No. 17-3035

In The United States Court of Appeals for the Tenth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JEREMY KETTLER,
Defendant-Appellant.

Appeal from the United States District Court for the District of Kansas District Court No. 6:15-cr-10150-JTM-01 J. Thomas Marten, United States District Judge

Appellant's Reply Brief

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I. THE GOVERNMENT OFFERS NO PERSUASIVE OPPOSITION TO KETTLER'S ARGUMENT THAT THE NFA IS NO LONGER JUSTIFIABLE UNDER CONGRESS'S POWER TO TAX.

Unsurprisingly, the Government disputes Appellant Kettler's claim that the National Firearms Act of 1934 ("NFA") is no longer justifiable under Congress's taxing power. Government Brief ("Gov't Br.") at 16-26. Yet the Government offers no persuasive support for its position, confirming the NFA's current lack of constitutional basis.

A. Appellant's Claim Is Not Foreclosed by Any Applicable Precedent.

1. Contrary to the Government's Claim, the Supreme Court Has Never Reaffirmed Sonzinsky.

The Government asserts that "[t]he Supreme Court never has questioned the continued validity of Sonzinsky." *Id.* at 18. That is true, as Mr. Kettler himself previously noted. Appellant's Brief ("App. Br.") at 11. But neither does the Supreme Court appear to have reaffirmed Sonzinsky v. United States, 300 U.S. 506 (1937) in the eight decades since it was decided.[1]

Rather, the core of Mr. Kettler's argument is that what might have been true in 1937 is certainly no longer true today. As the Supreme Court

[1] The few Supreme Court cases that mention Sonzinsky do so only in passing, either in a string cite with no discussion, or as authority for the axiom that "a tax is not any the less a tax because it has a regulatory effect." Sonzinsky at 513.

has said, "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." United States v. Carolene Products Co., 304 U.S. 144, 153 (1938). Moreover, as recently as last year, the Court has expressly reaffirmed the need to re-examine prior decisions based on changed circumstances. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2306 (2016).

The Government attempts to shore up Sonzinsky, by wrongly claiming that "the Court consistently has **affirmed**" Sonzinsky. Gov't Br. at 18 (emphasis added). However, noting that a prior opinion reached a particular conclusion in no way reaffirms that conclusion.

Indeed, in the Court's 2012 opinion of NFIB v. Sebelius, 567 U.S. 519 (2012), on which the Government relies,[2] the Court in no way reaffirmed Sonzinsky; it simply **cited** Sonzinsky as an example of a regulatory tax that had been **upheld in the past**. *Id.* at 567. The Court certainly never indicated that Sonzinsky would be decided the same way today. Similarly, the Court cited Sonzinsky as an example (without any discussion and

[2] The Government also cites to United States v. Thompson/Center Arms Co., 504 U.S. 505 (1992), which refers to the NFA as "a tax statute," but does not further discuss the issue, and certainly did not examine the continuing validity of Sonzinsky.

certainly without any reaffirmation) in 1994, in Dep't of Revenue v. Kurth Ranch, 511 U.S. 767 (1994).

The Government really does not dispute that Sonzinsky's factual underpinnings have been eroded by a series of changed circumstances, each of which now demonstrate that the NFA of today is not at all a tax, but entirely a regulatory scheme. None of the reasons the Sonzinsky Court gave for reaching its conclusion in 1937 now apply.

Before Kurth Ranch, one must look back 20 years to 1974 to find another mention of Sonzinsky. Of course, it was not until 2003 that Congress moved the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") to the Department of Justice — after the National Instant Criminal Background Check System ("NICS") was implemented in 1998.[3] It was also before the Firearm Owners' Protection Act of 1986, and in large part inflation rendered the $200 "tax" insignificant in comparison to ATF's operation and enforcement costs. And, of course, 1974 was long before the 2008 Heller and 2010 McDonald opinions affirming the Second Amendment protection of firearms.

[3] https://www.fbi.gov/services/cjis/nics.

2. This Court's Precedents Do Not Foreclose Kettler's Taxing Power Argument.

The Government also claims that the decisions in this Circuit foreclose Mr. Kettler's argument, arguing that "this Court ... has recognized that the NFA is a valid exercise of Congress's taxing power." Gov't Br. at 18-19. In support, the Government cites three decisions, two of which are unpublished, and therefore not precedential. *See* 10th Cir. Rule 32.1(A).

First, in United States v. Houston, 103 Fed. Appx. 346, 349-50 (10th Cir. 2004) (unpublished), this Court rejected the same argument made in Sonzinsky — essentially that the NFA cannot be justified under the taxing power because of its onerous regulatory requirements. But in this case Mr. Kettler is not challenging the law as it was written and applied in Sonzinsky in 1937; he is challenging a very different statute as it is written and applied today. The NFA no longer can be thought constitutional due to Sonzinsky; it must stand on its own. Second, in United States v. Roots, 1997 U.S. App. LEXIS 21473 (10th Cir. 1997) (unpublished), this Court addressed a motion for post-conviction relief filed by a *pro se* litigant. The Court rejected a Commerce Clause challenge to the NFA because the NFA is not a Commerce Clause statute, but rather had been enacted under the power to tax. *Id.* at *6. The Roots court never independently examined the constitutionality of the NFA under the taxing power.

Lastly, while it is true that United States v. Dalton, 960 F.2d 121, 124-25 (10th Cir. 1992), notes that "the registration requirements of the National Firearms Act **were passed** pursuant to the taxing power" — that case actually supports Mr. Kettler's argument. In Dalton, this Court noted its agreement with an Illinois court decision which held, "because the registration requirements of the [NFA] were passed pursuant to the taxing power ... and because ... the government will no longer register or tax machineguns," then the machinegun ban "**has 'removed the constitutional legitimacy** of registration as an aid to taxation.'" *Id.* at 124-25 (emphasis added).

B. Sonzinsky Addressed Quite a Different Statute from the NFA of Today.

1. ATF's Transfer from Treasury to Justice Was More than Symbolic, Contrary to What the Government Claims.

The Government disputes the significance of Congress's relocation of ATF from the Department of the Treasury to the Department of Justice. As Mr. Kettler pointed out in his opening brief, after spending its entire history as an agency within the Treasury Department, ATF was transferred to the Justice Department in 2003. App. Br. at 12. The change was intended so that ATF would "no longer be responsible for collecting taxes and fees on tobacco and spirits. Instead, it will be devoting itself full time to

investigating firearms violations, explosives thefts, cigarette smuggling and other crimes."[4] App. Br. at 13. This constituted a major shift in the ATF's focus and purpose.

The Government, however, argues that this transfer "did not undermine the tax nature of the NFA." Gov't Br. at 24. The Government offers two reasons, neither of which is persuasive. First, the Government notes that the NFA "remains codified in the Internal Revenue Code," yet as Mr. Kettler has pointed out previously, "[t]he Internal Revenue Code, **with the exception of the NFA**, is administered and enforced by the Secretary of the Treasury." ATF National Firearms Act Handbook (2009) at *89 (emphasis added).

Second, the Government argues that "**Congress indicated** that it still viewed the NFA as a revenue measure." Gov't Br. at 24 (emphasis added). Yet the authority to which the Government cites for this proposition was not prepared by "Congress," but rather it was "prepared by the staff of the Joint

[4] D. Eggen, "Move to Justice Dept. Brings ATF New Focus," Washington Post (Jan. 23, 2003).

Committee on Taxation,"[5] during the 108th Congress, after ATF was moved during the 107th Congress.

What's more, the Joint Committee on Taxation is just that — a joint committee made up of five members of the House and five from the Senate. It is not an authorizing or appropriating committee of either House of Congress. It has no legislative authority. Its charter is limited to holding hearings and issuing reports. *See* 26 U.S.C. § 8021. To infer the intent of the 107th Congress from a subsequent document prepared by the staff members of a Joint Committee made up of 10 members of the 108th Congress defies reason. The Government's approach is not much better than searching out legislative history by listening to conversations about the bill in the locker room at the congressional gym.

However, even if the document the Government cites had relevance, it only describes the NFA as a tax statute — hardly a revolutionary assumption, given the NFA's history. But the point is not whether the NFA was a statute passed pursuant to the taxing power, or whether some members of Congress (or their staff) believe it still is so. The question for this Court is whether —

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[5] Staff of Joint Commission on Taxation, 107th Congress, General Explanation of Tax Legislation Enacted in the 107th Congress, Part Twelve: The Revenue Provisions of the Homeland Security Act of 2002 (Jan. 24, 2003) at 300, n. 316. http://www.jct.gov/s-1-03.pdf.

constitutionally — the NFA can continue to be justified based on Congress's power to tax.

The Government repeatedly relies on NFIB, where the Supreme Court upheld the penalty contained in the Affordable Care Act as an exercise of Congress's taxing power. Gov't Br. at 12, 18, 20-21, 25-26. However, the Government neglects to explain how the Supreme Court reached that decision. In NFIB, the Supreme Court found highly persuasive that the penalty was collected by the IRS — not another department:

> But **the fact the exaction here is paid like a tax, to the agency that collects taxes** — rather than, for example, exacted by Department of Labor inspectors after ferreting out willful malfeasance — **suggests** that this exaction may be viewed as a **tax**. [NFIB at 566 n.9 (emphasis added).]

Unlike the tax in NFIB, the so-called NFA "tax" is paid by a "check or money order ... to be made payable to ATF"[6] — not to "the agency that collects taxes."

Since the NFA provides no role for the IRS, and now no role for the U.S. Department of the Treasury, under the Homeland Security Act of 2002, the Court's reasoning for NFIB actually supports Mr. Kettler's argument that the NFA does not constitute a constitutional exercise of the taxing power.

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[6] https://www.atf.gov/firearms/docs/form/form-4-application-tax-paid-transfer-and-registration-firearm-atf-form-53204/download.

2. The Government's Claim that All of the NFA's Regulatory Provisions Aid Revenue Collection Is Demonstrably False.

The Government notes that "[m]any of the current administrative requirements [of the NFA] date back to the original statute upheld in Sonzinsky." Gov't Br. at 22. No doubt that is true, but the Government is playing word games. Mr. Kettler did not focus on the "many" aspects of the NFA that date back to 1934. App. Br. at 16. Rather, Mr. Kettler focused on the aspects that have changed. For example, in his opening brief, Mr. Kettler noted some of the modern aspects of the NFA that have nothing to do with registration of NFA weapons or collection of NFA taxes. Mr. Kettler noted that a background check is run on each applicant, contrary to statute. *Id.* at 17. A background check certainly has nothing to do with collecting taxes or processing application paperwork. The IRS does not run a background check on a taxpayer before it accepts his annual tax return, seeking to disqualify him from doing so.

Next, Mr. Kettler noted that, in conducting a background check, many individuals are prohibited from registering NFA weapons and paying the tax, while many weapons are disqualified from registration under any circumstances. *Id.* at 18-19. But the Government claims that "all of the current regulatory provisions are 'in aid of a revenue purpose.'" Gov't Br. at

22. That statement is nonsensical — **prohibiting payment** of a tax certainly does not "**aid in collection**" of the tax, as the Government claims. *Id.* at 21 (emphasis added).

Finally, Mr. Kettler noted that the current eight-month delay before one is permitted to register an NFA weapon discourages payment of the tax in the first place. App. Br. at 16. The IRS certainly does not wait eight months to cash a check attached to a tax return.

The Government has no answer for these **recent** developments in the administration of the NFA, other than to attempt to shift focus to the **original** aspects of the NFA that are not at issue.

3. No Matter How the Government Spins It, the NFA Does Not "Produce Revenue," but rather Is a Significant Drain on Federal Resources.

As Mr. Kettler noted in his opening brief, in recent years the federal fisc has been forced to absorb the ATF's and the FBI's ever-increasing administrative costs of processing NFA registrations, conducting background checks (contrary to statute), and maintaining a perpetual database of NFA registrations, coupled with the enforcement cost of investigating and prosecuting NFA offenses. The broader point is that, as the NFA has morphed from being a taxing statute to a regulatory regime, so too have the costs of administering the ATF's vast regulatory regime increased

exponentially. The result is clearly visible today — any meager sum raised by NFA application fees is quickly eaten up and negated by the mounting costs of its administration. The net result is that the NFA does not produce revenue, but rather imposes millions of dollars of costs annually on taxpayers.

The Government's reply appears to be that so long as the NFA produces even one dollar of gross revenue on the front end, then any amount of regulatory red tape and associated costs can be justified on the back end. Gov't Br. at 20-21. The Government points to NFIB v. Sebelius to support this claim. *Id*. at 21. However, the tax at issue in NFIB "is expected to raise about $4 billion per year by 2017" (NFIB at 564) — a significant source of revenue, considering the IRS's entire budget (to administer all taxes except the NFA) is $11.2 billion.[7] Likewise, in United States v. Kahriger, 345 U.S. 22, 28 n.4 (1953), the Court noted that a tax on wagering was a "proper revenue measure." Finally, even in Sonzinsky, the NFA clearly produced some revenue because, as Mr. Kettler has already pointed out, $200 in 1937 is

[7] While the tax in NFIB itself equated to 36 percent of the total IRS budget, the scant $37 million raised from NFA taxes accounts for a mere 3.6 percent of ATF's budget. https://www.atf.gov/resource-center/fact-sheet/fact-sheet-atf-staffing-and-budget; B. Debot, E. Horton & C. Marr, "Trump Budget Continues Multi-Year Assault on IRS Funding Despite Mnuchin's Call for More Resources," Center on Budget and Policy Priorities (Mar. 16, 2017) https://www.cbpp.org/research/federal-budget/trump-budget-continues-multi-year-assault-on-irs-funding-despite-mnuchins.

the same as approximately $3,650 today — a significant sum. App. Br. at 22. Thus, the claim to raise "some revenue" cannot be read in a vacuum, as the Government would prefer. Each time the Supreme Court has used that term, it has gone further to explain how the particular tax at issue produced some sort of meaningful revenue — not just an amount greater than zero.

The Government points out that "the statute could have produced more revenue had Congress raised the tax" (Gov't Br. at 20) — but, of course, Congress has not raised the tax. The Government has not pointed to any other tax where it costs the Government significantly greater than $1 to collect $1.

The NFA appears to be the only "tax" not administered by the Treasury Department or the IRS, and the only "tax" that does not make the Government any money. That's because, today, the NFA is no longer a tax.

II. THE GOVERNMENT ERRONEOUSLY DISMISSES KETTLER'S *MENS REA* DEFENSE.

The Government brief defends the district court instruction to the jury that it "was not required to prove that [Kettler and Cox] knew their conduct was unlawful." Accordingly, the Government believes, the Appellants' good-faith reliance on the Second Amendment Protection Act ("SAPA"), K.S.A. § 50-1204, was not allowed as a defense to their failure to comply with the NFA registration requirement. Gov't Br. at 7, 15, 45-46. In support of this

ruling, the Government makes essentially two arguments, neither of which sustains its position.

A. The Common Law Rule that Ignorance of the Law Is No Defense Does Not Govern the *Mens Rea* Issue in this Case.

Invoking the common law maxim that ignorance of the law is no excuse, the Government contends that it need not prove any *mens rea* to establish criminal liability for failure to register and pay a tax under the NFA. Gov't Br. at 15, 49-50. In support of this claim, the Government relies primarily upon Cheek v. United States, 498 U.S. 192 (1991). *See* Gov't Br. at 49. Although it is true that Cheek states "[t]he general rule that ignorance of the law ... is no defense to criminal prosecution," and further that the rule "is deeply rooted in the American legal system," the Government fails to acknowledge that Cheek also asserts that the rule is nevertheless limited to those cases where the "law is definite and knowable." Cheek at 199. When such is not the case, the rule does not apply. Thus, as the Cheek Court itself explained, the common law rule that ignorance of the law is no excuse was especially not amenable to:

> [t]he proliferation of statutes and regulations [making] it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. [*Id.* at 199-200.]

The Government concedes that the NFA is a "comprehensive scheme to levy and collect taxes" (Gov't Br. at 3), but at the same time refuses to

recognize Cheek's teaching that, in light of the fact that "[t]he proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend," Congress has "softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses." *Id.* at 199-200. The courts, in turn, have interpreted "willfully" to require evidence of more than what the Act prohibited, but also evidence of "'a voluntary, intentional violation of a known legal duty.'" *Id.* at 200.

To be sure, Congress has not required proof of specific intent with respect to all tax obligations. The Government argues that the duty to register a certain firearm under the NFA is an example of a tax law that "does not require any specific intent or knowledge that the weapons were unregistered: 'the only knowledge required to be proved [is] knowledge that the instrument possessed was a firearm.'" *See* Gov't Br. at 46, citing United States v. Freed, 401 U.S. 601, 607 (1971). But Freed is a very different case from the one here, involving a statute defining a single legal obligation to register, as well as "'the failure to act under circumstances that should alert the doer to the consequences of his deed.'" Freed at 608. *See* Lambert v. California, 355 U.S. 225, 228 (1957). In this case, the enactment of SAPA and the controversy that accompanied its enactment and subsequent enforcement

left Appellants in the unenviable position of not knowing which law governed the registration of a Kansas-made suppressor[8] in Kansas.

B. The Maxim that an Act Does Not Make a Defendant Guilty without a Guilty Mind Governs the *Mens Rea* Issue Here.

According to the Government, Appellants should be held strictly liable because "[t]he supremacy of federal laws is a basic principle of our system of government and one that ordinary citizens are expected to know." Gov't Br. at 48. Indeed, the Government propounds that "the NFA's supremacy over the SAPA does not turn [on] any 'intricacies' of constitutional law," and was addressed in the newspapers and on the Internet. *Id.* at 49. Nevertheless, the Government would deny Appellants here of any meaningful guilty mind requirement, whether it be willful, intentional, reckless, or negligent. "Since crimes usually do require some fault (as expressed by the old maxim *actus non facit reum nisi mens sit rea*),"[9] the Government has failed to proffer any good reason why the jury should not have been the one to decide whether "the NFA's supremacy over the SAPA ... is ... one that ordinary citizens are expected to know." Gov't Br. at 48. To the contrary, there is good reason to have submitted the blameworthiness issue to the jury, who alone is the best

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[8] Appellant uses the term "suppressor" as opposed to "silencer" for the reasons stated in his Opening Brief at 10 n.5.

[9] *See* W. LaFave & A. Scott, Jr., Criminal Law at 219 (West: 1972).

arbiter of whether Appellants acted with "moral culpability." *See* H. Packer, The Limits of the Criminal Sanction at 261-62 (Stanford Press: 1968).

III. KETTLER'S SECOND AMENDMENT CLAIM IS PROPERLY BEFORE THIS COURT ON THE MERITS.

A. The Second Amendment Claim Was Raised Below.

The Government attempts to make much of the fact that the rule of Murdock v. Pennsylvania, 319 U.S. 105 (1943) — that the Government may not impose a tax to discourage the exercise of a constitutional right — was not raised below, requiring Mr. Kettler to demonstrate "plain error." Gov't Br. at 28. However, the Second Amendment claim was clearly both made and ruled upon by the district court, and the Supreme Court has determined that "'once a federal **claim** is properly presented, a party can make any **argument** in support of that claim...'" Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 379 (1995) (emphasis added).

The Government relies on Richison v. Ernest Grp., Inc., 634 F.3d 1123 (10th Cir. 2011) which employed a "plain error" standard of review where a party pursued a "new legal theory" on appeal. *Id*. at 1125. Crushing the distinctions between claims and arguments, the Government represents this rule to be fixed and inviolate, but it is not.

Other federal Courts of Appeals and the Supreme Court have recognized a difference between **claims** raised below and **arguments** raised

below. *See, e.g.*, United States v. Pallares-Galan, 359 F.3d 1088, 1095 (9th Cir. 2004) ("As the Supreme Court has made clear, it is **claims** that are deemed waived or forfeited, not **arguments**." (Emphasis added.)). *See also* United States v. Billups, 536 F.3d 574, 578 (7th Cir. 2008). A **claim** is the issue that was raised; in this case, the Second Amendment. An **argument** is a particular line of reasoning or authority in support of a claim. The Government, however, conflates claims with arguments, treating them the same. *See* Gov't Br. at 28 (arguing that Appellants both "did not preserve the claim" and "fail[ed] to make a specific argument").

B. Even if the Argument Was Not Raised Below, this Court Should Address the Claim on the Merits.

Even in Richison, this Court acknowledged that it has discretion to address an argument not raised below, without even mentioning the standard of review employed. Richison at 1128-29 ("this court's cases haven't always ... been so precise ... about applying the plain error/manifest injustice standard to newly raised legal theories."). *See also* United States v. Jarvis, 499 F.3d 1196 (10th Cir. 2007), and its progeny. "*Jarvis* illustrates how we have, on occasion, come to reverse based on a forfeited argument without addressing the standard for doing so." Richison at 1129 n.3.

In United States v. Jarvis, this Court did not apply a plain error standard, and stated that it may exercise discretion to address an argument

raised for the first time on appeal if it meets two tests: "where the argument involves [1] a pure matter of law and [2] the proper resolution of the issue is certain," citing five prior cases where it had done just that. *Id*. at 1202. In other cases decided since Jarvis, this Court has considered arguments raised for the first time on appeal and decided cases based on those new arguments, including an appeal decided earlier this year in Margheim v. Buljko, 855 F.3d 1077, 1087-88 (10th Cir. 2017) (exercising discretion to consider a new argument on appeal, and reversing based on that argument):

> We have similarly said of forfeited arguments: "Our discretion allows us to determine an issue raised for the first time on appeal if it is a **pure matter of law** and its **proper resolution is certain**." *Cox v. Glanz*, 800 F.3d 1231, 1246 n.7 (10th Cir. 2015) (quotations omitted).... [*Id*. at 1088 (emphasis added).]

The Court easily could reach the issue of whether the NFA imposes a tax on Second Amendment rights, *de novo*. There are no issues of fact with respect to the Second Amendment's protection of the transfer and the possession of firearms or firearm accessories. That is a matter of law that can be decided by this Court, not requiring remand on any other issue.[10]

[10] Dissenting from requests made by Appellant Cox (Cox Br. at 51) and Intervenor Kansas (Kansas Br. at 25), Appellant Kettler does not believe that remand is necessary.

IV. THE DISTRICT COURT ERRONEOUSLY REJECTED KETTLER'S SECOND AMENDMENT CLAIM.

A. The Murdock Rule Applies.

Although the Government is correct that "neither the Supreme Court nor this Court has ever applied *Murdock* to the Second Amendment" (Gov't Br. at 42), the Murdock principle is clear: outside a few narrow exceptions not applicable here, a tax on a constitutionally protected right is unconstitutional. Only nine years ago, the Supreme Court held that the Second Amendment protects an individual right to keep and bear arms — the first time it had so held since the Second Amendment was ratified in 1791. *See* District of Columbia v. Heller, 554 U.S. 570 (2008). And the Government does not dispute that the NFA was enacted in 1934 under the taxing power, or that it imposes a tax.[11] The Government's only point of contention is that it argues that the NFA does not implicate the Second Amendment.

Yet, as explained in Appellant Cox's opening brief (at 36-47) and Mr. Kettler's opening brief (at 32-36), as well as the brief filed by the State of Kansas (at 15-24), the NFA directly implicates the exercise of Second Amendment rights, and Murdock prohibits a tax on the exercise of constitutionally protected rights.

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[11] "The statute imposes an occupational tax ... and an excise tax...." Gov't Br. at 43.

The Government's argument that a suppressor is not a firearm is also unavailing. Other courts have found that Second Amendment rights can be violated where a statute does not involve a direct ban on keeping and bearing arms. *See*, *e.g.*, Ezell v. Chicago, 846 F.3d 888 (7th Cir. 2017) (striking down a city zoning restriction which placed too heavy restrictions on firing ranges).

The lower court's decision was plain error. Although neither this Circuit nor the Supreme Court have ruled on the Murdock principle's application to the Second Amendment, the government offers no reason why the principle should not apply.[12] Even if the Court were to apply a plain error standard, the district court still should be reversed.

B. No Exception to the Murdock Principle Applies Here.

The Government argues that "the NFA does not directly tax the constitutional right at issue — here, the right to 'keep and bear' arms." Gov't Br. at 43. It asserts that the NFA tax is simply "an occupational tax on importers, manufacturers, and dealers" and "an excise tax on the manufacture and transfer of NFA 'firearms.'" *Id*.

However, Murdock applies here as the NFA tax is not a generally applicable tax which incidentally covers the manufacture and transfer of

[12] Two other Circuits have applied the Murdock analysis to the Second Amendment. *See* App. Br. at 30-31.

firearms, along with the manufacture and transfer of other items of commerce. It is a tax that was enacted specifically to apply to certain firearms and firearm accessories which, once again, are protected by the Second Amendment.

C. The Government Misstates the Murdock Rule.

The Government misstates the Murdock rule, claiming that Mr. Kettler must show that "the costs of the NFA tax exceed the expenses of the registration program." Gov't Br. at 43. Murdock establishes no such standard. Under the Murdock analysis, a not-generally-applicable tax on a constitutionally protected right is *per se* unconstitutional. First, a general revenue-raising tax targeting constitutionally protected activity is invalid, but that is exactly what the NFA is.[13] Furthermore, only fees which are directly tied to defraying the costs of a particular governmental program are permissible under Murdock (*i.e.*, "a nominal [fee] imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors"). *Id.* at 116. The NFA

[13] In cases antedating Heller, this Court held that the NFA "'was a revenue measure only and did not purport to exercise any general criminal power not delegated to Congress by the Constitution.'" United States v. Dalton at 124 (quoting United States v. Rock Island Armory, 773 F. Supp. 117, 121 (C.D. Ill. 1991)).

cannot be both a tax and a fee designed to defray the costs of administering the tax. Those notions are mutually exclusive.[14]

Additionally, the Government defends the constitutionality of the tax because it does not exceed the program's costs. Gov't Br. at 43. However, the Supreme Court has stated that a "tax based on the content of speech does not become more constitutional because it is a small tax." Forsyth County v. Nationalist Movement, 505 U.S. 123, 136 (1992). That decision explained "[t]he tax at issue in *Murdock* was invalid because it was unrelated to any legitimate state interest, not because it was of a particular size." *Id*. at 137.

V. SUPPRESSORS ARE PROTECTED "ARMS" UNDER THE SECOND AMENDMENT.

The Government supports the district court's view that suppressors "are not protected by the Second Amendment." Gov't Br. at 33. The Government asserts that suppressors are not "arms" within the meaning of the Second Amendment but are merely "firearm **accessories**." *Id.* (emphasis added). The Government's assertion disregards the Second Amendment's text and context. It fails to address the plain language of the several federal statutes which describe suppressors as "firearms." *See, e.g.*, 18 U.S.C.

[14] This Court has held that "the registration requirements ... are solely in aid of collecting the tax." Dalton at 124-25.

§ 921(a)(3), 26 U.S.C. § 5801(a), § 5845(a), and § 5861(e).[15] It fails to explain why those possessing unregistered silencers are prosecuted for *firearm* offenses. *See, e.g.,* United States v. Wilks, 58 F.3d 1518, 1523 (10th Cir. 1995). Although a distinction may be drawn between statutory and constitutional definitions of similar terms ("firearms" vs. "arms"), the congressional decision to repeatedly describe suppressors as "firearms" in statutes reflects the common-sense understanding that suppressors are a subset of "arms."

Of course, such statutory semantics do not define the scope of a constitutional right. Far more persuasive are portions of the Heller opinion, ignored by the Government, explaining why the Second Amendment protects an individual's right to bear "all instruments that constitute bearable arms, even those that were not in existence at the time of the founding" (Heller at 582) and providing justification for constitutional protection of suppressors. To fully understand that justification, however, it is important to first see the linkage between the two clauses of the Second Amendment. As the Heller Court explained:

> [t]he Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose.

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[15] *See, e.g.,* 26 C.F.R. § 313.1(b), 1939 Supp. (1940).

> The Amendment could be rephrased, 'Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.'... Logic demands that there be a link between the stated purpose and the command. [*Id.* at 577.]

Noting that "'[i]t is nothing unusual in acts for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law,'" the Heller Court then proceeded to analyze the critical operative clause, concluding it protected an individual's right to bear arms. *Id.* at 578.

The Heller Court then turned back to the prefatory clause, examining the announced purpose of this individual right in a historical context, noting that 19th-century scholars almost universally "interpreted the Second Amendment to secure an individual right unconnected with militia service." *Id.* at 616. And why? Because "'"a well-regulated militia" . . . cannot exist unless the people are **trained to bearing arms**.'" *Id.* at 617 (emphasis added); *see also id.* (stating that scholars "understood the [Second Amendment] right not as connected to militia service, but as securing the militia by ensuring a populace **familiar with arms**") (emphasis added). Moreover, "'to bear arms implies something more than the mere keeping; it implies the **learning to handle and use them in a way that makes those who keep them ready for their efficient use**.'" *Id.* at 617-618 (emphasis

added). Heller noted that other scholars shared the view that the Second Amendment protected an individual's right to train and gain familiarity with weapons. *Id.* at 618-619.

In other words, to achieve the stated purpose announced by the prefatory clause — a well-regulated militia — the People must have the individual right to gain familiarity and train with firearms. Suppressors are a material element of such training. As noted in his opening brief, Mr. Kettler used the suppressor to "reduce the sound level while shooting." App. Br. at 3. The suppressor assisted in protecting him from further hearing loss, allowing him to continue his firearm practice and training as he saw fit. *Id.* Of course, a suppressor does not completely silence the discharge of his weapon; it only suppresses the sound of the report to a level not dangerous to hearing. *Id.* at 10 n.5. Mr. Kettler's suppressor allowed him to train unencumbered without bulky ear protectors, as well as unencumbered of the dangers associated with the devastating decibels of a modern firearm report.[16] Finally, the use of his suppressor also minimized risks to the hearing of those around him and facilitated noise abatement in populated areas.

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[16] "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, http://www.betterhearing.org/hearingpedia/hearing-loss-prevention/noise-induced-hearing-loss.

The Government flippantly responds that Mr. Kettler could have accomplished the same result with "ear plugs or ear muffs." Gov't Br. at 37. This suggestion is flatly rejected by the National Institute for Occupational Safety and Health, which observes that "[f]irearm noise [is] between 159 and 169 dB" and "[p]eak noise reductions from the ear plugs, ear muffs, and customized protectors [is] in the 30 dB range" (bringing the level down to 129-139 dB); however, the OSHA limit for noise exposure is 90 dB.[17] Importantly, this federal agency actually recommends "providing noise suppressors for gun barrels" at firing ranges.[18] If ear plugs or ear muffs were sufficient, such a recommendation would have been entirely unnecessary. And finally, ear plugs or ear muffs do not serve to protect nearby observers/passersby, or allow for the necessary noise abatement in populated areas. In short, suppressors are a modern imperative to proper training, which in turn effectuates a critical purpose of the Second Amendment. *See* Ezell at 892.

Citing Heller, the Government also attacks suppressors as "not 'in common use' by law-abiding citizens for 'defense of person and home.'"[19] Gov't

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[17] National Institute for Occupational Safety and Health, "Reducing Exposure to Lead and Noise at Outdoor Firing Ranges" (November 2012) https://www.cdc.gov/niosh/docs/wp-solutions/2013-104/pdfs/2013-104.pdf.

[18] *Id.*

[19] On the contrary, suppressors are highly effective in self-defense. A law-abiding American defending his home from intruder(s) in the middle of

Br. at 34. The Government's read on Heller is too narrow. When the Heller Court specifically discussed weapons limitations under United States v. Miller, 307 U.S. 174 (1939), it stated that it "read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes...." Heller at 625. The Supreme Court further explained ("that the sorts of weapons protected were those 'in common use at the time.' We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'") *Id.* at 627 (citation omitted).

Moreover, the Government has failed to point to any evidence before this Court that suppressors are generally used by citizens for **un**lawful purposes. The fact is, virtually no crimes are committed using suppressors.[20] Rather, citizens use suppressors almost exclusively for lawful purposes. And

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the night certainly is not first going to don a bulky set of earmuffs that completely eliminate his ability to hear the intruder(s) moving about. Thus, a suppressor enables him to retain critically important hearing after firing, so that he can listen for possible additional intruders. As to the choice between muffling all tactical hearing, or "blinding" one's ears with the concussive report of a firearm, suppressors provide a critical third option — to engage while retaining situational awareness.

[20] P. Clark, "Criminal Use of Firearm Silencers," 8 W. CRIM. REV. 44 (2007) http://www.westerncriminology.org/documents/WCR/v08n2/clark.pdf ("The data indicates that use of silenced firearms in crime is a rare occurrence, and is a minor problem").

their numbers are not minimal; earlier this year, a U.S. Department of Justice spokesman stated that "there are 1,297,670 suppressors registered with ATF under the National Firearms Act."[21] And, as the Government's outdated number reflects,[22] sales have been increasing rapidly in recent years. Growing numbers of Americans recognize there is absolutely nothing "dangerous" or "unusual" about a suppressor; they want one because it enhances safety and facilitates training.

But even if 1,297,670 suppressors were somehow deemed "uncommon,"[23] the Government declines to address Mr. Kettler's arguments that (i) the Heller Court could not have been referring to absolute numbers with respect to "common use" as the number of handguns in the District were miniscule; and (ii) that "a long period of unconstitutional infringement of a

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[21] S. Gutowski, "ATF: 1.3 Million Silencers in U.S. Rarely Used in Crimes," *The Washington Free Beacon* (Feb. 17, 2017) http://freebeacon.com/issues/atf-despite-nearly-1-3-million-silencers-united-states-rarely-used-crimes/.

[22] Gov't Br. at 34. *See also* A. Smith, "Gun silencer sales are booming," CNN (July 31, 2015) http://money.cnn.com/2015/07/30/news/companies/gun-silencer-sales-up/index.html.

[23] The government's suggestion that suppressors are not widely owned for purposes of self-defense (Gov't Br. at 36), unlike the stun guns cited in Caetano v. Massachusetts, 136 S. Ct. 1027 (2016), is wholly speculative both as to numbers and as to their use for self-defense.

Second Amendment right cannot transform a protected firearm into an unprotected one." App. Br. 34.

Thus, suppressors are increasingly common, safe, reasonably related to the efficiency of a citizen militia, and almost universally used for lawful purposes, including self-defense. This Court should reject the district court's ruling that they are wholly unprotected by the Second Amendment.

Respectfully submitted,

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BRIEF FORMAT CERTIFICATION

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CERTIFICATE OF SERVICE AND DIGITAL SUBMISSION

I HEREBY CERTIFY that the foregoing Appellant's Reply Brief was filed with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit through the CM/ECF system on this 21st day of November, 2017. I ALSO CERTIFY that all participants are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system. I ALSO CERTIFY that any required privacy redactions have been made, and that the hard copies being submitted to the clerk's office are exact copies of the electronic version. I FURTHER CERTIFY that the digital submission of this document has been scanned for viruses with Comodo Internet Security Premium 10 (ver. 10.0.1.6294, database ver. 28079), last updated November 21, 2017, and according to the program, the file is free from viruses.

Dated: November 21, 2017

/s/
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