

No. 18-936

In the Supreme Court of the United States

JEREMY KETTLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

**BRIEF OF AMICI CURIAE STATES OF KANSAS,
ARKANSAS, IDAHO, LOUISIANA, MONTANA,
SOUTH CAROLINA, TEXAS, AND UTAH
IN SUPPORT OF PETITIONER**

DEREK SCHMIDT

Attorney General of Kansas

JEFFREY A. CHANAY

Chief Deputy Attorney General

TOBY CROUSE

Solicitor General of Kansas

(Counsel of Record)

DWIGHT R. CARSWELL

Assistant Solicitor General

BRYAN C. CLARK

Assistant Solicitor General

120 S.W. 10th Ave., 2nd Floor

Topeka, KS 66612

(785) 296-2215

toby.crouse@ag.ks.gov

Counsel for Amicus Curiae

State of Kansas

QUESTION PRESENTED

This brief will address the second question presented:

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

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. The Second Amendment protects firearms accessories such as silencers. 4

II. Silencers are commonly used by law-abiding citizens for lawful purposes and are not dangerous and unusual. 6

III. The Second Amendment is not strictly limited to weapons used for self-defense. . . 10

CONCLUSION 11

TABLE OF AUTHORITIES

CASES

<i>Caetano v. Massachusetts</i> , 136 S. Ct. 1027 (2016)	4, 5
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008)	3, 5, 10, 11
<i>Ezell v. City of Chicago</i> , 651 F.3d 684 (7th Cir. 2011)	5
<i>Heller v. District of Columbia</i> , 670 F.3d 1244 (D.C. Cir. 2011)	5, 11
<i>Jackson v. City and Cnty. of San Francisco</i> , 746 F.3d 953 (9th Cir. 2014)	5
<i>New York State Rifle & Pistol Ass’n, Inc. v. Cuomo</i> , 804 F.3d 242 (2d Cir. 2015)	5
<i>United States v. Miller</i> , 307 U.S. 174 (1939)	2, 5

CONSTITUTION

Kan. Const. Bill of Rights, § 4	1
Kan. Const. Bill of Rights, § 21	1

STATUTES

26 U.S.C. § 5811	7
26 U.S.C. § 5845	4

OTHER AUTHORITIES

- Jay M. Bhatt, et al., *Epidemiology of Firearm and Other Noise Exposures in the United States*, *The Laryngoscope* (2017), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6067011/> 8
- Bureau of Alcohol, Tobacco, Firearms and Explosives as of February 2018. U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Firearms Commerce in the United States: Annual Statistical Update 2018*, available at <https://www.atf.gov/file/130436/download> 6
- Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Enforcement Programs & Services Processing Times*, <https://www.atf.gov/about/docs/undefined/current-processing-times-atf-applications/download> 7
- Stephen P. Halbrook, *Firearm Sound Moderators: Issues of Criminalization and the Second Amendment*, 46 *Cumb. L. Rev.* 33 (2015) 9
- Glenn Kessler, *Are firearms with a silencer 'quiet'?*, *Washington Post*, Mar. 20, 2017, available at <https://www.washingtonpost.com/news/fact-checker/wp/2017/03/20/are-firearms-with-a-silencer-quiet?> 9
- A.J. Peterman, *Second Amendment Decision Rules, Non-Lethal Weapons, and Self-Defense*, 97 *Marq. L. Rev.* 853 (2014) 10

Nathan Rott, *Debate Over Silencers: Hearing Protection or Public Safety Threat?*, <http://www.npr.org/2017/03/21/520953793/debate-over-silencers-hearing-protection-or-public-safety-threat> 9

Michael Stewart, *Recreational Firearm Noise Exposure*, <http://www.asha.org/public/hearing/Recreational-Firearm-Noise-Exposure/> 8

INTERESTS OF *AMICI CURIAE*¹

Amici curiae are the States of Kansas, Arkansas, Idaho, Louisiana, Montana, South Carolina, Texas, and Utah. *Amici* have a strong interest in protecting their citizens' Second Amendment rights to keep and bear arms. Indeed, the lawful use of firearms—including for hunting or recreational shooting—is a venerable tradition in many *amici* States. This is especially true in Kansas, where its citizens recently and overwhelmingly voted to amend the State's Constitution to reaffirm that an individual “has the right to keep and bear arms for the defense of self, family, home and state, for lawful hunting and recreational use, and for any other lawful purpose,” Kan. Const. Bill of Rights, § 4, and the right to “hunt . . . by the use of traditional methods,” *id.* § 21. The Tenth Circuit's unsupported conclusion that firearm accessories are categorically excluded from Second Amendment protection threatens *amici*'s citizens' right to enjoy these time-honored pursuits.

¹ *Amici* States submit this brief under Supreme Court Rule 37.4. All parties received timely notice of the *amici* States' intention to file this brief.

SUMMARY OF THE ARGUMENT

The Tenth Circuit's holding that all firearms accessories, including silencers, are not protected by the Second Amendment because they do not constitute "bearable arms" has sweeping ramifications. Under that logic, Congress could conceivably ban all ammunition without violating the Second Amendment, which obviously cannot be correct. The Tenth Circuit's holding is also inconsistent with this Court's decision in *United States v. Miller*, 307 U.S. 174 (1939), which recognized that the "Arms" the people had the right to keep and bear included not only firearms but also accessories and "proper accoutrements." *Id.* at 180-82. And it conflicts with the holdings of other circuits that have recognized that restrictions on firearms accessories and ancillary rights *are* subject to Second Amendment scrutiny.

The Tenth Circuit also suggested in a footnote that silencers are "dangerous and unusual" and might be excluded from the Second Amendment for that reason, as the district court held. But in reality, silencers are in common use for traditionally lawful purposes. Approximately one-and-a-half million silencers are registered with the Bureau of Alcohol, Tobacco, Firearms and Explosives, and silencers serve several lawful and beneficial purposes, such as providing hearing protection. Firearms create noise that can cause permanent hearing damage if hearing protection is not used. And to many law-abiding citizens, silencers are the preferred method of hearing protection in certain hunting and sport-shooting situations. Contrary to a popular misconception, silencers do not completely silence firearms. Nor has the federal government

provided any basis for believing that silencers lead to increased firearm-related crime or cause firearm-related crimes to go unsolved.

Before the Tenth Circuit, the federal government incorrectly argued that the Second Amendment only protects arms that are commonly used for self-defense. That argument is inconsistent with *District of Columbia v. Heller*, 554 U.S. 570 (2008), which held that the Second Amendment protects weapons “typically possessed by law-abiding citizens for lawful purposes.” *Id.* at 625. The “core” protected lawful purpose may be self-defense, *id.* at 630, but that is not the *only* protected lawful purpose. In fact, *Heller* recognized that the Second Amendment protects the keeping and bearing of arms for the purpose of hunting. *See id.* at 588-89. Even if silencers are most commonly used by hunters and sport shooters, those are lawful purposes protected by the Second Amendment.

ARGUMENT

In holding that firearms accessories are categorically excluded from the Second Amendment’s protections, the Tenth Circuit improperly narrowed the scope of that important amendment in conflict with the decisions of this Court and other circuits. This Court’s review is needed to affirm that the “Arms” protected by the Second Amendment include items such as silencers and other firearms accessories.²

² Kettler’s co-defendant, Shane Cox, whose appeal was decided in the same Tenth Circuit opinion, has also filed a petition for certiorari challenging the Tenth Circuit’s holding that silencers are categorically excluded from the Second Amendment. *See Cox v.*

I. The Second Amendment protects firearms accessories such as silencers.

In an opinion based on threadbare analysis, the Tenth Circuit held that the National Firearms Act's restrictions on silencers do not implicate Second Amendment scrutiny because silencers are firearms accessories, and accessories are not "bearable arms."³ Pet. App. 28a-29a. Under that sweeping logic, Congress could ban all ammunition without violating the Second Amendment. That cannot be correct.

While Judge Hartz recognized this absurdity, explaining in a concurrence that he did not understand the panel opinion to exclude ammunition from the Second Amendment's protections, the panel opinion left no hint that it could be read so narrowly. The panel's sole rationale for holding that silencers were not protected was that silencers were not "bearable arms," a rationale that would apply equally to ammunition. That improper analysis warrants reversal. *See Caetano v. Massachusetts*, 136 S. Ct. 1027, 1027-28 (2016) (reversing a lower court decision holding that stun guns are not protected by the Second Amendment

United States, No. 18-7451. This Court should either grant the question in that case as well or hold that petition pending the outcome of this one.

³ Devices that diminish the report of a firearm go by several different names, including silencer, muffler, and suppressor. In this brief the State uses the term silencer because that is the term used in the National Firearms Act, *see* 26 U.S.C. § 5845(a), although as discussed below, silencers do not actually silence the sound of a firearm.

because the lower court's analysis was based on faulty reasoning).

The Tenth Circuit's holding is inconsistent with this Court's decision in *United States v. Miller*, 307 U.S. 174 (1939). In *Miller*, this Court recognized that the "Arms" the people had the right to keep and bear were not strictly limited to firearms but included "ordinary military equipment" such as ammunition, bayonets, iron ramrods fitted on the firearm's barrel, and other "proper accoutrements." 307 U.S. at 180-82. Although modern silencers of the sort at issue here were invented long after the Second Amendment was ratified, the Amendment "extends . . . to . . . arms . . . that were not in existence at the time of the founding." *Caetano*, 136 S. Ct. at 1028 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008)). At the very least, silencers are a modern-day analog to the various firearm accoutrements the Second Amendment protects.

The Tenth Circuit's decision also conflicts with the decisions of other circuits, which have held that restrictions on firearms accessories and ancillary rights are subject to Second Amendment scrutiny. See *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (hollow-point ammunition); *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 253-55 (2d Cir. 2015) (firearm magazines); *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) ("*Heller II*") (same); *Ezell v. City of Chicago*, 651 F.3d 684, 704-06 (7th Cir. 2011) (firing ranges).

As discussed below, silencers offer an important source of hearing protection, superior to other methods of hearing protection in many situations. Under the

Tenth Circuit's analysis, Congress could completely prohibit the use of hearing protection without running afoul of the Second Amendment, thereby allowing gun owners to exercise their Second Amendment rights only at the cost of risking hearing damage. Silencers, along with other methods of hearing protection, are integral to the Second Amendment because they improve the safety of firearms use.

The Tenth Circuit's holding that restrictions on firearms accessories, and specifically silencers, do not even implicate Second Amendment scrutiny is based on faulty logic and warrants reversal.

II. Silencers are commonly used by law-abiding citizens for lawful purposes and are not dangerous and unusual.

Although the Tenth Circuit based its decision on its conclusion that silencers are not "bearable arms," it also suggested in a footnote that silencers are outside the scope of the Second Amendment because they are dangerous and unusual. Those unsupported assertions are wrong. In reality, silencers are in common use for traditionally lawful purposes.

Silencers are broadly used despite procedural impediments to obtaining them. Nearly one-and-a-half million silencers have been registered with the Bureau of Alcohol, Tobacco, Firearms and Explosives as of February 2018. U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, Firearms Commerce in the United States: Annual Statistical Update 2018 at 15, available at <https://www.atf.gov/file/130436/download>. And that is despite legal obstacles to owning a silencer, including

the National Firearms Act requirements—paying a \$200 transfer tax, submitting a detailed application and fingerprints, and a months-long wait for the federal government to process the application. *See* 26 U.S.C. § 5811; Dep’t of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, Enforcement Programs & Services Processing Times, <https://www.atf.gov/about/docs/undefined/current-processing-times-atf-applications/download> (reporting an average seven-month wait for processing of an ATF Form 4 to transfer and register a silencer).

In addition to the sheer number of lawfully registered silencers, silencers serve several lawful and beneficial purposes, such as reducing damaging noise levels. One of the federal government’s own experts in this case, Special Agent Neal Tierney of the Bureau of Alcohol, Tobacco, Firearms and Explosives, testified that he has two registered silencers and that the “primary purpose” of a silencer is to reduce the sound of a firearm so it does not damage the user’s hearing. 10th Cir. Aplt. App. 382-83. Sound suppression is particularly important to Petitioner Kettler who lost much of his hearing while serving in the military and purchased the silencer to avoid aggravating his hearing loss. Pet. 2, 27. One of the silencers produced by Kettler’s co-defendant, Shane Cox, and tested by Elizabeth Gillis, a Firearms Enforcement Officer with the Bureau of Alcohol, Tobacco, Firearms and Explosives, reduced the report of the firearm by 23.13 decibels, which is a material reduction. 10th Cir. Aplt. App. 391-92.

Without noise suppression, hearing damage is a threat to firearms users. The American Speech-

Language-Hearing Association warns that “[e]xposure to noise greater than 140 dB can permanently damage hearing,” and that “[a]lmost all firearms create noise that is over the 140-dB level.” Michael Stewart, *Recreational Firearm Noise Exposure*, <http://www.asha.org/public/hearing/Recreational-Firearm-Noise-Exposure/>. As a result, people “can suffer a severe hearing loss with as little as one shot, if the conditions are right.” *Id.* Other experts agree. *See, e.g.*, Jay M. Bhatt, et al., *Epidemiology of Firearm and Other Noise Exposures in the United States*, *The Laryngoscope* at 5 (2017), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6067011/>. Hearing loss from even limited firearm use is a regular occurrence, “especially during hunting season when hunters and bystanders may be exposed to rapid fire from big-bore rifles, shotguns, or pistols.” Stewart, *Recreational Firearm Noise Exposure*. Even a “.22-caliber rifle can produce noise around 140 dB, while big-bore rifles and pistols can produce sound over 175 dB.” *Id.* And firing guns at an indoor firing range, “where sounds can reverberate, or bounce off walls and other structures, can make noises louder and increase the risk of hearing loss.” *Id.*

Silencers are frequently preferred over other methods of hearing protection, such as earplugs. Kettler’s co-defendant, Shane Cox, testified that earplugs are uncomfortable and detract from the sport shooting experience. 10th Cir. Aplt. App. 411-12. This explains why more than 20% of firearms users never use hearing protection, while only 58.5% use hearing protection consistently. Bhatt, *Epidemiology of Firearm and Other Noise Exposures*. And “[h]unters are even less likely to wear hearing protection because they say they cannot hear approaching game or other noises.”

See Stephen P. Halbrook, *Firearm Sound Moderators: Issues of Criminalization and the Second Amendment*, 46 *Cumb. L. Rev.* 33, 33 (2015); see also Nathan Rott, *Debate Over Silencers: Hearing Protection or Public Safety Threat?*, <http://www.npr.org/2017/03/21/520953793/debate-over-silencers-hearing-protection-or-public-safety-threat> (“Some hunters will choose not to wear earplugs because they don’t want to sacrifice their ability to hear in the backcountry while stalking prey.”).

There is no basis for the federal government’s argument that silencers are dangerous and unusual and therefore fall outside the scope of the Second Amendment. Neither the federal government nor the district court cited any evidence suggesting that silencers lead to increased firearm-related crime or cause firearm-related crimes to go unsolved. In fact, “[d]ata from the ATF show that silencers are seldom used in crime.” Rott, *Debate Over Silencers: Hearing Protection or Public Safety Threat?*

Rather, the federal government’s position appears to be based on the cinematic misconception that silencers eliminate the report of a fired weapon. That simply is not true. See Glenn Kessler, *Are firearms with a silencer ‘quiet’?*, *Washington Post*, Mar. 20, 2017, available at [https://www.washingtonpost.com/news/fact-checker/wp/2017/03/20/are-firearms-with-a-silencer-quiet?](https://www.washingtonpost.com/news/fact-checker/wp/2017/03/20/are-firearms-with-a-silencer-quiet/) (“There is little that’s quiet about a firearm with a silencer, unless one also thinks a jackhammer is quiet.”); Rott, *Debate Over Silencers: Hearing Protection or Public Safety Threat?* (comparing the sound of four different firearms with and without a silencer).

Because silencers are arms in common use for lawful purposes and are neither dangerous nor unusual, they are protected by the Second Amendment.

III. The Second Amendment is not strictly limited to weapons used for self-defense.

The federal government also argued below that the Second Amendment only protects arms that are commonly used for self-defense. Although the Tenth Circuit did not address this argument, it did suggest in a footnote that silencers might be excluded from the Second Amendment's protections for this reason. That cramped interpretation of the Second Amendment is incorrect.

Silencers offer valuable benefits related to self-defense. Silencers improve accuracy by reducing recoil and also reduce hearing loss and disorientation after firing, which could give a victim critical additional time to defend against an attack. *See* A.J. Peterman, *Second Amendment Decision Rules, Non-Lethal Weapons, and Self-Defense*, 97 Marq. L. Rev. 853, 892 n.221 (2014). In addition, gun owners may wish to practice shooting to better prepare themselves for self-defense, and silencers can provide important hearing protection during practice.

But in any event, the federal government's argument that the Second Amendment only protects weapons commonly used for self-defense is inconsistent with *Heller*. *Heller* identified only one limit on the Second Amendment—it does not protect the “carrying of dangerous and unusual weapons.” 554 U.S. at 627. Other than that, the Second Amendment protects an individual right to possess weapons “typically

possessed by law-abiding citizens for lawful purposes.” *Id.* at 625. The “core” protected lawful purpose may be self-defense, but that is not the *only* protected lawful purpose. *Id.* at 630.

In fact, *Heller* recognized that the Second Amendment protects the keeping and bearing of arms for the purpose of hunting. *See id.* at 588-89 (referencing the right to bear arms for the purpose of killing game); *id.* at 599 (“The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting.”); *see also Heller II*, 670 F.3d at 1260 (“[T]he Second Amendment protects the right to keep and bear arms for other lawful purposes, such as hunting” (internal quotation marks omitted)). This is consistent with the original understanding of the amendment. *See Heller*, 554 U.S. at 606-07 (noting that St. George Tucker’s early American edition of Blackstone’s Commentaries stated that English game laws abridged the right of the people to keep and bear arms by prohibiting “keeping a gun or other engine for the destruction of game”).

Even assuming silencers are most commonly used by hunters and sport shooters, those are lawful purposes the Second Amendment protects.

CONCLUSION

This Court should grant the second question in the petition for writ of certiorari.

Respectfully submitted,

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
TOBY CROUSE
Solicitor General of Kansas
(Counsel of Record)
DWIGHT R. CARSWELL
Assistant Solicitor General
BRYAN C. CLARK
Assistant Solicitor General
120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215
toby.crouse@ag.ks.gov

Counsel for Amicus Curiae
State of Kansas

ADDITIONAL COUNSEL

LESLIE RUTLEDGE
Attorney General of Arkansas

JEFF LANDRY
Attorney General of Louisiana

LAWRENCE G. WASDEN
Attorney General of Idaho

TIMOTHY C. FOX
Attorney General of Montana

ALAN WILSON
Attorney General of South Carolina

KEN PAXTON
Attorney General of Texas

SEAN D. REYES
Attorney General of Utah