and short-barreled rifles are legal for law-abiding citizens to possess, as are machineguns manufactured before May 19, 1986, and these weapons are possessed by law-abiding citizens for lawful purposes. The NFA's registration requirements do not apply to criminals because of the Fifth Amendment's prohibition against self-incrimination; instead it only applies to lawful transactions by law-abiding citizens.

As found by the Supreme Court in *U.S. vs Haynes*, 390 U.S. 85, as originally enacted, Title 26 U.S.C. §5841 of the NFA required that "every person possessing such a firearm is obliged to register his possession with the Secretary, unless he made the weapon, or acquired it by transfer or importation," and 26 U.S.C. §5851 made "unlawful the possession of any firearm which has 'at any time' been transferred or made in violation of the Act's

provisions, or which 'has not been registered as required by section 5841.'" *id.* at 89. After considering the Fifth Amendment's privilege against self-incrimination, the Supreme Court in *Haynes* stated, "We hold that a proper claim of the constitutional privilege against self-incrimination provides a full defense to prosecutions either for failure to register a firearm under s 5841 or for possession of an unregistered firearm under s 5851." *id.* at 100.

In an attempt to remedy the constitutional defect set forth in *Haynes*, the Defendant removed the NFA's provisions ensuring that "only weapons used principally by persons engaged in unlawful activities (criminals) would be subjected to taxation" and instead mandated that "only possessors who *lawfully* (emphasis added) make, manufacture, or import firearms can and must register them." The Supreme Court recognized in *U.S. v. Freed*, 401 U.S. 601, that only possessors "who lawfully make, manufacture, or import firearms can and must register them; the transferee does not and cannot register:"

> Following our decision in *Haynes v. United States*, 390 U.S. 85, Congress revised the National Firearms Act with the view of eliminating the defects in it which were revealed in *Haynes*.
>
> At the time of *Haynes* "only weapons used principally by persons engaged in unlawful activities would be subjected to taxation." Id.

> at 87. Under the Act, as amended, all possessors of firearms as defined in the Act are covered, except the Federal Government. 26 U.S.C. § 5841 (1964 ed., Supp, V).
>
> At the time of *Haynes* any possessor of a weapon included in the Act was compelled to disclose the fact of his possession by registration at any time he had acquired possession, a provision which we held meant that a possessor must furnish potentially incriminating information which the Federal Government made available to state, local, and other federal officials. Id. at 95-100. Under the present Act only possessors who lawfully make, manufacture, or import firearms can and must register them; *the transferee does not and cannot register. U.S. v. Freed,* 401 U.S. 601, at 602-604.

As currently enacted, the NFA *only* applies to weapons used by law-abiding citizens for lawful purposes, and thus, according to the Supreme Court's holding in *Heller*, NFA weapons are entitled to Second Amendment protection.

Machineguns manufactured before May 19, 1986 are fully transferable and lawfully possessed by countless, typically wealthy, law-abiding Americans for lawful purposes. Because of the regulations of the Federal Government, the cost of transferable machineguns has risen by design to the point, often tens of thousands of dollars, where Bezet cannot afford to purchase one. Unable to afford a

transferable machinegun, Bezet, a law-abiding citizen, filed his suit so he could build one and lawfully join wealthier or more fortunate Americans in possessing the safest[1] and most effective weapons for the lawful purpose of defending his home and family, or should the need arise, fulfilling his second amendment duties, and based on his understanding of the plain language of the Supreme Court's reasoning in *Heller*, he has a right to keep and bear these arms protected by the Second Amendment.

The Fifth Circuit's reasoning that the Federal government can ban or restrict arms because they are not in "common" use when the Federal government is restricting their use is perfectly circular. Under this circular reasoning the Fifth Circuit attributed to the *Heller* Court, the Federal Government can freeze the arms development of the citizens' militia by banning or restricting new and modern weapons soon after they are introduced, because they would not be in "common use" in the early stages of their adoption. This is exactly what the Federal Government did when it enacted the NFA restrictions on the civilian possession of short-barreled rifles, silencers, and machineguns before they became the standard issue arms of government forces that they are today. The Supreme Court rejected this reasoning in *Heller* when it held "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding," *Heller*, 554 U.S., at 582.

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[1] Firing an unsilenced rifle indoors can permanently damage the hearing of the shooter and those standing nearby.

The Supreme Judicial Court of Massachusetts upheld a law prohibiting the possession of stun guns. In so doing, the Massachusetts court concluded that stun guns are "unusual," (uncommon) because they are "a thoroughly modern invention." In *Caetano v. Massachusetts*, 136 U.S. S.Ct. 1027, 1027 (2016), the Supreme flatly rejected the Massachusetts Court's reasoning stating it "is inconsistent with Heller's clear statement that the Second Amendment 'extends . . . to . . . arms . . . that were not in existence at the time of the founding.'"

Despite the Federal Government's costly and burdensome restrictions, in the three most recent years for which the ATF provided data on its website, 2014-2016, the ATF processed 5,348,285 NFA firearms. Every one of these costly and burdensome transfers was *required by law* to be to a law-abiding citizen for a lawful purpose. https://www.atf.gov/resource-center/data-statistics.

Even if the Fifth Circuit's "common use" restriction were not contrary to established Supreme Court precedent, whether or not a weapon is in common use or not is a question of fact, and the argument that NFA weapons are in "common use" has never been argued before the Supreme Court as the Court never heard from the defense in Miller:

> The respondent 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) … *Heller*, 554 U.S., at 582

In the present case, Bezet was denied the opportunity to present evidence that short barreled, silenced machineguns are in "common use," as the government never filed an answer to Bezet's complaint and instead filed a motion to dismiss, which the district court granted and the appellate court upheld. In dismissing all of Bezet's claims, the district and appellate courts held Bezet lacked standing to challenge §§ 5811 and 5812:

> Bezet has failed to demonstrate that he has standing to challenge §§ 5811 and 5812. As the district court correctly noted, both deal exclusively with the transfer of firearms: Section 5811 levies a tax on the transferor of a firearm, and § 5812 imposes registration requirements on the transferor of a firearm. Bezet has not alleged that he wishes to transfer a firearm. Accordingly, he is not directly subject to those provisions and suffers no immediate injury. App. 4a – 5a.

Although the Fifth Circuit claimed "§ 5812 imposes registration requirements on the transferor of a firearm," by its plain text § 5812 imposes *application* requirements on the transferor of a firearm that require Bezet to obtain the approval of the United States to obtain a short barreled rifle, silencer, or machinegun:

§ 5812. TRANSFERS

(a) Application
A firearm shall not be transferred unless
(1) the transferor of the firearm has filed with the Secretary a written application, in duplicate, for the transfer and registration of the firearm to the transferee on the application form prescribed by the Secretary;
(2) any tax payable on the transfer is paid as evidenced by the proper stamp affixed to the original application form;
(3) the transferee is identified in the application form in such manner as the Secretary may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph;
(4) the transferor of the firearm is identified in the application form in such manner as the Secretary may by regulations prescribe;
(5) the firearm is identified in the application form in such manner as the Secretary may by regulations prescribe; and
(6) the application form shows that the Secretary has approved the transfer and the registration of the firearm to the transferee. Applications shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in violation of law.
(b) Transfer of possession
The transferee of a firearm shall not take possession of the firearm unless the Secretary

> has approved the transfer and registration of the firearm to the transferee as required by subsection (a) of this section. (emphasis added)

The primary purpose of § 5812's requirement that Bezet apply for and obtain the approval of the United States in order to have particular arms transferred to him is not to raise revenue; its primary purpose is to regulate and restrict the possession of particular classes of arms. Section 5812 is not a mere registration provision; it is a regulatory one.

The Fifth Circuit also claimed Bezet failed to establish that the taxes imposed by § 5811 would be passed on to him as the transferee:

> Furthermore, any indirect injuries that Bezet may incur are insufficient to establish standing. Regarding the first prong of injury-in-fact, he claims that any taxes levied on the transferor will eventually be passed on to the transferee, and he observes that § 5812 requires that a transferee be photographed and fingerprinted. But such allegations do not establish the "concrete and particularized" injury of "a legally protected interest" that standing requires. App. 5a.

The taxation and application requirements of §§ 5811 and 5812 are supply side regulations that are designed to subject Bezet to the exact same prohibitive taxes and regulatory controls as the provisions that apply to the making of short-barreled rifles, silencers, and machineguns. No honest

argument can be made that the prohibitive taxes imposed by the NFA would not be passed on to the transferee as a fixed transfer cost as they were in fact designed to be.

The right to keep and bear arms guaranteed by the Second Amendment seems to be a disfavored right when compared to even unlisted rights plucked from the penumbra surrounding the Bill of Rights. Bezet doubts the Appellate court would have reached the same findings regarding standing had supply side controls been placed on abortion service providers where the providers had to pay a prohibitive tax on each abortion, where the recipient had to apply, and the State had to approve the procedure in each individual case, and where the recipient had to be photographed and fingerprinted, but perhaps that is a question for another case should the Supreme Court allow the Fifth Circuit's ruling to stand.

In *Heller*, the Supreme Court held that the inherent right of self-defense was central to the Second Amendment right and extended to the home where the need for defense of self, family, and property is most acute.

The Supreme Court held in *Heller*: "the inherent right of self-defense has been central to the Second Amendment right," "the need for defense of self, family, and property is most acute" in the home, and "banning from the home 'the most preferred firearm in the nation to 'keep' and use for protection of one's home and family,' would fail constitutional

muster" "under any of the standards of scrutiny that [the Supreme Court] has applied to enumerated constitutional rights." *Heller, 554* U.S. at 628-629.

Because Mr. Bezet loves his family dearly and values his own life, he therefore prefers to defend his home and family with the safest and most effective small arms available for ensuring their survival, short-barreled, silenced machineguns, and based on the Supreme Court's reasoning in *Heller*, he understood that laws banning from his home short-barreled, silenced machineguns would fail constitutional muster under any standard of scrutiny.

While the Fifth Circuit paid lip service to the Second Amendment stating, "'the core of the Second Amendment Guarantee' ... is, the right to use firearms in defense of the home," and if this "core right is burdened, strict scrutiny applies," the Fifth Circuit applied strict scrutiny to none of Bezet's claims, and held, "we need not decide whether, under a liberal construction of Bezet's complaint, the statutes burden his Second Amendment rights:"

> Again, we need not decide whether, under a liberal construction of Bezet's complaint, the statutes burden his Second Amendment rights. Maybe he only seeks to make a machinegun—in which case his challenge is squarely foreclosed by Hollis, 827 F.3d at 451. Or he may wish to make firearms that receive Second Amendment protection and has rights that are burdened by the challenged

> provisions. But even under this latter supposition, these laws survive the second step of our Second Amendment analysis. As above, they do not substantially burden a core Second Amendment right, so they trigger intermediate scrutiny. See NRA, 700 F.3d at 205. And, as the district court correctly explained, there is a reasonable fit between these relatively light burdens and the important government objective of curbing gun violence. Accordingly, Bezet has failed to show that any of the above provisions violate the Second Amendment. App. 8a – 9a.

The Fifth Circuit's own statements contradict its own holding. If the Second Amendment guarantee is the right to use firearms in defense of the home, then strict scrutiny should apply when this core right is burdened, and laws hindering or preventing Bezet in his efforts to obtain the safest and most effective weapons available for defending his home, silenced short-barreled rifles, should receive strict scrutiny. The Fifth Circuit's holdings are not based on the Constitution, the holding of the Supreme Court, or even the holdings of the Fifth Circuit; they instead appear based on the desired results of the judges that sit on the Fifth Circuit Court of Appeals.

Although the Supreme Court in *Heller* held "the very enumeration of the [Second Amendment] takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon," and "The Second Amendment

… surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home," *Heller, 554* U.S. at 635, apparently, the Fifth Circuit court of appeals disagrees and dismissed all of Mr. Bezet's claims brought under the Second Amendment.

CONCLUSION

The case before the Court is about far more than firearms because it goes to the very core of the Constitution's system of limited government and perfectly raises the question of whether or not the constitutional order is breaking down, as the Congress does not follow the Constitution, and the Fifth Circuit does not follow the precedent of the Supreme Court.

In the present case alone the Federal Government has made not one, but two claims to an unlimited police power obliterating the sovereignty of the Several States and the rights of the people protected by the Bill of Rights. In one place, the Government argues it can tax everything, even fundamental rights, and can regulate everything it can tax. In another place, the Government argues the Interstate Commerce Clause enables it to regulate non-commercial, *intrastate* behavior for non-commercial purposes, even the behavior protected by the Bill of Rights. Furthermore, the government has not confined its use of its "magic" taxing power and its power to regulate non-commercial, intrastate behavior for non-commercial purposes to the regulation of firearms and has used these "general

police powers" to encroach ever further into the sovereignty of the Several States and rights of the American people.

As set forth above, the Congress is using its constitutionally delegated powers as a pretext to pass unnecessary laws for improper purposes, in violation of the Necessary and Proper Clause, in order to exercise powers the Constitution did not delegate, in violation of the Tenth Amendment, and using these pretext powers to violate the Second Amendment, and the Federal judges whose appointments the Congress confirmed allow these usurpations. While Bezet acknowledges the Supreme Court's holdings that the Second Amendment was codified to enable the people to use arms to oppose their government should it become oppressive, Bezet finds the thought of Americans using violence to do so horrific, and he files this petition in the hope that the Supreme Court will check an ever-expanding national government that violates the Constitution's clearest limiting provisions so that the people never have to.

Respectfully submitted,

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