No. 25-5150

In the
Supreme Court of the United States

DAVID ROBINSON JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF AMICUS CURIAE THE SECOND AMENDMENT FOUNDATION, SECOND AMENDMENT LAW CENTER, CALIFORNIA RIFLE & PISTOL ASSOCIATION, INC., AND MINNESOTA GUN OWNERS CAUCUS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
AMICUS CURIAE STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. SBRs Are "Arms" Under the Plain Text of the Second Amendment	4
A. The simple "plain text analysis," as it applies to SBRs	4
B. This court must step in soon to correct errant circuit courts	6
II. There Is No Relevant History of Restrictions on Firearms Based on Their Barrel Length	10
III. When Properly Applied, *U.S. v. Miller* Confirms that SBRs Are Protected Arms	13
IV. Special Taxes on Protected Arms Lack Historical Support	18
CONCLUSION	24

TABLE OF AUTHORITIES

Page(s)

Andrews v. State,
50 Tenn. 165 (1871) 15

Aymette v. State,
21 Tenn. 154 (1840) 15

Bevis v. City of Naperville,
85 F.4th 1175 (7th Cir. 2023) 6

Bianchi v. Brown,
111 F.4th 438 (4th Cir. 2024) 9

District of Columbia v. Heller,
554 U.S. 570 (2008) 6, 10, 11, 13, 14, 16, 19

Duncan v. Bonta,
83 F.4th 803 (9th Cir. 2023) 9

Duncan v. Bonta,
133 F.4th 852 (9th Cir. 2025) 3, 7

Duncan v. Bonta,
142 S. Ct. 2895 (2022) 8

Duncan v. Bonta,
695 F. Supp. 3d 1206 (S.D. Cal. 2023)..... 8, 10

Harrel v. Raoul,
144 S. Ct. 2491 (2024) 3

Luis v. United States,
578 U.S. 5 (2016) 5

McDougall v. Cty. of Ventura,
23 F.4th 1095 (9th Cir. 2022) 6

Mock v. Garland,
75 F.4th 563 (5th Cir. 2023) 12

N.Y. State Rifle & Pistol Ass'n v. Bruen,
597 U.S. 1 (2022) 3-6, 8, 13, 16-18, 21

Nunn v. State,
1 Ga. 243 (1846) 21

Snope v. Brown,
145 S. Ct. 1534 (2025) 3, 5, 7, 9

United States v. Bridges,
No. 24-5874, slip op. (6th Cir. Aug. 7,
2025) 7, 10

United States v. Jennings,
195 F.3d 795 (5th Cir. 1999) 17

United States v. Miller,
307 U.S. 174 (1939) 4, 10, 13-18

United States v. Rahimi,
602 U.S. 680 (2024) 4-6, 17, 20

United States v. Robinson,
No. 23-12551, 2025 U.S. App. LEXIS 6544
(11th Cir. Mar. 20, 2025) 16, 17

Yukutake v. Lopez,
130 F.4th 1077 (9th Cir. 2025) 5

CONSTITUTION

U.S. Const. amend. II 1-7, 9-11, 13-16, 18, 24

STATUTES

An Act Entitled Revenue, ch. 34, § 23, pt. 4, 1856-1857 N.C. Pub. Laws..... 22

COURT FILINGS

Br. for United States, *United States v. Miller*, 307 U.S. 174 (1939)..... 16

Complaint, *Brown v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 4:25-cv-01162 (E.D. Mo. filed Aug. 1, 2025) 1

Order, *Duncan v. Bonta*, No. 23-55805 (9th Cir. Sept. 28, 2023), ECF No. 3..... 8, 9

Order, *Yukutake v. Lopez*, No. 21-16756, 2025 U.S. App. LEXIS 18691 (9th Cir. July 28, 2025) 5

Petition for Writ of Certiorari, *Rush v. United States*, No. 24-1259 (U.S. June 6, 2025) 7

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Acts and Laws of His Majesty's Province of New Hampshire in New England: With Sundry Acts of Parliament; by Order of the Governor, Council and Assembly, Pass'd October 16th, 1759 (Daniel Fowle, Portsmouth, NH 1761) 20

Acts of the General Assembly of the Commonwealth of Kentucky (J. Bradford, Frankfort 1857) 23

Acts of the Legislative Council, of the Territory of Florida, Passed at its Sixteenth Session, Commencing Monday January 1st, and Ending Sunday February 11th, 1838. With also the Resolutions of a Public or General Character Adopted by the Legislative Council (S.S. Sibley, Printer, Tallahassee, FL 1838) 21

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David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. Legis. 223 (2024) 11

Documented 12 Inch Barrel Winchester Model 1892 Trapper Carbine, Rock Island Auction Co. (May 15, 2021), https://www.rockislandauction.com/detail/82/1089/documented-12-inch-barrel-winchester-model-1892-trapper-carbine .. 12

H. Journal, 42nd Cong., 2d Sess. 716 (1872) 22

Henry Campbell Black, *Handbook of American Constitutional Law* (1895) 15

Joseph Bartlett Burleigh, *The American Manual: Containing a Brief Outline of the Origin and Progress of Political Power and the Laws of Nations* (1852)..... 14

Joseph G.S. Greenlee, *The Tradition of Short-Barreled Rifle Use and Regulation in America*, 25 Wyo. L. Rev. 111 (2025) 11, 18

Laws of the State of Mississippi (C.M. Price & S. Rohrer 1844) 20

Laws, Statutes, Ordinances and Constitutions, Ordained, Made and Established, by the Mayor, Aldermen, and Commonalty, of the City of New York, Convened in Common-Council, for the Good Rule and Government of the Inhabitants and Residents of the Said City (John Holt, New York 1763) 19

M4 Carbine, Military.com (Jan. 18, 2023), https://www.military.com/equipment/m4-carbine 14

Robert Leider, *The Individual Right to Bear Arms for Common Defense* (Dec. 17, 2024), https://ssrn.com/abstract=4918009..... 15

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AMICUS CURIAE STATEMENT OF INTEREST

The Second Amendment Foundation ("SAF") is a non-profit membership organization founded in 1974 with over 720,000 members and supporters in every state of the union. Its purposes include education, research, publishing, and legal action focusing on the constitutional right to keep and bear arms. Currently, SAF is involved in other litigation concerning short-barreled rifles and thus has great interest in the outcome of this case. *See* Complaint, *Brown v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 4:25-cv-01162 (E.D. Mo. filed Aug. 1, 2025).[1]

The Second Amendment Law Center ("2ALC") is a nonprofit corporation in Henderson, Nevada. The Center defends the individual right to keep and bear arms as envisioned by the Founders. 2ALC also educates the public about the social utility of firearm ownership and provides accurate historical, criminological, and technical information to policymakers, judges, and the public.

Founded in 1875, the California Rifle and Pistol Association, Incorporated, ("CRPA") is a nonprofit organization that seeks to defend the Second Amendment and advance laws that protect the rights

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[1] No counsel for a party authored this brief in whole or in part, nor did such counsel or any party make a monetary contribution to fund this brief. No person other than the amicus parties, its members or counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The Parties were notified that this brief would be filed on July 28, 2025, in compliance with Rule 37.2.

of individual citizens. CRPA works to preserve the constitutional and statutory rights of gun ownership, including the right to self-defense, the right to hunt, and the right to keep and bear arms. CRPA is also dedicated to promoting shooting sports, providing education, training, and competition for adult and junior shooters. CRPA's members include law enforcement officers, prosecutors, professionals, firearm experts, and members of the public. In service of these ends, CRPA regularly participates as a party or amicus in firearm-related litigation.

Minnesota Gun Owners Caucus ("MGOC") is a 501(c)(4) non-profit organization incorporated under the laws of Minnesota with its principal place of business in Shoreview, Minnesota. MGOC seeks to protect and promote the right of citizens to keep and bear arms for all lawful purposes. MGOC serves its members and the public through advocacy, education, elections, legislation, and legal action. MGOC's members reside both within and outside Minnesota.

SUMMARY OF ARGUMENT

This Court frequently deals with some of the most complex legal questions of our time. This is not one of them. A short-barreled rifle ("SBR") is indisputably an "arm" under the plain text of the Second Amendment, and so any restrictions on it must comport with history. Because the Eleventh Circuit failed to engage in a historical analysis, it must be reversed. Further, the particular restriction imposed here, an onerous tax, has no distinctly similar historical laws to point to, and it too must crumble.

This petition provides a low-pressure way for this Court to begin to clarify that the Second Amendment does indeed apply to all commonly owned bearable arms, something several members of this Court have already indicated they are interested in doing. *Snope v. Brown*, 145 S. Ct. 1534, 1535 (2025) (Kavanaugh, J., statement regarding denial of certiorari) ("Additional petitions for certiorari will likely be before this Court shortly and, in my view, this Court should and presumably will address the AR-15 issue soon, in the next Term or two."); *see also Harrel v. Raoul*, 144 S. Ct. 2491, 2492-93 (2024) (Thomas, J., statement regarding denial of certiorari) ("It is difficult to see how the Seventh Circuit could have concluded that the most widely owned semiautomatic rifles are not 'Arms' protected by the Second Amendment.").

There has been enough "percolation," and the results are clear: lower courts in several circuits will keep reaching unserious rulings in order to do everything they can to undermine the Second Amendment and this Court's ruling in *Bruen*. "[F]urther percolation is of little value when lower courts in the jurisdictions that ban AR-15s appear bent on distorting this Court's Second Amendment precedents." *Snope*, 145 S. Ct. at 1538 (Thomas, J., dissenting from denial of certiorari). This Court need not take Amici's word for it; several judges in the lower courts have criticized their colleagues for giving "a judicial middle finger" to this Court when it comes to the Second Amendment. *Duncan v. Bonta*, 133 F.4th 852, 890 (9th Cir. 2025) (R. Nelson, J., dissenting).

The Petitioner makes a compelling argument for why certiorari is appropriate here. Amici submit this brief to emphasize: (1) why SBRs are plainly "arms" under the Second Amendment; (2) the lack of any historical tradition to support the NFA's restrictions on them; (3) how the Eleventh Circuit misunderstood *Miller*; and (4) the importance of this Court confirming that special taxes on protected arms are unconstitutional.

ARGUMENT

I. SBRs Are "Arms" Under the Plain Text of the Second Amendment.

A. The simple "plain text analysis," as it applies to SBRs.

By its plain language, *Bruen* eschews a two-step analytical test for deciding Second Amendment challenges: "Despite the popularity of th[e] two-step approach, it is one step too many." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 19 (2022). Indeed, just last year, this Court reiterated its one-step substantive analysis: "In *Bruen*, we explained that when a firearm regulation is challenged under the Second Amendment, the United States must show that the restriction 'is consistent with the Nation's historical tradition of firearm regulation.'" *United States v. Rahimi*, 602 U.S. 680, 689 (2024) (citing *Bruen*, 597 U.S. at 24); *see also id.* at 691 ("when the Government regulates arms-bearing conduct, . . . it bears the burden to 'justify its regulation.'").

To be sure, a Second Amendment challenge requires that the restriction at least *implicate* the right to keep and bear arms. *Bruen*, 597 U.S. at 17.

That's why a plaintiff challenging a gun law "has the initial burden of showing that 'the Second Amendment's plain text covers [his] conduct.' " *Snope*, 145 S. Ct. at 1538 (Thomas, J., dissenting from denial of certiorari) (quoting *Bruen*, 597 U.S. at 17.). Just as a First Amendment free speech case must involve speech, so too must a Second Amendment case involve the acquisition, ownership, possession, carry, use of, or commerce in, arms.[2] This is not meant to be an intensive analytical step, but rather a simple qualifier. For example, if a law in any way regulates arms-bearing conduct, the plain text is met. *Id*. at 1536 (Thomas, J., dissenting from denial of certiorari) (quoting *Rahimi*, 602 U.S. at 691.).

This discussion is critical here because, ever since *Bruen* was decided, courts have exaggerated the requirements of the "first step" to dodge the historical analysis altogether, shifting the burden away from the government. Under these "extremely narrow reading[s]," the Second Amendment is "wrongly. . .reduced to 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" *Yukutake v. Lopez*, 130 F.4th 1077, 1092 (9th Cir. 2025) (citing *Bruen*, 597 U.S. at 70).[3] This

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[2] *See Luis v. United States*, 578 U.S. 5, 26 (2016) (Thomas, J., concurring in the judgment) ("Constitutional rights thus implicitly protect those closely related acts necessary to their exercise.").

[3] Unsurprisingly, because *Yukutake* was a Ninth Circuit ruling that sided with plaintiffs challenging a gun law, it has now been vacated to be reheard en banc. Order, *Yukutake v. Lopez*, No. 21-16756, 2025 U.S. App. LEXIS 18691 (9th Cir. July 28, 2025). This has historically always been the case in the Ninth Circuit, leading to an over 0-50 record for those seeking to

exaggerated "plain text analysis" approach ultimately allows lower courts to treat obvious arms-related questions as though they are not, making a mockery of both the Second Amendment and *Bruen*.[4]

Here, it is not even a close question whether SBRs are "arms" that meet the plain text of the Second Amendment because they are undoubtedly "weapon[s] of offence" that a person "takes into his hands, or useth in wrath to cast at or strike another." *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008) (citing founding-era dictionaries). Indeed, as one 1794 thesaurus observed, "*all firearms* constituted 'arms.'" *Id*. (emphasis added).

B. This court must step in soon to correct errant circuit courts.

Determining whether a particular firearm is an "arm" under the plain text of the Second Amendment is thus simple and straightforward. Yet so many circuits are struggling with this question, as they are

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vindicate Second Amendment rights. *Rahimi*, 602 U.S. at 712 (Gorsuch, J., concurring); *see also McDougall v. Cty. of Ventura*, 23 F.4th 1095, 1119 (9th Cir. 2022) (VanDyke, J., concurring) (explaining that when a panel of the Ninth Circuit enforces the Second Amendment, the ruling "will almost certainly face an en banc challenge. . .[that] is *always* what happens when a three-judge panel upholds the Second Amendment in [the Ninth Circuit].").

[4] For example, in *Bevis v. City of Naperville*, 85 F.4th 1175, 1191 (7th Cir. 2023), the Seventh Circuit ruled that any weapon that in the court's estimation is most useful for military purposes is not covered by the Second Amendment at the plain text step. This reasoning would lead to absurd results. For instance, muskets—the quintessential arms of the founding era—would not be protected due to their widespread military use at the time.

with questions pertaining to "common use," questions about whether arms used by the military are excluded (and not just the "dangerous and unusual" ones), and more. *See Rush v. United States*, No. 24-1259, Petition for Writ of Certiorari at 8–18 (U.S. June 6, 2025) (summarizing questions some Circuit Courts are getting wrong).

What's important to understand about all of this supposed confusion is that it is primarily contained in only particular circuit courts. It is no coincidence that the courts reaching these obviously erroneous conclusions about the Second Amendment are the very same ones that have long demonstrated hostility to the right it protects. In any good faith analysis, it would be "difficult to see how [a] categorical prohibition on [common firearms] passes muster. . ." *Snope*, 145 S. Ct. at 1535 (Thomas, J., dissenting from denial of certiorari).[5] When a circuit *does* get this simple question right, the straightforward discussion stands in stark contrast to the tortured logic of the others. *See, e.g., United States v. Bridges*, No. 24-5874, slip op. at 9–10 (6th Cir. Aug. 7, 2025) (upholding machine gun ban under historical tradition, but only after easily deciding machine guns are at least clearly "arms" under the Second Amendment).

Some dissenting judges in the circuits most hostile to the Second Amendment do not consider their colleagues' rulings to be defensible. Consider *Duncan*

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[5] This case is a little odd in that the Eleventh Circuit is not usually among the circuits regularly erring on Second Amendment questions. But they did here, which perhaps further underscores the need for this Court to provide more clarity.

v. Bonta, a Ninth Circuit case challenging California's ban on magazines holding more than ten rounds that will soon be before this court again on a petition for certiorari. The case has been percolating since 2017 and was previously remanded by this Court following *Bruen*. *See Duncan v. Bonta*, 142 S. Ct. 2895 (2022) (mem.). After remand, the district court again struck down California's law under the *Bruen* framework. *Duncan v. Bonta*, 695 F. Supp. 3d 1206, 1255 (S.D. Cal. 2023). In a seemingly unprecedented move, however, the Ninth Circuit en banc panel that had heard the previous appeal reassumed control of the case—bypassing the typical three-judge panel—to ensure a preordained result. Order 1, *Duncan v. Bonta*, No. 23-55805 (9th Cir. Sept. 28, 2023), ECF No. 3.

As noted by Judge VanDyke in his dissent:

> Apparently, even summary reversal by the Supreme Court has not tempered the majority's zeal to grab this case as a comeback, stay the district court's decision, and make sure they—not the original three-judge panel—get to decide the emergency motion (and ultimately, the eventual merits questions) in favor of the government. I think it is clear enough to everyone that a majority of this en banc panel will relinquish control of this case only when it is pried from its cold, dead fingers. And I think it is clear enough to everyone why.

Id. at 5 (VanDyke, J. dissenting).[6]

Similarly, in *Snope*, which this Court unfortunately denied cert on recently, a three-judge panel deliberated for over a year, only for the Fourth Circuit to suddenly decide to "rehear" the case en banc—without even waiting for the panel's ruling. *See Bianchi v. Brown*, 111 F.4th 438, 484 n.2 (4th Cir. 2024) (Richardson, J., Niemeyer, J., Agee, J., Quattlebaum, J., and Rushing, J., dissenting) (explaining the suspicious and unorthodox circumstances of the case's procedural posture).

Gun rights litigants in hostile circuits stand little chance of success when the system is so heavily stacked against them. As several dissenting Ninth Circuit judges put it, "[i]f the protection of the people's fundamental rights wasn't such a serious matter, our court's attitude toward the Second Amendment would be laughably absurd." *Duncan v. Bonta*, 83 F.4th 803, 808 (9th Cir. 2023) (Bumatay, J., Ikuta, J., R. Nelson, J., and VanDyke, dissenting).

If nothing else, this Court should grant certiorari to confirm that when a ban of a firearm is at issue, the historical analysis must proceed because all firearms are at least "arms" under the plain text of the Second Amendment. "[J]ust because we regulate (or ban) certain arms doesn't mean that they aren't arms to

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[6] Judge VanDyke's dissent also revealed, for the first time, the questionable circumstances under which the Ninth Circuit granted en banc review of California's first appeal in 2020 following the plaintiffs' initial victory. Apparently, the Ninth Circuit had missed its own deadline for en banc review but circumvented its rules to proceed regardless. *Id*. at 7.

begin with." *Bridges*, slip op. at 44 (Nalbandian, J., concurring in part and concurring in the judgment).

From there, the only relevant question left at the historical step is whether the regulated firearm qualifies within the historical tradition of restricting "dangerous and unusual" weapons. *Heller*, 554 U.S. at 627. Ultimately, courts may not dodge the required analysis by claiming otherwise, or by, as the Second Circuit did here, claiming that *Miller* resolves whether or not SBRs may be restricted.

Regardless of the ultimate constitutionality of restrictions on the use of SBRs, it is unserious to assert that they are not even "arms" presumptively protected by the Second Amendment. They clear—at least—that low bar.

II. There Is No Relevant History of Restrictions on Firearms Based on Their Barrel Length.

The desire of many courts to avoid a rigorous historical analysis whenever possible is likely because they are aware that there is so little history supporting restrictions on common firearms. "Though it is the State's burden, even after having been offered plenty of opportunity to do so, the State has not identified any law, anywhere, at any time, between 1791 and 1868 that prohibited simple possession of a gun or its magazine or any container of ammunition." *Duncan v. Bonta*, 695 F. Supp. 3d 1206, 1242 (S.D. Cal. 2023). A recent law review article agreed:

> In sum, the nineteenth century history of firearms bans is not helpful for justifying

> prohibitions today on semiautomatic firearms. The only pre-1900 statutory precedent for such a law is from Florida in 1893, and it is dubious. Before that, there were three prior sales prohibitions that covered many or most handguns. One of these was held to violate the Second Amendment, and the other two are plainly unconstitutional under *Heller*.

David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. Legis. 223, 293 (2024).

SBRs are no different, and they existed long before the National Firearms Act. For example, the popular Winchester 1892 "Trapper" model came in 14", 15" and 16" version, the first two of which, if made again today, would be classified as SBRs. *This Old Gun: Winchester Model 1892 'Trapper'*, American Rifleman (Aug. 9, 2022), https://www.americanrifleman.org/content/this-old-gun-winchester-model-1892-trapper/; *see also* Joseph G.S. Greenlee, *The Tradition of Short-Barreled Rifle Use and Regulation in America*, 25 Wyo. L. Rev. 111, 127 (2025) ("Winchester produced several of its popular lever-action repeating arms in models with short barrels, sometimes called 'Baby Carbines,' 'Trapper Models,' or most often by Winchester, 'Special Short Carbines.').

A Winchester 1892 "Trapper" Model With a 12 Inch Barrel[7]

Modern SBRs remain popular today despite the NFA's burdens on them, with over 870,000 registered rifles in circulation. *Bureau of Alcohol, Tobacco, Firearms & Explosives, Annual Firearms Manufacturing and Export Report 2024*, at 12 (2024), https://www.atf.gov/resource-center/docs/report/-2024firearmscommercereportpdf.

Moreover, very similar firearms that are not subject to the same legal requirements, non-NFA-regulated pistols (which usually differ from SBRs only in that they have a pistol brace instead of a shoulder stock) number between 3 and 7 million. *See Mock v. Garland*, 75 F.4th 563, 572 (5th Cir. 2023) (citing ATF's 2023 estimates). Identical firearms with barrels mere inches longer likewise number in the millions.

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[7] *Documented 12 Inch Barrel Winchester Model 1892 Trapper Carbine*, Rock Island Auction Co., (May 15, 2021), https://www.rockislandauction.com/detail/82/1089/documented-12-inch-barrel-winchester-model-1892-trapper-carbine.

III. When Properly Applied, *U.S. v. Miller* Confirms that SBRs Are Protected Arms.

Rather than going through the historical test of *Heller* and *Bruen*, the Eleventh Circuit turned back the clocked to *US v. Miller*. It should not have done so, and this Court should direct it to conduct the proper analysis under *Bruen* to determine whether SBRs fall within the historical tradition of "dangerous and unusual" weapons (and Amici believe they clearly do not). Yet even in working from only the outdated standard set forth in *Miller*, the Eleventh Circuit still reached an erroneous result.

In its own way, *United States v. Miller* implicitly confirmed that the Second Amendment recognizes an individual right, because "[h]ad the [*Miller*] Court believed that the Second Amendment protects only those serving in the militia, it would have been odd to examine the character of the weapon rather than simply note that the two crooks were not militiamen." *Heller*, 554 U.S. at 622. *Miller* ultimately concluded only that "in the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." *United States v. Miller*, 307 U.S. 174, 178 (1939).

Here, there is no such absence of evidence. Not only are many SBRs combat arms of the kind that would be useful to a militia, but they are the main firearm in that role; the M4 carbine is our military's

most common service rifle, and it has a barrel length of 14.5 inches. *M4 Carbine*, Military.com (Jan. 18, 2023), https://www.military.com/equipment/m4-carbine. In the civilian context, where it would be sold in a semiautomatic form, that would make the most common military rifle an SBR subject to the NFA's tax, which applies to rifles that have barrels under 16 inches in length.

To the extent then that *Miller* still tells us anything at all about which "arms" are protected—Amici believe (and *Heller* confirmed) that its limitation of the Second Amendment to cover only arms useful to a militia is far too constrictive of the individual self-defense side of the Second Amendment—it stands for the proposition that SBRs cannot be unilaterally excluded from the scope of the right to keep and bear arms, given their prevailing use today for the very sort of combat role *Miller* was looking for.

Significant history confirms that the Second Amendment was meant to protect such arms most of all. "Arms. . .is used for whatever is intentionally made as an instrument of offence. . ." Joseph Bartlett Burleigh, *The American Manual: Containing a Brief Outline of the Origin and Progress of Political Power and the Laws of Nations* 31 (1852). Burleigh contrasted "arms" with the term "weapons," which are instruments of offense or defense: "We say firearms, but not fire-weapons; and weapons offensive or defensive, but not arms offensive or defensive." *Id*. Henry Campbell Black, the original author of the renowned *Black's Law Dictionary* wrote that the arms protected are "those of a soldier … the citizen has at

all times the right to keep arms of modern warfare." Henry Campbell Black, *Handbook of American Constitutional Law* 403-04 (1895). He contrasted such arms with "other weapons as are used in brawls, fights, and riots." *Id*.[8]

Court decisions of the era agreed. In an 1871 case about a law restricting the carry of a "dirk, swordcane, Spanish stiletto, belt or pocket pistol or revolver," the Supreme Court of Tennessee upheld the law—except as it pertained to revolvers that soldiers used. *Andrews v. State*, 50 Tenn. 165, 187 (1871); *see also Aymette v. State*, 21 Tenn. 154, 158 (1840) ("[T]he arms the right to keep which is secured are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment.").

The United States itself, in its briefing in *Miller*, agreed that the Second Amendment protected combat arms that would be useful in a militia meant to defend against foreign invasion or tyrannical government:

> [I]t would seem that the early English law did not guarantee an unrestricted right to bear arms. Such recognition as existed of a right in the people to keep

[8] Many additional examples of this sort of historical commentary abound and have been detailed in a law review article coauthored by Amici's counsel. *See* C.D. Michel & Konstadinos Moros, *Restrictions "Our Ancestors Would Never Have Accepted": The Historical Case Against Assault Weapon Bans*, 24 Wyo. L. Rev. 89, 90 (2024). While the focus of that article was the Second Amendment's anti-tyranny purpose, another article covers the common defense rationale. *See* Robert Leider, *The Individual Right to Bear Arms for Common Defense* (Dec. 17, 2024), available at https://ssrn.com/abstract=4918009.

> and bear arms appears to have resulted from oppression by rulers who disarmed their political opponents and who organized large standing armies which were obnoxious and burdensome to the people. This right, however, it is clear, gave sanction only to the arming of the people as a body to defend their rights against tyrannical and unprincipled rulers. It did not permit the keeping of arms for purposes of private defense.

Br. for United States at 11-12, *United States v. Miller*, 307 U.S. 174, 178 (1939). (citations omitted).

Thus, even if we momentarily set aside the personal self-defense reasons for why Americans have the right to own SBRs,[9] the Eleventh Circuit was wrong to conclude that SBRs are somehow unprotected under *Miller*. Indeed, they are among the commonly owned firearms *most* protected under *Miller*'s militia purpose standard, even if that were still the only relevant criteria in a Second Amendment case (and after *Heller* and *Bruen*, it is not).

The Eleventh Circuit's fundamental mistake was that it believed this Court would need to "overturn its own precedent" in order for the Eleventh Circuit to rule for Robinson. *United States v. Robinson*, No. 23-

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[9] Even if SBRs were once uncommon among civilians, that they are popular today is enough for them to be unquestionably protected arms. *See Bruen*, 597 U.S. at 47 ("Whatever the likelihood that handguns were considered 'dangerous and unusual' during the colonial period, they are today 'the quintessential self-defense weapon.'").

12551, 2025 U.S. App. LEXIS 6544, at *11 (11th Cir. Mar. 20, 2025). But even if *Miller* is still binding, for the reasons above, it supports that SBRs *today* must be treated as protected arms, regardless of what may have been the case nearly a century ago. Just like the law is not "trapped in amber," *Rahimi*, 602 U.S. at 691, so too are the types of firearms protected not stuck in the past.

Moreover, *Miller* only reached the conclusions that it did as it pertains to short-barrel *shotguns* ("SBS"). The Eleventh Circuit decided to treat them as essentially the same, *Robinson*, 2025 U.S. App. LEXIS 6544, at *12, and that was error.[10] Today, SBSs remain far less common than SBRs, with just 165,000 registered SBSs compared to over five times as many registered SBRs. *Annual Firearms Report 2024,* at 12. And while SBSs were added to the NFA intentionally, the inclusion of SBRs was a historical accident. The NFA was originally going to regulate handguns too, and so SBRs were included to prevent criminals from circumventing the restriction by using SBRs instead of handguns. But after handguns were removed from

[10] The Eleventh Circuit also cited a Fifth Circuit ruling for support which upheld SBR and SBS restrictions on the grounds that such firearms are "weapons of war." *Robinson*, 2025 U.S. App. LEXIS 6544, at *13 (citing *United States v. Jennings*, 195 F.3d 795, 799 n.4 (5th Cir. 1999)). But besides being ahistorical, that logic clashes with *Miller*, which said exactly those sorts of civilian-owned arms useful for militia service are what is primarily protected. If the Eleventh Circuit is going to erroneously set *Miller* as the standard in SBR cases instead of *Bruen*, then it should be true to that case's reasoning.

the final version of the NFA due to public backlash, SBRs remained. Greenlee, 25 Wyo. L. Rev. at 130-131.

Petitioner's arguments are consistent with *Miller*; it need not be overturned for him to prevail.

IV. Special Taxes on Protected Arms Lack Historical Support.

A recent tactic some states and localities that are hostile to the Second Amendment are engaging in to undermine *Bruen* is raising the financial burden of exercising the right to keep and bear arms. For example, getting a concealed handgun license in Santa Clara County, California, now costs an applicant approximately $2,000 in total expense. Brandon Pho, *State Gun Group May Sue Santa Clara County Over License Fees,* San José Spotlight (Feb. 27, 2025), https://sanjosespotlight.com/state-california-gun-group-may-sue-santa-clara-county-over-concealed-carry-weapons-permit-license-fees/.

Also in California, last year the governor signed into law a bill which places an additional 11% tax on all gun and ammunition sales, calling it a "sin tax." *Bills of 2023: Newsom Signs 'Sin Tax' on Guns and Ammo*, Signal SCV (Dec. 31, 2023), https://signal-scv.com/2023/12/bills-of-2023-newsom-signs-sin-tax-on-guns-and-ammo/. This is on top of a federal 11% excise tax, an approximately $37 background check fee in California, and regular sales tax.

This case thus presents an excellent opportunity for this Court to begin to address this growing problem of the government financially burdening Second Amendment conduct. It can make clear that special

taxes on protected arms (as opposed to generally applicable sales taxes) are unconstitutional, and it should do so because our historical tradition is clear on this point.

The earliest examples of taxes on firearms were not taxes at all but rather fines for various violations. For instance, a 1762 New York colonial law barred storing more than 28 pounds of gunpowder for those who lived in New York City, and if violated, a fine of Ten Pounds was assessed. *Laws, Statutes, Ordinances and Constitutions, Ordained, Made and Established, by the Mayor, Aldermen, and Commonalty, of the City of New York, Convened in Common-Council, for the Good Rule and Government of the Inhabitants and Residents of the Said City* 39–40 (John Holt, New York 1763) (Number 21—A Law for the Better Securing of the City of New York From the Danger of Gun-Powder, §§ 1–6).

If someone chose to have more than 28 pounds of gunpowder, they had to store it at a designated "Powder-House," which required a fee of three shillings per barrel of powder. But that was less of a "tax" and more of a fee for using the powder-house, and in any case, would only apply to those who wanted to have more than 28 pounds of gunpowder. Powder-storage laws in general were not motivated by a desire for taxation or even gun control, but rather fire-prevention; black powder was extremely combustible, and thus a major safety hazard to the densely packed and mostly wooden cities of the time. *See Heller*, 554 U.S. at 632 (characterizing colonial powder storage laws as pertaining to fire-safety and not gun control).

Other early examples demonstrate the limits of relying on colonial history. A 1759 New Hampshire law required foreign ships coming into port to pay a tax of two shillings per pound of gun powder, in order to financially support "his Majesty's fort and fortifications within this province." *Acts and Laws of His Majesty's Province of New Hampshire in New England: With Sundry Acts of Parliament; by Order of the Governor, Council and Assembly, Pass'd October 16th, 1759* 63 (Daniel Fowle, Portsmouth, NH 1761) (An Act About Powder Money, passed Oct. 16, 1759).

While superficially similar in that this was a tax on a necessary component to firearms – gunpowder – it is not the same as the NFA's far higher tax on each SBR sold, and it only applied to foreign ships. Moreover, with similar laws being sparse or nonexistent, this seems to be an outlier, and "in using pre-ratification history, courts must exercise care to rely only on the history that the Constitution actually incorporated and not on the history that the Constitution left behind." *Rahimi*, 602 U.S. at 723 (Kavanaugh, J., concurring).

In the Nineteenth Century, some laws started to appear that were slightly more similar to the NFA's taxes. For example, an 1844 Mississippi law taxed Bowie knives at one dollar, and dueling or pocket pistols at two dollars. *Laws of the State of Mississippi* 57–58 (C.M. Price & S. Rohrer 1844) (An Act to Amend and Reduce into One the Several Acts in Relation to the Revenue of This State, and for Other Purposes, ch. 1, § 1, approved Feb. 24, 1844). But to understand the critical distinction, it is important to note what was *not* taxed: the prevailing civilian-owned combat

weapons of the time. Bowie knives and pocket pistols were seen as a criminal threat when carried concealed in this era, when those who carried lawfully did so openly. *See Nunn v. State*, 1 Ga. 243, 251 (1846) (contrasting constitutionally protected open carry from concealed carry). That did not apply to other arms which were typically openly carried.

Other similar taxes existed around this late-antebellum time period, like an 1838 law from territorial Florida which taxed dealers (but not buyers) of dirks, pocket pistols, and bowie knives $200 per year. *Acts of the Legislative Council, of the Territory of Florida, Passed at its Sixteenth Session, Commencing Monday January 1st, and Ending Sunday February 11th, 1838. With also the Resolutions of a Public or General Character Adopted by the Legislative Council* 36 (S.S. Sibley, Printer, Tallahassee, FL 1838) (No. 24, § 1). That law also taxed those who publicly carried those specific weapons ten dollars per year. But again, these were not the civilian-owned combat arms of their time, but rather concealable weapons that were used in petty crimes and personal disputes. Moreover, these taxes existed almost exclusively in Southern states and territories, and we have to be careful about relying too heavily on laws from the South given that *Bruen* looks for a national tradition.

Still, even if these laws were representative of the nation as a whole, there remains the problem that the taxes they enacted did not apply to the sorts of arms most useful for militia service. A North Carolina law from 1856 makes this especially clear, specifically exempting pistols used for mustering from a $1.25 tax

that otherwise applied on all pistols and bowie knives (though the tax applied only if the weapons in question were carried publicly, mere possession was untaxed). *An Act Entitled Revenue*, ch. 34, § 23, pt. 4, 1856-1857 N.C. Pub. Laws.

After the Civil War, many southern territories under reconstruction adopted "Black Codes," which aimed to keep newly freed former slaves repressed, often with the assistance of the Ku Klux Klan. Strategic disarmament of Black Americans was part of this nefarious project, as even President Grant complained to Congress. *See* H. Journal, 42nd Cong., 2d Sess. 716 (1872). It's no surprise that the Jim Crow era also saw a much more rapid adoption of taxes on certain weapons in the South.

Some of these were barely veiled at all. As also cited by the Petitioner, an 1867 Mississippi law assessed a tax of between five dollars and fifteen dollars on "every gun and pistol," and if the tax was not paid, the Sheriff was obligated to seize that gun. Pet. 21. This seems to be a very close NFA analogue, given it applied to all guns, and the tax was considerable, ranging from $108 to $325 per gun in today's dollars. The trouble is, the law *only* applied in Washington County, Mississippi, and not the whole state. According to the 1860 census, Washington County was made up of 92% enslaved people, and even to this day is still over 70% African American. So this law was not some general tax on guns, it was a racist effort to price freedmen out of firearms ownership.

The last large category of taxes related to weapons and arms in the latter parts of the Nineteenth

Century are occupational taxes on dealers. These were not assessed on a per-gun basis and are not similar to the NFA's scheme. For example, an 1885 Kentucky law imposed a tax of fifty dollars on dealers of pistols and bowie knives. *Acts of the General Assembly of the Commonwealth of Kentucky* 154 (J. Bradford, Frankfort 1857).

While the above was not a comprehensive listing of every historical tax on weapons and arms, it did provide a representative sample of the sorts of pre-1900 laws that existed imposing such taxes. There is simply no historical tradition of taxing common firearms. This Court should confirm the same by granting certiorari in this case.

CONCLUSION

For the reasons discussed above and in Petitioner's brief, this Court's intervention is appropriate here. Yet if the Court is not inclined to grant certiorari, it should at least, grant, vacate, and remand the Eleventh Circuit's ruling with instructions that SBRs are indeed "arms" under the plain text of the Second Amendment, and so a proper historical analysis must be conducted.

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Respectfully submitted,

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