No. 17-3034 & 17-3035

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES,

Plaintiff-Appellee,

v.

SHANE COX and JEREMY KETTLER,

Defendants-Appellants.

STATE OF KANSAS,
ex rel. DEREK SCHMIDT, in his official capacity
as Attorney General of the State of Kansas,

Intervenor.

On Appeal from the United States District Court
For the District of Kansas (No. 15-CR-10150-JTM-01, -02)
Honorable J. Thomas Marten, Chief United States District Judge

REPLY BRIEF OF INTERVENOR STATE OF KANSAS

OFFICE OF ATTORNEY GENERAL
DEREK SCHMIDT

Derek Schmidt
Attorney General of Kansas
Memorial Bldg., 2nd Floor
120 SW 10th Ave., 2nd Floor
Topeka, KS 66612-1597
Tel: (785) 296-2215

Attorneys for Intervenor
State of Kansas

Jeffrey A. Chanay
Chief Deputy Attorney General
Stephen R. McAllister
Solicitor General of Kansas
Dwight R. Carswell
Assistant Solicitor General
Bryan C. Clark
Assistant Solicitor General

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

ARGUMENT

After previously attacking the Kansas Second Amendment Protection Act as "unconstitutional," "clearly preempted," and "invalid," Kan. Br. 3, 5, the federal government has tempered its effort to strike down the state law. The United States now acknowledges that the Second Amendment Protection Act does not conflict with the National Firearms Act. Gov't Br. 15. Yet the government presses a sweeping defense of the National Firearms Act, at times seeming to suggest it is above constitutional challenge, and offers a surprisingly restrictive view of the Second Amendment, especially given that the government supported broad (though not absolute) individual Second Amendment rights in *District of Columbia v. Heller*, 554 U.S. 570 (2008). *See* Brief for the United States as Amicus Curiae at 17-19, *Heller*, 554 U.S. 570 (No. 07-290). The government's response shows that the State still has an important role to play in defending its Second Amendment Protection Act, including proper application of the Second Amendment.[1]

[1] The State is filing a single reply brief in both *United States v. Cox*, No. 17-3034, and *United States v. Kettler*, No. 17-3035, as encouraged by this Court's July 26, 2017 order.

I. The Government Overstates Kansas's Agreement with the Government's Claims.

Before responding to the federal government's attempts to narrow the Second Amendment's protections, a few important clarifications are necessary.

1. The government states that Kansas agrees the National Firearms Act is a proper exercise of Congress's Taxing Power. Gov't Br. 20 n.8. But Kansas has not gone quite that far. To be precise, Kansas has acknowledged that Congress enacted the National Firearms Act under Congress's Taxing Power, Kan. Br. 11-12, and that 80 years ago the Act was upheld as a proper exercise of Congress's Taxing Power, Kan. Br. 24. Kansas has not taken the additional step of accepting that the National Firearms Act, as it is *currently* implemented, is a valid exercise of Congress's Taxing power, a proposition Cox and Kettler dispute. Because Kansas's interest in this case is in defending the constitutionality of its Second Amendment Protection Act, which as relevant here relates to federal laws enacted "under the authority of congress to regulate interstate commerce," K.S.A. 50-1204(a), Kansas need not address whether the National Firearms Act is valid under Congress's Taxing

Power. Thus, Kansas has not taken, and need not take, a position on the Taxing Power question.

2. The federal government also overstates Kansas's agreement with the United States' preemption claims. The government declares that Kansas agrees the Second Amendment Protection Act does not purport to excuse noncompliance with the National Firearms Act, Gov't Br. 47, and that the National Firearms Act preempts any conflicting statute, Gov't Br. 48. Both statements are true insofar as they go, but they require an important clarification. Because the Second Amendment Protection Act simply codifies as a matter of Kansas law the federal constitutional limits on Congress's power to regulate firearms, firearm accessories, and ammunition, the Act does not by its own force even purport to limit the validity of the National Firearms Act. Instead, the Second Amendment Protection Act simply recognizes that there are important limits on congressional authority under the federal Commerce Power, and under the Second, Ninth, and Tenth Amendments. *See* Kan. Br. 11-14.

3. Finally, the government claims the Kansas Legislature "has no authority to opine on the scope of the crime at issue," that is, the scope of the National Firearms Act. Gov't Br. 51-52 n.17. But whether the

government likes it or not, our country was founded on the "counterintuitive insight" that "'freedom is enhanced by the creation of two governments, not one." *Bond v. United States*, 564 U.S. 211, 220-21 (2011) (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)). The "allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived." *Id.* at 221. So both individuals and States have a "direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable." *Id.* at 222.

II. The Second Amendment Applies to Silencers.

The Second Amendment protects an individual "right of the people to keep and bear Arms" that are in common use for traditionally lawful purposes. *Heller*, 554 U.S. at 624, 627, 635. Surprisingly, the federal government urges the Court to drastically roll back this fundamental right by limiting the types of weapons that count as "Arms" under the Second Amendment and by imposing on "the people" an onerous and

unfounded burden of showing that their arms are commonly used for self-defense. There is no support for either limitation on the Second Amendment.

When the government claims that a law regulates weapons not covered by the Second Amendment, it bears a heavy burden of showing through conclusive historical evidence that the weapon is outside the scope of Second Amendment protection as it was understood historically. *See Ezell v. City of Chicago*, 651 F.3d 684, 702-03 (7th Cir. 2011). The First Amendment, which *Heller* repeatedly references as a model for interpreting and applying the Second Amendment, provides an apt analogy. For example, some categories of speech, such as obscenity, defamation, fraud, and incitement, are not protected by the First Amendment as a matter of history and tradition. *See United States v. Stevens*, 559 U.S. 460, 470 (2010). But the burden is on the government to show that a particular law regulates speech falling in one of those limited historically recognized categories. *See Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 791-92 (2011). The government bears a similar burden here, as it claims silencers are categorically beyond

Second Amendment protection, and it has failed to carry its burden. *See, e.g.*, *Ezell*, 651 F.3d at 702-03.

A. Silencers are "Arms" the Second Amendment protects.

The federal government first argues that silencers are not "Arms" within the meaning of the Second Amendment because silencers are firearm accessories that are not integral to the operation of a gun. Gov't Br. 33. The government cites no support for its perfunctory conclusion. But it is not at all obvious that silencers are not "arms" just because they are detachable. *See People v. Shreffler*, 38 N.E.3d 145, 151 (Ill. App. Ct. 2015) (no basis for the court to "conclude that a flash suppressor—which undisputedly serves a functional purpose—is not part of a gun simply because it can be unscrewed and removed from the other parts of the gun"). After all, Congress included silencers in its definition of "firearm." 26 U.S.C. § 5845(a).

Nor does the government respond to the State's argument that silencers are a modern-day analog to the various firearm accoutrements that *United States v. Miller*, 307 U.S. 174 (1939), says the Second Amendment protects. *Id.* at 180-82; *see also Heller*, 554 U.S. at 582 ("[T]he Second Amendment extends, prima facie, to all instruments that

constitute bearable arms, even those that were not in existence at the time of the founding."); Kansas Br. 17.

There is no support, in logic, history, or caselaw, for limiting the Second Amendment to protecting only firearm accessories that are necessary for the firearm to function. Under the government's reasoning, the Second Amendment would not apply to countless other firearm accessories commonly used for lawful purposes, such as scopes and laser sights, specific types of ammunition and magazines, recoil pads and specific handle grips. If this Court were to adopt the government's argument, the Tenth Circuit would become an outlier among its sister circuits in taking such a limited view of fundamental Second Amendment rights. *See, e.g.*, *Jackson v. City & County of San Francisco*, 746 F.3d 953, 967-68 (9th Cir. 2014) (holding that the Second Amendment applies to hollow-point bullets); *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) ("*Heller II*") (assuming the Second Amendment applies to semi-automatic rifles and magazines holding 10 or more rounds); *Ezell*, 651 F.3d at 704-08 (granting preliminary injunction of Chicago's ban on firing-ranges within the city, concluding the ban was subject to Second Amendment scrutiny and was not likely to survive).

B. Silencers are in common use for lawful purposes.

1. Citing *Heller*, the federal government claims that when it indisputably restricts the right of the people to keep and bear arms, the people bear the heavy burden of showing not only that their arms are in common use, but also commonly used for self-defense. *Heller* requires nothing of the sort. *See Ezell*, 651 F.3d at 702-03.

Heller recognized 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." *Heller*, 554 U.S. at 625. *Heller* recognized that the "core" (though not only) protected lawful purpose is self-defense, including defense of the home. 554 U.S. at 630; *see also id.* at 624-25. Other lawful purposes, by definition and at a minimum, include hunting, recreational (*e.g.*, skeet or target) shooting, among other lawful uses of firearms.

The government does not contest that silencers offer valuable benefits related to self-defense. *See* Gov't Br. 34. Silencers improve accuracy by reducing recoil and also reduce hearing loss and

disorientation after firing, which could give the victim of a crime 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); Cox Br. 45-46. In addition, responsible gun owners likely will desire to practice shooting to better prepare themselves for effective self-defense. Silencers would provide important hearing protection during such practice, and the hearing protection silencers provide would encourage more firearms practice, which is not only desirable but also independently protected by the Second Amendment. *See Ezell*, 651 F.3d at 704-08 (stating that Chicago's ban on firing ranges was "a serious encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense."); Kansas Br. 20-21.

Instead, the government argues that no person can claim the protections of the Second Amendment unless they first establish that the arms they seek to keep and bear are possessed by a *significant proportion* of the United States' population for the *specific purpose* of defending themselves and their homes. Gov't Br. 34-35. The burden the government

seeks to impose on people asserting their right to keep and bear arms is substantial and unfounded. Even the examples the government cites—50 million large-capacity magazines in circulation and semi-automatic rifles that make up 5.5% of the domestic firearm market—would not meet its test, which apparently requires empirical evidence of not just the total number of weapons in circulation but also the sub-set of those weapons possessed for self-defense.

If anything, the government's examples undermine its argument. Neither case the government cites limited the inquiry to whether the weapons at issue were used for self-defense. *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 256-57 (2d Cir. 2015) (asking whether "assault weapons and large-capacity magazines are 'typically possessed by law-abiding citizens for lawful purposes,'" including "self-defense *and hunting*" (emphasis added) (quoting *Heller*, 554 U.S. at 625)); *Heller II*, 670 F.3d at 1261 (asking whether semi-automatic rifles and magazines holding 10 or more rounds "are commonly used or are useful specifically for self-defense *or hunting* and therefore whether the prohibitions of [such weapons] meaningfully affect the right to keep and bear arms" (emphasis added)).

In fact, in both cases the government relies upon the lower courts found that requiring proof that gun owners typically possess the weapons for particular purposes was unworkable. *New York State Rifle & Pistol Ass'n*, 804 F.3d at 256-57 (finding the inquiry into "broad patterns of use and the subjective motives of gun owners" to be "elusive" and therefore assuming large-capacity magazines and assault rifles were "typically possessed by law-abiding citizens for lawful purposes"); *Heller II*, 670 F.3d at 1261 (assuming the Second Amendment applied because "we cannot be certain whether these weapons are commonly used or are useful specifically for self-defense or hunting").

2. Doubling down on its argument that the defendants must show that silencers are in common use *for self-defense*, the government suggests that the use of silencers in hunting and sport shooting has no bearing on whether the Second Amendment applies because those activities are not related to defense of the person and home. Gov't Br. 37.

The government is correct that *Heller* recognizes defense of self and home as a "core" purpose for protecting the individual right to keep and bear arms. But *Heller* does not draw a bright line between arms used for hunting and arms used for self-defense, as the government suggests. *See,*

e.g., 554 U.S. at 590 (suggesting that hunting rifles could be used for self-defense). *Heller* even equated the importance of the use of arms for self-defense and hunting. *See id.* at 599 (preserving the militia was not the only reason Americans valued the ancient right to keep and bear arms; "most undoubtedly thought it even more important for self-defense and hunting."); *see also Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1130 (10th Cir. 2015) (Tymkovich, J., concurring in part and dissenting in part) (while the "Second Amendment protects the right of self-defense, the need for which is most acute in the home," the "Amendment also guarantees the right to possess and carry weapons in case of confrontation" and "the founding generation believed the right important for both self-defense and hunting" (internal quotation marks omitted)).

Regardless whether preserving the right to use arms for hunting was a "core" purpose of the Second Amendment, *Heller* makes clear that using arms for hunting is a protected lawful purpose. *See* 554 U.S. at 589 (referencing the right to bear arms for the purpose of killing game); *id.* at 606 (noting that the most important early American edition of Blackstone's Commentaries (by St. George Tucker) 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" (internal quotation marks omitted)); *see also Bonidy*, 790 F.3d at 1130 (Tymkovich, J., concurring in part and dissenting in part); *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)).

Even if silencers are most commonly used by hunters and sport shooters, the use of silencers for those purposes is both common and lawful. It is difficult to escape the common sense and factually supported conclusion that the possession and use of silencers for these activities is a lawful purpose of keeping and bearing arms. Thus, the Second Amendment protects the possession of silencers.

3. Finally, the government claims that *all* courts to consider the question have rejected the argument that the Second Amendment protects the use of silencers. But just last year a *federal* court struck down a ban on flash suppressors, holding that such a ban violates the Second Amendment. *Murphy v. Guerrero*, No. 14-cv-26, 2016 WL 5508998, at *19 (D. N. Mar. I. Sept. 28, 2016) (unpublished). The court understood flash suppressors to be much like silencers—an attachment to the front barrel

of a rifle that reduces noise and potentially increases accuracy. *Id.* The court not only concluded that the ban could not survive intermediate scrutiny but stated that the suppressors actually "make self-defense safer for everyone" by improving the accuracy of firearms thereby reducing stray bullets. *Id.* at 20.

Moreover, the scant reasoning of the cases on which the government relies is just as unpersuasive as the District Court's reasoning in the cases now on appeal in this Court. *See* Kan. Br. 18-19. For example, the government cites *United States v. McCartney*, 357 F. App'x 73, 76 (9th Cir. 2009) (unpublished), which said that silencers are less common and more dangerous than short-barreled shotguns and machineguns. Gov't Br. 38. That is absurd and utterly unsupported. According to Bureau of Alcohol, Tobacco, Firearms and Explosives statistics cited elsewhere in the government's brief, as of February 2016, there were 902,805 *silencers* registered in the United States, but only 575,602 machineguns and 140,474 short barreled shotguns. *Firearms Commerce in the United States: Annual Statistical Update 2016* 15, *available at* https://www.atf.gov/resource-center/docs/2016-firearms-commerce-united-states/download. Equally telling, the government has

not offered a shred of evidence that silencers are dangerous or unusual. Kan. Br. 22-23. And the government certainly has not shown, through conclusive historical evidence, that silencers are categorically outside the scope of Second Amendment protection as it has been understood historically. *See Ezell*, 651 F.3d at 702-03.

4. The proper test for whether the Second Amendment protects silencers is whether silencers are "typically possessed by law-abiding citizens for lawful purposes," *Heller*, 554 U.S. at 625, such as self-defense, hunting, and target or sport shooting. Kansas and the defendants have shown—without meaningful contradiction or rebuttal by the government—that silencers are used precisely for these lawful purposes.

The Second Amendment, which "extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding," therefore applies to silencers. *Id.* at 582. Kansas and the government (and to some extent Cox) agree that the remaining question—whether the National Firearms Act's restrictions on silencers passes Second Amendment scrutiny—should be resolved by the District Court in the first instance on remand. Kan. Br. 24-25; Gov't Br. 44; Cox Br. 51-52.

CONCLUSION

Kansas respectfully requests that the Court reject the government's argument that the National Firearms Act preempts the Second Amendment Protection Act, reverse the District Court's decision that the Second Amendment does not protect the possession of silencers, and remand the case to the District Court for a determination—following briefing and an evidentiary hearing—whether the National Firearms Act's regulation of and restrictions on silencers violate the Second Amendment.

Respectfully submitted,

OFFICE OF ATTORNEY GENERAL DEREK SCHMIDT

s/ Derek Schmidt

Derek Schmidt
Attorney General of Kansas
Jeffrey A. Chanay
Chief Deputy Attorney General
Stephen R. McAllister
Solicitor General of Kansas
Dwight R. Carswell
Assistant Solicitor General
Bryan C. Clark
Assistant Solicitor General

Memorial Bldg., 2nd Floor
120 SW 10th Ave., 2nd Floor
Topeka, KS 66612-1597
Tel: (785) 296-2215
E-mail: general@ag.ks.gov
jeff.chanay@ag.ks.gov
steve.mcallister@trqlaw.com
dwight.carswell@ag.ks.gov
bryan.clark@ag.ks.gov

Attorneys for Intervenor State of Kansas

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This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 3,014 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(b), as calculated by the word-counting function of Microsoft Word 2013.

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I certify that a copy of the foregoing Reply Brief of Intervenor State of Kansas, as submitted in digital form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Sophos Endpoint Security and Control (version 10.7), last updated November 7, 2017. According to the program, the document is free of viruses. No privacy redactions were necessary in this document.

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I hereby certify that on the 7th day of November 2017, I electronically filed the foregoing Reply Brief of Intervenor State of Kansas with the Clerk of the Tenth Circuit Court of Appeals using the CM/ECF system. I certify that that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I also certify that I caused seven hard copies to be delivered to the Clerk's Office by Federal Express within two business days of this filing.

Dated: November 7, 2017 s/ Derek Schmidt