No. 18-_____

IN THE
Supreme Court of the United States

JEREMY KETTLER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner was convicted of possessing an unregistered firearm sound suppressor in violation of the National Firearms Act of 1934, 26 U.S.C § 5861(d). He challenged whether the NFA continues to be a proper exercise of Congress's taxing power due to changed circumstances, and if so, whether it imposes an impermissible tax on the exercise of a constitutional right. The Tenth Circuit concluded that it was bound by this Court's decision in United States v. Sonzinsky, 300 U.S. 506 (1937), upholding the NFA, and that only this Court could overturn its own decisions. The Tenth Circuit also concluded that the Second Amendment protects only "bearable arms," not including firearm accessories such as sound suppressors. The questions presented are:

1. Whether the National Firearms Act of 1934, upheld in Sonzinsky, continues to be a constitutional exercise of Congress's taxing power when the justifications for that decision have significantly eroded over the last 82 years.

2. Whether the Second Amendment protects firearm accessories such as sound suppressors.

3. Whether the tax imposed by the National Firearms Act, targeting the exercise of a Second Amendment right, violates the rule of Murdock v. Pennsylvania, 319 U.S. 105 (1943) and Cox v. New Hampshire, 312 U.S. 669 (1941).

PARTIES TO THE PROCEEDINGS

Petitioner Jeremy Kettler was a defendant and appellant below.

Shane Cox was a co-defendant in the district court, and their appeals were decided together by the circuit court, but not consolidated. Shane Cox is not a party to this Petition.

The United States was the appellee below.

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Issued on October 16, 2018, the court of appeals decision below is reported as United States v. Cox, 906 F.3d 1170 (10th Cir. 2018) (Appendix A). The district court's first decision denying defendant's motion to dismiss issued on May 10, 2016, is reported as United States v. Cox, 187 F. Supp. 3d 1282 (D. Kan. 2016) (Appendix B). The district court decision denying defendant's further motions to dismiss on January 31, 2017, is reported as United States v. Cox, 235 F. Supp. 3d 1221 (D. Kan. 2017) (Appendix C).

JURISDICTION

The court of appeals issued its opinion on October 16, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article I, Section 8, Clause 1 and the Second Amendment to the United States Constitution, and the National Firearms Act, 26 U.S.C. § 5801(a), *et seq*. *See* Appendix D.

STATEMENT OF THE CASE

Jeremy Kettler grew up in rural Kansas, the eldest of 10 children. After graduating from high school, he decided to serve his country by enlisting in the United States Army. He was deployed to a war zone overseas, where he was decorated for his actions in combat. As

a result of his service, Mr. Kettler became medically disabled and was discharged honorably. After leaving the service, he returned to his boyhood home.

Shortly thereafter, in 2014, Mr. Kettler met Shane Cox while shopping in Mr. Cox's military surplus store near his hometown. Mr. Kettler had suffered hearing damage from his military service and was attracted to a sound suppressor[1] offered for sale, so that he could preserve what was left of his ability to hear while still hunting and target shooting. While there, Mr. Kettler saw a sound suppressor on a shelf, and next to it, a copy of Kansas' Second Amendment Protection Act ("the Kansas Act"). The Kansas Act provided that "a firearm accessory ... manufactured commercially or privately and owned in Kansas and that remains within the borders of Kansas is not subject to any federal law." K.S.A. § 50-1204(a). The Act further provided that the term "firearm accessory" was inclusive of "sound suppressors." K.S.A. § 50-1203(b). Based on the unambiguous language of the Kansas Act, Mr. Kettler purchased the suppressor, reasonably believing — as did his co-defendant Shane Cox and others in his community, including local law enforcement[2] — that the purchase, possession, and use

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[1] This Petition uses the term "suppressor" as opposed to the colloquial term "silencer" because such a device will only "suppress" the noise of a gunshot to below a level that would cause hearing damage. *See* OSHA Technical Manual, Sec. III, Ch. 5. Suppressors come nowhere close to "silencing" the sound of a gunshot, despite such depictions in movies and on television.

[2] Many other individuals in Mr. Kettler's community — including a police lieutenant — also purchased suppressors from Mr. Cox's

of such a suppressor was entirely lawful. They did not understand that a federal law enacted under the taxing power could reach such intrastate activity.

Obviously believing his purchase to be lawful, Mr. Kettler posted a video of it on Facebook, praising its effectiveness. Eventually, agents from the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") heard about Mr. Kettler's suppressors and his Facebook posts. When interviewed by the ATF, Mr. Kettler readily admitted to his possession of the suppressors, declaring that he had "done nothing wrong." Further, referencing the Kansas Act, Mr. Kettler stated that the "Kansas law ... says this is completely legal [but that] what [you a]re doing [i]s illegal."

Despite having no serious criminal history, and further despite it being uncontested that Mr. Kettler had relied on the Kansas Act, Mr. Kettler was charged with three separate federal felonies: (i) making false statements during a federal investigation in violation of 18 U.S.C. § 1001; (ii) conspiring with Mr. Cox in violation of 18 U.S.C. § 371 to make, receive, and transfer a firearm in violation of 26 U.S.C. § 5861; and (iii) possessing an unregistered firearm in violation of 26 U.S.C. § 5861(d). As the Tenth Circuit stated, "the government prosecuted two Kansas men .... for violating the NFA by manufacturing (in Kansas), transferring (in Kansas), and possessing (in Kansas)"

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store. Appellant's (10th Cir.) Appendix, vol. 2 at 372-73. However, none of these other individuals were ever prosecuted.

sound suppressors. App. at 2a. Appellant's (10th Cir.) Appendix, vol. 2 at 425.

Mr. Kettler joined co-defendant Cox's motion to dismiss the charges, arguing, *inter alia*, that the National Firearms Act was an unconstitutional exercise of Congress's taxing power. Mr. Kettler also filed his own motion to dismiss on the ground that he did not possess the requisite *mens rea* because the Kansas Act declared unambiguously that his possession of a suppressor was lawful. The district court denied the motions to dismiss but, after the presentation of the government's case at trial, dismissed all charges against Mr. Kettler except the third: possession of an unregistered firearm in violation of the NFA. The jury returned a guilty verdict on this remaining felony charge, and he was sentenced to probation for one year.

Mr. Kettler then appealed to the Tenth Circuit, arguing, *inter alia*, that: (1) the National Firearms Act no longer can be justified as a valid exercise of Congress's power to tax, but that (2) even if the NFA continues to be a proper exercise of Congress's taxing power, the district court erred in giving effect to the NFA, as it impermissibly imposes a tax on the exercise of the Second Amendment right to the possession of firearm accessories. Although conceding that times have changed since the NFA's enactment in 1934, the tribunal rejected the first argument, suggesting that times have not changed **enough** for the appellate court to take the bold step of striking down the NFA. Appellant was reminded that "'[o]nly the Supreme Court may overrule its decisions.'" App. at 22a. The

appellate court also rejected Mr. Kettler's second argument, concluding that a suppressor is not "a 'bearable arm' protected by the Second Amendment." App. at 29a.

REASONS FOR GRANTING THE PETITION

I. The National Firearms Act Is No Longer Justifiable as an Exercise of the Enumerated Taxing Power, as the Factual Underpinnings of Sonzinsky Have Been Eroded.

In 1937, this Court upheld the National Firearms Act of 1934 ("NFA") as a legitimate exercise of Congress's Article I, Section 8 power to lay and collect taxes. United States v. Sonzinsky, 300 U.S. 506 (1937). There, Sonzinsky had argued that the NFA was "not a true tax," but rather that the "cumulative effect" of the NFA's various taxes on manufacturers, dealers, and transfers had a "penal ... character" and a "prohibitive ... effect" with "the purpose of suppressing traffic in a certain noxious type of firearms...." *Id.* at 512. The Court rejected this challenge, noting that "[e]very tax is in some measure regulatory" and "interposes an economic impediment to the activity taxed." *Id.* at 513. The Court held that "an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed." *Id.*

Yet as the district court below noted, it was "long ago" that Sonzinsky found the NFA to be a legitimate tax. App. at 56a. In the intervening eight decades, many if not all of the reasons the Sonzinsky Court

gave for its decision have been undermined or negated by subsequent congressional enactments and regulations by the Executive Branch. Additionally, there have been other important developments that necessitate this Court's revisiting the conclusion reached by the Sonzinsky Court. Although the NFA may once have been a tax with some regulatory effect, today it has become what Justice Frankfurter colorfully described in a later "tax" measure as a regulation "wrapped ... in the verbal cellophane of a revenue measure"[3] — an unabashed gun control measure in purpose and effect, bearing virtually no resemblance to a "tax" designed to raise revenue.

The NFA's constitutional basis should be reexamined. Understandably, reopening the issue was something the courts below were reluctant to do. Noting that "'[o]nly the Supreme Court may overrule its decisions,'" the Tenth Circuit teed up the issue for this Court, observing that "courts of appeals should follow Supreme Court precedent that 'has direct application in a case' even if that precedent 'appears to rest on reasons rejected in some other line of decisions' and should 'leav[e] to th[e] Court the prerogative of overruling its own decisions.'" App. at 22a. Likewise, the district court noted that "*Sonzinsky* has never been reversed, vacated or modified [and thus] it is 'the supreme Law of the Land' on this issue." App. at 70a. Both courts below thus implicitly have passed the baton to this Court to review the continuing validity of Sonzinsky.

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[3] United States v. Kahriger, 345 U.S. 22, 38 (1953) (Frankfurter, J., dissenting).

Whether, in the face of completely changed circumstances, the NFA remains a legitimate exercise of Congress's power to tax is an "important question of federal law that has not been, but should be, settled by this Court." *See* Supreme Court Rule 10(c).

In Sonzinsky, this Court gave several reasons for concluding that the original NFA was justified under the taxing power. First, the Court noted that the 1934 NFA had none of the characteristics of other cases in which the Court had struck down a bogus "tax." Sonzinsky at 513. The NFA as it exists in 2019, however, possesses many if not all of these suspect characteristics. Second, the Sonzinsky Court explained that "the subject of the tax described [is not] treated as criminal by the taxing statute." *Id.* However, today the law treats ownership of NFA items as criminal in ways entirely unrelated to the collection of any "tax." Third, today's NFA constitutes a pervasive regulatory scheme, almost entirely unrelated to collection of NFA licensure and transfer fees. Fourth, the Court noted that "the annual tax of $200 is productive of some revenue." *Id.* at 514. Today, however, the NFA constitutes a net drain on federal resources.

A. The NFA Today Is the Only Internal Revenue Code "Tax" Not Enforced by the Treasury Department.

In National Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) ("NFIB"), this Court recently upheld a tax, observing that it was "collected solely by the IRS through the normal means of taxation...." NFIB at

566. In contrast, in the Child Labor Tax Case, 259 U.S. 20 (1922), this Court struck down a penalty in part because enforcement was accomplished "not only by the taxing officers of the Treasury, the Department normally charged with the collection of taxes, but also by the Secretary of Labor and his subordinates whose normal function is the advancement and protection of the welfare of the workers." Child Labor Tax Case at 37. Below, Petitioner noted that the enforcement regime in this case is even less a "tax" than either of those, because NFA "taxes" are payable not to the IRS but to the ATF,[4] and today, only the Justice Department enforces the NFA, having displaced the Treasury Department in 2003. *See* Appellant's Opening Brief at 13. The NFA no longer can reasonably be justified as a tax — if it were, then it would be **the only Internal Revenue Code ("IRC") "tax"** not administered by the Secretary of the Treasury. *Id.* at 13-14.

Petitioner's point was found persuasive by the Tenth Circuit, but apparently was not persuasive enough. Instead, the circuit court below noted that the law considered in "the *Child Labor Tax Case* had two more strikes against it" — including "'a heavy exaction' on violators." App. at 15a. The circuit court concluded that it need not "assess which way those features point in this case." *Id.* at 16a. However, when those other two factors are actually examined, at least one is present here as well.

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[4] ATF, Application for Tax Paid Transfer and Registration of Firearm ("The check or money order is to be made payable to ATF.").

B. The Current NFA Imposes a "'Heavy Exaction' on Violators."

This Court struck down the statute in Child Labor Tax Case in part because it imposed a "'heavy exaction' on violators" — a penalty of 10 percent of a business's profits, if child labor were knowingly used. *Id*. at 36-37. Likewise, as the Tenth Circuit noted, "the [NFA] has teeth ... to ensure compliance." App. at 13a. Indeed, the NFA provides for an exceedingly "'heavy exaction' on violators" for possession of an unregistered firearm (26 U.S.C. § 5861(d)). Failure to obtain a $200 tax stamp carries a maximum penalty of $10,000 and 10 years imprisonment (26 U.S.C. § 5871) — for **each** unregistered firearm.

This NFA criminal penalty is far more severe than other criminal penalties in the nation's tax laws. For example, the maximum penalty for IRC tax violations is five years imprisonment (26 U.S.C. § 7201), with other violations carrying three-year (26 U.S.C. § 7206) or one-year (26 U.S.C. § 7203) terms. And in NFIB v. Sebelius, this Court found a fee to be a tax in part because "the Service is *not* allowed to use those means most suggestive of a punitive sanction, such as criminal prosecution." NFIB at 566.

Moreover, as Petitioner pointed out to the circuit court, the "taxes" imposed by the NFA have never been increased from their original $5 and $200. Appellant's Opening Brief at 20-24. Since its enactment, the NFA's $200 "tax" has lost nearly 95 percent of its value in real dollars. *See id.* at 22. Yet as part of the Gun Control Act of 1968 ("GCA"), Congress dramatically

increased the penalties set out in 26 U.S.C. § 5871 for failure to pay that small "tax," from $2,000 and five years imprisonment to $10,000 and 10 years imprisonment. *See* Gun Control Act of 1968, 82 Stat. 1235. If the NFA is and has always been justified as a taxing scheme and not a gun control scheme, why would Congress have increased the law's criminal enforcement penalty, while leaving unchanged the revenue stream it supposedly protects, even though it has been severely eroded by inflation?

In practice as well, penalties for violations of true tax laws are designed to protect meaningful revenue streams, yet the severe NFA penalties protect almost no revenue generation. In 2017, the U.S. Sentencing Commission reported 584 sentences nationwide for tax fraud, wherein "[t]he median tax loss for these offenses was $277,576."[5] On the other hand, the maximum losses resulting from nonpayment of the NFA's fees is $1,000 for a manufacturer/importer license, $500 for a dealer license, and the $200 transfer fee — the "tax" the government believes should have been paid in this case.[6] Thus, a criminal penalty under the NFA is much more severe (and, arguably, disproportionate to the magnitude of the offense) than is a penalty under

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[5] U.S. Sentencing Commission, Quick Facts on Tax Fraud Offenses, FY 2017.

[6] Applying this Court's conclusion in Carter v. Carter Coal Co., 298 U.S. 238 (1936), it matters not whether the NFA's heavy exaction is the $200 "tax" or the 10-year penalty for those who do not pay it: "[o]ne who does a thing in order to avoid a monetary penalty does not agree; he yields to compulsion precisely the same as though he did so to avoid a term in jail." Carter at 289.

Internal Revenue Service ("IRS") tax statutes. In other words, it defies logic to conclude that Congress has provided for a maximum 10-year prison sentence solely to ensure payment of a relatively small $200 "tax."

As this Court explained, "there 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." Child Labor Tax Case at 38. That time has come for the NFA's "tax." This gross disproportionality of penalties between the NFA and the amount of the "tax" being enforced by the IRS raises the question why Congress saw fit to penalize NFA violations so ruthlessly, when such a small amount of money is at stake. If not a regulatory law in purpose and effect, why would the government choose in this case to bring felony charges against Petitioner for his failure to pay $200, while far more substantial IRS tax cases are routinely resolved through fines and repayment agreements?[7] The question answers itself. It is not about the money.

C. Today's NFA Imposes Onerous Regulations on Gun Owners, Unrelated to Collection of Any "Tax."

In Hill v. Wallace, 259 U.S. 44 (1922), the Court considered a "20 cents a bushel" tax on grain contracts unless "such contracts are made by or through [a

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[7] Petitioner is unaware of any federal criminal prosecution of a taxpayer by the IRS for failure to pay a $200 tax.

government-authorized] contract market," in turn imposing onerous regulations on such contract markets. Hill at 63. The Court struck down the statute, noting that "[t]he 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**." *Id.* at 66 (emphasis added). Similarly, in Carter v. Carter Coal Co., the Court examined a tax on bituminous coal and concluded that "[i]t is very clear that the 'excise tax' is not imposed for revenue but exacted as **a penalty to compel compliance with the regulatory provisions** of the act." Carter at 289 (emphasis added). These statements apply to the NFA regulatory scheme as it exists today.

In Sonzinsky, the Court noted that the NFA (as examined in 1937) could be upheld because it contained "no regulation other than the mere registration provisions." Sonzinsky at 513. How times have changed. In 1968, the NFA was amended by Title II of the Gun Control Act of 1968[8] — which was enacted not under the taxing power, but pursuant to the commerce power.[9] The $200 NFA tax that Petitioner failed to pay is merely the jurisdictional hook by which to exact his compliance with a whole host of NFA and GCA regulatory provisions that have

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[8] ATF, "National Firearms Act."

[9] This case involved a suppressor manufactured, sold, and possessed in Kansas, which presents no interstate commerce "nexus" such as that required in criminal prosecutions under the Gun Control Act.

absolutely nothing to do with collection of any so-called "tax."

As Petitioner argued to the circuit court, the NFA today "is now designed to **prevent payment of the tax** in as many instances as possible.... Real taxes do not operate in this fashion." Appellant's Opening Brief at 15 (emphasis added). Indeed, millions of persons are prohibited from paying the NFA "tax," governmental entities are exempt from paying the tax, and as of 1986, the law prohibits NFA taxes from being paid on a class of NFA weapons. Although suppression of an activity might be incidental to taxation in that some people will choose to forgo the activity to avoid payment of the tax, certainly the goal of a true "tax" should not be calculated to prevent millions of people from paying it: "[a] **pure penalty** prevents behavior, thereby raising little revenue.... Alternatively, a **pure tax** permits a person to engage in the taxed conduct.... A pure tax dampens conduct but does not prevent it, thereby raising revenues." R. Cooter & N. Siegel, "Not the Power to Destroy: An Effects Theory of the Tax Power," 98 VA. L. REV. 1195, 1198 (2012) (emphasis added). When examined closely, the NFA constitutes such a "pure penalty."

First, ATF mandates and conducts a background check on NFA purchasers — a background check that federal law appears to prohibit. *See* Appellant's Opening Brief at 17. In doing so, ATF denies NFA transfers to individuals who are considered prohibited persons under 18 U.S.C. § 922(d)(1)-(9), meaning "literally tens of millions of Americans are deemed ineligible to pay the NFA tax." *Id.* at 18. An early

version of this "prohibited persons" list was first enacted as part of the Federal Firearms Act of 1938 (after Sonzinsky was decided),[10] and thereafter expanded to exclude additional categories of persons. Second, some NFA weapons — post-1986 machineguns — are completely banned from registration due to the Hughes Amendment to the Firearm Owners Protection Act of 1986.[11] *Id.* at 19. Third, "certain governmental entities" are exempted from paying the NFA tax pursuant to 26 U.S.C. § 5853 — an exemption first added by the 1938 Federal Firearms Act.

In addition to these post-Sonzinsky restrictions, "[c]urrently, a person wishing to purchase an NFA weapon has to wait in an ATF queue for approximately eight months...." Appellant's Opening Brief at 16. That delay occurs after a person has (i) submitted his completed application, (ii) paid his $200 tax stamp, (iii) submitted his fingerprints and photographs (see 26 U.S.C. § 5812(a)), and until recently, (iv) obtained permission from his "chief law enforcement officer" — a relic of a pre-computer age that somehow endured until 2016,[12] nearly 20 years after the implementation

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[10] Federal Firearms Act, 52 Stat. 1250 (June 30, 1938).

[11] The Hughes Amendment, passed as part of the Firearm Owners Protection Act of 1986, was enacted pursuant to the Commerce Clause and amended the Gun Control Act. Yet that statute prohibited payments of NFA "taxes" on post-1986 machineguns, even though the NFA had been enacted under the taxing power.

[12] "Machineguns, Destructive Devices and Certain Other Firearms; Background Checks for Responsible Persons of a Trust

of computerized criminal background checks under the National Instant Criminal Background Check System ("NICS").

Moreover, even after having paid his NFA "tax" and obtained ATF permission to take possession of an NFA-registered item, a person is still not able to freely enjoy possession and use of his NFA firearm. In order to transport NFA weapons (other than suppressors) interstate, a person is required to obtain ATF preapproval through the filing of an ATF Form 5320.20 — a form that requires payment of no fee or "tax." As the ATF form explains, "[s]olicitation of this information is made pursuant to the Gun Control Act of 1968."[13] In other words, the purpose of this requirement is purely gun control, not tax collection. Although no violation of this requirement was present in this case, this post-purchase regulation is further evidence of the fact that the NFA "tax" here has transformed into what this Court in Sonzinsky called a "so-called tax."[14]

In the Child Labor Tax Case, this Court noted that "a court must be blind not to see that the so-called tax

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or Legal Entity With Respect To Making or Transferring a Firearm (Final Rule)," 81 *Fed. Reg.* at 2658 (Jan. 15, 2016).

[13] *See* "Application to Transport Interstate or to Temporarily Export Certain National Firearms Act (NFA) Firearms," ATF Form 5320.20.

[14] In United States v. Kahriger, this Court noted that "taxes" may be "invalid" if there are regulatory or penalty "provisions extraneous to any tax need...." Kahriger at 31.

is imposed to [have a] prohibitory and regulatory effect and purpose...." Child Labor Tax Case at 37. Likewise, the NFA today is no longer a tax, but rather a cobbled-together mass of regulatory provisions designed not to help raise revenue, but to restrict and deter ownership of popular firearms and accessories.

D. Today, NFA Items Are Treated as Criminal.

In Sonzinsky, the Court concluded that "the subject of the [NFA] tax [is not] treated as criminal by the taxing statute." Sonzinsky at 513. That may have been the case in 1937, when many NFA items such as machineguns and suppressors were relatively new inventions and were largely (if not entirely) unregulated by the states and the federal government — at the time long ago when a machinegun could be ordered by mail.

In other words, under the NFA in 1937, it was not a crime to possess the weapon; the only crime was failure to pay the tax. A very different situation obtains today. As discussed *supra*, as of the 1986 Hughes Amendment, it is a crime to possess a post-1986 machinegun and impossible to register one under the NFA. And due to the large classes of prohibited persons created by the laws of 1938 and 1968, it is now a crime to own an NFA weapon if one is a felon, convicted of misdemeanor domestic violence, etc. *See* 18 U.S.C. § 922(g). Finally, owners of many NFA items today must obtain government preclearance to travel with them. *See* 18 U.S.C. § 922(a)(4); ATF Form 5320.20. Under the NFA of the 1930's, Al Capone theoretically could have bought himself a brand new

Tommy Gun, so long as he paid the $200 tax. Today's NFA constitutes a pervasive regulatory scheme, almost entirely unrelated to collection of NFA licensure and transfer fees.

E. The NFA Is a Money-Losing "Tax" which Produces No Net Revenue.

In NFIB, this Court noted that "the essential feature of any tax" is that it "produces at least some revenue for the Government." NFIB at 564. On the other hand, the Court earlier explained, "a tax is not any the less a tax because it has a ... deterrent effect on the activities taxed." Sonzinsky at 513. Today's $200 NFA "tax" falls into neither category.

The NFA does not really produce revenue for the federal government. Unlike the tax considered in NFIB v. Sebelius, which was "expected to raise about $4 billion per year by 2017," in 2017 the ATF raised a paltry $29.3 million from NFA licensing and transfer fees.[14] Meanwhile, ATF's FY 2019 budget request asks for $13.2 million in additional funds to run its NFA branch, which is already comprised of many dozens of full-time employees and contractors who process NFA paperwork and maintain the National Firearms Registration and Transfer Record (NFA Registry). This is quite a substantial funding increase request since, in 2018, Congress already authorized ATF to be

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[14] ATF, "Firearms Commerce in the United States: Annual Statistical Update," (2018).

given $20 million more than ATF had requested.[15] Moreover, a House committee report recommended that a substantial part of this above-request increase be used "for the activities of the National Firearms Act (NFA) Branch." *Id.* Needless to say, ATF's NFA activities cost the federal government untold millions of dollars[16] — far in excess of the amount brought in by NFA licensing and transfer fees. In other words, the NFA does not "produce revenue" for the government — rather, its net effect is to impose millions (if not tens of millions) of dollars in unrecovered costs on taxpayers annually.

The circuit court rejected Petitioner's argument, admitting that "[r]evenue ... mattered in *Sonzinsky*," but citing this Court's opinion in Minor v. United States, 396 U.S. 87 (1969), for the principle that "'[a] statute does not cease to be a valid tax measure ... because the revenue obtained is negligible....'" App. at 21a. From that single sentence, the circuit court concluded that it does not matter "how little revenue the tax generates." *Id.* at 20a. The circuit court then went one step further, concluding that "the constitutional question hinged on *gross* revenue, and it set the bar low — 'some' gross revenue." *Id.* at 21a.

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[15] "Consolidated Appropriations Act, 2018," Pub. L. No. 115-141; *see also* "Commerce, Justice, Science, and Related Agencies Appropriations Bill, 2018," H. Rept. 115-231.

[16] Of course, there is no way to account for the cost of NFA investigations conducted by ATF special agents, or criminal prosecution by the Justice Department.

Yet to Petitioner's knowledge, this Court has never ruled on or considered whether a tax may generate only some gross revenue or must generate actual net revenue. The circuit court seemed to have assumed it was implicit that a tax need only generate some gross revenue, it being irrelevant that tax revenue is far offset by the costs of maintaining a vast regulatory scheme — but nowhere is that made explicit.[17] Certainly, the authorities cited by the circuit court do not make any such distinction between gross and net revenue.[18]

As Petitioner explained below, the NFA "is **productive of no net revenue**." Appellant's Opening Brief at 22. In other words, if ATF today spends $2 to raise $1, it could hardly be assumed that the NFA scheme meets the test of being "productive of some revenue," as required in 1937 in Sonzinsky. As

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[17] For example, in Kahriger, this Court upheld a "wagering tax" even though "the tax amount collected under it was $4,371,869" (Kahriger at 28 n.4), but did not look at the cost of administering and enforcing the tax.

[18] Surprisingly, the circuit court adopted the government's argument that "'[i]f the focus were on net revenue, then the Executive Branch could negate the constitutionality of a tax imposed by Congress simply through spendthrift enforcement.'" App. at 21a. But that is simply not true. It is Congress that must fund the Executive Branch, and thus has significant final say about the level of funding spent on enforcement of the laws it makes. President Trump cannot tomorrow decide that ATF will spend an additional $500 million enforcing the NFA, as it is Congress that appropriates money to ATF and the Department of Justice to fund NFA administration and enforcement.

Petitioner noted below, "[t]hat would be the sort of logic that appeals only to lawyers." *Id.* at 25.

F. The NFA Masquerades as a Revenue-Raising System.

Even if it once did, the NFA's $200 "tax" no longer meaningfully deters commerce in NFA items. Since its inception in 1934, the NFA "tax" on transfers of suppressors, short-barreled rifles, short-barreled shotguns, and machineguns has been fixed at $200. Just accounting for inflation would necessitate a tax of $3,650 today. Whereas in 1934 the NFA's $200 transfer fee represented "[a]bout a 100-percent tax" on the cost of a machinegun (*see* Appellant's Opening Brief at 20 n.7), today the lowest-cost machineguns exceed $6,000,[19] making an additional $200 little more than an annoyance, and certainly does not "discourage or eliminate transactions" in such items.

Today, the "tax" is not a meaningful impediment to acquiring NFA items. Rather, the impediment is the NFA's "offensive regulation" the Court found missing in Sonzinsky, but which has been imposed since that decision. *See* Sonzinsky at 514. In NFIB v. Sebelius, this Court noted that "taxes that seek to influence conduct are nothing new." NFIB at 567. But that is just it. Today, it is not the $200 tax that influences conduct — it is the regulatory scheme that is the impediment. It is the months-long wait, the complicated (and unnecessary) mountain of

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[19] *See* Machine Gun Price Guide, "Submachine Guns."

paperwork, the ban on millions of persons paying the tax, the ban on paying the tax to register certain weapons, and the life-ruining potential 10-year prison sentence for anyone who fails to pay what essentially amounts to a New York City parking ticket.[20] NFA regulations are the impediment to owning NFA items. The $200 "tax" is just the hook by which the government continues to claim that the NFA is a tax, instead of what it so obviously has become — unconstitutional gun control.

This Court has previously recognized that times can change: "there 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." NFIB v. Sebelius at 573 (citing Dep't of Revenue v. Kurth Ranch, 511 U.S. 767 (1994) (emphasis added)). The time has come to reconsider the NFA "tax."

II. The Tenth Circuit's "Bearable Arms" Test Violates the Second Amendment and Undermines Heller, Creating a Conflict among the Circuits.

A. The Tenth Circuit Misconstrued this Court's Decision in Heller.

The Tenth Circuit erroneously determined that suppressors do not fall within the protection of the Second Amendment because they are "firearm

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[20] *See* A. Haury, "U.S. Cities With The Largest Parking Fines," Investopedia (Nov. 15, 2012).

accessories." It based this determination on an extremely narrow and distorted reading of this Court's decision in District of Columbia v. Heller, 554 U.S. 570 (2008). In Heller, this Court struck down the District's categorical ban on the ownership and possession of handguns in the home for self-defense — calling it "the *central component* of the right itself." Heller at 599. To reach that conclusion, it determined that the Second Amendment protects an individual's right to keep and bear arms, based on an evaluation of the text, history, and tradition of the Second Amendment. The Heller decision acknowledged that it left open several questions regarding the scope of the Second Amendment right: "since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field."[21] *Id.* at 635.

Rather than treating the applicability of the Second Amendment to suppressors as a new issue to be considered, the Tenth Circuit read Heller as narrowing the Second Amendment protection to only "bearable arms": "According to *Heller*, 'the Second Amendment extends, prima facie, to all instruments that constitute *bearable arms*.'" Cox, App. at 28a (emphasis added by the Tenth Circuit). The Tenth Circuit ignored Heller's recognition that the "central component" of the Second Amendment served as a starting point for its coverage, not the limit of the entire right.

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[21] The dissent in Heller also cautioned that the Court's ruling was focused: "a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right." *Id.* at 636 (Stevens, J., dissenting).

Having confined the Second Amendment to bearable firearms, the Tenth Circuit concluded that suppressors are only firearm accessories and not bearable arms, and thus not protected by the Second Amendment: "[B]ecause silencers are not 'bearable arms,' they fall outside the Second Amendment's guarantee." Cox, App. at 29a.

Although joining the majority opinion, Judge Hartz issued a separate concurring opinion "to caution against overreading our holding regarding silencers," noting that the court did not "consider whether items that are not themselves bearable arms but are necessary to the operation of a firearm (think ammunition) are also protected." Cox, App. at 51a. However, this concurrence does not cure the court's indefensibly narrow view of the Second Amendment.

Clearly, the phrase "central component" means it is part of something larger, a broader scope of protection afforded by the Second Amendment. The Tenth Circuit's opinion that the term "bearable arms" extends no further than an actual firearm is indefensible. Concurring, Judge Hartz recognized as much, opining that the majority's conclusion might not apply to firearm ammunition. *Id*. But what about a firearm magazine? It is integral — but not technically "necessary" — for a modern firearm to operate. Along the same line, a rifle stock, handguard, muzzle brake, and sights would not be protected by the Second Amendment, because technically the rifle can be fired without those pieces (albeit not safely or accurately). Is a holster that enables lawful concealed carry not protected, even though it enables one to "bear arms"?

By its ruling, the Tenth Circuit parted ways with its sister circuits, which recognize that the Amendment protects ancillary firearms rights, subsumed under the "central component" of a broader right.

B. There Is a Circuit Split regarding the Scope of the Protection Provided by the Second Amendment.

Other circuits have recognized the Second Amendment as protecting more than merely "bearable arms." Two years ago, the Ninth Circuit noted, "[a]fter *Heller*, [the Ninth Circuit] and other federal courts of appeals have held that the Second Amendment protects **ancillary rights** necessary to the realization of the core right to possess a firearm for self-defense." Teixeira v. Cty. of Alameda, 873 F.3d 670, 677 (9th Cir. 2017) (emphasis added). In Teixeira, the Ninth Circuit acknowledged a Second Amendment interest in having access to gun stores to purchase arms for self defense, although it declined to "define the precise scope of any such acquisition right under the Second Amendment" because the plaintiffs "failed to state a claim that the ordinance impedes Alameda County residents from acquiring firearms." *Id*. at 678.

The Teixeira decision followed an earlier Ninth Circuit decision in Jackson v. City and County of San Francisco, 746 F.3d 953 (9th Cir. 2014), which recognized a Second Amendment protection for ammunition — which is not a literal "bearable arm." The court noted that even though "The Second Amendment ... does not explicitly protect ammunition. Nevertheless, without bullets, the right to bear arms

would be meaningless. A regulation eliminating a person's ability to obtain or use ammunition could thereby make it impossible to use firearms for their core purpose." Jackson at 967.

The Seventh Circuit has taken the broadest view of ancillary activity that is protected by the Second Amendment. In two related cases, the Seventh Circuit held that the City of Chicago's ordinances banning or severely restricting access to firing ranges within city limits violated the Second Amendment: "The right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective." Ezell v. City of Chicago, 651 F.3d 684, 704 (7th Cir. 2011); *see also* Ezell v. City of Chicago, 846 F.3d 888, 893 (7th Cir. 2017) ("Range training is not categorically outside the Second Amendment. To the contrary, it lies close to the core of the individual right of armed defense.").

Similarly, in New York State Rifle & Pistol Ass'n v. City of New York, 883 F.3d 45 (2d Cir. 2018), the Second Circuit assumed that a city ordinance which severely restricted the transportation of lawfully owned firearms within city limits restricted activity "'protected by the Second Amendment.'" New York State Rifle at 55.

Just last month, the Third Circuit held that a firearm magazine — an accessory designed to hold multiple rounds of ammunition in a firearm — "is an arm under the Second Amendment.... Because magazines feed ammunition into certain guns, and

ammunition is necessary for such a gun to function as intended, magazines are 'arms' within the meaning of the Second Amendment." Ass'n of N.J. Rifle & Pistol Clubs v. AG N.J., 2018 U.S. App. LEXIS 34380, *13-14 (3d Cir. 2018).

Finally, in a case involving a challenge to Department of State restrictions on the distribution of plans for 3D-printed gun-related items, a district court "presume[d] a Second Amendment right is implicated...." Defense Distributed v. United States Dep't of State, 121 F. Supp. 3d 680, 699 (W.D. Tex. 2015).

Each of these cases involved restrictions on firearms-related activities or firearm accessories, not just "bearable arms." The Tenth Circuit's restrictive reading of the Second Amendment and Heller is incorrect and inconsistent with the scope recognized by other circuits, requiring this Court to establish some guidance for the lower courts regarding the scope of protection provided by the right to keep and bear arms.

C. Suppressors Are Protected under the Second Amendment as Weapons in Common Use.

In Heller, this Court held that Miller's statement "that the sorts of weapons protected were those 'in common use at the time' ... is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" Heller at 627 (citing United States v. Miller, 307 U.S. 174, 179

(1939)). Suppressors are firearm accessories which meet that test for protected weapons. Neither the court below nor the authorities it cited make any mention that there are nearly 1.3 million suppressors registered pursuant to the NFA — demonstrating that suppressors both now and increasingly are in common use.[22] Certainly, suppressors are far more common today than handguns were in Washington, D.C. in 2008 when this Court determined that the categorical ban on handguns in the home was unconstitutional.

Likewise, Heller recognized that possession of "those weapons ... typically possessed by law-abiding citizens for lawful purposes" is protected by the Second Amendment. *Id*. at 625. Most suppressors are used by law-abiding citizens for target practice to reduce noise pollution and protect hearing. Other than in movies, the use of a suppressor in the commission of a crime is exceedingly rare.[23]

Petitioner, a disabled veteran, purchased a firearm suppressor to reduce the report of his firearm while shooting. The suppressor assisted in protecting him from aggravating his hearing loss, allowing him to continue his firearm practice. Petitioner's suppressor allowed him to train unencumbered without bulky ear protectors, as well as unencumbered of the health

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[22] S. Gutowski, "ATF: 1.3 Million Silencers in U.S. Rarely Used in Crimes," *Washington Free Beacon* (Feb. 17, 2017).

[23] *See* S. Halbrook, "Firearm Sound Moderators: Issues of Criminalization and the Second Amendment," 46 CUMB. L. REV. 33, 63-67 (2016).

dangers associated with hearing the high decibel levels of a modern firearm report.[24] Finally, the use of his suppressor also minimized risks to the hearing of those around him and facilitated noise abatement in populated areas. There was no allegation or evidence that Petitioner used or intended to use his suppressor for any unlawful purpose.

III. The Murdock/Cox Prohibition of a General Revenue-Raising Tax on the Exercise of Constitutional Rights Extends to the Second Amendment.

This case comes to this Court in the bicentennial of McCulloch v. Maryland, 17 U.S. 316 (1819), wherein Chief Justice John Marshall famously proclaimed: "That the power to tax involves the power to destroy ... [is a] proposition[] not to be denied." McCulloch at 431. To that principled point, Justice Oliver Wendell Holmes added his pragmatic view that "The power to tax is not the power to destroy while this Court sits." Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting). Under either view, however, the power to tax may not be relied on either to camouflage the exercise of a general police power not granted to Congress (*see* Section I, *supra*), or to infringe a right protected by the Constitution (*see* Section II, *supra*). Moreover, even if the NFA were a

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[24] "A single shot from a large caliber firearm, experienced at close range, may permanently damage your hearing in an instant." B. Fligor, Sc.D, "Noise Induced Hearing Loss," Better Hearing Institute.

valid exercise of the taxing power, it is still unconstitutional.

A. A Tax on Protected Rights Is *Per Se* Unconstitutional.

This case presents this Court with the opportunity to consider one of the most important limitations on the federal taxing power: that the government "may not impose a charge for the enjoyment of a right granted by the Federal Constitution." Murdock v. Pennsylvania, 319 U.S. 105, 113 (1943). As the Murdock Court explained, "[t]he power to tax the exercise of a privilege is the power to control or suppress its enjoyment." *Id*. at 112. Although the exercise of constitutionally protected activities may be subject to generally applicable taxes, such activities may not be singled out for special taxes, or even fees, except as narrowly permitted under this Court's fee jurisprudence established in Murdock and Cox v. New Hampshire, 312 U.S. 569, 577 (1941). A fee targeting constitutionally protected conduct is permissible only if it is "'not a revenue tax, but one to meet the expense incident to the administration of the Act and to the maintenance of public order in the matter licensed.'" Cox v. New Hampshire at 577. But, as the government has argued, the NFA is a revenue tax, not a cost-of-administration coverage.

In Murdock and Cox v. New Hampshire, the Court applied this principle to fees which targeted First Amendment protected activity. "The framers of the First Amendment were familiar with the English struggle" with the British "'taxes on knowledge,'" and

this Court has acknowledged that the reach of the First Amendment must have included "modes of restraint" embodied by taxation. Grosjean v. American Press Co., 297 U.S. 233, 247-48 (1936) (striking down a Louisiana tax on newspaper advertisements). *See also* Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983) (tax on paper and ink impermissibly burdens freedom of the press). However, the principle is not limited to taxes on First Amendment activities.

The modern National Firearms Act is a comprehensive regulatory scheme, masquerading as an exercise of Congress's taxing power and void for that reason. *See* Section I, *supra*. However, even if the NFA is found to be an exercise of the taxing power, then it is an impermissible revenue tax on the exercise of a constitutionally protected right — the right to keep and bear arms. It is **not** a generally applicable tax, as it applies only to the possession, transfer, and manufacture of certain firearms and firearm accessories.

The issue presented here has never been resolved by this Court. To be sure, this Court upheld the NFA tax against a Second Amendment challenge in United States v. Miller, 307 U.S. 174 (1939), but that case did not challenge the NFA tax as a tax on the exercise of a constitutional right. Moreover, Heller warned against giving too much weight to the Miller decision: "It is particularly wrongheaded to read *Miller* for more than what it said, because the case did not even purport to be a thorough examination of the Second Amendment." Heller at 623. Heller explained the

remarkable fact that Miller did not involve an adversarial proceeding before this Court: "The defendants made no appearance in the case, neither filing a brief nor appearing at oral argument; the Court heard from no one but the Government (reason enough, one would think, not to make that case the beginning and the end of this Court's consideration of the Second Amendment)." *Id*. For both reasons, it cannot be said that the question presented by this case was addressed by and resolved in Miller.

B. The Tenth Circuit Failed to Apply Murdock to the Second Amendment, Differing from the Second and Ninth Circuits' Approach.

The Murdock and Cox v. New Hampshire rule against a tax on the exercise of a constitutional right is a *per se* rule, not subject to any form of judicial interest balancing. Murdock at 113. Instead, this Court's fee jurisprudence established a separate test that bars general revenue taxes and allows only for fees that are for the purpose of defraying "the expenses of policing the activities in question." Murdock at 114.

Although raised below, the Tenth Circuit bypassed the issue of whether this Court's "fee jurisprudence" applies in the Second Amendment context because of its:

> conclusion that the Second Amendment covers neither silencers nor short-barreled rifles. NFA taxes on the possession, transfer, and manufacture of these items do not constitute

> "charge[s] for the enjoyment of a right granted by the federal constitution," so they need not be measured against administrative costs or the expense of maintaining public order. [Cox, App. at 32a-33a (citing Murdock at 113).]

The Tenth Circuit declined to apply the Murdock and Cox v. New Hampshire principle, even after expressly noting that two other circuits have "imported fee-jurisprudence principles to their Second Amendment analyses." App. at 32a. In Kwong v. Bloomberg, 723 F.3d 160 (2d Cir. 2013), the Second Circuit applied the Murdock fee jurisprudence to a handgun-licensing fee, finding that a $340 fee was not excessive and was designed to "defray ... the administrative costs associated with the licensing scheme." Kwong at 166. And even though the Ninth Circuit claimed that it was not applying "First Amendment fee jurisprudence" to the Second Amendment in Bauer v. Becerra, 858 F.3d 1216, 1224-26 (9th Cir. 2017), *cert. denied* 138 S.Ct. 982 (2018), it did exactly that. The challengers in that case argued that the portion of a California firearm transaction fee that exceeded the administrative costs of performing the background check and registration of the transaction violated the fee jurisprudence test. The Ninth Circuit then determined that the excess fees were used for enforcement costs and were closely enough related to the activity to be permissible under the Murdock/Cox v. New Hampshire analysis.[25] Bauer at 1226.

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[25] Petitioner does not concede that either the Second or Ninth Circuits properly upheld the fees challenged in those cases.

Both Kwong and Bauer were correct to apply fee jurisprudence analysis.[26] However, the fees in those cases are readily distinguishable from the NFA tax at issue here. Unlike the NFA tax, the fees imposed by California and New York City were arguably, even if only superficially, related to some aspect of the administration of law enforcement associated with the exercise of the right to keep and bear arms.

The NFA was enacted and has been defended only as an exercise of Congress's taxing powers. Any regulatory effect is permissible only as it is incidental to Congress's flexing of its taxing muscle. Here, the tax cannot be justified as necessary to defray the costs of administering a regulatory system. Such reasoning would conflict with the taxing rationale and, if adopted, would enable Congress to entirely circumvent the limitations of enumerated powers, granting it a general police power.[27]

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[26] Seven judges on the Fifth Circuit adopted the view that the residency requirement to purchase a firearm under the Gun Control Act "imposes a *de facto* tax on interstate handgun sales, in the form of shipping costs and transfer fees." Mance v. Sessions, 896 F.3d 390, 399 (5th Cir. 2018) (Ho, J., dissenting from denial of rehearing *en banc*).

[27] It is beyond question that "[t]he Federal Government 'is acknowledged by all to be one of enumerated powers.' ... The enumeration of powers is also a limitation of powers, because '[t]he enumeration presupposes something not enumerated.'" NFIB at 534 (citing McCulloch and Gibbons v. Ogden, 22 U.S. 1 (1824)). The constitutional powers granted to Congress "must be read carefully to avoid creating a general federal authority akin to the police power." *Id.* at 536. *See also* United States v. Lopez, 514 U.S. 549, 567 (1995), and United States v. Morrison, 529 U.S.

In the end, the Tenth Circuit did not apply this Court's fee jurisprudence, because it incorrectly determined that the activity covered by the NFA does not fall within the scope of the Second Amendment's protection.[28] This Court should grant the petition to determine both whether the Second Amendment does apply to suppressors, and if it does, whether the prohibition against taxing rights protected by the Constitution applies to **all** rights in the Constitution,[29] including the Second Amendment.

For decades, the Second Amendment was largely ignored, and ever since this Court's decision in Heller in 2008, the lower courts have found creative ways to avoid applying it to invalidate onerous infringements of protected rights. Fifth Circuit Judge Don Willett lamented that "Constitutional scholars have dubbed

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598, 618-619 (2000).

[28] The Tenth Circuit compounded its error in this case by rejecting this Court's fee jurisprudence. Rather, the Tenth Circuit claimed that the applicable standard was the interest-balancing two-step test that most of the Courts of Appeals presently apply to Second Amendment challenges: "To analyze Second Amendment challenges to federal statutes, we have used *Reese*'s two-step test, borrowed from the Third Circuit, which does not incorporate the Court's fee jurisprudence." Cox, App. at 32a.

[29] One can only imagine how swiftly the courts would respond if a state were to impose a special tax on the exercise of certain other rights, such as the penumbral right to an abortion. *See* Silvester v. Becerra, 138 S.Ct. 945, 951 (2018) (Thomas, J., dissenting from a denial of certiorari) (comparing California's 10-day waiting period for purchasing a firearm to its 24-hour waiting period for abortions).

the Second Amendment 'the Rodney Dangerfield of the Bill of Rights.'"[30] As former Ninth Circuit Judge Alex Kozinski recently noted, "[t]he time has come to treat the Second Amendment as a real constitutional right. It's here to stay."[31]

This Court has allowed many Second Amendment challenges to go by the boards, although not without some if its members drawing attention to what was called this "distressing trend: the treatment of the Second Amendment as a disfavored right." Peruta v. California, 137 S.Ct. 1995, 1999 (2017) (Thomas, J., dissenting from denial of certiorari).[32] This case provides an appropriate vehicle to address the question of whether a tax on the exercise of Second Amendment rights is permissible.

CONCLUSION

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

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[30] Mance v. Sessions at 396 (Willett, J., dissenting from a denial of rehearing *en banc*).

[31] Fisher v. Kealoha, 855 F.3d 1067, 1072 (9th Cir. 2017) (Kozinski, J., ruminating).

[32] *See also* Silvester v. Becerra, 138 S.Ct. 945 (2018) (Thomas, J., dissenting from denial of certiorari); Friedman v. Highland Park, 136 S.Ct. 447 (2015) (Thomas, J., dissenting from denial of certiorari); and Jackson v. City and County of San Francisco, 135 S.Ct. 2799 (2015) (Thomas, J., dissenting from denial of certiorari).

Respectfully submitted,

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