No. 18-936

In the Supreme Court of the United States

JEREMY KETTLER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Firearms Act, 26 U.S.C. 5801 *et seq.*, exceeds Congress's taxing power under Article I of the Constitution.

2. Whether the Second Amendment guarantees a right to possess firearm silencers.

3. Whether the district court plainly erred by holding that the National Firearms Act's tax on firearms silencers is constitutional.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and rule:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-51a) is reported at 906 F.3d 1170. The order of the district court (Pet. App. 52a-64a) is reported at 187 F. Supp. 3d 1282. A second order of the district court (Pet. App. 65a-79a) is reported at 235 F. Supp. 3d 1221.

JURISDICTION

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

STATEMENT

Following a jury trial in the United States District Court for the District of Kansas, petitioner was convicted of possessing an unregistered silencer, in violation of 26 U.S.C. 5841, 5861(d), and 5871. Pet. App. 8a.

The district court sentenced him to one year of probation. *Id.* at 9a. The court of appeals affirmed. *Id.* at 1a-51a.

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

The Act requires manufacturers, importers, and dealers of NFA firearms to register and pay an occupational tax. 26 U.S.C. 5801, 5802. The Act also requires registration with the National Firearms Registration and Transfer Record and payment of an excise tax of $200 upon the manufacture, importation, or transfer of an NFA firearm. 26 U.S.C. 5811, 5812, 5821, 5822, 5841. The Act does not, however, prohibit the manufacture, sale, or possession of properly registered and taxed NFA firearms.

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

2. Petitioner's co-defendant, Shane Cox, operated "Tough Guys, an army-surplus store in Chanute, Kansas." Pet. App. 3a. In 2014, Cox began manufacturing and selling firearm silencers, which are firearm attachments designed to suppress the sound of the shot. *Id.* at 4a; Gov't C.A. Br. 9-10. Petitioner bought one of

Cox's silencers and later praised its performance on Facebook. Pet. App. 4a. The silencer was not registered as required by the National Firearms Act. *Ibid.* The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) received a tip about Cox's sale of silencers, and agents began an investigation. *Ibid.*

3. A federal grand jury in the District of Kansas indicted petitioner for knowingly and willfully making false statements during a federal investigation, in violation of 18 U.S.C. 1001; conspiring to violate the National Firearms act, in violation of 18 U.S.C. 371; and possessing an unregistered silencer, in violation of 26 U.S.C. 5841, 5861(d), and 5871. Pet. App. 4a-5a; Gov't C.A. Br. 3.

Before trial, petitioner and Cox moved to dismiss the indictment on the ground that the National Firearms Act was "an invalid exercise of Congress' power to tax." Pet. App. 53a; see *id.* at 64a. The district court denied the motion. *Id.* at 52a-64a. Citing *Sonzinsky* v. *United States*, 300 U.S. 506 (1937), the court explained that "the Supreme Court long ago rejected the argument that the Act was not a valid exercise of Congress' authority to levy taxes because it was allegedly designed as a penalty to suppress trafficking in certain firearms." Pet. App. 56a. The court further explained that "a tax is not any the less a tax because it has a regulatory effect." *Ibid.* (quoting *Sonzinsky*, 300 U.S. at 512-514).

Petitioner and Cox proceeded to trial. Pet. App. 8a. At the close of trial, the district court granted petitioner's motion for judgment of acquittal on the conspiracy and false-statements counts. *Ibid.* During jury deliberations, petitioner again moved to dismiss the remaining National Firearms Act count, arguing that the Act exceeded Congress's taxing power, that it violated the Tenth Amendment, and (in the reply brief) that its

application to silencers violated the Second Amendment. *Ibid.*; Gov't C.A. Br. 8-9.

The district court denied petitioner's motion. Pet. App. 65a-79a. Echoing its previous decision, the court again held that the National Firearms Act is a valid exercise of Congress's taxing power. *Id.* at 69a-71a. The court also determined that the Second Amendment does not protect a right to possess silencers, because silencers "are not in common use by law abiding citizens for lawful purposes." *Id.* at 76a (citation omitted). Because silencers "are outside the scope of Second Amendment protection," the court concluded, the application of the National Firearms Act "to persons possessing, transferring or making such items does not infringe on Second Amendment rights." *Ibid.*

The jury found petitioner guilty of possessing an unregistered silencer, in violation of 26 U.S.C. 5841, 5861(d), and 5871. Pet. App. 8a; Gov't C.A. Br. 3. The district court sentenced petitioner to one year of probation. Gov't C.A. Br. 3.

4. The court of appeals affirmed. Pet. App. 1a-51a.

The court of appeals first rejected petitioner's claim that the National Firearms Act exceeds Congress's enumerated powers, explaining that the Act "is a valid exercise of Congress's taxing power, as well as its authority to enact any laws 'necessary and proper' to carry out that power." Pet. App. 12a (quoting U.S. Const. Art. I, § 8, Cls. 1, 18). As the court explained, the Act "is a taxing scheme." *Ibid.* It imposes a tax of $200 on the transfer of a "firearm," and a tax of up to $1000 a year on importers, manufacturers, and dealers of "firearms." *Ibid.* And the Act's registration requirements "ensure compliance" with the statute. *Id.* at 13a.

The court of appeals continued that the National Firearms Act's taxes remain constitutional even though they have a regulatory effect. It explained that, in *Sonzinsky*, this Court had rejected the contention that the tax imposed by the Act was "not a true tax, but a penalty imposed for the purpose of suppressing traffic in a certain noxious type of firearms." Pet. App. 13a (quoting *Sonzinsky*, 300 U.S. at 512). The court further stated that, although "times may have changed since" *Sonzinsky*, petitioner "point[ed] to no differences, either in the [Act] or in courts' understanding of the national taxing power, that justify departing from *Sonzinsky*'s conclusion." *Id.* at 22a. The court observed that "[o]ther circuits uniformly agree." *Id.* at 22a n.12.

The court of appeals next rejected petitioner's claim under the Second Amendment, explaining that silencers fall outside the scope of the right to keep and bear arms protected by that Amendment. The court explained that the Amendment protects "bearable arms," which include "weapons of offence, or armour of defence." Pet. App. 28a (quoting *District of Columbia* v. *Heller*, 554 U.S. 570, 581-582 (2008)) (brackets and emphasis omitted). The court noted that a silencer is a "firearm accessory," "not a weapon in itself (nor is it 'armour of defence')." *Id.* at 28a-29a. Because silencers fall outside the scope of the Second Amendment, the court concluded, the National Firearms Act's regulation of them "doesn't burden protected conduct." *Id.* at 30a.

Finally, the court of appeals declined to pass upon petitioner's claim, raised for the first time on appeal, that the government may not tax the exercise of a person's Second Amendment rights. The court observed that "this appeal [was not] the right vehicle to test that approach * * * given [the] conclusion that the Second

Amendment" does not cover silencers in the first place. Pet. App. 32a.

Judge Hartz wrote a concurrence "to caution against overreading [the court of appeals'] holding." Pet. App. 51a. He emphasized that, although silencers are not "bearable arms," the court did not have "occasion to consider whether items that are not themselves bearable arms but are necessary to the operation of a firearm (think ammunition) are also protected." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 5-21) that this Court should grant review so that it can reconsider its holding in *Sonzinsky* v. *United States*, 300 U.S. 506 (1937), that the National Firearms Act rests on a valid exercise of Congress's taxing power. Petitioner identifies no sound reason to revisit that decision, and his arguments for doing so are inconsistent not only with *Sonzinsky* but also with decades of this Court's taxing-power cases. Petitioner also contends (Pet. 21-28) that the Second Amendment guarantees a right to possess silencers. But the court of appeals' contrary conclusion was correct and does not conflict with the decision of any other court of appeals. Finally, petitioner maintains (Pet. 28-35) that the government may not tax the exercise of Second Amendment rights. But this case is a poor vehicle to address that question, because the court of appeals concluded that petitioner had *not* exercised his Second Amendment rights, because it declined to opine on the question, and because petitioner in any event forfeited the contention by failing to raise it in the district court.

1. A writ of certiorari is not warranted to revisit this Court's decision in *Sonzinsky*. In that case, the Court upheld the taxation and registration provisions of the

National Firearms Act as legitimate exercises of Congress's taxing power, and it expressly rejected the argument that the transfer tax imposed by the Act "is not a true tax, but a penalty imposed for the purpose of suppressing traffic in a certain noxious type of firearms." 300 U.S. at 512. The Court has denied previous petitions inviting reconsideration of *Sonzinsky*, and it should follow the same course here. See *Thompson* v. *United States*, 543 U.S. 859 (2004) (No. 03-10935); *Gresham* v. *United States*, 522 U.S. 1052 (1998) (No. 97-5420); *Milojevich* v. *United States*, 522 U.S. 969 (1997) (No. 97-5207).

Petitioner maintains (Pet. 6) that "important developments" during the eight decades since *Sonzinsky* have "undermined or negated" the Court's holding that the National Firearms Act is a constitutional exercise of the power to tax. The court of appeals correctly concluded, however, that petitioner "point[s] to no differences, either in the [Act] or in courts' understanding of the national taxing power, that justify departing from *Sonzinsky*'s conclusion." Pet. App. 22a. And as the court observed, "[o]ther circuits uniformly agree." *Id.* at 22a n.12; see, *e.g.*, *United States* v. *Dodge*, 61 F.3d 142, 145-146 (2d Cir.), cert. denied, 516 U.S. 969, and 516 U.S. 1000 (1995); *United States* v. *Grier*, 354 F.3d 210, 215 (3d Cir. 2003); *United States* v. *Aiken*, 974 F.2d 446, 448-449 (4th Cir. 1992); *United States* v. *Gresham*, 118 F.3d 258, 261-262 (5th Cir. 1997), cert. denied, 522 U.S. 1052 (1998); *United States* v. *Thompson*, 361 F.3d 918, 921 (6th Cir.), cert. denied, 543 U.S. 859 (2004); *United States* v. *Lim*, 444 F.3d 910, 912-914 (7th Cir.), cert. denied, 549 U.S. 908 (2006); *United States* v. *Village Ctr.*, 452 F.3d 949, 950 (8th Cir. 2006); *United States* v. *Giannini*, 455 F.2d 147, 148 (9th Cir. 1972) (per curiam); *United States* v. *Spoerke*, 568 F.3d 1236, 1245 (11th Cir.

2009); see also *United States* v. *Palmer*, 435 F.2d 653, 656 (1st Cir. 1970).

Petitioner's contrary arguments lack merit. First, petitioner contends (Pet. 6) that the National Firearms Act is "an unabashed gun control measure." In *Sonzinsky*, however, the Court explained that "a tax is not any the less a tax because it has a regulatory effect." 300 U.S. at 513. "Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed." *Ibid.* Since *Sonzinsky*, the Court has repeatedly reaffirmed these principles. See, *e.g.*, *National Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 567 (2012) (*NFIB*) ("[T]axes that seek to influence conduct are nothing new."); *Department of Revenue* v. *Kurth Ranch*, 511 U.S. 767, 787 (1994) ("It is * * * firmly established that taxes may be enacted to deter or even suppress the taxed activity."); *Minor* v. *United States*, 396 U.S. 87, 98 n.13 (1969) ("A statute does not cease to be a valid tax measure because it deters the activity taxed."); *United States* v. *Sanchez*, 340 U.S. 42, 44 (1950) ("It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed.").

Second, petitioner maintains (Pet. 17) that the National Firearms Act "does not really produce revenue for the federal government." Under this Court's cases, "the essential feature of any tax" is that it "produces at least some revenue for the Government." *NFIB*, 567 U.S. at 564. A tax that produces at least some revenue remains valid, even if "the revenue obtained is negligible." *United States* v. *Kahriger*, 345 U.S. 22, 28 (1953), overruled in part on other grounds by *Marchetti* v. *United States*, 390 U.S. 39 (1968). The National Firearms Act

satisfies these criteria. For example, in 2015, it produced nearly $38 million in occupational and excise taxes. ATF, U.S. Dep't of Justice, *Firearms Commerce in the United States: Annual Statistical Update* 11 (2016), http://www.atf.gov/resource-center/docs/2016-firearms-commerce-united-states/download. By way of comparison, the Act produced an average of just $5000 a year around the time this Court upheld it in *Sonzinsky*. See 300 U.S. at 514 n.1.

Third, petitioner observes (Pet. 7-8) that the National Firearms Act tax is collected by ATF, an agency housed in the Department of Justice rather than the Department of the Treasury. As the court of appeals recognized, however, the identity of the "agency" that "administer[s] a tax" does not, by itself, determine "whether that tax is really * * * a tax." Pet. App. 15a. Further, ATF originally *was* housed within the Department of the Treasury; Congress moved it to the Department of Justice during the reorganization of federal departments that occurred after the attacks of September 11, 2001. *Id.* at 14a; see Homeland Security Act of 2002, Pub. L. No. 107-296, Tit. XI, § 1111(a)(1), 116 Stat. 2274. Petitioner does not explain why the transfer of an agency from one department to another transforms a tax that it collects into something other than a tax.

Fourth, petitioner observes (Pet. 16-17) that, since *Sonzinsky*, Congress has enacted a separate statutory provision (not challenged here) that limits the possession of some machineguns. This case, however, involves silencers, not machineguns. Petitioner fails to explain how Congress's enactment of restrictions on the possession of one item affects the constitutionality of a tax on the transfer of a different item. See *United States* v. *Copus*, 93 F.3d 269, 276 (7th Cir. 1996) (rejecting the

argument that the enactment of the machinegun restrictions "has undermined the constitutional basis of the taxation and registration requirements" applicable to silencers).

Finally, petitioner complains (Pet. 12) that the National Firearms Act imposes "onerous" registration requirements. The Constitution, however, grants Congress broad authority to enact laws that are "necessary and proper for carrying into Execution" its enumerated powers, including the power to tax. U.S. Const. Art. I, § 8, Cl. 18. And this Court has held that the Act's "registration provisions" "are obviously supportable as in aid of" the tax provisions. *Sonzinsky*, 300 U.S. at 513. Petitioner may consider (Pet. 12) the registration requirements "onerous," but that does not make them any less constitutional. In any event, petitioner himself states (Pet. 27) that "there are nearly 1.3 million suppressors registered pursuant to" the National Firearms Act—undermining his contention that the registration requirements are prohibitively "onerous."

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

The Second Amendment, by its terms, protects the right to keep and bear "Arms." In *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), this Court interpreted the word "Arms" to mean "'weapons of offence, or armour of defence.'" *Id.* at 581 (brackets and citation omitted). As the court of appeals correctly determined, a silencer is neither a weapon nor an "armour of defence," and restrictions on silencers "don't materially burden" one's ability to use a gun for "self-defense." Pet. App. 28a,

29a n.13 (citation omitted). Petitioner now attempts to argue (Pet. 27) that silencers facilitate self-defense, but, according to the testimony of petitioner's co-defendant, the "main purpose" of a silencer is that it "just makes the shooting sport more enjoyable." Gov't C.A. Br. 11 (quoting trial transcript). And the few courts to have addressed the issue have agreed that the Second Amendment does not protect silencers. See *United States* v. *McCartney*, 357 Fed. Appx. 73, 76 (9th Cir. 2009), cert. denied, 559 U.S. 1021 (2010); *United States* v. *Perkins*, No. 08-cr-3064, 2008 WL 4372821, at *4 (D. Neb. Sept. 23, 2008); *State* v. *Dor*, 75 A.3d 1125, 1130 (N.H. 2013); *People* v. *Brown*, 235 N.W. 245, 246 (Mich. 1931); see also *United States* v. *Stepp-Zafft*, 733 Fed. Appx. 327, 329-330 (8th Cir.) (per curiam), cert. denied, 139 S. Ct. 279 (2018).

Petitioner contends that the decision below conflicts with decisions in which other courts of appeals have recognized that the Second Amendment "protects ancillary rights necessary to the realization of the core right to possess a firearm for self-defense." Pet. 24 (quoting *Teixeira* v. *County of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017), cert. denied, 138 S. Ct. 1988 (2018)) (emphasis omitted). He further contends (Pet. 24-26) that the decision below conflicts with decisions in which other courts have held or stated that the Second Amendment protects the possession of ammunition. But the court of appeals never denied that the Second Amendment protects ammunition and other accessories that are necessary to make firearms usable for self-defense or other lawful purposes. In fact, Judge Hartz's concurring opinion expressly "caution[ed] against overreading [the] holding regarding silencers," explaining that the court "had no occasion to consider whether items that are not

themselves bearable arms but are necessary to the operation of a firearm (think ammunition) are also protected." Pet. App. 51a.

In addition, silencers meaningfully differ from other accessories such as ammunition. The right to bear arms "would be meaningless" "without bullets." *Jackson* v. *City & County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014), cert. denied, 135 S. Ct. 2799 (2015). In contrast, restrictions on silencers "don't materially burden" one's ability to use a gun for "self-defense." Pet. App. 29a n.13 (citation omitted). Moreover, this Court explained in *Heller* that the Second Amendment allows the prohibition of "dangerous and unusual weapons," 554 U.S. at 627, and many courts have upheld restrictions on silencers on the alternative ground that silencers are dangerous and unusual. See, *e.g.*, *McCartney*, 357 Fed. Appx. at 76 ("Silencers" "are even more dangerous and unusual than machine guns * * * and are less common than either short-barreled shotguns or machine guns."); *Perkins*, 2008 WL 4372821, at *4 ("[S]ilencers/suppressors 'are not in common use by law-abiding citizens for lawful purposes.'") (citation omitted); *Brown*, 235 N.W. at 247 (describing silencers as part of "the arsenal of * * * the 'gangster'" and contrasting them with "weapons usually relied upon by good citizens for defense or pleasure").

3. Finally, a writ of certiorari is not warranted to review petitioner's contention (Pet. 28-29) that the government may not tax the exercise of Second Amendment rights. For three reasons, this case is a poor vehicle to address that issue.

First, the court of appeals held that petitioner was *not* exercising his Second Amendment rights when he bought and possessed an unregistered silencer. Pet.

App. 22a-31a. The limits on Congress's authority to tax activities that *do* constitute exercises of Second Amendment rights therefore have no bearing on the outcome of this case.

Second, the court of appeals expressly declined to consider the limits of the government's authority to tax the exercise of Second Amendment rights. Given the court's "conclusion that the Second Amendment [does not cover] silencers," the court determined that "this appeal isn't the right vehicle to test that approach." Pet. App. 32a. This Court ordinarily does not consider issues "not addressed by the Court of Appeals," because it is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

Third, petitioner raised his arguments about the limits of the government's authority to tax the exercise of constitutional rights "[f]or the first time on appeal." Pet. App. 31a. As a result of petitioner's failure to preserve the issue in the district court, the issue would be reviewed only for plain error. See Fed. R. Crim. P. 52(b). Petitioner cannot satisfy the plain-error standard here, among other reasons because the purported invalidity of the National Firearms Act's taxes is not "clear under current law." *United States* v. *Olano*, 507 U.S. 725, 734 (1993).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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